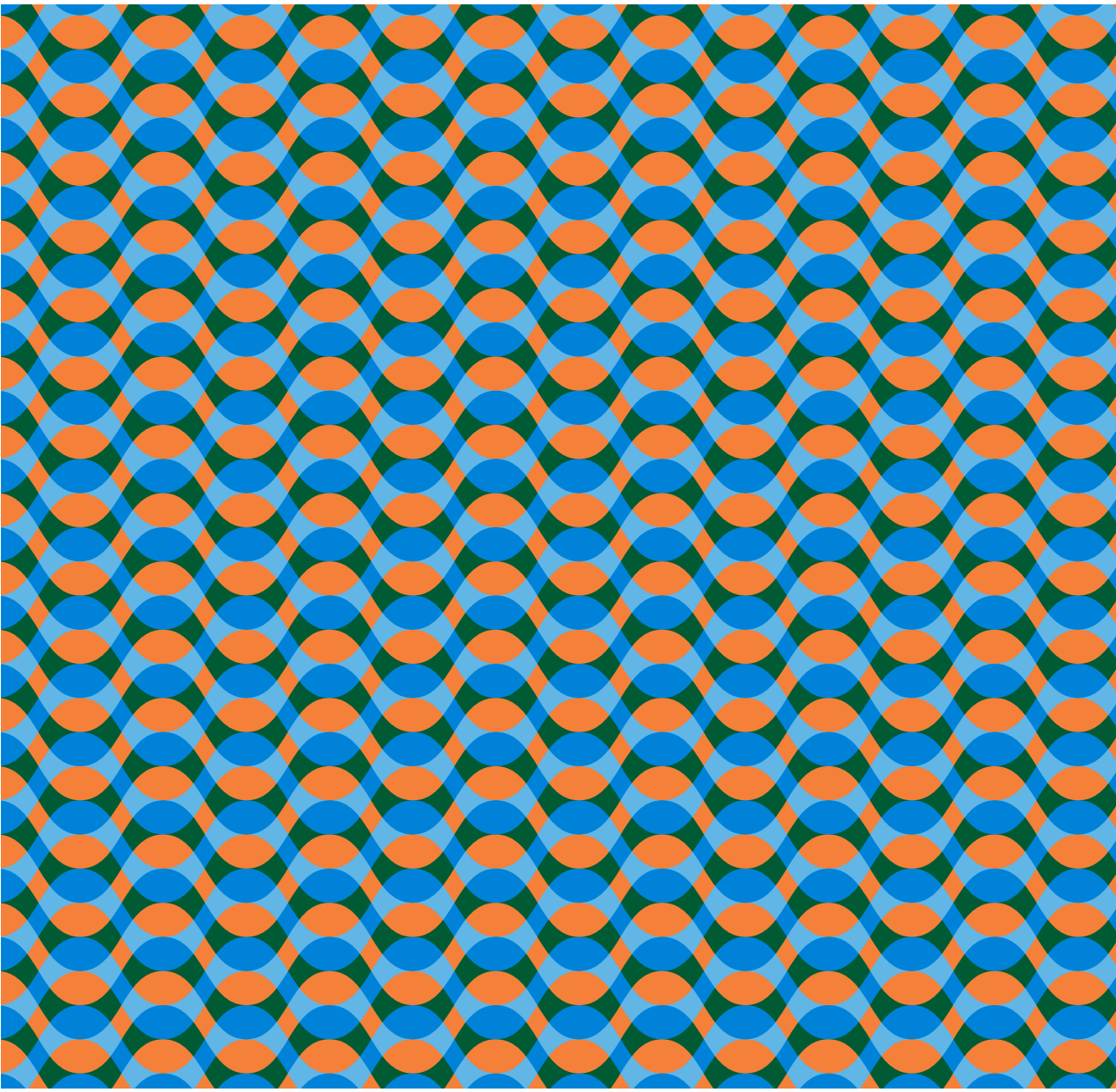
volume three / number one / twenty twenty one

ROMA TRE LAW REVIEW



RomaTrE-Press
2021

ROMA TRE LAW REVIEW

volume three / number one / twenty twenty one

Roma TrE-Press
2021

ROMA TRE LAW REVIEW
volume three / number one / twenty twenty one

Coordinamento editoriale
Editorial Staff Roma Tre Law Review
Per informazioni in merito a contributi, articoli e argomenti trattati
è possibile contattare la Redazione al seguente indirizzo email: law.review@uniroma3.it

I contributi pubblicati in questa Rivista sono sottoposti, in forma anonima, alla valutazione di "referees".

Rivista pubblicata nel rispetto del Codice etico adottato dal Dipartimento di Giurisprudenza dell'Università degli Studi Roma Tre, in data 22 aprile 2020.

Cura editoriale e impaginazione
teseo editore Roma teseoeditore.it

Elaborazione grafica della copertina
MOSQUITO mosquitoroma.it

Caratteri grafici utilizzati
Bodoni 72 Smallcaps Book; Didot; MinionPro-Regular (copertina e frontespizio); Adobe Garamond Pro (testo).

Edizioni Roma TrE-Press ©
Roma, settembre 2021
ISSN 2704-9043

http://romatrepress.uniroma3.it

L'attività della *Roma TrE-Press* è svolta nell'ambito della
Fondazione Roma Tre-Education, piazza della Repubblica 10, 00185 Roma.

ARTICLES

NOTES ON ITALIAN LAW

LEGAL WORLDWATCH

INTERNATIONAL CONFERENCES AND SEMINARS

MARIA CECILIA PAGLIETTI[*]

STARE INDECISIS. HOW DECISIONS INCONSISTENCY AFFECTS THE REGULATORY FUNCTION OF THE BANKING OMBUDSMEN

ABSTRACT. *The spread of ADR systems based at the supervisory Authorities (Ombudsmen) is increasing especially in regulated markets (such as banking, financial and insurance market). These Ombudsmen are assigned double functions: immediate (at the micro level), since they aim to settle private disputes (as an instrument of contractual governance); and mediated(at the macro level), they accomplish market regulation. Given this legal context, the predictability of the decisions takes a very specific connotation, since, placed in the more complex framework of banking supervision, this represents the conjunction point between the decision-making and the market regulation carried out by these bodies.*

[*] Dr. Maria Cecilia Paglietti, PhD, Research Fellow, Department of Law, EMail: mariacecilia.paglietti@uniroma3.it. A. is an alternate member of the Rome Panel of the Italian Banking and Financial Ombudsman. The opinions expressed in work are personal and shall not be construed as those of the institution under any circumstances. Part of this paper has been published with the title Banking and Financial Dispute Resolution. The Italian Banking Ombudsman Model in a European Context, in European Consumer and Market Law Journal, 2019, 3, p. 108 ff.

1. The Italian Ombudsmen: setting the scene

The contemporary movement of multiple paradigms of justice,[1] intended as a tendency to seek alternative methods to the jurisdictional solution of disputes[2] (by virtue of the different perception of the jurisdictional process accrued by virtue of post-modern theories)[3] is a matter acquired in the legal debate. Equally well-known is the proliferation – recurrent in regulated markets, like financial and network services – of ADR systems based at the supervisory authorities.[4]

[1] A. Uzelac-C.H. van Rhe, *The Metamorphoses of Civil Justice and Civil Procedure: The Challenges of New Paradigms - Unity and Diversity,* A. Uzelac & C.H. van Rhe, *Transformation of Civil Justice,* Springer, Cham, 2018, p. 3; B. Hess & M. Requejo Isidro*, Approaches to Procedural Law - The Pluralism of Methods*, Luxembourg, Nomos, 2017; C.H. Crownie, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, *New York Law Rev*., 76, 2001, p. 1768.

[2] See the Directive on consumer ADR, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. See also P. Cortes, *The New Regulatory Framework for Consumer Dispute Resolution*, Oxford, Oxford Univ. Press, 2016; N. Creutzfeldt-Banda, *The Origins and Evolution of Consumer Dispute Resolution Systems in Europe*, C. Hodges & A. Stadler, *Resolving Mass Disputes: ADR and Settlement of Mass Claims*, Cheltenham, Edward Elgar Pub, 2013, pp. 223 ff.; I. Benohr & Creutzfeldt-Banda, *Consumer ADR in Europe: Civil Justice Systems,* Oxford, Hart Publishing, 2012, p. 396; see also di P.H. Lindblom, *ADR – The Opiate of the Legal System? Perspectives on Alternative Dispute Resolution Generally and in Sweden*, *European Review of Private Law*, 16, 2008, p. 63.

[3] In upholding a perspective that has recently become popular, the promotion of alternative solutions to disputes also comes as part of the transition from the system of rights to the system of remedies: A. Gentili, *Il diritto come discorso*, Milano, Giuffrè, 2013, p. 384; U. Mattei, *I rimedi. Diritto soggettivo, 2*, in R. Sacco*, Trattato di diritto civile*, Torino, Utet, 2001, spec. pp. 108-114. On ADRs: C. Menkel-Meadow, *What is an appropriate measure of litigation? Quantification, qualification and differentiation of dispute resolution*, *11 Journal Oñati Socio-legal Series,* 2020, pp. 321 ff.; L. Cadiet-Th. Clay, *Les modes alternatifs de règlement des conflits,* Paris, Dalloz, 3e ed., 2019, p. 180; Cadiet-Hess & Requejo Isidro, *Privatizing Dispute Resolution: Trends and Limits*, Baden-Baden, Nomos, 2019; C. Hodges, S. Voet, *Consumer Dispute Resolution Mechanisms: Effective Enforcement and Common Principles*, in Hess & X.E. Kramer, *From Common Rules to Best Practices in European Civil Procedure*, Oxford, Hart Publishing, 2018, p. 377; G. Wagner, *Private Law Enforcement Through ADR: Wonder Drug or Snake Oil?, Common Market Law Review*, 51, 2014, p. 165; J. Resnik, *Managerial Judges, Jeremy Bentham and the Privatization of Adjudication*, in J. Walker & O.G. Chase, *Common Law and Civil Law and the Future of Categories*, Markham, Ontario, LexisNexis Canada, 2012, p. 205 at 210; B. Hess, *EU Trends in Access to Justice*, in van Rhee & Uzelac, *Civil Justice Between Efficiency and Quality: From Ius Commune to the CEPEJ*, Antwerp-Portland, Intersentia, 2008, at 189.

[4] It is a trend that is shared in most systems, that the regulatory authorities adopt a litigation procedure to ascertain compliance with the rules set on a primary and sub-primary level: G. Napolitano, *Regulation and Litigation. La linea continua tra regolazione e soluzione delle controversie*, in A. Zoppini, *Tra giurisdizione e regolazione*, Roma, Roma TrE-Press, 2017, p. 141; P. Sirena, *ADR Systems in the Banking and Financial Markets*, *Osservatorio del diritto civile e commerciale*, 2018, p. 632; G.L. Carriero, *Abf e principali Adr in materia finanziaria: profili comparatistici*, *Contratto e impr.*, 2018, p. 35 ss.; S. Lucattini, *Modelli di giustizia per i mercati*, Torino, Giappichelli, 2013.

These Ombudsmen (in borrowing the Swedish term generally used to refer to these bodies) comes fully within the third wave of access to justice,[5] which has effectively had some authors constitute a trend of a "divorce" between consumers and process, in lieu of a conflict resolution model, outside the legal system.[6] In the eyes of parties increasingly culturally inclined to perform a cost-benefits analysis,[7] the trial is a risk both in terms of time and the little flexibility in results, as well as for the nature of the dispute.[8]

This type of ADR is where the Banking and Financial Ombudsman (*Arbitro bancario e finanziario* or "ABF", based at the Bank of Italy), established in 2009,[9] comes into play, along with the Securities and Financial Ombudsman (*Arbitro per le controversie*

[5] The first two being related to *legal aid* and collective dimension of conflicts: M. Cappelletti, *Alternative Disputes Resolution Processes within the framework of the World-Wide Access-to-Justice Movement*, *Mod. L. Rev.*, 56, 1993, p. 283.

[6] Ch. Hodges, *The Private Sector Ombudsman,* in M. Hertogh & R. Kirkham, *The Research Handbook on Ombudsman*, Cheltenham, Edward Elgar Publishing, 2018, p. 53; R. James, *Private Ombudsmen and Public Law*, Ashgate, Dartmouth Pub Co, 1997.

[7] Hodges-S. Vogenauer-M. Tulibacka, *The Costs and Funding of Civil Litigation A Comparative Perspective*, C.H. Beck, Hart Publishing, 2010.

[8] V. Ferrari, *Le parti e il rischio del processo*, in *Accordi di parte e processo. Quaderni della Riv. trim. dir. proc. civ.*, 2008, p. 39.

[9] Art. 128-*bis*, para. 1, Consolidated Banking Law, introduced by Art. 27 of the Investor Protection Law (Law 262/2005); see Carriero, *L'Arbitro Bancario Finanziario presso la Banca d'Italia: genesi, struttura e funzioni*, in *Trattato di diritto dell'arbitrato. Le controversie bancarie e finanziarie – vol. XV*, Esi, Napoli, 2020, pp. 1 at 42; D. Dalfino, *L'Abf e i principi del processo civile: contestazione, "contumacia", onere della prova*, in *Il Processo*, 2019, pp. 27 ss.; A.F. Auletta, *… il sole e l'altre stelle: è la giurisdizione quella del "sistema" dell'ABF (Arbitro Bancario Finanziario)*? in *Banca borsa tit. credito*, 2018, p. 794; M. Bianco, *L'Arbitro Bancario Finanziario a sette anni dalla nascita*, in R. Lener & A.F. Pozzolo, *I metodi alternativi di risoluzione delle controversie. L'ACF: primi passi e prospettive*, Minerva Bancaria, Roma, 2017, p. 65; I.A. Caggiano, *L'arbitro bancario finanziario, esempio virtuoso di degiurisdizionalizzazione*, in *Nuova giur. civ. comm.*, 2015, p. 439; Carriero, *Giustizia senza giurisdizione: l'arbitro bancario finanziario*, in *Riv. trim. dir. e proc. civ.*, 2014, p. 161; M. Rabitti, *La relazione banca-clientela nel tempo della crisi economica: la "spinta gentile" dell'ABF*, in G. Grisi, *Le obbligazioni e i contratti nel tempo della crisi economica. Italia e Spagna a confronto*, 2014, Napoli, Jovene Editore, p. 191; E. Lucchini Guastalla, *Arbitro bancario finanziario*, in *Enc. Dir.*, Annali, VIII, Milano, Giuffrè, 2014, p. 35; S. Delle Monache, *Arbitro bancario finanziario*, in *Banca borsa tit. cred.*, 2013, p. 144; E. Capobianco, *Arbitro Bancario Finanziario*, in *Dig. disc. priv., Sez. Comm.*, Torino, Utet, 2012, p. 35; A. Scotti, *Abf e rapporti bancari*, in *Dig. disc. priv., Sez. comm.*, Agg., Torino, 2012, p. 1; M. Maione, *Forma e sostanza delle delibere dell'arbitro bancario finanziario*, in *Società*, 2012, p. 437; B. De Carolis, *L'Arbitro Bancario Finanziario come strumento della trasparenz*a, in *Quad. di ricerca giuridica della Banca d'Italia*, n. 70, Roma, 2011; S. Ruperto, *L'Arbitro Bancario Finanziario*, in *Banca borsa tit. cred.*, 2010, p. 325; E. Quadri, *L'*«arbitro bancario finanziario» *nel quadro dei sistemi di risoluzione stragiudiziale delle controversie,* in *Nuova giur. civ. comm.,* 2010, p. 305.

fianziarie or "ACF", based at the the Italian Financial Authority: Consob) established in 2016,[10] and the Insurance Ombudsman (*Arbitro per le controversie assicurative* or "ACA", based at the Italian Institute for Insurance Supervision: IVASS),[11] imminently to be established, assigned to solve "small and medium-sized" disputes (and we are therefore outside the logic of mere small claims – the competence, in terms of value, of the various arbitrators ranges from 200.00 euros for the ABF to 500,000 euros for the ACF), involving customers, which, according to the decision-maker before whom the claim is brought, act as investors, savers and insured parties.[12]

While entitlement is not reserved exclusively to consumers, but rather is instead extended to also cover collective entities and/or natural persons, the professional or private scope of the contract is irrelevant,[13] these Ombudsmen represent a form of justice that aims to settle disputes relating to asymmetrical relations, given that the isonomic trial, intended as a dispute between equal parties based on the neutrality of the judge is, in a banking, financial and insurance area, a model that has now been left behind us, considered unable to handle conflicts between parties where there is such a marked imbalance of powers (on the shared assumption that the customer is the weaker party both in the contract and in the trial).[14] Although not formally able to be ascribed to initiatives for exclusive consumer protection, they share the same needs to afford pro-

[10] Legislative Decree 130/2015 (implementing Directive 2013/11/EU) and Consob Resolution n. 19602, 4 May 2016; on the institution of the "Securities and Financial Ombudsman" see G. Afferni, *Remedies available to retail clients of investment firms in the light of the decisions of the Italian Financial Ombudsman (ACF),* in R. D'Ambrosio & S. Montemaggi, *Quaderni di ricerca giuridica della Banca d'Italia, Private and public enforcement of EU investor protection regulation*, Roma, 2019, p. 97; V. Mirra, *Il nuovo sistema Adr in ambito Consob: l'arbitro per le controversie finanziarie, tra alte aspettative e primi riscontri operativi*, in *Riv. Arb*., 2018, p. 615; A. Dolmetta-U. Malvagna, *Sul nuovo ADR Consob*, in *Banca, borsa, tit. cred.,* 2016, p. 251; A. Antonucci, *Gli strumenti di tutela metaindividuale e collettiva dell'utente finanziario*, in F. Capriglione*, I contratti dei risparmiatori*, Milano, Giuffrè, 2014, p. 523.

[11] N. Soldati, *La Insurance Distribution Directive: verso un ulteriore sistema di risoluzione delle controversie presso l'IVASS*, *Federalismi.it*, 2019, p. 2.

[12] M. Stella, *Lineamenti degli arbitri bancari e finanziari. In Italia e in Europa*, Padova, Cedam, 2016.

[13] The customer is «the person who has or who has had a contractual relationship with an intermediary for the provision of banking and financial services»: Art. 1 lett. a, of the Cicr resolution.

[14] See the European Court of Justice *positive action* doctrine: «The imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract»: Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v. Rocìo Murciano Quintero and Salvat Editore SA v. José M* [2000] ECR I-4941, I-4973 para. 27); see Arts. 6 and 7 of Council Directive 93/13/ EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95 p. 29.

tection and restore balance to asymmetrical positions, which form the basis and assumption of the regulatory and legislative choices of consumer-type "unequal legislation." Indeed, they provide a response to the requests most frequently recalled, underlying consumer-type disputes, such as the removal of barriers to accessing justice, the effectiveness of protection and the limitation of the time and costs of the procedure. The attempt to restore balance to asymmetrical positions is confirmed, on a regulatory level, by the provisions relative to the right to act is reserved to the customer alone;[15] there is no obligation to obtain legal assistance;[16] only the defending party is charged for the process, and only if the complaint is upheld;[17] the *forum actoris* rule (consumer contract jurisdiction).[18] It would therefore be overly simplistic to limit the function of these Arbitrators to the mere deflation of the ordinary dispute,[19] as they are assigned to pursue a broader, higher end: one of "delivery justice"[20] and the removal of barriers to accessing justice, making them necessary even in a system whose courts work in the best possible way.[21]

2. The background

Although Italian Ombudsmen offer a virtuous example of efficiency of justice systems (the success of which is borne out by the considerable number of citizen petitions brought to them), they do have some unresolved issues, of merit and method.

[15] Art. 5, para. 1, of the Cicr Resolution, whose aim is to reserve an alternative remedy for settling economic disputes in banking and credit matters and payments to the customer alone.

[16] Respecting the provisions of Art. 8, letter c, Alternative Dispute Resolution for Consumer Disputes Directive.

[17] Differently by the FOS: *Financial Ombudsman Service v Heather Moor & Edgecomb Ltd*, Court of Appeal (Civil Division) [2008] EWCA Civ 643.

[18] Art. 1, section III, "Provisions on the Systems for the Extrajudicial Settlement of Disputes Concerning Banking and Financial Transactions and Services".

[19] It is true, in fact, that if, on the one hand, the ABF has removed certain types of dispute from the courts (typically those regarding unlawful reports in risk centres), on the other, it has intercepted new ones, which would not otherwise have been brought (the most paradigmatic example is that of salary-backed loans, but also fraudulent transactions carried out using payment systems); the deflation effect is, therefore, secondary: this point is grasped very clearly by A. Tucci, *L'arbitro bancario finanziario fra trasparenza bancaria e giurisdizione*, in *Banca Borsa Titoli di Credito*, 2019, p. 623 ff. and in F. Capriglione, *Liber amicorum Guido Alpa*, Cedam, Padova, 2019, p. 605.

[20] Hodges, *Delivering Justice*, *International Journal of Procedural Law*, 9, 2019, p. 149.

[21] R. Carleo, *L'Arbitro Bancario Finanziario: anomalia felice o modello da replicare*, in *Riv. arb*., 2017, pp. 21 ff.

The matters of method (and, notably, the improvement of function and the speed of the proceedings) have found ideas for solutions in the new provisions adopted by the Bank of Italy in October 2020.[22]

With regards to the merits, the crucial aspect is the uniformity of approach and stability of decisions.

This work aims to address the matter of uniformity of arbitration case law from the standpoint of the conforming effect on the conduct of intermediaries, verifying that the predictability of the decisions is functional to both the preventive alignment of intermediaries with ABF decisions and the legitimation of the justice function of the Regulatory authority.

To fully understand the structure and function of the ABF, and then deal with the issue of the consistency of its decisions, one has to consider the cultural and structural context in which it is placed, with regard to scenarios of both private and public law.

I will take the ABF as paradigmatic example as, since it was the first to be established in our system, it has a more consolidated structure.

As regards private law, one reflection may be made on a point of clear acceptance for which, in the current legal and cultural context, efforts are mainly concentrated on the modification of mixed models of justice (covering different legal experiences) characterized by the effectiveness of the remedy; there is no single cultural reference;[23] the enforceability of the law is a preferential observation point.[24]

As regards public law, particularly banking supervision, in national systems the common path is that of ever greater centrality and instrumentality of customer protection over the objectives of classic prudent supervision; while within the EU the settlement of disputes is considered to be a means of promoting convergence on supervision.[25]

[22] N. Soldati, *La terza riforma dell'Arbitro Bancario Finanziario (ABF)*, in *Contr. Impr.*, 2020, p. 1541; S. Cotterli, *ABF e tutela del cliente bancario*, *Banca Impresa Società*, 2019, pp. 307 at 311.

[23] R. Michaels, *The Functional Method of Comparative Law*, in M. Reimann & R. Zimmermann, *Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, p. 339.

[24] A. Carratta, *Tecniche di attuazione dei diritti e principio di effettività*, in Riv. *trim. dir proc. civ.,* 2019, p. 1; G. Biehler, *Procedures in International Law*, Berlin, Heidelberg, Springer, 2008, p. 5; P. Rott, *Effective Enforcement and Different Enforcement Cultures*, in T. Wilhelmsson-E. Paunio & A. Pohjolainen, *Private Law and the Many Cultures of Europe*, Deventer, Kluwer, 2007, p. 291 ff.; F. Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, *Mod. Law Rev.*, 56, 1993, pp. 19 at 22.

[25] Green paper, Building a Capital Markets Union, 18.2.2015 COM(2015) 63 final.

3. The Hybrid nature of the ABF

Moreover, in terms of banking supervision, a common trajectory is noted, in the domestic legal systems, towards a more central, instrumental role of customer protection with respect to the classic prudential supervision objectives. In Italy, for example, Art. 127 of the Consolidated Banking Law has redesigned the institutional architecture of the banking market regulation, adding an additional purpose to the supervision; it constitutes the viaticum that makes it possible to reconstruct, in terms of coordination, the relationship between the typically publicist protection system with the protection of private law.[26] This cohabitation of "micro" (non-systemic) and "macro" objectives and the shift of the barycentre of legislations in certain regulated segments to retail, would appear to be further confirmed, internally, by legislation that can be traced to contiguous legal segments.[27]

The ABF is an ADR,[28] based at the supervisory authorities,[29] of the adjudicative type[30] which reaches a decision according to the law.[31] The ABF does not have a judicial

[26] A. Zoppini, *Appunti in tema di rapporti tra tutele civilistiche e disciplina della vigilanza bancaria,* in *Banca, borsa, tit. cred.*, 2012, p. 26.

[27] See Art. 1 Dir. 2013/11/UE; Art. 3, d.lgs. 12 May 2015, n. 74 (c.d. *Solvency* II), transposition of Art. 27 (and whereas 16) Dir. 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

[28] G. Boccuzzi & A. Valsecchi, *Tutela della clientela e regolamentazione bancaria e finanziaria*, in G. Boccuzzi, *I sistemi alternativi di risoluzione delle controversie nel settore bancario e finanziario: un'analisi comparata, Quaderni di Ricerca giuridica della Consulenza legale della Banca d'Italia,* n. 68, Roma, 2010, p. 17; B. De Carolis, *L'arbitro bancario finanziario come strumento di tutela della trasparenza*, *Quaderni di Ricerca giuridica della Consulenza legale della Banca d'Italia*, n. 70, Roma, 2011, p. 21.

[29] C. Tabarrini, *L'indipendenza delle ADR incardinate nelle Autorità di Vigilanza*, in *Osservatorio del diritto civile e commerciale*, 2018, p. 239.

[30] Lucchini Guastalla, *Arbitro bancario finanziario*, p. 37.

[31] The Bank of Italy's "Provisions on the Systems for the Extrajudicial Settlement of Disputes Concerning Banking and Financial Transactions and Services" literally stipulate that the decision is passed by the panel based on the documentation collected within the scope of the investigation, applying the legal and regulatory provisions on the subject, as well as any codes of conduct with which the intermediary complies (Section VI, Art. 3). This approach, which therefore provides for the ABF's decision to be fair, must take into account the "guidelines followed by the adjudicating body, by consulting the computer records of the decisions pronounced by the panels published on the Internet" (Section VI, par. 1), the assessment of the aforesaid appeals having to take place "in the light of the aforesaid guidelines as well" (Section VI, par. 1).

nature,[32] and its decisions of investigation and sentencing (not, therefore, constituent decisions, e.g. annulment of the agreement) are not binding.[33] Therefore, it does not deprive intermediaries and customers of the power to have recourse to the legal authorities.[34] The ABF is articulated in 7 regional panels, the structures of which are based at the Bank of Italy, operates as second-instance body (after the complaint), and may be accessed by consumers at a very low cost (€ 20);[35] it hears certain disputes, which are, from the subjective point of view, disputes between "customers" and "intermediaries," and under the objective point of view, related to banking and financial transactions and services, including loans narrowly defined (for example, mortgage loans), but excluding financial intermediation agreements.

A compliance failure results in the inclusion of the name of the intermediary in the black list of non-complying intermediaries on the website of the Bank of Italy and the ABF.[36] Even without having the binding and enforceable character of a judicial decision, an effective protection is therefore ensured through a reputational enforcement mechanism (the so-called *shame culture*),[37] which, in a sector like the financial one that is based on trust and reliability of the operators, is very effective as sanction and deterrent. The ABF decision, therefore, although not legally binding, is binding at the social level.

Participation in the system is mandatory for the intermediaries authorised to (banking, financial, post office banking, the issue of electronic money, overdraft guarantees, payment services), with regard to the disputes that fall within the area of competence of the ABF,[38] it is a pre-condition for the execution of the activity, and compliance may

[32] Italian Constitutional Court, ord. no. 218, 11 July 2011.

[33] Art. 6 of the Cicr (The Interministerial Credit Committee) Resolution (issued on 29 July 2008).

[34] Art. 128-*bis*, para. 3, Consolidated Banking Law; on the "Civil Justice Double Helix", see N. Andrews, *The Modern Civil Process in England: Links between Private and Public Forms of Disputes Resolution*, *ZZI*, 2009, 14, p. 3 ff.- in the sense of support offered by and lack of alternative nature of the co-existing legal system compared to the Bar.

[35] Art. 8, lett. c, Dir. 2013/11.

[36] More specifically, the intermediary's default is made public via the ABF and Bank of Italy websites and by publication in two widely-circulated national daily newspapers - Art. 6 of the Cicr Resolution.

[37] A. Schwartz-R.E. Scott, *Contract Theory and the Limits of Contract Law, Yale Law Journ.*, 113, 2003, p. 541.

[38] Art. 128-*bis*, para. 1, Consolidated Banking Law, introduced by Art. 27 of the Investor Protection Law (Law 262/2005) and amended by Art. 40, para. 2, of Legislative Decree no. 11 of 27 January 2010; Circular of 20 April 2011 issued by the Department of Legal and Legislative Affairs.
There is, therefore, no ABF clause, in the sense that the contract between bank and customer, based on the interme-

be assessed by the Bank of Italy in the context of its supervision activity.[39]

The Ombudsmen are appointed by the Bank of Italy, following the directions of the parties involved.[40]

As mentioned, the ABF belongs to the wide *genus* of ADR based at the supervisory authorities. Accreditation of the Authorities as privileged site to which an ADR is brought, already had case law in our system (on striking in essential public services) and is not, in terms of models, absolutely new.[41]

The ABF "statutory relationship" with the regulator in no way jeopardises the impartiality and independence of the deciding body in individual cases,[42] it however represents a key characteristic of the decision-making body, bound to the regulator by a complementary and synergistic relation.

Because of its hybrid nature, therefore, it is not appropriate to assign the ABF to traditional categories, as this might result in forced interpretation and depress or undervalue some specificities: the ABF seems, once again, a lab to test new models of reconstruction in the context of European law, leaving behind the traditional reconstruction processes.[43]

4. The ABF at the intersection of substantive and procedural law

The ABF is therefore (by way of priority) a tool that regulates contracts and private justice.

diary's obligation of acceptance, does not have to include an arbitration clause which would otherwise be necessary for all cases of assignment to arbitration, given the intimately voluntaristic and negotiating nature of arbitration.

[39] And punishable with an administrative fine: Art. 144, para. 4, Consolidated Banking Law.

[40] Art. 3 of the CICR Resolution; Bank of Italy, 'Provisions Governing the ABF Dispute Resolution System', Section III; see also the European Court of Justice, joined cases C-317/08 to C-320/08 *Rosalba Alassini v Telecom Italia SpA* [2010] ECR I-02213.

[41] Art. 13, para. 1, lett. a), Law 12 June 1990, n. 146; M. Clarich, *L'attività delle autorità indipendenti in forme semicontenziose*, in S. Cassese & C. Franchini, *I garanti delle regole,* Bologna, Il Mulino, 1995, pp. 149, at 159 and 162: the fact that, in that case, the Authority attempted to promote the settlement of the case instead to decide it, changes the issue slightly.

[42] As established by the European Court of Human Rights: *Heather Moor & Edgecomb Ltd v United Kingdom* App no. 1550/09 (ECtHR 26 June 2012).

[43] M. Taruffo, *Adeguamenti delle tecniche di composizione dei conflitti di interesse*, in *Riv. trim. dir. proc. civ*., 1999, p. 779.

At the functional level, the ABF is assigned double functions: (i) immediate (at the micro level), since it aims to settle private disputes. It is an instrument of contractual governance;[44] (i) mediated (at the macro level), it accomplishes market regulation (the decisions, although not binding, encourage compliance of conduct among the intermediaries: Art. 5 Consolidated Banking Law. This aspect is the most relevant to the regulators, since it aims to consolidate and increase effectiveness of the regulation.[45]

Public law protection mechanisms and private law remedies coexist, therefore, in the same body.

Moreover, under the point of view of the banking supervision, the co-existence of elements of public and private enforcement does not create a conflict, since the institutional architecture of the regulation of the banking sector has been modified.[46] The protection of the customer must now be added (Art. 127 Consolidated Banking Law) to the objectives of prudential supervision strictly defined (those included in the *Grundnorm* of Art. 5 Consolidated Banking Law).[47] A three-sided model of supervision has, therefore, been adopted (Bank of Italy – intermediary – customer), instead of the traditional two-sided model. Transparency and correctness become the means to increase the trust of investors, which in turn is a precondition for financial stability.[48]

5. The nomophylactic function

At the functional level, the provision establishing the ABF states that this must "ensure a fast and cost-effective dispute resolution process and an effective protection" (Art. 128-*bis*, para. 2 Consolidated Banking Law). While the first two objectives are an indication of the approach with regard to the governance of the deciding body (that is,

[44] Art. 127 Consolidated Banking Law.

[45] Art. 5 Consolidated Banking Law; M. Perassi, *Il ruolo dell'ABF nell'ordinamento bancario: prime riflessioni*, *Analisi Giuridica dell'Economia*, 2011, p. 154.

[46] See M. Clarich, *Regulation of the Italian Banking Sector: From the 1936 Banking Law to the European Banking Union*, in D. Sorace-L. Ferrara & I. Piazza, *The Changing Administrative Law of an EU Member State,* Springer, 2021, pp. 223 ff.

[47] I. Visco, 'Governor's Concluding Remarks' (2010) 8 <https://www.bancaditalia.it/pubblicazioni/interventi-governatore/integov2011/en_cf_2010.pdf?language_id=1>.

[48] C. Hodges, *The Consumer as Regulator,* D. Leczykiewicz & S. Weatherill, *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Oxford, Hart Publishing, 2016, pp. 245 ff.

the provisions regulating the process and its progress),[49] the other objective seems the conceptual basis to be used for the choices in terms of interpretation and reconstruction about the ABF.

It should be mentioned that this rule, which is set by primary legislation, represents a choice of system, reflects the current political approach on consumer protection and, in my opinion, represents both an operational standard and a hermeneutic criterion.

Because of this convergence between public enforcement and private remedies, the private dispute becomes instrumental to the public regulation and to the integrity of the market.[50]

The circumstance that the decision must be hinged on a model of protection characterised in a regulatory manner is not limited to underlying the fact that the decision-maker must, in reasoning, also apply consequentialist assessments, but rather has significant fallout in terms of the stability of decisions.[51]

Given the lack of the principle of *stare decisis* in our legal system, the uniformity of approach would appear, in the context of banking and financial ombudsmen, to be functional: a) to the reliance of operators; b) to legal certainty; 3) to the deflation of internal disputes; 4) to the measurement of regulatory compliance, through the collection and publication of aggregated data on individual disputes in order to obtain a global overview of the violations and market performance; 5) to the consolidation of regulation; and 6) prospectively, to the study of the review of the regulatory framework.[52]

Bank of Italy's "Provisions on the Systems for the Extrajudicial Settlement of Disputes Concerning Banking and Financial Transactions and Services" provide the institution of the coordinating Panel (*Collegio di coordinamento*), which decides on the complaints concerning issues of particular significance or that have given or could give rise to inconsistent decisions by the seven territorial Panels. The coordinating Panel establishes a principle of law that is binding for the territorial Panels in all future disputes

[49] G. Costantino, Governance *e giustizia. Le regole del processo civile italiano*, in *Riv. trim. dir. proc. civ.*, 2011, pp. 51 at 55.

[50] M. Perassi, *Ruolo della Banca d'Italia e dell'Autorità Giudiziaria nel preservare l'integrità del sistema economico finanziario,* in *Banca Impresa Società*, 2014, pp. 349 at 356.

[51] T. Sourdin-A. Zariski, *What Is Responsive Judging?*, in T. Sourdin & A. Zariski, *The Responsive Judge. Ius Gentium: Comparative Perspectives on Law and Justice*, Springer, Singapore, 2018, p. 8.

[52] Napolitano, *Regulation and Litigation*, cit., at p. 141.

involving the same issue. Although it is always possible, for a single panel, to deviate from a decision taken by the coordinating Panel, stating the reasons for deciding on a different solution.

The predictability of the decisions takes a very specific connotation, since, placed in the more complex framework of banking supervision, this represents the conjunction point between the decision-making and the market regulation carried out by these bodies.

The consistency issue appears to be even more important in the Italian legal system, given the absence in statutory law systems of the *stare decisis* principle, so decision-making bodies are not requested to conform to decisions reached by previous decision-making bodies.[53]

It is in the guarantee of a significant degree of uniformity that the principle of regulation through the Ombudsmen decisions may ultimately be completed, and the ultimate objective of an effective customer protection may be achieved. The issue of the relationship between regulation and dispute resolution, elaborated in the area of the theory of relations between regulation and litigation and, therefore, in the relationship between agencies and courts, must here be placed within the context of ADR (so regulation through adjudication),[54] relative to the relationship between the dispute resolutions body – Ombudsmen –, agencies and courts.

If upholding the idea of the ABF as an instrument of regulation of the contract with conforming effects, and if taking into account the fact that ABF decisions express general principles and wishes (outlining conduct to be adopted in the future, beyond the individual dispute) and have a high degree of publicity, we can see that the uniformity of approaches, and with it, the legal certainty and predictability of future decisions, take on particular weighting because, in order to fully achieve a regulatory effect, the decision must be perceived as stable.

And although comparative analysis shows a divergence, in civil law systems, between positivist theory and operational practice being observed – for example, the decisions of the Constitutional Court and the existence of legal areas addressed only by

[53] A. Carleo, *Il vincolo giudiziale del passato. I precedenti*, Bologna, Il Mulino, 2018; L. Passanante, *Il precedente impossibile Contributo allo studio del diritto giurisprudenziale nel processo civile*, Torino, Giappichelli, 2018.

[54] R.A. Posner, *Regulation (Agencies) versus Litigation (Courts): An Analytical Framework*, in D.P. Kessler, *Regulation vs. Litigation: Perspectives from Economics and Law*, Chicago, Chicago University Press, 2009, pp. 11 at 19 ff.

case law, like in the field of damages to health –, there is no provision expressly attributing a regulatory function to Arbitrators, who regulate by correlating the decision of the dispute with the conformity effect, raising the uniform interpretation – and application – of the regulatory framework as a hallmark of the work of Arbitrators.

The instability of decisions therefore disorientates the market (different decisions make it impossible for the users of justice to identify how they should behave in order to be considered compliant with the system), reduces the power of using decisions as an integral part of the information available to the regulatory in going about its supervisory duty, and causes the onset of problems relating to decision acceptance (with the consequent risk that those supervised do not abide by the Arbitrator's decisions and instead seek ordinary justice).

The need for monophilia to be assured in the sector[55] becomes even more evident in matters subject to a high level of regulatory obsolescence (consider, for example, payment services, where jurisprudential creationism emerges particularly clearly) because the delay of legal formant (which is physiological) can only make up for the jurisprudential formant, thereby meaning that decisions precede legislation.

To allow for private disputes to fully achieve their end of being instrumental to public regulation, it may be useful – according to the recalled cultural preclusions – to have a legislative inclusion of the regulatory functions.

We can therefore wonder if the route by which to guarantee a greater stability of decisions could be the provision of a rule of principle and a programmatic approach that assigns legislative relevance to the connection between public and private protection, accompanying the solution of disputes with the general industry objectives and, specifically, those of regulation (more generally, we should consider the express legislative prohibition of gold-plating), on the model of the provisions of Articles 13 and 23 of the Commercial Code[56] and, therefore, envisage that in leenella nella dispute resolution, the ABF decides in regard to market stability and integrity.

[55] Costantino, *Appunti sulla nomofilachia e sulle nomofilachie di settore»*, in *Riv. dir. proc.*, 2018, pp. 1443 at 1454.

[56] Preto, *Il lungo cammino della riforma*, in *Tra regolazione e giurisdizione*, cit., pp. 13 at 15.

REBECCA SPITZMILLER[*]

POCKET PARKS: LEGAL STRATEGIES AND CITIZEN ENGAGEMENT TO ENHANCE CITIES' SUSTAINABILITY

ABSTRACT. *The article aims to identify the broad range of sustainable benefits provided to cities by the creation of pocket parks, including health-related, environmental, economic and social aspects. It examines several relevant legal aspects inherent to such parks, by describing the legal characteristics and frameworks of two jurisdictions where these parks thrive, the US and England, in a comparative light. It notes an EU project featuring urban parks, including pocket parks, to further compare similar features and the benefits deriving from them, and offers reflections on common goods. It then analyses pertinent aspects of the Italian legal system, seeking to identify viable means to strengthen the possibility of creating pocket parks there, placing the discussion within the broad context of civic engagement, subsidiarity, empowerment, law enforcement and the rule of law.*

[*] Researcher in Comparative Law and Professor (*aggregato*) of International Business Contracts, Roma Tre University.

1. Introduction

Access to clean, open spaces in our cities plays an essential role in allowing increased walkability, better air quality and a healthy social and economic life. The adoption by all UN Member States of the "2030 Agenda for Sustainable Development" underlines the need to "make cities and human settlements inclusive, safe, resilient and sustainable" through "safe, inclusive and accessible, green and public spaces." One sustainable solution is the creation of such areas by converting relatively small, residual lots located across urban neighborhoods into viable parks, which can provide many benefits to city-dwellers. Creating such parks, known as pocket parks, requires innovative approaches across architectural, environmental and administrative sectors. However, the legal aspects of setting up pocket parks are of *a priori* importance, and effective legal strategies are often accompanied by active citizenship and engagement. This paper will discuss the benefits of pocket parks, examine the legal paradigms and approaches that have been successful in countries where they have been established, such as the United States and England, as well as an EU project regarding urban parks. After a brief discussion on "common goods," the article concludes with a look toward the legal posture, challenges and potential solutions to create and maintain pocket parks in Italy, including the importance of crucial overarching elements: civic engagement, subsidiarity, empowerment, law enforcement and the rule of law.

2. Need for and Benefits of Increased Green Spaces in Cities

"Greening" refers to the actions needed to protect the natural environment and to combat the various ecological harms our planet is now facing. Health considerations demand that green areas be incorporated throughout densely populated areas to improve air-quality conditions and thereby benefit city-dwellers' well-being. The WHO predicts that problems caused by climate change, such as increasing heat and decreasing rainfall, will provoke increased allergopathies in coming years.[1] It recommends "restoring de-

[1] "Climate and Health Country Profile: Italy," WHO/FWC/PHE/EPE/15.52, World Health Organization 2018, p. 4.

graded ecosystems and establishing new Green Infrastructures[2] (GI)" as appropriate strategic actions in "countering air pollution, climate change and urban heat island effect" in Italian cities.[3]

In economic terms, creating small green oases in dense urban areas is an effort that would fit squarely within the "Safe and Just Space for Humanity" of "doughnut economics." Economist Kate Raworth depicts this space within a doughnut-shaped graphic, occupying the ring between "ecological ceiling" and "social foundation,"[4] as elaborated in *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist*.[5] Increasing the number of green areas throughout our cities would at once shore up health conditions and other essentials of our social foundation, while protecting against the various threats of overshooting sustainable limits of a "regenerative and distributive economy," such as climate change and air pollution.[6] Other research underlines urban parks' importance by showing that they "improve the quality of life and generate a relevant benefits flow" that generally outweighs their management costs, thus producing a net gain for citizens.[7] Benefits flowing from urban green spaces to health and well-being reduce healthcare expenditure, reducing productivity losses and problems of anti-social behavior or petty crime.[8] "Parks and green areas can also be a resource for economic growth or development. Attractive parks attract use, and with it expenditure

[2] Defined by the EC's GI communication as «a strategically planned network of natural and semi-natural areas with other environmental features designed and managed to deliver a wide range of ecosystem services» in COM/2013/249final.

[3] "Climate and Health Country Profile: Italy," p. 12.

[4] K. Raworth, *A Safe and Just Space for Humanity,* 2012 Oxfam. "Environmental stress can exacerbate poverty. Crossing planetary boundaries, or their regional thresholds, can push people back below the social foundation, or prevent them from ever achieving it. The current and potential impacts of climate change, for example – including rising temperatures, shifting seasons, sea-level rise, and increasing droughts and floods – seriously undermine poor people's ability to ensure their food security, health, and access to safe water and sanitation […]." Id. at p. 16. Available at: <https://bit.ly/3sDGR8m>. Accessed 20.4.2021.

[5] K. Raworth, *Random House*, New York (2017).

[6] Id.

[7] T. Tempesta, *Benefits and Costs of Urban Parks: A Review*, AESTIMUM 67, December 2015: 127-143, p. 127.

[8] *Park Atlantic Urban Parks and Green Areas Action Plan, Main Report*, November 2012, p. 13 (hereinafter *Park Atlantic Main Report*.)

through footfall for local shops and cafes."[9] They can also enhance property values, thus increasing local property taxes.[10]

Regarding broader societal considerations, the insertion of small parks across cities would also contribute to greater inclusivity. According to the UN Department of Economic and Social Affairs' Statistics Division, with regard to Sustainable Goal 11, "Sustainable Cities and Communities," not only does air pollution pose a health hazard, but too few open public spaces lie within easy walking distance to make cities more inclusive.[11] "Where public space is inadequate, poorly designed or privatized, the city becomes increasingly segregated."[12] Indeed, though such spaces may exist, they are not evenly distributed across cities so that all residents have convenient access to them.[13] Increasing interaction, cohesion and engagement among persons generates a sense of community that can build greater understanding and empathy, thus leading to empowerment and positive change in society. Grassroots movements such as Retake Roma,[14] a volunteer organization aimed at bolstering civic pride, personal responsibility and empowerment through educational and hands-on clean-up events in Rome, demonstrate this nexus between engagement and empowerment. The *Retake solidale* project unambiguously targets this goal: "The project for a supportive community aims to make the inseparable link between urban regeneration and human regeneration explicit and concrete."[15]

[9] Ibid.

[10] Ibid.

[11] United Nations SDG Goals, Goal 11, Sustainable Cities and Communities. Available at: <https://unstats.un.org/sdgs/report/2019/goal-11/>. Accessed 20.4.2021

[12] Id.

[13] Id. "Based on 2018 data from 220 cities, in 77 countries, few cities have been able to implement a system of open public spaces that covers entire urban areas – that is, within easy reach of all residents. Findings show that the average share of the population within 400 metres walking distance of an open public space is around 31 per cent, with huge variations among cities (from a low of 5 per cent to a high of 90 per cent). A low percentage does not necessarily mean that an inadequate share of land is open public space, but rather that the distribution of such spaces across the city is uneven." Id.

[14] <https://retake.org/roma/>. Accessed 27.4.2021.

[15]< https://retake.org/roma/retake-solidale/>. Accessed 27.4.2021.

The need to improve living conditions in cities all over the world has been acknowledged in by the United Nations in the UN Sustainable Development Goals (SDGs), adopted by all the UN Member States via the "2030 Agenda for Sustainable Development" with the aim of providing a path towards achieving a more sustainable future. Among the SDGs, Goal 11 is: "Make cities and human settlements inclusive, safe, resilient and sustainable." More specifically, Goal 11.7 reads: "by 2030, provide universal access to safe, inclusive and accessible, green and public spaces […]." Such a goal is to be verified and measured by means of the "average share of the built-up area of cities that is open space for public use for all."[16]

European authorities have also endorsed actions aim to increase green spaces in cities. "Nature-based solutions based on the creation, enhancement, or restoration of ecosystems, including soils and green infrastructure, in cities can improve air quality and regulate GHG in the atmosphere, both directly through the removal of air pollutants and carbon storage and sequestration and indirectly by reducing energy needs and pollutants emissions through natural cooling and active mobility."[17]

3. The Purpose and History of Pocket Parks

As seen above, many concerns lead to the consensus that more green spaces in our cities would benefit those living in them, and indeed the very life of the entire planet. However, large tracts of land in which to situate large public parks are unavailable – or prohibitively expensive – in urban settings. By definition, urban spaces are densely populated with buildings and pavement covering most city areas, reducing nature or eliminating it altogether. The versatility of small, "pocket parks" – occupying usually less than one acre of land, which allows them to serve as welcome, green gap-fillers within the urban fabric – provides an opportunistic solution to convert otherwise abandoned or unused space into attractive rest or play spots throughout cities. They can be placed anywhere innovative planners identify: between buildings, replacing decommis-

[16] SDG Indicator 11.7.1; see: <https://sdg.data.gov/11-7-1/>.

