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"Social Governance vs. Social Management: Towards a New Regulatory Role for Social Organizations in China?"

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Abstract

On November 12, 2013 the Central Committee of the Communist Party of the People's Republic of China approved the "Decision of the CCCP on Some Major Issues Concerning Comprehensively Deepening the Reform". The document – the first major policy statement of President Xi Jinping's new administration – was well received for its calls for greater liberalization of the economy and a greater governance role for the market, private sector, and non-state players, including social organizations. The most important signal of this new (and more positive) attitude towards NGOs

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seemed to be a lexical one: since then, the expression "*shehui guanli*" (社会管理，*social management*) has been replaced in official discourse by "*shehui zhili*" (社会治理, *social governance*) a notion that recognizes social players' role in governance, alongside government and businesses.
Concretely, what has this change meant for NGOs and their participation in the regulatory process? And how have the role and responsibility of government(s) and social organizations been clarified and enforced at the central and local levels?
In this paper, I will analyze the impact of this new way of understanding the relationship between States and Societys with regard to social organizations, considering the ways in which the relationship between state and non-state actors has been shaped in the past few years. I will concentrate especially on the experiments that have been going on at the local level, and on the rise (and decline?) of NGOs' potential influence on the regulatory process through legal actions, through "public interest litigation".

Keywords

Chinese Law – Social Organizations – Regulatory Governance – Environmental Public Interest Litigation

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I. Introduction

On November 12, 2013, the Central Committee of the Communist Party of the People's Republic of China approved the "Decision of the CCCP on Some Major Issues Concern-

ing Comprehensively Deepening the Reform"[1]. The document – the first major policy statement of President Xi Jinping's new administration – was well received for its calls for greater liberalization of the economy and a greater governance role for the market, private sector, and non-state players, including social organizations. The most important signal of this new (and more positive) attitude towards NGOs seemed to be a lexical one: since then, the expression "*shehui guanli*" (社会管理，*social management*) has been replaced in official discourse by "*shehui zhili*" (社会治理, *social governance*)[2] a notion that recognizes social players' role in governance, alongside government and businesses.

According to section 13 of the "Decision", improving methods of "social governance" will "*strengthen leadership by the Party committee*" and "*give full play to the leading role of the government*," but – at the same time – "*encourage and support the participation of all sectors of the society*", and "*establish an open and orderly mechanism under which people can express their grievance*", in order to achieve "*positive interaction between the government management on the one hand, and social self-management and residents self-management on the other*".

Concretely, what has this change meant for NGOs and their participation in the regulatory process? And how have the role and responsibility of government(s) and social organizations been clarified and enforced at the central and local levels?

In this paper, I will analyze the impact of this new way of understanding the relationship between States and Societys with regard to social organizations, considering the ways in which the relationship between state and non-state actors has been shaped in the past few years. I will concentrate especially on the experiments that have been going on at the local level, and on the rise (and decline?) of NGOs' potential influence on the regulatory process through legal actions, through "public interest litigation".

II. Social governance vs. social management

Although not new, the term "social governance" (社会治理，*social governance*) has been used almost exclusively under Xi Jinping's administration instead of "social management" (社会管理，*social management*), which was more frequently employed during the Hu Jintao period[3].

[1] The original text of the Decision (in Chinese) can be found at: http://cpc.people.com.cn/n/2013/1115/c64094-23559163-13.html (last accessed: January 31, 2017). The official translation (in English) of the Decision can be found at: http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm (last accessed: January 31, 2017).

[2] 孙涛, "从社会管理到社会治理", 金陵科技学院学报(社会科学版), 第29卷， 第4期， 2015年12月，Sun Tao, "Cong shehui guanli dao shehui zhili" (From Social Management to Social Governance), Jinling kezhi xueyuan bao (shehui kexue ban), vol. 29, no. 4, December 2015, p. 37.

[3] Samantha Hoffman and Peter Mattis, "China's Proposed 'State Security Council': Social Governance under Xi Jinping", in China Policy Institute Blog, November 21, 2013, available at: https://blogs.nottingham.ac.uk/chinapolicyinsti-

The expression "*shehui guanli*" has been part of Chinese political discourse for over twenty years: introduced by the CCP Central Committee in 1993[4], it was listed in the 1998 "Proposal to Restructure the State Council" as one of the basic government functions, together with "macro-economic control" and "public service"[5]. With the beginning of the new century, the concept began to gain prominence in the agendas of both the Party and the government: it was further elaborated on in the 16th and 17th Party Congresses, and became a focus at the Fifth Plenary Session of the 17th Central Committee in 2010. According to the "Resolution" of this session:

"*the general principle of social management is party leadership, government responsibility, social coordination, and public participation*"[6].

The notion – almost impossible to translate in English because it is one of many political terms that are difficult to define outside the Chinese context[7] – was eventually elevated to a key target by the 12th Five-Year Plan for National and Social Development in March 2011[8]. In the Plan, the goal of "*innovate(ing) social management institution*" is considered to be twofold: involving the "*improvement of the social management structure*", on the one hand, and pushing "*innovation of the social management system*", on the other[9].

However, while the first aspect includes – among other things – playing a coordination role between social players, and improving the standardization, professionalization, socialization and legalization of social management, the second aims at strengthening the

tute/2013/11/21/chinas-proposed-state-security-council-social-governance-under-xi-jinping/ (last accessed: January 31, 2017).

[4] As noted by Prof. Xiang Chunling, of the Social Science Department of the Central Party School, in March 2014. See: "创新社会治理应'放权于民'", 中国人大杂志 2014年第5期, "Chuangxin shehui zhili ying, 'fangquan yu min'" (for making innovation in social governance it is necessary to "transfer power to the people"), Zhongguo renda zazhi (Chinese People's Congress Review), no. 5, 2014, available at: http://www.npc.gov.cn/npc/zgrdzz/2014-03/31/content_1858216.htm (last accessed: January 31, 2017). According to other scholars, however, the concept is deeply rooted in Chinese culture, having inspired state administration since the Xia dynasty (c. 2070 – c. 1600 BC). See 窦玉沛, "从社会管理到社会治理：理论和实践的重大创新", 行政管理改革, 第4期, 2014年, Dou Yupei, "Cong shehui guanli dao shehui zhili: lilun he shixian de zhongda chuangxin" (From social management to social governance: major innovations in theory and practice), no. 4, 2014, 21.

[5] Yu Keping, "A Shift Towards Social Governance in China", Eastasiaforum, September 9, 2011, available at: http://www.eastasiaforum.org/2011/09/09/a-shift-towards-social-governance-in-china/ (last accessed: January 31, 2017)

[6] *Ibid*.

[7] *Ibid*. For a more recent and deeper analysis of the concept and of its impact on social policies, see: 毛寿龙, 李锐 "社会治理与社会政策的秩序维度", 中国行政管理，总第382期， 第4期， 2017 Mao年，Shoulong, Li Rui, "Shehui zhili yu shehui zhengce de zhixu weidu" (Order Dimensions of Social Governance and Zhongguo Xingzheng guanli, 2017, vol. 382, nota 4, 72-75.

[8] See 中华人民共和国国民经济和社会发展第十二个五年规划纲要 (Zhonghua renmin gongheguo jingji he shehui fazhan di shier ge wu nian guihua gangyao), online: http://news.xinhuanet.com/politics/2011-03/16/c_121193916.htm (last accessed: January 31, 2017); an English translation of the Plan can be found at: http://www.britishchamber.cn/content/chinas-twelfth-five-year-plan-2011-2015-full-english-version (last accessed: January 31, 2017). For an academic analysis of the concept, with reference to the implementation of the "rule of law" in social governance, see: 刘旺洪, "社会管理创新与社会治理的法治化", 法学, 第10期, 2011 年， Liu Wanghong, "Shehui guanli chuangxin yu shehui zhili de fazhihua" (Innovation in social management and the implementation of the "rule of law" in social governance), Faxue, no. 10, 2011, 42-46.

[9] See *PRC's 12th Five-Year Plan for National and Social Development,* chapter 37.

management of the origin of social problems, focusing on the "dynamic management" of social conflicts and developing a crisis response system[10].

It is precisely this last coercive aspect that, according to many Chinese and Western observers, had overshadowed the more "cooperative" aspects, at least in the late Hu Jintao era (2002 – 2012)[11], not only undermining the possibility of reaching one of the main goals of the period (the "improvement of people's livelihood") and jeopardizing the most important of the leader's objectives (the creation of a "harmonious society"), but also threatening the Communist Party's long-term legitimacy[12].

Certainly, as Samantha Hoffman pointed out in an article published in August 2012, Beijing at the time was implementing:

"*a strategy of improving control through social management", "building a service-oriented government to prevent and reduce the number of social problems; […] and strengthening the party-state ability to manage the sudden outbreak of public incidents*"[13].

The new "contradictions among the people", caused by economic growth, and the challenges of increasing social complexity generated by the so-called "five-izations" (五 化, *wuhua*: industrialization, urbanization, marketization, informatization and globalization)[14], however, could not be resolved only through targeted coercion and domestic intelligence[15].

Therefore, the growing number of the aforementioned public incidents, and the increasingly violent and large-scale nature of protests over the past several years, immediately revealed the limits of the implementation of social management, and the need, for Chinese leadership to change its attitude towards civil society's involvement in public choices, in order to maintain social stability and avoid putting its political power at risk.

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[10] *Ibid.*

[11] Samantha Hoffman and Peter Mattis, "China's Proposed State Security Council: Social Governance under Xi Jinping", in China Policy Institute Blog, November 21, 2013, available at: https://blogs.nottingham.ac.uk/chinapolicyinstitute/2013/11/21/chinas-proposed-state-security-council-social-governance-under-xi-jinping/(last accessed: January 31, 2017). For a similar analysis of the interpretation (and implementation) of "social management" by the Chinese leader, see also: David Cohen, "Decoding 'Social Management'", The Diplomat, September 21, 2011, available at: http://thediplomat.com/2011/09/decoding-social-management (last accessed: January 31, 2017). For an analysis (in Italian) of the complex relationship between government and civil society in China see: Renzo Cavalieri, Ivan Franceschini, "Introduzione. L'emergere di nuovi spazi di pluralismo e partecipazione nella Cina di oggi" in Renzo Cavalieri e Ivan Franceschini, "Germogli di società civile in Cina", Milano, Francesco Brioschi Editore, 2010, pp. 1-24.

[12] Samantha Hoffman and Peter Mattis, cit.

[13] See Joseph Fewsmith, "Social Management as a Way of Coping with Heightened Social Tensions," China Leadership Monitor, No. 36, cited by Samantha Hoffman, "Portents of change in china's social management", China Brief Volume 12, Issue: 15, August 3, 2012, available at: http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=39727#.U1Fa4Vew6ZJ (last accessed: January 31, 2017).

[14] 麻宝斌, 任晓春, "从社会管理到社会治理 - 挑战与变革"，学习与探索，2011年3期 总第194期，Ma Baobin, Ren Xiaochun, "Cong shehui guanli dao shehui zhili – Tiaozhan yu biange" (From social management to social government – Challenge and transformation), Xuexi yu tansuo, no.2 (serial number 194), 2011, 95, available at: http://www.doc88.com/p-907565190301.html (last accessed: January 31, 2017).

[15] Peter Mattis: "Resolving Contradictions in Social Management", China Brief, Volume 12 Issue 18, September 21, 2012, available at: http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=39865#.U1FY9Few6ZJ (last accessed: January 31, 2017). On the topic, see also: "创新社会治理应"放权于民"", cit.

While this recognition seems to have been driven as much by the causes of civil unrest themselves as by the Chinese Communist Party's internal problems[16], it is a fact that – especially after July 2012, when Premier Hu Jintao used the expression "social governance" in an official speech for the first time[17] – many authors have called for a shift from the "social management" model to one in which all social players could regulate and manage social affairs "*as equal cooperative partners according to law, in order to maximize eventually the public interest*"[18].

In this sense, the change in terminology certainly reflects the (slight) change in Chinese government policies that leans towards civil society and coincided with seizure of power of the new leadership. Indeed, in recent years, "social governance" has replaced "social management" as China's "*strategic intention*" and "*major objective*"[19], to the point that the 13th Five-Year Plan for Economic and Social Development of the People's Republic of China (2016-2020) dedicates all of part XVII[20] to "*better and more innovative social governance*", and considers "social governance" as a way "*to promote social vitality, stability and harmony*"[21].

But, in a nutshell, what are the differences between "social management" and "social governance"?

In an article published on October 22, 2012 in the Central Party School's review "Xuexi shibao" (学习时报, Study time), Chen Jiagang of the China Center for Comparative Politics and Economics explained how the two concepts, despite sharing the same goals, differ in four aspects, and in particular:

(1) Social management, although inclusive of both government and social organizations, is government-centered management of society, while social governance is diversified, and no single body can monopolize the practical process of regulation and management;

(2) Social management tends to place the government above the rest of society, while social governance incorporates the role of social organizations and the private sector in

[16] Samantha Hoffmann, *ibid.*

[17] 陈家刚, 从社会管理走向社会治理, 学习时报, 2012年10月22日. Chen Jiagang, "Cong shehui guanli zou xian shehui zhili" (From social management to social governance), Xuexi shibao, 22 Oct. 2012

[18] 陈家刚, Chen Jiagang, cit. An English translation of the main contents of the article can be found in Chen Jiagang, "Governance not management", available at: http://www.china.org.cn/opinion/2012-11/20/content_27168301.htm (last accessed: January 31, 2017).

[19] See 中华人民共和国国民经济和社会发展第十三个五年规划纲要 (*Zhonghua renmin gongheguo jingji he shehui fazhan di shisan ge wu nian guihua gangyao,* 13th Five Year Plan for Economic and Social Development of the People's Republic of China), online: http://www.china.com.cn/lianghui/news/2016-03/17/content_38053101.htm (last accessed: January 31, 2017). The official translation (in English) of the Plan can be found at: http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf (last accessed: January 31, 2017). On "social governance" as a model that can "break government chauvinism and eliminate administrative arrogance" in order to adapt to the actual needs of a pluralistic society, see 张康之, "社会治理创新与服务型政府建设——论主体多元化条件下的社会治理", 中国人民大学学报, 第2期, 2014年, Zhang Kangzhi, "Shehui zhili chuangxin yu fuwu xing zhengfu jianshe – lun zhuti duyuanhua tiaojian xia de shehui zhili" (Innovation in social governance and construction of service- oriented government – on social governance under the "pluralization" of subjects), Zhongguo renmin daxue xuebao, no. 2, 2014, 1-13.

[20] *Ibid.*

[21] See "Thirteenth Five-Year Plan", part XVII.

governance, considering effective management a cooperative process between different bodies;
(3) Social management is a subjective and top-down control method, while social governance aims to encourage social participants to reach consensus through self-expression, negotiation and dialog, in order to ensure public policies meet the interests of the whole society;
(4) Social management relies mainly on government authority and dictation of orders; on the contrary, social governance means the government guides more and controls less, while civil organizations and civil society take on more responsibilities[22].
As Zhu Guangyuan, vice-secretary of the Committee of Political and Legal Affairs of Jiangsu Province Committee of the Communist Party of China, pointed out in 2013:
"*social management and social governance differ only in one word, but this diversity mirrors a new, further leap forward in our Party's acknowledgment and comprehension of laws and regulations regarding social development*"[23].
In the following sections we will see how Chinese leaders' new "acknowledgement" and "comprehension" of the role of social players in governance is transforming the legal environment in which social organization has to operate, in the PRC. In order to better understand this development, it is important to know something about the evolution of civil society in China. So, a brief history of such associations and a short description of the current legal framework will precede the discussion.

III. State and civil society organizations in China: a recurring conflict?

Section 13 of the "Decision of the CCCP on Some Major Issues Concerning Comprehensively Deepening the Reform" is devoted – as already noted – to "Making Innovations in Social Governance". Paragraph 48 of the same section talks about stimulating the vigor of social organizations by intensifying efforts to separate government administration from social organizations, commissioning the latter to provide public services that supply and facilitate registration for some social organizations[24]. The Decision also mentions social organizations in other sections, calling for them to become involved in cultural and educa-

[22] 陈家刚, Chen Jiagang, cit. On the same topic, with particular reference to the role of social organizations in social governance see also: 马金芳, "社会组织多元社会治理中的自治与法治", 法学, 第11期, 2014年, Ma Jingsong, "Shehui zuzhi duoyuan shehui zhili zhong de zizhi yu fazhi" (Autonomy and rule of law of social organizations in the governance of a pluralistic society), Faxue, no. 11, 2014, 87-94.

[23] 任松筠, 陈旭, "推动社会管理走向社会治理", 新华日报, 2013 年12 月19 日, 第 1 版, Ren Songyun, Chen Xu, "Tuidong shehui guanli zou xian shehui zhili" (Pushing social management towards social governance), Xinhua ribao, 19 Dec. 2013, first ed., 1.

[24] In particular: trade associations and chambers of commerce, scientific and technological associations, charity and philanthropic associations and urban and rural community service organizations. See Decision, cit., par. 48.

tional activities (par. 41-42), and to be consulted – together with community-level organizations – on policy decisions and their implementation (par. 28-29)[25].
All of these statements may seem difficult to interpret if we take into account not only the increased political repression and the constant harassment of social activists in the last ten years (in particular from 2006, and with even more impetus since Xi Jinping became party chief)[26], but also – in a broader sense – the suspicion with which the power in China has regarded social organizations since ancient times, and the involvement of civil society in policy-making.
Indeed, it could not have been otherwise in a (neo)Confucianist country, as China was for centuries. In this context, the general attitude of distrust, if not outright hostility, towards this form of association (defined as 党 *dang*, "faction, party", in a mildly negative sense[27]) was based on the same metaphysical premises as blame for any "individualistic" claim: in no case would the greater public interest (大公 *da gong*) – by definition coinciding with the interest of the sovereign – be subordinate to any fraction thereof[28].
During the Imperial era, the repression of certain forms of social and civic organizations was therefore quite frequent, while the disdain for groups[29] was such that – as, for example, in a regulation of the Kaiyuan period of the Tang Dynasty (713 - 741) – the people who were organizing societies were referred to as "*living the lives of beast*"[30].
Nevertheless, as noted by Karla Simon, there is also evidence that charities and associations involved in serving society were, at that time, fairly common[31].
As a matter of fact, from the earliest days of imperial China through to the end of the Qing dynasty and into the Nationalist era that followed:
"[o]*ften local government and charitable associations worked hand in hand to provide relief at time of famine, drought, floods or disease*",
to the point that

[25] See Decision, cit. at note 1. On the subject, see also Administrator: "Policy brief. no. 14 (January 2014): The Third Plenum Brings a Chilly Spring for China's Civil Society", posted on February 7, 2014 China Development Brief website, and available at: http://www.chinadevolopmentbrief.cn/?p=3173 (last accessed: January 31, 2017). For an analysis of the same Decision, but from the point of view of Marxist theory, see: 徐汉明, "推进国家与社会治理法治化", 法学, 第11期, 2014年, Xu Hanmin, "Tuijin guojia yu shehui zhili fazhihua" (Promote the rule of law in state and social governance), Faxue, no. 11, 2014, 14-19.

[26] Editor, "Chinese Civil Society. Beneath the Glacier", The Economist, April 12, 2014, available at: http://www.economist.com/news/china/21600747-spite-political-clampdown-flourishing-civil-society-taking-hold-beneath-glacier?fsrc=scn%2Ftw_ec%2Fbeneath_the_glacier (last accessed: January 31, 2017).

[27] On the topic, see Timothy Brooks, "Auto-organization in Chinese Society", in Timothy Brooks, B. Michael Frolic, "Civil Society in China", New York, Routledge, 1997 29-30.

[28] Simona Novaretti, "Le ragioni del pubblico. Le azioni nel pubblico interesse in Cina" [The rationale of the public: "public interest litigation" in China], Napoli, ESI, 2011, 23. On the evolution in China of the concept of public interest, and its relationship with private/collective interest see *ibid.*, 18-27.

[29] In particular, when the group was not organized in a hierarchical form, such as the clan, but formed by peers. On the topic, see Simona Novaretti, cit. 23.

[30] Liu Peifeng, "Expansion of the Civil Right of Association", in Wang Ming (ed.), "Emerging Civil Society in China, 1978 – 2008, Leiden, Brill, 2011, 62, note 2.

[31] Karla Simon, "Civil Society in China. The legal framework from Ancient Times to the 'New Reform Era', Oxford, Oxford University Press, 2013, 52 and 54.

"*[…] in some cases, local government simply delegated activities to organized charities, from charitable disaster relief to public works, such as road building*"[32].

But while it is true that the imperial state frequently co-opted social organizations for its own purposes, supporting civil society through direct and indirect means, it is also important to note that it did so only as long as it approved of what these organizations were doing[33]. This is an attitude quite comparable with the way in which Chinese leadership has dealt with CSOs (Civil Society Organizations, generally indicated in Chinese as 社会组织 *shehui zuzhi*), in recent years.

We will return to this later. For the time being, we will briefly refer to how the traditional distrust of associations composed of citizens (which grew during the Ming and Qing dynasties[34]) and the "dual-management" system[35] of CSOs' registration (borrowed from Japan during the Republic era to channel public activism in ways that enabled the power to direct and control the modernization process without opening political challenge from below[36]) were to be combined in modern China to create a controlling state system that not only flourished during the Nationalist period but also continued after the revolution[37].

Indeed, from the very beginning, the PCC's attitude towards social organizations was clearly driven by pragmatism. In the 1930s and 1940s, it encouraged the organization and development of NGOs[38], most of which supported the anti-Japanese war and the war against the Guomindang as part of the United Front. Following the foundation of the People's Republic in 1949, however, the Party tried to eliminate anything that stood between the state and the individual[39] in order to extend its control over the country. To this purpose, associational rights were restricted, and civil society organizations were required to register with the Ministry of the Interior.

Concretely, from 1950 (when the first rudimentary regulation on CSOs was adopted) to the late 1980s (when the General Principles of Civil Law and the national regulations on NGOs were promulgated), there was a firm belief in China that social organizations simply "belonged to" the state and the Party[40]. Not surprisingly, therefore, former independent organizations were outlawed or absorbed into the Party-state system starting in the early 1950s, being merged into mass organizations (群众组织 *qunzhong zuzhi*)[41], or part of

[32] *Ibid.*, 53 and 54.

[33] *Ibid.*, 54.

[34] See Timothy Brooks, cit., 30.

[35] See *infra*.

[36] *Ibid.*, 32. For a brief description of the "dual-management" system as it works today, see *infra*, in this paragraph.

[37] Karla Simon, cit., Introduction, p. xxxvii.

[38] Zhang Ye, "Chinese NGOs: A Survey Report", in Tadashi Yamamoto (ed.), "Emerging Civil Society in the Asia Pacific Community", Tokyo: Institute of Southeast Asian Studies and Japan Center for International Exchange, 1995.

[39] On the topic, see also Editor, "Chinese Civil Society. Beneath the Glacier", cit.

[40] *Ibid.*, 156.

[41] Such as the All-China Women Federation, the All-China Federation of Trade Unions and so on. These organizations, as

the post-revolution United Front[42]. Moreover, beginning with the anti-rightist campaign in 1957 and until the end of the Cultural Revolution in 1976,
"*under the total control of a coercitive state, trust, civic engagement and associations became fragmented*"[43],
so that "*civil society virtually disappeared*"[44].
It was only after Deng Xiaoping seized power in 1978 that CSOs were considered as playing a part in economic reform and opening up, and were (once again) given an important role in the restructuring of the state bureaucracy[45].
First, in 1986, the GPCL recognized social organizations as (at least slightly) separate from the state party apparatus. They were listed among legal entities, together with enterprises, independently founded official organs and public institutions. Then, in 1988, the State Council transferred regulatory power over CSOs from the Ministry of the Interior to the Ministry of Civil Affairs, and finally it issued the first set of regulations concerning foundations (基金会 *jinjihui,* 1988, amended in 2004) and social organizations (社会团体 *shehui tuanti*, 1989, amended in 1998 and 2016). The (provisional) regulations concerning the third type of social organization recognized in China, private non-commercial institutions (民办非企业单位 *minban fei qiye danwei*, or 民非 *minfei*) were enacted only in 1998.
It is interesting to note that – while controlled by different regulations – both SOs and *minfei* have been (at least until now) subject to the so-called "dual management" system, a scheme with a long history in China, provided not only for the 1950 regulations but also - as seen before - in the KMT Civil Code[46].
Indeed – focusing only on social organizations – according to articles 3, 7 and 9 of 1998's Regulations (revised in 2016), to be founded a *shehui tuanti* was required to:
a) be examined and approved by a sponsor organization (业务主管部门 *yewu zhuguan bumen*, affectionately known as "mother-in-law", 婆婆 *popo*);
b) register with the Ministry of Civil Affairs (MCA) or local civil affairs department at the county level and above[47].
Moreover, in addition to the aforementioned requirements, the SO's regulations specifi-

Karla Simon pointed out, "have been used as a means to penetrate the society at large, encouraging popular participation, mobilizing the masses, and integrating them into political life, as seen appropriate by the party. They were considered, in practice, as "transmission belts" between the CCP and the people. On the point, see Karla Simon, cit., 169-183.

[42] See *karla Simon*, cit, 146.

[43] Ma Qiusha, "Non-governmental Organizations in Contemporary China. Paving the Way to Civil Society?", London and New York, Routledge, 2006, 111.

[44] Karla Simon, cit., 183.

[45] *karla Simon*., cit., 187.

[46] See *supra*. Sect. 45 of the KMT Civil Code required that associations seek permission to register. On the topic, see also Karla Simon, cit. 118-122.

[47] See "Regulations on the Registration and Management of Social Organizations", published by the State Council at the 8th ordinary session on October 25, 1998 and revised on February 6, 2016, articles 3, 7 and 9.

cally provide that the MCA may deny registration:
"*if in the same administrative area there is already a social organization active in the same or similar area of work*"[48].
The rationale for this system of registration was (and is), obviously, to create institutional dependency and control, and to allow the government to manipulate the number of organizations that can be registered in any given locality.
Undoubtedly, Chinese leaders have often considered this strict oversight on SOs more than appropriate. For example, in 1989, after the Tiananmen Square events; or in the early 1990s, during the period following the collapse of the Soviet Bloc, which were also precipitated by trade unions, churches and other groups in Poland, Czechoslovakia and elsewhere; or, again, in 2005, at the time of "colored" revolutions in Ukraine, Georgia and Kyrgyzstan[49].
In recent years, however, the party has come to see NGOs in a different light, and to consider "dual management" as one of the main obstacles to the growth of the NGOs sector. Currently, the sponsor organization has the duty to assist the Ministry of Civil Affairs not only in establishing, but also supervising the "sponsored" organizations, taking full responsibility for their activities[50]. As a consequence, many SOs remain unregistered or are registered as commercial entities, sometimes by choice, but more often because they cannot obtain the support of local authorities which – preferring to reduce political risk and avoid liability – refuse to oversee them.
To understand the extent of this phenomenon it is worth considering some data. According to official statistics, about 460 000 social organizations were registered with the MCA at the end of 2011[51], but there were perhaps ten times as many unregistered organizations, including ones registered as businesses[52].
Although registering as a commercial entity might seem a better choice for an NGO than being unregistered – making it easier, for example, to receive grants or donations – it implies a more onerous tax regime, and exposes the organization to significant risks, since it violates provisions that specifically forbid an organization registered as a business entity to act as an SO or *minfei*[53].

[48] See Regulations (2016), cited, art. 13, point 2.

[49] See Editor, "Beneath the Glacier", cit.

[50] See Regulations (2016), art. 25 (2).

[51] According to MCA data, at the end of 2013 there were 541 000 registered social organizations in China, 19 000 of which were registered through the new direct registration procedure. See MCA's website, at: http://www.chinanpo.gov.cn/1938/77052/index.html (last accessed: January 31, 2017). On the subject, see also *infra*, in the following section.

[52] See Karla Simon, cit., p. xxxiv. On the topic, see also Yu Keping, cit.

[53] See Art. 69, "Regulations of the People's Republic of China on the Administration of Company Registration", issued by the State Council on June 24, 2005 and "Temporary Measure Banning Illegal Organizations", issued by the Ministry of Civil Affairs on April 10, 2000.

The party-state turns a blind eye[54], as long as it likes (or needs) what an organization is doing, but it can (and, in practice, often does) use the grounds of tax evasion to de-register it (i.e.: shut it down), when such an organization steps out of line, and engages in activities deemed undesirable. This is exactly what happened to Gongmeng (公 盟, better known by its English name, Open Constitution Initiative, OIC) and its founder, lawyer Xu Zhiyong, in the summer of 2009, or – one year later – to Ai Yuan (爱 源, also commonly known by the English name "Loving Source"[55]). In January 2014 Xu Zhiyong was sentenced to four years imprisonment for "*gathering crowds to disturb order in a public place*" – an accusation frequently used against activists and dissidents under the new leadership, instead of more "politicized" charges, i.e. "*endangering state security*"[56].

But if, on the one hand, PRC's leaders have been undoubtedly far from relaxing control over civil society's activities in the last several years, on the other – notably after the 2008 earthquake, when thousands of volunteers converged on Sichuan to lend a hand to the rescue, showing that social organizations can be much more effective than the government[57] – they have begun to realize that co-opting such activist citizens can be much more beneficial than suppressing them. Indeed, in a complex society like China as a result of the reforms, the party can no longer provide everything for its citizen as once it did (or pretended to do), while the people's anger over inadequate social services could threaten social stability (and, ultimately, the power of the CCP itself). Moreover, as a consequence of decentralization, localities have been given the freedom to develop certain social services in their jurisdictions, but at the same time, they have been given responsibility for financing and managing them[58].

[54] According to the so-called "no banning, no recognition, no intervention" rule. On the subject, see Deng Guosheng, "The Hidden Rules Governing China's Unregistered NGO's: Management and Consequences", 10 The China Rev. 183 (2010).

[55] The Ai Yuan – an NGO registered as a commercial enterprise since 2004, and that has been subject to constant tax inspections by the authorities since September 2010 – announced through its legal representative on November 11, 2010, its decision to cease its activities benefitting AIDS patients and orphans. The decision was taken following increasing pressure from tax authorities, and – in particular – after having received a notification of an extensive audit by the same office of the Beijing Tax Bureau that had inspected the Gongmeng. On the issue affecting the Gongmeng, see, among others: "China v. Civil Society", The Wall Street Journal, July 21, 2009, "Chinese Public Interest Lawyer Charged Amid Crackdown", The New York Times, August 18, 2009. More details on the closure of Ai Yuan are available at: http: // zengjinyan.wordpress.com / (last accessed: January 31, 2017). On the topic, see also Simona Novaretti, "La riforma della procedura civile della RPC e le 'azioni nel pubblico interesse': un balzo in avanti? Diritto con caratteristiche cinesi e società civile" (The reform of civil procedure in China and "public interest litigation": a step forward? Law with Chinese Characteristics and Civil Society), in Rivista di Diritto Civile, no. 2, March-April 2013, 363.

[56] On the subject, see Josh Chin, "China's New Strategy in Prosecuting Critics", The Wall Street Journal, March 13, 2014, available at: http://blogs.wsj.com/chinarealtime/2014/03/13/chinas-new-strategy-in-prosecuting-critics/?mod=chinablog (last accessed: January 31, 2017). For an English translation of Xu Zhiyong's verdict, see: http://chinalawtranslate.com/en/xu-zhiyong-opinion/ (last accessed: January 31, 2017).

[57] Karla Simon, cit., p. XXXIV. Editor, "Chinese Civil Society. Beneath the Glacier". For a study on the post-disaster NGO development in China using cases from a city in Sichuan that was severely struck by the Wenchuan earthquake see Yi Kang, "The Development of Grassroots Chinese NGOs Following the Wenchuan Earthquake of 2008: Three Case Studies, Four Modi Vivendi", Voluntas (online), February 6, 2017, 1-25.

[58] "Reform Will Promote NGOs – To Serve Beijing Agenda", The Oxford Analytica Daily Brief, Friday, May 16, 2014.

In this perspective, NGOs could become a useful tool in the hands of the Party-state, being involved – under its direction – in providing some of the social support that the central (or local) government itself is unwilling or unable to supply on its own.
We must place the recent reforms in this context. I will now discuss them in more detail, with a particular focus on two of the points recalled by the Decision: the simplification of NGO registration procedures and the creation of a social service procurement system. The last section of this paper will be dedicated to the participation of civil society to policy decision.

1. The simplification of the NGO registration procedure

As we have already pointed out, although notable, the change in terminology and the introduction of the notion of "social governance" has not led to a fundamental change in the goals pursued by Chinese leaders via the reform of the social sector. On the contrary, it seems to have accelerated the process carried out in recent years mostly through local experiments[59].
Indeed, as Karla Simon pointed out:
"*By the time the twenty-first century dawned, the party-state was developing policy with regard to the role of CSOs in service provision and experimenting with new solutions to social problems by giving more powers to favored CSOs*"[60].
First of all, that has meant relaxing the dual management system in order to recognize the existence of certain smaller, community-based CSOs[61].
The pioneer of this reform was the General Office of Qingdao Municipality, which adopted a "documentation system" (备案 *bei'an*) in 2002, allowing for the quasi-legal existence of those civil society organizations not qualifying for actual registration because of their size, lack of funds, or because they are not for the public benefit[62].
Concretely, according to article 2 of the "Opinions for Strengthening the Development and Management of Civil Community Organizations" (关于加强社区民间组织培育与管理的意见 *Guanyu jiaqiang shequ minjian zuzhi peiyu yu guanli de yijian*)[63], "objectively existing community civic organizations that are not eligible for legal registration" can obtain a certificate of "quasi-SO" or "quasi-*minfei*" upon registering with the residents' committee, the sub-district office and the district department of civil affairs[64]. Obviously, this certificate does not grant the preferences accorded to properly registered SO or minfei (i.e.: tax pref-

[59] For a study on the different resource environments available for NGOs in different cities in China see Jennifer Y. J. Hsu, Carolyn L. Hsu, Reza Hasmath, "NGO Strategies in an Authoritarian Context, and Their Implications for Citizenship: The Case of the People's Republic of China ", Volume 28, Issue 3, June 2017, pp 1157–1179.

[60] Karla Simon, cit., 236.

[61] *Ibid.*

[62] *Karla Simon*, cit., 264.

[63] The opinions are available at: http://hk.lexiscn.com/law/law-chinese-1-391703.html (last accessed: January 31, 2017).

[64] *Ibid.*

erences, limited liability and so on)[65], but – at least – it gives such organizations the right to carry out activities within the community.

Although the model of Qingdao's documentation system has been adopted – with a few nuances in characterization – by many provinces (i.e.: Jiangsu, or Guizhou) and districts of large cities (i.e.: Shanghai Hongkou district, or Beijing Xicheng district)[66], it is undoubtedly in Guangdong province, and more particularly in the Special Economic Zone of Shenzhen, that the most innovative solutions for the development of civil society have been drawn in the last several years.

In fact, Shenzhen signed a "Cooperative Agreement on Pushing Forward to Integrated Reforms to Civil Affairs Undertakings" (民政部于深圳签订民政事业改革合作协议 *Minzhengbu yu Shenzhen qianding minzheng shiye gaige hezuo xieyi*) with MCA in 2009[67] becoming an "experimental site" for reforms in a wide range of civil affairs issues. These include the possibility for trade associations and public benefit organizations to register directly with the Shenzhen Civil Affairs Bureau, the outsourcing of public services to NGOs and the provision of coaching assistance to organizations involved in social services such as those concerning the disabled, senior citizens, developmentally challenged children, environmental protection and health[68].

It is worth noting that other cities like Tianjin signed similar agreements in those years, and that all of these contracts also contained clauses for experimenting with a reduction in requirements for the registration of SOs and *minfei*[69]. By the end of 2011, at least four municipalities (Beijing, Changsha, Guangzhou and Foshan), in addition to Shenzhen, had already adopted new norms on direct registration, while the same kind of provisions, approved in November 2011, would have been extended to the whole Guangdong Province on July 1, 2012.

These last regulations are, in particular, relevant; although the amendments to the State Council's Regulations on SOs and *minfei*, expected for the end of 2013, at the time of writing this paper (February 2017) are still under discussion, there is little doubt that the new national rules will resemble very closely those currently implemented in Guangzhou and Guangdong, and that – as the then Minister of Civil Affairs Li Liguo called for in November 2011 – "*the Guangdong model will [soon] be used throughout China*"[70].

According to Guangdong Regulations, eight types of civil society organizations should benefit from legal relaxation: industrial associations, trade associations registered in other

[65] *Ibid.*

[66] On the topic, see Karla Simon, cit. 265-267.

[67] For the content of the agreement, see the Ministry of Civil Affairs website, at: http://www.mca.gov.cn/article/zwgk/mzyw/200907/20090700033466.shtml (last accessed: January 31, 2017).

[68] On the subject, see more in the detail: "No challenges too big for 'city of courage'", Global Times, August 26, 2010, available at: http://www.globaltimes.cn/content/567294.shtml (last accessed: January 31, 2017).

[69] See Karla Simon, cit., 277, note 86.

[70] Quoted by Karla Simon in Karla Simon, cit., XLIII.

provinces, organizations serving the living of the mass, charity organizations, social service organizations, rural-urban grassroots organizations, organizations related/affiliated with foreign organizations, and nexus organizations[71]. These NGOs can register directly with the Civil Affairs Bureau while the role of the former "mother-in-law" agency is lessened to management focusing on the work, administration and capacity building of the CSO in question. Furthermore, in these cases, the restriction on having only one entity performing a service in any given locality is eliminated[72].

I would like to briefly point out that the types of NGOs set out by the above Regulations are not only the same ones listed in paragraph 48 of the CCCP's Decision[73], but are also very similar to the ones cited in the "Blueprint on the Reform and Transformation of Civil Service Institutions and their Functions", adopted by the 12th National Peoples' Congress in March 2013[74]. The Blueprint's 23rd clause states that:

"*trade associations, chambers of commerce, scientific and technological organizations, charitable (or public benefit) organizations, and urban-rural community service organizations will carry out MCA's direct registration system*"[75].

In this sense, we can state that – even in the absence of a national framework – what was only a hope for Li Liguo in 2011, became a reality in 2014 for almost all of the PRC's territory.

By the end of 2013, in fact, following the guidelines provided by both the NPC and CCCP, every province (except Tibet and Xinjiang) and every self-governing municipality had adopted "direct registration" rules shaped on the Guangdong's model[76].

The removal of the dual management requirement has undoubtedly had a greater impact on the growth of the NGO sector. In an article published in the China Daily in 2014, He Dan stated that 221 social organizations registered directly with civil affairs departments in Beijing alone in 2013, accounting for about 34% of the social organizations that

[71] The definition of nexus organizations is not clear. According to the Hong Kong Liaison Office of the international trade union movement, the more comprehensive (and official) explanation defines these organizations as federations of organizations that liaise, administer and provide service to social organizations of the same nature, in the same sector or the same area of work/services. On the subject, see: IHLO, "Guangdong Government Implements New Scheme to Promote Civil Society Organizations and Outsourcing of Social Services", Nov. 2011, available at: http://www.ihlo.org/LRC/Laws/011111.html (last accessed: January 31, 2017).

[72] *Ibid*.

[73] See Decision, cit., paragraph 48.

[74] Matt Perrement (transl.): "Beijing University Civil Society Center's Ten Major Events in China's Social Sector for 2013", January 16, 2014, available at: http://www.chinadevelopmentbrief.cn/?p=3435 (last accessed: January 31, 2017). The original document (in Chinese) is available at: http://www.ccsspku.org/archives/3914 (last accessed: January 31, 2017). The Ministry of Civil Affairs also listed the Blueprint among the "Top Ten Major Events for Social Organizations in 2013". See Matt Perrement (transl.), "The Ministry of Civil Affairs' 'Top Ten Major Events for Social Organizations in 2013", available at: http://www.chinadevelopmentbrief.cn/?p=3411 (last accessed: January 31, 2017). The original document (in Chinese) can be found at: http://www.chinanpo.gov.cn/1938/76760/index.html (last accessed: January 31, 2017).

[75] Matt Perrement (transl.): "Beijing University Civil Society Center's Ten Major Events in China's Social Sector for 2013", cit.

[76] Karla Simon, "Charity and Social Enterprise in China", cit.

obtained legal status in that year[77] while, according to the Ministry of Civil Affairs, the overall growth of the sector was 8.4% in the same period[78]. In its early stages, the new system of direct registration helped more than 19 000 SOs to register with the Civil Affairs authorities at all levels. In December 2013, over 500 000 registered NGOs were operating in China[79], an achievement that would have seemed unattainable until a short time before: as noticed by John Tai in 2015, the number of registered NGOs had increased over one hundredfold between 1988 and 2013, from just under 4 500 in 1988 to over 4 540 000 in 2013[80].

It is worth noting that the experiments on "making innovations in social governance" conducted from 2009 to 2013 by local governments across China – in particular by lowering barriers to the registration of Civil Society Organizations – recently led to important changes in national legislation.

This is, for example, the case for the new "Charity Law", adopted at the 4th Session of the 12th National People's Congress of the People's Republic of China on March 16, 2016, after a legislative process lasting over eleven years[81].

