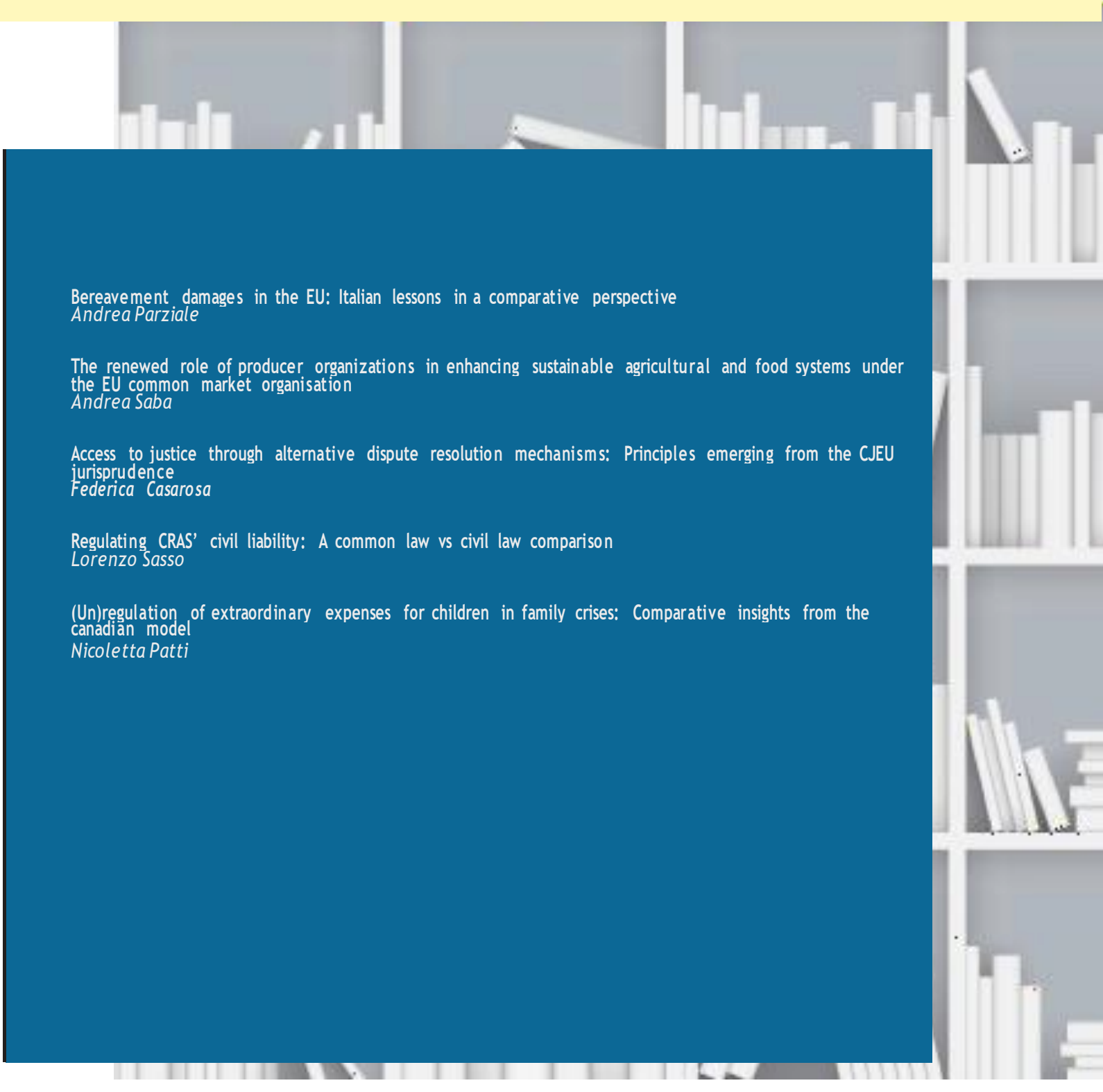
ISSN 2281-5147

Opinio Juris

In Comparatione

Studies in Comparative and National Law

Vol. 1, n. 1/2024



CONTENTS

Articles

ISSN 2281-5147

BEREAVEMENT DAMAGES IN THE EU: ITALIAN LESSONS IN A COMPARATIVE PERSPECTIVE

Andrea Parziale*

Abstract

Background. Compensating non-pecuniary damages can be challenging, as non-economic losses, including bereavement damages, are difficult to quantify in monetary terms. This may lead to unfair outcomes and inefficiencies. Such concerns persist in the literature despite adjudicators' increasing use of guidelines to promote consistency and predictability of damage awards.

Aim. This article aims to provide general indications to lawmakers and adjudicators considering setting up or improving their national frameworks for compensating bereavement damages. The focus is on balancing treating all secondary victims equally and providing personalised compensation based on individual circumstances.

Methodology. To this end, the article reviews the lessons that can be drawn from the recent reform of the Italian system for compensating bereavement damages. The article also comparatively discusses the approaches adopted in other European legal systems that have established formal guidelines for compensating bereavement damages in light of horizontal and vertical equity principles.

Results and conclusions. Among the different approaches to the compensation of bereavement damages that have emerged in several European legal systems, particularly promising seem the approaches that prioritise standardisation, with uniform monetary values accompanied by a closed list of objective and easily assessable personalising factors. This approach can foster horizontal equity and

* Andrea Parziale is an Assistant Professor of Health Law at Maastricht University and an Adjunct Professor of Markets, regulations and law at LUISS Guido Carli University. He obtained his PhD in Law from the Sant'Anna School of Advanced Studies with a thesis that was later developed into the research monograph The Law of Off-Label Uses of Medicines: Regulation and Litigation in the EU, UK, and USA (Routledge, 2022). This article is part of a project that has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Sklodowska-Curie grant agreement No 101028723.

ISSN 2281-5147

efficiency while ensuring satisfactory personalisation, provided sufficient personalising factors are foreseen.

Indice Contributo

Keywords

Civil liability – Non-pecuniary damages – Bereavement damages – Standardisation – Comparative law

1. Introduction

When a person is injured, they have the right to claim damages from the person who caused the injury or their insurance company, provided that all the requirements for

ISSN 2281-5147

civil liability are met.[1] The purpose of damages is to compensate the victim fully.[2] This means that the victim should be placed in the same position they were in before the accident occurred. Damages can be divided into two categories: economic and non-economic. Economic damages are quite straightforward to calculate as they cover losses that have a market price. On the other hand, non-economic damages are more difficult to determine as they relate to personal losses that do not have a market price. For example, non-economic damages may include the pain and suffering experienced by the victim due to the injury or the loss of a loved one.[3]

The gradual expansion of civil liability to protect non-monetary interests is a shared concept in European comparative legal studies.[4] However, quantifying non-monetary damages is challenging because it requires a judge to assign a monetary value to a loss that cannot be measured financially. Without proper guidance, this process becomes highly subjective and discretionary, leading to what is known as a damage lottery.[5] This damage lottery can create issues of unfairness and inefficiency. On the one hand, it can result in inequitable outcomes,[6] both horizontally (with similar losses resulting in different damage awards) and vertically (with different losses leading to similar damage awards). On the other hand, highly variable and unpredictable damage awards make it more difficult for injured parties and those responsible for the injury (or their insurers) to settle disputes outside of court.[7] As judicial adjudication typically involves

[1] C van Dam, *European Tort Law* (Oxford University Press 2013).
[2] JCP Goldberg, 'Two Conceptions of Tort Damages: Fair v. Full Compensation' (2006) 55 DePaul L Rev 435; R Singh, 'Full' Compensation Criteria: An Enquiry into Relative Merits' (2004) 18 European Journal of Law and Economics 223 https://doi.org/10.1023/B:EJLE.0000045083.39477.bc; P van Wijck and JK Winters, 'The Principle of Full Compensation in Tort Law' (2001) 11 European Journal of Law and Economics 319 https://doi.org/10.1023/A:1011260419168.
[3] G Comandé, 'International Juridical Overview on Personal Injury Compensation' in SD Ferrara (ed), *Medicine and Justice* (Springer 2017) 293 https://doi.org/10.1007/978-3-319-67092-8_19; R Zimmermann, 'Comparative Report on Non-Pecuniary Damage' in B Winiger, H Koziol, BA Koch, and R Zimmermann (eds), *Digest of European Tort Law, Vol. 2: Essential Cases on Damage* (De Gruyter 2011) 706; C van Dam, 'Damage and Damages' in C van Dam, *European Tort Law* 301.
[4] BA Koch and H Koziol, 'Comparative Report' in BA Koch and H Koziol (eds), *Compensation for Personal Injury in a Comparative Perspective* (Springer 2003) 419.
[5] FD Busnelli, 'Prospettive europee di razionalizzazione del risarcimento del danno non economico' (2001) Danno e Responsabilità 5.
[6] SD Sugarman, 'Tort Damages for Non-Economic Losses: Personal Injury' in M Bussani and AJ Sebok (eds), *Comparative Tort Law* (2021) 324.
[7] FS Levin, 'Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie"' (1989) 22 U Mich J L Reform 310.

ISSN 2281-5147

lengthy and costly procedures, this increases the individual costs of compensation and its social costs by contributing to a steady increase in judicial workload.

Adjudicators and lawmakers have developed guidelines or tariffs to address these concerns. These guidelines aim to promote equal treatment (horizontal equity) and personalisation based on individual circumstances (vertical equity). The aim is also to help parties in a dispute settle out of court and reduce the judicial workload. Although the scope of these guidelines has been increasing steadily over time, concerns about a damage lottery in the domain of non-pecuniary damages persist in the literature. This raises the question of how a compensation system can be constructed to promote equity and efficiency.

This article aims to provide some general indications that can help lawmakers, adjudicators, and scholars improve the fairness and efficiency of their systems for compensating bereavement damages. This will be done through a comparative analysis of different compensation models. By comparing the advantages and disadvantages of existing models, lawmakers, adjudicators, and scholars can find inspiration to improve their systems. In particular, it may prove instructive for policymakers to look at the lessons that can be drawn from legal systems that have recently attempted to pursue this two-fold objective.

From this point of view, the recent developments in the Italian law of bereavement damages can offer a starting point of particular interest to European lawmakers, adjudicators, and scholars. As will be seen more in detail below, the Italian Supreme Court, the *Corte di Cassazione* (hereinafter also *Cassazione*), released a series of judgments stating that judicial tariffs used by adjudicators to compensate for bereavement damages should ensure equal treatment and personalisation and set several principles that judicial tariffs should comply with to this end.[8] In response, the Court of Milan, whose tariffs are widely used nationally in Italy to compensate non-pecuniary damages, revised their tariffs on bereavement damages to comply with the

[8] Cassazione civile sezione III, 21 April 2021, n 10579, commented upon by R Pardolesi and R Simone, 'Il danno da perdita del rapporto parentale: giudice (-legislatore?) in fuga da Milano' (2021) I Foro italiano 2017; F Ruggiero, 'Si scrive equità ma si legge prevedibilità: la III sezione ritorna sulle Tabelle Milanesi' (2021) Nuova giurisprudenza civile commentata 793; P Ziviz, 'Misura per misura (del danno da perdita parentale)' (2021) Responsabilità civile e previdenza 85.

ISSN 2281-5147

principles established by the *Corte di Cassazione*.[9] As will be seen more in detail below, while these recent developments somewhat improved consistency and predictability in the awarding of bereavement damages, there is still room for improvement. Considering the limitations of the Italian judicial reform of bereavement damages, this article also includes a comparative analysis of different approaches followed by the guidelines used in other European legal systems, in search for best practices.

Accordingly, this article is divided into four sections. Firstly, it discusses the recent case-law developments related to bereavement damages in Italian law. Secondly, it evaluates the advantages and disadvantages of these developments in the quest for equity and efficiency of damage awards. Thirdly, the article examines the guidelines used by other European legal systems for calculating bereavement damages. Lastly, it draws general conclusions from this comparative analysis that may inspire potential revisions of national mechanisms for compensating bereavement damages.

2. Bereavement damages under Italian law: the Tables of the Court of Rome

At the outset, different guidelines are used by Italian lower courts for the compensation of bereavement damages. The most popular guidelines are the Tables of the Court of Milan, followed by the Tables of the Court of Rome. However, these two Tables follow different methodological approaches. The Tables of the Court of Rome guide the quantification of bereavement damages both in case of loss of a close one and in case of a severe injury suffered by the primary victim.[10] The Table applicable to the loss of a close one assigns a numerical score to the suffering experienced by the secondary victim based on five key factors. The degree of proximity of the secondary victim to the primary victim is taken into account under

[9] Osservatorio sulla giustizia civile di Milano, 'Criteri per la liquidazione del danno non patrimoniale derivante da perdita del rapporto parentale – tabelle edizione 2022' (29 June 2022) <https://tribunale-milano.giustizia.it/index.phtml?Id_VMenu=1&daabstract=1267> accessed 21 Mahy 2024; G Ponzanelli, 'Le tabelle milanesi, l'inerzia del legislatore e la supplenza giurisprudenziale' (2011) Danno e responsabilità 957.

[10] Tribunale ordinario di Roma, 'Tabelle per la valutazione del danno non patrimoniale (anno 2019)' <https://www.tribunale.roma.it/allegatinews/A_24405.pdf> accessed 21 May 2024; R Parziale, A Cisterna, F Martini and M Rodolfi, 'Danno non patrimoniale: le tabelle del Tribunale di Roma - L'analisi della «svolta» nella capitale e lo sviluppo dei prospetti' (2019) 2 Guida al diritto – dossier 1; M Rodolfi, 'Il calcolo del risarcimento al tribunale della capitale' (2019) 26 Guida al diritto 17. Regarding the competition between the Roman and Milanese Tables, see Tribunale di Roma, 7 February 2019, commented upon by M Gagliardi, 'Il nuovo sistema del danno non patrimoniale e la "guerra" delle tabelle' (2019) I La Nuova Giurisprudenza Civile Commentata 920.

ISSN 2281-5147

the assumption that a closer relationship corresponds to more intense suffering for the secondary victim. In the event of the loss of a loved one, the consequences can be more severe for a younger victim. The impact can last for a more extended period. The relationship between the primary and secondary victims is also taken into consideration. It is assumed that if they cohabitated, the level of interaction was higher, and therefore, the suffering experienced by the primary victim would be greater if this interaction was interrupted. The presence of surviving relatives is also factored in. It is believed that a person left entirely alone, without the support of surviving relatives, will suffer more. A numerical score is calculated based on these factors and multiplied by a predetermined monetary amount to determine the actual amount of bereavement damages to be awarded to the primary victim. However, the award may be reduced if there are other circumstances, such as contributory or comparative negligence.

A similar approach is followed by the Roman Table covering bereavement damages in case the primary victim is (not killed, but) severely injured in an accident. In this case, relevant factors include the degree of proximity between the primary and secondary victims, the number of dependents, and the age of the primary and secondary victims. The resulting numerical score is then multiplied by a coefficient based on the number of relatives entitled to compensation. Subsequently, the result of this calculation is multiplied by a predetermined monetary amount. Finally, the resulting monetary sum is multiplied by the degree of permanent disability of the primary victim of the accident. This leads to the bereavement damage award the primary victim is entitled to (again, with the *caveat* that contributory or comparative negligence may apply and reduce the level of the award).

3. Bereavement damages under Italian law: the Tables of the Court of Milan - and the *Cassazione*

Until June 2022, the Milanese Tables on the compensation of bereavement damages in case of loss of a close one[11] followed a different structure, revolving around three

[11] Osservatorio sulla giustizia civile di Milano, 'Tabelle milanesi per la liquidazione del danno non patrimoniale – edizione 2021' (8 March 2021)

ISSN 2281-5147

columns. The first column listed various categories of personal relationships. The second column indicated the minimum monetary value of each relevant relationship. Finally, the third column indicated the maximum amount that could be reached for each relevant relationship through personalisation. Similarly structured was the Milanese Table for bereavement damages in case of severe invalidity of the primary victim.[12] This provided a maximum monetary threshold, corresponding to the minimum amount established in the Table for the loss of a close one for each type of family relationship. Unlike the Roman Tables, the Milanese Tables did not refer to the degree of invalidity of the primary victim, assuming that such an element was only relevant to assessing the existence (the *an*) of the right to compensation. In contrast, the harmful consequences for the secondary victims should be considered to determine the quantum of compensation. Both Milanese Tables provided lists of criteria for the personalisation of the damage award, including the presence of surviving relatives, cohabitation between the primary and the secondary victim, and the ages thereof.

As anticipated above, despite its relative popularity among Italian lower courts, the system outlined by the Court of Milan attracted the criticisms of the *Corte di Cassazione* in 2021. By judgment no. 10579/2021,[13] the *Cassazione* held, in particular, that the Milanese Tables were not well-suited to guarantee equal treatment and predictability in awarding decisions, as they failed to provide clear quantifying instructions besides a minimum and a maximum threshold. Thus, the *Cassazione* outlined several fundamental principles to be adopted when drawing up a judicial table for compensating bereavement damages. In particular, the *Cassazione* stated that, in principle, a point-based system is better suited to promote more consistent and predictable compensatory outcomes, coupled with the possibility of adjusting the final award to the specific circumstances of the individual case.

<https://www.ordineavvocatimilano.it/media/allegati/uffici_giudiziari/TABELLE_DANNO_NON_PATRIMONIALE_2021/OssGiustiziaCivileMI%20-%20Tabelle%20milanesi_Danno%20non%20patrimoniale_ed-%202021.pdf> accessed 21 May 2024.

[12] ibid.

[13] Cassazione civile sezione III, 21 April 2021, n 10579. Along the same lines, Cassazione civile, 29 September 2021, n 26301, commented upon by F Poiatti, 'L'inevitabile complessità del danno non patrimoniale. Una compiuta analisi della Cassazione in materia di danno parentale e morale' (2021) Danno e responsabilità 212; Cassazione civile, 10 November 2021, n 33005 and 6 October 2021, n 27130, commented upon by C Ragazzo, 'Tra standard e rule: la via maestra del risarcimento del danno alla persona' (2022) Nuova giurisprudenza civile commentata 280.

ISSN 2281-5147

Following this judgment, the Court of Milan quickly incorporated the *Cassazione*'s remarks into their Tables, a revised version of which was published in June 2022.[14] This revised version of the Milanese Tables (hereinafter also the new Milanese Tables) included two tables: one addressing the loss of a parent, a child, or a spouse/partner; the other covering cases of loss of siblings and nieces and nephews. According to the accompanying explanatory note, the new Milanese Tables are not entirely new tables but rather the same table supplemented with a point-based system.

In particular, under the new Milanese Tables, the specific circumstances that were already listed in the previous table are given a specific numerical score: a) the age of the primary victim is assigned up to 30 points; b) the age of the secondary victim up to 28 points; c) cohabitation is attributed up to 16 points; and d) the presence of surviving relatives up to 16 points.

In addition, a fifth, more elastic criterion is introduced. This fifth criterion concerns the quality and intensity of the specific relationship between the primary and the secondary victim, which the new Tables assigns up to 30 points. To assess this last parameter and determine the relevant score, the new Tables provide that both the objective circumstances already mentioned and specific, additional circumstances may be considered. These may include, but are not limited to, circumstances such as how often the primary and the secondary victim actually communicated or met each other and whether or not they shared common interests and hobbies. Finally, the Tables provide a maximum compensation threshold (a cap). However, the Q&As annexed to the Tables[15] add that adjudicators may exceed this cap in exceptional circumstances, such as in case of intentional crime.

Finally, the Court of Milan deliberately failed to develop a new Table for awarding damages in case of severe invalidity of the primary victim due to the lack of a significant sample of awarding decisions in the case law. For such cases, the adjudicator can refer to the Table for the compensation of damages for the loss of a close one, with the appropriate adjustments.

[14] Osservatorio sulla giustizia civile di Milano, 'Criteri per la liquidazione del danno non patrimoniale derivante da perdita del rapporto parentale' (n 9) 4, 7; M Franzoni, 'Le Tabelle milanesi sul danno parentale' (2022) Danno e responsabilità 548.

[15] Osservatorio sulla giustizia civile di Milano, 'Criteri per la liquidazione del danno non patrimoniale derivante da perdita del rapporto parentale' (n 9) 13.

ISSN 2281-5147

4. How do the new Milanese Tables fare between horizontal and vertical equity?

The new Milanese Tables had a mixed reception in the literature. On the one hand, the new Tables were hailed as a positive development in the compensation system for bereavement damage, contributing to more transparent, explainable, and predictable compensation thanks to a more precise listing of relevant criteria and their respective weight.[16]

On the other hand, the quantification criteria attracted several critical remarks. First, some noted that several criteria confuse elements pertaining to the *an* (the 'if') and *quantum* (the 'how much') of compensation.[17] In particular, the new Milanese Tables state that, in exceptional circumstances, such as significant conflicts or litigation between the primary and the secondary victim, or in case the secondary victim had committed violence against the primary victim, the *quantum* of compensation indicated in the Tables may be reduced (even down to zero). However, it was noted that such circumstances should actually bar the secondary victim from claiming compensation in the first place, rather than reducing the compensation amount.[18] Secondly, some inconsistencies were pointed out. For instance, it is not entirely clear why the duration of cohabitation, relevant for brothers and sisters or grandparents and grandchildren, is not mentioned for spouses, parents, and children.[19] In fact, for these latter, a longer duration of the relationship corresponds to lower compensation levels because of the inversely proportional relationship between the age of the victims (parameters A and B) and the amount of compensation.

The new criterion of the quality and intensity of the specific relationship between the primary and the secondary victim (criterion E) also lends itself to some critical remarks. This criterion was presumably introduced to allow adjudicators to personalise the amount of compensation considering the concrete circumstances of

[16] G D'Aietti, 'Le tabelle a punti del danno da morte: una predittività (finalmente) concreta, misurata e realizzata da giuristi' (2022) V Foro italiano 284. *Contra*, O Troiano, 'Il «punto» … sulle tabelle milanesi del danno da perdita parentale. Liquidazione equitativa del danno nell'età degli algoritmi' (2022) I Foro italiano 2975, where it is argued that the new Milanese Tables are excessively rigid in their reliance on automatic factors.
[17] G Comandé, 'Il danno parentale, la riguadagnata centralità delle tabelle milanesi e l'esigenza ...di superarle' (2022) Danno e responsabilità 554.
[18] ibid.
[19] ibid.

ISSN 2281-5147

each case (in sum, to promote vertical equity in awards). While pursuing personalisation (or vertical equity) is essential, it is unclear how this objective can be pursued without clear instructions.[20] In particular, in lack of clear instructions, an adjudicator may use a specific factor to personalise the award, whereas another may disregard that same factor. Likewise, an adjudicator may assign a higher monetary value to a particular factor, whereas another may set a lower economic value to that specific factor. Such inconsistencies may ultimately undermine vertical equity (as awards may not be personalised consistently) and horizontal equity (similar cases may attract different damages) in awards. For these reasons, the literature argues that the pursuit of vertical equity requires clarity over the personalising factors and their respective weight on the final award amount.

These concerns apply to how criterion E of the new Milanese tables (the quality and intensity of the specific relationship) was structured. While the new Tables provide adjudicators with some factors, these are not exhaustive. This means that further factors may be used by some adjudicators, which may be disregarded by other adjudicators in similar cases. Also, the weight of each factor in determining the score to be assigned to criterion E (and, therefore, on the final award) is left unspecified. This may also lead to inconsistencies, with different adjudicators potentially weighing the same factor differently.

These concerns find some preliminary support in a few first-instance rulings that have used the new Milanese tables. For example, the judgments of the Court of Naples No. 11235/2022[21] and No. 2264/2023,[22] concerning, among other things, cases of loss of a father, seem to apply the criterion of the quality and intensity of the affective relationship quite inconsistently. In particular, the former decision attributes an average score of 15 points (over a maximum of 30 points) to the relationship between father and children since further information was unavailable that their relationship was more intense than the average. Conversely, the latter judgment assigned, in lack of specific elements, a lower value of 10 points to a father-child relationship.

[20] LM Zanitelli, 'Determining Pain-and-Suffering Awards Accurately: General or Case-by-Case Law' (2009) 28 Quinnipiac Law Review 183.
[21] Tribunale Napoli, sezione VI civile 16 December 2022, n 11235, *Archivio giurisprudenziale nazionale*.
[22] Tribunale Napoli, sezione IX civile 2 March 2023, n 2264, *Archivio giurisprudenziale nazionale*.

ISSN 2281-5147

Also, the judgments of the Court of Milan n. 9378/2022[23] and 7180/2022,[24] concerning cases of loss of a mother, offer examples of unclear assessments of the quality and intensity of the specific relationship. In particular, in the former judgment, the relationship quality attracted 30 points, i.e. the maximum allowed by the Tables. Conversely, in the latter judgment, the same relationship typology was awarded 28 points out of 30. One can only wonder how one can assess the quality and intensity of a specific personal relationship with such a high level of detail, to the point of telling '30-grade' from '28-grade' mother-child relations.

In conclusion, the point-based system embraced by the new Milanese Tables is likely more suitable for promoting consistency and transparency than the previous system revolving around minimum and maximum monetary value intervals. However, lacking clear instructions on personalisation, this point-based system lends itself to inconsistent applications, as suggested by how the new criterion of the quality and intensity of the specific relationship has sometimes been implemented in the case law.

5. The quantification of bereavement damages in Europe: a comparative overview

The limitations of the new Milanese Tables raise the question of how horizontal and vertical equity can be promoted more effectively concerning bereavement damages. To answer this question, comparative reference to other European legal systems is a valuable source of inspiration for best practices. Indeed, compensation of bereavement damages is a widely discussed topic in the European legal landscape, where an increasing number of legal systems admit the possibility of compensating the suffering experienced (indirectly) by secondary victims due to the death or severe invalidity sustained by the primary victim.[25]

The following paragraphs provide an overview of the approaches to quantifying bereavement damages in the European legal systems where formalised guidelines have been developed specifically for this specific head of non-pecuniary damages.

[23] Tribunale Milano, sezione X civile 29 November 2022, n 9378, *Archivio giurisprudenziale nazionale*.
[24] Tribunale Milano, sezione X civile 16 September 2022, n 7180, *Archivio giurisprudenziale nazionale*.
[25] BA Koch, 'The Dynamics of Tort Law in Europe – Two Decades of Accumulated Experience' (2021) European Tort Law Yearbook 722. Along the same lines, see O Riss, 'XXXII. Comparative Remarks' (2019) European Tort Law Yearbook 746, and S Perner, 'XXXII. Comparative Remarks' (2017) European Tort Law Yearbook 714.

ISSN 2281-5147

Besides Italy, these are, in alphabetical order, Belgium,[26] Croatia,[27] Finland,[28] France,[29] Ireland,[30] the Netherlands,[31] Portugal,[32] Spain[33] and Sweden.[34] Annex I of this article provides a schematic overview of the criteria and amounts indicated in the guidelines in these legal systems. For the sake of clarity, this article does not have the ambition of offering an exhaustive, in-depth analysis of how bereavement damages are compensated across the EU.

At the outset, a feature shared by most systems is that the most critical factor for determining the amount of compensation is generally that of the presumed proximity between the primary and secondary victim, with the provision of higher monetary values in the event of damage to the relationship between partners and between parents and children and lower in other cases. Likewise, damages are usually higher for the loss of a close one compared to cases where the primary victim is severely injured in an accident (but not killed). This is on the reasonable assumption that the former case entails higher suffering for the secondary victim than the latter.

---

[26] 'Indicatieve Tabel 2020/Tableau indicatif 2020' (2021) 2 T Pol/JJ Pol 83.

[27] 'Orijentacijski Kriteriji I Iznosi Za Utvrđivanje Visine Pravične Novčane Naknade Nematerijalne Štete', Su-1331-VI/02 i 1372-11/02 <https://www.iusinfo.hr/aktualno/u-sredistu/novi-orijentacijski-kriteriji-vrhovnog-suda-rh-za-naknadu-neimovinske-stete-42019> accessed 21 May 2024.

[28] The Personal Injury Commission, *Guidelines of the Personal Injury Commission 2020 regarding the amounts of compensation payable under Chapter 5 of the Finnish Tort Liability Act for pain, other temporary harm, permanent harm, and suffering* (2020) 41 <https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/162880/Personal%20Injury%20comission%20Guidelines%202020_.pdf?sequence=1&isAllowed=y> accessed 21 May 2024. See also P Tiilikka, 'IX. Finland' (2012) European Tort Law Yearbook 212.

[29] B Mornet, *L'indemnisation des préjudices en cas de blessures ou de décès* (2021) 83. See also M Viglino, *L'indemnisation des préjudices en cas de décès de la victime directe* (Presses Universitaires Savoie Mont Blanc 2020); Y Quistrebert, 'Le respect du principe de la réparation intégrale assuré par la distinction des souffrances psychologiques de la victime par ricochet' (2019) *Responsabilité civile et assurances* étude 9.

[30] Section 48, Civil Liability Act 1961. BME McMahon and W Binchy, *The Law of Torts* (Bloomsbury Professional 2013), chapters 41 and 42; E Quill, *Torts in Ireland* (Gill & Macmillan Ltd 2014) 498.

[31] EGD van Dongen and ALM Keirse, 'XIX. The Netherlands' (2020) European Tort Law Yearbook 409.

[32] Annex II Portaria, 25 June 2009, n 679 https://dre.pt/dre/detalhe/portaria/679-2009-491971 (accessed 25 October 2023).

[33] 'Tablas indemnisatoria Baremo 2021', Tabla 1.A <http://www.dgsfp.mineco.es/es/Regulacion/DocumentosRegulacion/Tablas%202021.pdf> accessed 21 May 2024. See also E Karner, 'Quantification of Moral Damages in Personal Injury Cases in a Comparative View' in H Koziol and U Magnus (eds), *Essays in Honour of Jaap* Spier (Jan Sramek Verlag 2016) 125.

[34] Trafikskadenämnden, Cirkulär nr 1-2023, Annex 7 (2023 års ersättningsnivåer för skadefall från och med 2002) <https://www.trafikskadenamnden.se/siteassets/2.-skadereglering/tabeller/skador-fran-och-med-2002/bilaga-7-2023-ars-ersattningsnivaer-for-skadefall-fran-och-med-2002.pdf> accessed 21 May 2024. See also S Friberg, 'XXVIII. Sweden' (2021) European Tort Law Yearbook 617.

ISSN 2281-5147

Conversely, national systems diverge wildly on how to balance the pursuit of equal treatment and personalization and on how standardised amounts are put in relation to judicial discretion to this end. In this respect, the national systems can be grouped in two main approaches.

The first approach is mainly based on fixed sums assigned to different typologies of relationships between the primary and the secondary victims, based on the presumption that the closer the relationship between them, the higher the suffering for the secondary victim (and the corresponding award). In Belgium, the *Tableau Indicatif / Indicatieve Tabel*[35] assigns specific amounts, ranging from 1,500 to 24,000 euros, to different types of relationships, based on the presumed intensity of the personal relationship between the primary and the secondary victim. The amounts are higher in the case of cohabitation between the primary and secondary victims. The highest amount is provided for the child who loses both parents. The sums indicated in the *Tableau / Tabel* may be flexibly adapted by the adjudicator based on the specific circumstances of the individual case.

Less detailed are the guidelines developed by the Croatian Supreme Court in 2002 and revised in 2020.[36] The Croatian Orientation Criteria provide for fixed amounts for certain types of relationships, both in the event of death and in the event of severe disability of the primary victim. The figures vary from 75,000 to 220,000 Croatian *kuna*.

While judicial adjudicators have developed the Belgian and Croatian guidelines, the Dutch system mainly relies on the legislative formant.[37] This system, which the Dutch legislator outlined in 2018-2019, assigns fixed amounts to a series of personal relationships, with amounts ranging from 12,500 to 20,000 euros, based on the presumed intensity of the relationship between the primary and secondary victim and depending on whether the case at hand is crime-related or not. The higher figure of 20,000 euros is foreseen for the interruption of most personal relationships. In contrast, the lower figure of 15,000 euros applies in the event of the death of children or parents who no longer live together. Compensation is provided not only in the

[35] 'Indicatieve Tabel 2020/Tableau indicatif 2020' (n 26) 83.
[36] 'Orijentacijski Kriteriji' (n 27).
[37] 'Besluit van 20 april 2018 tot vaststelling van bedragen voor nadeel van naasten dat niet in vermogensschade bestaat' (Besluit vergoeding affectieschade).

ISSN 2281-5147

event of the death of the primary victim but also in the event of a severe personal injury (which includes but is not limited to, 70% permanent personal invalidity). The figures foreseen in the event of death are higher than those indicated for cases of severe personal injury.

