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JURISDICTION OVER CROSS-BORDER COLLECTIVE REDRESS IN THE EU EMPLOYMENT CONTEXT

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1. Introduction

Collective redress through litigation as a procedural instrument for protecting collective interests has been the object of scrutiny in Europe within both legislatures and the courts. The notion of collective redress¹ should be construed in line with the definition provided by the Commission in the 2013 Communication «Towards a European Horizontal Framework for Collective Redress», where it is considered to be a procedural mechanism for joining within a single action individual claims, where each has a low individual loss, which may be used to resolve the dispute entirely, taking the form of either injunctive or compensatory relief, and with the aim of enhancing access to justice and improving procedural efficiency and effectiveness². This definition takes account of the variety within the national terminology used in relation to collective proceedings among

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¹ The expression collective redress needs also to be distinguished from that of collective action, although often the two expressions are used indiscriminately. In fact, commonly «the concept of ‘collective action’ includes many different forms of industrial struggle, since different systems of industrial relations know (or have known) different ways for the workers to exert pressure upon the employer. From the most ‘classical’ strike, to boycotts, working to rule, and go-slows» (see M. ROCCA, *Posting of Workers and Collective Labour Law: There and Back Again*, Cambridge – Antwerp – Portland, 2015, p. 87 ff.), while collective redress refers to the judicial procedures which enable citizens and/or organizations (see below) to enforce collective actions.

² COM(2013)401 final of 11 June 2013, para. 1.2.

EU Member States, including for example representative actions, group actions, class actions or collective redress mechanisms³, each having its own specific features as regards the composition of the group, admissibility, legal standing, funding and other substantive or procedural requirements⁴.

Whilst such discussions have concerned mainly consumers, collective redress may be a viable remedy in other areas in which collective interests could be affected. Violations of diverse types involving individuals from different countries or that take place in different Member States are increasing being caused by a variety of factors, such as cross-border mobility, environmental damages, the free movement of goods, e-commerce and the use of internet in general. These observations will be deepened below with reference to the issue of when collective redress mechanisms can be enforced in transnational disputes and which courts have jurisdiction over such legal actions under EU law in the employment context.

As is well known, under current EU law there are no general provisions that address the mechanism of collective redress for all areas in a transnational context along with the related private international law issues, while more specific collective redress requirements have been introduced in some fields, like environmental law, competition law, consumer protection or data protection, creating a fragmented and rather confusing regulatory framework. Nonetheless, there have been some soft law initiatives and a recent proposal seeking to raise awareness concerning this issue by setting out general principles, such as the recognition of foreign representative entities, and the applicability of the existing private international law rules, although these do not offer sufficient guidance in order to be applicable in practice. However, to date the scope of labour relations remains apparently excluded from this effort, which is required to respect Member States' procedural autonomy and the principles of subsidiarity and proportionality, although the EU seems to encourage Member States to develop a uniform procedural approach whenever natural and/or legal persons' interests have been affected by a breach of EU law.

Indeed, on the judicial level, two aspects must be distinguished: that of the *locus standi*, or of the standing to bring proceedings of the subject interested in acting in the case of collective action, and that of the court that has jurisdiction over such action, in the area of EU labour law.

As to the first profile, in the absence of rules directly conferring the legitimate interest to act in the case of collective redress, if not with specific reference to the case of posted workers, it will be a question of verifying whether, under the EU current framework, suitable connecting criteria to recognise the *locus standi* can already be traced.

As to the second, if it is true that there already exist special rules on jurisdiction with regard to labour relations, their application to collective redress mechanisms is not without

³ Collective redress may also «take the form of *actio popularis*, which enable citizens and/or certain organizations to pursue litigation in the public interest, even if there are no identifiable complaints. This is technically different from representative actions, which are initiated by interest organizations or public bodies *on behalf of group of individuals*-and not simply to pursue the public interest *in abstracto*. *Actio popularis* and representative actions can be distinguished from joint actions, where multiple individual claims can be grouped together into one single procedure, and each member of the claim can directly enforce his/her individual rights. Multiple individual claims can also be channelled through class actions, whereby 'one or a few individuals, called 'class representative(s),' sue on behalf of all who are similarly situated': S.B. LAHUERTA, *Enforcing EU Equality Law Through Collective Redress: Lagging Behind?*, in *Comm. M. Law Rev.*, 2018, 55, p. 783 ff., at p. 787 f.

⁴ See, among others, T. BOSTERS, *Collective Redress and Private International Law in the EU*, The Hague, 2017, p. 9 ff.

difficulty, so much as to make it desirable that, as already envisaged for other areas, specific criteria be introduced in the field of employment, or at least the current criteria be properly interpreted. Therefore, whilst the relevant provisions of applicable Regulations may be invoked and applied, their operability should be clarified by adjustments that take account of the collective dimension of the claimant party.

The jurisdictional regime applicable in collective judicial proceedings brought by employees that have transnational implications (e.g. where the habitual workplaces, or the domiciles of the claimants or of the employer may be situated in different EU Member States, and there is no choice of court agreement pursuant to Article 23 of the Brussels I *bis* Regulation)⁵ will be examined below in relation to the two abovementioned cases: where the employees are represented by a trade union or another similar entity (representative action) and where they (i.e. multiple claimants) act collectively without any representative organisation (group action)⁶. In the cases under consideration, both representative and group actions seek to request the application of a specific employment legislation or to recover the damages suffered as a result of the violation of certain terms and conditions of employment (thus disregarding non-contractual aspects). Essentially, these two situations differ in that the action is promoted either by a representative organisation or by a group of individuals. However, the assessment of both will reveal similar considerations concerning the operability of existing rules on jurisdiction.

To investigate whether Member States could have already a duty to allow collective redress procedures especially with regard to the employment law, it must be first considered that the ability of a group of individuals to apply collectively or to institute a collective procedure before the courts should be verified according to the *lex fori*. Indeed, procedural requirements applicable to collective judicial proceedings are governed by the law of the court seised by virtue of the principle of national procedural autonomy⁷. Justice systems do not fall within the competence of the EU, although the Union may nonetheless adopt legislative acts with the aim of harmonising national legal systems⁸. In any case, while

⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, in OJEU L 351 of 20 December 2012, p. 1 ff.

⁶ See the explanation of group action in the Commission Recommendation of 11 June 2013 *on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* (2013/396/EU), in OJEU L 201 of 26 July 2013, p. 60 ff., especially Recital 17: «Where the action can be brought jointly by those who claim to have suffered harm».

⁷ See Judgments of the Court of Justice of 16 December 1976, Case 45/76, *Comet BV v Produktschap voor Siergewassen*, EU:C:1976:191, paras. 12-13; and Case 33/76, *Reve-Zentralfinanz eG and Reve-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para. 5; 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, EU:C:1978:49, para. 14 ff.; 19 June 1990, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1990:257, paras. 18-20; 13 March 2007, Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163, para. 37; 27 June 2013, Case C-93/12, *Agrokonsulting-04*, EU:C:2013:432, para. 35. For comments see A. MAFFEO, *Diritto dell'Unione europea e processo civile nazionale*, Napoli, 2019, p. 43 ff.; M.C. BARUFFI, *Art. 4 TUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 13 ff., 21 ff.; I. BENÖHR, *Collective Redress in the Field of European Consumer Law*, in *Leg. Iss. Ec. Int.*, 2014, 3, p. 243 ff., at p. 249 ff.; C. FAVILLI, *I ricorsi collettivi nell'Unione europea e la tutela antidiscriminatoria: verso un autentico approccio orizzontale*, in *Dir. Un. eur.*, 2014, 3, p. 439 ff., at p. 440 ff.; B. HESS, *A coherent approach to European collective redress*, in D. FAIRGRIEVE, E. LEIN (eds.), *Extraterritoriality and collective redress*, Oxford, 2012, p. 107 ff., 110.

⁸ On harmonization acts, see B. HESS, *The Role of Procedural Law in the Governance of Enforcement in Europe*, in H-W MICKLITZ, A WECHSLER (eds.), *The Transformation of Enforcement. European Economic Law in Global Perspective*,

determining the «procedural rules governing actions for safeguarding rights which individuals derive from EU law», Member States are required to establish rules «that are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness)»⁹.

European lawmakers have acknowledged the emergent need to provide rules to govern collective litigation at EU level and have attempted to introduce general principles – in the form of a recommendation – in sectors in which mainly collective interests are in play and where some level of wide-scale harm has already occurred. However, collective redress may also be significant within other fields as a viable means of ensuring protection, such as specifically employment law, where the rights of trade unions to take collective action on behalf of workers are recognised within the relevant EU legislation.

Against this background, in the light of legislative developments and the small number of cases before the Court of Justice that have involved in particular consumers, this analysis will focus, first, on the current framework for collective redress within the EU, placing particular emphasis on the employment context and the provisions applicable in transnational situations. Secondly, it will consider the applicability of the existing rules on jurisdiction under the Brussels I *bis* Regulation to cross-border collective redress sought by workers, whether represented or not, with a view to highlighting a few practical difficulties and to proposing some potential changes.

2. Collective redress under EU law

The protection of the rights granted under Union law and the provision of enforcement remedies, in compliance with the fundamental right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights, have been at the core of certain sector-specific legislation in consumer and antitrust law.

The need to take action at EU level concerning the issue of collective redress has been addressed by a series of Commission initiatives, starting from the Green Paper on access of consumers to justice from 1993, which assessed national systems on the protection of collective interests and the related difficulties¹⁰. The first binding measure was the 1998 Directive on injunctions for the protection of consumers' interests¹¹, which sought to approximate national laws by establishing a common procedure to allow qualified entities to bring injunctive actions in order to put a halt to unlawful practices that harm collective interests of consumers in any part of the EU. The debate on effective protection and collective redress mechanisms has intensified since the adoption of the

Oxford and Portland, Oregon, 2016, p. 343 ff., 345-347; A. DAMATO, *Art. 114 TFUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario*, cit., p. 904 ff.

⁹ See Opinion of Advocate General Sharpston delivered on 31 October 2019, Case C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford*, EU:C:2019:922, point 93 ff. On the principles of equivalence and effectiveness, see A. MAFFEO, *Diritto dell'Unione europea*, cit., p. 44 ff. and 51 ff.

¹⁰ Green Paper Access of consumers to justice and the settlement of consumer disputes in the Single Market, COM(93)576 final of 16 November 1993.

¹¹ Directive 98/27/EC, in OJEU L 166 of 11 June 1998, p. 51 ff. See I. BENÖHR, *Collective Redress*, cit., p. 248 ff.