Since the entry into force of the new law on September 1, 2016, dual registration is no longer required for organizations conducting "charitable activities"[82]. Public welfare activities considered "charitable activities" under the law are listed in article 3. They include: providing services such as poverty alleviation, emergency assistance, elder care, assistance to persons with disabilities, disaster relief, health care, and education[83]. The law also al-

[77] He Dan, "Reforms give NGOs a level playing field", China Daily, 2014-03-31, available at: http://usa.chinadaily.com.cn/china/2014-03/31/content_17390892_2.htm (last accessed: January 31, 2017).

[78] On the subject see, on Ministry of Civil Affairs website: "中国慈善发展报告：社会组织总量达54.1万个 同比增长8.4% ", 新华社, 2014-05-19, "Zhongguo cishan fazhan baogao: Shehui zuzhi zongliang da 54.1 wan ge tong bi zengzhang 8.4%" (China Charity Development Report: total social organization are 541 000, with an 8.4% increase), available at: http://www.mca.gov.cn/article/mxht/mtgz/201405/20140500639535.shtml (last accessed: January 31, 2017). See also Matt Perrement (transl.): "Beijing University Civil Society Center's "Ten Major Events in China's Social Sector for 2013", cit., and "The Ministry of Civil Affairs' "Top Ten Major Events for Social Organizations in 2013", cit.; Karla Simon, "Charity and Social Enterprises in China", Latest from Alliance, May 24, 2014, available at: http://philanthropynews.alliancemagazine.org/2014/05/24/charity-and-social-enterprise-in-china/ (last accessed: January 31, 2017).

[79] See *supra*, prev. note.

[80] John W. Tai, "Building Civil Society in Authoritarian China: Importance of Leadership Connection for Effective Non-governmental Organizations in a Non-Democracy" Cham Heidelberg New York Dordrecht London, Springer, 2015, 20.

[81] On the long and difficult drafting process of this law, see Rebecca Lee, "Modernizing Charity Law in China", Pacific Rim Law & Policy Journal, vol. 18, no. 2, (2009) 347-372. For more details on the Law, see The International Center for Not-For-Profit Law, "Civic Freedom Monitor: China", December 5, 2016, online: http://www.icnl.org/research/monitor/china.html (last accessed: January 31, 2017)). On the challenges that come with the abolition of the dual management system see: Yang Yongjiao, Mick Wilkinson, "Beyond the Abolition of Dual Administration: The Challenges to NGO Governance in 21st Century China", Voluntas, Vol. 27, Issue 5, October 2016, pp. 2292-2310; Yang Yongjiao, Zhang Xiongxiong, Tang Delong, and Mick Wilkinson, "The Abolition of Dual Administration of NGOs in China: Imperatives and Challenges", International Journal of Social Science and Humanity, Vol. 5, No. 6, June 2015, 546-551.

[82] See art. 10, "Charity Law" (2016).

[83] See art. 3, "Charity Law" (2016).

lows "urban and rural community service organizations" to carry out "mass mutual aid and relief activities within their communities and entities"[84].

2. Outsourcing services to civil society organizations

The reforms aiming to reduce the threshold for NGOs registration in recent decades have gone hand in hand with attempt to encourage the outsourcing of services to civil society organizations. This seems quite obvious, since for the government(s), the growth of the sector may also mean an increase in the number of partners to whom the provision of certain social services can be entrusted. Not surprisingly, therefore, the "Decision of the CCCP on some Major Issues Concerning Comprehensively Deepening the Reform", besides "*making it easier for some social organization to register*", has also called for "*commissioning social organizations the public services that are able to supply*".

However, with regard to this aspect as well, the shift from "social management" to "social government" has only given a further boost to the objectives pursued through the local trials of the past few years.

Indeed, as we have already pointed out, the involvement of civil society in the provision of public services has been inevitable for Chinese leaders, ever since the beginning of the Deng Xiaoping era.

While, the post-1978 marketization reforms considerably undermined the state's direct service delivery capacity[85], the administrative and fiscal reorganizations of the 1990s shifted responsibility for certain types of services from central and provincial governments to local level governments[86].

In this situation:

"*Local official were forced to cope with rising social demands. In-house production, either through governmental agencies or public service units, was not a feasible option because of consistent pressure of administrative downsizing. Contracting with for-profit organizations was also infeasible as a profit margin was prohibited for government-funded social service. In response, local governments began to systematically sponsor non-profits to provide services like home care, mental health services, job training, legal aid and social relief*"[87].

In the beginning, the government at all levels delegated certain functions only to CSOs closely related to it, so-called "government operated non-government organizations" (GONGO, in Chinese: 由政府运行的非政府组织 *you zhengfu yunxing de fei zhengfu zu-*

[84] See art. 110, "Charity Law" (2016).

[85] Jing Yijia, Bin Chen, "Is competitive contracting really competitive? A case study of Restructuring Government-Non profit relations in Shanghai", Baruch College Center for Nonprofit Strategy and Management Working Paper Series, 2010, 12, available at: http//www.baruch.cuny.edu/spa/researchcenters/nonprofitstrategy/documents/JingChen_IsCompetitive-ContractingReallyCompetitive-ACaseStudyofRestructuringGovernment-Nonpr.pdf (last accessed: January 31, 2017).

[86] Karla Simon, "Civil Society in China", cit., 291-292.

[87] Jing Yijia, Bin Chen, *ibid.*

zhi), while funding for outsourcing originally came from revenues generated by the social welfare lottery[88].

As the reforms proceeded, however, the needs for government-nonprofit collaboration increased dramatically together with the concern for transparency and the urgency to find a number of high quality CSOs able to provide adequate services to marginal and other needy citizens.

Once again, Guangdong served as a reference. The enactment of the "Shenzhen Special Economic Zone Regulation on Public Procurement" in October 1998 was followed by the PRC Standing Committee's adoption of the "Competitive Bidding Law" (1999) a year later, and then by the Government Procurement Law in 2002.

These two pieces of legislation marked the beginning of the transformation of a highly informal system into a more formalized one[89], while during the same period, government funding of CSO services started at the municipal level[90].

The Shanghai Department of Civil Affairs (DoCA) took the lead in 2000, when it established an office providing funding for social organizations serving the elderly in six districts and twelve street offices[91]. Then, in 2006, Shanghai's new Pudong district began providing funding for charity and for the education of migrant workers' children, while the Shenzhen municipal government has been fostering social work organizations since 2007, and the Beijing municipal government provided 100 million RMB in July 2010 to support 300 welfare projects[92]. Local experiments were, eventually, scaled up to the national level when the Ministry of Finance allocated 200 million RMB to support social service delivery CSOs in 2012[93].

It is worth noting that the trend has only grown since then. In a conference in Beijing in mid-May 2014, the MCA announced that social service purchase funds rose to the remarkable amount of 150 billion yuan in 2013[94].

Undoubtedly, as Zhao Yong, Vice Director of the Institute of Public Market and Government Procurement, pointed out:

"*government procurement in China is still in its early stages, but its power and its rate of development is incredibly fast*"[95].

[88] Karla Simon, last work cited, 292

[89] Karla Simon, cit., 293.

[90] Andreas Fulda, "Government procurement of CSO services in the PR China: Doing the party's work?, China Policy Institute Policy Paper 2013: No. 4, available at: http://www.nottingham.ac.uk/cpi/documents/policy-papers/cpi-policy-paper-2013-no-4-dr-andreas-fulda-government-procurement-of-cso-services-in-the-prc.pdf (last accessed: January 31, 2017)

[91] Ibid. On the subject, see also Jing Yijia, Bin Chen, op. cit.

[92] Andreas Fulda, *ibid.*

[93] *Ibid.*

[94] Karla Simon, "Charity and Social Enterprise in China", cit.

[95] 吴建华, 政府买服务造千亿大市场 - 民政部财政部连续发文推动, 华夏时报, 2014-02-14, Wu Jianhua, "Zhenggu mai fuwu zao qianyi da shicang - Minzheng bu cai zheng bu lianxu fawen tuidong" (Government service procurement creates a big market – The Ministry of Civil Affairs and the Ministry of Finance continuously issue and promote) available at:

According to Zhao, the "acceleration" of the reforms in this sense were fostered, in particular, by the enactment of the "Guiding opinions regarding government purchasing of social work services"[96], jointly issued by the Ministry of Finance and the Ministry of Civil Affairs on November 14, 2012.

In that document, however, outsourcing to social organizations is still confined to purchasing social work. On the contrary, the "Guiding Opinions on Government Purchasing Services from Social Actors" (国务院办公厅关于政府向社会力量购买服务的指导意见 *Guowuyuan bangong ting guanyu zhengfu xiang shehui liliang goumai fuwu de zhidao yijian*), released by the State Council General Office on September 26, 2013, refer more generally to government procurement of "public" services, expanding the tasks which can be delegated to civil society, and "*marking a milestone in the field of decentralization and reform of government functions*"[97].

It is for this reason that the latter Guiding Opinions – considered as "*filling a void in the government's current procurement policy*" and representing "*an important step in the strategy to transform government functions, by enhancing the environment in which SOs develop and helping to realize the positive role they play in the improvement of public service*"[98] – has been listed among the MCA's "Top Ten Major Events for Social Organizations in 2013"[99]. Following the directions contained in them, many provinces (i.e.: Shandong, Hebei, Hubei, Anhui, plus Beijing, Shanghai and the Guangdong province, which are, as always, at the forefront when it comes to the NGO sector[100]) have started issuing provisions to promote government procurement of public services[101].

The remarkably fast development described above must obviously also (and above all) be linked to the statements contained in the CCCP's Decision. As noted in an article published in China Development Brief in February 2014, the Decision:

"*not only gives a green light to the reform and experiments that have been going on […] at the local level in the past few years, but also provides a macro framework decided by the top leadership for envisioning how those reforms should proceed*"[102].

Many problems, however, remain unsolved. For example, it is still not clear how, concretely, government contracting will be implemented, or how the distribution of functions between governments and social organizations will work. Moreover, there are doubts

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http://www.chinatimes.cc/hxsb/news/zhengce/140214/1402142258-133577.html (last accessed: January 31, 2017).

[96] *Ibid*. The original text (in Chinese) of the "Guiding Opinions" can be found at http://www.mca.gov.cn/article/zwgk/tzl/201211/20121100383464.shtml (last accessed: January 31, 2017).

[97] 吴建华, Wu Jianhua, cit.

[98] Matt Perrement (transl.), "The Ministry of Civil Affairs' Top Ten Major Events for Social Organizations in 2013", cit.

[99] Ibid.

[100] 吴建华, Wu Jianhua, cit.

[101] *Ibid*.

[102] Administrator: "Policy brief. no. 14 (January 2014): The Third Plenum Brings a Chilly Spring for China's Civil Society", cit.

regarding the type of social organizations that will be eligible to apply, since government-affiliated organizations currently already provide up to 80-90% of public services in China, blurring the boundaries between funding provision and service production[103].

Precisely with reference to the resources that can be used for the purpose, the Ministry of Finance clarified that the purchasing of social services must understood only as a pattern of public service delivery and a way of employing the existing government resources, and that it does not imply, in any possible way, an increase in funds available to local governments[104].

In fact, as pointed out by Zhao Yong:

"*Government purchasing is not a step forward to the creation of a "big government", but, instead, a transformation into "small government, big society*"[105].

It seems evident, however, that not all organizations will benefit from the emerging trend in the same way. In particular, as remarked by Andreas Fulda and confirmed by the provisions of the new Charity Law, social service CSOs focusing on community services, health services, children, the elderly or the disabled will be the main beneficiaries of the new government policies while CSOs promoting democracy, human rights or labor issues will be fairly unlikely to receive financial aid. This could also have an impact on such organizations' ability to sustain their operations autonomously in the face of the recent dwindling of international support[106].

Notwithstanding these concerns – and despite the "chilly wind" for activists that has been blowing since Xi Jinping seized power[107], some members of non-government organizations say that the outlook has never been sunnier[108].

Indeed, they hope that the creation of access channels that are, at present, operating merely in one direction may in the future allow organizations to participate in relevant policy areas. In their perspective, contracting public services might potentially have significant effects by increasing pluralism in local public policy and generating more demand for transparency and accountability in government services[109].

[103] Andreas Fulda, cit.

[104] 吴建华, Wu Jianhua, cit.

[105] *Ibid*. It is worth noting that the principle of "small government – big society" (小政府 – 大社会 *xiao zhengfu – da shehui*) was incorporated by CCP into its platform at the Fifteen Party Congress, with reference to the decision to privatize some state-owned enterprises. On the subject, see Mary Gallagher, "Time is Money, Efficiency is Life: The Transformation of Labor Relations in China", 39 Stud. In Comp. Int'l Dev. 11, 22 (2004), cited by Karla Simon, cit. 236, note 10.

[106] See Andreas Fulda, op. cit.

[107] Many authors have commented on the concept. See, among others, Editor, "Policy Brief no.14", cit.; Tom Miller, Warren Lu, "Better Governance Through Kung-Fu", Gravekal Dragonomics, February 14, 2014, available at: http://research.gavekal.com/content.php/9689-China-Better-Governance-Through-Kung-Fu-by-Tom-Miller (last accessed: January 31, 2017).

[108] Tom Miller, Warren Lu, *ibid*.

[109] Jessica C. Teets, "Reforming Service Delivery in China: The Emergence of a Social Innovation Model", Journal of Chinese Political Science, March 2012, Volume 17, Issue 1, 15.

This could undoubtedly be true, in the long term, at least for NGOs not engaging in advocacy or other sensitive areas[110]. In fact, as Shawn Shieh, editor of China Development Brief, a newsletter focused on social development and civil society, explained:
"*The government wants people to have an input into governance, but it wants it to occur in an orderly manner […] It wants to depoliticize acceptable NGOs, and bring them into the fold so they can be regulated properly*"[111].
But is there any evidence that the new focus on "social governance" is currently opening a novel space, (at least) for "acceptable" social organizations involvement in public choice?

IV. Civil society's involvement in policy decision-making

In an interview published in the National People's Congress review, Prof. Xiang Chunling of the Central Party School stated that:
"*for a long time, the neglect and disregard for social cooperation meant that the government took any decision independently, without seeking the opinion of the masses*"[112].
This way of interpreting the concept of "social management"" though, has been quite costly from both a political and an economic point of view since, as remarked by Prof. Xiang, very often, as soon as a new policy was launched, citizens immediately filed petitions, or even organized protests to stop its implementation[113].
This occurred, for example, in Qidong (Jiansu) and Shifang (Sichuan) in the spring of 2012[114]. In both incidents, thousands of protesters demanded the end of construction projects considered environmentally destructive and harmful to local interests. The protests reached a point of limited violence, and were resolved quickly when the local governments suspended the disputed project[115]. But while some authors consider this way of handling civil unrest a positive indication of the government's move towards some conciliatory changes[116], there is no doubt that such a policy can be extremely harmful for the construction of a "harmonious society".

[110] *Ibid.*

[111] Tom Miller, Warren Lu, cit.

[112] 张学文(责任编辑), Zhang Xuewen (ed.), cit.

[113] *Ibid.* For an analysis (in Italian) of the role played by environmental NGOs in popular mobilization against public projects that could (potentially) harm local communities' interests, see: Simona Grano, "Attivismo verde: un'analisi delle organizzazioni ambientaliste nella Cina di oggi", in Renzo Cavalieri, Ivan Franceschini, cit., 185-196.

[114] On the subject, see Samantha Hoffman, "Portents of Change in China's Social Management", cit.

[115] *Ibid.*

[116] *Ibid.*

As pointed out in an article published after the Qidong incidents in Global Times, a newspaper known for its highly nationalist bent[117]:
"*The two protests have together left the impression that the quickest way to change a government policy is to hold a violent demonstration. If this model is copied widely, it would be disastrous for social stability*"[118].
It is (also) to avoid this risk, as I have already pointed out, that the CCCP's Decision calls for "making innovation in social governance", a model implying a bi-directional relationship between local governments and social actors, focusing on the involvement of civil society in public choice in order to "*solve problems at the source*"[119].
In this respect, and for some scholars, this change of attitude is already evident, as shown by the outcome of the protests against the Anning PX project, one year later.
On April 18, 2013, two local environmental organizations, Green Kunming and Green Watershed, conducted an on-the-spot investigation of Yunnan Petrochemical's one billion ton oil refining project in Anning City, approved by the Yunnan Provincial Government at the end of March 2013. The announcement of the plan had caused panic and worry in the Kunming public, owing to the omission of certain details, which resulted in a peaceful protest by almost 3 000 citizens on May 4, 2013. On the morning of May 10, the Kunming city government held a press conference to publically respond to rumors about PX, inviting citizen representatives to meet informally with chemical engineering experts. Towards the end of June, China Petrochemical Company finally bowed to public pressure, and published an "Environmental Impact Assessment of the Yunnan PX Project", bringing closure to this incident.
This incident was considered one of the "Ten Major Events in China's Social Sector for 2013" by the Beijing University Civil Society Center[120], which remarked that:
"*when compared to PX projects in Xiamen, Dalian, Ningbo and other places that 'stopped as soon as they hit problems', the handling of the Yunnan Px incident promotes and highlights both the management capability of local government and growing public maturity*"[121].
It is a manner of "*making innovation in social governance*" endorsed by Prof. Xiang who, in the previously mentioned interview, pointed out how "*the major change of direction inflicted by 'make innovation in social governance' imply the correct handling of the relationship between the government and the masses or, rather, the construction of a new relationship between the government and the masses*".

[117] Donald Clarke, "Dumb Arguments about Human Rights in China", Chinese Law Prof Blog, June 6, 2014, available at: http://lawprofessors.typepad.com/china_law_prof_blog/2014/06/dumb-arguments-about-human-rights-in-china.html (last accessed: January 31, 2017).

[118] Global Times, July 30 2012, cited by Samantha Hoffman, last work cited.

[119] 张学文 (责任编辑), Zhang Xuewen (ed.), cit.

[120] Matt Perrement (transl.): "Beijing University Civil Society Center's "Ten Major Events in China's Social Sector for 2013", cit.

[121] *Ibid.*

In my opinion, however, events like the one reported above are not representative (or, at least, not representative *enough*) of a real change in Chinese leaders' attitude towards civil society. In fact, if social organizations' involvement in public choice were to be judged on that basis only, there would be very little novelty in it.

First of all, the call to "*improve the public hearing and expert consultation system of public decision-making process*" was already mentioned in the 12th Five Year Plan for National and Social Development of March 2011[122]. This suggestion is included in the chapter regarding the invitation to "*actively and proactively respond to social concerns*"; a recommendation that is not new at all, but – as the recent clampdown on bloggers and the arrest or detention of well-known activists, scholars and businessmen demonstrated – has been taken quite seriously by Chinese leaders in the past several years.

It seems to me that the outcome of the Anning PX plan (and of others like it) is more the result of the government(s) success in tearing down the consensus of the general public on decisions already taken at the highest levels, than a genuine attempt to mediate between the demands of the citizens and local governments. In each of these incidents, in fact, the masses – once properly informed – agreed to what had already been established, and no change was made to the original project.

So, should we conclude that the concept of "social governance" is just an empty slogan, a new lexical tool used by Chinese leaders to co-opt social organizations while maintaining a monopoly on political choices?

Possibly not. There is at least one development that leads us to be (moderately) optimistic about the possibility, for civil society, to gain some space of action regarding policy-making. I am referring to the amendment of the Law of the People's Republic of China on Environment Protection, in a sense (unexpectedly) more favorable to public interest litigation filed by social organizations.

1. Environmental public interest litigation: a first real step towards "making innovation in social governance"?

Public interest litigation (公益诉讼 *gongyi susong*), is a new sort of lawsuit for China[123], but has grown rapidly over recent decades to become a significant and influential form of legal action.

Since 1996, when Qiu Jiandong sued the Post and Telecommunication Office of Xinluo district (Loyan city, Fujian) for failing to implement discounts on holiday and nighttime telephone calls, an increasing number of NGOs, law firms, and individual lawyers have

[122] See中华人民共和国国民经济和社会发展第十二个五年规划纲要 (*Zhonghua renmin gongheguo jingji he shehui fazhan di shier ge wu nian guihua gangyao*), cit., chapter 40, point 1.

[123] Chinese scholars, in fact, often refer to "gongyi susong" using expressions like 现代型诉讼 (*xiandaixing susong*, litt. "litigation of modern type" or 新型诉讼 *xinxing susong*, litt. "litigation of new type"). Regarding this topic, see S. Novaretti, "Le ragioni del pubblico: le "azioni nel pubblico interesse" in Cina", Napoli, ESI, 2011, 40, note 7.

used this judicial tool to remind the government of what it means, in practice, to be "*a country of Rule of Law*"[124], asking Chinese leaders to follow through on their promises and apply the laws they have approved. For a short time, the latter has been one of the few instruments of political participation allowed to Chinese citizens, and the only way they can make their voices heard.

A few years ago, however, this trend began to slow.

NGOs and lawyers dealing with public interest litigation have always been considered moderate, as they choose cases having both a direct impact on the livelihood of ordinary citizen and lesser political ramifications (i.e.: consumer, environmental or educational rights protection, anti-discrimination protection etc.). Despite this, they have been victims of harassment, intimidation and abuse by the PRC's government in the past several years, as a result of what Carl Minzner described as the Chinese leaders' "*turn against law*"[125].

The government's skepticism and distrust towards civil society involvement in public choices – and its concern for anything that might even remotely threaten social stability – have become even more evident after the approval of the "Amendment of the PRC's Civil Procedure Law", in force since August 31, 2012.

Article 55 of the Law contained the first provision dedicated to Public Interest Litigation (PIL) in the history of Chinese legislation. Although it was received with great enthusiasm, welcomed as a big step forward in the development of PIL, it immediately became clear that that this "development" would not be in the direction hoped for by public interest lawyers and grassroots social organizations.

Article 55 states that:

"*For conduct that pollutes the environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court*"[126].

Until that time, activists and organizations had been able to take advantage of the absence of specific provisions to file lawsuits in defense of the public interest. Although, most of the time, the rigidity of the rules relating to the right of standing had provided an excuse for the People's Courts to refuse such cases, other times they had been successful, or – at least – had been able to attract the public's attention on specific violations of the common good.

Ironically (or perhaps intentionally), the amendment that was supposed to open the doors to public interest litigation ended up excluding many potential "players". In the new legal

[124] See PRC Constitution, art. 5.1: "People's Republic of China implements the Rule of Law".

[125] Carl Minzner, "Chinese State Council White Papers and the "Turn against Law"", August 29, 2012, available at: http://sinolaw.typepad.com/chinese_law_and_politics_/2012/08/chinese-state-council-white-papers-and-the-turn-against-law.html (last accessed: January 31, 2017).

[126] It is worth noting that the Law was revised for the third time on June 27, 2017, adding a second paragraph to article 55, allowing People's Procuratorates to file lawsuits "in the public interest" in case of inaction by the authorities or social organizations prescribed by paragraph one.

environment, not only individual citizens, but – in practice – also NGOS were not permitted to file lawsuits in the public interest, since at the approval of the new Civil Procedure Law, there was no mention of such a right for any social organization in all Chinese legislation.

Moreover, it seemed very likely that, even if the laws regulating the areas specifically listed in article 55 (i.e. environment and consumer protection) had been amended, the right of standing in case of violation of the public interest would be attributed merely to association(s) more closely linked to (or controlled by) the government.

These predictions came true in October 2013, when the new Law of the People's Republic of China on the Protection of Consumer Rights and Interests was approved. The Law allows only one government-sponsored NGO (i.e.: the China consumers' Association) to file lawsuits in cases of "*infringement upon the lawful rights and interests of vast consumers*"[127]. So, no one would have been surprised if the revision of the Law of the People's Republic of China on Environment Protection had also followed this path, and this actually was the case, at least until its final approval.

It is interesting to note that under the 1989 Law on Environmental Protection, any natural person, legal entity, or social organization, regardless of whether they were personally affected, could technically engage in environmental public interest litigation by filing a lawsuit against an alleged polluter[128]. In reality, however, NGOs that tried to initiate such lawsuits often faced challenges to their standing. That is why experts and activists have followed the process of revision of the Law with much apprehension, especially after the publication[129] of the second draft of the "Environment Protection Law'", which assigned the "Chinese Federation for Environment Protection" (中华环保联合会 *Zhonghua huanbao lianhebui*, also known through its English acronym, ACEF) – an association founded (and financed) by the Minister for Environment Protection itself – the monopoly of standing in cases of environmental pollution[130].

[127] "For infringement upon the lawful rights and interests of vast consumers, the China consumers' Association and the consumer associations formed in provinces, autonomous regions, and municipalities directly under the Central Government may file lawsuits in the people's court". See Law of the People's Republic of China on the Protection of Consumer Rights (amended), amended for the second time in accordance with the Decision on Amending the Law of the People's Republic of China on the Protection of consumer Rights and Interests adopted at the 5th Session of the Standing Committee of the 12th National People's Congress on October 25, 2013, art. 47.

[128] "All units and individuals shall have the obligation to protect the environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment". See "Law of the People's Republic of China on Environment Protection", art. 6.

[129] By that time, the publication "to raise the opinions of all sectors of society and that of the people" had become common practice for more important laws. For more on the subject, with special reference to the task of drafting Law on contracts, see M. Timoteo, "Il contratto in Cina e Giappone nello specchio dei diritti occidental" (The contract in China and Japan reflecting Western rights), Padova, Cedam, 2004, 310.

[130] For further information, see Du Jiabao, "Experts, Activists Call Proposed Amendment to China's Environment Law "Monopolization of Litigation", Tealeafnation, July 15 2013, available at: http://www.tealeafnation.com/2013/07/amending-the-environmental-law-willenvironmental-public-interest-litigation-be-monopolized/#sthash.JLvqlwi1.dpuf (last accessed: January 31, 2017).

For this very reason, the final version of the Environment Protection Law passed by the Standing Committee of the 12th People's National Congress on April 24, 2014 was a real game changer.

Article 58 of the Law states that:

'*For an act polluting the environment or causing ecological damage in violation of public interest, a social organization which satisfies the following conditions may institute an action in a people's court:*

1*It has been legally registered with the civil affairs department of the people's government at or above the level of a district city.*

2*It has specially engaged in environmental protection for the public good for five consecutive years or more without any recorded violation of law.*

A people's court shall, according to the law, accept an action instituted by a social organization that satisfies the provision of the preceding paragraph.

A social organization may not seek any economic benefit from an action instituted by it'[131].

It was, as can easily be understood, a regulation that was liable to have a huge impact on the ability of civil society to intervene on environmental matters.

The provision did extend the opportunity to take action in public interest from the single case of "pollution" provided by the CPL to any "violation of social public interest, including ecological damage"[132]. Moreover, it conferred the right to file *huanjing gongyi susong* for a surprising number of environmental organizations and NGOs, not only exceptional for the PRC but for any other Civil Law Country, notoriously resistant to class actions: according to the experts, there are between three hundred and seven hundred NGOs in China that satisfy the criteria required by Article 58[133].

But did Article 58 really expand the opportunity for NGOs to fight for a healthier environment?

[131] 中华人民共和国环境保护法（2014修订）*Zhonghua renmin gonghe guo huanjing baohu fa (2014 xiuding)*, (Environment Protection Law, 2014), passed by the 8th session of the Standing Committee of the People's National Congress, April 24 2014, article 58.

[132] 侯书平, "新环境保护法下环境公益的新思考", 天中学刊, 第 30卷 第 5 期2015年 10月, Hou Shuping, "Xin huanjing baohu fa xia huanjing gongyi susong de xin sikao" (New reflections on public interest litigation in light of the new "Environment protection law"), Tianzhong Xuekan, vol. 30, no. 5, October 2010, 24.

[133] The number changes according to different sources. For more see D. Pettit, "A Step Forward For Public Interest Litigation In China", Switchboard (Natural Resources Defense Council Blog), April 28, 2014, available online at: http://switchboard.nrdc.org/blogs/dpettit/a_step_forward_for_public_inte.html (last accessed: January 31, 2017); B. Finamore, "New Weapons in the War on Pollution: China's Environmental Protection Law Amendments", Switchboard (Natural Resources Defense Council Blog), April 24, 2014, available at: http://switchboard.nrdc.org/blogs/bfinamore/new_weapons_in_the_war_on_poll.html (last accessed: January 31, 2017); United Nations Development Program, "Rule of Law and Access to Justice. Environmental Public Interest Litigation in China", May, 2015, available online at: http://www.cn.undp.org/content/china/en/home/library/democratic_governance/-.html (last accessed: January 31, 2017); 刘琴, "环保组织索赔空气污染企业3000万", 中外对话 2015年3月25日, Liu Qin, "Huanbao zushi subei qiwuran qiye 3000 wan" (Organizations for environment protection request 300 million yuan from a company for air pollution damages), Zhongwai duihua, March 25, 2015, available online at: https://www.chinadialogue.net/article/show/single/ch/7790-China-court-to-hear-3-m-yuan-air-pollution-lawsuit (last accessed: January 31, 2017).

2. NGOs and "Environmental public interest litigation": latest developments

Almost two years after it came into force in January 2015, the Environment Protection Law does not seem to have brought about the transformative effect that its contents had promised.

According to data supplied by the Supreme People's Court, as of June 2016, the people's courts had accepted 93 public interest litigation cases brought by non-governmental organizations nationwide, compared to a total of 195 141 civil cases of trial of first instance involving the resource ownership, environmental infringement, and contract disputes and 57 738 administrative cases of trial of first instance concerning the environment and resources concluded between January 2014 and June 2016[134].

There are many reasons adopted on principle to justify the (still) limited use of this tool. One of the major factors is certainly the weakness of Chinese NGOs.

It is interesting to note that, at least in this case, this weakness does not stem as much from the stern control the government exercises in civil society [135] as from practical reasons. According to the experts, only a few dozen of the almost seven hundred NGOs meeting the criteria set out in Article 58 of the EPL currently have the technical, financial, organizational and human resources needed to file public interest cases[136]. It is not surprising, therefore, that only six Chinese NGOs brought environmental cases in 2016[137].

Although the impact of the new law continues to be rather small in terms of quantity (number of cases and NGOs involved), there were some improvements in 2016 from a qualitative point of view: this includes the "size" of the polluters brought to court by NGOs and the amount of damages awarded against the defendants. As noted by Dimitri de Boer and Douglas Whitehead in a recent article, more and more environmental public interest litigation cases were brought against "big polluters" (multinationals and Chinese state-owned enterprises in 2016[138], instead of individuals and small enterprises as was the case in 2015[139]), and in many environmental public interest lawsuits the courts awarded major damages against the defendants, as in the case of All-China Environment Federa-

[134] See PRC Ministry of Environmental Protection, "Supreme People's Court Releasing White Paper on China's Environmental Resource Trial", August 1, 2016, online: http://english.mep.gov.cn/News_service/media_news/201608/t20160801_361517.shtml (last accessed: January 31, 2017).

[135] See *supra*, paragraph 2.

[136] For more, see once again, United Nations Development Program, cit. p. 2; 刘琴, Liu Qin, cit.

[137] Dimitri de Boer, Douglas Whitehead, "Opinion: The future of public interest litigation in China", Chinadialogue, 8.11. 2016, online: https://www.chinadialogue.net/article/show/single/en/9356-Opinion-The-future-of-public-interest-litigation-in-China (last accessed: January 31, 2017).

[138] See, for example, the lawsuit filed by China Biodiversity Conservation and Green Development Foundation (CBCGDF) against Volkswagen and Hami Coal Power Co., or the ones filed by Friends of Nature vs. Hyundai, Jilin Petrochemical and Anshan Iron and Steel. On the topic, see Dimitri de Boer, Douglas Whitehead, cit., *ibid*.

[139] *Ibid*.

tion (ACEF) vs. Jinghua Group Zhenhua Decoration Glass Limited Company, in which the company was ordered to pay nearly 22 million yuan (approximately US$3.3 million) for its excessive emission of pollutants[140].

The Chinese government and the Supreme People's Court (SPC) seem to be actively promoting NGOs participation in environmental public interest litigation, both through regulations and policy documents. In July 2015, the Ministry for Environment Protection enacted the Measures of Public Participation in Environment Protection (环境保护公众参与办法, *huanjing baohu gongzhong canyu banfa*)[141], while in December 2014, the Supreme People's Court's adopted the "Supreme People's Court's Interpretation on Several Issues Regarding the Application of Law in Environmental Civil Public Interest Litigation", giving a broad definition of «social organization» (art. 2-5) and making it possible to file PIL for "any action that have significant risk of harming the public interest" (art. 1)[142]. The Supreme People's Court also included the first environmental public interest litigation case decided on the basis of the new Environment Protection Law (i.e.: Friends of Nature vs. Xie Zhijin and others)[143]. as a model case which Chinese courts are asked to implement in rulings of environmental disputes[144]. Moreover, in July 2016, the SPC issued a "White Paper on Environmental and Natural Resources Adjudication" (中国环境资源审判白皮书 *Zhongguo huanjing ziyuan shenpan baipishu*), in which it elaborated and displayed the progress on environmental resource trials, including environmental public interest litigation[145]. With such active encouragement from the top court, it is likely that lower level courts'

[140] 山东省德州市中级人民法院, （2015）德中环公民初字第1号, Shandong sheng Dezhou shi zhongji renmin fayuan, 2015 Dezhong huan gongminchuzi di 1 hao. The full text of the judgment (in Chinese) is available online at: http://wenshu.court.gov.cn/content/content?DocID=8904ca93-89c1-4c6b-bfb8-d21e15c91931&KeyWord=%E4%B8%AD%E5%8D%8E%E7%8E%AF%E4%BF%9D%E8%81%94%E5%90%88%E4%BC%9A%7C%E5%BE%B7%E5%B7%9E%E6%99%B6%E5%8D%8E%E9%9B%86%E5%9B%A2%E6%8C%AF%E5%8D%8E%E6%9C%89%E9%99%90%E5%85%AC%E5%8F%B8 (last accessed: January 31, 2017). For more details on this case (in English), see "China Firm Fined For Pollution In Landmark Case",NDTV, July 21, 2016, online: http://www.ndtv.com/world-news/china-firm-fined-for-pollution-in-landmark-case-1434289 (last accessed: January 31, 2017).

[141] Decreed by the Ministry of Environment Protection, order no. 35, July 13, 2015.

[142] See "Supreme People's Court Interpretation on Several Issues Regarding the Application of Law in Environmental Civil Public Interest Litigation", adopted by the 1631st meeting of the Adjudication Committee of the Supreme People's Court on December 8, 2014, and effective on January 7, 2015.

[143] For more details, see 崔筝, "新环保法实施后*NGO*打赢首例公益诉讼", 财新网, 2015年10月30日, Cui Zheng, "Xin huanjing baofa shishi hou NGO daying shouli gongyi susong" (Following the entry into force of the Environment Protection Law, an NGO wins an exemplary case in public interest), Caixin wang, 30 October 2015, available online at: http://china.caixin.com/2015-10-30/100868387.html (last accessed: January 31, 2017); 小田, "环境诉讼第一案，*NGO*赢了！",自然之友, 2015年10月30日, Xiao Tian, "Huanjing susong diyi'an, NGO ying le!" (First case of environment litigation where an NGO wins!), Ziran zhiyou, 30 October 2015, available online at: http://ngocn.blog.caixin.com/archives/135981 (last accessed: January 31, 2017); Lin Yanmei, "China's First Environmental Public Interest Litigation: Green NGOs win", Asia Environmental Governance Blog, October 30, 2015, Available online at: http://asia-environment.vermontlaw.edu/2015/10/30/chinas-first-environmental-public-interest-litigation-green-ngos-win/ (last accessed: January 31, 2017).

[144] 最高法, "今年法院共受理*45*件环境公益诉讼案件", Zuigaofa, "Jinnian fayuan gong shouli 45jian huanjing gongyi susong jian" (This year the court has admitted in total 45 environmental public interest lawsuits), cit.

[145] See "Supreme People's Court Releasing White Paper on China's Environmental Resource Trial", cit.

ability to accept and effectively rule on environmental public interest cases will continue to improve, allowing civil society to play a more active (and perhaps less controlled) role, at least in this area.

V. Conclusions

When I began my research on this topic, I was definitely not optimistic about the possibility for Chinese civil society organizations to increase their role in policy-making.
In particular, I considered the 2013 CCCP Third Plenum's new focus on "social governance" more of an attempt by the Chinese government to relieve social pressure and maintain social stability using NGOs as a tool, rather than genuine recognition by Chinese leaders of the importance of involving social forces in the decisions affecting them.
Indeed, the transition from "*social management*" to "*social governance*" has occurred at a time of increased political repression. Since Xi Jinping seized power in 2012, the state has cracked down on freethinkers[146]. News of disappearances, intimidations and arrests of activists, widely reported by the international press, show how even those who in recent years have tried a less confrontational approach by simply calling on the government to respect the Constitution and the laws – like many of the lawyers arrested in July 2015 during the so-called "709 crackdown"[147] – are no longer tolerated in China.
In this context, the recent loosening of restraints on certain types of NGOs can easily be interpreted as the Party's latest clever brainwave to adapt to the new environment created by the reforms. By outsourcing the public services they can no longer provide to NGOs, Chinese leaders can maintain social harmony threatened by growing social demand without relaxing their political grip.
Curiously, this attitude reminds me of the role social organizations played during the Qing dynasty when, as we have seen, the emperors delegated power to the CSOs of the time, allowing them to manage various social issues on their behalf. During the imperial era, the government ended up supporting only the organizations it approved of or whose agenda was useful to it: recent developments do not seem far from this scenario.
In the past several years, enormous progress has been made for party-approved organizations, such as those providing public services and publicly desired good for the Chinese people. However, the government's attitude towards overtly political or human rights

[146] See Editor, "Chinese Civil Society. Beneath the Glacier", cit.

[147] The name refers to the unprecedented crackdown on human rights lawyers and defenders which began on July 9, 2015, targeting 248 human rights lawyers and activists. A full list of all individuals Amnesty International has documented as targeted in the crackdown can be found at: https://www.amnesty.org/en/latest/campaigns/2016/07/one-year-since-chinas-crackdown-on-human-rights-lawyers/ (last accessed: January 31, 2017). On the topic, see also: Human Rights in China, "Mass Crackdown on Chinese Lawyers and Defenders", at: http://www.hrichina.org/en/mass-crackdown-chinese-lawyers-and-defenders (last accessed: January 31, 2017).

organizations has become even more aggressive, to the point where no one is expecting them to be allowed registration in the near future[148].

Despite this, many who work for NGOs feel that allowing new freedoms for civil society groups will transform the party from within, eroding the distinction between service provision and advocacy[149].

Only time will tell whether this "peaceful evolution" will ever take place. A recent incident, though, has changed in a positive way my perception of the Chinese government's interpretation of the concept of social governance: the amendment of the Law on Environmental Protection, on April 24, 2014.

As we have seen, article 58 of the new Law gives environmental NGOs more ability to supervise social affairs, expanding the right of standing in cases of pollution or ecological damage to a number of environmental social organizations incredibly high not only for China, but also for any Civil law country, notoriously cautious when it comes to group litigation[150].

The amended Law on Environmental Protection took effect only on January 1, 2015, and it is obviously too early to evaluate how successful the provision on NGOs' standing will be in promoting meaningful environmental litigation[151].

Nonetheless, I believe it is an important sign of change in the relationship between government and society, and – perhaps – a first real step towards "*making innovation in social governance*".

[148] See Karla Simon, "Civil Society in China", cit., 340.

[149] See Editor, "Chinese Civil Society. Beneath the Glacier", cit.

[150] On the topic, with reference to the Italian legal system, see Edoardo Ferrante, "L'azione di classe nel diritto italiano" [Class action in the Italian legal system], Lavis (TN), Cedam, 2012.

[151] See David Pettit, cit.

Articles

Systematizing and rebalancing EU copyright through the lens of property

Caterina Sganga*

Abstract

For decades now, the propertization of copyright has been viewed as the ultimate cause of many of the distortions affecting contemporary copyright law, and the enclosure of knowledge that has ensued. Although traces of this phenomenon are also present in the EU copyright harmonization, scholars have classified it as a dogmatically incorrect and merely rhetorical use of the proprietary label, hence not worthy of technical analysis, but only of repudiation and correction of its effects. Running counter to majority opinion, and building on a range of positive national examples of application of property rules and constitutional property doctrines in copyright matters, this article proves that property may become the systematic framework needed to solve a wide array of the most compelling balancing and interpretative problems affecting EU copyright law.

Keywords

EU copyright law – Harmonization – Propertization – EU property law – Social function – Constitutional property – Article 17 CFREU – Copyright balance – Exceptions – Three-step test – Scope of exclusive rights – Co-ownership – Abuse of copyright]

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1. Introduction

For decades now, the propertization of copyright has been viewed as the ultimate cause of many of the distortions affecting contemporary copyright law, and the enclosure of knowledge that has ensued.[1] US scholars link the phenomenon to the extension of the term of protection, the broad reading of exclusive rights, and the strict implementation of the fair use doctrine.[2] EU scholars criticize EU copyright harmonization for being tainted by an inappropriate "property logic", which contaminates the interpretation of copyright rules with a rhetoric of absolute protection.[3] Yet, in contrast to the US, EU courts seem to ignore the phenomenon, while the doctrine only attacks the rhetorical use of the proprietary label, judging it dogmatically incorrect and hence not worthy of technical analysis, but only of repudiation and correction of its effects.[4]

The reasons for such a divergence are manifold, the chief one being the traditional rejection of the notion of intangible property in civil law systems. This approach has never

[1] As in J. Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 Law Contemp. Prob. 33.