Normative in nature is also the Spanish *Baremo* for road traffic accidents.[38] This latter, like the guidelines referenced above, assigns different monetary sums to other kinds of personal relationships. Amounts vary from 10,535.48 to 94,819.28 euros. Alongside these basic figures (*perjuicio personal basico*), the *Baremo* provides for additional sums or fixed percentage increases in the presence of specific circumstances (*perjuicio personal particular*). The circumstances that can lead to a rise in the award include cohabitation between the primary and secondary victims, the death of the only parent, or the death of both parents in an accident. Finally, adjudicators can increase the award by up to 25% in exceptional cases, which the *Baremo* leaves unspecified.

Finally, the Swedish model is highly standardised.[39] In particular, compensation for losing a close one is usually 30,000 crowns (approximately 3,000 euros). However, in the case of voluntary homicide, compensation is doubled (thus amounting to 60,000 crowns, i.e. about 6,000 euros).

Other legal systems follow a different quantification approach based on intervals of monetary values, ranging between a minimum and a maximum. The French system[40] offers an example of this approach. In particular, in case of loss of a parent, different intervals are envisaged depending on whether the surviving son/daughter is a minor (from 25,000 to 30,000 euros) or an adult and, in the latter case, whether or not he or she was living together with the primary victim (respectively, from 15,000 to 25,000 euros and 11,000 to 15,000 euros). An increase in compensation of 40 to 60% is also envisaged in favour of a son/daughter who has lost both their parents. Cohabitation (or the lack thereof) leads to different intervals of monetary values in the relationships between brothers and sisters. In contrast, in those between grandparents and

[38] 'Tablas indemnisatoria Baremo 2021' (n 33).
[39] Högsta domstolen, 26 February 2021, Nytt Juridiskt Arkiv (2021) 46; Högsta domstolen, 29 December 2020, Nytt Juridiskt Arkiv (2020) 1142.
[40] Mornet (n 29). Cour de cassation, Chambre civile 2, 11 February 2021, n 19-23525, ECLI:FR:CCASS:2021:C200118; Cour de cassation, Chambre civile 1, 7 October 2020, n 19-17041, ECLI:FR:CCASS:2020:C100536; Cour de cassation, Chambre civile 1, 24 October 2019, n 18-21339, ECLI:FR:CCASS:2019:C100872.

ISSN 2281-5147

grandchildren, the frequency of contact between them modifies the award level. The intervals foreseen in the latter cases are lower than those proposed for relationships between parents and children. In the event of damage to emotional ties not foreseen in the table, the compensation cannot exceed, except in an entirely exceptional way, 3000 euros.

The Portuguese *Portaria* for road traffic accidents[41] is inspired by a similar model, where the judge can quantify the compensation in favour of the secondary victim up to a maximum sum (a cap) of a variable amount depending on the presumed intensity of the emotional relationship. The highest cap is 25,000 euros and is foreseen in the event of losing a spouse after 25 or more years of cohabitation. Furthermore, circumstances are listed that allow the amount to be paid to be increased up to a maximum percentage. The most significant increase is up to 150% and is foreseen in the particularly dramatic case in which a minor son or daughter loses both parents in the same accident.

Compared to the French and Portuguese instruments, the Finnish guidelines[42] are decisively more standardised, providing for different intervals depending on the relationship between the deceased family member or partner and the secondary victim. The lowest range is foreseen in the case of the death of a brother or sister (from 2,000 to 8,000 euros), whereas the highest range applies to the loss of a parent (from 3,000 to 15,000 euros). The guidelines do not make the criteria for determining the amount of compensation within the respective ranges explicit.

Finally, the Irish system[43] is an outlier in the divide between the abovementioned models. Indeed, access to bereavement damages is restricted to the dependents of the primary victim, and only one action for damages for wrongful death can be brought against the injurer. The compensation, which cannot exceed a cap of 35,000 euros, is to be divided among the dependents of the primary victim in proportion to the damage suffered by each of them.

[41] Portaria 25 June 2009, n 679, Annex II. See also J Bernardo, 'O "Quantum" Indemnizatório Relativamente aos Danos Pessoais' (2019) Revista de Direito da Responsabilidade 971.
[42] The Personal Injury Commission, *Guidelines of the Personal Injury Commission* (2020) 41.
[43] Sections 48 and 49, Civil Liability Act 1961. McMahon and Binchy (n 30) chapters 41 and 42; E Quill, *Torts in Ireland* 498.

ISSN 2281-5147

6. Comparative remarks

To summarise the review conducted above, the first group of approaches provides fixed sums for different categories of personal relations, with different roles played by judicial discretion across different legal systems. Some guidelines are purely indicative, which means that the adjudicators are, in principle, allowed to diverge from the guidelines' instructions (as in Belgium and Croatia). Conversely, other guidelines are more restrictive of judicial discretion, where basic amounts and personalisation factors (and their respective weight) are binding and made more explicit (as in the Netherlands and in Spain, although with very different degrees of room for personalisation). Instead, the second group of legal systems restricts judicial discretion within intervals of value. However, within these intervals, adjudicators enjoy broad discretion in setting the exact award.

Against this backdrop, the approach based on intervals of minimum and maximum values (as emerging in France and Finland) may lend itself to inconsistent and unpredictable decision-making for compensation amounts. This is because it lacks clear awarding instructions besides indicating a minimum and a maximum threshold. This critical remark may also be extended to the Portuguese and the Irish systems, where adjudicators are not given specific instructions on quantifying damages under a maximum threshold.

Conversely, thanks to more precise and transparent instructions, the systems belonging to the first group of compensation approaches (Belgium, Croatia, the Netherlands, Spain, and Sweden) have the potential to promote consistency and predictability of bereavement damages more effectively. However, this statement should be nuanced, considering the specific characteristics of each guideline. In particular, as already stated above, the Belgian and Croatian guidelines are purely indicative, which means that adjudicators are not bound to their instructions and can diverge from these quite freely. This degree of flexibility may help adjudicators account for the specific features of each case. However, as already argued above, if not properly guided, judicial discretion may lend itself to potential issues of inequity and unpredictability in awards.

More binding systems, such as the Dutch and Spanish ones, seem better suited to contribute more effectively to fostering consistency and predictability. This is also

ISSN 2281-5147

because both guidelines clarify which factors affect damage award and to what extent. In this respect, the two guidelines display substantial differences in terms of room for personalisation. In particular, while the Dutch guidelines rely on a few factors, which in turn lead to limited increases in the award, the Spanish ones are much more analytical, with numerous personalising factors, many of which warrant even significant increases in the level of the award. Despite these differences, the personalisation factors listed in both the Dutch and Spanish guidelines share some common characteristics. In particular, they all refer to objective elements that parties can acquire easily and that are indicative, for the secondary victim, of a more intense moral suffering arises (e.g., cohabitation, which is mentioned in both guidelines) or a more extensive impact on their daily life (e.g., in case of the loss of both parents by the minor child, as mentioned in the Spanish *Baremo*).

This approach of relying on objective and easily acquirable factors to guide personalization also emerges in guidelines that present a different structure (e.g., the French tables, where the intervals of monetary values change based on factors such as cohabitation or the age of the secondary victim) or that have a similar structure but are indicative only (e.g., the Belgian *Tableau / Tabel*, which proposes different, indicative sums based on objective factors such as cohabitation). Conversely, reference to more subjective factors (e.g., the 'internal' suffering actually experienced by the victim) or objective factors that are, however, costly to assess accurately (e.g., hobbies shared between the primary and secondary victims)[44] is generally avoided.

This approach, which, in essence, attempts to standardize the personalisation of bereavement damages, displays two main advantages. First, from a horizontal equity perspective, it can promote equal treatment between similar cases decisively. Secondly, it is a pragmatic approach, leveraging objective factors that can be easily acquired by the parties to a dispute, avoiding considering elements or aspects the assessment of which tends to be excessively costly, subjective, and ultimately unpredictable. These features can inspire a predictable and efficient system capable of facilitating the out-of-court resolution of disputes to benefit both the parties and the judicial workload.

[44] Both examples come from the new Milanese Table, where they are included in the list of factors adjudicators should consider when assessing the quality and intensity of the personal relation between the primary and secondary victims (criterion E).

ISSN 2281-5147

On the other hand, the objection may be made that such an approach may prove excessively rigid and undermine vertical equity. This is because no guidelines can possibly foresee all the circumstances that may be relevant in the specific case. Therefore, a closed list of personalising factors will always miss potentially relevant factors, thus preventing the optimal personalisation of bereavement damages.

Two counterarguments can be advanced against this objection. First, the objection presupposes that unrestricted judicial discretion ensures optimal personalisation or vertical equity in damage awards. However, as already argued above (with some supporting evidence from the Italian case law), a lack of precise instructions on the relevant personalising factors and their monetary weight may, in fact, negatively affect vertical (and horizontal) equity. Secondly, while it is true that a closed list of personalising factors can hardly ensure *optimal* personalisation, a *satisfactory* level of personalisation may still be achieved. This is provided that enough relevant discretionary criteria are listed based on an analysis of available historical-comparative data (whereas guidelines relying only on a few personalising factors are probably too rigid).

7. Conclusions

The recent developments occurred in the Italian law of bereavement damages can provide useful insights to policymakers considering reforming their own systems and make them more suitable to promote equity and predictability in damage awards. In particular, the new Milanese Tables (and the way lower courts have been applying them) suggest that, to pursue horizontal and vertical equity, it is not sufficient to foresee quantification criteria. These should also be structured in a way that they convey clear guidance to adjudicators regarding relevant factors and their respective weight on the final award.

The comparative review of the European legal systems conducted in this article suggests that a potential source of inspiration for good practices is offered by those systems that prioritise damage standardisation via a basis of uniform monetary values, accompanied by a list of personalising factors that are objective and easy to assess. Indeed, such an approach has the potential of fostering equal treatment and a (probably not optimal but a) satisfying level of personalisation, provided a sufficient

ISSN 2281-5147

number of personalising factors are foreseen in the guidelines. Critical reference to the factors referenced in the case law, complemented by a comparative outlook, can offer a valuable source of inspiration to this end.

Annex I

Belgium - Tableau Inficatif / Indicatieve Tabel (2020)	
In favour of spouse, registered partner, or unregistered yet cohabiting partner for loss of respective partner	15000 €
In favour of son / daughter for loss of parent, and vice versa	Cohabiting: 15000 €
	Not cohabiting : 6000 €
In favour of orphan, coaìhabiting son / daughter for loss of parent	24000 €
In favor of parent for loss of foetus	3000 €
In favour of brother / sister for loss of brother / sister	Cohabiting: 3000 €
	Not cohabiting: 1800 €
In favour of grandparent for loss of grandchild, and vice versa	Cohabiting: 3000 €
	Not cohabiting: 1500 €

ISSN 2281-5147

N.B. The amounts indicated above do not bind adjudicators. Further secondary victims may be entitled to bereavement damages provided a specific and stable relationship with the primary victim is established.	
Croatia - Orijentacijski Kriteriji (2020)	
In favour of spouse or cohabiting partner for loss of spouse or cohabiting partner In favour of parent for loss of son / daughter	220000 HRK
In favour of parents for loss of foetus	75000 HRK
In favour of son / daughter for loss of parent	150000 HRK
In favour of brother / sister for loss of brother / sister	75000 HRK
N.B. The amounts indicated above do not bind adjudicators.	
Finland - Personal Injury Guidelines (2020)	
In favour of parent for loss of son / daughter	3000 - 12000 €
In favour of son / daughter for loss of parent	3000 - 15000 €
In favour of brother / sister for loss of brother / sister	2000 - 8000 €
In favour of spouse, registered partner, or unregistered yet cohabiting partner for loss of respective partner	3000 - 11000 €

ISSN 2281-5147

<table>
<tr><th colspan="3">France - Référentiel Mornet (2022)</th></tr>
<tr><td>Spouses, registered partners, unregistered yet cohabiting partners</td><td colspan="2">20000 -30000 €</td></tr>
<tr><td rowspan="3">In favour of son / daughter for loss of parent</td><td rowspan="2">Minor son / daughter</td><td>25000 -30000 €</td></tr>
<tr><td>Son / daughter that is already an orphan: increase from 40% to 60%</td></tr>
<tr><td rowspan="2">Adult son / daughter</td><td>Not cohabiting : 11000 -15000 €</td></tr>
<tr><td>Cohabiting : 15000 -25000 €</td></tr>
<tr><td>In favour of parent for loss of son / daughter</td><td colspan="2">20000 -30000 €</td></tr>
<tr><td rowspan="2">In favour of grandparent for loss of grandchild</td><td colspan="2">Frequent contacts: 11000 -14000 €</td></tr>
<tr><td colspan="2">Unfrequent contacts: 7000 -10000 €</td></tr>
<tr><td rowspan="2">In favour of grandchild for loss of grandparent</td><td colspan="2">Frequent contacts: 6000 -10000 €</td></tr>
<tr><td colspan="2">Unfrequent contacts: 3000 -7000 €</td></tr>
<tr><td colspan="3">N.B. Further secondary victims are entitled to bereavement damages only if they prove a specific affective relationship that warrants compensation, which can only exceptionally exceed 3.000 €.</td></tr>
<tr><th colspan="3">Ireland - Section 49, Civil Liability Act</th></tr>
</table>

ISSN 2281-5147

In favour of *dependents* of primary victim		Up to 35000 euro, to be apportioned among the *dependents*
The Netherlands - Besluit vergoeding affectieschade (2018)		
Spouses and registered partners	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Unregistered yet cohabiuting partners	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime 17500 €
Minor sons / daughters and parents	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Adult cohabiting sons / daughters and parents	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Adopted sons / daughters and parents	Death	17500 €
		In case of crime: 20000 €

ISSN 2281-5147

	Lesioni gravi e permanenti	15000 €
		In case of crime: 17500 €
Adult, not cohabiting sons / daughters and aprents	Death	15000 €
		In case of crime: 17500 €
	Severe and permanent injury	12000 €
		In case of crime: 15000 €
Family care	Death	17500 €
		In case of crime: 20000 €
	Severe and permanent injury	15000 €
		In case of crime: 17500 €
Further close personal relations	Death	15000 €
		In case of crime: 17500 €
	Severe and permanent injury	12500 €
		In case of crime: 15000 €
Portugal - Portaria, Annex II (2009)		
In favour of spouse	More than 25 years of marriage: up to 25650 €	
	Less than 25 years if marriage: up to 20520 €	
In favour of son / daughter	Equal or minor of 25 years old: up to 15390 €	

ISSN 2281-5147

	More than 25 years old: up to 10260 €
In favour of grandchild or other descendents	Up to 5130 €
In favour of parent	For child aged 25 or younger: up to 15390 €
	For child older than 25: up to 10260 €
In favour of grandparent (in lack of parent)	Up to 7695 €
In favour of other ancestors or collaterals (in lack of parents and grandparents)	Up to 2565 €
In favour of brother / sister	Up to 7695 €
Increases (examples)	Only child: up to 25%
	Loss of more than one child in the same accident: up to 50%
	Loss of all children in the same accident: up to 100%
	Children under the age of 18 who remain orphans of a second parent: up to 100%

ISSN 2281-5147

	Children under the age of 18 who lose both parents in the same accident: up to 150%	
N.B. *Portaria* does not bind adjudicators		
Spain - Baremo (2022)		
In favour of widower	Until 15 years of cohabitation	Primary victim younger than 67 years: 94819,28 €
		Primary victim between 67 and 80 years old: 73748,33 €
		Primary victim older than 80 years: 52677,38 €
	For any additional year of cohabitation	1053,55 €
In favour of ancestors	In favour of parent	Son / daughter of 30 years old or younger : 73748,33 €
		Son / daughter older than 30 years: 42141,90 €
	In favour of grandparent, only if parent of their family branch dies breforehand	21070,95 €
In favour of descendants	In favour of son/daughter younger than 14 years: 94819,28 €	
	In favour of son/daughter between 14 and 20 years old: 84283,80 €	
	In favour of son/daughter between 20 and 30 years old: 52677,38 €	

ISSN 2281-5147

	In favour of son/daughter older than 30 years: 21070,95 €	
In favour of brother / sister	In favour of brother / sister up to 30 years old: 21070,95 €	
	In favour of brother / sister older than 30 years: 15803,21 €	
In favour of each *allegado*	10535,48 €	
Increases (examples)	Cohabitation (examples)	In favour of parent, if son/daughter was older than 30 years: 31606,43 €
		In favour of son/daughter older than 30 years: 31606,43 €
	Secondary victim has no other surviving close ones: 25%	
	Loss of the only parent	In favour of son/daughter up to 20 years old: 50%
		In favour of son/daughter older than 20 years: 25%
N.B. If harm is exceptional, adjudicator can increase award up to 25%. *Baremo* is binding for road traffic accidents and advisory for other cases.		
Sweden - Cirkulär nr 1-2023 and Supreme Court 29 December 2017		
Person that was particualrly close to primary victim (spouse, cohabiting partner, parent, child)	Death caused not voluntarily: 30000 SKE	
	Death caused voluntarily: 60000 SKE	

ISSN 2281-5147

ISSN 2281-5147

THE RENEWED ROLE OF PRODUCER ORGANIZATIONS IN ENHANCING SUSTAINABLE AGRICULTURAL AND FOOD SYSTEMS UNDER THE EU COMMON MARKET ORGANISATION

Andrea Saba*

Abstract

This article delves into the role of producer organizations within the framework of the European Union's Common Market Organization (CMO) as part of the Common Agricultural Policy (CAP). By reducing administrative burdens and fostering environmental sustainability, producer organizations are positioned as key players in achieving the CAP's objectives. Furthermore, the article explores how CMO provisions interact with EU competition law, particularly under Articles 209, 210, and the newly introduced 210bis, which allow for collective bargaining and sustainability initiatives. This analysis underscores the vital role of producer organizations in ensuring a fair, resilient, and sustainable agricultural sector within the European Union.

Indice Contributo

*Post-Doctoral Research Fellow, Sant'Anna School of Advanced Studies, Pisa (Italy). This publication is part of the PRIN2022 Project "Towards a sustainable agrifood system: legal tools for the development of European agrifood supply chain". Funded by the European Union – Next Generation EU. The support for the production of this publication does not constitute endorsement of the contents which reflects the views only of the authors.

ISSN 2281-5147

Keywords

Producer organizations - Common Agricultural Policy - Common Market Organization - Sustainability - Farm to Fork.

1. Common Market Organization: a brief introduction.

The Common Market Organization (CMO) is a regulatory instrument of European origin that contributes—explicitly recognized in Article 40 of the Treaty on the Functioning of the European Union (TFEU)—to implementing the measures necessary to achieve the objectives of the Common Agricultural Policy (CAP) as defined in Article 39 of the TFEU.[1] This is particularly done through price regulations, subsidies for both production and distribution of various products, systems for stockpiling and carryover, and common mechanisms for import or export stabilization. The TFEU outlines the fundamental principles of CMO regulation and defines the "forms" that the common organization can take depending on the agricultural sector in question.[2] These forms include common rules on competition,

[1] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [2013] OJ L 347.
[2] See A Saba, 'L'OCM unica' in F Albisinni and L Costato (eds), *Trattato breve di diritto agrario italiano e dell'unione europea* (Cedam 2023).

ISSN 2281-5147

mandatory coordination of various national market organizations, and a European market organization.[3]

Based on these premises, starting in 1962, the then European Economic Community began regulating the European agricultural market by organizing it product by product and removing the authority of individual states to intervene in the production governed by the various common organizations.[4] Historically, common organizations were characterized by price regulation, with the primary aim of regulating product marketing and thereby controlling and standardizing the market.[5] This approach involved differentiated interventions designed for each sector.[6] Today, only the so-called institutional price regulation, specifically the intervention price, partially remains. Since the MacSharry reform of 1992, the European Community undertook a substantial revision of its price policy to comply with the new international regulatory framework established by the Marrakesh Agreement on the World Trade Organization.[7]

From the creation of sector-specific CMOs, introduced for individual products or groups of products and expanded to a total of twenty-one, the adoption of Regulation (EC) No. 1234/2007 (the so-called single CMO regulation) marked the first reorganization of the complex set of rules related to various agricultural sectors into a single legislative act through an effort of unification and simplification.[8] This reorganization was not merely formal but also substantive, involving a systemic restructuring of the texts that resulted in a comprehensive rewrite of the European

[3] See F Adornato, 'Agricoltura, politiche agricole e istituzioni comunitarie nel Trattato di Lisbona: un equilibrio mobile' (2010) Rivista di diritto agrario I, 266; F Albisinni, 'Istituzioni e regole dell'agricoltura dopo Lisbona' (2010) Rivista di diritto agrario, I, 210; D Bianchi, 'La Pac «camaleontica» alla luce del Trattato di Lisbona' (2009) Rivista di diritto agrario I, 592.

[4] See L Costato, 'Trattato istitutivo della Comunità europea e l'organizzazione del mercato dei prodotti agricoli' in F Albisinni and L Costato (eds), *Trattato breve di diritto agrario italiano e dell'unione europea* (Cedam 2023).

[5] See J Blockx and J Vandenbergh, 'Rebalancing commercial relations along the food supply chain: the agricultural exemption from EU competition law after Regulation 1308/ 2013' [2014] European Competition Journal 387.

[6] See D Gadbin, 'L'"OCM unique": le décline de la régulation publique des marchés' [2014] Revue de Droit Rural 423.

[7] See P Borghi, *L'agricoltura e il Trattato di Marrakech. Prodotti agricoli e alimentari nel commercio internazionale* (Giuffré 2004).

[8] See L Costato, 'Lo sviluppo della Politica Agricola Comune' in F Albisinni and L Costato (eds), *Trattato breve di diritto agrario italiano e dell'unione europea* (Cedam 2023).

ISSN 2281-5147

model for agricultural market governance.[9] As the Court of Justice has repeatedly observed (notably in the joined cases C-90/1963 and C-91/1963), the CMO represents the set of provisions and legal instruments used by competent authorities to control and normalize the agricultural market. Over time, and as further confirmed by the latest reform introduced by Regulation (EU) 2021/2117, the CMO has evolved into a tool for broadly regulating the agricultural sector.[10] Through it, the European legislator has established a comprehensive regulatory system, whose contents, initially focused on support measures and trade, have extended to the production and consumption of agricultural products.

Considering that the CAP must refine its responses to emerging challenges and opportunities at international, Union, national, regional, local, and corporate levels (recital 2, Regulation (EU) 2021/2117), the CMO is part of the effort to simplify the governance of the CAP to help achieve the Union's objectives and significantly reduce administrative burdens. Furthermore, in a context of increasing climate vulnerability, exacerbated by the recent pandemic crisis,[11] the CMO is expected to contribute to building a fair, healthy, and environmentally respectful agri-food system. It should also strengthen the position of the agricultural entrepreneur within the supply chain,[12]

[9] See F Albisinni, *Strumentario di diritto alimentare europeo* (Giuffré 2016).

[10] Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union [2021] OJ L 435.

[11] The reference is to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system [2020] COM/2020/381 final. The Farm to Fork Strategy is central to the Green Deal, addressing the comprehensive challenges of sustainable food systems and acknowledging the interconnectedness of healthy people, societies, and the planet. This strategy is also key to the Commission's efforts to achieve the United Nations' Sustainable Development Goals (SDGs). In the wake of the COVID-19 pandemic and the economic downturn, the Communication recognizes that it is crucial that all citizens and value chain operators, both within the EU and globally, benefit from a just transition. Shifting to a sustainable food system can yield environmental, health, and social benefits, create economic opportunities, and ensure that the recovery from the crisis sets us on a sustainable path. Ensuring a sustainable livelihood for primary producers, who continue to lag behind in terms of income, is essential for the success of both the recovery and the transition.

[12] See I Canfora, 'Le pratiche commerciali sleali alla luce della corte di giustizia dell'UE' in P Fimiani and D Colucci (eds), Le pratiche commerciali sleali e gli illeciti agroalimentari (Giuffré 2024).

ISSN 2281-5147

by encouraging the adoption of sustainable production methods and fostering opportunities for both horizontal and vertical cooperation.[13]

According to the Commission's Communication Farm to Fork, to support farmers in the transition to sustainable agricultural and food systems in the EU, the Commission plans to clarify competition rules for collective initiatives that promote sustainability in supply chains. This will help farmers strengthen their position in the supply chain and capture a fair share of the added value from sustainable production by encouraging cooperation within the common market organizations for agricultural products. This article aims to analyse the role of producer organizations within the framework of the European Union's Common Market Organization (CMO) and their significance in achieving the CAP's objectives. Furthermore, the article explores how CMO provisions interact with EU competition law, particularly under Articles 209, 210, and the newly introduced 210a. This analysis highlights the vital role of producer organizations in ensuring a fair, resilient, and sustainable agricultural sector within the European Union.

2. Empowering Agricultural Producer Organizations: Strategic Initiatives and EU Legal Frameworks.

The enhancement of tools for organizing, coordinating, and managing agricultural supply by the producers themselves represents one of the strategic actions pursued by the European Commission to promote greater equity in the distribution of bargaining power within the agri-food chain and enhancing sustainability in the agricultural and food systems.[14] Recently, these strategic actions have been incorporated into the Communication on the European Green Deal,[15] and the "Farm

[13] See A Germanò, *Manuale di diritto agrario* (Giappichelli 2022). On the issue of short supply chain, see I Canfora, 'Is the Short Food Supply Chain an Efficient Solution for Sustainability in Food Market?' (2016) Agriculture and Agricultural Science Procedia 8, 402.

[14] See A Jannarelli, *Profili del sistema agroalimentare e agroindustriale. I rapporti contrattuali nella filiera agroalimentare* (Cacucci 2018).

[15] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal [2019] COM/2019/640 final.

ISSN 2281-5147

to Fork" Strategy.[16] Producer organizations have been a key focus in the Common Market Organization (CMO) reform processes, wherein the experience of organizations in the fruit and vegetable sector has progressively extended to the recognition of organizations across the entire spectrum of agricultural production.[17]

The regulation, particularly as interpreted through Article 152 of Regulation (EU) No. 1308/2013, identifies producer organizations as key players in the agricultural and food systems in the EU.[18] These organizations are capable of ensuring the planning of agricultural production and its alignment with market demand,[19] optimizing production costs, and concentrating supply, including through direct marketing.[20] Additionally, producer organizations promote and provide technical assistance, manage mutual funds, and offer necessary support for futures markets and insurance systems. The structure of Article 152, which outlines the specific objectives of producer organizations, references applicable environmental and animal welfare regulations. In response, these organizations optimize production costs and investment profitability, and they provide technical assistance, such as employing environmentally friendly cultivation practices and production techniques. To achieve these goals, producer organizations can jointly engage in activities such as processing, distribution, packaging, labeling, or promotion.[21] They can also collectively undertake quality control, use of equipment or storage facilities, waste management directly

[16] In connection to the Communication from the Commission, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system (COM/2020/381 final), see P. Lattanzi, 'Il "New Green Deal", la PAC 2021-27 e la sostenibilità nelle produzioni alimentari' in P Borghi, I Canfora, A Di Lauro, L Russo (eds), *Trattato di diritto alimentare italiano e dell'Unione europea* (Giuffré 2021).
[17] See L Costato and L Russo, *Corso di diritto agrario italiano e dell'Unione europea* (Giuffré 2019), p. 166.
[18] For a general overview, see A Suchon, The legal and economic aspects of associations of agricultural producers in selected countries of the world (Adam Mickiewicz University Law Books No. 14, 2020)
[19] See also I Canfora, 'Raggiungere un equilibrio nella filiera agroalimentare. Strumenti di governo del mercato e regole contrattuali', in L Scaffardi and V Zeno-Zencovich (eds), Cibo e diritto. Una prospettiva comparata (Romatr-ePress 2020).
[20] See I Canfora, 'Organizzazioni dei produttori agricoli' in *Digesto delle discipline privatistiche, sez. civ.* (Giuffré 2018). On the issue of the relations between producers organizations and professional organizations representative of farmers, see I Canfora, 'Le Organizzazioni di produttori agricoli tra funzioni di mercato e composizione interna. Riflessioni a margine della sentenza della Corte di giustizia nel caso Saint-Luis Sucre' [2023] Diritto Agroalimentare 3.
[21] See N Ferrucci and G Strambi, 'Organizzazione dei produttori, organizzazioni interprofessionali e organizzazione di operatori (artt. 122-124)' (2009) Il Regolamento unico sull'organizzazione comune dei mercati agricoli (reg. Ce n. 1234/2007), Le Nuove Leggi civili commentate, I, 133.

ISSN 2281-5147

related to production,[22] procurement of production means, or any service activity consistent with one of their specific objectives.

For recognition, which is granted by Member States, a producer organization must be a clearly defined legal entity. Besides meeting the objectives and activities outlined in Article 152, it must include a minimum number of members or aggregate a minimum volume or value of marketable production in the area where it operates. Each Member State, based on the characteristics of agricultural activity within its territory, establishes the minimum requirement regarding the number of members, volume, or value of marketable production in accordance with Article 154. This provision should not prevent the recognition of small-scale producer organizations.[23] Furthermore, Article 152 stipulates that when applying for recognition, producer organizations must provide sufficient guarantees of proper conduct of their activities in terms of duration, efficiency, and support for their members through human, material, and technical resources, and, if necessary, concentration of supply. Article 153, which deserves special attention, details the minimum requirements that producer organizations must comply with in drafting their bylaws. It sets out the minimum obligations that each organization must impose on its members, such as the requirement for a farm producing a specific product to belong to only one producer organization, except in cases where two separate production units are located in different geographical areas. The 2021 reform introduced (Article 153, paragraph 2bis) the possibility for producer organizations to request recognition in multiple agricultural sectors, provided they can meet the conditions for each sector in which they seek recognition.

Among the specific objectives outlined in Article 157, interbranch organisations aim to enhance knowledge and transparency in production and the market.[24] This can be achieved through the publication of relevant statistical data related to production costs and prices, and by providing the necessary information and conducting research to innovate, streamline, improve, and guide production. Additionally, interbranch

[22] See L Costantino, La problematica degli sprechi nella filiera agroalimentare. Profili introduttivi (Cacucci 2018).
[23] See N Coutrelis, *EU competition law as applied in the agriculture sector, From agricultural to food law* (Wageningen Academic 2014).
[24] See L Paoloni, 'Le regole interprofessionali per il funzionamento della filiera' in P Borghi, I Canfora, A Di Lauro, L Russo (eds), Trattato di diritto alimentare italiano e dell'Unione europea (Giuffré 2024).

ISSN 2281-5147

organisations can draft standard contracts for the sale of agricultural products, ensuring they are compatible with the need to maintain fair competitive conditions and avoid market distortions.

3. The Role of Producer Organizations in Enhancing Environmental Sustainability and Innovation.

The 2021 reform, introduced by Regulation 2021/2117, recognizes that producer organizations and their associations can play a crucial role in consolidating supply and improving marketing. According to preambular paragraph 50, the producer organisations should also help plan and align production with demand, optimize production costs, stabilize producer prices, conduct research, promote best practices, and provide technical assistance.[25] Additionally, they manage by-products and risk management tools available to their members, thereby strengthening producers' positions within the food supply chain. Interbranch organisations can also be instrumental by facilitating dialogue among various stakeholders in the supply chain and promoting best practices and market transparency.

To contribute to the achievement of the European Union's environmental objectives, the Regulation 2021/2117 should allow Member States to recognize producer organizations that pursue specific goals related to the management and valorization of by-products, residual flows, and waste. This recognition is particularly important for protecting the environment and promoting circularity. Additionally, Member States should recognize producer organizations that manage mutual funds across various sectors. Consequently, Regulation 2021/2117 expands the current list of objectives for producer organizations as outlined in Article 152 of Regulation (EU) No 1308/2013. For greater transparency within producer organizations, their statutes should allow members to democratically control the organization's accounts and budgets. This transparency ensures accountability and trust among members, which is crucial for the effective functioning of these organizations. Moreover, to facilitate commercial transactions conducted by producer organizations, the statutes should permit members to have direct contact with buyers. However, such direct contact

[25] See G Pisciotta Tosini, 'Impresa agricola e sistema agroalimentare', in G Pisciotta Tosini (ed) *Lezioni di diritto agrario contemporaneo* (Giappichelli 2023).

ISSN 2281-5147

should not undermine the organization's role in consolidating supply and marketing products. The producer organization must retain exclusive discretion over the essential elements of a sale, ensuring that the organization can effectively perform its market functions. This expanded recognition and enhanced transparency will empower producer organizations to contribute more significantly to environmental sustainability and economic stability. By managing by-products and waste efficiently, these organizations can promote a circular economy, reduce environmental impact, and foster sustainable agricultural practices. Furthermore, the democratic control of finances and direct engagement with buyers will strengthen the organizational structure and market presence of producer organizations, ensuring they remain resilient and adaptive to market demands.