[17] European Commission, *Horizon 2020 Work Programme 2018-2020, 12. Climate action, environment, resource efficiency and raw materials*, European Commission Decision C(2020)6320 of 17 September 2020.

sioned roads or railroad tracks, in tracts of land along power lines. They can be built quickly and inexpensively, often using recycled materials to furnish them.

Pocket parks began during post-WWII reconstruction in Europe, providing war torn cities a way to rebuild public spaces with little cash, labor and raw materials.[18] The parks first took hold in the United States when Professor Karl Linn, a landscape architect who had also studied psychology,[19] became part of a Philadelphia postwar-economic-boom pilot project, called the "Melon Commons," an innovative, "decentralized experiment in participatory neighborhood-scale urban renewal."[20] In 1961, Linn involved his first-year landscape-architecture students in an innovative educational effort that seems to be a precursor to and landscape-architecture corollary of "Street Law."[21] He organized meetings with his students, community members and a neighborhood advisory board and the class proposed a design for the park, or "commons." This groundbreaking effort combined "interagency cooperation, community engagement, and imaginative design" to counter urban blight and enhance collective identity, thus encouraging "more authentic feelings of community, cooperation, and self-reliance."[22]

[18] Trust for Public Land, *Pocket Park Tool Kit,* available at: <https://www.tpl.org/sites/default/files/Pocket%20Park%20Tool%20Kit_FINAL.pdf>, accessed 21.4.2021. *See* also: American Society of Planning Officials, *Information Report*, No. 229, December 1967, Chicago Illinois.

[19] In his early work, Linn specialized in healing trauma in children; he believed that nature could forge peace-making and conflict resolution.

[20] A. Goodman, "Karl Linn and the Foundations of Community Design: From Progressive Models to the War on Poverty," *Journal of Urban History* 1-22, Sage, 2019, p. 4.

[21] "Street Law" is a legal clinic, or hands-on course taught in law schools throughout the world, first taught at Georgetown Law School in 1972, that uses innovative, interactive teaching techniques allowing law students to become teachers of civic action to high-schoolers or other cohorts, thus becoming promoters of social action. *See* R. Spitzmiller, "The Influence of Comparative Law in Teaching 'Street Law' in Italy," *Roma Tre Law Review*, n. 2/2019, pp. 219-240.

[22] Goodman, "Karl Linn and the Foundations of Community Design," pp. 4-5. "The design was a hybrid urban-naturalistic scheme with rolling hills and play equipment made of recycled and repurposed materials found among the neighborhood's crumbling structures. This included an amphitheater made of marble steps salvaged from partially demolished homes, a sandbox of used bricks, and play structures built from telephone poles and industrial cable reels (Figure 2). This strategy of reuse emerged from lack of funds, but as Linn wrote, these materials also added 'a dimension to design that cannot be accomplished on sites that were scraped barren by the blades of bulldozers.' In the context of conventional understandings of urban renewal at this time, Linn argued that designers must make spaces that draw directly from existing community resources and which, in turn, reaffirm community identity." Id., at 5.

Linn deemed the neighborhood an "emerging institution of grass roots democracy."[23] His work on community-based urban renewal contributed to the War on Poverty, which led to passage of federal legislation and funding such as the Economic Opportunity Act (EOA) in 1964, part of Lyndon Johnson's "Great Society," the Housing and Urban Development Act and "Community Action." These efforts that gave opportunities to blacks, women and other oppressed individuals and spurred grassroots movements to transform themselves "from protest to direct action on social problems."[24] In very tangible terms, these early efforts in the US are emblematic of the ability to create legal strategies through citizen engagement to enhance cities' sustainability by means of pocket parks.

Since the 1960s pocket parks have since taken hold elsewhere, notably in other cities in the US,[25] Australia, Singapore, England, and Denmark – where they are called "Small Public Urban Green Spaces (SPUGS)"[26] – demonstrating their benefits to environmental, health, social and even aesthetic needs.[27]

4. Legal Features of Pocket Parks: A Comparative View

Having described the many characteristics and benefits of establishing pocket parks throughout our cities, we turn to the focus of this article, the legal considerations that underlie their creation, maintenance and sustainability. In addition to property and ownership rights, zoning regulations and other local and national regulatory

[23] K. Linn, "Neighborhood Commons: Advocacy Design and Volunteer Builders," box 12, folder: "Neighborhood Commons"– F5 Summary' 67-87, Karl Linn Collection, Environmental Design Archives, University of California, Berkeley, cited in Goodman, "Karl Linn and the Foundations of Community Design," p. 7.

[24] Goodman, "Karl Linn and the Foundations of Community Design," p. 14.

[25] In New York City, e.g., two parks stand out as emblematic of pocket parks: Paley Park (1967) and Greenacre Park (1971).

[26] *See* K.K. Peschardt, J. Schipperijn and U.K. Stigsdotter, "Use of Small Public Urban Green Spaces (SPUGS)," *Urban Forestry & Urban Greening* 11(3): pp. 235-244, 2012.

[27] For a visual presentation of pocket parks, *see* N. Jewell, *WOHA revamps Singapore office with lush 'pocket parks,'* Inhabit, Feb 15, 2017. "Although the architects had to work within a number of spatial restrictions, they were able to strategically maneuver new open space out of the existing layout. The plan focused on vertically 'lifting up' the existing office space in order to maximize flexibility and provide optimal natural light and city views." Available at: <https://inhabitat.com/woha-revamps-singapore-office-with-lush-pocket-parks/>. Accessed 21.4.2021.

schemes play important roles in the legal landscape characterizing pocket parks. These tools are often used by long-sighted urban planners to encourage, through concessions and other advantages, the creation of green areas or public spaces aimed at collective use. Below we will describe some of the legal features and structures that support pocket parks in a representative jurisdiction in the US (New York City) and England. We will cite a relevant project involving four countries in the EU and consider some international features before finally analyzing the legal posture in Italy regarding the potential to create pocket parks there.

To understand the regulatory posture of pocket parks, the most fundamental legal principle to examine is that of the property rights of the parcels of land where pocket parks are generally situated at the time the park is being created, and those rights and corresponding duties once parks are established. Ownership of the land parcels targeted for the creation of pocket parks varies greatly; it can be publicly or privately held, or some combination of these. Sometimes, the exact ownership rights may be difficult to ascertain: land with potential to become a viable pocket park often presents itself as a sort of no-man's-land. Once title to the property is properly identified, the parcel may be transferred to a range of entities, even held jointly by multiple owners that vary across communities, in different cities, states and countries. Such parks may be "both owned and maintained by the city, […] owned and maintained by a charitable foundation [or] held by public private partnerships."[28]

4.1. USA: New York

Pocket parks in NYC exemplify the two main types of legal ownership – public and private – through its two major programs through which pocket parks are created: "Privately Owned Public Spaces (hereinafter POPS)" and the "NYC Plaza Program." POPS are "spaces dedicated to public use and enjoyment and which are owned and maintained by private property owners, in exchange for bonus floor area or waivers."[29]

[28] Kronkosky Charitable Foundation, Research Brief, *Pocket Parks*, March 2016, p. 3.

[29] <https://www1.nyc.gov/site/planning/plans/pops/pops.page>. Accessed 27.4.2021.

They are governed by zoning regulations first introduced in 1961.[30] The NYC Plaza Program[31] is based on a partnership between the city's Department of Transportation and private actors to convert unused public land into useful, vibrant parks called "pedestrian plazas." Because the first deals with publically owned land and the second with private property, these two programs through which New York City incentivizes and regulates pocket parks represent normative prototypes.

In the POPS program, the city promotes open, green spaces by granting greater floor area to proposed buildings whose premises include a small parks that adhere to prescribed design criteria regarding location, orientation, size, access, amenities, seating, greenery, lighting, litter receptacles and signage as well as regulations regarding maintenance and compliance.[32] The parks, though situated on private property, must be open to the public, thus bringing light and air to the pedestrian street level. Today, over 590 POPS have been created at over 380 privately owned buildings throughout New York City.[33]

In the NY City Plaza program, the Department of Transportation (DOT) partners with qualified organizations to convert underused, abandoned streets and plazas

[30] Id.

[31] Authorized under NYC Administrative Code, Title 19-157, "Pedestrian plazas," in 2016. Title 19 "authorizes the New York City Department of Transportation ("DOT") to promulgate rules to provide a regulatory framework for DOT's pedestrian plazas. These rules do so by adding definitions to section 4-01 and a new section 4-16 to DOT's Traffic Rules. Among other things, the rules formalize an application process by which DOT will designate pedestrian plazas; impose uniform rules of conduct for all pedestrian plazas; and create specific rules for the Times Square Pedestrian Plaza." New York City Department of Transportation, "Notice of Adoption of Rules related to Pedestrian Plazas." <https://www1.nyc.gov/html/dot/downloads/pdf/notice-of-adoption-plaza-rules.pdf>. Accessed 21.4.2021.

[32] POPS must adhere to principles requiring they be open and inviting from the sidewalk, accessible, safe, secure, comfortable and engaging. See <https://www1.nyc.gov/site/planning/plans/pops/pops.page>. The complete text related to public plaza design standards are found in NYC Planning Zoning Resolution Article III Chapter 7 - Special Urban Design Regulations § 37-70 to 37-78, "Public Plazas," as amended in 2007 and 2009, contains design criteria regarding area dimensions, location, orientation, size, access, amenities, seating, greenery, lighting, litter receptacles and signage as well as regulations regarding maintenance and compliance. <https://zr.planning.nyc.gov/article-iii/chapter-7>. Accessed 21.4.2021.

[33] See <https://www1.nyc.gov/site/planning/plans/pops/pops.page, which describes the parks and contains an interactive map>. Accessed 21.4.2021 A history of NY's pocket parks is provided here: <https://www1.nyc.gov/site/planning/plans/pops/pops-history.page>.

into pocket parks, which become vibrant social spaces in neighborhoods.[34] The DOT and the "partner" form an agreement to assign between them the responsibilities of funding, insuring and maintaining the parks, including the planning and organizing of events to ensure they become lively centers for community activity.[35] Thus, while the city may technically own the parks, they may be run and maintained by volunteers or citizen groups.

Funds may be acquired from "public-private ventures, individual contributions, and philanthropic support… to underwrite start-up and equipment costs."[36] Funding to develop pocket parks throughout the United States may also come from the Trust for Public Land, a non-profit organization founded in 1972 that "helps communities raise funds, conduct research and planning, acquire and protect land, and design and renovate parks, playgrounds, trails, and gardens."[37] Thus, funding may originate from a vast array of sources, and parks' ownership can vary in form and combine multiple parties, both public and private.

4.2. England

England's pocket-park project has a broader sweep than the New York citywide programs in two ways. It is offered on a national basis, and legal ownership of the property where the parks can be created "may rest with the community, the local authority or other public sector body, or a private sector body or trust including a housing association."[38] This comprehensive and truly flexible program, headed up by the Ministry

[34] See <https://www1.nyc.gov/html/dot/html/pedestrians/nyc-plaza-program.shtml>. Accessed 27.4.2021.

[35] See NYC Plaza Program Application Guidelines 2021. Available at: <https://www1.nyc.gov/html/dot/downloads/pdf/nyc-plaza-program-guidelines.pdf>. Accessed 27.4.2021.

[36] National Recreation and Park Association, Issue Brief, "Creating Mini-Parks for Increased Physical Activity." Available at <https://www.nrpa.org/contentassets/f768428a39aa4035ae55b2aaff372617/pocket-parks.pdf>. Accessed 27.4.2021.

[37] The Trust for Public Land, available at <https://www.tpl.org/our-work>. Accessed 27.4.2021.

[38] Ministry of Housing, Communities and Local Government "Pocket Parks: helping communities transform unloved, neglected or derelict areas into new green spaces, Prospectus," 2019, p. 6. "All [grant] applications will need to provide written evidence of agreement from the landowner to the works or activities outlined in the application." Ibid.

of Housing, Communities and Local Government (MHCLG), is called the "Pocket Parks Plus Scheme," through which the MHCLG allocates funding to projects all across England. The program provides funding to local authorities supporting the projects as authorized under national legislation.[39] "The scheme provides support, through grants to community-led bodies working in partnership with their local authority, with the aim of creating new pocket parks or bringing existing green spaces up to a safe, usable and inviting standard."[40]

As of March 2020, England had funded 352 grants to create 146 new parks through supporting community groups, thereby converting 206 derelict urban spaces into green, vital areas in towns and cities across the country.[41] The project Prospectus explains the important links between community and green spaces:

> Communities are at the heart of everything we do. They are where we live, work and play. Parks and green spaces are a hub of many communities. Neglect of these precious spaces can create a detrimental effect on the local people and environment. […]. The benefits of green spaces – no matter their size – are well-known. Even some of our smallest 'pocket parks' help to shape local identity, help people overcome social isolation and create a sense of belonging in the places we call home.[42]

The program aims to build "safer, stronger communities and creating places which are 'owned' and valued by everyone within local communities."[43] However, this type of "ownership" does not refer to a proprietary asset in the strict legal sense, as discussed above, but rather, it conveys a social significance: that heightened sense of be-

[39] Local Government Act 2003 c. 26, Part 3, Chapter 1, Section 31.

[40] "Pocket Parks: helping communities transform unloved," 2019, p. 4.

[41] Ministry of Housing, Communities & Local Government and Robert Jenrick MP, "68 new parks to inject green space into urban areas." 3 March 2020. Available at: <https://www.gov.uk/government/news/68-new-parks-to-inject-green-space-into-urban-areas>. Accessed 29.4.2021.

[42] The Rt. Hon. Robert Jenrick MP, Secretary of State for Housing, Communities and Local Government, in "Pocket Parks: helping communities transform," <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/852241/191025_PP_Prospectus.pdf>.

[43] "Pocket Parks: helping communities transform unloved," 2019, p. 4.

longing to a community, which is a key benefit generated by pocket parks. This type of "ownership" is indeed a significant aspect of the pocket-park-creation process. Also known as "community-building," it is accentuated through active participation in the park's creation and especially in its ongoing care by those who will ultimately use it. The "Pocket Parks Plus Scheme" builds this type of community involvement directly into the grant-application process, which stresses the importance of "robust maintenance and sustainability"[44] and establishes "sustainability" as one of the "core criteria"[45] for submission evaluation. It first provides "Statement of intent, including outline sustainability and maintenance plan" as an "Example of evidence likely to score highly,"[46] and suggests "increased voluntary support/voluntary activity to support the park" as an Outcome and "Increase in the number of volunteers who help to maintain the park regularly (monthly)" as an Indicator.[47] Other suggested outcomes include "increased use of the park bringing people from different backgrounds together (social mixing), increased wellbeing and social connections," which could be indicated by providing, e.g., the "number (and percentage) of people who say that people in this neighbourhood can be trusted."[48] It is clear that the desired synergies of creating pocket parks center on attaining a greater sense of "community" or "ownership" in this broad sense. This outcome is sought after consistently across jurisdictions as an important by-product of creating these small urban gardens.

4.3. The European Union

One EU project relating to urban parks of all sizes was organized and funded through INTERREG Atlantic Area, an EU funding program promoting transnational cooperation in the fields of Innovation & Competitiveness, Resource Efficiency, Territorial Risks Management, Biodiversity and Natural & Cultural Assets[49] in five European

[44] Id., at p. 10.

[45] Id., at p. 21.

[46] Ibid.

[47] Id. at p. 26.

[48] Ibid.

[49] <https://www.atlanticarea.eu>.

countries.[50] The project, called "Park Atlantic" involved five cities in four Atlantic Area countries: Angers and Pau-Pyrénées in France; Limerick, Ireland; Santiago de Compostela, Spain and Vila Nova de Famalicão, Portugal.[51] The project's main objective was to "enhance the inherent value of urban parks and green areas in the Atlantic Area and to encourage their contribution for sustainable urban development."[52]

The vast expanse of the project across four countries contributed to great diversity in the type of legal contexts and approaches these parks and green areas comprised, reflecting the public/private ownership distinctions and the wide range of funding methods for their creation and maintenance, as observed in the US and England. Given this wide diversity of legal contexts, an analysis of the myriad examples in each city and country is untenable here. The project's Main Report contains a useful "Toolkit of Best Practice for Parks and Green Areas Management," drawn from the project's analysis of the parks in the five partner cities. This Toolkit contains policies that fall into three main themes: "urban composition features," "social features" and "economic features" that comprise and reflect the various considerations discussed above.[53] Unsurprisingly, the use and benefits of pocket parks feature widely in this report as a best practice: as a method to attain connectivity of parks and green areas[54] and as a key variable contributing to "urban legibility," which "enables citizens and visitors to gain an emotional ownership of the city arising from having a mental picture of it, of feeling that they know it and are safe in it, or of recognizing its beauty."[55] In Spain, a medium-term action plan item was to identify a site for the development of a community pocket park, using the model of public participation in Pau-Pyrenees."[56]

The Park Atlantic project ultimately aligns with what was described above in the US and England regarding the importance of and symbiotic relationship between

[50] France, Ireland, Portugal, Spain and the United Kingdom.

[51] *Park Atlantic Main Report*.

[52] Id. at p. 2.

[53] Id. at p. 80.

[54] Id. at p. 84.

[55] Id. at p. 86.

[56] Id. at p. 156.

civic participation and the establishment and care of city parks and green areas. Its Main Report endorses citizen empowerment to achieve its objectives, citing the need for "ongoing dialogue to identify [the community's] needs, opinions and values (which evolve over time) and by facilitating their participation in devising solutions and strategies and decision making."[57]

4.4. Common Goods

Recently, interest in the "commons" or "common goods" as a bundle of property rights has drawn attention from legal scholars worldwide. According to this notion, one can argue that regardless of which property or ownership status is vested in the land when parks are first created, once they become established within the city's community life, they effectively become what are known as "common goods." At the international level, a wide range of literature exists on the commons,[58] demonstrating that "in modern legal systems, the commons represent the epitome of the crisis of the public/private di-

[57] Id. at 102. "For successful community participation, certain preconditions must be met. These include:
– People must want to be engaged in local decision making through community participation;
– The information/data necessary to enable groups make informed decisions must be available (see for example Greenspace Information for Greater London: <http://www.gigl.org.uk/>);
– The community must be empowered to make effective decisions;
– Community leadership and skills training is an essential part of the process;
– There must be a policy framework within the city administration to permit and support community participation;
– The participants must have confidence in the officials engaged with the programme and there needs to be efficient and supportive co-ordination." Ibid.

[58] See: J. Boyle, 2003. Foreword: The opposite of property? *Law & Contemporary Problems* 66: 1; Boyle, 2003. The second enclosure movement and the construction of public domain. *Law &Contemporary Problems* 66: 33; Chatterton, 2010. Seeking the urban common: Furthering the debate on spatial justice. *City* 14(6): pp. 625-628; B. Coriat (ed.). 2015. *Le retour des communs. La crise de l'idéologie propriétaire*. Paris: Editions Les Liens qui Libèrent; P. Dardot-C. Laval, 2014. Commun. *Essai sur la révolution au XXIe siècle*. Paris: La Découverte; M. Davies, 2012. Persons, property, and community. *feminists@law* 2(2): 1-21; M. Davies (ed.), 2015. *Property Volume IV: Public-private spaces, the commons and the public domain*. Abingdon: Routledge; H. Demsetz, 1967. Toward a theory of property rights. *The American Economic Review*. 57(2): pp. 347-359. G. Hardin, 1968. The tragedy of the commons. *Science, New Series* 162(3859): pp. 1243-1248; L. Lessig, 2004. The creative commons. *Montana Law Review* 65: 1; L. Lessig, 2006. Re-crafting a public domain. *Yale Journal of Law & Humanities* 18: 56; P. Linebaugh, 2008. *The Magna Carta Manifesto: Liberties and commons for all.* Berkeley: University of California Press; E. Ostrom, 1990. *Governing the commons. The evolution of institutions for collective action*. Cambridge: Cambridge University Press; B. Parance and J. De Saint Victor (eds.). 2014. *Repenser les biens communs*. Paris: CNRS Editions.

chotomy in property law."[59] Common goods have been defined as goods "that cannot be *enjoyed* without [their] communal aspect," and which "gain their quality as goods only in connection to a community" and that "typically take a community to create and to sustain."[60] Gregorio Arena has defined common goods as any goods for which a community has assumed responsibility, thus providing for their care, reuse and regeneration, so that the enrichment of such goods can enrich everyone, not only the owner.[61] Another Italian scholar defines common goods this way: "all those goods and resources that every individual shares and exploits together with other human beings, whose enjoyment no one may be excluded."[62] Fulvio Cortese provides an overview of the Italian debate on common goods, describing it as falling within two different camps: those who approach common goods as an inefficient management model from a "purely ideological point of view,"[63] and those who believe that common goods are "functional in activating a *different administrative model* from the traditional one."[64] The Italian Court of Cassation has also pronounced itself on this matter. In 2011, "it offered a first formal recognition of the category of common goods. Examining the claim of a private fishery to an area of the Venice Lagoon, the Court maintained that state properties had to be considered common goods when they were devoted to the fulfillment of people's fundamental rights (in this case, the right to enjoy the environment)."[65]

[59] M.R. Marella, "The Commons as a Legal Concept" *Law Critique* (2017) 28:61-86, at p. 63.

[60] A. Marmor, *Do We Have A Right To Common Goods?* Canadian Journal of Law and Jurisprudence Vol. XI, No. 2 (July 2001).

[61] G. Arena, *I beni comuni* (ed.). Nota allegata al Bando per progetti emblematici provinciali, 2018.

[62] N. Carestiato, "*Beni pubblici, beni comuni e proprietà collettiva."* Available at: <https://www.slideshare.net/decrescitafvg/beni-pubblici-beni-comuni-e-propriet-collettiva-nadia-carestiato>. Accessed 29.4.2021.

[63] F. Cortese, "What Are Common Goods (*Beni Comuni*)? Pictures from the Italian Debate." *Revista da Faculdade de Direito da UFMG, Nº Especial* - 2nd Conference Brazil-Italy, pp. 121-146, 2017, at p. 123.

[64] Id., at p. 124. The author cites Gregorio Arena as the proponent of this point of view.

[65] Marella, "The Commons as a Legal Concept", at p. 63, citing Cass. Civ. Sez. Unite. Sent., 14 February 2011, n. 3665.

5. Italy: Current Legal Posture

Turning to the normative context regarding the potential for establishing pocket parks in Italy, we can first examine the urban planning Law of 17 August 1942, no. 1150 – incorporating changes made by Law no. 765 of 6 August 1967 – establishes that the maximum ratios between "spaces intended for residential and productive settlements" and "public spaces or spaces reserved for collective activities, public green areas or parking areas" must be observed in urban planning. Ministerial Decree 2 April 1968, no. 1444 then identifies minimum quantities of public spaces per inhabitant (so-called urban planning standards), distinct in relation to various objective differences in territories. Despite the new distribution of legislative competences enacted by Constitutional Law of 18 October 2001, n. 3 on the subject of "territorial government," the standards established at the ministerial level still continue to act as a point of reference for regional urban planning legislation. These standards must in any case observe a fundamental principle, to ensure a balanced relationship between residential and productive settlements and public and collective-use spaces.[66]

However, it should be stressed that even the detailed provisions on urban planning standards are not sufficient to guarantee the effective implementation of adequate public spaces. The identification in urban planning instruments of the areas allocated to such spaces is only the prerequisite for a process aimed at their expropriation and implementation through related works. The lack of public resources together with the new rules on expropriation for public benefit[67] have contributed to the increase the difficulty municipalities face to create urban spaces for collective use. An attempt has been made to overcome these difficulties by having the public works of urbanization carried out directly by the private sector, but further problems with this approach exist. These include the so-called "monetization of standards" – allowed by regional urban planning legislation, i.e., the payment of money by private parties instead of their finding areas necessary to carry

[66] P. Biondini, "*Beni pubblici e beni comuni: città, spazi pubblici e beni urbani a fruizione collettiva*," Labsus, Laboratorio per la sussidiarietà, 18 December 2017. Available at: <https://www.labsus.org/2017/12/i-beni-pubblici-urbani-nella-prospettiva-dei-beni-comuni/>. Accessed 20.3.2020.

[67] Unified text on Expropriation for Public Use, Presidential Decree (D.P.R.) n. 327/2001 and successive modifications and integrations, updated 2019.

out works of general interest due to the "lack of available areas" and the struggle by local authorities to maintain the goods created through these conventions.[68] A viable alternative is presented in that the "public spaces referred to in the regulations on urban norms and standards do not necessarily have to be publicly-owned public property, as they may instead be private spaces destined for public use, made and managed by private parties, even on a contractual basis with the municipal authority."[69] To that end, well established case law on this matter could incentivize private parties to transform their property into areas for public use, and even allow them derive profit from the assets in question.[70]

These strategies could be facilitated in establishing pocket parks through the reliance on citizen participation to help manage these spaces – urban public goods for collective use – or common goods. In Italy, as we will see below, this may occur through application of the constitutional principle of horizontal subsidiarity.[71] Article 118, paragraph 4 of the Italian Constitution reads: "The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity." Through this principle, and in conjunction with state and/or local regulations, methods of managing public goods are being implemented. Such methods aim in particular at urban public goods for collective use, which directly and actively involve citizens, individuals or associates. Individual citizens and groups of them (active citizens), by spontaneous initiative or responding to an invitation from the municipality, can propose interventions of care or regeneration of public spaces (green areas, squares, streets, sidewalks, etc.. and other public spaces, public property or subject to public use) as well as buildings of the municipality that are in a state of even partial disuse or dilapidation.[72]

[68] Biondini, "*Beni pubblici e beni comuni: città, spazi pubblici e beni urbani a fruizione collettiva*," Labsus, Laboratorio per la sussidiarietà, 18 December 2017, at p. 6. Available at: <https://www.labsus.org/2017/12/i-beni-pubblici-urbani-nella-prospettiva-dei-beni-comuni/>. Accessed 20.3.2020.

[69] Ibid.

[70] Id. at p. 7.

[71] Article 118, paragraph 4, Italian Constitution.

[72] Biondini, "*Beni pubblici e beni comuni: città, spazi pubblici e beni urbani a fruizione collettiva*," Labsus, Laboratorio

Once the strictly legal issues regarding property rights and urban-planning in creating pocket parks are understood and overcome, we can proceed to the problems regarding their ongoing care. All common goods, including pocket parks, require regular maintenance; like any other public park, as common goods, they are subject to normal wear and tear. Since common goods are open to and used by the public at large, they are unfortunately also vulnerable to acts of vandalism. Thus, to maintain parks in good order and to combat the effects of vandalism, such spaces depend to a large extent on a well-developed sense of respect for common goods and civic duty among those living in the area and to the ability of law enforcement to prevent malicious or destructive acts. This is why both a strong sense of civic responsibility and efficient law enforcement are among the essential elements needed to sustain pocket parks: where either is lacking, urban security is not guaranteed, and the parks simply cannot be maintained in a clean, safe and orderly fashion. These broader issues concerning property rights and maintenance as they relate to the broader elements of civic engagement, subsidiarity empowerment, law enforcement and the rule of law will be examined below.

6. Legal Challenges and Potential Solutions for Creating Pocket Parks in Italy

Collaboration between cities and citizens comprises activities that, taken individually, are usually of modest importance. However, if the principle of horizontal subsidiarity is correctly interpreted and widely implemented, what begins as small activities in the daily lives of a few active citizens appears capable of initiating a wider process of revitalization of the democratic constitutional model based on the enrichment of the expressions of popular sovereignty.[73] Together, these concerns contribute to urban security, and in a broader sense, to what is known as the rule of law. In this section, we will explore these aspects and propose possible solutions to the legal challenges that exist for the creation and maintenance of pocket parks in Italy. A two-pronged approach will be used in our analysis: 1. Civic Engagement, Subsidiarity and Empowerment and 2. Law Enforcement and the Rule of Law.

per la sussidiarietà, 18 December 2017. Available at: <https://www.labsus.org/2017/12/i-beni-pubblici-urbani-nella-prospettiva-dei-beni-comuni/>. Accessed 20.3.2020.

[73] Id.

6.1. Civic Engagement, Subsidiarity and Empowerment

Ironically, Italy's vast natural splendor and rich cultural heritage lie in contrast to its civic culture, which is somewhat characterized by apathy. Generally, citizens tend to believe they can simply delegate authority to the public administration to take care of all the normal and maintenance and emergency situations that require action across all sectors of public life. Even with the outbreak of the corona-virus pandemic, which has spurred a surge in civic awareness and community spirit, active citizenship and true participatory democracy are relatively weak, and still in their adolescence. The recent rise in popularity and victory in the 2018 parliamentary elections of the young Five Star Movement, the political party based on direct, online participation, symbolize the experimental changes (typical of adolescence) that have been occurring in Italy recently and the desire for increased citizen involvement.[74] Despite the emergence of this new political scenario, governments are still unable to take care of the vast range of matters requiring regular attention and emergency management in the public domain, including the maintenance and care of public spaces such as parks. This longstanding inertia and numerous other factors have been contributing in a broad sense to a declining quality of life in Italy.[75] Many areas that could be used to create pocket parks have fallen into abandonment, or worse, have become havens for illegal activity.

This bleak situation has led to a need for citizens to learn more about the way their cities are run, to empower themselves as active citizens who can create more efficient, clean, law-abiding and safe living conditions. Arena and Cotturi have summarized the current state of affairs as follows: "The public sphere, as such, of our country seems no longer be the responsibility of anyone."[76] Italy does seem ready for "a change of the paradigm… concreteness, effectiveness, practical sovereignty, active citizenship, and shared administration."[77]

[74] A. Floridia-R. Vignati, "Deliberativa, diretta o partecipativa?" *Quaderni di Sociologia*, 65 | 2014, pp. 51-74.

[75] Spitzmiller, "A Comparative-Law perspective on Street Law in Italy: Drawing best practices from Common-Law traditions to boost Civic Engagement in a Civil-Law Context," *Street Law and Public Legal Education: A collection of best practices from around the world in honour of Ed O'Brien*, (D. McQuoid-Mason, ed.) Juta and Company, Cape Town (2019), pp. 221-236 at 221.

[76] G. Arena-G. Cotturri, *Il valore aggiunto: come la sussidiarietà può salvare l'Italia* (2010), p. 12.

[77] Id. at 26. Translation by the author.

Faced with the need for a shift in societal responsibility and organization, citizens have begun to form groups that enable them to contribute to the care of common goods. As noted above, one of these is Retake Roma, [78] a volunteer association playing a role in empowering citizens to take care of common goods through a grassroots movement that has spread across the peninsula. Retake Roma is a non-profit, non-governmental, non-partisan organization founded in 2010 and currently comprised of some 80 self-organizing neighborhood groups in Rome alone. Aimed at bolstering civic pride, personal responsibility and empowerment, it organizes educational and hands-on clean-up events that engage citizens in the democratic process of caring for and defending common goods. The volunteers seek to raise awareness about the need to increase and improve normal maintenance operations by city administrations; they educate citizens about their duty to respect the public places by influencing public opinion through first-hand engagement, social media amplification, endorsements and testimonials from key opinion leaders; they gain support and action from public authorities and the private sector. For pocket parks to catch on and take hold in Italy, the idea would likely arise through a grassroots demand from citizens, perhaps through a movement such as Retake.

Pocket parks face characteristic problems facing all common goods, labelled the "Tragedy of the Commons" in Hardin's seminal work.[79] These problems have been amply described based on Flood and Dresher's prisoners' dilemma – where cooperation would inevitably lead to a the best outcome, but individuals generally end up worse off because they choose options based on self-interest alone – and the metaphor of the free rider, who similarly pursues strictly individual needs and avoids contributing to common endeavors.[80]

The Retake movement reinterprets the role of citizens from passive by-standers to active protagonists in "retaking" their cities, collaborating with and stimulating the

[78] <https://www.retakeroma.org>.

[79] G. Hardin, "The Tragedy of the Commons." *Science* 162 (1968): pp. 1243-1248.

[80] See R. Hardin, "The Free Rider Problem," The Stanford Encyclopedia of Philosophy (Spring 2013 Edition), E.N. Zalta (ed.), and U. Pomarici, *Beni comuni*, in Pomarici, Costa, Rapone, et al., "Atlante di filosofia del diritto (beni comuni, cittadinanza, codice, democrazia costituzionale dignità, diritti fondamentali) Vol. 1 (ed.) (2012). p. pp. 1-58, Torino: Giappichelli.

institutions to do their work better. Active citizens pursue self-interest by taking care of common goods, creating scenarios where everyone benefits. Moreover, Retake's "approach, aimed at qualifying itself as a relevant subject in the public-private-non-profit partnerships, PPPNP – which has become one of the main forms of organized interventions in local politics – seems to supersede the vision through which every issue of urban politics is resolved exclusively with institutional relationships where the city administration is [merely] called upon to carry out its own functions."[81] The sense of empowerment engendered by active citizenship lies at the basis of the legal principle known as horizontal subsidiarity. It is opportune to describe in more detail how Retake empowers citizens across a broad range of the demographic spectrum – even marginalized portions of society.

Retake's activities constitute virtuous cycles by creating visible results of rescued urban space that then become the banners of proof that improvement is possible; "before and after" photos are posted on line and transmitted to some 90,000 followers on its social media.[82] The positive cycle of change serves to inspire others with the encouraging results achieved. These refurbishing events and their dissemination through social media meet the criteria of best practices provided by Italy's Former Minister of Integration, Kashetu Kyenge, who characterized them as "trigger[ing] a social mechanism that produces positive effects that mutually implement, in accordance with a win-win dynamic."[83] Retake's activities fit Kashetu Kyenge's formula, which she describes as those where "high culture comes down from its pedestal, opens its doors and arises in communication and in service to society,"[84] since Retakers "act as a driving force to avoid surrendering to the state of things, proof that you can do things differently and in a better way."[85] This embodiment of the principle of empowerment is closely linked to the legal principle, horizontal subsidiarity.

[81] M.C. Antonucci-A. Fiorenza, *Democrazia dal basso: Cittadini organizzati a Roma e nel Lazio*, (2016), p. 87.

[82] See <https://www.retakeroma.org/2018/05/03/retake-italia-il-nostro-primo-incontro/>. Accessed 4 April 2020.

[83] C. Kashetu Kyenge, "Foreword," in C. Bartoli "Legal clinics in Europe: For a commitment of higher education in social justice" *Diritto & Questioni Pubbliche*, Special Issue (2016) at p. 8.

[84] Ibid.

[85] Ibid.

As mentioned above, subsidiarity has been established relatively recently as a legal principle in Italy, demonstrating that the general legal framework seems ready to embrace change as well. In 2001 the Italian Parliament approved and a referendum confirmed revisions of Title V of the Italian Constitution, inserting the principle of subsidiarity in paragraph 4 of Article 118 of the Italian Constitution. The term "subsidiarity" also expresses one of the key principles of European law, as established in 1992 in the Treaty of Maastricht and currently formulated under the Treaty on European Union, which entered into force in 2009. In both the EU and in Italy, this principle helps distribute and allocate administrative resources and functions throughout the governmental frameworks. In the EU context, it regulates and limits EU authorities from acting when national or even local governments could do so in more effectively, requiring that decisions be taken as closely as possible to the citizens.[86] In some instances, instead, action is indeed warranted at the European level. This occurred, e.g., in case C-547/14, where Philip Morris et al challenged the EU's authority as exercised by Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014, regulating the manufacture, presentation and sale of tobacco. The Court of Justice of the European Union upheld the EU's Tobacco Products Directive, holding that "the Commission's proposal for a directive and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at Member State level.[87] At the EU level, this vertical type of subsidiarity thus regulates concurrent powers, providing a flexible mechanism that weighs the national interest against local ones, paralleling the supremacy clause in the United States and the *konkurrierende Gesetzgebung* in Germany.

Under the Italian constitutional principle of *horizontal* subsidiarity, instead, we can observe an increased interaction and productive synergy developing between institutions and grassroots movements such as Retake Roma, especially in the field of urban security, highly relevant to the potential for creating pocket parks. A key example of

[86] See "The Principle of Subsidiarity, European Parliament," available at: <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>. Accessed 4 April 2020.

[87] Case C-547/14, paragraph 226.

this collaboration is invitation by Italy's Chamber of Deputies to Retake Roma to be heard[88] relevant to the drafting of the Legislative Decree on Security.[89] Retake's proposals were taken into consideration and incorporated into the Security Decree of 2017.[90] Thanks to Retake Roma's proposals, school and university grounds fall within the areas eligible for pacts for urban security and all the touristic and cultural points of interest, regardless of the number of tourists that visit them, will be protected, in the law that will be further examined below.[91]

Retake has been presenting its philosophy and methodology of active citizenship in schools in its *Retake Scuole* program since its founding, often partnering with other civic and legal organizations. One such organization is Labsus, or the *Laboratorio per la sussidiarietà*,[92] a think-tank of legal scholars supporting the implementation of the principle of horizontal subsidiarity, where volunteers – active citizens – elaborate ideas, collect a vast array of experiences and materials and report on relevant initiatives throughout Italy, including Retake Roma.[93]

If we compare the situation regarding active citizenship and empowerment in Italy to that of the United States, e.g., we can note the historic analysis of Alexis de Tocqueville on these matters – even if he wrote about them using different names – in Democracy in America in 1835. His thoughts show deeply rooted differences between European and American legal and civic cultures that persist even today. On active citizenship and empowerment, he wrote: "the most powerful, and perhaps the only, means of interesting men in the welfare of their country which we still possess is to make them partakers in the Government, […] everyone takes as zealous an interest in the affairs of

[88] <http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/74/audiz2/audizione/2017/10/03/stenografico.0023.html>.

[89] <https://www.retakeroma.org/2017/03/07/dl-sicurezza-le-proposte-di-retake-a-montecitorio/>.

[90] <http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0049720.pdf>.

[91] <https://www.andreamazziotti.eu/decreto-sicurezza-migliorato-grazie-alle-proposte-dei-retakers-retake/>.

[92] <https://www.labsus.org/>. Accessed 4 April 2020.

[93] "*Retake Roma… dal degrado: Il movimento è riuscito nell'intento di riqualificare importanti spazi urbani*" Lucia Zonfrilli, 13 October 2013, *Laboratorio per la sussidiarietà.* See: <http://www.labsus.org/2013/10/retake-roma-dal-degrado/>. Accessed 4 April 2020.

his township, his county, and of the whole State, as if they were his own, because everyone, in his sphere, takes an active part in the government of society."[94] The link between active citizenship and the welfare of our societies, including security and care of common goods, leads us to the need for adequate law enforcement and respect for the rule of law.

6.2. Law Enforcement and the Rule of Law

Recent laws have been enacted in Italy to address the problem of declining urban spaces, including the Security Decree discussed above. It defines urban security as the public good relating to the livability and decorum of cities, to be pursued also through the joint contribution of local authorities through the following interventions:

- requalification and recovery of the most degraded areas or sites;
- elimination of marginality and social exclusion factors;
- crime prevention, in particular predatory crime;
- promoting respect for legality;
- higher levels of social cohesion and civil coexistence.[95]

All these elements must be tackled simultaneously once to reverse the overall declining tendency of urban spaces, which falls within the category of "wicked problems."[96] The legislature's multilateral approach aimed at this range of factors reflects the vicious cycle that link the threats of harm to common goods, weak social cohesion, insufficient law enforcement and the degeneration of the rule of law.

The interventions identified by the Italian legislature are intended to "strengthen the intervention of local authorities and police forces in the fight against the degradation of urban areas,"[97] increasing urban security and pursuing the following objectives, which aim to foster a culture of legality while recovering and protecting common goods:

[94] A. DE TOCQUEVILLE, *Democracy in America*, translated by Henry Reeve, Penn State Electronic Classics Series Publication, (2002) V 1 at 270. Available at: <https://goo.gl/MmPVwx>. Accessed 4 April 2020.

[95] "Sicurezza urbana: il testo coordinato del decreto", Legislative Decree, coordinated text 20/02/2017 n° 14, Gazzetta Ufficiale 20/02/2017.

[96] H.W.J. RITTEL, M.M. WEBBER, Dilemmas in a general theory of planning. *Policy Sci* 4, pp. 155-169 (1973).

[97] "Sicurezza urbana: il testo coordinato del decreto", Legislative Decree, coordinated text 20/02/2017 n° 14, Gazzetta Ufficiale 20/02/2017.

- preventing phenomena of widespread and predatory crime, […] in particular to the benefit of the most degraded areas;
- promoting respect for legality, including initiatives to dissuade any form of illegal conduct, including the arbitrary occupation of real estate and the sale of counterfeit goods, as well as the prevention of other phenomena that disturb the free use of public spaces;
- promoting respect for urban decorum.

As noted above, pocket parks have developed mainly in places such as the United Kingdom, the United States and Scandinavia, all of which possess robust institutional frameworks and efficient law enforcement, hence they have strong ratings in the rule of law. The World Justice Project Rule of Law Index 2020[98] (hereinafter WJPRoLI), the "world's leading source for original, independent data on the rule of law,"[99] includes qualities such as institutional framework, absence of corruption and law enforcement among the eight main factors contributing to measure and rank the countries around the world regarding the rule of law. Not surprisingly, Denmark, Norway, Finland and Sweden topped the WJPRoLI rankings in 2020, and the UK ranked 13th with the US coming in 21st out of 128 countries.[100] Italy comes in at 27th,[101] mostly due to its lower scores in categories such as "Absence of Corruption," where it ranks 35th,[102] and "Order and Security," where it comes in 56th.[103] In addition, Italy scores relatively poorly in regulatory enforcement, 32nd, where the UK, US and Scandinavian countries all rank in the top 20.[104]

This overview of Italy's placement as compared to the countries where pocket parks are flourishing provides insights as to the areas that need improvement from a legal point of view. The Italian Security Decree is certainly a step in the right direction,

[98] Available at: <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>. Accessed 21.3.2020.

[99] Id., p. 4.

[100] Id., p 16.

[101] Ibid.

[102] Id. p. 23.

[103] Id., p. 28.

[104] Id., p. 29.

addressing the types of measures that could allow abandoned urban areas to be converted into vibrant common goods. To reach the objectives set out in the decree, the legislature has provided for the possibility of pacts for urban security between territorial networks of volunteers – a characteristic manifestation of civic engagement. Such pacts might arrange for the protection of urban "furniture," (e.g., electrical enclosures, dumpsters, utility poles) green areas and city parks. They could also encourage the use of the police force to pursue extraordinary territorial control and provide for the installation of video surveillance systems.[105] The enactment of such laws and encouragement of this type of pact illustrate the current need in Italy for strengthening civic engagement, law enforcement, and the interaction between them.

The above analysis has aimed at identifying the strengths and weaknesses found in the Italian legal system as a way to formulate viable means to strengthen the common goods, specifically focusing on the potential to create pocket parks. The greening effects achieved by creating such parks in our cities would provide sustainable improvements to the environment while producing health, economic, and broader societal benefits. Some positive signs are emerging as Italy and Europe prepare to reopen with the lessons learned during the Covid-19 pandemic. Social distancing and mask-wearing have awakened civic culture and engagement as citizens have realized our great inter-dependence; we increasingly understand the important role we can play if we cooperate and actively contribute to the achievement of our common goals, with the help of the government and within the legal framework, respecting the rule of law.

[105] "Sicurezza urbana: il testo coordinato del decreto", Legislative Decree, coordinated text 20/02/2017 n° 14, Gazzetta Ufficiale 20/02/2017.

SIRIO ZOLEA[*]

LE DROIT DE SUPERFICIE AUJOURD'HUI: ENTRE DISSOCIATION JURIDIQUE DE L'IMMEUBLE ET SOLIDARISATION DU DROIT

Une analyse comparative des ordres juridiques français, belge et italien

RESUMÉ. *L'objet de cet article est le droit de superficie, dans trois ordres juridiques: non pas explicitement réglementé en France, normé en Italie par le* Codice civile *et en Belgique par une loi spéciale, les diversités concernent non seulement la forme, mais aussi le fond des règles et leur usage dans la pratique. L'article analyse les raisons historiques et systématiques de ces différences, notamment pour comprendre pourquoi le droit de superficie s'est récemment développé en France en une multitude de figures, chacune répondant à des besoins sociaux spécifiques, bien au-delà des emplois de cette institution juridique pratiqués dans le modèle juridique italien. La Belgique pourra fournir d'autres éléments de comparaison, en tant que système de droit civil très proche de celui de la France, mais ayant connu des développements autonomes importants dans la matière spécifique de la superficie.*

ABSTRACT. *This article concerns the right of superficies, with regard to three legal orders. This right is not explicitly regulated in France, while it is regulated in Italy by the* Codice civile *and in Belgium by a specific act. The differences concern not only the form, but also the content of the rules and their use in practice. The article analyses the historical and theoretical reasons of such differences, particularly in order to understand why the right of superficies has recently developed in France into a multitude of structures, each one answering a specific social need, far beyond the more sporadic uses of this legal instrument in the Italian legal order. Belgium can provide further elements of comparison, as a legal order close to the French one, having experienced important autonomous developments in the specific topic of the right of superficies.*

[*] Postdoctoral researcher in Private Comparative Law - University of Macerata; Lecturer of Private Comparative Law - University of Teramo.

CONTENT. 1. Introduction – 2. Le droit de superficie en tant que manifestation d'un principe juridique de l'acquisition de la propriété par le travail – 3. France: un droit de superficie souple et adaptable, ayant évolué dans les interstices de la loi – 4. Belgique et Italie: des expériences de transposition de la superficie en droit positif – 5. Des équilibres variables entre droit de superficie et dissociation juridique de l'immeuble – 6. Conclusion

1. Introduction

L'objet de cet article est le droit de superficie, en tant que manifestation principale des phénomènes de dissociation juridique de l'immeuble, dans une perspective comparative[1]. La dissociation juridique de l'immeuble est la situation dans laquelle la propriété du dessus ou du dessous est distincte de celle du sol, en permettant des montages immobiliers plus ou moins complexes. Le droit de superficie est l'instrument, exclusif ou prévalent, qui dans plusieurs ordres juridiques continentaux satisfait à l'exigence de réaliser ces dissociations, avertie de plus en plus fréquemment avec l'urbanisation massive des sociétés du XXI siècle. On prendra en considération trois modèles juridiques, France, Italie et Belgique. La superficie présente des différences importantes entre eux: non pas explicitement réglementée en France, normée en Italie par le *Codice civile* et en Belgique par une loi spéciale, les diversités concernent non seulement la forme, mais aussi le fond des règles et leur usage dans la pratique du droit. Cet article analyse les raisons historiques et systématiques de ces différences, notamment pour comprendre pourquoi le droit de superficie s'est récemment développé en France en une multitude de figures, chacune répondant à des besoins sociaux spécifiques, bien au-delà des emplois de cette institution pratiqués dans le modèle juridique italien. La Belgique pourra fournir d'autres éléments intéressants de comparaison, en tant que système de droit civil en général très proche de celui de la France, mais ayant connu des développements autonomes importants dans la matière spécifique de la superficie.

[1] V., *amplius*, S. Zolea, *Il diritto di superficie nei sistemi delle regole di appartenenza: uno studio comparativo*, Eum, Macerata, 2020.

2. Le droit de superficie en tant que manifestation d'un principe juridique de l'acquisition de la propriété par le travail

En droit romain, la conception classique unitaire du *dominium* faisait obstacle à toute hypothèse de division de la propriété immobilière en couches superposées[2]. Ce système évolua avec le temps, tandis que la société romaine était confrontée à une urbanisation massive requérant de nouvelles et plus souples règles de droit. Dans un but d'exploitation économique des utilités constructives du fonds sans impliquer sa cession définitive, on commença à attribuer à des tiers la possibilité d'édifier sur le sol d'autrui, public et successivement aussi privé, dans un premier temps dans le cadre d'un rapport de *locatio conductio* de longue durée. Par l'œuvre du préteur, la rendant directement justiciable à l'égard de tiers, la situation du superficiaire ne tarda à s'approcher à la sphère de la réalité, jusqu'à s'y établir décidément à l'époque de Justinien, en tant que droit réel sur le fonds d'autrui ayant un contenu ample d'attribution de la pleine jouissance d'un bâtiment ou d'une partie de celui-ci, aliénable, susceptible d'hypothèque et transmissible aux héritiers[3]. L'avènement des invasions barbares, le nouveau paradigme culturel et religieux et la fin de l'Empire romain eurent en tant que conséquence en matière de règles des situations d'appartenance un affaiblissement du principe individualiste de l'accession en faveur d'un principe plus solidariste, en vertu duquel tout ce que l'homme produit par son œuvre et son travail lui appartient, sauf si y fait obstacle un autre principe de droit auquel la loi donne prévalence dans le cas spécifique, l'acquisition d'un bien dépendant ainsi en général du fait du travail humain et non pas d'un rapport de prééminence entre des choses[4]. La notion ayant une source romaine du droit de superficie, en tant qu'exception, dérogation et tempérament aux implications les plus extrêmes du régime du *dominium*, s'affaiblissait par conséquent, tandis que dans la multitude de droits coutumiers locaux des formes diverses de décomposition de la titularité du sol de celle des plantations et des œuvres se diffusaient[5]. Tout cela dépendait largement des

[2] V. Gai, 2, 73.

