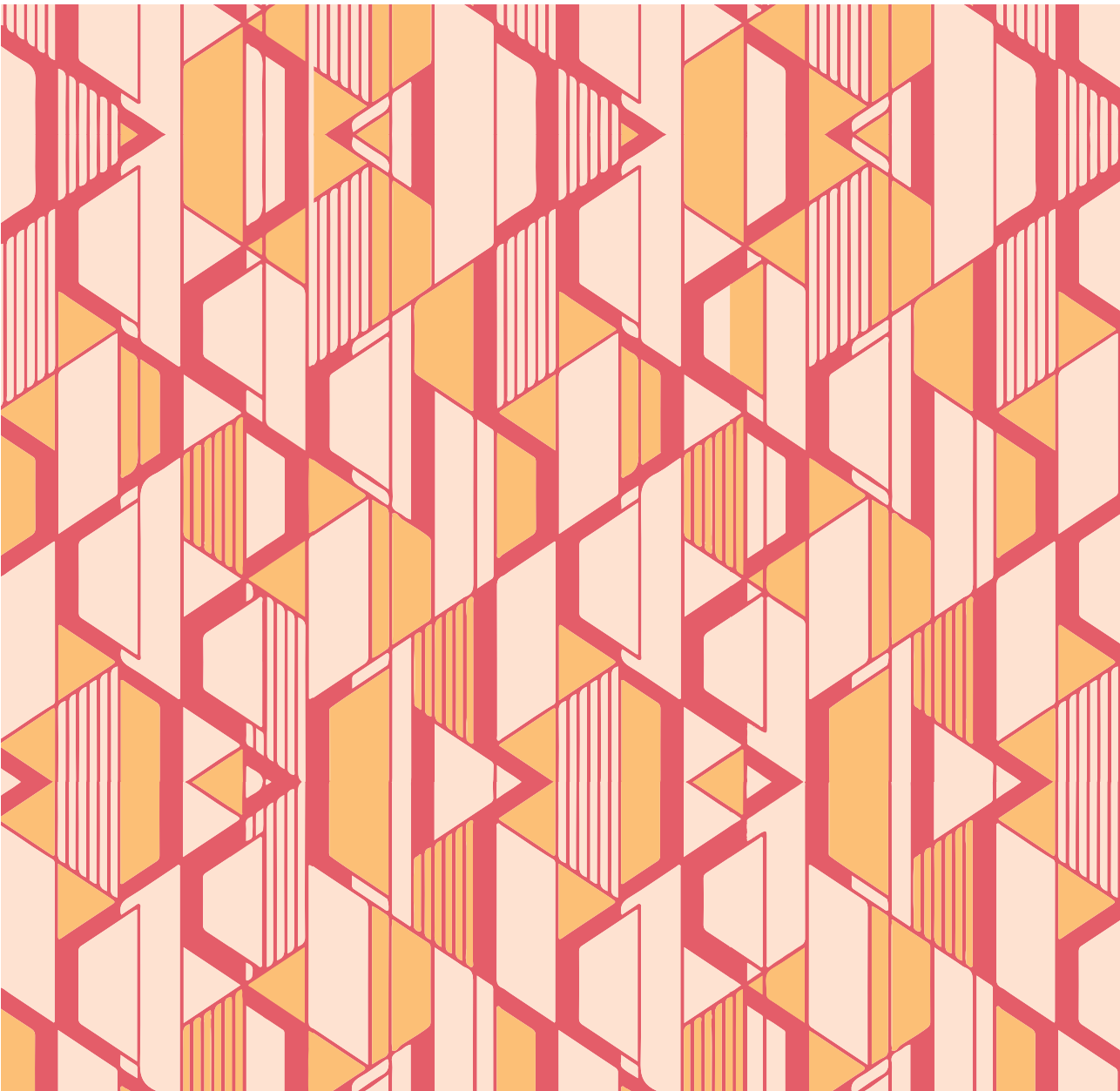


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ROMA TRE LAW REVIEW



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2025

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ANTONIO BALSAMO*

PROTECTING HUMAN DIGNITY THROUGH CRIMINAL LAW: FROM MODERN SLAVERY TO FREEDOM THROUGH JUSTICE**

ABSTRACT. This paper explores the evolving challenges of human trafficking and the critical role of criminal law in safeguarding human dignity. It highlights the increasing complexity of human trafficking, driven by global crises and digital exploitation, and underscores the need for enhanced judicial responses. The study advocates for a human rights-based approach to international judicial cooperation, emphasizing the cross-fertilization between the European Convention on Human Rights and the UN Palermo Protocol. It examines recent Italian Supreme Court case law affirming the principle of non-punishment for trafficking victims, particularly through the lens of state of necessity. Furthermore, the paper discusses the social reuse of confiscated assets as a tool for inclusion and resilience against organized crime, showcasing innovative practices in Italy and across the EU.

CONTENT. 1. The evolution of human trafficking and the progress required in judicial activity. – 2. The fruits of cross-fertilization between ECHR and UN Palermo Protocol: towards a human rights-based approach to international judicial cooperation. – 3. The principle of non-punishment of victims of trafficking in persons in the recent case-law of the Italian Supreme Court. – 4. Social reuse of confiscated assets as a factor of inclusiveness.

* Deputy Attorney General at the Court of Cassation.

** The article builds upon the presentation given at the conference “International Protection Of Human Dignity Through Criminal Law: Strengthening Italy’s Implementation Record (Dignita)”, held on February 25th, 2025, and organised by RomaTre University.

1. *The evolution of human trafficking and the progress required in judicial activity*

There is a growing awareness that human trafficking is a multi-billion-dollar business that has changed dramatically in recent years, driven by global challenges such as war, large migration and refugee flows, cybercrime, climate change. The involvement of organized crime and the rapid evolution of digital technologies have exacerbated the situation. Online technologies are regularly abused to exploit trafficking victims. Financial crises, armed conflicts and forced displacement have strained justice systems, significantly reducing investigations, prosecutions, victim identification and protection.¹

The statistics on trafficking in human beings published by Eurostat on 24 January 2024 showed that in the European Union there was an increase in the number of detected victims and a decrease in the number of suspected and convicted traffickers in 2022, compared to 2021.

In particular, 10,093 victims of human trafficking were registered in the EU in 2022, an increase of 41% compared to 2021. Over the same period, the number of suspected traffickers (8,064) decreased by 16% and the number of convicted traffickers (2,097) decreased by almost 17%.

The same statistics highlighted that in 2022, for the first time, the number of registered victims for labour exploitation (3,990) came close to the number of victims sexually exploited (4,014), each amounting to about 41%: therefore, the percentage of labour exploitation was almost equal to that of sexual exploitation, while trafficking for other purposes – criminal activities, forced begging, benefit fraud, organ removal and others – reached a total of 1,699 victims (18% of all trafficking victims).

It is therefore clear that facing these new challenges requires a shift in judicial activity, both in terms of international judicial cooperation and at a domestic level, with the aim of bringing victims from modern slavery to freedom.

¹ See ‘UNODC launches new action to combat human trafficking and migrant smuggling’ (22 April 2024) <www.unodc.org/unodc/en/press/releases/2024/April/unodc-launches-new-action-to-combat-human-trafficking-and-migrant-smuggling.html> accessed 8 September 2025.

2. *The fruits of cross-fertilization between ECHR and UN Palermo Protocol: towards a human rights-based approach to international judicial cooperation*

The methodology of legal reasoning and interpretation illustrated by Paulo Pinto de Albuquerque, which aims at the cross-fertilization of international human rights and other fields of international law,² appears to be more important than ever today in the field of international judicial cooperation.

Until a few years ago, international judicial cooperation was essentially considered as a network of obligations binding states to one another, within an intergovernmental framework, for addressing the transnational dimension of a wide range of criminal phenomena.

The recent case law of the European Court of Human Rights, however, brought about a significant change in the overall role of judicial cooperation, which is no longer limited to a purely intergovernmental perspective, but is, instead, firmly rooted in the protection of fundamental human rights.³

Such a new approach entails including mutual legal assistance within the framework of positive procedural obligations arising from the provisions of the ECHR, aimed at protecting the fundamental rights of victims and binding on all state authorities: executive, legislative, and judicial.

As noted by prominent scholars,⁴ this perspective was opened by the judgment issued by the European Court of Human Rights on 7 January 2010 in the case *Rantsev v. Cyprus and Russia*, which developed an innovative and systematic interpretation of the ECHR in light of the Palermo Protocol (i.e. the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime).⁵

² See the separate opinions of judge Pinto de Albuquerque in several ECHR judgments, including *Hrvatski Liječnički Sindikat v. Croatia*, no. 36701/09, 27 November 2014; *Konstantin Markin v. Russia* [GC], no. 30078/06, 22 March 2012; *K.M.C. v. Hungary*, no. 19554/11, 10 July 2012; and on points of principle, *Case of Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* (GC), no. 47848/08, 17 July 2014.

³ Maria Assunta Accili Sabbatini, 'La Convenzione di Palermo e i negoziati per il rafforzamento della cooperazione internazionale' (2019) 5(4) *Rivista di Studi e Ricerche sulla criminalità organizzata* 29 35-37.

⁴ Serena Forlati, 'The notion of Organised Crime and the European Convention on Human Rights', in Stefania Carnevale, Orsetta Giolo and Serena Forlati (eds), *Redefining Organised Crime. A Challenge for the European Union* (Hart Publishing 2017).

⁵ In particular, paragraph 289 reads as follows: 'In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking

By doing so, the European Court of Human Rights relied on the UN Palermo Protocol, as well as the Council of Europe Convention on Action against Trafficking in Human Beings, in order to construe the scope of article 4 ECHR (prohibition of slavery and forced labour) and of the positive obligations stemming from that article.

As a consequence, obligations to rely on instruments for international cooperation, whenever this would be conducive to the effective protection of human rights, can be construed as a facet of the obligation to protect human rights.⁶

Such a development refers to a matter – the serious violations of fundamental rights connected to human trafficking – in respect of which important innovations were introduced as to the mechanisms of judicial cooperation.

It is worth mentioning the relevant experience developed at the Public Prosecutor's Offices of Palermo and Catania and at the National Antimafia and Counter-Terrorism Directorate, where, in the context of pilot projects carried out in partnership with UNODC, it was possible to benefit of the cooperation of three magistrates, respectively from Nigeria, Ethiopia and Eritrea.⁷

A significant peculiarity of this experience consists of the enhancement of the functions of the liaison magistrate, employed not only as an intermediary (or facilitator of contacts) between the competent authorities of two countries, but also as a real partner in investigation. The advanced model of cooperation thus created was described as a 'co-working system', where the liaison magistrate performed the functions of an investigative link with the host country, working side by side with the Italian prosecutors. The liaison magistrate participated personally in operational and coordination meetings, learning new techniques and building up new experiences, and, at the same time, providing the Italian colleagues with his/her know-how and legal/judicial knowledge, and with the keys to decrypt criminal behaviour and strategies.⁸

cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Such a duty is in keeping with the objectives of the member States, as expressed in the preamble to the Palermo Protocol, to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination.'

⁶ See UNODC, 'Issue Paper. The United Nations Convention Against Transnational Organized Crime and International Human Rights Law' (April 2022) <https://www.unodc.org/documents/organized-crime/tools_and_publications/21-01901_UNTOC_Human_Rights_eBook.pdf> accessed 8 September 2025.

⁷ See Antonio Balsamo, 'Twenty years later: the new perspectives of the Palermo Convention' (2020) 6(3) *Rivista di studi e ricerche sulla criminalità organizzata* 5; Chervine Oftadeh and Annalisa Pauciullo, 'Rethinking Judicial Cooperation between Africa and Europe' [2019] *Eu crim* 194.

⁸ Giovanni Russo, 'Strengthened judicial cooperation between Nigeria and Italy: key results and case briefs', presen-

3. *The principle of non-punishment of victims of trafficking in persons in the recent case-law of the Italian Supreme Court*

As pointed out in the UNODC's Legislative Guide to the Palermo Protocol, the rationale of the principle of non-punishment of victims of trafficking in persons is grounded in foundational criminal law principles that recognize that criminal liability should be based upon voluntary conduct. The non-punishment principle is also seen as an important tool to increase the likelihood that victims will exit their trafficking situation and cooperate freely with law enforcement and other authorities in the investigation and prosecution of their traffickers. Furthermore, the principle helps to safeguard the rights of victims, to ensure that they are provided immediate access to necessary support and services and to avoid subjecting them to further trauma or victimization.

Since 2012, the Group of Experts on Action against Trafficking in Human Beings (GRETA) of the Council of Europe stressed that 'criminalisation of victims of trafficking not only contravenes the State's obligation to provide services and assistance to victims, but also discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State's obligation to investigate and prosecute those responsible for trafficking in human beings.'⁹

However, there is significant variation in the manner in which the non-punishment principle has been introduced in the domestic legal systems of the different countries.

The non-punishment principle has been enshrined in domestic legislation in some States, such as Argentina and the UK.

In particular, the UK has given the non-punishment principle domestic legal effect through the Modern Slavery Act 2015, the Nationality and Borders Act 2022, the power of the criminal courts to stay a prosecution as abuse of process and the review process via the appellate courts.¹⁰

tation delivered at the side event held on 14 October 2020 on 'Deploying African Liaison magistrates to fight transnational organized crime: Building on the Nigerian experience.'

⁹ GRETA, 'Second General Report on GRETA's activities' (4 October 2012) <<https://rm.coe.int/greta-2012-13-2ndgenrpt-en/16807b4d74>> accessed 8 September 2025.

¹⁰ IBA Legal Policy & Research Unit and British Institute of International and Comparative Law, 'Human trafficking and the rights of trafficked persons' (2023) <https://www.biiicl.org/documents/171_human_trafficking_and_the_rights_of_trafficked_persons.pdf> accessed 8 September 2025.

In other countries, the principle is not enshrined in hard law (e.g., criminal code provisions) or procedural standards (e.g., prosecutor guidelines), but other defences under national law can have similar effects to the principle (e.g., the common law defence of duress).

As indicated by the GRETA reports, there is still no specific provision on the non-punishment of victims of human trafficking in Italy. If a victim of trafficking is involved in criminal activities, general criminal law rules on the exclusion or limitation of criminal liability can be applied. In particular, Article 54 of the Criminal Code provides that a person is not punishable for a criminal offence committed in a state of necessity, provided that the act committed is proportionate to the danger avoided. But examples of the application of the general criminal law provision on ‘state of necessity’ to victims of trafficking continued to be very limited until 2024.¹¹

However, there is a new commitment to implement the non-punishment principle in the most recent case-law of the Italian Supreme Court.

Such an approach is clearly expressed in the Supreme Court of Cassation ruling No. 2319/2024, which overturned the previous two-month prison sentence of a woman who complained of being forced to flee, at just 18 years old, and of having been subjected to very serious violence by traffickers during her journey from Nigeria to Libya, repeatedly raped, with constant danger to herself and the accumulation of a huge debt repaid first with the prostitution activity in Italy and then by complying with the proposal to become a drug courier.

Ruling no. 2319/2024 is based on an interpretation of Article 54 of the Criminal Code consistent with European and international law and opens a path of cross-fertilization in which human rights become the ‘common language’ that makes justice a powerful factor for social inclusion.

A new concrete meaning is given to the defence of state of necessity, which can be invoked by a vulnerable person who appears to be victim of human trafficking, subjected to conditions of subjugation by criminal organizations dedicated to drug trafficking, and forced to transport narcotics, without a concrete possibility of escaping the dangerous situation by resorting to the protection of the authorities.

To this end, the judge is tasked with determining, through an individualized assessment, the specific situation of the victim, taking into account factors such as her personal conditions at the time of departure from Nigeria and her experiences during

¹¹ GRETA, ‘Evaluation report Italy. Third evaluation round’ (23 February 2024) <<https://rm.coe.int/greta-2024-03-fgr-ita-en-2750-4314-7273-1/1680ae9f81>> accessed 8 September 2025.

the journey, including in transit countries; her living conditions in Italy (with specific reference to the working context, the relationship with compatriots, the sources of livelihood and the sexual exploitation suffered); the existence of a debt, its amount, and the reasons why it was contracted; the need to repay the debt with specific concern for her family; the specific condition of subjection to the will of others; the belief that she cannot escape the control of her exploiters and that she cannot resort to the authorities; the connection between the nature of the danger threatening her and the crime for which she is being prosecuted; the risks to which she would have been exposed if she had refused, with reference to possible retaliation, even indirect, by her exploiters.

There is no doubt that the aforementioned Supreme Court ruling can play a key role in protecting the dignity of victims of human trafficking, fostering the renewal of our legal culture on an international horizon.

4. *Social reuse of confiscated assets as a factor of inclusiveness*

Significantly, the new frontier of the harmonization of the legislation of the Member States of the European Union on the fight against the economic dimension of crime also includes the most expressive definition of the social reuse of confiscated assets.

Indeed, whereas 38 of Directive (EU) 2024/1260, on asset recovery and confiscation, reads as follows:

The social reuse of confiscated property sends a visible message to society in general regarding the importance of values such as justice and legality, reaffirms the prevalence of the rule of law in communities more directly affected by organised crime, and builds the resilience of those communities against criminal infiltration in their social and economic fabric, as observed in those Member States that have already adopted such social reuse measures.

Therefore, Member States are encouraged to take the necessary measures to allow for the possibility to use confiscated property for public interest or social purposes, so that it is possible to maintain confiscated property as State property for justice, law enforcement, public service, social or economic purposes or to transfer such confiscated property to the authorities from the municipality or region where it is located so that those authorities can use it for such purposes, including for assignment to organisations carrying out work of social interest.

A meaningful experience is underway in Palermo, where a social tailoring enterprise (*Al Revés Società Cooperativa Sociale*), based in a building confiscated from the Sicilian mafia, is achieving significant results in the rehabilitation of migrants and vulnerable people.

As a factor of inclusiveness, the social reuse of confiscated assets has become a relevant point of convergence between international cooperation and protection of victims of human trafficking.

Worth noting is the outcome of the innovative procedure by which the Italian government returned to France, for social use, an apartment located in Paris, confiscated from a member of the Calabrian mafia following an Italian judicial decision. On 24 February 2021, the *Agence de gestion et de recouvrement des avoirs saisis et confisqués* (AGRASC), which was entrusted with the management of this apartment, leased it to the association *l'Amicale du Nid*, which provides assistance to victims of the prostitution system and supports them in their efforts to change their lives.

Experiences like these shed light on the rationale behind EU Member States' joint commitment to combating organized crime. It is not just a matter of criminal justice. It is also, and above all, a far-reaching strategy aimed at ensuring that every person, and especially the most vulnerable members of society, can enjoy their human rights and fundamental freedoms, as stated in the "Falcone resolution" (resolution 10/4) adopted in 2020 by the Conference of the Parties to the Palermo Convention.

MAURIZIO BLOCK*

HUMAN DIGNITY IN ARMED CONFLICT: PERSPECTIVES FROM INTERNATIONAL CRIMINAL LAW AND ITALIAN MILITARY LAW**

ABSTRACT. This paper examines the concept of human dignity as a foundational and transversal principle within the legal system, with particular reference to international criminal law and military justice. Beginning with a theoretical reflection on human dignity as an inalienable right of the individual, the analysis highlights its centrality in various provisions of the Italian Constitution, despite not always being explicitly mentioned, as well as in the jurisprudence of the Italian Constitutional Court and in key supranational and international instruments, including the Charter of Fundamental Rights of the European Union and the Rome Statute of the International Criminal Court. The presentation focuses on the protection of human dignity within the Italian military criminal codes, underscoring the structural and normative limitations of the 1941 Italian Wartime Code, which remains partially applicable in peacetime, yet does not fully align with the Rome Statute, particularly concerning crimes against humanity. Special attention is given to the proposed Code of International Crimes, drafted by two ministerial commissions (Palazzo-Pocar and Nordio), whose legislative progress was halted despite its inclusion of innovative provisions, such as the recognition of cultural genocide. The paper further analyses draft law No. 1135/2024, currently under parliamentary review, which seeks to introduce the crime of sexual violence against women during armed conflict into the Italian Criminal Code, based on the principle of universal jurisdiction. While the bill's objectives are endorsed, several amendments are proposed, including gender-neutral language for victims, recognition of mitigating circumstances, and reconsideration of the crime's placement within the legal framework. Additionally, the introduction of a separate offense for the failure of superiors to prevent such crimes has to be recommended. In conclusion, although partial in scope, these legislative initiatives represent an important step toward a more comprehensive protection of human dignity in both domestic and international criminal law.

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** The article builds upon the presentation given at the conference “International Protection Of Human Dignity Through Criminal Law: Strengthening Italy’s Implementation Record (Dignita)”, held on February 25th, 2025, and organised by RomaTre University.

CONTENT. 1. Introduction – 2. The Principle of Human Dignity in National and International Law. – 3. Military Criminal Law and the Italian Wartime Code. – 4. The Gap between the Italian Wartime Code and the Rome Statute of the International Criminal Court. 4. The Proposed Italian Code of International Crimes. – 6. The New Legislative Proposal on Sexual Violence in Armed Conflict. – 7. Conclusion.

1. *Introduction*

The protection of human dignity is a central value of international criminal law. As described by international doctrine, even commenting international law and jurisprudence in the context of armed conflict – where the erosion of fundamental values is most evident – the safeguarding of human dignity assumes a decisive role in preserving the moral core of the legal order.¹

This article aims to highlight the role of human dignity in national and international criminal systems, with a specific focus on Italian military justice and the challenges posed by the partial implementation of international norms, such as the Rome Statute of the International Criminal Court.² It defines human dignity as an inalienable and fundamental right of the individual. Human dignity refers to the inherent value that a person attributes to themselves and the perception of how their personhood is respected by others. There exists a minimum threshold below which human dignity is compromised; respecting this threshold must remain inviolable, even in extreme situations such as armed conflict, where the subversion of values endangers social peace and therefore calls for adequate legal regulation.

¹ Alessandra Annoni, Francesca Salerno, *La tutela internazionale della persona umana nei conflitti armati* (Carocci editore, 2023); Martti Koskenniemi, The gentle civilizer of Nations. *The rise and fall of International Law 1870-1960* (CUP, 2002); see also the Italian translation: Martti Koskenniemi, *Il mite civilizzatore delle nazioni. Ascesa e caduta del diritto internazionale 1870 -1960* (Carocci editore, 2012); Mahasen Mohammad Ataghoub, *The advisory function of the International Court of Justice, 1949-2005* (Springer Law International, 2006). Andreas Zimmermann, Rainer Hofmann (eds), *Unity and diversity in international law* (Duncker & Humblot, 2006). Sameh Amr, *The role of the international Court of Justice as the principal judicial organ of the United Nations* (Brill, 2003); Christian Dominicé, 'L'accorde du siege conclut par le Comité international de la Croix Rouge, avec la Suisse', (1995) *Revue générale de droit international public*, 1; Antonio Truyol Y Serra, *Histoire du droit international public* (Economica, 1995). Paolo Benvenuti, *L'accertamento del diritto mediante i pareri consultivi della Corte Internazionale di Giustizia* (Giuffrè, 1985); Wolfgang Fiedmann, *The changing structure of international law* (Stevens & Sons, 1964).

² Edoardo Greppi, 'Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza', (1996), *La Comunità internazionale*, 473.

2. *The Principle of Human Dignity in National and International Law*

The principle of human dignity pervades the entire legal order and has gained increasing prominence at both national and supranational levels.

It seems relevant to underline that numerous international and European sources affirm and protect human dignity.

From an international perspective, the Universal Declaration of Human Rights (1948) affirms, in Article 1, that all human beings are “born free and equal in dignity and rights”.³

The Preamble of the International Convention on the Elimination of All Forms of Racial Discrimination States Parties⁴ (1965) express their understanding that the United Nations Charter is founded on the principles of “the dignity and equality inherent in all human beings”, and that the UDHR proclaims all human beings are born equal in “dignity and rights”.

The mentioned Preamble situates the Convention within the broader framework of international human rights, anchoring it to foundational texts like the UN Charter and the Universal Declaration of Human Rights, both of which affirm human dignity as a core value.

The Preamble of the International Covenant on Civil and Political Rights⁵ (1966), states: “Recognizing that these rights derive from the inherent dignity of the human person”. Furthermore, Art. 10, paragraph 1 expressly mentions this core principle: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

The International Covenant on Economic, Social and Cultural Rights⁶ (1966) shows an identic text in its Preamble, but any specific article concerning the human dignity.

From a gender perspective, The Preamble of the Convention on the Elimination

³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), art 1.

⁴ Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>>.

⁵ Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>.

⁶ Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>>.

of All Forms of Discrimination Against Women⁷ (1979) indicates: “Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity...”. The following Article 11, paragraph 1 (c) recalls “in particular the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction, and to ensure, on a basis of equality of men and women, the protection of the human dignity of all workers.”

The following Article 13 (c) requires that the States shall grant to all women on an equal gender basis, “the right to family benefits, the right to bank loans, mortgages and other forms of financial credit, and the right to participate in recreational activities, sports and all aspects of cultural life.”

The above-mentioned Treaty is often described as an international bill of rights for women and defines what constitutes discrimination against women, setting up an agenda for national action to end such discrimination that offends the dignity of the women.

In the Preamble of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸ (1984), human dignity is affirmed as the foundation of human rights, in accordance with the language of the Universal Declaration of Human Rights, as follows: “Recognizing that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and that these rights derive from the inherent dignity of the human person...”.

In more recent times it should be relevant to mention also the Convention on the Rights of the Child (1989), as well as the Convention on the Rights of Persons with Disabilities (2006) that completed the modern international framework.

Last but not least, from an international perspective, it is mandatory to recall the Statute of the International Criminal Court⁹, that is a fundamental agreement that led to the formation of the International Criminal Court. The so-called Rome Statute¹⁰ was adopted at a diplomatic conference in Rome, Italy, on 17 July 1998 and it entered

⁷ Available at: <<https://www.un.org/womenwatch/daw/cedaw/cedaw.htm>>.

⁸ Available at: <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>>.

⁹ Available at <<https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>>.

¹⁰ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), arts 6-8.

into force on 1 July 2002. As of July 2025, 125 states are party to the Statute.

The Rome Statute established four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression (added by the Kampala amendments in 2010). As described in the following paragraph 4, those crimes, that “shall not be subject to any statute of limitations”, are not fully provided for by the Italian Wartime Code.