To ensure the sustainable development of production and thereby provide a fair standard of living for farmers, it is essential to strengthen their contractual power against downstream operators.[26] This enhancement aims for a more equitable distribution of added value along the supply chain. To achieve these Common Agricultural Policy (CAP) objectives, recognized producer organizations should be allowed to negotiate supply contract terms, including prices, within quantitative limits, for the production of some or all of their members.[27] These organizations must pursue one or more of the following goals: concentrating supply, marketing their members' production, and optimizing production costs. The pursuit of these objectives should lead to the integration of activities, likely generating significant efficiency gains, thereby ensuring that the overall activities of the producer organization contribute to achieving the objectives of Article 39 of the Treaty on the Functioning of the European Union (TFEU). This can be achieved provided that the producer organization undertakes certain specific activities that are significant in terms of the volume of production concerned, as well as the cost of production and marketing. By engaging in these activities, producer organizations can consolidate their efforts, reduce costs, and enhance their market presence, leading to improved bargaining power and a fairer share of the value created within the supply chain. This

[26] T Verdonk, 'Planting the Seeds of Market Power: Digital Agriculture, Farmers' Autonomy, and the Role of Competition Policy' in L Reins (ed), *Regulating New Technologies in Uncertain Times* (Information Technology and Law Series, Asser Press 2019).

[27] See I Canfora, 'Cessione dei prodotti tramite le organizzazioni di produttori', in P Borghi, I Canfora, A Di Lauro, L Russo (eds), Trattato di diritto alimentare italiano e dell'Unione europea (Giuffré 2024).

ISSN 2281-5147

integration and enhanced contractual capacity will enable producers to better navigate market challenges, secure more stable incomes, and contribute to the overarching goals of sustainable agricultural development and economic resilience in the European Union.

4. The Competition Rules: Vertical and Horizontal Initiatives for Sustainability.

With the revision of the Common Market Organization (CMO), initiated in 2013 and now reformed by Regulation (EU) 2021/2117, the protection of producers' bargaining power within the agri-food supply chain has been reinforced.[28] This revision highlights the ongoing complexity of reconciling the common organization of the agricultural products market with the protection of competition within the single market.[29] Historically, the use of traditional tools of individual CMOs has been significantly limited to addressing crisis situations.[30] The current regulatory framework of the CMO now entrusts market regulation to key instruments represented by producer organizations, interbranch organisations, and contractual agreements.[31]

Under Articles 209 and 210, recognized producer organizations and interbranch organisations are permitted to plan production and negotiate contracts regarding the supply of agricultural products, thereby derogating from the application of Article 101, paragraph 1, TFEU,[32] which prohibits commercial practices among Member States that impede, restrict, or distort competition.[33] This derogation is connected to the provisions of Article 101, paragraph 3, TFEU, which acknowledges the non-

[28] See A Jannarelli, 'Gli accordi di sostenibilità nell'art. 210 bis del reg. 1308 del 2013 ed il relativo progetto di comunicazione della Commissione europea' [2023] Diritto Agroalimentare, 3.
[29] See A Jannarelli, *Profili giuridici del sistema agro-alimentare e agro-industriale. Soggetti e concorrenza* (Cacucci 2018); and, A Jannarelli, 'Mercato e concorrenza nella nuova PAC: un cantiere aperto su un futuro incerto' (2021) Rivista di diritto agrario IV, 453.
[30] See P Chauve, 'Agriculture, Food and Competition Law: Moving the Borders' [2014] Journal of European Competition Law & Practice 309.
[31] See M Gioia, 'Le organizzazioni dei produttori e le loro associazioni' in F Albisinni and L Costato (eds), *Trattato breve di diritto agrario italiano e dell'unione europea* (Cedam 2023).
[32] See A Jannarelli, 'Gli Accordi di sostenibilità' in P Borghi, I Canfora, A Di Lauro, L Russo (eds), Trattato di diritto alimentare italiano e dell'Unione europea (Giuffré 2024).
[33] See M Mauro, 'Prime riflessioni a margine della novella dell'art. 210 bis del reg. (UE) n. 1308/2013, introdotto dal reg. (UE) n. 2021/2117' [2023] Diritto Agroalimentare 3.

ISSN 2281-5147

applicability of competition rules to agreements, decisions, or practices that contribute to improving the production or distribution of products or promoting technical or economic progress.[34] In this context, although restrictive effects on competition may be present, the actions of producer organizations and interbranch organisations are recognized for their potential to provide superior economic benefits, necessary for achieving the objectives of the Common Agricultural Policy, as outlined in Article 39 TFEU.[35]

The activities for which Article 101, paragraph 1, TFEU does not apply can be carried out as long as the products of the members of the recognized organization are placed on the market. This can occur regardless of whether there is a transfer of ownership of the agricultural products from the producers to the producer organization and whether the negotiated price is the same for the aggregated production of all members or only some of them.[36]

To ensure effective use of the negotiation tools under Articles 209 and 210, as well as for simplification and reduction of administrative burdens, it is not necessary for organizations to request a prior decision from the Commission regarding the inapplicability of the competition rules stipulated in Article 101, paragraph 1, TFEU. However, upon request, the Commission can provide an opinion on the compatibility of these agreements, decisions, and practices with competition rules, reserving the right to modify its opinion in the future—either on its initiative or at the request of a Member State—if the necessary conditions for the inapplicability of competition rules are no longer met. According to Regulation (EU) No. 1308/2013, agreements, decisions, and practices that can cause market segmentation within the Union, harm the proper functioning of market organization, create competition distortions that are not necessary to achieve the objectives of the Common Agricultural Policy (CAP), or lead to the fixing of prices or quotas, are considered incompatible with Union regulations in any case.

---

[34] See J Malinauskaite, Competition Law and Sustainability: EU and National Perspectives, Journal of European Competition Law & Practice, 2022, 13, 5, 336–348.

[35] See R Inderst and S Thomas, 'Legal Design in Sustainable Antitrust' (2023) 19 Journal of Competition Law & Economics 4.

[36] See I Canfora, 'The «fair price» in agri-food chain', in AM Mancaleone and R Torino (eds), Agri-Food Market Regulation and Contractual Relationships in the Light of Directive (EU) 2019/633 (RomaTrE-press 2023).

ISSN 2281-5147

Article 210*bis*, introduced as part of the CMO reform by Regulation (EU) 2021/2117, complements the framework of rules on the application of competition law to agriculture. It specifically establishes the inapplicability of Article 101, paragraph 1, TFEU to sustainability standards within vertical and horizontal initiatives.[37] The objectives achievable through these sustainability standards—always stricter than those required by Union or national mandatory provisions—are outlined in Article 210bis, particularly in paragraph 3. The first objective concerns the overall sustainability of the agri-food system, which includes, for instance, mitigating and adapting to the effects of climate change, sustainable use of water and soil, landscape protection, transition to a circular economy, and the protection of biodiversity and ecosystems. The second objective addresses the production of agricultural products through practices that reduce pesticide use, manage the risks associated with their use, and limit the threat of antimicrobial resistance in agricultural production. The third and final objective pertains to the health and welfare of animals.

Similar to the provisions regarding the derogation regime applicable to enterprises discussed in the previous paragraph, Article 210bis does not require a prior decision from the European Commission concerning the admissibility of the sustainability standard. However, starting from December 8, 2023, producers can request the Commission's opinion on the compatibility of agreed-upon agreements, decisions, and practices. It is important to note that Article 210bis allows for intervention by the national competition authority, which can decide, in particular cases, that an initiative—whether horizontal or vertical in the agri-food supply chain—must be halted to prevent the exclusion of competition or compromise the objectives of the Common Agricultural Policy.

5. Concluding remarks.

The Common Market Organization (CMO) remains a key legal instrument within the framework of the European Union's Common Agricultural Policy (CAP). Over its extensive history, the CMO has evolved significantly from its initial focus on price

[37] See RP Baayen, *Sustainability agreements in agriculture: Horizontal and vertical agreements in agriculture for the benefit of nature, the environment, the climate, animal welfare and the earning capacity of farmers* (Wageningen Environmental Research, 2023, No. 3239).

ISSN 2281-5147

regulation to a comprehensive governance model addressing the entire agricultural market. This evolution has been characterized by efforts to unify and simplify the regulatory framework, particularly through the adoption of the single CMO regulation, culminating in the current Regulation (EU) No. 1308/2013 and its subsequent amendments, such as Regulation (EU) 2021/2117.

The strategic enhancement of agricultural producer organizations underscores the EU's commitment to fostering greater equity in the distribution of bargaining power and promote economic, social and environmental sustainability in the agricultural and foo. Producer organizations, as delineated in Article 152 of Regulation (EU) No. 1308/2013, are instrumental in this endeavor, with their roles extending beyond mere production planning to include environmental sustainability and innovation in agricultural practices. The regulatory framework emphasizes transparency, democratic control, and the facilitation of direct market engagements, which collectively aim to bolster the effectiveness and market presence of these organizations.

In addition to producer organizations, the recognition and role of interbranch organisations, as provided for under Article 157, are crucial. These organizations enhance market knowledge, foster innovation, and ensure the equitable functioning of the market through standard contracts and best practices. The focus on sustainability within the CMO framework is particularly notable, aligning with broader EU environmental objectives and promoting a circular economy.

The intersection of CMO regulations with competition law, particularly through Articles 209 and 210, introduces a nuanced approach to market regulation. These provisions allow recognized organizations to plan production and negotiate contracts, thus fostering greater economic benefits while ensuring adherence to CAP objectives. The introduction of Article 210bis further reinforces the commitment to sustainability by exempting certain vertical and horizontal initiatives from the stringent application of competition rules, provided they contribute to overarching sustainability goals.

The ongoing reforms and strategic initiatives within the CMO framework reflect a dynamic approach to agricultural market regulation in the EU. By continually adapting to emerging challenges and opportunities, the CMO plays a critical role in shaping a resilient, fair, and sustainable agri-food system. The focus on reducing administrative burdens, enhancing producer power, and promoting environmental sustainability

ISSN 2281-5147

ensures that the CMO remains a vital tool in achieving the objectives of the CAP and the broader goals of the European Union.

In conclusion, the CMO, through its evolving regulatory mechanisms and strategic initiatives, continues to provide a robust framework for the governance of the European agricultural market. The emphasis on producer empowerment, market transparency, and sustainability highlights the EU's commitment to creating a fair and resilient agricultural sector. As the CMO adapts to future challenges, it will undoubtedly remain a cornerstone of the CAP, ensuring the stability and sustainability of the European agricultural landscape.

ISSN 2281-5147

ISSN 2281-5147

ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION MECHANISMS: PRINCIPLES EMERGING FROM THE CJEU JURISPRUDENCE

Federica Casarosa*

Abstract

The digitalisation of justice is an ongoing process that characterises all EU Member States with different scopes and, most importantly, at a different pace. This process also extends to creating Alternative dispute resolution mechanisms that enhance citizens' access to justice (social network users, consumers, or business entities). ADRs are deemed a faster and cheaper process than judicial proceedings; they can adapt to the time and place constraints of the parties, allowing the possibility to meet or communicate in a diachronic manner. Although this seemed a solution that could easily enable citizens to exercise their rights, courts, particularly the Court of Justice of the EU, slowed down this process. The (few) cases decided by the CJEU show that the Court was initially sceptical in the use of alternative dispute resolution mechanisms to exercise EU-granted rights, and only through the repeated clarifications provided by the Member States in the arguments presented during the proceedings was able to change its approach. Still, the response of the CJEU was not simply accepting the member states' positions but instead providing them with a framework where the alternative dispute resolution mechanisms may ensure a fair trial and effective protection outside judicial proceedings. Thanks to this dialogue, we may identify a set of criteria that may guide policymakers' choices.

* Federica Casarosa is a Research Affiliate at the Scuola Superiore Sant'Anna and a part-time professor at the Centre for Judicial Cooperation, European University Institute, Florence (I); federica.casarosa@santannapisa.it.
This contribution is based on research carried out in the framework of the DG Justice-supported project 'e-Justice ODR scheme' (GA n. 101046468). Thanks to Evangelia Psychogiopoulou, Valentina Goulanova, Mariolina Eliantonio and the anonymous reviewers for suggestions and comments. The usual disclaimer applies.

ISSN 2281-5147

Indice Contributo

Keywords

CJEU - Fundamental Rights - Access to justice - Out-of-court dispute settlement - Fair trial

1. The ongoing process of digitalisation of the European justice system

Online interactions may not only bring increasing opportunities to connect with others, engage in public discourse and exploit more comprehensive commercial options, reaping the benefits of a digitalised social, cultural and professional life; at the same time, these interactions also include the risk of conflicts and disputes among the subjects involved.[1] Examples may range from disputes regarding the goods or services bought from an online marketplace (e.g. refunds for flights or accommodation, defective pieces of clothing, etc.) to disputes concerning the content posted on a social network (e.g. content disabled due to violation of the terms and

[1] See the statistics available on the European Online Dispute resolution platform, available at https://ec.europa.eu/consumers/odr/main/?event=main.statistics.show.

ISSN 2281-5147

conditions) or disputes related to data collected by AI-based software tools (e.g. unlawful collection of personal data for profiling activities).

In all these cases, users/citizens wanting to present a claim before a national authority or court and seek redress for the damage suffered will be based on different legislative acts. Until recently, online conflicts were bound to become in-person proceedings before national judges. However, this path is not an easy one. Starting a judicial proceeding means initiating a long journey, which may last for almost a year,[2] with increasing costs (primarily due to the cross-border nature of the dispute and the need for a legal representative). The proceeding, moreover, may not avoid the risk of lack of participation of the counterparty. Considering these challenges, it is more than understandable that, according to the most recent statistics regarding consumer disputes occurring in the online context, only 2,9% of consumers decide to pursue the judicial path whenever a problem regarding purchasing goods and services online occurs.[3]

Among the initiatives European legislator took to overcome such problems and enhance access to justice, the digitalisation of justice takes a prominent place. This digitalisation process was carried out by adopting several legislative acts to face the challenges of the available technology solutions and their possible coordination.[4] If the effort to modernise the European justice system was running at a reasonable pace until the 2020s, the process sped up as a result of the impact of the pandemics,[5] which

[2] According to the European Commission for the Efficiency of Justice (CEPEJ), the disposition time of civil and commercial litigious cases in the EU is, on average, 237 days. See https://public.tableau.com/app/profile/cepej/viz/EfficiencyEN/Efficiency.

[3] See the results of the 2022 Consumer conditions survey - standard survey, available at https://commission.europa.eu/document/download/0cdcc170-e877-4b3b-b4eb-404f47596896_en?filename=Consumer%20Conditions%20Survey%20-%20standard%20survey.xlsx. This perception is then confirmed by the statistics addressing business-to-business disputes, particularly regarding late payments, where the potential use of alternative dispute resolution vis-à-vis judicial proceedings is seen as a measure that could enhance the possibility of companies exercising their rights across all EU countries. See EU Payment Observatory, Enforcement measures combating late payments in commercial transactions - 2nd Thematic Report, March 2024, available at https://cdn.ceps.eu/wp-content/uploads/2024/04/Thematic-report-on-enforcement-measures_Final.pdf

[4] Elena Alina Onţanu, 'The Digitalisation of European Union Procedures: A New Impetus Following a Time of Prolonged Crisis' (2023) 5 Law, Technology and Humans 93.

[5] European Commission for the Efficiency of Justice (CEPEJ), "Lessons learnt and Challenges faced by the judiciary during and after the COVID-19 Pandemic", CEPEJ (2020)8rev, 2020, available at https://rm.coe.int/declaration-en/16809ea1e2; Marco Fabri, 'Will COVID-19 Accelerate

ISSN 2281-5147

- as a response to the limitations imposed to (in person) access to justice - required the digitalisation and dematerialisation of national judicial systems to guarantee access to justice also in a remote manner. The interventions of the EU focused on cross-border disputes, where the effects of the limitations and restrictions on the possibility of accessing court premises are even more evident.[6] Among the interventions aimed at improving access to justice[7] lies also the recent project to revise the overall online dispute resolution (ODR) mechanism package,[8] which includes the Directive on Consumer Alternative Dispute Resolution Mechanisms 2013/11 and the Consumer Online Dispute Resolution Regulation 524/2013.[9] This intervention should be read

Implementation of ICT in Courts?' (2021) 12 International Journal for Court Administration 2; 'Access to Justice and the COVID-19 Pandemic' (OECD 2020).

[6] Note that the Regulations on Service and Taking of Evidence Recast (Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence), OJ L 405, 2.12.2020, 1-39) and the e-CODEX Regulation (Regulation (EU) 2022/850 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters, OJ L 150, June 1, 2022, 1–19) were quickly adopted. In contrast, the proposal for a Regulation on the Digitalisation of Cross-Border Judicial Cooperation and review of the Electronic Identification and Services (eIDAS) Regulation (Proposal for a regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity, COM(2021)281) is ongoing.

[7] For a comprehensive analysis of the most recent developments, which are not always following a unified path, Onţanu (n 4). See also Xandra E Kramer, 'Digitising Access to Justice: The Next Steps in the Digitalisation of Judicial Cooperation in Europe' [2022] SSRN Electronic Journal <https://www.ssrn.com/abstract=4034962> accessed 25 August 2023.

[8] Proposal for a Directive amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, Brussels, 17.10.2023, COM(2023) 649 final and Proposal for a Regulation repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and Regulation (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform, Brussels, 17.10.2023 COM(2023) 647 final. On the critical issues emerging from the existing framework of consumer alternative dispute resolution, see European Commission, Report to the European Parliament, the Council and the European Economic And Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, Brussels, 17.10.2023 COM(2023) 648 final and EESC opinion on the Proposal for a regulation of the European Parliament and of the Council repealing Regulation (EU) No 524/2013 and amending Regulations (EU) 2017/2394 and (EU) 2018/1724 with regards to the discontinuation of the European ODR Platform, and the Proposal for a directive of the European Parliament and of the Council amending Directive 2013/11/EU on alternative dispute resolution for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, INT/1047.

[9] Regulation (EU) No 524/2013 on consumer Online Dispute Resolution, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0524.

ISSN 2281-5147

in the light of a wider strategy that sees alternative dispute resolution as one of the mechanisms to enhance access to justice, which includes the Digital Services Act,[10] the European Media Freedom Act,[11] the Data Act,[12] and the P2B Regulation.[13]

Before delving into the analysis, it is important to clarify the concept of alternative dispute resolution, which collects different types of procedures that provide means to resolve conflicts between two or more parties without a need to litigate the matter before a national (or supranational) court. In particular, one can distinguish between mediation,[14] negotiation,[15] adjudication or arbitration,[16] and conciliation. Depending on the type of mechanism selected, the result of the alternative dispute resolution mechanisms can be an agreement that has a binding or non-binding effect on the parties.[17] Moreover, the procedures may involve the assistance of a third party (such

[10] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102.
[11] Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ L, 2024/1083, 17.4.2024.
[12] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L, 2023/2854, 22.12.2023
[13] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57–79.
[14] On the standards applicable to mediation in different sectors see CEPEJ, *Recommendation Rec(98)1 on family mediation; Recommendation Rec(2002)10 on mediation in civil matters; Recommendation Rec(99)19 concerning mediation in penal matters*, <https://www.coe.int/en/web/cepej/cepej-work/mediation> accessed 29 April 2024.
[15] Negotiation is widely used in various fields, including not only divorce and parental disputes, but also legal proceedings, see H Raiffa, *The Art and Science of Negotiation* (Belknap Press 2002). It is interesting to note that the use of technology is also applicable in negotiations leading to two alternatives: fully automated negotiation or assisted negotiation.
[16] See M. Piers, C. Aschauer (eds) Arbitration in the Digital Age, Cambridge University Press, 2018.
[17] For instance, as regards mediation, the most recent reform of the judicial system in Italy (so-called Riforma Cartabia) supported the use of this ADR mechanism and set it as a condition on for the admissibility of judicial proceedings as regards a list of specific disputes. See the text of art. 5 Decreto Legislativo 4 marzo 2010, n. 28, recante attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Legislative Decree no. 28 of 4 March 2010 implementing Article 60 of Law no. 69 of 18 June 2009 on mediation in civil and commercial matters) as amended by Decreto Legislativo n. 149 del 10 Ottobre 2022, di attuazione della legge 26 novembre 2021, n. 206, recante delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di

ISSN 2281-5147

as a professional mediator, an arbitrator or a lawyer) or may based on fully or partially automated tools.[18] Although distinctions among the different mechanisms exist, the analysis of such differences is outside the scope of this article. Therefore, in the following, the terminology used will be the most encompassing one, namely alternative dispute resolution.

ADR mechanisms have been qualified as means to enhance access to justice: they are a faster and cheaper process than judicial proceedings, and they can adapt to the time and place constraints of the parties. Moreover, in the case of online dispute resolution, the parties have the possibility to meet online or to communicate in a diachronic manner. Although this seemed a solution that could easily enable (online) users to exercise their rights, courts, particularly the Court of Justice of the EU, slowed down this process. The (few) cases decided by the CJEU show that the Court was initially sceptical in the use of alternative dispute resolution mechanisms to exercise EU-granted rights, and only through the repeated clarifications provided by the Member States in the arguments presented during the proceedings was able to change its approach. Still, the response of the CJEU was not simply accepting the positions of the member states but instead providing them with a framework where the alternative dispute resolution mechanisms may ensure a fair trial and effective judicial protection outside judicial proceedings. Thanks to this dialogue, we may identify a set of criteria that may guide European policymakers' choices. However, it must be highlighted that a step forward in the analysis is still needed: the criteria identified emerge from cases that deal with 'offline' ADR with limited attention afforded by the CJEU regarding the safeguards that should be applicable to the online ADR. However, given that the number of legislations referring to alternative dispute resolution mechanisms is increasing, it is possible that new cases will soon reach the court, requiring a finetuning of the aforementioned criteria.

---

diritti delle persone e delle famiglie nonchè in materia di esecuzione forzata (Legislative Decree n. 149, of 10 October 2022, implementing Law N. 206 of 26 November 2021, delegating to the Government the efficiency of the civil process and the revision of the regulation of alternative dispute resolution instruments and urgent measures for the rationalisation of proceedings on personal and family rights and on enforcement). See G. Matteucci, Mediazione civile e commerciale in Italia dopo la Riforma Cartabia, Aracne 2024; A. M. Tedoldi, Le ADR nella riforma della giustizia civile, in Questione Giustizia, 2023, 1, 208.

[18] See also the *CEPEJ Glossary*, CEPEJ(2020)Rev1, 5, available at https://rm.coe.int/cepej-2019-5final-glossaire-en-version-10-decembre-as/1680993c4c.

ISSN 2281-5147

This contribution will proceed as follows: after a preliminary analysis of the role of alternative dispute resolution as a means to enhance access to justice will be provided (sect. 2), the study of the two strands of the CJEU case law on alternative dispute resolution will be presented. This core part will show the different approaches adopted by the court towards alternative dispute resolution and the responsiveness of the Court towards the arguments of the member states (sect. 3). Conclusions will follow.

2. Access to justice through alternative dispute resolution mechanisms

Access to justice, qualified as judicial protection of rights, has become the central pillar of the rule of law system since the 19th century.[19] From the perspective of the effective protection of rights, the concept encompasses both the right of defence and the right of action, considering the judicial path as the primary and indefectible form of protection of rights. Based on this right, the state must arrange for free and speedy access to the court, ensuring trial publicity and correcting mistakes.[20]

Many national Constitutions include the reference to access to justice for the protection of rights and legitimate interests.[21] Similarly, Art 6 and 13 of the European Convention of Human Rights (ECHR) provide, respectively, for the right to a fair trial and the right to an effective remedy, while Art. 47 of the European Charter of Fundamental Rights (EU Charter) provides for effective protection at the European level. According to the EU Charter, the right to effective protection requires fairness, transparency, reasonable length of the trial, independence, the judge's impartiality pre-

[19] Daniel Bonilla Maldonado, The Right to Access to Justice: Its Conceptual Architecture, in Ind J Global Legal Stud, n. 1, 2020, 15-33; Francesco Francioni (ed.), Access to justice as a human right (Oxford University Press 2007).

[20] Nicola Trocker, Costituzione e processo civile: dall'accesso al giudice all'effettività della tutela giurisdizionale, in Giust. proc. civ., n. 1, 2019, pp. 15-48.

[21] See art. 24 of the Italian Constitution, art. 18(2) of the Dutch Constitution, etc. See more in EVA STORSKRUBB and JACQUES ZILLER, 'Access to Justice in European Comparative Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) <https://doi.org/10.1093/acprof:oso/9780199233083.003.0006> accessed 7 November 2023.

ISSN 2281-5147

established by law and the guarantee of means for those who cannot afford a technical defence.[22]

The wording of the EU Charter and the ECHR explicitly refers to 'tribunal', thus adopting the view that access to legal protection shall be understood as access to courts, being them in the EU context, both the national and the European ones. In the latter case, legal actions can be brought before national courts according to national laws to enforce the rights granted by the EU law.[23] Applying the doctrine of direct effect and the primacy of EU law justifies this. These principles cannot be used if the rights granted by the EU legislator cannot be enforced with the substantive work of courts.[24]

Although the case law of the CJEU clarified that access to justice could not be interpreted as the ability to take legal action at every stage of the procedure,[25] the approach adopted by the EU Charter is the traditional one, where the administration of justice lies only in the hands of public courts. However, EU legislation and academic literature put forward a broader interpretation of access to justice, including methods to provide substantial law protection.[26] In this sense, access to justice is not

[22] See also Fundamental Rights Agency, 'Access to Justice in Europe: An Overview of Challenges and Opportunities', report, (2010), p. 14, available at fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf; Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing 2022) <http://www.bloomsburycollections.com/book/article-47-of-the-eu-charter-and-effective-judicial-protection-volume-1-the-court-of-justices-perspective> accessed 25 August 2023.

[23] This suggests that the concept of access to justice under EU law is narrow, formal, and pertaining to procedural rather than substantive rights of EU citizens to access courts. See Barbara Warwas, 'Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice in the EU' (Nomos Verlagsgesellschaft mbH & Co KG 2019) <https://www.nomos.elibrary.de/10.5771/9783748900351-325/access-to-privatized-consumer-justice-arbitration-adr-and-the-future-of-value-oriented-justice-in-the-eu?page=1> accessed 15 November 2023.

[24] Jagna Mucha, 'The Role of ADR in the Materialisation of Consumer Access to Justice', in Dan Wei, James P Nehf and Claudia Lima Marques (eds), *Innovation and the Transformation of Consumer Law: National and International Perspectives* (Springer Singapore 2020) <http://link.springer.com/10.1007/978-981-15-8948-5> accessed 4 October 2023.

[25] See Case C-69/10 Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration [2011] ECLI:EU:C:2011:524, para 56, where the court clarifies that it is sufficient that a court can review the final decision regarding EU claim.

[26] This wider interpretation is also used to justify the other developments of 'digital' justice, such as predictive justice systems. See Erik Longo, *Giustizia digitale e Costituzione* (FrancoAngeli 2023); Siddharth Peter de Souza and Maximilian Spohr, 'Introduction. Making Access to Justice Count:

ISSN 2281-5147

limited to the formal possibility of bringing an action before a judicial authority.[27] Still, in the procedural dimension, it expands to that set of rules and institutions of the process and the judicial system, making judicial protection not only activatable but also 'effective'.

To frame the role of online dispute resolution mechanisms to enhance access to justice, it is necessary to look back in time and look at the seminal works developed in the late 1970s by Mauro Cappelletti within the so-called Florence Project.[28] Within this research, Cappelletti acknowledged three waves aimed at enhancing access to justice for citizens that can be pursued outside the judicial proceedings, all included in the definition of "co-existential justice". The first wave referred to legal aid for people experiencing poverty, the second concerned enhancing public interest litigation, and the third encompassed the need to reform judicial systems, inviting more substance-oriented justice. In this last wave, Cappelletti's premise was that conflicts are more prone to 'receive' justice from alternative methods rather than within the traditional path before courts. In these cases, there is no need to define – and eventually sanction - who is wrong and who is right, thanks to the *jus dicere* of the judge, but rather a need to provide the means that allow the parties in conflict to find their own (self-determined, and thus creative) solution to the dispute. Therefore, the solution can 'mend' the relationship with a view to its continuation in the future.

Debating the Future of Law' in Siddharth Peter de Souza and Maximilian Spohr (eds), *Technology, Innovation and Access to Justice* (Edinburgh University Press 2021) <https://www.jstor.org/stable/10.3366/j.ctv1c29sj0.9> accessed 6 November 2023.

[27] For an analysis of the caselaw of the Italian Constitutional law on the role of ADR bodies, see Maria Grazia Rodomonte, Tutela giurisdizionale effettiva e indipendenza del giudice tra principi costituzionali e orientamenti della Corte costituzionale. L'esperienza dell'ordinamento italiano, in Mario Bertolissi, Marco Lamandini, Roberto Nania (eds), La tutela giurisdizionale effettiva dei diritti Sfide e prospettive in materia economico-finanziaria nell'ordinamento italiano, Franco Angeli, 2024, 43.

[28] Mauro Cappelletti, Bryant Garth, Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report, in Access to Justice, I, 1, 1 ss., 49 ss., 54 ss.; Mauro Cappelletti, Bryant Garth, Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective, in 27 Buffalo. L. Review (1978), 181; Mauro Cappelletti, Bryant Garth and Nicola Trocker, Access to Justice – Variations and Continuity of a World-Wide Movement, in Rabels Zeitschrift, 1982, 664; Mauro Cappelletti, Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement, in 56 Modern L. Review (1993), 282.

ISSN 2281-5147

This idea of 'mending justice'[29] cannot be applied as a general rule but rather in some specific disputes, such as family disputes involving minor children, neighbourhood disputes, and disputes between business partners whose primary interest is continuing the business relationship. In the abovementioned cases, the mending justice approach may be more effective due to the features that characterise the dispute: the litigation occurs as an episodic (albeit conflictual) interruption of the relationship between the parties rather than its fatal and definitive fracture. In these cases, the sword of the court's decision, which inevitably 'separates' the wrong from the right, cannot provide effective remedies. In contrast, the conflict would be overcome more effectively by creating a shared solution between the parties, allowing them to "co-exist" even in continuing the relationship.

However, such alternative solutions are not without risks, in particular when they are applied in the absence of certain conditions, such as the guarantee of a balance of power between the disputants, the independence and impartiality of the bodies that collaborate with the parties towards the agreement, as well as their competence.[30] Hence, there is a warning about the pitfalls underlying a critical translation of the mending and co-existential justice paradigm into the realm of any litigation. For instance, in the case of consumer disputes, the fact that there is a disproportion between the modest value of the dispute and the high costs of the process would lead to including such disputes into the ones that need *ad hoc* solutions;[31] however, the imbalance between the consumer and the professional requires careful consideration. In particular, if alternative dispute resolution mechanisms were to be used to resolve consumer disputes, special arrangements should be put in place aimed at balancing the substantial inequality between consumers and professionals (for example, providing support to the consumer regarding their rights by consumer associations); guaranteeing that procedures are carried out by qualified bodies, that comply with quality standards and transparency in funding mechanisms; ensuring the management

[29] Cappelletti (fn 28) 288.
[30] Cappelletti (fn 28) 287.
[31] In consumer litigation, the individual is in a new form of poverty, namely 'organisational poverty', as he/she is only a small fragment of the harm perpetrated by the professional on consumers. The consumer is isolated individual, and inevitably lacks sufficient motivation, knowledge, and power to initiate and pursue legal action against his - on the contrary - motivated, experienced, and powerful counterparty. Cappelletti (fn 28) 284.

ISSN 2281-5147

of procedures by experts consumer law and its mandatory rules.[32] Only if these conditions are complied with, and consumer litigation is solved through alternative dispute resolution can it ensure effective enforcement of consumer rights, avoiding the risk of providing second-class justice that would not consider the weaker position of the consumer.

The previous conditions can be generalised, and thus, it is possible to affirm that the requirements applicable to alternative dispute resolution mechanisms that safeguard the objective of co-existential justice, or the objectives of substantial judicial protection are the following:

- Sufficient information was provided to the right holders.
- Recognition of qualified dispute resolution providers.
- Defined procedures for the dispute resolution.
- Transparency of funding and absence of conflict of interests.
- Expertise in dispute resolution providers.

