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Prefazione

Emma Castellin

Care lettrici, cari lettori,

è con non poca commozione che vi presento il Volume 5 Numero 2 della Trento Student Law Review. Ancora una volta, questa Rivista aspira a dare il suo modesto contributo al panorama della letteratura giuridica, presentandovi un numero in cui vengono trattate tematiche di diritto comparato, europeo e internazionale, rami del sapere molto cari alla nostra Facoltà.

Con questa sua undicesima pubblicazione, la TSLR arriva a superare la quota dei cinquanta articoli, risultato che per una realtà che esiste solo da cinque anni va celebrato. Permettetemi quindi una breve riflessione.

Con la fine del mio mandato, termina anche la prima generazione di *editors* che hanno fatto parte di questa Rivista a partire del suo primo anno di vita. La mia è stata una prospettiva privilegiata, dalla quale ho potuto vedere dall'interno i lavori di questa Redazione a partire dal suo primo volume e dalla quale ho potuto partecipare, nel mio piccolo, al suo percorso di *crescita*.

Crescendo, questa Rivista ha cercato di colmare una lacuna[1] e di creare un ambiente di ampio respiro per gli studenti che volessero partecipare alla dimensione universitaria in modo più attivo.

Crescendo, questa Rivista ha permesso a quasi un centinaio di *editors* aspiranti giuristi di costruire la sensibilità e l'attenzione necessarie a fronteggiare un mondo del diritto sempre più veloce e vorticoso.

1. Sacco, Rodolfo. 2018. "Perché Una Nuova Rivista? Era Necessaria? Perché Una Rivista Studentesca? Era Necessaria?". Trento Student Law Review 1 (April). Trento, Italy:7-9. https://doi.org/10.15168/tslr.v1i0.5

Inoltre, ha cercato di essere un punto di ritrovo per tutti coloro che, nel loro percorso accademico all'interno di questa Facoltà, hanno visto nella letteratura scientifica e nella ricerca delle chiavi per potersi migliorare, per poter apprendere *by doing.*

Crescendo, questa Rivista ha cercato di essere molto di più.

Riuscire a fare tutto ciò, non è stato facile per la nostra realtà. I momenti di difficoltà non sono stati pochi e non sono mai cessati, ma la volontà tesa a realizzare un prodotto ogni volta migliore ha reso gli ostacoli incontrati lungo il cammino momenti di formazione, dai quali è stato possibile imparare e risollevarsi nella direzione giusta.

Questo privilegio di sperare per il meglio, di sapere che nonostante le avversità il fine a cui si tende è condiviso non avremmo potuto averlo senza il continuo supporto della Facoltà di Giurisprudenza dell'Università di Trento e della sua comunità accademica, alle quali va la nostra più sentita riconoscenza.

Un ulteriore ringraziamento va all'intera Redazione della TSLR, che è riuscita a lavorare come una vera squadra.

Infine, un sentito grazie lo voglio rivolgere a tutti coloro che hanno fatto parte di questa Rivista negli anni: senza il vostro contributo il percorso di questo progetto, di cui non smetterò mai di vedere le potenzialità, non sarebbe stato altrettanto ricco.

Certa del fatto che con il nuovo *Managing Board* e la nuova direttrice Rossella Borella il timone è nelle mani giuste, faccio loro i più sinceri auguri per i nuovi importanti risultati che raggiungeranno.

Ad maiora!

Preface

Emma Castellin

Dear readers,

It is with the utmost privilege that I introduce you Volume 5, Number 2 of the Trento Student Law Review. Once again, this Review aspires to make its modest contribution to the panorama of juridical literature, presenting an Issue in which topics of Comparative, European, and International law, which are all very dear to our Faculty, are discussed.

With this eleventh publication, the Trento Student Law Review has published more than fifty articles, a result that should be celebrated since this project has been around only for five years. Allow me to make a brief comment about it.

With the end of my mandate, the first generation of editors who have been part of this Review since its first year of existence also ends. My perspective has afforded me the privilege of seeing the work of this Editorial Board from its first volume and participating in its growth.

Growing up, this Review has tried to fill a gap[1] and create a wide-ranging environment for students who wanted to participate in the university dimension more actively.

Growing up, this Review has allowed almost a hundred editors and aspiring jurists to build the necessary sensitivity and attention to face a world where the law is constantly, and frenetically, evolving. In addition, it has been a meeting point for all those who, in their academic

1. Sacco, Rodolfo. 2018. "Perché Una Nuova Rivista? Era Necessaria? Perché Una Rivista Studentesca? Era Necessaria?" Trento Student Law Review 1 (April). Trento, Italy: 7-9. Available at https://doi.org/10.15168/tslr.v1i0.5

path within this Faculty, have seen in scientific literature and research the keys to be able to improve and learn by doing.

Growing up, this Review has tried to be so much more.

This has not been an easy path, but despite the times of difficulty, the desire to create a better product has always been a driving force, and the obstacles we have encountered along the way have helped us learn and grow in the right direction.

We would not have had this privilege of hoping for the best without the continuous, unwavering support of the Faculty of Law of the University of Trento and its academic community, to whom we extend our deepest gratitude. A further thanks goes to the entire editorial staff of the TSLR, which has managed to work as a real team.

Lastly, I wish to express my gratitude to all those who have been part of this Review over the years: your contribution has made this project richer and full of potential.

I am confident that the helm is in the right hands with the new Managing Board and Rossella Borella as Director. I wish them all the best for the important new results they will achieve.

Ad maiora!

Freedom of the Press during COVID-19 Pandemic: a Comparative Overview

Akram Alasgarov*

Abstract: The emergence of the COVID-19 pandemic hindered the maintenance of stability in many fields, including the working environment of the media sector. Therefore, the UN Human Rights Committee and the Council of Europe issued several guidelines and informative documents to ensure press freedom and the significance of the media's work during the period of the coronavirus crisis. Accordingly, this article applies a comparative analysis to observe compliance with international standards in the chosen jurisdictions. Firstly, several cases between media workers and governmental agencies in Northern European countries are reviewed from the human rights perspective. Subsequently, the governmental bills and amendments to Hungarian and Russian laws are commented on through an interpretative lens. Finally, challenges brought by the new standards and regulatory norms are assessed on grounds of the protection of health and public safety.

The same approach is followed in Azerbaijan's legal framework, where specific amendments have been introduced to both the Code of Administrative Offenses and the Criminal Code. These amendments explicitly prohibit the dissemination of disinformation during emergencies, especially when it poses a real and imminent threat to the life and health of individuals. Furthermore, corresponding legal provisions have been analyzed, outlining sanctions such as administrative imprisonment or deprivation of freedom in the respective codes. In the end, guided by the global standards of international and regional human rights organizations, recommendations are indicated for developing a legal policy against disinformation.

Keywords: State of Emergency; Fake News; Dissemination; Transparency; Proportionality.

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Introduction

Freedom of the press plays an important role in the protection of democracy as well as in the political and social development of society. Without that cornerstone, it would not be possible to obtain accurate and impartial information about the actions or policies of governments.

In 2021, the United Nations Educational, Scientific and Cultural Organization (UNESCO) published its Global Report on freedom of expression and media development[1]. The overall global statistics indicated that 85 % of the world population contemplated a compression of press freedom in their countries over the previous five years[2]. According to UNESCO data, many countries have adopted bills and regulations and established new law policies towards the media sector, which put the protection of freedom of the press at stake[3]. In 2022, Reporters Without Frontiers (RWF) ranked the Republic of Azerbaijan at 167th place out of over 180 countries on the Press Freedom Index, with a score of 58.48[4].

On June 24th, 2022, the Thematic Report on freedom of opinion and expression was presented to the UN Human Rights Council. The

1. See UNESCO, *World Trends in Freedom of Expression and Media Development,* available at https://www.unesco.org/en/world-media-trends (last visited November 29, 2023)

2. See *id*., at 2.

3. See *id*., at 10.

4. See Reporters Without Borders, *Azerbaijan* in *Press Freedom in Europe overshadowed by the war in Ukraine,* available at https://rsf.org/en/country/azerbaijan (last visited November 29, 2023).

UN Special Rapporteur highlighted the importance of a diverse, independent, and unrestricted news media in upholding democracy, ensuring accountability, and fostering transparency. It is clarified that both states and the international community should actively support and foster a media environment as a public good to ensure the vitality of these democratic principles[5]. In short, the press serves as a vital link between the public and the government in fostering democracy. Hence, governments must create an environment where journalists can operate without financial constraints. Yet, in recent times, notably due to the impact of the COVID-19 pandemic, financial backing for media organizations has significantly dwindled. According to the Global Report by UNESCO, global newspaper circulation has decreased by 13% between 2019-2020 compared with almost 3% between 2018-2019, and over one-fifth of the journalists and other media workers have been exposed to salary cuts[6].

Since 2016, 44 countries have been adopting constitutional, statutory acts or policy frameworks concerning the implementation of new standards in the media sector[7]. In general, many laws have limited access to health-related information and emergency plans, prohibiting the sharing of materials like epidemiological data and government protocols. Domestic laws often grapple with the intricate dynamics of a society, encompassing various interconnected issues such as privacy, health protection, moral concerns, and public safety. In the context of COVID-19, regulating health and morals should strike a balance that supports the free flow of information with minimal barriers. However, the increased use of sanctions and penalties based on political and social reasons in national laws creates ambiguity and jeopardizes press freedom.

Therefore, firstly the statements made by the UN Human Rights Committee will be discussed regarding the protection of freedom of

5. See United Nations Human Rights, Office of the High Commissioner, *Ensuring media freedom and safety of journalists requires urgent concrete action backed by political will: UN expert,* available at https://www.ohchr.org/en/press-releases/2022/06/ensuring-media-freedom-and-safety-journalists-requires-urgent-concrete (last visited November 29, 2023).

6. See *World Trends in Freedom of Expression and Media Development* (cited in note 1).

7. See *id*., at 48.

the press during the COVID-19 pandemic. Later, I will refer to the Council of Europe's suggestions in connection with the shaping of Member States' legal policy and will assess the adherence level to the regional framework in European nations that excel in addressing conflicts among fundamental rights during the pandemic. Finally, the restrictive laws and adopted amendments in some chosen countries will be contemplated, the critical points will be outlined, and relevant recommendations will be made.

2 *International Legal Standards during the COVID-19 Pandemic*

2.1 *Legal Policy of the UN and the Council of Europe*

The COVID-19 virus emerged in China at the end of 2019 and spread all over the world within a short time, resulting in many changes and transformations in economic, political, and social fields on a global scale. In this process, the fact that people were forced to pay attention to social distance caused many challenges in working conditions in a wide range of professional fields, including the media sector. Due to the domestic measures applied during the pandemic, media outlets, journalists and bloggers have naturally been cautioned in catering information.

Brownson et al. observed that the deficiency in translating public health knowledge into practical settings and policy development happens, at least in part, because of ineffective dissemination [8]. In other words, the challenge lies not only in generating valuable knowledge but also in efficiently communicating and distributing that knowledge to those who can implement it in practice or policy. Nayyar et al. further elaborate that the unregulated environment of social media has led to a comparable degree of harm[9]. The freedom of speech on these platforms - often a source of misinformation and anti-scientific rhetoric - has hindered efforts to respond effectively to public health

8. See Anjali Nayyar, et al., *Social Media in the Time of a Pandemic: Global Perspectives of COVID-19 Pandemic on Health, Education, and Role of Media* at 293, available at https://doi.org/10.1007/978-981-99-1106-6 (last visited November 29, 2023).

9. See *id*. at 296.

emergencies, including the ongoing COVID-19 pandemic[10]. It once again highlights the importance of effective communication strategies in the daily lives of individuals, as the latter acts according to the government's research findings and recommendations. It is true that during the pandemic, misinformation can spread rapidly and contribute to panic, fear, and non-compliance with public health guidelines[11]. Limiting press freedom may be seen as a measure to prevent the dissemination of false or misleading information. But a question arises: are monitoring press activities and controlling media publications sufficient to eliminate risks that caused the health crisis?

Moreover, the extent of the imposed boundaries should also be investigated to find a reasonable answer to our question. In that regard, international and regional human rights organizations, such as the United Nations and the Council of Europe, published statements which will be discussed below. Generally, these statements lay down their standardized requirements concerning the potential restrictions of fundamental rights and freedoms due to the state of emergency. In the meantime, those sorts of requirements avail to understand the acceptable limits to restricting rights during emergencies, which foster the coordinated approach among nations.

From the angle of the European Convention on Human Rights (ECHR), Article 15 regulates the derogatory circumstances in times of emergency. Considering the emergency, it states that any High Contracting Party has the authority to implement measures that deviate from its commitments under the Convention[12]. However, such measures must be strictly vital for addressing the urgent demands of the situation, and they should not conflict with the Party's other responsibilities under international law[13].

As can be seen from the textual interpretation of the provision, the area of discretion for Member States is narrowly restricted. When derogations or restrictions are permitted, the State's interference in the enjoyment of a guaranteed right is subject to several conditions. First and foremost, derogation or restriction must be in accordance

10. See *ibid.*

11. See *Infodemic Definition* (World Health Organization) available at https://www.who.int/health-topics/infodemic#tab=tab_1 (last visited November 29, 2023).

12. Art. 15, European Convention on Human Rights.

13. See *ibid.*

with international law and must respect formal and procedural rules. Secondly, the limitation of rights must fulfill the principles of necessity and proportionality. The measure under consideration should align with a legitimate goal (in this case with the protection of health and life) and the inconveniences it causes should not be disproportionately high compared to the same aim. There should be no other appropriate measure that would be less costly in terms of freedom. Thirdly, the Siracusa Principles make the derogations to international human rights permissible only in cases of exceptional public emergency[14]. As stated in the Principles, the circumstances should challenge the very existence of the nation and the threat must be directed against the totality of the population or all the territory[15]. In the context of the COVID-19 pandemic, this exceptional danger may be linked to the protection of public health.

On April 24, 2020, the United Nations Human Rights Committee adopted the Statement on derogations from the Covenant in connection with the COVID-19 pandemic which attracted attention to the significance of freedom of the press during the pandemic situation[16]. The statement also emphasizes the importance of freedom of expression during COVID-19, so that to ensure the measures taken by State parties are consistent with the obligations under Covenant[17]. According to the text of the document, derogable rights might be conducted during emergencies, while still ensuring compliance with necessary public health measures, including physical distancing[18]. In other words, a derogation from freedom of movement and assembly is sufficient in combating the COVID-19 pandemic.

International cooperation has the potential to promote conducive measures that achieve public health objectives without

14. See UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* available at https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf (last visited November 29, 2023).

15. See *id*., at10, paragraph 39 (a).

16. See UN Human Rights Committee, *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/COVIDstatementEN.pdf (last visited November 29, 2023).

17. See *id*., at. 2, paragraph 2 (f).

18. See *ibid*., paragraph 2 (b).

unnecessarily infringing on freedoms. From that perspective, non-mandatory guidelines invite member states to collaborate with international bodies to collectively address challenges while respecting human rights. Due to its flexible character, legally enforceable policy frameworks, regulations, and other legal acts can initially be tested, changed, or exchanged via non-binding acts[19]. Simultaneously, it ensures transparency in communication and decision-making processes related to pandemic response[20]. The Tromsø Convention on Access to Official Documents[21] emphasizes the need for transparency, therefore it stipulates that the public authority must take the necessary measures to make official documents open to the public on its initiative to promote informed public participation in matters of general interest[22]. Meanwhile, compliance with those human rights standards can enhance public trust in government actions and uphold the rule of law by ensuring that any restrictions imposed are based on clear legal frameworks and are subject to legal oversight.

On April 7, 2020, The Council of Europe issued an Information Document[23] as a toolkit for Member States under the heading, "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis". The regional organization promoted its suggestions for regulating democracy and the rule of law in various aspects of public affairs and for maintaining fundamental rights and freedoms, including freedom of expression, during the period of crisis. According to the recommendations on freedom of information, any restrictions on access to official information must be exceptional and proportionate to the objective of protecting public health[24].

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19. See Barbara Boschetti and Maria Daniela Poli,*A Comparative Study on Soft Law: Lessons from the COVID-19 Pandemic* at 23 (Cambridge University Press on behalf of Centre for European Legal Studies 2021), available at https://doi.org/10.1017/cel.2021.8 (last visited November 29, 2023).

20. See *id*. at 50.

21. See Council of Europe, *Council of Europe Convention on Access to Official Documents*, available at https://rm.coe.int/1680084826 (last visited November 29, 2023).

22. See *id*. at 5, Article 10.

23. See Council of Europe, *Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis,* (April 7, 2020), available at https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40 (last visited November 29, 2023).

24. See *id*. at7.

Authors often emphasize the importance of the temporal aspect in exceptional measures[25], as their duration is strictly confined to the necessities of the situation and is directly contingent on the objective existence of the extraordinary circumstance, including the pandemic [26]. Although the European Court does not consider temporary tests in its cases, the proportionality of the emergency measures might be linked to the duration of the situation[27].

In general, International and European human rights law serves as a supplement to national systems for the protection of human rights. When there is a conflict between national laws and European human rights norms, the latter take precedence or have greater authority[2829]. However, it does not suggest an entire replacement of domestic laws but emphasizes the significance of prioritizing international human rights principles when there is a clash with national provisions. Meanwhile, the State's judiciary is obliged to set aside domestic provisions that are not in line with the international conventions of human rights, including in the event of a health crisis.

As for freedom of the press, the guidelines envisaged that the official means of communication cannot be the only source of information about the pandemic. This could lead to censorship and suppression of legitimate interests. Therefore, journalists, the media, health workers, civil society activists, and the public should have the opportunity to criticize government authorities and monitor their response

25. See Sanja Jovi i , *COVID-19 restrictions on human rights in the light of the case-law of the European Court of Human Rights* at 549 (ERA Forum 21 2021), available at https://doi.org/10.1007/s12027-020-00630-w (last visited November 29, 2023).

26. See Carlos Ayala Corao, *Challenges that the COVID-19 Pandemic Poses to the Rule of Law, Democracy, and Human Rights* at 3 (Max Planck Institute for Comparative Public Law & International Law (MPHIL) Research Paper No. 2020-23), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3638158# (last visited November 29, 2023).

27. See *A. and Others v. the United Kingdom*, ECHR 3455/05 (2009), available at https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-1647&filename=002-1647.pdf&TID=ihgdqbxnfi (last visited November 29, 2023).

28. See *Hirst v. The United Kingdom,* ECHR 74025/01 (2005), available at https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-70442&filename=001-70442.pdf&TID (last visited November 29, 2023).

29. See *Marckx v. Belgium*, ECHR 6833/74 (1979), available athttps://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57534%22]} (last visited November 29, 2023).

to the crisis. Stringent controls are necessary for any initial limitations on specific subjects, shutting down media channels, or entirely blocking access to online communication platforms, and they should only be warranted in highly exceptional circumstances. Subsequent prevention of misinformation dissemination and misuse can be achieved through sanctions and government-led awareness initiatives. Collaborative efforts between states, online platforms, and media outlets are essential to thwart public opinion manipulation and prioritize trusted sources of news, particularly information disseminated by public health authorities.

2.2 *Scandinavian Model for Freedom of the Press during COVID-19*

On April 15, 2020, the Swedish Ministry for Foreign Affairs published a joint statement on the safety of journalists and access to information during the COVID-19 pandemic[30]. The statement stands out for touching on the most susceptible issues in connection with the freedom of the press. Thus, the significance of internet access is strongly emphasized to guarantee that the information reaches the people affected by the pandemic. Therefore, State authorities are suggested to restrict interference with internet information sources to provide accessibility to online information services. It was also highlighted in the statement that the emergency circumstances during COVID-19 must not be addressed to solve the limitations on freedom of the press as it complicates and challenges the working conditions of journalists and other media workers[31]. Additionally, smear campaigns aimed at discrediting journalistic work, the expulsion of foreign media officers based on their COVID-19 coverage, and the criminalization of alleged misinformation, both online and offline, may potentially infringe upon human rights[32].

30. See Group of Friends on the Safety of Journalists and Media Freedom in Strasbourg, *Joint statement on safety of journalists and access to information during the COVID-19 crisis* (April 15, 2020) available at https://www.government.se/statements/2020/04/joint-statement-on-safety-of-journalists-and-access-to-information-during-the-covid-19-crisis/ (last visited November 29, 2023).

31. See *ibid.*

32. See *ibid.*

The Nordic countries are appreciated and are highly ranked for maintaining stability during the COVID-19 pandemic about fundamental freedoms. However, from time to time several restrictions arose from the policy of governmental authorities which were publicly criticized for the lack of reasonable grounds.

Generally, the restrictions practiced against the media sector were not encountered in the Norwegian jurisdiction, and the pandemic was not an exception to the matter. There was solely one following case that has been exposed to criticism on social media regarding the freedom of the press. The Minister of Health participated in a public debate on October 27, 2020, and, amid the discussion, he complained that the host should not have been asking questions concerning the consistency of governmental measures on medical masks with scientific suggestions[33]. Since journalists are considered as a "watchdog of the public"[34], making inquiries to the government ensures transparency and helps to scrutinize decision-making processes by communicating accurate information to the public. It should be highlighted that the cardinal goal of the governmental bodies must be dispelling all the doubts from the minds of the public, especially during emergencies. Without transparency, citizens might become skeptical of government actions, and this may prompt political and legal challenges due to the decreased confidence in public health measures.

As for the established laws linked to the emergency, the Norwegian Government presented general guidance to State authorities on access to public documents during COVID-19[35]. The cardinal goal of the document covered the process of accessing information and guaranteeing this fundamental right during the pandemic, whereas it was stated in the guidance that access to specific information is up to the decision of the relevant Ministry. On the other hand, the press

33. See E Holmøyvik, B Moltumyr Høgberg and CC Eriksen, *Norway: Legal Response to COVID-19*,in Jeff King and Octávio LM Ferraz et al (eds), The Oxford Compendium of National Legal Responses to COVID-19 (OUP 2021). At paragraph 55.

34. See *Lingens v. Austria*, ECHR 9815/82 (1986), at paragraph 44, available at https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-57523%22]%7D (last visited November 29, 2023).

35. See *Veileder Til Behandling Av Innsynskrav*, available at https://www.regjeringen.no/contentassets/c40279014de04fa182485b02e86421f4/veileder-til-behandling-av-innsynskrav---utarbeidet-i-forbl178657.pdf (last visited November 29, 2023).

expressed its concern due to the lack of public hearings for reviewing the emergency bills and regulatory standards. Considering the social and economic regulations, some of the draft documents were sent for public review 24-48 hours before their adoption[36]. However, none of the draft regulations which were considered the most restrictive measures deriving from the Infection Control Act 1994 were sent for public discussion before passing[37].

In Finland, at the outset of the pandemic, financial limitations on the media sector captured the attention of the public. Some media organizations cut off the number of workers and other independent journalists faced difficulties in finding a job. However, the Government took respective measures to find solutions and devoted 7.5 million euros to media outlets and organizations for supporting purpose[38].

There were also issues regarding the access to information. Executive authorities, including the Prime Minister's Office, the Ministry of Social Affairs and Health, and the Institute for Health and Welfare refrained from the distribution of adequate information about their decisions considering their strategic policy[39]. Such a situation sparked criticism among the public and challenged the stability of the newsgathering mission of journalists. According to the Finnish Act on the Openness of Government Activities[40], everyone is entitled to the right to access official documents in the public domain[41]. Therefore, governmental authorities were criticized for not abiding by the requirements of the law.

The policy taken by the Prime Minister's Office was the target of other criticism when it did not issue the minutes of the Coordination Group considered for COVID-19. The minutes, which set out the sharing of functions among ministries, were initially held secret, and

36. See *id*., at 34, paragraph 55.

37. See *ibid*.

38. T Kotkas, A Kantola, H Wass, E Husu, Finland: Legal Response to COVID-19 , in Jeff King and Octávio LM Ferraz et al (eds), The Oxford Compendium of National Legal Responses to COVID-19 (OUP 2021), doi:10.1093/law-occl9/e32.013.32, paragraph 56.

39. See *id*., at paragraph 57.

40. See Ministry of Justice Finland, *Act on the Openness of Government Activities* (1999), available at https://www.finlex.fi/en/laki/kaannokset/1999/en19990621_20150907.pdf (last visited November 29, 2023).

41. See *id*., at section 9, paragraph .

only after heated debates, they were presented to the consideration of the press[42]. Another critical point was made over the execution of competencies arising from the Emergency Powers Act because while the Government resolved the imposition of the restrictions on freedom of movement between the southern Uusimaa region and the rest of Finland, the reasonable grounds for the implementation were not indicated[43]. Especially in situations like emergencies, which impact the lives of the people, the lack of specified grounds may raise questions about the constitutionality and the legality of the imposed restrictions. The concept of public interest typically pertains to issues that significantly impact the public or have substantial implications on the well-being of citizens or the community[44]. In times of emergency, this extends to matters that the public has a legitimate interest in understanding.

At the same time, a lack of transparency decelerates effective public cooperation. When citizens are not informed or are hesitant about the reasons for restrictions, compliance may decrease, and it complicates the management of the pandemic. For instance, in 2021, the Finnish Government was condemned for not disclosing the pandemic exit policy and the information published after the decisions of executive authorities[45]. Moreover, the Finnish News Agency s requests to access several documents were responded to differently by relevant ministries and public organizations. While some of the bodies presented the requested documents, others decided not to distribute the documents and held them secret. The Finnish Institute for Health and Welfare was also among the publicly criticized State organizations. The Institute was renowned for not divulging information about the ongoing pandemic and not revealing the scientific grounds for its strategic policy[46]. From time to time, the Ministry of Social Affairs and Health also criticized the Institute for the lack of

42. See *id*., at 39, paragraph 58.

43. See *id*., paragraph 59.

44. See *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, ECHR 931/13 (2017), paragraph 171, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-175121%22]} (last visited November 29, 2023).

45. See *id*., at 39, paragraph 59.

46. See *ibid*.

improvements in data reporting and communication [47]. It is no coincidence that multiple scholars emphasized the importance of transparency as enabling individuals to gain a better understanding of the government and fostering closer connections among people[48]. Therefore, it is worth bearing in mind that transparency of government communication enhances its local and international reputation. Once the public comprehends the necessity of restrictions, it signals a governmental commitment to democratic values and human rights.

3 *Legal Analysis of Domestic Emergency Laws adopted during COVID-19 Pandemic*

3.1 *Hungary*

In 2020, the Ninth Amendment to the Hungarian Constitution of 2011 concerning the state of emergency was adopted. For the adoption of "special legal orders" by the Government, six circumstances were outlined: "state of national crisis", "state of emergency", "state of preventive defense", "emergency response to terrorism", "unforeseen intrusion", and "state of danger"[49]. According to Article 53, paragraph 1 of the Constitution, a "state of danger" is declared when there is an imminent threat to lives and property due to natural or industrial disasters, to mitigate the consequences of the event[50]. This is the constitutional base used during COVID-19, entitling the Government to lay down emergency regulations established in a separate act to temporarily suspend the application of certain laws or derogate from the provisions of those laws, and give priority to the emergency rules and measures. It is worth mentioning that the situation qualified as an emergency must be of such magnitude and gravity that it seems impossible for the State to effectively address the crisis without altering

47. See *id*., paragraph 61

48. See Stephan Grimmelikhuijsen, Linking Transparency, *Knowledge and Citizen Trust in Government: An Experiment*, 78(1) International Review of Administrative Sciences, at 51 (2012), available at https://doi.org/10.1177/0020852311429667 (last visited November 29, 2023).

49. See Art. 48-53, Hungarian Constitution.

50. See *ibid*., Article 53, paragraph 1.

its structure to enhance effectiveness (e.g., by extending executive powers) and/or efficiency (e.g., by reducing parliamentary control to expedite decision-making) on a temporary basis[51]. As can be seen from the Hungarian Constitution, after obtaining the approval of Parliament, the Government is the only determiner of the state of danger and is empowered with extraordinary capacity to terminate or limit the application of fundamental rights. However, the objective in mitigating the impact on fundamental rights should exclusively focus on reinstating conditions that eliminate any scope for the dominance of emergency rules[52]. Actions taken must be precisely suited and proportional to their intended purpose[53]. While they may go beyond existing laws, they should never seek to endorse values that deviate from the usual legal framework. Therefore, the activities of extraordinary powers should be balanced with safeguards, to prevent potential abuses and protect fundamental rights.

The Authorization Act adopted by the Hungarian Government appointed the extraordinary power and determined its authority over COVID-19[54]. The Act conferred the Government the legal competence to amend Section 337 of the Hungarian Criminal Code[55], and to extend the scope of the "Scaremongering" crime. Hereinafter, anyone who communicates any false information or distorts a factual occurrence related to the public danger, leading to potential disturbance or unrest among a larger group of people at the scene of public

51. See Andrej Zwitter, *The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy*, 98(1) ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, at 98 (2012), available at https://www.jstor.org/stable/24769102 (last visited November 29, 2023).

52. See Guillaume Tusseau, *The Concept of Constitutional Emergency Power: A Theoretical and Comparative Approach*, 97(4) ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy, at 528 (2011), available athttps://www.jstor.org/stable/23681137 (last visited November 29, 2023).

53. See *id*. at 529.

54. See Ministry of Justice Hungary, *Act XII of 2020 on the containment of coronavirus*, available at https://berlin.mfa.gov.hu/assets/77/49/43/cc3672166e33b-2cf015ce4371aeedf19417c2710.pdf (last visited November 29, 2023).

55. See Ministry of Justice Hungary, *Act C of 2012 on the Criminal Code* (2023), available at https://njt.hu/jogszabaly/en/2012-100-00-00 (last visited November 29, 2023).

peril, is deemed to have committed a felony[56]. Most importantly, an individual who utters or spreads any untrue information or misrepresents a factual occurrence with the potential to impede or obstruct the effectiveness of a special legal order will be subject to criminal liability[57]. It should also be stressed that the ruling party's majority in the Parliament guaranteed the immediate approval and application of those amendments. The Government also issued a statement explaining the reasons behind the new version of the definition [58]. According to the latter, the legislative elements mentioned in paragraph 1 were not sufficient to take measures against scaremongering when it came to the pandemic[59]. Since paragraph 1 only allows measures for communication made regarding public danger, it restricts the legality of sanctions in times of pandemic. However, penalizing disinformation during COVID-19 can now be justified by referral to paragraph 2, as it abolishes geographical standards.

The newly established provisions entailed such strong public criticism that the issue was raised to the Hungarian Constitutional Court[60]. An applicant presented a complaint to the Constitutional Court, indicating that the latest provisions were contrary to the rule of law's requirements of the Constitution, with particular regard to the clarity of provisions. Moreover, the arbitrary implementation of those provisions was not in accordance with the legal necessity and

56. A person who, at a site of public danger and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact with regard to the public danger that is capable of causing disturbance or unrest in a larger group of persons at the site of public danger is guilty of a felony and shall be punished by imprisonment for up to three years.

57. A person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection is guilty of a felony and shall be punished by imprisonment for one to five years.

58. See András Koltay, *The Punishment of Scaremongering in the Hungarian Legal System, Freedom of Speech in the Times of the COVID-19 pandemic*, in Law and Economics of the Coronavirus Crisis. Economic Analysis of Law in European Legal Scholarship, ed. Klaus Mathis, Avishalom Tor (Springer 1st ed. 2022), at 41, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910395 (last visited April 29, 2023)

59. See *ibid.*

60. See *ibid.*

proportionality elements, giving a broad competence to the Government for restrictions[61].

On June 17, 2020, the Court ruled on the constitutionality of the trending definition of scaremongering[62]. The Court justified the criminal provisions on the grounds that they apply to a narrow range of communications, meaning the dissemination of untrue facts. The Court also noted that there is insufficient basis for inferring that the newly introduced legal elements, including terms such as fact, statement of fact, statement of untrue fact, distortion of fact, distinction between statement and rumor, special legal order, wide publicity, etc., are inherently uninterpretable and thus inapplicable[63]. Judicial precedents concerning these elements can serve as a benchmark for determining what constitutes scaremongering under the Criminal Code[64]. A general court might ascertain that criticism of specific government measures during a special legal order, forecasting future events, or speculating on undisclosed data in the context of the special legal order may not fall within the scope of this criminal offense[65]. In several statutory elements, the Criminal Code requires that the act be capable of producing a consequence. This suitability indicates the objective effectiveness and direction of the act[66].

That is the reason why the Court decided that the newly established provisions are in line with the requirements of the Constitution and affirmed that it positively responds to the standards of freedom of expression. It further stated that scaremongering is a type of crime that should be committed deliberately[67]. The offender must be aware that he is conducting this specific act during a special legal order. If the fact an individual asserted is wrong or materially distorts the real facts

61. See Hungary Two pandemics: Covid-19 and attacks on media freedom (The European Center for Press and Media Freedom, June 17th, 2020), available at https://www.ecpmf.eu/hungarys-two-pandemics-covid-19-and-attacks-on-media-freedom/ (last visited November 29, 2023).

62. See Constitutional Court of Hungary, 2020, no. 15,available at https://hunconcourt.hu/decisions/decision-15-2020-on-scare-mongering/ (last visited November 29, 2023).

63. See *id*, paragraph 43.

64. See *ibid*.

65. See *ibid*.

66. See *ibid*.

67. See *id*., at 11.

(irrespective of being a state or local/municipality act), it can put the effective defense at stake under the special legal order [68].

As can be seen from the decision of the Constitutional Court, it was aware somehow of the disproportionality of the provision with respect to the restrictions born by the freedom of the press. The boundaries are frequently defined by international legal instruments. As it was discussed in previous chapters, the boundaries are frequently defined by international legal instruments, even if those sources are not directly mandatory. Once human rights are in danger, the media should leverage its influence to maintain a balance to fulfill its democratic responsibility, which is preserving the diversity of thoughts[69]. States, in turn, must under no circumstances, exploit a crisis to assert disproportionate powers or curtail freedom of expression. Actions such as exerting control over information or undermining media independence pose direct and significant threats to the fundamental pillars of democracy[70].

Thus, the Hungarian Constitutional Court tried to balance and facilitate the strict nature of the statutory provisions made to the Criminal Code, thereby narrowing down the scope of the definition and framing its applicability circumstances. Overall, the measures taken by the Government amplified the deteriorating state of the freedom of the press in Hungary. Except for the above-mentioned criminal sanctions in response to the disinformation, other measures included the curtailment of the support for the press by public funds, complicating the licensing procedure for independent journalists and media outlets, and so on. According to the 2020 ranking statistics of the Media Freedom Index by Reporters without Frontiers, Hungary positioned in 89th place out of 180 countries, declining 25 places since 2014[71].

68. See *ibid.*

69. See Aneta Stojanovska-Stefanova and Hristina Runcheva Tasev, *The Mass Media Freedom in a State of Emergency: Infodemic vs. COVID-19 Pandemic*, 15(1) South East European University Review, at 46 (2020), available at https://sciendo.com/article/10.2478/seeur-2020-0003 (last visited November 29, 2023).

70. See *id.*, at 52.

71. See *id.*, at 62.

3.2 *Russian Federation*

During the COVID-19 pandemic, the Russian Federation was one of the countries that set statutory norms and regulations for preventing the dissemination of fake news. The respective adopted bills and amendments were made to the Criminal Code of the Russian Federation; the Code of Administrative Offenses; and the Federal Law on Information, Information Technologies, and the Protection of Information. Spreading disinformation about the pandemic is now punished with prison sentences[72].

On April 1, 2020, a new Article was incorporated into the Criminal Code through the Federal Law. As outlined in Article 207, paragraph 1 of the Criminal Code[73], disseminating knowingly false information publicly, disguised as reliable reports regarding circumstances that jeopardize the lives and safety of citizens, as well as information about government measures taken to safeguard the population and territories, is subject to legal consequences[74]. While the Article previously regulated the spread of fake news about an act of terrorism[75], the scope of application extended to the State's health emergency operations during the pandemic. Here, the cardinal reason for the expansion of misinformation could potentially be a distrust in political

72. Tariq Ahmad, et al., U.S. Global Legal Research Directorate Law Library of Congress, *Freedom of expression during COVID-19* at 44 (The Law Library of Congress, Global Legal Research Directorate, 2020) 44, available at https://www.loc.gov/item/2020714999/ (last visited November 29, 2023).

73. See Article 207.1, The Criminal Code of Russia Federation 1 April 2020, available at https://base.garant.ru/10108000/37c73f2864615edbc14df2a73fccde7c/ (last visited November 29, 2023).

74. The offenders may face penalties, including fines ranging from 300,000 to 700,000 rubles. Alternatively, the penalty may be equivalent to the convicted person s wage, salary, or any other income, spanning a duration of one year to eighteen months. In addition to fines, punishment may involve compulsory labor for up to three hundred and sixty hours, corrective labor for up to one year, or a restriction of freedom lasting up to three years.

75. See Art. 207, The Criminal Code of Russian Federation 28 December 2004, available at https://www.imolin.org/doc/amlid/Russian_Federation_Criminal_Code.pdf (last visited November 29, 2023).

institutions[76]. This contributes to the dissemination of false information and amplifies its impact on official media outlets.

Consequently, the repercussions of this phenomenon pose significant harm to democracy. Moreover, it was noted in Article 207, paragraph 1 that circumstances that pose a threat to the life and safety of citizens are recognized as natural or man-made emergencies[77]. Therefore, there is no doubt that Article 207, paragraph 1 directly addresses the disinformation acts related to the COVID-19 pandemic.

The second paragraph of Article 207 is devoted to the public dissemination of knowingly false, socially significant information that entails grave consequences. According to the provision, public distribution of deliberately false socially significant information under the guise of reliable messages, which negligently entailed infliction of harm to human health or caused the death of a person or other grave consequences is also punishable by certain terms of deprivation of freedom, among other types of sanctions[78]. The main difference between the first and second paragraphs of Article 207 is distinguished in the consequences that the action brought. While the consequences of the first paragraph should be deliberate, the second paragraph requires those repercussions through negligence. For instance, erroneous exposure of state measures on COVID-19 or a presentation of false infection numbers is sufficient to consider the action as criminal either under paragraph 1 or 2 of Article 207.

Although deliberate nature plays a paramount role in the categorization of the wrongful act as a crime, dissemination of the information negligently is also subject to punishment at the administrative level. Article 101 of Administrative Code[79] enshrines that the dissemination of false information about circumstances that pose a threat to the safety of citizens and about the government's emergency

76. See Andreu Casero-Ripollés, *Impact of COVID-19 on the media system. Communicative and democratic consequences of news consumption during the outbreak*, 29(2) El Profesional de la Información 2 (2020), available at http://dx.doi.org/10.3145/epi.2020.mar.23 (last visited November 29, 2023).

77. See *id*., at 75.

78. See *ibid.*

79. See Art. 13.15, Russian Administrative Code April 2020, available at https://base.garant.ru/12125267/07a4a413953ad94308be69165d05fd74/ (last visited November 29, 2023).

operations will be punishable[80]. An interesting point is that besides the constitutional legitimacy of those legislative provisions, even before the new statutory norms were adopted, the Investigative Committee of the Russian Federation stated on its official website[81], stressing that the investigations are launched against the spreading of fake news about the number of individuals being infected with COVID-19 in the capital city, Moscow[82]. According to the text of the statement, those investigations were carried out under Articles 237 (distortion of information about events, facts, or phenomena endangering human life or health)[83] and 281.1 (defamation)[84] of the Criminal Code of the Russian Federation.

Following this, the material, so-titled "Death from coronavirus is the lesser evil" by Elena Milashina, published in the "Novaya Gazeta"[85] stated that doctors do not have enough protective equipment and that local authorities carry out mass detentions for violating self-isolation[86]. Roskomnadzor (the Federal Service for Supervision of Communications, Information Technology, and Mass Media)[87], in response to the issued article, filed an administrative complaint against Novaya Gazeta and its editor-in-chief Dmitry Muratov for two publications. The executive organ stated that the alleged statement contained unreliable

80. See Ahmad et al., *Freedom of expression during COVID-19* at 45 (cited in note 73).

81. Available at https://sledcom.ru/news/item/1451926/ (last visited November 29, 2023).

82. See Ahmad et al., *Freedom of expression during COVID-19* at 45 (cited in note 73).

83. See Art. 237, The Criminal Code of Russian Federation (cited in note 76).

84. See Art. 281.1., The Criminal Code of Russian Federation (cited in note 76)

85. Available at https://novayagazeta.ru/articles/2020/04/12/84851-smert-ot-koronavirusa-menshee-zlo (last visited November 29, 2023).

86. Available athttps://perma.cc/L44L-JADL (last visited November 29, 2023).

87. The Federal Service for Supervision in the Field of Communications, Information Technologies and Mass Communications (Roskomnadzor) is a federal executive body exercising control and supervision functions in the field of mass media, including electronic and mass communications, information technologies and communications, functions for control and supervision of compliance of the processing of personal data with the requirements of the legislation of the Russian Federation in the field of personal data, as well as functions for organizing the activities of the radio frequency service, available at https://rkn.gov.ru/about/ (last visited November 29, 2023).

socially significant information, which poses a threat of harm to the health of citizens and threatens public safety[88]. After the supportive demands by the Prosecutor General's Office, the article was removed from the site before the case was ruled by the judiciary.

Roskomnadzor later lodged a complaint against the Ekho Moskvy radio station. According to the factual background of the case, on March 16, 2020, a guest during an interview in the program expressed doubts about the reliability of the Government's official statistics on COVID-19. After the Roskomnadzor initiated administrative proceedings, a court fined the radio station 260,000 rubles for knowingly spreading false news that posed a threat to human health[89]. The editor-in-chief of the radio station, Alexei Venediktov, was also fined 60,000 rubles, due to the deliberate dissemination of false news and entailing a threat to the life and health of persons.[90] Moreover, the Roskomnadzor ordered the online editors of Ekho Moskvy to remove the interview from the website[91].

The limited availability of public records is most likely the main reason for the proliferation of fake news. Utilitarianism philosophers, like John Milton and John Stuart Mill[92], believed that individuals had certain natural rights that transcended any social contract[93]. They opined that if individuals were properly informed of what was happening around them, then they would rationally get to the truth, either on their own or through informed public debate. It is no coincidence that the European Court of Human Rights (ECHR) ruled in various cases that the grounds for restrictions on accessibility to public information materials should be minimized and the margin of appreciation

88. See also The European Center for Press and Media Freedom, at 46 (cited in note 62).

89. See *id*., at 47.

90. See *ibid*.

91. See *ibid*.

92. Lindsay Palmer, *Press Freedom during COVID-19: The Digital Discourses of the International Press Institute, Reporters Sans Frontières, and the Committee to Protect Journalists*, 10(6) Digital Journalism, 3 (2022), available at https://doi.org/10.1080/21670811.2021.1943480 (last visited November 29, 2023).

93. See *ibid*.

from that perspective is narrowed down[9495] also. As I mentioned earlier in this chapter, political institutions create social concern via restricted access to information. Inherently, the lack of transparent, accountable, and precise governmental communication prompts multiplicities in content material. In emergencies, restrictions for a temporary period aim to mitigate public safety risks and discourage the dissemination of false information in a way that is palatable under constitutional principles. However, the reflection of those limitations via criminal prosecutions becomes excessive and might lead to abuses of power.

After discussing the legislative provisions and their application in practice, I would also like to highlight the proportionality criterion of those provisions in the Russian Federal Constitution. Specifically, the Constitution delineates the circumstances under which restrictions on human and civil rights and liberties are permissible. According to this constitutional provision, such limitations can only be imposed by federal law and must be tailored to the extent necessary for safeguarding fundamental aspects of the constitutional system. This includes considerations of morality, health, and the protection of the rights and lawful interests of other individuals. Moreover, these restrictions are deemed justifiable when they contribute to ensuring the defense of the country and the overall security of the state[96]. In a state of emergency, the Constitution provides that, individual restrictions of rights and liberties with identification of the extent and term of their duration, may be instituted in conformity with the federal constitutional law under conditions of the state of emergency, to ensure the safety of citizens and protection of the constitutional system[97].

The freedom of the press is not considered one of the non-derogable rights under Article 56, paragraph 3 of the Federal Constitution. Another fact that is worth mentioning is that legislative provisions

94. See *Mamere v. France*, ECHR 12697/03 (2006), available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-77843%22]} (last visited November 29, 2023).