Consumer Policy Strategy for 2007-2013¹². With the 2008 Green Paper on Consumer Collective Redress¹³, the Commission proposed possible future action in the area of collective procedures which could be carried out with a view to providing a tangible and effective solution at EU level for the protection of collective interests, including injunctive as well as compensatory measures. The proposal was welcomed by the European Parliament, which concluded that collective redress, as a means of facilitating access to justice, is also an important deterrent against unlawful practices¹⁴. The Directive on injunctions enacted in 2009¹⁵, which replaced the 1998 Directive, still does not allow collective redress for damages in order to compensate consumers where they have suffered identical harm or loss.

At EU level, collective mechanisms for mass harm cases have been developed also within competition law. According to the 2005 Green Paper, the enforcement of antitrust law and the efficiency of judicial systems could be improved by establishing collective actions, thus consolidating a large number of smaller claims into one single action, and thereby saving time and money¹⁶. In the wake of this, the European Parliament stressed, assuming private actions to be complementary to and compatible with public enforcement¹⁷, that «in the interests of justice and for reasons of economy, speed and consistency, victims should be able voluntarily to bring collective actions, either directly or via organisations whose statutes have this as their object»¹⁸.

The Commission went further in the subsequent 2008 White Paper on damages actions for breach of the antitrust rules¹⁹. It proposed two collective redress mechanisms, which were intended to be complementary, namely: (i) representative actions brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims; and (ii) opt-in collective actions, in which the victims expressly decide to combine their individual claims for the harm they suffered into one single action²⁰. The outcomes of the studies and public consultation were considered within the process of drafting the proposal on remedies under antitrust law, which led to the adoption of Directive 2014/104 on antitrust damages actions²¹. This Directive provides that any natural or legal person who has suffered harm as

¹² Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *EU Consumer Policy Strategy 2007-2013, Empowering consumers, enhancing their welfare, effectively protecting them*, COM(2007)99 final of 13 March 2007.

¹³ Green Paper on Consumer Collective Redress, COM(2008)794 final of 27 November 2008.

¹⁴ European Parliament resolution of 26 March 2009 *on the White Paper on damages actions for breach of the EC antitrust rules* (2008/2154(INI)), P6_TA(2009)0187, especially point 4.

¹⁵ Directive 2009/22/EC, in OJEU L 110 of 1 May 2009, p. 30 ff., which should be repealed by the 2018 Proposal (further discussed in this para).

¹⁶ Green Paper Damages actions for breach of the EC antitrust rules, COM(2005)672 final of 19 December 2005, accompanied by SEC(2005)1732, para 2.5.

¹⁷ European Parliament resolution of 25 April 2007 *on the Green Paper on Damages actions for breach of the EC antitrust rules* (2006/2207(INI)), P6_TA(2007)0152, point 6.

¹⁸ *Ibid*, point 21.

¹⁹ White Paper on damages actions for breach of the EC antitrust rules, COM(2008)165 final of 2 April 2008, accompanied by SEC(2008)404, SEC(2008)405, SEC(2008)406. See also the impact assessment of group litigation in Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report, 21 December 2007, p. 268 ff., available at <http://ec.europa.eu>, T. CHIEU, *Class Actions in the European Union?: Importing Lessons Learned from The United States' experience into European Community Competition Law*, in *Cardozo Jour. Int. Comp. Law*, 2010, 18, p. 123 ff., at p. 143 ff.

²⁰ White Paper 2008, cit., section 'Standing: indirect purchasers and collective redress'.

²¹ Directive 2014/104/EU, in OJEU L 349 of 5 December 2014, p. 1 ff.

a result of a breach of competition law can effectively exercise the right to claim full compensation for that harm through individual or collective (representative) actions²². However, it does not regulate the procedural prerequisites for the admissibility of collective redress actions. Moreover, the Directive does not require the Member States to introduce collective redress mechanisms in order to enforce Articles 101 and 102 TFEU²³.

The Commission has also carried out studies and other initiatives focusing on the procedural means of collective redress in general, with a view to proposing uniform solutions in order to limit any divergence among national systems. In 2013 it published the Communication (mentioned above) on a European horizontal framework for collective redress and the Recommendation on common principles.

The Communication outlined the notion of collective redress in the EU, described the main aims and reported the views expressed by the stakeholders within the public consultation concerning the conflict of laws rules, mostly in relation to damages and competition claims, collective dispute resolution mechanisms and the need to introduce specific jurisdictional rules for cross-border collective redress²⁴. Namely, the proposals on such cross-border rules focused on collective proceedings in general, irrespective of the relevant subject matter, and called for: the establishment of the place where the majority of injured parties are domiciled as a connecting factor; the extension of jurisdiction for consumer contracts to representative entities bringing a collective claim; reference to the place of the defendant's domicile as it is easily identifiable and ensures legal certainty; and finally the creation of a special judicial panel within the Court of Justice for cross-border collective actions. These suggestions went unheeded. In particular, as regards the jurisdictional aspect, the Commission concluded that the provisions of the Brussels I Regulation²⁵ «should be fully exploited» and that attention should be paid to «the experience involving cross-border collective redress»²⁶. Therefore, it did not consider providing any guidance for the determination as to which courts should have jurisdiction.

The parallel 2013 Recommendation sets out principles that are common to both injunctive and compensatory collective redress, followed by other rules specifically applicable to each individual category²⁷. These principles were supposed to represent the “minimum standards” that Member States were encouraged to apply under the national legislation governing collective procedures. In the Commission's opinion, compliance with these standards would have improved the judicial protection offered to group rights by means of procedures that are «fair, equitable, timely, and not prohibitively expensive»²⁸.

²² *Ibid*, Article 1 and Article 2(4).

²³ *Ibid*, Recital 13.

²⁴ COM(2013)401 final, cit., para. 3.7.

²⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJEC* L 12 of 16 January 2001, p. 1 ff.

²⁶ COM(2013)401 final, cit., para. 3.7.

²⁷ The first set of common principles applicable to injunctive and compensatory collective redress deals with issues such as standing, the admissibility of actions, adequate information for potential claimants, funding of collective actions, and the application of the ‘loser pays’ principle to the costs of lawsuits (paras. 4 to 18). In relation to the injunctive procedure, it is recommended that the Member States ensure expedient procedures and appropriate sanctions (paras. 19-20). For compensatory redress, other features are proposed, such as the constitution of the claimant party on the basis of express consent (opt-in principle), the recourse to alternative dispute resolution and settlements, limits on lawyers' fees, the prohibition of overcompensation and punitive damages, and the coordination with public enforcement proceedings (paras. 21 to 34).

²⁸ Recommendation of 11 June 2013, cit., para. 2.

Injunctive and compensatory collective redress procedures are defined under paragraph 3, and are shaped as representative actions²⁹.

Cross-border cases are covered by paragraphs 17 and 18 of the Recommendation. Under the former, the Commission called on the Member States to ensure that foreign claimants (group of individuals or the representative entities) are not prevented from bringing a single collective action by national rules on admissibility or standing³⁰. This may occur when claimants originate from more than one Member State, or when foreign groups of claimants or representative entities are domiciled in other national legal systems. In such scenarios, the courts should recognise the admissibility and procedural standing of any foreign entities in accordance with the law of their State of origin. Were this not to be the case, as a result of different legislation on *locus standi* applicable to representative organisations in the relevant State where the claim was brought, certain entities might not have the power to act due to restrictive criteria provided for under the *lex fori*³¹. Moreover, where the applicable requirements differ, the (procedural) public policy exception may be invoked against the recognition and enforcement of decisions issued within collective procedures in another EU country. Paragraph 18 complements the above principle on mutual recognition of foreign entities and requires that any officially designated representative entity «should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation».

The crucial issues relating to jurisdiction and applicable law were previously pointed out by the European Parliament in its 2012 Resolution on a coherent European approach to collective redress³², which was delivered prior to the adoption of the Communication and Recommendation mentioned above. In relation to the jurisdictional aspect, the Parliament stressed that the horizontal framework should lay down rules to prevent a rush to the courts (*forum shopping*), in line with the provisions of the Brussels I Regulation³³. However, the common principle of the mutual recognition of foreign representative entities introduced by the 2013 Recommendation does not appear to resolve this issue conclusively, although this may contribute to the introduction of provisions aimed at preventing conflicts of jurisdiction and *forum shopping*.

Collective proceedings in the form of representative actions are then considered in Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), which provides for the right to bring an action for organisations or other similar entities (not-for-profit) acting on behalf of data subjects on the basis of a mandate³⁴. As regards the courts having jurisdiction, pursuant to Article 80 of the GDPR the representative organisations, upon data subjects' mandate, may exercise the actions set forth in Articles 77 to 79 (and

²⁹ *Ibid*, para. 4.

³⁰ On this issue, see T. BOSTERS, *Collective Redress*, cit., p. 244 ff.; A. STADLER, *The Commission's Recommendation on Common Principles of Collective Redress and Private International Law Issues*, in E. LEIN, D. FAIRGRIEVE, M. OTERO CRESPO, V. SMITH (eds), *Collective Redress in Europe: Why and How?*, London, 2015, p. 235 ff.

³¹ In this sense, see R. MONEY-KYRLE, *Legal standing in collective redress actions for breach of EU rights: facilitating or frustrating common standards and access to justice?*, in B. HESS, M. BERGSTRÖM, E. STORSKRUBB (eds), *EU Civil Justice. Current issues and Future Outlook*, Oxford, 2016, p. 223 ff., at p. 240.

³² Resolution of 2 February 2012 (2011/2089(INI)), P7_TA(2012)0021.

³³ *Ibid*, para. 26.

³⁴ Regulation (EU) 2016/679, in *OJEU* L 119 of 4 May 2016, p. 1 ff., in particular see Recital No. 142 and Article 80. On this issue, see A. BIARD, *Collective Redress in the EU: a rainbow behind the clouds?*, in *ERA Forum*, 2018, 189, p. 201 ff.

also the right to seek compensation under Article 82), where also specific *fora* are established, which prevail over the general rules contained in the Brussels I *bis* Regulation by virtue of Recital 147. Those entities may accordingly be able to invoke such grounds. In other words, actions brought by representative organisations could be subject to the same rules on jurisdiction as are available to data subjects (acting individually) under Articles 77 to 79. Accordingly, collective actions could be brought against a supervisory authority before the courts of the Member State of the claimant's habitual residence or place of work, the place of the alleged infringement, or where the supervisory authority is established, or, against a controller or processor, where the controller or processor has an establishment or, when it is not acting with public powers, the claimant's habitual residence³⁵. Moreover, under Article 80(2), Member States may endow representative entities with an independent legal standing, with the exception of the right to seek compensation³⁶.

