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1.1. CRIMINAL LAW

THE RIGHT TO DIGITAL COMMUNICATION OF PERSONS DEPRIVED OF LIBERTY: FROM ABSOLUTE PROHIBITION TO INTELLIGENT CONTROL

Mihaela Angela CĂLIN (ATANASIU)*

Abstract

The digital transformation of society has profoundly altered the social content of communication, work, education, and family relationships, without the penitentiary enforcement regime undergoing an equivalent normative adaptation. At present, persons deprived of liberty benefit from limited forms of telephone communication and, in certain restricted situations, from online communications; however, the general prohibition on the use of mobile phones and other telecommunication devices continues to reflect a normative logic specific to the analog era. In a context in which digital communication has become the ordinary infrastructure of social, professional, and educational life, maintaining an absolute prohibition raises questions concerning the proportionality of the restriction and its compatibility with the reintegrative purpose of punishment.

This paper examines the right to communication of persons deprived of liberty from the perspective of the digital transformation of society and argues for the necessity of a reconceptualization of the penitentiary enforcement regime applicable to communications. The analysis begins with the domestic legal framework governing telephone conversations and online communications and highlights its principal dysfunctions: unequal legal treatment among different categories of persons deprived of liberty, the insufficient nature of the existing facilities, and the lack of a genuine correlation between penitentiary security and the need to maintain family and social ties.

The paper argues that the appropriate solution does not lie in maintaining absolute prohibition, but rather in transitioning toward a model of intelligent control, in which the regulated use of digital communications is permitted within predetermined limits, under technological supervision and effective human oversight. Such an approach makes it possible to reconcile penitentiary order, the protection of fundamental rights, and the contemporary requirements of social reintegration.

Keywords: digital communication, persons deprived of liberty, execution of sentences, intelligent control, social reintegration.

1. Introduction

The execution of sentences and custodial measures is one of the fields in which the gap between social transformation and normative reaction is becoming increasingly visible. While, traditionally, discussions concerning detention were centered on physical isolation, institutional discipline, and the restriction of the exercise of certain rights, contemporary reality requires a shift in perspective: social life itself has moved, to a significant extent, into the digital sphere. Communication with family, access to information, continuation of professional training, participation in educational activities, administrative relations, and even the exercise of basic forms of personal autonomy currently presuppose technologically mediated interactions.

It is well established that online communication is more effective than traditional telephone contact and may provide greater opportunities for improving family relationships for persons deprived of liberty presenting a high degree of vulnerability or special needs¹ and yet, the legal provisions governing the execution of sentences have failed to keep pace with the technological revolution that has shifted society into the digital world, marking a profound transition from the coin-operated telephone to the smart device capable of responding instantly to biometric interaction and image-based recognition.

Nevertheless, the legal provisions governing the execution of sentences continue, to a large extent, to reflect a normative logic insufficiently adapted to contemporary technological transformations. While society

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¹ Ioan Chiș, Alexandru Bogdan Chiș, *Executarea sancțiunilor penale, Curs universitar, ed. a II-a revizuită și adăugită*, Ed. Universul Juridic, Bucharest, 2021, p. 680.

has undergone a profound transformation, moving from rudimentary forms of telecommunication to intelligent and hyperconnected digital infrastructures, the legal regime applicable to persons deprived of liberty has remained predominantly structured around mechanisms specific to an outdated technological paradigm.

In this context, the issue of the right to communication of persons deprived of liberty can no longer be analyzed exclusively by reference to traditional telephone conversations or correspondence in the classical sense. Digital communication no longer represents a mere technological convenience, but rather one of the ordinary infrastructures of social life. Consequently, the near-total exclusion of persons deprived of liberty from this environment no longer produces merely an ancillary limitation of private life, but may affect the very possibility of genuine reintegration into a profoundly digitalized society.

The subject matter of this paper lies at the intersection of penitentiary enforcement law, the protection of fundamental rights, and the adaptation of legal institutions to technological transformation. The starting point of the analysis is the observation that the current legal regime governing communications in detention largely preserves a philosophy of prohibition and controlled exception. Persons deprived of liberty may benefit from certain regulated forms of contact with the outside world; however, the use of telecommunication devices in the contemporary sense remains, as a rule, prohibited. Although this normative solution may be historically explicable, it is becoming increasingly difficult to justify from the perspective of proportionality and the purpose of punishment.

This paper seeks to demonstrate that the transformation of the social environment also requires a transformation of the penitentiary enforcement paradigm. The issue is not one of replacing penitentiary order with unconditional digital freedom, but rather of identifying a legal model capable of reconciling institutional security with the preservation of meaningful family, social, and educational ties. In this regard, the analysis supports the transition from absolute prohibition toward a model of intelligent control, based on limited authorization, technological filtering, and effective human oversight.

2. Digital communication and the transformation of the social content of reintegration

The digital transformation of society has profoundly altered the social content of communication, work, education, and family relationships, such that effective participation in social life increasingly presupposes technologically mediated interactions. At present, social life itself has significantly shifted into the digital sphere, and digital communication can no longer be understood as a mere technological convenience, but rather as one of the ordinary infrastructures of social existence. Under these conditions, the reintegration of persons deprived of liberty can no longer be conceived exclusively in traditional terms, by reference to the restoration of social ties in a physical sense or to mere compliance with the rules of social coexistence, but must also be correlated with the possibility of readaptation to a profoundly digitalized social environment.

Thus, the digital transformation of society has altered not only the instruments of communication, but also the very structure of social relations and the concrete mechanisms through which individuals participate in community life. Family life, professional integration, access to education, relations with public authorities, and the exercise of personal autonomy are today deeply dependent upon digital infrastructures and upon the individual's capacity to use technological tools for communication and interaction. Under these circumstances, the social reintegration of persons deprived of liberty can no longer be analyzed exclusively by reference to their readaptation to traditional norms of social coexistence, but must also be assessed from the perspective of their genuine capacity for reinsertion into a profoundly technologized social environment.

From this perspective, the execution of custodial sentences cannot remain isolated from the structural transformations produced within society through digitalization. If the purpose of punishment is to prepare the convicted person for reintegration into a functional social environment, then ignoring the digital dimension of contemporary existence risks transforming the execution of punishment into a mechanism of adaptation to an already outdated social reality. In other words, reintegration can no longer be effectively achieved outside the technological reality into which the individual will return following the execution of the criminal sanction.

In this context, the near-complete exclusion of persons deprived of liberty from the sphere of digital communications may produce effects that go beyond the traditional restriction of the exercise of certain rights. Digital isolation risks generating a new form of penitentiary marginalization, characterized by the inability of the convicted person to maintain genuine contact with contemporary social mechanisms. Persons deprived of liberty are excluded not only physically from the community, but also functionally from the digital environment that

currently structures essential social relations. Indirectly, this rupture may affect the continuity of family relationships, access to education and vocational training, as well as the possibility of developing skills necessary for subsequent social reintegration.

Moreover, it must be observed that maintaining an almost absolute separation between the convicted person and the digital environment creates an increasingly evident tension with the preventive-educational and reintegrative purpose of the execution of sentences. Insofar as contemporary society functions through digital mechanisms of communication, work, and social organization, the progressive adaptation of the convicted person to these realities becomes an integral part of the reintegration process. A penitentiary system that ignores this transformation risks accentuating the phenomenon of desocialization and amplifying the difficulties of readaptation following release.

From this perspective, the issue of controlled access to digital communications can no longer be reduced exclusively to the classical opposition between liberty and penitentiary security. In reality, the discussion concerns the manner in which the penitentiary enforcement system understands the need to redefine the relationship between control, reintegration, and institutional adaptation to the technological transformations of contemporary society.

3. The current legal regime governing the use of telecommunication devices

The current legal regime governing the use of telecommunication devices within the penitentiary environment continues, to a large extent, to reflect an enforcement philosophy specific to the analog era. The prevailing normative model is structured around the logic of general prohibition and direct physical control, within which contact between persons deprived of liberty and the outside world is permitted only in strictly limited, predetermined, and institutionalized forms. Such a conception was historically justified by the necessity of maintaining penitentiary order and by the difficulty of exercising effective control over communications carried out outside infrastructures directly administered by the authorities.

However, the technological transformation of contemporary society has significantly altered the relationship between communication, control, and security. Whereas, in the past, the unrestricted use of telecommunication devices entailed risks that were difficult for penitentiary administrations to manage, the development of current technological mechanisms of monitoring, filtering, and traceability now allows for the configuration of forms of control significantly more sophisticated than mere absolute prohibition. Under these conditions, the persistence of an enforcement model constructed almost exclusively around the exclusion of digital communications risks reflecting not so much an objective necessity of security, but rather the inertia of a normative paradigm insufficiently adapted to technological transformation.

From this perspective, the incompatibility between the current structure of enforcement norms and the reality of a profoundly digitalized society becomes increasingly evident. Digital communication no longer represents an exceptional or marginal activity, but rather one of the ordinary means through which individuals exercise their family, social, professional, and educational lives. Consequently, the near-total exclusion of persons deprived of liberty from this environment produces effects that go beyond the mere limitation of a technological advantage and may affect the very capacity for reintegration into a social environment structured around digital interactions.

Traditionally, penitentiary control has been conceived predominantly as a form of physical control: restriction of movement, supervision of direct contacts, and limitation of access to certain objects or spaces. Technological evolution, however, now makes possible a transition toward forms of intelligent control based not exclusively on prohibition, but on differentiated supervision, digital filtering, and traceability of use. Within this model, technology does not eliminate institutional control, but transforms it from an absolute material control into a functional and adaptive form of control, capable of managing concrete risks without completely excluding the convicted person from the digital sphere.

This conceptual transformation must also be analyzed in light of recent European regulations concerning artificial intelligence and the use of digital systems impacting fundamental rights. Thus, the European Union Artificial Intelligence Act (AI Act) classifies certain systems used in the fields of law enforcement and justice as high-risk systems, subject to strict requirements regarding transparency, human oversight, and proportionality control. Although the use of digital surveillance mechanisms in the execution of sentences may pursue legitimate

objectives of security and prevention, such mechanisms cannot operate in the absence of legal safeguards capable of preventing the excessive automation of restrictions on rights.

In this regard, the principle of human oversight acquires essential importance. The use of digital instruments for monitoring or filtering communications cannot lead to the replacement of effective human control through automated decisions. The intervention of penitentiary authorities and the possibility of individualized assessment must remain central elements of the enforcement process. Technology may function as a support tool for identifying risks, managing differentiated access, or ensuring the traceability of communications; however, decisions concerning the restriction of the exercise of rights must remain subject to human control and proportionality criteria.

Consequently, the fundamental issue is not whether the penitentiary system should exercise control over digital communications, but rather the manner in which such control may be exercised in a way compatible with the contemporary requirements of the protection of fundamental rights and social reintegration.

4. The limits of absolute prohibition

The analysis of the limits of absolute prohibition regarding the use of telecommunication devices by persons deprived of liberty must be carried out in relation to the requirements of fundamental rights and, in particular, to the standards developed in the case law of the European Court of Human Rights concerning Article 8 of the Convention. Although detention inevitably entails restrictions upon the exercise of certain rights and freedoms, the Court has consistently held that convicted persons continue to benefit from the protection of the Convention, and that interferences with private life and correspondence must remain compatible with the principle of proportionality and with the legitimate aims pursued by the penitentiary administration.

In this field, the requirement of proportionality acquires particular relevance. Not every measure restricting communications is incompatible with fundamental rights, since maintaining institutional security and preventing genuine risks constitute legitimate objectives of the execution of sentences. The problem arises, however, when the restriction acquires a generalized, undifferentiated, and almost absolute character, irrespective of the concrete situation of the convicted person, his or her conduct, the nature of the identified risks, or the purpose pursued through the execution of the sanction.

From this perspective, the principal difficulty of the current normative model lies not in the existence of control over digital communications, but in its uniform and disproportionate nature. An enforcement system constructed almost exclusively upon absolute prohibition tends to ignore the necessity of individualized execution and transforms restriction into an autonomous rule, relatively detached from the concrete assessment of risks and of genuine reintegration needs. Yet, the individualization of the execution of punishment presupposes precisely the adaptation of restrictive measures to the profile of the convicted person, his or her conduct, and the legitimate objectives pursued by the penitentiary administration.

Moreover, it must be observed that the progressive transformation of society into a profoundly digitalized space also alters the practical significance of exclusion from digital communications. Whereas, in a previous social context, limiting access to certain technological means could have had an ancillary character, today such restrictions risk producing far deeper effects upon the private, family, and social life of the convicted person. Digital communication currently represents one of the ordinary means of maintaining family relationships, accessing education, participating in professional activities, and exercising personal autonomy. Under these circumstances, near-total exclusion from the digital sphere may lead to the emergence of a genuine form of indirect social exclusion.

This evolution requires a clear distinction between legitimate penitentiary security and excessive restriction of the exercise of rights. The necessity of preventing unlawful activities, protecting institutional order, or avoiding risks related to penitentiary security cannot be disputed. Nevertheless, the mere existence of potential risks does not automatically justify maintaining an absolute and uniform prohibition applicable to all persons deprived of liberty, regardless of the particularities of their individual situations. In a state governed by the rule of law, restrictions on the exercise of rights must remain necessary, adequate, and proportionate to the aim pursued, rather than functioning as the autonomous expression of an exclusively security-oriented logic.

In reality, maintaining an almost complete separation between the convicted person and the digital universe risks entering into structural contradiction with the very reintegrative purpose of the execution of sentences. If contemporary society functions through digital mechanisms of communication and social

organization, then the prolonged exclusion of the convicted person from this environment may amplify difficulties of readaptation and intensify the process of penitentiary marginalization. From this perspective, the central issue is not whether penitentiary authorities should exercise control over digital communications, but whether the current model of absolute prohibition still constitutes a solution compatible with the contemporary requirements of proportionality and social reintegration.

5. From absolute prohibition to intelligent control

Overcoming the model of absolute prohibition requires the configuration of a new type of penitentiary enforcement paradigm, founded not upon the generalized exclusion of digital communications, but upon their controlled and intelligent use. Within this framework, technology no longer appears exclusively as a source of risk to penitentiary order, but also as an instrument capable of reconciling institutional security, the protection of fundamental rights, and the reintegrative purpose of the execution of sentences. The central issue is not the elimination of control, but rather its transformation into a differentiated, proportionate, and risk-adapted mechanism.

In reality, the digital transformation of the execution of sentences reflects a deeper tension between two contemporary paradigms of criminal justice: the logic of predictive justice and the requirements of restorative justice. The development of algorithmic risk-assessment mechanisms and digital monitoring infrastructures encourages the emergence of an enforcement model oriented toward the anticipation of behaviors, the probabilistic management of risks, and the enhancement of institutional control efficiency. Within this framework, technology enables the identification of behavioral patterns and supports the configuration of differentiated supervision mechanisms based on predictive assessments.

In this regard, modern approaches to contemporary criminal policy pursue the implementation of restorative justice, defined by criminologist Tony F. Marshall as a form of justice grounded in responsibility, restoration, and social reintegration. According to him, restorative justice is, in essence, a process through which all parties involved in a particular offense come together in order collectively to determine how the consequences of the offense and its future implications should be addressed.²

This differentiated approach does not amount to a denial of the humanistic values underlying restorative justice; on the contrary, it represents a condition for its credibility and sustainability. The humanization of criminal law cannot be achieved through diminishing the State's capacity to protect life, physical integrity, and personal security, but rather through a careful and contextualized balance between rehabilitation and legitimate coercion.

Thus emerges the concept of predictive justice, which defines a new fundamental principle of the judicial process: "a principle of sincerity on the part of the judge, who should strive to offer litigants a new perspective, free from prejudice and from any predictive pressure".³

In this context, predictive justice constitutes a deeply unsettling subject. On the one hand, it offers a promise of security and certainty, which may appear reassuring in the face of what is commonly referred to as legal uncertainty. On the other hand, however, the prospect of replacing human beings with machines is inevitably disturbing and may ultimately represent the very negation of justice itself.⁴

Nevertheless, the execution of sentences cannot be reduced exclusively to a logic of prediction and algorithmic control. The reintegrative purpose of criminal sanctions presupposes the preservation of a profoundly human dimension within the enforcement process, centered on accountability, the reconstruction of social relationships, and the progressive reintegration of the convicted person into the community. From this perspective, restorative justice cannot be replaced by automated risk-management mechanisms, since social reintegration involves elements that exceed the capacity of technology to operate solely on the basis of statistical correlations and predictive behaviors.

Consequently, the use of intelligent control mechanisms must be integrated into an enforcement model capable of avoiding the transformation of the convicted person into a mere object of algorithmic assessment.

² Tony F. Marshall, *Restorative Justice: An Overview*, Kindle Edition, Ed. Coventry Lord Mayor's Committee for Peace & Reconciliation, Coventry City Council, Regatul Unit, 2018, p. 3.

³ Antoine Garapon, Jean Lassègue, *Justice Digitale: Révolution Graphique et Rupture Anthropologique*, Presses Universitaires de France (PUF), Paris, 2018, p. 259.

⁴ A se vedea, în acest sens, *La Justice Prédictive*, Actes Du Colloque du 12 Février 2018 organisé par L'ordre Des Avocats au Conseil d'état et À La Cour De Cassation à l'occasion de son bicentenaire en partenariat avec L'Université Paris-Dauphine PSL, Paris, Dalloz, 2018.

Technology may contribute to the individualization of the execution of sentences and to the reduction of concrete risks; however, it cannot substitute the relational and restorative dimension of criminal justice. For this reason, artificial intelligence must remain a support tool for penitentiary administration, rather than an autonomous mechanism for decision-making concerning the enforcement trajectory of the convicted person.

Such a reconceptualization may be achieved through the development of an integrated digital enforcement infrastructure, built upon the principles of an Artificial Intelligent Penal Enforcement System (AIPES), within which technology functions as a support tool for the penitentiary administration, without substituting human decision-making. Within this framework, the use of digital communications by persons deprived of liberty would no longer be governed exclusively by the logic of total prohibition, but rather by mechanisms of gradual access, differentiated monitoring, and individualized control.

Within such a model, access to digital communications could be configured according to objective and verifiable criteria: the category of the enforcement regime, the conduct of the convicted person, the identified risks, the level of penitentiary trust, and the purpose of the activities carried out. Thus, the system would no longer operate on the basis of a rigid opposition between total access and absolute prohibition, but rather according to an adaptive logic, capable of distinguishing between different degrees of risk and different enforcement needs.

From a technological perspective, intelligent control presupposes the use of mechanisms of algorithmic filtering, digital traceability, and functional monitoring of communications. Concretely, technology could allow the restriction of access to certain applications or platforms, the identification of behaviors considered incompatible with penitentiary rules, the verification of communication traceability, and the automatic signaling of potential risks to the penitentiary administration. Nevertheless, the function of such systems must not be confused with the autonomous exercise of decision-making power.

In this field, one of the most important conceptual limits concerns the relationship between artificial intelligence and human authority. Technology must not decide, but rather assist the penitentiary administration in the exercise of its duties. The role of digital systems is not to substitute individualized analysis or human judgment, but to provide additional tools for risk management, the organization of control, and the individualization of the execution of sentences. Consequently, any restrictive measure concerning access to digital communications must remain the result of effective human intervention and of a concrete assessment of the individual situation.

This idea reflects the necessity of maintaining meaningful human intervention within the enforcement process, in a context in which it has been argued that “the secret is to keep humans involved in the decision-making loop—to use AI as an assistance tool, not as a crutch upon which we become dependent.”⁵

Moreover, the use of intelligent supervision mechanisms may contribute to overcoming the structural limits of exclusively physical control. Unlike the traditional model, predominantly based on prohibition and isolation, intelligent control allows for the exercise of continuous and differentiated supervision without completely eliminating digital contact with the outside world. In this regard, technology may function as an instrument for reducing enforcement-related risks, without transforming the convicted person into an individual excluded from the digital social infrastructure.

Viewed from this perspective, predictive justice is not conceived as a mechanism of subjugation, but rather as one that encourages creation and even interaction. Prediction cannot bind or constrain legal professionals; it cannot constitute the basis of a decision, but it possesses the capacity to stimulate inquiry and to assist in the search for a solution hoped to be more equitable.⁶

In reality, the true stake of such a transformation does not lie in the excessive digitalization of the execution of sentences, but rather in adapting the penitentiary enforcement system to the actual structure of contemporary society. In a social environment increasingly organized through digital platforms and technologized communications, maintaining an enforcement model built exclusively upon the logic of exclusion risks becoming incompatible with the very purpose of social reintegration. From this perspective, intelligent control does not represent a weakening of penitentiary security, but rather a reorganization thereof within a more flexible, differentiated, and rule-of-law-compatible framework.

⁵ Ethan Mollick, *Co-inteligență, Cum să trăiești și să muncești cu AI*, Publisher: Publica, Bucharest 2025, p. 68.

⁶ Jean Francois Burgelin, *Sur le rôle de l'expert*, v. J. Sainte-Rose, « *Le juge face à la science* », in *Principes de justice. Mélanges en l'honneur de Jean Francois Burgelin*, Publisher: Dalloz, Paris, 2008, p. 345.

The governance of an Artificial Intelligent Penal Enforcement System (AIPES) presupposes a clear delimitation of competences among the actors involved, such that the activities of data collection, processing, and analysis remain distinct from the exercise of decision-making powers, which must belong exclusively to the competent judicial and enforcement authorities. From this perspective, the integration of artificial intelligence into the execution of sentences cannot lead to the transfer of legal responsibility to autonomous algorithmic systems.

Accordingly, it becomes necessary to limit the delegation of penitentiary enforcement decisions to automated mechanisms. Artificial intelligence may be used particularly in fields characterized by large volumes of information, high complexity, and difficulties in rapidly identifying correlations relevant to penitentiary administration. In this context, intelligent systems may function as support instruments for data analysis, risk assessment, and the organization of enforcement control, without substituting the individualized legal assessment carried out by the human decision-maker.

Human beings are particularly skilled at recognizing new objects and understanding their purpose. Traditionally, when AI systems encounter something new for which they have not been trained to recognize, they may experience difficulties in classifying that object in the same manner as a human being would. However, a new artificial intelligence method known as “one-shot learning” is beginning to address this limitation.⁷

Even though recent developments in the field of artificial intelligence allow for the emergence of increasingly sophisticated mechanisms of processing and adaptation to new situations, these technological advancements do not justify the elimination of human intervention from the decision-making process. The capacity of technology to identify patterns and operate upon large volumes of data does not equate to the ability to exercise the legal and moral judgments specific to the execution of sentences.

According to Ethan Mollick, when information is transmitted to AI systems, most contemporary large language models do not learn directly from those data, since they are not part of the model’s pre-training process, which has generally been completed long beforehand. Nevertheless, the data uploaded may subsequently be used in future training sessions or for fine-tuning the model being used.⁸

Consequently, the integration of AI into the execution system must remain subordinate to the principle of exclusive human responsibility for decisions regarding the execution of criminal sanctions. The role of AI can be consultative, technical and informative, but the decision regarding the restriction of rights, the individualization of the execution regime or the assessment of the conduct of the convicted person must always belong to the competent authorities.

6. The conditions for the legitimacy of intelligent control

The legitimacy of a model of intelligent control concerning the digital communications of persons deprived of liberty depends upon the existence of legal and technological safeguards capable of preventing the digitalization of the execution of sentences from being transformed into an autonomous mechanism for restricting fundamental rights. In the absence of such limits, the use of surveillance and monitoring technologies risks leading not to a legitimate enhancement of the execution of sentences, but rather to the emergence of forms of excessive control incompatible with the requirements of the rule of law.

From this perspective, recent developments in European law concerning artificial intelligence are of essential relevance. The European Union Artificial Intelligence Act (AI Act) classifies systems used in the fields of law enforcement, justice, and the management of activities impacting fundamental rights as high-risk systems. Such classification entails the obligation to comply with strict standards concerning transparency, human oversight, traceability of operations, and the possibility of verifying the functioning of the systems employed.

The necessity of maintaining effective human control over intelligent surveillance mechanisms becomes all the more important in the context of contemporary debates regarding the risk of the autonomization of systems based on artificial intelligence.

As Yuval Noah Harari warns, we are in danger of losing control over our own future⁹, in the context of the emergence of an informational network governed by the decisions of a non-human intelligence, potentially

⁷ Nigel Toon, *How AI Thinks: How We Built It, How It Can Help Us, and How We Can Control It*, Transworld Publishers, Editura Penguin Random House, Londra, 2024, p. 70.

⁸ Ethan Mollick, *Co-inteligență, Cum să trăiești și să muncești cu AI*, Editura Publica, București, 2025, p. 67-68.

⁹ Yuval Noah Harari, *Nexus: A Brief History of Information Networks from the Stone Age to AI*, Ed. Penguin Random House, Londra, 2024, p. 200.

capable of functioning independently of human intervention. Although this perspective has the merit of highlighting the genuine risks associated with the excessive delegation of decision-making to autonomous algorithmic systems, we consider that such a vision tends to absolutize the technological potential of artificial intelligence and to underestimate the role of the legal, institutional, and ethical framework within which it is integrated.

Contrary to this approach, we argue that artificial intelligence, including in the field of criminal and penitentiary justice, should not be conceived as an autonomous “extraterrestrial intelligence,” but rather as a tool created, trained, and limited through human will and legal norms. The risk of losing control does not derive from the existence of technology itself, but from the absence of adequate mechanisms of governance, transparency, and democratic oversight concerning its use.

In this regard, intelligent control may be defined as a model of supervision that uses available data to support human decision-making, without substituting it. Unlike absolute prohibition, intelligent control does not seek the complete elimination of potentially problematic behavior, but rather its management within a regulated and predictable framework.

Applied to the execution of sentences, these requirements imply that any digital mechanism intended for the monitoring or filtering of communications must operate within a predictable, verifiable, and controllable legal framework. Persons deprived of liberty must benefit from sufficient safeguards enabling them to understand the existence and nature of the restrictions imposed, as well as from the effective possibility of challenging measures considered excessive or unjustified. In the absence of such guarantees, digital control risks acquiring an opaque character that is difficult to subject to genuine judicial review.

Similarly, the requirements imposed by the European Union General Data Protection Regulation (GDPR) become essential within a system based on digital monitoring and technological traceability. The collection, storage, and use of data generated through digital communications must comply with the principles of legality, proportionality, purpose limitation, and data minimization. The existence of a custodial enforcement regime cannot justify the establishment of unlimited surveillance mechanisms or the undifferentiated use of the personal data of convicted persons.

At the same time, one of the central elements of the legitimacy of such a model concerns the prohibition of the autonomous automation of restrictions on rights. The use of algorithmic instruments for identifying risks, filtering communications, or signaling behaviors considered problematic cannot lead to the elimination of meaningful human intervention from the decision-making process. In a state governed by the rule of law, restrictions upon the exercise of fundamental rights must remain the result of an individualized human assessment carried out in relation to the concrete circumstances of each situation.

From this perspective, the principle of human oversight does not represent a mere procedural formality, but rather a structural safeguard against the transformation of technology into an autonomous authority of penitentiary control. Human intervention must be genuine, effective, and capable of correcting or invalidating the conclusions generated by the technological systems employed. Technology may support penitentiary administration in the management of risks and in the organization of control; however, it cannot substitute legal responsibility and human judgment.

At the same time, the legitimacy of intelligent control presupposes the existence of clear mechanisms of auditability and traceability. Any operation involving the monitoring, filtering, or restriction of communications must be capable of subsequent verification from the perspective of its legality and proportionality. Auditability thus becomes an essential condition for preventing arbitrariness and for maintaining effective judicial oversight over the manner in which technology is used in the execution of sentences.

In reality, the fundamental issue is not whether the penitentiary enforcement system should employ digital instruments and intelligent control mechanisms, but rather the manner in which these may be integrated without affecting the fundamental structure of the legal safeguards specific to the rule of law. The digital transformation of society renders the adaptation of the execution of sentences to new technological realities inevitable; however, such adaptation cannot be achieved through the autonomous transfer of decision-making power to algorithmic systems.

7. Conclusions

The digital transformation of society profoundly modifies the conditions under which the social reintegration of persons deprived of liberty may be achieved. In a social environment in which communication, education, family relationships, and professional activities are increasingly mediated through technology, maintaining an enforcement model constructed almost exclusively upon the exclusion of digital communications becomes increasingly difficult to reconcile with the reintegrative purpose of the execution of sentences.

The present analysis has demonstrated that the fundamental issue does not lie in the existence of control over digital communications, but rather in its generalized, undifferentiated, and disproportionate character. Maintaining an almost absolute prohibition concerning the use of telecommunication devices risks transforming detention not only into a deprivation of physical liberty, but also into a form of digital exclusion incompatible with contemporary social realities.

In this context, the transition toward a model of intelligent control appears to constitute a possible solution of balance between the requirements of penitentiary security, the protection of fundamental rights, and the necessity of adapting the enforcement system to the technological transformations of society. The use of mechanisms of differentiated monitoring, technological filtering, and digital traceability may allow the exercise of effective control without completely eliminating access to regulated forms of digital communication.

Nevertheless, the legitimacy of such a model depends fundamentally upon the existence of clear legal safeguards concerning transparency, proportionality, judicial oversight, and effective human intervention. Technology must not become a substitute for human decision-making, but rather a support instrument for penitentiary administration in the management of concrete risks and in the individualization of the execution of sentences.

Ultimately, the real challenge is not exclusively technological, but rather legal and institutional: namely, how to adapt the execution of sentences to the realities of a digitalized society without compromising the fundamental principles of the rule of law and the profoundly human dimension of criminal justice.

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THE ACCOUNTING EXPERT REPORT AS A CONDITION OF REGULARITY OF THE INDICTMENT IN TAX EVASION CASES: LIMITS OF THE PRELIMINARY CHAMBER PROCEDURE AND CONSEQUENCES OF THE NORMATIVE ARCHITECTURE OF ART. 10 OF LAW NO. 241/2005

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Abstract

Decision HP no. 430/2025 of the High Court of Cassation and Justice (HCCJ) establishes with binding force that the failure to conduct a specialised accounting expert report in tax evasion cases renders the indictment irregular, attracting the remittal of the case to the prosecutor. The purpose of this article is to demonstrate that this solution represents the interpretation that best ensures the coherence of the normative architecture of Art. 10 of Law no. 241/2005 for the prevention and combating of tax evasion, as amended by Law no. 126/2024. The article pursues four objectives. First, it anchors the decision in the legislative history of Art. 10, reconstructed through HP no. 69/2023, demonstrating that the need for an objective standard for determining the damage is a recurring problem that has required repeated legislative and judicial intervention. Second, it delimits the tripartite of evidentiary instruments available in tax evasion cases — the ANAF tax inspection report, the technical assessment report, and the judicial expert report — showing that only the latter satisfies the requirement of Art. 10(2). Third, it proposes the systematic category of mandatory evidence with substantial effect, which the HCCJ implicitly created without naming it, and applies it to resolve two gaps left open by Decision HP no. 430/2025: the applicability of the expert requirement to the non-punishment grounds in Art. 10(3), and the constitutional implications of the absence of transitional provisions in Law no. 126/2024. Fourth, it develops a classification of pending cases into three categories and identifies the available remedies in the trial phase for cases that have already passed the preliminary chamber without an expert report.

Keywords: preliminary chamber, irregular indictment, accounting expert report, tax evasion, temporal application.

1. Introduction

On 15 December 2025, the Panel for the Resolution of Legal Issues in Criminal Matters of the High Court of Cassation and Justice pronounced Decision HP no. 430/2025¹, establishing that the failure to draw up a specialised expert report in tax evasion cases renders the indictment irregular and attracts the remittal of the case to the prosecutor. Binding from 26 February 2026, the decision put an end to a deeply fragmented practice in which more than half of the courts of appeal had adopted contrary positions. This article analyses the decision within the framework of four questions that the specialized literature has not yet addressed in a systematic manner.

(1) What matter does the paper cover? The paper covers the interpretive construction through which the HCCJ qualified the omission of the expert report as an irregularity of the indictment, the gaps left open by that construction, and the temporal application of the decision to cases pending at different procedural stages on the date of its publication. The qualification of the omission of the expert report as an irregularity of the indictment is not expressly provided by law — it is an interpretive construction of the HCCJ, deduced through the correlation of the evidentiary norm with Arts. 327 and 342 of the Code of Criminal Procedure (CPC). This article adopts, supports, and completes that construction.

(2) Why is the studied matter important? The decision affects a very large number of pending cases — all tax evasion prosecutions brought after 13 May 2024 without a specialised expert report, as well as all cases in which the defendant may invoke the more favourable law introduced by Law no. 126/2024. Beyond its immediate impact, the decision creates a new procedural category — mandatory evidence with substantial effect

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¹ Published in the Official Gazette of Romania, Part I, no. 149 of 26 February 2026.

— that may generate further case law in domains beyond tax evasion. Its correct understanding is essential for prosecutors, preliminary chamber judges, trial judges and defence counsel alike.

(3) How does the author intend to answer to this matter? The article employs a systemic coherence argument: it examines the alternative interpretive variants and shows that each produces consequences incompatible with the effective purpose of the law or with other imperative procedural norms. It further proposes the systematic category of mandatory evidence with substantial effect, defined by three cumulative conditions, as the instrument that best explains the HCCJ's decision and resolves its remaining gaps. A comparative perspective covering four systems — Italian, German, French, and British — contextualises the Romanian solution within the broader landscape of evidentiary standards in tax criminal law.

(4) What is the relation between the paper and the already existent specialized literature? Decision HP no. 430/2025 was pronounced in December 2025 and published in February 2026, leaving virtually no time for sustained academic analysis before the present article. The existing commentary is confined to practitioner notes and preliminary analyses. The article builds on the legislative history reconstructed by HP no. 69/2023 of the HCCJ,² the constitutional case law of the CCR — in particular Decisions no. 867/2021³ and no. 146/2024⁴ — and the author's own judicial practice,⁵ which is used exclusively as practical illustration, not as primary argumentative authority. The article is structured as follows: after reconstructing the legislative history and comparative framework (Section 2), it analyses the structural constraints that make the expert report necessary in the investigation phase (Section 3), critically evaluates the HCCJ's arguments (Section 4), examines the admissibility of the referral (Section 5), identifies the gaps in the decision (Section 6), proposes solutions for the temporal application of the decision (Section 7), and concludes with *de lege ferenda* proposals (Section 8).

2. Legislative framework, paradigm shift, and comparative perspective

2.1. The legislative history of Art. 10 — a norm in continuous reform

Art. 10 of Law no. 241/2005 has undergone four substantial modifications in less than twenty years, each reflecting a change of vision regarding the relationship between the recovery of the tax damage and the mitigation of criminal liability. HP no. 69/2023 of the HCCJ has already reconstructed this trajectory,⁶ furnishing a source of authority for the present analysis.

In its initial 2005 form, Art. 10(1) provided for reduction by half of the penalty limits if the accused covered the damage in full before the first hearing. The norm contained no provision on how to determine the damage — a gap that generated a subjective and variable standard, at the discretion of the investigating authorities.⁷ Through Law no. 255/2013, the phrase "damage caused" was replaced by "the civil party's claims" — a modification with paradoxical consequences. The Constitutional Court declared this phrase unconstitutional through Decision no. 867/2021,⁸ holding that it contravened the right to a fair trial and the principle of equality. Law no. 55/2021 returned to the criterion of the damage caused, but without resolving the problem of the evidentiary standard. This gap — the damage established by the prosecutor on the basis of the file documents, without procedural guarantees for the defendant — is precisely the one that Law no. 126/2024 sought to correct.⁹

As the HCCJ held in HP no. 69/2023, "the intertwining of criminal law with tax and procedural tax law in configuring the content of tax evasion offences, as well as the way in which the content of Art. 10 of Law no. 241/2005 has evolved over time, required repeated intervention by the Constitutional Court and the High Court

² Law no. 126/2024 on certain measures for strengthening the capacity to combat tax evasion, published in the Official Gazette of Romania, Part I, no. 437 of 13 May 2024.

³ HP no. 430/2025, par. 68.

⁴ HP no. 430/2025, par. 75.

⁵ HP no. 430/2025, par. 76 and 93.

⁶ HP no. 430/2025, par. 86.

⁷ Criminal judgments no. 30 and no. 38 of 2026, pronounced by Prahova Tribunal, not final at the time of writing.

⁸ CCR Decision no. 1.084 of 8 September 2009, published in the Official Gazette of Romania, Part I, no. 665 of 6 October 2009.

⁹ CCR, Decision no. 1.084/2009: "The amount of the damage caused is that which results from the documents in the file, namely from the indictment or from the financial-accounting documents existing in the file. [...] The concrete determination of the damage caused falls, in the investigation phase, to the case prosecutor." The formula was confirmed in CCR Decision no. 867/2021, par. 31, and cited in HP no. 430/2025, par. 37.

of Cassation and Justice."¹⁰ Each intervention signalled the same structural deficit: the absence of an objective standard for determining the damage.

2.2. The paradigm shift produced by Law no. 126/2024

Law no. 126/2024 responded to this structural deficit by introducing a unique objective evidentiary standard: the specialised expert report. Art. 10(2) now provides that "the damage shall be determined on the basis of a specialised expert report", with express reference to Arts. 172-180 CPC.¹¹ The Constitutional Court, in Decision no. 146/2024,¹² characterised Law no. 126/2024 as representing a transition from retributive theories of criminal law toward modern theories, according to which the main objective in economic crime cases is the recovery of illicitly obtained assets.¹³

The change is not merely formal. By introducing the expert report as the mandatory standard, the legislator transformed the determination of the damage from a matter of unilateral discretion of the investigating authorities into a technical operation subject to the procedural guarantees of Arts. 172-180 CPC. Non-compliance with this standard raises a problem of legality — and the manner in which the HCCJ qualifies this problem is the central subject of Section 4.

2.3. The dual dimension of Art. 10 and its normative implications

As the HCCJ held in HP no. 69/2023, in tax evasion cases "the determination of the damage constitutes an essential element for the legal classification of the criminalised act, while its coverage constitutes an essential element for establishing the conditions of legal liability."¹⁴ This dual dimension — Art. 10 is simultaneously a norm of substantive law (the causes for reduction or elimination of the penalty) and a procedural norm (the conditions and method for determining the damage) — is the pivot of the entire argument in this article.

The new regulation introduces a complex architecture structured on two distinct paragraphs. Art. 10(2) regulates three hypotheses for reduction of the penalty: reduction by half if the damage is paid in full before the first hearing; application of a fine if the damage is up to EUR 1,000,000 and is covered before the first hearing; reduction by one third if the damage is paid before the final resolution. Art. 10(3) regulates three grounds of non-punishment, differentiated according to the procedural phase and the applicable percentage surcharge.

2.4. A comparative perspective: four systems, four solutions, one conclusion of systemic coherence

Comparative law is useful not to confirm the solution of HP no. 430/2025 — which is a national legislative policy choice — but to clarify the stakes of that choice through contrast with alternative solutions adopted by comparable legal systems.

In the Italian system, the criminal court itself determines the amount of tax evaded, "proceeding ex officio to the necessary verifications, possibly by recourse to presumptions of fact."¹⁵ The Italian Court of Cassation has held that the criminal court cannot use the tax authority's presumptions and is not bound by the Agenzia delle Entrate's calculations.¹⁶ Italy also knows a non-punishment ground through settlement of the tax debt (Art. 13 D.lgs. 74/2000¹⁷) — structurally analogous to Art. 10 of Law no. 241/2005 — but without imposing the judicial expert report as the mandatory standard in the investigation phase. The difference in solution reflects not a difference of principle but one of procedural architecture: in the Italian system, the active judge corrects the evidential deficiencies of the investigation, whereas in the Romanian system, the preliminary chamber functions as a filter preventing the transfer of those deficiencies to trial.

¹⁰ CCR Decision no. 867 of 14 December 2021, published in the Official Gazette of Romania, Part I, no. 325 of 1 April 2022.

¹¹ CCR Decision no. 146 of 19 March 2024, published in the Official Gazette of Romania, Part I, no. 496 of 29 May 2024.

¹² HP no. 430/2025, par. 84; CCR Decision no. 146/2024.

¹³ HP no. 69/2023, par. 79: "The intertwining of criminal law with tax and procedural tax law in configuring the content of tax evasion offences, as well as the way in which the content of Art. 10 of Law no. 241/2005 has evolved over time, required repeated intervention by the Constitutional Court and the High Court of Cassation and Justice."

¹⁴ HP no. 430/2025, par. 88: "Such evidence may be administered during the criminal investigation or in the trial phase, but not within the preliminary chamber procedure, since it concerns the merits of the case."

¹⁵ HP no. 430/2025, par. 94-95: the HCCJ deduces the irregularity of the indictment from the omission of the expert report through correlation with Arts. 327 and 342 CPC, building on the dual nature of the norm in Art. 10(2). The qualification as "implicit condition of validity" belongs to the HCCJ, not to the explicit text of the law.

¹⁶ Art. 345(2) CPC corroborated with Art. 346(3)(a) CPC.

¹⁷ Art. 346(3)(a) CPC.

The German system adopts a similar approach. The Bundesgerichtshof has held that the criminal court may estimate (Schätzung) the tax bases when the amount of evaded tax is uncertain, provided the estimation is exhaustively reasoned in the judgment,¹⁸ and that the criminal court cannot automatically adopt the tax authority's (Finanzamt) calculations but must verify them independently, applying the *in dubio pro reo* principle.¹⁹ There is no obligation of judicial expertise in the investigation phase under § 370 AO²⁰ — a model of the "active fiscal judge" that has no counterpart in the Romanian system post-CPC 2010.

The French system presents a relevant procedural particularity: the existence of tax fraud "cannot be inferred from mere evaluations made by the administration according to its own procedures, but must result from the findings of the judges extracted from elements subjected to contradictory judicial debate."²¹ The expert report appears in the French system as a judicial instruction act, ordered by the investigating judge at the judge's discretion depending on the complexity of the case²² — not systematically obligatory.²³

The British Tax Tribunal confirms that the determination of the fiscal damage is a matter that, through its complexity, requires specialist expertise. The Tribunal has held that a fact witness's statements cannot contain inferences, conclusions or opinions on technical matters²⁴ and has accorded precedence to expert evidence over HMRC's administrative positions where complex valuation methodologies are involved.²⁵

The comparative tableau shows systematic diversity: Italy and Germany place damage determination at the trial court (active); France at the investigating judge (discretionary); the United Kingdom at the trial court through expert evidence (as a rule of prudence, not a formal obligation); Romania at the investigating authorities (obligatory by law). No solution is universally superior; each is coherent with its own procedural architecture. The Romanian model distributes the risk of evidential insufficiency to the prosecutorial authorities — more favourable to the defendant, who will know the amount to pay before the legal deadline expires — but more costly for the prosecutorial system and more susceptible to case remittals.

3. Structural constraints: why the expert report in the Investigation Phase is the interpretation ensuring systemic coherence

The central argument of this article is one of systemic coherence: the alternative interpretive variants each produce consequences incompatible with the effective purpose of the law or with other imperative procedural norms.

3.1. Variant I — the expert report can be administered in the preliminary chamber

This variant is excluded by an express norm of criminal procedure. Art. 342 CPC defines the object of the preliminary chamber procedure as verification of "the legality of the referral to the court [...] of the

¹⁸ Cass. pen., Sez. III, sent. n. 44170 del 3 novembre 2023 — the Court held that "*ai fini della configurabilità del reato di omessa dichiarazione di cui all'art. 5 d.lgs. 74/2000, non può farsi ricorso alle presunzioni tributarie, in quanto spetta al giudice penale la determinazione dell'ammontare dell'imposta evasa procedendo d'ufficio ai necessari accertamenti, eventualmente mediante il ricorso a presunzioni di fatto*".

¹⁹ Cass. pen., Sez. III, sent. n. 43330 del 26 ottobre 2023 — reaffirming that "*spetta esclusivamente al giudice penale il compito di procedere all'accertamento e alla determinazione dell'ammontare dell'imposta evasa, attraverso una verifica che può venire a sovrapporsi o anche ad entrare in contraddizione con quella eventualmente effettuata dal giudice tributario, non essendo configurabile alcuna pregiudiziale tributaria*".

²⁰ Art. 13, comma 1, D.lgs. 10 marzo 2000, n. 74 (as amended by D.lgs. 158/2015 and D.lgs. 87/2024): "*I reati di cui agli articoli 10-bis, 10-ter e 10-quater, comma 1, non sono punibili se, prima della dichiarazione di apertura del dibattimento di primo grado, i debiti tributari, comprese sanzioni amministrative e interessi, sono stati estinti mediante integrale pagamento degli importi dovuti*".

²¹ § 370 Abs. 1 Abgabenordnung (AO) of 16 March 1976 (BGBl. I p. 613), last amended by Art. 3 of the Act of 21 December 2019 (BGBl. I p. 2875).

²² BGH, Beschluss vom 24. Mai 2007, Az. 5 StR 58/07 — the BGH held that tax assessments in criminal proceedings fall exclusively to the trial court, with an obligation of detailed reasoning. BGH, Beschluss vom 14. Dezember 2007, Az. 1 StR 293/07 — mere adoption of the tax authority's estimates is insufficient. See also Schwarz/Pahlke/Keß, Kommentar zur AO, § 370 Rz. 87 (Haufe Verlag): "*Das Gericht darf eine finanzbehördliche Steuerschätzung nicht ungeprüft übernehmen, sondern hat grundsätzlich eine eigene Schätzung vorzunehmen*".

²³ Schwarz/Pahlke/Keß, Kommentar zur AO, § 370 Rz. 87 and § 162 Rz. 211 (Haufe Verlag): "*Die im Besteuerungsverfahren geltenden steuerlichen Beweislast- und Vermutungsregeln finden im Strafverfahren keine Anwendung. [...] Insbesondere gilt der Grundsatz 'in dubio pro reo'*". BGH, Urteil vom 10. November 2009, Az. 1 StR 283/09 (Mindestschätzung principle).

²⁴ Cass. crim., 8 février 1988, n° 87-82777 — the first decision in which the Criminal Chamber held that the existence of tax fraud cannot be inferred from administrative evaluations. See also Cass. crim., 20 décembre 2017, n° 16-85029 — synthesis of the principle.

²⁵ Art. 156(1) Code de procédure pénale (CPP): "*Toute juridiction d'instruction ou de jugement, dans le cas où se pose une question d'ordre technique, peut, soit à la demande du ministère public, soit d'office, ou à la demande des parties, ordonner une expertise*". Available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006575748.

administration of evidence and of the acts performed by the investigating authorities." The preliminary chamber judge cannot order the administration of new evidence relating to the merits, and the accounting expert report on the amount of the damage is, by excellence, evidence on the merits. The HCCJ explicitly held that the expert report "may be administered during the criminal investigation or in the trial phase, but not within the preliminary chamber procedure, since it concerns the merits of the case."²⁶

3.2. Variant II — the expert report can be administered in the trial phase, before the first hearing

A judicial expert report cannot be ordered before the first hearing, since the procedural measure requires the designation of the expert, communication of objectives, setting a deadline for the report, the possibility of appointing a party's expert, possible additions — a process that takes, in court practice, several months. Even assuming the expert report is ordered at the first hearing, the limit established by Art. 10 — until the first hearing — is already reached and exceeded. Beyond the practical impossibility, there is a purposive argument: as the HCCJ held in HP no. 69/2023, the cause for reduction of the penalty in Art. 10 aims to "facilitate the recovery by the state budget of the claims resulting from the commission of tax evasion acts."²⁷ This aim presupposes that the defendant can make an informed decision regarding payment, which is not possible if the exact amount becomes known only when the time limit has already expired.

3.3. Variant III — the expert report is optional, conditional on the defendant's manifestation

This variant — supported by the Prosecutor General's Office and some courts of appeal²⁸ — is excluded by three cumulative arguments. The first is textual: Art. 10(2) uses the imperative formulation "the damage shall be determined on the basis of a specialised expert report", without any condition regarding the defendant's manifestation of will. The HCCJ held that "the legislator did not make the performance of the expert report conditional on the prior manifestation of an intention to pay the damage by the suspect or defendant."²⁹ The second argument concerns the effective purpose of the law: if the expert report is optional, the norm in Art. 10(2) sentence I becomes practically inapplicable, since the defendant cannot make an informed decision on payment without knowing the exact amount. As the HCCJ held, "accepting the contrary thesis would empty the first sentence of Art. 10(2) of content."³⁰ The third argument concerns coherence with the objectives of Law no. 126/2024: leaving the determination of the damage to the discretion of the investigating authorities would perpetuate precisely the structural deficit the legislator sought to eliminate.³¹

3.4. Conclusion of the systemic argument

All alternative variants are incompatible with the effective purpose of the law or with imperative procedural norms. The qualification of the omission of the expert report as an irregularity of the indictment is the inevitable interpretive consequence — confirmed by the internal logic of HP no. 69/2023: once the repair of the damage is established by the criminal court, "this matter can no longer be reopened in another civil process."³² But *res judicata* presupposes certainty — and certainty presupposes a damage determined by judicial expert report, not estimated by a technical assessment report with conditional conclusions.

²⁶ Cass. crim., 11 septembre 2019, n° 18-81.067 — the Court held that "*l'opportunité d'ordonner une mesure d'instruction relève de l'appréciation souveraine des juges du fond*", confirming that refusal of the expert report is valid if reasoned.

²⁷ *CF Booth Ltd v. HMRC* [2016] UKFTT 261 (TC), §14; *Megantic Services Ltd v. HMRC* [2013] UKFTT 492 (TC), §§15-20.

²⁸ *Graham Chisnall and Others v. HMRC* [2023] UKFTT 857 (TC), with reference to *McArthur and Bloxham v. HMRC* [2021] UKFTT 237 (TC), §15, and *Netley v. HMRC* [2017] UKFTT 442 (TC), §203.

²⁹ The express reference in Art. 10(2) of Law no. 241/2005 to Arts. 172-180 CPC — which regulate exclusively the judicial expert report — with the implicit exclusion of Art. 181 CPC on the technical assessment report, confirms that the legislator intended to impose a distinct instrument with full procedural guarantees.

³⁰ HP no. 430/2025, par. 33, reproducing the position of certain courts of appeal (Cluj, Oradea, Suceava, Timișoara): "the performance of the expert report in the investigation phase is optional and conditional on the manifestation of will of the suspect or defendant to pay the damage" — this is the thesis expressly rejected by the HCCJ.

³¹ HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 430 of 15 December 2025, published in the Official Gazette of Romania, Part I, no. 149 of 26 February 2026, par. 79, 91-92.

³² HP no. 430/2025, par. 87.

4. Critical analysis of the HCCJ's arguments in Decision HP no. 430/2025

4.1. The convincing arguments

The most solid argument in the decision's reasoning is that of the effective purpose of the law: if the expert report is not conducted in the investigation phase, the benefit of halving the penalty limits becomes illusory.³³ A structurally inapplicable norm is a norm devoid of normative content. Equally solid is the argument of the impossibility of administering the expert report in the preliminary chamber — a direct normative argument constructed on the legal definition of the object of the preliminary chamber, regarding which there is no room for appreciation. The teleological argument based on the purpose of Law no. 126/2024 as identified by the CCR in Decision 146/2024 and confirmed by HP no. 69/2023³⁴ is also well anchored.

4.2. Vulnerabilities in the reasoning

The first vulnerability concerns the leap from evidentiary norm to condition of procedural validity. Art. 10(2) is an evidentiary norm — not a norm on the validity of the indictment. The HCCJ makes this leap³⁵ through correlation with Arts. 327 and 342 CPC, without exhaustively explaining why the omission of a mandatory piece of evidence can be assimilated in all cases with an irregularity of the referral document. The vulnerability can be managed: the answer lies in the dual nature of the norm — Art. 10(2) is not a mere evidentiary norm, but one that conditions the exercise of a substantive right — and in the practical impossibility of subsequent remedy.

The second vulnerability concerns the relationship with "the impossibility of establishing the object and limits of the trial" from Arts. 345-346 CPC. The HCCJ extends the concept of irregularity beyond traditional formal deficiencies without articulating a general criterion for this extension. In the author's view, the most solid argument completing the reasoning is that of the effective right to defence: the omission of the expert report renders illusory a substantive right of the defendant, not merely a formal element of the indictment.

4.3. The distinction from ordinary evidential omission and the theory of mandatory evidence with substantial effect

Decision HP no. 430/2025 created, without naming it, a new procedural category: evidence mandated by law whose omission in the investigation phase generates the irregularity of the indictment. This article proposes its systematisation under the name "mandatory evidence with substantial effect."³⁶

Mandatory evidence with substantial effect is defined by three cumulative conditions: (a) the existence of an express norm requiring the administration of the evidence in the investigation phase; (b) the evidence conditions the exercise of a substantive right of the defendant — not a purely formal procedural right, but one that directly affects the criminal consequences of the case; (c) the omission of the evidence is not remediable in subsequent phases of the criminal process without definitively depriving the defendant of the exercise of that right.

The expert report from Art. 10(2) satisfies all three conditions: (a) the express norm — "the damage shall be determined on the basis of a specialised expert report"; (b) substantive right — the defendant's right to benefit from the halving of penalty limits or the non-punishment ground by paying the damage; (c) subsequent irremediability — the expert report cannot be administered in the preliminary chamber, and ordering it in trial no longer allows the defendant to pay the damage before the first hearing.

The importance of this systematisation extends beyond tax evasion cases.³⁷ It furnishes a general criterion for answering the question that every practitioner will raise after HP no. 430/2025: what other mandatory pieces of evidence provided by law could generate, through their omission, the irregularity of the indictment? The

³³ CCR Decision no. 932 of 14 December 2006, published in the Official Gazette of Romania, Part I, no. 42 of 19 January 2007.

³⁴ HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 69 of 13 November 2023, par. 94, published in the Official Gazette of Romania, Part I.

³⁵ HCCJ, Panel for the Resolution of Legal Issues in Criminal Matters, Decision no. 430 of 15 December 2025, par. 31, 86-92, published in the Official Gazette of Romania, Part I, no. 149 of 26 February 2026.

³⁶ HP no. 69/2023, par. 79.

³⁷ HP no. 69/2023, par. 90: "The norms of the Code of Criminal Procedure [...] have a degree of generality that cannot cover the entire range of situations that may arise in connection with offences for which criminal law provides a sentencing regime with specific elements, in which the determination of the damage constitutes an essential element for the legal classification of the criminalised act, while its coverage constitutes an essential element for establishing the conditions of legal liability."

answer is precise: only those that simultaneously satisfy conditions (a), (b), and (c). The category is narrow but real, and HP no. 430/2025 provides its first paradigmatic case. The theory also responds to the doctrinal criticism that the HCCJ unjustifiably extends the concept of irregularity: the extension is not arbitrary but delimited by the three cumulative conditions, which function as limits against uncontrolled generalisations.³⁸

5. Admissibility of the Referral — A Precedent with Implications of Principle

The Prosecutor General's Office sought rejection of the referral as inadmissible, arguing that the question formulated was not "necessary" for the solutions available in the preliminary chamber procedure. The HCCJ upheld admissibility by extending the concept of "concrete effect on the decision", namely that the preliminary ruling would have "a decisive influence on the final decision in the preliminary chamber phase." This extension creates a useful precedent for future referrals, but must be applied with caution: the mechanism for pronouncing a preliminary ruling is an instrument for unifying practice, not a means of resolving any legality problem. The extension is justified in the present case by the principled importance of the resolved issue and by the scale of the non-unitary practice identified.

6. Gaps in Decision HP No. 430/2025

6.1. The tripartite of evidentiary instruments

The first practical gap concerns the relationship between the judicial expert report required by Art. 10(2) and the other instruments for determining the damage that circulate in tax evasion cases. The decision does not explicitly delimit these instruments. The answer is negative for both alternatives, for different reasons.³⁹

The ANAF tax inspection report (Arts. 94-105 of the Tax Procedure Code) is an administrative instrument through which the tax authority establishes the tax claim owed.⁴⁰ It may constitute a referral act for investigating authorities but cannot constitute evidence regarding the existence and extent of the unpaid tax obligation in the sense of the CPC,⁴¹ was not ordered by a judicial authority, and does not benefit from the procedural guarantees of judicial expertise. More importantly, it expresses the position of a state body that is a civil party in the criminal case — which gives it a position structurally incompatible with the objectivity required by the standard of Art. 10(2).

The technical assessment report (Art. 181 CPC) is a piece of evidence, but with a different regime from that of the expert report: it is ordered by investigating authorities when there is urgency or risk of evidence disappearing, without the defendant's participation and without the procedural guarantees of judicial expertise. It may be challenged by requesting the performance of an expert report — which suggests the legislator treats it as evidentiary instrument inferior to, not equivalent with, the expert report.

The judicial expert report (Arts. 172-180 CPC) is the only instrument that satisfies the requirement of Art. 10(2). The express reference to Arts. 172-180 CPC, with the implicit exclusion of Art. 181 CPC, is a deliberate legislative choice, coherent with the objective of establishing an objective standard with complete procedural guarantees for determining the damage.⁴²

³⁸ HP no. 69/2023, par. 92: "This intertwining between two branches of law and two types of liability (criminal and fiscal) requires systematic and teleological interpretation of the applicable norms, in a manner that does not contradict the purpose pursued by the legislator through the regulation of procedures for the prevention and combating of tax evasion."

³⁹ HP no. 69/2023, par. 55, with reference to HP no. 9 of 15 March 2017, published in the Official Gazette of Romania, Part I, no. 346 of 11 May 2017: the cause for reduction of the penalty in Art. 10 aims to "facilitate the recovery by the state budget of the claims resulting from the commission of tax evasion acts and, correlatively, the mitigation of the sanctioning regime for persons who contribute to their recovery."

⁴⁰ Prahova Tribunal — Criminal Section, Judgment no. 38 of 26 February 2026, case no. 3586/105/2025, and Judgment no. 30 of 16 February 2026, case no. 8538/105/2014, both non-final at the date of writing and unpublished. Both judgments are cited in this article exclusively as practical illustrations of the principles demonstrated on the basis of binding case law, not as independent argumentative authority. The author, as the judge who pronounced these judgments, transparently marks this capacity and the strictly illustrative — not probative — function of his own case law, in accordance with the practice of comparative law journals which admit references to the author's own case law provided the role thereof in the economy of the argument is clearly delimited.

⁴¹ Judgment no. 38/2026, Prahova Tribunal (see fn. 41): "The report was drawn up with broad objectives [...]. Such a report may naturally serve as a guiding instrument for the investigation. The problem arises when the prosecution transforms it into the main foundation of the damage [...] without completing the gaps that the report itself acknowledges."

⁴² Judgment no. 38/2026, Prahova Tribunal (see fn. 41): "The agreement is useful when the facts are clear, the evidence is sufficient, the damage is determined and the parties wish a rapid solution. The agreement becomes problematic when it is used as a solution to avoid clarifying essential technical issues."

Judicial practice illustrates these distinctions concretely. A court rejected a guilty plea agreement in which the assessment report constituted the main basis for the amount of the damage, on the ground of the estimative and conditional nature of its conclusions. The report used the formula "the estimated damage will be in a total amount of [...] insofar as the company has not declared fiscally and has not recorded its revenues in its accounts" — a formulation that does not affirm the existence of the damage as a certain fact but conditions it on further demonstrations.⁴³ The court identified four structural deficiencies: absence of VAT enforceability analysis; absence of verification of the right of deduction; absence of analysis of the applicable fiscal regime for the entire charged period; reconstruction of the damage exclusively from bank statements, without primary accounting documents.⁴⁴ The conclusion that the assessment report may serve as a guiding instrument for the investigation but cannot be transformed into the main foundation of the damage⁴⁵ is directly applicable to the problem in this article.

6.2. Art. 10(3) — a solution through the operative part of the decision

An apparent gap concerned the obligation of the expert report for the non-punishment grounds in Art. 10(3), given that the formulation in par. 72 of the decision — "in the rapporteur judge's opinion" — could suggest that the full panel did not adopt a firm position on this point in the reasoning. This apparent gap is, in reality, resolved on two convergent levels. At the level of positive law, the operative part of HP no. 430/2025 refers to "Art. 10 of Law no. 241/2005" in its entirety, without any distinction between paragraphs. At the dogmatic level, the theory of mandatory evidence with substantial effect permits a more rigorous demonstration: not an extension from one paragraph to another on the basis of similarity of rationale, but a deduction from the same general principle.⁴⁶

The deductive reasoning is as follows. Major premise: the omission of the expert report generates the irregularity of the indictment when conditions (a), (b), and (c) are simultaneously satisfied. Minor premise: in the hypotheses of Art. 10(3), all three conditions are satisfied — (a) Art. 10(2) imposes the expert report through an express norm applicable to all tax evasion cases within the scope of Art. 10, regardless of the paragraph invoked by the defendant; (b) the absence of the expert report deprives the defendant of the possibility to calculate the applicable surcharge (25%, 50% or 100%) and to make an informed decision on payment; (c) the omission is not remediable subsequently, because the time limits in Art. 10(3) are even shorter or coincide with procedural phases in which the expert report cannot be administered. Conclusion: the omission of the expert report generates irregularity also for the hypotheses of Art. 10(3). This is a deduction from principle, not an extension by analogy — and the difference is not terminological but methodological.

6.3. The defendant's waiver of the expert report

The decision does not address the situation where the defendant expressly waives the expert report. There exist, within the expert report procedure, procedural guarantees established exclusively in the defendant's favour, with a disposable character — the right to propose a party's expert, the right to raise objections, the right to be notified of the ordering of the expert report. The expert report itself, however, cannot be set aside by the defendant's unilateral waiver,⁴⁷ for three distinct reasons. First: the text of Art. 10(2) does not subordinate the

⁴³ HCCJ, Administrative and Fiscal Section, Decision no. 1831 of 8 June 2016: the ANAF inspection report constitutes a preliminary act to the issuance of an administrative act of fiscal claim, pursuant to Art. 18 of Law no. 554/2004 on administrative litigation.

⁴⁴ CCR Decision no. 80 of 14 February 2024, par. 23, published in the Official Gazette of Romania, Part I, no. 266 of 27 March 2024. In the same sense: CCR Decision no. 72 of 29 January 2019, published in the Official Gazette of Romania, Part I, no. 332 of 2 May 2019.

⁴⁵ Prahova Tribunal, Criminal Section, Judgment no. 30 of 16 February 2026, case no. 8538/105/2014, non-final, cited for illustrative purposes — see fn. 41.

⁴⁶ Judgment no. 38/2026, Prahova Tribunal (see fn. 41): "The deficiency identified does not concern the level of evidence or the accuracy of the amount of damage, which could be clarified by administering an accounting expert report, but concerns the very determination of the material facts charged. The expert report presupposes the verification and evaluation of facts already determined in the referral document; it cannot substitute for the lack of determination of the facts."

⁴⁷ The logical chain of the connection with Directive 2012/13/EU: (i) Art. 10(2) conditions the reduction of the penalty on the payment of a damage determined by expert report; (ii) without the expert report, the defendant does not know the exact amount to pay in order to benefit from the cause for reduction; (iii) the financial consequence of the accusation — the amount to pay for mitigation of the penalty — forms part of the content of the accusation that the defendant must know in detail in order to exercise effectively the right to defence; (iv) Art. 6(3) of Directive 2012/13/EU, as interpreted in Case C-282/20, *ZX v. Bulgaria*, guarantees precisely this right. The connection is not direct but mediated through the right to effective defence — which makes it stronger in principled terms.

obligation to perform the expert report to any manifestation by the defendant.⁴⁸ Second: the damage is an objective element of the case, relevant not only to the defendant but also to the civil claim and to the public interest of recovering the tax claim. Third: to admit that the defendant can waive the expert report would be equivalent to allowing the defendant to unilaterally influence the conditions for the application of a criminal law norm — which contradicts the public order character of criminal law norms.

6.4. Expert report costs — an open legislative problem

The regime of costs for the expert report mandatorily ordered in the investigation phase, regardless of the defendant's manifestation of will, is not addressed by the decision and requires legislative clarification. The general rules from Arts. 272-276 CPC do not adequately cover the situation of the expert report whose mandatory character does not depend on any request by any party, and whose costs cannot reasonably be automatically charged to the defendant before the definitive resolution of the case.

7. Temporal Application of Decision HP No. 430/2025 and available remedies

Published in the Official Gazette on 26 February 2026, Decision HP no. 430/2025 is binding for courts from that date. But the interpreted norm has been in force since 13 May 2024. The classification of pending cases into three categories is therefore essential for the correct application of the decision.

7.1. Category A — Indictments issued before 13 May 2024

Category A covers all cases whose indictment was issued before the entry into force of Law no. 126/2024, regardless of the procedural stage on the date of publication of HP no. 430/2025. The norm interpreted by HP no. 430/2025 was not in force at the time the indictment was issued, so the standard of regularity remains the prior one: the damage established by the prosecutor on the basis of the file documents, without the obligation of the expert report as a legality requirement. CCR Decision no. 867 of 14 December 2021 remains the relevant benchmark.⁴⁹

A1 — Indictment before 13 May 2024, with a definitive preliminary chamber decision before 26 February 2026

Res judicata operates both in relation to HP no. 430/2025 and in relation to Law no. 126/2024. The trial has begun under the dual protection of the prior evidentiary standard and the definitive preliminary chamber decision. The absence of the expert report cannot be invoked on any ground in the trial phase regarding the regularity of the referral. The problem of applying Art. 10 as amended through invocation of the *lex mitior* principle remains open and follows the regime analysed below.

A2 — Indictment before 13 May 2024, with the preliminary chamber procedure not finalised on 26 February 2026

This situation might appear assimilable to Category C, since the preliminary chamber procedure is ongoing at the date of publication of HP no. 430/2025. The assimilation is however erroneous: the standard of regularity of a procedural act is determined by reference to the norm in force at the time of the act. Law no. 126/2024 could not impose a retroactive obligation on an investigating authority that issued the indictment before its entry into force, and HP no. 430/2025 interprets a norm that did not exist at that time. The preliminary chamber judge will therefore find the referral regular in the absence of the expert report and order the commencement of trial, leaving the *lex mitior* question to be resolved in the trial phase.

In Category A cases where the defendant invokes *lex mitior* and requests the benefit of Art. 10(2) sentence I, a structural impossibility arises in the current normative framework. The accounting expert report takes in practice several months — sometimes a year or more — making it structurally impossible for the report to reach the file before the first hearing. The cause for halving the penalty from Art. 10(2) sentence I thus becomes

⁴⁸ Judgment no. 30/2026, Prahova Tribunal (see fn. 41), legal basis: Art. 371 CPC related to Art. 346(3)(a) CPC, interpreted in conformity with Art. 6(3) of Directive 2012/13/EU and Art. 47 of the Charter of Fundamental Rights of the European Union, as interpreted by CJEU C-282/20, *ZX v. Bulgaria*. Direct application — not mere conforming interpretation — represents an element of procedural novelty.

⁴⁹ Judgment no. 30/2026, Prahova Tribunal (see fn. 41): "To consider that the lack of individualisation can be remedied by an expert report would mean admitting that the court can adjudicate an undetermined accusation, subsequently establishing its exact contours through evidence, which is incompatible both with Art. 371 CPC and with the standard of detailed information enshrined in Art. 6(3) of Directive 2012/13/EU."

objectively and definitively inapplicable for any defendant in Category A, not because of the defendant's conduct, but exclusively because of the absence of transitional provisions in Law no. 126/2024. A constitutional exception could target Art. 10(2) of Law no. 241/2005 as amended by Law no. 126/2024, in relation to the absence of any transitional norm, through reference to Art. 15(2) and Art. 21(3) of the Constitution — a form of unconstitutionality by legislative omission, recognised in the CCR's case law.

Until a possible intervention by the CCR or the legislator, the practically reasonable solution is for the court to order the expert report immediately upon the defendant's manifestation of intent to pay, and to treat the hearing immediately following the submission of the report as the reference hearing for the application of Art. 10(2) sentence I, through a teleological and *pro reo* interpretation. This interpretation has no direct normative support, but it is the only one that preserves the effectiveness of the more favourable norm and prevents the absence of transitional provisions from functioning as a sanction attributable to the defendant rather than the legislator.

7.2. Category B — Indictments issued between 13 May 2024 and 26 February 2026, with a definitive preliminary chamber decision

For cases in which the preliminary chamber judge has already issued a definitive decision before the publication of HP no. 430/2025, *res judicata* retains its effect. The trial has commenced with the potential absence of the expert report validated by a definitive decision. The trial court cannot reopen the question of the regularity of the referral on the basis of HP no. 430/2025. However, if the accusation remains unclear and the damage undetermined, the trial court may invoke European Union law, independently of the *res judicata* of the preliminary chamber decision.

The problem of applying Art. 10 as amended arises in Category B cases in identical terms to those analysed for Category A. The trial court will be able — and, insofar as the defendant invokes *lex mitior*, will be required — to order the expert report during the trial. The expert report ordered in the trial phase will not remedy the irregularity of the indictment — which remains covered by *res judicata* — but will serve exclusively to determine the damage to the standard required by Law no. 126/2024. The structural impossibility analysed for Category A reproduces identically in Category B, with the same consequences for the effectiveness of Art. 10(2) sentence I and with the same argument in favour of a constitutional exception.⁵⁰

The most serious situation — and with the greatest procedural costs — is that of Category B cases in which the absence of the expert report has generated an accusation whose damage remains unclear or undetermined. By "procedural damage" the author means the definitive deprivation of the defendant of the possibility of exercising a substantive right recognised by law, caused by an omission in the investigation phase that can no longer be remedied subsequently.⁵¹ This connects, through Art. 6(3) of Directive 2012/13/EU as interpreted in Case C-282/20, *ZX v. Bulgaria*, to the right to receive detailed information about the accusation, independently of the preliminary chamber's *res judicata*.⁵²

7.3. Category C — Indictments after 13 May 2024, with the preliminary chamber procedure not finalised on 26 February 2026

Category C covers two distinct situations, united by the same procedural effect: the preliminary chamber judge is obliged to find the irregularity of the referral document and to proceed pursuant to Arts. 345-346 CPC.

The first situation concerns indictments issued between 13 May 2024 and 26 February 2026 for which the preliminary chamber procedure was not definitively finalised at the date of publication of HP no. 430/2025. The interpreted norm was in force at the time the indictment was issued, and the binding ruling covers the ongoing procedure. From 26 February 2026, all preliminary chamber judges seized with such cases are obliged to find the irregularity and to remit the case to the prosecutor.

The second situation concerns indictments issued after 26 February 2026. These are subject to HP no. 430/2025 directly and uncontroversially. A prosecutor who issues an indictment without an expert report after

⁵⁰ HP no. 430/2025, operative part, corroborated with HP no. 69/2023, par. 91 and 94, and with HCCJ — RIL Panel Decision no. 17 of 5 October 2015: the damage in tax evasion cases consists of principal and accessory tax debts established pursuant to tax legislation, its determination requiring a specialist fiscal and accounting analysis that exceeds the ordinary evaluative competence of judicial bodies.

⁵¹ HP no. 430/2025, par. 91.

⁵² HP no. 430/2025, par. 79.

this date acts with full knowledge of the consequences, and the preliminary chamber judge has no margin of appreciation. An essential distinction that judicial practice explicitly formulates is that the specialised expert report verifies facts already determined, so it cannot substitute for the lack of concrete determination of the accusation. If the accusation is unclear and the damage undetermined, ordering the expert report in the trial phase does not solve the problem, and remittal to the prosecutor remains the only effective remedy.⁵³

8. Conclusions

The analysis undertaken confirms and extends the thesis that Decision HP no. 430/2025 represents the interpretation ensuring the coherence of the normative architecture of Art. 10 of Law no. 241/2005. The article makes five original contributions beyond a mere commentary on the decision. First: anchoring the argument in the legislative history documented through HP no. 69/2023, demonstrating that the need for objectivity in damage determination is a recurring problem that has required repeated legislative and judicial intervention. Second: delimiting the tripartite of evidentiary instruments — ANAF inspection report, technical assessment report, judicial expert report — and demonstrating that only the judicial expert report satisfies the normative requirement of Art. 10(2). Third: systematising the theory of mandatory evidence with substantial effect, with the three cumulative conditions that delimit the category and furnish a general criterion applicable beyond tax evasion cases. Fourth: demonstrating by deduction — not by analogy — the obligation of the expert report for the hypotheses of Art. 10(3), resolving a gap that Decision HP no. 430/2025 left open. Fifth: identifying the concept of procedural damage as an analytical instrument for Category B cases and as the principled foundation for the connection with Directive 2012/13/EU, independently of the preliminary chamber's *res judicata*.

The expected impact of these research outcomes operates on three levels. At the level of judicial practice, the theory of mandatory evidence with substantial effect and the tripartite classification of cases provide preliminary chamber judges, trial judges, prosecutors and defence counsel with a precise and operationally complete toolkit for applying Decision HP no. 430/2025. At the level of constitutional litigation, the identification of the structural impossibility affecting Category A and Category B defendants — and the consequent argument for a constitutional exception on grounds of unconstitutionality by legislative omission — opens a path for CCR intervention that could restore the effectiveness of the *lex mitior* right for defendants already in the trial phase. At the level of legal doctrine, the systematic category of mandatory evidence with substantial effect has the potential to extend beyond tax evasion cases, generating a new doctrinal instrument for the qualification of evidential omissions in the preliminary chamber procedure.

Three directions for further research emerge from this analysis. First, empirical research on the actual application of HP no. 430/2025 in the months following its publication — particularly the rate of case remittals, the duration of expert reports ordered in the investigation phase, and the impact on the duration of criminal proceedings in tax evasion cases — is needed to assess the systemic costs identified theoretically in this article. Second, the connection between the concept of procedural damage and the right to information under Directive 2012/13/EU, applied directly in the trial phase independently of the preliminary chamber's *res judicata*, deserves a dedicated study exploring its potential application in other categories of criminal cases where a mandatory investigative act conditions a substantive right of the defendant. Third, the constitutional exception identified for the absence of transitional provisions in Law no. 126/2024 requires a detailed analysis of the CCR's case law on unconstitutionality by legislative omission, in order to assess the admissibility and chances of success of such a referral. The decision retains one significant legislative gap — the cost regime for the mandatory expert report — which requires legislative intervention and which the present article cannot resolve through doctrinal instruments alone.

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⁵³ The term "mandatory evidence with substantial effect" is proposed by the author as an analytical instrument to delimit the category of evidential omissions that generate the irregularity of the indictment from ordinary evidential omissions, subject to review exclusively on grounds of merits. The category is not expressly regulated by the CPC, but is implicit in the interpretive construction of the HCCJ in HP no. 430/2025, which this article explicates and systematises.

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THE TAKING OF EVIDENCE IN PRE-TRIAL CHAMBER PROCEEDINGS. BETWEEN LEGALITY REVIEW AND THE RISK OF PREJUDICING THE MERITS

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Abstract

This paper analyzes, from both a theoretical and practical perspective, the issue of taking of evidence during the preliminary chamber proceedings, as a mechanism for vetting the legality of criminal investigation acts and the evidentiary basis of the charges. The study aims to highlight the specificities of taking the evidence in this procedural stage, as well as to define the boundaries within which the preliminary chamber judge may exercise the review of legality without encroaching upon the assessment of the substantive merits of the charge.

The analysis focuses on the conditions of admissibility, relevance, and necessity of evidence in the preliminary chamber, as well as on its role in verifying the legality of how evidence was obtained and administered during the criminal investigation phase.

Furthermore, the paper examines the practical difficulties arising from the intersection of legality and the merits of the case, highlighting the risk that, in certain situations, review exercised by the judge may take on a substantial dimension. Based on an analysis of the regulatory framework, doctrinal trends, and judicial practice, the study identifies the main challenges encountered in applying the provisions regarding the taking of evidence in the preliminary chamber and the verification by the judge of preliminary chamber of evidence-gathering by criminal investigation bodies, with critical observations and points of reflection aimed at strengthening the role of this procedure in ensuring a fair criminal trial.

Keywords: evidence, assessment, legality, verification, vetting.

1. Introduction

The preliminary chamber proceedings are configured, within the architecture of the criminal trial, as a vetting mechanism between the investigation phase and the trial phase. Its role is to ensure a controlled transition between investigative activity and the actual jurisdictional stage, by subjecting the indictment and the evidentiary material to a rigorous legality review. Within these proceedings, any irregularities affecting the criminal investigation activity are subject to examination, debate, and, where applicable, sanctioning.

The purpose of the preliminary chamber is, on the one hand, to strengthen the legitimacy and credibility of the evidence to be used at trial, and, on the other, to ensure the effective and enhanced protection of the fundamental rights and freedoms of the parties involved in the criminal proceedings.

According to Article 342 of the Code of Criminal Procedure, the scope of the preliminary chamber consists of verifying, following the referral for trial, the jurisdiction and the legality of the court's referral, as well as verifying the lawfulness of the taking of evidence and the performance of procedural acts by the criminal investigation bodies. Consequently, the preliminary chamber judge is vested with strictly defined powers, exclusively limited to the judicial review of legality over the criminal investigation activity. By establishing this procedure, the legislature sought to create an autonomous judicial framework designed to ensure, with a high degree of rigor, the verification of the legality and correctness of procedural acts prior to the case being brought before the court.

This paper aims to analyze, in particular, the verification of the legality of the taking of evidence in preliminary chamber proceedings, with an emphasis on the specific manner in which this review is carried out in judicial practice. The aim is to highlight key aspects regarding how the preliminary chamber judge, although limited by the scope and jurisdiction established by law, actually proceeds with the review of the legality of the taking of evidence. From the perspective of judicial practice, the issue arises of the risk that, during this review, the judge may exceed—even unintentionally—the limits of the legality review, encroaching upon the sphere of assessing the merit of the evidentiary material.

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In this context, this paper will address the hypothesis of a possible “contamination” of the preliminary chamber judge, in the sense of forming a preliminary opinion regarding the veracity of the charges, as a result of direct contact with the evidentiary material. This raises the core question of the study: to what extent can the preliminary chamber judge go in analyzing the evidence without exceeding the bounds of legality and entering the realm of the substantive merits? The difficulty of this distinction is compounded by the fact that, in certain situations, verifying legality requires access to the content of the evidence, which may, in practice, compromise the neutrality of the analysis.

Another key aspect of the analysis is the admission of new evidence by the preliminary chamber judge in this procedure. In this regard, this paper will examine how the preliminary chamber judge admits and examines evidence in this procedure, as well as the criteria by which the judge assesses the necessity of such evidence for verifying the legality of the evidence gathered during the criminal investigation phase or the legality of the criminal investigation authorities’ activities. The evidence adduced in the preliminary chamber is not intended to help establish the facts of the case or to support the charges, but serves exclusively to verify the legality of how the evidence was obtained and handled by the criminal investigation bodies.

The analysis of the legality of the taking of evidence represents, in this context, one of the central components of the preliminary chamber procedure, and the exercise of this power must be carried out according to the requirements established in the case law of the European Court of Human Rights, particularly with regard to respect for procedural safeguards and fundamental rights. Consequently, it is necessary to examine, from both a theoretical and practical perspective, the limits of the legality review exercised by the preliminary chamber judge, as well as the risk that this review may take on a substantial dimension, going beyond the scope of a strictly formal verification.

Closely linked to the subject matter of the preliminary chamber proceedings is the exclusion of evidence, acting as the primary consequence when the taking of evidence during the investigation phase is found to be unlawful. Thus, in the exercise of his or her duties, the preliminary chamber judge is not limited to an abstract verification of the compliance of procedural documents, but may order, according to the law, the exclusion of evidence obtained in violation of legal provisions or procedural safeguards. This prerogative gives the review of legality concrete effectiveness, transforming it into an effective mechanism for the protection of fundamental rights.

Furthermore, the exclusion of evidence gathered during the criminal investigation phase may be ordered not only as a result of the examination and assessment of the documents in the case file, but also following the submission of new evidence during the preliminary chamber proceedings. Such evidence, requested by the parties, may aim to highlight the unlawful nature of the evidence obtained by the criminal investigation bodies, including with regard to the specific methods and techniques used in the process of administering and obtaining it.

Consequently, the analysis also addresses the mechanisms through which the illegality of the taking of evidence can be demonstrated, as well as the legal effects of such a finding on the configuration of the evidence to be used during the trial phase.

2. Taking of evidence within the Preliminary Chamber. Legislative evolution and functional limits

Since the entry into force of the Code of Criminal Procedure, the preliminary chamber proceedings have undergone significant changes regarding the admissibility of evidence in this procedure, changes driven by both legislative amendments and the case law of the Constitutional Court.

In its original form, the preliminary chamber was conceived as a predominantly written procedure, in which the judge conducted a review of legality limited to examining the documents and evidence in the case file. The lack of oral proceedings and effective adversarial proceedings, as well as the restricted role of the parties, effectively precluded the possibility of presenting evidence at this stage of the proceedings, with the review being predominantly formal in nature.

This initial approach, however, was subject to substantial criticism in constitutional case law, which highlighted the need to ensure adversarial proceedings and the effective participation of the parties within this procedure.

Thus, in Decision No. 641 of November 11, 2014¹, the Court ruled that, under certain circumstances, the factual circumstances underlying the obtaining of certain evidence have direct and implicit relevance to the legality of the evidence. The inability of the preliminary chamber judge to admit new evidence or to request the submission of certain documents, as well as the absence of oral arguments regarding these issues, placed the judge in a position where he could not clarify the factual situation, a circumstance that may implicitly affect the legal analysis. From this perspective, the Court held that the outcome of the preliminary chamber proceedings regarding the lawfulness of the taking of evidence and the performance of procedural acts by the criminal investigation bodies has a direct influence on the trial on the merits, as it may prove decisive in determining the guilt or innocence of the defendant; furthermore, the Court found that the strict regulation of the preliminary chamber leads to a violation of the parties' right to a fair trial, specifically regarding its components of adversariality, orality, and equality of arms.

In light of this decision by the Constitutional Court, Law No. 75/2016² amended Article 345(1) (1) of the Code of Criminal Procedure, establishing that when ruling on motions and objections raised in the preliminary chamber, in addition to the material in the criminal investigation file, any new documents submitted may also be taken into account. In practice, the legislator has established through this amendment that only documentary evidence may be additionally admitted in the preliminary chamber.

This legislative solution was in turn criticized by the Constitutional Court, which, in Decision No. 802/2017³, invoked the case law of the European Court of Human Rights to establish the need for the parties to have the opportunity to use all means provided by law to invoke facts or circumstances in their defense, including the presentation of any evidence that would demonstrate the illegality of the evidence produced by the criminal investigation bodies. Thus, the Court ruled that although the amendment introduced by Law No. 75/2016 regulates the possibility for the parties and the injured party to challenge the evidence admitted during the criminal investigation phase, it did not provide the procedural tools or means to demonstrate the illegality of the act, so that, in order not to undermine the right to defense and the principle of equality of arms, it is necessary that, in the preliminary chamber proceedings, the verification of the legality of the taking of evidence by the criminal investigation bodies be carried out directly, in the presence of the parties and the injured party, with the possibility of presenting any means of evidence.

Currently, Article 345(1) of the Code of Criminal Procedure provides that "At the hearing scheduled according to Article 344(4), the preliminary chamber judge shall rule on the motions and objections filed, as well as on objections raised ex officio, in chambers, based on the proceedings and materials in the criminal investigation file and any other evidence, hearing the arguments of the parties and the injured party, if present, as well as those of the prosecutor."

However, the taking of evidence in the preliminary chamber is specific and limited in nature. The evidence admitted in this proceeding is not intended to establish the facts or support the charges, but exclusively to verify the legality of the taking of evidence and the conduct of the criminal investigation. In this sense, it serves an instrumental function, being subordinate to the limited scope of the proceeding.

In the specialized literature⁴, it has been noted that the preliminary chamber judge must make a clear distinction between a challenge to the legality of the evidence and a challenge to its credibility or reliability, so as not to extend the scope of the preliminary chamber to matters specific to the trial on the merits.

Therefore, the taking of evidence in this proceeding is admissible but must remain strictly limited to the purpose of the proceeding, in order to avoid transforming the preliminary chamber into a preliminary stage of the trial on the merits.

3. Verification of the legality of the taking of evidence and the admission of evidence in preliminary hearing proceedings

As we have shown, verifying the legality of the taking of evidence is one of the essential components of the preliminary chamber proceedings, as through this process the judge is called upon to determine whether the

¹ Published in the Off.Gazette no. 887 of 05.12.2014.

² Published in the Off.Gazette no. 334 of 29.04.2016.

³ Published in the Off.Gazette no. 116 of 06.02.2018.

⁴ See Kuglay in M. Udriou (coord) *Codul de procedură penală. Comentariu pe articole*, 4th ed., C.H. Beck Publishing House, Bucharest, 2023, p. 2252.

evidence gathered during the criminal investigation phase was obtained and used in compliance with the provisions of criminal procedure, the right to defense, and the specific safeguards of a fair trial.

The review conducted by the preliminary chamber judge does not concern the probative value of the evidence or its ability to support a conviction, but exclusively the legality of how it was obtained and handled in the case.

The preliminary chamber judge, according to his strict powers, must distinguish between two aspects, which from a practical perspective may be confused: on the one hand, the legality of the evidence, which concerns compliance with the legal conditions for its collection and administration, and, on the other hand, the merit of the evidence, which concerns its persuasive force and its relevance in establishing the factual situation. The latter does not fall within the jurisdiction of the preliminary chamber judge; it belongs to the trial phase itself, where the evidence is subject to adversarial debate among the participants in the criminal proceedings and to the free and direct assessment of the trial court.

At this stage, it is not the responsibility of the preliminary chamber judge to assess the relevance, conclusiveness, or usefulness of the evidence already gathered by the criminal investigation bodies from the perspective of the merits of the case. Its analysis is limited to determining whether the evidence was obtained and produced in a lawful and fair manner.

When, during the preliminary hearing proceedings, the parties or the injured party submit a request for evidence, the judge must verify whether such evidence is admissible, useful, and necessary in light of the limited scope of the proceedings. At this stage, the proposed evidence is not admitted to prove the existence of the offense, the defendant's guilt, or the groundlessness of the charge, but rather to demonstrate or clarify an alleged illegality that occurred during the criminal investigation phase.

Consequently, the criterion of the evidence's utility in the preliminary chamber has a specific connotation. Evidence is useful not because it can contribute to ascertaining the truth in the sense of establishing the merits of the charge, but because it can clarify the circumstances relevant to verifying the legality of the criminal investigation or the challenged evidentiary procedure. Usefulness thus relates to the evidence's ability to demonstrate the existence of a procedural irregularity, a violation of the right to defense, an unjustified interference with fundamental rights, or the use of illegal techniques to obtain evidence.

The admissibility of the evidence proposed in the preliminary hearing must, in turn, be analyzed in relation to the purpose of the proceedings. Not every piece of evidence requested by the parties may be granted, but only that which is directly related to verifying the legality of the taking of evidence or the conduct of criminal investigation acts. A request for evidence that is, in reality, intended to challenge the merits of the accusation, re-evaluate the credibility of a witness, or demonstrate the insufficiency of the evidence must be rejected as exceeding the scope of the preliminary chamber.

The judge may not admit evidence of an exploratory nature, formulated in general terms, or lacking a minimum of justification. The party requesting the taking of evidence must indicate, at least in substance, which aspect of illegality it seeks to prove and how that evidence can help clarify that aspect. In other words, the evidence must be necessary for resolving a question of legality, not merely convenient for the party's procedural strategy.

The preliminary chamber procedure cannot be transformed into an early trial on the merits. The risk of such a transformation arises especially when, under the guise of invoking procedural irregularities, the parties actually seek to submit to the judge issues concerning the credibility of the evidence, its probative value, or the coherence of the charges. However, these issues may be examined in the preliminary chamber only if they are inextricably linked to the legality of how the evidence was obtained or produced.

The admission of evidence in the preliminary chamber may be justified when a party alleges the existence of unfair practices in the taking of evidence. This category may include, for example, entrapment to commit an offence, the use of manoeuvres likely to affect the free will of the person being questioned, the obtaining of statements through pressure, or the use of procedures that evade legal safeguards. In such situations, the evidence requested in the preliminary chamber is not intended to prove the non-existence of the act, but rather to demonstrate that the evidence was obtained through means incompatible with the legality and fairness of the criminal proceedings.

From a practical standpoint, in order to decide whether proposed evidence is useful and necessary for verifying legality, the preliminary chamber judge must understand the subject of the criticism and the connection

between the requested evidence and the alleged irregularity. This operation inevitably involves some reference to the content of the documents and evidence in the case file.

However, the analysis must not turn into an assessment of the merits of the charge. The judge must not ask whether the evidence proposed in the preliminary chamber is capable of changing the decision on the merits, but whether it is capable of clarifying the legality of how the evidence was obtained.

The evidence taken in the preliminary chamber proceedings has an instrumental and limited function. It serves to verify the legality of the evidence gathered during the criminal investigation phase and may, if relevant violations are found, justify the exclusion of evidence obtained or taken unlawfully. This function explains why the standard of analysis is different from that applicable during the trial phase: the aim is not to ascertain the judicial truth in the sense of establishing guilt, but to protect the criminal proceedings against the use of evidence tainted by legal defects.

4. The scope of verification of the legality of evidence in the Preliminary Chamber

The scope of the preliminary chamber judge's review of the legality of the taking of evidence remains a significant practical and doctrinal controversy.

Over time, the role of the preliminary chamber judge has been debated, particularly in cases involving evidentiary procedures that interfere with fundamental rights (technical surveillance, home searches, etc.). Thus, the question has arisen as to whether this review must be limited to verifying the formal conditions for authorizing and taking evidence, or whether it may also include an examination of the substantive grounds that justified the use of such procedures.

Legal doctrine⁵ has held that the prevailing trend in judicial practice is restrictive in nature, meaning that the preliminary chamber judge cannot go beyond a strictly procedural review, limited to the jurisdiction of the judicial body, the existence and validity of the authorization documents, as well as compliance with the legal requirements regarding form and duration. According to these courts, an analysis of substantive elements—such as the existence of reasonable suspicion, the necessity, or the proportionality of the measure—would amount to an assessment of the merits, which is inadmissible at this stage of the proceedings.

However, legal doctrine has also developed the view⁶ that the preliminary chamber must verify both the “legality” and the “merits” of the authorization of evidentiary procedures. According to this approach, the preliminary chamber judge should verify not only the formal compliance of the authorization documents but also the existence of elements that effectively justify the use of those measures.

In this regard, a series of arguments have been presented. A first argument in support of this view is that the distinction between “legality” and “substantiation,” established in case law, finds no explicit support in the regulation of evidentiary procedures. An analysis of the legal provisions shows that the authorization of measures such as technical surveillance, search, or other infringements of fundamental rights is conditioned not only on the fulfillment of procedural requirements but also on the existence of substantive elements, such as reasonable suspicion, necessity, and proportionality of the measure. However, these conditions cannot be excluded from the scope of legality, as they are an integral part of the requirements imposed by law for the validity of the evidentiary procedure.

It was then shown that limiting the review to purely formal aspects would lead to an incomplete and, in certain situations, ineffective verification. If the preliminary chamber judge were prevented from examining the existence of reasonable suspicion or the proportionality of the interference, the review of legality would become a mere formality, devoid of any real substance.

Thus, it would be possible for a highly intrusive measure to be retained in the evidence solely because it formally meets the authorization requirements, even if, in practice, it was not justified. Another important argument in support of this view stems from the need to ensure effective review of interferences with fundamental rights. In the area of technical surveillance measures, for example, it has been emphasized that the verification must be comprehensive, covering both formal and substantive requirements. In the absence of such a possibility, the defendant would be deprived of an effective remedy against unjustified interference, which would amount to an impermissible restriction of the right to a defense and the right to a fair trial. In other words, if the analysis of substantive conditions could not be carried out either during the criminal investigation phase,

⁵ See B. Micu, *Camera preliminară*, Hamangiu Publishing House, Bucharest, 2022, p. 49.

⁶ See R. Slăvoiu, *Verificarea legalității procedurilor probatorii în camera preliminară*, in *Dreptul* no. 1/2018, p. 147-155.

or in the preliminary hearing, or subsequently during the trial phase, this would lead to a situation where certain evidentiary procedures escape any real control.

From this perspective, the author has shown that the concept of legality must be understood in a broad sense, encompassing all the conditions imposed by law for the ordering and execution of an evidentiary procedure. Thus, the verification of legality cannot be limited to the existence of the authorization order or to formal compliance with it, but must also address the grounds that justified its issuance.

The proposal is not to transform the preliminary chamber into a full-fledged trial on the merits, but merely to recognize that certain elements traditionally considered to pertain to the merits are, in reality, components of legality when the law establishes them as conditions for ordering the measure. Therefore, the analysis of these elements would not constitute an exceeding of the jurisdiction of the preliminary chamber judge, but rather a correct application of the legal provisions.

I concur with this view, as the broad interpretation of the concept of legality in certain situations appears to be not only justified but necessary. A rigid demarcation between legality and merits, although established in theory, proves difficult to maintain in practice and, in certain situations, even artificial. Cases arising in judicial practice reveal that there are instances in which the legality of the taking of evidence cannot be meaningfully assessed without at least some reference to the substantive elements that justified the ordering of the evidentiary procedure. As correctly emphasized in the opinion cited above, regarding intrusive means of evidence, the conditions of legality inherently include elements such as the existence of reasonable suspicion, necessity, and proportionality of the measure. However, excluding these elements from the scope of review would reduce the verification of legality to a purely formal exercise, devoid of effectiveness. This controversy is not accidental but reflects a certain lack of coherence in criminal procedural law. The law does not provide a complete and clearly defined framework in all situations; there are areas of overlap between institutions and even genuine legislative gaps. Under these circumstances, the attempt to maintain an absolute separation between legality and merits risks ignoring the reality of how procedural mechanisms function and leading to formalistic solutions, to the detriment of the effective protection of fundamental rights.

The view expressed above, with which I concur, is also significantly supported by the reasoning of Constitutional Court Decision No. 244/ 2017⁷ issued with reference to the provisions of Article 145 of the Code of Criminal Procedure, which did not allow the person subject to technical surveillance—who did not have the status of a defendant—to challenge the legality of the measure.

This Decision highlights the need for effective review of technical surveillance measures, as a form of interference in private life. In this regard, the Court held that there must be an a posteriori review of these measures, allowing the person concerned to verify not only the formal compliance with legal provisions but also the fulfillment of all conditions provided by law for their ordering and execution.

However, since the Constitutional Court held that the provisions of Article 145 of the Criminal Procedure Code were unconstitutional precisely due to the lack of an effective mechanism for a posteriori review of technical surveillance measures in cases where the subject of the surveillance was not indicted — a review that must address not only formal aspects but also elements pertaining to their justification, such as necessity and proportionality — it is all the more imperative to recognize such a review in the case of a defendant subject to these measures who has been indicted. To accept the contrary would lead to an inconsistent outcome, in which the very person against whom the criminal proceedings have advanced to a later stage would enjoy a lower level of protection. Therefore, verifying compliance with legal conditions necessarily involves analyzing the elements justifying the interference, namely the necessity and proportionality of the measure in a democratic society. In the absence of this possibility, the review would become illusory, and the right of access to justice and the right to an effective remedy would be devoid of content.

Another distinct issue, particularly sensitive in the context of verifying the legality of the taking of evidence, is the scenario of entrapment.

According to Art. 101 of the Criminal Procedure Code “(1) The use of violence, threats, or other means of coercion, as well as promises or inducements for the purpose of obtaining evidence, is prohibited. (2) Interrogation methods or techniques that impair a person’s ability to recall and recount, in a conscious and voluntary manner, the facts constituting the subject matter of the evidence may not be used. This prohibition applies even if the person being interrogated consents to the use of such interrogation methods or techniques.

⁷ Published in the Off.Gazette no. 529 of 06.07.2017.

(3) Judicial authorities and any persons acting on their behalf are prohibited from inciting a person to commit or to continue committing a criminal offense for the purpose of obtaining evidence.”

To the extent that a defendant brought to trial claims in the preliminary chamber proceedings that judicial bodies or persons acting under their coordination determined or decisively influenced the defendant’s conduct, the question arises as to whether and under what conditions such a circumstance may be taken into account in the preliminary chamber proceedings.

Entrapment constitutes a serious violation of the principle of fairness in the taking of evidence, as the State cannot artificially create the criminal situation it subsequently seeks to punish. In this sense, a finding of entrapment does not merely concern the credibility of the evidence, but the very legality of the manner in which it was obtained. Given this situation, the first issue that arises is how the defendant can prove, during the preliminary chamber proceedings, that entrapment occurred during the criminal investigation phase. In the absence of an express provision, such proof may be established by requesting the taking of evidence capable of demonstrating the active role of judicial authorities or their collaborators in inducing the criminal conduct.

The admissibility of such evidence must be analyzed in relation to the purpose of the preliminary chamber proceedings. Although, at first glance, invoking entrapment might be characterized as a defense on the merits, in reality it may have direct relevance regarding the legality of the taking of evidence. To the extent that it is demonstrated that the evidence was obtained through provocative behavior by the authorities, it becomes incompatible with the requirements of a fair trial and, consequently, subject to exclusion. The major difficulty, however, lies in the position of the preliminary chamber judge, who is called upon to analyze such a claim without exceeding the limits of his or her jurisdiction. Thus, the question arises as to whether assessing the existence of an entrapment requires an analysis of legality or one of merit.

Of course, proving this situation of illegality can be done by any means of evidence, and audio-video recordings, documents, witnesses, etc., may be requested.

In this regard, in judicial practice⁸ during the preliminary chamber, entrapment was analyzed as a violation of the principle of legality and fairness in the taking of evidence in a case where the defendant was indicted for committing high-risk drug trafficking offenses, essentially holding that, following an investigative operation conducted by the criminal prosecution bodies, using an undercover investigator and an authorized collaborator, the defendant offered prohibited substances and was subsequently found in possession of a significant quantity of drugs intended for sale.

During the preliminary chamber proceedings, the defendant argued that the evidence had been obtained unlawfully, claiming that the entire criminal activity had been instigated by the judicial bodies, through the investigator and the authorized collaborator. In this regard, it was argued that there were no prior concrete indications of the defendant’s involvement in drug trafficking, and that the initiative for the transaction did not originate with him, but was instigated by the collaborator. It was also argued that the entire investigation was the result of active participation by the judicial bodies in the commission of the offense, in violation of the provisions of Article 101(3) of the Code of Criminal Procedure, which prohibit inciting a person to commit an offense for the purpose of obtaining evidence.

To substantiate the alleged illegalities raised by the defendant, he requested that the preliminary chamber judge admit certain evidence, namely the hearing of the undercover investigator and the authorized collaborator, as well as the conduct of investigations regarding the status of the informant and any benefits from which the informant might have benefited. In this case, the preliminary chamber judge, in light of the purpose of the preliminary chamber proceedings as regulated by Article 342 of the Code of Criminal Procedure, rejected the requests to take evidence, finding that the motions and objections raised could be resolved based on the material in the criminal investigation file, without the need for additional evidence.

In analyzing the arguments raised by the defendant regarding provocation by the criminal investigation bodies, the preliminary chamber judge held that the defendant’s allegation that he was provoked into committing the offense of which he is accused cannot be upheld. In the preliminary chamber judge’s assessment, the actions of the criminal investigation bodies cannot be considered to have led to the initiation of the defendant’s criminal activity, but rather conformed to it; the investigative activity remained, proportionally,

⁸ Order of divestiture (of jurisdiction) no. 66 din 12.03.2026, Satu Mare Tribunal, available at <https://rejust.ro/juris/3g9e649g8> last time consulted on 14.03.2026.

within the limits of undercover operations rather than falling within the scope of the activities of agents provocateurs.

The preliminary chamber judge held that certain cumulative conditions must be met for the undercover investigator's activities to be considered passive conduct that does not constitute entrapment, conditions which were cumulatively met in this case: a) There must be reasonable suspicion that a person is participating in an offence, this suspicion arising from the existing complaint documents in the case—regarding this condition, the preliminary chamber judge noted that at the time the criminal investigation began, the defendant's involvement in drug trafficking had come to the attention of the criminal prosecution bodies and was already under their scrutiny, and his conduct could justify a reasonable suspicion regarding the pre-existence of criminal activity. Furthermore, there was reasonable suspicion that the defendant had not become involved in such drug trafficking activities by accident; at the time of the ex officio referral, there was information that the defendant was part of a specialized criminal group, and he was using a Facebook account to sell high-risk drugs, namely crystal meth; b) the activity of the criminal investigation authorities was authorized according to the law – regarding this condition, the preliminary chamber judge held that the activity carried out by the undercover investigator and the collaborator took place under the conditions and within the limits authorized by the prosecutor's order dated June 3, 2025 as part of the evidentiary procedure involving authorized participation in operations concerning drugs and psychoactive substances, for the purpose of obtaining evidence; c) the undercover investigator did nothing other than offer the defendant an opportunity, a routine occasion—in this case, the preliminary chamber judge held that the undercover investigator-informant acted within the limits authorized by the prosecutor, the defendant being the one who offered the authorized informant the quantity of 2.19 g of 3-CMC, and he was the one who set the price.

At the same time, the preliminary chamber judge also noted that the defendant's criminal intent was not created by the actions of the judicial bodies, as they had well-founded reasons to suspect the defendant's illegal activities, so that the criminal investigation bodies acted within the scope of a bona fide investigation through which a "normal" opportunity was created for the defendant to commit an offence.

Consequently, the preliminary chamber judge found that the actions of the judicial bodies were carried out for the sole purpose of gathering evidence, and not with the intent of unfairly inciting the commission of a criminal act; thus, the defendant's allegations regarding the existence of entrapment are entirely implausible.

The preliminary chamber judge emphasized that the actions of state agents and their collaborators merely provided the defendant with an opportunity to commit a new criminal offense, and thus did not violate the principle of fair administration of evidence or the right to a fair trial; consequently, the judge held that, in this case, the orders to continue criminal investigation proceedings and to initiate criminal prosecution are not affected by any procedural defect and no grounds for illegality can be established in this regard.

Finally, the preliminary chamber judge noted that during the criminal investigation, procedural rules were not diverted from their purpose, having been used to substantiate the criminal charges rather than to incite the commission of offenses. The investigative methods and strategies employed by the investigation bodies were used within the scope of their legal authority to gather evidence regarding the facts under investigation, and not to provoke the defendant into committing offences. Thus, given the dates on which the criminal investigation bodies claim the acts were committed (June 3, 2025, November 9, 2025) of which the defendant is accused, it cannot be considered that the criminal investigation was conducted in violation of the principle of fairness of evidence or that the defendant was provoked to commit offences. Furthermore, the judge noted in his reasoning that the hearing of the undercover investigator and the collaborator, as well as the issuance of the letter to DIICOT regarding the outcome of the complaint filed by the defendant, are irrelevant in light of the evidence presented in the case (witnesses) during the criminal investigation. Thus, it was held that the evidence requested during the preliminary chamber proceedings is not useful for resolving the case, which is why it was also rejected at the court hearing.

In my opinion, the analyzed decision clearly highlights the practical difficulty in preliminary chamber proceedings of distinguishing between the exclusive review of legality and the assessment of the merits of the charge. Although the preliminary chamber judge starts from the correct premise that the scope of the proceedings is limited to verifying the legality of the taking of evidence and the conduct of criminal investigation acts, the actual analysis carried out regarding the entrapment appears to exceed, at least in part, this framework. Thus, in order to reject the defendant's argument regarding the existence of entrapment, the preliminary chamber judge did not limit himself to a formal verification of the authorization of the undercover investigator

and the collaborator or to checking compliance with the limits of the authorization. On the contrary, it examined the existence of reasonable suspicion, the defendant's prior conduct, his alleged involvement in drug trafficking, the fact that he allegedly supplied the prohibited substances, and that he allegedly set the price of the transaction. However, such elements no longer concern exclusively the regularity of the evidentiary process, but inevitably touch upon the factual basis of the charge. In this context, it can be observed that the preliminary chamber judge ends up using, to exclude the hypothesis of entrapment, reasoning that presupposes a certain assessment of the defendant's conduct. Statements such as that the judicial authorities' activity "conformed" to an already existing criminal activity or that the defendant merely benefited from a "common opportunity" to commit the offence may be perceived as going beyond the analysis of legality and as approaching a preliminary assessment of the merits of the charge. In such a scenario, the risk is not merely that of an overly broad analysis, but of forming a preliminary judicial opinion regarding the existence of the act and the defendant's conduct.

The decision cited above confirms that entrapment represents one of the borderline situations in which legality and merit inevitably intersect. Although one might say that entrapment is a matter of legality, since it concerns the fairness of the taking of evidence and the express prohibition provided for in Art. 101(3) of the Code of Criminal Procedure, its analysis in the preliminary chamber proceedings is risky and difficult. The line between assessing legality and assessing merit is fine. In this context, the question legitimately arises as to whether it is appropriate for such an issue to be resolved in the preliminary chamber proceedings or whether, on the contrary, it should be reserved for the trial phase. On the one hand, examining the challenge at this stage serves the preliminary chamber's filtering function, allowing for the exclusion of evidence obtained unlawfully before it influences the decision on the merits. On the other hand, the deeply factual nature of this institution and the need for a detailed analysis of the specific circumstances of the case create the risk that the preliminary chamber judge may exceed the limits of its jurisdiction and carry out, even implicitly, an assessment of the merits of the charge.