[3] P. Bonfante, *Diritto romano*, F.lli Cammelli, Florence, 1900, p. 316.

[4] V. Simoncelli, *Nota a Trib. civ. Lecce, 8 giugno 1899*, in « Il foro it. », 1900, I, c. 70; A. Barca, C. Marvasi, *La superficie* (« Il diritto privato oggi »), Giuffrè, Milan, 2004, p. 24.

[5] V. R. Faivre-Faucompré, *Le droit de superficie dans la doctrine coutumière d'Ancien Régime*, in G. Choisel *et al.*,

conditions économiques de l'époque: fuite des gens des villes à la campagne, agriculture de subsistance, réduction de la population, délaissement des fonds, en rendant nécessaire que le droit encourageât leur culture même au détriment de la situation juridique du propriétaire formel. L'une des réponses à ces besoins fut une plus souple ouverture à des schémas de séparation horizontale de la propriété, valorisant l'exploitation d'éléments du dessus − attribués de façon variée selon le temps et le lieu à titre de propriété à plusieurs sujets différents − sans sacrifier complètement les intérêts du titulaire du sol[6]. En général, s'affirme une conception des situations d'appartenance tendant à donner un habillage juridique au fait économique, à l'effectivité bariolée des situations possessoires visant à la jouissance productive d'une ou de plusieurs des potentialités concrètes de la chose, à travers la reconnaissance de la part de l'ordonnancement juridique de ces situations possessoires, au moins jusqu'à ce qu'un meilleur titre à la possession de quelqu'un d'autre se manifeste[7]. La notion romaine de la propriété, qui malgré tout n'avait jamais été complètement éradiquée, revenait à attirer l'attention seulement à l'époque de la redécouverte des sources romaines, tandis que de nouveaux phénomènes d'urbanisation commençaient à se dérouler. On admettait alors une propriété séparée de la construction, en tant qu'exception à la règle de l'accession, en mélangeant d'une manière variée selon le territoire des institution juridiques ayant des origines diverses comme superficie, emphytéose, fief, baux de longue durée, tous placés dans le cadre de la théorie du double domaine, qui essayait d'adapter le *dominium* romain aux régimes féodaux des situations d'appartenance − manquant d'homogénéité, stratifiés et axés sur le lien avec le *status* du bénéficiaire − pour les légitimer de l'autorité idéale du *Corpus iuris civil*[8]. À travers la notion de domaine utile, des droits sur la chose d'autrui étaient

Coutume, usages et pratiques: disputatio magistrorum et scholarium argentorati, Mare et Martin, Paris, 2015, p. 31; A. Solmi, *Il diritto di superficie nei documenti italiani del medio evo*, in « Rivista di diritto civile », nº 4, 1915, p. 481.

[6] V. D. Richard, *De la propriété du sol en volume*, thèse Paris II, 2015, p. 37: « Au cours de la période féodale, le droit de superficie subit des transformations […], perdant plus ou moins ses spécificités romaines (usage en milieu urbain, division de la chose plutôt que du droit). Il semble prendre surtout la forme d'un éclatement de prérogatives, même si des situations articulées autour d'une séparation physique subsistèrent ».

[7] L. Moccia, *Forme della proprietà nella tradizione giuridica europea*, in L. Moccia, *Comparazione giuridica e prospettive di studio del diritto*, Cedam, Padoue, 2016, pp. 114-116.

[8] V., *ex ceteris*, Solmi, *Il diritto di superficie nei documenti italiani del medio evo*, cit., p. 494; P. Grossi, *La proprietà*

transformés idéalement en des formes de propriété, économiquement commercialisables; le superficiaire était ainsi réputé propriétaire de la chose à titre utile, ce qui marquerait l'institution de la superficie aussi dans ses évolutions successives, avec une intensité particulière due à la fusion conceptuelle entre la dissociation idéale de la propriété en éminente et utile et la dissociation juridique de la matérialité de l'immeuble entre le sol et le dessus[9].

3. France: un droit de superficie souple et adaptable, ayant évolué dans les interstices de la loi

En France, au lendemain de la Révolution, l'englobement de la superficie dans la théorie du double domaine rendait cette institution 'suspecte' aux yeux du nouveau pouvoir, réalisant le dessin de libérer la propriété immobilière de tous poids[10] en limitant la pleine exploitation économique capitaliste et une circulation facile[11]. La codification civile de 1804 essaya de rétablir le modèle romain du *dominium*, symbolisé dans la proclamation de l'absolutisme propriétaire de l'art. 544, assorti d'une notion forte d'accession telle que les anciens romanistes et, puis, surtout Pothier, avaient refondu et systématisé. Le droit de superficie n'était, comme celui d'emphytéose, même pas cité dans le texte[12], mais, survécus dans la pratique du droit, surtout à la campagne, ils étaient reconnus par la jurisprudence. Un espace très étreint pour le droit de superficie fut trouvé dans les interstices des règles de l'art. 553 du Code (qui, avec l'art. 552, reformulait le concept de l'art. 187 de la Coutume de Paris), qui, en établissant que toutes constructions, plantations et ouvrages sur un terrain ou dans l'intérieur sont présumées faites par le propriétaire à ses frais et lui appartenir, admettait la preuve contraire, en

e le proprietà nell'officina dello storico, Editoriale scientifica, Naples, 2006, p. 70; J.P. Lévy, A. Castaldo, *Histoire du droit civil*, Dalloz, Paris, 2010[2], pp. 423-428.

[9] F. Zenati-Castaing, *Propriété et droits réels: étendue de la propriété foncière*, in « RTD civ. », 1999, pp. 146-147; F. Zenati-Castaing, T. Revet, *Les biens*, Puf, Paris, 2008[3], p. 226.

[10] V. Déclaration des Droits de l'Homme et du Citoyen de 1789, artt. 2, 17.

[11] V. art. 537 Code civil.

[12] On trouve aujourd'hui la superficie citée aux artt. 2521 et 2531, parmi les dispositions applicables à la collectivité territoriale d'outre-mer de Mayotte.

ajoutant aussi que la règle ne préjudiciait pas la propriété qu'un tiers pourrait avoir acquise ou pourrait acquérir par prescription soit d'un souterrain sous le bâtiment d'autrui, soit de toute autre partie du bâtiment[13]. Avec le soutien de la plupart des auteurs[14], la jurisprudence, après quelques hésitations, en fit des droits de propriété physiquement superposés mais pleins, indépendants et absolus[15], dans une vision adhérant à l'idéologie de l'individualisme propriétaire du Code. La figure de la superficie acquérait ainsi un caractère résiduel et expansif, en récupérant, au moins formellement, au système post-révolutionnaire du droit des biens une variété de situations préexistantes qu'il ne semblait pas socialement désirable mettre en question. Cette construction était néanmoins bien fragile: dans le but d'éviter une compromission du nouveau système, que l'on voulait inspiré au droit romain, elle en cachait la compromission à un état souterrain et latent, en accueillant en vérité la conception médiévale de la superficie (avec son inspiration germanique), en tant que droits de propriété superposés, même si libérés du cadre de la théorie du double domaine. Les juristes français d'aujourd'hui se partagent encore entre les partisans d'un tel point de vue, dit « moniste », sur la superficie[16] et les

[13] V. aussi l'art. 664 de la version originale du Code, avant la réglementation de la copropriété des immeubles bâtis.

[14] V. P.A. Merlin, *Recueil alphabétique de questions de droit*, t. III, Tarlier, Bruxelles, 1829[4], p. 37; C. Demolombe, *Cours de Code Napoléon,* IX: *Traité de la distinction des biens, de la propriété, de l'usufruit, de l'usage et de l'habitation*, t. I, Durand, Hachette, Paris, 1870[4], p. 371; C. Aubry, C.F. Rau, *Cours de droit civil français d'après la méthode de Zachariae*, t. II, 5[e] éd, Marchal et Billard, Paris, 1897, pp. 623-624: « Le droit de superficie est un droit de propriété portant sur les constructions, arbres, ou plantes, adhérant à la surface d'un fonds (*édifices et superficies*), dont le dessous (*tréfonds*) appartient à un autre propriétaire. […] Le droit de superficie constitue une véritable propriété corporelle, immobilière ».

[15] *Cass. req., 7 mai 1838, S., 1838, 1, 719*; *Cass. civ., 18 mai 1858, D., 1858, 1, 218*; *Cass. req., 23 déc. 1861, D., 1862, 1, 129*; *Cass. civ., 16 déc. 1873*, *S., 1874, 1, 457*; *Cass. civ., 14 nov. 1888, D., 1889, 1, 469; Cass. req., 27 avr. 1891, D., 1892, 1, 219; Cass. req., 8 nov. 1911, D., 1912, 1, 484*; cfr A.-M. Patault, *La propriété non exclusive au XIX[e] siècle: histoire de la dissociation juridique de l'immeuble,* in « Revue historique de droit français et étranger », 1983, pp. 217 ss.

[16] V. déjà G. Baudry-Lacantinerie, M. Chauveau, *Traité théorique et pratique de droit civil,* VI: *des biens*, Sirey, Paris, 1905[3], p. 242; A. Colin, H. Capitant, *Cours élémentaire de droit civil français*, t. I, Dalloz, Paris, 1921[3], pp. 789-790; L. Josserand, *Cours de droit positif français*, t. I, Sirey, Paris, 1932[2], pp. 943-945, pp. 1008-1010; de nos jours, H. Mazeaud, L. Mazeaud, J. Mazeaud, F. Chabas, *Leçons de droit civil. Biens: droit de propriété et ses démembrements,* t. II, vol. II, Montchrestien, Paris, 1994[8], p. 5, pp. 122-123; W. Dross, *Droit des biens*, LGDJ, Issy-les-Moulineaux, 2014[2], p. 299; en discutant de baux réels, v. D. De Lataulade, A. Boquet, *L'avenir du bail à construction*, in « Gaz. Pal. », 1974, 1, *Jurisprudence*, p. 439; Richard, *De la propriété du sol en volume*, cit., pp. 731

partisans d'une théorie, dite « dualiste », qui, sur la base de la considération de l'abstraction excessive impliquée par la vision traditionnelle[17], reconnaît la superficie comme ayant une nature complexe: droit réel[18] sur le sol d'autrui, une sorte de participation à sa propriété consistant en la prérogative d'y bâtir ou d'y planter, intégré avec un conséquent véritable droit de propriété séparée sur les constructions ou plantations[19]. Encore, il y a quelqu'un qui, dans le but de récupérer la conception romaine de la superficie, plus proche peut-être de l'intention originaire des rédacteurs du Code – mais peu soucieux de la multiplicité d'usages qu'une institution désormais 'contaminée' de la dimension propriétaire a trouvé en satisfaisant par son élasticité beaucoup de besoins sociaux diversifiés – voudrait réduire ce droit à une prérogative réelle sur le fonds d'autrui[20], en tant que telle soumise à prescription extinctive.

En tout cas, ce qui a fait la fortune de la superficie française semble avoir été précisément sa configuration légère et flexible due au manque d'un régime législatif précis, ce qui a permis à cette institution de se développer assez librement pour répondre à des exigences variées de la pratique du droit des immeubles auxquelles le système des biens du Code civil n'aurait pas facilement pu faire face autrement. Tandis qu'au XIX

ss.; plus attentifs à la problématique de la nécessité d'un droit réel ou personnel comportant la mise à disposition du sol au superficiaire, qu'ils recherchent dans un titre externe au droit de superficie mais qui est la source de celui-ci, v. P. Lefèvre, *Les conventions de superficie en droit français*, thèse Paris II, 1976, *passim*, notamment pp. 29-30; C. Larroumet, *Droit civil,* t. II: *les biens, droits réels principaux*, Economica, Paris, 2006[5], pp. 435 ss.; G. Cornu, *Droit civil – les biens*, Paris, Montchrestien, 2007[13], p. 248; P. Malaurie, L. Aynes, *Les biens*, Lgdj-Lextenso, Paris, 2015[6], pp. 292-293.

[17] Cfr C. Goyet, *Le louage et la propriété à l'épreuve du crédit-bail et du bail superficiaire*, Lgdj, Paris, 1983, p. 151; G. Goubeaux, *Abstraction et réalisme dans la détermination de l'objet de la propriété immobilière*, in *Etudes dédiées à Alex Weill*, Dalloz, Paris, 1983, p. 293, note 43.

[18] Ou, pur quelques-uns, personnel: J. Cumenge, *Imbrication dans l'espace de propriétés privées et publiques*, in « Tunnels et ouvrages souterrains », 1974, p. 254.

[19] J.P. Bertrel, *L'accession artificielle immobilière: contribution à la définition de la nature juridique du droit de superficie*, in « RTD civ. », 1994, pp. 770-771; J. Carbonnier, *Droit civil,* t. III: *les biens*, Puf, Paris, 2000[19], pp. 339-340; v. déjà J.B.V. Proudhon, *Traité des droits d'usufruit, d'usage, d'habitation et de superficie*, t. VIII, Lagier, Dijon, 1825, p. 549; A. Weiss, *Des droits de superficie, en droit français et en droit romain*, thèse Strasbourg, 1853, pp. 40-41; cfr, dans la jurisprudence, *Cass. req., 5 nov. 1866, S., 1866, 1, 441*; *Cass. 3e civ., 16 mai 2001, no 98-70142.*

[20] Zenati-Castaing, *Propriété et droits réels: droit de superficie,* cit., pp. 656 ss.; *adde*, F. Dumont, *La nature juridique du droit de superficie*, thèse Lyon III, 2001.

siècle il s'agissait surtout de sauver dans le nouveau système de droit civil des situations préexistantes de dissociation atypique de l'immeuble dans l'espace, dans le temps ou dans ses utilités économiques, aujourd'hui les manifestations de la superficie les plus répandues et les plus fécondes consistent en les baux réels et en la propriété de volumes. Les juristes français conviennent qu'un bail ordinaire peut attribuer pendant la durée du rapport au preneur d'un fonds un droit de superficie sur les œuvres qu'il va y réaliser, au moins si cela résulte explicitement[21] ou implicitement[22] du contrat. En outre, le législateur a adopté avec le temps plusieurs figures spécifiques de baux réels, chacune attribuant au preneur un droit de superficie, différentiées selon l'exigence spécifique envisagée au cas par cas, dans le but de favoriser des typologies d'opérations immobilières, souvent en présence d'intérêts généraux. L'archétype de ces figures hybrides est le bail emphytéotique, c'est-à-dire la forme dans laquelle le législateur français a en 1902 cristallisé dans cet ordre juridique l'emphytéose, dans le sillage de la tradition d'Ancien Droit et de la pratique du droit, mais (comme déjà depuis la Révolution) en interdisant sa perpétuité. Comme l'art. L451-10 du Code rural le consacre, l'emphytéose française est en même temps attributive au preneur, profitant de l'accession pendant la durée du rapport, aussi d'un droit de superficie, ce qui a donné lieu à des montages immobiliers sophistiqués, cumulant la souplesse d'un droit personnel et la solidité de deux droits réels. Le succès du bail emphytéotique bien au-delà du monde rural − ce qui est précisément dû à son aptitude à attribuer, à travers aussi le droit de superficie qui s'y accompagne, la jouissance de l'utilité constructive d'un fonds, dans le cadre d'un rapport conventionnel de longue durée axé sur un projet d'amélioration d'un fonds − a poussé le législateur à la création de nouveaux et plus spécifiques baux réels (notamment bail à

[21] *Cass. req., 27 mai 1873, S., 1873, 2, 254; Cass. 3e civ., 6 nov. 1970, D., 1971, J., 395; Cass. 3e civ., 12 mars 2002, no 00-21123*; Zenati-Castaing, Revet, *Les biens*, cit., pp. 223-224; F. Terré, P. Simler, *Droit civil: les biens*, Dalloz, Paris, 2014[9], p. 842.

[22] *Cass. civ., 7 avr. 1862, S., 1862, 1, 450*; *Cass. civ., 26 juill. 1921, D., 1925, 1, 78*; *Cass. civ., 14 déc. 1923, D., 1925, 1, 111*; E. Larcher, *Traité théorique et pratique des constructions élevées sur le terrain d'autrui*, Rousseau, Paris, 1894, pp. 288-289; Aubry, Rau, *Cours de droit civil français d'après la méthode de Zachariae*, cit., p. 627; Baudry-Lacantinerie, Chauveau, *Traité théorique et pratique de droit civil,* cit., p. 31; Josserand, *Cours de droit positif français*, cit., p. 945; cfr M. Planiol, G. Ripert, M. Picard, *Traité pratique de droit civil français: les biens*, t. III, Lgdj, Paris, 1926, p. 317.

construction, bail à réhabilitation, bail réel immobilier, bail réel solidaire, bail emphytéotique administratif, ainsi que d'autres formes de concession administrative attributives d'un droit réel), dans lesquels le droit réel conféré est directement et simplement un droit de superficie, adapté d'une manière variée à l'opération envisagée[23], par exemple de réalisation de logements sociaux ou de projets d'édification sur des sols privés ou publiques à des fins d'intérêt privé ou général.

L'autre évolution contemporaine de la superficie en France est la propriété de volumes. On l'a décrite ainsi: « Dès lors que le droit de propriété immobilière n'est pas confondu, comme dans la vision classique, avec l'immeuble par nature qui en est l'objet, rien ne s'oppose à la reconnaissance, d'une part, d'une dissociation de la propriété de l'espace délimité par une parcelle de sol en plusieurs propriétés autonomes, d'autre part, de l'existence d'un véritable droit de propriété en l'absence même de bâtiments. La propriété foncière n'est autre chose, en définitive, que la maîtrise exclusive d'un espace, dont la définition par référence à une parcelle foncière n'est que le procédé habituel d'identification »[24]. Les propriétaires de volumes sont réciproquement indépendants malgré un réseau de servitudes et d'obligations *propter rem* les liant l'un l'autre. Théorisée dans un premier temps par Savatier comme une évolution de la conception de l'objet de la propriété immobilière, d'un plan à un espace[25], plutôt que comme une nouvelle forme du droit de superficie[26], la plupart des auteurs et des praticiens du droit − confron-

[23] Plusieurs auteurs français, adoptant l'interprétation moniste, qui ne voit dans la superficie rien d'autre que des droits de propriété juxtaposés dans l'espace, sont au contraire poussés par leur vision à « dédoubler », comme dans le bail emphytéotique, le droit réel conféré au preneur par ces autres contrats. Le bail attribuerait donc une sorte de droit réel innommé autorisant le preneur à bâtir et lui donnant le titre nécessaire pour acquérir, une fois réalisée l'œuvre, aussi la propriété superficiaire de celle-ci: LARROUMET, *Droit civil,* cit., p. 444; cfr MAZEAUD, MAZEAUD, MAZEAUD, CHABAS, *Leçons de droit civil. Biens: droit de propriété et ses démembrements*, cit., p. 5, pp. 414-415; v. aussi GOYET, *Le louage et la propriété à l'épreuve du crédit-bail et du bail superficiaire*, cit., p. 128. C'est pour cette raison que les baux réels semblent l'un des points faibles de la théorie moniste, qui, en la présence dès le début du rapport d'un droit réel sur le fonds tel que la loi l'attribue, est contrainte à une multiplication conceptuelle des droits réels peu conforme au rasoir d'Occam.

[24] TERRÉ, SIMLER, *Droit civil: les biens*, cit., p. 839.

[25] R. SAVATIER, *Vers de nouveaux aspects de la conception et de la classification juridique des biens corporels*, in « RTD civ. », 1958, pp. 1 ss.; R. SAVATIER, *Essai d'une présentation nouvelle des biens incorporels*, in « RTD civ. », 1958, pp. 331 ss.

[26] SAVATIER, *La propriété des volumes dans l'espace et la technique juridique des grands ensembles immobiliers*, in « D. »,

tés à la réalisation de grands ensembles immobiliers auxquels le régime légal de la copropriété des immeuble bâtis, avec ses parties communes, peu s'adapte, d'autant plus en la présence éventuelle d'espaces du domaine public[27] – ont plus traditionnellement conçu cette propriété de volumes d'espace dépourvue d'un droit sur le sol dans une certaine continuité avec la notion de superficie[28], à laquelle ils étaient plus familiarisés.

L'avant-projet de réforme du droit des biens[29], proposition doctrinale de mise à jour du deuxième livre du Code civil, face à cette multitude bigarrée de phénomènes juridiques réunis sous le cadre conceptuel de l'institution superficiaire, a hardiment proposé de les séparer selon leur titre constitutif: la propriété d'une partie du fonds située au-dessus ou au-dessous d'une limite conventionnellement fixée, ainsi que les volumes créés par une division spatiale moyennant l'établissement d'un état descriptif de division, parmi les règles concernant l'objet de la propriété immobilière, comme Savatier l'avait suggéré; les droits réels conférés par certains baux comme des démembrements du droit de propriété, attributifs au preneur d'un fonds de l'utilité de construire ou de planter sur celui-ci, en acquérant, pendant la durée du contrat, la propriété de ce qu'il a réalisé;

1976, Chronique, pp. 105-106; v. aussi Lefèvre, *Les conventions de superficie en droit français*, cit., p. 29; H. Périnet-Marquet, *L'immeuble et le Code civil*, in *1804-2004, le Code civil: un passé, un présent, un avenir*, Paris, Dalloz, 2004, p. 404: « même si référence à l'octroi d'une superficie est encore parfois faite dans les actes notariés, l'appréhension par la pratique du phénomène est, aujourd'hui, plus directe. Le volume, objet de la vente, n'est pas un cube d'air mais un espace géographique à trois dimensions bien définies. Il peut avoir pour assiette un ou plusieurs terrains, mais n'inclut pas ces terrains et n'intègre pas forcément d'immeubles, même s'il est destiné à en recevoir »; J.C. Chaput, S. Rochegude, *De la notion de droit de superficie à celle de volume immobilier*, in « Rép. Defrénois », 2007, I, p. 580.

[27] Etant donnée l'incompatibilité entre le régime d'affectation du domaine public et la copropriété, avec ses larges limitations aux pouvoirs du titulaire d'un appartement: v. *CE, 11 févr. 1994, n° 109564; CAA Douai, 1re Ch., 8 juill. 2003, n° 00DA00376*.

[28] E. Sommier, *La division de la propriété immobilière*, in « JCP N », 1976, I, *Formules*, n° 2788, parr. 1-8; P. De Besombes-Singla, *Droit de superficie et construction en volumes*, in *Pratique et évolution de la copropriété, 73e congrès des notaires de France*, Clermont-Ferrand, De Bussac, 1976, 596 ss.; P. Chambelland, Y. Rousseau, A. Haloche, *Copropriété et grands ensembles, la construction en volumes*, in « AJPI », 1981, pp. 691 ss.; P. Simler, *Ouvrages complexes et droit de propriété*, in « RDI », 1999, p. 494; G. Daublon, *Droit de superficie et état descriptif de division*, in « Rép. Defrénois », 2000, I, pp. 21 ss.; J.C. Chaput, *Volumes (construction en-)*, in P. Malinvaud, *Droit de la construction*, Dalloz, Paris, 2018[7], pp. 2072 ss.

[29] H. Périnet-Marquet (sous la direction de), *Propositions de l'association Henri Capitant pour une réforme du droit des biens,* Litec-LexisNexis, Paris, 2009.

enfin, un droit réel de jouissance spéciale, conférant, sous réserve des règles d'ordre public, le bénéfice d'une jouissance spéciale d'un ou de plusieurs biens, en absorbant la fonction traditionnelle de la superficie de soupape de décharge du système de droit des biens du Code en présence de nécessités atypiques de dissociation des utilités d'un immeuble[30]. L'adoption de la part du législateur français d'une telle approche envers le droit de superficie, après l'avoir laissé développer spontanément pendant longtemps, serait la source d'une certaine simplification du système, que les théories courantes, moniste, plus apte à expliquer la propriété d'un volume sans attribuer à son titulaire un droit portant sur le sol, et dualiste, mieux s'adaptant aux baux réels, ont du mal à reconstruire d'une manière cohérente.

4. Belgique et Italie: des expériences de transposition de la superficie en droit positif

En Belgique, où les événements historiques ont fait demeurer en vigueur le Code Napoléon, avec quelques modifications au fil du temps, le droit de superficie est l'une des institutions du droit des biens réglementées avec plus de différences avec la France. Dès la loi du 10 janvier 1824, des règles spécifiques s'ajoutent aux articles du Code civil en matière d'accession[31]. Considéré longtemps un sujet désuet, suite à sa reprise par la pratique du droit, la superficie est revenue à attirer l'attention des juristes et une réforme en a récemment précisé et modernisé la réglementation, par la loi du 25 avril 2014. L'article premier de la loi sur le droit de superficie le définit comme « le droit réel qui consiste à avoir des bâtiments, ouvrages ou plantations, en tout ou partie, sur, au-dessus ou en-dessous du fonds d'autrui ». Si la formulation littérale semble tendre à une notion de la superficie seulement comme un droit réel sur le fonds d'autrui[32], la

[30] C'est une idée qui a bientôt été reprise par la jurisprudence, qui demeure incertaine sur le point de la durée possible d'un tel droit réel de jouissance spéciale: *Cass. 3e civ., 31 oct. 2012, n. 11-16304*; *Cass. 3e civ., 28 janv. 2015, n. 14-10013*; *Cass. 3e civ., 8 sept. 2016, n. 14-26953.*

[31] Dont notamment l'art. 553 du C. c., de l'esprit de *probatio diabolica* duquel les juristes belges tendent à donner une interprétation plus souple que leurs collègues français, en admettant par toutes voies de droit des éléments de fait propres à renverser les deux présomptions: A. Gosselin, L. Herve, *De quelques questions d'actualité au sujet de la superficie, une institution bientôt bicentenaire aux reliefs et contours encore incertains*, in « Revue de la Faculté de droit de l'Université de Liège », nº 1, 2007, p. 18.

[32] Cfr F. Laurent, *Principes de droit civil français*, t. VIII, Bruylant, Bruxelles, Durand et Pedone Lauriel, Paris,

doctrine d'aujourd'hui interprète quand même « avoir » comme « avoir en propriété »[33], dans une lecture qui peut rappeler la théorie dualiste en France: « C'est un droit réel démembré, mais un peu particulier en ce qu'il se décline par rapport au fonds, qui reste le point de repère, mais se définit par sa conséquence essentielle, une propriété immobilière temporaire sur, au-dessus ou en-dessous de ce fonds »[34]. Malgré les ouvertures théoriques de la doctrine[35] à une approche tridimensionnelle en matière de propriété, en Belgique la jurisprudence fait obstacle à l'accueil d'opérations de division en volumes appropriables d'un espace abstrait telles que pratiquées en France[36], si bien que la seule manière de dépasser un tel barrage pourrait être l'intervention du législateur, comme l'a récemment souhaité le Gouvernement dans son projet de loi réécrivant les règles de droit civil en matière de biens[37]. La différence avec le modèle français, qui découle de la présence en Belgique d'un régime légal de la superficie, est profonde, à partir de l'existence d'une limite (de 50 ans) à la durée du droit. Mais l'élaboration des juristes belges a rapproché le chemin de la superficie entre les deux ordres juridiques, en distinguant les situations dans lesquelles le droit conféré consiste en un droit de superficie à titre principal − soumis au régime légal sauf convention contraire − des situations dans lesquelles il s'agit, au contraire, d'un droit de « superficie-conséquence », constitué d'une façon explicite ou implicite à titre accessoire, au service d'un autre droit constitué à titre principal: emphytéose (elle aussi régie par une loi de 1824), usufruit, servitude, bail ou

1878[3], pp. 494-496.

[33] Gosselin, Herve, *De quelques questions d'actualité au sujet de la superficie, une institution bientôt bicentenaire aux reliefs et contours encore incertains*, cit., pp. 9-10.

[34] P. Lecocq, S. Boufflette, A. Salvé, R. Popa, *Manuel de droit des biens*, t. II: *droits réels principaux démembrés*, Larcier, Bruxelles, 2016, p. 365.

[35] Lecocq, Boufflette, Salvé, Popa, *Manuel de droit des biens*, cit., pp. 364-365; N. Verheyden-Jeanmart, P.P. Renson, *La propriété et les enjeux urbanistiques du troisième millénaire. La propriété des volumes*, in A. Wijffels, *Le Code civil entre* ius commune *et droit privé européen*, Bruylant, Bruxelles, 2005, pp. 333 ss.

[36] Encore sur la base du texte législatif d'avant la réforme de 2014, v. *Cour de Cassation, 13 septembre 2013, n° C.12.0422.F*.

[37] Chambre des représentants de Belgique, *Projet de loi du 31 octobre 2018 portant insertion du Livre 3 « Les biens » dans le nouveau Code civil*, dont v. notamment les artt. 3.61, 3.192 ss. Avant la publication de cet article, le projet a enfin été approuvé (loi promulguée par le Roi le 04/02/2020, publiée sur le Moniteur belge du 17/03/2020, page 15753) et entrera en vigueur le 01/09/2021.

éventuellement concession domaniale. Dans ces cas, sauf si la non-renonciation à l'accession immédiate du propriétaire du fonds émerge du titre, le droit principal, apte à justifier l'occupation du fonds, comporte aussi, pour son bénéficiaire, une propriété provisoire des constructions[38]. Le régime du droit conféré − notamment les modalités de constitution, l'ampleur, la durée, les limites et les règles sur l'opposabilité à l'égard des tiers − n'est donc pas dans ces cas celui de la loi sur le droit de superficie, mais il dépend du régime du droit principal[39]. Par cette théorie, que le projet de loi soumis au législateur – enfin approuvé, en vigueur depuis septembre 2021 – veut transposer en droit positif[40], la superficie belge combine les avantages de la certitude d'un régime général précis de l'institution avec les avantages de souplesse des situations plus fluides où la superficie est la conséquence d'un autre droit. Une autre spécificité remarquable de la réglementation belge est la possibilité de constituer un droit de superficie de la part de tout titulaire d'un droit réel immobilier, même si autre que la propriété, naturellement dans les limites de son droit.

En Italie, le *Codice civile* de 1865 avait explicitement réglementé le droit d'emphytéose, mais, assez fidèle au modèle français, non pas celui de superficie[41]; au contraire, le nouveau texte de 1942 a codifié aussi la superficie. En reprenant l'une des orientations du débat précédant[42] − qui déjà affirmait dans le silence du texte, comme

[38] V. déjà P. Lévie, *Traité théorique et pratique des constructions érigées sur le terrain d'autrui*, Publication universitaires de Louvain, Louvain, 1951, pp. 373-374; cfr Gosselin, Herve, *De quelques questions d'actualité au sujet de la superficie, une institution bientôt bicentenaire aux reliefs et contours encore incertains*, cit., pp. 18-19.

[39] Lecocq, Boufflette, Salvé, Popa, *Manuel de droit des biens*, cit., pp. 361-364; cfr *Cass. 1re, 12 juin 2014, Pas., nº 422, 1483*; *App. Liège, 28 janvier 2015, nº F-20150128-10*; *App. Liège, 7e ch., 11 janvier 2017, Revue de jurisprudence de Liège, Mons et Bruxelles, 2017, nº 20, p. 933*.

[40] V. notamment les artt. 3.195 et 3.197 du projet.

[41] La doctrine italienne avant 1942 se partageait, avec des similarités avec le débat français actuel, entre partisans d'une juxtaposition dans l'espace de propriétés autonomes, partisans d'une sorte de servitude sur le fonds d'autrui s'ajoutant à la propriété du dessus, partisans d'une copropriété *pro indiviso*, partisans d'un droit exclusivement personnel et partisans d'une nature complexe du droit de superficie, en tant que droit réel autonome attribuant la prérogative d'édifier ou de planter avec la conséquence de l'acquisition de la propriété séparée de ce que l'on a réalisé, en essayant comme en France de déduire l'existence de ce droit des interstices des règles en matière d'accession ou, plus radicalement, en rejetant le principe du *numerus clausus* des droits réels.

[42] V. notamment A. Lucci, *Del diritto di superficie, della proprietà del sottosuolo* (« Il diritto civile italiano secondo la dottrina e la giurisprudenza »), Marghieri, Naples, Utet, Turin, 1927.

la doctrine dualiste en France, la nature complexe du droit de superficie, en tant que droit réel autonome attribuant la prérogative d'édifier avec la conséquence de l'acquisition de la propriété séparée de ce que l'on a réalisé − l'art. 952 du nouveau Code explicite que le propriétaire peut constituer le droit de faire et de maintenir au dessus du sol une construction (mais non pas une plantation, dont le législateur a voulu prohiber la propriété superficiaire, en la jugeant périlleuse pour l'exploitation agricole efficiente du fonds[43]) à bénéfice d'un autre, qui en acquiert la propriété. Il peut également aliéner la propriété de la construction déjà existante, séparément de la propriété du sol. Les mêmes règles concernent les constructions dans le sous-sol. La superficie peut être constituée pour un temps déterminé ou indéterminé, en permettant une aliénation permanente des constructions en dessus ou en dessous, mais le droit de bâtir sur le sol d'autrui se prescrit en cas de non-usage pendant 20 ans. La réglementation de la superficie dans le *Codice civile* est assez courte et synthétique, en laissant libres les parties (en cas d'attribution conventionnelle du droit) de déterminer le régime détaillé et la doctrine d'énucléer la configuration de l'institution et du rapport entre sol et construction[44]. Les auteurs d'après la codification se sont partagés entre une vision bipartie et une vision tripartie de la superficie, découlant d'une interprétation différente de l'expression de la loi « droit de faire et maintenir une construction » et du rapport entre « faire » et « maintenir ». Une théorie lit alors dans l'art. 952 du Code civil l'existence de trois figures: droit de superficie sur le sol d'autrui, propriété superficiaire, se formant suite à (et comme effet de) l'édification de la part du bénéficiaire du droit de superficie, et simple propriété séparée due à l'aliénation d'une construction déjà existante séparément de la propriété du terrain, matériellement imbriquée avec celle-ci mais indépendante de tout droit réel de superficie sur le sol, avec la conséquence que son propriétaire, dépourvu de toute prérogative sur le sol, ne pourrait pas reconstruire en cas de ruine ou de démolition de son bien[45]. L'autre théorie, au contraire, ne voit que deux situations juridiques

[43] *Codice civile: testo e relazione ministeriale*, Istituto poligrafico dello Stato, Rome, 1943, n° 446, p. 94.

[44] G. Pandolfelli *et al.*, *Codice civile: libro della proprietà illustrato con i lavori preparatori e con note di commento*, Giuffrè, Milan, 1941, pp. 147-148.

[45] L. Salis, *La superficie*, Utet, Turin, 1949, *passim*; L. Salis, *Superficie (diritto vigente)*, in *Noviss. Dig. it.*, XVIII, Utet, Turin, 1971, pp. 945 ss.; F. Messineo, *Manuale di diritto civile e commerciale*, vol. II, Giuffrè, Milan, 1965[9], pp. 534-535; A. Riccio, *Il diritto di superficie, la proprietà superficiaria e la proprietà separata*, in « Contratto e impresa

réglementées à l'art. 952, droit de superficie et propriété superficiaire, les deux dans le cadre unitaire formé par l'idée d'un droit de construire sur le sol d'autrui et d'y maintenir la construction réalisée ou déjà existante, en requérant toujours un droit de superficie sur le sol pour justifier le droit de maintenir une construction sur le terrain d'autrui, avec la conséquence que, sauf exclusion dans le titre, le bénéficiaire du droit pourrait toujours reconstruire en cas de ruine ou de démolition[46]. Certains essais du législateur italien d'investir sur les potentialités de la superficie, par exemple en matière de parkings (art. 9 de la loi n° 122 du 24 mars 1989), d'installations productives (art. 27 de la loi n° 865 du 22 octobre 1971) et de logements sociaux (art. 35 de la loi n° 865 du 22 octobre 1971), ont été fréquemment démentis par ses orientations plus récentes – souvent dictées par des préoccupations budgétaires – tendant à consentir et à encourager la possibilité pour le superficiaire à temps de devenir un propriétaire 'ordinaire' en acquérant du sujet public concerné la pleine propriété aussi du sol.

», 1998, pp. 428-432; F. Galgano, *Diritto civile e commerciale*, vol. I: *le categorie generali, le persone, la proprietà*, Cedam, Padoue, 2004[4], p. 544; R. Peratoner, *Della superficie*, in P. Cendon, *Commentario al codice civile. Artt. 952-1099: superficie - enfiteusi - usufrutto - uso e abitazione - servitù prediali*, Giuffrè, Milan, 2008, pp. 11-17; v. aussi G. Palermo, *La superficie*, in P. Rescigno, *Trattato di diritto privato*, vol. VIII: *proprietà*, t. II, Utet, Turin, 2002, p. 20; *Cass. civ., sez. II, 13 febbraio 1993, n° 1844, Giurisprudenza italiana, 1994, I, I, 1852; Cass. civ., sez. II, 4 febbraio 2004, n° 2100; Cass. civ., sez. II, 22 novembre 2004, n° 22032; Cass. civ., ss. uu., 30 luglio 2007, n° 16794.*

[46] V.G. Pugliese, *Della superficie*, in F. De Martino *et al.*, *Libro terzo, della proprietà: art. 810-956* (« Comm. Scialoja-Branca »), Zanichelli, Bologne, Foro italiano, Rome, 1957[2], pp. 463-464; G. Pescatore, R. Albano, *Della proprietà* (« Commentario del Codice civile »), t. I, Utet, Turin, 1968, p. 624, note 9; G. Pasetti Bombardella, *Superficie (diritto privato)*, in *Enc. dir.*, XLIII, Giuffrè, Milan, 1990, pp. 1472-1473; M. Bessone, M. Di Paolo, *Superficie (dir. civ.)*, in *Enc. giur.*, XXX, Treccani, Rome, 1993, pp. 1-2; P. Gallo, *La superficie*, in P. Gallo, A Natucci, *Beni, proprietà e diritti reali* (« Trattato di diritto privato, t. II, Giappichelli, Turin, 2001, pp. 6-8; C. Trinchillo, *Breve analisi dei rapporti tra diritto di superficie ed edificio in condominio. Il diritto di sopraelevazione previsto dall'art. 1127 c.c.*, in « Rivista del notariato », 2002, I, pp. 1134-1135; Barca, Marvasi, *La superficie*, cit., pp. 288 ss.; M. Magri, E. Schilanick, *Diritto di superficie*, (« Diritto italiano »), Cedam, Padoue, 2006, *passim*; G. Gabrielli, *Diritto di superficie e pubblicità nei registri immobiliari e nei libri fondiari*, in « Vita notarile », 2008, pp. 83-85; R. Caterina, *Usufrutto, uso, abitazione, superficie*, (« Trattato di diritto civile »), Turin, Utet, 2009, pp. 197-201; v. aussi G. Balbi, *Il diritto di superficie*, Giappichelli, Turin, 1947; *Cass. civ., sez. II, 5 maggio 1958, n° 1467, Repertorio giustizia civile, 1958, 3257, Superficie, 3*; *Cass. civ., sez. II, 3 dicembre 1964, n° 2851, RFI, 1965, Trascrizione, 3083, 17; Cass. civ., sez. II, 24 febbraio 2006, n° 4258*.

5. Des équilibres variables entre droit de superficie et dissociation juridique de l'immeuble

Entre les modèles ici envisagés, des différences importantes se manifestent. Une comparaison détaillée du régime de la superficie est compliquée par la parcellisation diversifiée de ses manifestations en France, de sorte qu'il semble plus intéressant d'en sélectionner les aspects mieux témoignant la physionomie de l'institution dans chaque ordre juridique. En termes d'adaptabilité, on pourrait positionner la superficie belge, avec son élément de souplesse de la superficie-conséquence, entre celle française, la plus liquide, actuellement dépourvue d'un régime législatif, et celle italienne, la plus rigide, offrant peut-être aux parties à un contrat une meilleure sécurité juridique, mais dans le cadre de bornes beaucoup plus restreints à leurs possibilités de régler conventionnellement les intérêts impliqués. Un regard aux sources du droit de superficie dans les trois modèles peut mieux en montrer les structures. Des différences importantes apparaissent déjà par rapport aux sources conventionnelles. Au-delà des contrats de cession de superficie à titre principal (vente, donation, division, échange, etc.) admis dans tous les systèmes envisagés – mais non pas, en Italie[47] et en Belgique, en la variante postmoderne de la cession de la pleine propriété d'un volume abstrait d'espace encore vide – des différences importantes se manifestent pour ce que les juristes belges, dans un modèle juridique où toute dérogation à la règle de l'accession immobilière est identifiée avec un droit de superficie[48], ont réussi à réabsorber dans leur système sous la forme de superficie-conséquence. En reconduisant même l'emphytéose à une forme de bail de longue durée, le juriste français contemple la plupart des situations de superficie-conséquence en droit privé comme des droits de superficie attribués au preneur d'un bail, de droit commun ou de droit spécial (c'est-à-dire des baux anomaux qui confèrent institution-

[47] *Cass. civ., sez. II, 8 luglio 1960, nº 1831, MFI, 1960, 400*; Cass. *civ., sez. II, 22 gennaio 1964, nº 155, MFI, 1964, 40*; *Cass. civ., 16 luglio 1969, nº 2622, MFI, 1969, 772*; *Cass. civ., sez. II, 19 dicembre 1975, nº 4192, MFI, 1975, 1001; Cass. civ., sez. II, 30 dicembre 1977, nº 5754, MFI, 1977, 1078*; *Cass. civ., sez. II, 20 giugno 1983, nº 4220, MFI, 1983, 878*; *Cass. civ., ss.uu., 4 maggio 1989, nº 2084*; *Cass. civ., sez. II, 7 dicembre 1994, nº 10498; Cass. civ., sez. II, 14 aprile 2004, nº 7051*; *Cass. civ., sez. II, 22 novembre 2004, nº 22032*; *Cass. civ., sez. II, 16 giugno 2005, nº 12880*; *Cass. civ., ss. uu., 30 luglio 2007, nº 16794. Contra*: *Cass. civ., sez. II, 11 luglio 1958, nº 2511, MFI, 1958, 506*; *Cass. civ., sez. III, 18 febbraio 1975, nº 636, MFI, 1975, 149.*

[48] *Cour de Cassation, 19 mai 1988, Pas., 1988, 1, p. 1142.*

nellement une situation juridique de nature réelle), et, habitué à considérer la superficie comme une figure exceptionnelle, atypique et résiduelle dans le système des droits réels, admet facilement l'aptitude d'un bail à en être la source, comme déjà c'était le cas à l'aube des développements de cette institution en droit romain. Au contraire, bail et superficie ne parviennent pas à s'hybrider dans le modèle italien depuis 1942, leur rapport étant en général considéré d'alternative et non pas de collaboration[49].

Même hors du domaine conventionnel, des juristes français admettent des sources variées de la superficie: il semble qu'ils essayent de trouver ainsi une place à quelques situations atypiques difficiles à intégrer dans le système des droits réels mais dont la suppression mécontenterait la pratique du droit. *Nulla quaestio* pour l'usucapion[50], la loi, l'acte administratif et le testament, qui n'étonneraient point le juriste italien et son système du droit des biens en tant que sources du droit de superficie. Plus étranges lui sembleraient néanmoins, par exemple, comme des sources d'un droit de superficie, la renonciation unilatérale à l'accession de la part du propriétaire du sol, à bénéfice d'un tiers mais hors de toute convention avec celui-ci[51], ou les usages[52]. En général, l'enlèvement à la superficie italienne, par sa codification en 1942 et sa cristallisation en tant que figure précise du système des droits réels, de sa fonction résiduelle de permettre des configurations variées de dissociation juridique de l'immeuble n'a pas

[49] Balbi, *Il diritto di superficie*, cit., pp. 143-144; Pugliese, *Della superficie*, cit., p. 476; M. Paradiso, *L'accessione al suolo, artt. 934-938* (« Il codice civile commentato »), Giuffrè, Milan, 1994, pp. 93-94.

[50] Les juristes italiens se partagent à ce propos surtout sur la possibilité de prescription acquisitive du droit réel de bâtir sur le terrain d'autrui avant la construction, sans usucapion de la propriété du sol. En France, il semble possible de prescrire un droit de superficie à titre principal, mais non pas un droit de superficie découlant de la situation de preneur d'un bail réel, requérant nécessairement un rapport contractuel.

[51] Larcher, *Traité théorique et pratique des constructions élevées sur le terrain d'autrui*, cit., p. 287; B. Grimonprez, *Superficie*, in *Encyclopédie Dalloz*, *Rép. dr. civ.*, Dalloz, 2013, p. 12; *Cass. 3e civ.*, *7 nov. 1978, Bull. civ. III, nº 335*, par ailleurs contredisant l'orientation générale assez stricte du juge français en matière de preuve du droit de superficie; c*ontra*, Larroumet, *Droit civil,* cit., p. 442, note 1. En droit belge, ouvrant à l'hypothèse que des circonstances de fait puissent démontrer la renonciation du propriétaire du sol à son droit d'accession, v. *Cass. 26 déc. 2014, nº C.14.0121.N*. En Italie, des actes unilatéraux attributifs d'un droit réel semblent envisageables seulement en tant que promesses au public (art. 1989 du *Codice civile*) et donations en vue d'un mariage (art. 785): cfr *Cass. civ., sez. II, 30 gennaio 2007, nº 1967*.

[52] G. Marty, P. Raynaud, P. Jourdain, *Les biens*, Dalloz, Paris, 1995, p. 237; B. Grimonprez, *Superficie*, cit., p. 13.

probablement été perçue en ces termes par les juristes italiens, mais certains de leurs efforts semblent implicitement ciblés précisément à la récupération de ce rôle perdu. Seulement quelques auteurs, plus hardis, évoquent une véritable propriété superficiaire de l'emphytéote, de l'usufructuaire ou du preneur à bail sur les constructions réalisées par celui-ci[53]. D'autres se servent de la formulation plus large de l'art. 934 du *Codice civile* (admettant que tout titre contraire peut écarter la règle de l'accession) par rapport à la définition plus stricte du droit de superficie de l'art. 952, pour admettre l'existence, au moins marginale dans le système, de titres aptes à déroger à l'accession ultérieurs et différents du droit de superficie, qui ainsi échappent à ses limites, en présence d'un bail, d'un usufruit, d'une emphytéose, d'une servitude, d'une concession administrative, etc.[54]. Encore, ladite théorie tripartie de la superficie essaye de récupérer des situations atypiques de dissociation de l'immeuble dans la catégorie de la propriété séparée dépourvue d'un droit de superficie sur le sol, notamment en la présence sur le sol d'un autre droit réel ou d'un bail du propriétaire séparé. Toutefois, la majorité de la doctrine n'a pas rejoint cette théorie, à laquelle on peut reprocher une certaine artificialité − peu adhérente à la formule adoptée par le législateur et multipliant ses figures d'une manière douteuse − ainsi que son manque d'efficience, impliquant des augmentations possibles des coûts de transaction par rapport à la théorie bipartie[55]. En outre, au cas où la propriété séparée est attribuée à titre principal, à ces critiques à la théorie tripartie s'ajoute celle de la précarité et de l'incertitude dommageable de la situation du propriétaire séparé, qui ne peut pas reconstruire suite à la ruine ou à la démolition du bâtiment et

[53] A. Carrozza, *I miglioramenti delle cose nella teoria generale e nei rapporti agrari*, vol. I, Giuffrè, Milan, 1965, pp. 304-309; v. aussi Barca, Marvasi, *La superficie*, cit., pp. 266 ss.

