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EFFECTS OF EUROPEAN RULES OVERCOMING *RES JUDICATA* IN THE ITALIAN CIVIL JUSTICE SYSTEM

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EFFECTS OF EUROPEAN RULES OVERCOMING *RES JUDICATA* IN THE ITALIAN CIVIL JUSTICE SYSTEM

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INTRODUCTION
Unmasking the Truth Behind Res Judicata

Res judicata: perhaps the most solemn and complex doctrine of civil procedure law.
This work does not seek to reinvent the wheel, nor to review the countless theories that scholars have developed over the centuries about its preclusive effect or its resistance to *ius superveniens*.
My aim is different: to unmask the truth behind the judicial approach to *res judicata*.
Although Italian case law has identified its preclusive effect, the reality looks rather different: among the many doctrinal theories, the italian case-law seems to embrace none. Depending on the circumstances of the case, the scope of *res judicata* may be adjusted, widened or restricted. No general theory, then – only a pragmatic approach, focused on the need of justice.
For this reason, the first chapter investigates the constitutional dimension of *res judicata*, which I believe can be justified considering the principle of the separation of powers. Precisely because of this constitutional nature, *res judicata* is exposed to balancing against other fundamental constitutional values: as the Italian Constitutional Court has taught us, "no right is tyrannical." This constitutional reading, in my view, is confirmed by the history of *res judicata* itself – perpetually suspended between two poles: the myth of its finality and the need of justice that sometimes call for its flexibility.
The second chapter explores this intuition through the analysis of medieval sources of the period of *Ius Commune*, and particularly through the thought of Maranta, who identified several cases of *res judicata* "overcoming".
The encounter – or rather, the clash – between *res judicata* and European law has opened new perspectives. The principle of procedural autonomy of Member States has gradually been eroded, and even *res judicata* has been reinterpreted in light of the need to ensure the effectiveness of EU law. This theme is developed in the third chapter.
The fourth chapter adopts a case-based approach. I have examined the most significant judgments of the European Court of Justice concerning the flexibility of *res judicata*, from which I have derived a general guideline: the principle of conferral operates also in relation to the resistance of *res judicata* to EU law. It is therefore easier for *res judicata* to be set aside where it was formed in matters of exclusive EU competence – such as State aid – and where it obstructs the proper implementation of EU law. In fields of shared competence, such as consumer protection, *res judicata* is not disregarded but "functionalised": the Court of Justice reshapes national doctrines so that the preclusive effect of final judgments does not obstruct the effectiveness of EU law.
Hence, genuine procedural autonomy of Member States seems today to survive only in matters of "third-type", which are less affected by the influence of EU law.
The fifth and final chapter closes the work. After analysing national case law that has absorbed the teachings of the Court of Justice, I have tried to explain why certain judgments remain unconvincing – too rigid, and insufficiently respectful of EU law. I therefore propose my own handbook concerning State aid and consumer protection.
Finally, I want to thank my Supervisor, Professor Andrea Giussani, *Master and Friend*, for inspiring in me his passion for civil procedural law and for teaching me the art of doubt.

CHAPTER ONE
THE OVERCOMING OF *RES JUDICATA*
Section I
The Social Function of Res Judicata

SUMMARY: 1. – The Social Function of *Res Judicata* in Non-State Legal Orders. – 2. The Social Function of *Res Judicata* in State Legal Systems. – 2.1. Correlation Between *Res Judicata* and the Modern State in the Thought of Adolf Julius Merkl and Enrico Tullio Liebman. – 3. *Substantive and Procedural Theories of* Res Judicata *Compared*. – 3.1. Continued: Summary of the Two Doctrines. – 4. Legal Systems That Reject the Finality of *Res Judicata*: The Israeli Example. – 4.1. The Finality Rule in the Israeli Legal System. Tension Between Substantive Justice and Legal Certainty. – 5. Concluding Considerations on the Function of *Res Judicata* in Non-Secular Legal Systems. – 6. The Constitutional Nature of *Res Judicata*. – 6.1. The Resistance of *Res Judicata* to Retroactive *Ius Superveniens*: Theoretical Justifications and the Difficult Balancing of its Finality with Equally Ranked Legal Values.

1. *The Social Function of* Res Judicata *in Non-State Legal Orders*.

It's worth mentioning from the start that the Latin expression *res judicata*[1] refers to the principle whereby a judicial decision issued by a judicial authority acquires finality between the parties and precludes the initiation of any subsequent proceedings concerning the same issue (*eadem res*) between the same litigants (*personae*). Once the decision is no longer subject to ordinary appellate review, it becomes binding and conclusive[2], thereby definitively resolving the dispute[3].
According to several scholars, this effect constitutes a fundamental element of any dispute resolution mechanism[4]. Indeed, the authority of *res judicata* is

[1] The expression forms part of the broader maxim «*res judicata pro veritate habetur*», which appears in *Digest* 42.5, alongside other equally well-known formulations of the effects of final judgment: «*res judicata dicitur quae finem controversiarum pronuntiatione judicis accipit*» and the likewise famous – but probably interpolated – phrase: «*res judicata facit de albo nigrum, originem creat, aequat quadrata rotundis, naturalia sanguinis vincula et falsum in verum mutat*», used by S. SCACCIA, *De sententia et re iudicata*, Roma, 1628, gloss. 14, question 2, no. 7, p. 421.
[2] E. BETTI, voce *Regiudicata*, in *Noviss. dig. it.*, XV, Torino, 1968, p. 216.
[3] The earliest attestations of the principle of *res judicata* can be found in Latin literature. See, for example, PLAUTO, *Pseudolus*, v. 261; TERENZIO, *Hautontimorumenos*, v. 564 e *Phormio*, v. 419, where formula «*actum aiut ne agas*» was used; CICERONE, *Ad Atticum*, 9.18. 3; ID., *De domo*, 78, describes a notable exception to the preclusive effect of final judgment under *ius civile*, specifically in cases concerning the *status libertatis*:«*[Q]uin etiam si decemviri sacramentum in libertatem iniustum iudicassent, tamen, quotienscumque vellet quis, hoc in genere solo rem iudicatam referri posse voluerunt*». For further analysis of the earliest appearances of the doctrine of *res judicata* in Latin literature, see M. VARVARO, *Lineamenti di procedura civile romana*, Napoli, 2023, p. 20.
[4] See, for example, S. MENCHINI, voce *Regiudicata civile*, in *Dig. priv.*, XVI, Torino, 1999, p. 404; ID., *Il giudicato civile*, Torino, 2002, p. 7 ff.; A. ZEUNER-H. KOCH, *Effect of Judgments*, in *International Encyclopedia of Comparative Law*, XVI, *Civil Procedure*, Leiden, 2012, p. 4; R. L. MARCUS-M. H.

recognized by most legal systems, including international law[5]. Nevertheless, comparative legal analysis shows that certain justice systems can function without this doctrine[6].

Moreover, it is commonly held that the authority of *res judicata* constitutes the essential characteristic of the justice system makes available by the State to its citizens[7].

REDISH- E. F. SHERMAN, *Civil Procedure. A Modern Approach*, Eagan, 2008, p. 1092; R. C. CASAD- K. M. CLERMONT, *Res Judicata. A Handbook on Its Theory, Doctrine, and Practice*, Durham, 2001, p. 5; K. M. CLERMONT, *Res Judicata as Requisite for Justice*, in 68 *Rutgers University Law Review*, 2016, p. 1069 ff., at 1077; C. CAVALLINI, *Anglo-Saxon Res Judicata Culture for Civil Law Systems Anglo-Saxon Res Judicata Culture for Civil Law Systems*, in 45 *Northwestern Journal of International Law & Business*, 1, 2024, p. 3 ff.; see also A. C. FREEMAN, *A Treatise of the Law of Judgments*, II, Clark, 1925, reprinted in 1993, p. 1321, who said: «*[T]he doctrine of res judicata is a principle of all civilized nation*».

5 It is well established that the finality of *res judicata* is part of the general principles of law recognized under Article 38(1)(c) of the Statute of the International Court of Justice, and is therefore applicable to decisions rendered by international adjudicatory bodies. This has been repeatedly affirmed by the International Court of Justice itself (hereinafter: ICJ): ICJ *Nicaragua v. Colombia*, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 National Miles from the Nicaraguan Coast*, 17 March 2016, § 55; ICJ, *Bosnia ed Erzegovina v. Serbia e Montenegro*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, sentenza del 26 February, 2007, §§ 114-120; ICJ, *Cameroon v. Nigeria*, *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundaries between Cameroon and Nigeria*, 25 March1999, § 12. The inclusion of *res judicata* among the general principles of law under Article 38(1)(c) of the Statute of the International Court of Justice has been extensively discussed; see the comprehensive treatment by B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals,*, London, 1953, reprinted in 1987, p. 336 ff.; B. HANOTIAU, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue, and Class Actions*, Alphen aan den Rijn, 2006, p. 240; N. GALLAGHER, Parallel *Proceedings, Res Judicata and Lis Pendens: Problems and Possible Solutions*, in *Pervasive Problems in International Arbitration*, Alphen aan den Rijn, p. 335; S. SCHAFFSTEIN, *The Doctrine of* Res Judicata *Before International Commercial Arbitral Tribunal*, Oxford, 2016, p. 12 e 82 ff.; Y. SHANY, *The Competing Jurisdiction of International Court and Tribunals*, Oxford, 2003, p. 245 who argued that the doctrine of *res judicata* may form part of customary international law; Z. CRESPI REGHIZZI, *L'intervento come «non parte» nel processo davanti alla Corte Internazionale di Giustizia*, Milano, 2017, p. 11. For a detailed analysis of the preclusive effects of *res judicata* in international law through an examination of case law, see D. MEJÌA-LEMOS, *The Principle of* Res Judicata, *Determination by "Necessary Implication," and the Settlement of Maritime Delimitation Disputes by the International Court of Justic*, in 5 *Journal of Territorial and Maritime Studies*, 2, 2018, p. 46 ff., at 57 ff.; N. RIDI, *Res Judicata and Time*, in *Time and International Litigation*, disponibile all'indirizzo: https://ssrn.com/abstract=4860079; J. KAMMERHOFER, *Beyond the* Res Judicata *Doctrine: The Nomomechanics of ICJ Interpretation Judgments*, in 37 *Leiden Journal of International Law*, 2024, p. 206 ff.

6 See *infra*, in this section, § 4.

7 E. ALLORIO, *L'ordinamento giuridico nel prisma dell'accertamento giudiziale*, Milano, 1957, II, pp. 16-17; ID., *Saggio polemico sulla "giurisdizione" volontaria*, in *Riv. trim. dir. proc. civ.*, 1948, p. 487 ff.

However, in practical terms, this assumption is contradicted by the fact that the doctrine of *res judicata* is used by international arbitral tribunals[8] and the International Court of Justice to resolve the international disputes[9].
This suggests that *res judicata*'s binding force is not intrinsically linked to the institutional framework of the modern nation-state[10].
On the contrary, the doctrine of *res judicata* responds to fundamental needs shared by all organized communities, which may be summarized in two propositions:

a) every organized society pursues, as its ultimate goal, its own perpetuation and the progressive improvement of its institutional functioning. To achieve this, disputes among members must be brought to a definitive conclusion. This requires limiting the possibilities of appeals, in accordance with the maxim «*interest rei publicae ut sit finis litium*[11]»;

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[8] It should not be overlooked that supporters of international commercial arbitration increasingly advocate for the development of an autonomous set of principles governing *res judicata*, distinct from those found in the law of the arbitral seat, thereby elevating it to the level of a non-state legal system in its own right. This perspective is endorsed, among others, by L. G. RADICATI DI BRONZOLO, *I caratteri fondamentali dell'arbitrato commerciale internazionale*, in *Riv. comm. int.*, 4, 2024, p. 919 ff., at 954; L. G. RADICATI DI BRONZOLO-F. PONZANO, *How to assess the res judicata effects of international arbitral awards - Giving concreteness to an autonomous approach*, in *Arbitration International*, 2024, p. 1 ff.; S. SCHAFFSTEIN, *The Doctrine of* Res Judicata *Before International Commercial Arbitral Tribunal*, cit., p. 188 ff.; B. S. GUNES, Res Judicata *in International Arbitration: To What Extent Does an Arbitral Award Prevent the Re-Litigation of Issues?*, in 12 *Transnational Dispute Management*, 6, 2015, p. 11 ff.; G. A. BERGMANN, *Res Judicata in International Arbitration*, in *Cambridge Compendium of International Commercial and Investment Arbitration*, edited by S. KRÖLL, A. K. BJORKLUND and F. FERRARI, Cambridge, 2023, p. 1688 ff.; *contra* M. GRASSI, *Il riconoscimento degli effetti del giudicato nell'arbitrato commerciale internazionale*, Torino, 2022, p. 258 ff.

[9] According to the classical view of SANTI ROMANO, *L'ordinamento giuridico*, reprited in 2018, Macerata, 2018, p. 103 ff., the international legal order is a non-statual legal order.

[10] The classical notion of jurisdiction as an essential attribute of sovereignty – and thus of the modern State – only began to take hold in the eighteenth century, following the decline of the medieval *ordo judiciarius*. This development has been convincingly demonstrated by the penetrating analyses of N. PICARDI, *Le trasformazioni della giustizia nell'età della globalizzazione*, in *Riv. dir. proc.*, 4, 2012, p. 1153 ff.; ID., *La crisi del monopolio statuale della giurisdizione e la proliferazione delle corti,* in *Corti europee e giudici nazionali*, Atti del XXVII convegno nazionale dell'Associazione italiana fra gli studiosi del processo civile, Verona, 25-26 settembre 2009, Bologna, 2011, p. 6 ff.; ID., *La giurisdizione all'alba del terzo millennio*, Milano, 2007, p. 165 ff.; ID., *il giudice secondo l'ideologia medievale*, in *Riv. dir. proc.*, 4, 2007, p. 1475 ff.; ID., *Giurisdizione e sovranità: alle origini della giurisdizione statuale*, in *Riv. trim. dir. proc. civ.*, 2, 2007, p. 685 ff.; *contra* K. M. CLERMONT, *Res Judicata as Requisite for Justice*, cit., p. 1077: «[…] *res judicata* thus determines how a judgment differs from legislation and administration, the doctrine plays a basic role in understanding the governmental system. Meanwhile, res judicata offers protection from inroads in the other direction. It helps to ensure judicial independence by prohibiting the other branches from overturning judgments».

[11] A. D. VESTAL, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, in 66 *Michigan Law Review*, 1968, p. 1723 ff., at 1731-1732; J. NIEVA-FENOLL, *La cosa juzgada*, Barcellona, 2006, p. 119; ID., *La cosa giudicata: la fine di un mito*, in *Riv. trim. dir. proc. civ.*, 4, 2014, p. 1369 ff., at 1372. See also the well-known case *Blair v Curran* (1939) 62 CLR 464, HCA at 531: «[A] judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so

b) Any community that has moved beyond the condition of «*bellum omnium contra omnes*[12]» through the formation of a social contract must suppress private revenge[13] to avoid a return to internal disorder (*stasis*[14]). If each member forgoes self-protection and delegates to a neutral third party the authority to adjudicate disputes – committing to accept the outcome – the community, in turn, must guarantee the finality of such decision. This prevents litigation from continuing indefinitely once a matter has been conclusively resolved, in adherence to the principle «*nemo debet bis vexari pro una et eadem causa*[15]».

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that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and is sue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order. [...] In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negated. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. [...] Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the for- mer decision was erroneous».

12 According to the well-known definition given by T. HOBBES, *De cive*, London, 1642, *Introduction*.

13 In the sense that the social justification of civil justice system lies in the prohibition against self-justice, see R. CAPONI, *Processo civile e conflitto sociale*, in *Diritti fondamentali e conflitto sociale. Un dialogo tra le discipline*, Roma, 2024, p. 127 ff.

14 The meaning of *stásis* cannot be faithfully rendered into any modern language. *Stásis* is a term with a wide semantic range and no exact equivalent in other languages. It is often ambiguously or inadequately translated as "sedition," "riot," or even "revolution" (cf. M. I. FINLEY, *Politics in the Ancient World*, Bari, 1985, p. 157). However, *stásis* derives from a verb not of motion, but of position – hístēmi (ἵστημι) – commonly translated as "to stand," "to set oneself," or "to take a stance." Accordingly, a more accurate translation – closer to the ethical and political understanding of antiquity – would interpret *stásis* as a form of taking sides that divides the citizen body into two opposing camps. It denotes the act of partisanship that escalates into violent conflict, armed confrontation, and even civil war. For an in-depth analysis of the semantics of *stásis*, see P. RADICI COLACE – A. SERGI, *Stasis nel lessico politico greco*, in *Annali della Scuola Normale Superiore di Pisa*, vol. 1, 2000, p. 223 ff.

15 About the social function of the *ne bis in idem* principle and its connection with the legal certainty see A. ROCCO, *Trattato della cosa giudicata come causa di estinzione dell'azione penale*, in *Opere giuridiche*, II, Roma, 1932, p. 239; Z. STEAKLEY-W. U. HOWELL, *Ruminations of Res Judicata*, in 28 *SW L. J.*, 1974, p. 355 ff., at 359.

In non-state legal systems, the finality of *res judicata* represents the necessary counterpart to the abandonment of private revenge[16].
It thus becomes evident that civil adjudication and the doctrine of *res judicata* is not inherently connected to the existence of the State[17].
From a historical perspective[18] it is inaccurate to assert that the finality of *res judicata* emerged solely with the advent of the modern State. Instead, what should be acknowledged is the gradual recognition of the judge as a public officer, who exercises a a sovereign power (*jurisdictio*) conferred directly by the State[19], and thereby he is authorized to act in its name. From this follows the convergence between *iurisdictio* and *gubernaculum*[20].
Archaic legal systems, which were largely no-statual, provide a different insight: with the modern State *res judicata* became the expression of State authority[21], but the core elements of the doctrine – as well as the equally ancient problem of its overcoming – can already be identified in non-state legal orders[22].
It is worth noting that the concept of *res judicata* was known by archaic Roman law, and more broadly by Mediterranean legal culture[23]. It is likely that, even during the period of the *legis actiones*, judgments already produced a preclusive effect: «*res acta est*[24]». Indeed, across the Mediterranean world, one finds clear instances of legal systems acknowledging the binding force of final adjudication[25].

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[16] The transition from the ancient system of private revenge to the civil justice system is clearly highlighted by J. NIEVA-FENOLL, *La cosa juzgada*, cit., p. 26 ff., who historically identifies *res judicata* as the key turning point. According to his analysis, the earliest expression of this doctrine can already be found in the Code of Hammurabi.
[17] A. GIULIANI, *L'«ordo iudiciarius» medioevale (Riflessioni su un modello pure di ordine isonomico)*, in *Riv. dir. proc.*, 2, 1988, p. 583 ff.; see also R. CAPONI, *Giudicato civile e identità nazionale (appunto con contrappunto sul caso Taricco)*, in *Questioni giustizia*, 1, 2017, p. 105 ff., at 107.
[18] P. STEIN, *Legal Institutions. The Development of Dispute Settlement*, London, 1984, p. 3.
[19] N. PICARDI, *voce Processo (diritto moderno)*, in *Enc. dir.*, XXXVI, Milano, 1987, p. 101 ff., at 114.
[20] T. HOBBES, *Leviatanus*, London, 1651, chapter 18.
[21] In the sense that the affirmation of modern State's authority merely expanded the function of *res judicata*, see F. JAMES-G. C. HAZARD-J. LEUBSDORF, *Civil procedure*, Boston-Toronto-London, 1992, p. 580-581.
[22] See *infra*, § 4 ff., and *funditus* chapter II.
[23] About ancient Mediterranean law see F. P. CASAVOLA, *Diritto romano e diritti dell'antico Oriente mediterraneo*, in *Civiltà del Mediterraneo* (luglio-dicembre 1992), ora in *Sententia legum tra mondo antico e moderno (Antiqua 87) II: Metodologia e storia della storiografia*, a cura di F.M. D'IPPOLITO, Napoli, 2004, p. 325 ff.; ID., *Fondamenti del diritto antico*, in *Iura & Legal System*, 2, 2015, p. 275 ff.; E. STOLFI, *La cultura giuridica dell'antica Grecia*, Roma, 2020, p. 17.
[24] See G. PUGLIESE, *Giudicato civile (storia)*, in *Enc. dir.*, XVIII, 1969, p. 730; ID., *Il processo civile romano*, I. *Le legis actiones*, Roma, 1962, p. 396 ff. and also 443 ff..; M. MARRONE, *l'efficacia pregiudiziale della sentenza nel processo civile romani*, in *Ann. sem. Palermo*, 1955, p. 93 ff.; ID., *L'effetto normativo della sentenza*, Palermo, 1960, p. 19 ff..; M. VARVARO, *Lineamenti di procedura civile romana*, cit., p. 19 ff.; K. HANDELY-S. BOWER, *Res Judicata*[4], London, 2009, p. 324: «[T]he Roman rule complaint did not distinguish between the effect of a res judicata as a bar to contradiction, and as a bar to repetition, but was a general prohibition against reopening the res judicata, in any form, and for any purpose».
[25] Demosthenes, for example, refers to an Athenian law that barred the losing party from initiating a new action concerning the same matter once judgment had been rendered (Ὅσων

Although the doctrine of *res judicata* finds its roots in pre-statual legal experiences, the progressive establishment of the State's monopoly over administration of justice and legal norm production marked a pivotal moment in the historical development of the social function of final judgments, as will be further examined.

2. *The Social Function of* Res Judicata *in State Legal Systems*.

The principal outcome of the transition from a pre-legal or non-statual order to a State-based legal order can be summarized as follows: procedural law becomes part of statual law, and the exercise of jurisdiction is configured as one of the essential functions of the State[26].

From this perspective, the purpose of civil process becomes the concrete application of State law in the individual case[27].

This development is clearly reflected in Chiovenda's theoretical framework, according to which *res judicata* consists in the immutability of the existence of the concrete will of the law as affirmed in the final judgment[28]. Although Chiovenda held that *res judicata* has nothing absolute or necessary, since the judicial office merely requires that the judgment be enforceable – not that it must be regarded in the future as a *lex specialis* for the resolved case[29] – this reasoning is nonetheless deeply intertwined with the consolidation of the modern State.

δίκη πρότερον ἐγένετο), and magistrates were not authorized to disregard the prior decision (see DEMOSTHENES, *Against Timocrates*, § 54: «Ὅσων δίκη πρότερον ἐγένετο ἢ εὔθυνα ἢ διαδικασία περί του ἐν δικαστηρίῳ, ἢ ἰδίᾳ ἢ δημοσίᾳ, ἢ τὸ δημόσιον ἀπέδοτο, μὴ εἰσάγειν περὶ τούτων εἰς τὸ δικαστήριον μηδ' ἐπιψηφίζειν τῶν ἀρχόντων μηδένα, μηδὲ κατηγορεῖν ἐώντων ἃ οὐκ ἐῶσιν οἱ νόμοι»). Similarly, a *senatusconsultum* from the second century BCE seems to confirm that the legal arrangement resulting from a final ruling – specifically, the resolution of a protracted arbitration between the cities of Samos and Priene over the territory of Batinetis – could not be modified by any subsequent judge, not even by a magistrate of the Roman Republic (about the *senatusconsultum* see F. CAMIA, *Roma e le poleis, L'intervento di Roma nelle controversie territoriali tra le comunità greche di Grecia e d'Asia Minore nel secondo secolo a.C.: le testimonianze epigrafiche*, Atene, 2009, p. 86; see also I. NICOLINO, *L'arbitrato tra Samo e Priene per il possesso della Batinetide*, in *Axon*, 1, 2019, p. 129 ff.).

[26] L. MANNORI-B. SORDI, *Giustizia e amministrazione*, in *Lo Stato moderno in Europa*, edited by M. FIORAVANTI, Bari, 2002, p. 81 ff.

[27] The same conclusion is reached – albeit from a legal-philosophical perspective – by N. BOBBIO, *Il Positivismo giuridico*, Torino, 1979, p. 250, who said that the purpose of the system of administration of justice, within the framework of legal positivism, is not to produce law, but to *reproduce* it, that is, to explicate – by purely logical and rational means – the content of legal norms that are already given.

[28] G. CHIOVENDA, *Principii di diritto processuale civile*, Napoli, 1965, Reprinted with the preface of V. ANDRIOLI, p. 906 ff.; ID., *Sulla cosa giudicata*, in *Saggi di diritto processuale civile 1900-1930*, II, Roma, 1931, p. 400; for the same perspective see E. BETTI, *Diritto processuale civile italiano*, Milano, 1936, p. 589.

[29] G. CHIOVENDA, *Principii di diritto processuale civile*, cit., p. 907; ID., *Sulla cosa giudicata*, in *Saggi di diritto processuale*, cit., p. 400; E. T. LIEBMAN, *Efficacia e autorità della sentenza*, Milano, 1935, p. 25 ff.; F. CARNELUTTI, *Lezioni di diritto processuale civile*, IV, Padova, 1931, p. 483. More recently, in the same sense, see R. TISCINI, *I provvedimenti decisori senza accertamento*, Torino, 2009, p. 18, who

Indeed, in Chiovenda's definition, one perceives the dual essence of the modern State, unified through the affirmation of sovereignty: *iurisdictio* and *gubernaculum*. The entire judicial proceeding develops within a public-law dimension: emphasis shifts to the judgment as an act of a state organ, which, once final, is «*pro veritate habetur*».
It is precisely in this political climate that theories of the "fiction of truth[30]" flourish. Though dismissed by most scholars as doctrinally unreliable[31], such theories nonetheless capture an important aspect: in a State-centered legal order, for the majority of citizens, a court's decision is *presumed* to correspond to the truth, because they have accepted the authority of the State.
The presumption of truth thus becomes the social justification of *res judicata* within the State-based legal order. It supplements the practical aims previously highlighted, which represent the core and most ancient foundation of the doctrine.
From this perspective, the finality of the assessment contained in a final judgment constitutes the culmination of the authoritative substitution of the judge's application of the law for that of the parties in dispute[32]. In a State-centered legal system, *res judicata* was conceived as an expression of genuine *raison d'État*, while the memory of pre-state legal experiences – where finality was an inherent effect of the social and practical function of dispute resolution – was gradually forgotten[33].
It is not at all unreasonable to assert that *res judicata* became functionally connected to the powers of the modern State only at a certain stage in its evolution. The relationship between *res judicata* and sovereignty is the product of a specific historical contingency – one that continues to cast its shadow over the real nature and operation of the doctrine today[34].

2.1. *Correlation Between Res Judicata and the Modern State in the Thought of Adolf Julius Merkl and Enrico Tullio Liebman.*

This conception of the authority of *res judicata* during the consolidation of the modern State is firmly supported by the work of two leading scholars: the Austrian Adolf Julius Merkl and the Italian Enrico Tullio Liebman.
Merkl, fascinated by the normative and constitutive effect of *res judicata*, tried to develop a unitary theory of State acts as expressions of public and coercive

considers theoretically possible a full-flegded trial which concluded with a judgment not capable of acquiring *res judicata* binding force; *contra* M. GRADI, *Il contrasto teorico tra giudicati*, Bari, 2020, p. 32 ff.
[29] N. BOBBIO, *Il Positivismo giuridico*, cit., p. 251 ff.
[30] G. PUGLIESE, voce *Giudicato civile* (*storia)*, cit., p. 782 ff.
[31] See *infra*, in this section, § 3.
[32] R. CAPONI, *Corti europee e giudicati nazionali*, in *Corti europee e giudici nazionali*, cit., p. 253.
[33] The link between State authority and *res judicata* emerged clearly in the work of A. ROCCO, *Trattato della cosa giudicata*, in *Opere giuridiche*, II, Roma, 1932, p. 205 ff.
[34] We are alluding to the procedural theory of *res judicata*, about which see *infra*, in this section, § 3.

power. In doing so, he embraced the "jurisdictionalization" of administrative acts and, consequently, extended the scope of *res judicata* (*Rechtskraft*) to administrative decisions[35].

Although Merkl's theory was not followed by scholars or legislation, it had a nonetheless significant – albeit suggestive – influence on later scholarship and case law. The failure of his ambitious framework highlighted the sharp distinction between judicial decisions and administrative acts: while both apply the law, only the judge has the authority to render a final determination, which becomes effectively immutable once *res judicata* is formed. By contrast, administrative acts, even when they are no longer challengeble before a Court, remain exposed to higher-level review mechanisms and may still give rise to liability[36].

In early 1930s Milan, Enrico Tullio Liebman began his research about *res judicata*, starting from the theoretical failure of Merkl[37]. Liebman, however, approached the issue from the procedural angle, drawing on the theory of administrative acts to move beyond the notion that *res judicata* is the culminating effect of the judgment. As he wrote, the judgment, as an authoritative act issued by a state organ, *naturally* asserts before all its function of formulating what the concrete command of the law is, or more generally, the will of the State in the concrete case[38].

The authority of *res judicata* adds nothing to the content of the judgment; it merely confers the quality of presumptive immutability.

It has been observed that Liebman's theorization marks both the peak and the beginning of the crisis of *res judicata*. It opened the way to questioning the necessary link between sovereignty and the authority of *res judicata*, thereby weakening the latter[39].

That said, it is precisely during this period that scholars began to debate the nature of *res judicata*, with significant implications for its function. Even if briefly, this debate must be addressed within the scope of the present work.

3. *Substantive and Procedural Theories of Res Judicata Compared.*

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[35] A. MERKL, *Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff*, Lipsia, 1923; ID., *Allgemeines Verwaltungsrecht*, Wien-Berlin, 1927, p. 76 ff.

[36] See E. T. LIEBMAN, *Efficacia e autorità della sentenza*, cit., p. 108: «[M]eno che mai può parlarsi per gli atti amministrativi di una immutabilità degli effetti, cioè della vera autorità della cosa giudicata, perché indubbiamente la autorità amministrativa, in quanto può revocare un atto, può anche emanare un secondo atto che, senza revocare espressamente quello precedente, ne annulli o modifichi gli effetti; infine perché, quando vi è lesione di un diritto soggettivo del privato, atto amministrativo è in ogni modo soggetto al sindacato dell'autorità giudiziaria, la quale, sebbene non possa annullarlo, conosce tuttavia della sua legalità e può condannare la amministrazione a risarcire il danno».

[37] E. T. LIEBMAN, *Efficacia e autorità della sentenza*, cit., p. 33.

[38] E. T. LIEBMAN, *Efficacia e autorità della sentenza*, cit., p. 95.

[39] R. CAPONI, *Corti europee e giudicati nazionali*, cit., p. 256 ff.

Before focusing on the phenomenon, we have defined as the "flexibility of *res judicata*[40]," it is necessary to examine the longstanding issue of its legal nature. It would be methodologically uncorrect to address a specific feature of res *judicata* without first briefly outlining its general structure. Indeed, the various possible solutions to the problem of flexibility depend on the theoretical premises adopted regarding the nature of *res judicata*[41].
The debate over whether *res judicata* has a substantive or procedural nature emerged in Germany in the second half of the nineteenth century. The abundance of theoretical constructions, academic disputes, and conflicting interpretations was largely due to the absence of a codified body of procedural law that might have articulated positive principles, as had occurred in the French experience. It was, in fact, the *Professorenstreit* that drove the rapid and complex development of the doctrine of *res judicata*, the reverberations of which are still felt today[42].
In Savigny's framework – influenced by Roman legal sources, and particularly by the two well-known Digest passages stating that «*res judicata pro veritate accipitur*» and «*sententia facit ius*[43]» – *res judicata* is conceived as a substantive legal institute. Its essence lies in the «fiction of truth» (*Fiktion der Wahrheit*), but not in the sense given by Domat and Pothier, or later by Article 1351 of the Code Napoléon, as an absolute presumption. Rather, for Savigny, the final judgment gives rise to a new substantive legal situation, severing the legal relationship from its original factual and normative source[44].
On the opposite side was Brinz, who offered a new explanation of *res judicata* known as the procedural theory. According to Brinz, *res judicata* could «*facere ius*» only in exceptional cases where it had *erga omnes* effect – such as in *status*-related proceedings – while generally it operated as a duty for the judge, who was bound to observe the prior *res judicata* between the same parties on the same issue (*de eadem re*)[45].
Other scholars refined the premises laid out by Savigny and Brinz, developing the so-called orthodox versions of their respective theories[46].
Bülow, while acknowledging the substantive effects of *materielle Rechtskraft*, argued that the judgment represents an expression of State authority, which contributes to the formation of the legal order. As a result, the judgment may prevail over conflicting legislative provisions according to the chronological criterion for resolving normative antinomies[47].
By contrast, Hellwig argued that the legal effects created by a judgment must be understood as consequences of its procedural irreversibility. Hellwig's position

[40] See *supra*, § 1.
[41] See *infra*, chapter V, section II.
[42] About *Professorenstreit* and its implications see R. C. VAN CAENEGEM, *I sistemi giuridici europei*, Bologna, 2002, p. 102 ff.
[43] See *supra*, § 1.
[44] F. K. SAVIGNY, *Sistema del diritto romano attuale*, VI, Torino, 1885, p. 270 ff.
[45] A. VON BRINZ, *Lehrbruch der Pandekten*[2], I, Erlangen, 1873, p. 348 ff.
[46] See G. PUGLIESE, *voce Giudicato civile (dir. vig.)*, cit., p. 789 ff.
[47] O. BÜLOW, *Gesetz und Richteramt*, Leizpig, 1885, p. 7 ff. and 41 ff.

is reinforced by an apagogic argument: if the finality of a judgment were to constitute an autonomous source of new legal entitlements, then even an unjust civil judgment would necessarily produce such effects. This outcome would contradict not only the judge's intent and the scope of the parties' procedural powers, but also the legal nature of the judgment itself[48].
Thus, the sole effect of *res judicata* would be to impose a procedural constraint on any subsequent judge, preventing them from issuing a ruling inconsistent with the earlier final judgment.
The procedural theory gained predominance soon, supported by the growing trend in Germany, toward the end of the 19th century, to separate (*Trennung*)[49] the study of procedural law and legal doctrine from civil and Roman law[50].
The debate over the nature of *res judicata*'s effects quickly crossed the Rhine. Leaving aside the French experience[51], Italian scholars, at the beginning of the 20th century and under the influence German doctrinal models, left the theory of the «fiction of truth», which openly conflicted with Article 1350, no. 3 of the Pisanelli Code[52].
It was thanked to Chiovenda that the procedural theory, in its orthodox formulation, was initially received in Italy. He defined *res judicata* as the indisputable affirmation, binding on judges in all future proceedings, of a concrete expression of the law, which grants or denies a legally protected interest to one of the parties[53].
Upon closer inspection, however, Chiovenda's position was original: it had some connections with the the substantive approach, because the assessment contained in the final judgment was binding not only for judges, but also for parties in subsequent cases[54]. In this perspective, *res judicata* creates law.

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[48] K. HELLWIG, *Wesen und subjective Begrenzung der Rechtskraft*, Leizpig, 1901, p. 12 ff., at 15.
[49] About *Trennung* see the classic pages of G. CHIOVENDA, *Istituzioni di diritto processuale civile*, I, Roma, 1935, footnote 17, p. 102; F. CARNELUTTI, *Sistema di diritto processuale civile*, I, Padova, 1936, p. 216; R. ORESTANO, *Azione (storia del problema)*, in *Enc. dir.*, IV, Milano, 1959, p. 786 ff., at 788; more recently, see A. PROTO PISANI, *Il codice di procedura civile del 1940 fra pubblico e privato: una continuità nella cultura processualcivilistica rotta con cinquanta anni di ritardo*, in *Quaderni fiorentini*, 1999, I, p. 713 ff.
[50] F. LENT, *Die Gesetzeskonkurrenz im bürgerlichen Recht und Zivilprozess*, II, Leizpig, 1912, p. 168 ff.; ID., *Diritto processuale civile tedesco*, Napoli, 1962, p. 237 ff.; and also J. GOLDSCHMIDT, *Zivilprozessrecht²*, Berlin, 1932, p. 206.
[51] About it see G. PUGLIESE, *voce Giudicato civile (dir. vig.)*, cit., p. 792 ff.
[52] See *contra* the influence of German doctrine, L. MORTARA, *Manuale della procedura civile*, Roma-Torino-Napoli, 1887, p. 299: «[L]a sentenza del giudice di prima istanza, pronunciata dopo che le parti hanno potuto svolgere con ogni ampiezza le loro ragioni ed eccezioni, da un magistrato o da un collegio, di cui è necessità logica, giuridica e politica, presumere la rettitudine e la intellettuale idoneità a decidere secondo giustizia, dev'essere considerata l'espressione della verità».
[53] G. CHIOVENDA, *Principii di diritto processuale civile*, cit., p. 909; E. REDENTI, *Il giudizio civile con pluralità di parti*, Milano, 1960, p. 30 ff.
[54] The ambiguity of Chiovenda's position is clearly identified by E. T. LIEBMAN, *Ancora sulla sentenza e sulla cosa giudicata*, in *Riv. dir. proc. civ.*, 1, 1936, now in *Efficacia e autorità della sentenza (e altri scritti sulla cosa giudicata)*, Milano, 1983, p. 145 ff.

In the first decades of the 20th Century, the substantive theory was not followed[55]. Its first authoritative proponent was Carnelutti, who maintained that the judgment, once it becomes final, produces a complementary command intended to integrate the legal norm into the concrete case[56].
A more orthodox position was later advanced by Allorio, who wrote that *res judicata* is the normative effect of judicial determination: it ends and renders futile any further debate on the justice or injustice of the ruling*; res judicata* binds the parties and any future judge; by virtue of the judgment, what has been decided is law[57].
In more recent times, the substantive theory has continued to find support among scholars such as Vellani[58], Busnelli[59], Attardi[60], Vocino[61], Pugliese[62], and Falzea[63]. At the same time, however, the procedural conception has also gained new supporters[64].
Both approaches have been subject to various criticisms. Nevertheless, the procedural theory seems stronger, as it withstands the most fundamental objection: it has been argued that, insofar as the procedural theory seeks to explain the binding effect of *res judicata* exclusively within the domain of procedural law – disregarding substantive law – it fails to account for the

55 But statutory law provides a strong argument in support of the substantive theory. Article 2953 of the Italian Civil Code establishes that rights originally subject to a shorter limitation period become subject to the ordinary ten-year limitation period when a final judgment of condemnation has been rendered in respect thereof. It seems natural to interpret this change in the type of prescription as confirmation of the constitutive substantive effect of *res judicata*, to the extent that the newly recognized right differs from the one originally asserted, even in terms of its limitation period. It is worth noting that under the Pisanelli Code, despite the absence of a provision equivalent to current Article 2953, legal scholarship had nonetheless concluded that the *actio iudicati* was subject to the thirty-year ordinary prescription period, regardless of the limitation period applicable to the original right (see G. A. PUGLIESE, *Trattato della prescrizione acquisitiva nel diritto civile italiano*, Torino, 1889, p. 448). This rule became *ius receptum* in our case-law, also in absence of a specific norm: Cass., 8 August, 1945, n. 722, in *Foro it.*, 1944-1946, I, p. 199; Trib. Chieti, 25 July 1940, in *Giur. it.*, 1941, I, 2, c. 313).
56 F. CARNELUTTI, *Lezioni di diritto processuale civile*, IV, cit., p. 453 ff.; ID., *Sistema del diritto processuale civile*, I, Padova, 1936, p. 270 ff.; ID., *Diritto e processo*, Napoli, 1958, p. 254 ff.
57 E. ALLORIO, *La cosa giudicata rispetto ai terzi*, 1935, p. 3 ff. and 22 ff.
58 M. VELLANI, *Appunti sulla natura della cosa giudicata*, Milano, 1958, p. 88 ff.
59 F. D. BUSNELLI, *Considerazioni sul significato e sulla natura della cosa giudicata*, in *Riv. trim. dir. proc. civ.*, 4, 1961, p. 1317 ff.
60 A. ATTARDI, *La cosa giudicata*, in *Jus*, 1961, p. 217 ff.; ID., *Diritto processuale civile*³, I, Padova, 1999, p. 441.
61 C. VOCINO, *Considerazioni sul giudicato*, Milano, 1963, p. 110 ff.
62 G. PUGLIESE, voce *Giudicato civile (dir. vig.)*, cit., p. 812 ff.
63 A. FALZEA, voce *Efficacia giuridica*, in *Enc. dir.*, I, XVII, p. 209 ff., now in *Ricerche di teoria generale del diritto e di dogmatica giuridica*, II, *Dogmatica giuridica*, Milano 1997, p. 5 ff.
64 U. ROCCO, *L'autorità della cosa giudicata e i suoi limiti oggettivi*, I, Roma, 1917, p. 367 ff.; E. BETTI, *Diritto processuale civile italiano*, cit., p. 590 ff.; A. SEGNI, *La natura dell'eccezione di cosa giudicata e il procedimento per le controversie individuali di lavoro*, in *Foro it.*, 1937, p. 826 ff.; ID., *La tutela giurisdizionale in generale*, in *Commentario del Codice civile*, a cura di SCIALOJA – BRANCA, VI, Roma-Bologna, 1960, p. 295 ff.

judgment's resistance to retroactive *ius superveniens*[65]. In particular, while the procedural theory can justify the irreversibility of the judgment in a static legal context, it seemingly cannot explain why a final judgment should remain unaffected when a retroactive statute modifies the rule of law originally applied by the court. Under such circumstances, the procedural theory would appear to require that the operative part of the final judgment also be revised in light of the new law. However, this critique overlooks a decisive point: the resistance of *res judicata* to retroactive legislative intervention is constitutionally protected precisely within the procedural framework under consideration. This protection arises once it is recognized that the constitutional status of *res judicata* is grounded in the democratic principle and the separation of powers[66], insofar as these principles guarantee the autonomy and independence of the judiciary. As such, judicial decisions are, as a rule, shielded from retroactive legislative interference, pursuant to Articles 102 and 103 of the Italian Constitution[67].

By contrast, the orthodox substantive theory suffers numerous aporias that undermine its internal coherence and expose it to contradiction. The substative theory cannot justify the retroactive effect generally attributed to *res judicata*, which forces its proponents into complex and often artificial argumentative constructions in an attempt to avoid theoretical deadlock.

For instance, according to Pugliese, the assessment contained in a final judgment would have both constitutive effect with respect to future legal relationships and declaratory effect with respect to those existing before the judgment[68]. However, this position contaminates the substantive theory with elements of the procedural theory, exposing its reliance on a framework it purports to reject. The consequence is the substantive theory's inability to coherently justify the retroactive reach of the judgment's effect.

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[65] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 235.

[66] See A. GIUSSANI, *Intorno al riconoscimento e all'esecuzione degli atti di conciliazione e transazione*, in *Riv. dir. proc.*, 2019, p. 1020 ff., at 1022 footnote 6; ID., *Remedies concerning enforcement of foreign judgments*, in *Studi Urbinati*, 3-4, 2019, p. 267 ff., at 270: «from the point of view of the substantive theory of res judicata, because from that moment on the decision becomes a self-standing source of the law of the case (so that changes the substantive law applied, even if they are retroactive for every other interested party, are irrelevant for the parties bound by res iudicata); from the point of view of procedural theory of res iudicata, because immunity of judicial adjudication from the effects of a new retroactive law is an essential feature of balance of powers in a democratic system […]»; ID., *Intervento*, in *La crisi del giudicato*, Atti del XXX convegno nazionale dell'Associazione italiana fra gli studiosi del processo civile, Cagliari 2-3 ottobre 2015, Bologna, 2017, p. 357; in the same sense, see K. M. CLERMONT, *Res Judicata as Requisite for Justice*, in 68 *Rutgers University Law Review*, 2016, p. 1069 ff., at 1077: «*res judicata*, being the law that specifies what a judgment decides and what it does not decide, shores up separation of powers by setting the boundaries on the output of the judicial branch of government. It is res judicata law that restrains the applicability of judicial decisions to nonparties and the retroactivity of legal change to already adjudicated matters. Because res judicata thus determines how a judgment differs from legislation and administration, the doctrine plays a basic role in understanding the governmental system. Meanwhile, res judicata offers protection from inroads in the other direction. It helps to ensure judicial independence by prohibiting the other branches from overturning judgments».

[67] About the constitutional nature of *res judicata* see, more deeply, in this section, § 6.

[68] G. PUGLIESE, voce *Giudicato civile (dir. vig.)*, cit., p. 831.

In fact, the retroactive effect of *res judicata* compels us to consider the right affirmed by the judgment as having existed since the moment the constitutive fact occurred, and the right denied by the judgment as never having existed. Such a perspective is plainly incompatible with the substantive theory, which presupposes a novative effect triggered by the finality of the judgment, whereby the right affirmed or denied by the court originates only upon the judgment's becoming final (*facit ius*).
Moreover, the substantive theory cannot resolve the paradox of the wrong final judgment. If a wrong judgment – that is, one inconsistent with the applicable substantive law – nonetheless creates law, then it cannot be said that the constitutive fact upon which that right is based existed *ab initio*; the wrong judgment imposes an artificial reconstruction of legal reality. Likewise, if a judgment unjustly denies a right to a claimant who is legally correct, the theory cannot plausibly hold that the denied right never existed: this is precisely what the substantive view must affirm, as it attributes to the judgment the creation or extinction of the right for the first time.
Conversely, if one holds that even an unjust final judgment *facit ius*, based on the premise that substantive law does not necessarily align with the law as judicially determined, the substantive theory again contradicts itself, implicitly adopting procedural elements. Allorio invokes the concurrence of legal situations (concorso di fattispecie) to justify a discontinuity between the pre- and post-judgment legal situation imposed by an unjust ruling[69]. But this attempt does not avoid the logical *impasse* of substantive theory of *res judicata*.
Nor have the so-called monistic theories – those that reject the most significant innovation of modern legal thought, namely, the separation of legal experience into substantive and procedural law[70] – succeeded in overcoming the objections outlined above[71]. Proponents of this approach, refusing to reduce *res judicata* either to procedural or substantive law, start from the premise that law exists only insofar as it is affirmed through adjudication.
In particular, Satta – who is credited with the well-known definition of jurisdiction as the "concretization of the legal order[72]" – regarded the debate over the substantive or procedural nature of *res judicata* as a false problem, because the judge participates in the realization of the legal order through his decisions. Accordingly, once *res judicata* is formed, the legal situations of the parties are fixed and rendered incontrovertible with respect to the past –

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[69] E. ALLORIO, *La cosa giudicata rispetto ai terzi*, cit., p. 23

[70] R. ORESTANO, *Diritti soggettivi e diritti senza soggetto*, in *Jus*, 1960; ID., *Azione (storia del problema)*, cit., p. 786 ff., at 788.

[71] In general terms, such theories postulate the coincidence between entitlements and action, whereby the former exists only within the judicial process and insofar as it is affirmed to exist by the judge, following the perspective already outlined by A. PEKELIS, *Azione (teoria moderna)*, in *Nuovo Dig. it.*, II, Torino, 1937, p. 96 ff.; ID., *Azione (teoria moderna)*, in *Noviss. Dig. it.*, II, Torino, 1958, p. 29 ff.

[72] S. SATTA, *voce Giurisdizione, (nozioni generali)*, in *Enc. dir.*, XIX, Milano, 1970, p. 218; ID., *Commentario al Codice di procedura civile*, II, Milano, 1962, p. 24 ff.; S. SATTA-C. PUNZI, *Diritto processuale civile*, Padova, 1992, p. 10 ff., 132 ff.

meaning their existence or nonexistence can no longer be questioned – and their future legal positions are likewise definitively determined. This theory, which postulates the coincidence of *ius* and *actio*[73], assigns the judgment a reality-creating function. However, this should not be confused with the constitutive effect imagined by proponents of the substantive theory. On the contrary, any subsequent statute, not having been judicially applied, would lack legal force and thus could not affect the binding judgment, which has become part of legal reality through the judicial command.
Satta's theory ultimately asserts the following principles regarding the nature and effects of *res judicata*:

a) *Res judicata* is not an additional source of the legal situation recognized by the judgment, but the only source that concretizes it;

b) Nor can it be regarded as a new procedural obligation imposed on future judges not to challenge or reassess the adjudicated situation;

c) Nor is it exhausted by the preclusion of a new action *de eadem re* or by the application of *ne bis in idem*; rather, depending on the substantive and procedural context in which it is invoked, *res judicata* performs either a negative or a positive function, both aimed at ensuring that the final determination constitutes legal certainty;

d) *Res judicata* cannot be overridden by reference to the "true" legal relationship, since such a relationship could only be identified through a new proceeding, under the extraordinary grounds for retrial recognized by Article 395(1), (2), (3), and (6) of the Code of Civil Procedure.

However, to endorse this theory, one must also accept its initial premise: the denial that abstract norms operate autonomously outside the judicial process, hence its limited reception among later scholars and the courts. Moreover, the assumption that a norm lacks legal force prior to its judicial application rests on an unverified equation: that only what is concrete is real, while what is abstract is unreal. This reasoning overlooks the fact that the uncertainty surrounding a substantive rule prior to judgment is merely subjective. From the State's perspective, such uncertainty does not exist, as the spontaneous compliance with legal norms by individuals produces, within social life, a concrete factual situation (a concrete case) which corresponds to one of the hypothetical scenarios provided by law[74]. This, in turn, activates the normative mechanism and triggers the effect stipulated for that specific case.

[73] Digest 44, 7, 51: «*Nihil aliud est actio quam ius iudicio persequendi quod sibi debeatur*».
[74] E. BETTI, *Diritto processuale civile italiano*, cit., p. 65.

In the end, the monistic theory disregards that law – before being command, and apart from its authoritative enforcement – is first and foremost a form of sociality: it lives through spontaneous compliance with what the legal order recognizes and protects as binding.

3.1. *Continued: Summary of the Two Doctrines.*

Under the influence of dominant legal scholarship, the notion of *res judicata* as a legal presumption also faded from positive law. The new Codes of the 1940s finished the debate on the nature of *res judicata*. On the one hand, Article 2909 of the Civil Code – placed under the title «*On the Protection of Rights*» and titled «*Res Judicata*» – departed significantly from Article 1351 of the previous Code, providing that «the assessment contained in a final judgment is binding for all issues between the parties, their heirs, and successors in title». On the other hand, Article 324 of the Code of Civil Procedure – titled «*Formal Res Judicata*» – clarifies what is meant by a judgment becoming final, linking it to the exhaustion or non-use of the ordinary grounds of appeal within the time limits set out in Article 325[75].
Both the literal wording and the systematic placement of these provisions suggest an overcoming of the rigid dichotomy between the two traditional theories on the nature of *res judicata*[76]. Such dualism appears to imply that both theories retain validity within their respective domains: the procedural theory would describe a form of res judicata operating within the process, while the substantive theory would delineate its effects outside the process in which it was formed.
There are, therefore, no ontological reasons supporting either theory, or can conclusive indications be drawn from positive law. Each reflects a cultural orientation that largely mirrors the underlying source of legitimacy of judicial power. In legal systems where the administration of justice is bureaucratized (as in the Italian system), there is a preference for the judiciary as neutral power with respect to legislative authority. This entails a general reluctance to accept that the judge *facit ius* or that *res judicata* produces a constitutive effect in shaping the legal relationship.
It appears that, at least within the Italian legal order, constitutional provisions, as they implicitly recognize a constitutional status for *res judicata*, tend to favor the procedural theory. Compared to the substantive theory, the procedural approach offers the practical advantage of better protecting the finality of

[75] For an analysis of Article 324 of the Code of Civil Procedure, including relevant case law, reference may be made to A. GIUSSANI-G. DE CESARE, *Art. 324 c.p.c.*, in CARPI e TARUFFO (a cura di), *Commentario breve al Codice di procedura civile*[9], Padova, 2023, p. 1299 ff. The dualism between Articles 2909 of the Civil Code and 324 of the Code of Civil Procedure reflects the idea that *res judicata* serves as the point of connection between procedural and substantive law, an idea long emphasized in traditional scholarship, particularly by E. BETTI, *Il concetto di obbligazione costruito dal punto di vista dell'azione*, Pavia, 1920, *passim*; F. CARNELUTTI, *Diritto e processo nella teoria delle obbligazioni*, in *Studi in onore di G. Chiovenda*, Padova, 1927, p. 221 ff.
[76] L. PICCININNI, *L'eccezione di giudicato nel processo civile*, Napoli, 2016, p. 7.

judgments from retroactive legislative intervention, as such interventions may amount to a direct assault on judicial independence and the separation of powers[77].

In summary, the recognition of the constitutional dimension of *res judicata* has implicitly weakened the arguments in favor of the substantive theory and contributed to the strengthening of the procedural perspective. Today the procedural theory appears to be the most adequate in justifying the protection of final judgments from the effects of retroactive *ius superveniens*. Despite the substantive theory offers a coherent explanation of the separation between the judgment and the applied norm, it ultimately postulates an autonomous normative force of the judgment (thereby exposing it to the risk of being overridden by subsequent statute *de eadem re*). On the other hand, the procedural theory conceives of *res judicata* as a procedural preclusion rather than as the normative will embodied in the judgment. It thus ensures a more effective protection of legal certainty. On this view, the stability of *res judicata* consists not in the creation of new legal rights by the judgment, but in its preclusive effect against any further reconsideration of the same dispute.

This approach is solidly supported by constitutional case law[78], which has repeatedly affirmed that the principle of separation of powers prevents the legislature from retroactively interfering with final judgments. As a result, civil *res judicata* does not merely crystallize the judicial command expressed in the ruling, but represents a barrier to subsequent legislative intervention, thereby safeguarding the stability of individual legal situations.

Before addressing the implications of the constitutionalization of *res judicata*, it is worth examining those legal systems that either do not recognize the institution or acknowledge it only in a significantly attenuated form.

Comparative analysis reveals a strong indication that the flexibility of *res judicata* is a universal issue, particularly prominent in legal systems that do not attribute constitutional importance to it and instead prioritize the pursuit of Truth.

4. *Legal Systems That Reject the Finality of* Res Judicata*: The Israeli Example*.

As previously noted,[79], it is widely recognized that *res judicata* is neither absolute nor necessary[80]. In most legal systems, the limitation on the re-litigation of decided matters has been introduced for reasons of procedural convenience: «*ut*

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[77] The practical importance of the procedural theory of *res judicata* will be clarified later: see *infra*, in this section, §§ 6 and 6.1; see also chapter V.

[78] See *infra*, § 6.1.

[79] See *supra*, § 1.

[80] G. CHIOVENDA, *Principii di diritto processuale civile*, cit., p. 906 ff.; ID, *Sulla cosa giudicata*, in *Saggi di diritto processuale civile 1900-1930*, II, Roma, 1931, p. 399 ff.; see also A. BARAK, *The Judge in a Democracy*, Princeton University Press, 2006, p. 111: «a judge must recognize his mistakes. Like all mortals, judges err. A judge must admit this. According to the well-known statement of Justice Jackson, "We are not final because we are infallible, but we are infallible only because we are final" »; but *contra*, see R. C. CASAD-K. M. CLERMONT, *Res Judicata: A Handbook on Its Theory, Doctrine, and Practice*, Durham, North Carolina, 2001, p. 5.

finis litium sit». Indeed, ancient legal systems allowed for the nullification of judgments issued in violation of the procedural norms governing their formation[81]. Focusing on the Western legal tradition[82], the Roman formulary procedure – which was unfamiliar with the concept of appellate review[83] – permitted the *actio nullitatis sententiae* to challenge a decision issued by a *iudex* in breach of procedural requirements[84]. Injustice or substantive legal error, however, was considered irrelevant[85].

The introduction of appellate remedies did not negate the independent legal relevance of judicial invalidity. Medieval jurists developed the notion of an alternative remedy to appeal, aimed specifically at asserting the invalidity of the judgment[86]. The so-called *querela nullitatis*[87] allowed a party to invoke the nullity either autonomously or in with the appeal, using the formula: «*dico sententia nulla et si qua est, appello*[88]».

It was in this context that Ulpian's maxim «*res iudicata pro veritate habetur*» was the starting point of the theory of "fiction of truth", from which Tancred, a canonist and logician, derived the idea – indeed still influential today – that *res judicata* replaces "true truth" in favor of a juridical truth[89].

With the end of the age of *ius commune* followed the rise of the modern State. From the outset of this work, we have tried to highlight the risks of linking the finality of *res judicata* to State authority and, by extension, to the role of the judge. Doing so there is the risk of obscuring the origin and function of the institution under examination. As has been demonstrated, only the enforceability of the judgment can be properly attributed to the authority of the State[90], since the State monopolizes the legitimate use of force[91].

[81] F. P. LUISO, *La cedevolezza del giudicato*, in *Riv. dir. proc.*, 1, 2016, p. 17 ff., at 21.

[82] For an overview of the Eastern legal system that reject the finalty of *res judicata*, see K. M. CLERMONT, *Res Judicata as Requisite for Justice*, cit., p. 1102 ff.

[83] P. CALAMANDREI, *Vizi della sentenza e mezzi di gravame*, in *Opere giuridiche*, VIII, Napoli, 1979, p. 249 ff.

[84] P. CALAMANDREI, *La Cassazione civile*, in *Opere giuridiche*, VI, Napoli, 1976, p. 24 ff., at 37; G. PUGLIESE, voce *Giudicato civile (storia)*, cit., p. 765.

[85] F. K. SAVIGNY, *Sistema del diritto romano attuale*, cit., p. 317.

[86] About this topic see *amplius*, *infra* chapter II, section II.

[87] P. CALAMANDREI, *ult. op. cit.*, 134 ff., at 137

[88] G. PUGLIESE, *ult. op. cit.*, p. 768.

[89] G. CHIOVENDA, *Sulla cosa giudicata*, cit., p. 403.

[90] E. T. LIEBMAN, *Efficacia e autorità della sentenza*, Milano, cit., *passim*; see also A. GIUSSANI, *Efficienza della giustizia civile e culture della riforma*, Milano, 2017, p. 299 ff.; ID., *Efficienza giusta*, Torino, 2022, p. 135 ff.; B. CAPPONI, *Orientamenti recenti sull'art. 282 c.p.c.*, in *Riv. trim. dir. proc. civ.*, 1, 2013, p. 265 ff.; C. CAVALLINI, *L'efficacia della sentenza impugnata*, in *Riv. dir. proc.*, 1, 2015, p. 339 ff.; S. CIRILLO, *«Efficacia» e «autorità» della sentenza nel prisma della riforma del processo*, in *Riv. dir. proc.*, 2, 2024, p. 557 ff.; U. CORREA, *Verso la provvisoria "efficacia" della sentenza non passata in giudicato*, in *Il processo esecutivo*, *Liber amicorum* Romano Vaccarella, a cura di B. CAPPONI, B. SASSANI, A. STORTO, R. TISCINI, Torino, 2014, p. 1429 ff.; A. TRINCHI, *Sugli effetti delle decisioni non ancora passate in giudicato*, in *Riv. dir. proc.*, 2, 2014, p. 702 ff.

[91] E. BETTI, *Diritto processuale civile italiano*, cit., p. 16.

Nothing compels the conclusion that the findings of a final judgment are immutable simply because they express the will of the judge[92]. It may be said that the judgment reflects the will of the State, but it does not follow that *res judicata* is the essential feature of the judgment (or of judicial system itself)[93]
Rather, it is more accurate to assert that the authority of *res judicata* may be extended to assessment determined in the judgment, but this must be understood as an additional effect, not an inherent one[94].
The idea that *res judicata* is not inherently necessary for the adminitration of civil justice implies that the natural demand for justice – which would favor the possibility of always reopening a decision – could be overridden by the practical need to bring litigation to an end and to ensure legal certainty[95].
Choices of policy – imposed by law – determine the greater or lesser irrelevance of the injustice of the final decision and, conversely, the limited significance attributed to its invalidity[96].
This does not preclude a procedural system oriented toward the pursuit of truth from assigning absolute weight to the injustice of the judgment, to the extent of allowing the *revisio in perpetuum* of decisions affected by *error iuris*, while at the same time excluding the possibility of challenging judgments affected by *errores in procedendo* if the legal determination reached is substantively correct[97].
Israeli law, applied by rabbinical courts, follows this line[98]. This approach derives from a balancing of conflicting values, resolved in favor of the principle that the

[92] This idea is still substained today by A. TURMO, *Res Judicata in European Union Law. A Multi-Faceted Principle in a Multilevel Judicial System*, Granada, 2022, p. 44.
[93] See R. CAPONI, *Il principio di proporzionalità nella giustizia civile: prime note sistematiche*, in *Riv. trim. dir. proc. civ.*, 2, 2011, p. 389 ff., at 405.
[94] E. T. LIEBMAN, *op. cit.*, p. 28.
[95] See about this theme the classical pages of M. R. DAMASKA, *The Faces of Justice and State Autority*, Yale University Press, 1986, p. 146: «[T]o an outside observer, a system of justice may seem seriously flawed – perhaps even perverse – where fairness of procedure can justify a substantively erroneous decision and where faulty procedures can undermine substantively correct decisions: the cart appears to be put before the horse. But in a justice administration that values the integrity of the contest above the attainment of accurate outcomes on the merits, this result seems perfectly normal and acceptable»; see also G. CHIOVENDA, *Sulla cosa giudicata*, cit., p. 400.
[96] F. P. LUISO, *La cedevolezza del giudicato*, in *Riv. dir. proc.*, 1, 2016, p. 17 ff., at 19.
[97] This is, for example, the perspective of the Tibetan legal order before the reform of 1959, in which final judgments were binding only if they were accepted by the parties. About the Tibetan administrastion of civil justice see R. REDWOOD FRENCH, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet*, Cornell University Press, 1995, p. 344-345: «cases could be reopened right after they were decided, even when the parties had both agreed to the judge or conciliator's decision. Tibetans considered this one of the best aspects of their system: they were free to disagree until they felt that the dispute had been correctly decided. Judicial decisions had no finality in the way we understand finality; calming the mind and reaching real harmony were necessary before a dispute could actually be over. In Buddhism, this continuing freedom to disagree is part of the infinite potential of the mind to change and choose».
[98] According to Y. SINAI, *Reconsidering Res Judicata: a Comparative Perspective*, in 21 *Duke Journal of Comparative & International Law*, 2011, p. 353 ff., at 396, «an incorrect judgment is absolutely null and void, and it may be said that the judge has not finished his work until he gives true judgment».

civil trial must serve as an instrument for discovering the truth. Consequently, an unjust judgment must be overcome.
The complex relationship between law, religion, and the State in the Israeli legal system exhibits entirely unique characteristics[99]. Indeed, rabbinic tradition[100], observed by the majority of Jews in Israel, does not recognize any opposition between law and religion. Religion itself possesses a "legal" dimension, as it is expressed through binding normative rules that govern the conduct of the faithful, or of community members as such[101]. This gives to Israel a dual character: a "*Jewish and democratic state*[102]." Talmudic precepts influence not only substantive law but also procedural rules, particularly the function of the trial: the assessment of truth. From this perspective, it is unsurprising that the principle of *res judicata* has no place in rabbinic law[103].
Generally speaking, Jewish law allows for the reopening of a case concluded by an erroneous final judgment[104]. Despite this element of uncertainty, the judgment remains binding between the parties and may be enforced unless and until it is reformed by the Court of appeal[105].
Moreover, despite Jewish law does not recognize the finality of *res judicata*[106], it prohibits the same claim before different judges according to a mechanism similiar to the doctrine of *lis alibi pendens* as understood in civil law systems.

[99] I. ENGLARD, *Law and Religion in Israel*, in *Am. J. Comp. Law*, 1987, p. 185 ff., wrothe that «among the Western style democracies, there is no other country which experiences more intensely the problem of religion's place».
[100] About the rabbinic courts see D. HACKER, *Religious Tribunals in Democratic States: Lessons from the Israeli Rabbinical Courts*, in 152 *Tel Aviv University Law Faculty Papers*, 2012, p. 59 ff.; M. EDELMAN, *The Rabbinical Court in the Evolving Political Culture of Israel*, in *Middle Eastern Studies*, 3, 1980, p. 145 ff.
[101] About the Israeli legal order see S. L. STONE, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, in 106 *Harv. Law Rev.*, 1993, p. 813 ff; see also S. L. STONE, *In Pursuit of the Counter-Text*, cit., p. 893: «in the final analysis, Jewish law is not only a legal system; it is the life work of a religious community. The Constitution, on the other hand, is a political document. It may even be a nomos […]. But it will not be Torah»; K. CARMIT YEFET, *Israeli Family Law as Civil Religious Hybrid: a Cautionary Tale of Fatal Attraction,* in 4 *Univ. of Illinois Law Rev.*, 2016, p. 1505 ff., at 1509, who observed that «[R]eligion's formal monopoly on these areas of family law breeds an irreconcilable value conflict between the patriarchal Muslim, Christian, and Jewish religious systems, on the one hand, and the liberal, egalitarian, and progressive civil system, on the other. In a well-meaning attempt to navigate between these two value systems, civil law, operating in the shadow of religious law, has developed an underground set of civil alternatives to religiously defined marriage and divorce. The result of this secular subterfuge, we shall see, is a perturbed hybrid, a civil-religious entanglement rife with costs and complications largely borne by the most vulnerable members of society: women and children».
[102] R. HIRSCHL, *The "Constitutional Revolution" and the Emergence of the New Economic Order in Israel*, in *Israel Studies*, 1997, 1, p. 136.
[103] K. M. CLERMONT, *Res Judicata as Requisite for Justice*, cit., p. 1100.
[104] Y. SINAI, *Reconsidering Res Judicata*, cit., p. 353 ff., at 389
[105] Y. SINAI, *ult. op. cit.*, p. 387.
[106] This appears to be one of the contributing factors that led the Bologna Court of Appeal, in its decision of 1 June 2005, in *Rivista di diritto internazionale privato e processuale*, 2007, pp. 142 ff., to deny, pursuant to Article 64(e) of Law No. 218 of 1995, recognition of a judgment rendered by the Rabbinical Court of Jerusalem. The foreign judgment in question affirmed the validity of a

It thus appears that rabbinic law does incorporate some principles typically associated with *res judicata*, such as the prohibition of *bis in idem*. Indeed, under the traditional view[107], the rationale for *lis alibi pendens* is to avoid conflicting judgments, which – if not raised by the parties, noticed *ex officio* by the judge, or challenged through ordinary revocation under Article 395(5) of the Italian Code of Civil Procedure[108] – is resolved in favor of the later decision.
In Jewish law, however, a rule whereby such conflict is resolved in favor of the last in time decision is unacceptable.
The function of the trial is the pursuit of truth. Therefore, any practical conflict between judgments – or more precisely, between decisions – can only be resolved in favor of the one that is legally correct, following a logic not unlike that found in the French legal system[109].
It follows that, in Jewish law, the purpose of the *lis alibi pendens* and *res judicata* doctrine is not to prevent practical conflicts between decisions, but rather to avoid unnecessary waste of judicial resources: it is an efficiency-oriented perspective that is also widely accepted in contemporary legal thought[110].

4.1. *The Finality Rule in the Israeli Legal System. Tension Between Substantive Justice and Legal Certainty.*

Although Israeli legal order does not recognize *res judicata* in the same terms as secular Western legal systems do, the notion that civil procedure must follow a

Jewish religious marriage celebrated in Italy between two Israeli citizens. Although in that legal system the irreversibility of a judgment no longer subject to ordinary appeal is not recognized, this does not preclude the existence of a conflict with the domestic judgment rejecting the opposition to the denial of transcription of the foreign decision. In such cases, the conflict must be resolved by applying the conflict-of-law rules set out in Italian private international law.

[107] The connection between *exceptio litis pendentis* and *exceptio rei iudicatae* was underlined by G. CHIOVENDA, *Principii*, cit., p. 615; see also A. GIUSSANI-G. DE CESARE, *Art. 39 c.p.c.*, in *Commentario breve al Codice di procedura civile*[9], cit., p. 179 ff.

[108] The prevalence of the second *res judicata*, according to the *last in time rule*, was substained, in the traditional doctrine, by G. CHIOVENDA, *Principii*, cit., p. 920; v. anche E. BETTI, *Diritto processuale civile italiano*, cit., p. 599; ID., *Trattato dei limiti soggettivi della cosa giudicata in diritto romano*, reprinted, Roma, 2021, p. 35. This rule is a consequence of the principle of party self-responsibility. The party with an interest in invoking the preclusive effect of the first *res judicata* bears the burden of raising it in the second proceeding or of challenging the incompatible judgment by asserting its nullity under Articles 161 and 395 of the Code of Civil Procedure. The possibility to prevent a practical conflict between judgments – whether by means of a *res judicata* objection or through the remedy of ordinary revocation – allows for the recognition of the second judgment's prevalence. This is because the party who fails to activate all remedies made available by the legal system implicitly accepts the second judgment, which will then «*be binding for all purposes*» (fa stato ad ogni effetto, according to Article 2909 of the Italian Civil Code).

[109] Article 618 of the *Code de procédure civile* provides for a special appeal to the Cour de cassation designed to address cases of *contrariété de jugements* (inconsistent or conflicting judgments). This particular mechanism for harmonizing conflicting *res judicata* concerns both judgments in conflict, and the Cour de cassation has the authority to give precedence to either the first or the second judgment, or to annul both. For further analysis, see M. GRADI, *Il contrasto teorico tra giudicati*, Bari, 2020, p. 188; L. PICCININNI, *L'eccezione di giudicato nel processo civile*, cit., p. 364 ff.

[110] See, for example, C. CONSOLO, *Spiegazioni di diritto processuale civile*, I, Torino, 2019, p. 371.

balance between justice and efficiency is well-known by Jewish law. In fact, the principle of retractability of an erroneous judgment – derived from the Bible – has long been the subject of intense debate.
The *Mishnah* knows two divergent views on the matter, reflecting the underlying tension between justice and procedural efficiency. According to the first view, set at the beginning of the *Mishnah*, the losing party may introduce new evidence at any time in order to obtain a modification of the judgment. The second view, while accepting the possibility of *revisio in perpetuum*, introduces a limiting factor: the judge may set a peremptory deadline – no longer than thirty days – for the submission of new evidence, after which the application for review must be dismissed.
Modern Jewish law, going beyond the limits imposed by the *Mishnah*, affirms that the right to request revision of a judgment is not subject to any limitation period. Scholars have emphasized the serious problems raised by this rule, as it deprives the winning party of any legitimate expectation on the finality of the judgment[111].
According to a minority view codified in the Jerusalem *Talmud*[112], revision would be precluded once the judgment has been enforced. In other words, the enforcement of the judgment creates a legitimate expectation on the result of the process for the winning party. This view, however, is a marginal position, generally rejected by commentators, who argue that imposing a temporal limit on the remedy of revision would be incompatible with the function of the process[113].
Accordingly, the prevailing opinion allows for the revision of judgments affected by *error iuris*, whether based on new legal arguments or by reiterating arguments previously raised but not accepted[114].
Moreover, a significant limitation on the parties' power to request the reopening of a case arises from the hierarchical structure of the rabbinical court system. The establishment in 1921 of the Rabbinical Court of Appeals has deeply affected the right to seek revision, insofar as the trial court may reconsider its own decision only if that decision has not been appealed. Once the appellate court gives its ruling, the power of the lower court is extinguished, such that «the trial court is not authorized to reconsider the case because a rabbinical court

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111 Y. SINAI, *ult. op. cit.*, p. 390.
112 See Sanhedrin 3: 12.
113 This perspective is not dissimilar to that expressed in the final paragraph of Article 615 of the Italian Code of Civil Procedure, insofar as it establishes the principle of stability in the outcomes of enforcement proceedings (but see A. BARLETTA, *La stabilità della vendita forzata*, Napoli, 2002, p. 283 ff., who argues that the stability of the effects of a forced sale derives from substantive law provisions, specifically, by analogy with Article No. 2920 of the Civil Code). For the view that the result of enforcement proceedings produces a preclusive effect *pro iudicato*, see S. SATTA, *Commentario al Codice di procedura civile*, cit., p. 216 ff.; C. MANDRIOLI, *L'azione esecutiva. Contributo alla teoria unitaria dell'azione e del processo*, Milano 1955, p. 546 ff.; E. REDENTI, *Diritto processuale civile*, Milano 1957, p. 198-99.
114 Y. SINAI, *op. cit.*, p. 392.

functioning within a legal system that includes an appellate tribunal must (by law) respect the decision of the appellate court[115]».

The principle whereby a judgment remains perpetually subject to revision is justified by the political scope of the civil justice in Israeli legal order: the pursuit of truth. The fusion of law and religion imposes an additional duty upon the judge, who is bound to deliver a correct decision not only in light of professional liability rules but also as a matter of religious obligation. Hence, the judge is accountable not only to the parties but also before God[116].

Unlike secular legal systems which identify the purpose of proceedings in the resolution of disputes or in the assessment of the will of the legislator in the concrete case resolved by the judge[117], Jewish law, through the "juridification" of religious norms, embodies the conviction that without justice – *i.e*: without the correct application of substantive law – no genuine resolution can be achieved[118].

A legal system such as the Jewish one, which allows for the possibility of perpetual reopening of final judgments affected by *error iuris*, achieves a reduction in adjudication costs at the expense of significantly increased administrative costs. Such a model would be structurally unsustainable in legal systems that guarantee constitutional access to justice or that impose no barriers to the invocation of judicial protection.

Thus, the solution adopted in Jewish law does not appear to be generalizable, as it may lead to inefficiencies, although those who have extensively studied this issue argue otherwise[119].

Indeed, the *non-finality rule* seems to be an efficient solution only within the rabbinical court system, since their exclusive jurisdiction is limited to matters such as family law – typically characterized by a weak preclusive effect of *res judicata*. Moreover, with respect to areas outside family law, the jurisdiction of rabbinical courts is subject to the prior consent of the parties[120]; this contributes to sustaining the illusion of systemic efficiency, since the generally low number of cases makes it possible to absorb the inflationary effects on litigation caused by the perpetual possibility of reopening final judgments (*revisio sine die*) and to

115 Y. SINAI, *op. cit.*, p. 393.

116 Y. SINAI, *The Religious Perspective of the Judge's Role in Talmudic Law*, in *Jew. Law and Rel.*, 2009, p. 357.

117 The function of dispute resolution is prevalent in the U.S. legal system, even at the cost of the correctness of the final decision. On this topic see A. GIUSSANI, *Studi sulle "class actions"*, Padova, 1996, p. 129 ff.; M. TARUFFO, in *Il processo civile "adversary" nell'esperienza americana*, Padova 1979, p. 44 ff. By contrast, in Chiovenda's system, judicial activity, from a functional standpoint, represents the implementation of substantive law. Thus, the ascertainment of the concrete will of the law resolves the crisi of cooperation between the parties. See G. CHIOVENDA, *Istituzioni di diritto processuale civile*, cit., p. 7 ff. According to Y. SINAI, *Res Judicata*, cit, p. 397 «[T]he main objective of the court in an adversarial system is not to ascertain the truth but to resolve disputes objectively and to choose between the contentions of law and fact laid before it by the litigants».

118 Y. SINAI, *Res Judicata*, cit., p. 396.

119 Y. SINAI, *Reconsidering Res Judicata*, cit., p. 387 ff.

120 Y. SINAI, *Reconsidering Res Judicata*, cit., p. 389.

offset them with the positive outcomes stemming from the correct implementation of substantive law.

5. *Concluding Considerations on the Function of* Res Judicata *in Non-Secular Legal Systems*.

The analysis of legal systems that do not recognize the binding force of *res judicata*, such as Jewish law, highlights the divergent purposes underlying the institution in different legal frameworks. It is essential to underscore that the decision to prioritize substantive truth over legal certainty depends on the internal structure and overarching goals of each legal system. While in secular systems the stability of judicial decisions serves the values of legal certainty and the efficiency of legal transactions, in religious systems the primary objective is the ascertainment of material truth, deemed superior to procedural finality. This distinction implies that the experience of non-secular systems cannot be directly transposed into systems – such as the Italian one – that ascribe constitutional value to the authority of *res judicata*. In particular, the Italian legal order, by framing *res judicata* as a safeguard of legal stability, cannot fully embrace models that negate the finality rule of *res judicata*.
After this short analysis of *res judicata*'s treatment among legal orders, what deserves to be emphasized here is the worldwide relevance of the issues arising from the flexibility of *res judicata*. Indeed, while *res judicata* raises the question of what is to be considered legally merged in subsequent proceedings between the same parties, the interaction between different legal systems raises the further issue of what is deemed *pro veritate* in one system but not in another. This issue becomes particularly acute in the relationship between domestic *res judicata* and European Union law, as will be examined further[121].

6. *The Constitutional Nature of* Res Judicata.

As a traditional safeguard of the stability of judicial application of statutory law, *res judicata* must face the challenge implied by the multiplication of normative floors: above ordinary legislation stands, first and foremost, the Constitution[122]. In the Italian legal system, this confrontation was left unresolved by the Constituent Assembly, as the Constitution contains no explicit reference to civil *res judicata*. However, it would be unfounded to deny its constitutional relevance solely on the basis of the Assembly's rejection of Article 104 of the draft Constitution[123] – prepared by the Commission of Seventy-Five – which stated: «[J]udgments no longer subject to any form of appeal may not be annulled or

[121] See *infra*, chapters IV and V.
[122] R. CAPONI, *Giudicato civile e diritto costituzionale: incontri e scontri*, in *Giur. it.*, 12, 2009, p. 2827 ff.
[123] About Article 104 of the draft see G. MATTUCCI, *Giudicato civile e declaratoria d'incostituzionalità*, *in I principi generali del processo comune e i loro adattamenti alle esperienze della giustizia costituzionale*, Torino, 2008, p. 385 ff.; see also G. SERGES, *Il "valore" del giudicato nell'ordinamento costituzionale*, in *Giur. it.*, 12, 2009, p. 2819 ff., at 2820.

modified, not even by legislative act, except in cases of repealing criminal law, amnesty, pardon, or clemency».
This argument proves too much. Indeed, the finality of civil *res judicata* – and thus its protection from retroactive statutes – may be established through multiple interpretative pathways, even in the absence of an express constitutional provision.
By contrast, it has been argued that the stability of judicial decisions would merely derive from the principle of procedural economy, which, however, lacks an explicit constitutional foundation. Consequently, insofar as *res judicata* would merely express such a principle, it would be impossible to infer its constitutional protection[124].
Nonetheless, on the one hand, the principle of procedural economy may well be rooted in the corollary of the reasonable length of proceedings, enshrined in Article 111, paragraph 2, of the Italian Constitution[125], an interpretation that has been consistently endorsed by case law in support of constitutionally oriented interpretation that depart from a purely textual approach[126].
On the other hand, the rationale underlying the finality rule associated with *res judicata* – namely, the avoidance of procedural resource waste through repeated litigation over the same matter – coexists with, and arguably gives way to, a more fundamental justification: the constitutional principle of legal certainty[127].
Accordingly, it must be concluded that civil *res judicata* enjoys implicit constitutional protection, inferable from constitutional principles[128].

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124 For this approach see V. DENTI, *La magistratura*, *sub art. 111*, in *Comm. cost.*, a cura di G. BRANCA, Bologna-Roma, 1987, p. 22; ID., *La giurisdizione volontaria rivisitata*, in *Riv. trim. dir. e proc. civ.*, 1, 1987, p. 325 ff.; V. TAVORMINA, *Dedotto, deducibile e Costituzione*, in *Riv. Dir. Proc.*, 1, 1992, p. 317 ff.; I. ANDOLINA-G. VIGNERA, *I fondamenti costituzionali della giustizia civile*, Torino, 1997, p. 10; S. MENCHINI, *Il giudicato civile*, cit., p. 8; L. QUERZOLA, *La tutela anticipatoria fra procedimento cautelare e giudizio di merito*, Bologna, 2006, p. 204; R. TISCINI, *Il ricorso straordinario in Cassazione*, Torino, 2005, p. 106 ff., at 115; EAD, *I provvedimenti decisori senza accertamento*, Torino, 2009, p. 15; see also G. TRISORIO LIUZZI, *Centralità del giudicato al tramonto?* in *La crisi del giudicato*, cit., p. 103.
125 About the relationship between judicial economy and reasonable lenght of the proceeding see L. P. COMOGLIO, *Le garanzie fondamentali del giusto processo*, in *NGCC*, 1, 2001, p. 23 ff., at 29; ID., *Il principio di economia processuale*, I, Padova, 1980, II, Padova, 1982; *passim*; G. OLIVIERI, *La «ragionevole durata» del processo di cognizione (qualche considerazione sull'art. 111, 2° comma, Cost.*, in *Foro it.*, 2000, V, c. 251; G. SERGES, *Il "valore" del giudicato nell'ordinamento costituzionale*, cit., p. 2821.
126 About the impact of reasonable lenght of the proceeding on the interpretation of procedural norms see C. CONSOLO, *Travagli «costituzionalmente orientati» delle sezioni unite sull'art. 37 c.p.c., ordine delle questioni, giudicato di rito implicito, ricorso incidentale condizionato (su questioni di rito o, diversamente operante, su questioni di merito)*, in *Riv. dir. proc.*, 4, 2009, p. 1141 ff., at 1149; A. GIUSSANI, *Voce Sospensione*, in *Dig. disc. priv.*, cit., p. 605 ff.
127 R. CAPONI, *L'efficacia del giudicato civile nel tempo*, Milano, 1991, p. 370.
128 Indeed, even if not explicitly stated, a principle may acquire constitutional importance through systematic interpretation, or by enhancing the general directives that can be inferred from the whole Constitution. For the specific features of constitutional interpretation, and in particular the necessity of resorting to systematic interpretation in order to integrate the principles derivable from the Constitution, see the reflections of F. MODUGNO, *Scritti sull'interpretazione costituzionale*, Napoli, 2008, p. 199 ff.

The oldest analyses identified the constitutional foundation of *res judicata* in the guarantee of the right of action and of the extraordinary appeal to the Supreme Court, given by Article 111 of the Italian Constitution[129]. According to this thesis, «Article 111(2) ensures the minimum and indispensable requirement – formal *res judicata* – to safeguard the highest value of the judicial function: the authority of *res judicata* of decisions that adjudicate rights[130]».
However, this reasoning and other arguments formulated to ground a constitutionally mandated prohibition on legislative retroactive interference with final judgments[131], must yield to the broader principle that the legislator, as a rule, cannot affect legal situations in the past that have already been adjudicated by a final judgment. This is due, on the one hand, to the legitimate expectation placed by the prevailing party on the outcome of the dispute, and on the other[132], to the severance of the adjudicated legal situation from its original normative source, which has been subsequently modified by *ius superveniens*.
On the other hand, the legislature may not dispose of legal effects already produced in the past, as is clearly expressed in Article 11 of the Preliminary Provisions to the Italian Civil Code[133].
The Italian Constitution explicitly sets forth the principle of non-retroactivity solely in the context of criminal law, pursuant to Article 25(2) of the Constitution. However, the Constitutional Court imposes a number of limits on the ordinary legislator's power to regulate merged legal situations, not through explicit prohibitions, but rather by reference to general constitutional principles, such as reasonableness, equality, and legitimate expectation[134].

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129 M. GRADI, *Il contrasto teorico fra giudicati*, cit., p. 31.
130 That's the idea of A. CERINO CANOVA, *La garanzia costituzionale del giudicato civile*, in *Riv. dir. proc.*, 1, 1977, p. 395 ff., at 427; ID., *Per la chiarezza delle idee in tema di procedimento camerale e di giurisdizione volontaria*, in *Riv. dir. civ.*, 1987, p. 431 ff.; L. MONTESANO, *Sull'efficacia, sulla revoca e sui sindacati contenziosi dei provvedimenti non contenziosi dei giudici civili,* in *Riv. dir. civ.*, 2, 1986, p. 597; ID., *«Dovuto processo» su diritti incisi da provvedimenti camerali e sommari*, in *Riv. dir. proc.*, 3, 1989, p. 920; L. LANFRANCHI, *Profili sistematici dei provvedimenti decisori sommari*, in *Riv. trim. dir. proc. civ.*, 1, 1987, p. 88; ID., *Diritti soggettivi e garanzia della cognizione ordinaria e del giudicato*, in *Garanzie costituzionali dei diritti fondamentali*, Roma, 1997, reprinted in 2006, p. 384 ff.; G. SERGES, *Il "valore" del giudicato nell'ordinamento costituzionale*, cit., p. 2822; see also E. FAZZALARI, *Il cammino delle sentenza e della «cosa giudicata»*, in *Riv. dir. proc.*, 1, 1988, p. 589 ff.; A. CHIZZINI, *La revoca dei provvedimenti di volontaria giurisdizione*, Padova, 1994, p. 213; A. CARRATTA, *La Corte costituzionale e il ricorso per cassazione quale «nucleo essenziale» del «giusto processo regolato dalla legge»: un monito per il legislatore ordinario*, in *Giur. it.* 2010, p. 628 ff.; R. DONZELLI, *Sul «giusto processo» civile «regolato dalla legge»*, in *Riv. dir. proc.*, 2015, p. 943 ff.; see also, in the case law, Constitutional Court, 3 July 1996, n. 224.
131 R. TARCHI, *Le leggi di sanatoria nella teoria del diritto intertemporale*, Milano, 1990, p. 429 ff.; see also R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 369 ff.
132 G. GROTTANELLI DE' SANTI, *Profili costituzionali della irretroattività delle leggi*, Milano, 1970, p. 62.
133 According to E. T. LIEBMAN, *Efficacia e autorità della sentenza*, cit., p. 40-41, the the finality rule is an expression of the different principle of non-retroactivity of statutory law.
134 R. CAPONI, *Giudicato civile e diritto costituzionale: incontri e scontri*, cit., p. 2828, footnote 16; U. COREA, *Il giudicato come limite alle sentenze della Corte costituzionale e delle Corti europee,* in *La crisi del giudicato*, cit., p. 253.

A description of the legal order suitable with the canons of the *american realismus*[135] requires us to analyse the constitutional dimension of *res judicata* as construed by the Constitutional Court[136]. According to its case law, the principle of legal non-retroactivity derives from the principle of legal certainty, inherent to the rule of law[137].
In the well-known theoretical framework developed by Flavio Lopez de Oñate, the value of legal certainty is elevated to the very *quintessence* of justice[138]; and Capograssi linked it with striking clarity to the doctrine of *res judicata*, asserting that through it the endless chain of individual disputes between men is brought to a close, ensuring the security of rights, the elimination of uncertainties dangerous by virtue of their potential to generate disputes and conflict, achieving the ultimate goal of justice[139].
From this perspective, the impermeability of *res judicata* to *ius superveniens* would find its indirect positive foundation in Article 3 of the Italian Constitution, which established the principles of equality, reasonableness, and proportionality. Consequently, a retroactive statute that nullifies the effects of one or more final judgments would be contrary to the Constitution, because that provision could not be justified by reference to the values introduced by the *ius superveniens*, unless the retroactive statutory law introduces constitutional legal values that, on an exceptional basis, justify the overcoming of *res judicata*[140].

6.1. *The Resistance of* Res Judicata *to Retroactive Ius Superveniens: Theoretical Justifications and the Difficult Balancing of its Finality with Equally Ranked Legal Values.*

Beyond the general principle that the legislator may not dispose of legal effects already produced in the past, the impermeability of *res judicata* to retroactive *ius superveniens* may also be justified through the substantive theory of *res judicata*[141].

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135 G. TARELLO, *Il realismo giuridico americano*, Milano, 1962, p. 199 ff.
136 According to G. TARELLO, *ult. op. cit.*, p. 62, «the realists conceive law as something mutable, and identify an element of such mutability in the judicial creation of law».
137 See Constitutional Court, 22 November 2000, n. 525. See also, about this issue, M. GRADI, *Cosa giudicata incostituzionale*, in *Riv. dir. proc.*, 4, 2022, p. 1190 ff.
138 F. LOPEZ DE OÑATE, *La certezza del diritto*, reprinted by G. ASTUTI, Milano, 1968, p. 157 ff. About the work of the philosopher see P. CALAMANDREI, *La certezza del diritto e le responsabilità della dottrina*, in *Riv. dir. comm.*, 1942, p. 342 ff.; and the criticism of F. CARNELUTTI, *La certezza del diritto*, in *Riv. dir. proc. civ.*, 1, 1943, p. 83 ff.
139 G. CAPOGRASSI, *Considerazioni conclusive*, in F. LOPEZ DE OÑATE, *La certezza del diritto*, cit., p. 246 ff.
140 R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 370; A. PIZZORUSSO, *Riproposizione di un decreto-legge non convertito*, in *Giust. civ.*, I, 1984, p. 2581 ff., at 2583 ff.; A. SANDULLI, *Il principio della irretroattività delle leggi e la Costituzione*, in *Foro amm.*, 2, 1947, p. 73 ff., at 85; L. PALADIN, *Appunti sul principio di irretroattività delle leggi*, in *Foro Amm.*, 1959, p. 946 ff., at 950; for the procedural doctrine, see G. CHIOVENDA, *Principii di diritto processuale civile*, cit., p. 963; ID., *Cosa giudicata e preclusione*, in *Riv. it. sc. giur.*, 1933, p. 3 ff., at 46; E. T. LIEBMAN, *Efficacia e autorità della sentenza*, cit., p. 92; M. VELLANI, *Appunti sulla natura della cosa giudicata*, cit., p. 92 ff.; L. MONTESANO, *Sul contenuto e sulle sanzioni del divieto di giurisprudenza «politica»*, in *Riv. dir. proc.*, 1, 1983, p. 20 ff., at 22.
141 See *supra*, § 3.

According to this view, once a judgment has become final, it produces the merger effect and the legal position acknowledged by the judgment no longer finds its foundation in the original rule, but rather in the final judgment itself. Therefore, the retroactive statute cannot affect such a position, now crystallized in *res judicata*.

The idea that retroactive legislation cannot affect judgments rendered prior to its entry into force is also confirmed by comparative analysis: in the United States, classical legal doctrine justifies such impermeability by invoking the principle that «the broader and even more important aspect of the public policy of *res judicata* is its promotion of peace and quiet in the community through the creation of certainty in the relations of men[142]».

From this perspective, one may concur with Caponi's observation on the subjective orientation of the protection afforded by the rule of law to *res judicata*: «the protection of the parties' legitimate expectation on the outcome of the trial becomes central[143]».

This conclusion logically stems from the idea that *res judicata* does not serve the interests of the State but rather responds to the social need to settle disputes in the concrete, individual interest of the prevailing party[144].

However, while the substantive theory offers stronger justification of *res judicata*'s resistance, it simultaneously renders it more vulnerable to institutional policy decisions. This is because such protection, though arguably rooted in constitutional principles, remains inherently fragile and is likely to be outweighed in most cases by competing constitutional interests or legislative aims.

Conversely, the procedural theory of *res judicata* not only ensures the same outcome, but also offers stronger protection by limiting the influence of legislative policy choices[145]: its constitutional protection may be grounded in the

142 See R. V. MOSCHZISKER, *Res Judicata*, in 38 *Yale Law Journal*, 3, 1929, p. 299 ff., at 301 ff.; E. W. CLEARLY, *Res Judicata Reexamined*, in 57 *Yale Law Journal*, 3, 1948, p. 339 ff., at 345.; A. D VESTAL, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, cit., p. 1723; K. M. CLERMONT, *Res Judicata as Requisite for Justice*, cit., p. 1077.

143 R. CAPONI, *Corti europee e giudicati nazionali*, cit., p. 307.

144 See, for example, G. VERDE, *Intervento*, in *Corti europee e giudici nazionali*, cit., p. 443-444.

145 See the well-known *Prohibitions'case* [1607], EWHC, 1 November 1607, safeguarding the constitutional independence of the judiciary power: «[A] controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod *Rex non debet esse sub homine, sed sub Deo et lege*».

principle of democracy and the separation of powers[146], insofar as these principles safeguard the autonomy and independence of the judiciary power, which is shielded from retroactive legislative interference pursuant to Articles 102 and 103 of the Italian Constitution[147].
Moreover, nothing precludes a reconciliation of the two seemingly parallel approaches, as follows: *res judicata*, as a tool for the judicial protection of rights, enjoys constitutional protection to the extent that it guarantees legal certainty and the stability of the outcome of the trial, in the interest of the involved parties. The constitutional power attributed to the judiciary is, therefore, expressions of the guarantees afforded to the judicial protection of rights: any compromise of the former negatively affects the latter. This highlights the need for constitutionally safeguarded protection to prevent retroactive legislative interventions, in respect of relationships that have been definitively settled.
The fact that certain scholars and even the Constitutional Court tend to approach the matter solely from the perspective of the judicial order is mainly due to a distorted viewpoint, rooted in the historical development by which the modern State assumed jurisdictional functions in pursuit of social pacification: «*ne cives ad arma ruant*»[148]. This distortion has led to a reconstruction of the purpose of civil litigation from the standpoint of the State dispensing justice, rather than from that of the citizens seeking it[149]. Within this framework, the administration of justice is conceived as an essential function of the modern State. The benefit that litigants may obtain from such function is relegated to the background, acquiring a merely instrumental value.
Yet, although state-centric drifts are not absent[150], contemporary legal thought tends to identify the purpose of civil proceedings in the concretization of entitlements. If this holds true, then the foremost concern must be the utility that private parties seek to obtain through access to the civil justice system.

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[146] A. GIUSSANI, *Intorno al riconoscimento e all'esecuzione degli atti di conciliazione e transazione*, cit., p. 1022 footnote 6; ID., in *Remedies concerning enforcement of foreign judgments*, cit., p. 270; ID., *Effects of Judgments – Res Judicata*, in *Civil Justice in Italy*, a cura di M. DE CRISTOFARO e N. TROCKER, Nagoya, 2011, p. 123 ff., at 127.
[147] See R. CAPONI, *Retroattività delle leggi: limiti sostanziali v. limiti processuali nel dialogo tra le corti*, in *Giur. cost.*, 6, 2012, p. 4232 ff., at 4234. See also, in the U.S. case-law, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19, 1995: «[A]rticle III establishes a «judicial department» with the province and duty... to say what the law is in particular cases and controversies. The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article I hierarchy […]. By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle».
[148] See *supra*, § 2.
[149] R. CAPONI, *Giudicato civile e diritto costituzionale: incontri e scontri*, cit., p. 2829.
[150] For a critique of the tendency of the Italian Council of State and the Constitutional Court to modulate the temporal effects of their rulings in order to safeguard the public interest and protect public finances, see V. CAPASSO, *Giudici consequenzialisti. La modulazione temporale degli effetti delle pronunce tra efficacia ultra partes ed effettività della tutela*, Napoli, 2020, p. 93 ff.,. and 131 ff.

Accordingly, jurisdiction should be understood not so much (or not only) as a function of the modern State aimed at implementing objective law in concrete cases, but rather as a public service whose primary function is the resolution of disputes in accordance with justice[151] – that is, in line with the directives given by substantive law[152].