[2] For an essential literature overview, see M. Carrier, "Cabining Intellectual Property through a Property Paradigm" (2004) 54 D*uke* L.J. 1 (2004), pp. 8-12.

[3] See A. Peukert, "Intellectual Property as an End in Itself" (2011) 33(2) E.I.P. R. 67.

[4] T. Dreier, "How much "property" is there in intellectual property? The German Civil Law perspective", in H.R. Howe-J. Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge:CUP, 2013), p. 116

witnessed substantial changes, not even after the Europeanization of the discipline and the modernization of property doctrines. Today, however, the features of EU copyright harmonization suggest that the time has come to reconsider this aversion and "take the propertization of copyright seriously", that is to verify its technical grounds and analyze its consequences. In fact, EU copyright law has leaned towards a high level of protection of rightholders, triggering new imbalances between copyright and other rights, interests and socio-cultural policy goals. In the most cited manifesto of this maximalist trend, Recital 9 of the InfoSoc Directive,[5] the approach is justified by the proprietary nature of copyright. Art.17(2) CFREU formalizes this qualification, including the protection of intellectual property (IP) under the Charter's property clause, with no mention of the limitations in the public interest provided under Art.17(1) CFREU. Meanwhile, the harmonization proceeds via patchworked interventions, with no attempt to build a unitary framework. Its regulation has departed in many respects from the common core of Member States' copyright laws, creating a hybrid, market-oriented system whose mixed features have increased the risk of interpretative short-circuits, and deprived it of external reference to cure its lacunae and ambiguities. The CJEU's rampant harmonization has intervened only in circumscribed sectors, without tackling the most challenging pitfalls of the system but increasing, instead, its degree of fragmentation, while its cursory references to Art.17 CFREU have reinforced the negative impact of the property rhetoric without bringing any systematic contribution. The most prominent victims of these inconsistencies are the definition of core economic rights, the scope and flexibility of exceptions, and the criteria used to perform the "fair (copyright) balance".

Against this chaotic background, the scarce interest in copyright propertization and the systemization of EU copyright is staggering. While national scholars have engaged in comprehensive reconstructions of the discipline, at the EU level no such effort has ever been properly made, with the laudable exception of the Wittem Code.[6]

This paper makes a first attempt to fill this gap. Running counter to majority opinion, it starts from the assumption that property may become the systematic framework needed to solve a wide array of the most compelling balancing and interpretative problems affecting EU copyright law.

Part II sketches the main traits and rationales inspiring the EU legislation and the CJEU's judicial harmonization, highlighting their hybrid nature, weak compatibility with national copyright models, and distortions caused by lack of systematic guidance. Then, it investigates the foundations of the "property logic" critique, commenting on the references to

[5] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 [InfoSoc].

[6] Wittem Group, European Copyright Code (2010), available at www.copyrightcode.eu. See P. B. Hugenholtz, "The Wittem Group's European Copyright Code", in T.E. Synodinou (ed), *Codification of European copyright law* (The Hague: Kluwer, 2012), pp. 339-354.

property in legislative and judicial texts and their implications, and shedding light on the cryptic Art.17(2) CFREU. Part III analyses examples of property rules used in national statutes and cases, and of constitutional property doctrines applied in copyright matters, comparing their results with the effects of the property rhetoric on the EU model. This exercise helps dispel the doctrinal oversimplification of the alleged effects of the phenomenon, by distinguishing between rhetorical arguments and technical qualifications when assessing its impact on the drafting and interpretation of national copyright rules. Part IV connects the dots, verifying whether a technical copyright propertization could carry positive systematic and balancing effects on the development of EU copyright law.

2. EU copyright law: hybrid, unsystematic and affected by a "property logic"

2.1. The mixed traits and rationales of harmonization

I. In secondary law…

Before the Lisbon Treaty entered into force, the EU did not enjoy any competence in the field of IP.[7] Compelled to find other grounds for its interventions, the legislator linked them to the creation and functioning of the internal market. This has legitimized an economic approach to the subject, characterized by extreme pragmatism, the use of a-technical concepts, and a combination of rules and rationales that merge the main national models with little care for the overall consistency of the system.[8]

From the earliest days, copyright harmonization has been based on the need to strengthen the internal market and remove obstacles to its functioning,[9] incentivize the development and competitiveness of creative industries,[10] create new jobs,[11] and protect and stimulate the investments of producers of creative works.[12] Other goals, such as the promotion of access and participation in cultural life,[13] are confined to marginal statements, and the "cultural dimension" of copyright is limited to its role as a tool to recognize, protect and stimu-

[7] Broadly see A. Ramahlo, *The Competence of the European Union in Copyright Lawmaking*, (Berlin/Heidelberg: Springer, 2016), pp. 9-13.

[8] In this sense see M. van Eechoud-P. B.Hugenholtz et al., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking* (The Hague: Kluwer, 2009), esp. p. 297.

[9] Eg Directive 91/250/EEC on the legal protection of computer programs [1991] OJ L122/42 [Software I], Recitals 4-5; Commission, Green Paper "Copyright and Related Rights in the Information Society", COM (1995) 382 final [GP InfoSoc], paras 11-12; Directive 92/100/EEC on rental right and lending right [1992] OJ L 346/61 [Rental I], Recitals 1-7.

[10] Software I, Recital 3; Directive 96/9/EC on the legal protection of databases [1996] OJ L 77/20 [Database], Recital 9.

[11] GP InfoSoc, paras 16-18; InfoSoc, Recitals 4 and 10.

[12] Software I, Recital 2; Database, Recital 11; InfoSoc, Recital 4.

[13] Commission, "Green Paper Copyright and the Challenge of Technology", COM (88) 172 final, paras 1.4-4.5.

late the production of the common cultural heritage by guaranteeing authors adequate remuneration.[14] With the advent of horizontal directives, the blend of inspirations and hybrid traits becomes more problematic. A utilitarianism closed to the Anglo-Saxon tradition seems to take the lead, justifying copyright as a tool to incentivize creative endeavors and ensure the widest possible dissemination of the work.[15] Yet, the economic approach remains dominant. The discipline aims at providing a "satisfactory return on investment" to industrial rightholders and a "legitimate profit" to individual creators,[16] judged enough to safeguard their independence and dignity.[17] Subjects whose diverging national regulations do not impact on cross-border transactions, like moral rights, are excluded from EU intervention.[18] This approach could suggest a departure from the civil law model, were it not coupled with a continental-style qualification of originality in terms of individual creativity and a provision of exceptions in closed lists.[19] None of these choices is justified by continental personality-based arguments, though. Exceptions, for instance, are narrowly defined in order to "reflect the increased economic impact that [they…] may have", and ensure that their fragmentations do not create obstacles to the internal market.[20] Even the "high level of protection" of copyright, linked to its proprietary qualification, is not an adhesion to the continental model, but is explicitly connected to the utilitarian role of copyright as an incentive to creativity, and to the neo-classical economic theory of property as a tool to prevent market failures.[21]

Subsequent documents show a higher consideration of the cultural dimension of copyright, identifying among its functions fostering cultural diversity, identity and heritage, in line with Art.167 TFEU.[22] Also here, however, cultural policy goals are positive by-products of interventions fully directed at pursuing internal market objectives,[23] even in texts that are fully motivated by cultural policies, such as the Orphan Works Directive.[24] At the same

[14] GP InfoSoc, paras 13-15.

[15] InfoSoc, Recital 10.

[16] Directive 2004/48/EC on the enforcement of intellectual property rights [2004] OJ L157/32 [IPRED], Recital 2.

[17] Id., Recital 10.

[18] InfoSoc, Recital 19, but already in the Database Directive, Recitals 2-3 and 28.

[19] Database, Art.3.1, Software I, Art.1.3. On exceptions, see the closed list of Art.5 InfoSoc. Similarly L.M.C.R. Guibault, Copyright Limitations *and Contracts, An Analysis of the Contractual Overridability of* Limitations *on* Copyright (The Hague: Kluwer, 2002), pp. 17-19; M.R.F. Senftleben, *Copyright, limitations, and the three-step test: an analysis of the three-step test in international and EC copyright law* (The Hague: Kluwer, 2004) pp. 38-39; A.Strowel, *Droit d'auteur et copyright. Divergences et convergences* (Paris-Bruxelles: Bruylant-LGDJ, 1993), p. 114.

[20] Infosoc, Recitals 31 and 44.

[21] As in Senfltleben, Copyright, p. 31.

[22] Commission, Communication "The management of copyright and related rights in the internal market", COM (2004) 261 final, para 1.1.1.

[23] As in Commission, Communication "Creative content online in the single market", COM(2007) 836 final, p. 4; Communication "A Single Market for Intellectual Property Rights", COM(2011) 287 final, pp. 4-7.

[24] Directive 2012/28/EU on certain permitted uses of orphan works [2012], OJ L299/5 [OWD], Recitals 2-3.

time, however, more market-oriented texts refer to collective management organizations[25] and creative industries[26] as promoters and nurturers of cultural diversity; exceptions are justified by a blend of social and internal market rationales;[27] and the extension of the term of protection for performers[28] and the provision of legal tools that guarantee fair remuneration for authors and performers against industrial rightholders are based on economic considerations, with no emphasis given to their individual (social) rights.[29] To complete the picture, licenses are the elective tool to realize both market and non-market goals, such as the digitization and dissemination of out-of-commerce works by cultural heritage institutions,[30] or the cross-border use of protected materials for teaching purposes.[31]

The overlaps of normative justifications, coupled with the cherry-picking of definitions and rules taken by both national archetypes, makes it impossible to classify EU copyright law under any traditional model, and bolsters the negative effects of its lack of systematic order. This is crystal clear from the CJEU's copyright case law, and particularly in its most recent rampant harmonization.

II. … and in the CJEU's case law

The earliest decisions applying primary EC law to national copyright rules presented a vivid market-based narrative, based on pure economic arguments, to the detriment of conceptual precision and the consideration of non-market goals.[32] Once the Court was called to interpret secondary law,[33] the utilitarian inspirations of the directives, albeit colored with economic nuances, penetrated through its teleological interpretations. In over sixty cases that the Court has ruled on between 2006 and 2017, this shift contributed to highlighting the hybrid nature of the EU copyright model, the frictions between its rationales and rules, and the incalculable or even distortive effects of its unsystematic harmonization.[34] For our purposes, it will be enough to sketch a few telling examples.

The first case in point comes from the definition of the notion of originality. Despite the voluntary silence of the EU legislator, in *InfoPaq* the CJEU decided to generalize the requirement set by the Software and Database Directives, ruling that a work is protectable if

[25] Directive 2014/26/EU on collective management of copyright and related rights [2014] OJ L84/72, Recital 4.

[26] Communication "Trade, growth and IP", COM(2014) 389 final, p. 10.

[27] This is particularly visible in the Proposal for a Directive on Copyright in the Digital Single Market, COM (2016) 593 final [Proposal for a CDSM Directive], Recitals 5, 18, 19.

[28] In Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L372/12, Recital 5.

[29] Proposal for a CDSM Directive, Recitals 40-44.

[30] Id., Recitals 22-23.

[31] Id., Recital 17 and Art.4.2.

[32] Pointed out in the Opinion of AG Gulmann in *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v Commission* (C-241-2/91P) [1995] ECR I-743, paras 36, 50.

[33] From *Metronome Musik GmbH v Music Point Hokamp GmbH* (C-200/96) [1998] ECR I-1953, para 22.

[34] As in M. Leistner, "Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives" (2014) 51(2) C.M.L.Rev., pp. 559-560; M. Favale-M. Kretschmer-P.L.C. Torremans, "Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings on the European Court of Justice" (2016) 79(1) M.L.Rev. 31

it represents the author's own intellectual creation.[35] Further decisions leaned even more towards the continental model, requiring that the creation reflects the author's personality, thus excluding that investments (or the Anglo-Saxon "sweat of the brow") could alone justify the protection of functional works, in clear contrast with the economic rationales of several directives.[36] However, this position was never justified by any deference towards the continental notion of authorship (which was largely neglected), but by the need to avoid distortions in the internal market.[37]

Similar features characterize the evolution of the criteria used to determine the infringement of the right of communication to the public. From *SGAE* on, the notion of "new public" and the profit-making activity of the alleged infringer play a determinant role,[38] with a functional reading that departs from the continental tradition, for it draws the boundaries of the right by looking at the economic impact of the conduct and not at its technical characteristics, with the only aim of protecting rightholders' economic interests.[39] The market-oriented inspiration and high flexibility of these parameters gave rise to unpredictable and distortive results,[40] culminating in *Svennson*,[41] which stretched Art.3(1) InfoSoc to cover indirect acts such as hyperlinking every time they grant access to a new public compared to the original website. Despite the risk of chilling effects on online behaviors underlying the undue and uncertain expansion of the provision to weblinks,[42] *GSMedia* confirmed the position, trying to strike a balance between copyright and conflicting freedoms/rights through the introduction of additional filtering criteria,[43] such as the infringer's knowledge or reason to know the illicit nature of the content linked – an element presumed if her activity is profit-making.[44] With a functional approach lacking any systematic precision, the CJEU used exogenous factors relevant at most to the application of exceptions (the profit-making nature of the activity), or completely alien to copyright, for knowledge or intention do not even matter to find an infringement. How much this solution could engender distortive effects is visible in

[35] *Infopaq International A/S v. Danske Dagblades Forening* (C-5/08) [2009] ECR-6569, paras 34-35, 40-42.

[36] E.g. *Football Association Premier League Ltd and Others v QC Leisure and Others* and *Karen Murphy v Media Protection Services Ltd* (C-403-429/08) [2011] ECR I-09083 [FAPL], paras 97-98; *Eva-Maria Painer v Standard VerlagsGmbH and Others* (C-145/10) [2011] ECR I-12533, paras 42, 89; *Bezpečnostní softwarová asociace v Ministerstvo kultury* (C-393/09) [2010] ECR I-13971, para 48; *Football Dataco Ltd and Others v Yahoo! UK Ltd and Other*s (C-604/10) EU:C:2012:115, ruling no.1

[37] Infopaq, paras 40-42.

[38] *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (C-306/05) [2006] ECR I-11519.

[39] As emphasized in the Opinion of AG Trstenjak in *Società Consortile Fonografici (SCF) v Marco Del Corso*, (C-135/10) EU:C:2012:140, para 25.

[40] Particularly visible in the diverging outcomes of *OSA — Ochranný svaz autorský pro práva k dílům hudebním os. v Léčebné lázně Mariánské Lázně as* (C-351/12) EU:C:2014:110 and *Reba Training Gesellschaft für Sport- und Unfallrehabilitation mbH v GEMA* (C-117/15) EU:C:2016:379.

[41] *Svensson v Retriever Sverige AB* (C-466/12) ECLI:EU:C:2014:76.

[42] Opinion of AG Wathelet in *GS Media BV v Sanoma Media Netherlands BV and Others* (C-160/15) EU:C:2016:644, paras 78-79

[43] *GS Media*, paras 30-31.

[44] Id., paras 47-50.

Filmspeiler, which sanctioned the multimedia player's provision of add-ons that facilitate the finding of freely available websites streaming unlicensed content.[45]
The potential uncontrolled expansion of the right, triggered by the economic-based reading of its scope, is a phenomenon that also characterizes the case law on the right of distribution. After *Peek&Cloppenburg*, which excluded the application of Art.4(1) InfoSoc to the use of a designer chair in a shop window, clarifying that not all the forms of commercial exploitation of a work are covered by copyright and that the scope of exclusive rights should be defined in light of their essential function,[46] *Donner*[47] and *Dimensione Direct Sales*[48] extended the provision to cover all supply chain activities, including preparatory acts, such as offers or targeted advertising, even if they do not materialize in actual sales.
The hybrid nature of EU copyright is also visible in the field of exceptions. The goal of avoiding internal market distortions and providing a high level of protection to copyright require their strict reading which, however, should not hinder, in a utilitarian perspective, the fulfillment of their goals and the balance between copyright and conflicting interests.[49] Following the same approach, *Deckmyn* harmonizes the notion of parody not, as is usual, to eliminate obstacles to the internal market, but to ensure that the exception can uniformly perform its function of protecting freedom of expression across the Union, by banning any more restrictive interpretations.[50] Similarly, *Ulmer* creates an additional limitation, beyond the exhaustive list of Art.5 InfoSoc, to make sure that the exception provided by Art.5(3)(n) can be properly implemented and perform its role.[51] However, these laudable attempts still clash with the rigid market-based approach to the three-step test (Art.5(5) InfoSoc), interpreted strictly as *ex post* filter to the application of exceptions, to ensure that their operation does not unreasonably prejudice the economic exploitation of the protected work.[52]
Against this fragmented, unpredictable, and dangerously slippery background, the peculiar propertization of EU copyright adds only another layer of complexity to an already challenging puzzle.

2.2. How much property is there in EU copyright law?

In the four decades of EU copyright history, the few traces of systematic classification converge towards its definition as a property right. They are, however, largely inconsistent, and surely not an example of technical precision.

[45] *Stitching Brein v Jack Frederic Wullems* (C-527/15) EU:C:2017:300.
[46] *Peek&Cloppenburg KG v Cassina SpA* (C-456/06) [2008] I-2731, paras 34-35.
[47] *Criminal proceedings against Titus Alexander Jochen Donner* (C-5/11) EU:C:2012:370.
[48] *Dimensione Direct Sales Srl v Knoll International SpA* (C-516/13) EU:C:2015:315.
[49] FAPL, paras 97-98.
[50] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* (C-201/13) EU:C:2014:2132, paras 17-20.
[51] *Technische Universität Darmstadt v Eugen Ulmer KG* (C-117/13) EU:C:2014:2196, para 43.
[52] *ACI Adam BV and Others v Stichting de Thuiskopie* (C-435/12) EU:C:2014:254, para 25.

I Legislative hints

Copyright is defined as property in the preambles to the InfoSoc Directive and the IPRED, with statements that are too concise to carry little systematic meaning. Recital 9 InfoSoc connects the proprietary qualification to the need to grant a high level of protection to copyright, using the connector "therefore", as if the former would be the effect and not the reason for the latter. Recital 32 IPRED adds only a reference to Art.17(2) CFREU as a further ground for the "full respect" of IP rights. Apart from these formal declaratory statements, the directives do not show any sign of propertization. The fact that EU law has not yet covered areas where property rules have traditionally played a role at a national level reinforces the perception that the propertization of EU copyright law is limited to a rhetorical phenomenon, with no technical implications.

Recently, the proprietary qualification has emerged in preparatory materials, as in the explanatory memorandum to the proposal for a Directive on Copyright in the Digital Single Market.[53] Here, the Commission connects the improved bargaining power of authors and performers to "a positive impact on copyright as a property right, protected under Art.17 [CFREU]", and draws the same connection between the position of other rightholders and the measures proposed "to improve licensing practices, and ultimately rightholders' revenues".[54] Once again, the declamatory references to property are not followed by any systematic consequence.

II. Art.17(2) CFREU

Due to its cryptic text, Art.17(2) CFREU creates more interpretative problems than it solves. Instead of introducing the IP clause under a separate provision, as in several national constitutions,[55] Art.17(2) places its dry "intellectual property shall be protected" in an article devoted to the right to property. This classificatory decision is not unprecedented, as in the 1990s the European Commission of Human Rights declared that IP enjoyed the protection offered by Art.1 of the First Protocol (P1) of the ECHR,[56] and the ECtHR followed the same approach in 2005.[57] However, the Strasbourg Court's extension of the notion of property under the ECHR has never covered only IP, and stretched instead to claims, administrative licenses, and even welfare benefits.[58] Against this backdrop, the Praesidium's decision to limit the addendum of Article 17 only to IP has left commentators puzzled.

[53] Proposal for CDSM Directive, p. 9.

[54] Ibidem.

[55] Inter alia, Portugal (art.42(2)), Sweden (ch.2 s.19); Slovakia (art.43(1)), Slovenia (art.60), Czech Republic (art.34), Russia (art.44(1)).

[56] On copyright, *Aral v Turkey*, App. No. 24536/94, ECHR:1998:0114DEC002456394 (1998, admissibility decision).

[57] *Anheuser-Busch Inc. v Portugal* (2007) 44 EHRR 42; *Melnychuck v Ukraine*, App. No.28743/03 (ECHR 5 July 2005); *Dima v Romania*, App. No.58472/00 (ECHR 16 November 2006).

[58] Noted also by L. Helfer, "The New Innovation Frontier? Intellectual Property and the European Court of Human Rights"(2008) 49 Harvard Int'l L.J. 1 2008, p. 17.

Both the explanations to the Charter[59] and the comment prepared by the Commission's Network of Independent Experts on Fundamental Rights[60] justify the choice with the aim to emphasize the growing importance of IP for the Union, as if its qualification as a fundamental right (to property) could be based on "its economical weight and the activism of the Community legislator" instead of on its nature and objectives.[61] Yet, apart from its debatable basis, Art.17(2) CFREU has given rise to quite the contrary result, for not only has it triggered a heated doctrinal debate, but it has also increased public skepticism against IP rights and their perceived unbalanced protection.[62]

The text of the provision raises several interpretative questions. The emphasis on the right ("intellectual property shall be protected") and not, as in other CFREU provisions, on its subject ("everyone has the right to") seems to turn the spotlight on investments more than on the creator, pointing to a property model deprived of the personality-based traits that characterize the continental propertization of authors' rights.[63] At the same time, the lexeme "shall be protected" and the missing reference to the limitations of Art.17(1) CFREU have raised doubts as to the hierarchical rank attributed to IP, leading some scholars to argue that the Charter had imposed not only a negative institutional guarantee for existing entitlements, but a new positive obligation on the EU legislator to broaden the number and scope of exclusive rights.[64]

This interpretation, however, would run counter to the drafting history of the provision, and to the ECtHR's and CJEU's case law, which have never attributed absolute protection to property rights. In addition, other translations of the Charter use the plainer verb "is", and the Praesidium's explanations limit the rhetorical power of the provision by specifying that IP is not a special, absolute form of property, and that Art.17(1) CFREU also applies, "as appropriate", to the second paragraph.[65] Still, the silence of Art.17(2) as to the possible functionalization of IP to other social goals remains problematic. Not only has the provision no normative pretense, but its text remains an empty statement that leaves without guidance those who are called to interpret EU copyright rules, particularly now that the

[59] Praesidium, Explanations relating to the Charter of Fundamental Rights [2007] OJ C-303/17, p. 23.

[60] EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, June 2006, pp. 165-166.

[61] Praesidium, Explanations, p. 23.

[62] In this sense C.Geiger, "'Intellectual Property shall be protected!?'–Art. 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope" (2009) 31(3) E.I.P. R., p. 113.

[63] M. Vivant, "L'intérêt général servi par une reconnaissance éclairée des droits de propriété intellectuelle", in M. Buydens and S. Dusollier (eds), *L'intérêt général et l'accès à l'information en propriété intellectuelle* (Bruxelles: Bruylant, 2008), p. 204.

[64] Geiger, Intellectual Property, p. 115; J. Griffiths-L. McDonagh, "Fundamental rights and European IP law: The case of Art 17(2) of the EU Charter", in C. Geiger (ed), *Constructing European Intellectual Property Achievements and New Perspectives* (Cheltenham/Northampton:Edward Elgar, 2013) p. 82.

[65] Praesidium, Explanations, p. 24.

Charter has acquired the same cogent value of the Treaties (Art.6(1) TFEU). In fact, the obscure language of the provision has reinforced the property logic that depicts EU copyright as an end in itself, based on a rhetorical understanding of property as an absolute right that does not need any justification nor have any functionalization.[66] Recitals 9 InfoSoc and 23 IPRED reflect this approach, assuming that a high level of protection is always required and can only lead to positive socio-economic results. The same interpretation emerges between the lines of some of the CJEU's decisions.

III.The CJEU's case law

The CJEU's case law in the field of copyright best illustrates the nature and different effects of copyright propertization.

Already in 1981, the Court rejected the doctrinal argument that excluded the proprietary qualification of copyright due to its moral rights component, and limited its focus to economic rights.[67] The classification, however, did not carry any systematic consequence. In fact, subsequent decisions defined copyright as a bundle of exclusive rights strictly defined by law, and not an all-encompassing right like traditional civil law property. Along these lines, *Warner Bros* denied recognizing exclusive rights beyond those granted by national or EC law,[68] while *Peek&Cloppenburg* refused to extend them beyond their legislative boundaries.[69]

Peek&Cloppenburg is also remarkable for its rejection of the absolute property logic based on Recital 9 InfoSoc in favor of a more balanced approach, but again with a teleological and not systematic reasoning. The same a-technical reference to property appears every time the Court deals with the copyright balance, particularly after the advent of the Charter of Nice and later CFREU, as in *Laserdisken*, where the CJEU justified the restriction on the freedom to receive information with the need to protect copyright as "part of the right to property",[70] or *Promusicae*, with its uncommented cursory reference to Art.17 CFREU,[71] followed by a number of similar examples.[72] The only exceptions are *Scarlet Extended* and *Netlog*, where the CJEU excluded that Art.17(2) CFREU attributes inviolability and absoluteness to IP rights,[73] in line with *Metronome Musik* and its affirmation of the social

[66] Geiger, Intellectual Property, p. 116; Griffiths-McDonagh, Fundamental right, p. 81. See also J. Drexl, "Constitutional Protection of Authors' Moral Rights in the European Union", in K.S. Ziegler (ed), *Human Rights and Private Law, Privacy as Autonomy* (Oxford:Hart Publishing, 2007), p. 159.

[67] *Musik-Vertrieb Membran and K-tel International v GEMA* (C-55/80 and 57/80) [1981] ECR 147, paras 12-13.

[68] *Warner Brothers Inc. and Metronome Video ApS v Erik Christiansen* (C-158/86) [1988] ECR 2605, para 18.

[69] Peek & Cloppenburg, paras 37-39.

[70] *Laserdisken v Kulturministeriet* (C-479/04) [2006] ECR I-8089, paras 62-65.

[71] *Productores de Música de España v Telefónica de España SAU* (C-275/06) [2008] ECR I-271, para 62.

[72] *Coty Germany GmbH v Stadtsparkasse Magdeburg* (C-580/13) EU:C:2015:485, para 29; GS Media, para 31; *Tobias McFadden v Sony Music Entertainment Germany GmbH* (C-484/14) EU:C.2016:689, para 80.

[73] *Scarlet Extended SA v SABAM* (C-70/10) [2011] ECR I-11959, para 43; *SABAM v Netlog NV* (C-360/10), EU:C:2012:85, para 41.

function of (intellectual) property as the basis for the legislative limitations of proprietary prerogatives in the public interest.[74]

These omissions could not avoid leading to inconsistent, unpredictable decisions. Suffice it to mention here, again, the opposite reading of Recital 9 Infosoc offered in *Peek&Cloppenburg* and *Dimensione Direct Sales*,[75] the different output of the "fair balance" in *Promusicae* and *Bonnier Audio*[76], despite the similar factual landscape, and the precedents advancing the strict reading of exceptions and the three-step test.[77] Only in *Luksan* did the CJEU engage in a holistic reading of Art.17 CFREU, admitting the application to IP of both the guarantees and limitations enshrined in Art.17(1), and qualifying the national denial of exploitation rights to a film director, who had them granted by EU law, as a deprivation of "his lawfully acquired property right".[78] However, the reasoning was once again too concise to provide effective systematic guidance. An attempt in this sense came from *SCF*, where the Court distinguished exclusive economic rights from remuneration rights, qualifying the first as "preventive in nature", that is requiring the author's consent for any protected use of the work, and the second as "compensatory in nature",[79] for they grant only the right to be remunerated for the use. The distinction recalls the dichotomy property-liability rules, but clearly defines copyright as a bundle of negative rights – a feature characterizing monopolies rather than property – with no further explanations.

The approach does not change in the case of entitlements originating from the EU, such as the *sui generis* right. While its functional similarity to a property right over information[80] could have facilitated the recourse to the proprietary framework to guide its implementation, the case law on Art.7 Database just bears the traces of a strong property logic, as proven by its expansion to cover indirect transpositions of the database, or its use as mere inspiration, with no systematic reference to property law.[81]

AG Opinions offer more theoretical hints than judgments do, showing how frequently parties advance proprietary arguments in copyright cases, and how much the CJEU is reluctant to discuss them in the decisions. In *Foreningen* the Opinion depicts copyright as a dualist bundle comprising "a number of proprietary and moral rights".[82] In *Uradex* it takes

[74] *Metronome Music*, para 21. Similarly *Sky Österreich GmbH v Österreichischer Rundfunk* (C-283/11) EU:C:2013:28, paras 23-24.

[75] *Dimensione Direct Sales*, para 33.

[76] *Bonnier Audio AB v Perfect Communication Sweden AB* (C-461/10) EU:C:2012:219

[77] As *Infopaq*, para 58; OSA, para 40; ACI Adam, paras 25-27*; Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others [Meltwater]* (C-360/15) EU:C:2014:1195, para 23.

[78] *Martin Luksan v Petrus van der Let* (C-277/10) EU:C:2012:65, para 70.

[79] SFC, para 75.

[80] Similarly E. Derclaye, *The legal protection of databases. A comparative analysis* (Cheltenham/Northampton: Edward Elgar, 2008), p. 50.

[81] The most articulated analysis of the issue is in *Football Dataco,* paras 13, 14, 35-36.

[82] Opinion of AG La Pergola in *Foreningen af danske Videogramdistributorer v Laserdisken* (C-61/97) [1998] ECR I-5157,

the use of the terms "owners and holders" instead of authors and producers as a sign of the intent to emphasize the importance of the economic ownership of a work instead of its personal link with the author.[83] In *Scarlet,* it evidences the connection between propertization and a high level of protection,[84] and in *Sky Österreich* it defines the exclusion of fair compensation in the case of minimum prejudice as an application of the principle of *de minimis* impairment of property from the public power, justifying the rule as a proportionate limitation of property in light of its social function.[85]

The scarce attention devoted by the CJEU to systematic questions in favor of functional, policy-based interpretations[86] deprives EU copyright law of a framework that could dispel the risks posed by the propertization rhetoric, ensure consistency, fill in gaps and stabilize the copyright balance. At the same time, it leaves national courts without guidance to manage the interplay between their copyright laws and a model that, due to its market-oriented rationales and hybrid traits, may act as "legal irritant" for the transplanting systems, with inevitable distortive effects. Up to now, the doctrinal answer to the EU's proprietary labelling of copyright has swung between neglect and its consideration as a clumsy dogmatic mistake. However, it is not too late to verify, by looking at other national experiences, whether the empty property rhetoric may instead be turned into an opportunity of systematic reordering.

3. The thousand faces of copyright propertization: national experiences

Doctrinal critiques of copyright propertization often make the mistake of oversimplification, linking the phenomenon to specific consequences, without verifying whether their assumptions can be effectively generalized. The history of national copyright models would already prove them wrong.[87] A few examples of the operation of property concepts and rules and of constitutional property clauses in selected national experiences will suffice to show that the propertization of copyright is not a new phenomenon, and its implications are various and far from being as negative as depicted by the mainstream literature. For the sake of conciseness, the comparison will focus on three test-beds: France, for its role as a model for the continental tradition and historical openness towards the concept of literary property;

footnote 2.

[83] Opinion of AG Ruiz-Jarabo Colomer in *Uradex v RTD and BRUTELE* (C-169/95) [2006] ECR I-4973, para 46.

[84] Opinion of AG Cruz Villalon in *Scarlet Extended*, paras 76-78.

[85] Opinion of AG Bot in *Sky Osterreich*, paras 29, 48-50, 75.

[86] This is also the opinion of AG Trstenjak in *SCF*, para 102.

[87] I delve more extensively into these historical evidences in C.Sganga, *Propertizing European Copyright. History, Challenges and New Opportunities* (Edward Elgar Publishing 2018), Chapter 2, pp. 50 ff.

Germany, as a system whose local doctrine and strict private law dogmas have strongly opposed the propertization of copyright; and Italy, as a second-generation system whose blend of French and German influences leads to different and interesting results.

3.1. Private law property

At a statutory level, France is the only country that uses the term *propriété litteraire et artistique* to label authors' rights.[88] The *Code de la Propriété Intellectuelle* (CPI) classifies such *propriété* as *incorporelle*, distinct from the civil code bipartition between movable and immovable property, to avoid conceptual frictions, underline the need for a specific regulation, and justify the limited duration and scope of the rights. The term "propriété" returns in the provision devoted to joint authorship settings (Article L.113). While the CPI does not refer directly to the civil code rules on *copropriété*, their application by analogy is a consistent judicial practice. [89] This has resulted, *inter alia*, in the request for unanimous consent for the assignment of economic rights,[90] and in the parallel exclusion of the applicability of provisions unfitting to the hybrid characteristics of literary property, such as the co-owner's right to individually enjoy and defend the property and to exit from the co-ownership (Art.815 Code). Provisions of the CPI adapt civil code property rules to authors' rights, as in the case of Art.L.113-3(4) CPI, allowing co-authors to separately exercise their exploitation rights if their participation was of different genres, Art.L.113-4 CPI, derogating from accession and attributing the *propriété* of the composite work to the creator, or Art.L.113-5 CPI, granting original ownership to the coordinator of a joint work. In the case of marriage, the CPI excludes authors' rights from falling under community property, but uses civil code rules to regulate the exploitation of profits, assignment, consideration of the spouses' contribution, and the residual attribution of the usufruct of economic rights to the surviving spouse.[91]

Not every aspect of French propertization is so systematically consistent, though. An example comes from the judicial development of the *droit de destination*, originated from the broad interpretation given to the concise definition of literary property, which attributes to the author the "exclusive right to exploit his work in whichever form he desires" (Arts.L.111-1-L.123-2 CPI), as including every use not explicitly excluded by law. This reading has led to theorizing an extension of the rightholder's control beyond the first sale of the work, implying a proprietary, *erga omnes* effect of the contractual limitations imposed on the uses of the copy.[92] Similarly, it has allowed rightholders to prohibit

[88] *Loi 57-298 du 11 mars 1957 sur la propriété litteraire et artistique*, JORF 14.3.1957, 2723, later codified in 1992 in the *Code de la propriété intellectuelle (CPI), Loi 92-597 du 1 Juillet 1992*, JOFR 3.7.1992, 8801.

[89] Since CA Paris, 27 February 1918, Gaz.Pal. 1918, I, 125. More recently Cass.2 April 1996, JCP G 1996, IV, 1238; Cass, 15 February 2005, 3 RIDA 2005, 415.

[90] CA Paris, 7 June 1995, 1 RIDA 1996, 270; CA Paris, 2 April 2003, JurisData n.2003-206143.

[91] See the overview provided by A. Lucas-H.J.Lucas-A.Lucas-Schloetter, *Traite de la propriété littéraire et artistique* (4th ed., Paris:LexisNexis, 2012), pp. 163-168.

[92] As also confirmed by the Cour de Cassation from Cass.22 March 1988, 4 RIDA 1988, 295.

the public exhibition of an already alienated sculpture, or the appearance in a movie advertisement of a lawfully acquired poster.[93] Unlike the technical use of property rules, the *droit de destination* is a doctrine derived from an orthodox application of a tangible property principle – the overarching, absorbing scope of ownership – ill-suited to the features of copyright law. Its existence proves, within a single system, the difference between systematic and rhetorical propertization, where the first uses property as an adaptive framework, while the second applies its general principles "as is", in the belief that no proprietary qualification can be attributed to an entitlement should this mirror application prove impossible.

Not only do systems with an uncontested acceptance of the notion of literary property show these trends. The Italian example is paradigmatic. The influence of the German doctrine led to the elimination of any trace of proprietary language from the 1941 law on authors' rights,[94] while new detailed rules decreased the need to resort to the civil code, which also moved the provision on authors' rights to Book VI on Labour, again following the German qualification of exploitation rights as a form of salary for the author.[95] Still, several articles of the copyright statute present proprietary traits, from the all-encompassing definition of Art.12 to the independence of each economic right (Art.19) and, before the InfoSoc Directive, the open-ended general definition of the right of reproduction, interpreted similarly to the *droit de destination* in France.[96] The statute also refers explicitly to civil code property rules, predominantly in the field of co-ownership, to regulate cases of indistinguishable/inseparable contribution (Art.10 l.aut), the transfer of quotas between co-authors (Art.1103 c.c.), the majority needed for the exercise of economic rights (Arts.1108 ff. c.c.),[97] and all aspects linked to the communion between the author's heirs (Art.115 l.aut).[98] Economic rights can be subject to security rights, with moral rights-based specifications such as the limitation of confiscation and pledges to the proceeds of the exploitation, and only after the author has assigned her economic rights (Arts.111-112 l.aut.).[99] The same mix of copyright propertization and exceptionalism emerges in Arts.113-114 l.aut., on the expropriation of authors' rights in the public interest.

Along the same lines, several Italian court decisions have used property rules to compensate legislative gaps, particularly *vis-à-vis* new technologies. Examples range from the defi-

[93] Cass.15 October 1985, 3 RIDA 1986, 124; CA Anvers, 29 March 2010, 1 A&M 2010, 489.

[94] Legge 22 Aprile 1941, no.633, GU 16.4.1941, no.166.

[95] See L.C. Ubertazzi (ed), *Commentario breve alle leggi su proprietà intellettuale e concorrenza* (4th ed, Padova: CEDAM, 2007), p. 36.

[96] L.C. Ubertazzi-M. Ammendola, *Il diritto d'autore* (Torino: UTET, 1993), p. 40.

[97] With debates as to the possibility of independent exercise of economic rights, as in France. See, eg, CA Milano, 13 March 1973, AIDA 1973, 315; Trib.Milano, 2 July 2004, AIDA 2005, 1039.

[98] Reported by Ubertazzi, Commentario, p. 350.

[99] P. Greco-P. Vercellone, *I diritti sulle opere dell'ingegno* (Torino: UTET, 1974), pp. 334-338

nition of the relationship between photograms and soundtracks as servitude,[100] or between single components and the entire work as that between accessories and principal good,[101] to the reference to union and confusion to establish the ownership of each contributor (Art.939 c.c.),[102] and to the rule on the compensation due to co-owners for innovations and amelioration in a case on the use of part of an opera performance in a cinematographic work.[103] Encyclopedias or treaties have been treated as universalities of movables (Art.816 c.c.),[104] ceasing to publish a periodical as abandonment in order to excuse infringement,[105] and conflicts between successors in title have been tackled by applying either the rule on conflicts of acquisition of movables (Art.1155 c.c.),[106] or the rule dictated in case of transfer of the right to use (Art.1380 c.c.),[107] although it was resolutely denied that authors' rights could be acquired through adverse possession, occupation, or any other way not provided by law.[108] More recently, courts have asked for evidence of an uninterrupted chain of transfers of exploitation rights in cases of requests of declaratory judgment and injunction against infringement,[109] or for a *rei vindicatio* under Art.948 c.c.[110]

Among EU Member States, Germany is the country where the civil code and copyright statute show the most resolute rejection of copyright propertization. The reasons for such aversion are deeply rooted in the rigid tangible property notion enshrined in the BGB, the lessons of the Historical School of Jurisprudence, and the concomitant predominance of the personality theory in shaping the modern *Urheberrecht*.[111] The German *Bundesgerichtshof* rarely uses the term "intellectual property", usually only doing so when referring to EU or international sources,[112] or in a rhetorical, a-technical fashion, with no real conceptual implications.[113] More generally, despite the self-sufficient nature of the 1965 copyright statute, whose level of details avoid the need to resort to the civil code in several areas, issues such as the fate of copyright in the matrimonial property regime, the enforceability of pecuniary claims on authors' rights and the possibility to subject them to pledge or expropriation

[100] Cass. 12 August 1953, Dir.aut. 1953, 510.

[101] CA Roma, 23 May 1947, Foro it., 1947, I, 782.

[102] Ibid.

[103] Pret.Roma, ord. 8 February 1954, Foro it., 1954, I, 707.

[104] Eg Cass.15 June 1951, Foro it., 1952, I, 1569.

[105] Eg Cass.22 July 1953, Dir.aut., 1953, 506.

[106] CA Roma, 14 October 1986, AIDA 1987, 139; CA Milano, 22 December 1965, Riv.dir.ind., 1965, II, 278.

[107] CA Torino, 23 June 1960, AIDA 1960, 523.

[108] Recently Cass. 29 December 2011, n.20082.

[109] Cass.5 March 2010, n.5359, in Foro it., 2011, VI, I, 1875.

[110] Trib. Roma, 23 February 2007, unpublished.

[111] See G. Schricker-U. Loewenheim (eds), *Ubreberrecht: Kommentar* (5th ed, Munich: Beck), pp. 32-4.

[112] See recently ZR 185/03, 20 July 2006, para 21, ZR 29/05, 12 July 2005, 11; ZR 114/04, 15 February 2007.