95. See *Hertel v. Switzerland*, ECHR 25181/94 (1998), available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59366%22]} (last visited November 29, 2023).

96. See Art. 55, Russian Federation Constitution.

97. See Art. 56, Russian Federation Constitution.

in the Criminal Code and Administrative Code were adopted at the outset of COVID-19. In that regard, the substantial grounds that aggravated the situation to the extent of imposing administrative or criminal sanctions on individuals are highly debatable. The legal policy undertaken by the Government from the outset of the pandemic in relation to the freedom of the press enshrined in Article 29 of the Federal Constitution, was not in accordance with the legal necessity and proportionality principle, which we also encountered in the Hungarian Constitution. As we discussed, soft laws published by United Nations organs and the Council of Europe strongly recommend minimizing the restrictions on fundamental rights. Even if the limitations are imposed, they should be consistent with the international obligations of a state. It should be borne in mind that soft laws have an indirect effect and European Court rules according to those laws when the pending case concerns the balance between the pressing social needs. However, in the case of the Russian Federation and Hungary, emergency powers apply criminal prosecution because of the unreliable information in the media. Therefore, condisering those administrative and criminal provisions as constitutional is not straightforward..

3.3 *Azerbaijan*

Similar bills and amendments were also made in the legislative system of the Republic of Azerbaijan.

According to the Law of March 17, 2020, on amending the Code of Administrative Offenses[98] of the Republic of Azerbaijan, new provisions were added to Article 388-1 of the Code of Administrative Offenses. The legislation stipulates that failure to comply with the regulations concerning the dissemination of prohibited information on an internet resource by the owner of the domain name can result in fines. Specifically, individuals may face fines ranging from five hundred to one thousand manats for such violations. Officials, on the other hand, may incur fines between one thousand to one thousand and five hundred manats, or in certain circumstances, they could be subject to administrative imprisonment for a maximum of one month. The

98. See The Law on Amendments to the Criminal Code (2020).

severity of the penalty takes into consideration the recurring nature of the offense. Legal persons found in violation may be fined from one thousand five hundred to two thousand manats[99]. That provision covers the dissemination of false information about the coronavirus or spreading material that could cause people to alarm. It was also noted in the provision that such administrative sanctions are applied when the perpetrated act does not lead to criminal liability. However, it should be mentioned that criminal proceedings might only be initiated under Article 139-1 of the Criminal Code[100] in case the violation of the anti-epidemic regime, sanitary, hygiene, or quarantine regimes causes the spread of diseases or creates a real threat to the spread of diseases. That provision is not exclusively devoted to restricting the freedom of the press in the territory of the Azerbaijan Republic.

Article 13-1 of the Law of the Republic of Azerbaijan "On Information, the Provision of Information and the Protection of Information" envisages the procedural rules for the elimination of materials whose dissemination is prohibited by the administrative provisions. According to the regulatory norms, the Ministry of Digital Development is tasked with identifying cases in which prohibited information is being accessed on an internet resource. The Ministry may discover the violation on its motion or via notifications by individuals, legal entities, or state institutions. After verification, the Ministry issues a written official warning to the owner of the internet information resource, the possessor of the domain name, and the hosting provider[101]. In the content of the notice, there should be an indication of prohibition by law on disseminated information. The recipient of that warning is requested to remove the relevant information or to restrict access to the Internet resource or its relevant part. The notice also contains

99. See The Law on Amendments to the Code of Administrative Offenses (2020).

100. If the violation of the anti-epidemic regime, sanitary-hygiene or quarantine regime causes the spread of diseases or creates a real threat for the spread of diseases, individuals will be punished with a fine in the amount of 2500 to 5000 manats or restriction of freedom for a period of up to three years or deprivation of liberty for a period of up to three years.

101. See Art. 13-3, paragraph 1, The Law On Information, the Provision of Information and the Protection of Information.

information about measures to be taken if the relevant request is not fulfilled promptly.

If information prohibited by law remains on an Internet resource beyond the stipulated time frame of 8 hours from the issuance of the notice, the Ministry of Digital Development takes further action[102]. In such cases, the Ministry sends a notification and proceeds to file an application with the relevant district court. The purpose of this legal action is to request the court's intervention in the removal or restriction of access to the internet information resource or its specific section that contains the prohibited content. This underscores a legal process initiated by the Ministry when timely compliance with content removal or access limitations is not achieved.

The court considers the application within 5 days and takes a decision[103]. The decision enters into force immediately after its ruling, and filing an appeal against the decision does not prevent its execution. Subsequently, the Ministry attaches the information resource to the list of "Dissemination Prohibited"[104]. Immediately after the Internet information resource is added to the list, the hosting provider and Internet service providers are required to prohibit entry to the entire Internet information resource. Simultaneously, they are obligated to communicate the ensuing consequences to the owner of the internet information resource.

When evaluating a legal measure, the discussed procedural regulations appear transparent and aligned with the principle of a valid purpose. Initially, a warning to remove information within 8 hours, backed by valid reasons, signifies intent by the disseminator. Failure to comply might result in alternative administrative penalties. However, imposing administrative imprisonment for up to one month contradicts the Council of Europe's April 7, 2020 Guidance and lacks proportionality concerning actions taken during the COVID-19 period.

When restricting press freedom, it is crucial to consider legitimate intent and proportionality. In Azerbaijan's legislation, while there were valid reasons for adopting bills and amending criminal and

102. See *id*., paragraph 2
103. See *id*., paragraph 5.
104. See *id*., paragraph 6.

administrative laws, the imposition of administrative imprisonment and deprivation of liberty exceeds the due consequences.

4 *Conclusion*

Overall, the newly established administrative sanctions in the legislation don not seem to be in accordance with the requirements of the Constitution of the Republic of Azerbaijan. According to Article 71, paragraph 3 of the Constitution, upon declaration of war, martial law, and emergency, certain human rights and freedoms may be partially and temporarily restricted. This curtailment is carried out in accordance with the international obligations of the Republic of Azerbaijan. The provision reflects a recognition that, under exceptional circumstances, there may be a need to limit certain rights for the sake of national security or public welfare, aligning with the country's commitment to international standards and agreements. Article 3, paragraph 6 of the Constitutional (Organic) Law on the Implementation of Human Rights and Freedoms in the Republic of Azerbaijan defines the freedom of the press as a derogable right for the purposes of protection of health and morality. Moreover, the Constitutional Law encapsulates the legitimate aim and the principle of proportionality regarding the restrictions. Even if the protection of life and health could be interpreted as serving legitimate aims, it can hardly be considered proportionate regarding the consequences. The Code of Administrative Code enshrines the administrative imprisonment sentence, and it looks rigid and excessive regarding the restrictions on freedom of the press.

On the other hand, the criminal sanctions established in Hungarian and Russian codes, take an analogical position in the Criminal Code of Azerbaijan as well. Article 139-1 of the Criminal Code envisages the applicability of the provision in a wide range of fields. The textual interpretation of the provision, as well as the notice in Article 388-1 in the Code of Administrative Offenses, gives us sufficient grounds to consider its applicability in the media sector. While the criminal provision in the Russian Code distinguishes the deliberateness, the Article in the Azerbaijani Code does not differentiate the purposiveness or negligence in dissemination. The obscure points in the text of the

criminal provision shrink the quality of the law in terms of the foreseeability criterion. Thus, neither the administrative nor the criminal sanctions established in the relevant Codes during the pandemic were proportionate to the due consequences of the legitimate aim.

Capturing Killer Acquisitions in Digital Markets under the European Union Merger Control Rules

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Abstract: A few years ago, a novel development identified as "Killer Acquisitions" surfaced within the domain of EU Merger Control: incumbent undertakings were under suspicion of acquiring promising startups with the intent of eliminating prospective market competitors. Big Tech companies in digital markets are among the usual suspects in this kind of transaction. While this strategy can surely serve to cement incumbent platforms' dominant position in the digital markets, the issue resides in the impracticability of capturing these acquisitions within the framework of EU Merger Control regulations due to the impossibility of complying with the stipulated threshold requirements which respectively brought about the enhancement of the European Commission's toolbox. This paper will display the options to carry out those amendments and what options were opted for. It will address whether the proposed methodologies for addressing killer acquisitions represent viable solutions to the issue. This paper aims to clarify the challenges faced by digital platforms engaged in business operations and strategic merger and acquisition planning within the European Union. This work's focus is also on elucidating the challenges that digital platforms engaged in business operations and mergers and acquisitions within the EU may confront.

Keywords: Killer Acquisitions; EU Merger Control; Article 22 Referrals; EUMR; DMA.

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1 Introduction

The phenomenon of "killer acquisitions" was first introduced in the doctrine in 2019[1]. The concept draws attention to the acquisitions in which incumbent undertakings acquire start-ups to discontinue the rival product, leading to the distortion of future competition. Killer acquisitions are especially significant in the markets where innovation is important, such as the pharmaceutical or digital sectors. In the latter, Big Tech[2] companies are usually suspected of being engaged in this peculiar activity, since it can be considered as a strategy to make their market power uncontestable through the acquisition of potential competitors.

When this phenomenon first emerged, the existing legal framework was not able to capture killer acquisitions within the European Union (EU). A massive boom happened in the legal doctrine on discussion[3] of the potential ways to reform the legal framework of the

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1. See Colleen Cunningham, Florian Ederer, Song Ma, Killer Acquisitions, 126(3) Journal of Political Economy, 649 (2021).

2. Big Tech, also known as the Tech Giants, refers to the most dominant companies in the information technology industry, most notably the five largest American tech companies: Google (Alphabet), Amazon, Facebook (Meta), Apple, and Microsoft. Sometimes these big five companies are called GAFAM companies.

3. See, for example Claire Turgot, Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime, 5(2), European Competition & Regulatory Law Review 112, (2021); Nicholas Levy, Andris Rimsa & Bianca Buzatu, The European Commission s New Merger Referral Policy: A Creative Reform or an Unnecessary End to Brightline Jurisdictional Rules?, 5(4) European

EU Merger Regulation (EUMR)[4]. This occurred because the merger notification thresholds did not give the European Commission (EC) the authority to intervene against potential killer acquisitions, therefore several options were brought to the table to address this gap[5].

In March 2021, the EC published a Guidance[6] encouraging National Competition Authorities (NCA) of member States (MS) to refer cases that fall below the EU and national thresholds to the EC. This served the purpose of capturing transactions, especially killer acquisitions, that might otherwise escape review under the EU and MSs merger control rules. In April 2021, the Guidance was first applied to refer Illumina/Grail transactions to the EC[7]. The EC accepted that referral and this position was upheld by the General Court (GC) as well. Such usage of Article 22 of EUMR led to huge controversies and caused wide-ranging concerns among undertakings in digital markets.

Meanwhile, the Digital Markets Act[8] (DMA) entered into force in November 2022, containing an obligation for gatekeepers[9] to notify any merger involving providers of services in the digital sector, irrespective of whether the national, or EU, merger turnover thresholds were met[10].

Competition & Regulatory Law Review 364 (2021); Nicholas Levy, Henry Mostyn & Bianca Buzatu, Reforming EU merger control to capture killer acquisitions – the case for caution, 19(2) Competition Journal Law, 51 (2020); Tânia Luísa; Martins, Margot Lopes; Nunes, Raquel Marques, New trends in merger control: capturing the so-called killer acquisitions... and everything else, 57 Actualidad Jurídica Uría Menéndez 33, (2021); Vaclav Smejkal, Concentrations in Digital Sector – A New EU Antitrust Standard for Killer Acquisitions Needed?, 7(2) InterEULawEast 1, (2020); Abhishek Tripathy & Akshita Totla, Changing contours of Merger Control: Exploring the enforcement gap in regulating nascent acquisitions, 8(2) NLUJ Law Review 74, (2021).

4. Council Regulation on the control of concentrations between undertakings (EC Merger Regulation) (20 January 2004), OJ L24/1.

5. See infra.

6. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021, OJ C 113 (Communication from the Commission).

7. T-227/21, Illumina Inc v Commission, EU:T:2022:447.

8. Council Regulation on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) 12 October 2012, OJ L 265.

9. It will be further provided under the second section of this paper that Big Tech companies – GAFAM, are also targeted under the term of gatekeepers .

10. Article 14, DMA 2022.

This paper intends to shed light on the attempted efforts to fill this enforcement gap. In the first section, the paper will draw a clear picture of the killer acquisitions problem, establish the need to expand the jurisdictional scope of the EUMR, depict how some MSs addressed this issue, and discuss various possible solutions that could have been adopted. The second section will discuss a new reading and usage of Article 22 of the EUMR referrals regime and, in particular, what kind of difficulties it can cause the companies planning mergers or acquisitions within the EU, and the obligation introduced by the DMA to notify the mergers. In addition, it seeks to provide answers to the concerns of whether altering the status quo in the easiest way possible is a good solution to the issue in question and, if not, what the effective options to tackle this issue are. It will also try to depict what kind of challenges digital platforms can face in the future due to the recent alterations of merger control rules. These objectives will be pursued by using and analyzing the treaty provisions of EU law, the CJEU case law, the EC's decision-making practice, the EC's soft law, and the different views of scholars in the legal doctrine.

2 Capturing killer acquisitions in digital markets under EU Merger Control; Difficulties and possibilities

2.1 The enforcement gap in the EU Merger Control

The EUMR applies to concentrations with an EU dimension[11]. In particular, Article 1 of the EUMR requires that certain turnover thresholds have to be met to do so[12].

11. See Alison Jones and Brenda Sufrin, EU competition law: text, cases, and materials, at chapter 15 p.12 (Oxford University Press) (7th ed. 2019) (1st ed. 2010).

12. According to articles 1(2) and 1(3) of EUMR, concentrations are deemed to have an EU dimension where: (i) the combined worldwide turnover exceeds 5 billion, at least two of the parties have EU-wide turnover exceeding 250 million, and the parties do not achieve more than two-thirds of their EU turnover in the one Member State, or (ii) the combined worldwide turnover exceeds 2.5 billion, the EU-wide turnover of at least two of the parties exceed 100 million, in each of the three member States, the combined turnover of all parties exceeds 100 million, in each of those member States, the turnover of at least two of the parties exceeds 25 million, and the

Those thresholds were designed to create "precise and objective criteria" which can lead to the straightforward application of EUMR to better reflect "the requirements of legal certainty and speed"[13] and to "make a clear allocation between the interventions to be made by the national and by the Community authorities"[14]. Therefore, EUMR can only capture "major concentrations"[15] that are deemed to have an EU dimension.

Article 21 of EUMR entails the "one-stop shop" principle[16]: this means that, if the concentration has an EU dimension, only EUMR will be applied - therefore, other EU or national competition laws are excluded -, and the EC will have sole jurisdiction over such transactions[17]. The purpose is to establish a clear division of powers between the NCAs and the EC, avoiding joint jurisdiction over one concentration[18]. Such kind of competence division between MSs and the EC is due to the principle of subsidiarity[19].

However, the concept of killer acquisitions deals with the acquisition of start-ups which, at the time of the event, have minimal or no turnover at all, leaving them out of the European Union s control. They could be referred to the EC only if they fell within the competence of the particular MS[20], which was unlikely since the MSs had similar thresholds. Furthermore, it has been established that the

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parties do not achieve more than two-thirds of their individual EU-wide turnover in one Member State .

13. T-417/05, Endesa, SA v Commission of the European Communities, EU:T:2006:219, para 209.

14. C-202/06 P, Cementbouw Handel & Industrie v. Commission, EU:T:2006:64, para 37.

15. Recitals 8 and 20, Council Regulation (EC) on the control of concentrations between undertakings (the EC Merger Regulation), 20 January 2004, 2004/139 OJ L24.

16. See Jones and Surfin, EU competition law: text, cases, and materials at 24 (cited in note 11).

17. See ibid.

18. Reading together article 1 and 21 of EUMR means that the EC has no competence to review concentrations that lack an EU dimension; such concentrations are instead subject to review by NCAs if they meet national jurisdictional thresholds.

19. See Paragraph 2, Report on the Functioning of Regulation No 139/2004, 18 June 2009, COM (2009) 281 final (Communication from the Commission to the Council).

20. Under the conditions set out in Articles 4 (5) and 22 of EUMR.

enforcement gap used to exist in EU Merger Control but it was not able to capture killer acquisitions. This brought about discussions of reforming the EU Merger Control. This paper will now turn to establish whether there was an actual need for reformation in order to capture killer acquisitions in digital markets, or not.

2.2 Need for intervention, was there a necessity to fill the enforcement gap?

Big Tech companies are usually the ones suspected of being engaged in killer acquisitions, as they use this concept as a strategy to make their market power impregnable through the acquisition of potential competitors. The main concern about killer acquisitions carried out by GAFAM is that these Big Tech companies take advantage of their scale and scope, direct and indirect network effects, and more varied data collections, thus making their offers irresistible for consumers, and constituting barriers to switching[21]. By doing so, the affected digital markets became incontestable as they tipped in favor of the serial acquiring digital platforms. Empirical evidence should be drawn to illustrate this better: between 2008 and 2018, Google acquired nearly 168 companies, Facebook purchased 71 companies, and, finally, Amazon bought 60 companies[22]. All these acquisitions had a massive impact on the growth of these Big Tech companies.

Competition law scrutinizes killer acquisitions as "a particular variation of the more general loss of potential competition through the acquisition of a nascent firm" theory of harm"[23]. These acquisitions can result in reduced competition, and in the potential loss of both product and technology itself, which in turn threatens the efficiency of innovative sectors, ultimately impacting consumer welfare.

21. See Peter Alexiadis and Zuzanna Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review, 16(2) Indian Journal of Law and Technology, 65 (2020)

22. Elena Argentesi et al, Ex-post Assessment of Merger Control Decisions in Digital Markets (Learlab, June 2019), available at https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf (last visited November 29, 2023)

23. OECD, Start-ups, Killer Acquisitions and Merger Control (OECD, June 2020), available at https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf (last visited November 29, 2023).

However, it is important to note that the acquisitions of start-ups do not always lead to such detrimental effects and it cannot be stated that all those above-mentioned acquisitions by GAFAM companies are killer acquisitions. To state that, competition law has to provide criteria under which these transactions are to be labeled potential killer acquisitions. Before such a definition, the relevant competition authorities have to first get jurisdiction over those concentrations. This means that, within the framework of merger control rules, they should be able to capture and review those acquisitions.

However, some authors consider that clear evidence should be referred to in order to establish a significant enforcement gap[24]. By referring to the Cunningham report, a distinguishing line was drawn between digital and pharmaceutical sectors: while some pharmaceutical companies may acquire nascent rivals to terminate innovation that threatens to challenge established drugs, digital platforms often acquire innovative start-ups to expand and integrate the acquired product or service[25]. According to them, these are not typical killer acquisitions as depicted in the Cunningham report, and there are even some more proponents of this line of argumentation. Certain scholars also assert that within digital markets, in contrast to the pharmaceutical industry, the desire will develop the services of start-up firms, rather than shutting them down[26]. They, therefore, believe that since product development is less structured and the pace and success of innovation are more problematic in digital markets, assessing the theory of harm will be more complex[27].

These concerns are justifiable, yet one issue must be taken into consideration: it is not just about killing the product itself, but also about the "acquisitions for the purpose of killing or taming a potential future threat to the acquirer's core business"[28]. The problem here is:

24. See Nicholas Levy, Henry Mostyn & Bianca Buzatu, Reforming EU merger control to capture killer acquisitions – the case for caution, 19(2) Competition Journal Law, 51 (2020).

25. See id, at 53.

26. See Alexiadis and Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review, at 69 (cited in note 21).

27. See ibid.

28. Gregory Crawford, Tommaso Valletti, Cristina Caffarra, How Tech Rolls: Potential Competition and Reverse Killer Acquisitions (CEPR, May 11 2020), available

"What innovation by the buyer is foregone as a result of it buying a business it could have built organically instead?"[29]. Therefore, concern about needed interventions must be addressed, given the overall intensity of innovation efforts in the economy and its impact on consumer welfare[30].

It is necessary to state, however, that strong evidence is needed to justify any legislative reform. To this end, as also emphasized by Commissioner Vestager in 2020, there is a need to be respectful and very careful in investigating the evidence before imposing wide-ranging alterations to the EUMR[31]. It is mentioned by the EC in 2021 that, between 2015 and 2019, 87 transactions (42 in digital, 24 in pharmaceutical, and 21 in the other sectors) might have possibly merited a revision because of horizontal overlaps or other commercial links. Especially in 27 of them, transaction value exceeded the target firm s turnover by a ratio of 10 or more[32]. However, before implementing any wide-ranging alterations to the EUMR, the EC should still seek to better examine those unreported transactions where it considers that they were wrongly chosen to establish stronger evidence.

Maybe that is the reason why instead of opting for any reforms which will be examined in the next subsection, the EC went on to adopt its very controversial Guidance on Article 22 of EUMR.

2.3 Different proposals to reform the enforcement gap in EU Merger Control

When the jurisdictional gap first emerged, different proposals were brought to reform enforcement rules. This paper will now turn to some of them and look at their intricacies and criticisms.

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at https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions (last visited November 29, 2023).

29. See ibid.

30. See ibid.

31. See Michael Acton, Vestager careful about new merger thresholds to catch killer acquisitions, MLex, April 24, 2020, available at https://mlexmarketinsight.com/news/insight/vestager-careful-about-new-merger-thresholds-to-catch-killer-acquisitions (last visited November 29, 2023).

32. See Paragraph 105, Evaluation of procedural and jurisdictional aspects of EU merger control 26 March 2021, SWD(2021) 66 final (Commission Staff Working Document).

Lowering turnover thresholds[33] was heavily faulted as being burdensome and time-consuming since it could have potentially led to capturing large numbers of unproblematic transactions. Therefore, it was rejected by the EU Special Advisors' Report[34].

It was also proposed to demand certain EU-wide turnover not from all participants in the transaction, but from only one of them, especially from the acquirer[35]. This option was also dismissed because it could have allowed, for example, a US tech giant to enter the EU market through its first acquisition outside the scope of the EU merger control.

Another highlighted possibility was the imposition of a new merger threshold for killer acquisitions based on the "transaction values"[36], as already implemented in some MSs including Germany and Austria[37].

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33. See Vaclav Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? 7 Intereulaweast 1, 4 (2020) (as a matter of fact, it is possible to lower turnover thresholds as a system for this provided with articles 1(4) and (5) of the EUMR. Following a proposal from the EC, the Council can change the size of the thresholds by a qualified majority vote. Nevertheless, the wording of these paragraphs (on the basis of statistical data that may be regularly provided by the member States) means that that kind of change can occur to reflect the graduate expansion of companies turnovers or the inflation rates).

34. See J. Crémer, Y-A de Montjoye and H. Schweitzer, Competition Policy for the digital era at 114, (March 29, 2019) (Final Report), available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (last visited November 29, 2023).

35. This is an actually existing criteria in some jurisdictions all over the world, for example in Albania, Brazil, or Colombia.

36. J. Crémer, Y-A de Montjoye and H. Schweitzer, Competition Policy for the digital era (cited in 34) (his was among the main proposals considered in the Cremer Report. However, it is also criticized in the report itself that this can be burdensome on NCAs and the EC and its application can be resource-intensive).

37. Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35(1a) GWB and Section 9 (4) KartG), July 2018, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2 (last visited November 29, 2023) (Germany imposed transaction value based threshold, requiring mandatory notification for the transactions with consideration paid in excess of EUR 400 million, adding that the target is significantly active in the territory of Germany, also one of the parties generated a German turnover more than EUR 50 million, and the parties to the transaction have a combined global turnover of above EUR 500 million. The similar test was also introduced in Austria with lower thresholds).

This option was also heavily criticized on its own merits[38]. First of all, defining the true value of any transaction poses significant challenges and this is due to the inherent complexity of some transactions and the availability of multiple methodologies for measuring their value, as noted by Commissioner Vestager, who emphasized that "it is not easy to set a threshold like that at the right level". Furthermore, parties involved in a transaction can always artificially lower its value by splitting it up into several transactions. The value of transactions is also subject to fluctuation over time to better reflect changes in the underlying assets. Allocating transaction value by geography can be especially challenging, particularly within the EU with 27 different MSs. This complexity is further amplified when dealing with acquisitions of potential competitors that generate low revenues. The expert report by the EC, thus, recommended not to change turnover thresholds into the transaction value-based one, but to watch the experience of the member States that opted that way[39].

Introducing jurisdictional criteria for the combined market share of the merging companies was also proposed in some MSs such as Spain[40] and Portugal[41]. This alternative was not that appealing[42] since it could have also resulted in capturing a lot of transactions (again

38. See Nicholas Levy, Henry Mostyn & Bianca Buzatu, Reforming EU merger control to capture killer acquisitions – the case for caution at 59 (cited in 24).

39. See Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? at 7 (cited in 33).

40. See Tânia Luísa; Martins, Margot Lopes; Nunes, Raquel Marques, New trends in merger control: capturing the so-called killer acquisitions... and everything else, 57 Actualidad Jurídica Uría Menéndez 33, (2021) (Article 8(1), Law no. 15/2007, BOE of 4 July 2007 (Spanish Competition Act) provides two alternative criteria: as a result of the concentration, a market share equal to or greater than 30% of the relevant product or service market is acquired or increased at the national level or in a defined geographic market within the country, except if the overall turnover in Spain of the acquired company or of the assets acquired in the last period does not exceed the amount of €10 million...).

41. See id., at 35 (cited in note 40) (Article 37(1) of the Portuguese Competition Act provides three alternative criteria, two of them including market shares: the transaction leads to the acquisition, creation or reinforcement of a market share equal to or greater than 50% in the national market of a specific product or service, or in a substantial part of it (market share criterion) ...),

42. Difficulties of defining the relevant market and market power in digital markets must also be taken into account.

spending burdening resources) but failed to capture situations "where a large foreign-based company firstly enters the EU market through the acquisition of a local start-up"[43].

Another reform proposal was the burdening of large market actors in the digital space with merger filing obligations[44]. It was also included in the Stigler report and was heavily favored[45]. This approach was somewhat adopted in the DMA, which recently came into force and will be discussed in the second section.

Nevertheless, making substantive changes to the EUMR demands, under Article 352 of TFEU, a unanimous vote from all 27 MSs in the Council. As discussed in the second subsection, it is imperative to establish compelling evidence demonstrating the necessity of legislative reform in order to align with political considerations during this legislative process. As a result, it will not be easy, given all the abovementioned criticisms and difficulties with the proposed alternatives.

2.4 Potential ex-post review of killer acquisitions under Article 102 TFEU

Ex-post review of potential killer acquisitions under Article 102 of the Treaty on the Functioning of the European Union (TFEU)[46] can also be a way of capturing them. Flexible ex-post intervention powers for NCAs already exist under some MSs jurisdictions, namely Ireland, Hungary, Estonia, Lithuania, and Sweden[47].

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43. Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? at 7 (cited in 33).

44. Alexiadis, Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review at 76 (cited in note 21).

45. See Stigler Center for the Study of the Economy and the State, Stigler Committee on Digital Platforms: Final Report (2019), available at https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E (last visited December 25, 2022) (according to the report, it would not be prudent to alter the nation s antitrust laws to accommodate one difficult and fast-moving sector where false negatives are particularly costly. Therefore, this is an effective solution for the report because additional power over merger review can be useful for sectoral regulators.).

46. Article 102 TFEU is a tool to address the abuse of dominant position.

47. See Cunningham et all, Killer Acquisitions (cited in note 1).

The main benefit of capturing killer acquisitions ex-post would be the elimination of heuristic difficulties[48]. This is because, during pre-emptive assessments, it can be difficult to establish strong evidence of killer acquisitions[49] and to prove potential harm to competition[50], particularly when dealing with the swiftly evolving nature of digital markets[51]. In contrast, it is noticeably easier to evaluate the likely effects[52] of killer acquisitions in the ex-post scenario.

Nonetheless, such use of Article 102 of TFEU will not be so straightforward, since defining the relevant market and establishing the dominance and market power of incumbents is not an easy task in digital markets due to their characteristics. Some authors who oppose such usage of Article 102 of TFEU justify their opinion on the ground that Article 102 is a behavioral tool, and the EC will be reluctant to apply it to mergers that concern the acquisition of control[53]. It has to be mentioned that what is prohibited under Article 102 TFEU is the abuse of a dominant position and not the possession of a dominant position in the market in itself. Therefore, that kind of reasoning cannot be accepted taking into consideration the fact that Article 102 has already been used by the Commission to fill the enforcement gap in EU merger control rules[54].

48. See Vaclav Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? at 8 (cited in note 33).

49. See OECD, Start-ups, Killer Acquisitions and Merger Control (cited in note 23).

50. See ibid.

51. The European Commission, Commission Notice on the definition of relevant market for the purposes of Community competition law 9 December 1997, OJ C372, at 41.

52. For example, whether the product or technology itself was continued, or whether the market has gained anti-competitive effects from the point of the future competition, such as the strengthening of the dominant position.

53. See Alexiadis and Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review, at 87 (cited in note 21).

54. The Tetra Pak case is a clear example that this happened before. It was deemed that the merger review was not suitable in addressing a monopoly arising from unique technological characteristics.

The concerns about legal certainty (as closed concentrations can be reviewed ex-post under article 102 TFEU) will occur[55] especially since most MSs have reformed, or are still reforming, their rules to capture killer acquisitions. Therefore, a double review of the transactions that have already undergone the scrutiny of a national merger review will lead to duplicative effects. However, following amendments at the EU and national levels, using ex-post review to assess transactions that have not been faced with merger review at the national level will elevate those concerns.

To conclude the discussion, it is theoretically possible to capture killer acquisitions ex-post under Article 102 TFEU. However, this option is not the preferred one by the EC, as it will be further depicted, maybe because the process under Article 102 takes longer and requires an extensive investigation to establish both dominance and harm to competition.

3 Preferred ways to capture killer acquisitions in digital markets under EU Merger Control

3.1 Article 22 of EUMR

The first limb of Article 22 EUMR reads that any MS can request the EC to examine any concentration that does not have an EU dimension if it affects the trade between MSs and threatens to significantly affect the competition within the territory of that MS[56]. It also sets out a deadline for the notification, which is 15 working days from the date on which the transaction was notified, or it was made known, to the MS concerned.

55. Even though the list of abusive practices is non-exhaustive under article 102 of TFEU.

56. The EC Merger Regulation, OJ L 24.

Turning to the teleological interpretation, Article 22 EUMR[57] is historically called the "Dutch Clause"[58] because some MSs, such as the Netherlands, Italy, and Luxembourg, did not have national merger control rules when the decision was made to adopt the first Merger Regulation at EU level (4064/89). However, there was a need to find a legal tool so that mergers affecting competition in those MSs could be transferred and undergo merger review by the EC. Therefore, such a legal tool was included in EUMR at the request of the Netherlands. Hence, the logic behind this provision was to allow MSs, which lacked their merger review regimes, to call on the EC for assistance to review presumably local transactions[59]. Therefore, it is not a requirement for the requesting Member State to possess the authority to assess the concentration under its national legislation, as this tool is utilized by member States without any such regulations.

Nevertheless, the EC had established a practice of discouraging referrals when they originated from member States lacking the requisite competence for review, while only accepting Article 22 referrals when a transaction exceeded the national notification thresholds in at least one Member State[60]. Consequently, Article 22 referrals have not been common and remained infrequent: since its introduction and up to the end of 2021, there have been 43 cases with requests for Article 22

57. See Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, 1 European Journal of Legal Studies, 137 (2007) (the teleological interpretation method can be defined as the method of interpretation used by courts when they interpret legal norms in the light of their purpose, values, legal, social and economic goals these provisions aim to achieve. This interpretation is also considered to be the method utilized most by the European Court of Justice (ECJ).

58. See Jones and Sufrin, EU competition law: text, cases, and materials at 33 (cited in note 11).

59. See Jay Modrall, Illumina/Grail Prohibition: The End of the Beginning for EU Review of Killer Acquisitions ? (Kluwer Competition Law Blog, September 8, 2022), available at <http://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/> (last visited November 29, 2023).

60. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else at 40 (cited in note 40).

referrals[61] and, after the publication of the Guidance, only two additional referrals were initiated in 2022[62].

It was in 2021 that the EC abandoned its restrictive approach towards the "Dutch Clause" and accepted the Guidance to broadly interpret Article 22.

3.2 The EC's Guidance on Article 22 of EUMR

On 26 March 2021, the EC published the Guidance[63] on Article 22 referral mechanisms, bypassing any formal legislative procedure, public consultation, or implementation period[64]. The Guidance first establishes that there has been an enforcement gap about concentrations in certain sectors, particularly regarding transactions in the digital and pharmaceutical sectors[65]. It is especially focused on the transactions where "the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential"[66]; it provides five situations in which this can occur, such as start-ups, important innovators, or other recent entrants with substantial competitive potential that are about to generate significant revenues[67]. In short, the purpose of the Guidance is to enable a review of killer acquisitions.

It is stated in paragraph 12 that the Guidance aims "to increase transparency, predictability, and legal certainty concerning the wider application of Article 22 of the Merger Regulation". Firstly, this work will outline the implications brought about by the Guidance; then,

61. Some of the referrals were made during the time when the MS lacked their own merger control rules.

62. See the EC s Statistics on Merger cases <https://competition-policy.ec.europa.eu/system/files/2023-01/Merger_cases_statistics.pdf> accessed 10.01.23.

63. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

64. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else at 39-40 (cited in note 40).

65. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases at paragraph 10, 31 March 2021, OJ C 113 (Communication from the Commission) (cited in note 6).

66. See id., at paragraph 19.

67. See ibid.

it will examine its intended objectives; and, finally, it will evaluate whether these implications are congruent with the stated purposes.

Primarily, owing to the Guidance, MSs can now refer any transactions to the EC, even if they do not meet the respective thresholds outlined by their national merger regulations[68]. Secondly, MSs can also make referrals for cases where a transaction has already been concluded[69]: the Guidance merely establishes a time frame for such referrals, which is more of a guideline rather than a strict deadline[70]. Thirdly, with regards to the notification deadline defined under Article 22 EUMR, the Guidance clarifies that the "notion of "made known" should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral"[71] to be present. These three issues will be discussed in detail later on. Nonetheless, when paragraphs 21 and 28 of the Guidance are read together, it appears unclear when the timeline for Article 22 EUMR referrals will start running, since the criteria according to which information is deemed to be sufficient remain vague[72].

The Guidance states that the EC will cooperate with NCAs to identify potential referral candidates and assess complaints from third parties[73]. Additionally, parties involved in mergers can voluntarily provide information about their intended transactions[74].

As observed, the EC expressly granted itself the authority to review any transaction, and ex-post review of closed transactions, without any legislative means. Nonetheless, according to the ECJ, the Commission s soft law - including its communication documents - is not

68. See id., at paragraph 21.

69. See ibid.

70. See ibid. (the EC provides that it will not generally accept those referrals if more than six months passed after the closing. However, if material facts were not known to the public in the EU, six months will start running after those facts are made publicly known.).

71. See id., at paragraph 28.

72. See Jay Modrall, Illumina/Grail Prohibition: The End of the Beginning for EU Review of Killer Acquisitions ? (cited in note 55).

73. Paragraph 25, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

74. See id., at paragraph 24.

capable of imposing indented obligations on the MSs and, therefore, it is not legally binding[75].

The broadening interpretation of Article 22 EUMR was first applied to Illumina's proposed acquisition of Grail a month after the publication of the Guidance. This paper will now turn to examine the Illumina/Grail case, in order to have a clear example to assess the re-interpretation of Article 22 EUMR.

3.3 Curious case of Illumina/Grail

On April 19, 2021, the EC decided to accept the referral on Illumina's[76] acquisition of Grail[77]. The 7.1 billion dollars' worth transaction was first announced in September 2020 and, in February 2021 - a month before the publication of Guidance -, the EC invited NCAs to employ Article 22 referral mechanism if they had any concerns on this transaction, which was not reportable to any NCA at that time[78]. The EC stated in its decision that the proposed transaction may have affected trade between MSs and would have threatened to significantly affect the competition in the territory of France. It is also provided that Grail's competitive significance was not reflected in its turnover. Illumina went on to appeal this decision before the GC: its first argument was based on the fact that the EC should not have accepted referrals under Article 22, since the transaction does not meet notification thresholds; the second point was that the EC's interpretation was contrary to the one-stop-shop principle, including principles of legal certainty, legitimate expectations, subsidiarity, and proportionality.

In its analysis of Article 22 EUMR, the GC rejected these arguments relying on literal, contextual, historical, and teleological interpretation; by doing so, the GC upheld the EC's position in its decision[79]. The GC provided that, based on the literal meaning of "any concentration"[80], any MS has the right to refer any concentration to

75. Case C-526/1, Tadej Kotnik and Other, EU:C:2016:570 at 44.

76. A US based pharmaceutical company.

77. A US start-up which develops multi cancer early detection tests.

78. Case T-227/21: Action brought on 28 April 2021 Illumina v Commission [2021] OJ C 252.

79. See ibid.

80. See id., at paragraphs 91-94.

the EC, not depending on whether notification thresholds are met. This has been called a "corrective mechanism" by the GC because it ensures the effective application of EUMR to the concentrations that are significantly affecting competition but escaping the merger review[81]. While assessing Illumina's plea that the referral request was submitted out of time, the GC also gave the interpretation of the terms "made known" as "the relevant information to be actively transmitted to that Member State, enabling it to assess, in a preliminary manner, whether the conditions for a referral request under that article [22 EUMR] have been satisfied"[82]. The GC also went on to state that the EC is supposed to comply with the "reasonable time principle" for merger reviews, as it is required by the principles of "legal certainty" and "good administration"[83]. Even though the GC concludes that the EC failed to act within the reasonable time limit[84], this failure should not be considered as an affecting factor of the applicant's rights of defense[85].

The GC's Illumina decision also represents the confirmation of the EC's Guidance. Thus, implications brought by the broad interpretation of article 22 EUMR will be further analyzed by bringing clear examples from the Illumina/Grail case[86].

81. See id., at paragraph 165.

82. See id., at paragraph 211.

83. See id., at paragraph 226.

84. See id, at. paragraph 239 - "It follows that the invitation letter was sent within an unreasonable period of time".

85. See id., at paragraph 246.

86. See Illumina, Illumina intends to Appeal European Commission s Decision in GRAIL Deal (Press release, September 6, 2022), available at https://www.illumina.com/company/news-center/press-releases/2022/1ef95365-0ca9-4726-a683-37124b1116b5.html (last visited November 29, 2023) (Illumina has announced that it will appeal the judgment to the European Court of Justice).

3.4 Implications of Guidance and their assessment

The assessment in this subsection will be carried out by taking into consideration the legal certainty[87], legitimate expectations[88], subsidiarity, and one-stop-shop principles.

Above all, the reinterpretation of Article 22 EUMR means that the EC departed from the one-stop-shop principle, thereby triggering the subsidiarity principle. As it is clearly stated above (both in the discussions of Guidance and Illumina/Grail case), literally "any concentration" can now be referred to the EC. This is contrary to the EUMR's guiding principles and core jurisdictional rules[89] and, moreover, it brings about more uncertainty for digital platforms since this reinterpretation is based on unpredictable criteria to identify which transactions will be notified under Article 22 EUMR (basically any concentrations). Prior to the publication of the Guidance, it was at least possible to assure undertakings that their transaction would not undergo mandatory merger review when the notification thresholds were not met. However, such assurance to undertakings could not be given anymore due to the lack of any objective and precise criteria under the Guidance. Being unable to foresee the outcome, the most certain evaluation undertakings could make is to estimate whether the EC might have potential interest in reviewing the transaction, based

87. See Takis Tridimas, The General Principles of EU Law at 242 (OUP 2006) (as a general principle of EU law, the legal certainty entails legal norms to be clear and applied in a foreseeable and consistent manner. This principle contains that the precise content of law has to be known to subjects to whom it is applied, allowing them to plan their conduct accordingly). See also Case C-201/08, Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt, EU:C:2009:539, paragraph 49 (legal certainty principle is also confirmed by the ECJ as requiring "rules must be clear and precise and, on the other, that their application must be foreseeable by those subject to them").

88. See Paul Craig, EU Administrative Law at 555 (OUP 2nd ed. 2012) (legitimate expectations principle is a part of the EU constitutional and administrative law. In general, this principle applied where "legal situation caused expectations on which the addressee relied, the reliance was reasonable, and the individual interest preponderates over conflicting public interests (principle of proportionality)").

89. See Nicholas Levy, Andris Rimsa & Bianca Buzatu, The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to "Brightline" Jurisdictional Rules?, Vol. 5 European Competition and Regulatory Law Review 364, at 375 (2012).

on their subjective analysis[90]. That is why the reinterpretation of Article 22 EUMR lessens the legitimate expectations of digital platforms.

It is mentioned that the EC encourages companies to voluntarily provide information on their intended transactions. In return, the EC may guide them on whether it may consider their transaction a good candidate for referral under Article 22, depending on the amount of information that has been submitted[91]. However, this will be burdensome on digital platforms, as they have to assess the benefits of voluntarily informing the EC, not knowing what "sufficient information" is to provide, how much time it will take them to get the EC's opinion, and so many other issues. In other words, this will create more uncertainty and bureaucracy for them, rather than a useful tool to seal their transactions.

With regards to the uncertainty related to the timeline of the referrals, as the Guidance stated, NCAs will be considered informed, and thus the transaction will be "made known" if they possess sufficient information to make a preliminary assessment[92]. The uncertainty here is that this interpretation gives MSs excessive discretion to determine when they became aware of the transaction[93]. The above-mentioned Illumina/Grail case is an excellent example of this situation since France submitted its referral request in March 2021, six months after the extensive public announcement. Drastically, the GC's interpretation of the concept of "made known" does not bring any clarity on what is considered sufficient information, leaving MSs with the mentioned discretion by the Guidance. Instead, the GC states that there is an obligation on undertakings to actively transmit the relevant information to the MSs, to enable them to preliminarily assess whether the conditions to make a referral request are satisfied. More drastically, it is also not clear which conditions are intended to be mentioned here

90. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else, at 41 (cited in note 40).

91. Paragraph 24, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

92. See ibid.

93. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else, at page 42 (cited in note 40) (it will be up to them to decide whether they are in the possession of sufficient information to be able to make preliminary assessment, since it is not provided what is sufficient information).

since, according to the Guidance, any transaction can be mentioned, and there is not an objective criterion for that. Therefore, undertakings are obliged to actively transmit sufficient information to all 27 MSs about their transaction to make sure the timeline for Article 22 referral kicks off, while the concept of "sufficient information" itself is not known. Such interpretation of EU merger rules is highly likely to raise concerns on the principles of legal certainty and legitimate expectations.

The EC has the power to review closed transactions within six months after their closing. However, this is subject to exception when the information about the transaction was not made public in the EU (again, the same issues are at stake with regards to the notion of "made known"), constituting a discretionary basis for the EC. Moreover, if the EC considers that there is a potentially detrimental effect on consumers, or that the magnitude of the potential competition is threatened, it can accept later referrals in exceptional circumstances[94]. This means that undertakings will always be under the risk of review by the EC about their completed transactions[95]. Thus, the acquirers and merging parties have to accept the unpredictable post-closing review by the EC in most cases. As a consequence, undertakings can never be assured to complete their transaction with the confidence of not being subject to merger review (e.g., Illumina) in the unknown future since it is not possible to foresee when the timeline starts, and the EC can at all times rewind the six months.

3.5 The obligation under Article 14 of DMA

The DMA contains an obligation for gatekeepers to notify any concentration "where the merging entities or the target of concentration provide core platform services or any other services in the digital

94. Paragraph 21, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

95. See Nicholas and al., The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to "Brightline" Jurisdictional Rules?, at 377 (cited in note 89) ("In previous years, since the Article 22 was generally applied to transactions that were subject to notification to one or more NCAs, there was a little risk that a reference would be made in respect of a transaction that had closed.").

sector or enable the collection of data, irrespective of whether it is notifiable to the Commission under [EUMR] or [to NCAs] under national merger rules"[96]. This serves to capture killer acquisitions as well[97].

Article 3(1) of DMA defines a gatekeeper as a provider of core platform services if a) it has a significant impact on the internal market; b) it operates a core platform service which serves as an important gateway for business users to reach end-users; and c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future[98]. Article 3(2) of DMA adds threshold requirements to that, as an annual EEA turnover equal to or above EUR 7.5 billion in the last three financial years, or where it provides a core platform service that has more than 45 million monthly active end users in the EU and more than 10 000 business users, among other things[99]. Given this definition and established thresholds, it can be easily pointed out that it is specifically intended to bring Big Tech (GAFAM) companies under the scrutiny of Merger Control[100].