Lastly, in April 2018 the Commission submitted a Proposal for a Directive on representative actions for the protection of the collective interests of consumers³⁷ in the context of the "New Deal for Consumers"³⁸. This Proposal seeks to define a common framework at Union level for representative actions to ensure the effective and efficient treatment of infringements of Union law arising in relation to domestic or cross-border transactions in a variety of sectors, such as data protection, financial services, energy, telecommunications, health and environment³⁹. Contrary to the common principles set forth in the 2013 Recommendation, this Proposal only regulates certain procedural aspects of collective mechanisms for the protection of consumer interests⁴⁰. Moreover, the proposed framework is not intended to replace the national systems for collective redress; however, Member States are required to design the representative action outlined in the Proposal as an alternative procedure or to incorporate it into their national law⁴¹.

Insofar as cross-border cases are concerned, the proposed Article 16 reproduces the principle of mutual recognition of foreign entities⁴², in line with the 2013 recommended principle. Article 2(3) of the Proposal for its part clarifies that the Directive shall be «without prejudice to the Union rules on private international law, in particular rules related to court jurisdiction and applicable law». Finally, Recital 9 states that «the Directive should not establish rules of private international law», thus noting that «the existing Union law

³⁵ Some criticism has been raised with regard to the extension of the grounds to representative entities: see M REQUEJO ISIDRO, *Procedural Harmonization and Private Enforcement in the Area of Personal Data Protection*, in *Max Planck Institute Luxembourg for Procedural Law Research Paper Series*, 2019, 3, para. 4.1.1.

³⁶ See L. JANČIŪTĖ, *Data protection and the construction of collective redress in Europe: exploring challenges and opportunities*, in *International Data Privacy Law*, 2019, 9, p. 2 ff., at p. 11.

³⁷ Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018)184 final of 11 April 2018.

³⁸ COM(2018)183 final of 11 April 2018, which also includes the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC, Directive 2005/29/EC and Directive 2011/83/EU as regards better enforcement and modernisation of EU consumer protection rules, COM(2018)185 final.

³⁹ COM(2018)184, cit., Recital 6.

⁴⁰ *Ibid.*, 4.

⁴¹ *Ibid.*, Recital 24. See also A. BIARD, X. KRAMER, *The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?*, in *ZEUP*, 2019, 2, p. 249 ff., especially p. 251 f., where the Authors specify that the Proposal follows a minimum-harmonisation approach.

⁴² *Ibid.*, 254.

instruments apply to the representative actions set out by this Directive»⁴³. In other words, it allows for the application of the existing private international law Regulations to representative actions. Accordingly, the general rules and special grounds for consumers laid down within the Brussels and Rome regimes could be invoked by the representative entities. However, in practice, the application of connecting factors to the representative actions seems to be ambiguous because those rules clearly address individual claims by referring to individual connecting factors⁴⁴.

Should the proposed legislation aimed at harmonising procedural requirements for collective redress by consumers be adopted, the Member States will be required to make efforts to implement it within their respective national legal orders. Indeed, reports suggest that the 2013 Recommendation on common principles has had quite a limited effect as new legislation has been enacted only in a few Member States⁴⁵.

3. In particular: in the employment context

The general principles set out and recommendations issued so far in the area of collective redress for consumers may also be valid in the area of employment law, in which collective action could represent a more viable and effective instrument for the protection and enforcement of collective rights. For instance, employees could bring a collective action where they have suffered from the same violation and wish to invoke certain terms and conditions of employment. Usually, collective proceedings involving employees take the form of representative actions, which are brought by trade unions acting on their behalf.

⁴³ The European Parliament has proposed an amendment to this Recital, specifying that the Directive does not affect the existing rules and mentioning the specific applicable Regulations: see Recital 9(a) new, in the European Parliament resolution of 26 March 2019, P8_TA-PROVV(2019)0222, where it also suggested the establishment of a European Ombudsman for collective redress (Recital 41(a) new and Article 18(a) new).

⁴⁴ In this sense, see C. HODGES, *Collective Redress: The Need for New Technologies*, in *Jour. Cons. Pol.*, 2019, 42, p. 59 ff., at p. 79; A. BIARD, *Collective Redress*, cit., p. 193; Study *Collective redress in the Member States of the European Union*, PE 608.829, October 2018, p. 96, available at <http://www.europarl.europa.eu/supporting-analyses>. However, it has also been sustained that, due to the harmonisation approach of the proposed Directive, uncertainty on the practical operability of the existing rules might not be raised: see E. LEIN, *Class Actions à l'Européenne – Competition for U.S. Mass Litigation?*, in A. BONOMI, K. NADAKAVUKAREN SCHEFER (eds.), *US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger?*, Zürich, 2018, p. 137 ff., at p. 152, where the Author asserts that «Article 16 of the Proposal does not address the issue of court competence or applicable law, but refers to the existing Regulations in this area, as Art. 2(3) of the Proposal expressly clarifies. The Proposal (...) leaves EU rules on jurisdiction and private international law untouched. However, (...) the rules on conflict of laws and jurisdictions lose relevance where a uniform regime is provided for in an area such as consumer law, in which substantive law is broadly harmonised across the EU. If a common regime is available across the EU, jurisdiction is less of an issue and the applicable law question loses its complexity in areas with pan-European uniformity of substantive law»; see also F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)*, Milano – Padova, 2015, at p. 216, where the Author considers that the individual dimension characterises the wording of the grounds of jurisdiction, similar to the provisions on the applicable law under Regulation 593/2008, as well as underlines the absence of a reference to class actions aimed at protecting collective interests.

⁴⁵ Report on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), COM(2018)40 final of 25 January 2018, p. 3 ff.

The relevant EU legislation on employment law does not contain (and does not explicitly exclude) any clear provisions on the procedural means available for private enforcement, except for a general obligation requiring Member States to provide effective remedies in favour of workers seeking to enforce their rights granted under Union or national law. Such remedies could include collective procedures, brought either by a representative organisation or by a group of employees, who may originate from or work in different States. As is the case for consumer protection and competition law legislation, there are no specific EU rules concerning the procedural requirements for and the transnational nature of collective proceedings. Thus, due to the lack of any provisions on collective redress, it is necessary to assess the applicability (to collective redress procedures involving workers) of the existing private international law rules and, in particular - for the purpose of this analysis - the general and special rules on jurisdiction under the Brussels I *bis* Regulation, subject to the fact that trade unions, interest organizations or group of workers have been granted the *locus standi* by Member States in accordance with their own legal systems.

Collective actions concerning workers' rights are nothing new within the context of the free movement of workers and the freedom to provide services, where legislation has been adopted with the aim of guaranteeing the smooth functioning of the internal market. In fact, some cases brought before the Court of Justice have involved industrial or strike actions undertaken to enforce rights granted under the relevant legislation. The exercise of this form of collective action is ensured by Article 28 of the Charter of Fundamental Rights of the European Union. However, any such action should comply with fundamental economic freedoms, which must prevail whenever the conduct of the action - which is governed by national laws and practice - may be liable to hamper the enjoyment of those fundamental freedoms. Even though no distinction is drawn within the wording of that Article between different forms of action, it could be sustained that, from a procedural perspective, collective redress could be regarded as one of the measures giving effect to the fundamental social right to collective action⁴⁶.

Having regard to the relevant legislation, there are indeed some provisions that establish an obligation for the Member States to ensure remedies and rights of action in favour of workers as well as their representative associations, organisations or other similar entities, including, at a procedural level, enforcement mechanisms which enable such entities to pursue litigation in the interest of workers themselves.

In particular, under EU legislation on the protection of workers, the right to collective action is laid down in Article 3 of Directive 2014/54 on measures facilitating the exercise of rights conferred on workers⁴⁷, which was adopted within the framework of the free movement for workers⁴⁸ and requires national authorities to ensure that judicial procedures are available for all EU workers in cases involving discrimination or violations of EU or national law, provided that these remedies - including collective actions - comply with national laws and practice⁴⁹. In addition, organisations, associations, trade unions or

⁴⁶ See, *inter alia*, C. PERARO, *Right to collective action in cross-border employment contexts: a fundamental social right not yet covered by EU private international law*, in UNIO - EU Law Journal, 2016, 2, p. 20 ff.

⁴⁷ Directive 2014/54/EU, in OJEU L 128 of 30 April 2014, p. 8 ff.

⁴⁸ Other relevant rules are contained in Regulation (EU) No 492/2011, in OJEU L 141 of 27 May 2011, p. 1 ff., that updates (and codifies) earlier legislation on the freedom to move and work of EU citizens in another EU country.

⁴⁹ Directive 2014/54/EU, cit., Article 3, paras 2-4.

other entities may represent or support EU workers and their families⁵⁰. However, no specific procedural requirements are established, and only a generic clause on respect for the right to take action is included. It is also significant to note that, under Recital 15 of this Directive, Member States are invited «to examine the implementation of common principles for injunctive and compensatory collective redress mechanisms, with a view of ensuring effective legal protection, and without prejudice to the existing collective defence mechanisms available to the social partners and to national law or practice»⁵¹. This reference to the 2013 Recommendation could be read as a mere suggestion, and not a mandatory requirement. In any case, it is important to mention it because it underscores the need for measures regarding collective procedures also in the area of employment, which did not feature in the 2013 Recommendation as one of the areas envisaged as falling within the scope of the proposed common principles. On the contrary, neither the Directive on antitrust damages actions (which was adopted almost at the same time) nor the consumer legislation cited above contain any reference to the Recommendation. Thus, it may be inferred from these considerations that collective procedures are regarded as a viable instrument for the protection of collective interests also under employment law.

Furthermore, provisions on the right to take collective action are incorporated into the legal framework applicable to posted workers (i.e. employees who have temporarily moved to another EU Member State in order to perform working activities), which consists in Directive 96/71 on the posting of workers (as amended by Directive 2018/957)⁵² and the Enforcement Directive 2014/67⁵³. According to Article 1a of Directive 96/71, Recital 22 and Article 11 of Directive 2014/67, the right to collective action must be recognised also to trade unions acting on behalf of workers in judicial or extra-judicial proceedings. In any case, aside from the general obligation for Member States to ensure such forms of effective remedies, collective redress is not associated with procedural requirements, which are accordingly regulated by national legislation. As regards the transnational implications of disputes concerning the rights granted under the Directives on posted workers, a rule of private international law refers to the law applicable to terms and conditions of employment (Article 3 of Directive 96/71), whilst another establishes the courts having jurisdiction (Article 6 of Directive 96/71, in a similar manner to Article 11 of Directive 2014/67), although no clear reference is made to collective redress procedures.