Although these elements are well-defined in the academic literature[33] and later included in the legislation adopted at the EU level, [34] the approach of the CJEU on the role of alternative dispute resolution mechanisms was initially less welcoming. This approach, however, has changed over time, thanks to the responsiveness of the CJEU towards the needs of the member states regarding the reforms applied to their justice system to introduce alternative dispute resolution mechanisms.

[32] Cappelletti (fn 28) 289. See also Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 Fla. St. U. L. Rev. 1 (1991).

[33] See also ELI-ENCJ Report On The Relationship Between Formal and Informal Justice: the Courts and Alternative Dispute Resolution, 2018, available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement_Final.pdf.

[34] For a detailed analysis of the steps leading to the adoption of the consumer ADR Directive, see Betül Kas, 'The Untapped Potential of a Structured Interaction between Courts and ADR for the Resolution of Consumer Disputes in the EU' in Xandra Kramer and others (eds), *Frontiers in Civil Justice* (Edward Elgar Publishing 2022) <https://www.elgaronline.com/view/book/9781802203820/book-part-9781802203820-8.xml> accessed 25 August 2023.

ISSN 2281-5147

3. CJEU jurisprudence on alternative dispute resolution

A few are the cases in which the CJEU decided on alternative dispute resolution mechanisms. However, they provide valuable insights into how the court has changed its approach to consider the member states' positions regarding the possibility of including mandatory alternative dispute resolution mechanisms. Moreover, the court provided a minimum set of requirements for such a mechanism to comply with the principle of effective judicial protection. The cases can be clustered into two groups: the cases *Fritsch, Chiari & Partner* case,[35] *Grossmann Air Service* case[36] the first one, and then the *Alassini* case,[37] which became famous as being the first occasion where the CJEU mentioned at that time, recently enforced EU Charter; the *Menini and Rampanelli* case,[38] and *Volksbank Romania* case in the second one.[39]

a. The first group of cases on out-of-court dispute resolution

The first occasion in which the CJEU addressed alternative dispute resolution mechanisms was in the case of Fritsch, Chiari & Partner, which addressed compliance with EU law with mandatory application to a conciliation commission for public procurement contracts. The preliminary ruling before the CJEU was presented by the Austrian *Bundesvergabeamt* (Federal Public Procurement Office) based on a claim by a group of companies regarding the award of a public service contract by an Austrian *Autobahnen- und Schnellstraßen-Finanzierungs-AG* (Asfinag) for which the companies had

[35] CJEU, Case C-410/01 Fritsch, Chiari & Partner, Ziviltechniker GmbH and Others v. Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag) [2003] ECLI:EU:C:2003:362.
[36] CJEU, Case C-230/02 Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich, [2004] ECLI:EU:C:2004:93.
[37] CJEU, Judgement of the Court (Fourth Chamber) of 18 March 2010, Rosalba Alassini v. Telecom Italia SpA and alii, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, ECLI:EU:C:2010:146.
[38] CJEU, Judegment of the Court (First Chamber) of 14 June 2017, Livio Menini and Maria Antonia Rampanelli v. Banco Popolare Società Cooperativa, Case C–75/16, ECLI:EU:C:2017:457.
[39] CJEU, Judgement of the Court (Fourth Chamber), 12 July 2012, SC Volksbank România SA v Autoritatea Naţională pentru Protecţia Consumatorilor — Comisariatul Judeţean pentru Protecţia Consumatorilor Călăraşi (CJPC), Case C-602/10, ECLI:EU:C:2012:443.

ISSN 2281-5147

tendered. According to the Austrian implementation of Directive 89/665 on the application of review procedures to the award of public supply and public works contracts, the review procedure involved a preliminary conciliation phase aimed at reconciling '*any differences of opinion between the awarding body and one or more candidates or tenderers*'.[40] The newly created Bundes-Vergabekontrollkommission (Federal Public Procurement Review Commission, hereinafter B-VKK) was the body in charge of such a conciliation phase. Although participation in the conciliation phase is not mandatory, any claim related to the application of federal law or its implementing regulations can only be carried out before the contract is awarded. After the award of the contract, any claim should be presented before the Bundesvergebeamt, which will have the power to adopt interim measures and, if required, set aside the unlawful decisions of the contracting authority.[41]

In the case presented before the CJEU, the claimants, Fritsch, Chiari & Partner, submitted a claim regarding the illegality of the tendering procedure before the Bundesvergebeamt. However, Asfinag argued against the admissibility of the claim, affirming that such a claim would have to be presented during the conciliation phase before the B-VKK.[42] The Bundesvergebeamt then suspended the proceeding and requested the CJEU a preliminary ruling, asking in particular if the review procedure could proceed even if the undertaking did not use the conciliation phase to prevent the contract from being awarded. The CJEU based its argument on the objectives of Directive 89/665, which provides effective and swift review procedures for disputes emerging in public procurement.[43] Article 1(3) provides that "Member States shall ensure that the review procedures are available"; thus, it was a choice of the national legislator to implement the directive through the procedure involving a conciliation phase and then a judicial proceeding before the Bundesvergebeamt. According to the Court, the Austrian implementation was contrary to the principles enshrined in Directive 89/665, as the conciliation phase contrasted with the objectives of effectiveness and speed: the fact that a prior application before the conciliation commission was a condition for the subsequent participation in the review procedure

[40] Para 109 of *Bundesgesetz über die Vergabe von Aufträgen* (Bundesvergabegesetz) - Federal Public Procurement Law, 1997, BGBl. I, 1997/56 (hereinafter BVergG).
[41] Para 113 BVergG.
[42] See CJEU, Fritsch, Chiari & Partner (fn 35) paras 15-16.
[43] See CJEU, Fritsch, Chiari & Partner (fn 35) para 30.

ISSN 2281-5147

would only delay the introduction of the latter. Additionally, the Court stated that the conciliation commission does not have the powers the EU law requires to be granted by the Member States to the bodies responsible for carrying out the judicial review procedures, hampering the effective application of the relevant EU law. As a result, the Court affirmed that national legislation could not deprive those undertakings that failed to apply to the conciliation commission of the possibility of accessing the review procedure in advance.[44]

It must be highlighted that, in its analysis, the Court disregarded the arguments of the Austrian and French governments (as well as the Commission)[45] which compared the case with the Court's previous decisions in *Universale Bau*.[46] The latter case addressed the inclusion of limitation periods for bringing proceedings before the authority in charge of administrative review. According to the AG's Opinion,[47] sharing the positions of the member states, the effectiveness of the Directive was not undermined by a national procedure that "*requires a tenderer to take all steps reasonably available to it to prevent the contract from being awarded to another tenderer*", even if it also included a conciliation phase. On the contrary, the Court interpreted the effectiveness in light of the speediness of the procedure, and thus, any additional step was deemed as hampering the effective review.

Similarly, in the Grossmann Air Service case, the Bundesvergebeamt presented a new preliminary ruling addressing the position of an undertaking that did not participate in a tender or present any claim before the B-VKK during the conciliation phase.[48] The Court re-affirmed the principle already defined in Fritsch, Chiari & Partner, clarifying that access to the review procedures should not be made subject to prior referral to a conciliation committee such as the B-VKK because the national legislation would be contrary to the objectives of speed and effectiveness of the underlying directive.

---

[44] See CJEU, Fritsch, Chiari & Partner (fn 35) para 35.
[45] See the reference to the arguments in the Opinion of Mr Advocate General Mischo delivered on 25 February 2003, Fritsch, Chiari & Partner, ECLI:EU:C:2003:104, paras 43-45.
[46] CJEU, Judgment of the Court (Sixth Chamber), of 12 December 2002, Universale-Bau AG, Bietergemeinschaft v Entsorgungsbetriebe Simmering GmbH, ECLI:EU:C:2002:746
[47] AG Opinion, Fritsch, Chiari & Partner (fn 45), paras 40-41.
[48] It must be clarified that in this case, a first tender procedure was initiated and then discontinued. The undertaking provided its bid in this first tender. Then, the tender procedure was represented with a narrower focus. In this second procedure the undertaking did not present its bid.

ISSN 2281-5147

The evaluation of the Court in the previous cases shows that the conciliation procedures, as forms of alternative dispute resolution mechanisms, were, in principle, considered an unnecessary step in the review procedure. The Court viewed them as a prolongment of the duration of the overall system without the possibility of providing an effective remedy to the parties to overcome potential conflicts. In this case, only a different authority, such as in the case at stake, the Bundesvergebeamt, was seen by the Court as having the (sanctioning) powers granting effective remedies.

A different approach was adopted a few years later when the second group of cases started. The shift was triggered by a different approach towards alternative dispute resolution mechanisms adopted at the national level. In particular, the Court acknowledged that the introduction of ADR mechanisms was aimed at enhancing the speed and limiting the costs of dispute resolution for the parties and enhancing the effectiveness of the administration of the justice system. [49]

b. The second group of cases on out-of-court dispute resolution

As a preliminary observation, it must be highlighted that this second strand of cases addresses different types of national disputes involving consumers as one of the parties. The European Commission acknowledged the opportunity to use alternative dispute resolution to settle disputes in this area. Already in 1993, the Green Paper on Consumer Access to Justice in the Internal Market[50] noted the increasing presence of consumer ADR, and this triggered the intervention of the Commission Action Plan on "Consumer access to justice and the settlement of consumer disputes in the

[49] See for instance the position of the Italian government, as referred in the Opinion of Advocate General Kokott delivered on 19 November 2009, Rosalba Alassini et al., ECLI:EU:C:2009:720, Para 45.

[50] Commission's Green Paper, 16 November 1993, on access of consumers to justice and the settlement of consumer disputes in the single market – COM(93) 576 Final, p. 76.

ISSN 2281-5147

internal market".[51] If the Action Plan was the starting point for the analysis of the challenges of cross-border consumer disputes to be solved in an alternative forum vis-à-vis courts, the subsequent Commission Recommendation on the out-of-court settlement of consumer disputes[52] could be defined as a reply to the different types of ADR already available on the market, laying down the principles that should apply to the settlement of consumer disputes. These measures show that the policy framework already acknowledged the use of out-of-court procedures for resolving consumer disputes as an effective technique to achieve the consumer protection objective, which may be equivalent to judicial enforcement. [53] Although no mention of this overall framework is included in the arguments of the CJEU in the cases that will be analysed below, it is presumable that the European approach towards alternative dispute resolution has affected the choices of the Court.

The first case that showed a different approach by the CJEU was the decision in the Joined case, Alassini et al. The Joined cases, named after the first claimant, are all based on the application of the Italian implementation of the Directive 2002/22 on Universal Services and users' rights relating to electronic communications networks and services (Universal Service Directive), namely Legislative Decree n. 259/2003.[54] The latter, in article 84, included a pre-judicial mandatory out-of-court settlement procedure in litigation concerning electronic communications. The cases were resolved around the complaints lodged by consumers against different telecommunication service providers that failed to comply with the pre-trial out-of-court settlement procedure, which Italian law set as mandatory conditions to bring a complaint to court. The Italian courts presented a set of similar preliminary rulings on the compliance of compulsory such alternative procedure with the rights granted to consumers under the Universal Service Directive, and especially with Article 34 of

[51] Communication by the Commission on 14 February 1996, COM(96) 13 Final, "Action plan on consumer access to justice and the settlement of consumer disputes in the internal market".
[52] Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, COM(1998) 198 Final, <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=1998&nu_doc=198>.
[53] See for an analysis of the telecom sector, Marta Cantero Gamito, 'Dispute Resolution in Telecommunications: A Commitment to Out-of-Court' (2017) 25 European Review of Private Law 387.
[54] Legislative Decree no. 259 of 1 August 2003, relating to the Electronic Communications Code (GURI no. 214 of 15 September 2003, p. 3).

ISSN 2281-5147

that Directive, under which Member States "*shall ensure that transparent, simple and inexpensive out-of-court procedures are available for dealing with unresolved disputes, involving consumers, relating to issues covered by this Directive […] without prejudice to national court procedures*."

The CJEU solved the dispute, assessing whether the mandatory alternative procedure complies with the principle of effectiveness and the right to an effective remedy enshrined in Art. 47 EU Charter.[55] A first point the Court addressed was that the Universal Service Directive was not deemed to be construed as explicitly prohibiting a pre-judicial mandatory settlement procedure.[56] Then, the court assessed the dimensions of effectiveness because the mandatory alternative procedure may hamper the substantive rights granted to consumers by the Universal Service Directive. Although the principle of procedural autonomy grants member states the possibility to define the procedural rules that govern the actions that safeguard the EU-granted rights, this autonomy must be exercised respecting the principles of equality and effectiveness. Thus, any procedural rule should not "*make it in practice impossible or excessively difficult to exercise the rights which individuals derive from the directive*". To test whether this is the case, the CJEU further stated six specific criteria:

- the procedure shall not result in a decision which is binding on the parties;
- the procedure shall not cause a substantial delay in bringing legal proceedings;
- the procedure shall suspend the period for the time-barring of claims;
- the procedure shall not give rise to significant costs for the parties;
- the procedure shall not be accessible only by electronic means and
- the mandatory requirement shall not prevent the grant of interim measures in exceptional cases where the urgency of the situation requires.

The CJEU then continues its reasoning, also addressing the compliance with Art. 47 EU Charter, as the mandatory alternative procedure, would potentially hinder

[55] Angiolini Chiara, Iamiceli Paola, "Access to justice and effective and proportionate Alternative Dispute Resolution (ADR) mechanisms", in Paola Iamiceli, Fabrizio Cafaggi and Mireia Artigot i Golobardes (Ed.), Effective Consumer Protection and Fundamental Rights, Fundamental Rights in Courts and Regulations (Fricore)-Scuola Superiore della Magistratura, Rome, 2022, p. 283 ff.
[56] See CJEU, Alassini et al. (fn 37) par. 42.

ISSN 2281-5147

consumers' access to judicial redress. The starting point of the CJEU is the fact that fundamental rights shall not be construed as unfettered prerogatives and may be restricted; however, such restrictions may only be considered lawful when they pursue objectives of general interest through proportional means and without excessively impairing the substance of the rights guaranteed.[57] According to these conditions, the imposition of a mandatory alternative procedure for dispute settlement is not contrary to Art. 47 EU Charter, as it pursued the general and legitimate objectives of offering a quicker and less expensive method for settling disputes and reducing the burden on the court system. Moreover, the alternative option of providing a merely optional procedure would not be as efficient. Implicitly, the Court interpreted art. 47 EU Charter in a wider sense, giving space for a broad notion of effective access to justice that may encompass access not only to a court but also to ADR.[58] However, such legitimacy is conditional on compliance with the principle of effectiveness.

It is essential to highlight that, in this case, the national government defended its choice with detailed arguments. The Court considered the position of the Italian government regarding the justification for adopting the national rule regarding the out-of-court dispute resolution procedure. The Italian Government pointed out that the mandatory requirement aims to achieve quicker and less expensive resolution of disputes, which could consequently reduce "*the burden on the court system as a whole and thus enhances the effectiveness of the administration of justice by the State*".[59] This was also confirmed in the AG's opinion, which acknowledged that the infringement of the right to judicial protection represented by the requirement to attempt out-of-court dispute resolution must be regarded as minor so that the advantages of that procedure far outweigh any possible disadvantages.[60]

The following case is the Menini and Rampanelli case, where the preliminary ruling revolved around the national implementation of the ADR Directive in Italy and, in particular, the mandatory pre-judicial out-of-court settlement procedure in some civil and commercial matters, including (as relevant for consumer litigation): tort liability

[57] See CJEU, Alassini (fn 37) par. 63.
[58] Kas (n 34).
[59] CJEU, Alassini (fn 37) para 64.
[60] AG Opinion, Alassini (fn 49) para 48.

ISSN 2281-5147

in healthcare, insurance, banking and financial contracts.[61] The validity of the mandatory ADR procedures was questioned by the national court when addressing a credit agreement-related dispute: the judge was asked to decide on the opposition to an enforceable payment order, but being one of the parties, a consumer, a mandatory pre-judicial ADR procedure should have been completed to access the judicial proceeding. On this point, however, the doubt raised by the judge concerned the possibility of imposing such mandatory procedure as an admissibility condition to legal proceedings.

The CJUE solved the case following the arguments already stated in Alassini. First, the court interpreted the terminology used in Art. 1 ADR Directive, saying that "*on a voluntary basis*" should be framed in light of the context and the objectives pursued. Moreover, the same article allows for mandatory procedures regarding the parties' right to access judicial proceedings to be maintained.[62] As a supporting argument, the court affirmed that this interpretation did not contradict the provisions of Directive 2008/52 on mediation, which in Art. 3(a) affirms that national legislation may use compulsory mediation only as "*such legislation does not prevent the parties from exercising their right of access to the judicial system*".[63] The Court then compared the national legislation with the criteria set out in Alassini. It affirmed that the additional step before accessing the court imposed by the participation in the mandatory ADR proceeding is not in principle in contrast with the principle of effective judicial protection if it is based on "*objectives of general interest pursued by the measure in question*" and the measure itself is proportionate with the objective. In the specific case, the mandatory ADR procedure can be compatible with effective judicial protection if it does not result in a binding decision, does not cause substantial delay for bringing judicial proceedings, does not

[61] See art. 5 of Decreto Legislativo 4 marzo 2010, n. 28, recante attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali (Legislative Decree no. 28 of 4 March 2010 implementing Article 60 of Law no. 69 of 18 June 2009 on mediation in civil and commercial matters).

[62] See CJEU, Menini and Rampanelli (fn 38) par. 48. It should be noted that the AG Opinion, frame the same issue considering directly art. 47 EU Charter, affirming that in the field of consumer law the procedural autonomy of the member states is constrained by respect of the right to an effective remedy and to a fair trial guaranteed by Art. 47 EU Charter, and he suggested that compliance of a mandatory pre-judicial procedure with such provision should be verified by taking into consideration the six tests stated in the Alassini case. See AG Opinion Saugmandsgaard Øe, Case C-75/16, Menini and Rampanelli v Banco Popolare, 16 February 2017, ECLI:EU:C:2017:132, par. 82.

[63] See CJEU, Menini and Rampanelli (fn 38) par. 49.

ISSN 2281-5147

give rise to costs for the parties, it is available both in online and offline context, and it suspends the period for the time-barring of claims.[64] Then, it is up to the national court to verify the application of such conditions to the national legislation.

The last case to be considered is the Volksbank Romania case, which addressed the interpretation of Directive 2008/48 on consumer credit directive, in particular Art. 24 affirming that Member States shall ensure that adequate and effective out-of-court dispute resolution procedures for the settlement of consumer disputes concerning credit agreements are put in place. The national judge presented a preliminary ruling regarding compliance with EU law and national legislation implementing the directive into the Romanian legal system, namely OUG 50/2010.[65] According to the legislation, the consumer was able to present a direct recourse to the National Consumer Protection Authority (District Commissariat for Consumer Protection of Călăraşi, ANPC), being the latter empowered to impose penalties on credit institutions for infringements of the national regulation. However, such an option was available to the consumer without the need to pursue an out-of-court resolution procedure.[66]

The CJEU affirmed that the out-of-court dispute resolution procedures, according to Art. 24 Directive 2008/48, should be adequate and effective. However, no additional guidelines regarding these procedures are given in the Directive, leaving the Member States free to decide the details. This leeway extends also to a choice between voluntary or mandatory procedures as long as they remain effective.[67] The court recalled again the decision in the Alassini case and acknowledged that a mandatory pre-judicial dispute resolution procedure could strengthen the effectiveness of Directive 2008/48; however, the discretion left to Member states by Art. 24 still does not preclude the adoption of a rule that opens an additional option before consumer protection bodies. Such an option does not reduce the out-of-court proceedings' adequacy and effectiveness; instead, it is justified by the fact that "*consumers, who are as*

[64] See CJEU, Menini and Rampanelli (fn 38) par. 61.
[65] Government Emergency Order (Ordonanţă de Urgenţă a Guvernului) 50/2010, *Monitorul Oficial al României,* Part I, No 389 of 11 June 2010.
[66] Note that art. 85(2) OUG 50/2010 provided that : "*In order to settle any disputes amicably and without prejudice to the right of consumers to bring proceedings against creditors and credit intermediaries who have infringed the provisions of this emergency order and to their right to have recourse to the [ANPC], consumers may use the out-of-court complaints and compensation procedure for consumers, in accordance with the provisions of Law 192/2006 on mediation and the organisation of the profession of mediator, as amended and supplemented*".
[67] See CJEU, Volksbank Romania (fn 39) par. 95.

ISSN 2281-5147

a general rule in an inferior position to creditors so far as concerns both bargaining power and level of knowledge, will be unaware of their rights or encounter difficulties in exercising them".[68]

4. Conclusion

Access to justice is one of the fundamental rights that has always been on research and policy agenda, but the challenges that may hamper its exercise by citizens are never solved once and for all. The ever-present issues related to costs and delays of judicial proceedings are now coupled with the challenges (and opportunities) emerging from using technological innovations to deliver justice. This led to an ongoing revision and refinement of the justice system at national and supranational levels. At the European level, the legislation addressing these challenges has triggered the adoption of several legislative documents related to the improvements of features and elements regarding judicial proceedings and more detailed and efficient rules regarding alternative dispute resolution mechanisms.

It must be acknowledged that access to justice is framed in the ECHR and the EU Charter as access to a court. This fundamental right encompasses elements ranging from fair trial guarantees to independence and impartiality of the judge to the right to be heard, to the right to be advised, defended and represented, and equality of arms.[69] However, access to court also includes very practical issues, such as the easiness of finding the court premises and specific offices or courtrooms, the availability of information on opening hours, the presence of physical and language barriers, the attention of the personnel to the court users' needs, and availability of procedural forms that need to be filled with the court.[70] Yet, this interpretation should be extended to adapt the justice system to the needs of informal, accessible, fast, and cost-effective procedures: effective access to justice is not limited to the existence of

[68] See CJEU, Volksbank Romania (fn 439) par. 98.

[69] For a detailed analysis of the CJEU jurisprudence on art. 47 EU Charter on the right to an effective remedy see ACTIONES project, Handbook on the Techniques of Judicial Interactions in the application of the EU Charter, Module 3 – The Right of an effective remedy, 2017, <https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.c-Module-3.pdf> accessed 30 November 2023.

[70] Marco Velicogna, 'Electronic Access to Justice: From Theory to Practice and Back' [2011] Droit et cultures. Revue internationale interdisciplinaire <https://journals.openedition.org/droitcultures/2447> accessed 29 November 2023.

ISSN 2281-5147

a competent court and a formal entitlement to instituting proceedings. It also relates to the possibility of the parties claiming their rights in court and receiving a fair and good-quality decision within a reasonable time and cost. In this sense, the ADR mechanisms have proven to be a viable option to avoid some issues emerging from judicial proceedings. This does not imply that the ADRs are problem-free: academic literature has on several occasions criticised ADRs as second-class justice or providing opportunities for 'justice behind closed doors'.[71] Still, the ADR can achieve a 'co-existential justice' that aims to reach a solution that may ensure effective enforcement of rights.

The first set of criteria that should apply to ADR is found in the CJEU case law. Although the Court has rarely addressed the issue of ADR, a few cases show a definite change of approach toward these mechanisms triggered by the Court's responsiveness towards the needs of the Member States. If, in the case of *Fritsch, Chiari & Partner* and *Grossmann Air Service,* the Court denied any added value to conciliation being able to hamper the swift and effective application of EU law, in *Alassini* case, the Court considered and supported the positions of the Member States as regards the possibility to include mandatory alternative dispute resolution mechanisms. Although the Court does not delve into the specific rules regarding the relationship between the ADR mechanisms and the subsequent judicial proceeding, it acknowledged that such a relationship may not, in principle, hamper the application of the principle of access to justice, enshrined in Article 47 of the EU Charter.[72] In particular, the Court justified this different approach on the fact that the introduction of ADR mechanisms at the

[71] See Horst Eidenmüller, Engel M (2014) Against false settlement: designing efficient consumer rights enforcement systems in Europe. Ohio St J Disp Resol 29:261 – 297; Gerhard Wagner, 'Private Law Enforcement through ADR: Wonder Drug or Snake Oil?' (2014) 51 Common Market Law Review 165; Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—An Assessment of the Incentivizing Effects of the ADR Directive' (2015) 38 Journal of Consumer Policy 265; Joasia Luzak, 'The New ADR Directive: Designed to Fail? A Short But Hole-Ridden Stairway to Consumer Justice' [2015] SSRN Electronic Journal <http://www.ssrn.com/abstract=2685655> accessed 25 August 2023; Pietro Sirena, Tutela dei diritti fondamentali e sistemi di risoluzione alternativa delle controversie, Rivista di Diritti Comparati, 2022, 1, 95.

[72] For instance, the Court does not address the problems that may emerge when the ADR is a condition to the admissibility of the subsequent judicial proceeding, such as in the Italian legal system. In this case, it is possible that the ADR procedure does not exactly converge with the judicial claim presented to the court. Thus, it will be the task of the judge to verify that the procedure has been correctly carried out, but without the possibility to rely on the traditional objective elements of the *res in iudicium deducta*. See on this point, Tedoldi, (fn 17).

ISSN 2281-5147

national level was aimed at enhancing the speed and limiting the costs of dispute resolution for the parties, as well as at improving the effectiveness of the administration of the justice systems. However, the Court identified six general criteria to assess the compliance of the ADR with the principle of access to justice. Such a test was then used in the subsequent decisions of the Court, showing that it applies to any ADR mechanism regardless of its qualification at the national level.

When looking at the potential adaptation of the principles defined by the CJEU to online disputes, it is interesting to note that the Court includes this option, affirming that different means should be available for the parties. This is relevant as the Court recognised that the exercise of rights (conferred in the case by the Universal Service Directive) might be rendered impossible or excessively difficult for individuals without access to the Internet if the settlement procedure could be accessed only by electronic means.[73] However, the Court does not require any additional aspects regarding the accessibility of the online procedure for consumers, as the mere availability of the offline option may have been supported by other requirements, taking into account the different levels of vulnerability that users may have.[74] Given the push towards an increasing role of ADR in several areas, and predominantly in resolving disputes on online platforms, it is probable that cases will emerge regarding a more detailed analysis of the criteria applicable to how ADR should be framed in the online context.

[73] See CJEU, Alassini (fn 37) para 58.

[74] For an analysis of the concept of average consumer vs vulnerable one, see Hanna Schebesta and Kai Purnhagen, 'Island or Ocean: Empirical Evidence on the Average Consumer Concept in the UCPD' (2020) 28 European Review of Private Law 293. For an evaluation of the additional effort to be adopted by online dispute resolution providers as regards vulnerable consumers and users, see Federica Casarosa, 'Access to (Digital) Justice: Is There a Place for Vulnerable People in Online Dispute Resolution Mechanisms?', (2024) EuCML 126.

ISSN 2281-5147

ISSN 2281-5147

REGULATING CRAs' CIVIL LIABILITY: A COMMON LAW VS CIVIL LAW COMPARISON

Lorenzo Sasso*

Abstract

The article focuses on the civil liability of credit rating agencies (CRAs) in a comparative way. It starts from the historical evolution of CRAs as international standard setters to justify an economic rationale for their liability regime. It discusses the statutory law introduced in the US and the EU for CRA's civil liability and analyses the approaches of common law and civil law to private enforcement. The analysis shows that common law countries are better equipped to tackle global market challenges since the judicial reforms of certain common law courts have been more effective than statutory rules implemented in many civil law countries. For an effective private enforcement, the EU countries must harmonise national legal traditions of private law and procedural law tools. Such a result can be achieved not much through statutory intervention but especially through developing new interpretative tools that might best assist the civil law courts.

Indice Contributo

* Professor of International Commercial Law, MGIMO (Moscow State Institute of International Relations), Adjunct professor of International Business, UNIBO (University of Bologna), e-mails: l.sasso@odin.mgimo.ru, lorenzo.sasso3@unibo.it.

ISSN 2281-5147

Keywords

CRA civil liability – Tort – Aquilian liability – Causation– Proximity – Fraud-on-the-market presumption

1. Introduction

Globalization has eroded the sovereignty of States by promoting the diffusion of authority away from States to markets, firms, local and supranational bodies, and sometimes to no authority at all. This process has been so robust that States have had no choice but to conform to market pressures. As Susan Strange – an eminent scholar of global political economy – pointed out in her work,[1] some of the most revolutionary effects of globalization on institutional changes coincide with the new

[1] S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press, 1996, p. 4.

ISSN 2281-5147

role of the State and the law. Concerning the former, we have witnessed a shift in productive activities and service management from public administration to private organisms. Regarding the latter, there has been an actual genetic alteration of the law. The actors and the modalities of the production and functioning of the legal rules have changed. A wide variety of actors, and not only States, nowadays express the law. Non-state actors are an integral part of global governance. Their involvement does not only include the possibility to influence States but also to fulfill real governance profiles, replacing the States and their delegated authorities.[2]

This is the case, for instance, of Credit Rating Agencies (CRAs) – *private* rating agencies playing a decisive role in ordering *public* financial markets worldwide.[3] CRAs evaluate the credit risks and profiles of entities and financial instruments issued by them. The assessment of these securities may require specific knowledge and be highly time-consuming, making it attractive for institutional and non-institutional investors to rely on the ratings by CRAs. The qualified financial opinions issued by CRAs through their ratings indirectly promote specific organizational procedures. By establishing a shared understanding of what constitutes creditworthiness, CRAs generate standards, and their activity is that of international standard-setters for global financial markets similar to, for instance, OECD recommendations (on best practices) for corporate governance. Being *de facto* international standard-setters for global financial markets has granted them a mode of governance that, on one side, could be socially useful to harmonize the praxis and uses of the markets effectively; on the other side, it has been criticized by several scholars because considered sometimes as socially unequal. Their standards mainly benefit (and result from) the politics and regulatory needs of the world's largest financial centers, which are the places where these companies have their publicly-registered headquarters. Therefore, their ratings

[2] Y. Dezalay and B. *Garth, Merchants of law as moral entrepreneurs: constructing international justice from the competition for transnational business disputes*, in 29 *Law & Society Review*, 1995, pp. 27-64.

[3] See S.L. Schwarcz, *Private ordering of public markets: the rating agency paradox*, in 1 *U. Ill. L. Rev.,* 2002, pp. 12-26, where the author inquires whether market forces sufficiently restrain rating agencies or whether public sector regulation is warranted. See also S.L. Schwarcz, *Private ordering*, in 97 *Nw. UL Rev.,* 2002, pp. 319-349, at 344-347; J.R. Macey, *Public and private ordering and the production of legitimate and illegitimate legal rules,* 82 *Cornell L. Rev.,* 1996-97, pp. 1123-1149, at 1140-1147.

ISSN 2281-5147

could unfairly penalize countries sharing different societal setups and stages of economic development.[4]

Empirical research showed that a different perception of the same credit risk existed from one rating agency to another, resulting in a difference between the ratings issued by the American agencies Moody's and S&P and the more "Europe-oriented" Fitch. According to the study, the latter rated Eurozone crisis countries on average between 0.25 and 0.59 rating notches more favourably than the former.[5] At the same time, while CRAs have been chiefly criticized for not having acted at the right time in the last financial crisis, sometimes criticisms were voiced for having acted at the most inconvenient time, spreading undue panic. National governments raising finance in global financial markets can be severely affected by the rating of CRAs.[6] In such cases, the main problem remains to what extent the private ordering of CRAs should undercut democratic authority.[7]

After the last financial crisis of 2008, there have been an overhaul of the regulation concerning CRAs worldwide. For the first time, the States have begun to elaborate an accountability model to adopt for CRAs. To catch up with the US counterparty, the EU legislator introduced a public and a private legal regime for CRAs to improve the regulatory governance of the financial markets. Accordingly, in the EU, financial authorities of regulated markets have been empowered with higher supervisory

[4] D. Kerwer, *Holding global regulators accountable: the case of credit rating agencies*, 18 *Governance*, 2005, pp. 453-475.

[5] However, the study also found out that Fitch's ratings had no significant impact on investors' behaviour, which instead followed the ratings of Moody's and S&P. See the Halle Institute for the Economic Research (IWH), Worse ratings by U.S. rating agencies for European sovereigns no argument for European rating agency, press release (4 January 2017), available at https://www.iwh-halle.de/en/press/press-releases/detail/worse-ratings-by-us-rating-agencies-for-european-sovereigns-no-argument-for-european-rating-agency-1 (accessed 17 December 2024).