In practical terms, Article 14 DMA will allow the EC to capture all digital mergers intended by Big Tech companies. Therefore, the EC can capture potential killer acquisitions ex-ante, after the DMA. Since all intended transactions by gatekeepers will be notified to the EC for its ex-ante review, the referrals of Article 22 will now operate to enable the EC to have an ex-post review over transactions pursuant to DMA.

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96. Article 14, DMA 2022.

97. There are also critical discussions over the obligation in question under article 14 DMA but they will not be discussed in detail because of the purposes of this paper. In general, the DMA seems to achieve its stated purposes adequately without undermining any general principles of EU law.

98. Article 3(1), DMA 2022.

99. Article 3(2,) DMA 2022.

100. See Cabral L, Haucap J, Parker G, Petropoulos G, Valletti T, van Alstyne M, The EU Digital Markets Act a Report from a Panel of Economic Expert (Joint Research Paper) at 9 (2021) ("These thresholds are designed to capture the largest online platforms, where potential harm is the greatest. Effectively, it comes down to the GAFAM tech giants (Google, Apple, Facebook, Amazon and Microsoft), possibly a few more.").

4 Conclusion

The first section of this article focused on how there used to be a gap in the EUMR to capture killer acquisitions. Furthermore, it has been highlighted the need to fulfill this gap, but strong empirical evidence was needed to adopt legislative reforms. Then, it has been shown how some MS reformed their merger control rules to capture killer acquisitions. Therefore, it has been established that choosing any of those legislative reforms discussed was challenging. It has also been depicted how the *ex-post* review of killer acquisitions is theoretically possible under article 102 TFEU even though it has its own difficulties.

The second section illustrated the preferred ways to capture killer acquisitions. It has been pointed out how the EC obtained the competence to review any transaction by abandoning the one-stop shop mechanism. It was also shown that the other core principles of EUMR were also concerned to some extent with the adoption of the EC's Guidance which bypassed any legislative reforms. As presented, the EC's competence is based on non-objective criteria which can potentially raise a lot of concerns on legal certainty and legitimate expectations principles. Moreover, the wording of Guidance gives MS the discretion to decide when they are made known about the transaction and leaves undertakings in difficulty on what is sufficient information to provide MS with. The GC's Illumina decision fails to bring any clarity on the issue, instead imposing an extra obligation on undertakings to actively transmit sufficient information while it is still unknown what is considered sufficient information. Therefore, it will always be unknown to undertakings when the timeline starts with regard to their intended transactions. Even their completed transactions will always (due to the unclearness of the timeline) be at the risk of being subject to ex-post-merger review by the EC. It is also established that after the DMA came into force, the EC will be able to capture potential killer acquisitions of Big Tech companies in an ex-ante way, and Article 22 referrals will be possibly used for an ex-post review of the potential killer acquisitions pursuant to DMA.

In conclusion, it is answered that the EC abandoned the *status quo* without legislative reforms and in an easier way compared to the other options that were available to carry on the legislative reforms. This can

be probably explained by the fact that making substantive legislative changes to EUMR was demanding. Considering the assessment of the reinterpretation of Article 22 EUMR and its implications with clear examples from the Illumina/Grail case, it is possible to say that this is unlikely to be the best solution. Maybe *ex-post* review under article 102 TFEU is no panacea in the face of all the difficulties raised but it still could have been a better tool for the EC instead of using article 22 referrals by raising concerns on the general principles of EU law.

Il Record of Meeting concluso tra la Cina Continentale e Hong Kong S.A.R.: luci ed ombre dell'accordo attraverso una comparazione con il Regolamento (UE) n. 848/2015

Marta Cirillo*

Abstract : L'articolo intende fornire una disamina analitica sulla disciplina del mutuo riconoscimento delle procedure d'insolvenza tra Cina Continentale e Hong Kong S.A.R. In apertura, l'autrice ripercorre quanto verificatosi nella Repubblica Popolare Cinese fino al 2021. A prevalere era, infatti, l'atteggiamento della Cina Continentale, da sempre restia al riconoscimento delle procedure d'insolvenza aperte nel territorio di Hong Kong. L'impasse termina il 14 maggio 2021 quando le parti addivengono ad un accordo: il cd. Record of Meeting. Quest'ultimo rappresenta il primordiale tassello di un mosaico tuttora in fieri. A seguito di una sintetica analisi condotta sulla fonte prescelta dalle parti, l'autrice analizza i principali contenuti dell'accordo mediante una comparazione con il Reg. (UE) n.848/2015. La scelta non è casuale, dal momento che, nelle pagine che seguono, si evince come il richiamato regolamento rappresenta l'archetipo a cui ambire, ma anche una bussola capace di dettare la via. In conclusione, si evidenziano le lacune del Record of Meeting e delle fonti ad esso annesse e, al contempo, si tenta di descrivere lo scenario futuro in materia di insolvenza transfrontaliera tra il maggior rivale degli Stati Uniti d'America, la Cina Continentale e Hong Kong, il terzo centro finanziario a livello internazionale.

The article aims to provide an analytical examination of the discipline of mutual recognition of insolvency proceedings between Mainland China and Hong Kong S.A.R. The author traces what occurred in the People's Republic of China until 2021. Prevailing was, in fact, the attitude of Mainland China, which had always been reluctant to recognize insolvency proceedings started in Hong Kong territory. The impasse ended on May 14, 2021 when the parties reached an agreement: the so called "Record of Meeting." The latter represents the primordial piece of a mosaic still in the making. Following a brief analysis conducted on the source chosen by the parties, the author analyzes the main contents of the agreement through a comparison with Reg. (EU) No. 848/2015. The choice is not accidental, since, in the following pages, it becomes clear how the aforementioned regulation represents the archetype to aspire to, but also a compass capable of dictating the way. In conclusion, the shortcomings of the Record of Meeting and the sources attached to it are highlighted and, at the same time, an attempt is made to describe the future scenario in cross-border insolvency between the major rival of the United States of America, Mainland China, and Hong Kong, the third largest financial center internationally.

Parole chiave: 1. Insolvenza transfrontaliera Cina Continentale-Hong Kong S.A.R., 2. Reg. (UE) n. 848/2015, 3. Record of Meeting, 4. Opinion della Suprema Corte del Popolo della R.P.C., 5. Practical Guide del Governo di Hong Kong S.A.R.

Sommario: 1. Prologo: La Necessità di concludere un Accordo tra la Cina Continentale e Hong Kong S.A.R. in Merito alla Disciplina dell'Insolvenza Transfrontaliera; 2. Il Paper del 22 Giugno 2020 redatto da Hong Kong S.A.R.: un Valido Incentivo per la Sottoscrizione del Record of Meeting; 3. Il Regolamento (UE) n. 848/2015: l'Archetipo a cui ambire; 4. Memorandum of Understanding, Agreement o Arrangement. Tre Alternative Fonti per giungere alla Conclusione dell'Accordo; 5. Record of Meeting del 14 Maggio 2021: la Tanto attesa Chiave di Volta per porre Fine alle Controverse Questioni sull'Insolvenza Transfrontaliera tra Cina Continentale e Hong Kong S.A.R. Analisi della Struttura e dei Caratteri Peculiari dell'Accordo; 6.

Disamina di Alcune Dibattute Questioni insite nell'Opinion e nella Practical Guide alla Luce del Regolamento (UE) n.848/2015 e di Alcune Selezionate Pronunce della Corte di Giustizia dell'Unione Europea; 6.1 L'Individuazione della Giurisdizione. Il Criterio del C.O.M.I.; 6.1.1. La Nozione di C.O.M.I. nell'Opinion della Suprema Corte del Popolo della R.P.C.; 6.1.2. L'Assenza del C.O.M.I. nella Practical Guide del Governo di Hong Kong S.A.R.; 6.2. Il Riconoscimento delle Procedure, la Mancata Distinzione tra Procedure Principale e Secondaria, l'Assenza della Nozione di Dipendenza; 6.3. Le Eccezioni di Ordine Pubblico; 6.4. Gli Effetti Giuridici prodotti a Seguito dell avvenuto Riconoscimento della Procedura. I Poteri dei Curatori Stranieri; 6.5 La Cooperazione e la Comunicazione tra Giudici e Curatori: il Timido Tentativo di Uniformarsi agli Standard Internazionali; 7. La Reazione della Giurisprudenza all'Indomani del Record of Meeting; 8. I Possibili Scenari Futuri; 9. Conclusione.

1 *Introduzione: La necessità di concludere un Accordo tra la Cina Continentale ed Hong Kong S.A.R. in Merito alla Disciplina dell'Insolvenza Transfrontaliera*

Fino al 2021, la Cina Continentale[1] e la Regione Amministrativa Speciale di Hong Kong (di seguito, Hong Kong S.A.R.) erano sprovviste di una comune disciplina sul mutuo riconoscimento e l'assistenza delle procedure d'insolvenza a carattere transfrontaliero.

Sul punto il legislatore cinese si è sempre mostrato restio a riconoscere le procedure d'insolvenza aperte ad Hong Kong. Lo dimostra l'art. 5, co.2 *EBL 2006* in cui, apparentemente, la Cina si dichiara favorevole al riconoscimento della sentenza dichiarativa di fallimento o

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1. Nel corso del presente elaborato, Cina e Cina Continentale verranno utilizzati come sinonimi.

di un equivalente provvedimento definitivo pronunciato *dalla Corte di un altro Stato*[2]. L'impiego della locuzione *Stato* è volto ad escludere Hong Kong *S.A.R.* In linea con il legislatore, la giurisprudenza rigetta le domande aventi ad oggetto il riconoscimento e l'assistenza delle procedure di insolvenza aperte ad Hong Kong *S.A.R.* A riprova di ciò, nel settembre 2011, la *Suprema Corte del Popolo della* Repubblica Popolare Cinese (di seguito, R.P.C.) osserva: *there is no legal basis for the Mainland Courts to recognize the particular winding-up order issued by the Hong Kong Court*[3].

Ciò non si verifica ad Hong Kong *S.A.R.* In *re*[4] *Takamatsu*[5], il giudice per la prima volta riconosce la procedura di insolvenza aperta in Giappone, ordinamento di *civil law*. Da quel momento in avanti anche le procedure d'insolvenza aperte in Cina Continentale sono

2. L'art. 5 è stato introdotto per la prima volta con la riforma della Enterprise Bankruptcy Law del 2006 e disciplina l'insolvenza transfrontaliera. Il primo comma è interamente dedicato al riconoscimento, in un altro territorio, delle procedure d'insolvenza aperte in Cina Continentale. Al contrario, il secondo comma ha ad oggetto il riconoscimento in Cina Continentale delle procedure di liquidazione aperte nel territorio di un altro Stato.

Molteplici sono i fattori che hanno sollecitato l'intervento del legislatore cinese. Fondamentale importanza assume il riconoscimento della sentenza dichiarativa di fallimento n. 951/1997 pronunciata dal Tribunale di Milano avverso E.N. Group S.p.A. L'Italia ha giocato, infatti, un ruolo cruciale per l'evoluzione della disciplina dell'insolvenza transfrontaliera in Cina Continentale.

3. Si veda Legislative Council Panel on Administration of Justice and Legal Services - Proposed Framework for Co-operation with the Mainland in Corporate Insolvency Matters, punto 16 (Giugno 22, 2020), disponibile ahttps://www.doj.gov.hk/en/legco/pdf/ajls20200622e2.pdf; Bryan O'Hare, Puy Yip Leung e Soony Tang, A New Era of Mutual Recognition of Insolvency Proceedings between Hong Kong and Mainland China, 15 Insolvency & Restructuring INT'l 26, 29 (2021) .

4. Negli ordinamenti giuridici di common law, per indicare la controversia a cui si riferisce il provvedimento definitivo emesso dall'autorità giudiziaria o l'opinione giuridica si è soliti anteporre la locuzione "re" (termine inglese il cui significato è "in merito a" o "riguardo a") al fine di indicare il nome della controversia in cui si agisce.

5. Re Mr Kaoru Takamatsu, HKCFI 802 (2019). Japan Life Co Ltd è una società costituita in Giappone. Accertato lo stato di insolvenza in cui versa la società, la Corte di Tokyo dichiara l"apertura della procedura di insolvenza nominando in qualità di curatore l"avvocato Mr.Takamatsu Kaoru. Il curatore accerta che nel territorio di Hong Kong S.A.R. la società debitrice aveva aperto dei conti correnti presso due istituti di credito (Mizuho Bank Ltd e HSBC Ltd). Il curatore si rivolge alla Court of First Instance per richiedere, attraverso il rilascio di un order, la possibilità di ottenere maggiori informazioni dagli istituti di credito.

riconosciute ad Hong Kong. Successivamente, in *re CEFC Shanghai International Group Ltd*[6]*,* oltre al riconoscimento, sarà garantita l'assistenza ai curatori nominati in Cina Continentale. Al contempo, il giudice dell'ex-colonia britannica lancia un monito al legislatore. Nei casi *re CW Advanced Technologies Ltd*, *re Da Yu Financial Holdings Limited*[7] e nel già citato *re CEFC Shanghai International Group Ltd* evidenzia la necessità di concludere un comune accordo tra le due parti[8].

Occorre soffermarsi su quest'ultimo punto chiedendosi quali sono le principali ragioni che giustificano tale urgenza. A tal proposito, si deve considerare tanto il contesto internazionale quanto quello locale.

Considerando l'evoluzione dell'economia globalizzata, nel 2021, la *World Bank* ha elaborato i cd. *Principles* per sollecitare i legislatori nazionali, più in particolare coloro che non hanno adottato l'*UNCITRAL MLCBI*[9], ad intervenire in materia di insolvenza transfrontaliera. In

6. Re The Joint and Several Liquidators Of Cefc Shanghai International Group LimitedHKCFI 167 (2020), punto 29. La Corte Intermedia del Popolo di Shanghai dichiara il fallimento della società CEFC Shanghai International Group Ltd. Nella sentenza vengono nominati tre curatori: Shanghai Fangda Partners, Shanghai AllBright Law Officies e King & Wood Mallesons (Shanghai Office). Questi accertano che nel territorio di Hong Kong S.A.R. sono ubicati alcuni beni di proprietà del fallito. In aggiunta, nel territorio dell'isola pendono i procedimenti esecutivi volti a soddisfare le pretese dei singoli creditori istanti. I curatori cinesi chiedono, quindi, al giudice di Hong Kong: (i) di riconoscere la sentenza dichiarativa di fallimento pronunciata dalla Corte del Popolo, (ii) di sospendere i procedimenti esecutivi pendenti, (iii) di garantire loro l'assistenza necessaria.

7. Da Yu Financial Holdings Ltd HKCFI 2531 (2019).

8. La necessità di adottare una comune disciplina in materia di insolvenza transfrontaliera è espressa dal giudice di Hong Kong S.A.R. in tre rilevanti casi giurisprudenziali. In Re CW Advanced Technologies Ltd HKCFI 1705 (2018), il giudice esplicita: [...] the urgent need to enact a statutory cross-border regime. Si veda Re CW Advanced Technologies Ltd 3 HKLRD 552 (2018), punto 552 Da Yu Financial Holdings Ltd HKCFI 2531 (2019), punti 46-53, 2019;Re The Joint And Several Liquidators Of Cefc Shanghai International Group Limited HKCFI 167 (2020), p.10-11; Legislative Council Panel on Administration of Justice and Legal Services - Proposed Framework for Co-operation with the Mainland in Corporate Insolvency Matters, punto 21,Giugno 22, 2020), disponibile ahttps://www.doj.gov.hk/en/legco/pdf/ajls20200622e2.pdf

9. La United Nations Commission on International Trade Law (UNCITRAL) è stata istituita dall'Assemblea Generale delle Nazioni Unite nel 1966 al fine di armonizzare le diverse discipline che ciascuno Stato adotta in merito al commercio internazionale. L'UNCITRAL è intervenuta, nel 1997, sull'insolvenza transfrontaliera. La Model Law on Cross Border Insolvency (UNCITRAL MLCBI) è una fonte di soft-law, non

definitiva, ciascun ordinamento dovrebbe munirsi di una procedura di riconoscimento caratterizzata da una congrua durata che favorisca, altresì, meccanismi di cooperazione tra le Corti e i curatori ed un'equa soddisfazione delle pretese vantate da ciascun creditore[10].

A livello locale, invece, si ravvisa un graduale avvicinamento tra la Cina Continentale ed Hong Kong *S.A.R.* Nel 2018, la *S.A.R.* è il principale investitore in Cina Continentale (il 65% degli *investimenti esteri diretti* (*IDE*)[11] derivano dall'ex-colonia britannica). Al contempo, la Cina è il secondo investitore ad Hong Kong (il 26,8% degli *investimenti esteri diretti* provengono dalla Cina Continentale). All'incremento

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vincolante per gli Stati, che intende perseguire cinque diversi obiettivi: promuovere la cooperazione tra le Corti presenti nei diversi Stati, garantire agli investitori stranieri una maggiore certezza del diritto non rimettendo in capo alle Corti un ampio potere discrezionale, favorire procedure eque e giuste per il riconoscimento delle procedure di insolvenza aperte nel territorio di un altro Stato, garantire un equo trattamento tra i creditori locali e i creditori stranieri, incentivare l'apertura di procedure a carattere non liquidatorio in ossequio alla cultura del salvataggio delle imprese. L'International Monetary Fund (d'ora in avanti, FMI) e la World Bank raccomandano a ciascuno Stato l'adozione della UNCITRAL MLCBI. I dati relativi dimostrano, a livello globale, che oggigiorno circa sessanta giurisdizioni hanno adottato l'UNCITRAL MLCBI. Relativamente alla posizione adottata dalla Cina Continentale ed Hong Kong S.A.R. si segnala come ambedue le parti preferiscono, tuttora, non adottare la richiamata fonte. Si veda Jenny Clift, The Uncitral Model Law on Cross-Border Insolvency - A legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency, 12 Tul. J. Int'l & Comp. L., 307 e ss.(2004); per un approfondimento sugli Stati che hanno adottato la richiamata fonte

https://uncitral.un.org/en/texts/insolvency/modellaw/crossborder_insolvency/status; per consultare il testo integrale https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (ultimo accesso 29 novembre 2023).

10. Si veda Scott Atkins e Dr Kai Luck, Cross-Border Insolvency in Hong Kong: Will the New Cooperation and Coordination Framework with Mainland China Provide the Impetus for Broader Reform? International Corporate Rescue, 18 (3) International Corporate Rescue 165 , 165-167 (2008).

11. Con l'espressione investimenti esteri diretti si identifica la situazione in cui la società, la società multinazionale o la persona fisica proveniente da un altro Stato investe in attivi di un altro Stato o ne detiene la proprietà nelle sue società. Gli investimenti esteri diretti tipicamente si manifestano quando l'imprenditore, individuale o collettivo, acquisisce una partecipazione in una impresa già costituita o costituisce ex novo società controllate nel territorio di un altro Stato. Per un maggiore approfondimento: https://trade.ec.europa.eu/access-to-markets/it/content/tipi-di-investimento (ultimo accesso 29 novembre.2023).

degli investimenti stranieri corrisponde un aumento dei casi riguardanti l'insolvenza transfrontaliera.

In aggiunta, nello stesso anno, il Presidente della *R.P.C.* annuncia la costituzione della *Greater Bay Area*[12]. Quest'ultima, nel tentativo di dotare la Cina di una equivalente *Silicon Valley*, coinvolge Hong Kong *S.A.R.*, Macao *S.A.R.* e nove città della provincia di Guangdong. Il progetto promuove la libera circolazione di persone, merci e capitali. Per agevolare la circolazione di capitali è necessario tutelare i creditori, locali e stranieri, dando loro la possibilità di prevedere con certezza le eventuali conseguenze scaturenti da una probabile insolvenza del debitore. In conclusione, solo se il rischio di insolvenza è calcolato è possibile attirare investitori stranieri e, di conseguenza, competere con gli Stati Uniti d'America, il maggior rivale nella graduale ascesa della *Repubblica Popolare Cinese*.

2. *Il Paper del 22 Giugno 2020 redatto da Hong Kong S.A.R.: un Valido Incentivo per la Sottoscrizione del Record of Meeting*

Hong Kong *S.A.R.* riveste un ruolo determinante per giungere alla conclusione dell'accordo con la Cina Continentale. Lo si evince dai decisivi passi in avanti compiuti dalla giurisprudenza a cui segue l'intervento del *Department of Justice* (D.O.J.). Quest'ultimo, in data 22 giugno 2020, ha emanato il *Legislative Council Panel on Administration of Justice and Legal Services - Proposed Framework for Co-operation with the Mainland in Corporate Insolvency Matters (d'ora in avanti, Paper 22*

12. La Grater Bay Area, realizzata entro il 2035, coinvolge Hong Kong, Macao e nove città della provincia di Guangdong. Tra le nove città della provincia di Guangdong sono ricomprese Dongguan e Foshan. Nel progetto si prevede che Dongguan diventi un'eccellenza nell'ambito della robotica; Foshan, invece, consoliderà il proprio primato nell'ambito manifatturiero. A queste due si giustappone, poi, Shenzhen quale principale hub tecnologico. Nell'inedita Silicon Valley cinese, Hong Kong funge da imprescindibile centro economico-finanziario e Macao da fondamentale polo turistico. Per un maggiore approfondimento:
https://www.ispionline.it/it/pubblicazione/greater-bay-area-una-silicon-valley-cinese-23503 (ultimo accesso 29 novembre 2023).

giugno 2020)[13]. L'atto, destinato all'esecutivo, si compone di sei sezioni (lett. A-F).

Nelle prime sezioni (lett. A-B) si esegue una ricognizione della disciplina sul riconoscimento e l'assistenza delle procedure d'insolvenza in Cina Continentale ed Hong Kong *S.A.R.*

Le restanti sezioni (lett. C-F) devono essere esaminate con maggiore attenzione giacché in esse sono racchiusi gli obiettivi e alcuni tra i contenuti del futuro *Record of Meeting*.

Alla luce dello stretto legame esistente in ambito economico tra la Cina Continentale e Hong Kong *S.A.R.*, il *D.O.J.* qualifica l'assenza di una disciplina specifica sull'insolvenza transfrontaliera nei seguenti termini: *the current lack of a cooperation mechanism for recognition of and assistance in corporate insolvency matters is unconducive to the promotion of an orderly and efficient insolvency regime and the facilitation of the rescue of financially troubled businesses*[14].

Spiegata la principale ragione per cui urge un accordo, è utile domandarsi quale debba essere il contenuto dell'atto. La risposta è contenuta nella sezione D riguardante il riconoscimento in Cina Continentale delle procedure d'insolvenza[15] aperte ad Hong Kong *S.A.R.* La competente *Corte del Popolo* della *R.P.C.* può riconoscere la procedura di insolvenza aperta nell'ex-colonia britannica a patto che si tratti di una *compulsory-winding up*, di una *creditors' voluntary winding-up* o di uno *scheme of arrangement.*[16] In aggiunta, la Corte deve stabilire se trattasi di una *procedura principale* (*main*) ovvero *secondaria* (*non main*)[17]. È

13. Per consultare il testo integrale del Legislative Council Panel on Administration of Justice and Legal Services - Proposed Framework for Cooperation with the Mainland in Corporate Insolvency Matters si veda: https://www.doj.gov.hk/en/legco/pdf/ajls20200622e2.pdf. (ultima visita in data 01.06.2023); si veda Alex Chan, Codifying CEFC: from Pragmatics to Practicals in Recognising PRC Enterprise Bankruptcy in Hong Kong, 15 H.K. J. LEGAL Stud.92, 107-112 (2021).

14. Paper 22 giugno 2020, punto 19 (citato in nota 3).

15. È opportuno specificare cosa si intende nel Paper del 22 giugno 2020 con l'espressione procedure di insolvenza. Sono espressamente escluse le procedure che coinvolgono il debitore persona fisica. Il D.O.J. omette di giustificare la scelta compiuta. Considerando che nella EBL 2006 non è prevista la possibilità che il debitore persona fisica sia sottoposto alla procedura d'insolvenza è possibile dedurre che la decisione assunta dal D.O.J. è volta a incentivare, nel breve termine, la sottoscrizione dell'accordo.

16. Paper 22 giugno 2020, punto 26 (citato in nota 3).

17. Paper 22 giugno 2020, punto 25.1 (citato in nota 3).

un chiaro segnale dal quale desumere la volontà di schierarsi a favore dell'*universalità limitata*[18].

La Corte riconoscerà la procedura d'insolvenza come *procedura principale* ogni qualvolta accerta che il *centro degli interessi principali* (C.O.M.I.) è ubicato ad Hong Kong. Si presume che il *C.O.M.I.*, luogo in cui il debitore svolge la propria attività in modo abituale e riconoscibile ai terzi, coincida con la sede legale. La presunzione è *iuris tantum* potendo essere superata nei soli casi in cui si provi che la sede effettiva, luogo in cui sono assunte le decisioni, non coincide con la sede statutaria.[19] Il criterio del *C.O.M.I.* non è elaborato dal *D.O.J.* Si adotta un criterio enunciato nell'*UNCITRAL MLCBI* (ex. art. 16), compiutamente definito dalla *CGUE* e dal *Reg. (UE) n. 848/2015*, a più riprese, richiamato dalla *Court of First Instance*[20].

La domanda avente ad oggetto il riconoscimento della procedura di insolvenza aperta ad Hong Kong *S.A.R.* è rigettata quando alternativamente il giudice cinese constata che: (i) il riconoscimento è *manifestamente* contrario all'ordine pubblico[21], (ii) il *C.O.M.I.* non è ubicato nel territorio di Hong Kong *S.A.R.*, (iii) il riconoscimento pregiudica gravemente gli interessi dei creditori cinesi[22].

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18. Per la prima volta esplicitata nell'UNCITRAL MLCBI e poi adottata dai molteplici Stati (ma dalla stessa Unione Europea), l'universalità limitata rappresenta una efficace soluzione di compromesso. In essa si distingue la procedura principale, aperta nello Stato ove è sito il C.O.M.I., e la procedura secondaria, la quale può essere eventualmente aperta nel territorio dello Stato in cui è situata la dipendenza. La dottrina ha preferito giustapporre all'universalità l'aggettivo limitata in quanto, in caso di apertura della procedura secondaria, quest'ultima produce i propri effetti nel solo territorio in cui è presente la dipendenza. Qualora nello Stato in cui è situata la dipendenza venga aperta la procedura secondaria allora si procede applicando la disciplina dello Stato in cui tale procedura è aperta senza procedere ad un ulteriore accertamento dei presupposti di fallibilità.

19. Paper 22 giugno 2020, punto 29 (citato in nota 3).

20. Si veda Re Pioneer Iron and Steel Group Company Limited HCCW322 (2010), Re Lamtex Holdings Limited HKCFI 622 (2021).

21. Paper 22 giugno 2020, punto 32.2 (citato in nota 3). Come dimostra l'avverbio manifestamente, la condizione ostativa è da interpretare restrittivamente. Diversamente da quanto accade in Cina Continentale (ex art. 5.2 EBL 2006), il D.O.J. sembra volersi adeguare a quanto disposto ai sensi dell'art. 6 UNCITRAL MLCBI.

22. Paper 22 giugno 2020, punto 32.3 (citato in nota 3). l D.O.J. non motiva la propria decisione. In questo caso, in linea con quanto affermato relativamente all'esclusione delle procedure d'insolvenza individuali, sembra che l'apposizione di tale

È necessario soffermarsi sulla seconda condizione[23]. Non è, infatti, sempre vero che se il *C.O.M.I.* non è sito ad Hong Kong *S.A.R.* la domanda è rigettata. Talvolta, invero, la procedura d'insolvenza aperta ad Hong Kong *S.A.R.* sarà riconosciuta in Cina Continentale come *procedura secondaria*. Nel *Paper del 22 giugno 2020* nulla si dice relativamente al criterio idoneo a determinare il riconoscimento della *procedura secondaria*. Vi è una sola precisazione in merito: quando la domanda ha ad oggetto il riconoscimento di una *procedura secondaria* la *Corte del Popolo della R.P.C.* ha discrezionalità nel garantire misure aggiuntive volte a tutelare gli interessi dei creditori e/o la conservazione del patrimonio del debitore insolvente. Ciò ricalca il contenuto dell'art. 21.1 *UNCITRAL MLCBI*[24] e conferma la volontà dell'ex-colonia britannica di adottare la fonte di *soft law*.

In chiusura, la sezione D elenca tassativamente gli effetti che possono manifestarsi a seguito dell'avvenuto riconoscimento in Cina della procedura di insolvenza aperta ad Hong Kong *S.A.R.* Tra quelli enunciati, la Corte può ordinare la sospensione delle liti pendenti in cui il debitore stia in giudizio in qualità di legittimato passivo. Dal momento che il *D.O.J.* si rivolge ai soli *proceedings [...] against the debtor*, si conclude che ciò non possa applicarsi per tutte quelle liti pendenti in cui il debitore insolvente stia in giudizio in qualità di legittimato attivo. Queste ultime proseguono a condizione che, a seguito dell'interruzione, il curatore sia intervenuto per ripristinare il contraddittorio.

Al contrario, nel caso in cui il creditore proponga azioni esecutive individuali avverso il debitore già dichiarato insolvente, tale domanda sarà inammissibile.

In conclusione (lett. E), il *D.O.J.* rivolge al Governo alcune raccomandazioni sul riconoscimento e l'assistenza delle procedure

condizione sia volta a facilitare la conclusione dell'accordo dal momento che la Cina ha sempre prediletto la tutela degli interessi dei creditori locali.

23. Paper 22 giugno 2020, punto 32.1 (citato in nota 3).

24. L'art. 21.1 UNCITRAL MLCBI stabilisce che la Corte, dinanzi ad una procedura secondaria, può discrezionalmente disporre alcune misure che reputa necessarie al fine di tutelare l'intero ceto creditorio e/o la conservazione dei beni del debitore insolvente. Tra le misure indicate nella proposizione prescrittiva si rinviene: la possibilità di dichiarare inammissibili le azioni individuali proposte avverso il debitore insolvente, la possibilità di sospendere le azioni esecutive individuali, l'opportunità di acquisire nuove prove inerenti il patrimonio del debitore.

d'insolvenza aperte in Cina Continentale. Preso atto dell'assenza di una disciplina *ad hoc* e constatato l'intervento suppletivo del *common law*, il *D.O.J.* sollecita l'intervento del legislatore. La conclusione trae origine da una tra le principali lacune del *common law.* Questo, infatti, non garantisce la certezza e la prevedibilità del diritto poiché il giudice, a determinate condizioni, può ribaltare il precedente (cd. *overruling*). Tralasciando le questioni giuridiche di natura sostanziale, il *D.O.J.* non ammette il riconoscimento automatico delle procedure d insolvenza aperte in Cina Continentale. Pertanto, la *Corte del Popolo della R.P.C*. deve redigere la cd. *letter of request*[25] da indirizzare al competente giudice di Hong Kong *S.A.R.*[26].

Ciò detto, il *Legislative Council Panel on Administration of Justice and Legal Services - Proposed Framework for Co-operation with the Mainland in Corporate Insolvency Matters* funge da *catalizzatore* accelerando, quindi, il processo che condurrà la Cina Continentale ed Hong Kong *S.A.R.* alla sottoscrizione del *Record of Meeting*.

3 *Il Regolamento (UE) n. 848/2015: l'Archetipo a cui Ambire*

Compreso il cruciale ruolo assunto da Hong Kong *S.A.R.* in tale ambito e le ragioni sottese all'urgente bisogno di pervenire alla conclusione di un accordo con la Cina Continentale, è pertinente domandarsi se esiste nel panorama internazionale un archetipo per ambedue le parti.

L'interprete potrebbe rispondere riferendosi all'*UNCITRAL MLCBI*. Alla luce dei continui rinvii contenuti nel *Paper 22 giugno 2020*, riferirsi all'*UNCITRAL MLCBI* non sarebbe completamente errato né totalmente soddisfacente. Ciò per almeno due ragioni. Anzitutto, è una fonte di *soft law* che, quindi, può essere trasposta da ciascuno Stato apportando lievi o rilevanti modifiche. Queste, talvolta, tradiscono gli obiettivi che la Commissione originariamente ha inteso perseguire. In secondo luogo, l'*UNCITRAL MLCBI* resta silente o non

25. La cd. letter of request è un documento redatto dalla Corte che ha precedentemente aperto la procedura d'insolvenza. È indirizzata al giudice "straniero" adito per il riconoscimento del provvedimento con il quale è stata disposta l'apertura della procedura d'insolvenza.

26. Paper 22 giugno 2020, punti 34-37 (citato in nota 3).

approfondisce alcune controverse questioni giuridiche sull'insolvenza transfrontaliera (a titolo meramente esemplificativo l'insolvenza dei gruppi e l'assenza di una disciplina esaustiva sul *C.O.M.I.*). Tanto il silenzio quanto il mancato approfondimento sono volti a scongiurare la mancata adozione del *MLCBI* da parte degli Stati[27].

Dalla concisa disamina si deduce che l'archetipo per la Cina Continentale ed Hong Kong *S.A.R.* è, invece, rappresentato dal vigente *Regolamento (UE) n. 848/2015*[28]. Prima di esplicitare le argomentazioni poste a sostegno di tale conclusione, è utile soffermarsi su quanto l'Unione Europea ha compiuto in materia di insolvenza transfrontaliera.

Ancor prima che l'*UNCITRAL* muovesse i primi passi verso l'adozione del *MLCBI*, nel 1959, l'allora *Comunità Economica Europea* avverte la necessità di promulgare una disciplina uniforme sull'insolvenza transfrontaliera[29]. Introdurre procedure di insolvenza transfrontaliera efficaci ed efficienti si ritenne necessario per assicurare il buon funzionamento del mercato interno fondato sul libero scambio di merci, persone e capitali[30]. I lavori per dotare l'Unione di una disciplina comune subiscono notevoli battute di arresto determinate dall'ostruzionismo di Stati ostili all'adozione del predetto atto[31]. Ai sensi dell'art. 220 Trattato *CEE*, il 23 Novembre 1995, viene

27. Si veda The European Insolvency Regulation and the UNCITRAL Model Law on Cross Border Insolvency i26 (3) Int. Insolv. Rev., 246, 246-269 (2017).

28. Si veda Reg. UE n.848/2015:

https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32015R0848&from=nl (ultimo accesso 30 novembre 2023). In deroga al Reg. (UE) n. 1215/2012, nei casi di crisi o insolvenza a carattere transfrontaliero che coinvolgano l'imprenditore individuale o collettivo si applica il Reg. (UE) 848/2015.

29. L'iniziativa della Comunità Economica Europea non rappresenta il primo tentativo di pervenire alla conclusione di un accordo multilaterale in materia di insolvenza transfrontaliera. Tra le proposte a livello internazionale che non hanno prodotto gli effetti desiderati, vi è l'esperienza dell'America Latina con il Trattato di Montevideo del 1940. Si veda Xinyi Gong, China's Insolvency Law and Interregional Cooperation. Comparative Perspectives from China and the EU, in Routledge, a 81-82 (2018).

30. Reg. UE n. 1346/00, Considerando n. 2; Reg. UE n. 848/2015, Considerando n. 3.

31. A riprova di ciò, nel 1980, la Comunità Economica Europea (C.E.E.) muove i primi passi verso l'adozione di una disciplina ad hoc sull'insolvenza atta a garantire l'unitarietà e l'uniformità delle procedure. Il tentativo si rivelò vano. L'accordo non fu raggiunto a causa della ferma opposizione della Repubblica Federale Tedesca contraria all'applicazione dell'atto alle procedure d'insolvenza interne (a tutti quei fallimenti

promulgata la *European Convention on Insolvency Proceedings* (d'ora in avanti, *Convenzione di Istanbul del 1995*). Sebbene non sia mai entrata in vigore a causa delle resistenze sollevate dal Regno Unito[32], la *Convenzione di Istanbul del 1995* enuncia la teoria dell'*universalità limitata* e i corollari principi (in particolare l'elezione del *C.O.M.I.* e la nozione di *dipendenza*). Nonostante l'insuccesso, l'*UNCITRAL MLCBI* e il successivo *Regolamento (UE) n. 1346/2000*[33] ricalcano alcuni tra i contenuti della *Convenzione di Istanbul del 1995.* A differenza della direttiva, il regolamento garantisce l'uniforme applicazione del diritto e la diretta applicabilità nel territorio degli Stati membri dell'Unione (ex. art. 288 *TFUE*)[34]. Nel caso di specie vi è un'eccezione: il *Regolamento (UE) n. 1346/2000* (successivo *Reg. (UE) n. 848/2015*) si applica in tutti gli Stati membri eccetto la Danimarca[35].

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in cui non si registra la presenza di beni o creditori in altri Stati). Si veda Carlo Vellani I, L'approccio giurisdizionale all'insolvenza transfrontaliera, Giuffrè Editore, 2006, a 4-5.

32. L'autorevole dottrina sostiene che la contrarietà del Regno Unito, unico tra i dodici Stati membri a non firmare la Convenzione, parrebbe giustificarsi alla luce dell'applicazione della Convenzione nel territorio di Gibilterra e a causa delle evidenti frizioni che in quegli stessi anni si verificarono tra la Comunità Europea e il Regno unito relativamente al diffondersi del morbo della mucca pazza.

33. Per consultare il testo integrale del Reg. UE n. 1346/00:

https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32000R1346 (ultimo accesso 29 novembre 2023).

Si veda anche Matteo M. Winkler, Le procedure concorsuali relative ad imprese multinazionali: la Corte di giustizia si pronuncia sul caso Eurofood, INT'l Lis 16-17 (2006-2007).

34. Il legislatore europeo, nel Considerando n. 8 del Reg. (UE) n. 848/2015, considera la distinzione tra direttiva e regolamento per giungere alla conclusione che la seconda fonte richiamata è quella che garantisce al meglio l'efficacia e l'efficienza delle procedure di insolvenza a carattere transfrontaliero.

35. La Danimarca non è vincolata a causa della sua mancata partecipazione al titolo IV del Trattato CE. Sul punto manca una apposita norma in ambedue i Regolamenti in quanto essi traspongono quasi fedelmente quanto originariamente disposto nella Convenzione di Istanbul del 1995. La questione è oggigiorno menzionata nel Considerando n. 88 del Reg. (UE) n. 848/2015. La Danimarca non è vincolata dal Reg. concernente l'insolvenza transfrontaliera sebbene è tenuta a rispettare le direttive in materia di insolvenza (talune riguardanti l'insolvenza transfrontaliera degli enti creditizi e/o imprese di assicurazione che non rientrano nel Reg. (UE) n. 848/2015). Il rapporto tra la Danimarca ed il Reg. (UE) n. 848/2015 fa sorgere diversi quesiti di non facile risoluzione. Per un maggiore approfondimento sulla questione si veda Carlo

L'art. 46 del *Reg. (UE) n. 1346/00*[36], i successivi interventi della Corte di Giustizia dell'Unione Europea (CGUE), le critiche sollevate dagli operatori giuridici e gli interventi dei legislatori nazionali in materia concorsuale[37] sono fattori che concorrono a determinare l'intervento della Commissione Europea, la quale elabora una proposta di riforma del Regolamento[38].

L'efficienza della procedura di insolvenza, la certezza del diritto, la pubblicità delle procedure, la proficua cooperazione tra gli attori in gioco e la promozione dell'autonomia privata nella procedura sono i principi cardini su cui si fonda il vigente *Regolamento (UE) n. 848/2015*[39].

Vellani, L'approccio giurisdizionale all'insolvenza transfrontaliera, Giuffrè Editore, (2006), a 138-142.

36. L'art. 46 del Reg. (UE) n. 1346/2000 disponeva che, entro dieci anni dall entrata in vigore del Regolamento e, a seguito, ogni cinque, la Commissione era tenuta a redigere una relazione sull'applicazione della disciplina e, eventualmente, una proposta di modifica da indirizzare al Parlamento Europeo.

37. Dagli ultimi anni del XX secolo, i legislatori nazionali intervengono per modificare la disciplina concorsuale. Si assiste ad una transizione: dal modello autoptico si passa alla Chapter 11-ization. Pietro Fazzini e Matteo M. Winkler coniano tale espressione per riferirsi all'adozione da parte dei maggiori Stati membri dell'UE di procedure alternative o preventive in linea con il contenuto del Chapter II dell'USA Bankruptcy Code. A riprova di ciò, in Germania, nel 1994, viene introdotto un inedito procedimento unitario avente ad oggetto il cd. Insolvenzplan redatto dall'imprenditore, approvato dai creditori e, infine, omologato dalla Corte. A ciò si giustappone la procedura di composizione negoziata della crisi che, a differenza della procedura precedentemente descritta, opera qualora l'imprenditore versi in stato di crisi.

Anche la Francia propende per l'adozione di nuove procedure ispirando, successivamente, l'intervento del legislatore spagnolo e portoghese.

Il Regno Unito, seguendo la tendenza dei principali Stati occidentali, adotta una inedita procedura cd. Administrative Procedure. Si tratta di un procedimento elastico, in cui si prevede la nomina di un soggetto addetto al salvataggio della società nominato o da quest'ultima o dai creditori. Per un maggiore approfondimento si veda Pietro Fazzini, Matteo M. Winkler, La proposta di Modifica del Regolamento sulle Procedure di Insolvenza, in Rivista del Commercio Internazionale, (2013), a 142-147.

38. La Commissione giustifica il proprio intervento dichiarando: the Regulation is functioning well in general but [...] it is desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. Si veda id a 144

39. Si veda Reinhard Bork, The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency, in Int. Insolv. Rev., vol. 26, 2017, pp. 246-269; Pietro Fazzini, Promulgato il Nuovo Regolamento (UE) n. 2015/848 sulle

Ritornando alla originaria questione, si ritiene che il *Reg. (UE) n. 848/2015* costituisca l'archetipo in vista della conclusione di un comune accordo tra la Cina Continentale ed Hong Kong *S.A.R.* Ciò per ragioni di diversa natura.

Alla base del *Reg. (UE) n. 848/2015* vi è un accordo raggiunto tra Stati membri appartenenti a tradizioni giuridiche differenti. All'interno dell'Unione convivono, ad esempio, l'Irlanda, tradizionalmente vocata al *common law*, e l'Italia, storicamente appartenente alla famiglia di *civil law*. Questo non è dissimile da ciò che accade nella *Repubblica Popolare Cinese* laddove coesistono, in ossequio al principio *one country, two systems*[40], ordinamenti di diversa natura.

Procedure di Insolvenza Transfrontaliere: Principali Profili di Riforma, in Diritto del Commercio Internazionale, 2015, pp. 907 e ss.

40. Il principio One Country, Two Systems, pensato dal lungimirante Deng Xiaoping, fu esplicitato, per la prima volta, nel Preambolo e nell'art.3 della Joint Declaration sottoscritta dal Regno Unito e dalla R.P.C. nel 1984. Per la concreta realizzazione della Open Door Policy, Hong Kong assunse un ruolo di indubbia centralità. Il richiamato principio prevedeva, in origine, che vi fosse, quale condizione imprescindibile, un Paese (One Country): la R.P.C. All'interno del Paese, però, avrebbero dovuto convivere pacificamente i Due Sistemi (Two Systems): la Cina Continentale, con un ordinamento giuridico di civil law e un sistema economico (ancora in parte) socialista, e Hong Kong, con il proprio differente sistema giuridico di common law ed un'economia capitalista. Quella che, in origine, doveva essere una convivenza pacifica in cui i due contrari sistemi convivevano pacificamente influenzandosi vicendevolmente ben presto disvelò le proprie lacune. I due sistemi non hanno mai convissuto come lo Ying convive con lo Yang all'interno del Tao, bensì la relazione è da Bob Wessels descritta facendo riferimento al rapporto che intercorre tra l'acqua e l'olio. Non c'è osmosi tra le due, ma una convivenza tutt'altro che pacifica in cui nessuna delle due parti si dà appieno all'altra. Per un approfondimento in merito al contenuto e alle ragioni sottese al principio One Country, Two Systems si vedano Gong, China's Insolvency Law and Interregional Cooperation. Comparative Perspectives from China and the EU a 8-11 (citato in nota 29); Guiguo Wang & Priscilla M.F Leung, One Country, Two Systems: Theory into Practice, 7 PAC. RIM. L. & POL'y J., (1998), a 280-321; Yash Ghai, Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law, Second Edition, Hong Kong University Press, (1999), pp. 48-53; Leonard J. Turkel, One Country, Two Systems: Hong Kong's Paradox of Politics and Business, 8 N.Y.L. Sch. J. INT'l & COMP. L.,(1987) a 475-498 ; Tu Yunxin, The question of 2047: Constitutional Fate of "One Country, Two systems" in Hong Kong, 21 GERMAN L.J., (2020) a 1488-1495, Denis Chang, The Imperatives of One Country, Two Systems: One Country before Two Systems, 37 HONG KONG L.J., (2007), a 351-362; Bob Wessel, Cross-border Insolvency between Mainland China and Hong Kong; First steps; Ready to Jump?, International Restructuring Newswire, vol. Q1, (2023), a 22.