The idea that substantive justice considerations may, in exceptional cases, affect the stability of *res judicata* leads to the conclusion that the impermeability of *res judicata* to ius superveniens with retroactive force is not absolute[153]. In fact, the legislative introduction of new worth legal values – capable of retroactively fulfilling interests and overcoming *res judicata*, contrary to these values – implies a constitutional balancing of equally ranked principles on the scales of justice[154]. Accordingly, if one holds that *res judicata* prevails when retroactive legislation affects the rule of law underlying the final determination, then exceptions to such resilience must be attributed to a *ius superveniens* – capable to introduce retroactively legal values of constitutional significance, overcoming *res judicata* – which, in order to override the *lex specialis* embodied by *res judicata*, must possess a form of "hyper-retroactivity".

From this perspective, one fully grasps the implications of the "relativisation" of *res judicata* in light of constitutional legality[155]: although the general rule is that of natural protection of final judgments against retroactive legislative intervention, the outcome of a balancing test between the legal values introduced by the retrospective *ius superveniens* and the legitimate expectation of the winning party on the result of the proceeding should be overcame, allowing a renewed adjudication *de eadem re* in light of the new normative framework. The outcome of such a balancing between constitutionally significant legal values enables a resolution of the conflict *ex aequo et bono*.

The guarantee of legal certainty associated with the stability of legal relationships defined by *res judicata* represents the point of equilibrium in the balancing of other principles of equal constitutional importance[156]. It follows that the relativisation of the principle of the finality of *res judicata* cannot be affirmed in absolute terms but must instead be assessed in light of the specific circumstances

[151] G. VERDE, *Diritto processuale civile*[6], I, Bologna, 2023, p. 24; ID., *Il metodo delle riforme nella giustizia civile. Passato e presente*, in *Sul potere giudiziale e sull'inganno dei concetti*, Torino 2023, p. 9; F. AULETTA, *Gli ultimi cinquant'anni del «fa[re] stato»*, in *Riv. dir. proc.*, 2, 2024, p. 482 ff.

[152] A. GIUSSANI, *Efficienza della giustizia e culture della riforma*, cit., p. 23 ff.; R. CAPONI, *Il principio di proporzionalità nella giustizia civile: prime note sistematiche*, cit., p. 392.

[153] But see the *dissenting opinion* of J. CLARKE, *Riordan vs Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945): «*the defense of res judicata is universally respected, but actually not very well liked*».

[154] R. CAPONI, *Corti europee e giudicati nazionali*, cit., 309; ID., *Democrazia, integrazione europea e circuito delle corti costituzionali (in margine al LissabonUrtail)*, in *Riv. it. dir. pubbl. com.*, 2010, p. 387 ff.; F. MODUGNO, *Introduzione a Giudicato e funzione legislativa*, in *Giur. it.*, 12, 2009, p. 2815 ff., at 2817; A. BARAK, *The Judge in a Democracy*, cit., p. 168; F. M. COFFIN, *Judicial Balancing: The Protean Scales of Justice*, in 63 *New York University L. Rev.*, 1988, p. 16 ff., at 25.

[155] According to the expression of R. CAPONI, *Il giudicato civile dimensionato*, in *Riv. trim. dir. proc. civ.*, 3, 2009, p. 941.

[156] M. GRASSI, *Il riconoscimento degli effetti del giudicato nell'arbitrato commerciale internazionale*, Torino, 2022, p. 27.

of the case, because every balancing exercise proves inherently resistant to abstract attempts at systematisation[157].

[157] F. MODUGNO, *Introduzione a Giudicato e funzione legislativa*, cit., p. 2819; G. SERGES, *Il "valore" del giudicato nell'ordinamento costituzionale*, cit., p. 2827.

Section II
The Flexibility of Res Judicata *in the Italian Legal Order*

SUMMARY: 1. The Overcoming of *Res Judicata* in the Italian Legal System. – 2. The Problem of the Nonexistent Judgment. – 3. *Res Judicata* Overcoming Due To Invalidity of The Judgment: Appeal by The Contumacious Party Under Article 327(2) of the Italian Code of Civil Procedure. – 4. Flexibility of *Res Judicata* and The *Numerus Clausus*' Grounds for Revocation Under art. 395 c.p.c. – 4.1. Inconstitent Judgments. – 4.2. Practical Contrast Between Judgments. – 4.2.1 Resolving Practical Conflicts Between Final Judgments: Analysis of Articles 161(1) and 395(5) of the Italian Code of Civil Procedure. – 4.2.2. Practical Conflict Between a Domestic *Res Judicata* and Judgments of the Court of Justice Under Article 263 TFEU. – 4.2.3. Concluding Remarks on the Practical Conflict Between *Res Judicata* and the Problem of Overruling. Introduction to logical conflict. – 4.3. The External Expansive Effect of the Reformation or Cassation of the Challenged Judgment: The Expansive Force of Article 336(2) of the Code of Civil Procedure and the Resolution of Logical Conflicts Between Final Judgments. – 4.4. The Temporal Limits of *Res Judicata*: Entitlements with Instantaneous Effects. 4.4.1. Continued: Legal Subjective Situations Producing Continuing Effects. – 4.4.2. Continued: The "Hyper-Retroactive" *Ius Superveniens* as a Limit to the Finality of *Res Judicata*: Examples of Derogation. – 5. The Unconstitutional *Res Judicata*. – 5.1. The Overcoming of Unconstitutional *Res Judicata* in a Comparative Perspective: Analysis of the Issue in German and Brazilian Law. – 5.2. The Overcoming of *Res Judicata* in Case-Law Experience on Both Sides of the Atlantic. – 5.3. The Manipulation of the Preclusive effect of *Res Judicata* in Cross-Border Disputes as a Hypothesis of "Covert" *Res Judicata* Derogation. – 5.4. The Overcoming of *Res Judicata* Conflicting with EU Law.

1. *The Overcoming of* Res Judicata *in the Italian Legal System*.

Outlined the essential features of *res judicata*'s nature, it is now necessary a more detailed analysis of the hypotheses of overcoming that may be inferred from statutory law. As a preliminary step, it is important to define this concept in order to more precisely delineate the scope of our investigation. Indeed, the expression "overcoming of *res judicata*" is undoubtedly evocative. One instinctively understands that it refers to situations in which a matter that has already been decided may once again become subject to dispute. However, the evocative force it generates is directly proportional to the degree of vagueness with which it defines the field of inquiry[1].

First of all, one must ask why the binding effect of *res judicata* might cease to operate. This brings into play the fundamental dichotomy between invalidity and injustice of the judgment. A final judgment is to be deemed invalid when it was

[1] In this sense, see F. Cordopatri, *La «crisi» del giudicato*, in *Riv. dir. proc.*, 2015, p. 894 ff.

rendered in breach of the procedural norms governing its formation; by contrast, a judgment is considered unjust when it results in a manifest misapplication of the law or in a mistaken reconstruction of the factual circumstances underlying the substantive legal situation, which serves as the basis for the determination under Article 2909 of the Italian Civil Code[2].

Thus, the dichotomy between invalidity and injustice essentially coincides with the distinction between procedural (*errores in procedendo*) and substantive errors (*errores in iudicando*)[3].

As demonstrated by Calamandrei – starting from the ancient Roman law[4] – in a legal system that does not provide for appellate remedies, the consequences of a judgment's invalidity and injustice are antithetical[5]. Invalidity is always justiciable by any party with a legitimate interest, always subject to *ex officio* review, and not time barred. By contrast, in such hypothetical system, the injustice of the final judgment is irrelevant: the effectiveness of a final but unjust decision cannot be overturned merely because the judge does not apply correctly substantive law[6]. Rather, it is compliance with formal rules that confers *res judicata* authority upon the judgment, thus precluding any form of reconsideration.

Even in contemporary legal systems, the acknowledgment of the fallibility of judicial determinations has historically led to the irrelevance of the substantive incorrectness of a judgment once it becomes *res judicata*, while limiting challenges based on procedural invalidity to the specific instruments of review and within strictly defined procedural frameworks.

In the Italian system, the irrelevance of substantive injustice after *res judicata* is clearly reflected in Article 2738 of the Italian Civil Code[7]. This provision, on the one hand, excludes the possibility of revoking a judgment founded upon perjury established by a final criminal condemnation[8]; on the other hand, it admits a

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[2] See F.P. LUISO, *La cedevolezza del giudicato*, cit., p. 18.

[3] About this distincion, see, for example, v. G. CHIOVENDA, *Principii*, cit., p. 1023 ff.; P. CALAMANDREI, *Sulla distinzione tra* «errores in judicando» *ed* «errores in procedendo», in *Studi sul processo civile*, I, Padova, 1930, p. 213; A. CERINO CANOVA, *Le impugnazioni civili Struttura e funzione*, Padova, 1973, p. 359 ff.; see also C. CONSOLO, *Le impugnazioni delle sentenze e dei lodi*, Padova, 2012, p. 29 ff.; ID., *Spiegazioni di diritto processuale civile*, II, Torino, 2023, p. 417 ff.

[4] E. BETTI, *Istituzioni di diritto romano*, I, Padova, 1942, p. 330 ff.; R. ORESTANO, *L'appello civile in diritto romano*, Torino, 1953, p. 90 ff.

[5] About this issue see the broad work of L. DI COLA, *Provvedimento anomalo e processo civile*, Napoli, 2024, p. 33 ff.

[6] P. CALAMANDREI, *La Cassazione civile*, cit, p. 38 ff., at 48.

[7] What has been stated above implies the substantial nature of the oath. This appears to be inferred from Article 2737 of the Italian Civil Code, in line with the interpretation advanced by F. CARNELUTTI, *Natura del giuramento*, in *Riv. dir. proc.*, 1, 1947, p. 183 ff., at 188; S. SATTA, *Commentario*, II, cit., p. 228; R. PROVINCIALI, *Giuramento decisorio*, in *Enc. dir.*, XIX, 1970, p. 103; C. M. DE MARINI, *Giuramento e disposizione del diritto*, in *Giur. it.*, 1, 1956, p. 791 ff.; *contra* E. ALLORIO, *Il giuramento della parte*, Milano, 1937, p. 156.

[8] About the sistematic consequences of the perjury see M. GRADI, *L'obbligo di verità delle parti*, Torino, 2018, p. 682 ff.; see also the hystorical analysis of A. TRIGGIANO, *Ricerche sulle origini della revocazione civile*, Salerno, 2016, p. 93 ff.

claim for damages. The implication is significant: by derogating Article 185 of the Italian Criminal Code, the injured party may never recover the same *res*, but only its economic equivalent[9].

This construction, however, is overcame by the evolution of case-law, which admits that a manifestly unjust *res judicata* may be overcome or restricted, setting aside doctrinal boundaries concerning its objective scope, in deference to overriding demands of justice, even in the absence of an expressly provided extraordinary remedy[10].

It should be clear that by the expression "overcoming of *res judicata*" we refer to all cases in which the legal system, on the one hand, expressly provides for extraordinary remedies aimed at challenging the injustice of a final judgment, and, on the other hand, in the absence of a specific remedy, nonetheless accords legal relevance to certain profiles of injustice or invalidity in the definitive decision. Though these defects differ in normative and dogmatic terms, they share a common denominator: the exception to the principle of the finality of *res judicata*. Under this light, the proposed definition may have heuristic value, allowing the conceptual consolidation of otherwise heterogeneous phenomena under a single category. Those instances in which the legal order permits the removal or neutralization of the effects of a final judgment in deference to a higher interest, whether rooted in formal validity or substantive justice.

From this perspective, the traditional dichotomy between invalidity and injustice of the judgment remains firmly in place and retains its structuring function. It gives rise to the general rule whereby the reversal of a judgment affected by invalidity is more acceptable, while any reconsideration of a merely unjust judgment requires a more calibrated balancing of constitutionally relevant interests[11].

This section will examine the hypotheses of overcoming of *res judicata* in the Italian legal order, starting with those grounded in serious invalidity, before moving to remedies targeting the "unjust" final judgment.

Before proceeding, however, it is necessary to dispel the persistent misunderstanding surrounding the so-called non-existent judgment.

2. *The Problem of the Nonexistent Judgment.*

Beyond the meaning traditionally attributed to the category of "nonexistence" in philosophical speculation – already addressed by Parmenides[12] – its juridical

[9]G. BALENA, *Istituzioni di diritto processuale civile*, II, Bari, 2023, p. 175 ff.

[10] A. GIUSSANI, *Appunti dalla lezione sul giudicato delle Sezioni Unite*, in *Riv. dir. proc.*, 4, 2015, p. 1564 ff.

[11] P. BIAVATI, *Intervento*, in *Corti europee e giudici nazionali*, cit., p. 436 has observed that the hypothesis of flexbility of *res judicata* are not a *numerus clausus*.

[12] About Parmenides see PLATO, *Soph*. 258.e.6-7: «Μὴ τοίνυν ἡμᾶς εἴπῃ τις ὅτι τοὐναντί□ον τοῦ ὄντος τὸ μὴ ὂν ἀποφαινό□μενοι τολμῶμεν λέ□γειν ὡς ἔστιν»; SESTUS EMPIRICUS, *Adversus mathematicos*, *liber* VII: «[…] ἡ μὲν, ὅπως ἔστιν τε καὶ οὐκ ἔστι, μὴ εἶναι, πειθοῦς ἐστι κέλευθος

counterpart identifies those acts which, while perhaps materially performed, are entirely devoid of legal effect[13]. These acts constitute mere appearances, incapable of satisfying the structural requisites set by the legal system; they may give rise to the superficial impression of having been performed, witnessed, or suffered, yet they produce no legally relevant consequence, not even of a negative kind.

Until recently, the notion of juridical nonexistence was largely absent from positive law[14]. Nonetheless, it has long held traction in soft law instruments and in jurisprudential reasoning, serving to exclude legal efficacy in cases where an act – despite its material completion – is affected by such a fundamental defect as to render it legally null, irremediable, and incapable of triggering any juridical effect.

In recent times, however, this doctrinal and jurisprudential construct has been partially codified. Notably, Article 7-*sexies* of the Italian Taxpayer's Statute (Law No. 212/2000), as introduced by Legislative Decree No. 219/2023, explicitly qualifies as "nonexistent" any notification lacking essential elements or effected on legally nonexistent persons, entirely unrelated to the addressee or on entities already dissolved, thus delimiting the broader category of nullity in negative terms[15].

In civil procedure, the boundary between nullity and nonexistence remains particularly subtle. In the Italian legal system, discussions typically begin with Article 161(2) of the Code of Civil Procedure, which many scholars consider the normative anchor of the category under analysis[16]. This provision excludes the conversion of nullities into grounds of appeal – ruled by paragraph 1 – where the judgment lacks the judge's signature. The absence of such signature raises the doubt on the lawful exercise of *potestas iudicandi*, implying that similarly "nonexistent" should be the decision rendered *a non iudice* or any act that has not yet attained the status of a judgment due to the failure to satisfy the procedural formalities prescribed by Article 133 c.p.c.[17]. Thus, the absence of signature may be raised outside the ordinary procedural time limits and modalities of appellate review.

(ἀληθείῃ γὰρ ὀπηδεῖ), ἡ δ᾽ὡς οὐκ ἔστιν, τε καὶ ὡς χρεῶν ἐστι, μὴ εἶναι, τὴν δή τοι φράζω παναπευθέα ἔμμεν ἀταρπόν·οὔτε γὰρ ἂν γνοίης τὸ γε μὴ ἐόν (οὐ γὰρ ἀνυστόν) οὔτε φράσαις».

[13] About the juridical non existence, see v. F. K. SAVIGNY, *Sistema del diritto romano attuale*, cit., p. 610 ff.; E. BETTI, *Teoria generale del negozio giuridico*, rist., Napoli, 2002, p. 460 ff.; and G. CONSO, *Il concetto e le specie d'invalidità*, Milano, 1972, p. 95 ff.

[14] See the broad analysis of C. BESSO, *La sentenza civile inesistente*, Torino, 1996, p. 31 ff.

[15] About the new Article No. 7-*sexies* of the Italian Taxpayer's Statute (Law No. 212/2000) see, for example, F. BUFFA, *Il nuovo Statuto dei diritti del contribuente*, in *Quest. Giust.*, 3, 2024, p. 111 ff., at 118.

[16] P. CALAMANDREI, *Sopravvivenza della querela di nullità nel processo civile vigente*, in *Riv. dir. proc.*, 1, 1951, p. 112 ff.; G. CONSO, *Prospettive per un inquadramento delle nullità processuali civili*, in *Riv. trim. dir. proc. civ.*, 1, 1965, p. 110 ff.; V. DENTI, *inesistenza degli atti processuali civili*, in *Noviss. Dig. it.*, XI, Torino, 1968, p. 467 ff.

[17] G. BALENA, *Istituzioni di diritto processuale civile*, I, cit., p. 308; ID., *la rimessione della causa al primo giudice*, Napoli, 1984, p. 299 ff.

Such defect is so grave as to preclude any healing through the judgment's finality: it does not merely affect the judgment but rather prevents it from acquiring *res judicata* effect[18]. More precisely, a nonexistent judgment is *tamquam non esset*: it lacks juridical character altogether and never acquires legal force. If invoked in subsequent proceedings, it remains perpetually open to challenge via *actio nullitatis*[19] or through an incidental declaratory action of negative assessment, and it may be declared void *ex officio*[20].
Article 161(2) c.p.c. is thus commonly interpreted as confirming that, where the duty to challenge a judgment through appeal is excluded, the defect renders the decision incapable of attaining finality and makes it susceptible to challenge through *querela nullitatis*. If that provision expresses a general principle, the absence of signature is merely an illustrative case, not exhaustive of the broader category of procedural nonexistence. Following the general rule codified in Article 1365 of the Civil Code, the express mention of one case does not exclude the applicability of the same rationale to unenumerated but analogous cases[21].
Although a legally nonexistent judgment is formally incapable of attaining *res judicata* status, this does not exclude the possibility of its ordinary appealability – at least within the time limits established by Article 325 c.p.c. This is clearly affirmed in Article 354 c.p.c., which provides for remittal to the trial court when the appealed decision is null under Article 161(2). Consequently, until the expiration of the appellate time limits, a nonexistent judgment may be subject to ordinary remedies; once such terms lapse, its inherent incapacity to acquire legal finality justifies its removal through the *actio nullitatis*.
From the interplay between Articles 161(2) and 354 of the Italian Code of Civil Procedure, many scholars have inferred that a judgment lacking the judge's signature should not be regarded as legally nonexistent, but rather as affected by a form of "absolute nullity in the strict sense". This would distinguish it from other defects – such as improper constitution of the bench – which are deemed cured upon the judgment becoming final: while the defect may survive formal *res judicata* and be asserted through an autonomous negative declaratory action, it would not preclude the judgment from producing its typical effects or from being subject to appellate review, as it would still be considered legally existent[22].
This reading, however, is unconvincing, as it overstates the significance of Article 354 c.p.c., which at most should be construed as granting the prejudiced party a self-standing title to access the appeal process, regardless of whether the grounds for appeal relate to the merits of the decision. Against the aforementioned view also stands a *reductio ad absurdum* argument: one cannot infer from the admissibility of an ordinary appeal against a legally nonexistent

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18 C. BESSO, *La sentenza civile inesistente*, cit., p. 123.
19 About this remedy, see *infra*, chapter II.
20 P. CALAMANDREI, *Sopravvivenza della querela di nullità nel processo civile vigente*, in *Riv. dir. proc.*, 1951, p. 112 ff., now available in *Opere giuridiche*, VIII, Roma, 2019, p. 515 ff.
21 L. QUERZOLA, *Contributo allo studio degli atti processuali tra forma e linguaggio giuridico*, Torino, 2018, p. 118.
22 G. BALENA, *La rimessione della causa al primo giudice*, Napoli, 1984, p. 299 ff.

judgment that the judgment can produce legal effects – and therefore that it "exists" – until formally set aside. Were that the case, the aggrieved party would paradoxically be required to wait for the judgment to acquire *res judicata* status to remove it, which would defeat the rationale underlying the concept of legal nonexistence[23].
Accordingly, in line with the underlying principle that, where the legal system differentiates between degrees of invalidity affecting a judgment, the most serious defects ought to be removable through multiple remedial channels, the dual-remedy regime applicable to legally non-existent judgments is justified by the aim of maximizing the chances of their removal. The turning point lies in the lapse of time limits for lodging ordinary appeals. Thus: a) Prior to the formal *res judicata* (*i.e.*, before the expiration of the time limits under Article 325 of the Italian Code of Civil Procedure), the legally non-existent judgment may still be challenged through ordinary appellate remedies, as clearly inferred from Article 354 of the Italian Code of Civil Procedure; b) Once such time limits have expired, the judgment – being absolutely incapable of producing legally relevant effects – must be removed through an *actio nullitatis*, which may be brought *sine die*, without the beneficiary of the judgment being able to invoke any legitimate reliance on a legal position so precariously conferred. This is without prejudice to the stabilizing effects of substantive-law mechanisms such as adverse possession, limitation periods, or the twenty-year lapse for non-use.
That said, the legal non-existence of a judgment cannot properly be classified among the cases of *res judicata* overcoming in the case of non-existent judgment the apparent advantage conferred upon the prevailing party is purely illusory. The legal fiction of finality is inapplicable: a party initiating an enforcement proceeding on the basis of a legally non-existent judgment may at any time face an *actio nullitatis* (including by way of opposition to enforcement[24]) and may not invoke legitimate expectation on a non-existent judgment, despite it seems final. The *actio nullitatis*, in this respect, is perpetually available due to the structural *infirmitas* of the act.

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[23] The theory previously discussed – according to which a legally nonexistent judgment may nonetheless produce legal effects until it is formally set aside – appears to rest on a misreading of Dig. 49.8.1 pr.: «*Illud meminerimus: si quaeratur, iudicatum sit nec ne, et huius quaestionis iudex non esse iudicatum pronuntiaverit: licet fuerit iudicatum, rescinditur, si provocatum non fuerit*». The passage is peculiar in that it appears to link the rescission of the judgment (*rescinditur*) to a ruling that had just been declared as not qualifying as a judgment at all (*iudex non esse iudicatum*). However, it is likely that the verb «*rescinditur*» is used in a non-technical sense and does not imply that the judgment had been legally effective prior to its annulment. This interpretation is reinforced by a constitution of Emperors Valentinian, Valens, and Gratian from 374 AD (Cod. Theod. 4.17.1), which cautions against any reading that presupposes legal effectiveness of an unformed decision: «*Huic adicimus sanctioni, ut sententia, quae dicta fuerit, cum scripta non esset, ne nomen quidem sententiae habere mereatur, nec ad rescissionem perperam decretorum appellationis sollemnitas requiratur*». Here, a judgment delivered orally (*quae dicta fuerit*) is deemed legally nonexistent (*ne nomen quidem sententiae habere mereatur*), and precisely for this reason, no formal appeal is required for its rescission (*nec* [...] *appellationis sollemnitas requiratur*). For a detailed analysis of these sources, see B. BIONDI, *Appunti intorno alla sentenza nel processo civile romano*, Pavia, 1929, p. 99 ff.
[24] C. BESSO, *op. cit.*, p. 385 ff.

The overcoming of *res judicata* implies that the judgment – albeit invalid or manifestly unlawful – has nonetheless produced legal effects within a defined temporal framework. By contrast, a legally non-existent judgment is devoid of any legal relevance. When confronted with such an act, social disqualification prompts the foundational question: *quid est*?

Drawing from the definition of non-existence found in Article 137 of the European Contract Code, the legally non-existent judgment lacks external recognizability and thus cannot be subsumed under the concept of "judgment" at all.

On these premises, some scholars have gone so far as to assert that a judgment, though formally final and binding, which contravenes EU law – particularly due to a breach of the non-derogable allocation of competences under the Treaties, in violation of the principle of conferral – should be considered radically non-existent and thus challengeable through *actio nullitatis*[25]. However, such a stance is inherently contradictory. A non-existent judgment, by definition, is wholly incapable of producing effects and is subject to nullification *ab origine*. Conversely, a domestic *res judicata* violating EU law retains formal validity and effectiveness within the national legal order until and unless annulled following a ruling by the Court of Justice or the European Commission, in the specific field of unlawful state aids[26].

Moreover, the mere passage of time – under certain conditions – may reinforce its *firmitas*, based on the prevailing legitimate expectation of the winning party concerning the outcome of the process.

A different reasoning would imply the emergence of a category of "relative non-existence", which contradicts the Eleatic prohibition and undermines the internal coherence of the entire conceptual framework.

3. *Res Judicata Overcoming Due To Invalidity of The Judgment: Appeal by The Contumacious Party Under Article 327(2) of the Italian Code of Civil Procedure.*

Setting aside the scenario contemplated by Article 161(2) of the Italian Code of Civil Procedure (in the following: c.p.c.) – which, as previously noted, allows challenge a judgment *prima facie* capable of producing the effects of substantive *res judicata* – the legal system provides the involuntary contumacious party with a specific remedy of an appellate nature aimed at setting aside the effects of a judgment that has formally become final, due to its invalidity[27]. This is governed

[25] See, for example, F. CORDOPATRI, *La «crisi» del giudicato?* in *Riv. dir. proc.*, 4, 2015, p. 894 ff.; ID., *Giudicato nazionale e osservanza del diritto comunitario*, in *Riv. dir. proc.*, 2, 2016, p. 514 ff., at 520; M. GIAVAZZI, *Eureka! La sentenza anticomunitaria è* inutiliter data *per carenza di giurisdizionale del giudice nazionale sui segmenti comunitari di un procedimento di amministrazione intrecciata*, in *Riv. it. dir. pubbl. com.*, 5, 2019, p. 683 ff.; ID., *Anatomia del processo amministrativo, Riflessioni sull'autonomia processuale negli Stati dell'UE*, Napoli, 2021, p. 114 ff. and p. 125; V. CERULLI IRELLI, *Violazioni del diritto europeo e rimedi nazionali*, in *Riv. trim. dir. pubbl.*, 2014, p. 657 ff.

[26] See *infra*, chapters III, § 6, IV and V.

[27] About the remedies recognized to the contumacious party by Italian and European law see, for example, B. ZUFFI, *Contumacia e giudizio nel processo civile*, Napoli, 2024, p. 429 ff.; D. D'ADAMO,

by Article 327(2) c.p.c., which excludes application of the six-month term (running from the publication of the judgment) for ordinary appeals in favour of the defaulting party who proves lack of knowledge of the proceedings[28], due to nullity of the writ of summons or its service, or nullity of the service of documents listed in Article 292 c.p.c.

Access to this remedy is conditional upon the concurrence of an objective condition – *i.e.*, nullity of the relevant procedural acts; and a subjective condition – *i.e.*, actual unawareness of the proceedings due to such nullity.

The burden of proof lies with the defaulting party, according to the prevailing case law[29].

What is relevant here is that no time bar is established for raising such nullity, analogously to Article 161(2) c.p.c. However, unlike the latter, the nullity ruled by Article 327(2) c.p.c. may only be asserted by the interested party through a specific procedural tool: the *querela nullitatis*.

This raises the delicate issue of the opposability of *lis alibi pendens* to third-party transferees who acquired rights from the party unaffected by the procedural defect. If Article 327(2) c.p.c. is construed as a case of *restitutio in integrum* in favour of the unaware contumacious party, the late appeal – regardless of how many years have elapsed – revives the original procedural relationship rather than initiating a new one. Accordingly, if the prevailing party had transferred the *res litigiosa* following the (apparently final) first-instance judgment, any appellate ruling rendered in favour of the defaulting party would be enforceable against the transferee, pursuant to Article 111(4) c.p.c., thereby undermining the certainty of legal transactions and juridical relations[30].

The intolerability of such an outcome leads to the view that the belated appeal by the contumacious party, under Article 327 (2) c.p.c., should be classified as an action in the form of an appeal, with significant implications for standing. In principle, this remedy ought to be extended not only to those formally appearing in the first-instance proceedings, but also to those who, while not formally parties, were materially affected by the judgment. This is particularly relevant to the case of the falsely represented party, who was unaware of the proceedings and of the judgment rendered against the *falsus procurator*. According to

Contributo allo studio della contumacia nel processo civile, Milano, 2012, p. 127 ff.; G. M. SACCHETTO, *Le decisioni contumaciali e il diritto di difesa alla prova del principio del mutuo riconoscimento e del regolamento UE 1215/2012 (Bruxelles I-bis)*, in *L'istituto della contumacia nell'ordinamento italiano e beyond. Passato, presente e futuro*, Milano, 2024, p. 179 ff.

[28] About Art. 327 (2) c.p.c. see R. CAPONI*, La rimessione in termini nel processo* civile, Milano, 1996, p. 334 ff.; ID., In *tema di impugnazione da parte del contumace involontario*, in *Foro. it.*, 2000, p. 2869 ff.; F. CARNELUTTI, *Impugnazione tardiva del contumace*, in *Riv. dir. proc.*, 1965, p. 455 ff.; C. E. BALBI, *voce Rimessione in termini (dir. proc. civ.)*, in *Enc. giur. Treccani*, IX, Roma, 1988, p. 4; . GIUSSANI-G. DE CESARE, *Art. 327 c.p.c.*, in Carpi e Taruffo (a cura di), *Commentario breve al Codice di procedura civile*[9], cit., p. 1318 ff.

[29] See, for example, Supreme Court, 21 february 2023, n. 5366; Supreme Court, 12 february 2022, n. 36181.

[30] See *contra* C. E. BALBI, *voce Rimessione in termini (dir. proc. civ.)*, cit., p. 5.

established scholarly opinion and case law, such a party should be granted access to the remedy under Article 327(2) c.p.c.[31].
According to some scholars, Article 327(2) c.p.c. could be used to properly interpret the well-known Lucchini case[32]. There, a final judgment between Lucchini S.p.A. and the Italian Ministry had confirmed the legality of a particular State aid regime yet was subsequently set aside by the Court of Justice under the Commission's recovery decision of 20 July 1990.
According to this line of reasoning, the parties to the second set of proceedings – before the administrative courts, concerning the enforcement of the recovery decision – were not the same as those in the first. While the Italian State had acted as the material party in the first case, the actual substantive party in the second was the European Community (or the Commission)[33]. The implication is the following: in the second case, the Italian State acted merely as agent or extraordinary representative of the Commission. Consequently, all procedural acts ought to have been notified to the Commission itself, thereby triggering the applicability of Article 327(2) c.p.c.
This theory will be analysed more extensively below[34]. For now, we can observe that this reasoning overemphasises the role of domestic procedural concepts and, more crucially, mischaracterises *the res judicata* in the *Lucchini* case as invalid rather than unjust. The case, in fact, raises issues of substantive injustice rather than procedural nullity.

4. *Flexibility of Res Judicata and The Numerus Clausus of Grounds for Revocation Under art. 395 c.p.c.*

Revocation is an extraordinary remedy that may operate in addition to or concurrently with the ordinary means of appeal – *i.e.*, appeal on the merits and cassation – as made clear by Article 398(4) of the Italian Code of Civil Procedure[35]. Certain circumstances justifying revocation may have so deeply distorted the decision-making process that the removal of the irregularity could plausibly lead to a different judicial outcome[36].

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31 V. ANDRIOLI, *Legittimazione all'opposizione ordinaria di terzo*, in *Studi in onore di E. T. Liebman*, III, Milano, 1979, p. 1843 ff.; Supreme Court, 27 July 2012, n. 13374.
32 Court of Justice, 18 July 2007, Case C-119/05, *Lucchini*; see also the section II of Chapter IV below.
33 F.P. LUISO, *La cedevolezza del giudicato*, cit., p. 28.
34 See *infra*, Chapter IV, section II.
35 C.A. NICOLETTI, *La revocazione della sentenza*, Milano 1988, p. 14.
36 About the grounds for revocation see, for example, G. DE STEFANO, *La revocazione*, Milano, 1957, *passim*; A. ATTARDI, *La revocazione*, cit., *passim*; V. COLESANTI, *Sentenza civile (revocazione della)*, in *Noviss. Dig. it.*, XVI, Torino, 1969, p. 1161 ff.; E. FAZZALARI, *Revocazione (dir. proc. civ.)*, in *Enc. dir.*, XL, Milano, 1989, p. 293 ff.; F. ROTA, *Revocazione nel diritto processuale civile*, in *Dig. civ.*, XVII, Torino, 1998, p. 473 ff.; C. CONSOLO, *La revocazione delle decisioni della Cassazione e la formazione del giudicato*, Padova, 1989 *passim*.

Revocation is a rescinding remedy subject to specific statutory grounds[37], which – although not generally implying procedural invalidity – nonetheless allow for a substantive reassessment of the decision's correctness, rather than a review of its legality.
The law permits revocation and cassation to be brought simultaneously against second-instance decisions or against unappealable first-instance decisions. Given the lack of a suspension either of cassation proceedings or of time limits for filing, several scenarios arise[38]. If the revocation is decided first and becomes final, the judgment before the Supreme Court should be void, 'cause the absence of its subject (the challenged judgment). If, however, the revocation judgment is itself challenged in cassation, the proceedings must be joined.
Conversely, if the Court of Cassation rules first, two interpretations are possible. Under the first and prevailing view, the annulment of the challenged decision renders the revocation action devoid of subject matter, as the judgment under challenge is removed from the legal order[39]. This interpretation aligns with the current framework of Article 398(4) c.p.c., after the 1990 reform (Law No. 353/1990), which abandoned the prior rule of the revocation's procedural primacy by eliminating the automatic suspension of terms to appellate before the Supreme Court or the automatic suspension of the proceedings after the proposition of the revocation[40].
The second view, by contrast, rests on the logical primacy of revocation as a merits-based remedy. Accordingly, the revocation proceedings should continue even where the Court of Cassation has upheld the appeal or ruled on the merits, since the revocatory decision – if granted – would nullify the Supreme Court's ruling due to its rescissory effect. This leads to a form of *ex post* derogation of *res judicata*, functionally analogous to the coordination mechanism under Article 336(2) c.p.c.[41]. By contrast, dismissal of either remedy (cassation or revocation) would eliminate any interference between the two proceedings.
This theory implicitly introduces into the system an uncodified derogation to the binding effect of *res judicata*, grounded in the unjust nature of the Supreme Court's ruling as revealed by the subsequent revocation of the judgment under review.
Revocation may be ordinary or extraordinary, as reflected in Article 326 CPC, which provides a thirty-day time limit for filing – extended to sixty days for

37 But see *contra* A. ATTARDI, *La revocazione*, cit., p. 70 and A. CERINO CANOVA, *Le impugnazioni*, cit., p. 636.
38 G. IMPAGNATIELLO, *Il concorso tra cassazione e revocazione*, Napoli-Roma, 2003, p. 416.
39 G. TRISORIO LIUZZI, *Proposizione della revocazione e sospensione del giudizio di cassazione*, in *Foro it.*, 1999, I, p. 1278 ff.; A. SCALA, *La cessazione della materia del contendere nel processo civile*, Torino, 2002, p. 327; V. TAVORMINA, *Concorso tra revocazione e ricorso per Cassazione: il problema dell'uovo e della gallina*, in *Giur. it.*, 1980, p. 1643 ff.; C. CONSOLO, *L'impugnazione delle sentenze e dei lodi*, cit., p. 452. See also Supreme Court, 2 January 2025, n. 49.
40 F. CIPRIANI, *Cassazione e revocazione nel sistema delle impugnazioni*, in *Foro it.*, 2001, I, p. 588 ff.
41 That's the thesis of F. ROTA, *Revocazione nel diritto processuale civile*, cit., p. 487; G. IMPAGNATIELLO, *Il concorso tra cassazione e revocazione*, cit., p. 236 ff., and 255 ff.

decisions of the Supreme Court under Article 391-*bis* c.p.c. For ordinary revocation, the time limit runs from the formal notice of the judgment; for extraordinary revocation, it begins from the discovery of the exceptional circumstance forming the ground for relief and justifying the quashing of the final decision.

Such an exceptional derogation from the rule of finality of judgments, on the basis of their substantive unfairness, is permitted only in the cases expressly provided by law. For this reason, it is widely accepted that the grounds for extraordinary revocation constitute a *numerus clausus*, and, due to their exceptional nature, are not open to analogical extension. Consequently, even a serious breach of EU law by a final civil or administrative judgment does not constitute a valid ground for extraordinary revocation, as such a basis is not expressly provided by domestic procedural law.

The party injured by an EU law incompatible judgment is not left entirely without remedy. Article 2(3) of Law No. 117 of 1988 (on the civil liability of judges) expressly provides for State liability where the judge's final decision is a manifest breach of European Union, caused by a gross negligence[42].

Notwithstanding the concerns regarding the effectiveness of compensatory remedies for judicial error[43], the principle that grounds for revocation should not be extended by way of interpretation might still be considered acceptable, were it not for the fact that, in various instances, the case law has shaped functional variants of extraordinary remedies, effectively sounding the *requiem* for the legislative reserve in procedural matters[44].

It thus remains difficult to grasp why certain creative or even nomopoietic judicial pathways are deemed admissible, while others are instead regarded as lying within the exclusive prerogative of the legislature[45].

It should be noted that Italian Council of State (the Supreme Court of administrative justice) appears inclined toward a praetorian extension of the grounds for revocation, with the aim of safeguarding the effectiveness of EU law in particularly sensitive sectors, such as public procurement.

Specifically, the Council of State[46], applying the principle established by the European Court of Justice in *Consorzio Italian Management* [47], has held that,

[42] The introduction of liability for judicial misconduct based on gross negligence in cases of breach of EU law was prompted by the judgment of the Court of Justice of the European Union of 13 June 2006 in *Traghetti del Mediterraneo*, Case C-173/03 (discussed further *infra*, Chapter IV, Section I, § 4).

[43] A. GIULIANI-N. PICARDI, *La responsabilità del giudice,* rist., Milano, 1995, p. 253 ff.; M. CAPPELLETTI, *Giudici irresponsabili?* Milano, 1988, p. 5 ff.; R. MARTINO, *Appunti sulla responsabilità civile del giudice per dolo o colpa grave*, Bari, 2020, p. 107 ff.

[44] See *infra*, chapter V, section I.

[45] N. PICARDI, *Eventuali conflitti fra principio del giudicato e principio della superiorità del diritto comunitario*, in *Giust. civ.*, 2008, I, p. 561.

[46] Council of State, 5 april 2024, n. 3164.

[47] CJEU, 6 October 2021, Case C-561/19, paras. 50 ff. According to the Court, the system of direct cooperation between the Court of Justice and national courts, established by Article 267 TFEU, lies entirely outside the initiative of the parties and therefore does not constitute a legal remedy available to them (paras. 53–54). Nonetheless, courts of last instance are under a duty to

although a national court of last instance cannot be compelled by the parties to submit a preliminary reference, it remains under a duty to rule on the request for preliminary ruling. This omission constitutes a violation of Article 112 of the Italian Code of Civil Procedure, which rules the principle of correspondence between claim and ruling extends also to explicit requests for a preliminary reference, particularly were made before a court of last instance[48].
In the reasoning adopted by the Supreme Administrative Court, the failure to address a party's request for preliminary ruling is thus assimilated to a failure to rule on a claim or plea, with the implication that the case law on the causal relevance of omissions and the conditions under which they may be challenged as revocable errors of fact also applies[49].
This conceptual manipulation is readily apparent: a substantive error of law (*error iuris*), such as the failure to refer a question to the CJEU, is recharacterised – because of the silence of the court of last as an error of fact under Article 395(4) of the Italian Code of Civil Procedure.
However, it is worth noting that the decision under comment marks a clear departure from the Council of State's earlier case law: a first breach has been opened in the bastion of *the numerus clausus* of grounds for revocation.
This jurisprudential evolution reinforces the thesis advanced above[50]: by means of a systematic interpretation that duly considers the conflicting interests involved – each with constitutional relevance – it is possible, in highly exceptional cases, to assign weight to the substantive injustice of a final decision, even in the absence of a specifically codified extraordinary remedy. This entails a delicate balancing exercise, made even more complex by the pluralisation of jurisdiction from the interplay between domestic and EU legal systems. A more thorough analysis will follow in the appropriate section[51].

4.1. *Inconstitent Judgments*.

In general terms, the expression "inconsistent judgments" refers to the particular situation of incompatibility arising between two judgments that have acquired *res judicata* status and were rendered between the same parties with regard to identical rights (so-called practical conflict), or in relation to rights that are

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examine the relevance of a preliminary reference independently and with all due diligence (para. 50). They must provide reasoning that clarifies whether they consider themselves to fall within one of the exceptions authorising them to refrain from referring a question of interpretation of EU law that has been raised before them. Such reasoning must show either (i) that the question is not relevant to the resolution of the dispute, or (ii) that the provision of EU law in question has already been interpreted by the Court, or (iii) in the absence of such case-law, that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt (para. 51).

[48] [48] Council of State, 5 april 2024, n. 3164, para 8.3.1.

[49] H. SIMONETTI, *Questioni di giurisdizione e diritto dell'Unione Europea*, in *Judicium online*, 14 giugno 2024, p. 14.

[50] See *supra*, in this section, § 1.

[51] See *infra*, capitolo V.

logically interdependent because both depend upon the resolution of the same preliminary issue (so-called logical conflict)[52].
Both judgments are, in appearance, binding upon the parties, notwithstanding the fact that they convey rulings which are logically and legally incompatible – either because they resolve the same controversy in different ways or because they offer discordant determinations of an identical preliminary issue which bears upon the dependent substantive rights.
This phenomenon can arise due to structural features of the Italian procedural system. On one hand, there exists no extraordinary remedy specifically designed to address a practical conflict between judgments: Article 395 no. 5) of the Code of Civil Procedure allows for the revocation of a non-final decision that is incompatible with a previous final one, but not vice versa. On the other hand, the system does not impose a duty upon the parties to join all related claims in a single proceeding, and a judge hearing a dependent claim – where he is not required to resolve the preliminary issue with the authority of *res judicata* under Article 34 of the Code[53] – may consider such issue only *incidenter tantum*. As a result, a logical conflict may arise where the same preliminary question is subsequently decided with *res judicata* effect in a different way.
This gives rise, once again, to the unresolved tension between several competing values: legal certainty – which is undermined by the coexistence of final and incompatible rulings on the *eadem rem* or on legally interconnected rights; the aspiration to justice – which is frustrated by the uncertainty surrounding which of the two irrevocable decisions should prevail; the principle of the finality; and the legitimate expectation of the winning party on the result of the process.
The critical nature of the issue is exacerbated by the fact that the legislature has provided no *ex-post* mechanism for resolving such conflicts. Rather, the procedural tools available are aimed solely at preventing their occurrence: *lis alibi pendens*, joinder of proceedings, procedural connection, and mandatory suspension due to prejudicial dependence.
Nonetheless, such conflict cannot be resolved by simply invoking the protection of the reliance interest of both prevailing parties, since the very existence of contradictory judgments precludes the emergence of any legitimate expectation. *A fortiori*, the contradiction between judgments must be seen as a symptomatic expression of substantive injustice, capable of undermining the citizen's trust in the judicial system[54]. The idea that one of the two judgments is unjust is not a

[52] J. NIEVA-FENOLL, *La cosa juzgada*, cit., p. 269 ff.
[53] About Article No. 34 see M. PILLONI, *Profili processuali della domanda di accertamento incidentale*, Torino, 2020, p. 49 ff.
[54] K. M. CLERMONT, *Limiting the last-in-Time Rule for Judgments*, in 36 *Review of Litigation*, 2017, p. 2 ff.: «First, society now recognizes an efficiency interest in avoiding inconsistent adjudications. At best, inconsistency would erode faith in our system of justice and diminish acceptability of its output. At worst, inconsistency would put a party into an impossible situation of conflicting obligations. Second, any decrease in the certainty and stability of repose would create inefficiency. Society has an interest in increasing certainty for the purposes of primary conduct; once a court determines legal relations, we all need to be able to act in the world with assurance that those relations are indeed fixed to some known extent. Society also has an interest in

mere opinion of the losing party; on the contrary, it is documented – indeed, authoritatively attested – by another decision which is still *res judicata*.
While it may be impossible to determine with certainty which of the two conflicting decisions is legally correct, their coexistence violates the principle of non-contradiction: one of the two judgments must be unjust, and as such, its *res judicata* effect must be overcame[55].
From the standpoint of the legal system, injustice is attributed to the judgment ultimately deemed susceptible to displacement.
Such injustice arises from the irrational and contradictory outcome whereby a party, logically, ought to have prevailed in both proceedings, yet succeeded in one and failed in the other. In this regard, McCoid has noted: «[I]f two decisions are inconsistent, one of them must be wrong. Without more, the evil does not lie in the inconsistency; it lies in the erroneous decision. Inconsistency is merely a signal that error exists, a symptom of something bad, but not itself evil. Eliminating inconsistency will not surely cure the error[56]».
It should be stressed, however, that resolving the conflict between judgments does not necessarily entail nullifying the erroneous judgment in terms of legal effects. Rather, the objective of seeking an *ex-post* remedy lies in correcting the logical incongruity inherent in a legal system that tolerates the coexistence of two irrevocable and contradictory judgments[57].

4.2. *Practical Contrast Between Judgments.*

According to the well-known definition provided by Chiovenda, a practical conflict arises when different decisions are rendered with respect to the same cause of action[58]. Such a conflict results from inconsistent judgments concerning the same cause of action, typically due to the failure of the parties or the court

increasing stability in the judicial system; we all benefit when courts treat prior decisions, from the same or other courts, with respect and comity. Third, fairness further argues for equal treatment in similar circumstances, and for furtherance of reliance interests by consistently adhering to prior adjudication. One of the obvious purposes of our res judicata law is to minimize the possibility of inconsistent judgments. However, the doctrine cannot completely eliminate that possibility. On the one hand, res judicata must be raised in the subsequent action by the party who seeks to take advantage of it. If that party fails to assert the preclusive effect of the former adjudication, a judgment may be rendered in the subsequent action that is inconsistent with the former judgment. On the other hand, inconsistent judgments can result even when the party entitled to rely upon the initial judgment does assert it, but the subsequent court erroneously or willfully refuses to give it preclusive effect, or correctly refuses under its own conflicts law. The subsequent court may assert that some requirement of res judicata is lacking or some exception applies, and the resulting relitigation may then produce a different outcome».

[55] S. RECCHIONI, *Pregiudizialità processuale e dipendenza sostanziale nella cognizione ordinaria*, Padova, 1999, p. 138.

[56] V. J. C. MCCOID, *Inconsistent Judgments*, in 48 *Washington and Lee Law Review*, 1991, p. 486 ff., at 488.

[57] G. FABBRINI, *Connessione (dir. proc. civ.)*, in *Enc. giur.*, VIII, Roma, 1988, p. 6.

[58] G. CHIOVENDA, *Principii di diritto processuale civile*, cit., p. 920; ID., *Istituzioni di diritto processuale civile*, I, 1935, p. 377.

to assert or recognize the negative preclusive effect of *res judicata* in the subsequent proceedings (*ne bis in idem*). In this sense, the practical conflict entails a violation of the *ne bis in idem* principle[59].

This criterion must be tested against recurring case patterns, as scholarly opinion remains divided on the precise scope of the category. According to some authors, following Attardi's thought, the notion of practical conflict includes not only cases involving identical parties, *petitum*, and cause of action, but also judgments concerning rights or legal relationships bound by a dependency or prejudicial link. Under this view, logical conflict would be limited to situations in which two judgments offer incompatible solutions to a shared preliminary question[60].

Other scholars have introduced the notion of a "semi-practical" conflict, arising where an issue examined *incidenter tantum* in the first case is later decided in the second with the force of *res judicata* in a different way[61].

The blurred boundaries between practical and logical conflict turn this area into a conceptual thicket. In order to preserve analytical clarity despite the terminological ambiguity, it is appropriate to outline the types of situations that may be subsumed under practical conflict: such conflict arises not only when the same legal issue (*res litigiosa*) is resolved differently, but also when two judgments award the same substantive entitlement in differing measures[62], for instance, conflicting monetary awards for the same debt (*quantum debeatur*).

A practical conflict between *res judicata* may also arise in the case of specular claims, namely when, in one proceeding, a party seeks the recognition of a right, while in another, the opposing party seeks its denial. It has been noted that, despite their opposing nature, such claims share the same object, with the consequence that if both are upheld or both are dismissed, a practical conflict between final judgments arises[63].

The examples discussed above confirm the previously stated criterion for identifying a practical conflict: the negative-preclusive effect of *res judicata* serves as the benchmark for assessing whether such a conflict exists. Whenever that effect ought to have operated, a form of inconsistency between judgments must be deemed to exist.

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[59] M. GRADI, *Il contrasto teorico tra giudicati*, cit., p. 74; F. P. LUISO, *Diritto processuale civile*, Milano, I, 2015, p. 197.

[60] A. ATTARDI, *La revocazione*, cit., p. 206; ID., *Conflitto di decisioni e sospensione necessaria del processo,* in *Giur. it.*, 4, 1987, p. 418; ID., *In tema di limiti oggettivi della cosa giudicata*, in *Riv. trim. dir. proc. civ.*, 2, 1990, p. 496 ff.; ID., *Diritto processuale civile*[3], cit., p. 527; G. TARZIA, *Connessione di cause e processo simultaneo*, in *Riv. trim. dir. proc. civ.*, 1988, p. 419; A. LORENZETTO PESERICO, *La continenza di causa*, Padova, 1992, p. 122 ff.; E. VULLO, *La domanda riconvenzionale nel processo ordinario di cognizione*, Milano, 1995, p. 125; S. RECCHIONI, *Pregiudizialità processuale e dipendenza sostanziale nella cognizione ordinaria*, cit., p. 476 ff.

[61] C. CONSOLO, *Spiegazioni*, cit., p. 124; ID., *Il cumulo condizionale di domande*, I, Padova, 1985, p. 377.

[62] K. M. CLERMONT, *Limiting the last-in-Time Rule for Judgments*, cit., p. 5; v. anche A. ATTARDI, *Diritto processuale civile*[3], cit., p. 528.

[63] A. A. ROMANO, *L'azione di accertamento negativo*, Napoli 2006, p. 92 ff., at 96.

Accordingly, we may now proceed to analyse the instruments available to resolve a practical conflict between final judgments, as may be inferred from a systematic interpretation of Articles 161(1) and 395(5) of the Italian Code of Civil Procedure.

4.2.1. *Resolving Practical Conflicts Between Final Judgments: Analysis of Articles 161(1) and 395(5) of the Italian Code of Civil Procedure – The Last in Time Rule.*

In the absence of an unequivocal statutory rule, a practical conflict between judgments may be resolved in favour of the earlier or the later decision. Part of the scholarship, influenced by German legal theory, has supported the priority of the earlier judgment. Among these, Attardi notably argued that failure to file an ordinary revocation under Article 395(5) of the Code of Civil Procedure against the later decision is irrelevant, since that remedy is designed to prevent the formation of conflicting judgments, rather than to resolve an already existing conflict – since, technically, a second final judgment has not yet formed.
The mere existence of a statutory remedy aimed at avoiding conflicting judgments does not, however, justify that the last judgment prevails[64]. The arguments in favour of this thesis amount only to objections against the "last in time" rule, and do not positively establish the primacy of the earlier judgment.
A practical argument in favour of the priority of the first judgment, from the perspective of the economic analysis of litigation, is that it may have a deflationary effect on litigation, discouraging the losing party in the first case from re-litigating the same issue[65]. However, accepting the priority of the earlier judgment necessarily implies that the later one is *inutiliter datum*. The first judgment, having acquired the force of *res judicata*, would exhaust the court's *potestas iudicandi*, implying that the adversely affected party could seek the nullification of the second judgment at any time through an autonomous *actio nullitatis*. In this direction leans the position of Augusto Chizzini, who maintains that failure to bring an ordinary revocation action does not preclude a perpetual challenge to the validity of the second judgment, which was rendered in radical absence of jurisdictional power (*potestas iudicandi*)[66].
This assumption must be rejected. A second decision rendered in breach of a prior *res judicata* is not simply *inutiliter data*. It is affected by unjustice. If one were to qualify the later judgment as invalid for deciding a *res prius iudicata*, the resulting nullity – although absolute and not cured by the passage of time – must be

[64] A. ATTARDI, *Diritto processuale civile*[3], cit., p. 535; A. CHIZZINI, *La revoca dei provvedimenti di volontaria giurisdizione*, Padova, 1994, p. 62 ff.
[65] See RUTH B. GINSBURG, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgment*, in 82 *Harvard Law Review*, 4, 1969, p. 798 ff: «A first-in-time rule would lessen the incentive of the party discontented with the first adjudication to relitigate»*;* T. ARRUDA ALVIM, *Sul problema dell'esistenza di due giudicati contraddittori nel diritto brasiliano*, in *Riv. trim. dir. proc. civ.*, 1, 2022, p. 99 ff.; E. TALAMINI, *Conflito entra coisas julgadas: prevalencia da segunda, quando não rescindida*, in *Revista Acadêmica da Faculdade de Direito do Recife*, 2021, p. 112 ff.
[66] A. CHIZZINI, *La revoca dei provvedimenti di volontaria giurisdizione*, cit., p. 65.

challenged with the remedy given by Article 161(1) of the Code, which provides that defects in validity must be raised through ordinary appeals.
That provision, which expressly mentions appeal and cassation but may be construed as covering all ordinary remedies, including revocation under Article 395(5) c.p.c., allows for a resolution of the conflict: failure to bring an ordinary appeal (in this case, revocation) cures the nullity affecting the later judgment. Consequently, the chronologically later judgment will prevail over the earlier one[67].
Therefore, the inconsistency with a prior *res judicata* cannot result in the juridical non-existence or incurable absolute nullity of the subsequent judgment, which implies the necessary rejection of the latter theory.
The view that favours the prevalence of the subsequent *res judicata* is dominant in both Italian scholarship and case law[68]. This solution is also widely accepted in the international arena[69]. On one hand, it may encourage the defeated party in the first instance to relitigate the matter; on the other, it aligns more coherently with the principle of party self-responsibility, and more generally, with a semi-dispositive model of judicial protection of rights.
The idea that the second judgment is affected by a remediable nullity implies that such a defect must be challenged by ordinary means of appeal, either by way of a regular appeal or revocation. Once the time limit to bring such remedies has expired, the defect becomes irrelevant, and *a fortiori*, the later judgment must prevail over the earlier one.
Furthermore, a systemic argument also excludes the precedence of the first judgment: if the first *res judicata* were always to prevail, the losing party in the second judgment would have no actual interest in challenging the latter decision, as it would be rendered ineffective regardless of whether or not it was appealed.

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[67] A. PROTO PISANI, *Appunti sul giudicato civile e i suoi limiti oggettivi*, in *Riv. dir. proc.*, 1, 1990, p. 417 ff.
[68] G. CHIOVENDA, *Principii*, cit., p. 920; E. BETTI, *Diritto processuale civile italiano*, cit., p. 599; ID., *Trattato dei limiti soggettivi della cosa giudicata in diritto romano*, Roma, 2021, p. 35; F. CARNELUTTI, *Sistema del diritto processuale civile*, p. 314 ff.; N. GIUDICEANDREA, *Le impugnazioni civili*, I, Milano, 1952, p. 85; G. PUGLIESE, voce *Giudicato civile (dir. vig.)*, cit., p. 825; S. SATTA, *Commentario*, II, cit., p. 331; L. MONTESANO, *La tutela giurisdizionale dei diritti*, cit., p. 273; G. SCARSELLI, *Note in tema di eccezione di cosa giudicata*, in *Riv. dir. proc.*, 1996, p. 824 ff., at 851; S. RECCHIONI, *Pregiudizialità processuale e dipendenza sostanziale nella cognizione ordinaria*, cit., p. 479 ff.; S. MENCHINI, *Il giudicato civile*, cit., p. 64 ff.; E. MERLIN, *Il contrasto internazionale di giudicati*, Milano, 2004, p. 34 ff.; S. TONOLO, *Pluralità di giudicati ed opposizione all'esecuzione delle sentenze straniere*, in *Riv. dir. proc.*, 5, 2008, p. 1277 ff.; L. PICCININNI, *L'eccezione di giudicato nel processo civile*, cit., p. 356 ff.; M. GABOARDI, *Pregiudizialità in senso logico e comando giuridico: il rilievo del giudicato nel giudizio di legittimità*, in *Riv. dir. proc.*, 2020, p. 429 ff.; M. GRADI, *Il contrasto teorico tra giudicati*, cit., p. 224 ff.
[69] See, for example, the well-known case *Treinies v. Sunshine Mining Co*, 3 308 U.S. 66 (1939); see also W. L. REYNOLD, *The Iron Law and Full Faith and Credit*, in 53 *Maryland Law Review*, 1994, p. 412 ff.; K. M. CLERMONT, *Limiting the last-in-Time Rule for Judgments*, cit., 1 ff., at 11: «*We are to apply the later judgment because the party who could have benefited from it waived its benefits by failing to urge the F-1 judgment on the F-2 court*

In other words, as Mortara clearly explained, the party that does not pursue an ordinary challenge in the second proceeding tacitly accepts the first judgment[70]. Hence, the following conclusion can be drawn: the availability of preventive mechanisms – whether via plea, appeal, or revocation – supports the principle that the later judgment prevails, since the party who fails to make use of all available remedies is deemed to accept the subsequent *res judicata*, which will then acquire full legal effect.
Even if one considers the *res judicata* as having normative effect, the same conclusion emerges[71]: the chronologically later judgment prevails by analogous application of the principle of succession of normative acts over time. Accordingly, one may adapt the classical maxim to declare: «*iudicatum posterior derogat priori*».
Conversely, in a system where no mechanisms exist to prevent practical conflicts between judgments, such a conflict must be resolved in favour of the first decision, as the winning party in the earlier judgment would have no procedural means of preventing the inconsistency. Thus, the mere existence of even a single effective remedy, available before the second judgment becomes final, suffices to trigger both the principle of party self-responsibility and the prevalence of the subsequent judgment – provided, of course, that such remedy is effective.

4.2.2. *Practical Conflict Between a Domestic Res Judicata and Judgments of the Court of Justice Under Article 263 TFEU.*

One might suppose that the criteria for resolving such conflicts, as previously outlined, could also serve to resolve tensions between a domestic final judgment – whether explicitly or implicitly recognising the lawfulness of a given State aid scheme – and a final, unappealable judgment issued by the European Court of Justice, confirming the lawfulness of a Commission decision ordering the recovery of the same aid.
It could be argued, in fact, that the priority between the domestic and EU judgments depends on the temporal sequence in which they are rendered: the domestic *res judicata* would prevail if issued after the EU judgment, which would then be pleadable and reviewable within the national proceedings[72]; conversely, the EU judgment would prevail if rendered after the national ruling has become final.
However, the criteria for resolving practical conflicts between domestic judgments cannot be transposed to the fundamentally different and more intricate scenario of conflict between national and EU judgments[73]. For the issue to be properly framed, one must acknowledge two essential premises: first, the

[70] L. MORTARA, *Commentario del codice e delle leggi di procedura civile*[4], IV, Milano, 1923, p. 504; see also M. GIORGETTI, *Le rinunce alle impugnazioni civili*, Milano, 2001, p. 421 ff.
[71] E. BETTI, *Cosa giudicata e ragione fatta valere in giudizio*, *Riv. dir. comm.*, 1929, p. 545 ff.
[72] About *res judicata* in the European legal order see A. TURMO, *Res Judicata in European Union Law. A Multi-Faceted Principle in a Multilevel Judicial System*, cit., p. 110 ff.
[73] R. CAPONI, *Relazione*, in *La crisi del giudicato*, cit., 366.

Court of Justice, by virtue of the allocation of powers established in the Treaties, constitutes the natural judge of certain areas of EU litigation, as is evident from the wording of Articles 19 TEU and 263 TFEU; and second, the *res judicata* principle belongs to the common constitutional traditions of the Member States, under Article 6, para 3, TEU. The conflict between an EU and a national *res judicata* concerns distinct rights, although these may stem from the resolution of the same preliminary issue, understood broadly to include both the *Rechtsfrage* (question of law) and the constitutive element of the cause of action. As such, this is more properly classified as a conflict of motivations rather than a practical conflict between judgments.
This implies that resolution of the conflict cannot be addressed through the traditional categories of inconsisten judgments.

4.2.3. *Concluding Remarks on the Practical Conflict Between Res Judicata and the Problem of Overruling. Introduction to logical conflict.*

Upon concluding the analysis of the practical conflict between final judgments, it may be stated that the entire matter can be traced back to the broader issue of the overcoming of an unjust *res judicata*. Indeed, the rule of prevalence of the "last-in-time" judgment entails that a final decision, seemingly capable of producing its effects within a given temporal framework, is retrospectively deprived of its legal force.
Moreover, from the foregoing analysis, one can distil a further general principle: the absence of an express statutory provision governing the conflict between *res judicata* does not imply that the legal system is willing to tolerate such a contradiction. The full implications of this principle can only be properly appreciated by turning to the issue of logical (or theoretical) conflicts between final judgments.

4.3. *The External Expansive Effect of the Reformation or Cassation of the Challenged Judgment: The Expansive Force of Article 336(2) of the Code of Civil Procedure and the Resolution of Logical Conflicts Between Final Judgments.*

Different principles govern the logical (or theoretical) conflict between *res judicata*. According to the traditional view, stemming from the authoritative teachings of Chiovenda, the legal system would tolerate logical conflicts between final judgments – that is, a conflict between two non-appealable decisions, both binding on the same parties, one concerning the prejudicial issue and the other the dependent claim[74].

[74] G. CHIOVENDA, *Istituzioni di diritto processuale civile*, I, cit., p. 377; ID., *Principii di diritto processuale civile*, cit., p. 920; E. HEINITZ, *I limiti oggettivi della cosa giudicata*, Padova, 1937, p. 211; S. MENCHINI, *Sospensione del processo civile (processo civile di cognizione)*, in *Enc. dir.*, XLIII, Milano, 1990, p. 31; A. CERINO CANOVA, *L'effetto espansivo della cassazione o della riforma sulle pronunce di altri processi*, in *Riv. dir. proc.*, 1975, p. 481; A. BONSIGNORI, *Della tutela giurisdizionale dei diritti*, I, in *Commentario del*

Recently, however, the solidity of this traditional position within the evolving legal framework has been called into question by Marco Gradi[75], who has identified a possible *ex post* remedy for the theoretical conflict between final decisions, building upon earlier insights by Luigi Montesano[76] and Andrea Giussani[77]. Rather than quietly accepting the irreparability of such conflict – which undermines the credibility of the entire justice system – logical coordination between decisions may be achieved by giving proper effect to the rule that *res judicata* is binding for all legal purposes (Article 2909 of the Italian Civil Code), as well as by applying the automatic invalidation mechanism inherent in Article 336(2) of the Italian Code of Civil Procedure.
It is first necessary to distinguish whether the final judgment on the prejudicial issue was rendered before or after the formation of *res judicata* on the dependent issue. In the first case, any logical inconsistency must be corrected through an ordinary appeal against the later decision, on the grounds that it violated the positive-conforming effect of the earlier res judicata concerning the prejudicial issue. The appropriate remedy would thus be ordinary revocation under Article 395(5) of the Code of Civil Procedure, which may be used not only to prevent practical conflicts but also logical ones. As a result, where the losing party in the second proceeding has failed to pursue this remedy, the principle of *imputet sibi* applies: the party who, through negligence, loses the opportunity to challenge the invalidity of the second decision is deemed, by operation of Article 161(1) c.p.c., to have waived the favorable effects of the first judgment. Consequently, the later *res judicata* concerning the dependent claim prevails, even if logically irreconcilable with the prior ruling on the prejudicial issue[78].
A more problematic scenario arises when, after a final judgment on a dependent claim, a second final and binding judgment is rendered on the prejudicial issue in contradiction with the first. The *res judicata* on the prejudicial question determines the disputed legal situation *ab origine*, that is, with *ex tunc* effect, as if the judgment had been issued at the time the claim was deemed well-founded or unfounded. The retroactive *inter partes* effect of the judgment on the prejudicial issue entails the loss of effectiveness of the earlier dependent judgment, which must be regarded as "resolutively conditioned" on the negative determination of the prejudicial matter that served as the basis of the decision[79].
The invalidation of the effects of the dependent judgment gives rise to a restitution obligation concerning what was obtained in the enforcement proceeding.

Codice civile, fondato da di A. SCIALOJA e G. BRANCA, Bologna-Roma, 1999, p. 167; E. MERLIN, *Il conflitto internazionale di giudicati*, cit., p. 35.
[75] M. GRADI, *Il contrasto teorico tra giudicati*, cit., p. 268 ff.
[76] L. MONTESANO, *La sospensione per dipendenza di cause civili e l'efficacia di accertamento contenuto nella sentenza*, in *Riv. dir. proc.*, 1983, p. 403 ff.; ID., *Questioni e cause pregiudiziali nella cognizione ordinaria del Codice di procedura civile*, in *Riv. dir. proc.*, 1988, p. 299 ff., at 321.
[77] A. GIUSSANI, voce *Sospensione del processo*, cit., p. 610; ID., *Efficienza della giustizia civile e culture della riforma*, cit., p. 299; ID., *Efficienza giusta*, cit., p. 135 ff.
[78] M. GRADI, *Il contrasto teorico tra giudicati*, cit., p. 292.
[79] M. GRADI, *Il contrasto teorico tra giudicati*, cit., p. 310.

It should not be overlooked that certain special rules limit the right to restitution – for instance, in family law (*e.g.*, maintenance obligations) or in industrial property disputes (see Article 77 of the Italian Code of Industrial Property) – thus offering the interpreter a gauge of the importance of protecting the legitimate expectations of the victorious party regarding the outcome of the proceedings, especially when specific social or value-based considerations demand that what was obtained under the conditional judgment should not be gave back. The protection of legitimate expectations correlates with the passage of time: if the annulment of the conditional judgment is close to the moment of enforcement, then the expectations of the prevailing party will be protected [80].
The theory of the conditional judgment is grounded in the need to coordinate, *ex post*, mutually contradictory final judgments. The mechanism of automatic invalidation of the dependent decision appears to be modeled on Article 336(2) of the Italian Code of Civil Procedure, which, even in case law, is considered to express a general logical principle applicable not only within the *hortus conclusus* of appellate procedures, but also in all situations where a subsequent judgment proves incompatible with one already final and binding – provided, however, that no legitimate reliance on the irreversibility of the earlier decision comes into play.
The mechanism of automatic invalidation of the incompatible dependent ruling, as provided for in Article 336(2) of the Italian Code of Civil Procedure, reflects a general principle of logical order allows the "conditional *res judicata*" theory to be applied beyond the confines of conflicts between domestic judgments. Indeed, this mechanism can be employed to resolve the conflict between a final domestic judgment that upholds the legality of a given State aid scheme and a subsequent incompatible recovery decision ruled by the European Commission in contradiction with the national judgment, affirming that the aid scheme is incompatible with the internal market. This is subject, however, to the specific relevance that the legitimate expectations of the beneficiary may acquire in the individual case under consideration.
This final observation will be explored further below; at the same time, it introduces the next topic that must be addressed in order to obtain a comprehensive understanding of the phenomenon of *res judicata*'s overcoming: the "temporal limits of *res judicata*."

4.4. *The Temporal Limits of* Res Judicata*: Entitlements with Instantaneous Effects*.

Although civil *res judicata* is constitutionally protected against retroactive legislative interventions[81], it is not excluded that certain subsequent factual or legal developments may affect its *firmitas*.

[80] M. GRADI, *Il contrasto teorico tra giudicati*, cit., p. 340.
[81] See *supra*, section I, § 6.

This issue pertains to the theory of the temporal effects of *res judicata* (or, if preferred, the chronological limits of *res judicata*[82]), which examines the relationship between the uncontestability of the determination contained in a final judgment and the possibility that subsequent effects may influence the temporal development of the substantive situation adjudicated with the authority of *res judicata*[83].

A starting point in examining the temporal dimension of *res judicata* is the observation that the legal effect established by the final ruling and the supervening one may either be in a relationship of mere chronological succession or one of conflict.

There is no conflict when the supervening legal effect arises from a modifying or extinguishing fact which affects on the *res judicata*, or when a non-retroactive subsequent legal provision, relevant only in cases where the judgment concerned a continuing situation, redefines certain aspects for the period not covered by the authority of *res judicata*.

This first scenario presents two practical issues.

The first one concerns identifying the temporal scope covered by the effect of *res judicata* and, consequently, the point from which a supervening legal effect may be deemed to arise[84].

The second pertains to the identification of the prerequisites and criteria for determining the legal relevance of such supervening effects, which must be assessed with caution so as not to undermine the authority of *res judicata*[85].

With regard to the first issue, all facts that occurred after the final procedural window for introducing new factual elements are considered supervening. Under the procedural regime prior to Legislative Decree No. 149 of 2022, at least in ordinary proceedings, this window was traditionally identified with the hearing for the specification of conclusions under Article 189 of the Code of Civil Procedure; under the current regime, the relevant reference is the hearing in which the case is remitted for decision. All facts occurring after that point, insofar as they affect the substantive situation adjudicated in the proceedings, are not barred by the preclusion of deducibility and may, if necessary, be asserted in a subsequent proceeding[86].

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[82] Accordign to the expression used by F. P. LUISO, *Rinnovazione dell'atto di licenziamento e limiti cronologici del giudicato*, in *Giust. civ.*, 1985, I, p. 559 ff.; ID., *Diritto processuale civile*, cit., p. 182 ff.; C. CONSOLO, *Spiegazioni di diritto processuale civile*, cit., p. 97; A. PROTO PISANI, *Lezioni di diritto processuale civile*, cit., p. 78; G. CRISTOFOLINI, *Efficacia della sentenza nel tempo*, in *Riv. dir. proc.* civ., 1935, p. 293 ff.

[83] About this topic see the masterpiece of R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., *passim*; ID., *Corti europee e giudicati nazionali*, in *Corti europee e giudici nazionali*, cit., p. 296 ff. See also the Article 150 delle *Eli-Unidroit Model European Rules of Civil Procedure*, sancisce: «(1) *Where a judgment that has become res judicata requires periodic performance, on application by a party, the court may vary the judgment prospectively*. (2) *A judgment may only be varied under this Rule where there is a substantial change of circumstances*».

[84] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 119 ff.

[85] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 155 ff.

[86] S. MENCHINI, *I limiti oggettivi del giudicato civile*, cit., p. 302.

This conclusion is supported by comparative analysis: German legal doctrine generally reaches the same conclusion by referring to § 767(2) ZPO, which provides that only objections based on facts that occurred after the close of the oral hearing on the facts (*die letzte mündliche Tatsachenverhandlung*) may be raised against the claim established in the judgment. This final hearing marks the last procedural stage at which new facts may be introduced[87].
With respect to supervening legal norms, the relevant procedural cut-off is the date of the judgment's publication, as it marks the moment in which the judgment legally comes into existence. This is the latest point at which the court may consider *ius superveniens*.
As regards the second issue, only those facts and normative developments that occur after the last opportunity to raise them during proceedings – and that produce a modifying or extinguishing effect on the adjudicated legal advantage – are relevant[88].
The temporal limits of *res judicata* operate differently depending on the nature of the adjudicated legal position. In the case of instantaneous legal situations – that is, those in which the holder's interest is realized *uno actu* at the moment the situation itself extinguishes (such as the creditor's right to performance, delivery of a good under a sales contract, or the right to compensation for tortious conduct), supervening non-retroactive legislation does not create a real conflict. By definition, an instantaneous legal situation cannot have intertemporal effects. Therefore, the introduction of a new impeding, modifying, or extinguishing fact affecting the right that was the object of the final adjudication, insofar as it falls outside the temporal scope considered by the judgment, may affect applicability of the *res judicata*[89].
Conversely, the introduction of retroactive *ius superveniens* that impacts the portion of the instantaneous legal situation covered by the temporal scope of the *res judicata* – particularly by modifying or nullifying the constitutive fact – creates a conflict with the findings of the final judgment, which, at least with respect to what was claimed or claimable, "is final for all purposes."
However, given the natural resistance of *res judicata* to retroactive *ius superveniens*, as derived from Articles 102 and 103 of the Italian Constitution, the conflict must be resolved in favor of the *res judicata*. This is because the fact that has been the subject of an unappealable determination is no longer part of the class of facts abstractly contemplated by the retroactive norm. The formation of the *res judicata* has effectively severed the factual situation from its original legal source, in accordance with the mechanism invoked by the substantive theory to support the impermeability of *res judicata* to retroactive normative developments.

4.4.1. *Continued: Legal Subjective Situations Producing Continuing Effects.*

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[87] D. LEIPOLD, *Zur zeitlichen Dimension der materiellen Rechtskraft*, in *Keio Law Review*, 1990, p. 277 ff.
[88] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 133 ff.
[89] IBIDEM, p. 158 ff.

The discussion does not substantially differ when it comes to legal situations with continuing effects, such as ownership and real estates, the creditor's right to receive a periodic or continuous performance, personality rights, status, and tax obligations. The legal interest persists over time and is realized as long as the legal situation endures. Therefore, while legal advantages with instantaneous effects are governed fully and tendentially immutably by the *res judicata* (except where subsequent legal or factual events assign relevance to facts not precluded as deducible), situations with lasting effects continue to exist and be performed even after the judgment has become final.
As with instantaneous legal situations, a conflict arises only when retroactive *ius superveniens* affects that segment of the entitlment which continues after the judgment has become final. The rule expressed by the adjudication – limited to the temporal scope considered by the judgment – remains unalterable and is impermeable to retroactive legislative interventions. That segment must be identified as the portion of the ongoing legal situation after the publication of the judgment – this being, as noted, the last moment in which the judge must consider *ius superveniens* or Constitutional Court rulings, given their retroactive effect. Thus, the rule established by the judgment continues to be subject to subsequent normative developments that may retroactively affect the portion of the legal relationship not covered by *res judicata* or may attribute legal relevance to new facts that condition its progression[90].
In relation to instantaneous relationships with fragmented execution over time – such as instalment sales with retention of title pursuant to Article 1523 of the Italian Civil Code – retroactive *ius superveniens* cannot alter the number of individual instalments when their value has already been judicially ascertained with *res judicata* effect, under penalty of undermining the guarantee of the finality of exhausted relationships. If judgment has been rendered ordering payment of overdue instalments, and a retroactive law subsequently sets, by operation of Article 1339 of the Civil Code, a different price for that category of goods, such law cannot affect the already adjudicated amount. This is because the entire contractual relationship was formed and completed at the time of consent, while the instalment payments merely reflect the execution modality of the obligation assumed.
Where, instead, the judgment establishes the nonexistence of the asserted legal position due to an impeditive, modifying, or extinguishing fact, a *ius* or *factum superveniens* removing the obstacle may permit the claimant to reassert the original constitutive fact, provided that the *res judicata* does not concern that fact (*e.g.*, if the prior case was dismissed on a preliminary issue, with other issues absorbed and thus not adjudicated). In the reverse scenario – where the judgment affirmatively determines the nonexistence of the constitutive fact – a new claim is precluded. Conversely, the defendant in such a new trial may raise other impeditive, modifying, or extinguishing facts, even if they pre-existed the first judgment and were thus previously deducible.

[90] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 288.

A further variant occurs when retroactive *ius superveniens* grants legal significance to a purely factual interest that was legally irrelevant during the period covered by the prior judgment. As Caponi observes, «a retroactive norm that legally qualifies a factual situation always introduces a new subjective legal situation not precluded by the prior *res judicata*[91]». However, where a claim is rejected due to its non-justiciability or because of an absolute lack of jurisdiction, this leads to a substantive *res judicata* on the nonexistence of the right itself. Admitting retroactive effect *in bonam partem* (modelled after Article 2(2) of the Criminal Code) appears inconsistent with the logic of civil law, at least within symmetrical legal relationships; however, such a form of *res judicata* flexibility may be contemplated when the party benefiting from the judgment is a public administration, in which case the need to protect the winner's reliance interest – integral to the doctrine of *res judicata* – may be less stringent.
A different scenario arises when *ius superveniens* – such as a declaration of unconstitutionality – affects the norm that led to the exhaustion of the relationship. In this case, the "unconstitutional" exhaustion is an effect flowing from the application of a norm that has been removed from the legal system. The impermeability of *res judicata* to the invalidation of the norm that enabled the extinguishment appears profoundly illogical, given that the declaration of unconstitutionality reopens already concluded relationships: in the absence of that unconstitutional provision, the extinguishment could not be considered final.
In such a case, the impermeability of *res judicata* to the neutralization of the norm that led to the exhaustion of the legal relationship appears profoundly illogical, since the declaration of unconstitutionality reopens legal relationships that were previously considered concluded; indeed, in the absence of the provision that prescribed the exhaustion of the relationship, the latter could not genuinely be regarded as untouchable.
Similar conclusions must be drawn regarding *res judicata*. When the failure to pursue an ordinary appeal, which has rendered the judgment immutable, is due to an excusable impediment, the need to safeguard the party's right of defence – who has in good faith forfeited the power to appeal – overrides the principle of finality. As in the case of the unconstitutionality of a specific statutory limitation provision, it is not the institution of prescription itself that is unconstitutional, but rather the particular modalities through which the legal relationship was extinguished, so too, in cases involving a breach of the

[91] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 347. More recently, the same Author has expressed doubts about the conclusion he had previously reached. Indeed, as noted by R. CAPONI, *Corti europee e giudicati nazionali*, in *Corti europee e giudici nazionali*, cit., p. 324, *res judicata* rejecting the claim renders the reassertion of the same action inadmissible where the legal situation remains unchanged (*ne bis in idem*), but does not prevent the retroactive law from reclassifying the facts alleged in the proceedings and the claim from being reasserted on that new basis. Perhaps. In the same sense, see C. CONSOLO, *Il cumulo condizionale di domande*, I, cit., p. 503; S. MENCHINI, *I limiti oggettivi del giudicato civile*, cit., p. 327; W. HABSCHEID, *Effetti della sentenza e cambiamento della legge*, in *Studi in onore di Segni*, II, Roma, 1967, p. 535 ff., at 571.

adversarial process, it is not res judicata per se that is unconstitutional, but rather the way in which it was formed in the specific instance.
This is the proper interpretation of the *restitutio in integrum* mechanism, which – as is well known – was generalised by the 2009 legislative reform. Article 153, paragraph 2 of the Italian Code of Civil Procedure now provides that a party who has incurred a forfeiture due to an excusable cause may request to be reinstated within the timeframe necessary to exercise that right – including the right to appeal – which, pursuant to Article 327 c.p.c., is otherwise lost if not exercised within the prescribed time.

4.4.2. *Continued: The "Hyper-Retroactive" Ius Superveniens as a Limit to the Finality of Res Judicata: Examples of Derogation.*

The conflict between retroactive *ius superveniens* and *res judicata* is not always resolved in favour of the latter. At times, historical-political imperatives to realign the legal system with a shifting social consensus induce the legislature to expressly provide for the annulment of final judgments, thereby encroaching upon the principle of *res judicata*[92], whose fundamental importance has been extensively examined above.
Such provisions may be characterised as singular norms of intertemporal law, in that they explicitly refer to the legal interests previously settled by the judgment to exclude their applicability retroactively[93]. What remains to be clarified is under which conditions such hyper-retroactive legislative interventions may be considered constitutionally legitimate – thereby precluding a finding of unconstitutionality, particularly for violation of Article 3 of the Italian Constitution, when laws override final judicial decisions.
The Italian legal system provides several examples of hyper-retroactivity, most of which relate to specific legislative acts (leggi-provvedimento). An example is found in Article 10(2) of Law No. 425 of 6 August 1984, concerning the remuneration of magistrates, which provided for the progressive absorption of benefits already awarded by final judgments, in addition to the benefits granted by the same law to all other magistrates.
Generally, legislative acts of this kind (leggi-provvedimento) should be constrained by the limits imposed by *res judicata*, considering the constitutional significance of the principle of separation of powers[94]. Setting aside extraordinary circumstances in which the *interest rei publicae* justifies the annulment of final judgments, res judicata constitutes an insurmountable limit, even for the legislature.
In this regard, the normative justification for hyper-retroactivity cannot reasonably be grounded in Article 30(4) of Law No. 87 of 1953, which implicitly affirms the untouchability of civil judgments rendered under a provision later declared unconstitutional. The fact that such intangibility is prescribed by an

[92] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 365 ff.
[93] G. U. RESCIGNO, *Disposizioni transitorie*, in *Enc. dir.*, XIII, Milano, 1964, p. 219 ff.
[94] F. CARINGELLA, *Manuale di diritto amministrativo*, Roma, 2023, p. 1162.

ordinary statute does not imply – contrary to some views[95] – that *a lex posterior* may simply and automatically override *res judicata*.
It is less self-evident whether such a "hyper-retroactive" *ius superveniens* should be recognised only when the legislature's intent is explicitly stated. Against this restrictive reading, at least two axiological arguments may be raised: (a) The fact that hyper-retroactivity is supported by an express clause within the retrospective statute does not alter the substance of the matter: to comply with the Constitution, such legislation must pursue constitutional values retroactively, enabling a transition from one normative framework to another. The notion that these values must be stated *expressis verbis* in the text of the retroactive law should be firmly rejected, as it does not correspond to the current state of case-law experience, under which constitutional principles need not always be expressly articulated in the letter of the statute[96]; (b) Hyper-retroactivity entails a partial tacit abrogation by incompatibility of Article 2909 of the Italian Civil Code[97], as the legislature intervenes directly upon the source of exhaustion of the legal relationship, reclaiming the power to requalify the adjudicated case. This follows the theory of "singular norms of intertemporal law" discussed above. Through hyper-retroactive legislation, the legislator disregards the detachment effect of the legal situation from its original source, an effect normally produced by the formation of *res judicata*. On a normative level, this phenomenon may only be explained through the doctrine of implied repeal due to incompatibility, as the legal conflict arises upon entry into force of the retroactive statute.
Having outlined the essential features of aggravated retroactivity, the remaining issue is to determine under which conditions it becomes *interest rei publicae* that a *res judicata* may be hyper-retroactively deprived of its effects.
As with other constitutional guarantees, the protection of civil *res judicata* is not absolute. It must be balanced with competing constitutional values. In exceptional circumstances, the ordinary legislator must be allowed to ensure uniform legal treatment across all past cases falling within the material scope of the retroactive provision, regardless of whether some of those cases have been subject to final judgment, and irrespective of any legitimate expectation of the prevailing party on the result of the proceeding. This may occur in three types of scenarios, namely where: a) the evolution of the constitutional order and a changed social sensibility may come to regard certain judicial decisions as profoundly unjust, and *ius superveniens* may enshrine such repudiation in legal terms by explicitly or implicitly providing for the displacement of final judgments; b) in the specific case no issue of legitimate expectations arise, as the final judgment displaced by the retroactive law was rendered between a private party and the public administration; c) mandatory requirements of EU law, in areas of exclusive or shared competence of the Union, may lead to the invalidation of national judgments that are contrary to EU law, provided that, in

[95] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 375.
[96] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, p. 381 ff., at 387; see also L. PALADIN, *Appunti sul principio di irretroattività delle leggi*, cit., p. 950.
[97] E. T. LIEBMAN, *Efficacia e autorità della sentenza*, cit., p. 40.

the case at hand, no legitimate reliance (a fundamental EU principle) by the prevailing party on the outcome of the process has taken root[98], which would otherwise tilt the balance in favour of preserving the final judgment.
As to case (a), reference may be made to a significant Italian precedent: in 1944, the Milan Tribunal, applying racial laws, declared a certain marriage null and void by final judgment and convicted the bride and her father for concealing her "Jewish race". In 1946, the other spouse, despite the repeal of the racial laws, sued for the determination of the *quantum* and obtained a favourable ruling. Indeed, Article 7 of Legislative Decree No. 25 of 20 January 1944 provided for the annulment only of criminal judgments rendered under the racial laws, not civil ones. From this legislative gap, some legal scholars (regrettably) inferred a rule of intangibility of civil judgments, even where they had been issued under a radically incompatible pre-constitutional legal order[99].
However, if the displacement of the final judgment cannot be affirmed based on principles drawn from ordinary legislation, constitutional principles can justify an interpretation embracing hyper-retroactivity. When a statute retroactively asserts fundamental principles of civil coexistence that had been denied by a barbaric political regime, both the rules of judgment finality in the face of *ius superveniens* and of legitimate expectation on the outcome of a process must yield. Such rules encounter an insurmountable obstacle in Article 2 of the Italian Constitution, which refers to natural rights pre-existing the State and merely acknowledged by its *ab initio*. Therefore, considering Article 2, Article 7 of Legislative Decree No. 25/1944 should have been interpreted as also encompassing civil judgments that gave effect to racial laws – thus rendering them *tamquam non essent*, due to the grave injustice arising from violations of human rights[100].
In any case, should such an interpretive outcome not prevail, it does not seem possible to exclude referral to the Constitutional Court of a question of constitutional legitimacy for violation of Article 2, insofar as the retroactive law that reaffirms the previously denied fundamental rights fails to expressly provide for the displacement of judgments rendered under the prior legislation.
Regarding case (b), the displacement of the final judgment by hyper-retroactive *ius superveniens* appears arguable, as the prevailing party's reliance on the outcome of the process is less deserving of protection compared to the justice goals pursued by the new legislation. This may arise in asymmetrical legal relationships, particularly where the dispute involves a private party and the public administration. In such a case, relying on Articles 5 and 81 of the

[98] About the constitutional importance of the principle of legitimate expectation in EU Law see R. BIN, *Il diritto alla sicurezza giuridica come diritto fondamentale*, in *Principio di ragionevolezza delle decisioni giurisdizionali* (a cura di G. FRANCARIO e A. M. SANDULLI), Napoli, 2018, p. 29; V. CAPASSO, *Giudici consequenzialisti*, cit., p. 79; F. CARINGELLA, *Manuale di diritto amministrativo*, cit., p. 886 ff.; A. GAMPER, *Legal Certainty,* in *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, a cura di SCHROEDER, Oxford – Portland, 2016, p. 80 ff.; R. Williams, *The Multiple Doctrines of Legitimate Expectations*, in 132 *The Law Quarterly Review*, p. 639 ff.
[99] G. STOLFI*, L'intangibilità della cosa giudicata*, in *Temi*, 1950, p. 113 ff., at 117.
[100] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 386-387.

Constitution – which affirm the unity of the State – one may argue that when the State itself, through *ius superveniens*, confers legal significance on facts previously deemed irrelevant by a final judgment.
Thus, where the party benefiting from a final dismissal is the State (which is also responsible for the normative change), the need to protect legitimate expectation on the outcome of the process loses relevance. Conversely, where a judgment has upheld the public entity's claim and has already been executed, such displacement becomes far more difficult to justify, given the heightened presumption of finality[101].
As for case (c), it is addressed in detail in Section II of Chapter V. Nevertheless, it can already be stated that the complex balancing test that may result in the limitation of *res judicata* must be conducted in accordance with European Union law.
Thus, while it is undisputed that interpretative judgments of the Court of Justice operate as *ius superveniens* with retroactive effect over unresolved legal relationships to which they apply[102], it is far more difficult to argue their hyper-retroactive nature – namely, their capacity to affect the rule of the case as crystallised in a national *res judicata* that is incompatible with the *dictum* of the Luxembourg Court.
It can already be anticipated that the case-law of the Court of Justice, both in preliminary ruling procedures and in annulment proceedings, generally affirms the overcoming of those national judgments rendered as a result of collusive conduct between the parties to the detriment of the European Commission in the field of State aid, as well as those judgments that failed to take account of a prior recovery decision issued by the Commission.
Conversely, the hyper-retroactive effect of recovery decisions adopted after the formation of the national *res judicata* by the Commission appears arguable only in those cases where no legitimate expectation of the beneficiary regarding the lawfulness of the aid has arisen. Identifying such situations is far from straightforward, and we therefore defer a more detailed treatment to a later stage[103].

5. *The Unconstitutional* Res Judicata.

Recently, legal scholarship has voiced increasing dissatisfaction with the notion that *res judicata*, beyond being generally protected against retroactive legislative interventions, should also be protected from the effects of judgments of

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[101] W. HABSCHEID, *Effetti della sentenza e cambiamento della legge*, cit., p. 566.
[102] C. COMMANDATORE, *I limiti oggettivi del giudicato amministrativo all'esame della Plenaria*, in *Urb. App.*, 11, 2016, p. 1382 ff., at 1386; L. CARBONARA, *Il giudicato a formazione progressiva e l'efficacia delle sentenze dalla Corte di giustizia*, in *Giorn. dir. amm.*, 3, 2017, p. 372 ff., at 376; P. BIAVATI, *Diritto processuale dell'Unione europea*, Bologna, 2015, p. 432 ff.; C. RASIA, *Civil Procedura in the European Union*[3], Alphen aan den Rijn, 2022, p. 80; A. BRIGUGLIO, *Pregiudiziale comunitaria e processo civile*, Padova, 1996, p. 264.
[103] See *infra*, chapter V, section II.

unconstitutionality regarding the substantive norms on which the irrevocable determination was based[104].
The traditional doctrine on the chronological limits of *res judicata* – according to which the declaration of unconstitutionality by the Constitutional Court, like a retroactive statute, does not affect legal relationships that have been exhausted by a final judgment[105] – has been called into question by the interpretive hypothesis advanced by Marco Gradi, which we proceed to outline[106].
The critical issue of the traditional view lies in this: after the declaration of unconstitutionality, a final judgment comes to embody a legal value that is no longer constitutionally valid. It is, therefore, an unjust decision. This form of injustice is not merely subjective, but it is certified by the Constitutional Court itself, thus generating a conflict between judgments: namely, between an irrevocable decision no longer subject to ordinary remedies and the constitutional judgment, which, pursuant to Article 137 of the Constitution, is itself unappealable. Considering the unjust outcomes produced by the irreversibility of unconstitutional judgments, Gradi proposes a new reading of Article 30, paragraph 4, of Law No. 87 of 1953. Although that provision is often invoked to support the immunity of *res judicata* from constitutional review, it does not explicitly establish such protection and indeed implicitly excludes it.
Starting from a literal analysis of Article 30, paragraph 4, of Law No. 87 of 1953 – where it states that «the execution and all criminal effects cease» in relation to a judgment declared unconstitutional – it is possible to reach the conclusion that, in such cases, the Italian legal system does not permit the enforcement of a final judgment, whether criminal or civil.
Article 30(4) thus appears as an amphibological provision, one that admits two plausible literal interpretations: a) the adjective "criminal" could refer both "execution" and "effects"; b) alternatively, "criminal", in its plural form, may refer exclusively to "effects", while the word "execution", left unqualified, could be understood as referring broadly to the enforcement of any final judgment, be it criminal, civil or administrative.
The practical implication of this interpretation becomes evident when one considers that such judgments would no longer constitute valid enforceable

[104] The idea of the irrelevance of the declaration of unconstitutionality was held by L.P. COMOGLIO, *Diritto di difesa e retroattività delle decisioni costituzionali*, in *Riv. dir. proc.*, 1, 1967, p. 76; E. GARBAGNATI, *Efficacia nel tempo della decisione di accoglimento della Corte costituzionale*, *ivi*, 1, 1974, 214 ff.; U. COREA, *Il giudicato come limite alle sentenze della Corte costituzionale e delle Corti europee*, in *La crisi del giudicato*, cit., p. 265; B. CAPPONI-R. TISCINI, *Introduzione al diritto processuale civile*[3], Torino, 2022, p. 225 ff., at 229 ff.; P. BARILE, *La parziale retroattività delle sentenze della Corte costituzionale in una pronuncia sul principio di uguaglianza*, in *Giur. it.*, 1960, 1, p. 912 ff.; N. LIPARI, *Orientamenti in tema di effetti delle sentenze di accoglimento della Corte costituzionale*, in *Giust. civ.*, 1963, I, p. 2239 ff.; A. PIZZORUSSO, *sub art. 136*, in *Commentario della Costituzione*, a cura di G. Branca, Bologna-Roma, 1981, p. 183 ff.; G. ZAGREBELSKY, *Processo costituzionale*, in *Enc. dir.*, XXXVI, Milano 1987, p. 633 ff.; A. RUGGERI-A. SPADARO, *Lineamenti di giustizia costituzionale*[6], Torino, 2019, p. 177.
[105] R. CAPONI, Tempus regit processum. *Un appunto sull'efficacia delle norme processuali nel tempo*, in *Riv. dir. proc.*, 2006, 459 ff.
[106] M. GRADI, *Cosa giudicata incostituzionale*, in *Riv. dir. proc.*, 4, 2022, p. 1190 ff.

titles, thus allowing the debtor to raise an opposition to enforcement under Article 615 of the Italian Code of Civil Procedure. The judge of the opposition is called to apply the impact of the Constitutional Court's decision on the civil judgment previously enforced.
However, Article 30(4) refers specifically to an "irrevocable sentence of condemnation", borrowing terminology from criminal procedure law, which considers a sentence irrevocable once it has become final (see Article 648 of the Italian Code of Criminal Procedure). From this, one might infer that the provision of Article 30 (4) applies exclusively to criminal judgments affected by a declaration of unconstitutionality of the substantive criminal offence applied. A cross and systematic analysis supports a different interpretation: the notion of irrevocability is not exclusive to criminal law. For example, Article 2, paragraph 2-*ter*, of Law No. 89 of 2001 (the "Pinto Act") provides that a trial respects the requirement of reasonable duration "if the proceedings are irrevocable resolved within six years". There is no doubt that the term "irrevocable resolved" refers both to criminal and civil proceedings, clearly alluding to the finality that arises from the exhaustion of ordinary remedies[107].
Moreover, Article No. 1772 of the Italian Civil Code of 1865 already stated: «Transactions between parties have the authority of an irrevocable judgment», clearly implying that civil law too uses the term irrevocable as synonymous with final or *res judicata*. This reinforces the argument against the traditional view, which holds that Article 30(4) applies only to criminal judgments.
In any case, the debtor may object to the enforcement of an unconstitutional civil judgment, with the sole limit being the "executed matter", since the fulfilment of an "unconstitutional debt" entails the actual exhaustion of the legal relationship, thereby precluding any claim for unjust enrichment or restitution[108].
Although Gradi's interpretation may appear heterodox or even subversive, systemic indicators support a different view: the explicit provision in Article 391-*quater* of the Code of Civil Procedure, which allows for the reopening of proceedings in the event of a final judgment conflicting with a ruling by the European Court of Human Rights, suggests that the "orthodox" reading of Article 30(4) is no longer sustainable within the evolved legal framework. In both scenarios, a violation of fundamental rights is at issue, and it is unclear why the reopening of the case is permitted in the one, and not in the other.
Furthermore, considering that the ECHR holds a lower position in the hierarchy of sources of law compared to the Italian Constitution, the orthodox interpretation becomes even more unreasonable. Nor are the doctrinal arguments about the rationality of excluding the overcoming of the unconstitutional judgment. It can hardly be argued that limiting the remedy under Art. 391-*quater* only to final judgments incompatible with Strasbourg jurisprudence is justified by institutional differences between the two Courts[109].