In conclusion, if, in theory, when EU law creates rights for individuals, and for group of them, «the principle of effective judicial protection requires the existence of effective enforcement mechanism. Yet, *in practice*, though the combined effect of weak secondary law, national procedural competence and the CJEU requirement of *minimum* – not *adequate* – judicial protection, this principle can become a mere chimera because EU law may not require a particular form of judicial and/or administrative enforcement mechanism at national level»⁵⁴. This lack of uniform enforcement is «clearly linked to the classic EU law

⁵⁰ *Ibid*, Recitals 15 and 29, which ensure the possibility for entities to represent workers and the respect for the right to collective action, and Article 3 on the defence of rights.

⁵¹ See S.B. LAHUERTA, *Enforcing EU Equality Law*, cit., p. 811: «This “invitation”, inspired by Recommendation 2013/396, is further supported by a reference to national law on the right to take action *on behalf of a collective interest in Article 3(3)*».

⁵² Directive 96/71/EC, in OJEC L 18 of 21 January 1997, p. 1 ff., and Directive 2018/957/EU, in OJEU L 173 of 9 July 2018, p. 16 ff.

⁵³ Directive 2014/67/EU, in OJEU L 159 of 28 May 2014, p. 11 ff.

⁵⁴ S.B. LAHUERTA, *Enforcing EU Equality Law*, cit., p. 807.

disconnection between rights and remedies, i.e. rights are granted by EU law, enforcement procedures are established by national law»⁵⁵. Therefore, absent any specific European provisions, collective proceedings are subject to the national legislation of the *forum* and there is no general obligation for the Member States to expand the *locus standi* in the case of representative actions, or collective redress in general.

This was confirmed in a case concerning the law on establishing the admissibility of judicial action by the trade union *Sähköalojen ammattiliitto*⁵⁶. This Finnish trade union had launched an action before the Finnish courts against the Polish posting undertaking (that has a branch in Finland) acting on behalf of posted workers from Poland, whose employment contracts were concluded in Poland and under the Polish law, with the aim of claiming the minimum pay guaranteed under the Finnish collective employment agreement. The Polish undertaking claimed that the admissibility and legal standing of the Finnish trade union should be established in accordance with the law of the State of origin of the workers, that is the Polish law, which prohibits the assignment of claims arising out of an employment relationship and thus the ability of posted workers to be represented by a foreign organisation. The Court instead stated that the law governing the collective procedure was the *lex fori* and therefore the Finnish trade union was entitled - under its national (Finnish) law - to represent posted (Polish) workers⁵⁷. This ruling clearly reflects the principle of national procedural autonomy, which usually implies the application of the law where the court action is taking place. Moreover, Finnish jurisdiction could have not been contested because the main proceedings had been properly initiated in the place where Polish posted employees were working, in accordance with the rule set out in Directive 96/71.

The lack of significant judgments addressing issues relating to cross-border collective redress involving workers is connected to the absence of any EU provisions on this procedural instrument, which has only been developed in few Member States, mainly in the area of consumer law. The differences between national laws in terms of judicial requirements, procedural rules, the admissibility of group actions, representation of members, as well as the recognition of foreign collective judgments may hamper the proper, efficient and effective protection of rights. However, current legislative developments should increase awareness concerning this matter and thus contribute to the establishment of a common European legal framework, not only in the form of harmonisation through recommendations or directives. In some area, for instance consumer protection, data protection and competition law, EU law seems to be advancing in the direction of guaranteeing the effective enforcement and primacy of EU substantive rights by requiring some degree of procedural uniformity, especially with regard to *locus standi*. This approach should also be valid whenever workers' organizations or group of workers have legitimate interest to take action against a breach of EU law. Indeed, under the current legal framework, the EU principles of social right to collective action, effectiveness and effective judicial protection could have the effect of requiring Member States to grant standing to public bodies or private actors to initiate representative action proceedings and enforce EU rights.

⁵⁵ *Ibid*, p. 808.

⁵⁶ Judgment of the Court of Justice of 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto*, EU:C:2015:86.

⁵⁷ S.B. LAHUERTA, *Enforcing EU Equality Law*, cit., p. 24 ff.

4. The applicability of the Brussels I bis Regulation

As far as the current legislative background is concerned, actions for cross-border collective redress in the employment context should be governed by the existing rules on jurisdiction under the Brussels I *bis* Regulation along with the special *forum* for posted workers. Considering the paucity of case law from the Court of Justice on collective redress, which mainly concerns consumer protection, as already noted, there is a (general) question as to whether the scope of these provisions could be extended to cover collective proceedings, or whether new provisions should be introduced.

The analysis must consider first of all the Brussels I *bis* Regulation, along with its objectives and scope, including the two articles that generically address the collective dimension of disputes⁵⁸, and thereafter the rules on jurisdiction over individual employment contracts. In addition, the alternative special *forum* for posted workers will be examined as a possible provision applicable to cross-border collective redress involving workers.

As already outlined, the assessment of jurisdiction regimes focuses on judicial proceedings launched by groups of workers with transnational implications, either where they are represented by a trade union or another similar entity, or where they are acting collectively without any representative organisation.

From a general perspective, the Brussels I *bis* Regulation was conceived of for individual disputes within civil and commercial matters, including employment law, and it does not cover explicitly collective redress or any other collective procedural instruments with transnational implications⁵⁹, though it does not expressly exclude them. Since the scope of application *ratione personae* has not been defined by clearly identifying the nature of the person entitled to bring the actions, it can be interpreted broadly⁶⁰. It could be thus sustained that the existing rules can be extended to collective redress. Consequently, their practical application remains to be verified in order to evaluate if they can be

⁵⁸ See further in this para. on Arts. 8 and 30. For comments, see B. HESS, *A coherent approach*, cit., p. 112; E. LEIN, *Jurisdiction and Applicable Law in Cross-Border Mass Litigation*, in F. POCAR, I. VIARENGO, F.C. VILLATA (eds), *Recasting Brussels I*, Padova, 2012, p. 159 ff.

⁵⁹ See also *supra* n 44. Mainly with regard to consumer protection, see P. MANKOWSKI, P. NIELSEN, *Introduction to Articles 17-19*, in U. MAGNUS, P. MANKOWSKI (eds), *European Commentaries on Private International Law. Brussels Ibis Regulation*, Köln, 2016, p. 450; S. BARIATTI, *Le azioni collettive dell'art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale*, in *Riv. dir. int. priv. proc.*, 2011, p. 19 ff.; L. CARBALLO PIÑEIRO, *Las acciones colectivas y su eficacia extraterritorial. Problemas de recepción y trasplante de las class actions en Europa*, Santiago de Compostela, 2009, p. 105 ff. See also European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 (2009/2140(INI)), P7_TA(2010)0304, point 32, where it stressed «that the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions».

⁶⁰ For instance, with regard to consumer contracts, Article 17 refers to the «contract concluded by a person, the consumer», which is then taken into account as the contractual party. Although Article 18 uses the term «a consumer» referring to the person that can bring proceedings, this term is just a mere repetition of the previous notion used in Article 17, without indicating whether «the consumer» entitled to bring an action could be a single or collective subject; accordingly, it could be interpreted broadly to cover collective claimants. Similarly, in relation to employment contracts, Articles 20 to 23 do not refer to the person entitled to act, and the terms «employee» or «employer» are used to indicate the parties to the employment relationship, but the persons entitled to bring actions could also be a collective subject.

straightforward applied or they need any adjustments or adaptation to the collective nature of the dispute.

By contrast, a restrictive interpretation of the Brussels system based on the textual and teleological perspectives may prevent it from being extended because the structure and aims of the Regulation do not cover transnational collective litigation, but only individual disputes, where one individual person brings an action against another on the basis of their contractual relationship. Accordingly, when specific matters, such as employment contracts, are concerned, also the protective grounds cannot be invoked because those protective rules derogate from the general rule and must be interpreted narrowly⁶¹. This means that such rules cannot cover collective disputes and cannot be applied to representative persons or entities, being otherwise in contrast with the Regulation's scope. One argument in favour of this interpretation is that the collective nature of the claimant is at odds with the objective of protecting weaker parties⁶². In other words, collective proceedings representing collective strength do not feature a party that is typically weaker, as an individual, and such proceedings do fundamentally alter the inequality between the contracting parties in terms of their litigation power⁶³. It has been argued that associations acting on behalf of consumers are not natural persons because they have their own *locus standi*, and thus that actions promoted by them do not fall within the scope of the Brussels I *bis* Regulation. Consequently, special protective *fora* are not open to associations or other entities seeking to claim in order to uphold collective interests⁶⁴. Such considerations may nonetheless be objected because collective redress should be considered as a procedural instrument that may better pursue the aim of protecting weaker parties, as confirmed by the Court of justice in the *Fashion ID* case with regard to a consumers' representative association⁶⁵. It follows that, under a general perspective, the restrictive interpretation could not be deemed consistent with the role of collective redress within private enforcement under EU law, and no objections related to the nature of the claimants could impede the extension of the scope of application of the Brussels I *bis* Regulation.

The collective dimension of litigation has been discussed, although especially in terms of recognition of collective judgments, within the review process of the Brussels I Regulation (44/2001) as stemming from the 2010 Proposal «for the recast of the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters»⁶⁶. In fact, this Proposal reported the outcomes of preliminary public consultation, in which stakeholders voiced concerns at the proposed abolition of the *exequatur* procedure with respect to collective redress proceedings in general terms and not in relation to a specific sector, as they require safeguards in order to protect the defence

⁶¹ In this sense, see M. DANOV, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, in *Jour. Pr. Int. Law*, 2010, 6, p. 359 ff., at p. 364 ff.; see also L. CARBALLO PIÑEIRO, *Acciones colectivas transfronterizas: Prospectiva de Derecho Internacional Privado europeo*, in *Revista de Derecho Privado y Comunitario*, 2011, 2, p. 585 ff., at p. 597.

⁶² C. KESSEDJIAN, *Les actions collectives en dommages et intérêts pour infraction aux règles communautaires de la concurrence et le droit international privé*, in S. BARIATTI, G. VENTURINI (a cura di), *Liber Fausto Pocar*, Milano, 2009, p. 533 ff., at p. 535 f.

⁶³ P. MANKOWSKI, P. NIELSEN, *Introduction*, cit., p. 450; Z.S. TANG, *Consumer Collective Redress in European Private International Law*, in *Jour. Pr. Int. Law*, 2011, 7, p. 101 ff., at p. 107, who pointed out that «collective redress has not obtained the blessing of a special rule».

⁶⁴ P. MANKOWSKI, P. NIELSEN, *Introduction*, cit., p. 451.