In aggiunta, il *Reg. (UE) n. 848/2015*, diversamente dall'*UNCITRAL MLCBI*, non si limita ad esplicitare i principi su cui si fonda la disciplina dell'insolvenza transfrontaliera. Il Regolamento fornisce una disciplina dettagliata allo scopo di rendere effettivi i richiamati principi (a titolo esemplificativo, ex artt. 41-43, la cooperazione e comunicazione tra le Corti ed i curatori).

V'è poi da considerare che, nel panorama internazionale, il *Reg. (UE) n. 848/2015* è l'unica fonte che espressamente disciplina l'insolvenza transfrontaliera dei gruppi di società (ex artt. 56-77). Ciò non è un elemento del tutto marginale visto che nella prassi si constata come la gran parte delle procedure d'insolvenza che coinvolgono la Cina Continentale ed Hong Kong *S.A.R.* riguardano l'insolvenza di grandi gruppi di società.

Inoltre, dapprima il *Reg. (UE) n. 1346/2000* poi il *Reg. (UE) n. 848/2015* hanno permesso ai giudici della CGUE, per mezzo del rinvio pregiudiziale (ex art. 267 TFUE), di intervenire in materia di insolvenza transfrontaliera colmando le lacune insite nelle predette fonti assicurando, altresì, l'omogenea applicazione del diritto europeo. Così facendo è aumentata la professionalità acquisita da ciascun membro della Corte. Questo è un elemento di cui la *R.P.C.* è carente: manca tanto un organo giurisdizionale *super partes* deputato a regolare i conflitti emersi nelle diverse giurisdizioni quanto giudici specializzati in materia di insolvenza transfrontaliera[41].

Infine, l'aumento degli *investimenti esteri diretti* e l'ambizione della *Repubblica Popolare Cinese* ad aprirsi definitivamente al libero mercato con la costituzione della già citata *Greater Bay Area* fanno sì che la Cina osservi il *Reg. (UE) 848/2015* nello stesso modo in cui il marinaio guarda la stella polare nell'estremo tentativo di orientarsi nella notte.

41. Per un maggiore approfondimento relativo alle ragioni per cui si predilige il Reg. (UE) n. 848/2015 quale archetipo per la disciplina sul mutuo riconoscimento ed assistenza delle procedure d'insolvenza tra Cina Continentale ed Hong Kong S.A.R. si veda Shuai Guo, Cross-Border Insolvency between Chinese Mainland and Hong Kong: the past, the present and the future, Asia Pacific Law Review, 84-92 (2022).

4 *Memorandum of Understanding, Agreement o Arrangement. Tre Alternative Fonti per giungere alla Conclusione dell'Accordo*

Nei paragrafi precedenti si è fatto cenno alla conclusione dell'accordo. In merito, occorre premettere che la possibilità di concludere un accordo tra la Cina Continentale e Hong Kong *S.A.R.* è sancita ai sensi dell'art. 95 della *Basic Law HKSAR*[42] il quale garantisce la cooperazione e l'assistenza in ambito giudiziario tra le parti. In conformità al principio *one country, two systems*, il richiamato riferimento normativo è la chiave di volta per garantire l'integrazione tra due diversi sistemi giuridici che convivono in un unico Stato.

Giunti a questo punto della trattazione non resta che illustrare le possibili alternative fonti del diritto al fine di individuare tra esse la più adeguata per il raggiungimento del comune obiettivo.

L'autorevole dottrina ha, dapprima, escluso la possibilità di adottare un Trattato[43]. La preclusione può essere compresa considerando che deve sussistere una condizione necessaria ma non sufficiente affinché il trattato sia valido: l'atto deve essere concluso tra due o più Stati. L'opzione del trattato non può essere contemplata dal momento che Hong Kong *S.A.R.* non è uno Stato.

Un'ulteriore fonte che viene in rilievo è il cd. *Memorandum of Understanding* (d'ora in avanti, *Memorandum d'Intesa*). E' un accordo concluso tra gli Stati dal quale non discendono diritti ed obblighi di diritto internazionale. Anche il governo italiano è recentemente ricorso

42. Art. 95 Basic Law HKSAR: "the Hong Kong S.A.R., through consultations and in accordance with the law, maintain judicial relations with the country, and they may render assistance to each other".

Adottata il 4 aprile 1990 dall'Assemblea Nazionale del Popolo della R.P.C. e formalmente in vigore dal 1° luglio 1997, la Basic Law esplicita i principi contenuti nella Joint Declaration. La Basic Law si compone di 160 articoli volti a disciplinare il funzionamento delle principali istituzioni dell'isola, il rapporto con le principali istituzioni della R.P.C. e il sistema economico capitalista. In dottrina si ravvisa un aspro dibattito tra coloro che considerano la richiamata fonte una mini-costituzione e, al contrario, altri che la considerano subordinata alle fonti del diritto della R.P.C. Per un ulteriore approfondimento si veda Yash Ghai, Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law a 1 ss (citato in nota 40). .

43. Si veda Lee, Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters between Hong Kong and Mainland China, 63 American Journal of Comparative Law 439 (2015).

all'adozione di tale strumento. Nel marzo 2019, infatti, ha concluso un *Memorandum d'Intesa* con il governo della *R.P.C.* relativo alla collaborazione nell'ambito della *Via della Seta Economica* e dell'*Iniziativa per una Via della Seta Marittima del XXI secolo*[44]. Il *Memorandum d'Intesa* può anche essere concluso tra il governo centrale della *R.P.C.* e le amministrazioni locali. A riprova di ciò, nel 1991, il governo della *R.P.C.* sottoscrive il *Memorandum d'Intesa* con Hong Kong per la redazione della *Basic Law.* Se è vero che il *Memorandum* è una valida alternativa per dotare ambedue le parti di una disciplina sull'insolvenza transfrontaliera, sul punto, Emily Lee[45] esprime la propria contrarietà. Nonostante i vantaggi, in *primis* l'opportunità di sospendere o interrompere gli effetti prodotti dal *Memorandum* per un tempo indeterminato, molti sono gli svantaggi. Tra questi, il *Memorandum* non è una fonte di *hard law*. Pertanto, così come l'*UNCITRAL MLCBI*, il *Memorandum* non è vincolante e non garantisce l'uniforme applicazione del diritto tra le parti contraenti.

Al *Memorandum d'Intesa* si giustappone l'*Arrangement*. Quest'ultimo, secondo Wei Wang[46], non può essere utilizzato come sinonimo di *Agreement*. Con tale ultima espressione si è soliti riferirsi all'accordo concluso tra gli Stati. Al contrario, l'*Arrangement* coinvolge il governo centrale e l'amministrazione locale, è giuridicamente vincolante per le parti e garantisce l'omogenea applicazione del diritto. In

44. Il Memorandum d'Intesa concluso con il governo della R.P.C. non fu accolto favorevolmente dai maggiori Stati europei (in particolare, dalla Germania e dalla Francia). L'accordo fu sottoscritto allo scopo di rafforzare i rapporti politici, i legami economici e gli scambi diretti tra la Cina e l'Italia, quest'ultima vista storicamente come ultima rotta marittima lungo la Via della Seta. Nel Paragrafo II sono elencati gli ambiti di collaborazione: dialogo sulle politiche, trasporti - logistica ed infrastrutture, commercio ed investimenti senza ostacoli (cd. libero mercato), collaborazione finanziaria, connettività people-to-people, cooperazione per lo sviluppo verde. In chiusura, si evidenzia che il contenuto del Memorandum deve essere conforme alle rispettive legislazioni nazionali delle parti, al diritto internazionale applicabile e, per l'Italia, agli obblighi derivanti dall'appartenenza all'Unione Europea. Per consultare il testo integrale in lingua italiana: https://www.governo.it/sites/governo.it/files/Memorandum_Italia-Cina_IT.pdf (ultimo accesso 29 novembre 2023).

45. Si veda Lee, Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters between Hong Kong and Mainland China (citato in nota 43) .

46. Si veda Wei Wang, CEPA: A Lawful Free Trade Agreement under "One Country, Two Customs Territories?", 10 Law & Bus. Rev. Americans 647, 654 (2004).

Cina deve essere trasposto dalla *Suprema Corte del Popolo* della *R.P.C.*; ad Hong Kong, invece, dal Governo.

Tanto la Cina Continentale quanto Hong Kong S.A.R., fin dai primi anni del XXI secolo, hanno adottato diversi Arrangements. Tra questi l'Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong S.A.R. (d'ora in avanti, Accordo sul mutuo riconoscimento ed esecuzione delle sentenze pronunciate in materia civile e commerciale dalle Corti della Cina Continentale e Hong Kong S.A.R.) concluso nel 2006. Il quesito da cui muove l'autorevole dottrina è il seguente: è possibile estendere l'applicazione del richiamato accordo ai casi riguardanti l'apertura delle procedure d'insolvenza che coinvolgono la Cina Continentale ed Hong Kong S.A.R.47?

Fino al 2019, la gran parte degli interpreti si è espressa a favore dell'estensione ad una condizione: alcune parti dell'accordo dovevano essere emendate. Per intendere appieno la posizione degli interpreti è doveroso elencare le parti controverse.

L'accordo prevede il riconoscimento delle sentenze pronunciate in materia civile o commerciale aventi natura pecuniaria. La sentenza con cui il giudice dispone l'apertura della procedura d'insolvenza non ha una natura pecuniaria poiché si limita ad accertare lo stato di insolvenza in cui versa il debitore insolvente, nomina il curatore e, tra i molteplici effetti prodotti, dà luogo allo spossessamento del debitore.

In aggiunta, l'accordo attribuisce alle parti in giudizio la facoltà di stabilire *ex ante* quale giudice adire (se la *Corte del Popolo* della *R.P.C.* o il giudice di Hong Kong *S.A.R.*). Se presumiamo (erroneamente)[48] che ciò possa applicarsi anche ai casi riguardanti l'insolvenza transfrontaliera, allora si assisterebbe ad un incremento del cd. *forum shopping* a favore del giudice di Hong Kong *S.A.R.* Ciò per due ragioni: la dilagante

47. Si veda Emily Lee, Legal Pluralism, Institutionalism and Judicial Recognition of Hong Kong - China Cross-Border Insolvency Judgments, 45 Hong Kong Law Journal 331, 336 (2015) .

48. Si è ricorso all'impiego dell'avverbio erroneamente in quanto nei casi riguardanti l'apertura della procedura d'insolvenza la giurisdizione è inderogabile.

corruzione dei giudici cinesi[49] e il *protezionismo cinese*[50] verso i creditori locali. In aggiunta, relativamente alle procedure d'insolvenza sarebbe complesso, se non impossibile, pervenire *ex ante*, quando il debitore è ancora *in bonis*, ad un accordo atto a stabilire quale sia il giudice competente. Non è, infatti, sempre possibile per il creditore prevedere con certezza la futura insolvenza del debitore.

Non da ultimo, le controversie aventi ad oggetto i contratti di lavoro sono espressamente escluse dall'ambito di applicabilità dell'Accordo. Al contrario, le procedure d'insolvenza coinvolgono anche i lavoratori in qualità di creditori concorrenti[51].

Le aspettative che la dottrina nutriva sono definitivamente abortite nel 2019. In quello stesso anno, il legislatore cinese interviene mostrando la sua radicale opposizione in merito all'estensione dell'Accordo alle procedure d'insolvenza a carattere transfrontaliero. L'art. 3 esclude, infatti, dall'ambito di applicabilità dell'accordo le richiamate procedure[52].

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49. La corruzione dei giudici cinesi è un problema che, da sempre, ha interessato la Cina Continentale. Il fenomeno sorge dalla procedura di nomina dei giudici. Contrariamente a quanto accade in Italia, i giudici in Cina sono nominati dall'esecutivo. Esiste, quindi, uno stretto legame di dipendenza che lega i due poteri. Questa è una tra le ragioni per cui non è possibile ravvisare in Cina l'applicazione del principio di separazione dei poteri negli stessi termini in cui si applica negli ordinamenti occidentali. Si veda Lee, Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters between Hong Kong and Mainland China (citato in nota 43) .

50. Con l'espressione protezionismo cinese si è soliti riferirsi alla tutela che la Cina garantisce rispetto agli interessi dei creditori locali. A riprova di ciò, l'art. 5.2 EBL 2006 menziona tra le cause ostative al riconoscimento della procedura d'insolvenza straniera il grave pregiudizio che potrebbero subire i creditori locali a seguito del riconoscimento. Si veda Emily Lee, Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters between Hong Kong and Mainland China a 450 (citato in nota 43).

51. Per un maggiore approfondimento sulle caratteristiche dell'accordo si veda Emily Lee, Legal Pluralism, Institutionalism and Judicial Recognition of Hong Kong - China Cross-Border Insolvency Judgments (citato in nota 42); Lee, Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters between Hong Kong and Mainland China (citato in nota 38); Gong, China's Insolvency Law and Interregional Cooperation. Comparative Perspectives from China and the EU a 16-19 (citato in nota 29).

52. Si veda Paper 22 giugno 2020, punto 20; Chan, Codifying CEFC: from Pragmatics to Practicals in Recognising PRC Enterprise Bankruptcy in Hong Kong a 98 (citato in nota 13).

La decisione assunta dal legislatore nel 2019 permetterà ad ambedue le parti di giungere ad un decisivo punto di arrivo: è necessario dotarsi di un accordo *ad hoc* in materia di insolvenza transfrontaliera che assuma le forme dell'*Arrangement*. L'epilogo a cui si giunge fa sì che l'esperienza della Cina Continentale ed Hong Kong *S.A.R.* replichi quanto accaduto all'interno dell'Unione Europea laddove, infatti, viene promulgato il *Reg. (UE) n. 1346/2000* e il successivo *Reg. (UE) n. 848/2015* non potendo applicare la *Convenzione di Bruxelles del 1968* e il successivo *Reg. (UE) n. 1215/2012,* entrambi *concernenti la competenza giurisdizionale, il riconoscimento e l'esecuzione delle decisioni in materia civile e commerciale*[53].

5 *Record of Meeting del 14 Maggio 2021: la Tanto Attesa Chiave di Volta per porre Fine alle Controverse Questioni sull'Insolvenza Transfrontaliera tra Cina Continentale ed Hong Kong S.A.R. Analisi della Struttura e dei Caratteri Peculiari dell'Accordo*

Il 14 maggio 2021, la Suprema Corte del Popolo della R.P.C. e il Governo di Hong Kong S.A.R. sottoscrivono il cd. Record of Meeting on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong S.A.R. (d'ora in avanti, Record of Meeting)54.

Il *Record of Meeting* è (probabilmente) il traguardo a cui si giunge al termine di un confronto iniziato tra le parti contraenti nel lontano 2017. Da quel momento in avanti si sono succedute quattro fasi di consultazione e l'elaborazione di circa dieci bozze[55]. Dai lavori preparatori si individuano quattro obiettivi: (i) la Cina e Hong Kong *S.A.R.* devono lavorare alacremente per contenere la duplicazione delle procedure, limitare i costi aggiuntivi, evitare che il fenomeno del *forum and law shopping* proliferi mediante la costituzione o il trasferimento

53. Rif. Considerando n. 7 Reg. (UE) n. 1346/2000 e Considerando n. 7 Reg. (UE) n. 848/2015.

54. Per consultare il testo integrale del Record of Meeting, si veda: https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_RoM_en.pdf (ultimo accesso 29 novembre 2023).

55. Si veda Meng Seng Wee, A major step in developing Mainland China's cross-border insolvency law, 31 (1) Int. Insolv. Rev. 101, 104-105 (2022).

delle società nelle giurisdizioni cd. *offshore*; (ii) migliorare l'esperienza acquisita dai giudici, in particolare delle Corti cinesi, in tale ambito; (iii) garantire la cooperazione tra le Corti, (iv) facilitare l'integrazione e lo sviluppo economico tra i due territori.

Quanto appena richiamato sarà trasposto all'interno dell'accordo. In apertura (par. 1), il sintetico atto provvede a designare tre *aree pilota*[56]. Il legislatore individua le tre competenti Corti Intermedie del Popolo della *R.P.C.*: Shanghai, Xiamen e Shenzhen[57]. La scelta delle Corti non è casuale. A ben guardare, sono state selezionate le aree poste a confine con Hong Kong *S.A.R.* in cui, quindi, vi sono imprese cinesi che intrattengono rapporti commerciali con l'isola.[58] La dottrina ritiene che nel lungo termine l'efficacia dell'accordo sarà estesa all'intero territorio nazionale[59].

I successivi paragrafi (2-4) si soffermano sugli aspetti sostanziali e procedurali connessi al riconoscimento e l'assistenza delle procedure d'insolvenza. Tanto nel territorio della Cina Continentale quanto ad Hong Kong *S.A.R.*, per ottenere il riconoscimento e l'assistenza delle (tassative)[60] procedure d'insolvenza si segue la procedura prevista

56. L'individuazione delle cd. aree pilota rientra nella cd. sperimentazione legislativa tipica del legislatore cinese. Le leggi vengono applicate dapprima a livello locale e, constatati gli esiti positivi, viene estesa l'applicazione sull'intero territorio nazionale. Pertanto, quanto contenuto nel Record of Meeting (art. 1) non identifica un evento sui generis. A titolo meramente esemplificativo, si registra l'individuazione delle aree pilota nei casi riguardanti l'introduzione del cd. sistema dei crediti sociali. In aggiunta, l'individuazione delle aree pilota tempo addietro riguardò anche il settore economico. Mao Zedong, infatti, individuò le cd. SOEs pilota.

57. Si precisa che il Record of Meeting dispone l'individuazione delle aree pilota nel territorio della Cina Continentale. Queste ultime sono, poi, specificatamente individuate nell'Opinion (art.1) redatta dalla Suprema Corte del Popolo della R.P.C. a seguito della conclusione del Record of Meeting.

58. Si veda Moore et al., The New Cross-Border Arrangement between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code, 18 Pratt's Journal of Bankruptcy Law, 39-40 (2022); O'Hare, Leung, Tang, A New Era of Mutual Recognition of Insolvency Proceedings between Hong Kong and Mainland China, a 30 (citato in nota 3).

59. Si veda Guo, Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present and the future (citato in nota 41).

60. Il Record of Meeting, condividendo l'approccio insito nel Paper 22 giugno 2020, specifica che le procedure aperte ad Hong Kong di cui si richiede il riconoscimento in Cina sono le seguenti: compulsory winding-up, creditors' voluntary winding-up, procedure di ristrutturazione del debito. La locuzione procedure di

nel territorio in cui si propone la domanda di riconoscimento. Se la domanda è accolta, la procedura d'insolvenza produce gli effetti in conformità con la disciplina del territorio in cui è aperta. A determinate condizioni (non esplicitate dal *Record of Meeting*), è possibile aprire un procedimento parallelo nel territorio in cui è avvenuto il riconoscimento. Quanto detto rivela, in realtà, la ferma volontà delle parti contraenti di adeguarsi agli standard internazionali attraverso l'espressa adesione all'*universalità limitata*. Inoltre, taluni interpreti sostengono che ciò costituisca un incentivo affinché la Cina Continentale riformi l'art. 5.2 *EBL 2006*[61].

In chiusura (par. 5), le parti si impegnano a cooperare proficuamente e ad adottare, nel prosieguo, ulteriori fonti del diritto per approfondire il contenuto del Record of Meeting. L'impegno è stato portato a compimento mediante la promulgazione, in Cina Continentale, dell'Opinion on Taking Forward a Pilot Measure in relation to the

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ristrutturazione del debito sottende la volontà di dotare Hong Kong S.A.R. di procedure di salvataggio. Le procedure d'insolvenza aperte in Cina e riconosciute ad Hong Kong S.A.R. sono le seguenti: bankruptcy liquidation, reorganisation e le compromise proceedings. Le triplici procedure sono contenute nell'EBL 2006.

61. Si veda Wee, A major step in developing Mainland China's cross-border insolvency law a 104-105 (citato in nota 55). Per comprendere le ragioni per cui ciò costituisce un incentivo affinché il legislatore cinese riformi l'art. 5.2 EBL 2006 è opportuno soffermarsi, seppur brevemente, sul contenuto del richiamato articolo. L'art. 5.2 EBL 2006 disciplina il riconoscimento, in Cina, dei provvedimenti pronunciati dal giudice di un altro Stato in materia d'insolvenza. Affinché il provvedimento sia riconosciuto e produca i suoi effetti in Cina è necessario che, in primis, il giudice cinese accerti che sussista un trattato internazionale tra la Cina e lo Stato in cui è stato emesso il provvedimento (ciò si è verificato, ad esempio, quando, per la prima volta, la Cina ha riconosciuto la sentenza di fallimento n. 951/1997 pronunciata dal Tribunale di Milano) o, alternativamente, che vi sia reciprocità (cd. reciprocità de facto) ossia che il giudice dello Stato in cui è stata aperta la procedura d'insolvenza abbia precedentemente riconosciuto un provvedimento (non necessariamente riguardante l'apertura di una procedura di insolvenza) emesso dal giudice cinese. Successivamente, il giudice cinese sarà chiamato ad eseguire un'ulteriore valutazione. Dovrà, infatti, accertare che il riconoscimento del provvedimento (i) non viola i principi fondamentali della R.P.C., (ii) non lede la sovranità e la sicurezza dello Stato, (iii) non pregiudica, in alcun modo, i diritti e gli interessi dei creditori cinesi. L'articolo pone non pochi problemi: dall'ampia discrezionalità dei giudici al frequente rigetto delle domande di riconoscimento della procedura straniera. Ciò detto è palese come il Record of Meeting, promuovendo la cooperazione tra le Corti nel riconoscimento delle procedure d'insolvenza, può fungere da "catalizzatore" per far sì che il legislatore cinese intervenga opinando a favore dell'universalità limitata.

Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region (d'ora in avanti, Opinion)62; ad Hong Kong S.A.R., invece, per mezzo delle Procedures for a Mainland Administrator's Application to the Hong Kong S.A.R. Court for Recognition and Assistance - Practical Guide (d'ora in avanti, Practical Guide)63.

In conclusione, ciò che si verifica il 14 maggio 2021 segna uno *spartiacque* per l'evoluzione della disciplina sull'insolvenza transfrontaliera. Esiste un prima, caratterizzato da un assordante silenzio e dalle frizioni tra ambedue le parti, ed un dopo, in cui si guarda al futuro con maggiore fiducia nella consapevolezza che la cooperazione tra le parti in materia d'insolvenza non può che rafforzarsi.

6 *Disamina di Alcune Dibattute Questioni Insite nell'Opinion e nella Practical Guide alla Luce del Regolamento (UE) n. 848/2015 e di Alcune Selezionate Pronunce della Corte di Giustizia dell'Unione Europea.*

Giunti a questo punto occorre esaminare analiticamente alcune selezionate questioni presenti nell'*Opinion* e nella *Practical Guide*. Giova premettere che, nei paragrafi che seguono, l'analisi è condotta in ottica comparata osservando, quindi, le analogie e le differenze che connotano le fonti testè richiamate e la disciplina in vigore nell'Unione Europea (*Reg. (UE) n. 848/2015*).

6.1 *L'Individuazione della Giurisdizione. il Criterio del C.O.M.I.*

6.1.1. *La Nozione di C.O.M.I. nell'Opinion della Suprema Corte del Popolo della R.P.C.*

L'art. 4 *Opinion S.C.P.* dispone che:

62. Per consultare il testo integrale dell'Opinion redatta dalla Suprema Corte del Popolo della R.P.C., si veda: disponibile a https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_opinion_en_tc.pdf (ultimo accesso 29 novembre 2023).

63. Per consultare il testo integrale della Practical Guide redatta dal Governo di Hong Kong S.A.R., si veda: disponibile a https://www.doj.gov.hk/en/mainland_and_macao/pdf/RRECCJ_practical_guide_en.pdf. (ultimo accesso 23 novembre 2023).

This Opinion applies to Hong Kong Insolvency Proceedings where the Hong Kong S.A.R. is the center of main interests of the debtor.

Centre of main interests referred to this Opinion generally means the place of incorporation of the debtor. At the same time, the People's Court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor.

When a Hong Kong Administrator applies for recognition and assistance, the center of main interests of the debtor shall have been in the Hong Kong S.A.R. continuously for at least six months"[64].

La richiamata proposizione prescrittiva introduce, per la prima volta, in Cina Continentale la nozione di *C.O.M.I.* In generale, il criterio permette di individuare il luogo in cui si radica la giurisdizione, la legge applicabile e l'identificazione della procedura come *procedura principale*.

La Corte enuncia la presunzione *iuris tantum*. Si presume, infatti, che il *C.O.M.I.* coincida con il luogo in cui è presente la sede legale dell'imprenditore collettivo insolvente (si suppone, invero, che in tale sede il debitore curi normalmente i propri interessi). Trattandosi di una presunzione relativa, la quale può essere vinta fornendo la prova contraria, è possibile aprire una procedura d'insolvenza principale nel luogo in cui è presente la sede effettiva. Quest'ultima viene indirettamente indicata attraverso una serie di fattori (*place of principal office*, *principal place of business*, *the place of principal assets*). Osservando la norma ci si chiede se l'elencazione a cui si è appena fatto cenno ha natura tassativa o esemplificativa. Dal dato letterale (rif. a *etc*) sembrerebbe trattarsi di un'elencazione esemplificativa. Evidentemente,

64. Per un maggiore approfondimento sulla nozione di C.O.M.I. nell'Opinion della S.C.P. si veda: Shuai Guo e Bob Wessels, Cross-Border Insolvency between Mainland China and Hong Kong: A First Glance from a Global Perspective, 18 International Corporate Rescue 247; Shuai Guo, A Historic Milestone for Mainland China-Hong Kong Cross-Border Insolvency, (Leidenlawblog, 25 Maggio, 2021), disponibile a

https://www.leidenlawblog.nl/articles/a-historic-milestone-for-mainland-china-hong-kong-cross-border-insolvency (ultimo accesso 29 novembre 2023); Bob Wessels, Cross-Border Insolvency between Mainland China and Hong Kong: First steps; ready to jump? Norton Rose Fulbright, 24 (2023); Shuai Guo, Cross-Border insolvency Chinese Mainland and Hong Kong: the past, the present and the future, 30 Asia Pacific Law Review 70, 84-87 (2022).

l'intento della *S.C.P.* è quello di dar vita ad una *norma aperta* da plasmare a seconda delle caratteristiche del singolo caso concreto.

Il dettato normativo si conclude con un particolare riferimento alla *perpetuatio iurisdictionis*. Affinché la procedura possa essere riconosciuta dalla competente Corte Intermedia del Popolo della *R.P.C.* è necessario accertare che nel territorio dell'isola è ubicato il *C.O.M.I.* continuativamente per un periodo di sei mesi, calcolati a ritroso da quando è stata proposta la domanda di riconoscimento ed assistenza.

Da una prima sintetica disamina dell'art. 4 *Opinion S.C.P.* è possibile constatare che, a differenza di quanto verificatosi a Singapore, la Corte non si è limitata a trasporre in modo pedissequo l art. 16.3 *UNCITRAL MLCBI*[65]. Piuttosto, si evince la parziale intenzione della *S.C.P.* di emulare quanto avvenuto in Europa. Si preferisce parlare di una *parziale intenzione* in quanto non si tratta di una trasposizione fedele. Ci sono, invero, delle similitudini e delle divergenze tra ambedue le discipline di seguito esplicitate.

La ragione per cui la Cina Continentale compie il grande passo in avanti adottando il *C.O.M.I.* è la stessa che, dal lontano 1995, si è inteso perseguire in Europa. Il criterio vuole, da un lato, garantire la certezza del diritto, presumendo che il *centro degli interessi principali* del debitore coincida con la sede legale dell'impresa; dall'altro, la possibilità di superare la presunzione fornendo la prova contraria rappresenta il punto a cui inevitabilmente si giunge per tutelare l'incolpevole affidamento dei terzi e limitare il cd. *bad forum shopping*[66]. Con

65. Art. 16.3, UNCITRAL MLCBI: In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests. Si veda Moore, et al., The New Cross-Border Arrangement Between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code a 49 (citato in nota 58).

66. Il ricorso all'aggettivo bad è necessario per distinguere tale pratica dal lecito good forum shopping. Le due espressioni nascono nel contesto europeo laddove il good forum shopping, il trasferimento o la costituzione delle imprese in un altro Stato membro, è permesso ex art. 49 TFUE. Per giungere a tale conclusione non è sufficiente menzionare il dettato normativo, ma, al contempo, ricordare come un importante passo in avanti, nei primi anni del XXI secolo, è stato compiuto dalla CGUE con il caso C-212/97, Centros, ECR 1999 I-01459. Si veda Fazzini e Winkler, La proposta di Modifica del Regolamento sulle Procedure di Insolvenza a 161 (citato in nota 37); Luciano Panzani, La nozione di COMI nella disciplina comunitaria dell'insolvenza transfrontaliera: i casi Interedil e Rastelli, 11 Int'l Lis 31, 36 (2012).

quesultima espressione si indica il trasferimento o la costituzione fittizia dell'impresa in luoghi dove il debitore è destinatario di un trattamento fiscale o concorsuale più favorevole. Una parte dell'autorevole dottrina ravvisa nel criterio del *C.O.M.I.*, così come articolato, un accettabile compromesso tanto per gli Stati che da sempre hanno creduto nel primato del cd. *place of incorporation* quanto per coloro che, al contrario, hanno prediletto il criterio della sede effettiva[67].

Soffermandosi sull'elenco dei fattori utili a provare il superamento della presunzione, la *S.C.P.* sembra aver fatto tesoro della lezione che l'Unione Europea ha dovuto apprendere a proprio scapito. Per comprendere appieno tale conclusione è doveroso compiere un passo indietro. A causa della mancata enunciazione, nel Considerando n. 13 e nell'art. 3 *Reg. (UE) n.1346/2000*, dei fattori idonei a vincere la presunzione, la *CGUE* è intervenuta per colmare tale lacuna. Nel caso *Eurofood IFSC Ltd*, la Corte osserva che la presunzione può essere superata solo *se elementi obiettivi e verificabili da parte dei terzi consentono di determinare l'esistenza di una situazione reale diversa da quella che si ritiene corrispondere alla collocazione nella detta sede statutaria*. Ciò si verifica in presenza della cd. *letter box company*, una *società fantasma*, che non esercita alcun tipo di attività presso la sede legale. Pertanto, il semplice fatto che le scelte gestionali vengano assunte in uno Stato diverso da quello in cui la società ha la propria sede statutaria non costituisce un fatto idoneo a vincere la presunzione[68].

Sebbene l'interpretazione restrittiva della Corte é tesa a garantire la certezza del diritto e la prevedibilità nell'individuazione della giurisdizione, la dottrina maggioritaria condanna aspramente la decisione in quanto alimenta il *forum shopping*, quello stesso fenomeno che il legislatore aveva inteso limitare[69].

Il caso *Eurofood* sarà ricordato come un incidente di percorso, una lettera morta dalla quale prenderanno le mosse tanto i giudici dei singoli Stati membri[70] quanto la stessa *CGUE*. Nel caso *Interedil S.r.l.* la

67. Si veda, Gong, China's Insolvency Law and Interregional Cooperation. Comparative Perspectives from China and the EU a 83-84 (citato in nota 29).

68. C-341/04, Eurofood IFSC Ltd, 2006 I-03813, punti 32-27.

69. Si veda Laura Baccaglini, Il caso Eurofood: giurisdizione e litispendenza nell'insolvenza transfrontaliera, Int'l Lis 123, 126 (2006).

70. A titolo esemplificativo si veda quanto accaduto in Italia. La Suprema Corte di Cassazione, in due pronunce, attribuisce maggiore rilevanza al punto di vista dei

Corte osserva che: *[...] laddove il luogo dell'amministrazione principale di una società non si trovi presso la sua sede statutaria, la presenza di attivi sociali nonché l'esistenza di contratti relativi alla loro gestione finanziaria in uno Stato membro diverso da quello della sede statutaria di tale società possono essere considerate elementi sufficienti a superare tale presunzione [...]*[71]. Nel successivo caso *Rastelli*, la CGUE aggiunge: *[...] la mera constatazione della confusione dei patrimoni non è sufficiente [...]. Per confutare la presunzione [...], è necessario che da una valutazione globale dell'insieme degli elementi pertinenti permetta di accertare che, in modo riconoscibile ai terzi, il centro effettivo di direzione e di controllo della società [...] si trova nello Stato membro nel quale è stata avviata la procedura d'insolvenza iniziale*[72].

Tralasciando le similitudini nell'individuazione dei fattori idonei a superare la presunzione relativa, giova ricordare che tanto l'*Opinion* quanto il *Reg. (UE) n. 848/2015* non discorrono di *principale centro degli interessi*, ma, erroneamente, di *centro degli interessi principali*. La differenza non investe il solo piano semantico giacché la locuzione *centro degli interessi principali* rimette in capo al giudice l'onere di effettuare, caso per caso, una valutazione qualitativa dovendo, infatti, determinare quali tra i diversi interessi in gioco prevalgono più di altri[73]. Questo compromette la certezza e la prevedibilità nell'individuazione della giurisdizione.

Al contempo, in merito al *centro degli interessi principali* del debitore v'è da rilevare un'importante differenza tra le due fonti. Fin dai primordi, il legislatore europeo ha mostrato una certa premura

terzi che entrano in contatto con la società a discapito del dato formale (sede legale). Per un maggiore approfondimento si veda Laura Baccaglini, In tema di giurisdizione fallimentare europea: trasferimento della sede legale all estero e Centro degli interessi principali della società nel pensiero della S.C. alla vigilia della modifica del Reg. 1346/2000, 12 Int l Lis 140, 140-141 (2013).

Anche il giudice francese sceglie di non seguire la massima espressa in Eurofood. In Francia viene data maggiore rilevanza al luogo in cui vengono assunte le scelte gestionali dell impresa. Sul punto si veda Panzani, La nozione di COMI nella disciplina comunitaria dell insolvenza transfrontaliera: i casi Interedil e Rastelli a 35 (citato in nota 66).

71. C-396/09, Interedil S.r.l., ECR 2011 I-09915 punto 59.

72. C-191/10, Rastelli Davide e C. Snc., ECR 2011 I-13209, punto 39.

73. Si veda Baccaglini, Il caso Eurofood: giurisdizione e litispendenza nell insolvenza transfrontaliera a 125 (citato in nota 69).

nel definire cosa si intenda con l'uso di tale locuzione[74]. Attraverso i requisiti della *abitualità* e della *riconoscibilità*[75] ha disvelato il proprio *favor* a tutela dell'affidamento incolpevole dei terzi. Ciò non si ravvisa nell'*Opinion* laddove, infatti, non si rinviene né l'esatta definizione di *C.O.M.I.* e neanche l'esplicito riferimento ai due requisiti testé richiamati. Una parte della dottrina si è limitata a rilevare l'assenza[76]. Al contrario, alcuni interpreti rinvengono nel silenzio della *S.C.P.* una precisa scelta compiuta. Tra questi, Shuai Guo osserva che: [...] *ascertainability is hard to determine and can be used to deceive creditors, in the way of the debtor making the place of incorporation ascertainable by creditors when actually managing the business in another jurisdiction*[77].

L'ulteriore elemento che accomuna ambedue le discipline è la cd. *perpetuatio iurisdictionis*. Nell'arco temporale individuato dalle norme qualsiasi trasferimento della sede legale dell'impresa è irrilevante poiché (evidentemente) compiuto nell'intento di sottrarsi dall'applicazione della disciplina concorsuale (ciò rientra nel cd. *bankruptcy tourism*). Il richiamato elemento non è contemplato nell'*UNCITRAL MLCBI* e tantomeno nel *Chapter 15 U.S. Bankruptcy Code*[78]. L'unico riferimento normativo dal quale la *S.C.P.* può aver

74. Si veda Considerando n. 13, Reg. UE 29 Maggio 2000, no. 1346: (Per "centro degli interessi principali" si dovrebbe intendere il luogo in cui il debitore esercita in modo abituale, e pertanto, riconoscibile dai terzi, la gestione dei suoi interessi). Successivamente, il menzionato riferimento è stato trasposto all'interno dell'art. 3.1 Reg. UE 20 Maggio 2015, no. 848.

75. La riconoscibilità ha un'accezione gius-economica in quanto consente di individuare con certezza l'ordinamento giuridico competente ad aprire la procedura d'insolvenza principale e garantisce, altresì, ai creditori la possibilità di prevedere con certezza l'entità del rischio che intendono assumere. Sono, infatti, questi ultimi a sopportare il rischio d'insolvenza (quello d'impresa è, invece, sopportato dal debitore). Si veda Winkler, Le procedure concorsuali relative ad imprese multinazionali: la Corte di giustizia si pronuncia sul caso Eurofood a 17 (citato in nota 33).

76. Si veda Wessels, Cross-border insolvency between Mainland China and Hong Kong: First steps; ready to jump? a 24 (citato in nota 64).

77. Si veda Guo, Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present and the future a 84-85 (citato in nota 41).

78. Il C.O.M.I. si determina al momento della proposizione della domanda in conformità con quanto prescritto nel Chapter 15. Il legislatore prevede che il giudice verifichi che il C.O.M.I. non è stato manipolato nel corso del tempo. Si veda Moore, et al., The New Cross-Border Arrangement between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code a 43-50 (citato in nota 58).

attinto è l'art. 3.1 *Reg. (UE) n. 848/2015*[79]. Ancora una volta, si parla di un processo che non comporta una perfetta equivalenza tra le due norme. Lo si desume dal differente termine indicato (l'art. 3.1 *Reg.* individua un termine pari a tre mesi, l'art. 4 *Opinion* un termine pari a sei mesi) e dalla mancata indicazione del termine per l'insolvenza che coinvolge la persona fisica. Quest'ultima non costituisce una lacuna ma la logica conseguenza derivante dalla scelta compiuta a priori dalle parti contraenti: l'accordo si applica per l'insolvenza transfrontaliera che coinvolge i soli imprenditori collettivi. Un ulteriore elemento di discrimine tra le due fonti è rappresentato dal diverso momento da cui calcolare a ritroso il termine. Nel *Reg.* (UE) *n. 848/2015* il termine decorre a ritroso dalla data di apertura della procedura d'insolvenza; nell'*Opinion* dal momento di proposizione della domanda di riconoscimento ed assistenza nel luogo in cui sono presenti i beni del debitore già dichiarato insolvente.

Il giurista continentale deve accogliere con favore l'intervento della *S.C.P.* in punto di giurisdizione ricordando che la portata della questione non è marginale[80]. In questo paragrafo sono state avanzate delle ipotesi interpretative e non resta che attendere i futuri sviluppi che la *S.C.P.* compirà rispetto alle zone d'ombra presenti nell'art. 4 *Opinion* (a titolo esemplificativo tra i fattori idonei a determinare il

79. L'originario Reg. UE 29 Maggio 2000, no. 1346 era silente sulla questione. Quest'ultima viene affrontata, per la prima volta, dalla CGUE nel caso C-1/04, Susanne Staubitz-Schreiber, ECR 2006 I-00701. La Corte dichiara che in caso di litispendenza prevale la procedura aperta per prima (non quindi chi per primo ha proposto la domanda). Da una parte si limita la cd. race to the judge, dall'altra si alimenta la cd. race to the judgment. In seguito, durante il processo di riforma del Regolamento, la dottrina ha auspicato che, in linea tanto con la disciplina di alcuni Stati membri quanto con la proposta avanzata dall'International Insolvency Institute, fosse introdotta la cd. perpetuatio iurisdictionis. Ciò è avvenuto ed oggi rappresenta un accettabile compromesso tra la libertà di stabilimento, diritto di cui dispone l'imprenditore, e la necessità di evitare il cd. bad forum shopping. Sul punto si veda Baccaglini, In tema di giurisdizione fallimentare europea: trasferimento della sede legale all'estero e "Centro degli interessi principali" della società nel pensiero della S.C., alla vigilia della modifica del Reg. 1346/2000 a 146-148 (citato in nota 70).

80. Dai dati pubblicati nel 2020, si evince che il 52% delle società quotate presso la Borsa di Hong Kong S.A.R. sono cinesi. Si veda, Moore, et al., The New Cross-Border Arrangement between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code a 49 (citato in nota 58).

superamento della presunzione relativa prevarrà il luogo in cui sono assunte le scelte gestionali dell'impresa insolvente o il luogo in cui sono presenti i beni?). Non resta che concludere con una domanda attualmente senza risposta: la Corte, nell'interpretazione dell'art. 4 *Opinion*, seguirà le decisioni assunte dalle altre Corti o darà vita ad un proprio orientamento[81]?

6.1.2. *L'Assenza del C.O.M.I. nella Practical Guide del Governo di Hong Kong S.A.R.*

Se la Suprema Corte del Popolo della *R.P.C.* dedica un'apposita proposizione prescrittiva (art. 4 *Opinion*) al *C.O.M.I.*, ciò non si ravvisa nella *Practical Guide* redatta dal Governo di Hong Kong *S.A.R.*[82].

Sul punto l'autorevole dottrina ha formulato il seguente quesito: il silenzio dell'esecutivo deve essere interpretato come indice rivelatore di un'apposita scelta o si tratta di una mera dimenticanza?

La maggior parte degli interpreti propendono per la seconda ipotesi. Fin dai primordi, infatti, Hong Kong S.A.R. si è sempre mostrata favorevole all'accoglimento di tale criterio. A riprova di ciò, la Court of First Instance, in re Pioneer Iron and Steel Group Company Limited83, è incline ad accogliere la sede effettiva quale valido criterio

81. Si veda Wee, A Major Step in Developing Mainland China's Cross-Border Insolvency Law a 113 (citato in nota 55).

82. Per un maggiore approfondimento in merito all'assenza della nozione di C.O.M.I. nella Practical Guide si veda: Guo, Wessels, Cross-Border Insolvency between Mainland China and Hong Kong: A First Glance from a Global Perspectivea 13-14 e 247-252 (citato in nota 64); Guo, A Historic Milestone for Mainland China-Hong Kong Cross-Border Insolvency (citato in nota 64); Wessels, Cross-Border Insolvency between Mainland China and Hong Kong: First steps; ready to jump? a 24 (citato in nota 64); Guo, Cross-Border insolvency Chinese Mainland and Hong Kong: the past, the present and the future a 84-85 (citato in nota 64).

83. HCCW 322/2010, punto 30. La società Pioneer Iron and Steel Group Company Ltd è costituita nelle Isole Vergini Britanniche in data 16 ottobre 2003. Si occupa del commercio di ferro e acciaio. A causa della crisi finanziaria del 2008, manifesta i presupposti tipici dell'insolvenza. Presso le Isole Vergini Britanniche viene sottoposta alla procedura di liquidazione e vengono nominati i curatori Roderick Sutton e William Tacon. Constatata la contrarietà degli amministratori della società a collaborare e visto che la società esercita la propria attività ad Hong Kong allora si rivolgono alla Court of First Instance domandando l'apertura della procedura di liquidazione della unregistered-company ex sec. 327 CWUMPO.

alternativo alla sede legale. È in re Lamtex Holdings Limited 84 che viene definitivamente esplicitato il criterio del C.O.M.I. sulla base del fatto che non si ravvisano sufficienti nonché contrarie argomentazioni giuridiche rispetto alla sua adozione. In aggiunta, vengono dettate tre condizioni alternative85 al ricorrere delle quali è possibile constatare il superamento della presunzione relativa.