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107 M. GRADI, *Cosa giudicata incostituzionale*, cit., p. 1207.
108 M. GRADI, *Cosa giudicata incostituzionale*, cit., p. 1209.
109 F. PINTO, *La cedevolezza del giudicato civile a fronte delle pronunce della Corte di giustizia dell'Unione europea*, in *DPCIeC*, p. 133 ff., at 141.

The fact that recourse to the ECtHR is individual and subject to the exhaustion of domestic remedies under Article 35 ECHR is not sufficient to justify the legislator's selective approach. While there are institutional differences between the two courts, the true source of the violation of Article 3 of the Constitution and the principle of reasonableness lies elsewhere: if constitutional provisions hold a hierarchically superior status, it is axiologically unacceptable that only final judgments contrary to the ECHR can be set aside through a special extraordinary remedy.
This is why an interpretative adjustment and rationalisation, as proposed by Gradi, becomes necessary: it is thus reasonable to advocate a broader judicial review over unconstitutional *res judicata* than over those merely incompatible with ECtHR judgments between the same parties, since, in the axiological hierarchy of the domestic legal system, the Constitution prevails over the ECHR, and an unconstitutional judgment entails a more severe breach than one deemed only contrary to the ECHR.

5.1. *The Overcoming of Unconstitutional* Res Judicata *in a Comparative Perspective: Analysis of the Issue in German and Brazilian Law.*

From a comparative perspective, the *firmitas* of an unconstitutional *res judicata* is a solution rejected by multiple legal systems. In Germany, if an unconstitutional decision has not yet been executed, § 767 ZPO allows the judgment debtor to object to enforcement, rendering compulsory execution inadmissible[110]. Moreover, although § 79(2) of the Federal Constitutional Court Act (BVerfGG) provides for the preservation of *res judicata* formed under a legal provision subsequently declared unconstitutional, the German Constitution (*Grundgesetz*) provides for a tempering mechanism: when a final judgment violates a fundamental right, that violation may be challenged before the Federal Constitutional Court via constitutional complaint (*Verfassungsbeschwerde*), pursuant to Art. 93(1)(4a) GG, within one month from service or notification of the final decision.
Turning to the Brazilian legal system, the immunity of *res judicata* from retroactive legislation finds explicit constitutional grounding in Article 5, paragraph 36 of the Brazilian Constitution, which states that «the law shall not prejudice acquired rights, perfected legal acts, or *res judicata*».
Nonetheless, despite the constitutional statute of civil *res judicata*, Brazilian legal scholarship has developed an extensive debate around the "relativization of *res judicata*" in cases where the final judgment undermines constitutionally protected fundamental rights[111].

[110] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, cit., p. 279; ID., *Corti europee e giudicati nazionali*, in *Corti europee e giudici nazionali*, cit., p. 307 ff.
[111] See, for example, J.A. DELGADO, *Efeitos da coisa julgada e principios constitucionais*, in *Coisa julgada inconstitucional*, a cura di C. VALDER DO NASCIMENTO, Rio de Janeiro, 2003, p. 33 ff.; H. THEODORO JR.-J. CORDEIRO DE FARIA, *A coisa julgada inconstitucional e os instrumentos processuais pare seu controle*, *ivi*, p. 77 ff.; E. F. RODRIGUEZ, *Coisa julgada inconstitucional*, in *Revista de Informação*

With the advent of the 2015 Brazilian Code of Civil Procedure, the concept of unconstitutional *res judicata* has been codified under Article 525 § 15, which permits opposition to enforcement of a civil judgment based on a law declared unconstitutional – but only if the Supreme Federal Court's decision preceded the final judgment. Where the declaration of unconstitutionality is subsequent to the formation of *res judicata*, the Brazilian system allows for an extraordinary action for rescission (*ação rescisória*) within two years from the final judgment of unconstitutionality rendered by the Supremo Tribunal Federal[112].
This brief comparative analysis supports the initial assumption: the transformed constitutional framework can no longer tolerate the untouchability of unconstitutional *res judicata*, because had the declaration of unconstitutionality been timely, it would have altered the content of the civil judgment. Waiting for a casa law response, it can already be observed that the internal logic of the legal system there are hypothesis of *infirmitas rei iudicatae* as the result of balancing competing constitutional principles. The *numerus clausus*' principle does not correspond to the reality of the case law experience, as we will see soon.

5.2. *The Overcoming of* Res Judicata *in Case-Law Experience on Both Sides of the Atlantic.*

We may now proceed to identifying relevant cases arising from case law, where courts often strategically manipulate the theory of the objective limits of *res judicata* à la carte to conceal phenomena of "hidden" overcoming[113].
Although the entire theory of the objective limits of *res judicata* may be viewed as a creation of jurisprudence, albeit inspired by doctrinal reconstructions, it would be naïve to assume that the Italian Supreme Court consistently apply their own teachings even when the extension of implicit *res judicata* to all deducible matters would result in the irremediable perpetuation of serious injustice.
According to Italian case-law experience, *res judicata* covers both what has been pleaded and what could have been pleaded with respect to the same subject matter, and therefore encompasses not only the factual and legal grounds actually invoked but also all potentially actionable or defensible issues which,

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Legislativa, 2005, p. 95 ff.; T. ARRUDA ALVIM WAMBIER, J.M. GARCIA MEDINA, *O dogma da coisa julgada. Hipoteses de relativizacao*, San Paulo 2003, p. 39 ff.; L.G. MARINONI, *Coisa julgada inconstitucional*, San Paulo 2008, p. 84 ff.; E. ANDRADE*, Il nuovo Codice di procedura civile brasiliano del 2015: sguardo generale e alcuni aspetti di interesse comparatistico*, in *Riv. dir. proc.*, 4, 2020, p. 1254 ff.; J. M. TESHEINER- R. THAMAY, *Ação rescisória no novo Código de Processo Civil*, in 6 *Civil Procedure Review*, 1, 2015, p. 53 ff.; G. CHIARAMONTE, *La revocazione nel processo civile italiano: criticità del sistema italiano e prospettive di riforma alla luce del nuovo CPC brasiliano*, in 12 *Civil Procedure Review*, 1, 2021, p. 133 ff., at 145; for a case law analysis see A. PELLEGRINI GRINOVER, *Miti e realtà sul giudicato: una riflessione italo-brasiliana*, in *La crisi del giudicato*, cit., p. 208 ff.
112 About the unconstitutionality art. 525 § 15, cfr. L.G. MARINONI, *A coisa julgada diante da decisão de inconstitucionalidade do Supremo Tribunal Federal*, in *Direito, razao e argumento. A reconstrucão dos fundamentos democraticos e republicanos do direito publico com base na teoria do direito*, São Paulo, 2020, p. 1084 ff., at 1098.
113 About this phenomenon in the U.S. legal order see S. SCHAFFSTEIN, *The Doctrine of* Res Judicata *Before International Commercial Arbitral Tribunal*, cit., p. 29.

though not specifically raised, constitute the logical, essential and necessary antecedents of the ruling.
But it does not seem to realistically reflect the actual functioning of the Italian civil justice system.
The application of implicit *res judicata* to the underlying legal relationship is influenced by numerous practical considerations, which are not explicitly codified in the latter judicial handbook.
Notably, procedural context matters[114]: where the second proceeding presents a high degree of *fumus*, courts are more likely to deny the existence of implicit *res judicata* on the underlying legal relationship if the prior judgment on the resulting legal effect was rendered, for instance, via an unopposed payment order. Conversely, when the judgments follow a full flegded trial, implicit *res judicata* may extend even to so-called "co-planar" claims, *i.e.*, claims that the parties could – or perhaps should – have brought in the first action, as they too derive from, or are closely connected to, the same factual basis.
This approach is not dissimilar from the doctrine developed in English case law since *Henderson v Henderson*[115].
In such cases, it becomes easier to accept that *res judicata* may arise from what was not even a proper *iudicium* – that is, that the authority *of res judicata* may extend to matters not even addressed in the reasoning of the judgment.
The analysis of case law on the "modulation" of the objective limits of *res judicata* supports the following conclusion: the criteria established by the Supreme Court serve primarily to guide judicial discretion in the application of what is, in essence, a broadly discretionary general rule.
This discretion is not easily inferred from the *ex-post* rationalisations found in the reasoning of decisions. Rather, it emerges from the persistence of latent conflicts that are not easily resolved through the mechanisms provided in Articles 360-*bis*, 363, and 363-*bis* of the Code of Civil Procedure, which are designed to eliminate only *manifest* inconsistencies. Case law tends to conceal this discretion, particularly in legal systems – like those of continental Europe – where the judiciary is more bureaucratically structured and where judicial legitimacy is traditionally grounded in its technical dimension.

[114] See L. MONTESANO, *Luci ed ombre in leggi e proposte di «tutele differenziate» nel processo civile*, in *Riv. dir. proc.*, 2, 1979, p. 592 ff., at 597; E. BERTILLO, *Sui rapporti tra c.d. giudicato implicito e provvedimento monitorio non opposto*, in *Riv. dir. proc.*, 3, 2023, p. 1035 ff., at 1045.
[115] Cfr. English Court of Chancery, *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313: «where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter[s] which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time». About *Henderson v Henderson* see P. BARNETT, Res Judicata, *Estoppel, and Foreign Judgments*, Oxford, 2001, p. 23 ff.

Nonetheless, it is now widely acknowledged that the ideal of mechanical application of the law has failed the test of reality. The legitimacy of judicial power must instead be grounded in its independence and transparency, which implies that the margins of discretion must be disclosed and subjected to critical scrutiny. This is necessary to prevent opacity from undermining public trust in the judiciary[116].
A realistic description of the phenomenon of implicit *res judicata* concerning deducible matters may be summarized as follows: just as the appellate court considers contrary evidence and orders a retrial only when such evidence appears particularly persuasive, so too does the court – whether of first instance or of last resort – reopen an issue that appears implicitly precluded only when the objections raised against it demonstrate a high degree of *fumus boni iuris*[117]. Fewer *fumus* is required when the implicit preclusion arose within a summary procedure, whereas a stronger indication of injustice is needed if the preclusion resulted from a full trial.
Accordingly, the possibility of challenging the injustice of a decision – despite the invocation of implicit preclusion on the fundamental legal relationship – is in practice safeguarded only to the extent that such injustice is manifest. The evidentiary burden varies in light of:

I. the substantive legal principles grounding the need for consistency in judicial determinations;

II. the factors indicating the reliability of the earlier decision;

116 See R. ZIFF, *Note For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, in 77 *Cornell Law Review*, 1992, p. 905 ff., at 927,: «[T]he proper model of res judicata law is, whenever possible, to establish clear rules, with some flexible exceptions used in rare cases, that serve only to block, but never to invoke, preclusion in unforeseeable situations». About the importance of foreseeability of objective limits of *res judicata* see W. W. HEISER, *California's Unpredictable* Res Judicata *(Claim Preclusion) Doctrine*, in 35 *San Diego Law Review*, 1998, p. 560 ff., at 562: «understandable res judicata rules promote efficient judicial administration in a variety of related ways. First, they inform parties as to what matters they must pursue in a single lawsuit or forever be foreclosed and thereby assure the parties that the resolution of these matters will be final and conclusive. To accomplish this efficiency goal, and accomplish it fairly, any doctrine of res judicata should provide clear warning to parties as to which claims and issues they must present in initial litigation, and which ones they may legitimately reserve for resolution in a subsequent proceeding. Clear res judicata rules provide a degree of predictability which allow parties to structure their litigation conduct with some assurance as to when that conduct will or will not foreclose presentation of claims and issues in a subsequent proceeding. […] A successful res judicata doctrine, from an efficient judicial administration viewpoint, is one which achieves its intended substantive preclusive effects with little or no judicial enforcement. Uncertain preclusion rules undermine this efficiency goal. Ambiguous preclusion standards may encourage a plaintiff to commence subsequent litigation that clearer rules would have discouraged. Likewise, both parties in subsequent litigation may involve the court in threshold motions regarding the preclusive effects of a prior judgment which, under more precise rules, the parties would forgo as untenable».
117 A. GIUSSANI, *Intorno alla «riflessione» del giudicato contro il terzo*, cit., p. 1197.

III. the procedural framework in which the preclusion took shape.

In extreme cases, courts may engage in a form of derogation from implicit preclusion when, upon consideration of all such factors, the injustice of the decision is nearly incontrovertible – much in the same way that appellate courts may censure a lower court's failure to consider key evidence only where such omission would almost certainly have led to a different finding of fact.
In these circumstances, the implicit *res judicata* concerning the fundamental relationship projects its effects *ultra litem*, thereby functioning as a true rule for the concrete case comparable to how factual determinations made at trial are respected before the Supreme Court only when not vitiated by manifest error[118].
The discretion in the application of the theory of implicit *res judicata* is, moreover, normal. This discretion allows for both ensuring justice in the specific case and avoiding excessive burden of motivation for the judge (even relieving the judge from providing complex reasoning in open dissent with the orientation formalized by the Supreme Court). This is based on a modern understanding of the judge's "subjection to the law", which refers to oversight of the criteria the judge uses to arrive at that particular decision. This implies that a decision is more socially acceptable when the criteria used by the judge are universalizable and rationally agreeable. This approach should balance the need for reasonable duration of the proceedings, procedural economy, and the justice of the decision in the specific case.
The attitude of Italian case-law towards the preclusion of what can be deduced is not unique but can also be observed in different legal cultures, such as the American one. In the U.S. federal system, the idea that preclusion resulting from the formation of a judgment impacts the entire relationship is confirmed by Section 24 of the Restatement (Second) of Judgments: «[W]hen a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose[119]».
The "transactional[120]" conception follows the principle that a dispute must be resolved in a single proceeding and cannot be fragmented into multiple

118 A. GIUSSANI, *Intorno alla «riflessione» del giudicato contro il terzo*, cit., p. 1197.
119 Il *Restatement (second) of Judgment* is a consolidation of the principles ruled in procedural matter by the American case-law. About *res judicata* in the Restatement see G. C. HAZARD, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, in 66 *Cornell Law Review*, 1981, p. 534 ff.; J. A. MARTIN, *Restatement (Second) of Judgments: An Overview*, *ivi*, 404 ff.; A. VESTAL, *Restatement (Second) of Judgments: A Modest Dissent*, *ivi*, p. 464 ff.
120 K. M. CLERMONT, *Res Judicata as Requisite for Justice*, cit., p. 1107; R. C. CASAD & K. M. CLERMONT, *Res Judicata: A Handbook on Its Theory, Doctrine, and Practice*, cit., p. 62: «[T]he old view, to which some jurisdictions still adhere, defined cause of action more narrowly in terms of a single legal theory or a single substantive right or remedy of the plaintiff. The modern view is that a claim includes all theories' bestowal of rights on the plaintiff to remedies against the defendant with respect to the transaction from which the action arose»; W. W. HEISER,

proceedings[121]. Therefore, the preclusive effect extends to both factual and legal issues that have been expressly litigated.
The rule of preclusion with respect to factual and legal issues is expressed by Section 27 of the Restatement (Second) of Judgments: «[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim[122]». Unlike claim preclusion, issue preclusion will apply in the second trial to the extent that the factual or legal issue was litigated and determined in the first case, implying that implicit res judicata preclusion cannot be admitted concerning the issues.
An apparent linearity in delineating the objective boundaries of judgment in the federal system is contrasted by the explicit recognition of discretionary margins in the application of issue preclusion, as detailed in Section 28 of the Restatement (Second) of Judgments: «[A]lthough an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or (2) The issue is one of law and (a) the two

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California's Unpredictable Res Judicata *(Claim Preclusion) Doctrine*, cit., p. 577. See also, in our literature, D. VOLPINO, *L'oggetto del giudicato nell'esperienza americana*, Padova, 2007, p. 119 ff.

121 In the Anglo-American legal experience, the preclusive effect of a judgment generally extends to factual or legal issues under the theory of collateral (or issue) estoppel. This implies that such issues cannot be re-submitted for decision in a case between the same parties, but with a different subject matter. The leading American case on this matter is *Cromwell v. County of Sac*, 94 U.S. 351, 195 (1876), in which the U.S. Supreme Court distinguished the effects that a decision can have in a second trial between the same parties, stating that: a) when the two proceedings involve the same subject matter, claim preclusion operates to prevent the second trial, implying that the judge must declare the action as barred or merged; and b) when issues are identical in two successive proceedings, the judgment from the first case does not prevent the second trial from reaching its natural conclusion but will influence its course, as the second judge must adhere to the first judgment on the common issues. However, in the American legal system, the scope of collateral estoppel is not indiscriminate. Subsequent case law has limited its effects to only those issues that were necessary for resolving the dispute, expressly discussed in the first trial, and explicitly addressed in the reasoning (*U.S. v Tohono O'Odham Nation*, U.S. Supreme Court, 563 U.S. 307 (2011); *Daewoo Electronics America Inc. v Opta Corporation*, U.S. Court of Appeals, Ninth Circuit, 875 F.3d 1241 (2017); *SimpleAir v Google LLC*, U.S. Court of Appeals, Federal Circuit, 884 F.3d 1160 (2018); *Ashbourne v Hansberry, U.S. Court of Appeals*, District of Columbia Circuit, 894 F. 3d 298 (2018); *Kilburn-Winnie v Town of Fortville*, U.S. Court of Appeals, Seventh Circuit, 891, F.3d 330 (2018); and in literature, see R.W. MILLAR, *The Historical Relation of Estoppel by Record to Res Judicata*, in 35 *Illinois Law Review*, 1940, p. 41 ff.; A. N. POLASKY, *Collateral Estoppel – Effect on Prior Litigation*, in 39 *Iowa Law Review*, 1953, p. 217 ff.; B. CURRIE, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, in 9 *Stanford Law Review*, 1956, p. 281; A.D. VESTAL, *Res Judicata/Preclusion Variables: Nature of the Controversy*, in *Washington University Law Quarterly*, 1965, p. 157 ff.; M. ROSENBERG, *Collateral Estoppel in New York,* in 44 *St. John's Law Review*, 1969, p. 165 ff.; W. FREEDMAN, *Res Judicata and Collateral Estoppel*, Westport, Connecticut, 1988, p. 20 ff.).

122 About issue preclusion see the leading case U.S. Supreme Court, 18 S. Ct. 18, 42 L. Ed. 355 (1897).

actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action».

It should be noted that the exceptions to issue preclusion are essentially the same that our case law attributes to itself, based on equitable considerations, in the application of implicit *res judicata* preclusion. This results in the "unpredictable" nature of the objective scope of judgment, in a manner not too dissimilar to what occurs in our legal system[123].

The Atlantic Ocean may mark geographical boundaries, but these are becoming increasingly porous when it comes to the circulation of legal models. In this perspective, one can derive a systemic thought that transcends national borders: regarding preclusion of what is deduced and deducible, the preclusive effect of *res judicata* is never automatically determined, even in the most bureaucratic legal cultures. It is always subject to the prudent judgment of the court, respecting the justice requirements that guide the legal system. This is confirmed by the analysis of the *Klausner Holz* case, where the European Court of Justice suggested that the referring court adjust the objective boundaries of judgment based on the literal wording of § 322 ZPO, to avoid a conflict between the national principle of *res judicata* and the European law[124].

This is the phenomenon of flexibility that we have tried to describe: a form of deviation from the standard formalized by judicial practice for delineating the preclusive effect of *res judicata*, which responds to justice needs that require not taking overly seriously the conceptualizations of what is precluded from the parties' re-litigation.

5.3. *The Manipulation of the Preclusive effect of* Res Judicata *in Cross-Border Disputes as a Hypothesis of "Covert"* Res Judicata *Derogation*.

123 W. W. HEISER, *California's Unpredictable* Res Judicata *(Claim Preclusion) Doctrine*, cit., p. 560 ff.

124 See European Court of Justice, 11 November 2015, C-505/14, *Klausner Holz Niedersachsen GmbH c. Land Nordrhein-Westfalen*, para. 36.

The phenomenon of covert derogation from the authority of *res judicata* is also known by cross-border litigation. In fact, during the process of recognising foreign judgments, it is not uncommon for the objective scope of the foreign decision to be subtly reshaped by the court of the requested State, to prevent the circulation of rulings that may be inconsistent with the fundamental principles of the *forum*. This practice is typically concealed beneath the veil of private international law techniques, such as the resolution of conflicts of laws or the determination of the applicable rules governing the effects of the foreign judgment.

In this context, the case law often draws upon a rich array of theories developed within private international law scholarship, which allow courts to calibrate, depending on the case, the preclusive scope of the foreign *res judicata*, sometimes enlarging, sometimes restricting its reach[125].

The risk that judgments producing effects inconsistent with domestic legal values may circulate within the internal legal order is primarily addressed by the so-called theory of effect assimilation (*Gleichstellungstheorie*). Proponents of this theory argue in favour of the "nationalisation" of the foreign decision: once recognised, the foreign ruling is subject only to the domestic rules on the effects of *res judicata*. In this view, the recognising court need not concern itself with how the judgment operates in the legal system of origin.

While this approach certainly simplifies the task of the recognising judge, it also creates the potential for divergence between the effects of the judgment in the recognising State and those in the State of origin. Nonetheless, there is textual support for this position. Article 54 of Regulation (EU) No 1215/2015 provides that: «If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests».

This provision appears to endorse, albeit indirectly, the logic underpinning the effect assimilation theory through its reference to "equivalent effects".

This theory finds its most natural application in systems where the recognition of foreign judgments occurs through an *exequatur* procedure, typically characterised by a certain diffidence towards foreign rulings[126].

By contrast, in legal systems where foreign judgments are automatically recognised – without a formal *exequatur* procedure – the effect assimilation theory appears less compatible. Here, the prevailing doctrine is often the theory of effect extension of effects (*Wirkungserstreckungstheorie*), according to which the

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[125] About those theories see C. CONSOLO, *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla CEDU a sua volta)*, in *Corti europee e giudici nazionali*, cit., p. 139 ff.

[126] C. CONSOLO, *Evoluzioni nel riconoscimento delle sentenze*, in *Riv. trim. dir. proc. civ.*, 2, 1997, p. 575 ff.; F. SALERNO, *Lezioni di diritto internazionale privato*, Milano, 2020, p. 189; M. GRASSI, *Il riconoscimento degli effetti del giudicato nell'arbitrato commerciale internazionale*, cit., p. 157 ff.

preclusive effects of *res judicata* should be governed by the law of the State of origin[127]. This approach is not precluded by the general principle of international civil procedure that procedural matters are governed by the *lex fori* (see Article 12 of Law No. 218/1995), because the extension of the objective scope of *res judicata* is not purely a procedural issue: it bears clear substantive implications and must therefore be resolved in accordance with conflict-of-law rules[128].
The advantage of the effect extension theory lies in its ability to mitigate the "surprise effect" that would otherwise arise if the preclusive effect of *res judicata* were altered by the receiving State's domestic rules: the preclusive effect of the the recognised judgment remains stable and predictable[129]. That this reflects the original intent of the European legislator is confirmed by Article V(2) of the Protocol to the Brussels Convention, which reads: «The effects produced with respect to third parties by judgments rendered in such States [Austria and Germany] under the provisions contemplated in the preceding paragraph shall likewise be recognised in the other Contracting States».
Although some scholars have expressed concern that this theory increases the risk of judicial error in determining the precise preclusive effects of a foreign judgments[130], this kind of risk could be arguably overstated. After all, the interpretive effort required is not greater than that which courts routinely undertake when applying foreign law, and as such, cannot constitute a decisive objection to the adoption of the effect extension theory[131].
Moreover, the case law of the Court of Justice in Luxembourg – beginning with the landmark *Hoffmann* case[132] – appears to favour the effect extension theory, viewing it as an expression of mutual trust among the Member States[133].
Occasionally, however, private international law literature refers to the so-called theory of "double limitation", which rests on the idea that the original effects of a foreign judgment may be allowed to operate within the receiving legal order only to the extent permitted by the rules governing the scope of *res judicata* under the latter's domestic law[134]. While the foreign decision is recognised in principle

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127 A. ATTARDI, *La nuova disciplina in tema di giurisdizione italiana e di riconoscimento delle sentenze straniere*, in *Riv. dir. civ.*, p. 727 ff., at 768, footnote 58.
128 Cfr. E. D'ALESSANDRO, *Il riconoscimento delle sentenze straniere*, Torino, 2007, p. 101.
129 E. D'ALESSANDRO, *Il riconoscimento delle sentenze straniere*, cit., p. 64.
130 D. VOLPINO, *Il riconoscimento del giudicato statunitense*, in *Int'l Lis*, 2007, p. 88 ff.
131 That's the idea of M. GRASSI, *Il riconoscimento degli effetti del giudicato nell'arbitrato commerciale internazionale*, cit., p. 163.
132 See European Court of Justice, 4 February 1988, C-145/86, *Hoffman v Krieg*, para. 11; see also European Court of Justice, 28 April 2009, C-420/07, *Apostolides*, para. 66.
133 See Supreme Court,16 May 2014, n. 10853, in *Int'l Lis*, 1, 2015, p. 95 ff., with comment of E. D'ALESSANDRO, *La legge regolatrice dei limiti oggettivi di efficacia del giudicato riconosciuto in Italia secondo la Corte di cassazione*; in *Riv. dir. proc.*, 2, 2015, p. 827 ff., and S. VILLATTA, *I limiti oggettivi dell'autorità di una sentenza straniera nel sistema «Bruxelles»*; see also C. CONSOLO-M. STELLA, *Il giudicato sulla motivazione come zaino da viaggio*, in *Int'l Lis*, 2014, p. 105 ff., at 109 ff. In favour of the effect extension theory see Court of Milan, 25 January 2018, no. 824.
134 C. CONSOLO, *Nuovi problemi di diritto processuale civile internazionale*, Milano, 2002, p. 33; ID., *La tutela sommaria e la Convenzione di Bruxelles: la "circolazione" comunitaria dei provvedimenti cautelari e dei decreti ingiuntivi*, in *Riv. dir. int. priv. proc.*, 1991, p. 628.

as a valid "jurisdictional act", its ability to produce effects is substantially shaped by the policy choices underlying the domestic rules on *res judicata*. In this way, the foreign judgment is prevented from producing consequences that would exceed those ordinarily attributable to domestic judgments of analogous content.

Acceptance of the theory of double limitation entails that, if the law of the State of origin attributes to *res judicata* a narrower scope than that recognised by the law of the receiving State, the foreign judgment will, within the latter legal order, produce a correspondingly narrower preclusive effect than that typically arising from domestic decisions. Conversely, if the originating legal system recognises a broader scope for the binding effect of judgments than the receiving State does, the effects of the foreign ruling will be curtailed to align with those of equivalent domestic judgments under the forum's law. In such cases, this approach may operate as a buffer to mitigate the potentially disproportionate impact of the foreign judgment, shielding the parties from the unfairness of being bound by a decision whose objective scope exceeds that which could reasonably have been anticipated at the time of the original proceedings before the court of the requested State[135].

At the international level, the assimilation theory tends to prevail in English law[136]. By contrast in the U.S. – where the recognition of foreign judgments is a matter for individual federal States – is marked by greater flexibility. U.S. legal doctrine generally holds that no fixed rule prevents courts from ascribing to foreign judgments preclusive effects that diverge from those they would have in their country of origin[137]. By contrast, in Switzerland, the double limitation theory enjoys considerable favour – consistent with a legal tradition, not unlike the German one, that is generally reluctant to allow foreign judgments to produce broader preclusive effects than domestic ones[138].

The absence of definitive normative parameters, coupled with the attribution of considerable discretion in applying private international law rules, supports the view that the delimitation of the objective limits of foreign *res judicata* responds to context-specific policy choices that defy rigid categorisation and are resolved through a consequentialist logic.

This lends further support to the overarching assumption: the theory of the objective limits of *res judicata* resists confinement within fixed conceptual frameworks. The idea that the various doctrinal models are ultimately interchangeable and reflect different policy orientations also emerges from Consolo's reflections, according to which the double limitation theory

135 C. CONSOLO, *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla CEDU a sua volta)*, in *Corti europee e giudici nazionali*, cit., p. 140.

136 S. HARDER, *The Effect of Recognized Foreign Judgments in Civil and Commercial Matters*, in 62 *International & Comparative Law Quarterly*, 2013, p. 441 ff.; P. BARNETT, Res Judicata, *Estoppel, and Foreign Judgments*, cit., p. 126.

137 R. C. CASAD, *Issue Preclusion and Foreign Country Judgments: Whose Law?* In 70 *Iowa Law Review*, 1984, p. 53 ff., at 76.

138 C. CONSOLO-M. STELLA, *Il giudicato sulla motivazione come zaino da viaggio*, cit., p. 109 ff.; see also M. GRASSI, *Il riconoscimento degli effetti del giudicato nell'arbitrato commerciale internazionale*, cit., p. 171.

encapsulates a "tendential policy directive". This directive, in our view, may be generalised. If foreign judgment is perceived by the second court erroneous, and if the objections raised against it appear persuasive, the second court will recalibrate the objective scope of *res judicata*, allowing for challenges that would ordinarily be precluded, either by invoking the domestic doctrine of *res judicata* or by adapting the foreign one, as circumstances require. This approach, *mutatis mutandis*, applies equally to disputes involving cross-border elements, in which the need arises to recognise a foreign judgment.

5.4. *The Overcoming of* Res Judicata *Conflicting with EU Law.*

The issue of overcoming of *res judicata* given in violation of European Union law will be examined in greater detail in the next chapters[139]. However, it is already possible to outline the key principles of European law that must be kept in mind to fully grasp the phenomenon.

A useful starting point for understanding the dynamics of European integration is the principle of primacy of EU law, theorised in the leading cases *Costa v. ENEL* and *Van Gend en Loos*[140]. The principle entails the supremacy of EU law over conflicting domestic provisions, with the consequence that national courts must disregard incompatible internal norms whenever they cannot be interpreted in conformity with Union law.

Initially, however, procedural law was seen as a "free zone" from direct EU influence, pending harmonisation initiatives from the European institutions. This conception was reflected in the early jurisprudence of the Court of Justice in Luxembourg, which during the 1970s coined the reassuring formula of Member States' procedural autonomy[141].

At least in its initial formulation, the principle of procedural autonomy could be regarded as an expression of the principle of cooperation between European and national institutions: while it was for the Union to define the content and legal effect of subjective rights arising under EU law, it was left to the Member States to determine the procedural mechanisms for their enforcement – an approach described as "integrationist." In practice, the effectiveness of EU law was conditional upon the procedural autonomy of national systems.

This understanding of procedural autonomy was, however, destined to change. The progressive consolidation of EU competences, starting with the Maastricht Treaty and culminating in the Treaty of Lisbon, has rendered increasingly unsustainable the notion that Member States remain free to regulate procedural forms even in areas of exclusive or shared EU competence.

The former integrationist model has thus been left in favour of a "functional" or "internationalist" approach, grounded in the imperative to ensure the

[139] See *infra*, chapters IV and V.

[140] European Court of Justice, 15 July 1964, C-6/64, *Costa v. Enel*; European Court of Justice, 5 February 1963, C-26/62, *Van Gend & Loos*.

[141] About procedural autonomy of Member States see *infra*, chapter III.

effective enforcement of EU rights and freedoms, often through the mechanism of conforming interpretation.

Within this paradigm shift, any procedural rule may in principle undermine the effectiveness of a substantive EU norm. In such cases, the rigidity of national procedural rules must be softened through a functional interpretation; where even that proves unworkable, the only alternative is outright disregard. It is hardly surprising that, in areas of exclusive or shared EU competence, this internationalist outlook has eroded the conceptual core of procedural autonomy, so much so that, arguably, such autonomy may no longer meaningfully exist in those fields.

Even *res judicata* has not escaped this evolution. The temporal dimension and objective scope of final judgments have been gradually "functionalised" by the jurisprudence of the Court of Justice.

A full appreciation of the problem therefore requires not only a precise delineation of the scope of the EU principles of conferral, sincere cooperation, primacy, and procedural autonomy, but also a careful examination of the remedial instruments available under national legal systems to overcome judgments that are manifestly unjust. But these issues will be analysed in the following chapters.

CHAPTER TWO
THE FLEXIBILITY OF RES JUDICATA IN MEDIEVAL LAW
Section I
The Flexibility of Res Judicata in Romano-Barbaric Law

SUMMARY: 1. Introduction: A Glance at Medieval Europe. – 2. The Flexibility of *Res Judicata* in the Ancient Germanic trial: *Urteilsschelte* and the Royal Complaint. – 2.1. Remedies Against Wrong Judgments in Lombard Law. – 2.2. The Royal Complaint in Carolingian Legal Order. – 3. From *Urteilsschelte* to *Querela Nullitatis*. – 3.1. Development of the *Querela Nullitatis* and Delimitation of Cases of Flexibility. Transition.

1. *Introduction: A Glance at Medieval Europe*.

The triumph of communal liberties[1], preceded by centuries of demographic and economic growth[2], opened the way to a new juridical humanism, born from the encounter between Germanic law and Roman law[3]. This ferment of renewal did not spare procedural law, within which, through statutory legislation, the work of jurists, and the practice of the courts[4], a new kind of procedure took shape,

[1] We are refering to the winnin of the Lombard League on the Barbarossa (1183). About the juridical implications of this event see F. CALASSO, *Medio evo del diritto: le fonti*, Milano, 1954 p. 413 ff.; G. DE VERGOTTINI, *L'impero e lo* «ius statuendi» *dei Comuni*, ora in *Scritti di storia del diritto italiano*, II, Milano 1977, 481 ff.; P. GROSSI, *Il sistema giuridico medievale e la civiltà comunale*, in *La civiltà comunale italiana nella storiografia internazionale*, a cura di A. ZORZI, Firenze, 2008, 10 ff.

[2] About the demographic growth in the Middle Age, see F. MENANT, *L'Italia dei Comuni (1100-1350)*, Roma, 2020; G. PETRALIA, *Crescita ed espansione*, in *Storia Medievale*, Roma, 1998, p. 291 ff.; C. FRUGONI-A. BARBERO, *Medioevo*, Bari-Roma, 1999, p. 183 ff.

[3] G. CHIOVENDA, *Romanesimo e germanesimo nel processo civile*, in *Riv. it. sc. giur.*, 1902, p. 94 ff., and also in ID., *Saggi di diritto processuale civile*, Roma, 1930, p. 181 ff.; A. COSTA, *Nullità della sentenza e la* "querela nullitatis" *nella storia del processo italiano*, Roma, 1916, p. 9; P. CALAMANDREI, *La teoria dell'*error in iudicando *nel diritto italiano intermedio*, in *Studi sul processo civile*, Padova, 1930, vol. I, p. 149 ff.; ID., *La Cassazione civile*, I, in *Opere giuridiche*, VI, Napoli, 1976, p. 116 ff.; ID., *La sopravvivenza della querela di nullità nel processo civile vigente*, in *Riv. dir. proc.*, 1, 1951, p. 112 ff.; N. PICARDI, *voce Processo (diritto moderno)*, in *Enc. dir.*, XXXVI, Milano, 1987, p. 101 ff.; C. BESSO, *La sentenza civile inesistente*, Torino, 1996, p. 29 ff.; G. OLIVIERI, *La rimessione al primo giudice nell'appello civile*, Napoli, 1999, p. 25 ff.; L. DI COLA, *Provvedimento anomalo e processo civile*, Napoli, 2024, p. 53 ff.; E. CORTESE, *Il rinascimento giuridico medievale*, Roma, 1992; P. GROSSI, *L'ordine giuridico medievale*, Bari-Roma, 1995, p. 127 ff. and 253 ff.

[4] That's the *ordo judiciarius* elaboreted by doctrine and applied by Courts, which was considered a sort of *naturalis ratio*, as we can observe in the following words of Isidoro, *Synonyma*, II, 86: «*[I]n ambiguis Dei iudicio serva sententiam. Quod nosti tuo, quod nescis divino committe iudicio. Non potest condemnri humano examine quem Deus suo iudicio reservavit. Incerta non iudicamus, quousque veniat Dominus, qui latentia producit in lucem, qui inluminabit abscondita tenebrarum, qui manistabit consilia cordium. Quamvis enim vera sint, credenda non sunt, nisi quae certi indiciis demonstrantur, nisi quae manifesto examine convicuntur, nisi quae ordine iudiciario pubblicantur*». About *ordo judiciarius* see A. GIULIANI, *L'«ordo iudiciarius» medioevale (Riflessioni su un modello pure di ordine isonomico)*, in *Riv. dir. proc.*, 2, 1988, 583 ff.; N. PICARDI, *La giurisdizione all'alba del terzo millennio*, Milano, 2007, 33 ff.

one no longer Germanic, though without reverting to Roman[5]. It is precisely in this period of fusion between legal traditions that we owe the origin of procedural institutions that have persisted into modern legislation[6]. Our analysis, however, focuses on a more specific issue: the flexibility of *res judicata* in medieval law.

Medieval jurists were well aware of the problem of "void judgments": that's a cost the legal order must bear cause the irrepressible demands for justice and substantive truth[7], demands that, in various historical contexts, had to confront the constraints of legal constructs, inevitable errors, and the need for certainty. It is precisely in response to these tensions that medieval *Doctores* sought possible balances between truth and legal security[8].

In the previous chapter, we argued that this issue is inherent to the nature of *res judicata*: finality and flexibility are two sides of the same coin; if the interest to the correct application of substantive law prevails in a balancing judgment, the final decision could be in practice disregarded by a second judge.

Roman law recognized the flexibility of judgments rendered «*contra tam manifesti iuris formam*[9]», that is, in manifest violation of the law[10]. However, pushing the investigation this far back exceeds the scope of this study and would be of limited usefulness, given how distant Roman legal experience is from our own, thus risking misleading analogies.

By contrast, our legal experience finds its roots in that Europe that stood on the threshold of the first millennium. Beyond historical evolution, we may still discern a shared feature between our legal experience and that of the Middle Ages: the disintegration of centralized authority and the emergence of centrifugal forces, each bearing its own values and formalized in legal statutes often in conflict with the norms issued by the central authority[11].

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[5] P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 131.

[6] G. CHIOVENDA, *Principii di diritto processuale civile*, Napoli, 1965, Ristampa con prefazione di V. ANDRIOLI, p. 1 ff.

[7] M. ROSBOCH, *Decidere invano. Aspetti delle invalidità nelle sentenze medioevali*, Napoli, 2010, p. 4.

[8] E. KANTOROWICZ, *Studies in the Glossators of the Roman Law. Newly discovered writings of the Twelfth Century*, Cambridge, 1938, p. 231.

[9] C.I. 7, 64, 2 pr. of Alessandro Severo (a. 226): «*Si, cum inter te et aviam defuncti quaestio de successione esset, iudex datus a praeside provinciae pronuntiavit potuisse defunctum et minorem quattuordecim annis testamentum facere ac per hoc aviam potiorem esse, sententiam eius contra tam manifesti iuris formam datam nullas habere vires palam est et ideo in hac specie nec provocationis auxilium necessarium fuit. Quod si, cum de aetate quaereretur, implesse defunctum quartum decimum annum ac per hoc iure factum testamentum pronuntiavit, nec provocasti aut post appellationemimpletam causa destitisti, rem iudicatam retractare non debes*».

[10] As observed by D. TUZOV, Contra ius sententiam dare. *Profili dell'invalidità della sentenza contraria a diritto nella riflessione giurisprudenziale tardoclassica*, in *Res iudicata*, edited by L. GAROFALO, Napoli, 2015, vol. II, p. 251 ff., at 265 ff.; ID., Quod contra ius gestum videtur, firmitatem non tenere: *riflessioni minime su Carus, Carinus, Numerianus, C. 7.64.5 (a. 283)*, in *Erga-Logoi*, 5, 2017, p. 149 ff.

[11] S. CASSESE, *La crisi dello Stato*, Roma-Bari, 2002; ID., *Lo spazio giuridico globale*, Roma-Bari, 2003; ID., *Globalizzazione del diritto*, in *Enc. it.*, Roma, 2009, p. 7 ff.; M. SHAPIRO, *Globalization of law*, in *Indiana Journal of Global Legal Studies*, 1993, p. 37 ff.

Although the Western Roman Empire fell «without noise[12]», the gradual dissolution of central authority, together with the affirmation of Germanic laws and institutions, led to the eclipse of state power – at least as conceived by the Romans – and to the weakening of those tasked with administering public affairs.
Nothing could be more different from the harmonizing pressures of today's EU legal system: national law is being progressively replaced by a European common law in harmonized areas, including procedural law, thanks to the jurisprudence of the Court of Justice[13]. The multiplication and overlap of normative levels challenge the idea of *res judicata* as the definitive expression of State authority[14].
A glance at the medieval legal reality reveals that this is, in fact, natural: the legal order within which a judgment is inscribed and takes effect shapes and defines the judgment itself more than the order is shaped by the judgments it produces[15].
The supranational realities that now exert pressure on national systems to gain ever more recognition follow a path not so different from the intermediate bodies of the medieval legal world, whose proliferation delayed the affirmation of a centralized state authority, as we understand it today, and simultaneously contributed to the multiplication of normative planes, source of both juridical disorder and vitality in that era.
Alius et idem: in the medieval world, centrifugal forces led to the production of legal norms often incompatible with the *ius commune* or with law imposed by the central authority empowered to legislate, hence the issue of the flexibility of judgments that had clearly violated the law. Today, by contrast, the harmonizing thrust of EU law operates from within national institutions, almost taking possession of them, yet aiming to produce an *e pluribus unum*. The cession of sovereignty in favor of European institutions shapes the distribution of competences between them and the Member States; any "abusive encroachment" into EU competences delegitimizes, according to Union law, the acts performed, stripping them of legal effect.
There is, then, a common element between these two legal experiences, which invites us to trace the roots of the issue of flexibility back to medieval law: the weakening of state authority.
The weakness of State authority was the cause of the flexibilization of *res judicata*. This is why medieval Europe, and the law of the *ius commune*, are our focus. We will attempt to demonstrate this through historical analysis.

12 A. MOMIGLIANO, *La caduta senza rumore di un impero nel 476 d.C.*, in *Annali della Scuola Normale Superiore di Pisa. Classe di Lettere e Filosofia*, 1973, 2, p. 397 ff.
13 About the erosion of procedural autonomy of the Member States see the following chapters.
14 R. CAPONI, *Corti europee e giudicati nazionali*, Atti del XXVII convegno nazionale dell'Associazione italiana fra gli studiosi del processo civile, Verona, 25-26 settembre 2009, Bologna, 2011, p. 260.
15 R. CAPONI, *Il giudicato civile dimensionato*, in *Riv. trim. dir. proc. civ.*, 3, 2009, p. 941 ff.

2. *The Flexibility of* Res Judicata *in the Ancient Germanic Trial: Urteilsschelte and the Royal Complaint.*

The decline – and subsequent revival – of Roman law in Europe, albeit deeply transformed, was largely due to its encounter with the legal traditions of the Germanic peoples, the new rulers of West Europe[16]. Legal historiography has partially reconstructed the characteristics of the ancient Germanic judicial system, in which a clear distinction existed between the body responsible for determining the content of the judgment (*Urteilsfinder*) and the authority endowed with sovereign power to render it binding as a legal command (*Richter*)[17].

This Germanic judicial structure may vaguely resemble modern conceptions of how a court functions. Yet it also featured elements that set it apart. In addition to the president (*comes*, representing royal authority) and the panel of private citizens representing the people – who advised the president on the response to be given legal force (the so-called *rachimburgi* or *scabini*) – there was also a public assembly (*Mallus*), whose task was to ratify, either tacitly or explicitly, the judgment proposed by the popular judges. The response offered by these judges did not immediately determine the content of the future sentence; only after the assembly's ratification could it acquire legal effect and be formally proclaimed by the president as binding.

The litigants could appear before this judicial assembly and, as members of it, challenge the accuracy of the judgment being proposed for ratification. This peculiar procedural mechanism – known in German legal literature as *Urteilsschelte*[18], and in Latin sources from the seventh century as «*contradicere sententiae*» or «*iuditium blasphemare*[19]» – served to express disapproval of the proposed judgment and prevent it from becoming a formally issued judgment. Whether raised by the losing party or by other members of the assembly, such an objection required a new deliberation to determine the content of a sentence not yet proclaimed.

Setting aside these brief remarks on the mechanics of *Urteilsschelte*, the ancient Germanic peoples lacked the concept of appeal as understood today, which presupposes a decision has already been rendered. Here, instead, disapproval aimed to prevent the judgment from becoming final by the denial of the assembly's *placet*[20].

16 G. SALVIOLI, *Storia del diritto italiano*, Torino, 1921, p. 764. See also, limited to procedural law, G. CHIOVENDA, R*omanesimo e Germanesimo nel processo civile*, in *Saggi di diritto processuale civile (1900-1930)*, I, ristampa, Milano 1993, p. 181 ff.

17 P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 91.

18 V. J. W. PLANCK, *Die Lehre von dem Beweisurteil*, Götingen, 1848, p. 32 ff.; R. SOHM, *Die altdeutsche Reichsund Gerichtsverfassung. Erster Band: Die Fränkische Reichsund Gerichtsverfassung*, Weimar, 1871, p. 130 ff.; A. SKEDL, *Die Nichtigkeitsbeschwerde in ihrer Geschichtlichen Entwiwicklung: eine civilprocessuale Abhandlung*, Leipzig, 1886, p. 8 ff.; A. PERTILE, *Storia del diritto italiano. Dalla caduta dell'impero romano alla codificazione*, VI, II, Torino, 1902, p. 266 ff.

19 *Lex Salica*, 57, 4.

20 G. PUGLIESE, voce *giudicato civile (storia)*, in *Enc. dir.*, Milano, XVIII, 1969, p. 757 ff.

The fact that *Urteilsschelte* was admissible only in cases of legal error has led some to liken it to modern appeal mechanisms[21]. However, this analogy overlooks a fundamental feature of ancient Germanic trials: judges were required to rule solely on questions of law[22], while factual matters were left to the parties, who relied on means of proof that, according to the shared social conscience, carried persuasive authority – such as oaths, witness testimony, or ordeals[23]. Thus, one could prevent an unjust decision from taking legal form, but under no circumstance was it possible to challenge a judgment that had been validly issued following the proclamation procedure.

That said, we must acknowledge that the nineteenth-century scholars belonged to the Historical School[24], and their conclusions appear partly influenced by the nationalist spirit of their time, which encouraged a stark divide between *Volksrechte* and Roman law. Calamandrei himself admitted trusting these reconstructions primarily because they were upheld by the «*dominant doctrine*[25]».

Indeed, the notion that an unjust judgment was absolutely immune from challenge was later questioned by Seelmann, who argued that *Urteilsschelte* should be directed not at the proposed judgment, but at the sentence already rendered, even if formally proclaimed by the president. This implies that an unjust sentence was always subject to annulment[26].

The reception of the institution in the Romano-Barbaric kingdoms lends support to Seelmann's interpretation. The *Lex Romana Burgundionum*, for instance, states: «*Ceterum praesentibus partibus secundum leges data et relecta sententia postea non poterit revocare*[27]» – except where the sentence suffers from such a serious legal violation that it is rendered ineffective. In such cases, the power to «*sententiam revocare*» belonged to the King[28].

Similarly, in the *Lex Salica*, one finds a provision stating that if the *rachimburgi* «*non secundum legem iudicaverunt, his contra quem sententiam dederint causa sua agat*[29]»: those adversely affected by a sentence issued «*non secundum legem*» were granted the right to reinitiate proceedings. Even more explicit is the provision in the *Lex Ribuaria*: «*si quis causam suam prosequitur et raginburgii inter eos secundum legem Ribuariam dicere noluerint, tunc illi, in quem sententiam contrariam dixerint, dicat: ego vos tangano, ut mihi legem dicatis*[30]».

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21 *Contra* P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 96.

22 A. PERTILE, *Storia del diritto italiano. Dalla caduta dell'impero romano alla codificazione*, cit., p. 267.

23 F. PATETTA, *Le ordalie. Studio di storia del diritto e scienza del diritto comparato*, Torino, 1890, p. 219 ff.

24 R. C. VAN CAENEGEM, *I sistemi giuridici europei*, Bologna, 2002, p. 104 ff.

25 P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 104.

26 W. SEELMANN, *Rechtszug im älteren deutschen Recht. Ein Beitrag zur Geschichte der Berufung*, Breslau, 1911, 90 ff., at 102-103.

27 *Lex Rom. Burg.*, *De interpellationibus et appellationibus*, XXXIII, 4.

28 IBIDEM, XXXIII, 5.

29 *Lex. Sal.*, 57, 3.

30 *Lex. Rib.*, 55, 1.

The Romano-Barbaric legal tradition preserved the older *Urteilsschelte*, whose distinctive features are still traceable in Latin-language sources: the parties presented their case before the *rachimburgi*, and once judgment was delivered, the losing party could contest it on the grounds of nonconformity to the law. At this stage, however, *Urteilsschelte* appears less a means to prevent a sentence from forming, and more akin to a petition for justice denied, or a complaint for manifest breach of law[31].

Likewise, the Visigothic Code of 654 provided a remedy against unjust judgments: if a judge issued a judgment contrary to the law «*per ignorantiam*», the losing party could seek its annulment: «*ille, qui a iudice ordinatus ad tollendum fuerat destinatus, ea, quae tulit, restituat; quod iudicabit non valeat*[32]». Another provision addresses cases where judges, due to external pressure (*metus*), had ruled in violation of the law: while the judges were immune from sanction, the sentence had no legal effect, as «*obvium iustitie vel legibus iudicatum est adque concretum in nihilo redeat*[33]».

Of particular interest is that the «*sententia iniusta*» produces no effect: «*non valeat*» or «*in nihilo redeat*». From these sources, Seelmann developed the theory that Germanic legal systems – even after contact with Roman law – never accepted that an unjust judgment could produce legal consequences[34]. If taken literally, the phrase *«in nihilo redeat»* confirms the idea of flexibility: the ruling, though formally issued and hence *res iudicata*, loses its force once its injustice is recognized.

This shows the difference with the Roman *appellatio*, which sought a new decision on the merits of the original dispute[35]. By contrast, the Visigothic remedy aimed not at a re-evaluation of the merits, but at the nullification of the judgment's legal effect.

2.1. *Remedies Against Unjust Judgments in Lombard Law*.

The idea of a remedy against wrong judgments is also present in Lombard law[36]: the Edict of Rothari mentions the possibility of an appeal to the King against any act contrary to the law issued by a subordinate official[37]. The remedy admitted by Lombard legislation differs substantially from the

[31] A. PADOA-SCHIOPPA, *Ricerche sull'appello nel diritto intermedio*, I, Milano, p. 153 ff.
[32] *Lex. Visig.*, c. II, 1, 21.
[33] *Lex. Visig.*, c. II, 1, 29.
[34] W. SEELMANN, *Rechtszug im älteren deutschen Recht. Ein Beitrag zur Geschichte der Berufung*, cit., p. 91; *contra* P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 112
[35] About the appeal in Roman law, see L. MORTARA, *Appello civile*, in *Dig. it.*, III, 2, Torino, 1890, p. 404 ff.; R. ORESTANO, *L'appello civile in diritto romano*, Torino, 1953; ID., *voce Appello (dir. rom.)*, in *Enc. dir*, II, Milano, 1958, p. 708 ff.; S. ZIINO, *I rimedi contro l'ingiustizia della sentenza nel diritto romano*, in *Riv. dir. proc.*, 4-5, 2016, p. 1107 ff., at 1119 ff.
[36] C. TROYA, *Codice diplomatico longobardo*, II, Napoli, 1853, n. 540 and 548.
[37] *Ed. Roth.*, 150; 251.

original *Urteilsschelte* (at least as understood by the majority view), and more closely resembles extraordinary remedies aimed at reopening a final judgment[38].
As Calamandrei notes, in the later barbarian laws – particularly in the Lombard system – the principle of the formal validity of judgments, typical of ancient Germanic proceedings and implying the absolute stability of a judgment solemnly proclaimed by the president of the judicial assembly, assumed a new meaning: the judgment retains full effect until it is challenged by way of complaint, and all defects in the judgment must be raised through this channel[39].
This observation, along with the insights of more recent legal historiography, which notes that Germanic-derived legal systems did not recognize *error in procedendo* and were therefore unfamiliar with the concept of procedural invalidity[40], suggests that only judgments tainted by a substantive legal error, that is, unjust judgments resulting from incorrect application of the law, could be brought before the King for redress.

2.2. *The Royal Complaint in Carolingian Legal Order.*

This perspective is confirmed by the analysis of the *reclamatio ad regis definitivam sententiam* in Carolingian law[41], whose purpose was to ensure that lower courts ruled *secundum iustitiam*. The concentration of both judicial and legislative powers in the person of the King meant that the royal court functioned as a court of equity. The *reclamatio* sought a review of the judgment to verify whether the first judge had correctly applied the law.
It should also be noted that not all litigants had access to this remedy: it was reserved to those who had obtained, by *litterae* from the King, the *ius reclamandi*, *i.e.* the privilege of submitting their case to the royal court[42]. This right allowed the losing party to challenge not only the outcome but also the application of the *Volksrecht* by the lower judge, seeking instead a new decision based on the *ius aequum*, or royal law (*Königsrecht*). The *reclamatio* therefore presupposed a judgment that was formally valid under *Volksrecht*, but unjust according to the *Königsrecht*.
Calamandrei's insight – that in this form of complaint one might find the origin of the *querela nullitatis* later developed in statutory law – may overstate the analogy and understate the differences: while both mechanisms allow for the annulment of a final judgment, the *querela nullitatis* rests on the dichotomy between *error in iudicando* and *error in procedendo*, and under statutory law it was granted solely to address the latter. If there is a closer comparison to be made, it is perhaps with the Roman remedy available during the era of *cognitiones extra*

[38] M. ROSBOCH, *Decidere invano. Aspetti delle invalidità nelle sentenze medioevali*, cit., p. 65.
[39] P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 118.
[40] M. ROSBOCH, *Decidere invano. Aspetti delle invalidità nelle sentenze medioevali*, cit., p. 76.
[41] A. ESMEIN, *La chose jugée dans le droit de la monarchie franque*, in *Nouvelle revue historique de droit français et étranger*, 1887, p. 545, at 551; C. SCHWARZENBERG, *Giurisdizione (diritto intermedio)*, in *Enc. dir.*, XIX, Milano 1970, p. 200 ff.
[42] A. ESMEIN, *La chose jugée dans le droit de la monarchie franque*, cit., p. 555.

ordinem, aimed at annulling judgments that contravened imperial legislation (*contra constitutiones*), an instrument designed to ensure the supremacy of central law over local norms[43]. These similarities between royal barbarian law and the imperial *ius constitutionis* support the conclusion that an unjust judgment did produce legal effects, at least until formally set aside.

Thus, the royal complaint may be viewed as an early antecedent of the extraordinary review mechanisms known in modern legal systems as remedies used to challenge manifestly unjust final judgments. The absence of any time limit for lodging a *reclamatio* places it closer to revocation[44] than to appeal, consistent with the principle, known also in archaic Roman law, that each magistrate is sovereign within his own ground[45].

We are therefore dealing with a remedy that renders the judgment flexible in the sense previously defined[46]: a judgment that is formally final and thus valid under *Volksrecht*, yet constitutes a manifest violation of *Königsrecht*, and for that reason must be annulled to prevent further legal consequences[47].

Moreover, even in the Justinian legal compilations circulating in the West Europe, it was acknowledged that judgments rendered *contra leges* could be revoked: «*Quae contra leges iudicatae sunt a iudicibus vel a praefecto, retractari potest*[48]».

The idea that a judgment based on provisions contrary to a superior legal order, one that encompasses the rule establishing the judgment's finality, must yield, is far older than generally assumed.

3. *From Urteilsschelte to Querela Nullitatis*.

The Romanist compilations of laws offered insights that were duly developed by the glossators, whose contribution to shaping the modern concept of *res judicata* was of enormous significance[49].

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[43] C.I. 1, 14, 5: «*Quae lege fieri prohibetur, si fuerint facta, non solum inutilia sed pro infectis etiam habeantur, licet legislator fieri prohibuisset tantum nec specialiter dixerit inutile esse debere quod factum est, sed et si quid fuerit subsecutum ex eo vel ob id, quod interdicente lege factum est, illud quoque cassum atque inutile esse praecipimus*»; see also, for the same principle, D. 49, 8, 1, 2-3: «[2] *Item cum contra sacras constitutiones iudicatur, appellationis necessitas remittitur. contra constitutiones autem iudicatur, cum de iure constitutionis, non de iure litigatoris pronuntiatur. nam si iudex volenti se ex cura muneris vel tutelae beneficio liberorum vel aetatis aut privilegii excusare, dixerit neque filios neque aetatem aut ullum privilegium ad muneris vel tutelae excusationem prodesse, de iure constituto pronuntiasse intellegitur: quod si de iure suo probantem admiserit, sed idcirco contra eum sententiam dixerit, quod negaverit eum de aetate sua aut de numero liberorum probasse, de iure litigatoris pronuntiasse intellegitur: quo casu appellatio necessaria est.* [3] *Item cum ex edicto peremptorio, quod neque propositum est neque in notitiam pervenit absentis, condemnatio fit, nullius momenti esse sententiam constitutiones demonstrant*».

[44] G. PUGLIESE, *voce giudicato civile (storia)*, cit., p. 759.

[45] L. MORTARA, *Appello civile*, cit., p. 381.

[46] See *retro*, chapter one.

[47] A. BARBERO, *Carlo Magno. Un padre dell'Europa*, Bari-Roma, 2000, p. 234 ff.

[48] These words comes from the *Summa Perusina*. About it see the critical edition edited by F. PATETTA, in «*Bullettino dell'Istituto di diritto romano*», XII, 1900, p. 242.

[49] G. PUGLIESE, *voce giudicato civile (storia)*, cit., p. 762 ff.

Unlike early medieval interpreters, the glossators not only understood Roman jurists and legislative thought, but also adapted it to the needs of the flourishing communal civilization.
The experience of Germanic law was harmonized with Roman legal rules into a Roman-inspired *ius commune*. Already in the *Quaestiones de iuris subtilitatibus*, possibly attributable to the legendary Irnerius[50], it was noted that Germanic law had overlooked a key principle: once res judicata was formed, the *quaestio* (*i.e.*, the matter under discussion) was removed from judicial cognition[51].
Yet, as the theory of the finality and preclusive effect of *res judicata* grew more refined, jurists and municipal legislation increasingly felt the need to provide a remedy for those harmed by unjust decisions. This was partly due to the often-limited credibility of judges, many of whom lacked formal legal training[52].
The extreme vulnerability of *res judicata* in the period of *ius commune* was justified through reinterpretation of a principle already present in Roman law and adopted by the glossators as well as by canon law[53]: appeals did not preclude raising grounds of nullity, which could be asserted independently of the appeal and outside its time limits.
Inspired by this principle and balancing it against the need for legal certainty, municipal statutes introduced a specific remedy for challenging judgments distinct from appeal: the *querela nullitatis*[54].
The conceptual foundation of this remedy, however, lies in the work of the glossators and commentators. Early glossators did not clearly distinguish between invalid and unjust judgments. Durante, for example, likened appeal to an informal remedy for alleging nullity. Even at that time, the distinction between ordinary and extraordinary remedies was already established: appeal was the ordinary remedy for review and redress[55], while *supplicatio* and *restitutio in integrum* were extraordinary remedies[56].
These remedies all aimed at reviewing and potentially reforming judgments deemed valid. Yet Roman sources already hint at the emergence of mechanisms specifically addressing invalid judgments:

> «*Quoniam supra § proximo dicimus quando sententia sit ipso iure nulla, consequens est ut dicamus quibus remediis valida sublevetur, seu impugnetur, seu retractetur. Et not. quod septem modis generaliter. Primo per appellationem […]. Secundo per supplicationem de qua infra de supplic. Tertio per in integrum restitutionem. Quarto per simplicem petitionem in illis casibus in quibus iudex potest suam sententia revocare. Quinto per querelam falsi de qua statim infra*

[50] *Contra* E. KANTOROWICZ, *Studies in the Glossators of the Roman Law*, cit., p. 181
[51] *Quaestiones de iuris subtilitatibus*, edited by G. ZANETTI, Firenze, 1958, p. 42: «[R]*es apud iudicem queri potest, com non est quod tollat questionem, ut auctoritas rei iudicatae*».
[52] A. PERTILE, *Storia del diritto italiano. Dalla caduta dell'impero romano alla codificazione*, cit., p. 270.
[53] *Decretalia* c. 1 X. 2, 27: «*Sententia contra leges canonesve prolata, licet non sit appellatione suspensa, non potest tamen subsistere ipso iure*».
[54] P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 131 ff., at 133.
[55] P. CALAMANDREI, *Vizi della sentenza e mezzi di gravame*, in *Opere giuridiche*, VIII, cit., p. 322 ff.
[56] G. PUGLIESE, *voce giudicato civile (storia)*, cit., p. 768 ff.

> *dicetur. Sextus per implorationem tristis auxiliis ut si sententia alia lata sit contra servuum, ille appellare non potest, sed permittitur ei implorare triste auxilium, ff. de appell. servi [D. 49,1,15]. Septimo quando post sententiam nullo remedio attentatam iterum de causa cognoscitur [….]; et licet ab ea appellatum non fuerit, tamen propter aequitatem supervenientes casus retractatur, et ab ea receditur […]. Et not. quod cum sententia dicitur nulla ipso iure, sine temporis praefinitione retractari potest […]*[57]».

Durante's *Speculum* lists seven remedies that comprehensively address the challenge of judgments, whether valid or invalid, final or not. It is notable that null and void judgments, unlike valid yet unjust ones, could be challenged at any time and without specific formalities.

Already, we see the contours of the *querela nullitatis*, which would reach full development only with fourteenth-century communal legislation.

The emergence of the remedy dates to the latter half of the thirteenth century, the very period of Durante's activity, while its full conceptualization occurred in the statutory legislation of the city-states, where legal theory intersected with the practical demands of a commercial society.

3.1. *Development of the Querela Nullitatis and the Delimitation of Cases of Flexibility. Transition.*

Originally, the *querela* was used to challenge both *errores in procedendo* and *errores in iudicando*, precisely because the distinction between an invalid judgment and an unjust one was not as clearly defined as it is often believed[58].

In a gloss to the *Codex*, to narrow the scope of the *querela*, a contrast was drawn between judgments rendered *contra ius constitutionis* and those *contra ius litigatoris*, following the well-known Roman legal dichotomy[59]. However, to limit the availability of review mechanisms, in cases of judgments *contra ius constitutionis*, it was deemed necessary to establish whether the judge had been aware of the violation. If so, the judgment was null *ipso iure*, without needing to be challenged through appeal. If not, the sentence stood as valid unless appealed, since the judge was presumed to have erred in good faith. This investigation into the judge's state of mind soon came to be seen as futile and was abandoned in later doctrinal developments.

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[57] G. DURANTIS, *Speculum*, Lyon, 1578, *Quoniam*, § 1-2.

[58] L. DI COLA, *Provvedimento anomalo e processo civile*, cit., p. 67.

[59] Glossa, ad C.I. 7, 64, 2: «*Quando provocare necesse non est* 7, 64: *Cum iudex contra ius constitutionis iudicavit. Distinctio est adhibenda talis s. an causam legibus iuvari scivit vel nescivit. Nam si scivit appellatio necessaria non fuit, cum sententia non tenuit, nam in dicendo eam fraudem adhibuit veluti si eum quem sciebat numero trium tutelarum (numero annorum vel liberorum) tutela posse excusari tutorem debere petentis esse iudicavit. Sed si nescivit sententia tenet firmaque permanet, si altera pars non appellet, fuit enim iudicis iudicando eam bona fides. Que distinccio in lege ista servari debet. Aliud est si iudicavit contra ius litigatoris, veluti eum de iure suo probantem audisset ut de privilegio vel de aetate vel numero liberorum et postea dixit eum non provasse. Tunc enim appellandum est sive scivit iudex sive ignoravit causam legibus iuvari*».

The *Summa Trecensis* instead focused on the element of contradiction with the law: a decision rendered *contra ius* was different from an *iniqua* decision, which was subject to appeal[60]. On this point, Placentinus, when listing the grounds for nullity, stated that a sentence pronounced in violation of the law should be considered «*inutilis*[61]» and, in a subsequent passage, admitted the possibility of annulling a sentence issued «*expressim contra iuris rigorem*[62]».
The rationalization of such a vague and flexible criterion was the work of late-medieval jurists: Durante referred to sentences tainted by «*manifesta iniquitas*[63]», or by a manifest breach of law, while Baldus distinguished between «*error expressus*» and «*manifesta iniquitas*», suggesting the latter functioned as a general clause[64].
This dichotomy was further developed, assigning different legal consequences to *errores in procedendo* and *errores in iudicando*. A substantive error in the application of the law became relevant, capable of overcoming the presumption of the judgment's legitimacy, provided it was *causalis*, meaning it had determined the unjust judgment[65]. By contrast, violations of procedural norms (*ordo iudiciarius*) rendered the judgment incurably void and challengeable through a *querela*, regardless of whether the error was *causalis*, as such a defect was taken as evidence of logical or structural fallacy, irrespective of the accuracy of the outcome.
Scholars have rightly noted that «there was a shift from initially treating *errores in iudicando* and *errores in procedendo* alike, to a distinction that, paradoxically, made substantive errors less significant than violations of procedural rules[66]».
The subsequent evolution of the *querela nullitatis* was also shaped by canonical legal thought: canon law, as previously noted[67], embraced a more flexible concept of *res judicata*, considering judgments always retractable in spiritual matters when seriously flawed. Even in the period of *ius commune*, a judgment of

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[60] *Summa Trecensis*, ad C.I. 7, 34, *De sententia*, 4: «*Salvo autem iure tam scripto quam non scripto statuere debet (iudex): contra ius enim lata sententia statim infirmata est, quemadmodum iniqua per appelationem infirmari potest*».
[61] PLACENTINUS, *Summa Codicis*, ed. Maguntiae, 1536, Torino, 1962, p. 48: «*Item inutilis est sententia, quae non fuerat pronunciata secundum idoneas leges, vel secundum longaevas non tamen pravas consuetudines*».
[62] PLACENTINUS, *Summa Codicis*, cit., p. 48: «*Est autem appellatio introducta ut iudicantum iniquitas corrigatur, et imperitia* [...]. *A sententia illa appellari debet, quae contra aequitatem litigatoris fuerit lata, secus si expressim fuerit contra iuris rigorem iudicatum, tunc enim provocare necesse non est, licet de supervacuo et solet, et possit appellari*».
[63] G. DURANTIS, *Speculum*, Lyon, 1578, *De sententia*, III, § 8, n. 1.
[64] BALDUS, In VII-IX *Codicis libros commentaria*, Venetiis, 1615, c. 47.
[65] PANORMITANUS, *Commentaria in Decretales*, Venetiis, 1571, c. 1, X, 11, 27, n.1, n. 6: «[...] *aut sententia est contra ius habito respectu ad merita causae; aut illud ius contra quod est lata sententia concernit extrinsecus aliam iniustitiam a meritis causae, puta ut sententia non feratur die feriata vel aliquid simile*. [6] *In concernentibus merita causae datur iudici facultas discernendi at arbitrandi, cuius partis iura sint potiora; quia non potest dari certa regula et ideo in istis praesumitur esse iustum quod iudex iudicaverit. Praesumendum est saltem per lapsum dicem dierum – nisi exprimatur error iuris, quia tunc cessat praesump- tio. In aliis iuribus concernentibus aliam iniustitiam meritis causae non datur facultas iudici discernendi sed ponitur necessitas contemperandi*».
[66] L. DI COLA, *Provvedimento anomalo e processo civile*, cit., p. 70.
[67] See *supra*, chapter I.

excommunication caused by an «*intolerabilis error patenter expressus*» was deemed null. Revocability was similarly recognized for judgments rendered «*contra matrimonium*» or in any case where the persistence of injustice would entail a «*periculum animarum*[68]», eventually extending to any sentence containing a «*manifestam iniquitatem*[69]».
This mode of reasoning influenced how *errores in iudicando* and *errores in procedendo* were treated by the Doctors and by statutory legislation. The authority of *res judicata* was regarded as a presumption of justice – «*quae praesumptio est quod diligenter iudex exercuerit officium suum*[70]» but when a sentence clearly contravened the law (on the assumption that the judge «*ne exercuerit officium suum*»), the presumption ceased to operate[71]. It would, in fact, be unjust to confer the force of *res judicata* on a patently erroneous ruling.
The idea, germinated in canonical thought, that the quality of the error affecting the judgment determined its *firmitas* depending on whether it was *causalis*, gradually gave way to a more pragmatic criterion: the manifest violation of a rule of law. A sentence rendered *contra ius* could be overcame by *querela nullitatis*, even after the time for appeal had lapsed. In a kind of reversal of its original purpose, the *querela nullitatis* – initially designed to challenge invalid judgments and formally distinct from appeal – gradually evolved into an extraordinary remedy against manifestly unjust final decisions. A clear example of a *querela nullitatis* based on *error in iudicando* can be found in the Neapolitan *Prammatica de dilationibus* of 11 May 1612, which allowed a declaration of nullity «*ex capite notoriae iniustitiae*» in only two cases: a) when the sentence was «*contra expressum locum iuris sive communis sive municipalis*»; b) when it was «*contra publicam autenticamque scripturam iam ante actis insinuatam*[72]».
The association between breach of law and what we might now call a "revocable factual error" suggests a common rationale behind the annulment of judgments: the evident nature of the error.
To conclude this part of the analysis, one final point must be considered: that intermediate law admitted a plurality of forms of flexibility, albeit loosely defined, should not surprise us. Until the advent of the modern state, the various centrifugal forces of the medieval world were in constant struggle to gain and retain control over legal norm production.
Nor should we overlook the tension between the opposing demands of legal certainty and justice, a tension to which the Doctors, many of whom were prominent legal practitioners[73], did not always contribute constructively. Often,

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[68] G. PUGLIESE, voce *giudicato civile (storia)*, cit., p. 768.
[69] P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 153.
[70] PANORMITANUS, *op. cit.*, p. c. 40, V, 39, n. 11.
[71] IBIDEM, *op. cit.*, p. c. 1, X, 27, n. 6.
[72] G. GRIMALDI, *Istoria delle leggi e magistrati nel regno di Napoli*, Napoli, 1772, XI, n. 311 ff.
[73] A. PADOA-SCHIOPPA, *Brevi note sull'avvocatura nell'età del diritto comune*, in G. ALPA and R. DANOVI, *Un progetto di ricerca sulla storia dell'avvocatura*, Il Mulino, Bologna, 2003, p. 41 ff.; P. FIORELLI, *Avvocato (diritto romano ed intermedio)*, in *Enc. dir.*, IV, Giuffrè, Milano, 1959, p. 646 ff.; P. JANNELLI, *Avvocati e procuratori*, in *Nuovo dig.*, II, Torino, 1937, p. 43 ff.; L. BUGATTI, *La professione forense tra tradizione e innovazione. Un'analisi storico-comparatistica*, Torino, 2022, p. 15 ff.

their main interest was to propose remedies for clients who believed themselves harmed by unjust decisions, particularly in view of the often-limited competence of local judges.

The authority of these Doctors greatly influenced the process by which grounds for flexibility were incorporated into legislation – and the *Prammatica* is a notable example. And yet, doctrinal thinking of the time went even further.

Section II
The Flexibility of Res Judicata *in the Medieval Doctors' Elaboration*

SUMMARY: 1. Remarks on the Theory of *Res Judicata* in Intermediate Law. Lines of Development. – 2. A Lengthy Page on Flexibility: Maranta's thought. – 2.1. Continued: Flexibility of Decisions Rendered by *Non Iudices* or by Laymen, in Conflict with a Supervening Fact. – 2.2. Continued: Flexibility of *Res Judicata* Formed in Violation of Evidentiary Prohibitions or in Case of Unreliability of Evidence. – 2.3. Continued: *Retractatio per Confessionem* and the Limits of Art. 395 No. 2 of the Code of Civil Procedure. – 2.4. Continued: Instances of Flexibility of *Res Judicata* for *Manifesta Iniquitas* in Maranta's Thought. – 2.5. *Confiscatio in Casibus Prohibitis* and *Sententia Lata in Causa Usuraria* as Hypotheses of Flexibility of Manifestly Unjust *Res Judicata*. Similarities with the Flexibility of Anti-Union *Res Judicata* in Consumer Matters. – 3. Wrapping up and Transition.

1. *Remarks on the Theory of* Res Judicata *in Intermediate Law. Lines of Development.*

After the analysis of how the *contaminatio* between Roman law and Germanic laws influenced the development of medieval procedural law and the doctrine of *res judicata*, we can now address the different issue of how its nature and effects were reconstructed by medieval Doctors. In keeping with the methodological approach adopted since the outset of our analysis[1], a proper discussion of the issue of flexibility requires outlining the physiological features of *res judicata*; indeed, the various solutions available to the issue of flexibility derive from the theoretical assumptions made regarding the nature of the institute.

We have already noted that medieval Doctors were inclined to conceive *res judicata* as a presumption of justice[2]; however, this statement warrants further elaboration. The twelfth-century works that addressed the relationship between *sententia* and *res iudicata*, both by glossators and canonists, not only laid the groundwork for their distinction by enhancing the idea of the "final judgment", but also breathed new life into the Justinian formulas used to describe the effects of the institute, deriving from them its very nature: «*res iudicata pro veritate accipitur*» and «*sententia facit ius*[3]».

Azo and Accursius leaned toward contrasting the two maxims, distinguishing between judgments producing effects *inter partes* and those having *erga omnes* efficacy, *i.e.*, as sources of *ius*.

A natural implication of these speculations is the classification of *res iudicata* producing *inter partes* effects among the *praesumptiones iuris et de iure*, or

[1] See *supra*, chapter I.
[2] See *supra* in this chapter, section I, para 3.
[3] Digest. XLII, 5.

more generally, within the law of evidence, while judgments that *facit ius* even *ultra partes* were included in substantive law, as sources of rights[4].
Other glossators attempted instead to harmonize the two maxims. For instance, Placentinus regarded the first as a conceptual tool from which to draw the authority of the judgment and render it binding and immutable, even when erroneous («*rei iudicatae stare*[5]»), whereas the second would describe the functioning of this conceptual replacement of "true" truth with judicial truth via the mechanism of *ius facere*. The canonist Tancred also attempted a reconciliation of the two maxims, maintaining that once a decision had passed into *res iudicata*, it constituted a source of *ius* which, as such, was to be applied in a second potential trial between the same parties as something now «*notorium*», regardless of the accuracy of the assessment made in the first ruling, since *res iudicata* prevails over the truth «*etsiamsi lata sit contra ius litigatoris*[6]».
It is noteworthy that the notion of *notorium* was originally developed in criminal law, as an expression of the principle that a manifest crime requires no proof. Soon enough, however, the notion broadened to include everything that appeared so evident and secure as to require no proof. Canonists distinguished between *notorium facti* and *notorium iuris*, identifying the latter with a conviction or a *confessio*. Therefore, if *notorium* is that which is certain and does not require proof, and since a judgment that has passed into *res iudicata* is *pro veritate habetur*, it follows naturally, as Antonio da Budrio observed, that «*sententia quae transivit in rem iudicatam inducit notorium*[7]».
However, it remained unclear whether such an artificial form of *notorium* could be rebutted. In fact, it is one thing to state that a notorious fact needs no proof, and another to allow that notoriety may be overturned by counter-evidence. Antonio da Budrio denied this possibility, while Durante more reasonably allowed it, applying the general principle that an unjust judgment could be challenged by the very party who benefited from it, namely, the victorious party, through *confessio*.
Conversely, glossators tended to downplay the importance of the maxim «*sententia facit ius*», restricting it to those judgments that created a position of advantage and produced effects *erga omnes* or toward specific third parties. Indeed, this expression appeared solely in passages of the Digest addressing the issue of the reflection of res judicata effects toward third parties. Thus, both Rogerio and Placentinus addressed *ius facere* only to describe the effects of a ruling that annulled a testament, since its annulment opened the door to intestate

[4] G. PUGLIESE, *voce giudicato civile (storia)*, cit., p. 764.
[5] PLACENTINUS, *In Codicis Domini Justiniani sacratissimi Principis ex repetita praelectione libros IX summa*, 7, 55.
[6] TANCREDIS, *Ordo iudiciarius*, Göttingen, 1842, IV, I, § 6.
[7] ANTONIUS BUDRIENSIS, *Super quinque libris Decretalium*, Venetiis, 1578, c. 20 X 2, 27; ID., *De notorio*, *in Tractatus universi iuris*, IV, Venetiis, 1584, II, n. 33: «*Non obstante quo id quod non est non possit notorium […] a iure potest haberi, fingi et praesumi notorium et pro notorio, quia sententia pro veritate accipitur*».

succession or transferred the inheritance to the victorious heir, while disqualifying the testamentary heir: in short, it created rights[8].

It follows that, in the thought of the glossators, only constitutive judgments were capable of creating *ius*, and both maxims were valid, each within its own domain. Yet, this dichotomy between judgments that are binding only *pro veritate* and those that create *ius* could not fail to have practical consequences, given the mindset of those jurists. For Bartolus, equating *haberi pro veritate* to an absolute presumption implied that only *probatio per confessionem* was admissible against such a ruling, while such proof was excluded in cases where the effect of the judgment was *ius facere*[9]. Bartolus' teaching was taken up and developed by Paulus de Castro, who, in addition to reiterating the distinction between *haberi pro veritate* and *ius facere* («*non semper sententia facit ius*»), explained that in the first case «*veritatem non inducit*», implying that a judgment not producing *ius* was merely a form of proof, albeit a strong one, but always susceptible to being overturned by a confession from the victorious party[10].

Once again, even while affirming the authority of *res judicata* through the presumption of truth, these jurists sought to temper its irretractability, confirming our earlier premise regarding the complementarity of the two opposing issues.

2. *A Lengthy Page on Flexibility: Maranta's Thought.*

Particularly significant is the analysis of the grounds for the flexibility of *res judicata* conducted by Maranta[11].

We have chosen to focus on the jurist from Venosa for three reasons: a) Maranta operates at the boundary between two different realities, on the one hand, he was a professor within the Kingdom of Naples and witnesses the rise of monarchical absolutism, in an era when the long path toward the state's monopoly on legal production was just beginning; b) he was steeped in the legal culture of the glossators, commentators, and canonists: his encyclopedic treatment of the causes of *infirmitas rei iudicatae* also encapsulates the preceding doctrinal tradition already discussed; c) beyond his academic role, Maranta also practiced law with success.

In this respect, the *Speculum* authored by the jurist from Venosa is remembered as a «*lumen advocatorum*», precisely for its practical orientation and case-based

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[8] ANTONIUS BUDRIENSIS, *De notorio*, cit., II, 69, n. 33.

[9] G. DURANTIS, *Speculum*, Lyon, 1578, II, 69, n. 2: «*licet falso quis confitetur vel inique condemnetur, tamen per illam confessionem seu sententiam factum illud habetur de iure pro notorio, donec contrarium ostendatur* […]. *In tali autem notorio, contra ipsum probatio recipitur, si in dubium revocetur*».

[10] ROGERIUS, *Summa codicis*, in *Scripta anecdota Glossatorum*, a cura di G. B. PALMERI, Bologna, 1963, 3, 18; PLACENTINUS, *Summa institutionum*, Lugduni, 1536, 2, 12.

[11] BARTOLUS, *Commentaria in primam Digesti Novi partem*, Fradin, 1555, 1, n. 22: «*Aliud est dicere sententiam facere ius, ut hic aliud est dicere quod contineatur in sententia haberi pro veritate. Nam primo casu sententia inducit ipsam veritatem, et facit quod verum est illum, quod in sententia dicitur. Secundo casu non facit hoc, sed perinde habetur ficte ac si esset […]. Isto casu sententia non facit ius, sed inducit praesumptionem iuris et de iure quod ita sit; contra quam praesumptionem admittitur probatio solum per confessionem*».

approach – an approach to which we have already devoted, and will continue to devote, ample space throughout this work.
With this in mind, Maranta identifies as many as twenty-four distinct causes of flexibility that preclude the establishment of *res judicata*, emphasizing that «*multi sunt casus in quibus sententia non transit in rem iudicatam*[12]». In the comparison of his analysis of the grounds for the flexibility of *res judicata* with the sections dedicated to appeal and to the *querela nullitatis*, one perceives a notable difference: the *firmitas* of the judgment, outside the cases where appeal or *querela* are granted, can be challenged without time limitation. Maranta does not devalue the authority of *res judicata* – on the contrary, he recognizes, through a well-known hyperbole, that «*est tantae auctoritatis sententia, quod facit de non ente ens; et de falso verum; et de albo nigrum*[13]» – yet, in the cases where judgment formation is only apparent, the expiration of the ten-day term for rising does not imply forfeiture[14], since the underlying defect is so severe that a remedy must always be admitted.
The scenarios of flexibility thus identified can be grouped into three categories, occurring when:

1. the judgment was issued by a non *iudex* (§§ 130, 131, 132, 149);
2. the decision was based on evidence later found to be false, or issued in violation of specific evidentiary prohibitions (§§ 133, 134, 136, 139, 143, 146, 152);
3. the judgment is profoundly unjust, or entails a failure to apply a legal rule (§§ 138, 140, 141, 142, 144, 148, 153).

In confirmation of his treatise-driven orientation, Maranta also reports cases in which the judgment is inherently unfit to attain irretractability, such as in spiritual or sacramental matters.
However, what interests us here is understanding in which cases retractatio of *res judicata* was admissible in practice, and especially why.

2.1. *Continued: Flexibility of Decisions Rendered by Non Iudices or by Laymen, in Conflict with a Supervening Fact.*

According to medieval legal ideology, *iurisdictio* could be exercised only over subordinates[15]. In the context of the *ius commune*, the term *iurisdictio* was understood as *dictio iuris*, namely the judge's power to ascertain the law and establish equity.

[12] R. MARANTA, *Tractatus de ordine iudiciorum*, Lugduni, 1550, p. 243 ff., § 128 ff.
[13] R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 129
[14] R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 129.
[15] IBIDEM, § 129.

According to Irnerius, «*iurisdictio est potestas cum necessitate iuris sive rendendi, equitatisque statuendae*[16]», marked by a coercive element, since it constituted *imperium: sine quo nulla est iurisdictio*[17]. However, these solemn declarations about the essence of jurisdiction clashed with the fragmented reality of medieval Europe, structured around intermediate bodies, each claiming to be judged by their *pares*[18]. Thus, there existed episcopal, corporate, mercantile, university, and noble jurisdictions[19]. The implication was that justice administration in the medieval legal order was often a private affair, attributed, de *jure* or de *facto*, by concession or by usurpation, to a plurality of judges, both lay and legally trained[20]. The phenomenon of jurisdictional fragmentation was further intensified by the widespread practice of delegating *iurisdictio*: political authorities entrusted justice to *officiales*, often foreigners brought in by the *podestà*, forming part of his *familia* and departing with him at the end of his term.
Within this framework, glossators revisited the distinction, already known by Roman law, between *iudex ordinarius* and *iudex delegatus*[21]. The expression *iudex quasi ordinarius* was used to indicate a delegate appointed *a principe* or an *auditor palatii domini papae*[22], distinguishing between delegation of jurisdiction (*ad universitatem causarum*) and delegation for a single case (*ad unam causam*)[23]. The intricate network of tribunals and jurisdictions described here was, in theory, linked to imperial or royal authority, but in practice, intermediate bodies often acted autonomously – even to the extent of disavowing superior authority[24].
In this regard, Picardi's meticulous research has provided an image of medieval political ideology in which *iurisdictio* and *gubernaculum* are, in effect, separated[25]. It is plausible that such fragmentation undermined public confidence in the justice system, at times even leading to the denial that a *dictum* had the authority to resolve a dispute[26].

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[16] IBIDEM, § 129: «*Sed quando dicimus, quod sententia transivit in rem iudicatam: intellegitur, id est, quia accepit authoritatem et vires rei iudicatae, que pro veritate accipitur […] quod est, quando per lampsum decem diereum sententia firma rendit si ab ea non fuit appellatum […], quando fuit appellatum et appellatio est deserta*».
[17] N. PICARDI, *Il giudice secondo l'ideologia medioevale*, in *Riv. dir. proc.*, 2007, p. 1475 ff.
[18] IRNERIUS, *Glossa Ad Digestum Vetus*, *De iurisdictione*, in E. BESTA, *L'opera di Irnerio. Contributo alla storia del diritto italiano*, vol. II, Glosse inedite d'Irnerio al *Digestum Vetus*, Torino 1896, p. 20.
[19] IRNERIUS, *Glossa Imperium. De officio eius cui mandata*, in *L'opera di Irnerio. Contributo alla storia del diritto italiano*, a cura di E. BESTA, vol. II, p. 19.
[20] A. PADOA-SCHIOPPA, *Il ruolo del diritto nella genesi dello Stato moderno*; *modelli, strumenti, principi*, in *Studi di storia del diritto*, II, Milano p. 47 ff.; A. PERTILE, *Storia del diritto italiano. Dalla caduta dell'impero romano alla codificazione*, cit., p. 270.
[21] We can read in the Statute of of Crema and Brescia of 1429 that *«[L]ata sententia per consules mercantiae, liceat appellare ad quatuor mercatores eligendos in consilio generali mercantiae quolibet anno. Infirmata aut reformata sententia, licitum sit parti in causa appellationis succumbenti infra quatuor dies continuos appellare et de nullitate dicere ad consilium universitatis mercatorum, qui infra unum mensem definisse debeant dictam causam. A qua quidem sententia amplius non liceat appellari, nec de nullitate dici*».
[22] N. PICARDI, *Il giudice secondo l'ideologia medioevale*, cit., p. 1481.
[23] A. ENGELMANN, *A History of Continental Civil Procedure*, Boston, 1927, p. 264 ff.
[24] G. DURANTIS, *Speculum*, cit., *De iudice delegato*, § 2 n. 9.
[25] G. DURANTIS, *Speculum*, cit., *De iudice delegato*, § 1, n. 1: «*iudex delegatus […] ex alterius commissione alicuius causae recepit iudicialem missionem*».
[26] O. VON GIERKE, *Political Theories of the Middle Age*, trad. MAITLAND, Cambridge 1900, p. 72 ff.

This may explain why Maranta gave particular attention to judgments rendered *a non iudice*, or by lay experts unfamiliar with legal disciplines who, for reasons we might term "corporative", were nevertheless commonly vested with *iurisdictio* over their *pares*. In particular, he deems flexible the «*sententia est lata de consilio alicuius doctoris seu iurisperiti*», which may always be retracted «*quandocunque apparebit consilium alterius doctoris rectius sententis ita tenet*[27]». Indeed, a legal expert as such does not hold *iurisdictio*, or if delegated for a specific matter, lacks the authoritative and coercive dimension[28]. Therefore, it was deemed equitable that a decision issued upon the advice of a Doctor, or with the assistance of a *collegium iurisperitorum*, could be retracted should a conflicting expert opinion emerge.

Using modern terminology, such a judgment might be described as forming *res judicata rebus sic stantibus* – thus subject to supervening circumstances. This form of flexibility is justified once one considers that *consilia* could be requested by the parties, with the judge conducting a preliminary assessment of the seriousness of the *dubitatio*: by requesting the *consilium*, due to the complexity of the issue, the parties effectively renounced the irretractability typical of *res judicata*, accepting instead a weaker judgment not immune to *ius* or *factum superveniens*[29].

Conversely, the justification for the flexibility of judgments based on *consilia* of merchants and artisans in matters within their purview seems to rest on different grounds[30]. In this case, an additional factor, beyond those already noted for *consilia iurisperitorum*, argues in favor of flexibility: the segmentation of society into guilds or similar intermediate bodies fosters distrust of decisions rendered by *pares*, which could reasonably be influenced by personal ties with the parties. In this social context, it becomes clear why Maranta does not hesitate to align decisions based on the *consilia* of *iurisperiti* with those incorporating the contents of an expert opinion: in both cases, absolute irretractability of *res judicata* appears excessive, either because the former lacks the stability guaranteed by *opiniones iuris*, or the latter lacks the impartiality and absence of prejudice expected of the adjudicator. Even at the time, these elements were already perceived as fundamental and counted among the *essentialia iurisdictionis*[31], requirements that only a robed judge was deemed capable of satisfying.

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27 N. PICARDI, *La crisi del monopolio statuale della giurisdizione e la proliferazione delle corti,* in *Corti europee e giudici nazionali*, Atti del XXVII convegno nazionale dell'Associazione italiana fra gli studiosi del processo civile, Verona, 25-26 settembre 2009, Bologna, 2011, p. 6 ff..; ID., *Il giudice secondo l'ideologia medioevale*, cit., p. 1484; ID., *voce Processo civile (diritto moderno)*, in *Enc. dir*., XXXVI, Milano 1987, p. 192 ff.; A. GIULIANI- N. PICARDI, *La responsabilità del giudice*, Milano, 1995, p. 23 ff.

28 G. PUGLIESE, *voce giudicato civile (storia)*, cit., p. 765.

29 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 130.

30 A. PERTILE, *Storia del diritto italiano. Dalla caduta dell'impero romano alla codificazione*, p. 270.

31 G. ROSSI, *Il* Consilium sapientis iudiciale. *Studi e ricerche per la storia del processo romano-canonico*, Milano, 1958; M. ASCHERI, *I* consilia *dei giuristi: una fonte per il tardo Medioevo*, in *Bullettino dell'Istituto storico italiano per il Medioevo*, 105, 2003, p. 305 ff.; M. VELLERANI, Consilia iudicialia. *Sapienza giuridica e processo nelle città comunali italiane*, in *Mélanges de l'École française de Rome - Moyen Âge*, 2011, p. 129 ff.

The importance of judicial impartiality is confirmed in § 149, where Maranta specifies: «*Vicesimus casus est in sententia venali: ut quando iudex corruptus pecunia, mala profert sententiam*[32]». A judgment rendered by a corrupt judge (*iudex corruptus*) is incapable of acquiring the authority of *res judicata* and is always subject to retractatio – no differently than one based on the *consilia* of merchants and artisans. In both instances, a rescinding remedy is granted, provided the injustice of the initial decision or the error committed can be demonstrated[33].

2.2. *Continued: Flexibility of* Res Judicata *Formed in Violation of Evidentiary Prohibitions or in Case of Unreliability of Evidence.*

The sensitivity of *ius commune* doctrine to the matter of evidence in trials led Maranta to construct a microsystem dedicated to the flexibility of *res judicata* in cases where the judgment was based on unreliable or false evidence. Although in our current legal culture irrevocable judgments are no longer subject to revision merely due to evidentiary unreliability, thanks to the refinement of epistemic methods and the evolution of knowledge, in the medieval world, legal presumptions and fictions were frequently employed to address the practical difficulties of accurately ascertaining facts[34].

This simplification of the *thema probandum* was, however, counterbalanced by the possibility of rebuttal in a separate proceeding. When the sources refer to the expression familiar to us, *praesumptio iuris et de iure*, they do not thereby exclude rebuttal of the legal inference. Rather, the aim is to limit the means through which such rebuttal may be achieved.

When Bartolus defines the effect of *res judicata* as a *praesumptio iuris et de iure*, he does not thereby rule out the possibility of contrary proof but rather specifies that *contra quam praesumptionem admittitur probatio solum per confessionem*[35]. Thus, in treatises, the expression *praesumptio iuris et de iure* is to be understood as a hendiadys, in a sense markedly different from our modern interpretation. This should not surprise us, given the distance between that legal culture and ours, in which the technological limitations of the time rendered factual reconstruction significantly more difficult.

Accordingly, the flexibility of *res judicata* due to unreliable evidence used by the judge as the basis for their reasoning applies not only to judgments built on *falsae praesumptiones*[36], which are inherently incapable of accurately describing the

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[32] R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 149.

[33] IBIDEM, § 155: «*quando iudex aditur per viam quereale, non debet simpliciter admittere querelentem: sed debet prius summarie saltem se informare de iniustitia vel errore commisso in sententia*».

[34] About the evolution of juridical fictions see S. PUGLIATTI, *voce Finzione*, in *Enc. dir.*, XVII, Milano, 1968, p. 658 ff.; A. LA TORRE, *Le finzioni nel diritto*, in *Riv. dir. civ.*, 2000, p. 315 ff., at 319.

[35] BARTOLUS, *Commentaria in primam Digesti Novi partem*, cit., n. 22.

[36] R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 133, 136, 139 «*Quartus casus est in sententia lata ex iuris praesumptione: et fictio ex probationibus ubi idem generaliter dicunt in omni sententia lata ex probationibus privilegiatis: ut quandunque retractari possit […]. Septimus casus est in sententia lata super etate ex aspectu: quia cum fit probatio praesumptiva, non transit in rem iudicatam. […] Decimus casus est quando*

factual situation of the case, since they presume what is only probable or at most doubtful[37], but never certain, but also to those rendered on the basis of testimony *deponentes de credulitate*[38]. (Indeed, Article 194 of the Italian Code of Criminal Procedure prohibits testimony based on public rumor, due to the difficulty of verifying its source – just as Article 195(7) of the Code of Criminal Procedure renders inadmissible hearsay testimony offered by those who refuse or are unable to identify their source[39]).

In the same way, according to Maranta's system, a judgment based on testimony from a *sumvicinus* or *consanguineus*, that is, someone particularly close to the parties, is also considered infirm[40]. Likewise, the falsity of the evidence is sufficient to invalidate *res judicata*: both perjured oaths[41] and those rendered *ex falsis allegationibus*[42] were subject to *querela nullitatis*. These are, indeed, the cases in which the distance between the judgment and the goal of ascertaining substantive truth is most acutely felt.

In any case, it seems that the burden of proving the unreliability of the evidence, the fallacy of the presumption, or the falsity of the facts always rested with the complainant. Still, Maranta was willing to accept something less than full proof of the causal link between the defect and the outcome of the decision[43].

This reveals a certain analogy with the standard set by Article 395 no. 2 of the Italian Code of Civil Procedure, which governs the impact of falsity on a revocable judgment. That provision appears to require less than full causal proof[44]: it is one thing for a judgment to be *based on* false evidence, and another for it to be *caused by* an unlawful act or a factual error evident from the case record.