⁶⁵ See Judgment of the Court of Justice of 29 July 2019, Case C-40/17, *Fashion ID*, EU:C:2019:629, point 59.

⁶⁶ COM(2010)748 final of 14 December 2010.

rights of the party against whom enforcement is sought⁶⁷. Given the different national systems, the Commission argued that «the required level of trust cannot be presumed at this stage», acknowledging that further developments of the law in this area were pending because a public consultation on collective redress was ongoing at that time. Thus, it clarified that the Proposal would abolish the *exequatur* procedure for all judgments covered by the Regulation except judgments in defamation and compensatory collective redress cases⁶⁸. Finally, the Regulation does not contain any provisions on the recognition and enforcement of collective judgments, which are thus subject to the general principles, including the public policy exception.

The idea of collective litigation could be implied by two provisions of the Brussels I *bis* Regulation, namely Article 8(1) on multiple defendants⁶⁹ and Article 30 on related claims⁷⁰, because these rules provide for the possibility upon the courts seized to deal with similar disputes, that could be consolidated and thus addressed as a “collective action”. These optional procedural rules are laid down with a view to contributing to the proper administration of justice and procedural economy⁷¹ and thus preventing the irreconcilability of judgments and facilitating their enforcement in other jurisdictions⁷². These Articles should therefore be considered in the present analysis with a view to assessing whether they provide any guidance concerning and support for the applicability of the Regulation in relation to collective redress. For the purposes of the present analysis, Article 8 on multiple defendants clearly appears not be suitable for an action brought by a group of workers or by a workers’ representative organisation against one defendant, i.e. the employer/undertaking⁷³.

Article 30, instead, covers the possibility for joining related actions, i.e. «when they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings». According to this Article, «where the action in the court first seized is pending at first instance, any other

⁶⁷ *Ibid*, p. 6 ff.

⁶⁸ *Ibid*, and see the proposed Article 37.

⁶⁹ This provision is applicable to employment matters pursuant to Article 20, paragraph 1 of the Brussels I *bis* Regulation. The extension of Article 6, point 1 of the Brussels I Regulation was favoured by Advocate General Poiares Maduro: see his opinion delivered on 17 January 2008 in the *Glaxosmithkline* case and the judgment of the Court of Justice of 22 May 2008, Case C-462/06, *Glaxosmithkline*, EU:C:2008:299; see also judgments of the Court of Justice of 13 July 2006, Case C-539/03, *Roche*, EU:C:2006:458; 11 October 2007, Case C-98/06, *Freeport*, EU:C:2007:595; 1 December 2011, Case C-145/10, *Painer*, EU:C:2011:798. On this Article, see P. STONE, *Private International Law in the European Union*, Cheltenham, 2018, p. 164 ff. and 204; M.E. ANCELP, *Derived special jurisdiction (Art. 8)*, in A. DICKINSON, E. LEIN (eds), *The Brussels I Regulation Recast*, Oxford, 2015, p. 183 ff., at p. 187 ff.; F. SALERNO, *Giurisdizione*, cit., p. 181 ff.; J-J KUIPERS, *Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation*, in *Jour. Pr. Int. Law*, 2012, 8, p. 225 ff., at p. 237 ff.; E. LEIN, *Cross-border collective redress and jurisdiction under Brussels I: a mismatch*, in D. FAIRGRIEVE, E. LEIN (eds), *Extraterritoriality*, cit., p. 129 ff., at p. 137 ff.

⁷⁰ With regard to the Brussels I Regulation, see P. STONE, *Private International Law*, cit., p. 304 ff.; A. NUYTS, *The Consolidation of Collective Claims Under Brussels I*, in A. NUYTS, N.E. HATZIMIHAIL (eds), *Cross-Border Class Action. The European Way*, Munich, 2014, p. 69 ff.; J.N. STEFANELLI, *Parallel litigation and cross-border collective actions under the Brussels I framework: lessons from abroad*, in D. FAIRGRIEVE, E. LEIN (eds), *Extraterritoriality*, cit., p. 143 ff., at p. 162 ff.

⁷¹ See S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il Regolamento UE n. 1215/2012*, Torino, 2016, p. 176.

⁷² Judgment of the Court of Justice of 27 September 1988, Case 189/87, *Kalfelis*, EU:C:1988:459, para. 13.

⁷³ Even though the possibility of a workers’ action against multiple defendants cannot be excluded outright. For comments on this scenario, see Study *Collective redress*, PE 2018, cit., p. 99.

court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof». This rule could be applied to workers' representative actions, where similar actions are initiated against the same defendant in different places, because those actions can be easily deemed to be closely connected. Article 30 could also be relevant in the other scenario of multiple claimants, where various groups or the same group of workers bring similar actions against the same defendant in different places. The application of this Article could thus imply that collective litigation has been implicitly considered within the Brussels system from its origin even if it has not been directly addressed.

As regards the connecting criteria for establishing which courts have jurisdiction, as already remarked above, their practical application to the collective redress could appear not to be easily operated and some adjustments may be needed. Indeed, the provisions are structured taking into account factors that refer to elements linked to the persons involved, because those elements are deemed to pursue the aims of ensuring legal certainty in terms of the predictability of the competent *forum* and vesting jurisdiction in the most appropriate courts in accordance with the principle of proximity. The Regulation also purposes that the weaker party to a contract be protected by making special regimes in sensitive areas, i.e. consumer, insurance and employment law. In respect of employment law, it is a general principle of private international law that employees are deemed to require protection as weaker contractual parties from a socio-economic perspective.

Uncertainties in the practical functioning of the specific grounds do not however preclude the applicability of the existing rules to collective redress. According to an overall analysis, the general rules on jurisdiction laid down by the Brussels I *bis* Regulation could also be applied to cross-border collective redress, irrespective of whether or not a group of members is represented, because such collective proceedings are aimed at pursuing the same objectives of the proper and efficient administration of justice, legal certainty and the protection of the weaker parties. It follows that the scope of the Regulation may be extended to cover collective disputes, although some adjustments may be needed in any case in order to clarify the operability of the connecting criteria, as will be considered in greater detail below.

Based on the above remarks, the relevant provisions of the Brussels I *bis* Regulation (i.e. the general rule of the defendant's domicile, which is mentioned in the specific provision on employment disputes, followed by the rule on special jurisdiction for contracts, and finally Section 5 on employment contracts) will be analysed in order to assess whether they are operable in cases of collective redress involving workers, represented or not.

4.1. *The applicability of Article 4 on general jurisdiction*

The Brussels jurisdictional regime is based on the general rule of the defendant's domicile (Article 4), which provides that the courts of the domicile of the defendant are competent. Having regard to the underlying principles of proximity, legal certainty and predictability, as mentioned in Recital 15, this ground for jurisdiction could also be applied to collective redress proceedings because it ensures a solid solution for any dispute,

regardless of its individual or collective nature. However, it is not fully satisfactory because it would advantage the defendant⁷⁴.

“Domicile” is a legal notion which is not defined in the Regulation, whose Article 62 (for natural person) only provides that «in order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law»⁷⁵. Exceptions from the general rule are only accepted where the closest link between the proceedings and the territory could be based on a different ground, which identifies the most appropriate court to assume jurisdiction because it is deemed to be best placed to hear the case.

The general rule is also included in the special jurisdictional regimes regarding weaker parties: specifically, an insurer domiciled in a Member State may be sued in the courts of the Member State in which it is domiciled (Article 11(1)(a)), a consumer may bring proceedings against the other party to a contract in the courts where that party is domiciled (Article 18(1)) and, as regards individual employment contracts, the employer may be sued before the courts of the Member State in which it is domiciled (Article 21(1)(a)).

From a general perspective, as mentioned above, the principle of *forum rei* could be applied to collective proceedings⁷⁶, that relate to matters covered by the Regulation. Regardless of the individual characteristics of the claimants, the action may be brought before the courts of the Member State where the defendant is domiciled because this State is easily identifiable, which thus ensures legal certainty⁷⁷. This consideration was already pointed out by stakeholders within the public consultation on a coherent European approach to collective redress⁷⁸. It has been noted that, on the one hand, the general rule would make it possible to solve the collective dispute for all claimants⁷⁹, because the defendant is assumed to be the same. However, on the other hand, it might not represent the closest connection with all claimants and thus prejudice effective protection for some members, which might encounter problems associated with higher costs, complex and lengthy procedures, unfamiliarity with foreign proceedings and legislation, recognition and enforcement issues, and this could disincentivise their participation in the collective procedure⁸⁰. Nonetheless, in cases involving collective redress brought by a representative entity or a group of workers, the employer’s domicile appears to be a viable ground because it represents a common element for all members.

⁷⁴ Study *Collective redress*, PE 2018, cit., p. 97.

⁷⁵ On this connecting factor, see A. DUTTA, *Domicile, habitual residence and establishment*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds), *Encyclopedia of Private International Law*, Cheltenham, 2017, p. 555 ff.; L. GUILLÉN, *Article 4*, in P. PÉREZ-LLORCA (ed.), *Comentario al reglamento 1215/2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en material civil y mercantil*, Toronto, 2016, p. 111 ff., at p. 122 ff.; P. VLAS, *Article 4*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels Ibis Regulation*, cit., p. 111 ff., where the Author also specifies that this provision differs from Article 63 on the domicile of legal person, that gives an autonomous definition of the domicile of a company or other legal person or association of natural or legal persons; F. SALERNO, *Giurisprudenza*, cit., p. 126 ff., at p. 127, where the Author notes that the two provisions under Arts. 62 and 63 differ because the domicile of the natural person should be determined according to the *lex fori*, whereas the domicile of the legal person should be based on factual circumstances.

⁷⁶ For comments on this issue see E. LEIN, *Cross-border collective redress*, cit., p. 133 f.; M. DANOV, *The Brussels I Regulation*, cit., p. 365.

⁷⁷ C. KESSEDJIAN, *Les actions collectives*, cit., p. 537.

⁷⁸ COM(2013)401, cit.

⁷⁹ See T. BOSTERS, *Collective Redress*, cit., p. 245.

⁸⁰ In relation to consumers collective litigation, see the problems outlined by the Commission in the 2008 Green Paper, cit., para. 6 ff.

4.2. *The applicability of Article 7 on special jurisdiction for contracts*

The Brussels regime contains special rules for determining jurisdiction over contractual obligations in civil or commercial matters, which fall within the scope of the Regulation. The wording of the provisions of Article 7 clearly refers to disputes arising between individuals in matters relating to a contract. As observed in general terms, no reference is made however to the persons entitled to bring proceedings.