Precisely for this reason, this matter confirms the idea that the distinction between legality and merit is not always rigid, and in certain situations, the review of legality inevitably takes on a substantive dimension. I believe that such an analysis should be conducted with great caution. The preliminary chamber judge may and must verify whether the evidence was obtained through entrapment, but the judge's reasoning must avoid wording that anticipates the defendant's guilt or that validates, prior to the trial on the merits, the existence of criminal conduct. Otherwise, the preliminary chamber proceedings risk becoming not only a filter for legality, but also a forum where the outcome of the case on the merits is foreshadowed, even if only indirectly.

In conclusion, entrapment confirms, perhaps more than any other legal institution, that the distinction between legality and the merits of the case, although necessary at a theoretical level, cannot be maintained in absolute terms in judicial practice, requiring a nuanced approach tailored to the specifics of each case.

A key aspect regarding the exclusion of illegally obtained evidence is the current wording of the provisions of Article 102(2) and (3) of the Criminal Procedure Code, as amended by Law No. 201/2023. According to these provisions, evidence obtained unlawfully may not be used in criminal proceedings, and the nullity of the act ordering or authorizing the taking of evidence, or by which it was taken, results in the exclusion of the evidence and the removal from the case file of the evidence corresponding to the excluded evidence. This legislative solution has a dual significance. On the one hand, it penalizes violations of the rules governing the taking of evidence. On the other hand, it aims to prevent any subsequent contact by the judge with evidence affected by legal defects. In this way, exclusion is not merely a declaratory sanction but creates an appearance and an effective guarantee of impartiality, in the sense that the judge will not be influenced, even indirectly, by the content of illegally obtained evidence.

The effects of the exclusion of evidence are not limited to its mere removal from the case file, but may even influence the structure of the charge. In the event that, following a verification of legality, the preliminary chamber judge excludes one or more pieces of evidence, without this measure affecting the entire body of evidence, the judge orders, pursuant to Art. 345(3) (3) of the Criminal Procedure Code, that the case be returned to the prosecution so that the prosecutor may assess whether to maintain the indictment or request the return of the case.

Thus, the preliminary chamber judge is not in a position to assess whether the remaining evidence is sufficient to support the indictment and to refer the case to trial. Such an assessment would inevitably entail an analysis of the merits of the charge, which exceeds the limits of its jurisdiction. For this reason, the procedural

mechanism established by law requires that, following the exclusion of evidence, the prosecutor—as the party bringing the criminal action—be the one to decide whether to maintain the order to refer the case to trial.

The preliminary chamber judge cannot order the commencement of the trial without the prosecutor expressing his position following the exclusion of evidence, as this would implicitly validate the sufficiency of the remaining evidence, thereby making an assessment regarding the merits of the charge. This is evident from Article 346(3)(c) of the Criminal Procedure Code, which provides that the preliminary chamber judge will return the case to the prosecution if the prosecutor requests its return, under the conditions set forth in Article 345(3), or fails to respond within the time limit specified in those provisions.

This mechanism confirms the functional distinction between the powers of the preliminary chamber judge and those of the prosecutor, as well as the legislator's concern to prevent the judge from ruling, even indirectly, on the sufficiency of the evidentiary material.

Regarding the issue under consideration, we emphasize that the taking of evidence in preliminary chamber proceedings—requested by the parties precisely to demonstrate the illegality of evidence obtained during the criminal investigation phase—helps to identify legal defects and, consequently, to exclude such evidence. The effect of such a solution is not merely formal, but may have a direct impact on the substance of the charge, either by weakening the evidentiary basis or by leading to the case being remanded to the prosecutor's office.

In this context, the manner in which motions to admit evidence in the preliminary chamber are worded takes on particular importance. The parties must precisely identify the alleged irregularity, the evidence by which it can be proven, and the connection between the requested evidence and the subject matter of the preliminary hearing. In such a situation, the preliminary chamber judge faces a difficult balancing act: they must remain within the bounds of legality review, but at the same time allow for the taking of evidence necessary for that review to be effective.

Therefore, even if the preliminary chamber judge does not assess the merits of the evidence, the effects of verifying the legality of its collection may indirectly influence the structure of the indictment and the subsequent course of the criminal trial. This reality confirms that, in practice, the distinction between legality and merit is not absolute, and the preliminary chamber remains a procedural space where this tension is constantly present.

5. Conclusions

The taking of evidence in preliminary chamber proceedings is an essential element in ensuring the effectiveness of the review of legality over criminal investigation activities.

The evidence admitted in the preliminary chamber is not intended to help establish the facts or support the prosecution's case, but rather serves an instrumental function, being intended solely to verify how the evidence was gathered during the criminal investigation phase. It is precisely this function that gives the preliminary chamber procedure the character of a genuine filtering mechanism, insofar as, through this evidence, the judge can identify and sanction violations of procedural rules or fundamental safeguards.

However, the analysis revealed that the preliminary chamber judge is in a difficult position, being called upon to strike a delicate balance between the need for effective review of legality and the obligation not to exceed the limits of its powers.

In many situations, verifying the legal violations alleged by the parties and the injured party involves a reference, even if indirect, to factual elements that approach the merits of the charge. This reality creates the risk that the legality review may take on a substantial dimension, and that the judge may be exposed to the danger of forming, even unintentionally, a preliminary opinion on the merits of the case.

The effectiveness of the legality review depends not only on the legal framework but also on the parties' ability to identify irregularities and propose relevant evidence to prove them, as well as on the judge's willingness to admit the evidence necessary to conduct a substantive—rather than merely formal—review.

The preliminary chamber procedure remains an essential institution in the architecture of criminal proceedings, but, at the same time, one marked by significant practical difficulties. The rigidity of certain legal provisions, the lack of clear guidelines in distinguishing between legality and soundness, and the complexity of specific situations can transform this stage, in certain cases, into a process that is more formal than effective.

Under these circumstances, the question legitimately arises as to whether the preliminary chamber procedure, in its current form, always succeeds in fulfilling its role as a genuine filter of legality or whether, on

the contrary, it risks becoming, in certain situations, a formal stage, insufficiently adapted to the complexity of the issues it is called upon to solve.

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CHILD SEXUAL ABUSE MATERIAL (CSAM): AN ANALYSIS OF ART. 374 CP IN LIGHT OF DIRECTIVE 2011/93/EU AND THE LANZAROTE CONVENTION

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Abstract

This study analyses the offence under art. 374 CP from the perspective of European standards on combating the sexual exploitation and sexual abuse of minors, with particular emphasis on Directive 2011/93/EU and the Lanzarote Convention. The research proceeds from the premise that the traditional term “child pornography” no longer adequately reflects the legal, social and criminological nature of the phenomenon, since the materials targeted by criminalisation are not merely obscene products, but forms through which the sexual abuse of minors is represented, preserved, circulated and perpetuated. From this perspective, the use of the concept of child sexual abuse material (CSAM) allows for a more accurate understanding of the protected legal interests and of the seriousness of the criminalised conduct.

The study examines the extent to which the current regulation of art. 374 CP complies with European requirements from a terminological, systematic and normative standpoint. It addresses the main forms of criminalised conduct - production, possession, acquisition, storage, distribution, making available and accessing such materials - as well as the issue of sexual performances involving minors. The analysis also engages, to a limited extent, with the debate concerning the protected legal interest of the offence, in the sense that, although the provision is placed in Title VIII of the Criminal Code, its substantive purpose is to protect minors against sexual exploitation and continuous victimisation.

Particular attention is paid to the digital environment, self-generated material involving minors, intentional or accidental access, and simulated, manipulated or AI-generated material. Finally, the study draws on comparative-law benchmarks and formulates de lege ferenda proposals for adapting Romanian criminal law to the CSAM paradigm.

Keywords: *child sexual abuse material, CSAM, child pornography, art. 374 CP, sexual exploitation of minors, sexual abuse of minors, Directive 2011/93/EU, Lanzarote Convention, AI - artificial intelligence.*

1. Introduction

The offence under art. 374 CP is currently undergoing conceptual and normative reassessment. Although the Romanian Criminal Code continues to use the marginal heading “child pornography”, recent developments in European and international law show that this terminology is no longer fully adequate to describe the phenomenon at issue. What is criminalised is not, in essence, a form of pornography in the ordinary meaning of the term, nor merely obscene content, but a range of conduct through which the sexual abuse or sexual exploitation of a minor is produced, recorded, stored, transmitted, accessed or perpetuated.

From this perspective, the concept of child sexual abuse material (CSAM) provides an analytical framework that more accurately reflects the legal and criminological reality of the phenomenon. Terminology is far from marginal. Legal scholarship has shown that the debate on “child pornography” is, in reality, a debate about language, the definition of the offence, criminal sanctions and social consequences, since the terms used influence both the perception of the phenomenon and the delimitation of the criminalised conduct¹. Similarly, it has been observed that the term “child pornography” is inappropriate, as it may suggest an analogy with adult pornography, although such materials do not express a form of consensual sexuality, but rather document or reproduce the sexual abuse of a child².

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¹ Hessick, Carissa Byrne. “Introduction.” In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016, p. 1-16 <http://www.jstor.org/stable/j.ctt1gk08jr.4>.

² Cassell, Paul G., James R. Marsh, and Jeremy M. Christiansen. “Not Just ‘Kiddie Porn’: The Significant Harms from Child Pornography Possession.” In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. <http://www.jstor.org/stable/j.ctt1gk08jr.11>.

The use of the CSAM concept shifts the focus from the apparently obscene nature of the material³ to the harm caused to the child and to the continuing victimisation generated by the circulation of such materials. The image, recording or representation is not merely the object of criminal conduct, but becomes the means through which the abuse is preserved, multiplied and reactivated.

This change of perspective is confirmed by the main European instruments applicable in this field. Directive 2011/93/EU⁴ and the Lanzarote Convention⁵ do not treat child pornography as a mere manifestation contrary to public morals, but as a form of sexual abuse and sexual exploitation of children, imposing on States obligations concerning criminalisation, prevention, victim protection and cooperation. In the same vein, the interpretative documents adopted within the Council of Europe recommend the use of CSAM terminology precisely in order to avoid minimising the seriousness of the acts and to place the child at the centre of legal protection⁶.

In Romanian criminal law, Article 374 of the Criminal Code covers a plurality of forms of conduct: producing, possessing, acquiring, storing, distributing, making available and accessing materials, as well as certain conduct relating to the participation of minors in sexual performances. This normative diversity raises issues not only of terminology, but also of the structure of criminalisation, the proportionality of the sanctioning regime and the adaptation of the law to new forms in which the phenomenon manifests itself in the digital environment. At present, computer systems, online platforms and electronic communications networks are no longer merely an incidental means of commission, but the predominant framework in which CSAM materials are produced, distributed and accessed.

An analysis of Article 374 of the Criminal Code cannot avoid the issue of the protected legal interest of the offence, especially since the provision is placed in Title VIII of the Criminal Code, which concerns offences affecting social coexistence. However, in the present study, this issue is not the main object of inquiry, but rather a necessary reference point for a broader assessment of the compatibility of the Romanian regulation with the CSAM paradigm. To the extent that the protected value is understood by reference to the minor used for sexual purposes or represented in such materials, it also becomes necessary to reconsider the terminology, the structure of criminalisation and the applicable legislative solutions.

The topicality of this research is also reinforced by the existence of a legislative proposal to amend Article 374 of the Criminal Code, which seeks to abandon the term “child pornography” and to rethink the offence around the notion of child sexual abuse material. This initiative confirms the need for a broader discussion on how Romanian criminal law should respond both to new European standards and to the challenges generated by self-generated material involving minors, accidental access, simulated representations, manipulated images and AI-generated content.

Accordingly, the present study aims to analyse Article 374 of the Criminal Code in light of Directive 2011/93/EU and the Lanzarote Convention, with a view to identifying the limits of the current regulation and possible directions for reform. The methodology used is doctrinal and normative-comparative, based on the analysis of domestic law, relevant European instruments, interpretative documents and recent literature on the CSAM phenomenon. The purpose of the research is to formulate benchmarks for a clearer, more proportionate and more appropriate regulation, capable of ensuring the effective protection of children against sexual exploitation and sexual abuse.

2. Article 374 of the Criminal Code in its current form: normative architecture and difficulties of application

2.1. The current normative configuration

In its current form, Article 374 of the Romanian Criminal Code regulates the offence of “child pornography” through a broad structure, covering several categories of criminalised conduct within the sphere of criminal

³ Păun Costică, în V. Dobrinioiu și alții (coord.), *Noul Cod penal comentat. Partea specială*, Ed. a III-a, Ed. Universul Juridic, București, 2016, p. 938.

⁴ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, <https://eur-lex.europa.eu/legal-content/RO>.

⁵ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, <https://rm.coe.int/1680084822>.

⁶ Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse Adopted by the Interagency Working Group in Luxembourg, 28 January 2016, <https://www.unicef.org/media/66731/file/Terminology-guidelines.pdf>.

wrongdoing. The provision starts from a principal form, laid down in paragraph (1), which criminalises the production, possession, acquisition, storage, display, promotion, distribution and making available, by any means, of pornographic materials involving minors.

In addition to this principal form, Article 374 of the Criminal Code separately regulates conduct relating to pornographic performances involving minors⁷. On the one hand, it sanctions inducing or recruiting a minor for the purpose of participating in such a performance, obtaining benefits from such a performance or exploiting the minor for its performance; on the other hand, it sanctions the viewing of pornographic performances in which minors participate. The provision thus seeks to cover both the conduct of the person who attracts or exploits the minor in a sexual activity that is transmitted or displayed, and the conduct of the person who consumes such content.

The regulation also contains an aggravated form, applicable where the acts referred to in paragraph (1) are committed through a computer system or by another means of storing computer data. It also criminalises unlawful access to pornographic materials involving minors through computer systems or other means of electronic communication, provisions through which the legislature sought to adapt the norm to the digital environment.

At the same time, the provision establishes an aggravating regime for certain circumstances that increase the seriousness of the acts. Thus, the special limits of punishment are increased where the acts are committed by a family member or by a person cohabiting with the victim, by a person in whose care, protection, education, custody or treatment the minor was placed, or by a person who abused a position of trust or authority over the minor. The aggravation also applies where the act endangered the life of the minor or where the offender has previously committed certain offences against sexual freedom and integrity against a minor, offences of child pornography or offences of pimping involving a minor.

Another important component of the provision is the criminalisation of a request made by an adult to a minor to record, produce, distribute, display or transmit images, videos or other pornographic materials depicting that minor in sexually explicit conduct or credibly simulating a minor engaged in such conduct. This hypothesis reflects the legislature's concern with conduct involving solicitation or grooming, including in the digital environment.

Finally, Article 374 of the Criminal Code includes the definition of pornographic materials involving minors and of pornographic performance, as well as a provision on the punishability of attempt. Pornographic materials involving minors are defined by reference to the depiction of a minor, or of an adult presented as a minor, engaged in sexually explicit conduct, as well as to representations that credibly simulate a minor engaged in such conduct or to the representation of a child's genital organs for sexual purposes. A pornographic performance is defined as a live display addressed to an audience, including by means of information and communication technology, of a child engaged in sexually explicit conduct or of the child's genital organs for sexual purposes.

II.2. Difficulties of application and limits of the current provision

This normative architecture shows that Article 374 of the Criminal Code does not criminalise a single form of conduct, but rather a set of acts connected with the production, preservation, circulation, accessing and consumption of pornographic materials involving minors, as well as with the exploitation of minors in pornographic performances. The breadth of the provision is justified by the complexity of the phenomenon. However, its current wording raises a number of difficulties of application and normative limits, which will be analysed below. These concern not only the terminology used, but also the internal coherence of the criminalisation, the proportionality of the sanctioning regime and the ability of the norm to respond to present technological realities, in accordance with the relevant European and international instruments.

A first difficulty concerns the terminology itself. The marginal heading "child pornography", as well as the expressions "pornographic materials involving minors" and "pornographic performance", keep the provision within a paradigm close to adult pornography and to the obscene nature of the material. Yet, where minors are concerned, the legal issue does not lie in the obscenity of the content, but in the use of the minor in a sexual context and in the perpetuation of the harm through the production, preservation, accessing or circulation of the material. In addition, the alternating use of the terms "minor" and "child" within the same article is questionable from the standpoint of terminological consistency, especially in an area in which the norm must be as clear and foreseeable as possible.

⁷ See Art. 374 para. (1¹) and para. (1²) Criminal Code.

Beyond the marginal heading of the offence, one of the main difficulties concerns the lack of internal coherence of the sanctioning regime, since Article 374 paragraph (1) of the Criminal Code subjects forms of criminalised conduct with different degrees of danger and seriousness to the same penalty.

In its current form, production, possession, acquisition, storage, display, promotion, distribution and making available are sanctioned uniformly, although they do not have the same significance within the economy of the criminal phenomenon. The production of the material has the highest degree of seriousness, since it lies at the origin of the entire circuit: without the creation of the material, the subsequent conduct consisting in possession, storage, distribution, promotion, display, making available or accessing would have no object. Promotion and display, in turn, involve an additional degree of danger compared with the mere preservation or transmission of the material, since they increase the visibility of the content and facilitate its dissemination. By contrast, acquisition, possession and storage mainly express the maintenance of the material within the criminal circuit, while distribution and making available ensure its circulation to other persons. Therefore, the problem with the current provision is not that it criminalises these forms of conduct, but that it subjects them to the same sanctioning regime, without reflecting the differences in seriousness between them.

Another difficulty concerns the classification of the use of a computer system as an aggravated form. Under the current regulation, the commission of the acts referred to in paragraph (1) through a computer system or by another means of storing computer data attracts a more severe penalty. This solution was understandable at a stage when the digital environment could be regarded as a particular mode of commission. At present, however, in the field of child sexual abuse material, computer systems are no longer an exceptional circumstance, but the ordinary framework in which materials are produced, stored, transmitted, distributed and accessed. In these circumstances, the aggravated form risks becoming the typical form of commission, thereby weakening the distinction between the basic form and the aggravated form and affecting the coherence of the sanctioning regime.

A separate problem arises from the use of the expression “other means of electronic communication”. This expression is not defined in the Criminal Code or in the Code of Criminal Procedure and is used in isolation in Article 374 of the Criminal Code, which may generate uncertainty as to its scope of application. In an area in which materials may be accessed, transmitted or stored through messaging applications, online platforms, cloud services, social networks or encrypted channels, the criminal-law norm must use clear, foreseeable and technologically neutral terminology. In the absence of such clarification, the application of the provision risks depending excessively on the interpretation of judicial authorities.

As regards the content of paragraph (1¹), which sanctions inducing or recruiting a minor for the purpose of participating in a pornographic performance, obtaining benefits from such a performance or exploiting the minor for the production of pornographic performances, it may be observed that these alternative modalities of criminalisation do not include the hypothesis of coercing the minor. This omission is debatable, since the European standard distinguishes between inducing or recruiting a child to participate in pornographic performances and coercing or forcing the child to participate in such performances. Moreover, in terms of seriousness, coercion represents a more severe form of interference with the minor’s freedom and should be expressly reflected in the content of the norm. The absence of such a reference may generate difficulties of legal classification or may require the judicial authority to rely on other criminalisation provisions, although the conduct naturally belongs to the sphere of the exploitation of minors in sexual performances.

The same area also includes the problem of delimiting Article 374 of the Criminal Code from the offence of trafficking in minors. Paragraph (1¹) uses notions such as recruitment, obtaining benefits and exploitation of the minor, elements which form part of the constituent content of trafficking in minors. Where the minor is recruited or exploited for the purpose of participating in pornographic performances, the question may arise whether the act should be classified exclusively under Article 374 of the Criminal Code, within the sphere of trafficking in minors, or as a concurrence of offences. The difficulty is not purely terminological, but concerns the delimitation of the scope of the norms and the avoidance of overlaps between criminalisation provisions.

A separate perspective concerns the grooming of minors for sexual purposes, referred to in the specialist literature as grooming. The current paragraph (3²) concerns the act of an adult who requests a minor to produce or transmit materials depicting that minor. The criminalisation provision does not, however, cover the hypothesis in which the request concerns materials relating to another minor, nor the hypothesis in which the perpetrator is himself or herself a minor. In addition, an issue of proportionality arises where the request, not followed by the production of the material, is sanctioned more severely, by imprisonment from 5 to 12 years, than certain

completed forms of conduct relating to materials already produced, which are punishable by imprisonment from 3 to 10 years. From the perspective of the logic of criminal law, conduct consisting in solicitation should not ordinarily receive a more severe sanctioning regime than the completed form of the principal conduct.

A particular problem concerns situations in which minors are involved as perpetrators or recipients of self-generated materials. The current provision does not offer sufficient criteria for distinguishing between conduct involving exploitation, coercion, manipulation or non-consensual distribution and situations in which minors close in age and maturity produce, possess or transmit, in a private and consensual setting, materials concerning themselves exclusively. Yet a modern regulation must avoid both the impunity of abusive conduct and the disproportionate criminalisation of minors in situations that rather call for measures of protection, education and prevention.

With regard to simulated, manipulated or AI-generated materials, the legal text raises additional difficulties. The current definition of pornographic materials involving minors includes representations which, although they do not depict a real person, credibly simulate a minor engaged in sexually explicit conduct. However, the norm does not expressly refer to materials generated by artificial intelligence systems, nor does it distinguish between situations in which the image of a real minor is altered, combined or integrated into a representation of a sexual nature.

The difficulty is not merely terminological, but concerns the delimitation of different technical hypotheses, with distinct consequences for legal classification and proof. Materials generated or manipulated by artificial intelligence may include representations based on the image of a real minor, representations combining features derived from several persons, entirely artificial but realistic representations, or materials in which an adult is presented as a minor. Where there is an identifiable real minor, the harm caused to that minor is direct, even if the act represented did not take place in reality. Where the material is entirely artificial, the difficulty shifts towards establishing the credible nature of the representation and delimiting the scope of protection of the criminal-law norm. In addition, judicial authorities may encounter difficulties in distinguishing real materials from artificially generated ones, which may affect both the identification of victims and the proof of the constituent elements of the offence.

Another problem concerns the definition of pornographic performance. The current text refers to a live display addressed to an audience, which may generate restrictive interpretations in the case of transmissions made to a single person, especially by digital means. In the field of protecting minors against sexual exploitation, the seriousness of the conduct does not depend on the public nature of the display, but on the involvement of the minor in a live sexual activity, regardless of the number of recipients.

Finally, Article 374 of the Criminal Code does not separately regulate tools facilitating the commission of such acts, such as computer programs, guides, manuals, instructions or other materials designed for producing, accessing, distributing or concealing the materials. This absence is relevant in the digital environment, where the criminal circuit is supported not only by the materials themselves, but also by infrastructures for access, anonymisation, avoidance of detection or content generation.

Therefore, the current form of Article 374 of the Criminal Code has the merit of covering a broad spectrum of conduct, but remains dependent on a normative architecture built on partially outdated terminological and technical premises. Its shortcomings concern terminology, the gradation of the forms of criminalised conduct, the regime of accessing, the treatment of situations involving minors, the definition of technologically generated or manipulated materials, the configuration of online performances and the criminalisation of facilitating tools.. These difficulties justify a reassessment of the provision not merely through a change of name, but through a coherent reconstruction within the CSAM paradigm.

3. The Protected legal interest of the offence and its relevance to the CSAM paradigm

The analysis of Article 374 of the Criminal Code within the paradigm of child sexual abuse material cannot be separated from the issue of the protected legal interest of the offence. Although this issue is not the main focus of the present research, identifying the protected social value is indispensable for understanding why the traditional formula of “child pornography” is insufficient and why the concept of CSAM more accurately reflects the legal nature of the act⁸.

⁸ see Nicolae-Cătălin Magdalena, *The Legal Object of the Crime of Child Pornography – Between the Protection of the Person and the Protection of Public Order*, *Universul Juridic Magazine* no. 4/2026.

The placement of Article 374 of the Criminal Code in Title VIII of the Criminal Code, devoted to offences affecting relations concerning social coexistence, may suggest that the principal protected value is public order, public morals or decency. Such a conclusion would, however, be incomplete. The systematic positioning of the norm is an indication of legislative technique, but it cannot prevail over the concrete content of the criminalisation. In the case of Article 374 of the Criminal Code, the central element is not the indecent nature of the material, but the use of the minor for sexual purposes and the circulation of representations that express, preserve or reactivate a form of abuse or exploitation.

The view has also been expressed in legal scholarship that Article 374 of the Criminal Code would rather tend to sanction conduct regarded as profoundly immoral, which would create only a potential risk - and one insufficiently supported by empirical evidence - for children who might become subjects of child pornography in the future⁹. Such an interpretation naturally starts from the placement of the provision within the category of offences against public order and peace and from the abstract nature of the danger associated with the circulation of such materials. However, it cannot satisfactorily explain all the situations criminalised by Article 374 of the Criminal Code, especially those in which the material concerns a real minor, whether identifiable or subsequently identifiable, or those in which the production, distribution, storage or accessing of the material prolongs the effects of the initial abuse. In such cases, the issue is not merely the repression of immoral conduct or the prevention of a future risk, but the protection of a person already affected by being used in a sexual context and by the maintenance of the material within the criminal circuit.

This perspective is confirmed by the evolution of international and European instruments. Directive 2011/93/EU treats child pornography within the broader context of the sexual abuse and sexual exploitation of children, while the Lanzarote Convention includes it within the measures designed to protect children against sexual exploitation¹⁰. Consequently, criminalisation cannot be satisfactorily explained solely by reference to the protection of collective morality. The protected value must be related, first and foremost, to the freedom, sexual integrity, dignity and development of the minor.

In this logic, the minor is not a mere contextual element of the offence, but the substantive reference point of criminal-law protection. The materials covered by Article 374 of the Criminal Code are not mere media of an obscene nature, but means through which the child is represented or used in a sexual context. Even where the act does not involve direct contact between the perpetrator and the minor, the conduct may contribute to maintaining the criminal circuit and prolonging the harmful effects. For this reason, the protected legal interest of the offence must be understood by reference to the protection of the minor against being used for sexual purposes, and not merely by reference to public order in the abstract sense.

An essential element of this criminalisation is the continuing nature of the harm, namely revictimisation. In the case of materials involving minors, the harm is not exhausted at the moment when the material is produced. On the contrary, through each subsequent act of storage, distribution, making available or accessing, the material may reactivate the consequences of the initial abuse and keep the minor in a state of exposure and vulnerability. This reality is also emphasised in the documents of the Lanzarote Committee, which show that child sexual abuse material may continue to circulate online long after the abuse has been committed, being difficult to remove and generating an additional form of harm¹¹.

The same perspective is also supported in legal scholarship. It has been shown, on the one hand, that the possession and subsequent viewing of images are not neutral forms of conduct in relation to the victim, but may cause harm in themselves, through the repeated invasion of privacy and the reactivation of the trauma generated by the initial abuse¹². On the other hand, the harm caused by such materials is not limited to the physical or psychological harm generated at the moment of their production, but also includes harm to dignity: by its very

⁹ Sergiu Bogdan, Doris Alina Șerban, *Criminal Law. The special part. Crimes against Patrimony, Against Authority, Corruption, Service, Forgery and Against Public Order and Tranquility*, Universul Juridic Publishing House, 2020, p. 590.

¹⁰ Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Lanzarote, 25 October 2007.

¹¹ Lanzarote Committee, *Interpretative Opinion on the Applicability of the Lanzarote Convention to Sexual Offences against Children Facilitated through the Use of Information and Communication Technologies (ICTs)*, adopted by the Lanzarote Committee on 12 May 2017, <https://www.coe.int/en/web/children/adopted-documents-and-activity-reports>.

¹² Cassell, Paul G., James R. Marsh, and Jeremy M. Christiansen. "Not Just 'Kiddie Porn': The Significant Harms from Child Pornography Possession." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. <http://www.jstor.org/stable/j.ctt1gk08jr.11>.

existence and circulation, the material turns the child into an object of the gaze and sexual use of others. From this perspective, not only the producer, but also those who receive, possess, view or contribute to the circulation of the material participate in maintaining an interference with the dignity and private life of the child represented¹³.

This idea explains the connection between the protected legal interest and the terminological shift. If the material is viewed merely as an obscene product, the analysis remains confined to the paradigm of public morality. If, by contrast, it is viewed as child sexual abuse material, the focus shifts to the affected child and to the effect of continuing victimisation. In this sense, the CSAM paradigm is not merely a correction of language, but a consequence of the reassessment of the protected social value.

The issue becomes more complex in the case of simulated, manipulated or AI-generated materials. The analysis must distinguish between at least three situations: materials generated on the basis of the image or features of a real minor, real materials concerning existing but unidentified minors, and entirely artificial representations of non-existent minors¹⁴. In the first situation, the connection with the victim is direct: even if the act represented did not occur in reality, the child's image is used in a sexual context. Technology changes the manner in which the material is created, not the harm caused to the minor.

In the case of real materials concerning unidentified minors, the difficulty does not concern the nature of the protected value, but proof and victim identification. The fact that the minor cannot be individualised in the course of criminal proceedings does not transform the protected value into a collective one. Behind the material there remains a real child, and the impossibility of identifying that child cannot alter the nature of criminal-law protection. The Lanzarote Committee also emphasises the difficulty of the victim-identification process and the need for international cooperation in cases involving materials distributed through information and communication technologies¹⁵.

More difficult is the case of entirely artificial representations, which do not correspond to a specific minor. It might be argued that, in the absence of a real victim, the basis of criminalisation shifts towards public morality. Such a conclusion would, however, be premature. Even in this situation, the material reproduces the image of the child as the object of conduct of a sexual nature, may fuel demand for real materials and may contribute to the normalisation of the use of minors for sexual purposes. Recent literature on AI-generated materials shows that they should not be treated as a harmless substitute for real materials, but as a phenomenon that forms part of the same logic of consumption and symbolic exploitation of the child¹⁶.

Accordingly, the emergence of AI-generated materials does not require abandoning the thesis that the protected value has a personal character, but only nuancing it. Where there is an identifiable real minor, the personal character of the protection is direct. Where the minor is real but unidentified, the personal character remains, even if protection is confronted with evidentiary difficulties. Where the representation concerns a non-existent minor, the connection with the protection of the person becomes mediated, but does not disappear entirely, since the criminalisation remains oriented towards protecting the child against sexual exploitation and against being represented as a sexual object.

This conclusion is also supported by the recent guidance of the Lanzarote Committee, which draws attention to offences facilitated by emerging technologies, including materials generated or modified by artificial intelligence¹⁷. Recent developments in European Union law point in the same direction, tending to treat

¹³ Rogers, Audrey. "The Dignitary Harm of Child Pornography—From Producers to Possessors." In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. <http://www.jstor.org/stable/j.ctt1gk08jr.10>.

¹⁴ Parti Katalin, and Judit Szabó. 2024. The Legal Challenges of Realistic and AI-Driven Child Sexual Abuse Material: Regulatory and Enforcement Perspectives in Europe. *Laws* 13: 67., p 1 <https://doi.org/10.3390/laws13060067>.

¹⁵ Lanzarote Committee, The protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs): Addressing the challenges raised by child self-generated sexual images and/or videos, 10 March 2022, p. 72, <https://www.coe.int/en/web/children/adopted-documents-and-activity-reports>.

¹⁶ Andresen, Claire, Artificially Generated, Genuinely Harmful: Prosecuting AI-Generated Child Sexual Abuse (July 22, 2024). *University of Hawai'i Law Review*, Volume 47, p. 55-56, Available at SSRN: <https://ssrn.com/abstract=5381736> or <http://dx.doi.org/10.2139/ssrn.5381736>.

¹⁷ Lanzarote Committee - Declaration on protecting children against sexual exploitation and sexual abuse facilitated by emerging technologies Adopted by the Lanzarote Committee at its 43rd meeting (6-8 November 2024), <https://www.coe.int/en/web/children/adopted-documents-and-activity-reports>.

artificially generated sexual representations of minors in a manner close to traditional child sexual abuse material¹⁸.

There remains, however, the issue of the placement of Article 374 of the Criminal Code in Title VIII. The fact that the protected legal interest has a personal core does not automatically entail the need to move the provision into the category of offences against the person. The norm covers very different situations: materials involving identified victims, materials involving unidentified victims, simulated representations, artificially generated content, conduct consisting in possession or accessing, and situations in which there is no direct contact with the minor. A reconstruction based exclusively on the logic of a specific injured person could create practical difficulties, especially in cases involving a large number of materials, victims located in other jurisdictions or persons who cannot be identified.

Moreover, if the full application of the norm were made conditional upon the individualisation of each victim, this would lead to an excessive rigidity of the procedural mechanism. In cases involving large archives, thousands of files or materials originating from different jurisdictions, identifying all the minors represented may be impossible or disproportionately difficult. Such a requirement could affect the effectiveness of criminal prosecution and would turn criminal-law protection into a mechanism dependent on an evidentiary element which, in CSAM cases, is frequently absent for objective reasons.

There is also the risk of revictimising the identified minor. Child sexual abuse material may circulate for a long time, in separate cases and across different jurisdictions. If every case in which the material reappears required the minor to be summoned, heard or repeatedly involved, procedural protection could turn into a new form of exposure of the victim. For this very reason, the functionality of the norm should not be made conditional, in all cases, upon the identification and procedural participation of all the children represented in the materials.

This solution does not, however, diminish the status of the identifiable minor. On the contrary, where the child represented can be individualised, that child must be recognised as a victim of the offence and as an injured party in the criminal proceedings. This conclusion is also supported by domestic provisions. Article 111 paragraph (7) of the Code of Criminal Procedure refers to the hearing of injured parties who were victims of the offence under Article 374 of the Criminal Code, while Law No. 211/2004 includes child pornography among the offences that may give the victim access to financial compensation granted by the State. It follows that the minor is not an element external to the criminalisation, but may, where identified, have the full procedural position of an injured party.

From this perspective, classifying the minor as a secondary passive subject allows the two levels of analysis to be reconciled. On the one hand, Article 374 of the Criminal Code must also operate in situations in which the victim cannot be identified, in which the materials circulate across borders, or in which the representation is simulated or artificially generated. On the other hand, where the child is identifiable, that child must be recognised as a victim directly affected by the criminalised conduct. This solution preserves the functionality of the norm without denying the personal dimension of criminal-law protection.

Therefore, maintaining Article 374 of the Criminal Code in Title VIII may be explained by reasons of legislative technique and procedural functionality. This solution should not, however, be confused with a denial of the personal dimension of criminal-law protection. Formally, the provision is placed within the category of offences concerning social coexistence; substantively, however, it is oriented towards protecting minors against being used for sexual purposes, against interferences with their dignity and integrity, and against the continuing victimisation produced by the circulation of the materials. This understanding justifies the shift from the terminology of “child pornography” to the CSAM paradigm and provides the basis for reassessing the current regulation.

4. Relevant European Standards

The European standards applicable to child sexual abuse material must be analysed thematically, according to their impact on Article 374 of the Criminal Code. Directive 2011/93/EU, the Lanzarote Convention, the

¹⁸ Amendments adopted by the European Parliament on 17 June 2025 on the proposal for a directive of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child sexual abuse material and replacing Council Framework Decision 2004/68/JHA (recast) (COM(2024)0060 – C9-0028/2024 – 2024/0035(COD)). The ordinary legislative procedure has not been completed, and the act is not, at this stage, a directive in force. https://www.europarl.europa.eu/doceo/document/TA-10-2025-06-17_EN.html.

Explanatory Report to the Convention and the documents of the Lanzarote Committee outline several main requirements: the criminalisation of the entire circuit of materials, the distinction between intentional and accidental access, the comprehensive regulation of performances involving minors, the nuanced treatment of self-generated material produced by children, the use of CSAM terminology and the adaptation of criminalisation to emerging technologies.

As regards the scope of the criminalised conduct, both the Lanzarote Convention and Directive 2011/93/EU cover the full range of operations through which materials are produced, obtained, possessed, distributed, transmitted, offered, made available or accessed. The Explanatory Report to the Lanzarote Convention clarifies the role of these forms of conduct: production is criminalised in order to combat the phenomenon at its source; offering and making available may include placing materials online or facilitating access to them; distribution and transmission involve active dissemination; acquisition entails obtaining the material; and possession is sanctioned in order to hold accountable each participant in the chain that fuels the phenomenon¹⁹. This approach is relevant for Romanian law because it confirms the need to criminalise the entire circuit of materials, but it does not justify treating all forms of conduct as equivalent in terms of seriousness.

With regard to accessing such materials, the Explanatory Report to the Lanzarote Convention states that the criminalisation of access is aimed at persons who view materials online without downloading them, so that their conduct cannot always be classified as acquisition or possession. Criminal liability, however, presupposes the intention to access a source where such materials are available and knowledge that they may be found there. The report expressly states that sanctions should not be applied to persons who accidentally access such content²⁰. In the same logic, Directive 2011/93/EU refers to knowing access. The European standard therefore requires access to be understood as a conscious act, not as the mere technical or involuntary appearance of the material on a device or in a digital stream.

As regards performances involving minors, the European instruments are not limited to criminalising the production or circulation of materials, but treat the exploitation of children in pornographic performances as a distinct matter. The Explanatory Report to the Lanzarote Convention shows that the provisions on performances concern both the organisation or facilitation of the child's participation and the conduct of the spectator, including situations involving means such as webcams²¹. Directive 2011/93/EU is relevant because it distinguishes between causing or recruiting a child to participate, obtaining profit from or otherwise exploiting the child, coercing or forcing the child to participate, threatening the child for that purpose, and knowingly attending such performances²². This structure indicates that the hypothesis of coercion, force or threat must be dealt with expressly, as a distinct and more serious form of interference with the minor's freedom.

With regard to the solicitation of children for sexual purposes, European standards provide important benchmarks for delimiting the criminalised conduct. The Explanatory Report to the Lanzarote Convention describes grooming as the process of preparing a child for sexual abuse, which may involve gradually approaching the minor, gaining the child's trust, discussing intimate matters, exposing the child to sexual material and even causing the child to produce pornographic material²³. In the original form of the Convention, the offence presupposes the proposal of a meeting and material acts leading to that meeting. Subsequently, Recommendation II-10 of the Lanzarote Committee invited States to consider criminalising the solicitation of children for sexual purposes even where it does not lead to a face-to-face meeting or to the production of child sexual abuse material²⁴. This development is important for the analysis of Article 374 paragraph (3²) of the Criminal Code, since requests made online are not always reducible to the classic scenario of a physical meeting.

With regard to self-generated material produced by children, the Recommendations of the Lanzarote Committee require a differentiated approach. Recommendation II-2 invites States to introduce explicit references in domestic law to conduct involving self-generated sexual images or videos of children and to identify

¹⁹ Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, Lanzarote, 25 October 2007, paras. 133–139; Article 20 of the Lanzarote Convention; Article 5 of Directive 2011/93/EU.

²⁰ Explanatory Report to the Lanzarote Convention, para. 140.

²¹ Explanatory Report to the Lanzarote Convention, paras. 146–150; Article 21 of the Lanzarote Convention.

²² Article 4 para 2-4 of Directive 2011/93/EU.

²³ Explanatory Report to the Lanzarote Convention, paras. 155–160.

²⁴ Lanzarote Committee, *The Protection of Children against Sexual Exploitation and Sexual Abuse Facilitated by Information and Communication Technologies (ICTs): Addressing the Challenges Raised by Child Self-Generated Sexual Images and/or Videos*, Implementation Report, adopted on 10 March 2022, Recommendation II-10.

situations in which children should not be held criminally liable or should be prosecuted only as a last resort²⁵. Recommendation II-6 requires that a child not be prosecuted for possessing his or her own self-generated material, for possessing another child's self-generated material with that child's informed consent, or for passively receiving such material²⁶. Recommendation II-8 concerns voluntary and consensual sharing intended exclusively for private use between children²⁷. Finally, Recommendation II-9 indicates that the distribution or transmission by children of self-generated material of other children, where such material qualifies as child pornography under the Convention, should be prosecuted only as a last resort²⁸.

These standards do not eliminate criminal liability in all situations involving minors. They do, however, require a distinction between cases of exploitation, coercion, manipulation, blackmail or non-consensual distribution and situations involving private interactions between minors who are close in age and maturity. From this perspective, criminal law must remain an instrument of protection, not a mechanism of secondary victimisation of the child.

From a terminological and technological standpoint, recent European documents indicate both the need to use the concept of CSAM and the need to adapt criminalisation to emerging technologies. Recommendation II-1 of the Lanzarote Committee invites States to use the term "child sexual abuse material" — CSAM — for materials that represent acts of sexual abuse of children or focus on the child's genital organs, since the term "child pornography" may be misleading and may diminish the seriousness of the acts²⁹. In its factsheet on Romania, the Committee expressly notes that Romanian legislation uses the term "child pornography" and invites Romania to use the term CSAM and to introduce an appropriate definition³⁰.

As regards new technologies, the Explanatory Report to the Lanzarote Convention is relevant in that it accepts the inclusion of simulated representations and draws attention to the rapid development of technology, which allows the production of highly realistic images³¹. The Lanzarote Committee's Declaration on emerging technologies, in turn, supports the need for criminal-law protection not to depend on the technical means used, including in the case of materials generated or modified by artificial intelligence, virtual reality or other digital tools³². The standard that emerges is one of technological neutrality: the norm must cover new forms of content creation and manipulation, without sacrificing the requirements of clarity and foreseeability.

This orientation is also confirmed by the Lanzarote Committee's recent concerns regarding emerging technologies. In its 9th Activity Report, the Committee notes the increase in AI-generated CSAM, the use of "nudifying" applications to manipulate images of children, and the use of such materials for grooming, blackmail and coercing victims into new forms of abuse³³. Similarly, the 8th Activity Report records the difficulties of distinguishing real materials from artificially generated ones and the need to clarify the legal regime of AI-generated images, including in relation to manuals or exchanges of instructions concerning the creation of such materials³⁴.

It follows, therefore, that the European standards relevant to Article 374 of the Criminal Code may be summarised in several concrete requirements: the criminalisation of the entire circuit of materials; the differentiation of conduct according to seriousness; the distinction between intentional and accidental access; the inclusion of coercion, force and threat in the field of performances; the nuanced regulation of self-generated material produced by children; the use of CSAM terminology; and the adaptation of the norm to simulated, manipulated or technologically generated materials. These benchmarks constitute the criteria against which the current Romanian regulation and the need for its amendment must be assessed.

²⁵ *Idem*, Recommendation II-2.

²⁶ *Idem*, Recommendation II-6.

²⁷ *Idem*, Recommendation II-8.

²⁸ *Idem*, Recommendation II-9.

²⁹ *Idem*, Recommendation II-1.

³⁰ Lanzarote Committee, *Factsheet – Romania. The Protection of Children against Sexual Exploitation and Sexual Abuse Facilitated by Information and Communication Technologies (ICTs): Addressing the Challenges Raised by Child Self-Generated Sexual Images and/or Videos*, updated March 2025, section II, *Legal Frameworks*.

³¹ *Explanatory Report to the Lanzarote Convention*, paras. 142–144.

³² Lanzarote Committee, *Declaration on Protecting Children against Sexual Exploitation and Sexual Abuse Facilitated by Emerging Technologies*, adopted at the 43rd meeting of the Lanzarote Committee, 6–8 November 2024.

³³ Lanzarote Committee, *9th Activity Report of the Lanzarote Committee*, covering the period 16 February 2024 – 6 March 2025, adopted on 6 March 2025, pp. 7–8, 17–20.

³⁴ Lanzarote Committee, *8th Activity Report of the Lanzarote Committee*, covering the period 3 February 2023 – 15 February 2024, adopted on 6 March 2024, para. 72.

5. Comparative-law aspects concerning the regulation of CSAM

Comparative-law analysis may be used as a tool for identifying normative solutions that are useful in assessing Article 374 of the Criminal Code. From this perspective, particular relevance attaches to the terminology used, the manner in which the materials are defined, the regime applicable to the criminalised conduct, the treatment of simulated or virtual representations, and the existence of exceptions or grounds for non-punishment.

From the standpoint of terminology, European legal systems do not offer a uniform solution. Some systems still retain formulas close to “child pornography”, while others use notions closer to the idea of sexual representation of minors or child sexual abuse material. Austrian law is relevant in this respect, since the regulation contained in § 207a StGB concerns representations involving minors and includes both situations relating to production, transmission, acquisition and making available, and situations concerning knowing access. This structure shows a concern to cover the entire circuit of materials, without reducing the analysis to mere possession or distribution³⁵.

In terms of the structure of criminalisation, several systems differentiate forms of conduct according to their seriousness. Production, distribution, making available, possession and accessing are therefore not treated as perfectly equivalent modalities. In German law³⁶, for example, the provisions of §§ 184b–184e StGB distinguish between pornographic content involving children and pornographic content involving young persons, as well as between dissemination, production, acquisition, possession and access by means of internet communication. This differentiation allows for a more nuanced criminal-law response, depending on the age of the person represented, the real or realistic nature of the content and the specific conduct of the perpetrator. From this perspective, the German model confirms that criminal-law protection can cover a broad range of acts without subjecting all modalities to the same sanctioning regime.

A differentiated structure is also found in Croatian law. Article 163 of the Croatian Criminal Code³⁷ sanctions both attracting, recruiting or encouraging a child to participate in the production of child pornography, and knowingly producing, offering, making available, distributing, acquiring, possessing or accessing child pornography. At the same time, where the act is committed by coercion, threat, deception, abuse of power or by exploiting a relationship of dependency, the sanctioning regime becomes more severe. This solution is relevant for Romanian law, as it shows that the legislature may distinguish between conduct relating to the circulation of materials and conduct involving direct intervention upon the minor.

French law³⁸ offers another relevant example. Article 227-23 of the French Criminal Code sanctions the making, recording or transmission of the image or representation of a minor where it is pornographic in nature, as well as the offering, dissemination, import or export of such an image or representation. The provision deals separately with habitual consultation, or consultation in return for payment, of an online service that makes such images available, as well as with their possession or acquisition. In addition, the use of an electronic communications network for dissemination to an indeterminate public constitutes a circumstance of increased seriousness. The French solution is useful for Romanian law because it shows that accessing and repeated consumption of materials may be treated separately from production and dissemination, without being confused with them.

An area of particular comparative interest is the regulation of virtual, simulated or apparently juvenile materials. In Italian law³⁹, Article 600-ter of the Criminal Code criminalises the production or making of pornographic performances or materials through the use of minors, the recruitment or inducement of minors to participate in such performances, as well as the distribution, dissemination, offering or transfer of materials. At the same time, Article 600-quater sanctions the possession of pornographic materials produced through the use of minors, while Article 600-quater.1 extends the regulation to virtual pornography. This latter provision is of particular relevance to the topic under analysis, since it refers to images created through graphic processing

³⁵ Austria, *Strafgesetzbuch*, § 207a, § 208a and § 215a, available in the official RIS system: <https://www.ris.bka.gv.at>.

³⁶ Germany, *Strafgesetzbuch*, §§ 184b–184e, available on the official *Gesetze im Internet* portal: <https://www.gesetze-im-internet.de/stgb>.

³⁷ Croatia, *Kazneni zakon*, Art. 163 and Art. 164, available on the Croatian legislative portal *Zakon.hr*: <https://www.zakon.hr/z/98/kazneni-zakon>.

³⁸ France, *Penal Code*, arts. 227-23, 227-24, available on the official *Légifrance* portal: <https://www.legifrance.gouv.fr/codes/>.

³⁹ Italy, *Codice penale*, arts. 600-ter, 600-quater and 600-quater.1, available on the official *Normattiva* portal: <https://www.normattiva.it>.

techniques, not wholly or partly associated with real situations, but which appear to represent real situations. The Italian model confirms that criminal law may treat virtual materials distinctly, without excluding them from the scope of criminal-law protection.

The United Kingdom, in turn, offers an interesting solution through the use of the notion of “pseudo-photographs” in the Protection of Children Act 1978. This notion allows for the inclusion of images generated or manipulated so as to appear to be photographs, even if they are not real photographs. In addition, the Criminal Justice Act 1988 sanctions the possession of indecent photographs or pseudo-photographs of children, while the Coroners and Justice Act 2009 extends the regime to prohibited pornographic images of minors, including situations in which the representation may be unrealistic but the predominant impression is that of a minor⁴⁰. This model is particularly useful for the discussion concerning technologically generated or manipulated materials, as it avoids limiting criminalisation to authentic photographs or recordings.

In the same direction, Polish law⁴¹ is of interest because it criminalises created or processed images depicting a minor involved in sexual activity, even without the participation of a real minor. This solution is important for the discussion concerning artificially generated materials, since it shifts the focus from the physical existence of the victim in the act of production to the nature of the representation and to the risk it creates for the protection of minors.

In the matter of access, the legal systems analysed confirm the importance of the conscious nature of the conduct. Both German and Austrian law regulate forms of accessing or attempting to access through computer or communication means, placing emphasis on the conscious conduct of the perpetrator. In the same vein, French law sanctions habitual or paid consultation of an online service that makes pornographic materials involving minors available. These solutions confirm that accessing must be treated as a distinct form of conduct, but only where it expresses a conscious choice to access unlawful content. For Romanian law, the comparative conclusion is that the criminalisation of access should be maintained, but formulated or interpreted in such a way as to exclude accidental contact with the material.

Another comparative element concerns pornographic performances involving minors. In several legal systems, this matter is regulated separately from materials that have already been produced. Croatian law sanctions the exploitation of children for pornographic performances and treats more severely situations in which the child’s participation is obtained through coercion, threat, deception, abuse of power or exploitation of a relationship of dependency. Similarly, Bulgarian law criminalises both recruiting, assisting or using a minor for pornographic performances and forcing a minor to participate in such a performance⁴². These solutions are relevant for Romanian law, as they confirm the need for the hypothesis of coercing the minor to be expressly provided for, rather than indirectly inferred from broader notions such as recruitment or exploitation.

With regard to private, consensual and non-abusive situations, comparative law offers relevant examples of grounds for non-punishment or exclusion of liability. Austrian law provides that the production or possession of a pornographic representation involving a minor who has reached the age of 14 is not punishable where it was made with the minor’s consent and is intended for the personal use of the minor or of the person who possesses it. Liability is also excluded for the production, possession or transmission of a pornographic representation of oneself, where the minor has reached the age of 14 and the material is intended for personal use. Croatian law moves in a similar direction, providing that a child may not be punished for producing and possessing pornographic material depicting himself or herself, or himself or herself together with another child, if the material was produced and possessed with the consent of each person and exclusively for personal use⁴³. In German law, in the field of material involving young persons, liability does not apply to the production and possession of materials made with the consent of the persons represented and intended exclusively for their own use⁴⁴.

These solutions do not relativise the protection of minors and do not permit the public circulation of materials. On the contrary, they draw a line between exploitative situations — imposed production, non-

⁴⁰ United Kingdom, *Protection of Children Act 1978*, section 1; *Criminal Justice Act 1988*, Section 160; *Coroners and Justice Act 2009*, sections 62, 65 and 66, available on the official website [legislation.gov.uk](https://www.legislation.gov.uk): <https://www.legislation.gov.uk>.

⁴¹ Poland, *Kodeks karny*, Art. 202, available in the official ISAP/Sejm database: <https://isap.sejm.gov.pl/isap.nsf/>.

⁴² Bulgaria, *Criminal Code*, art. 158a, official text/English translation available through the Ministry of Labour and Social Policy: <https://www.mlsp.government.bg/uploads/1/blgarsko-zakonodatelstvo/en/criminal-code.pdf>.

⁴³ Croatia, *Kazneni zakon*, art. 163 para. (5).

⁴⁴ Austria, *Strafgesetzbuch*, § 207a para. (5); Germany, *Strafgesetzbuch*, § 184c para. (4).

consensual distribution, use for blackmail, making available to other persons — and situations in which the material remains within the private sphere of the minors involved, without elements of coercion, abuse or dissemination. For Romanian law, such models are relevant because the current Article 374 of the Criminal Code does not contain sufficient criteria for situations involving self-generated materials and private interactions between minors who are close in age and maturity. A coherent regulation should avoid both the impunity of abusive conduct and the transformation of the minor into the perpetrator of an offence in situations that rather call for protection, education and prevention.

Finally, several systems complement criminalisation with confiscation measures designed to neutralise the material and computer-related means used to commit or facilitate the acts. Croatian law provides for the confiscation of special equipment, means, computer programs or data intended, adapted or used for committing or facilitating offences concerning child pornography or pornographic performances involving minors. Bulgarian law provides for the confiscation of the object of the offence, while German law regulates the confiscation of property to which the criminal act relates.

Similar solutions are also found in Czech law⁴⁵, where objects, valuables or property connected with the act may be confiscated, in Estonian law⁴⁶, which allows the extended confiscation of assets or property obtained through crime, and in Luxembourg law⁴⁷, which provides for the mandatory confiscation of objects in the event of conviction. These solutions are particularly relevant in the digital environment, where criminal conduct is supported not only by the material itself, but also by devices, programs, data, storage media, access tools, anonymisation mechanisms or means of avoiding detection. Confiscation therefore has not only a repressive function, but also a preventive one, by eliminating the technical infrastructure that may allow the resumption or continuation of criminal conduct.

These comparative benchmarks are useful for reassessing Article 374 of the Criminal Code. They confirm that a coherent regulation must differentiate forms of conduct according to their seriousness, without placing production, possession, distribution, promotion and accessing under the same sanctioning regime. Accessing must also be built around conscious conduct, not accidental contact with the material. The definition of the materials must be sufficiently flexible to cover real, simulated, virtual or technologically manipulated representations, while the regime applicable to self-generated materials must avoid the disproportionate criminalisation of minors. Finally, comparative law shows the usefulness of complementary instruments, in particular the confiscation of the means used to commit or facilitate the act.

6. De lege ferenda proposals for the reconfiguration of Article 374 of the Criminal Code

The analysis of the current form of Article 374 of the Criminal Code, carried out by reference to European standards and comparative-law benchmarks, highlights the need for a legislative intervention broader than a mere terminological adjustment. The provision currently in force has the merit of covering a wide range of forms of conduct, but it remains built on a normative architecture that no longer fully corresponds to the reality of the phenomenon. The reform should therefore concern not only the legal language and definitions used, but also the manner in which the criminalised conduct is structured, the regime applicable to minors, adaptation to new technologies and the complementary instruments for combating the phenomenon.

The amendment should start from the marginal heading of the offence. This solution may also be justified by the requirement of accurate legal labelling of the criminalised conduct. Legal scholarship has shown that, in the field of child sexual abuse and exploitation, legal labels must reflect both the nature of the conduct and the seriousness of the harm, since imprecise terms may lead to inappropriate social perceptions and legal responses⁴⁸. Replacing the expression “child pornography” with a formula such as “operations involving child sexual abuse material” would more accurately express the nature of the criminalised conduct. The term “pornography” refers to an inappropriate logic, associated with content intended for adults and with the sphere of obscenity. By contrast, the notion of child sexual abuse material places the emphasis on the abuse, exploitation

⁴⁵ Czech Republic, *Criminal Code*, Act No. 40/2009 Coll., §§ 192–193, available on the official e-Sbirka portal: <https://www.e-sbirka.cz/sb/>.

⁴⁶ Estonia, *Penal Code*, §§ 175¹, 178, available in official version in English on Riigi Teataja: <https://www.riigiteataja.ee/en/eli/>.

⁴⁷ Luxembourg, *Code pénal*, arts. 383, 383bis, 383ter and 384, available on the official Legilux portal: <https://legilux.public.lu/eli/etat/leg/code/penal>.

⁴⁸ Leary, Mary Graw. “The Language of Child Sexual Abuse and Exploitation.” In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. <http://www.jstor.org/stable/j.ctt1gk08jr.8>.

and continuing victimisation of the child. Such an amendment would not have merely symbolic value, but would guide the interpretation of the norm towards the social value actually protected: the minor against being used for sexual purposes.

The same logic also requires a redefinition of the criminalised materials. The current text defines “pornographic materials involving minors”, but does not provide sufficiently clear regulation for the situations generated by new technologies. A definition adapted to the CSAM paradigm should include materials depicting a real minor, an adult presented as a minor, a credibly simulated minor, as well as representations of the minor’s genital organs for sexual purposes. In addition, the definition should expressly cover materials manipulated or generated by artificial intelligence, in order to avoid difficulties of legal classification in cases where the content does not directly reproduce real abuse, but credibly simulates the use of a minor in a sexual context.

Another necessary amendment concerns the structuring of the forms of criminalised conduct. The current form of Article 374 paragraph (1) of the Criminal Code places production, possession, acquisition, storage, display, promotion, distribution and making available under the same regime. Such a solution is no longer satisfactory. The production of the material should be treated as one of the most serious forms, since it lies at the origin of the criminal circuit and is, as a rule, the closest to the initial moment of the abuse or of the use of the minor for sexual purposes. Promotion and display, in turn, entail an additional degree of danger, as they increase the visibility of the material and facilitate its dissemination. Possession, storage and acquisition remain criminally relevant forms of conduct, but their contribution is different, being linked mainly to the preservation of the material and the maintenance of demand.

This differentiation is also supported in legal scholarship, where it has been shown that an undifferentiated focus on possession of materials may lead to a questionable allocation of criminal-law resources and to a distortion of the relationship of seriousness between the various forms of the phenomenon. The production of the material, its distribution and direct sexual abuse involve a higher level of danger than mere possession, which is why the criminal-law response must be calibrated according to the concrete role of the conduct in producing, circulating and maintaining the material within the criminal circuit⁴⁹.

In the matter of access, the issue is not whether criminalisation is appropriate, but how it should be delimited. Accessing should remain punishable, since it sustains demand and contributes to maintaining the circuit of materials. However, criminal law should not sanction accidental contact with CSAM, the involuntary appearance of an image in a digital stream, or automatic technical storage over which the person has no real control. Criminal liability must be based on conscious conduct: searching for, opening, viewing, maintaining access to, returning to the material, or using means that indicate an intention to access such content. Clarifying this requirement would ensure the compatibility of the provision with the principle of culpability and with the European standard of knowing access.

Particular attention should be paid to performances involving minors. The current Article 374 paragraph (1¹) of the Criminal Code criminalises inducing or recruiting a minor, obtaining benefits and exploiting the minor for the purpose of producing pornographic performances, but does not expressly mention coercion. Yet coercing, forcing or threatening the minor are distinct and more serious situations, which European standards treat separately. A comprehensive regulation should therefore expressly include the coercion of a minor for the purpose of participating in a performance involving child sexual abuse.

In the same context, the relationship between this criminalisation and trafficking in minors must be clarified. Terms such as “recruitment”, “obtaining benefits” or “exploitation” may, in certain circumstances, also fall within the scope of trafficking in minors, especially where the conduct goes beyond the strict framework of participation in a performance and involves a broader activity of exploitation. In order to avoid overlaps and non-uniform solutions of legal classification, the formula “where the act does not constitute a more serious offence” would allow the special criminalisation in Article 374 of the Criminal Code to be maintained, while also permitting the application of the more severe norm where the act fulfils the constituent elements of trafficking in minors. Such a legislative technique is already known to the Criminal Code and would preserve the obligations to transpose European standards on performances involving minors, without weakening the delimitation from more serious offences.

⁴⁹ Hessick, Carissa Byrne. “Questioning the Modern Criminal Justice Focus on Child Pornography Possession.” In *Refining Child Pornography Law: Crime, Language, and Social Consequences*, edited by Carissa Byrne Hessick. University of Michigan Press, 2016. <http://www.jstor.org/stable/j.ctt1gk08jr.9>.

The definition of performance should, in turn, be detached from the idea of public display. In the digital environment, transmission to a single person or to a restricted group may have the same seriousness as a display addressed to a broad audience, where the minor is involved in live conduct of a sexual nature. A formulation referring to display addressed to one or more persons would be better suited to current technological realities and would avoid restrictive interpretations.

As regards the request addressed to a minor, the current text concerns a request made by an adult for the production or transmission of materials concerning that minor. A more coherent regulation should also cover the situation in which the request concerns materials relating to another minor. In addition, the liability of a minor who requests such materials from another minor should be analysed, but only under strictly delimited conditions, where the conduct is abusive, exploitative, coercive or manipulative. Not every interaction between minors can be turned into an offence, but criminal liability cannot be excluded in serious cases either.

The regime of self-generated materials involving minors also calls for separate regulation. The production, possession or storage by a minor of his or her own materials should not be punishable where such materials are not intended for distribution or making available to other persons. Voluntary, consensual and private transmission between minors who are close in age and maturity must be treated differently from non-consensual distribution, sexual blackmail, threat, coercion or the introduction of the material into the public circuit. In this matter, criminal law must remain *ultima ratio*, in order to avoid turning the child into the perpetrator of an offence in situations in which he or she rather needs protection and education.

New forms of content generation and manipulation require special attention. The text must be sufficiently clear to cover situations in which the image of a real minor is altered, integrated or combined into content of a sexual nature, as well as situations in which an apparently real minor is generated without the existence of an individualisable victim. At the same time, the wording must be foreseeable and must allow the criminalised materials to be distinguished from other representations that do not fall within the scope of criminal-law protection. The issue is not the sanctioning of any artificial image, but of those materials that credibly simulate the use of a minor in sexually explicit conduct or focus on the minor's genital organs for sexual purposes.

The reform should also address instruments facilitating the commission of such acts. The digital environment involves not only the existence of the materials themselves, but also computer programs, guides, manuals, instructions, anonymisation methods or technical tools designed for producing, accessing, distributing or concealing CSAM. The criminalisation of such instruments must be formulated precisely, so as to target materials designed or adapted for criminal purposes, without affecting neutral tools or legitimate uses of technology.

Last but not least, an express confiscation regime is necessary. In the field of CSAM, confiscation does not merely serve to deprive the offender of the objects used to commit the act, but also to eliminate the means that may allow the continuation, resumption or facilitation of the conduct. Equipment, programs, storage media, tools adapted for the production or distribution of materials and proceeds obtained from the exploitation of the minor should be subject to confiscation, including confiscation by equivalent where they can no longer be found. Such a solution is all the more important in the digital environment, where technical tools may play an essential role in the production, multiplication and dissemination of materials.

Overall, the amendment of Article 374 of the Criminal Code should pursue a coherent reconstruction of the norm, not merely a punctual intervention concerning the marginal heading. The reform should ensure coherence between the terminology used, the definition of the criminalised materials, the structure of the criminalised forms of conduct and their concrete seriousness. At the same time, the text must be adapted to the realities of the digital environment by clarifying intentional access, regulating self-generated materials, including materials generated or manipulated by artificial intelligence, delimiting performances involving minors and establishing the relationship with more serious offences, such as trafficking in minors. In addition, the criminalisation of facilitating instruments and the confiscation regime must ensure the neutralisation of the means through which the phenomenon is produced, maintained or resumed. Only such an intervention can lead to a clear, proportionate regulation adapted to the current reality of the sexual exploitation of minors.

7. Conclusions

The analysis of Article 374 of the Criminal Code reveals a tension between the traditional terminology of "child pornography" and the current legal reality of the phenomenon, which concerns child sexual abuse

material. This difference is not purely linguistic. The name of the offence influences the way in which the protected social value, the seriousness of the conduct and the function of the criminalisation norm are understood.

The current text has the merit of covering a broad spectrum of conduct: production, possession, acquisition, storage, distribution, making available, accessing, exploitation in the context of performances and solicitation addressed to a minor. However, this coverage is not matched by a sufficiently coherent normative architecture. Article 374 of the Criminal Code treats in a similar manner forms of conduct with different degrees of harmfulness, maintains questionable terminological formulas and does not fully respond to the challenges generated by the digital environment, self-generated materials, performances transmitted to limited recipients and content generated or manipulated by artificial intelligence.

The protected legal interest of the criminalisation confirms the need to reassess the provision. Although the norm is placed in Title VIII of the Criminal Code, criminal-law protection cannot be satisfactorily explained solely by reference to public order or public morals. In substance, the criminalisation seeks to protect minors against being used for sexual purposes, against interferences with their dignity and integrity, and against the continuing victimisation produced by the circulation of the materials. This reality justifies the shift from the terminology of "child pornography" to the CSAM paradigm.

European standards and comparative-law benchmarks support the same conclusion: the regulation must cover the entire circuit of materials, but in a differentiated and proportionate manner. Accessing must be distinguished from accidental contact, coercion must be dealt with expressly in the field of performances, minors must not be disproportionately sanctioned in cases involving self-generated materials, and the norm must be capable of including simulated, manipulated or technologically generated representations.

Consequently, the amendment of Article 374 of the Criminal Code should pursue a normative reconstruction, not merely a change of name. The reform must correlate the legal language used, the definition of the criminalised materials, the gradation of conduct, the regime applicable to minors, the delimitation from more serious offences and the complementary instruments for combating the phenomenon, including confiscation.

Therefore, Article 374 of the Criminal Code should be retained as a central instrument of criminal-law protection of children against sexual exploitation, but reconfigured so as to reflect more clearly the nature of the phenomenon it sanctions. A modern criminalisation in this field must be precise, proportionate, technologically neutral and oriented towards the effective protection of minors, without losing sight of the requirements of legality, foreseeability and the ultima ratio character of criminal law.

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THE CONSEQUENCES OF ENGAGING THE CRIMINAL LIABILITY OF LEGAL PERSONS ON THE CRIMINAL LIABILITY OF NATURAL PERSONS

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Abstract

This paper examines the relationship between the criminal liability of legal persons and the criminal liability of natural persons under Romanian criminal law. Starting from the legislative framework established by Article 135 of the Romanian Criminal Code, the analysis focuses on whether holding a legal person criminally liable excludes, limits, or coexists with the liability of the natural person who contributed to the commission of the offence. The paper argues that Romanian law adopts a model of autonomous and parallel liability, under which the criminal liability of the legal person does not remove the individual liability of the natural person. At the same time, it highlights the doctrinal and practical controversies generated by this model, particularly in relation to the individualisation of sanctions, evidentiary difficulties, and the proportionality of cumulative punishment.

Keywords: *corporate criminal liability, criminal liability of natural persons, concurrent liability, organisational fault, ne bis in idem, compliance programmes, Romanian criminal law.*

1. Introduction

The criminal liability of legal persons is one of the most debated topics in contemporary criminal law, both in legal doctrine and in case law. Traditionally, criminal law was built around the individual offender, while collective entities were regarded as incapable of criminal guilt. However, the development of economic and financial crime has gradually required the extension of criminal liability beyond natural persons, in order to address offences committed within or through corporate structures.

The recognition of criminal liability of legal persons has therefore raised a fundamental question: what is the relationship between the liability of the legal entity and that of the natural person involved in the commission of the offence? More specifically, does the punishment of the legal person exclude the punishment of the individual perpetrator, or can both forms of liability coexist?

Under Romanian law, this issue is addressed by Article 135 para. (3) of the Criminal Code, according to which the criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act. This provision reflects the legislator's preference for a model of independent and concurrent liability. Nevertheless, the practical application of this model continues to raise important questions concerning the limits of such independence, the attribution of guilt, and the possible influence of corporate sanctions upon the individualisation of punishment imposed on natural persons.

2. Normative Framework

Under Romanian law, the criminal liability of legal persons is regulated by Art. 135 of the Criminal Code, according to which "a legal person, except for the State and public authorities, shall incur criminal liability for offences committed in its name or in its interest by natural persons acting within the scope of the legal person's object of activity or for the purpose of achieving such object of activity."

This wording highlights two fundamental aspects:

This legislative solution is consistent with European trends in the matter, numerous Member States of the European Union recognising the criminal liability of legal persons without always conditioning it upon establishing the identity of the natural person who committed the offence.¹

Furthermore, Art. 135 para. (3) Criminal Code expressly provides that "the criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act."

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¹ See J. Pradel, *Droit pénal comparé*, Dalloz Publishing House, Paris, 2008, p. 352.

This provision enshrines the principle of parallel liability, meaning that the same act may attract distinct sanctions for both the entity and the individual.

No hierarchy or order of priority is established between the two forms of liability.

Arts. 136–138 Criminal Code regulate the sanctions applicable to legal persons (criminal fine, dissolution, suspension of activity, publication of the conviction judgment, etc.).

These provisions form part of the broader European and international tendency aimed at strengthening mechanisms for holding legal persons accountable, particularly in the fields of organised crime, corruption, and economic-financial offences.

3. The Relationship Between the Criminal Liability of the Legal Person and That of the Natural Person

The engagement of criminal liability of a legal person inevitably presupposes the existence of an act or omission committed by a natural person. Such person may be a member of the management body, a representative, or even an ordinary employee acting in the name or interest of the entity. The Romanian legislator chose not to condition the liability of the legal person upon the effective identification of the natural person, thereby allowing the entity to be sanctioned even where the material perpetrator has not been discovered.

Where the natural person is identified, the issue arises concerning the relationship between the two forms of liability. Three possible approaches may thus be identified:

- Exclusion of the liability of the natural person

According to this view, sanctioning the legal person would absorb the liability of the natural person, since the collective entity becomes the exclusive holder of the unlawful conduct. This solution is, however, rarely accepted and has been criticised for leading to the impunity of those who effectively acted.²

- Conditional concurrence of liabilities

This opinion admits the simultaneous liability of both the legal person and the natural person only in certain situations, for instance where the act serves both the interests of the entity and the personal interests of the individual.³

- Unconditional concurrence of liabilities

At present, this is the solution enshrined in Romanian legislation and supported by the majority of doctrine and case law: the criminal liability of the legal person does not exclude the criminal liability of the natural person, the two forms of liability coexisting autonomously and applying independently⁴.

The preference for unconditional concurrence is justified by the distinct nature of the two types of liability: the legal person is liable for the act committed in its interest, whereas the natural person is liable for his or her own conduct. Moreover, recognising concurrence ensures the effectiveness of the sanctioning mechanism and prevents possible gaps in criminal liability.

4. The Majority Doctrine

The prevailing Romanian doctrine starts from the premise established by Art. 135 para. (3) Criminal Code, according to which engaging the criminal liability of a legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same act. In this regard, most scholars emphasise that:

This conception is supported not only by domestic case law, but also by comparative law influences (France, Italy, Belgium), where the principle of concurrence of liabilities applies. The central argument is that excluding the liability of the natural person would lead to a form of disguised impunity, thereby undermining the effectiveness of criminal law.

Example: In a tax fraud case, the Bucharest Court of Appeal (Decision no. 146A/2018) upheld the simultaneous liability of both the company and its administrator, rejecting the defence argument that sanctioning the company should lead to mitigation of the administrator's punishment⁵. Other courts

² See G. Antoniu, *Despre răspunderea penală a persoanei juridice*, Romanian Journal of Criminal Law, no. 2/2004, p. 21.

³ D. Dobrinioiu, *Drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2016, p. 428.

⁴ High Court of Cassation and Justice, Criminal Chamber, Decision No. 3824/2012.

⁵ Bucharest Court of Appeal, Criminal Decision No. 146A/2018.

consolidated the same line of reasoning, holding that the distinct nature of the liabilities excludes any form of compensation between the sanctions imposed upon the two subjects.

5. The Minority Conception

On the other hand, a minority doctrinal current, sporadically supported by certain judicial decisions, advocates for a relative mitigation of the criminal liability of the natural person where the legal person is also held liable. The arguments invoked include:

Another argument advanced in legal literature is that, in the absence of mitigation, a form of “double punishment” could arise, potentially conflicting with the case law of the European Court of Human Rights concerning proportionality and the reasonable nature of sanctions.

Example: In a corruption case, the court justified a more lenient sentence imposed upon the natural person by reference to the severe patrimonial and reputational consequences already suffered by the company, thereby reducing the necessity of a harsh sanction against the individual (Cluj Court of Appeal).⁶

6. Procedural Challenges

Criminal investigations simultaneously targeting natural persons and legal persons generate a series of practical and conceptual difficulties requiring careful handling by judicial authorities.

6.1. Establishing Individual Guilt

One recurring issue concerns the exact identification of the natural person responsible for the conduct attributed to the legal person. In practice, offences may be committed by employees lacking decision-making authority or direct representative powers. In such cases, the question arises whether liability should be attributed to such executants, to the management bodies, or cumulatively to both categories.

Furthermore, there is a risk that the criminal liability of the legal person may be based exclusively upon organisational deficiencies, while the establishment of individual guilt remains incomplete, thereby affecting the coherence of the final judicial solution.

6.2. The Principle of “Ne Bis in Idem”

Formally, the separate sanctioning of the natural person and the legal person does not infringe the principle of ne bis in idem, since the legal subjects are different. Nevertheless, in practical terms, the cumulative effect of sanctions may create the perception of excessive punishment, particularly where the same act generates both patrimonial consequences (corporate fines, confiscation measures) and personal consequences (imprisonment of the administrator). This situation raises concerns regarding legitimacy and fairness and is frequently invoked in defence arguments seeking a more lenient individualisation of punishment.⁷

6.3. Evidentiary Issues

The evidentiary regime differs significantly between natural persons and legal persons.

With respect to the legal person, guilt is often inferred indirectly from the absence of effective internal control mechanisms, tolerance of unlawful practices, or the benefit obtained by the company.

With respect to the natural person, the evidentiary threshold is stricter, requiring direct evidence of intent or negligence.

This evidentiary asymmetry may lead to paradoxical outcomes, such as the conviction of the legal person in the absence of a conviction of the natural person, or vice versa.

6.4. Difficulties of Procedural Coordination

Complex investigations involving both categories of subjects require careful administration of evidence, simultaneous summoning and hearing of legal representatives, and a clear delimitation of defence strategies. In practice, conflicts of interest frequently arise between the company and its representatives (for example, the

⁶ Cluj Court of Appeal, Criminal Decision No. 872/2019.

⁷ C. Mitache, C. Mitache, *Drept penal român. Partea generală*, Universul Juridic Publishing House, Bucharest, 2021, p. 142.

administrator may argue that he acted in the interest of the company, while the company may attempt to prove the contrary). Such situations complicate procedural strategy and may result in lengthy proceedings.

6.5. Procedural Effects upon Third Parties

Sanctioning a legal person also affects shareholders, creditors, employees, and contractual partners who are not directly involved in the proceedings. This indirect extension of consequences raises questions regarding the proportionality and fairness of the measures adopted, especially where the company continues to conduct legitimate economic activity.

7. Case Law and Doctrinal Opinions

Romanian judicial practice has firmly established the solution of concurrence of liability, courts repeatedly holding that the criminal liability of the legal person does not exclude the punishment of the natural person who contributed to the commission of the offence. For example, the High Court of Cassation and Justice held that the liability of the legal person is grounded upon the unlawful act committed by the natural person, yet retains an autonomous character, thereby justifying the simultaneous application of both forms of liability.⁸

Likewise, the Courts of Appeal have delivered similar judgments, emphasising that sanctioning only the legal person, without holding accountable the natural person directly responsible for producing the harmful result, would contradict the principle of personal responsibility in criminal matters.⁹

From a doctrinal perspective, the majority of scholars support the concurrence of liabilities. It is argued that the two forms of liability are connected through a relationship of conditioning, but not exclusion. The natural person represents the instrument through which the will of the entity manifests itself, while the concurrence of liabilities reflects the necessity of sanctioning both the individual conduct and the collective benefit obtained through the commission of the offence.¹⁰

Moreover, admitting concurrence also fulfils a preventive function, discouraging both abusive conduct by natural persons and its tolerance by legal entities.¹¹

Conversely, as previously indicated, a minority part of doctrine expressed reservations concerning concurrence, arguing that there exists a risk of double punishment for the same act, potentially conflicting with the principle of *ne bis in idem*. Nevertheless, this criticism does not appear to have been embraced either by Romanian or European jurisprudence, which has progressively consolidated the concept of autonomy of the liability of legal persons.

8. European and Comparative Jurisprudence

European Court of Human Rights (ECtHR): the Court recognised the legitimacy of corporate liability, while emphasising the necessity of respecting the proportionality of sanctions (*Paksas v. Lithuania*, by analogy concerning prohibitions).¹²

Court of Justice of the European Union (CJEU): the Court held that Member States must ensure effective, proportionate, and dissuasive sanctions against legal entities (Case C-45/08, *Spector Photo Group*).¹³

France: the French Criminal Code (Art. 121-2) enshrines parallel liability, and case law allows the simultaneous conviction of both the company and its director.¹⁴

9. Trends and Practical Recommendations

o Strengthening Compliance Programmes

At European level, judicial practice and sectoral regulations encourage companies to adopt and implement effective compliance mechanisms. Such programmes include:

⁸ High Court of Cassation and Justice, Criminal Chamber, Decision No. 3824/2012.

⁹ Bucharest Court of Appeal, Second Criminal Chamber, Decision No. 1472/2015, excerpt published in the *Romanian Review of Criminal Law*, No. 3/2016, p. 143.

¹⁰ N. Volonciu, *Tratat de procedură penală*, vol. I, C.H. Beck Publishing House, Bucharest, 2014, p. 217.

¹¹ Gh. Mateuț, *Răspunderea penală a persoanei juridice în dreptul român*, *Romanian Journal of Criminal Law*, no. 1/2010, p. 57.

¹² ECtHR, *Paksas v. Lithuania*, Judgment of 6 January 2011.

¹³ CJEU, Case C-45/08, *Spector Photo Group and Van Raemdonck*, Judgment of 23 December 2009.

¹⁴ French Criminal Code, Art. 121-2.

In France, for instance, the “Sapin II” Law expressly establishes compliance obligations in the field of anti-corruption, while in Germany the Lieferkettengesetz (Supply Chain Due Diligence Act) emphasises corporate responsibility in relation to suppliers and subcontractors. In Romania, although there is not yet a comprehensive regulation governing compliance programmes, both legal doctrine and recent judicial practice increasingly regard the existence of effective compliance mechanisms as a relevant factor in the individualisation of sanctions imposed on legal persons.

O Digitalisation and Artificial Intelligence

An emerging trend concerns offences committed through artificial intelligence systems or complex digital instruments. These raise issues of attribution of liability: who is the real perpetrator — the developer, the user, or the company’s management? In the future, an expansion of the concept of “organisational fault” may be envisaged in order to cover failures of supervision concerning emerging technologies. The European Union is already working on the AI Act, which includes provisions concerning legal liability for damages caused by AI systems.

O Liability for the Acts of Subcontractors and Contractual Partners

Globalisation and outsourcing complicate the attribution of criminal liability. In transnational corruption cases, parent companies are frequently held liable for acts committed by their partners or intermediaries. The trend in Romania also appears to be moving towards strengthening the standard of corporate due diligence, meaning the obligation to verify business partners and subcontractors.

10. Conclusions

The analysis of the relationship between the criminal liability of legal persons and that of natural persons reveals a clear option adopted by both the Romanian legislator and judicial practice in favour of the unconditional concurrence of the two forms of liability. This solution has the merit of avoiding, on the one hand, the risk of impunity of the natural person through the exclusive transfer of guilt to the entity, and, on the other hand, the risk of “exonerating” the legal person merely through the identification of the material perpetrator.

Furthermore, the solution of concurrence aligns with European and international standards promoting extended accountability of collective entities in combating economic-financial crime, corruption, and other complex criminal phenomena. Legislative models in France, Belgium, Italy, and even the United States confirm this orientation, reinforcing the idea that sanctioning only the natural person would be insufficient to combat complex criminal phenomena rooted in organisational structures.

In my opinion, double sanctioning does not infringe the principle of *ne bis in idem*, since the legal person and the natural person are not the same subject of criminal law, and liability is grounded upon different criteria and interests. The natural person is liable for his or her own conduct, whereas the legal person is liable for the benefit obtained or the interest pursued through the commission of the offence.

In conclusion, the criminal liability of the legal person should not be regarded as an alternative to, but rather as a complement of, the criminal liability of the natural person, the two coexisting within a coherent system aimed both at sanctioning the material perpetrator and the entity that tolerated, encouraged, or benefited from the unlawful conduct. Consequently, the concurrence of liabilities is not only possible, but necessary, in order to reflect the complex reality of contemporary criminal phenomena. Such an approach contributes not only to the effectiveness of criminal repression, but also to the promotion of an organisational culture based upon legality, ethics, and responsibility, through the pressure placed upon legal persons to adopt prevention and compliance mechanisms.

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THE RELATIONSHIP BETWEEN TRAFFICKING CRIME AND FORMS OF EXPLOITATION. EVOLUTION AND CHALLENGES

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Abstract

On July 1, 2024, Law no. 202/2024¹ entered into force, a normative act that provides that if the acts of trafficking in persons or minors are followed by the effective exploitation of a person, within the meaning of art. 182, the rules of concurrent offenses will apply. However, through Law no. 269/2024², which entered into force on November 3, 2024, a normative variant was introduced, among other things, into the scope of the offense of trafficking in persons and trafficking in minors, by translating pimping by coercion, respectively that committed against a minor, into the scope of the two offenses.

In this context and in order to ascertain the impact produced by the two legislative interventions in the field of preventing and combating the phenomenon of human trafficking, this article aims to treat, from an evolutionary perspective, the relationship between the crime of human trafficking and forms of exploitation, starting from the normative solutions existing in the old Criminal Code, Law no. 678/2001 on the prevention and combating of human trafficking (hereinafter, Law no. 678/2001) and the current Criminal Code, then continuing with those introduced following the amendments recently made by the Romanian Parliament through the two laws mentioned above.

In the conditions of maintaining the solution of concurrent offenses de lege lata, an aspect corroborated with the amendment made by Law no. 269/2024, this article aims to clarify whether the (recent) intention of the legislator was to (partially) invalidate the solution of the concurrence of crimes in the case of trafficking followed by sexual exploitation, by operating an absorption of the latter or, as the case may be, the intended purpose was to continue to allow the application of the norm of Law no. 202/2024 also with regard to the form of sexual exploitation, consisting in the coercion to start or continue practicing prostitution or in the case of determining or facilitating the practice of prostitution or obtaining patrimonial benefits from the practice of prostitution by one or more minors, thus being only in the presence of a legal reclassification of the form of exploitation.

Keywords: *traffic, people, report, minors, exploitation, absorption.*

1. Preliminary aspects

In the matter of human/minor trafficking, the problem at the doctrinal and jurisprudential level that was raised both in the old and the new regulation was related to the possible retention of the concurrence between the crime of human/minor trafficking and the forms of exploitation highlighted in the form of distinct crimes, such as: submission to forced or compulsory labor, forcing to practice prostitution³, exploitation of begging etc. Against the background of an increasingly high incidence of the practice of prostitution in relation to other forms of exploitation, the problem of establishing this ratio was raised especially in the case of pimping, an aspect that also led to the supreme court issuing a decision on appeal in the interest of the law.

In this context, the trafficker of persons/minors is the intermediary who makes the connection between the organized crime networks that exploit the victims and the recruited victims, being the one who uses his knowledge to identify and transport the victims to these networks, regardless of whether we are talking about domestic or international human trafficking⁴. Obviously, in such situations, the solution to the retention of the crime of trafficking in persons/minors is as obvious as possible and does not raise problems of interpretation and application, which is why we will not insist on this aspect in the present analysis.

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¹ Law for the amendment and completion of Law no. 286/2009 on the Criminal Code, published in the Official Gazette, Part I no. 607/28.06.2024.

² Law for the amendment and completion of Law no. 286/2009 on the Criminal Code, published in the Official Gazette, Part I no. 1089/31.10.2024.

³ We are considering the previous form of the absorption of procuring by coercion within the scope of human trafficking, currently, para. (2) of art. 213 CP being repealed.

⁴ R. Mocanu, *Infrațiuni din sfera criminalității organizate*, Hamangiu Publishing House, Bucharest, 2024, p. 180.

Instead, the central problem that has plagued this relationship between the crimes of trafficking in persons/minors and the forms of exploitation over time was that related to the commission by the same person of both recruitment, transportation, transfer, reception or hosting through coercion, deception, etc., and of the subsequent obligation to commit various activities (prostitution, begging, agricultural work, housekeeping, etc.). In this case, the question arose whether it is necessary to retain a plurality of crimes or, as the case may be, only the crime of trafficking in persons/minors, by absorbing the crime - which constitutes the form of exploitation - within the scope of the trafficking crime.

Analyzing the doctrine and judicial practice on both the old and the current regulation, prior to the amendment made in 2024 by Law no. 202/2024 (which requires the solution of concurrent offenses), we will be able to find that, although at the doctrinal level, the majority trend was in the sense of correctly retaining the plurality, the majority opinion in practice was in the sense of retaining the absorption thesis. Such an approach on the part of the practice came in the conditions in which the original intention of the legislator clearly aimed at the solution of retaining the concurrent offenses, an aspect confirmed, once again, by the legislative intervention operated with the entry into force of Law no. 202/2024.

Without entering into the subject of further discussion at this point, we only mention that such an approach on the part of the legislator was the correct one since the crime of human trafficking, respectively the crime of trafficking in minors, each represents an intermediary crime (a preparatory activity that the legislator, considering the danger that could follow these activities, decided to criminalize), followed most of the time by the actual exploitation of the victims⁵. Therefore, by constructing this intermediary crime, human/minor trafficking is interposed between the victim's state of freedom and the subsequent action of actual exploitation of the victim, by subjecting the victim to forced labor, subjecting the victim to prostitution, forcing the person to beg, etc.⁶.

Exploitation, required only as a special purpose pursued by the perpetrator, makes the crime of trafficking in persons/minors autonomous in relation to the acts of actual exploitation, which may be criminally sanctioned in addition to the sanction applicable for trafficking in persons/minors⁷. Therefore, if exploitation takes the form of a crime, in addition to actual trafficking, the natural solution is to withhold the concurrence with the crime-purpose, to the extent that the trafficker subsequently exploited the person in question⁸.

However, as we will see below, although such an approach was shared by the majority at the doctrinal level, the constant solution in practice was to retain only the crime of trafficking in persons/minors, considering that the forms of exploitation that take the form of distinct crimes are absorbed into the content of trafficking. However, as we will see later, this orientation of practice, towards retaining a single crime, came to be consolidated with the pronouncement of appeal Decision in the interest of the law no. XVI of March 19, 2007, artificially stopping any discussion regarding the possibility of retaining plurality.

Unfortunately, given that the texts in issue at the time of the decision had a distinct content and required an intervention related to that time, maintaining the solution retained by the supreme court and applying it superficially/artificially, with the entry into force of the Criminal Code, to normative solutions different from those envisaged by this court, led to an unjustified limitation of the sanctioning treatment in the case of the same person committing two distinct criminal conducts. Practically, although the new legal provisions imposed a cessation of the applicability of those retained by the supreme court, judicial practice unjustifiably perpetuated an approach that could no longer be supported by the new legislative reality.

⁵ In the same sense, S. Bogdan, D.A. Șerban, *Drept penal. Partea specială. Infrațiuni contra persoanei și contra înfăptuirii justiției*, 2nd ed., Universul Juridic Publishing House, Bucharest, 2020, p. 288; N. Neagu, in V. Dobrinioiu et al., *Noul Cod comentat. Partea specială*, 3rd ed, Universul Juridic Publishing House, Bucharest, 2016, p. 141; T. Toader, *Drept penal român. Partea specială*, vol. I, Universul Juridic Publishing House, Bucharest, 2019, p. 163.

⁶ R. Mocanu, *op. cit.*, pp. 171-172.

⁷ S. Bogdan, D.A. Șerban, *op. cit.*, p. 288; In the same sense, R. Mocanu, *op. cit.*, p. 199.

⁸ For such a correct solution, see HCCJ, crim. s., dec. pen. no. 3566/8.06.2005, in *Pandectele Române* no. 1/2006, available at: www.lege5.ro; This opinion is also shared by: S. Bogdan (coord.), D.A. Șerban, G. Zlati, *Noul Cod penal. Partea specială. Analize, explicații, comentarii. Perspectiva clujeană*, Universul Juridic Publishing House, Bucharest, 2014, p. 130; S. Bogdan, D. A. Șerban, *Drept penal. Partea specială. Infrațiuni contra persoanei și contra înfăptuirii justiției*, 4th ed., Universul Juridic Publishing House, Bucharest, 2024, p. 355.

2. Brief mentions regarding the forms of exploitation

Human trafficking can lead to multiple forms of exploitation: sexual, through labor [the case of child soldiers⁹, unpaid domestic servitude and forced labor in various industries - agriculture, commercial fishing, construction, hospitality, cleaning services, nail salons, begging, etc.], illegal organ harvesting or the commission of forced criminal activities¹⁰. Equally, forms of exploitation can also involve the conclusion of forced marriages, the carrying of pregnancy by other people (surrogate mothers) or the conclusion of illegal adoptions of children resulting from commercial acts.

Most of the previous examples of exploitation also meet, in our domestic law, the constitutive elements of autonomous crimes: slavery (art. 209 CP), submission to forced or compulsory labor (art. 212 CP), pimping by coercion [art. 213 para. (2) CP]¹¹, exploitation of begging (art. 214 CP) or the removal or transplantation of organs, tissues or cells of human origin from living donors without consent or obtained by coercion [art. 154 para. (1), respectively art. 156 para. (2) of Law no. 95/2006] or, as the case may be, improper participation in the commission of various crimes.

Next, we will briefly highlight, from the perspective of judicial practice, the relationship between the crime of trafficking in persons/minors and the forms of exploitation, in the situation of the commission by the same person of both the elements specific to trafficking and the forms of exploitation:

2.1. Forced labour or services

With regard to this form of exploitation, it is important to remember that statistics show that one third of victims of human trafficking are subsequently placed for labour exploitation¹². At European level, according to the Report on the progress made in the EU in combating human trafficking (fifth report) of 20.01.2025 (hereinafter, Report)¹³, this form of exploitation was the second most widespread in the EU in 2021-2022, with a percentage of 37% of all victims of human trafficking¹⁴. Among the sectors involved in this phenomenon we mention: construction, agriculture, forestry, food processing, assembly lines, hospitality, retail, car washes, beauty and cleaning services, transportation and housekeeping, and recently sectors such as: home care or medical care services or parcel delivery have appeared¹⁵.

Regarding the relationship between trafficking and this form of exploitation, in addition to the doctrinal opinions indicating the solution of the concurrent crimes between human trafficking (art. 210 CP) and submission to forced or compulsory labor (art. 212 CP)¹⁶, we can also recall a decision confirming this solution in the case of persons transported to Italy and misled regarding the situation they would have in this country, but who were forced by the same subjects to work 10-12 hours a day, being accommodated in unsanitary places and having their money and identity documents taken in order to prevent them from evading the performance of such activities¹⁷.

In the reasoning of the solution, the court held that „(...) the acts committed by the defendants T.E. and T.F. meet the constitutive elements of the crimes of human trafficking and forced or compulsory labor. As regards the material element of the objective side of the crime of human trafficking, the court finds that it was carried out through several alternative normative methods, namely through recruitment, by facilitating the transport of the injured persons and by ensuring accommodation (activities that were not denied by the defendants), which were committed by misleading, in order to exploit these injured persons (...) It is obvious that the defendants

⁹ These are children who are forcibly or voluntarily involved in armed conflicts.

¹⁰ M. Drăguș, *Activități de instruire privind identificarea și detectarea proactivă a victimelor traficului de persoane derulate la Brașov și Timișoara*, 2024, article available at: <https://anip.mai.gov.ro/activitati-de-instruire-privind-identificarea-si-detectarea-proactiva-a-victimelor-traficului-de-persoane-derulate-la-brasov-si-timisoara/>

¹¹ We are considering the form prior to the absorption of pimping by coercion into the scope of human trafficking, currently, para. (2) of art. 213 CP having been repealed.

¹² R. Mocanu, *op. cit.*, p. 217-218.

¹³ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

¹⁴ Report available at: <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=COM%3A2025%3A8%3AFIN&qid=1737377409773>.

¹⁵ *Ibidem*.

¹⁶ In the sense of retaining a concurrence between the crime of human trafficking and submission to forced or compulsory labor, see S. Bogdan (coord.), D.A. Șerban, G. Zlati, *op. cit.*, p. 136; In the sense of retaining only the special norm (art. 210/art. 211 CP) and leaving the general norm unapplied (art. 212 CP), see C. Duvac, *Drept penal. Partea specială*, vol. I., Universul Juridic Publishing House, Bucharest, 2015, p. 176.

¹⁷ CA Iași, crim. s., crim. dec. no. 981/21.12.2018, available at: www.lege5.ro.

recruited and facilitated the transport, misleading the injured persons, in order to exploit them by subjecting them to forced labor, but also to obtain sums of money in an easy, but also unfair way (...). With regard to the factual situation proven in the case, the Court finds that, in „In this case, it was proven, beyond a doubt, that the exploitation of the injured persons was carried out by subjecting them to forced labor or services”¹⁸.

On the other hand, we also find jurisprudence in the sense of exclusively retaining the crime of human trafficking (unfortunately, the majority¹⁹) when: „The court thus found that, in law, the act of the defendant B.C. who, during the period October 2010 - June 6, 2012, repeatedly and based on the same criminal resolution, recruited, housed and received the injured parties C.Ș.I., M.D. and Z.F. by threat, violence and kidnapping and other forms of coercion (in the case of the injured party C.Ș.I.), taking advantage of his inability to defend himself and express his will and by giving money to obtain the consent of the person who has authority over him (in the case of the injured party M.D.) and taking advantage of his inability to defend himself and express his will (in the case of the injured party Z.F.) for the purpose of exploiting these persons by performing forced labor and in violation of the legal norms regarding working conditions, wages, health and security, violating fundamental human rights, meets the constitutive elements of the crime of trafficking in persons provided for by art. 12 para. (1) of Law no. 678/2001 with the application of art. 41 para. (2) CP”²⁰.

In another case, in which the absorption thesis was retained, it was shown that: „In law, the act of the defendant H.T.V., consisting in the fact that, during the period September 2008 - June 2009, he together with B.Ș.D. the latter's wife, respectively B.E., B.C., H.C.C. and P.Ș.O., exploited through labor, in violation of the legal norms regarding working conditions, wages, health and security, several persons recruited by the promise of well-paid jobs in Suceava and Botoșani counties, respectively: (...), using as methods of coercion the victims: keeping them in a continuous state of psychological pressure by uttering insults and threats, using in some cases physical violence, limiting the freedom of movement of the victims by withholding their identity documents, meets the constitutive elements of the crime of „trafficking in persons”, provided for and punished by art. 12 para. (1) and (2) letter a) in conjunction with art. 2 point. 2 letter a) of Law no. 678/2001 on preventing and combating trafficking in persons, with the application of art. 41 para. (2) CP”²¹.

Finally, in another case, the crime of trafficking in minors was also found in the case of the defendant who: „(...) taking advantage of the vulnerability of the minors: (...) and (...), of the ascendancy over the victims: the adult (...) and (...) since they lived in the building owned by the accused and her family, abusing the recognized position of trust and authority, sheltered the four injured persons, forcing them, using physical and psychological coercion, to perform various household chores every day, in a forced manner”²².

2.2. Forcing prostitution, pornographic performances for the production and dissemination of pornographic materials or other forms of sexual exploitation

It is important to remember that, according to statistical data provided by the National Agency against Trafficking in Persons (ANITP), sexual exploitation, viewed from the perspective of all its associated forms (including child pornography), accounts for 75% of all forms of exploitation, so that 3 out of 4 trafficked victims are sexually exploited²³. At the European level, according to the European Commission Report, human trafficking for the purpose of sexual exploitation continued to be the most widespread form of exploitation in the EU in the period 2021-2022 (49% of victims), the most common method of recruiting young women and girls for sexual exploitation continuing to be the „lover boy” method²⁴.

Regarding the relationship between the crime of trafficking and that of pimping, prior to the changes made in 2024, if at the doctrinal level the majority opinion was in the sense of retaining the concurrence of crimes, at

¹⁸ *Ibidem*.

¹⁹ This is also noted in the doctrine, see V. Cioclei, in G. Bodoroncea *et al.*, *Codul penal. Comentariu pe articole*, 4th ed, C.H. Beck Publishing House, Bucharest, 2025, p. 801.

²⁰ Trib. Călărași, crim. s., crim. dec. no. 16/7.02.2013 remained final in terms of legal classification by crim. dec. no. 270/1.11. 2013 of CA Bucharest, 1st crim s., *apud* HCCJ, crim. s., crim. dec. no. 1814/28.05.2014, available at: www.scj.ro.

²¹ Trib. Suceava, crim. c., crim. dec. no. 148/24.09.2012, remained definitive in terms of this legal classification through crim. dec. no. 101/9.07.2013 of CA Suceava, *apud* HCCJ, crim. s., crim. dec. no. 1311/14.04.2014, available at: www.scj.ro.

²² CA Craiova, crim. s., crim. dec. no. 1287/20.11.2025, available at: www.rejust.ro.

²³ M. Drăguș, *Analiza datelor privind fenomenul traficului de persoane aferente anului 2024 pentru Raportul privind traficul de persoane (RAPORTUL TIP)*, 2025, available at: <https://anitp.mai.gov.ro/analiza-datelor-privind-fenomenul-traficului-de-persoane-aferente-anului-2024-pentru-raportul-privind-traficul-de-persoane-raportul-tip/>.

²⁴ Available at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=COM%3A2025%3A8%3AFIN&qid=1737377409773>.

the level of judicial practice, the courts have predominantly retained the thesis of the absorption of pimping by coercion within the scope of trafficking in persons/minors, in the hypothesis of the same subject committing, after the elements of trafficking, those of coercion to start prostitution. However, being an issue that involves several discussions, we have opted for a separate treatment of this issue within a distinct section.

2.3. Forcing to beg

This form of exploitation is found at European level in a percentage of 2% of the total forms of exploitation²⁵, we found an almost unanimous judicial practice regarding the exclusive retention of the crime of trafficking in persons/minors, of which we can mention: „3. The act of the defendant I.C., who in May 2006 recruited F.I., by misleading him that he would find him a job in Italy, for the purpose of exploiting him, for which purpose, on 5.06.2006, together with ŞABAN I., transported him by car (...) from Romania to the city of Milan, where through physical and moral coercion they forced him to beg for their benefit until August 2006, meets the constitutive elements of the crime of trafficking in persons, provided for in art. 12 para. (1) and (2) letter a) of Law no. 678/2001, with application of art. 13 of the Criminal Code”²⁶.

In delimiting the crime of human trafficking from that of forcing to practice begging, it was held in another case that „the fact that it was invoked, for the defendant I.Ş., (...) that the crime would meet the constitutive elements of the crime of exploitation of begging provided for in art. 214 of the Criminal Code, an aspect that cannot be retained by the court considering the elements that differentiate the two types of crimes, namely the particularity of human trafficking committed specifically by misleading the victims. In contradiction, the exploitation of begging requires that the victim be explicitly informed that he will repeatedly appeal to the public's mercy, and not be misled”²⁷.

We find this delimitation clearly highlighted in another decision: «The evidence administered in the case outlines the circumstances in which the recruitment and exploitation of minors was carried out, by using coercion and taking advantage of their vulnerability due to their age. Specifically, the activity carried out achieves the material element of the objective side of the content of the crime of trafficking in minors, not only a „determination” taking place in the sense provided for by art. 214 of the Criminal Code, which implies the victim's compliance with proposals and incitements. Without repeating the facts set out above, it emerged in the case that the minors were subjected to conditions imposed by the defendants in their begging activity regarding the location and manner in which they were to carry out the activity, the amount of money they were to obtain daily, otherwise being subjected to acts of physical violence or threats, the conclusion being that they were forced to practice begging under the imposed conditions and for the benefit of the defendants and not just determined ones»²⁸.

2.4. Illegal removal of organs, tissues or cells of human origin

In the absence of relevant decisions, we can imagine the situation of members of a clinic that recruits needy people by offering them sums of money, thus taking advantage of their precarious financial situation and by misleading them, in order to sell organs, tissues or cells of human origin to interested persons. Recruitment can also be committed by misleading them in a situation where victims are promised certain surgical interventions for modest sums or even without paying any sums of money, the real purpose being the unlawful removal of organs. Obviously, to the extent that the same persons commit both the acts of recruitment and then those of illegal removal, the natural solution is to retain the concurrence between trafficking in persons/minors and the crime provided for in art. 154 para. (1), art. 156 para. (2) or even art. 157 para. (1) of the Law no. 95/2006 on healthcare reform²⁹.

²⁵ According to the aforementioned Commission Report.

²⁶ Trib. Constanța, crim. s., crim. dec. no. 264/09.04.2014, remained definitive through crim. dec. no. 48/22.01.2015 of CA Constanța, crim. s., available at www.lege5.ro.

²⁷ *Ibidem*.

²⁸ Trib. Maramureș, crim. s., crim. dec. no. 56/20.03.2017, remained definitive through crim. dec. no. 939/14.06.2017 of CA Cluj, crim. s., available at: www.lege5.ro.

²⁹ Republished in the Official Gazette, Part I, no. 652/28.08.2015.

2.5. Compulsion to commit acts provided for by criminal law

This form of exploitation is found at European level in a percentage of 3% of all forms of exploitation and aims to commit criminal activities, such as: thefts, petty crimes, pickpocketing or shoplifting, transporting or selling drugs, etc.³⁰. As previously mentioned, this form of exploitation was introduced into our domestic law by Law no. 269/2024, finding its source in the provisions of art. 2 para. (3) of Directive 2011/36/EU³¹, provisions which provide that: „Exploitation includes at least the exploitation of the prostitution of other persons or other forms of sexual exploitation, forced labor or service, including begging, slavery or practices similar to slavery, servitude, exploitation of criminal activities or the removal of organs”³².

Given the difficulties generated by the interpretation of the phrase „forced performance of services”, in which the exploitation of individuals through pickpocketing has been included by some courts within the scope of exploitation through the performance of services [art. 182 letter a) sentence 2 CP], we consider that the introduction of this form of exploitation is a welcome one. In this context, we can recall, as an example, the following situation in which such assimilation was considered: „The action of the defendant (...) committed in the general interval May 2023 - December 27, 2023, consisting of imposing the injured person (...) to steal food and drinks from stores, (...) all executed by the minor injured person considering the state of moral subordination after his recruitment through violence by the defendant and the recurrent physical violence on the part of the defendant, constitutes the material element of the crime of submission to forced or compulsory labor”³³.

Regarding the relationship between the crime of human/minor trafficking and the form of exploitation, to the extent that the same person recruits, transports, hosts, etc. through coercion, deception, etc. another person whom he subsequently forces to commit a crime (e.g., pickpocketing, fraud, destruction, drug trafficking, etc.), he will be liable for a real concurrence of crimes between human/minor trafficking and improper participation (in the form of instigation) in that crime.

2.6. Exploitation of surrogacy, forced marriage or illegal adoption

Last but not least, we must remember that, on July 14, 2024, Directive (EU) 2024/1712 of the European Parliament and of the Council of June 13, 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims³⁴ entered into force, with a transposition deadline of July 15, 2026. This directive provides for the extension of the concept of „exploitation” to the exploitation of surrogacy, forced marriage or illegal adoption.

In this context and given the new forms of exploitation, according to the Commission Report several Member States (Slovenia, Slovakia, Spain, Croatia, Latvia, Greece and Lithuania) have reported cases of trafficking in human beings for the purpose of forced and sham marriages, among ethnic minorities, such as the Roma and children (mainly girls) from migrant families. And with regard to surrogacy, a trend has been identified at European level for criminals (in particular, reproductive clinics) to exploit vulnerable women through egg retrieval and assisted human reproduction services, through surrogacy³⁵.

Further, as a result of the obligation to transpose the directive into domestic law, the Ministry of Justice put into public debate a draft law aimed at, among other things, amending the Criminal Code, providing for the extension of the notion of „exploitation”, from the content of art. 182 CP, with new hypotheses, such as:

- forcing to conclude a marriage or to cohabit in a relationship similar to that between spouses;
- forcing a person to obtain or carry a pregnancy for another person;

³⁰ According to the aforementioned Commission Report.

³¹ Of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

³² In developing this article, the directive states in recital 11 of the Preamble that: „The expression „exploitation of criminal activities” should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain. The definition also covers trafficking in human beings for the purpose of the removal of organs, which constitutes a serious violation of human dignity and physical integrity, as well as, for instance, other behaviour such as illegal adoption or forced marriage in so far as they fulfil the constitutive elements of trafficking in human beings.”

³³ Trib. Galați, crim. s., crim. dec. no. 264/19.11.2025, available at: www.rejust.ro. We note that such a solution was refuted by the CA Galați (crim. dec. no. 326/06.04.2026, available at: www.rejust.ro), which ordered the removal from the appealed sentence of the penalties applied regarding the crimes of forced or compulsory labor and exploitation of begging in an aggravated form, thus retaining only the crime of trafficking in minors.

³⁴ Published in the Official Journal of the European Union, L series of 24.06.2024.

³⁵ See the report of Comission, available at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=COM%3A2025%3A8%3AFIN&qid=1737377409773#footnoteref42>.

- taking over or handing over a child for adoption by another person by evading the legal procedure regarding adoption, as well as forcing or misleading consent to an adoption or obtaining money or other material benefits in exchange for adoption³⁶.