Because the statute does not require a full counterfactual analysis, it would allow for revocation even in cases where the false evidence was only a contributing factor to the judge's conviction. Nevertheless, it may be observed that the rescissory nature of revocation requires at least a showing that the falsity of the evidence influenced the contested decision. Otherwise, the judge should declare the motion inadmissible for lack of interest, since, even if the rescinding phase succeeded, the plaintiff would be unable to obtain a different outcome. This would amount to a repetition of the trial in violation of the principle of reasonable duration and for the sole benefit of the plaintiff, who could thereby

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sententia est lata ex probationibus a iudice reprobatis: punta per duellum: seu per experientiam ferri cadentis nam tunc non solum non transit in rem iudicatam: imo est penitus nulla».

37 W. D'AVANZO, *voce Presunzioni*, in *Enc. giur. it.*, XIII, Milano, 1901, p. 882.

38 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 134.

39 P. CORSO, *Notizie anonime e processo penale*, Padova, 1977, p. 105 ff.; M. NOBILI, *Il principio del libero convincimento del giudice*, Milano, 1974, p. 324; P. TONINI, *La prova penale*, Padova, 2000, p. 98.

40 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 143: «*Quartusdecimus casus est quando sententia fertur per testes adisgnantes causam scientiae: quia sumvicinus, vel consaguineus*».

41 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 146.

42 IBIDEM, *Tractatus de ordine iudiciorum*, cit., § 152.

43 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 155.

44 Così F. ROTA, *Revocazione nel diritto processuale civile*, in *Dig. civ.*, XVII, Torino, 1998, p. 478.

secure both suspension of the enforceability of the judgment and an impermissible rehearing of the factual issues.

2.3. *Continued: Retractatio per Confessionem and the Limits of Art. 395 No. 2 of the Code of Civil Procedure.*

In Maranta's thought, the protection afforded by *res judicata* to the prevailing party does not extend to judgments that are gravely erroneous, especially when the error is acknowledged by the party who would benefit from the decision's preservation.

Maranta admits, in line with canon law doctrine, the possibility of *retractatio per confessionem victoris*[45]. From this emerges a general principle – indeed one that has reached us, whereby the prevailing party may renounce the effects of an unjust judgment.

More precisely, under current Italian positive law, Article 395 no. 2 of the Code of Civil Procedure allows for the revocation of a judgment not only when it was rendered because of evidence *declared false*, but also when the falsity is *recognized as such*. According to many scholars and unanimous case law[46], such recognition is effective for purposes of revocation only if it comes from the party *in whose favor* the evidence was used, not from the author of the falsehood, as might occur when a witness later acknowledges having lied[47].

This restriction on the significance of the recognition of falsity has often been viewed as a byproduct of the dispositive principle, whereby "it is ultimately held that the party's acknowledgment of falsity amounts to an admission of the fact contrary to what was proven[48]". It is precisely the pursuit of *veritas* and the need to prevent deeply unjust judgments from becoming irrevocable that justify viewing such recognition as an exception to the unavailability of the preclusive effect of *res judicata*[49]. One might then ask whether the combined provisions of Article 395 no. 2 of the Code of Civil Procedure and Article 2732 of the Civil Code allow for revocation of a knowingly false confession once *res judicata* has formed.

A confessing party may indeed nullify their declaration against interest by demonstrating either a factual mistake or coercion, but only before judgment is rendered, or via appeal, provided such actions are taken prior to the judgment becoming final. However, under Article 395 no. 2, the acknowledgment of falsity may still ground an extraordinary appeal for revocation, provided it originates from the party who benefitted from the confession. This is because, as

[45] R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 138.

[46] V. ANDRIOLI, *Commentario al codice di procedura civile*[3], IV, Napoli, 1964, p. 625; V. COLESANTI, *Sentenza civile (revocazione della)*, in *Noviss. Dig. it.*, XVI, Torino, 1969, p. 1166; C. CONSOLO, *Le impugnazioni delle sentenze e dei lodi*, Padova, 2012, p. 445; F. ROTA, *art. 395 c.p.c.*, in CARPI-TARUFFO (a cura di), *Commentario breve al Codice di procedura civile*[9], Padova, 2023, p. 1705.

[47] See Supreme Court, 3 May 2005, No. 9098.

[48] F. ROTA, *Revocazione nel diritto processuale civile*, cit., p. 478.

[49] E. T. LIEBMAN, *Manuale di diritto processuale civile. Principi*[6], II, Milano, 2002, p. 286.

mentioned, it represents a voluntary renunciation of the binding effect of the judgment, something the confessing party cannot unilaterally revoke.
This conclusion, however, is highly unsatisfactory once we consider that in cases of coercion, psychological barriers to retracting a forced confession may persist well beyond the deadline for ordinary appeals. It therefore seems reasonable, at least in cases of violence, to grant recourse under Article 395 no. 2, even when the retraction comes from the confessing party, or alternatively, to broaden the concept of *dolo* as used in Article 395 no. 1 to include all defects of consent that undermine autonomous will.
Such an interpretation would avert inconsistencies with the principle of reasonableness: after all, violence is arguably more reprehensible than fraud. Thus, denying the retractability of *res judicata* in cases of coercion, while allowing it for cases of fraud, appears difficult to justify.

2.4. *Continued: Instances of Flexibility of* Res Judicata *for Manifesta Iniquitas in Maranta's Thought.*

The concept of *iniquitas* recurs frequently in Maranta's analysis as a cause for the flexibility of *res judicata*[50]. At times, *iniquitas* rises to the level of a general clause justifying *retractatio*; at others, it serves to circumscribe the specific situations in which an extraordinary remedy may be sought. In the latter regard, Maranta specifies that *retractatio* is possible «*quando per evidentiam facti apparet de iniquitate sententiae*[51]».
The precise scope of application for this remedy is not entirely clear: one might conjecture that *iniquitas* stems from a distortion of facts as reflected in the case record, not unlike the revocatory ground of *error facti* provided for in Article 395 no. 4 of the Italian Code of Civil Procedure. However, in a procedural system that did not yet recognize a remedy limited solely to questions of law, as evidenced by Calamandrei's research[52], granting an extraordinary remedy for a factual error would seem conceptually incoherent, as the natural remedy would have been the appeal, through which the higher court would review the entire case *de novo*, since the appeal was itself a full remedy (*gravamen*)[53].
Therefore, unless one were to hold that *iniquitas per evidentiam facti* could only be invoked against appellate judgments (though Maranta's discussion of appeals provides no indication of this), it seems more plausible to interpret *iniquitas* as encompassing cases in which a factual error, though not apparent from the case record, nonetheless led to a profoundly unjust *decisum*, possibly due to later developments capable of overcoming the presumption of veracity that Maranta himself associates with the formation of *res judicata*.

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50 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 138, 141, 144.
51 IBIDEM, *Tractatus de ordine iudiciorum*, cit., § 144.
52 P. CALAMANDREI, *La Cassazione civile*, I, cit., p. 222 ff.
53 R. MARANTA, *Tractatus de ordine iudiciorum*, *Secundus actus*, cit., § 1 e 5: «*appellatio est provocatio ad maiorem iudicem ratione gravaminis illati vel inferendi*»; «*appellatio proprie dicitur quando aliquis in iudicio se aggravat ab aliquo actu iudiciario tendente in eius laesionem habendo recursum ad superiorem*».

Indeed, Maranta appears to provide an example of *iniquitas per evidentiam facti* shortly thereafter: «*Decimusnonus casus est quando causa redit ad non causam: ut si fullo conducit vestimenta: et his amissis condemnatur per sententiam ad solvendum pretium locatori seu domino. Nam si postea dominus invenit vestimenta quandocunque potest sententia retractari, ut fullo recuperet solutum pretium*[54]». That is, the judgment condemning the *fullo* (cloth cleaner) to pay the value of the garments to the lessor or owner is subject to *retractatio* if, after *res judicata* has formed, the owner later recovers the garments (*invenit vestimenta*), thereby entitling the fuller to recover the payment made.

To Maranta, the judgment – final though it may be – that had condemned the *fullo* was manifestly unjust, given that the garments were never truly lost, but in fact returned to their rightful owner. To insist that the fuller must still pay for them would run *contra evidentiam facti*, as the basis for the judgment (that the goods were lost) had been refuted by subsequent factual developments.

2.5. *Confiscatio in Casibus Prohibitis and Sententia Lata in Causa Usuraria as Hypotheses of Flexibility of Manifestly Unjust Res Judicata. Similarities with the Flexibility of Anti-Union Res Judicata in Consumer Matters.*

Particularly indicative of Maranta's approach are those cases in which he regards the manifest iniquity of the judgment as reason enough to deny it the effects of *res judicata*. Among these, he includes the confiscation carried out *in casibus prohibitis*[55], as well as the judgment rendered in a usury case (*sententia lata in causa usuraria*) [56].

These examples stand out for the gravity of the illegality affecting the content of the decision, which is so severe that it undermines the legitimacy of the judgment itself, even if it has passed unchallenged into *res judicata*. In this sense, Maranta considers the unlawfulness not as a procedural vice, but as an objective breach of justice and law, so manifest and intolerable that it renders the judgment retractable despite its apparent finality.

In the *confiscatio in casibus prohibitis*, the vice lies in the direct contradiction between the judgment and the positive legal prohibition. Similarly, in *causa usuraria*, the judgment that upholds or enforces usurious agreements, even if not expressly impugned by the party concerned, is affected by a material illegitimacy so severe that it cannot be allowed to stand, as it enshrines and legitimates an economic injustice contrary to public policy and morality.

The practice of agreeing to interest above a certain threshold has never been considered as lawful either by the legal system or by merchants' customary norms. For this reason, Maranta includes among the hypotheses of flexibility for *iniquitas* the *sententia lata in causa usuraria*. Maranta's reasoning does not appear to be influenced by religious precepts: the notion of *iniquitas* – which undermines the firmness of the *res judicata* – is purely legal in nature, given that the

54 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 148.

55 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 140.

56 R. MARANTA, *Tractatus de ordine iudiciorum*, cit., § 143.

enforcement of a judgment rendered in a usury case would be legally intolerable. It is therefore considered susceptible to annulment at any time.

From a diachronic perspective, it is worth noting that even in very recent times, *res judicata* has been deemed flexible when it ratified an agreement on supra-threshold interest in violation of the peremptory rule enshrined in Article 1815(2) of the Italian Civil Code. Although *res judicata* extends its protective force to unjust decisions, as previously noted, such protection does not necessarily render immune from scrutiny even gravely erroneous decisions, particularly where they entail a blatant misapplication or disregard of the law.

Beyond the much-criticized judgment of the Monza Court of 25 July 2015 – where the judges held that the criminal prohibition of usury precluded the enforcement of creditor claims for usurious interest, even if sanctioned by a non-contested order of payment[57] – the enforcement judge of the Milan Tribunal, of 13 September 2019, found the clause concerning default interest to be unfair due to its stipulation of supra-threshold rates. Although the enforcement title consisted of a non-contested order of payment, the judge referred a preliminary question to the Court of Justice of the European Union, asking: «Whether and under what conditions Articles 6 and 7 of Directive 93/13/EEC and Article 47 of the Charter of Fundamental Rights of the European Union preclude a national system, such as that described, which prevents the enforcement judge from conducting a substantive review of a judicial enforcement title that has acquired the force of res judicata, and which precludes that judge from setting aside the effects of implicit res judicata where the consumer has expressed a desire to invoke the unfairness of the clause forming the basis of the enforcement title».

In its well-known *SPV Project 1503 Srl, DoBank SpA v. YB judgment*[58], the CJEU justified the debtor's failure to contest the oder of payment in a time, ruling out the formation of implicit *res judicata* concerning the validity of the underlying legal relationship. This conclusion was reached despite the debtor's passivity being difficult to excuse, as the enforcement judge had repeatedly urged the consumer to assert the protective nullity under Article 33(f) of the Consumer Code.

Scholars have insightfully observed that the CJEU's flexibility in *SPV Project* was implicitly justified by a decisive factor absent from the judgment's reasoning: a manifest violation of the law[59]. In other words, it is entirely possible that, even outside the appellate process, a second judge may – albeit tacitly – declare that the first judge erred, particularly when the documentary evidence presented during summary proceedings reveals a glaring mistake that led to an unjust *res judicata*. The breach of the prohibition against supra-threshold interest has,

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[57] See Court of Monza, 25 July 2015, in *Giur. it.*, 11, 2015, p. 2370 ff., commented by M. STELLA, *Paralisi dell'*actio iudicati *per contrarietà al divieto di usura?*

[58] See European Court of Justice, 17 May 2022, C-693/19 e C-831/19, *SPV Project 1503 Srl, Dobank SpA/YB* e *Banco di Desio e della Brianza SpA e a./YX, ZW*.

[59] A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: l'intervento della Corte di Giustizia*, in *Riv. dir. proc.*, 1, 2023, p. 291 ff., at 300-301.

across all eras, been perceived as symptomatic of injustice – an injustice that opens the door to "atypical" remedies (or, at the very least, tacitly tolerated mechanisms) outside the formal system of appeals.

The injustice inherent in a judgment endorsing a violation of a socially entrenched legal prohibition cannot be automatically cured by the mere passage of time or by the judgment's finality. This is especially true where the prohibition in question is also recognised at the European level.

Thus, it is especially meaningful to observe a line of continuity between the thought of the Doctors of Intermediate Law – particularly Maranta – and the most recent national and European case-law. To hold even irremediably flawed and legally erroneous decisions immune from any form of challenge simply because they have become final is a stance difficult to defend for anyone concerned with justice.

3. *Wrapping up and Transition.*

What emerges from the analyses conducted throughout this second chapter is the absence, in medieval legal thought, of a monolithic notion of *res judicata*. Rather, what we observe is a multifaceted and dynamic concept, whose scope and stability are contingent upon multiple variables: the nature of the judge, the reliability of the evidence, the correctness of the legal reasoning, and the compatibility of the judgment with fundamental values.

The doctrine of the Doctors, especially in the thought of Maranta, illustrates that the *firmitas* of a final judgment is not a static attribute, but one subject to scrutiny considering considerations of fairness, truth, and legal coherence. The cases in which *res judicata* proves to be retractable are not merely exceptions but reflect a broader theoretical stance: the authority of a judgment must yield when faced with reasons that fundamentally call into question its legitimacy.

This theoretical sensitivity, rooted in both practical advocacy and academic speculation, would significantly influence the formation of modern legal systems. The idea that legal certainty must not come at the cost of justice continues to animate contemporary debate, particularly where the flexibility of *res judicata* intersects with supranational norms, fundamental rights, and structural guarantees of fairness.

CHAPTER THREE
THE PROCEDURAL AUTONOMY OF MEMBER STATES
Procedural Autonomy and the Fundamental Principles of European Law

1. *Introduction to the Principle of Procedural Autonomy of Member States.*

Among the original objectives of the Treaties establishing the European Communities, the harmonisation of national procedural laws was notably absent. This omission reflected the concern that any harmonisation would entail an excessive encroachment upon a field historically regarded as a core expression of national sovereignty[1]. In this respect, Articles 100 and 100A of the Treaty

[1] See *retro*, chapter I, section I, §§ 2 e 3. See also T. BALLARINO, *Diritto dell'Unione europea*, Padova, 2010, p. 54.

establishing the European Community (later amended by the Treaties of Maastricht, Amsterdam, and eventually Lisbon[2]), while allowing for legislative approximation among Member States, limited such measures strictly to those directly impacting the efficiency of the internal market.

The implications of the absence of uniform procedural rules become immediately clear when one considers that EU law is applied in a decentralised way by the national courts of the Member States. This structure reflects the "vertical" character of the Union's legal system, wherein EU institutions rely on the Member States for the resources and personnel necessary to achieve the Treaties' objectives[3].

During this work, we have made references to the procedural autonomy of Member States as a limit on the influence of Union law over national procedural law. The existence of such a principle is today commonly inferred from a straightforward reading of Article 81 TFEU[4]. This provision affirms two key ideas: first, judicial cooperation is restricted to disputes with cross-border implications; second, the harmonisation of national procedural systems is merely optional and contingent, since Article 81 TFEU is, in essence, a programmatic norm in respect of purely domestic litigation[5].

As a result, procedural law is not formal harmonisation, despite the influence of soft law instruments on domestic legal systems[6]. The normative framework thus supports the recognition of procedural autonomy as a general principle of EU law, a principle which, albeit in a markedly different legal context, had already been developed by the Court of Justice as early as the 1970s[7].

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[2] About the historical evolution of the Treaties see L. DANIELE, *Diritto dell'Unione europea*[8], Milano, 2022, p. 3 ff.; R. ADAM-A. TIZZANO, *Manuale di diritto dell'Unione europea*[4], Torino, 2024, p. 17 ff.

[3] D. H. HALBERSTAM, *Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach*, in 23 *Cambridge Yearbook of European Legal Studies*, 2021, p. 128 ff.; K. LENAERTS, *National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness*, in 46 *Irish Jurist*, 2011, p. 13: «national courts are, in principle, entitled, and indeed expected, to apply national procedural rules when applying substantive EU rules» and «division of functions between the EU and national legal systems, with the former providing the rights and the latter the remedies».

[4] P. BIAVATI, *Il futuro del diritto processuale di origine europea*, in *Riv. trim. dir. proc. civ.*, 2010, p. 859 ff., at 861.

[5] S. LAW- J. T. NOWAK, *Procedural Harmonization by the European Court of Justice*, in *The Future of European Law of Civil Procedure. Coordination or Harmonization?* edited by F. G. INCHAUSTI & B. HESS, Cambridge, 2020, p. 23.

[6] R. C. FELIPE-S. T. TOMAS, *La trasformazione del processo civile spagnolo per effetto del diritto europeo*, in *Riv. trim. dir. proc. civ.*, 4, 2024, p. 1239 ff., at 1243; see also S. HUBER, *Initial Remarks on the methodological approaches to procedural armonisation*, in *The Future of European Law of Civil Procedure. Coordination or Harmonisation?*, cit., p. 11; R. CAPONI, *Le regole modello europee Eli-Unidroit sullo sfondo della riforma italiana del processo civile*, in *Riv. trim. dir. proc. civ.*, 3, 2022, p. 717 ff., at 736; F. G. INCHAUSTI, *Las European Rules of Civil Procedure: ¿Un punto de partida para la armonización del proceso civil?*, in *Cuadernos de Derecho Transnacional*, 13, 1, 2021, p. 277 ff.

[7] The expression "procedural autonomy" was invented by J. RIDEAU, *Le rôle del Ètats membres dans l'application du droit communautaire*, in *Annuaire Français de Droit International*, 1972, p. 864 ff.

If the EU legal order is a *novum ordo* – both integrating and presupposing national legal systems – then the mutual integration of Union and domestic law becomes an indispensable stage in the realisation of the Union's objectives. This is particularly true from the perspective of substantive EU norms, which are typically enforced through national procedural instruments. Consequently, despite the seemingly unequivocal wording of Article 81 TFEU, procedural autonomy must be regarded as a "clockwork principle": one liable to deactivate once full harmonisation is achieved in areas of Union competence.
It follows that the fact that most EU norms conferring substantive rights do not also prescribe the consequences of their breach, nor the procedural mechanisms for their enforcement, is hardly dispositive. Indeed, if the creation of individual rights and legal interests under EU law did not implicitly entail the guarantee of their judicial enforceability in concrete cases, the normative affirmation of such rights would be a mere *flatus vocis*.
Indeed, the fundamental principles of direct effect[8] and effet utile[9] of Union law guarantee the enforcement of European provisions across all Member States.
In other words, the natural complementarity – or, more precisely, the procedural dependence – of the EU legal order on the systems of the Member States cannot be construed as a tacit or advance waiver by the Union of its power to sanction domestic procedural mechanisms that obstruct the full realisation of EU law. Such an interpretation would amount to acknowledging the insufficiency of Union norms to ensure their own concrete enforcement, ultimately leading to a denial of their effectiveness.
In this perspective, the relevance of the principle of procedural autonomy of the Member States becomes intelligible only when viewed against the backdrop of the limitations imposed upon it by the foundational principles of Union law: primacy, direct effect, effet utile, effectiveness, and the principle of conferral.
In areas of exclusive Union competence, procedural autonomy is virtually extinguished. By contrast, in areas of shared competence, a sort of autonomy may survive. Likewise, where EU substantive law lacks direct effect, procedural autonomy fully operates; but where such law can produce direct effects within

[8] See G. TESAURO, *Manuale di diritto dell'Unione Europea*², Napoli, 2020, p. 235; and P. PESCATORE, *Diritto comunitario e diritto nazionale secondo la giurisprudenza della Corte di giustizia delle Comunità europee*, in *Foro it.*, 4, 1970, p. 37 ff., at 42,
[9] European Court of Justice, 4 December 1974, C-41/74, *Van Duyn*, para 12: «[I]n particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law»; and also European Court of Justice, 19 November 1991, C-6/90 and C-9/90, *Francovich*, para. 33-34: «The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law».

domestic legal orders, it becomes more difficult to uphold the inviolability of procedural institutions that stand in the way of its concrete application.

1.1. *What Do We Mean When We Speak of Procedural Autonomy of the Member States? An Analysis of the Concept of Procedural Norms in EU Law and Its Implications.*

Before analysing the limits of the principle of procedural autonomy, it is necessary to address a preliminary question: in the absence of a legal definition, what are the defining features of a procedural rule under Union law? To avoid excessive fragmentation of the category, this definition should not be derived from domestic legal systems; conversely, a Union-based approach suggests that any normative provision – regardless of its formal classification or national label – that affects the concrete enforcement of EU law must be regarded as procedural[10]. The distinction between substantive and procedural rules thus turns on the functional or instrumental character of the provision under scrutiny[11].

Accordingly, while in domestic law a procedural rule is traditionally seen as the instrument *par excellence* of legal implementation[12], in EU law any rule that serves to give effect to primary norms may be deemed "procedural". Therefore, such provisions – at least in principle – fall within the scope of the procedural autonomy of the Member States and thus remain, to some extent, insulated from harmonising pressures under EU law.

The principle of procedural autonomy applies, therefore, to all provisions that do not, in themselves, confer a substantive advantage stemming from EU law, but which regulate how such an advantage is enforced. This definition makes it possible to carve out a kind of "safe zone" from influence of EU law, in which institutions that might otherwise be deemed substantive under national law may be treated as procedural. Examples include rules on prescription and limitation periods, administrative annulment of unlawful decisions, or the temporal requirements for the initiation of antitrust sanctioning procedures.

The functional overlap between procedural and substantive norms within the EU legal space confirms a broader insight only hinted at previously: that procedural and substantive law are, in truth, complementary. Any rigid separation between national procedural forms and substantive Union law risks introducing an element of arbitrariness. What ultimately matters are whether domestic procedural mechanisms allow for the full enforcement of EU-derived legal entitlements. Instrumental provisions may indeed remain insulated from EU law, but only insofar as they do not obstruct the realisation or undermine the effective protection of those rights.

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[10] For this approach in the American legal order, see P. MACMAHON, *Procedural, Civil Justice and American Legal Thought*, in 34 *U. Pa. J. Int'l L.*, 3, 2013, p. 545 ff.
[11] D. U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?* Berlin, 2011, p. 1 ff.
[12] E. BETTI, *Diritto processuale civile italiano*, Roma, 1936, p. 4.

1.2. *The "Functionalised Procedural Competence" of the Member States. Approaching the Case-Law Analysis.*

History has shown that the so-called safe zone created by the principle of procedural autonomy is not capacious enough to accommodate all "sensitive" procedural institutions[13]. The recognition of Member States' procedural autonomy has thus been systematically counterbalanced by the identification of limits[14], in line with the Court of Justice's characteristic approach: whenever an exception is carved out from the all-encompassing scope of EU law, the Court often proceeds to define its boundaries with such scrupulousness as to render the exception largely ineffective.

These limits are to be found in compliance with the principles of effectiveness and equivalence. The former guarantees the actual protection of EU-derived rights, meaning that their exercise must not be rendered practically impossible or excessively difficult by domestic procedural rules; the latter ensures equality and non-discrimination between EU-based legal positions and their domestic counterparts, with the implication that the former must be treated under conditions at least as favourable as those granted to the latter under national law. These two principles have been progressively linked to the principles of primacy and conferral[15], ultimately serving the purpose of safeguarding the effet utile of EU law, even in areas that, according to the programmatic intent of the Treaties, ought to remain immune from EU interference.

The idea that procedural autonomy must operate within clear limits has led scholars to develop the influential distinction between horizontal and vertical harmonisation of procedural rules[16]. The former is achieved through legislative instruments adopted on the legal basis of Article 81 TFEU and comprises the body of European norms applicable to cross-border disputes. The latter, by contrast, functions as an invisible cornerstone of European integration: it applies in fields where the Union holds legislative competences over substantive law,

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[13] C. CONSOLO, *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla CEDU a sua volta)*, in *Corti europee e giudici nazionali*, Atti del XXVII convegno nazionale dell'Associazione italiana fra gli studiosi del processo civile, Verona, 25-26 settembre 2009, Bologna, 2011, p. 51.

[14] See European Court of Justice, 16 December 1976, C-45/76, *Comet bv c. Produktschap voor Siergewassen*,; European Court of Justice, 16 December 1976, C-33/76, *Rewe-Zentralfinanz eg e Rewe-Zentral ag c. Landwirtschaftskammer für das Saarland*; European Court of Justice, 27 February 1980, C-68/79, *Hans Just c. Ministero danese delle imposte ed accise*, § 25; European Court of Justice, 27 March 1980, C-61/79, *Amministrazione delle Finanze dello Stato c. Denkavit italiana*, § 25; European Court of Justice, 9 November 1983, C-199/82, *Amministrazione delle Finanze dello Stato c. San Giorgio*, § 12.

[15] T. C. HARTLEY, *The Foundations of European Union Law*[8], Oxford, 2014, p. 112-113.

[16] G. WAGNER, *Harmonisation of Civil Procedure: Policy Perspectives, in Civil Litigation in a Globalizing world*, a cura di S. KRAMER & C.H. VAN REE, The Hague, 2012, p. 101; B. KRANS, *EU Law and National Civil Procedure Law: An Invisible Pillar, in European Review of Private Law*, 2015, p. 567 ff. In the Italian doctrine, see P. BIAVATI, *Il diritto delle prove nel quadro normativo dell'Unione europea*, in *Riv. trim. dir. proc. civ.*, 2006, p. 483 ff., at 504.

regardless of the national or transnational character of the litigation concerned, and it is driven primarily by the case law of the Court of Justice.
Considering the exponential growth of vertical harmonisation through judicial intervention, it is worth asking whether the principle of procedural autonomy still holds real significance[17]. Indeed, some commentators have gone so far as to define it in essentially negative terms, as the residual area of procedural law not yet covered by the principles of equivalence and effectiveness[18].
In this regard, Cannizzaro has observed that the traditional reading of the principle of procedural autonomy – although supported by the principle of conferral enshrined in Article 5 TEU – is no longer possible[19]. This is because procedural instruments of enforcement may interfere with the application of substantive EU law, potentially limiting or frustrating its effet utile[20]. Indeed, in accordance with the most recent interpretative approach adopted by the Court of Justice, domestic procedural rules that hinder the realisation of the effet utile of EU law must either be disregarded or at least "functionalised" by national judges[21].
Scholars have effectively referred to the phenomenon as the "functionalised procedural competence" of the Member States, to describe the impact of the principle of effectiveness on domestic procedural law[22]. According to the original design of the Treaties, EU law was not supposed to interfere with national procedural law, cause to the absence of an express attribution of competences in this area (and therefore of any corresponding transfer of

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[17] M. GNES, *Verso la «comunitarizzazione» del diritto processuale nazionale*, in *Giorn. dir. amm.*, 5, 2001, p. 524 ff.; A. IERMANO, *I principi di equivalenza ed effettività tra autonomia procedurale e "limiti" alla tutela nazionale*, in *Dir. Un. Eur.*, n. 3, 2019, p. 525 ff.; G. CAGGIANO, *Il richiedente la protezione internazionale davanti al giudice tra tutela giurisdizionale effettiva e autonomia processuale degli Stati membri dell'Unione europea*, in *Studi sull'integrazione europea*, n. 3, 2019, p. 579 ff., at 581; A. MAFFEO, *Diritto dell'Unione europea e processo civile nazionale*, Napoli, 2019, p. 41 ff.; R. MASTROIANNI, *L'effettività della tutela giurisdizionale alla prova della Carta dei diritti fondamentali*, in *Liber Amicorum* Antonio Tizzano. *De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, 2018, p. 586 ff.; C. PERARO, *Diritti fondamentali sociali e tutela collettiva nell'Unione europea*, Napoli, 2020, p. 223 ff.; A.M. ROMITO, *La tutela giurisdizionale nell'Unione europea tra effettività del sistema e garanzie individuali*, Bari, 2015, p. 62 ff.
[18] F. G. INCHAUSTI, D*erecho europeo y legislación procesal civil nacional: entre autonomía y armonización*, Madrid, 2018, p. 12.
[19] About the importance of the principle of conferal in European Union Law see M. C. BARUFFI, *art. 5 TUE*, in *Commentario breve ai Trattati dell'Unione Europea*^{2}, a cura di F. POCAR e M. C. BARUFFI, Padova, 2014, p. 25 ff.; G. GAJA-A. ADINOLFI, *Introduzione al diritto dell'Unione Europea*, Roma/Bari, 2014, p. 126 ff.; I. GOVAERE, *To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon*, in *European Legal Studies*, 4, 2016, p. 2 ff.
[20] E. CANNIZZARO, *Sui rapporti tra sistemi processuali nazionali e diritto dell'Unione europea*, in *Dir. Un. Eu.*, 2008, 447 ff.
[21] See A. CARRATTA, *Libertà fondamentali del Trattato dell'Unione Europea e processo civile*, cit., p. 1404; E. CANNIZZARO, *Effettività del diritto dell'Unione e rimedi processuali nazionali*, in *Dir. un. eur.*, 2013, p. 660 ff.; P. BIAVATI, *Le categorie del processo civile alla luce del diritto europeo*, *Riv. trim. dir. proc. civ.*, 4, 2018, p. 1323 ff.; G. C. RODRIGUEZ IGLESIAS, *Sui limiti dell'autonomia procedimentale e processuale degli Stati membri nell'applicazione del diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2001, p. 5 ff.
[22] D. U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?* cit., p. 117.

sovereignty). In contrast, the elegant formula «functionalised procedural competence» implies that, although the Member States have not granted the European Union an explicit procedural competence, they remain nonetheless bound by the obligation to adjust their internal procedural mechanisms in line with the directives laid down by the Court of Justice, whenever those mechanisms obstruct the realisation of EU rights and entitlements.
This close connection with the principle of conferral has led, as we shall demonstrate in the following pages, to the conclusion that true procedural autonomy fully exists in relation to rights not covered by exclusive or shared competences of European Union. In fields governed by exclusive or shared competences, domestic procedural regimes must necessarily be measured in the light of the case-law of the Court of Justice through its case-by-case approach[23].
As we shall argue, the Court of Justice routinely extracts from exclusive or shared Union competences an implicit procedural jurisdiction, whose reach is broad enough to encompass all institutions instrumental to the enforcement of EU law within the fields of competence allocated to EU institutions[24].
This sudden shift has elicited strong criticism from the most distinguished doctrinal voices on the matter. Their *J'accuse* targets what has been described as the "commercial pragmatism" of the Luxembourg Judges, who act without ever displaying any real interest in properly procedural, historical, systematic, or dogmatic analysis[25].
The latest phase in the erosion of procedural autonomy has coincided with the weakening of the authority of *res judicata*, the disregard of the *ne bis in idem* principle, and the limitation of the positive and preclusive effects of final judgments.
In this chapter, we will not yet address the relationship between national *res judicata* conflicting with EU law and the principle of procedural autonomy. Instead, we shall focus on the broader issue of the harmonisation of national procedural laws in the case law of the Court of Justice. Once the underlying logic of judge-made harmonisation is clearly understood, it will then be possible to turn to the analysis of *res judicata* in contrast with EU law, which, in practice, is profoundly shaped by the principles of primacy and conferral.
Having now identified the objective of the present analysis, we may proceed to examine the evolution of the principle of procedural autonomy of the Member States in the case law of the Court of Justice.

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[23] S. AMADEO, *Norme comunitarie, posizioni giuridiche soggettive e giudizi interni*, Milano, 2002, p. 311.
[24] See *infra* in this chapter, para. 5; see also D. U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?* cit., p. 13; P. PIVA, *Il principio di effettività della tutela giurisdizionale nel diritto dell'Unione europea*, Napoli, 2012, p. 18.
[25] C. CONSOLO, *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla CEDU a sua volta)*, cit., p. 63; A. BRIGGS, *The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*, in *Int'l lis*, 2005, p. 137 ff.

2. *The Principle of Procedural Autonomy According to the "Integrationist" Conception: From Rewe to the Early 1990s.*

In the *Rewe* and *Comet* judgments, the Court of Justice ruled that the protection of individual rights conferred by European Union law must be pursued through domestic remedies, provided that such remedies are not discriminatory compared to those available for equivalent rights under national law, and that they do not render the enforcement of Union law rights impossible or excessively difficult[26]. In both cases, the companies sought the repayment of charges that were, in substance, internal customs duties contrary to EU law. The defending national authorities did not dispute the incompatibility of the charges with European law but argued that the claims had been brought too late and were thus inadmissible under national procedural time limits.

The issue before the Court was thus whether relatively short – but not *per se* unreasonable – time limits for challenging tax decisions, which in effect could nullify the direct effect of EU law, were compatible with Union principles.

The Court's answer from the *Kirchberg Plateau* upheld the procedural autonomy of Member States in defining their domestic procedural frameworks. At the time, the European legal order did not yet require the introduction of specific remedies to protect rights conferred by EU law. It simply demanded, in negative terms, that national remedies not provide a lower level of protection for Union rights than for comparable domestic rights (principle of equivalence), and in positive terms, that they ensured the effet utile of EU law (principle of effectiveness)[27].

The deeper rationale for this strict delineation of competences lay in the principle of sincere cooperation: just as the then European Community committed to respecting national procedural systems, so too were the Member States expected to ensure that their procedural mechanisms did not obstruct the implementation of Union law[28].

Indeed, this "integrationist" view of the relationship between EU substantive law and national procedural law was, in many ways, inevitable. Rights and freedoms conferred by EU law are, by their very nature, intended to be enforced within legal systems other than that of their origin. As has been observed that the rights ensured by Union law exist only in their substantive dimension; they are not accompanied by procedural mechanisms for their recognition and enforcement[29].

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[26] R. WIDDERSHOVEN, *National Procedural Autonomy and General EU Law Limits*, in 12 *Review of European Administrative Law*, 2, 2019, p. 5 ff., at. 7-9.

[27] L. DANIELE, *L'effettività della giustizia amministrativa nell'applicazione del diritto comunitario europeo*, in *Riv. it. dir. pubb. comp.*, 1997, p. 1385 ff.; R. CARANTA, *Judicial protection against membter states: a judge-made set of rules and some occasional legislative interventions*, in *CMLR*, 1995, p. 703 ff.

[28] A. WALLERMAN, *Towards an EU law doctrine on the exercise of discretion in national courts? The Member States' self-imposed limits on national procedural autonomy*, in *CMLR*, 2016, p. 342 ff.

[29] E. CANNIZZARO, *Effettività del diritto dell'Unione e rimedi processuali nazionali*, cit., p. 663.

Until the mid-1980s, the prevailing rule remained that of applying national procedural law and the standards of protection it entailed. Interference by Union law with domestic procedural rules was the exception rather than the norm. For instance, in *Rewe*, the thirty-day deadline to challenge an administrative decision and obtain reimbursement of a tax paid in violation of EU law was deemed sufficient to ensure effective judicial protection, even though the tax in question had been unequivocally prohibited by secondary EU legislation[30].
A proper understanding of the Court of Justice's original restrictive approach to procedural matters may arguably be traced back to the tense atmosphere that, during those years, had developed between national courts and European institutions[31]. In fact, the principle of primacy – established by the leading cases *Van Gend & Loos* and *Costa v. ENEL* – was frequently questioned or resisted by national jurisprudence. In Italy, for instance, the Constitutional Court went so far and declared the entire Treaty unconstitutionality, invoking for the first time the so-called counter-limits doctrine (controlimiti)[32]. This approach was eventually tempered during the 1980s with the so-called "La Pergola turn," when the Constitutional Court adopted an approach of judicial self-restraint by affirming that provisions of EU law endowed with direct effect must be applied by domestic courts. It retained jurisdiction solely for assessing potential violations of supreme constitutional principles committed by Union law itself, thus effectively recognising the general primacy of European law over national constitutional provisions[33].
This approach – described as integrationist – rests on the notion that substantive provisions of European law merely integrate national legal systems, while their enforcement is left entirely to the domestic procedural framework. The underlying idea is that national procedural law and EU substantive law do not form part of a single legal system. Competences conferred upon the Union are limited to substantive matters, given the Treaties' silence on the existence of any express procedural competence attributed to EU institutions.
From this perspective, it becomes irrelevant whether EU norms are absorbed into the domestic system according to a dualist view, or whether domestic rules are treated, from a monist standpoint, as instruments for implementing EU law. What matters is that the integrationist model conceives EU substantive rules and national procedural norms as components of a unified legal experience, in which systemic coherence is guaranteed by domestic procedure, understood as a mere instrument of enforcement[34].
In other words, the integrationist conception is grounded on a presumption of procedural autonomy for the Member States: a presumption that can only be overcame through the difficult demonstration that national procedural

[30] European Court of Justice, 16 December 1976, C-33/76, *Rewe*, para. 6.
[31] S. CASSESE, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Roma, 2009, p. 46 ff.
[32] About "counter-limits" see *infra*, chapter IV, § 1.2.
[33] See Constitutional Court, 6 December 1984, No 170.
[34] E. CANNIZZARO, *Sui rapporti tra sistemi processuali nazionali e diritto dell'Unione* europea, cit., p. 449.

mechanisms fail to comply with the principles of equivalence and effectiveness. Such failure entails a compression of EU-based individual entitlements and thus breaches the principle of direct effect[35].

2.1. *The Crisis of the "Integrationist" Conception*.

Over time, the Court of Justice has progressively widened the scope of review under the principles of effectiveness and equivalence, and its inherently a-systematic approach has increasingly rendered the case law of the 1970s anachronistic[36].

After all, the integrationist perspective appears only partially suitable with the scope of European law, since procedural instruments of protection can indeed interfere with the application of substantive rules. It thus seems that the formulation, starting from *Rewe*, of the two limits on the principle of procedural autonomy served a primarily precautionary function: from an axiological standpoint, it was not acceptable that only the procedural law survived to the harmonization and "functionalization" impetus of European law. Indeed, in more recent times, the need to ensure equivalence between remedies protecting purely domestic entitlements and those derived from Union law has been supplanted by the ambition to define a minimum standard of procedural guarantees that Member States must ensure in the implementation of EU law. This has obliged national courts either to disregard or to reinterpret domestic institutions that may conflict with Union law.

Scholarship has noted that the two judicial attitudes – integrationist and internationalist – correspond to two distinct, and scarcely reconcilable, understandings of the function of civil procedure in relation to EU law[37]. The first accepts a purely instrumental conception of domestic procedural law, treating it as neutral with respect to the substantive framework. From the Court's viewpoint, it is entirely acceptable that, in the absence of specific EU procedural rules, the enforcement of EU-derived rights be governed by the same rules that apply to the enforcement of domestic substantive rights in internal proceedings. By contrast, the second attitude conceives procedural law as an instrument dedicated to the enforcement of Union law, so that potentially any national

[35] K. SOWERY, *Reconciling Primacy and Environmental Protection: Association France Nature Environnement*, in 54 *CMLR*, 2017, p. 12; D. H. HALBERSTAM, *Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach*, cit., p. 130.

[36] M. DOUGAN, *The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts*, in *The Evolution of EU Law*², edited by P. CRAIG and G. DE BÙRCA, Oxford, 2011, p. 412.

[37] E. CANNIZZARO, *Sui rapporti tra sistemi processuali nazionali e diritto dell'Unione europea*, cit., p. 451; C. CONSOLO, *il flessibile rapporto*, cit., p. 226; L. FLYNN, *Taking remedies too seriously? National procedural autonomy in the European court of justice*, in *Irish jurist*, 1996, p. 110 ff., at 132: «[F]rom the survey carried out above, whatever the desirability of such legal order, one must have serious doubts about the coherence of the positions adopted by the Court of Justice at this point in time. This is not to say these developments should be discarded or that a particular outcome should be sought. However, we certainly should not stand still».

procedural mechanism may come into conflict with EU law if it impedes the effet utile – and, more specifically, the effectiveness – of substantive EU provisions[38].

While the integrationist model might appear more suitable to safeguard the primacy of Union law over domestic legislation, there can be no doubt that the second model proves far more effective in addressing the obstacles posed by national procedural systems. It is unsurprising that the Court of Justice has employed both approaches, albeit in different contexts: the integrationist model is commonly invoked to resolve normative conflicts between a superior EU provision and an inferior national rule, thereby expressing the essence of the principle of primacy[39], whereas the internationalist model is applied when national procedural mechanisms hinder the effective application of EU law.

The internationalist scheme operates as follows: it is not necessary to disregard a domestic procedural mechanism that is incompatible with Union law; it suffices to "functionalise" it, adapting it to the need to give full effect to the substantive EU provision, even at the cost of sacrificing the legislative prerogative *in subiecta materia* on the altar of effectiveness.

This solution transforms national procedural law into a flexible system (*Bewegliches System*) when confronted with substantive Union law[40]: the influence of the latter upon the former is such that it can determine modifications even in the absence of any explicit attribution of competence to that effect. In this respect, scholars have rightly emphasised that procedural harmonisation is being achieved through the operation of the Court of Justice, rather than via intervention by the EU institutions, which – according to the allocation of competences set out in the Treaties – lack any explicit legislative power in this area[41].

The case law of the Court of Justice analysed below lends further support to this assertion.

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[38] G. TESAURO, *La sanction des infractions au droit communitaire*, XVth FIDE Congress, Lisbon, 1992, p. 455.

[39] E. CANNIZZARO, *Sui rapporti tra sistemi processuali nazionali e diritto dell'Unione* europea, cit., p. 452.

[40] A. CARRATTA, *Libertà fondamentali del Trattato dell'Unione Europea e processo civile*, cit., p. 1404.

[41] See A. TIZZANO, *Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario*, in *Dir. Un. Eur.*, 2009, p. 141 ff.; J. H. JANS, *Harmonization of national procedural law via the back door? Preliminary comments on the ECJ's judgment in Jenecek in a comparative context*, in *European law from the mountain: Liber amicorum Piet Jan Slot*, Kluver Law International, 2009, p. 275; T. HORSLAY, *Reflections on the role of the Court of justice as the "motor" of European integration: legal limits to judicial lawmaking*, in *CMLR*, 2013, p. 931 ff.; M. TULIBACKA, *Europeanization of civil procedure: in search of a coherent approach*, in 46 *CMLR*, 2009, 1535 ff.; W. VAN GERVEN*, Bridging the gap between Community and national laws: towords a principle of homogeneity in the field of legal remedies*, in 32 *CMLR*, 1995, p. 697-698; M. DOUGAN, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*, Hart Publishing, 2004, p. 227 ff.; S. LAW-J. T. NOWAK, *Procedural Harmonisation by the European Court of Justice*, in *The Future of European Law of Civil Procedure. Coordination or Harmonization?* cit., p. 19.

3. *The Shift to the "Internationalist" Conception: The Erosion of Procedural Autonomy of the Member States Through the Constraints Imposed by the Principles of Equivalence and Effectiveness.*

The principles of equivalence and effectiveness, ruled in *Rewe*, were only applied as actual limits on the procedural autonomy of the Member States starting in the 1990s. Through the mechanism of compliance review with these principles, the Court of Justice has effectuated the transition from the integrationist to the internationalist paradigm.

The principle of equivalence is rooted in the broader principle of non-discrimination, enshrined in Articles 2 TEU and 21 of the Charter of Fundamental Rights of the European Union. The Court's concern is that domestic legal systems may provide for procedural mechanisms that are less protective in the enforcement of EU rights than those available for the enforcement of analogous domestically derived claims. This implies that Member States are not required to extend their most favourable procedural safeguards to EU-based rights but are merely obliged to ensure that such rights receive no less favourable treatment than comparable domestic rights under normal conditions[42].

Accordingly, in order to determine whether this negative constraint on Member State procedural autonomy is observed, the Court of Justice must carry out a comparative analysis that unfolds in two distinct steps[43]: first, the Court must verify whether a remedy exists in the national legal system capable of enforcing a directly effective EU provision; if such a remedy exists, the Court may then proceed to compare the actual outcomes generated by the use of that remedy with those produced in relation to similar domestic legal positions. Identifying a suitable remedy is not always straightforward, as this presupposes a thorough understanding of the relevant national legal order[44].

Hence, to properly carry out its review under the principle of equivalence, the Court of Justice must first interpret the relevant domestic procedural law to assess whether it applies equally to claims based on EU law[45]. Yet, this approach reveals its inherent fragility when one considers that, on the one hand, the review of compliance with the equivalence principle would more appropriately fall within the competence of the national court – given its superior familiarity with its own legal system, which would allow for more accurate identification of the

[42] Cfr. European Court of Justice, 26 January 2010, C-118/08, *Transportes Urbanos y Servicios Generales SAL*, para. 34.

[43] S. LAW-J. T. NOWAK, *Procedural Harmonization by the European Court of Justice*, in *The Future of European Law of Civil Procedure. Coordination or Harmonization?* cit., p. 34; R. WIDDERSHOVEN, *National Procedural Autonomy and General EU Law Limits*, cit., p. 9.

[44] See A. ADINOLFI, *The Procedural Autonomy of Member States and the Constraints Stemming of Justice and Autonomy of the Member States, in The European Court of Justice and the Autonomy of the Member States*, edited by B. DE WITTE e H. W. MICKLITZ, Cambridge, 2011, p. 286.

[45] M. BOBEK, *Why There Is No Principle of Procedural Autonomy of the Member State*, in *The European Court of Justice and the Autonomy of the Member States*, Cambridge, 2011, p. 312.

applicable comparator remedy[46] – and, on the other hand, the Court of Justice nonetheless maintains that it is for itself to perform this assessment based on an abstract evaluation of the broader legal context in which the remedy in question is situated.

In practice, however, it is quite rare for a domestic remedy to fail the non-discrimination test implicit in the equivalence principle. Such a failure would effectively amount to a denial of the minimum level of protection that a Member State's legal order provides to its own citizens, now being withheld from individuals invoking rights derived from Union law.

More incisive than the equivalence test is the scrutiny carried out by the Court of Justice regarding compliance with the principle of effectiveness. In *Rewe*, the Court held that procedural autonomy of the Member States operates only insofar as domestic law does not render, in practice, impossible the exercise of rights which national courts are obliged to protect.

In the subsequent *Amministrazione delle Finanze v. San Giorgio* judgment, the European Court of Justice complemented the impossibility threshold with the additional criterion of "excessive difficulty," thus further constraining the procedural autonomy of the Member States and claiming for themselves a rather broad margin of discretion in identifying procedural rules that may jeopardize the effective application of EU law[47].

Some Authors have interpreted this progressive expansion of EU competences as being politically motivated. Without a formal Treaty revision, the Court of Justice – by encroaching upon the procedural autonomy of the Member States – has in effect extended the competences of the Union institutions to include procedural matters as well[48].

It has even been emphatically argued that «*effectiveness has no internal limits*[49]», thereby implicitly justifying the Court's refusal to frame this principle within a rigid conceptual structure. Such observations seem only partially persuasive: the scope of the principle of effectiveness is elusive; however, one should not, for that very reason, abdicate the effort to understand the deeper rationale underpinning the Court's stance.

The extension of the effectiveness test to include procedural mechanisms that, while not rendering the application of directly effective EU law impossible, nonetheless make it excessively difficult, is not unlimited. The Court has applied this standard with notable caution, limiting its corrective intervention to those procedural mechanisms that compromise the application of substantive EU law in areas falling within the Union's exclusive or at most shared competences.

This approach aligns with the principle of conferral: if the substantive competences conferred upon the Union were not supported by a corresponding

[46] European Court of Justice, 14 December 1995, C-430/93 and C-431/93, *Van Schijndel*, §§ 19-20; European Court of Justice, 1° December 1998, C-326/96, *Levez*, §§ 43-44.

[47] European Court of Justice, 9 November 1983, C-199/82, *Amministrazione delle Finanze dello Stato c. San Giorgio*, § 14.

[48] S. LAW-J. T. NOWAK, *Procedural Harmonisation by the European Court of Justice*, cit., p. 37.

[49] M. BOBEK, *Why There Is No Principle of Procedural Autonomy of the Member State*, cit., p. 311.

power on the part of national courts to disregard or reinterpret domestic procedural rules that conflict with the aims of Union law, the Member States would, in effect, reclaim the competences they had once transferred, thus undermining Article 50(3) TEU, which governs the withdrawal procedure and the continuing effectiveness of the Treaties.
To accept that Union competences are confined solely to legislative activity, without extending to their implementation, would be to neutralize the very notion of direct effect. The internationalist conception grasps this fundamental point: the rollback of Union law is prevented by the expansion of the effectiveness test, which leads to the emergence – albeit implicitly – of a procedural competence on the part of the Union, provided that domestic rules either impede or unduly complicate the enforcement of EU law and that the matter at hand falls within an area of exclusive or shared competence already exercised. This line of reasoning finds further confirmation in Article 19(1) TEU, about the duty of Member States to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law.
Member States are not free to shape their procedural rules in areas falling under Union competence. National judges are required to interpret such rules in conformity with Articles 19 TEU and 47 of the Charter of Fundamental Rights[50], pruning domestic procedural law of any obstacle or limitation that may hinder the proper enforcement of Union law. In extreme cases and following a preliminary reference to the Court of Justice, such rules may even be disregarded altogether if they fail to withstand scrutiny under the effectiveness principle[51].
The idea that the extension of the effectiveness test is confined to areas falling within the Union's exclusive or shared competences is supported by the case law of the European Court of Justice.

3.1. *The Impact of the Principle of Effectiveness in the Case Law of the Court of Justice.*

The *Peterbroeck* case is often regarded as the turning point between the "integrationist" and the "internationalist" conceptions[52]. On that occasion, the Court of Justice laid down the principle that EU law precludes the application of a national procedural rule which, in circumstances such as those of the main proceedings, prevents the national court, when acting within the scope of its jurisdiction, from examining of its own motion whether a provision of national law is compatible with a rule of Community law, where that rule has not been invoked by the individual in a prescribed time limit.
The effective enforcement of EU substantive law is thus achieved by placing EU law provisions on the same hierarchical level as principles of domestic public policy. This allows national courts to raise them *ex officio*.

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[50] C. PERARO, *Diritti fondamentali sociali e tutela collettiva nell'Unione europea*, cit., p. 59 ff.; ID., *L'autonomia procedurale degli Stati membri alla prova della Carta dei diritti fondamentali*, in *Annali AISDUE*, 3, 2020, p. 31 ff.
[51] C. SCHEPISI, *Aiuti di Stato e tutela giurisdizionale*, Torino, 2012, p. 307.
[52] European Court of Justice, 14 December 1995, C-312/93, *Peterbroeck*.

Some scholars interpret *Peterbroeck* as marking a shift away from the era of strict "interpretation in conformity" in favor of an expansive reading of national concepts of public policy[53]. A clear limitation to the procedural autonomy of Member States emerges and has become increasingly evident over the years: proceedings that may result potentially irreversible and in contrast with EU law must be open to judicial review by a court empowered to refer questions to the Court of Justice under Article 267 TFEU. This guarantees the possibility of centralized, incidental review of the validity and proper interpretation of EU law[54].
Accordingly, where the national procedure satisfies this structural requirement, procedural preclusions may still operate, provided that they do not undermine the enforcement of EU rights or advantages. Conversely, where the application of EU law is, even in principle, conditioned by the dispositive principle or subject to procedural bars, such preclusions must give way, so as not to deprive the national court of the power to submit a preliminary reference to the Court of Justice.
In the *Van Schijndel* case, the Court held that national procedural rules that prevent judges from raising *ex officio* a legal issue in the field of competition law – another area of exclusive EU competence under Article 3 TFEU – must generally be disregarded. However, this does not entail abandoning the dispositive principle in its substantive sense: national courts cannot be required to base their decisions on facts or legal grounds not submitted by the parties themselves[55].
The same principle was applied in *Eco Swiss*, where the Court of Justice admitted the annulment of an arbitral award on the grounds of incompatibility with competition law, thereby expanding the notion of public policy to include the prohibition of abuse of a dominant position[56]. The rule of *ipso jure* nullity of anticompetitive agreements, now enshrined in Article 101(2) TFEU (formerly Article 81(2) TEC), would otherwise have been disregarded, undermining the effective enforcement of Union law.
Eco Swiss illustrates with particular clarity the impact of the principle of effectiveness in the field of competition law: from the standpoint of EU law, it

53 D. U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?* cit., p. 72.
54 M. BROBERG, *When are public administrative bodies competent to make preliminary references to the European Court of Justice?*, in *Eur. Pub. Law*, 2009, p. 207; P. BIAVATI, *Diritto processuale dell'Unione europea*, Milano, 2015, p. 416 ff.; M. CONDINANZI-R. MASTROIANNI, *Il contenzioso dell'Unione europea*, 2009, p. 193; L. DANIELE, *art. 267 TFUE*, in A. TIZZANO (a cura di), *Trattati dell'Unione Europea*, Milano, 2014, p. 2103; J. RODRIGUEZ MEDAL, *Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who can Refer Questions to the Court of Justice of the EU?*, in *European Journal of Legal Studies*, 2015, p. 104; N. WAHL-L. PRETE, *The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings*, in *CMLR*, 2018, p. 511 ff.
55 European Court of Justice,14 December 1995, C-430/93 e C-431/93, cit., §§ 17-20.
56 European Court of Justice, 1° May 1999, C-126/97, *Eco Swiss China*, in *Corr. giur.*, 1, 2000, p. 32 ff. commented by C. ONNIBONI; and in *Riv. arb.*, 1999, p. 665 ff. commented by L. G. RADICATI DI BRONZOLO, *Arbitrato, diritto interno della concorrenza, diritto comunitario e regole di procedura nazionali*.

is unacceptable that national procedural mechanisms frustrate the enforcement of Union rules in areas of exclusive competence. This entails that such mechanisms may, where necessary, be stretched or softened, so as to align the concept of public policy with that of economic public policy, thereby preventing the formation of a *res judicata* that would crystallize a violation of Union law.

The analysis of three judgments – *Peterbroeck*, *Van Schijndel*, and *Eco Swiss* – which collectively mark the Court of Justice's shift toward the "internationalist" approach to procedural autonomy, supports the conclusion that compliance with EU law must also be ensured through corrective interpretations of national procedural rules[57].

The national procedural rule must be considered in light of the function it performs within the domestic proceedings. In the balancing judgment between the Union's interest in securing the effectiveness of its substantive law and the protection of individual rights conferred by it, the national court must certainly consider the core principles of the domestic judicial system – such as the rights of the defence or adversarial proceedings principle. However, it is often the case that these principles must recede to give full effect to Union law in sensitive areas covered by it[58].

Accordingly, the prohibition against the court raising of its own motion issues not timely invoked by the parties may legitimately be limited whenever the public interest in the proper enforcement of Union law – particularly in areas of exclusive or shared competence – imposes the overcoming of national preclusion rules to enforce rights recognized by European law[59].

4. *The Impact of the Principle of Primacy on the Procedural Autonomy of the Member States*.

There can be little doubt about the impact of the progressive acceptance by Member States of the principle of primacy on their procedural autonomy.

The judgments *Costa c. Enel*[60], *Simmenthal*[61] e *Factortame*[62] made it clear that both the primacy and the direct effect of Union law can cover every area of national law. This perspective is further supported by an apagogic argument: if the principles of primacy and useful effect were to apply only to substantive law, domestic procedural mechanisms could frustrate the application of substantive provisions of European law – effectively nullifying that Union law which, pursuant to Article 288 TFEU, is ordinarily endowed with direct effect, thereby seriously undermining the institutional framework designed by the Treaties.

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[57] N. TROCKER, *Il diritto processuale europeo e le «tecniche» della sua formazione: l'opera della Corte di giustizia*, in *Eur. dir. priv.*, 2010, p. 361 ff.

[58] P. PIVA, *Il principio di effettività della tutela giurisdizionale nel diritto dell'Unione europea*, cit., p. 103.

[59] In this sense, see C. SCHEPISI, *Sull'applicabilità d'ufficio delle norme comunitarie da parte dei giudici nazionali*, in *Dir. un. eu.*, 1997, p. 811 ff.

[60] European Court of Justice, 15 July1964, C-6/64, *Costa c. Enel*, cit.

[61] European Court of Justice, 9 March 1978, C-106/77, *Simmenthal*, cit.

[62] European Court of Justice, 19 June 1990, in causa C-213/29, *The Queen contro Secretary of State for Transport, ex parte: Factortame Ltdand others*, § 21.

Having recognized the dangers posed by a strict adherence to the principle of procedural autonomy as formulated in *Rewe*, the European Court of Justice has progressively extended the reach of the principles of primacy and direct effect. In *Factortame*, it required national courts to disregard procedural rules preventing interim relief against government action, rejecting the presumption of national law's compatibility with Union law pending a declaration of invalidity. A similar rationale underpinned the Court's judgment in *Elchinov*, where a national procedural rule obliged lower courts to adhere to the legal principle established by a higher court, even when the lower court doubted the compatibility of that principle with Union law[63]. The Court held that such a rule must be disregarded if it prevents the lower court from referring a preliminary issue to the Court of Justice: otherwise, the higher court's interpretation would prevail at the expense of the preliminary reference procedure under Article 267 TFEU, which the higher court should itself have activated.

Safeguarding the effectiveness of the preliminary reference mechanism takes precedence over the procedural autonomy of the Member States. It follows that, from the perspective of primacy, domestic procedural law becomes ancillary to European substantive law, implying its implicit incorporation into the latter[64].

From this standpoint, Union law comes to exercise an internal control over the national procedural rules relevant to the enforcement of directly effective EU norms. The result is that the principle of equivalence, as enunciated in *Rewe*, is effectively supplanted by the principle of effectiveness[65].

Indeed, from the "internationalist" perspective, the review of compliance with the principle of equivalence becomes nearly superfluous, since the goal is no longer to ensure equivalent protection for Union rights and comparable national rights, but rather to ensure the enforcement of the former at all costs, even by means of judicial modification of domestic procedural institutions.

In this regard, it has been observed that the principle of effectiveness functions as a *trait d'union* between the so-called *twin pillars* of direct effect and primacy: the need to guarantee the effectiveness of Union norms is pursued both through the recognition of their direct effect – justifying the functionalization of national procedural law – and through the assertion of primacy, which legitimizes the disregard of domestic rules that cannot be interpreted in harmony with Union law[66].

From the Court of Justice's perspective, this line of reasoning reflects its broader aim of developing the principle of effective judicial protection, in view of the imperative to provide rights given by Union law with an adequate framework of remedies[67].

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63 European Court of Justice, 5 October 2010, C-179/09, *Elchinov*.

64 D. H. HALBERSTAM, *Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach*, cit., p. 133.

65 See, in the same sense, A. CARRATTA, *Libertà fondamentali del Trattato dell'Unione Europea e processo civile*, cit., p. 1407.

66 P. PIVA, *Giudice nazionale e diritto dell'Unione. I. Diretta efficacia e primato*, Napoli, 2008, p. 54 ff.

67 N. TROCKER, *La formazione del diritto processuale europeo*, Torino, 2011, p. 22.

5. *The Impact of the Principle of Conferral: Towards a Compression of Procedural Autonomy in Areas of Exclusive and Shared Competence. The Emergence of Implicit Procedural Powers.*

The direct effect of Union law now requires national procedural rules to be "functionalised" in light of the effectiveness principle. The shift from the "integrationist" to the "internationalist" approach has diluted the idea of procedural autonomy into the more nuanced concept of a "functionalised procedural competence" of Member States, while the principle of effectiveness continues to absorb, and indeed repurpose, domestic procedural rules likely to obstruct the application of EU law[68].
As a result, national legislatures enjoy far narrower margins of discretion in shaping procedural rules when EU-derived subjective legal positions are involved than the principle of conferral, as set out in Article 5 TEU, might suggest. This is not merely a consequence of the primacy of Union law but also of the osmotic relationship between national and EU legal orders: national procedure is progressively reshaped under the influence of general EU principles, which are made operative through the case law of the Court of Justice and the mechanism of preliminary reference[69].
Sometimes, these principles require the outright disregard of conflicting procedural norms; other times, they guide the national court towards a conforming interpretation[70], as a concrete expression of the duty of sincere cooperation enshrined in Article 4 TEU[71]. The result is a kind of "principled harmonisation[72]", whereby the Court derives fragments of procedural discipline from the general principles of Union law, without any pretence to systemic consistency or fidelity to previous case law.
As one scholar has pointed out with clarity, the primacy of "useful effect" effectively overrides the filtering function traditionally performed by the principles of equivalence and effectiveness. Rather than simply limiting national autonomy, it risks eliminating it altogether[73].
Yet while we agree that the expression "procedural autonomy" no longer captures the actual dynamics at play in the interaction between national procedural rules and Union law, we are less convinced by the claim that the principles of equivalence and, especially, effectiveness lack any real filtering

[68] G. S. ØLIKKE, *State Aid as a Defence for Public Authorities?* in *EStAL*, 2, 2016, p. 286 ff., at 288: «only the principle of effectiveness was relevant; it requires that the application of EU law must not be made impossible [...] by national procedural rules».
[69] A. PAINO, Il *giudice amministrativo italiano come giudice europeo*, in *Dir. proc. amm.*, 2018, p. 585 ff.; A. BARONE, *Nomofilachia, corti sovranazionali e sicurezza giuridica*, in *Dir. proc. amm.*, 2020, p. 557 ff.
[70] P. VAN CLEYNEBREUGEL, *Judge-Made Standars of National Procedure in the Post-Lisbon Constitutional Framework*, in *ELR*, 2012, p. 90 ff.
[71] See European Court of Justice, 13 November 1990, C-106/89, *Marleasing.*
[72] E. CANNIZZARO, *Effettività del diritto dell'Unione e rimedi processuali nazionali*, cit., p. 661. See *amplius*, *infra* § 8.
[73] G. GRECO, *A proposito dell'autonomia procedurale degli Stati membri*, in *Riv. it. dir. pubbl. com.*, 2014, p. 12.

capacity. The idea that all national rules which hinder the application of EU law must be adjusted or removed – as if the Court's case law operated under the night in which "all cows are black" – is overly reductive.

The issue is more nuanced. It lies not only in the relationship between domestic procedural rules and the useful effect of Union law, but more broadly in the legal consequences of applying a highly indeterminate concept – such as effectiveness – to define the procedural framework applicable in the case at hand.

The outcome of any interpretation aimed at aligning national procedural rules with the useful effect principle depends on the specific facts of the case, which retrospectively shape the normative framework. This forces the national judge to look beyond the letter of the law – but still within the legal order – for values through which to give substance to otherwise indeterminate general clauses.

Hence, the *ex-ante* unpredictability of case law developments is intrinsic to this system. General clauses and indeterminate legal concepts are not susceptible to offer *a priori* definitions. They only acquire meaning through judicial assessment, guided by the general principles of the legal order, in relation to the facts at issue.

In our view, the principle of conferral plays a crucial role in reconstructing national procedural frameworks in a way that enables the effective application of EU law. It calibrates the extent to which the effectiveness principle can reshape national rules. The closer a given area lies to the core of EU competence as defined by the Treaties, the more intense the pressure becomes to functionalise procedural norms that obstruct the realisation of useful effect. The level of required effectiveness thus increases in direct proportion to the normative weight of the area in question. This produces a sliding scale between full procedural autonomy (in so-called "third category" matters) and its near-total eclipse (as in State aid or competition law), with intermediate stages marked by conforming interpretation, functionalised interpretation, and, ultimately, the disregard of incompatible procedural norms.

The combined operation of the principles of primacy and conferral reshapes the presumption of procedural autonomy, as originally conceptualised in the *Rewe* case. Where the domestic case involves rights grounded in directly effective EU acts within a field falling under exclusive or shared Union competence, the primacy principle allows for the rebuttal of any presumption of procedural autonomy. In such cases, if the domestic procedural rule frustrates the application of EU law and cannot be interpreted in a way that is compatible, it must be disregarded.

This framework finds a broad confirmation in the case law of the Court of Justice concerning State aid and consumer protection; two areas in which procedural autonomy has been most visibly limited.

6. *Decline and Fall of Procedural Autonomy in the Field of State Aid.*

A starting point for understanding the relationship between Member States' procedural autonomy and areas of exclusive Union competence is Article 2 TFEU. When the Treaties confer on the Union exclusive competence in a

specific area, only the Union may legislate and adopt legally binding acts. Member States may do so themselves only if empowered by the Union or for the implementation of Union acts.
The features of exclusive competences are therefore clear: (a) only the Union is entitled to adopt binding legislative acts; (b) Member States no longer hold this power, having given it to the Union; and (c) national authorities may act only when authorised, or where they are giving effect to Union rules.
As a result, in matters of exclusive EU competence, Member States lack both legislative authority and the ability to adopt binding legal acts. Any such acts adopted unilaterally are to be regarded *tamquam non essent*. It follows that even domestic procedural provisions which lead to outcomes incompatible with Union competence – because they substantively encroach upon it – must be reinterpreted or "functionalised" to ensure the full application of substantive EU law.
Despite this, the Court of Justice still proclaims the continued existence of procedural autonomy in the State aid field[74]. Yet repeated *caveat* and constant judicial intervention aimed at "functionalising" national procedural rules have gradually emptied that formula of any real content[75]. In this area, the imperative of ensuring full compliance with the rules governing aid control – and the need to eliminate the market distortions such measures may produce – has led the Court to scrutinise the compatibility of domestic procedural mechanisms with EU law, and to require national judges to disregard any such mechanisms where incompatibility arises[76].
This trend is confirmed by the 2021 European Commission Communication on the application of the new State aid Regulation[77]. There, it is stated that Member States, according to their procedural autonomy, are free to choose how to fulfil their obligations under the Treaties, provided that the means they use do not adversely affect the scope and effectiveness of Union law[78]. However, the Commission goes further than merely reiterating the case law of the Court of Justice. In various sections of the Communication, it extrapolates from the Court's case-by-case reasoning to declare more broadly that national courts must take all measures necessary to ensure compliance with Union obligations and

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[74] See, for example, European Court of Justice, 5 October 2006, C-368/04, *Transalpine Ölleitung in Österreich*.
[75] D. BAGHRIZABEHI-A. FERČIČ, *Private Enforcement of EU State Aid Rules: Is There Any Room For National Procedural Autonomy Left?* in 73 *Zbornik Pravnog fakulteta u Zagrebu*, 4, 2023, p. 663 ff.; M. BOBEK, *Why There Is No Principle of Procedural Autonomy of the Member State*, in *The European Court of Justice and the Autonomy of the Member States*, Cambridge, 2011, p. 305 ff.; C. N. KAKOURIS, *Do the Member States Posses Judicial Procedural Autonomy?*, in 34 *CMLR*, 1997, p. 1389 ff.
[76] E. A. SEPE, *Giudicato nazionale e diritto UE. Norme sugli aiuti di Stato, in Aiuti di Stato: il ruolo delle giurisdizioni nazionali ed europee*, Bari, 2023, p. 173; D. BAGHRIZABEHI-A. FERČIČ, *Private Enforcement of EU State Aid Rules: Is There Any Room For National Procedural Autonomy Left?* cit., p. 687.
[77] Communication 2021/C 305/01. About it see C. SCHEPISI, *Aiuti di Stato e giudici nazionali nella bozza di nuova Comunicazione della Commissione: alcune riflessioni a prima lettura*, in *Eurojus*, 2, 2021, p. 1 ff.
[78] Para. 19.

refrain from decisions which could compromise the achievement of the objectives of the TEU and TFEU[79]. In doing so, the Commission implicitly assumes a normative power in procedural matters.
This stance appears to be justified by the Commission's exclusive competence to authorise State aid schemes[80]. This prerogative is precluded to national courts, whose role is instead to protect individual rights in the event of breach of the prior notification requirement under Article 108(3) TFEU[81].
Indeed, the Court of Justice has never recognised the direct effect of Article 107 TFEU. Consequently, individuals cannot challenge the compatibility of a state aid measure before national courts, nor can they request that those courts assess such compatibility either directly or indirectly. That responsibility belongs solely to the Commission, whose assessments take the form of binding decisions[82].
The competences of national courts and the European Commission operate in substantial autonomy from one another, as they carry out complementary yet distinct functions[83]. Indeed, nothing in the wording of Article 108 TFEU suggests that national courts possess any parallel competence to assess the compatibility of State aid with the internal market[84]. On the contrary, Articles 107 and 108 TFEU support the view that the scope of the preventive control mechanism on State aid is to ensure that only aid compatible with the internal market is implemented[85]. Accordingly, national courts must ensure that all consequences of a breach of Article 108(3) TFEU are drawn in accordance with domestic law – both in terms of the validity of implementing acts and the recovery of unlawful financial support, including any provisional measures

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[79] Para. 18.
[80] L. ARMATI-F. MACCHI, *The Commission Adopts the New Notice on the Enforcement of State Aid Rules before National Courts: An Overview of the State of Play of Private Enforcement of State Aid Law*, in *EStAL*, 1, 2022, p. 3 ff., at 5; see also D. BAGHRIZABEHI-A. FERČIČ, *Private Enforcement of EU State Aid Rules: Is There Any Room For National Procedural Autonomy Left?* cit., p. 673: «Procedural law is not "domaine réservé" of a Member State. Even though the EU has no (explicit) "procedural competence", the EU legislator has demonstrated that it can (incidentally) affect national procedural law when exercising its competences in area of substantive law. Furthermore, even where such (incidental) "proceduralisation" has not taken place, national procedural law is subject to the omnipresent constraints as set by the EU fundamental principles, such as the principle of effectives, which can ultimately lead to the disregard of conflicting national procedural rules».
[81] About the direct effect of Article 108, par. 3, TFUE see S. AMADEO, *Aiuti statali alle imprese e competenze del giudice nazionale nell'applicazione dell'art. 93.3 Trattato CE*, in *Studium iuris*, 1998, p. 354 ff.; E. FONTANA, *Aiuti di Stato ed efficacia diretta*, Napoli, 2007; C. SCHEPISI, *Aiuti di Stato e tutela giurisdizionale*, cit., p. 163 ff.
[82] European Court of Justice, 21 October 2003, C-261/01 and 262/01, *van Calster*, para. 47; European Court of Justice, 22 March 1977, C-78/76, *Steinike und Weinling*, para. 8-10.
[83] R. PALERMO, *L'effettività degli strumenti di private enforcement delle norme sugli aiuti di Stato tra autonomia procedurale e nuove frontiere di cooperazione tra gli attori coinvolti*, in *L'effettività del diritto dell'Unione europea tra strumenti di attuazione pubblici e mezzi di tutela privati*, Napoli, 2023, p. 204.
[84] C. SCHEPISI, *Aiuti di Stato e tutela giurisdizionale*, cit., p. 6.
[85] European Court of Justice, 3 March 2020, C-75/18, *Vodafone Magyarországg*, para. 19; European Court of Justice, 21 November 2013, C-284/12, *Deutsche Lufthansa*, para. 29.

granted without authorisation or exemption (such as *de minimis* aid or aid falling under block exemptions).

A different question arises, however: does the Commission's exclusive competence to assess compatibility under State aid law limit the national courts' ability to apply Articles 107(1) and 108(3) TFEU[86]? The answer turns on the legal effects of Commission recovery decisions. It is widely accepted that such decisions may produce direct effects, if they contain sufficiently clear, precise, and unconditional obligations. A distinction must nonetheless be drawn between different types of Commission decisions. Direct effect is more easily acknowledged in decisions requiring omissions or standstill obligations on the part of States, while doubts remain as to the direct effect of decisions that require affirmative legislative or administrative action. Nonetheless, the prevailing view in legal scholarship is that all Commission decisions on State aid should be regarded as producing direct effect, since their legal basis – Article 108(3) TFEU – is itself directly effective and imposes an unconditional obligation on Member States[87]. This provision may therefore be directly relied upon in court by private parties when breached. Moreover, the Commission's order to recover unlawful aid stems precisely from a prior violation of such an obligation[88]. The binding nature of Article 108(3) TFEU, combined with the mandatory nature of recovery decisions, means that national courts are under a duty to take all necessary measures to compel the administration to suppress and recover unlawful aid.

As a result, final Commission decisions are binding on national judges, who must defer to the Commission's assessment of whether aid has been granted, and, where necessary, must adapt – or disregard – domestic procedural rules that prevent such decisions from taking effect.

It should also be recalled that the Commission's exclusive substantive competence in the field of State aid is mirrored by the Union's exclusive jurisdiction over the annulment of its decisions, under Article 263(4) TFEU[89].

[86] For the affirmative answer see European Court of Justice, 4 March 2020, C-586/18, *Buonotourist/Commissione*, para. 93-94.

[87] G. BENACCHIO, *Diritto privato dell'Unione europea*[6], Milano, 2013, p. 87; R. PALERMO, *L'effettività degli strumenti di private enforcement delle norme sugli aiuti di Stato tra autonomia procedurale e nuove frontiere di cooperazione tra gli attori coinvolti*, cit., p. 214; G. STROZZI, *Gli aiuti di Stato*, in *Diritto dell'Unione europea. Parte speciale*, Torino, 2010, p. 360; U. VILLANI, *In tema di efficacia diretta*, in *Riv. dir. int.*, 1989, p. 609 ff.; P. MENGOZZI, *Diretta applicabilità del diritto comunitario e decisioni della Commissione CE*, in *Riv. dir. eur.*, 1990, p. 399 ff.

[88] European Court of Justice, 21 November 2013, C-284/12, *Deutsche Lufthansa*, 37-38: See also R. A. ACHLEITNER, *The Interplay between the European Commission, National Authorities and National Courts in State Aid Law: An Attempt to Cut the Gordian Knot*, in *EStAL*, 2022, p. 174 ff.: *«[I]n a nutshell: the recovery obligation of Member States exists even in the absence of a Commission decision and without the Commission's supervision»*. In the same way, see Cons. Stato, 1° April 2025, n. 4961.

[89] About the annulment jurisdiction of ECJ see P. BIAVATI, *Diritto processuale dell'Unione europea*, cit., p. 61 ff.; L. DANIELE, *Diritto dell'Unione europea*[8], cit., p. 354 ff.; E. MERLIN, *Sulla legittimazione dei privati all'azione di annullamento degli atti normativi comunitari: evoluzioni e prospettive*, in *Riv. dir. proc.*, 2011, p. 1098 ff., at 1102; C. SCHEPISI, *Aiuti di Stato e tutela giurisdizionale*, cit., p. 46; R. BARRENTS, *The Court of Justice after Treaty of Lisbon*, in *CMLR*, 2010, p. 709 ff.; K. LENAERTS, *The Rule of Law and the Coherence of the Judicial System of the European Union*, ivi, 2007, p. 1626 ff.; D. ORDONEZ-

This precludes national courts from reviewing the legality of Union acts[90]. As such, they cannot pronounce on the compatibility of State aid measures with the internal market, because this prerogative is expressly reserved to the Commission by the Treaties.
Taken together, these elements support a clear conclusion: if the Court of Justice is to ensure both the smooth functioning of the internal market and respect for the principle of conferral, the only effective solution – albeit a drastic one – is to disregard domestic procedural rules that interfere with the Commission's exclusive jurisdiction in the field of State aid. Such rules include not only preclusions, but also constraints on standing for competitors harmed by unlawful aid, on jurisdictional competence, and on the admissibility of certain forms of evidence.
This approach has been elaborated in the case law since the *Lorenz* judgment[91]. There, the Court held that a national judge must raise *ex officio* the incompatibility of a domestic law establishing an unlawful aid scheme, even absent a prior Commission decision. That ruling was handed down in a very different legal context: at the time, no strict deadline was imposed on the Commission to assess the compatibility of national measures, nor was it required to notify the Member State unless a formal investigation was initiated. It was thus debatable whether a domestic court could unilaterally assess the compatibility of a measure before a formal decision was issued.
It is therefore not inaccurate to say that, in the field of State aid, there is «no room left for national procedural autonomy[92]».

6.1. *Implications for the Standing of Economic Operators Harmed by Unlawful State Aid.*

SOLIS, *Waiting for National Judges in Infringement Proceedings on State Aid,* in *EStAL*, 3, 2017, p. 377 ff.

[90] European Court of Justice, 19 December 2018, C-219/17, *Berlusconi*, para. 58. In the same sense, see M. DOUGAN, *The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and Towards a Remedy of Nullity?*, in 59 *CMLR*, 5, 2022, p. 1301 ff. for the same solution, in Italian case-lae, see Supreme Court, 20 April 2021, n. 10355 in *Riv. dir. proc.*, 1, 2022, p. 207 ff., at 214, commented by R. VACCARELLA, *Violazione del diritto europeo e «motivi inerenti alla giurisdizione»: novità in vista?*; in *Il Processo*, 1, 2023, p. 166 ff., commented by E. CIBELLA, *Unione Bancaria Europea: il rapporto tra la Banca Centrale Europea e le Autorità Nazionali Competenti, un ritorno al modello della coamministrazione?*

[91] European Court of Justice, 11 December 1973, C-120/73, *Lorenz*.

[92] D. BAGHRIZABEHI-A. FERČIČ, *Private Enforcement of EU State Aid Rules: Is There Any Room For National Procedural Autonomy Left?* cit., p. 687: «in the discussed area, there is no room left for national procedural autonomy as was already suggested a decade ago. While we do not negate that the discussed principle exists at least in nominal terms, since the CJEU makes explicit reference to it, we deem that the principle confers no real or genuine autonomy. National procedural rules are certainly an important factor and a starting point of enforcement before national courts, however, this is principally so only as long as they do not impair the supranational (substantive) rules. In case of an indirect collision, it is the supranational rule which prevails over the national rule. Therefore, we believe that there is no room left for (genuine) national procedural autonomy also when observed in the context of the private enforcement of EU State aid rules».

Under the principle of procedural autonomy, Member States apply their own domestic rules on standing to act in disputes concerning State aid, provided the principle of effectiveness is respected. However, the rights of those seeking to invoke State aid rules are, at least in principle, extremely limited. The reason is that harm to the abstract right to a properly functioning competitive market often fades into what is deemed a mere *de facto* interest – not specific and distinct from a general interest in legality – making it difficult to frame such claims within systems of judicial protection grounded in a subjective-rights model.

As previously highlighted, the efforts of the Commission and the Court of Justice have aimed at softening this subjectivist structure of national legal standing, particularly when an entitle grounded in EU law is at stake. Thus, the Court of Justice's case law reflects a progressive expansion of standing before national courts for third parties adversely affected by the grant of unlawful aid to competitors. In this regard, under the principle of effectiveness, domestic rules on standing and on the right to bring legal proceedings should not impair individuals' access to effective judicial protection of the rights conferred on them by Union law[93].

This case law-driven enlargement of standing for claimants seeking to challenge State aid measures has led to a clear shift: whereas, in the 2010s, scholars remarked that most disputes involve beneficiaries opposing recovery measures[94], the Commission noted in its 2021 Communication that national courts now predominantly hear cases brought by the competitors of the beneficiary, who are directly affected by the distortion of competition caused by the unlawful aid[95].

An analysis of the Court's judgments confirms this shift from a subjective-rights model of adjudication to one focused on the enforcement of the law. In particular, when a competitor initiates proceedings to recover unlawful aid, their interest is satisfied only if the State is compelled to enforce Articles 107 and 108 TFEU and demand repayment from the beneficiary. Thus, the competitor's interest necessarily implies the removal of the advantage granted by the illegal aid.

Legal scholars have noted that the direct effect of Article 108(3) TFEU – which prohibits Member States from implementing aid measures before the conclusion of the Commission's formal investigation – has a "triangular effect[96]." Although the provision imposes no obligations directly on the aid recipient, its enforceability against the Member State inevitably results in adverse consequences for the beneficiary. This underscores that the enforcement of State aid rules is a matter shared between the Commission and national courts, whose functions are complementary but distinct. While the Commission retains exclusive competence to assess the compatibility of State aid with the internal

[93] European Court of Justice, 13 January 2005, C-174/02, *Streetgewest*, § 18.
[94] C. SCHEPISI, *Aiuti di Stato e tutela giurisdizionale*, cit., p. 290.
[95] Para. 23.
[96] C. SCHEPISI, *Aiuti di Stato e tutela giurisdizionale*, cit., p. 162.

market, it is for national courts to protect individual rights where Article 108(3) TFEU is breached[97].

The broadening of standing in this field has also reshaped the boundaries of national jurisdiction. A competitor need only show a general interest in the annulment of the aid, sometimes even non-economic in nature, for their claim to be deemed admissible. Domestic courts, therefore, must not apply national rules on standing in a way that frustrates the rights of (even potential) competitors who are directly affected by the distortion of competition caused by the unlawful measures.

In *Streekgewest*, the Court of Justice confirmed that an economic operator may rely on the direct effect of the standstill obligation under Article 108(3) TFEU to challenge not only the competitive distortion caused by the aid, but also to claim restitution of a tax levied to finance it. In such cases, whether the claimant was in direct competition with the aid beneficiary is irrelevant. What matters is that they were subject to a tax forming part of an unlawful aid measure[98]. Conversely, third-party taxpayers cannot invoke the illegality of an aid measure exempting other firms from taxation unless the revenue is earmarked for financing that aid and the claimant has not passed on the tax burden, thereby avoiding unjust enrichment. Thus, even absent a competitive relationship with the aid recipient, EU case law increasingly recognises third-party standing to challenge unlawful State aid schemes.

The Court's effort to expand standing in this domain culminates in its recognition of the complementary relationship between the annulment remedy under Article 263 TFEU and the effective protection that national courts must provide. Building on the obligation of national courts to ensure effective judicial protection of EU-derived rights, the Court held that natural persons and organisations lacking standing under Article 263 TFEU should nonetheless be able to raise the same issues before domestic courts. These courts may then refer questions to the Court of Justice under Article 267 TFEU, ensuring review of the Commission's decisions as to validity and interpretation[99].

From this case law, a general principle emerges in areas of exclusive EU competence, the effectiveness of Union law requires that individuals be placed in a position to enforce breaches of EU law, even at the cost of sacrifice the subjectivist foundation of national civil procedure. Individuals, in effect, are elevated to enforcers of legality, representing not their personal interest alone but the broader interest in the legality of administrative action in fields governed by EU law.

This reveals the underlying strategy of the Commission and the Court: through a recalibration of national standing rules, they aim to intensify procedural pressure on aid beneficiaries. These actors must now not only challenge recovery decisions before EU courts but also defend themselves against restitution claims

[97] See European Court of Justice, 11 March 2010, C-1/09, *CELF et Ministre de la Culture et de la Communication*, para. 26.

[98] European Court of Justice, 13 January 2005, C-174/02, *Streetgewest*, para. 19.

[99] European Court of Justice, 10 October 2017, C-640/16, *Greenpeace Energy/Commissione*, § 61.

from third parties, even those only indirectly harmed by the contested measure. In this light, any benefit conferred by the finality of a judgment becomes a rebuttable presumption, which may be overcome by evidence that the unlawful aid distorted the competitive structure of the market.

6.2. *Consequences for the Rules on Evidence.*

Even in the field of evidence, the procedural autonomy of the Member States has undergone a progressive process of erosion. In particular, the need to prevent the rigid application of the burden of proof – understood as a rule for allocating the risk of uncertainty[100] – has led the Court of Justice to expand the court's *ex officio* investigative powers in proceedings concerning the unlawfulness of State aid. Although the Court had previously stated that the burden of proof is governed by national law[101], it has become clear that national rules allocating that burden must be mitigated whenever they would render practically impossible or excessively difficult the reimbursement of taxes levied in breach of Union law[102].

From the judgments in *Brasserie du pêcheur*[103] and *Factortame*[104], one can infer the principle that national rules on evidence must not impose an excessive burden on proving the elements of a breach of EU law. This requirement is particularly pronounced in the area of State aid. In *Laboratoires Boiron*, the Court, relying on the principle of effectiveness, held that when a claimant seeks a refund of a tax used to fund a State aid scheme deemed incompatible with the internal market, but is unable to prove the direct link between the tax and the aid granted to third parties, the judge must admit all forms of evidence available under national law, including ordering the production of documents held by the aid recipient.

In another judgment, the Court held that the need to protect the competitive structure of the market, even in the field of intellectual property, may justify a lowering of the evidentiary threshold or even a *relevatio ab onere probandi*, where the claimant would otherwise face excessive difficulty in proving infringement[105].

Scholars have noted that the adversarial principle clashes with the effet utile, insofar as the latter favours the protection of European legality[106]. While the adversarial principle in a procedural sense (*Verhandlungsmaxime*) prohibits courts from investigating facts not alleged by the parties, it does not exempt them from gathering additional evidence regarding the facts that have been alleged. In this

[100] A. GIUSSANI, *Sulla «vicinanza» della prova del vizio della cosa venduta*, in *Riv. dir. proc.*, 2020, p. 1321 ff.; G. CALABRESI, *The Cost of Accidents. A Legal and Economic Analysis*, New Haven, 1970, p. 135 ff.

[101] European Court of Justice, 21 September1983, C-205/82, *Deutsche Milchkontor*, § 39.

[102] European Court of Justice, 9 November 1983, C-199/82, *San Giorgio*, cit., § 18.

[103] European Court of Justice, 5 March 1996, C-46/93 and C-48/93, *Brasserie du pêcheur*, § 32.

[104] European Court of Justice, 19 June 1990, C-213/89, *Factortame.*

[105] European Court of Justice., 13 February 2014, C-479/12, *H. Gautzsch Großhandel GmbH & Co. KG*, § 44.

[106] M. GIAVAZZI, *Anatomia del processo amministrativo. Riflessione sull'autonomia processuale negli Stati dell'UE*, Napoli, 2021, p. 41.

light, proceedings involving positions of advantage grounded in EU law and falling within areas of exclusive Union competence are increasingly characterised by a weakened version of the adversarial principle. In this model, the court's *ex officio* powers are instrumental in assisting the party whose claim reflects not only an individual interest, but also a public one.

Here, the public interest stems from the direct effect of the applicable EU rules and the exclusive competence of the European institutions in State aid matters. According to the interpretive guidance offered by the Court of Justice's case law, national courts are therefore obliged to assist the party in obtaining the relevant evidence.

The quasi-inquisitorial nature of these enhanced evidentiary powers further supports the characterisation of proceedings in State aid matters as objective in nature. The partial departure from traditional rules on the burden of proof is justified by the need to avoid rejecting claims which, if dismissed, would risk perpetuating breaches of internal market rules and distortions of competition.

This derogation to the semi-adversarial model to the demands of EU law reflects a broader imperative: ensuring that distortions of competition are neutralised at all costs. National procedural rules cannot obstruct this goal. Therefore, when such limitations cannot be reconciled with EU law through interpretation, they must be set aside.

The same fate has befallen other procedural barriers, including rules on limitation periods, time bars, and – last but not least – *res judicata*.

6.3. *Follow-up: The Impact on National Time Limits and Res Judicata (To be Continued).*

The case law of the Court of Justice has significantly impacted the institutions of limitation and forfeiture, both of which tend to restrict judicial protection in the field of State aid. Time limits for bringing actions for annulment or reimbursement must be equivalent to those applicable to actions based on national law, while the principle of effectiveness requires that such time limits be reasonable, so as to allow interested parties sufficient time to assert their claims. This standard of reasonableness enables the Court to assess whether the content of a national rule adequately protects the competitive structure of the internal market; if not, the Court's jurisprudence, taking on an increasingly norm-creating role, has gone so far as to suggest the adoption of alternative time limits.

In *Marks and Spencer*, the Court held that the principles of effectiveness and legitimate expectations preclude national legislation that retroactively shortens the time period within which taxpayers may request refunds of unduly paid VAT[107]. Similarly, in *Grundig Italia*, the Court found a retroactive reduction of the limitation period to be incompatible with the principle of effectiveness: EU law precludes applying a shorter forfeiture period to refund claims relating to taxes levied in breach of EU law, unless a sufficient transitional period is granted

[107] European Court of Justice, 11 July 2002, C-62/00, § 47.

during which such claims can still be lodged under the former, more favourable time limit[108]. On that occasion, the Court effectively introduced a "reasonable time" standard *ex officio*, extending the transitional period from 90 days to six months to ensure compliance with the principle of effectiveness[109].

In *Alcan*, the principle of effectiveness directly affected the consequences of a lapsed time limit[110]. The possibility for the administrative authority to revoke a state aid scheme declared incompatible with the internal market by a final Commission decision, only within the time frame established by national law to ensure legal certainty, was found to be incompatible with EU law. In the area of State aid, administrative powers are generally not subject to limitation periods, save for necessary balancing with the principle of legal certainty and legitimate expectations.

More broadly, when the legality of a State aid regime is at stake, EU law precludes the application of national procedural barriers that prevent the substantive claim from being brought or that bar annulment of the granting act or the recovery of the undue benefit. This is because the private party harmed by the aid, just like the Member State, is a co-holder of the public interest in eliminating distortions to competition caused by unlawful or unauthorized aid. Therefore, rules such as time limitation, where they lead to the loss of the right or of the power to act, are in conflicting with Articles 107 and 108 TFEU.

A fortiori, the preclusive effect of *res judicata* – the final and binding nature of a domestic judgment contrary to EU law – should also be disregarded in the specific context of State aid, as it produces effects analogous to forfeiture or limitation. However, the cultural legacy linking *res judicata* to national sovereignty long prevented the Court of Justice from launching a direct attack on it by explicitly requiring its disregard. Indeed, the annulment of a domestic judgment would amount to an encroachment on the sovereignty of the Member States. Thus, until the pivotal *Lucchini* ruling[111], the Court resorted to interpretative strategies to avoid the disregard of *res judicata* contrary with the duty of recovering unlawful state aids.

It is precisely in the field of State aid that the fragility of *res judicata* in the face of EU law has emerged most clearly: when the preclusive effect of a final judgment impedes the recovery of aid incompatible with the internal market, the finality of the ruling must be disregarded. Otherwise, the judiciary should usurp a power exclusively attributed to the Union by the Treaties.

In our view, these conclusions are the direct and coherent evolution of what the Court of Justice has been affirming on procedural autonomy since the 1970s: in areas of exclusive competence, only a *simulacrum* of procedural autonomy

[108] European Court of Justice, 24 September 2002, C-255/00, *Grundig Italia*, § 42.

[109] F. MONTANARI, *Evoluzione del principio di effettività e rimborso dei tributi incompatibili con il diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2009, p. 89 ff.

[110] European Court of Justice, 20 March 1997, C-24/95, *Land Rheinland-Pfalz* c. *Alcan Deutschland GmbH*.

[111] European Court of Justice, 18 July 2007, C-119/05, *Lucchini*.

remains, and any procedural mechanism that obstructs the effet utile must at least be "functionalized" and, if necessary, disregarded.
In this perspective, litigation becomes an instrument for implementing EU law; a vehicle for achieving the objectives set forth in the Treaties. It is thus entirely natural that judges could have *ex officio* investigatory powers, and that the allocation of the burden of proof is adjusted: in the State aid domain, litigation is no longer merely "a matter for the parties," but also "a matter for the Union." The idea that the recipient of unlawful State aid might retain the benefit because of broadly construed procedural grounds is deeply incompatible with the Union's legal sensibility.
That even *res judicata* must sometimes be overcame is, then, understandable.

6.4. *Preliminary Conclusion: The Current Inconsistency of the Principle of Procedural Autonomy in Areas of Exclusive EU Competence.*

The principle of conferral underpins the constitutional architecture of the EU legal order, delineating the boundaries of residual national sovereignty with respect to unharmonized areas of law. In the absence of an express EU competence in procedural matters, it would logically follow that national rules should apply. However, the principles of primacy and effet utile require the precedence of EU law over conflicting domestic provisions, even to the point of necessitating their disregard when incompatibilities arise.
Within the framework of the objectives set out by the Treaties, procedural autonomy can still be said to exist, but only insofar as it does not obstruct the effective implementation of EU law in matters of exclusive competence.
The supposed neutrality of procedural rules, which forms the basis of the non-interference underpinning procedural autonomy, proves to be largely illusory whenever effet utile is jeopardized. Accordingly, one may conclude that in areas of exclusive EU competence, the Union possesses a form of "implicit competence", which, although formally limited to substantive law, manifests in such a way that genuine procedural autonomy becomes a fiction, viable only within the limits and corrective measures developed over time by the Court of Justice in Luxembourg.
This "implicit competence," unlike the express powers regulated under Article 3 TFEU, is both subsequent and contingent: subsequent, because it arises only in the context of pending litigation concerning EU-derived rights falling within exclusive Union competences; contingent, because the national court, being bound by the principle of effective judicial protection under Article 47 of the Charter of Fundamental Rights of EU (which itself has direct effect), is institutionally obliged to adapt domestic procedural mechanisms to serve Union objectives. Only in cases of genuine doubt must the court refer a question of interpretation to the Court of Justice, the true custodian of this "implicit competence."
The burial of procedural autonomy in areas of exclusive competence may also be attributed to a distinct rationale: excessive decentralization – an inherent

consequence of the EU's procedural neutrality – would result in the fragmented application of EU law, thereby undermining not only the principle of effet utile but also that of equality and non-discrimination, as solemnly affirmed in Article 2 TEU, upon which the Union itself "is founded[112]."
In varietate discordia – we might say, inverting the EU's motto – when the uniform application of EU law in areas of particular importance, namely those falling within exclusive Union competence, is jeopardized by the procedural mechanisms of individual Member States.
In recent years, this erosion of procedural autonomy has also begun to affect matters of shared competence domains, particularly the field of consumer protection. In the following analysis, we will examine the reasons for this shift in jurisprudential trend.