As to the material scope, in the light of the autonomous definition of contract and the case law of the Court of Justice, also on the former Brussels Convention, employment relationships could have been covered under this general category, even though there are some specific aspects that set apart employment relationships from contracts in general⁸¹. Specifically, the place of performance (contained in Article 7(1)(a)) under employment law is regarded as the place where the employee discharges his or her obligations towards the employer⁸². The characteristics of an employment contract thus call for specific grounds for jurisdiction, which were introduced by the Brussels I Regulation (Section 5). Therefore, in cases involving disputes concerning individual employment contracts, the criterion of the place of the performance is not applicable because other connecting factors may provide a better basis for jurisdiction with a view to ensuring protection for workers⁸³. Accordingly, this special ground of jurisdiction for contracts could not be applied to transnational collective redress on employment matters.

Similarly, letter (b) of Article 7(1), which determines the place of performance with reference to two specific categories of contract, namely the sale of goods and the provision of services, could not be applied to employment relationship due to its particular characteristics⁸⁴, as explained above. This also means that this provision may not cover collective redress under employment law.

Paragraph 2 of Article 7 provides that the courts of the place where the harmful event occurred or may occur should have jurisdiction in matters relating to tort, delict or quasi-delict, that is to say extra-contractual obligations. The place of the harmful event has been interpreted as the place where the damages have been sustained⁸⁵, and could be applied to collective procedures brought by a representative entity or a group of workers only if it could be identified as a common element to all workers involved. Otherwise, in case the place of the harmful event is not common, its application will lead to a multiplicity of courts (and parallel proceedings), because the place would not be the same and some of the members would not benefit from this rule⁸⁶. As a result, the jurisdictional rule under Article 7(2) may not be considered consistent with and suitable to one collective redress,

⁸¹ C. ESPLUGUES MOTA, G. PALAO MORENO, *Articles 20 to 23*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels Ibis Regulation*, cit., p. 534 ff., at p. 536; U. GRUŠIĆ, *The European Private International Law of Employment*, Cambridge, 2015, pp. 58 ff. and 91 ff.

⁸² Judgment of the Court of Justice of 13 July 1993, Case C-125/92, *Mulox*, EU:C:1993:306, para. 26.

⁸³ See P. STONE, *Private International Law*, cit., p. 111; U. GRUŠIĆ, *The European Private International Law*, cit., p. 95 ff.

⁸⁴ P. MANKOWSKI, *Article 7*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels Ibis Regulation*, cit., p. 161 ff.

⁸⁵ Judgments of the Court of Justice of 30 November 1976, Case 21/76, *Mines de potasse d'Alsace SA*, EU:C:1976:166; 5 July 2018, Case C-27/17, *Lithuanian Airlines*, EU:C:2018:533. On this ground see F. SALERNO, *Giurisdizione*, cit., p. 160 ff.

⁸⁶ Study PE 2018, *supra* n 44, 98.

but rather it could give rise to the institution of various (parallel) collective proceedings each one involving the workers that have sustained damages in the same place. Such an outcome could be thus overcome with the introduction of new criteria by way of interpretation of the existing grounds or by way of legislative reform of the existing provisions.

In order to adapt the existing rules to the collective dimension, an option could be the introduction of a reference to the majority of the workers involved, in a similar manner to the suggestion made with regard to mass damages cases, as reported in the Commission communication of 2013 mentioned above⁸⁷. However, also in this situation some members not belonging to the majority would be prejudiced by the application of this criterion, because it may not lead to the closest connected *forum* with them, and thus not result in the most favourable court to hear their case. This suggests that another solution should be provided, that could consist in the determination of different groups of claimants based on the different places of harmful event (or other grounds), which can thus bring different (parallel) actions before the courts of the respective places⁸⁸. As a result of this suggested provision, all members would benefit by the application of the same ground of jurisdiction, or the one that is most favourable to them. Yet, many collective actions would be promoted, and not one single collective redress, but in any case, this would support the institution of collective proceedings.

In the light of the above, it can be noted that even if collective redress may fall within the scope of application of the Brussels I *bis* Regulation, some difficulties may arise when applying the specific grounds for jurisdiction. Indeed, as observed in relation to Article 7(2), a connecting criterion may be easily applied insofar as it represents a common element to all members involved in the collective redress. By contrast, as already mentioned, the adaptation of the connecting factor to the collective nature of the claimant could result from the case law of the Court of Justice, or could be put forward by proposals for modification of the existing rules⁸⁹.

All said observations would also be relevant when applying the specific protective grounds, as will be examined below with regard to the employment contracts, because the

⁸⁷ See COM(2013)401, cit., para. 3.7: «A first group of stakeholders advocate a new rule giving jurisdiction in mass claim situations to the court where the majority of parties who claim to have been injured are domiciled and/or an extension of the jurisdiction for consumer contracts to representative entities bringing a collective claim». On this issue, see also European Parliament Resolution of 2 February 2012, cit., point 27, according to which it «believes that one solution could be to apply the law of the place where the majority of the victims are domiciled, bearing in mind that individual victims should remain free not to pursue the opt-in collective action but instead to seek redress individually in accordance with the general rules of private international law laid down in the Brussels I, Rome I and Rome II regulations»; and T. BOSTERS, *Collective Redress*, cit., p. 245, who argued that «the situation, when it is the court of the domicile of the largest group of victims that has jurisdiction, could partly comply with the goals of the Brussels Regulation. It could very well be that this group of victims is a weaker party, which means that they would be protected, since the court of their domicile would have jurisdiction. On the other hand, the Brussels Regulation principle of *forum sequitur rei* will be departed from. In addition, if the court of the domicile of the largest group of plaintiffs has jurisdiction, it is unclear whether this court will also have jurisdiction over victims domiciled in another Member State and/or whether the judgment of this specific court should be recognisable for other victims in the same mass dispute».

⁸⁸ On possible consequences of referring to the largest group in mass disputes, see T. BOSTERS, *Collective Redress*, cit., p. 237 ff.; Study *Collective redress*, PE 2018, cit., p. 98.

⁸⁹ Legislative modification could be considered within the report on the application of this Regulation, that should be presented by the Commission by 11 January 2022 according to its Article 79.

application of the connecting factors, provided in Section 5, may give rise to similar practical outcomes.

4.3. *The applicability of Section 5 on individual contracts of employment*

4.3.1. *Preliminary considerations*

Section 5 contains provisions specifically concerning disputes relating to individual employment contracts. The regime is similar to the other special sections on insurance (Section 3) and consumer (Section 4) contracts as they govern cases involving weaker parties. The criteria laid down establish jurisdiction in favour of the weaker contractual parties, assuming that the courts of the place with which there is the closest connection are the most appropriate⁹⁰. Indeed, the special protective grounds seek to identify the courts that have the practical advantage of first-hand knowledge of the facts, can most easily take evidence and have knowledge of the applicable law⁹¹.

In order to assess the applicability of the special regime to cross-border collective redress under employment law, the development in the case law concerning other special protective grounds could assist in verifying whether similar concepts and findings could be applied by analogy to employment.

The Court of Justice has only addressed the nature of the action (whether it could be qualified as a collective redress procedure or a class action), the nature of the claimant party (whether the organisation acting on behalf of a group of individuals could be considered as a weaker party) and consequently the question of the applicability of the special grounds of jurisdiction in a few cases concerning consumers. In actual fact, the main proceedings involved an assignment of claims in accordance with the applicable national law. In the *Henkel* judgment of 2002⁹² the Court reaffirmed the finding delivered in the *Shearson Lehman Hutton* case⁹³, according to which «a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers»⁹⁴. Based on this consideration, the Court held that the specific provisions

⁹⁰ See Recital 18. For comments: F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale*, Volume I, *Parte generale e obbligazioni*, 8th ed., Milano, 2017, p. 95; V. LAZIC, *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, in *Utrecht Law Review*, 2014, 10, p. 100 ff. Among the case law: judgments of the Court of Justice of 14 September 2017, Joined Cases C-168/16 and C-169/16, *Nogueira and Others*, EU:C:2017:688, para. 49; (Grand Chamber) 19 July 2012, Case C-154/11, *Mahamdia*, EU:C:2012:491, para. 44; *Glaxosmithkline*, cit., para. 17. With the aim of protecting employees, Section 5 also includes specific provisions concerning the *forum* for employer's actions against the employee (Article 22, para. 1), choice of court agreements (Article 23), the prorogation of jurisdiction (Article 25), tacit prorogation (Article 26, paragraph 2), *lis pendens* (Article 31, paragraph 4), and the violation of special grounds of jurisdiction (Article 45, paragraph 1(e)), which are not discussed in the present work.

⁹¹ T. BOSTERS, *Collective Redress*, cit., p. 21.

⁹² Judgment of the Court of Justice of 1 October 2002, Case C-167/00, *Henkel*, EU:C:2002:555.

⁹³ Judgment of the Court of Justice of 19 January 1993, Case C-89/91, *Shearson Lehman Hutton*, EU:C:1993:15.

⁹⁴ *Henkel*, cit., para. 33.

governing consumer contracts did not apply because the organisation was not itself a consumer and thus a weaker contractual party to the main dispute⁹⁵.

This finding was then upheld by Advocate General Bobek in the *Schrems* case of 2017⁹⁶, in which he first argued that the main proceedings did not involve collective redress, as alleged by the claimant, but rather an assignment of claims according to the national (Austrian) law. He then went on to assert that the *forum actoris* of the consumer under Article 16 of the Brussels I Regulation could not be applied to the assignee of claims of other consumers who are not themselves parties to the contract in question⁹⁷. In his opinion, the wording of Articles 15 and 16 clearly refers to the other party to a contract, and thus the special *forum* is always limited to the specific parties to the contract⁹⁸, if this were not the case, the scope of the special head of jurisdiction would be extended beyond the cases explicitly provided for under those Articles⁹⁹. To allow the special consumer *forum* on the basis of a claim emanating from a contract concluded by another person would weaken the link between the consumer's *status* and a given contract, thus leading to a paradoxical result¹⁰⁰. Moreover, since Articles 15 and 16 constitute exceptions from the general rule, being special rules applicable to contracts, they must be interpreted narrowly and should not be extended to include other situations¹⁰¹. In the light of the *Shearson Lehman Hutton* decision, the Advocate General then argued that the special consumer jurisdiction was not available for legal persons acting as assignees of the rights of a consumer because those legal persons (a private company and a consumer association) were not weaker parties, and also because those persons were not themselves parties to the contract¹⁰². Similarly, he recalled the *CDC Hydrogen Peroxide* decision of 2015¹⁰³, where the transfer of claims for damages by the initial creditor was deemed to be irrelevant for the purposes of determining the court with jurisdiction.