In linea con quanto espresso dalla giurisprudenza, il *Department of Justice*, nel *Paper, 22 giugno 2020*, richiama la nozione di *C.O.M.I.* insita nell'*UNCITRAL MLCBI* (art. 16.3) e nel *Reg. (UE) n. 848/2015* (art. 3.1) per determinare la giurisdizione, la legge applicabile e il riconoscimento della procedura d'insolvenza come *procedura principale* (*main*).

A dimostrazione della validità della risposta fornita dalla dottrina maggioritaria, nel 2022, è intervenuta la giurisprudenza. Come sovente accade, la *Court of First Instance* interviene, in via suppletiva, per correggere le lacune o porre rimedio ai silenzi del legislatore o dell esecutivo. Ciò si verifica anche a seguito della conclusione del *Record of Meeting* con il caso *re Provisional Liquidator of Global Brands Group Holding Limited*[86]. Anzitutto, il giudice Harris compie una premessa richiamando il caso *HIH*[87] in cui Lord Hoffmann osserva che il criterio del *C.O.M.I.* (art. 3 *Reg. (UE) n. 1346/2000*) appare il più appropriato quando non vi sia alcun legame con il luogo in cui è sita la

84. [2021] HKCFI 622, punto 22. La controversia vede protagonista la società capigruppo Lamtex Holdings Limited costituita a Bermuda e quotata nel listino di Hong Kong S.A.R. (HKSE). La società in stato di insolvenza viene posta in liquidazione tanto ad Hong Kong S.A.R. quanto a Bermuda.

85. [2021] HKCFI 622, punto 35.

86. [2022] HKCFI 1789. Global Brands Group Holding Ltd è la società capogruppo costituita a Bermuda, una tra le giurisdizioni cd. offshore. Durante la pandemia da Covid-19, manifesta i presupposti tipici dello stato di crisi. Pertanto, viene sottoposta alla procedura di ristrutturazione nel tentativo di scongiurare l'insolvenza. Visto l'insuccesso della procedura, il 10 settembre 2021, viene proposta la domanda di apertura di una procedura di liquidazione avverso la società insolvente. Accertata la sussistenza di tale stato, la domanda è accolta in data 5 novembre 2021. Il provisional liquidator, Mr. Mckenna, avuta cognizione della presenza di beni ad Hong Kong, propone domanda alla Corte per il riconoscimento della procedura ed il rilascio dell'order. La Court of First Instance rigetta la domanda in quanto ritiene che trattandosi di una letter box company (società fantasma costituita a Bermuda ma che opera completamente ad Hong Kong) il C.O.M.I. è sito nell'ex-colonia britannica.

87. Re HIH Casualty and General Insurance Ltd v Chase Manhattan Bank, [2003] UKHL 6.

sede legale del debitore insolvente. Successivamente Harris considera quanto accaduto nel territorio dell'ex-colonia britannica dichiarando: *the position adopted in Hong Kong has historically been that a liquidator appointed in the place of incorporation is recognised. However, it would be incorrect to say that the Hong Kong recognition criteria has exclusively been tied to the debtor's country of incorporation. There are instances of the Hong Kong Court granting, or be willing to grant, recognition to insolvency office-holders appointed in a foreign jurisdiction which was not the jurisdiction of incorporation [...]*[88]. Il giudice, menzionando alcuni casi giurisprudenziali,[89] conferma la possibilità di riconoscere una procedura aperta in un luogo diverso da quello in cui è ubicata la sede legale del debitore insolvente. In aggiunta, Harris ipotizza che in futuro la sede effettiva prevalga rispetto al criterio della sede legale: *In my view the criteria for recognition should in future primarily be determined by the location of a company's C.O.M.I. [...] This better reflects the current commercial practice in Hong Kong [...]. The connection between such companies and the place of their incorporation is entirely formal [...]*. La conclusione a cui perviene il giudice si spiega in ragione del diffuso fenomeno concernente la costituzione di società in giurisdizioni cd. *offshore*. Inoltre, le parole di Harris fungono da monito per l'esecutivo qualora, ex art. 96 *B.L.*[90], addivenga alla conclusione di accordi bilaterali o multilaterali con altri Stati riguardanti il mutuo riconoscimento e l'assistenza delle procedure d'insolvenza a carattere transfrontaliero.

Appurato che ad Hong Kong *S.A.R.* la lacuna deve essere colmata attraverso l'adozione del *C.O.M.I.*, Harris affronta, poi, un'ulteriore questione: quale è la data rilevante per la determinazione del *C.O.M.I?*

Sul punto il giudice afferma che il giudice competente deve limitarsi ad accertare che alla data di proposizione della domanda di riconoscimento della procedura d'insolvenza il *C.O.M.I.* della società insolvente è ubicato nel territorio della Cina Continentale[91]. La richiamata conclusione mostra come, sul punto, vi sia una divergenza con la Cina

88. [2022] HKCFI 1789, punto 30.

89. Re The Russo-Asiatic Bank e re Bank of Credit and Commerce International (Overseas) Ltd.

90. Art. 96 B.L.: With the assistance or authorization of the Central People's Government, the Government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance.

91. [2022] HKCFI 1789, punto 50.

Continentale la quale fissa un termine semestrale calcolato a ritroso a partire dalla data di proposizione della domanda (ex art. 4.3 *Opinion*). Dietro la netta divergenza si nascondono diversi interessi in gioco: al contrario di Hong Kong, la Cina Continentale ha interesse a limitare il fenomeno del cd. *bankruptcy tourism* dal momento che, come dimostra la prassi, le società cinesi in odore di insolvenza trasferiscono la propria attività ad Hong Kong *S.A.R.* per beneficiare di una disciplina concorsuale più favorevole.

Se, sulla questione in esame, la Cina Continentale è persuasa dal *Reg. (UE) n. 848/2015*, ciò non può dirsi per Hong Kong. La *S.A.R.* fa proprio l'approccio insito nel *Chapter 15 U.S. Bankruptcy Code*. È, questa, una tra le rare circostanze in cui l'ex-colonia britannica non segue il Regno Unito[92].

In conclusione, è possibile affermare con assoluta certezza che Hong Kong adotta il criterio del *C.O.M.I.* e, come spiega Harris, ciò è necessario per conformarsi alla Cina Continentale (art. 4 *Opinion*) garantendo, in tal modo, una maggiore cooperazione tra le due parti[93]. Ciò nonostante, non mancano le zone di penombra (basti pensare al silenzio sui fattori idonei a superare la presunzione *iuris tantum*) che richiedono, quindi, il solerte intervento delle autorità competenti.

6.2 *Il Riconoscimento delle Procedure, la Mancata Distinzione tra Procedura Principale e Secondaria, l'Assenza della Nozione di Dipendenza*

Relativamente al riconoscimento delle procedure aperte nella *S.A.R.*, in linea con il *Record of Meeting* (par. 2), l'art. 2 *Opinion*[94] ha

92. Giova ricordare che nel Regno Unito la data che rileva per la determinazione del C.O.M.I. è quella relativa alla proposizione della domanda di apertura della procedura d'insolvenza. Hong Kong non condivide neanche la scelta adottata da Singapore, luogo in cui la data rilevante per la determinazione del C.O.M.I. è quella in cui si tiene la prima udienza del procedimento avente ad oggetto il riconoscimento della procedura d'insolvenza a carattere transfrontaliero. Si veda Moore, et al., The New Cross-Border Arrangement between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code a 43-50 (citato in nota 58).

93. [2022] HKCFI 1789, punto 32.

94. Art. 2 Opinion S.C.P.: "Hong Kong Insolvency Proceedings" referred to in this Opinion means the collective insolvency proceedings commenced in accordance

stabilito che con la locuzione *Hong Kong Insolvency Proceedings* si intende far riferimento ai *collective insolvency proceedings*, i quali coinvolgono tutti o una parte significativa dei creditori. La *S.C.P.* ha poi esplicitato tre procedure incluse nell'espressione *collective insolvency proceedings*: la *compulsory winding up*, *creditors' voluntary winding up* e lo *scheme of arrangement*, a condizione che quest'ultimo sia proposto dal curatore ed omologato dal giudice di Hong Kong *S.A.R.*

Nella *Practical Guide*, al contrario, non è contenuta alcuna indicazione. La lacuna è colmata dalla dottrina per mezzo del rinvio al *Record of Meeting* che, nel paragrafo 3, individua tre procedure d'insolvenza che possono essere riconosciute dalla *Court of First Instance.* Si tratta della *bankruptcy liquidation*, della *reorganization* e dei *compromise proceedings* annoverate nella *EBL 2006*.

Dalla richiamata disciplina emerge, in *primis*, l'intento delle parti contraenti di non conformarsi al *Chapter 15 U.S. Bankruptcy Code*[95] condividendo, invece, un approccio simile al contenuto degli artt. 2 (a) *UNCITRAL MLCBI* e 1 *Reg (UE) n. 848/2015*. In secondo luogo, si constata una sostanziale divergenza con l'Unione Europea giacché secondo il Considerando n. 10-20 e l'art. 1 *Reg. (UE) n. 848/2015* nell'*Allegato A*, oltre alla liquidazione, sono ricomprese anche le procedure volte a garantire il salvataggio, la ristrutturazione del debito e la riorganizzazione. È, infatti, il necessario epilogo a cui giunge il legislatore europeo a seguito del diffondersi della cd. *Chapter 11-ization*[96]. Di converso, dall'individuazione tassativa delle procedure insita

with the Companies (Winding Up and Miscellaneous Provisions) Ordinance and the Companies Ordinance of the Hong Kong S.A.R., which includes compulsory winding up, creditors' voluntary winding up and scheme of arrangement promoted by a liquidator or provisional liquidator and sanctioned by a court of the Hong Kong S.A.R. in accordance with sec. 673 of the Companies Ordinance of the Hong Kong S.A.R.

95. Il Chapter 15 U.S. Bankruptcy Code fa proprio il contenuto dell'art. 2 (a) UNCITRAL MLCBI. Si parla, più genericamente, di Foreign Proceedings senza che queste siano tassativamente individuate. L'approccio è contrario al Reg (UE) n. 848/2015 e a quanto stabilito dalla Cina Continentale ed Hong Kong S.A.R. Si veda Moore, et al., The New Cross-Border Arrangement between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code a 42 (citato in nota 58).

96. Winkler, Le procedure concorsuali relative ad imprese multinazionali: la Corte di giustizia si pronuncia sul caso Eurofood (citato in nota 33)

nel *Record* e nell'*Opinion* emerge la volontà di escludere le procedure di salvataggio per evitare inutili tensioni con Hong Kong, da sempre restia ad introdurre tali procedure.

Un'ulteriore differenza riguarda la procedura di riconoscimento. Nel *Reg. (UE) n. 848/2015* si parla di un riconoscimento automatico (ex art. 16). Al contrario, nell'*Opinion* (artt. 6-11) e nella *Practical Guide* è contenuta la procedura apposita che il curatore deve seguire per richiedere ed ottenere il riconoscimento e l assistenza.

Comprese quali sono le procedure di insolvenza che possono essere riconosciute, occorre chiedersi se il giudice competente debba stabilire se trattasi di una procedura *principale* o *secondaria*.

Tanto nell'*Opinion* quanto nella *Practical Guide* non c'è alcun espresso riferimento. In ambedue i casi si tratta di una palese dimenticanza della *S.C.P.* e dell'esecutivo.

Per quanto riguarda la Cina Continentale ciò si evince dall'art. 19 *Opinion* in cui si ammette la possibilità di aprire *separate insolvency proceedings concerning the same debtor*. A primo acchito, quest'espressione potrebbe rivelare l'adesione della Cina alla *territorialità*[97]. Non è così poiché nel *Record of Meeting* la Cina Continentale si è espressa a favore dell'*universalità limitata*. Pertanto, l'espressione a cui si è fatto cenno deve essere implementata aggiungendo che, durante il riconoscimento, il giudice è chiamato a stabilire se trattasi di una procedura *principale*, in presenza di una procedura d'insolvenza aperta nel luogo dove è sito il *C.O.M.I.*, o *secondaria*. In quest'ultimo caso, è necessario

97. La teoria della territorialità comporta che la procedura aperta in un determinato Stato non produce effetti extraterritoriali così come le procedure aperte oltre confine sono improduttive di effetti nello Stato ove è richiesto il riconoscimento e l'esecuzione della procedura straniera. Tra gli effetti prodotti dalla teoria della territorialità vi è la cd. duplicazione delle procedure. Il Giappone si è distinto in quanto è stato l'unico ordinamento nel panorama internazionale ad adottare il principio della territorialità pura (a riprova di ciò si veda l'art.3 della Japanese Bankruptcy Law). Sul finire del XX secolo tale approccio appare anacronistico rispetto alle nuove sfide che in ambito economico il Giappone è chiamato ad affrontare. Pertanto, si uniforma agli altri Stati recependo, di fatto, quanto insito all'interno della suindicata UNCITRAL MLCBI. Emulando il Giappone, anche la Cina Continentale adotta la territorialità per poi (apparentemente) aprirsi all'universalità a seguito della promulgazione dell'EBL 2006. Al contrario, i giudici di Hong Kong S.A.R. si sono sempre mostrati favorevoli all'accoglimento dell'universalità limitata.

introdurre nell'*Opinion* la nozione di *dipendenza*, tuttora assente[98]. Nel far ciò è necessario osservare ciò che accade in Europa. La nozione (art. 2.10 *Reg. (UE) n. 848/2015*) sorge nel lontano 1995 e diviene, nel 2011, oggetto di approfondimento per la *CGUE* che, nel caso *Interedil Srl*, afferma: l*a nozione di dipendenza […] richiede la presenza di una struttura implicante un minimo di organizzazione e una certa stabilità ai fini dell'esercizio di un'attività economica. La mera presenza dei singoli beni o di conti correnti bancari non corrisponde, in linea di principio, a tale definizione*[99].

Come anticipato, anche il Governo di Hong Kong *S.A.R.* non si pronuncia in merito al riconoscimento della procedura d'insolvenza nei termini di *principale* o *secondaria* e tantomeno enuncia la nozione di *dipendenza*. Anche in questo caso si tratta di una disattenzione dell'esecutivo il quale, infatti, non ha trasposto nella *Practical Guide* la raccomandazione contenuta nel *Paper 22 giugno 2020* (par. 25.1) redatto dal *D.O.J.* Anche in questa circostanza, l'autorevole dottrina ritiene opportuno emendare la *Practical Guide* adeguandola al contenuto del *Paper* aggiungendo, altresì, la nozione di *dipendenza* (non contemplata neanche nel *Paper*). Quanto appena affermato confermerebbe, inoltre, la ferma adesione di Hong Kong *S.A.R.* all'*universalità limitata*.

6.3 *Le Eccezioni di Ordine Pubblico*

Un'ulteriore questione su cui è doveroso concentrarsi è rappresentata dalle eccezioni di ordine pubblico. L'unica fonte che si esprime in merito è l'*Opinion*. La Corte Intermedia del Popolo della *R.P.C.*, ex art.

98. Kun Liu, interprete vicino alla S.C.P., ha tentato di giustificare tale assenza. Secondo l'autore, la mancanza di una espressa norma relativa alla nozione di dipendenza si spiega in ragione dell'EBL 2006. In quest'ultima fonte del diritto non si ravvisa alcun riferimento all'apertura di una procedura d'insolvenza secondaria nel luogo in cui è ubicata la dipendenza. Ciò detto unitamente al riferimento contenuto nell'art. 19 Opinion rivelano il timido tentativo della S.C.P. di contemplare la possibilità di aprire una procedura secondaria laddove sia presente la dipendenza. Si veda Shuai Guo, Bob Wessel, Cross-Border Insolvency between Mainland China and Hong Kong: New Proposals from a Global Perspective, 20 International Corporate Rescue 11, 14 (2023).

99. C-396/09, Interedil Srl, punto 64.

18[100], deve rigettare la domanda sul riconoscimento ed assistenza della procedura d'insolvenza aperta ad Hong Kong *S.A.R.* quando, esaminate le prove, si accerta una tra le seguenti fattispecie: (i) il *C.O.M.I.* del debitore insolvente non è sito ad Hong Kong *S.A.R.* o è stato presente per un termine inferiore ai sei mesi, (ii) non vi sono i requisiti di fallibilità soggettiva/oggettiva ex art. 2 *EBL 2006***; (iii) i creditori locali non sono destinatari di un equo trattamento; (iii) frode, (iv) altre circostanze che la Corte considera rilevanti per il rigetto della domanda.

La Corte deve inoltre rigettare la domanda quando il riconoscimento o l'assistenza viola i principi fondamentali, l'ordine pubblico o il buon costume.

La *S.C.P.* adotta un approccio cd. *ibrido* in quanto diversi sono gli archetipi da cui trae ispirazione. Anzitutto, la Corte sembra voler trasporre alcuni connotati tipici dell'art. 5.2 *EBL 2006*. Lo si constata quando, in ottica protezionistica, si riferisce ai creditori locali o quando, in chiusura, attribuisce alla Corte un'ampia discrezionalità nell'individuare ulteriori circostanze utili a rigettare la domanda[101]. Attribuire un'ampia discrezionalità ai giudici potrebbe generare l'aumento dei casi di rigetto della domanda. Ciò sarebbe contrario alla teoria dell'*universalità limitata*.

100. Art. 18 Opinion: A people's court shall refuse to recognise or assist the Hong Kong Insolvency Proceedings, upon examination off the evidence adduced by an interested party to the satisfaction of the court of any of the following: (1) the centre of main interests off the debtor is not situated in the Hong Kong S.A.R. or it has been situated in the Hong Kong S.A.R. for less than six months continuously; (2) art. 2 EBL 2006 is not satisfied; (3) Mainland creditors are unfairly treated; (4) there is fraud; (5) there is any other circumstance where the people's court considers that recognition or assistance shall not be rendered.

The people's court shall refuse to recognise or assist the Hong Kong Insolvency Proceedings if it considers that such recognition or assistance violates the basic principles of the law of the Mainland or offend public order or good morals.

101. Il protezionismo non emerge solo nella circostanza a cui si è fatto cenno. Un ulteriore riferimento è insito nell'art. 20 Opinion. La norma dispone che, a seguito della vendita forzata dei beni del debitore siti in Cina Continentale, il ricavato deve essere ripartito in primis tra i creditori locali privilegiati applicando le norme della EBL 2006. L'ammontare residuo deve essere, poi, ripartito tra i restanti creditori (locali e stranieri) applicando la disciplina di Hong Kong S.A.R.

Se da una parte la Corte resta ancorata alle proprie origini (art. 5.2 *EBL 2006*)[102], dall'altra guarda oltreconfine. Questa volta, sembra essere stata parzialmente persuasa dall'eccezione di ordine pubblico annoverata nel *Chapter 15 U.S. Bankruptcy Code* quando, tra le cause che comportano il rigetto, menziona l'assenza del *C.O.M.I.* nel territorio dell'isola. In realtà, si tratta di una trasposizione parziale perché, a differenza del *Chapter 15*, non aggiunge che il rigetto può avvenire se, dopo aver constatato la mancanza del *C.O.M.I.*, si accerta anche l'assenza della dipendenza nel territorio dell'ex-colonia[103].

L'eccezione, così come formulata dalla Corte, è estremamente lacunosa poiché, contrariamente all'art. 6 *UNCITRAL MLCBI* e all'art. 33 *Reg. (UE) n. 848/2015*, non si presta ad un'interpretazione restrittiva. Inoltre Shuai Guo osserva che la proposizione prescrittiva in esame è contraria al principio dell'efficienza delle procedure di riconoscimento e assistenza le quali, richiedono che il legislatore rimuova qualsiasi ostacolo all'accoglimento della domanda[104]: non a caso si parla di eccezione in quanto si presume che la procedura d'insolvenza straniera sia valida.

Non resta che attendere i futuri interventi del legislatore e della giurisprudenza. In questa sede ci limitiamo a formulare delle ipotesi. È possibile che l'art. 18 *Opinion* venga riformulato eliminando i riferimenti all'art. 5.2 *EBL 2006*. In aggiunta, è plausibile che si intervenga per correggere la condizione relativa al *C.O.M.I.* contemplando, anche la dipendenza in conformità al *Chapter 15*. Non meno importante, è ragionevole ritenere che, in accordo con il *MLCBI* e il *Reg. UE*, l'art. 18 venga emendato aggiungendo l'avverbio *palesemente* o *manifestamente*. Ciò, unitamente alla possibilità di accogliere l'eccezione nei soli casi in cui vi sia una lesione dei principi costituzionali e/o processuali, costituirebbe un indice dal quale desumere la ferma volontà di interpretare

102. Si veda Guo, Wessels Cross-Border Insolvency between Mainland China and Hong Kong: A First Glance from a Global Perspective a 247-252 (citato in nota 64).

103. Si veda Moore, et al., The New Cross-Border Arrangement between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code a 46 (citato in nota 58).

104. Si veda Guo, Cross-Border Insolvency between Chinese Mainland and Hong Kong: the past, the present and the future a 87-88 (citato in nota 41).

restrittivamente l'eccezione in esame. Quanto ipotizzato si porrebbe in linea con l'approccio cd. *ibrido* che connota il vigente art. 18 *Opinion*.

Se la Suprema Corte enuncia la propria posizione, invece la *Practical Guide* tace sulla questione. Il silenzio non disvela una precisa scelta dell'esecutivo, bensì una lacuna in quanto si è omesso di trasporre le indicazioni contenute nel *Paper 22 giugno 2020* (par. 29). Il governo di Hong Kong *S.A.R.*, nella futura fase di implementazione della *Practical Guide*, dovrebbe intervenire sul punto trasponendo il contenuto del *Paper* e apportando, altresì, alcune necessarie modifiche.

6.4 *Gli Effetti Giuridici prodotti a Seguito dell'avvenuto Riconoscimento della Procedura d'Insolvenza*

Nei paragrafi precedenti, si è precisato che tanto l'*Opinion* quanto la *Practical Guide* individuano l'apposito iter procedurale affinché la procedura d'insolvenza sia riconosciuta nel territorio in cui sono presenti i beni o i creditori del debitore insolvente. Il richiamato approccio è contrario al riconoscimento automatico ex art. 16 *Reg. (UE) n. 848/2015*. Le procedure previste dalla Cina Continentale (artt. 6-11 *Opinion*) ed Hong Kong *S.A.R.,* prevedendo il rapido accoglimento o rigetto della domanda, si pongono in linea con l'intento perseguito dall'*UNCITRAL.* Per evitare, nel *medio tempore*, una riduzione della massa attiva, la Commissione si rivolge agli Stati nei seguenti termini: *there is no time to waste, as the recognition must take place as expeditiously as possible*[105]. Al monito non seguiva una norma, simile all'art. 7 *Reg. (UE) n. 848/2015*, che sanciva l'applicazione della legge dello Stato di apertura nello Stato in cui erano presenti beni o creditori del debitore insolvente. Ciò, infatti, avrebbe reso più complessa l'adozione dell'*MLCBI*. Pertanto, negli artt. 19-21 *MLCBI*, l'*UNCITRAL* individua, da un lato, gli effetti che automaticamente si producono nel territorio in cui è avvenuto il riconoscimento e, dall'altro, ulteriori misure discrezionali, che possono essere richieste dal curatore ed eventualmente concesse dalla Corte.

105. Si veda Gong, China s Insolvency Law and Interregional Cooperation. Comparative Perspectives from China and the EU a 95 (citato in nota 29)

L'*Opinion* segue il contenuto delle richiamate norme. L'art. 9[106] stabilisce che, tra la proposizione della domanda ed il suo accoglimento, il curatore può richiedere ed ottenere dal giudice cinese misure cautelari conservative volte ad evitare che il debitore già dichiarato insolvente depauperi il proprio patrimonio riducendo di fatto la massa attiva.

In conformità all'art. 20.1 *MLCBI* e gli artt.16-20 *EBL 2006*, negli artt. 11-13 *Opinion* sono, poi, elencati gli effetti che automaticamente si producono a seguito del riconoscimento: (i) inefficacia del pagamento a favore di alcuni tra i creditori concorrenti, (ii) sospensione delle liti pendenti e/o inammissibilità delle azioni che coinvolgono il debitore insolvente (sia sul lato attivo che passivo), (iii) sospensione o inammissibilità delle azioni esecutive individuali proposte dal creditore avverso il debitore, (iv) revoca delle misure cautelari eventualmente concesse. Si desume pertanto che gli effetti automaticamente prodotti investano tanto la sfera giuridica soggettiva del debitore quanto quella dei creditori.

Pertanto a seguito dell'avvenuto riconoscimento occorre considerare quale sia l'assistenza fornita dalla Corte al curatore straniero. Se gli artt. 7 e 21 *Reg. (UE) n. 848/2015* stabiliscono che il curatore straniero possa esercitare nel territorio in cui sono presenti beni o creditori del debitore insolvente tutti i poteri in virtù della legge dello Stato membro in cui la procedura è stata aperta, ciò non può dirsi in Cina Continentale e ad Hong Kong *S.A.R.* L'art. 14 *Opinion*[107] mostra come

106. Art. 9 Opinion: From the time of receipt of an application for recognition and assistance and until it is decided upon, the people's court shall deal with any application from a Hong Kong administrator for preservation measures in accordance with the relevant provisions of Mainland Law.

107. Art. 14 Opinion : After the people's court recognises the Hong Kong Insolvency Proceedings, it may, upon application, decide to allow the Hong Kong Administrator to perform the following duties in the Mainland: (i) taking over the property, seals, account books, documents and other data of the debtor, (ii) investing into the financial position of the debtor and preparing a report on such position, (iii) deciding on day-to-day expenses and other necessary expenditures, (iv) before the holding of the first creditors meeting, deciding whether to continue or suspend the business of the debtor, (v) managing and disposing of the debtor's property; (vi) participating in a legal actions , arbitrations or any legal proceedings on behalf of the debtor; (vii) accepting declaration of claims by creditors in the Mainland and examining them; (viii) performing other duties that the people's court considers that he may so allowed.

If the Hong Kong administrator performs any of the abovementioned duties that involves waiver of property rights, creation of security on property, loan transfer of

la Cina, probabilmente al fine di cooperare in modo più proficuo con l'isola, ha condiviso la posizione adottata da Hong Kong[108]. Il curatore straniero non può esercitare i poteri come se (*as if approach*) fosse stata aperta una procedura locale (in Cina). Nel territorio in cui la procedura è riconosciuta, il curatore può esercitare solo quei poteri ritenuti necessari e che, al contempo, non eccedano quelli previsti dalla disciplina del luogo in cui è stato nominato. In alcuni casi il curatore nominato ad Hong Kong deve richiedere ed ottenere una specifica autorizzazione dal giudice cinese (a titolo esemplificativo si consideri il caso in cui deve porre in essere atti dispositivi sul patrimonio del debitore presente in Cina).

Un'importante novità apportata dalla *S.C.P.* è data dalla possibilità che, ex art. 15 *Opinion*, il giudice cinese, previa proposizione di una domanda da parte del curatore straniero o dei creditori, nomini un curatore cinese. L'autorevole dottrina ritiene che ciò non dia luogo ad un'ulteriore procedura poiché questo sarebbe palesemente contrario all'*universalità limitata*. Meng Seng Wee osserva che in tal modo la Corte ha garantito al curatore nominato ad Hong Kong *S.A.R.* la possibilità di colmare la propria incompetenza relativa all'*EBL 2006:* se, da un lato, il curatore cinese funge da *longa manus* del curatore nominato ad Hong Kong, d'altra parte, ciò comporta un aumento dei costi della procedura ed una conseguente riduzione del profitto che ciascun singolo creditore può ottenere in sede di riparto dell'attivo[109].

In conclusione è doveroso volgere lo sguardo al contenuto della *Practical Guide*. L'esecutivo si è limitato a fornire un cd. *standard order* nel quale è contenuta l'elencazione tassativa dei poteri riconosciuti ai curatori cinesi. Tra questi rileva: la possibilità di richiedere ed ottenere informazioni da terze parti (es. istituti di credito), il ricorso a

property out of Mainland and other acts for disposing of the property that has a major impact on the creditors' interest, it requires separate approval by the people's court.

The Hong Kong administrator shall not perform his duties beyond the scope provided by EBL 2006 and by the law of the Hong Kong S.A.R.

108. Si preferisce parlare di adozione in quanto Hong Kong, a sua volta, condivide quanto i giudici inglesi hanno sancito nel caso Singularis Holdings Ltd v. Pricewaterhouse Coopers. Sul punto si veda Wee, A major step in developing Mainland China's cross-border insolvency law a 117-119 (citato in nota 55).

109. Si veda Wee, A major step in developing Mainland China's cross-border insolvency law a 120-121 (citato in nota 55).

talune misure per evitare la riduzione della massa attiva, il richiedere consulenze a professionisti allorquando ciò si reputi necessario.

Più volte, nel corso della trattazione, si è sottolineato che la posizione assunta da ambedue le parti contraenti, tanto sulla procedura di riconoscimento quanto sui poteri riconosciuti ai curatori, è maggiormente conforme al contenuto dell'*UNCITRAL MLCBI* che al *Reg. (UE) n. 848/2015*. Indubbiamente quest'ultimo rappresenta l'archetipo a cui ambire dato che garantisce effettività alla teoria dell'*universalità limitata*.

6.5 *La Cooperazione e la Comunicazione tra Giudici e Curatori: il Timido Tentativo di uniformarsi agli Standard Internazionali*

Per quel che riguarda la cooperazione tra gli attori in gioco nelle procedure di insolvenza a carattere transfrontaliero, l'*UNCITRAL* osserva che: *Cooperation [...] is often the only realistic way, for example, to prevent dissipation of assets, to maximize the value of assets [...] or to find the best solutions for the reorganization of the enterprise*[110].

Muovendo da tale presupposto, nel *Record of Meeting* le parti contraenti si impegnano ad incrementare la cooperazione e la comunicazione tra le Corti. In seguito, la *S.C.P.*, ex art. 24 *Opinion*, stabilisce: *the Courts in the pilot areas shall actively communicate and take forward cooperation with the Courts in the Hong Kong S.A.R.* In linea con l'art. 24 si collocano anche gli artt. 15.3 e 19 *Opinion* i quali invitano i curatori a rafforzare la loro cooperazione[111].

110. Par. 211, Guide to Enactment and Interpretation. Per consultare il testo integrale della richiamata fonte: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf (ultima visita in data 08.06.2023). Si veda Gong, China's Insolvency Law and Interregional Cooperation. Comparative Perspectives from China and the EU, in Routledge a 104 (citato in nota 29).

111. Art. 15.3 Opinion: The administrators in both jurisdictions shall strengthen their communication and cooperation.

Art. 19 Opinion: When separate insolvency proceedings concerning the same debtor or connected debtors respectively take place in the Hong Kong S.A.R. and the Mainland, the administrators in the two jurisdictions shall strengthen their communication and cooperation.

Conformemente al *Chapter 15 U.S. Bankruptcy Code*[112], le richiamate norme mostrano il tentativo della *S.C.P.* di trasporre fedelmente il contenuto degli artt. 25-27 dell'*UNCITRAL MLCBI*.

Bob Wessels critica l'approccio adottato dalla Cina Continentale in quanto si tratta di *vuoti enunciati* che non creano dei vincoli giuridici in capo alle parti interessate[113]. Rifacendosi all'idea di Shuai Guo, Wessels ritiene che per la Cina Continentale il modello è, ancora una volta, rappresentato dall'Unione Europea.

In un primo momento, il legislatore europeo si rivolge ai soli curatori non definendo chiaramente cosa si intenda per cooperazione. L'art. 31 *Reg. (UE) n. 1346/2000* invita i curatori a scambiare tempestivamente le informazioni relative alla procedura, a cooperare reciprocamente garantendo al curatore della procedura principale di avanzare una proposta relativamente alla ripartizione dell'attivo ottenuto dalla procedura secondaria. Il successivo *Reg. (UE) n. 848/2015* definisce al meglio cosa debba intendersi per cooperazione e comunicazione. Inoltre, in linea con il *MLCBI*, il predetto Regolamento estende il dovere anche alle Corti e ai curatori in rapporto con le Corti (artt. 41-43). Riferendosi a queste ultime, il legislatore indica come si esplica la cooperazione e la comunicazione (ad esempio, tramite la nomina dei curatori o lo scambio di informazioni ritenute rilevanti).

Se, da una parte, l'Europa funge da archetipo per la Cina, è, altresì, doveroso specificare che per le Corti del Popolo della *R.P.C.* è alquanto complesso cooperare e comunicare direttamente con le Corti di altri Stati o territori dal momento che esse hanno limitati poteri e dipendono fortemente dal governo centrale. Nonostante questo imponente ostacolo la dottrina maggioritaria crede, sulla scorta di quanto già compiuto con la sottoscrizione del *Record of Meeting*, che sia comunque possibile conformare la disciplina seguendo gli standard

112. Il Chapter 15 U.S. Bankruptcy Code, in merito alla cooperazione, dispone che: The court shall cooperate to the maximum extent possible with a foreign court or a foreign representative. Sul punto si veda Moore, et al., The New Cross-Border Arrangement between Hong Kong and Mainland China on Insolvency and Restructuring Matters - A Comparison with Chapter 15 of the U.S. Bankruptcy Code a 46 (citato in nota 58).

113. Si veda Wessels, Cross-border insolvency between Mainland China and Hong Kong: First steps; ready to jump? a 24 (citato in nota 64).

internazionali sebbene ciò implica la necessità di compiere un lungo e tortuoso percorso il cui traguardo non è raggiungibile nel breve termine[114].

Tralasciando il contenuto dell'*Opinion* e le relative proposte di riforma, la cooperazione e la comunicazione tra le Corti, tra i curatori e tra le Corti e i curatori non è menzionata nella *Practical Guide, rappresentando* l'ennesima conferma di un esecutivo poco incline a dotare l'isola di una dettagliata disciplina sul riconoscimento e l'assistenza delle procedure d'insolvenza a carattere transfrontaliero aperte in Cina Continentale. A colmare tale vuoto interviene il giudice Harris il quale si esprime in materia di comunicazione e cooperazione in due specifiche circostanze. Infatti, nel caso *re Peking University Founder Group Company Ltd*, Harris rivolge un chiaro invito al governo: *[...] The courts aim to work together to implement fair and efficient insolvency processes whilst respecting the substantive law and procedure of each other's jurisdiction. [...] I hope [...] to advance the communication and cooperation of the SPC's Opinion encourages*[115]. Harris ritiene quindi che esistano due diversi livelli in cui opera la cooperazione: il primo investe le autorità, il secondo si rivolge ai curatori ed alle Corti[116]. Se la cooperazione tra le autorità in materia d'insolvenza transfrontaliera si è compiuta attraverso la conclusione del *Record of Meeting*, dell'*Opinion* e della *Practical Guide*; nel secondo caso, quello inerente la cooperazione tra le Corti e i curatori, è necessario intervenire nel tentativo di colmare tale lacuna. Così come per la Cina Continentale, questa rappresenta la futura sfida che anche Hong Kong *S.A.R.* dovrà affrontare.

7. *La Reazione della Giurisprudenza all'Indomani del Record of Meeting*

All'indomani della sottoscrizione del *Record of Meeting*, tanto la *S.C.P.* quanto il Governo di Hong Kong *S.A.R.* promulgano l'*Opinion* e la *Practical Guide*. Da lì a poco insorgeranno i casi riguardanti

114. Si veda Guo Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present and the future a 91 (citato in nota 41).

115. HCA 778/2021, HCA 798/2021, HCA 1418/2021, HCA 1442/2021 e HCMP 1381/2021, HKCFI 3817 (2021).

116. Si veda Guo, Cross-border insolvency between Chinese Mainland and Hong Kong: the past, the present and the future a 90 (citato in nota 41).

l'insolvenza transfrontaliera. Oltre a comprovare l'importanza che riveste la questione, la giurisprudenza si troverà a dover applicare le neonate fonti del diritto. Come decideranno, in merito, i giudici[117]?

Osservando ciò che accade in Cina Continentale, tra maggio 2021 e gennaio 2022, le Corti competenti nelle aree pilota saranno chiamate a pronunciarsi in: (i) *re Samson Paper*[118], (ii) *re Zhaoheng Hydropower (Hong Kong Ltd)*[119], (iii) *re Ozner Water International Holding Ltd*[120], (iv) *re Hong Kong Fresh Water International Group Ltd*[121].

Ad oggi, la Corte Intermedia del Popolo di Shenzhen ha accolto la domanda proposta dal curatore nominato ad Hong Kong *S.A.R.* a seguito dell'apertura della procedura di liquidazione avverso l'insolvente *Samson Paper.* Il giudice cinese, ex art. 4 *Opinion*, ha garantito il riconoscimento e l'assistenza dopo aver constatato la presenza del *C.O.M.I.* nel territorio di Hong Kong e l'assenza delle condizioni ostative tassativamente indicate ai sensi dell'art. 18 *Opinion*.

È un evento di grande rilievo poiché per la prima volta in Cina Continentale si assiste al riconoscimento di una procedura d insolvenza aperta ad Hong Kong *S.A.R.*

Le altre tre procedure richiamate poc'anzi pendono ancora dinanzi alle Corti di Shenzhen e Shanghai.

Nello stesso arco temporale, ad Hong Kong *S.A.R.*, invece, il giudice ha accolto la domanda proposta dal curatore nominato in Cina Continentale a causa dell'apertura della procedura di liquidazione dell'insolvente *HNA Group Co Ltd*. Diversamente dalla Cina Continentale, ciò non delinea una svolta giacché il giudice dell'ex-colonia britannica aveva già riconosciuto e fornito assistenza alle procedure aperte in Cina. V'è da segnalare, però, come la Corte di Hong Kong, in due ulteriori casi (*re Nuoxi Capital Ltd and others v. Peking University Founder Group Company Ltd*[122] *e re Citicorp International Ltd v. Tsinghua Unigroup Co Ltd*[123]) riconosce la procedura ma non rilascia un *order* per

117. Si veda Wessels, Go, Cross-Border Insolvency between Mainland China and Hong Kong: New Proposals from a Global Perspective a 12 (citato in nota 98).
118. [2021] HKCFI 2151.
119. [2022] HKCFI 248.
120. [2022] HKCU 940.
121. [2022] HKCFI 924.
122. [2021] HKCFI 3817.
123. [2023] HKCFI 1572.

tutte le misure richieste dal curatore. In particolare, la Corte si oppone alla sospensione delle liti pendenti in cui il debitore insolvente è in giudizio nelle vesti di legittimato passivo. Probabilmente, la decisione della Corte è tesa a tutelare le pretese vantate dai creditori inglesi[124].

8. *I Possibili Scenari Futuri*

Esplicitato il grande passo in avanti compiuto dalla Cina Continentale e da Hong Kong *S.A.R.*, e dopo aver esaminato, in ottica comparata, alcune selezionate questioni insite nell'*Opinion* e nella *Practical Guide* è opportuno giungere alle conclusioni immaginando ciò che potrebbe accadere nel medio-lungo termine.

Giova ribadire che il *Record of Meeting*, secondo la dottrina maggioritaria, ha costituito un *milestone* ed, al contempo, un *testing-stone* soprattutto per la Cina Continentale. Si tratta, infatti, di una *pietra miliare* ed un t*est di prova* che però non può essere considerato un definitivo punto di approdo. La sfida che ambedue le parti dovranno fronteggiare sarà quella di implementare i contenuti dell'accordo colmando i silenzi e le lacune presenti nell'*Opinion* e nella *Practical Guide* (ad esempio introducendo una chiara disciplina sull'insolvenza transfrontaliera inerente i gruppi di società, rimuovendo qualsiasi traccia dell'ormai obsoleta *territorialità mascherata* ex art. 5.2 *EBL 2006*, adottando procedimenti più snelli per l'insolvenza delle *Piccole e Medie Imprese*). Dopo la sottoscrizione dell'accordo, la richiamata implementazione potrebbe costituire il secondo tassello per ambire a qualcosa di più grande: un accordo interregionale sul mutuo riconoscimento ed assistenza delle procedure d'insolvenza aperte a Macao *S.A.R.*, Hong Kong *S.A.R.*, Taiwan e Cina Continentale[125]. Ecco che in

124. Id, a 12.

125. Questa non è un'ipotesi priva di alcun fondamento. Alcuni interpreti, all'incirca sei anni fa, hanno diffuso il cd. China's inter-regional cross-border insolvency arrangement (d'ora in avanti CICIA). Esso contiene misure inerenti all'individuazione della giurisdizione, il riconoscimento e le misure da esso derivanti, l'eccezione di ordine pubblico, la sospensione delle liti pendenti, i protocolli, l'istituzione di una Corte ad hoc. Il contenuto del CICIA trae spunto dal Global Principles for Cooperation in International Insolvency Cases and Global Guidelines elaborato, nel 2012, dall'American Law Institute (ALI) - International Insolvency Institute (III). Sul punto si veda Wessels, Cross-border insolvency between Mainland China and Hong Kong:

questo complesso mosaico, ancora una volta, l'Unione Europea assume un ruolo di assoluta centralità, confermandosi l'archetipo a cui ambire. Ciò in riferimento ai contenuti dell'atto, alla capacità di dotarsi di specifici protocolli (rif. *European Model Protocols*) ed alla possibilità di istituire un organo giurisdizionale *super partes* (cd. *Standing Judicial Committee*) composto da giudici esperti in tale ambito, terzi ed imparziali, capaci di pronunciare decisioni vincolanti atte a garantire l'uniforme interpretazione ed applicazione del diritto[126]. Bob Wessels e Shuai Guo raccomandano alle autorità di considerare anche l'esperienza di altri ordinamenti (Canada (Quebec), Sudafrica, Scozia, Malta) in cui i diversi sistemi giuridici coesistono all'interno di un unico Stato così come accade nella *Repubblica Popolare Cinese* in virtù del principio *One country, Two Systems*[127].

Al termine dell'articolato processo, la *Repubblica Popolare Cinese* potrebbe uscirne rafforzata, o meglio, dotata di una disciplina in materia d'insolvenza transfrontaliera che assicuri una maggiore efficacia ed efficienza delle procedure. Da ciò deriverebbe un incremento economico, in termini di quantità degli investimenti, innovazione, produttività e crescita dello Stato[128]. In buona sostanza, l'araba fenice, dopo anni di umiliazioni patite a causa del dominio delle maggiori potenze occidentali, potrebbe nuovamente fregiarsi dell'appellativo *Paese di Mezzo*[129] concorrendo o, persino, superando gli Stati Uniti d'America.

First steps; ready to jump? a 25-26 (citato in nota 64); Wessels, Go, Cross-Border Insolvency between Mainland China and Hong Kong: New Proposals from a Global Perspective a 15-16 (citato in nota 98); Gong, China s Insolvency Law and Interregional Cooperation. Comparative Perspectives from China and the EU (citato in nota 29).

126. La proposta di istituire un cd. Standing Judicial Committee trae ispirazione dalla CGUE. La richiamata proposta è stata formulata da un gruppo di esperti in materia di insolvenza transfrontaliera ed oggi è contenuta nella CICIA. Si veda Wessels, Cross-border insolvency between Mainland China and Hong Kong: First steps; ready to jump? a 25-26 (citato in nota 64).

127. Id a 25; Wessels, Go, Cross-Border Insolvency between Mainland China and Hong Kong: New Proposals from a Global Perspective a 13 (citato in nota 98).

128. Si veda Atkins, Luck, Cross-Border Insolvency in Hong Kong: Will the New Cooperation and Coordination Framework with Mainland China Provide the Impetus for Broader Reform? a 165-167 (citato in nota 10).