In this context and without going into an in-depth analysis of these new forms of exploitation, we believe that the legislator could also consider the method of exploitation by obtaining money or other material benefits in exchange for entering into a marriage or living together in a relationship similar to that between spouses or, as the case may be, obtaining money or other material benefits in exchange for obtaining or carrying a pregnancy for another person. In this case, those situations in which interested persons enter into arranged marriages or agree to obtain or carry a pregnancy for another person in exchange for sums of money could also be involved in the purpose of trafficking.

And in these situations, we believe that the question of the purpose of exploitation pursued by the trafficker at the time of committing the trafficking methods could be raised. It is true that such an approach opens up a problem related to the configuration of, for example, sexual exploitation, when the legislator has chosen to transpose this form of exploitation by forcing a person to practice prostitution, and therefore not the hypothesis when the trafficker only seeks to obtain patrimonial benefits. However, as we will see later, as a rule, the person is coerced into practicing prostitution so that the trafficker implicitly also seeks to obtain patrimonial benefits from practicing prostitution or we could even say that his direct intention is aimed at obtaining patrimonial benefits, while the compulsion to practice prostitution is committed with an indirect intention.

Also, the same draft submitted to public debate also provided for the criminalization of „forced marriage”, by virtue of the obligation incumbent on Member States under Directive 2024/1385 on combating violence against women and domestic violence³⁷. As stated in the Explanatory statement, forced marriage is a form of violence that involves serious violations of fundamental rights and, in particular, the rights of women and girls to physical integrity, freedom, autonomy, physical and mental health, sexual and reproductive health, education and private life. In these circumstances, it was deemed necessary at the European Union level to criminalize these acts, with the provision of appropriate levels of sanctions³⁸.

According to art. 211¹ CP, forced marriage will have a basic form consisting of coercing a person to consent to the conclusion of a marriage or to cohabit in a relationship similar to that between spouses, as well as an assimilated form consisting of determining a minor under the age of 16 to cohabit with another person in a relationship similar to that between spouses. The norm also provides for an aggravated form in the event that the act in the basic form is committed against a minor. Last but not least, the legislator also sanctions the attempt to this crime.

In light of these observations, to the extent that the same person recruits, transfers, etc. by coercion, deception, etc. a person in order to force him/her to enter into a marriage or to live together in a relationship similar to that between spouses, and then actually carries out such coercion for the aforementioned purpose, the thesis of the competition between the crime of trafficking in persons/minors and that of forced marriage will be retained.

3. Particular hypothesis of the relationship between the crime of trafficking in persons/minors and that of pimping

Furthermore, we will make some clarifications, first with regard to the relationship between the crime of trafficking in persons/minors and that of pimping, with the same reasoning to be applied *mutatis mutandis* to the other forms of exploitation, there being no rational justification for applying a distinct legal regime to the other forms of exploitation, other than the compulsion to practice prostitution³⁹. Such a conclusion is also reinforced by the correct solution promoted by Law no. 202/2024.

³⁶ <https://www.just.ro/proiect-de-lege-pentru-modificarea-si-completarea-legii-nr-286-2009-privind-codul-penal-legii-nr-135-2010-privind-codul-de-procedura-penala-precum-si-pentru-modificarea-si-completarea-altor-acte-n/>.

³⁷ Published in the Official Journal of the European Union, L series of 24.05.2024.

³⁸ <https://www.just.ro/proiect-de-lege-pentru-modificarea-si-completarea-legii-nr-286-2009-privind-codul-penal-legii-nr-135-2010-privind-codul-de-procedura-penala-precum-si-pentru-modificarea-si-completarea-altor-acte-n/>.

³⁹ In the sense that only in the case where the exploitation of a person within the framework of the crime of human trafficking is carried out by forcing them to practice prostitution, does the issue of delimitation between the two crimes arise, see G. Alexandroiu, *Scurte considerații referitoare la delimitarea infracțiunii de trafic de persoane de infracțiunea de proxenetism*, in *Revista Română de Jurisprudență* no. 3/2019, available at: www.sintact.ro.

However, to begin with, I consider it important to observe how such a paradigm shift in judicial practice (unfortunately, the majority) was reached, in the sense of exclusively retaining the crime of trafficking in persons/minors, even in the hypothesis in which, after the commission of the trafficking acts, the exploitation activities are effectively carried out by the same person, by analyzing the relevant aspects of international law, the provisions of the old/current Criminal Code, Law no. 678/2001, as well as the relevant jurisprudence in this regard.

3.1. Progress of the report prior to the entry into force of the 2009 Criminal Code

To begin with, we recall that, at the international level, the United Nations General Assembly adopted, on 15 November 2000, the United Nations Convention against Transnational Organized Crime (UNTOC), also known as the Palermo Convention, which still represents the main international legal instrument for combating organized crime. This act, which entered into force in 2003, promotes cooperation between states in order to prevent and punish crimes such as human trafficking, migrant smuggling and money laundering.

In the Additional Protocol to the Convention to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, trafficking in persons is defined as „the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of another person or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, the use or removal of organs;”

At the European level, a particular interest in the issue of human trafficking has also been shown over time, so that, in 1991, the Council of Europe adopted Recommendation of the Committee of Ministers of the Council of Europe no. R 91 on sexual exploitation, pornography, prostitution and trafficking of children and young adults⁴⁰. Subsequently, also at the level of the same body, the Convention on Action against Trafficking in Human Beings was adopted, adopted on 16 May 2005 in Warsaw and which entered into force on 1 February 2008, which aims to prevent human trafficking, protect victims of trafficking, criminalize traffickers and promote coordination of national actions and international collaboration⁴¹.

At EU level, Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings⁴² and the EU Plan on best practices, rules and procedures for combating and preventing trafficking in human beings⁴³ were adopted, both with a view to preventing and combating trafficking in human beings and protecting the rights of victims of trafficking. Subsequently, also with a view to achieving the same objective, Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims was adopted, as well as replacing Council Framework Decision 2002/629/JHA⁴⁴, which defines the crime of trafficking in human beings.

In light of these international regulations, domestically, Law no. 678/2001 represents the first legislative instrument that treats trafficking in human beings as a distinct form of crime and that criminalizes its elements within the scope of art. 12 para. (1): „The recruitment, transportation, transfer, harbouring or receipt of a person by means of threat, violence or other forms of coercion, by means of abduction, fraud or deception, abuse of authority or taking advantage of the inability of that person to defend himself or herself or to express his or her will or by offering, giving, accepting or receiving money or other benefits to achieve the consent of a person having authority over another person, for the purpose of exploiting that person, constitutes the crime of trafficking in human beings, and is punishable by imprisonment from 3 to 10 years and the prohibition of certain rights.”

As can be seen, the content of the incrimination has the same form as that found in the Palermo Convention, as it is presented in a similar form to that existing in the content of art. 2 para. (1) of Directive 2011/36.

⁴⁰ Adopted by the Committee of Ministers on 9 September 1991 at the 461st meeting of the Ministers' Deputies.

⁴¹ <https://rm.coe.int/16805d41fc>.

⁴² Published in the Official Journal of the European Communities L 203/1 of 1.08.2002.

⁴³ Published in the Official Journal of the European Union C 311 of 9.12.2005.

⁴⁴ Published in the Official Journal of the European Union L 101/1 of 15.04.2011.

Looking also from the legislative perspective of trafficking, specific elements of it were also found in the content of art. 329 para. (2) CP 1969, in the structure of aggravated pimping and which concerned the commission of an action of recruiting persons for prostitution or trafficking in persons for this purpose, as well as the coercion of a person to practice prostitution. In the context of the existence of similar ways of committing the crime, in the previous judicial practice existing on the old Criminal Code there were numerous controversies regarding the relationship between the crime of trafficking in persons and that of pimping.

According to some solutions in practice, the criterion for differentiating between the two crimes was the existence or absence of the element of tainting the subjective position (of the free manifestation of conscience and will) of the person who prostitutes himself, tainting which was achieved through psychological or physical violence, misleading or any other form of coercion. From this perspective, when there was a defect in the subjective position of the victim, the legal classification of the act was that of human trafficking, provided for in art. 12 of Law no. 678/2001⁴⁵, and in the absence of this defect, the act was classified as the crime of pimping, provided for in art. 329 para. (1) or (2) CP 1969, with the exception of the last sentence of this para. (*i.e.*, the coercion of a person to practice prostitution)⁴⁶.

It has also been shown in the doctrine that, given an overlap of the material element of coercion from art. 329 para. (2) sentence III of the Criminal Code over that found in art. 12 para. (1) of Law no. 678/2001, between which there is no quantitative or qualitative difference, the solution to resolve this competition of criminal laws must be the application of the principle of specialty - *specialia generalibus derogant*, meaning that Law no. 678/2001, regulating a specific area of crime, that of human trafficking, will be considered as a special law, derogatory to the general provisions contained in the Criminal Code⁴⁷. Even so, it cannot be overlooked that in judicial practice there have been situations when the two crimes were held to be in real or ideal competition, a practice that exists even at the level of the supreme court⁴⁸.

In this context, in order to resolve the controversies that have arisen, the Supreme Court, by decision of the HCCJ no. XVI of March 19, 2007, established the differentiation between the two crimes by referring, mainly, to the two variants of the aggravated form of the crime of pimping: the action of recruiting people for prostitution, respectively human trafficking for this purpose and the material element of the crime contained in Law no. 678/2001, stating the following: „...2. Consequently, if a person, without using coercion, encourages or facilitates the practice of prostitution or benefits from the practice of prostitution by adults, he commits the crime of pimping provided for in art. 329 para. 1 of the Criminal Code (currently, art. 213 para. (1) CP, *n.n.*).

- If a person, without using coercion, recruits adults for prostitution or traffics adults for this purpose, the act meets the constitutive elements of the crime of pimping, provided for in art. 329 para. 2 sentences I and II of the Criminal Code.
- In the case of acts of recruitment, transportation, transfer, accommodation or reception of a person, by threat, violence, kidnapping, fraud or deception, abuse of authority or by other forms of coercion or by taking advantage of the impossibility of that person to express his/her will or by offering, giving, accepting or receiving money or other benefits to obtain the consent of the person who has authority over another person, for the purpose of exploiting this person, the act meets the constitutive elements of the crime of trafficking in persons, provided for by art. 12 of Law no. 678/2001 (currently, art. 210 para. (1) CP, *n.n.*).
- If a person acts on another person in the manner indicated in points 2 and 3, inciting, facilitating or benefiting from or recruiting or trafficking adults in order to voluntarily practice prostitution, and subsequently acts on the same person in the manner indicated in the text of art. 12 of Law no. 678/2001, the commission of both the offense provided for in art. 329 para. (1) of the Criminal Code

⁴⁵ HCCJ, crim. s., crim. dec. no. 4158/2004; HCCJ, crim. s., crim. dec. no. 3995/2005, *apud* N. Cristuș, *Traficul de persoane, proxenetismul, crima organizată. Practică judiciară*, Hamangiu Publishing House, Bucharest, 2006, p. 111-114.

⁴⁶ HCCJ, crim. s., crim. dec. no. 1987/2005; HCCJ, crim. s., crim. dec. no. 6670/2004, *apud* N. Cristuș, *op. cit.*, p. 107; CA Timișoara, crim. s., crim. dec. no. 733/A /15.07/2015, *apud* V. Pușcașu, C. Ghigheci, *Codul penal adnotat. Partea specială*, vol. II, Universul Juridic Publishing House, Bucharest, 2021, p. 168.

⁴⁷ G.C. Zaharia, *Traficul de persoane*, C.H. Beck Publishing House, Bucharest, 2012, p. 155; Also, in the sense that the special law (the crime of human/minor trafficking) will prevail over the general law (forcing prostitution), see HCCJ, crim. s., crim. dec. no. 2550/2004, in *Buletinul Jurisprudenței* 2004, p. 827-828; Similarly, regarding the relationship between child trafficking and pimping, see M. A. Hotca, R. Slăvoiu, *Noul Cod penal și Codul penal anterior. Adnotări, situații tranzitorii, noutăți*, Universul Juridic Publishing House, Bucharest, 2014, p. 323.

⁴⁸ HCCJ, crim. s., crim. dec. no. 3566/2005, nr. 1701/2004 and no. 4825/2004, *apud* N. Cristuș, *op. cit.*, p. 156.

or art. 329 para. (2) sentences I and II of the Criminal Code, as the case may be, and the offense provided for in art. 12 of Law no. 678/2001, in real contest”.

In support of these differentiations, the supreme court retained the following arguments: «Now, while for the existence of the crime of pimping provided for in art. 329 para. (1) of the Criminal Code, as well as its qualified form, regulated under para. (2) of the same article, with the exception of the modality consisting of „coercion to prostitution”, it is not necessary to exercise acts of coercion on the victim or subject her to pressure from a person whose authority over her was purchased, it is necessary to consider that precisely these specific features constitute the criterion for differentiating between the crime of trafficking in persons, for the purpose of exploitation by forcing her to practice prostitution, provided for in art. 12 para. (1), with reference to art. 2 point 2 letter c) of Law no. 678/2001, where the presence of such elements is necessary, and the crime of pimping, provided for in art. 329 of the Criminal Code, whose existence is conditioned only in the particular modality of vitiating the subjective position of the victim of the commission through „coercion to prostitution”. Thus, if in the case of pimping, coercion is provided only as a particular, aggravated modality of alternative commission of the crime, in such a case the recruitment and trafficking of persons are not made for the purpose of forcing to practice prostitution, which is performed voluntarily by the person concerned, in all cases of committing the crime of trafficking in persons, coercion constitutes the main specific means of achieving the material element of the objective side of this crime.»

As can be seen, the comparative analysis of the HCCJ exclusively targeted the two variants of the aggravated form of the crime of pimping: the action of recruiting people for prostitution, respectively trafficking in persons for this purpose (the latter in particular, given the overlap with the material element of the crime contained in Law no. 678/2001), as well as the material element of the crimes contained in Law no. 678/2001 and in no way the form of coercing a person to practice prostitution by relating to the act of trafficking found in the special law. In this context, what the Court holds in point 4 is correct from a criminal point of view, the simple recruitment, transportation, transfer, accommodation or reception of a person through one of the methods listed in the norm, for the purpose of exploitation, leads to the retention of the crime of trafficking in persons/minors, but it does not follow from this, contrary to some motivations illustrated in practice, that if the same person is the one who commits the elements of trafficking, but also the coercion to practice prostitution, the thesis of the concurrence of crimes would be excluded from the plano.

Obviously, the element of differentiation between the two crimes and the one that must prevail from the perspective of the exclusive retention of the crime of trafficking in persons/minors, according to Law no. 678/2021, is the one related to the vitiation of the subjective position of the victim, the methods found in art. 329 CP 1969 (except for the obligation to practice prostitution) being devoid of the necessity of the existence of a constraint. On the other hand, to the extent that the intention of the court would have been to retain exclusively the crime of trafficking in persons/minors and in the situation where, following the recruitment, transportation, transfer, accommodation or reception of a victim, her exploitation is carried out in practice by the same person who committed the elements of trafficking, this would have resulted, obviously, from the content of the judgment.

However, such an issue could not even be the subject of the Supreme Court's analysis given that the non-uniform practice resulted from the existence of two similar texts that concerned one of the elements of trafficking (recruitment) compared to the situation of trafficking in persons for the purpose of practicing prostitution, with regard to which, as the Supreme Court also pertinently noted, the differentiation element strictly aims at vitiating the subjective position of the victim. Moreover, the issue of such a comparative analysis was not raised in HHCI Decision no. XVI/2007 between the crime of trafficking in persons/minors under Law no. 678/2001 and pimping by coercion since, as we anticipated, the crime of trafficking in persons and that of trafficking in minors, respectively, each represent an intermediary crime (which constitutes a preparatory activity), followed most of the time by the actual exploitation of the victims⁴⁹.

⁴⁹ In the same sense, S. Bogdan, D. A. Șerban, *op. cit.*, p. 288; N. Neagu, in V. Dobrinou et al., *op. cit.*, p. 141.

4. Evolution of the report with the entry into force of the 2009 Criminal Code and prior to the amendments made by the legislator in 2024

a. With the entry into force of the Criminal Code in 2014, the crime of trafficking in persons retained a form similar to that existing in the content of art. 12 para. (1) of Law no. 678/2001. On the other hand, the content of the crime of pimping was simplified, abandoning the aggravated version of recruitment for prostitution and trafficking in persons for this purpose, which thus created numerous difficulties in the previous legislation, these amendments representing the transposition into domestic criminal law of the obligations resulting from international legal acts to which Romania is a party^{50 51}. Considering the content of the new crime of pimping, part of the doctrine considered that the following hypotheses of demarcation between the crimes of trafficking and pimping can be retained⁵²:

1. The commission of the crime of pimping in the basic form will be considered if the act is committed under the conditions of art. 213 para. (1) of the Criminal Code, when prostitution is practiced for any reason (and not as a result of coercion), even if the case also includes elements specific to trafficking (for example, the pimp is the one who recruits the person or provides their transport or shelters them). In this situation, trafficking in persons or minors cannot be considered since there is no exploitation, which involves forcing them to practice prostitution.
 - The commission of the crime of pimping in the aggravated version provided for in art. 213 para. (2) of the Criminal Code will be considered, if it is not considered that, along with the coercion, there was also an activity of recruitment, transportation, transfer, respectively sheltering of the prostitute specific to human trafficking.
 - The commission of the crime of human trafficking will be considered if, along with the determination by coercion of a person to start or continue practicing prostitution is also considered an activity of recruitment, transportation, transfer, respectively sheltering of the prostitute. In this case, the crime of pimping provided for in art. 213 para. (2) Criminal Code will be absorbed into the crime of trafficking in persons or trafficking in minors.”

b. Such an opinion regarding the resolution of the conflict between trafficking and the form of exploitation consisting of forcing to practice prostitution, which unfortunately has influenced judicial practice over time and which we have found in countless court decisions, could not be shared for the following arguments, applicable *mutatis mutandis* also with regard to other forms of exploitation:

b.1. First, the author starts from the same confusion that he has promoted over time in the editions of his course and to which judicial practice has unfortunately agreed, imposing in point 1 of his analysis the retention of human/minor trafficking from the existence of exploitation, which also involves the obligation to practice prostitution. The same confusion was promoted by the author regarding the form of exploitation of the obligation to practice begging, who supported the retention of human/minor trafficking in all cases in which the person is forced to practice begging, such a solution being imposed under the conditions in which „the coercion is equivalent to the obligation to practice begging and, thus, the condition of exploitation provided for in art. 182 letter d) is achieved”⁵³.

Returning to the previous point, as we have already mentioned, the exploitation of a person represents the purpose of the criminal activity, and not a requirement of the objective side of the crime⁵⁴, so that it is not necessary to achieve the purpose in order to meet the constitutive elements of the crime of trafficking, but only

⁵⁰ See N. Neagu, in V. Dobrinioiu *et al.*, *op. cit.*, p. 141; Al. Boroii, *Drept penal. Partea specială*, 4th ed., Ch. Beck Publishing House, Bucharest, 2019, p. 141.

⁵¹ Among these acts can be listed: the UN Convention for the Suppression of Trafficking in Persons and of the Exploitation of the Prostitution of Others, signed on March 21, 1950, the UN Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, ratified by Law no. 565/2002 or the Council of Europe Convention on Action against Trafficking in Human Beings, signed by Romania in Warsaw on May 16, 2005.

⁵² See V. Cioclei, *Drept penal. Partea specială I, Infrațiuni contra persoanei și patrimoniului*, 6th ed., Ch. Beck Publishing House, Bucharest, 2021, p. 180. This opinion was also shared by M. Udrioiu, *Sinteze de drept penal. Partea specială*, 2nd ed., vol. I, Ch. Beck Publishing House, Bucharest, 2021, p. 283; Similarly, see also: G. Alexandroiu, *op. cit.*

⁵³ V. Cioclei, *op. cit.*, 6th ed., p. 184.

⁵⁴ We also find an isolated opinion according to which the purpose completes the objective side, and not the subjective one, see R. Mocanu, *op. cit.*, p. 202.

to pursue it⁵⁵. Therefore, being in the presence of a direct intention qualified by purpose⁵⁶, the simple pursuit of the purpose is sufficient to contain the crime, it being not necessary for its consummation that the purpose has actually been achieved⁵⁷. Therefore, we cannot speak of an absorption of the crime of pimping within the crime of trafficking in persons, since the achievement of the purpose exceeds the variants of committing the material element of this crime, in which case if the purpose crime is also consummated, liability for a plurality of crimes will naturally arise⁵⁸.

In the doctrine we also find the opinion that the intention present in the case of the crime of trafficking in persons/minors can also be indirect, giving as an example the situation of recruiting the victim in order to hand her over to the one who will exploit her and transfer power over her in exchange for a sum of money (the actual purpose pursued), the trafficker implicitly accepting that the latter will exploit her, being indifferent to the method or intensity of the exploitation⁵⁹. Looking from this perspective, one could even conclude that most traffickers do not aim to exploit the victim, at most accepting such a possibility, but to obtain income by committing elements specific to human trafficking: recruitment, transfer, transportation, etc.

However, as is also stated in the doctrine, „the perpetrator acts with direct intent not only when the production of the result constitutes the very purpose of his action or inaction, but also when its production is viewed by him as a necessary means (...) of the intended result”⁶⁰. Under these conditions, a direct intent will be retained in the case of crimes of abstract danger, given that the legislator’s approach to direct intent is that it links the volitional factor to the consequence⁶¹. This has led to the consideration that, in the case of sexual crimes, the perpetrator does not aim to harm the victim’s sexual freedom, but to obtain sexual satisfaction, but since the desired result can only be achieved by producing the consequence provided for by the criminal law, these crimes can only be committed with direct intent⁶².

Under these conditions, we also consider that in the case of trafficking offenses (abstract danger offenses), the perpetrator does not seek to harm the freedom/safety of the trafficking victim, but exclusively to obtain patrimonial benefits as a result of undertaking certain commercial acts. However, given that obtaining them can only be achieved by carrying out the immediate pursuit of trafficking, we must admit that the intention can only be found in the form of the direct one.

Returning now to the issue of the relationship between trafficking and forms of exploitation, it is certain that the retention of the real contest is likely to emphasize both the dangerous nature of the crimes of human trafficking/trafficking in minors, as well as the attribute of these crimes to be instrumental crimes, and, on the other hand, only in such a manner can the specific function of initiating and holding criminally liable in a complete manner for all associated criminal behaviors be achieved⁶³. Thus, the goal of the human trafficker is to exploit the victim, and the legislator has chosen to punish - relatively drastically - all actions preceding the achievement of this goal, in order to prevent exploitation, thus offering the authorities the possibility to intervene before the

⁵⁵ H. Diaconescu, *Drept penal. Partea specială*, vol. I, 2nd ed, All Beck Publishing House, Bucharest, 2005, p. 185; G. Alexandriou, *Probleme jurisprudențiale în legătură cu infracțiunea de trafic de minori*, Revista de Drept Public no. 1/2019, available at: www.sintact.ro.

We also find such an opinion in Spanish doctrine, which considers human trafficking to be a crime of anticipated consumption, see: F. Muñoz Conde, *Derecho penal. Parte especial*, 23rd ed., Tirant Lo Blanch Publishing House, Valencia, 2021, p. 197.

⁵⁶ In the same sense, see also: T. Toader, *op. cit.*, p. 163; T. Manea, C.-N. Constantinescu-Mărunțel, H.-Ș. Tiugan, *Drept penal. Partea specială. Infracțiuni contra persoanei. Infracțiuni contra patrimoniului*, Hamangiu Publishing House, 2022, p. 240; H. Diaconescu, *op. cit.*, p. 185; A. Ionaș, A. F. Măgureanu, C. Dinu, *Drept penal. Partea specială conform noului Cod penal*, Universul Juridic Publishing House, Bucharest, 2015, p. 132; C. Duvac, *op. cit.*, p. 169.

⁵⁷ G. Fiandaca, E. Musco, *op. cit.*, p. 332. *apud* F. Streteanu, D. Nițu, *op. cit.*, p. 347; C. Ap. Craiova, crim. s., crim. dec. no. 1287/20.11.2025, available at: www.rejust.ro.

⁵⁸ In the sense of retaining the thesis of the competition of crimes, see: F. Muñoz Conde, *op. cit.*, p. 197; V. Dobrinioiu, N. Neagu, *Drept penal. Partea specială*, Universul Juridic Publishing House, Bucharest, 2014, p. 132; T. Toader, *op. cit.*, p. 163; Al. Boroi, *op. cit.*, p. 144; N. Neagu, in V. Dobrinioiu et al., *op. cit.*, p. 141;

In terms of retaining the concurrence of crimes in the hypothesis of the relationship between the crime of human trafficking and pimping by coercion, see: T. Manea, C.-N. Constantinescu-Mărunțel, H.-Ș. Tiugan, *op. cit.*, p. 243. On the other hand, in the case of trafficking in minors, to the extent that the determination or facilitation of the practice of prostitution is carried out through solicitation, transfer, etc., a crime of trafficking in minors will be considered, and not of procuring, given that the material element of trafficking is no longer linked to coercion (in particular), and the consent offered has no legal value, see *Ibidem*, p. 243.

⁵⁹ R. Mocanu, *op. cit.*, pp. 202-203; S. Bogdan, D.A. Șerban, *op. cit.*, p. 28; HCCJ, crim. s., dec. pen. no. 1498/2004, available at: www.scj.ro.

⁶⁰ C. Bulai, B. Bulai, *Manual de drept penal. Partea generală*, Universul Juridic Publishing House, Bucharest, 2007, p. 159-160.

⁶¹ F. Streteanu, D. Nițu, *op. cit.*, p. 321.

⁶² *Ibidem*.

⁶³ A se vedea, A. Florea, *Trafic de persoane și proxenetism. Exploatarea persoanei. Aspecte controversate. Problema concursului de infracțiuni*, in Dreptul no. 5/2019, available at: www.sintact.ro.

victim is subjected to any of the forms of exploitation. Following the line of reasoning presented by one part of the doctrine, it would be completely and utterly absurd for the judicial body to give up on punishing the purpose crime, representing the more serious crime (e.g., pimping by coercion, slavery, exploitation of begging etc.)⁶⁴.

In this context, we cannot help but draw a natural parallel with the crime of aggravated murder committed to facilitate the commission of a crime [art. 189 para. (1) letter d) CP], when the doctrine and judicial practice are unanimous in holding the real concurrence with etiological connection between the qualified murder and the crime for which the killing of the victim is necessary (e.g., robbery, rape, sexual assault, home invasion etc.), just as it is not necessary to commit the purpose crime for holding the crime of qualified murder (the means crime). However, human/minor trafficking is committed in order to facilitate the commission of the purpose crime, which is the exploitation of the person, a relationship that implies *mutatis mutandis* the holding of a real concurrence with the same form of connection as that present in the case of qualified murder followed by the commission of the purpose crime.

b.2. Secondly, there cannot be an overlap between the material element of coercion in the case of the two crimes, since if in the case of the crime of trafficking, the coercion is an accessory element to one's own actions (transportation, transfer, sheltering, etc.), in the case of the aggravated variant of the crime of pimping, the coercion is manifested exclusively with regard to the commencement or continuation of the practice of prostitution. Looking also from a temporal perspective, these material elements are realized successively, in a certain chronological order, an aspect that also leads to a distinct moment of consumption⁶⁵.

Therefore, it cannot be said that, automatically, in the hypothesis in which we find ourselves in a situation of coercion to practice prostitution, the crime of trafficking will be exclusively retained, but it must be verified whether the same person who coerces the victim is the same who previously recruited her, transported her, sheltered her, etc. by violence, misleading, etc., in which case the two successive activities will entail criminal liability for a concurrent offense. Otherwise, that person will be liable only for the aggravated form of the offense of pimping, provided for in art. 213 para. (2) CP in conjunction with an offense against sexual freedom and integrity (e.g., rape, sexual assault, sexual act with a minor etc.).

As well, the thesis of concurrent offenses cannot be automatically retained to the extent that a person commits the activities prior to exploitation and specific to trafficking, but does not participate in carrying out the exploitation, in which case only trafficking can be retained to the extent that he knew the purpose of the exploitation (however, the simple commission of the material element, without proof of intent, will not even be able to lead to the retention of trafficking). In this context, as some authors note, the issue of the relationship between trafficking crimes and those concerning exploitation does not only concern the form of authorship, but any form of participation, so that, given that the purpose of trafficking in persons is to exploit the person (this being one of the constitutive elements of the crime of trafficking in persons), the perpetrator of trafficking will also be liable as an accomplice to the subsequent crime concerning the form of exploitation⁶⁶.

b.3. Thirdly, although human/minor trafficking constitutes a means crime in relation to the purpose crimes for which it is committed, it does not borrow the same social values and does not produce the same immediate consequences as exploitation crimes, given that, for example, the victim of human trafficking does not always end up being deprived of liberty during the recruitment, transportation, etc. operations (e.g., the victim voluntarily accompanies the perpetrator to the place where the exploitation will take place in the hope of being employed in certain fields, but the reality on the spot is completely different)⁶⁷.

Under these conditions, in the modality of committing the crime through recruitment or transportation by misleading, therefore in situations in which the victim is deceived about the true purpose at the end of the itinerary proposed by the perpetrator, it cannot be argued, for example, that during the journey to the destination the victim was deprived of liberty⁶⁸. This means that the legal object of the crime of trafficking in

⁶⁴ *Ibidem*.

⁶⁵ Other authors also note that in the presence of „two different coercive actions, which aim at two different results, the displacement of the victim, respectively her subsequent sexual exploitation, (...) it is necessary to hold that there is a real concurrence of crimes between the act provided for in art. 210 para. (1) letter a) of the Criminal Code and the act provided for in art. 213 para. (2) CP” see D. Lucaciu, *Câteva aspecte referitoare la infracțiunile de trafic de persoane (art. 210 CP), proxenetism (art. 213 CP) și folosirea serviciilor unei persoane exploatate (art. 216 CP)*, in *Revista Penalmente* nr. 2/2018, p. 15, available at: <https://www.revista.penalmente.ro/wp-content/uploads/2019/02/Lucaciu.pdf>.

⁶⁶ *Idem*, p. 14.

⁶⁷ R. Mocanu, *op. cit.*, p. 200.

⁶⁸ *Idem*, p. 173, 175.

persons/minors can only concern the safety of the person, a concept that brings together physical integrity, physical freedom, but also other social values⁶⁹. However, we cannot fail to recall that at a doctrinal level, the almost unanimous opinion is that the social value protected in the case of trafficking crimes is the freedom of the person, a value incompatible with exploitation⁷⁰.

In a decision in which the court opted for the thesis of the concurrence of offenses, it was shown that «although the joining of the two offenses in the same section of the Criminal Code (...), would suggest that they protect the same social value, namely the „human dignity” of the person (...), a careful reading of the marginal name of Chapter VII reveals that in the regulatory paradigm, human dignity involves valences and thus criminal protection discourages distinct acts: human trafficking (with a view to exploitation) and the effective exploitation of the person”⁷¹. Practically, the criminalizations under discussion have the role of preventing/combating, on the one hand, the transformation of a person into a „tool”, by „preventing the person's regression to the level of a commodity, of a tradable (circulable, „tradable”) economic value, similar to the animal which, in human society, has the legal nature of movable property», and, on the other hand, preventing the use of this atypical „tool”⁷².

Therefore, the subsequent exploitation of a person or, more precisely, maintaining him in the state of enslavement necessary for his exploitation through labor, occurs exclusively in relation to the specific acts of exploitation of the victim, when we are already under the incidence of the effect of a different criminalization, an aspect that makes it necessary to prevent the creation of a contamination of the legal object of trafficking (means offense) with that of the criminalizations concerning the forms of exploitation (purpose offenses)⁷³.

Therefore, with the entry into force of the Criminal Code, although the majority opinion at the doctrinal level continued to support the solution of retaining the concurrence of crimes, at the level of judicial practice, as we could observe in a previous section, the almost unanimous opinion was in favor of retaining exclusively the crime of trafficking in persons/minors. Regarding the almost unanimous nature of judicial practice⁷⁴, it is worth recalling what was retained in a decision that once again reinforces this conclusion: „According to the relatively uniform judicial practice prior to the entry into force of Law no. 202/2024 by which this normative provision was introduced, if the purpose provided by the law for the prevention of human trafficking was also achieved, the subsequent act consisting of the exploitation of the injured person, even if it meets the constitutive elements of a distinct offense, is absorbed into the constitutive content of the offense of human trafficking”⁷⁵.

5. Legislative solutions operated by Laws no. 202 and no. 269 of 2024

a. As previously mentioned, Law no. 202/2024 provides, among other things, that if acts of human trafficking or minors are followed by the effective exploitation of a person, within the meaning of art. 182, the rules of concurrent offenses will apply. Such a legislative amendment confirms once again the original and correct intention of our legislator regarding the relationship between the crime of trafficking and forms of exploitation, if the two are committed by the same active subject.

In this context, we recall that a similar rule in this regard also exists in the Spanish Criminal Code. Thus, in art. 117 bis para. (9) of this code: „In any case, the penalties provided for in this article shall be applied without

⁶⁹ R. Mocanu, *op. cit.*, p. 173, 175.

⁷⁰ T. Toader, *op. cit.*, p. 160; I. Lascu, *Incrimnări privind traficul de persoane*, in *Revista de drept penal* nr. 3/2002, p. 65; G.C. Zaharia, *op. cit.*, p. 47. Other authors also note that the norm protects the person's freedom of movement, see D. Lucaci, *op. cit.*, p. 13. We also find a middle opinion according to which the legal object would protect both the freedom and rights of the person, as well as the dignity, bodily integrity or health of a person against acts of exploitation, see N. Neagu, in V. Dobrinou *et al.*, *op. cit.*, p. 128.

Spanish doctrine also holds that human trafficking protects the freedom and dignity of the victim and, therefore, their moral integrity, see F. Muñoz Conde, *op. cit.*, p. 195.

⁷¹ Trib. Iași, crim. s., crim. sent. no. 206/15.04.2025, available at: www.rejust.ro. Even though at the time of the trial of the case, the provisions of Law no. 202/2024 and Law no. 269/2024 were in force, the court retained in the decision as the more favorable criminal law the form of incriminations prior to the amendments made by the two normative acts.

⁷² *Ibidem*.

⁷³ R. Mocanu, *op. cit.*, p. 173-174. As the author also notes on the same occasion, „once the exploitation process begins, by subjecting the victim to forced labor, or by forcing her to prostitute herself (in other examples), her freedom is limited to the framework allowed by the one who exploits her.”

⁷⁴ In this regard, see also a series of court decisions mentioned in the doctrine that reinforce this conclusion, A. V. Iugan, *Codul penal adnotat. Partea specială. Jurisprudență națională 2014-2020*, Universul Juridic Publishing House, Bucharest, 2020, p. 115-119.

⁷⁵ Trib. Călărași, crim. s., crim. sent. no. 28/27.03.2025, remained final by dec. pen. no. 42/15.01.2026 of CA Bucharest, 1st crim. s., both available at: www.rejust.ro. The same decision also states that: „This solution was deduced by the courts from the per a contrario interpretation of the solution from point 5 of the operative part of Decision no. 16 pronounced on 19.03.2007 by the High Court of Cassation and Justice in resolving the appeal in the interest of the law.”

prejudice to those that correspond, as the case may be, to the offense provided for in article 318 bis of this Code or to other offenses actually committed, including those that constitute the corresponding exploitation”⁷⁶. Therefore, this correct approach, taken into account by the Romanian legislator, is also found in other European legislation.

Naturally, after the entry into force of Law no. 202/2024, judicial practice has focused on retaining the concurrence of offenses, thus abandoning the (deeply unjust) solution of absorption. Thus, for example, in a decision it was noted that: „(...) there can be no confusion between the criminalization norm provided for in art. 210 with the criminalization norm in art. 213 of the Criminal Code, given that the actions specific to human trafficking are carried out with a purpose in mind, and the purpose can never include the materialized purpose under the conditions in which the materialized result enjoys a distinct criminalization in another criminal norm”⁷⁷.

Approximately half a year later, Law no. 269/2024 enters into force, a normative act that provides, with the translation of par. (2) of art. 213 of the Criminal Code into art. 210, respectively of par. (3) and (3¹) into art. 211 of the Criminal Code⁷⁸, a new variant of criminalization in the case of the crime of human trafficking, respectively trafficking in minors. Specifically, according to art. 210 par. (1¹) Penal Code: „(1¹) The same punishment shall be imposed for the determination to start or continue the practice of prostitution, if this was carried out through any of the methods provided for in para. (1).”⁷⁹, and in accordance with art. 211 para. (1¹) of the Criminal Code: „The punishment provided for in para. (1) shall also be imposed for the determination or facilitation of the practice of prostitution or the obtaining of patrimonial benefits from the practice of prostitution by one or more minors”⁸⁰.

According to the Explanatory statement, the initiators consider that the proposed amendments to art. 210 and art. 211 of the Criminal Code are necessary in order to eliminate the alleged problems of interpretation and application that have arisen in judicial practice regarding the delimitation of the crimes of trafficking in persons/minors from those of aggravated pimping. In essence, the starting point is the (wrong) premise that numerous people are convicted in Romania for acts of pimping, although these should constitute crimes of trafficking in persons or minors. In practice, in the authors' view, the same criminal behavior ends up being framed differently, a situation that is likely to generate confusion in practice, with consequences regarding the legality of criminal prosecution, given that the competence to handle cases involving pimping crimes (other than those committed in the context of an organized criminal group - and trafficking in persons) ends up belonging to regular prosecutorial structures.

Regarding the legislative solution of absorption, even before the entry into force of Law no. 269/2024, the Superior Council of Magistracy noted in the content of the point of view expressed regarding the legislative proposal (L no. 420/2024, PI-x no. 450/2024) that: „Unlike the old criminal legislation, the current Criminal Code has made a more precise distinction between the crimes of human trafficking (including minors) and pimping, at the level of the science of criminal law, the element of differentiation not necessarily being given by the free or constrained nature of the action of the vulnerable person, but by the action of the agent in relation to the exploited person, therefore by *verbum regens*. In other words, the idea of trafficking in living beings is based on a behavior similar to trade, with the mention that the good is replaced by the person (trafficking in people or "living flesh"), the agent relating to trafficked persons similarly to goods, obtaining them (through recruitment), transporting them, transferring them or receiving them from another participant in the commission of the act. Therefore, the distinction between these crimes is obvious, the act of determining to start or continue practicing prostitution, even through coercion, cannot be scientifically qualified as human trafficking, or, as the case may

⁷⁶ <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>.

⁷⁷ CA Galați, crim. s., conclusion of the hearing of 31.10.2024, available at: www.rejust.ro.

⁷⁸ Correlatively also in the case of the crime of trafficking in minors.

⁷⁹ According to art. 210 CP: „(1) The recruitment, transportation, transfer, harbouring or receipt of a person for the purpose of exploitation, committed:

a) by coercion, abduction, deception or abuse of authority;

b) taking advantage of the impossibility of defending oneself or expressing one's will or of the obvious vulnerability of that person;

c) by offering, giving, accepting or receiving money or other benefits in exchange for the consent of the person who has authority over that person, is punishable by imprisonment from 5 to 12 years and the prohibition of exercising certain rights.”

⁸⁰ According to art. 211 CP: „(1) The recruitment, transportation, transfer, sheltering or receiving of a minor, for the purpose of exploiting him, is punishable by imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights.”

be, trafficking in minors, since the pimp proceeds directly to the „exploitation” of the person, while the trafficker is limited to activities prior to it”⁸¹.

This point of view, expressed also at the institutional level, reiterates what was previously shown by the doctrine, namely the fact that the specific elements of trafficking constitute activities prior/precursor to the activity of exploiting victims, so that in no case could the issue of absorbing pimping by coercion into the scope of the crime of human/minor trafficking be raised.

After the entry into force of Law no. 269/2024, surprisingly the same author who for years in his courses supported the thesis of the absorption of pimping by coercion within the scope of human/minor trafficking committed by the same person and who, unfortunately, shaped judicial practice in this direction, through a surprising „doctrinal reversal” ends up criticizing the solution provided by this law. Thus, it specifies the following: „Before the discussed amendment, if the perpetrator transported a person, for the purpose of exploitation by forcing them to practice prostitution, after which he also forced her to practice prostitution, he could be held liable for two concurrent offenses: human trafficking and aggravated pimping⁸². After the amendment, for the same acts, criminal liability will be incurred for a single offense: human trafficking in the assimilated version. Specifically, this results in a substantial reduction of criminal liability for the serious acts mentioned. Was this the intention of the legislator? I don't think so. It is rather a new legislative error”⁸³.

Other authors also rightly criticize such a legislative solution: „The legislative amendment is uninspired, in the context of the recent clarifications of reality by Law no. 202/2024, in the sense of retaining the concurrence of offenses between the crime of human trafficking and the purpose offense through which the actual exploitation is carried out. Thus, prior to the legislative amendment by Law no. 269/2024, in the case of recruiting, transporting, transferring, harboring or receiving a person, for the purpose of their sexual exploitation, followed by determining them to prostitution, committed by the same person, the act would have constituted the crimes of human trafficking and procuring, in concurrence. At this time, the acts indicated above constitute only the crime of human trafficking. The exception only concerns the sexual exploitation of the person, not the other forms of exploitation, where the rule of concurrence of offenses applies. (...) The legislative amendment is unnecessary, inconsistent with criminal policy recent and generating confusion and uncertainty”⁸⁴.

b. Further and analyzing the new legislative solutions, we note that, unlike pimping by coercion provided for in art. 213 para. (2) CP and in accordance with the new vision, the determination to start or continue practicing prostitution may be achieved through: coercion, kidnapping, misleading or abuse of authority, taking advantage of the impossibility of defending oneself or expressing one's will or the state of obvious vulnerability of that person or by offering, giving, accepting or receiving money or other benefits in exchange for the consent of the person who has authority over that person, etc. Therefore, the new regulation, which operates an assimilation of human trafficking to a form of exploitation, operates an expansion of the ways in which pimping is committed, no longer being limited only to the requirement of coercion.

Also, given that the text of the variant of art. 210 para. (1¹) CP speaks of the commission of the act „by any of the means provided for in para. (1)”, the question arises whether the legislator intended this reference to cover both the means of committing the crime of trafficking (recruitment, transportation, transfer, etc.) and the essential conditions/requirements attached to the material element (e.g., coercion, misleading, etc.) or only the latter. According to the first variant, plausible from the perspective of the fact that the text speaks of „means”, i.e. normative means of the material element, it is concluded that in order to apprehend human trafficking in the variant provided for in art. 210 para. (1¹) CP, recruitment, transportation, sheltering, etc. is necessary, the simple determination to start or continue practicing prostitution by means of coercion, misleading, etc. being

⁸¹ Superior Council of Magistracy, Address no. 11072/26.07.2024, p. 1-2, available at: https://www.senat.ro/legis/lista.aspx?nr_cls=L420&an_cls=2024#ListaDocumente.

⁸² V. Cioclei, *Drept penal. Partea specială I. Infrațiuni contra persoanei și infrațiuni contra patrimoniului*, 9th ed., C.H. Beck Publishing House, Bucharest, 2024, p. 187. Another author who took the opinion of absorption prior to the entry into force of Law no. 202/2024 also surprisingly supports, after its entry into force, the unnecessary nature of regulating the solution of concurrent offenses, see M. Udriou, *Sinteze de drept penal. Partea specială*, vol. I., 6th ed, Ch. Beck Publishing House, Bucharest, 2025, p. 306.

⁸³ V. Cioclei, *Traficul și exploatarea persoanelor vulnerabile, din nou sub „bisturiul” legiuitorului. Modificarea Codului penal prin Legea nr. 269/2024 o altă „operație” eșuată*, 2025, article available at: https://www.juridice.ro/essentials/10200/traficul-si-exploatarea-persoanelor-vulnerabile-din-nou-sub-bisturiul-legiuitorului-modificarea-codului-penal-prin-legea-nr-269-2024-o-alta-operatie-esuata#_ftnref6; V. Cioclei, in G. Bodoroncea et al., *op. cit.*, p. 794-795.

⁸⁴ N. Neagu, in N. Neagu, V. Dobrinou et al., *Codul penal comentat. Partea specială*, Universul Juridic Publishing House, Bucharest, 2025, p. 142.

insufficient. According to the second variant, such a determination committed through one of the essential requirements attached to it (e.g., coercion, misleading etc.) is sufficient.

Given the legislator's intention to create a normative variant by absorption, we also consider that it will not be necessary to commit the modalities of trafficking (recruitment, transportation, transfer, shelter or reception), being in the presence of a trafficking „lacking trafficking” (in practice, devoid of its elements), a contrary interpretation leading to the unacceptable conclusion that the "simple" coercion of a person to start or continue practicing prostitution could no longer be criminalized *de lege lata*⁸⁵. It can be observed that such an interpretation, contrary to the strictly literal interpretation that concerns a form of the text that speaks of modalities of committing the material element, has the role precisely of saving the norm in the face of a decriminalization operated by the legislator, out of ignorance and/or incompetence.

Even so, we believe that such an opinion, which we also share, will be intensely discussed in judicial practice, as defendants will invoke decriminalization in their favor in those situations in which they only coerced the victim to start or continue practicing prostitution, but did not previously commit specific trafficking modalities (e.g., recruitment, reception, hosting, etc.).

c. Regarding trafficking in minors, Law no. 269/2024 introduces in art. 211 CP a form assimilated to trafficking in minors consisting in determining or facilitating the practice of prostitution or obtaining patrimonial benefits from the practice of prostitution by one or more minors. Practically, any instigation or complicity or, as the case may be, obtaining patrimonial benefits from the practice of prostitution by a minor will no longer constitute aggravated pimping, but trafficking in minors.

The new perspective of the legislator is based on the premise that, in no case, a minor can express a valid consent to the practice of prostitution, this being one by hypothesis flawed. Without going into an in-depth analysis of this issue, such an approach raises serious problems from the perspective of the fair nature of such a solution given that not every determination/facilitation of the practice of prostitution starts from the idea of misleading the minor. In practice, there may be mature minor victims, 16, 17 years old, under 18 years old who, for various reasons, choose to practice prostitution voluntarily. However, considering that in any situation there is no valid consent, automatically qualifying, for example, any help from such a person (by promoting him on the Internet or making a home available) as an act of trafficking in minors, leads to a real departure, on the one hand, from the traditional social values that the crime of trafficking in persons protects, and, on the other hand, from the need to anchor criminal law in the realities of a society, even in conditions in which criminal policy is the prerogative of the legislative authority.

But when the legislator manifests a huge appetite for the field of criminal law through reckless legislative interventions and intended to show its citizens that the state intervenes promptly and firmly in their defense, although there are many other instruments that could have solved such problems, such a way of regulation, with unjust consequences that will arise in the future, should not surprise us. Certainly, other legislative (non-criminal) or administrative solutions (e.g., effective mechanisms for identifying and protecting victims of sexual exploitation, mechanisms for their psychological counseling in the conditions in which they suffer multiple traumas, etc.) would have required time, a more in-depth analysis and additional financial, logistical and human resources allocated to the fight against this scourge.

Under these conditions, amending the CP (e.g., by increasing the special punishment limits, eliminating the possibility of suspension under supervision for certain crimes, introducing special aggravating circumstances/aggravated forms that practically annihilate the application of the crime in its basic form, declaring the imprescriptibility of criminal liability etc.) has for some time represented in domestic law an extremely easy and quickly implemented solution, intended to quench the „blood thirst of the population”. In contrast, in the long term we may find that these legislative interventions in the field of criminal law may do more harm than good, while the other solutions, which would have led to lasting results, continue to function in a state of disrepair, with no interest in resolving them. But, once again, since this easy-to-use and effective tool exists from the perspective of its popularity, capable of bringing a state of tranquility to the city, no one is interested in addressing the real problems and causes of the phenomenon of human/minor trafficking and, especially, its forms of exploitation.

⁸⁵ V. Cioclei, *Traficul și exploatarea persoanelor vulnerabile, din nou sub „bisturiul” legiuitorului...*, cit. supra; V. Cioclei, in G. Bodoroncea et al., op. cit., p. 794. Although the author constantly uses the notion of „assimilated variant”, we consider that the incrimination norm in art. 210 para. (11) CP, respectively art. 211 para. (11) CP, does not represent an „assimilated variant” of the basic one, but a distinct offense united by the legislator within the same article with the actual offense of trafficking.

d. Finally, regarding the issues of material competence and which, in the view of the authors of Law no. 269/2024, justified the solution of absorbing pimping by coercion within the scope of human trafficking, we recall that human/minor trafficking falls under the competence of the Directorate for the Investigation of Organized Crime and Terrorism Offences, while pimping in any of its forms (basic and aggravated forms) belonged to local prosecutors' offices, to the extent that it was not committed within an organized criminal group, when it would have fallen under the competence of DIICOT. Starting from the fact that judicial practice almost unanimously held that any coercion to start or continue practicing prostitution, in the presence of a trafficking modality (recruitment, transportation, hosting, etc.), led to the detention of human trafficking, two working options were discussed regarding the competence to carry out criminal prosecution in the case of pimping: taking over the entire crime of pimping (Option 1), respectively taking over the aggravated forms of pimping, namely those by coercion and on a minor [art. 213 para. (2)-(3¹) CP] and leaving pimping with consent [art. 213 para. (1) CP] at the level of local prosecutors' offices (Option 2).

Obviously, any of the solutions would have presented both advantages, such as the lack of declination to regular prosecutors' offices, the carrying out of criminal prosecution by a specialized prosecutor's office unit, with related resources and logistics, better international judicial cooperation, etc., as well as disadvantages, such as the one related, in particular, to the loading of a specialized prosecutor's office with files of reduced complexity and the allocation of disproportionate resources for such files, against the background of an already insufficient human resource⁸⁶. However, in agreement with the opinion expressed by the Superior Council of Magistracy, we consider that the issues invoked by the initiators in the Explanatory statement could have been easily resolved by extending the scope of DIICOT's competence to the crime of pimping by coercion⁸⁷ and not through a legislative intervention that would overturn an original philosophy envisaged by the legislator and recently confirmed by him with the entry into force of Law no. 202/2024, with negative consequences in terms of the sanctioning regime and which will pose problems of interpretation and application in practice.

6. Evolution of the report and the solutions identified with the amendments made by Laws no. 202 and 269 of 2024

In the context of the absorption of pimping by coercion and pimping of a minor in the scope of art. 210 and 211, operated with the entry into force of Law no. 269/2024, the issue of a (partial) invalidation of the provisions introduced by Law no. 202/2024 is being discussed and which confirms once again the original and correct intention of the legislator regarding the relationship between the crime of trafficking and the forms of exploitation regarding the need to retain the concurrence between trafficking in persons/minors and the crime of pimping by coercion. Specifically, the question arises whether, following the entry into force of Law no. 269/2024, a single crime of trafficking in persons/minors will be retained [art. 210 para. (1¹) or art. 211 para. (1¹) CP], a possible concurrence between the crime of trafficking in persons/minors and pimping or, rather, a concurrence of crimes between the form provided for in art. 210 para. (1)/ art. 211 para. (1) CP and that provided for in art. 210 para. (1¹)/art. 211 para. (1¹) CP?

Under these conditions, we can identify 3 solutions to resolve the conflict between the crime of trafficking in persons/minors and pimping:

a. The first of these aims at excluding *de plano* the retention of a plurality of crimes between trafficking and pimping or, as the case may be, between the form provided for in art. 210 para. (1)/art. 211 para. (1) CP and that provided for in art. 210 para. (1¹) /art. 211 para. (1¹) CP, in all cases a single offense of trafficking in persons/minors is retained.

Under these conditions, if a person recruits, transports, hosts, etc. a person by coercion, misleading, etc. who subsequently forces him to start or continue practicing prostitution, the form provided for in art. 210 para. (1¹) /art. 211 para. (1¹) CP. This solution starts from the literal interpretation according to which para. (1¹) of art. 210 CP refers to the modalities provided for in para. (1), therefore implicitly to recruitment, transportation, hosting, etc. and not only to the essential conditions attached to the material element, namely: coercion, misleading, etc. Therefore, prior to the exploitation of the person we also find the elements of trafficking in the person of the same author.

⁸⁶ To the extent that the consensual pimping was not committed within an organized criminal group.

⁸⁷ See also the Superior Council of Magistracy, *Adress nr. 11072/26.07.2024*, p. 2-3.

We note that such a variant leads to a significant decrease in the sanctioning regime by moving from the possibility of retaining a concurrence of offenses between human trafficking (art. 210 CP) and pimping by coercion [art. 213 para. (2) CP], according to the amendment made by Law no. 202/2024, to a single offense of human trafficking [art. 213 para. (1¹) CP]. However, for the reasons expressed above, such a solution cannot be considered, the modalities considered by the legislator actually referring to the essential conditions attached to the material element⁸⁸. Therefore, as we will see below, we consider that in such a situation the concurrence between the offense provided for in art. 210 para. (1)/ art. 211 para. (1) CP and the one provided for in art. 210 para. (1¹)/art. 211 para. (1¹) CP.

On the other hand, if the perpetrator of trafficking acts with a view to exploiting the person, and he does not subsequently carry out the exploitation, the question of retaining the offense provided for in art. 210 para. (1¹) CP, given that this concerns an action of determination to start or continue practicing prostitution, therefore an action of exploitation that has begun, can no longer be raised. Under these conditions, only the offense of trafficking in persons in its basic form [art. 210 para. (1) CP] can be retained. Such a solution could be based on the argument that the exploitation of a person was not eliminated by the legislator from the Criminal Code (this being not even possible, by the way), but only legally reclassified by transferring it from the offense of pimping to that of trafficking in persons. We believe that such an approach is correct, but even so, it does not fully resolve the relationship between the crime of human trafficking and the form of exploitation, when both are committed by the same person.

b. The second option concerns the possibility of confining human trafficking to the crime of pimping in the situation where the trafficker acts to facilitate the practice of prostitution or to obtain financial benefits from the practice of prostitution by a person, an activity that is subsequently carried out⁸⁹. Therefore, the confining of the crimes will be incidental in the event that, following the recruitment, transportation, etc. by coercion, deception, etc. of a person, the victim practices prostitution, and the trafficker is also the one who helps the victim to practice prostitution or to obtain financial benefits from his activity. This solution proposed by part of the doctrine is based on the fact that pimping does not only involve the determination to start or continue practicing prostitution, acts that are not found in the constitutive content of the crime of human trafficking⁹⁰.

We could find such an approach in a decision in which, even if such a classification was not opted for, it was considered that the more favorable criminal law was the one prior to the amendment made by Law no. 269/2024, the legal classification of the court caught our attention: „Thus, in the case of the defendant (...) who is charged with recruiting the injured person (...) in order to force him to practice prostitution by misleading the injured person, transporting the injured person to the territory of Spain, as well as determining the injured person to start and then continue practicing prostitution between November 2021 and April 2022, by coercion as a result of the use of aggressive tactics, the defendant thus obtaining material benefits from practicing prostitution, the legal classification according to Law no. 269/2024 would be that of human trafficking, provided for by art. 210 para. 1 let. a and para. 1¹ of the Criminal Code (punished by imprisonment from 5 to 12 years) and pimping, provided for by art. 213 para. 1 of the Criminal Code (punished by imprisonment from 2 to 7 years). The concurrent detention of the two offenses is expressly provided for by art. 210 para. (4) of the Criminal Code, which provides that (...) the acts provided for in para. (1) and (2) are followed by the effective exploitation of the minor, within the meaning of art. 182, the rules of concurrent offenses apply”⁹¹.

As can be seen, the court is considering the detention of a crime of human trafficking by reporting both to para. (1) and to para. (1¹), in conjunction with a crime of pimping. First of all, regarding the retention of a single offense, we cannot embrace such an opinion for the arguments that we will develop in detail later, being in the presence of two heterogeneous and not homogeneous modalities from the perspective of criminal significance. Secondly, the retention of pimping, on the grounds of the defendant obtaining material benefits from practicing prostitution, cannot be considered *de lege lata* given that exploitation is defined by the legislator in a clear and limiting manner in the content of art. 182 of the Criminal Code, as being the forcing of a person to practice prostitution.

⁸⁸ See also V. Cioclei, *Traficul și exploatarea persoanelor vulnerabile, din nou sub „bisturiul” legiuitorului...*, cit. supra; V. Cioclei, in G. Bodoroncea et al., op. cit., p. 794.

⁸⁹ N. Neagu, in N. Neagu, V. Dobrinou et al., op. cit., p. 142.

⁹⁰ *Ibidem*.

⁹¹ CA Galați, crim. s., crim. dec. no. 264/31.10.2024, available at: www.rejust.ro.

Therefore, holding a person who did not intend to exploit another person, and therefore coercing them to engage in prostitution, the purpose of which is to facilitate the practice of prostitution or to obtain financial benefits from the practice of prostitution (following the agreement given in this regard by the prostituted person), would lead to an impermissible extension of the criminalization norm and to an interpretation to the detriment of the defendant (in mala partem), which would constitute a violation of the principle of legality of criminalization.

Moreover, the method of effectively obtaining financial benefits from the practice of prostitution in art. 213 para. (1) CP considers the practice of prostitution voluntarily and not through coercion, in which case only the trafficking offense provided for in art. 210 para. (1¹) CP will be held. In this regard, even if this method is no longer provided for in art. 210 para. (1¹) CP, it implicitly results from the manner of forcing the person to start or continue practicing prostitution (which will also constitute the basis for the legal classification), as there has been no situation in practice when such coercion targeted a motivation of the author of the coercion other than the strictly financial one.

Regarding the relationship between trafficking and the crime of pimping following the changes made in 2024, we also find another opinion, in the sense that „In the event that the perpetrator facilitates the practice of prostitution or obtains material benefits from the practice of prostitution, in the manner provided for in art. 210 para. (1) of the Penal Code, art. 210 para. (1¹) of the Penal Code cannot be retained, because it provides as a means of the material element only the determination to start or continue prostitution. Most likely, if all the elements of typicality are met, the acts will be classified as the standard variant of human trafficking - art. 210 para. (1) CP. Specifically, this will be the legal classification if, for example, the perpetrator obtains material benefits from the practice of prostitution by a person whom, previously, by coercion, he trafficked (or recruited her, transported her, etc.). And in such a situation, the concurrence with the crime of pimping is excluded because it does not (anymore) contain the option of coercion”⁹².

We agree with the solution of excluding the concurrence between the two crimes, but it should be noted in this context that, to the extent that a person is recruited by coercion and subsequently the trafficker obtains patrimonial benefits from practicing prostitution, it is obviously difficult to imagine that that person will practice prostitution voluntarily. In this case, we will also be in the presence of a coercion when starting or continuing to practice prostitution, so that, as we will see later, a concurrence will be retained between the crime of trafficking in persons provided for in art. 210 para. (1) of the Criminal Code and that provided for in art. 210 para. (1¹) of the Criminal Code. Obviously, the solution of retaining the conspiracy with pimping is excluded in such a hypothesis, just as the solution of retaining exclusively the crime of human trafficking in its basic form cannot be considered.

In relation to the retention of the crime of pimping following the amendments made by the legislator in 2024, the same author also shows that: „In the hypothesis provided for in para. (1) of art. 213 of the Penal Code, when the person voluntarily practices prostitution, the crime of pimping will be retained, even if the case also includes elements specific to trafficking, for example, the pimp is the one who recruits the person, or provides transportation for them, or shelters them. In this case, the constitutive elements of human trafficking are not fulfilled because exploitation is missing, which implies forcing them to practice prostitution [art. 182 letter c) of CP]”⁹³.

As can be seen, the author perpetuates the same error of reasoning that he has promoted over time in his courses, excluding the retention of trafficking due to the lack of exploitation and which implies forcing them to practice prostitution. Or, as we mentioned above, the apprehension of trafficking cannot be conditioned by the effective exploitation of the trafficked victim, this being an action subsequent to the commission of the trafficking, but by the pursuit or acceptance of the exploitation of the victim, exploitation that can be effectively carried out by the trafficker (in which case a plurality of crimes will be apprehended) or by another person. On the other hand, if specific modalities of trafficking appear (recruitment, transportation, hosting, etc.), but which are not committed by coercion, deception, kidnapping, etc. we will not be able to be in the hypothesis of a human trafficking crime. However, we will be in the presence of a pimping crime, given that modalities, such as transportation or hosting, can lead to the apprehension of facilitating the practice of prostitution, a crime that

⁹² V. Cioclei, *Traficul și exploatarea persoanelor vulnerabile, din nou sub „bisturiul” legiuitorului...*, cit. supra.

⁹³ *Ibidem*.

currently assumes exclusively the existence of a consent to the practice of prostitution. Therefore, the solution retained by the author is, in essence, correct, but not for the arguments expressed by him.

c. The third option involves retaining a competition between the offense provided for in art. 210 para. (1)/art. 211 para. (1) CP and that provided for in art. 210 para. (1¹)/art. 211 para. (1¹) CP. In this regard, we consider that the only solution that can further give efficiency to the provisions of art. 210 para. (4) and art. 211 para. (4) CP and eliminate discrimination against the sanctioning treatment in the case of trafficking followed by other forms of exploitation, is to consider the new offense contained in para. (1¹) as a distinct offense, not as an alternative normative variant of the material element of the offense of trafficking in persons/minors. Practically, such an interpretation envisages treating the crime of trafficking in persons/minors as a crime with alternative constitutive contents, in which the two crimes provided for in para. (1) and para. (1¹) of art. 210 and 211 CP will be considered together.

In this sense, as has also been noted in the doctrine, if in the case of crimes with alternative content the modalities provided for by the incrimination norm are equivalent in terms of criminal significance, which means that the commission of several of them does not affect the unity of the crime, in the case of those with alternative constitutive contents the modalities of incrimination cannot be equivalent⁹⁴. Therefore, in order to analyze whether or not the alternative variants of commission have the same significance in terms of damage to the legal object, the following can be taken into account: the compatibility of the variants provided for alternatively, the reason for incrimination, etc.⁹⁵. As other authors note, the essential feature of crimes with alternative content is fungibility, so that the acts described in the criminal norm can substitute for the others, „presenting a similar abstract gravity expressed in the same limits of punishment”⁹⁶.

However, within the form provided for in para. (1¹) of art. 210/art. 211 CP, the hypothesis introduced by the legislator in 2024 is fundamentally different from that provided for in para. (1), the differences between the methods of committing the crimes being essential, given that para. (1) aims to sanction an activity prior to/precursor to the exploitation of a person: recruitment, transportation, hosting, etc. by coercion, misleading, etc., while para. (1¹) aims at the very exploitation of a person, by forcing him to start or continue practicing prostitution. Therefore, there can be no talk of fungibility or substitution of the variants described in the two paragraphs. The lack of equivalence of the methods of the two crimes is also highlighted by the legislative solution provided for in Law no. 202/2024 which correctly imposed the solution of the concurrence of crimes between the crime of trafficking in persons/minors and any form of exploitation (therefore, including the compulsion to practice prostitution).

Looking also from the perspective of the reason for the incrimination, we mention that the apparent problem that generated the legislative intervention in practice was related to the legal classification of certain conducts that, apparently, would have met elements of both the crime of trafficking and that of pimping. In these conditions, nothing prevents, under the conditions of the existence *de lege lata* of an express norm that further imposes the retention of the concurrence of crimes, as in the hypothesis in which the elements of trafficking are followed by the compulsion, misleading, etc. to practice prostitution, a plurality of crimes to be retained. We say this because regardless of the legal qualification of the form of exploitation – pimping or trafficking in persons/minors, forcing prostitution remains a form of exploitation under the terms of art. 182 CP.

Under these circumstances, we consider that the reclassification of a form of exploitation cannot be such as to invalidate a rule in force, which the legislator imposed in order to eliminate any controversy regarding the possibility of retaining or not the concurrence of crimes. Therefore, retaining exclusively a single crime of trafficking in persons/minors, while in the case of other forms of exploitation (equally or even less serious) the rules of concurrence of crimes would apply, would constitute an approach devoid of any logical/rational justification and which would lead to the application of a distinct sanctioning treatment to legal situations (forms of exploitation) which are, in essence, similar.

The solution proposed by us also finds support in recent judicial practice, holding in the content of a decision that: „Through the amendment brought by Law no. 269/2024, the offense provided for by art. 210 CP becomes an offense with alternative contents because the incrimination in para. (1) has a distinct legal significance from the incrimination newly introduced by para. (1¹), a distinction given by the concrete, different

⁹⁴ F. Streteanu, D. Nițu, *Drept penal. Partea generală*, vol. I, Universul Juridic Publishing House, Bucharest, 2014, p. 263-264.

⁹⁵ *Idem*, p. 265.

⁹⁶ C. Duvac, *Pluralitatea aparentă de infracțiuni*, Universul Juridic Publishing House, Bucharest, 2008, p. 102-103.

content of the material elements: "recruitment, transportation, etc. for the purpose of exploitation" provided for by para. (1), respectively the effective exploitation in the manner of "determination to start or continue practicing prostitution" provided for by para. (1¹), whose incrimination protects the person from two distinct perspectives: a. prevention of trafficking, of the person's relegation to the level of a commodity, tool, animal, and b. prevention of the exploitation of the person's labor"⁹⁷.

The same reasoning, but viewed from a different chronological sequence of the conduct of the crimes, will also apply to the crime of trafficking in minors, when, after determining or facilitating the practice of prostitution or, as the case may be, obtaining patrimonial benefits from the practice of prostitution by one or more minors, hypotheses that do not imply the existence of acts of coercion, misleading, etc. (in the context of the presumed state of vulnerability of the minor victim), the element of trafficking is committed (transportation, transfer, receipt, etc.) in view of sexual exploitation. In this case too, we consider that it is necessary to retain the solution of the actual concurrence of crimes and not just of a single crime, as some authors wrongly retain⁹⁸, given that, after the commission of the material element of the crime provided for in art. 211 para. (1¹) CP, and which concerns the realization of a form of exploitation of the minor victim, the perpetrator treats the victim as an object, concluding commercial acts regarding her (in exchange for sums of money), thus preparing the commission of one or more new forms of exploitation of her. However, the retention of a single offense is likely to abstract, in an unfair way, from the existence of a new criminal conduct and the need to repress any acts preceding the commission of other new forms of exploitation.

This reasoning applies *mutatis mutandis* also in the case where, subsequently to the commission of the compulsion to start or continue practicing prostitution art. 210 par. (1¹) CP., the same active subject commits the element of trafficking in order to exploit the victim (e.g., transfers the victim to another trafficker, in exchange for a sum of money, for sexual exploitation or even for the purpose of another form of exploitation).

In conclusion, in the situation where the trafficked victim (minor or adult) is rescued by the judicial authorities from the arms of the trafficker, during or after the commission of the activity of recruitment, transportation, transfer, shelter or reception by coercion, deception, etc., but before the start of her exploitation, the perpetrator will commit exclusively the crime of trafficking in persons [art. 210 para. (1) CP] or of minors [art. 210 para. (1) CP]. To the extent that the rescue of the victim will be done during or after her exploitation, the same active subject (trafficker) will be held responsible for a real competition with etiological connection between the trafficking crime provided for in art. 210 para. (1) CP] and that provided for in art. 210 para. (1¹) CP. And in the case of sexual exploitation of a minor, such a concurrence will be retained between the crime of trafficking in minors provided for in art. 211 para. (1) CP and that provided for in art. 211 para. (1¹) CP. Also, to the extent that, after the commission of sexual exploitation, the elements of trafficking are also committed, the same person will be held liable for a real concurrence of crimes between the form provided for in art. 210/art. 211 para. (1) CP and that provided for in art. 210/art. 211 para. (1¹) CP.

On the other hand, we consider that in the future it is necessary to return to the correct approach envisaged by the legislator regarding the configuration of the crime of pimping, once the Criminal Code enters into force. Specifically, we consider that it is necessary to return to the form prior to the amendments made by Law no. 269/2024, so that *de lege ferenda* the concurrent retention of the crime of trafficking in persons/minors in conjunction with the aggravated forms of pimping (by coercion or on a minor) is taken into account.

7. Some aspects of comparative law regarding the crime of pimping

In support of the return to the previous version of Law no. 269/2024, it is necessary to mention the existing legal provisions of the aggravated forms of pimping from other legislation, those in the basic form having, as a rule, a regulation similar to that existing in the case of our legislation.

According to article 225-5 of the French Criminal Code⁹⁹: „Pimping is one of the following acts committed by any person in any way:

- Helping, assisting or defending the prostitution of another person;

⁹⁷ Trib. Iași, crim. s., crim. sent. no. 206/15.04.2025, available at: www.rejust.ro.

⁹⁸ V. Cioclei, *Traficul și exploatarea persoanelor vulnerabile, din nou sub „bisturiul” legiuitorului...*, cit. *supra*; V. Cioclei, in G. Bodoroncea et al., *op. cit.*, p. 798.

⁹⁹ The mentioned texts constitute my own translation, for the French version, see: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/.

- Obtaining profit from prostitution committed by another person, sharing the products or receiving subsidies from a person who habitually practices prostitution;
- Hiring, training or diverting a person with a view to practicing prostitution or exerting pressure on them to prostitute themselves or continue to prostitute themselves.”

According to art. 216 (Procurement) of the Austrian Criminal Code¹⁰⁰: „(1) Whoever exploits another person with the intention of obtaining a continuous income from his prostitution shall be punished with imprisonment for a term of up to two years.

(2) Whoever, with the intention of obtaining a continuous income from the prostitution of another person, exploits this person, intimidates him, dictates the conditions of his prostitution or exploits several such persons at the same time shall be punished with imprisonment for a term of up to three years. (...)

(4) Whoever, by means of intimidation, prevents a person from giving up prostitution shall also be punished with imprisonment for a term of six months to five years.”

According to Section 233 of the Danish Penal Code¹⁰¹: „A person who induces another person by invitation, incitement, by committing a crime or in any other way to have sexual relations with a client in return for a sum of money or on the basis of the promise of a sum of money shall be liable to a fine or to imprisonment for a term not exceeding 2 years.”

According to Section 181a. (Procurement) of the German Penal Code¹⁰²: „(1) Whoever

1. exploits another person who engages in prostitution or
2. for his own financial benefit controls the exercise of prostitution by another person, determines the place, time, extent or other circumstances of the exercise of prostitution or takes measures to prevent the person from giving up prostitution, and, for this purpose, maintains a general relationship with that person beyond a specific occasion, shall be liable to imprisonment for a term of six months to five years.”

According to art. 169 (Procurement) of the Portuguese Penal Code¹⁰³:

1. Whoever, professionally or for profit, promotes, favors or facilitates the practice of prostitution by another person shall be punished with imprisonment from six months to five years.

2. If the perpetrator commits the crime provided for in the preceding paragraph:

- o By violence or serious threat;
- o By deception or fraudulent manoeuvre;
- o By abuse of authority arising from a family relationship, guardianship or trusteeship, or hierarchical, economic or professional dependence; or
- o By taking advantage of the victim’s mental incapacity or situation of special vulnerability; shall be punished with imprisonment from one to eight years.”

According to art. 187 of the Spanish Criminal Code¹⁰⁴: „1. Whoever, by means of violence, intimidation or deception, or by abusing a position of superiority or the need or vulnerability of the victim, induces an adult to engage in prostitution or to remain in prostitution, shall be punished with imprisonment from two to five years and a fine from twelve to twenty-four months.

A sentence of imprisonment from two to four years and a fine from twelve to twenty-four months shall be imposed on anyone who profits from the exploitation of the prostitution of another person, even with their consent. In any case, exploitation shall be considered to exist when any of the following circumstances are present:

1. The victim is in a situation of personal or economic vulnerability.
2. That onerous, disproportionate or abusive conditions are imposed on him for the exercise thereof.”
3. By deception, coercion or threat.”

Based on the provisions of art. 200 para. (4) of the Hungarian Criminal Code¹⁰⁵:

¹⁰⁰ The mentioned texts constitute my own translation, for the German version, see: <https://www.jusline.at/gesetz/stgb>.

¹⁰¹ The mentioned texts constitute my own translation, for the Danish version, see: <https://danskelove.dk/straffeloven>.

¹⁰² The mentioned texts constitute my own translation, for the English version, see: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

¹⁰³ The mentioned texts constitute my own translation, for the Portuguese version, see: <https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1995-34437675>.

¹⁰⁴ The mentioned texts constitute my own translation, for the Spanish version, see: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>.

¹⁰⁵ The mentioned texts constitute my own translation, for the Hungarian version, see: <https://njt.hu/jogszabaly/2012-100-00-00.78>.

1. (1) Whoever induces a person, for the purpose of obtaining profit, to commit a sexual act on another person shall be punished by imprisonment for a period of up to three years.

2. (2) Whoever offers or solicits a person under the age of eighteen for prostitution shall be punished by imprisonment for a period of up to one year and a maximum of five years. (...)

3. (4) The punishment shall be imprisonment for a period of between two and eight years, if the procuring, as provided for in paragraph (1), is committed: (...)

As can be seen from the analysis of comparative law, the Romanian legislator correctly opted, with the entry into force of the Criminal Code, for a structure of the crime of procuring similar to that found in many Member States of the EU: France, Austria, Denmark, Germany, Portugal, Spain, Hungary. Thus, if the basic form contains the specific elements of consensual pimping, the aggravated forms concern the practice of prostitution by coercion or other similar means that lead to the idea of exploitation of the victims of prostitution. Therefore, we consider that, also from this perspective, it is necessary to return to the form prior to the amendment made by Law no. 369/2024.

8. Conclusions

As we have seen above, in the relationship between the crime of trafficking in persons/minors and forms of exploitation, the exploitation of a person always represents the purpose of the criminal activity, and not a requirement of the objective side of the crime, so that it is not necessary to achieve the purpose in order to meet the constitutive elements of the crime of trafficking, but only to pursue/accept it. The actions of the trafficker (e.g., recruitment, transportation, etc.) are committed with a view to exploiting the victim (even if this exploitation is not subsequently carried out by the same trafficker), and the legislator has chosen to punish, relatively drastically, all actions preceding the achievement of this purpose (essentially, acts of trade), precisely in order to prevent the start of the exploitation activity. Under these conditions, it would be completely and utterly absurd for the judicial body to give up on punishing the purpose crime, representing even the more serious crime, in the situation where the trafficker is also the one who subsequently exploits the victim. Contrary to an almost unanimous practice, based on a superficial/artificial interpretation of what was retained by the Supreme Court in the content of RIL Decision no. XVI of March 19, 2007, which embraced the thesis of absorbing any form of exploitation within the content of the crime of trafficking in persons/minors, with the entry into force of Law no. 202/2024, a consecration of the original intention of the legislator was achieved, but also of what was constantly shown in the majority doctrine, in the sense of the need to retain the concurrence of crimes to the extent that the same person successively commits the two criminal activities. However, if until the entry into force of Law no. 269/2024 this ratio was quite clearly applicable in practice, by retaining the actual concurrence of crimes, after the entry into force of this law the question arose whether the concurrence of crimes solution provided for by Law no. 202/2024 can still be supported or, as the case may be, will a single trafficking crime be retained, in the event of forcing a person to start or continue practicing prostitution?

This was based on the idea that, although the provisions of Law no. 202/2024 were maintained with the entry into force of Law no. 269/2024, with the translation by the latter normative act of pimping by coercion into the crime of trafficking in persons, respectively of pimping of a minor into the crime of trafficking in minors, it was questioned whether the recent intention of the legislator was to partially invalidate the solution of the concurrence of crimes in the case of sexual exploitation and to operate an absorption of the form of exploitation into the crime of trafficking or, as the case may be, to continue to allow the application of the norm of Law no. 202/2024, but with regard to other normative modalities.

For the reasons expressed in detail, we have shown that, in order to continue to produce legal effects of the provisions introduced by Law no. 202/2024 [art. 210 para. (4) and art. 211 para. (4) CP], the natural solution for resolving the relationship between trafficking offenses and sexual exploitation [this being present in the content of art. 210 para. (1¹) and art. 211 para. (1¹) CP], aims at the need to consider the offenses of trafficking in persons and minors as offenses with alternative constitutive contents.

Given that we are in the presence of activities preceding exploitation, respectively of activities of exploitation of a person, this is required, mainly, in light of the heterogeneous and non-fungible nature of the normative modalities provided for in para. (1) and (1¹) compared to those in para. (1) of art. 210/art. 211 CP, an aspect that makes such crimes not be considered as having a unique constitutive content, therefore crimes that present equivalent modalities from the perspective of criminal significance.

Secondly, such a solution is also required by the fact that regardless of the legal qualification of the form of exploitation in our domestic law – pimping or trafficking in persons/minors, forcing to practice prostitution will continue to remain a form of exploitation, under the terms of art. 182 CP. However, the requalification of a form of exploitation cannot, in any case, be of a nature to invalidate a norm still in force, which the legislator imposed, precisely, in order to eliminate any controversy regarding the need to retain the concurrence of crimes between trafficking crimes and forms of exploitation.

Thirdly, as we have seen previously, if at the domestic level 3/4 of the exploited victims are forced to practice prostitution, at the European level approximately 1/2 are subject to such a form of exploitation. Therefore, from this perspective, imposing a less punitive treatment than other forms of exploitation can only lead to providing a signal of encouragement from the Romanian authorities regarding the fight against human trafficking and sexual exploitation, which can have serious consequences, while failing to ensure this protection could endanger the values of democracy and the rule of law, as regulated in art. 1 para. (3) and (5) of the Constitution.

Last but not least, the exclusive retention of a single crime of human/minor trafficking in the case of the trafficker who subsequently committed the sexual exploitation of the victim, while in the case of other forms of exploitation (equally or even less serious) the rules of concurrent crimes would apply, would lead to the application of a distinct sanctioning treatment to legal situations (forms of exploitation) which, in essence, are nothing more than similar, an approach that would again lack any logical/rational justification from the perspective of the need to respect the principle of equal rights.

In light of the above and in order to resolve the relationship between the crime of trafficking and the forms of exploitation, in the situation where the trafficked victim (minor or adult) is rescued by the judicial authorities from the arms of the trafficker, during or after the commission of the activity of recruitment, transportation, transfer, shelter or reception by coercion, deception, etc., but before the start of her exploitation, the perpetrator will commit exclusively the crime of trafficking in persons [art. 210 para. (1) CP] or of minors [art. 210 para. (1) CP]. To the extent that the rescue of the victim will be done during or after her exploitation, the same active subject (trafficker) will be held responsible for a real competition with etiological connection between the crime of trafficking provided for in art. 210 para. (1) CP] and that provided for in art. 210 para. (1¹) CP. This reasoning is also applied accordingly in the case of sexual exploitation of a minor, when a plurality of crimes will be retained, as, equally, in the situation where, after the commission of sexual exploitation, the elements of trafficking are also committed, the same person will be held responsible for a real concurrence of crimes between the form provided for in art. 210/art. 211 para. (1) CP and that provided for in art. 210/art. 211 para. (1¹) CP.

Last but not least, and also from the perspective of comparative law, we were able to observe that the Romanian legislator correctly opted, with the entry into force of the Criminal Code, for a structure of the crime of pimping similar to that found in many other Member States of the European Union, including: France, Austria, Denmark, Germany, Portugal, Spain, Hungary, a fact for which we consider, once again, that a return *de lege ferenda* to the form prior to the amendment made by Law no. 369/2024 is required. Under these conditions, the relationship between the crime of trafficking and the form of exploitation of forcing to practice prostitution will no longer be established, in an atypical way, between two crimes provided for in the same article (art. 210/art. 211 CP) but, correctly, as in the case of the rest of the forms of exploitation, between art. 210 /art. 211 CP and art. 213 par. (2) or (3) CP, a solution that was retained in practice, for a short period of time, between the entry into force of Law no. 202/2024 and Law no. 269/2024.

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THE RIGHT OF PRISONERS TO EDUCATION: AN ABSOLUTE OR A RELATIVE RIGHT?

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Abstract

This paper examines the legal nature of the right to education of persons deprived of liberty, analysing whether it should be regarded as an absolute right or a relative one subject to limitation. The study is grounded in Article 79 of Law no. 254/2013 on the execution of custodial sentences in Romania, as well as in the relevant European human rights standards, particularly the jurisprudence of the European Court of Human Rights, including the case of Velyo Velev v. Bulgaria.

The main objective of the research is to determine the scope and limits of the right to education in the penitentiary context and to assess the extent to which national legislation complies with European standards. A secondary objective is to identify the balance between the educational needs of prisoners and the legitimate interests of the penitentiary administration, including security, order, and resource constraints.

Methodologically, the paper uses a doctrinal and comparative legal analysis, combining national legal provisions with European case law and relevant scholarly commentary. The analysis highlights that while the right to education is strongly protected under international and European instruments, its implementation in detention settings is often subject to practical and administrative limitations.

The study concludes that the right to education of prisoners cannot be considered absolute in a strict legal sense, but neither can it be reduced to a purely discretionary benefit granted by penitentiary authorities. Instead, it represents a qualified right that requires effective and meaningful access, subject to proportional limitations. The paper ultimately argues for a reinforced interpretation of positive obligations incumbent on the state to ensure real educational opportunities within prisons.

Keywords: prisoners' rights, right to education, penitentiary law, European Court of Human Rights, Law no. 254/2013.

1. Introduction

This paper addresses the legal characterization of the right to education of persons deprived of liberty, with a particular focus on whether this right should be understood as absolute or relative within the penitentiary context.

The subject is important due to its direct implications on the rehabilitation and social reintegration of prisoners, as well as on the obligations of the state under both national and European legal frameworks. Education in detention is widely recognised as a key instrument for reducing recidivism and promoting social inclusion, yet its practical implementation often raises legal and administrative challenges.

The author aims to answer this issue by analysing the relevant provisions of Romanian legislation, especially Law no. 254/2013, in conjunction with the standards developed in the case-law of the European Court of Human Rights. Particular attention is given to the proportionality of restrictions imposed on the exercise of this right in penitentiary institutions.

This paper is also situated within the broader scholarly debate concerning prisoners' rights and the scope of positive state obligations under Article 2 of Protocol No. 1 to the European Convention on Human Rights. It seeks to contribute to existing literature by offering a structured analysis of the tension between normative guarantees and practical limitations in correctional environments.

2. The right to education of the convict from a legal perspective

This right is provided and guaranteed by Article 79 of the Law no. 254/2013, which mentions that, depending on the possibilities of the prison, the convicted persons may participate in school or university training courses, under the terms of the collaboration protocol concluded with the Ministry of National Education, taking into account the following aspects:

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3. Pivotal Judgment: Case of Velyo Veleve v. Bulgaria¹

The applicant, who was in pre-trial detention at Stara Zagora Prison, where he claimed to have been housed together with “repeat offender” inmates.

Having never completed secondary school, the applicant requested to be enrolled in the school operating within Stara Zagora Prison. In August 2005, he submitted a request to the Governor of Stara Zagora Prison, seeking enrollment in the 2005/06 school year. By the start of the school year on 15 September 2005, he had received no response. Consequently, on 29 September 2005, he addressed the Governor again and additionally contacted the Ministry of Education and the Public Prosecutor’s Office (in Bulgaria, the prosecutor is the authority responsible for supervising the lawful execution of pre-trial and post-conviction detention).

The applicant received a letter from the Public Prosecutor’s Office dated 6 October 2005, stating that the prison administration, taking into account the applicant’s prior conviction, had considered the possibility of the applicant pursuing his studies. Furthermore, the prosecutor noted that the applicant’s allegations concerning a denial of the right to education had not been substantiated. On 24 October 2005, the applicant also received a response from the Ministry of Education. The letter confirmed that persons deprived of liberty had the right to continue their education within the prison system, without making any reference to pre-trial detainees.

The applicant complained that he had been denied access to the school at Stara Zagora Prison, in violation of Article 13 of the Convention and Article 2 of Protocol No. 1 to the Convention. The Court considers that this complaint should be examined under Article 2 of Protocol No. 1, which provides as follows:

“No one shall be denied the right to education. In the exercise of any functions which it assumes in respect of education and teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

3.1. Arguments of the Parties

The applicant argued that national legislation does not explicitly prohibit the participation of pre-trial detainees in the prison’s educational programs and, therefore, he should have been treated in the same manner as convicted prisoners and allowed access to education. In particular, in his view, the provisions regarding the access of convicted prisoners to educational facilities should apply to all categories of prisoners. In support of his claim, the applicant maintained that the national authorities had misinterpreted the relevant provisions and, as a result, had treated him in a discriminatory manner; his rights had been restricted more than necessary for the purpose of detention; and he had been automatically and arbitrarily deprived of the right to education.

Furthermore, the applicant contested the reason invoked by the prison authorities and the Government in their observations, namely that, as a person who could potentially be sentenced as a “repeat offender,” his exclusion from school was justified in the interest of “first-time offenders” attending it. He emphasized that during the time he was held at Stara Zagora, there were “repeat offender” inmates attending the prison school. In his view, this demonstrated that the principle of separating “repeat offenders” from other prisoners had not been respected.

Moreover, the applicant argued that it was illogical to exclude him from school on the ground that, as an unconvicted detainee, there was a possibility that he might be acquitted and therefore would have to leave the school before the end of the school year. In any case, he spent nearly two full school years in pre-trial detention at Stara Zagora Prison. If the prison authorities had any doubt regarding the duration of his pre-trial detention, they could have referred the matter to the Public Prosecutor’s Office.

The applicant maintained that, until he was convicted, he was entitled to the presumption of innocence and should not have been denied the right to education during this period. Once convicted and transferred to Pazardjik Prison, he no longer had the opportunity to continue his studies.

While the Court is mindful of the Committee of Ministers’ recommendations that educational facilities should be made available to all prisoners (see paragraphs 21–24 above), it recalls that Article 2 of Protocol No. 1 does not impose an obligation on the Contracting States to establish educational facilities in prisons where none exist (see *Natoli v. Italy*, no. 26161/95, Commission decision of 18 May 1998, unpublished; and *Epistatu v. Romania*, no. 29343/10, § 63, 24 September 2013).

¹ Available at: <https://hudoc.echr.coe.int>, accessed on 17 April 2026.

However, in the present case, the applicant's complaint concerns the refusal of access to an already existing educational facility, namely the Stara Zagora Prison School. As noted above, the right of access to an existing educational institution falls within the scope of Article 2 of Protocol No. 1. Any restriction on this right must therefore be foreseeable, pursue a legitimate aim, and be proportionate to the objective pursued.

Although Article 2 of Protocol No. 1 does not impose a positive obligation to organize education in prisons, where such a possibility exists, it must not be subject to arbitrary or excessive restrictions. The Court considers that, in the context of Article 2 of Protocol No. 1, the foreseeability of the restriction applied to the applicant is questionable. The relevant legislative framework provided that convicted prisoners aged 16 or over had, upon request, the right to be included in educational programs and that, in the absence of clear contrary rules, the provisions regarding convicted prisoners would apply equally to pre-trial detainees. The only express provision regarding the right to education of pre-trial detainees was that the prison authorities should "encourage" their participation in the prison's educational programs.

The lack of clarity in the legislative framework was also reflected in the fact that, during the domestic proceedings and before this Court, the national authorities cited various reasons for refusing the applicant's request to enroll in school. His request was initially denied by the Department for Execution of Sentences within the Ministry of Justice on the grounds that, "once convicted," he would be transferred to a prison for "repeat offenders" and that, in the meantime, allowing "repeat offenders" to mix with "first-time offenders" in the school would violate the legal obligation to separate them. Subsequently, the Governor of the prison also refused his request for similar reasons.

When the applicant appealed the prison authorities' decision to exclude him from school, the Stara Zagora Tribunal found that he could not be classified as a "repeat offender" and ordered the prison Governor to enroll the applicant in school. Following the Governor's appeal, the Supreme Administrative Court quashed the tribunal's decision on the grounds that the applicant was not entitled to participate in the prison's educational programs, as the right to education, according to the relevant legislation, was intended to apply exclusively to persons deprived of liberty following a final conviction, and not to those held in pre-trial detention.

Furthermore, during the proceedings before the Court, the Government relied on three different reasons to justify the applicant's exclusion from school. First, it argued that, as a pre-trial detainee, it was inappropriate for the applicant to attend school together with convicted prisoners. Second, it claimed that, as a detainee held in pre-trial detention for an indeterminate period, it was not appropriate for him to attend a school intended for prisoners sentenced to 12 months or more of imprisonment. Third, the Government asserted that, since the applicant risked being sentenced as a "repeat offender," it would not be in the interest of the "first-time offenders" if the applicant were allowed to attend school.

For the Court, it is noteworthy that the Government did not support its arguments with any evidence concerning the conditions applicable at Stara Zagora Prison. The need to protect the applicant by keeping him separate from convicted prisoners, due to his status as a pre-trial detainee, was not a reason relied upon by the prison authorities when they rejected the applicant's requests. Moreover, from the numerous requests submitted by the applicant to be allowed to attend school, it was clear that he had no objection to participating in this activity alongside convicted prisoners. The evidence submitted before the Court contains no indication that, in a supervised and controlled educational environment, pre-trial detainees would have been affected in any way, or that, at Stara Zagora Prison, they were separated from convicted or "repeat offender" prisoners, and if so, whether such segregation applied to all aspects of the prison regime.

The second reason invoked by the Government was the indeterminate nature of pre-trial detention and the requirement under national law that prisoners must be serving sentences of one year or more before they could be enrolled in prison schools. However, the Government did not explain why this was a necessary condition for admission to the prison school. With particular reference to pre-trial detainees, such as the applicant, the Court does not consider that initial uncertainty regarding the total duration of pre-trial detention should justify depriving them of access to educational facilities, except in cases where, for specific reasons, it is clear that detention will be of short duration. Furthermore, the Government did not provide the Court with statistical information regarding the school's available resources to justify, for example, a policy of concentrating limited resources on prisoners serving the longest sentences.

Finally, regarding the last reason invoked by the Government, namely the need to separate the applicant from other prisoners due to the risk of being sentenced as a "repeat offender," the Court does not consider this

to be a valid justification, since at the time in question he was an unconvicted detainee enjoying the presumption of innocence.

Consequently, the Court does not find any of the reasons invoked by the Government persuasive, particularly as they are not supported by any evidence regarding the precise means of ensuring access to education at the Stara Zagora Prison school. On the other side of the balance must be placed the applicant's undeniable interest in completing his secondary education. The value of education in prison, both with regard to the individual prisoner and the prison environment and society as a whole, has been recognized by the Committee of Ministers of the Council of Europe in its recommendations on prison education and through the European Prison Rules.

In the present case, the Government did not provide any practical reasons, such as a lack of school resources, nor any clear explanation of the legal grounds underlying the restriction imposed on the applicant. In these circumstances, based on the evidence before it, the Court finds that the refusal to enroll the applicant in the Stara Zagora Prison school was neither sufficiently foreseeable, nor did it pursue a legitimate aim, nor was it proportionate to such an aim. It follows that, in the present case, there has been a violation of Article 2 of Protocol No. 1.

Accordingly, the application is declared admissible.

From this case, it can be observed that a prisoner's right to education must be respected, even in the context of a transfer to another prison, and that the factors that may influence the exercise of this right include:

Thus, in a situation where the prison has available resources and refuses the prisoner access to education without a legitimate aim, this may constitute a violation of the prisoner's right to education.

4. National Jurisprudence

4.1. Judgment no. 625 of 22 April 2024 of the Oradea Court ²

The Court found that, by the complaint, the applicant Administration of the Penitentiary, through its legal representative, contested the decision issued by the delegated judge within the Penitentiary through the ruling pronounced in case no. 1, regarding the measure taken by the prison administration in relation to the refusal of the applicant's request to enroll in university courses at University X—specialization in Journalism, on the grounds that the person deprived of liberty did not cumulatively meet the conditions for enrollment in a new faculty, according to the provisions of Article 79, Article 89 paragraphs (5) and (8) of Law no. 254/2013 and Article 86 paragraph (2) of the Ministry of Justice Order no. 1322/C/2017.

Subsidiarily, it requested the partial acceptance of the complaint filed by the convicted person, in the sense of granting the possibility of enrollment in a second faculty, specializing in Journalism, at University X, and not at University Y, so that the Penitentiary could ensure, in a balanced and reasonable manner, the resources necessary for attending examinations, within the territorial competence limits established for the performance of escort duties.

In the reasoning of the contestation, the applicant Administration of the Penitentiary stated that, through several internal requests submitted during 2023, the person deprived of liberty requested approval for enrollment in two additional faculties, in addition to the Faculty of Law, which had previously been approved, namely the Faculty of Psychology and later the Faculty of Journalism at University X.

In both cases, the refusal measures adopted by the Penitentiary were based on the same arguments, namely that the applicant is already a fourth-year student at the Faculty of Law (final year, which also involves preparation for the graduation examination), being assigned to a closed regime of execution, with a disciplinary offense committed in connection with attendance at courses. The current possibilities of the Penitentiary do not justify prioritizing enrollment in a new faculty, taking into account the closed execution regime, the security measures specific to this restrictive regime, the stage of the execution process, and the limited human, material, and time resources available to the prison administration. These resources are intended for equitable distribution, so that persons deprived of liberty can benefit from equal treatment, adapted to their identified needs.

It is further noted that, as a result of the refusal to approve enrollment in the two faculties, the prisoner filed a complaint invoking the Administration of the Penitentiary's violation of the provisions of Article 79, in

² Available at: <http://rejust.ro>, accessed on 17 April 2026.

conjunction with Article 91 of Law no. 254/2013 and Article 192 of Government Decision no. 157/2016, requesting permission to initiate procedures for re-enrollment at UBB — Faculty of Psychology and Educational Sciences, specialization in Psychology, for the 2023–2024 academic year.

On the merits, it is considered that the person deprived of liberty does not cumulatively meet the conditions for enrollment in a new faculty, pursuant to the provisions of Article 79, Article 89 paragraphs (5) and (8) of Law no. 254/2013, Article 92 of Government Decision no. 157/2016, as well as Article 36 paragraph (4) of Law no. 254/2013 and Article 86 paragraph (2) of Ministry of Justice Order no. 1322/C/2017, because the condition of good conduct is not fulfilled. The prisoner remains in a closed regime following a disciplinary offense committed in close connection with attendance at the Faculty of Law courses, consisting of accessing the internet and viewing videos with pornographic content during class hours.

Moreover, following his return to the Penitentiary, the prisoner repeatedly refused, during October 2023 (after the start of the academic year), to sign the written commitments regarding the use of IT equipment provided by the prison administration for the individual study program and class attendance. The commitments were only signed on 23 November 2023, approximately two months after the start of the academic year.

The applicant Administration considers that ignoring the first condition, regarding the prisoner's conduct, would undermine the obligations and prohibitions incumbent upon persons deprived of liberty and affect the very purpose of social reintegration measures, namely fostering a proper attitude towards the rule of law and social coexistence rules, in accordance with the purpose of sentence execution provided in Article 3 of Law no. 254/2013 and Article 4 paragraphs (4) and (5) of Government Decision no. 157/2016. Both provisions link the achievement of the purpose of sentence execution to the good conduct of the prisoner (a proper attitude towards the rule of law and social coexistence rules) and emphasize that the formalities required by the present regulations, to be fulfilled before a prisoner exercises a right or benefit, are subject to measures necessary in a democratic society for national security, territorial integrity, or public safety, maintaining order and preventing crime, protecting health or morals, protecting reputation or the rights of others, preventing the disclosure of confidential information, or guaranteeing the authority and impartiality of the judiciary.

Regarding the other criteria provided by law, Article 79 (right to education) of Law no. 254/2013 provides that convicted persons may participate, depending on the possibilities of the penitentiary, in school or university training courses, under the conditions of the cooperation protocol concluded with the Ministry of National Education, taking into account the priority intervention needs identified, the state of health, the type of execution regime, and the security measures applied.

From the content of the provision, it follows that the formalities established by the legislator for the exercise of the right to education (i.e., participation) refer to the assessment of the following criteria: the possibilities of the penitentiary, the priority intervention needs identified, the state of health, the type of execution regime, and the security measures applied.

It is noted that the possibilities of the penitentiary are limited both in terms of staffing levels (43% staffing rate for officer-educator positions) and in terms of the existence and provision of equipment and infrastructure necessary for the implementation of all activities in the daily program, taking into account the number and complexity of operational missions, as well as the social reintegration needs of all persons deprived of liberty, the diversity of identified needs, and the necessity to adapt rehabilitative interventions to the characteristics of each group.

It is considered that the legislator intended for existing resources to be allocated in a balanced manner, so that the administration of the place of detention can ensure participation in social reintegration activities for as many persons deprived of liberty as possible, thereby guaranteeing equal opportunities for the fulfillment of recommendations established through individualized evaluation and educational and therapeutic intervention plans.

Regarding the priority intervention needs, it should be noted that the convicted person is already enrolled in a faculty, thus ensuring the exercise of the right to education. In this context, enrollment in a new faculty could be considered at this stage of sentence execution only provided that it does not infringe upon the rights of other persons deprived of liberty.

In close connection with the possibilities of the penitentiary, the type of execution regime and the security measures applied must be taken into account. In this regard, the convicted person is assigned to a closed regime, and the provisions of Article 36 paragraph (4) of Law no. 254/2013 apply:

"(4) Convicted persons serving their sentence in a closed regime may perform work and engage in educational and cultural activities outside the penitentiary, under continuous guard and supervision, with the approval of the director of the penitentiary."

Evidently, the security measures specific to the closed regime require the allocation of additional resources for guard duty, supervision, escort, and accompaniment, compared with the semi-open or open regimes, which offer greater freedom of movement, including the possibility to participate in activities outside the penitentiary without supervision (in the case of the open regime).

The fact that the convicted person remains in a closed regime, after more than seven years since incarceration (admitted to the penitentiary on 28 March 2016), is also the result of conduct during this period, in the sense that there have been periodic breaches of the obligations and prohibitions set out by the penal enforcement legislation.

Regarding the criterion related to the recommendations included in the individualized plan, the convicted person was assigned a recommendation for university courses in 2017 by Penitentiary, which corresponds to the university courses pursued at the Faculty of Law.

In this context, the provisions of Article 92 of Government Decision no. 157/2016 are considered relevant.

In conclusion, the measures implemented by the Penitentiary administration are designed to plan rehabilitative actions in accordance with the criteria established by law and its implementing regulations, so that existing resources are allocated in a balanced and equitable manner to as many detainees as possible. The revision of recommendations for the convicted person is triggered by a change in the execution regime (from closed to semi-open), which will allow participation in a larger number of reintegration activities, with fewer resources required to ensure security measures.

Furthermore, the petitioner emphasizes that the recommendations included in the Individualized Evaluation and Educational and Therapeutic Intervention Plan are complemented by specialists from the social reintegration sector, from a multidisciplinary perspective, based on priority intervention areas and not solely according to the wishes of the person deprived of liberty. From this perspective, it is clear that pursuing a new university degree will constitute an optional/facultative action, while it is desirable that the range of activities offered within the penitentiary encourages convicted persons to work in order to understand the social value and importance of labor, including fulfilling civil obligations established by the sentencing decision, in accordance with the purpose of sentence execution.

From the case files submitted by the judge supervising deprivation of liberty within the Penitentiary, the court notes the following:

Through the complaint received and registered at the Office of the Supervisory Judge within the Penitentiary on 04.01.2024, the inmate invoked the violation by the Penitentiary administration of the provisions of Article 79 of Law no. 254/2013, in relation to Article 91 of the same normative act and Article 192 of Government Decision no. 157/2016, essentially requesting the admission of the complaint and permission to enroll at U.B.B. — Faculty of Political, Administrative, and Communication Sciences, specialization Journalism, Year I, distance learning. Case file no. 10/C/2024 was established.

The inmate was heard on 17.01.2024, by rogatory commission, by the judge supervising deprivation of liberty at the Penitentiary, who declared the following:

"I maintain my complaint regarding the reasons invoked in writing, including in relation to the probation request made, for the violation of the mentioned provisions, requesting that the Penitentiary administration be obliged to allow me to participate in undergraduate university studies at U.B.B., Faculty of Political, Administrative, and Communication Sciences, ID, specialization Journalism, Year I of study."

The supervising judge within the Penitentiary noted that the petitioner-inmate is a student in the fourth year of the Faculty of Law, in distance learning, and, according to the Penitentiary administration's statements, he had independently undertaken steps to also be admitted to the Faculty of Political, Administrative, and Communication Sciences, specialization Journalism.

Through the request registered under no. II/I/1989 on 22.11.2023, the petitioner-inmate asked the Penitentiary administration to approve enrollment in university studies at the Faculty of Political, Administrative, and Communication Sciences, ID, specialization Journalism, Year I, invoking the provisions of Article 79 of Law 254/2013 and Article 86 paragraph 1 of O.M.J. no. 1322/C/2017.

The Penitentiary administration rejected the petitioner's request through the resolution of 10.08.2023, stating that the conditions provided for in Article 79 of Law 254/2013 were not met.

The judge notes that, according to Article 79 of Law no. 254/2013, convicted persons may participate, depending on the capabilities of the penitentiary, in school or university training courses, under the conditions of the cooperation protocol concluded with the Ministry of National Education, taking into account the identified priority intervention needs, health status, type of execution regime, and the security measures applied.

Also, according to Article 192 paragraph 1 of the Implementation Regulation of Law no. 254/2013, inmates may, with the approval of the penitentiary director, attend university courses in distance learning or reduced-attendance formats, bearing all expenses, including travel costs. For courses with reduced attendance that require travel outside the penitentiary, only inmates classified in an open regime may participate. For enrollment in distance learning courses, all inmates have equal chances, regardless of the regime in which they are serving their sentence.

According to the provisions of Article 85 paragraph 1 of O.M.J. no. 1322/C/2017 of 25 April 2017, regarding the approval of the Regulation on the organization and conduct of educational, psychological assistance, and social assistance activities and programs in places of detention under the authority of the National Administration of Penitentiaries, CHAPTER VI — Methodology and rules regarding enrollment and participation in courses and exams for university education, convicted persons may, with the approval of the director of the place of detention, attend university courses in distance learning, regardless of the execution regime of their sentences.

Article 86, paragraph 1 of the same order provides that, for the approval of the initiation, by the convicted person, of the steps to enroll in or continue university courses, they must submit a request to the director of the place of detention. According to Article 86, paragraph 2 of O.M.J. 1322/C/2017, approval is conditioned on the conduct of the inmate, the other criteria provided by law, and may be granted based on the recommendations contained in the individualized plan.

In the present case, the supervising judge essentially noted that the Penitentiary administration did not approve the inmate's request for re-enrollment at the Faculty of Psychology and Educational Sciences, specialization Psychology, because the inmate is already enrolled in a faculty (fourth-year student at the Faculty of Law).

Considering the overall situation of the petitioner-inmate, the judge deemed that the refusal by the Penitentiary administration of the re-enrollment request at the Faculty of Psychology and Educational Sciences, specialization Psychology, is unjustified.

Indeed, according to Article 86, paragraph 2 of O.M.J. no. 1322/C/2017, approval of such a request is conditioned, among other legal criteria, on the conduct of the inmate.

In the present case, the petitioner was sanctioned on 08.06.2023, in the Penitentiary, with a warning for violating the Internal Regulations, for an infraction committed on 20.05.2023 while attending online courses, and the sanction was final.

Therefore, regarding the criterion of the inmate's conduct, it can be noted that, indeed, it was not appropriate, given that the inmate was disciplinarily sanctioned for committing a disciplinary infraction during the attendance of university courses.

On the other hand, it should be noted that, according to Article 79 of Law no. 254/2013, convicted persons may participate, depending on the capabilities of the penitentiary, in school or university training courses.

In this regard, it is noted that, considering the specific conditions of the closed execution regime in which the petitioner is currently held, continuous supervision and security must be provided during activities related to university courses, daily, three hours per day for individual study. One supervising officer must ensure the presence of the inmate and supervise the activities performed. Additionally, for the three hours per day, several more hours are required (sometimes after the evening roll call) on days when courses are scheduled for at least six subjects. A supervising officer and a specialist from the Education Service must be engaged each calendar day to monitor updates and posting of courses on the Microsoft Teams platform, as well as to prepare tables and attendance charts requiring multiple approvals.

The mentioned aspects concern the courses of a single faculty, and attending the courses requires internet access, the deployment of a supervising officer, and supervision for at least two hours per course. Access is restricted for education officers, meaning that checking the schedule on the university platform is carried out by the Head of the Education Service / Deputy Director of Social Reintegration, with the schedule sometimes changing daily, experiencing delays or rescheduling.

It is considered that all these defenses of the penitentiary, although pertinent and realistic, are not sufficient to restrict the right to education that the inmate must enjoy and which is necessary for full reintegration upon release from the penitentiary.

The supervising judge within the Penitentiary appreciates the efforts made by the petitioner-inmate to acquire knowledge in various fields, noting that his behavior and actions have been constructive.

It should also be emphasized that this situation—attending courses at two faculties simultaneously—will take place for a short period of time; theoretically, during 2024, the inmate should complete the courses at the Faculty of Law.