With regard to the *Schrems* case, the Advocate General argued that, absent any contractual relationship between the assignee and the other party to the original contract, the special consumer *fora* could not be invoked, and there was no entitlement to the creation of a new *forum* for the assignee-consumer¹⁰⁴. As regards the application of the consumer *forum* to the assignee, contrary to the Commission's argument in its opinion concerning the protection of consumers residing within the same State, he stated that local (internal) jurisdiction (i.e. the competent courts are those of the place where the consumer is domiciled) cannot be disregarded¹⁰⁵ and that it even excludes consolidation with claims brought by other consumers domiciled in the same country. Nevertheless, a new special jurisdiction may be provided for internally under national law¹⁰⁶. It was then recognised that the Brussels I Regulation does not establish specific provisions on the assignment of

⁹⁵ *Ibid*, para. 34. On this aspect, see also L. IDOT, *Les actions collectives en droit de la concurrence: Aspects de droit international privé européen*, in *Concurrences*, 2016, 1, 61, p. 64 f.

⁹⁶ Opinion of Advocate General Bobek delivered on 14 November 2017, Case C-498/16, *Schrems v Facebook Ireland Limited*, EU:C:2017:863.

⁹⁷ *Ibid*, para. 77 ff.

⁹⁸ *Ibid*, para. 82.

⁹⁹ *Ibid*, para. 85.

¹⁰⁰ *Ibid*, para. 86.

¹⁰¹ *Ibid*, para. 88.

¹⁰² *Ibid*, para. 96.

¹⁰³ Judgment of the Court of Justice of 21 May 2015, Case C-352/13, *CDC Hydrogen Peroxide*, EU:C:2015:335.

¹⁰⁴ Opinion of Advocate General Bobek, *Schrems*, cit., para. 110.

¹⁰⁵ *Ibid*, paras. 115-116.

¹⁰⁶ *Ibid*, para. 117.

claims or collective redress procedures, and that judicial legislation in this area would be inappropriate¹⁰⁷.

The Court issued its judgment on 25 January 2018¹⁰⁸, endorsing the opinion of the Advocate General. After explaining the concept of consumer for the purposes of social media platforms¹⁰⁹, it first acknowledged the derogative nature of the special provisions on consumer contracts, which must be interpreted narrowly¹¹⁰, and that the necessary existence of a contractual link between the parties to the dispute serves to ensure the predictability of the *forum actoris*¹¹¹. Secondly, as regards the assignment of claims, in line with its previous case law, the Court held that the consumer cannot bring the assigned claims within the jurisdiction of the courts of the place of his domicile. Situations different from those provided for under the Regulation cannot be brought within its scope. Thus, «an assignment of claims cannot provide the basis for a new specific *forum* for a consumer to whom those claims have been assigned»¹¹², irrespective of whether the other consumers are domiciled in the same Member State, in another EU Member State or in a third country¹¹³. Finally, the Court did not refer to any possible *forum* for assigned claims that could be established under national law and that might nevertheless be consistent with the objectives of the Regulation. It might simply have assumed that it will be for the national law of the courts having jurisdiction on the basis of a general (defendant's domicile) or special (consumer's domicile) ground to allow the consolidation of claims or the establishment of a collective redress procedure.

Overall, the Court of Justice limited its ruling to the questions referred by interpreting the Brussels provisions narrowly, without addressing the issue of collective litigation and the related jurisdictional regime. This is presumably due to the fact that, in line with the *lex fori*, the main proceedings were not considered to involve proper collective redress, but rather an assignment of claims, which had already been defined by the Court.

Although the assignment of claims differs from the concept of collective redress in the form of representative action, both procedural institutes aim to represent collective interests. However, the findings in the cases mentioned above on the impossibility to extend the protective jurisdictional regime could not be transposed by analogy to an assessment of jurisdiction over collective redress. First of all, it may be noted that such conclusions could have been overcome by the Commission in the 2018 Proposal for a directive on representative actions for consumers¹¹⁴, which in any case does not consider the assignment of claims as a possible form of collective action. Indeed, as already examined, according to Article 2(3) and Recital 9 of the Proposal, the existing private international law rules (on jurisdiction, recognition and enforcement of judgments and applicable law) are applicable to the representative actions promoted to protect the collective interests of the consumers. In other words, on the one hand, at the interpretative level, since the Recital can provide guidance concerning the application of legislative provisions but is itself non-binding, the representative entities could invoke the protective

¹⁰⁷ *Ibid*, para. 119 ff. For comments, see G.M. RUOTOLO, *I dati non personali: l'emersione dei big data nel diritto dell'Unione europea*, in *St. integr. eur.*, 2018, 1, p. 97 ff., at p. 115 ff.

¹⁰⁸ Judgment of the Court of Justice of 25 January 2018, Case C-498/16, *Schrems*, EU:C:2018:37.

¹⁰⁹ *Ibid*, paras. 25-41.

¹¹⁰ *Ibid*, para. 43.

¹¹¹ *Ibid*, paras. 44-46.

¹¹² *Ibid*, para. 48.

¹¹³ *Ibid*, para. 49.

¹¹⁴ COM(2018)184, cit.

criteria established in favour of consumers under the Brussels regime. From a practical perspective, on the other hand, its applicability is uncertain because the special grounds clearly refer to one individual consumer along with his or her personal details, such as domicile. As a result, absent any clarification, it is doubtful whether an extension should apply for the representative entity or the group of members represented. As already observed in relation to other grounds of jurisdiction, adjustments should be made, which could involve a reference to an element common to all members or to the majority of them. However, the introduction of such a statement into Recital 9 on the extension of the scope of the Regulations must be welcomed as the first solution provided by the Commission to address private international law issues. Moreover, with a view to supporting the idea of a general European framework to govern the collective redress procedure in different areas, the scope of application of existing rules could be extended by analogy in other areas, such as employment. Based on this assumption and in the light of the considerations set out above in relation to consumers, it is necessary to assess the operability of the special section on the jurisdictional regime applicable to employment disputes that should be applied in case of collective redress involving workers.

4.3.2. Analysis of the specific provisions

The scope of application of Section 5 covers individual employment contracts and matters relating to such contracts¹¹⁵. The related disputes have been distinguished into, on the one hand, matters arising out of an employment contract (e.g. breach of contract) and, on the other hand, matters that may be closely connected to it, which may not arise (directly) out of the contract, and may also be non-contractual in nature¹¹⁶. In any case, a broader interpretation of the notions is preferred for the purpose of granting wide protection to workers.

Claims involving workers, related to employment matters, should be subject to the protective jurisdictional regime «regardless the procedural form they choose to make use of in order to enforce their rights» because «collective redress would not change the nature of employment relations which is typically imbalanced, in favour of the employer»¹¹⁷. This view, which disagrees with the narrow interpretation of the claimant party in the disputes covered by the Brussels I *bis* Regulation and is consistent with the purposes of collective rights' protection, should be preferred. As a consequence, workers should be considered the weaker party even if acting collectively, whether represented or not, and thus be entitled to invoke the special rules to determine the courts having jurisdiction.

However, it does not appear to be a straightforward matter to apply the specific

¹¹⁵ On this Section see, among others, P. STONE, *Private International Law*, cit., p. 198 ff.; C. ESPLUGUES MOTA, G. PALAO MORENO, *Articles 20 to 23*, cit., p. 537 f.; F. SALERNO, *Giurisdizione*, cit., p. 228 ff. On the definition, see also L. MERRETT, *Jurisdiction over Individual Contracts of Employment*, in A. DICKINSON, E. LEIN (eds), *The Brussels I Recast*, cit., p. 239 ff., at p. 241; Report on the Application of Regulation Brussels I in the Member States, presented by Prof. Dr. B. Hess, Prof. Dr. T. Pfeiffer and Prof. Dr. P. Schlosser, 2007, para. 152 (hereinafter Heidelberg Report). See Judgment of the Court of 15 January 1987, Case 266/85, *Shenavai*, EU:C:1987:11, para. 16; see also *Mulox*, cit., para. 15.

¹¹⁶ As Heidelberg Report cit. pointed out (paras. 352-356), difficulties arise due to the inconsistency between the different language versions of the Regulation. See also L. MERRETT, *Jurisdiction*, cit., pp. 242-243.

¹¹⁷ J. CRAMERS, M. BULLA, *Collective redress and workers' rights in the EU*, in *Working Paper 118*, University of Amsterdam, 2012, p. 46.

grounds for jurisdiction to collective procedures as they may not establish which courts have the closest connection with all the workers concerned. Once again, as observed with regard to the application of Article 7(2) and the determination of the place of the harmful event, absent a common place to all workers involved, other criteria should be introduced, such as the reference to the majority of the group or the possibility of determining different categories based on different grounds.

4.3.2.1. *The habitual place of work of the employee (Article 21(1)(b)(i))*

An action may be brought against an employer, even if it is not domiciled in a Member State according to Article 20(2)¹¹⁸, either in the courts of the country of his domicile pursuant to Article 21(1)(a) or alternatively in those of the habitual place of work (Article 21(1)(b)(i)). This latter ground singles out the courts of the place that are most closely connected with the employment activity and the related disputes (*favor laboratoris*). The habitual workplace differs from the place of performance under Article 7, which applies in general to contracts, and amounts to a specification of that notion when transposed to the special category of employment contracts¹¹⁹.

In terms of collective redress, both when workers are represented by a trade union or another similar entity and when a group of workers acts collectively, this connecting factor raises doubts similar to those arising in relation to other grounds of jurisdiction, because - once again - the provision is related to one individual worker. Indeed, the assessment of the concept of habitual workplace should consider a variety of factors pertaining to the relevant individual employment relationship, thus requiring a case-by-case approach, which may lead to establish many workplaces when referring to multiple claimants. This is true because of the variety of factors that should be considered.

As was stated by the Court of Justice, indeed, the habitual workplace should be the place where or from where the employee principally discharges his or her obligations towards the employer¹²⁰, or where the employee performs the essential part of his or her duties, or that is the effective centre of the working activity¹²¹, having regard to the duration of the employment relationship, especially in cases where the work is carried out in more than one Member State¹²² or of double employment¹²³. Nonetheless, the interpretation of the connecting factor is subject to the aim of effective protection for the rights of the employee who, where there is more than one place of work, may choose the one that best reflects his or her interests¹²⁴. From a practical perspective, this court may grant the most

¹¹⁸ On the application to non-EU-domiciled defendants, see P. STONE, *Private International Law*, cit., p. 201 ff.; R. CAFARI PANICO, *Enhancing protection for weaker parties: jurisdiction over individual contracts of employment*, in F. FERRARI, F. RAGNO (eds), *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, Milano – Padova, 2015, p. 41 ff., 52 f.; L. MERRETT, *Jurisdiction*, cit., p. 245 and 250 f.; V. LAZIĆ, *Procedural Justice*, cit., p. 108; COM(2010)748, cit., para. 3.1.2.