129. Per riferirsi alla Cina, si è soliti utilizzare l appellativo Zhongguo ossia Paese di mezzo. Un ulteriore denominazione, adoperata per indicare la predetta nazione,

9. *Conclusione*

Quella della Repubblica Popolare Cinese è la storia di un Paese che alla prosperità economico-commerciale alterna amare cadute ed inaspettate resurrezioni. Una storia costellata dal monito: *l'imperativo è sopravvivere!* È con la logica della sopravvivenza che la Cina, araba fenice ormai condannata ad un destino nefasto, risorge dalle proprie ceneri. Nel processo di rinascita economica centrale è il ruolo assunto da Hong Kong *S.A.R.*, della disciplina concorsuale e dell'insolvenza transfrontaliera. Nel quadro geo-politico attuale caratterizzato da gravi crisi finanziarie, pandemia e conflitti tra Stati, il *Paese di Mezzo* mira alla realizzazione del cd. *Sogno Cinese*: fronteggiare l'egemonia economico-commerciale degli Stati Uniti d'America a livello internazionale. In siffatto contesto, l'accordo sull'insolvenza transfrontaliera (cd. *Record of Meeting*) concluso tra Hong Kong *S.A.R.* e la Cina Continentale nel maggio 2021 rappresenta il primordiale tassello di un articolato mosaico tuttora *in fieri*. Non solo, il *Record of Meeting* riflette nuovamente la maestria di un Paese capace di contemperare i contrari: un ordinamento di *common law* con un'economia capitalista ed uno di *civil law* con un'economia (ancora in parte) socialista. Attraverso l'analitica disamina dell'accordo condotta nel presente elaborato si constata un'ulteriore abilità: lasciarsi inebriare, almeno in ambito giuridico, dall'Occidente. Quello stesso Occidente che ostracizza la Cina definendola un Paese piuttosto rigido, in cui non esiste la capacità politica, dove tutto è eternamente scolpito nella pietra. Dal tentativo, a tratti maldestro, di emulare l'Occidente, e più in particolare il *Reg. (UE) n. 848/2015*, sorgono alcune questioni giuridiche a cui i giudici,

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era impero celeste. Il sovrano ricevendo un mandato celeste era, quindi, deputato a regolare il mondo. Tanto Paese di Mezzo quanto impero celeste non costituiscono terminologie impiegate in modo accidentale ma, al contrario, sono indici rivelatori della supremazia che la Cina, fin dall'inizio della sua storia, ha reclamato e reclama, ancora tutt'oggi, a gran voce. Entrambe le espressioni devono essere interpretate dallo studioso del diritto come l'immediata conseguenza della lacuna presente nell'ordinamento giuridico cinese il quale, infatti, fino al XIX secolo non aveva ancora sviluppato una propria nozione di sovranità. L'incapacità di concepire gli altri Stati quali persone giuridiche di diritto pubblico poste, altresì, in una posizione di reciproca e perfetta parità conduce la Cina a considerarsi un unicum a livello internazionale. Sul punto si veda Yash Ghai, Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law a 38-43 (citato in nota 40).

l'esecutivo e gli interpreti saranno chiamati a rispondere. Ma si fa strada anche una convinzione: per competere o superare l'egemonia del grande rivale, la Cina deve trarre profitto dalle sue debolezze e, al contempo, attrarre investitori stranieri garantendo loro la possibilità di prevedere con certezza il rischio d'insolvenza.

A comparative review of the regulation of Islamic banking and finance in Indonesia, Nigeria and the United Kingdom

Paul Elebute*

Abstract: This study examines the nuances of the regulation of Islamic banking and finance in three major jurisdictions i.e. Nigeria, the UK, and Indonesia. It addresses the challenges and prospects for these legal systems and economies. The research adopts a qualitative methodology, drawing theory from a vast trove of materials from authors in the African, Asian, and European continents. The intention behind bringing this topic into discussion primarily revolves around the undeniable significance that Islamic finance has in certain parts of the world. Islamic banking dominates the global Muslim finance industry, representing 80% of Islamic financial assets. There is growing concern for the subpar usage of the practice in certain jurisdictions. Most of the scholarship on this matter does not question this need, perhaps due to the general acceptance of the conventional banking system worldwide. Previous research works are yet to undertake a comparative assessment of the usage of Islamic banking and finance practices among jurisdictions, spanning representative nations from diverse regions and continents, thus causing a gap in the literature. This article discusses the legal and regulatory provisions, earmarking the practice of Islamic banking and finance in the jurisdictions using available literature. While each jurisdiction recognizes the practice of Islamic finance, those in Indonesia and, to a good extent, the UK, have richer provisions for its development. Thus, while taking cognizance of the socio-cultural contexts, a critical assessment of the regulatory mechanisms in Nigeria is carried out against the background provided by the Indonesian and English legal systems. It is discovered that for the existence of a robust appropriation of the practice in the jurisdictions, especially Nigeria, a forward-looking system must be adopted.

Keywords: Islamic banking; Riba; Nigeria; Indonesia; the United Kingdom.

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1 Introduction.

Islamic banking has turned out to be one of the fastest-developing constituents of the global financial system. As for some Western countries, Islamic finance continues to be at a relatively nascent stage; however, certain factors would more likely aid its increased development[1]. These factors have been noted to include government incentives and the processes initiated to bring on an atmosphere suitable

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1. Islamic finance has been greatly impactful in the last decade. The Islamic banking industry has been developing at a sustained proportion, in spite of its relatively blossoming stage. Islamic banking has not stopped dominating the worldwide Islamic finance industry, standing for 80% of complete Islamic finance assets.

for a developing and flourishing Islamic finance market; the developing Muslim population within European jurisdictions; the increased emphasis on optional financial solutions at the start of the European financial watershed; and the great desire for attracting liquidity from upcoming industries[2].

Islamic finance has been greatly impactful in the last decade. The Islamic banking industry has been developing at a sustained proportion, despite its relatively blossoming stage. Over time, Islamic banks have profited from a demand-focused sectorial market which is growing currently. Nevertheless, due to the huge number of Islamic banks present and the developing interest from traditional entities in this upcoming market, the industry is getting extremely competitive. Traditional financial institutions are progressively discovering the worth of Islamic financial methods and are beginning to weld these into their current financial practices or are starting separate Islamic windows.

This treatise attempts to study the regulation of Islamic banking in the United Kingdom, and Indonesia to create room for improvements and better accommodation of the practice in Nigeria. The regulatory provisions of these jurisdictions are offered a front-row consideration. Despite the colonial past and the international relations of Nigeria and Indonesia with the United Kingdom, it is somewhat surprising to discover a moderately similar Islamic banking system between the three nations over the decades. A critical outlook is given to consider the vagaries of Islamic banking in Nigeria while examining the prospects and challenges that are obtainable given the testimonies of better practice that the UK and, more importantly, Indonesia, offers. It is not argued that Indonesia operates a picture-perfect system, but the serial examination of each of these jurisdictions seriatim, against the backdrop that regular Islamic banking practice provides, offers a touchstone against which stakeholders can draw inspiration for the betterment of each jurisdiction. It is concluded, having examined the gaps, that Nigeria needs to be more pragmatic in establishing institutions that contribute to the optimal appropriation of the benefits of Islamic banking. It is recommended that jurisdictions seeking to fully

2. See Muhammad Akram, Mamoona Rafique and Hassan Alam, Prospects of Islamic Banking: reflections from Pakistan, 1 (2) Australian Journal of Business and Management Research 125 (2011).

maximize the prospects of Islamic banking and finance must improve their regulatory provisions alongside the conventional banking and finance system as human existence evolves.

1.1. Definition of Islamic Banking.

Expectedly, Islamic banking revolves around the Islamic law – (Sharia). This can be readily appreciated from the varying perspectives that scholars of note from the world of economics and law have given it. Akram[3] simply explains that Islamic banking is a system operated in line with Islamic laws as well as the Sharia board that leads the institutions. On a further note, it was posited that Islamic banking refers to a system of banking that is consistent with the ideas of Islamic law as well as its usage via the development of Islamic economies[4]. In a similar vein, Marimuthu and others[5], stated that Islamic banking can be seen as the running of a bank relying on the principles of Sharia. Ghayad[6], reasoning in a similar way, perceives Islamic banking as a banking arrangement that works in line with the dictates of Sharia which refers to the Fiqh al-Muamalat which are the Islamic rules on deals[7]. It could be surmised from these definitions that Islamic banking pertains to a form of banking arrangement that works strictly based on Sharia.

Islamic banking must, however, not be mistaken for the concept of Islamic banking window which is run by some commercial secular banks. Interested in putting round pegs in round holes, Akram[8] thought it well to conceptualize an "Islamic banking window". According to the leading light, the Islamic banking window is a business setup in which traditional banks provide Islamic banking services

3. See Ibid.

4. See Ibid. See also Kosmas Njamike, Introduction of Islamic Banking in Zimbabwe: Problems and Challenges, 12 (8) Journal of Sustainable Development in Africa 70 (2010).

5. See Marimuthu Maran, et al., Islamic Banking: Selection Criteria and Implication, 10 (4) Global Journal of Human Social Science 52 (2010).

6. See Ghayad Racha, Corporate governance and the global performance of Islamic Bank, 24 (3) Journal of Humanomics 207 (2008).

7.Josè Scheinkman and Jerry Green, In general equilibrium, growth and trade, 81 Academic Press 104 (2014).

8. See Id.

and products from their current network. In a nutshell, the Islamic banking window presents a circumstance through which a traditional banking system may offer Islamic banking services or products. Further, it can be thought of as a banking arrangement that meets up exclusively with the profit, loss, and risk-sharing idea of Islamic banking for some of its items[9].

1.2. Riba (Interest): The Conceptualization.

Riba, also known as "interest" or "usury" has been perceived uniquely. Some of these opinionists refer to it as the same thing, while some attempt to differentiate it from the interests charged in the traditional banking system without striving to take the lead on the argument charts. In the most basic sense of it, Riba means the "excess" or "interest" beyond the idea of a loan[10]. It is perceived as an illegitimate practice which has been condemned in the Quran[11]. Riba, in the business sense of it, has been described as the amount over the principal of a loan that is paid to the owner of the capital due to the extension of maturity available to the debtor as well as the deferment of the repayment of the debt.

Riba has been rightly divided into two parts – Riba al-Fadl and Riba al-Nasiah. The first is the form of Riba that is connected to the quality of express exchange of goods. It is the quality premium in turn for low quality with higher-quality goods. The idea of al-Fadl refers to sales transactions[12]. On the other hand, Riba al-Nasiah talks about the increment that obtains on the principal of a debt payable or loan. It is the concept that encourages the practice of lending money for any

9. A credible example can be found in the Nigerian situation when Habib Bank Plc. was allowed to provide some Islamic banking offerings by the Central Bank of Nigeria.

10.See Abraham Ibrahim, Riba and Recognition: Religion, Finance and Multiculturalism (Essays from the AASR Conference 2008).

11. See Id. More particularly, Riba translates into any fixed, positive, predetermined rate linked to the amount and maturity of the capital – to wit, such as is guaranteed despite the investment s performance. Once again, Islam forbids the Muslim faithfuls from giving or taking interest no matter the purpose behind the loan transaction as well as its proportion.

12. See Lawal Yekini, Islamic economics: the cornerstone of Islamic banking, Journal of Economics and Engineering 2010.

length of time on the knowledge that the borrower would give back to the lender at the period's end. This refers to the amount initially lent together with some increase on it, instead of the lender giving him time to pay regardless of profit or loss[13].

In every contemporary banking transaction, interest comes under al-Nasiah. In the present banking system, as money is exchanged for money with delay and excess, it comes under the definition of Riba which has been forbidden in Islam regardless of the nomenclature accorded to it. The forbidding of interest is stated in four diverse revelations in the Holy Qur'an. First is the emphasis that it deprives wealth of the blessings of Allah. Secondly, the interest is juxtaposed with the wrongful usage of property that belongs to others. Thirdly, the revelation implores the Muslim faithfuls to steer clear of interest on grounds of their welfare. Finally, the fourth revelation sets up an obvious differentiation existing between trade and interest, imploring Muslims to take just the principal sum and to forgive even this amount if the borrower cannot pay. A further declaration from the Holy Qur'an instructs that those who do not forbid the taking and giving of interest are at war with God and his Prophet. Furthermore, the Prophet opposed not just those who take interest but also those who provide it along with those who compile records of it or are witnesses to such deals, insisting that they are all equally guilty. Therefore, the concept of working with free interest gains recognition and enforcement, in that it meets the prohibitory stance of Islam which may be hard to achieve following the traditional banking system.

1.3. Basic Features of Islamic Banking.

Islamic banking refers to a unique mode of banking arrangement that prohibits all transaction types that are forbidden in Islam. As a result, for any bank to be taken as Islamic, the following simple basics must be observed by its operators[14]. To begin with, there is a prohibition of interest – any bank that identifies as Islamic must not

13. See Id.

14. See Abraham, Riba and Recognition: Religion Finance and Multiculturalism (cited in note 10). See also Felix Alio and Uhomohibi Toni, Islamic banking, practices and insights for Nigeria, 5 (1) International Review of Business Research Papers 321 (2009).

partake in any form of interest associated with transactions. It may only involve itself in profit and loss-sharing deals. Also, there is the prohibition of making speculations or Gharar[15]. Therefore, any deals that bear extreme risks or are, as a result, associated with gambling are avoided. An Islamic bank will refrain from a business with extreme risk in all transactions brought before it. Additionally, there is a social justice system that presupposes that any deals resulting in injustice are prohibited for Muslims by Islam. Therefore, Islamic banks are not expected to engage in any exploitative tendencies towards any party in any transaction. Again, there is the mandatory payment of Zakat – Islamic banks are mandated to pay Zakat[16] as one of the five pillars of Islam[17]. In addition, there is a formula for profit, loss, and risk sharing, the providers of such funds and the engaging entrepreneurs share the risk that is linked with the business and the gains are on common agreement. Fairly, this step is expected to distribute the income generated, improve social justice, and redound to poverty alleviation.

Islamic finance is compliant with the religious law of Sharia and bears the unique characteristic of getting along with a secular financial system with the foundational principles of the Islamic faith. As far as Islam is concerned, the idea of floating an economy performing independently of religious criteria must not be sustained as the faith

15. This term literally refers to hazard .

16. The Islamic economic system does not offer debt-oriented finance, which is taken as an unjust, exploitative, and unfair economy, rather, considers institutes a system called Zakat which is an obligatory charity or Islamic tax). This interest-free arrangement is taken as an ethical and moral tool of Islamic principles, where the ultimate objective is to pursue the pleasure of God. By eliminating interest and implementing Zakat, a viable forum is established as a part of the Islamic economy. Islamic banks develop towards profitability and pooling funds, which is the center of the economy s expansion. The payment of Zakavt at a nominal rate of 2.5% of their net income remains one of the major pillars of Islam showing the huge role of Islamic banks in reducing inequality between people and mitigating poverty. As an Islamic canvas of taxation, Zakat aims to balance the economy via wealth distribution to the economy. See more in Salah Alhammadi, Analyzing the role of Islamic finance in Kuwait regarding sustainable economic development in COVID 19 era, 14 (2) Sustainability (2022), available at https://doi.org/10.3390/su14020701 (last visited November 29, 2023)

17. See Yekini, Islamic economics: the cornerstone of Islamic banking (cited in note 12).

"marinates every part of the life of the believer"[18]. The major sources of the Sharia are the Sunna and the Quran, the actions and sayings of the Prophet Muhammad transmitted orally by way of Hadeeth – the story of the companions of the Prophet. The Sunna and the Qur'an afford room for interpretation as they do not cater to all the questions that challenge the Muslim Brotherhood. In that regard, there is the need to turn to secondary law sources[19].

These secondary sources are referred to as the jurisprudence of Islam (fiqh), relying on the interpretations (Ijitihad) of professionals in certain cases (for example, of unclear or implicit rules) about deductive reasonings (Qiyas) and on the professional consensus of varying schools of thought (Ijma')[20]. Nevertheless, it is arguable as to whether interpretation is yet possible, as some scholars insist that interpretation was done centuries back[21]. This is more complicated by the divide between the Shia and the Sunni branches of Islam, and the availability of several schools of thought on Islamic jurisprudence within these denominations. Traditional Sunni Islam, for instance, has four major schools of law[22]. Disparities in the interpretation of the law (fiqh) can bear huge implications for the development of Islamic finance. The dearth of harmonization of Islamic rules, with diverse scholars demonstrating diverse views, could occasion uncertainty on critical matters, to wit, whether certain financial instruments comply with the Sharia.

18. See Ibid.

19. See Ibid.

20. See Ibid.

21. See Felix, Islamic banking: theories, practices, and insights for Nigeria at 329 (cited in note 14).

22. The major schools of law are considered to be the Maliki, Hanafi, Hanbali, and Shafi i schools. The traditional theory of Islamic law explains the scriptures (Quran and hadith) ought to be explained from the perspective of rhetoric and linguistics. It also consists of approaches for affirming the realness of hadith and for knowing when the legal force of scriptural verses is removed by some passage taken away at some later date. In addition, the classical theory of Sunni law identifies with secondary sources of jurisprudence such as qiyas (analogical reasoning) and ijma (juristic consensus). For further examination, see Vikor, K.S. Shariah In John, L. E. (ed.) The Oxford Encyclopedia of the Islamic world. (Oxford University Press).

2 Discussion.

2.1. The legal provisions - the regulation of Islamic banking in Nigeria.

Islamic banking remains the sector of the finance industry that receives the most attention amongst the progressives of Nigeria. Islamic banking in Nigeria is regarded as a way of profit and loss sharing (PLS) banking as stipulated in the relevant laws[23]. The development of contemporary Islamic banking in Nigeria can be traced back to 1991 when the Banks and other Financial Institutions' Decree[24] (BOFIA) was promulgated. This Decree reckons banks based on profit and loss sharing.

Also, the provisions of the Decree identify specialized banks and feature them in the definition of such other banking institutions may be given from time to time. Such profit and loss sharing banks deal in commercial and investment business and keep profits and loss sharing accounts. In Islamic banks, there are account holders that keep their funds on a profit and loss sharing arrangement known as Mushrakah[25]. The keeping of these accounts in Islamic banks has made society refer to them as profit and loss-sharing banking institutions.

The enactment of the Bank and other Financial Institutions Act (BOFIA 2020) marked the cessation of a single financial arrangement in the country. The fiscal market turned out to be more competitive ever since BOFIA 2020 was legislated[26]. It was at this time that non-interest financial institutions were properly recognized and established under the financial system of Nigeria. During the original promulgation of BOFIA, profit and loss-sharing banks became exempted from certain regulations and requirements[27]. Mournfully, this exception has been struck out in the recent amendments by taking away the

23. See Mubarak O., et al Laws of Islamic banking in Nigeria: critical review and best practice proposal, International Journal of Academic Research in Business and Social Sciences 45 (March 2020).

24. See S. 23 and 61, BOFIA Decree 1991.

25. See Maxwell J. Fry, Money, Interest and Banking in Economic Development (Johns Hopkins University Press 2nd ed. 1994).

26. See Mubarak, Laws of Islamic banking in Nigeria: critical review and best practice proposal (cited in note 23).

27. See Abubakar S. Socio-economic and legal challenges of Sharia-compliant banking operation, its developmental impacts and the struggles of the believers:

power of the CBN Governor from such an exemption[28]. Therefore, all specialized banks become subject to comprehensive treatment under the Act similar to their conventional peers.

Moreover, the amendment that took place in 1998 concerning the limited profit-loss sharing (PLS) banks was amended and increased to the extent that banks may provide more Islamic banking products with the written consent of the CBN Governor[29]. However, the latest amendment is yet to clarify the time factors in securing such consents – daily, sporadically, quarterly, or yearly? It is observed in general that BOFIA is not competent enough to contribute significantly to Islamic banking progress in Nigeria. Whereas the amendments of the BOFIA, instead of strengthening the existing provisions - added more ambiguities to the area of non-interest financial services. Apart from this, the dearth of expedient adjustments, necessary enhancements, and substantial insertions upon its original 1991 promulgation, obstruct the entire development of Islamic banking in the country[30]. Therefore, firm amendments are highly sought for the whole legal framework to facilitate the notable workings of Islamic banking in Nigeria.

2.2. Certain Lacunas in Islamic Banking Legislation in Nigeria.

A critical assessment of the whole amendments made after the initial promulgation of BOFIA 1991 reveals that no attention was given to restoring the presence of the Sharia Advisory Board (SAB). The consequence of this omission means that suitable verification cannot be carried out on every banking product, and a wrong decision can be made where the consultations of the experts are absent.

BOFIA continues to be reckoned as the most comprehensive legislation that discusses Islamic banking in Nigeria. The Act is deemed to have shunned some important aspects that can fasten the progress

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epistemological lessons from Nigeria 8(5) Journal of Islamic Economics, Banking and Finance (2012).

28. See Central Bank of Nigeria Act 2007.

29. See Ibid.

30. See Mubarak, Laws of Islamic banking in Nigeria: critical review and best practice proposal at 43 (cited in note 23).

of Islamic banking all over the country[31]. This has rendered it inadequate for non-interest financial bodies in Nigeria. It is felt that those who drafted the Act posed some challenges to Islamic banking operations in the country. Nevertheless, BOFIA remains a major place to sufficiently administer Islamic banking operations, BOFIA is bereft of certain essential aspects of a systematized Islamic banking system.

Nigeria's banking system is comprehensively regulated by the Central Bank of Nigeria Act (CBN Act) 2007; the Banks and Other Financial Institution Act (BOFIA)[32]; and the Companies and Allied Matters Act (CAMA)[33]. In the past years, Nigerian regulatory bodies have made announcements regarding several regulatory ideas that will provide the framework for developing a sturdy Islamic finance hub. These have been categorized rightly under certain guidelines which seem to not have the force of law as do other legislative pronouncements.

2.3. Guidelines for the Regulation and Supervision of Institutions offering Non-Interest Financial Services in Nigeria.

The Guideline is provided in pursuance of the non-interest banking regime of Regulation[34] on the Scope of Banking Activities and Ancillary Matters, No 3, 2010[35]. Considering the Guidelines, the non-interest finance and banking models are widely grouped into non-interest finance and banking built on the jurisprudence of Islamic

31. For instance, there is almost no provision made for Shariah compliance in BOFIA. Also, Islamic banking consumers are wrongly grouped or shunned in the BOFIA Act. Also, the Act is passive about setting up a Shariah Advisory Board responsible for ascertaining the extent of complying with any specified product. See generally El-Mubarak I., et al., Laws of Islamic banking in Nigeria: critical review and best practice proposal 10(3) Intl. J of Acad. Res. in Bus. & Social Sci. 29 - 42, available at https://dx.doi.org/10.6007/IJARBSS/v10-i3/7020. It may however be argued that Islamic banking has been facilitated under the Specialized Bank groups only that this vehicle might not just be accommodating enough for the unhindered practice of Islamic banking and finance.

32. Cap B3 Laws of the Federation 2004.

33. Cap C20 Laws of the Federation 2004.

34. See S. 33(1)(b) of the CBN Act; Ss. 23(1); 52; 55(2); 59(1)(a); 61 of BOFIA and S 4(1)(c).

35. These shall be read together with the provisions of other relevant parts of the CBN Act, CAMA, BOFIA, and circulars/guidelines issued by the CBN from time to time.

commerce on one hand, and non-interest banking and finance built on other established non-interest ideas on the other hand. The non-interest banks are to be categorized into two. First, the national non-interest bank shall possess a capital base of N10 billion and will work in each state of the Federation including the FCT. Second, the regional non-interest bank, which shall bear a capital base of N5 billion, and will work in at least six states and a maximum of 12 contiguous federation states, which lie within not more than two geo-political zones and the Federal Capital Territory.

A non-interest financial body with this model will make sure that its Memorandum and Articles of Association (MEMART) show that its business activities will be carried out in line with the ethos and practices of Islamic commercial jurisprudence. The body providing Islamic fiscal services will deal with businesses making use of exclusively financing instruments that comply with the ideals expected of the model and sanctioned by the Central Bank of Nigeria.

The Islamic banking institution may issue charges such as fees or commissions as may be expedient in line with the ethos under the Guidelines and the Guide to Bank Charges. The funds obtained as fees and commissions shall be part of the income of the bank and shall not be shared with depositors. Considering S. 39 (1) BOFIA, the licensed and registered name of an Islamic Bank may not include the word "Islamic"; anything otherwise will require the consent of the Governor of the CBN. The financial body shall, nevertheless, be identified by some uniform symbol created by the CBN. All the symbols, as well as promotional items of the Islamic financial institution, shall have this symbol to aid recognition by customers as well as the public.

An Islamic financial company shall make sure that relevant disclosures are issued by what is known as Profit Sharing Investment Accounts (PSIA) holders in some timely and workable way and ensure that the right execution of investment contracts takes place[36]. Likewise, they are to apprise their prospective PSIA clientele working under loss-bearing, profit-sharing contracts, by way of writing that the risk of loss stays with the clientele and that the company will not

36. See Mubarak, Laws of Islamic banking in Nigeria: critical review and best practice proposal at 42 (cited in note 23).

partake in the loss unless there is established negligence or some misconduct for which the body is liable.

In pursuance of this Guideline, there are just two companies that presently offer Islamic finance services in Nigeria. These are Jaiz Bank, a full-blown Islamic lender operating in Nigeria since 2012, and Nigeria-Stanbic IBTC, a unit of South Africa's Standard Bank[37]. Sterling Bank has been offered "approval in principle" to start an Islamic finance arm as well.

2.4. Guidelines on the Regulation and Supervision of Non-Interest (Islamic) Microfinance Banks in Nigeria.

In April 2017, the Central Bank of Nigeria issued the Guidelines on the Regulation and Supervision of Non-interest (Islamic) Microfinance Banks in Nigeria. This Guideline is to offer a level-playing ground for the traditional microfinance bank and the non-interest (Islamic) microfinance bank. It offers the mode of operation and other working requirements that operators of Islamic microfinance banking need to work with.

Despite the innate restrictions in Islamic banking, there are chances for the market to develop. Islamic financial bodies afford varying finance and banking services and products that can cater to the needs of the Nigerian banking public as stated herein. As anticipated, the coming of the non-interest (Islamic) Microfinance Banks in Nigeria should spark a trend of healthy competition in the microfinance sector which leads to reducing interest rates. This will help drive the Nigerian economy and ensure its steady development since Nigeria has battled with recession in recent times.

3 The United Kingdom

One positive aspect of the Islamic finance industry in the United Kingdom is that it accounts for an almost non-discriminatory regime. Every financial institution that is authorized by the Financial Services

37. See Felix, Islamic banking: theories, practices, and insights for Nigeria at 332 (cited in note 14).

Agency (FSA) and that operates in the UK, or looking to be so, is subject to the same standards. This is so despite its country of origin and the sectors that it looks to specialize in, or its religious ethos. This stance is entirely in line with the six Principles of Good Regulation earmarked in the FSMA[38]. The provisions deal with allowing for innovation and preventing undue barriers to entry as well as expansion in the financial markets. In this regard, a level-playing field operates irrespective of the status of the bank's methodologies. It is noted that while the FSA is enthusiastic about the exclusive development of Islamic banking in the UK, it is resolved by the UK authorities that it would not be appropriate or within legal possibility to differ its standards for a certain category of institution. According to Sir Howard Davies in the September 2003 Speech in Bahrain, the approach of the FSA can be summarized as "no obstacles, but no special favors"[39].

Every organization looking for authorization is expected to offer a reliable business plan as well as meet and proceed in meeting the five basic benchmarks referred to as the "Threshold Conditions". These are set out in the FSMA and referred to in extensive detail in the FSA Handbook. These five conditions[40] are; first, the organization must have the right legal position for the activities it looks forward to undertaking. This identifies, for instance, that European directions put specific restrictions on the legal form that a firm taking deposits or performing insurance contracts may assume. Second, for an organization that is incorporated in the UK, its headquarters and management must also be in the UK. Third, in the event that the individual or firm possesses close connections with another individual or organization, these are possibly not going to avoid the workable supervision of the organization. Fourth, the organization has sufficient resources, both financial and non-financial, for the activities that it attempts to carry out. Lastly, the organization is "fit and proper". This is connected to its relationship with other individuals, consisting of employees and shareholders; the form of the activities it seeks to undertake, and the necessity to carry out its affairs prudently and soundly. In applying

38. See The Financial Services Markets Act (FSMA) 2000 (Regulated Activities) (Amendment) Order 2010.

39. See Ainley, M et al Islamic finance in the UK: regulation and challenges Financial Services Authority (2007).

40. See Ibid.

the provisions of the FSMA to organizations seeking to become Islamic banks, there are several areas where additional work or clarity is required. For some time now, they have not indicated any challenges that could not be dealt with. This is because of the cooperation between the FSA as well as the applicants to create pragmatic solutions. The FSA has spotted three major areas of likely difficulty that are identifiable with Islamic situations. These are the regulatory definitions of the products, the place of Sharia teachers, and financial promotions.

3.1. Regulatory Conceptualization of Products.

Defining products provided by Islamic organizations remains a major factor that organizations and the FSA are required to consider as part of the authorization process. As earlier clarified, the structure of Islamic products is based on a range of contracts that can be accepted under Sharia law[41]. As such, while their economic impact is identical to or the same as traditional products, the underlying structure might substantially differ. Consequently, firms need to evaluate if Islamic products can be accepted within the Regulated Activities Order.

3.2. The Role of Sharia Teachers.

The place of the Sharia Supervisory Board (SSB) also needs to be considered by the FSA. The market defines the major objectives of the SSB teachers as having to do with establishing Sharia compliance in every one of the products and deals of the entity. In practice, Sharia teachers assess a novel product or deal and, if satisfied that it complies with Sharia, issue an authorization[42]. It is however critiqued that the FSA is only a secular and not a religious organization, hence it might be incompetent in judging the appropriateness of the Islamic products as sanctioned by the SSB.

41. See Ibid.
42. See Ibid.

3.3. Financial Promotions

A reflection on the statutory aim of protecting consumers underscores the requirement of the FSA that all advertising should be fair, clear, and void of misleading people. This has proven to be important for Islamic finance as the products remain new and their structure varies from more traditional products[43].

The process that greeted the authorization of the first retail Islamic bank in the UK was one that has a lot of lessons leading to the successful adoption of an improved template for the creation of four additional Islamic banks in the country. This first Islamic bank, created back in 2004, is known as the Islamic Bank of Britain (IBB). The process took about 2 years to complete. One of the major issues that arose concerned the seemingly conflicting interpretations of the certainty or uncertainty of funds kept as "deposits" in the account of the conventional or Islamic bank respectively. The idea of a "deposit" suggested keeping a profit-and-loss sharing account where Sharia law demands that a customer accepts the risk of loss of initial capital in case the Islamic bank becomes insolvent[44]. This position is inconsistent with the FSA's interpretation of the legal perception of the certainty feature that characterizes "deposits" even in the event of the insolvency of the bank.

The UK boasts of one of the most developed Islamic financial markets in the West turning up as one of the major destinations for foreign institutions compliant with relevant Sharia provisions. The country continues to be home to the first full-blown retail bank that is Sharia-fit and presently has five Islamic banks[45]. London in particular remains an essential financial hub, with mainstream global firms and the Middle East's biggest conventional banks that offer Islamic products in the city. Islamic financing operations launched in the UK in the 1980s at a time when the London Metal Exchange offered Sharia-compliant overnight deposit aids drawing from the Marabahah idea.

The major legislation governing Islamic finance in the United Kingdom (UK) is encapsulated in the Finance Act 2005 as amended in

43. See Ibid.
44. See Ibid.
45. See Ibid.

the Finance Act 2007[46]. The FA 2005 features Islamic finance transactions as an optional financial plan and takes a comparatively direct approach to weld Islamic finance instruments with the traditional legislative atmosphere[47]. For instance, anything described in some Islamic finance instrument as gain will be approached in the same manner as provided for under the stipulations of the previous Acts[48] that relate to interest. This is specifically essential when consideration is given to the tax treatments of Islamic finance instruments.

However, the Finance Act 2007 extended the coverage of the previous Act to consist of sukuk with a view to providing a way out for the inaugural sukuk issuance by the government by offering some response to the anomaly brought about by hitherto not offering for the tax-deductibility of profit spreads under a sukuk[49]. This makes it a more costly way to raise finance when placed side by side with traditional bonds with tax-deductible interest payments. Before introducing FA 2007, an issue emerged relating to a likely sukuk[50] issuance by some UK brand was if, for the ends of the Financial Services and Markets Act 2000, sukuk would be taken as an equivalent of a traditional bond or of a joint investment scheme. In response, the Financial Services and Markets Act[51] brought on several amendments to address this issue and give confirmation that sukuk should be governed in the same way as traditional bonds.

Notably, the 2010 Order introduced a slew of consequential amendments to other regulations and legislation[52]. These amendments operate to enlarge the scope of those regulations to account for optional finance investment bonds. The amendments display an

46. See Dewar John, Hussain Munib The Islamic finance and markets law review: United Kingdom The Law Reviews (2022) available at https://www.thelawreviews.co.uk (last visited November 29, 2023).

47. See id.

48. See id.

49. See id.

50. See Ainley, M. et al. Islamic finance in the UK: regulation and challenges (cited in note 39).

51. FSMA 2000 (Regulated Activities) Order 2010.

52. These include the FSMA 2000 (Regulated Activities) Order 2001, the FSMA 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 and the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005.

intentional approach observed by successive administrations to treat Islamic finance as a subset of the world of traditional financial instruments[53]. Praiseworthily, this approach shows that the Islamic finance niche will be approached with the same benchmarks as the traditional finance industry in the United Kingdom, and parties in contract need to anticipate being held subject to the same extents of examination from the regulators in the UK and courts as their traditional mates.

It is worth observing that financial transactions that are entered into with a person who is not otherwise bound by regulation under the FSMA may be subject to regulation under the Consumer Credit Act 1974 (CCA)[54]. The only exception may be when such agreement is entered into predominantly or wholly for business ends, or one of the other exemptions under the CCA 2006 is applicable. In the year 2005, the Sanctuary Building Sukuk was started, the first corporate sukuk in Europe and the first to come from the UK. Built on the same framework, the second corporate sukuk was made by International Innovative Technologies (ITI) Ltd in 2010[55]. The British government undertook a consultation with the legislative framework for optional finance investment bonds that are built to have economic features similar to traditional debt instruments. Following the consultation, the government brought on measures explaining the regulatory treatment of corporate sukuk that cut down the legal cost implications for this sort of investment and took away undue obstacles to their issuance. In March 2013, the UK Government set up the first Islamic Finance Task Force.

The UK continues to be a transnational provider of the professional legal expertise expected for Islamic finance, with about 25 main law firms offering legal services in this sector. Specialist services are likewise available for advice on listings, tax, regulations, transactions, management, compliance, and information technology, and operations systems[56]. Islamic banking started in the UK in the 1990s at a time when corporations from the Gulf Cooperation Council (GCC) got the idea of Islamic mortgages and provided mortgage financing

53. See Filippo di Mauro, Caristi, Pierluigi, et al. Islamic finance in Europe 146 European Central Bank – Eurosystem, (2013).

54. See id. at 38.

55. See ibid.

56. See ibid.

shortly thereafter. Nevertheless, these instruments were thought to be highly pricey because of the double stamp duty applicable. The removal of the double taxation administration in 2004 led to an increased demand for Islamic home financing.

The Bank of England and the Financial Services Authority (FSA), the two banking regulators, have been open to the creation of Islamic finance in the UK. The Islamic finance sector carries on under a single piece of law that applies to every sector, to wit, the Financial Services and Markets Act 2000[57]. Therefore, there remains a level-playing ground for traditional and Islamic products thus helping the markets take care of the needs of local minority consumers. The UK government s facilitation of a fiscal and regulatory framework for Islamic finance accounts for the following: the abolition of capital gains tax and stamp duty (land tax) for sukuk issuances and Sharia-compliant home mortgages; the reform of plans for bond issues such that returns and income payments are approached identically to interest; and the FSA initiatives to make sure that the regulatory treatment of Islamic finance is in tandem with its statutory principles and objectives.

4 Indonesia.

Indonesia's Islamic banking has always been a reference point when it comes to developing Islamic banks in Southeast Asia. This is partly because the country boasts of a majority Muslim population of about 90% of more than 270 million people. In an internal competition, the Islamic banking market structure in Indonesia has been described as one that is regulated by several market authorities[58] that have ended up producing amazing results for its economy[59].

57. See ibid.

58. See Mala Chajar Matari Fath, HosenNadratuzzaman and Al Arif Nur Rianto, M. An analysis of market power and efficiency of Islamic banking in Indonesia and Malaysia 9(1) Jurnal Ekonomi & Keuangan Islam 1–16 (2023) available at https://doi.org/10.20885/JEKI.vol9.iss1.art1 (last visited November 29, 2023).

59. When it comes to profitability, results reveal that Islamic banks in Indonesia have immunity from losses when nonperforming loans (the rate of default) is lower than 8.5%. With respect to capital position, it was underscored that the industry is less probable of getting bankrupt when the default probability is lower than 9%. But when the default probability exceeds 9%, the sum expected gets higher than the capital

Islamic banking in Indonesia is regulated by the Indonesia Government Act of 1998, giving room for Commercial and Rural banking houses to concentrate their activity on traditional and/or Islamic principles. By virtue of this, traditional and Islamic banking possess unitary identical regulation as supervised by Bank Indonesia. As a result, No. 21 of 2008 improved the Islamic Banking regulation offering a better definition to the Islamic Banking and Business Unit[60]. This Act enables people to partake in Islamic Banking in one part (business unit) or a subdivision of the Conventional banking or full-fledged.

The Indonesian Ulama Council[61] simply verifies the principles of Sharia, recommending the Shariah Supervisory Boards for banks[62]. Bank of Indonesia (Similar to Nigeria's CBN and the UK's Financial Conduct Authority) likewise codified some Islamic banking products which defined the varying contracts well[63]. As a result, the framework of Indonesia is a traditional financial system that regulates Islamic

available. More so, the authors revealed that no liquidity threat exists for Islamic bank in Indonesia based on value at risk (VaR) capped at 99% confidence. Even though the share of most Indonesian Islamic banks is little, the assets of the banks are rated to be the fastest growing in the sample drawn with a CQGR that is equal to 2.86%. The analysis presented by Mansor et al s work reveal that Indonesian Islamic banks are the most impacted by the COVID-19 shock, showing that supplementary liquidity needs to be put to sustain greater capital adequacy ratio (CAR) apart from reinforcing the nonperforming financings provisions See also Mansour Walid, Ajmi Hechem, and Saci Karima, Regulatory policies in the global Islamic banking sector in the outbreak of COVID-19 pandemic J Bank Regulations 23, 265 – 87 (2022).

60. See Delle Foglie Andrea et. al., The regulators dilemma and the global banking regulation: the case of the dual financial systemsJ. of Banking Regulation 249 – 63 (2023), available at https://doi.org/10.1057/s41261-022-00196-2 (last visited November 29, 2023).

61. See Lindsey Tim, Monopolising Islam: the Indonesian Ulama Council and state regulation of the Islamic economy, Bulletin of Indonesian Economic Studies (July 2012) available at https://doi.org/10.1080/00074918.2012.694157 (last visited November 29, 2023). See also Fenwick Stewart, Eat, pray, regulate: the Indonesian Ulama Council and the management of Islamic affairs33(2) Journal of Law and Religion 271 – 90 (2018) available at https://doi.org/10.1017/jlr.2018.23 (last visited November 29, 2023).

62. See Waemustafa Waeibrorheem, Abdullah Azrul, Mode of Islamic bank financing: does effectiveness of Shariah supervisory board matter?9(37) Australian J. of Basic & Applied Science 458 - 63 (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769667 (last visited November 29, 2023).

63. See Ningsih Ayup, Disemadi Hari Breach of contract: an Indonesian experience in akad credit of Sharia banking 19(1) Jurnal Wacana Hukum Islam dan

banking and issues licenses with a particular local law but cannot be compared with the hitherto Fully Dual Banking System[64]. Islamic banking cannot execute independent entities or Islamic channels, but this can occur exclusively in the subsidiaries of traditional banks[65].

Through this traditional financial system, efforts are geared towards ensuring that policies that enliven the Islamic banking architecture are introduced at time. For instance, it has been discovered[66] that spin-off policy has implications for efficiency in the Islamic banking industry in Indonesia. The operational efficiency declines after implementing the spin-off policy in the spun-off banks. The outcome, in the view of the researchers, contradicts the objective of the Islamic Banking Act[67] which is seeking to promote the growth of the Islamic banking sphere. From an asymmetric relationship point of view, analysts have established that conventional and Islamic banks affect financial stability in the short and long run. Nevertheless, traditional banks add to financial stability more favorably than Islamic banks do[68].

Islamic finance continues to play a huge role in the development narrative of the economy of Indonesia. The Indonesian government, via the Financial Services Authority (OJK)[69] and the Ministry of Finance (MoF), seeks to offer an equal opportunity for both traditional and Islamic finance sectors. The Ministry of Finance, OJK, and Bank

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Kemanusiaan 89 – 102 (2019), available at https://doi.org/10.18326/ijtihad.v19i1.89-102 (last visited November 29, 2023).

64. This system connotes that both conventional and Islamic banking systems are perpetuated at the same time by an economy.

65. See ibid.

66. See Nur Rianto Al Arif, Ismawati Haribowo, Ade Suherlan, Spin-off policy and efficiency in the Indonesian Islamic banking industry Banks and Bank Systems, 13(1), 1–10 (2018), available at https://www.researchgate.net/publication/322584119_Spin-off_policy_and_efficiency_in_the_Indonesian_Islamic_banking_industry (last visited November 29, 2023).

67. Islamic Banking Law No. 21 of 2008.

68. See Fakhrunnas Faaza, Nahda Katiya, Chowdhury Mohammad Abdul Matin, The contribution of Islamic and conventional banks to financial stability in Indonesia 22(1) Etikonomi, 213 – 32 (2023), available at https://www.researchgate.net/publication/369279492_The_Contribution_of_Islamic_and_Conventional_Banks_to_Financial_Stability_in_Indonesia (last visited November 29, 2023).

69. OJK is the exclusive authority saddled with the duty of overseeing the capital markets, banking, insurance and other non-banking financial bodies.

Indonesia (Indonesia's Central Bank) have areas committed to Islamic finance in their respective organizational frameworks[70]. Bank Indonesia released its Blueprint on the Development of Shariah Banking in Indonesia in 2002. OJK released its Roadmaps for Shariah Capital Markets (2015 – 2019), the Development of Indonesia Shariah Financing (2017 – 2019) and the Shariah Non-Bank Finance Industry (2015 – 2019)[71].

Prior to 2008, Islamic finance was regulated majorly by legislation relevant to traditional finance. In 2008, however, the government provided a platform for Islamic finance by the issuance of Law 19 of 2008 on Sovereign Sukuk, Law 21 of 2008 on Shariah Banking and Government Regulation 56 of 2008 on Sovereign Sukuk Issuing Companies[72].

4.1. Major Legislation for Islamic Banking, Insurance and Capital Markets.

The major legislation applicable to Islamic banking is Law 21 of 2008 on Shariah Banking. Islamic capital markets are governed by Law 8 of 1995 on Capital Markets, which comprehensively governs all activities related to capital markets[73]. Nevertheless, sovereign sukuk are OJK Regulation 18/POJK.04/2015 relevant to Sukuk Issuance and Requirements which became enacted on November 10, 2015, but was amended by OJK Regulation 3/POJK.04/2018, which was enacted on March 26, 2018. Islamic insurance is governed by Law 40 of 2014 on Insurance[74]. The Insurance Law governs both traditional and Islamic finance. As far as this Law is concerned, traditional insurance and reinsurance companies that boast of Islamic openings are expected

70. See Nastiti Nur Dyah, Kasri Rahmatina Awaliah, The role of banking regulation in the development of Islamic banking financing in Indonesia 12(5) Intl J of Islamic and Middle Eastern Finance and Management, 643 – 62 (2019).

71. See Dewi Gemala, The legal protection for applying Islamic contract law in banking regulation in Indonesia and Turkey 15(1) Indonesian J of Intl Law Article 5 (2017), available at https://doi.org/10.17304/ijil.vol15.1.719 (last visited November 29, 2023).

72. By the amendment introduced by the Government Regulation 73 of 2012.

73. See ibid.

74. See Nastiti, N. Kasri, R. The role of banking regulation in the development of Islamic banking financing in Indonesia at 643 – 62 (cited in note 70).

to spin off their Islamic openings into Islamic insurance companies within 10 years of the enactment of the law, or after the investment funds and tabarru (premium) funds of the policyholders consist of at least 50% of the sum of the insurance funds, investment funds, and tabarru funds of the company[75].

4.2. Central Authority.

The Indonesia Ulema Council (MUI) has the responsibility for determining whether a transaction or product is compliant with the Sharia or not. Concerning Islamic finance, the relevant authority is the National Shariah Board of the MUI (DSN-MUI). Law 40 of 2007 on Limited Liability Companies stipulates that every company that intends to take part in Shariah-compliant business activities must set up a Shariah supervisory board consisting of one Shariah expert at least[76]. This board offers counsel to the board of directors of the company and otherwise oversees the company's activities to make sure they are compliant with the Shariah.