On the other hand, given that the petitioner is already a fourth-year student at the Faculty of Law (the final year, which also involves preparation for the licensure exam), the assertions of the Penitentiary administration, stating that under the given circumstances the inmate's right to participate in university courses for an additional faculty is limited, are entirely unjustified.

For these reasons, the supervising judge admitted the inmate's complaint and ordered the Penitentiary administration to allow the inmate to attend university courses at U.B.B.—Faculty of Political, Administrative, and Communication Sciences, distance learning, specializing in Journalism, first year.

The court, upon reviewing the case file and documents, finds that the conclusion of the supervising judge of deprivation of liberty is well-founded and lawful and, consequently, the appeal does not need to be admitted for the reasons invoked by the penitentiary petitioner.

In this context, it can be observed that the regime in which the convict serves his sentence does not justify the refusal of his right to education and training. This criterion may influence the manner in which this right is exercised, specifically how the inmate's attendance at courses will be ensured.

Therefore, it must be noted that the regime of sentence execution is a criterion for individualizing the exercise of this right, not a reason to deny its exercise.

Thus, it can be observed that in the case of an inmate in a maximum-security regime, the mere denial of his right to education, invoking only the execution regime, amounts to a violation of his rights. Consequently, the inmate will be able to participate in courses and online workshops.

Regarding the good conduct of the convict, this is a sensitive point, because in cases where disciplinary infractions occur during participation in courses, it must be analyzed whether the courses are not merely a pretext to escape from the prison environment, rather than serving the purpose of social reintegration. The seriousness of the committed infraction must also be considered.

In the present case, the convict has already committed a disciplinary infraction but has applied for enrollment in two additional universities.

The following issues must be analyzed: is a single disciplinary infraction, as in the present case, sufficient to disregard the inmate's right and intention to acquire knowledge in various fields, which would evidently contribute to his reintegration into society?

Indeed, the conduct of the inmate is a determining criterion regarding the manner and possibility of exercising the right to education. Disciplinary infractions may lead to restrictions in the way this right is exercised, but not to its denial.

In this case, the inmate was a fourth-year student at the Faculty of Law and was preparing to take the licensure exam, which demonstrates his concrete involvement in educational programs, a fact that influenced the decision in his favor.

4.2. Decision no. 1465 of 31.10.2024 of the Târgu Jiu Court³

On 27.08.2024, the appeal filed by the appellant-inmate against the decision of the judge supervising the deprivation of liberty at the Penitentiary was registered on the court's docket.

In the justification of his complaint, the petitioner essentially stated that education in the penitentiary is carried out formally rather than in practice, and that formalities alone cannot lead to performance, a situation that resulted in him failing to pass the baccalaureate exam.

Upon analyzing the case file documents, the court notes the following:

By the decision of the judge supervising the deprivation of liberty at the Penitentiary, based on Article 56(6)(b) of Law no. 254/2013, the petitioner's complaint was dismissed as unfounded.

³ *Ibidem*.

In issuing this decision, the judge supervising the deprivation of liberty noted the following:

It was noted that the provisions of Article 56(2) of Law no. 254/2013 establish a special procedure, and therefore a procedure of strict interpretation, intended to serve as a guarantee of respect for the rights granted to persons deprived of liberty. This procedure applies only in cases where the rights provided in Chapter V of Law no. 254/2013, entitled “Rights of Convicted Persons,” are violated.

Moreover, the complaint must concern a specific measure taken by the penitentiary administration, regarding which annulment or modification can be ordered, with the purpose of stopping the violation of the right (by “measure” is also understood the failure to fulfill an obligation correlated with one of the rights enshrined in Chapter V of Law no. 254/2013), a measure that must be taken by the administration of the place of detention.

Consequently, the provisions of Article 56 of Law no. 254/2013 establish the obligation to meet certain preliminary conditions before examining the substance of such a complaint: the requirement that the complaint concerns a specific measure taken by the administration of the place of detention; and the requirement that the measure relates to the exercise of the rights provided in Chapter V of Law no. 254/2013, and not to other rights.

With regard to the factual grounds invoked by the petitioner, the judge supervising the deprivation of liberty found that, in the submitted complaint, the petitioner invoked a violation of the right provided by Article 79 of Law no. 254/2013.

Thus, according to Article 79 of Law no. 254/2013, convicted persons may participate, depending on the possibilities of the penitentiary, in educational training courses, taking into account the identified priority intervention needs, health status, the type of execution regime, and the applied security measures.

Regarding the aspect raised, namely the violation of the right to education, the judge supervising the deprivation of liberty noted that, based on the information provided by the penitentiary administration, the field of education encompasses all programs and activities of learning, training, skill and vocational development, moral-religious education, creative activities, sports, and recreational activities aimed at acquiring and consolidating prosocial behaviors, in order to facilitate the social integration of persons deprived of liberty. Accordingly, the detainee participated consistently in educational activities and programs during the execution of the sentence, completing a professional qualification course—an IT operator course for data entry and processing—graduated on 29.03.2013, as well as numerous participations in educational activities and programs, including in August 2024, according to the data provided by the IMS-Web computerized application.

Furthermore, as evidenced by the administration’s response, the petitioner was involved in various thematic competitions and educational activities, as well as moral-religious and sports activities.

Therefore, in light of these considerations, the judge supervising the deprivation of liberty concluded that the petitioner’s right to education and instruction, as described in the provisions of Article 79 of Law no. 254/2013, was neither limited nor restricted, and consequently, the complaint of the petitioner on this aspect must be dismissed as unfounded.

Before the judge supervising the deprivation of liberty, the petitioner declared on 20.08.2024 that he maintains the complaint regarding the restriction of the right to education and professional training, because in the Penitentiary he was unable to benefit from cook-waiter courses that would help him after release, and for this reason he requested to be transferred to another penitentiary, where he identified such courses.

The petitioner also stated that he did not request to take professional qualification courses in agriculture or animal husbandry; in this penitentiary, he took courses to complete the 12th grade and sat for the baccalaureate exam, which he failed.

At the same time, in this penitentiary, he participated consistently in educational activities and programs, since, due to illness, he is unable to engage in work.

Regarding the professional qualification courses, it was explained that these are conducted in collaboration with the County Employment Agency. In this regard, the petitioner had an individual conversation to clarify the requested aspects (specifically, professional qualification courses), and it was also explained to him that, at that time, no professional qualification courses were being offered in the penitentiary where he was serving his sentence by representatives of the County Employment Agency.

He was also informed that a request had been submitted to the County Employment Agency to identify an instructor for two professional qualification courses in agriculture, but no instructor could be identified to conduct the proposed courses.

Concerning the issue raised, namely the alleged violation of the right to education, it was clarified that the field of education includes all programs and activities of learning, training, skill and vocational development, moral-religious education, creative activities, sports, and recreational activities, which aim to acquire and consolidate prosocial behaviors, in order to facilitate the social reintegration of persons deprived of liberty. Accordingly, the detainee participated consistently in educational activities and programs. During the execution of the sentence, he completed a professional qualification course: IT operator – data entry and processing operator.

During the hearing before the court, the petitioner-complainant stated that he maintains the statements made before the judge supervising the deprivation of liberty. He specified that he attended the 13th-grade courses in the penitentiary, and at their completion, he took the baccalaureate exam, which he did not pass.

Furthermore, the petitioner declared that he has been incarcerated in this penitentiary since 2019 and that, from that time until the present, no professional qualification courses have been conducted, with the education instructor verbally explaining that such courses could not be held because there were no teaching staff available to conduct them.

He emphasized that he submitted a new transfer request to the same penitentiary and mentioned that he requested to take professional qualification courses as a cook, but the Director of the National Administration of Penitentiaries rejected this request as well, citing that there were no available places for him to attend those courses, as they were already occupied.

He considered that, in this penitentiary, he is completely unable to attend professional qualification courses, thereby obstructing his access to education.

Additionally, the petitioner mentioned that the penitentiary is unable to provide adequately trained educators capable of identifying his weaknesses and helping him obtain a passing grade on the baccalaureate exam, noting that in 2024 he obtained a general average of 5.83, i.e., below 6.

In conclusion, the petitioner stated that he wishes to remain in the current penitentiary and that, within this facility, he should be granted access to the education he requested, meaning he should be able to take professional qualification courses and have teachers who can provide him with better preparation.

The court considers, based on the petitioner's statements and the evidence in the file, that, overall, his right to education within the penitentiary has been respected, through his participation in numerous educational activities. Therefore, the administration of the detention facility cannot be held responsible for the fact that he did not pass the baccalaureate exam.

Regarding the measures undertaken by the detention facility to ensure the detainee's participation in courses in the field of agriculture, which the petitioner does not wish to attend, opting instead for professional qualification courses as a cook, the court also considers that this aspect cannot be attributed to the detention facility. For this reason, the petitioner's request is dismissed as unfounded.

In the present case, it can be observed that the petitioner attended school courses within the penitentiary, even taking the baccalaureate exam. From this, it is evident that he had access to education and training.

The manner in which he prepared for the baccalaureate exam and the grade he obtained are not matters that can be attributed to the Penitentiary Administration, especially since each penitentiary is equipped with a library, which the detainee could have used to consolidate his preparation.

Moreover, the fact that he attended the professional qualification courses available at that time in the penitentiary, rather than those he desired, does not constitute a violation of this right. As can also be observed in the case of *Velev v. Bulgaria*, cited previously, the resources of the penitentiary represent a factor that influences the way in which the detainee can exercise this right.

Professional qualification, regardless of its nature, is a means to promote the social reintegration of the detainee, as once released, he will be able to earn income through the practice of that profession.

Thus, regardless of the type of qualification, once a course has been completed, it contributes to the development of the detainee as an individual in society and, at the same time, prevents the commission of new offenses, because with a qualification, he will be able to find employment and earn income.

4.3. Decision no. 1121 of 08.07.2024, Deva Court⁴

By the petition registered on the court's docket on 14.06.2024, the petitioner filed an appeal against the ruling of the judge supervising the deprivation of liberty at the penitentiary where he was serving his sentence.

The appellant submitted a complaint in which he alleged the violation of several rights, including the right to educational activities, psychological and social assistance, and professional training of the convicted person, claiming that these activities were not conducted in accordance with legal provisions. He also argued that his preparation for conditional release was not ensured and that he had not carried out activities in the period preceding or following the review by the conditional release committee. Furthermore, he claimed his right to education was violated because he could not continue his studies and was not included in professional qualification courses in various trades according to his skills.

Regarding the alleged violation of the right to educational, psychological, and social assistance activities and professional training of the convicted person, the claim that these were not conducted according to legal provisions, that preparation for conditional release was not ensured, and that no activities were performed before or after the conditional release committee, as well as the claim concerning the right to education, insofar as he could not continue his studies or participate in professional qualification courses, the court considers the provisions of Article 79 of Law no. 254/2013.

According to the cited legal text, convicted persons may participate, depending on the penitentiary's capabilities, in school or university training courses, under the framework of a cooperation protocol concluded with the Ministry of National Education, taking into account the priority intervention needs identified, the state of health, the type of execution regime, and the safety measures applied.

According to Article 89, paragraphs 1–8 of the same normative act, educational, psychological, and social assistance activities are organized in each penitentiary and aim at the social reintegration of convicted persons. For each convicted person, upon admission to the penitentiary, during the quarantine and observation period, a multidisciplinary assessment is carried out from educational, psychological, and social perspectives.

Based on the assessment conclusions, an Individualized Plan of Educational and Therapeutic Intervention is prepared for each convicted person, respecting priority intervention needs and in consultation with the convicted person. This Individualized Plan is updated and modified as necessary. Inclusion of convicted persons in activities recommended in the Individualized Plan is carried out taking into account the identified needs, the execution regime of the custodial sentence, and the stage of the sentence execution process.

Each penitentiary operates a library. The book collection is provided by the National Administration of Penitentiaries, through budgetary subsidies, own revenues, and donations or sponsorships. Convicted persons who work may participate in the activities provided in this chapter, respecting the work schedule. The conditions for organizing and carrying out educational, psychological, social, school, university, and professional training activities for convicted persons are established by order of the Minister of Justice.

In agreement with the supervising judge of the deprivation of liberty, the court notes that there can be no question of an absolute right of inmates to be included in all requested activities and social reintegration programs. On the contrary, the inclusion of inmates in school courses is subordinated to the existence of such opportunities at the level of the penitentiary, and participation in other social reintegration programs is subordinated to the prior determination of the necessity of attending them by the specialized personnel who carry out the assessment of the risks and vulnerabilities of the inmate.

From the response communicated by the administration of the place of detention, it is noted that during the mentioned period (01.01.2024 – present), the inmate did not submit requests to participate in school instruction activities. In the same vein, the Penitentiary also organizes school instruction activities for inmates at the level of grades I–VIII. Considering his level of education, he cannot participate in school instruction activities within the Penitentiary.

Regarding the period preceding the analysis by the Parole Board, it is noted that the inmate, in the current year, participated in 8 programs and activities in the educational field.

It is also noted that the inmate completed grades IX, X, XI, and XII during the execution of his custodial sentence.

Concerning the need for vocational qualification of the appellant, it is noted that this was addressed through the completion of a vocational qualification course in the profession of barber, conducted during the

⁴ *Ibidem*.

execution of his sentence at Aiud Penitentiary, in the period 01.07–05.10.2011. During the execution of the sentence at Penitentiary #####, he did not submit a request to attend vocational training courses. These matters have res judicata authority, having already been analyzed by the supervising judge on several occasions and remaining final through the judicial decisions that dismissed the inmate's appeals.

In the psychological domain, it is noted that the person deprived of liberty, in the period preceding the analysis by the Parole Board, completed 12 activity programs. Subsequently, following the analysis by the Parole Board, the person deprived of liberty was not included in psychological interventions, since the identified psychological needs had been addressed and the objectives proposed within the interventions had been largely achieved, and therefore no psychological intervention was required.

Regarding intervention on issues specific to the social assistance domain, it is noted that in the period preceding the analysis by the Parole Board, the person deprived of liberty completed 8 programs and activities.

Since, in the period following the analysis by the Parole Board, no other social needs or risks were identified, and given the fulfillment of the objectives established in the Individualized Plan, the person deprived of liberty did not participate in further social programs and activities.

Taking these aspects into consideration, the court, based on Article 56 in conjunction with Article 39 of Law no. 254/2013, dismisses the appeal filed by the Appellant.

In the present case, it can be observed that the convicted person benefited from school instruction, completing grades IX, X, XI, and XII during the execution of the custodial sentence, as well as vocational training, by attending a qualification course as a barber, which fulfills the purpose of social reintegration.

Furthermore, he was involved in and participated in numerous psychological and social assistance activities and programs. It should be noted that the identified priority intervention needs represent one of the factors influencing the assignment of the convicted person to such activities.

Therefore, it must be considered whether the inmate actually requires participation in such programs.

It follows that not including him in all requested social reintegration activities and programs does not constitute a violation of his rights, especially given that the inclusion of inmates in school courses is influenced by the concrete possibilities of the penitentiary, and participation in other social reintegration measures is based on the prior determination of the necessity of attending them by the specialized personnel who assess the risks and vulnerabilities of the inmate.

Conclusions

Summary of Main Outcomes. The analysis demonstrates that the possibilities of the penitentiary represent a primary criterion influencing the manner in which the right to education is exercised by convicted persons. These limitations cannot be attributed to the Penitentiary Administration. As noted in the pivotal case of *Velev v. Bulgaria*, the Court first assessed whether the penitentiary had the necessary resources to ensure the prisoner's access to education. Once resources are established, several factors determine how this right is exercised:

- o identified priority intervention needs;
- o the prisoner's state of health;
- o the type of detention regime;
- o the security measures applied.

It is important to emphasize that a more restrictive detention regime, such as maximum security or closed regime, does not equate to a prohibition of this right but rather determines a stricter manner of exercising it. Additionally, the good conduct of the prisoner may temporarily influence the manner of exercising the right to education. Failure to pass examinations offered by penitentiary educational programs is not attributable to the penitentiary, particularly when the prisoner has received formal schooling during incarceration. Finally, completing a professional qualification course different from the one requested by the prisoner does not constitute a violation of this right. Even if the course pursued is not the prisoner's first choice, it still fulfills the purpose of social reintegration.

Expected Impact of the Research Outcomes. This analysis provides clarity regarding the relative nature of prisoners' right to education: it is not absolute but conditional on penitentiary resources, security measures, and individual assessment of needs. Understanding these factors will help policymakers, penitentiary

administrations, and legal practitioners better ensure the effective implementation of educational rights for prisoners, balancing security concerns with reintegration objectives.

Suggestions for Further Research. Future research could focus on:

- comparative studies across jurisdictions to evaluate how resource availability affects prisoners' access to education;
- empirical assessment of the impact of different detention regimes on educational participation;
- investigating the role of professional qualification programs in reducing recidivism and supporting post-release employment.

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THE CRISIS OF RESOCIALIZATION IN THE ROMANIAN PENITENTIARY SYSTEM. THE ROLE OF THE PRISON CHAPLAIN BETWEEN SPIRITUAL FUNCTION AND SOCIAL REINTEGRATION MECHANISM

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Abstract

The issue of resocialization of persons deprived of liberty represents one of the core theoretical and normative pillars of enforcement criminal law, being expressly enshrined both in domestic legislation and in the European legal instruments governing the execution of custodial sentences. Nevertheless, the practical realities of the Romanian penitentiary system reveal a persistent structural gap between the normative recognition of resocialization and the actual capacity of detention institutions to translate this objective into a coherent and effective rehabilitative process. Against this background, the present paper examines the crisis of resocialization through the lens of non-punitive mechanisms capable of mitigating the criminogenic effects of imprisonment, with particular emphasis on the role of the prison chaplain within the penitentiary framework.

The analysis is grounded in the legal foundations of religious assistance in detention, understood not merely as an expression of the right to freedom of religion, but also as an instrument for safeguarding human dignity and facilitating social reintegration. Adopting an interdisciplinary approach, the paper explores the historical development of prison chaplaincy, the relevant national and European normative framework, as well as the institutional and functional limits of religious intervention in the contemporary context of sentence enforcement.

The study ultimately advances the argument that, despite being frequently marginalized within the formal architecture of resocialization programs, the prison chaplain constitutes one of the few stable forms of non-coercive interaction in the penitentiary environment, capable of contributing to the reconstruction of personal identity and moral agency among detainees. Without advocating a singular or universal solution, the paper underscores the need to reassess religious assistance as a complementary component of enforcement criminal policy, essential for addressing the current crisis of resocialization in the Romanian penitentiary system.

Keywords: *resocialization in detention, Romanian penitentiary system, prison chaplaincy, social reintegration of offenders, execution of custodial sentences.*

1. Introduction

The issue of resocialization of persons deprived of liberty constitutes one of the fundamental dimensions of contemporary enforcement criminal law, being explicitly enshrined in the European standards governing the execution of sentences. In this regard, at the level of the Council of Europe it is provided that “All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.”¹

This normative recognition indicates that the execution of sentences does not have an exclusively repressive function, but necessarily entails an objective of social reintegration. However, the specialized literature and criminal policy analyses have shown that a mere increase in incarceration does not necessarily lead to a reduction in crime and, in certain contexts, may even produce effects contrary to the intended preventive purpose.²

The importance of the topic is emphasized by the fact that resocialization is closely linked to the respect for the fundamental rights of persons deprived of liberty. The European Court of Human Rights has held that “Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty” (Hirst v. the United Kingdom (No. 2), para. 69).³

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¹ Available at https://hrlibrary.umn.edu/instate/COE_prison-rules.html, accessed on March 28, 2026.

² Available at https://www.vera.org/downloads/publications/for-the-record-prison-paradox-incarceration-not-safer/legacy_downloads/for-the-record-prison-paradox_01.pdf, accessed on March 24, 2026.

³ Available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-70442%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-70442%22]}), accessed on 24.03.2026.

In this context, freedom of religion occupies an essential place, being also recognized in international standards concerning the treatment of prisoners. Thus, at the level of the United Nations, it is provided that “so far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life.”⁴

These standards justify the analysis of the role of the prison chaplain within the penitentiary environment, not only as an expression of a spiritual function, but also as a potential instrument of intervention in the process of social reintegration. The specialized literature highlights that religious-based interventions may have an impact on criminal behavior, in the sense that “the results of this study indicate that faith-based programs ‘work’ to reduce recidivism”⁵, while at the same time being considered “one of many potential tools for preparing inmates for successful reentry into society.”⁶

In this context, the present study aims to analyze the crisis of resocialization within the Romanian penitentiary system by reference to the role of the prison chaplain, employing an interdisciplinary approach situated at the intersection of enforcement criminal law and the sociology of detention. The research seeks to highlight both the legal foundations of religious assistance and its limits and potential within the contemporary enforcement-penal framework.

In relation to the existing specialized literature, this research is situated within a direction that remains insufficiently explored in Romanian legal doctrine, where the role of non-coercive actors in the resocialization process has not been systematically examined. Although there are studies addressing freedom of religion in detention and the effects of religion on criminal behavior, they do not coherently integrate the function of the chaplain within the framework of enforcement criminal policy, which justifies the need for such an analysis.

2. The Crisis of Resocialization as the Premise for Reassessing the Role of the Prison Chaplain

Any society functions on the basis of a system of social and moral norms and values, the observance of which is expected from all its members. When these norms are violated through deviant or unlawful conduct, the state intervenes through punitive and coercive measures, the most severe of which is the deprivation of liberty. Penitentiary institutions are thus commonly perceived as spaces of restriction and exclusion, where individuals who have committed socially reprehensible acts serve custodial sentences. Within this context, the involvement of religious institutions represents an important dimension of societal response to deviance, reflecting a broader concern for the individual beyond the purely punitive framework. The Church’s mission extends to all individuals, including those deprived of liberty, who remain part of the moral and social community despite their incarceration. This mission is concretely carried out through prison chaplains, whose presence within penitentiary institutions ensures the exercise of religious freedom and provides spiritual assistance to detainees. In the penitentiary environment, the prison chaplain may assume a distinct role, situated at the intersection between spiritual guidance and moral support. His activity is not limited to the performance of religious services, but may contribute to processes of self-reflection, responsibility, and personal transformation among detainees. In this sense, the chaplain’s mission can be understood as facilitating the reconstruction of the individual’s moral framework and the re-establishment of a meaningful connection with fundamental values, which may support, in certain circumstances, the broader objective of social reintegration.⁷

The resocialization of persons deprived of liberty is consistently affirmed, at both national and European levels, as a fundamental objective of the execution of custodial sentences, being expressly reflected in contemporary legal standards, which provide that “All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty”⁸ thus indicating that imprisonment is no longer conceived exclusively as a mechanism of repression, but as a process inherently

⁴ Available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf, accessed on 28.03.2026.

⁵ KIMBERLY D. DODSON and LEANN N. CABAGE, PAUL M. KLENOWSKI, *An Evidence-Based Assessment of Faith-Based Programs: Do Faith-Based Programs “Work” to Reduce Recidivism?*, *Journal of Offender Rehabilitation*, 50:367–383, 2011, Taylor & Francis Group, LLC, p.368, Available at: https://www.researchgate.net/publication/232992536_An_Evidence-Based_Assessment_of_Faith-Based_Programs_Do_Faith-Based_Programs_Work_to_Reduce_Recidivism, accessed on 20.03.2026.

⁶ Scott D. Camp, Dawn M. Daggett, Okyun Kwon, Jody KleinSaffran, *The effect of faith program participation on prison misconduct: The Life Connections Program*, *Journal of Criminal Justice*, Volume 36, Issue 5, September–October 2008, Pages 389–395, Available at: <https://www.sciencedirect.com/science/article/abs/pii/S0047235208000858>, accessed on 20.03.2026.

⁷ Alexandru Fleșer, *Antologie de intervenții pastoral-terapeutice în context penitenciar*, Ed. Episcopiei Devei și Hunedoarei, Deva, 2025, p. 11.

⁸ Available at https://hrlibrary.umn.edu/instree/COE_prison-rules.html, accessed on March 28, 2026.

oriented towards reintegration into society. This orientation is further reinforced at the level of international norms, where it is stated that “The purposes of a sentence of imprisonment... are primarily to protect society against crime and to reduce recidivism”,⁹ thereby highlighting the dual dimension of punishment, situated between protection and rehabilitation.

However, despite this coherent normative framework, the practical realities of penitentiary systems reveal a persistent structural tension between the declared purpose of resocialization and its actual implementation, as the institutional environment of detention, characterized by control, hierarchy and constraint, often proves incompatible with the individualized processes required for genuine reintegration. This dynamic may be understood in light of broader theoretical approaches to punishment, according to which the prison functions as an apparatus of discipline, suggesting that the penitentiary space is primarily structured around mechanisms of control rather than transformation.

As a consequence, resocialization risks becoming a formal objective rather than an effective outcome, embedded in legal discourse but only partially realized in practice, particularly in systems where rehabilitative programs are limited in scope or reduced to procedural compliance. Empirical analyses of penal policy further indicate that the expansion of incarceration does not necessarily achieve its preventive goals, it being observed that “Increased incarceration has no effect on violent crime and may actually lead to higher crime rates when incarceration is concentrated in certain communities”¹⁰ which calls into question the effectiveness of purely custodial approaches.

Within this context, the crisis of resocialization should not be understood merely as the result of logistical or administrative shortcomings, but rather as a structural imbalance between the punitive logic of imprisonment and its rehabilitative purpose, an imbalance that reveals the limitations of traditional, predominantly coercive mechanisms of intervention. It is precisely within this normative and functional gap that the role of non-coercive actors becomes increasingly relevant, as they operate outside the rigid framework of institutional authority and may access dimensions of the individual that remain insufficiently engaged by standard penitentiary programs.

Among these actors, the prison chaplain occupies a distinct and insufficiently explored position, as his activity is not grounded in discipline, evaluation or coercion, but in dialogue, trust and moral engagement, thus introducing a fundamentally different type of interaction within the penitentiary environment. In a system largely defined by control and restriction, the chaplain may function as a rare vector of non-coercive influence, capable of facilitating processes of introspection, responsibility and personal re-evaluation, which are essential for any meaningful attempt at reintegration.

Therefore, the crisis of resocialization does not merely expose the limits of existing institutional mechanisms, but also highlights the necessity of reassessing the contribution of actors traditionally situated at the margins of the formal rehabilitative framework. In this sense, the prison chaplain should not be regarded as a peripheral religious presence, but as a potentially relevant element within a system that formally affirms reintegration while struggling to achieve it in practice, thus justifying a deeper analysis of his role at the intersection between spiritual assistance and social reintegration.

3. The Role of the Prison Chaplain Between Spiritual Function and Social Reintegration

The prison chaplain becomes a counselor by virtue of the circumstances in which he carries out his activity. Persons deprived of liberty turn to him in order to identify and, more importantly, to address various spiritual concerns. The awareness that the chaplain possesses a solid theological background encourages detainees to approach him with the spiritual issues that trouble them. Within the framework of moral-religious counseling, several needs have been identified among those who engage in this process. The first identified need is that of relational connection. Persons deprived of liberty feel the need to draw closer to the chaplain, often perceiving him as a friend. The realization that the penitentiary environment deprives them of the support of family or friends plays a decisive role in fostering this closeness.¹¹

⁹ Available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf, accessed on March 28, 2026.

¹⁰ Available at https://www.vera.org/downloads/publications/for-the-record-prison-paradox-incarceration-not-safer/legacy_downloads/for-the-record-prison-paradox_01.pdf, accessed on March 24, 2026.

¹¹ Alexandru Fleșer, *Antologie de intervenții pastoral-terapeutice în context penitenciar*, Ed. Episcopiei Devei și Hunedoarei, Deva, 2025, p. 11.

The presence of the prison chaplain within the penitentiary system must be understood not merely as a manifestation of religious freedom, but as a complex institutional function situated at the intersection between spiritual assistance and the broader objective of social reintegration. At the normative level, the role of religion in detention is explicitly recognized, as international standards provide that “so far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life”¹², thus establishing the chaplain’s presence as a guarantee of a fundamental right, rather than a discretionary or symbolic element of the penitentiary environment.

However, the relevance of the prison chaplain cannot be reduced to the mere facilitation of religious practices. While the formal dimension of his activity consists in ensuring access to worship and spiritual guidance, the actual impact of his presence extends beyond this framework, operating within a domain that intersects with moral reconstruction, personal reflection and the reconfiguration of individual identity. In a setting defined predominantly by coercion and institutional authority, the chaplain introduces a different type of relational dynamic, one that is not grounded in hierarchy or control, but in voluntary engagement and trust.

This distinction becomes particularly significant in light of the structural limitations of traditional resocialization mechanisms, which often operate within rigid institutional parameters and may fail to generate genuine internal change. In contrast, the interaction between the detainee and the chaplain is not mediated by disciplinary expectations or evaluative criteria, but by the possibility of dialogue and personal transformation, which allows access to dimensions of the individual that remain largely inaccessible within formal correctional programs. In this sense, the chaplain may function as a non-coercive vector of influence within a coercive system, contributing to processes that cannot be fully institutionalized.

The potential contribution of spiritual assistance to the process of reintegration is further supported by empirical observations, according to which religious engagement may influence behavioral patterns and post-detention outcomes, it being noted that “religious-based programming... has also been shown to reduce recidivism”,¹³ thus suggesting that the internalization of moral values may have tangible effects beyond the strictly spiritual sphere. At the same time, other analyses emphasize that such interventions represent “one of many potential tools for preparing inmates for successful reentry into society”,¹⁴ which reinforces the idea that the chaplain’s role should be understood as complementary rather than substitutive.

Nevertheless, the positioning of the prison chaplain between spiritual function and social reintegration raises a series of conceptual and practical challenges. On the one hand, reducing his role to a purely religious dimension risks ignoring the broader impact of his activity within the penitentiary environment. On the other hand, overestimating his contribution may lead to an unrealistic expectation that spiritual assistance alone can compensate for the structural deficiencies of the resocialization system. The balance between these two perspectives is essential for a coherent understanding of his institutional role.

In this context, the chaplain’s activity can be interpreted as facilitating a process of moral reorientation, through which the detainee is encouraged to reassess his past conduct and to reconstruct a framework of values capable of supporting lawful behavior after release. This process, although difficult to quantify, plays a significant role in shaping individual attitudes and motivations, elements that are indispensable for any effective form of reintegration. Thus, while the chaplain does not operate within the formal mechanisms of correctional policy, his contribution may intersect with its objectives in a meaningful way.

Ultimately, the role of the prison chaplain should be situated within the broader logic of a penitentiary system that formally promotes reintegration, yet struggles to achieve it through conventional means. In such a context, the chaplain emerges as a distinct actor whose relevance derives precisely from his position outside the traditional structures of authority, allowing him to engage with the individual at a level that is less accessible to institutional actors. Consequently, his function cannot be reduced to that of a religious service provider, but must be understood as part of a wider, albeit insufficiently recognized, framework of non-coercive interventions contributing to the process of social reintegration.

¹² Available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf, accessed on March 28, 2026.

¹³ Allie C. Bosi, Religious-based programming and reentry success: an examination of spirituality and its effects on post-release engagement, employment, and recidivism, 2021, available at: <https://scholarsjunction.msstate.edu/cgi/viewcontent.cgi?article=6172&context=td>, accessed on March 28, 2026.

¹⁴ Scott D. Camp, Dawn M. Daggett, Okyun Kwon, Jody KleinSaffran, The effect of faith program participation on prison misconduct: The Life Connections Program, *Journal of Criminal Justice*, vol. 36, Issue 5, September–October 2008, p. 389-395, available at: <https://www.sciencedirect.com/science/article/abs/pii/S0047235208000858>, accessed on 20.03.2026.

4. Structural Limits of Chaplaincy and the Risk of Overestimation

While the role of the prison chaplain may reveal significant potential within the broader framework of resocialization, it is essential to approach this function with a critical perspective that acknowledges its inherent limitations. The tendency to emphasize the positive effects of spiritual assistance must be balanced by an understanding of the structural constraints that shape the penitentiary environment, as well as the institutional position occupied by the chaplain within it.

A first and fundamental limitation derives from the very nature of the penitentiary system, which remains predominantly structured around control, discipline and security. As previously noted, the prison operates within a framework in which “the prison functions as an apparatus of discipline”,¹⁵ a reality that inevitably conditions all forms of interaction taking place within it. In such an environment, any non-coercive intervention, including that of the chaplain, is constrained by institutional priorities that do not necessarily favor individualized or relational approaches.

Beyond this structural dimension, a particularly significant limitation concerns the shortage of personnel, which directly affects the capacity of prison chaplains to engage in meaningful and sustained interaction with detainees. In practice, the number of chaplains assigned to penitentiary units is often insufficient in relation to the size of the incarcerated population, resulting in a disproportionate ratio that limits both accessibility and continuity. Under these conditions, the chaplain’s activity risks becoming fragmented and episodic, rather than consistent and transformative.

The consequences of this imbalance are substantial. The effectiveness of moral-religious counseling depends, to a considerable extent, on the existence of a stable and trust-based relationship between the chaplain and the detainee, a relationship that requires time, availability and continuity.

However, when a single chaplain is required to address the needs of a large number of inmates, the possibility of developing such relationships is significantly reduced. As a result, the chaplain may be confined to fulfilling predominantly formal or ritual functions, with limited capacity to engage in deeper processes of personal reflection and moral reconstruction.

Moreover, the shortage of personnel must be understood not only in quantitative terms, but also in relation to the complexity of the needs present within the penitentiary environment. Persons deprived of liberty often experience multiple layers of vulnerability, including psychological distress, social disconnection and moral disorientation. Addressing these issues requires sustained engagement and individualized attention, which cannot be effectively provided under conditions of institutional overload.

This structural limitation also reinforces the risk of overestimating the role of the prison chaplain within the resocialization process. While spiritual assistance may contribute to personal transformation, it cannot substitute for the absence or inefficiency of other essential components of reintegration, such as education, psychological support or social reintegration programs. The chaplain’s role must therefore be understood as complementary, operating alongside other mechanisms rather than replacing them.

In this context, the tendency to attribute a central or decisive role to the chaplain in overcoming the crisis of resocialization must be approached with caution. Such an approach risks obscuring the systemic nature of the problem and transferring responsibility from institutional structures to individual actors. The limitations imposed by insufficient staffing, combined with the broader constraints of the penitentiary system, demonstrate that the chaplain’s contribution, while valuable, remains structurally conditioned and necessarily partial.

Ultimately, a realistic assessment of the prison chaplain’s role requires acknowledging both its potential and its limits. The chaplain may function as a meaningful point of support within a system marked by rigidity and constraint, but his capacity to influence the process of resocialization is intrinsically linked to the institutional conditions in which he operates. Without addressing issues such as staffing shortages and structural imbalance, the impact of chaplaincy will remain significant at an individual level, yet limited in its systemic effects.

5. Conclusions

The analysis undertaken in this study has sought to examine the crisis of resocialization within the Romanian penitentiary system through a specific and insufficiently explored lens, namely the role of the prison

¹⁵ Michel Foucault, *Discipline and punish*, p. 170-171, available at: <https://cpb-us-e1.wpmucdn.com/sites.psu.edu/dist/d/37602/files/2016/01/Discipline-and-Punish.pdf> accessed on 28.03.2026.

chaplain situated between spiritual assistance and the broader objective of social reintegration. Far from constituting a marginal or purely symbolic presence, the chaplain emerges as a distinct actor whose relevance becomes particularly visible precisely in the context of the structural limitations that affect contemporary resocialization mechanisms.

The normative framework governing the execution of custodial sentences, both at the European and international level, clearly establishes reintegration as a central objective of imprisonment. However, the persistence of structural deficiencies within penitentiary systems reveals a significant gap between this declared purpose and its effective realization. The predominance of custodial logic, the rigidity of institutional structures, and the limited effectiveness of traditional rehabilitative programs contribute to a situation in which resocialization risks remaining, to a considerable extent, a formal aspiration rather than a tangible outcome.

Within this context, the prison chaplain occupies a position that is both unique and paradoxical. On the one hand, his presence is formally justified by the need to ensure the exercise of a fundamental right, namely freedom of religion. On the other hand, the actual impact of his activity extends beyond this legal function, engaging dimensions of the individual that are only partially addressed by institutional mechanisms. Unlike other actors within the penitentiary system, the chaplain does not operate through coercion, evaluation, or disciplinary authority, but through dialogue, trust, and moral engagement. This distinction is not merely formal, but has substantive implications for the way in which detainees experience and internalize the process of change.

The capacity of the chaplain to facilitate processes of introspection, responsibility, and moral reorientation highlights an essential aspect of resocialization that is often overlooked in institutional approaches, namely the internal transformation of the individual. While educational or psychological programs may address cognitive or behavioral dimensions, the chaplain's intervention engages with the sphere of values, meaning, and personal identity. In this sense, spiritual assistance may contribute to the reconstruction of a moral framework capable of supporting lawful conduct after release, thus intersecting with the broader objectives of reintegration.

At the same time, the analysis has emphasized the necessity of maintaining a critical perspective regarding the scope and limits of this role. The effectiveness of chaplaincy cannot be considered in isolation from the structural conditions of the penitentiary system. The shortage of personnel, in particular, represents a significant constraint, limiting the chaplain's ability to engage in sustained and individualized interaction with detainees. In many cases, the disproportion between the number of chaplains and the size of the incarcerated population reduces the possibility of developing meaningful relationships, which are essential for any process of moral or personal transformation.

Moreover, the broader institutional context, characterized by an emphasis on security and control, further restricts the potential impact of non-coercive interventions. In such an environment, the chaplain's activity may be confined to episodic or formal functions, rather than constituting a continuous and structured contribution to resocialization. These limitations underscore the risk of overestimating the role of the chaplain and of attributing to spiritual assistance a capacity to compensate for systemic deficiencies that require, in reality, structural reform.

Consequently, the role of the prison chaplain should be understood in a balanced and nuanced manner. It would be both inaccurate and counterproductive to either minimize his contribution or to elevate it to a central and exclusive mechanism of reintegration. Instead, chaplaincy should be conceptualized as a complementary form of intervention, operating alongside other institutional mechanisms, and addressing dimensions of the individual that are otherwise insufficiently engaged.

From this perspective, the crisis of resocialization does not merely highlight the limits of existing programs, but also reveals the need to reconsider the architecture of intervention within the penitentiary system. The inclusion and recognition of non-coercive actors, such as the prison chaplain, may represent an important step towards a more comprehensive and effective approach to reintegration. However, such recognition must be accompanied by adequate institutional support, including sufficient staffing and the integration of chaplaincy within a broader, coherent resocialization strategy.

Ultimately, the contribution of the prison chaplain lies not in replacing existing mechanisms, but in complementing them through a form of engagement that reaches beyond formal structures and addresses the deeper layers of personal transformation. In a system marked by structural constraints and functional imbalances, this type of intervention, although limited in scope, may nevertheless play a meaningful role in supporting the process of reintegration. The extent of this contribution, however, remains intrinsically linked to

the conditions under which it is exercised, reaffirming the need for a realistic and context-sensitive understanding of chaplaincy within the contemporary penitentiary system.

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1.2. PRIVATE LAW

THE LOCK-OUT

Tudor APETRI*

Abstract

This paper analyses the legal nature and socio-economic implications of the lock-out (employer strike) in the contemporary legislative context, with a particular focus on the Romanian legal system. Although the strike is constitutionally recognised as a fundamental right of employees, the lock-out remains in a legislative vacuum marked by a deliberate silence in the Labour Code and the Social Dialogue Act (No. 367/2022). The study investigates whether this omission constitutes an implicit prohibition or a regulatory gap, assessing its impact on the principle of synallagmaticity in the employment contract and on Article 41 of the Romanian Constitution concerning the right to work.

Using a comparative methodology, the article examines the contrast between jurisdictions that accept lock-outs as an expression of 'equality of arms' (e.g. Germany) and the restrictive approach in Romania, where the protection of the vulnerable party takes precedence over the symmetry of the conflict. It also explores the crucial distinctions between lock-outs as an offensive tactic and the suspension of work caused by force majeure, highlighting the challenges that the lack of regulation of this measure poses for the coherence of the judicial system. The study's conclusions emphasise the need for legislative harmonisation with international standards (ILO) and propose solutions de lege ferenda for managing the balance between the employer's economic freedom and the employee's social protection.

Keywords: lock-out, collective labour dispute, right to work, equality of arms, legislative vacuum, comparative law.

1. Introduction

In the following lines, I aim to examine the legal nature of the lock-out — that radical measure whereby an employer decides to halt operations during a labour dispute. We cannot truly understand this concept without looking back briefly at its historical roots and its evolution in modern law, where the echoes of the old 'class struggle' still seem to influence the way we judge these tensions¹. This perspective strikes me as essential, particularly as it helps us decipher why Romanian labour legislation maintains a suspicious silence regarding lock-outs. It is an absence that raises questions about the fragile balance between the economic freedom of the employer and the constitutional right of the employee².

If we look more closely, we observe an interesting dynamic between the desire to protect the business and the need for social protection. The lock-out, simply defined as the temporary closure of factory or office gates to force or block certain demands, appears to function as a 'weapon' of counterattack in the face of trade union pressure³, often carrying connotations of an economic 'weapon' intended to counteract the pressure exerted by trade union actions, such as strikes. The lack of regulation of lockouts, unlike strikes, creates a substantial imbalance in the balance of power between employers and employees, a fact which requires a rigorous analysis of the compatibility of this legislative omission with constitutional principles and the rules of labour law. In this regard, a clear distinction must be drawn between a lock-out, in the sense of a strategic offensive measure, and a closure of the workplace imposed by exceptional circumstances, such as force majeure or a state of necessity⁴. Such a distinction is crucial for avoiding interpretative distortions and for maintaining the coherence of the legal

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¹ H. Wiczanowska, "MUTUAL RELATIONSHIP BETWEEN FREQUENCY OF THE RIGHT TO STRIKE AND RECOGNITION OF THE RIGHT TO LOCKOUT WITHIN THE LEGAL SYSTEMS OF SELECTED EUROPEAN STATES," *Toruńskie Studia Międzynarodowe*, vol. 1, no. 9, p. 87, Mar. 2017, doi: 10.12775/tis.2016.008.

² M. Seweryński, "Collective Labour Law Codification, Polish Experience," *Revista Latinoamericana de Derecho Social*, Jan. 2013, doi: 10.22201/ijj.24487899e.2013.17.9727.

³ J. Reklama et al., "Abstracts of the 8th International Scientific and Practical Conference," Nov. 2020, doi: 10.46299/isg.2020.ii.viii.

⁴ L. Fontaine, "Minimum service – Essential services: French and Quebec approaches," *HAL (The Centre for Direct Scientific Communication)*, Nov. 2004, Accessed: Feb. 2025. [Online]. Available: <https://theses.hal.science/tel-00068888>

system in the context of upholding social rights and solidarity⁵. A comparative approach to international legislation will complement the analysis, providing a basis for identifying best practices and potential solutions for harmonising the Romanian regulatory framework.

I do not believe we can draw a conclusion without taking a brief look at what our neighbours are doing. A comparative analysis with other European states could offer us some solutions for ‘patching up’ the Romanian regulatory framework. It is interesting to observe how other countries manage to balance collective rights and employers’ prerogatives without stifling social dialogue. Perhaps here too, the classical doctrine of labour law — built on the idea of equity and contractual freedom — should play a more active role in defining these conflicts⁶. Such an analysis is imperative to understand how fundamental labour rights, including the right to strike, are interpreted and protected in various jurisdictions, with direct implications for the Romanian regulatory framework⁷.

Currently, this regulatory landscape is characterised by a restrictive approach, in which the strike is strictly limited to collective bargaining, whilst the lock-out remains in a veritable legislative vacuum that oscillates between implicit prohibition and illegality⁸. This silence in the Labour Code⁹ or in the Social Dialogue Act¹⁰ appears to be more of a conscious choice. The intention was likely to protect the employee, considered the more vulnerable party, by rejecting the idea of perfect symmetry in the ‘weapons’ of industrial action. However, this ‘normative silence’ is problematic from a constitutional point of view. In a world where we are striving to align ourselves with the ILO’s international standards, it becomes imperative to decide: is this gap a tacit prohibition or simply a legislative lacuna that we refuse to address? It remains to be seen to what extent we can harmonise these disputes within a legal framework that does not ignore the economic realities on the ground.

However, this regulatory silence raises constitutional difficulties, given that the alignment of national judicial systems with international standards, such as those developed by the International Labour Organisation, is becoming essential for promoting fair labour practices and ensuring consistency in the resolution of collective disputes. The analysis will also examine the extent to which this legislative silence constitutes a genuine legislative gap or a tacit prohibition, in relation to dispute resolution mechanisms aimed at harmonising the coordination of labour relations within a comparative legal framework.

2. Content

Recent specialist literature emphasises the need to reassess traditional paradigms in labour law, highlighting the expansion of organisational responsibilities beyond mere profit maximisation, with an increasingly pronounced focus on ethical governance and corporate social responsibility¹¹. Within this framework, comparative research examines the delicate balance between the collective autonomy of the social partners and the imperative need to protect employees’ fundamental rights in the face of trends towards the flexibilisation of labour relations¹². This doctrinal recalibration highlights the risk that prioritising economic efficiency may marginalise the social function of collective bargaining¹³, ignoring the fact that industrial action has historically served as a means of redressing the power imbalances inherent in labour relations¹⁴.

⁵ W. P. Chaves and H. P. Martins, “JURIMETRIC ANALYSIS OF DECISIONS ON THE (non-)abuse of strikes by the Regional Labour Court of the 4th Region,” *Journal of Labour Law and the Working Environment*, vol. 6, no. 2, p. 76, Dec. 2020, doi: 10.26668/indexlawjournals/2525-9857/2020.v6i2.7052.

⁶ M. Rakhimov, “The Principles of the Classical Theory of Labour Law,” *International Journal of Law and Policy*, vol. 2, no. 2, Feb. 2024, doi: 10.59022/ijlp.157.

⁷ V.- Sribala, H. B. -, and B.- Layasri, “Right to Strike: A Fundamental Right or an Abstract Concept,” *International Journal For Multidisciplinary Research*, vol. 5, no. 6, Dec. 2023, doi: 10.36948/ijfmr.2023.v05i06.9929.

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⁹ Law 53/2003 – Labour Code, republished in the Official Gazette No. 345 of 18 May 2011;

¹⁰ Law No. 367 of 2022 on social dialogue, published in the Official Gazette No. 1238 of 22 December 2022;

¹¹ N. E. Eneh, S. S. Bakare, A. O. Adeniyi, and C. U. Akpuokwe, “MODERN LABOR LAW: A REVIEW OF CURRENT TRENDS IN EMPLOYEE RIGHTS AND ORGANISATIONAL DUTIES,” *International Journal of Management & Entrepreneurship Research*, vol. 6, no. 3, p. 540, Mar. 2024, doi: 10.51594/ijmer.v6i3.843.

¹² A. A. Vaz, M. A. L. Berberi, and T. Martins, “The Crisis in the European Union and the Impacts on Fundamental Labour Principles in the Face of the Erosion of Rights by Member States in Contravention of the Provisions of Community Law,” *REVISTA INTERNACIONAL CONSINTER DE DIREITO*, Jul. 2021, doi: 10.19135/revista.consinter.00012.16.

¹³ G. Centamore, *Collective Bargaining and the Plurality of Categories*. 2020. doi: 10.30682/sg301.

¹⁴ I. Meyrat, “Fundamental Rights and Changes in the Forms of Organisation of Economic Activity: Labour Law in the Face of the Transformations of Capitalism,” *HAL (The Centre for Direct Scientific Communication)*, Jun. 2015, Accessed: Jan. 2025. [Online]. Available: <https://hal.archives-ouvertes.fr/tel-01970239>

In the national context, this asymmetry is accentuated by the absence of explicit regulation of lockouts, a situation that creates a profound legal imbalance, where strikes enjoy constitutional protection, whilst employers' retaliation remains in a regulatory vacuum that limits the effectiveness of social dialogue mechanisms¹⁵. This silence on the part of the legislator cannot be interpreted as a mere omission, but reflects the difficulty of the state legal system in integrating, through legislation, collective phenomena of social self-determination that transcend the formal framework.

In this regard, comparative models of 'legislative abstention' demonstrate that, in the absence of a clear framework, conflict resolution tends to shift excessively towards the courts, perpetuating legal uncertainty regarding the legitimacy of employers' actions¹⁶. In states that adopt a balanced approach, such as Germany, the lock-out is integrated into the dispute resolution mechanism under the principle of equality of arms¹⁷, offering the employer a legitimate counterbalance to the pressure exerted by trade unions.

In contrast to the offensive parity model, jurisdictions such as France or Italy base the prohibition of lockouts on a social imperative: the need to compensate for structural power imbalances by granting the right to strike exclusively to the wage-earning segment¹⁸. This protectionist approach is not merely a technical option, but highlights a genuine conceptual divide between the idea of absolute collective autonomy of the social partners and the protective, almost providential, role that the state assumes in regulating industrial conflict. In such a paradigm, the strike is not seen as a mere counterbalance to economic freedom, but as an instrument of social citizenship, intended to correct the inherent asymmetry of the employment contract¹⁹.

Analysing these legal traditions, we observe a clear preference for the priority protection of the party considered to be inherently vulnerable, to the detriment of an 'equality of arms' which, in practice, might suggest a deceptive symmetry. In these systems, a lock-out is often characterised as a culpable failure on the part of the employer to fulfil their obligation to provide the agreed work, and is thus sanctioned not only as a breach of social peace, but also as a rupture of the synallagmatic logic of the employment relationship. This view tends to place the responsibility for economic risk exclusively on the employer, denying them the possibility of using the suspension of work as a pressure tactic in negotiations.

However, the evolution of this protectionism also reveals certain tensions in the context of globalised markets, where the rigidity of such prohibitions could, paradoxically, undermine the sustainability of businesses in the face of prolonged strikes. Nevertheless, the choice of these jurisdictions to maintain a monopoly on collective pressure in favour of employees reflects a philosophy of labour law that refuses to treat labour as a mere commodity, prioritising the maintenance of social balance by limiting the coercive prerogatives of capital. Thus, the distinction between states that opt for a symmetrical balance of power and those that choose asymmetrical protection becomes a key indicator of how each society defines fairness in production relations.

In Romania, the persistence of this legislative vacuum perpetuates a de facto asymmetry, where the right to strike is enshrined in the constitution, whilst the employer's refusal to accept labour remains in a legal grey area, lacking a clear basis that reconciles economic freedom with the social function of labour. This approach justifies, from the perspective of the national legislator, the exclusion of the lock-out as a means of pressure, reinforcing the presumption that employees require specific protective measures to compensate for the inherent imbalance of power in the employment contract²⁰. This legislative rigidity, coupled with a deeply formalistic interpretation of collective disputes, creates a context in which the accurate identification of conflicts becomes difficult, limiting the effectiveness of mediation and conciliation mechanisms²¹.

In Romanian law, the non-regulation of the lock-out does not constitute an accidental normative gap, but rather a legislative policy choice oriented toward the asymmetric protection of the vulnerable party. Although international instruments (e.g., the Revised European Social Charter) theoretically recognize the right of

¹⁵ D. Iliescu and A. Butucescu, "Mediation and Conciliation in Collective Labour Conflicts in Romania," in *Industrial relations & conflict management*, Springer International Publishing, 2019, p. 175. doi: 10.1007/978-3-319-92531-8_12.

¹⁶ S. G. Contreras and P. A. Ortíz, "Collective bargaining, autonomy and legislative abstention," **Ius et Praxis**, vol. 24, no. 3, p. 173, Dec. 2018, doi: 10.4067/s0718-00122018000300173

¹⁷ A. Allouch, "Comparative argument: Essay on changes in labour law," HAL (Le Centre pour la Communication Scientifique Directe), Oct. 2016, Accessed: Jan. 2025. [Online]. Available: <https://tel.archives-ouvertes.fr/tel-02970319>;

¹⁸ Z. Kotelnikova, "The Review of New Books in Economic Sociology — 2008," *Journal of Economic Sociology*, vol. 10, no. 3, p. 94, Jan. 2009, doi: 10.17323/1726-3247-2009-3-94-104

¹⁹ A. Allouch, op. cit.;

²⁰ J. Coleman, "Introducing Social Structure in Economic Analysis (translated by A. Kurakin)," *Journal of Economic Sociology*, vol. 10, no. 3, p. 33, Jan. 2009, doi: 10.17323/1726-3247-2009-3-33-40;

²¹ D. Iliescu and A. Butucescu, op. cit.;

employers to collective action, Law No. 367/2022 establishes a regime of "conflictual exclusivity" in favor of employees. By rigorously configuring the stages of collective labor disputes, the Romanian legislator has restricted the arsenal of industrial pressure to the right to strike, leaving the lock-out without a *sedes materiae* (legal seat). Viewed through the prism of the principle of legality, this nominal absence is equivalent to a lack of legal basis for any act of authority by the employer aimed at the unilateral suspension of activity for defensive or offensive purposes.

The legislative "ricochet" effect is primarily manifested through the imperative provisions of Art. 7 of Law No. 367/2022, which establishes an insurmountable barrier to any employer interference. The prohibition of any intervention capable of limiting the exercise of trade union rights transforms, in legal terms, any attempted lock-out into an illicit act. Since closing a unit would inevitably lead to the discouragement of participation in a collective dispute or the indirect penalization of the workforce, such a measure is absorbed into the sphere of prohibited coercion. Thus, although the law does not explicitly pronounce the word "prohibited" in relation to the lock-out, it sanctions all the material effects that such an institution would produce, stripping it of any possibility of lawful manifestation.

From the perspective of general labor law, the lock-out is in direct collision with the synallagmatic nature of the employment relationship and the restrictive regime governing the suspension of individual employment contracts. In the Romanian system, the suspension of activity at the employer's initiative (technical unemployment as regulated by Art. 52 para. 1 letter c of the Labor Code) is contingent upon the existence of objective motives independent of the employer's will. Utilizing this lever as an instrument of counter-pressure in negotiations would constitute a *détournement de pouvoir* (misuse of power), as the purpose of the measure would not be the management of an economic difficulty, but the exercise of subjective pressure. In the absence of a specific cause for suspension related to labor disputes for the employer, the refusal to accept work is qualified as a culpable failure to fulfill the obligation to provide work, entailing full pecuniary liability.

At the same time, the pressures exerted by economic governance regimes at European Union level tend to prioritise a liberalisation agenda, complicating the national system's efforts to harmonise the economic freedom of enterprises with the fundamental social guarantees of employees²². This tension between cross-border economic imperatives and the national specificity of social protection highlights the need for a reassessment of the principle of 'equality of arms' in the context of collective disputes, a concept which, although it underpins the right to lock-out in states such as Germany²³, remains a controversial or marginalised subject in Romanian case law. A rigorous examination of this imbalance must necessarily address the synallagmatic nature of the employment contract, within which the employer's refusal to provide work may be characterised as a culpable failure to fulfil their fundamental obligations. Consequently, legitimising such a measure could erode the principle of employee protection, transforming the structural inequality between the parties into a lever for disproportionate economic pressure²⁴.

In the absence of rigorous conciliation and arbitration mechanisms, the current legislative vacuum exposes collective relations to heightened risks of volatility, necessitating regulation that reconciles the imperatives of economic efficiency with fundamental labour safeguards. The introduction of mandatory mediation mechanisms could alleviate the tensions caused by this legislative vacuum, aligning national practices with international standards and facilitating a structured resolution of collective disputes²⁵. In this context, the imposition of good-faith obligations and procedural agreements would become essential to prevent the escalation of conflicts and to guarantee the stability of labour relations in an uncertain economic climate²⁶, aspects which cannot be regarded as balancing mechanisms; on the contrary, it may be argued that such mechanisms would be used to accentuate the inequality that is characteristic of most labour relations.

²² J. Jordan, V. Maccarrone, and R. Erne, "Towards a Socialisation of the EU's New Economic Governance Regime? EU Labour Policy Interventions in Germany, Ireland, Italy and Romania (2009–2019)," *British Journal of Industrial Relations*, vol. 59, no. 1, p. 191, Feb. 2020, doi: 10.1111/bjir.12522.

²³ O. Gourova and O. A. Mikhailova, "Consumer in the Mall: Between Freedom of Choice and Strategies of Restrictions of Consumer Behaviour," *Journal of Economic Sociology*, vol. 10, no. 3, p. 41, Jan. 2009, doi: 10.17323/1726-3247-2009-3-41-57;

²⁴ J. Pazos, "Negotiating Equality of the Parties in the Collective Sphere," *Revista de derecho*, vol. 91, no. 253, p. 93, Jan. 2023, doi: 10.29393/rd253-4injd10004;

²⁵ I. Rusi and M. Bejtja, "Legalising workplace mediation: Comparative lessons and policy gaps in Albania's labour dispute framework," *Multidisciplinary Science Journal*, vol. 8, no. 4, pp. 2026–284, Oct. 2025, doi: 10.31893/multiscience.2026284;

²⁶ C. David, "15 years of national legislation – On the path to maturity," HAL (The Centre for Direct Scientific Communication), Jan. 2016, Accessed: Sep. 2025. [Online]. Available: <https://hal.science/hal-02541365>;

This need for regulation becomes all the more pressing in the context of globalisation, where the asymmetry between transnational capital and the predominantly national organisation of trade unions undermines the traditional balance of collective bargaining²⁷. Thus, the implementation of social peace clauses and rigorous arbitration procedures, or even the implementation of the concept of preventive social peace, could offer a viable alternative to the escalation of conflicts, translating the principle of equality of arms from the theoretical sphere into the concrete practice of resolving industrial disputes²⁸. Thus, the adoption of rigorous regulations would not merely represent a normative solution to the current vacuum, but would constitute a fundamental step towards restoring the balance of power between the social partners²⁹. Consequently, any future legislative reform must go beyond the mere formalisation of procedures, incorporating a critical analysis of structural imbalances to prevent the recognition of lockouts from becoming a tool for undermining trade union rights³⁰. Consequently, the legislator must establish control mechanisms to ensure that negotiations are conducted in good faith³¹, thereby preventing economic freedom from becoming a mechanism for exerting unilateral pressure on employees. Such an approach should support the stability of collective relations, encouraging the parties to give priority to conciliation and arbitration mechanisms in order to suspend industrial action during negotiations.

A solid legislative consensus is indispensable for guaranteeing legal certainty, providing the predictability necessary both for the protection of the workforce and for the sustainability of the investment climate in a globalised economy³². Within this framework, the consolidation of social peace depends on the regulatory framework's ability to institutionalise dialogue, transforming conflict from a direct confrontation into a negotiated process under the aegis of institutional neutrality³³. This paradigm of structured dialogue, through the integration of social peace clauses, becomes the essential pillar for avoiding open conflicts and ensuring sustainable legal predictability³⁴. However, the success of these mechanisms depends on a rigorous distinction between conflicts of interest and legal disputes, an aspect that requires explicit legislative transposition to ensure uniform application of the rules.

The analysis highlights the fact that the current legislative vacuum undermines the balance of collective bargaining, necessitating a restructuring of the rules to incorporate proportionate sanctioning and conciliation mechanisms in order to ensure balanced protection for all parties involved³⁵. This approach must include strengthening trade union autonomy and control mechanisms, thereby reducing the risk that regulatory fragmentation will erode the effectiveness of negotiations at the workplace level. Thus, comparative experience confirms the need for legislative intervention to prevent the weakening of labour relations by maintaining a robust balance between economic freedom and social guarantees³⁶. Such intervention must clearly establish the limits of the non-negotiability of social rights³⁷, ensuring that collective autonomy remains the central lever in defining working conditions and in preventing any erosion of trade union freedom.

However, there must be a very delicate correlation and conditionality within the institution so that it ultimately passes any constitutional review; specifically, such a mechanism must not only not interfere with the

²⁷ R. Dimitriu, "Unsettling trends in collective bargaining today," *Journal of Accounting and Management Information Systems*, vol. 16, no. 3, p. 389, Aug. 2017, doi: 10.24818/jamis.2017.03008.

²⁸ J. Pleps, "The doctrine of state continuity in the case law of the Constitutional Court," p. 16, Jan. 2016, doi: 10.22364/cvcls.1.2016.01;

²⁹ J. M. M. Ortega, "Collective bargaining, deadlock in negotiations and collective agreements following RDL 32/2021," *Trabajo persona derecho mercado Journal of Labour Studies and Social Protection*, no. 5, p. 223, Jan. 2022, doi: 10.12795/tpdm.mon.2022.06;

³⁰ A. Rahmawati, H. Haryono, B. Endarto, I. Nuroini, and H. Hananto, "The Role of Labour Law in Settling Industrial Relations Disputes: A Normative Juridical Perspective on the Rights of Workers and the Obligations of Employers in Indonesia," *West Science Law and Human Rights*, vol. 3, no. 1, p. 115, Jan. 2025, doi: 10.58812/wslhr.v3i01.1653

³¹ R. M. Ruiz, "Labour conciliation: An examination of its functionality as a conflict resolution system," *THEMIS Revista de Derecho*, no. 75, p. 135, Apr. 2019, doi: 10.18800/themis.201901.011.

³² L. J. D. Herrero, "Challenges and proposals for the regulation of work in the production processes of digital platforms," **Cuadernos de Relaciones Laborales**, vol. 37, no. 2, p. 275, Oct. 2019, doi: 10.5209/crla.66038;

³³ M. Trajković and G. Obradović, "SOCIAL PEACE AS A VALUE ORDER," *TEME*, p. 1437, Jan. 2019, doi: 10.22190/teme1804437t;

³⁴ R. Chartier, "Labour legislation, freedom, fear and conflict," *Industrial Relations*, vol. 13, no. 3, p. 254, Feb. 2014, doi: 10.7202/1022424ar;

³⁵ L. Lukman, I. Isnawati, F. Farahwati, and S. R. Hendrayanto, "The Urgency of Regulating Legal Sanctions under Article 157A of the Job Creation Law for the Protection of Workers," *JURNAL USM LAW REVIEW*, vol. 8, no. 3, p. 2198, Dec. 2025, doi: 10.26623/julr.v8i3.12967.

³⁶ A. K. de Souza and C. F. do Nascimento, "Negotiated over Legislated: The Position of the Federal Supreme Court," *Research Society and Development*, vol. 11, no. 13, Oct. 2022, doi: 10.33448/rsd-v11i13.35363

³⁷ R. J. M. de B. Pereira and F. D. S. B. de Freitas, "Collective Bargaining and Labour Legislation: A Critical Analysis of Decision No. 1046 on General Repercussion by the Federal Supreme Court," *Journal of Fundamental Rights in Labour, Social and Business Relations*, vol. 9, no. 1, Aug. 2023, doi: 10.26668/indexlawjournals/2526-009x/2023.v9i1.9662.

provisions of Article 41 of the Romanian Constitution, but must also not contravene the spirit (*ratio legis*) of the constitutional provision. Although, from a legislative perspective, such an effort can be made without contravening constitutional requirements⁽³⁸⁾, this approach entails establishing a strict procedure that makes the recognition of this measure subject to rigorous criteria of proportionality and subsidiarity, in full accordance with recent European directives aimed at revitalising collective bargaining.

The integration of this instrument into national legislation must, therefore, be supported by vertical coordination mechanisms that prevent excessive fragmentation of negotiations, ensuring that collective autonomy remains an effective lever and not a source of systemic inefficiency. A combined analysis of the specialist literature and current legislation shows that a lock-out is defined, in a broad sense, as a temporary closure of the workplace by the employer to exert pressure or resist trade union demands. The research findings reveal a major discrepancy between the international recognition of this right and its status in Romania.

A comparative analysis of collective labour relations highlights the fact that, in many legal systems, the lock-out is legally grounded in the mechanism of non-performance of the contract, being perceived as a legitimate response to the suspension of work by employees; however, under Romanian law, this measure remains, at present, inadmissible. A rigorous taxonomy of this instrument allows it to be classified into three distinct strategic categories, namely defensive, preventive and subsequent, thus highlighting its profoundly subjective nature and its character as an instrument of industrial action. This voluntary feature clearly distinguishes it from the institution of technical redundancy, which, according to the provisions of the Labour Code, must be based exclusively on objective economic, technological or structural causes, arising independently of the employer's will and which cannot be used to mask a reaction to trade union demands.

Although Romania has ratified the revised European Social Charter³⁹, which in Article 6(4) explicitly recognises the right of employers to take collective action in the event of conflicts of interest, national legislation maintains a persistent regulatory silence on this subject. In the absence of explicit provisions in Law No. 367 of 2022 on social dialogue, this legislative vacuum is systematically interpreted as an implicit prohibition, forcing employers, in extreme situations, to resort to alternative justifications such as force majeure or the imperative of maintaining order and security within the premises to justify the suspension of work. This practice highlights a vulnerability in the current legal framework, which does not provide a transparent procedural route for exercising a right recognised at international level.

A combined review of legal doctrine and statutory texts indicates that a lock-out, broadly defined as a temporary closure of the workplace intended to exert pressure on trade unions or to resist demands deemed unacceptable, suffers in Romania from a major discrepancy between its recognition in international treaties and its status of quasi-clandestinity under domestic law. Any legislative integration of this instrument should therefore harmonise the obligations assumed under the European Social Charter with the need to protect employees against abuse, transforming the lock-out from a coercive measure into a regulated stage of collective bargaining, subject to judicial review and strict conditions of validity.

This state of legal uncertainty places employers at risk of sanctions, whilst also contributing to the weakening of the role of the social partners and accentuating the decline in collective bargaining coverage in a climate already marked by the limitation of trade unions' capacity for action⁴⁰. This vulnerability is exacerbated by the legislative trend to replace genuine trade union negotiations with diluted forms of employee representation, which undermines the quality of social dialogue and the effectiveness of collective bargaining at sectoral level⁴¹. Consequently, the current regulatory vacuum acts as an additional factor in restricting the bargaining power of trade unions, perpetuating a structural imbalance that favours the marginalisation of collective action⁴².

³⁸ R. Erne, S. Stan, D. Golden, I. Szabó, and V. Maccarrone, "Conclusion," in Cambridge University Press eBooks, Cambridge University Press, 2024, p. 353. doi: 10.1017/9781009053433.018;

³⁹ Law 74/1999 ratifying the revised European Social Charter, adopted in Strasbourg on 3 May 1996, published in the Official Gazette No. 193 of 4 May 1999;

⁴⁰ I. Daugareilh, C. Degryse, and P. Pochet, "The Platform Economy and Social Law: Key Issues in Comparative Perspective," SSRN Electronic Journal, Jan. 2019, doi: 10.2139/ssrn.3432441;

⁴¹ D. Adăscăliței and Ștefan Guga, "International actors and trade unions during postsocialism and after: the case of Romania," Employee Relations, vol. 40, no. 4, p. 692, May 2018, doi: 10.1108/er-01-2017-0017

⁴² M. Varga and A. Freyberg-Inan, "Post-communist state measures to thwart organised labour: The case of Romania," Economic and Industrial Democracy, vol. 36, no. 4, p. 677, Oct. 2014, doi: 10.1177/0143831x14548770;

This analysis substantiates the need for potential legislation on lockouts based on the fundamental principle of symmetry of arms, arguing that a genuine and balanced social dialogue presupposes the existence of a legal instrument corresponding to the right to strike. This view, supported by the legislative experience of countries such as Poland, suggests that the recognition of defensive lock-outs is not intended to undermine the fundamental rights of employees, but to offer the employer a legitimate means of economic self-defence in the face of disproportionate demands. However, the implementation of such a measure within the Romanian legal framework faces the major difficulty of distinguishing it from the institution of technical unemployment regulated by Article 52(1)(c) of the Labour Code. There is a risk that the use of a lock-out under the guise of a temporary suspension of operations could become a tool for abuse of rights, used exclusively to circumvent the obligation to pay compensation of at least 75% of the basic wage, which would profoundly alter the nature of collective labour disputes.

In a globalised economy, where the gap between the mobility of international capital and the geographical limitations of national trade unions is already pronounced, the introduction of lockouts without extremely rigorous procedures could lead to a radicalisation of social tensions. This dynamic risks generating a phenomenon of forced solidarity, in which employees not participating in the strike, having been deprived of income due to the closure of the workplace, are compelled by economic circumstances to join the protest, transforming a specific dispute into a generalised organisational crisis. The current Romanian system, characterised by the restrictive formalism of Law No. 367/2022 on social dialogue, makes the legal initiation of collective disputes a cumbersome procedure, often leaving real tensions without an appropriate framework for expression.

Consequently, a coherent regulation of lockouts, aligned with International Labour Organisation standards, should impose strict obligations of good faith and make this measure subject to rigorous conciliation and arbitration procedures. Rather than being perceived as a threat to trade union freedom, a regulated lockout could serve as a mechanism for channelling disputes towards mediation, preventing uncontrolled escalation and ensuring a framework of legal predictability for both parties involved in the employment relationship.

3. Conclusions

The transition from the current 'regulatory silence' to explicit regulation of lockouts should not be viewed merely as a technical adjustment, but as a social policy choice with profound systemic implications. The potential adoption of the German model of equality of arms within the domestic legal framework could, in theory, invigorate collective bargaining, compelling the social partners to engage in a more pragmatic dialogue. However, research points to a major risk: in a system where trade union structures are already weakened, legitimising an employer's counter-measure could degenerate into a tool for suppressing economic protest, thereby rendering the constitutional right to strike meaningless.

Furthermore, a rigorous analysis of the synallagmatic nature of the employment contract reveals doctrinal tensions that are difficult to overcome; a lock-out essentially entails a suspension of the employer's obligation to provide work, without any individual fault on the part of the employee. This recalibration of contractual risk raises questions regarding the measure's compatibility with the principle of protecting the vulnerable party, transforming structural inequality into a lever for disproportionate economic pressure.

The regulation of lockouts within the Romanian legal framework requires striking a delicate balance between the employer's economic freedom and the protection of the right to work, a constitutional pillar underpinning the welfare state model. Although national legal doctrine has consistently explored the possibility of integrating this measure, the persistence of the current legislative vacuum perpetuates a state of legal uncertainty, risking the transformation of the principle of equality of arms into an instrument of unilateral pressure that could undermine trade union rights. In this context, any future legislative initiative must incorporate the principles of European flexicurity, ensuring that the imperative of economic adaptability for businesses does not become a pretext for systematic abuses against the workforce.

The study demonstrates that lockouts, although often perceived through the prism of industrial aggression, represent an essential element in modern legal systems for balancing the balance of power. Maintaining an absolute prohibition in Romania, despite the obligations assumed through the ratification of the revised European Social Charter by Law No. 74 of 1999, creates an asymmetry that can be exploited through covert retaliatory measures, such as suspensions of operations under the pretext of technical difficulties. Future legislation should therefore go beyond a simple implicit ban, opting instead for a model that permits only

defensive lockouts, a solution that would reconcile the protection of employees with the employer's right to manage situations where a strike jeopardises the security or economic viability of the business.

The impossibility of transposing the lock-out into the internal legal order is sealed by the hierarchical interpretation of fundamental rights. In the collision between the employer's economic freedom (Art. 45 of the Constitution) and the right to work and social protection (Art. 41), the jurisprudence and the spirit of Law No. 367/2022 prioritize the stability of the employment relationship. The "silence" of the legislator thus becomes a constitutional barrier: recognizing a right to forced suspension of work by capital would hollow out the guarantee of remuneration for work performed. Consequently, the Romanian system rejects the "equality of arms" in favor of an asymmetric balance, considering that the employee's economic vulnerability cannot be used as a bargaining chip in industrial power plays—a fact that transforms any form of lock-out from an instrument of dialogue into an illicit barrier to social peace.

In conclusion, social stability depends on the legislator's ability to transform industrial conflict into a structured dialogue, in which both parties have access to legitimate and strictly controlled means of pressure. Such an approach would bring national legislation into line with European standards, facilitating more effective collective bargaining and reducing the duration of conflicts through legal predictability. This regulatory development would enable the courts to assess the legitimacy of disputes through the prism of procedural fairness and equality of arms, moving beyond the restrictive and often punitive approach that currently dominates national case law on collective labour disputes.

Consequently, any legislative initiative should go beyond the mere importation of foreign concepts and focus on establishing strict mechanisms for judicial review. It is imperative that the courts be able to assess not only the formal legality, but also the proportionality and good faith of the measure, thereby preventing the lock-out from becoming a method of covert trade union discrimination. In the absence of such safeguards, the regulation risks exacerbating the volatility of labour relations, undermining social stability under the pretext of equal treatment which, in the current economic reality, remains largely illusory.

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THE IMPACT OF THE USE OF ALGORITHMS ON ANTI-COMPETITIVE AGREEMENTS BETWEEN UNDERTAKINGS IN EU COMPETITION LAW

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Abstract

The rapid expansion of artificial intelligence and the widespread deployment of algorithms in the commercial strategies of undertakings have fundamentally reshaped the competitive landscape of the European Union's internal market. This article examines anti-competitive agreements between undertakings facilitated by algorithms from the perspective of EU competition law, with particular focus on the application of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to novel forms of algorithmic coordination. The central argument is that anti-competitive agreements do not constitute an autonomous legal concept but a synthetic doctrinal construct, whose conceptual flexibility is sufficient to encompass algorithm-facilitated conduct without requiring express legislative reform. The article analyses the main functional typologies of algorithms, including pricing, monitoring and prediction functions and identifies three distinct modalities through which they may facilitate anti-competitive agreements: the reinforcement of explicit collusion, hub-and-spoke structures, and autonomous algorithmic tacit collusion. Drawing on landmark European Court of Justice jurisprudence – namely Dyestuffs, Hüls, Anic Partecipazioni, T-Mobile Netherlands and Eturas – the article demonstrates that the notions of agreement, concerted practice and exchange of information are sufficiently elastic to address algorithmic coordination, in particular through the technologically neutral criteria of competitive uncertainty elimination and the presumption of causal linkage between concertation and subsequent market conduct. The article concludes that EU competition law already possesses the necessary conceptual instruments to prevent and sanction algorithmic collusion, and that the primary challenge lies not in normative gaps but in the coherent and adaptive enforcement of existing rules.

Keywords: algorithmic collusion, concerted practices, pricing algorithms, hub-and-spoke structures, competitive uncertainty, exchanges of information.

1. Introduction

At a time when artificial intelligence is in full development and is being used to an ever-greater extent, major changes are occurring both in interpersonal relations and in everyday human activities. At present, artificial intelligence is used in an increasing number of fields, if not all of them, generating substantial transformations in the practices adopted by natural persons and, at a structural level, by undertakings. The digitalisation of the economy and the extensive use of algorithms in the activities of undertakings have led to various profound transformations, including in the manner in which competition manifests itself on markets. Undertakings have begun to make constant use of pricing algorithms, market-monitoring algorithms and algorithms for the automatic adaptation of commercial strategies, which are integrated into the day-to-day decisions of undertakings, with a view to increasing economic efficiency and optimising interaction with consumers. In this context, a dissonance arises between the undeniable benefits of artificial intelligence systems and the risks they may generate for the functioning of effective competition, in particular through facilitating indirect coordination of market conduct among competitors.

Within this framework, the present article analyses anti-competitive agreements between undertakings facilitated by algorithms from the perspective of European Union competition law, with emphasis on the application and adaptation of Article 101 of the Treaty on the Functioning of the European Union¹ (TFEU) to novel arrangements arising from the use of algorithms. The starting point is the observation that anti-competitive agreements do not constitute an autonomous legal concept but rather a synthetic doctrinal construct reflecting the result of agreements, concerted practices and exchanges of information prohibited by Article 101 TFEU. This

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¹ Published in the Official Journal C 326 of 26 October 2012.

conceptual flexibility is essential for the analysis of algorithm-facilitated conduct, which does not always fit within the classical typologies of anti-competitive coordination.

The importance of the subject derives from the risk that the automation of economic decisions may lead to a reduction in competitive uncertainty and to an alignment of market conduct without direct, explicit or continuous contacts between undertakings — a situation that gravitates towards concerted practices. In such a context, the question arises whether the traditional instruments of competition law are sufficient to prevent and sanction these forms of coordination, or whether a rethinking of the criteria for attribution and proof of anti-competitive agreements is necessary.

The answer proposed by this article is based on an analysis of the case-law of the European Court of Justice, which, although it has not yet ruled directly on a case of autonomous algorithmic collusion, has developed principles of transversal and technologically neutral applicability. Cases such as *Dyestuffs*², *Hüls*³, *Anic Partecipazioni*⁴, *T-Mobile Netherlands*⁵ and *Eturas*⁶ demonstrate the capacity of competition law to adapt to innovative forms of coordination, through its emphasis on the elimination of competitive uncertainty, the presumption of causality and the irrelevance of the technical form of contact between undertakings.

By critically engaging with the specialist literature and by drawing on existing judicial reasoning, this article aims to demonstrate that Article 101 TFEU already possesses the conceptual resources necessary to address anti-competitive agreements facilitated by algorithms, without the need, at this stage, for express legislative reform.

2. The Legal Framework Applicable to Anti-competitive Agreements between Undertakings in the European Union

Anti-competitive agreements between undertakings consist of forms of coordination of their market conduct which have as their object or effect the restriction, prevention or distortion of competition.⁷ Thus, the conduct of at least two undertakings is coordinated towards certain actions which may consist, for example, in modifying the level of price or output. Such coordination may be achieved through agreements, decisions of associations of undertakings or concerted practices, forms of cooperation regulated and sanctioned at European Union level pursuant to Article 101 TFEU. Accordingly, anti-competitive agreements do not constitute a distinct autonomous legal concept but rather a synthetic doctrinal construct designed to cover the result of the conduct prohibited by Article 101 TFEU.

Pursuant to Article 101 TFEU, "(1) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void. (3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings; any decision or category of decisions by associations of undertakings; any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

² ECJ, 14 July 1972, C-48/69, *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, ECLI:EU:C:1972:70.

³ ECJ, 8 July 1999, C-199/92 P, *Hüls v. Commission of the European Communities*, ECLI:EU:C:1999:358.

⁴ ECJ, 8 July 1999, C-49/92 P, *Commission of the European Communities v. Anic Partecipazioni SpA*, ECLI:EU:C:1999:356.

⁵ ECJ, 4 June 2009, C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343.

⁶ ECJ, 21 January 2016, C-74/14, *"Eturas" UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, ECLI:EU:C:2016:42.

⁷ J.E. Harrington, Jr., *The Theory of Collusion and Competition Policy*, The MIT Press, Cambridge, 2017, p. 1.

In analysing Article 101 TFEU, it is necessary to define and clarify certain terms found in the EU regulation. First, there is the concept of the "internal market", which presupposes a space without internal frontiers in which persons, goods, services and capital move freely under the same conditions as within Member States.⁸ In this context of a free market, certain conduct of undertakings deemed incompatible is sanctioned.

Secondly, the main subjects whose conduct is analysed are undertakings, which may affect trade between Member States. The concept of undertaking has undergone conceptual development through the judgments of the European Court of Justice and is not legally defined at EU level. For example, in the Höfner⁹ case it was held that, in competition law, "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed."¹⁰ By economic activity we understand the offering of both goods and services.

Another important term, through which the action of undertakings in the sense of Article 101 TFEU is materialised, is that of "agreement". This term is central, being the classical form of coordination adopted by undertakings in distorting competition. Agreements take the form of a consensus, of arrangements between undertakings or of conduct which is coordinated through the will of the undertakings. It is necessary to highlight the difference between agreements between undertakings and the unilateral conduct of a single undertaking — not only because agreements require two or more undertakings whilst in the second scenario the conduct belongs to a single undertaking without any direct influence from another, but also because the latter may fall within the scope of Article 102 TFEU if it meets the conditions of abuse of a dominant position.

Another term which is close to an agreement between undertakings but must be distinguished from it is the concerted practice, which presupposes a form of coordination or practical cooperation between undertakings, realised through direct or indirect contacts between them, of a nature liable to influence their conduct or strategy on the market.¹¹ Another definition of concerted practices consists of "those deliberate behavioural alignments, produced through deceptive or simulative means, not formally reduced to a legal instrument, through which competitors in the relevant market supply each other with sensitive information (trade secrets or similar) with the intention of using it to coordinate the market policy of the participants."¹² The definition thus formulated presents, however, a number of limitations, as it introduces conditions which do not follow from Article 101 TFEU and from the case-law of the European Court of Justice, such as the deliberate character of the conduct, the use of deceptive means or the existence of an intention to coordinate, and it unjustifiably narrows the scope of the concerted practice to a mere exchange of sensitive information, whereas in EU law the essential element is the existence of direct or indirect contacts capable of eliminating competitive uncertainty and influencing the market conduct of undertakings, even in the absence of a formal agreement.

In this regard, in the Dyestuffs¹³ case, the European Court of Justice "explained that a concerted practice is "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition". Hence, a concerted practice is, firstly, a reciprocal cooperation, and secondly, it is such cooperation, which knowingly substitutes competition. According to the ECJ, a concerted practice, although it does not have all the elements of a contract, "may inter alia arise out of coordination which becomes apparent from the behaviour of the participants".¹⁴

An important condition for agreements between undertakings to be sanctioned is that they must have as their object or effect the prevention, restriction or distortion of competition within the internal market. The prevention, restriction or distortion of competition may be materialised primarily through the fixing of purchase or selling prices or any other trading conditions; the limitation or control of production, distribution, technical development or investment; the sharing of markets or sources of supply; the application to trading partners of dissimilar conditions in respect of equivalent transactions, thereby placing them at a competitive disadvantage; and the making of the conclusion of contracts subject to acceptance by the other parties of supplementary

⁸ L. Lazăr, I. Lazăr, *Tratat de Dreptul Uniunii Europene în domeniul concurenței*, Ed. C.H. Beck, București, 2025, p. 24.

⁹ ECJ, 23 April 1991, C-41/90, *Klaus Höfner and Fritz Elser v. Macroton GmbH*, EU:C:1991:161, para. 21.

¹⁰ A. Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Ed. Universul Juridic, București, 2016, p. 314.

¹¹ L. Lazăr, I. Lazăr, op. cit., p. 223.

¹² A. Almășan, *Dreptul concurenței*, 2nd ed., revised and enlarged, Ed. Hamangiu, București, 2021, p. 247.

¹³ ECJ, 14 July 1972, C-48/69, *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, ECLI:EU:C:1972:70, paras. 64 and 65.

¹⁴ G. Surblytė-Namavičienė, *Competition and Regulation in the Data Economy: Does Artificial Intelligence Demand a New Balance?*, Edward Elgar Publishing Limited, Cheltenham, 2020, pp. 159-160.

obligations which, by their nature or in accordance with commercial usage, have no connection with the subject of such contracts.

The distinction between agreements which have as their object the restriction of competition and those which produce an anti-competitive effect is essential.¹⁵ Restrictions by object are those forms of coordination which, by their very nature, are capable of harming competition on the market, without it being necessary to conduct a detailed analysis of the actual effects produced. In this category fall, traditionally, price-fixing, the limitation of output or the sharing of markets, conduct considered particularly harmful to the functioning of the internal market (the so-called "hard-core" agreements). By contrast, in the case of agreements which do not present an obviously anti-competitive character, their classification requires an analysis of the actual or potential effects on competition, having regard to the economic and legal context in which they operate. This distinction is particularly relevant in the context of the use of algorithms, insofar as certain mechanisms of algorithmic coordination may reveal, depending on their configuration and purpose, either a restriction by object or a restriction by effect¹⁶.

A central element in the qualification of concerted practices in the case-law of the European Court of Justice is the elimination or reduction of competitive uncertainty. The Court has consistently held that competition law seeks to preserve a situation in which each undertaking independently determines its conduct on the market.¹⁷ Any form of coordination which, even without the existence of a formal agreement, has the effect of replacing the risks inherent in competition with a knowing cooperation between undertakings is incompatible with Article 101 TFEU. In this sense, the elimination of uncertainty as to the future conduct of competitors constitutes a decisive criterion for identifying a concerted practice, it being irrelevant whether the coordination manifests itself through direct or indirect contacts or through technical mechanisms which facilitate the anticipation of market reactions. For instance, independent undertakings may eliminate market uncertainty through advance price announcements or by expressing complaints about the pricing policies of competitors. If the competing undertaking responds by making similar increases of its own prices, or accepts the complaints of rivals and adjusts its prices accordingly, then, in the absence of any other legitimate explanation for parallel conduct, the existence of a concerted practice may be established. In the case of agreements, by contrast, the same results are achieved through express contacts.¹⁸

Another important element in the relations between undertakings is the exchange of information, which constitutes a particularly sensitive practice in the analysis of the compatibility of conduct with Article 101 TFEU, in particular when it reduces competitive uncertainty and facilitates the coordination of market conduct. In the context of the use of algorithms, the exchange of information may take indirect forms, through common platforms, software providers or mechanisms for automatic adaptation to data available on the market. The increase in algorithmic transparency may lead to an alignment of the conduct of undertakings without the need for direct communication, which raises additional difficulties in identifying and proving anti-competitive coordination. Nevertheless, the mere absence of an explicit contact does not exclude the application of Article 101 TFEU, insofar as the exchange of information is of a nature to cause a distortion of competition. This flexible interpretation was consolidated in recent case-law on the exchange of information; the Court held, in *T-Mobile Netherlands*¹⁹, that even a single exchange of information may constitute a concerted practice when it is capable of influencing the market conduct of the undertakings involved.²⁰ In the context of the use of computer systems and indirect coordination, the *Eturas*²¹ case is relevant, as the Court recognised the possibility of the existence of a concerted practice facilitated through a common IT platform, in the absence of direct contacts between undertakings.²² In this regard, the Court demonstrated that the virtual environment and the use of technical

¹⁵ A. Almășan, op. cit., p. 247.

¹⁶ A. Ezrachi, M.E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, in Oxford Journal of Legal Studies 1, no. 37/2017, pp. 10-22.

¹⁷ L. Lazăr, I. Lazăr, op. cit., p. 214.

¹⁸ R. O'Donoghue QC, J. Padilla, *The Law and Economics of Article 102 TFEU*, 3rd ed., Ed. Hart, 2020, p. 222.

¹⁹ ECJ, 4 June 2009, C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, para. 60.

²⁰ B. Sufrin, N. Dunne, A. Jones, *Jones and Sufrin's EU Competition Law. Text, Cases, and Materials*, 8th ed., Oxford University Press, 2023, pp. 201-202.

²¹ ECJ, 21 January 2016, C-74/14, *"Eturas" UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, ECLI:EU:C:2016:42, paras. 39-49.

²² B. Sufrin, N. Dunne, op. cit., pp. 204-205.

means do not exclude the application of Article 101 TFEU, but require an adaptation of the legal analysis to modern forms of coordination.

Paragraph (3) of Article 101 TFEU regulates the exceptions to the prohibited agreements. Accordingly, agreements or concerted practices shall not be sanctioned if they satisfy the following conditions: they contribute to improving the production or distribution of goods or to promoting technical or economic progress; they allow consumers a fair share of the resulting benefit; they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and they do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

In the course of technological development, agreements take on ever more diverse forms and employ multiple mechanisms which make it difficult to determine whether they amount to an anti-competitive arrangement or not. One such mechanism currently used by undertakings in carrying out their activities is artificial intelligence. Thus, undertakings use various algorithms to improve their production, their sales and the adjustment of prices, as well as to target offers at consumers. When algorithms are used independently and underlie conduct that complies with the rules of competition, they do not give rise to the conclusion of an anti-competitive agreement. However, where undertakings use algorithms to establish an indirect or tacit agreement, the provisions of Article 101 TFEU ought to be activated. Thus, undertakings are making increasing use of artificial intelligence systems which, whilst not regulated as such in competition law, are defined, pursuant to Article 3(1) of Regulation (EU) 2024/1689²³, as a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers from the input it receives how to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments.

Although Article 101 TFEU contains no specific provisions concerning the use of algorithms or artificial intelligence, the case-law of the European Court of Justice plays an essential role in adapting the norm to new economic and technological realities. Through an evolutive interpretation of the concepts of agreement, concerted practice and exchange of information, the Court has ensured the applicability of the principles of competition law regardless of the technical form of the coordination. This approach allows for the inclusion of algorithm-facilitated conduct within the scope of Article 101 TFEU, without the need for an express amendment of the normative text, thereby preserving the efficiency and flexibility of European Union competition law.

3. Algorithms Used in Anti-competitive Agreements

Although no normative definition of the term "algorithm" exists, which may be regarded as both an advantage and a disadvantage since it must be interpreted on a case-by-case basis, the term has been defined as a sequence of operations designed to transform input data into results.²⁴ The definition thus analysed presents a high degree of generality, being formulated in an abstract and concise manner.

Undertakings may use and develop algorithms in pursuit of different purposes and/or effects. Accordingly, algorithms have been classified according to the following functional typologies:²⁵

- Search function: through the use of search engines (such as Google), information is displayed and ordered according to certain input data. This function may also be used for the search for products or services (for example, eMAG or Booking.com).
- Recommendation function: this is realised by correlating information about the user, collected by artificial intelligence following the user's interaction with various platforms, thereby creating a user profile matched against the characteristics of the product or service intended to be recommended. Following an analysis based on various algorithms, the product recommendation may be made by artificial intelligence (for example, Spotify or Netflix).
- Allocation function: this may take several forms, such as the automatic execution of

²³ "The Regulation as defined in Article 288 TFEU has 'general applicability'. It is binding 'in all its elements' (i.e. it is binding as to the final goal to be achieved and as to the forms and means through which that goal is to be fulfilled) and 'shall be directly applicable in each Member State', contributing, alongside directives, decisions, recommendations and opinions, to the exercise of the competences of the Union" – see A. Fuerea, *Manualul Uniunii Europene*, 6th ed., revised and enlarged, Ed. Universul Juridic, București, 2016, p. 235.

²⁴ Algorithmic Competition OECD, Competition Policy Roundtable Background Note, 2023, p. 8, at https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/05/algorithmic-competition_2be02d00/cb3b2075-en.pdf, last time consulted on 23.01.2026.

²⁵ *Idem*, pp. 8-9.

transactions and the distribution and allocation of supply and demand (for example, connecting a client with an available taxi, as occurs in ride-sharing applications).

- Surveillance or Monitoring function: this consists of the observation of user behaviours and patterns with a view to identifying deviations, such as the detection of fraud in transactional data, employee monitoring (for example, Spector or Sonar Spytec) or general monitoring software (for example, Webwatcher). This category may be used by undertakings in monitoring the market, for the purpose of tracking the conduct and strategic decisions of competitors, such as prices, in which case the provisions of competition law are relevant (for example, Wiser Solutions or Intelligence Node).
- Pricing function: this represents another function attracting the application of competition rules, as it involves the setting or recommendation of prices on the basis of data concerning the observable characteristics of customers, their behaviour or market conditions (for example, Rainmaker Group or A2i Pricecast Fuel).
- Aggregation function: this involves the collection, classification and reordering of information from different sources, such as news aggregators (for example, Google News or nachrichten.de).
- Communication function: this is used primarily by call-centre departments or firms and involves automated communication with consumers and/or other undertakings using chatbots; it may also take the form of virtual assistants such as Siri or Alexa.
- Filter function: the filtering of information and data, generally in the background, such as spam filters or filters designed to exclude copyright-protected material (for example, Norton or Net Nanny).
- Information production function: the generation of information already existing on various platforms or the automated drafting of various articles (for example, ChatGPT).
- Prediction function: the anticipation of future behaviours or scenarios (for example, PredPol, Sickweather or scoreAhit), representing a function that may engage the application of competition law norms.
- Scoring function: the evaluation or ordering of information, products, undertakings and/or consumers, such as online evaluation systems, evaluations that may take the form of ratings or stars provided by consumers (for example, the eBay reputation system) or consumer credit scores (for example, Kreditech).

Algorithms may be used by undertakings for development, the streamlining of certain processes, the creation of new concepts, products or services, for the monitoring and collection of information about consumers in order to make personalised offers, all conduct that is not prohibited. In the same vein, ordinary consumers may use artificial intelligence to improve certain aspects of their lives or to simplify various activities. All of these represent benefits of using artificial intelligence. From another perspective, the use of algorithms presents the following benefits: first, algorithms may constitute the basis for innovations leading to the emergence of new or improved products. For example, products may be personalised and adapted to the specific needs of consumers. Second, algorithms may reduce costs by optimising production processes or by increasing labour productivity²⁶. Third, they may reduce barriers to entry on the market, allowing new and smaller competitors entering the market to obtain relevant market information or to develop innovative products at lower costs²⁷. Fourth, algorithms may reduce consumers' search costs by giving them access to a range of suitable products, accompanied by comparable information in line with the main dimensions of competition, such as price, quality or consumer preferences²⁸. Thus, price comparison platforms allow consumers an instant comparison of prices for a variety of goods and services, price monitoring tools may inform consumers as to when prices are particularly low, and artificial intelligence is used even for product recognition, facilitating the rapid identification of desired goods. Finally, algorithms may contribute to a better balancing of supply and demand, with dynamic pricing enabling their optimisation in response to evolving market conditions.²⁹

²⁶ OECD, Artificial intelligence and competitive dynamics in downstream markets, 2025, pp. 6-8, at https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/11/artificial-intelligence-and-competitive-dynamics-in-downstream-markets_c6e81d0e/ccf0624a-en.pdf?utm_source=chatgpt.com, last time consulted on 23.01.2026.

²⁷ *Idem*, p. 11-13.

²⁸ A. Ezrachi, M.E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, Cambridge, 2016, pp. 4-6.

²⁹ *Idem*, pp. 10-11.

Nevertheless, in addition to the benefits presented above, there are certain risks analysed in the specialist literature and even regulated at European Union level through prohibited practices. Set out briefly below are only those of relevance to the subject of this article.

There are certain practices in the field of AI prohibited by Regulation (EU) No 2024/1689 which, while not directly applicable in competition law and therefore not constituting a *per se* infringement of Article 101 TFEU, may have implications, such as the use of systems employing subliminal techniques or intentionally manipulative techniques [Article 5(1)(a)], on the one hand, and, on the other, systems that exploit any of the vulnerabilities of and are based on the discrimination of persons or groups of persons [Article 5(1)(b)].

First, "subliminal techniques are understood as those techniques that are impossible to be consciously perceived by a person"³⁰ and are most frequently encountered in advertising targeting certain individuals. The second technique — the manipulative one — consists of "the exploitation of the emotions and vulnerabilities of persons to change their perception or behaviour (...)." ³¹ This technique may also be used in the promotion of a product, appealing to the fear or anxiety of a person who suffers, for example, from a compulsive buying disorder. Second, the provisions prohibit "the placing on the market, putting into service or use of AI systems that exploit the vulnerabilities of persons due to their age", ³² a disability or a social situation, with the purpose or effect of materially distorting the behaviour of that person or a person belonging to that group. As regards the prohibition of AI systems based on discrimination, these rely on the "socio-economic situation, state of health or age leading to a clear modification of the person's behaviour resulting in harm to that person or another person."³³ In this case, undertakings may use such systems for price differentiation employing criteria such as age, since persons in certain age groups may be more easily influenced than others.

4. The Algorithm-Facilitated Anti-competitive Agreement: Concept, Typologies and Delimitations

Agreements between undertakings may take several forms. First, agreements may be horizontal³⁴, involving undertakings at the same level of the production chain, such as, for example, an agreement between undertakings on the fixing of the selling price, or vertical³⁵, involving undertakings at different levels of the production chain, such as, for example, agreements between a producer and a distributor whereby the latter agrees not to distribute products from other producers similar to those of the former.

Secondly, we may differentiate between express agreements, on the one hand, which are directly regulated by Article 101 TFEU and take the form of agreements or concerted practices to which undertakings have arrived, involving a direct intention on the part of the undertakings to conclude the respective arrangement. And, on the other hand, tacit agreements, which may also be sanctioned if the expression of the will of one of the contracting parties to restrict competition constitutes an express or tacit invitation to the other party or parties to jointly achieve that objective.³⁶ These tacit agreements may also be realised through the use of an artificial intelligence system or algorithms, when through the use of such mechanisms, undertakings influence each other into adopting common conduct.

One of the most frequently encountered cases in which algorithms are used by undertakings is for the monitoring and setting of prices. Starting from this situation, it is necessary to draw a distinction between:³⁷

- price monitoring algorithms – monitoring the prices charged by other undertakings;
- dynamic pricing algorithms – which recommend or automatically set a price based on the prices charged by competitors and/or market conditions, such as the level of demand;
- personalised pricing algorithms – which adapt prices to the individual characteristics of consumers.

³⁰ R.-M. Nanu, *Regulamentul european privind inteligența artificială. Comentarii pe articole*, Ed. Universul Juridic, București, 2025, p. 74.

³¹ *Idem*, p. 75.

³² A. Popescu, *AI Act. Viitorul deciziilor noastre. Reguli explicate, studii de caz și exemple*, Ed. Universul Juridic, București, 2024, p. 146.

³³ R.-M. Nanu, *op. cit.*, p. 78.

³⁴ A. Ezrachi, *Horizontal and vertical agreements, in Competition and Antitrust Law: A Very Short Introduction*, Oxford University Press, 2021, pp. 74 et seq.

³⁵ A. Ezrachi, *EU Competition Law. An Analytical Guide to the Leading Cases*, 7th ed., Ed. Hart, 2021, p. 166.

³⁶ L. Lazăr, I. Lazăr, *op. cit.*, p. 217.

³⁷ Algorithmic Competition OECD, Competition Policy Roundtable Background Note, p. 11, at https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/05/algorithmic-competition_2be02d00/cb3b2075-en.pdf, last time consulted on 24.01.2026.

Pricing algorithms may have the effect of artificially increasing prices and of facilitating anti-competitive agreements. In this regard, three modalities may be identified:³⁸

- Algorithms facilitating express anti-competitive agreements: such as automated pricing systems based on available price data which may detect and react rapidly to deviations from coordinated conduct, thereby enhancing the stability of express agreements between undertakings, such as resale price maintenance or price-fixing.
- Algorithms used in hub-and-spoke structures: where multiple undertakings may use the same pricing software provided by a third party, which determines pricing decisions, resulting in a hub-and-spoke structure liable to facilitate the exchange of information between competitors.
- Autonomous algorithmic tacit collusion: where autonomous self-learning algorithms may coordinate market conduct, or at least avoid competitive outcomes, without the need for an exchange of information or explicit coordination.

Thus, through various artificial intelligence systems, undertakings may monitor the prices of competitors for similar goods or services and adjust their own prices accordingly, which entails a manual adjustment of prices. However, there are undertakings which resort to algorithms that automatically adjust prices on the basis of collected information. These adjustments may have a cascading effect, until undertakings arrive at tacit agreements, particularly when the price adjustment is carried out by algorithms. Furthermore, undertakings may deliberately allow algorithms to adjust prices in order to achieve autonomous algorithmic tacit collusion, since this is modelled primarily through reinforcement learning algorithms, which learn through autonomous trial-and-error exploration and is harder to prove. Personalised pricing, by contrast, is typically based on supervised machine learning methods, where the undertaking is directly involved, an involvement which may be proved.³⁹

There are several cases in which undertakings have arrived at anti-competitive agreements through the use of algorithms.

One of these is the Posters⁴⁰ case, in which two British poster retailers, Trod and GB, agreed to cease the practice of mutual price undercutting on the Amazon Marketplace platform. The cause that led to this agreement was the difficulty of manually adjusting prices on a daily basis for the purpose of continuous mutual undercutting. The implementation of this agreement was achieved through a repricing software programme, widely available through third-party providers, which was programmed to undercut other sellers but to keep the prices of the two undertakings equal. Thus, the software used created a link between the two undertakings so that their prices would remain equal but lower than those of other competitors. Even though the practice was carried out with the assistance of algorithms, human intervention was fundamentally present, due to the emails through which employees of the undertakings communicated situations where prices differed and where the software was not functioning properly. Thanks to the presence of constant communication, the British competition authority (Competition and Markets Authority) was able to establish the existence of a price-fixing agreement, characterised as a restriction of competition "by object", and the anti-competitive conduct could be sanctioned by the application of competition law norms.⁴¹ Although the aforementioned case was resolved by the British competition authority before the withdrawal of the United Kingdom from the European Union, it is relevant to EU law, as the facts predate Brexit and the legal analysis was conducted in accordance with the principles enshrined in Article 101 TFEU. Consequently, the case may be used as a reference point for the interpretation and application of European Union competition norms, including in the context of new forms of coordination facilitated by the use of algorithms.

The second is a landmark case at European Union level – the Eturas⁴² case. In this matter, the company Eturas, operator of a travel booking platform, sent a message to the travel agencies using the platform informing them that discounts would be automatically capped at 3%, with the aim of normalising competitive conditions. The European Court of Justice was referred the preliminary question of whether the use of a "common computer

³⁸ *Idem*, p. 13.

³⁹ For further details, see Algorithmic Competition OECD, Competition Policy Roundtable Background Note, at https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/05/algorithmic-competition_2be02d00/cb3b2075-en.pdf, last time consulted on 24.01.2026.

⁴⁰ Case 50223, Decision of the CMA, dated 12 August 2016.

⁴¹ F. Bostoen, *Artificial Intelligence and Competition Law*, pp. 8-9, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4655894, last time consulted on 24.01.2026.

⁴² ECJ, 21 January 2016, C-74/14, "*Eturas*" UAB and Others v. Lietuvos Respublikos konkurencijos taryba, ECLI:EU:C:2016:42.

system" for setting prices could constitute a concerted practice between travel agencies within the meaning of Article 101 TFEU. In its analysis, the Court started from the fundamental principle of competition law that each economic operator must independently determine its conduct on the market, any direct or indirect arrangement between operators influencing their conduct being excluded. Furthermore, the European Court of Justice emphasised that even passive forms of participation may infringe Article 101 TFEU. Nevertheless, the authorities must prove the tacit agreement that arose following the sending of the message. In such a situation, the authority may conclude that the travel agencies tacitly acquiesced in a common anti-competitive practice. This presumption must, in turn, be rebuttable and may be displaced, *inter alia*, by: (i) public distancing or a clear and express opposition to the Eturas initiative; (ii) notification of the competent administrative authorities; or (iii) the systematic application of a discount level exceeding the imposed cap.⁴³

Although no pricing algorithms in the technical sense were used in this case, it is significant insofar as a computer system was used which facilitated the influencing and modification of competitors' conduct. This ease of influence is also present in situations where algorithms are involved, and the Court's reasoning is of particular analogical value for the analysis of algorithm-facilitated coordination, as it concerns the use of a common computer system as an instrument for reducing competitive uncertainty and aligning the conduct of undertakings.

5. Current Challenges and Directions of Development in EU Competition Law

From the two cases analysed above, it may be inferred that, when human activity is still present, anti-competitive agreements between undertakings are relatively straightforward to prove, even in situations where algorithms have been involved. Algorithms may be triggers for human actions leading to anti-competitive agreements, or they may be instruments through which agreements already concluded are materialised. In both cases, undertakings arrive at these arrangements through human involvement.

In the second scenario, we encounter possible anti-competitive agreements based exclusively on artificial intelligence systems, through autonomous self-learning algorithms capable of coordinating market conduct without the need for human involvement. In this sense, if competitors use autonomous algorithms, their actions may lead undertakings to tacit anti-competitive agreements. Another case is the use of hub-and-spoke structures, where undertakings use the same system containing identical algorithms, thereby facilitating the exchange of information. If the hub-and-spoke structure employs autonomous algorithms, then these, based on the information received, may coordinate the conduct of undertakings in a compatible manner, facilitating the emergence of anti-competitive agreements. Even if the contracts between competitors are not direct, the algorithms being interposed between the undertakings, the conduct remains attributable to them, as algorithms constitute decision-making instruments integrated into the commercial strategy of the undertakings.

The central problem consists of adapting the mechanisms established by Article 101 TFEU, through the jurisprudential developments of the European Court of Justice, to forms of algorithmic coordination in which human intervention is difficult to prove, and where the classical sanctioning instruments must be interpreted in relation to the new technological modalities of influencing competitive conduct.

This adaptation must be carried out promptly, as algorithms are at the heart not only of numerous products and services on which consumers rely, but also of the functioning of the internet as a whole. Companies develop powerful algorithms that provide the interfaces enabling communication between persons and/or the interaction between undertakings and consumers. Algorithms facilitate the large-scale processing of data, enabling online platforms to optimise decision-making processes and to improve their performance.⁴⁴

Notwithstanding the evolution of artificial intelligence and the modalities of its use on the one hand, and the extensive development of the specialist literature on algorithmic collusion on the other, the case-law of the European Court of Justice does not, to date, contain a judgment directly analysing the use of algorithms as an instrument for the realisation of anti-competitive agreements. Nevertheless, the principles developed by the Court in cases such as *Eturas*, *Dyestuffs*, *Hüls*, *Anic Partecipazioni* and *T-Mobile Netherlands* permit an application by analogy of Article 101 TFEU to forms of coordination facilitated by algorithms.

⁴³ F. Bostoen, *Artificial Intelligence and Competition Law*, pp. 10-11 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4655894, last time consulted on 24.01.2026.

⁴⁴ S. Vezzoso, *Competition by design*, in B. Lundqvist, M.S. Gal (eds.), *Competition law for the digital economy*, Edward Elgar Publishing Limited, Cheltenham, 2019, p. 93.