From an European perspective, the European Convention on Human Rights (1950) has primary relevance.

Although it does not explicitly mention human dignity, the concept is embedded in the rights it enshrines, such as the right to life, bodily integrity, and the prohibition of torture.¹¹

In this exact direction, the Charter of Fundamental Rights of the European Union (2000), in Article 1, unequivocally states: “Human dignity is inviolable. It must be respected and protected.”¹²

More precisely, the following Article 2 states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...”.

The following milestone is represented by the Art. 2 of the Treaty of Lisbon (2009), consolidated in the Treaty of European Union: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...”.

From an Italian perspective, the principle of human dignity represents an implicit yet foundational value within the Italian constitutional framework, even though it is not always explicitly mentioned. Nonetheless, it is central to numerous constitutional provisions, including Articles 1, 2, 3, 13, and 32 of the Italian Constitution.

The significance of human dignity emerges particularly in the area of prison treatment, as stated in Article 27, paragraph 3, of the Constitution, which mandates that punishment must respect human dignity.

Furthermore, human dignity lies at the core of a number of criminal offenses against the person, such as mistreatment, torture, sexual violence, and others that inherently imply a violation of this legal asset.

From a national judiciary perspective, the Italian Constitutional Court has repeatedly invoked the principle of human dignity in its jurisprudence to declare the un-

¹¹ European Convention on Human Rights (ECHR) (1950), art. 2, 3.

¹² Charter of Fundamental Rights of the European Union [2000] OJ C364/01, art 1.

constitutionality of laws that infringe upon personal rights. A paradigmatic case is Judgment No. 96 of 2015, regarding end-of-life decisions, where the Court explicitly referenced human dignity as a criterion for ensuring the individual's right to self-determination.¹³ Unfortunately, this ruling has not yet been fully implemented by the legislative power, to which the Court had addressed its directive.

3. *Military Criminal Law and the Italian Wartime Code*

In the specific context of military justice, which is the field in which I deal with, particular attention must be paid to how the concept of human dignity is protected within military criminal codes, especially within the Italian Wartime Code¹⁴ and the proposed International Crimes Code,¹⁵ currently still under legislative consideration. Additionally, a specific legislative proposal presently under review by Parliament addresses the protection of women during armed conflict and, by extension, the human dignity of women in such contexts.

It is important to note that the Italian Wartime Code is applicable not only in wartime but also in peacetime, pursuant to the amendments introduced by Law No. 6/2002.¹⁶ This extension, however, applies only to certain provisions – specifically, Articles 165 and following – concerning crimes against the laws and customs of war.

Despite this, the existing Military Code does not entirely reflect contemporary standards, either in form or substance, due to its origin in 1941 and its foundation in outdated ideological premises. Nevertheless, alongside international instruments such as the 1949 Geneva Conventions and their 1977 Additional Protocols,¹⁷ the Universal Declaration of Human Rights, and other sources of international law (many ratified by Italy), the Italian Wartime Code still contains provisions that aim to protect human dignity.

In particular, the chapter on crimes against prisoners of war merits mention. Articles 209 through 213 address, respectively, torture and mistreatment, insult, violence

¹³ Constitutional Court, Judgment n. 96/2015 (End-of-life case), available at <<https://www.cortecostituzionale.it>>.

¹⁴ Italian Wartime Code (Royal Decree Law No. 303 of 13 November 1941), as amended.

¹⁵ Ministry of Justice, 'International Crimes Code Scheme' (Palazzo-Pocar Commission and Nordio Commission, 2023).

¹⁶ Law No. 6 of 31 January 2002, 'Changes to the discipline of military crimes in peacetime and in wartime'.

¹⁷ Geneva Conventions (1949) and Additional Protocols I and II (1977), ratified by Italy with Law No. 173/1985.

or threats, coercion to provide information or perform prohibited labour, and violations of religious freedom. Each of these offenses protects the moral autonomy of the prisoner, safeguarding their conscience and preserving their sense of self-worth and human personhood.

4. *The Gap between the Italian Wartime Code and the Rome Statute of the International Criminal Court*

Unfortunately, the current Italian Wartime Code does not include all the offenses provided for in Articles 6, 7, and 8 of the Rome Statute: this issue represents sensitive matter. The Rome Statute articulates a broader and more nuanced protection of human dignity through the codification of offenses not currently reflected in either the Italian Wartime Code or other areas of Italian criminal law.¹⁸

It should be highlighted:

Article 6(c), (d), and (e) of the Rome Statute: imposing living conditions calculated to destroy a group; preventing births within a group; or forcibly transferring children to another group.

Article 7(g) and (h): rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, and other forms of comparable sexual violence; and persecution against identifiable groups based on political, racial, national, ethnic, cultural, religious, or gender grounds.

Article 8(x): subjecting persons in enemy hands to mutilation or medical/scientific experimentation not justified by the medical treatment of the persons involved, causing death or serious harm.

These examples underscore the gap between international standard and national legislation.

Therefore, a legislative intervention aimed at giving full effect in the Italian criminal system to the criminal provisions contained in the Rome Statute appears to be essential and its adoption is hoped for as soon as possible.

¹⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), arts 6-8.

5. *The Proposed Italian Code of International Crimes*

Significant progress might have been achieved through the enactment of the proposed Code of International Crimes, which I contributed to in both the initial Palazzo-Pocar Ministerial Commission and the subsequent one chaired by Minister Nordio.¹⁹ Both commissions produced draft codes. The most recent – commonly referred to as the “Nordio Draft” – was presented to the Council of Ministers in March 2023, but it was approved (in a press release) only in part. The section on “crimes against humanity,” which offered the most robust protection of human dignity, was excluded.²⁰

The draft included offenses of considerable normative importance, such as cultural genocide. This crime punishes any person who, with the intent to eradicate a national, ethnic, racial, religious, or linguistic group, subjects members to restrictions on personal liberty, deportations, forced indoctrination, bans on religious or cultural practices, or other actions aimed at eliminating the group’s identity.²¹ Such conduct strikes at the very foundations of human personality and dignity.²²

Other crimes against humanity proposed in the draft included slavery, forced marriage, sexual and reproductive violence, torture, persecution, and apartheid. The exclusion of these provisions represents a significant setback, as they align directly with the Rome Statute and ensure full protection of fundamental rights, including human dignity. The remaining approved provisions have not proceeded through the legislative process, and the draft remains dormant.

The question of jurisdiction over crimes against humanity has also been debated, specifically, whether such cases should fall under the ordinary or military courts. Given the gravity of these offenses and their impact on fundamental rights, consensus was reached that they should be adjudicated by ordinary courts, notwithstanding the existence of military tribunals under Article 103 of the Italian Constitution.

On the other side, according to the draft law, war crimes committed by military personnel remain under the jurisdiction of military courts, while those committed by civilians in peacetime fall under the jurisdiction of ordinary courts. These provisions appear to be consistent with the Italian Constitution, which provides that military courts

¹⁹ Ministry of Justice, Report of the Nordio Commission on International Crimes Code Scheme (2023).

²⁰ Council of Ministers, Press release No. 51, 9 March 2023.

²¹ *Ibid.*, art 7-ter (draft), as proposed.

²² Edoardo Greppi, *I crimini dell'individuo nel diritto internazionale* (WK, 2012).

in peacetime have jurisdiction only for military crimes committed by members of the Armed Forces.

6. *The New Legislative Proposal on Sexual Violence in Armed Conflict.*

In the same spirit of protecting human dignity, a recent draft law – still under parliamentary review – addresses the protection of women during armed conflict. While partial in scope, this initiative revives much-needed attention to the implementation of international criminal law. It is draft law No. 1135, presented to the Senate on 9 May 2024 by members of the parliamentary majority, including Senators Campione, Balboni, and Rastrelli.²³ The mentioned draft law proposes incorporating into the Italian Criminal Code the offense of sexual violence against women as a mean or a method of war.²⁴

Commendably, it introduces Article 609-bis.1, which establishes the principle of universal jurisdiction for such crimes, allowing prosecution in Italy, even when committed abroad by foreigners, provided the perpetrator is present within Italian territory, a principle previously endorsed by the aforementioned ministerial commissions.²⁵

The proposed article punishes anyone who, during an armed conflict, coerces a woman into acts of sexual violence – including rape, sexual slavery, forced prostitution, and other forms of sexual coercion – by violence, threat, or abuse of power, with imprisonment from 8 to 12 years. A second paragraph criminalizes acts such as forced genital mutilation or sterilization aimed at preventing births.

The contextual element requires that the conduct be committed during an internal or international armed conflict, as defined in Article 165 of the Italian Wartime Code. However, limiting the protection to women as victims is problematic. This restriction contradicts the inclusive approach of both the general provisions of the Italian Criminal Code and the Rome Statute, which recognize protection regardless of gender or sexual orientation. International jurisprudence, including the International Criminal Court and The Hague Convention of 26 May 2023, supports this broader interpretation.²⁶

It would be more appropriate, therefore, to use the term *any person* as the victim of such crimes, ensuring gender-neutral protection.

As for the criminal conduct itself, it is recommended defining it in terms of *sexual conducts* already recognized under existing criminal law, encompassing a range from

²³ Senate of the Republic, Bill No. 1135 (presented on 9 May 2024).

minor sexual harassment to aggravated sexual violence. This would prevent the judiciary from having to interpret subjective terms such as “serious offense to liberty and human dignity,” which is inherently implied in any non-consensual sexual act.

A mitigating circumstance should also be included that of Article 609 bis, first paragraph of the Criminal Code for cases of lesser seriousness, also taking into account the high penalty (8 to 10 years imprisonment) for basic crime hypotheses.²⁷

This provision should also apply in peacetime for the Italian State even if the act is committed abroad in a situation of armed conflict, regardless of whether or not the state of war exists.

In the opinion of the author, this provision should include an aggravating circumstance when the offense is committed by military personnel, given the potential for abuse of power inherent in their role.

Finally, I suggest reconsidering the placement of this military-specific offense within the ordinary Criminal Code. A more appropriate approach would be to include it within the military criminal codes – either of peace or of war – as it inherently pertains to military conduct.

Additionally, I urge the introduction of a separate offense for failure to prevent the commission of such crimes by commanders or civilian superiors, even though negligence. Too often, these acts occur with the tacit approval or silent complicity of those in authority, yet existing legal provisions, such as Article 40 of the Criminal Code, may not fully encompass such responsibility.

In fact, it has often happened, in conflict territories, that serious crimes against the civilian population, consisting of rape and gang rape by combatants, have been permitted thanks to the complacent silence of the hierarchies, who have not taken steps to prevent the commission of such serious crimes but have instead used indifference to leave troops complete freedom to commit all kinds of atrocities, almost as a reward for their commitment to the conflict.

It is therefore considered necessary to provide for a specific criminal provision that punishes the hierarchical superior who willfully fails to take the necessary measures to prevent personnel employed in conflict zones from committing acts that are seriously harmful to the sexual and personal sphere of the civilian population, and who fails to report and punish those responsible.

However, the application of the general rules established for the complicity of persons in the crime remains unchanged in the case that the commander has encouraged the commission

²⁷ Rachele Marconi, The sexual violence against women as torture in the case of law of Inter-American Court of Human Rights (2019), 3, *Diritti Umani e Diritto Internazionale*, 639.

of such criminal acts or has expressed approval for their occurrence, according to the provisions established in the Common Penal Code in Articles 110 and 40 respectively.

This legislative proposal No. 1135 – though partial as it limits its scope of application only to the specific area of sexual violence in armed conflict rather than to the protection of all criminal offences covered by the Rome Statute – however fits within a broader framework for strengthening the protection of human dignity within our legal system.

7. *Conclusion*

Human dignity, particularly the dignity of women in armed conflict, remains a central concern of international humanitarian and criminal law. While normative developments have been significant, implementation gaps persist. Bridging these gaps requires stronger enforcement, increased gender sensitivity in military and humanitarian practices, and meaningful inclusion of women in peace and justice processes. A global commitment to these goals will not only protect women's dignity but also strengthen the rule of law and the prospects for lasting peace.

GIOVANNI GRASSO*

THE DUTY TO PROSECUTE VIOLATIONS OF HUMAN DIGNITY: A CRIMINAL LAW PERSPECTIVE**

ABSTRACT. The author underlines that the system of fundamental rights protection rise to obligations to criminalize certain behaviours. We have to observe that obligations to criminalize are not self-executing: the existence of treaty-based obligations to criminalize conduct lacks direct effectiveness in terms of legislative implementation. The framework outlined above changes once the legislature has already intervened to implement, within the domestic criminal system, the obligation to prosecute certain conduct established at the conventional (international) level. First of all, the adopted legislation gives rise to an obligation of consistent interpretation. A second significant issue arises once the national legislature has implemented an international obligation to criminalize; according to the case law of the Constitutional Court the legislature can no longer arbitrarily repeal the criminal provisions introduced.

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** The article builds upon the presentation given at the conference “International Protection Of Human Dignity Through Criminal Law: Strengthening Italy’s Implementation Record (Dignita)”, held on February 25th, 2025, and organised by RomaTre University.

1. It is now widely acknowledged that the system of fundamental rights protection gives rise to obligations to criminalize certain behaviors.

This fact highlights the peculiar tension between criminal law and human rights, a relationship that has evolved significantly over time.¹

Criminal law, originally conceived as a repressive instrument that the human rights protection system had to contain and limit, has progressively become a means of protection – perhaps even an indispensable one – for ensuring the effective safeguarding of human rights.

In fact, constitutional fundamental rights are no longer understood merely as *Abwehrrechte* (defensive rights) aimed at guaranteeing individuals and society a sphere of freedom against state aggression (as expressed through criminal law), but rather as values or principles that guide legislative activity, including in the field of criminal law.²

Within this framework, it is important to note that the existence of positive obligations to criminalize certain conduct has been repeatedly addressed by the European Court of Human Rights (ECtHR). The leading case in this respect is *X and Y v. the Netherlands*, in which the ECtHR recognized a positive obligation to protect the right to sexual autonomy.³ According to the Court, the facts under examination revealed a gap in the Dutch criminal system concerning a victim (a woman with disabilities) who had been subjected to acts infringing her sexual freedom. Dutch judges had ruled that the crime of sexual violence could not apply due to the lack of required elements, while the crime of corruption of minors was inapplicable because a formal complaint was necessary. Yet such a complaint could not be lodged by the victim, as she was legally incapacitated; nor by her parents, since she was over sixteen; nor could a guardian be appointed for that purpose, as Dutch law allowed this only for individuals over twenty-one.

According to the ECtHR, “when fundamental values and essential aspects of private life are at stake”, civil law remedies are “insufficient”. “Effective deterrence is indispensable in this area and can only be achieved through criminal law provisions.”

¹ Cfr. Giovanni Grasso, ‘La prospettiva penalistica (Protezione dei diritti fondamentale e obblighi di tutela penale)’, in Antonio Ruggeri (ed.), *Nuove forme di tutela delle situazioni soggettive nelle esperienze processuali* (Giuffrè, 2004) 115.

² Anna Maria Maugeri, ‘I reati di sospetto dopo la pronuncia della Corte costituzionale n. 370 del 1996: alcuni spunti di riflessione sul principio di ragionevolezza, di proporzione e di tassatività’ (1999) *Riv. it. Dir. proc. pen.* 468.

³ ECtHR, 26 march 1985, *X and Y v. Nederland*, serie A, n. 91; Id 22 october 1996, *Stubbings and others v. United Kingdom*, § 64.

The Court also noted that the Dutch legal system generally provided for criminal law interventions – except, notably, in situations such as the one faced by the victim in this case, thus creating a “gap in protection”.

In short, the ECtHR concluded that the absence of criminal penalties in this case constituted a violation of the positive obligation to protect private life.

However, positive obligations to ensure criminal law protection are not limited to rights protected under Article 8 of the ECHR.

Important in this regard are the conclusions reached by the ECtHR concerning Italy’s legal system, particularly in relation to acts of torture committed during the 2001 G8 summit in Genoa at the Diaz school, which occurred before the introduction in 2017 of Article 613-bis of the Penal Code. This article, introduced to comply with international obligations – especially under the Convention Against Torture (CAT) – established the criminal offense of torture under Italian law.

In the 2015 case *Cestaro v. Italy*, the ECtHR found a substantive violation of Article 3 ECHR due to the lack of a specific legal provision criminalizing acts of torture in Italy. The Court held that Italy was under an obligation to introduce “appropriate legal instruments to adequately sanction those responsible for acts of torture or other treatments prohibited by Article 3 and to prevent them from receiving benefits incompatible with the Court’s jurisprudence, in order to remedy the consequences of the established violation.”⁴

These conclusions were reiterated in 2017 in *Bartesaghi Gallo and Others v. Italy*, which concerned claims brought by other victims of the events during the 2001 G8 in Genoa.⁵

2. One important point must be emphasized: Obligations to criminalize are not self-executing.

As Francesco Palazzo rightly noted, the existence of treaty-based obligations to criminalize conduct lacks direct effectiveness in terms of legislative implementation.⁶

In particular, a violation of such an obligation cannot be followed by a Constitutional Court ruling that would have in *malam partem* effect (i.e., to the

⁴ ECtHR, Fourth Section, 7 april 2015, *Cestaro v. Italy*.

⁵ ECtHR, Grand Chamber, 22 June 2017, *Bartesaghi, Gallo and others v. Italy*.

⁶ Francesco Palazzo, *Valori costituzionali e diritto penale (un contributo comparatistico allo studio del tema)*, in Alessandro Pizzorusso and Vincenzo Varano (eds), *L’influenza dei valori costituzionali sui sistemi giuridici contemporanei*, (Giuffrè, 1985) 603.

detriment of the accused). Such a ruling would exceed the constitutional powers of the Italian Constitutional Court.⁷

It should be noted, however, that the framework outlined above changes once the legislature has already intervened to implement, within the domestic criminal system, the obligation to prosecute certain conduct established at the conventional (international) level.

First of all, the adopted legislation gives rise to an obligation of consistent interpretation: among the various possible interpretations of domestic law, preference must be given to the one that ensures compliance with obligations arising from international law.

This issue, which has general significance, has been the subject of particularly interesting academic debate and a considerable number of practical applications, especially in relation to community law – and, after the Lisbon Treaty, to EU Law. A recent and important contribution on this topic was made by Sandro Bernardi.⁸

Excluding the theory that rejects any interpretation producing in *malam partem* effects, the prevailing view in legal scholarship considers an extensive interpretation to be admissible, while excluding any analogical interpretation.⁹

Thus, with regard to Article 613-bis of the Italian Penal Code, it has been held that a consistent interpretation with international obligations requires considering the offense described in paragraph 2 (the so-called “state torture”) as a distinct and autonomous offense, rather than merely an aggravated version of the basic offense described in paragraph 1. This carries significant consequences in terms of legal classification and procedural guarantees in the Italian criminal system.¹⁰

⁷ Constitutional Court, 27 July 1995, n. 411.

⁸ Alessandro Bernardi, ‘Sull’interpretazione conforme al diritto UE con effetti in *malam partem*’, in Anna Maria Maugeri, Rosaria Sicurella, Francesco Siracusano, Grazia Maria Vagliasindi, Valeria Scalia, Annalisa Lucifora (eds), *Diritto Penale dell’Unione Europea e nell’Unione Europea. Studi in onore di Giovanni Grasso*, (Pisa University Press, 2023) 497.

⁹ Bernardi, op. cit. 508.

¹⁰ Fabio Salvatore Cassibba and Angela Colella, ‘Art. 3 Proibizione della tortura’, in Giulio Ubertis and Francesco Viganò (eds), *Corte di Strasburgo e giustizia penale*, (Giappichelli, 2022) 94.

3.1. A second significant issue arises once the national legislature has implemented an international obligation to criminalize: the legislature can no longer arbitrarily repeal the criminal provisions it introduced. In effect, a form of prohibition on regression applies.

This results from the position of the Constitutional Court, which holds that, in a legal system governed by the principle of legality, the Court cannot issue rulings that would create new criminal offenses – such authority rests exclusively with the legislature. Likewise, it cannot issue rulings that would aggravate penalties or reintroduce previously repealed or decriminalized offenses.

Nevertheless, the Constitutional Court has acknowledged that – in limited cases – in *malam partem* constitutional review may be permitted.

In its judgment no. 37 of 2019, the Court outlined a coherent framework of such exceptional cases. Among them is the violation of an obligation deriving from supranational law.¹¹

Specifically, the Court held that “constitutional review with effects in *malam partem* is admissible where the contested provision is alleged to violate supranational obligations relevant under Article 11 or Article 117(1) of the Constitution.”

In a recent judgment concerning the constitutionality of the provision that repealed the offense of abuse of office, the Constitutional Court clarified that this scenario covers not only violations of obligations deriving from supranational norms but also those arising from international law.¹²

In essence, once the obligation to criminalize has been implemented, the legislature is no longer free “to backtrack” and repeal the related criminal provisions.

4. The implications are particularly significant for the offense introduced under Article 613-bis of the Penal Code.

The criminalization of torture in Italy is based on multiple legal foundations: the CAT Convention, Article 3 of the ECHR, and Article 4 of the EU Charter of Fundamental Rights, which is substantially equivalent in content to Article 3 ECHR.

Moreover, in *Cestaro v. Italy*, the ECtHR made clear that Article 3 ECHR gives rise to an obligation to criminalize torture through a dedicated offense that reflects the

¹¹ Constitutional Court, 23 January 2019, n. 37.

¹² Constitutional Court, 3 July 2025, no. 95; in that particular case, however, the Court found that no such violation existed.

enduring gravity of such acts. This conclusion is well established in the Court's case law.

As such any outright repeal of the torture offense – or its replacement with a mere system of aggravating circumstances, as proposed in the Vietri bill¹³ – should be considered unconstitutional. The proposed model fails to meet the ECtHR's requirement of an autonomous criminal offense for torture.

Therefore, the bill in question should be considered incompatible with Articles 11 and 117 of the Italian Constitution.

More than that: since the proposed reform would also violate Article 4 of the EU Charter of Fundamental Rights, it would breach not just international but supranational obligations

¹³ The bill n. 623/2022 was presented by On. Vietri and others on 23rd november 2022.

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THE IMPLEMENTATION OF THE MORTGAGE CREDIT DIRECTIVE IN ITALY: SOME PROBLEMATIC ISSUES

ABSTRACT. *This article critically examines the implementation of Directive 2014/17/EU (Mortgage Credit Directive, MCD) in Italy, highlighting key legal and regulatory challenges. Transposed via Legislative Decree No. 72/2016 and integrated into the Italian Banking Law (TUB), the MCD aimed to harmonize credit practices and enhance consumer protection. The study explores five core areas: pre-contractual information duties, creditworthiness assessment, foreign currency mortgage loans, early repayment rights, and the evolving impact of artificial intelligence on credit scoring. It reveals tensions between EU consumer protection goals and Italy's traditional private law framework, particularly regarding remedies for breaches of information and assessment duties. The article also discusses the influence of landmark ECJ rulings, such as 'Lexitor' and 'Bank Millenium', and anticipates future regulatory shifts driven by AI and digitalization. Ultimately, it calls for a more integrated approach to consumer credit regulation that aligns national legal traditions with evolving European standards.*

CONTENT. 1. Introduction. – 2. Pre-Contractual Information. – 3. Creditworthiness Assessment. – 4. The Unfairness of the Indexation Clause in Foreign Currency Mortgage Loans. – 5. Early Repayment and Reduction in the Total Cost of the Credit. – 6. Instead of a Conclusion, Looking Ahead.

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1. *Introduction*

The Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property (MCD) was transposed in Italy by the Decreto legislativo (legislative decree) of 21 April 2016, no. 72. The implementing regulation of domestic law was included in the general regulatory framework of banking and financial services set by the Decreto legislativo of 1 September 1993, no. 385 ('Testo Unico Bancario', TUB, Chapter I-*bis*, Title VI). Eight years have elapsed since the implementation of the MCD in Italy, and one may well argue that the European regulation has certainly marked the strengthening of a classical perspective linking property (i.e. ownership of residential property) to credit (i.e. loan contracts); however, such dyad was put into a regulatory dimension entwined with consumer law and this intersection had a significant impact on the evolution in the understanding of property rights when combined with credit contracts concluded by parties who are not on the same footing.

It has often been pointed out that the MCD was aimed at fostering two regulatory objectives relating to this realm of law, namely, (i) the well-functioning of the market and (ii) to combat risks of consumer over-indebtedness.¹ However, the triggering point stimulating the adoption of the MCD has been symbolised by a growing awareness of the existence of divergent legal approaches among Member States in considering the conduct of business when granting credit agreements that specifically relate to residential immovable property as well as in the regulation and supervision of credit intermediaries and non-credit institutions which provide credit agreements for these purposes.² As widely known, it was a response to the crisis caused by subprime

¹ On the objective underlying the MCD, see Pietro Sirena and Dario Farace, 'I contratti bancari del consumatore' in Ernesto Capobianco (ed), *I contratti bancari* (Utet 2021) 269. The twofold protective nature that characterizes the MCD proves in line with the rationale underlying the rules established in the United States by means of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301, §§ 5481-5603, and in laws amended at Title X. An analysis of the American regulatory intervention is provided by Howell E Jackson, 'Loan-Level Disclosure in Securitization Transactions: A Problem with Three Dimensions' in Nicolas P Retsinas and Eric Belsky (eds), *Moving Forward: The Future of Consumer Credit and Mortgage Finance* (Brookings Institution Press 2011) 189.