7. *Procedural Autonomy in Areas of Shared Competence: Consumer Protection and the Functionalization of National Procedural Law.*

Article 2(2) TFEU addresses shared competences: «[W]hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence[113]».
From this provision, the following features of shared competences may be derived:
a) both the Union and the Member States are empowered to adopt legislative or binding acts if the Union remains inactive;
b) Member States retain full legislative authority until the Union intervenes;
c) the scope of national competence diminishes proportionally as the Union exercises its own;
d) Member States regain legislative authority if the Union ceases to act[114].
Thus, the coexistence of legislative powers in areas of shared competence is inherently transitory and may gradually shift in favor of the Union. The contraction of national competence corresponds directly to the extent of EU intervention in the relevant sector. Pursuant to the principle of sincere cooperation enshrined in Article 4(3) TEU, Member States are required to refrain from any measure which could jeopardize the Union's objectives. Once

112 See G. VITALE*, Diritto processuale nazionale e diritto dell'Unione europea. L'autonomia procedurale degli Stati membri in settori a diverso livello di "europeizzazione"*, Catania, 2010, p. 42 ff.
113 About the relationship between shared competences and federalism see R. SCHÜTZE, *Lisbon and the Federal Order of Competences: a Prospective Analysis*, in 33 *European Law Review*, 5, 2008, p. 714; P. CRAIG, *Competence: Clarity, Conferral, Containment and Consideration*, in 29 *European Law Review*, 3, 2004, p. 334 ff.
114 T. KONSTADINES, *The Competences of the Union, in Oxford Principles of European Union Law*, I, *The European Union Legal Order*, Oxford, 2018, p. 191 ff.; K. LENAERTS-P.V.NUFFEL-T.CORTHAUT, *EU Constitutional Law*, Oxford, 2021, p. 96.

the Union adopts a measure in a shared competence field, Member States must stand down.
Moreover, if the Union adopt an exhaustive and detailed legislative framework in a given area of shared competence, Member States will be precluded from intervening altogether. This phenomenon results in a *de facto* transformation of shared competence into exclusive competence (so-called pre-emption) [115].
In the *AETS* ruling[116], the Court of Justice expressed the phenomenon of pre-emption in striking terms: for the implementation of a common policy provided for in the Treaty, the Community adopts provisions laying down, in any form, common rules, the Member States no longer have the right, either individually or collectively, to undertake obligations with third countries which affect those rules. Accordingly, in fields of shared competence, the extent and endurance of Member State powers depend on the scope and way the Union exercises its competence: if the Union enacts comprehensive legislation, then pre-emption occurs, and the competence becomes exclusive. Conversely, if the Union's intervention is partial or merely programmatic, shared competence persists. In the former case, the resulting displacement of Member State competence has non-negligible consequences for national procedural autonomy; where exclusive competence arises, true procedural autonomy is lost, and domestic rules that would obstruct the application of directly effective EU provisions must be either adapted or, if that is not feasible, disregarded.
Thus, the shift from shared to exclusive competence transfers to the Union – particularly to the Court of Justice – what we earlier termed an "implicit competence" in procedural matters.
This dynamic has played out in the field of consumer protection.
Initially, Directive 93/13/EEC, often described as the consumer's Bill of Rights, offered a comprehensive framework solely with respect to unfair contract terms in consumer agreements[117].. Over time, however, EU legislation has progressively encompassed all aspects of consumer protection: Directive 1999/44/EC on the sale of consumer goods; Directive 2005/29/EC on unfair commercial practices; Directive 2007/64/EC on payment services; Regulation 1286/2014/EU on key information documents for investment products; and Directive 2016/97/EU on insurance distribution[118].
The full harmonization of consumer protection has entailed a progressive erosion of Member States' procedural autonomy. Since the early 2000s, the Court of Justice has increasingly conformed national civil procedure to ensure a

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[115] A. ARENA, *Il principio della* preemption *in diritto dell'Unione europea. Esercizio delle competenze e ricognizione delle antinomia tra diritto derivato e diritto nazionale*, Napoli, 2013, p. 85 ff.
[116] European Court of Justice, 31 March 1971, C-22/70, *AETS*, § 16-19.
[117] G. ALPA, *Lineamenti di diritto contrattuale*, in *Diritto privato comparato. Istituti e problemi*, a cura di G. ALPA-M. J. BONELL-D. CORAPI-L. MOCCIA-V.-ZENO-ZENCOVICH-A. ZOPPINI, Bari-Roma, 2012, p. 237 ff.; see also A. BARENGHI, *Diritto dei consumatori*[3], Milano, 2024, p. 70 ff.
[118] See G. HOWELLS-C. TWIGG-FLESNER-T. WILHELMSSON, *Rethinking EU Consumer Law*, London-New York, 2018, 46 ff. and 290 ff., for the impact of European consumer protection on procedural law.

high standard of consumer protection, in line with the objective set out in Article 169 TFEU.
This "Europeanization" of national consumer procedure has been achieved through the application of the principle of effectiveness, which has shaped all aspects of civil proceedings: from the judge's powers to rules on preclusion, from summary proceedings to enforcement, from the subjective scope of judgments to the finality of *res judicata*.
The restriction of procedural autonomy in consumer matters, accompanied by the expansion of the judge's *ex officio* powers to detect unfair terms, is further justified on economic grounds: unfair terms introduce irrationality into the market system and must be eradicated. Such terms effectively shift contractual risk from the trader to the consumer, allowing firms to lower operational costs and thus reduce the prices of goods and services[119]. Consumers, in turn, willingly accept the full assumption of such risks in exchange for lower prices – provided the adverse events covered by the unfair terms never materialize. Should those risks come to pass, the law grants the consumer maintenance-oriented remedies that ultimately reallocate the risk back onto the professional, who would then have sold the product below its real value without securing the benefit of transferring the full risk[120].
Thus, the economically efficient solution lies in empowering courts to closely scrutinize unfair contractual terms, thereby disincentivizing businesses from including such terms in standard consumer contracts.
Accordingly, only in supporting competences (the so-called "third category"), as outlined in Article 6 TFEU, or in areas not conferred upon the Union, does full procedural autonomy remain. In such domains, judicial functionalization is inadmissible, even for the purpose of extending the heightened procedural protections afforded to consumers, since the Treaties do not treat these positions in the same way.
With the well-known judgments *Océano Grupo Editorial*[121], *Cofidis*[122], and *Mostaza Claro*[123], the Court of Justice inaugurated a new era of *ex officio* judicial review of

[119] See P. GALLO, *Analisi economica del diritto*, in *Introduzione al diritto comparato*, III, Torino, 2017, p. 57.
[120] A. GAMBARO, *Perché si vessa il cliente. Note ed appunti di un itinerario tra i modelli occidentali*, in *Quadrimestre*, 1991, p. 386; R. PARDOLESI, *Clausole abusive (nei contratti dei consumatori): una direttiva abusata?*, in *Foro it.*, 1994, 5, p. 137 ff., at 144; L. A. BEBCHUK-R. POSNER, *One-Sided Contracts In Competitive Consumer Markets*, in 104*Michigan Law Review*, 2006, p. 827 ff., at 828: «[s]lanting the terms of the contract in favor of the seller is, we show, a way of redressing the balance. The existence of a one-sided contract does not imply that the transaction will be one-sided, but only that the seller will have discretion with respect to how to treat the consumer»; Y. M. ATAMER, *Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer - Insights from Behavioural Law and Economics*, in 80 *Modern Law Review*, 2017, p. 624 ff.
[121] European Court of Justice, 27 June 2002, C-240/98 and C-244/98, *Ocèano Grupo Editorial.*
[122] European Court of Justice, 21 November 2002, C-473/00, *Cofidis SA.*
[123] European Court of Justice, 26 October, C-168/05, *Elisa Marìa Mostaza Claro c. Centro Mòvil Milenium SL.*

unfair terms in consumer contracts[124]. It gradually became established that, even in cases where the consumer remains passive, the principle of effectiveness requires national courts to assess of their own motion whether the terms imposed by the professional are unfair, as derived from Article 6 of Directive 93/13/EEC. In line with the case law on State aid, the European Court of Justice has promoted a partial attenuation of the adversarial principle to redress the structural imbalance between professional and consumer through a proactive role assumed by national judges[125].

More specifically, in *Océano Grupo Editorial*, the Court held that Spain's failure to transpose Directive 93/13/EEC did not prevent a national court from declining its venue *ex officio* where a contractual clause – inserted abusively to the detriment of the consumer – conferred venue[126]. This ruling rested not only on the prohibition for Member States to invoke their own failure to implement a directive in support of interpretations contrary to Union law, but also on the principle of effectiveness, which mandates a conforming and functional interpretation of judicial powers. It is impermissible, in this light, for judges to have differing capacities to raise lack of venue depending on the case, when such a procedural limitation would infringe Article 6 of the directive.

Similarly, in *Cofidis*, the Court reaffirmed that temporal limitations to judge's power to detect *ex officio* unfair terms – whether of their own motion or upon the consumer's request – may undermine the effectiveness of the protection envisioned by Articles 6 and 7 of the directive. Indeed, were such limitations upheld, professionals could simply wait out the national deadline before invoking and enforcing unfair terms that remain embedded in BtC contracts[127].

In *Mostaza Claro*, the Court went further by requiring national judges to treat the directive's provisions as public policy norms, thereby enabling the annulment of an arbitral award based on an unfair arbitration clause, despite the consumer's failure to challenge the clause during proceedings, resulting in a forfeiture under domestic law[128]. As in *Eco Swiss* (in the area of competition and State aid), the *ex officio* review of the arbitration clause's unfairness served to avoid the formation of a final judgment contrary to Union law. Thus, even if the consumer did not file for annulment of the award based on a violation of public policy – among which Article 6(1) of the directive must be included – the judge is still required to assess such nullity on their own initiative.

Compared to *Eco Swiss*, the Court added that a breach of EU public policy may justify annulment of an arbitral award whenever the national legal system allows for annulment on grounds of internal public policy. As a result, EU consumer

124 J. NIEVA-FENOLL, *I poteri d'ufficio del giudice nazionale europeo, in Riv. trim dir. proc. civ*., 4, 2019, p. 1223 ff.

125 A. ANDOLFI, *L'incidenza del canone di effettività del diritto dell'Unione sulla disciplina processuale degli Stati membri: l'esperienza spagnola*, in *Riv. trim. dir. proc. civ*., 4, 2020, p. 1255 ff., at 1260.

126 European Court of Justice, 27 June 2002, C-240/98 and C-244/98, *Ocèano Grupo Editorial*, cit., §§ 30-32.

127 European Court of Justice, 21 November 2002, C-473/00, *Cofidis SA*, cit., § 35.

128 European Court of Justice, 26 October, C-168/05, *Elisa Marìa Mostaza Claro c. Centro Mòvil Milenium SL*, cit., § 38.

protection law helps define the concept of economic public policy, and its invocation cannot be precluded by failure to meet internal procedural deadlines[129].
The expansion of the judge's *ex officio* powers extends beyond first instance and into appellate review. In *Erika Jöros*, the principle of equivalence led the Court to affirm that appellate courts may examine of their own motion whether a clause is unfair – even if this was not raised at first instance or as a specific ground of appeal – provided national law allows judges to review nullities evident from the first instance record[130].
Professor Jordi Nieva-Fenoll has offered a "historicized" interpretation of this jurisprudence, asserting that the consumer represents the essential foundation of today's market economy and therefore deserves the highest level of protection, as if there existed a fundamental right of the consumer to receive effective, specific, and enhanced protection, in addition to the rights already recognized in our Constitutions[131]. This perspective is not only persuasive but appears to be constitutionally mandated by Article 38 of the Charter of Fundamental Rights, which requires a «high level of consumer protection». As such, the sacrifice of national procedural autonomy – where domestic mechanisms prevent *ex officio* review of unfair anti-consumer terms – may be not only tolerable, but constitutionally obligatory.
Regarding the mutuality of judgments favorable to the consumer, the Court has extended their reach in the context of injunctive relief, allowing such rulings to benefit all consumers who have entered into contracts with the same professional containing identically unfair terms[132]. Without invoking theories on the extension of *res judicata*, the Court emphasized the inherently collective nature of injunctive consumer protection: such judgments may produce *de facto* satisfactive effects for all members of a "fluid class", whose composition may change even after the judgment, provided they have signed a contract containing the same nullified clause in violation of Article 6 of Directive 93/13/EEC[133].
Similarly, in *Ismael Fernandez Oliva v. Caixabank SA*, the Court affirmed that EU law obliges national judges to issue interim protective measures *ex officio* to mitigate the negative consequences of duration of collective proceedings and to extend the favourable effects of the merits judgment to all consumers harmed by the same clause, even if they were not parties[134].
In recent years, CJEU case law has expanded the obligation to assess the unfairness of contractual clauses even to summary proceedings and enforcement

[129] C. RASIA, *Tutela giudiziale europea e arbitrato*, Bologna, 2010, p. 171.
[130] European Court of Justice, 30 May 2013, C-397/11, *Erika Jöros*, § 38.
[131] J. NIEVA-FENOLL, *I poteri d'ufficio del giudice nazionale europeo*, cit., p. 1239.
[132] European Court of Justice, 26 April 2012, C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság*, § 31.
[133] About olistic and fluid class see A. GIUSSANI, *Studi sulle* "class action", Padova, 1996, p. 260 ff.
[134] European Court of Justice, 26 October 2016, C-568/14 e C-570/14, *Ismael Fernandez Oliva c. Caixabank Sa*, § 35.

procedures[135]. Most of these judgments concern Spanish and Italian procedural law, prompting legislative amendments to align with the requirements imposed by the Court of Justice, as will be illustrated below.

7.1. *Continued: The Principle of Procedural Autonomy in Summary Proceedings and Arbitration. A look at Spanish Law.*

The interventions of the Court of Justice have been particularly significant in relation to order for payment proceedings[136]. In the *Banco Español de Crédito* case, the *Plateau Kirchberg* held that the domestic procedural law preventing the court, when seized with an application for a payment order, from examining *ex officio* the unfairness of an interest clause contained in a consumer contract, in the absence of an objection by the consumer, was contrary to Union law[137].
Notably, that judgment prompted the reform of the Spanish order for payment procedure by Law No. 42 of 5 October 2015, which now requires the *Letrado de la Administración de Justicia* – to whom the summary phase of the order for payment proceeding has been entrusted – to transmit the case file to a judge whenever the written evidence consists of a contract concluded between a professional and a consumer. The judge is then required to assess *ex officio* the existence of unfair terms and, where appropriate, to schedule a hearing for the parties' appearance, at the conclusion of which the judge may, by an appealable order, either declare the claim inadmissible or allow the procedure to continue, depending on whether the unfairness of the clause is established[138].
The Spanish legislator thus opted to prevent the concession of payment orders based on consumer contracts affected by unfair terms, thereby burdening the summary phase: when a consumer contract is at stake, this stage must allow for an incidental examination of the potential existence of unfair terms, to be conducted inter partes, with the result that the substantive relationship itself is also examined, effectively anticipating the opposition phase[139].
However, this approach seems to exceed its purpose, as the alteration of the order for payment technique results in a duplication of full proceedings. The model crafted by the Spanish legislator raises doubts as to its ability to resolve,

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[135] Z. VARGA, *EU and EEA Litigation Before National Courts. A practical Guide*, Oxford-New York-Dublin, 2024, p. 191 ff.
[136] About the structure of order for payment proceeding see P. CALAMANDREI, *Il procedimento monitorio nella legislazione italiana*, Milano, 1926, now in *Opere giuridiche*, IX, 2019, p. 7 ff.; G. CHIOVENDA, *Istituzioni di diritto processuale civile*, I, Roma, 1935, p. 233 ff.; E. GARBAGNATI, *Il procedimento d'ingiunzione*, Milano, 1991; A. RONCO, *Struttura e disciplina del rito monitorio*, Torino, 2000; B. CAPPONI, *Il procedimento di ingiunzione*, Bologna, 2009.
[137] European Court of Justice, 14 June 2012, C-618/10, *Banco Español de Credito*, § 52.
[138] F. JIMÉNEZ CONDE, *El proceso monitorio tras las reformas de 2015*, in *El proceso civil ante el reto de un nuevo panorama socioeconómico*, a cura di SALVADOR TOMÁS, RAFAEL CASTILLO FELIPE, GEMMA GARCÍA, ROSTÁN CALVÍN, JULIO SIGÜENZA, Pamplona, 2017, p. 103 ff.; R. C. FELIPE-S. T. TOMAS, *La trasformazione del processo civile spagnolo per effetto del diritto europeo*, cit., p. 1248.
[139] J. M. FERNANDEZ SEIJO, *La tutela de los consumidores en los procedimientos judiciales*, Barcellona, 2017, p. 167 ff.

with the force of *res judicata*, prejudicial issues, such as the validity of a consumer contract[140].

Despite the Spanish legislator's efforts to align with the Court of Justice's guidance, Law No. 42/2015 still presents points of friction with EU case law on unfair terms, as is evident from the well-known *Finanmadrid* judgment[141]. In that case, the Court found that the Spanish procedural framework was incompatible with Union law insofar as it prevented the enforcement judge from assessing *ex officio* the unfair nature of a contractual clause where no timely objection had been raised, and where the judge in the summary phase had no power to conduct such review *ex officio*.

Academic commentary has linked the principle expressed in *Finanmadrid* to the overcoming of *res judicata*[142], without acknowledging that prior to Law No. 42/2015, the summary phase of the Spanish order for payment procedure was entirely in the hands of a formally non-judicial authority – the Secretario judicial – so that the absence of an objection could not be said to produce the same effects as a failure to appeal a judicial decision, i.e., formal *res judicata* of the payment order.

Thus, *Finanmadrid* is not particularly helpful in explaining the overcoming of *res judicata* incompatible with Union law but rather offers important insights into how the principle of effectiveness affects the procedural autonomy of Member States. According to the Court of Justice, the excessively short deadline under Spanish law for objecting to a *requerimiento de pago* entails a not insignificant risk that consumers concerned will fail to raise objections[143]. Consequently, given that the Secretario judicial cannot assess *ex officio* the unfairness of a consumer clause, it becomes necessary to recover such power at the enforcement stage, by recognising unprecedented cognitive powers to the enforcement judge.

The principle of effectiveness thus compels the overcoming of the rigid dichotomy between cognition and enforcement: the notion of the unconditional effectiveness of the enforcement title risks conflicting with Union law and must therefore be disregarded, to permit review of unfair consumer clauses during the enforcement phase, where such review was precluded during the summary phase.

The rule laid down in *Finanmadrid* was subsequently confirmed in the *Ján Danko* case, where the Court of Justice reiterated that, in abstract terms, a national rule

[140] F. JIMÉNEZ CONDE, *El proceso monitorio tras las reformas de 2015*, in *El proceso civil ante el reto de un nuevo panorama socioeconómico*, cit., p. 108.

[141] European Court of Justice, 18 February 2016, C-49/14, *Finanmadrid*. About this judgment see E. FRANTZIOU, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reason for Horizontaly*, in 21 *European Law Journal*, 2015, p. 657 ff., at 665; A. VAN DUIN, *Civil Courts and the European Polity. The Constitutional Role of Private Law Adjudication in Europe*, edited by C. MAK and B. KOS, 2023, Oxford-New York-Dublin, p. 167; S. LAW, *Transformation of Civil Justice. Unity and Diversity*, edited by A. UZELAC and C. HENDRIK VAN RHEE, Cham, 2018, p. 304 ff.

[142] A. ANDOLFI, *L'incidenza del canone di effettività del diritto dell'Unione sulla disciplina processuale degli Stati membri: l'esperienza spagnola*, cit., p. 1268 ff.

[143] European Court of Justice, 18 February 2016, C-49/14, *Finanmadrid*, cit., § 45-46.

entrusting a non-judicial body with competence over the summary phase of the order for payment procedure is compatible with Union law, provided that the subsequent opposition phase, governed by full-fledged trial principle, includes judicial review. Moreover, the procedural modalities and time limits set out by national law for lodging the opposition must not discourage consumers from initiating the ordinary proceedings. Thus, a fifteen-day time limit from the notification of the payment order, within which the consumer is required to set out the grounds of opposition in detail, was found to be incompatible with Union law[144].

The above rulings are based on the premise that the procedural conditions and deadlines established by national law for opposing a payment order may discourage consumers from initiating full proceedings.

A general principle may be drawn from this: whenever the functioning of national proceedings prevents or hinders the active participation of the consumer, it is contrary to the principle of effectiveness to limit the review of the unfairness of contractual terms to a specific stage of the proceedings. In such cases, a derogation from the principle whereby enforcement proceedings are structurally unsuited to host cognitive phases, except where expressly provided by law, must be allowed.

This principle appears to underpin the well-known *Asturcom* ruling, in which the Court held that a national court called upon to enforce a final arbitral award not challenged within the prescribed time limits is nonetheless under a duty to verify the compatibility of such award with the consumer protection rules enshrined in Union law[145]. This is grounded in the principle of equivalence, understood as a negative limit to the procedural autonomy of the Member States.

Accordingly, the reading advanced by those who saw *Asturcom* as a circumvention of national *res judicata* is unconvincing[146], especially since, in that case, the award had been rendered in default of appearance of the consumer, who had then failed to bring an ordinary challenge. Spanish law, unlike Italian law, does not require prior *exequatur* for an arbitral award to be enforceable; moreover, Spanish procedural law allows the enforcement judge to raise of his own motion any conflict between the award and domestic public policy.

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[144] European Court of Justice, 20 September 2018, C-448/17, *EOS KSI Slovensko s.r.o. contro Ján Danko e Margita Danková*, §§ 51-53.

[145] European Court of Justice, 6 October 2009, C-40/09, *Asturcom Telecomunicaciones*, with the comments of G. RAITI, *Le pronunce Olimpiclub ed Asturcom Telecomunicaciones: verso un ridimensionamento della paventata "crisi del giudicato civile nazionale" nella giurisprudenza della Corte di giustizia*, in *Riv. dir. proc.*, 3, 2010, p. 677 ff.; ID., *Violazione dell'ordine dell'Unione europea e processo nazionale*, in *Federalismi*, 17, 2013, p. 12 ff.; E. D'ALESSANDRO, *La Corte di giustizia sancisce il dovere, per il giudice, di rilevare d'ufficio l'invalidità della clausola compromissoria stipulata tra il professionista ed il consumatore rimasto contumace nel processo arbitrale*, in *Judicium online*; G. LO SCHIAVO, *La Corte di giustizia ridimensiona progressivamente il principio nazionale di cosa giudicata*, in *Riv. it. dir. pubbl. com.*, 1, 2010, p. 287 ff., at 305 ff.; S. PAGLIANTINI, *La vaghezza del principio di "non vincolatività" delle clausole vessatorie secondo la Corte di giustizia: ultimo atto?* in *Rass. dir. civ.*, 2, 2010, p. 507 ff.; C. RASIA, *Tutela giudiziale europea e arbitrato*, cit., p. 177.

[146] R. CONTI, *C'era una volta il…giudicato*, in *Corr. giur.*, 2, 2010, p. 173.

Therefore, the principle of equivalence requires that the enforcement judge also assess, *ex officio*, whether the arbitration clause is unfair, as the procedural rules applicable to Union law must not be less favourable than those applicable to domestic law.
The enforcement judge, applying the principle set out in Asturcom, is thus required to carry out an *ex officio* review of the unfairness of the arbitration clause and, if the clause is found to be abusive, to refuse enforcement of the arbitral award.
There is nothing new, therefore, in the Italian legal order, which – even after the Asturcom judgment – still does not allow the enforcement judge to examine whether the arbitral award violates public policy, even in consumer disputes, as this possibility is not contemplated by Article 825 of the Italian Code of Civil Procedure.
The same rationale characterizes the contemporaneous Grand Chamber judgments in *Ibercaja Banco*, *Impuls Leasing România*, *Unicaja Banco*, *SPV Project 1503 Srl*, and *Banco di Desio e della Brianza SpA* (the so-called 17 May rulings) [147],

[147] European Court of Justice, 17 May 2022, C-600/19, *Ibercaja Banco*; ID., C-725/19, *Impuls Leasing România*; ID., C-869/19, *Unicaja Banco*; ID., C-693/19 and C-831/19, *SPV Project 1503 Srl* e *Banco di Desio e della Brianza SpA*, commented by A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: la lettura della Corte di Giustizia*, in *Riv. dir. proc.*, 2023, p. 294 ff., at 301; A. ASTONE, *Contratti del consumatore e clausole abusive: significativo squilibrio e dovere di trasparenza nell'interpretazione della giurisprudenza*, in *Rivista dell'associazione civilisti italiani*, 1, 2024, p. 113ff.; F. AULETTA, *Tutela del consumatore e decreto ingiuntivo non opposto: il ruolo del giudice dell'esecuzione alla luce della recente giurisprudenza della Cgue*, in www.giustiziacivile.com, 6 febbraio 2023; L. BACCAGLINI, *Nullità di protezione, decreto ingiuntivo non opposto e giudicato implicito*, in *Riv. dir. banc.*, 2023, p. 57 ff.; P. BERTOLLINI, *Procedimento monitorio, decreto ingiuntivo non opposto e tutela del consumatore: considerazioni a margine di due interessanti pronunce della Corte di Giustizia dell'Unione Europea*, in Rivistapactum.it, 10, 2022; M. BOVE, *La tutela del consumatore tra esigenze eurounionali e creatività della nostra Corte di cassazione: una proposta alternativ*a, in www.judicium.it, 1° agosto 2023; B. CAPPONI, *La Corte di Giustizia stimola una riflessione su contenuto e limiti della tutela monitoria*, in www.judicium.it, 18 gennaio 2023; A. CARRATTA, *Introduzione. L'ingiuntivo europeo nel crocevia della tutela del consumatore*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, a cura di S. CAPORUSSO e E. D'ALESSANDRO, in *Giur. it*, 2022, p. 485 ff.; V. CECCARELLI, *La tenuta del giudicato civile alla prova della tutela consumeristica. I poteri del giudice dell'esecuzione sotto la lente della Corte di Giustizia*, in *Jus Civile*, 2022; A. CRIVELLI, *Appunti sulla requisitoria del P.G. presso la Corte di Cassazione in ordine ai poteri del g.e. rispetto alle clausole abusive nei contratti con i consumatori*, in *Riv. es. forz.*, 2022, 707 ff.; G. COSTANTINO, *«Certezza» del diritto risultante dal titolo esecutivo, «accertamento con prevalente funzione esecutiva», «normativa senza giudizio», «preclusione pro judicato» e clausole vessatorie*, in www.inexecutivis.it; E. D'ALESSANDRO, *Il decreto ingiuntivo non opposto emesso nei confronti del consumatore dopo Corte di giustizia, grande sezione, 17 maggio 2022 (cause riunite C-693/19 e C-831/19, causa C-725/19, causa C-600/19 e causa C-869/19): in attesa delle Sezioni Unite*, in *Judicium*, 2022; EAD., *Una proposta per ricondurre a sistema le conclusioni dell'avv. gen. Tanchev*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, cit., p. 541 ff.; ID, *Dir. 93/13/CEE e decreto ingiuntivo non opposto: le Sez. un. cercano di salvare l'armonia (e l'autonomia) del sistema processuale nazionale attraverso una lettura creativa dell'art. 650 c.p.c.*, in *Giur. it.*, 2023, p. 1060 ff.; L. DE PROPRIS, *Considerazioni sparse sulla tutela transfrontaliera del consumatore nello spazio giudiziario europeo*, in *La nuova giuridica*, 1, 2024, p. 79 ff., at 89; F. DE STEFANO, *Le sentenze di Chicxulub: il decreto ingiuntivo contro il consumatore dopo le sentenze della Corte di giustizia dell'U.E.*, in www.giustiziainsieme.it, 24 febbraio 2023; ID*., La Corte di Giustizia sceglie tra tutela del consumatore e certezza del diritto. Riflessione sulle sentenze del 17 maggio 2022 della Grande Camera della CGUE*, in

according to which the preclusion arising from the "long shadow of implicit *res judicata*[148]" is incompatible with the principle of effectiveness underlying consumer protection law, to the extent that it prevents judicial review of the unfairness of contractual terms where the judge in the summary phase of the payment order procedure has not provided any reasoning on the matter, provided that the consumer has not remained entirely inactive.

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www.giustiziainsieme.it, 27 settembre; I. FEBBI, *La Corte di giustizia crea scompiglio: il superamento del giudicato implicito nel provvedimento monitorio*, in www.judicium.it, 12 luglio 2022; G. FIENGO, *Il decreto ingiuntivo non opposto privo di motivazione emesso nei confronti del consumatore: alla ricerca del rimedio effettivo*, in *Quest. giust.*, 2023; D. U. GALLETTA-M. GIAVAZZI, *Nozione di giudicato, giudicato implicito e limiti all'autonomia processuale degli Stati membri UE (nota a margine della sentenza in cause riunite C-693/19 e C-831/19, 17 maggio 2022)*, in *Osservatorio costituzionale*, 6, 2022, p. 97 ff.; A. M. GAROFALO, *Decreto ingiuntivo non opposto e protezione del consumatore dalle clausole vessatorie*, in *NGCC*, 2023, p. 86 ff.; ID., *Oltre Banco di Desio: le (altre) ricadute sul sistema processuale italiano della giurisprudenza europea in tema di protezione effettiva del consumatore*, in *Rivista dell'associazione civilisti italiani*, 1, 2023, p. 173 ff.; S. GUZZI, *L'intangibilità del giudicato monitorio della Corte di giustizia e i suoi limiti: tra esigenze di stabilità e tutela del consumatore*, in *Dir. un. eur.*, 2, 2022, p. 327 ff.; D. LONGO, *Le questioni poste dalle pronunce della corte di giust. ue del 17 maggio 2022 in punto di tutela giurisdizionale del consumatore esecutato: considerazioni introduttive*, in *La tutela del consumatore esecutato in prospettiva europea*, a cura di D. LONGO, Bari, 2022, p. 3 ff.; F. MARCHETTI, *Note a margine di Corte di Giustizia UE, 17 maggio 2022 (cause riunite C-693/19 e C-831/19), ovvero quel che resta del brocardo "res iudicata pro veritate habetur" nel caso di ingiunzioni a consumatore non opposte*, in judicium.it, 24 giugno 2022; D. MICALI, *Le ricadute sul sistema processuale italiano delle pronunce della Corte di giustizia UE 16 maggio 2022*, in www.judicium.it, 28 febbraio 2023; S. MINAFRA, *L'autorità di giudicato del decreto ingiuntivo non opposto e la tutela dei consumatori al vaglio della Corte di giustizia*, in www.GiustiziaCivile.com, 17 agosto 2022; M. MOROTTI, *Nullità di protezione e decreto ingiuntivo: poteri del giudice e (assenza di) giudicato*, in *Il Quotidiano Giuridico*, 2023; G. PARISI, *Brevi note sui rapporti tra "esecuzione" e "accertamento" alla luce della più recente giurisprudenza della Corte di giustizia*, in www.Giustiziacivile.com, 2022, and in *Riv. es. forz.*, 2022, p. 686 ff.; G. SCARSELLI, *La tutela del consumatore secondo la Cgue e le sezioni unite, e lo Stato di diritto secondo la civil law*, in www.judicium.it, 12 aprile 2023; E. SCODITTI, *Quando il diritto sta nel mezzo di due ordinamenti: il caso del decreto ingiuntivo non opposto e in violazione del diritto dell'Unione europea*, in www.questionegiustizia.it; P. SPAZIANI, *Ampliamento della giurisdizione oggettiva e nuovi limiti del giudicato dopo la sentenza della Corte di Giustizia UE del 17 maggio 2022 (cause riunite C-693/19 e C-831/19)*, www.Giustiziainsieme.it, 2022; B. SANCHEZ LOPEZ, *Efectividad vs. cosa juzgada de claúsulas abusivas en el proceso monitorio*, in *La tutela del consumatore esecutato in prospettiva europea: riflessioni trasversali e transfrontaliere su titolo esecutivo e giudicato*, a cura di D. LONGO, Bari, 2022, p. 143 ff.; R. PARDOLESI-B. SASSANI, *Clausole abusive nei contratti B2C, decreto ingiuntivo non opposto, giurisprudenza eurounitaria e sezioni unite: meta-realtà e diritto a metà*, in *Foro.it*, 2023, V, c. 1486 ff.; G. RAITI, *Non compatibile con l'ordinamento UE il giudicato nazionale implicito sulla questione di vessatorietà delle clausole dei contratti consumeristici*, in *Ridare*; C. RASIA, *Giudicato, tutela del consumatore, ruolo del giudice in sede monitoria ed esecutiva*, in *Riv. trim. dir. e proc. civ.*, 2023, p. 63 ff.; R. ROSSI, *Decreto ingiuntivo non opposto e tutela effettiva del consumatore*, in Judicium.it, 3 marzo 2023; A. SOLDI-B. CAPPONI, *Consumatore e decreto ingiuntivo: le soluzioni ermeneutiche percorribili per l'integrazione tra diritto eurounitario e diritto interno*, in *Judicium* online, 10 febbraio 2023; A. SOLDI, *Manuale dell'esecuzione forzata*[9], Torino, 2024, p. 1053 ff.; A. TURMO, "*A new chapter in the saga of national res judicata and the effectiveness of EU Law: Confirming the trend towards increasing encroachments upon domestic procedural law*", *EU Law Live*, 30th May 2022; S. VINCRE, *Le nullità consumeristiche tra necessità di protezione e di certezza. Brevi osservazioni sulle ricadute della decisione della Corte di giustizia del maggio 2022 sul decreto ingiuntivo e sull'esecuzione*, in *La tutela del consumatore esecutato in prospettiva europea*, cit., p. 202 ff.

148 G. DE CRISTOFARO, *Giudicato e motivazione*, in *Riv. dir. proc.*, I, 2017, p. 41 ff., at 64.

The exclusion of the formation of implicit *res judicata* concerning deducible issues derives from the inability of domestic procedural rules to ensure the effectiveness of Union law, as well as from their failure to incentivise the consumer's active participation. Where a consumer is not placed in a position to challenge the judge's (lack of) reasoning concerning the absence of unfair terms – precisely because no express assessment was carried out – he is dissuaded from filing an opposition. Therefore, inaction by a consumer who has been put in a position to assert a breach of Union law through national procedural tools extinguishes the possibility of challenging the enforceability of an unlawfull judgment under EU law[149]. This principle had already been cautiously affirmed by the Court of Justice in the earlier *Kapferer* case, where it held that failure to raise the issue of jurisdiction – namely, the violation of the consumer forum under Article 15 of Regulation 44/2001 – through incidental appeal precludes any later review of the first-instance decision on jurisdiction[150].
The idea that the protection afforded by Union law does not extend to the "sleeping consumer" – in application of the ancient legal maxim «*non dormientibus, sed vigilantibus leges succurrunt*» – was confirmed in the recent case of *ERB New Europe Funding II v. YI*, which gave the *Plateau Kirchberg* an opportunity to delineate the scope of the 17 May rulings[151]. The Court held that the national judge's duty to examine *ex officio* the potential unfairness of contractual terms is justified by the public interest in consumer protection, such that effective judicial review cannot be guaranteed if the authority of *res judicata* were to cover decisions where no such review had taken place. Conversely, effective protection is ensured where, in a subsequent proceeding *de eadem re*, the national judge ascertains that, during the first proceedings, the competent judge had in fact conducted a review – albeit summary one – of the potentially unfair nature of the relevant contractual clauses, had found no such unfairness, and the consumer had been duly informed that failure to appeal within the national deadline would bar any future challenge to such clauses.
According to the Court of Justice, the unfavourable outcome of a proper review of the possible unfairness of contractual clauses cannot be sufficient to undermine the principle of *res judicata*. It is therefore the absence of reasoning

[149] The principles enuntiated by the ECJ with the judgments of 17 may 2022 cannot be applied in the case of contumacious consumer, as ruled by European Court of Justice, 9 April 2024, C-582/21, *Profi Credit Polska S.A.*, with the comment of A. VINCZE, *Form follows functions: reopening of judicial proceedings and EU law in Profi Credit Polska*, in *CMLR*, 2024, p. 1645 ff., at 1652: «the judgment simply ignores the question of res iudicata. If the contractual terms were not examined during the regular proceedings, then any later review implies questions about finality and res iudicata. Second, the judgment sets new standards for access to justice contrary to recent case law. These standards apply to mandatory provisions of EU law, and so a fuzzy new category of EU law is created. Third, the judgment creates a claim for damages. And finally, all these challenge judicial attitudes, especially in the post-communist countries where judicial passivity often lingers».
[150] Cfr. European Court of Justice, 16 March 2006, C-234/04, *Kapferer*, in *Giur. it.*, 2007, p. 1089 ff., commented by C. DI SERI, *L'intangibilità delle sentenze «anticomunitarie»*.
[151] European Court of Justice, 7 November 2024, C-178/23, *ERB New Europe Funding II c. YI.*

concerning the lack of unfair terms in the contract relied upon by the professional party that allows excluding the formation of res judicata on deducible issues, *i.e.*, the validity (or, if preferred, non-nullity) of the contractual relationship.
In this regard, it has been noted that the impact of the Court of Justice's rulings on the Italian legal order – insofar as they make the formation of implicit *res judicata* conditional on explicit reasoning concerning the non-unfairness of the terms in a consumer contract – appears to concern not so much the information provided in advance to the parties, as the information passed on to the subsequent judge, *i.e.*, the one before whom preclusionary effects are invoked[152].
The judge in the order for payment procedure, like the judge of first instance in ordinary proceedings, by stating that no unfair terms exist, informs the judge of the opposition, appellate, or enforcement stage of the basis for granting the claim, thereby burdening the resisting party with the task of rebutting such *prima facie* finding. Thus, where the order for payment or the first-instance judgment is unreasoned, and the consumer fails to oppose or to appeal in time, such consumer does not definitively forfeit the possibility to raise the issue (*i.e.*, the deducible).
We will return to the impact of the 17 May rulings and to the subsequent developments regarding the flexibility of *res judicata* in areas of shared competence later in the exposition[153].

7.2. *Continuation: … and in enforcement proceedings*. – The analysis of the impact of European Union law on national civil procedure in areas of shared competence must be completed by examining the progressive adaptation of enforcement proceedings to the standards of protection laid down by the *Plateau Kirchberg*.
As with the order for payment procedure, the Spanish legal system has been most affected by the case law of the Court of Justice. In particular, the enforcement procedure known as *ejecución hipotecaria*, which allows a creditor holding a legitimate security title of an extrajudicial nature to act directly and exclusively on the asset subject to the security – thereby satisfying only the enforcing creditor – has been declared incompatible with Union law. This is due to the drastic limitations placed on objections based on substantive grounds, as well as the overly simplified procedural structure[154].
Specifically, Article 695 of the Spanish Code of Civil Procedure (LEC) restricted substantive grounds for objection to the extinction of the security or the secured obligation, and to errors in determining the amount claimed, excluding the possibility of invoking the incompatibility of the security contract or the underlying obligation with EU rules on unfair contract terms. The strict exhaustiveness of the objections list meant that consumers could only raise the

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[152] A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: la lettura della Corte di Giustizia*, cit., p. 300.
[153] See *infra*, chapter IV, section IV.
[154] P. M. QUESADA LÒPEZ, *Desencuentros entre el Derecho europeo y la ejecución hipotecaria española: ¿una relación imposible?*, Navarra, 2021, *passim*.

unfairness of a clause in a separate ordinary proceeding, for the purpose of obtaining a suspension of the *ejecución hipotecaria*, thereby burdening them with the costs and risks of a second, parallel action *de eadem re*.

Starting with the *Mohamed Aziz* case[155], the Court of Justice recognised that judges hearing objections in enforcement proceedings must be granted interim powers to ensure effective consumer protection, and that national procedural mechanisms cannot override this mandate. Indeed, the structure of *ejecución hipotecaria* is fundamentally incompatible with EU law insofar as it does not allow for the suspension of provisional enforceability when the extrajudicial enforceable title is tainted by unfair terms. The "dual-track" system frustrates the effectiveness of consumer protection, since enforcement on the secured asset may be completed – including through irreversible sale – before the court in the second proceeding can even determine whether a clause is unfair, thereby depriving the consumer of their rights.

The principle affirmed in *Mohamed Aziz* was further developed in the subsequent order in *Banco Popular Español* and *Banco de Valencia*, where the Court (unsurprisingly) held that the prohibition on the enforcement judge assessing *ex officio* – or at the consumer's request – the unfairness of a clause in the underlying contract was incompatible with the principle of effectiveness[156].

The Court's functional reinterpretation of procedural norms in relation to *ejecución hipotecaria* prompted the Spanish legislator to redesign the entire procedural framework. Under the current Spanish law, where enforcement is initiated on the basis of an extrajudicial enforceable title, the judge is required to examine *ex officio* whether the contract contains any unfair terms before ordering enforcement of the mortgaged goods. Furthermore, following the 2013 legislative reform, the grounds for objecting to enforcement in ejecución hipotecaria were expanded to include the existence of unfair contract terms in consumer contracts, although the debtor must demonstrate that such terms either form the basis of enforcement or affect the amount claimed.

This development clearly demonstrates the impact of the exercise of shared competence by the Union: as in the areas of exclusive competence, in matters of shared competence – particularly in consumer protection – Member States' procedural autonomy has become residual. Any national procedural mechanism that may undermine the effet utile of Union law must be at least functionalised, and, where necessary, disregarded or judicially reinterpreted.

Civil procedure thus becomes a tool for implementing European Union law, a vehicle for achieving the objectives laid down by the Treaties and harmonisation directives, such as those governing consumer protection.

In this context, the "implicit competence" of the Court of Justice in procedural matters is subordinate to the exhaustion of Union shared competence, as well as to the concrete need to ensure the direct effectiveness of EU substantive law.

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155 European Court of Justice, 14 March 2013, C-415/11, *Aziz c. Caixa d'Estalvis de Catalunya*, § 60.

156 European Court of justice, 14 November 2013, C-537/12 and C-116/13, *Banco Popular Español e Banco de Valencia*.

In the consumer protection field, both conditions are met: the first by the extensive harmonising interventions of the EU legislature, which have effectively displaced national legislative authority in this domain; the second by the combined reading of Article 38 of the Charter of Fundamental Rights of the European Union and Article 169 TFEU, which underscore the central role of the consumer – the true protagonist of the internal market – within the EU's system of rights protection. Consequently, national procedural mechanisms that conflict with the "high level of protection" mandated by Union law cannot be tolerated.

7.3. *Second Conclusion: Even in Matters of Shared Competence, the Principle of Effectiveness has Reshaped National Procedural Law.*

It should now be clear that the principle of conferral, together with the principles of primacy and effet utile, shapes national procedural systems, even in the absence of an explicit Union competence in the field. In areas of shared competence as well, the procedural autonomy of Member States appears limited to those domains not yet subject to harmonisation. Accordingly, in the area of consumer protection, where harmonisation may now be considered complete, no room remains for procedural autonomy, as if it were a matter falling under exclusive Union competence.

The case law of the Court of Justice regarding consumer payment order procedures and enforcement proceedings demonstrates that EU law can significantly affect national procedural law, to the point of inducing national legislators to intervene and adapt domestic procedural mechanisms to the guidance provided by the *Plateau Kirchberg*. In this regard, legal scholarship has noted that the erosion of procedural autonomy in areas of exclusive and shared competence has given rise to a new "conceptual paradigm", according to which national procedural law is seen as a complement to the substantive rules of the Union[157].

In this perspective, the instrumental nature of national procedural law clearly emerges, insofar as it must serve the realisation of the objectives of EU law, which is often redefined judicially by establishing minimum standards of protection that national systems are required to meet in accordance with the principle of effectiveness[158]. It may thus be observed that, through its systematic reliance on this principle, the Court of Justice unifies the relationship between EU substantive law and national procedural law, given that the mere recognition of a substantive advantage, without effective judicial protection, is insufficient to meet the objectives enshrined in the Treaties, as we shall further illustrate.

The fields of consumer protection and social policy have served as fertile testing grounds for this new paradigm developed by the Court of Justice, which consists in principle-based harmonisation, deriving procedural rules from normative

[157] E. CANNIZZARO, *Effettività del diritto dell'Unione e rimedi processuali nazionali*, cit., p. 664.
[158] P. PIVA, *Il principio di effettività della tutela giurisdizionale nel diritto dell'Unione europea*, cit., p. 195.

fragments that express general procedural principles[159]. Whereas the absence of a common European procedural framework once represented the negative condition for Member State autonomy, today, in areas of exclusive and shared competence, that absence has become the starting point for judicial construction by the Court of Justice – via the so-called "implicit procedural competence" – of newly forged rules derived from general procedural principles, to ensure the effectiveness of EU law.
Thus, the procedural autonomy of the Member States operates only to the extent permitted by these general principles and only insofar as it is compatible with them.
Conflicts between domestic procedural law and Union law are therefore resolved either through conforming interpretation or, where this is not possible, through their disregard, even in the absence of a direct normative conflict.
We are thus dealing with an indirect conflict between the national procedural provision and the protective aim pursued by EU law – a conflict that exists independently of any literal or textual inconsistency and that, at least in theory, might allow both provisions to coexist, were it not for the practical impact of the national rule in obstructing the realisation of Union objectives.
In conclusion, the new paradigm tested by the Court of Justice in the area of consumer protection defines the boundaries of procedural autonomy and opens the door to a European civil procedural law in these fields. Its foundation lies in national procedural mechanisms, but its outlines remain fluid and adaptable, continuously recalibrated by the Court of Justice to avoid or resolve conflicts with EU principles in a sector that has now been fully harmonised and is therefore firmly within the remit of the European Institutions.

8. *The Principle of Procedural Autonomy in the So-Called "Third Type" Matters.*

We may conclude that the principle of procedural autonomy of the Member States appears to operate exclusively regarding the so-called "third type" matters, identified in Articles 5 and 6 TFEU, in which the Union holds only supporting and coordinating competences.
Article 5 TFEU identifies three areas where the Union exercises coordinating competences: economic policy, employment policy, and social policy[160]. The placement of these sectors in a separate provision is the result of a political compromise reached by the *Praesidium* of the European Convention, and later codified in the Treaty of Lisbon[161], between those who feared that granting the Union shared competence would entail excessively preclusive effects, and those who considered a mere supporting competence insufficient.

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[159] E. CANNIZZARO, *Effettività del diritto dell'Unione e rimedi processuali nazionali*, cit., p. 661.
[160] But according to J. ZILLER, *Diritto delle politiche e delle istituzioni dell'Unione europea*, Bologna, 2013, p. 136, they are matters of shared competence.
[161] M. BARUFFI, *Il trattato di Lisbona tra vecchio e nuovo*, in *Dalla Costituzione europea al Trattato di Lisbona*, a cura di M. BARUFFI, Padova, 2008, p. 3 ff.; M. DOUGAN, *The Treaty of Lisbon 2007: Winning Minds, not hearts*, in *CMLR*, 2008, p. 617 ff.

In legal scholarship, two opposing views have emerged regarding the intensity of the Union's intervention in these fields. According to the first view, the Union exercises powers of intermediate intensity, falling somewhere between shared and supporting competences[162]. This theory is supported by the topographical collocation of Article 5 TFEU – placed between Article 4 TFEU (shared competences) and Article 6 TFEU (supporting competences) – as well as by the absence of a prohibition against harmonisation of national legislation, unlike what is expressly provided for under supporting competences. Therefore, the Union could, to a certain extent, achieve harmonisation in matters of economic, social, and employment policy, leading to the pre-emption of national regulatory powers. In this perspective, coordinating competences would not differ significantly from shared competences, with the implication that once the Union exercises its legislative power, national procedural mechanisms that frustrate the effet utile of Union law would have to be adjusted, or even disregarded.

According to the opposing view, however, the "coordination" referred to in Article 5 TFEU implies a lower degree of harmonisation compared to shared competences. In these sectors, the Union does not have the power of regulating through binding legal instruments, but rather of elaborating political guidelines via the exercise of non-regulatory powers[163]. Indeed, in the sectors concerned, the legal bases found in Part Three of the TFEU generally grant the Union the power to adopt non-binding and non-legislative acts. Therefore, no genuine conflict can be said to arise between Union acts and domestic law in these areas, which rules out the application of the pre-emption principle altogether. According to this interpretation, procedural autonomy remains intact in areas under coordinating competences, precisely because Union acts lack direct effect, which is a prerequisite for functionalising domestic procedural mechanisms that might hinder the enforcement of EU-based legal positions.

This second position is preferable, not only because it more faithfully reflects the division of competences laid down by the Treaties, but also because it gives full weight to the legal bases provided in Part Three of the TFEU in these matters. For instance, in the field of social policy, the Union legislature may adopt either measures designed to encourage cooperation between Member States, excluding any harmonisation, or directives setting out minimum requirements to be implemented progressively, which are incapable of producing full harmonisation, a necessary precondition for pre-emption to operate. The Commission, on the other hand, "encourages cooperation between the Member States and facilitates the coordination of their action" through

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162 P. CRAIG, *Competence: Clarity, Conferral, Containment and Consideration*, cit., p. 338; ID., *The Treaty of Lisbon, process, architecture and substance*, in 33 *European Law Review*, 2008, p. 148: «while this head of competence is framed largely in terms of co-ordination, the detailed Treaty provisions concerning, for example, economic policy nonetheless accord the European Union powers to take dispositive and peremptory action in certain circumstances».

163 T. TRIMIDAS, *Competence after Lisbon: the elusive search for bright lines*, in *The European Union after the Treaty of Lisbon*, Cambridge, 2012, p. 56; R. BARATTA, *Le competenze interne dell'Unione tra evoluzione e principio di reversibilità*, in *Il Trattato di Lisbona tra novità e conferme*, a cura di CLAUDIO ZANGHÌ e LINA PANNELLA, Torino, 2010, p. 138.

"studies and opinions" and by "organising consultations" – that is, by means of non-binding acts that do not affect the procedural autonomy of the Member States.

As for the supporting competences, governed by Article 5(2) and Article 6 TFEU, the Union may only act to «support, coordinate or supplement» Member State action, without replacing national competences in those areas. The intensity of the Union's involvement in these sectors is clarified by Article 2(5) TFEU, which allows for the adoption of legally binding acts that cannot entail harmonisation of Member States' laws. This prohibition reflects the intent of the Founding Fathers to limit the preclusive effects of Union action in areas deemed central to national identities. Accordingly, preclusive effects cannot arise when the Union acts under its supporting competence; even where binding acts are adopted, Article 2(5) prevents them from producing direct effect in national law. As a result, procedural autonomy in the fields listed under Article 6 TFEU must be regarded as unfettered, since there is no obligation to ensure the effet utile of Union law in such instances[164].

9. *Summary of the Results and Transition Toward the "Crisis of Res Judicata".*

At the end of the analysis developed in this chapter, many conclusions can be drawn. The principle of procedural autonomy of the Member States seems to rest on a straightforward reading of Article 81 TFEU, insofar as it limits the Union's competence in procedural matters to disputes «with cross-border implications».

However, a more pressing question arises as to how one should conceptualise the notion of procedural rule within the context of Union law.

We have demonstrated that domestic legal classifications risk undermining the objective of uniform application of Union law, thereby requiring that the notion of a "procedural rule" assume an autonomous meaning in the context of EU legal order. According to the case law of the Court of Justice, procedural autonomy applies to all provisions which, while not conferring a European legal advantage, nonetheless govern the modalities of its exercise. Thus, from the Union's perspective, even rules deemed substantive under national law may fall within the scope of procedural law.

The principle of procedural autonomy encompasses a wide range of institutions not traditionally classed as procedural.

Since the 1970s, while recognising the existence of procedural autonomy, the Court of Justice has always clarified its inherent limitations: the principles of effectiveness and equivalence. The former ensures that rights conferred by EU law are not rendered practically impossible or excessively difficult to enforce through national procedure. The latter guarantees that EU-derived rights enjoy treatment no less favourable than comparable domestic claims.

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164 R. BARATTA, *Le competenze interne dell'Unione tra evoluzione e principio di reversibilità*, cit., p. 139.

Initially, the Court embraced what doctrine – which we called "integrationist" approach – characterised by a presumption of procedural autonomy, rebuttable only where national procedural rules failed to satisfy the requirements of effectiveness and equivalence. This approach mirrored the political climate of the time: as the then-European Community undertook to respect national procedural rules, Member States were expected to ensure that these rules would not obstruct the enforcement of EU law.

Over time, however, the application of these limitations led the Court toward a more assertive "internationalist" stance. Procedural law came to be regarded as an instrument of implementation for substantive EU law, with the result that any national procedural rule could potentially come into conflict with Union law if it undermined its effectiveness.

This shift led to the functionalisation of certain domestic procedural rules: the principle of party disposition and the limitations to *ex officio* powers of judges were often overridden by the need to ensure effectiveness. Similarly, procedural barriers to appealing arbitral awards were struck down where they hindered judicial scrutiny of decisions that perpetuated abuses of dominant market position.

We linked this internationalist turn to the growing assertion of the principle of primacy: national procedural mechanisms cannot obstruct the effet utile of substantive Union provisions, failing which, the uniform application of EU law is jeopardised.

The principle of effectiveness has played a decisive role in the erosion of national procedural autonomy, operating as the bridge between the so-called twin pillars of direct effect and primacy. It justifies the reinterpretation of national procedural rules, and, where conformity is not possible, their disregard, to uphold EU rights that enjoy direct effect.

Thus, the transition from the integrationist to the internationalist model has resulted in the downgrading of procedural autonomy to a "functionalised competence", leaving Member States with a significantly diminished margin for shaping procedural rules, especially where Union-derived rights are at stake.

In particular, the intersection of primacy and attribution in areas of exclusive or shared EU competence recalibrates the presumption of procedural autonomy: where a domestic case involves directly effective EU rights in a field falling under Union competence, the primacy principle overrides procedural autonomy. Any national procedural rule that obstructs EU law must either be interpreted in conformity or, if that proves impossible, disregarded, unless higher constitutional principles advise judicial restraint.

Having traced this evolution, we turned to case law in exclusive competence areas, notably in the field of State aid control. The vast body of CJEU jurisprudence confirms that the combination of the Commission's exclusive competence, the principle of primacy, and the direct effect of Articles 107 and 108 TFEU, effectively creates an "implicit competence" in procedural matters. This is a subsidiary and contingent competence: subsidiary, because it presupposes ongoing litigation involving directly effective Union rights;

contingent, because the national judge is bound by Article 47 of the Charter of Fundamental Rights and the principle of loyal cooperation, and must adapt national procedural rules to the imperatives of EU law – referring interpretative doubts to the CJEU, which remains the ultimate guardian of such implicit competence.

In the field of shared competence, on the other hand, the erosion of procedural autonomy is conditioned on the actual exercise of EU competence, resulting in the pre-emption of residual national power.

Consumer protection has served as a testing ground for these dynamics. EU legislation has achieved almost complete harmonisation in this field. Much like in State aid control, the CJEU has progressively reshaped national procedural law: first by expanding judicial powers to enable *ex officio* review of abusive clauses – even before the enforcement judge – and then by displacing the authority of implicit *res judicata*, where the judge of the order for payment procedure failed to explicitly assess the fairness of contractual terms.

We concluded that even in shared competence areas, procedural autonomy has been relegated to fields untouched by harmonisation. In consumer law, given the degree of harmonisation, no genuine space remains for national procedural autonomy, mirroring the situation in exclusive competence domains.

The collapse of the procedural autonomy principle in both exclusive and shared competence areas has brought forth a new conceptual paradigm, whereby national procedural law becomes a complement to substantive Union law. In this light, the instrumental nature of procedural norms is undeniable. They are subject to reinterpretation or disregard where they fall short of effectiveness standards dictated by the Court of Justice.

In this sense, the CJEU has effectively unified the relationship between substantive EU rights and national procedural enforcement: merely recognising a substantive entitlement under EU law is insufficient if procedural barriers prevent its effective enforcement.

Conversely, the situation differs in relation to the so-called "third type" competences. Although the Union may adopt binding acts in such areas, Article 2(5) TFEU explicitly rules out any direct effect on domestic law. Consequently, Member States retain full procedural autonomy in these sectors, since the effet utile requirement does not arise.

In conclusion, true procedural autonomy today survives only in the third-type competences – those where the Union holds supporting or coordinating powers and where legislative authority remains with Member States. This entails the impermeability of domestic procedural law when Union law norms don't produce direct effect.

The internationalist paradigm developed by the CJEU has thus redrawn the contours of procedural autonomy and opened the way toward a European civil procedure that is not necessarily confined to cross-border disputes. While its foundations lie in national procedural systems, its boundaries are now flexible and dynamic, redefined case by case by the Court of Justice, to prevent conflicts with fundamental principles of Union law in areas where the Union's legislative competence has been fully exercised.

A clear awareness of this long journey toward the dismantling of national procedural autonomy – undertaken from the *Plateau Kirchberg* – now allows us to address the much-debated issue of the "crisis of *res judicata*" within the European system of judicial protection.

CHAPTER FOUR
THE OVERCOMING OF NATIONAL *RES JUDICATA* IN CONFLICT WITH EU LAW

Section I

Early Signs of Erosion in the Stronghold of Finality: From Köbler to Kempter

SUMMARY: 1. Crisis of *Res Judicata*? – 2. The Scope of the Analysis and the Opportunity for a Case-Based Approach. – 3. The *Köbler* Case. – 3.1. Proper Understanding of the Principle Affirmed in *Köbler* Through the Doctrines of Temporal Limits of *Res Judicata* and Logical Conflicts Between Judgments. – 4. The *Traghetti del Mediterraneo* Case. – 4.1. The Solution Adopted in *Traghetti del Mediterraneo* Has Its Roots in *Köbler*, but Then Goes Further. – 5. The *Kühne & Heintz* Case. – 5.1. The Overcoming of Final Administrative Decisions Contrary to EU Law Through the Mandatory Exercise of *Ex Officio* Review under EU Obligations. – 5.2. Implications of the *Kühne & Heintz* Principle in the Italian Legal System. 6. Some Observations on the Signs of Overcoming National *Res Judicata* Contrary to EU Law in the European Case-Law.

1. *Crisis of* Res *Judicata*?

The analysis conducted in the previous chapters has allowed us, on the one hand, to highlight the phenomenon of the overcoming of *res judicata*, not only from a synchronic perspective but also by looking retrospectively, identifying early signs of this doctrine[1]; and on the other hand, to assess the impact of European Union law and the case-law of the Court of Justice on domestic procedural institutions. These two profiles have sometimes been brought together under an evocative label: the "crisis of *res judicata*[2]."

The undeniable rhetorical strength of this expression is, however, inversely proportional to its ability to precisely define the scope of the problem. In this regard, it has been authoritatively argued that the phrase "crisis of *res judicata*" is as equivocal as it is vague, since it merges and confuses fundamentally different situations: cases where the finality of *res judicata* is not truly implied (as in

[1] See chapter II.

[2] I. ANDOLINA, *Crisi del giudicato e nuovi strumenti alternativi di tutela giurisdizionale. La (nuova) tutela giurisdizionale di merito e le garanzie costituzionali del giusto processo*, in *Giusto proc. civ.*, 2007, p. 317 ff.; M. G. PULVIRENTI, *Intangibilità del giudicato, primato del diritto comunitario e teoria dei controlimiti costituzionali*, in *Riv. dir. pubbl. com.*, 2009, p. 341 ff.; A. L. MARCONI-M. L. MATTA, I. SANDULLI, *Primazia del diritto della Unione e giudicato interno: relazioni e prospettive* de iure condendo, in *Questione giustizia*, 2014, p. 6 ff.; J. NIEVA-FENOLL, *La cosa giudicata: fine di un mito*, in *Riv. trim. dir. proc. civ.*, 4, 2014, p. 1369 ff.; F. CORDOPATRI, *La "crisi" del giudicato*, in *Riv. dir. proc.*, 4-5, 2016, p. 894 ff.; A. PIOTTO, *La crisi, senza fine, del "giudicato"? Tra effettività della tutela e "torsione" ermeneutica degli istituti processuali interni. Riflessioni a margine di Cassazione, ordinanza n. 11174/2024*, in *Diritto del risparmio*, 2, 2024, p. 4 ff.

provisional relief or collective actions), and cases where a final decision, although formally settled, may nonetheless be set aside (such as in instances involving EU law, supervening legislation, or a later constitutional judgment)[3].
It is indeed difficult to reconcile such heterogeneous phenomena under a single label – for example, the trend of the legislator to transform *res judicata* into a kind of negotiable benefit[4], and the inherent finality of judicial determinations no longer subject to ordinary appeal.
Properly understood, the expression "crisis of *res judicata*" refers at least to three distinct issues closely related to the authority of *res judicata*:

> a) the erosion of the ordinary cognition procedure, traditionally seen as the container of procedural activity leading to a merits judgment capable of acquiring the stability typical of *res judicata*[5];
> b) the manipulation of the preclusive effect of *res judicata* for reasons of substantive justice[6]. This dimension reflects a critical stance toward the formalism of the rule of law in favor of a pragmatic realism, according to which «judicial discretion is everything and rule of law is nothing[7]»;
> c) the influence of EU case-law on the stability of formally final judgments, especially those that prove incompatible with European Union law.

It is thus clear that an expression as elliptical as "crisis of *res judicata*" carries a significant risk of imprecision. It must be distinguished whether we are discussing: the policy-oriented question of which procedural models best serve the needs of justice; the judicial discretion to depart from apparently settled precedents in the name of substantive fairness; or rather, the tension between domestic final judgments and overriding supranational imperatives.
Given this framework, we propose to reserve the phrase "crisis of *res judicata*" exclusively to the latter phenomenon and not to the negotiability of finality as such (which pertains to the broader issue of procedural design and the form-function relationship), nor to the phenomenon we earlier labeled as "hidden overcoming" of *res judicata* for reasons of fairness (which implies a deviation from the rule of law). Instead, the crisis of *res judicata* should be understood to refer specifically to those new forms of overcoming: the cases in which final judgments may be invalidated by a ruling of the Court of Justice, by an act of

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[3] F. CORDOPATRI, *La "crisi" del giudicato*, cit., p. 898; P. BIAVATI, *Intervento*, in *La crisi del giudicato*, atti del XXX convegno nazionale dell'associazione italiana tra gli studiosi del processo civile, Cagliari, 2-3 ottobre 2015, Bologna, 2017, p. 343.
[4] G. TRISORIO LIUZZI, *Centralità del giudicato al tramonto?*, in *La crisi del giudicato*, cit., p. 199 ff.
[5] G. TRISORIO LIUZZI, *Centralità del giudicato al tramonto?*, in *La crisi del giudicato*, cit., p. 201; P. BIAVATI, *I procedimenti civili semplificati e accelerati: il quadro europeo e i riflessi italiani*, in *Riv. trim. dir. proc. civ.*, 2002, p. 751 ff.;
[6] A. GIUSSANI, *Appunti dalla lezione sul giudicato delle Sezioni Unite*, in *Riv. dir. proc.*, p. 1560 ff., at 1565.
[7] M. RHEINSTEIN, *Education for Legal Craftmanship*, in 34 *Iowa Law Review*, 1944-45, p. 411 ff.

the EU institutions, by "hyper-retroactive" legislation, or by a subsequent declaration of unconstitutionality affecting the rule of law applied in the final judgment.
Therefore, the expression "crisis of *res judicata*," if correctly understood, appears to partially overlap with the definition of the overcoming of *res judicata* that we have previously formulated as the relevance of the injustice of a decision that is no longer subject to ordinary appeal and in the absence of extraordinary remedies specifically provided for, sealed by an act of the European Union, whether it be a ruling of the Court of Justice or a decision of the Commission[8].
From this perspective, the scope of the problem might be reframed: the original "apocalyptic" approach to the crisis of *res judicata* gives way to a more reassuring "integrated" approach[9]. The latter entails the acceptance of the instrumental nature of national procedural law in relation to the objectives of the European Union and simultaneously encourages reflection on the pursuit of the correct decision, where "justice of the decision" is understood as its conformity with the substantive directives derivable from EU law, to minimize allocative failures[10].
The chessboard of the crisis of *res judicata* thus unfolds as follows: the European Institutions play white and make the first move, aggressively occupying the center by disregarding domestic judgments that encroach upon areas of exclusive Union competence; national judges, diverging from the traditional repertoire of openness, retreat into defensive positions, going so far as to invoke constitutional "counter-limits" to shield national *res judicata* and the constitutional prerogatives of the judiciary power.
The chess metaphor suggests that such an approach leads to an irreparable "perpetual check", where each player keeps moving pieces on the board, hoping for the opponent's fatal error, thereby straining reciprocal relations, when, in truth, chess etiquette would call for a draw.
Our approach to the issue is markedly different: the stalemate that has emerged in recent years because of "solipsistic" interpretations might be resolved by identifying certain limits to the indiscriminate overcoming of *res judicata* that conflicts with European Union law.
A reconstruction of the "crisis of *res judicata*" in the case-law of the Court of Justice is now vital.

2. *The Scope of the Analysis and the opportunity for a case-based approach.*

Indeed, several factors suggest beginning with an analysis of the case-law of the Court of Justice on the matter. This is because, although the Court frequently

[8] See *retro*, chapter I, section I, § 6.
[9] A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: l'intervento della Corte di Giustizia*, in *Riv. dir. proc.*, 1, 2023, p. 291 ff., at 300-301.
[10] R.A. POSNER, *An Economic Approach to Legal Procedure and Judicial Administration, The Journal of Legal Studies*, 1973, p. 399 ff.; A. GIUSSANI, *Efficienza della giustizia e culture della riforma*, Milano, 2018, p. 242 ff.

engages in overruling[11], it never tends to do so explicitly, maintaining instead an appearance of internal coherence[12].

The identification of the milestones that have marked internal discontinuities in the Court's case-law appears, in our view, to be instrumental to a proper approach to the entire issue: devoting more space to case-law analysis does not come at the expense of general theory. Given that the outcomes reached by both European and national case-law appear largely unsatisfactory, beginning with the former allows us to closely examine its theoretical shortcomings and the limits of its practical application.

Moreover, the Court of Justice itself has shown, over the years, a certain impatience with theoretical constructions, as well as with indeterminate legal concepts and general categories. Thus, starting from a general theoretical perspective and only later confronting it with the case-law of the Court of Justice seems unacceptable from the European standpoint.

This part of the work is therefore aimed at developing a handbook for practitioners on the issue of overcoming *res judicata* that conflicts with EU law. This handbook will consider the competing principles of legal certainty, understood as the finality of final judgments, legitimate expectations, and the primacy of EU law in areas of exclusive competence.

3. *The Köbler Case.*

Legal scholarship commonly identifies the *Köbler* judgment as the first moment in which the previously impenetrable shield of national *res judicata* was breached

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[11] E. D'ALESSANDRO, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di giustizia. oggetto ed efficacia della pronuncia*, Torino, 2012, p. 388 ff.

[12] C. CONSOLO, *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla CEDU a sua volta)*, in *Corti europee e giudici nazionali*, cit., *passim*.

by the primacy of EU law[13] (so much so that commentators have even spoken of the "Köblerisation" of EU law to describe its impact[14]).
The facts of the case can be summarised as follows: Mr. Köbler, full professor at the University of Innsbruck, applied to the Austrian administration for the payment of a special length-of-service allowance, arguing that he had accrued the requisite years of service through academic appointments held at universities in other Member States. The Austrian Supreme Administrative Court initially referred a preliminary question to the Court of Justice of the European Union (CJEU) but later withdrew it, relying on a newly issued judgment in an analogous case, which appeared favourable to Köbler's claim. Nevertheless, it ultimately dismissed the claim, reasoning that the allowance in question constituted a "loyalty bonus", thereby justifying a derogation from the provisions of EU law on the free movement of workers and the prohibition of discrimination. That decision became final and binding as *res judicata*. Mr. Köbler then brought an action for damages against the Austrian State before the Vienna Regional Court (*Landesgericht*), alleging that the Austrian judiciary – specifically, its highest administrative court – had infringed EU law, thereby causing him material harm. The referring court submitted a new preliminary question to the CJEU, asking whether the established case-law – according to which the liability of a Member State for breaches of EU law is independent of which organ committed the

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13 European Court of Justice, 30 September 2003, C-224/01, *Köbler c. Repubblica d'Austria*, in *Int'l Lis*, 2005, p. 62 ff., commented by P. BIAVATI, I*nadempimento degli Stati membri al diritto comunitario per fatto del giudice supremo: alla prova la nozione europea di giudicato*,; in *Riv. it. dir. proc. civ*., 2004, p. 879; and by S. DE MARIA, *Recenti sviluppi della giurisprudenza comunitaria in materia di responsabilità degli Stati membri per violazione del diritto comunitario*; in *Riv. dir. int. priv. proc*., 2004, p. 133 ff.; and by G. DI FEDERICO, *Risarcimento del singolo per violazione del diritto comunitario da parte dei giudici nazionali: il cerchio si chiuse?*; in *Foro it*., 2004, IV, c. 4 ff.; and by E. SCODITTI, *«Francovich» presa sul serio: la responsabilità dello Stato per violazione del diritto comunitario derivante da provvedimento giurisdizionale*; in *Danno resp*. 2004, 1, p. 30 ff.; and by R. CONTI, *Giudici supremi e responsabilità per violazione del diritto comunitario*; in *NGCC*, 2, 2005, p. 1 ff.; and by G. ALPA, *La responsabilità dello Stato per «atti giudiziari». A proposito del caso Köbler c. Repubblica d'Austria*; in *European Law Review*, 2004, p. 243 ff; and by M. BREUER, *State liability for judicial wrongs and Community law: the case of Gerhard Köbler v. Austria*; in 63 *The Cambridge Law Journal*, 2004, No. 3 p. 564 ff.; and by A. GARDE, *Member States' Liability for Judicial Acts or Omissions: Much Ado about Nothing?*; J.H. JANS, *State liability and infringements attributable to national courts: a Dutch perspective on the Kobler case*, in *The European Union: an ongoing process of integration*, edited by J.W. DE ZWAAN-J.H. JANS-F.A. NELISSEN-S. BLOCKMANS, Cambridge, 2004, p. 165 ff. See also M. BREUER, *State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v Austria*, in 29 *European Law Review* 2, 2004, p. 247 ff.; M. MAGRASSI, *Il principio di responsabilità risarcitoria dello Stato-giudice tra ordinamento comunitario, interno e convenzionale*, in *Dir. pubbl. comp. eur*., 2004, p. 490 ff.; A. DAVIES, *State Liability for Judicial decisions in European Union and International*, in 61 *The International and Comparative Law Quarterly*, 2012, p. 585 ff.; L. BAIRATI, *La responsabilità per fatto del giudice in Italia, Francia e Spagna, fra discipline nazionali e modello europeo*, Napoli, 2013, p. 75 ff.; K. M. SCHERR, *The Principle of State Liability for Judicial Breaches. The case Gerhard Köbler v. Austria under European Community law and from a comparative national law perspective*, Florence, 2008, p. 18 ff.

14 P. PIVA, *La tradizionale irresponsabilità del giudice davanti al diritto comunitario. Note a margine della «Koblerizzazione» del diritto comunitario e del diritto degli stati membri*, in *Il Diritto della Regione*, 5-6, 2004, p. 809 ff.

breach – also applied where the breach stems from a decision by a supreme national court.
The Court answered in the affirmative way, holding that the principle of compensation of damages caused to individuals as a result of breaches of EU law also applies when such a breach stems from a decision rendered by the Supreme Court, when the breach is sufficiently serious, and there exists a direct causal link between the breach and the damage suffered by the individuals concerned[15].

3.1. *Proper Understanding of the Principle Affirmed in Köbler Through the Doctrines of Temporal Limits of* Res Judicata *and Logical Conflicts Between Judgments*.

In *Köbler*, the Court of Justice admitted the possibility of an action for damages against a Member State whose judicial organs were responsible for the the misapplication of a directly effective rule of EU law[16]. Although this action is not formally identical to the one from which the *res judicata* contrary to EU law arose, it is nonetheless improperly connected to it, as both involve a violation of Union law[17].
Scholars have noted that the second action ends up sharing the same cause of action of the original claim, without, however, allowing the claimant to obtain the same benefit they would have obtained had they prevailed in the first proceedings concluded with a judgment incompatible with EU law, even though, in practical terms, both actions in *Köbler* sought a monetary award, differing only nominally[18].
The solution endorsed by the *Plateau Kirchberg* marks a watershed moment: if *res judicata* is traditionally linked to the declaratory effect of judgments and its authority rests on the finality of adjudication, it thereby upholds the legal value of legal certainty. Under such a view, even an unjust judgment cannot, as a rule, give rise to a compensable injury, since what has been *iudicatum* is presumed to be lawful. It follows that *res judicata* should not ordinarily be open to challenge on the basis of its injustice; in principle, the judge in subsequent proceedings should not assess the injustice of the earlier judgment for the purposes of awarding damages.
However, in *Köbler*, multiple elements converge in support of a departure from that rigidity, allowing for the erosion of the formal sources of obligation and deriving from fundamental principles a justification for asserting that the

[15] G. ALPA, *La responsabilità dello Stato per «atti giudiziari». A proposito del caso Köbler c. Repubblica d'Austria*, cit., p. 3.
[16] C. RASIA *Il controllo della Commissione europea sull'interpretazione del diritto comunitario da parte delle corti supreme degli Stati membri*, in *Riv. trim dir. proc. civ.*, 3, 2005, p. 1025 ff.; v. N. TROCKER, *La Carta dei diritti fondamentali dell'Unione europea ed il processo civile*, in *Riv. trim dir. proc. civ.*, 5, 2002, p. 1171 ff., at 1214 ff.
[17] R. CAPONI, *Corti europee e giudicati nazionali*, in *Corti europee e giudici nazionali*, cit., p. 274.
[18] See C. CONSOLO, *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla CEDU a sua volta)*, in *Corti europee e giudici nazionali*, cit., p. 183.

protection offered by *res judicata* to the successful party does not extend to cases of manifest legal violations.

The solution adopted by the Court of Justice constitutes a "diplomatic masterpiece": a dual-faced compromise that formally preserves the binding authority of the final judgment, without pronouncing its disregard, while simultaneously qualifying that finality – which crystallizes the breach of EU law – as the unlawful act giving rise to State liability. The judgment thus remains binding for the parties and any third parties it affects, yet it simultaneously constitutes an actionable wrong on the part of the Member State[19].

Austria was condemned to pay an amount equivalent to the special service allowance that Mr. Köbler would have received had EU law been correctly applied from the outset, in accordance with the principle of non-discrimination.

Therefore, scholars are correct in interpreting *Köbler* as entailing a substantial bypass of *res judicata*, since for purposes of national law the judgment remains formally binding, though stripped of its normative authority as a declaration of pre-existing law.

On a closer look at the case, the finality of the judgment in *Köbler* would have unjustly shielded a public authority from a legitimate claim by one of its employees, solely due to the breach of EU law committed by the Supreme Administrative Court[20].

Previously, we argued that the overcoming of unlawful *res judicata* is more acceptable in situations where legitimate expectation is absent, or where the judgment was rendered in proceedings between an individual and a public authority, since the latter's reliance on the finality of a decision, even if unjust, is less deserving of protection than that of a private citizen.

If we reject the fiction that the judgment remains binding despite being equivalent to an unlawful act, then *Köbler* essentially affirms the overcoming of *res judicata* by virtue of retroactive *ius superveniens* (in this case, the interpretative judgment of the CJEU), on the grounds that the victorious administration's expectation on the judgment's finality is less worthy of protection than the imperative of correctly applying Union law in a field – free movement of workers – falling within the exclusive competences of the EU.

Therefore, the *Köbler* rule may be interpreted through the lens of the doctrine of the temporal limits of *res judicata*[21]. The case presents a conflict between two distinct rules: one stemming from the binding effect of the national judgment, and the other imposed by the CJEU, binding upon the court assessing the State's liability.

The subsequent interpretative ruling by the CJEU gives new legal significance to facts already encompassed by the procedural bar of *res iudicata pro veritate habetur*.

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[19] P. BIAVATI, I*nadempimento degli Stati membri al diritto comunitario per fatto del giudice supremo: alla prova la nozione europea di giudicato*, cit., p. 65.

[20] In this senso, see R. CAPONI, *Corti europee e giudicati nazionali*, in *Corti europee e giudici nazionali*, cit., p. 331.

[21] R. CAPONI, *L'efficacia del giudicato civile nel tempo*, Milano, 1991.

Accordingly, the relationship between the supervening legal effect (the CJEU judgment) and the assessment contained in the earlier Austrian judgment that denied Mr. Köbler the allowance he was rightfully entitled to, is not one of mere chronological succession but of genuine conflict. It is a conflict because a retroactive *ius superveniens* (the interpretative ruling) affects not only the ongoing legal relationship (*i.e.*, the pension entitlements continuing after the formation of *res judicata*) but also requalifies past elements of the relationship previously adjudicated, assigning them a different legal value, challenging the *res judicata* binding force.

Consequently, the solution in *Köbler* cannot be neatly reduced to the simple formula that treats a judgment contrary to EU law as a mere unlawful fact. The monetary identity of *petitum* in the two actions – one seeking recognition of the pension benefit, the other claiming damages equal to the difference between the pension granted and the one due – reveals a deeper truth: we are facing not merely a wrongful act, but a true overcoming of *res judicata* contrary to Union law.

In *Köbler*, therefore, there is not a practical conflict between the national *res judicata* and the ruling of the *Kirchberg* Court. This is because the two actions brought cannot be considered identical according to the traditional theory of the constituent elements of legal action. Rather, what emerges is a theoretical or logical conflict, in which the effect of the CJEU judgment appears compatible with that of the domestic final judgment.

Indeed, the opposite resolution of the preliminary issue concerning the recognition of employment periods carried out in other Member States results, *de facto*, in a retroactive nullification of the previous determination – through a mechanism similar to that provided under Article 336(2) of the Italian Code of Civil Procedure – by awarding Mr. Köbler compensation equivalent to the differential in pension entitlements denied by the final judgment.

It is thus clear that the *Köbler* judgment achieved the impossible: it upheld the binding content of the domestic *res judicata* under national law, while simultaneously granting redress to the claimant for the breach of EU law by ordering the State to compensate the amounts due. Chapeau, no doubt.

But the reality is altogether different: already in *Köbler*, we can begin to speak of the overcoming of *res judicata* conflicting with European Union law.

4. *The Traghetti del Mediterraneo Case.*

About the *Köbler* rule, Biavati once observed that if placing the supreme national courts in check is a clear consequence of a European policy, it is equally vital – for the strength and authority of the legal order itself – that citizens can rely on the stability of final judgments once rendered[22]. This cautious *fulmen in clausula*

[22] P. BIAVATI, I*nadempimento degli Stati membri al diritto comunitario per fatto del giudice supremo: alla prova la nozione europea di giudicato*, cit., p. 66.

proved to be rather prophetic, finding clear practical confirmation in *Traghetti del Mediterraneo*[23].
The preliminary reference concerned the conditions under which Member States incur torts liability for damages caused to individuals by breaches of EU law attributable to national courts. Indeed, prior to the entry into force of Law No. 18 of 27 February 2015, Italian Law No. 117 of 1988 did not include either the manifest breach of EU law or the failure to make a preliminary reference as grounds for judicial liability. In the case submitted to the *Kirchberg Plateau*, *Traghetti del Mediterraneo S.p.A.*, a maritime transport company, brought an action against the Italian Republic seeking compensation for the damage it had allegedly suffered due to an incorrect interpretation ruled by the Supreme Court of EU rules on competition and State aid, and, in particular, due to the court's refusal to refer the relevant interpretative questions to the Court of Justice.
Specifically, Traghetti del Mediterraneo challenged the compatibility with EU law of State aid granted to its competitor, Tirrenia di Navigazione. The European Commission, in Decision 2001/851/EC concerning the aid provided by Italy to Tirrenia, had found such aid incompatible with the proper functioning of the internal market and ordered recovery. Thus, had the Italian Supreme Court submitted the matter of compatibility to the CJEU, the outcome of the national proceedings would likely have been different[24].
According to the Luxembourg Judges, the need to guarantee individuals effective judicial protection of the rights conferred upon them by EU law precludes any domestic legislation that rules out State liability solely on the basis that the breach of EU law committed by a national supreme court derives from its interpretation of legal norms. Furthermore, the Court's ruling appears to be influenced by the nature of the subject matter involved unlawful State aid and internal market.
Indeed, the Court clarified that to exclude, in such a field, any liability of the State on the ground that the breach of Community law committed by a national court result from an assessment of facts would risk undermining the procedural guarantees afforded to individuals. This is because the protection of the rights they derive from the relevant Treaty provisions depends largely on subsequent legal classification of the facts. Were the State's liability to be categorically excluded following factual assessments made by a court, individuals would be

[23] European Court of Justice, 13 June 2006, C-173/03, *Traghetti del Mediterraneo*, in *Foro it.*, 9, 2006, p. 417 ff., commented by E. SCODITTI, *Violazione del diritto comunitario derivante da provvedimento giurisdizionale: illecito dello Stato e non del giudice*; and by R. CONTI, *Responsabilità per atto del giudice, legislazione italiana e Corte UE. Una sentenza annunciata*; in *Riv. trim. dir. proc. civ.*, 2007, p. 661 ff.; and by C. RASIA, *Responsabilità dello Stato per violazione del diritto comunitario da parte del giudice supremo: il caso Traghetti del Mediterraneo contro Italia*; in *Danno e Resp.*, 5, 2007, p. 518 ff.; and by A. FERRARO, *L'illecito comunitario di un organo giurisdizionale supremo (prima parte)*; ID., *L'illecito comunitario di un organo giurisdizionale supremo (seconda parte)*, *ivi*, 6, 2007, p. 629 ff.; see also V. ROPPO, *Responsabilità dello Stato per fatto della giurisdizione e diritto europeo: una* case story *in attesa del finale*, in *Riv. dir. priv.*, 2006, p. 347 ff.
[24] E. SZYSZCAK-A. CYGAN, *Understanding UE Law*, London, 2008, p. 124.

left without judicial protection in cases where a national court of last instance committed a manifest error in its legal appraisal of the facts[25].

The Court therefore held that EU law precludes a national rule that generally excludes the liability of the Member State for harm caused to individuals by a breach of a directly effective provision of EU law attributable to a court of last instance. Moreover, such liability cannot be limited solely to cases of intentional fault or gross negligence if this resulted in excluding the State's liability in other instances involving a manifest breach of applicable law.

4.1. *The Solution Adopted in Traghetti del Mediterraneo Has Its Roots in Köbler, but Then Goes Further.*

The *Traghetti del Mediterraneo* judgment brought into sharp relief the lack of effectiveness of the domestic legal framework regarding the civil liability of judges. It is worth recalling that prior to Law No. 18 of 27 February 2015 – which adapted the Italian legal system to the principle laid down by the Court of Justice – no direct action for damages could be brought against a judge. The only available remedy was an ordinary tort claim under Article 2043 of the Italian Civil Code brought against the State by the individual harmed by the EU-incompatible *res judicata*. In the absence of a specific statutory provision, the State had no legal basis to seek recourse against the judge[26].

Thus, like in *Köbler*, the Court of Justice recognised the availability of an action for damages due to breach of EU law of the State-as-judge, but only against the State itself, as it could not go so far as to shape a mechanism of recourse without violating the rule of law in procedural matters[27]. Yet a significant distinction must be made with respect to *Köbler*: The entire dispute in *Traghetti del Mediterraneo* revolved around the lawfulness of State aid granted by the Italian Republic to a wholly State-owned company. Such aid enabled the beneficiary to offer substantially lower fares than its competitor, given that the State would cover any losses, effectively driving *Traghetti del Mediterraneo* out of certain routes.

This violation of EU law was the subject of a formal investigation by the Commission, culminating in Decision 2001/851/EC ordering recovery. Had been excluded the liability of the Italian State for the violation committed by the Supreme Court, the direct effect of the Commission's decision would have been undermined.

Perhaps even more so than in *Köbler*, a substantive circumvention of the authority of *res judicata* appeared inevitable. Both the original and subsequent actions involved a monetary claim; the only real difference lay in the formal characterisation of the parties involved. In both cases, the financial burden fell on the State, whether in the guise of the wholly State-owned shipping company

[25] European Court of Justice, 13 June 2006, C-173/03, *Traghetti del Mediterraneo*, cit., § 42-43.

[26] E. SCODITTI, *Violazione del diritto comunitario derivante da provvedimento giurisdizionale: illecito dello Stato e non del giudice,* cit., p. 419.

[27] P. PIVA, *Il principio di effettività della tutela giurisdizionale nel diritto dell'Unione europea*, Napoli, 2012, p. 179 ff.

Tirrenia di Navigazione, or directly as the Italian Republic for the violation of EU law by the Supreme Court.
The supervening Commission recovery decision was decisive. Generally, final judgments are impermeable to retroactive supervening law, unless such law introduces or gives effect to legal values of equal or greater importance than those reflected by the principle of *res judicata*, such as legal certainty or the legitimate expectations of the prevailing party.
Although, in theory, it is difficult to justify that a Commission decision could override the authority of a national judgment under domestic law, this view does not withstand empirical scrutiny. Jurisprudential practice reveals a different pattern: in the field of State aid, the circumvention or disregard of national judgments incompatible with Articles 107 and 108 TFEU is often justified by the need to implement a Commission recovery decision, whether adopted before or after the national judgment became final.
Thus, Commission recovery decisions possess retroactive force and are not deterred by the separation of the factual situation from its legal source once judgment has been rendered. They may reshape the legal interests involved differently from how they were formalised in the final national judgment, unless, in the specific case, a legitimate expectation arose on the part of the prevailing party that would resolve the balancing test in favour of the finality of *res judicata*.
All these elements converge in *Traghetti del Mediterraneo* and allow for the following reconstruction: the final judgment declining Traghetti del Mediterraneo's appeal to the Supreme Court involved not only a breach of the obligation to refer preliminary questions but also a substantive disregard of Article 107(1) TFEU, which was subsequently confirmed by the Commission. Since in the case at hand no legitimate expectation warranted protection – on the one hand, because the beneficiary of the unlawful aid was wholly State-owned; and on the other, because only about a year had passed between the final judgment and the Commission's decision – the Court resolved the balancing test in favour of overcoming the *res judicata*[28].
One might object that *Traghetti del Mediterraneo*, unlike *Köbler*, did not involve the explicit disregard of a national judgment. Yet it must be noted that the preliminary reference made to the Court of Justice concerned another issue: namely, whether the State could be held liable for an irreparable breach of EU law by a court of last instance. Nonetheless, this necessarily entailed an incidental assessment of the national decision's incompatibility with EU law, and thereby an implicit erosion of its binding effect, especially in cases where it conflicted with a supervening Commission decision[29].

5. *The Kühne & Heintz Case.*

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[28] R. CONTI, *Responsabilità per atto del giudice, legislazione italiana e Corte UE. Una sentenza annunciata*, cit., p. 1525.
[29] See, about this issue, European Cour of Justice, 4 March 2020, C-586/18 and C-587/18, *Buonotourist S.p.A. c. Commissione* e *CSTP Azienda della mobilità S.p.A. c. Commissione*.

The idea that a final decision in favour of the State can be overcome was explicitly affirmed for the first time in the *Kühne & Heintz* case[30].
Following the reclassification of certain food products exported by *Kühne & Heintz*, the Dutch authorities ordered the exporter to repay the amounts previously received as export refunds under the customs tariff. The order was challenged by Kühne & Heintz before the competent customs office, which dismissed the claim. Kühne & Heintz challenged the administrative decision before the judicial authority, invoking a subsequent interpretation of the relevant EU rules that was favourable to them, on the grounds that the court of last instance had failed to refer the matter for a preliminary ruling to the Court of Justice. The customs authority once again dismissed the claim, relying on the finality of the previous decision.
In the judicial proceedings brought to challenge this latest rejection, the referring court observed that, in principle, subsequent EU case law should not affect an administrative decision that had become final following the exhaustion of domestic remedies, to preserve legal certainty in administrative action.
Nonetheless, the court recognised that such a principle could be subject to an exception where the court of last instance had rendered its decision in breach of its obligation to make a preliminary reference, and the interpretation adopted was subsequently found to be incorrect by the Court of Justice.

[30] European Cour of Justice, 13 January 2004, C-453/00, *Kühne & Heintz*, in *Urb. App.*, 2004, p. 1151, commented by R. CARANTA, *Effettiva applicazione del diritto comunitario e certezza del diritto, nel caso Kühne & Heitz*. See also, about the principles ruled by the ECJ, D. DE PRETIS, *"Illegittimità comunitaria" dell'atto amministrativo definitivo, certezza del diritto e potere di riesame*, in *Giorn. dir. amm.*, 2004, p. 725 ff.; G. GATTINARA, *Il ruolo comunitario delle amministrazioni nazionali alla luce della sentenza* Kühne & Heitz, in *Dir. com. scamb. int.*, 2004, p. 489 ff.; G. MARI, *La forza di giudicato delle decisioni dei giudici nazionali di ultima istanza nella giurisprudenza comunitaria*, *Riv. it. dir. pubbl. com.*, 2004, p. 1007 ff., at 1022; F. CARINGELLA, *Affidamento e autotutela: la strana coppia*, in *Riv. it. dir. pubbl. com.*, 2008, p. 425 ff.; S. D'ANCONA, *Interesse pubblico, discrezionalità amministrativa e istanza di parte nell'annullamento d'ufficio: riflessioni sui recenti sviluppi dottrinari e giurisprudenziali tra diritto interno e diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2009, p. 537 ff.; P. DE LUCA, *Sull'obbligo di riesame delle decisioni amministrative contrarie al diritto comunitario*, available at: http://www.giustamm.it; M. DEL SIGNORE, *Il ruolo della Pubblica Amministrazione nazionale ai fini dell'effettività del diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2009, p. 442 ff.; P. FERRARI, *Annullamento in autotutela di provvedimenti contrastanti con il diritto comunitario*, in *Giur. it.*, 2008, p. 1286 ff.; D.U. GALETTA, *Autotutela decisoria e diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2005, p. 35 ff.; R. GIOVAGNOLI, *L'atto amministrativo in contrasto con il diritto comunitario: il regime giuridico e il problema dell'autotutela decisoria*, available at: http://www.giustamm.it; F. GOISIS, *L'annullamento d'ufficio dell'atto amministrativo per illegittimità comunitaria*, in *Dir. amm*, 2010, p. 439 ff.; G. GRECO, *Illegittimità comunitaria e pari dignità degli ordinamenti*, in *Riv. it. dir. pubbl. com.*, 2008, p. 514; G. GRÜNER, *L'annullamento d'ufficio in bilico tra i principi di preminenza e di effettività, da un lato, ed i principi di certezza di diritto e dell'autonomia procedurale degli Stati membri, dall'altro*, in *Dir. proc. amm.*, 2007, p. 235 ff.; N. PIGNATELLI, *L'illegittimità comunitaria dell'atto amministrativ*o, in *Giur. Cost.*, 2008, p. 3635 ff.; L. RAIMONDI, *Atti nazionali inoppugnabili e diritto comunitario tra principio di effettività e competenze di attribuzione*, in *Dir. Un. eur.*, 2008, p. 773 ff.; S. VALAGUZZA, *La concretizzazione dell'interesse pubblico nella recente giurisprudenza amministrativa in tema di annullamento d'ufficio*, in *Dir. proc. amm.*, 2004, p. 1245 ff.; M. GIAVAZZI, *Anatomia del processo amministrativo. Riflessione sull'autonomia processuale negli Stati dell'UE*, Napoli, 2021, p. 131 ff.

The judges in *Kirchberg*, relying on the principle of loyal cooperation under Article 4 TEU, held that EU law requires a national administrative authority to annul, *ex officio*, a final decision adverse to an individual, adopted on the basis of an interpretation of EU law later overturned by the Court of Justice, provided that the following four conditions are met:

> a) under national law, the administrative body must have the legal authority to revisit and reverse its earlier decision;
> b) the decision in question must have become final because of a ruling by a national court of last instance that failed to refer the matter to the Court of Justice for a preliminary ruling;
> c) the subsequent judgment of the Court of Justice must reveal that the national decision was based on an incorrect interpretation of EU law, reached without any recourse to the preliminary reference procedure; and
> d) the individual affected must have approached the administrative authority promptly after becoming aware of the new ruling from the Court of Justice.

5.1. *The Overcoming of Final Administrative Decisions Contrary to EU Law Through the Mandatory Exercise of Ex Officio Review under EU Obligations*.

As noted, for the first time in *Kühne & Heintz* the Court of Justice explicitly affirmed that, under certain conditions, a decision that has become final in accordance with national law may be overcome by a retroactive *ius superveniens* implementing EU law, as articulated in a preliminary ruling from the ECJ.
However, it has already been emphasised that the overcoming of *res judicata* depends on the balancing of multiple factors, the presence of which in the specific case may justify reopening some final decisions more readily than others. Legal scholarship has rightly pointed out that in *Kühne & Heintz*, administrative reconsideration of a decision – even after the formation of *res judicata* concerning its legitimacy – was possible because the rejection of the claim by an administrative court produces weaker preclusive effects than a grant, being limited only to the grounds of challenge raised by the claimant. This means that the emergence of new grounds, prior to the expiry of the time limit for *ex officio* annulment, can be raised within that procedure[31]. Moreover, it is more acceptable for a rejection decision, favouring the administration and concerning matters within the EU's exclusive competence (such as customs duties), to be displaced by an incompatible judgment of the Court of Justice. This is even more true if the affected party promptly requests the administration to exercise its *ex officio* powers after becoming aware of the new ruling.

[31] V. CERULLI IRELLI, *Diritto europeo e diritto interno nel sistema di tutela giurisdizionale delle controversie di diritto pubblico (intorno al principio di effettività)*, in *Riv. it. sc. giur.*, 1, 2010, p. 197 ff., at 215; S. VACCARI, *Il giudicato nel nuovo diritto processuale amministrativo*, Torino, 2017, p. 152 ff.

In other words, at present, one may admit a form of retroactivity *in bonam partem*, modelled after Article 2(2) of the Italian Criminal Code, leading to the invalidation of a final decision that violates EU law, provided that the beneficiary of that final decision is a public administration. In such cases, the principle of legal certainty and legitimate expectation is not fully engaged.
Once again, the underlying logic of overcoming final decisions contrary to EU law can be found in the theory of the temporal effects of *res judicata* and in the hyper-retroactivity often attributed to decisions of the Court of Justice[32]. Such hyper-retroactivity can easily undermine the finality of rejection decisions favourable to public administrations, since there is no expectation to protect[33].
In *Kühne & Heintz*, the administrative rejection of the request to annul the reimbursement order did not produce any legal benefit for third parties, thus allowing the administration to reverse its own determination despite the formation of a final ruling validating the lawfulness of its action. From a broader perspective, the *Kühne & Heintz* principle implies that when no competing interests must be balanced against the restoration of legality, the annulment of the unlawful administrative act becomes a mandatory exercise of power[34].
Indeed, the principle of loyal cooperation, which forms the basis of the *Kühne & Heintz* judgment, implies that, at least in areas of exclusive EU competence, the national administration must fully exhaust its traditional discretion in the exercise of secondary powers. This obligation is even stronger where no legitimate expectation worthy of protection exists to maintain the act, even if that act has been confirmed by a final judgment favourable to the State.

5.2. *Implications of the Kühne & Heintz Principle in the Italian Legal System*.