[113] As in BGH, 18 May 1955, *Tonband/Grunding-Reporter*, to extend the general definition of author's right to any use made possible by new technologies. Schricker-Loewenheim, *Ubreberrecht*, pp. 1385-6.

remain partially unregulated, posing the question of which discipline to apply by analogy as the closest to the institutions. Overcoming the strong doctrinal criticism towards the assimilation of property and copyright, courts have admitted the residual application of the BGB provisions on co-ownership to exploitation rights,[114] within the limits allowed by the personality aspects of the right,[115] and adapted to copyright principles.[116]

3.2. Constitutional property

Much less aversion to copyright propertization characterizes constitutional law, predominantly due to the common extension of the subject matter of national constitutional property clauses to cover also intangible goods, reinforced by the case law of the ECtHR and the CJEU. The country leading by example is Germany,[117] where the German Constitutional Court has extended the property clause (Art.14 GG) to cover a broad range on intangible assets, with the aim of emancipating the constitutional property notion from the BGB model and thus enable the implementation of the *Sozialstaat* plans on various new forms of wealth.[118] Due to its close connection with individual dignity, self-development and participation in the social and cultural life of the community, copyright has been subject to this constitutional propertization since 1971, with remarkable implications.

The first and most paradigmatic decision, *Schulbuchprivileg* (1971),[119] stemmed from the constitutional complaint against the legislative introduction of an exception allowing the reprint of excerpts of protected works in anthologies for educational or religious purposes, which rightholders challenged as an uncompensated violation of their property rights under Art.14 GG. Not only did the Court circumvent the monist theory and limit the check to the economic aspects of the right, specifying the need to consider "the special nature and character of such property right",[120] but it also ruled that "in defining the content of copyright in line with Art.14 GG, [the legislator] should formulate provisions that guarantee the compatibility of the exploitation of the work with [its] nature and social relevance", since he "is not only obliged to protect the interests of the individual, but also to limit her rights to the extent necessary to pursue the public good" – here the access of new generations to cultural materials, and the cultural and intellectual progress of the commu-

[114] Explicitly OLG Hamburg, OLGZ 207, 7; OLG Frankfurt, 11 U 26/05.

[115] OLG Hamburg GRUR-RR 2002, 249; OLG Nuernberg ZUM 1999, 656, but see Schricker-Loewenheim, Uhreberrecht, p. 302.

[116] As in LG Muenchen I ZUM 1999, 333(336).

[117] See H.P. Götting, „Der Begriff des geistiges Eigentums" (2006) 5 GRUR 353, p. 357, and F. Fechner, *Geistiges Eigentum und Verfassung* (Heidelberg:Mohr Siebeck, 1999), p. 56.

[118] The leading case is still *Nassaukiesungsbeschluss*, 58 BVerfGE 300 (1981). See D.P. Kommers-R.A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed., Durham: Duke University Press, 2012), p. 259.

[119] *Schulbuchprivileg,* 31 BVerfGE 229 (1971), para 28, translated by Kommers-Miller, Constitutional Jurisprudence, p. 232.

[120] Id., p. 241.

nity.[121] The social function of property was also the argument used in *Bibliotheksgroschen* to declare the constitutional legitimacy of an exception that allowed the non-commercial use in schools of copies of protected works after the stipulation of the first license,[122] and in *Kirkenmusik* to justify the unauthorized performance of a protected musical piece at a non-profit event.[123] More recently, in *Germania 3*,[124] the *Bundesverfassungsgericht*, called to rule on the legitimacy of a narrow interpretation of the quotation exception, stated that not every exploitation of copyright is constitutionally guaranteed.[125] Since "the more the work fulfils its social role, the more it may serve as the origin of another artistic endeavour", this social function allows a limitation of authors' rights to protect the artistic freedom of others, particularly when the work quoted has a high social relevance and contributes to the contemporary cultural and intellectual *milieu*.[126] With similar arguments, *Metall auf Metall*[127] reversed two *Bundesgerichtshof* decisions censoring the unauthorized use on a loop of a two-second rhythm sequence of a song in another piece,[128] for they were judged as an excessive impairment of the claimant's artistic freedom and the public goal of community cultural development.[129]

While the German constitutional case law on the social function of copyright as property right is the most paradigmatic example of the positive effect a technical propertization may have on the copyright balance, the hazy framework set by the Italian Constitutional Court (ICC) proves the negative effects that the lack of systematic precision has on the evolution of the discipline. The ICC precedents, in fact, show no attempt to qualify authors' rights, prefer market-based arguments, and avoid as far as possible addressing any question which would require a definition of the nature of the rights and its implications. One of the most eloquent examples, judgment no.38/73, rejected the unconstitutionality claim without answering its two key inquiries, which asked whether the copyright act was consistent with the social function of property enshrined in Art.42 Cost., and whether the legislator struck a proportionate balance between Arts.42 and 21 Cost. on freedom of expression.[130] Only a handful of precedents contain systematic indications, the most illustrative one still being judgment no. 108/1995 on the constitutional legitimacy of the rental right.[131]

[121] Id., pp. 247-48.

[122] *Bibliotheksgroschenentscheidung*, 31 BVerfGE 248 (1971).

[123] *Kirkenmusik*, 49 BVerfGE 382 (1978).

[124] 1 BvR 825/98 (2000).

[125] Id., para 19.

[126] Id., para 23 [my translation].

[127] 1 BvR 1585/13 (2016).

[128] BHG, GRUR 2013, 614.

[129] *Metall auf Metall*, para 47.

[130] ICC, 12 April 1973, no.38.

[131] ICC, 6 April 1996, no.108.

The claim was rejected on several significant grounds. The Court underlined that the legislator gave priority to authors' rights over the interest of users and other market players, in order to reward artistic creations and encourage their production in the general interest of cultural development.[132] For the first time, it explicitly defined copyright as "intellectual property", guaranteed under the property clause (Art.42 Cost.) and Art.35 Cost., which protects labour in any form,[133] and proceeded to the assessment of the legislative balance between opposing constitutional interests and goals. Unfortunately, the brevity of the reasoning led to the omission of important considerations. The copyright incentive to the production of creative works was apodictically linked to the promotion of the full development of individuals (Art.3 Cost.) and of culture (Art.9 Cost.), with no consequence drawn from the proprietary classification of authors' rights, and especially from the implications of the social function clause (Art.42(2) Cost.). [134]

The weak systematic precision caused more harm than good, with a return of contradictory statements and the rejection or absorption of claims grounded on Art.42 Cost. in favour of a classification under Art.41 Cost.[135] for "the particular features of the category of immaterial goods […] advise against its mechanical insertion in the schemes of public and private property".[136] More recently, the Court rejected as inadmissible an application advancing the argument that copyright has to be balanced with other fundamental rights, in light of its social function as property.[137] While the arguments advanced prove the growing sensitivity of civil courts towards copyright balance and the implication of copyright propertization, the ICC's silence stands as an obstacle to the evolution of the national case law towards more systematic consistency, in stark contrast with the German experience.

French decisions are much more recent, due to the lack of an *ex post* constitutional review of the legislation until 2008, and the late debut of the *Déclaration* as a cogent bill of rights.[138] In the first decision, concerning trademarks and the constitutionality of the restriction of advertisements of tobacco products, the *Conseil Constitutionnel* confirmed the protection of IP as property (Art.17 *Declaration*), but also its potential limitation – again as property – in the general interest, here the protection of public health.[139] Copyright came under the spotlight only in 2006, but with opposite results, with the *Conseil* equating to expropriation the obligation imposed on rightholders to provide information on the tech-

[132] Id., para 9.

[133] Id., para 10. Similar arguments can be found in several other decisions (eg ICC 26 June 1973, no.110; 13 April 1972, no.65; 17 April 1968, no.25)

[134] Ibid.

[135] ICC, 8 March 2006, no.110.

[136] ICC, 9 March 1978, no.20.

[137] ICC, 21 October 2015, no.247.

[138] Only from French Constitutional Court (FCC), 16 July 1971, no.71-44 DC.

[139] FCC, 8 January 1991, no.90-283 DC, para 7. Similarly FCC, 15 January 1992, no.91-303-DC, paras 8-11.

nological measures of protection applied to their work when needed for interoperability purposes. [140] The constitutional property guarantee was read extensively, as encompassing the rightholder's power to prevent any private copying of her work, while limitations in the case of conflicting public interest were not even mentioned. However, to calm the doctrinal concerns about the negative effects of the constitutional propertization of copyright on its internal balance,[141] three recent decisions offered a different interpretation, showing a balanced proportionality assessment, the consideration of conflicting constitutional rights and goals, and a rejection of the myth of absolute property still affecting part of the French jurisprudence.

In *HADOPI* (2009), the *Conseil* repeated its 2006 holdings, but highlighted the *spécificité* of copyright, stating that although the protection of IP is an "objective of general interest", it is still not enough to legitimate the delegation to an administrative authority of the power to sanction copyright infringements with the termination of an internet connection, which, in light of its impact on the users' freedom of expression, is a measure whose necessity and proportionality should be assessed by the judiciary.[142] Similarly, in *Soulier-Doke* (2013), the *Conseil* judged as constitutional the law setting up a non-voluntary collective management scheme for the digitization of out-of-commerce books, justifying the intervention as in pursuance of the general interest in the preservation of and access to national cultural heritage. The *Conseil* also held the measure proportionate, for it did not prejudice other forms of exploitation, limited its application to out-of-commerce works, and provided a set of procedural guarantees and the possibility to withdraw from the scheme at will.[143] Again in 2013, the same principle was used to uphold the judicial declaration of non-retroactivity of an amendment of Art.1 of the 1793 copyright decree, originally assuming the contextual transfer of the ownership of the material support and the right of reproduction of a work of art.[144] Matisse and Picasso's heirs claimed that their property rights were illegitimately damaged by this reading, but the *Conseil* rejected the argument, holding the limitation proportionate, since it left rightholders free to contract otherwise, while pursuing the social goal of providing legal certainty and facilitating the market for works of art.[145]

With circumscribed exceptions, the national propertization of copyright has never prevented the balanced development of the discipline nor engendered distortive effects. In line

[140] FCC, 27 July 2006, no.2006-540 DC.

[141] See V.L. Bénabou, "Patatras! A propos de la décision du Conseil constitutionnel du 27 juillet 2006" (2006) 20 Propr.intell. 240; M.Vivant, "Et donc la propriété littéraire et artistique est une propriété…" (2007) 23 Propr.intell. 193.

[142] FCC, 10 June 2009, no.2009-580 DC, paras 13-17.

[143] FCC, 28 February 2014, no.2013-370 QPC. The scheme was still declared contrary to EU law in *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* (C-301/15) EU:C:2016:878.

[144] FCC, 21 November 2014, no.2014-430 QPC.

[145] Id., paras 4-7.

with the historical findings, the analysis of selected contemporary national systems proves the consistent use, by legislators and courts, of property principles and rules, with the aim and positive effect of covering unregulated issues and gaps caused by technological evolution. Even more significantly, the constitutional propertization of authors' rights does not trigger the attribution of absolute guarantees for rightholders, but channels within copyright law the notion of social function and limitations in the general interest, providing more transparent and reliable criteria for the proportionality assessment required when balancing copyright with conflicting rights and goals.

These evidences substantiate the assumption that the ultimate reason for the distortions attributed to copyright propertization lies, in fact, in its superficial consideration and negligent management. National experiences demonstrate that whereas the use of a property rhetoric may trigger dangerous short-circuits, the use of property as a systematic framework may represent a useful paradigm to guide the reordering of the discipline. While this is true for every system, it assumes key relevance in the case of fragmented, unsystematic models, such as EU copyright law.

4. Connecting the dots

Against this background, following the same path traced by national copyright systems to conduct a systematic, technically grounded propertization of EU copyright appears to be the most reasonable solution to tackle most of the inconsistencies, uncertainties and distortions affecting the field. This exercise requires, however, the prior definition of the frame of reference.

Property remains one of the private law institutions least touched by EU law, due to the limitations set by Art.345 TEU.[146] Parallel to this, national property systems are characterized by complex nets of interrelated rules, most of them mandatory, which make their comparison a challenging endeavor. However, due to the same Roman law roots or the later circulation of legal solutions, contemporary property scholars have been able to identify basic principles that may be understood as the common core of European property law, channeling some of them in the DCFR.[147] It is reasonable to believe that the CJEU will draw inspiration from this background if requested to attribute autonomous meaning to a property concept used in a directive, or to cover gaps and interpret general rules through the lenses of property law. For obvious reasons, these are the property principles and

[146] Broadly B. Akermans-E. Ramaekers, "Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations"' (2010) 16(3) ELJ 292.

[147] Inter alia S. Van Erp, "From 'Classical' to Modern European Property Law?", in *Essays in Honour of Konstantinos D Kerameus* (Bruxelles:Bruylant, 2009), p. 1517, and C. Von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference, Outline Edition* (Munich: Sellier, 2009), p. 257.

concepts that the four-dimensional experiment of systemization of EU copyright briefly exemplified in this paper will build upon.
On the contrary, and particularly after the Lisbon Treaty entered into force, the construction of the EU constitutional property model has several multi-level sources to refer to, centered around Art.17 CFREU, and involving Art.1 P1 ECHR[148] and the Member States' common constitutional traditions. For the purposes of this paper, the next pages will attempt to sketch the main traits of this new framework.

4.1. An EU constitutional property framework for EU copyright law

Despite some divergences, national constitutional property doctrines share several common traits, which can be summarized around basic pillars. Property is generally subject to a varying degree of protection depending on the nature of the interests underlying it, with stronger preference given to goods closer to the owner's personality, dignity and personal needs.[149] Limitations to uses, subject to compensation, are distinguished from expropriations, requiring indemnification, on the basis of the intensity of the interference.[150] Both are justified if legitimate, proportionate and grounded on the general/public interest. In several national constitutions, property is a right internally limited by its social function/obligation – a notion that is either labelled as such, as in Germany, Italy and Spain,[151] or finds functional correspondence in other concepts, such as that of the French "objectives of general interest" and "objectives of constitutional value".[152] These personalist and solidarity-inspired traits are a direct consequence of the profound involvement of property in the goals of modern welfare states. Their implications are particularly visible in Germany, where *Eigentum* is considered a fundamental right because of its close connection with the protection of personal liberty and self-development, and its protection does not aim at the maximization of individual wealth, but at offering the owner the means to participate in community life and in the construction of the welfare state.[153] The link between the personalist conception and *Sozialstaat* goals is drawn by Art.14(2)GG, which states that property "obliges" and should serve the common good – a statement which implies its functionalization, and the inclusion of solidarity duties within its structure.[154]
The ECHR and CFREU's property provisions are largely similar. They both recognize and guarantee the owner's right to enjoy her possession, admit expropriation in the public

[148] Praesidium, Explanations, p. 23.

[149] As in 89 BVerfGE 1 (1993).

[150] Eg, in France, Cass.30 May 1972, no.71-70206, Bull.civ., III, no.335, and recently FCC, 20 January 2011, no.2010-87 QPC.

[151] Art.14(2)GG, Art.42(2) Cost. (IT), Art.33(2) Cost. (ESP). See A.J. Van Der Walt, *Constitutional Property Clauses: a Comparative Analysis* (Juta 1999), pp. 139-140.

[152] See G. Drago, 'La conciliation entre principes constitutionnels' (1991) Rec. Dalloz 265.

[153] 24 BVerfgGE 367 (1968), 389.

[154] G. Alexander, "Property as a Fundamental Constitutional Right? The German Example" (2003) 88 Cornell LR 733, p. 745.

interest, and distinguish it from the regulation of the use of property. Both provisions are vague enough to leave to their respective courts ample margin to shape the two property models.

In the ECtHR's case law,[155] deference towards state socio-economic policies[156] characterizes the assessment of proportionality, which is never tested for strict necessity, as with other rights, but on the basis of criteria of equality and justice.[157] Only highly disproportionate measures are sanctioned as exceeding the state margin of appreciation, with an evaluation based on the owner's economic loss.[158] Similarly, the definition of general/public interest, overlapping the notion of social function, is mostly value-neutral, colored with economic nuances and not giving any weight to the social relevance of the good.[159] When the public interest appears weaker, the control on legality becomes more pervasive, with neutral procedural checks prevailing over the assessment of the social function of the measure.[160] Save for side examples the assessment is generally based on a neutral evaluation of the economic impact of the contested provision,[161] making the ECtHR's property a bundle of economic utilities, which can be sacrificed only by legitimate, reasonable and proportionate measures, and upon the payment of full, market-value compensation.

Much of these traits are rooted in the Court's specific competence – protecting human rights against state violations – largely differing from national constitutional courts, whose cases allow a more holistic consideration of the goals set in national constitutions. The wide margin of appreciation and focus on legitimacy and economic impact represent an acknowledgment of this difference.[162] Yet, the narrow scope of the analysis is ill-suited to define the content, structure and functions of property (which is not, in fact, a task envisioned for the Court) – a circumstance that makes the ECtHR's and national models largely complementary, and only limited mutual antagonists.

On the contrary, the reference to Member States' common constitutional traditions and indirect EU intervention on national property law have made it possible for the CJEU to build an EU constitutional property model that includes references to the content of and limits to the right, based on the shared notion of social function as the ultimate ground for

[155] *Sporrong and Lonnroth v Sweden*, (1983) 5 EHRR 35.

[156] Explicitly *Gasus Dosier-Und Fordertechnik GmbH v. Netherlands*, (1995) 20 EHRR 403.

[157] *Sporrong*, para 69.

[158] Exemplarily in *James v. United Kingdom*, (1986) 8 EHRR 123.

[159] Id., para 40. Further case law in W. Schabas, *The European Convention on Human Rights: a Commentary* (Oxford: OUP, 2015), po.975-7.

[160] Ibidem.

[161] With a weaker protection of commercial property (as in *Gasus*) compared to dwellings involving the right to housing (*Venditelli v. Italy*, (1995) 19 EHRR 464), and a consideration for personality-based argument (*Chassagnou v. France,* (2000) 29 EHRR 615).

[162] As in T. Allen *Property and the Human Rights Act 1998* (Oxford: Hart Publishing, 2005), pp. 145-155.

state intervention.[163] From *Wachauf* onwards, this stable *acquis communautaire* justified, beyond the borders set by Art.345 TEU, EU interventions limiting national property laws, if proportionate, not impairing the essence of property rights, and in pursuance of the Community's objectives of general interest.[164] In the almost three decades that followed, the principle returned remarkably often.[165] Yet, the nature of the Treaties' objectives has often made the Court substantiate the concept of social function in the establishment and preservation of the internal market, and the development of European industries and the defense of competition,[166] with more sporadic references to the protection of fundamental rights,[167] of the environment[168] or of consumers.[169]

Against this fragmented framework, the construction of an EU constitutional property model may come at the price of highly generic formulations. However, the Lisbon Treaty and the CFREU indicates a potential convergence path. The joint reading of Art.6 TEU, reinforcing the role of common constitutional traditions as general principles of EU law, and Art.52(4) of the CFREU, which requires the use of common constitutional traditions to interpret EU fundamental rights stemming from them, leads to the integration of EU norms with shared national principles and doctrines.[170] Although the Praesidium's explanations specify that the meaning and scope of Art.17 CFREU "are the same as those of the right guaranteed by the ECHR", property is a "fundamental right common to all national constitutions", which demands the use of Member States' common constitutional traditions as a source to construe the EU property system, as the CJEU has indeed long been doing. To this end, the notion of social function – or its functional equivalents – can represent an optimal convergence platform, particularly in light of Art.3(3) TEU and its explicit reference to a "highly competitive social market economy", which requires bringing the internal market closer to welfare state models.

Compared to the CJEU's market-oriented approach, the national notion of social function/utility/obligation carries a much stronger meaning. In its most developed forms, it implies

[163] Paradigmatically *Nold v. Commission* (C-4/73) [1974] ECR 491, and *Hauer v. Land Rheinland-Pfalz* (C-44/79) [1979] ECR 3727, esp. paras 9, 14, 18-20.

[164] *Hubert Wachauf v. Germany* (C-5/88) [1989] ECR I-2609.

[165] *Commission v. Portugal* (C-367/98) [2002] ECR I-4731; *Commission v. France* (C-483/99) [2002] ECR I-4781; *Commission v. Belgium* (C-503/99) [2002] ECR I-4809; *Van den Bergh Foods Ltd. v. Commission* (T-65/98) [2003] ECR II-4653; *Germany v. Council* (C-280/93) [1993] ECR I-3667. More recently *Association Kokopelli v Graines Baumaux SAS* (C-59/11) EU:C:2012:447.

[166] Ibid. see also *Regione autonoma Friuli-Venezia Giulia (ERSA) v. Ministero delle Politiche Agricole e Forestali* (C-347/03) [2005] ECR I-3785; *Unitymark Ltd, North Sea Fishermen's Organisation v. Department for Environment, Food and Rural Affairs* (C-535/03) [2006] ECR-I 2689.

[167] *Alliance for Natural Health et al. v. Secretary of State for Health and National Assembly for Wales* (C-154-155/04) [2005] ECR I-6451.

[168] *Commission v United Kingdom* (C-530/11) EU:C:2014:67, para 70.

[169] *Société Neptune Distribution v Ministre de l'Economie et des Finances* (C-157/14) EU:C:2015:823, paras 66-68.

[170] See P. Craig-G. De Burca, *EU Law. Texts, cases and materials* (Oxford: OUP 2015), pp. 398-400, and related bibliography.

a duty of mutual solidarity towards other community members, which adds an obligatory element within the structure of the right, varying according to the social relevance of the object. Property performs a social function also towards its owner, either by protecting interests linked to her dignity and personality, or by providing the means she needs to self-develop and participate in community life. A convergence between the two systems would integrate the CJEU's notion with more overarching criteria and potentiate the value-oriented approach that already distinguishes the CJEU's case law from the ECtHR's precedents. Apart from its commonly accepted vertical application, where social function acts as a benchmark to assess the legitimacy and proportionality of current and future laws and their consistence with constitutional goals and values, the merger of the CJEU's models with national models would facilitate the horizontal application of the clause, for two synergic reasons. First, the CJEU's teleological method of interpretation also uses the functions of the right to solve interpretative knots.[171] Second, the horizontal effect of primary law has been part of the genetic traits of EU law since its beginning,[172] while the CJEU has progressively admitted the direct application of fundamental rights provisions in private controversies,[173] and copyright is not exempt, as confirmed by *Promusicae* in 2008.[174]

4.2. Four examples of the positive effects of a systematic propertization of EU copyright

Following national examples and the qualification proposed by Art.17(2) CFREU and Recital 9 InfoSoc, EU private and constitutional property rules and doctrines could constitute the systematic framework necessary to achieve greater legal certainty and consistency in EU copyright law, and a more stable copyright balance. The conciseness of this contribution allows proposing only a snapshot of this experiment of systematization,[175] focused on four "victims" of the harmonization pitfalls and linked to four elements of property law: (i) ownership (subject); (ii) works (object); (iii) economic rights (content); (iv) exceptions, fair balance, the three-step test and abuse of right (structure). However, this is already enough to showcase the importance of taking EU copyright propertization seriously, and its potential positive outcomes.

Property rules do not have an overarching impact on the definition of the **subjects** of copyright, characterized by subject-specific rules of acquisition. However, issues of authorship/ownership have been rarely considered by EU law, leaving several gaps which are destined to create interpretative problems. A glaring example is the issue of joint authorship under the

[171] See Favale-Kretschmer-Torremans, Copyright Jurisprudence, pp. 77-79; Leistner, Europe's copyright case law, p. 599.

[172] Among the first analyses see H.Rasmussen, "Between Activism and Self-Restraint: a Judicial Policy for the European Court" (1988) 13 E.L.Rev. 28.

[173] See D.Leczukiewicz, "Horizontal Application of the Charter of Fundamental Rights" (2013) 38 E.L.Rev. 479, and related bibliography on the heated debate surrounding the matter.

[174] Para 68.

[175] For a broader analysis, see Sganga, Propertizing European Copyright, Chapter 6, pp. 233 ff.

Database and Software Directives, mentioned but not regulated in detail. Should the CJEU decide that the missing reference to national laws requires its harmonizing intervention, the common core of Member States' rules on co-ownership could provide systematic guidance and ensure predictable results. Similarly, property rules could become essential if the definition of the initial attribution of ownership turn out to be necessary for the application of EU copyright provisions, as might happen, e.g., in the case of fair remuneration. Should the CJEU decide to proceed as with the notion of originality, the proprietary framework could support the extension of the authorship provisions of the Software and Databases Directives, both for their consistency with the principles of property acquisition and for their similarity to the common core of Member States' regulation in the field. The same can be said for the question related to rights management in the case of co-authorship.

The positive effects of a technical propertization are much more visible on the side of the **object.** Constitutional property doctrines may support the vertical (legislative) and horizontal (judicial) attribution of a higher degree of protection to works close to the author's dignity, personality and self-realization, while more solidarity duties – and therefore more flexible exceptions and narrower rights – are imposed on low-creativity works protected to secure investments, such as technical and informational works particularly prone to excessive monopolies, with a new balance between authors and industrial rightholders.

The property framework may have highly positive effects on the definition of the **content** of exclusive rights. If copyright is qualified as property, the configuration of its rights should respect the *numerus clausus* principle, since their *erga omnes* effects of the rights demand that it is made possible for third parties to know the boundaries of the entitlements which may be enforced against them. The principle excludes a contractual definition of the rights, but also a definition of their scope based on subjective criteria, such as the notion of new public in the case of Art.3(1) InfoSoc. In addition, the vertical application of the social function doctrine would require the EU legislator to specify the goals pursued by copyright law, making sure that they are "socially" justified and tested against the general interest. Any creation of new rights, protection of new uses, restriction of exceptions or term extension would need to be consistent with them.[176] Both at a legislative (vertical) and judicial (horizontal) level, this would ensure predictability and consistency, excluding aprioristic broad interpretations based on Recital 9 InfoSoc, and limiting – particularly in the case of a clash with other fundamental rights or the public interest – the protection to what is necessary for the right to perform its essential function, and therefore for the author to obtain "appropriate" remuneration, and for industrial rightholders to

[176] Similarly A. Peukert, "The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature", in C. Geiger (ed), R*esearch Handbook on Human Rights and Intellectual Property* (Cheltenham/Northampton:Edward Elgar, 2015), p. 142.

secure a "fair" return on their investment.[177] The non-idiosyncratic social, economic and cultural functions of the rights[178] would also call for an objective definition of their content based on what is required for them to reach the necessary incentivizing level. At the same time, they would constitute an internal limit, and not an external constraint, to copyright, so much that rightholders' conducts hindering their achievement would automatically fall outside the scope of the rights, eliminating the need to recur to exceptions.[179]

The constitutional propertization of copyright may have a significant impact on its **structure**, and particularly on the interpretation of exceptions, the notion of fair balance and the control of copyright misuses.[180] Vertically, the doctrine of social function would require the legislator to provide a specific derogation every time this is needed to protect a conflicting fundamental right, as already ruled in *Deckmyn*. Horizontally, it would impose a flexible reading of limitations, with an extension of their scope or their application by analogy, when needed for the fulfillment of the socio-cultural goals of copyright, or the protection of other fundamental rights. Both horizontally and vertically, the doctrine would offer clear guidelines for the proportionality test on which the CJEU bases its fair balance, by considering not a generic exclusive right, but its core, as identified on the basis of its function and the social relevance of the right/interest conflicting with it. In the application of the three-step test, the notion of "normal exploitation" would have its purely market-based meaning tempered by the consideration of the prismatic goals of EU copyright law, and its "normality" defined not against any potential market for the work, but only the commercial uses needed for the right to perform its essential social functions. The legitimacy of the rightholder's interest, as the second prong of the test, would also be measured as to its alignment with the social goals of the right, both in absolute terms and with regard to its specific exercise.

Last, the horizontal application of the social function clause could back the development of a new doctrine of copyright misuse, directed to tackle rightholders' dysfunctional conducts not addressed by EU copyright law, despite their incompatibility with the overall goals of the discipline. The property framework would channel in the national experiences on abuse of property rights, and use social function as a benchmark to define a conduct as abusive or dysfunctional, based on the presence of three requirements, which are the constraint of the qualified interest of a counter-interested party, its disproportionate nature, and the lack of an objective justification for the conduct based on the pursuance of any of the social functions of copyright.

[177] E.g. in InfoSoc, Recital 11; IPRED, Recital 2; OWD, Recital 5.

[178] Such as the achievement of the widest possible dissemination of works (IPRED, Recital 2), access to knowledge and culture (OWD, Recital 20; Marrakesh Directive Proposal, Recital 1) or the promotion of cultural identity and diversity (InfoSoc, Recitals 12-14; CMO, Recital 3; OWD, Recitals 18-23.

[179] For a more detailed descriptions of the effects of this interpretation on single economic rights, see Sganga, Propertizing European Copyright, pp. 245 ff.

[180] On which, broadly, C. Sganga-S. Scalzini, "From abuse of right to copyright misuse: a new doctrine for EU copyright law" (2017) 48(4) IIC 405.

5. Conclusions

The propertization of copyright has been viewed as the cause of most of the distortions afflicting contemporary copyright law. In spite of that, and of the problems created by the hybrid, patchworked and unsystematic nature of EU copyright and its harmonization, EU scholars have largely neglected the matter, and never really engaged in a systematic reconstruction of the discipline. Trying to fill this gap, and against the majoritarian doctrine, this paper started from the assumption that the parade of horribles usually attributed to copyright propertization is rather to be linked to a mismanaged property rhetoric, while the technical use of property as a systematic framework may help achieve greater consistency and predictability in legislative and judicial developments, and reach a more stable and reliable copyright balance. To substantiate its claim, this study assessed the instances and consequences of propertization in EU copyright law, and compared the negative impact of its a-technical property "logic" to the positive results achieved through the application of property rules and constitutional property doctrines in national copyright matters. Following the national paths, the article offered examples of how the use of EU private and constitutional property laws as systematic framework for EU copyright law could offer effective solutions to some of most relevant harmonization pitfalls and long-criticized tilt in the copyright balance.

Articles

On foreign investment and merger controls: A law and geo-economics view

Luca Arnaudo*

Abstract

The essay provides a brief overview of the transition that occurred in major legal systems from *golden share* to *golden power* provisions in order to protect national strategic interests in the economic field, with a focus on Italy. A closer look is then dedicated to a recent proposal for an EU regulation on foreign investment control. Final thoughts are developed in light of recent lines of social science research, pointing at the existence of geo-economic contests in a context of economic wars.

Keywords

Golden share – Golden power – Competition – Merger control – Geo-economics – Economic intelligence – Economic war

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1. Something like an introduction

There is law, there is economics, there are opportunities to assess legal systems by means of economic theories, there is a need to understand the legal frameworks that discipline the practices of economics: the structural components of any analysis, even when unperceived or undeclared, always depend on relevant times and spaces, history and geography. All this is just a different way to name, if you like, the cultural dimensions of human actions and their interpretations, when considering a social matrix shaped by relationships of power.

What occurred in the last few years, as regards the way major legal systems defined and protected national strategic interests within the economic arena, is an interesting test-bed for what remarked here above. In fact, following the end of the Cold War and the envisaged beginning of a global free market era, most of the States enforced limited sets of provisions for securing their capability to control economic and business activities. However, in the wake of the widespread crisis now known as *The Great Recession*, States' controls and prerogatives on economics are expanding again, in both direct and indirect ways.

The following brief essay aims to offer an examination of the transition that occurred in a number of legal systems – with a focus on Italy – from the so-called *golden shares* to new special powers, often titled *golden powers*, with possible consequences on the interactions between foreign investment and merger controls. Further thoughts will then be developed in light of some geo-economic and economic intelligence lines of research.

2. From golden shares to golden powers: a paradigm-shift (with some italian applications)

A golden share is a type of share that gives its shareholder (usually a government organization) special veto power over changes to the company's charter, as well as over a takeover or acquisition by other companies.

Such shares, to be issued after passing special resolutions and changing the memorandum and articles of association of a company, were a British invention of the 1980s, used to safeguard some public control over the management and ownership of formerly State-owned companies after their privatization. Golden shares were soon adopted by many Governments as a pivotal instrument of the privatization processes that occurred during the 1990s[1]. However, provided a common reference to some general legitimacy principles[2], a fundamental difference among European legal systems emerged.

In the United Kingdom, in fact, there was never an organic discipline of the golden shares, typically relying upon a case-by-case issuance of a special share by the privatized company, with different prerogatives to be exercisable within a limited period. European continental regimes, on the other hand, used to define nature, goals and modes of exercise of golden shares by means of public provisions, often without time limits for the implementation of related powers. Incidentally, a non-secondary effect of these trends has been to trigger an extensive judicial saga at a European Union level.

The EU Commission and the Court of Justice have indeed spent a lot of effort in delimiting the legitimacy of golden shares, raising relevant issues of compatibility of the various rules adopted by several Member States with the rights of free circulation of capitals established by the same EU fundamental treaty. As a consequence, limit principles were set up by the jurisprudence, pointing to the need to circumscribe the acceptability of the State's prerogatives on controlling the ownership and management of privatized undertakings. All in all, such prerogatives and their exercise must be non-discriminatory, appropriate and proportionate to imperative reasons of general interest[3].

The need to define and respect such a legitimacy framework has been duly considered in Italy, when a new legislation on special powers was adopted in 2012; the legal respect shown for the established principles, however, did not reduce the originality of the new discipline, when contemplated in light of the pre-crisis globalist sentiment. In fact, in order

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[1] For a historical survey of the privatization processes within different EU countries, see D. Parker (ed.), *Privatization in the European Union. Theory and Policy Perspectives*, London-New York, Routledge, 2002; a broader (critical) perspective is now offered by P. Ther, *Europe Since 1989. A History*, Princeton, Princeton University Press, 2016. For a close-up examination of golden shares, see S. Grundmann - F. Möslein, *Golden Shares - State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects*, 2003, mimeo, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=410580.

[2] Whereas article 63 of the TFEU states that "*all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited*", article 65 establishes that "*the provisions of Article 63 shall be without prejudice to the right of Member States […] to take measures which are justified on grounds of public policy or public security*".

[3] The EU Commission offered some guidelines on the legitimate limits to investment coming from other EU Member States (see *Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment*, 97/C 220/06, in O.J. C220, July 19, 1997, 15 ff.); the EU Court of Justice, however, had to further intervene on several occasions thereafter (for an updated view, cf. I. Antonaki, *Keck in Capital? Redefining 'Restrictions' in the 'Golden Shares' Case Law*, in *Erasmus Law Review*, vol. 9, no. 4, 2016, 177 ff., available at http://www.erasmuslawreview.nl/tijdschrift/ELR/2016/4/ELR_2016_09_04_003.pdf).

to understand how relevant the transition from golden shares to golden powers has been, it is sufficient to read the same title of Decree-Law no. 21 of March 15, 2012 (converted, with amendments, by Law no. 56 of May 11, 2012): *Rules on special powers in corporate governance in the defense and national security sectors, as well as referring to activities of strategic importance in the fields of energy, transport and of communications*[4].

The Italian golden power rules stipulate that an inter-ministerial committee may exercise veto powers on extraordinary operations related to companies that are incorporated in Italy and involved in special activities indicated by the law (see decree of the President of the Council of Ministers no. 108 of June 6, 2014). Now, the public or private nature of the companies' ownership has no relevance: a government's intervention is no longer triggered, as in the case of golden shares, by the move of an undertaking from public to private ownership, with the consequent need to check the activities of the new proprietors. Here, what matters are the nature of the activities and investors' foreign origins, according to a genuinely strategic vision of protecting paramount national interests, first of all referring to defense and security.

The new powers attributed to the public government on business activities *vis-à-vis* foreign investment are quite ample, as they foresee a direct intervention on the contestability and governance of companies, with applicable measures ranging from the imposition of specific conditions to be fulfilled by the company while carrying out its activities, up to vetoes against the new company's shareholders, as well against the adoption of shareholders' resolutions. The law allows to block changes of the corporate purpose, companies' break-up or mergers, divestment of branches, transfer abroad of seats and premises. Also, stock acquisitions are subject to precise information obligations to the President of the Council of Ministers, when certain thresholds are met: omitted notifications might be fined not less than 1% of the sum of the turnovers of the companies involved, up to twice the value of the transaction[5].

Very recently, amendments of Decree-Law no. 21/2012 have been adopted in order to further enhance public controls and measures. Following art. 14 of Decree-Law no. 148 of October 13, 2017, new objective and subjective areas have been established, and a set of detailed regulations for "*technology-intensive sectors*" related to energy, transport and communications are to be adopted soon. Also, new penalties have been introduced in the case of failures by the foreign investors to notify new purchases of shares.

In the aftermath of the recent amendments, a string of significant applications of the special powers occurred in Italy. For instance, in the face of a new purchase of shares of Italy's main information and communication technology group, Telecom-TIM, made by a

[4] Among the most recent Italian literature on the topic, see M. Lamandini, *Golden share e libera circolazione dei capitali in Europa e in Italia*, in *Giurisprudenza Commerciale*, 2016, I, 671 ff.; F. Gaspari, *Libertà di circolazione dei capitali, privatizzazioni e controlli pubblici. La nuova golden share tra diritto interno, comunitario e comparato*, Turin, 2015.

[5] For more details, see the information provided by the Italian Ministry of Economy and Finance, Department of the Treasury, available at http://www.dt.tesoro.it/en/faq/faq_privatizzazioni.html#faq_0002.html.

French-based media group, Vivendi, a Government decree adopted on October 16, 2017, imposed detailed measures for some companies of the Telecom-TIM group, considered to be companies holding strategic assets for national defense and security. Prescriptions have been focused on maintaining the stable maintenance and security functions of networks, services and support for strategic activities in Italy. Measures have also been taken against Vivendi (the group presently holds a 24% stake in the ordinary share capital of Telecom-TIM, and, according to a recent statement of the Italian national commission for companies and the stock exchange, exercises *de facto* control on the group)[6].
On November 2, 2017, a further Government decree imposed new measures upon the Telecom-TIM group, in order to safeguard the safety and functioning of telecommunication networks and infrastructures, with a request for adequate development and maintenance plans.
On the same November 2, 2017, the Italian Government also resolved to forbid the acquisition of Next, an Italian company operating in ballistics and air control engineering, attempted by a French group, Altran. Such a veto against the proposed operation signals a new level of public alert regarding the protection of economic strategic assets: in fact, it is the first time an acquisition has been denied in Italy under the golden powers rule.

3. Foreign investment and merger controls

Italian rules on foreign investment control and its recent applications are not an original, nor an isolated experiment; a similar design and intent can be found in a number of acts and interventions adopted by European States, all aligned with the need to enhance special powers (although more or less extended, based on different activation conditions and thresholds). Also, numerous non-European systems, including USA and China, have long been challenging foreign investment[7].
The issue of controlling foreign investment when targeting national strategic assets has become so important in Europe that it has finally reached the EU level: a comprehensive package of documents and legislative proposals on trade controls has been unveiled in September 2017, and the same President of the EU Commission delivered an unusually explicit statement about it[8].

[6] See CONSOB, Decision n. 0106341 of September 13, 2017, available at http://www.consob.it/web/consob-and-its-activities/other-regulatory-measures/documenti/english/resolutions/c0106341.htm.

[7] For a useful report on the state-of-the-world, see F. Wehrlé - J. Pohl, *Investment Policies Related to National Security: A Survey of Country Practices*, OECD Working Papers on International Investment, 2016/02, Paris, June 2016, available at http://dx.doi.org/10.1787/5jlwrrf038nx-en. Regarding India, that was not part of the aforementioned report, a recent Government's circular provides an updated view of its current policy (see Department of Industrial Policy & Promotion, *Consolidated FDI Policy Circular of 2017*, August 2017, available at http://dipp.nic.in/policies-rules-and-acts/policies/foreign-direct-investment-policy).

[8] "*Let me say once and for all: we are not naïve free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening. If a foreign, state-owned, company wants to*

The core of the new EU legislation is a plan for a *Regulation of the European Parliament and of The Council establishing a framework for screening of foreign direct investments into the European Union*[9]. The proposed new piece of legislation aims at allowing the EU Commission to intervene in cases where foreign (to be understood as coming from outside the EU) investment may affect projects or programs having EU interest, in terms of security or public order. In practical terms, the way forward is to establish a cooperation mechanism based on the obligation that Member States inform the Commission about any non-EU investment to be screened according to national applicable laws, with the possibility for the EU institutions to issue a non-binding – but highly authoritative – opinion.

Because foreign direct investment may take the form of mergers and acquisitions, or joint ventures, they can constitute concentrations, therefore falling within the scope of the legal framework already detailed by the EU competition law for such operations. As if to dispel any doubts about possible system breakages to be provoked by the new rules, the regulation proposal stresses the fact that the existing discipline (namely article 21(4) of the EU Regulation no. 139/2004) already allows EU Member States to take appropriate measures against concentration projects in order to protect legitimate interests of public relevance, such as those related to public security and media pluralism[10].

Merger controls established by competition laws as a tool to double-check national public interests in the economic/entrepreneurial field, now to be fine-tuned with the increasing amount of new special powers' regulations, is a critical issue, albeit (until now, at least) largely unnoticed by academic observers[11]. Again, an analysis of the Italian legal system provides a good example of the troubled, interesting times we are experiencing, because of a natural experiment recently provided by the national lawmaker.

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purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate" (J.C. Juncker, *State of the Union Address 2017*, September 13, 2017, available at http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm. See also the wrap-up document available at http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156040.pdf).

[9] https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF. See also COM(2017) 487 final (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0297&from=EN); COM(2017) 494 final (https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-494-F1-EN-MAIN-PART-1.PDF); further side-information available at http://europa.eu/rapid/press-release_IP-17-3183_it.htm.