[54] Cfr Balbi, *Il diritto di superficie*, cit., pp. 70 ss.; Messineo, *Manuale di diritto civile e commerciale*, cit., pp. 560-561, p. 532; A. Guarneri, *Superficie e nuovi diritti connessi* (« Trattato dei diritti reali »), vol. II, *Diritti reali parziari*, Giuffrè, Milan, 2011, pp. 5 ss.; C. Tenella Sillani, *Il diritto di superficie e la proprietà superficiaria*, in « I quaderni della fondazione del notariato », 2015, p. 61; *Cass. civ., sez. II, 26 marzo 1969, n° 974, MFI, 1969, 287*; *Cass. civ., sez. I, 25 novembre 1970, n° 2516, MFI, 1970, 763*; *Cass. civ., sez. II, 10 luglio 1985, n° 4111, MFI, 1985,* 764; *Cass. civ., sez. II, 21 febbraio 2005, n° 3440*; *Cass. civ., ss. uu., 16 febbraio 2018, n° 3873. Contra,* en identifiant avec l'attribution d'un droit de superficie toute dérogation à la règle de l'accession immobilière, Lucci, *Del diritto di superficie, della proprietà del sottosuolo*, cit., p. 103; Pugliese, *Della superficie*, cit., p. 455; Paradiso, *L'accessione al suolo, artt. 934-938*, cit., pp. 88 ss.; Barca, Marvasi, *La superficie*, cit., pp. 292-293, p. 404.

[55] U. Mattei, *La proprietà* (« Tratt. dir. civ.: i diritti reali »), II, Utet, Turin, 2015, pp. 296-297.

dont la durée de la situation juridique peut par conséquent être faite dépendre du fait de la ruine. En effet, malgré l'adhésion des dernières années de la jurisprudence à ce point de vue, à la différence de la superficie-conséquence belge cette théorie n'a pas été capable, au moins jusqu'à aujourd'hui, de fournir aux acteurs de la vie économique un cadre théorique reconnu, simple et solide, capable de garantir une circulation juridique paisible de cette propriété séparée.

En définitive, les variations du régime du droit de superficie entre France, Belgique et Italie différencient le rapport entre droit de superficie et dissociation juridique de l'immeuble. En France le droit de superficie, souvent utilisé dans des opérations ayant un intérêt général de valorisation de la propriété publique ou de réalisation de politiques sociales d'accès au logement, recouvre plus largement le spectre des demandes sociales de dissocier les titres d'appartenance sur une construction, tandis qu'en Italie, avec la superficie canalisée dans les bornes propres à la réglementation explicite du Code civil, une plus large partie de ce spectre est couverte autrement ou pourrait n'être pas adéquatement couverte, en contribuant peut-être à l'échec actuel des politiques du logement[56]. Le modèle belge, par sa théorie de la superficie-conséquence, se trouve au milieu.

6. Conclusion

La dissociation juridique de l'immeuble, ainsi que le droit de superficie qui en est la manifestation la plus courante, ont recouvert un rôle ambigu, un peu dans l'ombre, dans les systèmes juridiques modernes, idéologiquement orientés vers l'idée de l'absolutisme de la propriété et essayant de supprimer toute réminiscence des propriétés collectives germaniques. Ayant survécu – à cause de son enracinement profond dans la pratique du droit pour répondre à des nécessités concrètes de vie des personnes – à la vague du libéralisme, la superficie a repris à jouer un rôle moins résiduel et plus explicite en présence de phénomènes comme l'urbanisation massive et l'interventionnisme social de l'Etat. L'ambigüité découlant du rôle tournant et fluide de cette institution juridique n'a pas totalement disparu et demeure dans les amples débats sur son encadrement et

[56] Cfr. A. Vercellone, *Proprietà immobiliare urbana e accesso all'abitazione nella prospettiva dei beni comuni*, in *Studi in onore di Antonio Gambaro*, t. I, Giuffré, Milan, 2017, pp. 917 ss.

sur sa nature dans les systèmes de droit des biens, à la frontière entre l'idée plus abstraite d'un démembrement de la propriété et l'idée plus matérielle d'une division de la chose immobilière en des parties isolables distinctes en hauteur (comme déjà cela se passe sans problèmes en largeur), devenant de nouveaux immeubles[57]. En France l'adoption de l'une ou de l'autre perspective, dans un cadre juridique très flexible, est souvent choisie en fonction du montage juridique concrètement envisagé (bail attributif d'un droit réel, division de la propriété en volumes, etc.), tandis qu'en Italie et en Belgique l'intervention du législateur semble avoir figé le point d'équilibre entre ces deux lectures possibles, en accentuant l'aspect de droit réel sur le sol d'autrui.

On a déjà maintes fois évoqué dans cet essai la descendance, en général, de la figure du droit de superficie d'une approche juridique plus générale tournée dynamiquement à l'exaltation du travail humain et de la production en matière de situations d'appartenance, qui s'oppose depuis des millénaires d'expérience juridique au principe statique de l'accession, qui veut la propriété de l'œuvre ou de la plantation acquise par un rapport de subordination abstraite au sol, bien immobilier par excellence. Une doctrine italienne prestigieuse a pendant le XX siècle attiré l'attention sur un « principe juridique du travail »[58], caractérisant la conception germanique de la propriété − calquée sur l'effectivité productive des situations possessoires − et souvent dans l'histoire du droit renaissant de ses cendres après toute défaite face à l'idée d'une propriété unitaire, absolue, exclusive, perpétuelle. Dans des ordres juridiques qui accueillent en tant que corollaire de cette dernière idée de propriété le principe de l'accession, le principe juridique de la propriété acquise par le travail ne peut subsister que sous la forme discrète de dérogation et d'exception à la règle triomphante de l'accession: tel est le droit de superficie, qui, même si lui aussi était né dans le modèle juridique romain, a servi de forme juridique pour permettre une récupération d'éléments du modèle germanique de valorisation du travail en tant que moyen d'acquisition de la propriété, lorsque celui-ci était conforme au sentiment social et aux nécessités concrètes des acteurs économico-juri-

[57] MARTY, *La dissociation juridique de l'immeuble: contribution à l'étude du droit de superficie*, thèse Toulouse, 1976, pp. 3 ss.; cfr DROSS, *Droit des biens*, cit., p. 299.

[58] V. SIMONCELLI, *Il principio del lavoro come elemento di sviluppo di alcuni istituti giuridici*, in V. SIMONCELLI, *Scritti giuridici*, t. I, Foro italiano, Rome, 1938, pp. 314 ss.; BARCA, MARVASI, *La superficie*, cit., pp. 106-107.

diques, en trouvant son propre chemin même en opposition aux normes abstraites telles que codifiées[59]. Il est précisément dans une telle perspective que l'on peut regarder aux développements contemporains du droit de superficie, dans une phase d'éclatement des règles d'appartenance cristallisées par les codifications bourgeoises, alors que même le sommeil de la réglementation des immeubles est désormais plutôt un préjugé d'inamovibilité qu'une réalité effective, cette branche du droit aussi se trouvant à devoir régir, selon des critères de justice, d'efficacité et de certitude, des réalités socio-économiques qui sont en train de changer d'une manière rapide et radicale. Le droit de superficie a deux atouts à jouer, qui peuvent en faire une institution précieuse pour tout essai de renouvellement du droit des biens: sa fonction technique de permettre par une dissociation juridique de l'immeuble des montages immobiliers complexes tels qu'ils sont de plus en plus nécessaires dans des villes et des métropoles très développées dans la troisième dimension, de sorte que la vision de l'espace en tant qu'accessoire du sol apparaît désormais archaïque; sa fonction économico-sociale d'instrument potentiel de solidarisation du droit, découlant de son histoire troublée, qui en fait notamment un outil bien adaptable à plusieurs opérations possibles dans le cadre de politiques sociales en matière de logement. La multiplication d'utilisations en France − par le législateur ou par la pratique supportée par la jurisprudence − du droit de superficie pendant les dernières décennies, jusqu'à pousser une partie de la doctrine à proposer d'en séparer conceptuellement les différentes manifestations dans un effort enfin de transposition de cette institution en droit positif, et la redécouverte des potentialités de la superficie en Belgique − par la pratique et par la doctrine et prochainement peut-être aussi par le législateur pour contourner certaines résistances de la jurisprudence − appellent aussi les juristes italiens à réfléchir, *de iure condito* et *de iure condendo*, sur l'opportunité d'une plus profonde valorisation de cette institution. D'autant plus étant donné que la Constitution italienne valorise spécialement les idées d'un principe juridique de la prééminence du travail et d'une fonction sociale de la propriété dans une perspective de solidarité sociale, tandis que le *Codice civile*, réalisé avant la Constitution, n'a encore complètement

[59] Cfr E. Bassanelli, *Il lavoro come fonte della proprietà della terra*, in *Atti del primo convegno internazionale di diritto agrario*, II, Giuffrè, Milan, 1954, pp. 605-606.

absorbé les valeurs suprêmes que ce texte pose au sommet de l'ordre juridique; mise en valeur d'une manière adéquate, la superficie pourrait précisément contribuer à un effort de constitutionnalisation du droit des biens italien tel que plusieurs auteurs le souhaitent[60], ainsi qu'à une relance des politiques publiques du logement.

[60] V., parmi les contributions de la doctrine, S. RODOTÀ, *Note critiche in tema di proprietà*, in « Rivista trimestrale di diritto e procedura civile », 1960, pp. 1252 ss.; S. PUGLIATTI, *La proprietà e le proprietà (con riguardo particolare alla proprietà terriera*, in *La proprietà nel nuovo diritto*, Giuffrè, Milan, 1964, pp. 274 ss.; C. SALVI, *Il contenuto del diritto di proprietà* («Il codice civile commentato»), Giuffrè, Milan, 1994; MARELLA, *La funzione sociale oltre la proprietà*, in «Riv. crit. dir. priv.», 2013, pp. 551 ss.

GIACOMO ROJAS ELGUETA[*]
BENEDETTA MAURO[**]

COVID-19 AS A SUPERVENING EVENT IN LEASES OF NON-RESIDENTIAL PROPERTY[***]

ABSTRACT. *The outbreak of the Covid-19 pandemic has brought about a systemic interference with contractual performance, offering a unique opportunity for an empirical observation of the dynamics of contractual relationships. The first data are emerging in the context of leases of non-residential property. Following the business interruptions imposed by the pandemic and by its containment measures, tenants all over the world have suspended payment of rents, raising the legal question whether rent is payable even for time periods when the tenant was unable to operate its business from the leased premises due to circumstances out of its control. The objective of the present article is to describe the answers that have emerged from the courts of various jurisdictions.*

[*] Associate Professor of Private Law, Roma Tre University, School of Law.

[**] *J.D. equivalent* summa cum laude, Diploma di Laurea in Giurisprudenza, LUISS Guido Carli (2019). Tutor of the Certificate in International Commercial and Investment Arbitration, Roma Tre University – AIA.

[***] Giacomo Rojas Elgueta authored paragraph 2, while Benedetta Mauro authored paragraphs 3 and 4. Paragraphs 1 and 5 were co-authored.

1. Introduction

The outbreak of the Covid-19 pandemic has brought about a systemic interference with contractual performance.

Unlike any historical precedent, the pandemic has affected – at the same moment in time and on a global scale – the various contracts that nurture both national economies and international commerce. Such simultaneous and global impact on contractual performance, in turn, offers a unique opportunity for an empirical observation of the dynamics of contractual relationships.

The first contracts from which these empirical data are emerging are lease agreements of non-residential property.

Following the business interruptions imposed by the pandemic and by its containment measures, tenants all over the world have suspended payment of rents. The question that has thus been raised is whether rent is payable under the lease even for time periods when the tenant was unable to operate its business from the leased premises due to circumstances out of its control.

The objective of this article is to describe and summarize the answers to this legal question that have emerged from various jurisdictions, belonging to both the civil law and the common law traditions.

2. Italy

In the past year, several Italian courts have been dealing with the legal question whether the landlord – in a commercial lease – was entitled to the full amount of the rent accrued during the period of time when the tenant's business was shut down (or was otherwise affected) by virtue of the measures imposed by the Italian Government in response to the Covid-19 pandemic.

This legal question has been raised mostly in the course of interim proceedings, either where the court was requested by the tenant to enjoin the landlord from enforcing the bank guarantees provided by the tenant, or in the context of summary eviction actions brought by the landlord against the tenant. However, more recently, merits judgments have started to be handed down by some Italian courts.

2.1. Partial temporary impossibility of the landlord's performance

A first line of judgments has relied on the general principles of Italian contract law to order a reduction in the rent due for the time period when the governmental restrictive measures were in force.

A good example of this approach is an opinion recently delivered by the Milan Tribunal on 18 May 2021.[1] The landlord had requested the court to declare the contract terminated as a consequence of the tenant's failure to timely pay the rent due for the second trimester of 2020. The court rejected the landlord's request, stating that the tenant's failure to pay the rent did not amount to a serious breach of contract.

While the Milan court reached this conclusion mainly relying on a factual circumstance specific to the instant case, it also stated that, in any case, the rent for the time period when the lockdown was in force would not be due in full amount.

Notably, the court took the view that the governmental measures had not impacted the performance of the tenant's obligation to pay rent, but rather that of the landlord's obligation to maintain the leased property in such condition as to serve the purpose agreed by the parties (pursuant to the regulation of lease agreements in the Italian Civil Code).[2]

With regard to such landlord's obligation, the court found that the instant case was one of both *temporary* (given that governmental restrictions were limited in time) and *partial* (because the landlord's performance was not impossible as to its obligation to leave the property in the tenant's availability) impossibility.

Under the Italian Civil Code, the remedy for partial impossibility is a proportionate reduction of the contractual price.[3] The remedy for temporary impossibility is, instead, a suspension of performance and, correspondingly, an excuse

[1] Trib. Milano, sez. XIII civ., sent., 18 maggio 2021. A similar reasoning is found, among others, in Trib. Venezia, sez. I civ., sent., 30 settembre 2020; Trib. Venezia, sez. I civ., sent., 28 luglio 2020; Trib. Roma, sez. V civ., ord., 29 maggio 2020.

[2] See Article 1575 of the Italian Civil Code: "The landlord shall: (1) hand over the leased property in good conditions; (2) keep it in such condition as to serve the agreed purpose; (3) guarantee its undisturbed enjoyment during the lease" (free translation offered by the authors).

[3] See Article 1464 of the Italian Civil Code: "When performance of a party's obligation has become impossible in part, the unaffected party is entitled to a reduction of its obligation […]" (free translation offered by the authors).

from liability for delays (performance not being excused, but rather postponed in time).[4] The court thus ruled that the remedy for a partial temporary impossibility should be a reduction of the rent limited to the time period when the lockdown was in force.[5]

2.2. The good-faith argument

Notably, an opinion served by the Rome Tribunal on 27 August 2020 reached the same conclusion (that the tenant was entitled to a reduction of the rent due for the time period when the lockdown was in force) based on a different argument.[6]

According to this decision, in light of the pandemic's impact on contractual performance, the parties had a legal obligation to renegotiate the rent with a view to restoring the original equilibrium of the contract, the source of such obligation lying in the principles of good faith and solidarity grounded in Article 2 of the Italian Constitution. Failing the parties' renegotiation, the court declared to have the authority to readjust the rent itself.[7]

2.3. Landlord-favorable decisions

This good-faith argument, which has been endorsed by the Italian Court of Cassation's office in charge of the case reports and of the roll (*Ufficio del massimario e*

[4] See Article 1256, paragraph 2, of the Italian Civil Code: "If the impossibility is temporary, as long as it is present, the obligee is not liable for the delay in its performance. […]" (free translation offered by the authors).

[5] *Contra* A. Gentili, *Una proposta sui contratti d'impresa al tempo del coronavirus*, in «giustiziacivile.com», 29 April 2020, p. 7.

[6] Trib. Roma, sez. VI civ., ord., 27 agosto 2020. See also Trib. Milano, sez. contr., ord., 21 ottobre 2020.

[7] This theory has been submitted in the Italian legal scholarship particularly by F. Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli, Jovene 1996, p. 313; see also F.P. Patti, *Collegamento negoziale e obbligo di rinegoziazione*, in «La nuova giurisprudenza civile commentata», n. 2, 2013, pp. 120-127; *contra* A. Gentili, *La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto*, in «Contratto e impresa», n. 2, 2003, pp. 667-724, pp. 710 ff. For the various positions taken by the Italian legal scholarship since the outbreak of the pandemic, see G. Grisi, *La quarantena dei contratti di durata*, in «Rivista critica del diritto privato», n. 1-2, 2020, pp. 45-74; A. Gemma, *La rinegoziazione nell'emergenza covid-19 è modalità obbligata di attuazione in buona fede del contratto e l'esecuzione indiretta ex art. 614 bis c.p.c. ne è lo specifico rimedio*, in «Jus civile», n. 3, 2020, pp. 724-755; M. Zaccheo, *Brevi riflessioni sulle sopravvenienze contrattuali alla luce della normativa sull' emergenza epidemiologica da covid-19*, in *giustiziacivile.com*, 21 April 2020; R. Natoli, *L'impatto di Covid-19 sui contratti di locazione commerciale*, in U. Malvagna, A. Sciarrone Alibrandi (edited by), *Sistema produttivo e finanziario post COVID-19: dall'efficienza alla sostenibilità. Voci dal diritto dell'economia*, Pacini Giuridica, Pisa 2020.

del ruolo) in July 2020,[8] has however been rejected in other cases, where it has been stated that a legal obligation to renegotiate (and, failing such renegotiation, the court's authority to readjust the contract's terms) simply does not exist in Italian private law.[9]

Some of the courts that have taken a stance more favorable to the landlord's position have also rejected the partial temporary impossibility argument, stating that the landlord's obligation is limited to guaranteeing the fitness of the leased unit for the agreed purpose, while not extending to guaranteeing the productivity of the tenant's business to be conducted therein.[10]

2.4. The courts' application of the emergency legislation

Further, it is worth noting that Italian courts have also drawn opposite conclusions from a reading of the various emergency measures that have been enacted by the Italian Parliament to support businesses throughout the pandemic waves.

On one hand, the fact that the legislator has provided for several specific reliefs, including a 50% reduction of the rent due from March through July 2020 in leases of gyms, swimming pools and sports facilities,[11] while remaining silent as to the possibility to reduce rent in leases of other non-residential property, has been read by the courts more favorable to the landlords as confirming that such possibility does not exist (pursuant to the principle *ubi lex voluit dixit*).

On the other hand, in its decision of 18 May 2021, the Court of Milan argued that a constitutional reading of the abovementioned rent relief mandated that it be applied, by way of analogy, to *all* leases of non-residential property, given that any different interpretation would result into an unreasonable discrimination and thus

[8] Corte Suprema di Cassazione, Ufficio del Massimario e del Ruolo, *Novità normative sostanziali del diritto "emergenziale" anti-Covid 19 in ambito contrattuale e concorsuale. Relazione tematica n. 56*, 8 July 2020, available (in Italian) at <https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Tematica_Civile_056-2020.pdf>.

[9] See Trib. Roma, sez. VI civ., sent., 11 maggio 2021; Trib. Roma, sez. VI civ., ord., 15 gennaio 2021; Trib. Roma, sez. VI civ., ord., 16 dicembre 2020.

[10] See Trib. Roma, sez. VI civ., sent., 11 maggio 2021; Trib. Roma, sez. VI civ., sent., 23 marzo 2021. See also Gentili, *Una proposta sui contratti d'impresa al tempo del coronavirus*, cit., p. 7.

[11] See Article 216, paragraph 3, of Decree-Law No. 34 of 19 May 2020, as amended by Law No. 77 of 17 July 2020 (so-called *Rilancio* Decree).

violate the constitutional principle of equality.

In this fragmented scenario, the Italian Legislator seemed to have taken a strong position, having adopted an emergency norm (in force from May 26, 2021) pursuant to which "in cases where the tenant has witnessed a significant decrease in its turnover, its earnings or its revenues as a consequence of the sanitary restrictions or of certain industries' economic crisis or of the decrease in tourist flows linked to the current pandemic crisis […] the tenant and the landlord shall collaborate to readjust the amount of rent" (free translation by the authors).[12]

To add confusion, this norm has been recently rewritten. Pursuant to its current version (in force as of July 25, 2021), the tenant and the landlord obligation to collaborate is subject to several, stringent requirements.[13] In any case, it remains to be seen how these norms will be applied by the courts.

3. Latin America

Turning to the South American continent, it is worth focusing on the case law from two jurisdictions that have been greatly influenced by the Italian legal tradition: Argentina and Brazil.

3.1. Argentina

In the Argentine Republic, the pandemic has been the occasion to apply the regulation of unforeseen circumstances that was introduced with the new *Código civil y comercial de la Nación* that was approved on 1 October 2014 and entered into force on 1 August 2015.

In the Civil Code previously in force, the regulation of unforeseen circumstances was modeled after that of *eccessiva onerosità* in Article 1467 of the Italian Civil Code. Accordingly, the party whose performance had become excessively burdensome in consequence of an unforeseen event could only request the termination of the contract.

[12] See Article 6-*novies*, Decree-Law No. 41 of 22 March 2021, as amended by Law No. 69 of 21 May 2021 (so-called *Sostegni* Decree No. 1).

[13] See Article 4-bis, Decree-Law No. 73 of 25 May 2021, as amended by Law No. 106 of 23 July 2021 (so-called Sostegni Decree No. 2).

The end of the contractual relationship could in turn be avoided by the unaffected party by offering a fair and reasonable variation of the terms of the contract.

The 2014 reform, however, introduced a different regulation of supervening circumstances – one more akin to that adopted by the German reform of the law of obligations in 2002[14] or by the major European and international projects aimed to harmonizing private law[15] –, aimed at allowing for the preservation of contracts. Pursuant to Article 1091 of the Argentine Civil Code (which is tellingly titled *Imprevisión*), not only can the disadvantaged party request the termination of the contract, but also its adaptation.

In at least one occasion, Article 1091 of the Argentine Civil Code has been applied by Argentine courts in the context of commercial leases and Covid-related business interruptions. Reference is being made, in particular, to a decision of 14 September 2020 from the *Cámara Nacional de Apelaciones en lo Civil*. In light of the extraordinary and unforeseeable nature of the pandemic and of its impact on the real estate sector, the appellate court in Buenos Aires confirmed a lower court's decision granting the tenant an interim measure, by which it ordered a reduction of the rent due for a defined time period.[16]

3.2. Brazil

As it is well known, a relatively recent reform of the law of obligations has also been adopted in Brazil.

Unlike their 2014 Argentine counterparts, the drafters of the current *Código civil* (that was enacted in 2002) closely followed the Italian regulation of supervening events, by providing as a general rule that – in case of an extraordinary and unforeseeable event, making a party's performance excessively onerous to the advantage of the other party – the disadvantaged party may request the termination of the contract. Like under

[14] See § 313 of the German Civil Code (*Bürgerliches Gesetzbuch*).

[15] See Article 6.2.3 of the UNIDROIT Principles of International Commercial Contracts; Article 6:111 of the Principles of European Contract Law ("PECL"); Article III – 1:110 of the Draft Common Frame of Reference ("DCFR").

[16] Cámara Nacional de Apelaciones en lo Civil, sala J [CNCiv.][SalaJ], 14/09/2020, "H.B. de B.A. c. Z.S.A.s /Medidas precautorias", La Ley[L.L.] 28/10/2020, 3.

the Italian Civil Code, only the unaffected party may avoid the termination of the contract, by offering a fair readjustment of its terms.

Alongside this general rule, set forth in Articles 478 and 479, the 2002 reform of the Brazilian Civil Code introduced a special regulation of changed circumstances for pecuniary obligations (Article 317) and private procurement contracts (Article 620), both allowing for the preservation of contracts.

In particular, pursuant to Article 317 of the Brazilian Civil Code, any party may request the court to readjust the terms of the agreement, in case an unforeseeable event produces a patent disproportion between the value of a party's obligation at the date when the contract was executed and the value of such party's obligation at the date when performance is due.

The rationale for the introduction of Article 317 of the Brazilian Civil Code was to mitigate the nominalistic principle (set forth by Article 315) with a view to limiting the impact of large fluctuations in the rates of inflation, which had been experienced in the Brazilian economy in the previous years.

In other words, Article 317 was designed to grant the courts the authority to adapt pecuniary obligations to the *actual* value of money, rather than to restore the equilibrium between the contractual obligations of the parties.

This notwithstanding, some Brazilian courts have resorted to Article 317 to preserve commercial lease agreements in the context of Covid-19 and subsequent governmental restrictions. In particular, there are a significant number of decisions from the *Tribunal de Justiça* of the State of São Paulo, arising out of the appeals against lower courts' decisions granting (or denying) the tenant's requests for interim relief.

As mentioned above, some of these decisions have argued that the impact of the pandemic on the tenant's ability to generate revenue amounts to an unforeseeable circumstance capable of creating a patent disproportion between the value of the tenant's pecuniary obligation (i.e., the rent) at the date when the lease was entered into and its value at the date when the rent accrued, as required by Article 317 of the Brazilian Civil Code.

The remedies granted by these decisions, however, are not always consistent. The interim reliefs confirmed by the Tribunal of the State of São Paulo consist either of

a partial suspension of performance – and, correspondingly, an excuse from liability for delays (payment of the suspended portion of the rent not being excused, but only postponed in time)[17] –, or of a straightforward reduction of the rent due for the relevant period of time.[18]

Further, in at least one decision, the Tribunal of the State of São Paulo has not deemed Article 317 applicable in the instant case, only taking into account Article 478 of the Brazilian Civil Code (which, as explained above, does not allow for the adaptation of contractual obligations, but only for the termination of the contract).[19]

4. The Common Law

4.1. The doctrine of frustration of contracts

As it is well known, the regulation of changed circumstances in common law systems is enlightened by the common law's strict approach to the principle of *pacta sunt servanda* (or, as it is called at common law, "sanctity of contracts").[20]

Generally, under common law the exceptions to such principle are very limited. Further, they tend to be interpreted restrictively by the courts, thus leading to very different results than in civil law jurisdictions.

Under common law, the principle *pacta sunt servanda* is mitigated by the doctrine of frustration, whereby the occurrence of a supervening event may excuse the parties' performance and bring about the termination of the contract.[21]

The first type of event that may bring about discharge of the performance is its

[17] See T.J.S.P., Agravo de Instrumento no. 2073789-03.2020.8.26.0000, Relator: Sá Moreira de Oliveira, 04.05.2020; T.J.S.P., Agravo de Instrumento no. 2079651-52.2020.8.26.0000, Relator: Arantes Theodoro, 20.05.2020.

[18] See T.J.S.P., Agravo de Instrumento no. 2081753-47.2020.8.26.0000, Relator: Arantes Theodoro, 06.05.2020; T.J.S.P., Agravo de Instrumento no. 2084418-36.2020.8.26.0000, Relator: Luiz Eurico, 22.06.2020.

[19] T.J.S.P., Agravo de Instrumento no. 2086776-71.2020.8.26.0000, Relator: Cesar Luiz de Almeida, 26.05.2020.

[20] See J. Cartwright, *Contract Law: An Introduction to English Law of Contract for the Civil Lawyer*, Hart Publishing, Oxford 2016[3], p. 261. See also G.H. Treitel, *Frustration and Force Majeure*, London, Sweet & Maxwell 2014[3], p. 19 ff., where the Author describes the development of the doctrine of absolute contracts whose roots must be found in the well-known English case of Paradine v. Jane, [1647] EWHC KB J5.

[21] See Treitel, *Frustration and Force Majeure*, cit., p. 40, where the Author reminds that the roots of this doctrine must be found in the well-known case Taylor v. Caldwell, [1863] 3 B. & S. 826.

supervening impossibility. Impossibility is however only relevant when it is absolute and objective (e.g., in case of destruction or unavailability of the subject-matter or death or unavailability of the person where personal performance is required).[22]

Second, a contract may be discharged if performance thereof becomes illegal (generally as a result of a change in the law).[23]

Third, the contract may be discharged if the supervening event results in the frustration of the common purpose. This occurs where neither party's performance is impossible, but the purpose for which the contract has been made can no longer be achieved.[24]

In the United States of America, a fourth scenario where a contract may be discharged as a result of unexpected supervening events is where the contract's performance, though remaining possible, has become impracticable (i.e., severely more burdensome for a party).[25] To the opposite, impracticability is regarded as irrelevant under English common law.[26]

4.2. England and Wales

In the context of Covid-19 and commercial leases, there have been two reported judgments in England and Wales where the High Court had to decide on the legal question whether tenants of commercial premises have remained responsible to pay the rents due for time periods when they were subject to the enforced closure of, or inability to trade from, their premises. Both cases were decided in favor of the landlord.[27]

In the second decision handed down by the High Court, which arose out of multiple lease agreements, Master Dagnall clarified why he considered that none of the

[22] See Treitel, *Frustration and Force Majeure*, cit., pp. 69 ff.

[23] See Treitel, *Frustration and Force Majeure*, cit., pp. 345 ff.

[24] See Treitel, *Frustration and Force Majeure*, cit., pp. 307 ff.

[25] See Restat. 2nd § 261: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary".

[26] See Treitel, *Frustration and Force Majeure*, cit., pp. 255 ff.

[27] Commerz Real Investmentgesellschaft mbH v. TFS Stores Ltd., [2021] EWHC 1013 and Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd. and other cases, [2021] EWHC 1013.

leases had been frustrated as a consequence of the pandemic and its containment measures (although this argument had not been made by any of the parties).[28]

While he accepted that the doctrine of frustration of purpose applies to commercial leases and that, in principle, Covid-19 and its containment measures could qualify as a supervening event capable of giving rise to frustration of commercial leases, he found that the narrow test for a supervening event to have such a consequence was not met.

According to the "radical change" test, as developed by English case law,[29] a contract is frustrated when a supervening event changes so significantly the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated at the time when the contract was executed, that it would be "unjust" for the contract to continue in such "radically different" situation.

Having conducted a factual analysis of the case – the relevant factors in this regard being the term of each lease, the likely period of disruption and the likely remaining period of the lease after the disruption ended –, Master Dagnall determined that the proportions of the periods when the enforced closures were in place and the contractual terms remaining thereafter were not such as to justify a "radical difference."

Further, the High Court dealt with the argument that had been advanced by one tenant that there had been a "temporary frustration" over the periods of lockdown and enforced closures of the leased premises, resulting in rents not being payable in those periods.[30]

This argument was rejected based on the reason that there is no such thing as a "temporary frustration" in law. Frustration does not have the effect of suspending the contract, but rather of discharging performance and ending it (this being the reason why a "radical difference" is required).

Master Dagnall's reasoning and his conclusions are consistent with the

[28] Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd. and other cases, [2021] EWHC 1013, [194]-[210].

[29] See CARTWRIGHT, *Contract Law*, cit., p. 264 ff., where the Author describes the application of the test for frustration of purpose as set out in the English case of Davis Contractors Ltd. v. Fareham Urban District Council, [1956] AC 696.

[30] Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd. and other cases, [2021] EWHC 1013, [211]-[212].

traditionally strict approach adopted by English courts in dealing with supervening events and changed circumstances. This may signal that English courts are not going to adopt a more flexible attitude in the context of the pandemic, despite its unprecedented nature and proportions.

4.3. Ireland (Eire)

Also consistent with this takeaway is a decision from the High Court of Ireland, where the court – despite expressing sympathy for the tenant – established that there was no legal basis upon which it could hold that rent was not payable under the disputed lease for the periods when tenant could not operate from the premises due to the Covid emergency legislation.[31]

In that case, the tenant had (among other arguments) brought forward a "partial frustration" defense, arguing that its obligation to pay rent should have been regarded as having been temporarily suspended or partially frustrated due to the governmental measures, without the contract being terminated. In other words, it argued that its rent obligation was frustrated, while the other obligations under the lease remained valid.

The Irish High Court rejected this defense, relying on the principle that under common law there exists no such concept as partial or temporary frustration on account of partial or temporary impossibility. To the contrary, in case of partial impossibility, the contract is either terminated or remains in force.[32]

As a consequence, the Irish High Court denied the tenant's application requesting the court to enjoin the landlord from taking possession of the leased premises.

4.4. The United States of America

Turning to the United States of America, the landscape of judicial decisions rendered in the wake of Covid-19 shutdown orders seems to be both richer and more varied. Alongside a majority of landlord-favorable decisions, whereby courts have established that rent was payable including in relation to periods when enforced closures

[31] Oysters Shuckers Ltd. T/A Klaw v. Architecture Manufacture Support (EU) Ltd., [2020] IEHC 527, [99]-[101].

[32] Oysters Shuckers Ltd. T/A Klaw v. Architecture Manufacture Support (EU) Ltd., [2020] IEHC 527, [84]-[86].

were imposed upon tenants,[33] there are also a fair number of decisions where the tenant's defense of frustration of purpose and/or impossibility has been accepted.

Among the former line of judgments, it is worth focusing on a decision that was recently issued by the United States District Court for the Southern District of New York in a case where the tenant (the well-known fashion brand Gap) had advanced, and the court rejected, both a frustration of purpose and an impossibility argument in order to establish that it was excused from paying rent under the lease agreement.[34]

As to frustration of purpose, the court found that the New York State's prohibition on non-essential businesses could not be deemed wholly unforeseeable, given that the contract defined a *force majeure* event to also mean "[…] governmental preemption of priorities or other controls in connection with a national or other public emergency." This indicated that the parties had indeed foreseen and made provision for such an event.[35]

In addition, Gap failed to show that the Covid-19 pandemic completely frustrated the main purpose of the lease. This conclusion was largely fact specific, given that the court relied on the circumstance that, for periods of time since the outbreak of the pandemic, Gap had operated the leased premises for curbside pick-up, and had been able to open other retail locations in the same area as the leased premises.

The same arguments were held in relation to the tenant's impossibility defense. To the extent that tenant relied on the governmental measures, the court opposed that the parties had foreseen and allocated the risk of such event in their agreement. To the extent that it relied on the pandemic itself, the court referred to the evidence that Gap in fact operated its retail business at the leased premises by way of curbside pick-up and

[33] See, among others, Bay Plaza Community Ctr. LLC v. Bronx Vistasite Eyecare Inc., 2021 N.Y. Misc. LEXIS 2395; 1140 Broadway LLC v. Bold Food LLC, 2020 NY Slip. Op. 34017[U]; 35 E. 75th St. Corp. v. Christian Louboutin LLC, 2020 NY Slip. Op. 34063[U]; E. 16th St. Owner LLC v. Union 16 Parking LLC, 2021 NY Slip. Op. 30151[U].

[34] Gap Inc. v. Ponte Gadea N.Y. LLC, 2021 U.S. Dist. LEXIS 42964.

[35] Although section 1.7(H) of the lease agreement laid down a definition of a "Force Majeure Event", the sole *force majeure* provision of the lease (i.e., Article 21) only prevented the tenant's failure to perform certain non-monetary obligations under the lease from triggering the landlord's right to terminate the lease. Therefore, there was no *force majeure* clause in the lease agreement based upon which the tenant could have argued that its rent obligation was excused.

in other locations on an in-person basis.

In conclusion, the lease's purpose (i.e., Gap operating a retail business at the premises) could not be regarded as having been frustrated, nor did Covid-19 render Gap's performance impossible under New York law.

Notably, a recent decision from the New York Supreme Court (citing *Gap*) reiterated that temporary restrictions on a commercial tenant's business do not warrant discharge of performance or abatement of rent based on either frustration of purpose or impossibility.[36]

The opposite stance was taken by the Massachusetts Superior Court in the case of *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas Inc.*.

Here, the court dismissed the plaintiff landlord's motion for summary judgment and instead granted partial summary judgment to the defendant tenant, finding that under the doctrine of frustration of purpose the tenant's obligation to pay rent under the lease agreement was discharged for any period when governmental measures barred it from serving customers on-premises.[37]

The court applied the following test: first, whether the supervening event frustrated the main purpose of the contract, so that the value of continued performance has been destroyed; second, whether the non-occurrence of such event was a basic assumption made by the parties when the contract was executed; third, whether the contract allocated the risk of such event to the party seeking to be excused from performance.

Relying on a clause in the lease agreement limiting the permissible use of the leased premises to the operation of a Caffé Nero themed café, the court established that the government orders barring the tenant from serving customers on premises had completely frustrated the entire purpose of the lease.

Further, in the court's opinion this clause made it clear that the absence of such government orders, and the tenant's continued ability to serve customers indoors, was

[36] A/R Retail LLC v. Hugo Boss Retail, 2021 N.Y. Misc. LEXIS 2575. Notably, in setting out its decision the court commented: "A harsh result, to be sure, but so in its own way would be mass rescission of commercial leases, assigning all risk of the pandemic to property owners who face their own unrelenting expenses and economic burdened."

[37] UMNV 205-207 Newbury, LLC v. Caffé Nero Americas Inc., 2021 Mass. Super. LEXIS 12.

a basic assumption underlying the lease.

Finally, the court moved on to consider whether the parties had allocated the risk of such event in the lease agreement. The lease contained a *force majeure* clause which, however, contemplated excusing a party from liability if its performance became impossible, while it did not address the distinct risk of the main purpose of the lease being frustrated, even while performance remained possible.

In other words, given that the risk of frustration of purpose had not been allocated in the lease agreement, the court found that the tenant's frustration of purpose defense was thus not barred from the contract's *force majeure* clause.

Therefore, the court declared that the tenant's obligation to pay rent under the disputed lease was discharged under the doctrine of frustration of purpose in relation to any period when tenant was barred by government orders from serving food or beverage within the leased premises, and that the notice of termination that had been issued by landlord in consequence of tenant's alleged breach was not effective.[38]

In another case, the Supreme Court of New York has denied the landlord's motion for summary judgment and granted the tenant's cross-motion for summary judgment, having found that performance under the lease was made impossible due to the shutdown of tenant's business.[39]

It must be noted that, unlike in civil law systems, tenant-favorable decisions in the United States have adopted a zero-sum solution, whereby the economic losses caused by the pandemic are entirely shifted onto the landlord, and the contract is ultimately ended (which may not be a desirable solution even from the tenant's perspective).

A different solution had been reached relatively early in the pandemic by the United States Bankruptcy Court for the District of Illinois in the case of *In re: Hitz Restaurant Group*.

Here, the court found that the executive orders adopted by the Governor of

[38] In other similar cases, due to the existence of a factual question as to whether Covid-19 pandemic supports a frustration of purpose and/or impossibility defense, the Supreme Court of New York has further denied the plaintiff landlord's motion for summary judgment or for an order of dismissal. *See* Hwa 1290 III LLC v. Gkny 1, 2021 N.Y. Misc. LEXIS 2527; 1877 Webster Ave. v. Tremont Ctr., 2021 N.Y. Misc. LEXIS 1968.

[39] 267 Dev. V. Brooklyn Babies & Toddlers, 2021 N.Y. Misc. LEXIS 1079.

Illinois fell under the *force majeure* clause of the lease and that the tenant's liability was thus excused, being such measures the proximate cause of its non-performance.[40]

The court however proceeded to take into account the fact that the governmental measures did not entirely shut down the tenant's business, allowing the latter to perform carry-out, curbside pick-up and delivery services, and deduced that, to the extent that the tenant was able to perform these activities, its obligation to pay rent was not excused.

The court thus concluded that the tenant's obligation to pay rent for the months when the governmental restrictions were in force should be reduced in proportion to its reduced ability to generate revenue, which was fixed at 75% of the rent. Therefore, the tenant was ordered to pay rent in the amount of 25% for April, May and June 2020.

This remedy, consisting of reduction of rent due for the time periods when the tenant's business was closed and reached by applying a *force majeure* clause governed by Illinois State law, is strikingly akin to those that are sometimes granted based on the Civil Codes of Italy, Argentina and Brazil. However, this initial convergence should not be overemphasized, as it does not seem to have been pursued by other courts in the United States.

5. Conclusions

The court decisions described in this article possibly show that Covid-19's interference with contractual performance has not prompted a convergence between the civil law and the common law approaches to supervening events.

On the one hand, in the civil law systems, some courts have affirmed their authority to adapt the content of the contract in order to restore its equilibrium and to equally distribute between the parties the losses resulting from the Covid-19 pandemic.

This has not only been done where the courts could rely on an express provision of the law (like in Argentina), but also through a more flexible interpretation of the law and the application of general contract principles (like in Italy and in Brazil).

These decisions are consistent with the trend of the civil law tradition to move

[40] In re: Hitz Rest. Grp., 68 Bankr. Ct. Dec. 221.

toward a broader acceptance of the idea that, in case of a fundamental change of circumstances, the content of a contract may be adapted by an adjudicator.[41]

On the other hand, the courts of common law systems – with few exceptions in the United States – tend to restate their traditional deference to the principle of sanctity of contracts and not to depart from their narrow interpretation of the doctrine of frustration.

As a consequence, the parties are generally held liable to the original terms of the contract, and their obligations are neither excused nor adjusted.

In light of the above, it is of paramount importance for the contractual parties – especially in cases where they have different nationalities – to be aware of the decisive role that the governing law will have in determining the remedies that may become available to them in case of a change of circumstances.

[41] Notably, similar provisions have been introduced in the German Civil Code in 2002 (see § 313 of the *Bürgerliches Gesetzbuch*) and in the French Civil Code in 2016 (see Article 1195 of the *Code civil*). This trend is also confirmed by the European private law projects and other international harmonization instruments (see *supra* note 16).

GIULIA FIORELLI*

ITALIAN PRISON SYSTEM IN THE TIME OF COVID-19

ABSTRACT. *This essay aims to analyse the extraordinary measures adopted in the Italian prison system in order to reduce overcrowding and contain the spread of Covid-19 pandemic within inmates, to protect the health of prisoners and prison staff. These measures have not always proved adequate to reduce the pervasive problem of prison overcrowding and to keep the social distance within the penitentiary institutions. In an attempt, therefore, to fill the gaps of the legislator and ensure that the execution of the detention takes place in accordance with the constitutional principles of health protection and humanity of treatment, the Supervisory Penitentiary Magistrates have exercised and continue to exercise a role of substitute.*

* Research fellow in Criminal procedure law at Roma Tre University.

1. Background. Prison overcrowding and the high-risk of exposure to Covid-19

Well in advance of the spread of the Covid-19 pandemic, the Italian penitentiary system experienced a condition of deep crisis due to pervasive problem of prisons' overcrowding.[1]

The "Italian drama" of the prison overcrowding has roots dating back in time, but it's only with the well-known Torreggiani v. Italy judgment that the European Court of Human Rights has recognized this issue as a "systemic problem caused by the chronic malfunctioning of the Italian prison system."[2]

Through a pilot judgment,[3] the European Court of Human Rights imposed to Italy to adopt, on one hand, general measures suitable to solve the systemic problem of prison overcrowding; on the other hand, to guarantee effective remedies for inmates who are subject to inhumane or demeaning treatment.[4]

The sudden pandemic emergency has once again drawn attention to the dramatic state of overcrowding of Italian prisons, exposing the pre-existing defects and

[1] For further considerations on prison overcrowding in the Italian prison system, see, among many other studies, R. Del Coco, *Il sovraffollamento carcerario e l'*ultimatum *di Strasburgo*, in R. Del Coco-L. Marafioti-N. Pisani, *Emergenza carceri. Radici remote e recenti soluzioni normative. Atti del Convegno (Teramo, 6 marzo 2014)*, Giappichelli, Torino, 2014, p. 15; C. Fiorio, *Sovraffollamento carcerario e tensione detentiva*, in *Diritto penale e processo*, 2012, p. 410; G. Giostra, *Sovraffollamento carceri: una proposta per affrontare l'emergenza*, in *Rivista italiana di diritto e procedura penale*, 2013, p. 55; P. Corvi, *Sovraffollamento carcerario e tutela dei diritti del detenuto: il ripristino della legalità*, *ivi*, 2013, p. 1796; A. Pugiotto, *La parabola del sovraffollamento carcerario e i suoi insegnamenti costituzionalistici*, in *Rivista italiana di diritto e procedura penale*, 2016, p. 1204.

[2] European Court of Human Rights, 8 January 2013, Torreggiani and others v. Italy, in *Diritto penale contemporaneo*, 9 January 2013, with comment by F. Viganò, *Sentenza pilota della Corte EDU sul sovraffollamento delle carceri italiane: il nostro paese chiamato all'adozione di rimedi strutturali entro il termine di un anno*. For other comments on this judgment, see M. Pelissero, *La crisi del sistema sanzionatorio e la dignità negata: il silenzio della politica, i compiti della dottrina*, in *Diritto penale e processo*, 2013, pp. 261 ss; G. Tamburino, *La sentenza Torreggiani ed altri della Corte di Strasburgo*, in *Cassazione penale*, 2013, pp. 11 ss.

[3] The pilot judgment procedure was developed as a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems.

[4] An overview of the legislation adopted following the "warning" of the European Court of Human Rights is offered by Del Coco-Marafioti-Pisani, *Emergenza carceri. Radici remote e recenti soluzioni normative. Atti del Convegno (Teramo, 6 marzo 2014)*, cit.; F. Caprioli-L. Scomparin, *Sovraffollamento carcerario e diritti dei detenuti, le recenti riforme in materia di esecuzione della pena*, Giappichelli, Torino, 2015; M. Ruotolo, *Il senso della pena. Ad un anno dalla sentenza Torreggiani della Corte EDU*, Editoriale Scientifica, Napoli, 2014.

criticalities of the prison system.[5]

In fact, in the exceptional context of the pandemic emergency that struck Italy, the problem of overcrowding – as was foreseeable – took on an even more delicate role, since it amplifies and continues to amplify the risk of exponentially increasing danger of Covid-19 infections. This is because people in places of detention tend to be more exposed to infection than the general population because of the conditions of confinement in which they live for prolonged periods.[6]

Overcrowding means having no living space. It means, for example, to share twelve square meters and a single shared bathroom in four or five people, as well as to sleep on the third level of a bunk bed, and to share a shower with fifty people.

Indeed, the chronic insufficiency of space compared to the number of people confined, as well as the often-precarious hygienic conditions of penitentiary institutions, make it almost impractical to keep the social distance and to sanitize the environments, as minimum precautions to prevent the spread of the virus.

Suffice it to say that, at the start of the pandemic on March 2020, Italy had 61,230 presences in prison institutions, compared to a regulatory capacity of 50,931 inmates.[7]

Therefore, this situation made the need to alleviate the pressure of the presences within the institutions even more urgent, in order to ensure, even in prison, the social distance.

[5] On the relationship between the context of the pandemic emergency and the problem of overcrowding, see, among many other studies, P. Massaro, *Crisis and contradictions of the Italian penitentiary system, ten years after the declaration of the state of emergency*, in *Sociology and Social Work Review*, 1/2020, pp. 7 ss.; S. Carnevale, *Carcere e coronavirus: intorno a ciò che emerge dall'emergenza*, in *disCrimen*, 9 February 2021.

[6] In this regard, see World Health Organization (WHO) Interim Guidance, "*Preparedness, prevention and control of COVID-19 in prisons and other places of detention*", 15 march 2020 and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), "*Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*", in *Sistema penale*, 21 March 2020: "as close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding".

[7] E. Dolcini-G.L. Gatta, *Carcere, coronavirus, decreto 'Cura Italia': a mali estremi, timidi rimedi*, in *Sistema penale*, 20 March 2020, report that current statistics indicate a rate of overcrowding of 120%, with about 10,299 inmates in excess of the capacity of Italian prisons. For a constant update of numbers and data, see the website of the Antigone Association, as well as the website of the National Guarantor for the Rights of Persons Detained or Deprived of Liberty.

2. Measures adopted for the prevention of contagion from Covid-19

To this end, numerous regulatory interventions have followed, with the same emergency character.

In the very first days of the spread of the pandemic, the emergency legislation addressed the issue of prevention of contagion from Covid-19, with D.L. 8 March 2020, n. 11,[8] aimed at "closing" the prison from the outside, in order to limit the dangers of external contagion, without, however, a contextual intervention on the chronic problem of overcrowding of penitentiary institutions.