Looking at the Italian legal framework, the rule established in *Kühne & Heintz* appears to be applicable through a purposive interpretation of Article No. 21-*nonies* of Law No. 241 of 1990. The annulment of an administrative act contrary to EU law is conditioned on the existence of "reasons of public interest," which can easily be identified in the *ius superveniens* represented by the preliminary ruling of the Court of Justice or the Commission decision requiring the recovery of unlawful State aid.
However, the exercise of *ex officio* powers to annul the administrative act must occur within a "reasonable time," and in any case no later than twelve months from the adoption of the decision granting authorisation or conferring economic benefits. This second requirement, albeit an expression of the principle of procedural autonomy of Member States, may potentially conflict with the rule laid down in *Kühne & Heintz*, and consequently with the primacy of EU law.

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[32] R. CAPONI, *Corti europee e giudicati nazionali*, in *Corti europee e giudici nazionali*, cit., p. 296 ff.
[33] F. MERUSI, *Buona fede e affidamento nel diritto pubblico. Dagli anni "Trenta" all'"Alternanza"*, cit., p. 98; M. GIAVAZZI, *Anatomia del processo amministrativo. Riflessione sull'autonomia processuale negli Stati dell'UE*, cit., p. 138.
[34] M. MACCHIA, *Legalità amministrativa e violazione dei diritti non statali*, cit., p. 361 ff.

In fact, the *dies a quo* for the exercise of the annulment power is identified as the date the unlawful measure was adopted. However, it is highly unlikely that the legal proceedings concerning the legality of the contested measure – due to its incompatibility with EU law – would conclude within one year of its adoption. This means that a final rejection could potentially preclude the annulment of a measure that violates EU law.
From this perspective, a purposive interpretation suggests that the *ius superveniens*, whether a judgment of the Court of Justice or a Commission decision, should be regarded as sufficient to reset the time limit both for the administration to annul the measure and for the affected party to file the corresponding request. This would legitimise the individual to raise, even judicially, a ground of unlawfulness not previously included in the temporal scope of the original rejection judgment, as it arose subsequently.
Thus, it appears reasonable to defer the *dies a quo* to the date of publication in the Official Journal of the European Union of either the Court of Justice's judgment or the Commission's decision. This approach aligns with a trend already present in Italian case law, which often tends to adjust the running of peremptory deadlines to ensure the effectiveness of EU law.
In any case, such a purposive interpretation is viable only if, in the specific context of the exercise of administrative powers, no legitimate expectation of third parties is affected.
Accordingly, the principle of legitimate expectation acts as a counterweight to the requirements of affirming EU legality, and to the overcoming of *res judicata* incompatible with EU law, as will be further clarified in the following sections[35].

6. *Some Observations on the Signs of Overcoming National Res Judicata Contrary to EU Law in the European Case-Law.*

The analysed judgments in this section have opened a first breach in the fortress of finality of unjust final judgments.
The underlying reasons can be traced, in various ways, to the gradual erosion of the procedural autonomy of the Member States, the need to ensure the effective application of Union law in critical areas, and the balancing exercise between the finality of judgments and the primacy of EU law, resolved in favour of the latter. Due to the absence, in the specific cases analysed, of any legitimate expectation on the finality by the winning party.
Moreover, the core rationale underlying the analysed case law lies, on one hand, in the condemnation of the failure by the national court of last instance to make a preliminary reference, in breach of Article 267 TFEU, and, on the other, in the protection of the individual, who had exhausted all ordinary legal remedies available and had also diligently requested the withdrawal of the administrative act once the interpretative judgment of the Court of Justice revealed its incompatibility with EU law.

[35] See *infra*, chapter V, section II.

Within these strict limits, the overcoming of *res judicata* appears to be acceptable, as this form of yielding partially compensates for the absence of an extraordinary ground for revision, and does not fundamentally undermine the authority of the final judgment, even though it was issued in breach of Union law due to the clear non-compliance by the national court of last instance (*i.e.* failure to refer the preliminary ruling to the ECJ).

These are, in effect, exceptional cases, marked by special requirements of effective judicial protection for individuals, which justify a context-specific application of the principle of sincere cooperation, as the Court itself emphasised in *Kühne & Heintz*.

During the period examined in this section, the Court of Justice did not yet go so far as to require the disregard of the national rule which establishes the finality of a judgment no longer subject to ordinary remedies. That step would come later, with the *dictum Lucchini* in which, for the first time, the Court of Justice expressly ordered the disregard of a final national judgment that conflicted with a prior Commission decision requiring the recovery of unlawful State aid, overriding thus the principle of finality.

However, *Lucchini* cannot be merely interpreted as an instance of a higher legal order imposing its command on a subordinate one. A closer examination of the factual background reveals an alternative perspective. This perspective deserves scrutiny to understand why the Court felt compelled to go so far as to require the disregard of the final judgment.

Section II
The Apex of the "Crisis of Res Judicata*": From the Lucchini Case to the Avio Lucos Case, the Overcoming of Final Judgments in Matters of Exclusive UE Competence*

1. *The Lucchini Case: a Final Judgment Preventing the Recovery of a State Aid Scheme Incompatible with EU Law Must Be Disregarded.*

The gradual eclipse of the principle of procedural autonomy of the Member States in areas of exclusive competence is the real reason behind the disregard of final judgments incompatible with the prohibition of unlawful State aid[1]. Indeed, cases of overcoming of *res judicata*, with the consequent disregard of Article 2909 of the Italian Civil Code, mainly concern the field of State aid. In this area, such overcoming is justified by the Court to prevent the national judge's invasion of the exclusive competence of the Commission[2].

[1] See *supra*, chapter III, §§ 3 and 6.
[2] About the overcoming of *res judicata* cause the violation of federal exclusive competence in the U.S. legal order see R. C. ZACHARY, *Res Judicata, State Adjudications, and the Telecommunications Act of 1996*, in 83 *Univ. of Chicago Law Review*, 2016, p. 893 ff., at 917 ff.: «[A]nalysis of the structure and purpose of the Act demonstrates that allowing state agencies to have final, binding interpretations of the Act would conflict with Congress's intent. […] Applying *res judicata* would undermine federal oversight and fracture this essential uniformity, preventing the Act from

This statement, however, requires clarification. If the reason for overcoming *res judicata* were in fact attributable solely to an issue of the Commission's "competence", the logical corollary would be the lack of jurisdiction (or absolute lack of jurisdiction) of the national judge in matter of State aid. This does not correspond at all to the current allocation of venues, as recognised (and intended) by the existing system. In fact, while it is true that only the Commission is competent to assess the "compatibility" of aid with the internal market under Article 107(3) TFEU, it is also true that the assessment of the "existence" of aid is within the competence of the national judge as well[3].
The critical aspect of the system stems from the fact that, at least in the case of so-called "new" aid, the assessment of the existence of the aid precedes that of compatibility. As a result, a national judge's finding on the existence of aid risks precluding the Commission's subsequent assessment of its compatibility. Moreover, it is entirely normal for a decision of the national judge to be reviewed and, potentially, superseded by a different assessment from the Commission, should a decision of incompatibility or recovery of aid already granted be adopted while the time limit for filing an appeal is still pending. Indeed, the fact that a national court has excluded the existence of State aid in relation to a measure cannot prevent the Commission from subsequently concluding that the measure in question constitutes unlawful and incompatible aid[4]. The same criterion is applied when there is a ruling from the Court of Justice on the same matter (for example, in proceedings challenging the Commission's decision). In other words, the exercise of judicial power by the national judge does not pre-empt the jurisdiction of the EU institutions.
The problem is further aggravated by the fact that establishing the existence of State aid normally requires the assessment of several complex issues lying outside the competence and expertise of national judges.
Accordingly, a national *res judicata* which excludes the existence of aid and, thus, the need for its prior notification to the Commission under Article 108(3) TFEU, will always be potentially open to overcoming, since it is exposed to a divergent assessment by the Commission or the Court of Justice – a scenario which, realistically, is far more likely when the assessment by the national judge is not in line with the complex criteria developed by the Court of Justice and the Commission's practice[5].
It might be objected that is contrary to the principle of procedural economy recognising the national judge's competence to ascertain the existence of State aid when that finding can subsequently be nullified by a different assessment from the Commission. One might further note that the legal system already

serving its purpose», because «[T]he Act protects this important goal of uniformity by restricting states from acting in any way that contravenes federal regulation» (p. 942).

[3] S. MARINO, *Il ruolo del giudice nazionale nell'enforcement della disciplina sugli aiuti di Stato nel diritto dell'Unione Europea*, Milano, 2021, p. 33 ff.

[4] Communication 2021/C 305/01, § 32.

[5] For these criteria se Communication 2016/C 262/01.

provides, as a possible consequence, for the opening of infringement proceedings under Article 28 of UE Regulation No. 1589 of 13 July 2015.
The apparent contradiction seems to be resolved by bringing the principle of primacy into the analysis conducted so far. The judgment of the national court and the decision of the Commission (or the ruling of the Court of Justice) concern the same factual situation. This is therefore a very different case from that concerning the relationship between a national authoritative act (administrative decision or judgment) and an EU legislative act. In the latter case, the conflict clearly entails a defect in the national act, but that defect does not render it null and void: under the applicable regime, it is merely voidable[6]. This regime also applies to judgments of the national court, since the breach of an EU legislative act constitutes an *error in iudicando* that can be challenged through ordinary remedies until the judgment becomes final. Similarly, a final judgment is indeed tainted by the defect of such a conflict, but it does not, for that reason alone, lose effectiveness under national law.
The situation is quite different in the case of a conflict between a national act (administrative decision or judgment) and an EU act (decision of the Commission or ruling of the Court) that relate to the same specific case: unlike what happens with a breach of an EU legislative act – which continues to produce effects in all other situations within its scope – one of the two acts must necessarily give way, since it is plainly impossible for two contradictory prescriptive acts concerning the same concrete case to be simultaneously effective. Given the role and binding force that the Treaty assigns to EU decisions under Article 288(4) TFEU – which are binding in all their elements and may be set aside only by a ruling of the Court of Justice – it is far more likely that the losing act will be the national judgment, even if final.
This is also true where there is a ruling of the Court of Justice confirming the validity of the Commission's decision or otherwise ruling, even in preliminary proceedings, on the specific case of State aid.
This conclusion follows not only from the division of competences, since the national judge can indeed rule on State aid matters, but also from the existence of a conflict between two acts that prescribe and decide on the same factual situation. In line with the logic underlying the principle of primacy, in cases where prescriptive acts relating to the same concrete case and in mutual conflict overlap, preference is to be given to the EU legal act[7].
Accordingly, overcoming *res judicata* should occur only where a decision of the Commission (or a ruling of the Court) has been issued and is contrary to the findings of the national court, and not simply where the judgment is in general conflict with EU law on State aid.

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[6] G. DELLA CANANEA, *Diritto amministrativo europeo*[3], V, in *Corso di diritto amministrativo*, diretto da S. CASSESE, Milano, 2011, p. 198 ff.; F. CARINGELLA, *Manuale di diritto amministrativo*, Roma, 2023, p. 1212 ff.; M. FRATINI, *Manuale sistematico di diritto amministrativo*, Roma, 2022, p. 18 ff.; R. VILLATA-M. RAMAJOLI, *Il provvedimento amministrativo*, in *Sistema del diritto amministrativo*, Torino, 2017, p. 457 ff.
[7] See European Tribunal, 11 May 2022, T-913/16, *Fininvest*, §§ 105-107.

Even with this limitation, in recent years the overcoming *res judicata* in the field of State aid has assumed grew exponentially[8].
The rationalisation of the rule laid down by the *Plateau Kirchberg* implies that the need to safeguard the effectiveness of EU law cannot be hindered by domestic

[8] European Court of Justice, 18 July 2007, C-119/05, *Lucchini*, cit., §§ 59, 62 e 63: «[A]ccording to the national court, Article 2909 of the Italian Civil Code precludes not only the reopening, in a second set of proceedings, of pleas in law which have already been expressly and definitively determined but also precludes the examination of matters which could have been raised in earlier proceedings but were not. One of the consequences of such an interpretation of that provision may be that effects are attributed to a decision of a national court which exceed the limits of the jurisdiction of the court in question as laid down in Community law. It is clear, as the Consiglio di Stato has observed, that the effect of applying that provision, interpreted in such a manner, in the present case would be to frustrate the application of Community law in so far as it would make it impossible to recover State aid that was granted in breach of Community law. As stated at paragraph 52 above, the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts. That rule applies within the national legal order as a result of the principle of the primacy of Community law. he answer to the questions referred must therefore be that Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final.». About *Lucchini*, see P. BIAVATI, *La sentenza Lucchini: il giudicato nazionale cede al diritto comunitario* in *Rass. Trib.*, 2007, p. 1591; C. CONSOLO, *La sentenza Lucchini della Corte di Giustizia: quale possibile adattamento degli ordinamenti processuali interni e in specie del nostro?* cit., p. 224 ff.; ID., *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla cedu a sua volta)*, cit., p. 184 ff.; R. CAPONI, *Corti europee e giudicati nazionali*, cit., 361 ff.; E. SCODITTI, *Giudicato nazionale e diritto comunitario*, in *Foro it.*, 2007, 11, c. 534 ff.; PICARDI, *Eventuali conflitti fra principio del giudicato e principio della superiorità del diritto comunitario*, in *Giust. civ.*, 2008, I, p. 561 ff.; B. ZUFFI, *Il caso Lucchini infrange l'autorità del giudicato nazionale nel campo degli aiuti statali*, in *Giur. It.*, 2008, p. 381 ff.; F. P. LUISO, *La cedevolezza del giudicato*, in *La crisi del giudicato*, cit., 2017, p. 75 ff., and also in *Riv. dir. proc.*, 2016, p. 17 ff.; A. BIONDI, *Case Law Comment: Case C-119/05, Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA,* XLV, in *Comm. Market Law Rev.*, 2008, p. 1459 ff.; C. DI SERI, Primautè *del diritto comunitario e principio della res iudicata nazionale: un difficile equilibrio*, in *Giur. it.*, 12. 2009, p. 2836 ff.; A. MORRONE, *L'obbligo di recupero degli aiuti di Stato tra diritto comunitario e giudicato interno*, in *Il Lavoro nella Giurisprudenza*, 12, 2007, p. 1209 ff.; F. FRADEANI, *La sentenza "Lucchini": il giudicato sostanziale alla prova della Corte di giustizia CE*, in *Dir. prat. trib. int.*, 2008, p. 571 ff.; G. PETRILLO, *Il «caso Lucchini»: il giudicato nazionale cede al diritto comunitario*, in *Dir. prat. trib.*, 2008, p. 413 ff.; V. NUCERA, *La tenuta del giudicato nazionale al banco di prova del contrasto con l'ordinamento comunitario*, in *Riv. dir. trib.*, 2008, p. 161 ff.; M. T. STILE, *Giudicato interno e giurisdizione comunitaria: la composizione dei contrasti*, in *Dir. com. e scambi int.*, 2008, p. 873 ff.; D. SIMON, *Autorité de la chose jugée de l'arrêt d'une jurisdiction nationale devenu définitif*, in *Juris Classeur*, Europe, 2007, p. 235 ff.; X. GROUSSOT-T. MINSSEN, *Res Judicata in the ECJ Case Law: Balancing Legal Certainty with Legality?*, cit., 385 ff.; P. BŘÍZA, *Lucchini SpA – is there anything left of res judicata principle?*, in *Civil Justice Quarterly*, 2008, p. 40 ff.; P. NEBBIA, *Do the rules on state aids have a life of their own? National procedural autonomy and effectiveness in the Lucchini case*, in *ELR*, 2008, p. 427 ff.; v. anche, più di recente, M. FERRI, *Il principio della* Res Judicata *e l'effettività della tutela dei diritto garantiti dall'ordinamento dell'Unione: verso nuovi sviluppi di una antica questione?* in *Osservatoriosullefonti*, 2, 2022, p. 207 ff., at 231 ff.

legal institutions, still less by *res judicata*[9]. Although *res judicata*, in its substantive meaning, is an essential guarantee of the principles of legal certainty and the parties' expectations on the outcome of the proceedings. Consequently, the conflict between the effectiveness of EU law and the preservation of the finality – which, according to the Court of Justice itself, constitutes a common constitutional tradition of the Member States under Article 6(3) TEU within the scope of national procedural law – has been resolved by the Court in favour of the former.

This brings us to the *Lucchini* judgment, which ordered the disregard of substantive *res judicata* and, consequently, of the provision in Article 2909 of the Italian Civil Code, insofar as its finality prevents the recovery of State aid granted in breach of EU law and whose incompatibility with the common market has been declared in a decision of the Commission that became final due to not being challenged in time before the Court of Justice.

The effectiveness of EU law on the recovery of unlawful State aid would have been nullified had the *res judicata* not been disregarded once its conflict with a prior Commission decision had been established. However, in *Lucchini*, the disregard of *res judicata* is the result of the convergence of three distinct factors:

> a) first, the preclusion of "what has been raised and what could have been raised" meant that the national judge could not review the State's obligation to pay the contested State aid scheme to Lucchini, even though a Commission decision, prior to the judgment of the first-instance judgment, had found it contrary to EU law and ordered its recovery. The formation of *res judicata* on the lawfulness of the aid scheme thus entailed an encroachment by the national judge into the exclusive competences of the European Commission;
> b) according to the settled case-law of the Court of Justice, the assessment of the compatibility with the common market of aid measures or aid schemes falls within the exclusive competence of the Commission, whose decisions are subject to review only by the Court of Justice[10]. Although national judges may review the validity of an EU act, they are not competent to declare it invalid themselves, since the EU judicial protection system designates the Court of Justice as the natural judge for such disputes. Indeed, considering that the allocation of competences between Member States and EU institutions is based on the principle of conferral, whereby the former have transferred specific competences to the latter, any encroachment by the national judge into the exclusive

[9] D. ORDOÑES-SOLIS, *Waiting for National Judges in Infringement Proceedings on State Aid,* in *EStAL*, 3, 2017, p. 377 ff., at 392: «the credibility of all EU State aid system is based on this action and on deterrent financial penalties to Member States. [...] National Courts play a role that is subordinate, insofar as their duty is to take all possible steps to ensure that the European obligation of recovery is effectively carried out».

[10] European Court of Justice, 11 July 1996, C-39/94, *SFEI*, § 42.

competences of the EU – whether of the Commission or the Court of Justice – entails an upheaval of the Union's constitutional framework. Moreover, this exclusive competence was made even more explicit in Article 41 of the ECSC Treaty, which stated: «[O]nly the Court shall have jurisdiction, by way of preliminary ruling, to decide on the validity of acts of the High Authority and the Council, where a dispute brought before a national court calls such validity into question».

The ideal continuity between Article 41 of the ECSC Treaty and Article 263 TFEU, which no longer uses the adverb "only", nonetheless leaves no room for national courts to review the validity of EU acts. This underpins the view that the formation of *res judicata* on the validity of an aid scheme incompatible with the internal market runs counter to the principle of conferral and, as such, may be neutralised by the Court of Justice through the disregard of the national provision conferring *res judicata* authority and finality[11];

c) the Commission's exclusive competence in the field of State aid, coupled with the exclusive jurisdiction of EU courts to annul its decisions under Article 288(4) TFEU, might seem sufficient to justify the overcoming of *res judicata* in the *Lucchini* case. However, before the national court, the State Attorney's Office failed – whether through negligence or wilful misconduct – to raise the prior Commission decision. Thus, over the long-running *Lucchini* affair looms the serious suspicion of an attempted collusion to the detriment of the Commission. This circumstance could have influenced the panel's conviction in favour of disregarding *res judicata*.

That said, a close examination of the facts of the case reveals a scenario more complex than the account condensed in the Court of Justice's *dictum*.

1.1. *The Facts of the Lucchini Case.*

In 1985, Lucchini S.p.A. submitted to the Ministry of Industry an application for financial aid, pursuant to Law No. 183 of 1976, for the modernization of its steel production plants. Since the contribution was only partially granted, in 1989 the company brought an action against the Ministry seeking recognition of its right to receive the entire aid originally requested.

In 1990, while the first-instance proceedings were still pending, the European Commission declared the State aid scheme sought by Lucchini incompatible with the common market. The Commission's decision was published in the Official Journal of the European Communities and notified to the Ministry, while Lucchini did not challenge the recovery decision before the Court of

[11] European Court of Justice, 22 October 1987, C-314/85, *Foto-Frost*, § 20.

Justice. The State Legal Service, acting in defence of the Ministry of Industry, conspicuously failed to raise in court the supervening decision of the Commission.

In 1991, the Rome Tribunal upheld the claim, basing its ruling solely on Law No. 183 of 1976, which was subsequently confirmed by the Rome Court of Appeal in 1994. The State Legal Service advised the Ministry that lodging an appeal to the Court of Cassation would be inappropriate, given the correctness of the appellate decision.

In 1996, in execution of the judgment, the Ministry paid Lucchini more than one billion and seven hundred million lire. On 20 September of the same year, following a formal demand from the European Commission, the Ministry revoked the aid and required Lucchini to return the amounts unlawfully retained. Lucchini successfully challenged the revocation order before the administrative court; indeed, the prior formation of the civil judgment on the entitlement to the said State aid scheme precluded revocation in the absence of imperative and supervening public interest grounds. On appeal, the Council of State referred two preliminary questions to the Court of Justice, essentially asking it to resolve the conflict between the European Commission's decision and the subsequent civil judgment.

For the reasons already highlighted, the Court of Justice ordered the disregard of the national judgment.

Once the proceedings were resumed before the Council of State, its judgment was challenged before the Court of Cassation «on grounds relating to jurisdiction», according to Art. No. 111, § 8, of the Italian Constitution. The judgment of the Supreme Court of the 19 May 2008, No. 12641, upheld the appeal, remitting the matter to the Rome Tribunal on the basis that disputes concerning the restitution of sums unduly retained fall within the jurisdiction of the ordinary courts, even where the public administration is involved, since no exercise of discretionary power is at stake.

The Rome Tribunal, in open defiance of the Court of Justice, upheld Lucchini's claim, recognising its entitlement to the contribution received[12].

1.2. *The "Disregard" of the Lucchini Dictum (and of European Law) by National Courts.*

The decision rendered by the Rome Tribunal deserves analysis for two distinct reasons: first, the catechetical style it adopts, which is very rarely used in judicial decisions; and second, the blatant disregard it shows for over ten years of European case law on disregard, the susceptibility of *res judicata*, and administrative self-remedy.

The reasoning of the judgment opens with a question: given that Lucchini's right to obtain the funding was recognised by a final judgment, can that judgment be called into question on the ground that it is contrary to Community law, thereby

[12] Trib. Roma, 23 March 2011 n. 6039, in *Int'l Lis*, 2011, p. 139 ff., commented by G. RAITI, *La forza "di acciaio" del giudicato Lucchini nell'inatteso (temporaneo?) epilogo della vicenda pregiudiziale comunitaria dinanzi al Tribunale di Roma*.

legitimising the Ministry's claim to recover the sum paid because of that judgment? As was predictable, the answer is negative.
It is in fact held that the Ministry cannot recover the sum disbursed through self-remedy, since the administration merely made the payment following enforcement proceedings, nor can the administration disregard the administrative act granting the State aid: «there is no administrative measure that can be said to be annullable or revocable by the Ministry, which paid the sum solely in execution of a judicial decision There does not appear to be any rule in the Italian legal order allowing the public administration to disregard final judgments when they conflict with Community law. Or rather, there is no rule allowing the public administration to nullify res judicata, in the name of Community law, simply by administrative means, through a decree».
Neither of these arguments is convincing. The first, because there is indeed an administrative act subject to self-remedy – namely, the 1989 measure granting the State aid – pursuant to the rule drawn from the *Kühne & Heintz* judgment; the second, because it underestimates the impact of the Commission's recovery decision on the sustainability of the administrative act, and subsequently on the judgment.
Equally questionable is the final remark that closes the reasoning of the decision under review: «*res judicata* prevents the reopening not only of decisions wrong under domestic law, but also those wrong under Community law. Nor can anything different be inferred from the so-called primacy of Community law over domestic law. That national law must comply with Community rules means that such primacy applies in the creation and application of the law, but it does not mean that *res judicata* can be questioned under Community law. The primacy principle concerns the relationship between sources, not the principle that the determination of a right must at some point become final, even if it is wrong[13]».
The error in the reasoning is clear. The idea that, outside the system of extraordinary remedies, civil *res judicata* also covers the manifest injustice of a decision does not correspond to the reality of case law; in fact, the legal system, as already highlighted in this work, contemplates various instances in which *res judicata* may be set aside, outside the scope of extraordinary appeals. Likewise, the courts, for reasons of justice, often modulate the objective limits of *res judicata* to curb its preclusive effects where the exhaustion of what could have been claimed would result in intolerable injustice – a phenomenon we have defined as "hidden flexibility of *res judicata*."
It is significant that the Rome Tribunal's judgment avoids confronting the two main pillars of the Court of Justice's decision: the European Commission's exclusive competence in State aid matters and the precedence of its recovery decision over the first-instance judgment. *Res judicata* conflicting with EU law would not be removable because the domestic system does not provide a means of recovering sums paid by the administration because of enforcement proceedings.

[13] Trib. Roma, 23 March 2011 n. 6039, cit.

This decision was appealed by the Ministry. However, the Rome Court of Appeal, in a surprising ruling[14] – the outcome of which had been widely predicted by Scholars[15] – invoked the well-known "counter-limits" theory to defend national *res judicata*[16]. It stated that the principle of procedural autonomy of the Member States necessarily implies the finality of *res judicata*, even when it infringes, on one hand, the primacy of European law, and on the other, the principle of conferral under Article 5(2) TEU, which, as is well known, underpins the competence allocation system set out in the TFEU.
In the Court's reasoning, procedural autonomy serves to identify the "counter-limit" allegedly breached by the Court of Justice's dictum; indeed, if one were to allow the superseding of res judicata formed in breach of Union law – or more precisely, in disregard of the Commission's exclusive competence in State aid matters – «the independence and autonomy of the national judiciary would be gravely impaired, causing an unacceptable infringement of our constitutional framework and of the fundamental principles of the Constitution». Thus, if one is not mistaken, Articles 102, 103, and 104 of the Italian Constitution are elevated to the status of a unilateral "counter-limit" against the "subversive" logic of EU law.
The decision of the Court of Appeal suggests that in the complex *Lucchini* saga there is no room for judicial dialogue[17]; indeed, the same Court of Appeal admitted that the approach adopted «entails the persistence of consequent unresolved problems and issues in relation to the so-called susceptibility of national *res judicata* to Union law and the consequent need to resolve, once and

[14] See Court of Appeal of Rome, 20 dicembre 2019, n. 7949, in *Giur. it.*, 12, 2021, p. 2638 ff., with, *si vis*, my comment: G. DE CESARE, *Ancora Lucchini! La Corte d'Appello di Roma aziona i "controlimiti" a difesa del giudicato nazionale*.

[15] G. RAITI, *La forza "di acciaio" del giudicato Lucchini nell'inatteso (temporaneo?) epilogo della vicenda pregiudiziale comunitaria dinanzi al Tribunale di Roma*, cit., p. 145. C. DI SERI, *Primauté del diritto comunitario e principio della* res iudicata *nazionale: un difficile equilibrio*, cit., p. 2839 ff.

[16] About the "counter-limits" theory see P. BARILE, *Ancora su diritto comunitario e diritto interno*, in Aa.Vv., *Studi per il ventesimo anniversario dell'Assemblea costituente*, 6, Firenze, 1969, p. 33 ff., at p. 45; M. CARTABIA, *Principi inviolabili e integrazione europea*, Milano, 1995 and F. DONATI, *Diritto comunitario e sindacato di costituzionalità*, Milano, 1995;T. GROPPI, *La "primautè" del diritto europeo sul diritto costituzionale nazionale: un punto di vista comparato*, in *ASTRID-Rassegna*, 13, 2006; D. PELLEGRINI, *I controlimiti al primato dell'Unione europea nel dialogo tra le Corti*, Firenze, 2021.

[17] See R. B. AHDIEH, *Between Dialogue and Decree: International Review of National Courts*, in 79 *New York University Law Review*, 2004, p. 2031 ff., at 2051-2052: «intersystemic judicial dialogue is ordinarily prospective rather than retrospective. In judicial dialogue, a court does not seek to critique the prior decision of another. Rather, its orientation is to some future decision or norm. [...] Given a prospective orientation, past determinations of a court are not the focus of judicial dialogue. The focus of judicial dialogue is instead on the implications for forthcoming decisions. A second important characteristic of judicial dialogue-and a point of contrast with appellate review is its bidirectionality. Neither side is privileged in its contribution to a judicial dialogue. [...] Finally, judicial dialogue is characterized-unlike appeal-by some dimension of voluntariness. [...] This voluntariness suggests the limited role of judicial power in the dialogic interaction of courts. True dialogue does not depend on, and is arguably inconsistent with, the assertion or exercise of power between the relevant judicial bodies. Neither court enjoys authority over the other; hence, their engagement is a dialogue rather than a monologue».

for all, whether the latter has a preeminent expansive force capable of frustrating domestic res judicata […]. However, this is not a matter that can be resolved in these proceedings.».

By contrast, in subsequent judgments, the Court of Justice has scaled back the scope of *Lucchini*, stating that it was "a wholly exceptional case" where, had the solution of disregarding *res judicata* not been adopted, the very principle of conferral – which shapes the complementary relationship between the Member States and the European Union – would have been undermined[18].

This raises the question of whether "counter-limits" can be invoked as a reserve of competence for the Member States, despite the fact that State aid is, by explicit Treaty provision, removed from national judicial review; and whether the principle of procedural autonomy of the Member States can truly constitute a "counter-limit," given that it is difficult to demonstrate that the disregard of domestic *res judicata*, in a matter where the national judge is entirely devoid of jurisdiction, infringes the constitutional prerogatives of the judiciary.

Many authors have noted that the inclusion of *res judicata* among the common constitutional traditions of the Member States, under Article 6(3) TEU – and therefore its "Europeanisation" – implies that the Court of Justice has competence to lay down the guidelines for balancing interests, without national courts being able to unilaterally oppose "counter-limits" in defence of absolute irrevocability, as this would shatter the need for a genuinely uniform reconstruction of *res judicata* under EU law[19].

Accordingly, the constitutional guarantees underlying *res judicata* may be restricted, to the extent that the possibility of unilaterally invoking national "counter-limits" is limited. Only in this way is it possible to reconcile the guarantee of the irrevocability of final determinations with the principle of effectiveness, by leaving it to the Court of Justice to rewrite a common European grammar of *res judicata*, limited to matters of exclusive EU competence and those of shared competence already exercised by the EU institutions.

Indeed, the complexity of the relationship between national law and Union law implies that all the common constitutional traditions identified in Article 6(3) TEU are in a relationship of reciprocal integration: it is not possible to single out one of them as having, in the abstract, absolute precedence over the others. Were it otherwise, one right would expand without limit, becoming "tyrannical" toward other legal positions constitutionally recognised and protected by the Treaties, which collectively express the fundamental values of the Union.

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[18] See European Court of Justice, 22 December 2010, C-507/08, *Slovacchia c. Commissione*, commented by A. BIRNSTIEL, *Recovery of Unlawful State Aid: The Role of Member State Courts in State Aid Recovery Scenerios*, in *EStAL*, 3, 2012, p. 645 ff., at 646: «European Union law according to European Court of Justice does not under all circumstances require a national court to disregard domestic rules of procedure conferring the force of res judicata on a national judgement [...]»; and European Court of Justice, 10 July 2014, C-213/13, *Pizzarotti*, § 64.

[19] R. CAPONI, *Relazione*, in *La crisi del giudicato*, cit., p. 366; ID., *Giudicato civile e identità nazionale (appunto con contrappunto sul caso Taricco)*, in *Questione giustizia*, 1, 2017, p. 107.

Thus, the theory of the "Europeanisation of counter-limits," formulated by an acute author[20], would allow for a diffuse review by the Court of Justice of respect for the constitutional values common to the Member States. This is not about entrusting the safeguarding of constitutional principles solely to a supranational court (which would be illogical) but about extending the review of constitutional identity beyond national borders, insofar as the Union legal order, at least from an axiological perspective, is open to national legal systems. This would lead to the construction, through judicial cooperation, of a veritable Janus-faced identity: simultaneously European and national, in constant and unceasing evolution, a flexible identity fit to achieve the shared objectives of constitutional courts and the Treaties, in the spirit of *E pluribus unum*.

Returning to the procedural autonomy, this interdependence between national and Union legal orders excludes the existence of any logical-axiological priority between constitutional norms and EU norms; *a priori* solutions are incompatible with the demands of flexibility, which require resolving conflicts by reference to the specific case and avoiding dogmatic rigidities that disregard balancing exercises.

The doctrine of "counter-limits", rather than neutralising the EU norm as the last bastion of legal nationalism, should prompt the EU institutions to weave a web of common legal values[21], in the spirit of Article 6(3) TEU. Thus, in this different perspective, the doctrine of "counter-limits" becomes a dialogic tool at the service of the courts – the principium of a new dimension of European integration. By contrast, the unilateral opposition of a "counter-limit" undermines the unitary character of EU law: an act of the EU institutions, if found to conflict with the fundamental principles of our constitutional order, would no longer apply in the Italian legal system, yet would remain applicable in the other Member States.

The solution offered by the Court of Appeal is therefore open to criticism insofar as it accepts that the harmonisation promoted by the principle of primacy in matters of exclusive EU competence can coexist with the power of national courts – tacitly accepted by EU law – to unilaterally oppose "counter-limits[22]."

In truth, the disregard of Article 2909 of the Italian Civil Code is the natural consequence of the trespassing of the national judge into the exclusive

[20] A. RUGGERI, *A difesa della idoneità delle norme eurounitarie a derogare a norme costituzionali sostanziali e della "europeizzazione" dei controlimiti*, in *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali (a cura di Alessandro Ruggeri)*, Napoli, 2017, p. 473 ff.; ID., *Trattato costituzionale, europeizzazione dei "controlimiti" e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno*, in *Giurisprudenza costituzionale e principi fondamentali. Alla ricerca del nucleo duro delle costituzioni*, a cura di S. STAIANO, Torino, 2006, p. 827 ff.; M. DOOBS, *Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance in Favour of the Member States?* in *Yearbook of European Law*, 2014, p. 298 ff.; *contra* D. PELLEGRINI, *I controlimiti al primato dell'Unione europea nel dialogo tra le Corti*, Firenze, cit., p. 176 ff.

[21] Cfr. F. DE VANNA, *I "controlimiti" tra disordine delle fonti ed equilibrio del diritto*, in www.federalismi.it, 23, 2017, p. 1 ff., at 18.

[22] S. CASSESE, *I tribunali di Babele*, Roma, 2009, p. 57.

competence of the Commission[23], in a dispute where regard should have been had to the prior recovery decision for the unlawful State aid. Rather than invoking counter-limits, the Roman bench would have done better to refer the matter to the Constitutional Court, which could, if appropriate, have chosen either to broaden the scope of extraordinary remedies or to prompt legislative intervention.

Indeed, the reasoning of the Court of Appeal presupposes what should instead be proven — namely, that by recognising Lucchini's right to the State aid, the national judge rendered an implicit ruling, with res judicata effect, on the compatibility of such aid with the internal market, even though such competence belongs exclusively to the Commission, notwithstanding its prior recovery decision.

The Court of Appeal of Rome fell into a glaring inconsistency by invoking a principle of EU origin (the procedural autonomy of the Member States) that applies only in the absence of EU rules conferring exclusive or shared competence already exercised by the EU institutions. The principle of procedural autonomy is thus ontologically irreconcilable with the Commission's exclusive competence in matters of unlawful State aid; therefore, it cannot serve as a "counter-limit" to disregard the Lucchini judgment.

In summary: in the *Lucchini* case, when balancing the finality of *res judicata* against the principle of effectiveness, the former must be overcome; the breach of EU competences is so serious as to require the disregard. The reference to "counter-limits" therefore seems superfluous, given that the national judge acted in radical lack of jurisdiction – unless "counter-limits" are understood as an attempt to assert a competence alien to the domestic judicial system, with an "offensive" purpose wholly detached from the protective logic of domestic constitutional values emerging from the Constitutional Court's case law.

It is no secret that national case law has ignored the rule stated in *Lucchini*, showing a "pharisaic" respect for the rule that a final judgment is binding "for all purposes[24]." What is perhaps unconvincing about the decision under review is the determination to uphold at all costs – even to the point of invoking "counter-limits" as a reserve of judicial power – a judgment that should never have been rendered, given that it was issued in radical lack of jurisdiction[25]. It is telling that several scholarly voices have argued that a judgment contrary to a prior Commission decision on unlawful State aid is issued by a court that has

[23] M. ELIANTONIO, *A Spectre is Haunting Kirchberg – The Spectre of Article 47: The CJEU Case Law on the Finality of Judicial Decisions and on the Ex Officio Application of EU Law*, in M. BONELLI, M. ELIANTONIO, & G. GENTILE (Eds.), *Article 47 of the EU Charter and Effective Judicial Protection: Volume 1: The Court of Justice's perspective*, Hart Publishing, 2022, p. 99 ff., at 107.

[24] See P. BIAVATI, *disapplicazione del giudicato interno per effetto del diritto dell'Unione Europea*? in *Riv. trim. dir. proc. civ*., 2014, p. 1567 ff.; G. RAITI, *Giudicato civile interno e sopravvenuta giurisprudenza contraria della Corte di Giustizia: non è sempre Lucchin*i, in *Riv. It. Dir. Lav*., III, p. 659 ff.; see also C. SCHEPISI, *Corte di Cassazione, aiuti di Stato e res iudicata: brevi riflessioni a margine della sentenza n. 16983*/2018, in *Osservatorio europeo*, 2018.

[25] R. CAPONI, *Corti europee e giudicati nazionali*, cit., p. 362.

arrogated to itself the power to interpret and apply rules belonging exclusively to EU law.
In the following, we will examine the various scholarly interpretations of the *Lucchini* case and how the principle it established can be integrated into the national procedural system.

1.3. *Continuation: Luiso's Thesis – Res inter alios acta and the "Hat Change" of the Italian State.*

Suggestive is the thesis advanced by Luiso, who questions whether the judgment of the Court of Appeal had decided between the same parties, the same dispute that was later brought before the administrative judge[26]. According to the Author, if the decision on the recovery of unlawful State aid falls within the exclusive competence of the Commission, then the State charged with implementing that decision does not assert its own right but rather the right of another – namely, that of the Union. Indeed, if the European Union had its own administrative apparatus capable of collecting the sums unduly received by Lucchini, no problem of *res judicata* would have arisen.
Therefore, in the second proceedings against Lucchini, the Italian State did not appear as the holder of the right asserted, but as the *longa manus* of the Community: as its representative, or perhaps more accurately, as an extraordinary procedural substitute[27].
From this perspective, the Italian Council of State failed to consider that in the first proceedings the Italian State acted as a substantive party, whereas in the second proceedings the substantive party would have been the Union. Consequently, since for the purposes of invoking the binding effect of a prior *res judicata* the identity of the parties concerns only the substantive parties, the State, in response to Lucchini's *exceptio rei iudicatae*, should have replied: *res inter alios acta*.
In this respect, weight should be given to the difference in interest between the two proceedings opposing Lucchini and the Ministry: in the first, the interest was national – the correct disbursement of the aid; in the second, the interest at stake was that of the Union – to prevent an unlawfully granted State aid scheme from distorting competition. From this reasoning, Luiso draws the implication that, in situations analogous to Lucchini – *i.e.*, where a Community-protected interest is directly engaged – it is inconceivable that the primacy of Community law must operate through an extraordinary appeal, which can be lodged only by the parties or the public prosecutor and may even be subject to a limitation period[28].
Indeed, the introduction of a specific extraordinary remedy would not be mandated by EU law, since the only relevant interest is that of the Commission in ensuring the proper functioning of the internal market; at most, such a remedy

[26] F. P. LUISO, *La cedevolezza del giudicato*, cit., p. 91 ff., and also in *Riv. dir. proc.*, 2016, p. 28 ff.
[27] F. P. LUISO, *La cedevolezza del giudicato*, cit., p. 92.
[28] F. P. LUISO, *La cedevolezza del giudicato*, cit., p. 94.

could be considered a matter of expediency. In the absence of a specific remedy, when the claim is brought again, it is sufficient to raise the *exceptio rei iudicatae*, contesting the binding nature of a judgment that upheld the lawfulness of a given State aid scheme contrary to a prior recovery decision, in relation to the substituted/represented party, namely, the Commission.
However, this "reassuring" thesis conflicts with Articles 75(2) and 81 of the Italian Code of Civil Procedure, and with the statutory reserve governing representative standing and procedural substitution. Whether one qualifies the Italian State as a representative or as a procedural substitute, there is no normative basis for concluding that there was a "hat change" by the State in the second proceedings against Lucchini; nor can such a regime be regarded as a necessary implication of the principles of effectiveness and equivalence, which may limit and, where appropriate, "functionalise" domestic procedural institutions beyond the letter of the law.
Moreover, it is doubtful that the Commission is the holder of a right to the proper functioning of the market; rather, it holds a general interest in ensuring that the mutual obligations assumed by the Member States under the Treaties – in particular, the obligation not to distort the competitive structure of the internal market through unlawful aid – are not breached. This interest in the proper functioning of the internal market does not in itself amount to a subjective right of the Commission (or the Union) standing in a prejudicial-dependence relationship with the national proceedings between the State and the undertaking concerning the determination of a credit right and the order to pay the aid[29].
At the very least, it is difficult to imagine that the Commission, as a represented or substituted party, would not be bound by the *res judicata* formed in the first proceedings. Even assuming a case of strict procedural substitution, where the substituted party is not a necessary co-litigant, it is hard to exclude that in the first proceedings the right of the third party (extraordinary standing) was also at issue, given that the failure to raise the Community importance of the dispute between Lucchini and the Ministry was attributable to the latter's omission.
This is an untenable conclusion considering the clear provision of Article 111(4) of the Code of Civil Procedure, according to which a judgment rendered against the original parties "always" produces effects against the successor by particular title.
Accordingly, if one consistently develops the premises of this thesis, it ends up recognising the binding force of the Rome Court of Appeal's judgment even to the Commission: the subsequent interest of the Community in the proceedings between Lucchini and the Ministry, conveyed through the Commission's recovery decision, produces the same effect of the succession by particular title to the disputed right. Initially, the dispute had purely domestic significance, since the State aid scheme at issue had not been notified to the Commission;

[29] In this sense, see also M. STELLA, *Obbligo di recupero degli aiuti di stato illegittimi e (previo) giudicato arbitrale di condanna al risarcimento del danno... da revoca degli aiuti. È davvero il crepuscolo del giudicato?* in *Int'l Lis*, 2016, p. 175 ff., at 177, footnote 14.

subsequently, after the recovery decision, the national interest in the correct disbursement of the aid was replaced by the Community interest in maintaining the proper competitive structure of the market, through the order to the Italian authorities to recover what had been granted.
In substance, already in the first proceedings the Ministry should be considered as acting as the procedural substitute of the Commission, with the consequent "extensive" application of Article 111(4) of the Code of Civil Procedure and the opposability of the Rome Court of Appeal's judgment to the Commission. Thus, in the second proceedings, the Ministry – as procedural substitute of the Commission – could not invoke the latter's extraneousness to the first proceedings.
Nor can the reconstruction be accepted whereby the Ministry, in the second proceedings before the administrative judge, was not acting in its own name but as the legal representative of the Commission, since any form of voluntary representation must be excluded. Indeed, under Article 75(2) of the Code of Civil Procedure, legal procedural representation is limited to those who do not have the free exercise of their rights (*legitimatio ad processum*), among whom the European Commission cannot be included.
The Commission's procedural standing, far from being framed and resolved through domestic law concepts, must be assessed under the law of the Treaties, which expressly recognises the Commission's standing both to bring proceedings and to defend itself. This implies that, where a community-protected interest is at stake, the Commission can be a party to the legal relationship in dispute and be affected by a judicial act. Thus, it is unclear how – and especially why – in the first proceedings before the Rome Tribunal the Italian State was the substantive party, while in the second proceedings before the TAR, solely due to the supervening recovery decision, the substantive party would suddenly become the Commission.
Therefore, Luiso's thesis, however original and "reassuring," does not ultimately succeed in persuading us.

1.4. *Continuation: Caponi's Thesis.*

According to Caponi, a civil *res judicata* conflicting with a prior decision of the Commission gives rise to a conflict of powers between European Institutions (in this instance "nationalised") and the national judge, understood as a power of the State[30]. Such a conflict should be resolved at the request of the Government, through the ministry competent in the relevant matter, failing which the State would otherwise be exposed to infringement proceedings before the Court of Justice.
Jurisdiction would lie with the judicial body that issued the final judgment, following the model suggested by Article 398 of the Italian Code of Civil Procedure, thus adopting a broadly revocatory-type solution.

[30] R. CAPONI, *Corti europee e giudicati nazionali*, cit., p. 361 ff.

By construing the remedy as a case of conflict of powers between European Institutions and the national judge, the Author considers it possible to apply by analogy the sixty-day limitation period provided for in Article 39(2) of Law No. 87 of 1953 – which governs conflicts of powers between branches of the State – thereby avoiding the need to introduce an *ad hoc* extraordinary revocatory remedy.
However, the Author does not clarify a point that is anything but negligible: namely, whether the proposed remedy would have only rescinding effects or also rescissory effects.
In truth, the proposal under discussion is not entirely convincing. The choice to entrust the resolution of the conflict of powers to the same judicial body that has usurped an exclusive competence of the Commission is incompatible with the corollaries of the right to a fair trial, and with the guarantee of judicial impartiality. It is no coincidence that, in the case of conflicts of powers between branches of the State, the adjudicating body is the Constitutional Court, pursuant to the provisions of Law No. 87 of 1953.
Moreover, the hybrid construct devised by Caponi is nothing more than a revocatory action disguised under the theoretical label of a conflict of powers, designed, on the one hand, to circumvent the rule of the *numerus clausus* of appellate remedies under Article 323 of the Code of Civil Procedure, and, on the other, to allow for an analogous extension of the time limit set forth in Article 39(2) of Law No. 87 of 1953, thereby avoiding a situation in which the reopening of the proceedings could be requested *sine die*.

1.5. *Continuation: Biavati's Thesis.*

The overcoming of *res judicata* in the *Lucchini* case would be attributable not only (or not so much) to the national court's encroachment into the domain of the Commission's exclusive competences, but rather to the risk of collusion between the Ministry and Lucchini S.p.A. – a factor in fact left unspoken by the Court of Justice, although between the lines of its reasoning one can detect a sort of "EU disapproval" for the manner in which the case was handled by the State Attorney's Office[31].
Biavati's thinking can thus be summarised in a single expression: «*fraus omnia corrumpit*[32]». From this perspective, in cases of collusion between the State – which fails to raise the prior decision of the Commission – and the beneficiary of the unlawful State aid, the Commission, in the position of defrauded creditor, could bring a third-party revocatory opposition (*opposizione di terzo revocatoria*) pursuant to Article 404(2) of the Italian Code of Civil Procedure[33].

[31] P. BIAVATI, *Intervento*, in *Corti europee e giudici nazionali*, cit., p. 436.
[32] P. BIAVATI, *La sentenza Lucchini: il giudicato nazionale cede al diritto comunitario*, cit., p. 1601 ff.
[33] The problem of standing according to art. 404 (2) c.p.c. is analyzed by G. OLIVIERI, *Opposizione di terzo*, in *Digesto civ.*, XIII, Torino, 1995, p. 132; F. P. LUISO, *Opposizione di terzo*, in *Enc. giur.*, XXI, Roma, 1990, p. 6.

However, in the *Lucchini* case there is no genuine third-party opponent, since the Commission cannot be considered either as a creditor of Lucchini or, even less, as a successor in title. The available remedy, while preserving the relevance of the principle *fraus omnia corrumpit*, could therefore more appropriately be identified in the *revocazione* by the public prosecutor under Article 397(2) of the Italian Code of Civil Procedure.
The rationale of this provision is, on the one hand, to safeguard the public interest defended in the proceedings by the public prosecutor, pursuant to Article 75 of Royal Decree No. 12 of 30 January 1941, and, on the other, to allow for the replacement of the challenged judgment with a new one on the merits, where the former is irremediably tainted by the fact that a formally lawful instrument – judicial proceedings – has been used to achieve an outcome prohibited by law.

1.6. *Continuation: Consolo's Thesis and the Need for a New Ground for Revocation.*

The revocation proceeding is, in the Italian procedural system, a bound-criticism remedy available to challenge a judgment even after it has become *res judicata*. Grounds for revocation are linked to causes external to the decision, which have prevented the proper formation of the judgment; this explains the legislative choice that the court competent to hear the revocation is the same court that issued the judgment to be revoked (see Article 398 of the Italian Code of Civil Procedure). The revocation remedy aims to make the judicial process as impermeable as possible to injustice, while enhancing its ability to conclude with a judgment that is as correct as possible in both fact and law.
The grounds for revocation identified by the legislator reflect the outcome of a delicate balancing exercise between the principle of legal certainty – as expressed by *res judicata* – and the need for a just decision; thus, any expansion of the range of revocatory defects can only come through legislative intervention.
According to Consolo, in the absence *de lege lata* of the existing revocatory grounds to challenge the violation of European law, the legislator – if necessary prompted by an intervention from the Constitutional Court – should craft a new ground for extraordinary revocation, available both to the parties and to the public prosecutor (the latter also being able to be prompted by the European Commission, which could thereby remain external to the proceedings), within an appropriate time limit. This time limit would run, on the one hand, for the public prosecutor (prompted by the Commission), from the moment the Commission became aware of the civil res judicata formed in defiance of one of its final decisions concerning the recovery of unlawful State aid; and, on the other hand, for the parties (where they have an interest in seeking revocation), from the day of learning of the Commission's decision, regardless of whether it was issued before or after the national judgment became final[34].

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[34] C. CONSOLO*, La sentenza Lucchini della Corte di Giustizia: quale possibile adattamento degli ordinamenti processuali interni e in specie del nostro?*, cit., p. 235 ff.; ID., *Il flessibile rapporto dei diritti processuali civili nazionali rispetto al primato integratore del diritto comunitario (integrato dalla CEDU a sua volta)*, cit., p.

This appears to be the preferable thesis, since it prudently leaves the initiative to the legislator, while still admitting, in pathological cases of manifest procedural fraud – as in *Lucchini* – the extraordinary revocation by the public prosecutor under Article 397(2) of the Italian Code of Civil Procedure. Moreover, Consolo's proposal is reinvigorated by the recent introduction of Article 391-*quater* of the Code, whose systemic impact is far from negligible: indeed, it is difficult to justify the yielding of a civil *res judicata* contrary to a subsequent judgment of the European Court of Human Rights finding it incompatible with the ECHR, but not the yielding of a res judicata contrary to a subsequent judgment of the Court of Justice of the European Union, as in *Lucchini*.
Therefore, despite the Constitutional Court's well-known reluctance to expand the grounds for revocation, the *de iure condendo* path is to refer the matter to the Constitutional Court, given that the issue does not seem to attract the attention of Parliament.
Consolo's thesis, although prospectively agreeable, does not solve the problem under the current state of the law. It is precisely the absence of a specific ground for revocation that prompts us to pursue an entirely different route. As will be illustrated later, the problem of the overcoming of a civil *res judicata* that prevents the recovery of State aid incompatible with the internal market – pursuant to a prior Commission decision or a subsequent judgment of the Court of Justice – can, or rather must, be resolved even without legislative intervention or a manipulative ruling by the Constitutional Court, in order to avoid a proliferation of infringement proceedings against Italy for breach of its EU obligations[35].

1.7. *Continuation: Theories Considering as Legally Non-Existent a Final Judgment that has Usurped an Exclusive EU Competence – The Positions of Cordopatri and Giavazzi*.

Within the doctrinal mosaic, there are also those who have argued that a *res judicata* contrary to EU law due to the breach of the mandatory competences of EU institutions is radically incapable of governing legal relationships deriving from EU law.
In this regard, Cordopatri has authoritatively stated that a judgment issued by a national court which has arrogated to itself the power to interpret and apply a rule belonging strictly to EU law could be regarded as a non-existent judgment and, as such, incapable of becoming *res judicata*[36].
This line of argument, however, conceals a contradiction: a *non existens* judgment is incapable of producing effects, since non-existence – even if juridical – is a predicate of being, which is why the proper remedy is the *actio nullitatis*.

184 ff.; ID., *Il primato del diritto comunitario può spingersi fino ad intaccare la "ferrea" forza del giudicato sostanziale*, in *Corriere Giur.*, 9, 2007, p. 1189 ff., at 1192; ID., *Istruttoria monitoria "ricarburata" e, residualmente, opposizione tardiva consumeristica "rimaneggiata" (specie) su invito del g.e.*, in *Giur. it.*, 5. 2023, p. 1054 ff., at 1057.
[35] See *infra*, chapter V, section II.
[36] F. CORDOPATRI, *Giudicato nazionale e osservanza del diritto comunitario*, in *Riv. dir. proc.*, 2, 2016, p. 514 ff., at 520.

Conversely, a national judgment that has become final but is contrary to EU law, at least in the evaluation made by the domestic legal order, remains valid and effective until a decision of the Court of Justice or the European Commission is issued that is incompatible with it. Thus, reasoning in such terms ultimately leads to the identification of a concept of "relative non-existence" which contradicts the Eleatic prohibition, undermining the entire logical structure of the argument. Rather than non-existence, one should instead speak about the privity of a *res judicata* formed in violation of the Union's exclusive competences to the European Commission[37], which could instruct national institutions to recover the unlawful aid notwithstanding the formation of *res judicata* affirming its lawfulness – according to a model not dissimilar to that of third-party opposition.

Furthermore, Cordopatri's thesis seems criticisable for its rigidity, since in any case a *res judicata* that "trespasses" into the exclusive competences of the Commission, preventing the recovery of unlawful aid, would have to be considered *tamquam non esset*, removable *sine die*. Yet even regarding anti-EU *res judicata*, the passage of time, under certain conditions, reinforces its *firmitas* and the victorious party's legitimate expectations concerning the outcome of the proceedings[38].

Giavazzi also affirms the non-existence of a judgment contrary to a prior Commission recovery decision, although his hermeneutical path is markedly different from Cordopatri's one[39]. According to Giavazzi, the problem in *Lucchini* is that of the "co-administration" of a subjective legal situation unfolding across two legal orders, which are, at the same time, coordinated and autonomous[40]. Drawing on an insight of Vitale – who was the first to argue that a dispute between a national administrative authority and a private party cannot be resolved within the context of the national legal order but only at the EU level[41] – Giavazzi borrows from the theory of administrative invalidity and describes the judgment issued by the Italian court as tainted by an "absolute lack

[37] About the concept of privity in Common law systems see J.K. MORRIS, *Nonparties and Preclusion by the Judgment: The Privity Rule Reconsidered*, in 56 *California Law Rev.*, 1968, p. 1101 ff.

[38] About the relevance of legitimate expectation see *infra*, chapter V.

[39] M. GIAVAZZI, *Eureka! La sentenza anticomunitaria è inutiliter data per carenza di giurisdizione del giudice nazionale sui segmenti comunitari di un procedimento di amministrazione intrecciata*, in *Riv. It. Dir. Pubbl. Com.*, 5, 2019, p. 683 ff.; ID., *Anatomia del processo amministrativo. Riflessione sull'autonomia processuale negli Stati dell'UE*, cit., p. 110 ff.

[40] S. CASSESE, *Il procedimento amministrativo europeo*, in *Il procedimento amministrativo nel diritto europeo*, a cura di F. BIGNAMI e S. CASSESE, Milano, 2004, p. 31 ff.; G. DELLA CANANEA, *I procedimenti amministrativi composti dell'UE*, in *Riv. trim. dir. pubbl.*, 2004, p. 307 ff.; M. SAVINO, *I caratteri del diritto amministrativo europeo, in L'amministrazione europea e le sue regole*, a cura di L. DE LUCIA e B. MARCHETTI, Bologna, 2015, p. 231 ff.; F. D'ANGELO, *Pluralismo degli enti pubblici e collaborazione procedimentale. Per una rilettura delle relazioni organizzative nell'amministrazione complessa*, Torino, 2012, p. 57 ff.; M. P. CHITI, *I procedimenti amministrativi composti e l'effettività della tutela giurisdizionale*, in *Giorn. dir. amm.*, 2019, p. 187 ff.

[41] G. VITALE, *Il recupero degli aiuti di stato illegittimamente erogati tra autorità del giudicato ed incompatibilità con il mercato comune in una recente sentenze della Corte di giustizia*, in *Dir. Un. eur.*, 2008, p. 597 ff., at 609; ID., *Diritto processuale nazionale e diritto dell'Unione europea*, Catania, 2010, p. 160 ff.

of power". In State aid procedures, the relationship between the national administrative measure (and the EU endoprocedural act: the Commission's decision) is one of the latter's precedence over the former; thus, it is to the EU institutions that the administrative choice must be attributed, and the Court of Justice is the natural and exclusively competent judge to rule on the legality of the decision. From this, Giavazzi deduces that the national judge has encroached upon a prerogative of the Court of Justice and the EU institutions: in this perspective, the judgment would be incapable of becoming *res judicata*, as it was *inutiliter data*.

It is beyond doubt that the allocation of competences between different levels of government has a crucial importance in the relations between Member States and the European Union, and that encroachment into the latter's exclusive competences cannot remain without consequences. However, to accept that a *res judicata* validly formed under domestic law is always *inutiliter data* merely because of a prior Commission recovery decision finding it incompatible with the internal market is a draconian solution that disregards the competing principles at stake: legal certainty, the victorious party's reliance on the outcome of the proceedings, the autonomy and independence of the judiciary, and the principle of attribution.

Nor does it seem, as Giavazzi also postulates, that the supervening Commission recovery decision after the *lis alibi pendens* would make the Commission a necessary party, with the implication that a judgment rendered without a complete adversarial process would be *inutiliter datum*[42]. Indeed, it is unclear why the Commission should become a necessary party: the supervening recovery decision cannot transform a bilateral procedural relationship into a multi-party one, since that decision should have been challenged before the Court of Justice. The prejudicial relationship between the Commission's recovery decision and the national administrative measure granting aid certainly does not imply the necessity of joinder, otherwise it would have to be admitted – inconsistently – that the national court could rule on the former, while under Article 258 TFEU such competence belongs exclusively to the Court of Justice.

Although Giavazzi's theory cannot be accepted in its conclusions, his valuable insight – namely, that the acts issued within a European co-administration procedure are connected, in terms of domestic law categories, by a relationship of "prejudiciality-dependence" – deserves to be developed further. We shall return to this point in the final part of our work[43].

1.8. *Our Considerations on the Lucchini Case.*

[42] M. GIAVAZZI, *Eureka! La sentenza anticomunitaria è inutiliter data per carenza di giurisdizione del giudice nazionale sui segmenti comunitari di un procedimento di amministrazione intrecciata*, cit., p. 718; ID., *Anatomia del processo amministrativo. Riflessione sull'autonomia processuale negli Stati dell'UE*, cit., p. 114 ff.

[43] See *infra*, chapter V, section II.

In a field reserved to the exclusive competence of the European institutions, the principle of procedural autonomy has little room to operate; on the contrary, exclusive competence leaves minimal space for procedural autonomy, such that even the preclusive effect of *res judicata* may be overcome in order to ensure the implementation of EU law, in compliance with the principle of effectiveness. This is the lesson to be drawn from *Lucchini*: the double violation of exclusive competences – that of the Commission in assessing the compatibility of a given State aid scheme with the internal market, and that of the Court of Justice in reviewing the lawfulness of EU acts – allowed the *Plateau Kirchberg* to deliver the final blow to the clay-footed giant of *res judicata*.

It seems, however, that one last circumstance influenced the decision to disregard Article 2909 of the Civil Code. One must bear in mind that the conclusions reached here apply specifically to *Lucchini* and, consistent with the case-based approach typical of the Court of Justice, must be adapted differently depending on the specific facts of each case. In *Lucchini*, the temporal reference considered by *res judicata* does not seem irrelevant: it is one thing if the Commission's recovery decision predates the *lis pendens* or the formation of a *res judicata* that prevents its enforcement, and quite another if such a decision is issued – even years later – after the *res judicata* has formed.

Although the field of State aid falls within the exclusive competence of the Commission and the Court of Justice, to claim that any national judgment rendered in breach of such competences is, in all cases, *inutiliter datum* (or in any event incapable of founding enforcement) appears excessive for the reasons already set out. The idea that the theoretical constructions on the preclusive effect of res judicata are far from malleable and can be shaped according to the demands of justice in the individual case is by no means unfamiliar to the Court of Justice.

The implication is that even the overcoming of anti-EU *res judicata*, in a realistic perspective, depends on the balancing of multiple factors: although the judgments of the Court of Justice on the relationship between national *res judicata* and Commission recovery decisions for unlawful State aid share the common denominator of a breach of the Commission's exclusive competence, it does not seem that the infringement of the principle of attribution is, by itself alone, sufficient to justify the disregard or, as in the case at hand, the neutralisation of the national *res judicata*[44].

In our view, in the leading case *Lucchini*, the decision of the Luxembourg judges rested, on the one hand, on the fact that the Commission's recovery decision preceded the first-instance judgment and thus involved a breach of exclusive competences, and, on the other, on the glaring omission by the State's legal service in failing to raise the prior Commission decision in the merits proceedings. Accordingly, over the backdrop of the long-running *Lucchini* affair hangs the serious suspicion of an attempt at collusion to the detriment of the

[44] *Contra* L. STEPKOWSKI, *Not Quite Final: Principle of Res Judicata in National Judicial Proceedings in the Area of State Aid*, in 21 *EStAL*, p. 397 ff., at 404.

Commission. This circumstance, although unspoken by the *Kirchberg* judges, can only have influenced the panel's conviction in favour of disregarding *res judicata*. Wrapping up: the *a priori* disregard of *res judicata* does not belong to the *acquis* of the Court of Justice, which considers concurrent factors that may affect the stability of an anti-EU *res judicata*. Therefore, the notion of the absolute overcoming of *res judicata* in the field of State aid to undertakings appears difficult to reconcile with the directives suggested by a constitutional order that does not tolerate the axiological primacy of one principle over all others.
If one rejects the idea that the mere breach of the division of competences laid down in the Treaties is sufficient to neutralise national *res judicata*, then it becomes possible – through the case law experience – to identify certain situations in which, exceptionally, anti-EU *res judicata* does not yield, such as where the Commission's recovery decision comes years after the formation of *res judicata* favourable to the economic operator benefiting from the incompatible aid, thus irreversibly undermining their innocent reliance on the unassailable outcome of the proceedings.
These considerations will also be more fully developed in the final part of our work.

2. *The Klausner Holz Case: The Court of Justice's "Cautious" Solution and the Range of Remedies Offered by the German Legal System*.

In the subsequent *Klausner Holz* case[45], despite the existence of a formal investigation before the Commission regarding the alleged State aid nature of a certain public-law contract concluded by a German Land, the *Landgericht Münster* asked the Court of Justice whether EU law, in particular Articles 107 and 108 TFEU, as well as the principle of effectiveness, requires the disregard of a civil *res judicata* and was issued in the same proceedings confirming the continued validity of the civil-law contract without any examination of the State aid rules,

[45] See European Court of Justice, 11 November 2015, C-565/14, *Klausner Holz*, in *Foro it.*, 1, 2016, p. 37 ff., commented by E. D'ALESSANDRO, *La Corte di giustizia si esprime di nuovo sul rapporto tra giudicato nazionale e aiuti di Stato*; see also G. S. ØLIKKE, *State Aid as a Defence for Public Authorities?* in *EStAL*, 2, 2016, p. 286 ff., at 288; D. BAGHRIZABEHI-A. FERČIČ, *Private Enforcement of EU State Aid Rules: Is There Any Room For National Procedural Autonomy Left?* in 73 *Zbornik Pravnog fakulteta u Zagrebu*, 4, 2023, p. 663 ff., at 684; and G. GRECO, *Intangibilità o meno del giudicato nella giurisprudenza della Corte di giustizia*, in *Riv. it. dir. pubbl. com.*, 2023, p. 397 ff.; ID., *Giudicato nazionale, contrasto col diritto UE e autotutela amministrativa*, in *Riv. it. dir. pubbl. comp.*, 4, 2022, p. 423 ff.; M. GIAVAZZI, *Eureka! La sentenza anticomunitaria è inutiliter data per carenza di giurisdizione del giudice nazionale sui segmenti comunitari di un procedimento di amministrazione intrecciata*, cit., p. 713; ID., *Anatomia del processo amministrativo. Riflessione sull'autonomia processuale negli Stati dell'UE*, cit., p. 109 ff.; C. SCHEPISI, *Aiuti di Stato e giudici nazionali nella bozza di nuova Comunicazione della Commissione: alcune riflessioni a prima lettura*, in *Eurojus*, 2, 2021, p. 1 ff., at 19.

where the performance of the contract cannot otherwise be prevented under national law.
It is clear that the spectre of *Lucchini* hovers over the preliminary reference: although no Commission recovery decision had yet been adopted, the implicit *res judicata* preclusion regarding the lawfulness of the State aid scheme, arising from the judicial assessment of the contract's validity, led the referring court to request the intervention of the Court of Justice, doubting the compatibility of the public payment with EU law.
The analysis of the factual background clarifies the referring court's doubts. Klausner Holz Niedersachsen GmbH concluded a contract with the forestry administration of the Land of North Rhine-Westphalia for the supply of timber. The agreement provided for the sale of fixed quantities of timber from 2007 to 2014 at predetermined prices, with the Land undertaking not to sell to other buyers at lower prices. However, between 2007 and 2008, the Land failed to deliver the agreed quantities. Consequently, in 2009, the Land unilaterally terminated the contract, applying the principle established in German case law whereby private-law contracts granting State aid must be regarded as null and void.
Klausner Holz challenged the early termination before the Landgericht Münster, which declared the contract still in force. This decision was upheld on appeal. Subsequently, Klausner Holz brought an action for damages against the Land. The Land argued that the contract constituted unlawful State aid within the meaning of Article 107 TFEU, as it had not been notified to the European Commission, in breach of Article 108(3) TFEU[46].
The Landgericht Münster, recognising that the contract might constitute unlawful State aid but considering itself bound by the previous *res judicata* decision confirming the validity of the contract[47] – without having assessed the State aid issue – sought clarification from the Court of Justice. Starting from a straightforward reading of § 322 ZPO, according to which a judgment acquires the authority of substantive *res judicata* only where it has ruled on the claim made in the action or in a counterclaim[48], the Court suggested to the Landgericht Münster, as an alternative to staying the national proceedings pending the Commission's decision, that § 322 ZPO could be interpreted as meaning that where a breach of Article 108(3) TFEU is alleged, *res judicata* authority extends only to the legal claims actually adjudicated and does not preclude a judicial

[46] About the duty of notification of the scheme of State aid see J. L. BUENDÍA SIERRA-M. Á. BOLSA FERRUZ, *State Aid Assessment: what National Court Can Do and What They Must Do*, in *EStAL*, 3, 2017, p. 406 ff.
[47] European Court of Justice, 11 November 2015, C-565/14, *Klausner Holz*, §§ 55-57.
[48] About the interpretation of § 322 ZPO see W. J. HABSCHEID, *Der Streigegenstand im Zivilprozess und im Streitverfahren der freiwilligen Gerichtsbarkeit*, Bielefeld, 1956 e in *Riv. dir. proc.*, 1956, p. 136 ff.; D. LEIPOLD, *sub § 322 ZPO*, in F. STEIN-M. JONAS, *Kommentar zur Zivilprozessordnung*, IV, Tübingen, 2008, p. 1199 ff.; H. ROTH, *sub § 253 ZPO*, *ivi*, p. 34 ff.; F. LENT, *Zur Lehre vom Streitgegenstand*, in *ZZP*, 1952, p. 315 ff.; L. ROSENBERG-V. K. H. SCHWAB-P. GOTTWALD, *Zivilprozessrecht*[18], München, 2018, p. 527 ff., and p. 927 ff.

ruling, in the context of further proceedings, on points of law on which the final decision did not rule[49].

The *Klausner Holz* case lends itself to being understood through the lens of the theory of the objective limits of *res judicata*. Within the scope of such limits, it cannot always be assumed that an implicitly adjudicated issue encompasses a super-individual interest not expressly raised at first instance, such as the nullity of the contract for breach of the State aid prohibition[50]. In other words, the bringing of an action for legal effects deriving from a contract does not necessarily imply the automatic raising of the fundamental legal relationship.

Articles 107 and 108 TFEU do not always require the disregard of res judicata which prevents – even prospectively, where no Commission decision has yet been issued – the recovery of unnotified or unlawful State aid, since a recalibration of the objective limits of *res judicata* might lead to the conclusion that the issue remains open and that the compatibility of the State aid scheme with EU law may still be examined.

In our view, in *Klausner Holz* the reaffirmation of the principle of Member States' procedural autonomy is more apparent than real: not imposing the direct disregard of *res judicata* does not in fact preserve it, because a particular interpretation of its objective limits – apparently incompatible with the wording of § 322 ZPO but, according to established case law, constitutionally required to achieve procedural economy[51] – can no longer be applied when EU-protected advantages in areas of exclusive EU competence are at stake[52]. This required interpretation of § 322 ZPO thus conceals a genuine tacit disregard of the preclusion on issues that could have been raised, a form of "hidden overcoming," using the taxonomy devised earlier.

This confirms that, in a realist perspective, it is easier for implicit *res judicata* not to form (or, if it does, to be overcame) where the exhaustion of issues that could have been raised entails an irremediable breach of EU law: EU law opposes any form of automatic preclusion, in particular when the national court has never addressed the compatibility of the State aid scheme with EU law. Accordingly,

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49 European Court of Justice, 11 November 2015, C-565/14, *Klausner Holz*, § 36.

50 According to M. ELIANTONIO, *A Spectre is Haunting Kirchberg – The Spectre of Article 47: The CJEU Case Law on the Finality of Judicial Decisions and on the Ex Officio Application of EU Law*, cit., p. 108, «[U]nlike *Lucchini*, the question posed in Klausner Holz thus concerned the extent of the authority of res judicata, as the second case concerned the same parties, but did not have the same subject matter or the same cause. Furthermore, the situation differed from Lucchini as doubts over the compatibility of the aid with the internal market had not yet been resolved by the Commission. Therefore, there was no Commission decision being directly disregarded as it had been the case in Lucchini».

51 About the inefficient solution of the preclusion of implicit *res judicata*, see A. GIUSSANI, *Appunti dalla lezione sul giudicato delle sezioni unite*, in *Riv. dir. proc.*, 6, 2015, p. 1560 ff., at 1565; ID., *Efficienza della giustizia civile e culture della riforma*, Milano, 2017, p. 320 ff.; Y. SINAI, *The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel in Civil Actions*, in *McGill Law Journal*, 2011, p. 673 ff., at 688.

52 E. D'ALESSANDRO, *La Corte di giustizia si esprime di nuovo sul rapporto tra giudicato nazionale e aiuti di Stato*, cit., p. 47; and ID., *Aiuti di Stato e giudicato nazionale: nella vicenda Klausner Holz il Landgericht di Münster interpreta restrittivamente i limiti oggettivi del giudicato*, in *Riv. dir. proc.*, 2018, 1616 ff., at 1628.

the *Klausner Holz* judgment can also be read as an attempt by the Court of Justice to reduce the scope of implicit *res judicata*, which risks placing itself irreconcilably at odds with EU law.

Surprisingly, the Landgericht Münster did not opt for the (albeit suggested) suspension of the national proceedings pending the Commission's decision – by adopting an extensive interpretation of § 148 ZPO, under which the court may (*kann*) stay proceedings pending before it where the outcome depends on the decision of an administrative authority (which the Commission can be considered to be), until the conclusion of that procedure – but instead chose to disregard the preclusion on issues that could have been raised.

Applying an interpretation inspired by the primacy of EU law, the Landgericht held that the previous *res judicata* did not cover the issue of the nullity of the contract for incompatibility with the EU State aid rules. More specifically, the issue of the compatibility of the two timber sale contracts with EU law was not the *Gegenstand* of the first proceedings, which concerned solely the unlawfulness of the Land's termination of the contract.

This solution has the advantage of safeguarding the effet utile of a subsequent Commission decision: if the latter were to find the supply contracts incompatible with the State aid rules, then *nulla quaestio*, since this outcome would already have been anticipated by the Landgericht's judgment; whereas if the Commission's decision were not to find such incompatibility, the principle of *effet utile* would require ensuring the effectiveness of EU law also in favour of the private party, with the implication that the judgment in favour of the administration would have to be regarded as retroactively nullified, given that no legitimate expectation of the public authority in the finality of the anti-EU ruling would arise[53].

Therefore, the most reasonable solution would have been to stay the national proceedings pending the Commission's decision, since the loss of efficiency in the administration of justice caused by a necessary suspension is amply outweighed by the automaticity of the subsequent ruling on the merits once the preliminary legal question of the compatibility of the aid has been resolved; conversely, the risk of nullifying *res judicata*, with the consequent waste of judicial activity, should be avoided at all costs, particularly in a field such as State aid, where it is especially difficult for the national court to make accurate predictions on how the preliminary issue will be resolved, given not only the high level of technicality involved, but also the exclusive competence of the European institutions.

These last considerations introduce us to the particular issue of the fate of *res judicata* incompatible not with a prior Commission recovery decision, as in *Lucchini*, but with one adopted after the temporal reference point considered by *res judicata*.

[53] As suggested by H. WEIß, *Rechtskraftdurchbrechung bei (mutmaßlichem) Verstoß eines Vertrags gegen EU-Beihilferecht*, in *EuZW*, 2016, p. 57 ff., at 60.

3. *The Case Law of the Court of Justice on the Supervening Recovery Decision for an Unlawful State Aid Scheme and the Overcoming of* Res Judicata*: The Slovak Republic v Commission Case.*

After the *Lucchini* judgment, the Court of Justice was called upon to decide a different question: the overcoming of *res judicata* incompatible with a subsequent Commission decision ordering the recovery of unlawful State aid. Whereas in *Lucchini* the beneficiary could hardly invoke any legitimate expectation regarding public subsidies granted in breach of EU law – since both the Ministry and the economic operator were aware of the recovery decision before the delivery of the first-instance judgment – the supervening adoption of a recovery decision after the *res judicata* has been formed requires weighing the private party's innocent reliance against the principle of effectiveness of EU law.

The issue was incidentally addressed by the Court of Justice, seised by the Commission with an infringement action, in the well-known *Slovak Republic v Commission* case[54].

The technique employed by the Court of Justice mirrors that of Köbler: *res judicata* is not annulled by the subsequent Commission decision, even though it constitutes the wrongful act giving rise to State liability. From the ruling in *Slovak Republic v Commission*, *res judicata* emerges no weaker than it was before: Commission recovery decisions do not (yet) have hyper-retroactive effects capable of overturning a determination no longer open to ordinary appeal, but they can degrade it into an act that is unlawful under EU law, thereby giving rise to liability in damages.

If *Köbler* foreshadows the apex of the "crisis of *res judicata*," the apparent resilience of *Slovak Republic v Commission* heralds the complete overcoming of the finality of judgments contrary to a subsequent Commission recovery decision, marking their definitive hollowing-out.

4. *Overcoming of an Arbitral Award Contrary to a Commission Recovery Decision: The Micula Case.*

The idea that *res judicata* may be overcome even in the face of a subsequent Commission recovery decision was expressly affirmed for the first time by the Court of Justice only recently. A first opportunity arose from a highly controversial ICSID arbitration between Romania and two major local entrepreneurs[55].

[54] European Court of Justice, 22 December 2010, C-507/08, *Slovacchia c. Commissione*, commented by A. BIRNSTIEL, *Recovery of Unlawful State Aid: The Role of Member State Courts in State Aid Recovery Scenerios*, in *EStAL*, 3, 2012, p. 645 ff.; and in *Riv. dir. trib.*, 2011, 4, p. 95 ff., commented by C. FONTANA, *Certezza del diritto ed effettività del primato del diritto europeo nelle procedure di recupero degli aiuti fiscali incompatibili: il ruolo del giudice nazionale*.

[55] About this case see S. BATTINI, *Il «caso Micula», diritto amministrativo e entanglement globale*, in *Riv. trim. dir. pubbl.*, 2017, p. 325 ff.; M. DE BELLIS, *Regimi giuridici ultrastatali e conflitti: il caso della tutela degli investimenti*, in *Riv. trim. dir. pubbl.*, 2017, p. 355 ff.; M. MACCHIA, *Il «caso Micula», il labirinto amministrativo tra discrezionalità e regole*, in *Riv. trim. dir. pubbl.*, 2017, p. 343; M. STELLA, *Obbligo di*

Following the collapse of the Romanian communist regime in the late 1990s, the country's transition to a market economy was encouraged through a series of governmental measures. A 1998 government decree introduced a total exemption from import duties on production goods and reimbursement of duties on raw materials. These incentives were to remain in force until 2009. In 2000, the Micula brothers – Romanian magnates whose business interests were primarily based in Sweden – began investing in Romania on the promise of substantial tax breaks. However, in 2004, during the negotiations for EU accession, Romania undertook to abolish all State aid measures incompatible with the competitive structure of the EU internal market.
The following year, the Micula brothers initiated ICSID arbitration against Romania under the arbitration clause contained in the 2003 Sweden–Romania bilateral investment treaty. They sought damages for breach of legitimate expectations, arguing that Romania's EU accession had deprived them of the promised tax benefits. In 2009, the European Commission intervened in the still-pending arbitration and, pursuant to Article 37 of the ICSID Rules, was admitted only as *amicus curiae*, wrongly excluding its status as an intervening party despite its clear interest in a favourable outcome for Romania[56]. The Commission argued that any arbitral award granting damages equivalent to the amount of the withdrawn incentives could not be enforced within the EU, as it would amount to unlawful State aid not previously authorised.
Nonetheless, the arbitral tribunal upheld the investors' claims on the merits and ordered Romania to pay USD 250 million. In April 2014, Romania challenged the award under ICSID rules, but, pending the appeal, it partially enforced it by offsetting a tax debt owed by the investors against part of the damages, amounting to EUR 76 million. Upon learning of this, on 30 March 2015 the Commission issued a recovery decision, finding that any payment by Romania in favour of the Micula brothers constituted incompatible State aid. The Commission also intervened in the appeal proceedings against the ICSID award, going beyond Romania's arguments and raising the award's nullity for lack of *potestas iudicandi*, since under Article 344 TFEU all disputes concerning the interpretation or application of the Treaties fall within the exclusive jurisdiction of the Court of Justice. This implied that the 2003 Sweden–Romania BIT, together with its arbitration clause, had lost its effectiveness. The Romanian challenge and the Commission's objections were dismissed, and the award became final.
Taking advantage of the automatic enforceability of ICSID awards in the territory of each contracting State – without the need for exequatur – the investors initiated multiple enforcement proceedings against Romania.

recupero degli aiuti di stato illegittimi e (previo) giudicato arbitrale di condanna al risarcimento del danno...da revoca degli aiuti. È davvero il crepuscolo del giudicato? cit., p. 175 ff.; G. ZARRA, *The enforceability of arbitral awards deriving from intra-UE investment agreements. Reflections on treaty law issues and on the EU's unsustainable position*, in *Riv. comm. int.*, 2018, p. 891 ff.

56 The arbitral award is available here: https://italaw.com/sites/default/files/case-documents/italaw.

Interestingly, a Belgian enforcement judge, prompted by the Commission's intervention under Article 23b(2) of Regulation (EC) No 659/1999, went so far as to treat the Commission's recovery decision as *ius superveniens* with (hyper)retroactive effect capable of depriving the ICSID award of any effectiveness.
Meanwhile, the recovery decision was challenged before the EU General Court, which, by judgment of 18 June 2019, annulled it, holding that the arbitral tribunal's ruling did not concern a right to receive State aid, but rather a right to damages for the inappropriate withdrawal of such aid.
However, on appeal, the Court of Justice set aside that judgment for three reasons. First, the General Court had held that the Commission lacked competence to adopt the recovery decision because the compensation awarded by the ICSID award concerned events predating Romania's EU accession. The Court of Justice found instead that the fact the arbitration had begun before accession did not shield from Commission scrutiny State aid granted before accession but still effective at the time of EU entry. Where an ICSID award grants damages equivalent to withdrawn State aid, it effectively usurps the Commission's exclusive competence under Articles 107 and 108 TFEU.
Secondly, the General Court had excluded the qualification of the damages as State aid on the ground that the right arose in 2005, when the tax incentive scheme was abolished, *i.e.*, before accession. Yet the right to damages crystallised only with the award in 2013 and the subsequent set-off against the investors' tax debt – events postdating accession. Thus, the moment of actual recognition of the prohibited incentive scheme fell after Romania joined the EU, confirming the Commission's competence and the legitimacy of the recovery decision.
Finally, the Court stressed that, upon Romania's EU accession, the judicial system provided by the Treaties replaced the arbitral procedures previously envisaged by the BIT. Consequently, the arbitration clause had to be regarded as *tamquam non esset*, in line with the *Achmea* judgment[57], since such agreements remove disputes potentially involving the application or interpretation of EU law from the jurisdiction of Member State courts, and hence from the judicial system Article 19(1), second subparagraph, TEU requires them to establish. Given that an ICSID tribunal is not a "court of a Member State" within Article 267 TFEU and its awards are not subject to review for EU law compliance by any Member State court, the ineffectiveness of the arbitration clause was unavoidable.
Although the Court of Justice did not explicitly say so, its ruling in *Micula* effectively retroactively invalidated the ICSID award as incompatible with the

[57] See European Court of Justice, 6 March 2018, C-284/16, § 60. About the *Acmea* ruling see A. ANDOLFI, *Il difficile equilibrio tra primauté del diritto dell'Unione e autonomia dell'arbitrato: riflessioni all'indomani della sentenza Achmea*, in *Riv. trim dir. proc. civ*., 3, 2019, p. 987 ff.; A. BRIGUGLIO, *Achmea and the Day after Achmea*, in *Riv. arb*., 3, 2018, p. 493 ff.; L. MELCHIONDA, *The European Court of Justice ruling in Achmea v. Slovak Republic: more questions than answers*, in *Dir. comm. int*., 2018, p. 337; M. STELLA, *Cala il sipario sull'arbitrato degli investimenti «intra-UE»: la Corte UE esige che le liti tra investitori e Stati membri siano decise da giudici togati*, in *Giur. it*., 2018, p. 1969 ff.

prohibition of State aid to undertakings, in accordance with the subsequent Commission recovery decision. Some scholars had earlier criticised this outcome, arguing that a Commission decision, as an individual administrative act, cannot qualify as *ius superveniens* capable of depriving an arbitral award of enforceability, still less of undermining its operative part[58]. However, the Court's conclusion is acceptable: the recovery decision came after the "first-instance" arbitral award, and the investors' reliance on its finality was not such as to preclude recovery of sums paid in enforcement. Furthermore, the Commission had intervened – albeit in the limited capacity of *amicus curiae* – in both instances, arguing that any award in favour of the investors would contravene EU public policy.

In the context of overcoming *res judicata* contrary to EU law, the outcome of the *Micula* saga is nothing more than the practical application of the principle already established in *Lucchini*: where a recovery decision is adopted during pending proceedings, a judgment (or award) rendered without regard to it must give way. Admittedly, the stance of the Commission and the Court of Justice could be seen as a form of "European legal imperialism" extending even to international arbitral awards. The conclusion might have been different had the recovery decision been adopted after the judgment's finality, as in the *CSTP v Commission* case, which we now turn to examine.

5. *The CSTP v Commission Case: The "Hyper-Retroactive" Effect of Commission Decisions and the Emptying of National* Res Judicata.

A brief review of the facts illustrates the profound difference between *Lucchini* and the subsequent judgment *CSTP v Commission*[59]. CSTP Azienda della Mobilità S.p.A. sought to have set aside the judgment of the General Court of the European Union of 11 July 2018, which had dismissed its action for annulment of Commission Decision 2015/1074 of 19 January 2015 concerning alleged State aid granted by Italy in the form of additional compensation for public service obligations in favour of CSTP.

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[58] M. STELLA, *Obbligo di recupero degli aiuti di stato illegittimi e (previo) giudicato arbitrale di condanna al risarcimento del danno... da revoca degli aiuti. È davvero il crepuscolo del giudicato*? cit., p. 180; ID., *Il futuro dell'arbitrato di investimento e il problema antico del giudicato sui motivi*, in *Giur. it.*, 4, 2020, p. 914 ff., at 921.

[59] See European Court of Justice, 4 March 2020, C-587/18, *CSTP Azienda della mobilità S.p.A. c. Commissione*, and, *si vis*, see G. DE CESARE, *Il caso Cstp: Azienda della mobilità s.p.a. c. Commissione: il giudicato nazionale cede al principio della primauté, storia di una caduta (annunciata)?* in *Riv. trim dir. proc. civ.*, 4, 2020, p. 1421 ff.; see also R. FEDERICO, *Lucchini Revisited: When Judgments Harm Competition. Case C-586/18 P Buonotourist and Case C-587/18 P CSTP Azienda della Mobilità*, in *EStAL*, 1, 2021, p. 144; L. STEPKOWSKI, *Not Quite Final: Principle of* Res Judicata *in National Judicial Proceedings in the Area of State Aid*, ivi, 4, 2022, p. 397 ff.; A. TURMO, *National* Res Judicata *in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgement of Domestic Procedural Law*, in *CMLR*, Kluwer Law International, 2021, p. 361 ff, at 373; C. SCHEPISI, *Aiuti di Stato e giudici nazionali nella bozza di nuova Comunicazione della Commissione: alcune riflessioni a prima lettura*, cit., p. 20.

By judgment of 27 July 2009 No. 4683, which had acquired finality, the Italian Council of State recognised CSTP's right to such compensation, leaving the determination of the amount to the competent Region. Since the Region did not determine the amount, CSTP initiated enforcement proceedings before the Italian Council of State to compel compliance with the 27 July 2009 ruling. These proceedings ended with the Council of State's decision of 7 November 2012 No. 5649, which quantified the compensation at EUR 4,951,838. The Region paid that sum to CSTP on 21 December 2012.

However, on 19 January 2015, following a request from the Italian authorities, the Commission adopted a recovery decision, finding that the measure in question constituted State aid within the meaning of Article 107(1) TFEU, incompatible with the internal market and granted in breach of Article 108(3) TFEU. It therefore ordered the Italian authorities to recover the aid, holding that the measure was imputable to the State, involved State resources, conferred an economic advantage on CSTP, was selective in character, and was liable to distort competition and affect trade between Member States – and that it did not meet the so-called *Altmark* conditions[60].

This gave CSTP an interest in seeking annulment of the decision before the General Court. The application was dismissed by the General Court, and CSTP appealed to the Court of Justice, raising eight grounds of appeal. Of particular relevance here was the fourth ground, whereby CSTP argued that the General Court's recognition of the Commission's competence to rule on a measure which has been the subject of a final decision by a national court also infringes the principle of the protection of legitimate expectations, since in the present case more than five years elapsed between the date of that national decision and the date on which the Commission adopted its decision.

The Court of Justice rejected that argument, reaffirming the exclusive competence of the Commission to assess the compatibility of State aid with the internal market, and holding that national courts must refrain from ruling in a manner contrary to Commission decisions, regardless of whether the national judgment acquiring finality (and crystallising the breach of Article 107 TFEU) before the Commission's decision.

The Court further held that the principle of legitimate expectations applies only where an EU institution has given precise assurances capable of creating justified expectations in the addressee. In this case, CSTP cannot rely on the Council of State's decision as having created legitimate expectations to oppose the exercise by the Commission of its exclusive competence[61].

The appeal was therefore dismissed. The Court concluded that Commission's exclusive competence in the field of State aid is binding in the national legal order as a corollary of the primacy of EU law, with the result that the

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[60] European Court of Justice, 24 July 2003, C-280/00, *Altmark Trans GmbH*; see also about the conditions of illegal State aid, L. RUBINI, *The Definition of Subsidy and State Aid. Wto and EC Law in Comparative Perspective*, Oxford, 2009, p. 323 ff.

[61] European Court of Justice, 4 March 2020, C-587/18, *CSTP Azienda della mobilità S.p.A. c. Commissione*, § 94.

Commission's decision prevails over the national judgment, even if adopted more than five years later. The expectation generated by that judgment's finality is not, in the Court's view, protected under EU law.

5.1. *Implications of the Principle Enunciated in CSTP.*

One key to understand the issue raised by CSTP lies in the theory of the temporal effects of *res judicata*, which examines the relationship between the incontestability of the finding contained in a final judgment on the merits and the possibility that subsequent events may affect the temporal development of the substantive situation determined with the authority of *res judicata*[62]. According to the Court of Justice, Commission's decisions on State aid could overcome the finality of *res judicata* incompatible with the duty of recovery illegal state aids, under Art. No. 107 and 108 TFEU.
However, this solution is unsatisfactory once the constitutional dimension of *res judicata* and its importance within the Union legal order are considered. Declaring *res judicata* permeable to retroactive *ius superveniens* – particularly to subsequent Commission decisions ordering recovery of unlawful State aid – requires balancing equally weighty constitutional principles: on the one hand, the principles of primacy and conferral, which enjoy constitutional backing via Article 117(1) of the Italian Constitution; on the other hand, the principle of legal certainty, a corollary of the rule of law, which as a rule demands the resistance of *res judicata* to retroactive *ius superveniens*.
Affirming the persistence of *res judicata* against retroactive *ius superveniens* that affects the rule underlying the final finding implies that any derogation must stem from retrospective *ius superveniens* – capable of realising constitutionally oriented legal values for the past – that, in order to override the *lex specialis* constituted by *res judicata*, must have "hyper-retroactive" effect sufficient to undermine the prevailing party's legitimate expectation on the result of the process.
The Court's reasoning reveals the idea that, where an area of exclusive Union competence is at stake, no legitimate expectation can arise for the private party regarding the right to retain State aid found to be incompatible, with the implication that *res judicata* will always be subordinate. Overcoming the *res judicata* binding effects when they are incompatible with a subsequent Commission decision is a way to reconstruct, through a teleological interpretation of the principles of loyal cooperation and conferral, the Union's implicit will: the absolute subordination of any act that impedes or frustrates the completion of the internal market and its competitive structure.
This perspective is reinforced by the fact that the Commission's exclusive competence in State aid matters is accompanied by the exclusive jurisdiction to annul its decisions, under Article 288(4) TFEU, vested in the Union courts[63].

[62]See *supra*, chapter I, section II, § 5.4.
[63] L. STEPKOWSKI, *Not Quite Final: Principle of* Res Judicata *in National Judicial Proceedings in the Area of State Aid*, cit., p. 403.

National courts, therefore, cannot issue judgments with *res judicata* effect on the compatibility of State aid with the internal market, regardless of the temporal reference considered by the judgment, lest they usurp a competence categorically excluded by the Treaties.

These considerations would appear to justify the absolute weakness of *res judicata* endorsed by the Court of Justice in CSTP. Some commentators have welcomed the rule from the *Kirchberg Plateau*, perhaps underestimating its disruptive potential. According to Stepkowski, the *CSTP* judgment is a logical continuation of the Court's approach since *Lucchini*[64]. However, the two cases are different: in *Lucchini*, the recovery decision was adopted after the proceedings began but before the first-instance judgment, so that the State's legal counsel ought to have invoked it to defeat the claimant's action; in *CSTP*, by contrast, not only was the recovery decision notified to the aid beneficiary more than five years after the judgment had acquired finality, but the formal investigation itself was opened three years after the judgment recognising the public service compensation had become final.

A proper understanding of *CSTP* must therefore consider the prevailing party's expectation on the outcome of the trial, which had solidified over time – significantly weakening the parallels with the *Lucchini* ruling. Scholarly opinion has argued that in *CSTP* the breached EU rule was not so much Article 263(6) TFEU, as in *Lucchini*, where failure to disregard the *res judicata* would have allowed the national court to annul a Commission decision *de facto*, infringing the Court of Justice's exclusive jurisdiction, but rather Article 267(3) TFEU, since the Council of State failed to refer to Luxembourg a preliminary question on the interpretation of the *Altmark* criteria[65].

If, however, the entire *CSTP* problem were reducible to the failure to make such a reference, setting aside the final judgment in favour of the economic operator would still be excessive, as the omission by the court of last instance can be adequately sanctioned through Member State liability for infringement, as established since *Köbler* and *Traghetti del Mediterraneo*[66].

In our view, the anomaly in *CSTP* lies in the Court of Justice's failure to balance the principles of conferral and primacy against the prevailing party's legitimate expectation on the stability of the judgment that had acquired finality.

The Court would have done better to apply the principle ruled in *Slovakia v Commission*, under which Commission recovery decisions do not have hyper-retroactive effects so as to annul even determinations no longer subject to ordinary appeal when there is legitimate expectation deserving of protection, but may instead downgrade them to an EU-illegal factual situation, giving rise to liability for damages.

[64] L. STEPKOWSKI, *Not Quite Final: Principle of* Res Judicata *in National Judicial Proceedings in the Area of State Aid*, cit., p. 404 ff.; F. PINTO, *La cedevolezza del giudicato civile a fronte delle pronunce della Corte di giustizia dell'Unione europea*, in *DPCIeC*, 1, 2025, p. 133 ff., at 155.

[65] R. FEDERICO, *Lucchini Revisited: When Judgments Harm Competition. Case C-586/18 P Buonotourist and Case C-587/18 P CSTP Azienda della Mobilità*, cit., p. 147.

[66] See *retro*, in this chapter capitolo, section I, §§ 3 and 4.

The temporal reference of the *res judicata* cannot be dismissed: it is one thing for the Commission's recovery decision to predate the proceedings or the final judgment preventing its execution; it is another for the decision to post-date the judgment, perhaps by years; and yet another for the entire formal investigation to be initiated after the judgment has become final.
Although State aid falls within the exclusive competence of the Commission and the Court of Justice, to state that any national judgment in breach thereof could always be overcome, as if conclusively conditioned on the outcome of the formal investigation, is excessive. The "hyper-retroactive" effect of Commission recovery decisions should be confined to situations where there is no legitimate expectation of the prevailing party on the outcome of the trial deserving protection under EU law: for instance, where the aid beneficiary is formally private but substantively public under EU law; where the formal investigation was opened after the case became pending and the Commission duly notified the interested party; or where the recovery decision was adopted before the judgment acquired finality (as in *Lucchini*), thereby allowing the party concerned to invoke it through ordinary appeal of any incompatible decision.
Outside such cases, it is difficult to justify the weakness of *res judicata* conflicting with a Commission recovery decision.
A Commission decision on State aid, adopted after the conclusion of national proceedings, cannot be said to introduce legal values of such a nature as to prevail over a lawfully formed *res judicata*. On the contrary, it would seem to undermine the principles of legal certainty, legitimate expectations, and the constitutional prerogatives of the judiciary. Otherwise, fundamental principles of the Italian procedural system (Articles 3, 24, 102 and 104 of the Constitution) would be gravely jeopardize, causing a *vulnus* to the fundamental principles of the Constitution underpinning procedural guarantees, which ought to serve as a "counter-limit" to the unconditional assertion of the primacy principle, especially where the prevailing party's innocent reliance on the final award of the substantive benefit is at stake.
Thus, after CSTP, the stability of *res judicata* emerges more limping than ever.