[6] In the summer of 2011, S&P declared that it would classify any planned or voluntary restructuring of the Greek debt as default. The European leaders were re-negotiating a second rescue package for Greece, which was more expensive. See Council on Foreign Relations, The credit rating controversy (19 February 2015), https://www.cfr.org/backgrounder/credit-rating-controversy (accessed 17 December 2024). In July 2011, Mr Wolfgang Schäuble and Mr Jose Manuel Barroso claimed an anti-Europe bias following the downgrading of Moody's, S&P, and Fitch at the expense of several countries in Europe. See *The EU and credit rating agencies: poor standards?* in *The Economist*, 20 December 2013; *Europe threatens 'mad' rating agencies*, in *The Independent*, 6 July 2011.

[7] S.L. Schwarcz, *Private ordering of public markets*, before (n 3), p. 319; M. Bussani, *Credit Rating Agencies' Accountability: Short Notes on a Global Issue*, 10(1) *Global Jurist,* August 2010, pp. 1-20.

ISSN 2281-5147

powers and specific powers of public enforcement, which have been granted to them due to their direct day-to-day supervision. In addition, a civil liability regime has been introduced as a form of *ex-post* private enforcement. The private enforcement provides investors and issuers with a standalone cause of action for losses suffered due to a CRA's reckless behaviour.[8]

This article draws some considerations on the civil liability regime implemented in the US and EU, with a special focus on the different approaches taken by the States reflecting respectively a tradition of common law and civil law. The various reforms that have concerned CRAs in Europe have mainly remained ineffective due to the lack of harmonization of private law within the EU and the persistence of the different national legal traditions. This problem causes at the EU Member States level the existence of a mosaic of private enforcement mechanisms throughout the EU. While the harmonization of private enforcement is undoubtedly a political issue, the article shows that common law jurisdictions are better equipped to discipline global standard setters as CRAs when they cause investment loss to third parties for reckless or fraudulent behaviour. As evidenced by the case law analysed in the article, the different scaled-back *roles* of judges in civil law jurisdictions compared to that of common law has a more substantial impact on private enforcement efficacy.

The article continues as follows: section (2) is dedicated to the historical evolution of CRAs and their ascent as international standard setters for global financial markets. Section (3) comments on the economic rationale for having a civil liability regime. Section (4) analyses in a comparative way the different approaches – common law and civil law – to extra-contractual liability (torts and delictual liability) and the different features that characterize them. Section (5) draws some conclusive considerations.

[8] In the EU, the European Commission has several times amended its Regulation on CRAs to increase investors' protection. See Regulation (EC) No. 462/2013 (CRA III) of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No. 1060/2009 (CRA I) on credit rating agencies and Regulation (EC) No. 513/2011 (CRA II); in the US, see the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, HR 4173, 111th Congress, 2d Session (2010) (Dodd-Frank Act), Sec. 931–939H (Title IX, Subtitle C 'Improvements to Regulation of Credit Rating Agencies'); in Russia, the Central Bank of Russia approved a detailed range of regulatory measures to reduce CRAs' conflicts of interest and increase their supervision, see Federal Law No. 222-FZ of the Russian Federation dated 15 of July 2015 on The activities of the rating agencies in the Russian Federation.

ISSN 2281-5147

2. CRAs ascent as international standard setters for global financial markets

Since their appearance on the world stage, CRAs have acquired great importance and a strong reputation, so potential borrowers looking for new finance in the capital markets often feel obliged to obtain a credit rating beforehand. A significant share of CRAs' importance in global financial markets was a direct consequence of the involvement of ratings in financial regulation. The role of CRAs as independent providers of financial opinions has existed since the beginning of the last century.[9]

The use of credit ratings for risk regulation started in the US during the New Deal regulation of the 1930s and the birth of the modern administrative state.[10] In 1931, the Office of the Comptroller of the Currency (OCC) enacted a rule that included sovereign debt, municipal bonds, and specific domestic and foreign securities among the financial instruments to account for capital requirements. They could be entered in the accounts at their face value or market value depending on whether or not they obtained one of the four highest ratings by CRAs. The rationale was to oblige an issuer with a higher default risk to maintain higher capital provision. Later, the OCC introduced a second rule requiring US banks to hold only those securities in the top four rating categories. In those years, the terms "credit rating agency" and "rating agency" spread in banking and academic circles, contributing to giving ratings a quasi-regulatory imprimatur and facilitating the widespread reliance on ratings by

[9] Moody's was the first to start in 1909 with its Analysis of Railroad Investments manuals, and subsequently measuring the credit rating solvability of industrial and public utilities, which were raising finance through bond issues. In 1916, the Poor's Rating Agency started issuing corporate ratings. Later, two competitors – Standard Statistics and Fitch Ratings (Fitch) – entered the business in 1922 and 1924 respectively. In 1941, Standard Statistics and Poor's merged to form Standard & Poor's (S&P), which, together with Moody's and Fitch, accounted (in 2015) for 96.5 percent of the world market in ratings. See SEC, Annual Report on Nationally Recognized Statistical Rating Organizations (December 2016), p. 11, Chart 2, available at https://www.sec.gov/ocr/reportspubs/annual-reports/2016-annual-report-on-nrsros.pdf (accessed 17 December 2024).

[10] See W.A. Morton, *Liquidity and solvency,* in 29 *The American Economic Review,* 1939, pp. 272-285, at 277: "The Banking Act of 1935 had in effect transferred the responsibility for deciding upon the classes of securities to be purchased to governmental agencies, which in turn have delegated it to private institutions: Fitch, Moody, Poor and Standard Statistics."

ISSN 2281-5147

government agencies such as the Securities and Exchange Commission (SEC), and by investors.[11]

The US regulator relying on CRAs' historical reputation and methodologies has incorporated credit rating into regulatory rules since the 1930s and continued to do so after World War II. For instance, in 1951, the National Association of Insurance Commissioners imposed higher capital requirements on insurers' lower-rated bonds. Later, in 1975 and 1982, the SEC imposed higher capital haircuts on broker-dealers' speculative-grade securities (Rule 15c3-1, which has now been amended) and eased disclosure requirements for investment-grade bonds.[12]

An essential element of CRAs coming to exercise a *de facto* regulatory function was the establishment of the so-called Nationally Recognized Statistic Rating Organization (NRSRO) in 1975 by the SEC. This institute aimed to designate CRAs that could be used for regulatory purposes. NRSROs increased the market power of established CRAs and led to further reliance on credit ratings. After 2003, for the most part, there were only three CRAs because the three nationally recognized organizations bought all the other smaller players in the market in the 1990s. Only in the 2000s was the oligopoly of NRSRO status broken when the Dominion Bond Rating Service obtained the NRSRO designation in 2003, followed by A.M. Best in 2005. At the end of 2024, the list of US-recognized rating organizations amounted to ten.[13]

Since the 1980s, US capital markets have made CRAs extremely powerful. Investors have increased their reliance on CRAs, and the use of rating agencies has become an accepted best practice worldwide. In 2001, the Basel Committee on Banking Supervision (BCBS) recommended using ratings to define the capital reserve requirements of banks. This new set of rules on banking laws and regulations was implemented by means of the Basel II Accord (Basel II) in 2004. The rules established that the calculation of a minimum capital requirement was contingent upon the ratings

---

[11] N. Gaillard and M. Waibel, *The Icarus syndrome: how credit rating agencies lost their quasi-immunity*, Cambridge Legal Studies Research Series, Paper No. 12/2017, at 11-12.

[12] R. Cantor and F. Packer, *The credit rating industry*, in 19 *Federal Reserve Bank of New York Quarterly Review*, 1994, pp. 1-26.

[13] The number has not changed, see SEC, "Current NRSROs", https://www.sec.gov/ocr/ocr-current-nrsros.html (accessed 17 December 2024).

ISSN 2281-5147

assigned to the entities a bank had a claim on – the so-called "standardized approach": the higher the rating, the lower the capital requirement.[14]

Nowadays, the evaluations issued by CRAs through their ratings do not only signal the probability of default risk to investors and, thus, influence the price level, but also determine which regulatory measures apply. On the one hand, the embedding of ratings in regulatory rules and the creation of the status of a nationally recognized statistical rating organization (NRSRO) in the USA in 1975, on the other hand, have arguably contributed to transforming CRAs into quasi-regulatory bodies. Ratings have become an actual regulatory stamp capable of influencing the judgment of other stakeholders, such as investors (lenders) and regulatory authorities.[15]

3. How States have coped with CRAs

The last financial crisis brought to light several shortcomings characterizing CRA's business model the so-called "issuer-pays", which has been labelled as a source of potential conflicts of interest.[16] Furthermore, it was said a lack of competition in the industry has vastly reduced market control mechanisms.[17] Finally, the involvement of

[14] See Basel Committee on Banking Supervision (BCBS), *Basel II, International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (June 2004), available at https://www.bis.org/publ/bcbs107.htm (accessed 17 December 2024).

[15] F. Parmeggiani, *Gli effetti distorsivi del crediti rating sul rischio di insolvenza,* Milano, Giuffrè, 2023, pp. 58-67; H. Weber and A. Darbellay, *The regulatory use of credit ratings in bank capital requirements regulations*, in *Journal of Banking Regulation,* 2008, 10, pp. 1-16, at 18; F. Partnoy, *Rethinking regulation of credit-rating agencies: an institutional investor perspective*, in 25 *Journal of International Banking Law and Regulation,* 2010, p. 188.

[16] A. Miglionico, *The Governance of Credit Rating Agencies: Regulatory Regimes and Liability Issues,* Cheltenham, Edward Elgar, 2019, Ch. 2; M. Lamandini, *Le agenzie di rating: alcune riflessioni in tema di proprietà e conflitto di interessi*, in *Le agenzie di rating. Atti del Convegno* (Principe eds.), Milano, Giuffrè, 2014, p. 179; F. Parmeggiani, *Some rating failures and several regulatory weaknesses: the US and EU perspectives*, in *Le agenzie di rating*, p. 75; K. Alexander, *The risk of ratings in bank capital regulation*, in 24 *EBOR*, 2013, pp. 295-313, at 305– 306; Weber and Darbellay, *The regulatory use of credit ratings*, op. ult. cit. (n 15), pp. 10 ff.; H. McVea, *Credit rating agencies, the subprime mortgage debacle and global governance: the EU strikes back*, in 59 *International and Comparative Law Quarterly*, 2010, pp. 701-730, particularly at 716; G. Alpa, *Responsabilità civile delle agenzie di rating. Alcuni rilievi sistematici*, in I *Rivista trimestrale di diritto dell'economia*, 2013, p. 71; F. Amtenbrink and J. De Haan, *Regulating credit ratings in the European Union: a critical first assessment of regulation 1060/2009 on credit rating agencies*, in 46 *Common Market L. Rev.*, 2009, pp. 1915-1949, at 1943 ff.

[17] Darbellay, *Regulating Credit Rating Agencies,* Edward Elgar, 2013, p. 215; Libertini-Fabbio, *Concorrenza e rating finanziario*, in *Le Agenzie di Rating*, Atti del convegno. Salerno, 8-9 novembre 2012 (A. Principe ed.), Milano,

ISSN 2281-5147

CRA's activity in the banking capital regulation of the Basel Accords has created a ratings-embedded regulation, which has arguably weaken the monitoring role of banks as financial intermediaries while providing them with another great incentive for engaging in creative financial engineering.[18] Therefore, facing the opportunity to increase their profits, CRAs contributed to the causes of the financial crisis by issuing inaccurate ratings for complex structured finance based on flawed methodologies, which arguably lowered the perception of credit risk for financial supervisors and investors.[19] CRAs have always claimed the role of neutral information providers, who have based their reliability and reputation on their know-how and conduct. That is why regulators have always preferred market control mechanisms to legal strategies of accountability to oversight CRAs' operations.[20]

The International Organization of Securities Commissions (IOSCO) that is the international body regulating the world's securities' and futures' markets, including CRAs, drew a Code of Conduct called 'Fundamentals for Credit Rating Agencies'. This Code provides CRAs with a set of guidelines targeted to protect the integrity of the rating process, the fair treatment of all participants and the safeguard of any confidential material information given to CRAs by issuers. However, it does not regulate CRAs' liability for breach of their duties. Assuming that CRAs can certify the

Giuffrè, 2014, p. 160.

[18] L. Sasso, *Bank capital structure and financial innovation: antagonists or two sides of the same coin?* in 2 *Journal of Financial Regulation*, 2016, pp. 225-263, where the opportunistic behaviour of banks engaging in regulatory arbitrage is treated in more detail.

[19] See the Financial Stability Forum, Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (7 April 2008), available at <http://www.financialstabilityboard.org/publications/r_0804.pdf> (accessed 17 December 2024); see also, Financial Services Authority, The Turner Review: A Regulatory Response to the Global Banking Crisis (March 2009), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/18_03_09_turner_review.pdf (accessed 17 December 2024); Securities and Exchange Commission (SEC), Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies (July 2008), available at https://www.sec.gov/files/craexamination070808.pdf (accessed 17 December 2024); Report of the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière (February 2009), available at https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf (accessed 17 December 2024).

[20] C.A.E. Goodhart, *The Regulatory Response to the Financial Crisis,* Edward Elgar, 2009, p. 121; Schwarcz, *Private ordering of public markets*, before (n 3), p. 26. The control mechanism for these inefficiencies is "exit" rather than "voice"; see A.O. Hirschman, *Exit Voice and Loyalty: Responses to Decline in Firms, Organizations and States,* Harvard University Press, 1970, *passim*.

ISSN 2281-5147

quality of complex structured finance products through ratings and that no better alternative can be found for measuring credit risk in global financial markets, it is questionable whether the fear of losing reputation is still a strong enough deterrent for CRAs against negligent, reckless and fraudulent practices.[21]

CRAs' oligopoly was mainly due to the high knowledge and technical skills required to perform credit risk assessments and their undisputed (at least until the last financial crisis) reputation.[22] However, as demonstrated by the lawsuits against CRAs that followed the last financial crisis, rating agencies have operated not continuously in good faith or at least with professional diligence.[23] Since CRAs affect through their ratings the asset value of any financial entity by requiring specific capital adequacy requirements if the entities can use those assets as collateral, their activity may pose a systemic risk to financial stability when the mechanistic reliance by investors on credit ratings reveals to be misplaced.[24]

A straightforward solution would be to remove any rating involvement in regulation to reduce over-reliance on ratings by making them simple financial journalists. This approach has been followed by the US and EU governments – unsuccessfully

[21] J.P. Hunt, *Credit Rating Agencies and the "Worldwide Credit Crisis": The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement*, in *Columbia Business Law Review*, 2009, 109. The Author argues that reputational constraints may fail to work for novel products.

[22] In this sense, it has been argued that an unchecked increase in competition would have lowered not only the price but also the quality of ratings, see Hunt, op. ult. cit., pp. 112-114, 127-128; Cantor - Packer, *The credit rating industry*, before (n 12), pp. 25 f.

[23] See S. Fleming and H. Carnegy, *EU Watchdog Censures S&P for French Rating Cut Error,* in FT (3 June 2014) https://www.ft.com/content/326b279c-eafb-11e3-bab6-00144feabdc0 (accessed 17 December 2024). S&P, attempting to change an incorrect display of the 'Banking Industry Country Risk Assessments' ('BICRAs') for France, sent an email alert to all its subscribers, erroneously informing them that the rating of French debt had been downgraded. It took nearly two hours to correct the mistake, by which point the market had closed.

[24] Darbellay, *Regulating Credit Rating Agencies,* Edward Elgar, 2013, ch. 4-6; G. Risso, *Investor Protection in Credit Rating Agencies' Non-Contractual Liability: The Need for a Fully Harmonised Regime,* in 40(5) *EL Rev*, 2015, pp. 706-721; H. Gildehaus, *The Rating Agency Oligopoly and its Consequences for European Competition Law*, in 37(2) *EL Rev*, 2012, pp. 269-293; F. Partnoy, *Rethinking regulation of credit-rating agencies*, before (n 15), pp. 190 ff.; A. Miglionico, *Il giudizio di rating: incidenza sulle negoziazioni finanziarie e sulla stabilità dei mercati*, in II *Riv. trim dir. econ.*, 2010, p. 87; D.J. Matthews, *Ruined in a Conventional Way: Responses to Credit Ratings' Role in Credit Crises*, in 29 *Nw. J. Int'l L. & Bus.,* 2009, p. 245.

ISSN 2281-5147

though.[25] In late 2014, the Basel Committee in Banking Supervision (BCBS) proposed a complete overhaul of the "standardised approach", excluding the intervention of a CRA and a recalibration of risk-weight based on a limited number of alternative risk drivers, including revenue and leverage for risk-weighting exposures to corporates.[26] However, most of the participants criticized the proposals in the subsequent consultations, admitting that any other alternative to evaluate their credit risk than CRAs would be extremely expensive due to a lack of resources and expertise needed to carry out the assessment. For this reason, later in 2016, the BCBS reintroduced external ratings, where available and permitted by national supervisors, for exposure to banks and corporates.[27] Accordingly, the final standards removed the Internal rating-based (IRB) option for equities and the advanced IRB option for exposures to banks, other financial institutions, and large and medium-sized corporates. Eventually, the BCBS also removed the internal model option from the credit valuation adjustment framework.[28]

3.1 Economic rationale for a CRA liability regime

The matter of regulating CRAs has traditionally been examined through the lens of the principal-agent model.[29] CRAs act as agents to perform tasks on behalf of principals: States, investors, and entities issuing financial instruments. However, this paradigm, which is very effective in identifying the conflicts of interest between a company's constituencies,[30] is not entirely valid for CRAs because States and state-owned corporations are also ratings' final recipients. Therefore, a State implementing

[25] In particular, sec. 939(a-f) and 939A of the Dodd-Frank Act of 2010 and Art. 5 Sections b and c of the EU Regulation No. 462/2013 on credit rating agencies (CRA III) were expressly targeted to the purpose of removing references to rating within US and EU legislation altogether.

[26] BCBS, *Consultative Document: Revisions to the Standardised Approach for Credit Risk* (March 2015), available at http://www.bis.org/bcbs/publ/d307.pdf (accessed 17 December 2024). See also the changes to BCBS, *Standardised Approach for Measuring Counterparty Credit Risk Exposures* (March 2014), available at www.bis.org/publ/bcbs279.pdf (accessed 17 December 2024).

[27] BCBS, *Second Consultative Document: Revisions to the Standardised Approach for Credit Risk* (December 2015), available at https://www.bis.org/bcbs/publ/d347.htm (accessed 17 December 2024).

[28] BCBS, *Basel III: Finalising Post-Crisis Reforms* (December 2017), available at http://www.bis.org/bcbs/publ/d424.pdf (accessed 17 December 2024).

[29] R. Mulgan, *Accountability: An Ever-Expanding Concept?* in 78(3) *Public Administration*, December 2002, pp. 555 – 573, particularly at 555.

[30] See the IOSCO's 'Code of Conduct Fundamentals for Credit Rating Agencies', Final Report, March 2015, available at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD482.pdf (accessed December 2023).

ISSN 2281-5147

a regulatory regime to discipline CRAs can be seen as attempting to impact their independence negatively. Not surprisingly, political reactions to hold rating agencies accountable have often provoked a termination of CRA activity in a specific country rather than a revision of their operations by public demands. CRAs prefer not to establish subsidiaries or branches in countries that do not grant a certain degree of independence. They operate instead through offshore companies. The increasing complexity of modern corporate finance and the development of highly interconnected financial markets have pushed States' governments to delegate unelected bodies – better equipped to deal with highly technical areas – to regulate those markets in the name of efficiency. This phenomenon is called *agencification* and the new delegated institutions for specific policy objectives non-majoritarian institutions (NMIs). By doing so, States have lost (political) control in exchange for efficiency in financial markets.[31] Unfortunately, these (a-political) NMIs have increasingly taken political decisions with clearly distributive implications favouring some at the expense of others.[32] However, their independence from direct political control does not mean freedom from public accountability.[33]

CRAs have been compared to NMIs with whom they share all their legitimacy problems.[34]

Generally, NMIs possess specialized public authority, separate from other institutions, but are neither directly elected by people nor directly managed by elected officials. Their legitimacy depends on their capacity to engender and maintain the belief that they are the most appropriate for the functions entrusted to them. CRAs possess specialized public authority, which is their capacity to issue standards for the market participants (entities issuing securities). Standardizing is a mode of governance – bottom-up approach – that is sometimes more effective than hierarchical rules, which are a top-down approach to harmonize the praxis and uses of the global

[31] L. Enriques and M. Gargantini, *Regolazione dei mercati finanziari, rating e regolazione del rating*, in 2 *Banca Impresa Società*, 2010, p. 475.

[32] B. Levy and P. Spiller, *The Institutional Foundation of Regulatory Commitment*, in *The Journal of Law, Economics, and Organization*, 1994, 10(2), pp. 201-246; M. Thatcher and A. Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in *West European Politics*, 2002, 25(1), pp. 1-22.

[33] G. Majone, *The Regulatory State and its Legitimacy Problems*, in 22(1) *West European Politics*, 1999, pp. 1-24.

[34] T.J. Sinclair, *Bond-rating agencies and co-ordination in the global political economy*, in Cutler, Haufler and Porter (eds.), *Private Authority and International Affairs,* State University Press of New York, 1999, pp. 153-168.

ISSN 2281-5147

financial market.[35] Although standards are generally non-binding (*vs* rules) and for the *optional* use of the issuers who may or may not adopt them, CRAs' standards have been enforced hierarchically by the States through the regulatory involvement of ratings (i.e. The Basel Accords). However, NMIs are generally agents operating on behalf of the States and are always part of the institutional design of delegation through public authorities. CRAs, instead, do not qualify as state agencies, and they are not an independent sub-branch of government since there has been no formal delegation of powers by the U.S. Congress or any other government or legislation to CRAs. Therefore, CRAs are not directly accountable to anybody for their *public* activity other than their shareholders, who are *private* individuals. They do not act in the common interest, as would be the case if they were regulatory agencies mandated by a State. In situations where private interests and public imperatives diverge, conflicts of interest may arise and undermine the credibility of the regulatory process. In light of this, it could be inferred that the "principal-trustee model" would represent CRA's relationships better than the principal-agent model. According to the principal-trustee model, CRAs are trustees delegated by the regulatory national authorities (principal) to perform a task on their behalf and for the benefit of the beneficiaries, namely the investors (although they do not pay for these services). In such a model, CRAs would owe fiduciary duties (duties of care) to two constituencies: the regulatory authorities and the investors for whom the task is performed.[36] Thus, it seems appropriate to assign on CRAs a civil liability for tort liability in addition to an administrative liability for infringements of a procedural nature, which includes a CRA's non-compliance with the appropriate procedures.

3.2 Holding CRAs accountable for compensation and damages

Introducing a liability regime for CRAs has been one of the most controversial aspects of the new CRA reforms. Already in 2002, the loan default of the US giants Enron and WorldCom led to the approval in the USA of the Credit Rating Agency Reform

[35] Standardizing and hierarchical rule-making differ in how rules' underlying legitimacy is secured. While the legitimacy of hierarchical rules depends on the authority of the regulatory authority, standards rely on the legitimacy of the underlying expertise. See this discussion in D. Kerwer, *Standardising as Governance: The Case of Credit Rating Agencies,* Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, 2001, p. 8.

[36] G. Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, in 2/1 *European Union Politics,* 2001, p. 113.

ISSN 2281-5147

Act of 2006 (CRARA), which increased the SEC's supervisory powers over CRAs. However, the CRARA avoided addressing CRAs' civil liability for damages caused by inaccurate ratings and even impeded the SEC from dealing with it.[37] It is only after the last financial crisis that the US legislator introduced the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ('Dodd-Frank Act'), which dealt with this matter by providing at least two ways of bringing a claim against CRAs for losses suffered due to their reckless behaviour. First, like any other forward-looking statements, ratings are no longer exempt from liability. As a result, the same enforcement and penalty provisions that apply to statements made by registered public accounting firms and financial analysts apply to CRAs.[38] Generally, negligent misrepresentation claims should prove the *scienter* of the offending party, that is, their (CRAs') intent or knowledge of wrongdoing while issuing the disputed rating. However, the US legislator has relaxed this strict provision, introducing a notable exception for financial damages brought against a CRA. Accordingly, it is sufficient for the complaint to state that the CRA knowingly or recklessly failed to conduct a reasonable investigation of the rated security or to obtain reasonable verification of such factual elements from sources (other than the issuer and underwriter) that the CRA considered competent.[39]

Second, the Dodd-Frank Act has repealed section 11 of the Securities Act 1933 concerning liability for false registration statements.[40] Consequently, the law now considers ratings as registration statements and CRAs as qualified professionals in credit risk management, and, as such, they can be sued in their capacity as experts for false registration statements.[41] Although the claimant does not have the burden to prove the causation or that it relied on the CRA's statement, as is the case under the

[37] Because the government deemed the SEC not competent enough to set the standards of conduct and the models for CRAs to comply with. See J.C. Coffee Jr, *Ratings Reform: The Good, The Bad and the Ugly*, in 1 *Harv Bus L Rev*, 2011, p. 231 ff., at 247; T.M. Sullivan, *Federal Preemption and the Rating Agencies: Eliminating State Law Liability to Promote Quality Ratings*, in 94 *Minn. L Rev*, 2010, p. 2136 and 2151-2156; C. Picciau, *The Evolution of the Liability of Credit Rating Agencies in the United States and in the European Union: Regulation after the Crisis*, in 2 *ECFR*, 2018, pp. 339-402.

[38] See sec. 15E(m)(1) of the Securities Exchange Act 1934 (15 U.S. Code §78o–7(m)(1)) as amended by sec. 933(1), Dodd-Frank Act.

[39] See sec. 21D(b)(2)(A), Securities Exchange Act 1934 (15 U.S. Code § 78u–4(b)(2)) as amended by sec. 933(2), Dodd-Frank Act.

[40] See sec. 939G Dodd-Frank Act. Rule 436(g) 17 CFR § 230.436(g).

[41] See sec. 11(a)(4) of the Securities Act 1933.

ISSN 2281-5147

Securities Exchange Act of 1934, seeing a claim through to victory may not be so easy. US courts have refused to qualify CRAs as underwriters in the sense of this provision.[42] Besides, following the refusal of CRAs to have their ratings included in the registration statements, the SEC issued a no-action letter in which it postponed the enforcement of liability indefinitely under section 11 of the Securities Act of 1933 for ratings issued Asset-Backed Securities (ABSs). This decision was needed to facilitate a transition for asset-backed issuers since the rule could have paralyzed the market for ABSs.[43]

In the EU, a Regulation on CRAs was first introduced in 2009 (CRA I) and then overhauled in several steps with two amendments in 2011 (CRA II) and 2013 (CRA III).[44] Chapter II of the CRA I entrusts to ESMA the day-to-day supervision of CRAs. According to Art. 36(a) of the CRA II, ESMA has the power to request information, conduct necessary investigations and on-site inspections, and even take supervisory measures or impose fines for administrative infringements. Rules on CRAs' civil liability are introduced by Article 35(a) of the CRA III.[45] The CRA III regulation does not refer to false or erroneous ratings as the cause of damage. It instead provides a list of infringements of regulatory provisions, which may cause damage to the investor or the issuer.[46] These infringements must have impacted the rating, resulting in a patrimonial loss for the claimant.[47] Regarding the standard of care for civil

[42] See *In Re: Lehman Bros Mortgage-Backed Securities Litigation*, 650 F.3d 167, 175-85 (2d Cir 2011).

[43] SEC, No action letter to the Ford Motor Credit Company LLC and Ford Credit Auto Receivables Two LLC, 23 November 2010.

[44] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1 (CRA I); Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, 31.5.2011, p. 30 (CRA II); Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, 31.5.2013, p. 1 (CRA III).

[45] For an analysis, cfr. C. Picciau, *The civil liability of credit rating agencies to investors in the EU*, in Cherednychenko O.O. and M. Andinas (eds.) *Financial regulation and civil liability in European law*, EE, 2020, p. 181; C. Picciau, *Diffusione di giudizi inesatti nel mercato finanziario e responsabilità delle agenzie di rating*, Milano, Egea, 2018, Ch.4; E. Maciariello, *La responsabilità da rating: analisi dell'articolo 35-bis del Regolamento CE n. 1060/2009*, in *BIS*, 2018, p. 157; A. Sacco Ginevri, *Le società di rating nel Regolamento CE n. 1060/2009: profili organizzativi dell'attività*, in *Nuove leggi civili commentate*, 2010, pp. 335 ff.

[46] The same list introduced to impose administrative sanctions by EU Regulation No. 1060/2009 as amended, Annex III, Section I, point 42 also applies to civil wrongs.

[47] See Art. 35(a), sec. 2 of the EU Regulation as amended in 2013.

ISSN 2281-5147

enforcement, Article 35(a) states that the infringement shall be committed "intentionally or with gross negligence."[48] Therefore, it excludes cases of mere negligence. However, CRA III allows for "further liability claims in accordance with national law," which allows countries to sue CRAs in any European national court for all breaches of extra-contractual liability.[49] The investor willing to establish a claim under Art. 35(a) must show that they reasonably relied on "in accordance with Art. 5a(1) or otherwise with due care" the credit rating for their decision to invest in, hold, or divest from the asset that the infringement has caused damage.[50] The CRA's liability *vis-à-vis* the investor is extra-contractual and, therefore, he or she has the burden of proof. At first, the EU Commission proposed to reverse this rule, but the change did not survive in the final draft of Art. 35(a), sec. 2. In this regard, it was said that an excess of liability would also be counterproductive and destructive to the industry. Civil liability regimes should not and were not primarily introduced to compensate investors for their investment loss but rather to improve the regulatory governance of the financial markets.[51]

4. The different approach of common law and civil law to regulate global economy

4.1 Tort vs delictual liability

Although the concepts of delictual liability in civil law and tort in common law are theoretically similar, they differ in many substantive ways. At the same time, the evolution of the delictual liability since the 19th-century codifications in continental Europe – rooted in Roman Law – has brought different approaches in the various

[48] "Where a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to them due to that infringement."

[49] See Art. 35(a) sec. 5 of the CRA III.

[50] See Recitals 26 of the Proposal of CRA III.

[51] See B. Haar, *Civil liability of credit rating agencies – regulatory all-or-nothing approaches between immunity and overdeterrence*, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2013-02, available at http://ssrn.com/abstract=2198293 (accessed 17 December 2024); M. Lehmann, *Civil liability of rating agencies – an insipid sprout from Brussels*, in 11 *Capital Markets Law Journal*, 2016, pp. 60-83, at 74-75. CRAs' liability should be secondary and perhaps capped at a certain amount for these authors. See also C. Picciau *The civil liability of credit rating agencies to investors in the EU*, before (n 45), p. 181; A.M. Pacces, A. Romano e A. Troisi, *Agenzie di rating responsabilità civile: una soluzione contrattuale*, in 16(3) *Mercato concorrenza regole*, 2014, p. 571.

ISSN 2281-5147

nations (of civil law traditions) that mirror the different expressions of fundamental societal policies.[52] Tort law, the source of liability for CRAs in common law countries, focuses on securing compensation when a third party has suffered unjust damage (including a pure economic loss). In civil law countries, this liability is also called delictual (or *Aquilian*) liability, from the Latin word *delictum*, which means offense or civil wrong, and, initially, it was meant to provide for an appropriate sanction for a wrong suffered by the victim, rather than a fair compensation of losses. While the common law of torts arises from case law, the civil law of delict is statutory. Thus, while many specific types of torts exist in common law, only an abstract definition in terms of infringement of rights exists in the law of delict.[53]

Delictual liability provides a general liability for the wrongful invasion of a person's rights. Delicts were considered acts of direct (deliberate) injury or damage without justification (classified as unlawful intention), typically done with malicious intent (*dolus*). Later, a comprehensive principle of fault (*culpa*) appeared as a legal category in the Roman law of delict, albeit only in the shape of negligence.[54] However, intentional wrong remained the dominant form of delict throughout, whereas acts of negligence and some cases of no-fault liability were considered *quasi*-delicts.[55]

The law of delict of the 19th century, with its distinct focus on individuals and fault, soon reached its limits when faced with the new technical, economic, and social challenges of industrialization that began in England and then spread across continental Europe. The English common law of torts instead, which initially

[52] For instance, concerning the description of the protected interests and the relation between the traditional fault liability and strict liability, which are among the central structural decisions of every system of extra-contractual liability, while French law strongly favours the victims of accidents offering a far-reaching regime of strict liability and French judges are keen to compensate pure economic losses, English law is much more restrictive, assuming that free citizens are typically themselves responsible for their wealth and luck. Likewise, German law generally refuses to compensate pure economic loss through the medium of tort rules. Their liability under s. 823(1) and (2) BGB is fault-based and requires the presence of causality and damage as any action in German tort law. Alternatively, s. 826 BGB covers damage caused by a person acting contrary to public policy (*sittenwidrig*). However, mere negligence is not enough because this provision requires the tortfeasor's malicious intent.