² See Recital 2 of the MCD. The historical root of the MCD can be traced back to the White Paper of 18 December 2007 on the Integration of EU Mortgage Credit Markets presented by the Commission COM (2007) 807 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l24487>> accessed 4 September 2025.

mortgages in the United States.³

The MCD rests mainly on two tools for pursuing the goal of responsible lending, and they are fully embraced by the Italian legislature: (i) a precontractual creditworthiness assessment of the consumer (Arts 18 and 20 MCD; Art. 120-*undecies* TUB); (ii) an appropriate evaluation of residential immovable property for the purpose of granting mortgage-backed credit (Art. 19 MCD; Art. 120-*duodecies* TUB).⁴

Interestingly, this Directive deals with the governance of the credit process, in which the MCD rules are designed to conform and discipline parties' initiatives, with the end of forging effective tools for offering services on the market.⁵ In this respect, the decision of the European legislature to specifically regulate this area was triggered by an acknowledged lack of relevant norms at supranational level.⁶ Hence, the adoption of the MCD hinged on the assumption that the irresponsible behaviour of lenders was determined by the absence of a regulation of this sector and not by the violations of rules of conduct by lenders themselves.⁷ From a more general perspective, this could also be deemed an oddity if one considers the deep connection between consumer credit and fundamental rights.⁸

Compared to the time when the MCD was implemented, the current Italian scenario, as is the case elsewhere, appears to be influenced by the well-known emergence of new technologies, artificial intelligence (AI) and digitalisation, which can play a pivotal role on how European standards, as duly transposed in Italy, are to be interpreted and should work. By way of example, in continuity with an ongoing debate in several EU Member States, scholars and institutions are paying growing attention to the intersection between artificial intelligence and credit scoring, as testified by a number

³ On this point, see recently Pietro Sirena, 'Tutela dei clienti e regolazione del mercato trent'anni dopo l'emanazione del Testo unico bancario' [2024] Quaderni di Ricerca Giuridica della Consulenza Legale - Banca d'Italia 123 130.

⁴ Sirena, 'Tutela dei clienti e regolazione del mercato' (n 3) 130-131.

⁵ See Amedeo Valzer, 'La disciplina del credito ai consumatori. Un approccio critico' [2021] Banca, borsa, titoli di credito 894 896.

⁶ Recital 4 of the MCD.

⁷ See Valzer (n 5) 898.

⁸ See Olga O Cherednychenko, 'The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 139; Federico Ferretti and Daniela Vandone, 'Credit Risk Analysis and Creditworthiness in Relation to EU Data Protection Legislation' in Federico Ferretti and Daniela Vandone (eds), *Personal Debt in Europe. The EU Financial Market and Consumer Insolvency* (CUP 2019) 156.

of studies published on this topic;⁹ and it is worth stressing how, even beyond creditworthiness, Italian courts started to be confronted with problems posed by the interplay of algorithms and reputational rating.¹⁰ As mentioned, this reflects a tendency that can already be observed in Europe, where studies on how machine learning are used in the context of Internal Ratings-Based (IRB) models are increasing significantly.¹¹ And also the interest showed by the EBA is illustrative in this regard.¹²

Notwithstanding the incidence of AI and new technologies on the credit sector, the main problematical issues addressed at domestic level by Italian courts and scholars remain anchored to the traditional skeleton of the MCD and its junction with the Directive 2008/48/EC on consumer credit agreements (CCD 2008)¹³ which was transposed in Italy, becoming part of the TUB (Arts 121 ff.), and that will soon be completely repealed with the implementation of the Directive 2023/2225/EU (CCD 2023).¹⁴

⁹ See Emilia Bonaccorsi di Patti and others, 'Intelligenza artificiale nel credit scoring. Analisi di alcune esperienze nel sistema finanziario italiano' (2022) *Questioni di Economia e Finanza – Banca d'Italia* <https://www.bancaditalia.it/pubblicazioni/qef/2022-0721/QEF_721_IT.pdf> accessed 4 September 2025.

¹⁰ See *Corte di cassazione*, 10 October 2023, no. 28358, examined by Elena Falletti, 'Reputazione, proiezione di sé e diritto all'oblio: le diverse sfumature del caso Mevaluate' [2024] *Foro italiano* 251 and Nicola Brutti, 'Mito del consenso e rating reputazionale' [2024] *Nuova giurisprudenza civile commentata* 402.

¹¹ See Nikita Aggarwal, 'Machine Learning, Big Data and the Regulation of Consumer Credit Markets: The Case of Algorithmic Credit Scoring' in Nikita Aggarwal and others (eds), *Autonomous Systems and the Law* (Beck 2019) 37-45; Katja Langenbucher, 'Responsible A.I.-based Credit Scoring – A Legal Framework' (2020) 31 *EBLR* 527; Laura Ammannati and Gian Luca Greco, 'Piattaforme digitali, algoritmi e big data: il caso del credit scoring' [2021] *Rivista trimestrale di diritto dell'economia* 290 305; Julie Goetghebuer, 'AI and Creditworthiness Assessments: the Tale of Credit Scoring and Consumer Protection. A Story with a Happy Ending?' in Jan De Bruyne and Cedric Vanleenhove (eds), *Artificial Intelligence and the Law* (Intersentia 2021) 429; Katja Langenbucher and Patrick Corcoran, 'Responsible AI Credit Scoring – A Lesson from Upstart.com' in Emiliós Avgouleas and Heikki Marjosola (eds), *Digital Finance in Europe: Law, Regulation, and Governance* (De Gruyter 2022) 141; Maria Lillà Montagnani and Carolina Paulesu, 'Towards an Ecosystem for Consumer Protection in the Context of AI-based Credit Scoring' (2022) 33 *EBLR* 557; Gerald Spindler, 'Algorithms, credit scoring, and the new proposals of the EU for an AI Act and on a Consumer Credit Directive' (2023) 15 *LFMR* 239; Maddalena Rabitti, 'Credit scoring via machine learning e prestito responsabile' [2023] *Rivista di diritto bancario* 175.

¹² EBA, 'Machine Learning for IRB Models. Follow-up Report from the Consultation on the Discussion Paper on Machine Learning for IRB Models' (2023) <https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2023/1061483/Follow-up%20report%20on%20machine%20learning%20for%20IRB%20models.pdf> accessed 4 September 2025.

¹³ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133/66 of 25 May 2008).

¹⁴ Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agree-

Accordingly, in the light of the domestic background that has just been depicted, this chapter is structured as follows: sections II and III, respectively, illustrate the relevant issues related to the national implementation of the MCD's rules on pre-contractual duties of information and effective creditworthiness assessment; section IV analyses foreign currency loans; and section V is dedicated to the topic of consumers' rights in case of early repayment, which has undoubtedly been one of the issues that has attracted the most attention in case law and academic writing over the past five years.

2. *Pre-Contractual Information*

Pre-contractual information, addressed by Chapter IV of the MCD, has been transposed by the Italian legislator within Chapter I-*bis* of the TUB and, specifically, in Articles 120-*novies* and 120-*decies*.

The regulation of the pre-contractual phase, with the aim of enabling the appropriate formation of the consumer's will, was already provided for in the CCD 2008. The reason for this is that the underlying purpose of European interventions is to create and preserve a transparent, competitive and ultimately efficient credit market. However, whilst the intervention of 2008 had opted for a high level of harmonisation, in the MCD the EU legislator considered the peculiarities of national laws, providing for full harmonisation only for the regulation of personalized pre-contractual information and the Annual Percentage Rate of Charge (APRC).¹⁵

It should also be noted that credit agreements for consumers relating to residential immovables are often complex for the average consumer to understand. Hence, pre-contractual information plays a crucial role, in the sense that it is the means through which the consumer can come to a comprehension of the rights and obligations arising from the contract.

Moreover, pre-contractual information relates to the creditworthiness assessment in a double perspective. First it is the creditor who must provide the preparatory information on the contract that will be offered, while at a later stage it is up to the

ments for consumers and repealing Directive 2008/48/EC (OJ L 2023/1 of 30 October 2023). The deadline for the transposition of the CCD 2023 is 20 November 2025.

¹⁵ Alessandra Pischedda, 'Art. 120-*novies*' in Francesco Capriglione (ed), *Commentario al Testo Unico delle leggi in materia bancaria e creditizia* (Cedam 2018) 2000; for a history of EU regulation on the topic of consumer credit, see Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 217-219.

consumer to provide the information necessary to enable the counterparty to make the creditworthiness assessment.¹⁶

With regard to the information that the lender is required to outline, Italian law follows the distinction between standard and personalized information.¹⁷

Standard information, described in para. 1 of Article 120-*novies* TUB, shall be made available to the consumer at any time, so that the latter can understand and compare offers. In particular, the lender is required to make available to the consumer a document containing clear and understandable information, on paper or on another durable medium, that indicates the requirements to be provided by the consumer for the purpose of creditworthiness assessment, a warning that credit may not be granted if the consumer fails to submit the documents necessary to verify creditworthiness, the consultation of a database and the possibility of receiving advisory services. Article 120-*novies* TUB then refers to regulatory legislation for further details related to standard information. In particular, reference should be made to the Bank of Italy Order of 30 September 2016 (Chapter VI-*bis* of this Order, para. 5.2.1).¹⁸

Personalised information is instead addressed by the second paragraph of Article 120-*novies* TUB. This information fulfils its function in a phase subsequent to the one covered by standard information, and implies an active behaviour of consumers, who, on the ground of the first information received, can give details to the lender on their specific needs or preferences, as well as their financial situation, in order to obtain a retail offer.¹⁹

In view of the aim of enabling a pondered and informed decision by the consumer, personalized information must also be provided on paper or on another durable medium, through the delivery of the form known as the ‘European Standardised Information Sheet’ (ESIS). ESIS must be drawn up as described in Annex 4E to the aforementioned Bank of Italy Order of 30 September 2016, where a sample of ESIS is

¹⁶ Maria M Semeraro, ‘Informazioni adeguate e valutazione del merito creditizio: opzioni interpretative nel credito ai consumatori’ [2021] *Rivista di diritto civile* 687; Adriana Addante, ‘La sostenibilità del credito immobiliare fra meritevolezza del consumatore e responsabilità del creditore’ [2022] *Giustizia civile* 925.

¹⁷ Stefano Pagliantini, ‘Statuto dell’informazione e prestito responsabile nella direttiva 17/2014/UE (sui contratti di credito ai consumatori relativi a beni immobili residenziali)’ [2014] *Contratto e impresa Europa* 523.

¹⁸ Bank of Italy, ‘Trasparenza delle operazioni e dei servizi bancari e finanziari. Correttezza delle relazioni tra intermediari e clienti’ (2019) <www.bancaditalia.it/compiti/vigilanza/normativa/archivio-norme/disposizioni/trasparenza_operazioni/testo-disposizione-2019/Disposizioni_Testo_integrale.pdf> accessed 4 September 2025.

¹⁹ See again Pischedda (n 15) 2006.

given.²⁰

The Italian rules also provide that before the conclusion of the credit agreement, the consumer is entitled to a reflection period of at least seven days to compare the different credit offers on the market, assess their implications and take an informed decision. During this reflection period, the offer is binding on the lender and the consumer may accept it at any time.²¹

Further rules on pre-contractual information are set out in Article 120-*decies* TUB, which, with respect to credit intermediaries, not only includes provisions similar to those in Article 120-*novies* TUB, but also lays down some more specific indications. The reference is, *inter alia*, to the obligation to clarify whether the credit intermediary is subject to a mandate or works exclusively with one or more lenders, the fee to be paid by the consumer to the intermediary and the procedures through which consumers or other interested parties may lodge complaints against the intermediary.²² The aim is therefore to ensure the transparency of the transaction from a subjective point of view, i.e. regarding the identification of the counterparty in the negotiation.²³

None of the aforementioned provisions of the TUB specify the legal consequences triggered by non-compliance with information obligations by the lender. This legislative option has given rise to an intense debate on the remedies available to the consumer, exacerbated by the fact that while European law assumes that this party is in a physiological position of asymmetry compared to the contractual counterparty, the rules of the Italian Civil Code mainly relegate this case to a pathological phase, on the implicit assumption that private parties negotiate on an equal playing field.²⁴

²⁰ Daniele Maffei, 'Direttiva 2014/17/UE: rischi di cambio e di tasso e valore della componente aleatoria nei crediti immobiliari ai consumatori' [2016] Banca, borsa, titoli di credito 190; Antonio Las Casas, 'Informazioni generali e informazioni personalizzate nella nuova direttiva sui mutui ipotecari ai consumatori' [2015] Persona e mercato 251.

²¹ Art. 120-*novies* TUB, para. 3.

²² The Italian 'Organismo per la gestione degli Elenchi degli Agenti in attività finanziaria e dei Mediatori creditizi', in its Communication no. 14/17, with reference to Art. 120-*decies* TUB, clarifies that the intermediary, before the signing of the contract, is obliged to provide the consumer (for comparative purposes) with information as close as possible to reality, especially on the amount of the commissions relating to each lender's range of products.

²³ See Michela Cordeddu, 'Art. 120-*decies* TUB' in Francesco Capriglione (ed), *Commentario al Testo Unico delle leggi in materia bancaria e creditizia* (Cedam 2018) 2011 2012.

²⁴ On the information obligations in Italian and European contract law, see, *ex multis*, Stefan Grundmann, 'L'autonomia privata nel mercato interno: le regole d'informazione come strumento' [2001] Europa e diritto privato 257; Vincenzo Roppo, 'L'informazione precontrattuale: spunti di diritto italiano e prospettive di diritto europeo' [2004] Rivista di diritto privato 747; Giuseppe Grisi, 'Informazione (obblighi di)', *Enciclopedia del diritto, Annali IV* (Giuffrè 2011) 595; Rosalba Alessi, 'Gli obblighi di informazione tra regole di protezione del consumatore e diritto contrat-

In abstract terms, two areas of general contract law are called into question by a violation of information duties: rules on pre-contractual liability, protecting the party's freedom of contract in case of a breach of good faith and fair dealing in negotiations (Arts 1337, 1338 Italian Civil Code), and rules on defects of consent (relevant, in particular, in the form of mistake and fraud).²⁵ While the latter remedies are explicitly presented as a ground of contractual invalidity (Art. 1427 Italian Civil Code), the former norms impose of duty of conduct whose infringement has been traditionally sanctioned with a claim for pecuniary damages granted to the non-breaching party.²⁶

This outcome reflects the consolidated view that Italian law affirms a rigid separation (so called 'non-interference') between 'rules of validity' (*regole di validità*), which pertain to the structure and content of the contractual agreement, and whose violation leads to nullity or voidability of contract, and 'rules of behaviour' (*regole di comportamento*), for which a general compensatory liability is provided, and that cannot lead to the invalidity of the contract except when expressly provided for by law.²⁷ This distinction is firmly rooted in the Italian legal tradition, which ultimately dictates that rules of validity cannot be derived by the interpreter by a concretisation of the general clause of conduct, such as that of good faith.²⁸

According to this principle, still adhered to by the majority, it is excluded that the breach of pre-contractual information obligations by the lender may affect the

tuale europeo uniforme e opzionale' [2013] Europa e diritto privato 311. For a wider overview on the obsolescence of the Italian Civil Code rules on these contractual aspects, see Andrea Zoppini, 'Contratto ed economia comportamentale', *Enciclopedia del diritto, Tematici I. Contratto* (Giuffrè 2021) 313.

²⁵ Italian literature is particularly broad on this topic. See, for classic references, Giuseppe Stolfi, 'In tema di responsabilità precontrattuale' [1954] *Foro italiano* 1108; more recently Mauro Orlandi, 'Responsabilità precontrattuale', *Enciclopedia del diritto, Tematici I. Contratto* (Giuffrè 2021) 996.

²⁶ Giovanni D'Amico, *Regole di validità e principio di correttezza nella formazione del contratto* (ESI 1996); Giuseppe Vettori, 'Le asimmetrie informative tra regole di validità e regole di responsabilità' [2003] *Rivista di diritto privato*, 241 249; Enrico Scoditti, 'Regole di comportamento e regole di validità: i nuovi sviluppi della responsabilità precontrattuale' [2006] *Foro italiano* 1107; Claudio Scognamiglio, 'Regole di validità e di comportamento: i principi e i rimedi' [2008] *Europa e diritto privato* 599 619.

²⁷ The leading cases are *Corte di cassazione*, Sezioni Unite, 19 december 2007, no. 26724 and no. 26725; for comments, see Aurelio Gentili, 'Disinformazione e invalidità: i contratti di intermediazione dopo le Sezioni Unite' [2008] *Contratti* 393; Ugo A Salanitro, 'Violazione della disciplina dell'intermediazione finanziaria e conseguenze civilistiche: *ratio decidendi* e *obiter dicta* delle Sezioni Unite' [2008] *Nuova giurisprudenza civile commentata* 445.

²⁸ For a recent analysis of the non-interference principle in Italian case law, see Antonia Grimolizzi, 'L'evoluzione della distinzione tra regole di comportamento e regole di validità nella giurisprudenza. I parte' [2023] *Responsabilità civile e previdenza* 1946 1946-1956.

validity of the contract, allowing the consumer to obtain (only) compensation for damages resulting from the erroneous, incomplete, or false information rendered in the negotiation stage.²⁹

At the same time, it must be stressed that according to several commentators and doctrinal orientations, the distinction between *regole di comportamento* and *regole di validità*, as rigidly enforced by Italian case law, is to be considered outdated, especially in the light of European-derived law, which, with a view to rebalancing the relationship between parties with different contractual power and levels of information, often provides for behavioural rules which are eventually associated with provisions of invalidity, as in the case of information obligations associated to the formalities imposed in the formation of consumer contracts.³⁰

This observation, according to different scholars, calls into question the exceptional nature of the validity rules, and opens to a possible valorisation of the general clause of good faith³¹, which could give legal relevance to certain conducts that, although not directly laid down in the contract, shall be considered binding and capable of rendering the unfair contract invalid.³²

3. *Creditworthiness Assessment*

The creditworthiness assessment is crucial to ensure compliance with the responsible lending parameter, which represents a seminal point of intersection between private law and market regulation.³³

²⁹ See *Corte di cassazione*, 8 October 2008, no. 24795 [2009] *Foro italiano* 440; *Corte di cassazione*, 17 September 2013, no. 21255 [2013] *Europa e diritto privato* 1097.

³⁰ Francesco Galgano, 'Squilibrio contrattuale e mala fede del contraente forte' [1997] *Contratto e impresa* 418; Giovanni Perlingieri, *L'inesistenza della distinzione tra regole di comportamento e di validità nel diritto italo-europeo* (ESI 2013); Cristiano Cicero, 'Regole di validità e di responsabilità', *Digesto delle discipline privatistiche IX* (Cedam 2014) 539.

³¹ See Vincenzo Roppo, *Il contratto del duemila* (Giappichelli 2020) 83.

³² Angelo Riccio, 'La clausola generale di buona fede è dunque un limite generale all'autonomia contrattuale' [1999] *Contratto e impresa* 21.

³³ This topic came progressively to be ascribed to private law, despite being originally understood as a duty rooted in administrative law: see Nikolai Badenhoop, 'Private Law Duties Deriving From EU Banking Regulation and its Individual Protection Goals' (2020) 16 *ERCL* 233.

It is not happenstance that the lender's duty to carry out a creditworthiness assessment is regarded as a tenet of this area of law, which revolves around the need to forge more responsible markets and to avoid endemic risks of over-indebtedness of European consumers. This is the reason why the creditworthiness assessment of any borrower is carried out by financial intermediaries, banks and creditors, who are therefore responsible for consumer lending.³⁴ The notion of responsible lending is rooted in the CCD 2008, and has been transposed in Italy, as part of the TUB (Arts 121 ff.). Its Art. 124-*bis*, which mirrors Art. 8 of the CCD 2008, expressly states that, prior to the conclusion of the credit agreement, the lender shall assess the consumer's creditworthiness on the basis of adequate information; relevant data can be provided by the consumer and may be accessed by consulting public or private databases or a credit reporting agency (CRA),³⁵ which, in the Italian context, can be either private or public.³⁶ Private CRAs are underregulated in Italy (and in Europe), since they are commonly understood to be little more than vessels storing customer data that has been furnished by specific suppliers, such as banks, intermediaries and also consumers. Generally CRAs are deemed to play a 'neutral' role in the credit market, and the domestic approach tends to exempt them from liability in case of data errors impacting on the financing.³⁷ Yet, the typical features of CRAs show how they are provided with

³⁴ Recently, Noah Vardi, *Creditworthiness and 'Responsible Credit': A Comparative Study of EU and US Law* (Brill 2022).

³⁵ On a possible typological distinction between credit bureaus and private credit reporting agencies see Antonella Sciarrone Alibrandi, 'La rilevazione centralizzata dei rischi creditizi: ricostruzione evolutiva del fenomeno e crescita degli interessi' in Antonella Sciarrone Alibrandi (ed), *Centrali dei Rischi. Profili civilistici* (Giuffrè 2005) 4, fn. 8; from a different perspective, Federico Ferretti, 'The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges - Overindebtedness, Responsible Lending, Market Integration, and Fundamental Rights' (2013) 46 *Suffolk UL Rev* 791 798.

³⁶ On the difference between the activities of public and private reporting agencies, see Aldo A Dolmetta, 'Il "credito in sofferenza" nelle istruzioni di vigilanza sulla centrale dei rischi' [2004] *Banca, borsa, titoli di credito* 533. From a more general perspective, the two categories of credit bureaus represent a distinctive element characterising the Italian legal background, since a comparative analysis shows that public and private rating agencies do not always coexist in other Member States. The credit bureau set up at the Bank of Italy ('Centrale Rischi') is a national credit agency, which is regulated through primary sources: see Antonella Sciarrone Alibrandi, 'Centrali dei rischi creditizi e normativa di privacy: informazione e controlli dell'interessato' [2003] *Rivista diritto civile* 423.

³⁷ Tribunale Salerno, 22 April 2002 [2003] *Giurisprudenza commerciale* 210. Historically, this tendency appears similar to that which occurred outside Europe. Taking a cue from the US legal background, see Robert M McNamara Jr, 'The Fair Credit Reporting Act: A Legislative Overview' (1973) 22 *JPL* 67 71: 'during the period of their phenomenal growth, credit bureaus have somehow escaped the focus of both state and federal inquiry and regulation in spite of the existence of serious abuses'.

a quasi-regulatory function,³⁸ being essential both for the well-functioning of the market and for the parties to a credit agreement.³⁹ The urgency to reflect upon their actual role in the market is crucial for effectively reaching those objectives connected to the creditworthiness assessment that are carefully taken into consideration by the European legislature.

Beyond this aspect, it has been pointed out already that the need to further strengthen the duty of creditworthiness assessment was pursued by the MCD. In addition to its above-mentioned objectives, the TUB embraces all the tools for reaching the regulatory aims of the MCD.⁴⁰

Furthermore, pursuant to Art. 120-*undecies* TUB, the creditworthiness assessment is made on (necessary, sufficient and proportionate) information regarding the consumer; however, this article should not be understood as meaning that information is *primarily* collected and obtained by the consumer, since it may well be furnished by other sources. This interpretation is grounded on Art. 20 MCD, which clarifies how creditors should base their assessment on internal and external sources, including the consumer.⁴¹ The lender shall not terminate the credit agreement concluded with the consumer or make any changes thereto that are unfavourable to the consumer on the grounds that the creditworthiness assessment was carried out incorrectly or that the information furnished by the consumer prior to the conclusion of the credit agreement proved incomplete; however, the possibility to terminate the contract comes into play if the consumer is involved in the conveying data process and has intentionally withheld such information or has supplied false information (Art. 20 MCD; Art. 120-*undecies* TUB).

As to the advisory service that is required in this ambit, the intermediary is not

³⁸ On this topic, see Francesco Mezzanotte, 'Centrali rischi private e "diritto di preavviso" alla segnalazione' [2017] *Nuova giurisprudenza civile commentata* 303; Luigi Buonanno, 'Un modello giuridico europeo di credit reporting industry' [2022] *Banca, borsa, titoli di credito* 582.

³⁹ It is worth emphasising that, even though financial intermediaries or banks may be regarded as parties highly interested in the data accuracy, owing to which they can make correct credit-based decisions, it is quite apparent how the direct beneficiaries of that accuracy coincide with the customers (i.e. consumers and businesses, whose credit data are processed). On this aspect, see Austin H Krist, 'Large-Scale Enforcement of Fair Credit Reporting Act and the Role of State Attorneys General' (2015) 115 *Colum L Rev* 2311 2314.

⁴⁰ It is the case of the pre-contractual creditworthiness assessment of the consumer (Arts 18 and 20 MCD, which are implemented by Art. 120-*undecies* TUB); moreover, there is the need to make an evaluation of residential immovable property for the purpose of granting mortgage-backed credit (Art. 19 MCD; Art. 120-*duodecies* TUB). See above, I.

⁴¹ See also Recital 58 MCD.

obliged to guarantee assistance to the consumer as to the most convenient credit contract that, based on the latter's interest, could be concluded (Art. 22 MCD).⁴² Moreover, this contract can also be stipulated relying solely on the information obtained by consumer, on the proviso that it is sufficient;⁴³ in this respect, there is no obligation on the intermediary to provide an advisory service to the consumer nor to carry out systematic checks pertaining to veracity of the information given by the consumer.⁴⁴ Yet, one may doubt the full validity of the latter assumption since the intermediary is often involved in the process of data transmission; even when the information is given to the intermediary by the consumer, the law currently in force does not exempt the former from monitoring the formal and substantive aspects of data itself. As already emphasised, this does not mean that the intermediary must advise clients as to the contract that best suits their interests,⁴⁵ nor is a credit institution under a duty to refrain from entering into a credit agreement which is inappropriate in light of the consumer's interests.⁴⁶ Significantly, this has also been the view taken by the Italian Banking and Financial Ombudsman ('Arbitro Bancario e Finanziario',

ABF) in this regard.⁴⁷ Nonetheless, the ECJ has now overturned these deeply ingrained principles when it considers that the creditor has to refrain from concluding a contract if the creditworthiness assessment is negative, and this conclusion is based on a certain interpretation of the (not any more in force) CCD 2008, which, unlike

⁴² See Francesco Petrosino, 'Debt advice quale strumento preventivo del rischio da sovraindebitamento. Analisi del fenomeno e potenzialità applicative' [2021] *Rivista di diritto bancario* 417; Pagliantini, 'Statuto dell'informazione e prestito responsabile nella direttiva 17/2014/UE' (n 17) 532.

⁴³ See ECJ 18 December 2014, *CA Consumer Finance SA v. Ingrid Bakkaus, Charline Bonato and Florian Bonato*, Case C-449/13, EU:C:2014:2464, para. 45: '[t]he creditor is in a position to give the consumer explanations based solely on information which the consumer supplies to him, so that the consumer may make a decision with regard to a type of loan agreement, without the creditor being required to assess the consumer's creditworthiness beforehand. However, the creditor must take account of the assessment of the consumer's creditworthiness in so far as that assessment means that the explanations provided need to be adapted'.