6. *The Redefinition of the Objective Limits of* Res Judicata *in Avio Lucos: Transition to the Problem of the Overcoming of Implicit Collateral* Res Judicata.

Lastly, brief mention should be made of the recent 2022 *Avio Lucos* judgment, concerning support schemes for farmers under the Common Agricultural Policy[67]. The judgment was delivered in preliminary ruling proceedings in the context of a main action seeking reimbursement of financial support granted by the competent Romanian Agency to *Avio Lucos* and subsequently deemed

[67] European Court of Justice, 7 April 2022, C-117/20, *Avio Lucos*, commented by G. GRECO, *Intangibilità o meno del giudicato nella giurisprudenza della Corte di giustizia*, cit., p. 403 ff.; and G. GRÜNER, *Giudicato amministrativo nazionale e diritto dell'UE*, in *Riv. it. dir. pubbl. com.*, 4, 2022, p. 442 ff., at 456.

unlawful by the same Agency for being contrary to Union law, on the ground that the beneficiary's activity only ostensibly qualified as agricultural.
During the main proceedings, and later before the Court of Justice, the issue arose of the preclusive effects of a prior national *res judicata* in an action seeking annulment of the same Agency's decision imposing sanctions on *Avio Lucos*, sanctions likewise based on the unlawfulness of the financial support in question. In other words, the issue concerned the preclusive effect of implicit collateral *res judicata* in the State aid sector, whose binding effect would require the court in the subsequent proceedings – concerning annulment of the national recovery order – to follow the earlier judgment.
This extension of the binding effect flowing from *res judicata* was viewed critically by the Court of Justice. The Court observed that such an interpretation of the principle of the authority of *res judicata* would have the consequence that, when an earlier final decision of a judicial body is based on an interpretation contrary to Union law, the erroneous application of that law would be repeated in every decision adopted by civil courts concerning the same relationship[68]. In the Court's view, the obstacle posed by implicit *res judicata* must be removed, as it is contrary to the principle of effectiveness: where a final judgment is based on an incorrect interpretation of Union law, it is unacceptable for that erroneous application to be perpetuated in every subsequent civil court decision concerning the same legal relationship, without any possibility of correcting the interpretation given in breach of Union law.
In *Avio Lucos*, the issue at stake was not so much the infringement of the Union's exclusive competence in State aid matters as the risk that an erroneous interpretation of Union law might be perpetuated. It is worth noting that the stability of implicit external *res judicata* is certainly weaker than that of res judicata formed on an expressly pleaded claim[69]. In this regard, the Court itself noted that, although the two proceedings concerned the same facts, they related to different administrative acts.
This confirms the point made since the outset of this work: the finality of a decision depends on numerous factors, the presence or absence of which in the concrete case may imply its overcoming. In the present case, the decisive factor appears to be that the agricultural activity carried out by the aid beneficiary was only apparent: the idea that *res judicata* could shield a profoundly unjust judgment from attack does not fit with the Court of Justice's reasoning.
In any event, the *Kirchberg Plateau* holds that it is impossible to invoke implicit external *res judicata* considering the manifest breach of Union law committed by the first-instance court. A general rule emerges from this, to be examined in the next section: Union law does not in all cases require the disregard of a national *res judicata* contrary to EU law, even in an area of exclusive Union competence, provided that the breach can be remedied by narrowing or modulating its

[68] European Court of Justice, 7 April 2022, C-117/20, *Avio Lucos*, § 102.
[69] A. GIUSSANI, *Intorno alla «riflessione» del giudicato contro il terzo*, in *Riv. dir. proc.*, 4, 2014, p. 1193 ff.; ID., *Effetti conformativi della sentenza e sospensione del processo*, *ivi*, 1, 2017, p. 260 ff.; and ID., *Decreto ingiuntivo non opposto dal consumatore: l'intervento della Corte di Giustizia*, cit., p. 300-301.

objective limits, so as to ensure that the disregard of Union law is not irremediable.

Section III
The Overcoming of Collateral Res Judicata *and* Res Judicata *on Jurisdiction: From Olimpiclub to Interedil Cases*

SUMMARY: 1. The *Olimpiclub* Case: the Problem of Overcoming Implicit Collateral Estoppel Formed in Violation of European Law. – 1.1. Reception of the Principle Stated in *Olimpiclub* by Italian Doctrine. – 1.2. Our Considerations on the Principle Stated in *Olimpiclub*. – 2. The Overcoming of *Res Judicata* on Jurisdiction: The *Interedil* Case. – 3. The Overcoming of EU-Contrary *Res Judicata* on Jurisdiction in National Case Law. – 4. Concluding Remarks on the Overcoming of Collateral Estoppel and of *Res Judicata* on Jurisdiction. Strengthening the Idea that the Guarantee of Finality is not Absolute but Subject to the Concurrence of Multiple Factors.

1. *The Olimpiclub Case: the Problem of Overcoming Implicit Collateral Estoppel Formed in Violation of European Law.*

Although European taxation is not expressly included among the areas of exclusive Union competence under Article 3 TFEU, in the well-known *Olimpiclub* case, the Court of Justice went so far as to set aside a particular judicial interpretation of the objective scope of tax collateral estoppel[1]. However, the Court's ruling is far less disruptive than it might initially appear, as the facts of the case confirm.

By a *commodatum* agreement concluded in 1985, Olimpiclub S.r.l., holder of a sports complex on public land, granted the same facility to the association Olimpiclub. The latter undertook to pay the public concession fee, to pay an annual lump sum as reimbursement of expenses, and to transfer to the lender all gross revenues, consisting of the total amount of annual membership fees paid by its members, who would thus benefit from a VAT exemption. The tax authorities served Olimpiclub with four reassessment notices for the tax years 1988–1991, alleging that the *commodatum* agreement disguised a lease agreement,

[1] See European Court of Justice, 3 of September 2009, C-2/08, *Olimpiclub*, commented by M. BASILAVECCHIA, *Il giudicato esterno cede all'abuso di diritto (ma non solo)*, in *Riv. giur. trib.*, 2010, p. 13; C. CONSOLO, *Il percorso della Corte di Giustizia, la sentenza Olimpiclub e gli eventuali limiti di diritto europeo all'efficacia esterna ultrannuale del giudicato tributario (davvero ridimensionato in funzione antielusiva Iva del divieto comunitario di abusi della libertà negoziale?)*, in *Riv. dir. trib.*, 2010, p. 1143 ff.; ID., *Il flessibile rapporto*, cit., p. 189 ff.; R. CAPONI, *Corti europee e giudicati nazionali*, cit., p. 369 ff., at 371; G. D'ANGELO, *Giudicato tributario (esterno) e diritto comunitario: un equilibrio difficile*, in *Riv. dir. trib.*, 2009, p. 185 ff.; R. MICELI, *Riflessioni sul giudicato tributario alla luce della recente sentenza "Olimpiclub"*, in *Rass. trib.*, 2009, p. 1839 ff.; G. RAITI, *Le pronunce Olimpiclub e Asturcom Telecomunicaciones: verso un ridimensionamento della paventata "crisi del giudicato civile nazionale" nella giurisprudenza della Corte di Giustizia*, in *Riv. dir. proc.*, 2010, p. 677 ff.; G. LO SCHIAVO, *La Corte di giustizia ridimensiona progressivamente il principio nazionale di cosa giudicata*, in *Riv. it. dir. pubbl. com.*, 1, 2010, p. 287 ff.; A. POGGIO, *Dopo Lucchini, il caso Fallimento Olimpiclub: il ridimensionamento dell'efficacia del giudicato esterno "anticomunitario"*, in *Giur. it.*, 2, 2010, p. 369 ff.; G. VANZ, *Autorità del giudicato nazionale e diritto comunitario*, in *Dir. prat. trib. int.*, 2010, p. 1638 ff.

the rent from which would therefore be subject to VAT. The company challenged all the notices. Later, assessments for the years 1987 and 1992 were also issued. After challenging these latter assessments, Olimpiclub obtained two favourable final judgments about the validity of the *commodatum* contract. These judgments were invoked by Olimpiclub in the pending Court of Cassation proceedings concerning the earlier assessments.

The company relied on the implicit collateral estoppel effect regarding the absence of a VAT tax liability, invoking the principle of *ultra litem* effect of *res judicata* in tax judgments established by the Italian Supreme Court, notwithstanding the autonomy of each tax year[2]. The Tax Chamber, perhaps persuaded that the tax judge's ruling on the validity and non-fraudulent nature of the multi-year *commodatum* could bind subsequent years, referred to the Court of Justice the question whether the EU prohibition on abuse of rights must be applied by national courts even where it entails setting aside a final judgment.

The Court of Justice, while formally distancing itself from the *Lucchini* ruling – because the case did not concern the Commission's exclusive competences – held that recognizing *ultra litem* effect for a judgment on the existence or non-existence of a tax liability precludes calling into question a judicial decision that has become final, even if that decision involves a breach of EU law. Such an extension of the positive-conformative effect of collateral estoppel would mean that an erroneous application of EU law must be automatically carried over into every subsequent decision concerning a different tax year involving the same tax liability.

Thus, a rule of common sense underlies the principle in Olimpiclub*: Cuiusvis hominis est errare: nullius nisi insipientis, in errore perseverare* ("Anyone can err; only a fool persists in error").

The *Plateau Kirchberg*, in the name of the principle of effectiveness, imposed a recalibration of the objective scope of tax collateral estoppel: findings on incidental substantive issues made by the tax judge cannot have ultra litem effect where they would prejudice non-recessive EU interests, such as the proper operation of the VAT system.

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[2] See Italian Supreme Court, 16 June 2006, n. 13916, commented by C. MAGNANI, *Sui limiti oggettivi del giudicato tributario*, in *Riv. giur. trib.*, 2006, p. 755 ff.; E. MANZON, *I limiti oggettivi del giudicato tributario nell'ottica del "giusto processo": lo swing-over della Cassazione*, in *Corr. giur.*, 2006, p. 1694 ff.; C. GLENDI, *Giuste aperture al "ne bis in idem" in Cassazione ma discutibili estensioni del "giudicato tributario" extra moenia*, in *Riv. giur. trib.*, 2006, 557 ff.; F. TESAURO, *Giudicato tributario, questioni pregiudiziali e imposte periodiche*, in *Boll. trib.*, 2006, p. 1173 ff.; M. BASILAVECCHIA-A. PACE, *Valenza ultrannuale del giudicato*, in *Corr. trib.*, 2006, 2693 ff.; S. DALLA BONTÀ, *L'ultrattività del giudicato nel processo tributario*, in *Dir. prat. trib.*, 4, 2013, p. 697 ff.; ID., *Eccezione di giudicato esterno nei vari gradi di impugnazione*, in *Riv. giur. trib.*, 2020, p. 232 ff.; ID., *Alla continua ricerca della stella polare: la giurisprudenza sull'ultrattività del giudicato tributario nel mare degli elementi permanenti, semi-permanenti e variabili*, in *Dir. prat. trib.*, 6, 2022, p. 2335 ff., at 2348; D. CORRARO, *L'oggetto del giudicato tributario*, Milano, 2024, p. 283 ff.; ID., *Riflettendo attorno ad alcune premesse in tema di giudicato esterno nelle imposte periodiche*, in *Dir. prat. trib.*, 3, 2022, p. 889 ff.

Like our domestic procedural law, EU law rejects the all-devouring logic of the common point[3]; the theory of the fragmentation of judgments, revived in case law after *Olimpiclub*, seems best suited to preventing the risk that collateral estoppel might frustrate the Union's fiscal objectives. It is worth noting that the Court required the disregard of the specific interpretation of Article 2909 of the Italian Civil Code about *ultra litem* effect for tax judgments, with the implication that contradictory decisions may arise.

1.1. *Reception of the Principle Stated in Olimpiclub by Italian Doctrine.*

The Court of Justice's decision has been the subject of various reconstructions by scholars: some closer to the reasoning style of the European judges, others more "municipal" in that they sought to frame it within domestic legal categories.
According to Lo Schiavo, the key to understanding *Olimpiclub* lies in the progressive limitations that the Court of Justice has developed on the principle of procedural autonomy[4]. In particular, after balancing the authority of *res judicata* and the principle of effectiveness of EU law in the area of abusive VAT practices, the former must yield, since a strict application of it would make compliance with EU law "in practice impossible." This would mean that the principles of legal certainty and the legitimate expectation of the prevailing party on the finality of a judgment no longer subject to ordinary appeal can be "relativized" when overriding EU interests must be applied to the case. However, this reasoning seems tainted by a certain axiological *a priori*, whereby EU interests must always prevail over domestic ones, even where, in the specific case, the taxpayer relied on the external effect of collateral estoppel, reinforced by a ruling of the Supreme Court. In other words, this approach does not explain why the principles of legal certainty and legitimate expectation should be recessive and therefore cannot be shared.
Caponi has also proposed to read *Olimpiclub* through the lens of the theory of the temporal effect of civil judgments[5]: the interpretative ruling of the Court of Justice would amount to a relevant supervening event capable of recalibrating the scope of the adjudication, so that implicit collateral estoppel formed on a preliminary issue relevant to a different tax year would not be opposable where such extension could impair the useful effect of EU law. However, embedded in such reasoning is the very dangerous idea that even interpretative rulings of the Court of Justice would naturally possess "hyper-retroactive" effect – enough to eliminate the broadly novative effect of a final judgment – with the implication that such a supervening event could always affect the entitlement established by a no-longer-retractable judicial determination.

3 C. CONSOLO, *Il flessibile rapporto*, cit., p. 191.
4 G. LO SCHIAVO, *La Corte di giustizia ridimensiona progressivamente il principio nazionale di cosa giudicata*, cit., p. 299.
5 R. CAPONI, *Corti europee e giudicati nazionali*, cit., p. 369 ff., at 371.

It is difficult to accept that interpretative judgments of the Court of Justice are always capable of realizing, retroactively, constitutional-level values justifying hyper-retroactivity; it is even harder to accept that they have such effect outside the *hortus conclusus* of the Union's exclusive competences, as defined by Article 3 TFEU. Such an effect might perhaps be recognized in State aid or consumer law, as these are respectively exclusive EU domains or fully harmonized sectors. Therefore, the interpretation offered by Consolo seems preferable.
Relying on Article 34 of the Code of Civil Procedure, Consolo focuses on the lack of jurisdiction of the tax court to issue a judgment with *res judicata* effect on substantive preliminary issues falling within civil jurisdiction[6]. In his view, the entire matter should be read not so much through the prism of temporal limits, but rather through the prism of the objective limits of collateral estoppel, given that Article 2(2) of Legislative Decree No. 546/1992 provides that the tax judge may examine incidentally any issue on which resolution of a tax dispute depends. The true justification for denying the *ultra litem* effect of tax collateral estoppel lies in the tax court's lack of jurisdiction to decide, with binding effect, on the civil preliminary issue of the alleged sham agreement.

1.2. *Our Considerations on the Principle Stated in Olimpiclub*.

Consolo's reading supports the idea that the principle stated in *Olimpiclub* is far from apocalyptic: strictly speaking, it should be included among cases of "hidden overcoming" of *res judicata*, achieved by recalibrating its objective scope. It is hard to deny that the abandonment of the theory of judgment fragmentation by Italian Supreme Court, United Sections, 16 June 2006, No. 13916, also implied an expansion of the objective scope of *res judicata*, even to improperly include the sham agreement itself within the tax liability. However, the *ultra litem* effect of tax collateral estoppel based on a common premise across multiple tax years, while serving procedural economy, is incompatible with EU law and is not constitutionally imposed. Indeed, insofar as it risks making the first judge's error irremediable, it might even be excluded by the principle of effectiveness of the ability-to-pay principle under Article 53 of the Constitution, and by the principle of autonomy of tax years under Article 7 of the Consolidated Income Tax Act.
It also appears that the *Olimpiclub* solution can be reconstructed because of the longstanding problem of the object of tax proceedings[7]. More precisely, the exclusion of the external effect of tax collateral estoppel across different tax years involving the same decisive issue is linked to the rejection of the declaratory theory, under which tax authority acts merely acknowledge obligations arising by law, and tax proceedings define the tax relationship. The legislature, in Article 19 of Legislative Decree No. 546/1992, identified

[6] C. CONSOLO, *Il percorso della Corte di Giustizia, la sentenza Olimpiclub e gli eventuali limiti di diritto europeo all'efficacia esterna ultrannuale del giudicato tributario (davvero ridimensionato in funzione antielusiva Iva del divieto comunitario di abusi della libertà negoziale?)*, cit., p. 1143 ff.; ID., *Il flessibile rapporto*, cit., p. 190.
[7] See D. CORRARO, *L'oggetto del giudicato tributario*, cit., p. 309 ff., at 310-311.

"autonomously appealable acts" as the gateway to tax litigation, thus embracing the so-called constitutive theory[8], which also defines the object of tax proceedings as the challenged act, the source of the tax obligation.
If, on the one hand, the right at issue in tax litigation is nothing more than the legitimate interest in the exercise of taxing power according to legally predetermined forms and terms, and, on the other, the only admissible judgments on the merits are those annulling or upholding the contested act, then the logical consequence is that tax *res judicata* can only extend to the stability of the annulment or non-annulment of the specific contested act.
From a constitutive perspective, *res judicata* cannot extend to preliminary issues – especially where the tax judge can examine them only incidentally – since tax *res judicata* concerns the mode of exercising taxing power, with the sole exception of constitutive elements of the tax rule of a generally permanent nature (*e.g.*, "commercial entity" or "non-commercial entity" *status*, "resident" or "non-resident" status, classification as "cultural heritage property," entitlement to tax relief or exemptions, etc.).
Accordingly, in our view, the *Olimpiclub* judgment is far from heterodox; rather, it correctly applies the rules derived from the system concerning the object of tax proceedings and, consequently, *res judicata*. Tax proceedings deals with the contested act, and it is indeed difficult to assert the formation of *res judicata* on the existence of a sham agreement examined only incidentally.
One final point deserves mention: the Court of Justice's stance in *Olimpiclub* again confirms that when a certain interpretation of the scope of *res judicata* is not constitutionally required, case law tends to use highly discretionary criteria in defining it. This discretion is not apparent from the *ex post* reasoning in the judgment's grounds, but can be inferred from the fact that courts, whether on the merits or in cassation, when applying collateral estoppel, take account of challenges with a high degree of merit. It follows naturally that a prior decision, even if no longer subject to ordinary appeal, is more readily disregarded if the object of the latter case is different, if the earlier judgment was implicit, if it was not rendered by the highest court (as in *Olimpiclub*), if no evidence was taken or the record is incomplete, or if it involved a manifest misapplication of the law. The more evident the injustice of the first decision, the more likely it is that the second court will recalibrate the objective scope of *res judicata* to avoid perpetuating a clear violation of the law[9]. In this light, the protection that the unjust Olimpiclub judgment afforded was not taken overly seriously by the later court, since the idea that *res judicata* protection for the prevailing party truly extends to cases of blatant legal error is far from be accepted.

[8] This theory was elaboreted by C. GLENDI, *L'oggetto del processo tributario*, Padova, 1984, ristampa 2014; ID., *sub art. 19*, in C. GLENDI-C. CONSOLO, *Commentario breve alle leggi del processo tributario*[3], Padova, 2008, p. 299 ff., at 302 ff.
[9] See for this kind of reasoning, A. GIUSSANI, *Intorno alla «riflessione» del giudicato contro il terzo*, in *Riv. dir. proc.*, cit., p. 1193 ff.; ID., *Effetti conformativi della sentenza e sospensione del processo*, *ivi*, 1, 2017, p. 260 ff.

2. *The Overcoming of* Res Judicata *on Jurisdiction: The Interedil Case.*

The idea that not all rulings formally endowed with finality enjoy the same degree of stability, but that the protection granted to the prevailing party by a decision on the merits is more likely to be respected than that deriving from a ruling on procedural issues, is confirmed by the case law of the Court of Justice. In the well-known *Interedil* case, the *Plateau Kirchberg* held that the legitimate expectation of the prevailing party on the finality of a jurisdictional ruling – given that the Court of Cassation had pronounced on the matter with "pan-procedural" effect[10] – is not protected by EU law where it emerges that the decision is not consistent with EU law, as interpreted by the Court of Justice[11].

In that case, Interedil S.r.l. transferred its registered office from Monopoli to London without notifying the transfer to the companies' register. The company was therefore struck off the Italian register and simultaneously entered in the UK register as a foreign company. However, Interedil retained ownership of real estate and a lease relating to two hotel complexes in Italy. Subsequently, before the Bari Tribunal, bankruptcy proceedings were initiated against Interedil. The company, questioning the existence of Italian jurisdiction, sought a preventive ruling on jurisdiction before the Court of Cassation. The Tribunal, unconvinced by the objection, did not suspend the case and declared the company bankrupt. The preventive jurisdictional appeal was dismissed by the Court of Cassation, which affirmed the jurisdiction of the Italian courts. In the appeal proceeding, challenging the bankruptcy declaration, however, the Bari Tribunal, doubting its jurisdiction, referred a preliminary question to the Court of Justice, also disputing the binding effect of the Cassation's ruling on jurisdiction.

According to the Luxembourg judges, the binding force of Article 382 of the Italian Code of Civil Procedure cannot prevent a national judge from referring a preliminary question to the Court of Justice when uncertain about the correct interpretation of an EU rule on cross-border insolvency, especially when that rule determines the *forum decotionis*[12]. The implication is that if a national judge,

[10] E. REDENTI, *Il giudicato sul punto di diritto*, in *Riv. trim. dir. proc. civ.*, 1, 1949, p. 257 ff., at 258.

[11] European Court of Justice, 20 October 2011, C-396/09, *Interedil S.r.l.*, commented by E. M. BARBIERI, *Considerazioni sull'autorità del giudicato nazionale nel diritto comunitario dopo il caso Interedil*, in *Dir. Proc. Amm.*, 2012, p. 354 ff.; E. D'ALESSANDRO, *L'ordinanza conclusiva del regolamento di giurisdizione capitola dinanzi alla "primauté" del diritto dell'Unione europea*, in *Foro it.*, 2011, p. 537 ff.; EAD, *L'incidenza delle pronunce della Corte di giustizia sulla portata delle pronunce italiane in punto di giurisdizione. I casi* Interedil *e* Gothaer, in *Revista Ítalo-Española de Derecho Procesal*, 1, 2019, p. 57 ff.; C. HONORATI-G. COMO, *A double lesson from Interedil: higher courts, lower courts and preliminary ruling and further clarifications on COMI and establishment under EC Insolvency Regulation*, in *International Insolvency Law Review*, 1, 2013, p. 18 ff.; P. DE CESARI, *Procedura principale e procedure territoriali. Nuovi spunti interpretativi forniti dalla Corte di Giustizia*, in *Fall.* 2012, p. 545; F. M. MUCCIARELLI, *Da Monopoli a Londra, passando dal Lussemburgo: appunti sull'emigrazione delle società italiane*, in *Giur. Comm.* 2012, p. 11; L. PANZANI, *La nozione di COMI nella disciplina comunitaria dell'insolvenza transfrontaliera: i casi Interedil e Rastelli*, in *Int'l lis*, 2012, p. 31 ff.

[12] This ruling seems to overcome the idea that bankruptcy proceedings tend to encourage *forum shopping* or competition between alternative *fora*, due to the large revenues and volume of business that such proceedings bring with them. For an analysis of the issue, see M. A. LUPOI, *Conflitti*

notwithstanding a jurisdictional ruling with finality, can submit a preliminary question to the Court of Justice, then the judge is bound by the latter's ruling. If the Court identifies a different competent jurisdiction based on its authentic interpretation of EU law, the national court must comply. Consequently, the *Interedil* judgment can rightly be counted among those in which the Court of Justice has affirmed the overcoming of a civil *res judicata* that conflicts with EU law[13].

Indeed, the Court of Justice declared that the binding effect of a principle of law enunciated by the Cassation is overcome by the need to ensure the operation of the preliminary reference mechanism under Article 267 TFEU, thereby allowing the formation of EU-wide judicial consistency[14]. To affirm that a national judge may make a reference to the Court of Justice despite the finality of a jurisdictional ruling implies recognizing that judge's power to reassess a jurisdictional issue already decided. Thus, even before the preliminary ruling of the Court of Justice, it is the need to guarantee the effectiveness of EU law, through the preliminary reference mechanism, that affects domestic procedural law by setting aside the preclusive effect of the Supreme Court's ruling on jurisdiction for lower courts. In this way, the trial court regains the power to assess its jurisdiction in transnational disputes.

The rule stated in *Interedil* has been received by the Court of Cassation[15]. Interestingly, the Supreme Court, while acknowledging the lower court's obligation to comply with the Court of Justice's ruling – even when contrary to the Cassation's earlier jurisdictional order – explicitly stated the deeper reason why overcoming *res judicata* on jurisdiction is tolerable, even outside the sphere of exclusive Union competences: a ruling on jurisdiction is merely procedural, meaning that the party can still assert its rights before the competent *forum*, without violating the constitutional principle that requires finality only in respect of judgments conferring substantive rights.

In other words, the overcoming of formally final rulings on jurisdiction is justified because, unlike rulings on the merits, they lack constitutional protection, since they do not affect the stability of a party's right once definitively recognized. This implies that if a subsequent Court of Justice ruling were to establish that the court which rendered a final judgment on the merits in a transnational dispute lacked jurisdiction, this would not retroactively annul the merits ruling: the EU requirement to respect jurisdictional criteria cannot

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transnazionali di giurisdizioni, I, Policies*, Metodi, criteri di collegamento*, Milano, 2002, p. 32 ff.; and also ID., *Conflitti di giurisdizioni e di decisioni nel regolamento sulle procedure d'insolvenza: il caso "Eurofood" e non solo*, in *Riv. trim. dir. proc. civ*., 2005, p. 1393 ff.

[13] C. HONORATI-G. COMO, *A double lesson from Interedil: higher courts, lower courts and preliminary ruling and further clarifications on COMI and establishment under EC Insolvency Regulation*, cit., p. 29.

[14] See E. D'ALESSANDRO, *L'ordinanza conclusiva del regolamento di giurisdizione capitola dinanzi alla "primautè" del diritto dell'Unione europea*, cit., p. 548.

[15] See Italian Supreme Court, 15 June 2015, n. 12317, commented by F. FRADEANI, *Insolvenza transfrontaliera e "cedevolezza" del giudicato sulla giurisdizione secondo la Cassazione*, in *Dir. fall. soc. comm*., 1, 2016, p. 174 ff.

override the finality of a merits decision, which is generally impermeable to retroactive *ius superveniens*, owing to its constitutional foundation.
Another question is whether the principle of *Interedil* affects the stability of implicit *res judicata* on jurisdiction, or of domestic *res judicata* formed when the issue was not pursued on appeal. In both cases, the procedural bar for the appellate court to review jurisdiction arises from the losing party's inaction, and EU law does not (yet) appear inclined to reopen the finality of *res judicata* absent active conduct by the interested party. Moreover, conceding this would imply recognizing "hyper-retroactive" effect to the Court of Justice's interpretative rulings, an effect we have repeatedly excluded outside the sphere of exclusive Union competences[16]. In fact, the principle in *Interedil* rests primarily on the impossibility for a national court to submit a reference to the Court of Justice because of the preclusive rule in Article 382 of the Italian Code of Civil Procedure. If, however, the national judge has had the opportunity to refer the interpretative question to the Court of Justice, possibly at the parties' request, and thereby determine the competent *forum* in a transnational dispute, then the overcoming of implicit *res judicata* on jurisdiction seems excessive. The remedy for such a latent form of EU law infringement may instead lie in damages mechanisms, should harm from *forum non conveniens* be demonstrated, including increased litigation costs abroad, in line with the rule already articulated in *Köbler*.

3. *The Overcoming of EU-Contrary Res Judicata on Jurisdiction in National Case Law.*

Recently, the principle set forth in *Interedil* has been applied by the Italian Court of Cassation, though with some important clarifications[17]. It has been specified that the lapsing of the binding effect of the Supreme Court's ruling on jurisdiction, following a subsequent decision of the Court of Justice, finds its foundation in the principle of primacy of EU law, enshrined in Articles 11 and 117 of the Italian Constitution. Under this principle, Italy incurs obligations that cannot be evaded, except to the extent that they would infringe the so-called "counter-limits".
Such an infringement must, however, be ruled out. First, because the guarantee of finality in respect of purely procedural rulings is not constitutionally protected. Second, because there is no violation of judicial independence under Article 102 of the Constitution: the interpretive monopoly over EU norms and the corresponding nomophylactic function lies with the Court of Justice, and the amenability to review of a Cassation ruling on jurisdiction does not imply an

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16 See *contra* E. D'ALESSANDRO, *L'ordinanza conclusiva del regolamento di giurisdizione capitola dinanzi alla "primauté" del diritto dell'Unione europea*, cit., p. 550.
17 See Supreme Court, 4 April 2022, n. 10860, in *Giur. it.*, 1, 2023, p. 78 ff., commented by L. PENASA, *La cedevolezza della statuizione della S.C. sulla giurisdizione contraria al diritto UE*; in *Fall.*, 7, 2022, p. 924 ff., commented by L. PANZANI, *I limiti del sindacato del giudice di merito tra giudicato sulla giurisdizione ed applicazione del diritto unionale*; in *Judicium online*, 2022, commented by M. L. VACCARELLA, *Vincolatività del principio di diritto e rimessione in sede di rinvio alla Corte di giustizia (a proposito di Cass. Sez. un., sent. 4 aprile 2022 n. 10860).*

usurpation of judicial authority. Third, there is no violation of the right of defence under Article 24(2) of the Constitution, since the rule affirmed by the *Plateau Kirchberg* denies binding effect only to rulings on jurisdiction, not to merits rulings that have become final. Thus, the parties remain able to assert their rights before the competent *forum*, and the victorious party's reliance interest in the final attribution of substantive relief is not undermined.

On this basis, the Supreme Court formulated the following principle of law: Following a ruling on jurisdiction by the Supreme Court on a motion for a jurisdictional determination, the national judge who is not a court of last instance before whom the case continues may refer a preliminary question under Article 267 TFEU to the Court of Justice if he doubts the conformity of that ruling with EU law. In such a case, the binding effect of the internal jurisdictional ruling lapses only once the Court of Justice has found its actual incompatibility with EU law, and only to the extent of that incompatibility.

Thus, the Cassation's jurisdictional ruling is conditionally binding, subject to being superseded if an incompatible decision of the Court of Justice intervenes. Otherwise, while the lower court remains free to doubt the correctness of the forum determination and to refer the matter to the Court of Justice, the Cassation's ruling is not displaced.

The reasoning of the Supreme Court is persuasive insofar as it excludes that the overcoming of jurisdictional rulings undermines the constitutional prerogatives of the judiciary power. The flexibility of jurisdictional determinations does not jeopardize the constitutional guarantee of *res judicata*, which serves chiefly to protect the finality of decisions on the merits (the granting or denial of substantive relief), not the binding effect of certain procedural rulings merely because they are issued by the Cassation in its regulatory role.

Nor does a different conclusion follow from the reasons usually advanced for the binding effect of Cassation rulings on jurisdiction. No constitutional obligation can be found in that respect. The endoprocedural force of jurisdictional determinations rendered in preventive regulation proceedings derives from the logic of the institution itself, which would be pointless if the ruling of the Joint Chambers did not bind the trial court. Such force is usually justified by reference to the Cassation's institutional duty, under Article 65 of Royal Decree No. 12 of 1941, to ensure "respect for the limits of the various jurisdictions." Yet it is difficult to attribute constitutional standing either to the tool provided by Article 41 of the Code of Civil Procedure or to the Cassation's regulatory function over jurisdiction. The preventive jurisdictional motion has no basis in the Constitution, even implicitly, and its troubled history raises doubts about its very constitutionality: both because it may undermine the guarantee of the natural judge pre-established by law, and because it has proved unable to achieve genuine procedural economy[18].

As for the constitutional basis of the Cassation's regulatory function over jurisdiction, while Article 111(8) of the Constitution secures cassation appeals

[18] See F. CIPRIANI, *Il regolamento di giurisdizione*, cit., p. 293 ff.

"for reasons relating to jurisdiction" against decisions of the Council of State and the Court of Auditors, this does not extend constitutional protection to the binding effect (even internally) of Cassation rulings on international jurisdiction. At most, such a guarantee may apply to decisions on Italian domestic jurisdiction, but not to disputes with transnational implications, considering the limits arising from Articles 11 and 117 of the Constitution and Article 81 TFEU. Accordingly, it is correct to maintain that the binding force of a superior court's jurisdictional ruling lapses only if a subsequent interpretative judgment of the Court of Justice identifies its inconsistency with EU law. Where two conflicting obligations arise, the former must prevail. Conversely, if the Court of Justice confirms that the Supreme Court correctly applied EU law, the two obligations are compatible: the national judge need not violate Article 382 of the Code of Civil Procedure, and the Cassation's jurisdictional ruling continues to bind.

What remains to be clarified is when a true conflict between the two rulings arises, as a condition for overcoming the Cassation's jurisdictional ruling. Is it enough that the Cassation violated EU law by applying a different provision or interpreting it differently from the Court of Justice? Or is it necessary that such violation causally affected the outcome, leading to a different conclusion on Italian jurisdiction than the one that would have followed from correct application of EU law? The latter approach would require the trial judge to re-examine jurisdiction to decide whether the Cassation's ruling binds, thus effectively hollowing out the binding effect of Cassation's jurisdictional determinations, since the matter could always be reopened. In practice, jurisdiction would not rest on the Cassation's ruling but on the trial judge's reassessment.

To avoid a *de facto* disregard of Article 382 of the Code of Civil Procedure, the first solution must be adopted. This means that the overcoming of jurisdictional rulings must be recognized whenever the Cassation has violated EU law, regardless of whether the violation had a causal impact on the forum determination. In these cases, the trial judge may re-examine jurisdiction, freed from the binding effect of the Cassation's ruling, following the rule laid down in *Kirchberg*.

4. *Concluding Remarks on the Overcoming of Collateral Estoppel and of Res Judicata on Jurisdiction. Strengthening the Idea that the Guarantee of Finality is not Absolute but Subject to the Concurrence of Multiple Factors.*

The previous analysis confirms our reflections on the factors that may affect the overcoming of *res judicata* when it conflicts with EU law. While the overcoming of a substantive ruling requires that the decision, in addition to violating EU law, also concern a sector of exclusive EU competence, certain interpretations concerning the scope of a judgment's binding effects may be overridden merely because they render irreparable the breach of the principle of effectiveness.

Thus, the positive-conformative effect of collateral estoppel in respect of recurring taxes across subsequent proceedings relating to different tax years

bears a high degree of overcoming, precisely because the extension of the binding force to the *ratio decidendi* of the first ruling perpetuates the violation of EU harmonized tax rules. For the *ultra litem* effect of collateral estoppel to be correctly transposed, it must have arisen between the same parties in a prior proceeding: it is not enough that the earlier judgment concerned a finding of mere fact common to both cases, nor that it dealt incidentally with a matter pursuant to Article 2(2) of Legislative Decree 546/1992.
Scholars have observed that challenges to the alleged binding force of collateral estoppel are taken seriously only when they show a high degree of *prima facie* plausibility, much as in Cassation review of trial courts' evaluation of evidence, where reconsideration is ordered only if the counterevidence is sufficiently pervasive to undermine the reasoning of the impugned decision. This does not exclude that such an apparently binding ruling may exert some probative effect, as Calamandrei had already intuited in the 1930s[19]. What EU law seeks to avoid is the subjection of the second judge to an erroneous assessment of facts by the first judge, where this entails a substantive disregard of EU law.
Accordingly, the ability to challenge the injustice of a ruling whose effects are invoked *ultra litem* is effectively protected when the injustice is evident – perhaps even in the form of a manifest breach of procedural rules on fact-finding – at a level that varies depending both on the substantive legal issues underpinning special needs for consistency of rulings, and on the clues of the reliability of the first decision. A stronger *prima facie* case must be shown where more weighty values are involved, or more numerous clues are present. Given the centrality of EU taxation as a source of financing the Union's institutional functioning, the overcoming of a ruling – even an implicit one – on the opposability of a given contract to the tax administration, with consequent VAT exemption, appears tolerable.
The overcoming of the Supreme Court's ruling on jurisdiction also fits within this framework. Since it does not entail the allocation of any substantive right, *res judicata* formed on procedural matters carries only a relative degree of stability. Thus, a mere violation of EU law by the court of last instance is enough to justify its overcoming, as there is no legitimate expectation of the victorious party in such procedural determinations deserving protection. In this case, the balancing between the effectiveness of EU law and the stability of formal *res judicata* on procedural issues may easily be resolved in favor of the former.
Much more complex is the balancing required of the national judge where there is a conflict between a final substantive decision – such as an unopposed payment order – and EU consumer protection, a field of concurrent competence in which the regulatory power of the Member States has been displaced by the preventive intervention of the EU institutions.

[19] P. CALAMANDREI, *La sentenza civile come mezzo di prova*, in *Riv. dir. proc. civ.*, 1938, p. 108 ff.

Section IV
The Overcoming of Res Judicata *in Consumer Law*

1. *Introduction: the Role of the Principle of Conferral in the Overcoming of Anti-Consumer* Res Judicata *and the Functionalization*.

The phenomenon of the overcoming final judgments contrary to EU law[1] – originally confined to matters of exclusive competence, such as the recovery of State aid incompatible with the internal market, but now rapidly extending also to areas of shared competence, and in particular to consumer law – finds its institutional justification in the principle of conferral, *i.e.*, the allocation of competences under the European Treaties, as we have seen before[2].

The rule of Article 38 of the Charter of Nice, according to which EU law must ensure «a high level of consumer protection», appears to require the disregard of *res judicata* that prevents the assessment of the unfair nature of contractual clauses inserted in B2C contracts in violation of Article 6 of Directive 93/13/EEC. In other words, the strength of the principle of effectiveness of EU law is such that it can limit the scope of certain theoretical constructions concerning the objective limits of *res judicata*, whenever these make the enforcement of directly effective EU rules impossible or excessively difficult[3]. After all, these are judicial devices, crafted in the hope of achieving procedural economy, which are neither constitutionally mandated nor capable of resisting the superior normative force of EU law.

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[1] See the recent work of F. PINTO, *La cedevolezza del giudicato civile a fronte delle pronunce della Corte di giustizia dell'Unione europea*, in *DPCIeC*, p. 133 ff.

[2] See *supra*, chapter III.

[3] A. ANDOLFI, *L'incidenza del canone di effettività del diritto dell'Unione sulla disciplina processuale degli Stati membri: l'esperienza spagnola*, in *Riv. trim. dir. proc. civ.*, 4, 2020, p. 1255 ff.; R. C. FELIPE-S. T. TOMAS, *La trasformazione del processo civile spagnolo per effetto del diritto europeo*, in *Riv. trim. dir. proc. civ.*, 4, 2024, p. 1239 ff., at 1248 ff.; J. NIEVA-FENOLL, *I poteri d'ufficio del giudice nazionale europeo*, in *Riv. trim dir. proc. civ.*, 4, 2019, p. 1223 ff.

The recent judgments of the Court of Justice in *Ibercaja Banco*, *Impuls Leasing România*, *Unicaja Banco*, *SPV Project 1503 Srl*, and *Banco di Desio e della Brianza SpA*[4]

[4]European Court of Justice, 17 maggio 2022, C-600/19, *Ibercaja Banco*; European Court of Justice, 17 maggio 2022, C-725/19, *Impuls Leasing România*; European Court of Justice, 17 maggio 2022, C-869/19, *Unicaja Banco*; European Court of Justice, 17 maggio 2022, C-693/19 and C-831/19, *SPV Project 1503 Srl* e *Banco di Desio e della Brianza SpA*, with the comments of A. ASTONE, *Contratti del consumatore e clausole abusive: significativo squilibrio e dovere di trasparenza nell'interpretazione della giurisprudenza*, in *Rivista dell'associazione civilisti italiani*, 1, 2024, p. 113 ff.; F. AULETTA, *Tutela del consumatore e decreto ingiuntivo non opposto: il ruolo del giudice dell'esecuzione alla luce della recente giurisprudenza della Cgue*, in www.giustiziacivile.com, 6 febbraio 2023; L. BACCAGLINI, *Nullità di protezione, decreto ingiuntivo non opposto e giudicato implicito*, in *Riv. dir. banc.*, 2023, p. 57 ff.; P. BERTOLLINI, *Procedimento monitorio, decreto ingiuntivo non opposto e tutela del consumatore: considerazioni a margine di due interessanti pronunce della Corte di Giustizia dell'Unione Europea*, in Rivistapactum.it, 10, 2022; M. BOVE, *La tutela del consumatore tra esigenze eurounionali e creatività della nostra Corte di cassazione: una proposta alternativ*a, in www.judicium.it, 1° agosto 2023; B. CAPPONI, *La Corte di Giustizia stimola una riflessione su contenuto e limiti della tutela monitoria*, in www.judicium.it, 18 gennaio 2023; A CARRATTA, *Introduzione. L'inginutivo europeo nel crocevia della tutela del consumatore*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, a cura di S. CAPORUSSO e E. D'ALESSANDRO, in *Giur. it*, 2022, p. 485 ff.; V. CECCARELLI, *La tenuta del giudicato civile alla prova della tutela consumeristica. I poteri del giudice dell'esecuzione sotto la lente della Corte di Giustizia*, in *Jus Civile*, 2022; A. CRIVELLI, *Appunti sulla requisitoria del P.G. presso la Corte di Cassazione in ordine ai poteri del g.e. rispetto alle clausole abusive nei contratti con i consumatori*, in *Riv. es. forz.*, 2022, 707 ff.; G. COSTANTINO, *«Certezza» del diritto risultante dal titolo esecutivo, «accertamento con prevalente funzione esecutiva», «normativa senza giudizio», «preclusione pro judicato» e clausole vessatorie*, in www.inexecutivis.it; E. D'ALESSANDRO, *Il decreto ingiuntivo non opposto emesso nei confronti del consumatore dopo Corte di giustizia, grande sezione, 17 maggio 2022 (cause riunite C-693/19 e C-831/19, causa C-725/19, causa C-600/19 e causa C-869/19): in attesa delle Sezioni Unite*, in *Judicium*, 2022; ID., *Una proposta per ricondurre a sistema le conclusioni dell'avv. gen. Tanchev*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, cit., p. 541 ff.; ID., *Dir. 93/13/CEE e decreto ingiuntivo non opposto: le Sez. un. cercano di salvare l'armonia (e l'autonomia) del sistema processuale nazionale attraverso una lettura creativa dell'art. 650 c.p.c.*, in *Giur. it.*, 2023, p. 1060 ff.; F. DE STEFANO, *Le sentenze di Chicxulub: il decreto ingiuntivo contro il consumatore dopo le sentenze della Corte di giustizia dell'U.E.*, in www.giustiziainsieme.it, 24 febbraio 2023; ID., *La Corte di Giustizia sceglie tra tutela del consumatore e certezza del diritto. Riflessione sulle sentenze del 17 maggio 2022 della Grande Camera della CGUE*, in www.giustiziainsieme.it, 27 settembre; I. FEBBI, *La Corte di giustizia crea scompiglio: il superamento del giudicato implicito nel provvedimento monitorio*, in www.judicium.it, 12 luglio 2022; G. FIENGO, *Il decreto ingiuntivo non opposto privo di motivazione emesso nei confronti del consumatore: alla ricerca del rimedio effettivo*, in *Quest. giust.*, 2023; D. U. GALLETTA-M. GIAVAZZI, *Nozione di giudicato, giudicato implicito e limiti all'autonomia processuale degli Stati membri UE (nota a margine della sentenza in cause riunite C-693/19 e C-831/19, 17 maggio 2022)*, in *Osservatorio costituzionale*, 6, 2022, p. 97 ff.; A. M. GAROFALO, *Decreto ingiuntivo non opposto e protezione del consumatore dalle clausole vessatorie*, in *NGCC*, 2023, p. 86 ff.; ID., *Oltre Banco di Desio: le (altre) ricadute sul sistema processuale italiano della giurisprudenza europea in tema di protezione effettiva del consumatore*, in *Rivista dell'associazione civilisti italiani*, 1, 2023, p. 173 ff.; A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: la lettura della Corte di Giustizia*, in *Riv. dir. proc.*, 2023, p. 294 ff., at 301; S. GUZZI, *L'intangibilità del giudicato monitorio della Corte di giustizia e i suoi limiti: tra esigenze di stabilità e tutela del consumatore*, in *Dir. un. eur.*, 2, 2022, p. 327 ff.; D. LONGO, *Le questioni poste dalle pronunce della corte di giust. ue del 17 maggio 2022 in punto di tutela giurisdizionale del consumatore esecutato: considerazioni introduttive*, in *La tutela del consumatore esecutato in prospettiva europea*, a cura di D. LONGO, Bari, 2022, p. 3 ff.; F. MARCHETTI, *Note a margine di Corte di Giustizia UE, 17 maggio 2022 (cause riunite C-693/19 e C-831/19), ovvero quel che resta del brocardo "res iudicata pro veritate habetur" nel caso di ingiunzioni a consumatore non opposte*, in judicium.it, 24 giugno 2022; D. MICALI, *Le ricadute sul sistema processuale italiano delle pronunce della Corte di giustizia UE 16 maggio 2022*, *ivi*, 28 febbraio 2023; S.

have reshaped the preclusive effect of *res judicata* in consumer law, introducing a derogation from the rule of *res judicata* ("binding for all purposes"), based on the conviction that the choice of procedural track affects the scope of finality[5].

This is particularly so when the preclusion flowing from the "long shadow of implicit *res judicata*[6]" frustrates the effectiveness of consumer protection rules, insofar as it prevents the review of potentially unfair contractual clauses where the judge of the order of payment proceeding failed to give reasons on that point, provided the consumer has not remained entirely passive.

The idea of reinforced consumer protection in procedural law, even at the cost of derogating from settled national jurisprudence, emerged well before 17 May 2022[7]. The initiative of the Tribunal of Milan, acting as enforcement judge, which in 2019 submitted two preliminary references to the Court of Justice, represents the culmination of a process that began at least two decades earlier[8]. Both references questioned the extent of the *ex officio* powers of the enforcement judge when enforcement proceedings are brought against a consumer. More precisely, the court of Milan asked whether the enforcement judge is bound by *res judicata* arising from an unopposed order of payment, notwithstanding the

MINAFRA, *L'autorità di giudicato del decreto ingiuntivo non opposto e la tutela dei consumatori al vaglio della Corte di giustizia*, in www.GiustiziaCivile.com, 17 agosto 2022; M. MOROTTI, *Nullità di protezione e decreto ingiuntivo: poteri del giudice e (assenza di) giudicato*, in *Il Quotidiano Giuridico*, 2023; G. PARISI, *Brevi note sui rapporti tra "esecuzione" e "accertamento" alla luce della più recente giurisprudenza della Corte di giustizia*, in www.Giustiziacivile.com, 2022, and in *Riv. es. forz.*, 2022, p. 686 ff.; G. M. RUOTOLO, *I poteri officiosi del giudice nazionale e il concetto di giudicato interno*, in *La tutela del consumatore esecutato in prospettiva europea*, cit., p. 96 ff.; G. SCARSELLI, *La tutela del consumatore secondo la Cgue e le sezioni unite, e lo Stato di diritto secondo la civil law*, in www.judicium.it, 12 aprile 2023; E. SCODITTI, *Quando il diritto sta nel mezzo di due ordinamenti: il caso del decreto ingiuntivo non opposto e in violazione del diritto dell'Unione europea*, in www.questionegiustizia.it; P. SPAZIANI, *Ampliamento della giurisdizione oggettiva e nuovi limiti del giudicato dopo la sentenza della Corte di Giustizia UE del 17 maggio 2022 (cause riunite C-693/19 e C-831/19)*, www.Giustiziainsieme.it, 2022; R. PARDOLESI-B. SASSANI, *Clausole abusive nei contratti B2C, decreto ingiuntivo non opposto, giurisprudenza eurounitaria e sezioni unite: meta-realtà e diritto a metà*, in *Foro.it*, 2023, V, c. 1486 ff.; G. RAITI, *Non compatibile con l'ordinamento UE il giudicato nazionale implicito sulla questione di vessatorietà delle clausole dei contratti consumeristici*, in *Ridare*; C. RASIA, *Giudicato, tutela del consumatore, ruolo del giudice in sede monitoria ed esecutiva*, in *Riv. trim. dir. e proc. civ.*, 2023, p. 63 ff.; R. ROSSI, *Decreto ingiuntivo non opposto e tutela effettiva del consumatore*, in Judicium.it, 3 marzo 2023; A. SOLDI-B. CAPPONI, *Consumatore e decreto ingiuntivo: le soluzioni ermeneutiche percorribili per l'integrazione tra diritto eurounitario e diritto interno*, in www.judicium.it, 10 febbraio 2023; A. M. SOLDI, *Manuale dell'esecuzione forzata*[9], Torino, 2024, p. 1053 ff.; A. TURMO, "*A new chapter in the saga of national res judicata and the effectiveness of EU Law: Confirming the trend towards increasing encroachments upon domestic procedural law*", *EU Law Live*, 30th May 2022; S. VINCRE, *Le nullità consumeristiche tra necessità di protezione e di certezza. Brevi osservazioni sulle ricadute della decisione della Corte di giustizia del maggio 2022 sul decreto ingiuntivo e sull'esecuzione*, in *La tutela del consumatore esecutato in prospettiva europea*, cit., p. 204 ff.

[5] A. DE LA OLIVA SANTOS, *Oggetto del processo civile e cosa giudicata*, trad. it. a cura di D. VOLPINO, Milano, 2009, p. 149 ff: I. PAGNI, *Il contratto nel processo*, Milano, 2022, p. 39; G. COSTANTINO, *«Certezza» del diritto risultante dal titolo esecutivo*, in *La tutela del consumatore esecutato in prospettiva europea*, cit., p. 342.

[6] G. DE CRISTOFARO, *Giudicato e motivazione*, in *Riv. dir. proc.*, I, 2017, p. 41 ff., at 64.

[7] See, for example, Trib. Macerata, 1° March 2019, in *Dejure*.

[8] With the well-known rule enunciated by European Court of Justice, 27 June 2002, C-240/98 and C-244/98, *Ocèano Grupo Editorial*. See also *supra*, chapter III, § 7 and ff.

fact that the underlying consumer contract was tainted by unfair clauses which had gone undetected by the judge of the summary phase.

Both referrals rested on a common conviction: it is unproven that, in the Italian legal order, the enforcement judge must confine himself to a merely notarial role. Such a conception risks colliding with EU law insofar as the sharp division between cognition and enforcement prevents the latter from raising *ex officio* substantive defects of the enforceable title. In the summary phase, the judge is required to verify *ex officio* the "conditions of admissibility" of the claim according to Article 633 c.p.c.[9], among which it is difficult to deny the inclusion of the lawfulness of the credit claim. No one today disputes that a lack of such conditions may be raised *ex officio*, nor can it be seriously objected that recognizing such a power would break down once the unfairness of the clause is not *ictu oculi* evident but requires deeper evidentiary inquiries, possibly through the procedural tool in Article 640(1) c.p.c. Such inquiries would not transform the summary injunction phase into full cognizance litigation.

The Court of Justice's twenty-year-old orientation on the *ex officio* review of unfair terms in consumer contracts is justified by the awareness that endowing the judge in the summary phase with such powers is essential to the effectiveness of consumer protection law. Judicial initiative maximizes the chances of correcting allocative errors caused by unfair terms, thereby rebalancing the asymmetry between professional and consumer. From a normative standpoint, Article 6 of Directive 93/13/EEC is widely regarded as an imperative rule. In this context, the Court of Justice has construed the *ex officio* review of unfair clauses as an obligation: the national judge must comply as soon as he has at his disposal the factual and legal elements necessary to that effect, even employing *ex officio* evidentiary powers whenever the case file "raises serious doubts as to the unfair nature of certain clauses[10]."

Accordingly, the Court has designed a model of judge who, although active, is neither inquisitorial, nor partial, nor paternalistic[11]: regardless of whether the consumer appears, the judge must apply EU law *ex officio*, identify unfair terms, and reject the application for an injunction. This is because, under the EU design, the judiciary – in areas of exclusive or shared competence – is tasked with counteracting phenomena of judicial Darwinism, preventing market failures, however micro-fragmented (as in consumer protection)[12], that still represent allocative errors and thus violations of the law.

A different question arises when the judge of the summary phase has failed to conduct such *ex officio* review and to provide reasons on the unfairness issue. According to prevailing national case law, the decree granting the order of

[9] See classical study of P. CALAMANDREI, *Il procedimento monitorio nella legislazione italiana*, in *Opere Giuridiche*, IX, RomaTre-Press, Roma, 2019, p. 50 ff.

[10] Cfr. European Court of Justice, 11 March 2020, C-511/17, *Gyogynè Lintner*, § 38.

[11] See A. BEKA, *The Active Role of Courts in Consumer Litigation. Applying EU Law of the National Courts'Own Motion*, cit., p. 190.

[12] L. NIVARRA, *Diritto privato e capitalismo. Regole giuridiche e paradigmi*, Napoli, 2010, p. 116, footnote 58.

payment – although issued *inaudita altera parte* and briefly reasoned – is capable of acquiring *res judicata* binding force not only on the claim enforced but also on the validity of the underlying contractual relationship. It must therefore be asked whether the noble objective of preventing inequality in sensitive fields such as consumer law can go so far as to undermine the authority of *res judicata* implicitly formed on the validity of the contract tainted with unfair clauses, formally "cured" by the implicit finality of the order of payment decree.

2. *The Background of the "Twin Judgments".*

The solution adopted by the Grand Chamber does not seem entirely unrelated to the factual background of the cases[13]. In the case from which the first preliminary reference originated[14], the creditors had commenced enforcement proceedings because of an unopposed order of payment. The enforcement judge, considering that the clause concerning the calculation of default interest could be unfair due to a substantial violation of national usury rules, ordered the production of the loan agreements and invited the debtor to invoke the protective nullity, with the consequence of reducing the creditor's claim should the unfairness be established.

Once the debtor manifested the intention to rely on protective nullity, the enforcement judge deemed it possible to examine the issue *ex officio* and scheduled a new hearing so that the parties could address it. The creditor, in response, argued that the authority of *res judicata* arising from the failure to oppose the order of payment could not be overcome and referred to the rule set out in *Asturcom*. According to that judgment, the principle of effectiveness cannot compensate for the consumer-debtor's inaction in the original proceeding, the outcome of which produced the enforceable title[15]. Consequently, the enforcement judge could not raise the nullity of a contract containing unfair terms, since such an objection properly belongs in the cognizance phase. The judge noted, however, that despite the absence in the summary phase of any review concerning the potential unfairness of the default interest clause, under national law the issue must be regarded as precluded by the implicit *res judicata* resulting from the failure to oppose the order of payment. Hence the need for a preliminary reference to the *Plateau Kirchberg* to verify whether such a broad scope of collateral estoppel was compatible with EU law, even when it prejudices the consumer's right to effective judicial protection.

The case underlying the second reference presented the additional complication of uncertainty as to whether the debtor qualified as a consumer[16]. After requesting the deposit of the guaranteed agreements, the enforcement judge found that one of the two guarantors could indeed be classified as a consumer

[13] S. CAPORUSSO, *Procedimento monitorio interno e tutela* consumeristica, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, cit., p. 533 ff.

[14] European Court of Justice, 17 May 2022, C-693/19, *SPV Project 1503 c. YB.*

[15] European Court of Justice, 6 October 2009, C-40/08, *Asturcom Telecomunicaciones SL.*

[16] European Court of Justice, 17 May 2022, C-831/19, *Banco di Desio e della Brianza c. YX.*

and thus raised *ex officio* the additional problem of territorial jurisdiction, since the *forum* chosen was not that of the consumer's domicile.

Although from a legal standpoint the core issue remained the preclusive effect of matters not addressed during the summary phase and crystallized by the failure to oppose the decree, in practice the problem took a different form. Between the issuance of the order of payment and the initiation of foreclosure proceedings, domestic case law had shifted, following the guidance of the Court of Justice, regarding the subjective requirement of consumer status in guaranteed contracts[17]. This interpretative shift occurred after the expiry of the deadline for opposing the order of payment decree: at a point in time when it was no longer possible for the consumer to challenge the unfair terms.

Beyond the Italian cases, in *Ibercaja Banco*[18], within the framework of mortgage enforcement proceedings (*ejecución hipotecaria*), once the deadline for opposition to the forced sale of the mortgaged property had expired, the enforcement judge awarded the property to the same enforcing creditor. Consequently, the *Audiencia Provincial de Zaragoza* asked the *Plateau Kirchberg* whether the enforcement judge could nevertheless examine the unfairness of the clause, notwithstanding the debtor's inaction and the consummated transfer of ownership to the purchaser.

In *Impuls Leasing România*, once enforcement proceedings had been commenced on the basis of an extrajudicial enforceable title, the debtor lodged an opposition, and the judge hearing the opposition raised *ex officio* the existence of unfair terms in the leasing contract underlying the enforcement[19]. However, Article 713(2) of the Romanian Code of Civil Procedure allows the *ex officio* review of defects affecting an extrajudicial enforceable title only if no contractual remedies are available or can no longer be pursued to challenge the defect. Thus, the enforcement judge would not have been able to review *ex officio* the existence of unfair terms. This mechanism, seen as jeopardizing the principle of effectiveness of consumer protection, became the subject of the Romanian court's preliminary reference.

Finally, in *Unicaja Banco* the issue concerned the *ex officio* review of unfair terms despite the *res judicata* resulting from the failure to pursue ordinary appeals[20]. The bank had granted a mortgage loan with a fixed interest rate of 3.35% for the first year, followed by a variable rate (Euribor one year + 0.52%), with a minimum interest rate clause set at 3%. In 2009, the bank applied this clause despite the fall in the Euribor. In 2016, the borrower brought an action against the bank seeking annulment of the clause and reimbursement of the overpaid amounts,

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[17] F. AZZARI, *Spigolature attorno alla definizione di "consumatore"*, in *Contratti*, 2021, p. 60 ff.; M. BELLINO, *La Cassazione supera la teoria del professionista di rimbalzo*, in *NGCC*, 4, 2020, p. 758 ff.; S. PAGLIANTINI, *La fideiussione consumeristica: cronaca di un misunderstanding all'italiana*, in *Nuove Leggi Civ. Comm.*, 1, 2021, p. 106 ff.; A. ZURLO, *La qualifica consumeristica del fideiussore: il definitivo superamento della teorica della professionalizzazione di "rimbalzo"*, in *Riv. Dir. Risparmio*, 2020, I, p. 113 ff.

[18] European Court of Justice, 17 May 2022, C-600/19, *Ibercaja Banco*.

[19] European Court of Justice, 17 May 2022, C-725/19, *Impuls Leasing România*.

[20] European Court of Justice, 17 May 2022, C-869/19, *Unicaja Banco*.

arguing that she had not been adequately informed. The Court of First Instance of Valladolid upheld the claim by judgment of 6 June 2016, declaring the clause unfair for lack of transparency and ordering the bank to reimburse, but only as from 9 May 2013, in line with the case law of the Tribunal Supremo. The bank appealed against the costs award. The *Audiencia Provincial de Valladolid*, by judgment of 13 January 2017, upheld the appeal, setting aside the costs order without altering the decision on reimbursement, but disregarded the principle established in *Gutiérrez Naranjo*, which required full reimbursement of sums paid under unfair clauses[21]. The borrower appealed to the Tribunal Supremo, alleging breach of the principle of non-binding nature of unfair terms, while the bank raised the inadmissibility of the appeal, since the borrower had not filed an incidental appeal within the deadline. The Tribunal Supremo, despite the existence of internal *res judicata*, stayed the proceedings and referred to the Court of Justice the question whether national procedural principles – such as party disposition and the prohibition of *reformatio in peius* – could prevent the appellate court, seised only with the bank's appeal, from granting full reimbursement of the sums unduly paid by the consumer, thereby worsening the position of the appellant.

3. *The solution of the Court of Justice.*

The basic idea guiding the judgments of 17 May 2022 is the following: the system of protection established by Directive 93/13/EEC assumes that the consumer is in a position of weakness. It is not only the imbalance in bargaining power, but also the informational asymmetry that justifies the wording of Article 6(1) of that Directive, insofar as it provides that unfair terms shall not be binding on consumers. This provision aims to restore balance between the parties, through the removal of contractual clauses that create a disproportion of rights and obligations in favor of the creditor.

That said, it is a well-established principle that EU law precludes national procedural rules that prevent the national court from examining of its own motion the unfairness of terms contained in consumer contracts where it has at its disposal the legal and factual elements necessary to carry out such an assessment[22]. Another question, however, is whether, notwithstanding the formation of *res judicata*, the enforcement judge may of its own motion examine the possible unfairness of such terms, despite the implicit *res judicata* on the validity of the contract. The Court of Justice held that a national provision according to which an *ex officio* review of the unfairness of contractual terms is deemed to have been carried out – and covered by *res judicata* – even in the absence of reasoning on the point, deprives of any substance the obligation

[21] European Court of Justice, 21 December 2016, C-154/15, C-307/15 and C-308/15, *Francisco Gutiérrez Naranjo*. About this judgment see F. DE ELIZALDE-C. LESKINEN, *the control of terms that define the essential obligations of the parties under the Unfair Contract Terms Directive:* Gutiérrez Naranjo, in 55 *Common Market Law Review*, 2018, p. 1595 ff.

[22] J. NIEVA-FENOLL, *I poteri d'ufficio del giudice nazionale europeo*, cit., p. 1235 ff.

incumbent on the national court to undertake such a review. Accordingly, the need for effective judicial protection is incompatible with the mere "virtual control" of unfair terms and requires that the enforcement judge may assess, even for the first time, the possible unfairness of contractual clauses forming the basis of an order of payment decree issued at the request of a creditor and not opposed by the debtor, provided that the judge of the summary phase has not reasoned on the point. In fact, the principle of effectiveness, as construed by the Court, cannot entirely replace the consumer's complete passivity: a reasoning concerning the absence of unfair terms allows the consumer to weigh the opportunity of lodging opposition against remaining inactive and accepting the consolidation of the order of payment decree.

The reasoning of the Court is even more explicit in *Ibercaja Banco*: consumer protection can be regarded as effective only on condition that the national court expressly states in its decision authorising mortgage enforcement that it has undertaken an *ex officio* review of the validity of the title, providing at least a summary reasoning on the absence of unfair terms. Nor is such a review precluded by the sale of the mortgaged property: the principle of effectiveness requires that the consumer be able to assert his or her rights in subsequent proceedings to obtain compensation for damage arising from the application of unfair terms.

In *Impuls Leasing România*, the Court added a further element to the mosaic of overcoming *res judicata* in anti-consumer matters: national legislation is contrary to EU law if it prevents the judge hearing opposition to enforcement from examining of his or her own motion or at the consumer's request the unfairness of contractual terms in a consumer contract constituting an enforceable title, merely because the consumer may bring a separate civil action challenging the validity of that contract, where the latter action may suspend enforcement proceedings only upon the lodging of a security. Such a requirement, given the non-negligible economic disincentive imposed on the consumer, discourages recourse to that action and is thus incompatible with the principle of effectiveness of judicial protection in consumer law.

Finally, in *Unicaja Banco* the Court circumscribed the concept of the consumer's "complete passivity" that precludes *ex officio* review at the enforcement stage. Although in the main proceedings the consumer had not filed an incidental appeal to invoke the principle set out in *Gutiérrez Naranjo* on the repayment of overcharged interest, the Court held that such passivity was attributable to the fact that the time-limit for lodging an appeal or cross-appeal under national law had already expired by the time the authentic interpretation of EU law was delivered; thus, the consumer could not be blamed for failing to act. It follows that the court in the subsequent proceedings may examine of its own motion the unfairness of the interest clause and order full restitution of the sums unduly withheld by the bank, notwithstanding the prohibition on *reformatio in pejus*. The "hyper-retroactive" *ius superveniens* represented by *Gutiérrez Naranjo* is such as to overcome the internal *res judicata* resulting from the failure to file a cross-appeal, enabling the consumer to recover the undue payments.

3.1. *Limitations to Overcoming* Res Judicata *in Consumer Law.*

Before turning to the different doctrinal interpretations of the judgments of 17 May 2022, it should be noted that both the exclusion of the formation of implicit *res judicata* on deductible matters and the overcoming of internal *res judicata* caused by "unconscious acquiescence" derive from the inadequacy of domestic procedural law to ensure the effectiveness of EU law. The consumer must be placed in a position to challenge the reasoning given by the judge in the summary phase concerning the absence of unfair terms[23]; if no explicit assessment has been carried out, the consumer may even be discouraged from lodging opposition, since he or she is unaware of the reasoning followed by the judge of the summary phase.

The idea that the protection afforded by EU law does not extend to the "sleeping" consumer – in strict application of the ancient maxim *non dormientibus, sed vigilantibus leges soccurrunt* – was confirmed in *ERB New Europe Funding II v. YI*[24], where the *Plateau Kirchberg* had the opportunity to delimit the scope of the judgments of 17 May 2022: the duty of the national court to examine *ex officio* the possible unfairness of contractual terms is justified by the importance of the public interest underlying consumer protection. An effective review could not be guaranteed if the authority of *res judicata* also covered judicial decisions that made no reference to such a review. By contrast, that protection would be guaranteed if, in the subsequent proceedings *de eadem re*, the national court found that, in the first proceedings, the competent judge had in fact carried out a review of the potentially unfair character of the terms in question and that such review, reasoned at least summarily, had revealed no unfair terms, and that the consumer had been duly informed that, if no appeal were lodged within the prescribed period, he or she would forfeit the possibility of invoking the unfairness of such terms. According to the Court of Justice, the negative outcome of an effective review of the contractual terms cannot constitute a ground for setting aside the principle of *res judicata*[25].

It follows that it is the absence of reasoning on the absence of unfair terms in the contract that prevents the formation of *res judicata* on the deductible or on the existence of the contractual relationship. On this point, it has been observed that the impact of the Court of Justice's judgments on the Italian legal system, insofar as they make the formation of implicit *res judicata* on the contractual relationship dependent on explicit reasoning as to the absence of unfair terms in consumer contracts, seems to concern not so much the information provided to the parties but rather the information transmitted to the subsequent judge of the full-fledged phase, that is, the judge before whom the preclusive effects are

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[23] A. M. GAROFALO, *Decreto ingiuntivo non opposto e protezione del consumatore dalle clausole vessatorie*, cit., p. 92.

[24] European Court of Justice, 7 November 2024, C-178/23, *ERB New Europe Funding II c. YI.*

[25] European Court of Justice, 7 November 2024, C-178/23, *ERB New Europe Funding II c. YI*, cit., § 41.

invoked[26]. Just like the first instance judge in full-flegded proceedings, the judge of the summary phase, by reasoning on the absence of unfair terms, informs the judge of a possible opposition, appeal, or enforcement about the existence of the conditions for granting the claim[27], thereby placing the resisting party in a position to challenge that reasoning; accordingly, where the order of payment decree or the first instance judgment are not reasoned at all, and the consumer does not lodge opposition, *res judicata* covers exclusively the existence of the credit right but not the validity of the underlying contractual relationship, since there is no explicit reasoning on that point.
In any case, the overcoming of *res judicata* in consumer law encounters a limit in the adjudication of the auctioned asset and in the legitimate expectation of the purchaser regarding the stability of the forced sale. After balancing the effectiveness of consumer protection and the principle of the purchaser's legitimate expectation in the legality of the enforcement procedure – which is also functional to legal certainty in the circulation of rights – the *Plateau Kirchberg* appears to give precedence to the latter: the *ius superveniens* represented by *Ibercaja Banco* does not possess the "hyper-retroactive" effect necessary to overcome the preclusion of the deductible, since a countervailing principle of both EU and constitutional standing comes into play to limit its reach. However, the unjust decision authorising the sale, marked by the failure to examine the unfairness of the clause providing for usurious default interest, becomes an unlawful act giving rise to damages, according to a compensatory logic aimed at redressing the harm suffered by the consumer as a result of the unlawful expropriation.

4. *Reception in legal scholarship of the judgments of 17 May 2022: apocalyptic vs. integrationist readings.*

Italian scholarship, with a few exceptions, has given a lukewarm reception to the principles laid down by the Court of Justice regarding the overcoming of *res judicata* in consumer matters.

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[26] A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: la lettura della Corte di Giustizia*, cit., p. 300.
[27] A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: la lettura della Corte di Giustizia*, cit., p. 301.

It has been noted that the judgments of 17 May 2022 can be read either in an apocalyptic key[28] or in an integrationist one[29]. Indeed, the conclusions reached by the Luxembourg judges may appear either as the natural evolution of principles already established in other areas, such as the specific field of State aid to undertakings, or as confirmation of the irreversible "crisis of *res judicata*," which, although originally confined to areas of exclusive EU competence, now extends into consumer law, requiring a radical reconsideration of the general theory of *res judicata*.
In what follows, we will examine these two opposing perspectives separately.

4.1. *The Apocalyptic View*. – According to the supporters of the apocalyptic reading, the "swarm" of judgments delivered on 17 May 2022 struck a fatal blow to the very idea of the stability of implicit *res judicata*[30]. The main criticisms of the intervention of the *Plateau Kirchberg* would lie in the creation of a judicially crafted doctrine that cannot be framed within domestic conceptual categories[31], since it is undisputed that there can be no judicial review of the validity of a judicial enforcement title before the enforcement judge, unlike extrajudicial

[28] For this view see P. BERTOLLINI, *Procedimento monitorio, decreto ingiuntivo non opposto e tutela del consumatore: considerazioni a margine di due interessanti pronunce della Corte di Giustizia dell'Unione Europea*, cit.; F. DE STEFANO, *Le sentenze di Chicxulub: il decreto ingiuntivo contro il consumatore dopo le sentenze della Corte di giustizia dell'U.E.*, in www.giustiziainsieme.it, 24 febbraio 2023; I. FEBBI, *La Corte di Giustizia Europea crea scompiglio: il superamento del giudicato implicito nel provvedimento monitorio*; F. MARCHETTI, *Note a margine di Corte di Giustizia UE, 17 maggio 2022 (cause riunite C-693/19 e C-831/19), ovvero quel che resta del brocardo "res iudicata pro veritate habetur" nel caso di ingiunzioni a consumatore non opposte*, cit.; S. MINAFRA, *L'autorità di giudicato del decreto ingiuntivo non opposto e la tutela dei consumatori al vaglio della Corte di giustizia*, cit.; G. SCARSELLI, *La tutela del consumatore secondo la Cgue e le sezioni unite, e lo Stato di diritto secondo la civil law*, cit.

[29] A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: l'intervento della Corte di Giustizia*, cit., p. 301; L. BACCAGLINI, *Nullità di protezione, decreto ingiuntivo non opposto e giudicato implicito*, cit., p. 57 ff.; S. CAPORUSSO, *Attendendo le Sezioni Unite: appunti su tutela consumeristica, certezza del diritto e latitudine dei poteri officiosi*, in *Accademia*, 1, 2023, p. 139 ff.; C. CONSOLO, *Istruttoria monitoria "ricarburata" e, residualmente, opposizione tardiva consumeristica "rimaneggiata" (specie) su invito del g.e.*, in *Giur. it.*, 5, 2023, p. 1054 ff., at 1058; E. D'ALESSANDRO, *Il decreto ingiuntivo non opposto emesso nei confronti del consumatore dopo Corte di giustizia, grande sezione, 17 maggio 2022 (cause riunite C-693/19 e C-831/19, causa C-725/19, causa C-600/19 e causa C-869/19): in attesa delle Sezioni Unite*, cit.; D. U. GALLETTA-M. GIAVAZZI, *Nozione di giudicato, giudicato implicito e limiti all'autonomia processuale degli Stati membri UE (nota a margine della sentenza in cause riunite C-693/19 e C-831/19, 17 maggio 2022)*, in *Osservatorio costituzionale*, 6, 2022, p. 97 ff.; D. MICALI, *Le ricadute sul sistema processuale italiano delle pronunce della Corte di giustizia UE 16 maggio 2022*, cit.; G. RAITI, *Non compatibile con l'ordinamento UE il giudicato nazionale implicito sulla questione di vessatorietà delle clausole dei contratti consumeristici*, in *Ridare*; C. RASIA, *Giudicato, tutela del consumatore, ruolo del giudice in sede monitoria ed esecutiva*, cit., p. 63 ff.; E. SCODITTI, *Quando il diritto sta nel mezzo di due ordinamenti: il caso del decreto ingiuntivo non opposto e in violazione del diritto dell'Unione europea*, cit.

[30] F. MARCHETTI, *Note a margine di Corte di Giustizia UE, 17 maggio 2022 (cause riunite C-693/19 e C-831/19), ovvero quel che resta del brocardo "res iudicata pro veritate habetur" nel caso di ingiunzioni a consumatore non opposte*, cit., p. 2.

[31] P. BERTOLLINI, *Procedimento monitorio, decreto ingiuntivo non opposto e tutela del consumatore: considerazioni a margine di due interessanti pronunce della Corte di Giustizia dell'Unione Europea*, cit., p. 4.

enforcement titles, among which the order of payment decree certainly cannot be counted.
Moreover, the "hyper-retroactive" effect of the Court of Justice's decisions would irreversibly corrode the finality of *res judicata*, which under domestic law remains unassailable even in the face of constitutional illegitimacy rulings[32].
Finally, the overcoming of implicit *res judicata* in consumer matters would not provide any solution for the different hypothesis where the consumer has lodged opposition against an order of payment decree, but the abusive nature of the contractual clause has not been identified in that proceeding.
Several replies can be made to these arguments. The idea that domestic conceptual categories are timeless and untouchable does not withstand empirical scrutiny. National case law itself has, on more than one occasion, circumvented the strict separation between cognition and enforcement, admitting that the nullity of the contract underlying enforcement proceedings – where no explicit ruling on its validity was given by the court of cognition – could nonetheless be raised in enforcement proceedings, provided that the grounds appeared particularly well-founded, so as to avoid that forced execution might lead to a fundamentally unjust result, perpetuating the mistake of the first judge.
Looking at the case *SPV Project 1503 v. YB*, the risk of enforcing usurious default interest led the judge to consider the consumer's failure excusable, to the point that the issue was raised *ex officio* and the consumer was expressly invited to rely on the protective nullity. It is precisely the clear soundness of the nullity claim that allows the consumer's passivity to be excused, confirming the assumption that preclusion of the deductible should not be taken too seriously in the face of manifest injustice.
Furthermore, at least with reference to the cases, it is difficult to see any "hyper-retroactive" effect in the Court of Justice's decisions: the *Plateau Kirchberg* does not seem to proceed on the assumption that implicit *res judicata* had validly formed on the validity of the underlying contractual relationship following the consumer's failure to oppose. Rather, the reasoning of the judgments corresponds to the different idea of "hidden overcoming", whereby demands of justice allow the case law to reframe, *à la carte*, the scope of *res judicata* in order to contain its preclusive effects whenever consumption of the deductible would otherwise perpetuate intolerable injustice – provided that the criteria guiding this reshaping are made explicit and subjected to critical scrutiny, consistent with a modern understanding of the judge's subjection to the law[33].
The technical criterion identified by the Court of Justice is clear: the validity of abusive procedural clauses, just like substantive ones, insofar as they make the exercise of consumer rights more difficult, is not covered by the authority of *res judicata* when the judge in the summary phase has only implicitly ruled upon them. As a result, the judge in opposition proceedings, even if late, may ascertain

[32] F. MARCHETTI, *op. cit.*, p. 8.
[33] A. GIUSSANI, *Intorno alla «riflessione» del giudicato contro il terzo*, cit., p. 1197.

their nullity, since there is no binding ruling (explicit or implicit) on the validity of the underlying contract.
It is possible, however, to recognize a "hyper-retroactive" effect in *Unicaja Banco*. But if one considers the specificity of that case, the overcoming of internal *res judicata* operates in a way that resembles a more tolerable resetting of procedural time-limits through jurisprudential *overruling*. The practical effect of the decision was to allow the consumer to claim restitution of the interests unlawfully retained by the bank, because of a judgment of the Court of Justice handed down after the expiry of the deadline to lodge an incidental appeal. The same outcome could, moreover, have been reached without invoking hyper-retroactivity, since the restitutionary *petitum* is a monetary one; the incidental review by the second judge of the existence of an abusive clause may also be understood as scrutiny of the injustice of the damage suffered by the consumer, which is certainly not precluded by the formation of internal *res judicata*, according to the more reassuring rule expressed in *Köbler*.
Some scholars have argued that Articles 633 and 634 of the Italian Code of Civil Procedure clearly imply that, to obtain an order of payment, the applicant must hold a valid credit right[34], with the consequence that the judge of the summary phase must necessarily verify the validity of the title underlying the claim before issuing the order of payment decree. Others have gone further, suggesting that the blow inflicted by the 17 May 2022 judgments on the principles of legal certainty and on the legitimate expectation of the victorious party regarding the stability of the outcome could even trigger the so-called "counter-limits", on the premise that *res judicata*, even when formed implicitly, enjoys constitutional status[35].
In our view, the combined interpretation of Articles 633 and 634 does not support the idea that the monitoring judge always rules implicitly on the underlying relationship when issuing the injunction. These provisions merely describe the special procedural prerequisites for access to the order of payment proceeding, which must be verified by the judge for the application to succeed. Their absence does not deprive the creditor of the ability to pursue the same claim in another action. Under Article 640(3) of the Italian Code of Civil Procedure rejection of a monitoring application does not mean the creditor is not entitled to the substantive right, but only that it cannot be granted through the simplified procedure. Thus, no rule on summary proceedings supports the notion that the judge implicitly rules on the entire contractual relationship when issuing the order of payment decree[36].

[34] See, for example, I. FEBBI, *La Corte di Giustizia Europea crea scompiglio: il superamento del giudicato implicito nel provvedimento monitorio*, cit., p. 2.
[35] I. FEBBI, *La Corte di Giustizia Europea crea scompiglio: il superamento del giudicato implicito nel provvedimento monitorio*, cit., p. 4; F. DE STEFANO, *Le sentenze di Chicxulub: il decreto ingiuntivo contro il consumatore dopo le sentenze della Corte di giustizia dell'U.E.*, in www.giustiziainsieme.it, 24 febbraio 2023; and G. SCARSELLI*, La tutela del consumatore secondo la Cgue e le sezioni unite, e lo Stato di diritto secondo la civil law*, cit., p. 7 ff.
[36] B. CAPPONI, *La Corte di Giustizia stimola una riflessione su contenuto e limiti della tutela monitoria*, cit., p. 1.

Equally untenable is the invocation of constitutional "counter-limits."
It is doubtful that implicit *res judicata* can be afforded constitutional status at all; at most, it may be justified by procedural economy. In civil law systems where the judiciary is more bureaucratized, the legitimacy of judicial power is usually grounded in technical expertise, independence, and transparency[37]. But implicit *res judicata* betrays the transparency: for the disadvantaged party it is difficult to even foresee what issues will be deemed precluded. The use of "counter-limits" cannot be expoited to preserve such an opaque construct, which strips the exercise of judicial discretion of critical scrutiny, in violation of the principle of legality of adjudication.
A similar misunderstanding underlies those who complain about the lack of "consistency" in the 17 May 2022 rulings, noting that they impose on national judges the duty to review abusive clauses *ex officio* even at the enforcement stage, while not specifying how detailed the reasoning must be[38]. Yet the Court merely required that reasoning be explicit, leaving Member States free, in accordance with the principle of procedural autonomy, to impose stringent duties of reasoning. Indeed, the intervention of the *Plateau Kirchberg* should be welcomed precisely because it sought to overcome the Italian practice of issuing orders of payment decrees without any scrutiny of the validity of the underlying contract.
Ultimately, the functionalization of domestic procedural institutions – including *res judicata* – forces a rethinking of the political choices underlying special procedures. In the ideology of the 1941 legislator, the special procedures of Book IV of the Code of Civil Procedure were designed to favor creditors: allowing creditors or property owners to obtain, through summary proceedings, an enforceable title for forced execution or specific performance, based on privileged evidence and in much shorter times than ordinary cognition, was a clear class privilege. Yet for at least half a century, legal evolution has moved also towards the opposite pole: *favor debitoris*. It is this need that the European Union has endorsed in consumer law, as made clear by Article 7 of Directive 93/13, which requires Member States to adopt effective measures to prevent abusive clauses in consumer contracts. This objective cannot be achieved without reconsidering the traditional *favor creditoris* also in procedural law: it is intolerable that the preclusion stemming from implicit *res judicata* should benefit the seller or supplier who has imposed abusive clauses. The exclusion of the legal relationship from the objective limits of *res judicata*, raising from order of payment decree, where the judge has not expressly examined it in his reasoning, is thus a result imposed by EU law.
In truth, one must have the courage to admit that in asymmetrical relationships no summary and accelerated procedure can be fully satisfactory, especially if speed is provided solely in the interest of the stronger party. Such speed always requires a counterbalance: strong judicial activism, particularly in fact-finding,

[37] See M. DAMAŠKA, *The Faces of Justice and State Authority*, New Haven, 1986, p. 18 ff.
[38] A. TURMO, "*A new chapter in the saga of national res judicata and the effectiveness of EU Law: Confirming the trend towards increasing encroachments upon domestic procedural law*, cit., p. 5.

and the containment of mechanisms – such as implicit *res judicata* – which *de facto* perpetuate injustice.

4.2. *The Integreted View*.

As anticipated, the judgments of 17 May 2022 also lend themselves to an integrated reading. It must be borne in mind that these twin rulings originated from preliminary references. Thus, one should not fall into the error of believing that the principles expressed therein apply indiscriminately in objective terms. These are rulings that resolve interpretative questions, whose principles may be applied exclusively *in consimili casu*, since the object of the preliminary procedure is not the EU norm as such, but rather the concrete interpretative question referred to the Court, as formulated by the referring judge with reference to the factual and legal elements of the national case[39].
Bearing in mind the principle expressed in *Asturcom* – namely, that in the enforcement of an arbitral award rendered in default of the consumer the abusive nature of the arbitration clause cannot be raised, since such a challenge must be pursued through an action to set aside the award – one must be cautious against interpretations that see in the Grand Chamber's judgments a mere shifting of preclusion from the stage of formation of the title to that of enforcement opposition. At the heart of the Court's reasoning lies the effectiveness of the guarantee of adversarial proceedings: only the party that actively defends itself or has at least been put in a position to do so, consumes the deductible[40]. The full preclusive effect of *res judicata* presupposes that the possibility of adversarial participation has preceded, and not merely hypothetically followed, the formation of *res judicata*.
Moreover, it is worth recalling that traditional scepticism towards applying the *res judicata*'s preclusion to judgments rendered *inaudita altera parte*, following only summary cognition, stems from doubts about the real possibility of raising preliminary issues at that stage, where there would otherwise be no procedural space. Accordingly, the idea that preclusion may arise only if the order of payment decree not opposed contains reasoning on the point, suggests that the preclusive effect is conditional upon express consideration of the issue in the order of payment decree[41].
The Court of Justice's approach thus echoes widespread conceptions regarding the inconsistency of the conceptual category of logical prejudiciality: *res judicata* should form on all issues suitable to define the dispute, provided they were

[39] About the effects of preliminary rulings, see E. D'ALESSANDRO, *Il procedimento pregiudiziale interpretativo dinanzi alla Corte di giustizia. oggetto ed efficacia della pronuncia*, Torino, 2012, p. 236 ff.
[40] In this sense, see D. MICALI, *Le ricadute sul sistema processuale italiano delle pronunce della Corte di giustizia UE 16 maggio 2022*, cit., p. 8; E. D'ALESSANDRO, *Il decreto ingiuntivo non opposto emesso nei confronti del consumatore dopo Corte di giustizia, grande sezione, 17 maggio 2022 (cause riunite C-693/19 e C-831/19, causa C-725/19, causa C-600/19 e causa C-869/19): in attesa delle Sezioni Unite*, cit., p. 5 ff.
[41] L. BACCAGLINI, *Nullità di protezione, decreto ingiuntivo non opposto e giudicato implicito*, cit., p. 68.

actually discussed and decided in the first proceeding, since Article 34 of the Italian Code of Civil Procedure seems to limit the effects of rulings on preliminary issues to the pending case, unless law or the explicit request of the parties requires an incidental determination. Moreover, this limitation of preclusion due to lack of adversarial stimulation on the preliminary issue reflects an efficient, non-mechanical rule which – when delineating the objective limits of *res judicata* – considers the actual possibility of raising the issue in the prior judgment, considering the matters truly raised and addressed in the reasoning[42]. But there is more.

The absence of preclusions does not concern just any issue, but only those reviewable *ex officio*, with the implication that failure to oppose the order of payment decree precludes raising issues not subject to *ex officio* scrutiny, even if the debtor was not informed of them, since no implicit ruling can be inferred. Thus, beyond strengthening adversarial guarantees, the Court of Justice's decisions also reshape the exercise of judicial reasoning: they overcome the idea that the binding scope of *res judicata* lies only in the operative part of the judgment[43]. While it is generally accepted that the scope of dismissal *res judicata* must be identified through the reasoning, in the traditional private-law logic reasoning merely serves to interpret the operative part, not to attribute binding force to the judge's analysis.

Italian case law, however, often attributes binding effect to individual reasoning steps that constitute the necessary logical antecedents of the ruling. The Court of Justice goes further: it extends binding effect even to necessary logical antecedents that have been only implicitly decided, provided there is at least some trace of reasoning on the matter. The judge of the summary proceeding, by expressly reasoning on the absence of abusive clauses, informs the opposition or enforcement judge of the prerequisites for granting the claim. Thus, where the order of payment decree is reasoned and the consumer fails to oppose, the deductible is definitively consumed. Conversely, accepting that *res judicata* preclusion arises even in the absence of reasoning on a manifestly well-founded, *ex officio* reviewable preliminary issue means conceiving civil *res judicata* in a monadic, axiomatic, and ultimately unrealistic manner.

When general principles are in tension – such as legal certainty, of which *res judicata* is an expression, and effectiveness of EU law – entrusting the assessment solely to binary logic (true/false) may lead to inequitable results. One must also rely on the "fuzzy logic" of balancing.

The myth of *res judicata* is undermined by empirical case law reality. The binding effect of rulings no longer subject to ordinary appeal depends on balancing multiple factors, not all of which may appear in the reasoning. It is thus more likely that the second judge disregards a formally binding ruling where the parties

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[42] E. D'ALESSANDRO, *Il decreto ingiuntivo non opposto emesso nei confronti del consumatore dopo Corte di giustizia, grande sezione, 17 maggio 2022 (cause riunite C-693/19 e C-831/19, causa C-725/19, causa C-600/19 e causa C-869/19): in attesa delle Sezioni Unite*, cit., p. 6.

[43] D. MICALI, *Le ricadute sul sistema processuale italiano delle pronunce della Corte di giustizia* UE *16 maggio 2022*, cit., p. 9.

or subject matter differ, where the decision is implicit, where reasoning is summary or schematic, where the ruling was not issued by the Supreme Court, where the matter is of major public interest, where decisive evidence was overlooked, or where the proceeding lacked full adversarial participation, provided that doing so does not expose the first judge to liability. Sometimes the reason for disregarding *res judicata* is that the first judge committed a manifest violation of law[44]. For obvious institutional reasons, one cannot expect the second judge – outside the appeal system – to expressly declare that the first was wrong, particularly within the same judicial hierarchy. But it is natural that not every legal violation covered by *res judicata* should allow it to be disregarded. Only late challenges showing a very high degree of *fumus* – making the first judge's error manifest – will be considered.

The general resistance of *res judicata* to retroactive legislative interventions is explained by the constitutional principle of separation of powers. One may also argue, under Article 24 of the Italian Constitution, that parties hold the right to obtain the stabilizing effect of *res judicata* regarding disputes over their subjective rights. But this does not mean protection extends to grossly erroneous rulings, since no constitutional principles justify their preservation.

The perimeter of injustice in precluding the deductible absent reasoning on abusive clauses is traced by Articles 6 and 7 of Directive 93/13, which provide that such clauses "shall not bind" the consumer and that Member States must discourage their insertion in consumer contracts. Conversely, automatic preclusion of the deductible constitutes an intolerable incentive for professionals to insert abusive clauses, especially given that the burden of proof of the essential nature of a clause (for purposes of voiding the entire contract) lies with the consumer. These elements, combined with the centrality of EU competence in consumer law and the strong public interest underlying it, warrant attributing a high degree of apparent plausibility to a late challenge, even in enforcement, regarding the presence of abusive clauses overlooked by the monitoring judge.

Beyond any mystification, *res judicata* itself must be measured against EU public order norms in areas of EU competence. In such cases, *res judicata* may be deemed tangible.

What apocalyptic readers fail to admit is that deeply unjust *res judicata* must yield, especially when it frustrates the *effet utile* of EU law in areas of Union competence. If one adheres to the integrated vision, however, the Court of Justice's rulings appear anything but disruptive, even in holding that the attribution of a substantive right granted by a summary, unopposed order may be undone by a subsequent incompatible ruling, justifying the *condicio indebiti*[45], and that enforcement judges may raise abusive clauses *ex officio* when the violation of law is particularly evident, as in the substantial disregard of the usury prohibition.

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[44] A. GIUSSANI, *Decreto ingiuntivo non opposto dal consumatore: l'intervento della Corte di Giustizia*, cit., p. 302.

[45] See European Court of Justice, 17 May 2022, C-600/19, *Ibercaja Banco.*

EU case law thus revives an idea already intuited by medieval jurists: that manifest *iniquitas* may induce the second judge to disregard an apparently binding ruling[46]. The injustice of a judgment upholding a violation of such a socially sensitive prohibition cannot be cured *sic et simpliciter* by the passage formation of *res judicata*, especially where that prohibition is also imposed by EU law.

5. *The Reception of the Judgments of the Court of Justice of 17 May 2022 by Italian Supreme Court, Grande Chambre, 6 April 2023, No. 9479*.

With an unusual nomopoietic ruling[47], the Italian Supreme Court partially incorporated the principles set forth by the judgments of 17 May 2022, by

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[46] R. MARANTA, *Tractatus de ordine iudiciorum*, Lugduni, 1550, §§ 138, 141, 143 e 144. See *retro*, chapter II, section II.

[47] See Italian Supreme Court, Grande Chambre, 6 April 2023, No. 9479, in *Foro it.*, 2023, I, p. 1452 ff., commented by P. FARINA, *Le sezioni unite rispondono alla Corte di giustizia creando un nuovo istituto. L'opposizione ultra-tardiva a decreto ingiuntivo e l'effettività della tutela consumeristica*, *ivi*, p. 1474; R. PARDOLESI-B. SASSANI, *Clausole abusive nei contratti B2C, decreto ingiuntivo non opposto, giurisprudenza eurounitaria e sezioni unite: meta-realtà e diritto a metà*, *ivi*, p. 1486 ff.; S. PAGLIANTINI, *«Ce n'est qu'un début»: spigolature civilistiche sul decalogo europeista di sez. un. 9479/23*, *ivi*, p. 1491 ff.; and L. BACCAGLINI, *Il decreto ingiuntivo emesso nei confronti del consumatore: le ricadute sul piano della cognizione e dell'esecuzione alla luce delle Sezioni Unite*, in *NGCC*, 4, 2023, p. 946 ff.; E. BERTILLO, *Sui rapporti tra c.d. giudicato implicito e provvedimento monitorio non opposto*, in *Riv. dir. proc.*, 3, 2023, p. 1036 ff.; M. BOVE, *La tutela del consumatore tra esigenze eurounionali e creatività della nostra Corte di cassazione: una proposta alternativa*, in *Judicium online*, 2023; S. CAPORUSSO, *Le Sezioni Unite tra potere nomogenetico della Corte di Giustizia e autonomia processuale degli Stati membri*, in *Riv. dir. proc.*, 3, 2023, p. 1231 ff.; B. CAPPONI, *Primissime considerazioni su SS. UU 6 aprile 2023 n. 9479*, in www.Giustiziainsieme.it, 2023; A. CARRATTA, *Le Sezioni Unite della Cassazione tra nomofilachia e nomopoiesi. A proposito della sentenza n. 9479 del 2023*, in *Riv. esec. forz.*, 2023, p. 364 ff.; M. CIRULLI, *La tutela del consumatore ed il vaso di pandora*, in www.judicium.it., 2023; C. CONSOLO, *Istruttoria monitoria "ricarburata" e, residualmente, opposizione tardiva consumeristica "rimaneggiata" (specie) su invito del g.e.*, in *Giur. it.*, 5, 2023, p. 1054 ff.; G. COSTANTINO, *Clausole vessatorie e stabilità dei rapporti giuridici*, in www.in-Executivis.it, 2023; A. CRIVELLI, *Le Sezioni Unite e il titolo nei confronti del consumatore. Ovvero come il diritto eurounitario trasforma il diritto processuale esecutivo*, in *Riv. es. forz.*, 2, 2023, p. 384 ff.; D'ALESSANDRO, *Dir. 93/13/CEE e decreto ingiuntivo non opposto: le Sez. un. cercano di salvare l'armonia (e l'autonomia) del sistema processuale nazionale attraverso una lettura creativa dell'art. 650 c.p.c.*, in *Giur. it.*, 5, 2023, p. 1060 ff.; L. DE PROPRIS, *La più che dubbia compatibilità delle sez. un. 9479/2023 con il principio europeo di equivalenza: ovvero il raffronto tra tutela interna e transfrontaliera del consumatore*, in *Judicium*, 3, 2024, p. 412 ff.; ID., *Considerazioni sparse sulla tutela transfrontaliera del consumatore nello spazio giudiziario europeo*, in *La nuova giuridica*, 1, 2024, p. 79 ff.; I. FEBBI, *Impressioni a caldo sulla Sentenza della Corte di Cassazione S.U. 9479/2023*, in www.judicium.it, 2023; M. FARINA, *Decreto ingiuntivo non opposto e clausole abusive nella giurisprudenza delle corti di vertice*, in *Riv. dir. proc.*, 4, 2023, p. 1527 ff.; F. MARA, *Decreto ingiuntivo non opposto e clausole abusive nei contratti stipulati con i consumatori alla luce della complementarietà funzionale tra ordinamento nazionale ed unionale*, in Judicium online, 3 gennaio 2024; R. METAFORA, *Dalle sezioni unite un vademecum sugli strumenti a tutela del consumatore in caso di vessatorietà delle clausole*, in www.inexecutivis.it; V. RICCIUTO, *Il consumatore «assistito»: le Sezioni Unite riformulano la tutela consumeristica*, in *Riv. dei contr.*, 3, 2023; F. SANTANGELI, *Il processo civile e le nullità di protezione alla luce dei recenti interventi della Corte di giustizia e delle sezioni unite della Corte di cassazione*, in *Banc. Bors. tit. cred.*, 3, 2024, p. 383 ff.; M. LATINI VACCARELLA, *La Terza sezione e la rilevabilità d'ufficio delle clausole abusive a tutela del consumatore (a proposito di ord. 29 marzo 2023 n. 8911 e di sez. un. 6 aprile 2023 n. 9479)*, In *Judicium Online*; A. GIUSSANI, B. SASSANI, R. TISCINI, M.