[53] For a comparative analysis, see G. Brüggemeier, *The Civilian Law of Delict: A Comparative and Historical Analysis*, in 7 *EJCL*, 2000, pp. 339-383, at 342 ff.

[54] Culpa was differentiated into various degrees of faults: gross negligence (*culpa lata*), ordinary negligence (*culpa levis*), and slight negligence (*culpa levissima*).

[55] It is not the causing of damage that triggers liability and obliges compensation, but the injury of protected legal interests and the infringement of property-like absolute rights.

ISSN 2281-5147

consisted of many typified individual torts – seen independent of one another – quickly adapted and developed into the separate tort of negligence also to cover, apart from omission and indirect injuries, direct non-intentional acts of infringement.[56] The tort of negligence is not usually concerned with intentionally inflicted harm but with protecting against accidental harm where the defendant has been at fault. While intention appears essential to some torts, like tortious conspiracy and inducement of breach of contract, it is not a definitional criterion of negligent misstatement. Although historically, the courts' approach has been to exclude or limit pure economic loss from the scope of negligence because of concerns about a floodgate of litigation and indeterminate liability, the last six decades have witnessed an expansion towards pure economic loss negligently inflicted. Negligent misstatement does not involve an intention to injure.[57] Common lawyers elaborated a "duty to take reasonable care not to injure one's neighbour" as a legal concept to justify this extension of liability and restriction of freedom of action.[58] Therefore, the common law of torts consists of four essential elements: duty of care, breach of duty (fault), injury/damage/loss, and causation, while the objective elements of the law of delict are the conduct (action or omission), damage/injury (of a right or protected interest), causation, and fault/wrongfulness (unlawful intent and negligence).[59] In addition, while in the civilian tradition, a delict is a wrongful injury, in common law, a wrong/tort is generally conceived as a breach of a legal duty.[60]

4.2 State sovereignty vs role of judiciary

Civil law countries share the traditional idea of state sovereignty, where each nation has the exclusive monopoly of creating and enacting statutory law through a legislative body. This notion sharply contrasts with the role of the judiciary in common-law countries. Indeed, common law judges enjoy significant discretion in their operations and hold law-making powers, which are certainly denied to their civil law

[56] See the eminent cases: *Brown v. Kendall*, 60 Mass 292 (1850); fundamental for American Common Law, and *Donoghue v Stevenson* (1932) AC 562, 580 in England.

[57] C. Brennan, *Tort Law Directions*, Oxford University Press, 8th ed., 2022, p. 49.

[58] The "neighbour principle" of proximity became a decisive factor in the English tort law of negligence. See Brüggemeier, *The Civilian Law of Delict*, before (n 54), pp. 358-359.

[59] P. Giudici, *La responsabilità civile nel diritto dei mercati finanziari*, Milano, Giuffrè, 2008, p. 214 ff.

[60] P. Birks, *The Concept of a Civil Wrong*, in D. G. Owen (ed.), *Philosophical Foundations of Tort Law*, Oxford University Press, 1995, pp. 31-51.

ISSN 2281-5147

counterparts. Civil law judges have traditionally been considered la *bouche de la loi* ("the mouthpiece of the law")[61] and indeed cannot be said to act as "occasional legislators"[62].

The idea of the uniqueness of the legislator as the sole creator of the law has always been opposed, for instance, in the US, where its intervention has always been merely residual. The direct impulse of private individuals has instead supported the legal evolution. Their inputs, supported by the judge-made law designed by the US courts in response to the clashes of interests as they have presented themselves in economic history, have improved the legal system. Accordingly, the evolution of US legal history can be described in nautical terms as a "set and drift," namely decision-making based upon widely-held and persistent attitudes and values and the method used to adjust them. All the drifts gradually merge into a direction.[63]

Unfortunately, the EU legislator approved a regulation for CRA civil liability instead a directive[64], and thus, the role of the European Court of Justice in bringing uniformity through preliminary ruling is vastly diminished.[65] In addition, the regulation refers to the principles of private international law to determine the applicable national law, contributing unnecessary complexity to the EU liability regime by allowing as many autonomous interpretations of the civil liability regime as the EU Member States.[66] For these reasons, the new regulation hardly added something to the European legal background already available.[67]

---

[61] This famous idiom was coined by C. de Secondat Montesquieu, *The Spirit of the Laws*, Vol. 11, first published 1748, Cambridge University Press, 1989, chapter 6.

[62] This is Posner's claim; see R.A. Posner, *How Judges Think*, Harvard University Press, 2008, p. 81.

[63] M.R. Ferrarese, *Le istituzioni della globalizzazione: diritto e diritti nella società transnazionale*, Bologna, Mulino ed. 2000, Ch. 2 para 7 and Ch. 4 para 3, 6 and 7; J.W. Hurst, *Law and Social Process in United States History*, Da Capo Press, 1960, p. 42.

[64] The Product Liability Directive, for instance, gives an autonomous meaning to the many terms of tort law adopted in the text. See Art. 1 of the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[65] See M. Lehmann, *Civil liability of rating agencies – an insipid sprout from Brussels*, 11 *CMLJ*, 2016, p. 77.

[66] G. Deipenbrock, *The European civil liability regime for credit rating agencies from the perspective of private international law – opening Pandora's box?* in 11 *ICCLJ*, 2015, pp. 6-16.

[67] For instance, in France, since 2010, Art. L 544-5 of the French Code monétaire et financier (CMF ou COMOFI) provides that CRAs are liable both in tort and for negligence for violation of Regulation (EC) n.

ISSN 2281-5147

4.3 (Lack of) flexible procedural law tools

The legal trajectory designed in the process of globalization presents significant similarities with the evolution of US legal history. Not surprisingly, the US legal structure contains all features typical of globalization in its DNA; for this reason, it is more suitable to regulate it. For instance, a tool of procedural law such as the class action supported by the fraud-on-the-market presumption of reliance developed by the US Supreme Court has created a tort litigation culture in the US that does not seem to exist in Europe.[68] The fraud-on-the-market theory assumes that information regarding a security traded, whether incorrect or false, always impacts its market price. There is, thus, an inherent causal link between any public misrepresentation and any investors who purchased that security since the misrepresentation defrauded the entire market by affecting its stock price.[69] By assuming that simply investing in a given security– unaware of the fraudulent conduct – investors relied upon allegedly fraudulent information, the fraud-on-the-market theory releases them from proving the individual reliance on an alleged corporate misstatement and from the difficulties

1060/2009. In Germany, the doctrine of the Vertrag mit Schutzwirkung für Dritte (VSD) extends contractual protection to third parties who show sufficient proximity to the performance and the creditor of the performance, as long as the debtor could have recognized their existence or of the doctrine of liability based on confidence or trust (Vertrauenshaftung), see A. Darbelley, *Regulating Credit Rating Agencies,* Edward Elgar Publishing, 2013, p. 82; B. Haar *Civil Liability of Credit Rating Agencies after CRA 3 – Regulatory All-or-Nothing Approaches between Immunity and Over-Deterrence*, 25 *EBLR*, 2014, pp. 317-318. In England, Art. 35(a) looks like a less protective duplication of the tort of deceit. Deceit consists in making a false statement, knowing it to be false, or 'recklessly, careless whether it be true or false.' The claimant then acts to his or her detriment in reliance on it; see N. Hoggard, *What a Tangled Web We Weave: Conflicts in Rating Agency Liability*, 5(2) *Cambridge Journal of International and Comparative Law,* 2016, pp. 363-377, at 366; *contra* T.M. J. Möllers and C. Niedorf, *Regulation and Liability of Credit Rating Agencies—A More Efficient European Law?* in 11(3) *ECFR,* 2014, p. 333 and pp. 355-56.

[68] The US Supreme Court has reaffirmed the validity of this presumption, see *Halliburton Co. v. Erica P. John Fund, Inc.* (Halliburton II), 134 S. Ct. 2398 (2014), after 30 years from its adoption in *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988). See also U. Magnus, *Why is US Tort Law so Different?* in 1(1) *Journal of European Tort Law,* pp. 102-124.

[69] In *Basic v. Levinson*, that theory holds that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public misrepresentation, therefore, may be presumed for purposes of a Rule 10b-5 action."

ISSN 2281-5147

of establishing loss causation.[70] So doing, the presumption facilitates securities fraud class actions, allowing common issues of class to predominate over individual issues and making class treatment the perfect tool against the abuses of large corporate defendants.[71]

The presumption of reliance has mainly been criticized by scholars,[72] who claim that a disproportional use of it could create wrong incentives in the market by developing the idea of the existence of a cost-free form of insurance against stock price drops. The fraud-on-the-market theory is probably not applicable to CRAs' liability cases since CRAs evaluate, especially debt instruments and debt markets are generally less efficient than share markets.[73] However, it is an example of the tools available to judges that could be wisely used at their discretion. If, on the one hand, the US Supreme Court confirmed the ongoing validity of the fraud-on-the-market presumption, on the other hand, it also recognized a new avenue for corporate defendants to rebut it at the class certification stage by presenting evidence that an alleged corporate misstatement had no impact on the price of the stock.[74]

A civil law judge deeming the law inadequate to protect a plaintiff could apply a presumption of reliance in his or her reasoning. In Italy, for instance, a legal presumption could apply if, without causation proof, the fact results from "serious, precise, and consistent" elements pointing in the same direction.[75] However, in the

[70] Federal Rules of Civil Procedure, Rule 23(b)(3): "A class action can be maintained if Rule 23(a) is satisfied and if […]: the Court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[71] The argument goes: because fraudulent information disseminated on an efficient market leads to an artificially inflated price of the stock at issue, loss causation exists because plaintiffs would not have purchased the stock if they had known it was falsely inflated or because they paid too much for it.

[72] See W.W. Bratton and M.L. Wachter, *The political economy of fraud on the market,* 160 *U. Pa. L. Rev.,* 2011, pp. 69-168, at 77; L.A. Stout, *Are stock markets costly casinos? Disagreement, market failure, and securities regulation,* 81 *Virginia Law Review,* 1995, pp. 611-712, at 650; J. Macey and G. Miller, *Good finance, bad economics: an analysis of the fraud on the market theory*, 42 *Stanford Law Review,* 1990, pp. 1059-1092; D.C. Langevoort, *Theories, assumptions, and securities regulation: market efficiency revisited*, 140 *U. Pa. L. Rev.,* 1992, pp. 851-920, at 857-69.

[73] D. Darcy, *Credit Rating Agencies and the Credit Crisis: How the "Issuer Pays" Conflict Contributed and What Regulators Might Do about It*, in *Colum Bus L Rev.,* 2009, p. 656.

[74] *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398 (2014).

[75] In Italy, Art. 2727, Civil Code; in France, Art. 1353, Civil Code.

ISSN 2281-5147

case of CRAs, the presumption would be simple and always rebuttable. It could be argued that different would be the case of a claim brought under Art 11(2) of the Prospect Regulation[76] against CRAs for misstatement in prospectus rather than for damage compensation because, for instance, the rating has negatively impacted the stock price in the market. The courts' approach of applying a presumption of liability for CRAs' misstatement in the prospectus would also be justified by prospectuses' central role nowadays among the means of financial information available to companies for raising finance in the market.[77] However, the effective influence on the stock price must be measured and proved. Furthermore, like CRA III, the Prospectus Regulation has not harmonized prospectus liability law amongst Member States: the effective legal protection must be provided in accordance with the rules of national law.[78]

In tort liability, it is essential for establishing liability under negligent misstatements that the endangered person must be in a relationship of proximity with the actor – in this case, the CRA. In such a scenario, there would be an assumption of responsibility as a basis for liability.[79] The proximity requirement also appears in German law with similar traits, but not everywhere in continental Europe.[80] To have a relation of proximity, the claimant must prove he or she had a special position of trust due to the special skill of the defendant that made it reasonable for him or her to rely on the

[76] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

[77] In Italy see Cass. Civ., sez. I, 11 giugno 2010, n. 14056, commented by S. Cicchinelli, *La fattispecie della responsabilità da prospetto informativo. Problemi e prospettive*, in 2 *Rivista di Diritto Societario*, 2014, pp. 212 ff. where, according to the Supreme Court, any false information included in the prospectus should generate a presumption of distortion of financial information, which should be rebutted by the party who disclosed it.

[78] S. Lombardo, *Stabilization and underpricing in IPOs*, in *Prospectus Regulation and Prospectus Liability*, Busch, Ferrarini, Franx (eds.), Oxford University Press, 2020, 49-71; P. Giudici, *Prospectus Liability and Litigation. Italy*, idem, Ch. 22; Alvaro, Lener, Lucantoni; in collaboration with Adriani, Ciotti, Parziale, *The Prospectus Regulation. The long and winding road*, in *Quaderni giuridici*, Ottobre 2020, 60-73; P. Giudici and S. Lombardo, *La tutela degli investitori nelle IPO con prezzo di vendita aperto*, in *Rivista delle Società*, 2012, 907.

[79] See *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] AC 465.

[80] Unlike England and Germany, Swedish tort law does not contain a proximity requirement limiting liability to an identifiable or recognizable class; neither is this requirement present in French tort law. For an analysis of the national tort laws of several main jurisdictions in Europe, see E. Nästegård, *The Tort Liability of CRAs in Europe and the Need for a Harmonized Proximity Requirement at the Union Level*, 31 *EBLR*, 2020, pp. 804-813.

ISSN 2281-5147

statement made by the defendant. At the same time, the defendant must know, or ought to know, that the claimant relied on it.[81] In theory, these requirements could apply to CRAs, who present themselves to the market as financial experts on whose creditworthiness assessment depends an excellent part of the investors. The claimant must be a member of an identifiable or recognizable class (i.e. limited class) to establish liability. However, so far, the Courts in the UK and in Germany have shown that the use of the proximity requirement mainly targeted to limit the extension of liability.[82]

In England, the Davies Review commissioned by the HM Treasury in 2007 evaluated whether to strengthen and extend or not the issuer's liability on regulated markets[83] and decided not to take action in any direction and to trigger liability in tort only in the presence of intentional deception (fraud) of an issuer while excluding rating agencies from the range of potential fraudulent issuers. The fear of floodgates of "American-style" litigation to get the financial multinationals to share investors' losses has always resulted in strong pressure from the UK, supported by the industry, not to introduce mechanisms of investor litigation against investment funds or financial companies so as not to provide the market with perverse incentives.[84] In any case, due to the many differences at the European level about the interpretation and application of the liability requirements, CRAs could easily incur regulatory arbitrage and forum shopping to avoid liability.[85]

---

[81] In England, see *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (UKHL) 650. In Germany, the quasi-contractual doctrine is based on confidence.

[82] See M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, Oxford University Press, 2022, Ch. 6 on *Compensation for Pure Economic Loss*; B.S. Markesinis, J. Bell and Janssen A., Markesinis's *German Law of Torts: A Comparative Treatise*, Hart Publishing: Oxford, 5th ed., 2019, pp. 88 ff.

[83] See Section 90A and 90B of the Financial Service and Markets Act 2000 (FSMA), which is the detailed provision implementing issuer liability provisions into English law in relation to reports and statements made under the EU Transparency Obligations Directive. In particular, see also HM Treasury, Davies Review of Issuer Liability: Final Report (March 2007) (Davies Report 2007), discussion paper available at https://www.treasurers.org/ACTmedia/daviesdiscussion260307.pdf (accessed 17 December 2024).

[84] For the same reason, the EU Commission's proposal to reverse the burden of proof in favour of the investors in CRA III art. 35(a), sec. 2 did not survive in the final draft of the article. See M. Andenas and I.H-Y. Chiu, *The Foundations and Future of Financial Regulation: Governance for Responsibility,* Routledge, 2014, pp. 223-225.

[85] Nästegård, *The Tort Liability of CRAs in Europe*, before (n 81), pp. 814-818.

ISSN 2281-5147

4.4 Judicial activism *vs* judicial restraint

Judiciary review exists with different intensity both in common law and civil law countries, regardless of which theory of democracy – legislative supremacy or separation of power –the legal system is based on. However, judicial *activism* is a peculiarity of common law countries. Judicial activism refers to that approach to the exercise of judicial review or description of a particular judicial decision, in which a judge overlooks legal precedents invalidating those legislative or executive actions conflicting with the Constitution or with the spirit of the time. In such a way, judges can protect people from powerful institutions and restore social justice where it is threatened. Sometimes, this approach has also been taken to limit liability *vis-à-vis* third parties when it was perceived that such extra-contractual liability would have been too heavy a burden and would have provided the market with perverse incentives. For instance, in the eminent English case of *Caparo Industries v. Dickman*,[86] the House of Lords dismissed the action of a shareholder (Caparo) against the auditors (Dickman) even though they negligently pictured a healthier financial situation of the audited company (Fidelity Plc) in which the shareholder – holding 29.9 percent – had launched a takeover bid for the remaining shares. The House of Lords refined the criteria applied in the assumption of responsibility to provide professional or quasi-professional services for another who relied on those services. [87] They elaborated a threefold test on the concept of proximity, foreseeability, and whether it is just and reasonable to impose a duty of care. While proximity and foreseeability are a similar concept and essential elements in determining negligence claims, the reasonableness test does not really belong to the structure of tort law. In the absence of foreseeability, the harm in question would be unavoidable and, therefore, a duty of care impossible. Likewise, without proximity it would be impossible to assume the actor (i.e. a CRA) owns fiduciary duties towards a multitude of defendants (i.e. investors). However, the third stage for the court involves balancing policy factors and private justice and, therefore, a public policy reason, to decide whether imposing a duty of care responds to the principles of 'fairness, justice and reasonableness'.[88]

[86] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (UKHL) 650.

[87] See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 All ER 506.

[88] J. Stapleton, *Three Essays on Torts*, Oxford University Press, 2021, ch 2, pp. 29-32.

ISSN 2281-5147

In the Caparo case, the House of Lords found that there was not sufficient proximity or "closeness" between the auditors and the shareholder, and, therefore, no duty of care was owed to the shareholders at large. In other words, it would have been necessary to prove that the auditor knew that its financial opinions would be communicated to the third party, who would have relied upon those opinions to perform a specific transaction.[89] This decision overturned the Court of Appeal, which held that it followed from the general rule that the auditors should be liable. For this reason, Lord Bingham referred to the decision as "judicial activism" (although here used) to limit liability.[90]

Indeed, the courts of common law have traditionally upheld the principle of *caveat emptor* and followed the doctrine of *privity*. However, judicial cases, which are regarded as the most important source of law, have given judges an active role in developing rules and new categories of negligence.[91] This capacity – to fill the legal vacuum produced by the globalization process constantly adapting to innovation – makes the courts of common law better equipped to govern the global economy. By contrast, claims presented under delictual liability in courts of civil law countries face severe proof difficulties relating to causation.[92] In the famous Italian case of Parmalat, the

[89] This judgment and its extent were further discussed in *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank plc* [2006] UKHL 28 [2007] AC 181. The House of Lords' decision established that under English law, a duty of care in a tort claim for pure losses could arise, irrespective of whether a contractual relationship exists between the parties, if one of the following tests is met: assumption of responsibility, threefold test (see *Caparo*), incremental test that the law should develop novel categories of negligence incrementally and by analogy with established categories (see the Australian case *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481).

[90] Lord Bingham of Cornhill, *The judges: active or passive*, in 139 *Proceedings of the British Academy*, 2005, p. 64.

[91] See K. Alexander, *Tort liability for ratings of structured securities under English law*, in 11 *International and Comparative Corporate Law Journal,* 2015, pp. 12-15.

[92] On CRA's extra-contractual liability in Italy among the many, see F. Parmeggiani, *Gli effetti distorsivi del credit rating*, before (n 15), pp. 169-199; C. Picciau, *Diffusione di giudizi inesatti*, before (n 45), p. 309 ff.; C. Rinaldo, *Rating incongrui e tutele di mercato,* Milano, Giuffrè, 2017, pp. 167 ff., 216 ff.; E. Depetris, *La responsabilità civile delle agenzie di rating del credito nella disciplina italiana ed europea*, Torino, Giappichelli, 2015, 377 ff.; R. Rosapepe, *Intervento*, in *Le agenzie di rating. Atti del Convegno,* 2014, 177; L. Di Donna, *Danni da rating e rimedi degli investitori*, in *Le agenzie di rating,* ult.cit., p. 286; G. Fauceglia, *Intervento*, in *Le agenzie di rating.,* 2014, 253; F. Greco, *La responsabilità "extracontrattuale" dell'agenzia di rating nei confronti dell'investitore*, in *Resp. civ. e prev.,* 2013, p. 1461; C. Scaroni, *La responsabilità delle agenzie di rating nei confronti degli investitori*, in *Contratto e Impresa,* 2011, p. 806; P. Giudici, *L'agenzia di rating danneggia l'emittente con i propri rating eccessivamente favorevoli?* in *Società*, 2011, 12, 1454; G. Facci, *Le agenzie di rating e la responsabilità per informazioni inesatte*, in *Contratto e impresa*, 2008, p. 164.

ISSN 2281-5147

action against Standard & Poor's (S&P) was brought by the receiver appointed to restructure the company. The court refused the request of 4 billion euros for damages but, at least, granted the restitution of all the fees (about 800,000 euros) paid by Parmalat to S&P during the period from 2000 until 2003 (just before Parmalat's financial meltdown), when S&P constantly considered the company "investment grade".[93] In a recent German case, the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf)[94] rejected an investor's lawsuit against a CRA brought both under Art. 35(a) of the CRA III and the national (German) private law. The Court argued that the ratings published only covered the company and not the company's bonds as the internal structure of Art. 35(a) of the CRA III requires.[95] The Court's judgement shed light on the German doctrine concerning contracts with protective effect to the benefit of third parties, making clear that corporate ratings fall outside the protective scope of the doctrine. Ratings are disseminated to the investment market, and a CRA cannot foresee who will rely on its corporate rating once published. If we were in the presence of a limited and recognizable category of investors sufficiently close to the CRA, i.e. linked by a relationship of proximity, it would be theoretically possible to assume an assumption of responsibility by the CRA as a basis for its own liability.

While the English courts have consistently demonstrated a reluctance to impose obligations (such as a duty of care to avoid economic loss) on a party in the absence of a contractual relationship, in the Australian case *Bathurst*,[96] the Federal Court of Australia found that S&P owed a common law duty of care to investors, notwithstanding that there was no contract between them, and was liable to the investors who purchased complex collateralized debt obligation notes rated AAA, which later became junk bonds. This decision showed that liability for financial loss suffered by professional investors who had relied on ratings could be imposed on a

[93] *Parmalat v Standard & Poor's*, Tribunale di Milano, 1 luglio 2011, in *Riv. Dir. trim. dir. econ.*, 2012, II, 83 followed by the comment of Troisi, *I giudizi di rating sulle società emittenti: tecniche di valutazione e problematica giuridica*, at pp. 93-106.

[94] I-6 U 50/17 (8 February 2018).

[95] That states an issuer may claim damages for credit ratings that cover 'it [i.e. the issuer] or its financial instruments, while an investor may claim damages only if it has relied on a credit rating covering a financial instrument'.

[96] *Bathurst Regional Council v Local Government Financial Service Pty Ltd* (No. 5) [2012] FCA 1200. The first instance was later confirmed in *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65.

ISSN 2281-5147

bank and the CRA that issued the defective rating if the risk of loss was foreseeable because of a negligent act of misrepresentation by the CRA.[97] In Bathurst, the rating agency did not give any consideration to the model risk when assigning the rating. S&P accepted a 15 percent volatility figure from the issuer bank (ABN Amro). In such circumstances – without any evidence of the accuracy of that percentage – S&P should not have issued any rating. Conversely, they adopted this percentage even if they could have easily calculated the absolute volatility percentage and realized that the correct figure was around 28 percent.[98] On appeal, the court stated that the class of investors who acquired the securities rated by S&P and the foreseeable loss were determined by the function that the CRA undertook, which was "delineated by the purpose of the rating … and the known reasonable reliance".[99] Although S&P alleged it could not owe a duty of care because there was no direct dealings or contractual relationship with the class of investors, the court deemed a contractual nexus between S&P and the investors not necessary in such circumstances. S&P knew that its rating was functional to finding finance, given that the investors were only waiting for it to be able to buy securities. In light of this, since the purpose of the rating was to attract finance from professional investors through marketing financial products issued by a bank, it was considered fair, just, and reasonable to impose a duty on CRAs to issue independent and competent ratings.[100]

In the US, CRAs' ratings have historically been considered financial opinions and have, therefore, been protected as freedom of speech by the US Constitution's First Amendment. The reason is that, through their ratings, CRAs touched on matters of public concern – the credit risk of a rated entity. However, over the years, the US courts have developed the idea that whether or not a public concern is touched upon depends on the content, form, and context. In several cases where it was said that CRAs touched on private rather than public concerns, their status as financial

[97] The British court arrived at different conclusions in a comparable case, *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2007] EWCA Civ 910, [2008] 2 BCLC 22 [56], in which it stated that mere foresight is not enough to give rise to a duty of care to third parties; assumption of responsibility is needed. See *also Barclays Bank plc v Grant Thornton UK LLP* [2015] EWHC 320 (Comm), 2 BCLC 537.

[98] *Bathurst Regional Council v Local Government Financial Services Pty Ltd* (No. 5) [2012] FCA 1200. In the judge's words: '[a] reasonably competent rating agency could not have rated the Rembrandt 2006-3 CPDO AAA in these circumstances.'

[99] *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [1260].

[100] *ABN AMRO Bank v Bathurst* [2014] FCAFC 65 at [1270] – [1271].

ISSN 2281-5147

journalists and, therefore, the protection granted by the First Amendment for political speech was rejected.[101] The idea that CRAs could not be considered by default as performing the journalists' professional activity and, thus, benefitting from the immunity granted by the First Amendment was already growing in the US courts, even before the enactment of the Dodd-Frank Act.[102] In the case *In re Fitch, Inc.*,[103] the Court of Appeals for the Second Circuit concluded that when a CRA is significantly involved in the client's operations (as, for instance, because it is consulting the client on how to structure a particular transaction), all its information disseminating activity (in this case the rating was solicited) does not seem to be 'based on a judgment about newsworthiness, but rather on client needs'.[104]

After 2008, in light of the last financial crisis, the US courts changed their approach, and CRAs lost their permanent status as financial journalists, particularly with regard to the rating of structured products. US courts took up the idea that structured financial products addressed for a specific business audience, such as investment banks and selected groups of investment bankers were only of private, not public, concern, and, as a consequence, the constitutional protection did not apply. By requalifying CRAs' ratings no longer as political, but as commercial speech that does not touch public concerns,[105] the US courts managed to shift their approach from quasi-judicial immunity toward the possibility of holding CRAs liable. This approach of the courts materialized in the *Abu Dhabi* case, where CRA had to prove that the

[101] In *LaSalle Nat'l Bank v Duff & Phelps Credit Rating Co.*, 951 F.Supp.1071, 1086 (SDNY 1996), since LaSalle privately contracted Duff & Phelps concerning a private placement of securities, there was no such public concern. Similarly, in *Dun & Bradstreet, Inc. v Greenmoss Builders*, 472 U.S. 749, 763 (1985), the court said that, unlike the traditional media, Dun & Bradstreet was in the business of selling financial information to subscribers who paid substantial fees for their services and they were solely motivated by the desire for profits.

[102] In *re Enron Corp Sec, Derivatives & "Erisa" Litig,* 511 F Supp 2d 742, 817 (SD Tex 2005). The District Court for the Southern District of Texas observed that 'there is no automatic, blanket, absolute First Amendment protection for reports from the credit rating agencies based on their status as credit rating agencies'. See also *First Fin Sav Bank, Inc v American Bankers Ins Co of Florida, Inc,* 1989 US Dist LEXIS 16400, 13 (EDNC 1989); In *re Taxable Mun Bond Sec Litig,* 1993 US Dist LEXIS 18592, 13 (ED La 1993).

[103] *In re Fitch v UBS Painewebber, Inc.*, 330 F 3d 104 (2d Cir 2003).

[104] *In re Fitch, Inc*, 330 F 3d 104, 110–11 (2d Cir 2003).

[105] The Supreme Court has defined commercial speech as "solely related to the interest of the speaker and its audience", see Virginia. *State Board of Pharmacy v Va. Citizens Consumer Council Inc.*, 425 U.S. 748, 762 (1976). The First Amendment still protects this type of speech but does not reach the same level of constitutional protection. See *Central Hudson Gas and Electricity Corporation v Public Service Commission*, 447 US 557, 561 (1980).

ISSN 2281-5147

ratings were a matter of public concern to benefit from First Amendment protection. The rating was communicated only to a selected group of qualified investors in that case. The Court denied its applicability, arguing that a rating directed to a selected group of investors, although not a small group, cannot be considered a matter of public concern.[106]

Not surprisingly, in the US States, we have witnessed in the years following the financial crisis an exponential increase in lawsuits against CRAs brought by investors and regulators.[107] In King County,[108] the Southern District of New York held that the relationship between the CRA and investors was privity-like but this was not sufficient to avoid liability for negligent misrepresentation. The rating was issued for a selected group of qualified investors and prepared with the aim of inducing them to invest in a particular structured investment vehicle.[109] Similar conclusions were reached in the eminent cases of *USA v. McGraw-Hill and S&Ps*,[110] where the US Department of Justice and 19 states claimed civil penalties against S&P for allegedly defrauding investors out of $5 billion in mortgage-related securities,[111] and *CalPERS case*,[112] the nation's largest public pension fund that put $1.3 billion into plain vanilla bonds in 2006, at the height of the subprime-fuelled housing boom.[113] According to the court in the CalPERS case, ratings are not mere predictions of the future value of a

[106] The case was settled, but the terms remained unknown. See *Abu Dhabi Comm. Bank v Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 175-76 (SDNY 2009). To support its statement, *the District Court cited Dun & Bradstreet Inc. v Greenmoss Builders Inc.*, 472 U.S. 749, 751, 762, 763 (1985), where the rating grade was made available to a small group of investors bound to confidentiality.

[107] *Genesee County Employees' Retirement System v Thornburg Mortgage Securities Trust 2006-3*, 825 F. Supp. 2d 1082 (D.N.M. 2011).

[108] *King County, Washington et al. v IKB Deutsche Industriebank AG et al*, no. 09-08387, 31-50 (S.D.N.Y. 2012).

[109] The claim for negligence and breach of fiduciary duty were dismissed but not that for negligent misrepresentation.

[110] *USA v. McGraw-Hill Companies Inc. and Standard & Poor's Financial Services LLC,* No. CV 13-00779 DOC (JCGx) available at https://www.justice.gov/file/338701/download (accessed January 2024).

[111] The ratings gave a wrong picture of the market, portraying the securities as much safer than they were. The case was settled in February 2015 for the unprecedented sum of $1,375 billion.

[112] *Cal. Pub. Employees' Ret. Sys. v Moody's Investors Serv. Inc*, 226 Cal. App. 4th 643, (Cal. Ct. App. 2014). A similar approach was adopted in *Genesee County Employees' Retirement System v Thornburg Mortgage Securities Trust 2006-3*, 825 F. Supp. 2d 1082 (D.N.M. 2011).

[113] According to court filings, the fund estimates it lost as much as $1 billion when the bonds lost their value in the ensuing crash. The case was settled in 2016 before judgment for $130 million, a few months after S&P agreed to settle with CalPERS for $ 125 million.

ISSN 2281-5147

particular structured investment vehicle, but affirmative representations regarding the present state of the rated entity, its solvability, and its capacity to generate cash flow to repay interest and capital to the investors. For this reason, CRAs have to continuously monitor the structured finance products to ensure that the given rating remains accurate. This process involves withdrawing any rating that no longer represents the issuer's creditworthiness. The case resulted in a published appellate court opinion finding that CRAs can, in certain circumstances, be liable for negligent misrepresentations of their ratings of privately placed securities. Of course, the circumstances that would preclude the First Amendment defence might be examined case by case. In other circumstances, where it was not possible to establish a relationship, the principle of privity prevailed. Since there was no direct contact or communication between the CRA and the investors, claims for negligent misrepresentation were dismissed.[114]

5. Conclusion

The idea of the new global and interconnected markets, such as the financial markets, sharply contrasts with the notion of 'State', which is an entity delimited by geographical and political boundaries.[115] Many national codifications cannot regulate the global economy. Unfortunately, the civil liability regime introduced by the EU legislator, by allowing *renvois* to the applicable national law to interpret critical terms concerning the proof of causation and reliance, attempts just that. CRAs perform their activity in a global market; therefore, *ex-ante* supervision and *ex-post* enforcement

[114] *Anschutz Corp. v Merrill Lynch & Co.*, 690 F.3d 98 (2d Cir. 2012); *Ohio Police & Fire Pension Fund v Standard & Poor's Financial Services LLC,* 813 F. Supp.2d 871 (S.D. Ohio 2011); *Federal Home Loan Bank of Boston v Ally Financial Inc* No.11-10952-GAO, 3 (D. Mass. 2012); in *re Merrill Lynch Auction Rate Sec Litig,* 2011 US Dist LEXIS 14053, 38–39 (SDNY 2011), the Court rejected the claim holding that 'credit ratings are statements of opinion' and are therefore not actionable. In the Court's reasoning, the only exception to this rule is if the agency knew that the credit rating was false or inaccurate. Also see: *In re National Century Financial Enterprises, Inc.,* 580 F. Supp. 2d 630 (S.D. Ohio 2008), where "the Court's review of Ohio case law on negligent misrepresentation supports the conclusion in National Mulch that even though a special relationship is not an express element of a negligent misrepresentation claim, it is an apt characterization of the requirements that the defendant supply false information in a business transaction for plaintiffs guidance and that the plaintiff be the person or part of a limited class for whom defendant intended to supply the information".