⁴⁴ This is the principle elaborated by the ECJ in the ECJ 18 December 2014, *CA Consumer Finance SA v. Ingrid Bakkaus, Charline Bonato and Florian Bonato*, Case C-449/13, EU:C:2014:2464, para. 50(2), analysed by Matteo Francisetti Brolin, 'Ancora sul c.d. "merito creditizio" nel credito al consumo. Chiose a margine di una recente decisione comunitaria' [2015] *Contratto e impresa Europa* 357.

⁴⁵ On the way by which the creditor may give certain assistance to the consumer, see Tribunale Napoli, 27 October 2020 [2020] *Diritto fallimentare* 237.

⁴⁶ See for references Sirena, 'Tutela dei clienti e regolazione del mercato' (n 3) 132.

⁴⁷ See ABF Milano, 3 November 2016, no. 9786.

the MCD, did not expressly recognize this duty (see now Art. 18 CCD 2023).⁴⁸

Also, in the light of the very nature of this duty, one of the most problematical issues that had to be addressed at national level pertains to the consequences stemming from the infringement of that obligation. EU law does not govern the relevant penalties, the identification of which is normally left to Member States (Art. 23 CCD 2008).⁴⁹ In the Italian context, the widespread approach traditionally hinged on the idea that, once the disproportion between the principal disbursed by the creditor and the consumer's financial situation is ascertained (based on Art. 124-*bis* TUB), this violation can justify the decision to award damages to the client, who must therefore be compensated since the pre-contractual obligation to protect debtor's interest has not been complied with. It is a rule of conduct that is tied to the good faith principle; as such, if a gross violation of that rule occurs, this may give rise to an award of damages. In this case the consumer must provide evidence of the breach of the good faith duty and the causal link between the allegedly irresponsible lending and the damage suffered.⁵⁰ This was the traditional position of the ABF and some domestic courts: the characterisation of that duty as a rule of conduct cannot lead to the contract being declared null and void.⁵¹

However, in the light of the recent ECJ judgments stressing how the creditor is obliged not to enter into the contract when the creditworthiness assessment is negative,⁵² this must be understood as a mandatory rule. Consistently, the respect of that duty can be examined by national courts of their own motion.⁵³ The ECJ had already emphasized

⁴⁸ ECJ 6 June 2019, *Michel Schyns v. Belfius Banque SA*, Case C-58/18, EU:C:2019:467, paras. 49 and 50(2): 'Article 5(6) and Article 8(1) of Directive 2008/48 must be interpreted as not precluding a national rule, such as that at issue in the main proceedings, which obliges the creditor to refrain from concluding the credit agreement if he cannot reasonably take the view, following the check of the consumer's creditworthiness, that the consumer will be able to fulfil the obligations arising from the proposed agreement'.

⁴⁹ ECJ 10 October 2014, *Monika Kušionová v SMART Capital*, Case C-34/13, EU:C:2014:2189, para. 59; ECJ 16 November 2021, *Ultimo Portfolio Investment (Luxembourg) SA v. KM*, Case C-303/20, EU:C:2021:479, para. 30; ECJ 11 January 2024, *Nárokuj v. EC Financial Services*, C-755/22, EU:C:2024:10, para. 40: 'as regards the system of penalties applicable in the event of infringement of the national provisions adopted pursuant to Article 8 of Directive 2008/48, it is important to remember that, in accordance with Article 23 of that directive, that system must be defined in such a way as to ensure that the penalties are effective, proportionate and dissuasive'.

⁵⁰ See ABF Napoli, 16 January 2018, no. 1067.

⁵¹ See ABF Napoli, 18 May 2020, no. 9178; ABF Roma, 20 August 2013, no. 4440.

⁵² ECJ 6 June 2019, *Michel Schyns v. Belfius Banque SA*, Case C-58/18, EU:C:2019:467, para. 49.

⁵³ ECJ 5 March 2020, *OPR-Finance v. GK*, C-679/18, EU:C:2020:167, para 34.

that if the credit agreement is concluded without observing the obligation to make such an assessment, the sanction of forfeiture of the creditor's right to the agreed interest proves fully appropriate.⁵⁴ The way to nullity of the contract was expressly paved in the *Nárokuj* case decided by the ECJ: if the obligation to assess the consumer's creditworthiness is not duly fulfilled, the creditor can be penalised, in accordance with national law; in this respect the sanction may be based on the nullity of the consumer credit agreement and forfeiture of agreed interest, even though that contract has been fully performed by the parties and the consumer has not suffered any harmful consequences as a result of the breach of that obligation.⁵⁵

Its violation represents the most appropriate ground for the recognition by Italian courts of the nullity of the contracts, pursuant to Art. 1418(1) cod. civ. In Italy, this type of nullity is commonly referred to as '*nullità virtuale*', being inferred from an assessment based on any possible violation of mandatory rules in force in the national legal system.

4. *The Unfairness of the Indexation Clause in Foreign Currency Mortgage Loans*

A further relevant intersection between the rules of the MCD and general principles of Italian private law is to be identified in the issues raised by the unwinding of mortgage loans indexed to a foreign currency.⁵⁶ It is widely known how the triggering point underlying the legal issue at stake has been represented by changes of the exchange rate between the national currency and foreign currency over time to the detriment of borrowers.⁵⁷

⁵⁴ ECJ 5 March 2020, *OPR-Finance v. GK*, C-679/18, EU:C:2020:167, para. 30.

⁵⁵ ECJ 11 January 2024, *Nárokuj v. EC Financial Services*, C-755/22, EU:C:2024:10, para. 52.

⁵⁶ In case of loans indexed to a foreign currency, the principal is expressed (and disbursed) in national currency, but the borrower's debt is nonetheless calculated by the lending bank in a foreign currency; in doing so, the lending bank applies the rate at which, according to its own rate table, it buys the foreign currency on that date. On these points, see Pietro Sirena, 'The Unwinding of Annulled Contracts of Loan Due to the Unfairness of the Indexation Clause' in Pietro Sirena (ed), *Unfair Contract Terms and Restitution in European Private Law: The National and ECJ Litigation on House Loans Indexed in a Foreign Currency* (CUP 2024) (forthcoming); Federico Pistelli, *L'indicizzazione del regolamento contrattuale* (ESI 2023) 36-37; Federico Pistelli, 'Finanziamenti in valuta estera e rimedi: oltre la conversione' [2022] Osservatorio del diritto civile e commerciale 241 250-252.

⁵⁷ Practice shows that when interest rates are high in a national currency, banks are inclined to offer loans pegged to a stable foreign currency, under the obligation to comply with legal and regulatory requirements. On the relevant

From a legal point of view, in the light of the circumstance that loan agreements are grounded on the bank's general terms, the Directive 93/13/EEC on unfair terms in consumer contracts comes into play. Given that clauses dealing with the exchange rate risk generally constitute the main subject matter of these loan contracts, if the indexation clause is unfair, the entire contract may turn out to be null and void.⁵⁸

This outcome paves the way to the issue of restitutionary claims relevant between parties. In Italy, the discussion on this point has been recently inspired by the need to protect weak parties, thereby expanding the traditional safeguard aims of strengthening the consumers' position before the contract is concluded and during its execution.⁵⁹ In case of investment contracts that are null and void, the rationale behind this invalidity has a crucial impact on the discipline of restitutionary effects which arise from the judicial declaration of nullity: the weak party can claim that undue payment be returned, whereas the business is not entitled to do so. Although in a different sector, this very principle, referred to as 'protective *condictio indebiti*', has been already adopted by the Italian Supreme Court,⁶⁰ so that Italian scholars have proposed to extend its application to the case of mortgage loans declared invalid because of unfair indexation clauses.⁶¹

legal implications, see Radosveta Vassileva, 'Monetary Appreciation and Foreign Currency Mortgages: Lessons from the 2015 Swiss Franc Surge' (2020) 28 ERPL 173.

⁵⁸ This is what the ECJ recently stated in *Dziubak v. Raiffeisen Bank*, Case C-260/18, EU:C:2019:819, that has been examined by Aneta Wieworowska-Domagalska, 'Unfair Contract Terms in CHF Mortgage Loans. Case C-260/18 – where do we go from here?' (2020) 9 EuCML 206, and F. Esposito, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection' (2020) 16 ERCL 538. On the power of national courts when assessing the unfairness of a clause relating to the main subject matter of a financing contract, see ECJ 31 March 2023, *Lombard Pénzügyi és Lízing Zrt. v. PN*, Case C-472/20, EU:C:2022:242.

⁵⁹ See Stefano Pagliantini, 'Trent'anni di direttiva 93/13, postvessatorieta restitutoria ed il vuoto di un'interpretazione conforme a tutto tondo' [2023] Accademia 11; Stefano Pagliantini, 'La nullità selettiva quale epifania di una deroga all'integralità delle restituzioni: l'investitore è come il contraente incapace?' [2019] Persona e mercato 123; Aldo A Dolmetta, 'All'essenza della nullità di protezione: l'operatività "a vantaggio". Per una critica costruttiva di Cass. SS.UU., n. 28314/2019' [2020] Rivista di diritto bancario 89; Giovanni D'Amico, 'Sul carattere c.d. "selettivo" della nullità di protezione' [2020] Nuovo diritto civile 7; Daniele Imbruglia, 'Nullità e restituzioni' [2020] Giurisprudenza italiana 1533. The same problems have recently been addressed from a comparative law point of view: see, e.g. John D Mc Camus and Francesco Delfini, 'Ineffective contracts, restitution and the change of position defence. About a recent decision rendered by the High Court of Justice of London' [2023] MLR 19 20.

⁶⁰ See *Corte di cassazione, Sezioni Unite*, 4 November 2019, no. 28314.

⁶¹ See recently Francesca Corletto, 'Towards a Protective *Condictio*? The *Bank M* Case in the Prism of Restitutory Remedies: A Reconstructive Proposal' (2024) 20 ERCL 155.

In the light of what has been pointed out, one may wonder whether the borrower is bound (i) to return the loan principal and, in addition, (ii) to make an allowance for the usage of it, as well as (iii) to remunerate potential recurring and up-front services carried out by the lender; likewise, it is dubious that the lender must (i) give back the instalments that have been collected but also (ii) make an allowance for the usage thereof, (iii) besides reimbursing any expenses incurred by the borrower.⁶²

These doubts had found a controversial clarification in the Bank Millenium judgment rendered by the ECJ: the lending bank is obliged to return to the borrower the total amount of the monthly instalments and all expenses (regarding the performance of the agreement) incurred by the borrower, plus default interest at the statutory rate from the day on which repayment is demanded; conversely, the consumer should return to the lending bank only the principal, without being obliged to pay any interest either for the use of that principal or for arrears.⁶³

This solution appears in contrast with the tenets of the traditional law of obligations,⁶⁴ whose principles should dictate that the performance unduly received by the borrower consists in a financial service encompassing the enjoyment of the value of that sum of money over time, and precisely for the whole duration of the financing. On this ground, the ECJ decision can be better framed within a regulatory perspective, where the prevalence of instances of consumer protection over the stability of financial markets may well justify that asymmetrical law of restitution envisaged by the Italian scholarship.⁶⁵

From a more general point of view, the incidence of the MCD proved largely ineffective in addressing these legal problems. It was deemed to be tardive compared to the time these contracts have historically been concluded in several Member States since, even though consumers hold a right to convert the credit agreement into an alternative currency – typically, the home currency – under specified conditions (Art. 23(1), MCD;

⁶² Pietro Sirena, ‘The Unwinding of Annulled Contracts of Loan’ (n 56).

⁶³ Bank Millenium also claimed that the stability of the financial markets would be threatened if banks were not allowed to seek compensation from consumers. However, the ECJ replied that this argument proves not relevant in the context of the interpretation of Directive 93/13/EEC, on unfair terms which is aimed at protecting consumers. Additionally, ‘it cannot be accepted that sellers or suppliers may circumvent the objectives pursued by Directive 93/13 on the ground of preserving the stability of the financial markets’, since ‘[b]anking institutions are under a duty to organise their activities in in a manner which complies with that directive’ (ECJ 15 June 2023, *Szcześniak v. Bank Millenium*, C-520/21, EU:C:2023:478, paras 82-83).

⁶⁴ Sirena, ‘The Unwinding of Annulled Contracts of Loan’ (n 56).

⁶⁵ *Ibid.*

Art. 120-*quaterdecies*, para. 1, TUB), its provisions are not applicable retrospectively;⁶⁶ moreover, it was often considered deprived of effective tools to combat the risk of systemic effects tied to exchange rate risks.⁶⁷

Nonetheless, despite not being formally applicable to loans indexed to foreign currency, as they are not mentioned in the MCD, which only deals with contracts grounded on denomination mechanisms,⁶⁸ it has been claimed that its articles 23 and 24 may well represent a source upon which to base a set of claims in unjust enrichment; furthermore, some scholars held that the MCD could also be applied to old cases.⁶⁹

Considering the similar structure that denominated and indexed contracts share, it would therefore be plausible to argue that the MCD is to be applied by analogy to the second category of agreements and, even if not, article 24 could cover both of them: uncoincidentally it broadly encompasses ‘variable rate credits’ where the foreign currency is used as a reference rate.

5. *Early Repayment and Reduction in the Total Cost of the Credit*

In the recent years, the right of consumers to discharge their obligations early and the consequent reduction in the total cost of the credit have proved to be among the most controversial aspects of the Italian legal discipline on credit contracts, especially after the ground-breaking judgement rendered by the ECJ on September 2019 in the now-famous *Lexitor* case.⁷⁰

More specifically, before that important intervention of ECJ, the reimbursement

⁶⁶ The MCD does not apply to most part of this type of contracts that have been stipulated in Europe since it was adopted in 2014 and had to be implemented in the Member States by 21 March 2016 (see Article 42(1) MCD); in addition, it does not apply retrospectively to loan agreements concluded before that date (Article 43(1) MCD).

⁶⁷ See, on a slightly different issue, Federico Pistelli, ‘I prestiti in valuta fra contratto e concorrenza’ [2022] *Nuova giurisprudenza civile commentata* 108 108.

⁶⁸ For a general overview, revolving around the connection between the MCD and loans denominated in a foreign currency, see Maffei (n 20) 190; F. Azzarri, ‘I “prestiti in valuta estera” nella direttiva 2014/17/ UE sui “contratti di credito ai consumatori relativi a beni immobili residenziali”’ [2015] *Osservatorio del diritto civile e commerciale* 187 200.

⁶⁹ Stefan Grundmann and Nikolai Badenhoop, ‘Foreign Currency Loans and the Foundations of European Contract Law – A Case for Financial and Contractual Crisis?’ (2023) 19 *ERCL* 1 25.

⁷⁰ ECJ 11 September 2019, *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefczyka and Others*, Case C-383/18, EU:C:2019:702.

due to the debtor in case of early repayment was subject to an essentially unambiguous rule in Italy, shared by regulators, case law, and scholars in application of Art. 125-*sexies* TUB (the norm with which the Italian legislator had implemented the provision contained in the ancient Art. 16 CCD 2008, dedicated to consumer credit agreements).⁷¹

With regard to that discipline, the majority of commentators had considered the reduction of the total cost of the credit as a plain corollary of general civil law principles inspiring the rules on undue payments, operating after the exercise of the right to early discharge by the consumer.⁷² It had seemed thus logical to limit the reduction of the costs of credit to burdens and obligations which, at the moment of the early reimbursement, were still to be fulfilled according to the original contractual terms (e.g. interests not already accrued according to the agreed amortization plan), or to fees and sums entirely paid at the time of the conclusion of the deal, but referable to services meant to provide benefits to the consumer over the entire duration of the relationship.⁷³ The text of the original version of the already mentioned Art. 125-*sexies*, paragraph 1, TUB also appeared to be oriented in the same sense, since it was referred to a reduction ‘equal to’ (‘*pari a*’) and not simply ‘*consisting of*’ (as both Art. 16 CCD 2008 stated and 25 MCD still states verbatim) the interest and the costs for the remaining duration of the contract.⁷⁴

A clear operational rule had thus emerged in Italian law of consumer credit,

⁷¹ For a basic overview, Alessandro Ciatti, ‘La corresponsione anticipata delle somme dovute dal consumatore al creditore’ in Giovanni De Cristofaro (ed), *La nuova disciplina europea del credito al consumo* (Giappichelli 2009) 153.

⁷² For an overall reconstruction of the different theoretical orientations present in Italian doctrine, see Francesco Oliviero, ‘L’anticipato adempimento dell’obbligazione restitutiva nel credito ai consumatori’ [2014] *Nuove leggi civili commentate* 373 394.

⁷³ Lara Modica, ‘Il credito ai consumatori’ in Fabrizio Piraino and Stefano Cherti (eds), *I contratti bancari* (Giappichelli 2016) 267 306; Giovanni De Cristofaro and Francesco Oliviero, ‘I contratti di credito ai consumatori’ in Vincenzo Roppo (ed), *Trattato dei contratti* (vol 5, Giuffrè 2014) 343; Marco Maugeri and Stefano Pagliantini, *Il credito ai consumatori. I rimedi nella ricostruzione degli organi giudicanti* (Giuffrè 2013) 121; Francesco Quarta, ‘Estinzione anticipata dei finanziamenti a tempo determinato e modulazioni del costo del credito (commissioni di intermediazione, oneri assicurativi e penalità)’ [2013] *Rivista di diritto bancario* 1 5. For a different view, contrary to differentiation between categories of costs dependent on the undue payment rationale, see Aldo A Dolmetta, ‘Anticipata estinzione e “riduzione del costo totale del credito”. Il caso della cessione del quinto’ [2019] *Banca, borsa, titoli di credito* 644 649; Aldo A Dolmetta and Antonella Sciarone Alibrandi, ‘La facoltà di “estinzione anticipata” nei contratti bancari, con segnato riguardo alla disposizione dell’Art. 7 legge n.40/2007’ [2008] *Rivista di diritto civile* 523 541.

⁷⁴ Fabrizio Maimeri, ‘Credito al consumo: quali commissioni sono rimborsabili’ (2019) *FCHub* 1 6-7.

based on the distinction between so called ‘up-front costs’, not dependent on the agreed repayment term, and therefore not subject to reduction in the event of early reimbursement; and so called ‘recurring costs’, to be included in the proportional reduction of the cost of credit, since they are aimed at remunerating performances and utilities rendered by the professional throughout the entire contractual relationship.⁷⁵ This rule, constantly applied in ordinary case law and in the far more numerous decisions rendered on the subject by the ABF,⁷⁶ was eventually formalized in the regulatory measures issued by the Bank of Italy.⁷⁷

In light of the almost complete similarity detectable between the text of Art. 16 CCD 2008 and the rule dedicated to early repayment in the MCD (Art. 25), when the Italian legislator had to implement this latter directive it merely inserted, with a new Art. 120-*noviesdecies* TUB, a textual reference to the rule already contained in Art. 125-*sexies* for consumer credit. With this drafting technique, the legislative intention was clearly that of extending also to credit agreements relating to residential immovables the normative treatment based on the distinction between up-front (non-reimbursable) and recurring (reimbursable) costs.

Considering all the above, one can easily understand the disruptive impact assumed in the Italian system by the *Lexitor* ruling, according to which ‘Article 16(1) of Directive 2008/48 must be interpreted as meaning that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment of the credit includes all the costs imposed on the consumer’.⁷⁸

Leaving aside its more direct repercussions on the consumer credit sector,⁷⁹ the

⁷⁵ Andrea Barengi, *Diritto dei consumatori* (Wolters Kluwer 2017).461; Ugo Malvagna, ‘Nel focus del credito al consumo: gli oneri economici della “cessione del quinto”’ [2015] *Rivista di diritto civile* 1532 1551.

⁷⁶ See among others, Tribunale Torino, 24 April 2018; for a complete survey of the orientations of the ABF, see Marco Simeon, ‘Gli orientamenti dell’Arbitro Bancario Finanziario in materia di credito ai consumatori’ [2019] *Giurisprudenza commerciale* 429 436.

⁷⁷ Order on ‘Trasparenza dei Servizi bancari e finanziari. Correttezza delle relazioni tra intermediari e clienti’. See fn. 18, in particular Ch. VI, § 5.2.1, lett. *q*, nt. 3.

⁷⁸ ECJ 11 September 2019, *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefczyka and Others*, Case C-383/18, EU:C:2019:702, para. 36.

⁷⁹ For a comprehensive reconstruction of the complex evolution of the Italian consumer credit sector after *Lexitor*, marked by a series of interventions by the Italian legislature, which have even required a ruling by the Constitutional Court, see Marco Martino, ‘Ne nos inducas in tentationem. Effettività, affidamento e qualche chiosa sulla ripetizione di indebito, a valle della vicenda “Lexitor”’ [2023] *Nuova giurisprudenza civile commentata* 698; Stefano Pagliantini, ‘Lexitor atto secondo: il (prezioso) decalogo della Consulta sull’interpretazione euroconforme’ [2023] *Giurisprudenza italiana* 279.

publication of the ECJ's opinion has immediately given rise to an intense debate on whether the principle of law contained therein, though formally referred to the norm contained in the old Art. 16 CCD 2008, should be considered relevant and binding also with regard to the rules on early repayments of mortgage credit agreements.⁸⁰ On this crucial point, two opposing interpretative approaches have emerged in the Italian case law.

On the one hand, a number of decisions have over time endorsed the extensive, more rigorous, solution, on the ground of the evident continuity between the texts of the Arts 16 CDD 2008 and 25 MCD, and of their common protective nature, necessarily oriented in favour of the weaker party of the credit agreement.⁸¹

On the other hand, other litigations have been resolved proposing a restrictive interpretation of the *Lexitor* ruling,⁸² justified on the grounds of the different nature of the CCD 2008 and the MCD,⁸³ and on the (slightly) different contents of the provisions specifically devoted to early repayment in these two pieces of legislation. In particular, Art. 25(3) MCD depicts the provision of a 'fair and objective compensation' in favour of the creditor, 'for possible costs directly linked to the early repayment' as a purely optional measure for national legislators (and not as a mandatory rule, as it is instead presented in Art. 16(2) CCD 2008). This normative element has been considered apt to mark a relevant difference from the case examined in *Lexitor*, where the ECJ explicitly considered the right of the creditor as a crucial factor to counterbalance the effects of a reduction in the total cost of the credit covering all the costs incurred by the consumer in connection with the agreement.⁸⁴

⁸⁰ See Mario Natale, 'Estinzione anticipata nel credito immobiliare ai consumatori. Novità legislative e spunti comparativi dall'esperienza austriaca' in Adriante Addante and Lucia Bozzi (eds), *I contratti di credito immobiliare fra diritto europeo e attuazione nazionale. Strumenti di prevenzione del sovraindebitamento del consumatore* (Caccuci Editore 2022) 79; Francesco Mezzanotte, 'Il rimborso anticipato nei contratti di credito immobiliare ai consumatori' [2020] *Nuove leggi civili commentate* 65.

⁸¹ ABF Bari, 21 December 2021, no. 23408; ABF Roma, 22 February 2021, no. 4662; ABF Bari, 12 November 2020, no. 20119.

⁸² ABF Napoli, 9 October 2020, no. 17588 [2021] *Foro italiano* 358; ABF Napoli, 21 January 2021, no. 1753; ABF Napoli, 22 January 2021, no. 1887; ABF Napoli, 4 March 2021, no. 5853.

⁸³ As several Italian commentators have observed, the MCD is inspired by a dual soul, where the consumer protection rationale is not autonomous, or pre-eminent, with respect to that aimed at the regulation of the financial market: see Pagliantini, 'Statuto dell'informazione e prestito responsabile nella direttiva 17/2014/UE' (n 17) 523; Federico Ferretti, 'Contratti di credito ai consumatori relativi a beni immobili residenziali: prime osservazioni sulla direttiva 2014/17/UE' [2014] *Contratto e impresa Europa* 863.

⁸⁴ See ECJ 11 September 2019, *Lexitor Sp. z o.o v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefc-*

Evidently aware that persistent reasons of legal uncertainty were inevitably linked to the referral technique by which Art. 25 MCD had been originally transposed into domestic law, in 2021 the Italian legislator formally distinguished the domestic rules on early repayment relevant in case of consumer credit from those applicable to the mortgage credit field. In more detail, Art. 11-*octies*, paragraph 1, Law 23 July 2021, no. 106, has for the first time introduced in the national system a rule specifically dedicated to the reduction of the total cost of the credit valid for consumer agreements relating to residential immovable property, explicitly reaffirming, in this sector, the criterion of reimbursement limited to the recurring costs only (Art. 120-*quaterdecies* TUB).⁸⁵

This solution has been definitively sealed in its compatibility with the superior principles of EU law by the latest judgement of the ECJ rendered on February 2023 in the case *UniCredit Bank Austria*, which has definitively confirmed the peculiarities of the sector regulated by the MCD, clarifying that: ‘Article 25(1) of Directive 2014/17 must be interpreted as not precluding national legislation which provides that the consumer’s right to a reduction in the total cost of the credit in the event of early repayment of that credit includes only interest and costs which are dependent on the duration of the contract’.⁸⁶

Several commentators have criticised the choice to distinguish the legal treatment of the two areas of credit contracts,⁸⁷ especially considering that the principle of law established in *Lexitor* has been confirmed in the new CCD 2023.⁸⁸ At the same time, after the latest ECJ ruling the topic seems to have finally found, at least with respect to mortgage credit, a more stable framework in the Italian legislative landscape.

zyka and Others, Case C-383/18, EU:C:2019:702, para. 34.

⁸⁵ See Davide Achille, ‘Estinzione anticipata del credito (immobiliare) ai consumatori e “riduzione del costo totale del credito”: melius re perpensa’ [2023] *Foro italiano* 134.

⁸⁶ ECJ 9 February 2023, *UniCredit Bank Austria AG v Verein für Konsumenteninformation*, Case C-555/21, EU:C:2023:78, para. 39.

⁸⁷ See Esther Arroyo Amayuelas, ‘A Third Directive on Consumer Credit’ (2024) 20 *ERCL* 1 16; Jochen Hoffmann and Martin Samek, ‘Cost Reduction in the Event of Early Repayment Under the Mortgage Credit Directive: A Surprising U-turn After *Lexitor*’ (2023) 12 *EuCML* 164.

⁸⁸ See CCD 2023, Art. 29, and Recital 70.

6. *Instead of a Conclusion, Looking Ahead*

In more recent times, the Italian scenario on the issues analysed in this chapter has become progressively influenced by the emergence of new technologies and AI. Trying to inspect the relevant future way forward, these processes seem to show a twofold incidence: (i) they will be generating a disruptive impact on the concrete functioning of traditional legal institutions and mechanisms: among many, it is the case of credit scoring (*de facto* incidence); (ii) the rules governing these areas of law are increasingly adapting to the new reality (*legal* incidence).