[10] Among the (scarce) literature on the topic, see A. Jones, J. Davies, *Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate*, in *European Competition Journal*, vol. 10, no. 3, 2014, 453 ff., available at http://www.tandfonline.com/doi/pdf/10.5235/17441056.10.3.453?needAccess=true; K. Fountoukakos - M. Herron, *Merger control and the public interest: European spotlight on foreign direct investment and national security*, in *Competition Policy International*, December 2017, 1 ff., available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/Europe-Column-December-Full.pdf.

[11] Chinese merger control, for instance, has often been considered to be more a protectionist device than a fair rule of the game (cf. Y. Svetiev - L. Wang, *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, in *Law and Contemporary Problems*, vol. 79, no. 4, 2016, pp.187 ss., available at http://scholarship.law.duke.edu/lcp/vol79/iss4/7/; for a peculiar "crusade-like" approach to the issue, see N. Petit, *Chinese State Capitalism and Western Antitrust Policy*, in *Concurrences*, no. 4, 2016, 69 ff.).

Following a revision of the Italian competition law passed in year 2012 (article 16 of Law no. 287/1990, modified by Decree-Law no. 24 of January 24, 2012, converted, with amendments, by Law n. 27 of March 24, 2012), the applicable thresholds to be considered by the national competition authority for screening merger operations switched from a criterion based on the relevance of the turnover of the target company or the acquiring company to a criterion where both turnover's thresholds had to be fulfilled (at that time relevant turnovers being €47 million and €474 million, respectively). As a consequence, the number of merger operations notified to the Italian Competition Authority dropped from 459 to 80 between 2012 and 2013, remaining very low in the following years (45 in 2014, 51 in 2015, 52 in 2016).

Applicable turnover thresholds have been further revised by Law no. 124 of August 4, 2017, now forecasting an amount of €492 million for the turnover realized in Italy by all the undertakings concerned by the merger, and €30 million for each one of at least two of them. It is too soon to tell how much the new amendment will impact the monitoring capabilities of the Italian competition authority, but we can already anticipate that even the revision of a tiny detail of competition applicable rules can produce significant effects on broader economic and political balances.

To be clear, during the most delicate years of the global economic crisis, the shopping carried out by competitors and more generally foreign investors in the segment of medium-sized and small-sized companies – *i.e.* the backbone of the Italian industrial structure – could not be verified by important institutional controls, such as the ones by the national competition authorities, therefore escaping any record of its effects on technology and know-how transfers abroad. Time will tell how much the legal experiment sketched here above will affect the national economic and entrepreneurial scenario in the long run.

4. Geo-economics, economic intelligence, and the law

It is quite evident that the new position taken by the highest EU institutions regarding foreign investment aims at targeting, first of all, the frenzied shopping Chinese State-Owned Enterprises and related entities carried out in the last few years across Europe. Probably in order to brush up its look while facing growing requests for reciprocity of investment and buyout conditions, the People's Republic of China's main economic regulators recently issued a set of guidelines, jointly outlining a milder approach towards foreign investment in China; an official statement also envisaged the possibility that the current 49% cap imposed on foreign investment in Chinese securities companies, securities fund management companies, and future companies, will be raised to 51%[12].

[12] See King & Wood Mallesons, *China issues guidelines on overseas investments*, in *China Law Insight*, August 2017,

Provided that, again, we will have to stay tuned and follow further developments, all the aforementioned activities prove that a new level of political confrontation on economic issues has been reached, with a revamped relevance of States' strategic interests and their explicit protection. My modest proposal is that this ought to be properly analyzed within a conceptual framework based on two fields of study not immediately related to the law, yet subtly affecting it, namely geo-economics and economic intelligence.

As for geo-economics, we can trace its contemporary origins back to a provocative essay by an American scholar, Edward Luttwak, released immediately after the end of the Cold War, focusing on the idea a forced passage from direct wars to conflicts that, because of the disappearance (at least temporarily) of the most visible political profiles, would have arisen in the field of international trade by means of economic competition.

All in all, the proposal was to move from geo-politics to geo-economics. Better said, the latter was considered a new way to develop the first one through "*the admixture of the logic of conflict with the methods of commerce – or, as Clausewitz would have written, the logic of war in the grammar of commerce*"[13]. This bellicose way of thinking seems to have steadily planted its seeds and matured in the wake of the Great Recession; eventually, it also started to provoke some worried alerts by a growing number of commentators, pointing at the need to develop some basic discipline for curbing States' appetites and methods regarding unconventional economic warfare[14].

In my view, the thesis that geo-economics is to be understood as the use of economic tools to achieve geo-political goals can however be accepted only when it is made clear that geographic aspects are not merely a material background of the action, but they do always constitute a fundamental combination of cultural features, from which the potential for action is properly dependent. A strategic approach to the territory and its situation – legal framework included – must be consequently adopted.

This way of thinking seems to naturally align with the classical lesson of Chinese thought on the art of war, as well as with its update available from open source. A concept, allegedly developed within the Chinese military context, comes in handy, namely the one from the *Three Wars* (*San Zhong Zhanfa*). According to its reporters, it aims at directing the joint

available at https://www.chinalawinsight.com/2017/08/articles/global-network/china-issues-guidelines-on-overseas-investments/#more-13949; A. Kaja - T. Stratford, *China to Broaden Market Access for Foreign Investors in Financial Services*, in *Covington & Burling LLP - Global Policy Watch*, November 2017, available at https://www.globalpolicywatch.com/2017/11/china-to-broaden-market-access-for-foreign-investors-in-financial-services/.

[13] E. Luttwak, *From Geopolitcs to Geo-Economics. Logic of Conflict, Grammar of Commerce*, in *The National Interest*, vol. 20, 1990, 19.

[14] For instance, a recent position paper connected to the World Economic Forum stated that "*States must develop their rules of the road for economic warfare. When governments use the infrastructure of the global economy to pursue political goals, they challenge the universality of the system and make it more likely that other powers will hedge against it. They could also provoke attacks in retaliation. In the same way that States have developed a series of agreements and conventions that govern the conduct of conventional wars between countries, these principles must be applied to the economic arena*" (M. Leonard, *5 things to know about geo-economics*, World Economic Forum, February 26, 2015, available at https://www.weforum.org/agenda/2015/02/5-things-to-know-about-geo-economics/).

public State and private business agendas within the international arena, in view of acquiring informative and economic resources, as well as for controlling the dominant narrative, along a soft clash that is psychological, media, and legal, at the same time[15].

Regarding the legal side of the battlefront, we rely upon what was already mentioned on the topic of foreign investment controls for moving to a further level, referring here to the growing amount of research related to strategic uses of legal provisions as defensive or offensive instruments, in light of what has been labelled *lawfare*[16]. Those who deal with the topic of legal wars usually recall as a typical and recurrent example the use of regulations for imposing economic sanctions; in fact, provided that such measures always need to be enveloped by legal dresses, it is easy to understand the growing attention dedicated to the dress-code[17].

Very recently, a different case might also be quoted, namely the one of the Spanish government, that, in the face of a secessionist project affecting the region of Catalunya, quickly amended the national commercial code in order to simplify the transfer of companies' legal seats. The reform immediately unleashed a massive transfer of legal seats by many important Catalan companies (first of all, financial institutions) from Catalunya to other Spanish regions[18]; at present, it is fair enough to say that the secessionist project seems to have failed.

In order to overcome the perplexities that might be raised by the aggressive scenarios evoked above, it is now useful to introduce the second line of thought previously mentioned, *i.e.* the one regarding the complex practices and instruments adopted for acquiring and managing useful economic information within the current geo-economic contexts, better known as economic intelligence[19]. The contemporary meaning of this field of research and activities has been primarily shaped by what could well be considered a French

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[15] Cf. T. Walton, *China's Three Warfares*, in *Delex Special Report*, January 2012, 1 ff., available at http://www.delex.com/data/files/Three%20Warfares.pdf.

[16] O. Kittrie, *Lawfare: Law as a Weapon of War*, New York, Oxford University Press, 2016. For a history of the term (as well as a worrying debate around the question "*has the academy already lost control of the concept of Lawfare?*"), see *Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting September 11, 2010*, in *Case Western Reserve Journal of International Law*, vol. 43, no. 1, 2011, 11 ff., available at https://web.archive.org/web/20110807201635/http://www.case.edu/orgs/jil/vol.43.1.2/43_Lawfare_Report.pdf.

[17] According to a recent analysis, "*economic sanctions have been a fixture of U.S. foreign policy for decades, but never have they enjoyed so much popularity as they do today*" (E. Fishman, *Even Smarter Sanctions. How to Fight in the Era of Economic Warfare*, in *Foreign Affairs*, 2017, available at https://www.foreignaffairs.com/issues/2017/96/6).

[18] Cf. *Real Decreto-ley 15/2017, de 6 de octubre, de medidas urgentes en materia de movilidad de operadores económicos dentro del territorio nacional*, in *Boletín Oficial del Estado*, October 7, 2017, no. 242, section I, 97565 ff., available at https://www.boe.es/boe/dias/2017/10/07/pdfs/BOE-A-2017-11501.pdf. A first commentary of the amendment was offered by L. Fernández del Pozo, *Cambio de domicilio social. Comentario al nuevo artículo 285.2 LSC*, in *La Ley mercantil*, no. 40, 2017, 3 ff.

[19] Related literature is rapidly growing. For an updated quick introduction see S. Pasquazzi, *Economic Intelligence*, in V. Ilari - G. Della Torre, (eds.), *Economic Warfare. Storia dell'arma economica*, Milan, SISM, 2017, 499 ff., available at http://www.societaitalianastoriamilitare.org/quaderni/2017%20Quaderno%20Sism%20Economic%20Warfare.pdf.

school of thought, together with its related broader idea of economic war[20]. Apart from any possible practice of such war, its most updated, open source theories are indeed provided by a university institution based in Paris, the École de Guerre Économique, publicly operating for twenty years with the declared goal to form economic intelligence experts[21]. As already remarked by other scholars, there might be some risks that the definition of economic intelligence as a specific field of studies could just be a mere new way for conceptualizing old practices of explorations (after all, Marco Polo's renowned book of marvels, *the Million*, could also be seen as a strategic dossier *ante litteram* about the commercial roads and outlets of the Far East). However, it is unquestionable that the interactions between (large) States and (large) companies now have a number of previously unknown channels, opportunities and modes of cooperation in the context of economic/financial competition. In fact, geo-economic interests of such relevant actors are increasingly aligning along a continuum that goes from local (*i.e.* the same country of origin) to global, and way back. Interestingly enough, it seems that the Chinese government and enterprises, notably at the forefront of these strategies, have learned a typical lesson from Western history and its economic doctrines, namely the one about mercantilism, now developing it according to the new scenarios of regional powers[22].

After adopting this perspective, all the elements so far invoked eventually seem to nicely fit into the interpretive matrix masterfully developed by Susan Strange regarding international political economy. It seems in fact useful to evaluate political and economic relations in terms of a defined "structural power," along four dimensions: security, production, finance, and knowledge[23]. In order to effectively understand each of these dimensions,

[20] Cf. É. Delbecque - C. Harbulot, *La guerre* économique, Paris, PUF, 2011.

[21] See https://www.ege.fr/. About a possible account of the French roots of contemporary economic intelligence, according to a national expert, "*at the end of 2003, the nomination of a high civil servant in charge of economic intelligence near the Prime Minister (now under the authority of the Présidence de la République) strongly helped both private companies and State administrations to become aware of the challenges to economic security. At the same time, vocabulary evolved also, shifting from 'economic war', 'competitive intelligence' and 'economic watch' only, to 'economic intelligence', which aims to encompass all aspects of the globalized risks and opportunities and that is based on an upstream understanding and a multidisciplinary approach of the threats that need to be addressed. Also, since the French are French, there were a lot of semantic debates on the word 'intelligence', which is now accepted in its two meanings: the basic French one, intelligence as the ability to think and analyse, and the British one, which relates to the collection and treatment of information. These debates are more important than they might appear at first glance, since at the beginning the second meaning led to confusion with espionage, thus giving rise to strong criticism and mistrust towards these new approaches*" (C. Revel, *Economic Intelligence: An Operational Concept for a Globalised World*, in *Elcano Newsletter*, 2010, 2, available at http://biblioteca.ribei.org/1958/1/ARI-134-2010-I.pdf).

[22] For some interesting reading on the issue, see M. Wigell, *Conceptualizing regional powers' geoeconomic strategies: neo-imperialism, neo-mercantilism, hegemony, and liberal institutionalism*, in *Asia Europe Journal*, vol. 14, no. 2, 2016, 135 ff., available at https://link.springer.com/content/pdf/10.1007%2Fs10308-015-0442-x.pdf; cf. also A. Prašcevic, *Rebirth of Mercantilism in the Global Economy*, in *Proceedings of the 2nd International Conference on Scientific Cooperation for the Future in the Economics and Administrative Sciences*, Thessaloniki, September 2017, 100 ff., available at https://www.researchgate.net/profile/Kahraman_Kalyoncu/publication/320035987_Din-Iktisat_Iliskisi_Riba_Rehin_ve_Ekonomik_Islem_Kavramlari_Cercevesinde_Bir_Inceleme/links/59ca38e945851556e97df484/Din-Iktisat-Iliskisi-Riba-Rehin-ve-Ekonomik-Islem-Kavramlari-Cercevesinde-Bir-Inceleme.pdf#page=106.

[23] Cf. S. Strange, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge, Cambridge University

information and its intelligent management surely are strategic assets. Thus, this should always be borne in mind when assessing acts and actors of the international economic policy, public or private as they are. At the same time, it finally becomes clear how relevant the different legal rules aimed at disciplining economics are, from the ones related to foreign investment controls to those on merger controls according to competition laws. As a matter of fact, they play a fundamental role in the management of at least two of the dimensions mentioned above, namely the ones of production and finance, with direct effects on the other dimensions, security and knowledge.

5. Something like a conclusion

At the end of these brief and open notes, it might sound rather cynical to solve the closing with the ancient Latin motto: *si vis pacem para bellum*, "if you want peace, prepare for war" (even if possibly updated by recalling the contemporary joke that *only the paranoids survive*). At the same time, having dissipated the surrounding noise of populist rhetoric about protectionism, it would be naïve not to interpret the mounting arrangement of special powers, by a number of important legal systems, as a real race for "legal rearmament", in view of safeguarding essential economic interests. This is indeed a prospect that, like it or not, is an integral part of interstate policy, as newly confirmed also by the EU Commission with its envisaged new trade controls, as well as easily understandable when following some ongoing legal reforms, such as the Italian ones on golden powers mentioned before.

Provided the need for realism, however, it is precisely in the call for peace, implied in the Latin quote, which is believed it is possible to dissolve most of the tensions outlined here above. It is in fact necessary to understand the logic of conflict, and master the grammar of commerce offered by applicable laws, right for playing strategic games in view of reaching cooperative and positive results for those involved. As wisely remarked by Donald Kagan, a renowned scholar of war history, "*a persistent and repeated error through the ages has been the failure to understand that preservation of peace requires active effort, planning, expenditure of resources, and sacrifice just as war does*"[24]. Let us all be part of a conscious and conscientious effort to turn law and economics away from their offensive misuses, keeping their applications aligned with the pursuit of the largest possible common welfare.

Press, 1996. See also R. Germain, (ed.), *Susan Strange and the Future of Global Political Economy: Power, Control and Transformation*, London, Routledge, 2016.

[24] D. Kagan, *On the Origins of War: And the Preservation of Peace*, New York, Anchor Books, 1996, 567.

Perspectives on the regulation of search engine algorithms and social networks: The necessity of protecting the freedom of information

Matteo Monti*

ABSTRACT

The paper studies how the paradigm of the freedom of information has changed by the advent of the Internet and whether new forms of regulation of the Internet media are necessary.

The paper focuses on two different issues: on one side, the importance of the algorithms and of search engines in the field of the press is analysed; on the other side, the central role played by social networks in the spread of news is examined. These phenomena are affecting the world of journalism by impacting on one of the most important element of the constitutional-democratic order: the freedom of information and the press as "watchdog of democracy". The algorithms developed by search engines decide what type of news we "receive" when we use the search string

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for a query, and the social networks are going to become the global newsstand of news in the near future. The research question of this paper is whether and how these two phenomena should be regulated according to the Italian paradigm of the freedom of information.

In the first part of the paper, in section 2, the innovations and transformations of the world of information that are related to the advent of the Internet are highlighted. Next, in section 3, the constitutional principles of the media sector are briefly analysed, in order to develop a systemic approach to the framing of the *new media* of the Internet.

In the second part, in section 4, the characteristics of search engines and social networks are explored, and the requirement that they are classified as 'means of distribution of news' (i.e. as media), with the necessary regulatory consequences, is stressed. In the development of this analysis, comparisons with American doctrine and case law cannot be avoided, because of the remarkable sensitivity in the US to the reality of the Internet and its problems.

In this paper a fairly simple solution is proposed concerning the spreading of news by the new media: 1) search engines should show and clarify the algorithms they use to select the news they propose to users; in this way, readers can choose what type of editorial criteria (meaning algorithms) they use, by choosing what type of search engines they use; and 2) social networks should guarantee that fake news on their platforms will be rectified/corrected.

Keywords

Freedom of information – Freedom of expression – Right to be informed – Algorithms – Search engines – Social networks – Facebook – Fake news – Regulation – New media

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I. Introduction

Law is, par excellence, a technical means of control as well as an expression of the *will of power*, but it is also 'techno-law', that is, a «relationship of legal power and other powers»[1]. It is, therefore, necessary to be wary of the concept of technicality as a neutral principle, since it could be «one of the most powerful tools of autocracy» (Kelsen)[2] . The phenomenon of the Internet poses a new challenge to the national law in the same way as the so-called techno-economy did in the past, since the Internet is based on the same concept of a-territoriality and tries to escape the grip of national law.

The starting point of this analysis is the idea that the state can (and must) preserve its role of controlling the content of the Internet, at least such content as is visible in its territory (accessible from its territory), and of imposing forms of regulation on internet corporations. Although the Internet is currently described as a global phenomenon, the idea that national laws cannot regulate it is actually a false myth. The myth of a-territoriality is in fact denied by the 'moments of reaction' in states that have decided that national law applies to online content[3]. In Italy, there are already many tools to control online content, and various techniques for removing illegal content[4]. Regulating the Internet according to national rules is therefore not a utopia[5]. The new digital platforms are certainly economic giants and formidable opponents for the state, but it is not impossible that the struggle with them can be won.

The analysis in this essay will form part of the macro-survey that has been clearly defined by the Italian scholar Pasquale Costanzo, which concerns the transformation that «constitutionalism is undergoing as a result of global technological progress»[6].

In particular, this essay will study the development and problems of the new mass media of the Internet. It will focus on the innovative tools for spreading news: search engines and social networks.

The research question of this paper is one that has been repeatedly examined in the most accurate and sensitive Italian literature: is it necessary to develop forms of regulation for

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[1] N. Irti, *Il diritto nell'età della tecnica*, Naples, 2007, 3 (My own translation, MM).

[2] As stressed by Hans Kelsen, how it is reported by N. Irti, cit., 16 (My own translation, MM).

[3] The leading case of national regulation of the Internet is the French case *LICRA v. Yahoo!*. In this case, the *Tribunal de grande instance* of Paris in 2000 (*Tribunal de grande instance*, Paris, May 22, 2000 and November 22, 2000, No RG:00/0538) stated that the sale of Nazi memorabilia made through Yahoo was contrary to Article R645-1 of the French Criminal Code, and therefore ordered Yahoo to prevent access to these types of contents (See G. Berger-Walliser, *L'affaire YAHOO, comment repenser la notion de souveraineté à l'heure d'internet*, in *SSRN Electronic Journal*, September 2011). For a deep comparative analysis see: Swiss Institute of Comparative Law, *Comparative study on blocking, filtering and take-down of illegal internet content*, 2016.

[4] See Swiss Institute of Comparative Law, *Comparative study on blocking, filtering and take-down of illegal internet content*, 2016 (Excerpt, pages 773-800).

[5] Cf. O. Pollicino, M. Bassini, *The Law of the Internet between Globalization and Localization*, in M. Maduro, K. Tuori, *Transnational Law - Rethinking Law and Legal Thinking*, Cambridge, 2014, 346.

[6] P. Costanzo, *Il fattore tecnologico e le sue conseguenze*, Convegno annuale AIC, Salerno, 23-24 novembre 2012 "Costituzionalismo e globalizzazione", in *www.associazionedeicostituzionalisti.it*, 2012, 2 (My own translation, MM).

the new Internet media? The question seems to have to be answered in the affirmative; the analysis will therefore be strongly characterized by *de jure condendo* and *de lege ferenda* considerations.

The reason why regulation is necessary is quite simple: as will be seen, the role of the new media is increasing in the news ecosystem, and as a consequence these media are increasingly going to be the new *watchdogs of democracies*. Internet corporations cannot play this role without assuming the responsibilities of the press. It is certainly necessary to safeguard the pluralism and the correctness of news, because, in current liberal democracies, the press influences the voters and the political actors and has a role of accountability in political power that requires it to meet certain standards.

The *file rouge* that will accompany this brief dissertation is the need not only to ensure that the media system is as pluralistic or neutral as possible, but also to address questions relating to content, such as the *fake news* problem.

In this paper a fairly simple solution is proposed concerning the spreading of news by the new media: 1) search engines should show and clarify the algorithms they use to select the news they propose to users; in this way, readers can choose what type of editorial criteria (meaning algorithms) they use, by choosing what type of search engines they use; and 2) social networks should guarantee that fake news on their platforms will be rectified.

In the first part of the paper, in section 2, the innovations and transformations of the world of information that are related to the advent of the Internet are highlighted. Next, in section 3, the constitutional principles of the media sector are briefly analysed, in order to develop a systemic approach to the framing of the *new media* of the Internet.

In the second part, in section 4, the characteristics of search engines and social networks are explored, and the requirement that they are classified as a 'means of distribution' (i.e. as media), with the necessary regulatory consequences, is stressed. In the development of this analysis, comparisons with American doctrine and case law cannot be avoided, because of the remarkable sensitivity in the US to the reality of the Internet and its problems. It will, therefore, be inevitable that US theoretical constructions, which this paper seeks to frame within the Italian constitutional order with its unique distinguishing features, are discussed.

In the final remarks the arguments developed in the paper are summarized, and some paths to regulation are suggested.

II. The advent of the Internet: Changes in the media system, and the new hierarchy of sources of information

The Internet has radically changed the paradigm of freedom of information and the media system worldwide. This has involved a huge and radical change in the world of informa-

tion (i.e. news); in Italy the term 'information' also traditionally means both freedom of information and the media[7].

It should also be noted that until the advent of the Internet and the epochal change it produced, the first aspect (freedom of information) was always irretrievably tied to the second (the media). Freedom of information is not (and was not) characterized – in Italy or in any other democratic state – as a positive right of access to media, but merely as a negative liberty[8]. Nowadays, thanks to the Internet, information is no longer restricted to traditional media and professional journalists, but each of us has been made into a potential journalist. [9] Obviously, this transformation has mainly been positive, with an increase in pluralism and so-called counter-information, but there has also been a series of downsides like the spread of fake news. This latter aspect is particularly related to the absence of the control mechanisms that applied to the traditional media when they spread news. This radical transformation of information (seen as the media) has led to a profound change in democratic regimes, where the press (as the union of journalism and the media) has always been regarded as a "*watchdog of democracies*"[10], "*the fourth power*" or the "*fourth estate*"[11]. The press was (is it still?) appointed to carry out the task of holding the political powers *accountable*, which required, in particular, respect for the truth (i.e., narrating facts/events that actually happened)[12].

«Our news ecosystem has changed more dramatically in the past five years than perhaps at any time in the past five hundred»[13].

This change has led to a general crisis in journalism: for some[14], the impact has been so great as to involve a transformation in the whole concept of journalism, moving the clock

[7] As stressed by many Italian scholars, *ex pluribus* P.Costanzo, *Informazione nel diritto Costituzionale*, in *Dig. Pubbl. VIII*, Turin, 1993, 319, 370.

[8] «The CC clarified, however, that the language of Article 21 does not imply that everyone should have material availability of all possible means of distribution; rather, more realistically, the law 'should ensure for everybody the legal possibility to use and access them, in the manner and within the limits posed by the specific characteristics of each medium'». F. Casarosa, E. Brogi, *The Role of Courts in Protecting the Freedom of Expression in Italy*, in E. Psychogiopoulou (eds.), *Media Policies Revisited*, London, 2014, 101, 104. The judgments cited by the Authors are: Constitutional Court, judgment no. 59/1960 and no. 105/1972.

[9] Some Authors talk about the birth of the "Fifth Estate": E. Dubois, W. H. Dutton, *Empowering Citizens of the Internet Age*, in M. Graham, W. H. Dutton (eds.), *Society and the Internet*, Oxford, 2014, 238. Cf. Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 3.

[10] ECtHR, *Goodwin v. United Kingdom*, App. No. 17488/90, 27 March 1996.

[11] See *ex pluribus*: L. A. Powe JR., *The fourth estate and the constitution: freedom of the press in America*, Berkeley-Los Angeles-Oxford, 1991.

[12] «Respect for truth and for the right of the public to truth is the first duty of the journalist». IFJ Declaration of Principles on the Conduct of Journalists.

[13] E. Bell, *Facebook is eating the world*, in *Colum. Journalism Rev.*, March 7, 2016.

[14] M. C. Dorf, S. Tarrow, *Stings and Scams: "Fake News", the First Amendment, and the New Activist Journalism*, in *Cornell Legal Studies Research Paper No. 17-02,* 2017, 8. «When we look back to the 18th century, the idea of journalists as objective reporters looks like a brief 20th century interlude in a much longer story of the inseparability of journalism, activism, and social movements». Idem, 22.

hands back to a time when journalism and information were nothing more than a branch of political activism; for other scholars, the role of the journalism is changing from that of a gatekeeper to that of a gatewatcher[15].
Passing from the global sphere to the national one, it is important to note how the Internet ecosystem has acquired a very important role in the world of information, as noted in the XII[th] Censis-Ucsi Report[16]. In the field of information, the traditional media are still the most important (76.5% of Italians watch news broadcasts, and 52% listen to radio bulletins), but 51.4% of Italians also use search engines to find information and 43.7% are in the habit of using Facebook as well. The percentages are different among young people, where Facebook is the top source for news (71.1%), followed by search engines (68.7%) and news broadcasts (68.5%). The role of social networks and search engines in the information world is therefore destined to grow from one generation to the next. We are the witnesses of the construction of a «new hierarchy of the sources of information», in the words of the XII[th] Censis-Ucsi Report.

III. The Italian Constitution and the Constitutional Court's case law: Regulation of media, and freedom of information

The best way to consider the need to ensure pluralism and regulate the *new media* of the Internet is through analysing the fundamental principles of the freedom of information and media freedom as enshrined in the Italian constitutional system[17].
Mass media or media «have to be considered in our legal system (...) as a public service or at least as a public interest service»[18].
Although Article 21 of the Italian Constitution – given the historical period in which it was drafted – deals only with the regulation of the press, the principles of freedom of information have been extended to other instruments that do not have specific constitutional protection, such as radio and television.
Concerning newsprint, the most traditional tool for the dissemination of information, it seems that historically as well as currently the market has been able to guarantee both

[15] A. Bruns, *Gatewatching, Gatecrashing: Futures for Tactical News Media*, in AA.VV., *Digital media and democracy: tactics in hard times*, Cambridge, 2008, 247.

[16] XII° Rapporto Censis-Ucsi, 2015. Obviously, this is not only an Italian trend, but it is also at stake, for example, in the United States of America: See Pew Research Ctr., *The Modern News Consumer* 4 (2016), 3-4.

[17] For a more in-depth analysis of media freedom written in Italy in English, see: F. Casarosa, E. Brogi, cit.

[18] Constitutional Court, judgment no. 94/1977 (My own translation, MM). «Quite importantly, the CC has also acknowledged that the freedom of expression and media freedom enjoy an equal position as constitutional values, though the latter must be interpreted as instrumental to the former». F. Casarosa, E. Brogi, cit., 105. The Authors cited the Constitutional Court, judgment no. 48/1969.

internal and external pluralism[19]. Obviously, the 'success' of the market did not mean the absence of regulation of the mass media in either the days of the monarchy or the days of the republic. During each period there was general awareness of the need to 'regulate' what was then the major *watchdog of democracies* – to use an expression that is dear to the European Court of Human Rights – both from the point of view of the transparency of sources of information and sources of funding and from the point of view of safeguards[20]. The Italian Law no. 47/1948 and the subsequent Law no. 416/1981 therefore recognized the need to regulate the press from the point of view of the responsibility of publishers and journalists and from the point of view of safeguards, and this was fundamental in guaranteeing its central role in the new Italian democracy. In the field of information, in addition to the criteria for freedom of information such as objectivity (particularly in the process of correcting mistakes and published falsehoods)[21] and impartiality, the importance of the principle of transparency[22] was also recognized, and this had already been identified in Article 21 co. 5 of the Constitution on sources of funding.

Moreover, an ex ante anti-trust regulation has been enacted to protect external pluralism, because it ensures the existence of an adequate number of newspapers whose ownership is not concentrated in the hands of a few agents (through the so-called SIC – Integrated Communications System); control of this system is entrusted to an independent authority, the *Authority for Communications Guarantees* (Autorità per le garanzie nelle comunicazioni – AGCom).

In the field of radio and television, the broadcasting sector, the initial technical complexities, which had resulted in a limited number of available frequencies, not only caused more problems in defining the media, but also led to the development of constitutional case law that outlined in broad terms the constitutional principles underlying the media. At first, the Constitutional Court entrusted the broadcasting media to the public media monopoly system to ensure there was pluralism and correct information[23]. In the subsequent pluralistic regime with

[19] As stressed by Italian scholars, *ex pluribus* A. Pace, *Mezzi di diffusione e comunicazioni di massa,* in A. Pace, M. Manetti, *Commentario della Costituzione,* Rome, 2006, 540 and P. Caretti, *Diritto dell'informazione e della comunicazione*, Bologna, 2013, p. 25.

[20] This was quite clear in the debate inside the Constituent Assembly. The first draft of article 21 (article 16 of the Project of Constitution) contained a provision that concerned the control on the sources of information in order to guarantee the public faith: «Regarding the special functions of the press the law provides checks on sources of news and on means of financing in order to assure the public faith» (My own translation, MM). Cf. Seduta della Prima Sottocommissione del 27 settembre 1946, in *La Costituzione della Repubblica nei lavori preparatori della Assemblea Costituente*, Edizione a cura della Camera dei Deputati, Rome, 1976, 158 e ss.

[21] The truth correction process is linked with the human fundamental rights and with the public interest to the objectivity of news, as claimed by Constitutional Court, judgment no. 133/1974.

[22] Cf. A. Pace, *Disciplina della stampa e delle imprese editoriali*, in A. Pace, M. Manetti, *Commentario della Costituzione,* cit., 493.

[23] See Constitutional Court, judgment no. 59/1960. In the Constitutional Court, judgment no. 225/1974, the Court invited the government to enact a law granting the internal pluralism in broadcasting media.

many frequencies, the Constitutional Court[24] claimed the need to defend pluralism against the development of dominant positions[25] and to guarantee the «plurality, objectivity, completeness and impartiality of information»[26] in the 'mixed' public–private system. Thus, if internal pluralism is only maintained for public radio and television, certain «content and modal obligations»[27] must also be imposed on private broadcasters: «right from here "the constitutional imperative" establishes that "the freedom of information", guaranteed by Art. 21 of the Constitution, should be qualified and characterized, inter alia, by the pluralism of the sources (...) and by the objectivity and impartiality of the provided data, and finally by the completeness, correctness and continuity of the information activity (Judgment no 112 of 1993)»[28].

«The CC observed that the acquisition of economic and information power by private companies would allow them to "exercise, from a position of prominence, influence over collectivity, which would be incompatible with the rules of a democratic system". The CC thus supported the establishment of a pluralistic media environment, noting that only the achievement of a sufficient level of pluralism would allow a concrete possibility for citizens to choose among a multiplicity of information sources. This could not be achieved unless citizens were able to access, both in the public and in the private sectors, programmes that guaranteed the expression of heterogeneous tendencies»[29].

Finally, Article 2 of Law no. 223/1990 stated the two notions of pluralism, both internal and external, and, most importantly, stated, after the pressure imposed by the Constitutional Court, that the requirement of Article 1 for a range of radio and television programming was in the 'general interest'. The laws on the matter of television were subjected to many modifications to try to reduce the duopoly and grant external pluralism, but often they did not respect the principles that could be inferred from the case law of the Constitutional Court. The so-called Maccanico law (Law no. 249/1997) lowered the anti-trust limits, and the Communication Authority, with the support of the Constitutional Court (judgment no. 466/2002), required one of Silvio Berlusconi's three television channels to migrate to a digital platform. The next law, Law no. 112/2004, introduced by Berlusconi's government, did not solve the problem and, *au contraire*, it led to the well-known Europa 7 case[30].

[24] See Constitutional Court, judgment no. 202/1976.

[25] See Constitutional Court, judgment no. 826/1988, no. 420/1994 and no. 466/2002. This seems quite clear also in the main decision about the freedom to inform and right to be informed, Constitutional Court, judgment no. 148/1981.

[26] See Constitutional Court, judgment no. 153/1987 e no. 826/1988 (My own translation, MM).

[27] Wording by A. Pace, *Mezzi di diffusione e comunicazioni di massa,* op. cit., p. 535 (My own translation, MM).

[28] Constitutional Court, judgment no. 155/2002 (My own translation, MM). «[T]he information, in its passive and active features, expresses not only a subject, but rather a "precondition" or an "irrepressible requirement" for the implementation at any level, central or local, of the correct features of a democratic state». Constitutional Court, judgment no. 29/1996, (Translated by F. Casarosa, E. Brogi, cit., 103).

[29] F. Casarosa, E. Brogi, cit., 104. The internal quotation is a sentence translated from the Constitutional Court, judgment no. 826/1988.

[30] See P. Cavaliere, *The story of Italian television as Discovery Channel would tell it*, in *medialaws.eu*, 2011. O. Pollicino, *Has the never-ending Europa 7 saga finally ended? A guide to understand how the Italian audiovisual conundrum has*

Even with regard to broadcasting, the legislator has developed tools for the regulation of the mass media that guarantee the right to be informed and the correction of falsehoods[31]. After this brief examination of media regulation, it is necessary to recognize the lack of regulation of any of the new Internet media, which are also ignored in the latest SIC formulas[32]. On this point, a particularly significant statement by the Constitutional Court on the subject of the mass media should be recalled. The Court stated, in relation to television, that there is a need to regulate, in a more timely and complete manner, the mass media that are the most pervasive and 'influential' for public discourse. In relation to television broadcasting, the Court has requested 'intrusive' regulation, in «consideration of what are the characteristics of the mean of spreading the thought under consideration which, because of its well-known capacity for immediate and capillary penetration into the social sphere through spreading in the interior of the homes and the evocative force of the image together with the word, reveals a peculiar ability of persuasion and incidence on the formation of public opinion as well as on socio-cultural addresses of a very different nature from that attributable to the press»[33]. This principle is very useful if we are to understand why regulation of the new Internet media is needed. Indeed, the Internet media have a strong influence on the world of information and public discourse.

In order to summarize the main point, the guiding constitutional principles (which can be extrapolated from legislation and the constitutional case law) can be identified in two major areas for regulation: on the one hand, the need for the protection and safeguard of pluralism, and, on the other, the recognition of the role of freedom of information as characterized by certain rules. The press – in the broad sense – plays a central role in contemporary democracies and is linked to objectivity and correctness of information[34].

It should also be noted that in Italy the circulation of information (i.e. news), whether on paper, on radio or on television, was entrusted to the 'Order of Journalists', which was recognized by the Court as holding the most important position in the field of information: «experience shows that journalism, if it is fuelled by the contribution of those who do not engage in it pro-

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been able to make our Nation sadly famous non only in Luxembourg, but also in Strasbourg, in *medialaws.eu*, 2012. R. Mastroianni, *Media Pluralism in Centro Europa 7 srl, or When Your Competitor Sets the Rules*, in F. Nicola, B. Davies (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Cambridge, 2017.

[31] See Art. 10 of the law no. 223/1990. The individual has the right to request the correction of reported falsehoods. If the television/television channel/newscast does not correct the falsehood, the individual has the "right to appeal" to the *Authority for Communications Guarantees*, which can impose the correction.
In this field finds application also the article 2 of the law no. 69/1963 (The Journalists' Code of Ethics), which imposes the respect for the truth: journalists of newscasts shall scrupulously endeavor to report the truth.

[32] Available at the website of the Italian *Authority for Communications Guarantees* (www.agcom.it). In this matter there are two projects of law of the Italian Parliament: one concerning the press online (Ddl 1119-B, Senato della Repubblica, XVII Legislatura.) and the other the spread of fake news (Ddl S. 2688 - Senato della Repubblica, XVII Legislatura).

[33] Constitutional Court, judgment no. 148/1981 (My own translation, MM).

[34] In several occasions the Court claimed that the freedom of information is 'co-essential' to the system of freedoms guaranteed by the Constitution and for democracy, and it is composed by an active feature (freedom to inform) and a passive one (right to be informed). *Ex pluribus* Constitutional Court, judgment no. 348/1990 and no. 1/1981.

fessionally, lives above all through the daily work of professionals. Their freedom connects, in a single destiny, the freedom of periodic press, which in turn is an essential condition for that free comparison of ideas in which democracy is rooted in its vital roots»[35]. This link between information and professional journalism, identified by the Constitutional Court in judgments that 'saved' the Order of Journalists, cannot be ignored, because it has been at the centre of the information system and has undergone a crisis with the advent of the Internet.
The members of the Order, who were the real upholders of the freedom of information in the pre-digital era, were and are bound by a code of ethics[36] (as well as international codes)[37] to respect the truth and to correct falsehoods in news, and this was related to those values of objectivity and impartiality in the matter of the news that must be pursued in relation to information.

IV. The new media of the Internet: An analysis of search engines and social networks in the light of the Italian constitutional principles

Starting from the considerations of the paragraphs above, the impact of the Internet on the information system can be analysed from a dual perspective: search engine algorithms and social networks. These are the aspects of the Internet that show the most innovation from the previous paradigm of the press, since so-called individual journalism (that is, blogs, forums, etc.) and so-called digital journalism (that is, online versions of traditional media) are nothing more than a technological adaptation to the new tool of the Internet, and fit more easily within the legal framework of the media as it is traditionally understood. In particular, blogs and forums and all the other tools of individual journalism are more easily framed in the old media paradigms[38], both in processes for correcting falsehoods and in tools of control. Concerning digital journalism, it seems that digital newspapers are slowly

[35] And «[i]f the freedom of information and of criticism is unbreakable, it must be agreed that that precept, rather than the content of a simple law, describes the very function of the free journalist: It is the failure to do so, never practicing it that can compromise that decorum and that dignity on which the Order is called to watch». Constitutional Court, judgment no. 11/1968 (My own translation, MM). See also Constitutional Court, judgment no. 98/1968.

[36] See article 2 of the law no. 69/1963. As for Europe, consider the Journalistic Codes of Ethics (from Italian one to Azerbaijan one), which require the respect of truth as journalists' first duty (see T. Laitila, *Journalistic Codes of Ethics in Europe*, in *European Journal Of Communication*, 1995).

[37] See IFJ Declaration of Principles on the Conduct of Journalists, (a*dopted by 1954 World Congress of the International Federation of Journalists - IFJ. Amended by the 1986 World Congress*). Cf. B. Kovach, T. Rosenstiel, *The Elements of Journalism: What Newspeople Should Know and the Public Should Expect*, New York, 2007.

[38] Think of the different projects of law that try to apply the old tools of regulation to the Internet phenomena, like the project concerning the digital press (Ddl 1119-B, Senato della Repubblica, XVII Legislatura.) or the project developed to contrast the misinformation online (Ddl S. 2688 - Senato della Repubblica, XVII Legislatura).

converging towards forms of regulation that are equal to newsprint[39]. By contrast, search engines and social networks are completely different paradigms from traditional media. This does not mean that the Internet has not profoundly changed the traditional media, which are facing huge problems with its advent, but only that this does not seem to be a problem in which a non-paternalistic state should be interested. If the traditional media are going to disappear or, more realistically, become less important for the public discourse, this does not seem to be a big problem if the new media assume the same responsibilities. The interest for this analysis is to try to understand the problem for freedom of information linked to the new media, which currently seems to represent a concrete danger to the functioning of democracies. From the starting point of the Italian constitutional principles, it can be stressed that Internet corporations should be subject to regulation: as is clear from the Italian constitutional court case law, in the balance between the freedom of the press and the freedom to conduct a business, the freedom of the press prevails. In the Italian paradigm, the interest in pluralistic and correct information (i.e. the spreading of news) is much more relevant than the freedom of enterprise.