These cases lay the foundations of a jurisprudential evolution that will lead to the recognition of anti-competitive agreements based on algorithms, including tacit agreements or those entirely realised through autonomous algorithms. The reasoning from the *Eturas* and *Dyestuffs* cases that may be used by analogy has been presented above. As regards the *Hüls*⁴⁵ and *Anic Partecipazioni*⁴⁶ cases, the Court held that in order to establish the existence of an infringement of Article 101 TFEU in the case of a concerted practice, three elements are required, namely: the existence of a concertation, the adoption of subsequent market conduct, and the existence of a causal link between the concertation and the subsequent market conduct. However, such a causal link is presumed where the concertation is proved and the undertakings remain active on the market.⁴⁷ This jurisprudential reasoning may be applied *mutatis mutandis* in the case of anti-competitive agreements facilitated by algorithms, insofar as the concertation may be achieved through computer systems or pricing algorithms, subsequent market conduct being represented by the algorithmic results, and the causal link being presumed if the undertakings remain active on the market. As regards the *T-Mobile Netherlands*⁴⁸ case, it was held that in the hypothesis where coordinated market conduct follows even a single instance of concertation, EU law presumes, on a rebuttable basis, the existence of a causal link between that contact and the subsequent market conduct.⁴⁹ Jurisprudential presumptions as to the existence of the causal link acquire particular relevance in the context of algorithm-facilitated coordination. First, direct and continuous contact is not necessary for an anti-competitive agreement to exist between undertakings, such contact may be achieved through algorithms. And second, pricing or market-monitoring algorithms may operate as instruments of concertation, whether through the use of a common computer system or through the alignment of the response rules of the algorithms, subsequent market conduct manifesting itself in the form of algorithmic results automatically applied by undertakings.

In these circumstances, if the existence of a form of concertation is proved and undertakings remain active on the market through the algorithms employed, the rebuttable presumption established by the case-law of the Court allows the causal link to be inferred, without it being necessary to demonstrate a continuous human intervention in the decision-making process. Such an approach is consistent with Article 101 TFEU and ensures the effectiveness of the norm in the face of digitalised coordination mechanisms, preventing the automation of anti-competitive conduct from becoming a means of evading liability.

6. Conclusions

The analysis conducted reveals that the use of algorithms in the activities of undertakings does not, in itself, constitute a phenomenon incompatible with European Union competition law. On the contrary, algorithms may generate significant economic benefits, such as increased efficiency, cost reduction, the stimulation of innovation and improvement of the consumer experience. Legal problems arise, however, in situations where these technological instruments are used or configured in a manner that reduces competitive uncertainty and facilitates the coordination of market conduct between competing undertakings.

In this sense, anti-competitive agreements facilitated by algorithms must be analysed within the existing conceptual framework of Article 101 TFEU, without the need to recognise a distinct legal category. The notions of agreement, concerted practice and exchange of information, as developed by the case-law of the European Court of Justice, present sufficient evolution and flexibility to cover also anti-competitive agreements based on algorithms. In this regard, the technologically neutral character of Article 101 TFEU represents an advantage, not a limitation.

Although there is, to date, no judgment of the Court expressly establishing the use of autonomous algorithms for the realisation of anti-competitive agreements, cases such as *Eturas* demonstrate the analogical value of existing case-law. Even in the absence of automatic pricing algorithms, the Court recognised that the use of a common computer system may constitute an instrument of concertation, capable of aligning the conduct of undertakings and reducing competitive uncertainty. This logic is fully applicable to algorithm-facilitated coordination, which amplifies the speed, stability and opacity of the mechanisms of alignment of commercial

⁴⁵ ECJ, 8 July 1999, C-199/92 P, *Hüls v. Commission of the European Communities*, ECLI:EU:C:1999:358, paras. 161 and 162.

⁴⁶ ECJ, 8 July 1999, C-49/92 P, *Commission of the European Communities v. Anic Partecipazioni SpA*, ECLI:EU:C:1999:356, para. 121.

⁴⁷ G. Surblytė-Namavičienė, *op. cit.*, p. 159.

⁴⁸ ECJ, 4 June 2009, C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, ECLI:EU:C:2009:343, paras. 51-53.

⁴⁹ P. Hanspach, N. Galli, *Collusion by Pricing Algorithms in Competition Law and Economics*, p. 12.

strategies. The jurisprudence of the European Court of Justice also presents presumptions regarding the causal link between concertation and subsequent market conduct, established in cases such as *Hüls*, *Anic Partecipazioni* and *T-Mobile Netherlands*. Applied *mutatis mutandis* in the context of algorithmic coordination, these presumptions allow the attribution of anti-competitive conduct to undertakings even in the absence of continuous human intervention, where algorithms are integrated into the commercial strategy of those undertakings and produce effects on the market.

It is our view that EU competition law already possesses the conceptual instruments necessary to prevent and sanction anti-competitive agreements facilitated by algorithms. The current challenge does not consist in the absence of norms, but rather in their coherent application, adapted to the new realities of technological and digital evolution. The aim is to ensure that the automation of economic decisions does not become a means of evading legal liability, but remains subordinated to the fundamental principles of fair competition on the internal market.

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SUSTAINABILITY REPORTING ON ROMANIAN CAPITAL MARKET

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Abstract

Sustainability reporting means that entities report information related to sustainability matters, i.e. the disclosure of non-financial performance information concerning environmental, social and governance issues (acronym ESG).

Sustainability reports allow companies build consumer confidence and corporate reputations by revealing and implementing responsibility programs and give stakeholders broader access to relevant information outside the financial sphere. Though such things influence the company's performance.

In the European Union the sustainability reporting is regulated by CSRD (Corporate Sustainability Reporting Directive) - Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 as regards corporate sustainability reporting.

The legal framework of the Romanian capital market has already implemented European sustainability practices. Non-financial reporting is widely present at Romanian issuers, but the gender balance among directors of listed companies is a new item. Law no 11/2025 supplementing Law no 24/2017 on issuers and market operations lay down principles governing gender balance. The National Agency for Equal Opportunities between Women and Men (ANES), is designated as the body for promoting, analysing, monitoring and supporting gender balance within the management bodies of companies traded on a regulated market.

Keywords: capital market, CSRD, sustainability matters, non-financial reporting, gender balance.

1. Introduction

In the European Union the sustainability reporting is regulated by Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 as regards corporate sustainability reporting CSRD (Corporate Sustainability Reporting Directive).

The EU Directive (2022/2381), fully in force as of late 2024, mandates that large listed EU companies reach at least 40% of the underrepresented sex among non-executive directors—or 33% of all directors—by 30 June 2026. It requires merit-based selection, with preference for equally qualified underrepresented candidates.

The legal framework of the Romanian capital market has already implemented European sustainability practices. Non-financial reporting is widely present in Romanian issuers. Gender balance among directors of listed companies is regulated too. Law no 11/2025 supplementing Legea no 24/2017 on issuers and market operations lay down principles governing gender balance. The National Agency for Equal Opportunities between Women and Men is the body in charge with monitoring gender balance within the companies traded on BVB.

2. Sustainability report and gender balance report

The sustainability report adopted by European law¹ is prepared by the administrators together with the annual financial report. The assurance of reporting is supervised by the financial auditor (art. 65 para. 5-7 Law no. 24/2017). The internal regulation transposes the subjects of the obligations and the deadlines for the implementation of this new report².

The sustainability report is part of the administrators' annual financial report, comprising non-financial elements related to the sustainable development of the business. It is a declaration by the administrators regarding the company's reporting to environmental, sustainability and governance standards.

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¹ Directive (EU) 2022/2464 of the European Parliament and of the Council amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU with regard to corporate sustainability reporting, published in the OJEU, L series, No 322 of 16 December 2022.

Regulation (EU) 2020/852 of the European Parliament and of the Council on establishing a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088.

² Art. IV of Ministry of Finance Order No. 85/2024.

Sustainability reporting standards specify the information that companies must present (regarding environmental, social and governance factors)³.

2.1. The environmental factors

This report addresses the following issues: climate change mitigation, including greenhouse gas, climate change adaptation, water and marine resources, resource use and circular economy, pollution, biodiversity and ecosystems.

Environmental factors in the sustainability report represent a central pillar of the European corporate reporting framework established under Directive (EU) 2022/2464 (which amends Directive 2013/34/EU). Their inclusion reflects a fundamental shift in how companies are evaluated: environmental impact is no longer peripheral but integral to assessing long-term performance, resilience, and risk exposure.

Climate change stands at the core of environmental reporting. Companies are required to disclose greenhouse gas emissions as well as transition plans, reduction targets, and alignment with climate objectives. This ensures that stakeholders can assess both physical risks (such as extreme weather events) and transition risks (such as regulatory changes or market shifts toward low-carbon alternatives). Climate-related disclosures connect environmental responsibility directly with financial stability and strategic planning.

Reporting on pollution broadens the scope of accountability. Companies must disclose emissions into air, water, and soil, as well as the use of hazardous substances and mitigation measures. This dimension strengthens environmental compliance and demonstrates whether a company's operations contribute to environmental degradation and corrective strategies.

Water and marine resources are increasingly recognized as critical environmental assets. Sustainability reporting requires companies to explain their water consumption patterns, impacts on aquatic ecosystems. In water-stressed regions, these disclosures are particularly important for evaluating operational sustainability and potential business continuity risks.

Biodiversity and ecosystems have emerged as a strategic reporting area. Companies must identify their impacts on natural habitats, land use, and deforestation risks, as well as outline restoration or conservation questions. This reflects growing awareness that biodiversity loss presents systemic economic risks and may disrupt supply chains and natural resource availability.

Resource use and the transition to a circular economy highlight the efficiency dimension of environmental sustainability. Reporting obligations cover raw material consumption, waste generation, recycling rates, and initiatives aimed at reuse. By disclosing such data, companies demonstrate their capacity to dissociate economic growth from resource depletion and environmental harm.

Environmental factors in sustainability reporting create a comparable framework for evaluating corporate environmental performance. They enhance transparency, improve stakeholder trust, and facilitate sustainable investment decisions. These disclosures are not limited to describing past performance but they require forward-looking information and governance mechanisms as part of corporate strategy.

The integration of environmental factors into the sustainability report transforms environmental protection from a peripheral corporate social responsibility concern into a core governance issue.

This approach ensures that companies are assessed not only by the profits they generate but also by the environmental issues they leave behind and their capacity to contribute to a sustainable economy.

2.2. The social factors

These factors evaluated in the report concern: equal treatment and equal opportunities for all (including gender equality as well as employment and inclusion of persons with disabilities, measures against violence and harassment at work), working conditions (working hours, adequate wages, social dialogue, freedom of association, collective negotiating, consultation and participation of workers, work and life balance, health and safety), respect for human rights, fundamental freedoms, democratic principles and standards established by conventions (such as International Charter of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter and the Charter of Fundamental Rights of the European Union).

³ Art. 29b of Directive 2013/34/EU inserted by Art. 1 point 7 Directive (EU) 2022/2464.

Social factors in the sustainability report constitute another fundamental pillar of the European corporate reporting framework established under Directive (EU) 2022/2464. Their inclusion reflects the recognition that corporate performance cannot be measured solely through financial results or environmental impact, but must also consider how companies affect people—within and outside the organization.

The reporting of social factors strengthens corporate accountability toward a company's own employees. Disclosures concerning working conditions, equal opportunities, diversity, gender pay gaps, health and safety, and employee training ensure transparency regarding how human capital is managed. This not only protects workers' rights but also highlights the link between fair employment practices and long-term productivity, innovation, and resilience.

Social reporting extends beyond the company's direct employees to workers in the value chain. This extraterritorial dimension is particularly significant in a globalized economy. Companies must assess and disclose risks related to forced labour, child labour, unsafe working conditions, and other human rights violations among suppliers and business partners. As a result, sustainability reporting becomes closely connected to corporate due diligence obligations and responsible supply chain management.

The framework emphasizes the impact of corporate activities on affected communities. Businesses are required to identify and disclose how their operations influence local populations, including vulnerable groups. This may involve land use, access to resources, public health, or social cohesion. By promoting stakeholder engagement and transparency, sustainability reporting fosters dialogue between companies and communities.

Social disclosures are not limited to descriptive statements. The CSRD framework requires companies to adopt targets, policies, and governance mechanisms, linking social performance to strategic management and risk oversight. This integration ensures that social considerations are implanted within decision-making processes at board level.

Social factors in sustainability reporting represent an important change in European environment. They transform social responsibility from a voluntary commitment into a designed legal obligation tied to transparency, accountability, and long-term value creation.

2.3. The governance factors

The governance issues from the sustainability report concern: the role of the administrative and management bodies with regard to sustainability issues, as well as their competences to fulfil this role, the characteristics of the company's internal control and risk management systems with regard to sustainability reporting and decision-making, business ethics and corporate culture (including combating corruption and bribery, protection of whistleblowers), the company's activities and commitments regarding the exercise of political influence (including lobbying activities), the management of relationships with stakeholders (customers, suppliers and communities affected by the company's activities, including payment practices, especially late payments).

The regulations situate the company in the middle of the social and natural ecosystem by studying the intricate interactions that go beyond simple concern for the well-being of associates and profit by any means. The insertion of the company in the natural and social environment must ensure balance and good prospects for long-term coexistence and accommodation with all internal and external factors of the company.

Governance factors in the sustainability report represent an important element of the European corporate reporting architecture established under Directive (EU) 2022/2464. While environmental and social disclosures describe a company's external impact, governance disclosures explain the internal structures and mechanisms that ensure accountability and ethical conduct.

Governance reporting enhances transparency regarding the structure and functioning of management and supervisory bodies. Companies must disclose how boards are composed, how responsibilities are allocated, and how sustainability matters are integrated into decision-making processes. By clarifying the role of directors in supervising ESG risks and opportunities, the framework reinforces fiduciary responsibility and long-term value creation.

Governance disclosures strengthen ethical standards and corporate culture. Companies are required to present information on codes of conduct, anti-corruption measures, whistleblowing mechanisms and compliance systems. These elements demonstrate whether the organization has established effective safeguards against bribery, fraud, conflicts of interest, and other forms of misconduct.

Internal control and risk management systems constitute a central governance dimension. The sustainability report must explain how ESG risks are identified, assessed, and managed within the broader risk management framework. This integration ensures coherence between financial oversight and non-financial risk monitoring.

Executive remuneration policies reveal whether sustainability objectives are effectively embedded in corporate incentives. Disclosing how variable compensation is connected to ESG performance indicators ensures alignment between leadership rewards and long-term sustainability goals.

Governance reporting addresses relationships with shareholders and stakeholders, highlighting transparency in decision-making processes and engagement mechanisms. By encouraging dialogue and accountability, the framework supports trust in corporate institutions and strengthens market confidence.

Governance factors in sustainability reporting transform sustainability from a reporting obligation into a governance principle embedded within corporate strategy and accountability systems. Under the European legal framework, effective governance ensures that environmental and social commitments are credible, measurable, and enforceable.

2.4. Gender balance in the management of listed companies

European law is concerned with strengthening gender balance in the management of companies⁴. Domestic law⁵ has implemented European norms that aim for a balanced representation of women and men among the directors of listed companies by establishing effective measures to ensure gender balance.

Companies traded on a regulated market must satisfy at least one of the legal tests: members of the underrepresented sex must hold at least 40% of non-executive director positions or members of the underrepresented sex must hold at least 33% of all director positions, both executive and non-executive directors. The effective application of these tests is made explicit by the effective indication of the minimum number of underrepresented persons for each numerical composition of the administrative body⁶.

Companies traded on a regulated market that do not meet the composition tests of the administrative bodies must adjust their selection process for candidates for appointment to director positions. In the selection process for candidates for director positions, if candidates are equally qualified in terms of suitability, skills and professional results, priority is given to the candidate belonging to the underrepresented sex.

Beyond the stated goal of the regulation on gender equality, the regulation is achieving, perhaps unintentionally, a true meritocratic revolution. The selection of persons for regardless of gender, has never been based, in Romanian companies, on a competition of skills, a comparison of capacities and professional experience. Their election was an indisputable right of the shareholders with decision-making power. However, the procedure inserted normatively currently tends, with appropriate enforcement instruments, towards such a meritocratic finality. In concrete terms, the selection will be made according to transparent criteria of competence and only in case of equality will the candidate of the underrepresented sex be preferred. The remedies included in the law make the procedure efficient.

If a rejected candidate belonging to the underrepresented sex proves before a court that he had the same qualifications as the candidate of the opposite sex who was selected for a position of administrator (or higher qualifications!), the competent court at the company's headquarters notified with a request for annulment (or finding of nullity) will annul the decision of the company's shareholders (art. 109⁴ para. 6 Law no. 24/2017). If the election of directors is carried out by a shareholder vote, companies traded on a regulated market inform shareholders, prior to the vote, of the legal provisions regarding gender balance, including the sanctions to which the company traded on a regulated market is subject as a result of non-compliance with obligations. Obviously, the vote is free and secret and shareholders act according to their will.

⁴ Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November on enhancing gender balance among directors of companies listed on stock exchanges and related measures, published in the Official Journal of the European Union (OJEU), L series, No. 315 of 7 December 2022.

⁵ Law no. 11/2025 introduced Chapter V¹ into Law no. 24/2017.

⁶ Annex to Law No. 24/2017.

2.5. The rules establish a true meritocracy in the category of directors of listed companies

Thus, companies traded on a regulated market are obliged to publish on their own website a document that includes the selection/suitability policy of the management, which includes a presentation of the criteria underlying the selection process.

Companies traded on a regulated market are obliged to report annually to the A.S.F. data on gender representation within their management bodies (with an indication of executive and non-executive directors), as well as on the measures adopted in order to achieve the objectives of the legal tests (percentages). The mentioned information on gender balance is also included in the company's corporate governance statement, a statement given in accordance with the applicable accounting regulations⁷.

In addition to the ASF, the National Agency for Equal Opportunities between Women and Men (ANES) is designated as the body for monitoring and supporting gender balance within the management bodies of companies traded on a regulated market (art. 109⁸ Law no. 24/2017).

3. Conclusions

The adoption of the sustainability report by the directors is now part of annual company reporting, together with the annual financial report. Under European directives sustainability reporting is no longer a voluntary report, but a legal obligation embedded within the annual reporting framework of companies.

Such European reform strengthens the accountability of directors. By requiring management bodies to prepare and formally adopt the sustainability report, EU law makes them directly responsible for the accuracy, completeness, and reliability of ESG disclosures (environmental, social, and governance issues). Sustainability considerations are thus integrated into directors' fiduciary duties and strategic decision-making processes.

Publication of financial and sustainability information, together, promotes an extended understanding of corporate performance. Financial results are now assessed alongside with other general criteria such climate risks, social impact, governance structures, and long-term resilience. This integrated model reflects the reality that non-financial risks can materially affect financial stability and enterprise value.

The introduction of standardized European Sustainability Reporting Standards (ESRS) enhances comparability and transparency across the markets. Stakeholders benefit from consistent, and reliable data and investors are provided with decision-useful information that support sustainable investment flows.

The European framework establishes sustainability as a core component of corporate governance and long-term value creation. As directors adopt the sustainability report together with the annual financial report, EU law embeds responsible business conduct into the heart of corporate accountability and strategic management.

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⁷ Art. 4 paragraph (3) letter b, of Law no. 82/1991, republished, with reference to the accounting regulations issued by the ASF.

THE LEGAL LIABILITY FOR THE COMMISSION OF THE ACTS PROVIDED FOR IN ART. 2703 PARA. (21) AND PARA. (31) THESIS I OF LAW NO. 31/1990 ON COMPANIES, AS REPUBLISHED, WITH SUBSEQUENT AMENDMENTS AND ADDITIONS

Iacob-Cătălin MARCU*

Abstract

This study aims to analyze the provisions mentioned in its title from the perspective of their correlations with other provisions of the same legislative act, highlighting aspects that reveal the unclear, incomplete, inconsistent or even inapplicable nature of certain regulations regarding the active subject of the examined contraventions, namely their objective aspect.

At the same time, the author of this study examines how the provisions of para. (3¹) thesis I of art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions, correlate with the provisions of para. (2¹) of the same article and the implications of this correlation.

After analyzing these aspects, including by reference to the relevant doctrine in the subject matter under examination and the author's formulation of critical observations regarding the flawed manner in which several legal norms were drafted, the author's conclusions and corresponding proposals de lege ferenda are presented at the end of this study.

Keywords: *liability, company, contravention, dissolution, de lege ferenda proposals.*

1. Introduction

The provisions of para. (21) and para. (31) of art. 2703 of Law no. 31/1990 on companies, as republished¹, with subsequent amendments and additions -introduced by Law no. 265/2022 on the Trade Register and amending and supplementing other legislative acts affecting registration in the Trade Register², a legislative act that also amended the provisions of para. (3) of the same article - provide for new unlawful acts concerning joint-stock companies, for which distinct forms of legal liability are regulated, thereby seeking to establish greater discipline and rigor regarding the fulfillment of certain legal obligations pertaining to specific registers of such companies.

2. Aspects regarding the legal liability for committing the acts provided for in art. 2703 para. (21) of Law no. 31/1990, as republished, with subsequent amendments and additions

According to this provision, a violation of the provisions of art. 177 para. (1) point a) and art. 178 of Law no. 31/1990, as republished, with subsequent amendments and additions, constitutes a contravention and is punishable by a fine ranging from 5,000 lei to 15,000 lei.

Pursuant to the provisions of art. 177 para. (1) point. a) of the same law, in addition to the records required by law, joint-stock companies must maintain a register of shareholders that shows, as applicable, the first and last names, personal identification number, name, domicile, or registered office of the shareholders, as well as the payments made toward the shares, with the record of shares traded on a regulated market or alternative trading system being maintained in accordance with the specific legislation governing the capital market.

Art. 178 of Law no. 31/1990, as republished, with subsequent amendments and additions, provides as follows:

“(1) Directors, members of the board of directors, or, as the case may be, the entities responsible for maintaining the shareholder register in accordance with legal provisions, are required to make information regarding the company's shareholder structure available to shareholders and any other requesters and, upon request, to issue certificates regarding such information at the requesters' expense.

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¹ In *The Official Gazette of Romania*, Part. I, no. 1066/17.11.2004.

² Published in *The Official Gazette of Romania*, Part I, no. 750/26.07.2022.

(2) They are also required to make available to shareholders and bondholders, under the same conditions, the registers referred to in art. 177 para. (1) points b) and f)."

Although the use of the word "and" between "art. 177 para. (1) point a)" and "art. 178" in the text of art. 270³ para. (2) and (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, might suggest that the provision in question applies only when both the provisions of art. 177 para. (1) point a) and those of art. 178 of the same law are violated, in reality, the provision in question provides a contravention with alternative elements, the legislature combining within the same provision two distinct contraventions³, the first variant corresponding to a violation of the provisions of art. 177 para. (1) point a) of the same law, and the second normative variant corresponding to a violation of the provisions of art. 178 of the same law, such that, in the event of a violation of both the provisions of art. 177 para. (1) point a) and the provisions of art. 178 of the same law, a concurrence of contraventions may occur.

Regarding to the subject matter of the contravention provided for in art. 270³ para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, in its original version, it is noted that it is defined as follows:

- either in the joint-stock company⁴ to which the relevant shareholders' register refers, since, pursuant to the provisions of para. (4) of the same article, the provisions of Government Ordinance no. 2/2001 on the legal regime governing contraventions⁵, approved with amendments and additions by Law no. 180/2002⁶, as subsequently amended and supplemented, and, pursuant to the provisions of art. 3 para. (2) of the aforementioned ordinance, a legal entity is liable for contraventions in the cases and under the conditions provided for by the normative acts providing and sanctioning such contraventions, or, if the law provides *expressis verbis* that the obligation to maintain the register of shareholders rests with it, with the exception of the case provided for in art. 177 para. (1) point a) thesis II of Law no. 31/1990, as republished, with subsequent amendments and additions, the joint-stock company to which that register refers⁷, the violation of this obligation makes the joint-stock company that violated it the active subject of the contravention in question

- either with the central securities depository⁸, in accordance with the provisions of art. 177 para. (1) point a) thesis II of Law no. 31/1990, as republished, with subsequent amendments and additions, when it comes to the record-keeping of shares traded on a regulated market/alternative trading system⁹, considering Law no. 24/2017 on issuers of financial instruments and market operations, as republished¹⁰, with subsequent amendments and additions, and Law no. 126/2018 on financial instrument markets¹¹, with subsequent amendments and additions.

In the specialized literature¹², it has been stated that the active subject of the first normative version of the contravention provided for in art. 270³ para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, may be, among others, the entity that maintains records of its shareholders. In our opinion, since the obligation for an authorized independent registry company to maintain a company's shareholder register is provided for in article 180 para. (3) of Law no. 31/1990, as republished, with subsequent amendments and additions, and not within the provisions of art. 177 para. (1) point a) of the same law - the violation of which constitutes the contravention provided for in art. 270³ para. (2¹) of the same law, in its first normative version -, an extension of the application of the latter provisions violates the principle of legality in

³ See F. Streteanu, D. Nițu, Criminal law. The general part, vol. I, university course, Universul Juridic Publishing House, Bucharest, 2014, p. 262-264.

⁴ In legal doctrine (St. D. Cărpănu, Treatise on Romanian commercial law, 5th ed., Universul Juridic Publishing House, Bucharest, 2016, p. 313), a joint-stock company has been defined as "a company formed through the association of several persons, who contribute to the formation of the share capital through specific ownership interests represented by securities, called shares, for the purpose of conducting a commercial activity (production, trade, or provision of services), with the aim of sharing profits, and who are liable for the company's obligations only to the extent of their contributions."

⁵ Published in The Official Gazette of Romania, Part I, no. 410/25.07.2001.

⁶ Published in The Official Gazette of Romania, Part I, no. 268/22.04.2002.

⁷ See Gh. Piperea, in Gh. Piperea, S. David, Companies Law. Commentary on articles, 6th edition, revised and expanded, C.H. Beck Publishers, Bucharest, 2023, p. 1021; T. Prescure, in I. Schiau, T. Prescure, Companies Law no. 31/1990. Analysis and commentary on articles, 3rd edition, revised, expanded and updated, Hamangiu Publishing, Bucharest, 2024, p. 523 and 981;

⁸ It is a key institution in Romania's capital market, organized as a joint-stock company and a member of the Bucharest Stock Exchange (BVB), whose primary role is to maintain records of ownership of shares and other financial instruments.

⁹ See S. Bodu, Commentary on Companies Law, Rosetti International Publishing, Bucharest, 2023, p. 1012; T. Prescure, op. cit., p. 981.

¹⁰ In The Official Gazette of Romania, Part I, no. 772/10.08.2021.

¹¹ Published in The Official Gazette of Romania, Part I, no. 521/26.06.2018 and corrected in The Official Gazette of Romania, Part I, no. 675/2.08.2018.

¹² Gh. Piperea, op. cit., p. 1021; T. Prescure, op. cit., p. 981.

the providing for of contraventions, which results from the provisions of art. 1 thesis II of Government Ordinance no. 2/2001, with subsequent amendments and additions, as the law does not provide that such an act may also be committed by another legal entity¹³.

In the event of the commission of the contravention provided for in art. 270³, para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and supplements, in its second normative version, the active subject is, when any of the obligations provided for in the paragraphs of art. 278 of the same law are violated, qualified, consisting of the natural person acting as the sole administrator of the joint-stock company in question or, as the case may be, any natural person who is a member of the board of directors of that company¹⁴, the natural person acting as its sole general manager¹⁵, any natural person who is a member of its executive board, or the entity which, in accordance with legal provisions, maintains the shareholder register, and, in the event of a breach of the obligation to maintain the register of bonds issued in dematerialized form and traded on a regulated market or through an alternative trading system, only the central depository¹⁶.

Regarding to the objective element of the contravention provided for in art. 270³ para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, in its original version, we consider that the act constitutes a contravention not only when the party obligated to maintain the shareholders' register¹⁷ fails to maintain it, either manually or in a computerized system¹⁸, in accordance with the provisions of art. 179 of the same law, which no longer exists, but also - even if the legislature does not state it *in terminis* - when the party subject to that obligation fails to regularly maintain the register in question, since the holder is obligated to record in that register both the data regarding the shareholders of the company in question and the payments made toward the shares, and this obligation includes updating the entries provided for in art. 177 para. (1) point. a) of the same law, a fact that follows from the provisions of art. 73 para. (1) point c) of the same law, according to which the directors are jointly and severally liable to the company for the existence of the registers required by law and their proper maintenance.

¹³ See I. Corbeanu, Administrative law, Lumina Lex Publishing House, Bucharest, 2002, p. 199; D. Băjan, The contraventional liability, Tribuna Economică Publishing House, Bucharest, 2003, p. 138; M. A. Hotca, Contraventional law. The general part, Editas Publishing House, Bucharest, 2003, p. 33–37; M. Preda, Administrative law. The general Part, 3rd ed., Lumina Lex Publishing House, Bucharest, 2004, p. 291; F. Stanca, N. Gongea, The contravention - between theory and judicial practice, The Ministry of Administration and Interior Publishing House, Bucharest, 2005, p. 69; E. Albu (coord.), C. Banu, T. Popescu, B. Georgescu, Administrative Law, Part II, Romania of Tomorrow Foundation Publishing House, Bucharest, 2008, p. 187; C. Drăghici, A. Iacob, C. V. Drăghici, Contraventional law, Sitech Publishing, Craiova, 2008, p. 17; C. Manda, Administrative Law. Elementary treatise, 5th edition, revised and expanded, Universul Juridic Publishing House, Bucharest, 2008, p. 469 and 470; Al. Țiclea, Regulation of contraventions, 6th edition, Universul Juridic Publishing House, Bucharest, 2008, p. 12; M. Ursuța, The contraventional procedure, 3rd edition, revised and expanded, Universul Juridic Publishing House, Bucharest, 2010, p. 83; A.-G. Dinescu, Legislation on contraventions. Commentaries, doctrine and case law, Hamangiu Publishing House, Bucharest, 2016, p. 16 and 17; F. Maciu, The legal regime of contraventions, Romania of Tomorrow Foundation Publishing House, Bucharest, 2019, p. 36; D. Apostol Tofan, Administrative law, Vol. II, 5th ed., C.H. Beck, Bucharest, 2020, p. 320; E. L. Cătană, Administrative law, 2nd edition, revised and expanded, C.H. Beck Publishing House, Bucharest, 2021, p. 518 and 519; G. Manu, Administrative law. University course, Universul Juridic Publishing House, Bucharest, 2021, p. 286 and 287; D. C. Măță, Administrative law, Vol. II, 3rd edition, revised and expanded, Universul Juridic Publishing House, Bucharest, 2021, p. 294; E. E. Ștefan, Administrative law, Part II, University Course, 4th edition, revised and updated, Ed. Universul Juridic, Bucharest, 2022, pp. 198–200; V. Vedinaș, Administrative law. Doctrine, practice, case law, 14th edition, revised and expanded, Universul Juridic Publishing House, Bucharest, 2023, p. 538; O. Podaru, A.-C. Loghin, Contraventional law. University course, Hamangiu Publishing House, Bucharest, 2024, p. 39; C.-C. Ulariu, The procedure for establishing the contraventional liability. Evolution, characteristics, perspectives, C.H. Beck Publishing House, Bucharest, 2025, p. 165–171.

¹⁴ Pursuant to the provisions of art. 137 para. (1) thesis II of Law no. 31/1990, as republished, with subsequent amendments and additions, when a joint-stock company has more than one director, they shall constitute a board of directors.

¹⁵ Pursuant to the provisions of art. 1531, para. (2)-(4) thesis I of Law no. 31/1990, as republished, with subsequent amendments and supplements, the management board, which consists of a single managing director (sole general director) or several directors, the number of whom is always odd, exercises its powers under the supervision of the supervisory board.

According to the provisions of art. 15313 para. (1) of the same law, the directors of a joint-stock company in the unitary system, or the members of the management board in the dualistic system, are natural persons.

¹⁶ In the sense - which we believe to be erroneous, given the clarity of the provision in question - that, in the event of committing the contraventions provided for in art. 2703 para. (21) of Law no. 31/1990, as republished, with subsequent amendments and supplements, in its second normative version, the company in question may be the active subject thereof; see S. Bodu, *op. cit.*, p. 1381; T. Prescure, *op. cit.*, p. 981.

¹⁷ The register of shareholders serves as a means of proof and ensures enforceability against third parties, and its entries regarding shares are constitutive of the right of ownership over them, in accordance with the provisions of art. 98 para. (1) theses I and II of Law no. 31/1990, as republished, with subsequent amendments and additions. See S. Bodu, *op. cit.*, p. 1011; S. David, *op. cit.*, p. 617 and 618; T. Prescure, *op. cit.*, p. 523; Decision no. 187 of February 1, 2022, rendered by the High Court of Cassation and Justice - Second Civil Section, in S. Bodu, *Annotated Companies Law*, 3rd ed., Rosetti International, Bucharest, 2023, p. 575.

¹⁸ Although the law does not expressly specify where the register in question must be kept, we believe that it should be kept at the company's registered office. See S. Bodu, *op. cit.*, p. 1016; S. David, *op. cit.*, p. 619.

Regarding to the objective element of the contravention provided for in art. 270³ para (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, in its second version, regarding applicants who are not shareholders of the company to which requests are addressed to provide them with information regarding the shareholding structure of the company in question and to issue to them, upon their request and at their expense, certificates regarding the data indicated in art. 177 para. (1) point a) thesis I of the same law, in legal doctrine, in one opinion¹⁹, it was held that, in the absence of an express statutory provision, they are not required to prove their interest in obtaining the subject matter of the requests in question, and cannot be refused if they fail to provide such proof, while, in another opinion²⁰, it was held that they must prove a legitimate interest. In our opinion, at present, the applicability of the provisions of art. 178 para (1) of Law no. 31/1990, as republished, with subsequent amendments and additions, is subject to the requirement to apply Regulation no. 679/ 2016 of the European Parliament and of the Council of the European Union on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation)²¹, but one of the conditions for the lawfulness of the processing of such data, under this Regulation, is the existence of a legitimate interest - public or private -pursued by a private third party - a natural or legal person - for the fulfillment of which the processing in question is necessary, unless the interests or fundamental rights and freedoms of the data subject, which require the protection of personal data, prevail. In this scenario, the refusal to comply with such requests by the parties subject to the obligations set forth in art. 178 para. (1) of Law no. 31/1990, as republished, with subsequent amendments and additions, does not constitute a breach of those obligations, as it is permitted by law; thus, there can be no question of the commission of the contravention provided for in art. 270³ para. (2¹) of the same law, in its second normative version.

The wording of the provisions of art. 178 of Law no. 31/1990, as republished, with subsequent amendments and additions, indicates that making available to the shareholders of a company or to any other requesters, by the company in question, of information regarding its shareholder structure, refers to the disclosure of such information without the relevant applicants having to request a certificate regarding the respective data, nor by making the shareholder register available to them.

In the absence of specific provisions in the regulations, requests made by the shareholders of a company and by any other applicants, addressed to that company, for the purpose of obtaining information regarding the shareholding structure of the company in question, or for the issuance of certificates regarding such data, may be made orally or in writing; however, in order to prove that the information in question was requested and to demonstrate any refusal by the company in question, we consider that such requests may only be made in writing and must be submitted to the registry office of the company in question or sent to it via email/fax/mail/courier service, with confirmation of receipt.

Regarding to the obligation established in art. 178 para. (2) of Law no. 31/1990, as republished, with subsequent amendments and additions²², a literal interpretation of these statutory provisions, and at the same time in accordance with the provisions of para. (1) of the same article, it follows that the obligation in question must be fulfilled only at the request of the shareholders of the company in question, or of the holders of bonds issued by it and for a fee.

¹⁹ S. Bodu, *Commentary on Companies Law*, Rosetti International, Bucharest, 2023, p. 1015.

²⁰ S. David, *op. cit.*, p. 620; T. Prescure, *op. cit.*, p. 524.

²¹ Available at <https://eur-lex.europa.eu/eli/reg/2016/679/oj?locale=ro>, accessed on 25.03.2026. Art. 6 para. (1) of the Regulation states: "Processing is lawful only if and to the extent that at least one of the following conditions applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is a party or to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, unless such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."

²² Regarding the argument that this provision is unclear, see S. Bodu, *Commentary on Companies Law*, Rosetti International, Bucharest, 2023, p. 1016.

In the specialized literature²³, noting that the legislature failed to specify a time limit within which the obligations provided for in art. 178 of Law no. 31/1990, as republished, with subsequent amendments and additions, must be fulfilled, it has been asserted that it may be presumed that these obligations must be fulfilled either immediately or within the shortest possible time. In our opinion, although it is common sense that the obligations in question should be fulfilled immediately after the aforementioned request is made or, if this is not possible, as soon as possible, the principle of legality in the determination of contraventions precludes such an application of the provisions of art. 178 of Law no. 31/1990, as republished, as subsequently amended and supplemented, as those provisions do not meet the requirement of foreseeability, given that their addressees lack an objective temporal benchmark for compliance, in the form of a precise deadline, with an express indication of the moment from which it begins to run and whose expiration would lead to their contraventional liability in the event that they fail to fulfill their obligations within the time limit prescribed by law. Since there is no statutory deadline for fulfilling the obligations in question, failure to comply with them - regardless of how long it lasts - cannot, in fact, constitute a contravention, even though the legislature has classified such conduct as such, which renders the provisions of art 270³ para. (2¹) thesis II of Law no. 31/1990, as republished, with subsequent amendments and additions, inapplicable as of the date of their entry into force. This observation holds true even if the parties subject to the obligations in question promptly issue an explicit refusal, since, in the absence of an express provision in the relevant regulation stating that the act constitutes a contravention if the obligations are not fulfilled within a specific time limit, a period within which this refusal may be reconsidered, such an act cannot be considered a contravention, as it violates the principle of legality in the classification of contravention, a principle incompatible with the presumption of an essential requirement of the material element of the objective aspect, to which the moment of commission of the respective contravention is linked²⁴ - an instantaneous one -, an important aspect from the perspective of determining the moment when the statute of limitations for the imposition of the administrative fine begins to run²⁵.

Finally, it should be noted that, since Law no. 31/1990, as republished, with subsequent amendments and additions, does not preclude the imposition of the contraventional sanction of a warning, this sanction, in accordance with the provisions of art. 7 para. (3) of Government Ordinance no. 2/2001, with subsequent amendments and additions, may, in principle, be applied in the case of the commission of the contravention provided for in art. 270³ para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, in both of its normative versions; however, given that the provisions of the second thesis of para. (2¹) of the same article are inapplicable as of the date of their entry into force. in reality, the respective sanction may be applied only in the case of committing the first normative variant of the contravention in question.

3. Aspects regarding the legal liability for committing the acts provided for in art. 270³ para. (3¹) thesis I of Law no. 31/1990, as republished, with subsequent amendments and additions

According to this provision, if, within 30 days of the date on which the contraventional sanction provided for in para. (2¹) of art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions, the representative of the legal entity has not fulfilled the obligations provided in art. 177 para. (1) point a) and in art. 178 of the same legislative act, following the verification carried out by the control bodies of the Ministry of Finance - The National Agency for Fiscal Administration and its territorial units, the court/specialized court may order the dissolution of the company at the request of the Ministry of Finance - The National Agency for Fiscal Administration, with the provisions of art. 237 para. (3)-(13) of the same law applying accordingly.

Just as in the case of the provisions of para. (2¹) of art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions, so too in the case of the provisions of para (3¹) thesis I of the same article, the word "and" is inappropriately placed between "art. 177 para. (1) point a)" and "art. 178," which, through a literal interpretation of the provisions of art. 270³ para. (3¹) thesis I of the same legislative act, would lead to the conclusion that, for the application of these latter provisions, it is necessary to violate both the

²³ T. Prescure, op. cit., p. 981.

²⁴ See G. Pop, G. Șimu, G. Petre, M. Roman, I. Dobrescu, Gh. Frânculescu, G. Becheanu, Determination and sanctioning of contraventions. Theory and judicial practice, All Beck Publishing, Bucharest, 2004, p. 11; M. A. Hotca, The legal regime of contraventions. Commentaries and explanations, 5th ed., C.H. Beck Publishing, Bucharest, 2012, p. 278; A.-G. Dinescu, op. cit., p. 112, 117, 118, and 120; D. Apostol Tofan, op. cit., p. 348; O. Podaru, A.-C. Loghin, op. cit., p. 91 and 92.

²⁵ Pursuant to the provisions of art. 13 para. (1) of Government Ordinance no. 2/2001, with subsequent amendments and additions, the right to impose an administrative fine expires six months after the date on which the offense was committed.

provisions of art. 177 para. (1) point a) as well as those of art. 178 of the same law; however, in reality, for the application of those provisions, only the provisions of art. 177 para. (1) point a) of the same legislative act must be violated, given that the provisions of art. 270³ para. (2¹) thesis II of Law no. 31/1990, as republished, with subsequent amendments and additions, are inapplicable as of the date of their entry into force.

Furthermore, it should be noted that, unlike the provisions of para. (2¹) thesis I of art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions, the provisions of para. (3¹) thesis I of the same article refer to the representative of the legal entity that has failed to fulfill the obligation specified in art. 177 para. (1) point a) of the same legislative act. Thus, there is a complete lack of consistency between these provisions, since the obligation in question falls on the joint-stock company to which the shareholder register or the central securities depository refers, and not to one or more of its representatives who are natural persons, even if, in practice, those obligations must be fulfilled by such a person or persons²⁶. Under these circumstances, in order to apply the provisions of art. 270³ para. (3¹) thesis I of Law no. 31/1990, as republished, with subsequent amendments and additions, the parties subject to the obligations provided for in art. 177 para. (1) point a) of the same law must be taken into account.

Continuing the comparison between the provisions of art. 270³ para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, and the provisions of art. 270³ para. (3¹) thesis I of the same legislative act, it should be noted, with regard to the legal classification of unlawful acts, that the first provision concerns contraventions, whereas the second provision concerns civil wrongs. Therefore, in the event of a single recurrence of noncompliance with the provisions of art. 177 para. (1) point a) of Law no. 31/1990, as republished, with subsequent amendments and additions, for 30 days from the date of imposition of the contraventional fine for the act in question, the same conduct - which occurs when the party subject to the obligation ceases to maintain the shareholders' register regularly and ends upon the voluntary cessation of the act in question or, if this has not occurred, at the time the contraventional fine is imposed for the act in question, as this constitutes a continuing contravention²⁷ - is placed, by the will of the legislature, within the sphere of civil wrongdoing [an aspect resulting from the legal nature of the sanction applicable in this scenario - the dissolution of the respective company - which indicates the addition, thus, of a case of company dissolution to those provided for in art. 237 para. (1) of the same law, given that it is not found in those cases²⁸, a situation unprecedented in relation to the legislature's conception - frequently reflected in Romania's current legislation - that, in the event of the repetition of a contravention after its sanctioning, it should be sanctioned either as a contravention or as a criminal offense.

Beyond these issues, the legislator's inconsistency is also evident when comparing the provisions of the second thesis of para. (3) of art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions - which states that the report on the finding of the contravention provided for in para. (2¹) of the same article shall record that failure to fulfill the obligations provided for in art. 177 para. (1) point a) and in art. 178 of the same law entails the dissolution of the company under the provisions of art. 237 of the same law - with the provisions of para. (3¹) of art. 270³ of the same law, from which it follows that the imposition of the

²⁶ Art. 1432 para. (1)-(4) thesis I of Law no. 31/1990, as republished, with subsequent amendments and additions, provides:

"(1) The board of directors represents the company in dealings with third parties and in legal proceedings. Unless otherwise provided in the articles of incorporation, the board of directors represents the company through its chairman.

(2) By the articles of incorporation, the chairman and one or more directors may be authorized to represent the company, acting jointly or separately. Such a provision is enforceable against third parties.

(3) By unanimous agreement, directors who represent the company only by acting jointly may authorize one of them to carry out certain transactions or types of transactions.

(4) If the board of directors delegates the powers to manage the company to the directors in accordance with Article 143, the power to represent the company rests with the general manager."

Art. 1533 para. (1)-(3) of the same law states:

"(1) The management board represents the company in dealings with third parties and in court.

(2) Unless otherwise provided in the articles of incorporation, the members of the management board represent the company only by acting jointly.

(3) Where the members of the management board represent the company only by acting jointly, they may, by unanimous agreement, authorize one of them to conclude certain transactions or types of transactions."

²⁷ Pursuant to the provisions of art. 13 para. (2) of Government Ordinance no. 2/2001, with subsequent amendments and additions, an administrative offense is considered a continuing offense where the breach of the legal obligation persists over time, and the statute of limitations for imposing the contraventional fine begins to run from the date on which the commission of the offense ceases. See F. Stanca, N. Gongea, *op. cit.*, p. 161; Al. Țiclea, *op. cit.*, p. 21; M. A. Hotca, *Contraventional law. The general part*, Editas Publishing House, Bucharest, 2003, p. 180 and 181; D. Apostol Tofan, *op. cit.*, p. 347; O. Podaru, A.-C. Loghin, *op. cit.*, p. 93.

²⁸ See S. Bodu, *Commentary on Companies Law*, Rosetti International, Bucharest, 2023, p. 1380; T. Prescure, *op. cit.*, p. 982.

dissolution sanction by the competent court is discretionary. Given that the imposition of the sanction of dissolution of a joint-stock company, in accordance with the provisions of art. 237 para. (3)-(13) of Law no. 31/1990, as republished, with subsequent amendments and additions, must be applied as a *last resort*, as the priority is to safeguard the company in question, in the event of a single recurrence of the conduct provided for in art. 270³ para. (2¹) thesis I of the same legislative act for a period of 30 days from the date of imposition of the contraventional fine for the act in question, the court may admit or dismiss the action as unfounded or as having become moot²⁹, the request to impose the relevant sanction, submitted by the Ministry of Finance - The National Agency for Fiscal Administration; such a request must be submitted when, following an investigation conducted by the competent authorities, it is determined that the conduct in question has been repeated during the aforementioned time period³⁰.

Considering the literal interpretation of the provisions of the thesis I of para. (3) of art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions, if the administrative violation report drawn up in accordance with these regulatory provisions does not impose a fine, but rather a warning, it can be concluded that the repetition of the act in question within 30 days from the date of application of this sanction will not lead, upon the expiration of this period, to the imposition, pursuant to the provisions of para. (3¹) of the same article, as the act in question constitutes an contravention pursuant to the provisions of para. (2¹) of the same article.

4. Conclusions and de lege ferenda proposals

The analysis conducted in this study reveals the legislature's intent, as evidenced by the inclusion in art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions, of para. (2¹) and para. (3¹), as well as by amending the provisions of para. (3) of the same article, to provide adequate protection, through the means of administrative law, to shareholders, bondholders, and other persons whose rights or legitimate interests are affected by the commission of acts assessed, *in abstracto*, as being more serious than the contraventions provided for in the same legislative act even prior to the introduction of the respective provisions therein, but less serious than criminal offenses, relating to the violation of legal obligations concerning certain registers of joint-stock companies.

It should also be noted that the conduct described in art. 270³ para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, for a period of 30 days from the date of imposition of the contraventional fine for the respective act, within the scope of civil tort. This choice by the legislature is, in our view, welcome because, in addition to the fact that the regulation in question has -through the extremely severe sanction it includes - a deterrent effect considerably greater than that of the contravention, which provides for a fine - it also makes it possible to safeguard the joint-stock company in question during the judicial proceedings initiated by the filing of the dissolution petition submitted by the Ministry of Finance - The National Agency for Fiscal Administration - the institution of company dissolution is treated uniformly, with the respective sanction, if applicable, being imposed by a panel of judges specialized in disputes with professionals, as in the cases provided for in art. 237 para. (1) of the same legislative act.

However, the manner in which the legislature's aforementioned concern was reflected in the drafting of the legal provisions analyzed in this study reveals significant shortcomings regarding their clarity and predictability, as demonstrated in the body of the study; an improvement in the quality of these rules is necessary so that they do not encounter difficulties in implementation, do not encourage various abusive practices, or, as the case may be, remain unenforceable. In this regard, we will formulate some proposals *de lege ferenda* in the following sections.

Thus, to ensure greater legal precision, and considering the observations presented in this regard in the present study, we propose replacing the wording "the provisions of art. 177 para. (1) point a) and art. 178" in the text of para. (2¹) of art. 270³ of Law no. 31/1990, as republished, with subsequent amendments and additions, with the wording "the provisions of art. 177 para. (1) point a) or of art. 178."

In the event of a violation of the first statutory provision set forth in art. 270³ para. (2¹) of Law no. 31/1990, as republished, with subsequent amendments and additions, we consider that if the joint-stock company to

²⁹ See T. Prescure, op. cit., p. 982.

³⁰ See, in the same vein, T. Prescure, op. cit., p. 982; to the contrary, S. Bodu, Commentary on Companies Law, Rosetti International, Bucharest, 2023, p. 1380.

which the shareholders' register pertains has contracted, pursuant to the provisions of art. 180 para. (1) of the same legislative act, with an independent private registry company, the maintenance of said registry in a computerized system and the performance of registrations and other operations related to the registry in question, the active subject should be the entity that maintains the shareholder records of the company to which said registry refers. *De lege lata*, a breach by such an entity of the obligation provided for in art. 177 para. (1) point a) thesis I of Law no. 31/1990, as republished, with subsequent amendments and additions, does not give rise to its contraventional liability in the absence of an express statutory provision to that effect, or, since this situation is comparable to that in which the company referred to in the aforementioned register or, as the case may be, the central depository is administratively liable for the breach of the aforementioned obligation, we propose supplementing the introductory part of the provisions of art. 177 para. (1) of the same legislative act to the effect that the obligation in question falls, as the case may be, on the entity in question. Furthermore, to ensure greater clarity in the statutory text, we propose that these latter provisions also include an express reference to the fact that the obligation in question falls, as the case may be, on the legal custodian, who currently acts as the active party in the event of the commission of the contravention provided for in art. 270³ para. (2¹) thesis I of Law no. 31/1990, as republished, with subsequent amendments and additions, resulting from the correlation of these provisions with the provisions of art. 177 para. (1) point a) thesis II of the same legislative act, the same argument being valid, by analogy, in the case of committing the contravention provided for in art. 270³ para. (2¹) thesis II of the same law, by reference to the provisions of art. 178 para. (2) of the same law, in conjunction with the provisions of art. 177 para. (1) point f) thesis II of the same legislative act.

Regarding to the objective element of the contravention provided for in art. 270³ para. (2¹) thesis I of Law no. 31/1990, as republished, with subsequent amendments and additions, for greater accuracy of the statutory text, we propose that art. 177 para. (1) point a) of the same law expressly provide for the obligation to keep the register of shareholders permanently updated.

Regarding to the objective element of the contravention provided for in art. 270³ para. (2¹) thesis II of Law no. 31/1990, as republished, with subsequent amendments and additions, we consider that, in order to align the provisions of art. 178 para. (1) of the same legislative act with the provisions of art. 6 of Regulation no. 679/2016 of the European Parliament and of the Council of the European Union, it is necessary to introduce the condition that applicants, whether natural persons or legal entities under private law, who are not shareholders of the company to which they address requests to be provided with information regarding the shareholding structure of that company and to be issued, upon their request and at their expense, certificates regarding such data, must demonstrate a legitimate interest where the data subjects to whom their requests relate have not given their consent to the processing of their personal data for one or more specific purposes.

Since, as previously noted, the absence of a deadline by which the obligations provided for in art. 178 of Law no. 31/1990, as republished, with subsequent amendments and additions, must be fulfilled renders inapplicable the provisions of art. 270³ para. (2¹) thesis II of the same legislative act from the date of their entry into force, as the requirement of predictability of the respective provision is thus not met, we consider it to be of the utmost necessity to enact legislation specifying such a deadline, as well as the point in time from which it is calculated.

Given that the phrase "representative of the legal entity" contained in the provisions of para. (3¹) of art. 270³ of Law no. 31/1990, as republished, with amendments and additions, is not consistent with the provisions of art. 177, para. (1) point a) and art. 178 of the same legislative act regarding the parties subject to the obligations established by the latter, we propose replacing the aforementioned phrase with the phrase "the party subject to the obligation provided for in art. 177 or the obligations provided for in art. 178."

Although the regulations examined in this study are, to a significant extent, flawed, there is a notable growing interest on the part of the legislature in establishing greater discipline regarding the fulfillment of legal obligations pertaining to certain registers of joint-stock companies, by classifying certain unlawful conduct as contraventions, and by placing the same conduct, repeated even once, for a certain period following the date of their sanctioning with a contraventional fine, within the scope of civil liability, which demonstrates the legislature's commitment to ensuring appropriate means of enforcing compliance with the law regarding those obligations, while also taking into account the principle of safeguarding the companies in question.

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PRACTICAL ISSUES IN THE EX OFFICIO EXAMINATION OF UNFAIR CONTRACTUAL TERMS

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Abstract

In Romanian court practice, there are still situations where some courts examine the unfairness of contractual terms while others do not. Even within the same court, there are situations of inconsistent practice in this regard. Although there is, for example, a long-standing practice in which interest rates of 0.5% per day of delay have been declared unfair, there are still courts that do not examine the unfairness of such clauses imposing this type of penalty. As in any EU country, Romanian judges are independent and answer only to the law, so that, at least at first glance, they cannot be held responsible for not aligning their practice with that of the majority. The purpose of this article is to analyze other possible reasons for this practice, whether it is determined by other factors that could lead judges to choose the easier and faster way to resolve cases involving such clauses. This study will also analyze mechanisms that should have long since relieved the courts of repetitive cases in which unfair terms with identical content are invoked and annulled, and protected consumers. Ultimately, we will try to demonstrate the reality of the situation, the reasons why it has come to this, and the means by which consumers can be protected in the future.

Keywords: *unfair contractual clauses, ex officio invocation, national register of unfair contractual terms, alleviation of courts' workload, judges' disciplinary liability.*

1. Introduction

The subject of this paper is the analysis of inconsistent practices of Romanian courts regarding the investigation of the unfairness of contractual terms, when required, practices that lead to the deprivation of protection for Romanian consumers.

As we will show, although these practices could be prevented by current legislation, they continue to occur and affect the social and economic interests of consumers. In other words, current legislation does not provide sufficient guarantees to achieve the desired objective.

In the course of our research, we will demonstrate that the main blame for these results lies with the Romanian legislator, who should have intervened long ago and amended the legislation in this area, given that cases seeking protection of subjective rights arising from unfair terms are repetitive, which lays the foundations for inconsistent practice.

The issue at hand is particularly important for two reasons. The inconsistent practice analyzed leads to the impermissible infringement of consumer interests and the unnecessary congestion of the courts.

We will identify the causes in court case law where the same clause is or is not examined from the perspective of unfairness and will attempt to explain the reason for these practices.

Next, we will analyze the relevant domestic legislation and, in relation to judicial practice, we will attempt to identify and demonstrate the shortcomings of certain institutions regulated by current legislation, institutions that should otherwise be extremely effective in fulfilling their purpose. Also, through the case law of the Court of Justice of the European Union¹, we will identify a legal mechanism created by the Polish legislator, namely that of a national register of unfair terms, and, in the context of this paper, we will demonstrate the appropriateness of immediately regulating such an institution.

Internally, the work is intended to be original, as its subject matter has not been addressed in the specialized doctrine in our in-depth research.

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¹ Next up is the CJEU.

2. Legal framework. Ex officio examinations and accountability of magistrates

Directive 93/13² does not explicitly provide for an ex officio examination of the unfairness of contractual terms.

This obligation arose through case law and was ultimately expressly regulated by the Romanian legislature in Article 13¹(l) of Law No. 193/2000³, which expressly states that "The court has the obligation to examine ex officio the unfair nature of a contractual clause as soon as it has the necessary legal and factual elements to do so."

Violation of the aforementioned obligation should result in disciplinary action against the judge in accordance with the provisions of Article 271(s) of Law No. 303/2022⁴, which defines "performing one's duties in bad faith or with gross negligence" as a disciplinary offense.

Art. 272 art. (1) of Law No. 303/2022 defines bad faith as a situation in which "the judge or prosecutor knowingly violates substantive or procedural law, seeking or accepting harm to a person."

Art. 272 art. (2) of Law No. 303/2022 defines gross negligence as a situation in which "the judge or prosecutor seriously, undoubtedly, and inexcusably disregards the rules of substantive or procedural law."

According to art. 272(3) of Law No. 303/2022, "In order to determine cases in which substantive or procedural rules are seriously, undoubtedly, and inexcusably disregarded, the degree of clarity and precision of the violated rules, the novelty and difficulty of the legal issue in relation to the relevant case law and doctrine, the seriousness of the non-compliance, and other objective professional circumstances shall be taken into account, the novelty and difficulty of the legal issue in relation to the relevant case law and doctrine, the seriousness of the non-compliance, as well as other objective professional circumstances."

Therefore, the examination of unfair terms is mandatory in Romanian civil law. And the provisions on the liability of judges should constitute a serious guarantee, sufficient to achieve the intended purpose, namely consumer protection.

However, in order to invoke the unfairness of a clause, it must at least appear to be unfair. In other words, a clause must attract the judge's attention so that he has a reasonable standard of appearance regarding its unfairness and submits this unfairness to the parties for debate, following which, after judicial analysis, he decides, if appropriate, remove the effects of the clause from the legal relationship between the contracting parties by declaring it unfair in the final instance.

In his book *Noise*⁵, Daniel Kahneman distinguishes between rules and standards. While in the case of a rule such as a speed limit imposed on a certain section of road, violation attracts a unanimous verdict, the situation is not as simple in the case of a standard such as, say, bad faith in the performance of an obligation.

In such a situation, one judge may consider that a person who has failed to fulfill their obligation to compensate their creditor for the fact that they had a child in hospital, which required expenses, was acting in bad faith, while another may consider the opposite. Therefore, in the case of standards, the assessment is purely subjective, left to the sole discretion of the decision-maker who will evaluate the situation based on their level of theoretical and practical knowledge, life experience, education, and other such factors.

From this perspective, the unfairness of a contractual clause is a standard, not a rule, especially in the context where European legislation establishes as assessment criteria, inter alia, good faith, significant imbalance between rights and obligations, etc.

Under these circumstances, art. 272 (3) of Law No. 303/2022 establishes criteria that may lead to the judge being held liable if he or she has not raised for discussion and examination the unfair nature of a type of clause which, given the long-standing nature of the problem and its relatively low degree of difficulty, has been considered abusive by the majority of case law, the relatively low difficulty of the issue, and the majority of case law, has been deemed unfair.

Therefore, liability should be attributed not because the judge, in disagreement with the majority of courts or doctrine, considered a certain type of clause to be lawful, but for the simple fact that he did not bother to invoke the potentially unfair nature of the clause to be discussed and investigated.

² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Published in the Official Journal of the European Union, No. L 95 of 21.04.1993).

³ Law No. 303/2022 on the status of judges and prosecutors (Official Gazette of Romania No. 102 of November 16, 2022).

⁴ Law No. 193/2000 on unfair terms in contracts concluded between professionals and consumers, republished (Official Gazette of Romania No. 543/03.08.2012).

⁵ D. Kahnemann, O. Sibony, Cass R. Sustein, *Noise – A flaw in human judgment*, Ed. Vellant, 2021, pp. 391, 392.

Moreover, we believe that the CJEU should clarify, by means of a preliminary ruling, whether it is mandatory to invoke the unfairness of a contractual term, regardless of the judge's practice, but by reference to widespread judicial practice and doctrine in this area. This would constitute a matter of interpretation of the provisions of art. 13¹ of Law no. 193/2000 in accordance with European legislation, with reference to the classification of the described circumstance under the phrase "as soon as it has the legal and factual elements."

We therefore conclude on this issue that it is risky from a disciplinary perspective for Romanian judges to take such an approach, in which they do not invoke the unfair nature of clauses that are generally declared unfair at national level.

It should be noted that the liability of judges can be seen as a guarantee of compliance with and enforcement of the law and, ultimately, returning to the subject of this paper, a guarantee of consumer protection against unfair terms used by professionals.

We did not identify any disciplinary actions with such an objective on the judicial inspection⁶ website. Moreover, given the circumstances surrounding the adjudication of such cases, it is difficult to believe that such liability is effective, but it is potential.

More specifically, in small claims cases, most consumer debtors are people without specialized education and often completely misinformed, who are unable to even respond to the claims filed by professionals. However, since they do not strive to formulate defenses in these proceedings, the chances of informing the judicial inspectorate about the violation of the judge's positive obligation to invoke and investigate the unfairness of contractual terms are extremely low.

However, such a situation is not impossible. For example, there is a possibility that the consumer was not legally summoned and, at the time of enforcement based on the court decision obtained, complains to the judicial inspectorate about the lack of diligence of the trial judge who issued the decision that was enforced. The judicial inspectorate could also identify non-compliant practices in relation to unfair terms during the thematic checks it may carry out.

But before calling the judge to account for such an approach, which may be justified under the umbrella of his independence, if we allow the abusive nature of the practice not to be raised on the grounds of his own practice or a restricted judicial practice, the reasons leading to these practices should be identified and whether they are also due to legislative shortcomings.

3. Case law and the situation of the courts - administrative context

A significant proportion of cases in which contractual terms are analyzed from the perspective of unfairness are small claims procedures⁷.

Currently, Romania uses an application that can be accessed at www.rejust.ro by practitioners and citizens. The application allows for the analysis of Romanian court case law in any matter, covering all court decisions except those of the High Court of Cassation and Justice.

Therefore, with the help of this application, we identified claims involving small claims filed by the same claimants—professionals (mostly debt collectors initially arising from the assets of professionals, mobile phone operators, or internet service providers) against consumers.

Given the diversity of unfair terms used in consumer contracts, we focused our attention on one that is extremely popular, namely the penalty interest of 0.5% per day of delay, which accrues from the date the debt becomes due until its actual payment.

Thus, we have identified hundreds of thousands of cases, but we will limit ourselves to a small portion of them in order to demonstrate the premise underlying this study, namely the failure of some courts to examine the unfairness of clauses when required to do so, and the need to add new legislative mechanisms to prevent these clauses from taking effect.

⁶ <https://inspectiajudiciara.ro/page/Actiuni-dicivil-judgementiplinare/Jurisprudenta> accessed on 22.01.2026.

⁷ Small claims procedures are subject to a special procedure governed by art.1026-1033 of Law No. 134/2010 on the Code of civil procedure, republished in the Official Gazette No. 247/10.04.2015 (further referred to as the Code of civil procedure). This procedure is distinguished by the fact that it is, as a rule, paper-based, without the need for the parties to be present and for oral arguments before the court, which leads to a much shorter resolution time.

By civil judgment no. 1181/2013 of November 22, 2013⁸, handed down by the Vatra Dornei Court⁹, in which the court, on November 22, 2013, held the following:

"In this case, as shown, penalties of 0.5% per day of delay were stipulated, equivalent to a cumulative penalty that was disproportionately high compared to the interest rates applied on the banking market, a clause that contravenes the mandatory provisions of Law No. 193/2000 on unfair terms in contracts concluded between traders and consumers, as amended.

Thus, it can be seen that the penalty imposed is clearly disproportionate to any damage that could reasonably be assumed, including the fees paid to the creditor in the present case for the recovery of the debt.

This disproportion creates a significant imbalance between the rights and obligations of the parties, contrary to the requirements of good faith and to the detriment of the consumer.

(...)

For all these reasons, the court considers the creditor's claims to compel the debtor to pay late payment penalties (both invoiced and uninvoiced), calculated at 0.5% per day of delay, to be unjustified, and therefore rejects this part of the claim as unfounded."

The Slobozia Court of Law ruled similarly in Civil Judgment No. 1840/2014 of August 27, 2014¹⁰. In fact, for over 10 years, the overwhelming majority of Romanian courts have considered this type of clause to be unfair¹¹, noting that these default damages amount to an annual rate of 182.5%, which is clearly disproportionate to any damage that could reasonably be assumed¹².

On the other hand, there has been and continues to be a minority of courts that consider this type of clause not to be unfair, admitting claims based on them.

In this regard, in civil judgment no. 2228/2025 of October 24, 2025, handed down by the Găești Court¹³, the court held that "With regard to the requested late payment penalties, the court finds that the defendant owes late payment penalties in the amount of 0.5% per day of delay in accordance with the contract concluded between the parties. Given that the parties have expressed their agreement on this clause, the court finds that the claimant is entitled to the payment of late payment penalties by the defendant in the amount determined by agreement. The court also notes that this amount of penalties calculated by the assignor creditor was included in the invoices issued by the claimant."

By civil judgment no. 5137/2025 of 12.11.2025 handed down by the Giurgiu Court¹⁴, the court upheld the professional claimant's request and ordered the defendant "to pay the claimant the sum of 54.08 lei, representing late payment penalties calculated prior to the date of assignment, as well as to pay late payment penalties of 0.5% per day, calculated on the principal debt, from the date on which they were calculated by the assignor creditor, indicated in the last invoice issued, until the date of full payment of the debt."

It is also interesting to note that even within the same courts there are divergent practices. Thus, the Giurgiu Court of First Instance issued civil judgment no. 2189/2023 of 12.04.2023¹⁵, in which the clause containing the aforementioned penalties was considered unfair.

As far as we are concerned, there is no doubt that such clauses are unfair and that situations in which they are imposed on consumers by either the creditors or their assignees should have ceased to exist long ago.

However, each judge is and must be independent in the decisions they make, so that, in the absence of Supreme Court rulings ensuring uniform practice or of normative provisions, the matter may remain at the discretion of each individual judge.

⁸ To demonstrate the longstanding nature of the issue and the solutions adopted by the courts since that time, we have selected a case from 2013. We did not set out to examine the prevailing practice in this regard at the national level during that period, but we believe it is important to highlight this aspect.

⁹ Available at <https://www.rejust.ro/juris/2576e8gd2> – accessed on 16.01.2026.

¹⁰ Available at <https://www.rejust.ro/juris/52ge32432> - accessed on 16.01.2026.

¹¹ See also Civil judgment 361/2025 of 30.04.2025 issued by the Sfântu Gheorghe Court (available at <https://www.rejust.ro/juris/865gg985e>, accessed on 16.01.2026; civil judgement No. 20323/2024 of 26 November 2024 issued by the Bucharest Sector 4 Court, available at <https://www.rejust.ro/juris/ee6g47668>, accessed on 16 January 2026; civil judgement No. 10526/2025 of 23.09.2025 issued by the Bucharest Sector 3 Court, available at <https://www.rejust.ro/juris/d94d674d8>, accessed on 16.01.2026.

¹² Civil judgment No. 557/2024 of February 15 2024, handed down by the Târgoviște Court of First Instance, available at <https://www.rejust.ro/juris/g87ee3dd4>, accessed on January 16, 2026. We note on this occasion that in the Aziz case, para. 68 (CJEU, Judgment of 14 March 2013, C-415/11), the Court allowed the comparison of the situation that would have resulted under national law with that resulting from a contractual clause when deciding on significant imbalance.

¹³ Available at <https://www.rejust.ro/juris/9d38d42eg> – accessed on 16.01.2026.

¹⁴ Available at <https://www.rejust.ro/juris/8422d7gee> – accessed on 16.01.2026.

¹⁵ Available at <https://www.rejust.ro/juris/39d487387> – accessed on 16.01.2026.

Of course, although the situation is problematic, it could be accepted to the extent that the reason why such clauses are upheld by some courts is simply the interpretation given to the law. However, if the reasons for not investigating the unfairness of the clauses are different from the free evaluation, unconstrained by any type of influence, of the judge, of the situation brought to trial, then remedies must be found immediately to eliminate these practices.

Among the reasons for not investigating the unfairness of the terms could be the existence of a disproportionate workload, leading judges to try to lighten their load. Thus, it would be, hypothetically, much simpler to settle a small claim without complications regarding the invocation of unfairness, bringing it up for discussion between the parties, possibly by summoning the parties to court, even though the procedure would allow the case to be heard without a summons¹⁶.

Even from the perspective of the court's technical staff, things would be easier if there were no investigation of unfair terms. In this regard, for example, if this issue is raised, the clerk must seek new forms of communication so that the parties are informed about the broadening of the procedural framework regarding the examination of the unfairness of certain contractual terms. If such activity is extended to several thousand other cases per year, it is quite possible that the excessive volume of work will be a reason for some courts to adopt practices other than those in accordance with the legislation in force on unfair terms.

Furthermore, judicial statistics would be more favourable in terms of judges who settle cases without investigating the unfairness of contractual clauses between the parties. They will have a higher number of cases resolved in a shorter period of time, which will benefit them both in the promotion procedure to the position of execution and in the event of a disciplinary investigation based on delays in resolving cases registered on their panel.

We emphasize that, unlike the situation described above, where the disciplinary liability of the judge for failing to examine ex officio the unfairness of a contractual clause is at most possible, in the case of delay in performing the work, disciplinary liability is very real and actual.

In the absence of standardized work norms, judicial inspection evaluates the judge's activity by comparing it to the court's average on certain indicators, including the number of cases resolved within a certain time frame.

Therefore, it is easy to see that the number of cases resolved within a given period of time will always be lower in proceedings where the unfairness of contractual terms is invoked than in those where this issue is not examined, laying the foundations for the disciplinary liability of judges who are behind schedule in their work, especially in situations where his practice is isolated from that of the majority of members of the same court.

In this context, we emphasize something that is extremely obvious. Namely, in a situation such as the one described above, a practice that requires less effort on the part of one member of the court is likely to cause the other members to adopt it in disagreement with their own interpretation of the legislation in force, which is a matter of judicial independence as long as it can influence them to act in a manner that is not in accordance with their own convictions.

Another problem is that in the system for assessing the complexity of cases pending before Romanian courts, a small claims application is awarded 3 complexity points regardless of whether or not the contractual terms are examined from the perspective of unfairness.

The different weighting of causes could encourage the investigation of unfair terms when necessary.

Finally, in such cases, it is ultimately the consumer who suffers harm, and therefore the situation must be remedied.

Therefore, it is possible that some Romanian courts have approached such practices for reasons other than those relating to the interpretation and application of the law independently, free from any influence.

It is possible that this approach was triggered by fear of disciplinary action for delays in resolving cases, statistics that could affect career advancement, and other similar factors.

¹⁶ Under art. 1030 (1), (2), and (3) of the Code of civil procedure, it is possible to conduct proceedings without ordering the parties to appear, in writing and without summons. Some courts have ruled that in order to invoke the unfair nature of clauses, they must be cited and presented, which has made it difficult to conduct proceedings. Some courts have ruled that in order to invoke the unfair nature of the clauses, they must be summoned and appear in court, which has made it difficult to conduct judicial proceedings in this area, given the large number of requests made. Other courts have questioned the unfairness of contractual terms in writing, by means of a letter issued by the court. Moreover, art. 1030 (8) of the Code of civil procedure provides that "The court may request the parties to provide further information within the time limit it shall set for this purpose, which may not exceed 30 days from the receipt of the defendant's or, as the case may be, the claimant's response."

Under these circumstances, we considered it necessary to treat these divergent practices encountered in practice as being determined by causes other than the judge's own interpretation of the law based on his independence.

This perspective triggered the need to identify possible remedies that would lead to the elimination of such inconsistent practices in this area, so that Romanian consumers would be protected as well and as effectively as those in other European Union member states.

4. Legislative remedies

A simple search on rejust.ro for the terms "civil – small claims"; "disputes with professionals – small claims"; "unfair terms", "Admit", "Reject", "0.5%" returned a total of 235,244 results¹⁷. This number should represent the number of civil judgments handed down in which clauses regarding late payment penalties in the amount described above were challenged.

Clearly, long before such a large number of cases had been resolved, the romanian state should have intervened through the competent legislative bodies to remove the possibility of such clauses having any effect. This is, in fact, a duty and a requirement regulated by art. 7(1) of Directive 93/13, which states that "Member States shall ensure that, in the interests of consumers and competitors, there are adequate and effective means of preventing such terms from having effect. Member States shall ensure that, in the interests of consumers and competitors, there are adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers."

Instead, as we will show below, the romanian state remained passive in the face of the enormous number of repetitive cases that it could have prevented, at the risk of issuing divergent rulings, thereby relieving the role of the romanian courts, which are already extremely overburdened.

We would like to point out that, in the following, we will not focus our attention on addressing judicial practices that would streamline the work of the courts in resolving such cases. We will emphasize that the courts continue to suffer from a lack of involvement on the part of the legislative branch, with the result that the economic interests of European consumers - romanian citizens - are affected.

De lege lata, art. 8 of Law No. 193/2000 stipulates that "Compliance with the provisions of this law shall be monitored by authorized representatives of the National Consumer Protection Authority, as well as by authorized specialists from other public administration bodies, according to their competences."

Art. 12 (1) of Law No. 193/2000 stipulates that "If the use of adhesion contracts containing unfair terms is found, the supervisory bodies referred to in art. 8 shall refer the matter to the court of the domicile or, as the case may be, the professional's place of business, to order the cessation of the use of unfair terms in the future and the amendment of contracts currently being performed, by removing the unfair terms."

The Romanian legislator grants active procedural capacity, within the meaning of the above, to consumer protection associations in accordance with art. 12 (3) of Law No. 193/2000.

The purpose of this approach is specified in the provisions of art. 12 (3) of Law No. 193/2000, according to which "Consumer protection associations that meet the conditions set out in Articles 30 and 32 of Government Ordinance No. 21/1992 on consumer protection, republished, with subsequent amendments and additions, may bring legal action against professionals who use adhesion contracts containing unfair terms before the court referred to in paragraph (1), in order for the court to order the cessation of their use and the amendment of contracts currently being performed by removing the unfair terms. The provisions of article 13 (1) and (4) shall apply." The provisions of Art. 13 (1) and (4) are applicable." and the provisions of art. 13 (1) of the Law, which stipulate that the court may oblige the professional "to amend all adhesion contracts currently in force and to remove unfair terms from pre-formulated contracts intended for use in professional activities, and to oblige them to publish final court decisions on their own website."

A particular problem with the legislation outlined above is that it applies to contracts that are currently being executed. However, the overwhelming majority of small claims brought by professionals are based on contracts whose term of performance has ended, the contracts having been terminated due to consumers' failure to perform their contractual obligations, and are within the time frame for the compulsory enforcement of the obligations arising therefrom.

¹⁷ The inquiry took place on January 16, 2026, at 7:40 p.m. It should also be noted that the period under inquiry is from January 1, 2011, to January 16, 2026.

In practice, in these situations, the above-mentioned bodies cannot ask the courts to compel professionals to cease requesting court rulings obliging consumers to pay debts arising from unfair terms in contracts that have expired and which, in most cases, have been ceded to debt collectors.

Therefore, *de lege ferenda*, it is absolutely necessary to enrich the existing mechanism with regard to the phase following the execution of the contract, namely that of the compulsory enforcement of obligations.

Such an amendment may be made by the legislator expressly, which would be the most desirable option; however, in our view, it can also be achieved indirectly, through a civil proceeding in which the authorities competent to request a preliminary ruling from the CJEU examine the conformity of the above-mentioned internal mechanism with art. 7 (1) of Directive 93/13, with the likely aim of extending the scope of the national legal provision.

Thus, once notified, Romanian courts should be able to compel professionals to refrain from seeking court rulings in the future that would oblige consumers to pay debts arising from clauses declared to be unfair.

Following such widespread practice, in which clauses regarding late payment penalties of 0.5% per day of delay established to the detriment of the consumer were found to be unfair, state control bodies, as provided for in art. 8 of Law No. 193/2000, or consumer protection associations should be able to request the court of the consumer's domicile or the professional's place of business to impose the above prohibition.

The fact that, from a period prior to 2009 until today, there are still calls for the protection of professionals' rights derived from such clauses is an extremely serious problem, which not only reveals the unimaginable indifference of the responsible authorities, but also legislation that protects consumer rights only in a theoretical and illusory way. One of the consequences is the excessive congestion of the courts with repetitive cases of this kind.

A particularly important case was settled by civil judgment no. 2429/20.10.2023 of the Bucharest Tribunal, 6th Civil Section, pronounced in case no. 239/3/2023, which became final through civil decision no. 1923/13.12.2024 of the Bucharest Court of Appeal. No. 239/3/2023, which became final by civil decision No. 1923/13.12.2024 of the Bucharest Court of Appeal, 5th Civil Section, whereby the appeal in the case was dismissed as unfounded.

The case was heard between the Regional Consumer Protection Commission for the North-East Region (Iași) and the defendant Vodafone Romania SA, according to the court portal¹⁸.

In its ruling, the court found that the clause in the contract concluded by Vodafone Romania SA with consumers MD and JG regarding the application of late payment penalties of 0.5%/day of delay on the outstanding amount due, as moratory damages, in the event of failure to comply with the payment deadline for invoices issued by the defendant, was abusive.

Furthermore, the court ordered the defendant to amend all current adhesion contracts concluded with consumer customers and to remove unfair terms from pre-formulated contracts intended for use in the course of professional activity, in accordance with this judgment.

Unfortunately, due to the legislation in force, the ruling only has future effect and only applies to the sellers or suppliers¹⁹ who was a party to the proceedings. In other words, other professionals (those who use identical clauses) are not affected by the ruling, as they were not parties to the proceedings and, moreover, even the purchasers of the debts, assigned prior to the ruling, are not bound by this ruling as they were not parties to the proceedings.²⁰

However, the considerations on which the court's decision was based should have inspired uniform practice with regard to the examination of unfair terms with identical or similar content. In this regard, the Bucharest Court of Appeal noted²¹, among other things, when analyzing the unfairness of the aforementioned clause, considerations that have long been established in the overwhelming practice of the courts, namely:

«(...) In this case, applying a penalty rate of 0.5% per day of delay through the clause in question, without any limitation by the parties, leads to a penalty of 182.5% per year, which highlights the imbalance caused by

¹⁸ Available at <https://portal.just.ro/SitePages/acasa.aspx>, accessed on 22.01.2016.

¹⁹ Further referred to as professionals.

²⁰ According to art. 435 (1) of the Code of civil procedure, "The court decision is binding and has effect only between the parties and their successors." The judgment can only be used as evidence, which means that interested consumers can submit it in cases where they are sued. Furthermore, contrary evidence could be presented against the judgment, at least in theory, in other cases in accordance with the provisions of art. 435 (2) of the Code of civil procedure.

²¹ It should be noted that the Bucharest Court of Appeal jurisdiction also includes the Slobozia and Giurgiu courts, which issued the divergent rulings mentioned above.

applying such a contractual clause. The court of appeal will uphold the correctness of the reasoning applied by the court of first instance and the unfair nature of the clause, determining the absolute nullity of the clause relating to penalties, based on letters b) and i) of the annex to Law No. 193/2000.

The analysis must start from the assessment made by the Romanian legislator in O.G. 13/2011 regarding the damage caused as a result of the late execution of the obligation to pay a sum of money.

The statutory penalty interest (the amount owed by the debtor of the monetary obligation for failure to pay a sum of money when due), in accordance with the supplementary provisions on the matter, pursuant to Article 3(2) of Government Ordinance 13/2011, is set at the reference interest rate plus 4 percentage points. In relation to the date of conclusion of the contracts analyzed - April 2022, according to the Circulars of the National Bank of Romania (No. 7/2022, No. 11/2022, No. 17/2022, No. 22/2022, No. 31/2022, No. 37/2022, No. 1/2023, No. 29/2024, No. 35/2024, etc.), the reference interest rate of the National Bank of Romania ranged between 3% per annum and 7% per annum, so that the statutory penalty interest rate also varied between 7% and 11% per annum.

Thus, contrary to the appellant's arguments, the Court considers that there is a clear disproportion between the 11% per annum statutory penalty interest rate and the 182.5% per annum rate established by the clause in question for the same purpose: failure to pay the same amount of money (regardless of its value) on the due date.

Therefore, if the parties had not established the penalty interest rate in the contract, it would have been a maximum of 11% per annum. By establishing this penalty interest rate, the legislator considered that the creditor would be compensated for the damage resulting from the lack of use of the amounts paid late.

By comparison, at a rate of 0.5% per day of delay, this would result in a penalty interest rate of 182.5% per annum. It can therefore be concluded that such a clause would lead to the consumer paying a disproportionately high amount compared to any possible damage suffered by the professional.

As such, following this comparative analysis, the Court finds that this contractual clause places the consumer in a less favorable legal situation than that provided for by the national law in force, the conditions for significant imbalance being met.

At the same time, the Court notes that this penalty applies to the outstanding amount due, which may include not only the value of the subscription (as the appellant claims, in order to suggest that the amount is insignificant, by calculating only the minimum value of some subscriptions), but also other costs (for example, provided for in Article 5 of the main contractual clauses: fair compensation in the event of termination – 18% of the subscription value multiplied by the number of months remaining until the expiry of the minimum contractual term; for equipment purchased with payment in installments, upon termination of the contract, the customer shall pay, in a single installment, the remaining unpaid installments, as well as the difference between the purchase price of the equipment and the price without connection, etc.).

The appellant's argument that "judicial practice has deemed the criterion of 2% per day of delay for default damages to be reasonable and compatible with the requirements of Directive No. 93/13 and Law No. 193/2000" is manifestly unfounded.

The debates during the meeting of the presidents of the specialized (formerly commercial) sections of the High Court of Cassation and Justice and the Courts of Appeal on June 27-28, 2019, focused on another factual hypothesis (setting a percentage of 2% above the interest rate established in loan agreements, in order to establish a default interest rate), and the case law developed and referred to was that of Spain.

The reasoning of the Court of Justice of the European Union in Joined Cases C 96/16 and C 94/17, which refer specifically to loan agreements (concluded with Banco Santander and Banco de Sabadell, respectively) examined by the national courts in Spain, is relevant. which ruled that non-negotiated terms in personal loan agreements concluded with consumers relating to default interest that meet the criterion whereby the rate of such interest exceeds by more than two percentage points the ordinary interest rate agreed between the contracting parties must be declared unfair.

The Court considers that the court of first instance adequately analyzed the requirements of art. 4 (5) of Law No. 193/2000, and the appellant's contrary opinion regarding the decision handed down by the court of first instance does not indicate a violation of the aforementioned provision.

Given the legal nature of late payment penalties and the subject of the analysis (in relation to the legal provisions), the Court considers that the affordable price of the services, the consumer's right to switch to

another operator (there being, moreover, a mandatory legal framework in this regard), the possibility of deferring payment, the appellant's offers regarding the purchase of equipment, etc. are not relevant. (...)

The arguments concerning "the generation of a huge number of civil cases before the courts" and "the impact on other mobile phone operators" are not relevant to the subject matter of the case (the finding that the contractual clause in question is unfair) but, in the Court's opinion, may suggest precisely the negative financial impact of the clause on consumers (payment difficulties also relating to these excessive penalties, the rules on the allocation of payment, etc.) and the general preventive role in adjusting the behavior of mobile phone operators to voluntarily comply with mandatory legal requirements. (...)

With regard to the requirement of good faith, the court considers that the professional did not act in good faith when concluding the contract, given that the consumer would not have accepted such a clause after being adequately informed. From the wording of the contract, which is in fact a standard form contract, it is not clear that the consumer had the actual opportunity to influence the nature of the clauses inserted, namely those relating to the manner and amount of penalties for late payment (...)

The above-mentioned decision became final on December 13, 2024. As we have shown, although it could not have any effect on third parties who were not involved in the proceedings, the court's reasoning and decision should have inspired uniform practice, at least within the jurisdiction of the Bucharest Court of Appeal.

However, we will continue to present only a few solutions pronounced by courts within the same Bucharest Court of Appeal, in cases involving the aforementioned professional, in which such clauses had an effect.

By civil judgment 1657/09.10.2025²² of the Bolintin-Vale Court, the court ordered, among other things, the defendant to pay the claimant the sum of 6, 147.44 lei representing the value of contracted services and equipment installments and to pay late penalties equal to 0.5% for each day of delay, in accordance with art. 4 of the basic contractual clauses, namely the amount of 283.52 lei, and thereafter, from the due date of the last invoice issued until the full payment of the outstanding debt.

Furthermore, by civil judgment 1929/11.11.2025²³ of the Bolintin-Vale Court, the defendant consumer was ordered to pay the claimant the sum of 10,820 lei representing the value of contracted services and equipment installments, as well as to pay the claimant late payment penalties equal to 0.5% for each day of delay, in accordance with art. 4 of the basic contractual clauses, namely the amount of 655.39 lei, and thereafter, from the due date of the last invoice issued until the full payment of the outstanding debt.

By civil judgment no. 1853/2025 of 05.11.2025 handed down by the Bolintin Vale Court²⁴, it was ordered, among other things, that the defendant pay the claimant the sum of 996.02 lei for services rendered and not paid for, the sum of 4284.79 lei representing the monthly instalments for the equipment purchased, late payment penalties of 0.5% for each day of delay, calculated from the due date of the last invoice (28.09.2022) until the date of payment of the outstanding debt.

We note that from September 28, 2022, to November 5, 2025, there were 1,134 days, which, multiplied by 0.5% per day of delay, results in a debt of 567% of the aforementioned debt of 5,280, 81 lei (996.02+4284.79), and a simple calculation shows that the consumer will owe the amount of 29,942.19 lei under the aforementioned clause.

By civil judgment no. 3093/04.06.2025 of the Giurgiu Court²⁵, the court also ordered the defendant consumer to pay the amount of 5202 lei as outstanding debt and late payment penalties in the amount of 169.15 lei, calculated by the creditor, as well as late payment penalties in the amount of 0.5% per day of delay, from the due date of the last invoice issued until the date of actual payment.

In conclusion, there is an immediate need to amend the provisions referred to in this section so as to allow courts to render unfair terms ineffective even where the performance of the contract has ended.

²² Decision No. 1657/2025 of October 9, 2025, issued by the Bolintin Vale Court, available at <https://www.rejust.ro/juris/ggd2d2223> – accessed on January 16, 2026, January 22, 2026.

²³ Decision No. 1929/2025 of 11.11.2025 issued by the Bolintin Vale Court, available at <https://www.rejust.ro/juris/e94g27549> – accessed on 22.01.2026.

²⁴ Decision No. 1853/2025 of November 5, 2025, issued by the Bolintin Vale Court, available at <https://www.rejust.ro/juris/46g758226>, accessed on January 16, 2026.

²⁵ Decision No. 3093/2025 of 04.06.2025 issued by the Giurgiu Court of Law, available at <https://www.rejust.ro/juris/2362e5767>, accessed on 16.01.2026.

Another mechanism that we found interesting and that could be introduced into Romanian law is a national register of unfair terms, which was discussed by the Court of Justice of the European Union for the first time in case C-119/15²⁶.

The Court's ruling states that the register is public so that all consumers and professionals have access to it, even those who are not responsible for the clauses being entered in it. According to the Court's reasoning²⁷, the register is intended to avoid the proliferation of legal proceedings concerning clauses with the same subject matter due to their use by other professionals.

The Court held that such a register is compatible with EU law, noting that Article 8 of Directive 93/13 provides that Member States may draw up lists of contractual terms considered unfair.

According to the Court, the register must be managed transparently in the interests of professionals and consumers, and must be clearly structured, regardless of the number of clauses it contains²⁸.

The clauses in the register must meet the criterion of timeliness, meaning that they must be rigorously updated and, in accordance with the principle of legal certainty, clauses that are no longer necessary must be removed²⁹.

According to Polish law, professionals may be fined for using clauses included in the register and may appeal to a court when, not being identical, the clauses used differ not only in form but also in effect from those entered in the register.

In another case³⁰, the CJEU held that finding unfairness based on such a register could quickly contribute to ending the effects of unfair terms used in contracts, appearing to be an appropriate remedy for the problem we highlight in this study.

This mechanism led to predictable problems, since the prohibition on its use applied not only to the professional who was a party to the dispute that led to its entry in the register, but also to any other professional. Thus, on November 20, 2015, the Supreme Court of Poland³¹ issued a ruling establishing that the registration of an unfair term in the register has no effect on professionals other than those covered by the registration procedure, in order to respect the right of these other professionals to be heard.

It must be noted that, even under such a scenario, tens of thousands of disputes would nevertheless have been prevented, in which, in Romania, the same professionals—assignees of claims for the purpose of their recovery (debt collection agencies)—apply to the courts, by way of small claims procedures, for the delivery of judicial decisions based on contracts containing unfair contractual clauses. In other words, even if such clauses had been registered sequentially, for each professional individually, these practices would, by now, long since have been discontinued.

Returning to the decision of the Polish Supreme Court, in Case C-531/22³², the CJEU, by contrast, held that EU law, in the context of Directive 93/13, does not preclude national case-law according to which the entry of a contractual clause into the national register of unlawful clauses has the effect that such a clause is to be regarded as unfair in any proceedings involving a consumer, including with respect to a professional other than the one who was a party to the proceedings that led to the registration, even where the clause does not have wording identical to that registered, provided that it has the same scope of application and produces the same effects for the consumer.

In the aforementioned case, the CJEU further held that the choice of the means used to attain the specific objectives of such a register, as well as the determination of the legal effects produced by such registration, fall within the competence of the Member States. However³³, it also laid down the condition that the professional must have the possibility to challenge, before a national court, any assessment deeming a contractual clause to be equivalent to one entered in the register.

Attention must be drawn to the fact that the CJEU has emphasised that, irrespective of the scope of the obligation to raise ex officio the unfair nature of a contractual clause, the national court is required to bring this

²⁶ CJEU, Judgment of December 21, 2016, delivered in the case of *Biuro podróży Partner*, C-119/15.

²⁷ Paragraph 35 of Case C-119/15.

²⁸ Paragraph 38 of Case C-119/15.

²⁹ Par. 39 din cauza C-119/15

³⁰ CJEU, Judgment of February 25, 2022, delivered in the case of *mBank (Polish Register of Unfair Terms)*, C-139/22, paragraph 41.

³¹ CJEU, Judgment of January 18, 2024, delivered in the case of *Getin Noble Bank S.A. et al. v. TL*, C-531/22, paragraph 25.

³² See answer No 2 to the questions referred to the Court in Case C-531/22.

³³ Paragraph 72 of Case C-531/22.

issue before the parties for adversarial debate³⁴. Accordingly, it appears that, should professionals choose to seek the delivery of a judicial decision based on an unfair contractual clause - hypothetically entered in the register - and subsequently proceed to its enforcement, the same factual situation would arise as that currently existing, in which the equivalence with the clause entered in the register would still need to be discussed.

Nevertheless, the existence of such a register would be useful even under these jurisdictional conditions, since, first and foremost, it would ensure unity of action among courts, which would assess the matter brought before them by reference to a clause expressly prohibited and entered in a public register accessible *erga omnes*.

Accordingly, it would no longer be left to the discretion of the court to determine, contrary to the prevailing view, that a penalty of 0.5% per day of delay is permissible, but merely to examine whether, although the wording of the clause differs from that entered in the register, it has the same scope of application and produces the same effects for the consumer concerned.

We note that, in such a situation, the possibility of directly fining the professional for the abusive exercise of its civil action by the court would be welcome, or, alternatively, of the court seised referring the matter to the competent administrative authority, which could maintain a computerized record of such types of cases initiated by professionals and could sanction the professional for repeated attempts to give effect to unfair contractual clauses entered in the register.

5. Conclusions

In conclusion, at present, the Romanian State does not have sufficient safeguards to ensure the objective of Directive 93/13, namely the protection of consumers against unfair contractual clauses used by professionals.

The existing legislation merely serves to overburden the courts with repetitive cases brought by professionals seeking to enforce civil actions aimed at protecting rights arising from unfair contractual clauses, which should not produce any legal effects.

The result is that, in certain situations, due to inconsistent practices by some courts -which may be based not on the free application of the law in cases brought before them, in accordance with the principle of judicial independence³⁵, but on other factors such as excessive workload, fear of disciplinary liability, or the impact on prospects for professional promotion -some consumers obtain outcomes that are completely different from those of others in identical cases.

The liability of judges is, at present, only potential, as there are no precedents in which judges have been sanctioned for failing to examine, *ex officio*, the unfair nature of contractual clauses. Consequently, not only does this not constitute a guarantee of consumer protection, but it may even serve as a premise for violating such protection to the extent that judges' liability is engaged for failing to resolve cases within an optimal and reasonable timeframe³⁶.

One of the remedies we propose lies in alleviating the burden on the courts through the establishment of effective and efficient mechanisms, as presented throughout this study, namely by amending the provisions of art. 12 (1) and art. 13 (1) and (4) of Law no. 193/2000 so as to allow courts to prohibit the issuance of judicial decisions, even in the case of contracts whose performance has been completed, on the basis of clauses declared to be unfair.

Another remedy is the adoption of an institution of a national register of unfair terms, similar to the legislation of the Republic of Poland.

Such measures should, first and foremost, lead to the strengthening of safeguards for the protection of Romanian consumers, to the alleviation of the overloaded Romanian courts, and, last but not least, to the reinforcement of judicial independence, since, as we have shown, judges may be induced to deviate from the proper adjudication of cases due to various fears, which may be more or less justified.

In the continuation of this research, mechanisms should be identified that would clearly and effectively enhance the protection provided by Directive 93/13 by eliminating the hundreds of thousands of repetitive cases in which inconsistent practices still exist. Moreover, at a general level, the mechanisms of collaboration between the judiciary and the legislature, as well as between the latter and legal research institutions, should be examined

³⁴ Paragraph 73 of Case C-531/22

³⁵ According to art. 124 (3) of the Constitution of Romania, judges are independent and are bound solely by the law.

³⁶ Art. 271 (g) of Law no. 303/2022 provides that the following constitutes a disciplinary offense: "repeated failure, for attributable reasons, to comply with the legal provisions regarding the swift resolution of cases, or repeated delays in carrying out work, for attributable reasons."

and redesigned, since it appears that, at present, the legislation in force does not clearly, efficiently, or concretely reflect the interests of those governed.

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THE GUARDIANSHIP MANDATE – BETWEEN AUTONOMY OF WILL AND THE NEED FOR LEGAL PROTECTION

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Abstract

The guardianship mandate is a modern legal instrument that combines respect for the autonomy of the individual with the need to ensure effective protection in situations of vulnerability. This paper analyses the legal nature of the guardianship mandate, highlighting its foundations based on autonomy of will, as well as its preventive role in anticipating future situations of incapacity. The conditions under which the mandate becomes effective, the procedures for its termination, and the formalities required for its validity are detailed, as well as its content, which defines the rights and obligations of the principal and the trustee.

Particular emphasis is placed on the execution of the guardianship mandate, involving court approval, as well as the possibility of adopting additional measures to protect the interests of the person being protected. The authorization procedure is analysed in detail, emphasizing the role of the court in ensuring the legality and proportionality of the measures. The paper also discusses the scope of the mandate and the obligations of the trustee, including its interpretation in accordance with the rules applicable to the special guardianship of adults, when the provisions are unclear or not amenable to direct interpretation.

The study highlights the advantages of the guardianship mandate as a flexible alternative to traditional guardianship measures, such as special guardianship or judicial counselling, emphasizing its preventive nature and respect for the person's anticipated wishes. The limitations of this instrument are also discussed, such as the potential risks of abuse, the need for judicial oversight, and the importance of adequate legal safeguards to protect the interests of the person under guardianship.

Finally, the article places the mandate of protection in the context of contemporary civil law, highlighting its relevance as an expression of the balance between individual freedom and state intervention for protection purposes, as well as its importance for the development of preventive and personalized mechanisms for the protection of vulnerable persons.

Keywords: guardianship mandate, disabilities, vulnerable persons, autonomy of will, notary.

1. Introduction

The guardianship mandate is part of the contemporary trend of valuing autonomy of will, allowing capable persons to organize in advance the mechanisms of protection for the eventuality of a future loss or diminution of discernment. Unlike traditional judicial guardianship measures, which intervene *ex post* and are predominantly heteronomous in nature, the guardianship mandate is based on a freely expressed personal choice regarding both the guardian and the scope of their duties.

This normative configuration reflects the paradigm shift from a paternalistic model of legal protection to a person-centered one, in which the individual's anticipated will is the main criterion for organizing the protective measure.

Although based on autonomy of will, the guardianship mandate does not operate exclusively within the logic of contractual freedom. The intervention of the guardianship court, both at the approval stage and during the execution of the mandate, introduces a dimension of judicial control intended to prevent abuse and ensure the effective protection of the principal.

Thus, the court does not automatically validate the mandate, but verifies that the legal conditions are met and that the measure is appropriate in relation to the interests of the person under protection. This overlap between private will and public control illustrates the structural tension between individual autonomy and the need for legal protection of vulnerable persons.

Compared to other forms of legal protection, the guardianship mandate has a number of relevant features: (i) it is established by the will of the person concerned, and not by a court decision; (ii) it is, in principle, subsidiary

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to the autonomy of the principal, and does not result in general incapacity; (iii) it allows for a fine-tuning of the measure to the specific needs of the person, by expressly delimiting the powers of the trustee.

However, the protection mandate does not exclude the possibility of subsequently establishing a judicial protection measure when the principal's interest so requires, which confirms its flexible and evolving nature.

2. The guardianship mandate

2.1. Autonomy of will – the basis of the guardianship mandate

In doctrine¹, it has been stated that "will is indispensable to the conclusion of a legal act, being a psychological operation that acquires legal value only through its manifestation; will combines two elements in its structure: consent and cause (purpose); therefore, there is a whole-part correlation between legal will and consent." Therefore, legal will is not only a condition of validity, but also the generating element of the existence of a civil legal act. The absence of will or its manifestation is equivalent to the non-existence of the act, even if there is a material appearance.

Thus, legal will is conceived as the generative element of civil legal acts, without which they cannot acquire legal existence, regardless of their formal or material appearance. The transformation of psychological will into legal will requires its normative qualification, achieved through conscious deliberation, freedom of decision, and externalization capable of producing legal effects.

The externalization of will represents the moment of rupture between internal intention and legal order, since only manifested will is capable of entering the civil circuit and generating legal relationships. It has been emphasized that "the process of forming and expressing legal will is closely linked to the inner workings of the individual, involving 'deliberation, the power of man to plan, organize, carry out, and control his activities, the power to overcome obstacles encountered, perseverance, and mobilization commensurate with the demands imposed.'"².

Referring to legal will necessarily involves analyzing the principles that structure its functioning in civil law, among which the principle of real will and the principle of freedom of will, an expression of autonomy of will, stand out.

Regarding the principle of freedom of will or the principle of autonomy of will, in doctrine³ it has been emphasized that: "the parties are free to conclude any legal acts and to determine their content, within the limits imposed by law, public order, and morality (Art. 1169 of the Civil Code, which, under the marginal heading of "freedom to contract," refers to contracts, but, on the basis of Art. 1325 of the Civil Code, also applies to unilateral legal acts)."

The application of the principle of real will is particularly relevant in the area of guardianship mandate, a legal institution based essentially on the recognition of a person's authentic will, expressed at a time when they have unimpaired discernment. Unlike traditional guardianship measures, which are based on the determination of a current incapacity and the substitution of the person's will by a third party, the guardianship mandate is based on the actual, prior, and freely expressed will of the principal. In this context, any dissonance between a person's internal will and their subsequent actions, occurring in a state of vulnerability or diminished discernment, cannot lead to the removal of the effectiveness of the anticipated will. On the contrary, the real will, as expressed through the guardianship mandate, is called upon to prevail over an altered or impossible to form current will, precisely in consideration of its initial authenticity and fullness.

The guardianship mandate therefore operates a controlled reversal of the classic relationship between actual will and present will, giving priority to the legal will expressed ex ante, as an expression of the person's autonomy of will and self-determination. In this configuration, the principle of real will is no longer related to an opposition between internal intention and declaration of will, but to the contrast between the authentic will formed in a context of full capacity and subsequent manifestations lacking discernment.

Therefore, the guardianship mandate can be qualified as a legal mechanism for preserving the real will over time, designed to ensure the continuity of the fundamental choices of the person beyond the loss of their

¹ Gabriel Boroj, Carla Alexandra Anghelescu, Ioana Nicolae, *Fișe de drept civil Ediția a 8-a, revizuită și adăugită*, Hamangiu Publishing House, Bucharest, 2024, p. 106.

² Matefi Roxana, Nicolae Ioana, *Autonomia de voință și limitele sale de fond și formal*, Dreptul Magazine no 12, 2017, p. 1.

³ Gabriel Boroj, Carla Alexandra Anghelescu, Ioana Nicolae, *Fișe de drept civil Ediția a 8-a, revizuită și adăugită*, Hamangiu Publishing House, Bucharest, 2024, p. 107.

capacity to express a current legal will. This normative solution reflects the legislator's choice for legal protection based on respect for the authentic will of the individual, rather than its substitution by a presumed or externally imposed will.

2.2. Legal concept and characteristics

A guardianship mandate is a legal act whereby a person with full legal capacity, as well as an adult who benefits from juridical counselling, appoints a representative for situations in which they would no longer be able to take care of themselves or manage their assets (Art. 166 para. (2) and Art. 2029¹ para. (1) of the Civil Code). Also, a particular case is represented by the mandate granted by the parent with full legal capacity who exercises parental authority over his or her minor child or who is the guardian of his or her adult child under special guardianship, as well as by relatives up to and including the second degree who exercise guardianship over the minor or protected adult, with the purpose of caring for them, such as in the event that the principal dies or is no longer able to perform their guardianship duties (Art. 114 para. (6) of the Civil Code).

From a legal perspective, the mandate may be gratuitous or onerous, unilateral or bilateral, intuitu personae in nature, a solemn contract, and subject to a condition suspensive.

2.3. Conclusion of the guardianship mandate

The guardianship mandate may be concluded by certain persons, both as principal and as agent, under the conditions established by law. As principals, persons with full legal capacity, as well as adults who benefit from judicial counselling, may conclude a guardianship mandate, provided that the consent of the legal guardian and the authorisation of the guardianship court are obtained (Art. 166 para. (2) and Art. 2029¹ para. (1) of the Civil Code).

In the particular situation mentioned above, governed by Article 114(6) of the Civil Code, the guardianship mandate is concluded, as principal, by the parent with full legal capacity who exercises parental authority over his or her minor child or who is the guardian of his or her adult child for whom special guardianship has been established, as well as by relatives up to and including the second degree who are guardians of the minor or, as the case may be, of the adult under special guardianship. In this case, the minor or adult for whom special guardianship has been established is the beneficiary of the guardianship contract, in accordance with the provisions of Article 114(6) of the Civil Code, in conjunction with Articles 943¹ and 943⁴ of the Code of Civil Procedure.

As a trustee, persons who have the capacity to conclude the acts necessary to ensure the protection of the principal, the administration, in whole or in part, of his or her property and, in general, his or her moral and material well-being (Art. 2009 para. (2) of the Civil Code) may be appointed. By way of exception, persons who are in one of the cases of incompatibility provided for in Article 113 of the Civil Code and who, consequently, could not be appointed as guardians may not act as representatives (Article 2029¹(2) of the Civil Code). The capacity of the trustee is assessed both at the time of concluding the guardianship mandate contract and at the time of its approval by the guardianship court, in accordance with the law.

The purpose of the guardianship mandate is to conclude acts intended to ensure, in the event of the principal's inability to care for themselves or manage their property, the protection of their person, the administration, in whole or in part, of their property, and, in general, their moral and material well-being (Art. 2009 para. (2) Civil Code). The purpose of the guardianship mandate is not exclusively to conclude legal acts relating to property, but also to allow the principal to regulate in advance their living conditions after the onset of incapacity, to establish rules regarding their care, and to designate the person to whom the trustee is required to report at least once every three years.

Formally, the guardianship mandate can only be concluded by means of a notarized document (Art. 2029¹ para. (3) of the Civil Code), therefore the guardianship mandate is, in all cases, a solemn legal act, requiring authentic form *ad validitatem*. In this regard, the question arises as to whether the provisions of Article 2013 para. (1) final sentence of the Civil Code concerning the tacit acceptance of the mandate by its execution apply in the case of a guardianship mandate, more specifically whether the express consent of the trustee is necessary for its valid conclusion. In doctrine, it has been considered that "the general provisions relating to the mandate of representation shall also apply to the guardianship mandate, insofar as they are compatible with its specific nature, including those relating to the acceptance of the act by the trustee, the principal being entitled even to

keep the illness from which he suffers secret, if he so wishes. In this case, the mandate shall be accepted by the very request that he shall address to the court, requesting the approval of the mandate, as soon as he learns of its existence."⁴ (translated by the autor)

It is important to note that the guardianship mandate is immediately entered by the notary public in the Registrul Național de Evidență a Măsurilor de Sprijin și Ocrotire / National Register of Support and Guardianship Measures (RNEMSO), together with other relevant legal documents, in order to ensure the recording and monitoring of legal protection measures for the person under guardianship. In accordance with the methodological rules adopted by the Union through the Executive Office, the following shall be entered in this register: the application for the appointment of the assistant, the decisions to postpone or admit/reject the appointment, the statements of the assisted person regarding the revocation of the assistant, the statements of the assistant regarding the waiver of assistance, the documents confirming the performance of the assistance task, the guardianship mandate, as well as the agreement or document appointing the guardian, with the exception of last wills and testaments.⁵

2.4. Contents of the guardianship mandate

According to Article 2029² of the Civil Code, the guardianship mandate may include provisions regarding the principal's wishes concerning his or her care and living conditions after the onset of incapacity, the designation of the person to whom the trustee is required to report, and the frequency of this obligation, which may not exceed a period of three years. If the principal has not indicated such a person, the appointment of that person shall be made by the guardianship court when approving the mandate.