If the prominence of the former aspect proves to be immediately graspable, the importance of the latter is evidenced by the initiatives of the EU legislature; by way of example, the Regulation on Artificial Intelligence (AI Act),⁸⁹ together with the GDPR, will be representing the bulwark of automated credit scoring, which falls into the category of high-risk systems that has been envisaged by the AI Act itself.⁹⁰

The practical influence that automated systems will unfold in Italy is going to be assessed soon in all likelihood; by way of example, one might wonder whether resorting to artificial intelligence systems to assess credit scoring proves fully in line with the creditor's duty of care towards its clients and, in particular, with the requirement provided for by the above-mentioned Art. 124-*bis* TUB (and in addition Arts 5 and 127 TUB).⁹¹

Apart from potential doubts that may be raised and even beyond the indications inferable from the activity already carried out by the EBA,⁹² the Bank of Italy has already paid attention to AI, automated decision and credit scoring activity on the assumption that such intersection will be playing a pivotal role in this realm of law.⁹³ Furthermore, it is of interest that the trend characterising the activity of supranational and domestic courts becomes increasingly apparent, inasmuch as they are presently called to issue

⁸⁹ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 OJ L 2024/1689.

⁹⁰ Annex III (High-Risk Systems Referred to in Article 6(2) of the AI Act.

⁹¹ See Rabitti (n 11) 178.

⁹² EBA (n 12).

⁹³ See Bonaccorsi di Patti and others (n 9).

decisions regarding the interplay between data protection (GDPR) and credit scoring;⁹⁴ even beyond creditworthiness, Italian judgements have also examined cases based on algorithms and reputational rating.⁹⁵ This seems to be fully consistent with the above-mentioned tendency in Europe, in which analysis concerning the impact of machine learning on the IRB models are increasing significantly.

⁹⁴ ECJ 7 December 2023, *SCHUFA*, Case 634/21, EU:C:2023:957.

⁹⁵ See *Corte di cassazione*, 10 October 2023, no. 28358.

MICAELA LOTTINI *

SOLVIT AND THE ONGOING STRATEGY OF INTERNAL MARKET INTEGRATION AND GOVERNANCE

ABSTRACT. The paper aims to focus on the activity of the SOLVIT network after more than 20 years from its establishment as a mechanism for the informal resolution of disputes between citizens (or businesses) and national public administrations which allegedly acted in breach of EU law. In this respect the Commission after having constantly stressed that the system has lived up to expectations and has been considered effective in providing remedy for internal market problems, it also commits towards identifying its weaknesses and working to improve its services as is clearly shown by the more recent documents on the network.

CONTENT. 1. Preliminary remarks. – 2. SOLVIT and the integration process. – 3. SOLVIT and the procedure pursuant to Art. 8 of Regulation (EU) no. 2019/515 on mutual recognition of goods. – 4. Conclusions.

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1. *Preliminary remarks*

The year 2022 marked the twentieth anniversary of the establishment of the SOLVIT¹ network which has contributed,² over the years, to promoting the integration of the internal market, through the resolution of disputes between citizens (or businesses) and public administrations in a cross-border dimension, as well as encouraging the development of a culture of correct and effective interpretation and application of European law at national level.³

The SOLVIT website indicates a series of cases submitted to the network that have been concluded positively and that provide us with a detailed example of the role played by SOLVIT to guarantee the effective application of European standards and in the integration process.

One case concerned an Italian citizen who submitted a request to SOLVIT together with her brother, a Bulgarian citizen, for a problem related to inheritance procedures, after the death of their father, an Italian citizen resident in Sofia. Thanks to the intervention of SOLVIT, the competent Bulgarian administration issued the certificate requested by the heirs.

The cooperation between the Italian and German Centres solved the case of an Italian citizen residing in Germany by clarifying that the driving license issued in a member State must be recognised throughout Europe and when it expires the renewal must take place in the State of residence.

After SOLVIT's intervention, a French professor working in Italy obtained recognition of seniority reached in his Country. The Italian administration had rejected the request.

Another case.

A Belgian company applied for the approval by the Danish authorities of the

¹ For all the information relating to the network, see: Micaela Lottini, 'La rete SOLVIT: uno strumento di risoluzione delle controversie transfrontaliere (2006) 6 *Rivista italiana di diritto pubblico comunitario* 1089; Ead, 'The SOLVIT network: state of the art and possible future developments' (2020) 1 *Review of European administrative law* 109. Furthermore, all the founding documents, examples of resolved cases, etc., are available on the network's website at: <https://ec.europa.eu/solvit/index_it.htm>.

² In this sense, see, Commission Staff Working Document, 'SOLVIT's helping hand in the Single Market: celebrating 20 years', Brussels, of 26 September 2022, SWD (2022) 325 final.

³ On the topic, Åsa Casula Vifell and Ebba Sjögren, 'Governing by supervision: The EU Commission's SOLVIT-centres as juridified internal market watchdogs. The Case of Sweden', SSE/EFI Working Papers Series (2010) 1 *Business administration* 7.

addition of nutrients to a chocolate protein bar sold in many EU countries. The competent Danish authority approved the majority of added nutrients but banned the addition of some vitamins because they could pose a risk for little children. SOLVIT intervened making it clear that the objective of protecting children's health could be reached by other means, for example by using a label which included a warning to prevent consumption by underage consumers.

These cases provide us with a clear example of the obstacles that European citizens and businesses may have to face when, in practice, they decide to take advantage of the opportunities of the internal market; as well as an example of the key role that the SOLVIT network can play in their protection, in collaboration with the other services⁴ established to facilitate the integration process. Its intervention is particularly significant within specific areas of the internal market, where quick and/or cost effective solutions are needed. Commission's statistics show that a high percentage of the cases handled are social security cases, other involve the recognition of professional qualifications, or concern free movement of persons and European citizenship; problems also occur in relation to market access for products, access to education, employment rights, motor vehicle registration, etc.

The article focuses on the evolution of SOLVIT over the 20 years since its establishment and on the role played by the network within the European market, then proposing some conclusive considerations.

2. *SOLVIT and the integration process*

The last two decades have seen the development of a new phase of European integration in which, as highlighted in the documents⁵ of the Commission and other

⁴ Reference is made here, in particular, to the Internal Market Information System. IMI is an online tool, which facilitates the exchange of information between the national authorities responsible for the implementation of certain European regulations, facilitating compliance with the cross-border administrative collaboration obligations imposed on the authorities in these sectors. See, in this regard Regulation (EU) n. 1024/2012 of the European Parliament and of the Council, of 25 October 2012, 'on administrative cooperation through the internal market information system and repealing Commission Decision 2008/49/EC ('the IMI Regulation')', OJ L 316 of 14. 11. 2012. For further information, see: <<http://ec.europa.eu/internalmarket/iminet/ndexen.html>>.

⁵ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 28 October 2015, 'Improving the single market: more opportunities for citizens and businesses', COM (2015) 550 final, 16. See, also, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25

institutions,⁶ emphasis has been placed on promoting correct and effective application of EU law by Member States, to ensure that citizens (and businesses) can benefit from the opportunities offered by the single market.

In this sense, the role played by national public administrations,⁷ called upon to apply European law, has been recognised as crucial for market integration,⁸ so that the strengthening of administrative capacity at national level has become a matter of ever-growing interest.

In order to facilitate the activity of national administrations and encourage the correct application of European law,⁹ the imposition of ‘administrative cooperation’ obligations¹⁰ has been considered a fundamental tool, which is today in fact described as “*the backbone of the EU’s unique system of government and governance*”.¹¹

Cooperation obligations have been imposed on national administrations as a general principle (Article 4(3) TEU¹² and Article 197 TFEU¹³), by specific pieces of

October 2016, ‘Commission Work Program for 2017. Achieving a Europe that protects, empowers and defends’, COM (2016) 710 final.

⁶ European Parliament, Council and European Commission, ‘Joint Declaration on the EU’s legislative priorities for 2017’, at: <<https://ec.europa.eu/>>.

⁷ For the role of European administrative network and SOLVIT, in particular, for the integration of the internal market, see, Reini Schrama, Dorte Sindbjerg Martinsen and Ellen Mastenbroek, ‘European administrative networks during times of crisis: Exploring the temporal development of the internal market network SOLVIT’ (2024) 18 *Regulation and governance* 1395.

⁸ Allan Rosas, ‘Ensuring uniform application of EU law in a Union of 27: the role of national courts and authorities’, speech at the Sixth Seminar of the National Ombudsmen of EU Member States and Candidate Countries – Rethinking good administration in the European Union – Strasbourg, 14-16 October 2007, at: <<https://infoeuropa.eurocid.pt/>>. See, also on this topic, Phedon Nicolaides, ‘Enlargement of the EU and effective implementation of community rules: an integration-based approach’, EIPA (1999), Working Paper 99/W/04, at: <<http://www.eipa.nl/index.asp>>.

⁹ Commission Recommendation of 29 June 2009 ‘on measures to improve the functioning of the single market’, 2009/524/EC, OJ L 176, 7.7.2009; Commission, White Paper ‘on European Governance’, of 25 July 2001, COM(2001) 428 final.

¹⁰ François Lafarge, ‘Administrative cooperation between member States and the implementation of EU law’ (2020) 4 *European public law* 597.

¹¹ Alexander H. Türk and Herwig C.H. Hofmann, ‘An introduction to EU administrative governance’, in Herwig C.H. Hofmann and Alexander H. Türk (eds), *EU administrative governance* (Edward Elgar 2006) 1.

¹² “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”.

¹³ “1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. 2. The Union may support the efforts of Member States to improve

legislation¹⁴ and by the case law¹⁵ of the Court of Justice of the European Union (CJEU).

Furthermore, a series of initiatives have been proposed to facilitate the correct application of EU law from an ‘administrative point of view’¹⁶ and to support national administrations in fulfilling their co-operation obligations.

Since 2007, for example, the Internal Market Information System (IMI)¹⁷ has connected national, regional and local authorities in a cross-border dimension and allows them to communicate quickly and easily with their foreign counterparts, in specific sectors of the internal market.

Furthermore, the European Professional Card (EPC),¹⁸ an electronic document issued, through IMI, to professionals interested in working in another Member State, facilitates mutual recognition of professional qualifications.

These mechanisms are aimed at preventing unlawful decisions by national administrations when applying EU law; however, if a problem occurs, the citizen (or business) concerned must be guaranteed an effective and adequate redress mechanism.

Needless to say, the incorrect application of internal market rules by national public administrations raises particular issues regarding legal protection, as individuals

their administrative capacity to implement Union law. (...)”.

¹⁴ Just as an example: Directive 2006/123/EC, of 12 December 2006, ‘relating to services in the internal market’, OJ L 376 of 27.12.2006; Directive 2013/55/EU of 20 November 2013 amending Directive 2005/36/EC ‘on the recognition of professional qualifications and Regulation (EU) 1024/2012 on administrative cooperation through the internal market information system (“the IMI Regulation”)’, OJ L 354 of 28.12.2013.

¹⁵ Judgment of the Court of 10 February 2000, FTS, C-202/97, EU:C:2000:75: the CJEU, called upon to rule on the application of Article 10 of the Treaty, clarified that the principle of loyal cooperation imposes mutual obligations on the authorities of the ‘home’ State and the ‘host’ State. The former must carry out a correct evaluation of the facts relevant for the application of the rules in question and must guarantee the correctness of the information on which they base their decision (e.g. the issuing of an authorisation). The authorities of the ‘host’ State, however, must ‘recognise’ this decision, and must consider themselves bound by it.

¹⁶ “Co-operation assumes importance as a legal tool that might ensure effectiveness of European Union law and of its national implementation, thus favoring integration between public administrations and their legal systems (...)”. Roberto Cavallo Perin and Gabriella M. Racca, ‘Administrative cooperation in the public contracts and service sectors for the progress of European integration’, in Francesco Merloni and Alessandra Pioggia (eds), *European democratic institutions and administrations* (Springer 2018) 265, 267.

¹⁷ See, in this regard, Regulation (EU) no. 1024/2012 of the European Parliament and of the Council of 25 October 2012 ‘on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (‘the IMI Regulation’)’, OJ L 316 of 14.11.2012.

¹⁸ From this perspective, see Micaela Lottini, ‘The European professional card: a new single market governance tool’ (2017) 5 *Rivista italiana di diritto pubblico comunitario* 1254.

(or businesses) have to deal with the administration of a Member State other than their own. Furthermore, lengthy and costly court proceedings may not be effective, especially in specific areas of the internal market or in situations where an immediate decision is needed.

Taking this into account, in 2001, the Commission adopted the Communication on the effective solution of problems in the internal market: “SOLVIT”,¹⁹ and proposed the establishment of the network. Its purpose is to provide an alternative mechanism to the courts of law, for the resolution of disputes between citizens (or businesses) and national public administrations which allegedly acted in violation of EU law.

In other words, SOLVIT aims to facilitate the correct application of internal market rules by national public administrations, as well as to enable citizens and businesses to avail themselves of their free movement opportunities.

SOLVIT is an informal,²⁰ free of charge and non-binding mechanism that deals with complaints from citizens (or businesses) of one Member State regarding the application of EU law by a public authority of another Member State. SOLVIT works to resolve the problem in collaboration with the national public authority, by proposing a possible solution and, ultimately, a modification of the original administrative decision.

The SOLVIT system consists of a network²¹ of National Centres, an online database linking the Centres and a dispute resolution procedure, outlined in the Recommendation on principles for the use of SOLVIT,²² adopted in December 2001 (and amended in 2013).²³ SOLVIT’s activity is based on the principle of mutual cooperation,

¹⁹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, ‘Effective problem solving in the internal market’, COM (2001) 702 final.

²⁰ See, in this respect, Diana-Urania Galetta, ‘Informal information processing in dispute resolution networks: informality versus the protection of individual’s rights?’ (2021) 1 *European public law* 71.

²¹ Some scholars refer to SOLVIT as a transgovernmental network, as it entails: “*regular and purposive relations between government actors dealing with cross-border policies, and problems. The government actors represent the state but operate at levels below the head of states*”: Dorte Sindbjerg Martinsen and Mogens Hobolth, ‘The effectiveness of transgovernmental networks: managing the practical application of European integration in the case of SOLVIT’, in Sara Drake and Melanie Smith (eds), *New directions in the effective enforcement of EU law and policy* (Edward Elgar 2016) 158.

²² Commission Recommendation of 7 December 2001 ‘on principles for using “SOLVIT” – the problem-solving network in the internal market’, C(2001)3901, OJ L 331, 15 December 2001

²³ Commission Recommendation of 17 September 2013 ‘on principles for using SOLVIT’, C(2013) 5869 final, OJ L 249, of 19 September 2013.

which in this case operates at three different levels: at a cross-border level, the two Centres of the Member States involved collaborate to carry out an initial assessment of the issue; at national level, the Centres and the national authority that allegedly acted in violation of EU law cooperate to find a possible solution; finally, at a supranational level, the Centres collaborate with the European Commission and other institutions and networks.

Over the years, SOLVIT's evaluation documents²⁴ have indicated that the mechanism has proven effective in offering individuals and small businesses an alternative to the courts, in ensuring the correct application of EU law and in changing administrative practices at national level. In fact, the percentage of cases managed and resolved is constantly increasing. National authorities tend to follow the solutions proposed by SOLVIT, despite their non-binding nature, and have improved their ability to correctly interpret and apply EU law.

In 2013, the Commission adopted a new Recommendation on the principles for the use of SOLVIT,²⁵ considering that, despite the positive conclusions, the evaluation documents still showed several weaknesses with regard to the network's activity: the Centres were understaffed compared to the workload; cooperation at the various levels was not always effective. Furthermore, the extension of SOLVIT's mandate, i.e. whether a given case fell within the scope of the network's competence, had given rise to different interpretations between the Centres, revealing a high degree of ambiguity and uncertainty.

In this respect, the 2013 Recommendation seeks to clarify the level of service that individuals and businesses can expect from SOLVIT, the various procedural steps and deadlines that Centres must respect when dealing with a case; establishes minimum standards that SOLVIT Centres must respect regarding organisational structures, legal competences and relations with other networks. Furthermore, it provides a clearer indication of SOLVIT's mandate; in this sense, on the one hand, it allows SOLVIT to decide those cases in which the internal market problem is caused, not by the decision of a single administration, but by national rules incompatible with EU law; such cases, referred to as 'structural cases', according to previous documents, were in principle excluded from the mandate of the network, but nevertheless dealt with by the Centres.

SOLVIT's mandate is also extended to cases that are not 'cross-border' in the strict sense. In other words, the Recommendation extends SOLVIT's mandate to in-

²⁴ All reports are available on the SOLVIT website: <<http://ec.europa.eu/solvit/>>.

²⁵ Commission Recommendation of 17 September 2013 'on principles for using SOLVIT', cit.

clude problems where applicants deal with their own national administration rather than a foreign one, “*but only after having exercised their free movement rights or when they seek to do so*”.²⁶

It is worth mentioning, in conclusion, that the Commission has structured the SOLVIT online database as a separate module in the Internal Market Information System (IMI).²⁷

In 2017, the Commission adopted the Communication ‘Action Plan on strengthening SOLVIT: bringing the benefits of the single market to citizens and businesses’,²⁸ as part of a package of measures aimed at improving the correct application of EU law and the functioning of the European market (the ‘compliance package’).²⁹

The Action Plan includes measures to strengthen the mechanism and place it alongside the other initiatives included in the ‘package’, including, in particular, the Single Digital Gateway,³⁰ which aims to connect EU and national mechanisms providing information and problem-solving services, all sharing a common and single entry point.³¹

With the action plan, the Commission, using all available funding opportunities and the latest technologies, undertakes to act in order to improve the quality of the service provided by SOLVIT, in terms of administrative capacity, management of com-

²⁶ *Ibid.*, par. I B 2.

²⁷ On this topic, see, Lucia Musselli, ‘Administrative cooperation between Member States: the SOLVIT network’, in Laura Ammannati (ed.), *Networks. In search of a model for European and global regulation*, (Torino 2012) 91.

²⁸ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 2 May 2017, Action Plan ‘on strengthening SOLVIT - Bringing the benefits of the single market to citizens and businesses’, COM(2017) 255 final.

²⁹ Commission, Proposal for a Regulation of the European Parliament and of the Council ‘establishing the conditions and procedure under which the Commission may request businesses and business associations to provide information in relation to the internal market and related fields’, of 2 May 2017, COM(2017) 257 final; Commission, Proposal ‘for a regulation of the European Parliament and of the Council establishing a single digital gateway to provide information, procedures, assistance and problem-solving services and amending Regulation (EU) No. 1024/201234’, of 2 May 2017, COM (2017) 256 final. See, in this regard, Regulation (EU) no. 2018/1724 of the European Parliament and of the Council, of 2 October 2018, ‘establishing a single digital gateway for access to information, procedures and assistance and problem-solving services and amending Regulation (EU) no. 1024/2012’, OJ L 295 of 21.11.2018.

³⁰ Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 ‘establishing a single digital gateway to provide access to information, procedures and assistance and problem-solving services and amending Regulation (EU) No. /2012’, OJ L 295 of 21. 11. 2018.

³¹ Access to the help desk is via a search function in the ‘Your Europe’ portal.

plex and sensitive cases, legal competence, legitimacy of decisions.

Furthermore, the Commission aims to intensify and improve cooperation with other European and national information and assistance networks (such as ‘Your Europe’, ‘Europe Direct’, the European Consumer Centres, etc.) to make it easier for citizens and businesses to identify and choose the mechanism most suited to their needs. The strengthened forms of cooperation should favor the constant exchange of information and best practices, the mutual reporting of cases, as well as the direct transfer of a case from one network to another competent to decide on the specific issue.

In 2020, the Commission once again renewed its commitment to improve and enhance the use of SOLVIT with the Communication ‘Long-term Action plan for better implementation and enforcement of single market rules,’³² whose Action No. 18 is entitled: “*Making SOLVIT the default tool for dispute resolution in the single market*” and indicates a series of initiatives aimed at improving its performance; with particular regard to the strengthening of its cooperation the various bodies and networks at national and European level, such as the European Ombudsman³³ and the European Labor Authority (ELA).

The European Labor Authority (ELA) was formally established with the adoption of Regulation (EU) 2019/1149,³⁴ as a Union body with legal personality, the purpose of which is to assist Member States and the Commission in the implementation of EU law relating to the mobility of workers within the Union and the coordination of social security systems, in particular by encouraging cooperation and the exchange of relevant information, thus facilitating administrative action, especially at national level.

It is interesting to note that ELA is also called upon to operate a mediation service regarding disputes between national authorities of different Member States relating to the correct application of sector regulations, with the aim of providing an alternative to judicial action and of trying to reconcile the divergent national positions, following

³² Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 3 March 2020, ‘Long-term action plan for better implementation and enforcement of single market rules’, COM(2020) 94 final.

³³ In this regard, it is interesting to note that annual Reports of the European Ombudsman (EO) indicate that cases originally submitted to the EO are being directly transferred to SOLVIT (when they involve a cross-border dispute between a national administration and a European citizen or business). The reports are available at: www.ombudsman.europa.eu/.

³⁴ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 ‘establishing a European Labor Authority’, OJ L 186 of 11 July 2019.

a procedure outlined in Article 13 of the Regulation of 2019.

Regarding the relationships between ELA and SOLVIT, they are governed by a cooperation agreement between the two parties signed on 22 January 2022, to enable better coordination on case transfer, information exchange and follow-up.

3. *SOLVIT and the procedure pursuant to Art. 8 of Regulation (EU) no. 2019/515 on mutual recognition of goods*

One of the sectors in which SOLVIT has proved more effective is that of the application of a key principle of European law: that of mutual recognition, as clearly emerges from the Commission website dedicated to SOLVIT which lists the resolved cases.³⁵

As it is well known, in 2019, regarding the specific sector of the free movement of goods, mutual recognition was the subject of a new piece of legislation: Regulation (EU) no. 2019/519,³⁶ relating to the mutual recognition of goods legally marketed in another member State.

Art. 8 of the Regulation provides for a particular procedure referred to as a ‘problem resolution procedure’, which proposes a renewed cooperative commitment between SOLVIT and the European Commission, to which, an opinion may be requested by one of the national Centres, on the compatibility with EU law of an administrative decision which limits or denies market access to a product.

The intervention of the Commission is foreseen during the evaluation procedure carried out by the SOLVIT Centres.

In this respect, Art. 8 specifies that if the home or the lead Centre deems it necessary, they can ask the Commission to express an opinion, after having provided all the relevant documents relating to the administrative decision in question.

The opinion must be issued within a maximum of 45 working days and its object must be limited to assessing the compatibility of the said decision with the principle of mutual recognition and with the requirements expressed in the Regulation.

³⁵ All documents relating to the network is available on the relevant website, at the address: <https://ec.europa.eu/solvit/index_it.htm>.

³⁶ Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 ‘on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No. 764/2008’, OJ L 91 of 29.03.2019.

Regarding the content, the opinion can identify any critical issues that need to be addressed or make recommendations to help resolve the case. Regarding the effects, Art. 8 specifies that the opinion, although not binding, ‘must be taken into consideration’ by the SOLVIT Centres.

Therefore, Art. 8 introduces a cooperation procedure between SOLVIT and the Commission, as the latter is called upon to intervene *ex ante*, as part of the investigation phase by the SOLVIT network.

It must be said that, on the basis of the founding documents of the network (paragraph VI of the Recommendation, on the for using SOLVIT),³⁷ the Commission is required to assist and support the functioning of SOLVIT, among other things, by providing assistance for the processing of cases, informal legal advice, by offering training and specific documentation.

Also, in practice, and in general terms (therefore not only with regard to cases of mutual recognition) the Commission has often intervened *ex post* at the request of parties dissatisfied with the SOLVIT solution, as clearly demonstrated by various Decisions of the European Ombudsman (EO), subsequently called to investigate the Commission’s activity in this sense.³⁸

Furthermore, in general, the Commission can exercise a control function on the quality and work of the SOLVIT Centres, pursuant to the aforementioned Recommendation of 2013.

The relationship between SOLVIT and the Commission has thus far been based in practice on informal *ex ante* and *ex post* cooperation patterns regarding the decision cases.

Art. 8 of Regulation no. 2019/519 introduces a scheme which, as a matter of fact, gives formal shape to an activity that has always been carried out by the Commission towards the network, namely that of providing assistance and making its technical skills available, with the aim of favoring the interested individual (or business) that can benefit from a faster and more effective problem resolution procedure given the timely involvement of the Commission in case of doubt.

³⁷ Commission Recommendation of 17 September 2013 ‘on principles for using SOLVIT’, C(2013) 5869 final.

³⁸ European Ombudsman, Decision in case 330/2017/EIS ‘on the Commission’s decision to close an infringement complaint against Finland regarding entitlement to unemployment benefits in cross-border situations’ (European Ombudsman, 17 May 2017) at <www.ombudsmaneup.eu/>.

4. *Conclusions*

More than 20 years have passed since the European Commission envisaged the establishment of the SOLVIT network, inaugurating a new era of integration of the internal market, which, alongside regulatory instruments and the intervention of the Court of Justice, provides for alternative dispute resolution mechanisms and tools for enhancing cooperation between the administrations called upon to apply European law.

Among these, the SOLVIT network, based on cross-border cooperation procedures, aims at guaranteeing an alternative to the Courts for the resolution of internal market disputes, i.e. disputes concerning citizens and businesses who intend to make use of the freedoms and rights guaranteed by European rules and encounter obstacles posed by the national administrations of the host State.

Over the years, the Commission has constantly monitored SOLVIT's activity, affirming its effectiveness, both in terms of individual protection and of governance of the European market integration process.

As emerges from all the documents dedicated to the evaluation of the SOLVIT network and adopted over the last twenty years, the European Commission has constantly aimed to improve the quality of the services provided by the network, underlining its crucial role for the integration of the internal market.