In particular, Article 2, paragraphs 8 and 9 of D.L. 8 March 2020, n. 11 prescribed the interruption of all face-to-face interviews to be replaced by video calls and, at the same time, the suspension of the granting of the bonus leave and semi-freedom, i.e., the measures that entail leaving and re-entering prison and therefore the possibility of conveying the virus.

The inability of inmates to fully understand the emergency and the interruption of contacts with their families has generated numerous protests and riots, broke out in many Italian prisons on 7-9 March 2020.[9]

These first measures adopted by the Government to limit the spread of Covid-19 in prisons, to protect prisoners and prison staff, proved to be immediately inadequate, since the objective of "closing" the prisons, with no possibility of "exit", did not allow to deal with the roots of the problem: that is, to relieve the pressure of the presences inside the penitentiary institutions in order to ensure the necessary distance between people, as a precautionary hygiene measure, essential to prevent – or at least to slow down – the spread of the infection.

For these reasons, it was felt the need to use the deflationary tools already in force in our system to encourage the release from prison of inmates whose confinement

[8] D.L. 8 March 2020, n. 11, «Extraordinary and urgent measures to counter the epidemiological emergency from COVID-19 and contain the negative effects on the performance of judicial activity», extended to the entire national territory the restrictive provisions set forth by D.L. 2 March 2020, n. 9 for Lombardy Region and 14 provinces in Northern Italy. A deeper analysis of this legislation is offered by G. Daraio, *Emergenza epidemiologica da Covid-19 e sistema penitenziario*, in *Diritto penale e processo*, 7/2020, pp. 936 ss.

[9] On this topic, see V. Polimeni, *COVID-19. Riflessioni a margine delle rivolte in carcere: l'ennesimo campanello d'allarme*, in *disCrimen*, 2/2020, pp. 351 ss.

is not necessary.

The Government has thus adopted several measures aimed, in particular, at "opening" the prison for those not convicted of serious crimes, in order to serve their sentence in alternative ways.

Among the most important, it is worth mentioning D.L. 17 March 2020, n. 18 (so-called "*Cura Italia*")[10] and, most recently, D.L. 28 October 2020, n. 137 (so-called "*Ristori*")[11] that intervenes in penitentiary matters with solutions that propose, at least in part, the emergency measures already experienced during the first epidemic "wave".

The aim pursued by the legislation is to prevent the onset of new epidemic outbreaks within prisons through the adoption of measures capable of reducing the prison overcrowding.

In particular, Articles 123 and 124 of D.L. 17 March 2020, n. 18 tried to "open" the doors of the prison from the inside and to "close" them with respect to the entry of new prisoners through the provision of two types of measures: the introduction of an extraordinary and temporary home detention and the implementation of bonus leave for semi-free and common prisoners.

The recently introduced penitentiary measures move along two directions.

On one hand, the possibilities of home detention for short sentenced are extended.

On the other hand, the provision of bonus leave of exceptional duration aims

[10] D.L. 17 March 2020, n. 18 (conv. L. 24 April 2020, n. 27), «Measures to strengthen the National Health Service and economic support for families, workers and businesses related to the epidemiological emergency by COVID-19». On this legislation, see Dolcini-Gatta, *Carcere, coronavirus, decreto 'Cura Italia': a mali estremi, timidi rimedi*, cit.; F. Fiorentin, *Decreto legge "Cura Italia": le misure adottate dal Governo per affrontare l'emergenza COVID-19 in materia penitenziaria*, in *Il Penalista*, 20 march 2020; M. Ruaro, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, in *Cassazione penale*, 2020, pp. 2185 ss.

[11] D.L. 28 October 2020, n. 137 (conv. L. 18 December 2020, n. 176), «Further urgent measures in the field of health protection, support to workers and businesses, justice and security, related to the epidemiological emergency from COVID-19». On this legislation, see Fiorentin, *Carceri: un intervento solo parziale che condiziona la vita degli operatori - Commento al d. l. 137/20*, in *Guida al diritto*, 45, 2020; F. Gianfilippi, *Il contrasto all'emergenza epidemiologica in carcere nel D.L. "Ristori"*, in *Diritto penale e processo*, 2/2021, p. 190 et seq.; M. Peraldo, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, in *Sistema penale*, 16 November 2020.

to encourage those prisoners who already benefit from *extra-moenia* treatment resources and who reached a more advanced stage of social reintegration to remain outside of prison.

2.1. Home detention

Under the first profile, the legislator introduces a form of home detention, similar to the measure of prison deflation referred to in Article 1 of L. 26 November 2010, n. 199, recognizing the possibility for prisoners with less than 18 months left to serve – under certain conditions and for certain categories of offences – to be released on home detention.

The relevant regulations – pursuant to Article 123 of D.L.17 March 2020, n. 18 and also to Article 30 of D.L. 28 October 2020, n. 137 – refer, in general, to the measure provided by Article 1 of L. 26 November 2010, n. 199, whose provisions are applied to the newly introduced measure, "as far as compatible."[12]

Among the application prerequisites for this measure is the edictal limit of 18 months of the sentence to be served *ab initio* or as the residue of a greater sentence, in order to access the benefit.

The decision to limit the access to the alternative measure to 18 months of residual period of detention raised several concerns by commentators, since the measure should adapt to a situation of absolute emergency, in which the collective health is under serious and unprecedent dangers.[13]

In addition to this objective requirement, the legislator provides for six preclusive automatisms,[14] in order to exclude, from the scope of application of the measure, a whole series of prisoners who, for certain requirements, are not considered

[12] The special relationship between L. 199/2010 and D.L. 18/2020 is well expressed at the beginning of Article 123 of D.L. 18/2020, which derogates the provisions of paragraphs 1, 2 and 4 of Article 1 of L. 199/2010, as well as in paragraph 8 of the same provision which maintains «without prejudice to the other provisions of Article 1 of L. 199/2010, where compatible».

[13] In this sense, Dolcini-Gatta, *Carcere, coronavirus, decreto 'Cura Italia': a mali estremi, timidi rimedi*, cit.

[14] A wide analysis of these preclusive provisions is offered by Ruaro, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., pp. 2190 ss.

"worthy"[15] of accessing to this measure.

The first five negative requirements are related to the dangerousness of the convicted person,[16] in its different levels of intensity (concrete and abstract dangerousness), while the sixth contemplates a requirement which is not referred to the person himself, rather to the unsuitability of the domicile.

Starting from the last one, letter f) of Article 123 of D.L.17 March 2020, n. 18 – and likewise Article 30 of D.L. 28 October 2020, n. 137 – excludes from the scope of the measure prisoners without an effective and suitable domicile, considering also the need to provide protection to the victim of the crime. As to assess the suitability of the domicile, from the point of view of the "protection of the persons offended by the crime," it must verify that they are not present in the same domicile or, if they are, that they are willing to host the offender. The scope of this scrutiny, however, appears to be reduced, since Article 123, paragraph 1, letter a), precludes the access to the measure not only for convicted sex offenders, but also for perpetrators of domestic violence and stalking (persons for whom the need to verify an adequate distance from the victims is usually more stringent).

In fact, letter a) of Article 123 grounds a preclusion on an abstract social dangerousness of people convicted for any crime contemplated by Article 4-*bis* of L. 26 July 1975, n. 354 (Penitentiary Act and enforcement of liberty deprivation and restriction measures)[17] or for the crimes of family ill-treatment (Article 572 of the Criminal Code) and stalking (Article 612-*bis* of the Criminal Code).

Article 123, paragraph 1, letter b), on the other hand, takes into consideration

[15] M. Passione,*'Cura Italia' e carcere: prime osservazioni sulle (poche) risposte all'emergenza*, in *Questione giustizia*, 19 March 2020.

[16] A recent overview of the concept of "dangerousness" is provided by Gianfilippi-L. Luparia, *Organizzazione penitenziaria, ordine e sicurezza*, in F. Della Casa-Giostra, *Manuale di diritto penitenziario*, Giappichelli, Torino, 2020, pp. 132 ss.

[17] On this preclusion, see, among many other studies, P. Corvi, *Trattamento penitenziario e criminalità organizzata*, Cedam, Padova, 2010, pp. 37 ss.; Del Coco, *La sicurezza e la disciplina penitenziaria*, in P. Corso (a cura di), *Manuale della esecuzione penitenziaria*, Monduzzi Editore, Bologna, 2019, pp. 206 ss.; Fiorio, *Il "doppio binario" penitenziario*, in *Archivio penale*, 2018, n. 1, web; G. Fiorelli, *Il "doppio binario" in executivis, tra nuove tendenze e residue incertezze*, in *Indice penale*, 2019, n. 3, pp. 489 ss.

the actual social dangerousness, prohibiting the measure to subjects declared habitual, professional criminal or offender by inclination.

The legislator then introduces three further preclusions, all connected to the intramural dangerousness of the subject.

Letter c) of Article 123 forbids the measure to the inmate who, at the time of the decision, is subject to the regime of special surveillance ex Article 14-*bis* of the Penitentiary Act and, therefore, to those who are considered likely to endanger the good order of a prison.

The inclusion of letters d) and e) in Article 123 represents an exclusion expressly aimed at "punishing" the misconduct of inmates.

Specifically, letter d) precludes the access to the measure to inmates who have been imposed a disciplinary sanction following the commission of serious offences "in the last year," such as participation in riots or disturbances (as well as the promotion of such events), escaping from prison and the commission of any crime against fellow inmates, prison workers or visitors, ex Article 77, paragraph 1, numbers 18, 19, 20 e 21 of the Decree of the President of the Republic, 30 June 2000, n. 230 (Regulations containing norms relating to the prison system and to measures depriving and limiting personal freedom).

Finally, in accordance with letter e), also those persons, against whom – starting from the entry into force of the Decree – even only a "disciplinary report" is drawn up, must be excluded, because they are deemed to be promoters or participants in riots or disturbances after 7 March 2020.

This preclusion has a clear punitive and deterrent nature since it aims at "punishing," with the prohibition of access to home detention, those who have taken part – and will take part – in riots and disturbances inside the prison.

The reference to the simple "disciplinary report," instead of the "sanction," in order to preclude access to this measure, raises many doubts[18] because the preclusion

[18] About this critical aspect, see GIANFILIPPI, *Il contrasto all'emergenza epidemiologica in carcere nel D.L. "Ristori"*, cit., p. 196; PERALDO, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 11; A. PULVIRENTI, *COVID-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domi-*

operates on the basis of a merely provisional act, which could be overcome by the assessment made by the disciplinary committee. The contents of the report drawn up by prison staff could, in fact, prove to be groundless at the end of the disciplinary procedure or, in any case, not lead to the imposition of a sanction.

In this way, the operation of preclusion, based solely on the "disciplinary report," greatly lowers the level of guarantees for the protection of the prisoner,[19] since it is a new form of preclusion based on the "presumed penitentiary dangerousness."[20] This is probably justified by the difficulties, also of a practical nature, of conducting disciplinary proceedings in the period of the epidemiological emergency.

Once the absence of preclusive automatisms has been assessed, the Supervisory Penitentiary Magistrate – who is responsible for deciding whether to grant the benefit – may not order the execution of the sentence at home detention if he finds "serious reasons that prevent the measure from being granted." With the inclusion of this generic formula, the legislator recognizes to the judge a residual margin of appreciation of further reasons hindering the granting of the measure.[21]

The extreme generality of this formula, along with the provision of the many conditions that prevent the granting of home detention, ends up thwarting the effectiveness of this measure and, consequently, its ability to reduce the prison population.[22]

ciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n 18/2020 alle recenti novità del d.l. n. 29/2020, in *Legislazione penale*, 26 May 2020, p. 11 et seq.; Ruaro, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., pp. 2195 ss.

[19] This same criticism was also raised by Peraldo, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 11.

[20] Litterally, Ruaro, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., p. 2197.

[21] Several Authors wonder if the «serious reasons that prevent the measure from being granted» include the prognostic evaluations of the "risk of flight" and the "danger of recidivism" despite the legislator did not expressly contemplated them in the cited provisions: C. Minnella, *Coronavirus ed emergenza carceri*, in *Diritto penale e uomo*, 4/2020, p. 25; Peraldo, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 9; Ruaro, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., pp. 2199 ss.

[22] About the contradictions of the Italian criminal policy in the context of the pandemic emergency, see A. Averardi,

The specific modalities of execution of the measure also contribute to frustrating the usability of home detention.

In fact, the executive modalities of home detention require the application of an electronic monitoring procedure,[23] whenever the sentence, even residual, to be executed against an adult convict is longer than six months. The use of the electronic monitoring, which always requires the consent of the interested person, represents a necessary condition for the granting of the measure, in the absence of which it cannot be ordered.

Therefore, the provision of a compulsory monitoring procedures through electronic devices makes the home detention unenforceable, due to the limited availability of electronic bracelets, also due to the fact that the provision of such instruments must take place – according to the Decree – "within the limits of the financial resources available at the current legislation."[24]

So, it could happen that the Supervisory Penitentiary Magistrate, even after ascertained the fulfilment of all the requirements to grant home detention, cannot actually execute it because of the lack of electronic bracelets, i.e., for a cause not attributable to the behaviour of the subject and in any way not dependent on his will. This problem risks to limit, *de facto*, the access to this measure almost exclusively to prisoners with a residual sentence of no more than six months or to juvenile offenders.

La Costituzione «dimenticata». La funzione rieducativa della pena, in *Rivista trimestrale di diritto pubblico*, 2021, pp. 161-162.

[23] The electronic monitoring was introduced by L. 4 January 2001, n. 19, through the introduction of paragraph 4-*bis* in Article 47-*ter* o.p. and, subsequently, with the provision: Article 58-*quinquies* o.p., by L. 21 February 2014, n. 10. On the use of the electronic monitoring, see PITTIRUTI, *Le modalità di controllo elettronico negli arresti domiciliari e nell'esecuzione della detenzione domiciliare*, cit., p. 102.

[24] On the risk that the limited availability of electronic monitoring may weaken the home detention, see CARNEVALE, *Carcere e coronavirus: intorno a ciò che emerge dall'emergenza*, cit., pp. 7-8; DARAIO, *Emergenza epidemiologica da Covid-19 e sistema penitenziario*, cit., pp. 942-943; A. NATALINI, *Detenuti: domiciliari con "braccialetto" per pene fino a 18 mesi*, in *Guida al diritto*, 2020, n. 15, pp. 18 ss.; PULVIRENTI, *COVID-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domiciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n 18/2020 alle recenti novità del d.l. n. 29/2020*, cit., p. 17.

2.2. Extraordinary leave of absence from prison

The second area of intervention by the emergency legislator concerns the extension of the duration of the bonus leave granted to those convicts who have already been admitted to the alternative measure of semi-freedom, as well as to common inmates.

With reference to prisoners on semi-freedom, the bonus leave – so-called "licence" – is a rewarding instrument which let them to have more freedom, thanks to which they may not return to the penitentiary institution to spend the night there, even for many days, within the maximum limit of 45 days per year, as provided by Article 52 of the Penitentiary Act.

As exception to the overall maximum time limit of this benefit, both the licences already granted and in progress, at the time the Decree comes into force, and the new licences, arranged after that date, may last longer than what is provided for by the law.

The aim of this regulation is to reduce the frequent re-entry into penitentiary institutions by semi-free prisoners in order to avoid that the exit from prison and the subsequent re-entry, on a daily basis, may facilitate the spread of the virus.[25]

Licences are granted "unless the Supervisory Penitentiary Magistrate finds serious reasons to prevent the measure from being granted". With respect to these measures, it is still difficult to establish the meaning of the "serious hostile reasons,"[26] since – unlike home detention – the granting of semi-freedom requires that a judgement of "merits" of the convicted person has been previously formulated.

Therefore, the existence of "serious hostile reasons" – such as, for example, the increase in the danger of recidivism – should have already excluded the granting of the alternative measure of semi-freedom or, at most, caused the revocation of the same in

[25] In this sense, GIANFILIPPI, *Il contrasto all'emergenza epidemiologica in carcere nel D.L. "Ristori"*, cit., p. 192; PERALDO, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 3; RUARO, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., p. 2207.

[26] FIORENTIN, *Carceri: un intervento solo parziale che condiziona la vita degli operatori - Commento al d.l. 137/20*, in *Guida al diritto*, 45, p. 2020.

accordance with Article 51, paragraph 1 of the Penitentiary Act.[27]

The same logic of favouring the prolonged staying of the inmates outside of prison is pursued by the extension of the duration of the bonus leave, set forth by Article 30-*ter* of the Penitentiary Act.

Under Article 29 of D.L. 28 October 2020, n. 137, offenders, who have already been granted bonus leave or who have been assigned to work outside the prison or admitted to vocational training or education outside the prison, can be granted with bonus leaves for a longer period than that ordinarily provided for by Article 30-*ter* of the Penitentiary Act, and therefore for more than 15 days at a time and for more than 45 days in total per year.

Therefore, special bonus leaves will be granted to those who should ensure greater reliability in the proper execution of the permit of longer duration. In fact, there is no doubt that the offender who has taken (at least) ordinary bonus leaves and the one authorized to work daily outside the prison, have already revealed a constant sense of responsibility and correctness and can, in general, be considered worthy to this benefit.

However, the scope of the benefit is likely to be significantly limited by the provision of several exclusions to the granting of extraordinary bonus leave: for instance, in case of conviction of any of the crimes indicated in Article 4-*bis* of the Penitentiary Act and in Articles 572 and 612-*bis* of the Criminal Code.[28]

3. The pre-trial detention: a forgotten issue

No measure, however, is expressly provided for inmates in pre-trial detention, despite the fact that they represent 30% of the prison population.[29]

[27] This is the opinion expressed by Pulvirenti, *COVID-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domiciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n 18/2020 alle recenti novità del d.l. n. 29/2020*, cit., p. 28; Ruaro, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., p. 2208.

[28] On this point, see Gianfilippi, *Il contrasto all'emergenza epidemiologica in carcere nel D.L. "Ristori"*, cit., pp. 193-194.

[29] On 29 February 2020, out of 61,230 inmates, 18,952 (31%) were pre-trial detainees.

Such a gap has grounded many perplexities within Authors,[30] especially if we consider the contradiction of the legislative choice to begin to "empty the prisons" starting from convicted prisoners, who have already been found guilty by a final judgment, rather than from subjects confined in precautionary detention, whose legal position is still subject to the presumption of innocence under Article 27, paragraph 2, of the Constitution.

In this perspective, there could be an unreasonable disparity of treatment – in violation of Article 3 of the Constitution – between detainees serving a definitive sentence, for whom some alternative measures to detention have been designed, and pre-trial inmates who under the law are presumed innocent but to whom, on the contrary, the lawmaker has not shown as much sensitivity.[31]

The only discipline expressly provided for pre-trial detainees concerns the suspension of the maximum duration of pre-trial detention in prison for the same period in which the trial is suspended.[32]

Such a suspension implies, *de facto*, an extension of the time of the detainee's subjection to the measure and increases the risk of contracting the virus inside the penitentiary.

It is unreasonable, therefore, to think that an allegedly innocent person could be exposed by the State to a serious risk to his health, due to the "hoax" of having the limit of pre-trial detention suspended during the emergency.

Otherwise, the legislator should have provided for a temporary discipline requiring the judge to take into account, when applying and modifying the prison

[30] This gap is highlighted, among many other, by Daraio, *Emergenza epidemiologica da Covid-19 e sistema penitenziario*, cit., pp. 943 ss.; Minnella, *Coronavirus ed emergenza carceri*, cit., p. 32; C. Congestri, *L'emergenza covid-19 negli istituti penitenziari*, in A. Massaro (a cura di), *Connessioni di Diritto penale*, Roma Tre Press, 2020, pp. 70 ss.

[31] In this regard, F. Vergine, *Emergenza epidemiologica da Covid-19, efficienza e processo penale*, in *Il Processo*, 3, 2020, p. 843 remarks a two-speed regime: one for defendants and the other for inmates serving their sentence.

[32] For a critical overview of the suspension of time limits for the maximum duration of precautionary detention, see O. Mazza, *Sospensioni di primavera: prescrizione e custodia cautelare al tempo della pandemia*, in *Archivio penale,* 2020, n. 1; L. Marafioti, *Il processo penale di fronte all'emergenza pandemica*, in *disCrimen*, 1/2021, p. 135; E. Marzaduri, *Le sorti dei detenuti sottoposti a custodia carceraria ai tempi del Coronavirus*, in *Lalegislazionepenale.ue*, 24 March 2020; A. Scalfati, *La custodia cautelare durante l'emergenza sanitaria: leggi confuse e illiberali*, in *Archivio penale*, 2020, n. 2.

measure, also the current health emergency.

The suggestion is to include the epidemic risk – and, therefore, the concrete prejudice for the individual and collective health resulting from a detention in constancy of a Covid-19 pandemic – among the criteria for the choice of pre-trial detention in prison.[33] In this way, the requesting Public Prosecutor and the Judge, who orders the measure, should be able to balance the precautionary needs with the right to health, provided for by Article 32 of the Constitution, accordingly to Article 275, paragraph 3 of the Criminal Procedure Code, for which "precautionary detention in prison shall be ordered only when all the other coercive or prohibitive measures are inadequate," coherently to the principle of *extrema ratio* of the precautionary custody in prison.

In fact – as the General Attorney at the Supreme Court reminds us – never as in this period prisons must really be the *extrema ratio*, making it necessary to encourage the decision of other measures suitable to relieve the pressure from unnecessary presence in the penitentiary.[34]

The suggestion, which remained unheeded by the legislature, has been accepted by the jurisprudence that – as can be seen in some decisions immediately following the spread of the virus[35] – has interpreted several provisions of the procedural and penitentiary system taking into account the existing health emergency.

In particular, some decisions recognized – with respect to the danger of infection by Covid-19 – situations of incompatibility with the prison regime because of the severe health condition of prisoners, pursuant to Article 275 paragraph 4-*bis* of Criminal Procedure Code, according to which "precautionary detention in prison shall not be ordered nor maintained if the accused suffers […] from any other particularly severe

[33] In this sense, see the proposals contained in *Documento dell'Associazione tra gli Studiosi del Processo penale: Emergenza COVID-19 e custodia in carcere: perplessità e proposte, anche in vista della conversione del d.l. n. 18/2020*, in *Sistema penale*, 2 April 2020; and in *Le osservazioni dell'Associazione tra gli Studiosi del Processo Penale "G.D. Pisapia" sulle disposizioni eccezionali per la giustizia penale nell'emergenza COVID-19*, ivi, 14 April 2020.

[34] This is suggested in *Documento della Procura Generale della Cassazione (1° aprile 2020)*, in *Sistema penale*, 3 April 2020.

[35] See, among others judgments, *Giudice per le indagini preliminari – Tribunale di Caltanissetta*, 21 April 2020*; Giudice dell'Udienza preliminare – Tribunale di Trani*, 26 March 2020; *Giudice per le indagini preliminari – Tribunale di Milano*, 23 March 2020; *Tribunale di Roma*, Sez. VII, 18 March 2020.

disease which makes his health conditions incompatible with detention or which hampers adequate treatment in case of detention in prison."

The assessment of the incompatibility of pre-trial detention in prison with the health conditions of the detainee, in view of the risk of infection by Covid-19, must be carried out on the basis of a double verification: an abstract verification of the presence in the suspect of one or more diseases and a further concrete verification of the risk that the detainee may contract the virus.

The risk of contracting the virus in prison must result from specific elements that reveal factors of real and concrete danger for the prisoner, evaluated in the light of the situation existing in the prison where the person is confined, including: the existence of specific cases of Covid-19 contagion ascertained among the inmates of the relevant institution, the presence of precautionary measures adopted to ensure a safe distance between inmates "at risk" and the possibility that inmates, who are in a more precarious health conditions, may be transferred to other institutions or to more appropriate health facilities.[36]

4. The subsidiary role of the Supervisory Penitentiary Magistrates

A further fundamental contribution, in order to ensure that the execution of prison sentences is carried out in compliance with the constitutional principles of protection of health and humanity of treatment, is also provided by the Supervisory Penitentiary Magistrates.

Because of the inadequacy of the measures introduced by the legislature, the Supervisory Penitentiary Magistrates have played a real role of substitution,[37] aimed at finding, case by case, adequate solutions to reconcile the instances of collective security with those of maximum protection of the health of prisoners and of all those who work

[36] On the identification of criteria to verify the incompatibility of health conditions with the state of detention for the danger of contagion, see, e*x plurimis*, Corte di Cassazione, 15 April 2021, n. 16167; Corte di Cassazione, 25 February 2021, n. 18420; Corte di Cassazione, 23 September 2020, n. 27917, in *Cassazione penale*, 2021, p. 1345; Corte di Cassazione, 6 October 2020, n. 35012, in *Sistema penale*, 18 January 2021, with note of C. Cataneo, *La valutazione di compatibilità delle condizioni di salute dell'imputato per associazione mafiosa con lo stato detentivo durante l'emergenza sanitaria: la posizione della Cassazione*.

[37] *Consiglio Superiore della Magistratura*, Opinion on the Draft Law n. 1766, p. 18.

in penitentiary institutions.

To this end, the Supervisory Penitentiary Magistrates chose to resort to instruments already present in the penitentiary law system, by a "reinterpretation" of the application requirements through the "lens" of the pandemic emergency.[38]

So, the Supervisory Magistrates sought to strengthen the application of alternative measures, encouraging their provisional application directly by the Supervisory Magistrate, on the basis of the consideration that the health emergency integrates "a serious prejudice resulting from the continuation of the state of detention," required under Article 47, paragraph 4, of the Penitentiary Act for the granting of provisional measures.[39]

Always resorting to the instruments that our system offers, the Supervisory Penitentiary Tribunal has opted – in the case of "serious physical" or "supervening psychic"[40] infirmity – for the deferment of the execution of the sentence, pursuant to Articles 146 and 147 of the Criminal Code, also in the form of "surrogate" home detention as per Article 47-*ter*, paragraph 1-*ter* of the Penitentiary Act, in the light of which "when the compulsory or optional postponement of the execution of the sentence could be ordered pursuant to Articles 146 and 147 of the Criminal Code, the supervisory court, even if the sentence exceeds the limit referred to in paragraph 1, may order the application of home detention."

Indeed, due to the persistent serious epidemiological situation and the health emergency situation that has been created in the territory as a result of the rapid evolution of the Covid-19, the Supervisory Penitentiary Tribunal has considered, in

[38] An extensive review of the judgments of the Supervisory Penitentiary Magistrates can be found in A. Della Bella, *La magistratura di sorveglianza di fronte al COVID: una rassegna dei provvedimenti adottati per la gestione dell'emergenza sanitaria*, in *Sistema penale*, 29 April 2020; V. Manca, *Esecuzione della pena ed emergenza Covid-19: le prime ordinanze dei Tribunali di sorveglianza*, in *Il Quotidiano giuridico*, 9 April 2020; A. Manna, *Coronavirus, emergenza carceraria ed il ruolo della magistratura di sorveglianza*, in *Dirittodidifesa*, 29 April 2020, p. 7.

[39] *Ex multis*, Ufficio di Sorveglianza di Siena, 1 April 2020, n. 466/2020, by which probation was provisionally applied, in the "extended" form provided by Article 47, paragraph 3-*bis* of the Penitentiary Act.

[40] Corte Costituzionale, 19 April 2019, n. 99, in *Giurisprudenza Costituzionale*, 2019, p. 1088, stated that Article 47-*ter*, paragraph 1-*ter*, of the Penitentiary Act, is illegitimate in the part in which it does not provide that, in the event of serious mental illness, the Supervisory Penitentiary Tribunal may order the application of home detention to the convicted person, even out of the limits set forth by paragraph 1 of the same Article 47-*ter* of the Penitentiary Act.

several decisions, that it cannot exclude, "in case of possible contagion, the occurrence of a serious deterioration of the health conditions of the subject, difficult to cope with inside the prison."[41]

These measures, aimed at facilitating the release from prison of inmates with serious diseases, have caused much uproar in the public opinion and harsh attacks by some political forces to the Supervisory Penitentiary Magistrates[42] accused of having led to an undue release of prisoners who have been convicted for mafia-type offences and subjected to "41-*bis* regime."[43]

The relevant harsh political debate led to the issuance of a series of emergency measures, aiming to establish a control over the decisions of the Supervisory Penitentiary Magistrates.

First of all, under D.L. 30 April 2020, n. 28,[44] the Supervisory Penitentiary Tribunal or Magistrate – before proceeding to grant home detention in "surrogate", ex Articles 147 Criminal Code and 47-*ter* paragraph 1-*ter* of the Penitentiary Act, or ordinary leave, ex Article 30 of the Penitentiary Act – have to acquire the opinion of the District Anti-Mafia Prosecutor of the place where the crime was committed and, for inmates under "41-*bis* regime," the opinion of the National Anti-Mafia and Anti-Terrorism Prosecutor's Office, which are required to express their opinion on the actuality

[41] See, *ex plurimis*, Ufficio di Sorveglianza di Livorno, 19 March 2020; Ufficio di Sorveglianza di Padova, 30 March 2020, n. 1541/2020; Tribunale di Sorveglianza di Milano, 31 March 2020, n. 2206/2020; Ufficio di Sorveglianza di Brescia, 3 April 2020, n. 1553/2020; Ufficio di Sorveglianza di Siena, 6 April 2020, n. 481/2020.

[42] G. Fiandaca, *Scarcerazioni per motivi di salute, lotta alla mafia e opinione pubblica*, in *Sistema penale*, 19 May 2020.

[43] Ufficio di Sorveglianza di Milano, 20 April 2020; Tribunale di Sorveglianza di Sassari, 23 April 2020, ordered the postponement of the sentences, under home detention, of two people convicted of Mafia crimes subject to the 41-*bis* regime. For a comment about these judgements, A. Della Bella, *Emergenza covid e 41-bis: tra tutela di diritti fondamentali, esigenze di prevenzione e responsabilità politiche*, in *Sistema penale*, 1 May 2020.

[44] D.L., 30 April 2020, n. 28, «Urgent measures for the interception of conversations or communications, further urgent measures on the penitentiary system, as well as supplementary and coordinating provisions on civil, administrative and accounting justice and urgent measures for the introduction of the Covid-19 alert system». On this legislation, F. Gianfilippi, *Emergenza sanitaria in carcere, provvedimenti a tutela di diritti fondamentali delle persone detenute e pareri sui collegamenti con la criminalità organizzata*, in *Giurisprudenza penale web*, 4 May 2020; M. Gialuz, *L'emergenza nell'emergenza: il decreto legge n. 28 del 2020*, in *Sistema penale*, 1 May 2020; Della Casa, *L'intervento del d.l. 28/2020 sull'istruttoria dei permessi di necessità: un innesto sine causa e fuori asse rispetto al divieto di detenzione inumana*, *ivi*, 9 July 2020;

of the connections with organized crime and the dangerousness of an eventual release of the inmate.

Just ten days after the issuance of D.L. 30 April 2020, n. 28, D.L. 10 May 2020, n. 29[45] intervened as to introduce, among other things, a mechanism of anomalous compulsory re-evaluation of the orders that have granted home detention or deferment of punishment, and of those that have substituted home arrest for pre-trial detention, for "reasons related to the health emergency from COVID 19," in order to verify, through continuous and close checks, the "permanence of the reasons related to the health emergency."[46]

It is, evidently, a mere political intervention,[47] the expression of a material distrust for the Supervisory Penitentiary Magistrates[48] and aimed exclusively at demonstrating to the public opinion the ability of the Government to place constraints to the prudent appreciation of judges.

5. Conclusions

In conclusion, the pandemic emergency has once again brought to the surface all the complexity and fragility of the living conditions and health within the penitentiary institutions, with respect to which the legislature has not been able – or

[45] D.L., 10 May 2020, n. 29, «Extraordinary measures concerning home detention or deferment of the execution of the sentence, as well as concerning the substitution of pre-trial detention in prison with the measure of home arrest, for reasons related to the COVID-19 health emergency, of persons detained or interned for crimes of mafia-type organised, or for offences of criminal conspiracy linked to drug trafficking or for offences committed by availing themselves of the conditions or with the aim of facilitating mafia conspiracy, as well as inmates and internees subjected to the "41-bis regime". For a comment on this legislation, see A. Cambiale, *Covid e "scarcerazioni": diventano legge, con alcune novità, i contenuti dei dd.ll. nn. 28 e 29 del 2020*, in *Sistema penale*, 13 July 2021; L. Cesaris, *Il d.l. n. 29 del 2020: un inutile e farraginoso meccanismo di controllo*, in *Giurisprudenza penale trimestrale*, 2020, 2, p. 39.

[46] On the issue of constitutional legitimacy of the revocation *de plano* of the previous alternative measure of detention, see Magistrato di Sorveglianza di Spoleto, 26 May 2020, with comment of M. Gialuz, *Il d.l. antiscarcerazioni alla Consulta: c'è spazio per rimediare ai profili di illegittimità costituzionale in sede di conversione*, in *Sistema penale*, 5 June 2020.

[47] Gialuz, *L'emergenza nell'emergenza: il decreto legge n. 28 del 2020*, cit., p. 2.

[48] For this opinion, among the others, see Della Casa, *L'intervento del d.l. 28/2020 sull'istruttoria dei permessi di necessità: un innesto sine causa e fuori asse rispetto al divieto di detenzione inumana*, cit.; Pulvirenti, *Covid-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domiciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n. 18/2020 alle recenti novità del d.l. n. 29/2020)*, cit., p. 32.

perhaps did not want – to show the necessary sensitivity, more focused on supporting the demand of social security, under the emotional pressures of the community.

The legislator has undoubtedly missed a great opportunity to direct, in a more courageous way, the solutions prepared to deal with the pandemic emergency towards the effective recovery of a criminal policy constitutionally oriented to the protection of the dignity of prisoners and the prohibition of inhuman or degrading punishment.

It remains, however, the bitter feeling, now widely spread not only in public opinion but also in the political world, that the fundamental right to dignity and health should be deserved and is not recognized to each man as such and regardless of his behaviour.[49]

[49] Carnevale, *Carcere e coronavirus: intorno a ciò che emerge dall'emergenza*, cit., p. 1.

SOFIA STAZIO[*]

CRYPTOCURRENCIES AND LEGAL CAPITAL CONTRIBUTIONS

ABSTRACT. *The contribution of cryptocurrencies into the share capital of corporations represents an extremely contemporary topic that allows to understand how the traditional principles on which company law is based, such us the effectiveness of legal capital, deal with these radically new assets. In the article, it is considered whether the contribution of cryptocurrencies fulfils the legal requirements of stock contributions not only in the Italian system but also, through the comparative lens, in the major European legal systems. It should be preliminarily noted that the greatest difficulties in drawing a conclusion whether cryptocurrencies are eligible for the formation of legal capital are, on the one hand, the conversion of the value of cryptocurrencies into legal currency, also considering the volatility of the asset, and, on the other hand, the anonymity of blockchain technology that clashes with anti-money laundering laws.*

[*] Law School Graduate, Roma Tre University.

1. Contribution of virtual currencies into the legal capital. An introduction to the issue

Cryptocurrencies (or virtual currencies) are digital representations of value that are not issued or guaranteed by a central bank or a public authority and are used by subjects who conventionally recognize them as a means of exchange.

Recently, a definition of cryptocurrencies was introduced by the EU Directive no. 2018/843 (Article 1, no. 2.d), according to which a virtual currency is a "digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically."

The relevance of cryptocurrencies in the market economy is a steadily increasing phenomenon[1] even if the contribution of these assets into the share capital of a company is still essentially unexplored.

In Italy, there have been two recent judgments issued by the Tribunal and the Court of Appeal of Brescia[2] regarding the contribution of cryptocurrencies, which represent the starting point of this article.

The specific case concerns the legal possibility to contribute a certain amount of a cryptocurrency named "ONECOIN" during an onerous increase of the share capital in a limited liability company (S.r.l.). The notary requested to draft the minutes of the shareholders' meeting pointed out that it was not sufficiently endowed with the legitimacy requirements, since it was not possible to provide a sufficiently precise evaluation of the contribution of cryptocurrencies, due to the high volatility of the asset.

Both the Tribunal and the Court of Appeal confirmed the Notary's conclusion, although based on different reasons.

[1] According to www.coinmarketcap.com, there are a total of 5,430 cryptocurrencies on the market in June 2021, however their number is constantly increasing.

[2] Tribunal of Brescia, 25 July 2018, in *DeJure.it*, and Court of Appeal of Brescia, 30 October 2018, in DeJure.it. Starting from the aforementioned judgments, Italian legal scholars wrote a number of contributions on the subject under consideration (v. F. Felis, *Bitcoin: tra economia e diritto*, in *Jus civile*, 4/2020, pp. 964-1012; D. Fauceglia, *La moneta privata. Le situazioni giuridiche di appartenenza e i fenomeni contrattuali* in *Contratto e impresa*, 2020, pp. 1253-1288; G. Gitti and A. Sardini, *I conferimenti di criptoattività*, in *Contratto e impresa*, 2020, pp. 1289-1322).

The court of first instance relies on the general assimilation of cryptocurrencies to contributions in kind and thus rejected the request of the company to record the resolution in the companies' register, stating that the cryptocurrency to be transferred could not be assimilated to an asset susceptible of an economic evaluation, as provided by Article 2646 Italian Civil Code. "ONECOIN", as stated in the judgement, represents indeed a virtual currency in an embryonic phase (the applicant itself has highlighted that the "listing" of ONECOIN on the main platforms was still a mere a project under construction).

On the other hand, the Court of Appeal's judgment adopts the opposite approach, by assimilating cryptocurrencies to cash as a means of exchange, similarly to what happens in the case of the contribution of a currency not having legal tender in Italy. Starting from that assumption, the Court of Appeal deducts that the absence of a trading venue, that can assign the cryptocurrency a certain value denominated in euro, makes it impossible to recognize the legitimacy of the transfer.

The critical point arising from both judgments is therefore the difficulty, if not the impossibility to precisely appraise virtual currencies. This task turns out to be particularly challenging in light of the volatility characterizing cryptocurrencies today and that will hardly disappear in the future. Indeed, the value of virtual currencies is determined in accordance with demand and offer, which are significantly volatile and lack any support from central banks, and largely depends on the degree of trust expressed by the market toward currencies which are not recognized an official payment function.

2. The legal nature of cryptocurrencies between contribution in cash and contribution in kind

There is a top choice that seems identifiable in the above-mentioned cases and from which it seems appropriate to move: when it comes to legal capital, should cryptocurrencies be assimilated to a contribution in kind or in cash? While the Tribunal seems to favour the first option, the Court of Appeal, on the other hand, reconsiders this assumption and comes to equate cryptocurrencies to cash.

The traditional legal approach[3] believes that the notion of "contribution in cash" includes only the contribution in a currency having legal tender in the State, thus excluding assets in some ways similar to cash, such as bills and Treasury bonds or currencies having legal tender in a State different from the State of incorporation of the company.

Furthermore, this restrictive notion appears to be functional to the discipline that the law reserves for the contribution in cash, for which no expert appraisal is needed, it being obviously superfluous since cash itself measures the value of the contribution. Furthermore, the possibility of paying, at the time of subscription, only 25% of the value of the contribution finds its rationale in the fact that a currency having legal tender is the fungible asset *par excellence* and therefore it will be always available on the market (Articles 2342, para. 2, and 2464, para. 4, of the Italian Civil Code).

On the other hand, it is clear that the contribution of cryptocurrencies in a company's legal capital cannot prescind from a conversion of its virtual value into a value denominated in a measurement unit with legal tender. Therefore, according to the conventional wisdom just outlined (that was accepted by the court of first instance), the contribution of a cryptocurrency must be excluded from the notion of contribution in cash and, if anything, must be assessed according to the regime of contributions in kind.

The opposite argument (i.e. contribution of a cryptocurrency as cash contribution), expressed by the Court of Appeal, includes virtual currency in the notion of cash by observing that it performs the traditional functions that economic theory attributes to money: a medium of exchange, a unit of account and a store of value. In other words, according to this thesis, the qualification of an entity as cash depends on the function it performs on the market and not on whether it is a legal tender currency.

This latter thesis does not convince legal scholars:[4] in particular, the most

[3] See M.S. Spolidoro, *Conferimenti in natura nelle società di capitali: appunti*, in P. Abbadessa and G.B. Portale (eds.), *Il nuovo diritto delle società. Liber amicorum Gian Franco Campobasso*, volume 1, Utet, Torino, 2006, pp. 485 ff., where it is underlined that contribution in cash must be accomplished in the same currency in which the share capital is denominated; F. Di Amato, *Le SRL*, Padova, Cedam, 2011, pp. 82 ff.

[4] M. Natale, *Dal "cripto-conferimento" al "cripto-capitale"?* in *Banca Borsa Titoli di Credito*, 2019, I, p. 741.

perplexing statement is the consideration of digital currency as a unit of account.

It should be noted, however, that legal tender currency fulfils that function as a result of the determination of its nature as a unit of account by a central authority, ensuring the stability of that value by being charged with monetary policy choices. That stability is completely unknown to cryptocurrencies, whose value is by definition volatile, since it depends exclusively on market dynamics and thus on the amount of supply and demand on the reference platform. Therefore, the decentralization of a system such as the blockchain, which does not provide and does not allow any external stabilizing intervention – and is, somehow philosophically based exactly on the denial of States' and central banks' role –, excludes that cryptocurrencies may represent a unit of measurement on the market.

Therefore, cryptocurrencies do not fall within the notion of cash conventionally adopted to date. Moreover, assuming that they represent an *aliquid novi* intended to broaden the notion of money, it should be noted that recently both domestic[5] and European[6] legislatures have taken steps to include cryptocurrencies within the notion of means of payment, thus differentiating it from legal tender currency.

This is also clear from a case decided by the European Court of Justice[7] in 2015, stating that transactions involving non-traditional currencies, "in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions."

Lastly, a resolution of the Italian tax agency, released in 2016, stated that cryptocurrencies represent a decentralized payment system, using a network of peer-to-peer subjects, independent from any specific regulatory discipline or a central authority governing its stability.[8]

[5] Art. 12 qq) Legislative Decree no. 90/2017 of 25 May 2017, defines virtual currency as a means of exchange for the purchase of goods and services and transferred, archived and negotiated electronically.

[6] Art. 1 d) of UE Directive no. 2018/843 of 30 May 2018, defines virtual currency as a means of exchange that does not have the legal status of currency or money.

[7] European Court of Justice, C-264/14, 22 October 2015.

[8] Agenzia delle Entrate, resolution no. 72/E 2016 at <https://www.agenziaentrate.gov.it/portale/documents/

Such evidences confirm that not only scholars, but also legislature and regulators qualify virtual currencies within the category of payment systems, thus differentiating them from legal currencies.

Furthermore, they offer the opportunity to examine if the same conclusions about the qualification of virtual currencies should be extended also to a transnational dimension.

Thus, it is fundamental to analyse, above all, the impact that European law has had on company law. The aim of harmonizing member States' laws on companies is pursued by the European legal system through the so-called "double track" criterion, which means that the coordination of national provisions applies only to public limited companies and not limited liability companies. The reasons behind the choice can be summarized in that the activities of public limited companies predominate in the economy of member States and frequently extend beyond their national boundaries.

Directive no. 2017/1132/EU of the European Parliament and of the Council[9] confirms the abovementioned "double track" criterion, thus regulating capital formation, maintenance and alteration only of public limited companies (see Article 44 (1) of the Directive). Therefore, a number of rules of minimum harmonization are shared by public limited companies throughout Europe, such as *Société anonyme* (SA) in France, *Aktiengesellschaft* (AG) in Germany, *Sociedad Anónima* (SA) in Spain and *società per azioni* (S.p.A.) in Italy.

Among those rules, the directive provides that, for any consideration other than in cash, a report shall be provided by one or more independent experts appointed by an administrative or a judicial authority. The experts' report must contain a description of the assets comprising the consideration as well as the appraisal methods employed and, lastly, must state that the values set by the application of those methods correspond at least to the nominal value of the shares to be issued for them.

Considering that it is always needed to convert the value of virtual currencies

20143/302984/Risoluzione+n.+72+del+02+settembre+2016_RISOLUZIONE+N.+72+DEL+02+SETTEMBRE+2016E.pdf/8e057611-819f-6c8d-e168-a1fb487468d6>.

[9] Directive no. 2017/1132/EU of 4 June 2017.

into euros through an expert estimate, we may say that the contribution of cryptocurrencies in European public limited companies could only be subject, if anything, to the rules of contributions in kind.

The issue is more complex for limited liability companies, as there is no such a harmonized regulation from the European legislature.

The Italian limited liability company (S.r.l.), under this aspect, is similar to the public limited one (S.p.A.) since it requires, for any contribution in kind, an expert appraisal, even if with less formalities than the S.p.A. For example, the review of the appraisal by the board of directors is provided only for the S.p.A., in order to assure a bilateral acceptance of the value from both the expert and the company. Therefore, there is no doubt that contributing cryptocurrencies also in the legal capital of a S.r.l. should be subject to the procedure of contributions in kind.

On the other hand, in the limited liability companies of the most relevant countries in Europe, the expert appraisal is not always mandatory, as limited liability companies are not covered by EU harmonized company law.

In the French limited liability company (*Société à responsabilité limitée*, SARL), which represents the company type which is the most similar to the Italian one in this respect, an evaluation is requested of each contribution in kind through a report drawn up by an auditor. However, and this marks the difference with the Italian legal system, shareholders may decide, under certain conditions, to determine the value by themselves without the intervention of an external auditor (Article L-223-9 Commerce Code).[10]

In Spain, the *Real Decreto Legislativo* no. 1/2010[11] provides, as a default regime, that contributions in kind must be described in the articles of incorporation of a limited liability company along with their evaluation in euros (Art. 63), thus without considering an expert appraisal as mandatory. However, it is also established that shareholders may

[10] Shareholders may decide by unanimous resolution that the involvement of an auditor shall not be mandatory if no contribution in kind exceeds a value of 7,500 euros and if the total value of all the contributions in kind not subject to appraisal by an auditor does not exceed half of the capital. If there is no auditor for the evaluation proceeding, the members shall be jointly liable with respect to third parties for the value attributed to contributions in kind (Article L 223-9 Commerce Code).

[11] *Real Decreto Legislativo* no. 1/2010 of 2 July 2010.

delegate this evaluation to experts, in order to avoid being exposed to liability towards the company and third parties for the effectiveness of the attributed value (Art. 76).

A different discipline from that of the Italian S.r.l. in this respect is that of the German limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH). The Act on Limited Liability Companies (part 1, section 5)[12] provides that, if contributions in kind are to be made, shareholders shall set forth the evaluation of the asset in a report. No reference is made in the Act to the intervention of an expert to estimate the value, even if that is a solution that shareholders can certainly opt for.

Given the above, it is to say that in limited liability companies, even if the expert appraisal is not always mandatory, the contribution of virtual currencies (if allowed) must follow the procedure established for contributions in kind, since it is impossible to prescind from a translation of their value in euros. Anyway, it's clear that relying on an expert appraisal is particularly recommended for the contribution of cryptocurrencies considering both the difficulties to establish a value for such an asset and the shareholders' liability regime about the evaluation of the contribution.

3. Evaluation of the contribution in cryptocurrencies between volatility issues and the absence of a regulated market

Assuming that contribution of cryptocurrencies should be included among contributions in kind, it is now necessary to understand if they fulfil the legal requirements for those assets.

The starting point of the analysis is the second paragraph of Article 2464 of the Italian Civil Code, according to which all assets susceptible of an economic evaluation can be conveyed to a S.r.l, thus opening the door to the contributions of virtual assets, including the cryptocurrencies.

No like provision is set forth in the regime of S.p.A. and Article 2342 of the Italian Civil Code merely says that it is possible to have contributions in kind, without further clarification but the express exclusion of the prevision of work and services

[12] Federal Law Gazette III, Index No. 4123-1, last amended by Article 10 of the Act of 17 July 2017 (Federal Law Gazette I p. 2446).

(Article 2342, para. 5). Nonetheless, for all public limited companies it is the European harmonized law (Article 46 of Directive no. 2017/1132/EU[13]) to provide that subscribed legal capital may be formed only of "assets capable of economic assessment." We can assume that the Italian legislature did not consider the insertion of this definition necessary within the S.p.A. discipline, since it is a principle already inherent in the reference to contributions in kind and in their appraisal procedure in the Italian Civil Code.[14]

The same reference is not expressly included in all the aforementioned domestic company laws in Europe.[15] However, we can assume it from the fact that those disciplines require an economic evaluation for any contribution in kind.