More so, the banking sector, Bank Indonesia and OJK regulations further stipulate that the responsibilities and tasks of a Shariah Supervisory Board of a Shariah bank are to offer counsel and opinions to the board as well as administer the activities of the bank to ensure the principle of Shariah are complied with[77]. In the capital markets area, OJK Regulation 16/POJK.04/2015 on Capital Markets Shariah Experts legislated on November 15, 2015, particularizes the tasks, duties and authority of a Shariah expert in capital markets[78]. It is noteworthy that several articles in this regulation have since been rescinded by OJK Regulation 79/POJK.04/2017 on the Registration of Profession Certification institutions in the Capital Markets Business[79].

75. See ibid.

76. See Waemustafa, W. Abdullah, A. Mode of Islamic bank financing: does effectiveness of Shariah supervisory board matter? at 159 (cited in note 62).

77. See ibid.

78. See Dewi, G. The legal protection for applying Islamic contract law in banking regulation in Indonesia and Turkey at 23 (cited in note 71).

79. See Nur Eka Pradata, Retno Muljosantoso, Islamic finance and markets in Indonesia Soemadipradja & Taher (2019) available at https://www.lexology.com/library/detail.aspx?g=6add72f6-d54f-4f3d-b837-8e7a6c24c345 (last visited November 29, 2023).

4.3. Authorization Requirements for Islamic Banks in Indonesia.

For an Islamic bank to carry on business in Indonesia, the bank must first secure a permit from the OJK. The business needs to be set up in Indonesia as a limited liability company with 1 trillion Rupiahs as the minimum paid-up capital. The supervening regulations restrict the ability of specific categories of parties to maintain shares in commercial banks, which includes Shariah banks (category). Where the party specializes in the finance sector, whether as a bank or otherwise, it is allowed to hold up close to 40% of the capital of the bank[80]. If the party is a person, he or she is allowed to hold up close to 20% of the capital of the bank (or up to 25% of the capital of the Shariah bank)[81].

The applicable regulations further stipulate that if shareholders are associated with one another, through share ownership, family of acting as one, they will be approached as one party. Thereby, their max share ownership will be restricted to the greatest of the limits that applies to the relevant category for one party. The prevailing regulations likewise adopt a single-presence policy, which is to say that a controlling shareholder of a bank cannot be the shareholder in control of another; the only exception being that a bank is a traditional bank, and the other bank is a Shariah one, or that one of the banks remain a joint-venture one[82].

Foreign institutions seeking to provide Islamic banking services in Indonesia must meet the following requirements. First, they must commit to rendering support to developing the Indonesian economy via its works[83]. Second, they must secure a recommendation from the overseeing authority in their residence country (if it functions in the finance sector)[84]. Third, they must satisfy the required rating requirements concerning the applicable regulations[85]. Fourth and lastly, they

80. See Lindsley, T. Between piety and prudence: state shariah and the regulation of Islamic banking in Indonesia 34(107) Sydney Law Review, 107 - 27 (2012).

81. See ibid.

82. See ibid.

83. Nastiti, N. Kasri, R. The role of banking regulation in the development of Islamic banking financing in Indonesia at 643 – 62 (cited in note 70).

84. See ibid.

85. See ibid.

need to establish a PT Company[86]. These requirements for setting up a Shariah bank established in question are likewise relevant. However, the PT Company needs to be a joint-venture PT Company with a maximum of 99% shareholding of its paid-up capital.

4.4. Requirement or Specific Disclosure for Takaful, Sukuk and Islamic Funds.

All financial institutions that intend to carry out Shariah business must make a report gathered by its Shariah supervisory board with OJK. This requisite standard is also applicable to a person[87] that, yet, among other things, has a Shariah unit; is an investment manager managing Shariah investments; offers other Shariah services, and some part of its operational work is conducted based on Shariah ethos in the capital markets. As part of compliance with the reporting standards applicable to equivalent traditional businesses, certain standards are expected[88]. A takaful operator[89] must make quarterly and annual filings to report to OJK on its compliance with its Shariah Supervisory Board (SSB). Again, an SSB must make annual reports filings with the shareholder of the issuer of the Shariah or public company that it supervises on the outcomes of its supervision of Shariah compliance in the capital markets by that company or issuer[90].

Furthermore, a Sukuk operator needs to file reports on Sukuk issuance and yearly reports on the Sukuk operator's activities, which include financial reports to the Ministry of Finance. Also, a Shariah supervisory board needs to prepare yearly reports for the investment manager on the outcomes of its oversight of Shariah compliance in

86. See ibid.

87. Even though it does not state that its works in the capital market revolve around the principles of Shariah.

88. See Dewi, G. The legal protection for applying Islamic contract law at 31 (cited in note 71).

89. A takaful operator establishes a fund to administer and manage the pools of funds that policyholders contribute. See Hamzah Al-Zaquan Ahmed. Indonesia takaful firms boost agents, products before spin-off Reuters (2014) available at https://www.reuters.com/article/islamic-insurance-indonesia-idUKL3N0L32TT20140217 (last visited November 29, 2023).

90. See Waemustafa, W. Abdullah, A. Mode of Islamic bank financing at 161 (cited in note 62).

the capital markets by the Shariah mutual fund that it oversees[91]. Afterwards, the investment manager needs to submit the report to the OJK. Finally, an SSB is expected to prepare yearly reports for the investment manager's director on the outcomes of oversight of Shariah compliance in the capital markets on Shariah real estate investment funds by way of collective investment deals. Afterwards, the investment manager needs to make submissions of this report to the OJK[92].

4.5. Sanctions and Remedies.

Sovereign sukuk can exclusively be issued by any business unit that has secured a statement of compliance from the DSN-MUI. Corporate sukuk can exclusively be issued by a business that has secured such a statement of compliance from its SSB or elected Shariah expert team[93]. OJK may make impositions of administrative sanctions on company issuers who fail to secure a statement of compliance[94].

In the capital markets area, OJK has decided that the Shariah expert of a business takes responsibility for the Shariah compliance of Shariah services or products that are offered by such business. Nevertheless, the relevant OJK regulations do not particularly provide for any remedies or sanctions in the event that the products are presented as compliant with the Shariah. Rather, any report relating to this matter may lead OJK to assess the licenses of the Shariah expert team members[95]. Products that are not listed are not much regulated and it is the responsibility of the Shariah supervisory board to make sure that the relevant company becomes Shariah-compliant for the issuance and marketing of the products[96].

4.6. Courts with jurisdiction to hear Islamic finance matters.

91. See ibid.

92. See Nur P., Retno M., Islamic finance and markets in Indonesia Soemadipradja & Taher (cited in note 79).

93. See ibid.

94. See Franzoni Simona, Ait Allali Asma, Corporate governance of Islamic banks: a sustainable model to protect the participatory depositor? Journal of Banking Regulation (2023), available at https://doi.org/10.1057/s41261-022-00214-3.

95. See ibid.

96. See ibid.

The Law on Islamic banking in Indonesia expects parties to resolve their disputes before the Religious Court[97] with the exception that an alternative dispute resolution mechanism has been agreed on between the parties before then. The Insurance Law expects that every insurance company will get its members from a mediation institution that will function as the venue for disputes existing between the company and policyholders, partakers, and other beneficiaries. In the legal year 2014, OJK enacted Regulation 1/POJK.07/2014 on ADR Institutions for the Financial Sector. Under the Regulation, disputing parties may resolve disputes via these new bodies or the court, where amicable settlements fail[98]. The enactment demands that each financial services sector set up an ADR body by coordinating with the suitable business association. With respect to this OJK Regulation, six ADR bodies were set up and recognized by OJK. Each body bears jurisdiction over a distinct sector – these different sectors include capital markets, insurance, pension funds, guarantees, banking, pawnbroking, venture capital, and financing.

5 Concepts of contract in Islamic finance.

First is Mudarabah which is a profit-sharing partnership distinguishing responsibility for capital outlay and controlling. The guidelines of Bank Indonesia weld Mudarabah into the regulatory regime of financial services. Mudarabah agreements may be entered into concerning savings and lending deals. In saving deals, the bank acts as the fund manager while the customer acts as its owner while both agree on the formula for profit sharing and expenses chargeable to the customers. In lending deals, the bank acts as Shahibul Maal and the customer as Mudarib. The bank can supervise but may not manage the business of the customer. Both parties need to concede to the profit-sharing arrangement[99]. Second, is the Murabahah which is the

97. See Bintoro Rahadi Wasi, Sharia business and the challenge of dispute settlement in Indonesian Religious Court (2016) available at https://doi.org/10.21564/2414-990X.133.70649 (last visited November 29, 2023).

98. See ibid.

99. See Riyadi Selamet et al.,Optimization of profit-sharing financing at Islamic banking in Indonesia Jurnal Keuangan dan Perbankan 25(2) (2021) 260 – 79 available

"cost plus profit agreement". These agreements are usually utilized in financing. In line with Bank Indonesia Guidelines, in Murabahah deals, a bank acts as Shahibul Maal to buy certain goods, and the customer acts as the buyer of those goods[100]. The parties need to ascertain the quality, quantity, specifications, and costs of the goods. Moreover, the bank may grant a reasonable discount to the customer at any time and may likewise demand compensation from the customer in the event that the agreement is canceled up to the amount of the goods canceled[101]. Third, there is Mushrakah is the partnership agreement for profit-sharing joint ventures. These sorts of agreements represent a different form of agreement that can be leveraged in financing. In line with Bank Indonesia guidelines, under a Mushrakah agreement, the bank as well as the customer interacts as partners as they provide goods or capital jointly to finance a specific activity. The customer is expected to cater to the management of the business on its own but may also be expected to do so with the bank. The agreement does specify financing and profit-sharing terms, neither of which can be revisited unless the parties concede[102]. Fourth, there is Ijarah which is the lease to own agreement. In line with Bank Indonesia guidelines and an important MUI fatwa, in financing deals involving Ijarah agreements, the bank acts as the provider of the fund for the procurement of the lease object and as lessor, with the customer as lessee[103]. The object leased can consist of movable or immovable goods but must be capable of being particularly valued and recognized. The bank and the customer need to agree on the price and term of the lease per time[104]. Fifth, Shariah scholars talk about Wadiah which represents an agreement for safekeeping. In line with Bank Indonesia guidelines, Wadiah agreements can be utilized in safekeeping deals. In such deals, the bank acts as the receiver of deposited funds, while the customer acts

at https://doi.org/10.26905/jkdp.v25i2.5212 (last visited November 29, 2023).

100. See Manangin Susi Aryani et al., The nature of Murabahah financing in Islamic banking in Indonesia 25(7) IOSR J. of Humanities and Social Science (IOSR-JHSS) 7, 16 – 30.

101. See ibid.

102. See Riyadi, S. et al., Optimization of profit-sharing financing at 263 (cited in note 99).

103. See Nur P., Retno M., Islamic finance and markets in Indonesia Soemadipradja & Taher (cited in note 79).

104. See ibid.

as the depositor[105]. The bank may not guarantee any reward, incentive, or bonus to the customer. Nevertheless, the bank may, at its own discretion, gift the customer a portion of the profits garnered from the funds deposited.

However, there are some regulatory hiccups to Islamic banking in Indonesia. The major hiccup is noted to be the lack of some regulation on the rights of the holders of sukuk where there is default, bankruptcy or possible substitution of the relevant assets. Previously, any relevant conflicts existing between the accounting benchmarks adopted in Indonesia and Shariah principles would have been catered to via revisions to accounting benchmarks[106]. The Board for Shariah Accounting Standards of the Association of Indonesian Accountants then issued Financial Accounting Standard 110 Revision 2015 effective from 1 January 2016[107].

Microfinance has been one of the relevant features of the Indonesian Islamic finance regime as well as markets for Islamic finance products. The Indonesian government issued Law 1 of 2013 on Microfinance Institutions and introduced implementing regulations one year later. Microfinance institutions can complete traditional and Shariah deals and can exclusively be set up and owned by entities or individuals of Indonesian extraction[108]. Moreover, the development of financial technology (fintech) in Indonesia has likewise turned out to be a notable characteristic of the Indonesian Islamic finance administration.

Generally, fintech business is governed by OJK Regulation 77/POJK.01/2016 on Information Technology-Based Lending Services which was enacted in December 2016[109]. Nevertheless, the regulation does not offer any hint vis-à-vis fintech businesses that operate in line with Shariah ethos. As an option, the DSN-MUI issued Fatwah No. 117/DSN-MUI/II/2018 which may be leveraged as a hint for

105. See ibid.

106. See Nastiti, N. Kasri, R. The role of banking regulation in the development of Islamic banking financing in Indonesia, at 643 (cited in note 70).

107. See ibid.

108. This is to mean that direct or indirect foreign proprietorship is banned.

109. See Nur P., Retno M., Islamic finance and markets in Indonesia, Soemadipradja & Taher (cited in note 79).

companies planning to do business related to fintech in line with the principles of Shariah in Indonesia.

6 A Critical Outlook of Islamic banking in Nigeria.

6.1 The Prospects for Islamic Banking in Nigeria.

The BOFIA (as amended) provides for the setting up and regulation of profit and loss-sharing banking institutions in Nigeria.[110] Thankfully, Islamic banks come under this category of profit and loss-sharing banking organizations[111]. Also, Nigeria remains the most populous Black Country on the planet with a population estimated at 220 million people according to the World Population Census s latest statistics. A sizeable rate of the population – whether Muslim or non-Muslim – long for non-interest facilities afforded by Islamic banking.[112] The Islamic finance industry remains a multi-billion industry creating a global reach and drive. In line with the consolidation of the banking sector, Nigerian banks have created an increased desire to work at global level which brings the possibility of strategic conglomerates and connections with other world financial bodies providing Islamic financial services[113].

The economic solutions and advantageous ratings by international rating bodies have enhanced the profile of Nigeria as an effective investment destination[114]. A meaningful outcome of the worldwide fiscal crisis is the developing interest and demand for Islamic financial products and services the world over. Amid the crunch, Islamic financial bodies have shown huge resilience demonstrating their traditional approach to business and concentrating on the simple

110. See ss. 9, 23, and 52 of the BOFIA Act (2020).

111. See Noor Ahmed Memon, Islamic banking: present and future challenges 3(1) Journal of Management and Social Sciences, 1 – 10 (2007).

112. See Saleh Ali Salman, Zeitum Rami, The Development of Islamic Banking in Lebanon: Prospects and Future Challenges 9(2) Review of Islamic Economics, (2022); See also Oyeniran Basiru Fatain. Can Islamic banking work in Nigeria? 14(2) Journal of Sustainable Development in Africa (2012).

113. See Amin Hanudin, E-Business from Islamic Perspectives: Prospects and Challenges 13(3) Journal of Internet Banking and Commerce (2008).

114. See id.

matters of financial intermediation as against innovation[115]. This is a positive that may get into the perception and choice of Nigerians for Islamic banking as an optional form of financial intermediation. The determination of the government to revamp the ailing infrastructure with which the country is identified and the substantial investments in such critical areas such as railways, roads, power and so on, as well as the emphasis on Public Private Partnerships (PPP), affords the chances for Islamic banks to take part using revivified confidence and balanced financial setting[116].

The continuing financial sector reform has greatly resulted in the stabilization and restoration of confidence in the Nigerian financial system. Islamic banking institutions should take advantage of this revived confidence reposed in the stable financial environment[117]. The Zero-interest administration in Islamic banking provides a veritable attraction and workable alternative for investors who are strangulated by the high lending rates that are charged by traditional banks[118]. There continues to be a growing choice for ethical investments, services, and products by discerning Muslims and non-Muslims alike. Islamic banking has been considered amenable with the ethical orientation and belief systems of this sort of people[119]. The licensure of Lotus Capital Plc., the first Islamic operator of the capital market, was done by the Securities and Exchange Commission. The effective IPO of the company evinces the soaring popularity and acceptance by Nigerians of Islamic finance as some value proposition[120].

115. See Noor, A. Islamic banking: present and future challenges Journal of Management and Social Sciences, at 1-10 (cited in note 111).

116. See Baljeet Kaur Grewal, Islamic finance in the global financial system 146, Occasional Paper Series European Central Bank – Eurosystem, 18-39 (2013)

117. See Malik Shaukat, Malik Ali, Mustafa Waqas, Controversies that make Islamic banking controversial: An analysis of issues and challenges 2(1) American Journal of Social and Management Sciences (2011).

118. See id.

119. See Baljeet Kaur Grewal, Islamic finance in the global financial system 146, Occasional Paper Series European Central Bank – Eurosystem, 18-39 (2013).

120. See Saleh, A. S & Zeitum, R The Development of Islamic Banking in Lebanon: Prospects and Future Challenges Review of Islamic Economics (cited in note 112). See also Oyeniran, B. Can Islamic banking work in Nigeria? Journal of Sustainable Development in Africa (cited in note 112).

The swift growth and developing wealth in the Middle East are backing the desire for assets in the area and other world regions. Given the positive market setting and side opportunities available in Nigeria, it is expected that Nigeria will be perceived as a safe destination for investors. Novel approaches in Islamic banking and finance are offering acceptable options to traditional finance, causing it to be likely for corporates and investors to attract capital from a developing pool of Islamic liquidity on the global scene and make investments in Islamic products.[121] The substantial number of Nigerians who, due to religious beliefs, attempt to set the money aside the formal banking system, has resulted in a high level of cash kept outside the banking system. Further, this raises the chances for Islamic banks to greatly flourish in the country as a result of their conformity to the religious perceptions of Muslims.

6.2. The challenges to Islamic Banking in Nigeria.

There are a range of challenges that needs to be addressed for the successful emergence and operation of Islamic banking in Nigeria. A number of these challenges are as follows:

The absence of knowledge, technical capacity, and skills in the regulation and supervision of Islamic banks spells a huge challenge for the prospects of Islamic banking in Nigeria[122]. The absence of Sharia-compliant liquidity management instruments also constitutes another challenge[123]. Islamic banks do not have the capacity to invest their excess liquidity in interest-oriented instruments that are liquidity management instruments in the market. This puts them at some competitive flop regarding their traditional counterparts[124]. Likewise, the present interbank industry and the instruments that are used by

121. See id at 32

122. See Ariss Rima Turk, Sarieddine Yolla, Challenges in implementing capital adequacy guidelines to Islamic banks 9(1), Journal of Banking Regulation, (2007).

123. See M. Akram, M. Rafique and H. Alam, Prospects of Islamic Banking: reflections from Pakistan, 1 (2) Australian Journal of Business and Management Research 125 (2011), at 21 (cited in note 2).

124. See Dusuki, Wajdi AsyrafAboizaid Abdulazeem, A Critical Appraisal on the Challenges of Realising MAQAeID AL – SHARI AH in Islamic Banking and Finance 15(2) IIUM Journal of Economics and Management, (2007).

the Central Bank for monetary policy activities are all based on interests with no equivalent government securities or some other money market instruments that comply with the Sharia, all of which are important to prevent a liquidity challenge for Islamic banks when they get into operation.

Another is the dearth of Islamic insurance (Takaful) to secure investments of Islamic banks against a myriad of risks and aid the development of the industry in that order[125]. Knitted to this challenge is the deficiency of a deposit insurance plan for depositors protection of Islamic banks. What is more, is the lack of knowledge of auditing and accounting requirements required for Islamic financial groups. The balance-sheet framework of Islamic banks is special, and even though the work of the Accounting and Auditing for Islamic Financial Institutions (AAIFI) regarding accounting and auditing standards for Islamic banking products is within reach, it becomes necessary to train traditional accountants and auditors in applying these standards[126].

Moreover, the absence of a strong and holistic legal framework, particularly at the level of adjudicating conflicts relating to Islamic finance deals, groups, or products remains a challenge. In discharging its conventional role as a lender of last resort, the CBN offers loans to banks at liquidity crunch time. Islamic banks may not legitimately take advantage of such a facility due to such funds being often offered based on interest. Therefore, there is the need to plan and execute an interest-free structure for such help.[127] Also, the lack of Sharia scholars who are knowledgeable in traditional economics, accounting, law, banking and finance puts severe limitations on the regulatory Sharia compliance arrangement[128].

Double taxation which would be put on Islamic banks due to stamp duties and capital gains tax that are all deductible upon transfer of assets is also a challenge to the practice of Islamic finance in Nigeria.

125. See id.

126. See Abikan Ibrahim, Constitutionality of Islamic Banking in Nigeria Justice Idris Legbo Kutigi (eds) Contemporary Issues in Islamic Jurisprudence. Benin: Rawel Fortune Resources (2009).

127. See id.

128. See Ahmad, A., Humayoun, A. A. & Hassan, An Analysis of Function Performed by Islamic Banking: A Case of Pakistan 17(1) European Journal of Social Sciences (2010).

Islamic banks are faced with a huge challenge since their financial position is based on assets. For instance, in home financing, Islamic banks possess assets either via construction or sale contract, and they make stamp duty for that[129]. When they resell such assets to a customer via markup sale or some lease that ends with ownership deal, another stamp duty gets charged for the asset transfer[130]. Other jurisdictions, including Luxembourg and the UK, have altered their tax legislations to prevent Islamic banks from getting affected by double taxation on assets they get for financing ends.

Some other challenge posed as far as taxation is concerned vis-à-vis Islamic banking is that profits made from the financial instruments provided by Islamic banks are not afforded the tax relief obtained by debt instruments in traditional finance. Debt instruments released in Nigeria are presently exempted from taxes accounting on income tax and Value-added Tax (VAT). In the same manner, interest payments on loans advanced are offered the same relief. The same position should be given to receivables in an Ijarah-based and Murabahah financing[131].

There exists some evident misunderstandings regarding Islamic banking in Nigeria being used as an Islamizing tool to make Nigeria, a secular country, kowtow to the whims of Islam. With the mounting ethno-religious dichotomies, the country presently experiences; it is imperative to properly enlighten people to reconsider these objections. This is in light of the fact that religious tensions have turned out to be a volatile challenge over the years in the country. The tardiness in showing the right attitude towards the idea will jeopardize the whole idea and defeat the purpose of the introduction and indeed, the sustenance of Islamic banking in the Federation.

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129. See Ningsih A., Disemadi H., Breach of contract: an Indonesian experience in akad credit of Sharia banking, Jurnal Wacana Hukum Islam dan Kemanusiaan at 91 (cited in note 63).

130. See Ariss R.T., Sarieddine Y. Challenges in implementing capital adequacy guidelines to Islamic banks Journal of Banking Regulation, (cited in note 122).

131. See Manangin, S. Aburaera, S. Nawi, S. Sampara, S. The nature of Murabahah financing in Islamic banking IOSR J. of Humanities and Social Science (IOSR-JHSS) at 19 (cited in note 100). See also Dusuki, A. W. & Aboizaid, A. A critical appraisal on the challenges of realizing MAQAeID AL – SHARI AH in Islamic Banking and Finance IIUM Journal of Economics and Management, (cited in note 124).

7 Suggestions.

The three arms of government need to tackle the issue of setting up and operating Islamic banking in Nigeria quite similar to the way the UK has been able to successfully address theirs. The stakeholders would need to be objective and, at the same time, as innovative as possible to find ways to better integrate the inclusion of Islamic banking amid the mainstream secular banking that the economy currently practices. The respective attitudes on the part of the jurisdictions are not without implications. In Indonesia and the UK, Islamic finance has been greatly exploited to cater to interests that conventional finance practice may be incapable of. Nigeria needs to emulate this approach by developing clear methods and legislations that will help it assume the appropriate direction for the prospects of Islamic banking to benefit its relevant citizenry who develop an interest in it.

More so, the Central Bank of Nigeria must deploy all feasible ways to bring about enlightenment to the masses on the necessity for Islamic banking as well as its objectives in the country. Perhaps, these stakeholders need to drive home the message that Islamic banking is not a weapon to proselytize the non-Muslims emphasizing on its liberal terms and conditions. The Nigerian non-Muslim masses and even certain Muslim need to be properly educated on the nuances of Islamic banking practices. This may have to do with the solicitation of religious groups and interests all over the country so as to intensify the public campaign for the adoption of Islamic banking as part of the mainstream banking jurisprudence and practice in Nigeria.

Further, more modules, concepts, learning, people and other forms of resources need to be magnanimously harnessed to ensure that Islamic banking practice in Nigeria is well supported and may flourish. For instance, even most Islamic scholars are not well-schooled enough in the intricacies of the practice not to talk of the participating stakeholders should the practices be welded into the major banking and financial systems of the country. There is a gross lack of trained minds across all sectors that are versed in the art and practice of Islamic banking in Nigeria in spite of its open embracement in developed economies. This needs to be addressed if the good of Islamic banking is to see the light of day to the maximal desirable extents.

It is pleasing to discover that the Nigerian, Indonesian and English jurisdictions have a measure of leniency and embracement of the policy and practice of Islamic banking and finance each based on the contexts of their socio-legal realities. Even as such, it is discovered that elaborate systems would need to be developed to help improve the operations of the Islamic banking and finance idea in the respective jurisdictions. From the foregoing analysis, it appears that Indonesia and the UK have been on the heels of ensuring that pragmatic steps are designed to help appropriate Islamic law in the jurisdiction. Truly, the UK maintains a "no obstacles but no special favors" stance but has designed its financial and regulatory in such a way as to make its processes forward-looking. While Nigeria still dithers in calling its approaches mere "guidelines", Indonesia floating a traditional system legislates for Islamic banking and finance practices preferring to take things seriously by referring to them as "Laws".

Moreover, each of these jurisdictions should ensure a more custom-based Islamic banking and finance system that can unabatedly develop alongside the constantly featured conventional finance system. The world is now talking about education technology, financial technology, biotech, insurance technology and a number of other emerging areas of endeavors intersecting between finance, technology and the law. It is highly important that the respective jurisdictions give room for stakeholders, in theory and practice, to develop mechanisms by which Shariah and other Islamic provisions can bode well with these innovative areas of human endeavor. Thereby, Islamic banking and finance practice will not be unduly left behind as the world advances.

8 Conclusion.

This work has attempted to assess the comparative situation of Islamic banking and finance in Nigeria, Indonesia and the UK to suggest rooms for improvements. A critical outlook of Islamic banking is thereafter brooded upon which resulted in thoroughly scanning the associated prospects and the challenges that concern the practice and regulation of Islamic Banking in Nigeria against the backdrop of the level of progress achieved in Indonesian and English markets. It is opined that in view of the analysis, the benefits of a bolder

embracement of Islamic banking favor the Nigerian economy above the challenges. However, this is not to conclude that resolving these challenges will not be herculean. Seeing the mounting challenges that confront the Nigerian jurisprudence on the matter which remains multifaceted with varying circumstances and realities it is fitting to mention that an urgent need lies in closing these gaps with the right regulatory attitude and administrative attention.

Transitional Justice, Complementarity, and How the Colombian Case Affected the Notion of "Justice" inside the ICC System

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Abstract: The rules governing the power of the International Criminal Court resort to a blurred concept such as that of "justice". Moreover, this problem is compounded by the fragile balance on which transitional justice processes rest, particularly those in which it is accepted that the criminal sanction may be turned down in favor of the protection of higher interests. The outcome of this framework in a concrete case like the Colombian one could not have been any different than what it has been: almost twenty years of preliminary examination, a civil war that is not over yet, and much uncertainty. This article is an attempt to demonstrate how the combination of transitional and restorative justice is not only well possible but also compatible with the Rome Statute system. The norms of the ICC statute, both national and international case laws, and doctrinal interpretations all together show that if justice does not have a proper definition, it is thus able to acquire several different meanings, one of them being a system that does not pay tribute to the past but to the reconstruction of the future. The validity of the theoretical reconstruction is strengthened by the Colombian case and its historical, political, and legal aspects. The quest for peace has been conducted through instruments like amnesties and reduced sanctions, showing that this is a possible path. The silence more than the words of the International Criminal Court contributed to this answer: transitional processes that do not have at their core a retributive vision, even excluding criminal sanctions, are compatible with the Rome Statute.

Keywords: Transition; Reconciliation; Complementarity; Colombia; Justice.

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1 Introduction

The Rome Statute established a new criminal justice system, different from that of its constituent member states. The introduction of an additional punitive system raised concerns regarding its legitimacy and the effectiveness of its enforcement. In the past, the International Military Tribunal at Nuremberg and the ICTY and ICTR jurisdictions enjoyed primacy over national ones. In this case, the choice made by the drafting countries has fallen on the principle of complementarity. Hence, the International Criminal Court is only allowed to intervene in cases in which States fail to prosecute international crimes over which the Court has jurisdiction. However, problems arise in determining when a State is abdicating its punitive magisterium, as it could simply be disregarding a (perhaps excessively) retributive viewpoint, considering interests beyond those of strict punishment.

When transitional justice mechanisms come into play, these problems, or at least some of them, become even more acute.

The case of Colombia is particularly illustrative, given that the country has been subjected to an uninterrupted preliminary examination by the International Criminal Court since as far back as June 2004[1], yet without it ever resulting in substantive action. The lack of clear fundamental principles in the Court's system, such as the lack of an express indication of the purpose of its sanctions, may be the

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1. Office of the prosecutor, Informe sobre las actividades de examen preliminar (December 14, 2020), available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-col-spa.pdf (last visited November 5, 2023).

reason why the Court is perceived as not knowing what direction to pursue[2]. Trying to reconstruct such indications, albeit minimally, is the task this article is envisaged to fulfill. To achieve this assignment, firstly the notions of transitional justice and complementarity will be analyzed in their meanings and implications. Then, the interpretation of art. 53.1 (c) ICC St and the concept of justice given by the OTP, international and national case law and scholars will be discerned. Lastly, the Colombian case – in its historical, political, and legal aspects – and its impact on the notion of "Justice" inside the ICC system and on complementarity will be inspected.

2 Transitional Justice

Before attempting to navigate the interactions between national systems, the Rome Statute, and their possible frictions, an attempt

2. The absence of this reference is not something new in international criminal law. The Charter of the International Military Tribunal at Nuremberg only affirmed that The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just (Article 27, Charter of the International Military Tribunal at Nuremberg). The ICT, in the elebi i case, stated that in the determination of the sentence retribution, protection of society, rehabilitation, and deterrence shall be considered (Muci et al., Judgement, ICTY, IT-96-21-T, para. 1231-1234). Nevertheless, in the Furund ija case the Court then demanded freedom from a definitive list of sentencing guidelines, stating that The Prosecutor submits that, while there is no existing penal regime, it would be appropriate for the Appeals Chamber to set out sentencing guidelines which should be applied, based on the functions and purposes of sentencing in the legal system of the Tribunal. Without questioning the possible utility of such guidelines, the Chamber considers it inappropriate to establish a definitive list of sentencing guidelines for future reference, when only certain matters relating to sentencing are at issue before it now (Furund ija, Judgement, ICTY, IT-95-17/1-A, par. 238, later confirmed in Muci et al., Judgement, ICTY, IT-96-21-A, par. 715). Thus, the resulting scenario is a system characterized by a wide discretion and incoherence of solutions (Enrico Amati, et al., Introduzione al diritto penale internazionale at 278, (Giappichelli Editore 4th ed. 2020 [2006]). If one considers how the Yugoslavian Criminal code inspired the criteria indicated in the above-mentioned elebi i case (Muci et al., Judgement, ICTY, IT-96-21-T, par. 1230) it is evident how the ICC system, which lacks this strong national link, could not take up these indications. For a further reflection on the purpose of sanction inside the Rome Statute, see infra par. 4.3.

should be made to reconstruct what is meant by transitional justice and complementarity (see infra para. 3).

Transitional justice, in the definition given by Gabriele Fornasari, refers to "the transition of a state from a situation in which fundamental human rights are systematically violated by those in power to a situation in which respect for them is restored"[3]. The ways such a transition can occur are numerous and diverse. Due to the diversity of transitional justice methods and solutions available, it can be challenging to discuss the topic cohesively. Hence, it becomes necessary to turn to classification, as it offers guidance to a better understanding of these phenomena.

Jörg Arnold's work may serve this purpose. Arnold distinguishes between the conclusion model (Schlußstrichmodell), which entails a total renunciation of criminal sanctions, the model of criminal persecution (Strafverfolgungsmodell) in which the repudiation of certain acts and, to some extent, even of the ideology underlying them, are emphasized and the conciliation model (Aussöhnungsmodell) as in the case under examination in this article[4]. Examples and criticalities can be found for each model: in the case of the transition in Spain following the Francoist dictatorship, the population decided to close their eyes, not to look back, and to obstruct any attempt to shed light on the past; in the judgments, following the German reunification, having as defendants the guards placed in charge of guarding the Berlin Wall, to achieve justice, twists of the cardinal institutions and principles of criminal justice, first and foremost non-retroactivity, were accepted.

Arnold himself emphasized that these classifications were merely models, within which further subcategories could be identified. Since this shall not be the intent of this work and specific literature already exists[5], we can focus on how the models identified by Arnold, at a date before the entry into force of the Rome Statute, could in theory interact with the system of the International Criminal Court. The criminal

3. Gabriele Fornasari, *Giustizia di transizione e neopunitivismo: il campo di tensione tra garantismo penale e repressione delle violazioni sistematiche dei diritti umani* at 1 (2010).

4. Gabriele Fornasari, *Giustizia di transizione e diritto penale* at 12 (Giappichelli Editore 1st ed. 2013), citing Jörg Arnold, Volume I, Einführungsvortrag: Modelle strafrechtlicher Reaktion auf Systemunrecht at 11 ff. (Iuscrim, 2000).

5. See id. at 12 ff.

prosecution model seems to be the one most in line with the dictates of the Statute (and especially of the Court's Prosecutor's Office, see infra para. 4.1.), whereas that of the conclusion model is the furthest from the objectives set out in the Statute already in its Preamble[6]. The rationale behind the conciliation model may instead lead to the greatest doubts about the possibility of supranational intervention. The prospect that in these models, the threat of criminal intervention may be secondary (as in South Africa), or lacking altogether[7], would be poorly reconciled to end impunity for the most serious crimes. The lack, moreover, of a relevant practice outside of the Colombian case – which, nonetheless, still awaits effective definition – surely does not promote any clarification.

One cannot, however, investigate these aspects further without first looking specifically at how the Court intervenes.

3 Complementarity

The principle of complementarity influences the Statute in its entirety: it is found within the Preamble[8], in Art. 1 ICC St.[9], in Articles 5, 11, and 12 ICC St.[10], and likewise in the discipline of the general part of the Statute (e.g., attempt, mental element). It could be argued that a form, albeit indirect, of complementarity is also to be found in the special part of the Statute: the Court's jurisdiction would cover only the most serious crimes, of such a nature as to cause alarm in the international community as a whole, thus leaving it to the States to deal with the remaining matters; such a view would also serve as an interpretive aid for the special part provisions themselves. This, however,

6. Preamble, ICC Statute 17 July 1998, available at https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (last visited November 05, 2023), (States Parties are obliged to ensure effective prosecution of the most serious crimes established in the Statute, also through international cooperation).

7. Fornasari, *Giustizia di transizione e diritto penale* at 12 (cited in note 5).

8. Preamble, ICC Statute (cited in note 7) (establishing that the principle of complementarity of the ICC imposes an obligation on national courts to apply their criminal jurisdiction).

9. Art. 1, ICC Statute (referring to the principle of complementarity).

10. Artt. 5, 11, 12, ICC Statute (limiting the jurisdiction of the Court ratione materiae, ratione temporis and ratione loci, respectively).

is not complementarity in the proper sense. The principle of complementarity does not refer to all cases in which the system outlined by the Rome Statute does not intervene but stands to indicate that in cases where the Court is found to have jurisdiction – jurisdiction which thus serves as a prerequisite to this principle – its intervention is merely secondary to that of the States.

The Court is thus limited, partly for reasons of scarcity of resources and practical feasibility, to prosecuting only those facts which appear to it to be of the greatest gravity, and which are maximally intolerable in the light of the principles of international law. It cannot be ruled out that this limitation also stemmed from some States concerns about possible excessive limitations on sovereignty and illegitimate intrusions into purely domestic matters; indeed, this was precisely the reason for the break with previous experience (see supra para. 1).

Nonetheless, whenever a State decides not to intervene, the Court must step in. The latter cooperates with each State to encourage, in the first instance, the establishment of proceedings at the national level. This creates a system of indirect enforcement: if the State Party concerned does not exercise its punitive claim, the Court can, under the principle of complementarity, try the accused individuals[11]. And if this binary model, layered over several jurisdictional levels[12], were to work, the Court would hardly ever have to act[13].

However, this principle must also be coordinated with the goal of ending impunity for the most serious crimes affecting the international community (ICC Preamble St). It is to this end that Article 17.1 ICC St. intervenes, elucidating the cases in which the Court s exercise of jurisdiction is permissible. It reads as follows:

Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

11. Enrico Amati, et al., *Introduzione al diritto penale internazionale* at 31, (Giappichelli Editore 4th ed. 2020 [2006]).

12. Kai Ambos, Ezequiel Malarino, Jan Woischnik, *Dificultades jurídicas y políticas para la ratificación o implementación del Estatuto de Roma da la Corte Penal Internacional: contribuciones de América Latina y Alemania* at 489, (Konrad-Adenauer-Stiftung E.V., 2006).

13. Amati, et al., *Introduzione al diritto penale internazionale* at 32 (cited in note 12).

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3.

(d) The case is not of sufficient gravity to justify further action by the Court[14].

Paragraphs 2 and 3 of the Articles define what is to be understood by "unwilling or unable" to act on the part of the State in connection with the initiation of investigations or proceedings. But even before the Court does so, it must be triggered by one of the legitimated parties referred to in Article 13 ICC St, at which point the Prosecutor, in the case of a motu proprio initiative, opens a Preliminary Examination, limited to the general context, necessary to understand whether there are grounds for the following opening of an investigation. Having done so, in considering whether to subsequently open an investigation, he proceeds to the stage referred to in Article 53.1 ICC St, which provides:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.

(b) The case is or would be admissible under Article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. If the Prosecutor determines that there is no reasonable basis to proceed and his or

14. Art 17., ICC Statute (issues of admissibility).

her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber[15].

By the settled doctrine, Article 53 governs the exercise of essential aspects of prosecutorial discretion once the Prosecutor's power to commence actual investigatory activities has been activated[16]. The prosecutor, after verifying the Court's abstract jurisdiction, must make a prognostic judgment on the admissibility of the case considering Article 17. He then verifies compatibility with subsection (c), a "relief valve" that makes the system a model of constrained discretion, somewhat between the continental model of mandatory prosecution and the Anglo-American model of full discretion, and which represents the real punctum dolens of the discipline. If the Prosecutor bases his choice not to intervene exclusively on subsection (c) or decides not to continue with the investigation for the same reason, the Pre-Trial Chamber, on its initiative, may not validate his choice[17]. Furthermore, it is not easy to give an interpretation of what is to be understood by "interests of justice". The assessment that must be made, however, runs the risk of logically overlapping with that of Article 17 and Article 53.1 (b): if the Court was created to avoid cases of impunity, and Article 17 indicates the cases in which the Court – precisely to avoid such a problem – may intervene, then whenever the intervention passes, as required by Article 53.1 (b), the prognostic judgment on its admissibility should be considered to be by the Statute's conception of justice. However, as also confirmed by the Prosecutor's Office[18], the two levels need to be split. The only interventions on this issue by the Court, rather than clarifying the proper meaning of the wording, have limited themselves to establishing what this power is not and who does

15. Art 53., ICC Statute (initiation of an investigation).

16. Otto Triffterer, et al., *Commentary on the Rome statute of the International Criminal Court: observers' notes,* article by article at 702 (Beck, München, 2nd ed. 2008).

17. See ibid. (a possibility of initiative precluded in other cases that ensures that the power is not exercised arbitrarily. In particular, this means that if the Pre-Trial Chamber has to validate the Prosecutor's decisions, it is also necessarily bound to review all such decisions of the Prosecutor).

18. James Stewart, Deputy Prosecutor of the ICC, *Transitional Justice in Colombia and the role of the International Criminal Court*, at 16 (International Criminal Court, May 13, 2015), available at https://www.icc-cpi.int/news/transitional-justice-colombia-and-role-international-criminal-court-keynote-speech-james (last visited November 5, 2023).

not have it (i.e., the Pre-Trial Chamber[19]). And it is clear how by the interpretation of this rule, passes the admissibility or otherwise, within the ICC system, of a whole range of transitional justice measures.

4 The Interpretation of Art. 53.1 (c)

The Court seems to have delegated the hermeneutic function to all men "of goodwill", who dare to confront one of the terms of law with the most controversial meaning and a more than meager application practice. However, the aim of this work is not to give an account of all the literature produced to define what justice is, among other things with philosophical disquisitions even before legal. Because of the absence of certain references, it is possible to try to interpret the norm from several aspects.

4.1 The view of the Office of the Prosecutor

On May 15, 2015, the Deputy Prosecutor of the International Criminal Court, James Stewart traveled to Bogota to address a conference organized by the Universidad del Rosario, the Cyrus R. Vance Center for International Justice, the United Nations in Colombia, the International Center for Transitional Justice and Coalition for the International Criminal Court, and other relevant stakeholders on the subject. There, the Deputy Prosecutor had the opportunity to clarify how the OTP, and not the Court or any of its Chambers, has interpreted Article 53.1 (c), while also verifying the admissibility of certain transitional justice measures in relation to that interpretation[20].

The Deputy Prosecutor starts from the premise that once a State has acceded to the Statute, that State obligates itself to accept that justice is an integral part of its conflict resolution arrangements, and especially assumes the task of investigating and prosecuting crimes that are part of the Court's jurisdiction. Stewart also points out how,

19. ICC-02/17, Pre-Trial Chamber II, Situation in the Islamic Republic of Afghanistan at para. 25 ff.

20. Stewart, Transitional Justice in Colombia and the role of the International Criminal Court (cited in note 19).

when a State fails to fulfill its obligations, the Court is obliged to intervene. He emphasizes the wide range of measures that can be included in transitional justice, but also how those that are taken by Colombia must be in accordance with its obligations under the Statute. At the same time, the OTP affirmed the need to monitor developments in what would later become the Peace Agreement between the Colombian government and the FARC, as well as the failure to prosecute the most responsible individuals, pointing out how this would affect the admissibility of the case before the Court.

It is at this point, that interest in such discourse is maximized, as Deputy Prosecutor Stewart decides to explicitly answer a question of no small importance: "What mechanisms can be put in place to ensure that those most responsible for the most serious crimes are held accountable, in accordance with Colombia's obligations under the Rome Statute?"

For the Court to not intervene, the Deputy Prosecutor replies that the person allegedly responsible must be affected by genuine proceedings, and these cannot be considered as such if the conditions of Article 17.2 ICC St. are met[21]. Considering this, the content outlook of the Peace Agreement discussed at the time can be analyzed. The suspension of the execution of sentences already imposed would, in effect, mean that convicted individuals would not serve any time. This would be incompatible with the Statute, and the Deputy Prosecutor points out that he had already warned the Colombian authorities of this incompatibility so that similar measures would not be included in the Peace Agreement. Reducing sentences might be compatible with the Statute, but this would depend in practice on whether this is accompanied by other measures typical of transitional justice, such as disqualification from public office and admission of responsibility. The compatibility of alternative measures to imprisonment depends on several factors, such as possible mitigating circumstances, proportionality to the seriousness of the crime, and so on. The possibility of not prosecuting individuals other than those considered "the most

21. Art. 17(2), ICC Statute (requirements imply cases in which the proceedings serve to remove the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, those in which the trial has been unjustifiably delayed, and cases in which the trial was not conducted independently, impartially or inconsistently with the purpose of bringing the person concerned to justice).

responsible" instead seems to strike a void within the Court's work[22]. Indeed, while there is no express provision to this effect in the Statute, the established practice, partly considering obvious practical limitations, is for the Office of the Prosecutor to prosecute only top-level figures or particularly notorious middle-level figures. But, in a coda that almost reads like a warning[23], the Deputy Prosecutor says that "the differences between the ICC's mandate and that of national judicial systems means, however, that ICC prosecutorial strategy cannot be taken as authority for how national jurisdictions should determine whom to investigate or prosecute."[24] On the other hand, with regard to amnesties, Stewart simply states that on those about "political offenses" the Office of the Prosecutor expresses no view, as they are crimes outside the Court's jurisdiction[25]. He does not comment specifically on possible amnesties for crimes under Art. 5 ICC St. "Amnesty for conduct that amounted to Rome Statute crimes would raise very different issues". Again, just enough of a veiled threat to direct the behavior of the Colombian state[26].