As a matter of fact, SOLVIT not only offers individuals and small businesses an alternative to national judicial proceedings, but promotes the correct and uniform application of EU law³⁹ by national administrations and facilitates the amendment of unlawful national regulations,⁴⁰ in constant collaboration with other authorities and networks.⁴¹

Evidently, (and as it also emerges from the more recent document on the network, the 2024 Single Market and Competitiveness Scoreboard by the Commission)⁴²

³⁹ Dorte Sindbjerg Martinsen and Mogens Hobolth, 'The effectiveness of transgovernmental networks: managing the practical application of European integration in the case of SOLVIT', in Sara Drake and Melanie Smith (edited by), *New directions in the effective enforcement of EU law and policy* (Edward Elgar 2016) 158.

⁴⁰ Anabela Correia de Brito, 'Modern enforcement in the single European market', in José Maria Beneyto and Jerònimo Maillo (directors) and Justo Corti and Pilar Milla (coordinators), *Fostering growth in Europe: reinforcing the internal market* (CUE 2014) 396.

⁴¹ Catharina E. Koops, 'Compliance mechanisms compared. An analysis of the EU infringement procedures, SOLVIT, Pilot and IMS?', in José Maria Beneyto and Jerònimo Maillo (directors) and Justo Corti and Pilar Milla (coordinators), *Fostering growth in Europe: reinforcing the internal market* (CUE, 2014) 431, 456.

⁴² Available at: <https://single-market-scoreboard.ec.europa.eu/enforcement-tools/solvit_en>.

after 20 years, it can be concluded that the system has lived up to expectations, the percentage of cases handled and resolved is constantly increasing, national authorities tend to follow the solutions proposed by SOLVIT – despite their non-binding nature – and have improved their ability to correctly interpret and apply EU law.

Regarding the scope of the network, in accordance with the background documents, it is apparent that, over the years, it has been gradually shifting from SOLVIT being a mechanism aimed at resolving individual problems caused by the misapplication of internal market rules by national administrations, to becoming a tool aimed at fostering the enforcement of EU law and effective compliance and in this respect the Commission indicates SOLVIT as the default tool for single market dispute resolution.

However, in order to accomplish this objective, a political issue should probably be dealt with. It is worth noting in fact that, after more than 20 years from its creation, there still is no EU binding legal act referring to SOLVIT.

Hence, the next step forward to improve SOLVIT's effectiveness could be the opening of a debate on the possibility of giving it a formal legal basis,⁴³ so that an obligation can be imposed upon Member States to raise to staffing and financial resources; this would also allow to deal with the national procedural deadlines that often prevent the citizen or business referring the case to make use of judicial review in case network is unable to find a solution to the problems submitted to it.

⁴³ See in this respect, Diana-Urania Galetta, Micaela Lottini and Jacques Ziller, 'The SOLVIT Network after two decades: successes, shortcomings and the way forward', (2022) 1 *CERIDAP* 25.

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**FAIR REMUNERATION AND COLLECTIVE
REPRESENTATION OF SOLO-ENTREPRENEURS
IN THE COUNCIL OF EUROPE**

ABSTRACT. 'Solo-entrepreneurs' are self-employed workers who provide their personal labour to earn a livelihood but do not have an employment relationship or employees. Their work is often carried out under flexible arrangements which exhibits precarious features, prompting the need for the study of their protection in the Council of Europe. This paper focuses on their rights to fair remuneration and collective representation under the European Convention on Human Rights (ECHR) and the European Social Charter (ESC). The paper discusses the scope for protection of solo-entrepreneurs through the right to fair remuneration under the ESC and the right to collective representation under both treaties. Based on the interpretation of these two treaties and the relevant case law, the paper concludes that solo-entrepreneurs fall into the same category as workers under both instruments and are covered by the material and personal scope of those rights.

CONTENT. 1. Introduction. – 2. Rights of Solo-entrepreneurs. – 2.1. Definition of Workers in the Council of Europe. – 2.2. The Right to Fair Remuneration – 2.3. The Right to Collective Representation. – 3. Conclusion.

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1. Introduction

Globally, the dissolution of traditional forms of employment is marked by two key factors: the blurring of the boundaries between self and dependent employment, and the emergence of digitalisation and work flexibility. Self-employment,¹ including a considerable proportion of false self-employment, is on the rise. Studies show that self-employed workers are a heterogeneous group engaged in different forms of self-employment, ranging from top-level workers to the ‘vulnerable self-employed.’² These self-employed workers, also called solo-entrepreneurs, face multiple challenges relating to pay, social security coverage, training and access to fundamental rights at work.³

The aim of this paper is to clarify the human rights standards applicable to solo-entrepreneurs, to further the research on this category of workers, and to make suggestions to ensure their protection. Research on this group of self-employed persons also covers ‘crowd work’ and ‘platform work’ which have recently attracted much attention.⁴ This includes work provided locally and facilitated by digital platforms such as Uber, Didi, Grab, Deliveroo or Foodora which deliver services and crowd-based work provided globally by the likes of Amazon Mechanical Turk or Clickworker.⁵ Recent developments in self-employment include an increase in platform-mediated work ‘such

¹ The boundaries between self-employment and employment can be blurred. The main difference is that solo-self-employed persons work on their own. However, these self-employed can depend economically on third parties and may require social protection. See Claudia Schubert, ‘Introduction’ in Claudia Schubert (ed), *Economically-dependent Workers* (Bloomsbury Publishing 2022), 1.

² Of the estimated 32 million self-employed workers in the European Union (EU), roughly half — ‘employers’ and ‘stable own-account workers’ — have high-quality jobs. The other half, however, face economic dependence, low work autonomy and financial precarity. Greet Vermeylen, Mathijn Wilkens, Isabella Biletta, Andrea Fromm, Agnès Parent-Thirion and Ricardo Rodriguez Contreras, ‘Exploring Self-Employment in the European Union’, *European Foundation for the Improvement of Living and Working Conditions* (2017), 61.

³ ‘Ensuring Better Social Protection for Self-Employed Workers’, *International Labour Office and Organisation for Economic Co-operation and Development* (2020), 17.

⁴ Frank Bayreuther, ‘Sicherung Einer Fairen Vergütung Und Eines Angemessenen Sozialen Schutzes von (Solo-) Selbständigen, Crowdworkern Und Anderen Plattformbeschäftigten’, *Bundesministerium für Arbeit und Soziales* (2018); Martin Risak, *Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level* (Friedrich-Ebert-Stiftung 2018).

⁵ Christina Behrendt, Quynh Nguyen and Uma Rani, ‘Social Protection Systems and the Future of Work: Ensuring Social Security for Digital Platform Workers’ (2019) 72 *International Social Security Review* 17, 18.

as “crowd work”, “gig work” and other forms of on-demand labour.”⁶ Gig workers are those who are employed on a freelance basis, carrying out short-term jobs or contracts for one or more employers.⁷ The gig economy usually includes two forms of work: ‘crowd work and on-demand work through apps.’⁸ Crowd work requires individuals to ‘complete a series of tasks through online platforms,’⁹ whereas the work-on-demand via apps facilitates hiring of conventional labour,¹⁰ such as transport and delivery.¹¹

Digital labour platforms create opportunities for businesses and self-employed workers, as well as improve access to services for consumers. However, new challenges have emerged: it has become increasingly difficult to correctly classify the employment status of platform workers, leading to inadequate labour and social rights protection. Workers experience inequality of bargaining power and varying degrees of control exercised by digital employment platforms, including over working conditions and pay levels. Five-and-a-half-million people in the EU are misclassified as self-employed, although they carry out work with a certain degree of dependency on the platform similar to that of employees.¹²

Platform work is an indicator of the inclusion and exclusion mechanisms of the labour market. Those who have formal access to the labour market and are not entirely dependent on platform work for their livelihood can directly benefit from such services. Those who use these platforms because they cannot access the labour market in a secure way and with formal work arrangements tend to be exploited by the system. This contributes to the precarious nature of the ‘uberisation’ of their work.¹³

Thus, platform work involves both freedom and precariousness, depending on one’s position within the system. What is a flexible tool for some can become a means of exploitation for others. The exploitative element of this type of work needs to be

⁶ ‘Ensuring Better Social Protection for Self-Employed Workers’, (2020), 4.

⁷ Boidurjo Rick Mukhopadhyay and Bibhas K. Mukhopadhyay, *What Is the Gig Economy?* (Tripura Times 2020).

⁸ Valerio De Stefano, ‘The Rise of the «just-in-Time Workforce»: On-Demand Work, Crowdwork and Labour Protection in the «gig-Economy»’, (2016) *Comparative Labor Law & Policy Journal*, 1.

⁹ *Ibid.*

¹⁰ The use of the word ‘traditionally’ translates to the offline type of work.

¹¹ De Stefano, (2016), 1.

¹² ‘Improving Working Conditions in Platform Work’, European Commission (2021).

¹³ Julia Ticona and Alexandra Mateescu, ‘Trusted Strangers: Carework Platforms’ Cultural Entrepreneurship in the on-Demand Economy’ (2018) 20 *New Media & Society* 4384.

systematically addressed, as platform work and precarious self-employment are set to expand in Europe.

The above discussion raises concerns about two rights that solo-entrepreneurs should be entitled to: fair remuneration and collective representation. Fair remuneration allows the worker to lead a decent life, and collective representation fosters a secure working environment by setting fair terms and conditions of work through *inter alia* collective bargaining.

The status of the worker has a direct impact on these rights. One of the main characteristics of solo-entrepreneurs is the flexibility of working hours and place of work. Consequently, their remuneration depends on the number of hours they actually work. Their collective organisation is made difficult by the distance between them and the lack of a common physical workplace. Further, the existence of antitrust laws, which prohibit the conclusion of collective agreements necessary to establish their rights, subverts the possibility of organising.¹⁴ Therefore, using the Council of Europe's human rights standards, this paper will identify the legal obligations that states have towards such workers under European human rights law, and suggest individual and collective approaches to prevent their exploitation.

These developments raise certain fundamental questions: who is a worker under the Council of Europe's legal framework, as interpreted by the ECSR and the ECtHR? What are the standards set by the ECSR and the ECtHR for the rights to fair remuneration and collective representation and which of these protect solo-entrepreneurs? The second question also touches on the discrimination that solo-entrepreneurs may face in relation to their rights, in particular gender discrimination regarding the right to fair remuneration.

This paper has several subsections within the overall focus on the rights of solo-entrepreneurs. The first subsection discusses who is covered by the notion of workers in the Council of Europe, given that the ECHR and the ECSR have different personal scopes. The second subsection analyses the right to fair remuneration, delving into the issue of gender discrimination faced by female solo-entrepreneurs. The ECHR does not feature in this subsection as the right to fair remuneration is not recognised in the Convention. The third subsection examines the right to collective representation under ESC and the ECHR. The conclusion will summarise the findings.

¹⁴ Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2017) 46 *Industrial Law Journal* 185, 193.

2. *Rights of Solo-entrepreneurs*

The right to fair remuneration and the right to collective representation are areas where solo-entrepreneurs lack state protection, since they are not considered as employees and labour law protection is tied to employment status. In this section, we analyse what the states' obligations are in the Council of Europe to ensure that the rights of the solo-entrepreneurs are guaranteed.

2.1. Definition of Workers in the Council of Europe

The world of work has changed dramatically over the past few decades. Women have entered the labour market in greater numbers and the nature of work and employment relationships has changed. Technology has advanced, transforming market demands. However, the legal definition of who a worker is, and what protection they need, has not evolved at the same pace. Changes in the law have not kept pace with the changes in the nature of work. The position of solo-entrepreneurs as workers is legally unclear as it is a new, flexible type of work.

Due to the interpretative task attributed to adjudicatory bodies, we rely on this task to determine whether solo-entrepreneurs are included under the protection of the ECSR and the ECHR¹⁵ since the first research question concerned the meaning of workers in the Council of Europe and whether the protection of these instruments extends to solo-entrepreneurs.

Workers' rights, which are socio-economic rights, are not directly included in the ECHR. Consequently, the Convention does not mention workers. However, the ECtHR understood that the ECHR protects work-related issues through various provisions.¹⁶ Over the years, the ECtHR has expanded its competence to hear cases related to socio-economic rights by the method of interpretation of the positive obligations of states.¹⁷ This interpretive technique extended the Court's jurisprudence

¹⁵ The living instrument doctrine advances that treaties must be interpreted in light of the present-day conditions rather than by the standards of when they were drafted. See for example: *Demir and Baykara v Turkey* Application No 34503/97, Merits and Just Satisfaction, 21 November 2006, §146; *Marangopoulos Foundation for Human Rights (MFHR) v Greece* Complaint No 30/2005, Merits, 06 December 2006, §194.

¹⁶ ECtHR. Factsheet work-related rights. < https://www.echr.coe.int/documents/d/echr/fs_work_eng >.

¹⁷ *Airey v Ireland* Application No. 6289/73, Merits, 09 October 1979, §32; Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (2007), Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights*

from a merely procedural analysis of the rights in the Convention to a consideration of their social content. In the Court's jurisprudence, rights, such as the freedom of association, have been expanded to include social rights directly. Other rights, such as the rights to housing and health, are included indirectly as social and economic dimensions of certain civil and political rights. Despite their absence in the text of the Convention, the ECtHR has advanced the protection of social rights and has condemned states which do not enforce their own legislation covering these rights. Specifically regarding workers' rights, the European Court has protected aspects of individual labour and social rights as well as collective trade union rights. These cases have dealt with issues like access to work, dismissal, collective bargaining and pension benefits.¹⁸

Despite this expansion in the ECtHR's focus, the Court has not created a definition of workers. It is clear from the jurisprudence that some aspects of work are protected for those in employment relationships.¹⁹ By contrast, an individual's right to join or form trade unions as a self-employed person is not yet explicit from the Court's case law. However, the fact that there are cases discussing the self-employed means that the ECtHR has extended the protection of the Convention beyond individuals with employment status. Nevertheless, as analysed below, this expansion is limited due to the restraints on the Court's competence. Almost a decade later, the ESC came into force. Initially, the ECSR²⁰ had the competence to monitor the Charter, and states had to report on the implementation of social rights. In the 1990s, the Charter underwent two major changes: a Revised European Social Charter (RESC) came into force, and the Protocol for Collective Complaints²¹ was approved, allowing the Committee the competence to hear collective complaints.²² With regard to collective complaints, 16

(CUP 2018), 39-42.

¹⁸ *Guide on the Case-Law of the European Convention on Human Rights: Social Rights*, Council of Europe, August 2022. Leijten, (2018).

¹⁹ *Ibid*, 17-18.

²⁰ Protocol amending the European Social Charter 1991, Council of Europe ETS No 142. According to Article 24(2), the ECSR has the legal mandate to 'assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter.'

²¹ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1995, Council of Europe ETS No 158.

²² Holly Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', (2009) 9 *Human Rights Law Review* 61, 61-62. States that have ratified the RESC are bound by these rights, while those that have not are bound by the 1961 Charter (seven out of 42 States).

States have ratified the Protocol.²³ These decisions are legally non-binding, and the Committee of Ministers has the power to impose remedies and monitor compliance.²⁴

Besides the existence of two different versions, the ESC has two relevant caveats: the *à la carte* system and the personal scope of the Charter. In the *à la carte* system, State Parties choose the provisions to which they are bound and ensure compliance.²⁵ In the Charter systems, states must accept a certain minimum number of provisions of the Charter — either from the 1961 document or from the RESC.²⁶ This leads to protection gaps as some States Parties have accepted only the minimum, while a few have accepted all Charter provisions.

The second caveat relates to the personal scope of the Charter. Its Appendix states that the personal scope includes nationals of State Parties, and it extends to foreigners as long as they are ‘nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.’²⁷ On this, the ECSR had decided that unlawful residents (only) must have their most basic rights protected because of the object and purpose of the Charter, which acts as a human rights instrument protecting all persons on the territory of the concerned State Party. This means that states cannot deny basic rights like clothing, shelter, food, etc. to illegal migrants.²⁸ Therefore, when analysing the provisions of the ESC, the *à la carte* system and the personal scope are relevant to determine the obligations of states in relation to these rights.

Moreover, the ESC does not contain an explicit definition of the term ‘worker’. According to the ECSR, the definition of ‘worker’ does not depend on domestic law. The reason why the ECSR adopted an autonomous concept was to avoid leaving the enforcement of guarantees completely to the discretion of the states.²⁹ Consequently, if self-employed workers, including platform workers, are classified in domestic legislation

²³ Signatures & Ratifications - Social Rights <<https://www.coe.int/en/web/european-social-charter/signatures-ratifications>> accessed 3 December 2023.

²⁴ Andrea Spagnolo, ‘They Are not Enforceable, but States Must Respect Them: An Attempt to Explain the Legal Value of Decisions of the European Committee of Social Rights’, (2022) 7 *European Papers* 1495, 1509.

²⁵ For more information on the *à-la-carte* system, see: ‘Accepted Provisions of the European Social Charter - Social Rights’ <<https://www.coe.int/en/web/european-social-charter/provisions-of-the-charter>> accessed 3 December 2023.

²⁶ States must accept six of the nine articles: Articles 1, 5, 6, 12, 13, 16 and 19 from the 1961 Charter and Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20 from the RESC.

²⁷ Appendix European Social Charter (Revised) 1996, Council of Europe ETS 163.

²⁸ Conference of European Churches (CEC) v the Netherlands Complaint No 90/2013, Merits, 01 July 2014, §§62-76.

²⁹ European Youth Forum (YFJ) v Belgium Complaint No 150/2017, Merits, 08 September 2021, §119.

as entrepreneurs rather than workers, this will not determine whether they are seen as workers under the ESC.

The ESC does not expressly state whether the employment provisions of Part II apply to self-employed workers. However, the ECSR has taken the view that these provisions do apply to self-employed persons, unless the context of the provision limits it to employed persons.³⁰ As explained by Monika Schlachter, ‘unless a limitation is clearly required, the notion of “worker” is interpreted broadly to include anyone performing work; neither their contractual status nor an eventual economic dependence on their customer is determinative for including them in the personal scope of application of a given provision.’³¹ For example, the ECSR has held that Article 3 of the ESC on safe and healthy working conditions applies to all sectors of the economy and to all workers, including the self-employed.³²

Based on these interpretations of the ECtHR and the ECSR, solo-entrepreneurs are protected by the two main treaties of the Council of Europe. This protection is, however, limited. By ECtHR’s interpretation, the protection only covers trade union rights, whereas according to the ECSR, the protection of the ESC is only available in provisions that are not clearly intended to protect employees. The next two subsections discuss the right to fair remuneration and the right to collective representation of solo-entrepreneurs in the ECHR and the ESC.

2.2. The Right to Fair Remuneration

Fair remuneration is a fundamental labour right that guarantees that workers have a safety net of income to support themselves and their families. The discussion on the minimum wage for solo-entrepreneurs is necessary to address unfair working conditions created by unequal bargaining powers. The right to fair remuneration is directly prescribed by the ESC, but not by the ECHR. However, remuneration appears

³⁰ David Harris, *The European Social Charter*, 2nd ed (Brill 2001) at 388 as cited: Article 1§3 concerning employment services and Article 4§4 concerning notice of termination of employment. These provisions clearly do not apply to self-employed persons; Lukas, *The Revised European Social Charter: An Article-by-Article Commentary* (2021), 87.

³¹ Monika Schlachter, ‘The Self-Employed Persons Under the European Social Charter’ in Claudia Schubert (ed.), *Economically-dependent Workers* (2022), 244.

³² Regarding those workers engaged in vulnerable atypical work, casual workers are the ones that work under a fixed-term contract. See Conclusions XIV-2 - Statement of Interpretation - Article 3, European Committee of Social Rights (1998); Appendix European Social Charter (Revised) 1996, Council of Europe ETS 163; Lukas, (2021), 360-361.

in the ECtHR's case law in three instances.³³

By contrast, in the ESC, Article 4 provides for the right to fair remuneration in both versions of the Charter. On the personal scope of the provision, Article 4 uses the English word *workers* and the French word *travailleurs*, and not employee or employé when listing their rights.³⁴ Therefore, according to the ECSR, Article 4 covers all workers, including civil servants and public service employees, migrant workers, seasonal workers and domestic workers.³⁵

As mentioned in the introduction, the ESC functions on an *à la carte* system, allowing states to choose which articles they want to accept. Article 4 is a widely accepted provision.³⁶ The right to fair remuneration provision in Article 4(1) establishes the right to a remuneration that ensures a decent standard of living for workers and their families. According to the ECSR, the concept of a 'decent standard' of living goes beyond the basic material necessities such as food, clothing and housing, and includes the resources necessary to participate in cultural, educational and social activities.³⁷ In practical terms, the ECSR's interpretation of fair remuneration is that the minimum or lowest net remuneration paid in the labour market should not fall below 60% of the average net national wage. This assessment is therefore based on net amounts, after deduction of taxes and social security contributions from gross wages.³⁸ In any case, the wage must

³³ The first is the reduction of salaries due to austerity measures. The focus is not the right to remuneration, but on the extent to which the state reduces public servants' earnings. The second is when the Court assesses the existence of employment relationships and whether that leads to trade union rights. One of the elements addressed by the ECtHR is the remuneration paid by the employer to determine this relationship. In both cases, solo-entrepreneurs are not a protected group as they are neither public servants nor employees. The third instance covers cases on minimum subsistence levels focusing on extreme forms of poverty and deprivation. See: Guide on the Case-Law of the European Convention on Human Rights: Social Rights, Council of Europe, August 2022 at 27; *Sindicatul "Păstorul Cel Bun" v Romania* Application No 2330/09, Merits and Just Satisfaction, 09 July 2013, §§141-142; and *M.S.S v Belgium and Greece* Application No 30696/09, Merits and Just Satisfaction, 21 January 2011; See also Leijten, (2018), 65.

³⁴ In the Council of Europe, English and French are the two official languages for all treaties.

³⁵ Conclusions 2014 - Slovenia - Article 4.1, European Committee of Social Rights (2014).

³⁶ Acceptance of Provisions of the Revised European Social Charter (1996)' < <https://rm.coe.int/country-by-country-table-of-accepted-provisions/1680630742> > accessed 3 December 2023.

³⁷ Conclusions 2010 - Statement of Interpretation - Article 4.1, European Committee of Social Rights (2010).

³⁸ This benchmark was established in Conclusions XIV-2 - Statement of Interpretation - Article 4-1, European Committee of Social Rights (1998); Where net figures are difficult to establish, it is for the State Party concerned to provide proper figures or estimates. See also Lukas, (2021) at 75-93, 80; Emmanuelle Mazuyer, Article 4 Revised European Social Charter, in Edoardo Ales, Mark Bell, Olaf Deinert, and Sophie Robin-Olivier (eds), *International*

be clearly above the poverty line of the country, regardless of the percentage.³⁹

The benchmark developed by the ECSR applies to solo-entrepreneurs as they fall within the scope of Article 4(1). Therefore, a State Party is in contravention of the European Social Charter if the remuneration of solo-entrepreneurs is 60% below the net national average.

Finally, Article 4(3) enshrines the right to equal pay for equal work or work of equal value for women and men. This provision has been widely accepted by the states.⁴⁰ The Committee's extensive case law on this right covers several aspects. First, equal pay must be expressly provided for in national legislation.⁴¹ Second, it must cover all the elements of the payment, including wages and all other benefits, whether cash or in kind, paid directly or indirectly by the employer to the worker,⁴² and it applies to both full-time and part-time employees.⁴³ Third, it must be included in wage-setting processes either through legislation or collective bargaining, and violations must be sanctioned, for example, by eliminating discriminatory clauses in collective agreements.⁴⁴ Fourth, states must also have provisions in place to allow for pay comparisons across companies to enhance pay transparency⁴⁵ and take adequate measures to reduce and eventually close the gender pay gap.⁴⁶ According to the Committee, national law must establish effective remedies in cases of pay discrimination. These effective remedies include the right to appeal to a court,⁴⁷ a shift

and European Labour Law: a Commentary (2018), 273ff.

³⁹ Conclusions XX-3 - Greece - Article 4.1, European Committee of Social Rights (2014). If the lowest wage lies between 60 per cent and 50 per cent, the State Party must provide detailed evidence that the lowest wage is sufficient to provide for a decent standard of living. This will consider earnings-related benefits as well as the costs of health care, education, mobility etc. See Conclusions 2018 - Lithuania - Article 4-1, European Committee of Social Rights (2018).

⁴⁰ 38 countries accepted the provision: 5 countries under the 1961 Charter and 33 under the RESC.

⁴¹ Conclusions XV-2 - Slovak Republic - Article 4.3, European Committee of Social Rights (2001); Conclusions 2014 - Georgia - Article 4.3, European Committee of Social Rights (2014).

⁴² Conclusions I - Statement of Interpretation - Article 4.3, European Committee of Social Rights (1967).

⁴³ Conclusions XVI-2 - Portugal - Article 4.3, European Committee of Social Rights (2004).

⁴⁴ Conclusions XII-5 - Statement of Interpretation - Article 1.1, 4.3, 1 Additional Protocol, European Committee of Social Rights (1995).

⁴⁵ Conclusions 2012 - Statement of Interpretation - Article 20, European Committee of Social Rights (2012); Conclusions 2014 - Romania - Article 4.3, European Committee of Social Rights (2014).

⁴⁶ Conclusions XVIII-2 - Czech Republic - Article 4.3, European Committee of Social Rights (2006).

⁴⁷ Conclusions I - Statement of Interpretation - Article 4.3, European Committee of Social Rights (1967).

in the burden of proof in favour of the plaintiff,⁴⁸ adequate, proportionate and sufficiently dissuasive remedies,⁴⁹ and protection against dismissal or other retaliatory action by the employer against an employee who has taken legal action against the dismissal.⁵⁰

Studies on platform work indicate that remuneration disparities between women and men exist.⁵¹ Women face higher precariousness because of care work, which is also due to 'more precarious employment backgrounds.'⁵² Because of higher care responsibilities, women turn to atypical employment, in particular to part-time and self-employment, for its spatial and temporal flexibility. Studies on self-employment highlight 'the gender-based dynamic underlying the constrained choice of atypical employment.'⁵³ This multitasking of care and platform work limits the time windows and job opportunities they can seize.⁵⁴ Therefore, platform work and crowd work, 'can serve as a magnifying glass to study how gender inequalities are reproduced in the digital world of work.'⁵⁵ While the digital work model can be characterised as precarious, not all platform or crowd workers can necessarily be identified as being in a precarious work situation.⁵⁶ Precarity risks are lower for men and women where there are stronger social security systems, reflecting the lower commodification of labour. However, there are gender disparities in pay levels that defy objective explanations and consequently amount to gender discrimination.⁵⁷

⁴⁸ Conclusions 2014 - Andorra - Article 4.1, European Committee of Social Rights (2014).