It can be argued that the list of elements provided for in Article 2029² of the Civil Code is illustrative and not exhaustive, in accordance with the purpose of the mandate of protection as an anticipatory protection mechanism, centered on the autonomy of the principal's will. In this sense, the mandate could also include other clauses intended to detail the manner in which the trustee's powers are exercised, criteria for making personal or patrimonial decisions, or rules regarding relations with third parties, to the extent that these do not contravene mandatory legal provisions and public order.

At the same time, the regulation of the reporting obligation and the possibility of appointing a person other than the guardianship court constitute guarantees designed to ensure transparency in the exercise of the mandate and to prevent possible abuses, contributing to the balance between the freedom to configure the mandate and the need for effective supervision.

2.5. Execution of the guardianship mandate. Approval by the court. Additional measures

The execution of the guardianship mandate is subject to the cumulative fulfillment of the conditions set forth in Article 2029¹(4) of the Civil Code, namely the onset of deterioration of the principal's mental faculties, as determined on the basis of medical and psychological evaluation reports, as well as the approval of the mandate by the court at the request of the trustee appointed by contract.

When approving the mandate, the guardianship court may order, in order to prevent serious harm to the principal, any measure necessary to protect the principal's person, representation in the exercise of civil rights and freedoms, or administration of property (Art. 2029¹ para. (5) of the Civil Code). At the same time, the act by which the principal previously entrusted the administration of his property to another person continues to have effect, unless the guardianship court orders its revocation for valid reasons. (Art. 2029¹ para. (6) of the Civil Code).

In the event that the guardianship mandate does not sufficiently ensure the care of the principal or the administration of his or her property, the guardianship court may order, either during the approval procedure or subsequently, the establishment of a guardianship measure to supplement the mandate (Art. 2029⁵ para. (1) sentence I of the Civil Code). In such a situation, the legislator establishes a preference for appointing the representative as guardian (Art. 2029⁵ para. (1) final sentence of the Civil Code). If the trustee does not also acquire the status of guardian, he or she continues to exercise the mandate and is required to draw up, upon

⁴ Cristian Codrin Botu in Rodica Constantinovici (coordinator), *Ocrotirea majorului – Reforma legislativă realizată prin Legea nr. 140/2022*, Solomon Publishing House, Bucharest, 2023, p. 200-201.

⁵ For more details on the obligation to register with RNEMSO and the list of documents concerned, see Iulia Bogos, Veronica Stan, *Registrul Național de Evidență a Măsurilor de Sprijin și Ocrotire (R.N.E.M.S.O.) – cel mai nou Registru național notarial*, Universul Juridic Premium 5 din 2025, p. 4.

request and at least annually, a report to be submitted to the guardian of the principal, and, upon termination of the mandate, to render account to the latter as well (Art. 2029⁵ para. (2) of the Civil Code).

It can be said that the mechanism for executing the guardianship mandate reflects a careful balance between respecting the autonomy of the principal and the need for effective judicial intervention for the purpose of protecting them. Making the effects of the mandate conditional on both a medical finding of incapacity and the approval of the guardianship court gives this instrument a preventive but controlled character, reducing the risk of premature or abusive activation.

At the same time, the court's ability to supplement the mandate by establishing a protective measure demonstrates that the protective mandate is not designed as a rigid mechanism, but as an adaptable one, capable of being adjusted according to the specific needs of the protected person. The preference given to the trustee for appointment as guardian contributes to the continuity of protection and respect for the anticipated will of the mandate, without, however, excluding the judicial control necessary in situations where the interest of the mandate so requires.

2.6. Procedure for approving the guardianship mandate

The approval of the guardianship mandate is subject to a non-contentious judicial procedure of a particular nature (*sui generis*). The purpose of this procedure is to establish a legal protection measure, a category which, according to Article 527 of the Civil Procedure Code, includes, by way of example, court authorizations and legal supervision or insurance measures. The specific nature of the approach lies in the fact that its purpose is not to resolve a dispute or to establish a right in opposition to another person, but rather to adopt a protective measure.

From a procedural point of view, Art. 536 para. (2) of the Civil Procedure Code refers, as a matter of priority, to the provisions of Articles 943¹–943⁷ of the Civil Procedure Code and, in addition, to the general rules on non-contentious matters laid down in Articles 527–535 of the Civil Procedure Code, insofar as the special rules do not regulate certain aspects. At the same time, according to Article 536(1) of the Civil Procedure Code, these provisions may be supplemented, where necessary, with rules specific to contentious proceedings, but only to the extent that they are compatible with the non-contentious nature of the application.⁶

Therefore, the request for approval of the guardianship mandate falls within the jurisdiction of the guardianship court in whose district the principal or, as the case may be, the beneficiary of the guardianship mandate resides (Article 943¹ of the Civil Code).

In terms of territorial jurisdiction, the current regulation enshrined in Article 943¹ of the Civil Procedure Code establishes a derogation from both the general rule in contentious matters – *actor sequitur forum rei*, provided for in Article 107(1) of the Civil Procedure Code – and from the special protective rule contained in Article 114(1) of the Civil Procedure Code. This derogation also departs from the logic of Article 528(2) of the Civil Procedure Code, according to which, in non-contentious matters, jurisdiction is determined by reference to the rules applicable to contentious requests.

Since requests for the approval of guardianship fall within the scope of measures for the protection of individuals, the application of Article 114(1) of the Civil Procedure Code, a provision established precisely in consideration of the interests of the person under guardianship, would have been justified. Such a solution would have allowed jurisdiction to be determined based on the domicile or residence of the principal or beneficiary, which is relevant in practice, given that the persons resorting to such measures are often elderly or affected by health problems, and the actual place of care may differ from the formal domicile.⁷

Furthermore, a change of domicile during the proceedings does not affect the jurisdiction of the court already seised, which remains competent to hear the case, in accordance with the general rules on the stability of jurisdiction.

The right to bring proceedings lies exclusively with the trustee appointed by contract, the application being accompanied by the documents provided for in Article 943² of the Civil Procedure Code, namely a copy of the guardianship mandate contract, the medical and psychological assessment reports of the principal or the

⁶ For a comprehensive examination of the legal regime applicable to the approval of guardianship mandates, see Teodor Bodoasca, Natalia Saharov, *Contribuții la studiul reglementarilor legale referitoare la încuviințare și revocarea mandatului de ocrotire*, Universul Juridic Premium 7 from 2023, p. 2.

⁷ For a detailed analysis of the territorial jurisdiction regime in the matter of granting guardianship mandates, as well as for the arguments de lege ferenda formulated in doctrine, see Teodor Bodoasca, Natalia Saharov, *Contribuții la studiul reglementarilor legale referitoare la încuviințare și revocarea mandatului de ocrotire*, Universul Juridic Premium 7 from 2023, p. 2.

beneficiary of the mandate, drawn up no more than two months prior to the referral to the court, as well as, where applicable, the report of the healthcare institution where the principal is hospitalized. In the case governed by Article 114(6) of the Civil Code, the application must also be accompanied by the principal's death certificate or evidence of his inability to perform his guardianship duties, as well as a copy of the decision establishing special guardianship.

Upon receipt of the request, the court shall order its communication, together with the attached documents, to the principal or, as the case may be, to the beneficiary of the guardianship mandate and to the prosecutor, as well as a copy to a member of the family of the principal and to the person designated by contract before whom the agent is to fulfill his or her obligation to render account.

At the same time, the court shall verify, by consulting the National Notarial Register provided for in Article 2033 of the Civil Code, whether the mandate has been revoked or whether the trustee has resigned from it, requesting the notary public who drew up the contract to send a certified copy of the contract.

Throughout the proceedings, the court may order provisional measures imposed by the interests of the principal or the beneficiary of the mandate, including the appointment of a special curator, a position to which the trustee appointed by contract is given priority (Art. 943³ of the Civil Procedure Code).

The request shall be settled in a closed session, with the principal or, as the case may be, the beneficiary of the mandate and the trustee being summoned at short notice, as well as with the participation of the prosecutor (Art. 943⁴(1) and (2) of the Civil Procedure Code). The court has the obligation to hear the principal or the beneficiary, asking them questions aimed at assessing the necessity and appropriateness of granting the mandate. The hearing shall be conducted, if it is in the interest of the person concerned, at their home, at the place where they are cared for, or at a place deemed appropriate, in the presence, where appropriate, of a trusted person (Art. 941 para. (3)-(4) and Art. 943⁴ para. (3) of the Civil Procedure Code). Throughout the proceedings, the principal or beneficiary of the mandate shall be informed, in a manner appropriate to their condition, of the progress of the proceedings and of any measures taken in relation to their person or property (Art. 940 para. (7) and Art. 943⁴ para. (5) of the Code of Civil Procedure).

In conclusion, the court shall grant the request for approval of the guardianship mandate if the legal conditions are met, or reject it, in which case the special guardianship established for the duration of the proceedings shall cease by operation of law (Art. 943⁴ para. (6) and Art. 943⁶ para. (2) of the Civil Procedure Code). The decision is subject only to appeal, with no right of cassation in this matter (Art. 943⁵ of the Civil Procedure Code). After the admission decision becomes final, the court shall immediately communicate its operative part, in a certified copy, to the institutions referred to in Article 941 of the Civil Procedure Code, as well as to the notary public who authenticated the guardianship mandate (Article 943⁶(1) of the Civil Procedure Code).

It can be concluded that the procedure for approving the guardianship mandate is structured as a jurisdictional mechanism in which rigorous judicial control is intended to compensate for the principal's lack of capacity without nullifying their previously expressed autonomy of will. The court's obligation to hear the principal or beneficiary, to keep them informed, and to take provisional measures reflects a clear focus on protecting the individual, in accordance with the requirements of the right to dignity and self-determination.

2.7. Scope of the mandate. Obligations

In the event that the scope of the guardianship mandate is unclear or open to interpretation, the trustee has the obligation to interpret and exercise it in accordance with the rules applicable to the special guardianship of adults, in accordance with Article 2029⁴ of the Civil Code.

2.7.1. Obligations of the trustee

The trustee appointed by the guardianship mandate contract has the following legal obligations:

- The obligation to request approval of the mandate – the trustee has the duty to notify the competent guardianship court for approval of the mandate, under the conditions of Art. 2029¹ para. (4) of the Civil Code. This obligation is a condition for the effectiveness of the mandate, as the court exercises control over its legality and appropriateness in relation to the interests of the principal.
- Obligation to exercise the mandate exclusively in the interests of the principal and with respect for his dignity – In order to ensure the moral and material well-being of the principal, the agent is obliged: (i)

to take any decision regarding the execution of the mandate exclusively in the interests of the principal; (ii) to respect and protect the dignity, rights, and freedoms of the principal; (iii) take into account the principal's wishes, needs, and preferences; (iv) safeguard, as far as possible, the autonomy of the mandate. In this regard, the provisions of Art. 174 para. (1) and (2) of the Civil Code regarding the obligations of the guardian apply accordingly to the trustee, according to Art. 20293 of the Civil Code.

According to Art. 174 para. (1) and (2) of the Civil Code, applicable *mutatis mutandis*:

- The trustee is required to care for the principal in order to: accelerate healing, restore or maintain autonomy, improve living conditions, and ensure moral and material well-being. In fulfilling this obligation, the trustee shall take into account the principal's condition, abilities, degree of incapacity, and all the specific circumstances in which he or she finds himself or herself. For this purpose, the principal's income and, if necessary, all of his or her assets may be used. However, family heirlooms, personal items, and assets that are indispensable to the principal or intended for his or her care shall remain at his or her disposal, under the care of the trustee.

- (In exercising the mandate, the trustee has the following specific duties: a) to give priority to the wishes, preferences, and needs of the principal, to provide the necessary support for the formation and expression of the principal's wishes, and to encourage the principal to exercise his or her rights and fulfill his or her obligations independently, to the extent possible; b) to cooperate with the principal and respect his or her privacy and dignity; c) to ensure, where possible, that the principal is informed and explained, in a manner appropriate to his or her condition, all acts and facts that may affect him or her, their usefulness and urgency, as well as the consequences of a possible refusal to conclude them; d) take all necessary measures to protect and realize the rights of the principal; e) cooperate with natural or legal persons who have legal responsibilities in the care of the principal; f) maintain, as far as possible, a personal relationship with the principal; g) in the cases provided by law, to take the necessary steps to prepare medical and psychological assessment reports on the principal and to notify the guardianship court.

Therefore, the list reflects the modern orientation of civil law towards protecting the autonomy and will of the protected person.

- Obligation to report – the trustee is obliged to report at the intervals established by the principal in the contract, the interval between these dates not exceeding 3 years, to the person designated by the principal or, in their absence, to the person indicated by the guardianship court when approving the mandate, in accordance with Art. 20292 para. (2) of the Civil Code.

- Obligations in relation to the principal's tutor – if the agent does not also act as tutor, he or she has the obligation: to continue to perform the mandate, to draw up, upon request and at least once a year, a report to be submitted to the principal's tutor, and, upon termination of the mandate, to render account to the guardian as well, in accordance with Art. 20295 para. (2) of the Civil Code.

- Obligation to inventory the principal's assets – if the trustee is responsible for managing the principal's assets, they are required to inventory them. According to Art. 20296 para. (1) of the Civil Code, within 10 days of the approval of the mandate by the guardianship court, the trustee shall draw up an inventory of the principal's assets, a copy of which shall be sent to the guardianship court and to the person designated to receive the report, pursuant to Article 20292 para. (2) of the Civil Code. The provisions of Articles 820-822 of the Civil Code shall also apply, unless the parties have provided otherwise in the contract.

At the same time, according to Article 2029⁶(2) of the Civil Code, the guardianship court seized with a request for revocation of the mandate may request the trustee to submit an updated inventory of the principal's assets.

- Other obligations – the trustee also has all the other obligations provided for in Article 2017-2024 of the Civil Code, to the extent that they are compatible with the legal regime of the guardianship mandate.

2.7.2. Obligations of the principal

Unless otherwise stipulated in the contract, the trustee is authorized to perform, for his own benefit, the obligations incumbent upon the principal under Articles 2025-2027 of the Civil Code, namely: the principal's

obligation to bear all expenses necessary for the performance of the mandate, the obligation to compensate the trustee for damages suffered in the performance of the mandate, and the obligation to pay the remuneration due to the agent. This authorization results from the provisions of Article 2029⁸ of the Civil Code. Therefore, the rule is supplementary in nature, and the parties may derogate from this rule by agreement.

With regard to legal acts concluded by the principal, according to legal provisions, they are subject to distinct rules, depending on the moment of their conclusion in relation to the approval of the guardianship mandate:

- Legal acts concluded prior to the approval of the guardianship mandate may be annulled or the obligations arising therefrom may be reduced only to the extent that, at the time of their conclusion, the lack of discernment of the principal was notorious or known to the other party, according to Art. 20297 para. (1) of the Civil Code.
- Legal acts concluded after the approval of the guardianship mandate and which are incompatible with its clauses cannot be annulled, nor can the obligations arising therefrom be reduced, unless the principal has suffered damage, in accordance with Article 20297(2) of the Civil Code.

Therefore, the legal provisions establish differentiated protection for the principal, intended to ensure a balance between the security of legal relationships and the need to protect vulnerable persons.

2.8. Termination of the guardianship mandate as a result of regaining legal capacity

If the causes that led to the approval of the guardianship mandate have ceased to exist, the trustee is obliged to immediately notify the guardianship court in order to establish the termination of the contract, as a result of the principal regaining their capacity to exercise their rights.

If the principal is hospitalized or cared for in a healthcare institution, the same obligation to notify also applies to that institution, according to Article 2029⁹(1) of the Civil Code.

The guardianship mandate ceases to have effect from the date on which the guardianship court finds that the contract has been terminated as a result of the principal regaining capacity to exercise their rights, in accordance with Article 2029⁹ para. (2) of the Civil Code.

2.9. Revocation of the guardianship mandate by the trustee who has regained capacity, resignation and replacement of the trustee

After the mandate has been approved by the guardianship court, the trustee may not renounce the execution of his mandate except in strict compliance with the conditions provided by law, according to Art. 202910 para. (1) sentence I of the Civil Code. Therefore, revocation operates as a manifestation of the principal's regained autonomy and is not subject to any conditions of form or justification.

After the mandate has been approved by the guardianship court, the trustee may not renounce the execution of his mandate except in strict compliance with the conditions provided for in the delegation, according to Art. 2029¹⁰ para. (1) sentence I of the Civil Code. Thus, resignation is permitted only if the trustee: (i) replaces himself with another person in the execution of the mandate, to the extent that the principal has expressly authorized him to do so; or (ii) requests the guardianship court to establish a protective measure with regard to the principal. Any contractual clause that would allow the trustee to renounce in violation of these conditions is unwritten, according to Art. 2029¹⁰ para. (1) final sentence of the Civil Code.

The person replacing the trustee is required to immediately inform the guardianship court of the substitution, in accordance with Article 2029¹⁰(2) of the Civil Code. Thus, the restrictive regime of renunciation reflects the protective function of the guardianship mandate and the need to ensure the continuity of the measure to protect the principal.

The renunciation of the mandate is not permitted in the case of a mandate for the administration of the principal's estate, as the mandate is intended to ensure the continuity of the administration of the principal's estate.

3. Comparative law perspectives

The French Civil Code regulates the mandate for future protection (*mandat de protection future*), an institution that was one of the sources of inspiration for the Romanian regulation. The institution is regulated in the French Civil Code, in Articles 477–488.

According to Article 477 of this code, any adult or emancipated minor who is not under guardianship may appoint, by mandate, one or more persons to represent them in the event that, in one of the situations provided for in Article 425, they are no longer able to manage their own interests.⁸

Thus, under French law, the mandate is an expression of an anticipated will and only comes into force after incapacity has been established, under judicial supervision. The particularity of the French model lies in its emphasis on proportionality control and the mandatee's obligation to strictly respect the interests and wishes previously expressed by the mandator. Unlike *curatelle* or *tutelle*, the mandate does not affect the principal's legal capacity. Even after activation, the principal retains his or her rights and the ability to enter into legal acts within the limits of his or her remaining capacity. The principal may specify the exact areas of action of the agent (e.g., personal assistance, administration of property, or both).

Under German law, advance protection is achieved through *Vorsorgevollmacht*⁹ (power of attorney for care), which allows a person to appoint a representative in the event of loss of capacity. The German system favors conventional solutions, with the court intervening if protection through power of attorney proves insufficient. The mandate may cover financial, legal, and health matters; the designated person may make decisions regarding expenses, bank accounts, or even the granting/refusal of medical consent, within the limits expressly provided for in the document. In practice, if there is disagreement between the representative and the medical professional regarding the principal's wishes, the guardianship court (*Betreuungsgericht*) is involved.

Compared to the guardianship mandate under Romanian law: (i) both institutions are manifestations of anticipated autonomy of will, offering individuals the possibility to appoint a trusted representative for the event of future incapacity. The main difference lies in the level of judicial control and the preliminary formalities: (i) in Germany, the *Vorsorgevollmacht* takes effect without prior judicial validation, although there may be subsequent control; (ii) the Romanian guardianship mandate requires the approval of the guardianship court in order to be effective. The German model places a strong emphasis on immediate effectiveness and avoiding the establishment of guardianship, while the Romanian regime gives a more pronounced role to the guardianship court as supervisor of the protective measure.

The Civil Code of Québec establishes the protection mandate (*mandat donné en prévision de l'incapacité*) as a central instrument for the protection of adults, placing particular emphasis on respect for autonomy and the adaptation of measures to changes in the person's condition. The court validates the mandate, but seeks to maintain as much residual autonomy as possible for the principal, even after the measure has been activated. The principal may confer powers on the mandatary relating to: the care of the person (decisions relating to health, living conditions, residence, personal care); the administration of property (management of assets, conclusion of legal acts, representation in relations with third parties); or both categories, depending on the option expressed. The Civil Code of Québec allows for an extremely flexible configuration of the mandate, with the principal being able to: appoint several agents with distinct powers; establish detailed rules for the exercise of the mandate; introduce control and reporting mechanisms.¹⁰

A convergence can be observed among the systems analyzed in the direction of recognizing advance directives as a central element of legal protection, with differences arising mainly in the intensity of judicial control and the degree of flexibility granted to the representative.

4. Conclusions

The guardianship mandate lies at the intersection between contractual freedom and legal protection, representing a normative solution that strikes a balance between self-determination and legal solidarity. However, its effectiveness depends on how it is applied in practice, on the rigor of judicial oversight, and on the trustee assuming their role not as a substitute for the ward's will, but as a facilitator of it.

⁸ For a detailed comparative analysis of French regulation of the future protection mandate, see Roxana Matefi, *Mandatul de ocrotire în legislația română și cea franceză – Privire comparativă*, *Universul Juridic Premium* 9 from 2023, p. 3.

⁹ See more at <https://www.justiz.nrw/BS/lebenslagen/familie/Betreungsverfahren/vorsorgevollmacht>.

¹⁰ See more at https://cdn-contenu.quebec.ca/cdn-contenu/curateur-public/pdf/dep_mandat.pdf.

The regulation of guardianship is compatible with the principles enshrined in the UN Convention on the Rights of Persons with Disabilities, in particular Article 12, which promotes the recognition of the legal capacity of persons with disabilities based on a system of support in decision-making, rather than completely substituting their will.

The guardianship mandate is not just a technical alternative to traditional guardianship measures, but a paradigm shift in Romanian civil law. It reflects the transition from a model of substitute protection to a participatory one, in which the vulnerable person remains, as far as possible, an active subject of their own decisions.

By combining autonomy of will with proportionate judicial control, the guardianship mandate is emerging as a legal instrument that meets constitutional and conventional requirements.

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THE BURDEN OF PROOF OF FOREIGN LAW IN ROMANIAN PRIVATE INTERNATIONAL LAW

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Abstract

*Unlike Romanian law, the foreign law that constitutes the *lex causae* is not known to the Romanian court and, therefore, resolving the dispute involves establishing its content. To this end, the provisions of Article 2.562 of the Romanian Civil Code provide for the sharing between the court and the parties of the burden of proof of the foreign law.*

Starting from the aforementioned legal provision, the present scientific approach aims to first analyze the foundations of this division of roles, in other words to establish why the burden of proof does not fall on a single actor (the court that is called upon to apply the foreign law or the party that invoked it).

Secondly, the balanced nature of this division will be investigated, in order to establish whether, in reality, the burden of proof may end up affecting one of the participants in the civil process more strongly (i.e. the litigant).

Finally, the consequences that will arise in the event of a party's failure to fulfill its obligation to prove the content of the foreign law will be examined.

Regarding the aspects indicated above, the theoretical assessments will also take into account the recent judicial practice of Romanian courts in this matter.

Keywords: foreign element, *lex cause*, foreign law, burden of proof, international civil procedure.

1. Introduction

According to art. 2.562 of Civil Code:

"(1) The content of the foreign law shall be determined by the court by means of attestations obtained from the State bodies which enacted it, by the opinion of an expert or by some other appropriate means.

(2) A party invoking a foreign law may be required to prove its content ..."¹.

The cited legal provision assigns the burden of proving the foreign law to both the court and the parties, but the wording used is different: if the court "establishes" the content of the foreign law, the parties "may be obliged" to prove it².

The difference in regulation observed constitutes the starting point of the present study, which will examine the extent to which a normative solution that aims to establish a balanced relationship in the matter of the burden of proof of foreign law can turn into its opposite.

To this end, it is necessary first to test whether the legal norm has by itself the vocation of balance, and then to analyze the reason why the legislator considered it necessary to share the burden of proof between the court and the parties.

Only then, the investigation will bring into question the temptation of imbalance, in other words the extent to which the application of the legal norm can lead to a relief of the court to the detriment of the party who may be obliged to prove the foreign law. To this end, the consequences of the party's failure to comply with the obligation entrusted to it will be studied, with reference to the practice of the courts.

2. The foundations of the solution established by the legal norm

In order to understand the reason why the legislator decided to share the burden of proof of the foreign law between the court and the parties, a few premises are necessary.

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¹ For a general analysis of this legal provision, see I. Macovei in Fl. A. Baiaș, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Codul civil. Comentariu pe articole*, 3rd edition, C. H. Beck Publishing House, Bucharest, 2021.

² See, in the matter, D. Al. Sitaru, *Drept internațional privat Partea generală. Partea specială – Normele conflictuale în diferite și instituții ale dreptului privat*, C. H. Beck Publishing House, Bucharest, 2013, p. 84.

First of all, the application of conflicting rules³ is mandatory in the case of legal relationships with a foreign element, an aspect established by article 8 of the Civil Code, according to which "in the case of legal relationships with a foreign element, the determination of the applicable civil law shall be made taking into account the rules of private international law contained in Book VII of this Code". It follows, therefore, that the substantive Romanian law contained in the first six books of the Civil Code or in special normative acts are not automatically applied to these legal relationships (these derogating from the substantive provisions of the Romanian law, and not from the rule of priority application of conflicting rules). The reason for removing the immediate incidence of the Romanian substantive norms in the analyzed case is that, through the elements of foreignness it contains, the legal relationship acquires an equal link not only with the Romanian legal system, but also with those to which these elements lead. The existence of such links makes inexplicable a possible preference for Romanian material norms, to the detriment of foreign ones. Thus, for example, a contract concluded in France between two companies of Romanian and German nationality respectively has equal links with each of the three legal systems (French, Romanian and German), which entails a vocation for their identical application. In this way, the private international law norm (conflict rule) becomes the legal instrument that allows an *inter pares* option.

In the second place, since the application of conflicting rules is mandatory in the case of legal relationships with a foreign element, the impact of the legal system indicated by them (*lex causae*) cannot be optional either. Specifically, through the mechanism described, the *lex causae* can be Romanian law or a foreign law. In the first case, Article 252 of the Civil Code establishes a presumption of knowledge of the law by the Romanian court, so that proof of the law is no longer necessary (Article 251 of the Civil Code). On the other hand, in the second, as is natural, such a presumption no longer operates, and it is necessary to prove its content according to art. 253 of the Civil Code in conjunction with art. 2.562 of the Civil Code.

Thirdly, the Romanian court's lack of knowledge of the foreign substantive law (*lex causae*) does not constitute for it a cause that exempts it from the obligation to settle the dispute, remaining applicable the provisions of article 5 para. (1) C. pr. civ., according to which "judges have the duty to receive and settle any request within the competence of the courts, according to the law".

Finally, the jurisdiction of the Romanian courts to settle a dispute with a foreign element (international jurisdiction) is determined according to Title I ("International jurisdiction of the Romanian courts") of Book VII ("International civil procedure") of the Code of Civil Procedure or, as the case may be, according to European Union law (usually the Brussels I bis Regulation⁴). These rules are different from those according to which the substantive law applicable to the disputed legal relationship is determined (and which have their source in the Civil Code, or in normative acts adopted at the level of the European Union, such as the Rome I⁵ and Rome II⁶ Regulations).

In view of the above, the following reasoning can be formulated: the Romanian court legally competent to settle a dispute with a foreign element must apply the conflicting rule in order to determine the law applicable to it; if the law thus determined is a foreign one, the jurisdiction of the Romanian court is not removed, so it will be required to apply it. In these circumstances, the answer to the question "Who bears the burden of proving the foreign law?" is obvious: the one who has to examine the dispute in relation to that law, i.e. the Romanian court. It thus becomes explainable the reason why, according to art. 2.562 para. (1) of Civil Code, "the content of the foreign law shall be established by the court".

On the other hand, however, sometimes the application of foreign law is invoked not by the court, but by one or even by both parties. This is the case when the parties are the ones who have chosen the law applicable

³ The conflicting norm represents that legal norm belonging to the legal system of the court seized that determines the legal system applicable to the legal relationship with a foreign element, among those having such a vocation. Such a vocation belongs to the law of the forum, to the legal systems to which the extraneous elements that the legal relationship presents, as well as to the legal system chosen by the parties lead. For the definition of the conflictual norm, see: D. Al. Sitaru, *Op. cit.*, p. 8, B. M. C. Predescu, *Tratat de drept internațional privat*, Universul Juridic Publishing House, Bucharest, 2025, p. 80, I. Macovei, *Tratat de drept internațional privat*, Universul Juridic Publishing House, Bucharest, 2017, p. 29, C. Dariescu, *Fundamentele dreptului internațional privat*, Universul Juridic Publishing House, Bucharest, 6th edition, 2023, p. 37.

⁴ Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published in the Official Journal of the European Union L 351 of 20 December 2012. For a commentary on this normative act, see S. Al. Stănescu, *Procesul civil internațional*, 2nd edition, Hamangiu Publishing House, Bucharest, 2023.

⁵ Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), published in the Official Journal of the European Union L 177 of 4 July 2008. For a detailed analysis of this normative act, see T. M. Bantaș-Văduva, *Norme de drept internațional privat în materie civilă și comercială în dreptul european*, Hamangiu Publishing House, Bucharest, 2020, pp. 100-260.

⁶ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, published in the Official Journal of the European Union L 199 of 31 July 2007.

to the legal relationship between them (e.g., the parties can choose the law applicable to the contract they have concluded⁷, the non-contractual obligation⁸, the matrimonial regime⁹, divorce¹⁰ etc.). In such cases, it is to be assumed that, in the event of a dispute, the parties will formulate their claims or, as the case may be, their defences, based on the provisions of the (foreign) law chosen. It is also possible that one or even both litigants rely on the provisions of a (foreign) legal system, even though it has not been the subject of a choice of law convention. It is therefore reasonable to assume that, if the parties have chosen the applicable law or if, in the absence of the choice, they have based their claims or defenses on its provisions, then its content is known to them. Such a presumption determined the legislator that in art. 2.562 para. (2) of Civil Code to provide that "the party invoking a foreign law may be obliged to prove its content".

In conclusion, the two analyzed paragraphs of art. 2.562 of Civil Code establish a balanced division of the burden of proof of the foreign law between the court and the parties. Justifiably, it falls primarily to the court of law because of its obligation to resolve any case (including with an extraneous element) in respect of which it has established its jurisdiction. Exceptionally, the burden of proof may lie with the party who invoked the foreign law, as a result of the presumption of knowledge of it.

3. Possible deviation of the legal norm from the purpose for which it was enacted

In application of the provisions of art. 2.562 para. (2) of Civil Code, the court may instruct the party who invoked the application of the foreign law to prove its content. In such a situation, the reasons set out above justify, on the one hand, the measure ordered by the court, which will no longer itself take time-consuming steps to determine the *lex causae*, and, on the other hand, the cooperative attitude of the party, interested in the resolution of the case under the law which it itself has invoked.

It is not excluded, however, that, in some cases, the party who has invoked the foreign law is not aware of its provisions. This is, for example, the situation when the party applied the conflicting rule that indicated that a foreign law was applicable, directly at the stage of the investigation of the trial (voluntarily or at the suggestion of the court), although, through the procedural documents drawn up in the written stage, it referred only to the provisions of the Romanian law. In such a case, the reason for which art. 2.562 para. (2) of Civil Code was enacted does not subsist. Therefore, forcing the party to prove the foreign law, although it may seem to be in line with the letter of the law, is, in reality, a measure contrary to its spirit.

From the court's perspective, the application of the provisions of art. 2.562 para. (2) of Civil Code in their letter may appear tempting because it transfers to the party who invoked the foreign law the task, not always easy, of undertaking the necessary steps to prove it. These may materialize, as the case may be, in the formulation of requests for information on foreign law and their transmission to the Ministry of Justice under the conditions of art. 30 para. (3) in conjunction with art. 29 of Law no. 189/2003¹¹ or of the London Convention (1968),¹² in identifying an expert to determine the content of the foreign law, in formulating and transmitting requests to the diplomatic representation of the foreign state in Romania or to a chamber of commerce, a commodity exchange, a professional body in the state whose law is applicable in the present case etc.

From the perspective of the party whose burden of proving the foreign law has been established and who does not know/already has access to it, the steps listed above are quite complicated compared to the situation in which they would be undertaken by the court. That is why it is possible that the party will fail to fulfill its obligation. Also, at least on a theoretical level, it is conceivable that the party fails to prove the foreign law with guilt, even though the burden of proof was on it.

A problem that needs to be clarified concerns the consequence of the non-fulfillment by the party, with or without fault, of the obligation to prove the foreign law established according to art. 2.562 para. (2) of Civil Code. At the level of principle, at least the following approaches can be identified:

⁷ Art. 3 of the Rome I Regulation.

⁸ According to Art. 14 of the Rome II Regulation, the parties may choose the applicable law, in principle, after the occurrence of the event causing the damage, but, in exceptional situations, even before it.

⁹ Art. 2.590 of the Civil Code.

¹⁰ Art. 5 of Regulation (EU) no. 1259/2010 implementing a form of enhanced cooperation in the field of the law applicable to divorce and legal separation, published in the Official Journal of the European Union L 343 of 29 December 2010.

¹¹ Law no. 189/2003 on international legal assistance in civil and commercial matters, republished in the Official Gazette. no. 162 of March 3, 2026.

¹² The European Convention in the field of information on foreign law, adopted in London on June 7, 1968, to which Romania acceded by G.D. no. 153/1991 (published in the Official Gazette no. 63 bis of 26 March 1991).

- The application of the Romanian law instead of the foreign law determined by the conflictual rule, according to art. 2.562 para. (3) of Civil Code;
- Sanctioning the party, if it has the standing of plaintiff, by suspending the settlement of the case pursuant to art. 242 para. (1) C. pr. civ.¹³;
- The substitution by the court, pursuant to art. 2.562 para. (1) of Civil Code of the failure (culpable or non-culpable) of the party to prove the foreign law.

The first approach is based on the provisions of art. 2.562 para. (3) of Civil Code, according to which "in case of impossibility to establish, within a reasonable period, the content of the foreign law, the Romanian law shall apply". As is apparent from the legal text cited, the application of Romanian law can only constitute a remedy in the event of the impossibility of proving (within a reasonable time) the foreign law constituting *lex causae* in the present case, justified by the fact that the dispute cannot remain unresolved. Or, obviously, the condition of impossibility of proof is not met for the simple reason that the party, who had the obligation to prove the foreign law according to art. 2.562 para. (2) of Civil Code, did not fulfill it.

The second approach may have the technical advantage of representing an instrument of pressure on the party whose obligation is incumbent according to art. 2.562 of Civil Code. Therefore, situations can be identified in practice in which courts have adopted it. Thus, for example, by the Conclusion of 10 June 2025, the Court of Sector 2 asked the applicant to prove, within 10 days, the German law applicable to an assignment contract, under penalty of suspending the case pursuant to Art. 242 para. (1) C. pr. civ.¹⁴. From the measure ordered, it can also be seen the very short period within which the applicant must fulfill his obligation.

The third approach corresponds, in my opinion, to the balanced solution enshrined by the legislator and which I have analysed above. A brief examination of the case law shows us that the court's replacement of the party's failure to prove the content of the foreign law is sometimes perceived as conditioned by the absence of the fault of the party reviewing the burden of proof, and sometimes as independent of it.

Thus, it was held in a case that "the suspension of the trial pursuant to Article 242 of the Civil Code was established in order to give expression to the principle of availability of the trial and is justified, as in the case of obsolescence, by the state of passivity of the applicant in fulfilling the obligations imposed on the applicant. One of the essential conditions for ordering the suspension is that the applicant is at fault for the breach of procedural obligation, and the applicant in the present case has revealed and proven that he has taken all the steps to fulfill the obligation imposed on him. The fact that none of the authorities to whom he addressed the request to communicate a reply and which were obliged to communicate the content of the foreign law to the applicant has not replied cannot operate against the applicant since it cannot be held that the fault belongs to him".¹⁵

In another case, it was considered that "in order to order this case of optional suspension, the following conditions must be cumulatively met: the procedural obligation to belong to the applicant; the obligation of the plaintiff to be established against him during the trial, according to the law; the obligation of the party must be such as to prevent the court from the normal course of the trial; the plaintiff must have been at fault for the breach of procedural obligation. In the present case, the court retains the applicability of the provisions of Article 2.562 of the Civil Code (...). At the same time, it is emphasized that by art. 30 of Law no. 189/2003 (...) the manner of obtaining information on foreign law was regulated. In this regard, it is stated that the Ministry of Justice is the central authority that transmits to the ministries of justice of other states, at their request, information on domestic law in civil and commercial matters, as well as in the field of civil and commercial procedure and judicial organization, for specific judicial cases. (2) At the same time, the Ministry of Justice is the central authority that requests from the ministries of justice of other states information of the kind mentioned in para. (1), at the request of the Romanian courts, for determined judicial cases. Therefore, even if the appellant has not fulfilled his obligations under his charge, in the sense that he has not filed the law of the State of New York, this aspect does not preclude the trial of the case given that the court has the necessary means to find out the content of domestic law, in the sense that it can request the obtaining of this information from the Ministry of Justice, which as the central authority will in turn take steps with the US Department of Justice".¹⁶

¹³ According to art. 242. para. (1) C. pr. civ., "When he finds that the normal conduct of the trial is prevented by the fault of the plaintiff, by failing to fulfill the obligations established during the trial, according to the law, the judge may suspend the trial, indicating in the conclusion which obligations have not been respected".

¹⁴ <https://www.rejust.ro/juris/9846gge8e>.

¹⁵ Court of Appeal of Cluj, Civil Section II, Civil Decision no. 37/30 January 2017 (<https://www.rejust.ro/juris/67ge7435>).

¹⁶ Bucharest Tribunal, Civil Section III, Civil Decision no. 177 of October 23, 2024 (<https://www.rejust.ro/juris/628756g52>).

As far as I am concerned, I consider that the latter solution is the only one able to comply with the balanced solution enshrined in art. 2.562 para. (1) and (2) of Civil Code. Thus, regardless of whether or not a fault of the party who has not fulfilled the obligation imposed on him according to art. 2.562 para. (2) of Civil Code, such conduct cannot lead to the removal of the court's obligation to determine the content of the foreign law in the manner conferred by art. 2.562 para. (1) of Civil Code. As such, on the one hand, the suspension of the resolution of the case cannot occur as long as the burden of proof lies with both the court and the party who invoked the foreign law, and not only the latter. On the other hand, the application of Romanian law is an exceptional solution, incident only in the situation where, objectively, the content of the foreign law cannot be established within a reasonable period, and not when the party whose obligation was incumbent is unable or refuses to fulfill it.

4. Conclusions

Thus, as a result of the analysis carried out, art. 2.562 of Civil Code distributes in a balanced manner the burden of proof of the foreign law between the court of law and the parties. The balance evoked is not equivalent, however, to the establishment of equality in terms of obligations between the two categories of participants in the civil proceedings, but to proportionality with the tasks incumbent on them in terms of the application of foreign law. Therefore, the obligation to establish the content of the foreign law lies primarily with the court which, on the one hand, is also required to apply this law regardless of the position of the parties, as long as the conflicting norm refers to it, and, on the other hand, it is even better placed from the perspective of the instruments it has at its disposal (e.g. direct communication with the competent central authority designated by the Romanian State, respectively the Ministry of Justice). The party's obligation is of a secondary nature, so that any failure to fulfil obligations cannot lead to the removal of the court's burden of determining the content of the foreign law.

It therefore follows that the second paragraph of Article 2.562 of the Civil Code was not enacted by the legislator in order to relieve the court of law of the obligation to establish the content of the foreign law, but only to co-opt the party in the approach that it has to take.

Through these conclusions, the present study aims to contribute to the stabilization of the judicial practice in the matter, while raising new questions regarding how the court can be supported in an often complicated approach, but necessary for the resolution of disputes with a foreign element. Therefore, I consider it necessary to undertake future research with the objective of systematizing the modalities and mechanisms for determining the content of the foreign law.

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THE RIGHT TO PRIVATE LIFE, AS A RIGHT OF THE HUMAN PERSONALITY

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Abstract

Through a theoretical and practical approach, the study proves that the regulation of the right to private life, as an autonomous subjective right included the sphere of human personality rights, represents an innovative, progressive aspect of the current Civil Code, as a part of the modern trend of the civil law of protection of the human being. The study deals with issues of practical interest such as jurisprudential solutions in Romania regarding violation of the right to private life in the online environment, television shows and press articles. Though this work, we want to highlight the relationship between the right to private life and the right to free expression, as they have been analyzed in the E.C.H.R. jurisprudence and in national jurisprudence. At the same time, the criteria considered by the Romanian courts in granting compensations for violating the right to private life, and the differentiated amount of these compensations are also presented.

Keywords: civil tort liability, rights of personality, right to private life, Civile Code, jurisprudential solutions, right to dignity, moral damages.

1. Introduction

Enunciated by the European Convention on Human Rights (E.C.H.R.), freedom of expression (article 10) is, at the same time, an individual and indispensable right, as part of the freedom of each individual, but also a prejudicial right sometimes for others' rights achievement. More specifically, sometimes the right to freedom of expression as a fundamental right may affect the right to privacy of another person (article 8). Being a bivalent right (fundamental but also prejudicial), in the jurisprudence of the European court but also of the national courts, there is the problem of finding a balance between the exercise of the right to freedom of expression, on the one hand, and the protection of individual interests and rights belonging to other persons, on the other hand.

The freedom of expression in the E.C.H.R.'s view presupposes "duties and responsibilities", and its exercise may be subject to "formalities, constraints, restrictions or sanctions." Therefore, the possibility of state authorities to exercise certain interferences in the exercise of freedom of expression is explicitly recognized.

All these limitations of freedom of expression and the way in which they can be imposed by the state, gave rise to a non-unitary Romanian jurisprudence regarding the compensations granted for the interference in his private life, which we will analyze below starting from the provisions of domestic legislation in Romania.

The prejudice retained in the solutions of the national courts is related to the violation of the right to private life. The concrete determination of the amount of compensations equivalent to a non-patrimonial damage includes a dose of approximation. The moral compensations must represent a reasonable relationship of proportionality with the damage brought to the reputation, considering also the degree of damage of the protected social values, the intensity and the gravity of the damage brought to them. Although moral values cannot be quantified in money, the harm done to them causes serious suffering and deep damage in various forms, the intensity of which necessarily requires monetary compensation. Due to their non-patrimonial nature, an accurate assessment of moral damages in money is not possible. In general, the extent of damages is achieved by reference to factual elements, assessed in their complexity by the courts. But, in order to maintain their character of "equitable satisfaction", the compensations for moral damages must be granted in an amount that does not divert them from the purpose and finality provided by law, so as not to become an unjust material benefit, without causal justification in the damage suffered. As such, the only criterion considered by the Romanian courts is that the compensations granted should maintain a reasonable ratio of proportionality with the damage suffered, in order to ensure a fair compensation of the injured value, and without becoming an unjustified enrichment of the injured person.

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2. The right to private life according to the European Convention on Human Rights

The European Convention on Human Rights regulates in art. 8 The right to respect for private and family life, stipulating: "(1) Every person has the right to respect for private and family life, his home and his correspondence. (2) The interference of a public authority in the exercise of this right is not allowed except to the extent that this interference is provided by law and if it constitutes a measure, which in a democratic society, is necessary for (...) protecting the rights and freedoms of others."

At the same time, freedom of expression, defended by art. 10¹, occupies a special place among the rights guaranteed by the European Convention on Human Rights, being the basis of the concept of "democratic society", which summarizes the system of values on which the Convention is built. . In this sense, article 10 paragraph 1 of the European Convention on Human Rights establishes: "Everyone has the right to freedom of expression". Although guaranteed by the state authorities as a fundamental right, freedom of expression cannot be exercised beyond any limits. As a social freedom, freedom of expression is subject to limitations, restrictions according to the purposes provided by art. 10 paragraph 2 of the Convention, namely: respect for general interests (national security, territorial integrity of contracting states, prevention of crimes, protection of public health and morals, guaranteeing the authority and impartiality of the judiciary), as well as interests of personal order (reputation and rights belonging to other people).

Therefore, the right to freedom of expression is not an absolute right. It involves certain restrictions such as the reputation and rights to privacy of other persons.

The European Convention on Human Rights guarantees that the state respects the right to private life, and freedom of expression is regarded both as an individual right and as a limit to the right to privacy. Even if an individual engages in a public debate of general interest, he is obliged not to exceed certain limits in terms of respecting - in particular - the rights of others, he is also allowed to resort to a certain dose of exaggeration, or even provocative, more precisely to be exaggerated in his statements.² However, such an attitude violates the Convention if it does not comply with the requirements imposed by paragraph 2 of Article 10.

One principle established in the E.C.H.R. jurisprudence must be taken into account, according to which the right to privacy (art. 8) and the right to free expression (art. 10) "deserve a priori equal respect."³ Thus, the European Court has shown in its constant jurisprudence that a balance must be found between freedom of expression and the right to privacy, a balance that requires the liability of persons guilty of making derogatory statements, if the statements represent factual situations, without supporting evidence, made in a real campaign of denigration and reiterated in public, through media and bad faith.⁴ Thus, the positive obligation deriving from art. 8 of the Convention must be applied if the statements likely to affect a person's reputation exceed the limits of acceptable criticism, from the perspective of art. 10 of the Convention.

In other words, it is up to the national courts to ensure the right balance between the two rights, by balancing the conflicting rights, starting from the criteria identified in the ECHR jurisprudence⁵ as relevant in terms of preference for the right to free expression, on the one hand or respect for privacy on the other hand: contribution to a debate of general interest, notoriety of the person concerned and the subject of the report, previous behavior of the person concerned, content, form and repercussions of the publication.

¹ According to Article 10 of the afore mentioned Convention "Paragraph 1 - every person has the right to free expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Paragraph 2- The exercise of these freedoms involving duties and responsibilities may be subject to formalities, conditions, restrictions or sanctions provided by law, which constitute necessary measures, in a democratic society, for national security, territorial integrity or public safety, defense of order and the prevention of crime, the protection of health or morals, the protection of the reputation or rights of others, in order to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary.

² See Case Willem vs. France, Decision no. 10883/2005, point 33, 16th July 2009, available at www.echr.coe.int.

³ See Case Timciuc vs. Romania, Decision no. 28999/03, point 144, October 12th, 2010; Mosley v. United Kingdom no. 48009/08, point 111, 10th May 2011, available at www.echr.coe.int.

⁴ See Case Petrina vs. Romania, (Application 78060/01), Decision of October 14th, 2008, Case of Andreescu vs. Romania, (Application no. 19452/02), Decision of June 8th, 2010, final on September 8th, 2010, available at <https://jurisprudentacedo.com>.

⁵ See Case of Axel Springer AG vs. Germany, no. 39954/08, February 7th, 2012, Case Ralu Traina Filip vs. Romania no. 46131/06, 27th May 2014, available at www.echr.coe.int.

2.1. The right to private life according to the Romanian Civil Code and Constitution

The Romanian Civil Code offers an express regulation to the right to dignity and the right to privacy, distinctly, including them in the broad category of personality rights. We say that the two rights are correlative to the right to freedom of expression, because in the judicial practice of the Romanian courts, they are also considered limits of freedom of expression. Specifically, freedom of expression must not affect the privacy and dignity of others. In other words, freedom of expression ceases where the right to dignity and privacy begins. In addition, the national courts justify their solutions for granting compensation in case of violation of the limits of the right to freedom of expression, as we will show; starting from the non-observance of the right to privacy and dignity of another person.

In accordance with the provisions of art. 71 of the Civil Code "(1) Everyone has the right to respect for his private life. (2) No one may be subjected to any interference in his personal or family intimate life (...) without his consent or without observing the limits provided in art. 75. (3) It is also forbidden to use, in any way, the ... information from the private life of a person, without his consent or without observing the limits provided in art. 75." On the same line of ideas, art. 72 provides "(1) Every person has the right to respect for his dignity. It is forbidden any damage to the honor and reputation of a person, without his consent or without respecting the limits provided in art. 75." In the view of the legislator, the right to dignity is a complex right containing the right to honor and reputation of the person. The right to dignity, the right to honor and the right to reputation are aspect of the right to private life.⁶

The right to free expression is regulated in the Constitution of Romania⁷ as a limit to the right to private life. Thus, the Romanian Constitutional Court has defined free expression as "the possibility of a person to manifest himself orally, in writing, through images, through sounds or through any means of public communication, thoughts, opinions, religious beliefs and creations of any kind", stating that "freedom of expression has a complex content, including freedom of speech or freedom of the press."⁸

At the same time, the freedom of expression is not absolute, knowing the restrictions imposed by art. 30, paragraphs 6 and 7 of the Constitution. A first category of limits aims at protecting the rights of private life of another person, "freedom of expression cannot prejudice the dignity, honor, private life of the person nor the right to one's own image" (art. 30 paragraph 6 of the Constitution).

In this sense, article 74 of the Civil Code provides that: The following may be considered as invasions of privacy: c) recording or using the image or voice of a person in a private space without their consent; d) broadcasting news, debates, investigations or audiovisual reports regarding private, personal or family life, without the person's consent h) using, in bad faith, the name, image, voice of another person."

2.2. The jurisprudence of the European Court of Human Rights in the matter of private life

The European Court of Human Rights (E.C.H.R.) has shown, in its constant jurisprudence, that a balance must be found between freedom of expression and the right to private life, a balance that requires the liability of persons guilty of committing derogatory statements and posting images of persons, through means of communication through the press and mass media in bad faith⁹.

In its jurisprudence, the European Court of Human Rights based its solutions on the provisions of art. 8 of the Convention regulating the right to private life, appreciating that the publication by the press of some photos that showed a person alone or in the company of other people, in their daily life, concerns their private life. It was noted that the issue is not the dissemination of ideas, but the information that contain personal information, and the images that appear in the media often constitute continuous harassment and even persecution of the

⁶ See P. E. Ispas, *Freedom of expression and the right to private life. Defense of personal non-patrimonial rights*, in Titu Maiorescu University Law Review, no. XXI /2022 Hamangiu Publishing House, Bucharest, 2022, pp.35; H. D. Dumitru, *Libertatea de exprimare și viața privată. Conexiuni constituționale și civile*, în Pandactele Române, no. 5/2012.

⁷ In Romania, freedom of expression falls into the category of fundamental rights and freedoms, being regulated by art. 30 of the Constitution according to which "(1) The freedom to express thoughts, opinions or beliefs and the freedom of creations of any kind, by word of mouth, in writing, by images, by sounds or by any means of communication in public are irrefragable. (2) Censorship of any kind is prohibited (3) Freedom of the press also implies the freedom to set up publications. (4) No publication may be suppressed."

⁸ See Decision of the Romanian Constitutional Court no. 756 of June 1st, 2010, available at www.ccr.ro

⁹ See Case Petrina vs. Romania, (application 78060/01), Decision of October 14, 2008; Case Andreescu vs. Romania, application no. 19452/02, available at www.echr.coe.int.

person in question. In this sense, it was established that all states have the positive obligation to protect private life under the Convention¹⁰.

Synthesizing the criteria identified in the E.C.H.R. jurisprudence as being relevant regarding the preference for the right to free expression, on the one hand, or respect for private life, on the other hand, they are the contribution to a debate of general interest, the object of the report, the content, the form and the repercussions of the publication and the notoriety of the person concerned¹¹.

Regarding the first criteria, if the statements made are necessary for informing the public or generate public debate, the right of private life and the right to free expression are not violated, and the compensations are not granted. In the Case of von Hannover v. Germany¹², the plaintiffs, Princess Caroline von Hannover and her husband, Prince Ernst August von Hannover, complained of the refusal of the German courts to prohibit any further publication of two photographs which had been made during their vacation, without their knowledge, and which appeared in a German magazine. The photos were accompanied by an article about the tendency of wealthy people to rent out their vacation homes and contributed to a debate of general interest. The Court found that there was no violation of art. 8 of the European Convention and observed that it could not be stated that the article in question was a mere pretext for publishing the respective photograph or that the connection between the article and the photograph was purely artificial. The Court stated that there was no violation of the right to private life, because the article contributed to a debate of general interest.

In the case of Couderc and Hachette Filipacchi Associés v. France¹³, the national courts convicted the applicants - the publication director and editor of the weekly magazine *Paris Match* - following the publication in May 2005 of a ten-page article, announced on the cover of the magazine with the title "Albert of Monaco: A., the secret child", and which contained several photographs. The applicants claimed that the judgment against them constituted an unjustified interference with the exercise of their right to freedom of information. The Court decided that it was violated art. 10 (freedom of expression) of the Convention, finding that the arguments put forward by the French government regarding the protection of Prince Albert's private life and his right to his own image could not be considered sufficient to justify the interference and that the domestic courts had not ensured a balance between the right to respect for private life and the right to freedom of expression. The disputed article was indeed concerned with the sphere of Prince Albert's private life, but he considered that the essential element of the information contained in the article — the existence of the child — exceeded the private sphere, given the hereditary nature of the Prince's functions as head of state, covering a subject of public interest.

The second criteria, the negative consequences concern the way in which the victim's family, professional and social situation was affected. In the case of *Hachette Filipacchi et Associés v. France*¹⁴, the Court found a violation of the right to private life, taking into account the negative consequences of the publication of the image on the family. A few days after the assassination of a French prefect, the weekly magazine *Paris Match* published an article entitled "La République assassinée" (The Assassinated Republic). A two-page color photograph, taken shortly after the murder, showed the prefect's lifeless body on the ground in a pool of blood, facing the camera. The prefect's widow and children, invoking their right to privacy, made an urgent request to the courts, requesting the confiscation of copies of all magazines in which the photograph appeared and the prohibition of their sale, under penalty of payment of fines. The applicant company complained of the order requiring it to make public a statement that the prefect's photograph had been published without the consent of his family. The Court ruled that the measures taken by the French courts were proportionate to the legitimate aim pursued – to protect the rights of others – and therefore necessary in a democratic society. The Court observed, in particular, that the result of the publication of the photograph in question, in a magazine with a very large circulation, consisted in amplifying the trauma experienced by the victim's close relatives, so that they were justified in claiming that their right had been violated to respect for private life.

In the case of *Bogomolova v. Russia* (June 20, 2017), a photograph of a child appeared on the cover of a brochure intended to inform the public about the efforts of local authorities to protect orphans and the assistance available to families wishing to adopt. The applicant complained that the unauthorized publication of her son's photograph violated their right to private and family life. The Court decided that art. 8 was violated

¹⁰ See Case of Van Hannover vs. Allemagne, June 24, 2004, available at www.echr.coe.int

¹¹ See Case of Axel Springer AG vs Germania, application 39954/08, Decision of February 14, 2012, available at www.echr.coe.int.

¹² See Case of von Hannover v. Germany (Application 8772/10), available at www.echr.coe.int.

¹³ See Case of Couderc and Hachette Filipacchi Associés v. France, November 10, 2015, available at www.echr.coe.int.

¹⁴ June 14, 2007, available at www.echr.coe.int.

(the right to respect for private life) of the Convention. In particular, it found that Russian courts did not consider whether the applicant had given her consent to the publication of the photograph, focusing instead on her consent for her son to be photographed. The Court also emphasized the false impressions and consequences that could be drawn from the context of the photograph, namely that the child photographed had no parents or was abandoned, and the effect this fact could have on the public perception of the applicant's relationship with her son.

Regarding the third criteria, a public persons cannot claim a protection of their privacy life just like a common person, unknown to the public. As a rule, according to the practice of the European Court due to their status as a public person, they could not claim compensations. In the case of *Sihler-Jauch and Jauch v. Germany*¹⁵ (May 24, 2016), the German magazine *Bunte* published an illustrated article with several photos from the wedding of a well-known TV presenter and his and his wife's unsuccessful attempts before the German courts to obtain compensation. The applicants alleged that their private lives were not sufficiently protected by the domestic courts. The Court found that there was no violation of the right to private life, that the German courts had carefully balanced the claimants' right to respect for their private life and the magazine's right to freedom of expression. The domestic courts recognized the fundamental importance of the second applicant's notoriety, and in the general interest of society in relation to their wedding.

In the case of *Lillo-Stenberg and Saether v. Norway*¹⁶, a musician and an actress, well-known in Norway, complained that the media had invaded their private lives during their wedding in August 2005. The marriage ceremony was held on an island in the Oslo Fjord and was accessible to the public. Without the couple's consent, the weekly magazine *Se og Hør* later published a two-page article about the wedding, accompanied by six photographs. The Court decided that there was no violation of art. 8 (the right to respect for private and family life) of the Convention, the event being a well-known one.

By contrast, in *Peck v. the United Kingdom*¹⁷, the applicant, who was suffering from depression, complained about the disclosure in the media of footage taken by a closed-circuit television (CCTV) camera installed in the street, which shows him walking alone with a kitchen knife in his hand, attempting to commit suicide by cutting his veins, which led to images of him being widely published and circulated. The Court decided that the disclosure of the filmed sequence was not accompanied by sufficient guarantees and constituted a disproportionate and unjustified interference in the private life of the applicant, violating art. 8 (the right to respect for private life) of the Convention.

In a similar case¹⁸, the police summoned journalists and allowed them to take photographs, with a view to their publication, in which the applicant was shown in police custody, after he and another private person had been arrested by officers of a drug squad for possession of 800 grams of cannabis. The following day, a photograph of the applicant, with visible signs of violence, was published on the front page of the newspaper, together with an article calling him a "drug trafficker." The Court decided that it was violated art. 8 (the right to respect for private life) of the Convention. The behavior of the police officers, who summoned journalists and allowed them to film the applicant at the police station, without his consent and with a view to publishing the photographs in the mass media, constituted an interference with the applicant's right to respect for his private life.

2.3. The jurisprudence of the Romanian courts regarding the protection of the right to private life

Starting from the criteria identified in the E.C.H.R. jurisprudence, the courts have the task of ensuring the fair balance between the two rights, by balancing the conflicting rights – the right of free expression and the right of private life.

In the light of the principles laid down by the E.C.H.R. jurisprudence, the Romanian courts applied their own mechanisms in awarding moral damages¹⁹ for the violation of the right to private life, noting contradictory solutions and moral damages varying from 200 euros to 30,000 euros. Also, Romanian Civile Code established in article 71 that "(1) Everyone has the right to respect for his private life. (2) Nobody can be a subject of an interference into private and family life ... without his consent". The dissemination of news, debates, images,

¹⁵ May 24, 2016, at www.echr.coe.int.

¹⁶ 16 January, 2014 available at www.echr.coe.int.

¹⁷ 28 January 2003, available on www.echr.coe.int.

¹⁸ See *Toma v. Romania*, 24 February 2009, available at www.echr.coe.int.

¹⁹ See P. E. Ispas, *op.cit.*, pp. 41-44.

photo, reports on personal or family life without the consent of the person is considered an infringement of privacy.

Thus, in a number of similar cases ²⁰, the defendant being the same person, was obliged to pay compensation for violating the right to private life in the online environment in the amount of 2000 euros, respectively 4000 euros. In the mentioned cases, the defendant published on her Instagram page, in the story section, a series of photos or videos accompanied by comments regarding the plaintiffs' actions - public persons - for the promotion of certain services and products. The posts of the defendant (public person) in the online environment took place in the context in which in the public space there were numerous debates regarding "influencers" and their promotion of numerous products and services, without assuming any responsibility towards their followers and without specifying that the posts represent paid advertising, giving rise to a phenomenon of manipulation of the general public. The defendant motivated in defense that, as a public person, felt the need to take attitude and show her followers that not everything that appears on Instagram is real and not everything that these influencers post should be accepted as such. Under the prerogative of the public interest, she began to publish these satirical posts about influencers.

Compared to the fair balance between the two rights, the right to the freedom of expression of the defendant and the right to private life and reputation of the plaintiffs, the court is called to determine whether the posts are justified by a public interest and generate a debate of general interest. Indeed, the defendant's posts appeared on the background of the subject of interest of the influencers, however, the Bucharest Tribunal, in solving the cases, held that the incriminated statements reach a minimum threshold of gravity that would justify the finding of an injury to the plaintiff's image. In terms of the balance between public and private interest, the Tribunal noted that the defendant's posts cannot contribute to a real discussion and alert on the subject in question (disguised advertising and promotion of products on social networks for money), through the offensive expressions used, certainly reaching an overcoming of the balance that should exist between the public and the private interest. In other words, given the tone used in Instagram posts (slandorous, offensive expressions), the actual informational content transmitted, the social framework in which the statements are made, the courts found that the balance between public and private interest was not maintained. Furthermore, the repeated nature of the insulting and denigrating expressions addressed to the applicants (poor, hacks, criminal bitches) was taken into account, as well as the actual length of time in which these posts followed one another, as there were not just a few, isolated posts, but several successive posts.

The defendant's accounts published online, although revealing the origin of the products and their real value, accusing the plaintiffs' commercial practices, did not give the readers the opportunity to discern and verify the findings themselves, as they intentionally divert their attention from the information provided to aspects about the plaintiffs' private life, the colorful language used being likely to ridicule and minimize the plaintiffs' activity to the point of derision. Thus, it has been concluded that the ultimate purpose of the reports was not to hold public debates of general interest regarding the online behavior of influencers, but to ridicule the person in question, as a result of a language that transcends the boundaries of what is accepted as permitted by ECHR jurisprudence according to art. 10. Consequently, the role of public alert that the defendant wished to assume was diverted from its purpose recognized in a democratic society, consisting in informing the public about a matter of general interest, which clearly acts with the intention of deteriorating the public image of the plaintiffs, the abusive conduct manifested in the online environment thus failing to fall under the protection of Article 10 of the European Convention on Human Rights.

The plaintiffs requested, as an accessory end to the action, the obligation of the defendant to delete all the materials from the social media accounts (Facebook, Instagram, YouTube). In defense, the defendant invoked the fact that the alleged slanderous actions took place on the Instagram platform, story section, being notorious for the fact that these "stories" were available and could be viewed for only 24 hours. After this interval, the posts were automatically deleted from the respective section and were no longer available for viewing by the followers of the person who posted them. Unanimously, the courts pointed out that although the posts disappear after 24 hours, this aspect does not diminish the responsibility of the one who posts them, as long as they were continuous and during the time they were available for viewing they were followed by a large number of people.

²⁰Civil Sentence no. 1629/24th November 2021 of the Bucharest Tribunal, Civil Sentence no. 1388/19th October 2021 of the Bucharest Tribunal, unpublished..

Regarding the satirical character of the defendant's statements, the court did not share the opinion in the sense that the posts were exclusively a pamphlet. In this regard, it was argued that the defendant's posts included insulting words to the plaintiffs as a private person, and could not be strictly a pamphlet addressed to them as an influencer, meaning that the defendant's desire cannot be retained exclusively to sanction the actions of influencers in Romania. Thus, the courts held that the posts in question were not merely satirical pamphlets, but ways in which the defendant publicly and repetitively expressed her views on the plaintiffs' activities, using offensive, slanderous expressions, without them be argued through ideas, information or critical comments.

In this sense, the national courts²¹ appreciated that the freedom of expression is not and must not be absolute, and the right to opinion and expression, like any other right, must be exercised within its natural limits, not being able to prejudice the rights and legitimate interests of other persons. In addition, it has been consistently stated in the remaining legal practice that the use of literal artifices does not change in any way the denigrating nature of the statements made through the blog and Facebook account, as defamation of a person can be done even if the information is presented in the convenient shelter of a pamphlet.

As regards the plaintiffs' status of public persons, although in the ECHR jurisprudence it has been held that public persons are more exposed to interference with their privacy²², however, the Romanian courts adopted a diametrically opposed solution. In the litigations taken as a point of reference, the Romanian courts concluded that although the plaintiffs are an active presence in the online environment, and although they have the status of public person who chose to expose their private life to the public, they benefit from protection according to art. 10 from the ECHR, provided that the limits of freedom of expression have been exceeded.

In relation to the arguments retained above, in a single isolated case, but similar to those presented above²³, the court interpreted restrictively the jurisprudential criteria imposed by the case of Axel Springer AG vs. Germany in the analysis of the balance to be ensured between the right to freedom of expression and the right to privacy: contribution to a general interest debate, notoriety of the person concerned who is subject of the article, the previous behavior of the person in question, the method of obtaining the information and their veracity, the content, form and impact of the publication.

In relation to the stated criteria, first of all, the court found that the issues addressed by the defendant were related to a public interest issue, being topics of debate in a democratic society as they concerned the activity of public figures as influencers for the promotion of products or services. Secondly, the court held that the plaintiff was a public person, being well-known that she had participated in numerous TV shows and mass media interviews. In fact, the ECHR has seen that public persons, although recognized as having a legitimate expectation of respect for their privacy, still cannot claim a way of protecting their privacy identical to that applicable to individuals unknown to the public, so they are more exposed to capturing issues from their private lives. Thirdly, the defendant's actions were determined by the plaintiff's activity on social platforms, this being the source through which the information commented by the plaintiff was obtained together with other articles posted online, articles that were later reproduced and commented by the defendant. The central reason for the claim for damages, namely the main dissatisfaction of the plaintiff, is that the defendant used insults, obscene messages and trivialities against her in order to prove her bad faith, with the consequence of violating the right to privacy. Although the language used by the defendant was vulgar and licentious, the court (Bucharest Tribunal) took into account the fact that the European Court of Human Rights itself ruled in the sense that art. 10 of the Convention is applicable not only to "information" and "ideas" that are favorably accepted by the recipient or qualified as harmless or indifferent, but also to those that offend, shock or disturb, such a view being imposed by the demands of pluralism, tolerance and liberalism. Thus, the use of vulgar terms is not in itself decisive in the evaluation of some expressions, vulgarity can serve some stylistic purposes, style can be part of communication as a form of expression, benefiting from protection. In that regard, the Court held that, although the language used by the defendant was vulgar and offensive, the main purpose of her posts was to draw the public's attention to the services and products of blamable quality promoted by the plaintiff as an influencer. Thus, the language

²¹ Having as starting point the case of *Lingens vs. Austria*, Case No 12/1984, 8th July 1996, available at www.echr.coe.int.

²² See Case *Von Hannover vs. Germany* (no.1) no. 59320/00, 24th June 2004, available at www.echr.coe.int.

²³ Civil Sentence no. 869 of March 22nd, 2021, of the Bucharest Tribunal unpublished. In fact, on the Instagram page used by the defendant, several instagram stories (photos and videos) were published referring to the plaintiff's person, which were accompanied by several comments of the defendant regarding the plaintiff's person and actions. The defendant also published on the you tube platform two recordings called episode 1 - Nobody stops me, and episode 2 Pinocchio asks for barbers. From the evidence administered, it appears that the defendant gave the plaintiff the nickname Pinocchio and under that name she ridiculed her and addressed offensive words to the plaintiff.

of the defendant cannot be subordinated to a single purpose of denigrating, and therefore there is no impetuous need to justify interference in the exercise of freedom of expression.

As regards the photographs in which the plaintiff appears, they were made public on the internet, which is why they no longer fall under the protection of the right to privacy, regardless of the context in which they were used, after being made public. The fact that these photographs were unrealistically and exaggeratedly distorted by the defendant, including by overlapping some drawings, cannot lead to the conclusion that they were intended to reflect or suggest reality, such a portrayal being a caricature by using satirical elements and falling within the scope of freedom of expression. In conclusion, in this case the court considered that the existence of an illicit action likely to cause damage cannot be retained and rejected the claim for damages.

Even if the newspaper benefits from the highest degree of protection, in one case²⁴, the Court granted only 500 euros compensation. The writer qualified his published paper/work as a pamphlet and posted photos from a private party using funny words and phrases about the appearance of a public figure under the influence of alcohol. However, the court ruled that the public's right to be informed did not cover published photos and comments that exclusively concern the private lives of public figures. The author qualified his work as a pamphlet, but the court established that a simple warning like – „This work is a pamphlet” – could not be an exonerating cause of liability.

3. Conclusions

The prejudice retained in the solutions of the national courts is related to the violation of the right to dignity and to private life.²⁵ The right of every person to dignity, as protected by the Romanian Constitution and by Article 72 of the Civil Code, has both a subjective component consisting in the feeling of honor that each person has towards himself and an objective one, in relation to prestige, to the reputation that a person enjoys in a community. In general, the courts consider that the second component of this right is achieved through the statements and comments of the authors of online posts. Offensive posts infringe on the right to privacy of others, as long as the content of the statements concerns to a large extent strictly their private actions.

In assessing the amount of moral damages, the national courts, in the absence of legal evaluation criteria, start from the fact that the moral damages are granted as a sanction. They are compensations meant to penalize the perpetrator guilty of harm to privacy and, at the same time, are a severe warning to those who intend in the future to harm the reputation and dignity of others. Specifically, they are established by assessing, in relation to the negative consequences suffered by the victim physically and mentally, the importance of the damaged values, the extent to which these values were damaged, the intensity with which the consequences of the injury were perceived, the extent to which it was affected the professional and social family situation. In quantifying moral damages, these conditions are subject to reasonable assessment on an equitable basis, corresponding to the actual and real damage caused, so as not to lead to an unjust enrichment without just cause of the person claiming such moral damages.

The general criterion considered by the Romanian courts is the one adopted by the European Court of Human Rights in the *Tolstoy Miloslavsky* case²⁶, respectively that of the degree of damage to the protected social values, the intensity and severity of the harm brought to them. According to the courts, the compensations must respect a principle of proportionality with the ascertained damage as well as a principle of equity following that the injured person will receive a fair satisfaction for the moral damage suffered, with compensatory effects without this being an excessive sanction for the perpetrator or an illicit or unjustified enrichment for the victim.

In addition, in the absence of a legislative criterion of assessment, the courts grant moral damages through national jurisprudence reporting, more precisely at the maximum or minimum level of damages granted by other courts in similar cases. This requires the court to make the applicability of the jurisprudential solutions for granting moral damages, in the case brought before the court, taking into account the concrete circumstances of the case. Unlike the material compensations, the extent of which is determined on direct evidence, the

²⁴ Sentence no. 27099/2016 of the District Court 1 Bucharest, unpublished

²⁵ In one case, compensation in the amount of 500 euros was granted, the damage being quantified according to the number of views. A defamatory article was published on the author's blog page, being viewed by a number of 1436 people, out of which 846 would have accessed the like button. (Sentence no.21473 of 29 .11.2016 of the District 1 Court unpublished).

²⁶ See Case no. 8/1994, Decision no. of 13th July 1995, available at www.echr.coe.int.

compensations for moral damages are established on the basis of the evaluation of the court, performed in each case. This is the reason why the compensations vary from 200 euros reaching 30,000 euros.²⁷

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²⁷ See Civil decision no. 964 of April 22nd, 2021 of the High Court of Cassation and Justice. In this case, the court granted damages in the amount of 15,000 euros, considering that the statements made by the defendant and propagated in the online virtual environment, can be accessed further and do not represent information that would justify a public interest and be presented to the public without the consent of the person concerned. The statements are denigrating, defamatory, offensive, ironic and are insufficiently verified, regarding the personal life of the plaintiff, accusing her in an indirect way of drug use, which she would mask in the form of a cocktail of medications, aspects which have not been sufficiently verified and for the proof of which no pertinent evidence has been brought, some imputed facts having even a criminal connotation.

THEORETICAL AND PRACTICAL CONSIDERATIONS ON THE SUSPENSION OF ENFORCEMENT PROCEEDINGS IN THE CONTEXT OF SETTLEMENT UNDER LAW NO. 77/2016

Diana Andreea TOMA*

Abstract

In recent judicial practice, Romanian courts have increasingly been confronted with cases in which enforcement proceedings initiated at the request of creditors have been suspended following the debtor's submission of a notice of giving in payment. Although, the legislative intent behind the regulation of this suspension mechanism was to temporarily halt enforcement proceedings in order to facilitate negotiations between the parties, potentially leading to the extinguishment of the outstanding debt, recent judicial practice demonstrates that debtors frequently rely on the provisions of Article 5(3) of Law No. 77/2016 without a genuine intention to discharge the debt through the transfer of ownership of the immovable property.

A particularly sensitive issue arises where the debtor submits a notice of giving in payment, notifies the bailiff thereof, and subsequently requests the suspension of enforcement proceedings. In such circumstances, the bailiff is, in principle, obliged to apply the provisions of Article 5(3) of Law No. 77/2016, even in cases where the substantive conditions set out in Article 4 of the same law appear to be manifestly unfulfilled.

This situation raises significant questions regarding the extent to which a bailiff may exercise discretion in assessing the applicability of Article 5(3) of Law No. 77/2016, particularly in cases where the notice of giving in payment is manifestly unfounded.

This paper seeks to examine the theoretical and practical challenges arising from abusive requests for the suspension of enforcement proceedings, highlighting the potential for serious prejudice to creditors and the need for a balanced interpretation of the relevant legal provisions.

Keywords: *judicial practice, enforcement proceedings, consumer protection, immovable property, mortgaged property.*

1. Background to the enactment of the law

Law No. 77/2016 on the transfer of immovable property in lieu of payment came into force on 28 April 2016 and aims to settle the debts incurred by individual debtors who are no longer able to meet their obligation to repay the borrowed sums. It was introduced to assist those who had taken out mortgage loans but subsequently found themselves unable to honour them due to unforeseeable economic changes.

A primary cause was the economic crisis of 2007–2008, a period when property values were very high, but following this period, property prices fell considerably. This led to the depreciation of the national currency and, consequently, to rising interest rates. In this situation, debtors faced enforcement proceedings, but the proceeds from the sale of the property failed to cover the entire debt, leaving the debtor both homeless and with an outstanding loan.

In this context, which was unfavourable to borrowers, the legislature decided to intervene and enacted Law No. 77/2016 on the transfer of immovable property in lieu of payment. Thus, the main purpose of the law was to help the debtor settle the entire debt by transferring ownership of the mortgaged property. In this way, the debt was discharged and the creditor could satisfy their claim through the subsequent sale of the mortgaged property.

At the same time, the law on the transfer of immovable property in lieu of payment is not a 'rigid' law. It allows the parties to the contract, prior to the debt being extinguished through the transfer of the property in lieu of payment, to have the opportunity to adapt it through renegotiation, precisely in order to 'save' the agreement between the parties.

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Furthermore, another particularly important point to note is that this law is aimed at consumers rather than professionals. Thus, consumers are protected from any unfavourable and unforeseeable economic circumstances in relation to the other party, which is the bank, a professional.

Article 3 of the Law provides for the consumer's right to have their debts arising from credit agreements, together with ancillary costs, discharged without additional costs, by transferring ownership of the mortgaged property to the creditor, if the parties fail to reach another agreement within the time limit provided for by law. Furthermore, Article 1(3) of the Law stipulates this benefit for the consumer even where the creditor's claim arising from a credit agreement is secured by the suretyship and/or joint and several liability of one or more co-debtors or co-payers."¹

2. Amendments to Law No. 77/2016 in the context of the Constitutional Court's decisions

Currently, Law No. 77/2016 on payment in kind has not remained in force in its original form but has been subject to constitutional review, undergoing numerous amendments. Over time, the Constitutional Court of Romania has issued several decisions clarifying, limiting or removing certain provisions of the law, without, however, declaring it unconstitutional as a whole.

In Constitutional Court Decision No. 623/2016, the Court ruled that the law is constitutional only to the extent that the courts verify the existence of the condition of unforeseeability in each individual case. In other words, the payment-in-kind mechanism cannot operate automatically, but must be assessed by the judge, who verifies whether an exceptional change in circumstances has occurred that renders the performance of the contract excessively onerous.

Subsequently, in its decision of 17 June 2021, the Constitutional Court of Romania found the provisions of Article 8(5), second and third sentences, to be unconstitutional. These provisions established, in certain situations (for example, following the enforcement of the property), an almost automatic presumption of unforeseeability. The Court considered that such an absolute presumption contravenes the principle of legal certainty and its own previous decisions, as it eliminates the specific analysis of each case. Consequently, these provisions were struck down.

Consequently, the amendments made to Law No. 77/2016 by the Constitutional Court did not aim to abolish the mechanism of payment in kind, but to modify the way it is applied. The Court imposed an obligation on the courts to verify the existence of unforeseeability in each case and removed any automatic presumption that would have deprived the creditor of the right to an effective judicial review. Thus, the law remained in force, but in a form interpreted through the CCR's decisions.

However, certain aspects that are quite significant in practice have remained subject to constitutional review. One such example could be Article 5(3), Article 6(1) and Article 7(4) of this law, which regulate the suspensive effect of enforcement proceedings following the transfer of the immovable property in lieu of payment.

From the moment it came into force until now, the Law on Payment in Kind, despite all the decisions of the Constitutional Court concerning it, has never been examined by the constitutional court from the perspective of how it is applied, in the sense of taking into account the requirements that this law entails for it to be applicable and regarding the various specific situations in which it is invoked, that is, by analysing the behaviour of those persons who have come to, because the law itself has allowed them to, submit notices of payment in kind, even though they know that the legislative act in question does not apply to them."²

A very common example in the current judicial practice of the courts is the situation where the enforcement proceedings against a debtor are suspended following the submission of a notice of payment in kind.

As previously stated, Article 6(1) of Law 77/2016 provides that "From the date of receipt of the notice referred to in Article 5, the creditor's right to take action against co-debtors, as well as against personal or mortgage guarantors, shall be suspended." Therefore, from the moment the notice is received, any enforcement proceedings against the debtor are prevented or suspended.

¹ Irina Sferdian. "The legal nature of the transfer of immovable property in lieu of payment under Law No. 77/2016". Romanian Journal of Private Law, No. 3/2016, p. 10.

² <https://www.juridice.ro/500563/suspendarea-executarii-silite-in-situatia-notificarilor-de-dare-in-plata-nelegale-the-effect-of-gross-negligence-or-the-legislator's-intent.html>.

However, the law has not addressed the situation where debtors acting in bad faith repeatedly and unjustifiably issue successive notices of payment in kind, thereby indefinitely preventing enforcement proceedings.

Indeed, there is a procedural remedy for this situation, namely the creditor filing an objection against the notice of payment in kind. In our view, this cannot be considered a genuine remedy, given that enforcement proceedings will be suspended for the duration of the dispute, until a final decision is handed down. Even in this situation, once the proceedings have concluded, nothing prevents the debtor from unjustifiably issuing another notice of payment in lieu, thereby suspending the enforcement proceedings against the debtor once again.

In order to devise an effective solution, the following legal issue arises concerning the bailiff's ability to prevent this abuse of rights by the debtor.

A first solution could be to recognise the bailiff's right to determine that the conditions set out in Article 4(1)(a) to (e) of Law 77/2016 are not met. We are referring to clear, straightforward conditions for which we consider that the intervention of a judge is not necessary. In our view, the bailiff has the power to verify, of their own accord, whether the debtor qualifies as a consumer, whether the amount of the debt is less than the equivalent in lei of 250,000 euros, and whether the debtor has not previously been convicted by a final judgment for offences relating to the loan for which the application for payment in kind is being sought.

In the grounds set out in paragraphs 92, 93 and 94 of Decision No. 42/2022 of 27 June 2022, the High Court states that 'the referring court, although it considered that the preliminary ruling procedure should be initiated regarding the interpretation of the provisions of Article 6(1) in relation to Article 4(1)(a) and (b) and Article 5(1) and (2) of Law No 77/2016, did not specify, in concrete terms, what the difficulty in interpreting these legal provisions consists of, nor did it assert or argue that the legal provisions at issue in the case are doubtful, unclear or open to multiple interpretations. Moreover, apart from the fact that the order of the referring court lacks any argument regarding the ambiguity, lack of clarity or multiple meanings of the legal texts whose clarification is sought, it is noted that the applicant did not encounter any difficulties in interpreting them. In the referring court's view on the point of law forming the subject of the request, the suspensive effect provided for in Article 6(1) of Law No 77/2016 applies as a matter of law even in the event of manifest failure to meet the conditions of admissibility laid down in Article 4(1)(a) and (b) (1)(a) and (b) and/or the formal requirements for the notice of payment in kind, as provided for in Article 5(1) and (2) of Law No. 77/2016, since the legislature made no distinction in this regard and established a procedural remedy for the scenario in which the debtor exercised their right to submit the notice in bad faith. According to Article 7(5)¹ of Law No 77/2016, in the event that the creditor's challenge to the notification procedure provided for in Articles 5 and 6 is upheld by a final judgment, penalties and any damages resulting from the notification procedure may be claimed only if the challenging creditor proves that the debtor acted in bad faith when submitting the notification.'³

Therefore, we cannot conclude that the High Court interpreted the aforementioned provisions in such a way as to exclude the possibility of the enforcement officer refusing to suspend enforcement when the debtor issues a clearly unfounded notice of payment in kind. The decision to dismiss the referral, mentioned above, relates more to the grounds for the referral and less to the legal issue before the enforcement court.

3. Practical difficulties in applying Law No. 77/2016

Furthermore, we consider that a mere document on which Law No. 77/2016 is mentioned and which bears the marginal heading 'notice of payment in kind' should not have the power to block the entire enforcement proceedings. In this situation, the bailiff would be reduced to a mere data collector with no discretion as to the legality of the acts performed by the debtor. Indeed, the bailiff cannot take the place of the court; however, given that an entire enforcement procedure would be blocked by a manifestly unfounded act on the part of the debtor, we consider that the bailiff has the power to rule on the fulfilment of certain simple conditions, such as those listed above (Article 4(1)(a)-(e) of Law 77/2016).

Furthermore, the remedy to which the High Court refers may, in the case of a debtor acting in bad faith, constitute a false solution. Thus, although the creditor lodges an objection to the notice of payment in kind, enforcement proceedings will in any event be suspended until the judgment becomes final. Furthermore, once enforcement proceedings are resumed, nothing prevents the debtor from issuing a new notice of payment in

³ Decision No. 42/2022, handed down by the High Court of Cassation and Justice, Panel for the Resolution of Legal Issues, paras. 92, 93, 94.

kind, which will have the effect of suspending enforcement. This course of action by the debtor could be perpetuated, as the legal provisions, strictly interpreted, permit it.

A rigid interpretation of the legal rules could lead to significant abuses of the law by debtors acting in bad faith. Not even a judicial fine for submitting notifications in bad faith would be likely to cause them significant concern, as the vast majority of these debtors do not hold cash assets that could be seized.

In legal doctrine⁴, it has been stated that ‘the right to obtain the discharge of the debt through the compulsory transfer of ownership of the mortgaged property is a right of claim, which presupposes both the fulfilment of the (formal) conditions of admissibility provided for in Article 4 of Law No. 77/2016, as well as the fulfilment of the elements substantiating unforeseeability, a condition implied pursuant to Article 11 of this law.”

Among the conditions set out in Article 4 of Law No. 77/2016 is the condition of the existence of unforeseeability. Through the amendments made by Law No. 52/2020 to Law No. 77/2016, the legislature has expressly enshrined unforeseeability as the legal basis for the mechanism of payment in kind, transposing into law the approach already established in constitutional case law and in the practice of the courts.

Thus, unforeseeability is defined as that exceptional situation, arising after the conclusion of the credit agreement, independent of the parties’ will, which causes a significant imbalance in the performances and renders the performance of the obligation excessively onerous for the debtor. In this context, the court is required to verify the existence of a substantial change in the circumstances taken into account at the time of contracting, which exceeds the inherent risk assumed by the agreement.

The new element introduced by Law No. 52/2020 consists in the establishment of legal presumptions of unforeseeability, intended to ease the burden of proof on the debtor. These include, in particular, a fluctuation in the exchange rate exceeding 52.6% compared to the time the contract was concluded, as well as an increase in the monthly payment obligation of more than 50%. However, these quantifiable criteria do not remove the role of the court, which retains the power to assess whether the legal conditions are met and to determine whether the contractual burden is in fact excessive.

Therefore, with regard to the condition set out in Article 4(1)(e) of Law 77/2016, we consider that the assessment of unforeseeability is a matter for the court. Consequently, whenever the other conditions are met, when it comes to assessing the condition regarding unforeseeability, the bailiff is obliged to suspend enforcement proceedings, in accordance with the provisions of Article 7(7) of Law No 77/2016.

4. Methods of applying the law on payment in kind in judicial practice

In judicial practice, it has been established that ‘the debtor S.E.D. benefited from the provisions of Article 6 of Law 77/2016; enforcement was suspended until the final resolution of the objection lodged against the initial notices, however, the issuance of successive notices can no longer produce this effect, given that they are identical in content. Law 77/2016, which regulates this procedure, is not limited to the possibility of issuing a single notice and does not stipulate that the suspension applies only once during this extrajudicial procedure, nor does it provide debtors with a procedure that can be used repeatedly, without proof that new circumstances have arisen, distinct from those initially invoked, such as to lead to a different outcome of the objection. It noted that the respondent debtor had submitted successive notifications, identical in content, which leads to the conclusion that the notification of 3 December 2021 was submitted solely to obtain a stay of enforcement. The purpose of the procedure provided for by Law 77/2016 is not to suspend enforcement for a period of time, but to extinguish the debt through payment in kind, a purpose which cannot be said to have been pursued by the respondent as it was aware of the grounds for upholding the appeal lodged against the initial notices.”⁵

Furthermore, in the same decision, the Court of Appeal held that “In such circumstances, the trial judge correctly found that the notice sent on 9 December 2022, identical in content to that previously sent on 3 December 2021, was drawn up for the sole purpose of delaying enforcement proceedings and not for the purpose provided for in Article 5 of Law 77/2016, namely to transfer ownership of the property in order to settle the debt arising from the mortgage loan agreement.

⁴ https://www.juridice.ro/642863/suspendarea-executarii-silite-in-temeiul-legii-nr-77-2016-cand-masura-este-nejustificata-exista-oare-remedii-legale-pentru-inlaturarea-ei.html#_ftn7, op. cit. V. STOICA, *The Law on Payment in Kind. Arguments and Solutions*, Hamangiu Publishing, Bucharest, 2016, pp. 26–27.

⁵ Civil Decision No. 292/AP of 28 March 2024, handed down by the Braşov Tribunal.

Therefore, in the absence of any new elements in the notice sent on 9 December 2022, the bailiff, and subsequently the court of first instance, correctly found that the requirements set out in Article 6(1) of Law 77/2016 for the suspension of enforcement proceedings were not met.”⁶

The solution outlined above contains certain nuances established by the court. Thus, the court ruled that the bailiff was correct in refusing to suspend enforcement when the debtor gave notice of the payment in kind for the second time. In practice, it was found that only upon the second notice of payment in kind was the bailiff entitled to refuse the request to suspend enforcement. This approach was also supported in light of the grounds for upholding the challenge against a previous notice of payment in kind, brought before a court of law.

Consequently, certain scenarios may arise regarding the bailiff's ability to refuse to suspend enforcement proceedings where the basic conditions, listed above, concerning the notice of payment in kind are clearly not met. On the one hand, the bailiff could refuse to suspend enforcement proceedings as early as the first notice of payment in kind, where the substantive conditions thereof are manifestly unfounded (barring unforeseeable circumstances, as previously noted). On the other hand, there is the possibility that the bailiff might refuse to suspend enforcement only when the second notice is worded identically to the first, against which the creditor's objection had previously been upheld.

5. Conclusions

From our point of view, neither option is incorrect. Where the debtor acts in bad faith and submits a notice of payment in kind, the bailiff may refuse to suspend enforcement proceedings from the very first notice that is manifestly unfounded. For example, if the notice is not issued by a consumer but by a professional, we consider that the bailiff, as a legal professional, is capable of assessing this condition and refusing the suspension of enforcement proceedings requested by the debtor. Otherwise, the creditor will be obliged to lodge an objection against the notice of payment in kind, and enforcement proceedings will be suspended until a final decision is handed down by the court. Even if the challenge against the notice of payment in kind is heard under urgent proceedings, in accordance with Article 7(2) of Law 77/2016, the creditor loses valuable time in terms of satisfying their claim.

One possible way to optimise the functioning of the enforcement system and, by extension, to relieve the burden on the courts, is to recognise a limited but effective role for the bailiff in filtering out clearly unfounded notices of payment in kind. In the context of the regulations established by Law No. 77/2016, the mechanism for suspending enforcement operates, in practice, as a tool susceptible to abuse, generating a significant volume of litigation, such as challenges to enforcement or applications for suspension, which overload the courts without, in most cases, raising complex legal issues.

To the extent that the bailiff could refuse to suspend enforcement in cases where notifications contain obvious defects of legality, this would serve as a genuine preliminary filter against abusive or dilatory applications. Such an intervention, limited exclusively to a summary review of apparent legality, would have the effect of reducing the number of cases brought before the courts, restricting their jurisdiction to situations involving a genuine legal dispute.

At the same time, it could reduce the number of unfounded notices of payment in kind, used in practice to delay enforcement proceedings, which would contribute to making enforcement procedures more efficient and to strengthening the certainty of legal relationships. The reduction in the courts' workload would manifest itself not only through a decrease in the volume of cases, but also through the possibility of allocating judicial resources to complex cases requiring in-depth analysis.

However, such a solution must be designed in accordance with the functional limits of the bailiff, who cannot substitute the court in examining the merits of the case. Consequently, their competence should be strictly limited to identifying situations of manifest illegality, so as not to undermine the debtor's right of access to justice. Conceived in this way, the mechanism could serve as an effective tool for balancing the need for speed in enforcement proceedings with fundamental procedural safeguards.

⁶ *Ibidem*.

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DO WE NEED TODAY LEGAL HISTORY? FOR WHAT PURPOSE?

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Abstract

In general, nowadays history as a science is viewed somewhat with scepticism. For many, history is only a science of the past and only of the past. In the same way, many relate to the history of law.

On the one hand, an argument in support of this conduct would be that the too complex problems that today's law indicates are little inclined to be solved by resorting to the past.

On the other hand, a large part of the judges in Western Europe and not only regard Romanian law as the last solution in establishing the balance and moderate rules in the private law space.

The truth is probably in the middle.

The old law should not be idolized or mythologized, but it should be regarded as an object of reference and understood as a product of a certain historical epoch.

However, we do not exclude that through its study we will obtain useful conclusions to redress the legislation in force. The present study tries to synthesize certain aspects of the millennial evolution of the partnership contract in order to see if the main ideas and mechanisms are still valid, can be adapted or perhaps useless.

Keywords: legal history, partnership contract, corporation, Roman law, French Civil Code, Romanian Civil Code, BGB.

1. Introduction

At present, in most law textbooks or even of some extensive treatises on commercial law, the introductory chapter on the history of commercial law has disappeared to a large extent, if not entirely. It would seem that due to the rapidity of life and the need to quickly know what interests us or what really matters, the history of law has become an unimportant subject.

Even in academic environments in countries known for their traditional approach to the history of law, this seemingly pragmatic vision seems to have prevailed in recent decades. At most, a few ideas are presented that fail to form even a general image for the reader, not to arouse critical reflections¹.

Those who want to know more must turn to studies on the history of law, studies that are currently not very attractive especially due to the pragmatic approach that students currently have.

As a result, in the absence of readers, scholars in this field publish articles in specialized journals that are, on the one hand, a very technical and unfriendly language and approach, and on the other hand, fall under the label of research activities without obvious practical effects.

In reality, in our opinion, the history of law is as relevant as possible, as it allows us to understand the context in which various institutions and rules were born, while allowing us to understand whether they are still validated by the context in which we live and whether a reform of the law is necessary, in which directives that reform should be addressed.

In this regard, we try to outline some considerations having as the object of our analysis the company contract.

2. The Legal History of Company Contract

2.1. Civil Partnership in Roman Law

Most likely unknown during the early centuries of Roman society, the contract of partnership, as it took shape at the dawn of the modern era, gradually emerged as the need for cooperation within the community became increasingly pressing.

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¹ See e.g. Fr. Galgano, *Diritto commerciale* (Zanichelli, Bologna, 2013) 1-5.

Its origins appear, in reality, to lie in common ownership. In this regard, one of the earliest attested forms was the *societas omnium bonorum*, namely the universal partnership of all present and future assets². This form seems rather to have been an institution arising upon the death of a *pater familias*, a critical situation in which his descendants would remain in a state of consensual co-ownership, initially referred to as *consortium*.

Subsequently, as the exchange economy developed, various forms of association became established in practice, such as *societas unius rei*, involving the contribution of a single asset; *societas omnium bonorum*, based on the pooling of certain assets; and *societas quaestus* (or *lucris*), which concerned the sharing of future profits.

Eventually, associations also pursued what would today be described as ‘professional’ purposes, involving the use of contributed assets for the production and commercialization of goods (*societas alicujus negotiationis*).

During the consolidation of Roman law, the partnership contract could be reduced to several essential elements, closely interconnected:

- the contribution of each partner, which could consist of property rights, sums of money, or even personal activity;
- a common interest, namely the pursuit of material benefits by all partners;
- the intention to form a partnership (*affectio societatis*), without which the situation would merely amount to co-ownership; and
- a lawful purpose.

Accordingly, the partnership may be defined as a *bonae fidei* contract whereby two or more persons agree to associate in a common activity with the aim of obtaining mutual benefit³.

2.2. The Issue of Civil Partnership During the Period of Economic Revival

Beginning with the 11th century, when the incursions of northern peoples ceased or were contained and monarchies consolidated their power, Western Europe experienced a revival of the exchange economy.

Participation in commercial operations often took place through associations, typically among family members, which gave rise to the term *compagnia*, derived from the Latin *cum* (with) and *panis* (bread). This term would later be adopted in both English and continental legal systems.

Such an association represented a close union in which everything was shared: daily bread and risks, as well as capital and labor. Over time, this form evolved into what became known as the general partnership, whose members were jointly and severally liable, in principle without limitation, extending beyond their respective shares to all their assets.

2.3. Emergence of Commercial Companies

The era of the Crusades, characterized by the expansion of Western society on multiple levels, significantly accelerated economic growth, particularly in the Mediterranean basin and in the Italian city-states.

This led to what historian Roberto Lopez termed a “commercial revolution,” gradually transforming the rigid estate-based society of the Middle Ages. Trade between East and West expanded exponentially, generating substantial profits for merchants in port cities such as Venice, Genoa, Pisa, and Amalfi.

Despite relatively favorable political and economic conditions, maritime trade required constant and substantial financing to sustain exchanges and increase profits.

However, medieval European society was fundamentally structured around social estates, which imposed rigid behavioral norms and limited social mobility. As a result, commerce was largely restricted to certain urban groups, while nobles and clergy—despite their wealth—were precluded from engaging in such activities due to status-based incompatibilities.

Moreover, with the exception of Jewish communities, Christians were, at least in theory, prohibited from lending money at interest, as this would have violated religious precepts.

² See P.F. Girard, *Manuel élémentaire de droit romain* (Rousseau, Paris, 1929) 611 et seq.

³ See P. du Plessis, *Borkowski's textbook on Roman Law* (OUP, Oxford, 2010) 285 et seq.

2.4. Recourse to Legal Fiction

Beyond any kind of debate, regardless of social constraints, it is clear and relevant that the desire for financial gains and the opportunity for trade have significantly determined the search for legal forms to be able to participate in the large exchanges of goods.

Unlike the partnership contract under Roman law, the new contracts implied a differentiation of economic roles.

In this setting, contractual arrangements such as the *societas maris* or *commenda* emerged in Genoa, while analogous forms developed in Venice under the designation *collegantia*. Despite variations in terminology, these agreements generally involved two parties entering into a temporary association.

The analysis of the mechanism of the new contract indicates that, in principle, both parties bore the risks inherent in an international commercial business, but at the base one of the parties had the quality of debtor and the other of debtor.

The success and spread of these contractual forms seems to have their cause in the fact that the underlying lending operation overlapped with the association and a fair assumption of potential risks.

It should therefore come as no surprise that within a few decades the forms of association described above spread throughout most of Europe, from the shores of the Italian peninsula to the north of the Holy German Empire.

2.5. Obligations of the Parties and the Relevance of Risk

The risks as I mentioned were assumed in a fair manner. On the one hand, the person who contributed most of the capital did not take any particular risks. Obviously, there is a probability that the business will be damaged, but in the worst case it could lose the invested capital.

On the other hand, the trader or the person who is directly involved in carrying out the commercial operations assumes all the risks since he was the person visible from the outside and the creditors had only a legal relationship with him.

3. Civil Partnership under the Former Civil Code

As we know, the modern regulation of the partnership contract was first made by the French Civil Code adopted in 1804.

According to Article 1832 ‘la société est un contrat par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter’.

The French Civil Code, also known as the Napoleonic Code, has been a source of inspiration for many European codes, including those adopted in the twentieth century or even recently.

In the case of Romania, as far as the nineteenth century is concerned, it is widely accepted that the civil code adopted during the regime of Alexandru Ioan Cuza was the French one. The Commercial Code—essentially a faithful reproduction of its French counterpart and applicable at least in Wallachia since 1840— has no definition for the civil partnership.

The provisions governing civil partnerships contained in the Civil Code were also applicable to commercial companies, in the absence of contrary legal norms.

Article 1,491 of the 1864 Civil Code reproduced the text of the French Civil Code. According to this provision, a partnership was defined as ‘a contract whereby two or more persons agree to contribute something in common, with the aim of sharing the benefits that may result therefrom.’

More, Article 1,492 para 2 stated that ‘each member of a partnership must contribute either money, other assets, or their industry.’

This definition was rightly criticized in earlier doctrine for failing to acknowledge the possibility of losses arising during the performance of contractual obligations. No one could guarantee the achievement of the objectives pursued at the time of concluding the contract, particularly when such objectives depended not only on the parties’ performance but also on the actions of third parties or on events beyond their control.

In the event of losses, such losses—and the inherent risks—should, evidently, be borne by all partners.

Compared to the French regulation, the German one seems broader.

Section 705 of the German Civil Code (BGB) emphasized the pursuit of a common purpose within the partnership: ‘Through the partnership agreement, the partners mutually undertake to promote the achievement

of a common purpose in the manner determined by the contract, in particular by making the agreed contributions.⁴

The regulation was subsequently supplemented to clearly distinguish between civil partnerships and those engaged in relations with third parties.

The nature of the legal act was not contested so long as the mechanism created by the assumed obligations was easily understood and did not raise interpretative difficulties in practice.

As previously noted, the limited partnership was regarded as a contract, since it constituted a legal act concluded between two parties, and the rights and obligations arising from it had a clearly defined material object.

However, over the course of the modern era, the involvement of an increasing number of persons in the creation and operation of commercial companies—parties who simultaneously held both common and individual legally grounded interests—significantly altered the general perception of the legal nature of the company.

The contractual theory has remained, to this day, the simplest means of explaining this legal construction, which has become one of the central pillars of commercial law.

In line with 19th-century French doctrine and jurisprudence, which were predictably grounded in the aforementioned legal provisions, Romanian legal thought likewise regarded both civil and commercial companies as contracts—a form of civil legal act.

At a basic level, the company was understood as an agreement between two or more persons who assume obligations in order to achieve a clearly defined objective.

4. Legal Nature

Certain obvious elements cannot be denied: a company is established through the agreement of two or more parties; the parties assume obligations and acquire rights; there is a common objective; and the legal act—commonly referred to as a “contract”—is recognized as such by the major European civil codes.

However, a more in-depth analysis of the partnership contract reveals a number of features that clearly distinguish it from other contractual forms. As such, a traditionalist might regard it as an “atypical” contract, while a more innovative scholar might consider it an as yet undefined variety of civil legal act.

First, the partnership is an agreement concluded by at least two parties. Article 942 of the 1864 Civil Code defined a contract as an agreement concluded “between two or more persons in order to create or extinguish a legal relationship between them,” while Article 943 provided that a contract is “bilateral or synallagmatic when the parties bind themselves reciprocally to one another.”

Second, the partnership does not constitute a legal act whose essential obligations—or even a single essential obligation—can be performed immediately.

Third, the partnership entails obligations not only toward the other partners, as in typical civil contracts, but also toward the partnership itself. Notably, Chapter III of the 1864 Civil Code is, in our view, misleadingly entitled “On the obligations of partners among themselves and in relation to others,” since Article 1,503 provides that “each partner, in relation to the partnership, is considered a debtor for everything he has promised to contribute.” In other words, the legislator implicitly acknowledges—albeit ambiguously—that obligations initially assumed toward the other parties are ultimately regarded as obligations toward the partnership itself.

Fourth, in all European states, the establishment of commercial companies was subject to administrative or judicial authorization, even if such authority was often limited to verifying the formal and substantive conditions of the contract. Consequently, the mere will of the partners could not, in itself, give rise to a legal entity endowed with legal personality.

Finally, the creation of a company generates rights and obligations of a diverse nature, particularly in the case of commercial companies. This is evident even from the analysis of authors adhering to the traditional theory. Thus, from the interpretation of Articles 1,832 and 1,855 of the French Civil Code, it follows that “any partnership contract presupposes the convergence of four essential elements: (1) a contribution from each

⁴ For comparative analysis see K. Peglow, *Le contrat de société en droit allemand et en droit français comparés* (Paris, LGDJ, 2003), *passim*.

partner; (2) the intention to obtain profits for distribution; (3) the participation of all partners both in profits and, in the event of failure, in losses; and (4) *affectio societatis*, that is, the intention to form a partnership”⁵.

The organic link between the second and fourth elements outlines a pattern of social behavior not encountered in other contractual frameworks.

Whereas in civil contracts the rights granted to parties are primarily patrimonial and economically quantifiable, in the case of a company, the partner or shareholder acquires a complex set of rights of a diverse nature—both patrimonial and non-patrimonial—many of which are essential for the effective exercise of the former and are not found in other types of civil contracts.

The theory of the institution began to take shape alongside the criticism directed at the traditional theory, a criticism supported at the beginning of the 20th century first by Otto von Gierke in German doctrine, and later by Lorenzo Mossa in Italian doctrine.

The interwar period, through its economic crises and the new challenges posed to liberalism, became fertile ground for such a debate. It had become evident that the so-called partnership contract shared similarities with various other civil contracts, but at the same time displayed a number of unique features.

Moreover, it could no longer be denied that the organization and functioning of companies generated numerous practical issues, which led the legislator to intervene successively and increasingly “densely” in regulating the partnership contract.

Particularly in the case of commercial companies, the amendments to the Civil Code had already become noticeable since the second half of the 19th century, so much so that one may state, without fear of error, that the company is the contract whose regulation is in a continuous and often unpredictable process of change and evolution.

As a result, already in the first half of the 20th century, the partnership contract—especially the commercial one—was governed by a substantial body of supplementary and mandatory rules.

Furthermore, while in the previous century at most three forms of commercial companies were regulated, later historical developments and the experience accumulated in major European economies required the emergence and regulation of new corporate forms.

Consequently, in this context, the autonomy of the parties appears to lose substance, as associates or shareholders conclude a contract shaped within numerous legal limits. In other words, associates or shareholders have a reduced role in drafting the constitutive acts.

While they retain greater autonomy with respect to the partnership contract itself, regarding the company’s statute they undertake to comply with an already established set of rules governing the organization and functioning of the commercial company.

“When a contract is concluded, the parties freely determine the obligations that bind them, within the limits of public order. By contrast, we are dealing with an institution when the parties accept or reject as a whole a body of rules without being able to modify them, unless the law expressly allows it.”⁶

From another perspective, the theory of the institution explains why the rights of associates are not definitively established by the constitutive act, but may be modified by a majority decision if the life or prosperity of the company so requires, and why the administrators or directors of the company are not mere agents of the associates, but represent the authority responsible for achieving the common objective.

Initially, the institutional theory was used to provide the existence of the company with a more flexible framework; later, when regulation became too abundant, the contractual theory regained prominence even from the legislator’s perspective.

It has sometimes been said that this theory is imprecise, without explaining the reasons underlying such a conclusion.

It is true that the theory of the institution tends to overshadow, at least apparently, the agreement of the associates, which becomes rather a preliminary stage to the emergence of patrimonial and non-patrimonial relations that will unfold continuously or at least at key moments in the company’s evolution.

However, the will of the associates is by no means eliminated, whether we consider the initial will or its subsequent expression, and comparisons with the institution of marriage must be made with great caution, since

⁵ Ch. Houpin, H. Bosvieux, *Traité général théorique et pratique des sociétés civiles et commerciales et des associations: avec formules*, vol. I (Paris, Sirey, 1925) 60.

⁶ Y. Guyon, *Droit des affaires*, vol. I : *Droit commercial général et sociétés*, (Paris, Economica, 1995) 91.

despite multiple similarities, associates may introduce numerous changes to the company, even if these must comply with various limits and conditions.

5. Discussions and conclusions

It should not surprise or prove the assertion or claim that the partnership contract under Roman law, the contract of 'commenda' of the Middle Ages or the contract by which the large shipping companies were formed at the beginning of the seventeenth century – the forerunners of the joint stock companies of the nineteenth or twentieth century – are legal constructions that correspond to the economic context, should not be surprising, nor should it be proved. social and cultural aspects of that era, are products of that era.

At present, we believe that the theory of society needs to be reconstructed almost from scratch because the context has changed essentially.

As arguments for a new definition of the concept of contract, we can point to the numerous disputes related to the conflicts between shareholders, between the majority and the minority, on the nature of the shareholders' rights as well as on the responsibility of the corporate bodies.