The Deputy Prosecutor then provides the interpretation given by the Office of the Prosecutor of the notion of "interests of justice". With a rigidly literal approach, it is stated that the elements that are taken into consideration are only the interests of the victims and the seriousness of the crime, as only these are mentioned within the Statute, while considerations of peace and security will ordinarily fall outside the scope of the interests of justice formula in the Rome Statute, partly because the States Parties to the Rome Statute created the ICC as a judicial institution and not as a peace-making institution. Peace-making is the responsibility of other bodies, such as the United Nations Security Council[27]. Despite this, one must consider how the gravity of the crime and the interest of victims are criteria present in

22. Kai Ambos, et al, *Anistia, Justiça e Impunidade: reflexões sobre a justiça de transição no* Brasil, Coleção Forum de Direitos Humanos at 85-86 (Editora Fórum, 2010).

23. See ibid (although it is not quite clear what, if any, response tools would be provided by the Prosecutor's Office.).

24. Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court* at 15 (cited in note 19).

25. See ibid.

26. See ibid.

27. See id. at 16-17.

the Article's wording only to acknowledge the existence of factors that might outweigh them[28].

Nevertheless, the interpretation and attitude taken by the Office of the Prosecutor are reprehensible in two respects: the first is the almost total lack of reflection on such a central phenomenon as amnesties, without even wishing to consider any differentiations such as those made by some authors between self- or hetero-concessions, conditional and unconditional amnesties[29]. The world of amnesties, like that of transitional justice, turns out to be tremendously broad[30], so much so that the former is one of the princely instruments of the latter. A categorical, general rejection and one that does not suffer from exceptions turn out to be contrary to that weighing, that "balancing" which is at the basis of the term "justice". In doing so, one becomes excessively unbalanced in the protection of certain interests protected by law, while sacrificing those that undeniably come to be protected by amnesties. Amnesties which, it should be remembered, are an institution that is present in the vast majority of national legal systems and that has been, is, and will be used by those systems[31]. The second objectionable aspect is a limitation that the Prosecutor imposes on himself, even claiming it expressly. Indeed, the Deputy Prosecutor states: "I acknowledge that the question raised has much wider implications for Colombia and the Colombian people. However, I confine my remarks, as I must, to the narrower issue of what the Prosecutor must do in discharging her responsibilities under the Rome Statute"[32]. But the concept of justice in international criminal law cannot – nor generally has it – ignore broader implications and interests other than the mere execution of punishment[33].

28. Triffterer, et al., *Commentary on the Rome statute of the International Criminal Court: observers' notes,* article by article at 709 (cited in note 17).

29. Fornasari, *Giustizia di transizione e diritto penale* at 171 ff. (cited in note 5).

30. See ibid.

31. Kai Ambos et al., *Anistia, Justiça e Impunidade: reflexões sobre a justiça de transição no* Brasil, Coleção Forum de Direitos Humanos at 35-36 (cited in note 23).

32. Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court* at 8 (cited in note 19).

33. Kai Ambos et al., *Anistia, Justiça e Impunidade: reflexões sobre a justiça de transição* no Brasil, Coleção Forum de Direitos Humanos at 29 (cited in note 23).

4.2 The Perspective under International Criminal Law

There are numerous occasions in the history of international criminal law where the retributive instance has not been central to the concept of justice. The present work will address two instances considered maximally explanatory, whether before an international court or a domestic one, to show how the concept of justice is (or at least can be) different from that which is too often found in domestic systems, which are extremely devoted, even at times contrary to their constitutional dictates, to the retributive instance[34]. Interests too large and too foreign to the ordinary come into play in international criminal law, forcing one to disregard common tools and the usual pattern of reasoning.

The first case pertains to the context of the Rwandan genocide of 1994. This mass-scale conduct that only took months to execute could have not been carried out without the contribution and adherence of the population and the institutions at all levels. One of these contributors was Sylvestre Gacumbitsi, who was tried before the ICTR. Former mayor of the Rusumo municipality, he was convicted of genocide and crimes against humanity. The Trial Chamber determined that Gacumbitsi had used his position to meet with prominent elements and perpetuate a genocidal policy against the Tutsi population, receiving weapons and distributing them among the population, instigating the killing of Tutsis themselves and the rape of women[35]. Gacumbitsi was consequently sentenced to life in prison. There is, however, a part of the sentence that brings with it some reflections:

The preamble to the United Nations Security Council resolution 955[36] establishing the Tribunal emphasized the need to further the goals of deterrence, justice, reconciliation, restoration, and maintenance of peace.

34. Stefano Natoli, *Dei relitti e delle pene: giustizia, giustizialismo, giustiziati: la questione carceraria fra indifferenza e disinformazione* at 85 ff. (Rubbettino, 2020), (the author shows that in Italy non-custodial sanctions and measures are either non-existing or not functioning).

35. ICTR-2001-64-T, Trial Chamber III, The Prosecutor v. Silvestre Gacumbitsi at 8 ff.

36. Preamble, UN Security Council Resolution 995, 8 November 1994, available at http://unscr.com/en/resolutions/doc/955 (last visited November 05, 2023).

In deciding the sentence to impose on the Accused the Chamber will take into account all the factors likely to contribute to the achievement of the above goals. Given the gravity of the offenses committed in Rwanda in 1994, it is of the utmost importance that the international community condemn the said offenses in a manner that will prevent a repetition of those crimes either in Rwanda or elsewhere. The Chamber will also take into account reconciliation among Rwandans to which, under the same resolution, the Tribunal is mandated to contribute[37].

Two aspects of this brief passage are worth considering.

To begin with, the first paragraph points out that behind the establishment of the Tribunal was not only the need for justice but also for deterrence, reconciliation, restoration, and peacekeeping. If the Tribunal needs to satisfy several different needs, then more than one notion of justice is possible. Secondly, and perhaps more importantly, the Tribunal seems to suggest a relationship between the purposes of deterrence and reconciliation, as would also appear from the fact that the remaining purposes are dealt with in a separate paragraph. The judgment does not seem to give any clues as to the causal direction of this relationship: that is, whether it is through deterrence that reconciliation can be achieved or if reconciliation itself has a deterrent effect, making it possible to avoid, even narrowly, recourse to the sanctioning instrument[38].

The domestic case is that of Miguel Osvaldo Etchecolatz, Commissioner General of Police accused in 1986 of kidnapping and enforced disappearance, who had benefited from the laws (only improperly called amnesties) Obediencia debida[39] and Punto final[40]. In 2005, in

37. ICTR-2001-64-T, The Prosecutor v. Silvestre Gacumbitsi at para. 335-336 (cited in note 36).

38. See also Uprimny Rodrigo and Maria Paula Saffon. *Transitional justice, restorative justice and reconciliation: Some insights from the Colombian case. Coming to Terms with Reconciliation*. Working Paper Library (2006).

39. Ley de obediencia debida, 8 June 1987, n. 23 521 (the Ley de Obediencia debida established a presumption regarding crimes committed by members of the Armed Forces, who were not punishable for having acted under the so-called "due obedience").

40. Ley de punto final, 24th December 1986 (the Ley de punto final established the suspension of judicial proceedings against those accused of being criminally responsible for the crime of enforced disappearance of persons during the dictatorship).

the Simón case, somewhat controversially, the Corte Suprema de Justicia de la Nación decided, feeling bound by the Barrios Altos ruling of the Corte Interamericana de Derechos Humanos[41], for the unconstitutionality of the two laws[42]. Thus, on September 19, 2006, the Tribunal Oral en lo Criminal Federal No. 1 de La Plata convicted Etchecolaz of kidnapping, torture, and murder as crimes against humanity[43]. Brief reflections on the legitimacy of retroactive disapplication of such laws are more than adequate for this article: it suffices here to echo Fornasari's expression that "the rule of law cannot afford to play the three-card game"[44]. More in-depth considerations deserve to be made about the qualification of the facts ascribed to Etchecolatz. Officially qualified as crimes against humanity, the judge, while not changing the indictment, exploits the sentence for a historical reconstruction of the conduct as acts of genocide, without changing anything at the level of the quantum of punishment[45]:

It is on this point that of central importance is the consideration of events that occurred as genocide. The validity of the Convention in this matter is beyond question, as is that of the other human rights conventions contained in Article 75(22) of the National Constitution. Considering the cases under consideration in this way - genocide - and under this transcendental legal umbrella will allow us, in my opinion, to place the facts under consideration in the proper context, thus fulfilling the obligation contained in the famous Velazquez Rodriguez ruling to investigate seriously and not as a mere formality. All of this is also part of the reconstruction of collective memory and will make

41. Corte Suprema De La Naciòn, June 14, 2005, no. 17.768 at 115. (José Liborio Poblete Roa, his wife Gertrudis Marta Hlaczic and their eight-month-old daughter, Claudia Victoria Poblete, were kidnapped on November 28, 1978, and sent to the Clandestine Detention Center "El Olimpo". The Court considered that the "Obediencia debida" and "Punto final" laws are contrary to the American Convention on Human Rights and the International Covenant on Civil and Political Rights to the extent that they hinder the clarification and effective punishment of acts contrary to the rights recognized in said international treaties).

42. See id. at 240.

43. Tribunal Oral en lo Criminal Federal N 1 de La Plata, September 19, 2006. no. 2251/06 at 5-6 (Los hechos).

44. Fornasari, *Giustizia di transizione e diritto penale* at 180 (cited in note 5).

45. Tribunal Oral en lo Criminal Federal N 1 de La Plata, 2006, no. 2251/06 (cited in note 44) at 106.

it possible to build a future based on knowledge of the truth, which is the key to preventing further massacres. As already mentioned, all these facts constitute crimes against humanity committed as part of the genocide that took place in the Argentine Republic between 1976 and 1983[46].

International practice further sustains the possibility of disregarding the retributive instance. Indeed, no custom sanctions the illegitimacy of amnesties for international crimes. When the Pre-Trial Chamber went the other way in the Libyan case[47], establishing the configurability of such a custom, the Appeals Chamber promptly refuted it, arguing that the issue was still evolving in international law and configuring the assertion as obiter dictum.

Lastly, the Appeals Chamber finds that the Pre-Trial Chamber's holdings on Law No. 6's compatibility with international law were obiter dicta. [...] For present purposes, it suffices to say only that international law is still in the developmental stage on the question of acceptability of amnesties[48].

In the words of Christine Bell, there is a "largely undefined middle ground that is constantly shifting as the predominance of one or other poles asserts itself and is contested"[49].

4.3 The Purpose of the Sanction inside the Rome Statute

The reconstruction of the notion of "interests of justice" must contend with a serious gap in the Rome Statute: the lack of any indication of the purpose of punishment. Motivating this absence is not easy, also considering the centrality that such an indication assumes[50].

46. Ibid.

47. Despite the differences between the Libyan and the Colombian case, the opinion of the Court pertains to the inexistence of an international custom and is thus relevant for both cases. See Benedetto Conforti and Massimo Iovane, Diritto internazionale, 12. ed, Manuali per l'università at 46 (Napoli: Editoriale scientifica, 2021 [1976]).

48. ICC-01/11, Appeals Chamber, Situation in Libya, Prosecutor v. Saif Al-Islam Gaddafi at para. 96.

49. Carsten Stahn, et al., J*us Post Bellum: mapping the normative foundations* at 187 (Oxford University Press, 2014).

50. Amati, et al., *Introduzione al diritto penale internazionale* at 279 (cited in note 12).

As Fronza correctly pins down, "the criminal sanction delineates the structure of the system and the physiognomy of the general principles of criminal law, and not vice versa. It is also well known how, depending on the purposes assigned to the sanction, one may tend to accommodate one model of justice or another"[51]. Devresse and Scalia consider such omissions to be a direct consequence of public expectations and the seriousness of international crimes: the defendants thus, end up being considered "monsters" (one need only to recall the trial of Adolf Eichmann, in which Attorney General Gideon Hausner, in his opening remarks, addressing the defendant, stated that the latter «has committed horrendous crimes, and no longer deserves to be called a man[52]), and this makes theoretical elaboration on punishment unnecessary[53].

In the awareness of this gap, two reconstruction approaches have led to elucidations on these purposes, with opposing outcomes. The first, by Fronza herself, starts from a distinction, indeed necessary, between the functions of punishment and the purposes of international criminal jurisdictions, under which justice, the investigation and dissemination of truth, reconciliation, and peace fall. The former would be considered a means for the realization of the latter. Through such configuration criminal justice could possibly be considered as a mere instrument of peace and reconciliation, thus deeming concurrent solutions to criminal sanction, such as truth commissions, amnesties, and pardons, to be permissible. The reasoning behind this interpretation is that:

Outside the context of each State, there is a very different geometry of interests and actors than that which, at the domestic level, designs the relationship between state and citizens. Even the conception of punishment and the basis of this for international crimes are

51. See ibid.

52. See Gideon Hausner's opening statement, available at https://collections.ushmm.org/search/catalog/irn1001031 (last visited November 8, 2023).

53. Marie-Sophie Devresse, Damien Scalia, *An outsider's view from inside the experience of Acquittals before International Criminal Tribunals*, Volume 17, Journal of International Criminal Justice at 184-189 (2019).

inevitably affected by the web of axiological hierarchies, ethical-legal conceptions, and diverse political priorities[54].

The second approach, pursuing the goal of ending impunity for perpetrators of international crimes, was instead followed by the judges in the Katanga judgment. There the Court stated that the sentence would have two functions: punishment of the perpetrator as a testimony to social disapproval, and deterrence as a means of dissuasion of other possible perpetrators from carrying out such conduct.

When determining the sentence, the Chamber must also respond to the legitimate need for truth and justice voiced by the victims and their family members. It, therefore, considers that the role of the sentence is two-fold: on the one hand, punishment, or the expression of society's condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose[55].

Despite that, the Court later contradicted its own opinion in the Gbagbo and Blé Goudé cases: both in the view taken by the ruling, which would like to see a positive general-preventive purpose[56] and in the opinion of dissenting judge Herrera Carbuccia, who looks to the ascertainment of truth and the prevention of all forms of historical revisionism as the main purposes[57]. Hence, the case law seems unable to become the beacon that lights the Court's way.

54. Amati, et al., *Introduzione al diritto penale internazionale* at 264 (cited in note 12).

55. ICC-01/04-01/07, Trial Chamber II, The Prosecutor v. Germain Katanga at para. 38.

56. ICC-02/11-01/15-1263, Trial Chamber I, Situation in the Republic of Côte D'Ivoire in the case of the Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, para. 2040 (stating that the acquittal of the perpetrators shall not be interpreted as denial of the crimes and suffering inferred).

57. See id. at para. 6 (preventing revisionism and establishing the truth have always been the goals of the criminal justice system. If we allow impunity for crimes against humanity, we fail to comply with the values and purposes enshrined in the Rome Statute espoused by the international community).

4.4 Ronald Dworkin and iuris Analogy

If practice returns a picture with more shadows than lights, the doctrinal interpretation will seem to appear clearer and more straightforward.

One of the most appreciable attempts, which also includes an analysis of the Colombian case, maybe that of Javier Sebastián Eskauriatza, professor at Birmingham Law School[58]. The starting point of his reconstruction is the excessive number of gaps and interpretive issues present in international law if one interprets it from an overly positivist perspective. The answer to these issues would be Ronald Dworkin's "constructive interpretation", which would enjoy further legitimacy because of its similarities to Hernsh Lauterpacht's methodology: both authors are reluctant to an overly positivist conception of international law because of the normative gaps the latter would create[59]. The first step in Dworkin's theory requires finding the object of interpretation[60]. In this case, there may be two different sources: the Rome Statute and customary international law. However, the failure to come up with customary law on amnesties (see supra para. 4.2.) forces us to limit ourselves to the former. At this stage, however, several interpretations would still be possible. It is at this point that the concepts of "fit" and "justification" intervene: the interpretation must be consistent with what has happened up to that point, such as any precedents, and with the principles of the community, a morality external to the text of the norm itself and resolved in the personified community[61], in this case, the international community. It is through this approach that it can be argued that, although the Rome Statute does not make explicit choices on some points, such as amnesties or

58. Javier Eskauriatza, *The jus post bellum as "integrity": Transitional criminal justice, the ICC, and the Colombian amnesty law*, Volume 33, Leiden Journal of International Law 189 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4269038 (last visited November 11, 2023).

59. Patrick Capps, Lauterpacht's Method, 82 British Yearbook of International Law 248, (2012), available at https://academic.oup.com/bybil/article/82/1/248/276344 (last visited November 11, 2023).

60. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1997 [1977]).

61. Ronald Dworkin, *Law's Empire* at 45 and 167 (Hart Publishing Ltd 2006 [1986]).

the purposes of sanction, it still cannot be considered "silent". Thus, through interpretation, it is possible to verify whether these kinds of measures comply with the ICC system principles – and are therefore viable to the Member States – or not, even in the absence of relevant case law.

Two principles have been identified for interpretation: the principle of peace and the principle of "local ownership"[62]. The former would be behind the introduction in the Rome Statute of Articles 16 and 53. Article 16 ICC St. allows for the so-called "deferral", which is the possibility for the UN Security Council – by virtue of its role as the one responsible for maintaining international peace and security – to interrupt, through a resolution adopted based on Ch. VII of the UN Charter, the Court's activity on a given case[63]. The principle of peace would also inform Article 53.1 (c). While it is not quite clear, in fact, what is to be understood by "interests of justice" and thus when this rule can be applied, its more general meaning is clear: there are some cases in which the Court's intervention would be inappropriate and it is, therefore, necessary for the Court to remain a few steps behind. In the pages of Vol. 18 of Human Rights Quarterly, an anonymous person put it this way:

Accusation [...] comes more easily than making peace. The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow [...] Thousands of people are dead who should have been alive – because moralists were in quest of the perfect peace. Unfortunately, a perfect peace can rarely be attained in the aftermath of bloody conflict. The pursuit of criminals is one thing. Making peace is another[64].

It is therefore inevitable that issues of peace fall within the logic of the International Criminal Court, also keeping in mind how Article 4 of the UN Charter recites that "membership in the United Nations

62. Javier Eskauriatza, *The jus post bellum as "integrity"* (cited in note 59).

63. Art. 16, UN Charter 24 October 1945 (functions and powers, the General Assembly. The whole text of the Charter is available at https://treaties.un.org/doc/publication/ctc/uncharter.pdf, last visited November 11, 2023).

64. Anonymous, Human Rights in Peace Negotiations, 18 Human Rights Quarterly 249 (1996), available at https://www.jstor.org/stable/762504 (last visited November 11, 2023).

is open to all other peace-loving states"[65] and how peace can also fall, as in Colombia, within constitutional charters. Transitional justice mechanisms and restorative justice also have constitutional value in Colombia through Articles 22 and 95[66].

The principle of local ownership, found, among other things, also in the UN Charter in Article 2.7[67], which would be behind Article 17 ICC St, might justify the claim of Colombia and Colombian citizens to be themselves, and not the international community, protagonists of their transitional justice process, within the limits of what the Statute establishes. This, however, must be subject to one important clarification: justice that must be achieved in Colombia for the Court not to intervene, does not have to be perfect, but respectful of the international obligations that Colombia undertook by ratifying the Rome Statute.

5 The Colombian Case

Since theoretical reconstruction cannot go beyond what has been said above, all that remains is to turn to the analysis of the Colombian case, probably the only concrete example available to us of a conciliation model of transitional justice within the Rome Statute system with a certain degree of disregard to punitive instances. This analysis must not resolve itself into a mere theoretical exercise but must verify compatibility with the theoretical premises set forth above, to check their validity, and consider the possibility of it becoming a landmark for any further cases that may come before the International Criminal Court.

65. Art. 4, UN Charter (membership).

66. Art. 22, Colombian Constitution 4 July 1994 (la paz es un derecho y un deber de obligatorio cumplimiento) and art. 95 (son deberes de la persona y del ciudadano [...] Propender al logro y mantenimiento de la paz).

67. Art. 2, para. 7 UN Charter (nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state).

5.1 Historical Aspects

The element that perhaps characterizes the Colombian experience the most, in comparison to other South American epiphanies, is the ongoing nature of the conflict that has enveloped the country. As validated by Fornasari, "There is not a past, politically outdated, with which to settle accounts, but a present to be overcome"[68]. The first tensions came with "La Violencia", a period of clashes at the turn of 1948-1958 that claimed some 200,000 lives[69]. After the election of Jorge Eliécer Gaitán, candidate of the Liberal Party, the countryside began to become the scene of several violent episodes, which exploded with the killing of Gaitán himself by Juan Roa Sierra, who, although initially sheltered in a pharmacy by the local police to avoid reprisals, was consequently lynched by the crowd, and his mauled body was left naked in front of the Palacio Presidencial[70]. From there began the Bogotazo, a day of riots in the capital and other cities, in which all buildings thought to have ties to the Conservative Party were stormed and between 500 and 3,000 people died. As conservative President Ospina came into government, the tone of the confrontation became increasingly heated, and the pajaros, gangs supporting the conservative government, organized a series of massacres, with the approval of the police and the government. The liberals, in response, sought to impeach the president, but he countered by declaring a state of siege, assuming full powers, and instituting a policy of repression, later followed by his successor Laureano Gómez. At that point, there was no choice but to organize into guerrilla groups, and self-defense crowds, later known as Autodefensas campesinas, were created by the communist camp as well.

Subsequent presidencies, however, did not respond in the same way to the acts of the two sides: while tools such as amnesties were used for the liberal groups, for the communist ones the policy was that of an iron fist and repression. The end of La Violencia is identified with the agreement that gave birth to the Frente Nacional, a system

68. Fornasari, *Giustizia di transizione e diritto penale* at 153 (cited in note 5).

69. Doug Stokes, *America's Other War: Terrorizing Colombia* at 68 (Zed Books 2004).

70. Nathaniel Weyl, *Red Star over Cuba the Russian Assault on the Western Hemisphere* at 17-19 and at 34-35 (The Devin-Adair company 1962).

that provided for alternating power between the Liberal and Conservative Parties for 12 years[71]. It was during this period, however, that paramilitary groups such as the FARC (Fuerzas Armadas Revolucionarias de Colombia) and the ELN (Ejército de Liberación Nacional)[72], which are still part of the conflict today, began to form from communist self-defense groups, and with their emergence, early periods of armed guerrilla warfare also began[73]. In response to the violence perpetrated by such groups, through Decree 3398[74], the government de facto legalized the formation of paramilitary and self-defense groups among citizens for "organizing national defense". These groups then merged, in 1997, into the AUC (Autodefensas Unidas de Colombia). As a part of an initial attempt at a peace agreement, the paramilitary groups were being suppressed, only to be reauthorized in 1994[75]. The communist fighter groups, having never effectively ceased guerrilla activities, also successfully drove the drug cartels out of rural areas and gained control of a part of the narcos' business[76]. The paramilitary groups, which were very strong locally, gained control of part of the political circuit, giving rise to the para-political scandal[77]. But, in

71. Comisión Interamericana de Derechos Humanos, Contexto: origen y caracteristicas del conflicto armado interno en Colombia, available at http://www.cidh.org/countryrep/colombia04sp/informe3.htm (last visited October 20, 2023).

72. Camilo Torres, *Acerca de Camilo,* available at http://pensamiento.unal.edu.co/cp-camilotorres/acerca-de/camilo-torres/ (last visited November 7, 2023) (which even counted among its leading figures a priest, Camilo Torres, an exponent of liberation theology).

73. Medina Gallego Carlos, *Farc-Ep y Eln una historia política comparada* (1958-2006) at 121 ff. available at https://scholar.google.es/citations?view_op=view_citation&hl=es&user=DiRMOOcAAAAJ&citation_for_view=DiRMOOcAAAAJ:-Se3iqnhoufwC (last visited November 8, 2023).

74. Artìculo 25, Decreto 3398 de 1965, available at https://www.comisiondelaverdad.co/legalizacion-de-la-autodefensa (last visited October 19, 2023).

75. Decreto 356 de 1994 (estatuto de vigilancia y seguridad privada), available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=1341 (last visited November 11, 2023).

76. Caso 65 / Enfrentamientos entre ELN y FARC-EP en Arauca, available at https://www.comisiondelaverdad.co/caso-65-enfrentamientos-entre-eln-y-farc-ep-en-arauca (last visited November 7, 2023).

77. Jemima García-Godos and Knut Andreas O. Lid, *Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia*, 42 J. Lat. Am. Stud. 487 (2010), available at https://doi.org/10.1017/S0022216X10000891 (last visited November 3, 2023).

late 2002, the AUC declared a cease-fire, a precondition dictated by the government for entering negotiations, which were formalized in 2003 with the Pacto de Santa Fe´ de Ralito, intended to create a political project that promised to "rebuild the country, create a new social pact, and build a new Colombia"[78]. The effects of the first peace agreement[79] between the government and the AUC were immediately evident: kidnappings with ransom demands decreased by 87%, terrorist attacks by 76.5%, and murders by 45.2%[80].

Meanwhile, due to the killing of several of their leaders and due to the policy of close fighting against them, carried out by newly elected President Alvaro Uribe, the FARC, which had not been demobilized, were increasingly weakened, but not definitively defeated. Thus, peace negotiations began a few years later in Havana with the Colombian government. After a reform of the constitutional text in 2012, whose purpose was to "establish a constitutional framework for the transitional justice strategy that will facilitate the achievement of a stable and lasting peace in the future"[81], the agreement was squared and submitted to a popular referendum in 2016. However, this accord did not pass: the "No" party won by a slim 50.2 % majority. Despite the initial defeat, President Santos decided not to give up, calling himself "guarantor of Colombia's stability"[82]. FARC leader, Timochenko, also said that he was willing to continue working towards an end to

78. De la Espriella: *Fui puente entre Uribe y Auc para negociación de Ralito* https://verdadabierta.com/de-la-espriella-y-pineda-eran-el-enlace-de-los-paras-con-uribe-mancuso/ (last visited November 3, 2023).

79. Ley 975 de 2005 (this is executed by Law 975, known as Ley de Justicia y Paz), available at https://www.mais.com.co/images/pdf/ley_975_de_2005_0.pdf (last visited November 11, 2023).

80. Colombia y el Examen Periódico Universal de Derechos Humanos (EPU) ante el Consejo de Derechos Humanos de las Naciones Unidas: Experiencias, avances y desafíos, available at https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session3/CO/Colombia_UPR.pdf (last visited November 3, 2023).

81. Artìculo 1, Acto Legislativo 31 July 2012, no. 1, available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=48679 (last visited November 6, 2023).

82. Colombia's President Santos keeps up push for Farc peace deal, available at https://www.bbc.com/news/world-latin-america-37548493 (last visited October 19, 2023).

the conflict[83]. Santos thus initiated negotiations with the Democratic Centre members reformed the agreement by incorporating the latter's objections, and signed, on November 24, 2016, the Teatro Colon agreements. The signature, in the hopes of many, should have meant the end of a conflict that has taken, so far, the lives of an estimated 450,664 people[84]. But the answer given by history has unfortunately turned out to be a different one. With the new presidential elections and the victory of conservative President Duque, one of the biggest opponents of the peace agreement, its execution has been very slow, particularly in the implementation of land reform. While wanting to continue to hold out a faint hope, the impression is that the peace may, at any moment, founder.

5.2 Legal Framework

The Ley de Justicia y Paz represents the Colombian government's first attempt to reach out to paramilitary groups. The purpose of the law is "to facilitate peace processes and the individual or collective reintegration into civilian life of members of illegal armed groups, guaranteeing the victims' right to truth, justice, and reparation"[85]. Military and law enforcement groups, although found guilty of serious crimes in the conflict, are not included in the scope of the law. This was aimed at demobilizing paramilitary groups, which each did independently and at their own pace[86]. The demobilization considered a wide group of interests, including "the victims' right to truth, justice and

83. See ibid.

84. See generally Hallazgos y recomendaciones de la Comisión de la Verdad de Colombia, June 28, 2022, available at https://www.comisiondelaverdad.co/sites/default/files/descargables/2022-06/Informe%20Final%20capítulo%20Hallazgos%20y%20recomendaciones.pdf (last visited on November 3, 2023).

85. Art. 1, Ley 975/2005 (Principios y definiciones).

86. Sergio de León, El Presidente Uribe asegura que en Colombia "hoy no hay paramilitarismo", (the last demobilisation took place in 2006, with President Uribe stating, whether hastily or in bad faith, that in Colombia "hoy no hay paramilitarismo"), available at https://www.semana.com/el-presidente-uribe-asegura-colombia-hoy-no-paramilitarismo/87204-3/ (last visited November 11, 2023).

reparation and respect the accused's right to due process and judicial guarantees"[87].

Combatants would record their names, and their level of participation in the organization, and indicate whether they had committed serious violations. In the absence of such violations and pending criminal proceedings against them, they were granted immunity and the opportunity to participate in programs designed to reintegrate them into civil society[88]. For "postulados" – that is, those who had admitted their responsibility or had pending proceedings against them – the pathway began with declarations of admission of their responsibilities: the so-called versiones libres[89]. These were followed by audiencias, in which the Prosecutor's Office questioned the accused about the crimes charged against them. In the audiencias, great prominence was given to the figure of the victims, who had the right to follow the trials in person, question the accused through their legal representatives, and help in defining events related to the proceedings, such as the site of any mass graves. Victims and their representatives could also request a separate hearing, the audiencias de incidente de reparación integral, meriting the reparation measures due them. The accused could decide, at the end of their audiencia, whether to accept the charges against them. Refusal, however, entailed the applicability of the ordinary procedure, and the disadvantage becomes apparent as soon as one looks at the sentencing range for the offenses in question: five to eight years in the case of proceedings through audiencia, 20 to 60 in ordinary proceedings[90]. After serving the sentence, there was a period of probation, equal to half the prison sentence served[91], during which the offender had to avoid committing new crimes and had

87. Art. 4, Ley 975/2005 (Derecho a la verdad, la justicia y la reparación y debido proceso).

88. Decreto 128 de 2003, January 2022, available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7143 (last visited November 11, 2023).

89. Articulo 17, Ley 975 de 2005 (Versión libre y confesión).

90. Jemima Garcia Godos and Andreas Knut O. LID, *Transitional Justice and Victims' Rights before the End of a Conflict: the unusual case of Colombia*, 42 Journal of Latin American Studies 487 (2010), available at https://www.cambridge.org/core/journals/journal-of-latin-american-studies/article/abs/transitional-justice-and-victims-rights-before-the-end-of-a-conflict-the-unusual-case-of-colombia/29C196E8C4A1AB34FAFBA9A4975F7912 (last visited November 11, 2023).

91. Artìculo 29, Ley 975 de 2005 (pena alternativa).

to inform the authority of his or her movements. If these conditions were not met, the alternative regime would no longer apply. The Colombian Constitutional Court, when questioned about the validity of the provisions, decided, in ruling C-370/2006, for general conformity of the regulation with the constitutional dictate, but requested that it be interpreted and implemented differently in part[92]. The criminal sanction was thus placed on the sideline, but it seems difficult to say that there was no justice, at least in the form of an attempt.

The 2016 Peace Accord covers more areas: it has a six-point structure, ranging from a much-needed agrarian reform to a form of political participation and reintegration[93] for combatants[94]. Central, however, turns out to be the fifth point of the peace agreement, the so-called Acuerdo Sobra las Victimas del Conflicto, which provides for the establishment of jurisdictional and non-jurisdictional mechanisms, including the Jurisdicción Especial para la Paz (JEP); the Comisión de la Verdad, Convivencia y la no repetición; the Unidad de Búsqueda de Personas dadas por Desaparecidas (UBPD); and a system of reparations and guarantees of non-recidivism[95]. This, by being somewhat between restorative and retributive instances, seemed likely to make all parties happy, leading then-Prosecutor Fatou Bensouda to say that "any genuine and practical initiative to end the decades-long armed conflict in Colombia, while paying homage to justice as a critical pillar of sustainable peace, is welcome by her Office"[96]. Amnesties were officially granted only for political crimes and not also for those within

92. Corte Constitucional de Colombia, May 18, 2006, Sentencia C-370/06, available at https://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm (last visited November 5, 2023).

93. Suffice it to say that Julian Gallo Cubillos, a former FARC combatant, is now part of Colombia's Senate. https://senado.gov.co/index.php/component/sppagebuilder/?view=page&id=4321 (last visited November 6, 2023).

94. Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, available at https://www.cancilleria.gov.co/sites/default/files/Fotos2016/12.11_1.2016nuevoacuerdofinal.pdf (last visited November 5, 2023).

95. Marco Zupi, *La Colombia e il processo di pace*. CeSPI, Centro Studi di Politica Internazionale n. 72, available at https://www.cespi.it/it/ricerche/la-colombia-e-il-processo-di-pace (last visited November 5, 2023).

96. Office of the Prosecutor, Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia, available at https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-conclusion-technical-visit-office-prosecutor (last visited November 5, 2023).

the jurisdiction of the International Criminal Court; despite this, frictions still emerged between the international and state levels[97] (see infra para. 5.3.).

One should not, however, gloss over the importance of agrarian reform and the urgency of its implementation: in Colombia, 1% of the population owns 60% of the land, and 50% of the peasants have no title over the land they cultivate[98]. Pope Francis' first apostolic exhortation, the Evangelii Gaudium, thus comes to mind:

Today in many places we hear a call for greater security. But until exclusion and inequality in society and between peoples are reversed, it will be impossible to eliminate violence. The poor and the poorer peoples are accused of violence, yet without equal opportunities the different forms of aggression and conflict will find a fertile terrain for growth and eventually explode. When a society – whether local, national, or global – is willing to leave a part of itself on the fringes, no political programs or resources spent on law enforcement or surveillance systems can indefinitely guarantee tranquillity. This is not the case simply because inequality provokes a violent reaction from those excluded from the system, but because the socioeconomic system is unjust at its root. Just as goodness tends to spread, the toleration of evil, which is injustice, tends to expand its baneful influence and quietly undermine any political and social system, no matter how solid it may appear. If every action has its consequences, an evil embedded in the structures of a society has a constant potential for disintegration and death. It is evil crystallized in unjust social structures, which cannot be the basis of hope for a better future. We are far from the so-called "end of history" since the conditions for sustainable and peaceful development have not yet been adequately articulated and realized[99].

97. Annika Björkdahl, Louise Warvsten, *Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC,* International Journal of Transitional Justice 636 at 652 (2021), available at https://academic.oup.com/ijtj/article/15/3/636/6335777 (last visited November 5, 2023).

98. See generally https://www.land-links.org/country-profile/colombia/#1528464011915-6f6e82e5-9a53 (last visited 19 October, 23).

99. Vatican Publishing House, Evangelii Gaudium, Chapter II, part I, par. 59, available at https://www.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html (last visited November 5, 2023).

5.3 The Interpretation in the Colombian Case

The picture thus outlined could hardly leave the Office of the Prosecutor of the International Criminal Court indifferent. Not only that, but this affair also seems to have contributed to the delineation of the notion of "justice" in the Court's system and the margins of admissibility of the Prosecutor's Office's intervention. It would be erroneous, however, to think that the restoration work was influenced only by the ICC and the Colombian government, as there were far more actors at play. At the domestic level, there was the FARC, which categorically refused to allow any form of political exclusion and detention to be included in the agreement, and the Colombian Constitutional Court, which always vigilantly monitored the constitutionality of the agreement and its implementation; at the international level, in addition to the International Criminal Court, the jurisprudence of the Inter-American Court of Human Rights must be kept in mind[100]. While the peace agreement seemed to have everyone in consensus, the Office of the Prosecutor, in 2017, was again intervening in the Colombian peace process, outlining four critical issues it had identified in the system[101]. Of particular interest here is the second critical issue identified, namely, in the definition of serious war crimes: that is, while Colombia had well accepted the possibility of granting amnesties only for political crimes and not for those within the Court's jurisdiction, there was no agreement on the line between the two. The problem stemmed, rather than from issues inherent to the Colombian case itself, from uncertainties pertaining primarily to the interpretation of the Statute. Indeed, the contextual element of Art. 8 ICC St. recites that the court's jurisdiction over war crimes is to be enjoyed "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes"[102]. The problem lies in the possible, not consequence-free, classifications that are made of this

100. See generally Corte Suprema De La Naciòn, June 14, 2005, no. 17.768 at p. 115 (cited in note 42) (development resulted from the Barrios Altos case in the Simón ruling).

101. Office of the Prosecutor, "Report on Preliminary Examination Activities," 2017., available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Colombia_ENG.pdf (last visited November 5, 2023).

102. ICC Statute, Article 8 (war crimes).

element. The two alternatives, contextual element or mere guideline for the Prosecutor, lead the norm to cover a very different number of cases. Hardly commendable, however, is that such interpretative difficulties should come to "vent" on a case of such critical sensitivity. The Prosecutor's Office was also pointing out that, under the definition of command responsibility that had been adopted, the most responsible parties were in danger of being exempt from any form of liability. Despite this, for almost twenty years now, the Prosecutor's Office has never opened an investigation. Thus, the impression is that this impending threat hanging over the heads of Colombian citizens is good for neither the legitimacy nor the credibility of the Court, so much so that the Colombian system has enjoyed wide discretion in the management of the peace process[103]. By failing to intervene, the Prosecutor's Office has essentially accepted that the justice of the Colombian case complies with the Rome Statute.

5.4 Criticism and Considerations

A system in which such large interests come into play could certainly not meet with everyone's approval. The first critical issue that comes to be identified pertains to the very compatibility between transitional justice and restorative justice mechanisms, based on the different contexts in which the two have developed and thus the inadequacies of the two to solve their respective problems. Uprimmy and Saffon state that:

Transitional justice takes place in exceptional political and social circumstances, and it faces crimes that go against the most essential content of human dignity. In contrast, restorative justice was designed to face small-scale criminality in peaceful societies. Thus, whilst for the latter cases it is plausible to use forgive and forget as efficacious strategies for overcoming crime, for the former cases that strategy seems politically and legally impossible, as well as ethically questionable[104].

103. Björkdahl, Warvsten, *Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC* at 654 (cited in note 98).

104. Uprimny Rodrigo, and Maria Paula Saffon. *Transitional justice, restorative justice and reconciliation: Some insights from the Colombian case* at 5 (cited in note 39).

But such an argument – deliberately deciding to ignore cases in which the combination of transitional and restorative justice has been successful, such as the South African case[105] – takes the form of a petitio principii rather than a critique.

Another reproach leveled against the model would be its lack of democratic character. Starting from Crocker's theory of "democratic reciprocity" according to which citizens should be able to express themselves freely and on equal terms, the criteria for assessing the democratic nature of the transition would be first the degree of citizens' participation and then the degree to which citizens' rights are protected[106]. From these premises, which are certainly supportable, the authors derive Animal Farm-like consequences, stating that there would be "some democratic models that are [...] more democratic than others"[107]. Thus, episodes such as the 1989 referendum in Uruguay would be undemocratic because they result in the granting of amnesties[108]. The problem with this approach is that it does not consider the degree of peace and stability resulting from amnesties themselves as a right of citizens and, therefore, assessable under the second criterion. The impression is almost as if the degree to which transitions are democratic ends up depending on how much one likes the outcome resulting from them and not on actual democratic participation. Wanting, however, to analyze in detail the democratic nature of the Colombian transition, one must first start with the referendum numbers, which saw the Peace Accord being rejected by a very narrow margin. The "No" campaign was focused on the granting of amnesties, which would have led to impunity for individuals guilty of the most serious crimes. However, the distribution of votes does not seem to be consistent with that narrative. As reported by BBC[109], the votes for "No" were for the vast majority in urban centers, little affected by

105. See id. at 11 (it is the authors themselves who refuse to consider it, regarding it as an "exceptional" hypothesis).

106. David Crocker *Democracy and Punishment: Punishment, Reconciliation, and Democratic Deliberation*, 5 Buffalo Criminal Law Review at 528 ff.

107. Uprimmy, Saffon, *Transitional justice, restorative justice and reconciliation*. Some insights from the Colombian Case at 8 (cited in note 105).

108. Referendum econfirmed by a further one in 2009 https://www.electionguide.org/elections/id/150/ (last visited November 6, 2023).

109. See Colombia referendum: voters reject Farc peace deal, available at https://www.bbc.com/news/world-latin-america-37537252 (last visited November 11, 2023).

the civil conflict when compared to rural areas, where the "Yes" vote reached an overwhelming majority. In Choco, one of the provinces hardest hit by the conflict, 80 % of voters were in favor; in the town of Bojaya, where at least 119 people were killed when the FARC attacked a church with mortar fire, 96% of residents voted "Yes"; in the province of Vaupes, where members of the security forces have been held hostage by the FARC for 12 years, 78% of voters were in favor. Here, then, are the two sides of criminal law: on the one hand an instrument at the service of legal practitioners who are aware of its nature as a double-edged blade and therefore well disposed of, in some cases, to give it up; on the other, a mean servant of political interests and of a law-and-order system, which feeds on and is fueled by fear, in a dimension in which criminal law and criminality take on a mediatic dimension and the offender, demandingly, comes to be fully identified with the crime.

If we want, however, to question the democratic nature of a referendum in which only 37.4% of the eligible voters participated, we must remember that the Peace Accord was not approved through the referendum itself, but through an act of Parliament; a solution that also had the full support of the Colombian Constitutional Court, which expressed itself almost unanimously (eight votes in favor and only one against)[110].

Finally, the presence of a system of amnesties is blamed for the inability to adequately stigmatize the political project that made possible the commission of atrocities, a capacity that one would like to see present in a system of criminal proceedings instead. However, it is not clear how a criminal prosecution, which ascertains individual responsibility, can lead to the condemnation of an ideology unless we burden it with expectations and tasks that are not inherent to it. As expressed by the District Court of Jerusalem in the Eichmann case:

"It is the purpose of every criminal trial to clarify whether the charges in the prosecution's indictment against the accused who is on trial are true, and if the accused is convicted, to meet out due punishment to him. Everything that requires clarification for these purposes may be achieved, must be determined at the trial, and everything foreign to these purposes must be eliminated from the court procedure.

110. Zupi, *La Colombia e il processo di pace* at 8 (cited in note 96).

Not only is any pretension to overstep these limits forbidden to the court - but it would also certainly end in complete failure"[111]

6 *Conclusions*

An assessment can now be made concerning the tasks set in para. 5, relating to the verification of the validity of the theoretical reconstruction and of the possibility for Colombia to become a landmark case (see supra para. 5). Consistent with the conceptual premises identified, Colombia enjoyed wide discretion in constructing its model of peace, going out of its way to fill with its point of view the shadowy areas in which the Prosecution could well have lurked, with substantial reductions in sentences and the granting of amnesties, in a model that preferred to give centrality to victims rather than retributive demands. With the awareness, however, that if the theoretical premises were to change (e.g., with the final formation of a custom regarding amnesties), the results would be, in the future, quite different. Regarding the possibility of the Colombian system becoming a relevant case law, although the hope is that there will be no need to use the Colombian model, other States, should they find themselves in the same situation, will demand to be granted the same margin of flexibility. However, before Colombia can become a landmark, it would be necessary for the model itself to be brought to completion. The Peace Agreement is a long way from being executed, and equally far away appears, sadly, the peace itself. The impression remains that, in such a delicate framework, well capable of foundering on its own as it did, the intervention of a supranational tribunal represents a deeply inappropriate involvement[112], capable of extinguishing a small fire of peace ignited after more than 70 years of civil war, more than 600,000 dead and 7 million displaced persons. A system that aims at conciliation rather than punishment need not be the solution, nor does this position reflect that of the writer of these pages. Unacceptable, however,

111. District Court of Jerusalem, Criminal Case n. 40/61 at p. 2.

112. Kai Ambos et al. at 84, (cited in note 23) (the authors claim that it is inconceivable that the ICC intends to overrule the decision of an entire nation that seeks peace and justice by alternative means).

is that such a system should not come to be seen as one of the possible solutions. The fetish for a retributive approach often stems from a "good guys versus bad guys" narrative that is not reflected in reality. As if the interests of all victims could find satisfaction in the realization of violence foreclosed to them firsthand.