"reworking" late opposition to an order of payment decree and by "re-fueling" the *ex officio* investigative powers of the judge of the summary phase[48].
More precisely, the Supreme Court resolved the question of reception of the 17 May 2022 judgments by holding that if the judge of the summary phase detects an abusive clause, he or she must reject the application; otherwise, the judge must issue a reasoned decree under Article 641 of the Code of Civil Procedure, including reasoning concerning the absence of consumer-unfriendly clauses. In any event, the judge of the summary phase must proceed on the basis of the factual and legal elements at his or her disposal, supplemented, pursuant to Article 640 c.p.c., by *ex officio* investigative powers, to be exercised in light of the need for expedition inherent in the monitoring procedure. The implication is that if more complex fact-finding is required – such as appointing an expert – the judge is required to reject the application for the order of payment decree. The judge may, however, request the applicant to produce the underlying contract and to provide necessary clarifications, including those relating to the debtor's status as a consumer.
At the enforcement proceeding, by contrast, if the order of payment decree does not contain reasoning regarding the abusive nature of the clauses, the enforcement judge has a duty – exercisable until the sale or assignment of the asset or the credit – to verify the existence of any abusive clauses affecting the existence and/or the amount of the credit underlying the decree, possibly upon request by the parties under Article 484 c.p.c. Following this handbook, the judge must inform the parties and notify the debtor that he or she may file an opposition to the order of payment decree under Article 650 c.p.c. within 40 days, exclusively to contest the possible abusiveness of the clauses. Until the expiration of this new term, the enforcement judge must refrain from proceeding with the sale or assignment of the asset or the credit[49].
This amounts, in effect, to a "functional variant" of late opposition, since the Supreme Court declared inapplicable paragraph 3[50], which otherwise precludes opposition ten days after the first enforcement act, while the 40-day term – actually not provided in Article 650 c.p.c. – was borrowed from Article 641 c.p.c. on the basis of a systematic interpretation. In such cases, the enforcement process must enter a state of suspension until the opposition judge decides on the matter (or until the newly granted term expires). Conversely, if the debtor

LATINI VACCARELLA, I FEBBI, B. CAPPONI, F. VIGORITO, *A più voci su esecuzione forata, decreto ingiuntivo e tutela del consumatore dopo Cass. S.U. n. 9479/2023*, in *Rass. es. forz.*, 4, 2023, p. 894 ff.

[48] C. CONSOLO, *Istruttoria monitoria "ricarburata" e, residualmente, opposizione tardiva consumeristica "rimaneggiata" (specie) su invito del g.e.*, cit., p. 1054 ff.

[49] S. CAPORUSSO, *Decreto ingiuntivo non opposto e protezione del consumatore: la certezza arretra di fronte all'effettività*, cit., p. 2117 ff.; A. CARRATTA, *Introduzione. L'ingiuntivo europeo nel crocevia della tutela del consumatore*, in *Consumatore e procedimento monitorio nel prisma del diritto europeo*, cit., p. 485 ff., at 487.

[50] D. LONGO, *Le questioni poste dalle pronunce della corte di giust. ue del 17 maggio 2022 in punto di tutela giurisdizionale del consumatore esecutato: considerazioni introduttive*, in *La tutela del consumatore esecutato in prospettiva europea*; ID., *Il controllo giudiziale sulle clausole abusive ridisegnato dalle Sezioni unite*, in *Giusto proc. civ.*, 2, 2023, p. 572 ff., at 580 ff.; S. CAPORUSSO, *Le Sezioni Unite tra potere nomogenetico della Corte di Giustizia e autonomia processuale degli Stati membri*, cit., p. 1244.

files an opposition to enforcement under Article 615 c.p.c., the judge must qualify it as late opposition and transfer the matter *ex officio* to the competent judge, granting the parties, where jurisdictional issues arise, a period of no less than 40 days for re-filing. Upon such re-filing, the opposition judge may suspend, in whole or in part, under Article 649 c.p.c., the enforceability of the order of payment decree.

From this handbook drafted by the Supreme Court, it is evident that the Court sought to soften the principles articulated by the Court of Justice. Unlike the *Plateau Kirchberg*, the Supreme Court did not vest the enforcement judge, nor the judge in charge of opposition to enforcement, with the power to scrutinize the abusiveness of clauses in the consumer contract underlying the payment request. Moreover, granting the remedy of ultra-late opposition, though functionalized to the requirements of EU law, does not exclude but rather confirms the formation of *res judicata* by implication in the event of failure to pursue opposition to the order of payment decree. The Supreme Court thus merely tasked the enforcement judge with a preliminary review of the presence of abusive clauses, sufficient to restore judicial scrutiny denied at the summary stage. A positive finding of abusiveness allows the consumer to be reinstated in terms for filing ultra-late opposition, since the risk of the monitoring judge's omission cannot be definitively allocated to the consumer.

Doctrine had already suggested alternative theories: some more respectful of the principles enunciated by the Court of Justice; others more consistent with the traditional separation between cognition and enforcement.

In what follows, we shall briefly outline these theories.

6. *The Positions of Scholars.*

In the aftermath of the judgments of 17 May 2022, scholars questioned how the national judiciary would implement the principles articulated by the Court of Justice.

Some, more in line with the later ruling of the Supreme Court, maintained that the enforcement judge could not be vested with cognitive powers beyond those specifically conferred by law[51]. Others, instead, arguing that such a rule of our system had already been superseded, suggested the admissibility of a judicial review of the presence of abusive clauses in the contract underlying the credit recognized in an unopposed order of payment decree, even at the enforcement stage.

[51] See, for this view, A. SOLDI-B. CAPPONI, *Consumatore e decreto ingiuntivo: le soluzioni ermeneutiche percorribili per l'integrazione tra diritto eurounitario e diritto interno*, cit., p. 5 ff.; G. COSTANTINO, *Clausole vessatorie e stabilità dei rapporti giuridici*, in www.in-Executivis.it, 2023; ID., *«Certezza» del diritto risultante dal titolo esecutivo, «accertamento con prevalente funzione esecutiva», «normativa senza giudizio», «preclusione pro judicato» e clausole vessatorie*, in www.inexecutivis.it and also in *La tutela del consumatore esecutato in prospettiva europea*, cit., p. 336 ff.; *contra* C. RASIA, *Giudicato, tutela del consumatore, ruolo del giudice in sede monitoria ed esecutiva*, cit., p. 89; L. BACCAGLINI, *Nullità di protezione, decreto ingiuntivo non opposto e giudicato implicito*, cit., p. 74.

In any event, each of the proposals advanced – and perhaps of all those conceivable – presents drawbacks.
We will seek to clarify the different positions taken by legal scholarship.

6.1. *The Theory of Opposition to Enforcement Under Art. No 615 c.p.c. and the Ex Officio Review of Abusive Clauses by the Enforcement Judge, and the Consequent Admissibility of Opposition to Enforcement Act.*

Some scholars have identified the enforcement stage as the procedural *locus* in which the presence of abusive clauses can be raised or reviewed[52].
This approach is based on the consideration that the judgments of 17 May 2022 imposed – albeit as an *extrema ratio* – entrusting the enforcement judge with the task of ascertaining whether the consumer contract is affected by abusive clauses. Such a solution would have the merit of ensuring "full and swift" protection, guaranteed by the judge who directs the enforcement proceedings, in which the consumer's harm materializes[53].
The enforcement judge, by means of an internal enforcement order appealable under Article 617 of the Italian Code of Civil Procedure (c.p.c.), could ascertain whether the order of payment decree, left unopposed and lacking any reasoning regarding the absence of abusive clauses by the judge of the summary phase, was improperly issued on the basis of a contractual title affected by protective nullity. If such scrutiny were to produce a favourable outcome, the enforcement judge would be bound to order the early termination of the enforcement proceedings – the so-called "atypical extinction" – owing to the lack of a valid enforceable title.
The review and finding of nullity of the abusive clause would occur within an internal enforcement incident, modelled on Articles 512 and 549 c.p.c. However, this finding would have only an internal enforcement effect and would not produce *res judicata*, since its purpose would not be to adjudicate on the invalidity of the contract, but rather to verify whether a valid judicial enforcement title exists or to determine, for enforcement purposes, the amount of the credit once the contract has been purged of abusive clauses[54].

[52] L. BACCAGLINI, *Nullità di protezione, decreto ingiuntivo non opposto e giudicato implicito*, cit., p. 75 ff.; M. BOVE, *La tutela del consumatore tra esigenze eurounionali e creatività della nostra Corte di cassazione: una proposta alternativ*a, cit., p. 4 ff.; E. D'ALESSANDRO, *Il decreto ingiuntivo non opposto emesso nei confronti del consumatore dopo Corte di giustizia, grande sezione, 17 maggio 2022 (cause riunite C-693/19 e C-831/19, causa C-725/19, causa C-600/19 e causa C-869/19): in attesa delle Sezioni Unite*, cit., p. 10; C. RASIA, *Giudicato, tutela del consumatore, ruolo del giudice in sede monitoria ed esecutiva*, cit., p. 90 ff.; see also R. TISCINI, in *A più voci su esecuzione forata, decreto ingiuntivo e tutela del consumatore dopo Cass. S.U. n. 9479/2023*, in *Rass. es. forz.*, cit., p. 912 ff.
[53] A. SOLDI-B. CAPPONI, *Consumatore e decreto ingiuntivo: le soluzioni ermeneutiche percorribili per l'integrazione tra diritto eurounitario e diritto interno*, cit., p. 3.
[54] E. D'ALESSANDRO, *Il decreto ingiuntivo non opposto emesso nei confronti del consumatore dopo Corte di giustizia, grande sezione, 17 maggio 2022 (cause riunite C-693/19 e C-831/19, causa C-725/19, causa C-600/19 e causa C-869/19): in attesa delle Sezioni Unite*, cit., p. 9.

According to this approach, the enforcement judge should also have investigative powers. These may be derived from a functional interpretation of Article 485 c.p.c., which grants the enforcement judge the power to order the hearing of the parties. From this provision, a more general power of inquiry could be inferred: the judge, if suspecting the presence of abusive clauses in the contract not included in the enforcement file or doubting the debtor's status as a consumer, could grant the parties a deadline to make the necessary submissions. The debtor, under Article 486 c.p.c., could also prompt the review of the issue.

Moreover, after the notification of the enforcement title and/or writ of execution, the consumer could always have the abusive nature of the clauses reviewed through opposition to enforcement.

It's worth mentioning that the enforcement judge, in the context of such opposition, could order suspension of the ongoing enforcement proceedings. This solution, unlike the suspension under Article 649 c.p.c. endorsed by the United Sections, has the advantage of limiting the risk of judicial error and of placing greater responsibility on the consumer-debtor. Indeed, while suspension ordered in the context of ultra-late opposition concerns the effectiveness of the order of payment decree itself, halting all enforcement proceedings based on that decree pursuant to the residual clause at the beginning of Article 623 c.p.c., suspension ordered by the enforcement judge would halt only the proceedings in which it is pronounced, without affecting other pending proceedings based on the same title. In this way, the consumer would be required to raise the issue in the other enforcement proceedings, supported by the persuasive – but not binding – effect of the enforcement judge's prior review.

In our view, this approach entails non-negligible drawbacks.

An order of early termination of the enforcement proceedings would allow the creditor to resume enforcement the very next day through a separate proceeding, and it would be difficult to maintain that the merits proceedings under Article 618 c.p.c. would be defined by judgment, since only the creditor would be entitled to object, meaning that only his initiative would then allow the debtor – wishing to oppose with *res judicata* effect the non-binding nature of the clause – to bring such proceedings.

However, if atypical extinction occurred due to the review of an abusive clause, renewed enforcement initiatives might be deterred by the range of sanctions applicable to abuse of process and, in particular, by Article 92 c.p.c., which allows the judge to order the party breaching the obligations under Article 88 c.p.c. to reimburse the debtor for non-recoverable expenses incurred. This would create a meaningful deterrent effect, discouraging the creditor from reinitiating enforcement despite early termination of the proceedings.

Far more complex is the issue of the deadline by which the consumer may bring opposition under Article 615 c.p.c., given that its second paragraph sets the *dies ad quem* at the order for sale or assignment, while the Court of Justice, in *Ibercaja Banco*, identified the only preclusion as the actual transfer of ownership resulting from the forced sale. Yet, strictly speaking, there is a difference between the order for sale or assignment and the realization of the transfer effect. According to some scholars, the time limit in Article 615(2) c.p.c. should be functionally interpreted in light of *Ibercaja Banco*, coinciding *de facto* with adjudication[55]. Beyond that moment, only compensatory relief would remain, consistent with the teaching of the Luxembourg Court.

That said, the Court of Justice has required only the stability of adjudication in favor of the third-party purchaser, meaning that the consumer-debtor could challenge the enforcement judge's order approving the distribution plan, under Articles 510, 542, and 598 c.p.c., arguing the existence of abusive clauses to prevent distribution of proceeds to the creditor[56].

Conversely, in the case of assignment of credit, since the legitimate expectation of the purchaser in the transfer effect is not at stake, the consumer must be afforded an action for restitution of undue payment, according to Art. No. 2033 of the Italian Civil Code. In such cases, the issue arises of the limitation period for the restitution claim, specifically the *dies a quo* of time-limit prescription. In this regard, the Court of Justice has held contrary to EU law and to the principle of effective consumer protection any national rule setting prescription to run from the day performance was made by the consumer, where he was unaware at the time of performance of the abusive nature of the contractual clauses agreed with the professional.

Therefore, the *dies a quo* of the restitution claim must be identified as the moment when the consumer became aware of the contract's nullity and thus potentially even after the assignment of the credit.

6.2. *The Theory of The Actio Nullitatis.*

Particularly suggestive is the theory that would grant the consumer an autonomous action for a negative declaration regarding the formation of *res judicata* on the contractual relationship following the lack of opposition to the order of payment decree[57]. This approach received authoritative support from

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[55] Cfr. L. BACCAGLINI, *Nullità di protezione, decreto ingiuntivo non opposto e giudicato implicito*, cit., p. 76; C. RASIA, *Giudicato, tutela del consumatore, ruolo del giudice in sede monitoria ed esecutiva*, cit., p. 90.

[56] A. CRIVELLI, *Le Sezioni Unite e il titolo nei confronti del consumatore. Ovvero come il diritto eurounitario trasforma il diritto processuale esecutivo*, cit., p. 409 ff.; E. D'ALESSANDRO, *Dir. 93/13/CEE e decreto ingiuntivo non opposto: le Sez. un. cercano di salvare l'armonia (e l'autonomia) del sistema processuale nazionale attraverso una lettura creativa dell'art. 650 c.p.c.*, cit., p. 1067; M. FARINA, *Decreto ingiuntivo non opposto e clausole abusive nella giurisprudenza delle corti di vertice*, in *Riv. dir. proc.*, 4, 2023, p. 1527 ff.; *contra* A. AULETTA, *Le sezioni unite sul ruolo del giudice dell'esecuzione nel controllo sulla vessatorietà delle clausole contrattuali*, in www.giustiziacivile.com, p. 5 ff.

[57] M. BOVE, *La tutela del consumatore tra esigenze eurounionali e creatività della nostra Corte di cassazione: una proposta alternativa*, cit., p. 9 ff.; A. CRIVELLI, *Appunti sulla requisitoria del P.G. presso la Corte di Cassazione in ordine ai poteri del g.e. rispetto alle clausole abusive nei contratti con i consumatori*, cit., p. 721 ff.; ID., *Le Sezioni Unite e il titolo nei confronti del consumatore. Ovvero come il diritto eurounitario trasforma il diritto processuale esecutivo*, cit., p. 394 ff.; F. DE STEFANO, *Le sentenze di Chicxulub: il decreto ingiuntivo contro il consumatore dopo le sentenze della Corte di giustizia dell'U.E.*, cit., § 14; A. GIUSSANI, in *A più voci su esecuzione forata, decreto ingiuntivo e tutela del consumatore dopo Cass. S.U. n. 9479*/2023, cit.; S.

the General Attorney at the Court of Cassation, who, on the basis that the judgments of 17 May 2022 entrust the enforcement judge with the task of examining for the first time the abusiveness of contractual clauses, recognized the judge's power-duty to do so throughout the enforcement proceedings, provided that the judge of the summary phase had not expressly addressed the issue. Such review could also be triggered at the debtor's initiative, though not through formal opposition, to preserve the exclusion of the enforcement judge from interfering with the enforcement title. The matter would instead be referred to another venue for re-examination of the title, with the introduction of facts that should have prevented the issuance of the order of payment decree. Accordingly, the enforcement judge should limit himself to identifying the issue, indicating as the proper remedy an ordinary action for a declaration (*actio nullitatis*) to be filed at first instance before the ordinary competent judge. In that action, the abusive nature of one or more clauses detrimental to the consumer could be established as not covered by *res judicata*. Suspension of the judicial title's enforceability could then be obtained externally by way of interim relief under Article 623 c.p.c., with direct effects on the enforcement proceedings. If nullity were detected immediately before an enforcement act capable of definitively jeopardizing the consumer's right of defense, the judge could defer the sale to a date following the decision (even on an interim basis) of the court of cognizance.

The General Attorney's reasoning rests on two corollaries: first, *res judicata* on the existence of the contractual relationship forms regardless of whether the judge of the summary phase reviewed the presence of abusive clauses; second, the intervention of the enforcement judge cannot extend to the judicial title itself, lest it violate judicial public order, grounded in the principle of procedural autonomy of Member States. The enforcement judge must merely allow the consumer to bring an *actio nullitatis* before the cognizance judge to assert abusiveness.

This solution has the clear merit of not confusing the plane of adjudication with that of enforcement, while ensuring compliance with the principles enunciated by the Luxembourg Court[58].

The most problematic aspect of the Attorney General's theory concerns *interim* protection. The enforcement judge could defer the sale or assignment under Article No. 484 of the Italian Code of Civil Procedure, yet this seems barred by the rationale of Article No. 42 of the Italian Code of Civil Procedure, traditionally understood as designed precisely to prevent suspensions outside the cases provided by law.

Furthermore, the absence of a general *interim* power on the part of the enforcement judge burdens the consumer with the need to request suspension of the provisional enforceability of the unopposed order of payment decree

PUGLIESE, *La tutela eurounitaria del consumatore e il ruolo della res iudicata nel procedimento monitorio: la ricerca di una coerenza sistematica, tra autonomia ed effettività*, in *Il Processo*, 2, 2024, p. 363 ff., at 413 ff.

[58] A. CRIVELLI, *Appunti sulla requisitoria del P.G. presso la Corte di Cassazione in ordine ai poteri del g.e. rispetto alle clausole abusive nei contratti con i consumatori*, cit., p. 722 ff.

under Article No. 700 of the Italian Code of Civil Procedure. Unlike suspension under Article 649 of the Italian Code of Civil Procedure, this procedure is compatible with the imposition of a bond, potentially undermining the consumer's legitimate expectation of effective protection mandated by the Court of Justice, as also recognized by the Supreme Court. However, it may be noted that in *Impuls Leasing Romania*, the Court censured only mechanisms automatically requiring consumers to pay a bond, whereas Article 669-*undecies* of the Italian Code of Civil Procedure makes this discretionary. What may be questioned instead is the positive foundation of the *actio nullitatis*, as well as the advisability of introducing a remedy available *sine die*.
These two concerns led the Supreme Court to distance themselves from the Attorney General's proposal. Yet it can be argued that, though of alleged judicial creation, the *actio nullitatis* is part of our procedural system, as may be inferred a contrario from Article 161(1) of the Italian Code of Civil Procedure Moreover, the judicial creation of the "reworked" ultra-late opposition remedy – which straddles the line between *praeter* and *contra legem* by arbitrarily introducing a limitation period in disregard of Article 152 of the Italian Code of Civil Procedure – is surely a more invasive breach of the principle of legislative reservation in procedural matters than reliance on the *actio nullitatis*, which at least finds some textual basis in Article 161(1).
In fact, the Attorney General, by invoking the *actio nullitatis*, did not mean an action to declare the legal nonexistence of the unopposed order of payment decree due to a violation of EU law, as feared by the Supreme Court. That solution appears too extreme and hardly compatible with the principles ruled by the Court of Justice, which limit the judge's scrutiny to the presence of abusive clauses rather than to annulling the title in its parts unaffected by consumer protection rules[59]. Thus, the *actio nullitatis* should instead be understood as a remedy aimed at establishing that *res judicata* does not preclude the review of consumer protection violations, which may therefore be raised in any proceeding where relevant. In any event, this remedy should be available only until the moment of sale or assignment, after which it would convert into an action for damages or restitution, given the protection EU law accords to the purchaser's acquisition.
In the same interpretive vein lies the perceptive proposal of Bove[60]: the enforcement judge, rather than questioning the existence of the claim enforced by the professional, should identify a procedural defect committed by the judge of the summary phase who failed to state reasons concerning the absence of abusive clauses in the consumer contract.

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[59] A. GIUSSANI, in *A più voci su esecuzione forata, decreto ingiuntivo e tutela del consumatore dopo Cass. S.U. n. 9479*/2023, cit., p. 901.
[60] M. BOVE, *La tutela del consumatore tra esigenze eurounionali e creatività della nostra Corte di cassazione: una proposta alternativ*a, cit., p. 9 ff.; S. PUGLIESE, *La tutela eurounitaria del consumatore e il ruolo della res iudicata nel procedimento monitorio: la ricerca di una coerenza sistematica, tra autonomia ed effettività*, cit., p. 413 ff.

This reasoning would justify judicial activism in enforcement: the judge would not be declaring the contract null but rather identifying an *error in procedendo* by the judge of the summary phase, a nullity that falls outside the scope of Article 161(1) and for which final judgment does not cure the defect. Such an incurable defect would allow the enforcement judge to find the absence of a valid enforcement title. The implication of this reasoning is clear: in enforcement proceedings there would be no need to solicit the consumer-debtor or indicate a remedy before the cognizance judge, since the enforcement must be terminated upon finding the absence of an enforceable title. The creditor could contest this decision by opposition to enforcement acts or attempt to secure a new judgment in his favor; conversely, if the enforcement judge denied the debtor's request to close proceedings early for lack of a valid title, the consumer could challenge that choice with the same remedy, since it would indeed be peculiar to hold that the very same issue – the existence of an enforceable title – should be reviewed under Article 617 if raised by the creditor and under Article 615 if raised by the debtor[61].

Despite the commendable effort to avoid coining new remedies in breach of the principle of legislative reservation in procedural matters, this theory underestimates the consumer's interest in securing removal of the order of payment decree even before service of the title and writ of execution. The consumer may have an interest in acting pre-emptively to cancel a judicial mortgage entered by the professional because of the unopposed decree. Moreover, where multiple enforcement proceedings are pending, it may occur that one is closed while others remain ongoing: referral of the matter to the cognizance judge is also functional to obtaining interim relief suspending all ongoing enforcements under Article 623 c.p.c.

This practical necessity does not seem to have been considered by the theory in question.

6.3. *The Thesis of the Revocatory Remedy.*

Considering the intervention of the Supreme Court, it remains difficult to understand why certain creative avenues are deemed practicable, while others are considered reserved for the legislature.

This refers to the hasty dismissal by the Court of the doctrinal proposal to apply the rules on revocation[62]. In fact, between the judicial manipulation of the grounds for revocation and the introduction of a different time limit of forfeiture from that provided for in Article 650 of the Code of Civil Procedure – violating Article 152 of the Code – there is no real difference, since in both cases the *requiem* for the constitutionally guaranteed legislative reservation in procedural matters would have been played.

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[61] M. BOVE, *La tutela del consumatore tra esigenze eurounionali e creatività della nostra Corte di cassazione: una proposta alternativa*, cit., p. 11.

[62] A. GIUSSANI, in *A più voci su esecuzione forata, decreto ingiuntivo e tutela del consumatore dopo Cass. S.U. n. 9479*/2023, cit., p. 901.

In this respect, it had been proposed to work systematically on the semi-extraordinary revocation of order of payment, that is, on the list – originally incomplete – set out in Article 656 of the Code of Civil Procedure[63]. The Supreme Court would have done better to remit the question to the Constitutional Court, censuring the inconsistency of the rule with Articles 11 and 117 of the Constitution, insofar as it does not provide that the consumer may obtain the annulment of the order of payment decree where he or she is unaware of his or her status as a consumer or of the unfairness of the clause not detected by the judge of the summary phase.

Moreover, this legislative gap is made all the more striking by the introduction of Article 391-*quater* of the Code of Civil Procedure, which admits the revocation of final judgments that conflict with a subsequent ruling of the European Court of Human Rights, given also the higher rank of European Union law compared to conventional law according to the general reconstruction of the hierarchy of legal sources. It thus appears difficult to justify, on grounds of reasonableness, the overcoming of civil *res judicata* conflicting with a subsequent ruling of the European Court of Human Rights that has found a breach of the ECHR, while not admitting the same for *res judicata* conflicting with a subsequent judgment of the Court of Justice of the European Union.

Although the Supreme Court introduced a new procedural remedy rather than intervene on extraordinary revocation, bill no. C.1301 (Pittalis) was submitted to the Chamber of Deputies on 13 July 2023[64]. Its purpose is to "align the current procedural system with the case law of the Court of Justice of the European Union on consumer protection."

The bill first amends Article 640 of the Italian Code of Civil Procedure, expressly requiring the judge to carry out in all cases a review of the non-abusive nature of contractual clauses. It then amends Article 641 c.p.c., making it a necessary element of the order of payment that it include an explicit warning stating that, in the absence of opposition, the consumer-debtor loses the right to contest the unfairness of contractual clauses and that the unopposed order of payment becomes final and binding also with respect to such unfairness.

If, however, the order of payment is issued without such warning, the bill introduces a new form of extraordinary revocation, governed by the new Article 396-*bis* c.p.c. ("*Revocation of an unopposed order payment*"). This provision establishes a new remedy against an unopposed order of payment, which must be filed before the same court that issued the order, within thirty days from the objection raised by the judge of opposition to writ of execution (*opposizione a precetto*), or, if commenced, by the judge of opposition to enforcement proceedings.

The revocation may be brought when the order of payment lacks reasoning on the absence of unfair terms or fails to include the mandatory warning regarding

[63] C. CONSOLO, *Istruttoria monitoria "ricarburata" e, residualmente, opposizione tardiva consumeristica "rimaneggiata" (specie) su invito del g.e.*, cit., p. 1057 ff.

[64] About the proposal see A. BURTI, *Questioni ancora aperte sulla tutela del consumatore nel processo esecutivo*, in *Riv. es. forz.*, 2, 2025, p. 261 ff., at 290 ff.

forfeiture of the consumer's rights. Moreover, the judge may suspend the enforceability of the injunction under challenge, although the bill (incorrectly) refers to Article 649 c.p.c., which applies to ordinary opposition proceedings against an order of payment.

It must also be noted that Article 396-*bis*, paragraph 3, expressly excludes opposition under Article 650 c.p.c., thereby overturning the solution crafted by the Supreme Court

The bill, as drafted, presents significant critical issues.

First, attributing functional jurisdiction to the same judge who issued the order of payment conflicts with Article 66-*bis* of the Consumer Code, all the more so where the B2C contract includes a *forum* selection clause derogating from the consumer's *forum*.

Second, it is striking that the *ex officio* review of unfair terms is assigned to the judge of opposition to writ or to enforcement, while the Court of Justice has consistently held that such review lies with the enforcement judge, regardless of any consumer initiative. Making protection conditional upon consumer action is incompatible with the rationale of the judgments of 17 May 2022, which impose an ex officio review to redress substantive imbalance. It is therefore more coherent to empower the enforcement judge to assess abusiveness, irrespective of opposition under Article 615 c.p.c.

Another critical aspect concerns the starting point (*dies a quo*) for bringing the consumer revocation, which remains unclear. It would be preferable to set it at the time the consumer is notified of the judge's decision finding abusiveness. Furthermore, even absent such a judicial finding, the consumer should arguably be entitled to file a revocation under Article 396-*bis* c.p.c., for example to obtain cancellation of a judicial mortgage registered on the basis of an unopposed order of payment. In this case, since Article 326 c.p.c. does not apply (the bill contains no express reference to the consumer revocation), the remedy should be considered available without temporal limits, or at least until enforcement proceedings begin and the enforcement judge has carried out the incidental review of unfair terms.

CHAPTER FIVE
REMEDIES AGAINST *RES JUDICATA* INCOMPATIBLE WITH EU LAW

Section I
Remedies Against Res Judicata *Contrary to EU Consumer Law*

SUMMARY: 1. Our Considerations on the Principles Enunciated by the Supreme Court. – 2. An Alternative Handbook. – 3. Limitations to the Principles Laid Down by the Supreme Court in Cross-Border Litigation. – 4. Limitations to the Solution Offered by the Supreme Court in Collective Enforcement. The Problem of the Controlled Liquidation of the Over-Indebted Consumer. – 5. Compatibility of the Handbook Drafted by the Supreme Court with Enforcement Against the Third-Party Owner. – 6. Concluding Remarks.

1. *Our Considerations on the Principles Enunciated by the Supreme Court.*

Setting aside the reconstruction of the different positions advanced by Italian doctrine[1], the solution given by the Supreme Court appears unsatisfactory. One must begin with the *obiter dictum* of the judgment in which it was reaffirmed that a non-opposed order of payment decree is fully capable of producing substantive *res judicata* not only on the credit enforced, but also on the entire contractual relationship. However, this is neither a necessary solution nor one unanimously endorsed. The Court would have done better to admit the possibility for the consumer to invoke protective nullity, excluding that the preclusive effect of the order of payment decree could extend also to issues which could still be raised. Indeed, this approach matches perfectly with the current stance of practical case law, according to which the preclusion operates only insofar as the pleas raised appear manifestly well-founded. This phenomenon – which we have already defined in terms of the "hidden overcoming" of *res judicata*, whereby requirements of justice in the decision allow case law to (re)draw the scope of *res judicata* in order to limit its preclusive effects when the exhaustion of issues could result an intolerable injustice – is admissible provided that the criteria of such dimensioning are made explicit and subjected to critical scrutiny, in accordance with a modern conception of the subjection of the judge to the law. The technical criterion orienting this decision-making power has been clearly set forth by the Court of Justice: the validity of abusive procedural clauses, just like that of substantive ones, insofar as they make the exercise of consumer rights more difficult, is not covered by the authority of *res judicata* when the judge of the summary phase has ruled on them only implicitly. Therefore, the judge deciding opposition proceeding – even if late – may declare its nullity, since there is no implicit final ruling on the validity of the contract.

[1] See *retro*, chapter IV, section IV.

It then seems that, on this point, the Supreme Court did not correctly implement the guidance coming from *Kirchberg*.
Moreover, the limitation of the judge of execution's powers by the handbook drawn up by the Supreme Court is not always consistent with what was stated in *SPV Project 1503 Srl* and *Banco di Desio e della Brianza SpA*[2]. In that case, the Court of Justice imposed on the judge of execution the duty to ascertain violations of consumer law, whereas the Supreme Court recognized him only a "subsidiary" role: he can raise the issue without, however, deciding it. Nor does it seem that this deviation from the Court of Justice's case law can be justified by the claim that entrusting the judge of execution with the power to rule on the nullity of the consumer contract might even be detrimental to the consumer, since it could expose him to a repetition of the enforcement action. On this point, one may observe that such a power would disadvantage the consumer only if it were exclusive – namely, if the legal order did not allow concurrent remedies. Yet this must be denied once one affirms that the ruling of early termination of enforcement proceedings issued by the judge of execution cannot produce *res judicata*: since *res judicata* is a utility constitutionally guaranteed to justice users, the parties retain the right to a resolution that is, in principle, final. This means that the consumer could always opt for a full-fledged proceeding capable of producing *res judicata* in order to obtain a declaration of nullity of the consumer contract, alleging that the issues were not exhausted.
As for the alleged loss of a ground of judgment that would result from channeling the issue through opposition to enforcement acts against the judge of execution's ruling, the problem actually concerns the professional creditor. Where the judge of execution fails to note the issue, the consumer may still resort to opposition to enforcement; conversely, opposition to acts, according to Art. No. 617 of the Italian Code of Civil Procedure, would serve as a remedy for the creditor to challenge early termination of the enforcement proceeding. In this way, one also counters another justification advanced by the Supreme Court for rendering acceptable their reshaping of late opposition: such a tool prevents attachment by suspending the enforceability of the order of payment decree pursuant to art. 649 c.p.c. On the other hand, opposition to enforcement would still require waiting for service of the writ of execution. In fact, art. 615 allows the judge of execution to suspend the enforceability of the title, not the ongoing enforcement proceeding itself. The impossibility of accessing such protection before service of the writ could, in any event, be overcome through urgent interim relief.
Nor can opposition to enforcement be excluded by claiming that the consumer's *forum* would not apply, since jurisdiction would instead lie with the judge of the place of enforcement. Doctrine has pointed out that this argument proves too much: while the *forum rei sitae* may not coincide with the consumer's residence or domicile, it is still a place in which the consumer has significant interests, and

[2] European Court of Justice, 17 May 2022, C-693/19 and C-831/19, *SPV Project 1503 Srl* e *Banco di Desio e della Brianza SpA*.

thus less burdensome than the *forum* abusively chosen by the professional. In any case, the steady move toward full electronic proceedings further reduces the importance of this issue[3].
Moreover, the risk that the professional creditor might pursue enforcement again after early termination of the proceeding can also be forestalled. Where such termination occurs because the judge detects *ex officio* an abusive clause, repetition of enforcement may be deterred through the sanctions provided for abusive use of procedural instruments, in particular art. 92 c.p.c., which allows the judge – regardless of the notion of "losing party," technically alien to enforcement – to order the violator of the duties imposed by art. 88 c.p.c. to reimburse the counterparty (the consumer) for non-recoverable expenses incurred.
It must also be considered that the reasoning of the Supreme Court – according to which the oppositional remedy necessarily excludes preventive ones – underestimates the consumer's interest in removing an order of payment decree even before service of the writ of execution. In fact, the consumer may have an interest in acting preventively to obtain cancellation of a judicial mortgage registered by the professional on the basis of a non-opposed order of payment decree, without having to wait for enforcement to be announced by the writ. Therefore, if the EU law requires Member States to provide all effective remedies in sectors of exclusive or shared competence, so as not to frustrate the *effet utile* of directly effective provisions, it cannot be sustained that the possibility of lodging opposition to enforcement excludes the admissibility of a preventive remedy. The implication is that the consumer, even before enforcement is announced, may always act preventively to seek a declaration of nullity of the consumer contract, on account of the lack of preclusion resulting from the omission of the judge of the summary phase to expressly state the absence of abusive clauses.
As for territorial jurisdiction, where the consumer contract is affected by a *forum*-selection clause derogating from the consumer's forum, the latter will not be bound to address the judge abusively chosen by the professional, but may instead opt for the *forum* of his residence or domicile within the Italian Republic, under art. 66-*bis* of the Consumer Code, as well as the general *fora* provided by the Code of Civil Procedure.
All things considered, I believe my handbook provides the correct solution as opposed to that of the Supreme Court.

2. *An Alternative Handbook*.

After these considerations I can formulate an alternative handbook.
The judge of the summary phase:

[3] A. GIUSSANI, in *A più voci su esecuzione forata, decreto ingiuntivo e tutela del consumatore dopo Cass. S.U. n. 9479*/2023, cit., p. 898-899.

a) must *ex officio* review the potential abusiveness of the clauses contained in the contract stipulated with the professional, proceeding on the basis of the factual and legal elements available to him, which may be supplemented, if necessary, by the judge's own fact-finding powers under Article No. 640 c.p.c., exercised in harmony with the need for speed inherent in the order-for-payment procedure:

a_1) may therefore request the applicant to produce the contract and to provide any clarifications regarding the debtor's alleged status as consumer, where not clearly apparent *ex actis*;

a_2) if the assessment requires a complex investigation, incompatible with the function and structure of the order-for-payment procedure, he must dismiss the claim (with no preclusive effect, according to Article No. 640 (3) c.p.c.);

b) at the conclusion of the review:

b_1) if abusive clauses are found, he must either dismiss or partially uphold the application depending on the nature and effects of the clause;

b_2) if the review of abusiveness yields a negative outcome, he must issue a reasoned decree pursuant to art. No. 641 c.p.c., explicitly recording the review carried out, also making use, if appropriate, of artificial intelligence tools, provided that the decision sets out the specific questions put to the machine[4];

b_3) the order of payment decree shall contain the warning prescribed by art. No. 641 c.p.c., as well as the express warning that in the absence of opposition the debtor-consumer will no longer be able to assert the possible abusiveness of the contractual clauses, and that the non-opposed order of payment decree will become final.

In the enforcement phase, the judge of the enforcement proceeding:

a) in the absence of reasoning in the order of payment decree regarding the absence of abusive clauses, has the power-duty to review *ex officio* – until the transfer effect of the property in favor of the purchaser has occurred, or until the adjudication of the credit – the existence of any abusive clauses affecting the existence and/or amount of the credit recognized by the decree:

a_1) in the first case, he must issue an order for early closure of the enforcement proceedings, subject to opposition to enforcement acts by the creditor, due to the absence of a valid enforceable title capable of grounding compulsory execution;

a_2) in the second case, he must merely re-quantify the credit being enforced, for the purposes of the pending enforcement only;

a_3) in case of renewed enforcement action after early closure, he may order the professional to reimburse the consumer for the costs incurred, pursuant to Articles No. 88 and 92 c.p.c.;

b) where such review is not possible on the basis of the factual or legal elements contained in the enforcement file, he must, pursuant to Art. No. 485 c.p.c.,

[4] See about this tipic, *si vis*, G. DE CESARE, Small claims *e intelligenza artificiale: una proposta efficientista*, in *DPCIeC*, 1, 2025, p. 56 ff.

conduct a hearing of the parties to clarify whether the debtor qualifies as consumer, or he may order production of the contract;
b_1) if, in the summary phase, the judge failed to give reasons regarding the review of unfair terms, and the order of payment was issued without scrutiny of the consumer contract – either because the professional did not produce it, or because the judge did not exercise the powers granted by Article No. 640 c.p.c. – the enforcement judge, pursuant to Art. No. 485 c.p.c., may order the production of the contract in order to carry out such review in substitution[5];
b_2) where such review confirms the presence of unfair terms, the enforcement judge must terminate the enforcement proceedings prematurely with an order subject to opposition to enforcement acts (see *supra*, points a_1, a_2 and a_3), given the absence of a valid enforceable title;
b_3) however, the procedure indicated under b_2) cannot be followed where intervening creditors hold an enforceable title and are thus entitled to continue the enforcement started by the original creditor whose title was the unopposed order of payment. In such case, the enforcement judge must declare that the creditor initiating enforcement lacks a valid enforceable title; nevertheless, the intervening creditors, provided with an enforceable title, may carry on the enforcement proceedings and promote the individual action;
b_4) where, instead, the unfair clause affects only the *quantum* of the claim, the enforcement judge must simply re-determine the amount of the debt for the sole purposes of the pending enforcement proceedings.
If the writ of execution has already been noticed or enforcement has already begun, the consumer:
a) may file opposition to enforcement under art. No. 615 c.p.c., alleging the omission of the judge of the summary phase and the nullity of the contract concluded with the professional because of abusive clauses, and requesting, if necessary, suspension of the enforceability of the title in order to prevent sale or adjudication.
Before service of the writ of execution or starting of enforcement, the consumer:
a) may bring an autonomous declaratory action seeking a finding of nullity of the consumer contract, by reason of the lack of preclusion of issues;
a_1) if the contract is affected by a *forum*-selection clause derogating from the consumer's *forum*, he may address the court of his residence or domicile within the Republic, under art. No. 66-*bis* of the Consumer Code, as well as the general *fora* provided by the Code of Civil Procedure;
a_2) pending a merits judgment, the consumer may resort to urgent interim relief under art. No. 700 c.p.c. to obtain suspension of ongoing enforcement proceedings.
After the sale or adjudication has been ordered, the consumer:

[5] But according to C. G. PAULUS-V. KAPETANOS, *The German Payment Order Through the Lens of CJEU Case Law*, in *Riv. dir. proc.*, 2, 2025, p. 645 ff., at 657, the absence of the contract in the legal dossier could imply the premature ending the enforcement proceedings.

a) may bring an action against the professional for damages suffered due to wrongful expropriation, without threatening the stability of the purchaser's acquisition;
b) may, at the stage of distribution of proceeds, file opposition before the judge of execution's order approving the distribution plan, under Articles No. 510, 542 and 598 c.p.c., to prevent distribution of proceeds (also) in favor of the professional who employed abusive clauses;
c) may, in case of credit adjudication, bring an action for restitution of undue payment;
c_1) the *dies a quo* of the limitation period must be identified as the moment when the consumer became aware of the nullity of the contract, and therefore possibly after adjudication of the credit.

3. *Limits of the Principles Laid Down by the Supreme Court in Cross-Border Litigation*.

The drawbacks highlighted in the previous section are not the only ones arising from the solution adopted by the Supreme Court.
In particular, the requirement for the consumer to bring an ultra-late opposition to an order of payment decree within forty days from the moment when the judge of execution raises the issue of nullity of the B2C contract risks conflicting with the now well-settled case law of the Court of Justice which, in relation to Regulation 1215/2012 (Brussels I-*bis*), qualifies consumer protection as a matter of public policy[6].
The violation of rules on public policy is expressly recognized in art. 45 of Brussels I-*bis* as a ground for refusing the circulation of judgments within the European Economic Area. Accordingly, the failure to raise a consumer-protection nullity constitutes a violation of European economic public policy safeguarded by Directive 93/13/EEC as well as by arts. 12 TFEU and 38 of the Charter of Fundamental Rights of the European Union.
As is well known, Articles 36 and 39 of Regulation 1215/2012 provide that a decision rendered in one Member State automatically produces its declaratory and enforceable effects throughout the European legal space, without the need for any recognition or *exequatur* procedure. This implies that a creditor in whose favor an enforceable judgment has been issued can immediately commence enforcement in another Member State where the debtor owns attachable assets. However, arts. 45 and 46 of Brussels I-*bis* counterbalance this principle of automatic recognition by providing for grounds for refusal of recognition and

[6] Cfr. European Court of Justice, 26 October, C-168/05, *Elisa Marìa Mostaza Claro c. Centro Mòvil Milenium SL*, para. 38, commented by E. D'ALESSANDRO, *Sui rapporti tra la sentenza Mostaza Claro e gli artt. 817, comma 2, ed 829, n. 1, c.p.c.*, in *Riv. arb.*, 2006, p. 679 ff.; E. F. RICCI, *Clausola compromissoria "vessatoria" e impugnazione del lodo*, in *Riv. dir. proc.*, 2007, p. 1086 ff.

enforcement, which may be invoked by the party against whom enforcement has been initiated through the instrument of opposition under art. 615 c.p.c.[7].
Thus the consumer who is subject to a cross-border injunction can defend himself under arts. 45 and 46 of Brussels I-*bis* by means of the more flexible opposition to enforcement, whereas the consumer targeted by an execution based on an order of payment decree issued by an Italian judge would have to rely on the ultra-late opposition created by the Supreme Court, subject to the rigid forty-day deadline starting from the judicial raising of the issue[8].
The consequence is paradoxical: the consumer enjoys stronger protection against cross-border injunctions than against domestic ones, thereby discouraging professionals from bringing enforcement proceedings in States other than those where the order of payment decree was issued – an outcome that runs counter to art. 81 TFEU. Such a differentiated *ex post* protection depending on whether the order was issued by a domestic or another European judge ultimately violates the principle of equivalence among judgments rendered within the European legal space.
This inconsistency, however, is avoided by our handbook, insofar as it allows the consumer – after service of the writ of execution – to bring opposition under art. 615 c.p.c., alleging the omission by the judge of the summary phase in failing to reason on the absence of abusive clauses and the nullity of the contract concluded with the professional, while also being entitled to request suspension of the enforceability of the title in order to prevent sale or adjudication.

4. *Limits of the Solution Offered by the Supreme Court in Collective Enforcement. The Problem of the Controlled Liquidation of the Over-Indebted Consumer.*

A sharp doctrine has observed that the solution offered by the United Sections only takes into account the case of an unopposed and unreasoned order of payment decree used as the basis for an individual enforcement proceeding[9].
However, the need for an *ex post* review of the judge of the summary phase may also arise in collective enforcement, and in particular where, at the initiative of creditors or of the consumer himself, a controlled liquidation procedure has been opened under arts. 268 ff. of the Insolvency and Business Crisis Code (hereinafter: IBCC).
In controlled liquidation of an over-indebted debtor, the assessment of liabilities is not carried out by a judge but by the court-appointed liquidator, according to simplified procedures. The liquidator examines creditors' claims, prepares a draft

[7] E. D'ALESSANDRO, *Titolo esecutivo europeo e opposizione all'esecuzione*, in *Riv. trim. dir. proc. civ.*, 2016, p. 565 ff., at 568; M. FARINA, *I procedimenti per il riconoscimento e l'esecuzione delle decisioni straniere nella recente riforma del processo civile in Italia*, in *Riv. dir. int. priv. proc.*, 2023, p. 78 ff.
[8] For this consideration, see L. DE PROPRIS, *La più che dubbia compatibilità delle sez. un. 9479/2023 con il principio europeo di equivalenza: ovvero il raffronto tra tutela interna e transfrontaliera del consumatore*, cit., p. 421; L. DE PROPRIS, *Considerazioni sparse sulla tutela transfrontaliera del consumatore nello spazio giudiziario europeo*, cit., p. 103.
[9] L. BACCAGLINI, *Il decreto ingiuntivo emesso nei confronti del consumatore: le ricadute sul piano della cognizione e dell'esecuzione alla luce delle Sezioni Unite*, cit., p. 954 ff.

schedule of liabilities and communicates it to the interested parties who, within fifteen days, may submit observations. If no objections are raised, the liquidator finalizes the schedule and deposits it at the court registry; otherwise, if the objections cannot be resolved, he refers the matter to the delegated judge, who decides on the liabilities under art. 273(5) IBCC.

If the creditor, filing in the liabilities schedule of a consumer's-controlled liquidation, relies on an unopposed and unreasoned order of payment decree, the liquidator must either re-quantify or exclude the creditor's claim, depending on the impact of the abusive clause's nullity on the contract. The creditor may contest the draft schedule, thereby compelling the liquidator to refer the matter to the delegated judge for a decision on admission. True, the creditor's exclusion from the liabilities does not nullify the order of payment decree, since the decree of the delegated judge has only intra-concursal effect (art. 204 IBCC). However, although the decree remains formally valid, the professional creditor will not be able to commence enforcement once the controlled liquidation is closed, because the consumer benefits from debits discharge, rendering unenforced liabilities unenforceable.

The situation is more complex if the liquidator admits the creditor's claim without realizing that it is based on an unopposed and unreasoned order of payment decree, in the terms specified by the Court of Justice. In that case, the delegated judge has no power to review the admission decision. Nor can the path indicated by the Supreme Court be followed, since during controlled liquidation the consumer cannot bring an autonomous cognizance action such as an ultra-late opposition, because art. 270 IBCC (by reference to art. 143 IBCC) provides that the opening of liquidation entails the debtor's loss of *legitimatio ad causam*.

Doctrine has suggested exceptionally allowing the consumer to seek protection at the stage of distribution of proceeds, granting him the right to raise objections directly before the delegated judge, who, with the reasoned decree under art. 275(6) CCII, could exclude the creditor, in whole or in part, from the distribution, on account of an abusive clause not detected by the judge of the summary phase. However, under Italian insolvency law, the natural stage for review of the creditor's claim is the liabilities assessment phase, not distribution. Accordingly, respect for the structure of controlled liquidation requires the liquidator to refer the matter to the delegated judge, signalling the issue. The delegated judge, having raised the nullity of the contract supporting the decree, must then grant the parties a term – under art. 101(2) c.p.c. – to address the issue. In particular, the creditor, to avoid the exclusion, must be given an opportunity to file documents proving the claim, since the decree's incompatibility with Luxembourg's directives would otherwise entail its exclusion. If the delegated judge does not activate such adversarial proceedings, the omission may be challenged by way of complaint under art. 273(4) IBCC.

In any event, if the nullity of the consumer contract is not raised by the liquidator, it is arguable – in line with our proposal – that once the debtor returns *in bonis*, he may bring a *condictio indebiti* action against the creditor, in harmony with the Court of Justice's case law in *Ibercaja Banco*. In such a case, the *dies a quo* for the restitution claim must be identified as the moment when the consumer became aware of the nullity of the B2C contract, which may well occur after the closure of the controlled liquidation, in line with the Court's guidance.

5. *Compatibility of the Handbook Drafted by the Supreme Court with Enforcement Against the Third-Party Owner.*

It must also be asked whether the solution endorsed by the United Sections can be applied when enforcement is brought against a third-party owner, by way of a levy executed under arts. 602 ff. c.p.c.[10]. The problem arises when the original debtor, although having transferred ownership of the seized asset to the third party, still qualifies as a consumer, while the enforcing creditor qualifies as a professional.
In the absence of any specific guidance of the Supreme Court, the broader solution should prevail: the original debtor must be informed of his right to lodge an ultra-late opposition against an order of payment decree lacking specific reasoning on the absence of abusive clauses. This notice is essential, since it conditions the debtor's ability to exercise the remedy. In this way, one also prevents the risk that enforcement promoted by the professional creditor may lead to satisfaction of the debt to the detriment of the third party, even though the underlying B2C contract is affected by a protective nullity[11].

6. *Concluding Remarks.*

The limits highlighted above suggest that the solution offered by the Supreme Court, though rendered in the interest of the law, does not settle the matter. Moreover, imposing on the consumer the burden of defending himself – through the remedy of ultra-late opposition – from the effects of an abusive clause about forum derogation precisely before the court abusively designated, constitutes a non-negligible violation of EU law.
Thus, the handbook drafted by the Supreme Court seems to function only in a narrow set of cases, leaving uncovered several other scenarios of undeniable relevance. It follows that the road is still open, and that the elaboration of the principles laid down by the Court of Justice in its judgments of 17 May 2022 is destined to further developments along the lines we have sought to outline.

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[10] G. MICCOLIS, *L'espropriazione forzata per debito altrui*, Torino, 1998; G. TARZIA, voce *Espropriazione contro il terzo proprietario*, in *Noviss. Dig. it.*, VI, Torino, 1960, p. 967 ff.; F. P. LUISO, *L'esecuzione* ultra partes, Milano, 1984, p. 55 ff.; A. M. SOLDI, *Manuale dell'esecuzione forzata*[9], cit., p. 2191 ff.
[11] A. M. SOLDI, *Manuale dell'esecuzione forzata*[9], cit., p. 1071.

Section II
Remedies Against Res Judicata *Barring the Recovery of Unlawful State Aid*

SUMMARY: 1. Introduction to the Topic. – 2. Analysis of the Facts of Supreme Court, Tax Chamber, 1 September 2023, No. 25633. – 3. The Delicate Balance Between the Finality of *Res Judicata* and the Duty to Recover Incompatible State Aid. The Role of the National Judge. – 4. A Possible Handbook of Situations Where *Res Judicata* May Be Overcame. – 4.1. Following: The Semi-Judicial Nature of the Commission's Decisions on State Aid Justifies the Suspension of National Proceedings. – 4.2. Following: Disregard of *Res Judicata* Incompatible with a Prior Recovery Decision: the *Lucchini* Rule. – 4.3. Following: The Supervening Recovery Decision and the Protection of the Private Party's Legitimate Expectation: the Need for a Balancing Test. – 5. Final Remarks.

1. *Introduction to the Topic.*

While in consumer law the principles set forth by the *Plateau Kirchberg* on the overcoming of *res judicata* have been (at least apparently) absorbed into national case law through a process of legal engineering, in the different area of State aid to undertakings no such *koinè* has been reached. On the contrary, the prevailing attitude of the case law is marked by profound ambiguity.

Lower courts often "turn a blind eye" to the Lucchini *dictum*[1], going so far as to unilaterally invoke the so-called "counter-limits", on the assumption that the disregard of *res judicata* contrary to EU law would cause an irreparable infringement of the constitutional prerogatives of the judiciary power, thereby seeking to preserve a ruling that results from the national judge's "abusive trespass" into the enclosure of the Commission's exclusive competences.

By contrast, this approach of the lower courts does not correspond to that of the Court of Cassation, which tends instead to acknowledge the overcoming of *res judicata* incompatible with the EU obligation to recover unlawful State aid schemes, irrespective of the temporal reference considered in the recovery decision. Generally, the principles of legal certainty and of the beneficiary's legitimate expectation in the attribution of a substantive right through an irrevocable judgment cannot prevent the disregard of *res judicata* that conflicts with either a prior or even a subsequent recovery decision concerning unlawful State aid.

In the following pages, we will examine the leading case that inaugurated a new season in the "crisis of *res judicata*": one that is certainly more respectful of the guidance emerging from the case law of the Court of Justice, yet at the same

[1] See P. BIAVATI, *Disapplicazione del giudicato interno per effetto del diritto dell'Unione Europea?*, in *Riv. trim. dir. proc. civ.*, 4, 2014, 1567 ff.; G. RAITI, *Giudicato civile interno e sopravvenuta giurisprudenza contraria della Corte di Giustizia: non è sempre Lucchini*, in *Riv. it. dir. lav.*, p. 659 ff.; C. SCHEPISI, *Corte di Cassazione, aiuti di Stato e* res iudicata*: brevi riflessioni a margine della sentenza n. 16983/2018*, in *Osservatorio europeo*, 2018, available here: www.dirittounioneeuropea.eu.

time dangerously short-sighted with respect to the need to balance conflicting principles of constitutional rank.

2. *Analysis of the Facts of Supreme Court, Tax Chamber, 1 September 2023, No. 25633.*

The flexibility of *res judicata*, incompatible with the obligation to recover State aid contrary to the European market, has been recently reaffirmed by the Italian Supreme Courtin the case *Nuova Invincibile s.r.l. v. Internal Revenue Service*[2].
Nuova Invincibile s.r.l., beneficiary of the tax amnesty provided by Article 9(17) of Law No. 289 of 2002, challenged the tacit refusal arising from its request for reimbursement of taxes paid in the years 1990, 1991, and 1992. The proceedings on the merits concluded with the Regional Tax Commission of Sicily (hereinafter: RTC) recognizing the right to reimbursement of both direct and indirect taxes paid. The tax authorities appealed to the Court of Cassation, which partially upheld their grievances: the Supreme Court remanded the appellate judgment, excluding the recoverability of VAT paid during the three-year period at issue. Thus, *res judicata* was formed on the taxpayer's right to restitution of taxes paid other than VAT.
Nevertheless, in the remanded proceedings, the tax authorities argued that the amnesty regime introduced by Law No. 289 of 2002 was incompatible with Article 108(3) TFEU, since the European Commission, by a recovery decision adopted on 14 August 2015, had declared that the tax amnesty could distort the proper competitive structure of the market[3]. The CTR, however, rejected the Administration's objection on the ground that, up to that point, the Court of Justice had only admitted the overcoming of national *res judicata* conflicting with a prior Commission decision, whereas in this case the Cassation ruling had been issued subsequent to the recovery decision.
The tax authorities again appealed to the Court of Cassation. The Supreme Court dismissed the appeal, while rectifying the reasoning of the contested judgment. The CTR had erroneously held that *res judicata* had arisen before the recovery decision became final; on the contrary, the latter dated back to 15 August 2015, whereas the hearing was held on 25 November 2015. Thus, the finding that the tax amnesty was contrary to Articles 107 and 108(3) TFEU predated the implicit *res judicata* on the taxpayer's right to reimbursement of taxes other than VAT, contrary to what the CTR had stated.
One is tempted to say: much ado about nothing.
The case seems to lend itself to a straightforward application of the *Lucchini* rule[4], according to which *res judicata* conflicting with a prior decision ordering recovery of unlawful State aid must be disregarded. Yet, in their effort to further dismantle national *res judicata* inconsistent with EU law, the judges of the Court of

[2] See Supreme Court, Tax Chamber, 1 September 2023, No. 25633, with, *si vis*, our observations: G. De Cesare, *Il giudicato nazionale si arrende alle decisioni di recupero degli aiuti di Stato illegittimi? Nota a Cass., sez. trib, 1° settembre 2023, n. 25633*, in *Riv. trim. dir. proc. civ.*, 1, 2025, p. 195 ff.
[3] A. QUATTROCCHI, *Gli aiuti di Stato nel diritto tributario*, Milano, 2020, p. 128 ff.
[4] See *retro*, Chapter IV, section II.

Cassation went on to clarify that the exception to the finality of *res judicata* in matters of State aid – where a final decision of the European Commission has been issued before *res judicata* – applies *a fortiori* also in the reverse hypothesis, that is, where it has been issued afterwards.

It is evident that the reasoning of the Supreme Court represents a straightforward reception of the new approach of the Court of Justice inaugurated with the *CSTP v. Commission* case, in which for the first time the *Plateau Kirchberg* required the disregard of *res judicata* conflicting with a subsequent Commission decision. This is because the EU legal order seems to exclude any protection of the private party's legitimate expectation in the lawfulness of a State aid scheme incompatible with the internal market, even where more than five years have elapsed since the final judgment granting the right to public funding.

Nevertheless, the appeal was dismissed since the tax authorities had expressly requested the disregard of the anti-EU *res judicata*, whereas, according to the Court of Cassation, the issue ought more properly to have been framed as the inability of such *res judicata* to serve as a basis for enforcement in restitution of the taxes paid. Thus, the effect of the Commission's decision is not so much to erase from the legal order the *res judicata* already formed, but rather to prevent its enforcement. This approach suggests that any issues concerning whether *res judicata* may preclude the recovery of unlawful aid, or whether it can serve as a basis for enforcement, must be discussed, at least in tax matters, in enforcement proceedings.

There is reason to suspect that behind this nomopoietic exercise lies an intentional steering by the Supreme Court, which, overwhelmed by the need to reduce tax litigation, is reluctant to expend resources in discerning which judgments formed in violation of the Commission's competences must yield and which may not. It thus appears that the "hollowing out" of the effect of *res judicata* serves the function of redirecting the parties to enforcement proceedings, thereby easing the workload of the Court of Cassation (given that under Article 70(8) of Legislative Decree No. 546 of 1992 an appeal to the Court of Cassation against the enforcement judgment is permitted only for procedural irregularities). In this light, the Court's decision seems justified less by positive law or systematic interpretation than by the practical need to lighten the caseload of the court of last instance, by devolving to the enforcement judge the task of assessing whether anti-EU *res judicata* may or may not support enforcement.

Nevertheless, the cumbersome principle of law enunciated in the interest of the law by the judges of the Court of Cassation deserves to be reconsidered in the terms we shall now set forth.

3. *The Delicate Balance Between the Finality of* Res Judicata *and the Duty to Recover Incompatible State Aid. The Role of the National Judge.*

The analysis of the Court of Justice's case law undertaken above confirms that the absolute flexibility of *res judicata* contrary to EU law does not belong to the *acquis* of European Law[5]. On the contrary, the Court of Justice takes into account a plurality of concurrent factors that may affect the stability of an anti-EU *res judicata*. Accordingly, the doctrine of absolute flexibility of *res judicata* in the field of State aid, as propounded by the Court of Cassation, appears hardly reconcilable with the guidance stemming from a constitutional order that does not tolerate the axiological primacy of one principle over all others.

Indeed, the idea that national *res judicata* is incapable of either permitting or precluding enforcement – depending on whether the enforcing party is a private beneficiary or the tax administration – reduces the rule of "binding effect for all purposes" to a hollow *simulacrum*, thereby implying the unconditional prevalence of the principle of primacy. If, however, one rejects the notion that a mere breach of the allocation of competences set out in the Treaties is sufficient to neutralize national *res judicata*, then the severity of the rule enunciated by the Court of Cassation may be tempered. Neither the principle of primacy nor that of conferral is, taken alone, sufficient to justify the flexibility of *res judicata*.

The temporal element is not entirely irrelevant: it is one thing when the Commission's recovery decision predates the pendency of the proceedings or the formation of *res judicata* preventing its enforcement; it is quite another when the decision comes afterwards, even years later. Although the matter of State aid falls within the exclusive competence of the Commission and the Court of Justice, to assert that any judgment rendered by a national court in violation of such competences is, in all cases, *inutiliter data* (that is, incapable of supporting enforcement) or otherwise always subject to disregard appears excessive.

As this study has emphasized on several occasions, at least from a realist perspective, whether *res judicata* overcoming or not depends on the balancing of a range of factors: some certainly weightier than others, but none per se decisive[6].

Although the Court of Justice's rulings on the relationship between national *res judicata* and Commission recovery decisions all share the common denominator of an infringement of the Commission's exclusive competence, the breach of the principle of conferral alone does not seem sufficient to justify the disregard or, as in the present case, the hollowing-out of national *res judicata*.

An examination of the factual circumstances of the cases considered by the Court supports this conclusion. Thus, in the leading case *Lucchini*, the Court's reasoning rested not only on the prior nature of the recovery decision respect to the first-instance judgment – and therefore on the violation of exclusive competences – but also on the glaring omission of the State Attorney's Office, which, whether through negligence or design, failed to raise the prior Commission decision in the proceedings on the merits. Behind the protracted *Lucchini* saga thus loomed the serious suspicion of collusion to the detriment of

[5] See *retro*, chapter IV.

[6] A. GIUSSANI, *Intorno alla «riflessione» del giudicato contro il terzo*, in *Riv. dir. proc.*, 4, 2014, p. 1193 ff.; ID., *Effetti conformativi della sentenza e sospensione del processo*, ivi, 1, 2017, p. 260 ff.;, ID., *Decreto ingiuntivo non opposto dal consumatore: l'intervento della Corte di Giustizia*, ivi, 1, 2023, p. 291 ff., at 300-301.

the Commission. This circumstance, although unspoken by the Luxembourg judges, cannot but have influenced the Court's inclination towards disregard of *res judicata*.

By contrast, in the subsequent *Klausner Holz* case, even though a proceeding was pending before the Commission to determine whether a certain public-law contract entered by a German Land constituted State aid, the Court of Justice appropriately suggested an interpretation consistent with § 322 ZPO. Accordingly, within the scope of the objective limits of *res judicata*, a matter of super-individual interest – such as the nullity of a contract for breach of the State aid prohibition not expressly raised at first instance – cannot be deemed to fall under the long shadow of implicit *res judicata*. From the conclusions in *Klausner Holz* one may infer that not every legal effect arising from a contract and argued in litigation necessarily makes the fundamental relationship itself the subject of the proceedings and, consequently, of *res judicata*. It is thus more likely that implicit *res judicata* will not arise (or, if it does, that it will be overcame) when the preclusion of "what could have been argued" would amount to an irreparable breach of EU law. In this sense, *Klausner Holz* may be read as an attempt by the Court of Justice to recalibrate the preclusive effect of implicit *res judicata* for the sake of the full realization of EU rules endowed with effet utile.

Finally, in *CSTP* the disregard of *res judicata* was reached by emphasizing the prior pendency of the Commission's proceeding to determine the incompatibility with the internal market of the aid scheme granted to an Italian company, in contrast with the national enforcement judgment condemning the Campania Region to pay compensation for the provision of public transport services. In other words, in *CSTP* the Court of Justice stressed the state of uncertainty regarding the nature of the measure at issue, which should have prompted the parties to inform the national court of the pending proceeding before the Commission and, consequently, the national court to raise a preliminary reference on the compatibility of the aid with the so-called *Altmark* criteria[7].

Each of these decisions implies a delicate balancing of competing principles of constitutional significance[8] – legal certainty, in the guise of the irretrievability of *res judicata*, legitimate expectations, and the primacy of EU law in matters of exclusive competence. Moreover, the view that *res judicata* barring the recovery of unlawful State aid must in all circumstances yield to a subsequent Commission recovery decision proves difficult to justify within the framework of the procedural theory of *res judicata*[9].

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[7] European Court of Justice, 24 luglio 2003, in causa C-280/00, *Altmark Trans GmbH*. See also L. RUBINI, *The Definition of Subsidy and State Aid. Wto and EC Law in Comparative Perspective*, Oxford, 2009, p. 323 ff.

[8] T. A. ALEINIKOFF, *Constitutional Law in the Age of Balancing*, in 96 *Yale Law Journal*, 1987, p. 943 ff.; F. M. COFFIN, *Judicial Balancing: The Protean Scales of Justice*, in 63 *New York University Law Review*, 1988, p. 16 ff., at 23; L. HENKIN, *Infallibility Under Law: Constitutional Balancing*, in 78 *Columbia Law Review*, 1978, p. 1022 ff., at 1025; K. M. SULLIVAN, *Post-Liberal Judging: The Roles of Categorization and Balancing*, in 63 *University of Colorado Law Review*, 1992, p. 293 ff.

[9] See *retro*, capitolo I, sezione I, §§ 6 e 6.1.

If such an outcome may perhaps be explained under the substantive theory of *res judicata* – since the detachment of the operative fact from its original source, under the retroactive effect of the Commission's recovery decision, finds justification in the social need to end disputes – the procedural theory of *res judicata* achieves the same result while affording greater protection, by limiting the impact of legislative policy choices. Its constitutional status would thus find its foundation in the democratic principle and in the separation of powers, insofar as these ensure the autonomy and independence of the judiciary, which is thereby shielded from retroactive legislative interference under Articles 102 and 103 of the Italian Constitution[10].

Accordingly, the idea that the protection afforded by *res judicata* to the prevailing party finds constitutional justification in judicial autonomy and independence, as well as in that party's legitimate reliance on the finality of the judgment, implies that such protection must be balanced, case by case, against the principles of primacy and conferral, which are themselves enshrined in the Constitution through Articles 11 and 117(1).

The co-equal status of these principles calls for the use of the tools of "horizontal balancing[11]." This form of balancing makes it possible to affirm the primacy of one of the conflicting principles without indiscriminately disregarding the others. Such a result is achievable provided that the judge can identify the concrete circumstances in which one principle must yield to another. To borrow the words of Aharon Barak: «[R]estrictions must consider time, place, and manner, so that each of the competing principles enjoys a substantive and real existence. Therefore, traffic considerations should not necessarily preclude a demonstration in a city's main streets, but the city may nevertheless reasonably restrict a demonstration's time and manner[12]».

From this perspective, the judge called upon to assess whether *res judicata* barring the recovery of an unlawful State aid scheme must be applied or not will need to consider the concrete circumstances of the case, which may indicate the flexibility or, conversely, the resilience of *res judicata*, in the terms we shall now specify.

4. *A Possible Handbook of Situations Where Res Judicata May Be Overcome.*

Considering the considerations developed in the previous section, the following handbook may be proposed, intended to guide the judge in the complex exercise

[10] A. GIUSSANI, *Intorno al riconoscimento e all'esecuzione degli atti di conciliazione e transazione*, in *Riv. trim dir. proc. civ.*, 2019, p. 1022 footnote 6; ID., *Effects of Judgments – Res Judicata*, in *Civil Justice in Italy*, a cura di M. DE CRISTOFARO e N. TROCKER, Nagoya, 2011, p. 123 ff., at 127.

[11] A. BARAK, *The Judge in a Democracy*, Princeton, 2006, p. 171: «[H]orizontal balancing expresses the degree of reciprocal compromise that each of the fundamental principles must make, instructing judges to preserve the essence of the conflicting principles by crafting reciprocal compromises at the margins. This balancing attempts to ensure that the various compromises are proportionate and to give breathing space to each competing principle. One must avoid giving full expression to one fundamental principle at the expense of another».

[12] A. BARAK, *The Judge in a Democracy*, cit., p. 172.

of balancing competing constitutional principles which we have outlined. The possible scenarios are as follows:
a) Where, during the pendency of national proceedings, the national authorities notify the contested measure to the Commission under Article 108(3) TFEU in order to request the opening of a formal investigation procedure. On the basis of a systematic and functional interpretation, it seems possible, pending the Commission's decision, to suspend the national proceedings to avoid the waste of judicial activity that would result from the subsequent annulment of the *res judicata*[13].
b) Where the Commission's recovery decision precedes the starting of national proceedings, since legitimate expectations as to the stability of the outcome of the process cannot be invoked, the national judge must disregard the *res judicata*, as it concerns a determination that should never have been formed[14].
c) Conversely, where the Commission's decision follows the final judgment, it will nevertheless prevail if the initiation of the formal investigation procedure occurred before the conclusion of the national proceedings. In that event, the private party, being aware of the pending formal investigation, could have brought it to the attention of the national court, which in turn could have suspended proceedings pending the Commission's decision[15]. In this hypothesis, the *res judicata* is to be regarded as subject to a resolutory condition depending on the outcome of the procedure initiated by the Commission. By contrast, the authority of *res judicata* would remain intact if the entire procedure were initiated only after the national judgment, given the impossibility of suspending domestic proceedings in anticipation of the Commission's decision[16].

4.1. *Following: The Semi-Judicial Nature of the Commission's Decisions on State Aid Justifies the Suspension of National Proceedings.*

In order to avoid the risk of a conflict between a forthcoming decision of the Commission and a domestic judgment, it seems possible to interpret Article 295 of the Italian Code of Civil Procedure extensively, as well as in conformity with the principle of effectiveness, so as to safeguard the effet utile of the Commission's decision, even in the absence of a technical relationship of prejudiciality between the determination of whether a measure constitutes State aid and the advantage being claimed[17].
Such a solution is conceivable if one admits the existence of determinations with preclusive effect on subsequent dependent proceedings even when adopted in

[13] See *infra* § 4.1.
[14] See *infra* § 4.2.
[15] The mechanism is similitar with the one described by M. GRADI, *Il contrasto teorico tra giudicati*, Bari, 2020, p. 288 ff., at 316, to resolve the problem of logical contrast between final judgments.
[16] See *infra* § 4.3.
[17] See H. WEIß, *Rechtskraftdurchbrechung bei (mutmaßlichem) Verstoß eines Vertrags gegen EU-Beihilferecht*, in *EuZW*, 2016, p. 57 ff., at 60; see also E. D'ALESSANDRO, *Aiuti di Stato e giudicato nazionale: nella vicenda Klausner Holz il Landgericht di Munster interpreta restrittivamente i limiti oggettivi del giudicato*, in *Riv. dir. proc.*, 6, 2018, p. 1615 ff., at 1632.

procedures not formally qualified as judicial. This vision presupposes abandoning the "subjectivist" conception of judicial adjudication, based on the authoritative provenance of the act[18], in favor of an "objectivist" approach, grounded in the characteristics and effects of the determination (always, of course, within the limits set by Articles 6 and 13 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union).

Indeed, even in pre-litigation phases – which, according to traditional criteria, would have an administrative character – a high degree of proceduralization is present[19]. One need only consider, with reference to the Commission's activity, the introductory stage of the formal investigation procedure on the compatibility of State aid with the internal market (Article 6(1), second paragraph, Regulation (EU) 2015/1589), in which interested parties may submit observations. Although a true adversarial procedure between the parties involved is not envisaged, the recognition of procedural guarantees in the administrative phase is explained, on the one hand, by the centrality of the Commission within the European procedural system, where it operates *ex ante* as a «judge of the market[20]», and, on the other, by the fact that in the liquid and ever-changing system of European law the boundary between administration and jurisdiction is not so clear-cut. On the contrary, the distinction survives only structurally, since administrative bodies increasingly operate with strong proceduralization, while judicial bodies, conversely, often exercise a growing degree of discretion in technical assessments.

Accordingly, interpreting Article 295 of the Code of Civil Procedure in conformity with EU law means – within a perspective of progressive attenuation of the monopoly of State judicial bodies over jurisdiction[21] – to construe the expression "another judge" as encompassing all authorities whose determinations may produce direct effects in civil and administrative proceedings, regardless of whether they are formally non-judicial bodies. This would amount to a corrective interpretation of the statutory text; nevertheless, it seems difficult to deny the substantial equation between the Commission's decisions on State aid and a judicial determination.

In fact, national judges, on the one hand, cannot themselves rule on matters of State aid, since these fall within the Commission's exclusive competence[22]; on the other hand, suspension avoids the risk of disregarding *res judicata* and thereby prevents a waste of judicial resources in a sector particularly sensitive (and with significant economic impact) such as State aid to undertakings.

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[18] See D. SLATER, S. THOMAS E D. WAELBROECK, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform*? in *Research papers in law*, 5/2008, about the issue of quasi-judicial proceedings.

[19] P. BIAVATI, *Interessi e mercato nel processo comunitario*, in *Riv. trim. dir. proc. civ.*, 3, 1999, p. 793 ff., at 795.

[20] P. BIAVATI*, ult. op. cit.*, p. 796.

[21] N. PICARDI, *La giurisdizione all'alba del terzo millennio*, Milano, 2007; ID., *Le trasformazioni della giustizia nell'età della globalizzazione*, in *Riv. dir. proc.*, 5, 2012, p. 1153 ff.

[22] C. RASIA, *Il controllo della Commissione europea sull'interpretazione del diritto comunitario da parte delle corti supreme degli Stati membri*, in *Riv. trim. dir. proc. civ.*, 3, 2005, p. 1025 ff., at 1040.

Moreover, our statutory law already recognizes the possibility of suspending proceedings pending the outcome of procedures not formally characterized as judicial.
Article 840-*ter*, para. 3, of the Code of Civil Procedure allows the suspension of *class actions* where an investigation is ongoing before an independent authority or proceedings are pending before an administrative court. Likewise, Article 4(8) of Legislative Decree no. 3 of 2017 grants the judge hearing an antitrust damages action the power to suspend the case where proceedings are pending before a competition authority and it is necessary to safeguard the effectiveness of the public enforcement of competition law. These rules, albeit sectoral, reflect the conviction that the legal system tolerates suspension of proceedings when the decision of a semi-judicial authority may affect the outcome; thus, in the legislator's view, the infringement of the reasonable-time principle caused by suspension is justified by the need to prevent conflict between the authority's determination and the judicial ruling, in the name of coordination among institutions entrusted with the protection of market interests.
Criticism that suspension pending a Commission decision would impair the right to a trial within a reasonable time, guaranteed by Article 111 of the Constitution and Article 6 ECHR, does not seem persuasive. Article 297 CPC identifies only a *terminus ad quem* but not a *terminus a quo*, thereby functioning as an acceleratory, but not necessarily dilatory, term. This implies that the parties in a domestic proceeding dependent on a Commission decision are not obliged, under penalty of extinction, to continue the suspended case while the Commission's decision remains appealable before the Court of Justice or such appeal is still pending. In any event, if the parties decide to resume before the Commission's decision becomes final, the judge seized of the dependent case may still order discretionary suspension under Article 337(2) CPC, awaiting stabilization of the Commission's decision, should he consider its content susceptible to being overturned on appeal before the General Court or the Court of Justice.
From a theoretical standpoint, the suspension of the domestic proceedings pending the conclusion of the Commission's procedure requires framing the relationship between the Commission's decision and the claim for restitution of unlawful State aid as a case of so-called technical prejudiciality, which must otherwise be excluded.
If the right to restitution of unlawful State aid is uncontroversially an *Anspruch* – whose constitutive elements are the incompatibility finding in the Commission's decision and the actual payment of the aid – it is more doubtful whether the Commission's decision itself should be regarded as such. According to some doctrine, the recovery decision is a mere *Rechtsfrage*, an element of the factual matrix insufficient by itself to ground the right or duty of restitution[23]. And it was as a *Rechtsfrage* that the judges in Luxembourg reasoned in *Klausner Holz*, to exclude that the national court's cognizance extended – even implicitly – to the compatibility of public supply contracts with the prohibition of State aid.

[23] E. D'ALESSANDRO, *ult. op. cit.*, p. 1632, footnote 41.

Whether this German solution is transposable to Italy is, however, far from clear: it is one thing for a court to render an implicit pronouncement on the nullity of a contract for breach of Article 108 TFEU, another for it to rule expressly.
Properly understood, and following through the guidance offered in *Lucchini*, *Klausner Holz*, and *Cstp*, since national judges cannot rule on the lawfulness of State aid, the most reasonable choice, whenever an investigation is pending before the Commission, is precisely suspension.
This may even be seen as a case of technical prejudiciality *ex lege*, designed to ensure harmony between national rulings and Commission decisions. Even in matters of *status* – the classic domain of technical prejudiciality *ex lege* – no general statutory rule obliges the judge to render a determination with *res judicata* effect; rather, reliance is often placed on Article 124 Civil Code, requiring the validity of marriage to be adjudicated with binding effect, for systemic coherence.
This solution is justified by the practical need to resolve once and for all, with stable effects, a status question, given the risk of contradictory judgments. The same need arises with respect to the preliminary question of compatibility of a State aid regime under investigation with the internal market.
Allowing national courts to address this only incidentally, as a mere *Rechtsfrage*, is a suboptimal solution that inflates litigation: if the national judgment turns out incompatible with the Commission's recovery decision, the Member State must pursue a *condictio indebiti* to claw back the aid, while also multiplying the risk of logical conflict between Commission decision and national *res judicata*.
The principles of effectiveness and loyal cooperation justify recharacterizing what appears as a mere preliminary question of law into a case of prejudiciality *ex lege*. Their combined force supports compressing the domestic court's power of fact-finding, so that Commission decisions on State aid may be accorded *pro judicato* preclusive effect, as they fall within an area of exclusive competence. Hence, although politically constituted, the Commission in the field of State aid acts as a *de facto* judicial authority; and the possibility of suspending domestic proceedings pending conclusion of the formal investigation under Article 108(2) TFEU is far from subversive. On the contrary, it is justified both in terms of general process theory and in practical terms, since it prevents conflict between the Commission's determination and national *res judicata*, while avoiding an intolerable waste of judicial resources: given that, as a rule, the national judgment is subject to a resolutory condition tied to the Commission's recovery decision, unless the legitimate expectations of the economic operator grounded in the national judgment prevails.

4.2. *Following: Disregard of Res Judicata Incompatible with a Prior Recovery Decision: the Lucchini Rule.*

Where the Commission's recovery decision predates the pendency of the national proceedings for payment or restitution of aid, *res judicata*, formed without the issue of the established violation of Article 108 TFEU being brought to the national court's attention, must be disregarded. Indeed, the principle of the victorious party's legitimate expectation in the outcome of the proceedings cannot be invoked, since the Commission's decision preceded both the pendency of the domestic trial on the merits and, consequently, the formation of *res judicata*.

It is therefore objectionable the attitude of that segment of domestic case law which tends to not comply with the *Lucchini dictum*[24], going so far as to unilaterally trigger the "counter-limits" on the basis of the irreparable injury allegedly caused to the constitutional prerogatives of the judiciary by the disregard of *res judicata*. Moreover, where the domestic proceedings concern a private party's claim to the disbursement of a given State aid, the idea that "counter-limits" could prevent the disregard of *res judicata* formed after the recovery decision assumes as demonstrated what in fact ought to be demonstrated: namely, that the national court issues an implicit pronouncement, with *res judicata* effect, on the compatibility of such aid with the internal market, notwithstanding that this competence is attributed exclusively to the Commission.

The overcoming of *res judicata* incompatible with a prior Commission recovery decision rests on the principle of dependency between determinations, which in turn presupposes a substantive relationship of dependency between the dependent case and the preliminary finding made by the Commission. For the mechanism of invalidation of *res judicata* to operate, it is required that the national court has not undertaken any autonomous assessment of the lawfulness of the State aid scheme. Precisely the attribution to the Union of exclusive competence in matters of State aid to undertakings leads to the conclusion that the national court cannot render, with *res judicata* effect, any pronouncement on their compatibility with the internal market.

The conflict between national *res judicata* and the prior recovery decision can be resolved by employing the conceptual tools of the theory of "apparent *res judicata*" elaborated by case law with regard to determinations rendered within the same proceedings, but often also used to address contradictions between a reform or cassation judgment of the prejudicial case and the res judicata already formed on the dependent case.

In this regard, one may observe a rather loose use of procedural categories by case law, whose aim seems to lie in the intention to achieve coordination of rulings without engaging in more complex systematic reconstructions, while its foundation can be traced to Article 336(2) of the Code of Civil Procedure, a provision expressing a general logical principle transcending the system of appeals, which allows *a posteriori* coordination of two incompatible decisions[25].

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[24] P. BIAVATI, *Disapplicazione del giudicato interno per effetto del diritto dell'Unione Europea?*, cit., 1567 ff.; G. RAITI, *Giudicato civile interno e sopravvenuta giurisprudenza contraria della Corte di Giustizia: non è sempre Lucchini*, in *Riv. it. dir. lav.*, cit., p. 659 ff.; C. SCHEPISI, *Corte di Cassazione, aiuti di Stato e* res iudicata*: brevi riflessioni a margine della sentenza n. 16983/2018*, cit.

[25] M. GRADI, *Il contrasto teorico tra giudicati*, cit., p. 311 ff.; A. GIUSSANI, *Collegamento negoziale ed effetti del giudicato, in I collegamenti negoziali e le forme di tutela*, Milano, 2007, p. 123 ff.

Thus, if the dependent proceedings are not suspended pending the Commission's decision and the national court renders a judgment incompatible with the tenor of the recovery decision, the failure of the latter's conforming effect can be remedied *a posteriori* through the invalidation of the dependent national *res judicata*. Nor does it seem that this reconstruction could be opposed by invoking the principle of the private party's legitimate expectation in the finality of judicial outcomes, since the temporal priority of the initiation of the formal investigation and of the recovery decision over the conclusion of the domestic proceedings excludes its protection.

4.3. *Following: The Supervening Recovery Decision and the Protection of the Private Party's Legitimate Expectation: The Need for a Balancing Test.*

More problematic is the scenario in which the Commission's recovery decision supervenes after the formation of *res judicata*. The conclusion reached in the previous paragraph is grounded in the dependency between the judicial determination and the Commission's decision, which in turn presupposes that the national court cannot rule, except incidentally, on the lawfulness of State aid to undertakings. At this stage, it is necessary to ask whether the same conclusion can apply in the different situation where no relationship of procedural subordination exists between the determinations, as occurs when the preliminary issue is resolved after the dependent one, and where the national court has addressed the preliminary issue only *incidenter tantum*.
We refer to the hypothesis in which the formal investigation procedure is initiated after *res judicata* has already been formed, as well as to the case in which the procedure is opened before *res judicata,* but the recovery decision itself supervenes once ordinary appeals have been exhausted. We will proceed to illustrate why, in such cases, the mechanical disregard of *res judicata* as a result of the Commission's recovery decision is not tolerable, notwithstanding the centrality of the Commission's exclusive competence in matters of State aid.
From our perspective, it must be acknowledged that the fate of *res judicata* is conditioned by numerous factors, and its mechanical disregard cannot be sustained without severing its correlation with the general principles of the legal order, and with those of legal certainty and of the private beneficiary's legitimate expectation in the stability crystallized by *res judicata*[26].
Only in the absence of a legitimate expectation of the private party the solution of overcoming *res judicata*, contrary to a subsequent Commission decision, could be accepted. It follows that the supervening Commission decision prevails over the judgment that has become final if the opening of the investigation procedure about the compatibility of the unlawful aid with the internal market predates the conclusion of the national proceedings, since the national court could have

[26] H. GAMPER, *Legal certainty, in Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, a cura di Schroeder, Oxford – Portland, 2016, p. 80 ff.; B. WARDHAUGH, *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition*, Oxford – New York, 2020.

suspended the proceedings pending the Commission's decision, and the private party cannot legitimately rely on the irrevocability of the judgment during the pendency of the Union procedure, being aware of the formal investigation pursuant to Article 108(2) TFEU.

The apparent antinomy between two fundamental principles of EU law – namely, the principle of legitimate expectations and that of the effectiveness (effet utile) of acts of the EU institutions – finds a criterion of resolution in Article 16(2) of Regulation (EU) No. 1589/2016, which provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law[27].

Article 16(2) of Regulation No. 1589/2016 conveys the principle that a recovery decision adopted by the Commission in violation of general principles of EU law – and in particular of the legitimate expectations principle – is subject to annulment before the Court of Justice under Article 263 TFEU, on grounds of illegality arising from the Commission's failure to carry out the balancing test required by law[28]. Annulment of a recovery decision entails judicial proof that the economic operator's reliance was worthy of protection. The assessment of whether reliance is legitimate must be carried out case by case. Nevertheless, a systematic analysis of the rules governing the relationship between second-degree administrative activity and the private party's reliance on the attribution – albeit unlawful – of a legal advantage by the administration provides useful guidance in determining the temporal reference point within which reliance on the legitimacy of a State aid scheme is not protected against a subsequent Commission recovery decision.

Article 21-*nonies* of Italian Law No. 241 of 1990 establishes that the administration may annul *ex officio*, for reasons of public interest, within a reasonable time and in any case not exceeding twelve months from adoption, measures granting economic advantages. From this provision a general principle can be inferred: as a rule, before one year has elapsed from the adoption of the measure, the beneficiary's reliance on its legitimacy is not worthy of protection, given that the administration may annul it *ex officio* for public interest reasons other than the mere restoration of legality. In other words, before the one-year term expires, the law presumes that no legitimate expectation has arisen. If this principle is accepted as general, then also a recovery decision concerning unlawful State aid, adopted following a formal investigation commenced after *res judicata* has formed on the legitimacy of the aid, may prevail over the final judgment, since reliance is presumed not yet to have consolidated within one year of receipt of the advantage. In such circumstances, the national court is bound to disregard the judgment, in accordance with the Court of Justice's case law (*e.g.*, in *CSTP*).

[27] About Art. 16 (2) see M. RZOTKIEWICZ, *Compatibility of the state aid recovery order with the general principles of eu law*, in 5 *Polish Review of International and European Law*, 2016, p. 73 ff.

[28] M. RZOTKIEWICZ, *Compatibility of the state aid recovery order with the general principles of eu law*, cit., p. 75.

This solution rests both on the temporal dimension of the principle of legitimate expectation (derivable from Article 21-*nonies* Law No. 241/1990) and on the Commission's exclusive competence in State aid matters, which justifies the occasionally "hyper-retroactive" effect of recovery decisions. Such decisions can therefore override national *res judicata*, since national courts cannot rule with binding effect on the compatibility of aid with the internal market.

Once the one-year period has elapsed, however, different factors become relevant to establish the existence of legitimate expectations capable of precluding the hyper-retroactive effect of recovery decisions. More precisely, the aid beneficiary must prove – either before the Court of Justice in an annulment action under Article 263 TFEU, or before the national court in proceedings challenging the national recovery measure – the following constitutive elements of legitimate expectation:

(a) the existence of a national measure, a final judgment, or a recommendation by an EU institution affirming compatibility of the aid with the internal market;

(b) the unforeseeability of the recovery decision, assessed against the standard of the *homo eiusdem generis professionis et condicionis* (*i.e.*, absence of negligence);

(c) the prevalence of the private interest in retention over the public interest in recovery.

Scholars have noted that «an assurance from an EU institution can take the form of a positive action or inaction[29]». In this sense, Commission inaction may itself generate legitimate expectations in beneficiaries of an aid scheme incompatible with the internal market. In *Rijn-Schelde Verolme*, the Court of Justice held that a 26-month delay between the Commission's receipt of notification and the opening of formal investigation proceedings could engender legitimate expectations sufficient to preclude recovery[30]. Conversely, expectation cannot be deemed legitimate where a reasonably diligent operator should have recognized the aid as incompatible with the internal market, given its potential to distort competition, or where the measure is manifestly excluded from the notification obligation as de minimis aid.

Finally, invoking legitimate expectations as a ground of opposition to a recovery decision requires a balancing test between the public interest in recovery and the beneficiary's private interest in retention.

In any case, recital 26 of Regulation (EU) No. 1589/2016 confirms that after a certain lapse of time reliance on the aid must always be considered legitimate: «for reasons of legal certainty, it is appropriate to provide for a limitation period of 10 years for unlawful aid, at the expiry of which recovery may no longer be ordered». It is therefore reasonable to conclude that after ten years from the grant of aid, EU law precludes the opening of a formal recovery investigation, especially where a final judgment has meanwhile been delivered on its lawfulness.

[29] M. RZOTKIEWICZ, *Compatibility of the state aid recovery order with the general principles of eu law*, cit., p. 83.

[30] European Court of Justice, 24 November 1987, C-223/83, *Rijn-Schelde Verolme*, §§ 17-19.

Wrapping up: the resolution of the preliminary question of the legality of a given State aid scheme conditions the stability of the national *res judicata* which, explicitly or implicitly, has decided that same issue in the opposite sense. Proceeding from the premise of the semi-judicial nature of the Commission's decisions in matters of State aid, the logical coordination between the recovery decision and the judgment that has become final is achieved by recognizing a kind of "hyper-retroactive" effect to the former. Thus, the Commission's finding on the preliminary issue determines the legal situation in dispute from the outset, with the implication that the *res judicata* formed on the dependent claim, decided by the national court, is resolutively conditioned on the Commission's determination of the incompatibility of the contested aid scheme with the internal market.

The existence of a relationship of prejudiciality between the Commission's determination and that embodied in the judgment that has become final leads to the conclusion that an automatic invalidation mechanism of the latter may operate, modeled on Article 336(2) of the Code of Civil Procedure, insofar as this provision is considered the expression of a general logical principle, provided that no legitimate expectation of the private party in the finaoity of the judgment comes into play.

Conversely, where the entire procedure takes place after the national judgment has become final, it does not seem that the overcoming of *res judicata* already formed can so easily be asserted, by reason of the legitimate expectation placed by the private party in the irrevocable outcome of the proceedings and of the impossibility of preventing the conflict through the suspension mechanism. Such a solution, though not in line with that favored by the Court of Cassation and the Court of Justice, is the only one that allows weighing, on the scales, the finality of *res judicata* against the principle of the effet utile of the Commission's decisions.

5. *Final Remarks.*

The proposed solution has the merit of reconstructing the procedural rule in conformity with Union law on the basis of normative fragments, which are expressions of the general procedural principles of European law, while also considering the peculiarities of the concrete case. The considerations developed above therefore suggest not to take too seriously the extremely rigid solution offered by the Italian Supreme Court in 2023, especially if one considers that the principle of law it enunciated, insofar as it considers *res judicata* to be overcome by a subsequent recovery decision of the Commission incompatible with it, is entirely detached from the concrete case at hand.

At this point, we believe it is possible to oppose to the solution elaborated by the Italian Supreme Court, Tax Section, 1 September 2023, no. 25633, our own handbook.

The national judge, once aware of the pendency of a formal investigation procedure concerning the compatibility of a given State aid regime with the internal market must:
a) suspend the national proceedings to avoid the disregard of *res judicata*, in application of the *Lucchini* rule;
a_1) question the parties when there is doubt about the compatibility of the aid scheme with the internal market, asking them whether a formal investigation procedure is pending before the Commission;
a_2) in any case, request the Commission to transmit the information in its possession or its opinions on matters relating to the application of State aid rules, pursuant to Article 29(2) of Regulation (EU) 2015/1589.
Once the recovery decision has supervened during the pendency of proceedings, the parties:
b) may immediately resume the national dependent proceedings, in application of Articles 295 and 297 of the Code of Civil Procedure, as interpreted by our case-law in light of the principle of reasonable duration of the proceedings, without waiting for the two-month period provided for by Article 263(6) TFEU for the decision to become final;
b_1) if the national proceedings are resumed and the recovery decision has been challenged before the Court of Justice, the national judge may apply discretionary suspension under Article 337(2) of the Code of Civil Procedure if he considers that the decision will be annulled, whereas if he foresees rejection of the appeal, he will be obliged to comply with the content of the Commission's decision.
If the Commission's recovery decision precedes the pendency of the national proceedings, since no legitimate expectation deserving of protection arises, the national judge:
c) must disregard the *res judicata* incompatible with the recovery decision, in application of the *Lucchini* rule. If, instead, the Commission's recovery decision is subsequent to the judgment's finality, the national judge must use the tool of disregard when:
c_1) the starting of the formal investigation procedure precedes the conclusion of the national proceeding, since the private party, being aware of the pendency of the investigation, could have informed the judge, who in turn should have suspended the trial.
Conversely, the authority of *res judicata* is preserved if:
d) the entire procedure takes place after the judgment has become final, given the impossibility of suspending the national proceedings, provided that the recovery decision has supervened at least one year after the judgment became final, a period which, on the basis of normative indicators drawn from Article 21-*nonies* of Law no. 241 of 1990, is presumed to have consolidated a legitimate expectation worthy of protection (nonetheless, such presumption is rebuttable, and the Commission may displace it by adducing sufficient evidence to the contrary; the presumption is iuris et de iure after ten years, according to the principle set forth recital 26 of Regulation (EU) No. 1589/2016).

In any case, once one year has passed from the formation of *res judicata*, its overcoming by reason of the subsequent recovery decision is subject to:
e) a balancing test between the opposing principles of legal certainty, legitimate expectation, primacy of Union law, and conferral, in application of Article 16(2) of Regulation (EU) No. 1589 of 2015, taking into account the peculiarities of the concrete case and, in particular, the amount of the aid to be recovered, the size of the beneficiary and its market position, as well as the position of competitors, the impact of the aid on the market, and the duration of the distortion generated by it.
Finally, from Article 3 of Regulation (EC, Euratom) No. 2988/95 and Recital 26 of Regulation (EU) No. 1589 of 2015, it follows respectively that:
f) after four years from the formation of *res judicata*, the beneficiary's expectation has reached such a degree of legitimacy that recovery becomes extremely difficult, and the Commission must prove the absolute incompatibility of the aid scheme with the internal market; while those whose amount exceeds the threshold of *de minimis* aid, but without producing a significant distortive effect, should be preserved, the consolidation of legitimate expectation must be considered definitively preclusive of compulsory recovery;
g) after ten years from the granting of the unlawful aid, the Commission may no longer order its recovery, since the private party's expectation of its legitimacy is presumed to deserve protection.