⁴⁹ Conclusions XII-5 - Statement of Interpretation - Article 1.1, 4.3, 1 Additional Protocol, European Committee of Social Rights (1995).

⁵⁰ Conclusions XIX-3 - Iceland - Article 4.3, European Committee of Social Rights (2010); University Women of Europe (UWE) v Bulgaria Complaint No 125/2016, Merits, 06 December 2019, §138.

⁵¹ Christine Gerber, 'Gender and Precarity in Platform Work: Old Inequalities in the New World of Work' (2022) 73 *New Technology, Work and Employment* 206, 207.

⁵² *Ibid.*, 209.

⁵³ *Ibid.*, 208. The authors points out that in Germany, one-fifth of women in this type of employment lists 'care responsibilities [...]' as a motivation for pursuing self-employment.' The number of women in such arrangements contrasts the mere 2.5% of men choosing self-employment due to care responsibilities.

⁵⁴ Abi Adams-Prassl and Janine Berg, *When Home Affects Pay: An Analysis of the Gender Pay Gap Among Crowdworkers* (SSRN 2017).

⁵⁵ Christine Gerber, 'Gender and Precarity in Platform Work: Old Inequalities in the New World of Work' (2022) 73 *New Technology, Work and Employment* 206, 226.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

Further, a 2018 study conducted by the European Foundation for the Improvement of Living and Working Conditions, showed that there was '[p]otential for discrimination through algorithms and ratings and [there was a] lack of mechanisms to address this stigma of platform work.'⁵⁸ Once a plaintiff submits prima facie evidence of discrimination, it is for the platform to prove that the correlations it relies on to explain the difference are not discriminatory. This means that the data the algorithm uses must be free of discriminatory content or assumptions.⁵⁹ As Erika Kovacs notes, platforms have the necessary information about workers' profiles, pay and ratings, and are therefore in the best position to counteract discrimination.⁶⁰

This analysis of Articles 4(1) and 4(3) of the ESC leads to a number of conclusions. First, the personal scope of these provisions encompasses solo-entrepreneurs. Second, the material scope of the provision is of extreme relevance to this category of workers. Article 4(3) fosters gender equality in the workplace and the Committee has developed a robust set of standards to ensure such equality in this area.

Algorithmic bias can lead to gender discrimination in platform work. On this topic, the ECSR has noted that where seemingly neutral legislation leads to disproportionate and unjustified impact on a particular group of persons, this amounts to indirect discrimination and is in breach of the ESC.⁶¹ If this rule is applied by analogy to the situation of platform workers, a seemingly neutral algorithm that has the effect of discriminating against women in terms of wages would be in breach of Article 4(3). States would then be required to put in place regulations to avoid possible indirect discrimination through the algorithms.

In conclusion, the standards set by the Committee in relation to Articles 4(1) and 4(3) are applicable to solo-entrepreneurs by virtue of the personal and material scope of the provisions. The Committee has delivered explicit conclusions or decisions on the situation of solo-entrepreneurs, asking states to provide information on their

⁵⁸ Willem Pieter de Groen, Zachary Kilhoffer, Karolien Lenaerts and Irene Mandl, 'Employment and Working Conditions of Selected Types of Platform Work', *European Foundation for the Improvement of Living and Working Conditions* (2018), 36.

⁵⁹ For application of this issue in the EU context see Miriam Kullmann, 'Platform Work, Algorithmic Decision-Making, and EU Gender Equality Law', 34 *International Journal of Comparative Labour Law and Industrial Relations* 1 (2018), 19.

⁶⁰ Erika Kovacs, 'Gender Equality in Virtual Work II.: Regulatory Suggestions', 2 *Hungarian Labour Law E-Journal* 1 (2018), 10.

⁶¹ Associazione sindacale 'La Voce dei Giusti' v Italy Complaint No 105/2014, Merits, 18 October 2016, §§63–81.

situation with regard to Article 4(1) in the 2022 monitoring cycle.⁶² The 2022 reports under the Revised European Social Charter demonstrate the growing importance of discussing these rights. Thirty-five countries were required to report on their measures to protect labour rights, such as the rights to fair remuneration and collective representation. The ECSR requested 19 countries⁶³ to report on their efforts to ensure fair remuneration in the platform economy. The ECSR, based on these reports, recognized the right to fair remuneration of platform and gig workers. Due to misclassification as self-employed and the absence of labour protection, these workers are in a precarious situation.⁶⁴ The ECSR asked states for further information on how they protect this category of workers.

2.3. The Right to Collective Representation

The right to collective representation of solo-entrepreneurs has proved controversial due to the nature of the work and antitrust laws.⁶⁵ The ESC protects the right to collective representation through two rights: Article 5 concerns the right to organise and Article 6 the right to collective bargaining. Both are considered core provisions of the Charter and states have to accept them mandatorily, which explains the high number of ratifications.

Article 5 guarantees freedom of association, and the right to form and join trade unions and employers' organisations. It covers not only workers in active employment relationships, but also those exercising rights that result from work, such as pensioners or unemployed persons.⁶⁶ Regarding the personal scope, the provision uses the word 'workers' instead of employees, indicating that this protection can be extended to solo-entrepreneurs.

The state must take adequate legislative or other measures to guarantee the exercise of the right to organise and to protect the workers' organisations from employer

⁶² See for example European Committee of Social Rights Conclusions 2022 on Austria (2023), 12-13.

⁶³ The countries are Albania, Andorra, Austria, Azerbaijan, Belgium, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Portugal, Romania, Serbia, the Slovak Republic, Spain, and the United Kingdom.

⁶⁴ Press briefing elements, Conclusions 2022, European Committee of Social Rights (2023).

⁶⁵ Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2017) 46 *Industrial Law Journal* 185, 192-193.

⁶⁶ Conclusions XVII-1 - Poland - Article 5, European Committee of Social Rights (2005); Digest of the Case Law of the European Committee of Social Rights, Council of Europe, June 2022, 82.

interference.⁶⁷ This also means that the state should ensure that there are no laws that impede the right of workers to organise or allow the employers to interfere.⁶⁸

A restriction on the freedom to organise is compatible with the ESC only if it satisfies the conditions of Article G.⁶⁹ This provision requires that any restriction must be prescribed by law, pursue a legitimate purpose and be necessary in a democratic society for the achievement of that purpose.

Taking into account all the elements discussed above, solo-entrepreneurs have the right to organise. Nevertheless, they face several challenges in this respect, as analysed by, among others, Valerio De Stefano.⁷⁰ First, there are difficulties in organising people who work in different jobs and in different geographical locations. Second, people on temporary contracts are more likely to be afraid of organising given the precariousness of contract renewals. Third, in some countries, antitrust laws do not allow solo-entrepreneurs to organise, an issue under discussion in the EU.⁷¹ The case law of the ECSR has established that a total ban on the right to organise is contrary to Article G on permissible state restrictions and would not be a proportionate measure under the rule of the provision.⁷² In a report on the situation in Romania, an NGO submitted that the list of workers entitled to organise is restrictive and self-employed individuals were not protected by national law. The Committee has requested clarification from the government.⁷³ According to the ECSR's longstanding case law, a complete ban on the right to organise for solo-entrepreneurs is contrary to the ESC and would lead to a violation of Article 5.

Another aspect of the right to collective representation is present in Article 6 of the ESC that protects the right to collective bargaining.⁷⁴ Article 6 has four paragraphs

⁶⁷ Conclusions I - Statement of Interpretation - Article 5, European Committee of Social Rights (1967).

⁶⁸ *Ibid.*

⁶⁹ Conclusions XX-3 - United Kingdom - Article 5, European Committee of Social Rights (2014).

⁷⁰ Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2017) 46 *Industrial Law Journal* 185, 190-193.

⁷¹ *Ibid.*

⁷² *Confederazione Generale Italiana del Lavoro (CGIL) v Italy*, Complaint No 140/2016, Merits, 22 January 2019 §90.

⁷³ European Committee of Social Rights Conclusions 2022 on Romania (2023) at 22.

⁷⁴ Regarding Article 6, five out of the seven countries in the 1961 Charter accepted the whole provision, and the remaining two only rejected Article 6(4). In addition, under the RESC, 32 states accepted the whole provision, two did not accept it at all and one state accept the first three paragraphs and rejected Article 6(4).

listing the aspects of the right to collective bargaining. Nevertheless, the only paragraph applicable to solo-entrepreneurs is Article 6(2). This is because the personal scope of the other paragraphs is directed at employees.⁷⁵ Article 6(2) focuses on organisations of employers and workers. This paragraph has a high level of acceptance among states,⁷⁶ which means that there is almost a total consensus on the high relevance of this right.

A relevant characteristic of the practice of collective bargaining is that it must be free and voluntary, and the state must ensure that workers are protected, and take positive measures to protect them.⁷⁷ This right is not absolute in nature, states can restrict a trade union's rights if justifiable and proportionate.⁷⁸

The ECSR has clarified the personal scope of Article 6(2). The Committee explicitly considers a general prohibition of collective bargaining for self-employed persons as too excessive if they have 'no substantial influence on their contractual conditions at the individual negotiation level.'⁷⁹ This interpretation was confirmed in the case of *Irish Congress of Trade Unions v. Ireland*.⁸⁰

The Irish Congress of Trade Unions case concerned self-employed voice-over actors who were prohibited from collectively bargaining because they were subject to competition law. The Competition Authority found, in 2004, that a collective agreement between the trade union EQUITY/SIPTU (representing voice-over actors) and the Institute of Advertising Practitioners was in breach of the Competition Act 2002 on the exclusive ground that each actor was a 'business undertaking.' It was

⁷⁵ The other paragraphs dictate the need for consultation between employers and workers (paragraph 1), mechanisms to settle labour disputes (paragraph 3) and collective action in case of conflict between the two groups which includes the right to strike (paragraph 4).

⁷⁶ All states under the 1961 Charter and 33 states in the RESC accepted Article 6(2).

⁷⁷ Lukas, (2021) at 108; Digest of the Case Law of the European Committee of Social Rights, Council of Europe, June 2022 at 87.

⁷⁸ Associazione nazionale sindacato professionisti sanitari della funzione infermieristica - Nursing Up v Italy Complaint No 169/2018, Merits, 19 October 2022, §70 and §76.

⁷⁹ European Organisation of Military Associations (EUROMIL) v Ireland, Complaint No 112/2014, Merits, 12 September 2017, §94; Irish Congress of Trade Unions v Ireland Complaint No 123/2016, Merits, 12 September 2018, §40; The right to collective bargaining can only be restricted by law by the States Parties in the case when a legitimate aim is pursued and this restriction is considered to be necessary in a democratic society, see as mentioned in *ibid.*, §36; European Federation of Police v Ireland Complaint No 83/2012, Admissibility and Merits, 02 December 2013, §159; European Council of Police Trade Unions (CESP) v France Complaint No 101/2013, Merits, 27 January 2016, §118.

⁸⁰ Irish Congress of Trade Unions v Ireland Complaint No 123/2016, Merits, 12 September 2018.

unlawful to agree to fix prices for the sale of their services.⁸¹

Prior to the ECSR decision, Ireland passed an Amendment to the Act in 2017, which introduced a limited exemption allowing for three categories of self-employed workers — voiceover actors, session musicians, and freelance journalists — to bargain collectively on working conditions and terms of employment, including rates of pay. The Act also created a mechanism whereby trade unions representing certain categories of self-employed workers (false self-employed workers and fully dependent self-employed workers) could apply to a minister to allow them to bargain collectively.⁸²

Because of the two different time periods of the Act, the ECSR analysed them separately. Regarding the situation before the legislative change, Ireland breached the ESC. Without discussing the concept of ‘false self-employed’ or ‘fully dependent self-employed workers,’ the Committee found that this group of workers could not be predominantly characterised as genuinely independent self-employed persons. They did not meet all or most of the criteria, such as having several clients, the authority to hire staff, and to make strategic decisions on how to run their business. Consequently, denying them the right to collective bargaining led to the lack of influence over their payment conditions.⁸³

As for the period after the amendment of 2017, the ECSR emphasised that this mechanism must take into account its interpretation of Article 6(2). Any restrictions on the right of self-employed workers to bargain collectively must respect the conditions set out in Article G. Self-employed workers who have no substantial influence on the content of their contractual conditions must therefore be given the right to bargain collectively.⁸⁴

This decision clarifies that the right to collective representation for those who

⁸¹ *Ibid*, 45.

⁸² *Ibid*, §§104-108.

⁸³ *Ibid*, §99; *Rombouts, ICTU v. Ireland: Expanding the Scope of Self-Employed Workers Entitled to Collective Bargaining Rights in Relation to Competition Law Prohibitions* (2019) 5 International Labor Rights Case Law 17, 21; Countouris and De Stefano, *New Trade Union Strategies for New Forms of Employment*, European Trade Union Confederation (2019), §§53-54.

⁸⁴ *Irish Congress of Trade Unions v Ireland Complaint No 123/2016, Merits*, 12 September 2018, §111; However, see the dissenting opinion by Barbara Kresal and Petros Stangos. They considered the amendments introduced by Ireland still too restrictive, given the importance of the right to collective bargaining for all workers, including the self-employed. See also Barbara Kresal, ‘Collective Bargaining for Platform Workers and the European Social Charter’, in José Maria Miranda Boto and Elisabeth Brameshuber (eds), *Collective Bargaining and the Gig Economy a Traditional Tool for New Business Models* (2022), 71.

are not genuinely independent self-employed on the basis of the criteria above is crucial. In this context, Bas Rombouts notes that the right to collective bargaining is essential for workers who fall outside the formal definition of ‘dependent worker’ as this puts them at a disadvantage in setting the terms and conditions of their employment relations.^{85 86}

The importance of the right to collective bargaining for self-employed persons was already underscored by the ECSR in 2018 under the reporting mechanism since it requested the governments to submit information on whether they ensure this right. However, most states did not provide any information on the right of self-employed individuals under Article 6(2) in the 2022 reporting cycle. Two countries stand out in this reporting cycle. On the one hand, Poland changed its law to allow self-employed persons to bargain collectively.⁸⁷ On the other hand, Germany put in place legislation that is ‘overly restrictive’ of this right.⁸⁸ In both cases, the Committee requested further information on the implementation of these amendments.

Unlike the ESC, the ECHR does not contain an explicit right to collective bargaining. The ECHR provides for the freedom of assembly and association under Article 11, stating that this freedom belongs to ‘everyone.’ The European Court has extended the freedom of association to self-employed persons.⁸⁹ Trade union freedom is not an independent right, but a specific aspect of freedom of association.⁹⁰ Trade union freedom includes the right of its members to be heard in order to protect their interests but does not guarantee them any particular kind of treatment by the state. However, it does require the national law to enable trade unions ‘to strive for the protection of their members’ interests.⁹¹ Therefore, the personal scope of Article 11

⁸⁵ Bas Rombouts, ICTU v. Ireland: Expanding the Scope of Self-Employed Workers Entitled to Collective Bargaining Rights in Relation to Competition Law Prohibitions (2019) 5 *International Labor Rights Case Law* 17, 22.

⁸⁶ Similarly, Schlachter notes that the economic dependence is crucial in granting collective bargaining rights to self-employed persons since they do not have the power to change their precarious working conditions individually. Monika Schlachter, ‘The Self-Employed Persons Under the European Social Charter’ in Claudia Schubert (ed), *Economically-dependent Workers* (2022), 249-250.

⁸⁷ European Committee of Social Rights Conclusions XXII-3 (2022) on Poland (2023), 21.

⁸⁸ European Committee of Social Rights Conclusions XXII-3 (2022) on Germany (2023), 27.

⁸⁹ *Vöðdur Ólafsson v Iceland* Application No 20161/06, Merits and Just Satisfaction, 27 April 2010, §34 and §83. It also notes that Article 11 ‘does not exclude any occupational group from the right of association’; *Sindicatul “Păstorul Cel Bun” v Romania*, 09 July 2013, §145.

⁹⁰ *National Union of Belgian Police v Belgium* Application No 4464/70, Merits, 27 October 1975, §38.

⁹¹ *Sindicatul “Păstorul Cel Bun” v Romania*, 09 July 2013, §134.

includes solo-entrepreneurs, including their trade union rights.

Despite not being explicitly codified in the ECHR, in *Demir and Baykara v. Turkey*, the Grand Chamber held that the right to collective bargaining was an essential element of the freedom of association, having considered the ‘perceptive evolution in such matters.’^{92 93} The ECtHR observed in this case that the collective bargaining process and the resulting collective agreement were for the trade union ‘essential means to promote and secure the interests of its members.’⁹⁴ The lack of legislation in line with the ILO conventions, and the Court of Cassation’s decision ‘based on that absence, with the resulting de facto annulment *ex tunc* of the collective agreement in question, constituted an undue interference with the applicants’ trade-union freedom as protected by Article 11 of the Convention.’⁹⁵ In the case of solo-entrepreneurs, the right to form a trade union means that their obligations must largely correspond to those obligations typically found in an employment relationship in order for Article 11 of the ECHR to apply. The existence of an employment relationship depends on the performance of work and remuneration. However, it remains unclear which facts relating to the performance of work should be considered.⁹⁶

In interpreting Article 11, the ECtHR looks at elements of international law, their interpretation by competent organs, and the practice of European States reflecting their common values.⁹⁷ This is one of the Court’s interpretative techniques used over the years, and state consensus plays a crucial role when the Court expands the Convention’s protection.

The ECtHR has usually given states a wide margin of appreciation for the nature and scope of Article 11, including for self-employed workers. In *Manole and “Romanian*

⁹² *Demir and Baykara v Turkey*, 21 November 2006, §153.

⁹³ *Wilson, National Union of Journalists and Others v the United Kingdom* Applications Nos 30668/96, 30671/96 and 30678/96, Merits and Just Satisfaction, 02 July 2002, §44; *Swedish Engine Drivers’ Union v Sweden* Application No 5614/72, Merits, 06 February 1976, §39; *Gustafsson v Sweden* Application No 15573/89, Merits and Just Satisfaction, 25 April 1996, §45; *Francesco Schettini and Others v Italy* Application No 29529/95, Admissibility, 9 November 2000.

⁹⁴ *Demir and Baykara v Turkey*, 21 November 2006, §157.

⁹⁵ *Ibid.*

⁹⁶ Elisabeth Brameshuber, ‘(A Fundamental Right to) Collective Bargaining for Economically Dependent Employee-like Workers’, in José Maria Miranda Boto and Elisabeth Brameshuber (eds), *Collective Bargaining and the Gig Economy: A traditional tool for new business models* (2022), 231.

⁹⁷ *Demir and Baykara v Turkey*, 21 November 2006, §85; Schabas, *The European Convention on Human Rights: A Commentary* (2015), 507.

Farmers Direct” v. Romania,⁹⁸ the Romanian courts refused to register a union of self-employed farmers as under the existent legal provision because only employees and public servants were entitled to form trade unions.⁹⁹ The ECtHR held that there had been no violation of Article 11, finding that the refusal to register the applicant union had not exceeded Romania’s margin of appreciation in determining how they secured the right to freedom of association for self-employed farmers. Taking into consideration the relevant international instruments, particularly the Conventions of the International Labour Organization (ILO), the ECtHR found that farmers’ organisations enjoyed essential rights under the Romanian legislation. This enabled them to defend the interests of the members in dealing with public authorities by establishing trade associations, even if they were not technically trade unions.¹⁰⁰ The ECtHR cited the ILO Global Report on the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, which emphasised that all workers, regardless of their employment status, should enjoy the right to establish and join trade unions, especially for ‘vulnerable categories of workers’¹⁰¹ However, the Court said that there were ‘no sufficient reasons [...] that the exclusion of self-employed farmers from the right to form trade unions amounts to a breach of Article 11 of the Convention.’¹⁰²

In conclusion, the ECtHR recognises in Article 11 the essential levels of representation to protect the interests of trade union members. States enjoy a wide margin of appreciation in interfering with Article 11 because of ‘the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field.’¹⁰³ It is difficult to predict with certainty how a case of representation of self-employed workers, including that of solo-entrepreneurs, would be decided by the ECtHR. Nevertheless, the case law makes it evident that there must be a minimum level of collective representation, either through the establishment of a trade union or

⁹⁸ Manole and “Romanian Farmers Direct” v Romania Application No 46551/06, Merits, 16 June 2015.

⁹⁹ *Ibid.*, §11.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, §25.

¹⁰² *Ibid.*, §71. Although the Court noted the observations of the ILO in the Applications of Conventions and Recommendations for the implementation of ILO Convention no. 87 in Romania and the discrepancies identified at the ILO level, the wide margin of appreciation granted to states led to a non-violation finding.

¹⁰³ Wilson, National Union of Journalists and Others v the United Kingdom, 02 July 2002, §44; Sørensen and Rasmussen v Denmark Applications Nos 52562/99 and 52620/99, Merits and Just Satisfaction, 11 January 2006, §58.

other forms of collective representation. This minimum level is determined by the ECtHR on a case-by-case basis. However, the analysis of the jurisprudence of the Court to date indicates that only extreme forms of state interference will lead to a violation of Article 11 of the Convention.

3. *Conclusion*

The aim of this paper was to identify the human rights standards applicable to solo-entrepreneurs in the Council of Europe. It focused on the European Convention on Human Rights and the European Social Charter as the main European human rights treaties. Solo-entrepreneurs are self-employed workers who do not hire others and are independent of employers as they do not have an employment relationship. Yet, they are economically dependent on their clients if they are largely, or even exclusively, engaged in crowd work, work on demand via apps, gig work or platform work.

The cardinal issue here is that the binary nature of labour law, limited to employers and employees, leaves an increasingly large group of persons working in precarious conditions without its protection. Given the continuing trend towards flexible working arrangements it is necessary to reassess the concept of work and move beyond the doctrinal confines of traditional employment relationships.¹⁰⁴ Countouris and De Stefano suggest a definition of ‘personal work’ as human activity or its product that is ‘predominantly the result of a person’s own labour.’¹⁰⁵ In a broad sense, this definition would include solo-entrepreneurs within the ambit of labour law protection, ‘understood as including both individual employment law, collective labour rights, and equality law.’¹⁰⁶

The second question focused on the rights to fair remuneration and the right to collective representation. As for the right to fair remuneration, only the ECSR was analysed, as the ECtHR has not adjudicated on this right. Article 4 of the ESC prescribes the right to fair remuneration, which focuses on workers in a broad sense. Article 4(1)

¹⁰⁴ Sandra Fredman, ‘Pasts and Futures: EU Equality Law’, in Alan Bogg, Cathryn Costello, and A.C.L. Davies (eds), *Research Handbook on Eu Labour Law* (2016), 397.

¹⁰⁵ Nicola Countouris and Valerio De Stefano, ‘The Future Concept of Work’ in Kalina Arabadjieva, Nicola Countouris, Bianca Luna Fabris and Wouter Zwysen (eds), *Transformative ideas – ensuring a just share of progress for all* (2023), 98.

¹⁰⁶ *Ibid.*

ensures right to a decent life and Article 4(3) prohibits discrimination based on gender.

The standards developed by the ECSR under these rights are fully applicable to solo-entrepreneurs. With regard to Article 4(1), the ECSR has established that the lowest remuneration cannot be less than 60% of the average net national wage. It must be above the poverty line in all states. In case the wage is over 50% but below 60%, states must prove that the amount is sufficient to lead a decent life. Article 4(3) is of great importance for female solo-entrepreneurs in view of discriminatory behaviour. Women face a higher risk of precariousness due to their care responsibilities at home. In addition, seemingly neutral platform algorithms can affect women disproportionality in relation to their wages. The ECSR may be called upon to decide on both of these issues once cases concerning solo-entrepreneurs are submitted.

The right to collective representation is enshrined both in the ESC and the ECHR. First, the ESC has dedicated two provisions for this right: Articles 5 and 6(2). Additionally, both provisions include the term ‘workers,’ which means, as explained earlier, that solo-entrepreneurs fall within their personal scope. Article 5 relates to freedom of association and trade unions. States must guarantee the right to organise, and laws cannot interfere with this right without complying with the Charter’s limitation clause in Article G. The ECSR does not allow for a total ban, but solo-entrepreneurs face difficulties in organising due to antitrust laws. Article 6(2) enshrines the right to collective bargaining, and here, states have a wider margin of appreciation to restrict the right, but they cannot impose unlimited and unjustified restrictions. The right to collective bargaining is the only right that the ECSR has decided on with regards self-employed persons.

The ECHR does not directly provide for the right to collective bargaining. However, the ECtHR has recognised this right in Article 11 as an essential element of freedom of association. Based on the case law, states have a wide margin of appreciation, however, they must ensure some form of association, even if it is not through a trade union. The ECtHR expresses its standards on a case-by-case basis, and so far, no judgment on the collective representation of solo-entrepreneurs has been rendered, thus leaving the content of the right and the corresponding state obligations towards solo-entrepreneurs undetermined.

Thus, although the personal scope of the ESC and the ECHR protects solo-entrepreneurs, only the ECSR has had the opportunity to apply the protection of the ESC to the precarious situation of solo-entrepreneurs. It remains to be seen whether the ECHR’s protection will be triggered as well, which would be urgently needed given the vulnerable situation of this group in Europe.

FIONA ELIZABETH MACMILLAN*

ITALIAN CRIMINAL HISTORY BETWEEN JUDGEMENT AND NARRATIVE

On 27 May 2025 *Roma Tre Law Review* had the pleasure of presenting *Per questi motivi: Autobiografia criminale di un paese* (SEM, 2024) by the judge and well-known author, Giancarlo De Cataldo. Both in its conception and execution, this book unites a variety of perspectives from which its author has engaged with the history of criminal violence in Italy. Its readers encounter – often altogether, sometimes separately – Giancarlo De Cataldo as the Judge of the Court of Appeal of the Assizes in Rome, as novelist and screenwriter, as public intellectual and social commentator, and as a private individual profoundly shocked by the acts of criminal violence that make up this account.