Therefore, we can conclude that the conferral requirement for contributions in kind in general is that the asset should be susceptible of an economic evaluation. Besides that, some domestic laws, such as the Italian one for the S.p.A., exclude some contributions in kind from those allowed.

In the first place, therefore, the contribution must be an "asset element," which means a quid allowing to account a positive value in the company's assets.

It does not seem that this first requirement represents an obstacle for cryptocurrencies, since the contribution of virtual currency surely determines that positive accounting. Cryptocurrencies are, in fact, attributed by some scholars[16] to the category of legal goods pursuant to Article 810 of the Italian Civil Code and by others are considered to be debt instruments.[17]

[13] Directive no. 2017/1132/EU of 4 June 2017.

[14] A complete analysis of the notion of contribution within the Italian S.p.A. is offered in the commentary of Article 2342 Italian Civil Code by V. De Stasio and G. Nuzzo, in P. Abbadessa and G.B. Portale (eds.), *Le società per azioni*, volume 1, Milano, Giuffrè, 2016, pp. 344 ff.

[15] Only the *Real Decreto Legislativo* no. 1/2010, bearing the company law in Spain, provided that assets or patrimonial rights must be susceptible of economic evaluation (Article 58).

[16] M. Krogh, *L'aumento di capitale nelle S.r.l. con conferimento di criptovalute. Il commento*, in *Notariato*, 2018, pp. 663 ss.

[17] M. Miccoli, *Bitcoin fra bolla speculativa e controllo antiriciclaggio*, in *Notariato*, 2018, pp. 151 ff., remarks that, since the purchase of cryptocurrencies takes place through an annotation of an information register, it can well be configured as a receivable.

Secondly, the contribution must be "susceptible of economic evaluation." This is the most complicated requirement to deal with, as is clear from the two judgments analysed above, where the main issue is indeed the impossibility to precisely appraise virtual currencies.

The abovementioned term, in spite of its apparent plainness, is very elusive and problematic since it underlines the balance between two opposing interests. On the one hand, that of the company to acquire the widest possible variety of contributions useful for the company's business and, on the other hand, that of creditors to limit the contribution only to assets that are actually capable of creating a guarantee for the repayment of the company's obligations.

The prevailing theory[18] tries to reconcile those two interests by considering that the "susceptibility of economic evaluation" occurs if it is possible to attribute the asset a value that is as objective as possible. Therefore, in order to appraise the transferability of a given asset, it is necessary to verify whether or not that asset has a value on the market (the so-called "exchange criterion").

It is clear that the exchange criterion encounters some difficulties when it comes to cryptocurrencies, as an official regulated market for them does not exist, while there are only several exchange platforms. This assumption contributes to the volatility of the price of cryptocurrencies, which recommend adopting a weighted average of the prices recorded on those platforms in the appraisal.[19]

The affirmed volatility of the value of cryptocurrencies is certainly not a valid

[18] C. Angelici, *La costituzione della società per azioni*, in P Rescigno (ed.), *Tratt. dir. priv.*, volume XVI, Torino, Utet, 1985, pp. 246 ff.; G. Olivieri, *I conferimenti in natura nelle società per azion*i, Padova, Cedam, 1989, pp. 71 ff.

[19] For example, one of the most popular cryptocurrency market information sites (www.coinmarketcap.com) states that: «the price of any cryptocurrency is a volume weighted average of market pair prices for the cryptocurrency. The higher percentage of volume contributed from the pair, the more influence it has on the average price. The rationale for using a weighted average is because in general, markets with higher volume have higher liquidity and are less prone to price fluctuations. Some prices are manually excluded from the average, denoted by an asterisk (*) on the markets tab if the price does not seem indicative of a free market price; for example, when an exchange disables withdrawals or deposits, or regulatory conditions make it impossible for anyone else outside of a certain geographical region to buy coins. Some prices are also automatically excluded when our algorithms detect that the reported price is a significant outlier when compared to other market pairs for the same cryptocurrency, denoted by three asterisks (***) on the markets tab»

reason, by itself, to exclude their transferability, as the contribution of assets with an equally unstable value, such as credits, is allowed. At the same time, it is undeniable that the absence of a reference market reflects on the expert's choice of alternative and less objective appraisal criteria.

There is no doubt that these criteria strongly depend on the cryptocurrency taken into consideration in the specific case and in particular on the volume of exchanges involving that currency on the market.

The notoriousness of a currency is then fundamental in a system based essentially on trust: the more solid and popular the virtual currency is, the more users will take part in its system and contribute to increase its value. The numerical data of the users are, in fact, a fundamental parameter to identify the value of cryptocurrencies as their evaluation is nothing more than a result of the combination of demand and offer.

In this sense, it is clear that cryptocurrencies with a high market cap and therefore a large level of diffusion are more easily convertible into "real" currency. A different conclusion must be reached, however, in the case of cryptocurrencies that are not very widespread and adopted, the conversion of which is therefore made uncertain, if not, even impossible.

The Tribunal of Brescia, on closer inspection, does not deny the possibility of contributing cryptocurrencies, but rather distinguishes between "genus" (cryptocurrencies, in general) and "species" (that cryptocurrency, in particular). What indeed is denied is only the transferability of cryptocurrencies whose evaluation system is characterized by a high level of self-reference.

4. The anonymity of blockchain technology and the traceability of payments

Some legal authors[20] consider that the existence of the elements requested by Article 2464 Italian Civil Code only sanctions the abstract transferability of a specific

[20] G. Zanarone, *Della società a responsabilità limitata*, in P. Schlesinger (ed.), *Il Codice civile. Commentario*, Milano, Giuffré, 2010, pp. 293 ff.; Olivieri,, *Investimenti e finanziamenti nelle società di capitali*, Torino, Giappichelli, 2008, pp. 56 ff., where in particular it is noted that an asset is not susceptible of being contributed, if it cannot be materially released according to its own characteristics.

asset, not the actual possibility to transfer it by converting it into euros. According to this theory, in order to affirm its actual transferability, it would be needed to verify that the transferor has fulfilled all the formalities needed to make the asset available to the company, not only legally but also practically.

In the case of a transfer of cryptocurrencies, it is not possible to guarantee with absolute certainty that the cryptocurrency is in the legal ownership and material availability of the company, since the only thing that can be proved is the cryptocurrency transfer between two anonymous virtual wallets through the production of a so-called transaction password. On the contrary, there is no way to ascertain whether or not the company is the holder of the virtual portfolio, which is qualified as the beneficiary of the payment.

Therefore, even if the cryptocurrency operations are fully traced from an objective point of view, they cannot be from a subjective one. In fact, there is an IT register, public and immutable, in which there is an indelible trace of the transfer from a public key to another public key. However, the holders of the private keys associated with the public keys involved in the transfer, are unknown.

It should be noted, in fact, that the anonymity of the actual parties involved in the transaction does not derive from a form of protection (in some way reversible or suspended) of the data, but from a feature that is intrinsic to the technology adopted.

In 2018, the Italian National Council of Notaries[21] stated therefore that transactions in cryptocurrencies are only "apparent transactions," since both parties involved declare they are holders of their respective accounts, without however providing any proof of such statements.

This sort of anonymity surrounding cryptocurrencies represents an obstacle to the aim pursued with the anti-money laundering legislation, whose aim is that of making financial transactions clear and transparent, therefore introducing an additional issue in the debate about the contribution of the cryptocurrencies into legal capital.

The commitment in the field of anti-money laundering came not only from

[21] Consiglio Nazionale del Notariato (CNN), *Quesito Antiriciclaggio* no. 3-2018/8, at <https://www.notariato.it/sites//files/Quesito%203_2018_B.pdf>.

the Italian legislature but also from the European one. The latest effort in this area consist of Directive no. 2018/843 EU of May 2018, also known as the V Anti-Money Laundering Directive. The directive considers the anonymity of virtual currencies particularly risky both for a possible use of that assets by terrorist groups and for their potential misuse for other criminal purposes.

For this reason, the European legislature subjects all the providers of exchange services between virtual currencies and legal tender currencies to the AML/CFT obligations (Anti-Money Laundering/Combating the Financing of Terrorism), thus they are committed to comply with the customer identification requirements. The exchanges that enable the movement of virtual money thus have to identify who hide behind the accounts and also have the burden to report any suspicious manoeuvres to the appropriate authorities.

It is to say that Italy has anticipated the introduction of this commitment with the implementation of the IV Anti-Money Laundering Directive through Legislative Decree of 25 May 2017, no. 90[22]. Since then, for the activity of virtual currency exchange it is mandatory in Italy to register in a special section of the currency exchange register kept by OAM (*Organismo Agenti e Mediatori*)[23] as required by Article 128-*undecies* of Legislative Decree no. 385/1993 (TUB).

Despite subjecting exchange providers to these obligations, the V Anti-Money Laundering Directive itself specifies that their role does not entirely address the issue of anonymity attached to virtual currency transactions. It must be considered that, in fact, a large part of the virtual currency environment will remain anonymous because users mostly transact without such providers.

To combat the risks related to the anonymity, the Directive adds the suggestion that the national Financial Intelligence Units (FIUs) of each country should be able to obtain information allowing them to associate virtual currencies to the identity of their owner, also imagining the possibility that users can submit a self-declaration to the designated authorities.

[22] Legislative Decree no. 90/2017 of 25 May 2017.

[23] Article 8, para. 1, Legislative Decree no. 90/2017.

According to Article 65 of the Directive, by January 2022 and every three years thereafter, the Commission draws up a report on the implementation of the Directive and submits it to the European Parliament and the Council. The first report, to be published by 11 January 2022, must be accompanied, if necessary, by appropriate legislative proposals also with regard to (i) the aforementioned conferral of powers to the FIUs to establish a central database in which user identities and wallet addresses can be registered and (ii) the definition of a self-declaration form for users of virtual currencies.

Even though European legislature has directly addressed the problem on anonymity, this surely cannot be considered solved at the moment. This issue, which continues to be the biggest obstacle to the transfer of cryptocurrencies to the legal capital of companies, may perhaps be reconsidered in the light of what is currently only a proposal in the European Directive and that is a centralized register allowing to associate the holders of the private keys with the public keys involved in the transfer.

5. Conclusions

When it comes to debating what kinds of assets can be contributed to the legal capital of a company under Italian law, the theoretical starting point is that the transfer of cryptocurrencies is allowed both in a public limited company and in a limited liability company. Only the first are indeed subject to the EU process of harmonization of domestic company laws in the field of capital formation and effectiveness. Therefore, while a uniform answer can be attempted for companies limited by shares – although a certain degree of freedom is left to the member States in the EU – no uniform or even simply harmonized answer can be found when the issue is the contribution of "special" assets to the legal capital of limited liability companies. In particular, the legitimacy of such a contribution should be reviewed in relation to the individual case, according to the criteria provided for the evaluation of the contribution in kind.

It should be noted, however, that the impossibility to verify the coincidence between the owner of the cryptocurrency and the person who actually enters into the subscription agreement with the company, gives rise to non-negligible criticalities even in those hypotheses in which the asset was deemed to be conferrable in light of the requirements set out in Article 2464 of the Italian Civil Code.

The fact that European legislature has begun to tackle the problem of anonymity of virtual currencies is a major step towards homologating them to real currencies, radically changing the way in which these coins are considered in the eyes of those who consider them an attempt to evade tax duties or juggle illegitimate financing.

At present, we may say that the transfer of cryptocurrencies is actually possible only if the capital contribution occurs with the "exchange services" subject to the abovementioned parts' identification requirements. Only in this way, the transaction loses its anonymity and is fully compliant with anti-money laundering legislation.

FEDERICA CENTORAME[*]

INVESTIGACIONES CRIMINALES INTRUSIVAS Y BÚSQUEDA DE PRUEBAS A TRAVÉS DE "*SOFTWARE* ESPÍAS" EN LA EXPERIENCIA PROCESAL ITALIANA[**]

RESUMO. *Este artículo se ocupa de examinar el uso que la práctica italiana hace de los programas informáticos de espionaje como medio atípico de investigación criminal, al margen de un marco normativo de referencia. Con las evidentes consecuencias que se derivan para la protección equitativa de los derechos fundamentales afectados por la captura tecnológica.*

[*] Investigadora en Derecho procesal penal, Departamento de Derecho, Universidad de Roma Tre.

[**] Texto reelaborado y ampliado de la ponencia presentada en el marco de la *I Jornada Internacional De Jóvenes Investigadores* (21 y 22 de abril 2021), organizada por la Universitat de Girona sobre el tema "*Investigación y proceso penal en el siglo XXI. Nuevas tecnologías y protección de datos*".

1. Algunas consideraciones de fondo

En la experiencia italiana, el uso de programas informáticos de espionaje como instrumentos de búsqueda de pruebas ofrece una muestra muy representativa de la radical metamorfosis que ha sufrido la investigación criminal debido al continuo progreso de la tecnología.

Incluso los no profesionales están ahora familiarizados con el funcionamiento de este dispositivo. Se trata de un *malware* capaz de controlar de forma remota el dispositivo electrónico en el que está instalado, mediante el acceso manual al propio dispositivo así como, más frecuentemente, mediante una inoculación sigilosa a través de Internet, simplemente enviando un correo electrónico o durante una operación de actualización[1].

Introducido en el soporte informático de destino, el programa espía es capaz de vigilar toda la actividad realizada a través del mismo dispositivo y de operar como si tuviera la disponibilidad física, sin detectar nunca su propia presencia interna[2].

De esta manera, los investigadores pueden buscar, vigilar y adquirir de forma encubierta cualquier contenido informativo introducido en la red por usuarios individuales, en diversas capacidades implicados en el caso[3].

La información digital, contenida en los dispositivos electrónicos, constituye, de hecho, un instrumento ineliminable en la fase de investigación[4], tanto para documentar la comisión ocasional de delitos comunes a través del instrumento informático, como para averiguar casos más específicos, como los de carácter terrorista, cuya comprobación puede hacerse en tiempo real a través de la vigilancia electrónica de la con-

[1] Para un análisis de la capacidad de intrusión del virus espía, véase R. Brighi, *Requisiti tecnici, potenzialità e limiti del captatore informatico. Analisi sul piano informatico-forense*, en G. Giostra-R. Orlandi (editado por), *Revisioni normative in tema di intercettazioni. Riservatezza, garanzie difensive e nuove tecnologie informatiche*, Giappichelli, Torino, 2021, pp. 231 ss.

[2] Al respecto, A. Sanna, *L'irriducibile atipicità delle intercettazioni tramite* virus *informatico*, en A. Scalfati (a cargo de), *Le indagini atipiche*, II ed., Giappichelli, Torino, 2019, p. 604.

[3] Así, C. Conti, *Sicurezza e riservatezza*, en *Diritto penale e processo,* 2019, p. 1574.

[4] Desde un punto de vista monográfico, sobre el tema, consúltense los recientes trabajos de M. Pittiruti, Digital Evidence *e procedimento penale,* Giappichelli, Torino, 2017; S. Signorato, *Le indagini digitali: profili strutturali di una metamorfosi investigativa*, Giappichelli, Torino, 2018.

ducta proselitista vía *web*[5].

Todo esto es suficiente para encontrar las razones más profundas del recurso cada vez mayor a los dispositivos tecnológicos para la búsqueda de pruebas.

Además de la necesidad de oponerse, con medios adecuados al efecto, a la evolución ontológica de las formas delictivas, determinada precisamente por el uso masivo de los sistemas digitales[6], la creciente utilización, con fines de investigación, de sofisticadas tecnologías de vigilancia secreta y constante de las personas se explica a la luz de los efectos perturbadores que estas herramientas son capaces de provocar sobre las mismas coordenadas teóricas en las que hasta ahora se ha enmarcado el tema de la verdad en el proceso penal.

Aplicados en el terreno probatorio, los citados medios de vigilancia electrónica permiten al Juez no sólo reconstruir, con precisión, el hecho pasado sometido a su escrutinio, sino incluso asistir a la repetición fiel del hecho que debe ser juzgado[7].

De este modo, pasamos de una verificación veraz, pero todavía aproximada, ya que está condicionada por los insuperables límites cognitivos de la narración testimonial a la que tradicionalmente se confía la reevocación del episodio criminal, al realismo gnoseológico de la "verdad digital"[8], que, aunque diferida, es capaz de representar fielmente la misma conducta objeto del juicio.

Sin embargo, es necesario preguntarse inmediatamente hasta dónde estaríamos dispuestos a llegar para obtener la aportación probatoria de ese conocimiento (aparen-

[5] Véase G. Paolozzi, *Relazione introduttiva*, en L. Lupária-L. Marafioti-G. Paolozzi (a cargo de), *Dimensione tecnologica e prova penale*, Giappichelli, Torino, 2019, p. 9; en concreto, sobre la conexión entre las herramientas de investigación intrusiva y la lucha contra el terrorismo, véase M. Daniele, *Contrasto al terrorismo e captatori informatici*», en *Rivista di diritto processuale*, 2017, pp. 393 ss.

[6] Sobre este punto, véase L. Lupária, Computer crime *e procedimento penale*, en G. Garuti (editado por), *Modelli differenziati di accertamento*, en *Trattato di procedura penale*, dirigido por G. Spangher, Utet, Torino, 2011, p. 369; M. Torre, *Il* virus *di Stato nel diritto vivente tra esigenze investigative e tutela dei diritti fondamentali*, en *Diritto penale e processo,* 2015, p. 1163.

[7] En este sentido, O. Mazza, *La verità giudiziale nel sistema delle prove tecnologiche*, in Id., *Tradimenti di un codice. La Procedura penale a trent'anni dalla grande riforma*, Giappichelli, Torino, 2020, p. 8.

[8] La expresión es de F. Caprioli, *Tecnologia e prova penale: nuovi diritti e nuove garanzie*, en Lupária-Marafioti-Paolozzi (a cargo de), *Dimensione tecnologica e prova penale*, cit., p. 45

temente) "perfecto"[9] en cuanto al resultado de la comprobación del hecho del delito en el juicio.

La indiscutible utilidad heurística de la información que puede adquirirse mediante instrumentos tecnológicos siempre más sofisticados y intrusivos, centrando la atención en el único resultado cognitivo del hecho que se constata, tiende a perder el sentido constitucional del proceso penal como sistema de límites en el que se encauza el poder de castigar[10].

Así, se corre el riesgo de llegar al peligroso malentendido de que, en el procedimiento de reconstrucción de los hechos controvertidos, las formas procesales y las limitaciones probatorias no son más que un instrumento técnico, como tal, neutral e independiente respecto a los valores[11]. Y de ello se deriva otra paradoja: las actividades de investigación, justificadas por la represión de delitos agresivos contra los bienes jurídicos de los ciudadanos, pueden acabar comprimiendo los derechos y libertades fundamentales de las personas, a través de una injerencia incontrolada de la autoridad en la existencia privada de cada individuo[12].

2. Cuestiones no resueltas en la regulación jurídica de las intervenciones de comunicaciones mediante virus informáticos

Muy consciente de estos escollos para las prerrogativas de los particulares, el legislador italiano ha puesto recientemente la atención en una funcionalidad técnica específica del *software* espía. Es decir, la activación a distancia del micrófono o la cámara *web* integrados en el dispositivo.

De esta manera, es posible realizar una aprehensión oculta y continua de las

[9] Con énfasis crítico, habla de "prova perfetta" con referencia a la prueba digital, L. Marafioti, Digital evidence *e processo penale*, en *Cassazione penale,* 2011, p. 4510.

[10] En un sentido compartido, F. Cordero, *Procedura penale*, Giuffrè, Milano, 1983, p. 584.

[11] El argumento está tomado, por el contrario, de G. De Luca, *La cultura della prova e il nuovo processo penale*, en Aa.Vv*., Evoluzione e riforma del diritto e della procedura penale. Scritti in onore di G. Vassalli*, vol. II, Giuffrè, Milano, 1991, p. 184. Sobre el tema de las formas procesales como valores ético-políticos, véase M. Nobili, *Forme e valori*, (1993), ahora en Id., *Scenari e trasformazioni del processo penale*, Cedam, Padova, 1998, pp. 1 ss.

[12] F. Nicolicchia, *Il controllo occulto e continuativo come categoria probatoria: premesse teoriche di una sistematizzazione*, en *Diritto penale contemporaneo – Rivista trimestrale,* 2019, 2, p. 431.

conversaciones y de los comportamientos comunicativos entretenidos por la persona que tiene la disponibilidad material del dispositivo y por todos aquellos que se encuentran dentro del rango operativo del dispositivo infectado[13].

A pesar de un uso descuido del instrumento examinado, ya largamente establecido en la práctica de las Fiscalías[14], el reconocimiento normativo formal de la técnica de investigación basada en programas de espionaje se debe, en Italia, por primera vez, al Decreto Legislativo de 29 de diciembre de 2017, n. 216, cuya disciplina sobre el punto, retocada por el Decreto Legislativo de 31 de diciembre de 2019, n. 161, ha entrado en pleno funcionamiento, tras múltiples prórrogas, el pasado 1 de septiembre de 2020 .

En particular, las citadas medidas legislativas, al modificar los artículos 266 y siguientes del Código procesal penal, han previsto expresamente que la actividad de intervención de las comunicaciones entre las personas presentes "también puede realizarse mediante la inserción de un virus informático en un dispositivo electrónico portátil". Y esto también se permite en el domicilio, siempre que – tratándose de delitos comunes – existan indicios serios de que en los lugares reservados se está realizando una "actividad delictiva".

Hay que decir que esta iniciativa del Legislador intervino en rápida sucesión cronológica con respecto a un importante pronunciamiento de las Secciones Unidas del Tribunal Supremo italiano[15].

Los jueces de la legitimidad, abordando la cuestión relativa al uso probatorio de la intervención encubierta de conversaciones a través de virus informáticos, habían, de hecho, circunscrito el campo de aplicación sólo a los delitos de delincuencia organizada, para los que la disciplina tradicional de las interceptaciones admite la actividad de captación también en lugares de residencia privada, sin necesidad de un "motivo fun-

[13] Entre otros, véase, D. Curtotti, *Il captatore informatico nella legislazione italiana*, en *Jus*, 2017, 3, pp. 382 ss.; M. Torre, *Il captatore informatico. Nuove tecnologie investigative e rispetto delle regole processuali*, Giuffrè, Milano, 2017, pp. 12 ss.

[14] Prueba de ello es que el Tribunal Supremo lleva tratando el tema desde 2009: Cass., Sec. V, 14 de octubre de 2009, núm. 16556, (CED, rv. 246954).

[15] Cass., Sect. Un., 28 de abril de 2016, núm. 26889, en *Archivio della nuova procedura penale*, 2017, pp. 76 ss.

dado para creer que allí se está realizando la actividad delictiva".

Por lo tanto, la utilización de medios de investigación encubiertos debía considerarse prohibida para todo el ámbito de los procedimientos relativos a los delitos comunes.

En estos casos – según el Tribunal de Casación – el carácter itinerante de la interceptación a distancia mediante programas informáticos de espionaje, que impide conocer de antemano los movimientos del instrumento móvil, supondría, de hecho, siempre el riesgo de que la red de investigadores acabe con comunicaciones que no pueden ser legítimamente interceptadas por tener lugar en un contexto doméstico en el que no se están cometiendo delitos[16].

Sin embargo, el legislador italiano ha ido mucho más allá. No sólo ha extendido el uso incondicional, propio de los supuestos penales asociativos, a la categoría de los delitos de corrupción contra la administración pública[17], sino que, sobre todo, ha considerado compatible el carácter fisiológicamente itinerante de los medios intrusivos con la protección reforzada, ya prevista por el Código procesal para las intervenciones ambientales dentro de los lugares domiciliarios[18]. Y ha reafirmado, así, la operatividad investigadora del *software* espia en los ámbitos de la vivienda privada, también en relación con todos los delitos comunes para los que se admite la intervención ordinaria, siempre que subsista el ulterior requisito de gravedad circunstancial respecto a la realización efectiva de la actividad delictiva en los mismos lugares reservados.

Para este fin, según el Legislador, es suficiente que la medida con la que el juez de instrucción autorice la intrusión informática indique "los lugares y el tiempo, también determinados indirectamente, en relación con los cuales se permite la activación del micrófono". Y la garantía de la inviolabilidad del domicilio se deja, en cambio, al operador individual, que tiene la tarea de identificar los lugares de residencia privada que deben

[16] F. Caprioli, *Il "captatore informatico" come strumento di ricerca della prova in Italia*, en *Revista brasileira de direito procesal penal,* 2017, vol. 3, 2, p. 497.

[17] A este respecto, véase A. Procaccino-W. Nocerino, *Le nuove investigazioni nei reati corruttivi informatici*, en *Diritto penale e processo,* 2020, p. 1626.

[18] M. Torre, *Il captatore informatico, tra riforma Orlando e sistema processuale*, en *Giurisprudenza italiana,* 2018, p. 1777.

ser retirados de la actividad de captación, ajustando para ello, el encendido del micrófono en base a lo establecido en el decreto de autorización[19].

A mi juicio, es una solución poco tranquilizadora desde el punto de vista de la eficacia de la protección del núcleo duro de los derechos fundamentales afectados por el uso del virus informático.

Parece claro, en efecto, que la opción legislativa, situando el control del juez en la sola fase de autorización de la intervención informática y no también durante la ejecución de la misma[20], es inadecuada para conjurar el riesgo de un uso anormal de la intervención[21], es decir, desproporcionado respecto a la compresión del derecho a la intimidad del domicilio que, en abstracto, se quiere preservar.

En apoyo del supuesto, basta considerar que el Tribunal Europeo de Derechos Humanos, al perfilar las garantías mínimas que los distintos legisladores nacionales deben ofrecer en materia de interceptación, incluyó precisamente la facultad de revisión *in itinere* por parte del tribunal nacional de las operaciones de captación[22].

Las perplejidades, sin embargo, no se agotan en esta observación.

Otras objeciones contra la capacidad concreta de la disciplina normativa de realizar un correcto equilibrio entre la potencial fuerza invasiva del bug informático y la inevitable lesión de los derechos fundamentales consiguiente, surgen de los expedientes, aunque meritorios, con los que el Legislador italiano pretendió remodelar el acto típico de la interceptación de las comunicaciones para adaptarlo a la captura tecnológica en cuestión[23].

En efecto, es cierto que algunas disposiciones de reciente cuño, destinadas a ga-

[19] Ver, de nuevo, TORRE, *Il captatore informatico, tra riforma Orlando e sistema processuale*, cit., pp. 1777-1778.

[20] S. FURFARO, voce «*Intercettazioni (profili di riforma)*», en *Digesto delle discipline penalistiche,* X, Utet, Torino, 2018, p. 404.

[21] En este sentido, L. AGOSTINO-M. PERALDO, *Le intercettazioni con captatore informatico: ambito di applicazione e garanzie procedurali*, en M. GIALUZ (editado por), *Le nuove intercettazioni*, en *Diritto di internet*, 2020, 3, p. 80.

[22] Tribunal europeo de derechos humanos, 18 de mayo de 2010, *Kennedy* v. Reino Unido; Id., 31 de mayo de 2005, *Vetter* v. Francia; Id., 27 de julio de 2003, *Hewitson* v. Reino Unido.

[23] Sobre este punto, véase C. CONTI, *Prova informatica e diritti fondamentali: a proposito di captatore e non solo*, en *Diritto penale e processo*, 2018, pp. 1218-1219; DANIELE, *L'illusione di domare il captatore informatico*, en *www.lalegislazionepenale.eu*, 24 de noviembre de 2020, p. 58.

rantizar que el *software* de espionaje utilizado para la recepción encubierta se limite a realizar las operaciones expresamente ordenadas según estándares adecuados de fiabilidad técnica, seguridad y eficacia[24], denotan el compromiso legislativo de oponerse a una adquisición inmoderada de datos[25] que puedan ser atacados por la intrusión informática. Y así tienden a conformar el sistema interno a los principios de cautela y protección de la integridad y autenticidad de la información captada, establecidos por la Directiva 2016/680/UE sobre protección de datos en el ámbito de la cooperación judicial y policial. Directiva que evidentemente también se aplica al caso en cuestión, realizando el uso del *software* espía un tratamiento masivo de datos personales con fines de lucha contra los delitos[26].

Se hace referencia, por ejemplo, a las prescripciones contenidas en el artículo 89, Disposiciones de aplicación del código de derecho procesal penal, en virtud del cual, entre otras cosas, se establece que el informe de las interceptaciones a distancia debe indicar el tipo de *software* utilizado, de conformidad con los requisitos técnicos establecidos con Decreto del Ministerio de Justicia y se prevé la obligación de desactivar el interceptor "con modalidades tales que lo hagan inadecuado para su uso posterior", una vez concluidas las operaciones.

Sin embargo, la cuestión es que estas prescripciones carecen de una sanción formal en el caso de una transgresión relativa[27]. Y en ausencia de sanciones específicas que garanticen su eficacia, cualquier norma procesal se convierte en una simple recomendación, de la que siempre se puede apartar en su aplicación[28].

[24] Torre, *D.M. 20 aprile 2018: le disposizioni di attuazione per le intercettazioni mediante inserimento di captatore informatico*, en *Diritto penale e processo,* 2018, p. 1256.

[25] Véase, T. Bene, *"Il re è nudo": anomie disapplicative a proposito del captatore informatico*, en *Archivio penale web*., 2019, 3, p. 5.

[26] A este respecto, véase S. Signorato, *Rimodulazioni normative dell'uso investigativo del captatore informatico*, en . Giostra-Orlandi (editado por), *Revisioni normative in tema di intercettazioni*, cit., p. 332.

[27] G. Galantini, *Profili di inutilizzabilità delle intercettazioni anche alla luce della nuova disciplina*, en *Diritto penale contemporaneo,* 16 de marzo de 2018, p. 12.

[28] Véase M. Caianiello, *To Sanction (or not to sanction) Procedural Flaws at EU Level? A Step forward in the Creation of an EU Criminal Process,* en *European Journal of Crime, Criminal Law and Criminal Justice*, 2014, p. 319; A. Marandola, *Il modello sanzionatorio tra vecchio e nuovo sistema processuale*, in Ead. (editado por), *Le invalidità processuali. Profili statici e dinamici*, Utet, Torino, 2015, p. 7.

Esto es lo que ha sucedido con respecto a los mencionados cambios normativos en materia de intervencíon mediante trojan virus.

El Legislador italiano no ha actualizado el artículo 271 que, en el Código procesal penal italiano, enumera de manera perentoria las violaciones normativas relativas al caso de interceptación, sancionadas con la inutilización de los resultados relativos[29]. Y tal omisión, lejos de reforzar las barreras protectoras de los derechos fundamentales afectados por la peculiar agresividad del instrumento de captación tecnológica, es equivalente a autorizar el máximo sacrificio, sin siquiera el exiguo consuelo de un remedio tardío, destinado a prohibir el uso probatorio de los contenidos lesivos de tales derechos[30].

3. El programa de espionaje como diligencia de investigación atípica en la práctica de la jurisprudencia

Otra cuestión distinta es que el legislador de la reforma tampoco ha previsto nada sobre las otras formas de vigilancia y control encubiertos que pueden llevarse a cabo mediante el uso del instrumento tecnológico intrusivo[31]. Como, por ejemplo, la capacidad del *software* para conseguir una verdadera búsqueda remota de los archivos del dispositivo infectado, adquiriendo una copia de todo su contenido[32].

De este modo, se deja al intérprete entender si tal comportamiento silencioso equivale o no a excluir el uso investigativo del *software* de espionaje para las demás fun-

[29] La observación es de GALANTINI, *Profili di inutilizzabilità delle intercettazioni anche alla luce della nuova disciplina*, cit. p. 12; en sentido análogo, DANIELE, *L'illusione di domare il captatore informatico*, cit., p. 59, quien habla a este respecto de "*leges minus quam perfectae*".

[30] En un sentido compartido, L. PARLATO, *Le perquisizioni* on-line*: un tema che resta un tabù*, en Giostra-Orlandi (editado por), *Revisioni normative in tema di intercettazioni,* cit., p. 368.

[31] En dicha omisión encuentran una auténtica limitación de la intervención legislativa D. CURTOTTI-W. NOCERINO, *Le intercettazioni tra presenti con captatore informatico*, in G.M. Baccari- C. Bonzano-K. La Regina-E.M. Mancuso (editado por), *Le recenti riforme in materia penale*, Cedam, Padova, 2018, p. 544.

[32] Sobre el tema, véase, entre otros, CONTI-TORRE, *Spionaggio informatico nell'ambito dei* social network, en Scalfati (editado por), *Le indagini atipiche*, cit., p. 535 ss.; P. FELICIONI, *Le fattispecie "atipiche" e l'impiego processuale*, en T. Bene (a cargo de), *L'intercettazione di comunicazioni*, Cacucci, Bari, 2018, p. 303 ss.; E.M. MANCUSO, *La perquisizione* on-line, en *Jus*, 2017, 3, p. 414 ss.; PARLATO, *Problemi insoluti: le perquisizioni* on-line, en Giostra-Orlandi (editado por), *Nuove norme in tema di intercettazioni*, cit., pp. 289 ss.

ciones mencionadas anteriormente.

En este sentido, hay que decir que basándose en la correcta interpretación de las disposiciones del procedimiento penal[33] como límites a la acción de la autoridad procesal sería bastante fácil responder afirmativamente a la cuestión recién formulada[34]. Consecuencia de lo anterior es que todo lo que no está expresamente regulado dentro de las prescripciones normativas vigentes estaría implícitamente prohibido, precisamente por exceder los límites canónicos de la liturgia procesal.

No obstante, la jurisprudencia no se ha pronunciado hasta ahora en el mismo sentido.

El Tribunal de Casación italiano, en particular, ha sostenido que es legítimo registrar a distancia el dispositivo afectado por el virus, llevando a la categoría de prueba atípica a que se refiere el artículo 189 del Código procesal penal (CPP) la obtención -mediante un *software* espia- de la documentación informática memorizada en el ordenador personal en uso por el acusado (...), si la medida se ha referido a la extrapolación de datos, que no tienen por objeto un flujo de comunicaciones, ya formados y contenidos en la memoria del ordenador personal o que habrían sido memorizados en el futuro[35].

Esta suposición merece un poco más de atención.

Muy resumidamente, con dicha disposición el legislador italiano ha previsto la posibilidad de que el juez admita en el juicio pruebas no reguladas por la ley para abrir el proceso penal a nuevas formas de conocimiento, en constante ajuste al desarrollo tecnológico que amplía las fronteras de la investigación[36].

Para ello, el citado artículo 189 CPP exige la observancia de un triple orden de

[33] Así, MAZZA, *Amorfismo legale e adiaforia costituzionale nella nuova disciplina delle intercettazioni*, en ID., *Tradimenti di un codice*, cit., p. 154.

[34] Se sigue aquí el planteamiento de G. ILLUMINATI, *Libertà e segretezza delle comunicazioni*, en *Cassazione penale,* 2019, p. 3830, según el cual debe deducirse, en base al principio de taxatividad, que lo que no está expresamente permitido debe considerarse prohibido.

[35] Cass., Sec. V, 14 de octubre de 2009, núm. 16556 (CED, rv. 246954); en sentido similar, Cass., Sec. V, 30 de mayo de 2017, núm. 48370 (CED, rv. 271412).

[36] Así, *Relazione al Progetto preliminare del 1988*, en G. CONSO-V. GREVI-G. NEPPI MODONA, *Il nuovo codice di procedura. Dalle leggi ai decreti delegati, IV, Il progetto preliminare del 1988*, Cedam, Padova, 1990, p. 533.

condiciones. Debe ser una aportación probatoria "idónea para asegurar la averiguación de los hechos"; es necesario que la asunción relativa no "perjudique la libertad moral de la persona" afectada; es necesario, finalmente, que antes de proceder a la admisión, el Juez "sentencie a las partes sobre la modalidad de asunción de la prueba".

Por lo tanto, es a la luz de cada uno de estos requisitos legales que es necesario examinar los méritos del enfoque jurisprudencial descrito anteriormente, inclinado a permitir el uso investigativo multiforme de la escucha informática, como medio atípico de investigación de la prueba[37].

Ahora bien, si no parece haber dudas sobre la capacidad del instrumento tecnológico en cuestión para aportar una contribución decisiva a la reconstrucción de los hechos investigados[38], parece, en cambio, mucho más problemático sostener su cumplimiento de las otras dos condiciones exigidas por la ley procesal.

Por un lado, es oportuno recordar que la inoculación del *software* de espionaje dentro del dispositivo de destino, que tiene lugar, con frecuencia, con la colaboración inconsciente del destinatario, engañado por un enlace presente en un correo electrónico o por una solicitud de actualización de una aplicación, es capaz de realizar los propios extremos de una violación de la libertad moral de la persona implicada[39].

De hecho, al descargar el virus informático sin saberlo, la persona que tiene acceso al dispositivo infectado acaba realizando una acción potencialmente autoinculpatoria, en clara violación del canon "*nemo tenetur se detegere*"[40]. Principio que, en los

[37] En una opinión coincidente, M. Bontempelli, *Il captatore informatico in attesa della riforma,* en *Diritto penale contemporaneo,* 14 de diciembre de 2018, p. 14.

[38] Véase Caprioli, *Il "captatore informatico" come strumento di ricerca della prova in Italia*, cit., p. 486; Mazza, *La verità giudiziale nel sistema delle prove tecnologiche,* cit., p. 18; Torre, *Il captatore informatico. Nuove tecnologie investigative e rispetto delle regole processuali*, cit., p. 69.

[39] De esta opinión, Bontempelli, *Il captatore informatico in attesa della riforma,* cit., pp. 14-15; R. Brighi, *Funzionamento e potenzialità investigative del* malware*,* cit., p. 219; Signorato, *Le indagini telematiche*, cit., pp. 237-238. Sin embargo, según la jurisprudencia del Tribunal Supremo italiano, el virus informático no ejerce ninguna presión sobre la libertad física y moral de la persona, no pretende manipular ni forzar una aportación declarativa, sino que, dentro de los estrictos límites en que se permiten las interceptaciones, capta las comunicaciones entre terceras personas, en su genuinidad y espontaneidad: Cass., Sec. V, 30 de septiembre de 2020, núm. 31604, en *www.dirittoegiustizia.it*, 12 de noviembre de 2020.

[40] Lo señala, de nuevo, Signorato, *Le indagini telematiche*, cit., p. 237.

sistemas procesales liberales, tiene como objetivo proteger los actos y las palabras del individuo de formas perjudiciales para el derecho a un ofrecimiento voluntario a los órganos de investigación[41].

Por otro lado, parece algo cuestionable que el uso atípico de los medios tecnológicos intrusivos logre satisfacer el estándar necesario de interlocución con las partes del juicio interesadas por el empleo relativo, al que alude el mencionado artículo 189 del Código procesal penal.

En este sentido, basta considerar la posición de clara inferioridad argumental, frente a la contraparte pública, en la que, en tal caso, se ve obligado el abogado del demandado. Este último, al que la jurisprudencia italiana atribuye la carga de probar que, en el caso concreto, la tecnología de investigación utilizada ha comprometido la fiabilidad del elemento cognoscitivo que se haya podido adquirir[42], debería poder tener libre acceso a la información relativa al *software* mediante el cual se tomaron las pruebas y a las técnicas forenses adoptadas para ello por los investigadores[43].

El condicional, sin embargo, es obligatorio, ya que en presencia de pruebas algorítmicas[44], como las que se forman a través del *software* de espionaje, la defensa suele sufrir considerables dificultades en cuanto al conocimiento del código fuente que gobierna el modelo computacional con el que se han elaborado los datos, del que se pretende falsear la exactitud[45].

La razón es que el programa en la base del agente intruso basa su eficacia en el secreto de su funcionamiento; mientras que la posibilidad de conocer las instrucciones del programa permitiría a cualquier persona con un mínimo de conocimientos técnico-

[41] Lupária, Privacy, *diritti della persona e processo penale*, en *Rivista di diritto processuale,* 2019, p. 1465.

[42] Cass., Sec. III, 28 de mayo de 2015, núm. 37644, (CED, rv. 265180); Id., Sec. I, 5 de marzo de 2009, núm. 14511, (CED, rv. 243150).

[43] Sobre este punto, véase F. Palmiotto, *Captatori informatici e diritto alla difesa. Il caso Exodus*, en *www.lalegislazionepenale.eu*, 16 ottobre 2020, p. 19.

[44] Desde un punto de vista monográfico, para todos, remítase al reciente estudio de S. Quattrocolo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings*, Springer, 2020.

[45] Quattrocolo, *Equità del processo penale e* automated evidence *alla luce della Convenzione europea dei diritti dell'uomo,* en *Revista Italo-Espanola de Derecho Procesal*, vol. I, 2019, p. 120; al respecto, véase también V. Manes, *L'oracolo algoritmico e la giustizia penale: al bivio tra tecnologia e tecnocrazia*, en *disCrimen*, 15 de mayo de 2020, p. 14.

informáticos tomar las contramedidas adecuadas para burlarlo[46].

Este régimen de secreto se traduce en la imposibilidad, para la defensa, de verificar, *a posteriori*, la salida del algoritmo[47]. Lo cual, no sólo evoca una representación extrema de la posible violación de la igualdad de armas[48] entre las contrapartes del juicio, sino que, sobre todo, comprime la garantía del contrainterrogatorio, entendido también como una verificación póstuma sobre la corrección de la investigación informática[49].

4. La legalidad formal como única protección contra las interferencias tecnológicas en la investigación penal

Pero es en el plano constitucional donde se plantean las cuestiones más críticas.

La Constitución italiana, de hecho, prohíbe el uso de instrumentos atípicos para la búsqueda de pruebas siempre que afecten a derechos individuales definidos como inviolables por la propia Constitución: es decir, la libertad personal, la intimidad del hogar y el secreto de las comunicaciones[50].

En cada uno de estos ámbitos, además de la reserva de competencia al poder jurisdiccional único, la Carta Fundamental exige que sea la ley ordinaria la que establezca con precisión en qué casos, con qué modalidades y con qué garantías se pueden violar

[46] Así lo destaca G. Ziccardi, *Il captatore informatico nella "riforma Orlando": alcune riflessioni informatico-giuridiche*, en *Archivio penale,* 2018, 1, Speciale Riforme, p. 506. A este respecto, véase además Brighi, *Requisiti tecnici, potenzialità e limiti del captatore informatico*, cit., p. 255.

[47] Otra vez, Quattrocolo, *Equità del processo penale e* automated evidence *alla luce della Convenzione europea dei diritti dell'uomo*, cit., p. 120.

[48] De esta opinión, Quattrocolo, *Qualcosa di meglio del diritto (e del processo) penale?,* in *disCrimen*, 26 de junio de 2020, p. 7.

[49] En este sentido, Felicioni, *Le ispezioni e le perquisizioni*, en G. Ubertis-G.P. Voena (dirigido por), *Trattato di procedura penale,* vol. XX, Giuffrè, Milano, 2012, p. 245. Pero la literatura procesal penal sobre el punto es muy amplia: entre otros, véase R. Kostoris, *Ricerca e formazione della prova elettronica: qualche considerazione introduttiva*, en F. Ruggieri-L. Picotti (editado por), *Nuove tendenze della giustizia penale di fronte alla criminalità informatica: aspetti sostanziali e processuali*, Giappichelli, Torino, 2011, p. 181; L. Lupária, *La disciplina processuale e le garanzie difensive*, en Lupária-Ziccardi (editado por), *Investigazione penale e tecnologia informatica,* Giuffrè, Milano, 2007 cit., p. 128; L. Marafioti, Digital evidence *e processo penale*, cit., p. 4509; Pittiruti, Digital Evidence e *procedimento penale*, cit., pp. 161 ss.

[50] En este sentido se manifiesta Caprioli, *Il "captatore informatico" come mezzo di ricerca della prova in Italia*, cit., p. 487; Conti-Torre, *Spionaggio digitale nell'ambito dei* social network, cit., p. 536.

los derechos en cuestión[51].

Las limitaciones en la esfera individual causadas por el uso investigativo de *software* de espionaje ciertamente no escapan al alcance de tal prohibición constitucional.

Los múltiples servicios ofrecidos por el dispositivo de captación, que permiten a los investigadores vigilar a distancia, en secreto y sin límites espacio-temporales, cualquier actividad del sujeto pasivo, representan una amenaza actual para las renovadas instancias de confidencialidad que la modernidad pone en la protección del individuo informatizado[52].

En particular, la vigilancia continua y oculta que proporcionan los programas de espionaje ataca la intimidad de la esfera doméstica informática[53] que, hoy en día, cada uno de nosotros ocupa dentro del universo digital.

Como subraya la doctrina, la actual sociedad cibernética ha delimitado las fronteras de un espacio virtual "doméstico" sin precedentes, dentro del cual los usuarios individuales deben poder manifestar y desarrollar libremente su propia personalidad, protegidos de ojos y oídos indiscretos[54].

Así pues, ha surgido una nueva libertad fundamental, que merece una protección según las normas constitucionales al menos a la par que la inviolabilidad del domicilio físico sancionada por el artículo 14 de la Constitución italiana[55].

De ahí que la conclusión del razonamiento sea obligatoria.

Cualquier injerencia investigadora en el domicilio informático, afectando a un derecho subjetivo inviolable cuya limitación no ha sido regulada aún por la ley proce-

[51] Caprioli, *Il "captatore informatico" come strumento di ricerca della prova in Italia*, cit., p. 487.

[52] Véase W. Nocerino, *Il captatore informatico: un giano bifronte*. *Prassi operative* vs *risvolti giuridici*, en *Cassazione penale,* 2020, p. 830.

[53] Sobre el domicilio informático como bien fundamental afectado por las intrusiones tecnológicas, véase A. Camon, *Cavalli di Troia in Cassazione,* en *Archivio della nuova procedura penale,* 2017, 1, p. 95; F. Caprioli, *Tecnologia e prova penale: nuovi diritti e nuove garanzie*, cit., p. 49; Parlato, *Problemi insoluti: le perquisizioni* online, en Giostra-Orlandi (editado por), *Nuove norme in tema di intercettazione*, cit., p. 302; Ead., *Le perquisizioni* on-line: *un tema che resta un tabù*, en Giostra-Orlandi (editado por), *Revisioni normative in tema di intercettazioni*, cit., p. 350.

[54] En estos términos, Caprioli, *Tecnologia e prova penale: nuovi diritti e nuove garanzie*, cit., p. 49.

[55] Se sigue la opción de Conti, *Sicurezza e riservatezza,* cit., p. 1575.

sal[56], es constitucionalmente inaceptable[57]. De hecho, vulnera la reserva legislativa que la Constitución italiana establece como límite insuperable para que la autoridad judicial pueda suprimir una libertad fundamental, de acuerdo con el principio de proporcionalidad de los medios al fin[58].

Este principio representa un corolario de la propia inviolabilidad de las prerrogativas individuales puestas en peligro por el ejercicio de los poderes de búsqueda de pruebas en el proceso penal[59]. Opera, en primer lugar, respecto del legislador, obligándole a seleccionar los requisitos procesales idóneos para interferir en la esfera individual y, después, se refleja en el juez llamado a elegir la opción jurídica menos gravosa en el caso concreto[60].

Se trata de un "orden de precedencia" que no es en absoluto casual y que ha de tenerse en la debida consideración, sobre todo, en presencia de intentos jurisprudenciales, análogos a los descritos anteriormente, dirigidos a justificar el uso de técnicas de investigación intrusiva en el ámbito privado, también con independencia de los dictados normativos.

No hay que subestimar el riesgo de que si se invierte el citado orden de prelación y es el mismo órgano judicial el que encuentra por sí mismo la regla de proporcionalidad en concreto, prescindiendo de la norma fuente[61], el mencionado canon de proporcio-

[56] Ver R. Orlandi, *Usi investigativi dei cosiddetti captatori informatici*, in *Rivista italiana di diritto e procedura penale*, 2018, p. 542.

[57] A título indicativo: A. Capone, *Intercettazioni e Costituzione: problemi vecchi e nuovi*, en *Cassazione penale,* 2017, p. 1266; Illuminati, *Libertà e segretezza delle comunicazioni*, cit., p. 3832; Signorato, *Rimodulazioni normative dell'uso investigativo del captatore informatico*, cit., p. 324.