[115] In Europe, the law of a single State – no matter how powerful – is as threatening as "the roar of a mouse". See F. Galgano, *La globalizzazione nello specchio del diritto,* Bologna, Mulino, 2005, pp. 115-156.

ISSN 2281-5147

should also relate to the entire market. However, as the analysis above shows, statutory law seems to be too rigid a tool for regulating global markets. More flexible tools that can quickly adapt to circumstances should be adopted. This article evidences that the judicial reforms of certain common law courts have been more effective than many statutory (written) rules. Legal structures such as those of common law countries are better equipped to tackle global market challenges and improve the overall governance of CRAs. To reduce this gap, it becomes essential to identify the optimum means that would extend to the judiciary the flexibility to balance investors' protection and sustainable development in financial markets in any given factual circumstance; in other words, to contextualize to do justice.[116]

Increasing and extending the powers of the delegated financial authority ESMA is undoubtedly a good step forward. Compensation is not a goal of the ESMA's enforcement policy. However, it could become. Empirical evidence from the UK's practice shows that such a model (called 'integration model') is already adopted, prompted by a need of restorative justice, which sought to link the sanctioning activity of the authority with the redress of any damage caused by the CRA's infringement.[117] Alternatively, since the main problem concerns a lack of harmonization of civil law countries' various legal traditions and procedural law tools, a solution could be to start from the commonalities among the national tort laws regarding the application and interpretation of the proximity requirement to form the basis for harmonizing it as well as its central liability elements.[118] It could be helpful to develop always more accurate standards, professional norms, and best practices about CRA's activities on which the national courts could rely. Standards could be imposed on CRAs even contractually through *ad-hoc* designed clauses. Their role would be pivotal in private law enforcement because of their strong connection with contractual and extra-contractual liability. They could harmonize the private law and private enforcement procedures in the EU financial market and provide national courts with a model of behaviour against which CRAs must be assessed

[116] See P. Giliker, *Codification, consolidation, restatement? How best to systemise the modern law of tort*, 70(2) *International and Comparative Law Quarterly*, April 2021, pp. 271–305.

[117] See O.O. Cherednychenko, Regulatory Agencies and Private Damages in the EU: Bridging the Gap between Theory and Practice', (2021) Yearbook of European Law, Vol. 40, No. 1, p. 163.

[118] E. Nästegård, *The Tort Liability of CRAs in Europe*, before (n 81), pp. 804-814.

ISSN 2281-5147

ISSN 2281-5147

(UN)REGULATION OF EXTRAORDINARY EXPENSES FOR CHILDREN IN FAMILY CRISES: COMPARATIVE INSIGHTS FROM THE CANADIAN MODEL

Nicoletta Patti*

Abstract

The regulation of extraordinary expenses in separation and divorce proceedings represents a critical challenge in Italian Family Law. The absence of centralized legislation and uniform guidelines has resulted in fragmented practices across courts, amplifying judicial discretion and generating uncertainty for parents. This article provides the results of a systematic mapping of the protocols adopted by Italian courts, revealing significant disparities in the management of extraordinary medical, educational, and extracurricular expenses, both nationally and within individual Court of Appeal Districts.

Conversely, drawing on the Canadian model, which employs federal uniform guidelines to regulate extraordinary expenses, this study investigates how such an approach can balance certainty, predictability, fairness, and flexibility. Employing a methodology that integrates inductive and deductive approaches – including case study analysis and a review of normative and doctrinal sources from a comparative perspective – therefore, the article proposes actionable recommendations to harmonize Italian practices, aiming to reduce legal uncertainty and improve outcomes for families.

Indice Contributo

* Assegnista di Ricerca at LIDER Lab, Sant'Anna School of Advanced Studies. nicoletta.patti@santannapisa.it. Her research focuses on child protection in the digital age, with particular emphasis on the interaction with the Internet of Things and artificial intelligence-based technologies. Her broader academic interests include the evolution of family law and inheritance law, analysed from a comparative perspective.

ISSN 2281-5147

Keywords

Extraordinary Expenses, Parental Responsibility, Italian Court Protocols, Canadian Child Support Guidelines, Comparative Law.

1. Introduction.

The management of extraordinary expenses in child custody, separation, and divorce proceedings represents one of the most sensitive and complex aspects of parental responsibility. Despite the frequent disputes arising from the legal uncertainty surrounding these expenses in Italy, the topic often receives limited attention in academic discourse. Typically relegated to footnotes or addressed tangentially in broader debates, it is frequently overshadowed by issues such as custody arrangements or ordinary child maintenance payments. Yet, the regulation of extraordinary expenses plays a pivotal role in the practical functioning of post-separation family life, directly influencing not only parental rights and obligations but, more importantly, the well-being of children.[1]

[1] For a general analysis of child well-being, see: Z. Vagheri, J. Zermatten, G. Lansdown, R. Ruggiero, (eds) *Monitoring State Compliance with the UN Convention on the Rights of the Child. Children's Well-Being: Indicators and Research*, vol 25. Springer, 2022.

ISSN 2281-5147

The Italian law requires both parents to contribute to their children's maintenance under article 30 of the Constitution and several provisions of the Italian Civil Code[2]. However, the boundary between ordinary and extraordinary expenses remains ambiguous. Extraordinary expenses, by their nature, are unpredictable and occasional, leaving parents uncertain about when mutual consent is required for their approval. The absence of national uniform criteria has granted courts wide discretion in handling such cases, resulting in inconsistent decisions across the country. This fragmentation undermines predictability, fosters litigation, and places undue burdens on parents and the civil justice system (see Section 2).

To address these challenges, some courts, in collaboration with local bar associations, have introduced protocols to clarify the management of extraordinary expenses. However, rather than creating a cohesive national standard, this approach has produced a patchwork of inconsistent guidelines.

This research adopts a bottom-up approach, systematically collecting and analyzing national protocols on extraordinary expenses.[3] By focusing on local practices as a foundation, it identifies patterns and discrepancies across courts[4], offering a granular view of how extraordinary expenses are managed. This empirical basis enables the development of a broader comparative analysis (see Section 3.1). Building on this foundation, indeed, the article employs a multi-level approach, combining a synchronic analysis of court protocols across Italy with a diachronic perspective to examine how these categories have evolved over time in response to social and cultural changes. (see Sections 3.2 and 3.3). The fragmented legal framework that emerges from this analysis, resembles a mismatched puzzle, illustrates the difficulty

[2] Specifically, Articles 147, 148, 315-bis, and 316-bis of the Italian Civil Code, as well as Article 337-ter in cases of separation and divorce (reference is made to Section 2 of this article).

[3] The study related to mapping of extraordinary expenses in separation, divorce, termination of the civil effects of marriage proceedings started under the Chilndren's Rights and Family law research line coordinated by Denise Amram, at LIDER Lab, Dirpolis Institute, Scuola Superiore Sant'Anna of Pisa in Spring 2024, that has been solicitated as a member of the Family Law issues working group at the Observatory of the Civil Justice, established by the Tribunal of Pisa and the State Bar of Pisa, with the collaboration of the University of Pisa and the Scuola Superiore Sant'Anna. This request aimed to establish a knowledge base on Court protocols regarding extraordinary expenses, given the absence of unified guidelines and consistent practices at the national level, with the ultimate goal of developing a local protocol applicable at the Tribunal of Pisa.

[4] A significant outcome of this effort was the development of an interoperable digital interface designed to improve transparency and accessibility of information regarding court protocols. See D. Amram, N. Patti, D. Cerasuolo, *Piattaforma Spese Straordinarie*, 2024, available for consultation upon request on www.iris.santannapisa.it.

ISSN 2281-5147

of reconciling diverse local practices into a coherent and unified national standard. Instead of forming a clear and orderly picture, the resulting structure appears disjointed, lacking harmony and a guiding design.

In light of this, the Principles of the Commission on European Family Law (CEFL)[5] offer a critical reference point, underscoring fundamental tenets such as consistency, predictability, and fairness in the regulation of child maintenance. These principles advocate for the establishment of a clear and coherent legal structure across European jurisdictions, aimed at mitigating legal uncertainty and ensuring equitable treatment for all parties involved. Within the Principles on Parental Responsibilities, in particular, Chapter II, dedicated to the rights of the child, provides a foundational perspective, affirming that the best interests of the child must be the primary consideration in all matters concerning parental responsibilities. Principle 3:3 highlights the centrality of this concept that remains undefined, implicitly recognizing its inherently flexible nature and acknowledging its dependence on societal values and the unique circumstances of each child, such as age, maturity, and needs. This principle serves as the guiding star for our analysis, shaping the framework through which issues of legal uncertainty, such as the management of extraordinary expenses, are examined.[6]

Drawing upon these foundational concepts, the article examines a non-European model, specifically the Canadian model[7], which has successfully implemented child support guidelines at federal level.[8] Like the CEFL Principles, the Canadian

[5] The Commission on European Family Law (CEFL), established in 2001, is composed of legal experts specializing in comparative and European family law, representing various EU Member States. To date, the CEFL has developed several sets of principles, including those addressing divorce and maintenance obligations between former spouses, parental responsibilities, property relations between spouses, and the rights to property, maintenance and succession in *de facto* unions. The CEFL's work seeks to promote the harmonization of family law in Europe, offering a structured framework for legislators and policymakers. Further details about its initiatives can be accessed through its official website: https://ceflonline.net/.

[6] See https://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf.

[7] The presence of Québec, with its system influenced by civil law, adds further relevance to the comparison with Italy. See: J.E.C. Brierley, R. A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto 1993). In general, for an analysis of mixed legal systems see: E. Attwooll, E. Örücü, S. Coyle, *Studies in Legal Systems: Mixed and Mixing* (L'Aia 1996); J. Du Plessis, *Comparative Law and the study of Mixed Legal Systems*, in *The Oxford Handbook of Comparative Law* (Oxford 2006); S. Farran, E. Örücü, S.P. Donlan, *Mixed Legal Systems: Endangered, Entrenched, Blended or Muddled?*, (Londra 2014); V.V. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge 2012).

[8] *Federal Child Support Guidelines* (SOR/97-175) s 7.

ISSN 2281-5147

framework places the best interests of the child at the core of its legal approach, ensuring that all decisions concerning child support prioritize the child's needs and well-being. Unlike Italy, Canada operates within a federal system but has faced similar challenges, making it a particularly relevant case study. Both countries have grappled with fragmented judicial practices and inconsistent decisions regarding child support, which have created uncertainty for families and increased litigation. In response to these challenges, Canada has developed an innovative and pragmatic solution by adopting federal guidelines that combine structured criteria with targeted flexibility. This approach offers a compelling example of how fragmented judicial practices can be harmonised through uniform and standardised guidelines, balancing consistency with adaptability (see Sections 4 and 4.1).

Through its comparative and multidimensional approach, this study tries not only to map the Italian landscape, but also to propose practical solutions inspired by foreign models, to harmonize national practices and reduce legal uncertainty surrounding extraordinary expenses (see Section 5). This dual perspective frames the analysis and underscores the study's objective to bridge gaps and establish greater consistency in the management of expenses under comment.

The methodology combines both inductive and deductive approaches, offering a comprehensive framework for analysing legal practices and theoretical foundations. The inductive approach draws conclusions from empirical observations, uncovering patterns and trends in judicial practices and their application in diverse contexts. Concurrently, the deductive approach engages in a detailed examination of legal doctrine, case law, and regulatory frameworks, providing a deeper understanding of the underlying principles and norms. Together, these approaches bridge practical insights with broader theoretical perspectives, enabling a multidimensional and context-sensitive analysis.

2. Legal Framework of Ordinary and Extraordinary Expenses in Parental Responsibility

As anticipated, the Italian Constitution, under Article 30, explicitly states: *"It is the duty and right of parents to maintain, educate, and raise their children, even those born out of wedlock".* [9]

[9] Regarding the definition of the "rights" and "duties" of parents toward their children, reference is made to E. Lamarque, *Art. 30*, in R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Utet, Turin, 2006, vol. I, pp. 622 ss., who argues that "the rights of parents should never be separated from their corresponding duties, as such rights are merely a 'function' to be exercised in the best interests of the children". For an extensive comment, B. Liberali, *(Prima) il dovere e (poi) il diritto: alla*

ISSN 2281-5147

This principle is also codified in the Italian Civil Code. Specifically, within the institution of marriage, Article 147 obliges both spouses to support their children, taking into account the minor's "*abilities, natural inclinations, and aspirations*"[10], and proportionally to each spouse's financial capacity and contributions, whether professional or domestic.[11] This obligation extends to biological parents outside of marriage, creating a uniform standard for all parental relationships. Rooted in the parent-child bond and arising solely from the act of procreation, it applies regardless of the child's birth circumstances or legal recognition.[12]

The duty of maintenance is thus a core component of the broader parental responsibility[13], aimed at nurturing and safeguarding the child's personality

ricerca degli 'ossimori costituzionali' nella cura dei figli, in *Gruppo di Pisa*, n. 3, 2018; G. Bonilini, *Nozioni di diritto di famiglia*, Torino, 2002, 173; P. Perlingieri, Pisacane, *Art. 30 Cost*., in P. Perlingieri, Commento alla Costituzione italiana, Napoli, 2001, 191.

About the concepts that define the duties and rights of parents – namely maintenance, instruction, and education – three main areas can be identified. Maintenance refers to the obligation to provide the child with the necessary economic resources to ensure the material foundations essential for the development of their personality. Instruction concerns the acquisition of technical skills and knowledge that enable the child to actively participate in civil society and engage in productive employment. Finally, education is more complex as it involves the transmission of values, which are never neutral, and the construction of an ethical framework. In this perspective, parents are entrusted with the task of guiding their children toward a coherent value-based education, built upon a unified and structured educational plan. This plan is conceived as an organized set of principles aimed at directing the child's development toward an integrated vision of life. In this sense see G. Giacobbe, *Educazione della prole, progetto educativo e ruolo della famiglia: spunti per una riflessione*, in *Iustitia*, 2012, IV, 432 ss.

[10] This provision, in turn, refers to Article 315-bis, titled "Rights and Duties of the Child", which recognizes the child's "*right to be maintained, educated, instructed, and morally supported by their parents, with due respect for their abilities, natural inclinations, and aspirations",* as well as the *"right to be heard in all matters and procedures affecting them".*

[11] Art. 316-bis Italian Civil Code.

[12] See, among others, Cass., 14.8.1998, n. 8042, in *Famiglia e dir*., 1999, 175; Cass., 16.10.2003, n. 15481, in *Dir. famiglia*, 2003, 928. P. Perlingieri, Pisacane, *Art. 30 Cost*., cit., 191.

[13] Article 316 of the Italian Civil Code significantly replaced the terms "parental authority" with the expression "parental responsibility". This change emphasizes the parents' duty of care towards their children, prioritizing the fulfillment of the children's best interests, in relation to which the parents' role is functional. On the concept of parental responsibility, introduced by Law No. 219/2012, see, among others, A. Gorgoni, *Filiazione e responsabilità genitoriale*, Cedam, Padova, 2017; M. Sesta - A. Arceri, *La responsabilità genitoriale e l'affidamento dei figli*, Giuffrè, Milano, 2016, 89; A. D'Aloia - A. Romano, *I figli e la responsabilità genitoriale nella Costituzione (art. 30 Cost.),* in G. F. Basini - G. Bonilini - P. Cendon - M. Confortini (eds.), *Codice commentato dei minori e dei soggetti deboli*, Utet, Torino, 2011.

ISSN 2281-5147

development.[14] Indeed, it encompasses the child's right to financial support, along with access to education and instruction, recognized as fundamental rights guaranteed regardless of the child's legal status.[15] In essence, maintenance is the financial expression of the general duty of care, covering all expenses essential to meet the child's needs and ensure their overall well-being and psychophysical development.[16]

In cases of separation and divorce, Article 337-ter of the Italian Civil Code provides an "indirect"[17] method for fulfilling the duty of child maintenance through the so-called maintenance allowance (*assegno di mantenimento*). Paragraph 4 of the article specifies the criteria courts must apply to determine the amount of the allowance, ensuring compliance with the principle of proportionality. These include the child's current needs, the standard of living maintained during cohabitation with both parents[18], the time spent with each parent, their respective financial resources, and the economic value of domestic and caregiving contributions.[19] This provision underscores the obligation for both parents to contribute proportionally to their child's maintenance, with the overarching aim of preserving their well-being and ensuring equity in fulfilling parental responsibilities, even during family crises.[20]

---

[14] Angelozzi, *Sull'estinzione del diritto al mantenimento del figlio maggiorenne,* in *Famiglia e dir.*, 2006, 39; D. Achille, Il mantenimento del figlio maggiorenne tra diritto positivo e prospettive di intervento legislativo, in Famiglia, Persone e Successioni, 2011, p. 663.

[15] C. M. Bianca, *Diritto civile. 2. La famiglia – Le successioni*, 4a ed., Milano, 2005, 319.

[16] F. Ruscello, *La potestà dei genitori. Rapporti personali (Artt. 315 – 319)*, in Comm. Schlesinger e diretto da Busnelli, 2a ed., Milano, 2006, 103.

[17] E. Morotti, *Assegno di mantenimento del figlio: carattere ordinario o straordinario delle spese scolastiche e universitarie*, in *Familia, Il diritto della famiglia e delle Successioni in Europa*, 2022, p. 1, who writes: in the event of a family crisis "the duty of maintenance remains in a 'direct' form, i.e. through the immediate satisfaction of the child's needs, while the 'indirect' form, consisting of the so-called maintenance allowance, constitutes an exceptional modality, which occurs when the burden of providing for the child's needs falls on only one parent'. The translation is by the author.

[18] The notion of maintaining the standard of living previously enjoyed by the child is a recurring theme in case law. For references, see, among others, Cass., 23 July 2020, no. 15774; Cass., 6 August 2020, no. 16739, in Studium juris, 2021, 371; Cass., 16 September 2020, no. 19299 in CED Cassazione, 2020; Cass., 10 October 2018, no. 25134, in Foro it., 2018, 11, 1, 3465; Cass., 18 January 2017, no. 1162 in CED Cassazione, 2017 etc.

[19] The trial judge's assessment of the quantum is not subject to review by the Court of Cassation, provided it is adequately reasoned.

[20] A. Figone, *Alcune questioni applicative in tema di affidamento condiviso,* in *Dir. fam. e pers.*, 2006, 641 ss; P. Vercellone, *I rapporti genitori-figlio. I doveri di entrambi,* in *Trattato di diritto di famiglia*, diretto da Zatti, II,

ISSN 2281-5147

Despite the apparent terminological clarity surrounding parental responsibilities, providing an exhaustive and comprehensive definition of their scope remains a challenging task for any interpreter. This complexity arises from the fact that parental duties inherently encompass a broad and undefined range of the child's needs, which often go beyond the predictable and ordinary, making it challenging to classify expenses with precision. The monthly maintenance allowance is, in many cases, insufficient to cover all actual expenses, particularly those related to unforeseen and exceptional circumstances, creating significant difficulties in managing and allocating these additional costs between the parents.[21]

It is therefore evident that a central issue in this framework is distinguishing between *ordinary* and *extraordinary* expenses. In general, ordinary maintenance typically encompasses predictable and necessary daily costs related to the child's basic needs[22], such as food, clothing, and housing. In contrast, extraordinary expenses – that are not explicitly defined by law and are instead clarified through case law – typically arising from exceptional or unforeseen circumstances[23], such as specialised medical treatments, study abroad, or extracurricular activities involving significant financial commitments. Courts frequently allocate extraordinary expenses by establishing percentages during separation or divorce proceedings. This approach defines cost-sharing responsibilities, which may be equal, proportional, or entirely assigned to one parent based on financial capacity and the child's needs.[24] However, ambiguity persists regarding what constitutes an extraordinary expense versus one covered by the allowance and when prior parental agreement is required.

Filiazione, 2012, 951; F. Ruscello, *Il rapporto genitori-figli nella crisi coniugale,* in *Nuova giur. civ. comm.*, 2011, 402.

[21] E. Morotti, *Assegno di mantenimento del figlio*, cit., p. 5; D. Achille, *Il mantenimento del figlio maggiorenne tra diritto positivo e prospettive di intervento legislativo,* in *Famiglia, Persone e Successioni*, 2011, p. 663.

[22] Cass., 12 November 2021, n. 34100.

[23] Among others, Cass. 15 February 2021, no. 3835; Tribunale di Roma, sez. I, 7 May 2020, no. 6964.

[24] As a general rule, unless otherwise specified by the court, extraordinary expenses for minor children are divided equally between the parents (50%), in accordance with the general principle established by Article 30 of the Constitution and reiterated in Article 337-ter of the Civil Code, which imposes on both parents the duty to maintain their children. For reference, see Cass., January 11, 2022, No. 663, in CED Cassazione, 2022.

ISSN 2281-5147

A recent judicial ruling[25] illustrates the complexities involved in distinguishing extraordinary expenses. For educational and school-related expenses, the ruling clarified those expenditures for textbooks, stationery, and school uniforms – despite being incurred annually – are considered ordinary expenses, as they pertain to the child's fundamental and predictable needs. Similarly, monthly school fees, including semi-boarding costs, fall within the category of ordinary expenses, reflecting the child's pre-separation standard of living. In contrast, study trips abroad, school excursions, private tutoring, and extracurricular sports activities were classified as extraordinary expenses. University-related expenses, such as tuition fees and textbooks, were also deemed ordinary due to their foreseeable and regular nature. However, this classification often warrants an increase in the maintenance allowance to account for the additional financial burden. In healthcare, the distinction between ordinary and extraordinary expenses is equally nuanced. Routine medical visits, over-the-counter medications, and regular pediatric check-ups are categorized as ordinary expenses. Conversely, extraordinary medical expenses include urgent surgical interventions, psychotherapy treatments, physiotherapy following accidents, and the purchase of medical devices such as glasses or orthodontic braces. Recreational and leisure activities, while not essential to survival, are recognised as important components of a child's life. Accordingly, parents are generally expected to contribute to such expenses within their financial means. Purchases such as computers, scooters, or the costs associated with obtaining a driver's licence – and even fines for traffic violations – are often categorised as extraordinary expenses.

The lack of clear parameters for distinguishing these expenses creates uncertainty, often leading to disputes that strain parent-child relationships.[26] The key challenge is determining how extraordinary expenses should be shared and integrated with the allowance while ensuring the child's stability and well-being. To reduce disputes, it has often been suggested to include extraordinary expenses as a lump sum within the maintenance allowance. This approach aims to minimize unforeseen costs by incorporating as many predictable expenses as possible into the calculated amount. However, the Court of Cassation has repeatedly emphasized that this method could conflict with the principles of proportionality and adequacy enshrined in Article 337-ter of the Civil Code. If extraordinary expenses do not materialize, the paying parent may end up covering unjustified amounts, while, if such expenses exceed the lump

[25] Tribunale Savona, 29 January 2019, n. 84.

[26] D. Achille, cit. 665; In this sense also M.R. Mottola, la *Responsabilità Genitoriale al tempo del Covid 19*, 2020, p. 31, who states: "Such statutions, uncertain both in the *an* and *quantum*, lead to moments of tension and dispute between the parents".

ISSN 2281-5147

sum, the custodial parent might not receive adequate reimbursement. In both cases, the principle of equitable distribution of the maintenance burden between parents would be compromised.

In response many courts have adopted non-binding protocols developed in collaboration with local bar associations. These protocols aim to clarify the classification of expenses and establish decision-making authority (whether assigned to the custodial parent or requiring mutual consent)[27]. Although not legally binding, these guidelines strive to standardize decision-making processes and reduce conflicts across different Courts. Nevertheless, their localized nature raises concerns about consistency at the national level. Without a unified framework, disparities in the interpretation and application of parental obligations persist – an issue that will be explored further in the following sections.

3. Court Protocols on Extraordinary Expenses: A Comparative Analysis.

3.1. Methodology for Mapping and Classification.

This section outlines the methodology used to systematically map and classify the protocols adopted by Italian courts concerning extraordinary expenses. The analysis involved the comprehensive collection and cataloguing of the protocols issued by individual courts, organized by district of the Court of Appeal, and grouped into three main categories: medical expenses, educational expenses, and extracurricular expenses. While not all courts explicitly adhere to this tripartite classification, it proved to be a logically coherent framework, offering much-needed clarity and structure to the often-indistinct array of expense categories, thus enabling a meaningful comparative analysis.[28] A key aspect of the analysis was the distinction

[27] The prior agreement between the parents should ensure not only a mutual decision on incurring the expense but also a shared commitment to the underlying educational choice. For instance, the purchase of a mobile phone – an expense that may qualify as extraordinary and exceed the maintenance allowance – requires agreement on financial aspects as well as broader educational considerations, such as providing internet access and determining the appropriate age for the child to start using it.

[28]The research concerning the total mapping was conducted using a rigorous methodology, which involved the collection and cataloguing of protocols existing in Italian courts. Data have been analysed in a form aimed at classifying the expenses in a common and standardized category. Each protocol was analysed, and a dataset comprising 110 rows was created, with each row corresponding to a specific type of expense. This detailed mapping, validated by selected experts - Avv. Dr. Elena Occhipinti and Avv. Isabella Sardella - allowed for the classification of each expense based on its nature (medical, educational, extracurricular), and determined whether prior approval from both parents was required for each category.

ISSN 2281-5147

between expenses requiring mutual parental consent and those that could be decided unilaterally by one parent. This differentiation proved crucial in assessing how various courts regulate parental decision-making authority concerning extraordinary expenses.

On this basis, an excel form was created and validated. The resulting database consists of 120 rows, representing the individual expenditure items identified and organized into the three mentioned categories – medical, school, and extracurricular expenses – and 110 columns, corresponding to the courts grouped by district of the Court of Appeal. To ensure that the database was not only readable and interpretable but also searchable across a variety of variables, a digital platform was developed to consolidate and organize the data.[29] The tool enabled detailed searches across court protocols, focusing on expense categories, consent requirements, and variations in judicial approaches. The outcome clarified how courts categorize and regulate extraordinary expenses, identifying broader trends and divergences.[30] This foundation supports the synchronic analysis of current patterns and inconsistencies, and the diachronic analysis of how judicial practices have evolved in response to shifting social and legal dynamics.

3.2. Synchronic Comparison.

The synchronic analysis explores the current state of judicial protocols at the national level, highlighting areas of convergence and divergence in the classification and management of extraordinary expenses in separation and divorce cases.

A broad and generalized overview reveals a few (albeit limited) constants. For instance, urgent medical expenses or those covered by the National Health Service (SSN) - which are everywhere classified as extraordinary expenses - typically do not require parental agreement. Conversely, private facility expenses or non-urgent treatments often require prior consent from both parents. In education-related

[29] The *Piattaforma Spese Straordinarie* is a graphical interface that enables users to: consult the extraordinary expenses protocols of each court, analysing which expenses are covered and whether they require parental consent; conduct searches by expense categories (medical, educational, extracurricular) or by individual courts, allowing for comparisons of the practices adopted across different Italian Courts; and extract aggregated statistical data by expense category or court, providing a valuable tool for academic research and policy-making purposes.

[30] In the future, the platform could be enhanced by incorporating data on actual disputes that have arisen over extraordinary expenses, potentially integrating information from courts.

ISSN 2281-5147

matters, routine expenses - such as non-overnight school trips or public-school enrolment fees - usually do not require parental agreement, whereas the latter is required to attend private schools.[31] Similarly, certain extracurricular costs, like babysitting service may be decided unilaterally when justified by factors such as work obligations or lack of alternative childcare. In some cases, courts have set economic thresholds for specific expenses, mandating parental consent only when costs exceed a certain limit – independent of the economic situation of the individual family – to ensure financial stability.

While these patterns serve as a general starting point, a more in-depth analysis reveals a high degree of heterogeneity in the guidelines adopted at the local level. The data collected underscores the lack of uniformity regarding the classification and management of medical, educational, and extracurricular expenses. Discrepancies arise not only regarding the types of expenses considered extraordinary but also in the criteria courts use to determine whether these expenses require mutual parental consent.

For example, while some courts classify orthodontic care as an extraordinary expense requiring mutual parental agreement, other courts do not consider such consent necessary, particularly when such treatment is deemed essential for the child (see Fig. 1). Similarly, study trips abroad and extracurricular activities in some courts, these are considered extraordinary and require agreement, while in others, they do not, because viewed as part of the child's educational pathway.

Statistical analysis quantifies these inconsistencies, providing a clear mapping of territorial disparities. Even within the same appellate district, courts may adopt divergent approaches. For instance, in the Milan Court of Appeal District, significant disparities have emerged: Courts such as Lecco and Varese require consent for 24% of medical expenses, whereas the Pavia Court requires parental agreement in just over 10% of cases. By contrast, the Sondrio Court does not distinguish between expenses requiring prior consent and those that do not (see Fig. 2). These differences are

[31] The issue was also addressed by the Court of Cassation in its ruling of October 10, 2008, No. 25026 which explicitly clarified that attending a private school cannot be considered a fundamental necessity, as the right to education can be adequately fulfilled through public schooling. Consequently, when an expense is not directly linked to essential needs, the financial responsibility lies solely with the parent who incurred it. Applying this principle, the Court rejected the appeal, affirming the decision that excluded shared liability between the parents for the tuition fees of a private school, as the enrollment had been decided unilaterally by one parent.

ISSN 2281-5147

particularly pronounced in expenses like dental care or ophthalmological assessments, creating uncertainty that risks fueling disputes between the parties.

By focusing on a single expense category, we can further investigate these differences. For medical services not covered by the Italian National Health Service, courts such as Milan and Varese require advance consent, whereas Lecco allows these expenses to be incurred unilaterally (see Fig. 3).

Educational expenses show similar variability: while the Varese and Milan Courts require consent for nearly 35% of educational expenses, the Sondrio Court applies this criterion in less than 3% of cases. Specifically, overnight school trips and school contributions are subject to varying regulations, with some courts always requiring prior agreement, while others do not deem it necessary (see Fig. 4).

A particularly illustrative example involves public transportation costs for school commutes: while courts such as Como, Lecco, Milan, Pavia and Varese do not require prior parental consent, the Monza Court expressly demands it, and Sondrio mentions the expenses without providing specific guidance on whether agreement is necessary (see Fig. 5). The fragmentation observed in this area raises critical legal questions about safeguarding the best interests of the child.[32] Italian courts are tasked with ensuring that children can continue participating in school and educational activities even after their parents' separation, without parental conflict impeding their educational path. However, the lack of consistent protocols often makes it difficult for parents to anticipate which expenses require mutual consent.

[32] The concept of the best interests of the child is established under Article 3 of the UN Convention on the Rights of the Child, which states: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration"*. As Basset states, "the best interests of children is a physical and legal truth. It is legal because it expresses a practical truth, a directive orientation that runs through all of law, without exception. It is a physical truth because minors constitute an evolutionary condition of subsistence of humanity. Therefore, there is a structural resistance of the concept of the minor's interest to its manipulation". Please refer non-exhaustively to U.C. Basset, *The best interests of the child: the new challenges of a vague concept*, in Mirzia Bianca, *The best interests of the child*, 2020, p. 5; see also E. Lamarque, *Prima i bambini. Il principio dei best interests of the child nella prospettiva costituzionale*, FrancoAngeli, Milano, 2016; Zermatten, J., *The Best Interests of the Child Principle: Literal Analysis and Function,* in *The International Journal of Children's Rights*, *18*(4), 483-499, 2020, https://doi.org/10.1163/157181810X537391; P. Alston, *The best interests principle: towards a reconciliation of culture and human rights*, in *International journal of law and the family* 1994, n. 8, p. 2; C. Breen, *The Standard of the best interests of the child: a western tradition,* in *International and comparative law*, The Hague, 2002.