1. The impact of algorithms on the freedom of information: Google programmers as new publishers

The first issue for this paper is related to search engines and their role in the world of contemporary information. An information search can go through the paths of Google, Yahoo, Virgil, Istella or many other search engines. Search engines propose certain sites to Internet users, according to their selected *keywords* (a so-called 'query'), on the basis of an algorithm. By inserting the chosen *keywords*, the user will see certain information sites (i.e. news websites) on the first pages of the search engine (the pages that are most commonly viewed) in comparison with other sites "confined" on the more remote pages. If, as has been pointed out in the previous paragraph, search engines are beginning to have a greater role in the information world, it would be useful to understand how they 'select' the information sites for Internet users and whether this *editorial* role should remain unregulated. The site indexing is done with algorithms that favour certain sites over others, based on the upstream 'choices' of the programmers. This phenomenon has had a tremendous impact on the freedom of information, giving support to the traditional media with a new editorial subject: search engines. «As the role of information gatekeeper starts to pass from journalists at legacy news organizations to engineers, coders, and designers, the very nature of the Fourth Estate and the news it produces is changing. While their aspirations may be sweeping, platform executives have not indicated a desire to be a Fourth Estate»[40]. It is true that search engines do not directly *produce* news: they merely collect and disseminate it. However, the old dichotomy

[39] See what is stated by the Italian Supreme Court, Criminal division: Cass. pen., decision no. 31022/2015.

[40] E. C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, in *Georgetown Law Faculty Publications and Other Works*, 2017, 2-3.

between producers and distributors of news does not seem to be valid if it does not lead to search engines being considered as a means of disseminating thought, since they are characterized as news aggregation tools on the basis of their own publishing criteria. If one just looks at the right to be informed (the passive aspect of freedom of information), it is not relevant that Google does not directly produce information: by cataloguing and aggregating Internet content (i.e. news), these new media sources enjoy huge power to condition the public discourse, and this power is the more pervasive because it is (apparently) invisible[41]. For the purposes of this explanation, it is necessary to illustrate the topic of this paragraph, that is, the 'editorial' role of search engines, in more detail. To do this some thoughts of US scholars and US case law, which is always quick to note – particularly because of geographical issues – the innovations of the Internet, are discussed. Many American lawyers have considered the development of algorithms by search engines to be a real and true freedom protected by the First Amendment[42], since the algorithms are an editorial choice of what content is preferred by search engines. US case law has also been quite eager to recognize this editorial character of search engines. The *page ranking* discipline has been considered by the American courts as an expression of the free speech, primarily as *commercial speech*, and for this reason as being protected by the First Amendment[43]; in the particular context of *commercial speech*, however, the discipline remains subject to antitrust regulation[44]. The complete equivalence of search engines to real and true publishers has also been strongly reaffirmed within the more traditional freedom of expression (the political speech, in a broad sense). An explanation for this trend is found in *Zhang v. Baidu.com Inc* in which the Southern District of New York Court explicitly stated that

[41] As stressed by M. Cuniberti, *Tecnologie digitali e libertà politiche*, in *Il Diritto dell'informazione e dell'informatica*, 2, 2015, 312.

[42] S. M. Benjamin, *Algorithms and Speech*, in *University of Pennsylvania Law Review*, 161, 2013, 1445; Cf. E. Volokh, D. M. Falk, *First Amendment Protection For Search Engine Search Results,* in http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf, 2012. *Contra*: T.Wu, *Machine Speech*, in *University of Pennsylvania Law Review*, 161, 2013, 1495.

[43] Cf. *Search King, Inc. v. Google Tech., Inc.*, No. 02-1457, 2003 WL 21464568, at *3-4 (W.D. Okla. May 27, 2003) Cf. V. T. Nilsson, *Note, You're Not from Around Here, Are You? Fighting Deceptive Marketing in the Twenty-First Century*, in *Ariz. L. Rev.*, 54, 2012. Another case in the field of *commercial speech* is *E-Ventures Worldwide, LLC v. Google* (Inc., No. 2:2014cv00646 - Document 104 (M.D. Fla. 2016)), in which the Court affirmed the protection of algorithms under the First Amendment but then questioned the correct application of the Google's terms of service: «[w]hile a claim based upon Google's PageRanks or order of websites on Google's search results may be barred by the First Amendment, plaintiff has not based its claims on the PageRanks or order assigned to its websites. Rather, plaintiff is alleging that as a result of its pages being removed from Google's search results, Google falsely stated that e-ventures' websites failed to comply with Google's policies. Google is in fact defending on the basis that e-ventures' websites were removed due to e-ventures' failure to comply with Google's policies. The Court finds that this speech is capable of being proven true or false since one can determine whether e-ventures did in fact violate Google's policies. This makes this case distinguishable from the PageRanks situation. Therefore, this case does not involve protected pure opinion speech, and the First Amendment does not bar the claims as pled in the Second Amended Complaint», «Google's reason for banning its websites was not based upon "editorial judgments," but instead based upon anti-competitive motives».

[44] Cf. O. Bracha, F. Pasquale, *Federal Search Commission: Fairness, Access, and Accountability in the Law of Search*, in *Cornell L. Rev.*, 93, 2008, 1149.

choices to remove certain content from the *Baidu* search engine «are in essence editorial judgments about which political ideas to promote»[45]. This case, which certainly makes more sense in the context of freedom of information[46], clearly exemplifies the recognition that there is editorial value in the choices underlying the algorithms, as it highlights the 'political-editorial line' that can be subordinated to an algorithm. However, if it is true that, for example, Google promotes the 'most requested' pages or 'personalizes' the algorithm, other search engines may develop different publishing criteria[47]. Sometimes the editorial choice is not so clear, since, for example, it is based on the 'characteristics' of the individual user[48]. Nevertheless, staying with Google, the use of the 'most viewed pages' selection policy merely favours news from the more *mainstream* media at the expense of so-called counter-information (although sometimes the contrary occurs, but much more rarely)[49]: this is a fictitiously neutral and in fact a 'political' publishing criterion. Algorithms – even if they are the expression of decisions that are not explicitly political, as in the case of *Baidu* – are nothing more than the 'political-editorial line' of the search engine.

As regards the Italian system, in a recent decision of the Court of Appeal of Milan in relation to the possibility of filtering results made by a search engine, it was said that «on the other hand, that injunction could risk to damage the freedom of information and expression of the *Internet users*, since this system may not be able to distinguish between legitimate content and unlawful content so that its use could result in the blocking of communications having a legitimate content» (author's italics)[50].

[45] «Allowing plaintiffs to sue Baidu for what are in essence editorial judgments about which political ideas to promote would run afoul of the First Amendment». *Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014).

[46] The Court affirmed, in a legal framework such as the American one where according to US Supreme Court's decisions freedom of information is not distinguished from freedom of expression (S. R. West, *Press Exceptionalism*, in *Harv. L. Rev.,* 127, 2014, 2434, p. 2439), that «[o]n that theory of the First Amendment's protection of search-engine results, the fact that search engines often collect and communicate facts, as opposed to opinions, does not alter the analysis. As the Supreme Court has held, "the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs"». *Zhang v. Baidu.Com Inc.*, 10 F.Supp.3d 433 (S.D.N.Y. 2014).

[47] «Google uses various "signals" in order to personalize searches including location, previous search keywords and recently contacts in a user's social network». E. Bozdag, *Bursting the filter bubble: Democracy, design, and ethics*, CPI Koninklijke Wöhrmann, 2015, 17. However, Google, as some other search engines, uses a lot of others content-based criteria such as the bad reputation of a website, the uselessness, the similarity, the "length of service" of a page and so on (see E. Bozdag, cit., 21-23). In addition, Google, like Bing, promotes its own pages (B. Edelman, *Bias in Search Results?: Diagnosis and Response*, in *Indian Journal of Law and Technology*, 7, 2011, 16). Finally, as reported by some Italian journalists, Google has decided to develop "political" publishing criteria (in the algorithm) to avoid the spread of fake news (Redazione, *Google, nuovo algoritmo contro le fake news*, in *ansa.it*, 26 aprile 2017) or to prevent the access to websites promoting the Holocaust denial (Redazione, *Google rivede algoritmo del motore di ricerca, sfavorirà i siti scomodi*, in www.Repubblica.it, 21 December 2016). Cf. *S.Loius martin v. Google*, Superior Court of the state of California, 17 June 2014.

[48] «Perhaps Google in particular (and maybe blekko, too) is different, insofar as its message is not so much "We value relevant websites" but more like "We select for you what you want." In the latter formulation, Google arguably is not expressing its own preferences so much as it is indicating that it wants to satisfy ours». S. M. Benjamin, cit., 1474.

[49] Cf. H. Nissenbaum, L. D. Introna, *Shaping theWeb: Why the Politics of Search Engines Matters*, in *The Information Society*, 16, 2000, 169.

[50] Court of appeal of Milan, civil division, decision no. 29/2015 (My own translation, MM).

Regardless of the subject under discussion, the principle contained in this *obiter dictum* seems to be a paradigm that is different from the one proposed by US legal scholars: a search engine cannot arbitrarily decide to exclude certain content and remove it, so long as the content is legal. The dominant view in the Italian case law therefore seems to be that search engines should not be considered as publishers[51].

However, this 'perception' is similar to the view that describes a search engine as a '*caching provider*', that is to say merely as a 'neutral' news distributor, and not as a '*content provider*'[52]. This perspective is also certainly due to the absence of decided cases in which search engines set their own algorithms according to *explicitly* 'political-editorial line', such as the *Baidu* case. Moreover, the exclusion of search engines from the SIC seems to support this reconstruction.

Some isolated judgements, on the other hand, seem to present what Aristotle would describe as the "golden mean", supposing «a different figure of service provider not completely passive and neutral with respect to the organization of user content management»[53].

The *bias* that underlies all these judicial considerations concerns the fact that they have been discussed in procedures to evaluate the responsibility of search engines for the dissemination of illicit content, while what is involved here is the work of search engines as the 'legitimate' loudspeakers of others – the context is therefore the freedom of information (the spread of information/news). Compared to this paradigm it would not seem unfounded to consider that «[d]epending on the algorithm, algorithm-based decisions may well constitute self-expression, enhance autonomy, and contain meaningful thought. The algorithm is simply a means to gather relevant information, but the creator chooses what to gather»[54].

However, in contrast to the concepts mentioned above, an example of mass media editorial behaviour by a search engine can be found in the context of the right to be forgotten: here, search engines are assigned to do a first 'skimming' of requests for removal or to carry out better de-indexing of content that is detrimental to the right to be forgotten. For example, Google makes assessments about whether there is a public interest in the information[55].

Given this short theoretical and conceptual framework, it is necessary to focus on the possible constitutional problems that may arise in relation to search engines.

The problem of algorithms in the area of the freedom of information focuses on the constitutional principles of the pluralism and transparency of information (and of the 'content

[51] Sometimes the search engines were considered as databases: Tribunal of Milan, civil division, ord. no. 21/25 January 2011 and ord. 24 March 2011.

[52] See Tribunal of Milan, civil division, decision no. 11295/2014.

[53] Tribunal of Milan, civil division, decision no. 8748/2011 (R.T.I. v. Yahoo! Italia e Yahoo! Inc.) (My own translation, MM).

[54] S. M. Benjamin, cit., 1474.

[55] Cf. E. Lee, *Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten*, in *Chicago-Kent College of Law Research Paper,* 2015, 13.

and modal obligations').

As regards freedom of information, the 'choice' of the algorithm to prefer some sources of information over others cannot leave the legislator indifferent, since this technology is not neutral[56]. The problem is twofold: on the one hand, it relates to informational pluralism, and, on the other, it relates to the transparency of the true publishing criteria (the algorithms).

With regard to the first of these problems, it is important to note that, as for the constitutional principles discussed above, there is a constitutional imperative to guarantee the existence of so-called external pluralism if the service is, even vaguely, of an informative type. In relation to the question of pluralism, a problem would arise if there were some search engines that acted in a sort of *de facto* monopoly: in this case the Constitutional Court's ruling in the field of limited-band radio and television broadcasting would again come to mind[57]. In this case, a more intrusive inspection of the mechanism of the algorithm and its neutrality (which would be impossible or almost impossible) would be needed. Despite the fact that many observers have underlined Google's 'near' monopoly in the field of search engines[58], this, to date, does not look 'dangerous' enough to require public intervention; however, the supervision must be strong.

If, on the other hand, there are many different search engines, it would seem appropriate to let the market decide, as happened for the newspapers: as long as there is pluralism, it may, for example, be acceptable that certain sources of information are de-indexed for publishing policy reasons. If Google decides to remove (de-index) certain sites or not to support them through its algorithm, and makes this 'editorial decision' clear (but this is the second point in this analysis), users may choose to use a different search engine that does not apply this type of editorial policy. In fact, just as you may choose to read a communist newspaper or a catholic one, which not only describe different versions of the same events, but also cover different types of news, you can choose to use Google instead of Yahoo or Baidu instead of Bing. Obviously, if a monopoly regime arose in the future – despite anti-trust regulation – this should be regulated as such.

The second question, about transparency, is especially significant when there is a de-indexing of certain sites, and so a 'negative' alteration of the algorithm. In relation to the need for the algorithm to be transparent, it must first be emphasized that an algorithm cannot be considered to impose neutral criteria, since the factors that determine it are based on 'political' choices. The main problem of an algorithm today is that the underlying criteria are not clear to users, who should instead be made part, in the freedom of information

[56] In the field of European anti-trust law, cf. L.Vitzilaiou, *Keywords: Google, European Commission – Anyone feeling lucky?*, in *CPI Antitrust Journal*, 2011, http://ssrn.com/abstract=1750019; Cf. A. Urso, *Search algorithms and the boundaries of antitrust law and economics*, in *Mercato Concorrenza Regole*, 15, 2013.

[57] Constitutional Court, judgment no. 59/1960.

[58] See the Report: *Search engine usage*, www.statista.com, 2017.

context, of the criteria used to select the news that is offered to them. This is the main aspect for which regulation should be developed: it is necessary to impose transparency of editorial choices for search engines, in order to ensure complete awareness for Internet users and to give them the possibility of choosing a search engine that uses different criteria. The problem is clearly revealed, as has been highlighted, when platforms take steps to remove certain politically 'oriented'[59] content, thus demonstrating their *non-neutral* character[60]. However, the widely acclaimed neutral character of the algorithm does not even exist to begin with[61], since the algorithm is not a neutral technique but is *fundamentally* subordinate to certain political choices. Behind the algorithm there are people (programmers) who decide which variables to use[62]: «and, as has concerned many observers, their prejudices are the algorithm's prejudices».[63] Therefore, some type of regulation seems to be needed to ensure the transparency of the algorithm according to which a search engine selects news[64].

This idea, however, is not altogether outside the American doctrine, which has highlighted how algorithms end up creating a sometimes unacceptable *bottleneck*[65].

In addition, in Italy this gap in transparency was noted by the *Italian Competition Authority* (Autorità Garante della Concorrenza e del Mercato) in a legal controversy started by

[59] Cf. H. Nissenbaum, L. D. Introna, cit.; cf. E. Bozdag, cit., 98.

[60] «Indeed, the claim of such intermediaries to being merely neutral collectors of preferences is often undermined by the parallel claim they make, as corporations, they enjoy a free speech defence that would allow them to manipulate results in favour of (or contrary to), for example, a political campaign, or a competitor, or a cultural issue». G. Comandè, *Regulating Algorithms' Regulation? First Ethico-Legal Principles, Problems, and Opportunities* of *Algorithms*, in AA.VV., *Transparent Data Mining for Big and Small Data*, Berlin, 2016, 12. «In the United Kingdom in February 2016, Google's autocorrect function was even accused of being politically biased. In 2015, there were similar allegations that Google had favoured Hillary Clinton on its autocomplete feature; Google explained that "the autocomplete algorithm is designed to avoid completing a search for a person's name with terms that are offensive or disparaging. … This filter operates according to the same rules no matter who the person is"». Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 9.

[61] In the past communication *providers*, in a broad sense, used to be neutral tools, this cannot be said for the Internet providers. Cf. B. Harpham, *Net neutrality in the United States and the future of information policy*, in *Faculty of Information Quarterly*, 1, 2009.

[62] «Social media and search companies are not purely neutral platforms, but in fact edit, or "curate," the information they present». E. Bell, T. Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, in *Tow Center for Digital Journalism* 9, March 29, 2017, 15.

[63] E. C. Carroll, *Making News*, cit., 18. «While it is easy to think of algorithms with their lines and lines of code as cold and objective (and technology companies often portray them this way), they have human creators. Computer engineers, designers, and coders build and manage these algorithms. The people behind the algorithm decide what variables to use and how to weigh them relative to one another». (Ibidem)

[64] This necessity was affirmed also by the E.I.S.P.A.: «the European Internet Services Providers Association call on its members which provide social media, search engines and news aggregators: 8.3.1. to develop ethical quality standards regarding their own transparency and the due diligence of their media services; where commercial, political or other interests might conflict with the neutrality of these media services, the providers of such services should be transparent about such a bias». Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 4.

[65] Cf. F. Pasquale, *Dominant Search Engines: An Essential Cultural and Political Facility*, in AA.VV., *The next digital decade: essays on the future of the internet*, 2010, p. 401-402, who suggests the necessity of a "publicly funded search engine" (Idem, p. 416). The perspective suggested, i.e. the neutralization of the system, is a more difficult alternative compared to a regulation providing pluralism and transparency, as supported in this paper.

the *Italian Federation of Newspaper Publishers* (Federazione Italiana Editori Giornali) that concerned the transparency of Google News's algorithm (for page ranking) and the consequent impossibility of understanding the mechanism to calculate advertising income[66]. Another issue concerns one of the most critical perspectives on algorithms: the problem of so-called *filter bubbles*[67]. The problem here is that the 'personalized algorithm' personalizes search results too strongly: «personalization filters serve up a kind of invisible autopropaganda, indoctrinating us with our own ideas, amplifying our desire for things that are familiar and leaving us oblivious to the dangers lurking in the dark territory of the unknown»[68]. The concept of filter bubbles is linked to a so-called *pre-selected personalization*[69], which is a personalization driven by the search engine's algorithm without the user being aware of it. Two points should be made about this topic. The first concerns the actual danger of this phenomenon: «[t]he filter bubble argument is overstated, as Internet users expose themselves to a variety of opinions and viewpoints online and through a diversity of media. Search needs to be viewed in a context of multiple media»[70], and an 'escape' from filter bubbles is possible[71]. Secondly, the suggested implementation of the principle of transparency could resolve this type of problem[72]: users could choose to use search engines that

[66] A420 – FIEG - Federazione Italiana Editori Giornali /Google, Provvedimento n. 20224 (2009). The case was closed in 2010, after that Google proposed some reassurances about the development of a more transparent page ranking.

[67] Wording by E. Pariser, *The Filter Bubble: How the New Personalized Web is Changing What We Read and How We Think*, New York, 2011.

[68] E. Pariser, cit., 13. For more scholars' references see S. Flaxman, S. Goel, J. M. Rao, *Filter Bubbles, Echo Chambers, and Online News Consumption*, in *Public Opinion Quarterly*, 80, Special Issue, 2016, 298, 298 e ss.

[69] «Pre-selected personalisation concerns personalisation driven by websites, advertisers, or other actors, often without the user's deliberate choice, input, knowledge or consent». F. J. Zuiderveen Borgesius, D. Trilling, J. Moeller, B. Bodó, C. H. de Vreese, N. Helberger, *Should We Worry About Filter Bubbles?*, in *Internet Policy Review. Journal on Internet Regulation*, 5, 2016, 3.

[70] W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 5.

[71] Cf. K. O'Hara, D. Stevens. *Echo Chambers and Online Radicalism: Assessing the Internet's Complicity in Violent Extremism*, in *Policy and Internet*, 5, 2015, 401.

[72] See the *Report of the High Level Group on Media Freedom and Pluralism*: «The new media environment increases the importance of 'gate- keepers', digital intermediaries who are the access route to the internet (for example search engines and social networks); whose personalisation of content risks creating a "filter bubble" for the reader – or internet service providers, who have the ability to arbitrarily censor citizens' connections to the internet. For these actors, only the EU has the effective capacity to regulate them, given its role in competition policy and the transnational character of these actors». See the Report recommendation: «[i]n order to give complete transparency as to how individualised a service is, services that provide heavily personalised search results or newsfeeds should provide the possibility for the user to turn off such personalisation, temporarily for an individual query, or permanently, until further notice». V. Vike-Freiberga, H. Däubler-Gmelin, B. Hammersley, L. M. P. Pessoa Maduro, *A free and pluralistic media to sustain European democracy*, in *europa.eu* (http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf), 2013, 27. Cf. European Commission (2013), 'Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values (Green Paper) Brussels, COM (2013) 231 final' (24 March 2013), p. 13-14. In this field, the Committee of Ministers of the Council of Europe recommended «Member States should: – ensure that any law, policy or individual request on de-indexing or filtering is enacted with full respect for relevant legal provisions, the right to freedom of expression and the right to seek, receive and impart information. (…) In addition, member States should work with search engine providers so that they: – ensure that any necessary filtering or blocking is transparent to the user». Council of Europe, Recommendation CM/Rec (2012) 3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines, adopted by the Committee of Ministers on 4 April 2012.

offer a personalized algorithm, or they could choose other search engines with different 'editorial policies' (i.e. different algorithms)[73].
Another problem concerns 'modal and content obligations': search engines are the first tool for spreading news that, because professional journalists are not involved, is heavily influenced by the circulation of *fake news*. Fake news is created and appears on websites that, by passing themselves off as sources of information, spread the fake news, letting their operators earn thousands of Euros per day[74].
In relation to this particular issue, many search engines have already been using their own publishing criteria (algorithms) to decrease the impact of fake news on searched content[75].
Governmental and social pressures have led the search engines to reveal their editorial role completely, but so far this is free of any form of empowerment. The possibility that some form of further regulation in this particular area may be necessary cannot be excluded, perhaps by requiring the removal (or rather de-indexing) of fake news sites after an order of a judicial or independent authority.
In conclusion, it can be argued that as search engines begin to be considered as true media, it is necessary to understand and regulate these mass media to ensure they are not free from all forms of liability or from the requirements to which information has always been tied. Minimum regulation should therefore be conceived for search engines in relation to the transparency of their algorithms and to the minimum content limits already identified by the Constitutional Court (especially in relation to so-called *fake news*).

2. The world of social networks: Facebook as the infrastructure through which information flows

The second problem to be analysed in this essay is the power of Facebook in the field of the distribution of information.
A series of preliminary warnings are needed. The first refers to the specific subject of this section, and concerns how Facebook works. The choice to focus only on Facebook and not on other social networks (Google+, Twitter, etc.) has been made because Mark Zuckerberg's social network is the most popular social network in Italy (and in the world)[76].

[73] It needs to be highlighted how «[a]cross all nations, the majority of people (54.5%) believe that search engines should prioritize objective news and information. A further third (35%) say that search engines should present a range of viewpoints in search results. This data indicates that, by and large, people want search engines to be objective in the presentation of information and do not wish for their personal viewpoints to be prioritized». W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 124. Concerning the Italian system the problem seems to be less relevant, since the Italian users seem to be more subjected to different viewpoints online: see W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 94.

[74] As reported by the Italian journalist F. Costa: F. Costa, *Questa notizia è clamorosa (ma falsa): è la bufala bellezza*, in *Il-Sole24Ore.com*, 26 April 2015. For a summary of the phenomenon in English see A. Higgins, M. Mcintire, G. J. X. Dance, *Inside a Fake News Sausage Factory: 'This Is All About Income'*, in *nytimes.com*, 26 November 2016.

[75] As reported by Redazione, *Google, nuovo algoritmo contro le fake news*, in *ansa.it*, 26 aprile 2017.

[76] See the statistics here reported: https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/. See for the Italian scenario: http://vincos.it/osservatorio-facebook/.

The second warning is that in this section we are interested in analysing neither the issue of Facebook's *trending topics*, as this falls within the previous section, i.e. the algorithm[77], nor in the specific aspect of the Facebook algorithm that determines what appears on the *News Feed* (the main interface for each individual user).

The subject of this section is the role of social networks as 'megaphones' for information[78]. This role is very clear from the data presented in the second section of this essay concerning the influence of social networks on the information market: «Facebook operates at a scale hitherto unseen. No publisher in the history of journalism has enjoyed the same kind of influence over the news consumption of the world»[79].

In this matter, the Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe claimed that «social media such as Facebook and online platforms for user-generated content such as Twitter and YouTube have emerged with market prominence as new online media (...) become the primary contact point for users seeking news»[80].

In relation to their nature as providers of 'information', it has been objectively proved that social networks react in a schizophrenic way: on the one hand, they hope (economically) to become the main source of *news*[81], but, on the other, they refuse to consider themselves as *media corporations*[82]. Hence, «[t]he people who built these platform companies did not set out to do so in order to take over the responsibilities of a free press. In fact, they are rather alarmed that this is the outcome of their engineering success»[83].

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[77] See in general E. Bakshy, I. Rosenn, C. Marlow, L. Adamic, *The role of social networks in information diffusion*, in *Proceedings of the 21st international conference on WorldWideWeb*, 2012, 519. «Social information streams, i.e., status updates from social networking sites, have emerged as a popular means of information awareness. Political discussions on these platforms are becoming an increasingly relevant source of political information, often used as a source of quotes for media outlets. Traditional media are declining in their gatekeeping role to determine the agenda and select which issues and viewpoints should reach their audiences. Internet users have moved from scanning traditional mediums such as newspapers and television to using the Internet, in particular social networking sites. Social networking sites are thus acting as gatekeeper». E. Bozdag, cit., 38. Cf. D.T. Nguyen, N. P. Nguyen, M. T. Thai, *Sources of Misinformation in Online Social Networks: Who to suspect?,* in Military Communications Conference, 2012-MILCOM, 2012.

[78] «We see players like Snapchat, Facebook, Twitter, Instagram, playing extraordinarily powerful roles in the dissemination and understanding of information in the world». Kate Crawford, Journalism + Silicon Valley Conference, YOU TUBE (Nov. 13, 2015), https://www.youtube.com/watch?v=0Qftw6VkDKQ (at 52:30). How it is reported by E. C. Carroll, *Making News*, op. cit., p. 16. Cf. S. Goel, D. J. Watts, D. G. Goldstein, *The structure of online diffusion networks*, in *Proceedings of the 13th ACM Conference on Electronic Commerce*, 2012, 623.

[79] E. Bell, T. Owen, cit., 18.

[80] Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 5.

[81] «These companies' CEOs are unabashed in expressing their ambition that their platforms will be the key place we find news in the future. Facebook's Zuckerberg hopes that his company will provide "the primary news experience people have." Similarly, Twitter's CEO Jack Dorsey recently told Vanity Fair, "I want people to wake up every day and the first thing they check is Twitter in order to see what's happening in the world." The companies' news ambitions are evident». E. C. Carroll, *Making News*, cit., 13.

[82] «No, we are a tech company, not a media company (...) We build the tools, we do not produce any content». *Facebook CEO: 'We're a technology company. We're not a media company.'*, CNN tech. http://money.cnn.com/video/technology/2016/08/29/facebook-ceo-were-a-technology-company-were-not-a-media-company-.cnnmoney/.

[83] E. Bell, *Facebook is eating the world*, cit.

However, it should be noted that in recent months, after the clamour triggered by the influence of *fake news* in the US election, Facebook has also begun to consider itself as a *media corporation*[84].

Nowadays the problem is therefore related to this social network in its role as a 'mouthpiece': while it is true that Facebook does not directly produce news and information, it is now actually one of the main tools for spreading news. «Yet Facebook is, without doubt, the largest publishing company in the world. With 1.9 billion active users and 2 trillion searchable posts, the platform reaches more people than any media organization in history»[85].

It is necessary, first, to specify how information is spread on Facebook. Information on Facebook circulates either in the 'traditional' way, through Facebook pages dedicated to the spread of news (such as newspaper pages or the profiles of journalists), or by means of individual users sharing articles from external sites on the social network. Indeed, a single user may decide to share with his own contacts ('friends') an article taken from a blog, an online edition of a newspaper, or any other website. It is in this latter way that so-called counter-information circulates: thanks to Facebook, some websites that, if they depended on the above algorithms, would be basically inaccessible by users who did not know of them (finding themselves, for example, on the thirtieth page of the results), can reach a wide and heterogeneous audience. News that is spread in this way can in turn be re-shared by the 'friends' of the user who posted it for the first time, and can also become viral[86]. This potentially allows even the smallest blog or digital newspaper to reach an audience whose size would have been unthinkable in the old world of information. The impact of this tool for so-called counter-information is very important, but the dark side is linked to the transformation of journalism into the *new media* of the Internet: in addition to counter-information, *fake news* can also be widely spread. The problem is that, while giving visibility to information organs that in the past were economically relegated to the corners of public discourse, Facebook does not assume, as it has been seen, any form of responsibilities as media: the absence of controls leads to the spread of fake news.

Passing on to Facebook's media problem, it is first necessary to point out how, from the point of view of internal pluralism and in accordance with the paradigm of American free-

[84] «The two most discussed concerns this past year were about diversity of viewpoints we see (filter bubbles) and accuracy of information (fake news). I worry about these and we have studied them extensively, but I also worry there are even more powerful effects we must mitigate around sensationalism and polarization leading to a loss of common understanding. Social media already provides more diverse viewpoints than traditional media ever has. (..) Compared with getting our news from the same two or three TV networks or reading the same newspapers with their consistent editorial views, our networks on Facebook show us more diverse content». M. Zuckerberg, *Building Global Community*, 16 February 2017, Facebook note.

[85] E.Bell, T.Owen, cit., 59.

[86] W. Lee Howell, *Digital wildfires in a hyperconnected world*, in *Report Global Risks 2013*, 2013, 23. F. Vis, *The rapid spread of misinformation online*, in *Outlook on the Global Agenda 2014*, 2014, 28a. About the misinformation: Vv.Aa., *Viral Misinformation: The Role of Homophily and Polarization*, in *Proceedings of the 24th International Conference on World Wide Web*, New York, 2015, 335. Cf. Vv.Aa., *Collective attention in the age of (mis)information*, in M. Lytras, H. Mathkour, C. Yanez-Marquez, S. Siqueira, P. Jin, W. Al-Halabi (eds.), *Computers in Human Behavior*, 2015, 1198.

dom of expression, Facebook does not seem to have set up content filters to restrict certain ideologically-orientated news from circulating on social networks. There is therefore no question of internal pluralism, as it seems that Facebook can currently be considered to be a neutral instrument[87]. This statement is valid as long as the analysis of the algorithm – which will not be studied here – is excluded, as it allows the visibility of the news appearing in the *News Feed* to be based on interactions with certain 'friends' or 'pages' or sponsorships. In this matter, another issue still needs to be discussed: the phenomenon of so-called *Echo Chambers*[88]. When they are on social networks, individuals tend to be exposed to information and political ideas coherent with their existing beliefs, with a consequent increase in the polarization of groups in society. Echo Chambers are connected with the concept of *self-selected personalization*[89], i.e. the choice by an individual to subject him or herself solely to the opinions of people who think like him or her. This last characteristic of an Echo Chamber makes the issue less relevant from a legal point of view: group polarization also takes place offline (where individuals can choose to be party to a unique and homogenous political viewpoint), and, in addition, the online phenomenon of an Echo Chamber does not seem to be as dangerous as has been suggested[90] (and this seems to be particularly true for Italians users)[91].

From the point of view of external pluralism, the non-problematic nature of the *de facto* monopoly of Facebook can be noted; this will continue while the neutral nature of the

[87] Concerning the *Trending topics*, Gizmodo revealed in May 2016 that Facebook's Trending Topics "suppressed" conservative news. Facebook published an internal guideline for staff curating Trending Topics and responded to Congress Republicans. Finally Facebook decided to not use external websites to validate a story's importance. See E. Bell, T. Owen, cit., 64. «There are also claims that Facebook denies and removes advertisements designed for gay audience with no nudity or sexual content, labeling it "inappropriate". Others claimed that Facebook labeled their posts containing links to a political activism site as spam and prevented the users disseminating this information. Facebook has also removed pages because of offensive content, but later reinstated them». E. Bozdag, cit., 23. The Committee on Culture, Science, Education and Media has stressed that «Former Facebook employees allegedly admitted in an online media outlet in May 2016 having manipulated content politically, but the Vice-President of Search at Facebook responded in a post to this online story that they had found no evidence that the anonymous allegations were true». Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe, Report doc. 14228, 09 January 2017, 9.

[88] C. R. Sunstein, *Republic.com 2.0.*, Princeton, 2007.

[89] «Self-selected personalisation concerns situations in which people choose to encounter likeminded opinions exclusively. For example, a person who opposes immigration might want to avoid information that specifies how much a country has gained due to immigration, while paying a lot of attention to news stories about problems related to immigration. People tend to avoid information that challenges their point of view, for example by avoiding news outlets that often feature editorials that favour an opposing political camp». F. J. Zuiderveen Borgesius, D. Trilling, J. Moeller, B. Bodó, C. H. de Vreese, N. Helberger, cit., 3. Cf. idem, 7. «In its press outreach, Facebook has emphasized that "individual choice" matters more than algorithms do». E. Bozdag, cit., 5. Cf. W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 127 e D. Nikolov, D. F. M. Oliveira, A. Flammini, F. Menczer, *Measuring Online Social Bubbles*, in *PeerJ Computer Science*, 2015.

[90] See W. H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, op. cit., p. 5, regarding the necessity to consider the whole media system. In addition, «[o]ver three-fourths of our respondents (79%) say they sometimes, often, or very often, read something they disagree with (Table 4.27)» (Idem, 89).

[91] «Respondents in Italy report the most diverse political opinions among people they communicate with online. Seven in ten (71%) say the people they communicate with have mixed beliefs, which is the highest among all countries, and only 13 percent say they have similar beliefs, which is the lowest among all countries». W.H.Dutton, B.C. Reisdorf, E. Dubois, G. Blank, cit., 170.

platform is maintained. The *de facto* monopoly of Facebook, however, leads to a need to investigate the substantive profile of this mass media network, in terms of 'content and modal obligations', namely obligations related to impartiality and the objectivity of information, which are indispensable in a monopoly context.

From this point of view, Facebook has been particularly concerned with problems of *fake news* being given space, especially on social networks. The argument being put forward in this essay is that there is an inherent need for some form of regulation of this 'sounding board', in accordance with the content and modal obligations in relation to means of distribution of news under the Italian legal system. The direct non-production of news by Facebook cannot be considered as an excuse for Facebook not to be deemed to be a 'means of information': it would thus be risky to rely on a paradigm conceived for the pre-digital era and to ignore the progress made by technology. If this were the case, the national law would be turning its back on the dominance of a very important part of the information world. It is obvious that the traditional paradigm needs to be remodelled, for example in relation to the regime for a publisher's responsibility, but it is equally evident that these new forms of mass media cannot remain free of regulation. The role that Facebook will play in the future will in fact be in direct competition with the most pervasive traditional media, such as radio and television. «The latter may still filter news for the general public, but the alternative *social networking* threatens them because it selects precisely those people who escape *mainstream* information for intellectual curiosity or programmatic suspicion»[92]. The capillary spread of information through social networks seems to be even wider than the spread of information through television, given the diffusion of smartphones. Therefore, the reminder of the Constitutional Court of the need to regulate the most pervasive media should be recalled[93]: if in the past television came into the living rooms of Italians, today the same can be said for the social networks that accompany us wherever we go with our smartphones.

The nature of the instrument means that the main problem, as has been said, is the spread of *fake news*[94], and this is correlated with a series of social phenomena such as the so-

[92] F. Colombo, *Web 2.0 e democrazia: un rapporto problematico*, in P. Aroldi (eds.), *La piazza, la rete e il voto*, Roma, 2014, 30, 33 (My own translation, MM).

[93] See note no. 33.

[94] «The election results reverberated throughout Facebook, and caused a significant volte-face in its attitude towards its associations with journalism. In encouraging news businesses to make fuller use of Facebook as a distribution outlet, Facebook had in turn opened up publishing tools to everyone else too. While the rapid spread of misinformation on Facebook certainly represented a discrete problem during the election, it is also indicative of a much larger structural problem caused by the economic model and system of automation that lies at the core of Facebook». E.Bell, T.Owen, op. cit., p. 58.

called *social cascade*[95], *group polarization*[96], the role played by *prior convictions*[97]. and finally what seems to be a *collective credulity* about Internet content[98].

Obviously, any regulation cannot be based on the same rules of control, as social networks do not produce the information that they disseminate, but only provide a 'sounding board' for third party content. However, this does not mean that social networks should not be subject to forms of empowerment in relation to fake news.

The need for regulation has also been claimed by the Parliamentary Assembly of the Council of Europe, which recognized the attempts made by social networks to counter the spread of fake news[99]. The Parliamentary Assembly also recommended that governments «should co-operate with online media and internet service providers in order to set up codes of conduct which are inspired by the code of conduct countering illegal hate speech online agreed upon by the European Commission and major internet companies on 31 May 2016»[100].

Facebook itself is today increasing the action it takes to counter fake news: in the experimental phase in the United States, there is an active reporting system, the so-called *Fact-Checking Partnership*[101].

The system, which highlights how governments are pushing Facebook into self-empowerment, works through individual users reporting potential fake news and later through *fact-checking* agencies working under Facebook's control. Once the fake news has been identified by two of these agencies, Facebook reports the news as 'disputed' content. The mechanism is, however, ineffective in its current state of development, because it is not able to reach all Facebook users who have interacted with a fake news story on the social network before fact-checking has taken place. To be effective, the correction (rectification) could use other types of tools,

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[95] Cf. C. Sunstein, *On Rumors: How Falsehoods Spread, Why We Believe Them, and What Can Be Done*, Princeton, 2014, 97-102.

[96] Cf. C. Sunstein, *On Rumors,* cit., 50 and ff.

[97] Cf. C. Sunstein, *On Rumors,* cit., 75 and ff.

[98] Cf. Vv.Aa., *Collective attention in the age of (mis)information*, cit.

[99] «The Assembly welcomes the fact that large online media have established a policy whereby users can identify factual errors or factually false posts by third parties on their websites, such as on Facebook News Feed or through Google's "webpage removal request tool". Credibility and reliability of online media require that they remove or correct false information». Parliamentary Assembly of the Council of Europe, Online media and journalism: challenges and accountability, Resolution 2143 (2017), 2. (Provisional version).

[100] Parliamentary Assembly of the Council of Europe, Online media and journalism: challenges and accountability, Resolution 2143 (2017), 2. (Provisional version).

[101] M. Isaac, *How Facebook's Fact-Checking Partnership Will Work*, in *nytimes.com*, 15/12/2016. Cf. G. Pennycook, T. Cannon, D. G. Rand, *Prior Exposure Increases Perceived Accuracy of Fake News* (April 30, 2017), in *SSRN: https://ssrn.com/abstract=2958246*, 2017

This operation of Facebook seems coherent with what was suggested by EISPA in Europe: «the European Internet Services Providers Association call on its members which provide social media, search engines and news aggregators: 12.3.3. to voluntarily correct false content or publish a reply in accordance with the right of reply or remove such false content». Parliamentary Assembly of the Council of Europe, Online media and journalism: challenges and accountability, Resolution 2143 (2017), 3. (Provisional version)

such as a notification on a user's *News Feed* or *Wall*, and as a consequence a user who had interacted with fake news, by 'liking' it or sharing or commenting on it, would be aware that he or she had read fake news. Even this solution would not reach all users that had read the fake news – because it could not reach users who had not interacted with the news – but a large majority of them could be reached. This system would allow fake news to be corrected by the same use of social networks, and it would help the marketplace of ideas[102] to react to fake news without the use of criminal provisions or censorship.

Regardless of the effectiveness of the solution, however, it must be pointed out that the problem created by this system severely affects the principle of the neutrality of Facebook, even *prima facie*, since the selected fact-checking agencies, as has been highlighted by some Italian journalists, are politically oriented[103]. A possible application of this type of control in Italy would be partially in conflict with the constitutional principle of impartiality.

Just this further evolution of the system would impose the need for regulatory intervention: on the one hand, it would be necessary to ensure there were effective ways to assure people about content (by requiring social networks to have effective means to rectify fake news, such as by notifying the users who had interacted with it of its false nature) and on the other hand it would be equally necessary to ensure the impartiality and neutrality of the control system (e.g. through bipartisan fact-checking agencies, the Order of Journalists or independent authorities)[104].

Removing or correcting fake content (which ranges from mere fake news to the most serious type of defamation) should still require some form of public control: as with television[105], the right to demand rectification needs the fake content to be detected by an independent authority, so even for Facebook a similar solution might be possible. All other things being equal, additional forms of social network empowerment do not appear to be necessary or appropriate (except for a form of liability if a request for rectification is not met). «If Facebook is going to function as the new social arbiter of trust, replacing a role

[102] «According to the champions of the free market of ideas metaphor, since by definition scarcity of resources is an analogue and not a digital limit, with the result that there is no need to protect pluralism of information on the internet, legal rules (and especially public law) should take a step back in the name of the alleged self-corrective capacity of the information market. Just as the economic market knows no test of product "validity" but allows demand to drive supply, relying on the market to distinguish between viable and shoddy products, the best way of dealing with the phenomenon of fake news in the information market is to secure the widest possible dissemination of all news, including news from contradictory and unreliable sources. The thesis is not so convincing». O. Pollicino, *Fake News, Internet and Metaphors (to be handled carefully)*, in *MediaLaws Rivista di diritto dei media*, 1, 2017, 24.

[103] D. Scalea, *Perché il fact-checking di Facebook resterà politicamente orientato*, in *ilfoglio.it*, 18/12/17. It is true that *fact-checkers* must have subscribed the "Poynter's non-partisan code of principles", but this does not to seem a good warranty in a so delicate matter.