[58] Orlandi, *Usi investigativi dei cosiddetti captatori informatici»*, cit., p. 544; Id., *La riforma del processo penale fra correzioni strutturali e tutela "progressiva" dei diritti fondamentali*, en *Rivista italiana di diritto e procedura penale,* 2014, p. 113.

[59] Tal como afirma el Tribunal Constitucional italiano este principio constituye un requisito del sistema para cualquier medida del poder público que afecte a los derechos de la persona, a la luz del artículo 3 de la Constitución. Ver Tribunal Constitucional, 27 de febrero de 2019, núm. 24, en *Giurisprudenza costituzionale* 2019, p. 292.

[60] En este sentido Caianiello, *Il principio di proporzionalità nel procedimento penale*, en *Diritto penale contemporaneo – Rivista trimestrale*, 2014, 3-4, p. 148; G. Ubertis, *Equità e proporzionalità* versus *legalità processuale: eterogenesi dei fini?*, en *Archivio penale*, 2017, 2, p. 392.

[61] D. Negri, *Compressione dei diritti di libertà e principio di proporzionalità davanti alle sfide del processo penale contemporaneo*, en *Rivista italiana di diritto e procedura penale,* 2020, p. 27.

nalidad podría emplearse para gestionar libremente y bajo la bandera de la eficacia operativa, medios dotados de una enorme capacidad para socavar las libertades del individuo[62].

En ausencia de un estatuto normativo previo que fije distintamente los límites del ejercicio proporcionado del poder restrictivo de los derechos inviolables, el juez no está obligado a revisar si el acto intrusivo se aparta del esquema legal típico, sino las consecuencias en términos concretos producidas por la injerencia probatoria en las prerrogativas del destinatario[63]. De esa manera, se ve colocado en la condición de establecer discrecionalmente el régimen de compresión del derecho individual afectado por la acción investigadora[64].

Y – hay que decirlo – cuando falta una base jurídica sólida, la libertad de decisión cae inevitablemente en la arbitrariedad[65].

El riesgo, en esencia, es que los equilibrios de la balanza subyacente al canon de proporcionalidad acaben dependiendo sólo de la mayor o menor inclinación del magistrado a proteger las garantías individuales, en lugar del interés colectivo en la represión de los delitos.

Tampoco tranquiliza frente a tal riesgo de arbitrariedad jurisdiccional la referencia al estándar mínimo y obligatorio de protección de la esfera individual previsto en el artículo 8 CEDH, cuya operatividad en el ámbito interno como norma de rango subconstitucional[66] eleva el citado artículo al papel de parámetro orientador del juez

[62] Véase, de nuevo, Negri, *ibidem*.

[63] El concepto trascrito en el texto evoca similitudes con la deriva jurisprudencial sufrida por la declaración de nulidad de los actos procesales sobre la base de la teoría del perjuicio real de los intereses protegidos por la norma vulnerada sobre la que, por todos, véase Caianiello, *Premesse per una teoria del pregiudizio effettivo nelle invalidità processuali penali*, Bup Bologna, 2012.

[64] Ver en el mismo sentido E. Andolina, *La raccolta dei dati relativi alla localizzazione del cellulare ed al traffico telefonico tra inezia legislativa e supplenza giurisprudenziale*, en *Archivio penale web*, 2020, 3, p. 17; F. Nicolicchia, *Il principio di proporzionalità nell'era del controllo tecnologico e le sue implicazioni rispetto ai nuovi mezzi di ricerca della prova*, en G. Dodaro-E.M. Mancuso (dirigido por), *Uguaglianza, proporzionalità e solidarietà nel costituzionalismo penale contemporaneo*, Edizioni DipLap, Milano, 2018, p. 197.

[65] Así, efectivamente, O. Mazza, *Il crepuscolo della legalità processuale al tempo del giusto processo*, en *Criminalia*, 2016, p. 336.

[66] Se hace referencia a la reconstrucción elaborada por las sentencias "gemelas" del Tribunal Constitucional italiano,

nacional llamado a afectar, con su propia medida, un derecho inviolable del individuo[67].

Es indudable que la citada disposición convencional contempla la posibilidad de injerencias autoritarias en la vida privada sólo si están previstas por la ley y constituyen una medida que, en una sociedad democrática, es necesaria [entre otras cosas] para la defensa del orden público y la prevención de los delitos. De este modo, vincula el juicio de proporcionalidad de la injerencia a la comprobación de la existencia de una disposición legal concreta que le da la base justificativa[68].

Sin embargo, es igualmente cierto que esta disposición no sólo es relevante en su dimensión literal. La garantía fijada por el citado artículo 8 del CEDH se ve, de hecho, afectada por los "humores cambiantes"[69] del Tribunal Europeo de Derechos Humanos, cuya labor hermenéutica constituye una linfa vital para los preceptos del Convenio[70]. Y, precisamente en lo que se refiere al uso investigativo de instrumentos técnicos intrusivos y de vigilancia electrónica, la jurisprudencia europea tiende a oscilar ambiguamente.

Los jueces europeos expresan a veces su firme desaprobación de las operaciones invasivas en la vida privada que no se apoyan en una base jurídica suficientemente analítica[71] o se llevan a cabo de una manera que, en la práctica, no respeta el principio de proporcionalidad[72]; otras veces consideran perfectamente compatibles con las garantías convencionales las intrusiones en la esfera individual operadas mediante intervenciones y tecnologías de vigilancia masiva funcionales a la seguridad del Estado, incluso en au-

24 de octubre de 2007, núm. 348 y 27 de octubre de 2007, núm 349, en *Giurisprudenza costituzionale,* 2008, pp. 3475 ss. y pp. 3535 ss.

[67] Ver Caianiello, *Il principio di proporzionalità nel procedimento penale*, cit., p. 159.

[68] Nicolicchia, *Il principio di proporzionalità nell'era del controllo tecnologico e le sue implicazioni rispetto ai nuovi mezzi di ricerca della prova*, cit., p. 186.

[69] Caprioli, *Tecnologia e prova penale: nuovi diritti e nuove garanzie*, cit., p. 51.

[70] A este respecto, véase Daniele, *Norme processuali convenzionali e margine di apprezzamento nazionale*, en *Cassazione penale,* 2016, p. 1690.

[71] Tribunal europeo de derechos humanos, 27 de abril de 2017, *Sommer* v. Alemania.

[72] Tribunal europeo de derechos humanos, 30 de mayo de 2017, *Trabajo Rueda* c. España; Id., 27 aprile 2017, *Sommer* c. Alemania, cit.

sencia de una autorización judicial previa del acto intrusivo[73].

Esto explica bien, por tanto, que la importación a la práctica judicial de esquemas interpretativos y decisorios propios del Tribunal Europeo de Derechos Humanos no puede ser el antídoto contra el riesgo de ataques indebidos a los derechos fundamentales derivados del ejercicio de poderes probatorios tecnológicamente insidiosos[74].

Por el contrario, la volatilidad hermenéutica de la jurisprudencia europea, que opera sin hechos, sólo sobre la base de principios[75], constituye una prueba definitiva de que no es muy conveniente confiar, caso por caso, a los jueces individuales, el papel de guardianes efectivos de los bienes individuales, fuera de un contexto normativo preciso de referencia[76].

Y esto, está claro, no implica ninguna desconfianza irreverente hacia el buen sentido y el espíritu de equidad de los órganos del poder judicial. Se trata más bien de llamar la atención sobre el sentido mismo de la inviolabilidad de los derechos fundamentales de la persona. Estos derechos, para no resolverse en meras expectativas de protección, susceptibles de un tratamiento, de vez en cuando, incluso discriminatorio, sólo pueden ser aplicados por una ley formal y ordinaria para que sean iguales para todos[77].

[73] Tribunal europeo de derechos umanos, 13 de septiembre de 2018, *Big Brother Watch* et al. v. Reino Unido; Id., 19 de junio de 2018, *Centrum för Rättvisa* v. Suecia.

[74] Para conclusiones similares, véase Daniele, *Indagini informatiche lesive della riservatezza. Verso un'inutilizzabilità convenzionale?*, en *Cassazione penale,* 2013, p. 372.

[75] M. Nobili, *Torbide fonti e adorati errori*, en *Critica del diritto*, 2012, p. 164.

[76] Criticando una tarea similar encomendada al juez penal, Caprioli, *Il giudice e la legge: il paradigma rovesciato*, en *Indice penale,* 2017, p. 969; Negri, *Splendori e miserie della legalità processuale. Genealogie culturali,* ethos *delle fonti, dialettica tra le corti,* en *Archivio penale web,* 2017, p. 454.

[77] En un sentido plenamente compartido, Mazza, *Il crepuscolo della legalità processuale,* cit., p. 338. Véase también, P. Ferrua, *Il giusto processo tra governo della legge ed egemonia del potere giudiziario,* en *Diritto penale e processo,* 2020, p. 13.

GIULIA VALENTI

THE COVID-19 PANDEMIC AND THE FREEDOM TO EXERCISE RELIGION: THE DECISION OF THE FRENCH COUNCIL OF STATE

ABSTRACT. *With Decision no. 452144 of 6 May 2021, the Council of State rejected the preliminary application to suspend the curfew during the night between 7 and 8 May for the celebration of the "Night of the Destiny," the most important Muslim occasion. The decision must balance the freedom to the exercise of religion with the fight against the COVID-19 pandemic.*

With an urgent application sought to the *Conseil D'Etat*, the *Grande Mosquée de Paris* and two religious associations asked for the authorization to suspend the curfew during the night between 7 and 8 May in order to celebrate the *Qadr Night*. The celebration, named also *the Night of Destiny*, is celebrated by praying all night long and is one of the most important events in the Islamic religion, one of the last nights of Ramadan in which, according to the Islam religion, the Koran was revealed.

A previous request of exception was sought by the applicants to the Ministry of the Interior on 21 April, asking for a suspension of the curfew in order to celebrate the occasion, as it was already decided for the Christmas celebration; unfortunately, the submission was denied due to the high risks related to the evolution of the COVID-19 pandemic. In April 2021, France was in fact facing the peak of the third wave with roughly 34,000 new cases,[1] a risk higher than the one at the end of the year.

Facing the first rejection, the *Grande Mosquée* de Paris, the *Société des Habous et Lieux Saints de l'Islam* and the *Fédération de la Grande Mosquée de Paris* released a preliminary injunction claiming a suspension of the curfew between 9 p.m. and 2 a.m. of the night between 7 and 8 May in order to participate in the ceremony for the Night of the Destiny, the Qdar Night. The request was based on two main arguments: the respect of the measures to avoid contagions and the principle of equality between religions.

The applicants asserted that they would have been able to respect the strict social distancing rules in order to prevent new cases, stressing the point that, despite the trend of the pandemic that had been perpetuating for months, there was no evidence of any outbreak in any Mosque, so the risk of new clusters would have been very low.

The second claim was related to the breach of the principle of equality between religions and specifically to the free exercise of religion, arguing that several exceptions of the restrictions in action had already been taken for the Christmas Eve and Easter celebrations, and there would not been any reason not to provide another suspension for the *Night of Destiny*.

With Decision no. 452144 of 6 May 2021, the Council of State followed Article

[1] <https://www.data.gouv.fr/fr/organizations/sante-publique-france/>.

1 of the French Constitution, Art. 9 of the European Convention on Human Rights, and Articles 1 and 25 of the law of separation between the State and Religion of 9 December 1905, according to which anyone has the right to manifest his/her religion in public, the only limitation permitted to the free exercise is the control of Public Authority, necessary to ensure public order.

The decision rejected the request with several arguments, firstly the Council stated that there was no reason to doubt that the exercise of religion is a fundamental right, but it must be reconciled with the protection of public health, so the respect of the freedom of exercise of religion must be balanced with the evolution of the pandemic. The Council also stated that that the trend of the pandemic was still very dangerous in the Country, decreasing but still higher than in December 2020, with an incidence rate of 279,1 cases every 1,000,000 people; they thus decided to reject the request.

As second argument, the decision provided the efficiency of the curfew measure, stressing the point that other Mosques already adopted strict measures to prevent the pandemic diffusion, also by using electronic devices that could transmit the ceremony so to allow people to take part in the ceremony.

At last, the lack of necessity of an exception was demonstrated also by the fact that the French Minister of the Interior had decided to anticipate the curfew from 7 a.m. to 6 a.m. to permit the first pray of the morning during Ramadan.

The decision of the Council of State is strongly related to the pandemic trend, but at a more accurate analysis the two celebrations might be very close one to another; in fact, it appears that France suspended the curfew for Christmas eve with more than 21,600 cases a day and more than 24,600 total hospitalizations, against the 21,700 new cases and 26,900[2] total hospitalization of 6 May, while France was exiting from the third wave of the pandemic.

Furthermore, the number of people who would benefit from the exception requested would have been very different, with a related different risk of new clusters. France in 2020 counted over 37,000 Catholics and over the 5,400 Muslims (statista.com) causing a noticeably lower movement of people with a consequent re-

[2] <https://www.data.gouv.fr/fr/organizations/sante-publique-france/>.

duction in the risk of new outbreaks compared to the Christmas celebrations.

The decision is also interesting in comparison to a similar case of the Supreme Courte of the U.S.A., The Roman Catholic Diocese of Brooklyn, New York, Applicant v. Andrew M. Cuomo, which stated a suspension of the social distancing measure pursuant to the right to exercise religion. On 12 November 2020, The Roman Catholic Diocese of Brooklyn and two Orthodox Jewish synagogues sought an application to block the impositions of the executive decree that imposed restrictions to indoor gatherings, including places of worship. The reasoning of the Supreme Court is based on the same principles: the freedom of exercise of religion, the right to health and the effectiveness of restrictions, but the conclusions are opposite. The Supreme Court enjoined the severe restrictions against the freedom of exercise religion, considering the right to exercise religion a fundamental right provided by the Constitution that cannot be restricted even temporally and even with the use of technology, which was considered not sufficient.

It is interesting to underline that while in the fluctuating trend of the pandemic, the temporary of the restrictions are considered a right compromise between the right to exercise religion and the battle against COVID, in the French case, in the American case the uncertainty of the measure are considered a potential limit of the right to freely exercise religion, an unacceptable risk of breaching of the right of exercise religion.

BRUNO PAOLO AMICARELLI[*]

ITALIAN GOLDEN POWERS AND THE ROLE OF INDEPENDENT AUTHORITIES

ABSTRACT. *With the judgment in question, the Regional Administrative Tribunal for Lazio, Section I, helped define the role of the independent authorities within the administrative procedure aimed at exercising the so-called special powers referred to in law-decree n. 21/2012. The judge sanctioned the principle that the opinions rendered by independent authorities during the investigation phase must necessarily be issued by competent bodies and the final provision cannot be limited to reproducing the content of those opinions in its entirety. The court also reported the possible infringement of the principle of legality deriving from a golden power decision that stealthy expands the definition of "strategic asset." This definition, in fact, constitutes a prerequisite for the exercise of power that can only be identified by the law and by the implementing regulations.*

[*] Postdoctoral Researcher, Administrative Law, Law Department, Roma Tre University.

In 2018 the company Reti Telematiche Italiane S.p.A. (hereinafter Retelit) challenged the decree of the President of the Council of Ministers (d.P.C.M) of 7 June 2018, with which the Presidency exercised the golden power, i.e., the special screening powers provided for by the law-decree of 15 March 2012, n. 21, imposing on the company specific prescriptions and conditions, as well as the sanctions which derived to the non-fulfillment of the aforementioned prescriptions. The company, in fact, renewed the Board of Directors in 2018 and informed the Government of this change, since it feared that the corporate reform might have been under the scope of golden powers.

However, Retelit considered this administrative decision to be unlawful because of some procedural defects. Among those, the administrative decision would have been adopted on the basis of an assumption, the availability to Retelit of strategic assets, ascertained during the administrative procedure through technical considerations expressed by a body, the Secretary General of the Authority for Communications Guarantees (AgCom), lacking the competence to pronounce. Therefore, Retelit claimed the unlawfulness of the administrative decision in the part in which it would have identified new and different strategic assets than those included in the list of categories referred to in Art. 3 of the Presidential Decree n. 85 of 2014, thus violating Art. 2 of law-decree n. 21/2012, which provides that strategic assets can be identified only by law or through Government's subsidiary legislation. On the basis of these and other reasons, the Regional Administrative Tribunal for Lazio granted the appeals and annulled the administrative decision with decision n. 8742/2020.

The case in question allows us to carry out some reflections on the procedure for the exercise of the golden powers, since the decision was annulled by the judge because "the investigation carried out by the administration is unlawful since the evaluation about the "strategic nature" of the assets in Retelit's availability was based on an opinion of the AgCom issued by a subject lacking the competence to adopt it."

In general, the special powers referred to in law-decree n. 21/2012 are exercised through the issuance of a d.P.C.M. adopted collectively by the Council of Ministers. The d.P.C.M. can have various types of content: it can impose a veto on changes in the corporate governance and on the purchase of company's shares or it can consist in the provision of prescriptions and conditions for the economic activity.

The structure of the screening procedure has a profound influence on the rela-

tionship between the administration and private parties in the exercise of special powers. It is based on inter-ministerial coordination. The subjects who carry out an economic activity which may be subject to the exercise of the golden powers are required to notify the initiation or the intention to initiate them, within rather rigid deadlines, so that the Government can proceed with an investigation. Where the notification is actually sent, the Department for Administrative Coordination transmits it together with the documentation received to the offices of the responsible Ministries, to the President of the Council and to the members of the coordination group.

The investigation, of course, is that phase of the administrative procedure in which the facts are ascertained and the interests, public and private, are acquired, so that they can be evaluated by the public administration for the purpose of adopting a decision. In the case of the golden powers, this phase takes place in the very short term for the exercise of power for his experiment (thirty or forty-five days).

The Ministry responsible for the investigation, in the light of the findings that emerged at the meeting of the coordination group, sends the motivated proposal on the exercise of special powers to the Department for administrative coordination, to the President of the coordination group and to the other responsible Ministries. It will then be the Department for Administrative Coordination, having received the proposal, if it detects the exercise of special powers, to eventually submit the draft decree to the resolution of the Council of Ministers. The Ministry responsible for the investigation and the proposal, also taking into account any indications from the Presidency of the Council of Ministers or other interested Ministries, if he deems it necessary for the purposes of the assessment, may suspend the procedure and request clarifications or supplementary documentation to the notifying subject. In the same way, the Government can also request information and opinions from third parties.

On the other hand, despite the complex structure of the procedure, the involvement of various ministerial structures and the possibility of requesting information and opinions to external parties, some critical voices found the procedure to be flawed by a substantial lack of expertise, due to the fact that the investigation is mainly based on the means available to the responsible Ministry.

In order to fill any gaps in expertise, following the multiple reforms of the legislation on golden power, art. 2-bis of legislative decree n. 21/2012 today provides, in

the first paragraph, that the Bank of Italy, the Consob, the Supervisory Commission on Pension Funds, the Insurance Supervisory Institute, the Transport Regulatory Authority, the Italian Competition Authority, the Authority for Communications Guarantees, the Regulatory Authority for Energy, Networks and the Environment and the coordination group established pursuant to Article 3 of the Prime Minister's Decree of 6 August 2014 collaborate between them, including through the exchange of information, in order to facilitate the exercise of the functions referred to in the decree.

The second part of this article reiterates what is already provided for by other legal provisions, such as that in order to collect elements useful for the exercise of golden powers, the coordination group may request public administrations, public or private bodies, companies or others third parties who are in possession of it, to provide information and exhibit documents. The last part of the article, moreover, states that for the same purposes, the Presidency of the Council may enter into agreements or memoranda of understanding with research institutes or bodies.

The changes introduced in the body of the law-decree which regulates golden power, therefore, seem inspired by the desirable purpose of allowing a thorough investigation also through the collaboration of entities different from those that exercise the power. The effectiveness of these reforms can only be fully assessed over time, for example by analyzing the annual reports on the exercise of the golden power.

The examined case, however, is currently very useful for evaluating the possible degenerations of this model. The need, on the part of the coordination group, to rely on external subjects to make up for the lack of expertise, in fact, led to the aforementioned censorship by the Administrative Tribunal. This is because the Government requested a "technical report" from AgCom on the basis of which, after an examination of the assets available to Retelit, those assets were considered as strategic. If the request for an opinion to the independent authorities today is, as noted, admitted and promoted by law-decree n. 21/2012, especially following the introduction of Art. 2-bis, in this case the opinion of AgCom, however, played a very particular role.

In fact, although not mandatory, it was of central importance for ascertaining the existence of the objective prerequisite for the exercise of special powers. This is evident from the fact that, in addition to being expressly mentioned among the contributions taken into account in the investigation, its content has been almost faithfully

transcribed, both in the descriptive and in the evaluative part, of both the proposal of the Ministry of economic development of 7 June 2018, and the final administrative decision (the appealed d.P.C.M.). However, law-decree n. 21/2012 provides that the strategic assets are identified with Government's regulations, while there are no particular rules that attribute to the General Secretary of AgCom the task of interpreting, through an opinion, the content of laws and regulations, identifying new assets as strategic ones.

This story, therefore, should underline the importance of providing sufficient knowledge to the administrations which directly exercise special powers also in order to avoid problems capable, as in the case in question, of compromising the entire procedural chain and the final decision.

In this sense, it seems appropriate to reflect on the fact that the Committee on Foreign Investment in the United States (CFIUS) provides for the participation in the investigation of subjects who do not belong directly to the ministerial bureaucracy, but extends its borders only to a limited extent and very rarely to independent Authorities. The Committee, in fact, is made up of various ministers of the Federal Government: the Secretaries of the Treasury, Commerce, Internal Security, Defense, Energy, Labor, the Attorney General and the Secretary of State. They are complemented by the Director of National Intelligence (without voting rights) and all the other subjects at the head of a department, agency or office of the executive that the President or the Secretary of the Treasury deems necessary to involve on the basis of the circumstances relating to the concrete case under consideration. The reform brought by Executive Order no. 11858, introduced in 2008, also added as members with voting rights the Director of the Office of Science and Technology Policy and the United States Trade Representative as well as a series of other permanent members with an advisory role, also coming from the internal structure of the Presidency, as the Assistant to the President for National Security Affairs and the head of the Office of Management and Budget.

From this composition it can be deduced that in the US model the role of the Government and of the subjects connected to it is dominant. This is not surprising, on closer inspection, given the importance of special screening powers for the implementation of a broader industrial policy. The latter, it appears evident, can only belong to the natural powers of the executive branch and can hardly be entrusted to subjects born to perform very different tasks, such as independent authorities. Moreover, it should be

considered that entrusting the concrete decision on issues of this kind to a growing number of subjects would lead to the inevitable increase in interests involved in the issuance of golden power measures. This could result in both an extension of the cases subject to the discipline and a significant increase in the number of notifications sent on a purely prudential basis by individuals. These are two potentially paralyzing phenomena for the market, devoid of any clear utility for the government's industrial policy.

EDOARDO CESARINI*

WEBINAR
"REGULATING DIGITAL PLATFORMS: WHERE DO WE STAND?"

(Roma Tre University, May 15th, 2021)

ABSTRACT.

CONTENT. 1. The webinar and its subject – 2. The British Proposal – 3. The German Competition Act and its new 19a section – 4. A critical analysis of the EU Digital Markets Act – 5. The practice of self-preferencing between competition and regulation – 6. Conclusions

*Law Graduate, Roma Tre University.

1. The webinar and its subject

On Thursday 15 May 2021, Roma Tre University held a webinar on digital platforms and their regulation process, which is currently underway in the European area. The webinar was organized, chaired and moderated by Margherita Colangelo, Associate Professor of Comparative Law and Competition Law at Rome Tre University, who started off by presenting the idea behind the conference. Over the last five years, digital platforms have represented the main point of the agenda of policymakers all around the world and the object of many investigations by antitrust authorities. The latter aspect is well demonstrated by the recent decision of the Italian *Autorità Garante della Concorrenza e del Mercato* (AGCM), which fined Google over € 100 million for abuse of dominant position following its refusal to Enel X with regards to the interoperability with Android Auto. Cases like this reflect the ongoing debate on whether current antitrust rules are appropriate to deal with big tech companies, their practices and their business models. In this context, Professor Margherita Colangelo recalled that the webinar aims at discussing the main proposals elaborated both at a national and at European level, which foresee several important changes: UK's new competition regime for digital platforms with Strategic Market Status, Germany's Tenth Amendment to the Competition Act and EU's Digital Markets Act.

2. The British Proposal

The first speaker to take the floor was Amelia Fletcher, Professor of Competition Policy at Norwich Business School and Deputy Director at the Centre for Competition Policy at the University of East Anglia. Opening her intervention, she explained that in the last few years many digital platform markets have become highly concentrated and have extended their market positions into new services, creating whole digital ecosystems. Moreover, platforms act as gatekeepers between certain sets of users, particularly business users and their end customers, conferring them an additional degree of market power. Professor Fletcher pointed out that the factors which drove to such situation are both *within* and *across* markets, like strong trans-global economies of scale and scope, network effects and lack of interoperability, substantial mergers and acquisitions activity, consumer behaviour and strategic anti-competitive conduct. In this context, there are some static and dynamic reasons to be worried: if these markets

tip to monopoly and if these firms can be more successful than potentially innovative competitors, then this does not encourage innovation. It is true, in fact, that incentivising innovation requires some reward and that big tech companies have innovated a lot. Nevertheless, entrenched incumbents could have limited incentives to innovate further if they do not face serious challenges. Moreover, there is a risk that third party innovative challenge is restricted by limited access to relevant data, to users and to finance as well as by lack of rents in case of success. To face these concerns, the Furman Review[1] suggested there should be pro-competition regulation, which is justified on two main bases: firstly, some key drivers of concentration do not necessarily imply strategic anticompetitive behaviour and therefore antitrust cases do not seem applicable; secondly, even where antitrust could be used, cases turn out to be long, narrow and unsuitable for setting out a clear framework, not ensuring legal certainty and not promoting innovation. This means that regulatory design becomes crucial as it should be far quicker and more administrable than antitrust but without exceeding.

Professor Fletcher followed illustrating how the legislation overseen by the Digital Markets Unit (DMU) will look like. Primarily, the objective pursued by the new regime will be fair trading, open choices, trust and transparency. Then, a process of designating the platforms with Strategic Market Status (SMS) will be undertaken, which means that the regulation is intended to be only for those who hold a substantial, entrenched market power that provides them with a strategic position. Nonetheless, the rules will not apply to all their business, but only to the designated activities, which are those that really confer the market power. On the other hand, the code of conduct is expected to be principle-based, bespoke to each of the companies and developed alongside the designation of the abovementioned activities. It will also feature enforcement powers and sanctions. Finally, the regulators should be able to impose what are called pro-competitive interventions (PCIs) on the SMS firms following a market review.

Subsequently, Professor Fletcher quickly compared the British proposal to the DMA, stressing that the key difference between them concerns the obligations: in the

[1] *Unlocking digital competition: report of the Digital Competition Expert Panel*, published on 13 March 2019 (available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_ digital_competition_furman_review_web.pdf>).

UK, they will be developed in the designation process and bespoke, while in the EU they will be immediately displayed in the legislation. For this reason, many economists argue that the British proposal appears way more consumer-focused than the European one, which is seen as "one-size-fits-all" approach. However, the UK proposed principles present a lot of qualifying words like *undue* or *unreasonably*, which make them less clear and easy to self-execute. Professor Fletcher concluded claiming that the distinction between the two legislations is less clear than what many suggest, albeit there is certainly room for improvement in the DMA.

3. The German Competition Act and its new 19a section

The following country whose legislative measures were examined was Germany. Here, the legislator adopted the Tenth Amendment to the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), which introduces a few legal changes aimed at protecting competition in digital markets. Jens-Uwe Franck, Professor of Civil Law, Commercial Law and Competition Law at the University of Mannheim, explained it focusing especially on its major innovation: section 19a.

This provision foresees a two-step mechanism. In the first place, the German Competition Authority needs to decide whether a platform is of 'paramount significance for competition across markets.' If it does so, it can then prohibit the firm from engaging in specific types of practice which are presumed to be abusive: self-preferencing by vertically integrated firms; hindering supply or sales activities of other firms; hindering competitors in markets where the 19a firm may rapidly expand its position; using collected data to raise market entry barriers or requiring users' permission for such use; hindering competition by denying or impeding interoperability or portability of data; withholding information on the 19a firm's performance; demanding disproportionate compensation from business customers. Both the declaratory and the prohibition decision can be challenged before the German Federal Court of Justice, which will decide as the first and only avenue of appeal. Furthermore, in the event of a violation of prohibition decisions, instruments of public and private enforcement (like fines or actions for injunctions and damages) will be applied.

Professor Franck underlined that the 19a tool conceptually deviates from traditional competition law, especially when considering four of its specific features.

First of all, the provision addresses unilateral conduct of digital platforms because of their position as intermediaries and gatekeepers, regardless of whether they dominate a defined market. Secondly, it provides for an explicit shift of the burden of proof applicable to the above-mentioned list of practices presumed to be abusive. Thirdly, the obligations envisaged by it are not self-executory, which implies that the *Bundeskartellamt* enjoys discretion in this regard. Lastly, as already mentioned, the provision foresees an abridged judicial review in contrast with the regular two-level system.

Successively, Professor Franck drew the attention to the potential addressees of the 19a tool. In order to precisely define them, it is necessary to scrutinize the prerequisites and criteria mentioned in the provision. Firstly, section 19a(1) addresses only firms that are 'active to a significant extent on markets within the meaning of section 18(3a)' of the Competition Act. The latter rule refers to 'multi-sided markets and networks', which implies that section 19a shall apply to firms that operate as two-sided platforms and act, therefore, as intermediaries between different user groups that are linked through cross-group network effects. But the essential requirement that must be taken into account is the 'paramount significance for competition across markets.' Under this aspect, the second sentence of section 19a(1) presents a non-exhaustive list of five criteria that aim at identifying the firms which put competition at risk: dominance on one or more markets; financial strength and access to resources; vertical integration and activities on otherwise related markets; access to data relevant for competition and, ultimately, gatekeeper position. In this context, the 'Big Five' (the so-called 'GAFAM') are likely to be included, since important parts of their activity satisfy the above-mentioned criteria. Nevertheless, there remain some margins for the German Competition Authority to consider other firms than GAFAM to be potential section 19a addressees, like Booking or CTS Eventium.

Professor Franck also emphasized what is stated in the explanatory memorandum to the Bill, i.e., that within the context of objective justification, a balancing of interests is required, which, on the one hand, takes into account the law's objective of protecting free competition and, on the other hand, the legitimate freedom of business and possible procompetitive elements of the conduct. It can therefore be deduced that section 19a pursues the long-term objectives of limiting economic power, keeping markets open and protecting the competitive process. However, in the context

of digital markets, risks of underenforcement (the so-called 'false negatives') should be considered more carefully.

At the end of his speech, Professor Franck made some concluding remarks, stating that Section 19a sits between traditional competition law and sector regulation and that it rebalances the power between Big Tech companies and the German Competition Authority. At the same time, there is the risk that the listed practices will be interpreted as per-se prohibitions since they were drafted in wide terms. From this point of view, the *Bundeskartellamt* and the Federal Court of Justice have a great responsibility to avoid that scenario. The legislator seems to be aware of this uncertainty, as section 19a requires its provisions to be evaluated after four years.

4. A critical analysis of the EU Digital Markets Act

The next legislative initiative to be scrutinized was the Digital Markets Act, which was unveiled by the European Commission on 15 December 2020. Alexandre De Streel, Professor of European Union law at the University of Namur and Academic co-Director at the Centre on Regulation in Europe (CERRE), took the floor and presented the main findings of the proposal and his view in this respect.

His intervention began by explaining why the European Commission has come up with such proposal and which are their objectives. Firstly, there is a perception that, to some extent, we have lost control to the Big Tech companies. Therefore, behind the economic rationale, there is a political and more fundamental drive to take back control which pushed the legislator. Second, the main goal of the DMA is to increase the contestability and the fairness of the digital economy in the European Union. Contestability aims to decrease entry barriers to digital markets and to level the playing field among existing gatekeepers and other firms offering digital services that may substitute or complement the services already offered by the first ones. Differently, fairness relates to distribution of the value created by digital markets, as it aims at achieving the balance between the rights and obligations of each party and the absence of a disproportionate advantage in favour of the digital gatekeepers.

Once he settled these matters, Professor De Streel focused on the analogies and the differences between the proposal and existing competition law. He stressed that, for instance, the scope of the DMA covers only eight Core Platforms Services (CPS) like

B2C intermediation services, online search engines or video sharing platforms, while that of Article 102 TFEU concerns all economic activities.

Moreover, concerning the services, the trigger for intervention indicated by the DMA is a legally defined CPS, while for competition law is an economically defined relevant market. At firms' level, on the other hand, European Commission's proposal finds in the gatekeeper position the trigger to intervene, unlike Article 102 TFEU which finds it in the dominant position. From this point of view, since there is no clear definition of 'gatekeeper' in EU law, the designation is done by the European Commission on the basis of three cumulative criteria: their large size and impact on the EU internal market; their control of an important gateway for business users to reach end-users and, lastly, whether the control in question is entrenched and durable.

But above all, Professor De Streel drew the attention to the obligations imposed by the proposal, which he defined as "the 18 commandments." These can be divided into a black list that includes seven directly applicable detailed obligations which are mostly prohibitions and a grey list which comprises 11 other obligations which may need to be specified further by the Commission.

The sanction regimes are relatively similar, as both the DMA and competition law foresee, for example, the application of fines.

For what concerns the enforcement of the European proposal, Professor De Streel highlighted that it is mostly bilateral and possibly adversarial and that it is centralised at the Commission, which has a fully-fledged regulatory power. On the contrary, national regulators have a limited role and the function of other stakeholders such as business and end-users remains unclear.

Next, Professor De Streel argued that it is not easy to give a single answer when asked if the DMA is a revolution. On one hand, it is because it represents the first asymmetric EU law on digital platforms. On the other, it is based on the traditional EU policy choices since it uses *ex ante* regulation to complement *ex post* antitrust and not to substitute it. The Commission chose to open the platforms instead of breaking them up, to foresee rules rather than standards and to prefer a centralised EU enforcement over a decentralised national one.

Professor De Streel concluded his critical analysis of the DMA by illustrating how it can be improved in order to make their rules more resilient and effective. In

particular, he affirmed that the objectives and the logics behind the obligations should be clarified and that the administrability and the flexibility should be better balanced. Furthermore, the rules and the enforcement should improve over time with the support of regulatory experience, thus putting into practice a self-learning process. The institutional design should be perfected as well by allocating regulatory tasks on the basis of the comparative advantages of EU and national institutions. Lastly, Professor De Streel made some suggestions also on the enforcement level, arguing, for instance, that independent national authorities should have an additional role and that an alternative dispute resolution should be established.

5. The practice of self-preferencing between competition and regulation

The final speaker was Pedro Caro de Sousa, competition expert with the Organisation for Economic Co-operation and Development (OECD). He discussed one of the most debated practices in the context of digital markets: self-preferencing. Its treatment under antitrust rules, in fact, is contentious and a lively debate has arisen in the literature on the possibility to assess this conduct in accordance with the established categories of abuse.

In particular, de Sousa focused on the *Google Shopping* case, which is emblematic from this point of view. Google, a search platform, started providing search services for a number of shopping services as well. It also had its own shopping service and favoured it by showing it up in the first page and relegating the ones of his potential competitors on a related market in the sixth or the seventh page. The European Commission decided that it was a typical leveraging abuse, whereas Google argued before the General Court that it could provide services to whoever it wanted and that it did not discriminate the other shopping service providers.

This case provoked very different reactions. Some authors claimed that although some practices among leveraging are anti-competitive, not all of them are. In fact, it would be odd to say that every company which favourites its own products is engaged in anticompetitive conduct. On the contrary, others framed the practice in terms of discriminatory leveraging, whereas others focused on the fact that Google service was effectively essential and argued that the competitors were excluded from the market because people used Google in order to access their services.

In de Sousa's opinion, the main point is that the definition of these markets is not exactly clear. because there are ecosystems as well as gatekeepers within them. This kind of practices can be framed as anti-competitive from a variety of perspectives, but they are not a neat fit still. The result is that many inherent tensions emerge between different competition law schools.

The legislations that have been examined offer a range of solutions which go from an easier EU enforcement to a pure regulatory approach. But there is not a sharp line dividing these two approaches, in fact they influence each other, because competition and regulation overlap. In conclusion, de Sousa said that it is necessary to question what is going to be the interface between competition and regulation once these instruments have been adopted, especially in light of the fact that authors have been complaining for decades of the risk of a regulatory competition law. Unquestionably, it will be very interesting to see what will happen next.

6. Conclusions

Pedro Caro de Sousa's speech was followed by a round of comments of the speakers, which especially focused on the tendency towards a regulatory approach as well as on the advantages and disadvantages of the proposals addressed in their presentations.

In conclusion, the last speaker to take the floor was Vincenzo Zeno-Zencovich, Professor of Comparative Legal Studies at the University of Roma Tre. He strongly criticised the DMA arguing that, from his point of view, it presents two main flaws. Firstly, the fact that it responds to a 19th century's positivistic approach. The DMA, in fact, is part of a large set of EU legislations which is very difficult to comply with and, above all, it contains a considerable amount of protectionism. Secondly, the proposal lacks an international, global perspective, being written in what the speaker defined "Brussels' English." Professor Zeno-Zencovich closed his speech by questioning whether (unrealistically) optimistic expectations are related to the economic advantages of the DMA.

MICHELA MASTRANTONIO

CLOSING CONFERENCE OF THE STARS PROJECT (SKILLS TRANSFERS IN ACADEMIA: A RENEWED STRATEGY)

CONTENT. 1. The STARS project and its objective – 2. The Closing Conference of the STARS project

1. The STARS project and its objective

On 4 December 2020, the final STARS Project conference was held via Microsoft Teams, due to the Covid19 pandemic, and it was an opportunity to present project results and to discuss the new objectives.

The three-year Project started in September 2017 as the result of the joint effort of five European Universities (Luxembourg, Brescia, the Palacký University of Olomouc, Roma Tre and the Romanian American University of Bucharest) aimed at developing a network of legal clinics in most European law schools and spreading an innovative and diverse teaching method.

The project was titled Skills Transfers in Academia: A Renewed Strategy Enhancing Legal Clinics in the European Union (STARS) in order to reflect its main objective: promote a student-centric approach in both academic and societal contexts. Indeed, during legal clinic classes students are challenged to acquire both theoretical and practical skills by alternating individual assignments and group-based activities, thus teaching them to look at legal issues from a case-based perspective and preparing them for their professional future.

To this end, winter and summer school exchange activities have played a crucial role in both enriching students' professional and personal background and providing hosting universities with valuable insights on possible methodological improvements.

STARS project emphasized the importance of communication between academic institutions and student community: clinical teaching takes care of young learners' needs and difficulties. This explains the pivotal role played by the digital tools (e.g., websites, databases and newsletters) used to reach the younger academic resources.

Funded by the European Union, the project received significant support from the European Network for Clinical Legal Education (ENCLE), which infused its ambition to promote social justice by increasing the law teaching quality through clinical education.

We are facing an era of change and the University of Roma Tre, by taking part in the STARS project, took its third mission a step further also thanks to its long-standing and pioneering experience in the legal clinic field.

2. The Closing Conference of the STARS project

The STARS Project closing conference aimed at summarizing the project content and discussing its outcomes in order to shed a light on the future of clinical teachings within Europe. The conference program consisted of a morning and an afternoon session with focused-based roundtables in between to better delve into specific issued raised during the sessions from different standpoints.

The conference began with the keynote speech of PAUL MCKEOWN, Senior lecturer and solicitor at Northumbria University in UK and President of the ENCLE. Paul introduced the discussion on future challenges for clinical education. His speech retraced the milestones of the legal clinics' history. He recalled Professor Richard Wilson's description of the Western Europe as the last holdout in the worldwide acceptance of clinical legal education. The speaker underlined both the obstacles the clinical teaching encountered to gain acceptance in the academic environment and, at the same time, the success of the project, also due to the contribution of ENCLE. However, there are still many challenges to be faced, such as the persistent misconception of legal clinics as a second-class teachings and the consistent economic investments they need from Universities. Finding our own identity at the European level and providing a harmonized definition of legal clinics are crucial steps in this direction. An active role in the social justice field and a contribution to the so called "big issues" was also debated through the rest of the conference.

McKeown concluded his speech stressing how proving to the institutions the high quality of clinical legal education is one of the most important challenges.

Building upon McKeown's observations, ELISE POILLOT, Professor of University of Luxembourg and Coordinator of the STARS Project, focused on the project "deliverables", such as the standards encompassing the best practice of legal clinics, the creation of the websites, a database of cases analyzed by the clinics, the summer and winter schools and lastly the establishment of a legal clinic at the Romanian American University of Bucharest. Regarding the objectives of the project, Professor Poillot reflected on how lawyers and practitioners are naturally brought to reason and work according to the typical methodologies of their social and judicial reference system. For this reason, the project aimed at formalizing the clinical teaching method and its criteria, thus providing quality standards through guidelines and easily replicable best

practices. Legal clinics expose students to new business management skills, contributing to an aptitude change towards legal professions. The inspiration behind the STARS Project is clear: developing the culture of legal clinics in Europe, strengthening social responsibility and enabling other universities to learn about this system and adopt it.

To further delve into these issues, a roundtable was opened among those who actively took part in the first experience exchange between legal clinics of partner universities: Professor Cristina Amato and Dr. Laura Bugatti of the University of Brescia, Dr. Maria Cecilia Paglietti and PhD candidate Tommaso Sica of the University of Roma Tre and Damien Negre, PhD candidate of the University of Luxembourg. At first the speakers described the method of carrying out the legal clinic course as it takes place every year in the university; then they presented the way those clinics have been reproduced in the summer and winter schools.

In a second roundtable, a lively debate was opened on the role of legal clinics in a digitalized context. Moderated by Silvia Tabusca, Professor at Romanian American University, the roundtable began with the Dr. MARIA CECILIA PAGLIETTI's speech on the organization and functioning of the website. After highlighting the benefits of this activity, which is time consuming and for the realization of which the cooperation with various entities is crucial, Dr. PAGLIETTI stressed the need to look at universities no longer as a mere means of information providers but also as a useful marketing tool, able to connect with both the community of students, the scientific community and the society in general. High provincialism levels contradict legal clinics' inclusive and open nature. Accordingly, the speaker concluded by stressing how the call for innovative teaching techniques is too often undermined by the ongoing tendency to adopt outdated tools.

The discussion continued with a reflection of Professor CRISTINA AMATO about the role of the website as a communication tool among students and all project participants. This platform has allowed not only a faster and more effective exchange of information on consumer law and legal opinions, but also a greater involvement of young academic resources. On the one hand, the Professor highlighted the relevance and usefulness of such tools as the basis of a future possible application of Artificial Intelligence to law field, while on the other hand she wanted to emphasize how technological tools not always fit into clinical teaching, thus opening a very interesting

debate about the concept of customer/consumer protection.

The second part of the Conference was dedicated to the STARS Proposal on Standards for clinical legal education. MAXIM TOMOSZECK, Professor at Palacký University Olomouc, opened the discussion on the topic. He specifically pointed out the key aspects of the Standards. The overarching idea underpinning the draft prepared by the University of Olomouc is ensuring a high level of quality, guaranteed thanks to a wide and heterogeneous perspective of fifty ENCLE members contribution. It deals with the application of "learning by doing," based on the growth of knowledge, personal skills and values, while at the same time on enhancing the promotion of social justice, considered an important factor for lawyers and students as well as to understand, from the beginning, their role in society. A second major part of the draft is devoted to the legal clinics' organization, with a focus on student well-being. This means ensuring a safe and healthy teaching environment while providing them the appropriate training, to avoid student burnout.

The third part of the Standards deals with educational design, which includes the promotion of student autonomy, a sense of professional identity and the ability to move professionally in various settings, while the last one dealt with the legal services offered by legal clinics, particularly from three specific perspectives: control of information for the client, confidentiality and protection of users' interests.

The speaker then stimulated a wider debate on the topic by posing targeted guest questions during the last roundtable, attended by Guido Alpa, Former President of the Italian National Bar Association, Valerie Dupong, President of the Luxembourgish Bar Association, Alžběta Recová, Permanent Representative of the Czech Bar Association in Brussels and Ulrich Stege, Executive Secretary of ENCLE.

The discussion was particularly dense as the contributions came from very different cultural and professional backgrounds. In this sense, the question about the involvement of lawyers and practitioners in legal clinics working on a pro bono basis was emblematic. Professor GUIDO ALPA's speech offered a very detailed Italian perspective on this point. Although the involvement of lawyers in legal clinics is extremely useful for both lawyers and students, the national legislation makes a distinction between optional and mandatory mediation. Only in the first case the legal clinic would be a suitable place to carry out that type of activity, while in the second case the inclusion of lawyers would

be problematic since it requires the involvement of listed organizations.

The Luxembourg perspective offered by VALERIE DUPONG was different. According to the Bar Association member all cases should be pro bono. However, finding a sufficient number of lawyers to cover all the fields dealt with by legal clinics is difficult, not to mention issues relating lawyers' benefits and the chance that consulting activities still results in litigation.

An interesting point of view was offered by ALŽBĚTA RECOVÁ, who recalled Guido Alpa's speech about the differences among legal systems as a problematic aspect for a trans-national development of legal clinics. In the Czech Republic there is a broad definition of legal services, unlike in Italy where the concept of consulting activity is not included. Furthermore, Recová insisted on loyalty and confidentiality issues within legal clinics, not granted where the lawyer does not attend the clinic.

The discussion concluded with ULRICH STEGE's remarks on the fact that inserting lawyers into legal clinics certainly makes them better lawyers, but the issue is how lawyers are inserted into those activities.

The last part of the conference was dedicated to a rising legal clinic, addressed by SILVIA TABUSCA, Professor at the Romanian American University, who retraced the steps of the development of the clinical teaching method at the university, stressing both the achievements and the difficulties still existing. First, the attention was focused on the particularly relevant matter of the reasons leading this university to join the project. Then she discussed the cases actually analyzed, mainly pertaining to the field of Street Law rather than the typical contents of legal clinics, since the national legislation does not provide funds to invest in this type of education and especially live client clinics. Based on the students' interest in those issues, the clinic has been able to deal with topics such as migrant exploitation, the international scandal of Cambridge Analytica and Facebook, women's rights and domestic violence, acting as a boost for law enforcement to do justice.

On this thoughts VINCENZO ZENO-ZENCOVICH, Professor at the University of Roma Tre, built his final remarks by emphasizing the benefits brought by clinical teaching, thanks to the variety and diversity of experiences of the STARS project, as highlighted by the conference. STARS project represents an institutionalization of legal clinics that should be promoted together with all those "learning by doing"

activities that pursue that same goal of teaching and involving students in what they have learned in a practical way.

Professor ZENO-ZENCOVICH concluded his speech by reaffirming the general role of legal clinics: strengthening universities' Third Mission by introducing into society people, such as graduate students, who have already matured a high level of knowledge and skills. Legal clinics have a fundamental role in this context, as the Street Law cases but also the information provided to the community through the website demonstrate. In conclusion, the way in which the universities are assessed in the European academic landscape and consequently their ability to be funded depends on their robust approach to the Third Mission, which should not necessarily concern only the world of law but the general involvement in public activities. By putting legal clinics into this public engagement effort, STARS project could achieve even more significant goals in the future.

EDOARDO RUZZI*

REPORT ON THE CONFERENCE "AI REGULATION IN THE EU: WHAT IS THE RIGHT MIX?"

(May 31, 2021)

* PhD Student, Law & Social Change: The Challenges of Transnational Regulation, Roma Tre Law Department.