If we make an inventory of these still unsolved problems, we will notice that the definitions of the codes of the past centuries no longer have anything to do with what the commercial company represents.

These definitions focused on issues such as the creation of share capital, or the social interest of the partners in setting up the company, on formalities and very little on aspects related to the long-term functioning of the company.

It is becoming increasingly clear that a company contract is not just a simple contract with easily defined obligations, that it is a contract by which a group of people is organized rather than rules are established regarding the formation of the share capital and the earnings.

As such, the problems of the future corporate law, truly autonomous from commercial law, will no longer be those related to the share capital but those related to the organization of the company, to corporate governance.

Can we in this context still see the company as a contract by which several partners pool various goods as in Roman law, when the majority of partners do not participate in the social life?

Can we look at today's joint-stock companies from the perspective of 400 years ago when they were few throughout Western Europe and were strictly regulated and controlled by the monarch and his officials?

From this point of view, I believe that we should not reiterate those notions and definitions that are appropriate to the context of a historical moment. Today's commercial society requires a profound reform starting from its adaptation to the historical moment we are living in.

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1.3. PUBLIC LAW

REINVENTING DATA PROTECTION IN THE AI ERA: CHALLENGES FOR THE KNOWLEDGE SOCIETY

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Abstract

The unprecedented expansion of artificial intelligence across all sectors of contemporary society calls into question the traditional normative architecture of personal data protection, built upon the premises of the classical information age and upon the paradigm of a rational, informed human subject capable of effectively exercising their digital rights. This article proposes a systematic analysis of the challenges that artificial intelligence systems — in particular large language models, facial recognition systems, automated decision-making algorithms, and predictive surveillance networks — pose to the normative framework of data protection, with particular emphasis on the European Union's General Data Protection Regulation (GDPR) and the EU Artificial Intelligence Act (AI Act). The first part examines the structural tensions between the fundamental principles of data protection law — informed consent, data minimisation, purpose limitation, and the right of access — and the intrinsic characteristics of artificial intelligence systems: algorithmic opacity, implicit knowledge transfer, large-scale data exploitation, and the capacity to infer sensitive attributes from ostensibly anonymised data. The second part analyses the normative responses developed at European and international level, critically examining mechanisms of algorithmic accountability, transparency and explainability obligations, data protection impact assessments, and the role of supervisory authorities in the AI context. The third part identifies the emerging challenges of data protection in the knowledge society: biometric and neural data, generative artificial intelligence and intellectual property rights, data sovereignty and jurisdictional conflicts, as well as the ethical dimension of AI governance. The conclusions underscore the necessity of an integrated, coherent, and adaptive normative framework capable of protecting individuals' fundamental rights in the face of the processing power of artificial systems, without stifling the technological innovation essential to the knowledge society.

Keywords: *personal data protection, artificial intelligence, GDPR, AI Act, fundamental digital rights.*

1. Introduction

The knowledge society - a concept forged at the intersection of information sociology, the digital economy, and political philosophy - is defined by its unprecedented capacity to produce, process, distribute, and valorise information as a fundamental resource underpinning social organisation and economic value creation¹. In this society, personal data has become a strategic resource of an importance comparable to oil in the industrial economy of the twentieth century - a metaphor well-established in contemporary academic and political discourse which, however imperfect, accurately captures the dynamics of power in the current digital ecosystem². Artificial intelligence (AI) constitutes the technological vector that transforms this resource into the capacity for action, prediction, and control, exponentially amplifying both the beneficial potential and the systemic risks of the data society. The normative framework for the protection of personal data, crystallised in Europe through Regulation (EU) 2016/679 - the General Data Protection Regulation (GDPR) - represented at the time of its adoption the most ambitious and comprehensive instrument for regulating personal data processing at a global level, establishing standards that have inspired similar legislation in dozens of jurisdictions. However, the GDPR was conceived within a technological paradigm that predated the explosion of deep learning systems, generative language models, and architectures of ubiquitous algorithmic surveillance. Its application to the latest generation of artificial intelligence systems reveals deep structural tensions arising from fundamental

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¹ Castells, M., *The information age: Economy, society, and culture. Vol. I: The rise of the network society* (2nd ed.), Wiley-Blackwell, 2010, p. 33.

² Zuboff, S., *The age of surveillance capitalism: The fight for a human future at the new frontier of power*. PublicAffairs, 2019, pp. 12-15.

incompatibilities between the normative logic of data protection and the technical logic of machine learning³. The adoption of the EU Artificial Intelligence Act (AI Act, Regulation [EU] 2024/1689) constituted a historic milestone in global digital governance: for the first time, a legally binding instrument of regional scope classifies AI systems according to their risk level and imposes specific requirements regarding transparency, robustness, human oversight, and accountability⁴. Nevertheless, the articulation of the AI Act with the GDPR and with the broader European data protection framework raises normative questions of considerable complexity, with direct implications for the design of AI systems, for organisational data processing practices, and for the exercise of individual rights in the digital space.

This article aims to critically examine the challenges that artificial intelligence poses to the normative architecture of data protection in the knowledge society, structuring the inquiry across three complementary chapters. The first chapter examines the structural tensions between GDPR principles and the technical characteristics of AI systems. The second chapter analyses the European and international normative responses, with particular emphasis on the AI Act and mechanisms of algorithmic accountability. The third chapter identifies the emerging challenges of data protection in the context of generative AI, neurotechnology, and data sovereignty. The research is grounded in a critical analysis of legal doctrine, European Union legislation, relevant jurisprudence, and reports of data protection authorities, aiming to offer a comprehensive and up-to-date perspective on one of the most dynamic and challenging fields of contemporary law.

2. Structural Tensions Between the GDPR Architecture and Artificial Intelligence Systems

The free, specific, informed, and unambiguous consent of the data subject constitutes one of the central legal bases for data processing under the GDPR⁵. This conception of consent, inherited from the Enlightenment tradition of individual autonomy and from the contractual theory of civil law, presupposes a rational, informed subject capable of evaluating the consequences of consenting to the processing of their data. Artificial intelligence systems undermine these premises in multiple and structural ways, generating what the doctrine has termed the digital consent paradox⁶. In the first place, the technical complexity of machine learning algorithms makes it practically impossible to genuinely inform data subjects about how their data will be used to train models, what inferences the system will produce, and what impact those inferences will have on their rights and interests. Privacy notices and privacy policies have reached a level of complexity that renders them unworkable as genuine instruments of information: empirical studies demonstrate that reading all the privacy policies of services used by an average American would require approximately 76 working days per year⁷. In the context of AI, this crisis of informed consent is amplified by the intrinsic opacity of deep learning models, which cannot be explained in terms intelligible to a general audience. In the second place, the dynamic nature of AI systems - which evolve continuously through incremental training, fine-tuning, and adaptation to new data - generates fundamental problems regarding the specificity and currency of consent. Consent granted at an initial moment for a particular purpose may become irrelevant or insufficient following substantial modifications to the algorithm or to the uses of the trained model. Article 7 of the GDPR provides for the right to withdraw consent; however, in the context of AI models trained on massive datasets, the withdrawal of consent and the effective erasure of an individual's data from the parameters of an already-trained model represents a first-order technical challenge, partially addressed by the concept of machine unlearning, but still far from a satisfactory normative solution⁸.

In the third place, AI models may operate on ostensibly anonymised or pseudonymised data, generating inferences about identifiable individuals without the input data formally constituting personal data. Re-identification techniques applied to anonymised data have demonstrated that anonymisation guarantees are far more fragile than initially assumed: landmark studies have shown that 87% of the US population can be re-

³ Wachter, S., Mittelstadt, B., & Russell, C. (2017). Counterfactual explanations without opening the black box: Automated decisions and the GDPR, *Harvard Journal of Law & Technology*, 31(2), 2017, p. 860.

⁴ European Parliament & Council, Regulation (EU) 2024/1689 of the European Parliament and of the Council on artificial intelligence (AI Act), *Official Journal of the European Union*, L, 2024, p. 1689.

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⁶ Solove, D. J., Introduction: Privacy self-management and the consent dilemma, *Harvard Law Review*, 126(7), 2013, pp. 1888–1903.

⁷ McDonald, A. M., & Cranor, L. F., The cost of reading privacy policies, *Journal of Policy for the Information Society*, 4(3), 2008, p. 550.

⁸ Cao, Y., & Yang, J., Towards making systems forget with machine unlearning, *Proceedings of the 2015 IEEE Symposium on Security and Privacy*, 2015, pp. 463–480.

identified by combining three seemingly innocuous variables - zip code, date of birth, and sex⁹ In the context of AI models trained on massive datasets, the capacity for re-identification is substantially amplified, raising profound questions about the effectiveness of current anonymisation techniques as a data protection mechanism (Narayanan & Shmatikoff, 2008).

3. Data minimisation and purpose limitation in the context of machine learning

The principle of data minimisation - enshrined in Article 5(1)(c) of the GDPR, which requires that data be adequate, relevant, and limited to what is necessary in relation to the purposes for which they are processed - stands in direct structural tension with the technical logic of machine learning systems. The performance of AI models is systematically and positively correlated with the volume and diversity of training data: the more data, the more robust and performant the model. This logic of data maximisation, which governs the data economy and the competitive strategies of AI companies, is diametrically opposed to the normative imperative of minimisation, generating a fundamental contradiction between legal standards and techno-economic imperatives¹⁰.

The principle of purpose limitation - Article 5(1)(b) of the GDPR - requires that data collected for a specific purpose not be subsequently processed in a manner incompatible with that purpose. In practice, AI systems present considerable difficulties in this regard: data originally collected for a healthcare service may subsequently be exploited to train financial scoring models; behavioural data of social media users may be used to train emotional recognition systems; location data may be aggregated to produce inferences about political beliefs or religious preferences. The compatibility of a secondary use of data for AI model training with the original purpose of collection represents an issue of remarkable normative complexity, which Recital 50 of the GDPR and the guidelines of the European Data Protection Board do not resolve in a satisfactory manner¹¹. The concept of privacy by design, enshrined as a legal obligation through Article 25 of the GDPR, requires the integration of data protection into the design of information systems from the initial conceptualisation phase. In the context of AI systems, privacy by design involves selecting architectures that minimise data collection - for example, through federated learning, which allows models to be trained without centralising raw data, or through differential privacy, which adds controlled statistical noise to protect individual data within aggregated datasets. Although these advanced privacy-preserving techniques represent significant advances, they entail technical trade-offs between data protection and model performance, and their voluntary adoption by the AI industry remains fragmented and insufficient¹².

4. Automated decision-making, explainability, and the right not to be subject to algorithmic profiling

Article 22 of the GDPR enshrines the right of the data subject not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects or similarly significantly affects them. This right, together with the right to explanations provided for in Recitals 71 and 75, has generated a remarkably intense debate in both legal and technical scholarship regarding the content and limits of the right to algorithmic explainability¹³. The Court of Justice of the European Union has not yet delivered a definitive ruling on the interpretation of Article 22; however, the jurisprudence of the German Federal Administrative Court and of French courts is beginning to trace more precise normative contours. The fundamental tension in this domain resides in the intrinsic incompatibility between explainability and performance in highly complex deep learning models. Neural networks with hundreds of millions or billions of parameters - such as GPT, BERT, and transformer-based facial recognition systems - cannot be explained in causal-effect terms intelligible to a non-specialist without significant losses in accuracy. Post-hoc explainability techniques - LIME, SHAP, Grad-CAM -

⁹ Sweeney, L., Simple demographics often identify people uniquely, Carnegie Mellon University, Data Privacy Working Paper, 2000, p.10.

¹⁰ Wachter, S., & Mittelstadt, B., A right to reasonable inferences: Re-thinking data protection law in the age of big data and AI., *Columbia Business Law Review*, 2019(2), 2019, pp.494–620.

¹¹ Malgieri, G., & Comandé, G., Why a right to legibility of automated decision-making exists in the general data protection regulation, *International Data Privacy Law*, 7(3), 2017, p.260.

¹² Dwork, C., & Roth, A., The algorithmic foundations of differential privacy. *Foundations and Trends in Theoretical Computer Science*, 9(3–4), 2014, pp. 211–214.

¹³ Wachter et al., *op.cit.*, p.49.

provide local approximations of model behaviour, but do not furnish veridical causal explanations of the decision-making process¹⁴. This fundamental technical limitation generates a direct conflict with the normative requirements of the GDPR regarding the transparency and explainability of automated decisions.

Algorithmic profiling - defined in Article 4(4) of the GDPR as any form of automated processing of personal data consisting of the use of such data to evaluate certain personal aspects relating to a natural person - has undergone unprecedented expansion in the contemporary digital economy. Credit scoring systems, recruitment algorithms that filter candidates through the analysis of CVs and social media activity, dynamic pricing algorithms, and risk assessment systems in the context of predictive justice are examples of algorithmic profiling with a direct and significant impact on individual rights and opportunities¹⁵. The regulation of these practices through Article 22 of the GDPR raises unresolved normative questions regarding the definition of significant effects, the possibilities for opposition, and the guarantees required for meaningful human intervention.

A landmark case in European jurisprudence regarding algorithmic profiling is the SCHUFA Holding AG case, in which the Court of Justice of the European Union held, in its judgment in Case C-634/21 (2023), that the provision of a probability score calculated on the basis of an individual's personal data constitutes an automated decision within the meaning of Article 22 of the GDPR where third parties have accorded that score decisive importance in establishing contractual relationships with the person concerned¹⁶. This judgment substantially clarified the scope of Article 22 and generated significant normative pressure on the financial services industry and credit scoring agencies.

5. European and International Normative Responses: The AI Act, GDPR, and Algorithmic Accountability

The EU Artificial Intelligence Act (AI Act, Regulation [EU] 2024/1689), adopted by the European Parliament on 13 March 2024 and entering into force on 1 August 2024, constitutes the first legally binding instrument for the horizontal regulation of AI systems at a global level and represents a piece of legislation of paradigmatic importance for worldwide digital governance¹⁷. Its normative architecture is structured around a four-tier risk classification system - unacceptable risk, high risk, limited risk, and minimal risk - which generates differentiated requirements proportionate to the potential harm of AI systems to fundamental rights, health, safety, and democracy.

AI systems with unacceptable risk - including state-run social scoring, emotion recognition in workplaces and educational institutions, predictive biometrics based on protected characteristics, and individualised predictive policing - are entirely prohibited on EU territory, with strict exceptions for remote biometric identification in public spaces for law enforcement purposes. This absolute prohibition reflects a clear value choice by the European legislator: certain uses of AI are considered incompatible with the fundamental values of the Union, irrespective of technical performance or economic advantages¹⁸. High-risk AI systems - including those deployed in critical infrastructure, education, employment, essential services, law enforcement, migration and asylum management, and the administration of justice - are subject to a stringent regime of requirements: pre-market conformity assessment, transparency registries, detailed technical documentation, risk management systems, data quality and robustness standards for training datasets, automatic activity logs, and meaningful human oversight. These requirements are complementary to, yet not identical with, the data protection obligations imposed by the GDPR, generating a dual compliance regime for operators who use high-risk AI systems in the processing of personal data¹⁹.

The articulation between the AI Act and the GDPR constitutes one of the central normative challenges of implementing the new European regulatory framework. The Data Protection Impact Assessment (DPIA), required by Article 35 of the GDPR for processing operations likely to result in high risks to individuals' rights, overlaps

¹⁴ Rudin, C., Stop explaining black box machine learning models for high stakes decisions and use interpretable models instead, *Nature Machine Intelligence*, 1(5), 2019, pp.206–215.

¹⁵ O'Neil, C., *Weapons of math destruction: How big data increases inequality and threatens democracy*, Crown Publishers, 2016, p.33.

¹⁶ Curtea de Justiție a Uniunii Europene. (2023). *OQ v. Land Hessen (SCHUFA Holding AG)*, C-634/21, ECLI:EU:C:2023:957.

¹⁷ European Parliament & Council, Regulation (EU) 2024/1689 of the European Parliament and of the Council on artificial intelligence (AI Act), *Official Journal of the European Union*, L, 2024, p.1690.

¹⁸ Helberger, N., Doshi-Velez, F., & Naudts, L., Toothless and timid or bold and brave? The vision behind the AI Act, *Algorithm Watch*, 2022, p.22.

¹⁹ Veale, M., & Zuiderveen Borgesius, F., Demystifying the draft EU Artificial Intelligence Act, *Computer Law Review International*, 22(4), 2021, pp.97–112,

partially with the conformity assessment provided for by the AI Act for high-risk AI systems. The European Data Protection Board has issued guidelines on the coordination of the two instruments; however, the practical implementation of simultaneous GDPR and AI Act requirements will substantially test the compliance capacities of organisations, in particular small and medium-sized enterprises²⁰.

6. Transparency, explainability, and accountability obligations in AI systems

Transparency obligations constitute a central element of both the GDPR and the AI Act, reflecting the shared conviction that individuals cannot effectively exercise their digital rights in the absence of adequate information regarding how their data are processed and the logic of automated decisions affecting them. The GDPR requires, through Articles 13 and 14, the provision of comprehensive information regarding the identity of the controller, the purposes and legal bases of processing, data recipients, and data subjects' rights. The AI Act adds specific requirements regarding the information of users about their interaction with AI systems, the obligation to label AI-generated content, and technical documentation requirements for high-risk systems²¹. The concept of algorithmic explainability - referred to in both technical and legal scholarship by the acronym XAI (eXplainable Artificial Intelligence) - has become an explicit object of regulation in the AI Act, which requires high-risk AI systems to be sufficiently transparent to permit human users and supervisors to interpret their outputs. This normative requirement has stimulated an emerging industry of XAI tools, but has also generated intense scientific debate regarding the technical feasibility of veridical explainability for deep learning models and the risk that post-hoc explanations may be misleading or incomplete²². The tension between performance and explainability remains one of the fundamental technical limitations of the field.

Accountability - the principle enshrined in Article 5(2) of the GDPR, requiring controllers to demonstrate compliance with data protection principles - acquires additional dimensions in the AI context. The complex accountability chains in the AI ecosystem - foundation model providers, AI system providers, operators using AI systems, and data subjects - generate considerable difficulties in attributing responsibility for harms caused by automated decisions. The AI Act introduces a more precise allocation of responsibilities between providers and users of AI systems, but the relationship between AI Act liability and civil tort liability for AI-caused harm remains partially and imperfectly regulated²³. National data protection supervisory authorities - in Romania, the National Supervisory Authority for Personal Data Processing (ANSPDCP) - will acquire, under the AI Act, new competences and additional oversight tasks regarding AI systems used in personal data processing contexts. Strengthening the institutional and technical capacity of these authorities is a sine qua non condition for the effective enforcement of the new regulatory framework: the investigation of opaque AI systems, the technical assessment of algorithmic compliance, and the sanctioning of violations in highly technical domains require expertise that transcends the traditional legal training of supervisory authority staff.

7. Data subjects' rights in the context of AI-based processing

The catalogue of data subjects' rights enshrined in the GDPR - the right of access (Article 15), the right to rectification (Article 16), the right to erasure (Article 17), the right to restriction of processing (Article 18), the right to data portability (Article 20), and the right to object (Article 21) - proves insufficiently adapted to the technical realities of AI-based processing. The effective exercise of these rights presupposes the capacity of controllers to identify and extract an individual's data from large-scale processing systems - a substantial technical challenge in the context of AI models trained on datasets of billions of elements, entailing high costs and risks to the integrity of the models²⁴. The right to data portability - an instrument designed to stimulate competition in digital markets and to reduce lock-in effects generated by network externalities - carries significant transformative potential, but is conditioned upon the existence of interoperable technical formats

²⁰ European Data Protection Board, Guidelines 06/2022 on the interplay between the application of Article 3 and the provisions on international transfers, EDPB, 2023, p.15.

²¹ European Parliament & Council, Regulation (EU) 2024/1689 of the European Parliament and of the Council on artificial intelligence (AI Act), Official Journal of the European Union, L, 2024, p.1689.

²² Rudin, C., op.cit., p.210.

²³ Floridi, L., Cowls, J., Beltrametti, M., Chatila, R., Chazerand, P., Dignum, V., & Vayena, E., AI4People — An ethical framework for a good AI society: Opportunities, risks, principles, and recommendations, Minds and Machines, 28, 2018, pp. 689–707.

²⁴ Mantelero, A., The EU proposal for a general data protection regulation and the roots of the 'right to be forgotten'. Computer Law & Security Review, 29(3), 2014, pp.229–235.

and common data representation standards that the AI industry has not yet uniformly adopted. European initiatives to create common data spaces - in the domains of health, agriculture, mobility, and finance - seek to build data portability and interoperability infrastructures at European scale, but their implementation requires substantial investment and complex institutional coordination²⁵.

The right to erasure - popularly termed the right to be forgotten following the Court of Justice of the European Union's ruling in *Google Spain SL v. Agencia Espanola de Proteccion de Datos*²⁶ - acquires a specific technical dimension in the context of AI. The erasure of an individual's data from a training database does not automatically result in the elimination of knowledge acquired by the model through processing that data. Machine unlearning techniques - procedures for retraining or modifying models to eliminate the influence of specific data - are still in the research phase and have not yet attained the maturity required for industrial-scale implementation²⁷. This technical gap generates an unresolved normative tension between the legal obligation to erase data and the technical reality of trained AI models. The remedial mechanism of the GDPR - comprising the right to an effective judicial remedy against controllers and supervisory authorities (Article 79) and the right to compensation for material or non-material damage suffered as a result of a breach of the Regulation (Article 82) - has generated an emerging national jurisprudence of growing impact. Administrative fines imposed by national authorities - including sanctions in the order of billions of euros imposed on companies such as Meta, Google, and Amazon - have demonstrated that the GDPR's sanctioning mechanism is capable of generating significant compliance pressures, even if its application to AI systems raises considerable challenges of proof and causation²⁸.

8. Emerging Challenges of Data Protection in the Algorithmic Knowledge Society

The proliferation of generative artificial intelligence systems - large language models (LLMs) such as GPT-4, Gemini, Claude, and Llama; synthetic image generation systems such as DALL-E and Midjourney; and multimodal models capable of producing text, images, audio, and video from a single prompt - has generated a set of normative challenges of unprecedented novelty and complexity for data protection law²⁹. These systems are trained on colossal datasets extracted from the public space of the internet, which inevitably contain personal data - data about public figures, content published by users on digital platforms, publicly disclosed private correspondence, and identifying information present in publicly accessible documents. The collection and use of such data for the purpose of training generative models raises profound normative questions under the GDPR: what is the legal basis for processing personal data for the purpose of training LLMs? Can the legitimate interest exception provided for in Article 6(1)(f) of the GDPR be invoked for the training of commercial AI models? Does training constitute a purpose compatible with the original purposes for which data were published? Data protection authorities in several EU Member States have begun addressing these questions through investigations and sanctioning decisions: the Garante per la protezione dei dati personali (the Italian authority) ordered the temporary blocking of ChatGPT in Italy in 2023, citing the absence of a valid legal basis for processing the personal data of Italian users³⁰.

A specific challenge of generative AI is the phenomenon of training data memorisation - the capacity of models to reproduce, upon request, fragments of the data on which they were trained, including personal data. Landmark studies have demonstrated that large language models can, under certain conditions, reproduce email addresses, telephone numbers, fragments of private correspondence, and other personal data present in training data³¹. This capacity for memorisation transforms AI models into potential sources of personal data leakage, generating data security risks that do not easily fit into the typology of security incidents regulated by Article 33 of the GDPR. Copyright and the right to one's image in the context of generative AI represent an adjacent but

²⁵ European Commission, A European strategy for data. COM(2020) 66 final, Publications Office of the European Union, 2020, p.100.

²⁶ (C-131/12, 2014)

²⁷ Cao & Yang, *op.cit.*, p.60.

²⁸ Hoofnagle, C. J., van der Sloot, B., & Zuiderveen Borgesius, F., The European Union general data protection regulation: What it is and what it means, *Information & Communications Technology Law*, 28(1), 2019, 1-34.

²⁹ Bommasani, R., Hudson, D. A., Aditi, E., Altman, R., Arora, S., Khattar, S., & Liang, P., On the opportunities and risks of foundation models, 2021, p.45.

³⁰ Garante per la protezione dei dati personali, ChatGPT: Il Garante riapre il caso, il gestore di ChatGPT ha fornito risposte insoddisfacenti. Garante. <https://www.garanteprivacy.it>. 2023, (seen at 25.04.2026.)

³¹ Carlini, N., Tramer, F., Wallace, E., Jagielski, M., Herbert-Voss, A., Lee, K., & Roberts, A., Brown, T., Song, D., Erlingsson, U., Oprea, A., Raffel, C., Extracting training data from large language models, *Computer Science.Cryptography and Security*, 2021, pp.1-19.

deeply interconnected dimension to data protection. The images, voice, and creative style of natural persons may constitute personal data within the meaning of the GDPR, and their use for training generative models without the consent of the individuals concerned raises simultaneous issues of data protection and copyright law. European and American jurisprudence in this domain is in the process of crystallisation: American courts are examining actions in liability brought by artists against developers of image generation systems, while the Court of Justice of the European Union is expected to rule on the text and data mining exception provided for in the Directive on Copyright in the Digital Single Market³².

9. Neural data, advanced biometrics, and the frontiers of the new digital intimacy

The expansion of neurotechnology - devices that measure, interpret, and in some cases stimulate brain activity - and its convergence with AI systems opens a domain of data protection of exceptional importance and normative urgency: that of neural data or neurodata. Brain-computer interfaces (BCIs), consumer EEG devices, neurofeedback applications, and therapeutic neurostimulation systems generate data about the cerebral activity of individuals — data that may reveal, especially after processing through AI algorithms, thoughts, emotions, cognitive predispositions, mental health states, and psychological vulnerabilities with unprecedented granularity³³. The current GDPR framework protects neural data insofar as they fall within the special categories of data provided for in Article 9 - health data or biometric data - or insofar as AI systems processing them produce inferences about these sensitive categories. However, this protection by analogy is insufficient given the specificity and extreme sensitivity of neural data. Chile and Colombia have already adopted specific regulations on neurorights; Spain and France are discussing constitutional amendments regarding the protection of mental integrity. International legal doctrine promotes the recognition of a distinct set of neurorights - the right to cognitive liberty, the right to mental continuity, the right to mental privacy, and the right to psychological equality - as fundamental rights specific to the age of neurotechnology³⁴.

Biometric data - defined in Article 4(14) of the GDPR as personal data resulting from specific technical processing relating to the physical, physiological, or behavioural characteristics of a natural person - have undergone a massive expansion of AI-based uses: facial recognition in public and private spaces, gait and gesture analysis, voice recognition, emotional analysis based on micro-facial expressions, and multimodal biometric identification systems. The AI Act prohibits the use of real-time remote biometric recognition systems in publicly accessible spaces by law enforcement authorities, with strict exceptions, but does not comprehensively regulate private uses of facial recognition, leaving significant normative gaps³⁵.

10. Data sovereignty, jurisdictional conflicts, and the global dimension of data protection in the AI era

The concept of digital sovereignty - the capacity of states and regional blocs to control data generated on their territory and to impose their normative standards in digital governance - has acquired growing prominence in European and international political discourse, in the context of the dominance of American and Chinese platforms in the global data economy. The European data strategy, published by the European Commission in 2020, articulates the vision of a European data space - characterised by data portability, interoperability, and security, subject to GDPR principles - as an alternative to the closed ecosystem models of major digital platforms³⁶. International transfers of personal data to third countries - regulated by Chapter V of the GDPR - have generated some of the most intense legal disputes in the history of European data protection. The series of Schrems rulings - Schrems I (C-362/14, 2015) and Schrems II (C-311/18, 2020) - in which the Court of Justice of the European Union successively invalidated the Safe Harbor and Privacy Shield mechanisms for EU-US data transfers, demonstrated the fragility of the international data transfer architecture when measured against the requirements of effective protection of fundamental rights. The adoption of the EU-US Data Privacy Framework

³² Zittrain, J., IP and the future of AI: Creative attribution and compensation, *Harvard Law Review Forum*, 136, 2023, pp.120–144.

³³ Ienca, M., & Andorno, R., Towards new human rights in the neurotechnology era: Cognitive liberty, mental privacy, mental integrity and psychological continuity. *Life Sciences, Society and Policy*, 13(5), 2017, pp.1–21.

³⁴ Yuste, R., Goering, S., Arcas, B. A. Y., Bi, G., Carmenta, J. M., Carter, A., & Wolpaw, J., Four ethical priorities for neurotechnologies and AI. *Nature*, 551(7679), 2021, pp. 159–163.

³⁵ Terec-Vlad, L., & Rusu, A. Neuro-Cybersecurity and the Future of Cognitive Rights: Legal Foundations for the Protection of the Human Mind in the Digital Age. *Revista Românească pentru Educație Multidimensională*, 18(1), 2026, pp. 82-104.

³⁶ European Commission, *op.cit.*, p.99.

in 2023 re-established a transfer mechanism, but the continuation of litigation by the organisation NOYB (None of Your Business) suggests that this issue is not yet definitively resolved³⁷.

Global regulatory fragmentation in the fields of data protection and AI generates significant risks of regulatory arbitrage - the practice whereby operators locate their data processing activities or AI system development in jurisdictions with more permissive normative standards, in order to circumvent the stricter requirements of other jurisdictions. The divergence between the European model based on fundamental rights (GDPR, AI Act), the fragmented and sectoral American model, the Chinese model grounded in state sovereignty and governmental access to data, and the emerging models of India, Brazil, and South Africa generates an incoherent global normative landscape that reduces the effectiveness of any national or regional data protection system³⁸.

The UN initiative to develop an international treaty on AI - discussed within the UN Human Rights Council and promoted by General Assembly Resolution A/78/L.49 of 2024 - could constitute a vector of global normative convergence, establishing minimum common standards for the protection of human rights in the AI context. Nevertheless, the experience of negotiations in the fields of internet law and electronic commerce suggests that achieving global consensus on common AI regulatory principles is a formidably challenging objective, given that technologically dominant states have structural interests in maintaining normative flexibility for their domestic AI industries³⁹. Ethical AI governance - understood as the set of principles, processes, and institutional mechanisms ensuring that AI is developed and used in conformity with fundamental values and rights - is increasingly recognised as a necessary, though not sufficient, condition of effective data protection in the AI era. The ethical principles formulated by the OECD (2019)⁴⁰, the European Commission (2019), and UNESCO (2021)⁴¹ converge around the values of transparency, accountability, non-discrimination, robustness, and human primacy, but the major criticism levelled at these principles - including by legal scholarship - is their voluntary character and the absence of concrete enforcement mechanisms. The transition from principled ethics to effective legal accountability represents precisely the central stake of the AI Act and of the European regulatory framework under construction⁴².

11. Conclusions

The analysis conducted in this article demonstrates that the protection of personal data stands, in the context of the expansion of artificial intelligence systems, at a normative turning point of paradigmatic importance. The framework constructed through the GDPR in 2016 represented a major normative advance over Directive 95/46/EC, but was conceived within a technological paradigm that predated the current amplitude of deep machine learning systems. The structural tensions between data protection principles and the technical characteristics of AI - opacity, data maximisation, transferable learning, and re-identification capacity - cannot be resolved through the simple extensive application of existing norms, but require substantial normative adaptations and innovative implementation mechanisms⁴³.

The AI Act represents Europe's response to this challenge and constitutes the most ambitious instrument for regulating AI ever adopted by a public authority. Its normative value resides not only in its substantive content, but also in the global regulatory effect it generates - the Brussels Effect - whereby European standards become global references in the absence of comparable institutional alternatives. Nevertheless, its effective implementation will depend on the institutional capacity of national supervisory authorities, on the jurisprudential clarification of the numerous indeterminate concepts in the text of the Regulation, and on the elaboration of harmonised technical standards that translate abstract normative requirements into concrete technical specifications. The emerging challenges identified in the third chapter - generative AI, neural data,

³⁷ Curtea de Justiție a Uniunii Europene. (2020). *Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems* (Schrems II), C-311/18, ECLI:EU:C:2020:559..

³⁸ Bradford, A., *The Brussels effect: How the European Union rules the world*. Oxford University Press, 2020, p.111.

³⁹ Dafoe, A., *AI governance: A research agenda*. Future of Humanity Institute, University of Oxford, 2018, p.60.

⁴⁰ OCDE. (2019). *Recommendation of the Council on Artificial Intelligence*. OECD/LEGAL/0449. <https://legalinstruments.oecd.org> (seen at 26.04.2026)

⁴¹ UNESCO. (2021). *Recommendation on the ethics of artificial intelligence*. SHS/BIO/PI/2021/1. UNESCO. <https://unesdoc.unesco.org/ark:/48223/pf0000381137> (seen at 26.04.2026)

⁴² Mittelstadt, B., *Principles alone cannot guarantee ethical AI*. *Nature Machine Intelligence*, 1(11), 2019, pp. 501–507.

⁴³ Terec-Vlad, L., Ungureanu, C.G., *The Rights of Artificial Intelligence: Between Ethics, Law and Normative Pragmatism*, *Revista Universul Juridic*, 9, 2025, pp.72-83.

global normative fragmentation, and regulatory arbitrage - signal that the normative dynamics of data protection in the AI era are far from stabilised. The pace at which AI systems evolve - from text-only models to multimodal systems, from narrow AI to systems with increasingly general capabilities - exceeds the natural rhythm of normative elaboration, generating a structural gap between the technological frontier and the legal frontier. This temporal asymmetry demands the adoption of adaptive normative instruments capable of evolving alongside the technology they regulate, without sacrificing legal certainty or normative predictability. From the perspective of the knowledge society, data protection is not a bureaucratic constraint imposed on innovation, but a constitutive condition of digital trust - the fundamental resource without which the data economy cannot function sustainably. Paradoxically, robust data protection and the responsible development of AI are not competing objectives, but complementary ones: societies in which individuals trust that their data are processed lawfully and with respect for their rights are more willing to contribute to the data ecosystem that fuels AI innovation. The construction of a coherent, effective, and AI-era-adapted normative framework represents one of the fundamental missions of legal scholarship and doctrine in the knowledge society.

In conclusion, reinventing data protection in the era of artificial intelligence is not an optional or cosmetic normative project - it is an urgent necessity for safeguarding human dignity, individual autonomy, and democratic values in the face of the unprecedented processing power of artificial systems to process, interpret, and influence human behaviour at a global scale. Data protection law, alongside AI law and human rights in the digital environment, constitutes the fundamental normative stratum of the knowledge society, and its consolidation represents one of the absolute priorities of the contemporary legal agenda.

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TREES IN COURTS: BIOPIRACY AND THE SYSTEMATIC ENCLOSURE OF NATURE IN EUROPEAN LEGAL ORDER

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Abstract

"We are so dependent on plants that we do everything we can not to think about them," wrote neurobiologist Stefano Mancuso in Brilliant Green. This article argues that western law has elevated that psychological avoidance into a structural principle: the natural — understood as biological resources in their native state and as traditional knowledge — is not the object of legal protection in the usual sense of the term. It is the legal order's constitutive exception.

Through six case studies spanning intellectual property and environmental law, the article traces a single logic at work across seemingly unrelated fields. A pine tree fibre, a neem remedy, a rainforest plant, a mandarin variety, an apple trade mark, an ancient forest: each entered a courtroom with a story, with a struggle to exist, to be seen. In each case, the legal order applied the same enclosure philosophy: dependence converted into ownership, relation into control, living diversity into certified uniformity.

The article argues that biopiracy, agricultural monopolisation, and conservatory isolation are not anomalies or abuses of the system. They are its coherent expressions. Across patent law, plant variety law, trade mark law, and environmental law, the same architecture is at work: the natural is permitted to exist only after transformation — only once it has been isolated, certified, registered, or enclosed. The certified uniformity of crops, the monopolisation of varieties through contractual strategies or through the evergreening of the commercial trade mark, and the museum-like conservatory isolation of virgin forests are faces of the same coin.

Before a plant can be protected by law, it must first cease to be natural.

Keywords: *biopiracy, plant variety rights, evergreening, traditional knowledge, enclosure of nature.*

1. Introduction

A significant proportion of agricultural land used for major crops in Europe and the United States is currently cultivated with industrially improved varieties and hybrids.¹ This near-total dominance of production, legally subjected to rigid criteria of genetic homogeneity and stability, has led, according to FAO reports,² to a situation where just nine species now account for over 60% of total global agricultural output. As far back as 1997, the same reports indicated that more than 75% of historical plant genetic diversity had been eroded.³

Writing about our relation with the vegetal world, plant neurobiologist Stefano Mancuso observed that dependence on plants generates a form of willful blindness „we are so dependent on plants that we make every effort not to think about them. Perhaps we do not want to remember that our survival is bound to the vegetal world — because that would make us feel weak. How could we still call ourselves the masters of the universe?“⁴ We suggest that law participates in that blindness — and systematizes it....

Within the European legal order, and by extension in the broader Western legal tradition, the natural -- understood both in its biological dimension and in the form of traditional knowledge -- is configured as an exception subject to a regime of tolerance or conversion. Biological resources and ancestral knowledge are, paradoxically, disregarded in terms of their capacity to generate exclusive rights in their native state; they receive legal recognition only in a hybrid form -- after undergoing a process of technical transmutation in a laboratory.

This dynamic reveal that there is no structural contradiction between "protecting" the biodiversity of ancient forests and guaranteeing commercial exclusivity over monocultures in intensive fruit orchards. They

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² USDA, Economic Research Service (ERS). Based on the official USDA ERS report, as of 2025, over 90% of U.S. corn, upland cotton, and soybean acres are planted with genetically engineered varieties.

³ Food and Agriculture Organization of the United Nations, The Third Report on the State of the World's Plant Genetic Resources for Food and Agriculture (Rome: FAO, 2025).

⁴ See <https://www.fao.org/4/v1430e/V1430E02.htm>, last consulted 01.06.2026.

⁵ Stefano Mancuso and Alessandra Viola, *Brilliant Green: The Surprising History and Science of Plant Intelligence*, Island Press, Washington DC, 2015 (originally published as *Verde Brillante*, Giunti Editore, Florence, 2013), p.38.

represent, in reality, two sides of the same coin in European law, in which "protection" has become an autonomous concept⁵. While for monocultures "protection" means an aggressive commercial monopoly based on variety protection titles, in the case of biodiversity and ancient forests it translates into isolation, prohibition of use, and the enclosure of the resource. This isolation of the plant element manifests either through the establishment of strict reserves or through ex situ storage in seed banks.

Biopiracy is therefore not an accident of the system but a direct expression of this isolation of the natural and the exclusive validation of the synthetic product. Contemporary international treaties have not eliminated the phenomenon; instead, they have found means to institutionalize, through mechanisms of public and private law, the legal appropriation of natural elements.

This article aims to show how the legal order uses legal fictions to confine the natural to the logic of enclosure, of exception.

2. The Pine - the Patenting of Nature

The exclusion of the "natural" from the scope of patents has its origins, in the Western legal space, in the classical distinction between a discovery of the laws of nature and an industrial invention susceptible to practical application. In the nineteenth century and the early twentieth century, Western legal systems maintained a firm barrier: the basic elements of the living world, unchanged by human intervention, belonged to the public domain. The rationale was both philosophical and pragmatic -- no private entity should control the fundamental structures of life. Nevertheless, the pressure exerted by the chemical and pharmaceutical industries forced a redefinition of the terms "manufacture" or "composition of matter", creating breaches through which elements isolated from nature began to be assimilated to artificial chemical substances.

2.1. The Case of Ex parte Latimer

A landmark moment in the development of this doctrine is the decision of the United States Patent Office in the case of *Ex parte Latimer*⁶ of 1889. The patent application concerned fibres extracted from the needles of *Pinus australis*, which displayed exceptional qualities for textiles. The US Commissioner of Patents, Benton J. Hall, rejected the application, offering reasoning that has become a classic of intellectual property law: "A contrary ruling would result in granting to one inventor the exclusive use of one species of fiber, and so on, successively, patents might be obtained upon the fibres of the various trees of the forest and the plants of the earth which, because being natural products, are no more the subjects of patents when eliminated from their surroundings than wheat which has been cut by some new method of reaping can be patented as wheat cut by such a process."⁷ This decision established the "products of nature" doctrine.

This doctrine subsequently evolved from a strict prohibition on the privatisation of natural elements into a legal regime that permits their patenting once they are manipulated or extracted in a laboratory. In the United States, the shift occurred through the courts in 1980, through the landmark decision of the Supreme Court in *Diamond v. Chakrabarty*.⁸ The Court held that a bacterium genetically modified to break down crude oil was no longer a simple product of nature but a human creation. The decision classified living matter within the categories of "manufactures" and "compositions of matter", opening the way for the patenting of any element modified by human intervention.

In Europe, the transformation began with decisions of the European Patent Office -- in the *Ciba-Geigy* case of 1983,⁹ which permitted the patenting of chemically treated seeds -- and was completed by Directive 98/44/EC of the European Union.¹⁰ This legislative act reinterpreted the limits of the European Patent Convention¹¹ of 1973 and introduced the "isolation" rule. Article 3(2) of Directive 98/44/EC expressly provides: "An element isolated from the human body or otherwise produced by means of a technical process, including the sequence

⁵ Alina Mihaela Conea, *To Bee Or Not To Be! Define And Defend In CJEU Environmental Case-Law, Challenges of the Knowledge Society*, Editura Universitatii Nicolae Titulescu, 2023.

⁶ U.S. Patent Office, *Ex parte Latimer*, 1889 C.D. 123, 46 O.G. 1638.

⁷ Available at <https://patentlyo.com/media/docs/2012/05/1889decommrpat123-ex-parte-latimer.pdf>, last consulted 01.06.2026.

⁸ Supreme Court of the United States, *Diamond v. Chakrabarty*, 447 U.S. 303, 100 S. Ct. 2204, 65 L. Ed. 2d 144 (1980).

⁹ European Patent Office, Board of Appeal, *Ciba Geigy*, T 0049/83, 26 July 1983, ECLI:EP:BA:1983:T004983.19830726.

¹⁰ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213, 30 July 1998, pp. 13-21.

¹¹ European Patent Convention (EPC), adopted in Munich on 5 October 1973.

or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element."¹² This rule is reflected identically through Rule 27(a) of the Implementing Regulations of the EPC.¹³ Accordingly, through the legal fiction of "isolation" and "laboratory purification", the natural element ceases to be regarded as a component of nature and becomes a patentable technological invention. The natural as such remains an unpatentable exception -- but only until it crosses the threshold of the laboratory, at which point it is validated and absorbed into the market.

3. The Neem Tree - Patenting the Natural from Anywhere

An analysis of biopiracy requires an illustration of the tensions between three major global legal instruments: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹⁴ the Convention on Biological Diversity (CBD),¹⁵ and the Nagoya Protocol.¹⁶

The TRIPS Agreement, adopted as Annex 1C to the Marrakesh Agreement¹⁷ establishing the World Trade Organization (WTO) on 15 April 1994, promotes a mercantilist philosophy based on private exclusive rights. Article 27(1) of TRIPS obliges Member States to make patents available for any inventions -- whether products or processes -- in all fields of technology, provided they are new, involve an inventive step, and are capable of industrial application. Although Article 27(3)(b) permits the exclusion from patentability of plants and animals, it requires the protection of micro-organisms and microbiological processes. TRIPS does not recognise orally transmitted traditional knowledge as prior art unless it is recorded in written databases accessible under Western standards.

By contrast, the Convention on Biological Diversity,¹⁸ adopted at Rio de Janeiro on 5 June 1992, reintroduces the principle of state sovereignty over biological resources. Article 15(1) of the CBD provides that states have sovereign rights over their own natural resources and that access to genetic resources is subject to prior informed consent.¹⁹ Article 8(j) of the CBD obliges states, subject to national legislation, to respect, preserve, and maintain the knowledge, innovations, and practices of indigenous and local communities.

To operationalise these principles, the Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation was adopted in 2010. It is incorporated into EU law through Regulation No 511/2014 on compliance measures for users from the Nagoya Protocol.²⁰ Nonetheless, rather than halting biopiracy, this framework institutionalises it: if a corporation obtains the necessary administrative authorisations and concludes an access contract with a state authority, the appropriation and patenting of indigenous communities' knowledge become entirely legal. International and European law thus do not protect the natural against private appropriation; they merely regulate the financial flow of that appropriation.

3.1. The Neem Tree Case (EP 0436257)

The neem tree (*Azadirachta indica*), used for centuries in India in Ayurvedic medicine and as a natural pesticide, was at the centre of one of the most resonant legal disputes in the history of intellectual property. In 1994, the American company W.R. Grace and the United States Department of Agriculture obtained from the European Patent Office patent EP 0436257 for a method of controlling fungi on plants, based on a hydrophobic extract of neem oil.

¹¹ European Parliament and Council of the EU, Directive 98/44/EC, OJ L 213, 1998, pp. 13-21.

¹² European Patent Office, Implementing Regulations to the Convention on the Grant of European Patents, Rule 27.

¹³ WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Marrakesh, 15 April 1994, UNTS vol. 1869, p. 299.

¹⁴ United Nations, Convention on Biological Diversity (CBD), Rio de Janeiro, 5 June 1992, UNTS vol. 1760, p. 79.

¹⁵ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, opened for signature 29 October 2010, 3008 UNTS 3 (entered into force 12 October 2014).

¹⁶ WTO, Marrakesh Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, UNTS vol. 1867, p. 3.

¹⁷ Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

¹⁸ United Nations, Convention on Biological Diversity, 1992, Art. 15(1).

¹⁹ For the CJEU's interpretation of international agreements to which the European Union is a party, see Popescu, Roxana-Mariana, *Competențele Curții de Justiție a Uniunii Europene în materia controlului realizat cu privire la acordurile internaționale la care Uniunea Europeană este parte*, Universul Juridic, Bucharest, 2025.

²⁰ European Parliament and Council of the EU, Regulation (EU) No 511/2014 of 16 April 2014 on compliance measures for users from the Nagoya Protocol, OJ L 150, 20 May 2014, pp. 59-71.

Following a legal challenge mounted by a coalition including the European Parliament's Green Group, India's Research Foundation for Science, Technology and Ecology, and the International Federation of Organic Agriculture Movements, the EPO Opposition Division completely revoked the patent. The central argument was a violation of Article 54 of the EPC regarding lack of novelty, demonstrating that the fungicidal properties of the neem tree constituted prior art well known to the public in India. In 2000, the EPO Opposition Division revoked the patent. The holder filed an appeal, but the Technical Board of Appeal of the EPO dismissed the appeal by its Decision of 8 March 2005 in case T 0416/01 (Neem oil/W.R. Grace),²² definitively confirming the annulment of the patent for lack of novelty. Although the patent was annulled, this case exposed the structural vulnerability of the system: had laboratory technique introduced a minor modification to the stability of the chemical compound, the patent would have remained valid, despite the therapeutic effect being one known from generation to generation.

4. The Couachi Tree (*Quassia amara*) - Biopiracy Justified

To convert a biological resource into private property, the law employs a subtle legal fiction: biochemical reductionism. In its natural state, the plant and its use by communities are regarded as diffuse phenomena, lacking juridical and economic rigour. The moment a laboratory isolates a specific molecule, that molecule is declared to have been extracted from natural chaos. From a legal standpoint, isolation severs the causal link with the environment and the community of origin, creating a *tabula rasa* upon which a patent right may be constructed.

A contemporary case in the European space concerns the Couachi tree (*Quassia amara*), a medicinal plant from French Guiana. The French Research Institute for Development (IRD) obtained in 2015 European patent EP 2459203 for the identification of the active molecule Simalikalactone E (SkE), isolated from the leaves of the plant, as a remedy against malaria. The researchers identified the anti-malarial properties after conducting interviews with local indigenous and Creole communities, who used an infusion of *Quassia amara* in a traditional manner.

A legal opposition was filed before the EPO by associations protecting indigenous rights, arguing that the patent violated Articles 54 (novelty) and 56 (inventive step) of the EPC, constituting a direct appropriation of traditional knowledge without consent and without any real inventive contribution, given that the extract used precisely the same solvents (water or alcohol) that local people employed in their domestic preparations. Nonetheless, in February 2018, the EPO Opposition Division rejected the principal opposition and maintained the patent in a modified form, holding that the isolation of the active compound and its precise dosage constituted a scientific contribution distinct from raw traditional use.²³ The decision confirmed the orientation of the European legal order: traditional knowledge is treated as a mere raw premise, an unprotected exception in the absence of the laboratory filter.

The *de facto* consequence is that jurisprudence finds the validity of a biotechnological patent to be unaffected even if the biological resources were obtained illegally or unethically from a territory.

5. The Mandarin - the Exclusion of Traditional Agriculture

While pharmaceutical biotechnology uses the patent system, agriculture and horticulture use a dedicated *sui generis* system: the International Convention for the Protection of New Varieties of Plants²⁴ (the UPOV Convention, adopted in Paris in 1961 and revised in 1972, 1978, and 1991). This international framework is directly reflected in European Union law through Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.²⁵ Unlike traditional farmers, whose seeds and local varieties evolve dynamically and are heterogeneous, legal systems based on the UPOV Convention impose strict uniformity. This legal regime drastically limits the farmer's exemption, restrictively provided for in Article 14 of Regulation No 2100/94,

²¹ European Patent Office, Technical Board of Appeal 3.3.02, Decision of 8 March 2005 in case T 0416/01, *Neem tree/W.R. GRACE & CO.*, EPO Boards of Appeal, 2005.

²² European Patent Office, Opposition Division, Decision of 21 February 2018 regarding patent EP 2459203, *Institut de Recherche pour le Developpement*.

²³ UPOV, International Convention for the Protection of New Varieties of Plants of 2 December 1961, as revised in 1972, 1978, and 1991, UNTS vol. 1861, p. 281.

²⁴ Council of the EU, Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1 September 1994, pp. 1-30.

prohibiting in principle the free use of seeds saved from one's own harvest for propagation and the exchange of planting material, if these interfere with a protected variety. Replacing traditional crop varieties with commercial, high-yielding varieties during recent decades is one of the main drivers of the decline in farmland and crop diversity.²⁶

5.1. The EU Catalogue and DUS Criteria as an Epistemic Barrier

In the legal architecture of the European agricultural sector, the regulation of plant reproductive material is governed by a fundamental restrictive principle: to be able to cultivate or plant for commercial purposes, the variety used must be mandatorily registered in the EU Common Catalogues ("EU Catalogue").²⁷ This instrument constitutes a strict administrative market authorisation functioning as a commercial passport for seeds and seedlings. Unlike the plant variety right administered by the Community Plant Variety Office (CPVO) under Regulation No 2100/94, which is an optional intellectual property title intended to secure an economic monopoly for the breeder, registration in the Catalogue is a mandatory procedure.²⁸ No one may place on the market, sell, or introduce plant material on a wide scale if it is not registered in the Catalogue.

This mandatory conditionality transforms the Common Catalogue into an absolute barrier to the free use of genetic resources in agriculture. For admission to this list, any new variety must pass the rigid technical DUS tests (Distinctness, Uniformity, Stability), designed to serve biotechnological standardisation and intensive industrial agriculture. This requirement demands that plants be perfectly uniform and stable from one generation to the next -- criteria that complex biological structures cannot naturally meet without severe laboratory modification or selection.

The principal controversy of this structure lies in the direct exclusion of traditional seeds -- those that are, in fact, "natural". From a biological perspective, these natural (ancient) varieties are valuable precisely because of their great genetic diversity, variability, and capacity to adapt to the environment -- characteristics that cause them to fail structurally at the uniformity tests. The legal order has introduced special regimes, such as "conservation varieties" and "amateur varieties". Although these subcategories permit registration under relaxed DUS criteria, they are subject to severe limitations: the cultivation and marketing of conservation varieties is geographically restricted to their historical region of origin, while varieties intended for amateurs may only be packaged in minute quantities. Consequently, the system's logic remains intact: the natural is an exception.

Equally, to receive Community legal protection from the CPVO, a plant variety must cumulatively meet the criteria established in Articles 7, 8, and 9 of Regulation No 2100/94: distinctness, uniformity, and stability (the DUS criteria -- Distinctness, Uniformity, Stability). These criteria operate as an insurmountable epistemic and legal barrier against traditional agriculture. Local plant varieties and landrace populations developed by communities exhibit high genetic variability and dynamic adaptation over time, and are automatically rejected by the legal system because they are not sufficiently "uniform" and "stable" in the technical sense of the Regulation.

At the level of the European Union, this dynamic goes beyond the mere sphere of granting intellectual property rights; it becomes a public policy of exclusive promotion and regulation of industrial crops to the detriment of traditional varieties. Through Council Directive 2008/90/EC of 29 September 2008 on the marketing of fruit plant propagating material,²⁹ the European legal order establishes a restrictive market regime. Under Article 9, propagating material of fruit plants (including the genus *Citrus*, of which the mandarin is a member) may not be marketed within the European Union unless the variety is officially registered. The direct legal consequence is a de facto prohibition on the commercial cultivation of traditional varieties. European law thus validates exclusively the artificially created industrial variety suited to monoculture, transforming traditional varieties into a commercial illegality and marginalizing actual agricultural biodiversity.

²⁵ Ficiciyan, Anoush Miriam; Loos, Jacqueline; Tschardtke, Teja, 'Better performance of organic than conventional tomato varieties in single and mixed cropping', *Agroecology and Sustainable Food Systems*, vol. 46, no. 4, 2022, pp. 491-509.

²⁶ Council of the EU, Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species, OJ L 193, 20 July 2002, pp. 1-11, art. 4.

²⁷ For a detailed analysis of how the internal market's commercial regime enforces standardization and the elimination of non-tariff barriers exclusively for approved products, see Fuerea, Augustin, *Dreptul Uniunii Europene: Principii, actiuni, libertati*, Universul Juridic Publishing House, Bucharest, 2016.

²⁸ Council of the EU, Directive 2008/90/EC of 29 September 2008 on the marketing of fruit plant propagating material and fruit plants intended for fruit production, OJ L 267, 8 October 2008, pp. 8-22.

5.2. The Nadorcott Case (C-176/18)

The coercive force of these protection titles is illustrated in the case *Club de Variedades Vegetales Protegidas v. Adolfo Juan Martinez Sanchis* (Case C-176/18).³⁰ The litigation centred on the interpretation of Article 13 of Regulation (EC) No 2100/94, in the context of the unauthorised exploitation of the mandarin variety "Nadorcott". A Spanish grower had purchased and planted seedlings of this variety during the provisional protection period -- the interval between the publication of the application for a plant variety right and the formal grant of the title. The legal issue was whether the plant variety right holder could retroactively bring an infringement action in respect of harvested material (the fruit) obtained after the grant but derived from plants put in the ground during the procedural transitional phase.

By its judgment of 19 December 2019, the CJEU refused to endorse a trend towards the absolute expansion of the right of exclusivity. The Court held that during the provisional protection period the holder does not enjoy a right to prohibit (*ius prohibendi*) but only a prerogative to "equitable remuneration".³¹ The Court limited cascading control over the fruit, conditioning the sanctioning of infringement of harvested material on proof that the holder had no reasonable opportunity to exercise primary rights over the propagating material. This restrictive approach drew severe criticism,³² being viewed as a barrier to the pro-monopoly current championed by the biotechnology industry.

6. The Apple - Biological Monopoly through Contractual Control and Branding

6.1. The Limits of Contractual Control -- the Greenstar Kanzi Case (C-140/10)

The crucial precedent in the attempt by major consortia to extend the biological monopoly beyond the strict limits of the plant variety right was established in the case *Greenstar Kanzi* (C-140/10, 2011).³³ The litigation concerned the apple variety "Nicoter", marketed under the protected trade mark "Kanzi". The breeder Better3Fruit had granted an exclusive licence to Nicolai for the marketing of trees of the protected variety. The contract imposed a strict obligation: Nicolai could only sell the trees if the purchaser first signed a cultivation and marketing agreement for the fruit. Nicolai disregarded this clause and sold trees to the grower Hustin without requiring the signature of the agreement. Hustin subsequently sold the harvested apples to the trader Goossens. In the interim, Nicolai's licence had been terminated, and the new exclusive licensee, Greenstar Kanzi Europe, brought an action against Hustin and Goossens for infringement of the plant variety right.

Referred for a preliminary ruling, the CJEU refused to confer on rights holders an instrument of absolute control. The Court clarified that a licence does not constitute an absolute and unconditional consent to placing goods on the market. Article 27(2) of Regulation No 2100/94 allows the rights holder to invoke their rights against a licensee who breaches the contract, meaning that downstream acquirers cannot automatically invoke exhaustion of the right. The CJEU nonetheless held that not every contractual breach blocks exhaustion of the right. The rights holder may take action against downstream third parties only if the licensee breached a clause directly relating to the essential features of the plant variety right (such as geographic limits, duration of the licence, or volume of production). A purely commercial breach does not vitiate consent to placing the goods on the market. Moreover, subjective elements -- such as the good faith or ignorance of the downstream acquirer -- play no role in the assessment of infringement.

6.2. The Evergreening Strategy -- the Pink Lady Case and the Cripps Pink Saga

The failure of the contractual strategy in Kanzi propelled a more sophisticated trend: the superimposition of the plant variety right upon trade mark law in order to artificially extend the monopoly beyond the legal term -- a phenomenon known as evergreening. The apple variety "Cripps Pink" was developed in 1973 by John Cripps

²⁹ CJEU, Judgment in Case C-176/18, *Club de Variedades Vegetales Protegidas v. Adolfo Juan Martinez Sanchis*, ECLI:EU:C:2019:1130, para. 42.

³⁰ Annsley Merelle Ward, 'The Nadorcott Case - Shifting the plant variety paradigm from a proprietary to a liability rule', *The IPKat* (blog), 27 April 2020, available at <https://ipkitten.blogspot.com/2020/04/guestpost-nadorcott-case-shifting-plant.html>, last consulted 01.06.2026.

³¹ Wurtenberger, Gert, 'The Nadorcott case: The ECJ specifies the scope of the provisional protection period for Community plant variety rights', *Journal of Intellectual Property Law & Practice*, vol. 15, no. 4, Oxford University Press, Oxford, 2020, pp. 239-242.

³² CJEU, Case C-140/10, *Greenstar Kanzi Europe NV v. Jean Hustin and Jo Goossens*, ECLI:EU:C:2011:677, Judgment of 20 October 2011.

within the Western Australian Department of Agriculture (WAAA). The CPVO granted the Community plant variety right for "Cripps Pink" in 1997 and for "Cripps Red" (marketed as "Sundowner") in 1998, with protection set to expire in 2027 and 2028 respectively, upon the completion of the 30-year period provided for in Regulation No 2100/94 for fruit tree varieties. WAAA, as holder of the plant variety right, licensed its commercial rights in Europe, while Apple and Pear Australia Limited (APAL) administers the "Pink Lady" trade mark in most of the world and Star Fruits Diffusion holds marketing rights in Europe. The consortium registered the verbal trade mark "Pink Lady" at EUIPO, conditioning the sale of fruit on compliance with quality standards and the payment of perpetual royalties.³⁴ Through massive marketing, the official botanical name "Cripps Pink" was reduced to a subsidiary element in consumer perception. The mechanism of economic captivity is thus constructed: upon the expiry of the plant variety right, independent fruit growers may freely cultivate trees of the "Cripps Pink" variety, but cannot sell the fruit under the only name recognised by consumers. The temporary biological monopoly is converted into a perpetual commercial monopoly through the endlessly renewable trade mark.³⁵

This strategy generated three major legal confrontations. In Case C-226/15 P (2016),³⁶ the CJEU maintained robust protection for the earlier "Pink Lady" trade mark, providing the consortium with an instrument of indefinite control over distribution networks even in the declining phase of biological protection.

In Case T-112/18 (2019),³⁷ Pink Lady America LLC -- the North American trade mark holder, with interests adverse to WAAA -- sought annulment of the Community plant variety right on grounds of lack of commercial novelty, claiming the variety had been distributed in Australia before the novelty bar date of 29 August 1989. The General Court dismissed the action, finding that the applicant had not discharged its burden of proving WAAA's knowledge or consent to commercial exploitation of those early transfers.

In Case T-159/24 (2025),³⁸ Teak Enterprises Pty Ltd -- whose variety "Barnsby" had been declared an essentially derived variety of "Cripps Pink" by WAAA in 2020, thus blocking its commercialisation without consent -- filed a new nullity application based on qualitatively different evidence: statements from independent growers showing that WAAA had distributed biological material before 1989 without restriction, suggesting an implicit consent to commercial exploitation. After the CPVO Board of Appeal found "serious doubts" as to novelty in January 2024, WAAA challenged that finding. The General Court dismissed the appeal on 24 September 2025, confirming that implicit consent to sale may destroy commercial novelty and ordering the CPVO to conduct a full examination on the merits.

The evolution from the Kanzi case (2011) to the epilogue of Cripps Pink (2025) illustrates the constant effort of rights holders to perpetuate biological control through the superimposition of legal instruments, but also the resistance of the European courts, which limit these extensions through the rigorous application of novelty conditions and the limits of consent to commercial exploitation. The natural -- the plant variety, the harvested fruit, the traditional variety -- is not the starting point of the legal system but the exception by reference to which the system defines itself.

7. Ancient Trees - Conservation as Enclosure

The interpretation of the concept of "conservation" in European law has shifted from a paradigm of dynamic silvicultural management to a strict standard of non-intervention and isolation of the plant element. The case *Commission v. Poland (Bialowieza Forest, C-441/17)*³⁹ represents a symbolic conflict between national sovereignty over natural resources and the requirements of EU environmental law. In the years 2016-2018, Poland tripled the volume of logging operations in this UNESCO site, justifying the need to combat a bark beetle infestation. The CJEU ruled that Poland was in breach of the Habitats Directive (92/43/EEC) and the Birds

³³ UPOV, Explanatory Notes on Acts in Respect of Harvested Material Under the 1991 Act of the UPOV Convention, UPOV/EXN/HRV/1, UPOV Publishing, Geneva, 2013, p. 5.

³⁴ Jocelyn Bosse, 'General Court decision doesn't fall far from the Board of Appeal's tree on validity of apple plant variety rights', The IPKat (blog), 26 September 2025, available at <https://ipkitten.blogspot.com/2025/09/general-court-decision-doesnt-fall-far.html>, last consulted 01.06.2026.

³⁵ CJEU, Case C-226/15 P, *Apple and Pear Australia Ltd and Star Fruits Diffusion v. EUIPO*, ECLI:EU:C:2016:382, Judgment of 9 June 2016.

³⁶ General Court of the EU, Case T-112/18, *Pink Lady America LLC v. Community Plant Variety Office (CPVO)*, ECLI:EU:T:2019:642, Judgment of 24 September 2019.

³⁷ General Court of the EU, Case T-159/24, *Western Australian Agriculture Authority (WAAA) v. Community Plant Variety Office (CPVO)*, ECLI:EU:T:2025:723, Judgment of 24 September 2025.

³⁸ *European Commission v. Republic of Poland (Bialowieza Forest)*, Case C-441/17, ECLI:EU:C:2018:255.

Directive (2009/147/EC) and ordered the immediate cessation of felling, including that "justified" on phytosanitary grounds.

Beyond the rhetoric of ecological victory, the Court's solution conceals a profound operation of enclosure of the forest ecosystem. Precisely stated, protection in the sense of EU law means absolute isolation, not active management. Under Article 6(2) of the Habitats Directive (92/43/EEC),⁴⁰ Member States must take "appropriate measures" to avoid the deterioration of habitats. In the Białowieża case, the Court held that any human activity -- including phytosanitary felling -- is incompatible with the Natura 2000 status, insofar as the management plan has not demonstrated the *sine qua non* necessity of the activity. Through this extensive interpretation of the negative obligation ("not to deteriorate"), the Court transformed a conservation directive into a mandate for isolation.

The parallel regime of Directive 1999/105/EC on forest reproductive material reinforces this dynamic: only officially certified, selected genetic material may be marketed for reforestation, favouring artificial uniformity of forest stock. The paradox and conflict are only apparent. In reality, the underlying logic displays the same treatment of the natural as a tolerated exception within frameworks imposed by "conservation" (isolation).

8. Conclusions

The legal histories of the pine, the neem tree, the Couachi tree, the mandarin, the apple, and the ancient forests reveal a profound structural reality: the Western and European legal order does not protect nature in its organic, dynamic, or traditional dimension, but treats it as an exception to be coercively administered or technologically reconverted. The process follows a clear logic.

The natural resource and the traditional knowledge associated with it are initially stripped of intrinsic legal value through conceptual neutralization. Biodiversity is conserved statically - through absolute prohibitions or isolated in gene banks - a fact that blocks communities' access to its natural biological use.

In parallel, through the fiction of biochemical isolation in the laboratory or through the rigid standardisation of criteria in monocultures, the same resources are extracted from the common domain, technically atomised, and reintroduced into the economic circuit in the form of patented inventions or protected varieties. International treaties, from TRIPS to the Nagoya Protocol, provide precisely the bureaucratic screen through which this appropriation is legalized under the guise of symmetrical benefit-sharing procedures.

Through the exclusion of local varieties via the strict mechanism of the EU Common Catalogues, legislation effectively declares the commercial marginality of dynamic biodiversity. Farmers are legally compelled to adopt patented, pure, and uniform genetic lines, eliminating *in situ* diversity from cultivation. Although special regimes exist, they are subject to severe geographic and quantitative restrictions that reduce them to an ornamental role relative to the dominant industrial production. The exception exists, but it confirms the structural rule: dynamic nature is marginally tolerated, not integrated into the center of the system.

The biotechnological patenting of traditional knowledge constitutes a mechanism for the extraterritorial extension of normative jurisdiction, operating through the reclassification of resources from under the territorial sovereignty of a third state. Legal scholarship has documented the consequences of this mechanism: through the TRIPS Agreement, intellectual property titles obtained in developed states may in practice block the capacity of countries of origin to valorise internationally products derived from their own ancestral genetic heritage.

The cases analysed also reveal nuanced resistance in jurisprudence. These are, however, the judicial exceptions that affected parties must obtain through considerable effort, before systems designed on a different underlying logic. Resistance exists, but its burden always falls on those who defend the natural, not on those who privatise it.

In this conceptual architecture, biopiracy and legal manipulation in horticulture do not represent accidents or violations of the spirit of the law, but the natural expression of the transformation of the natural into a technocratic, private, and controlled asset. The certified uniformity of crops, the monopolisation of varieties through contractual strategies or through the evergreening of the commercial trade mark, and the museum-like conservatory isolation of virgin forests are faces of the same coin. They belong to the same logic that refuses to nature the quality of partner in a relationship of coexistence, accepting it exclusively as raw material regimented in global legal circuits.

³⁹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, pp. 7-50.

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PROFESSIONAL CUSTOMS: THEIR EVOLUTION AND ROLE AS SOURCES OF LAW IN ROMANIA AND THE EUROPEAN UNION

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Abstract

*Professional customs are consistent and accepted practices within professions, acting as subsidiary sources of law in contexts where written rules are insufficient. This paper examines their historical evolution and contemporary role in Romania and the European Union, highlighting their contribution to the flexibility of labor law. The main purpose of the research is twofold: first, to assess the legal status of customs as sources of law and, second, to identify ways of harmonizing the Romanian system with the *acquis communautaire* in light of challenges such as digitization and the gig economy. The research methods combine a comparative analysis of legislation in this field, a study of case law, and an analysis of relevant doctrine.*

The results show that, in Romania, customs effectively fill legislative gaps in sectors such as construction and IT, but suffer from the lack of a national register, unlike the predictable EU model. The paper proposes practical recommendations: the establishment of an electronic register and explicit transposition into national legislation to promote European social dialogue. In this way, customs can become an essential tool for adapting the law to dynamic socio - economic realities.

Keywords: professional customs, sources of law, historical evolution, legal status, national register.

1. Introduction

Professional customs, known in international legal doctrine as professional practices, are consistent, repeated, and generally accepted practices within a specific profession or economic sector. They possess normative force in the absence of explicit legal regulations, distinguishing themselves from general commercial practices by their strictly sector - specific nature. They arise from the repeated interactions of professional actors - employers, employees, unions, and professional associations - who tacitly recognize them as binding rules capable of shaping behavior in complex contractual relationships. According to Article 3 of the Romanian Civil Code, customs supplement written rules whenever the latter are insufficient to establish the legal content of a situation, thus providing a dynamic and adaptable framework.

The relevance of this topic is deeply shaped by the accelerated transformations of the labor market, a field in which flexibility has become a strategic imperative for adapting to new forms of work organization, such as widespread remote work, the gig economy, and intense digitization processes¹. In Romania, the scale reached by platforms such as Bolt and Glovo has highlighted major legislative gaps, particularly in atypical employment relationships, where professional practices have spontaneously emerged to regulate aspects such as flexible work schedules or compensation for specific tasks. At the same time, at the European Union level, Directive 2019/1158² on work - life balance for parents and caregivers and repealing Council Directive 2010/18/EU places a strong emphasis on the role of national employment practices in ensuring contractual fairness, promoting a social dialogue that integrates customs as living elements of labor law. In this regard, the concept of “national practices (in force)” is mentioned ten times in the text of the Directive, beginning with Recital 25 of the Preamble and ending with the reference in Article 20 regarding the transposition of the Directive’s provisions into the legislation of Member States.

From a historical perspective, professional customs have evolved from marginal roles in centralized eras to essential tools in modern open economies. In Romania, the post-December transition marked their reintegration through the New Civil Code, Law 367/2022³, as amended, on social dialogue, reflecting a convergence with European standards. This paper analyzes the historical evolution of professional customs in Romania and the

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¹ For more on digitization in the administrative sector, see E.E. Ștefan, “Digitalization – part of the public administration reform,” in *International Journal of Legal and Social Order*, No. 1 (2025), <https://doi.org/10.55516/ijlso.v5i1.295>, pp. 407–417.

² Directive (EU) 2019/1158 of the European Parliament and of the Council, published in OJ L 188/79 of July 12, 2019.

³ Official Gazette No. 1238 of December 22, 2022.

European Union, assesses their current status as subsidiary sources of law, and explores possible comparative perspectives for effective regulatory harmonization.

The central premise of this study is that customs effectively fill legislative gaps in dynamic sectors such as IT, construction, and logistics, thereby promoting the adaptability and resilience of labor law in the face of socioeconomic shocks. However, their full effectiveness depends on explicit recognition through consistent case law, the creation of national registers of customs, and their integration into the European regulatory framework, in order to eliminate interpretive uncertainties and prevent potential abuses.

2. Custom as a Source of Law

In the Romanian legal system, particularly in the branches of private law, sources of law are organized according to a clear and coherent hierarchy, placing the Constitution at the top, followed by organic laws, ordinances, and other normative acts having the force of law. In a subsidiary position, yet essential for filling legislative gaps, are customs and the general principles of law. Article 3 of the Romanian Civil Code explicitly establishes customs as integrative sources of legal norms, applicable whenever written provisions are absent or do not exhaustively cover the factual situation under consideration. This provision reflects a modern and dynamic conception of law, in which social and professional practice not only influences the interpretation of the law but becomes itself a component of the legal order. Through this integration, customs allow for the continuous adaptation of the legal framework to rapid socio-economic developments, avoiding the excessive rigidity of written rules and promoting a balance between legal certainty and practical flexibility.

Under European Union law, professional customs have a clearly subsidiary status, applying strictly within the limits set by the *acquis communautaire*. Article 288 of the Treaty on the Functioning of the European Union (TFEU) establishes the direct applicability and supremacy of Community law—comprising regulations, directives, and the case law of the Court of Justice of the EU—over national legislation, which limits professional practices to areas not covered by European rules or to harmoniously supplementing them. This framework ensures legal uniformity across the 27 Member States, preventing the fragmentation of the single market, while preserving vital space for local practices in sensitive sectors such as labor law or competition.

For example, customs can influence the negotiation of collective bargaining agreements, as long as they do not conflict with fundamental European principles such as equal treatment or freedom of association. This provision is also found in Directive (EU) 2019/1152. The text establishes that the scope of application includes “an employment contract or an employment relationship as defined by law, collective agreements, or practices in force in each Member State”⁴ and affirms the autonomy of the social partners, allowing for the negotiation and application of collective agreements that may differ from certain standards of the directive, provided they do not reduce the general level of protection for workers⁵ — which legitimizes the role of customs/practices in collective bargaining, as long as they do not contravene fundamental principles (e.g., equal treatment, freedom of association).

The validity of professional customs, as an indispensable prerequisite for their legal recognition, requires the fulfillment of a set of rigorous conditions designed to confer normative authority upon them and to preclude arbitrariness. Their general nature requires their tacit or express acceptance by the majority of actors in a specific professional sector, creating a broad consensus that transcends the individual or circumstantial sphere. Temporal consistency requires a practice repeated over a long period, sufficient to generate a legitimate expectation of compliance on the part of all parties involved. Publicity requires accessible and transparent dissemination - whether through codes of professional conduct, specialized publications, or online databases - so that no party can claim ignorance of them.

Finally, the requirements of morality and legality exclude any practice contrary to public order, good morals, or mandatory norms, ensuring that these practices do not undermine the fundamental values of the legal system. Together, these elements transform customs from mere contingent habits into authentic sources of law, capable of ensuring predictability, fairness, and resilience in the face of contemporary labor market challenges.

⁴ Article 1(2) of Directive (EU) 2019/1152.

⁵ Recital (38) and Article 14 of Directive (EU) 2019/1152.

3. The Historical Evolution of Professional Customs in Romania

Professional customs, as a specific form of legal custom (*cutumă*), are part of the broader body of sources of private law, alongside local or general customs, and have their own history intertwined with the evolution of Romanian society and civil law in Romania.

In feudal law, prior to the process of legislative modernization, professional customs held significant importance - the law governing guilds, fairs, and merchants relied heavily on professional custom, while written rules were few, incomplete, or adapted to local specificities. The applicable law was largely of customary origin, and professional customs served as accepted rules of conduct in commercial and artisanal circles. As noted in legal doctrine, prior to the era of modern codifications, professional customs played a foundational role in governing social relations - medieval law, whether that of guilds or markets, was essentially based on custom and local/professional practice⁶.

With the adoption of the Romanian Civil Code of 1864, inspired by the French Civil Code of 1804, custom was clearly subordinated to law through a comprehensive codification aimed at standardizing legislation across the United Principalities. The 1864 Civil Code refers to local custom, common practice, or local usage nineteen times in its text, but almost exclusively in an interpretive or supplementary capacity⁷. The role of professional customs is thus limited to situations expressly provided for by the legislature; they intervene to supplement or interpret contracts, deeds, or incomplete provisions, but may not contravene the intent of the law. Custom was recognized as a source of law only marginally, „only to the extent that it corresponds to the reality of the state and with limited applicability, in strictly defined areas.”⁸

The 19th century also saw the development of commercial law, in which professional (commercial) customs continued to play an important role, albeit subordinate to the law. In commerce, customary practice is often accepted by the parties and invoked as an applicable rule in the absence of or to supplement contractual provisions. Such professional customs (e.g., regarding bills of exchange, letters of guarantee, banking practices, etc.) were frequently used and recognized in case law, supplementing written rules.⁹

With Romania's gradual integration into the European economic circuit, international commercial customs and standardized practices have begun to be taken into account, particularly in areas such as transportation and commercial credit.

The new Romanian Civil Code (Law No. 287/2009, as republished), which entered into force on October 1, 2011, establishes in Article 1 a hierarchical model in which custom (including professional customs) is subsidiary to the law. Thus, Article 1(1)–(3) of the Civil Code provides that: „The sources of civil law are the law, customs, and the general principles of law. In cases not provided for by law, customs apply; in the absence of such customs, the legal provisions relating to similar situations apply; and when no such provisions exist, the general principles of law apply. In matters regulated by law, customs shall apply only to the extent that the law expressly refers to them.”¹⁰ Specifically, paragraph (6) provides: „Customs shall mean customary practice (custom) and professional practices.”

However, references to custom (including professional custom) are limited - there are only five explicit references throughout the entire Code. Professional customs may apply only to the extent that they do not conflict with public policy, public morals, or explicit legal provisions. The new Civil Code thus preserves the traditional concept: professional customs may supplement or interpret legal relationships¹¹, may intervene where the law is incomplete or the contract does not explicitly regulate an aspect, but they cannot repeal, replace, or modify mandatory rules of law.

As the specialized literature indicates, the mechanism by which a professional custom becomes a source of modern law requires a two - step validation: either the state explicitly sanctions it by law (incorporated into an

⁶ I.L. Georgescu, *Drept comercial român*, vol. I, CH Beck Publishing House, Bucharest, 2002, p. 125-135; St.D. Cărpănu, *Tratat de drept comercial român*, 5th Edition, Revised and Expanded, Universul Juridic Publishing House, Bucharest, 2016, pp. 25-29.

⁷ S. Angheni, *Drept comercial. Profesioniștii-comercianți*, C.H. Beck Publishing House, Bucharest, 2013, p. 41; L. V. Herovanu, *Fondul de comerț*, Universul Juridic Publishing House, Bucharest, 2011, p. 38.

⁸ S. Angheni, *Autonomia dreptului comercial în sistemul dreptului privat român*, *Analele UTM* 2020, pp. 28-31, <https://www.utm.ro/facultatea-de-drept-bucuresti/analedrept-utm-arhiva/>

⁹ B.-I. Stroe, *Dreptul comercial în lumina Codului Civil – la limita dintre tradiție și modernitate*, <https://www.juridice.ro/499295/dreptul-comercial-in-lumina-codului-civil-la-limita-dintre-traditie-si-modernitate.html>,

¹⁰ Art. 1 C.civ., republished: <https://legislatie.just.ro/Public/DetaliuDocument/304560>

¹¹ Fl.A. Baiaș, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2022, art. 1.

official norm, for example, as references in legislative acts or professional codes of ethics)¹², or the court recognizes it as an applicable norm in a dispute, at the request of one of the parties or on its own initiative, if the evidence is conclusive and the custom does not contravene written law.

Today, professional customs play a primarily interpretive and supplementary role, supplementing written sources where they are deficient or incomplete, particularly in private law.

In civil law, customs are recognized as direct sources of law, complementary to the law, ensuring the applicability of legal norms and their adaptability to concrete social realities. The specialized literature¹³ emphasizes that customs are expressly mentioned in Article 1 of the Civil Code as sources of civil law alongside the law and the general principles of law, and their application is conditional upon the existence of an established custom and compliance with public order and morality.

At the same time, Professor Gabriel Boroi highlights the role of customs in supplementing legal provisions in civil matters, particularly when the law is silent, emphasizing the need for solid evidence of their existence and content, as well as their function as interpretive norms that support the stability and legal certainty of civil relationships. This doctrine is further reinforced by current regulations that legitimize customs as adaptive instruments of civil law in the context of social and economic evolution.

In current commercial law, professional customs and practices retain an important normative role, as the Civil Code expressly recognizes them as sources of law and allows them to supplement the law in unforeseen cases, and, in the matter of contracts, to determine the content of the obligations assumed by the parties together with established practices and equity. In relations between professionals, this function is essential because it adapts the legal rule to the concrete demands of the market, ensuring continuity, predictability, and an interpretation faithful to the customs specific to the commercial environment, without exceeding the limits of public policy and good morals¹⁴.

The distinction between generally accepted customs (customary law) and those specifically validated by a court remains relevant today: only those professional customs that are no longer contested and are recognized as such by case law become sources of law, albeit of a supplementary nature.

The historical evolution of professional customs reflects the trajectory of Romanian law from normative pluralism based on local/professional customs toward a written, centralized, and codified legal system, in which custom remains a living but limited source of law, adapted to the needs of the modern economy and the current rule of law. In the context of contemporary law, professional custom survives as a supplementary instrument, never contradictory, always subsidiary and interpretive in relation to the written legal provision.

4. Trade practices under European Union law

The European legal framework for trade practices is shaped by key directives that promote transparency and fairness in labor relations, recognizing their role as complementary to written rules. Directive (EU) 2019/1158 serves as a central pillar, requiring Member States to ensure clear information on contractual terms and to incorporate accepted professional practices into their negotiation.

Directive (EU) 2019/1152¹⁵ on transparency and predictability of working conditions, which repealed Directive 91/533/EEC, provides that Member States should, in accordance with national law and practices, adopt appropriate measures to ensure the effective involvement of the social partners, and to promote and strengthen social dialogue with a view to implementing this Directive. This Directive establishes the minimum rights applicable to all workers in the Union who have an employment contract or an employment relationship as defined by law, collective agreements, or practices in force in each Member State, taking into account the case law of the Court of Justice.

The concept of „current practices/national practices” is introduced as early as Article 1(2), which defines the scope of application as follows: „This Directive establishes the minimum rights applicable to all workers in the Union who have an employment contract or an employment relationship as defined by law, collective

¹² St.D. Cărpenaru, *Tratat de drept comercial roman*, op. cit., p. 35-36; I. Adam, *Drept civil. Teoria generală a drepturilor reale*, 3rd Edition, Revised and Expanded, C.H. Beck Publishing House, Bucharest, 2013, p. 9; I. Schiau, *Drept Comercial*, Hamangiu Publishing House, Bucharest, 2009, p. 75.

¹³ G. Boroi, C.A. Angheliescu, I. Nicolae, *Fişe de drept civil*, 9th Edition, Hamangiu Publishing House, Bucharest, 2025, p. 737

¹⁴ V. Nemeş, *Drept comercial*, 6th Edition, Revised and Expanded, Hamangiu Publishing House, Bucharest, 2022, pp. 13-15

¹⁵ OJ L 186/105, 11.07.2019

agreements, or established practices in each Member State, taking into account the case law of the Court of Justice.”

The Directive uses this phrasing – „in legislation, collective agreements, or practices in force/national practices” - in multiple articles, each time to define how Member States may ensure, interpret, and adapt the rights established at the EU level:

- Art. 8(1): Establishment of the probationary period „as defined in national law or national practices”
- Art. 10(1), (3), (4): Regarding the modalities of prior notice, compensation, and implementation „in accordance with national law... or national practices”
- Art. 14: The possibility for social partners to establish derogations through collective agreements „in accordance with national law or national practices”
- Art. 21, paras. (4) - (5): Transposition of the directive—involvement of the social partners „in accordance with national law and practice”, including the possibility of entrusting them with implementation.

The term encompasses both sector - specific practices (e.g., public holidays, non - standard types of contracts, customary standards of proof) and established case law or more flexible instruments, such as informal rules, administrative guidelines with the force of settled doctrine, or social conventions implemented at the national level.

According to the provisions of the directive, the role of national practices is twofold: first, as a filter for defining the employment relationship, since the directive does not impose a uniform definition of the contract/employment relationship but refers to the criteria established in national law, collective agreements, or prevailing practices (these being, in practice, a source of secondary law that supplements the legal criteria, especially where legislation is incomplete or where professional traditions exist). Second, it serves as an instrument of adaptation and flexibility, as Member States are encouraged to ensure compliance with minimum rights, including through the use of national practices, which allows for derogations, additions, or interpretations tailored to the sector or the economic/social context.

The Directive precludes Member States from using national practice to restrict the minimum rights established at the EU level: it maintains the existing level of protection and does not allow national practice to justify the removal of rights provided by the Directive; any „existing practice” must operate in accordance with „the case law of the Court of Justice.” At the same time, national practice cannot lead to the erosion of the minimum rights established as an EU standard - which ensures a balance between regulatory autonomy and minimum convergence of standards.

Directive 2000/78/EC (General Framework for Equal Treatment in Employment and Occupation) provides, in Article 13 (Social Dialogue), that Member States must encourage dialogue between social partners „including through the monitoring of workplace practices, collective agreements, codes of conduct, and research or the exchange of experience and best practices.”

Directive 2000/43/EC (implementation of the principle of equal treatment irrespective of racial or ethnic origin) contains an equivalent provision in Article 11 (Social Dialogue), which explicitly states that Member States must promote dialogue, including through the monitoring of workplace practices, collective agreements, codes of conduct, research, or the exchange of experience and best practices.

Directive (EU) 2024/2831 on improving working conditions in platform work (recently adopted, to enter into force on December 2, 2026) directly addresses „current practices” regarding the recognition of the employment relationship, provisions on legal presumption, the determination of the correct professional status, and the implementation of the legal framework, explicitly recommending the development of „appropriate guidelines, including in the form of concrete and practical recommendations, so that digital labor platforms, platform workers, and social partners understand and implement the legal presumption, including procedures for rebutting it” (Art. 6(1)(a)). The provision explicitly requires Member States to establish a framework of support measures „including in the form of concrete and practical recommendations” - which, in practice, amounts to codes of good practice for implementation at the sectoral/national or digital platform level.

At the same time, Article 25 states that Member States must promote the right to collective bargaining (which may include the development of sectoral codes), and Article 28(2) stipulates that Member States may allow the social partners „to maintain, negotiate, conclude, and implement collective labor agreements... establishing provisions regarding work on platforms other than those mentioned” in other articles, paving the way for the introduction and recognition of sectoral codes/codes of good practice as a self - regulatory instrument.

These provisions illustrate the EU's legislative approach, whereby non-legislative instruments (codes of conduct, codes of practice, collective agreements) are identified as relevant means for implementing the directive's objectives (combating discrimination and promoting equality in the workplace) and are expressly mentioned in the cited legislative texts.

At the European level, the Court of Justice of the European Union (CJEU) plays a key role in defining the status of customs through case law that balances economic freedoms with the protection of collective practices. In the case of *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line and OÜ Viking Line Eesti*¹⁶, the Court examined the right of a Finnish trade union to organize strikes based on collective customs to protect local labor standards against an Estonian company offering lower wages, concluding that such actions are permissible if they respect proportionality and do not unduly restrict the freedom to provide services (Art. 49 TFEU). Similarly, in the *Laval* case (C-341/05, 2007), the CJEU imposed limits on Swedish collective agreements that imposed binding minimum wages on a Latvian firm, emphasizing the priority of the freedom of establishment (Art. 49 TFEU) over discriminatory national practices.

Other examples include the case of *Rüffert v. Land Niedersachsen*¹⁷, where German minimum wage practices were restricted in the context of the posting of workers (Directive 96/71/EC), and *Bogatu v. Minister for Social Protection*¹⁸, which clarified the application of practices in cross-border work without undermining equal treatment.

The influence on Member States is manifested through progressive harmonization, achieved not only through binding directives but also through recommendations or opinions. For example, the Opinion of the European Committee of the Regions - *Work on Digital Platforms - Regulatory Challenges at the Local and Regional Levels 2020/C 79/07*¹⁹ - encourages the promotion of voluntary local, regional, and cross-border codes of good practice. This approach ensures convergence in case law, with countries such as Romania transposing these rules through legislative updates, thereby avoiding fragmentation of the internal market and strengthening the role of established practices as a bridge between national autonomy and European uniformity.

Labor practices have a profound impact on competition within the European Union, acting as a balancing force between practical standardization and the risk of distortions in the internal market. They can foster a healthy competitive environment by standardizing working conditions across transnational sectors, reducing unfair advantages based on differences in social costs. Practices contribute to predictability and trust among competitors, enabling the rapid negotiation of contracts in sectors such as construction or financial services.

For example, established practices regarding payment terms in European supply chains facilitate smooth trade flows, discouraging wage dumping and encouraging long-term investment in Member States with varying labor costs. This informal harmonization complements directives such as the one on the posting of workers, promoting fair competition based on efficiency, not exploitation. At the same time, when they become restrictive, they can hinder foreign firms' access to local markets, creating tensions with the fundamental principles of economic freedom.

On the other hand, the Court of Justice of the European Union has sanctioned practices that fragment the single market. In the *Säger* case (C-76/90, 1991), German sector-specific practices regarding fees for advertising services were declared incompatible with the freedom to provide services, as they favored local providers at the expense of Dutch ones. Similarly, in the *Carpenter* case (C-60/00, 2002), British customs regarding residency requirements for cross-border workers were restricted so as not to impede economic mobility. These precedents illustrate how the CJEU applies the proportionality test, requiring states to justify customs only if they serve the general interest without less restrictive alternatives.

Through case law and soft law instruments, such as the Commission's guidelines on competition in digitized sectors, practices are shaped to support the single market. They become allies of competition when they are transparent and non-discriminatory, preventing the economic isolation of less competitive Member States such as Romania.

¹⁶ C-438/05, 2007

¹⁷ C-346/06, 2008

¹⁸ C-322/17, 2019 <https://infocuria.curia.europa.eu/tabs/document?source=document&docid=210563&doclang=en>

¹⁹ OJ C 79/36, 10.03.2020, para. 25

5. Comparative Analysis: Romania vs. the EU

Professional customs occupy a comparable subsidiary position in both legal systems, being recognized as vital mechanisms for supplementing collective bargaining agreements and written rules, which are sometimes insufficient in the face of the complexity of modern labor relations.

Under Romanian law, Article 3 of the Civil Code allows for the invocation of customs whenever statutory provisions do not fully cover the factual situation, thereby providing a degree of flexibility to legal relationships. This flexibility manifests itself concretely in collective bargaining, where customs influence essential clauses such as variable pay or flexible work schedules, allowing the regulatory system to respond dynamically to labor market developments without undermining mandatory social protection rules.

Differences in regulatory predictability are evident, as the European Union establishes uniform standards through CJEU case law and European directives on the posting of workers, which require respect for their rights in the context of cross-border service provision. In particular, Directive 96/71/EC²⁰, as amended by Directive 2018/957/EU²¹, provides a unified framework and protects the rights of posted workers, including wage rights and working conditions in the construction sector, thereby ensuring predictability within the EU.

CJEU case law emphasizes that Member States must ensure the application of these uniform standards, thereby avoiding differing or non-compliant interpretations of European rules. For example, regarding the right to work and remuneration, the CJEU has issued rulings clarifying employers' obligations toward employees posted to other Member States, emphasizing compliance with the host country's specific social and wage regulations, in accordance with the aforementioned Directive.

In contrast, national case law, as expressed in Decision No. 23/2023²² of the High Court of Cassation and Justice – Panel for the Resolution of Legal Issues –, regulates the applicability of the provisions of the Labor Code and Framework Law No. 153/2017²³, as amended, regarding the remuneration of personnel paid from public funds in cases of secondments to the public sector, but without a clear and explicit reference to European requirements and standards. This decision establishes that the public transferee employer may not pay wages exceeding the maximum level provided by law, and the employee is not required to reimburse any excess benefits granted in such situations; these provisions are strictly tied to domestic law, which may create a climate of uncertainty regarding the uniform application of European rules in practice, potentially affecting the attractiveness of cross - border investments in sectors such as construction.

Thus, deeper harmonization between national legislation and European law is essential to ensure a predictable and coherent framework for all participants in the single market, eliminating discrepancies and strengthening the legal certainty of posted workers and employers.

Another area where a comparison between national and European frameworks is needed is post-pandemic telework, which falls under distinct European and national frameworks, regulated by European directives and domestic rules that reflect the complementarity and differences between forms of remote work.

At the European level, Directive (EU) 2019/1158 was adopted to support active policies on work-life balance, including leave entitlements and flexibility in work organization. This directive is transposed into the national legislation of member states; Romania has not yet fully transposed it but has adopted partial and operational measures that reflect its fundamental principles.

With regard to telework, which is a specific form of remote work involving the use of information and communications technology, Romanian legislation is set forth in Law No. 81/2018²⁴, as amended, on the regulation of telework. This law establishes the rights and obligations of teleworkers and employers, including the conditions under which the work schedule is organized by mutual agreement and the measures for monitoring and recording working hours.

The major differences between working from home (regulated by Articles 108–110 of the Labor Code) and telework (regulated by Law No. 81/2018) lie in the use of IT technology in the case of telework and in the organization of the work schedule by mutual agreement, whereas in home-based work, the employee sets their own schedule, and the activity is monitored in accordance with the individual employment contract. The Labor

²⁰ OJ L 18, 21.1.1997

²¹ OJ L 173, 9.7.2018

²² Official Gazette No. 364 of April 28, 2023

²³ Official Gazette No. 492 of 28 iunie 2017

²⁴ Official Gazette No. 296 of 2 aprilie 2018

Code and the Telework Law protect employees against the unilateral imposition of remote work and disciplinary sanctions in the event of their refusal.

In terms of domestic case law, to date there is no established practice regarding the telework regime alone that has a significant impact on its application, similar to major decisions in other areas of atypical work. However, recent decisions by the High Court of Cassation and Justice establish interpretive frameworks for employment relationships with atypical elements, and in practice, courts have distinguished between telework and other forms of remote work, such as working from home.

In contrast, the case law of the CJEU, as illustrated by the Yodel Delivery Network Ltd. case²⁵, clarifies the concept of „worker” and the conditions under which a person providing services with a certain degree of autonomy and the ability to use subcontractors cannot be treated as an employee under Directive 2003/88/EC²⁶ on the organization of working time, thereby expanding the relevant legal understanding of flexible working arrangements in the context of remote work. However, this case does not specifically address the telework regime as such. Thus, a clear comparison between the uniform European regime partially established by directives such as 2019/1158 and the national situation reveals a state of affairs in which Romanian legislation is still in the process of adaptation, and the case law of the High Court of Cassation and Justice has not yet established a uniform set of criteria and principles applicable to telework, which may lead to inconsistent practices within organizations and legal disputes with divergent interpretations.

Another comparative example emerges in the gig economy. In the Deliveroo case²⁷, transnational practices regarding the status of riders were analyzed in light of Directive 2019/1152, with the Court imposing European criteria for classification as an independent contractor, directly applicable in Romania through platforms such as Glovo. By comparison, in Romania, local practices regarding pay per delivery are applied without harmonization, creating disparities that affect fair competition in the single market.

It is clear that Romania suffers from the absence of a national register of legal practices - unlike European databases, which list validated practices - which leads to an increase in litigation and erodes professional trust. The absence of a national register of legal practices in Romania creates a vacuum of transparency and accessibility that fragments legal practice, unlike European databases, which offer centralized and validated catalogs of professional practices.

Without such a registry, the parties involved - employers, employees, or unions - lack a single, up- to-date, and official source to verify the existence, content, or validity of a practice in a specific sector, such as construction or IT. This forces the parties to rely on subjective empirical evidence, which prolongs legal proceedings and increases the number of appeals, as courts are required to analyze the general, consistent, and public nature of the practice each time, in accordance with Article 3 of the Civil Code.

In contrast, centralized and validated European catalogs of professional practices refer to official databases and registers that provide transparency, mutual recognition, and validation of competencies, qualifications, and good professional practices used in the member states of the European Union.

One of the most important such tools is the „Europass” framework, established by Decision 2018/646²⁸. Europass is a unified European system for documenting professional skills and qualifications, which includes standardized templates for CVs, diploma supplements, and certificates, the Language Passport, and a range of tools for skills assessment and self - assessment, as well as for career guidance. This framework provides a digital platform accessible to all EU citizens, facilitating professional mobility and lifelong learning through the transparency and interoperability of information related to validated qualifications and professional practices.

Another centralized directory is the European Register of Regulated Professionals (RegProf), which is a public database of the European Commission that centralizes information on regulated professions in EU Member States and the European Economic Area, as well as administrative cooperation for the recognition of professional qualifications. This register ensures collaboration between national competent authorities and the European Commission, supporting the recognition of qualifications and facilitating the free movement of workers in regulated professions.

²⁵ C-692/19, 2020

²⁶ OJ L 299, 18.11.2003

²⁷ C-268/20, CJUE, 2022

²⁸ OJ L 112, 2.5.2018

Furthermore, European directives such as Directive 2005/36/EC²⁹ on the recognition of professional qualifications regulate the framework for access to and the practice of regulated professions, include harmonized conditions and criteria for verifying qualifications, and provide for instruments such as the European Professional Card. These ensure that professionals holding a qualification in one Member State can obtain equivalent recognition in other Member States to practice their profession under the best conditions. To ensure quality in professional training and validated practices, there are registries such as the European Quality Assurance Register for Higher Education (EQAR), which lists agencies accredited at the European level that certify compliance with European standards.

In Romania's case, the erosion of professional trust stems from this perpetual uncertainty: firms hesitate to follow established practices for fear of nullification or retroactive sanctions, foreign investors avoid sectors with a high risk of litigation, and contractual relationships become hostile, based on mutual suspicion rather than tacit consensus. In the EU, centralized registries reinforce the authority of customs as living norms, fostering economic stability; in Romania, their absence perpetuates a chaotic environment, where customs remain contested exceptions rather than reliable rules.

Globalization intensifies tensions, with transnational practices being effectively shaped within the EU through cases such as Uber³⁰, where the CJEU harmonizes ride-sharing practices, while Romania faces persistent legislative gaps and lacks mechanisms for mutual recognition among member states. These shortcomings require accelerated harmonization through the rapid transposition of directives and convergent case law, avoiding economic isolation and fully leveraging the potential of practices within an integrated European context.

6. Current Role and Prospects

Professional practices are asserting their contemporary role through their exceptional adaptability to new labor market configurations, particularly in areas such as the gig economy and widespread remote work in the digital age. In the context of the gig economy, platforms such as Bolt, Uber, or Glovo generate atypical contractual relationships, characterized by one-off tasks and variable remuneration, where emerging practices regulate essential aspects such as order distribution algorithms, peak-period bonuses, or safety protocols for delivery workers.

This practical contribution enables the smooth functioning of these ecosystems without immediate legislative intervention, transforming informal practices - born from repeated interactions between platforms and workers - into functional conventions that balance individual autonomy with operational efficiency. When analyzing their role here, these customs act as a social lubricant, preventing bottlenecks in sectors that account for a significant percentage of Romania's urban GDP, yet they raise ethical questions regarding the true fairness of these unspoken norms.

At the same time, remote work - accelerated by the pandemic and formalized by Government Emergency Ordinance No. 116/2021³¹ - is governed by practices that establish practical standards not covered by the Labor Code, such as the provision of compensation for IT equipment, protocols for non-intrusive performance monitoring, or agreements regarding digital disconnection after work hours. In sectors such as IT or financial consulting, where a large portion of the workforce operates remotely, these practices provide a framework of predictability that overcomes the rigidity of Articles 108–110 of the Labor Code, fostering talent retention and productivity. Their practical perspective highlights a proactive role: customs not only fill gaps but anticipate developments, allowing for rapid adaptation to new technologies³² such as AI in human resources management, without waiting for slow legislative transpositions.

The fundamental limitations of customs stem from their hierarchical subordination to mandatory rules, which require the exclusion of any practice contrary to public order, morality, or mandatory provisions such as the gross minimum wage, maternity protection, or the prohibition of undeclared work. This subordination, anchored in Art. 3(3) (3) of the Civil Code, guarantees the supremacy of the rule of law and protects vulnerable groups, but exposes significant risks of abuse in sectors with power asymmetries, such as logistics, where tacit

²⁹ OJ L 255, 2005

³⁰ C-434/16, 2017

³¹ Official Gazette No. 845 of 29 august 2022

³² For more on new technologies and their impact on the law, particularly with regard to the concept of liability, see E. Anghel, New dimensions of legal responsibility and liability in the era of new technologies, in *International Journal of Legal and Social Order*, No. 1 (2025), <https://doi.org/10.55516/ijlso.v5i1.279>, pp. 17-30

customs may tolerate overwork without proportional compensation, or construction, where chronic delays are „normalized” to the detriment of small subcontractors. An analysis of this limitation reveals a paradox: the flexibility of practices stimulates innovation, but the absence of prior checks can perpetuate systemic inequities, generating costly litigation and eroding social cohesion, especially in contexts of economic crisis where performance pressure amplifies abuses.

Thus, practices can evolve from a reactive role - spontaneously responding to specific needs - to a strategic one, supporting a competitive and inclusive Romanian economy by transforming them into proactive economic policy instruments, integrated into national planning and aligned with Romania’s competitiveness and social inclusion objectives.

National strategies play a catalytic role in the evolution of professional practices in Romania, transforming them from spontaneous and fragmented practices into structured components of public policy³³, aligned with objectives of economic competitiveness and social inclusion.

National strategies provide a long-term planning framework that identifies priority sectors (IT, construction, green logistics), where emerging practices can be anticipated and proactively channeled, increasing predictability³⁴ and reducing the number of disputes. For example, the National Strategy for Sustainable Development 2030³⁵ incorporates practices from green professional retraining, directing PNRR funds toward training in renewable energy, where practices such as shift rotation at wind farms become standardized norms.

Conclusions

Employment contracts have proven to be essential instruments for the dynamism of labor law in Romania and the European Union, confirming the central hypothesis of this analysis. They effectively fill legislative gaps in dynamic sectors such as IT, construction, or the on-demand economy, offering flexibility and adaptability in the face of accelerated transformations driven by digitalization, remote work, and globalization. Their historical evolution—from recognition in the pre-communist Civil Code, through marginalization during the centralized era, to modern reintegration via the New Civil Code and EU directives - highlights a subsidiary yet vital role that balances the rigidity of written rules with practical realities.

A comparative analysis reveals similarities in their legal status, but also structural gaps, such as the lack of predictability in Romania compared to the uniform European standards established by CJEU case law. Practical contributions to new forms of work demonstrate their transformative potential, although limitations - subordination to mandatory rules and the risks of abuse - require proactive interventions to prevent the erosion of professional trust.

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³³ See E.E.Ștefan, Vulnerabilities of New Technologies in the Work of Public Authorities and the Need for Cybersecurity in *Scientia Moralitas International Journal of Multidisciplinary Research*, Vol. 10, No. 1, 2025, pp. 376-381, DOI: 10.5281/zenodo.16415586

³⁴ For more on normative predictability, see also E. Anghel, Predictability and accessibility of the law, in *LESIJ - Lex ET Scientia International Journal*, Nr. 1, An XXX/2023, pp. 69-78

³⁵ <https://dezvoltaredurabila.gov.ro/strategia-nationala-pentru-dezvoltarea-durabila-a-romaniei-2030-i>

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AI – DILEMMAS, CHALLENGES AND SOME ANSWERS TO POSSIBLE QUESTIONS

Augustin FUEREA*

Abstract

The article examines the role and impact of artificial intelligence within a legal and social context undergoing continuous transformation at national, European, and international levels. Starting from the need to maintain a balance between technological dynamics and the protection of fundamental rights, the paper highlights the insufficient attention given to the relationship between human and artificial intelligence. It addresses essential conceptual clarifications regarding artificial intelligence, as well as its implications for the regulatory framework and social behavior. The article also provides answers to frequently asked questions and proposes multiple analytical perspectives, emphasizing the need for balanced regulation that ensures both innovation and the respect of fundamental rights and freedoms.

Keywords: artificial intelligence, legal balance, fundamental rights, data protection, regulation, European legislation, ethics, technological innovation, jurisprudence, digital society.

1. Why an approach like this?

In a (domestic, European and international) society in which life, as well as the legislative and jurisprudential fields are in an unprecedented dynamic, (at three levels: domestic, European and international), balance is perhaps more necessary than ever. The concern for this balance has been the subject of previous interventions/writings, with multiple dimensions related, for example, to the protection of personal data¹. Data protection and ensuring their freedom of movement, analyzed from the perspective of rights and obligations, rules and exceptions as well as from the point of view of the current approach, make us become increasingly aware of the fact that that dimension relating to the balance that must be maintained between human and artificial intelligence escapes the attention of even the most prestigious specialists in the fields. This is not just an abstract analysis of such a component of the balance, but we are referring to some concrete aspects related to everyday life, that influence a conduct that is more or less compliant with domestic, European and international legislation, in general, but also with special reference to the protection of fundamental human rights, in particular. Personal data occupies a very important place, but it is increasingly difficult to manage/protect in the context of the unprecedented developments of artificial intelligence, that were difficult to imagine not so long ago, if we refer to its “performances” that generate both positive and negative “consequences”, difficult, if not impossible, to anticipate.

We consider the plea for balance to be timely, at this stage that humanity is going through, as well as from the perspective of the policies adopted at national, European (regional) and international levels regarding the harmonious, balanced development of both human and artificial intelligence. Consequently, following such policies oriented towards “human performance” which can’t be obtained otherwise than through quality education at all levels, but also towards initial and continuous professional training, we consider that investments must be balanced, targeting, equally, human intelligence and artificial intelligence.

There are many approaches that refer to the influence of artificial intelligence on the protection of personal data, an important component of private and family life viewed from the perspective of fundamental human rights.

The questions that may arise in such a matter are numerous, and the answers may be diverse, convergent or divergent. They may refer to the usefulness, necessity and opportunity of using human and artificial intelligence or they may concern the relationships between the two types of intelligence and, why not, the supremacy of one over the other (the predictable or unpredictable nature of the two, etc.).

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1 A. Fuerea, Echilibrul în domeniul drepturilor fundamentale ale omului – privire specială asupra protecției datelor cu caracter personal, Revista română pentru protecția și securitatea datelor cu caracter personal, no. 2/2023, pp. 12-26.

In this sense, we consider Professor Mircea Duțu's reference to Professor Daron Acemoglu's (2024 Nobel Prize laureate in economics) statement to be more than inspired, according to which "in this nebulous context [regarding the dynamics we were talking about above] it is important to understand, accept and act for an AI in the service of the human being and under its permanent and decisive control and for (...) [this] to orient it in the direction of the promise it represents"².