ISSN 2281-5147

In the field of extracurricular expenses, fewer discrepancies are noted. Most expenses are not accounted for in the protocols of courts within the Milan District (approximately 60%). However, 30% of catalogued expenses still require prior parental consent across all courts, while the remaining 10% do not (see Fig. 6). This situation confirms a lower degree of fragmentation compared to other expense categories, but disparities remain.

These divergences, made possible by Article 337-ter of the Italian Civil Code which grants judges broad discretion in assessing the needs of the child, reflect territorial differences not only in legal interpretation but also in access to public services, their quality, and the economic capacity of families. From a legal realism perspective, these differences mirror the specific social and economic needs that arise in local contexts. Judicially crafted protocols are often shaped by recurring disputes and challenges particular to their jurisdictions, reflecting the localised realities frequently encountered by the courts. For instance, regions with limited access to public healthcare or education may develop protocols that accommodate the higher prevalence of private expenses, whereas wealthier districts might focus on issues like extracurricular activities. This localised responsiveness aligns with the realist view that law must adapt to societal conditions to remain effective and relevant. Nonetheless, while this flexibility is valuable, the resulting territorial disparities can lead to unpredictability and conflict.

Without uniform standards, parents in similar circumstances could receive different legal outcomes for the same type of expense based on local court in which they find themselves, with repercussions on the principle of equality, a cornerstone of Western legal tradition.

ISSN 2281-5147

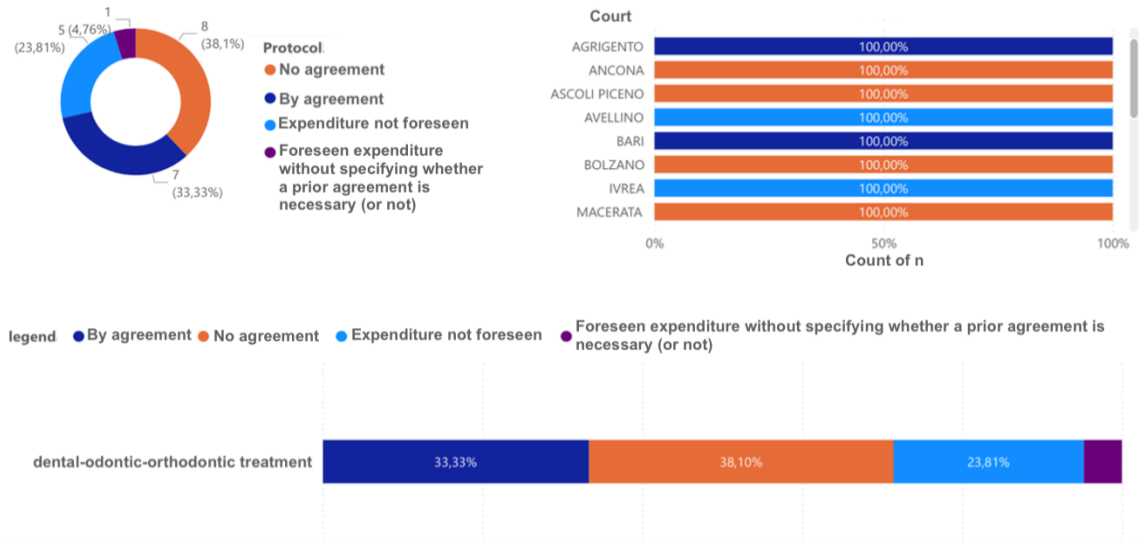


Fig.1: National overview of the percentage distribution of cases requiring (or not requiring) parental agreement for orthodontic care.

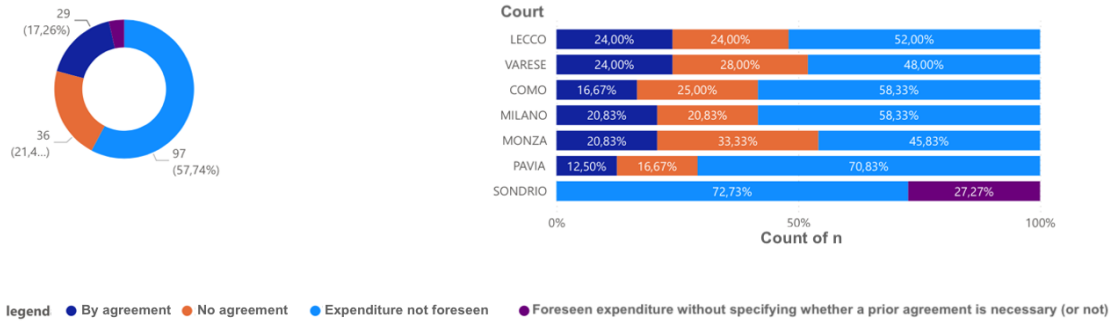


Fig. 2: Percentage distribution of medical expenses requiring parental consent in the Milan Court of Appeal District.

Fig. 3: Comparison of court requirements for parental consent on medical services not covered by the Italian National Health Service in the Milan Court of Appeal District.

ISSN 2281-5147

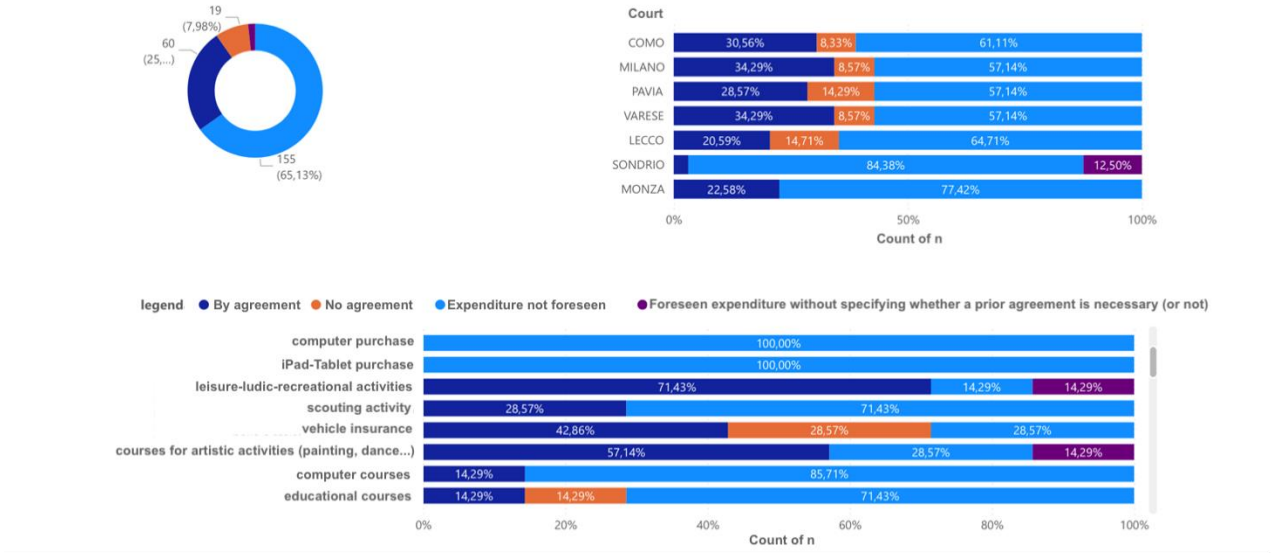


Fig. 4: Variability in parental consent requirements for educational expenses across courts in the Milan Court of Appeal District.

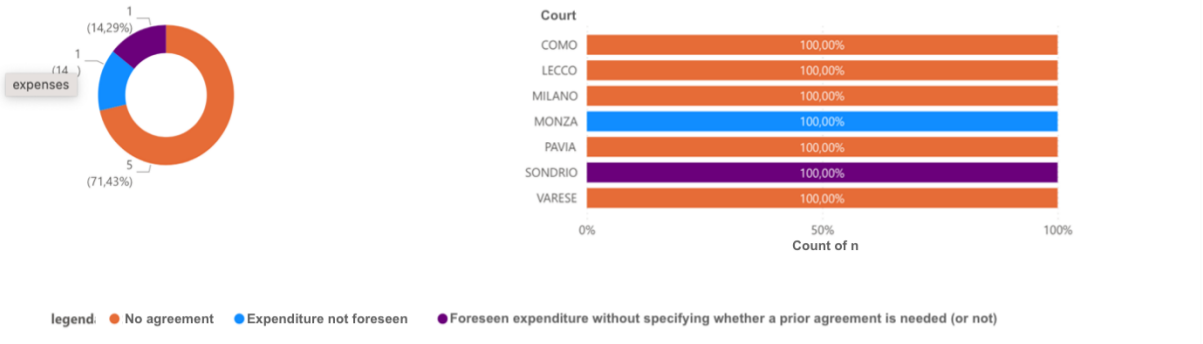


Fig. 5: Comparison of court approaches to parental consent requirements for public transportation costs for school commutes in the Milan Court of Appeal District.

Fig. 6: Distribution of parental consent requirements for extracurricular expenses across courts in the Milan District.

ISSN 2281-5147

3.3. Diachronic Perspectives.

The analysis of protocols related to extraordinary expenses reveals a significant evolution in the types of expenses recognised over time, closely tied to the shifts in social and family dynamics. The diachronic analysis presented here examines how the classification of extraordinary expenses has adapted to social, cultural, and economic changes.

Earlier protocols tended to focus on traditional aspects. Medical expenses were generally limited to specialist visits, dental and orthodontic treatments, diagnostic tests, and surgical interventions, with an emphasis on urgent and emergency needs. Educational expenses included school fees, learning materials, and school trips, with parental consent required only for particularly costly items or overnight trips. Extracurricular activities reflected a more conventional approach: occasional activities often did not require consent, while continuous ones, such as music lessons or sports courses, typically did due to their financial and time commitments. This framework reflected a more linear social reality, centred on essential needs.

More recent protocols reflect the changing technological and social landscape of modern families, introducing new categories of extraordinary expenses. Among these are technological devices such as smartphones, tablets, and computers, which underscore the increasing importance of digital literacy in education. The acceleration of digitisation during the pandemic has further highlighted this trend, with devices like iPads now recognised as necessary educational tools.[33] For instance, courts in Agrigento, Belluno, and Como have formally included these expenses in their protocols (see Fig. 7).

Moreover, certain courts have adapted their protocols to reflect the increasing emphasis on the psychological well-being of minors. More recent protocols, adopted by courts such as Belluno, Benevento, and Bolzano, explicitly require parental consent for expenses related to psychological support, underscoring a growing awareness of mental health needs, especially in post-separation contexts. The number of courts that include this item is significant and underscores how the protection of the psychological health of children is increasingly seen as a priority in separation and divorce proceedings (see Fig. 8).

[33] For an in-depth look at the relevance of digital tools in education and the legal framework, see: UNESCO, Judging for generative AI in education and research: https://unesdoc.unesco.org/ark:/48223/pf0000386693, 2023.

ISSN 2281-5147

Another emblematic example of this evolution concerns expenses related to the care and custody of domestic animals, a category absents in older protocols but gaining prominence in some courts, reflecting the growing attention given to the emotional bond between minors and domestic animals. Pets are taking on a more central role in family life, and therefore, expenses related to their care are now recognised as part of post-separation economic management. Courts such as Vercelli, Verona now systematically include provisions for such expenses in their protocols, demonstrating that the care and welfare of domestic animals are considered part of the overall well-being of the child. This recognition has been formalised in several rulings, including one issued by the Court of Venice[34], which established that expenses for the care of companion animals can be attributed to both parents, in proportion to their respective financial capacities, as they are considered part of the child's emotional needs (see Fig. 9).

A significant aspect concerns educational and professional development expenses. The analysis shows that expenses for language certifications or computer courses are always included among extraordinary expenses in the more recent protocols. This reflects a heightened awareness, on the part of the courts, of the importance of digital and linguistic skills for the future of minors (see Fig. 10).

Overall, these categories represent a notable shift in protocols, the court's responsiveness to evolving social, educational, technological, and cultural priorities. The diachronic analysis highlights how recent social trends and challenges have led to greater specificity and inclusion of these expenses in court protocols, demonstrating increased attention to the overall well-being of children, beyond traditional ordinary and extraordinary expenses. In other words, this transformation reflects a society in continuous evolution, where the education and personal development of minors are increasingly aligned with global and modern standards.[35]

At the same time, this diachronic analysis highlights how the timing of protocol adoption has created an additional layer of divergence. Older protocols, often less

[34] Tribunale di Venezia, No. 324/2022.

[35] As Oliver Wendell Holmes and Roscoe Pound have emphasized, effective legal systems must align with the real-world contexts in which they operate. In this regard, the adaptability of Italian courts to evolving social and cultural dynamics illustrates the capacity of family law to remain both relevant and impactful. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 1897, 461; Oliver Wendell Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 42 (1918).

ISSN 2281-5147

specific, fail to address the needs of modern families, while newer ones show greater sensitivity to contemporary priorities. This fragmentation exacerbates uncertainty for separated parents, contributing to increased litigation and significant disparities between Courts.

The absence of uniform criteria for managing extraordinary expenses remains a critical issue requiring coordinated intervention. A brief examination of the Canadian model[36], where the Federal Child Support Guidelines of 1997[37] have created a more predictable and transparent system, may offer valuable insights for reducing judicial discretion and fostering greater uniformity in decision-making. As previously highlighted, Canada has encountered analogous challenges, positioning it as an ideal laboratory for our research and a significant source of comparative insights.

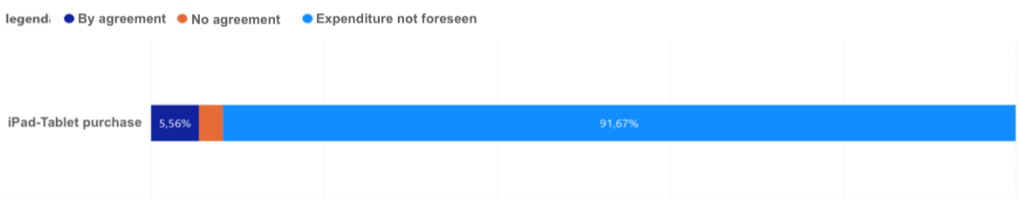


Fig. 7: Inclusion of technological devices as extraordinary expenses in court protocols.

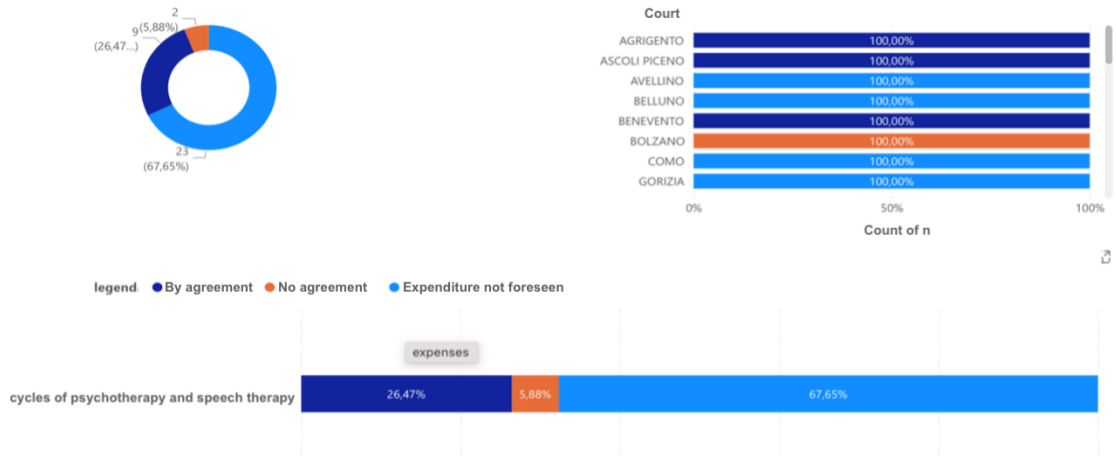


Fig. 8: Inclusion of psychological support expenses as extraordinary costs in court protocols.

[36] The Canadian system has faced challenges similar to those observed in the Italian context, such as excessive judicial discretion and inconsistent outcomes, which the guidelines were designed to address effectively.

[37] For an in-depth analysis, also historical, of the child support system in Canada, see J.D. Payne, M.A. Payne, *Child Support Guidelines in Canada* 2022.

ISSN 2281-5147

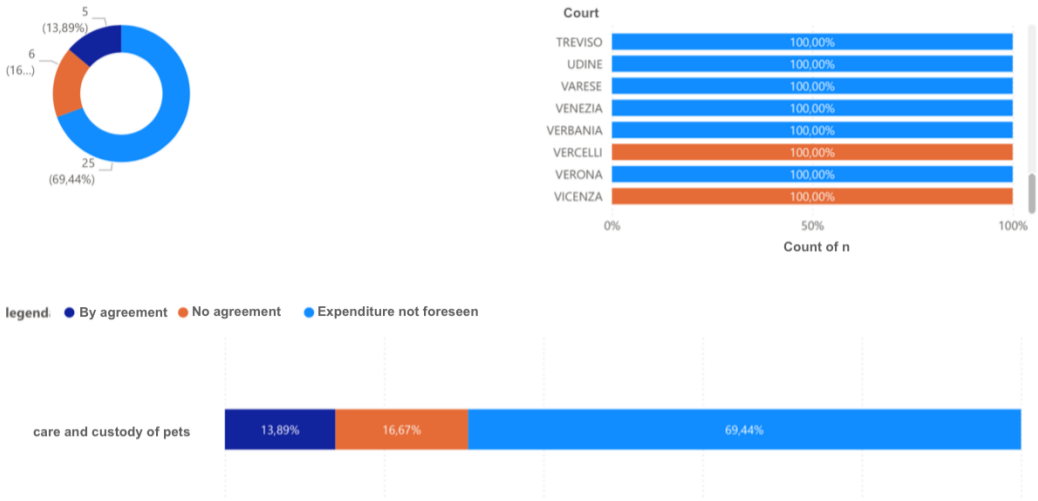


Fig. 9: Recognition of expenses for the care and custody of domestic animals as part of post-separation economic management in court protocols.

Fig. 10: Inclusion of language certifications and computer courses as extraordinary expenses in recent court protocols.

4. The Canadian Model: Federal Child Support Guidelines.

Before the implementation of the 1997 Federal Child Support Guidelines in Canada, the system for determining child support was heavily influenced by judicial discretion.[38] This approach led to inconsistent decisions, resulting in significant unpredictability regarding the amount of support payments. Consequently, disputes between spouses had increased, along with the costs associated with divorce. The lack of a clear and uniform method for calculating child support had made the legal process particularly contentious, exacerbating tension between the parties involved and making it harder to reach agreements. Judicial discretion was frequently perceived

[38] J.D. Payne, M.A. Payne, *Child Support Guidelines in Canada* 2022. Julien D. Payne, *Child Support Guidelines in Canada - Some Landmark Cases*, 42 Advoc Q, 2014, 309. Ming Ren Tan, *Developing Child Support Guidelines in Singapore: Lessons from Canada,* 32 SAcLJ 964, 2020, p. 975.

ISSN 2281-5147

as arbitrary and unfair, leading to a growing recognition in the late 1980s of the need for reform.[39]

To address these concerns, the Federal Family Law Committee conducted a series of studies between 1991 and 1995 to identify the weaknesses of the discretionary system.[40] These studies culminated in the introduction of the Federal Child Support Guidelines in 1997, with the aim of reducing judicial discretion and ensuring greater consistency in decision-making. Despite the term 'guidelines', which may suggest an advisory role, these provisions are binding. Judges have limited discretion to deviate from them, ensuring that their application leads to predictable and uniform outcomes.

The Federal Child Support Guidelines marked a clear departure from the previous regime. Instead of relying on subjective assessments, child support obligations are now calculated through a standardised system based on pre-determined tables.[41] These tables determine support amounts according to the paying parent's income and the number of children, eliminating the need for detailed examinations of family budgets or individual needs. Importantly, the income of the custodial parent is not factored into the calculation, reflecting the assumption that the child will benefit from both parents' financial resources as if they were still living together. This new framework represents an "ultimate example of rule-based decision-making"[42], aimed

[39] Department of Justice, Canada, Children Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines vol 1 (Ottawa: Minister of Justice and Attorney General of Canada, 2002), p. 1.

[40] Department of Justice, Canada, Child Support Discussion Paper: Backgrounder, Minister of Justice and Attorney General of Canada, Ottawa, June 1991; Federal/Provincial/Territorial Family Law Committee, Canada, Child Support: Public Discussion Paper, The Committee, Ottawa, June 1991; Federal/Provincial/Territorial Family Law Committee, Canada, The Financial Implications of Child Support Guidelines: Research Report, The Committee, May 1992, Ottawa; and Federal/Provincial/Territorial Family Law Committee, Canada, Report and Recommendations on Child Support Department of Justice, Communications and Consultation Branch, Ottawa, January 1995.

[41] The tables are developed at provincial and territorial level. The principle behind the tables is that they represent an average of the expenses incurred by families with similar characteristics and take into account the cost of living in the different provinces. This approach aims to ensure a fair distribution of financial responsibilities between parents, while simplifying the decision-making process for the courts and reducing the judge's discretion. See: J.D. Payne, M.A. Payne, *Child Support Guidelines in Canada* 2022, p. 10.

[42] D A Rollie Thompson, *Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative,* 18 Can Fam LQ, 2000, pp. 25 - 31.

ISSN 2281-5147

at promoting greater predictability and uniformity within the judicial system.[43] The guidelines reflect a broader trend in Canadian family law towards prioritising general justice, ensuring consistent treatment across cases-over finely tuned individualised justice.

Section 1 of the Federal Child Support Guidelines sets out the following objectives: (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation; (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective; (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and (d) to ensure consistent treatment of spouses and children who are in similar circumstances. These objectives should guide the interpretation and application of the substantive provisions of the Federal Child Support Guidelines.

However, while the guidelines provide a solid foundation for calculating ordinary child support, they also account for certain exceptional situations that require a more flexible approach to ensure fairness. These exceptions arise primarily in the context of managing extraordinary expenses.

4.1. Distinguishing ordinary, special and extraordinary expenses

While the Federal Child Support Guidelines provide a standardised framework for ordinary maintenance, Section 7 introduces necessary flexibility to account for expenses that exceed the normal financial burden of caring for a child.[44] These expenses, referred to as 'special' or 'extraordinary', cover a range of exceptional costs that cannot be adequately covered by the amount set by the standard tables alone.[45] Indeed, although the ordinary maintenance tables provide a solid basis for most of the expenses associated with raising a child, there are numerous circumstances in which parents are faced with unforeseen or large costs that go beyond what is considered ordinary and require more flexibility in calculating the contribution.

[43] Ming Ren Tan, *Developing Child Support Guidelines in Singapore: Lessons from Canada,* 32 SAcLJ 964, 2020, p. 977.

[44] Federal Child Support Guidelines (SOR/97-175) s 7.

[45] J.D. Payne, M.A. Payne, *Child Support Guidelines in Canada* 2022, p. 267.

ISSN 2281-5147

In particular, Section 7(1) of the Federal Child Support Guidelines permits the court to grant an additional sum, beyond the standard tabular amount, to address special or extraordinary expenses. These expenses fall into the following categories: (a) child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time; (b) that portion of the medical and dental insurance premiums attributable to the child; (c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses; (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs; (e) expenses for post-secondary education; and (f) extraordinary expenses for extracurricular activities.

The list of special and extraordinary expenses is exhaustive: any request that does not fall into these categories is automatically rejected. This strict criterion ensures procedural clarity and limits the scope for arbitrary interpretation.

What makes these expenses particularly significant is the recognition that not all families face the same costs in raising their children. Needs may vary according to socio-economic status, the health of the child and other specific circumstances. For this very reason, Section 7 grants judges limited discretion in determining when and how to award an additional contribution for extraordinary expenses, thus allowing for customisation that takes into account the particular situations of individual families.[46]

In order for these expenses to be recognised and apportioned, they must meet two essential criteria set out in Section 7(1): the expense must be *necessary* for the best interests of the child and *reasonable* in relation to the financial means of both parents, the child and the family spending pattern prior to separation.

For example, while babysitting services may fall within the category of Section 7(a) expenditure as a childcare expense, they may not be claimed if the custodial parent is unemployed or if the child can be adequately cared for by the former spouse's family. In that case, the expenditure would not satisfy the Section 7 test of necessity.

[46] J.D. Payne, M.A. Payne, *Child Support Guidelines in Canada* 2022, pp. 267 – 283.

ISSN 2281-5147

The original lack of clear guidance in the Federal Guidelines had led to different interpretations of the term 'extraordinary' used in (d) and (e) by the courts. Canadian courts had adopted two main approaches: one objective and one subjective. Some courts interpreted the term 'extraordinary' objectively, assessing the nature of the expense regardless of the parents' income. In this case, 'extraordinary expenses for extracurricular activities' were simply considered unusual or exceptional, based on the nature and amount, without considering the family's financial capacity.[47] Instead, a subjective approach took the parents' income into account to determine whether an expense was indeed extraordinary in relation to their economic circumstances.[48] This subjective approach was considered fairer because it took into account the specific needs of a family and the resources available to meet them. Considering economic conditions made it possible to avoid situations in which families with significantly different incomes incurred the same type of expenditure, which could be burdensome for one but completely ordinary for the other.

In 2006, to remedy the lack of consistency in interpretation, a formal definition of 'extraordinary expenses' was introduced in the Federal Guidelines.[49] The amendment established a two-part test: (a) expenses that exceed what the requesting spouse can reasonably cover, considering their income and the amount they would receive under the applicable table, or, if the court finds the table amount inappropriate, the amount the court deems appropriate; or (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account various factors, including the amount of the expense in relation to the requesting parent's income, the nature and number of educational or extracurricular programmes, the child's special needs and talents, the overall cost of the activities, and any other relevant factors.

As can be seen, Article 7(1.1) of the Guidelines adopts a subjective approach that relates expenditure to parental income and the child's inclinations, recognising that not all families have the same economic capacity or needs. This flexible approach allows courts to ensure that maintenance decisions are tailored to the specific circumstances of the family in question. Thus, extraordinary educational and extracurricular expenses include costs that go beyond the basic school curriculum, such as regular school fees, general school supplies, school trips, regular transport, and school lunches, which are all considered "usual expenses" and not

[47] See Raftus v Raftus (1998) 37 RFL (4th) 59.

[48] McLaughlin v McLaughlin (1998) 44 RFL (4th) 148.

[49] J.D. Payne, M.A. Payne, *Child Support Guidelines in Canada* 2022, p. 279.

ISSN 2281-5147

"extraordinary" under Section 7 of the Federal Child Support Guidelines. The underlying principle is that the standard maintenance amounts are designed to cover all ordinary expenses necessary for the child's growth, including food, shelter, clothing, and many educational, extracurricular, and recreational costs. However, some extracurricular activities, such as recreational sports or dance lessons, are typically regarded as part of ordinary expenses unless the child's participation exceeds what is considered typical for a child of that age. A particularly controversial issue arises when distinguishing between basic and advanced activities. While basic sports or music lessons are considered ordinary, participation in more advanced programmes or high-level sports competitions may be classified as extraordinary. The recognition of such expense's hinges on both the nature of the activity and the financial capacity of the parents. For families with lower incomes, even activities with significant costs may be deemed extraordinary, while for higher-income families, those same activities might be considered part of ordinary expenses.[50]

This nuanced approach reflects the importance of balancing the financial resources of the parents with the specific needs of the child, ensuring that extraordinary expenses are properly recognised where they impose a significant burden on the family.

Although the introduction of the Federal Guidelines has brought more clarity, courts still retain some discretion in applying the Section 7 rules, especially when there is a significant income disparity between parents. In such cases, the proportional allocation of extraordinary expenses may be adjusted to prevent a parent with a lower income from bearing a disproportionate burden, while maintaining fairness to the child.

Ultimately, the introduction of the Federal Child Support Guidelines is an important step towards greater fairness and predictability in the calculation of child support. However, Section 7 reflects the realisation that not all families face the same financial needs and that a degree of flexibility is needed to ensure that every child receives the support they need, regardless of the parents' financial circumstances.

[50] For a detailed analysis of the individual expenditure categories, see J.D. Payne, M.A. Payne, *Child Support Guidelines in Canada* 2022, pp. 293 - 323.

ISSN 2281-5147

This balance between structure and flexibility contrasts sharply with the Italian system, where the absence of uniform criteria often leads to inconsistency. The Canadian model demonstrates how structured criteria, combined with targeted flexibility, can provide a more equitable framework. Adopting a similar approach in Italian family law could reduce unpredictability and foster fairness in addressing extraordinary child expenses, aligning with the principles of predictability and equality.

5. Comparative remarks

The comparative analysis between the Italian and Canadian systems in managing extraordinary expenses for child support provides valuable insights for improving transparency, predictability, and fairness in the Italian system. While the legal and cultural contexts of the two countries differ, the Canadian experience highlights critical lessons that could enhance the Italian framework.

The 1997 Federal Child Support Guidelines in Canada illustrate how adopting uniform guidelines can significantly reduce uncertainty and litigation between separated parents. However, they also demonstrate that consistency and predictability are achievable only with clearly defined criteria for determining extraordinary expenses. Without such definitions, judicial discretion and divergent interpretations inevitably lead to inconsistent outcomes and increased legal disputes.

In Italy, as we have seen, the lack of a precise definitions has resulted in fragmented judicial decisions and non-uniform protocols that vary from one court to another. This fragmentation complicates the predictability of decisions, undermines the achievement of consistent justice, and exacerbates family litigation. It is therefore advisable for the Italian system to draw inspiration from the Canadian model by promoting a uniform regulation for the management of extraordinary expenses. From the outset, a legislative intervention could include a clear definition of "extraordinary expenses", categorized into standard types (e.g. medical, school, and extracurricular expenses), to reduce ambiguity and prevent divergent interpretations. Equally important could be limiting the recognition of extraordinary expenses to truly exceptional circumstances. These legislative provisions could then be implemented through non-binding national guidelines, developed in collaboration with judicial authorities. This framework would allow judges to retain the flexibility necessary to adapt decisions to the specific needs of families while ensuring greater consistency and reducing interpretative uncertainties.

ISSN 2281-5147

An approach that balances uniformity with the flexibility required to address unique family situations is essential. Italian judges have already acknowledged this need. For instance, a judicial ruling[51] deemed university expenses – generally considered ordinary[52] – to be extraordinary when they significantly impact the family's budget. Striking the right balance between rules and discretion remains a complex challenge.[53] As Carl Schneider observed, it is inherently difficult to determine "a priori what mixture of rules and discretion best suits a particular situation".[54]

Following the Canadian model and incorporating the criteria already embedded in the Italian legal framework, judicial discretion should provide evidence of being 'guided' by the criteria of *necessity* and *reasonableness*, taking into account the family's *financial context* and always prioritizing the *child's best interests*. The best interests of the child, in particular, remain the overarching principle, the guiding star that should inform every decision regarding children. This principle must also encompass consideration of the child's abilities, natural inclinations, and aspirations, which play a crucial role in determining the expenses necessary for their well-being. In line with Article 337-ter of the Italian Civil Code, parents' prior agreement should be required in all circumstances involving *"decisions of major interest for children related to education, upbringing and health"*, except in urgent situations, with the judge intervening only in cases of conflict.

In other words, the goal for the Italian system should be to provide a clear definition of extraordinary expenses harmonised guidelines that are simple and understandable even to non-professionals, allowing parties to easily apply them to resolve disputes independently and reduce judicial litigation. This would also avoid interpretative inconsistencies allowing judges to adapt rules to specific family contexts while preserving fairness and predictability. Striking this balance – between clear, standardised rules and purposeful flexibility – could foster a more equitable and responsive judicial system for families in Italy.

Inspired by a perspective of legal realism, which views law as a dynamic phenomenon shaped by societal needs, the outlined proposal would reflect the changing realities of

[51] Trib. Bari, 25 March 2010.

[52] Cass., 12 November 2021, n. 34100.

[53] Ming Ren Tan, *Developing Child Support Guidelines in Singapore: Lessons from Canada*, 32 SAcLJ 964, 2020 p. 1001.

[54] Carl E. Schneider, *Discretion and Rules: A Lawyer's View in The Uses of Discretion*, Oxford,1992, p 88.

ISSN 2281-5147

family life in Italy. By aligning judicial practices with the social and economic challenges faced by modern families, such enhancements would not only enhance predictability and fairness but also ensure that the legal framework remains relevant and adaptable.

ISSN 2281-5147