[104] As stressed, it is very important the «credibility of the source of the correction» (C. Sunstein, *On Rumors,* op. cit., 75 and 80).

[105] See note no. 31. Consider that for television the intervention of the independent authority is merely hypothetical (right to appeal in case of refusal to correct fake news) because in newscasts journalists collect and distribute news, and journalists have a duty to report the truth and promptly correct any falsehood (as a consequence, they refuse to correct falsehood when the truth is disputed).

journalism has, however imperfectly, long served, then they will need to both counter the spread of misinformation and encourage the spread of journalism based in fact. They will simply need to begin making editorial decisions»[106].

Regardless of the circulation of information on social networks, it is important to note that Facebook is now also a distributor of news from traditional media that, in addition to their digital platforms, must also develop forms of social communication in order to compete in the information market[107]. The problem arises particularly in the US, where *Instant Articles* give rise to the following problem: «[t]he platform decides who to offer contracts to, and publishers must commit to performance terms»[108]. Further regulation in this case should perhaps be considered.

V. Final Remarks

There is currently a complex scenario in which big corporations are playing a central role in the spread of information: «Search engines and social media, which are widely available and used among citizens (…) would have a strong influence on how they find, consume, and share information, which would lead them to form a certain political opinion that leads to a certain vote»[109]. In this scenario it seems unavoidable that the new Internet media are defined as information media, even though they cannot be traced back to the traditional paradigms. As has been shown, this awareness is very clear in the world of journalism, but less clear in the world of law: the lawyer reasons according to his own categories and this is particularly evident in the field of new media and the Internet. The problem is that, as would be expected, with the mid-twentieth and pre-digital media categories the law cannot fully understand the new realities, and there is a risk that the digital technology distorts and irremediably pulls the public discourse: «Online information intermediaries, similar to the traditional media, can control the diffusion of information for millions of people, a fact that gives them extraordinary political and social power. They do not provide equal channels for every user and they are prone to biases»[110]. The «*Remediation* »[111] has already hap-

[106] E. Bell, T. Owen, cit., 77.

[107] «While publishers all need to have a presence across a broad range of platforms, how they distribute their content—and, in particular, the amount they "give away" to platforms in the form of native content—differs considerably». E. Bell, T.Owen, op. cit., 28.

[108] E. Bell, T.Owen, cit., 33.

[109] H. Dutton, B. C. Reisdorf, E. Dubois, G. Blank, cit., 112.

[110] E. Bozdag, cit., 21. «The recent push to develop tools for flagging misinformation and digital literacy campaigns are important initiatives and signal that platform companies are beginning to engage with problems they have long avoided (..) But these types of initiatives are limited by their detachment from the structural problems inherent in the platform ecosystem. Namely, the near dominance of Silicon Valley ideology, the pernicious effect of adtech economics, and the opacity of automation». E. Bell, T.Owen, cit., 81.

[111] J. D. Bolter, R. Grusin, *Remediation: Understanding New Media*, Cambridge, 1999.

pened and will have enormous effects, as has been seen. In this context, it is particularly useful to look at the United States of America where, because large Internet corporations are located there, some phenomena that have not yet arrived in Italy are already developing (think of Facebook *Instant Articles* or the *Fact-Checking Partnership*) and a vigorous debate on *new media* is emerging. The opening of a serious debate about the regulation that should be developed and its subsequent enforcement seems to be unavoidable.
Moreover, although the political class (even for older questions) has ignored the issue for a long time, the situation today appears to be changing, at both the national and the EU level. The generational factor is, moreover, leading to a change of pace, as has been seen.
The communicative force of the new Internet media recalls the observation of the Constitutional Court or, rather, the Court's reasoning in relation to the need to ensure some form of regulation for the most pervasive media: «[I]t is well known and consistent in the case law of this Court, the acknowledgment of the peculiar diffusion and pervasiveness of the television message (judgment No 225 of 1974, No 148 of 1981, No 826 of 1988), so as to justify the adoption, strictly of broadcasting station, of a rigorous discipline capable to prevent any inappropriate conditioning in the formation of the will of the voters»[112]. If this is true for television, such a warning can also be extended to the Internet media.
This paper has suggested the regulation of the new media according to their specific nature. Concerning the search engines' algorithms, and given the existence of forms of pluralism and anti-trust laws, the main problem is to ensure the transparency of the algorithm according to which the search engines select the news. Thus, search engines should be obliged to tell users about the type of algorithm they use in searching news. As regards Facebook, all other things being equal, the actual and current problem concerns the spread of fake news, and this could be resolved through the application of the aforesaid mechanism of correcting false facts.
It seems inevitable today that forms of regulation will be built that act in relation to both pluralism and content, since the press is «the bible of democracy, the book out of which a people determines its conduct»[113].

[112] Constitutional Court, judgement no. 155/2002 (My own translation, MM).
[113] W. Lippmann, *Liberty and the news*, New York, 1920, 47.

Articles

Orphan Drugs under EU Competition Law: The Price is not Right

Andrea Parziale*

Abstract

In principle, pharmaceutical producers lack the incentives to develop orphan drugs, i.e. medicines intended to treat rare diseases. Regulation (EC) n. 141/2000 addresses the issue, providing orphan drug producers with accelerated approval, tax benefits, and a ten-year market exclusivity period. Today, orphan drug prices are extremely high and are set independently of ordinary pharmaceutical pricing criteria. Consequently, some scholars suggest that a competition law action for unfair prices under Art. 102, let. a, TFEU may be warranted. This paper claims that the prohibition of abuse of dominant position could play a role in reducing orphan drugs' prices. First, it is shown that market exclusivity provides orphan drug manufacturers with a dominant position in their reference markets. Then, the paper applies and adapts the excessive price test developed by the ECJ to orphan drugs. Civil liability could also play a role, by compensating the damages suffered by NHSs. Finally, recent enforcement developments in the EU concerning excessive prices of medicines confirm the potential role of competition law in curbing orphan drug prices.

Keywords

Competition Law – Orphan Drugs Pharmaceutical Regulation – Pharmaceutical Pricing – Reimbursement Regimes – Abuse of Dominant Position – Unfair Prices – Civil Liability

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1. Introduction

Quod ideo dico quia iustum pretium rerum quandoque non est punctaliter determinatum, sed magis in quadam aestimatione consistit, ita quod modica additio vel minutio non videtur tollere
Thomas Aquinas

Orphan drugs, i.e. medicinal products aiming at treating rare diseases, run the risk of being neglected by pharmaceutical companies, as the low demand for these products would not allow pharmaceutical producers to obtain a sufficient return on capital. This may lead to a market failure, where a lack of economic incentives leaves determinate categories of patients without valid therapeutic treatments[1].
As a result, several legal systems have adopted *ad hoc* incentive regulations[2] to make pharmaceutical companies occupy market sectors that a mere profit-led logic would leave untouched. Such a goal, as we will see *infra*, par. 2, has been pursued via many different incen-

[1] Berman, *Rare Diseases and Orphan Drugs*, London, 2014; Hernberg-Ståhl and Reljanović, *Orphan Drugs: Understanding the Rare Disease Market and its Dynamics*, Cambridge, 2013; *Orphan Drugs and Rare Diseases*, ed. by Pryde and Palmer, Cambridge, 2014; Jackson, *Medical Law: Text, Cases, and Materials*, Oxford, p. 510; Coté, Xu and Pariser, *Accelerating Orphan Drug Development*, in *Nat. Rev. Drug. Discov.*, 2010, 9, p. 901.

[2] Cafaggi and Muir Watt, *The Regulatory Function of European Private Law*, Cheltenham-Northampton 2009; Follesdall *et alii*, *Multilevel Regulation and the EU*, Leida, 2008; Schepel, *The constitution of private governance: product standards in the regulation of integrating markets*, EUI, Florence 2003.

tivizing methods, in particular through forms of market exclusivity in favor of the producer. However, empirical evidence (see *infra*, par. 3) shows that pharmaceutical companies, within the fragmented landscape of EU medicine pricing and reimbursement regimes, manage to sell orphan drugs at very high prices, compared to those set for common drugs. As these prices are set independently of ordinary pricing criteria, some legal scholars maintain that this phenomenon might fall under the scope of an abuse of dominant position, consisting in the setting of excessive prices, under Art. 102, let. *a)*, TFEU (see *infra*, par. 4).

This paper aims at developing this starting idea, hypothesizing that EU competition law may contribute to reducing orphan drug prices, in an attempt at striking the balance between the general interest in incentivizing pharmaceutical companies to produce drugs for rare diseases and the as general interest in affordable prices for National Health Systems (hereinafter, NHSs).

From this point of view, while par. 5 shows that orphan drug producers hold a dominant position in the relevant reference market, par. 6 reconstructs the test, developed by the EU Court of Justice (hereinafter, EUCJ) case law, according to which a product's price can be deemed abusive "in itself" or compared to competing products' prices. Then, by applying such a test to the case of orphan drugs, the paper identifies several possible lines of intervention for competition law (see *infra*, par. 7 and 8). It will be shown that a "comprehensive" approach to studying orphan drug regulation, in the frame of pharmaceutical regulation at large, may help the interpreter apply the unfair price test to the market sector at issue.

Our hypothesis is that such an approach could pave the way to an action under Art. 102 TFEU in this field. In fact, competition law could impose a reduction in the prices of orphan drugs as well as monetary sanctions having deterrent effects towards both the undertaking and the pharmaceutical industry at large (see *infra*, par. 9). In addition, civil liability could also play a role, by compensating the monetary damages suffered by NHSs due to publicly funded reimbursement of excessive prices (see *infra*, par. 10).

The considerations developed by the article seem to be supported by recent enforcement developments in excessive pricing (and pharmaceuticals) in Italy and at the EU level (par. 11).

Eventually, the conclusive par. 12, on one hand, summarizes the results of this analysis, which is conducted with a black letter method and with reference to relevant economic background information[3]. On the other hand, it identifies some research questions that should be furtherly developed.

These reflections are aimed at striking the balance between the need for ensuring the sustainability of public pharmaceutical expenditure and the need for offering sufficient incentives to pharmaceutical production. An excessive reduction in orphan drugs' prices

[3] EFPIA (European Federation of Pharmaceutical Industries and Associations), *The Pharmaceutical Industry in Figures*, Key Data, 2014; European Commission, *Pharmaceutical Industry: A Strategic Sector for the European Economy*, Bruxelles, August 2014; Ding, Eliashberg and Stremersch, *Innovation and Marketing in the Pharmaceutical Industry: Emerging Practices, Research and Policies*, New York 2014.

could take away any economic interest in producing this kind of products. Rather, the aim of this research line should be to coordinate regulation, competition law, and civil liability to contribute to a more effective protection of patients' health.

2. Economic problems of orphan drugs and incentive regulations in the USA and the EU

The lack of sufficient profit motives to develop medicinal products for rare diseases has led several legislators to introduce incentivizing measures.
In subjecta materia, the reference model is the US *Orphan Drug Act* (hereinafter, *ODA*)[4], whose par. 316.3 (*b*), (10)[5] defines orphan drugs as medicinal products intended to treat diseases concerning less than 200,000 people in the US or a disease that does not offer producers a reasonable expectation that R&D costs will be recovered through the sales of the product in the US market.
The *ODA* provides orphan drug producers with three main incentives. In the first place, federal funds support clinical trials[6]. In the second place, R&D costs benefit from wide tax exemptions[7]. In the third place, producers are granted with a 7-year market exclusivity period starting from the day on which the marketing authorization is issued by the competent public authority (in the US, the Food and Drug Administration, FDA)[8].
Following the example of the US *ODA*[9], the EU has established a largely similar legal framework with reg. (CE) n. 141/2000, which defines as "orphan" those drugs intended to treat a condition concerning no more than 1 in 10,000 people in the EU or a condition unlikely to offer sufficient economic incentives with reference to the initial investment [Art. 3, par. 1, let. *a)*, reg. (CE) n. 141/2000]. Moreover, there must not be an already author-

[4] *National Organization for Rare Disorders* (v. *Rare Diseases and Orphan Products: Accelerating Research and Development*, ed. by Boat and - Field, Washington 2011, p. 24).

[5] «*Orphan-drug designation means FDAs act of granting a request for designation under section 526 of the act*». According to par. 526, (2) *ODA*, «*[f]or purposes of paragraph (1), the term "rare disease or condition" means any disease or condition which (A) affects less than 200,000 persons in the United States, or (B) affects more than 200,000 in the United States and for which there is no reasonable expectation that the cost of developing and making available in the United States a drug for such disease or condition will recovered from sales in the United States of such drug. Determinations under the preceding sentence with respect to any drug shall be made on the basis of the facts and circumstances as of the date the request for designation of the drug under this subsection is made*».

[6] Par. 5 (*Grants and Contracts for Development of Drugs for Rare Diseases and Conditions*).

[7] Par. 4 (*Tax Credit for Testing Expenses for Drugs for Rare Diseases or Conditions*). See Rohde, *The Orphan Drug Act: an engine of innovation? At what cost?*, in *Food Drug Law Journal*, 2000, 55, 1, p. 125-143.

[8] Par. 527 (*Protection for Unpatented Drugs for Rare Diseases or Conditions*). See Yin, *Market incentives and pharmaceutical innovation*, in *Journal of Health Economy*, 2008, 27, p. 1060-1077.

[9] Art. 77-2, *Pharmaceutical Affair Law*, 1993.

ized method of diagnosis, prevention, or treatment for that condition or, if such a method exists, the medicinal product concerned must have a significant impact on those suffering from the abovementioned condition [Art. 3, par. 1, let. *b)*, reg. (CE) n. 141/2000]. For a drug to qualify as orphan, the producer ought to submit a request to the European Medicines Agency (EMA). Then the latter, after the positive evaluation of the Committee for orphan medicinal products, submits the dossier to the Commission for the final decision to be adopted. [Art. 5, reg. (CE) n. 141/2000].

The orphan drug marketing authorization is subject to a centralized procedure, which is valid across the EU [Art. 7, reg. (CE) n. 141/2000; whereas n. 7-8, reg. (CE) n. 726/2004]. Orphan drugs are part of the mandatory scope of the centralised procedure (Article 3). In addition, Art. 2, n. 3, reg. (CE) n. 507/2006 allows producers to get the conditional marketing authorization of an orphan drug, if, even in lack of complete clinical data about its safety and efficacy, the conditions provided by Art. 4, reg. (CE) n. 507/2006 are met[10]. Likewise, Art. 14, n. 9, reg. (CE) n. 726/2004 provides that «when an application is submitted for a marketing authorisation in respect of medicinal products for human use which are of major interest from the point of view of public health and in particular from the viewpoint of therapeutic innovation, the applicant may request an accelerated assessment procedure». Therefore, if the request is accepted, the deadline for the opinion of the Committee for medicinal products for human use to be issued is reduced from 210 [Art. 6, n. 3, par. 1, reg. (CE) n. 726/2004] to 150 days. It is worth noting that conditional marketing authorization and accelerated assessment are not mutually exclusive.

After the release of the marketing authorization, the main incentive orphan drug producers are provided with is a 10-year market exclusivity. Over this period, under Art. 8, n. 1, reg. (CE) n. 141/2000, the EU and the Member States cannot accept any marketing request for similar drugs treating the same condition[11]. Yet, the EMA can reduce the length of the market exclusivity period to 6 years, on condition that the product concerned is sufficiently lucrative. In addition, producers can ask for scientific advice and protocol assistance to perform clinical trials and develop the drug at issue (Art. 6, reg. (CE) n. 141/2000). Eventually, «medicinal products designated as orphan medicinal products under the provisions of this Regulation shall be eligible for incentives made available by the Community and by the Member States» (Art. 9, reg. (CE) n. 141/2000)[12].

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[10] «a) [T]he risk-benefit balance of the medicinal product, as defined in Article 1(28a) of Directive 2001/83/EC, is positive; (b) it is likely that the applicant will be in a position to provide the comprehensive clinical data; (c) unmet medical needs will be fulfilled; (d) the benefit to public health of the immediate availability on the market of the medicinal product concerned outweighs the risk inherent in the fact that additional data are still required ».

[11] EU Commission, Communication n. 4077/2008 (*Guideline on aspects of the application of Article 8(1) and (3) of Regulation (EC) No 141/2000: Assessing similarity of medicinal products versus authorised orphan medicinal products benefiting from market exclusivity and applying derogations from that market exclusivity*).

[12] . T. Gammie – C.Y. Lu – Z.U. Babar, *Access to Orphan Drugs: A Comprehensive Review of Legislations, Regulations and Policies in 35 Countries*, in *PLoS One*. 2015 Oct 9; 10(10):e0140002. doi: 10.1371/journal.pone.0140002.

Since these incentive regulations were enacted, orphan drug marketing authorizations have been increasing significantly both in the USA and in the EU[13].

3. Pricing and reimbursement of orphan drugs in the EU: the risk of excessive prices

When an orphan drug enters the market, it is necessary to refer to the applicable pricing and reimbursement mechanisms.

Orphan drug pricing in the EU follows the same rules as common drug pricing. Price and reimbursement are exclusive competence of the Member States. At the European level, dir. n. 105/1989/CEE and dir. n. 2011/24/UE only provide for a general principle of transparency in the negotiations between public authorities and pharmaceutical companies, whereas enforcement of specific rules is reserved to national legislations. From this viewpoint, Member States adopt many different pricing mechanisms, belonging to either a free-price model (such as in Germany) or a fixed-price one (such as in Italy).

Fixed price systems are based on State intervention in drug pricing. For instance, in Italy it is the Italian Agency for Medicinal Products (*Agenzia Italiana del Farmaco*, AIFA) that holds the competence to determine reimbursed drugs' prices through a bargaining process involving producers[14]. Likewise, in the French system prices are fixed or free if the relative drug is reimbursed or not, respectively[15].

Reimbursement mechanisms are subject to national competence, too. In Germany, for instance, drugs are reimbursed automatically after being granted marketing authorization, besides some exceptions, that do not usually include orphan drugs[16]. The German reimbursement system is based on a reference price mechanism, according to which the amount to be reimbursed is determined based on the prices set for comparable drugs[17].

[13] *Global Markets for Orphan Drugs*, BBC Research 2010 (http://www.bccresearch.com/market-research/pharmaceuticals/orphan-drugs-market-phm038c.html); *Evaluatepharma Orphan Drug Report* 2014 (http://info.evaluategroup.com/od2014-lp-ep.html); *Global Orphan Drug Market to Reach US$ 120 Billion by 2018*, in PRNewswire, 7th February 2014 (http://www.prnewswire.com/news-releases/global-orphan-drug-market-to-reach-us-120-billion-by-2018-244195511.html).

[14] See Italian law 24th November 2003, n. 326; AIFA, *Negoziazione e rimborsabilità*, http://www.agenziafarmaco.gov.it/it/content/negoziazione-e-rimborsabilit%C3%A0). Giorgetti, *Legislazione e organizzazione del servizio sanitario*, Rimini 2010, p. 182; Silano, *Medicinali di uso umano: aspetti economici, normativi, procedurali e tecnici*, Milan 2001, p. 492; Auteri, *Il mercato del farmaco. Tra andamenti e prospettive*, Padova, 2013, p. 77; *Eppur si muove: come cambia la sanità in Europa, tra pubblico e privato*, ed. by Pellisero and Mingardi, Turin 2010, p. 85; *Disciplina degli acquisti di servizi e beni nelle aziende sanitarie*, ed. by Bottari, Rimini 2013, p. 145.

[15] Sauvage, *Pharmaceutical pricing in France: a critique*, in *Eurohealth*, 2008, vol. 14, n. 2, p. 6-8.

[16] *Sozial Gesetzbuch*, V, par. 34.1. V. Paris – E. Docteur, *Pharmaceutical Pricing and Reimbursement Policies in Germany*, 2008, n. 39, OECD Publishing, p. 10 ss. doi: http://dx.doi.org/10.1787/228483137521.

[17] Herr and Suppliet, *Co-Payment Exemptions and Reference Prices: an Empirical Study of Pharmaceutical Prices in Germany*, HEDGE, York University, 2012, July, p. 4-6. Disponibile su http://www.york.ac.uk/media/economics/documents/

However, since an orphan drug, by definition, does not have comparable products, its price is usually fully reimbursed[18]. On the contrary, in France, drugs are reimbursed according to their "medicinal value", which means that almost all orphan drugs are reimbursed[19]. Finally, in Italy, orphan drugs are usually reimbursed by AIFA, since drugs of this kind are authorized to treat conditions lacking valid therapeutic alternatives[20].
In sum, while in a minority of Member States pharmaceutical producers can freely set the orphan drug's price, in the remainder they must bargain with public monopsonies. In addition, NHSs usually reimburse almost all orphan drugs[21]. Consequently, the fact that producers can set very high prices for orphan drugs greatly contributes to the unsustainability of public pharmaceutical expenditure across Europe[22].
In fact, the relevant regulatory framework provides for an interesting reaction tool. Under Art. 8, n. 2, reg. (CE) n. 141/2000, EMA could reduce the market exclusivity period to 6 years, as long as the product is deemed sufficiently lucrative. However, EU institutions have adopted a self-restraint policy, fearing that the exercise of such a power could curtail the economic incentives to develop orphan drugs. In addition, empirical studies show that, even after the end of the market exclusivity period, there is no potential competition able to drive prices down, given the low level of demand for the product concerned[23]. Therefore, the reduction of the market exclusivity period would prove to be largely ineffective.

4. The role of Art. 102 TFEU: abuse of dominant position

In sum, market regulation alone does not offer sufficiently effective reaction tools vis-à-vis orphan drugs' extremely high prices. From this standpoint, *Eurordis*, the European organization for rare diseases, in its study *How much is a life worth? How Swedish patients*

herc/wp/11_18.pdf.

[18] Garau and Mestre-Ferrandiz, *Access Mechanisms for Orphan Drugs: A Comparative Study of Selected European Countries*, in OHE Briefing, November 2009, p. 6 (https://www.ohe.org/publications/access-mechanisms-orphan-drugs-comparative-study-selected-european-countries).

[19] Gammie, Lu and Babar, *Access to Orphan Drugs*, see note n. 12.

[20] Folino-Gallo, Montilla, Bruzzone and Martini, *Pricing and reimbursement of pharmaceuticals in Italy*, in *European Journal of Health Economics*, 2008, 9, p. 305-310.

[21] J.C.P. Roos *et alii*, *Orphan drug pricing may warrant a competition law investigation*, in *BMJ* 2010;341:c6471, doi: http://dx.doi.org/10.1136/bmj.c6471 (17th November 2010).

[22] de Varax, Letellier and Börtlein, *Study on orphan drugs: phase I – overview of the conditions for marketing orphan drugs in Europe*, Alcimed report n. 26: http://ec.europa.eu/health/files/orphanmp/doc/pricestudy/final_final_report_part_1_web_en.pdf).

[23] Brabers *et alii*, *Does market exclusivity hinder the development of Follow-on Orphan Medicinal Products in Europe?*, in *Orphanet Journal of Rare Diseases* 2011, 6:59, doi:10.1186/1750-1172-6-59.

fought to have access to a very expensive orphan drug (May 2008)[24] has shown that common drugs' prices are usually set according to several factors, such as disease prevalence, production costs, molecular complexity, the need for recouping initial investments, and the perceived medical benefit. This study, however, indicates that orphan drugs' prices are set independently of these parameters.

Consequently, some scholars have argued that such a situation could meet the conditions of an abuse of dominant position, consisting in setting excessively high prices, under Art. 102, let. *a)*, TFEU[25].

This paper aims at developing such an idea, hypothesizing that the abovementioned competition law institution, in conjunction with civil liability, could play a role in reducing the excessive prices set for orphan drugs, thus contributing to making public pharmaceutical expenditure more sustainable and patients' health protection more effective.

To this end, the following paragraphs investigate the essential elements required by Art. 102 TFEU, that is a dominant position in the reference market (par. 5) and its abusive exploitation by the undertaking (par. 6).

5. Dominant position: market exclusivity and monopoly

To begin with, any dominant position refers to a determinate reference market. The latter notion was first introduced by the EUCJ case law[26], and then was considered by a Communication issued by the European Commission[27]. This Communication, followed by the subsequent EUCJ case law[28], states that the relevant market is made up of two different dimensions: the product market and the geographic market. The former includes all goods and services that are interchangeable by consumers. The latter is given by the area in which the good or service is marketed, provided that competitive conditions are comparable. In the orphan drug market, the market exclusivity prevents consumers from carrying out substitutive behaviors, so every orphan drug defines its own product market.

[24] See http://archive.eurordis.org/article.php3?id_article=1733.

[25] Ghezzi e Olivieri, *Diritto Antitrust*, Turin, 2013, p. 199 ss.; Marabini, *L'abuso di posizione dominante nella giurisprudenza comunitaria*, Turin, 2004, p. 164.

[26] EUCJ, 9 November 1983, C-322/81, *Michelin* v. *Commission*, in *Racc.*, 1983, p. 3461.

[27] *Commission notice on the definition of relevant market for the purposes of Community competition law*, in *Off. Bull. EC*, C 372, 9th December 1997, p. 5.

[28] EUCJ, 16th May 2000, C-344/98, *Masterfood HB* v. *Commission*; in *Racc.*, 2000, p. 11369; EUCJ, 24th October 2002, C-82/01, *Aéroport de Paris* v. *Commission*, in *Racc.*, 2002, p. 9297; EUCJ, 15th February 2005, C-12/03, *Commission* v. *Tetra Laval*, in *Racc.*, 2005, p. 987; EUCJ, 14th October 2010, C-280/08, *Deutsche Telekom* v. *Commission*, in *Racc.*, 2010, p. 9555.

The geographic market, instead, spreads to the whole EU territory, since orphan drugs are subject to a centralized marketing authorization (see *supra*, par. 2).
Under Art. 102 TFEU, the dominant position of an undertaking (a) ought to refer to the entire single market or a substantial part thereof (b) and to restrict (either actually or potentially) interstate trade (c).
Sub (a), according to the prevailing understanding[29], the undertaking holds a dominant position in the reference market when it is significantly and durably able to prevent an effective competition or if it can behave independently of competitors and consumers. This ability is usually assessed by measuring the market power held by the undertaking, that is the market share held by the latter[30]. In fact, in the case of orphan drugs measuring market power is not necessary, since market exclusivity incentive prevents an effective competition[31]. In other words, the dominant position of the orphan drug producer in the reference market constitutes a direct consequence of the incentives set out in the relevant EU legislation concerning orphan drugs.
Yet, a dominant position could not be able to effectively restrict competition, if it is not durable or if there is a sufficient level of potential competition[32].
From the former point of view, one could argue that, in the orphan market, the monopoly period is so limited in time that it cannot warrant a proper dominant position. However, patients are not able to wait for the market exclusivity period to expire, to purchase an orphan drug at a lower price in the future [33]. Therefore, market exclusivity amounts to a relatively durable barrier to free competition[34].
From the latter point of view, potential competition may have restraining effects on the behavior of a dominant undertaking. However, US empirical studies[35] show that, once the market exclusivity period has ended, competing pharmaceutical companies do not threat the position of dominant undertakings, given the low demand barrier featuring the market

[29] EUCJ, 14th February 1978, C-27/76, *United Brands Company* and *United Brands Continental BV* v. *Commission*, in *Racc.* 1978, p. 207, n. 65.

[30] Eu Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Communication 2009/C 45/02.

[31] EUCJ, 13th February 1979, C-85/76, *Hoffmann – La Roche & Co. AG* v. *Commission*, in *Racc.*, 1979, p. 461, n. 39.

[32] G. Bruzzone, *L'abuso di posizione dominante*, in L. Pace (ed.), *Dizionario sistematico del diritto della concorrenza*, Jovene editore, Napoli 2013, p. 99). 3 EUCJ, 14th February 1978, C-27/76, *United Brands Company* and *United Brands Continental BV* v. *Commission*, in *Racc.* 1978, p. 207 ss., par. 122; EC Trib., 23th October 2003, case T-65/98, *Van den Bergh Foods Ltd v. Commission*, in *Racc.*, 2003, II, p. 4662.

[33] J.C.P. Roos *et alii*, *Orphan drug pricing may warrant a competition law investigation*, in *BMJ* 2010-341:c6471, doi: http://dx.doi.org/10.1136/bmj.c6471 (17th November 2010), p. 6.

[34] *Ibid.*

[35] Seoane-Vazquez *et alii*, *Incentives for orphan drug research and development in the United States*, in *Orphanet Journal of Rare Diseases*, 2008, 3:33 (doi:10.1186/1750-1172-3-33); Haracoglou, *Competition Law and Patents: A Follow-on Innovation Perspective in the Biopharmaceutical Industry*, Northampton 2008, p. 31.

sector at hand.
Sub (b), the undertaking's dominant position concerns the entire single market, as the market exclusivity incentive is valid across the EU (Art. 7, reg. (CE) n. 141/2000).
Sub (c), for the same reasons, restriction of interstate trade is always possible.
It follows that the market exclusivity incentive provides the undertaking with a dominant position under Art. 102 TFEU. Accordingly, the European Commission could hold the competence to investigate and intervene under Art. 105, n. 1, TFEU.

6. Abusive pricing

Turning to the other requirement under Art. 102 TFEU, it is worth noting that, under competition law, the dominant position of an undertaking is not relevant in itself. Art. 102 TFEU provides that competent authorities ought to intervene only when the undertaking abusively exploits such a dominant position. Consequently, otherwise lawful conducts can be sanctioned if they are carried out by a dominant company[36].
Art. 102 TFEU lists a few examples of abuse of dominant position, including «directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions»[37] [Art. 102, let. *a)*, TFEU].
In the event of unfair prices the EU Commission tends to intervene only under exceptional circumstances. In fact, such an action is deemed as an *extrema ratio*, to resort to when market mechanisms alone are not able to drive prices down. For that reason, unfair price investigations are conducted only when the relevant market is featured by high and durable entrance barriers and the undertaking holds a "super-dominant" position there [38]. For the reasons explained *supra*, par. 5, orphan drugs' prices may well fall under the scope of Art. 102, let. a TFEU.
Since *United Brands*[39] the EUCJ case law has developed a test to assess prices' "unfairness"[40].

[36] See the notion of "special responsibility" of the dominant undertaking (EUCJ, 9th November 1983, C-322/81, *NV Nederlandsche Banden Industrie Michelin* v. *Commission*, in *Racc.* 1983, p. 3461, n. 57).

[37] "Other unfair conditions" may refer to so-called bundling practices (*Genzyme Ltd v. Office of Fair Trading* [2005] CAT 32; Ghezzi and Olivieri, *Diritto Antitrust*, p. 247 ss.; EU Commission, decision 24 March 2004, *Microsoft*, (COMP/C-3/37.792); EU Commission, *Competition DG. Pharmaceutical sector inquiry – preliminary report*, 28th November 2008: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf). Since the paper focuses on the problem of excessive prices, this aspect will not be furtherly investigated.

[38] Eu Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Communication 2009/C 45/02.

[39] EUCJ, 14th February 1978, C-27/76, *United Brands Company* and *United Brands Continental BV* v. *Commission*, in *Racc.* 1978, p. 207.

[40] Roos *et al.*, *Orphan drug pricing may warrant a competition law investigation*, in *BMJ* 2010-341:c6471, doi: http://dx.doi.org/10.1136/bmj.c6471 (17th November 2010); EUCJ, 6th October 1982, C-262/81, *Coditel* v. *Ciné*, in *Racc.*, 1982, p. 3381; Anand, *Lucrative niches – how drugs for rare diseases became lifeline for companies*, in *Wall Street Journal*, 15th

According to this test, it is first necessary to determine if the difference between costs and prices is excessive; in case it is so, it is then necessary to assess if the price is unfair "in itself" or compared to competing products (n. 252). In fact, some scholars[41] maintain that the Commission first assesses if the difference between prices and costs is a positive sum, and, if this is the case, then they assess price unfairness[42]. In fact, in its recent opinion, that will be discussed *infra*, par. 11, Advocate General Wahl states that, first, competent authorities have the burden of showing a significant difference between the economic value of the product and its price. Then, it is up to the undertaking to demonstrate that such a difference is not unfair[43]. This is in line with the *SACEM II* precedent[44] and is perfectly reasonable, since public authorities may lack the information needed to assess whether the price exceeding the benchmark value is actually unfair. It is likely that such information is held or at least easily obtainable by undertakings.

A product price can be deemed unfair either in itself or compared with competing products[45].

In fact, according to the EUCJ case law, the latter method may refer either (a) to the price set by the same undertaking in a different market, for the same product or a comparable one[46] or (b) to the price set by other companies in the same market[47] or in different markets[48]. *Sub* (a), the price set for the same drug in a different national market could be taken as a reference data (see *supra*, par. 3), thus turning the price unfairness issue into a problem of discriminatory pricing[49]. *Sub* (b), as market exclusivity prevents the same product or comparable products from being marketed, a comparison between reference

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November 2005; Whish, *Competition law*, Oxford, 2009, p. 192 ss.; Ghezzi and Olivieri, *Diritto Antitrust* p. 227 ss.; EUCJ, 14th February 1978, C-27/76, *United Brands Company* see note n. 39; *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 13, par. 412-413; *Pricing and the Dominant Firm: Implications of the Competition Tribunal's Judgment in the Napp Case*, in *European Competition Law Review*, 2003, 70, p. 82-86.

[41] *Scandlines Sverige AB v Port of Helsingborg*, par. 122. Commission, decision 11th November 1986, case 226/84, *British Leyland Public Limited Company v Commission*; EUCJ, 10th February 2000, C-147/97, *Commission* v. *Deutsche Post*, 2010 I-07831.

[42] L. Hou, *Excessive Prices Within Eu Competition Law*, in *European Competition Journal*, 2011, vol. 7, n. 1, p. 61.

[43] A.G. Wahl, *Opinion*, 6th April 2017, C-177/16, *AKKALAA v. Konkurences padome*, ECLI:EU:C:2017:286l, paras 132-136.

[44] EUCJ, 13th July 1989, joint cases 110/88, 241/88 and 242/88, *Francois Lucazeau et alii v. Société des Auteurs Compositeurs et Editeurs de Musique* (SACEM II), in *Racc*., 1989, p. 2811 ff.

[45] EUCJ, 14th February 1978, C-27/76, *United Brands*, par. 252.

[46] EUCJ, 13th November 1975, case 26/75, *General Motors*, in *Racc*. 1975, p. 1367.; EUCJ, 11th November 1986, case 226/84, *British Leyland v. Commission*, in *Racc*., 1986, p. 3263.

[47] EUCJ, 29th February 1968, case 24/67, *Parke Davis*, in *Racc*., 1968, p. 82; EUCJ, 5ft October 1988, case C-53/87, *Cicra and A. v. Renault*, in *Racc*.,1988, p. 6039.

[48] EUCJ, 8th June 1971, case C-78/70, *Deutsche Grammophon*, in *Racc*., 1971, p. 487; EUCJ, 4th May 1988, *Bodson v. Pompes Funebres*, in *Racc*., 1988, p. 2479.

[49] Motta and de Streel, *Excessive pricing in competition law: never say never?,* in Multiple Authors, *The Pros and Cons of High Prices*, Konkurrensverket, Lenanders Grafiska, Kalmar 2007, p. 35.

prices is statutorily made impossible.
As for the former assessment method, the price of a product can be deemed unfair if it has no "reasonable relation" with its "economic value".
As detailed in *Helsingborg*[50], the economic value of a product should include both production costs and "non-cost related factors", *i.e.* factors related to the characteristics of the demand[51]. In *Helsinborg*, the EUCJ held that the economic value of a ferry service had to be assessed considering its production costs as well as the circumstance that it offered a unique, quick transport service to consumers.
In fact, the EUCJ case law sometimes holds that a mere cost-plus approach is sufficient, depending on the features of the reference market[52].
Each method of assessing price unfairness can be applied using many different tests. Both the Commission and the EUCJ tend to utilize as many different assessment methods as possible, deeming a price unfair only if all tests applied show convergent results[53].

7. Orphan drug pricing

In sum, the price of an orphan drug can be deemed unfair either in itself or compared to the price set for the same product in a different national market.
From the letter point of view, some member States follow a fixed price approach through negotiations between private monopoly and public monopsony.
In a system where a national public regulator operates, is it legitimate to let the Commission carry out an investigation and an action for excessive prices? The issue is not new at all. In fact, the Commission has already opened several procedures for excessive prices in the telecommunication sector, where a national regulator is in charge. However, none of these procedures has resulted in a formal decision either because an agreement was reached or because national regulators had "jurisdiction to act"[54]. In the pharmaceutical sector, no precedents are recorded at EU level. However, two national antitrust causes could be useful to clarify this notion. Firstly, in the British competition law case *Napp Pharmaceutical* an action brought by the national competition authority was considered

[50] European Commission, decision 23rd July 2004, *Scandlines Sverige AB v Port of Helsingborg*, in *Common Market Law Review*, 2006, 4, p. 1224.

[51] *Ibid.*

[52] Motta and de Streel, *Excessive pricing in competition law: never say never?*, in Swedish Competition Authority, *The Pros and Cons of High Prices*, Kalmar 2007, p. 39-40.

[53] *Ibid.*

[54] Motta and de Streel, *Excessive pricing in competition law: never say never?,* p. 31.

legitimate[55], within a national pricing framework where pharmaceutical prices are indirectly regulated, through the regulation of the profit margin that the producer can acquire[56]. Secondly, in the recent case *Aspen* the Italian Competition Authority (AGCM) has intervened in a national regulatory environment where reimbursed drugs' prices are negotiated between AIFA and producers[57]. These cases show that national agencies, despite having some regulatory powers, do not have "jurisdiction to act" when producers hold a relevant market power. In fact, the (frequent) lack of alternatives and the innovative character of many drugs provide pharmaceutical companies with the power to impose almost any price *vis-à-vis* a relatively weak public counterpart.

Empirical studies show that an orphan drug may have a significantly lower price in fixed price systems than in free price ones. For instance, in some legal systems the price thus bargained is defined as a reasonable price[58]. Therefore, the price set in a fixed price country could constitute a reference value in assessing the (un)fairness of the price of an orphan drug in another national market. However, different prices between different national markets do not automatically prove that the higher prices are unfair, since such a difference can have either positive or negative effects on consumers' wealth[59]. Thus, one should assess on a case by case basis whether the overall effects of price discrimination are beneficial or detrimental to consumers. Yet, in *SACEM II* the EUCJ held that an undertaking selling a given product at a significantly higher price in a determinate market is likely to abuse its dominant position. As a result, it is the undertaking that has the burden to prove that such a difference in price is justifiable considering objective differences be-

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[55] «*First, as already stated, the PPRS* [i.e. the main English drug pricing mechanism] *is primarily directed to ensuring that a pharmaceutical company does not exceed the permitted ROC* [return on capital] *on the totality of its NHS business. The PPRS is not directed to the question whether or not the price of an individual product sold in a market where there is dominance is above the competitive level, which is the essential question in the present case. In our view, the fact that a pharmaceutical company is subject to the PPRS does not, of itself, give that company any kind of exemption from the Chapter II prohibition in general, or from section 18(2)(a) in particular, as regards the prices of individual products. In so far as Napp argues that its prices for MST cannot be excessive under the Chapter II prohibition simply because it is subject to the PPRS, any such argument has, in our view, no foundation in law or logic. In our judgment that argument, and indeed Napp's whole argument based on "portfolio pricing", impermissibly directs attention away from the specific product market 108 which we are required to consider when deciding whether there is an abuse of a dominant position under section 18 of the Act. In our view, it is not appropriate, when deciding whether an undertaking has abused a dominant position by charging excessive prices in a particular market, to take into account the reasonableness or otherwise of its profits on other, unspecified, markets comprised in some wider but undefined "portfolio" unrelated to the market in which dominance exists*» (*Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, [2002] CompAR 13, par. 412-413).

[56] Department of Health, *The Pharmaceutical Price Regulation Scheme 2014*, p. 23 ff.

[57] AGCM, decision n. 26185, 29th September 2016.

[58] «[*T*]*he Australian Pharmaceutical Benefit Scheme considers that a reasonable price may be identified by observing the results of bargaining between a monopoly supplier and a monopsony purchaser*» (Abbot, *Excessive Pharmaceutical Prices and Competition Law: doctrinal development to protect public health*, in *UC Irvine Law Review*, vol. 6, issue 3, forthcoming (see: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2719095&download=yes).