¹¹⁹ U. GRUŠIĆ, *The European Private International Law*, cit., p. 96 ff.; F. SALERNO, *Giurisdizione*, cit., p. 229 ff.

¹²⁰ *Mulox*, cit., paras. 24-25; *Nogueira*, cit., para. 60.

¹²¹ Judgment of the Court of Justice of 9 January 1997, Case C-383/95, *Rutten*, EU:C:1997:7, paras. 22-23.

¹²² Judgment of the Court of Justice of 27 February 2002, Case C-37/00, *Weber*, EU:C:2002:122, paras. 40 and 55.

¹²³ Judgment of the Court of Justice of 10 April 2003, Case C-437/00, *Giulia Pugliese*, EU:C:2003:219, para. 24; see L. MERRETT, *Jurisdiction*, cit., p. 249.

¹²⁴ E. PATAUT, *Note Affaire C-384/10*, in *Rev. cr. dr. int. pr.*, 2012, 2, p. 648 ff., at p. 661.

appropriate protection to the employee because it is more familiar with the socio-economic context of that place and may better enforce the rights granted under its national law.

In addition, this criterion is identical to that laid down in Article 8 of the Rome I Regulation¹²⁵, according to which the disputes arising out of employment contracts are to be regulated by the law of the habitual place of work. In this way, *forum* and *ius* coincide, which could contribute to ensuring effective protection by avoiding fragmentation in addressing the matters in dispute.

It follows that, when referring to a group of workers, whether represented or not, the outcomes of the assessment of each individual situation might not identify one single court that is common for all members. Therefore, the application of this basis for jurisdiction might not result in “collective” protection, but rather “limited” protection for “selected” members. In practice, as already observed with regard to Article 7(2), the possibility of multiple different workplaces cannot be excluded and thus, absent a common habitual workplace, an alternative option should be to refer to the majority of the workers involved. Since this solution may still prejudice some members, as a further option the group could be divided into different categories, based on the relevant applicable grounds, which in any case may lead to multiple collective actions.

4.3.2.2. *The engaging place of business (Article 21(1)(b)(ii))*

The residual criterion of the engaging place of business (*forum laboris*)¹²⁶ could be useful in determining the courts with jurisdiction over collective redress involving workers, whenever the habitual place of work cannot be easily determined in relation to all workers, whether represented or not. However, once again its application gives rise to considerations similar to those pointed out above with regard to the other connecting factors: this ground should result in a common element for all members, otherwise be applied to the majority of the group or used in order to determine different categories. Indeed, the unclear definition and determination of this ground¹²⁷ may increase the difficulties in identifying one single place, where the business which engaged all the workers involved in the collective action is or was situated and whose courts would be favourable to all of them.

It has been noted that this residual head of jurisdiction is rarely relevant, and that recourse to it will only be appropriate in exceptional cases, since in most cases it is possible to identify a stable base at which the employee carried out his or her work. According to the case law of the Court of Justice, since the term «habitual place of work» must be construed broadly, the rule of the engaging place of business, which is to be applied as a fall-back, is deprived of any significance¹²⁸. Moreover, it has been considered not to be in the interest of the employee, «as there will often be no real connection between that

¹²⁵ Regulation (EC) No 593/2008 (Rome I), in *OJEU* L 177 of 4 July 2008, p. 6 ff.

¹²⁶ See L. MERRETT, *Jurisdiction*, cit., pp. 247-249; F. SALERNO, *Giurisdizione*, cit., p. 232 ff.

¹²⁷ *Ibid.*, 249 ff. See also judgment of the Court of Justice of 15 December 2011, Case C-384/10, *Voogsgeerd*, EU:C:2011:842, para. 44.

¹²⁸ Referring to Article 6 of the Rome Convention, see judgment of the Court of Justice (Grand Chamber) of 15 March 2011, Case C-29/10, *Koelzsch*, EU:C:2011:151, para. 43. For comments see S.M. CARBONE, C.E: TUO, *Il nuovo spazio giudiziario europeo*, cit., p. 201; A.A.H. VAN HOEK, *Private international law rules for transnational employment: reflections from the European Union*, in A. BLACKETT, A. TREBILCOCK (eds), *Research Handbook on Transnational Labour law*, Cheltenham, 2015, p. 438 ff., at p. 445 f.

engaging place of business and the day-to-day work»¹²⁹. As regards to this concept of day-to-day work, it has been suggested that the place of business that gives the employee daily instructions concerning the work to be carried out should be established as one of the grounds for jurisdiction because it could ensure a connection between the courts having jurisdiction and the actual employment relationship, whenever the habitual place of work cannot be determined¹³⁰. In this way, the proposed criterion would comply with the principles of predictability, certainty and proximity which, by contrast, the residual ground of the engaging place of business does not fulfil¹³¹. This suggested factor could be also used in relation to collective redress proceedings as an alternative criterion whenever it is difficult to determine the other grounds of jurisdiction.

5. *The alternative forum for posted workers*

Alongside the protective rules laid down by the Brussels I *bis* Regulation in relation to individual employment contracts, under Article 67 of that Regulation, provisions on specific matters contained in instruments of the Union or in national legislation harmonised pursuant to such instruments may apply as *lex specialis*. This is the case for the legislation on posted workers, already mentioned above.

When a worker is posted temporarily abroad (although subject to a certain degree of continuity that enables a link to be established with the host country, without altering the habitual workplace), an (additional) alternative *forum* is provided for under Article 6 of Directive 96/71 on the posting of workers¹³². A posted worker may bring proceedings before the courts of the Member State in whose territory he or she is or was posted in order to enforce the terms and conditions of employment guaranteed under Article 3 of that Directive, in addition to the grounds of jurisdiction set out in Section 5 of the Brussels I *bis* Regulation. Therefore, disputes arising out of the employment relationship between an employee who has moved abroad and his or her employer (seated in the home state) may be heard before the courts of the host State where the worker carries or carried out work activities temporarily.

However, Article 6 of Directive 96/71 does not refer to collective redress procedures. These may be rooted in Article 11(3) of the Enforcement Directive 2014/67 - as observed above - which requires Member States to ensure that trade unions and other third parties, such as associations, organisations and other legal entities, may engage in any judicial or administrative proceedings on behalf or in support of the posted workers or their employer, with the approval of the litigant(s) represented. This provision could be deemed consistent with the “legislative recognition” of collective redress as a judicial remedy to protect workers’ interests, although national laws still have to apply as regards the substantive and procedural conditions of such unions or entities. Article 11(3) may thus

¹²⁹ On this issue see U. GRUŠIĆ, *Jurisdiction in employment matters under Brussels I: a reassessment*, in *Int. Comp. Law Quart.*, 2012, 61, p. 108 ff.

¹³⁰ R. CAFARI PANICO, *Enhancing protection*, cit., pp. 44 ff. and 57; European Parliament of 2 February 2012, cit.

¹³¹ See R. CAFARI PANICO, *Enhancing protection*, cit., p. 59, where the Author refers to the *Voogsgaerd* case, cit., which took ten years to establish which court had jurisdiction over the employee’s claim.

¹³² See, *inter alia*, F. SALERNO, *Giurisdizione*, cit., p. 233; C. BARNARD, *EU Employment Law*, Oxford, 2012, p. 235 ff.

establish the proper legal basis for the promotion of a potential collective redress action by a trade union established in accordance with the law of its State of origin, which may also allow the representation of workers posted in that State. Accordingly, whenever collective redress procedures involve workers posted in one State and relate to terms and conditions of employment that should be applied pursuant to the national law of that host State, the determination of jurisdiction could be based on Article 6 of Directive 96/71, alternatively to the other (general or special) applicable grounds. However, the possibility to apply different grounds of jurisdiction may in any case imply the risk of *forum shopping*, that conversely would prejudice the protection of workers' rights.

In collective redress cases, the place where the workers involved in a collective redress procedure are posted should be the same, because this special ground could be invoked only for disputes concerning the terms and conditions of employment and any work in general carried out at the place of posting. Therefore, no further adjustments would be required in order to apply this *forum* to collective proceedings related to matters covered by the legislation on the posting of workers.

6. Concluding remarks

As provided for in the Proposal for representative actions for consumer protection in relation to all private international law Regulations, the extension of the scope of those rules to transnational collective redress could be deemed to be consistent with their objectives and principles, and as such could be broadened to other fields, including employment law. Nonetheless, as examined above in relation to collective redress involving workers and the application of the general and protective jurisdictional provisions of the Brussels I *bis* Regulation, clarifications should be provided as regards the determination of the connecting criteria because they may not be suitable for a collective redress.

The outcomes of this analysis indeed highlight that some difficulties in terms of the protection of all the workers involved in one collective redress may be faced when it is not possible to single out a common element by applying the specific ground to the collective dispute, and that they thus call for the introduction of new criteria either by way of interpretation aimed at clarifying the applicability of the relevant connecting factors, or within a legislative reform process. The suggested options of adding a reference to the majority of the group or the possibility of determining different categories are aimed at allowing the constitution of collective proceedings based on the fact that collective redress represents a procedural mechanism that may better ensure and strengthen the protection of collective rights and interests across Europe.

Such finding may be valid regardless of the specific field concerned. Indeed, the above considerations concerning the jurisdictional regime for employment matters could be transferred by analogy to cross-border collective redress in general or falling within other protective jurisdictional regimes.

In summary, it has been noted that, on the one hand, the general rule of the defendant's domicile appears to be clearly applicable because it is easily identifiable and constitutes a possible common element for all the workers involved; however, it would benefit the defendant. On the other hand, the special grounds of the habitual place of work and the engaging place of business require a twofold consideration, which could then be

valid for all other connecting criteria. First, these grounds could be applied for workers and not for the representative entities, otherwise the connection between the relevant employment relationship and the courts would be undermined. Secondly, the fact that it is impossible to identify a common element, due to the existence of various workplaces, could cause difficulty in choosing the most appropriate court, thus implying the need to add further solutions, which can be identified on the basis of the potential case law or within a legislative reform of the relevant provisions.

In conclusion, the existing jurisdictional regime under the Brussels I *bis* Regulation could be applied to cross-border collective redress. Even if at the legislative level this approach has been adopted by the Commission within its Proposal on representative actions, uncertainties in the practical application of the specific provisions of the Regulation remain to be solved. Overall, different collective redress standards in national procedural law, especially with regard to representative actions and related *locus standi*, lead to divergences which might undermine the enjoyment of the social right to collective action by workers.