In its organization and selection of materials, the influence of Giancarlo De Cataldo as public intellectual and social commentator is strong. This is because there are two particularly striking themes that hold the argument of the book together. One of these is concerned with the question of why certain crimes not only provoke public interest and attention but also remain engraved on our collective psyche. The other theme that weaves its way through this book is the relationship between power – institutional, legitimate or otherwise – and violent criminal acts. Uniting these two themes is a concern with the role played by the press in constituting the popular perception of criminal behaviour and conditioning responses to the legal proceedings surrounding them. These issues are foregrounded in the opening chapter of the book, which deals with the unsolved murder in 1963 of Christa Wanninger, a young German woman living not far from Rome’s famously elegant Via Veneto. Here we have a blistering account of the role of the press in constructing the “facts” of the case and, at the same time, obscuring the relationship between political and industrial power that rests in its shadows.

One of the features of the book’s social commentary is the way in which it moves from events that have been almost forgotten to those that are part of the often re-visited

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history of the late twentieth century. Stories like that of Christa Wanninger sit side by side with major international media events such as the terrorist attack in Milan's Piazza Fontana in 1969, the murder of Pier Paolo Pasolini in 1975, the assassination of Aldo Moro in 1978, the bombing of the Bologna railway station in 1980 and the terrorist attack on the Rome Synagogue in 1982. The book's concern with the way in which crime as press spectacle distracts us from its relationship to the exercise of power is an important theme holding together De Cataldo's account of these famous events.

Whether he is writing of the manipulations and manoeuvres of the powerful, incidents of international fame or stories that have slipped from the collective conscious (and conscience), De Cataldo never loses sight of the human cost of the acts of violence with which the book is concerned. Here human cost is not only measured in the lost lives of the direct victims, but also in the effect of violence as it ripples outwards to the indirect victims – the witnesses, those involved in the investigations and criminal proceedings – and on to society at large. While the organization of the book owes much to Giancarlo De Cataldo as public intellectual and social commentator, the skills of the judge and novelist hold together all the stories he tells. The book's main title "Per questi motivi" ("For these reasons"), the phrase that begins the written judgement of the criminal court, reminds the reader from the outset that, as we read it, we are looking through the eyes of a criminal court judge of long experience. Evidence that is relied upon in legal proceedings is subjected to forensic enquiry. De Cataldo's judicial instincts throw light upon problematic procedural moments, unconvincing evidence and the likelihood that among the victims of the crimes detailed in this book we should also include those wrongly accused, tried and even convicted.

Of course, the novelist is freer than the judge. Time runs differently outside the courtroom and the stories that time tells often change as the years pass. The strict rules of evidence in criminal proceedings do not constrain, in the same way, the work of the novelist. But, in this book, the instincts of the novelist on questions of motive and probability dovetail with the judge's forensic perspective to raise a range of questions about accepted accounts of the crimes and their perpetrators. At the same time, the social and legal context is probed in a way that is not open to a judge. The novelist in Giancarlo De Cataldo frees the judge from the restrictions of the courtroom. The difference between the judge and novelist, however, is not just a question of the rules of criminal procedure and evidence. The style in which this book is written also reflects the multiple professional identity of its author, producing a potent and productive text. As a result, the book's careful and well-researched accounts of criminal violence are enhanced by the novelist's capacity to reflect on the human condition and to engage

the full attention of the reader while doing so.

Both judges and novelists use words carefully. Nothing is left to chance, even when much is open to speculation. In the light of this observation, it is difficult not to be intrigued by this book's sub-title, "Autobiografia criminale di un paese" ("Criminal autobiography of a country"). Why is this an autobiography? The words seem to suggest that it is Italy's autobiography, but how could that be? Perhaps De Cataldo wants to tell us that what he is writing about is a narrative that Italy as a social, legal and political entity has constructed about itself. Or perhaps the autobiography is that of Giancarlo De Cataldo himself. The events retold in this book are not only held together by grand concerns over interlocking sites of power, they are also linked by the personal participation of the author as judge, social commentator, novelist, screenwriter or witness. In this way, what would otherwise be a criminal biography of Italy is combined with an autobiographical account of the impact of the events depicted.

Especially striking in this respect are the moments when the intellectual, emotional and chronological distance of the social commentator, public intellectual, novelist or judge are replaced by the direct personal experience of the witness. This is the key in which the story of the assassination of Professor Vittorio Bachelet at the University of Roma "La Sapienza" in 1980 is told. The impact on De Cataldo as a law student – the impact of being present, of being right there a few steps away from Vittorio Bachelet's office – is recounted in raw terms. In this way the social and political significance of this event takes on an extra dimension. There are many moments in this book where the distanced and practiced eye of the judge and writer is conditioned by direct involvement or emotional engagement. De Cataldo describes the experience of being sent, during his period of military service, to represent his Regiment at the first annual commemoration of the Bologna Station bombing. He reflects on his response when, in 2022, he is asked to produce a podcast on the death of two year Stefano Gaj Taché and the injury of thirty seven other people when terrorists opened fire on worshippers at the Rome Synagogue in 1982. All this produces a personal context that serves to convey to the reader what it means to say that we are all, in some sense, not only the witnesses but also the indirect victims of a society in which violence becomes endemic. But it also reminds us that the direct victims of violence, to many of whom this book gives much needed faces and names, are people just like us.

As Giancarlo De Cataldo writes in this book, the questions of which violent events imprint themselves on our collective psyche – which are remembered and which are consigned to relative oblivion – tells us much about the spirit of our times. The retelling of the stories of these events in their social, political and legal contexts tell us

important things about ourselves and the society in which we live. It also gives us the opportunity to reflect with the benefit of distance – intellectual, emotional and chronological – on the type of society in which we want to live. This, however, is more than just an opportunity, it is an obligation. This is especially so for lawmakers, judges, lawyers, legal scholars and law students who collaborate – whether consciously or not – in forming and enforcing the rules that hold together the fabric of society. *Per questi motivi: Autobiografia criminale di un paese* gives us the opportunity and the material to reflect on how the obligation to construct a just and peaceful society might be better realised.

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FRENCH ADMINISTRATIVE LAW SEMINARS AT ROMA TRE LAW SCHOOL****

CONTENT. 1. The activities of Professor Grégory Kalflèche visiting the Department of Law – 2. The seminar on «Historical evolution of French administrative justice» – 3. The seminar on «The legal standing in French urban planning law» – 4. Healthcare in France: historical and organizational overview

1. *The activities of Professor Gregory Kalflèche visiting the Department of Law*

Grégory Kalflèche, Professor of Public Law at the Université Toulouse Capitole (France), visited the Department of Law of Roma Tre University from Monday 7th April until Sunday 20th April 2025. During his stay, Professor Kalflèche took part in the activities of the Department of Law contributing to its cultural and scientific development with his deep knowledge of Public, Administrative and Comparative Law and Health Law.

Professor Grégory Kalflèche was specifically invited by Professors Maria Alessandra Sandulli and Flaminia Aperio Bella to contribute to their respective courses – Administrative Justice and Health Law. Following Professor Sandulli's appointment to the Italian Constitutional Court in February 2025, both courses were subsequently conducted by Professor Aperio Bella.

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**** Par. 1 was written by the Authors together. Par 2 was written by Chiara Pallozzi Lavorante, par. 3 was written by Cristina Botezatu and par. 4 was written by Tania Linardi.

Professor Grégory Kalflèche opened the lecture series with an analysis of the historical development of administrative justice. He then critically examined the challenges that administrative justice poses to the effective protection of individual rights.

Professor Kalflèche gave also a lecture for PhD candidates in Legal Disciplines focusing on the distinctive features of the French urban planning law litigation. During his presentation Professor Grégory Kalflèche adopted a critical perspective to explore several key aspects: the classification of urban planning litigation as a special branch of law in France, the reasoning behind this specialized regime, and the specific procedural rules that apply to it. His contribution was significant, as it aimed to shed light on the need to strike a balance between, on the one hand, administrative efficiency, particularly the ability to enable rapid construction, and, on the other, the principles of the rule of law and effective access to justice.

As part of Professor Flaminia Aperio Bella's course on Health Law, the third lecture focused on the history of public health in France, the financial aspects of the healthcare system and the role played by the national, regional and local authorities in this field.

2. *The seminar on “historical evolution of French administrative justice”*

On April 9th, 2025, Professor Grégory Kalflèche gave a lecture focused on the historical and institutional evolution of French administrative justice. The lecture began with expressions of appreciation for Professors Flaminia Aperio Bella and Maria Alessandra Sandulli, who organized and supported the event. The presentation was structured around three key topics: the emergence of independent administrative courts, the institutional development of administrative justice, and the gradual transformation towards a more effective jurisdiction.

Professor Kalflèche began by outlining the context of the French Revolution, during which the need to separate ordinary justice from administrative justice became apparent. Under the “Ancien Régime”, the King together with the King's council had the authority to address administrative disputes. “Les Parlements” of that period, often composed of nobility of the robe, were distrusted by the revolutionaries, as they were perceived to be conservative, resistant to the public authority, and biased in favor of private individuals rather than the State. The enactment of the Law of 16 and 24 August 1790 prohibited judicial courts from interfering in administrative matters, thus affirming the autonomy of administrative action and laying the foundation for a distinct

jurisdictional order.

Within this framework, the “minister-judge” theory emerged, under which the disputes between citizens and the administration were resolved by the competent minister. There was no true judicial oversight of the administrative action. Only with the rise of Napoleon and the Constitution of Year VIII, administrative justice began, with the creation of the Council of State (*Conseil d'État*), which replaced the King's Council. This authority was entrusted with a dual function: assisting in the drafting of legislation and administrative regulations, and contributing to the resolution of administrative disputes. However, its rulings remained subject to approval by the Head of State: a system known as “*justice retenue*”

A genuine shift toward an independent judicial body occurred with the enactment of the Law of 24 May 1872, which granted the Council of State full judicial authority, thus marking the transition from “*justice retenue*” to “*justice déléguée*”, entrusting administrative adjudication to a specialized and independent judge. With the landmark *Cadot* decision of 1889, citizens gained direct access to the Council of State, effectively removing the ministerial filter. In parallel, the Tribunal of Conflicts (*Tribunal des Conflits*) was established to resolve jurisdictional disputes between ordinary and administrative courts.

In 1873, the Tribunal of Conflicts issued the historic Blanco decision, which became a cornerstone of administrative law. For the first time, it was recognized that when the State acts within the framework of a public service, the competent jurisdiction is administrative, which must apply autonomous legal rules. This ruling laid the groundwork for the recognition of administrative law as an autonomous field.

In the second part of the lecture, Professor Kalfèche addressed the institutional development of the system. Following the establishment of the Council of State, administrative justice gradually expanded at the local level. The Law of 28 “*Pluviôse*”, Year VIII (1800), established Prefectural Councils, which assisted prefects in resolving local administrative disputes concerning taxation, national property, public contracts, and public works. Only in the 20th century, with a decree in 1926, these councils became independent from the prefects; their presidents were appointed by decree, and their composition comprised autonomous judges. This process culminated in the 1953 reform, which replaced these bodies with Administrative Tribunals as courts of first instance, while the Council of State assumed primarily the role of court of second instance.

The establishment of the Administrative Courts of Appeal, in 1987, marked a decisive turning point. From that point onward, the Council of State assumed the role

of supreme administrative court. During the same period, administrative justice began to be vested with constitutional authority. The Constitutional Council's decision of 22 July 1980 affirmed the independence of the administrative courts. On 23 January 1987, the Council further recognized the duality of jurisdictions, administrative and judicial, as a fundamental principle recognized by the laws of the Republic (*PFRLR*). The 2008 constitutional reforms, introducing Priority Preliminary Rulings on Constitutionality (*QPC*), further strengthened the Council of State's authority. The decision of 3 December 2009 ultimately confirmed both the Council of State and the Court of Cassation as the highest authorities of their respective orders, as recognized by the Constitution.

In the final part of the seminar, Professor Kalflèche addressed more recent reforms aimed at enhancing the effectiveness of the administrative courts. Starting in the 1960s, growing criticism emerged – most notably through Jean Rivero's 1962 contribution "*Le Huron au Palais-Royal*" – challenging the practical efficacy of judicial protection provided by administrative judges. In the subsequent decades, several legislative reforms significantly expanded the powers of administrative judges. The Law of 8 February 1995 marked a turning point by granting administrative judges the authority to issue injunctions compelling the administration to comply with judicial decisions. Moreover, it introduced the possibility, at the claimant's request, of imposing financial penalties for non-compliance.

The Law of 30 June 2000 introduced emergency procedures, enabling judges to suspend administrative measures within hours in urgent cases, thereby ensuring swift and effective access to justice. Since 2018, claims may also be submitted online via the *Télérecours citoyens* platform, accessible 24/7.

Despite these significant advancements, Professor Kalflèche invited students to reflect on persisting challenges. The administrative judge is sometimes accused of hindering economic development and public investment, particularly in cases involving public procurement, urban planning, and immigration. Immigration litigation, in fact, accounts for nearly 50% of the administrative court's workload, although only 3% of expulsion orders are enforced. In conclusion, despite significant and ongoing reforms, the French system of administrative justice continues to face the intricate challenge of reconciling procedural efficiency with the protection of individual rights and the safeguarding of the public interest.

3. *The seminar on “The legal standing in French urban planning law”*

Professor Grégory Kalflèche on April 16th gave a lecture for PhD candidates in Legal Disciplines, titled “*The legal standing in French urban planning law*” focusing on the distinctive features of the French urban planning litigation. In particular, during his presentation Professor Grégory Kalflèche adopted a critical perspective to explore several key aspects: the classification of urban planning litigation as a special branch of law in France, the reasoning behind this specialized regime, and the specific procedural rules that apply to it.

The lecture was structured in two parts. The first part examined the justifications for treating urban planning litigation as a distinct legal category, followed by a critique of those justifications. The second part focused on four categories of procedural rules, assessing whether these rules protect citizens’ interests or, conversely, limit their rights to legal recourse and appeal.

Beginning with an overview of the major reforms in urban planning litigation, Professor Kalflèche noted that these reforms have progressively shaped a complex legal framework, one that increasingly tends to limit access to judicial review. Moreover, Professor Kalflèche described urban planning law as both a “*special law*” and a “*pioneer*.” On the one hand, it is designed to address issues specific to urban planning; on the other, the reforms introduced in this area of administrative law have, to some extent, served as a model for changes in other legal domains.

According to Professor Kalflèche, one of the key reasons behind the specific nature of urban planning litigation lies in its “*triangular structure*.” This concept, introduced by President Labetoulle in 1995, refers to the presence of three distinct parties involved in such litigation: the author of the contested act; the addressee of the act, typically someone required to apply it but adversely affected by its consequences and therefore challenging it; and a third party, such as local residents, environmental associations, or real estate companies, who contest urban planning decisions that impact their interests. The proliferation of legal challenges in France can be attributed to the triangular nature of urban planning law, particularly in litigation concerning building permits. This structural characteristic contributes significantly to the housing crisis, as well as to the delays or even the abandonment of major development projects. Consequently, one of the main justifications for special litigation is therefore to counter the unfortunate consequences of such appeals.

At this point, Professor Kalflèche explained that according to the French legal doctrine, the main reason of the peculiarities of this special area of law lies in the need

to strike a balance between legal certainty and the principle of legality. To achieve this equilibrium, the legislator has sought, on the one hand, to narrow the pool of individuals who can legitimately challenge urban planning decisions, by tightening the requirements for standing and introducing procedural constraints, and, on the other hand, to limit the duration of potential litigation through stricter timeframes.

Professor Kalfèche pointed out that, in many cases, appellants seek to delay development projects by filing appeals, with the aim of creating such costly delays that the developer ultimately abandons the project. He also referred to the phenomenon of so-called “*dilatory recourses*”, appeals filed not to oppose the construction itself, but rather to pressure developers into financial settlements in exchange for withdrawing the appeal. The Professor further noted that, according to both the French Parliament and the administrative courts, the various legislative measures adopted to limit the number of appeals are justified by the need to prevent such manipulative practices. In their view, these restrictions enhance the overall efficiency of the judicial process in urban planning litigation.

On the contrary, Professor Kalfèche argued that these justifications cannot be fully accepted. Firstly, the so-called triangular nature of urban planning litigation is not as rare as often portrayed, and thus cannot, in itself, justify such significant restrictions on the right to appeal. Secondly, while it is indeed essential to strike a balance between legal certainty and the principle of legality, Professor Kalfèche emphasized that limiting access to legal remedies is not the proper way to achieve legal certainty. In his view, the appropriate solution lies in accelerating the adjudication process rather than restricting the right to appeal. Specifically, he suggested that enhancing the resources allocated to the judiciary would be a more effective approach to reconciling the need for both efficiency and meaningful access to justice.

The second part of Professor Kalfèche’s lecture focused on the various special procedures applicable to urban planning litigation. In particular, he examined the rules designed to limit access to the courts, reduce procedural delays, regulate the powers of judges, and promote transparency within the legal process. With regard to the procedural rules governing urban planning law, Professor Kalfèche first outlined the specific provisions that characterize this area of law. He then proceeded to analyze each rule individually, assessing whether it can be considered effective, namely, whether it successfully avoids delaying construction projects while minimizing infringements on the right to appeal.

One of these procedural rules concerns the requirement of *interest to act* in challenging town planning authorizations. Professor Kalfèche clarified that the French

legislator has established a strict framework regarding the notion of interest when contesting building, development, or demolition permits. Specifically, it is not sufficient simply to be a resident of the municipality; there must be a direct connection between the nature or scale of the project and the appellant's specific conditions of occupancy or use of the neighborhood. In other words, the appellant must demonstrate that the project has a real and personal impact on them. This restriction aims to prevent abusive appeals that unduly delay urban planning processes without legitimate grounds. However, according to Professor Kalfèche, this rule is often too stringent, particularly for neighbors who must concretely prove their interest. Moreover, since neighbors typically do not have access to the project documentation, it can be challenging for them to substantiate their interest, risking the inadmissibility of their appeal. Another example is the temporary removal of the right to appeal in legal actions that could delay housing construction in municipalities suffering from a housing shortage. This restriction applies exclusively to so-called *zones tendues*, areas with high housing demand. According to Professor Kalfèche, this measure represents a significant limitation on the fundamental right to a double level of jurisdiction.

On the contrary, according to the Professor, there are certain rules that are genuinely effective and beneficial. These include the ten-month maximum period for delivering a judgment, and, in urban planning law, unlike in administrative litigation, where judges typically apply the principle of "economy of means", the obligation for the judge to address all grounds raised in the petition. Other noteworthy rules include those promoting transparency in non-recourse transactions that lead to dispute resolution, as well as the provision allowing judges to issue a partial annulment of a planning permission, rather than a total one. Furthermore, the law allows the administration or the beneficiary of the authorization to regularize the permit during the course of litigation. In such cases, the judge suspends the decision on the merits until the competent authority either issues an amended permit or remedies the identified irregularity.

In conclusion, Professor Grégory Kalfèche highlighted that French urban planning law is an example of a legal field designed to limit the right to legal recourse. He invited students to reflect on the need to strike a balance between efficiency (or the administration's ability to facilitate rapid construction), on one hand, and, on the other, the rule of law and access to remedies.

This question is particularly important because, if planning law serves as a "pathfinder," the new balance achieved could potentially be extended to all administrative litigation.

4. *Healthcare in France: historical and organizational overview*

As outlined in the introduction, Professor Grégory Kalflèche gave a lecture on April 15, 2025, entitled ‘*Healthcare in France: historical and organizational overview*’, as part of Professor Flaminia Aperio Bella’s course on Health Law at Roma Tre University.

Professor Flaminia Aperio Bella emphasized the importance of comparison in the healthcare field and, particularly, the comparison between a healthcare system based on a universal model, such as the Italian one, and a model characterized by a strong component of compulsory health insurance integrated with public services, such as the French one (a model more oriented towards a social insurance system).

Professor Kalflèche’s presentation was divided into four parts: the first part concerned the history of public health in France, while the second part focused on the financial aspects of the healthcare system. The third part provided an overview of the national and regional authorities of the French healthcare system, and the fourth part dealt with the role played by local authorities in this field.

Starting with an illustration of historical profiles, Professor Kalflèche pointed out that, until the 20th century, the French healthcare system was characterized by a clear separation between curative medicine, focused on the treatment of the sick, and preventive medicine, focused on hygiene and vaccination.

During the First World War, the State temporarily took control of the healthcare system, implementing health surveillance and vaccination measures in order to maintain a population capable of “producing and fighting”.

Subsequently, in the 1930s, the laws of 1928 and 1930 created a health insurance system aiming at preventing illness to avoid absences from work. However, private practice remained dominant, consolidated by the 1927 charter defending the independence of doctors.

During the Vichy government, a Medical Association was created, maternal and child protection was organized, and the National Institute of Hygiene was founded.

After the Liberation, the program of the National Council of Resistance inspired major reforms: social security became the pillar of the new system, the Ministry of Public Health was strengthened, medical research was consolidated, and prevention became the main target. In addition, the General Directorate of Health, the National School of Public Health, and centers for screening, vaccination, and health education were created.

Professor Kalflèche then highlighted the importance of the establishment, in 1953, of the public health code, which was reformulated by ordinance in 2000 and by

five decrees between 2003 and 2005. Its publication is one of the symbols of the renewal of French codification since 1989 (which has led to more than 60 new codes). It has more than 10,000 articles, concretely determining the field of public health law.

The second topic dealt with by Professor Kalflèche concerned the financing of healthcare in France, which takes the form of a system for financing all the social actions of the State: the National Health Insurance Fund (CNAM); the National Old Age Insurance Fund (CNAV), which manages pensions in particular; the National Family Allowance Fund (CNAF), which provides childcare assistance through family allowances, nurseries or parental leave; the National Solidarity Fund for Autonomy (CNSA), for old age and disability.

Specifically, Professor Kalflèche pointed out that social security is not financed, in the strictest sense, by taxation, but by social contributions, i.e. sums deducted from employers and employees. Furthermore, the social security budget is part of the State budget. Therefore, it is a system with three characteristics: it is a public system that is not profit-oriented; it is a “benefit-defined scheme” rather than a “capitalisation” system. This means that working people are paying for all those who need it: the elderly, the sick, children and the unemployed; it is a system in which people do not save for themselves, but “socialise” the risk.

Since 1996, the “social security financing law” has been added to the traditional “State finance law” (approximately €500 billion, for a French GDP of £2,300 billion). However, this system is not completely socialised: in order to try to maintain the system, part of it must be reimbursed by the private sector (mutual insurance companies or insurance companies). Thus, it is a system of solidarity but limited to members, specifying that all employees are obliged to have one.

The third topic dealt with by Professor Kalflèche concerned the main players in the French healthcare system at national, regional and local level, which is very complex: in 2021, there were more than 1,850 nursing homes, over 1,350 public healthcare facilities and 135 hospital groups (GHT).

At a national level, the two main ministries that play a central role in healthcare organization are the Ministry of Public Health and the Ministry of Public Action and Accounts. In particular, the ministry ensures the guidance and implementation of public health and health safety policies, aiming at preserving and improving the health of the population through the prevention of chronic diseases and the fight against infectious or environmental risks. To achieve these objectives, the ministries rely on health agencies (*Santé publique France, Agence nationale d'appui à la performance des établissements de santé et médico-sociaux*), which are public operators under the supervision of the

ministries, as well as independent partners, such as the *Haute Autorité de Santé* (HAS). Furthermore, the ministry frames health finances. Each year, parliament votes on the social security financing law. This law defines the national spending target for health insurance, which covers all care: city doctors, hospitals and medico-social facilities (places for people with disabilities and the elderly). Based on these amounts and in accordance with government guidelines, the ministries develop their policies for implementation.

At a regional level, the ARS (*Agence Régionale de Santé*), or regional health agencies, established by Law No. 2009-879 of 21 July 2009 known as “Hospital, Patients, Health and Territory” (HPST), have great relevance in a context of “new public management” to improve the effectiveness of the system.

They operate in the “regions”: 18 in mainland France and 5 overseas. They are administered by a General Manager and have a board of directors, headed by the Prefect of the region (as the representative of the State in the region). Furthermore, these structures perform important functions in the field of prevention, implementing health policy at a regional level with other authorities responsible for occupational health, school and university health, and maternal and child protection. In terms of care, the ARS regulate, guide and organize the provision of health services, authorizing health institutions, facilities and medical-social services; ensuring a territorial distribution of prevention and care services; and ensuring that people in cases of precariousness or exclusion also have access to prevention and care in order to fight inequality and improve the local distribution of care and medical-social services.

There are also the State agencies and institutions. In particular, the Biomedicine Agency is a national public body that carries out its tasks in the fields of organ, tissue and cell removal and transplantation, as well as in the fields of human reproduction, embryology and genetics. Its tasks include, among others, monitoring therapeutic and biological activities on the human body, ensuring the transparency of activities and participating in the development of regulations on “biomedicine”; issuing authorizations for embryo research (in vitro embryo research, embryonic cell research and issues relating to the storage of stem cells for research purposes). Furthermore, there is the French Blood Establishment (EFS, *Etablissement Français du Sang*), which is the sole civil operator in the field of blood transfusions.

The fourth part of Professor Kalfèche’s lecture concerned the description and analysis of the role played by local authorities in the field of health. At a municipal level, prevention structures implement national public health guidelines, in particular occupational health services, school medical services, vaccination services, maternal and

child protection services (PMI) that provide prenatal or postnatal care, and screening facilities for non-communicable diseases (cancer) or communicable diseases (AIDS, hepatitis).

Professor Kalflèche went on to point out that, in France, there are different types of care: outpatient care (or urban care), hospital care and home care. Outpatient care is provided in city clinics, dispensaries, during “outpatient consultations” in public or private hospitals, i.e. in cases where hospital doctors use the hospital for private practice. Hospital care is provided in hospital facilities, which are divided into several categories: public institutions; private institutions of collective interest under agreement (such as private hospitals, cancer centers or dialysis centers); private for-profit institutions. There are also regional hospital associations (GHTs), which are groups of hospitals linked by contract, whose aim is to ensure better access to care for all patients by strengthening cooperation between public hospitals. Finally, home care is mainly provided by doctors and nurses. To a lesser extent, it is provided by home nursing services (SSIAD), which provide nursing care or nursing procedures (dressing, distribution of medication, injections). This care is financed by health insurance or by home care and support services (SAAD) as part of social assistance. In general, the assessment of the person’s needs leads to the development of an individualized plan for assistance, support and care.

Professor Kalflèche concluded by pointing out that, despite reforms aimed at simplifying this sector, healthcare continues to be one of the most complex and articulated areas of French administrative law, especially in terms of multi-level governance between different levels of government.

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