[59] Papandropoulos, *How should price discrimination be dealt with by competition authorities?*, in *Concurrences*, 2007, n. 3, p. 34-38.

tween the markets at issue and is beneficial to consumers[60].
As an alternative, a drug's price can be deemed unfair in itself. The main national competition law precedents concerning drugs' prices (*Napp Pharmaceuticals* and *Aspen*) apply many different methodologies both to determine relevant costs and to estimate a "reasonable" profit margin, deeming a price unfair only if all applied tests show convergent results. From this viewpoint, however, pharmaceutical producers can argue that a reasonable relation can be established between the product's price and its economic value. First, from a cost perspective, an orphan drug can have considerable R&D (and production) costs. Second, from a non-cost perspective, purchasers have a high will and ability to buy the product, as they want to avoid more costly alternatives and have huge financial resources at their disposal, respectively. Third, a small and risky market makes it necessary for producers to apply a wide mark-up.
In fact, a comprehensive approach to studying this phenomenon, considering the interactions between orphan drug legislation and pharmaceutical regulation in general, can shed more light on the relation between products' prices and their economic values, thus paving the way to an action under Art. 102, let. *a)*, TFEU.
In the first place, relevant costs are reduced by incentive regulations providing for financial aids and tax exemptions[61] as well as non-monetary advantages, such as the right to early market access and to protocol assistance (see *supra*, par. 3). Moreover, the pharmaceutical industry massively benefits from publicly funded research on rare diseases.
Particularly, early access paths make for a reduction in authorization time and shift human experimentation costs and risks to clinical practice. When a drug is authorized based on incomplete data, patients are practically employed as guinea pigs without being protected by the safeguards and guarantees legally provided for clinical trials. Likewise, participation in compassionate use programs under Art. 83, reg. (CE) 726/2004[62] can help the pharmaceutical producer save money, even though drugs are offered for free[63], as physicians are burdened with almost all relevant civil liability risks[64]. Also, the undertaking could have just purchased the selling license of an orphan drug from the actual developer and pro-

[60] EUCJ, 13th July 1989, joint cases 110/88, 241/88 and 242/88, *Francois Lucazeau et alii v Société des Auteurs Compositeurs et Editeurs de Musique* (*SACEM II*), in *Racc.*, 1989, p. 2811 ff.

[61] Franco, *Orphan drugs: the regulatory environment*, in *Drug Discovery Today*, 2013, vol. 18, issue 3-4, p. 163-172; Barak and Nandi, *Orphan drugs: pricing, reimbursement and patient access*, in *International Journal of Pharmaceutical and Healthcare Marketing*, 2011, 5, 4, p. 299-317; Villa, Compagni and Reich, *Orphan drug legislation: lessons for neglected tropical diseases*, in *International Journal of Health Planning and Management*, 2009, 24, 1, p. 27-42.

[62] Plate, *The Impact of Off-Label, Compassionate and Unlicensed Use on Health Care*, *Ibidem*, Stuttgart 2014; Sáenz, *The 'Compassionate Exemption' in Spain: Not Asking for Compassion*, in *Opinio Juris in Compratione*, 2010, vol. 1, Paper n. 1; Cuzzolin, Zaccaron and Fanos, *Unlicensed and off label uses of drugs in pediatrics: a review of the literature*, in *Fundamental & Clinical Pharmacology*, 2003, 17, p. 125-131.

[63] Under Italian law, see Art. 4, n. 3, ministerial decree 8th May 2003.

[64] Art. 4, n. 2, let. *a)*, id.

ducer. In this case, the "high R&D costs" argument, of course, cannot be invoked[65].
In the second place, the characteristics of the demand, such as the high will and ability of the buyer to pay for the product, cannot justify an exorbitant orphan drug price. In fact, orphan drugs are offered by a legal monopolist, who can impose a very high price under the threat that the product will not be offered in the marketplace. Under these circumstances, such an approach is unacceptable, as it allows the producer to set very high prices for essential products by threatening their withdrawal[66]. For this reason, in the orphan drug market and, more generally, in the pharmaceutical market, *non-cost related factors*, such as the characteristics of the demand of the product, should not be invoked to establish a reasonable relation between price and economic value. The recent Italian competition law case *Aspen* confirms this conclusion[67] by observing that generally willingness to pay for medicines without valid alternatives is infinite, which could justify any increase in their price.
Thirdly, few sales makes the producers apply a wide mark-up to recoup initial investments. Yet, physicians can prescribe a drug even for indications different from those specifically authorized by regulators (so called off-label use), provided that determinate conditions are met[68]. From this viewpoint, pharmaceutical companies can utilize pharmacogenetic techniques to select small patient groups fitting the requirements for orphan drug designation. Then, the product is widely sold and prescribed to a far larger audience though off-label uses. This practice, known as *disease stratification* (or *high-tech salami slicing*), is particularly common in oncology[69]. In addition, a determinate drug can receive multiple orphan designations[70]. Under these circumstances, an exorbitant mark-up is not justifiable, given

[65] See the Italian *Aspen* case (AGCM, decision n. 26185, 29th September 2016, par. 23).

[66] «*The pharmaceutical industry prefers that discussion about price be based on the "value" to healthcare systems in terms of alternatives* (…) *This type of assessment is essentially a "hostage" bargaining model. The drug is under the control of the monopoly patent owner, and the price of ransoming the drug is whatever the party seeking to obtain it can pay* […] *It is only a bargain because of the threat* (…) *That does not make the value reasonable*» (Abbot, *Excessive Pharmaceutical Prices and Competition Law*, p. 19: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2719095&download=yes).

[67] AGCM, decision n. 26185, 29th September 2016, § 129-137.

[68] Cavalla, *Off-label Prescribing: Justifying Unapproved Medicine*, Oxford, 2015; Guidi, Nocco and Di Paolo, *La prescrizione off-label: dentro o fuori la norma?*, in *Resp. civ. prev.*, 2010, p. 2165 ss.; Lenk and Duttge, *Ethical and legal framework and regulation for off-label use: European perspective, in Therapeutics and Clinical Risk Management*, 2014, vol. 10, p. 537-546; Massimino, *Recenti interventi normativi e giurisprudenziali in materia di prescrizione dei farmaci* off label, in *Danno e resp.*, 2010, p. 1104).

[69] Pulsinelli, *The Orphan Drug Act: What's Right with It*, in 15 *Santa Clara Computer & High Tech. L.J.*, 1999, p. 332-36; Kesselheim *et al.*, *The Prevalence and Cost of Unapproved Uses of Top-Selling Orphan Drugs*, in *PLoS One* [*Internet*], 21 February 2012. doi: 10.1371/journal.pone.0031894; Faeh, *A Just Distribution of Health Care in the Case of Orphan Medicinal Products*, in *European J. of Social Security*, 2012, p. 21.

[70] «*A single drug can receive multiple orphan designations if it targets multiple distinct niche markets […] In particular, "[d]rug developers could genetically subdivide diseases that affect a large portion of the population into groups small enough to qualify for orphan drug status"*» (Gibson and Lemmens, *Niche markets and evidence assessment in transition: a critical review of proposed drug reforms*, in *Medical Law Review*, 22, 2, p. 206). See the interesting example of *Glivec*: http://www.accessdata.fda.gov/scripts/opdlisting/oopd/index.cfm; ec.europa.eu/health/documents/community register/html/

the real size of the relevant market[71]. Moreover, supposed marketing risks are markedly smoothed by the fact that these products are largely purchased and reimbursed by public authorities.

In sum, the price of an orphan drug can be deemed unfair either compared to the price set in a different national market or in relation to an unreasonable difference between price and costs.

Each option has its own advantages and shortcomings.

While comparative assessments can rely on objective reference values, they cannot consider that the lower reference price could be unfair too. Also, compassionate use programs often prevent this kind of referencing. Eventually, an increasing number of Member States is embracing a fixed price system. In contrast, unfairness in itself does not have these limits. Yet, measuring relevant costs is no easy task, and the determination of a just profit margin could prove to be arbitrary (see *infra*, par. 9). In fact, the Commission's Communication of the 3rd June 2013, n. 167 [72], suggests that a reasonable profit margin could be determined by referring to the margins practiced in comparable product markets [73]. It has been shown *supra* that a high profit margin is no longer justifiable if the relevant market is sufficiently large, e.g. though off-label uses. Therefore, the mark-up practiced by the dominant undertaking or by its competitors in selling common drugs with similar costs and sale volumes could represent a useful benchmark.

In addition, authoritative Italian scholars suggest that competition authorities should enrich their analytical tools by drawing on the recent developments in behavioral and cognitive sciences[74]. These authors maintain that, building on the existing literature on consumers' perception of price fairness, additional experimental tools could be envisaged to contribute to the assessment of a price's fairness[75]. Human sentiments about price (un)fairness should be considered as a reflection of unwritten social rules of cooperation rooted in

xalforphreg.htm.

[71] In a recent opinion, Advocate General H. Saugmandsaard has assessed the relevance of off-label uses to the definition of the reference market, stating that «in the pharmaceutical sector, the content of marketing authorisations for medicinal products is not necessarily decisive in the determination of the relevant product market. In particular, the fact that the marketing authorisation for a medicinal product does not cover certain therapeutic indications does not preclude that medicinal product from forming part of the market for medicinal products used for those indications, provided that it is actually used interchangeably with medicinal products whose marketing authorisation covers those indications. That is true even where there is uncertainty regarding the compliance with the applicable regulatory framework for the prescribing and marketing of medicinal products with a view to their use for therapeutic indications and by methods of administration not covered by their marketing authorisations» (H. Saugmandsaard, *Opinion*, 21st September 2017, C-179/16, *F. Hoffmann-La Roche Ltd et alii* v. *AGCM*, ECLI:EU:C:2017:714, par. 187, n.1).

[72] Practical Guide - Communication on quantifying harm in antitrust damages actions (available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf).

[73] *Id.*, par. 111.

[74] Arnaudo-Pardolesi, *Sul giusto prezzo, tra Aquino e Aspen*, in *Mercato, concorrenza e regole*, n. 3/2016, p. 479-498.

[75] *Id.*

the evolutionary history of our species[76]. These tests should be complementary to those already applied in the field, under the established "converging results" standard of proof. While showing high analytical potential prospectively, the literature on price perception is still faced with some shortcomings. In fact, despite the importance of price perception, research on the topic is surprisingly limited and yet highly heterogeneous.

The first problem with this literature is that a commonly acknowledged methodology is not yet established, which leads to contradictory results. *E.g.*, while participants to a study regarded as unfair the price remaining high when cost decreased[77], another study had found exactly the opposite[78].

Secondly, behavioural and cognitive processes are in themselves subject to distortionary schemes and limitations. For instance, different framings of the same research question can impact the behavior of the subjects, all other things remaining equal[79]. Also, subjects are likely to underestimate information that is difficult to process, event when they are given support (such as additional knowledge)[80].

Thirdly, the existing literature does not consider two variables that are relevant in the pharmaceutical market as well as in the orphan drug sector. The first variable is the impact of reimbursing mechanisms on price perception: the perception of the fairness of a price is likely to vary depending on whether or not the subject is going to pay directly for the product. The second variable is, at a more general level, the relationship between price fairness perception and willingness to pay: if a subject (either a patient or a NHS) has an "infinite" will to pay for a product, s/he will tend not to deem its price unfair. This way, there is a risk that, through cognitive tools, willingness to pay could surreptitiously enter the price fairness assessment process in a market where demand-side factors should not be considered, as they could automatically justify any increase in price (see *supra*).

In sum, behavioural and cognitive research on price perception could provide for useful indications to determine whether a price is fair or not. However, these methods should be used only in conjunction with traditional economic models. Moreover, the above-

[76] Arnaudo, *La ragione sociale. Saggio di economia e diritto cognitivi*, LUISS University Press, Rome 2012, p. 141 ff.

[77] Huangfu-Zhu, *Do consumers' perceptions of price fairness differ according to type of firm ownership?*, in *Social Behavior and Personality: An international journal*, May 2012, 40, p. 693-698

[78] Khahneman *et alii*, *Fairness and the assumptions of economics*, in *The J of Business*, vol. 59, n. 4, 1986, p. 299.

[79] *E.g.*, the role of the framing bias is clear in a price perception research conducted by Khahneman *et alii*, *Fairness and the assumptions of economics*, in *The J of Business*, vol. 59, n. 4, 1986, p. 299.

[80] "A series of studies demonstrates that consumers are inclined to believe that the selling price of a good or service is substantially higher than its fair price. Consumers appear sensitive to several reference points—including past prices, competitor prices, and cost of goods sold—but underestimate the effects of inflation, overattribute price differences to profit, and fail to take into account the full range of vendor costs. Potential corrective interventions—such as providing historical price information, explaining price differences, and cueing costs—were only modesty effective" (Bolton *et alii*, *Consumer Perception of Price (Un)fairness*, in *J of Consumer Research*, March 2003, vol. 29, p. 474). Indeed, it is widely known by cognitive scientists that too much information is in fact no information at all.

mentioned considerations suggest that the methodological validity of already conducted studies should be carefully assessed and the design of future research on the topic should be improved, also considering its compatibility with established rules and standards on excessive prices.

8. When market exclusivity expires: the persistent relevance of competition law

The considerations developed in the previous paragraphs could maintain their validity when the producer sets an excessive price after the expiration of the market exclusivity period. However, in this event, competent authorities should measure the market share held by the undertaking, as they cannot refer to market exclusivity anymore (see *supra*, par. 5).
We may assume the hypothesis that, once market exclusivity expires, one or more competitors of the undertaking succeed in developing comparable products, thus driving prices down. Yet, recent cases have shown that competitors are able to manipulate regulatory rights and duties for anticompetitive purposes. An interesting example is the Italian competition law case *Avastin-Lucentis*[81], where the pharmaceutical companies *Roche* and *Novartis* carried out a particularly sophisticated anticompetitive agreement. Such a strategy was aimed at protecting a product authorized to treat an ophthalmic disease from the competitive pressure coming from the authorization of a competing product prescribed off-label for the very same indication. To this end, the competitor accepted a share in the extra-profits earned by the undertaking through the sales of the product used on-label. In return, the competitor promised not to submit any request for the authorization of the competing prescription and to publicly overestimate the risks associated with the off-label use of the competing product. On one hand, not to submit a request for marketing authorization is perfectly in line with the regulatory framework[82], but it had no economic meaning, as the product was safely and effectively prescribed off-label by physicians. On the other hand, the spread of information about the risks concerning the ophthalmic use of the competing product was the result of the realization of pharmacovigilance obligations, but in a completely distortionary and selective manner[83]. The Italian Competition Authority held that such a complex strategy had met the requirements of an anticompetitive agreement and an abuse of dominant position. A similar strategy could be carried out to practically extend the market exclusivity period beyond its formal expiration.

[81] AGCM, 27th February 2014, n. 24823.

[82] Arts. 6 ff., dir. 2001/83/EC and Arts.3 ff., reg. (EC) 726/2004.

[83] Arts. 101 ff., dir. 2001/83/EC; Arts. 21 ff., reg. (EC) 726/2004.

9. Effects of competition law remedies and sanctions on orphan drug pricing

It has been shown that very high orphan drug prices may warrant an action under Art. 102 TFEU. This could result in products' prices being reduced and in fines being inflicted to producers.

From the former point of view, determining a product's "fair" price is no easy task, and could have distortionary economic effects. As an alternative, some scholars suggest that regulators should make the market itself more competitive structurally by reducing entry barriers (such as market exclusivity), to make prices lower. This suggestion, however, is not feasible. First, market exclusivity is one of the main incentives for producers to market orphan drugs. Second, removing this incentive would be useless, as low demand prevents competition in the first place. Third, recent EUCJ case law strengthens the market exclusivity barrier[84]. Therefore, no alternatives to "direct" price reduction seem to be left.

The Commission's *Practical guide* to the abovementioned Communication on damages quantification may play a role in determining an orphan drug's "fair" price, that is the price that the producer would have set in lack of anticompetitive behaviors. The *Practical guide* suggests that the investigating authority determine relevant costs and add a reasonable profit margin to them, based on that set for drugs having similar sale volumes. This idea, however, should be furtherly discussed and developed.

From the sanction point of view, the Commission ought to set the fines provided under Arts. 23-24, reg. (EC) n. 1/2003.

In this regard, EU institutions state that fines should have a deterrent effect towards the undertaking and other companies[85]. On the other hand, they concede that «*the use of ever higher fines as the sole antitrust instrument may be too blunt, not least in view of the job losses that may result from an inability to make payments, and calls for the development of a wider range of more sophisticated instruments*»[86].

Operationally, the 2006 *Guidelines* provide that the Commission should determine the amount of the sanction by quantifying the value of the sales of all relevant goods and services occurred in the last year of the infringement (*Guidelines on setting fines*, § 13). Then, the fine is determined as a percentage (30% maximum) of this basic amount. The percentage varies according to the severity and the duration of the infringement at issue (id., § 19

[84] «[T]he *ten-year period of market exclusivity with which an orphan medicinal product is endowed by virtue of Article 8(1) of Regulation No 141/2000 "cannot be curtailed as a result of the fact that there exists an orphan medicinal product which has received marketing authorisation for the same therapeutic indications and which benefits from market exclusivity for those indications"*» (EUCJ, 3 march 2016, C-138/15, *Teva Pharma v. EMA and Commission*, par. 39).

[85] EU Commission, *Guidelines on setting fines*, Communication 2006/C 210/02.

[86] European Parliament, resolution 20 January 2011.

and 21). In assessing the severity of the infringement, the Commission should particularly consider the nature of the infringement, the market share held by the undertaking(s), the geographic area of the infringement, and the actual or potential nature thereof (id., § 22). As an orphan drug producer holds a monopoly throughout the EU and has set an excessive price, the balance tips towards higher rates. In the event of an anticompetitive agreement (see *supra*, par. 8) the proportion of the value of the sales considered for this sanction will be set at the higher end of the scale (id., § 23).
However, if the sale volume is not big enough to make for an effectively deterrent effect *vis-à-vis* the undertaking, then the Commission can increase the fine "to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates" (id., § 30), but not beyond the caps set by the *Guidelines* themselves (id., § 32-33). This provision certainly applies to pharmaceutical companies, whose profits are generally high beyond the sales of (excessively priced) orphan drugs.
Finally, in fixed price systems the bargaining between the producer and the NHS may amount to a mitigating circumstance, as "the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation" (id., § n. 29). However, if the undertaking holds such a market power as to practically force its counterpart to accept any price, such a mitigation should not apply. In fact, if there is no alternative to the product, competent authorities have no ability to "walk away". Therefore, the competent public institution's acceptance of such an "offer" should not be considered as an authorization amounting to a mitigating circumstance under § n. 29 of the *Guidelines*.

10. The role of civil liability

Competition law remedies and fines are not intended to deal with the issue of compensating the pecuniary damages suffered by NHSs for reimbursing excessively priced orphan drugs[87].
National competition laws provide that anticompetitive infringements amount to civil wrongs (or torts)[88]. This kind of provisions could not be effectively enforced due to the dif-

[87] Cafaggi, *A Coordinated Approach to Regulation and Civil Liability in European Law: Rethinking Institutional Complementarities*, EUI Working Paper LAW n. 2005/13, p. 6; Comandé, *Risarcimento del danno alla persona e alternative istituzionali. Studio di diritto comparato*, Turin 1999, p. 369.

[88] In Italy, see Cons. Stato, sez. VI, 12th February 2014, n. 693, in *Rass. dir. farmaceutico*, 2014, p. 336; Alpa, *Appunti sul divieto di abuso del diritto in ambito comunitario e sui suoi riflessi negli ordinamenti degli Stati membri*, in *questa rivista*, 2015, p. 245); in Germany, see par. 33, *Wettbewerbsbeschränkungen*, 2005; in the UK, see, Art. 47a, *Competition Act,* 1998.

ficulties inherent in the burden of proof[89]. Yet, dir. n. 2014/104/EU promises to empower plaintiffs *vis-à-vis* those responsible for anticompetitive violations[90].

As for damages, the directive addresses two main issues.

On the one hand, it describes damages in terms of *damnum emergens*, *lucrum cessans*, and interests, while stating that "full compensation shall place a person who has suffered harm in the position in which that person would have been, had the infringement of competition law not been committed" (Art. 3, n. 2). Therefore, punitive damages as well as any other forms of overcompensation are prohibited (Art. 3, n. 3).

On the other hand, Art. 4 of the directive provides that "Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law" (so called effectiveness principle). Accordingly, upon the request of plaintiffs, judges can order the defendant or third parties to disclose relevant evidence (Art. 5, n. 1). Moreover, Art. 17, n. 1 of the dir. provides that national courts shall have the power "to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available"[91]. Eventually, national courts can ask for assistance from national competition authorities (Art. 17, n. 3)[92].

In quantifying relevant damages, the competent authority ought to compare the real situation with a non-infringement scenario, with an estimation of a reference non-infringement price. The *Practical guide* attached to the Commission's Communication of 13th June 2013, n. 167 describes several methods to do so. They include, on one hand, comparative techniques, based on data concerning normal periods of markets not affected by the infringement; and, on the other hand, economic models simulating the counterfactual scenario. In any event, "equitable" estimates will be inherent in such complex assessments. However, these difficulties are widely smoothed in case of a Commission's decision to reduce an orphan drug's excessive price. The decision could prove to be helpful in quantifying the pecuniary damages suffered by the NHS concerned. In fact, under Art. 16, reg. (EC) n. 1/2003, «when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty [now Arts. 101 and 102] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted

[89] Pardolesi, *Danno* antitrust *e (svuotamento dell') onere probatorio a carico del consumatore*, in *Foro it.*, 2014, I, c. 1729.

[90] Malagoli, *Il risarcimento del danno da pratiche anticoncorrenziali alla luce della direttiva 2014/104/UE*, in *Contratto e impr./Eur.*, 2015, p. 390; Marino, *Alcune novità nel* private enforcement *del diritto della concorrenza*, ivi, 2014, p. 75; Simonini, *Causalità nella fattispecie dell'illecito anticoncorrenziale*, in *Contratto e impresa*, 2015, p. 777.

[91] Under Italian law, Art. 17, n. 1 of the directive refers to Art. 1226 Civil Code (equitable measure of damages).

[92] Todino, *Il danno risarcibile*, in *Annali it. dir. d'autore*, 2015, 1, p. 15 ss.

by the Commission». This way, the difficulties inherent in determining non-infringement prices are shifted from damages compensation to the fine-setting stage.
In fixed price systems, however, systems public agencies contribute to the formation of (reimbursed) drugs. "Price fixing" agencies and "reimbursing" authorities could be seen as different entities or as two expressions of one unitary entity (i.e. the Public Administration), so the former could be considered either as a different tortfeasor or as an auxiliary of the damaged party, respectively. Therefore, a comparative civil liability (or a contributory negligence) of these entities could arise, thus reducing the amount of damages to be paid for by the undertaking. However, comparative liability (or contributory negligence) should be assessed based on the actual contribution of the defendant (or the victim) to the negative consequences of the civil wrong[93]. It has been already noted that in the orphan drug sector the lack of alternatives provides the producer with a strong market power even against a public monopsony, which has no ability to "walk away". Consequently, in this case the contributions of public entities to price determination should have no relevance under civil liability law.
Secondly, the decision to reimburse an excessively priced orphan drug does not seem to meet the requirements of a consent justifying the harm (*volenti non fit iniuria*). To a large extent, producers' market power in the orphan drug sector is so high that speaking of a *consensus* of the public counterpart is in fact a myth. Also, on a formal ground, the reimbursement decision expresses no real "consent" on the part of the Administration, which must reimburse a drug automatically if the relevant legal requirements are met.

11. Recent enforcement developments in excessive pricing (and pharmaceuticals)

The potential role of competition law in countervailing the current trend towards ever increasing orphan drug prices seems to be confirmed by recent developments in competition authorities' enforcement practices and by the recent opinion delivered by Advocate General Wahl in an unfair prices case (see *infra*).
As mentioned *supra*, in October 2017 the Italian Competition Authority (AGCM) imposed a fine of about 5 million euros on the pharmaceutical company Aspen for violating art. 102, letter a), TFEU, as the undertaking had fixed unfair prices with increases up to 1500%

[93] "Liability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons. Liability is solidary where: a) a person knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim; or b) one person's independent behaviour or activity causes damage to the victim and the same damage is also attributable to another person. c) a person is responsible for damage caused by an auxiliary in circumstances where the auxiliary is also liable" (Art. 9:101, n. 1, *Principles of European Tort Law*); "Liability can be excluded or reduced to such extent as is considered just having regard to the victim's contributory fault and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor" (Art. 8:101, n. 1, *Principles of European Tort Law*).

for life-saving drugs with no alternatives treating oncological patients[94]. To this end, the company threatened Italian health authorities to withdraw the products from the market should they reject their application to increase prices[95]. Following this decision, the European Commission officially opened an EU-wide investigation into Aspen's pricing strategies for niche oncological medicines[96]. As the commissioner in charge of competition policy puts it in a press release, «when the price of a drug suddenly goes up by several hundred percent, this is something the Commission may look at»[97]. Just like in the Italian case, the Commission has information that the company is making withdrawal threats to national authorities to impose extremely high prices. The behavior of the undertaking might breach art. 102, let. A, TFEU[98]. In addition, the AGCM has conducted a thorough investigation into the human vaccines market, highlighting several anticompetitive risk factors, such as the presence of a powerful oligopoly of four multinationals and severe lack of information about costs and prices[99]. The report states that, while the current trend towards concentrating public demand for vaccines into few purchase centers is positive, information should be more transparent[100]. In fact, a recent editorial about this investigation claims that, while competition should be favored by adopting more transparent procurement mechanisms in the first place, also competition law can play a role in promoting sustainable access to vaccines (and essential medicines)[101].

The abovementioned opinion of Advocate General Wahl is interesting for our purposes too. It is about a case concerning the Latvian collecting Society for the public performance of musical works. This authority, which enjoys a legal monopoly, was fined by the national competition council for abusing its dominant position, by applying excessive rates in comparison with those applicable in Estonia and in other Member States[102]. The administrative proceeding that followed has led the Latvian judges to ask several preliminary questions to the EUCJ about the application of Art. 102, let. a, TFEU[103]. The case is relevant to potential competition actions in the orphan drugs market too, as it concerns a legal monopoly imposing extremely high prices, where there are difficulties in determining the economic

[94] AGCM, decision n. 26185, 29th September 2016.

[95] *Ibid.*, par. 354 ff.

[96] European Commission, *Antitrust: Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines*, Press release, Brussels 15th May 2017 (http://europa.eu/rapid/press-release_IP-17-1323_en.htm).

[97] *Ibid.*

[98] *Ibid.*

[99] AGCM, *Indagine conoscitiva relativa ai vaccini per uso umano* (ICE 50) (http://www.agcm.it/component/joomdoc/allegati-news/IC50_testo.pdf/download.html).

[100] *Ibid*, p. 98 ff.

[101] Pitruzzella - Arnaudo, *Vaccini, mercati farmaceutici e concorrenza, in una prospettiva (anche) di diritti umani*, in *Italian Journal of Legal Medicine*, 2017, vol. 1, pp. 1 ff.

[102] A.G. Wahl, *Opinion*, 6th April 2017, C-177/16, *AKKALAA v. Konkurences padome*, ECLI:EU:C:2017:286, paras 8-12.

[103] *Ibid.*, paras 13-14.

value of the product and its relationship with the price thereof. To this end, the Advocate General reconstructs the *United Brands* test as a two-step assessment.

As underlined *supra*, the first step is to determine if there is a significant and persistent difference between the actual price of the product and the benchmark competitive price[104]. Fixing the latter is no easy task. Therefore, the Advocate General acknowledges that as many different methods as possible should be applied[105]. If these methodologies are not flawed in themselves, a convergence of result may be an indicator of the possible benchmark price [106]. So far, the opinion Advocate General is consistent with the case law and administrative practices on unfair prices, as reconstructed *supra*. Then, he indicates some criteria that competent authorities should use in choosing the methods to assess the excessive character of a given price. In particular, the methods should be appropriate, correct, and sufficient[107].

In par. 7 two methods were selected that might be used to assess orphan drugs prices, namely a comparison between different geographical markets and with reference to the profit margins applied to products with similar cost and sale volume characteristics. Both are likely to pass the test purported by AG Wahl. First, they are appropriate, as they are supported by the communication of the Commission on antitrust damages quantification[108]. Second, they are correct if they make use of data selected according to objective, appropriate and verifiable criteria. For instance, price comparison across the EU is correct only if reference is made to Member States sharing similar characteristics. Third, they seem to be sufficient to establish the benchmark price, since they use relatively objective data (e.g. prices fixed in other countries, production costs, profit margins of comparable products).

Finally, according to the AG, additional indicators should be considered. For instance, the presence of a sectoral regulator and of a powerful buyer makes unfair prices more unlikely to occur[109]. In the orphan drug sector, national and European regulators play a role and usually businesses bargain price and reimbursement issues with public monopsonies. However, it was shown *supra* (par. 7) that even these important players are not able to effectively countervail the market power held by producers.

[104] Theoretically, any price above competitive levels yields an inefficient allocation of resources and reduces consumers' welfare. However, this does not imply that an action under Art. 102, let. a, TFEU is always warranted. First, calculating the competitive price is a complex and uncertain task. Second, and consequently, it is difficult for undertakings to estimate in advance the borderline between competitive and excessive price. Third, a strict approach would result in competition authorities becoming price regulators. Therefore, an action under Art. 102, let. a, TFEU should be warranted only if the price exceeds significantly and persistently the benchmark price (*ibid.*, paras 101-106).

[105] *Ibid.*, paras 36-42.

[106] *Ibid.*, paras 43-45.

[107] *Ibid.*, paras 57-80.

[108] *Practical Guide - Communication on quantifying harm in antitrust damages actions,* par. 111.

[109] A.G. Wahl, *Opinion*, 6th April 2017, C-177/16, *AKKALAA v. Konkurences padome*, ECLI:EU:C:2017:286, paras 49-50.

12. Conclusions

Conclusions are devoted (a) to summarize the results of the analysis that has been conducted so far and (b) to indicate possible research lines to be furtherly investigated.

Sub (a), an orphan drug's price could be deemed unfair under Art. 102, let. a, TFEU if a discriminatory pricing takes place among different national markets or there is no reasonable relation between the product's price and its economic value. Regulatory benefits and incentives should be considered in determining relevant costs. Also, in assessing the reasonableness of the profit margin, competent authorities should not neglect the fact that producers can expand an orphan drug's market in many ways. Each method to assess price unfairness utilizes many different estimate methods. In line with EUCJ case law and Commission decisions, the burden of proof under Art. 102, let. a, TFEU shall be satisfied only if all the methods applied show convergent results. Finally, fines and civil damages should not be reduced considering the role of public authorities in fixing prices and reimbursing drugs, since the undertaking holds a "super-dominant" position in the market.

Sub (b), further interdisciplinary disciplinary investigation on the matter should focus on the following issues.

Firstly, the conditions under which different prices across different national markets may amount to discriminatory pricing should be clarified.

Secondly, in assessing the (un)fairness of a price in itself, difficulties inherent in quantifying relevant costs and a reasonable profit margin could be furtherly smoothed by referring to the law and economics literature about Art. 102, let. a, TFEU, which translates the issue of determining the "fair price" of a product into that of determining its competitive price. From this point of view, the role of simulation techniques should be discussed and investigated.

Thirdly, cognitive research on price perception could be a useful complementary tool to assess prices' (un)fairness; yet, the limited and heterogeneous existing literature on the topic should be read critically to assess their validity and improve the design and methodology of future studies.

Book Reviews

Revues

Reseñas de libro

Recensioni

Book Review

Mariusz Załucki*

EU Succession Regulation No 650/2012. A Commentary, edited by H. Pamboukis, published by Nomiki Bibliothiki, Verlag C.H. Beck, Hart Publishing and Nomos Verlag, Athens-München-Oxford-Baden Baden 2017, pp. 741

1. The subject-matter of the EU succession Regulation No. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[1], has been raising serious controversies for a long time. The act which applies to the succession cases in the European Union post 17 August 2015 raises doubts in the particular areas of its application, which are not identically resolved in the respective Member States. Therefore, every publication referring to such doubts and attempting to explain the importance of the mechanisms applied by the Regulation is worth noticing[2]. This applies to the presented publication, namely comments to the Regulation provisions by Greek authors. The look at the EU succession law in the light of the Greek law seems very interesting already at first glance. Despite the fact that several commentaries applicable to Regulation No. 650/2012 have recently appeared in the generally available literature[3],

* Head of the Institute of Private Law, AFM Krakow University, Poland. [1] OJ L 201, 27.7.2012, p. 107-134.

[2] Cf. M. Załucki, *New Revolutionary European Regulation on Succession Matters. Key Issues and Doubts*, Revista de Derecho Civil 2016, No 1, p. 165-176.

[3] For example: *Le droit européen des successions. Commentaire du Reglement no 650/2012 du 4 juillet 2012*, edited by A. Bonomi and P. Wautelet, Bruxells 2013; *Il nuovo diritto internazionale privato europeo delle successioni*, edited by A. Davi and A. Zanobetti, Torino 2014; *Die Europäische Erbrechtsverordnung*, edited by A. Dutta and S. Herrler, München

there are no publications by the authors from the countries which have not been recently considered to be the founders of the canons of the modern civil law studies. Therefore, it is really essential that the authors have coped with the problem and published the results of their considerations in English. Thus, the potential scope of impact of that publication has been extended and polemics with some of the views of the authors has been enabled.

2. The publication is a typical commentary to a legal act. It has been prepared by many authors, which makes the scientific level thereof slightly differentiated, as usual in the case of such work. Each of the fourteen authors referred to the specific provisions of the Regulation based on extensive European literature, and provided their own views on the current state of knowledge. Therefore, the commentary is not only a collection of previous ideas but in many ways the authors attempt to take the floor in the discussion referring to the Regulation provisions in order to propose a specific direction of interpretation. This is extremely important, specifically because the practice of applying certain standard solutions has only been born. Regulation No. 650/2012 has been applied only for two years, which makes it difficult to state whether it is an evolution or a revolution in the European succession law[4]. In many cases, the authors of the discussed publication are inclined to agree with the first stand, namely the evolution, indicating as an example that the Regulation entrance into force may simplify and shorten the procedure of hearing succession cases in the European Union.

3. The book starts with introductory comments to the Regulation provisions by H. Pamboukis and A.P. Sivitanidis (p. 1-13). The authors present shortly how the Regulation was passed and also the basic structure of the same, as well as changes in the Greek law resulting from the Regulation No. 650/2012 entrance into force. Greece, similarly as many other European countries, has previously referred in trans-border succession cases within its private international law to the citizenship of the testator, whereas as a result of the Regulation provisions coming into force this has changed to the place of habitual residence of the testator[5]. This is a very important change and it is a pity that the authors have failed to comment on the expected consequences of that change. It must be emphasised that the authors refer to the necessity of autonomic interpretation of the Regulation provisions, i.e. such interpretation where the assumption that the terms used in the Regulation are

2014; J. Carrascosa Gonzales, *El Reglamento Succesorio Europeo 650/2012 de 4 de Julio 2012. Análisis crítico*, Granada 2014; *Unijne rozporządzenie spadkowe*, edited by M. Załucki, Warszawa 2015; U. Bergquist, R. Frimston, F. Odersky, D. Damascelli, P. Lagarde, B. Reinhartz, *Commentaire de Reglement européen sur les successions*, Paris 2015; *Die EU-Erbrechtsverordnung*, edited by A. Burgstaller, G. Schmaranzer, A. Geroldinger, M. Neumayr, Wien 2016; *EU Succession Regulation. A Commentary*, edited by A. L. Calvo Caravaca, A. Davi and H.P. Mansel, Cambridge 2016.

[4] Cf. A. Devaux, *The European Regulations on Succession of July 2012: A Path Towards the End of the Succession Conflicts of Law in Europe, or Not?*, The International Lawyer 2013, No 2, p. 229-248.

[5] Cf. M. Pfeiffer, C*hoice of Law in International Family and Succession Law*, The Lawyer Quarterly 2012, No. 4, p. 291–306.

identical with the terms applied by the domestic substantive law must be abandoned. The domestic laws regarding inheritance may differ, and they actually differ, so considering them in the interpretation of the Regulation provisions would result in accepting mutually exclusive meaning of the same colliding legal regulations in the respective EU countries. For uniform application of Regulation No. 650/2012 throughout the EU, it is needed to assume identical understanding of the basic terms in all of the countries to which the Regulation applies. In some cases, this may mean that views expressed on the background of domestic substantive law will have to be abandoned. This will contribute to uniform interpretation of colliding legal regulations in all of the EU Member States[6].

After the introduction there follow approximately 100 pages (p. 15-109) written by G. Nikolaidis, where the scope of the Regulation application is discussed as well as the basic standard definitions introduced by that act. In the light of the necessity of autonomous interpretation of the Regulation provisions, that part of the work is of crucial nature, as these considerations will be further referred to by other authors. Autonomous definitions of the terms provided by the Regulation will serve, in the opinion of the author, to such autonomous interpretation. Therefore, the author meticulously discusses the ideas broadly referring to the literature published to date. He explains also the exclusion of the respective areas from the scope of application of the Regulation, namely taxes, customs duties and administrative affairs.

Further one hundred pages (p. 110-201) are devoted to the matter of jurisdiction in transborder succession cases. The respective authors discuss, among other things, the problems of general jurisdiction, prorogation clauses, determination of the lack of jurisdiction, jurisdiction in case of the selection of the applicable law (H. Pamboukis, A. P. Sivitanidis), jurisdiction based on dispute, additional jurisdiction, jurisdiction in case of declaration on acceptance or rejection of inheritance, legacy or mandatory participation, examination of jurisdiction and acceptability of proceedings if the respondent's place of habitual residence is in a country other than a Member State in which the action has been instituted (G. Panopoulos) or jurisdiction of the court in which the action has been first instituted, suspension of proceedings as there are related cases heard before the courts of various Member States, or the applied temporary and preventive measures in such cases (H. Meidanis). The authors frequently emphasise the importance of the place of habitual residence of the testator for the determination of jurisdiction in a succession case, expressing a view that there is a need to arrive at the effect of a uniform *forum* and *ius*, thanks to which the hearing of succession cases in the EU will be easier. This is an interesting thought which must be considered when interpreting the provisions of the Regulation, as it had been the foundation for the introduction of the act[7].

[6] F. Marongiu Buonaiuti, T*he EU Succession Regulation and Third Country Courts*, Journal of Private International Law 2016, No. 3, p. 552.

[7] Cf. G. Debernardi, *Le réglement européen sur les successions et nouvelles perspectives pour les systémes juridiques nationaux*, Nice 2017, p. 38 et seq.

On the following nearly two hundred and fifty pages (p. 202-444) the authors broadly discuss the applicable law in the European succession cases. This part of the publication has been written by many authors who consider the fundamental solutions applied by the Regulation in reference to the European literature published in that matter. It is obviously impossible to refer here to all of the views expressed in that part of the publication, but there are some that are worth the attention. First of all, interesting are the comments by H. Pamboukis and A. P. Sivitanidis regarding interpretation of Article 21 of the Regulation. It must be reminded that the Article introduces the rule that "the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death"[8]. The authors try to explain, among other things, what should be taken into account when determining the place of habitual residence of the testator. They also see the importance of the Recitals of the Regulation and the motives therefore, which must be mentioned particularly because it is not always the case that in the contents of that commentary the references to the Recitals are strongly emphasised. Another important element is the comment to the provisions of Article 22 of the Regulation referring to the choice of law for the respective succession case. This fragment, prepared by D. Stamatiadis, refers in the comparative perspective to allowing the freedom of choice of the applicable law in succession cases, however, with the indicated limited possibility in that regard by the testators being the citizens of the Member States. Of crucial importance are also the comments by A. Metallionos to Article 23 of the Regulation. The author discusses the applicable law in a succession case in reference to a specific testator, by emphasising the importance of the inheritance unity principle. The inheritance unity principle, namely a situation in which the applicable law and the jurisdiction in a succession case are related to one legal system, is one of the greatest achievements of the European succession law, to which the process of the Regulation provisions interpretation must be subjected, among other things[9].

Recognition, enforceability and enforcement of judgements in succession cases issued in other Member States are the objects of discussion on the following pages of the publication (p. 445-525). Further follows the discussion of official documents and court settlements in that area (p. 526-577). The authors present the legal problems appearing on those grounds, many times referring to the issue of acceptability of foreign documents in Greece. The comments are extremely interesting, specifically in the context of the mechanism of refusal of the specific documents originating from other Member States. Particular attention must be paid to the view of D. Stamatiadis on the European Certificate of Succession (p. 578-666). The author refers to the importance of the new instrument serving

[8] A. Davi, A. Zanobetti, *Il nuovo diritto internazionale privato delle successioni nell'unione europea*, Cuadernos de Derecho Transnacional 2013, No. 2, p. 29 et seq.

[9] P. Lagarde, *Présentation du règlement sur les successions*, [in:] *Droit européen des successions internationales. Le Règlement du 4 juillet 2012,* edited by G. Khairallah and M. Revillard, Paris 2013, p. 5-16.

the documentation of the entitlement to inheritance and broadly presents the purpose and consequences of the document issue. Moreover, he explains the matters of the Certificate rectification, amendment or annulment, as well as the appeal procedures vesting in case of the European Certificate of Succession issue, which are considered in accordance with the domestic laws.
The book is concluded by the discussion of general and intertemporal issues, as well as collision in reference to the existing international conventions applicable to succession. Also cited is the Regulation including Recitals.

4. The lecture of the discussed publication, which seems to be a successful contribution to the development of the European legal considerations, results in several conclusions. Firstly, the need of autonomous interpretation of the provisions of the succession Regulation justifies the origin of new publications in that regard, which would comprehensively present the legal act and explain the importance of its mechanisms. Secondly, the basic assumptions of the Regulation provisions, aimed at simplification of the succession procedures in the European Union and shortening of the duration of trans-border succession cases, are values which should become foundations for the interpretations made. Thirdly, authors should build the Regulation interpretations based on the inheritance unity principle. All that may contribute to further integration in future[10].

[10] Cf. L.-D. Rath-Boşca, L.M. Barmoş, i I.A. Stănescu, *The Need to Harmonize the Laws of the European Union Regarding the Succesion Law*, Agora International Journal of Economical Sciences 2016, No 10, p. 35–40.

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