In line with President von der Leyen's political commitment for a human-centric artificial intelligence (AI) that "must always comply with people's rights",[1] on April 21, 2021 the European Commission presented its proposal for a future regulation on AI (the so-called Artificial Intelligence Act), laying down a set of requirements and obligations for the development and deployment of AI systems.[2] According to the Commission, this legislative initiative has the dual aim of fostering AI innovation across the EU economy while limiting or prohibiting AI applications that threaten EU citizens' rights. In this regard, the proposal follows a risk-based approach and differentiates between uses of AI that pose (i) an unacceptable risk, (ii) a high risk, (iii) a limited risk, or (iv) a minimal or no risk to health, safety or fundamental rights. Depending on the specific level of risk, the proposal prescribes different and proportionate obligations on providers, users, and other participants across the AI value chain (e.g., importers, distributors, authorized representatives). Accordingly, no obligation is set out for those AI systems and application that fill in the last category (minimal or no risk).

The Artificial Intelligence Act was at the centre of the conference "*AI Regulation in the EU: what is the right mix*?" held on May 31, 2021 and organized within the research project of national interest (PRIN) on "*Governance through/by Big Data*: *challenges for European Law*". The event brought together international scholars with different backgrounds, as well as members of public bodies and representatives of non-governmental organizations to analyse the strengths and weaknesses of this recent proposal. Following the format of the initiative, this report outlines the key messages taken from the contributions.

The opening remarks and the panel moderation were entrusted to Professor Giovanni Sartor, professor of legal informatics at the University of Bologna and at the European University Institute. As the legislative procedure has just begun, Professor Sartor stressed the importance of both the academic scrutiny and the public debate for

[1] Press remarks by President von der Leyen on the Commission's new strategy: Shaping Europe's Digital Future, available at <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_294> (accessed: 14 June 2021).

[2] European Commission, "Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts", COM(2021) 206 final.

the evolution of the final text of the future Regulation. The session then turned to the six members of the panel who were asked to present their preliminary remarks on the proposal.

Paul Nemitz (Principal Advisor in the Directorate-General for Justice and Consumers of the European Commission) strongly emphasized the need of addressing the new risks posed by certain AI applications to the fundamental rights of individuals and to the core values of our European society. Nemitz provided an insight into the core concepts of the proposal, with a specific focus on the broad notion of AI systems laid down in Article 3. Despite some criticism of this definition for being too broad, the wording of Article 3 is intended to be technology neutral and as future proof as possible, whereas a more detailed definition would hardly keep pace with the fast development of the AI sector. Nemitz concluded with the risk-based approach, pinpointing the different obligations and risk mitigation measures provided for each category of AI system.

His speech was followed by the presentation of Mireille Hildebrandt, professor of "Interfacing Law and Technology" at Vrije Universiteit Brussels (VUB) and of "Smart Environments Data Protection and the Rule of Law" at Radboud University. Hildebrandt welcomed the first legislative initiative specifically addressing the issue of AI governance and its good balance between public and private interests. However, she underlined some critical aspects of the new proposal. Particularly, she argued that other performance metrics for high-risk AI systems should be added to Article 15, as the current requirements (i.e., accuracy, robustness, cybersecurity) might be insufficient to mitigate every risk. Moreover, she stressed that the strict requirements for high-risk AI systems – set out in Title III, Chapter 2 – should be extended to every system of emotion recognition and biometric categorisation, because of the unreliability of these practices. Finally, she suggested to consider more "legal tech" AI applications as highly risky, whereas the proposal only addresses AI systems intended to assist judicial authorities.

Francesca Fanucci, representative of the European Center for Not-for-Profit Law Stichting (ECNL), presented the position of the organization, which advocated for a more flexible regulatory approach to determine the level of risk of an AI system. Since the gravity of the risks may depend on the dataset to which the algorithms are trained or on the geographic and socio-economic context in which the AI systems are deployed, a continuous risk assessment is needed in order to take into account every

possible variation. In addition, Fanucci noted that the Commission established a procedure to update the list of high-risk AI systems but not an analogue procedure for amending the list of prohibited practices. While she welcomed the introduction of an EU database for high-risk AI systems, Fanucci also invited to consider the adoption of an open register for all AI systems used in the public sector regardless of the level of risk, as already considered within the Council of Europe.

The following speaker to take the floor was Tiziana Catarci, professor of Engineering in Computer Science at Sapienza University of Rome, who highlighted the current absence of consolidated techniques or methodologies to help humans understand and interpret predictions made by machine learning models. In this regard, the "XAI" (explainable AI) research field is still at a preliminary stage. As Catarci pointed out, the problem is exacerbated by the lack of a shared definition of AI within the community of computer scientists. She also stressed the importance of granting an appropriate technical education to every EU citizen to give everyone the instruments to understand these new technologies and support their active participation in the digital transformation.

Giorgio Resta, professor of Comparative Legal Systems and of Digital Technologies & the Law at Roma Tre University, first noted the unprecedent extension of the territorial scope of application of the new legal framework, as it affects "providers and users of AI systems that are located in a third country, where the output produced by the system is used in the Union" (Article 2(1)(c) of the proposal). Such expansion might constitute a breach of the principle of international comity, with the risk of generating frictions or phenomena of tit-for-tat in the application of jurisdictional norms relating to digital relationships. Resta also stressed a problem of coordination between Article 10(5) of the proposal – which enables the processing of special categories of personal data for training techniques of bias monitoring – and Article 22 of the GDPR (General Data Protection Regulation)[3] that prohibits the processing of the same categories of personal data for automated decision-making. Thus, he suggested considering a revision of Article 22 of the GDPR, as to authorize the processing of

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

"sensitive data" for the sole purpose of avoiding biases in automated decision-making. In addition, Resta argued that the regulation appears to overestimate the impact of some AI systems used by public authorities while overlooking the risks posed by the very same AI applications deployed by private actors. He took the example of Article 5(1)(c) of the proposal that prohibits the application of AI systems by public authorities for practices of social scoring but does not provide a similar ban on private actors, whereas the sharing economy heavily relies on such forms of personal scoring.

Nicolas Petit, professor of Competition Law at the European University Institute and the Robert Schuman Center for Advanced Studies, opened his presentation with some critical remarks on the notion of AI system provided in the proposal. In particular, he noted a contradiction between the rationale expressed in recital 6, which argues for a flexible notion of AI system based on the functional characteristics of AI, and the technical definition embraced in Article 3 and Annex I of the proposal that is clearly focused on a set of specific technologies. Petit also pointed out a lack of coherence between the notion of "harm" provided in Article 5, which refers to "physical and psychological harm", and the one set out in recital 4, which states that the proposal covers "material or immaterial" harm. He concluded by expressing some concerns on the future implementation of the EU database for high-risk AI systems. In his view, if this mechanism requires the revelation of strategic and business sensitive information, it could have a chilling effect on innovation and investments in the internal market.

Alessandro Mantelero, professor of Private Law and Law & Technology at the Polytechnic University of Turin, welcomed the EU proposal as it drew a line between what is technically feasible and what is legally possible for AI developers. As Mantelero pointed out, the Artificial Intelligence Act speeded up the regulatory debate on the governance of AI applications worldwide: for instance, within the Council of Europe. Moreover, the EU regulation of AI is intended to be the global gold standard for AI governance. Nevertheless, Mantelero remembered that other legislative instruments, whose influence extended far beyond the EU borders – such as the GDPR – were the result of decades of legal evolution in a certain field. On the contrary, the current proposal is the first legislative measure in an uncharted area: thus, its global acceptance remains unpredictable. From this perspective, Mantelero suggested limiting the future AI regulation to some core elements: for instance, a list of banned practices, a risk

management system, and some compliance tools; all elements already present in the proposal. Accordingly, this regulation could be subsequently adjusted or expanded to tackle future developments in the AI sector, following a cautious step-by-step approach. Furthermore, he argued that the risk-based approach adopted in the proposal appears to be more technology-centered rather than human rights-oriented, because it merely identifies in advance a list of technologies and practices that are considered or not considered sources of risk *per sé*. Contrariwise, a human rights-oriented approach would entail a closer investigation on the potential prejudices to fundamental rights and freedoms, for instance by requiring a case-by-case human rights impact assessment of each AI deployed. In this regard, Mantelero raised the question as to whether the proposal should have embraced a decentralised and empirical approach to risk assessment, on the model of the data protection impact assessment (DPIA) laid out by Article 35 of the GDPR.

A round table discussion between the conference participants concluded the event, which represented a precious opportunity to hear international panelists with different backgrounds and points of view about the governance of data-intensive technological trends. The full conference video is available on the Youtube channel of the Roma Tre Law Department.[4]

[4] See <https://youtu.be/pZu-WPplJ9E> (accessed: 26 July 2021).

CLAUDIA GIUSTOLISI[*], ADRIANO MAGGIOLI[**]

WEBINAR
SHADOW BANKING?
NON-BANK SUBJECTS MANAGING CREDIT

(Centro di Ricerca Interdipartimentale sul Diritto Europeo della Banca e della Finanza, Paolo Ferro-Luzzi, Grandangolo, Università Roma Tre, 13 novembre 2020)

CONTENT. 1. The objectives of the webinar – 2. Introductory interventions – 3. The debate

[*] Researcher in Economic Law - Centro Ferro-Luzzi - Roma Tre University.

[**] Law Graduate, Roma Tre University.

1. The objectives of the webinar

The Centro di Ricerca Interdipartimentale sul Diritto Europeo della Banca e della Finanza, Paolo Ferro-Luzzi, Grandangolo, of Roma Tre University, held the webinar "Shadow banking? La gestione del credito da parte di soggetti non bancari" as part of the "Ciclo di Seminari" (Seminars serie) that took place through October – December 2020.

The webinar was held, organised and moderated by Professor Andrea Zoppini, vice-director of Centro di Ricerca "Grandangolo" and Full Professor of Private Law at the University of Roma Tre.

Opening the event, Professor Zoppini introduced the subject under consideration. He defined "shadow banking" as the activity of credit intermediation performed out of the banking system regulation.

The Professor proceeded illustrating the rationales underlying the study of Centro Ferro-Luzzi. The reasons for the event reside in the necessity to address the multiple issues the "shadow banking" poses. Among the others, whether it is adequately and sufficiently regulated.

According to the speaker, the lack of a harmonized regulation of the phenomenon – and it not amounting to an irregular condition – answers the above question.

Relevant data cited by Professor Zoppini and The Economist evidence the qualitative and quantitative relevance of shadow banking, therefore, the convenience to analyse it. Also because of the strict regulation of banking activity, figures highlight it performs a different, negative and increasingly less profitable trend with respect to the activity provided by non-banking subjects.

In light of the above, Professor Zoppini considered it useful and necessary to assess the perimeter of the phenomenon, the adequacy of the legislative framework and the efficacy of the control systems.

Mutual lending was a helpful example for the speaker to define the scope of shadow banking: it does not qualify as saving collection, as such activity is only performed with respect to members of the mutual company and not investors.

Even because of its quantitative relevance – credit unions collected EUR 11 billion among their members – the phenomenon generated uneasy criticalities. Professor

Zoppini considered those arising from economic crises the ones of major interest. Credit unions bankruptcy reshapes what was perceived as a safe loan as a non-protected loan worsened by the juridical qualification of member of a credit union. Notwithstanding being creditors of the company, they were subject to a worse treatment with respect to other creditors.

The evolution of shadow banking sparked a live debate and proposals aiming to level playing field among mutual lending and bank deposits stemmed; Professor Zoppini branded them unfit.

The possibility provided to credit unions' customers to access a "platform" and open a deposit account caused the interplaying of mutual lending regime and depositors' protection rules. Professor Zoppini qualified the matter in question as an ante litteram case of shadow banking.

Professor Zoppini concluded it was on these grounds an assessment regarding the necessity of a shadow banking specific regulation and its adequacy was deemed useful and noted the overarching issue concerns the banking future.

The floor was then left to guest speakers.

2. The interventions

Professor David Ramos Muñoz, Full Professor of Commercial Law at Universidad Carlos III de Madrid, opened the round of interventions.

He firstly outlined the structure of his speech: distinguishing myth and reality of the shadow banking phenomenon; an investigative effort regarding the proper institutional approach and rationales justifying shadow banking; and, lastly, assessing whether shadow banking may be regarded as an opportunity for FinTech and sustainability investments.

Professor Muñoz followed identifying the first two myths on shadow banking, namely believing it new and considering it shadowy: shadow banking emerged with banking activity and one may argue at the time when banking activity was not regulated it all pertained to shadow banking; the phenomenon shall not be considered suspicious, albeit some cases may qualify as regulatory arbitrages, as per cases where market players avoid the application of mandatory rules, or the State itself grants regulatory aid to entities providing activities it considers socially desirable and worth enhancing.

Professor Muñoz followed pointing out shadow banking is not shadowed by something: contrarily, it often finds itself at the very core of the banking system.

The speaker identified two concepts at the core of shadow banking which also underly the banking system: money and credit.

Considering they are provided by the State activity – acting both as credit and money provider other than lawmaker – banking activity may be considered as an entrepreneurial idea or a State concession.

Bearing the latter perspective in mind, or accepting a hybrid version of the two, the speaker noted one may be led to think it as an activity to be performed under mandatory rules.

A different point of view takes into account privileges such activity enjoys, both in terms of liquidity and solvency – e.g., deposit guarantee schemes – which shall be paid a price.

Professor Muñoz commented the banking system grounds its rules on the abovementioned philosophies and noted State acting ambiguously – one time applying rules based on equality, others using a transactional approach – results in a lack of clarity of the prevailing philosophy.

Once illustrated the above, the speaker proceeded discussing the rationale underlying investment opportunity: in presence of low interest rates it is desirable to enhance investment diversification whereas, from an entrepreneurial perspective, non-financed projects shall be provided credit access.

For this purpose, innovation helpfully lowers transaction costs and enhances functional specification.

Regarding the rationale underlying sustainability investments, the speaker noted some investments are more sustainable and more fit for societies than others. Consequently, the structure of the banking system grants them financing. Instead, subjects who do not have access to credit may obtain it thanks to more flexible rules.

Examining justifications one by one, the speaker explained, convincing arguments justify a more flexible approach allowing shadow banking in specific contexts.

The speaker listed examples which prove useful easing access to more profitable investments when negative interest rates occur.

Professor Muñoz highlighted none of these themes is new: the idea of

combining low interest rates and supplying new products to investors so that they may catch more profitable opportunities was the rationale underlying the setting-up of money market funds in U.S. around 1970.

Professor Muñoz followed recalling the U.S. replied to low interest rates and lack of real estate investments with securitization, and with known results.

The speaker questioned whether the phenomenon presents differences this time and, in order to provide the answer, furtherly addresses the structural issue regarding maturity transformation and its transactional volume.

Professor Muñoz told himself unconvinced by concerns of shadow banking and FinTech ties are concerned as banking has always been a key sector in innovation. FinTech promises to ease disintermediation and make personal data management more efficient were considered justifications to specific regulatory responses in the U.S., higher tolerance in China and other different regulatory proposals.

The speaker drew the path leading from the special charters idea to a charter-based system causing some banking groups ending up under the supervision of a less adequate authority and highlighted how disintermediation led to shadow banking being based on securitisation.

Therefore, Professor summarized that no business model is completely new: smart technologies were used in the past as arguments justifying the tolerance of hedge funds and Wirecard case taught.

The speaker drew to the end and addressed the question of whether "this time is different" from another perspective. He wondered if such question shall be answered with another: whether we are in a moment of disintermediation or re-intermediation, and, thus, it is necessary to assess if value is being created or redistributed among traditional entities who are losing it and new entities who are gaining it as a result from direct contact with the customer.

The Professor told himself convinced by the efficiency deriving from better data management rather than by data management superiority as an argument per se, the former being the fundamental argument with respect to Fintech or Big Tech.

The speaker considered more welcoming regulatory attitude may ease channelling socially desirable investments flows or financial inclusion but, he notes again, this is convincing, not new.

The idea of easing access to credit through demonization of secondary market inspired government sponsored enterprises and social investment.

At last, Professor Muñoz summarized shadow banking is simply not new and it shall not raise suspects at any cost.

Professor Muñoz concluded stating the above illustrated arguments and justifications apply to new shadow banking models but are already known and were previously used, successfully in some cases, failing in others, as sometimes problems reside in shadow banking, other times in rules.

The second speaker to take the floor was Professor Filippo Annunziata, Associate Professor of Economics Law at Bocconi University. His intervention would illustrate a known example of shadow banking – which, he agreed with Professor Muñoz, is not so shadowy – as the undertakings for the collective investments (hereinafter UCIs), as doctrine states, traditionally belong to it. He noted not only in Italy but in many more countries these market players are subject to various regulations. Professor Annunziata underlined the interest of UCIs case as it confirms how regulation may cover shadow banking, which is far less unregulated than it is thought. Plus, it shows the flexibility of the UCIs tool as it evolved significantly with respect to the time it was introduced in Europe and U.S. many decades ago.

Collective investment had been conceived as a tool for savings collection among the public with the view to invest on secondary markets in liquid or easily liquid securities. It then evolved.

Professor Annunziata paused on the historical evolution of UCIs in recent years proving this tool adaptable and polymorphic and took in consideration their role as an alternative to banks or subjects authorized to provide credit. Such evolution came with other undefined schemes, where credit provision by UCIs is performed in more specific contexts.

The speaker also provided examples of rules allowing private equity UCIs to provide financings to target companies. Such features highlight the diversification of said tools and their openness to schemes winking at sustainable finance themes. Regulation EuVECA or UCITS evidence the above allowing investments in determined activities socially oriented or sustainability-coloured start-up.

Professor Annunziata acknowledged UCIs providing credit directly – and not in conjunction or in association with an investment activity – is a new instrument which appeared few years ago in some systems, as in the Italian one.

Nowadays, he followed, the tool is three-folded: those allowed to provide credit directly – so called supplying UCIs – in some systems including the Italian; investment UCIs – credit UCIs buying credits on the secondary market and securitizing them; and, lastly, restructuring UCIs – a hybrid species performing credit buy-out activity functionally to debit restructuration of one or more issuers and which find themselves in the middle of corporate, crisis and insolvency procedures legislative frameworks.

The growing importance of UCIs in various credit systems poses apical and punctual issues, as highlighted by the speaker.

The first matter Professor Annunziata took in consideration regarded the erosion of the reserve of an activity traditionally provided by banks and non-bank authorized subjects, monopolists of credit provision. However, this erosive phenomenon manifests in multiple ways: in the same years when the UCIs providing credit were introduced in Italy and other countries – just like a bank or a financial company referred to in Article 106 of the TUB – a similar faculty was recognized to insurance companies. Professor Annunziata then cited the case of peer-to-peer platforms. With reference to these, a clear regulatory structure has not been reached. These platforms are located in a grey zone in between the reserved activity and the deregulated activity, which poses an intersectoral "regulatory competition" issue. In fact, these entities may provide credit and are subject to more or less pervasive disciplines – depending on the legal system – but are not subject to the same rules banks and financial companies must comply with.

The Professor notes that regulation of credit UCIs has gone further in some countries whereas in others it has fallen behind.

However, the Professor commented, also in countries who firstly regulated credit UCIs a satisfactory balance point between the various types of UCIs that can operate in various capacities has not yet been found.

The speaker continued illustrating the example of UCIs investing in debt securities, such as mini bonds or other bonds issued by corporate entities. In such cases the approach is hybrid: looking at the substance of the transaction, these UCIs generate credit not only when they buy securities on the secondary market but most importantly

when they underwrite issuances of private companies on the primary market. They find themselves subject to the discipline of UCITS – as they are closer to the traditional scheme of the collective investment scheme – instead of being subjected to more specific or simply different rules of credit UCIs.

Professor Annunziata deemed necessary to understand whether substance shall prevail over form and posed following questions. How shall a UCIs with a portfolio represented in its entirety by debt securities both purchased on the primary and subscribed on the secondary be considered? As a UCIs that invests in financial instruments or as a credit UCI?

Professor Annunziata underlined the issue is not uncommon as the regulation of credit UCIs is more specific in countries that have decided to regulate credit UCIs differently from UCIs investing in debt securities.

In an effort to answer the question, Professor Annunziata observed if form shall prevail over substance, the traced path is one, contrarily, if the substance of the economic operation shall prevail, these UCIs should also be progressively subject to the rules and schemes provided for credit UCIs.

Professor Annunziata then briefly dwelled on the choices that have been made in Italy when introducing and regulating credit UCIs.

First of all, he addressed the decision not to limit the discipline of credit UCIs to so-called reserved UCIs. This decision, the speaker emphasized, is also to be considered worthy of consideration on the international scene: in other countries the choice to reserve such UCIs to the public or to professional investors prevailed. In Italy it was imagined that these UCIs could collect resources they use for investment activities with non-reserved investors relying on the classic gradation of the rules that apply to the different types of UCIs, which, as is well known, are very more flexible for reserved UCIs than those applying to non-reserved UCIs.

The above shall be considered a distinctive trait of the Italian system which marks a choice worthy of being highlighted, although it has not had a concrete and significant application on the market because of the lack of non-reserved UCIs in Italy.

He then highlighted another distinctive trait of the Italian system: the inclusion of activities reserved for AIF managers within the scope of collective management activities.

This choice, the speaker stressed, is far from obvious. He observed in many countries UCIs are not subject to specific discipline or it remains uncertain whether the applicable discipline is that of collective asset management. At the EU level, Professor Annunziata explained, the AIFMD does not unequivocally include discipline of credit UCIs in its perimeter unless the principle of prevalence of substance over form applies.

The third element of the Italian discipline Professor Annunziata examined was the mandatory enrolment to central credit registers imposed to credit UCIs. In the opinion of the speaker, this aspect is the closest point between the rules of the banking business and those of UCIs which, otherwise, are not subject to typical rules of prudential supervision applying to banks or other entities providing credit.

The speech followed providing explanation for this. The removal of these tools from a set of rules applying to banks or other entities traditionally providing credit, albeit applied pursuant to a principle of proportionality, certainly creates dystonia.

The reasons are to be found in the onerousness of capital absorption and in terms of limitations set in the provision of credit. Therefore, the rules concerning the concentration of risks, large exposures applying to banks or those related to capital requirements, are not applicable in this context.

Access to the central risk registers, Professor Annunziata considered, is a measure that on the one hand equates or brings closer the regulation of credit UCIs to that of banks. On the other hand, it is an indispensable tool for the management of UCIs itself which have the duty and the obligation to evaluate the credit assignment. Thus, it ensures a more solid and reliable risk management process.

Lastly, the speaker noted credit UCIs can only provide credit to non-retail clients in our country. Rationale for this provision was to not completely erode the reserve of activity of other market players.

Professor Annunziata then continued his intervention by citing ESMA opinion of 2016: the charts composing it mainly referred to EU countries, nonetheless, some referred to non-EU countries such as Switzerland. For each of these, ESMA pictured the applicable regulations. In some cases, such as in Croatia or France, at the time there were no specific rules for credit UCIs and this dystonia within the EU created an obstacle to the integration of the market at EU level for these products or tools.

The speaker stated such obstacle arises from the divergence of regulatory approaches, as many countries have not yet decided whether and how to regulate these products; on the other hand, the fact that these funds are not included in the perimeter of EU directives does not allow them to obtain the European passport.

Professor Annunziata stressed the importance of different regulation of these products and highlighted even when the scheme of credit UCIs is captured by rules applicable to banking activity, it shall still be borne in mind that the risk transformation activity the UCIs carries out is different from that of banks. While the depositor has a credit right to be repaid of the deposited sums in respect of the bank, whoever subscribes to an UCIs does not have a right to repayment but participates in the overall result deriving from the investment activity.

Professor Annunziata remarked and explained the different functions of credit UCIs when considered in their complexity – i.e. not considering the provision of credit as an isolated activity – and considered the regulatory approach not to entail the subjection of these bodies to the full regulation justifiable. The difference stands objective with respect to the typical banking activity, as credit is the object of the investment activity and the position of a depositor of a bank is different with respect to that of a shareholder of a fund.

The future of credit UCIs, Professor Annunziata reflected, seems to be linked to the debate on the future of NPLs due to the pandemic crisis. Also, it is solidly tied to the ongoing discussions on the possibility of establishing a bad bank at European level or many connected bad banks at national level to avoid the apparently unstoppable coming of NPLs resulting from the pandemic crisis. In this context, credit UCIs could actually play a role as securitization instruments for NPLs and support to the management of the crisis being experienced.

Professor Annunziata deemed necessary to proceed to level playing field of these subjects at EU level. In the study of ESMA – although dated – he found it remains the fact that today these bodies are not included within the EU directives. Importantly: since the NPLs market will have to be addressed in a European context, this problem shall be taken in consideration in the just started revision of the AIFM Directive. This might be an opportunity to clarify whether or not these subjects are included in this directive.

In the meantime, while waiting for something to move at the European level, Professor Annunziata hypothesized what could be done in Italy to incentivize the spreading of these subjects.

The Professor noted that there are some points that are already subject to the regulator attention: the improvement of the outsourcing approach for the performance of core functions of the UCIs, a cross-cutting point of both shadow banking and Fintech. The existing UCIs make extensive use of outsourcing, especially with regard to the creditworthiness assessment activity. The issue arising is what discipline shall be applied to outsourcers who are not supervised subjects but often perform truly essential functions in this market segment.

The second issue addressed by Professor Annunziata concerned the relationship between the figure of the credit UCI and the very rigid position that the case law retained with respect to reserve assets and conduit operations. He explained such conflict arose because in UCIs at hand – especially in those reserved for professional entrepreneurs – the level of independence and autonomy of the manager with respect to the UCIs participants may actually be rather reduced and, therefore, revive the problem of possible violation of the reserve of activity that would stem from using a vehicle formally authorized in Italy to provide credit but which obtains the resources for carrying out that activity from subjects operating in countries that are not "passported" in Italy.

The speaker underlined the relevance of the matter, as it was verified that performing securitization transactions of NPLs, the UCIs scheme , posed problems precisely in the light of the jurisprudence of the Court of Cassation on conduit transactions.

Professor Annunziata also addressed the revision of the rules of "derecognition" of banks' bad loans, in cases the UCIs scheme is used – for example to dispose of non-performing loans. In his opinion, this would deserve to be reconsidered in the context of the pandemic situation.

Finally, the speaker wished for a better clarification of the boundaries of the sub-sectors in order to facilitate the distinction between proper UCIs, UCIs that invest in debt securities, and lending activities of closed-end UCIs providing credit in various forms to investee companies or companies in which they intend to take a stake.

The link between the credit UCIs and the secondary market of NPLs is also clearly mentioned in the Report of the High Level Forum on the Capital Markets Union which, Professor Annunziata pointed out, has now been released a few months ago in a completely different context, with respect to the latest proposals from the European Central Bank itself on the creation of the bad bank for the management of NPLs.

3. The debate

As the introductory reports were concluded, and having provided a detailed overview of the phenomenon under examination tracing the scope of the debate, Professor Zoppini focused on a concept emerged during the interventions: the absence of a necessarily negative connotation. The reasons, he followed, must be sought in the fact that the activity under analysis is fully regulated and, consequently, regular. Nonetheless, in his opinion, this does not mean that the underlying question related to the suitability of the rules and their effectiveness shall be considered solved.

Professor Zoppini left the floor to Doctor Tiziana Togna, Deputy General Manager and Head of the Intermediaries Division of Consob. She began her speech investigating the wording "shadow banking" and the development around this concept in terms of preconceptions.

Dr. Togna reported the Financial Stability Board defined shadow banking as "any form of credit intermediation that involves entities or activities that are partially or completely outside the traditional banking system." On these grounds, the problem that arose was to ensure the risks associated with this activity be well known and regulatory arbitrage avoided.

Dr. Togna stated it was felt the necessity to regulate not too strictly some unregulated shadow banking activities and underlined initiatives followed – both at a European level and at a national level – with the two-folded aim of not depriving investors and the system of forms of investments and of reducing the impact deriving from shocks as that generated by the Lehman Brothers case.

The speaker added that there were also risks not deriving from the use of intermediation channels alternative to banking but from the banking system, in particular risks of credit quality deterioration, of NPLs and to the need to support the

banking system in order to reduce NPLs and then later UTPs. Walking this path, Dr. Togna continued, it was possible to identify a range of better delineated and partly regulated opportunities. Uncertainties in the regulation still remain.

With respect to the opportunity to combine traditional and alternative channels, the speaker identified possibilities in the context of mini bonds, of new forms of collective investment organizations, partly encouraged by the European legislator and partly regulated at a domestic level, such as credit UCIs, with consequent mismatches.

All of this was achieved aiming at two objectives: creating forms of collection helpful to disintermediate the banking system; and enhancing retail customers participation in these forms of financing, facing the challenge of keeping the same standards of protection.

Dr. Togna provided data from the Bank of Italy as of 31 December 2019 related to the phenomenon. With reference to mini bonds, data show there are 12 active operators, 18 funds and around 1.5 billion of assets invested in UCIs under Italian law that invest in mini bonds. With regard to investment in credit, figures tell the following: 17 operators, 26 funds and around 2.1 billion of assets. These sums are relevant but not as significant as the speaker wishes would be achieved.

Dr. Togna questioned whether recognition of UCIs – also at a European level – may allow a more generalized and less strict regulation.

The speaker argued specific choices made in Italy, in particular with regard to credit UCIs, enhanced the participation of professional investors. The possibility to involve retail customers is envisaged but only under certain conditions. At the time Doctor Togna gave her speech, Consob was unable to ascertain interest on behalf of the managers in this regard, thus she assessed the necessary maturity is not yet present. That is because, whenever an investor – especially retail – is allowed to participate in liquid investments or is required a holding period not allowing reimbursement at request, the commitment of the person suggesting this fund grows identifying the suitable client and the amount of the tied investment.

The speaker listed very interesting initiatives at national level in this regard: peers and alternative peers tried to bring retail customers closer to the context covered by this webinar, also thanks to the support of taxation.

Dr. Togna commented that the Italian experience poses a major problem regarding the involvement of retail customers, as a high percentage of savings of retail customers that are not held in pension funds, insurance, fund shares, but as assets under administration.

The speaker identified the real challenge for the future: working to ensure that retail customers can also access this world.

Although MEF presented initiatives to reduce constraints on the subscription of these types of funds, Dr. Togna illustrated, the most suitable subjects to subscribe to this type of products are investors with characteristics of professionalism, ability and knowledge of higher risks, rather than retail investors. Especially where these funds are no longer limited to buying and investing in debt securities but also provide credit or debt restructuring.

The speaker explained today's most advanced forms of intervention of alternative funds involve UTPs managers, meaning that the ability of investors and SGRs must focus on creditworthiness and work symmetrically with respect to what it is required in the banking system.

On the other hand, subscribers of these shares are not as protected as depositors and, therefore, if retail customers are to approach these forms of investment, it is necessary to have a clear understanding of the risks.

Doctor Togna concluded recalling the President of the Republic himself in his speech during "Giornata del Risparmio"; he pointed out that saving is a value that must be employed to contribute to investments. At the same time, the President underlined it must be properly used.

From the above it can be inferred that Supervisory Authorities are very sensitive to the opening of these forms of investment towards retail customers, as the proper precautions must be adopted.

The debate continued with Doctor Fabrizio Pagani's intervention, Global Head of Economics and Capital Market Strategy at Muzinich & Co. He clarified his favour for the term "Finance for growth" rather than shadow banking, as in English shadow banking is too close to "shady".

Doctor Pagani anticipated during his intervention he would address the

intersection of three representative lines of fundamental issues in terms of economic policy.

The first issue the speaker addressed regarded the banking sector.

He commented banks are challenged to reduce the impact on equity of loans they provide – especially with regard to SMEs loans – in compliance with new Basel rules.

Doctor Pagani explained this circumstance is not yet as evident in Italy as it is in other European countries and U.S., where reluctance of banks to lend to companies grows, especially medium-small ones.

Dr. Pagani followed considering the borrower side.

The speaker clarified his wish to develop a wider debate with regard to Italy. In his opinion, Italian companies are capable, by offering their products, to find international markets and to deeply root in markets where they are already present. They also have the ability to renew offers and bring innovation.

According to the speaker, two fundamental issues linked to the size and the bank-centred traits of the system affect Italian companies: governance and equity.

Dr. Pagani then recalled some of the initiatives implemented during the time he was Head of the Technical Secretariat of the Minister of Economy and Finance Pier Carlo Padoan. He aimed at pushing the Italian production system towards forms complementary rather than alternative to the Italian banking system: e.g. private equity funds, debt funds.

However, the speaker underlined all the initiatives implemented focused on the professional investor. That is because professional investors provide equity or financings the companies need with peculiarities that the bank is unable to provide. Plus, the professional investor, whether Italian or foreign, performs a more penetrating and robust control over companies, thus more stimulating.

In the opinion of the speaker, a company benefits from having an international investor in equity or as lender instead of turning to the bank. Even though it may have in-depth examination, it is certainly more stimulated in terms of competitiveness and productivity of the company.

The third topic addressed by Doctor Pagani is that of savings.

The speaker recalled the intervention of Dr. Togna and specified that interesting

initiatives have been put in place with the objective to channel retail savings to the real economy.

The speaker also mentioned his attempts through the so-called "Traditional peer 1", even though the result of this initiative has been limited.

Dr. Pagani underlined how the current government introduced "Alternative peers" which, in his opinion, are an excellent tool despite the fact they struggle to expand for various reasons.

Finally, the speaker asked Dr. Togna whether there is an issue of fairness, since more and more often saver protection is discussed. In particular, he asked whether it is correct to allow wealthy ones to access forms of savings characterized by high returns – e.g. private equity – whereas ordinary investors only access limited investments, which substantially have no return.

Dr. Pagani concluded his speech by briefly addressing UCITS. In his opinion it is correct no to include them under all the rules to which banks are subject, and it is also true that credit funds do not have access to financing from the European Central Bank.

The above stands as a fundamental difference because banks have access to money below market cost and can still obtain gaining on loans, which is not possible for credit funds.

Finally, the speaker reported the European Central Bank's important "warnings" regarding the incoming wave of NPLs. According to Dr. Pagani, this could represent a further reason to the use of alternative financing funds, be it credit funds, private equity funds, parallel lending funds together with banks.

Lawyer Patrizio Messina, Partner at Orrick Law Firm, then took the floor. He firstly reviewed three points emerged during the webinar, in particular the reference Professor Zoppini made to the article of the Economist. Lawyer Messina explained that article stemmed from the approval of the Capital Markets Union. At this moment, the words "shadow banking" were differently approached with a new constructive debate.

With reference to mini bonds, addressed by Dr. Togna, Prof. Annunziata and Dr. Pagani, the speaker positively evaluated the Italian law on mini bonds as it allowed to generate about 20 billion in eight years. Certainly, Attorney Messina admitted, it

might work better, but he also noted the fact that it was copied in Spain and Africa with the support of the World Bank prove it a positive legislative effort. In his opinion, the culture of mini bonds and alternative finance would probably need to be developed. The following issue Lawyer Messina addressed regarded "Finance for growth." Lawyer Messina agreed with considering this alternative finance which may also be called "Alternative finance for the growth of SMEs."

Moving on, he addressed Capital Markets Union. He illustrated it was launched by the Commission in 2015, when the Capital Market Union had to be the way and the perspective to provide alternative finance to small and medium-sized enterprises.

In the midst of the pandemic, the Commission focused on a plan to "encourage financial participation and transform the saver into an investor."

In the speaker's view, the issue consists of how to open up to alternative financing using the savings of sophisticated investors and, with due protection, that of retail investors.

Furthermore, he followed, the possibility of investing not only in clusters arises on the Capital Market Union. Lawyer Messina described in Italy a marketplace only means investing in clusters, a set of companies, while it is not yet possible to invest in a single company. Also, the company may not advertise in order to obtain alternative finance.

Secondly, the speaker dealt with "single investments." A few weeks before the webinar, the Crowdfunding Regulation was issued and will come into force the following year. It addresses single investments for the first time allowing crowdfunding, that is to put even the single company in the position to receive funding.

This, Lawyer Messina commented, although limitedly relevant from a quantitative perspective, puts single investments under the spotlight for the first time in a European regulation. The legal significance is relevant as it can ease the interpretation of the TUB with reference to the provision of the financial activity.

He noted the inclusive character of the Crowdfunding Regulation and he hoped that, as it is self-executing, it will boost the market.

The last matter Lawyer Messina dealt with regarded an international practice. The speaker illustrated that both United Kingdom and France provide investors the opportunity to check the detail of the investment, under certain conditions. The former

in a more articulated way, with investments platforms allowing the investor to do so.

The speaker wished this international practice may lead, with the help and support of the Commission, to a wider application of alternative finance which is essential to solve our systemic crisis as well.

The debate continued and Doctor Camilla Cionini Visani, General Manager of ItaliaFintech, intervened. Her speech analysed empirical data collected by ItaliaFintech during the first months of the pandemic, an association gathering main Italian Fintech companies.

Opening her intervention, Dr. Cionini Visani noted the Italian FinTech sector in not distant times lagged behind global trends (see U.S. and UK). The current year, instead, marked a strong dynamism regarding new realities entering the market: both in terms of turnover and companies that have exceeded one million euro revenue.

However, the speaker underlined that the gap in investments is still there, especially in venture capital and in the early stages of start-ups, less so in FinTech companies that are in a more advanced state of development.

The speaker highlighted three trends.

The first took into consideration the lending data provided with respect to association members active in the lending and capital market segment.

The first nine months of the year bond loans issuances grew tremendously. Even more importantly, in the opinion of the speaker: the growth of the number of companies served by FinTech solutions was exponential and many of these companies look to FinTech tools for the first time.

The association's members issued approximately 1,700,000,000 euros, for a total of nearly 6,000 companies served.

The second trend the speaker underlined is that of the appearance of new FinTech players in the SMEs market segment, a segment increasingly less served by traditional financial services. In recent months, an important number of new FinTech players – framed as banks or under Article 106 of the TUB under the Italian law – have turned serving SMEs through FinTech models into their core business.

These new players are characterized by lighter and different distribution models with respect to traditional models. They integrate their creditworthiness and rating

assessment platforms with methods exploiting artificial intelligence systems provided by other FinTech players who work and evaluate creditworthiness in a different, more advanced way.

The Doctor illustrated how this allows them to grant loans in relevant amounts.

The last trend the Doctor took in consideration concerned accelerating collaborations. This developed in recent months between FinTech and incumbents. The imposed digitalization imposed by the pandemic also pushed incumbents to accelerate the request and the need to change their business processes which, in turn, accelerated the contamination.

The speaker considered this an excellent news for both, since the nature of the latter is complementary, and its niche nature works better with a more universal as that of a traditional bank.

In conclusion, FinTech can make a very significant contribution both to end users, because they see new solutions and opportunities, and for others as an innovation accelerator. If adequately supported with measures at an institutional level, it may make an important contribution both to the real economy in terms of digitization and innovation.

Professor Zoppini intervened in the debate and, before introducing the remaining guests and speeches, he reported an article by the Economist that qualified Covid-19 as a significant accelerator of social and economic phenomena, which will produce effects in terms of digital transfer in 2-5 years.

The following guest to take the floor was Professor Valerio Lemma, Full Professor of Economic Law at the University of Guglielmo Marconi. Referring to what Professor Zoppini said, he argued the article of the Economist probably referred to more advanced realities than the Italian one. He noted Italy leapt forward by ten years during the pandemic, also in terms of relations with the Supervisory Authorities. Nevertheless, he commented evolutionary dynamics have not always benefitted from accelerations: the PEPP, the purchase program implemented by the ECB, and the emergency decrees adopted by the Government have pressured banks requiring them to act beyond the original role of private borrowers of credit institutions.

Professor Lemma noted that the pressure on banks seems to be reducing their full operation because of two trends: the first related to monetary policy, which is subject

to parameters of prudential supervision. It seems banks have to deal with safer creditors, offering low-cost credit even when backed by government guarantee. The result is that banks are left with a credit market segment characterized by low risk and yields.

Professor explained shadow banking system expands under these conditions, or the non-bank intermediation market, according to the latest definition of the Financial Stability Board. In fact, goods, risks and returns transit through this system because of the dynamics illustrated by Professor Annunziata in his speech, or as a result of financial platforms conveying subjects lacking credit the offer by subjects who have it in surplus, willing to accept in some high returns in exchange of risks not compatible with the prudential supervision system implemented by the latest Basel Accords.

The speaker noted that as UCIs are concerned, the context of Covid caused the skip of one of the typical phases of shadow banking: warehousing. He illustrated as the stock of credit portfolios originates in the assets of an UCI issuing financial instruments which readily circulate in shadow banking conduits modifying their quality, duration, maturity, and providing leverage in order to seize the unexpressed opportunities of investors by reaching a combination of risks and returns suitable to be offered on international markets.

Professor Lemma considered dynamism marked technologies, regulatory and financial innovation.

In this regard, the role of Big Techs is that of financiers of subjects who access their platforms. The Professor doubted the activity of Big Techs may remain in the scope of the exception under Article 3 of the Ministerial Decree of Ministero dell'Economia e delle Finanze, which illustrates the activity of granting financing and provides the exception for supply chain credit.

The Professor followed addressing the acceleration mentioned by Professor Zoppini which would provide all financial instruments of shadow banking with the possibility of digital quality and, thus, crypto assets that refer directly to underlying credits. In the speaker's opinion, the recent innovation linked to the European Commission's proposal to create a market for crypto asset seems to address what was until now the very opaque market-based financing of shadow banking.

Professor Lemma illustrated credits originating directly in vehicles suitable for issuing financial instruments and considered technological innovation projects these

financial instruments towards new types of markets. He commented if there will be the regulatory innovation of a new market dedicated to crypto assets, it might be said that shadow banking is finding full legitimacy within a European regulatory context leading somehow to legitimize and make visible all operations alternative to those of banks.

Professor Lemma then acknowledged how strong the competitive pressure towards credit institutions seems to be and imagined Covid might accelerate the role of banks.

The speaker concluded there will be more and more shadow banking and less and less banking, due

to the market conditions at which the latter can be exercised.

Doctor Ignazio Rocco di Torrepadula, Founder and CEO of Credimi S.p.A., brought in the experience of a FinTech operator under regulation. He proposed a comparison between Credimi S.p.A. and a similar English company: Funding Circle.

Dr. Rocco di Torrepadula briefly introduced his company: a financial intermediary enrolled in the register providing loans to small and very small companies and financing itself on the capital markets with securitization transactions. The company began operating in 2017, as all of 2016 was spent obtaining authorization.

The speaker specified that the obtaining of the authorization took, throughout the EU, a year of work, and an application of about 500 pages.

Before being able to start operating on the market, and in order to have the first customer, it was necessary to provide a three-year plan, the existence of sufficient capital to start and also for the following three years. The company also had to prepare more than ten different risk control policies, internal auditing, and certified financial statements. A risk appetite framework, a board of auditors with strict requirements and an independent chairman were required to be assessed and appointed.

All of this, explained Dr. Rocco di Torrepadula, happened before starting the business. While the operating capital needed to start would have been 2 or 3 million, he made clear in reality 8 million were raised because in order to cover the two years that followed the beginning of the business.

The speaker said Funding Circle, in the same year in which Credimi entered the market, had been operating for seven years in England. While Credimi's volumes

were zero, Funding Circle's volumes were £ 1.5 billion, it was close to listing and had already served thousands of clients. In particular, it operated without authorization, or rather with a provisional authorization from FCA.

Therefore, Funding Circle had put in place about 10-20% of the initiatives and activities that have been described to obtain authorization in Italy operating in England. In 2017, Funding Circle obtained its definitive license after seven years of activity. The following year it went public.

The speaker then explained that he compared the two companies to draw the attention to the fact that there are two effects of the regulation.

The first effect is controlling risks and safeguarding stability. Dr. Rocco di Torrepadula pointed out regulation has an extremely strong impact on competition and on the possibility of innovation. In these events regulatory arbitrage is often cited and this creates a certain bitterness in those who have truly dedicated gigantic resources to comply with all the rules. In his opinion – at least in the EU – regulatory arbitrage is substantially impossible, it results in a very strong advantage for existing operators, as the same type of legislation and regulatory investments are imposed on operators of very different sizes, disregarding the principle of proportionality.

The speaker followed indicating that very rarely, when dealing with these issues, he does hear about the impact on competition.

He considered Young FinTech companies are actually companies that often operate without any maturity transformation and stated they are owned by the same operators for which none of these would take a liquidity risk. That is not because they are more ethical but because the company is theirs, so almost everyone knows very well that a liquidity risk means a lethal risk.

When built this way, FinTech companies bring into the system an element of diversity and drive competition and growth. They also act as a hare allowing large operators to innovate.

In the speaker's opinion, this function shall be at the centre of the regulator's focus and noted it is interpreted in a more active way in Great Britain, where in fact every year the FinTech industry generates 10,000 jobs in London alone.

The speaker recalled data provided by Dr. Camilla Cionini Visani's importance because proving Italy largely at the top of the rankings compared to the rest of the EU.

This derives from the fact that, according to Dr. Ignazio Rocco di Torrepadula, Italy is a fabric of small businesses. This meant that many initiatives aimed at these companies were born thanks to the spontaneous Italian entrepreneurial sense.

Finally, the speaker went on specifying the risk he feared is that this entrepreneurship and innovation will not be left free to run its course and develop a market in which Italy is at the top, dedicating effort to regulating risks which they are still not there and not considering growth and competition.

Before concluding the webinar, Professor Zoppini again gave the floor to Doctor Togna, in order to allow her to respond to numerous questions she was addressed with during the debate.

Dr. Togna preliminarily focused on Dr. Fabrizio Pagani's observation and explained how, in her opinion too, it is correct to give the opportunity to participate in profitable investments even for individuals who do not have significant assets.

In this regard, the Doctor reminded the audience that this is one of the problems that led Consob, together with the Bank of Italy, to make a proposal to review the limits for the subscription of alternative investments by retail customers. Today this amount has been set at € 500,000. Analysis were carried out on the regulations in the various countries to try to more adequately calibrate protection and opportunities.

On the other hand, the Rapporteur continued, it is important to underline that also at EU level, in the MiFID II discipline, which somehow characterizes the definition of retail customers. An attempt was made to introduce a new category of retail investors – e.g. the retail investor sophisticated – to try to get out of the quantitative mechanism, which, in the opinion of Consob, risks to ignore the aspect of personalization of the investment.

Thus, Dr. Togna pointed out, the issue is sensitive: one must be aware of the fact that, taking into account the current distribution of the assets under administration, there is a pulverization of the funds currently invested in financial instruments.

The speaker noted there is a high number of investors who hold managed assets below 50,000 euros. She clarified that those to which it refers are invested in financial instruments and not the wealth of Italians.

Dr. Togna specified the underlying rationale: to transit these subjects towards these forms of investment, slightly riskier, through those channels that Dr. Pagani

recalled in his speech.

The speaker summarized the goal is to lead retail investors down that path in a less adventurous way and emphasized this is a topic to reflect on to enhance the principle of alternative finance for growth.

Continuing her reflection, she focused on Lawyer Patrizio Messina's considerations on the topic of crowdfunding. The speaker considered also in lending a further step forward has been made at European level following the Italian experience on equity crowdfunding, which our country was the first to discipline, thanks to the help of the Ministero dell'Economia e delle Finanze.

Crowdfunding initially had numerous constraints, but slowly they have been loosened.

Finally, the last point on which she reflected regarded considerations made by Doctor Ignazio Rocco di Torrepadula and, in particular, on how long the investigation was for the company he represents compared to what happens in other jurisdictions.

In this regard, it is necessary to work a lot on another initiative that has already been put on track at national level, the one of sandboxes, already recognized at European level. An experience is well represented in the UK, where an environment has been created for experimenting, before fully applying the rules governing an intermediary. Dr. Togna stated sandboxes became essential, as they provide the chance to have faster investigations and to experiment and she concluded Consob is very interested in these issues, especially because the operators are faster than the regulators and therefore the latter must accelerate the pace.

Professor Zoppini closed the webinar recalling that the regulatory authorities following the evolution of the market is physiological, given that the latter is by its nature qualified as a dynamic fact. Clearly, Professor Zoppini concluded, the regulation of the phenomenon must be aimed at protecting certainty, safety and trust.

ARTICLES

NOTES ON ITALIAN LAW

LEGAL WORLDWATCH

INTERNATIONAL CONFERENCES AND SEMINARS

ROMA TRE
UNIVERSITÀ DEGLI STUDI
DIPARTIMENTO DI GIURISPRUDENZA