2. Conceptual clarifications needed

From a strictly conceptual perspective, we can't penetrate the mysteries of intelligence, in general, and of AI, in particular, without understanding what "intellect" is. Such an approach was suggested to us during a debate on this matter, and since then, we have appreciated it as extremely effective. Why? Because there is a risk that, precisely given the dynamics invoked, we lean right from the beginning with all deference, on some profound, delicate, controversial aspects, even professionally, those to whom we address, dedicated to the field, may have different meanings of these concepts. That is why, referring to "intellect" we find that it is defined as "a subsystem included in the structure of the individual's cognitive system that brings together the set of psychic functions that ensure logical and abstract thinking, expressed through the capacity to operate with life experience"³ (natural, human or artificial?).

The comments, from anatomical perspective, regarding the neural convolutions and synapses on the basis of which the human brain creates its own algorithms, which we also encounter in artificial intelligence, can be among the most numerous and diverse. The same would be true from a strictly philosophical perspective, and not only.

Using the same prestigious source of documentation, both conceptually and from the perspective of forensic medicine, we note that intelligence, in general, is defined as that "adaptive mechanism of the psychic capacity [another possible and necessary approach] to understand and solve new problems, to perceive phenomena and the relationships between them"⁴.

Unlike previous approaches, the Explanatory Dictionary of the Romanian Language defines the intellect as representing "the capacity to think, to know, to have a rational activity, to operate with options, mind, thought, reason"⁵.

According to the same dictionary, intelligence refers to "the ability to understand easily and well [!! Speaking of AI?] to perceive what is essential, to solve new situations or problems based on previously accumulated experience; cleverness"⁶.

At a glance, which we do not claim to be highly specialized in the issue of intelligence, we can't help noticing that the definitions above, par excellence, speak of human intelligence. Remaining faithful to the established documentary sources, invoked above, with reference to artificial intelligence, the authors consider that this is "the capacity of evolved technical systems to achieve quasi-human performance"⁷.

While using modern technology – the internet – to identify an "up-to-date" definition, we have reached an often-used source, especially when time is very short, and the speed of formulating an answer is required, and that is Dexonline. According to this source, artificial intelligence is identified with that "field of computer science that develops technical systems capable of solving difficult problems related to human intelligence"⁸.

Developing our concerns in the applied conceptual field, we could not resist the temptations of trying to understand what artificial intelligence is and we have navigated through the cryptic labyrinth of information on established websites, this time, at European level⁹. A first meaning that has held our attention is that according to which artificial intelligence is equated with "the ability of a machine to imitate human functions, such as

² M. Duțu, *Elemente de dreptul inteligenței artificiale*, Universul Juridic Publishing House, Bucharest, 2025, p. 6.

³ I. R. Urs, M. Duțu, C. Birsan, A. Severin, N. Volonciu (coord.), *Enciclopedia Juridică Română*, vol. III, lit. F-I., Romanian Academy Publishing House and Universul Juridic Publishing House, Bucharest, 2022, p. 430.

⁴ *Ibidem*.

⁵ Romanian Academy, "Iorgu Iordan" Institute of Linguistics, *Dicționarul explicativ al limbii române*, 2nd edition, "Univers Enciclopedic" Publishing House, Bucharest, 1998, p. 497.

⁶ *Ibidem*.

⁷ *Ibidem*.

⁸ <https://dexonline.ro/intrare/inteligen%C8%9B%C4%83/28535>, accessed on April 8, 2026.

⁹ <https://www.europarl.europa.eu/topics/ro/article/20200827STO85804/ce-este-inteligenta-artificiala-si-cum-este-utilizata>, accessed on April 8, 2026.

reasoning, learning, planning and creativity”¹⁰. In this sense, AI “allows technical systems to perceive the environment in which they operate, to process this perception and to solve problems, acting to achieve a certain objective. The computer receives the data (already prepared or collected through its own sensors, such as a video camera) [with built-in audio system], processes it and reacts”¹¹. From the perspective of proximity to the human behavior, “AI systems are able to adapt their behavior, to a certain extent, by analyzing the effects of previous actions and operating autonomously”¹².

Given the rapid developments in human actions involving AI, from the point of view of social acts and facts, some of them even contrary to domestic, European and international legislation in force at a given time, regulations on the use of AI and its influence on the protection of personal data have multiplied. Such multiplication has implicitly determined concerns from the perspective of the object, respectively the method of regulation. All of this has inevitably led to the emergence of a question, namely: can we currently discuss the existence of a Law of artificial intelligence? In order to find a pertinent answer to such a question that appears more and more often, for academic reasons, we are going to focus our attention on the concept of law in general¹³.

According to the Explanatory Dictionary of the Romanian Language, already cited, law means “the totality of rules and legal norms that regulate social relations in a state”¹⁴.

The Romanian Legal Encyclopedia, through its prestigious authors, having a true notoriety in the field, shows that law, from the perspective of the general theory of law, represents a “holistic conception regarding the ordering of relations between persons [Is AI a person, a subject of law?], taken individually or collectively, scientifically substantiated and transposed, as an act of will of political power, into binding norms of conduct, the observance of which is guaranteed by the conviction of the society regarding their fairness, viability and reliability, as well as, ultimately, by the coercive force of the state, exercised through its institutions”¹⁵. In the context of these extensive debates, the closer we are to an answer given regarding the existence of the law of artificial intelligence, the further we are moving away because, this time, in recent doctrine, it is appreciated that “artificial intelligence appears as an oxymoron as the name juxtaposes two contradictory terms: on the one hand, artificial intelligence is associated with autonomous cognitive faculties, and, on the other hand, the word artificial refers to computer systems devoid of any consciousness”¹⁶.

3. A few answers to possible questions and multiple approaches

A possible question that is naturally originated in the current or future status of artificial intelligence, but also in the final part of the above assessments, refers to whether or not AI has consciousness? This would be a possible limit of AI, resulting from a series of conceptual clarifications. All of them have their origin in the reality according to which, in a philosophical sense, consciousness is a function of the human brain. It is “a feeling, an intuition that a human being has about its own existence, an intuitive or reflective knowledge that each one has about its own existence and about the things around it, an understanding of all of these”¹⁷.

The inevitable nature of AI developments contributes to an increased degree of acceptability. This determines the formulation of another question: is AI truth or challenge? The answer is unequivocal: AI is both truth and challenge. It is true because, practically, in the domestic and, especially, international context (post pandemic, epidemic, energy, financial, budgetary crisis; the surrounding natural and social environment in constant resettlement; the increasingly numerous wars, classic and hybrid) you can’t ignore AI with all that it implies, with the advantages and disadvantages that it undoubtedly generates.

Why is it a challenge? Because, under the sign of arguments that are hard to ignore, many other questions that await just as many answers, arise: are the legal, economic, social, political environments, etc. prepared to cope with the developments that AI is recording? Does AI increase or decrease the differences/conflicts between generations, as parts/segments/representations of the old and the new? Are the discrepancies between

¹⁰ *Ibidem*.

¹¹ *Ibidem*.

¹² *Ibidem*.

¹³ A. Fuerea, Statul de drept, o perspectivă europeană, Revista „Palatul de Justiție”, serie nouă, June 2024, pp. 18-21.

¹⁴ Romanian Academy, “Iorgu Iordan” Institute of Linguistics, Dicționarul..., op. cit., p. 320.

¹⁵ I. R. Urs, M. Duțu, C. Bîrsan, A. Severin, N. Volonciu (coord.), Enciclopedia juridică română, vol. II, lit. D-E, Romanian Academy Publishing House and Universul Juridic Publishing House, Bucharest, 2022, p. 287.

¹⁶ M. Duțu, op. cit, p. 12.

¹⁷ <https://dexonline.ro/definitie/con%C8%99tiin%C8%9B%C4%83>, accessed on April 8, 2026.

traditional and modern, innovative jobs becoming more acute, even ending in the disappearance of some of the old jobs and the multiplication, respectively, the consolidation of the new ones? What will be the future of some traditional professions? In the interview I gave to the Romanian Magazine of Criminal Business Law in 2020, I was generously asked a question that still lingers in my mind: “How much will artificial intelligence and new technologies influence the legal professions? How do you think criminal trials will be solutioned in 10-20 years? Will artificial intelligence be able, in the foreseeable future, to replace legal professionals (judges, prosecutors, lawyers, etc.)?” I still reflect on what I said then, over 5 years ago, thinking of whether my opinions have changed after deepening the presence of artificial intelligence in our daily lives¹⁸.

Computer literacy vs. resistance, reservations existing in the matter represent so many challenges that we, from the perspective of our human intelligence, will respond to.

How should we view artificial intelligence? As a partner or an adversary? If we understand it, human wisdom will always triumph. If we accept it and constantly prepare to keep up with AI, it will certainly be our partner. It will certainly be considered an adversary by those who, with or without science, will try to ignore artificial intelligence, the positive contributions it has to improving the quality of human life, the beneficial nature of its influences. Without a doubt, if we view AI as an adversary, we place it in competitive relations and it is very difficult, if not impossible, to determine which of the two intelligences (human and artificial) could be declared victorious.

The professional deformation of legal experts urges us to reflect on a possible answer to a natural question, especially in the current conditions. Is there or is there not an AI liability (civil, criminal, contraventional, tortious)? Liability can be related to the rights and obligations of AI, in peacetime and in wartime¹⁹.

From a regulatory perspective, the protection of personal data, for example, can't be separated from artificial intelligence. More than fifteen years ago, the European Union adopted a “European strategy for smart, green and inclusive growth”. This led to the need for effective investment in vocational training, within a coherent legal context at European level. The current Digital Agenda for Europe (for the period 2020-2030) refers to the fact that “digital service platforms and emerging technologies, such as artificial intelligence, are profoundly shaping our society. These innovations have transformed the way we communicate, shop and access information online, becoming part of our daily lives. The Agenda (...) responds to these changes, seeking to create safe digital spaces, ensure fair competition in digital markets and strengthen Europe's digital sovereignty, in line with the digital and green transitions”.

The dimensions of AI, from the perspective of multiple approaches, are becoming increasingly numerous, even if, at a superficial glance, we would be tempted to believe that three of these are the most important: technical, economic and legal. Many others are added to these, at least as important, if not more important, all of which need to be viewed and analyzed systemically, interconditioning each other, because they are interdependent, deriving from each other and mutually conditioning each other. This is the psychological dimension (acceptance/rejection; favorability/unfavorability; intellectual comfort/intellectual discomfort), to which is added, for example, the philological, linguistic dimension, at least as relevant, the newly appeared words, thousands of them, being edifying, in this sense. Without going into detail, the political, philosophical,

¹⁸ A. Fuerea, *Revista de drept penal al afacerilor*, no. 2 (July-December)/2020, pp. 110-111: “The answer can be simple, but also sophisticated. I am trying to strike a balance. In 2017, I drafted a country report for the Congress of the International Federation of European Law (held in Estoril, Portugal, in 2018), a report entitled “Internal market and digital economy”. While documenting myself for the report, I found that, inevitably, in the future, even the legal professions will be influenced by artificial intelligence and new technologies, just as, without exception, all other professions will be influenced by them. In summary, I believe that research and documentation activities will be influenced, as well as those concerning the development of regulations and their application by all legal professions. An example in this regard is that of the protection of personal data. Another country report, of which I am a co-author, was the one prepared in 2019, for the 2020 Congress in The Hague (Netherlands), of the same Federation of European and International Law, a report that also includes aspects regarding digitalization in the era of globalization, which I also wrote about in an article that will appear in 2021. Regardless of developments, I appreciate that the human being will remain the “piece of resistance”, with all the connotations, positive or negative, that we must assume, including within the solutions that will be given in criminal trials. Perhaps the ratio between objective and subjective will change, more or less, in the decisions that will be pronounced in certain cases. Artificial intelligence will help a lot, but I find it hard to believe that replacing legal professionals will happen, at least in the next 10-20 years. In the future, I'm also very curious to find out what will happen..., as long as I am in a position to find out😊”.

¹⁹ A.-Al. Stoica, *Răspunderea internațională a statelor pentru utilizarea aparatelor de zbor fără pilot*, doctoral thesis held at the Doctoral School of the Faculty of Law, “Nicolae Titulescu” University of Bucharest, in 2023 (doctoral supervisors, PhD. Professor Raluca Miga Beștelu and PhD. Professor Augustin Fuerea), published by C.H.Beck Publishing House, Bucharest, 2024, p. 493. The author believes that “liability will be complex, with the internal automation of states [n.n. see AI], where decisions are calculated by an algorithm and implemented by different devices”. A possible beginning of regulation in the matter of liability for AI could be represented by Directive (EU) 2024/2853 on liability for defective products (?).

religious or sociological dimensions can't be ignored either, all of which are the subject of consistent specialized analyses.

Possible problems, risks, vulnerabilities and threats generated by artificial intelligence refer, among others, to: fears about job loss, even in the case of legal professions (which legal professions would be most exposed to such a process?); concerns about professional retraining (fragility of jobs); investments in the technology necessary to understand and use AI; confusions arising from the perspective of digitization, digitalization and modern technologies, including AI; competition, not with AI, but with people who use AI; the evolution of rights in the 4th generation (AI); facial recognition; fingerprinting; genetic data and their use and, equally important, the electronic signature, respectively the use of the electronic wallet.

As a reflection, other possible vulnerabilities could be added, some of them quite realistic (e.g. AI – employee with work card; transition from the physical format of activities to the online/teleworking system, etc.) others that, now, may have science-fiction connotations, such as the case of the multiplication of holograms depending on intellectual performance, concerns about cloning and abandoning the classic system of movement or feeding. In the case of AI, we can even state, without fear of being wrong, that “the sky is the limit”, in the concrete or abstract sense of the word.

However, coming down to earth, from the perspective of the relations between AI and humans with their personal data, we can't help but notice that even if we often think that things are happening differently, diametrically opposite, AI is trained with the help of humans, respectively important personal data that belong to them, namely voice and image.

An essential moment in the developments recorded in the field of personal data protection is represented, at the level of the European Union, after Directive 95/46/EC²⁰, by the adoption and entry into force of Regulation (EU) 2016/679²¹ which, from the point of view of legal effects, was likely to stimulate the attention of both operators and data subjects, including from the perspective of rights and obligations, but especially of the sanctions applied²².

Concerns have intensified, in terms of the protection of personal data, and not only, as digitalization, respectively modern technologies (AI) have evolved. That is why, even if there are many criticisms regarding the fact that the EU is concerned with regulation, and others with creativity in the field, a truly important landmark, among many others, is the (EU) AI Act²³.

The dynamics of social relations, after the speed century (20th century), were also reflected in the legislative activity at the EU level. If 21 years passed from the adoption of Directive 95/46/EC until it was repealed by Regulation (EU) 2016/679, after the adoption of this regulation, legislation in the field has become extremely prolific. Without presenting an exhaustive list, in this sense, we can't ignore some of them, as they are incidental

²⁰ Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, published in OJ L 281, November 23, 1995. „Overall, the EU directive serves as a vital instrument for the development and enforcement of EU law. It empowers individuals, harmonizes national legal systems, and contributes to legal consistency and the protection of individual rights within the European Union” (M.-A. Niță, *Directiva - izvor important al dreptului Uniunii Europene cu rol de armonizare a legislațiilor naționale ale statelor membre*. Buletin de informare legislative, nr. 1 / 2024, p. 37).

²¹ Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), published in OJ L 119, May 4, 2016. „The increasing concerns regarding the protection of personal data have been favoured, among others, by the unprecedented developments in the field of technology and digitalisation. These concerns have increased over time, at the level of the European Union, in the sense that the issue of human rights has progressively come to the attention of European decision-makers. These aspects have materialized in the inclusion of generous objectives in the amending treaties of the European Union, in the adoption of an adequate derived legislation, but also in a consistent case law” (R.-M. Popescu, *Legislative and Jurisprudential Aspects Regarding the Protection of Personal Data*, CKS 2021 – Challenges of the Knowledge Society 2021 - http://cks.univnt.ro/cks_2021.html -, „Nicolae Titulescu” University Publishing House, p. 460 – 465).

²² A. Fuerea, *Aplicarea Regulamentului general privind protecția datelor*, Revista Dreptul, no. 7/2018, pp.110-116. „We appreciate that, even though the main contraventional sanction, the fine, is rather burdensome for the sanctioned operators, the existence of the admonition and the remediation plan, in an established term, represents a very important factor for the public and private area to respect the new legislation, prevention being what we consider is emerging from the law philosophy and not sanctioning. The impact of this European act – G.D.P.R. stretches equally over the public and private area, because, like we know, in law, no one is above the law” (E.E. Ștefan, *Interference Between the Protection of Personal Data and Contraventional Legislation*, Perspectives of Law and Public Administration Volume 7, Issue 2, December 2018, p. 163).

²³ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 establishing harmonised rules on artificial intelligence and amending Regulations (EC) no. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Regulation), published in OJ L 2024/1689, July 12, 2024.

to our analysis. The above are joined, by way of example: Regulation (EU) 2022/1925 on digital markets (abuse of dominant position, anti-competitive practice)²⁴; Regulation (EU) 2022/2065 on digital services (illegal content and forms of disinformation online)²⁵ and, most recently, Regulation (EU) 2025/2518 laying down additional procedural rules for the enforcement of Regulation (EU) 2016/679²⁶.

4. Instead of conclusions

With a force of indisputable argument, we invoke Opinion 28/2024 of the European Data Protection Board on certain aspects of data protection related to the processing of data in the context of AI models²⁷, in which we identify at least three questions formulated by the Irish supervisory authority and as many answers provided by the board.

The first question refers to whether “it is considered that, in all cases, the final AI model, which was trained using personal data, does not correspond to the definition of personal data” as provided for in Art. 4 point 1 of the GDPR?

The second concerns the situation regarding “if a data controller relies on legitimate interests as a legal basis for processing personal data for the purpose of creating, updating and/or developing an AI model, how should that controller demonstrate the adequacy of the legitimate interests as a legal basis, both in relation to the processing of data received from third parties and data collected directly from data subjects?”.

Thirdly, “after training, if a data controller relies on legitimate interests as a legal basis for the processing of personal data that takes place within an AI model or an AI system of which an AI model is part, how should a controller demonstrate the adequacy of the legitimate interests as a legal basis?”.

These are questions raised by Ireland, to which the Committee has provided answers, but above all, which have stimulated some of the most profound and diverse reflections.

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²⁴ Regulation of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, published in OJ L 265, October 12, 2022.

²⁵ Regulation of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation), published in OJ L 277, October 27, 2022.

²⁶ Regulation of the European Parliament and of the Council of 26 November 2025 laying down additional procedural rules for the enforcement of Regulation (EU) 2016/679, published in OJ L 2025/2518, December 12, 2025.

²⁷ Opinion of 17 December 2024.

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A FEW KEY POINTS REGARDING THE FREE CIRCULATION OF DIVORCE DECISIONS WITHIN THE EU

Marian GOCIU*

Abstract

The free circulation of divorce decisions is intended to facilitate the free movement of persons in an increasingly dynamic and complex European Union in terms of marriages. The concept under consideration is based on mutual recognition and it essentially involves the dismissal of any special procedure for the recognition and enforcement by one Member State of a court decision issued in another Member State.

Although it involves mutual trust between Member States, in order to circulate freely within the EU, a divorce decision must meet certain conditions so that its recognition is not refused. At the same time, a divorce decision usually entails not only the dissolution of the marriage, but also the effects of this dissolution, both financial and non-financial, which complicates the issue of recognition of the divorce decision.

In this paper, we will begin our analysis with the principle of mutual trust, then we will examine, from the perspective of EU law, the conditions required to recognize such a decision in another Member State, we will identify the legal and factual obstacles and we will draw our conclusions to answer the question of whether divorce decisions rendered by a court in one Member State actually circulate freely within the EU.

Finally, depending on the above conclusions, if we identify impediments to the free circulation of divorce decisions, we will propose appropriate legal measures.

Keywords: divorce decision, recognition, enforceability, EU law.

1. Introduction

The European Union is not merely an economic market, as the legislative measures adopted within it have a substantial impact on the social sphere in which family relationships take place. EU citizens move freely from one Member State to another and, in many cases, establish their habitual residence in a Member State other than that of their nationality, so that cross-border families have become an everyday reality and are no longer the exception.

At the same time, the number of cross-border divorce cases is increasing significantly year by year, and when such a case is finalized, the former spouses discover the reality of the bureaucratic obstacles inherent in national administrative procedures regarding the recognition of court judgments issued in another Member State.

The EU's legal framework on matrimonial matters has evolved positively, including with regard to the mutual recognition and enforcement of court decisions, so that currently a divorce decision issued in one Member State should be recognized in the other Member States, without the former spouses having to go through any special procedure.

Furthermore, the Brussels IIb Regulation¹ facilitates the circulation within the Union of divorce judgments rendered by a court of a Member State, by providing for their recognition and enforcement in another Member State. The interested party may submit to the competent public authority a copy of the judgment relied upon, accompanied by the certificate issued in accordance with the Regulation. The public authority may refuse to recognize the judgment only in the specific situations provided for in that same legal instrument.

The principle of mutual recognition of court decisions lies at the heart of the free circulation of such decisions, including divorce ones.

Through this scholarly endeavor, we aim to determine whether the EU's legal framework regarding divorce is sufficiently clear and precise to effectively ensure the free circulation of divorce judgments. To address this challenge, we will examine the substance of the principle of mutual recognition of judicial decisions from the

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¹ Council Regulation (EU) 2019/1111 of June 25, 2019, on jurisdiction, the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, and on international child abduction, published in the Official Journal L 178, pp. 1–115.

perspective of its evolution over time, in conjunction with legislative changes and the case law of the Court of Justice of the European Union, after which we will analyze several cases from the case law of Romanian courts concerning the application of the principle in question and draw relevant conclusions regarding the subject matter of this paper.

2. Historical aspects and legislative developments

The basis for the principle of mutual recognition of judgments within the EU is Article 220 of the Treaty establishing the European Economic Community². The Community's competences in the area of judicial cooperation in civil matters were limited to the mutual recognition and enforcement of court decisions and arbitral awards. The Member States of the European Communities implemented this principle by signing, in 1968, the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters³.

Family law is a branch of civil law⁴, therefore, the provisions of the Convention concerning the recognition and enforcement of court decisions were also applicable in matrimonial matters.

Since 1992, the area of judicial cooperation in civil matters has been incorporated into the third pillar of the European Union, entitled "Justice and Home Affairs" (Title VI), through the Treaty of Maastricht⁵, and until May 1, 1999, when the Treaty of Amsterdam⁶ entered into force, the measures adopted at the European Community level in the field of judicial cooperation in civil matters took the form of conventions signed and ratified by the Member States, pursuant to Article 220 of the Treaty establishing the European Economic Community or, subsequently, Article 293 of the Treaty establishing the European Community. Following the entry into force of the Maastricht Treaty, such conventions could also be drafted by the Council and recommended to the Member States for adoption, in accordance with the constitutional requirements of the Member States, pursuant to Title VI (Article K) of that Treaty⁷.

In family law, the first initiatives undertaken within the new legislative framework focused on divorce, due to growing demands from the public facing the challenges of cross-border divorce, and were launched within the European Group on Private International Law (GEDIP)⁸. On May 28, 1998, the Council of the European Union, pursuant to Article K.3(2)(c) of the Treaty on European Union, adopted the "Convention on Jurisdiction, Recognition, and Enforcement of Judgments in Matrimonial Matters"⁹, taking into account, among other things, the need to introduce modern rules for the recognition and enforcement of judgments on annulment, divorce, and legal separation among the Member States of the European Union, as well as to establish a uniform procedure¹⁰. This convention did not take effect due to the failure to comply with the procedure established under Article 47 and the rapid changes in EU law at that time.

Subsequently, the Council was empowered to adopt legislative acts under the 1997 Treaty of Amsterdam, which amended the Treaty establishing the European Community (first pillar)¹¹, the relevant provision being Article 61(c).

Following the 1999 European Council meeting in Tampere¹², pursuant to point 34 of its conclusions, in civil matters, the European Council was to request the European Commission to submit a proposal for a further reduction of the intermediate measures that were still necessary to enable the recognition and enforcement of a court decision in the requested State. Thus, in a first phase, these intermediate procedures were to be

² Signed in Rome on March 25, 1957; entered into force on January 1, 1958.

³ Published in OJ L 299, December 31, 1972, pp. 32–42; the provisions governing the recognition and enforcement of judgments are set forth in Article 26 et seq. of the Convention.

⁴ Under Romanian law, this area is governed by the Civil Code, adopted by Law No. 287/2009, Book II, "On the Family," Articles 258–534.

⁵ In force since November 1, 1993.

⁶ In force since May 1, 1999.

⁷ Wendy Kennette, *The enforcement of judgements in Europe*, Oxford University Press, Oxford, 2000, p. 5; Peter Stone, *EU Privat International Law*, Edward Elgar Publishing, Cheltenham, 2010, p. 6.

⁸ Alegría Borrás, *Introduction générale. L'évolution du droit de la famille en Europe*, in: Hugues Fulchiron și Christine Bideaud-Garon, *Vers un statut européen de la famille*, Dalloz, Paris, 2014, p. 7.

⁹ The Brussels II Convention can be viewed online at [https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:41998A0716\(01\)&from=BG](https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:41998A0716(01)&from=BG), last accessed on March 27, 2026.

¹⁰ Explanatory report on the 1998 Convention drawn up by the Council of the EU pursuant to Article K.3 of the Treaty on European Union, on jurisdiction, the recognition and enforcement of judgments in matrimonial matters, prepared by Alegría Borrás, published in OJ C 221, July 16, 1998, pp. 27–64.

¹¹ Consolidated version of 1997, published in the Official Journal, C 340 of November 10, 1997, pp. 173–306.

¹² Conclusions of the 1999 Tampere European Council, paras. 28–39, available online at <https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf>, last accessed on March 27, 2026.

eliminated for court decisions in small claims cases and for certain court decisions in family law matters (for example, regarding maintenance claims and visitation rights). At the same time, the European Council called on the Council and the Commission to adopt, by December 2000, a program of measures to implement the principle of mutual recognition of court decisions, as well as to draft new procedural legislation for cross-border disputes¹³.

Accordingly, the Council adopted Regulation No. 1347/2000 on jurisdiction, the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children¹⁴, by incorporating the provisions of the Brussels II Convention, establishing in Article 14 the principle of mutual recognition of decisions without the need for any special procedure and in Article 15 lists the four situations in which a public authority or a court may refuse to recognize a decision issued in another Member State.

On January 15, 2001, the Council drew up the Draft Program of Measures for the Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters¹⁵, which also proposed amendments to the Brussels II Regulation. Consequently, this Regulation was repealed by Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility¹⁶, which incorporated the rules on the recognition and enforcement of judgments in matrimonial matters without substantial changes¹⁷.

In 2014, the European Commission assessed how the Brussels IIa Regulation had been applied by the courts of the Member States and drew up a Report addressed to the European Parliament, the Council, and the European Economic and Social Committee¹⁸, in which it proposed reforming this legal instrument with the aim of further developing the European area of justice by simplifying procedures and increasing their efficiency¹⁹.

As a result of this report, the Brussels IIa Regulation was repealed by Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, and on international child abduction²⁰.

We observe that the mutual recognition and enforcement of court decisions within the EU have not undergone any substantive or qualitative changes over time, but only quantitative changes consisting of an expansion of their scope of application.

3. The principle of mutual trust and the free circulation of court decisions

Mutual trust is one of the cornerstones of cooperation in the field of European Union private international law. Based on this principle the rules on the cross-border recognition and enforcement of judgments in the European Union are still subject to simplification²¹.

The recognition and enforcement of decisions rendered in a Member State are based on the principle of mutual trust²². Thus, the principle of mutual trust forms the foundation of judicial cooperation in the European Union, based on a Member State's confidence in the national legal systems of the other Member States. Specifically, Member States operate on the assumption that other Member States respect fundamental rights and the rule of law when issuing judicial decisions, and there is confidence in the administration of justice within the European Union.

This principle represents a concept distinct from the notion of free circulation of judicial decisions, which has two dimensions: the recognition of judicial decisions and their enforcement.

¹³ Paragraph 37 of the conclusions of the Tampere meeting.

¹⁴ The Brussels II Regulation, published in OJ L 160, June 30, 2000, pp. 19–36, in force since March 1, 2001.

¹⁵ Published in the Official Journal of the European Communities No. C 12, January 15, 2001, pp. 1–9, available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001Y0115%2801%29>, last accessed March 27, 2026.

¹⁶ The Brussels IIa Regulation, published in the Official Journal L 338, December 23, 2003, pp. 1–29.

¹⁷ Peter Stone, op.cit., p. 10.

¹⁸ The report is available online at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52014DC0225>, CELEX 52014DC0225, last accessed on March 27, 2026.

¹⁹ Botond Czelicz et al., Seminar European – Cooperarea dintre statele membre ale UE în vederea soluționării cauzelor civile referitoare la deplasarea sau reținerea ilicită a unui copil – Manual, Sitech Publishing House, Craiova, 2018, pp.5-6.

²⁰ Effective as of August 1, 2022.

²¹ Marek Zilinsky, Mutual Trust and Cross-Border Enforcement of Judgments in Civil Matters in the EU: Does the Step-by-Step Approach Work?, in Netherlands International Law Review volume 64/2017, pp. 115-139, at <https://link.springer.com/article/10.1007/s40802-017-0079-0>, last time consulted on 28.03.2026.

²² See recitals (16) of the Brussels II Regulation, (22) of the Brussels IIa Regulation, and (55) of the Brussels IIb Regulation.

The principle of mutual trust subsequently gave rise to the principle of mutual recognition of judicial decisions, as the cornerstone for the creation of a genuine judicial area, endorsed by the 1999 Tampere European Council²³, as well as the principle of automatic recognition of judicial decisions, established by the Brussels IIa Regulation²⁴.

In light of the historical developments analyzed in section 2, an initial observation must be made regarding the scope of application of the Brussels II Regulation, namely that, in matters of parental responsibility, the Regulation applies only to the common children of married parents and does not apply to children whose parents are not married or to the children of a single parent, as can be easily seen from Article 1 of this legal instrument.

Although the Brussels II Regulation provided for the recognition of court decisions “without recourse to any special procedure,” it nevertheless established the exequatur procedure for the enforcement of decisions issued in another Member State that also contain provisions regarding parental authority²⁵.

In matrimonial matters, a divorce decision, without any ancillary provisions, does not contain enforceable obligations. Thus, the decision is required solely for the purpose of being submitted to the competent authorities to update the civil status records regarding the litigant parties. Therefore, based on the principle of mutual recognition of court decisions, it is sufficient for the relevant authority to recognize the divorce decision and make the corresponding changes in the civil registry records.

The situation becomes more complicated when the divorce decision includes other provisions, such as those determining parental authority over the minor, the minor’s residence, the visitation rights for the non-custodial parent and the minor, maintenance obligation, the spouses’ surnames following the divorce, the division of marital property, or other property-related consequences of the dissolution of the marriage. For some of these ancillary claims it is necessary to follow the exequatur procedure, which involves declaring the decision enforceable within the territory of the Member State of the court hearing the case.

The exequatur procedure should not be confused with the procedure for authorizing enforcement under the national law of the Member States; the former aims to confer enforceability within the territory of one Member State, on a decision rendered in another Member State, whereas the latter is a purely internal procedure and constitutes a stage in the enforcement process²⁶.

The purpose of exequatur is to confer enforceability in the Member State of the court seised, on a decision rendered in another State. In effect, through exequatur, the foreign decision also acquires the force of *res judicata* in the State of the court seised. With certain exceptions, a foreign court decision cannot have the force of *res judicata* before obtaining exequatur or recognition²⁷.

The Brussels IIa Regulation extended the scope of the principle of mutual recognition to all children, regardless of whether the parents are married or not and regardless of whether the children are the biological children of one of the spouses. At the same time, it eliminated the exequatur procedure for decisions concerning visitation rights and the return of the child.

The Brussels IIb Regulation has completely eliminated the exequatur procedure in matters of parental responsibility²⁸, including the exercise of parental authority, thereby effectively establishing the principle of automatic mutual recognition of court decisions.

From the perspective of the case law of the Court of Justice of the EU, the principle of mutual trust made it possible to establish a mandatory system of jurisdiction, which all courts are required to respect, and the corresponding waiver by Member States of their domestic rules on recognition and enforcement in favor of a simplified mechanism for the recognition and enforcement of decisions rendered in proceedings concerning parental responsibility²⁹.

The recognition of a decision must have the effect of conferring upon the decision the authority and effectiveness it enjoys in the State where it was rendered³⁰.

²³ See recital (2) of the Brussels IIa Regulation.

²⁴ See recital (54).

²⁵ See Article 14, paragraphs (1) and (3), and Article 21, paragraph (1).

²⁶ Evelina Oprina, *Tratat teoretic și practic de executare silită. Volumul I. Teoria generală și proceduri execuționale*, Editura Universul Juridic, București, 2013, p. 226.

²⁷ Ion P. Filipescu, *Drept Internațional Privat*, ediție revăzută și completată, Actami Publishing House, Bucharest, 1999, p. 512; Augustin Fuerea, *Drept internațional privat – ediția a II-a revăzută și adăugită*, Universul Juridic Publishing House, Bucharest, 2005, p. 234.

²⁸ See Article 34(1).

²⁹ Judgment of the CJEU of July 15, 2010, Case C-256/09, Bianca Purucker v. Guillermo Vallés Pérez, EU:C:2010:437, para. 72.

³⁰ Judgment of the CJEU of February 4, 1988, Case 145/86, Horst Ludwig Martin Hoffmann v. Adelheid Krieg, EU:C:1988:61.

The term “enforceable” in the first paragraph of Article 31 of the Brussels Convention of September 27, 1968, on jurisdiction and the enforcement of decisions in civil and commercial matters must be interpreted as referring exclusively to the enforceability, from a formal standpoint, of foreign decision and not to the circumstances in which those decisions may be enforced in the State of origin³¹. In other words, the enforcement of a decision rendered in a Member State will, in practice, be carried out in accordance with the domestic enforcement procedures of each Member State. The Brussels Convention aims to facilitate the free circulation of court decisions by establishing a simple and expeditious procedure in the contracting state where enforcement of a foreign decision is sought. This *exequatur* procedure constitutes an autonomous and comprehensive system³², and the enforceability of the decision in the State of origin is a prerequisite for the enforcement of that decision in the requested State³³.

Although these conclusions were formulated in connection with the interpretation of the concepts of recognition and enforcement of decisions contained in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, we consider that, for the same reasons, they are also applicable in matrimonial matters.

Therefore, in matters of divorce, the general rule is the free circulation of court decisions, with two categories of exceptions. The first category, involving legal limitations, covers cases in which recognition of a decision may be refused:

- where recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- where the document instituting the proceedings or an equivalent document was not served on the defendant who did not appear in sufficient time to enable him to arrange for his defense, unless it is established that the defendant has accepted the decision unequivocally;
- where it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought; or
- where it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings between the same parties, provided that the earlier decision fulfills the conditions necessary for its recognition in the Member State in which recognition is sought.

The second category concerns divorce decisions which, in addition to provisions regarding the dissolution of the marriage, the determination of parental authority, and visitation rights, also rule on other non-property or property-related effects of the dissolution of the marriage. In this situation, if no EU regulation has been adopted for such an ancillary matter to apply the principle of automatic recognition of judgments, the interested party may seek *exequatur* or obtain partial enforcement pursuant to Article 53 of the Brussels IIa Regulation.

4. Case study

For this section, I reviewed 50 relevant decisions issued by Romanian courts between August 1, 2022, and March 25, 2026, most of which granted the request for recognition of a divorce decision, while only a few dismissed the request as lacking interest. Thus, given the repetitive nature of these decisions, I selected three recent representative cases to examine how these courts have interpreted and applied the principle of automatic recognition of court decisions in divorce cases.

In the first case³⁴, the Caraş-Severin Tribunal granted the petition filed by the plaintiff MV, against the defendant CF, for the recognition in Romania of the divorce decision issued by the Judenburg District Court in Austria, which became final on January 11, 2023, confirming the agreement of both parties to dissolve the marriage. The plaintiff based his claim on the provisions of Article 1095 of the Romanian Code of Civil Procedure³⁵ and did not indicate that the Romanian authorities responsible for updating the civil registry in accordance with the new civil status had refused to recognize the divorce decision.

³¹ Judgment of the CJEU of April 29, 1999, Case C-267/97, *Eric Coursier v. Fortis Bank and Martine Bellami*, EU:C:1999:213.

³² *Ibidem*, para. 25.

³³ *Ibidem*, para. 23; Judgment of the CJEU of April 28, 2009, Case C-420/07, *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, EU:C:2009:271, para. 66.

³⁴ Judgment No. 781 of November 11, 2025, rendered by the Caraş-Severin Tribunal in Case No. 1133/115/2025, unpublished.

³⁵ Law No. 134/2010 on the Code of Civil Procedure, republished in the Official Gazette of Romania, Part I, No. 247 of April 10, 2015

Since the divorce decision was rendered by a court of an EU Member State, namely Austria, the Romanian court erroneously held that the provisions of Article 2567 of the Romanian Civil Code³⁶ and Articles 1095 and 1096 of the Romanian Code of Civil Procedure, concerning the exequatur procedure, are applicable, given the direct applicability of Articles 30 et seq. of the Brussels IIa Regulation, as well as the provisions of Article 1094 of the Romanian Code of Civil Procedure, according to which “for the purposes of this title, the term ‘foreign judgments’ refers to documents of contentious or non-contentious jurisdiction issued by courts, notaries, or any competent authorities of a non-member state of the European Union.”

Consequently, the provisions of Article 30 et seq. of the Brussels IIb Regulation apply to the plaintiff’s application. However, the plaintiff should have demonstrated an interest in filing the application for recognition. The competent Romanian authorities are required to recognize divorce decisions issued in a Member State for the purpose of making the necessary changes in the civil registry, without requiring the applicant to follow any special procedure and, only in the event of a refusal to recognize the decision, the plaintiff has the option to challenge this refusal before a court and to request a finding that there are no grounds for refusing the recognition of the decision and, consequently, to demand the recognition of the divorce judgment throughout the entire territory of the state. Since the plaintiff has failed to establish the prerequisite of a refusal to recognize the decision, his action lacks interest. Therefore, the proper course of action would have been for the court to raise, on its own motion, the defense of lack of interest and to dismiss the claim as lacking interest.

The second case³⁷ under consideration concerns the petition filed by the plaintiff HF, against the defendant GRF, seeking a declaration that there are no grounds for refusing the recognition of the Court of Reggio Emilia’s decision, local tribunal in the Italian Republic, which established parental authority over the minor HJ and the visitation schedule. Although it is not a divorce decision, the case is significant from the perspective of applying the principle of automatic mutual recognition of decisions provided for in the Brussels IIb Regulation.

The first instance court correctly raised the objection of lack of interest in filing the claim and dismissed the claim as lacking of interest, pursuant to Article 30(1) and (2) of the Brussels IIb Regulation. However, on appeal, the appellate court upheld the appeal, annulled the judgment of the tribunal, dismissed the objection of lack of interest as unfounded, and granted the appellant-plaintiff’s claim, recognizing the divorce decision rendered by the Tribunal of Reggio Emilia within the territory of Romania.

The main argument of the appellate court was that the appellant-plaintiff’s interest in filing the application need not be linked to a specific situation in which she encountered actual obstacles to the recognition of the decision in question with the Romania’s authorities, since the appellant-plaintiff sought recognition of the foreign decision in order to obtain travel documents for the minor.

We consider that the reasoning provided by the Court of Appeal is unfounded, since the interest in bringing an action must be specific, legitimate, personal, established and existing, in accordance with Article 33 of the Romanian Code of Civil Procedure. In the present case, the appellant-plaintiff has not demonstrated that she approached the competent Romanian authorities to request the issuance of the minor’s travel documents, and they reportedly refused to issue the documents.

If we were to accept the argument of the Court of Appeal, the provisions of Article 30 of the Brussels IIb Regulation would become ineffective, since the parties concerned would be required to resort to the exequatur procedure in all cases involving a judgment rendered in another Member State.

Finally, by Judgment No. 1188³⁸ of November 10, 2025, the Prahova Tribunal upheld the objection of lack of interest raised ex officio and dismissed, as lacking of interest, the claim brought by the plaintiff SI against the defendant DO, seeking recognition of the divorce decision rendered by the Court of Zaragoza, in Spain.

In its reasoning, the court found that the provisions of Article 21(1) (1) of Regulation 2201/2003 and Article 1094 of the Romanian Code of Civil Procedure are applicable, and concluded that the absence of grounds for refusing a court decision must not be formally established by a court ordering the recognition of the decision, but rather the interested party must file a special claim with the court to bring to the court’s attention the existence of valid grounds for refusal.

Furthermore, regarding the refusal by a Romanian authority to recognize the validity of the court decision at issue, the court held, on the one hand, that this had not been proven by the plaintiff. On the other hand, it

³⁶ Law No. 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, No. 505 of July 15, 2011.

³⁷ Decision 20A of February 11, 2026, issued by the Galați Court of Appeals in Case No. 1025/91/2025, unpublished.

³⁸ Judgment No. 1188 of November 10, 2025, rendered by the Prahova Tribunal in Case No. 1467/105/2025, unpublished.

found that even if such a refusal were proven, it would not justify the party's interest in seeking recognition of the court decision through the procedure provided for by the Romanian Code of Civil Procedure, given the mandatory application of Regulation 2201/2003, and a public official's refusal to recognize such a decision may constitute a breach of official duties, which the interested party may report to the competent authorities.

We agree with the Romanian court's reasoning that the exequatur procedure governed by domestic law does not apply to the plaintiff's application, and that the plaintiff must demonstrate an interest in filing the application, namely the specific refusal by a Romanian authority to recognize the judgment rendered in a Member State, but the Brussels IIb Regulation is applicable as of August 1, 2022, not the Brussels IIa Regulation.

5. Conclusions

From an analysis of legislative developments, we have observed that the recognition by one EU Member State of decisions rendered in other Member States formed the basis of early judicial cooperation in civil matters, grounded in the principle of mutual trust, but subject to the exequatur procedure. Over time, the EU legislature has gradually eliminated the exequatur procedure in several areas, such as matrimonial matters and parental responsibility, with the rule now being that decisions rendered in one Member State are recognized in the other Member States without the need for any special procedure, including the exequatur procedure. Consequently, based on the principle of mutual trust originally regulated in the Treaty establishing the European Economic Community and in the case law of the Court of Justice, the European Union has established the principle of automatic mutual recognition of court decisions.

Based on this principle, we have seen that there are two categories of exceptions: the first consists of the grounds for refusal of recognizing foreign decisions, listed in Article 38 et seq. of the Brussels IIb Regulation, while the second category refers to the situation where the judgment whose recognition is at issue includes both the dissolution of the marriage and solutions on ancillary matters concerning the pecuniary and non-pecuniary effects of the divorce. In the latter case, with respect to ancillary matters that do not fall within the scope of parental responsibility or other matters for which EU legislation has not established, by regulation, the application of the principle of automatic mutual recognition of court decisions, the interested party will have to resort to the national exequatur procedure or may invoke, before the competent authorities, only the partial recognition of the decision, with respect to the provision dissolving the marriage and the solutions pronounced regarding parental responsibility.

According to the Romanian case law reviewed, no plaintiff has invoked, in support of their claim, the refusal of public authorities—in any form—to recognize divorce decisions rendered in another Member State, resorting to the exequatur procedure only as a precautionary measure. Furthermore, based on the reasoning set forth in the analyzed jurisprudence, we observe that the courts either failed to examine the provisions of the Brussels IIb Regulation or applied them incorrectly, contrary to the purpose for which they were enacted—namely, to facilitate the free circulation of judgments— but these issues cannot be remedied through legislative changes, but only through individual study or as part of continuing professional development.

We therefore conclude that the free circulation of divorce decisions is effective within the European Union, from the perspective of applicable law, as interpreted by the Court of Justice of the European Union, subject to the limitations set forth above, so that, in future efforts, we will turn our attention to examining the grounds for refusing to recognize a divorce decision and to a comparative analysis of these grounds with those of the exequatur procedure under national law.

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THE LEGAL DIMENSION OF DEFENCE POLICY WITHIN THE EUROPEAN UNION

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Abstract

The paper examines the legal dimension of defence policy within the European Union in the context of profound transformations in the international security environment, characterized by volatility, multipolarity, and the intensification of geopolitical competition. In this framework, the European Union is compelled to redefine its role as a global actor and to strengthen its capacity for action through the development of a coherent and effective security and defence policy.

The analysis traces the historical evolution of the Common Security and Defence Policy (CSDP), from the early initiatives of European cooperation in the field of defence to its legal consolidation under the Treaty of Lisbon. It highlights the main institutional and conceptual milestones, as well as the role of recent instruments aimed at enhancing the Union's defence capabilities.

From a legal perspective, the paper examines the normative foundations of the CSDP, emphasizing its intergovernmental nature and the structural tension between the objective of establishing a common defence and the preservation of Member States' sovereignty in defence matters. The analysis focuses on the relevant provisions of the EU Treaties.

In conclusion, the paper argues that, despite significant progress in the development of the legal and institutional framework of defence, structural limitations continue to hinder the realization of a genuine common European defence. Nevertheless, recent developments indicate a clear trend towards strengthening the Union's role within the global security architecture.

Keywords: *Common Security and Defence Policy (CSDP), Treaty on European Union (TEU), mutual defence clause, strategic autonomy, European integration.*

1. Introduction

The international security environment is currently characterised by a complex and continuous dynamic, marked by volatility and uncertainty, whose unpredictability frequently exceeds the reactive and responsive capacity of States. The transition from a unipolar to a multipolar world order constitutes a complex phenomenon entailing the reconfiguration of international relations and global dynamics, and generating an intensification of geopolitical tensions among the principal international political actors. Relations between State and non-State actors are characterised, on the one hand, by a pronounced level of interdependence across a wide range of activity domains and, on the other, by increasingly acute geopolitical tensions and an intensification of strategic competition. A process of rebalancing global power dynamics is underway, characterised by the reshaping of political, economic, and security alliances, the emergence of regional alliances as expressions of a desire for enhanced autonomy vis-à-vis traditional powers, and a recurrent realignment of allegiances. This has generated considerable pressure upon traditional alliances, necessitating a redefinition of the global geopolitical system.

As a consequence of the manifestation of increasingly individualised, divergent, and antagonistic interests among State and non-State actors, as well as the amplification and diversification of influential factors particularly those of an asymmetric nature the current security environment has become increasingly fragmented and more conducive to the emergence and escalation of conflicts. The arsenal of means employed to advance interests has become progressively more varied. A discernible tendency has emerged, particularly among major powers, to substitute diplomatic solutions with coercive measures ranging from economic and financial sanctions to armed interventions thereby displacing the rule of law with the law of force, which engenders heightened concern and profound uncertainty within the global landscape.

The current international political context, with its diverse range of threats and challenges, poses an increasingly serious danger to the European continent. Accordingly, the European Union must redefine its common foreign policy and, by extension, its defence policy proceeding, on the one hand, from the obligation to

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ensure the protection of its constituent States and citizens and, on the other, from the necessity to consolidate and assert its status as a global actor on the present international political stage, as an active participant in the construction of the new international security architecture within which it aspires to constitute one of the poles of power.

One of the essential elements for the fulfilment of this objective is the definition and promotion of an effective, coherent, and credible defence and security policy, capable of providing the framework and instruments necessary for developing the Union's capacity for action, reaction, and adaptation in an increasingly unstable and uncertain environment. Defence policy must be legitimised through a robust legal foundation and through a continuously reinforced legal capacity in this domain.

In the present study, the authors set out to examine a series of issues concerning the legal basis of the Common Security and Defence Policy (CSDP), the efficiency, coherence, and sustainability offered by the current legal framework for the development of defence cooperation, as well as the limitations of that framework in the creation of genuine common defence at the level of the Union.

Methodologically, the paper employs a doctrinal and normative analysis of primary sources of European Union law, principally the Treaty on European Union and the Treaty on the Functioning of the European Union, as well as institutional documents, strategic frameworks, and relevant academic literature.

The analysis is conducted from a combined legal-institutional perspective, examining both the textual provisions of the Treaties and their practical implementation through CSDP missions and operations.

In terms of its relationship to the existing literature, the present paper draws upon relevant academic contributions which have examined the specificity of the defence domain in the law of the European Union, as well as the governance structures of the Union's defence activities.

The paper seeks to consolidate and extend these contributions by situating them within the broader context of the Union's recent strategic evolution, particularly in light of the geopolitical developments following Russia's aggression against Ukraine.

2. The Evolution of the European Security and Defence Policy

The aspiration towards a common European security and defence policy has deep historical roots, originating in 1948, when France, the United Kingdom, Belgium, the Netherlands, and Luxembourg concluded the Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, known as the Brussels Treaty/Brussels Pact.¹

Implementation of the commitments undertaken under the Treaty was entrusted to the Western Union, established pursuant to Article 51 of the United Nations Charter² as a regional organisation, designed to promote collective security and to guarantee automatic and immediate mutual assistance in the event of aggression against Western Europe.

In 1950, the French Prime Minister René Pleven proposed the establishment of the European Defence Community, to be composed of France, West Germany, Italy, and the Benelux States. The Pleven Plan envisaged the military reconstruction of Western Europe in anticipation of a potential Soviet attack, through the military integration of the signatory States and the creation of a unified European army subordinated to supranational institutions. The Treaty establishing the European Defence Community was signed in 1952 and ratified by Belgium, Germany, Luxembourg, and the Netherlands. France, however, objected to the transfer of military decision-making authority to a supranational body and to the rearmament of Germany, and consequently declined to ratify the Treaty. Although the plan was never realised, the Pleven Plan may be regarded as a foundational step in the process of European integration in the field of defence.

In 1954, the Paris Conference revised the Brussels Treaty, transforming it into the Modified Brussels Treaty. Italy and Germany acceded to the Treaty, and the Western Union was reconstituted as the Western European Union (WEU).³

¹The Treaty became part of NATO documents. In December 1950, the signatories of the Brussels Treaty decided to transfer the headquarters, personnel, and plans of the Western Union Defence Organisation to the Alliance.

²United Nations Charter, Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51, <https://www.un.org/en/about-us/un-charter>.

³Modified Brussels Treaty (Paris, 23 October 1954), Article VIII(2), https://www.cvce.eu/en/obj/modified_brussels_treaty_paris_23_october_1954-en-7d182408-0ff6-432e-b793-0d1065ebe695.html

Against the backdrop of Europe's efforts to develop a common foreign and security policy and to achieve an equitable partnership with the United States within NATO,⁴ the concept of the European Security and Defence Identity took shape. This concept, advanced at the Copenhagen European Summit (December 1973),⁵ marked the commencement of a process by which European States sought to develop a distinct and independent defence capability, separate from those of NATO and the United States.⁶ Without opposing Euro-Atlantic defence efforts, the process aimed at strengthening the European pillar of the Alliance, to the benefit of both the interests of the signatory States and the reinforcement of NATO's overall strength.

A significant milestone in the development of the European Union's security and defence policy was the adoption by the WEU Council of the Platform on European Security Interests (The Hague, October 1987), which underscored the importance of developing a European security pillar within NATO. The Platform defined the objectives and structural changes necessary for the development of a European identity in the field of security and defence.

The Treaty on European Union/Treaty of Maastricht (February 1992) constitutes the founding instrument of the European Union. Under its provisions, the EU was founded upon three pillars: the European Communities, the Common Foreign and Security Policy (CFSP), and Justice and Home Affairs (JHA). In the security domain, the Treaty provided for a policy whose ultimate objective is common defence, with the WEU consecrated as the principal instrument for implementing decisions and actions with implications in the defence sphere.⁷ As a distinct chapter (Title V) of the Maastricht Treaty, the CFSP highlights the fact that security and defence became a significant component of the European construction.

In 1992, the Petersberg Declaration established the spectrum of missions to be conducted by the Western European Union: humanitarian and rescue tasks, peacekeeping missions, and tasks of combat forces in crisis management. On that occasion, WEU member States declared their readiness to make available to the WEU, as well as to NATO and the EU, military units drawn from the full spectrum of their conventional armed forces.

The Treaty of Amsterdam (October 1997) introduced significant amendments to the CFSP. In the security and defence domain, five major objectives were established: the defence of common values, fundamental interests, and the integrity and independence of the Union in accordance with the principles of the UN Charter; the strengthening of the Union's security in all its dimensions; the maintenance of peace and the consolidation of international security; the promotion of international cooperation; and the development and consolidation of democracy, the rule of law, and respect for human rights.⁸ The European Council acquired enhanced competences in defining security and defence orientations, and the newly created post of High Representative for the CFSP was conferred upon the Council's Secretary-General.

The Cologne European Council (June 1999) reinforced the role of the European Union at the expense of the WEU in the security and defence domain. At this Council, the foundations were laid for the European Security and Defence Policy (ESDP), conceived as an integral part of the CFSP. The intention was to develop an autonomous decision-making capacity and to execute military operations under EU authority in response to crisis situations where the North Atlantic Alliance was not engaged as a whole. The ESDP was constituted as an intergovernmental process, with political control exercised by Heads of State and Government of the member States and financial control vested in the national parliaments.⁹ The principal objective (Headline Goal), established by the Helsinki European Council (December 1999), consisted in the creation of a Rapid Reaction Force of 50,000–60,000 personnel, capable of deployment within the theatre of operations for sixty days and for at least one year outside the theatre, able to fulfil the full spectrum of Petersberg missions.¹⁰ Helsinki also

⁴The North Atlantic Treaty Organisation (NATO/the Atlantic Alliance) was established in 1949.

⁵Declaration on European Identity (Copenhagen, 14 December 1973), https://www.cvce.eu/content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/publishable_en.pdf; European Institute of Romania, European Security and Defence Policy, 2005, p. 5, https://ier.gov.ro/wp-content/uploads/publicatii/Securitate_si_aparare.pdf.

⁶Declaration on European Identity, paragraph 14.

⁷Dragoş Ilinca, European Security and Defence Policy, Synthesis of the Department for Euro-Atlantic Integration and Defence Policy, Ministry of National Defence, Bucharest, 2006, p. 2, apud Alexandru Cristian, The Common Foreign and Security Policy of the European Union, INTELLIGENCE INFO, Volume 1, Number 1, September 2022, p. 4.

⁸Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (97/C 340/01), Part One, Substantive Amendments, Title V, Provisions on a Common Foreign and Security Policy, Article J.1.

⁹European Institute of Romania, European Security and Defence Policy, 2005, p. 6, https://ier.gov.ro/wp-content/uploads/publicatii/Securitate_si_aparare.pdf.

¹⁰Presidency Progress Report to the Helsinki European Council on Strengthening the Common European Policy on Security and Defence, in European Union Foreign, Security and Defence Policy. Basic Documents, pp. 278–279, apud European Institute of Romania, op. cit., p. 6.

addressed the institutional structures of the EU required to facilitate decision-making in the defence domain, leading to the establishment of permanent political and military bodies: the Political and Security Committee (PSC), the EU Military Committee (EUMC), and the EU Military Staff (EUMS).

The Declaration on European Security and Defence Policy (December 2002) established the foundations of the EU–NATO strategic partnership. The Declaration stipulated that 'while NATO remains the foundation of collective defence of its members, the European Security and Defence Policy (ESDP) has added to the range of instruments already available to the EU the capacity to conduct crisis management operations independently.'¹¹ The Declaration, together with the Berlin Plus arrangements (2003), constitutes the foundational documents of the EU–NATO strategic partnership.¹²

In 2003, at Thessaloniki, Javier Solana, the High Representative for the CFSP, presented the Security Strategy (the document entitled *A Secure Europe in a Better World*), which defined three core objectives: stability within the borders of the European Union and good governance in its immediate neighbourhood; an international order founded on effective multilateralism; and an adequate response to both old and new threats.

A significant role in the development of the European Security and Defence Policy was played by the establishment, in 2004, of the European Defence Agency (EDA), whose purpose is to promote a coherent European policy in the field of defence capabilities development, military technological research, and armaments, as well as to support member States wishing to develop their defence capabilities jointly.

The Treaty of Lisbon (January 2009)¹³ placed greater emphasis on defence and security than its predecessor treaties, both through the nomenclature assigned to this policy domain and through its positioning within the broader context of external relations. The Treaty introduced the concept of the Common Security and Defence Policy (CSDP), which superseded the European Security and Defence Policy (ESDP), providing an institutional framework for defence and security cooperation at Union level. The CSDP 'forms an integral part of the common foreign and security policy [and] includes the progressive framing of a common Union defence policy, [which] will lead to a common defence.'¹⁴ The CSDP is intended to provide the Union with an operational capability drawing on civilian and military assets, upon which it may call in the context of missions outside the Union for the purposes of peace-keeping, conflict prevention, and the strengthening of international security, in conformity with the principles of the UN Charter. A mutual defence clause was also introduced, pursuant to which EU member States are obliged to render mutual aid and assistance to any fellow member State subject to armed aggression.¹⁵ The CSDP retained its intergovernmental character, operating on the principle of unanimity in decision-making.

As a result of the increasingly tense international context, the Common Security and Defence Policy has undergone continuous and rapid development, recording significant progress both through the elaboration of the conceptual framework and through the launch of initiatives aimed at developing security and defence capabilities, with a view to transforming the EU into a defence union.

In June 2016, the High Representative Federica Mogherini presented before the European Council the EU Global Strategy for Foreign and Security Policy (EUGS), a strategic document guiding the external action of the EU in the medium and long term, to which the CSDP is subordinated. The Global Strategy underscores the importance of security, the EU's ambition of strategic autonomy, and a pragmatic approach to the geopolitical environment, in order to ensure an effective response to challenges facing the Union and to global stability. In the defence domain, the Global Strategy sought to offer member States significant incentives for operational and industrial cooperation, so as to ensure enhanced strategic alignment and interoperability.

Further significant steps in the domain of common defence policy include the establishment of the European Peace Facility for the period 2021–2027 (2021), designed to finance the common costs of CSDP military missions and operations, and the adoption of the Strategic Compass, whose principal objective is EU strategic autonomy and its transformation into a major actor in the field of security and defence. Consensus was reached

¹¹EU–NATO Declaration on European Security and Defence Policy (ESDP), <https://eur-lex.europa.eu/EN/legal-content/summary/cooperation-with-nato.html>

¹²*Ibidem*.

¹³The Treaty of Lisbon (entered into force January 2009) amended the Maastricht Treaty, renamed the Treaty on European Union (TEU), and the Treaty of Rome, renamed the Treaty on the Functioning of the European Union (TFEU).

¹⁴Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, (49) Common Security and Defence Policy, Section 2 – Provisions on the Common Security and Defence Policy, Article 28A(a) and (b), Protocol on permanent structured cooperation established by Article 28 of the Treaty on European Union.

¹⁵*Ibidem*, (c)(7).

on a common threat assessment and on a strategic vision aimed at transforming the EU into a security provider. A new rapid deployment capacity comprising 5,000 military personnel was created, capable of providing a timely response to crises, and a Union toolkit for countering hybrid threats was elaborated.

The outbreak of Russia's aggression against Ukraine prompted a reassessment of the Strategic Compass and necessitated a series of adjustments designed to address the situation thus created, as well as to redefine the role and instruments of the EU in the field of defence. To this end, a number of documents were elaborated: the European Defence Industrial Strategy and the European Defence Industry Programme; the ReArm Europe – Preparedness 2030 Plan (March 2025), included in the Joint White Paper of the Commission and VP/HR on Europe's Defence Readiness 2030; the Omnibus Package on Defence Preparedness of the European Commission (June 2025); the Defence Readiness Roadmap 2030, a Commission communication published in October 2025; and the EU Strategy 2025 for a Union of Preparedness, which aims to enhance resilience against hybrid threats.

This continuously evolving process has secured a legal, conceptual, and institutional framework capable of providing the prerequisites necessary for the achievement of the objective of 'common European defence'.

3. The Legal Basis for Defence

Long marginalised, the concept of 'defence/common defence' has acquired increasing importance within the process of European integration, progressively finding a more clearly defined place in the law of the European Union.

Through the introduction of the Common Security and Defence Policy aligned with the Common Foreign and Security Policy the Treaty of Lisbon affirmed and consolidated the Union's legal capacity in the defence domain. The importance of the CSDP is underscored by Article 42(1) TEU, which stipulates that 'the common security and defence policy shall be an integral part of the common foreign and security policy.'¹⁶ Defence is no longer perceived as a domain exclusively reserved to member States, but presents itself as a distinct and exclusive domain within the law of the European Union.¹⁷

3.1. Defence Policy and Common Defence

The diverse positions adopted by member States with respect to the defence question are reflected in the differentiated definitions of defence policy and common defence within the Treaties, through 'complex and ambiguous formulations.'¹⁸ Under the Treaty on European Union, the CFSP 'includes the progressive framing of a common Union defence policy [which] will lead to a common defence, should the European Council, acting unanimously, so decide.'¹⁹ This formulation draws a distinction between the two terms: common defence is understood as the ultimate objective, while defence policy constitutes the modality of its realisation. Correlating Articles 3 and 4 TFEU, which define the domains of competence of the EU and those in which competence is shared with member States, with Article 4(1) TEU, according to which 'competences not conferred upon the Union in the Treaties remain with the Member States,' national security remains the exclusive responsibility of each member State. It may be submitted that the Treaty provisions create the possibility of common defence whilst simultaneously guaranteeing the neutral or non-aligned status of certain member States in particular those which are not members of the North Atlantic Alliance.²⁰

Common defence is not clearly defined in the primary law of the EU; accordingly, the interpretation of the object of defence within the Treaty context presents certain difficulties. In the appellation 'Common European Security Policy,' which encompasses the CSDP, the term security is present (whilst the term defence is absent), suggesting that security subsumes defence. Conversely, the appellation 'Common Security and Defence Policy' conveys that security and defence are distinct, albeit interrelated, domains. This association of the two terms persists throughout the CSDP, generating a degree of ambiguity. While this approach permits a broader

¹⁶Consolidated Version of the Treaty on European Union, Title V, Section 2 – Provisions on the Common Security and Defence Policy, Article 42(1), https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF

¹⁷Anne Hamonic, Introduction. Quelle spécificité de la défense en droit de l'Union européenne?, p. 2, https://shs.hal.science/halshs-05099727v1/file/Hal_Hamonic_specificite_defense_droit_UE.pdf

¹⁸Ibidem, p. 3.

¹⁹TEU, Article 42(2).

²⁰Viktor Szep, Ramses A. Wessel, Ester Sabatino, Carmen Gebhard, Edouard Simmon, The Current Legal Basis and Governance Structures of the Defence Activities, p. 7, in ENGAGE, Working Paper Series No. 4 / December 2021, <https://www.researchgate.net/publication/357083078>

understanding of both concepts, it also raises questions as to the extent to which security debates encompass defence proper.²¹

A further difficulty relates to the relationship between the terms defence and military. Article 41(2) TEU refers to operations with 'military or defence implications,' leading to the conclusion that the two constitute distinct domains a proposition that is neither practically feasible nor doctrinally accurate. Conversely, a series of Treaty references indicates that the military domain is subsumed within defence. The CSDP provides the Union with an operational capability based on civilian and military assets, in that member States 'shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Member States which together establish multinational forces may also make those forces available to the common security and defence policy.'²² Likewise, in fulfilling the established missions, the Union 'may use civilian and military means.'²³ It may thus be concluded that defence encompasses forces and assets capable of conducting military operations, and possesses two dimensions a military dimension and a civilian dimension. Within this binary framework there persists a degree of uncertainty stemming from the fact that not all military actions automatically fall within the concept of defence at Union level, which complicates the determination of whether particular situations carry defence implications.²⁴

Notwithstanding the varying levels of engagement of member States in the domain of security and defence policy, and the ambiguity of certain Treaty provisions, common defence has been established, to a certain degree, at EU level, by virtue of the fact that 'if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power.'²⁵ This mutual defence clause approximates the concept of common defence, thereby generating a degree of ambiguity relating to the provisions of Article 42(2) TEU concerning what the European Council should decide when Heads of State and Government vote on 'common defence.'²⁶

3.2. Mutual Assistance

Notwithstanding the varying levels of engagement of member States in the domain of security and defence policy, and the ambiguity of certain Treaty provisions, common defence has already been established, to a certain degree, at EU level, by virtue of the fact that 'if a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power.'²⁷ This mutual defence clause approximates the concept of common defence, thereby generating a degree of ambiguity in relation to the provisions of Article 42(2) TEU regarding what the European Council ought to decide when Heads of State and Government vote on 'common defence.'²⁸

The introduction of this clause was not without its challenges, as it was required to harmonise the interests of member States mediating between those which sought a binding mutual defence commitment, those which wished to preserve their neutral status, and those which sought to ensure that the article would not impinge upon NATO, in particular through the elimination of references to military aspects. Nonetheless, Article 42(7) TEU covers collective defence by military means as well, with States offering assistance by all means at their disposal implicitly including military assistance in conformity with Article 51 of the UN Charter. Signatory States (with the exception of Denmark) are obligated to render mutual assistance, without, however, 'prejudice [to] the specific character of the security and defence policy of certain Member States.'²⁹ Although the term 'certain' is not clearly defined, it is generally understood to refer to the neutral States within the EU.³⁰ These States also bear a legal obligation provided their own national security is not jeopardised to render aid and assistance to the

²¹Anne Hamonic, *op. cit.*, pp. 4–5.

²²Consolidated Version of the Treaty on European Union, Article 42(3).

²³*Ibidem*, Article 43(1).

²⁴Anne Hamonic, *op. cit.*, p. 5.

²⁵*Ibidem*, Article 43(1).

²⁶Ramses Wessel, *Common Foreign, Security and Defence Policy*, in R. A. Wessel & J. Larik (Eds.), *EU External Relations Law: Text, Cases and Materials* (pp. 283–326), Hart, *apud* Viktor Szep, *op. cit.*, p. 7.

²⁷Consolidated Version of the Treaty on European Union, Article 42(7).

²⁸Ramses Wessel, *op. cit.*, *apud* Viktor Szep, *op. cit.*, p. 7.

²⁹Consolidated Version of the Treaty on European Union, Article 42(7).

³⁰The neutral States are Austria, Switzerland, Ireland, and Malta.

requesting member State, to the extent and with the means deemed appropriate and in conformity with their national defence policy.³¹

Without introducing substantive modifications and overlapping with Article 42 TEU, Article 222 TFEU adds a series of clarifications. It defines the types of events falling within its scope of application terrorist attacks and natural and man-made disasters stipulating that other member States shall provide assistance to the affected State at the request of its political authorities. It further specifies that the Union may 'mobilise all the instruments at its disposal, including the military resources made available by the Member States.'³² Military means are thus expressly enumerated among the instruments that may be mobilised. Article 222 is supplemented by Declaration No. 37 annexed to the Treaties, which provides that none of its provisions 'shall affect the right of another Member State to choose the most appropriate means to comply with its solidarity obligation.'³³

Notwithstanding the significant steps taken towards common defence, it cannot be said that there exists at Union level, with regard to the defence of the territorial integrity of member States, a fundamental function of defence in its traditional national conception.³⁴ The Treaty provisions are designed so as to avoid conferring any role upon the institutions of the Union. The Union merely provides a framework within which a member State may activate the mutual assistance clause, following which exchanges take place in essentially bilateral terms, outside the Union's legal framework.³⁵

3.3. CSDP Missions and Operations

Inasmuch as Article 42 TEU defines the CSDP as an integral part of the Common Foreign and Security Policy (CFSP) and provides the Union with an operational capability based on civilian and military assets, Article 43 TEU enumerates the types of missions in which the Union may employ civilian and military means, and Article 44 TEU permits the Council to entrust the execution of a mission to a group of member States. The missions provided for under Article 43(1) TEU, also known as the 'Petersberg Missions' from 1992, determine the scope of the CSDP.

Following the amendments introduced by the Treaty of Lisbon, Article 43(1) TEU provides an extended list of CSDP activities, including: joint disarmament operations; humanitarian and rescue tasks; military advice and assistance missions; conflict prevention and peacekeeping missions; tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation. Pursuant to Article 43(1), all such missions may contribute to the fight against terrorism, including by supporting third countries in combating terrorism on their territories. The counter-terrorism dimension thus extends the scope of the CSDP, although from a public policy perspective, it has been an integral part of the Union's external relations since 2001, in particular within the context of the European Security Strategy (Koutrakos, 2013).

Missions and operations conducted within the framework of the Common Security and Defence Policy constitute civilian and military endeavours through which the European Union pursues the prevention and management of international crises. They aim, as a matter of priority, at stabilising the Union's neighbourhood and enhancing the resilience of partner States in the face of a diverse spectrum of threats.

Each mission is established by a Council Decision adopted unanimously pursuant to Article 42 TEU,³⁶ which defines the mission's objective, mandate, duration, and headquarters. Thereafter, political control and strategic direction of EU crisis management operations are exercised, under the responsibility of the Council and the High Representative, by the Political and Security Committee, a body composed of ambassadors of the member States.

As of October 2025, the European Union was conducting twenty-one CSDP missions³⁷ and operations, involving approximately 4,000 military and civilian personnel, thereby evidencing the scale and complexity of the Union's engagement in the domain of international security.

³¹Ibidem, p. 8.

³²Consolidated Version of the Treaty on the Functioning of the European Union, Article 222, Official Journal of the European Union C 326/47, <https://www.clujst.ro/wp-content/uploads/2015/07/TFUE-RO-tratatul-pentru-functionarea-uniunii-europene.pdf>

³³Ibidem, Declaration No. 37.

³⁴Catherine Schneider, *Le renforcement de la légitimité de la PSDC*, in Auvret-Finck J. (dir.), *Vers une relance de la politique de sécurité et de défense commune*, op. cit., pp. 76–77, apud Anne Hamonic, op. cit., p. 8.

³⁵Ibidem, p. 8.

³⁶Notable exceptions include decisions relating to the European Defence Agency (Article 45 TEU) and permanent structured cooperation (Article 46 TEU), in respect of which qualified majority voting applies.

³⁷Council of the European Union, 'CSDP Missions and Operations', available at: <https://www.consilium.europa.eu/en/policies/csdp-missions-operations/>, accessed 30 March 2026.

The principal objectives of CSDP missions and operations include:

- Security sector reform (EUPM Moldova, EUCAP Somalia, EUPOL COPPS, EUAM Iraq, EUAM Ukraine);
- Border management (EUBAM Libya);
- Support and training of national armed forces (EUMAM Mozambique, EUMAM Ukraine);

3.4. Freedom of navigation (EUNAVFOR Aspides, Atalanta).

A benchmark mission within the Common Security and Defence Policy is the European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine). This mission reflects the Union's consolidated commitment to supporting the defence capabilities of its strategic partners in the context of the deteriorating regional security environment.

By the end of February 2025, the mission had contributed to the training of approximately 75,000 Ukrainian military personnel, thereby demonstrating both the scale of operational support provided by the Union and the increasingly active role of the CSDP in managing security crises in its immediate neighbourhood.

The financing of CSDP missions and operations is differentiated according to their nature. Military operations are not financed from the general budget of the European Union, but through contributions from participating member States and through the European Peace Facility an off-budget mechanism which replaced the former Athena mechanism and which covers the common costs of such operations. Civilian missions, by contrast, are generally financed from the general budget of the European Union.

4. Conclusions

The corroborated analysis of the legal, institutional, and operational framework of the Common Security and Defence Policy (CSDP), conducted on the basis of the doctrinal and institutional documents examined, reveals a progressive yet profound transformation of the European Union's role in the field of security and defence. Although initially characterised by a limited and predominantly intergovernmental approach, the CSDP has evolved into an essential instrument of the Union's external action, reflecting both the changes in the geopolitical environment and the maturation of the European legal construction.

From a legal perspective, the CSDP is situated within a specific normative framework, enshrined in the Treaty on European Union in particular in Articles 21–46 TEU, which regulate the Union's external action and, specifically, the common foreign and security policy. In this context, the provisions of Articles 42 and 46 TEU configure the CSDP as an integral part of the CFSP, underscoring its external character and its orientation towards missions conducted outside Union territory.

The legal architecture likewise reflects a structural tension between the objective of consolidating a common policy and the preservation of member States' sovereignty in the defence domain, given that national security remains an exclusive competence of the latter.

This legal ambivalence is also evidenced in the conceptual distinction between 'common defence policy' and 'common defence.' Whilst the former is already consecrated through the CSDP, the latter remains a potential objective, contingent upon a unanimous decision by the member States which reflects the current limitations of European integration in the military domain. At the same time, the existence of the mutual assistance clause under Article 42(7) TEU approximates the Union to a model of collective defence without, however, equating therewith, confirming the *sui generis* character of the CSDP.

From an institutional standpoint, the functioning of the CSDP is dominated by intergovernmental logic, with decisions adopted principally by unanimity within the Council of the European Union and the European Council. This decision-making mechanism, whilst ensuring the political legitimacy of actions, limits the Union's capacity to respond swiftly and effectively in crisis contexts. Nonetheless, the documents analysed reveal the existence of flexibility mechanisms such as Permanent Structured Cooperation (PESCO) or the option of invoking Article 44 TEU which permit a group of member States to advance in the defence domain without depending on unanimous consensus. These instruments, described in the doctrine as 'latent potentialities,' demonstrate that the current Treaties offer significant legal resources for deepening integration, even in the absence of formal treaty reform.

On the operational plane, the CSDP has been consolidated as a functional crisis management mechanism, through civilian and military missions and operations conducted in the Union's neighbourhood and in other regions of strategic interest. These pursuits aim at objectives such as the stabilisation of fragile States, security sector reform, border management, and ensuring freedom of navigation thereby contributing to the

consolidation of international security. The number and diversity of these missions reflect the Union's capacity to act as a security provider, even as resources and capabilities remain contingent upon contributions from member States.

Critically, recent developments particularly those occurring after 2022 have marked a significant acceleration of integration in the defence domain. The war in Ukraine has prompted a 'geopolitical reset' and conferred renewed impetus upon the CSDP, highlighting the necessity of consolidating the Union's strategic autonomy and its capacity for response. Instruments such as the European Peace Facility, the European Defence Fund, and the Strategic Compass illustrate this tendency, contributing to the development of military capabilities, the strengthening of the defence industry, and the enhancement of the coherence of the Union's external action.

At the same time, the industrial and technological dimension of defence has become a central element of the CSDP. The documents analysed emphasise that the efficiency of defence policy depends not merely upon the political will of member States, but equally upon the Union's capacity to develop a competitive and integrated industrial base. Nevertheless, market fragmentation and the reluctance of member States to relinquish control over a strategic sector continue to represent major obstacles to deeper integration.

From a doctrinal perspective, the specificity of defence in the law of the European Union resides precisely in this combination of integration and sovereignty. As highlighted in the academic literature, defence can no longer be considered a 'taboo domain,' but has become a genuine field of Union law, characterised, however, by distinct mechanisms and principles compared to other European policies. This specificity derives both from the sensitive nature of the domain and from the necessity of reconciling national interests with the common objectives of the Union.

In conclusion, the CSDP takes shape as a domain situated at the intersection of European integration and member State sovereignty, evolving at an accelerated pace under the pressure of the geopolitical context. Whilst legal and institutional constraints persist, the existing framework provides sufficient instruments for consolidating the Union's role as a global security actor. The future of the CSDP depends, in essential measure, upon the capacity of member States to valorise these instruments, to overcome existing fragmentation, and to translate the Union's strategic ambitions into concrete operational outcomes.

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THE LEGAL REGIME GOVERNING THE RECOGNITION OF PROFESSIONAL QUALIFICATIONS IN THE EU

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Abstract

This article analyses the legal regime governing the recognition of professional qualifications in the European Union, with a focus on the normative architecture of Directive 2005/36/EC, as substantially amended by Directive 2013/55/EU and the 2024-2025 legislative updates. The study examines the three main recognition mechanisms (the general system, automatic recognition based on coordinated minimum training conditions, and recognition based on professional experience), as well as the innovative instruments introduced by the 2013 reform: the European Professional Card, the alert mechanism, partial access to regulated professions, and common training frameworks. Special attention is paid to the 2024-2025 amendments, which update minimum training requirements by integrating digital competences, digital dentistry, pharmacogenomics, and the One Health concept. The article addresses the transposition into Romanian law through Law no. 200/2004, with particular reference to Directive (EU) 2024/505 concerning nurses trained in Romania, and the relevant case-law of the Court of Justice of the European Union, from Heylens and Vlassopoulou to the recent Artollisi and Lescolanno judgment. In light of the 2024 European Court of Auditors Special Report and the February 2026 Commission evaluation report, the article assesses current implementation challenges and reform perspectives. The central conclusion is that the EU framework is legally robust but unevenly applied, and that its future effectiveness depends on consistent administrative practice, digitalisation, proportionate regulation, and faster updating of automatic recognition standards.

Keywords: professional qualifications, regulated professions, free movement, internal market, proportionality.

1. Introduction

The free movement of persons and services constitutes one of the foundational pillars of the internal market; however, in the field of regulated professions, this freedom cannot operate solely through the mere crossing of a border. Between the right of an EU citizen to work, to establish themselves, or to provide services in another Member State, and the right of the host State to protect public health, safety, or the proper administration of justice, there lies an intermediate legal space: the procedure for the recognition of professional qualifications.¹ It is within this space that it is determined whether the training, experience, and qualifications obtained in one Member State are sufficient to permit access to the same profession in another Member State.

The topic is significant for at least four reasons. First, the recognition of professional qualifications serves a constitutional function within the EU legal order, as it gives concrete effect to Articles 45, 49, and 56 TFEU concerning the free movement of workers, the freedom of establishment, and the freedom to provide services.² Without a recognition mechanism, many of these freedoms would remain, for regulated professions, merely formal rights. Second, the subject matter exhibits a remarkable technical density, requiring the correlation of primary law, secondary law, the case law of the Court of Justice, and the administrative practices of competent national authorities. Third, the field has direct economic and social consequences, as it affects labour mobility and the filling of personnel shortages in healthcare, education, and construction. Fourth, practical difficulties demonstrate that the legal architecture, however well constructed normatively, can fail through uneven application, missed deadlines, or disproportionate administrative costs.³

The present study seeks to answer the question of the extent to which the current legal regime succeeds in coherently balancing the demands of the internal market with the protection of the public interest. The

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¹ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.09.2005, p. 22, consolidated text as of 29.10.2025.

² Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, Articles 45, 49 and 56.

³ European Court of Auditors, Special report 10/2024: The recognition of professional qualifications in the EU, Luxembourg, 2024.

working hypothesis is that EU law has reached an advanced level of normative sophistication, but that the effectiveness of the system depends decisively on the quality of administrative cooperation and on the manner in which Member States apply the principles of equivalence, proportionality, and mutual trust, including through the 2013 reform.⁴⁵ The research draws upon the most recent institutional evaluations, including the 2024 European Court of Auditors Report⁶ and the European Commission Report of February 2026⁷, providing an updated perspective on the challenges of European professional mobility.

2. Legal Foundations of the Recognition of Professional Qualifications

2.1. The Internal Market, Fundamental Freedoms, and Member State Competence

The recognition of professional qualifications lies at the intersection of two normative logics that can be neither conflated nor entirely separated. The first is the logic of European integration, which requires the elimination of unjustified obstacles to professional mobility. The second is the logic of Member State regulatory sovereignty, which retains the competence to organise access to professions and to define standards for the protection of the public interest.⁸ From this derives the specific character of the subject matter: the Union has not unified professions, but has constructed a legal mechanism of coordination and mutual recognition.

In Romanian legal scholarship, the foundations of EU substantive law, including the freedoms of movement underlying the recognition of professional qualifications, have been analysed by authors such as Augustin Fuerea, who examines in depth the free movement of persons and the freedom of establishment⁹, Dumitru Mazilu, who has examined the European institutional framework from the perspective of integration¹⁰, and Irina Moroianu Zlătescu and Claudia Elena Marinică, whose works systematically address European Union law¹¹. These contributions provide the doctrinal foundation in the Romanian language for understanding mutual recognition mechanisms within the broader context of internal market freedoms.

The primary law basis consists of Articles 45, 49, and 56 TFEU. Article 45 concerns the free movement of employed workers; Article 49 concerns the freedom of establishment for persons engaged in self-employed activities; Article 56 concerns the temporary provision of cross-border services. In practice, the same person may successively fall within the scope of several freedoms. A doctor employed in a hospital in another Member State falls within the logic of Article 45 TFEU; a lawyer opening a practice in another Member State falls within the scope of Article 49 TFEU; an architect providing occasional cross-border services may invoke Article 56 TFEU. Secondary law does not replace these freedoms but operationalises them in a field where differences in training could effectively block mobility.

At the same time, the Court of Justice has consistently held that, in the absence of complete harmonisation, Member States remain competent to establish the conditions of access to professions, subject to compliance with the principles of non-discrimination and proportionality. A Member State may continue to regard an activity as a regulated profession, may require membership of a professional body, may make access conditional upon a specific title or certain linguistic aptitudes, but may not use these mechanisms to empty the fundamental freedoms of their substance. It is precisely here that the disciplinary function of EU law intervenes: not to prohibit the regulation of professions, but to oblige Member States to justify their rules and to accept, within reasonable limits, the equivalence of qualifications obtained in another Member State.

⁴ Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC and Regulation (EU) No 1024/2012, OJ L 354, 28.12.2013, p. 132.

⁵ European Commission, Fit for Future Platform Opinion 2023/5, Fostering professional mobility in the Single Market, 28.11.2023.

⁶ European Court of Auditors, op. cit.

⁷ European Commission, COM(2026) 86 final, 20.02.2026, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2005/36/EC (contributing to the initiative on the portability of qualifications and competence mobility) {SWD(2026) 64 final}.

⁸ Vassilis Hatzopoulos, Forms of mutual recognition in the field of services, in Ioannis Lianos and Okeoghene Odudu (eds.), *Regulating Trade in Services in the EU and the WTO*, Cambridge University Press, 2012, pp. 59-98.

⁹ Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți* [EU Law. Principles, Actions, Freedoms], Universul Juridic Publishing, Bucharest, 2016, pp. 191-230.

¹⁰ Dumitru Mazilu, *Integrare Europeană. Drept comunitar și Instituții Europene* [European Integration. Community Law and European Institutions], Lumina Lex Publishing, Bucharest, 2006, pp. 55-64.

¹¹ Irina Moroianu Zlătescu, Claudia Elena Marinică, *Dreptul Uniunii Europene* [European Union Law], Universul Academic/Universitară Publishing, Bucharest, 2020, p. 42 și p. 249.

The relationship between the internal market and the protection of the public interest is particularly visible in professions involving risks to health, safety, or the exercise of sensitive social functions.¹² In these fields, an overly lax recognition would endanger the recipients of services; an excessively rigid recognition would transform administrative borders into economic barriers. The European regime has been built upon the idea of balance: mutual trust permits the acceptance of training obtained in another Member State, while legitimate verification allows compensatory measures where differences are significant.

2.2. The Concept of Regulated Profession and Its Distinction from Academic Recognition

The key concept of the entire subject matter is that of "regulated profession". The Directive proceeds from the premise that the need for recognition arises only where the host State makes access to a professional activity conditional upon possession of specific professional qualifications.¹³ For non-regulated professions, the market freely evaluates competences without a formal procedure based on the Directive. This dependence on national regulation explains why the European landscape remains highly fragmented: according to the European Court of Auditors, in recent years there were approximately 5,700-6,000 regulated professions in the Union, with very large variations between Member States.¹⁴

An essential clarification concerns the difference between academic recognition and professional recognition. The equivalence of a title for university purposes or the continuation of studies must not be confused with the recognition that permits access to a regulated profession. EU law treats professional recognition as a functional instrument oriented towards access to the labour market. The Court's case law insists upon this dimension: what matters is not the perfect identity of training paths, but the concrete aptitude of the applicant to pursue the professional activity in question.

3. Evolution of the Normative Framework

3.1. From Sectoral Directives to Directive 2005/36/EC

The harmonisation process began in the 1970s through sectoral directives dedicated to the medical, pharmaceutical, veterinary, and architectural professions. Recognising the limitations of the sectoral approach, the European legislator introduced a general recognition system through Directive 89/48/EEC, supplemented by Directive 92/51/EEC and Directive 1999/42/EC.¹⁵ The coexistence of over 15 directives generated a fragmented framework, which led to the adoption of Directive 2005/36/EC, consolidating into a single instrument the general system, automatic recognition, and recognition based on professional experience.

Directive 2005/36/EC was structured around four main titles: general provisions (Title I), the free provision of services (Title II), freedom of establishment (Title III, with three distinct chapters), and final provisions (Title IV). The complexity of the Directive derives from the plurality of legal pathways: it combines several regimes adapted to the nature of professional mobility and the existing degree of harmonisation. This normative architecture was designed to provide a coherent and comprehensive framework, adaptable to the diversity of regulated professions across Member States, without imposing a single model of recognition.

3.2. Modernisation through Directive 2013/55/EU

The evaluation of the implementation of Directive 2005/36/EC highlighted the need for substantial reform.¹⁶ Directive 2013/55/EU, adopted on 20 November 2013, introduced: the European Professional Card, the alert mechanism, partial access to regulated professions, common training frameworks and common training tests, transparency and mutual evaluation obligations regarding professional regulations, as well as the strengthening of the role of the Internal Market Information System. While the 2005 text aimed at codification,

¹² Dáire McCormack-George, Recognition of Professional Qualifications in the Single Market: A Recap, *European Business Law Review*, vol. 30, nr. 5, 2019, pp. 785-815.

¹³ Directive 2005/36/EC, Art. 3 on definitions, including the concept of regulated profession.

¹⁴ European Court of Auditors, *op. cit.*, paras. 31-32 and 105; Fit for Future Platform Opinion 2023/5, *cit.*, p. 3: approximately 5,700-6,000 regulated professions exist in the Union.

¹⁵ Council Directive 89/48/EEC of 21 December 1988, OJ L 19, 24.1.1989, p. 16; Council Directive 92/51/EEC of 18 June 1992, OJ L 209, 24.7.1992, p. 25; Directive 1999/42/EC, OJ L 201, 31.7.1999, p. 77.

¹⁶ European Parliament Resolution of 15 November 2011, [2011/2024(INI)]; European Council Conclusions of 23 October 2011.

the 2013 reform pursued modernisation: digitalisation, transparency, and the reduction of procedural bottlenecks.

3.3. The 2024-2025 Amendments

Directive (EU) 2024/505¹⁷ resolved the specific problem of the recognition of qualifications of general care nurses trained in Romania prior to accession, extending the acquired rights regime for diplomas obtained before 2007. Commission Delegated Directive (EU) 2024/782¹⁸ updated the minimum training requirements for nurses, dentists, and pharmacists, integrating digital competences, e-health, digital dentistry, and pharmacogenomics. Commission Delegated Directive (EU) 2025/1223¹⁹ completes the process by integrating the "One Health" concept into veterinary training. These amendments demonstrate the dynamic character of the normative framework, which requires continuous maintenance.

4. The Architecture of Directive 2005/36/EC: Systems, Procedures, and Legal Effects

4.1. Temporary and Occasional Provision of Services

Title II establishes a more liberal regime for temporary and occasional provision.²⁰ As a rule, the host State may not require prior recognition of qualifications. It may request a prior declaration, and for professions with implications for public health or safety, it may carry out a prior check.²¹ If the profession is not regulated in the State of establishment, the provider must demonstrate that they have pursued the profession for at least one year during the preceding ten years. The "temporary and occasional" character is assessed on the basis of the duration, frequency, regularity, and continuity of provision. The provider remains obliged to comply with the professional and ethical rules of the host State, insofar as these are proportionate.

An important element is also the relationship with the professional rules of the host State. Although not subject, as a rule, to a complete recognition procedure, the temporary provider remains obliged to comply with the professional, disciplinary, or ethical rules directly linked to professional qualifications and the protection of the profession. The "temporary and occasional" character cannot be assessed in a purely formal manner. The Directive requires consideration of the duration, frequency, regularity, and continuity of provision. Therefore, if the activity becomes stable, repetitive, and integrated into the economy of the host State, the legal qualification shifts towards the freedom of establishment, and the recognition requirements increase accordingly. The distinction is essential, as both the intensity of control and the procedural rights of the applicant depend on it.

4.2. The General System of Recognition

The general system, regulated under Chapter I of Title III²², applies to regulated professions that do not benefit from automatic recognition. The core consists of the comparative analysis: the host State may not automatically reject the application on the ground that the diploma bears a different name or that the duration of studies differs. It must examine the relevant knowledge, competences, and professional experience, as well as continuing education. The Directive classifies qualifications across five levels²³, and only substantial differences may justify the imposition of an adaptation period of up to three years or an aptitude test.²⁴ As a rule, the applicant chooses between the two measures. By way of exception, for professions requiring knowledge of national legislation, the host State may impose the aptitude test.

Following the 2013 reform, authorities must take into account not only formal training but also knowledge and competences acquired through lifelong learning, provided they are properly validated. The concept of "substantial difference" cannot be interpreted extensively; otherwise, the general system would become a

¹⁷ Directive (EU) 2024/505 of the European Parliament and of the Council of 7 February 2024, OJ L, 2024/505, 12.02.2024.

¹⁸ Commission Delegated Directive (EU) 2024/782 of 4 March 2024, OJ L 2024/782, 31.05.2024.

¹⁹ Commission Delegated Directive (EU) 2025/1223, concerning minimum training requirements for the veterinary profession, with a transposition deadline of 10 April 2027.

²⁰ Directive 2005/36/EC, Title II, Articles 5-9.

²¹ Directive 2005/36/EC, Art. 7(4).

²² Directive 2005/36/EC, Title III, Chapter I, Articles 10-14.

²³ Directive 2005/36/EC, Art. 11; the article classifies qualifications across five levels, compatible with the European Qualifications Framework (EQF).

²⁴ Directive 2005/36/EC, Art. 14.

disguised re-education procedure. Compensatory measures are subsidiary in nature and are admissible only where the differences concern areas essential to the exercise of the profession.

From a legal perspective, the core of the general system lies in the fact that the host State may not oppose an opaque or stereotypical refusal. The obligation to concretely examine the knowledge, competences, and aptitudes attested by the titles obtained, as well as the relevant professional experience, corresponds to a philosophy of functional rather than formalistic evaluation. Sometimes, the main difficulty does not lie in comparing studies but in identifying the relevant profession in the host State: the same occupation may be regulated in one State and unregulated in another, and the delimitation of reserved professional acts varies considerably. In other words, the question is not only "is my diploma sufficient?" but also "which profession in the host State corresponds to my activity?". Furthermore, the Directive provides that where a qualification was obtained in a third State but recognised in a Member State, and the holder has practised the profession for at least three years on that State's territory, the qualification may subsequently enter the European recognition circuit. This solution confirms that the system operates not solely on the basis of the diploma's origin but also on the basis of effective professional integration. This complexity justifies both the role of the assistance centres provided for in the Directive and the need for clear and accessible information for professionals.

4.3. Automatic Recognition for Sectoral Professions

Automatic recognition constitutes the most advanced level of integration and applies to the seven sectoral professions.²⁵ The principle is one of normative trust: if the training meets the harmonised minimum standards and the title appears in Annex V, the host State is obliged to recognise it without a substantive comparative examination.²⁶ The advantage is predictability; the risk is rigidity, if standards are not updated in time.²⁷ The 2024-2025 delegated directives modernised the requirements, integrating digital competences, digital dentistry, and the "One Health" concept.

Articles 49a and 49b provide for common training frameworks and common training tests, which enable automatic recognition for professions not included in the sectoral group, provided at least one third of the Member States participate. A concrete example is the common training test for ski instructors, established by Commission Delegated Regulation (EU) 2019/907. The Fit for Future Platform explicitly recommended the extension of these instruments, finding that they remain underutilised.

Automaticity should not be idealised. It functions well only if the minimum standards and the Directive's annexes are updated in a timely manner. The European Court of Auditors explicitly recommended faster updating of the Annex V lists, finding delays that affect the predictability of the system. Moreover, automatic recognition does not suspend all host State requirements: ethical, disciplinary, and professional liability obligations remain governed by the domestic law of the State in which the professional effectively exercises their activity. The Directive primarily regulates access to the profession, not the entirety of subsequent professional conduct. This distinction is essential for understanding that professional mobility does not equate to the suspension of domestic standards of practice.

4.4. Recognition Based on Professional Experience

The third mechanism concerns activities in the fields of crafts, commerce, and industry, for which the Directive provides automatic recognition based on sufficient professional experience.²⁸ The conditions vary according to the category of activity, including cumulative requirements concerning the duration of experience and prior training. This mechanism confirms that EU law does not operate exclusively with the classical university model of qualification, but recognises the plurality of legitimate forms of competence acquisition.

The main advantage of this mechanism lies in its procedural simplicity: once the applicant demonstrates compliance with the objective conditions of professional experience provided for in the Directive, the host Member State may not require additional compensatory measures. The professional experience must have been effectively and lawfully pursued on the territory of a Member State, and certification is carried out through

²⁵ Directive 2005/36/EC, Title III, Chapter III, Articles 21-49. Sectoral professions: doctor, general care nurse, dentist, veterinary surgeon, midwife, pharmacist, and architect.

²⁶ Article 24 of Directive 2005/36/EC: basic medical training, at least 5 years/5,500 hours; Art. 31: nurses, at least 3 years/4,600 hours; Art. 44: pharmacists, at least 5 years.

²⁷ European Court of Auditors, *op. cit.*, recommendations on the annual updating of the Annex V lists.

²⁸ Directive 2005/36/EC, Title III, Chapter II, Articles 16-20; covered activities are listed in Annex IV.

certificates issued by the competent authority of the Member State of origin. This mechanism is less visible in public debate than automatic recognition for medical or legal professions, but has real economic importance, particularly for the construction, installation, and technical services sectors, where cross-border mobility is frequent.

Table 1: Recognition Systems under Directive 2005/36/EC

Mechanism	Applicable Professions	Main Instruments	Legal Effect
Temporary provision (Title II)	All regulated professions	Prior declaration; limited verification	Temporary access, without full recognition
General system (Title III, Ch. I)	Non-harmonised professions	Comparison of qualifications; adaptation period or aptitude test	Access to profession following recognition
Professional experience (Title III, Ch. II)	Crafts, commerce, industry	Proof of sufficient professional practice	Automatic recognition for Annex IV activities
Automatic recognition (Title III, Ch. III)	7 sectoral professions	Harmonised minimum standards; Annex V	Host State obligation to recognise

Source: own synthesis based on Directive 2005/36/EC and subsequent amendments.

5. Instruments of Modernisation: From Recognition to Administrative Governance

5.1. The European Professional Card

The European Professional Card (EPC) is not a physical card but a standardised electronic recognition procedure through the IMI.²⁹ The procedure, detailed in Regulation (EU) 2015/983³⁰, is available for five professions: general care nurses, physiotherapists, pharmacists, mountain guides, and real estate agents. The applicant submits the application to the authority of the home State; the host State decides within one month (temporary services) or two months (establishment). In the absence of a decision, the EPC is deemed automatically issued.

Notwithstanding, the European Court of Auditors found that the use of the EPC remains modest.³¹ One of the explanations is cost: both the home State and the host State may charge fees, which can make the procedure more expensive than the standard one. The conclusion is not that the instrument has failed, but that digitalisation alone cannot compensate for administrative fragmentation and differences in practice between authorities.

5.2. IMI, the Alert Mechanism, and Partial Access

The Internal Market Information System (IMI) constitutes the institutional infrastructure of mutual trust.³² The alert mechanism³³ obliges Member States to immediately notify restrictions or prohibitions imposed on health professionals and those working in the education of minors. The specialised literature emphasises that, in the case of doctors, this mechanism introduced a dimension of transnational accountability previously absent.³⁴ The Court of Auditors recommended closer integration of alerts into the recognition procedure.

The alert mechanism should not be viewed as an exception to free movement but as a condition of its legitimacy. Mutual trust is sustainable only if Member States loyally communicate not only positive information concerning qualifications but also serious risks regarding fitness to practise. The mechanism was influenced by healthcare scandals, where insufficient cooperation between authorities allowed professionals with serious

²⁹ Directive 2005/36/EC, Articles 4a-4e, introduced by Directive 2013/55/EU.

³⁰ Commission Implementing Regulation (EU) 2015/983 of 24 June 2015, OJ L 159, 25.06.2015, p. 27.

³¹ European Court of Auditors, op. cit., paras. 66-68: the EPC is significantly used only for certain professions; for general care nurses, the share of decisions issued in the form of an EPC has remained very low.

³² Regulamentul (UE) nr. 1024/2012, JO L 316, 14.11.2012, p. 1.

³³ Directive 2005/36/EC, Art. 56a, introduced by Directive 2013/55/EU.

³⁴ Barend van Leeuwen, "The Doctor in Free Movement Law: Expertise, Duty, and Accountability", Cambridge Yearbook of European Legal Studies, vol. 25, 2023, pp. 198-224.

disciplinary problems to move between jurisdictions. Accordingly, alerts contribute to transforming free movement from a principle vulnerable to abuse into a right accompanied by transnational accountability.

Partial access³⁵ permits the exercise of only an autonomous part of the profession, where the training differences are so substantial that compensatory measures would amount to requiring completion of the entire national training. The refusal must be justified by overriding reasons of general interest. The professional carries out the activity under the title of the home State, informing consumers of the scope of authorised activities.

6. The Case Law of the Court of Justice: From Equivalence to Proportionality

The case law of the Court of Justice has played a constitutive role, not merely an interpretive one. Many of the ideas that today appear natural in the text of the Directive were formulated or prefigured by the Court before being codified by the European legislator.

6.1. Heylens: The Obligation to State Reasons and Effective Judicial Protection

The judgment in Heylens remains a cornerstone.³⁶ The Court held that, if the exercise of a fundamental freedom depends on the decision of a national authority, the person concerned must be able to know the reasons for the refusal and must benefit from effective judicial review. The obligation to state reasons disciplines the authority, limits arbitrariness, and enables the court to verify the compatibility of the refusal with EU law. Heylens introduced requirements of good administration in this field before the concept was enshrined in other instruments of European law.

The contribution of the Heylens case is essential because it demonstrates that the recognition of qualifications is not merely a matter of substance but also one of administrative procedure. An opaque, stereotypical, or purely formal refusal does not satisfy the requirements of EU law. The applicant must be able to know what is held against them in order to effectively challenge the decision. This obligation disciplines national authorities and limits the margin of arbitrariness, transforming recognition from an act of administrative goodwill into a justiciable right.

6.2. Vlassopoulou and Gebhard: Substantive Equivalence and Proportionality

Case Vlassopoulou³⁷ formulated the material canon of recognition: authorities must examine the diplomas, knowledge, and aptitudes acquired in another Member State and compare them with the qualifications required under domestic law. Where there is partial correspondence, this must be recognised; where essential elements are missing, additional measures may be imposed, but only to the extent necessary. The "Vlassopoulou test" shifted the focus from the formal identity of titles to the substantive equivalence of competences, and professional experience may compensate for training differences.

Vlassopoulou also carries systemic value. The judgment affirmed that, in the absence of complete harmonisation, primary law itself imposes on Member States an obligation of comparative examination. Consequently, the subsequent directives did not create this obligation *ex nihilo*, but formalised and ordered a standard already present in the case law. In legal scholarship, the "Vlassopoulou test" is viewed as the legal expression of functional mutual recognition: the host State is not required to regard different national systems as identical, but to seriously evaluate whether the identified differences have real significance for the exercise of the profession.

In the Gebhard case³⁸, the Court formulated the general proportionality test: restrictive measures must be applied in a non-discriminatory manner, justified by overriding reasons of general interest, suitable for securing the attainment of the objective pursued, and must not go beyond what is necessary. This test governs the entire recognition regime and has been incorporated into the Directive and subsequent case law.

³⁵ Directive 2005/36/EC, Art. 4f, introduced by Directive 2013/55/EU.

³⁶ Judgment of the ECJ of 15 October 1987, Case 222/86, *Unectef v. Heylens and Others*, ECLI:EU:C:1987:442.

³⁷ Judgment of the ECJ of 7 May 1991, Case C-340/89, *Irene Vlassopoulou v. Ministerium für Justiz*, ECLI:EU:C:1991:193.

³⁸ Judgment of the CJEU of 30 November 1995, Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411.

6.3. Hocsman and Morgenbesser: Complex Qualification Trajectories

Case Hocsman³⁹ addressed the situation of professionals whose qualifications have links to third States but which have been recognised in a Member State. The Court insisted on the need for a concrete analysis, rejecting the simplistic approach: authorities may not circumvent the logic of recognition by mechanically invoking the extra-Community origin of a title, where legal and professional integration in a Member State exists.

This case law remains current, since real professional mobility is often more complex than the classical model of an EU citizen holding a diploma obtained exclusively in a single Member State. Mixed training trajectories, naturalisation, professional experience accumulated across multiple jurisdictions, and prior recognitions necessitate a functional rather than schematic approach. The Court rejected a mechanical logic and insisted on the need for a comprehensive evaluation of the applicant's qualifications and concrete experience.

Case Morgenbesser⁴⁰ extended the Vlassopoulou logic to access to the preparatory professional stage: authorities may not automatically refuse registration in the trainee register simply because the diploma is not national. The judgment prevents the blocking of mobility through the closure of access to the compulsory traineeship, even where the refusal formally does not yet concern the actual exercise of the profession.

Morgenbesser is valuable because it demonstrates that the protection conferred by EU law does not begin only at the moment of effective entry into the profession, but also operates during the preparatory stages, where these constitute a necessary condition for access to the profession. In practical terms, the judgment confirms that Member States may not artificially segment the process of access to the profession in order to remove certain stages from the control of EU law.

6.4. Nasiopoulos, Brouillard, and Artollisi: Recent Developments

Case Nasiopoulos⁴¹ established the logic of partial access: a total refusal is disproportionate where the qualifications cover only an autonomous part of the regulated profession. The legislator codified this approach in Article 4f. In the Brouillard case⁴², the Court clarified that the obligation of individual examination also applies to competitive recruitment procedures for public functions.

More recently, in the Artollisi and Lescolanno cases⁴³, the Court specified the limits of the obligation to recognise: Directive 2005/36/EC does not apply where the invoked title is not legally recognised in the issuing State and lacks official character. This judgment underscores the importance of the quality of the title as a constitutive element of the right to recognition.

Viewed as a whole, these judgments reveal three major jurisprudential operations: the proceduralisation of fundamental freedoms (Heylens), the materialisation of the equivalence principle (Vlassopoulou), and the introduction of proportionality review (Gebhard, Nasiopoulos). These landmarks function as normative standards of review whenever the text of the Directive leaves room for interpretation.

Table 2: Key CJEU Case Law on the Recognition of Professional Qualifications

Case	Year	Established Principle
Heylens (222/86)	1987	Obligation to state reasons for refusal; effective judicial protection
Vlassopoulou (C-340/89)	1991	Comparative examination of diplomas and experience; substantive equivalence
Gebhard (C-55/94)	1995	Four-pronged proportionality test

³⁹ Judgment of the ECJ of 14 September 2000, Case C-238/98, Hugo Fernando Hocsman v. Ministre de l'Emploi et de la Solidarité, ECLI:EU:C:2000:440.

⁴⁰ Judgment of the ECJ of 13 November 2003, Case C-313/01, Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova, ECLI:EU:C:2003:612.

⁴¹ Judgment of the CJEU of 27 June 2013, Case C-575/11, Nasiopoulos, ECLI:EU:C:2013:430.

⁴² Judgment of the CJEU of 6 October 2015, Case C-298/14, Brouillard, ECLI:EU:C:2015:652.

⁴³ Judgment of the CJEU of 20 November 2025, joined cases C-340/24 and C-442/24, Artollisi and Lescolanno.

Hocsmán (C-238/98)	2000	Evaluation of qualifications in situations with complex foreign elements
Morgenbesser (C-313/01)	2003	Access to the preparatory professional stage (compulsory traineeships)
Nasiopoulos (C-575/11)	2013	Proportionality of total refusal; the logic of partial access
Artollisi/Lescolanno (C-340/24, C-442/24)	2025	Limits of recognition: the title must be legally recognised in the issuing State

Source: own synthesis based on CJEU case law.

7. Transposition into Romanian Domestic Law

Romania transposed the European framework through Law No. 200/2004⁴⁴, as amended by Emergency Government Ordinance (OUG) No. 109/2007 (transposing Directive 2005/36/EC) and Government Ordinance (OG) No. 43/2015 (transposing Directive 2013/55/EU).⁴⁵ CNRED operates as the national point of contact (official designation used in the context of Directive 2005/36/EC and Law No. 200/2004)⁴⁶, while for healthcare professions, the Ministry of Health and the professional orders exercise competent authority functions.

Directive (EU) 2024/505 resolved the specific problem of general care nurses trained prior to accession, extending the acquired rights regime. Diplomas obtained before 2007 are automatically recognised on the condition that the revalorisation programme (2014-2020) was completed. Qualifications obtained after 3 March 2024 benefit from full automatic recognition. Romania transposed the 2024-2025 delegated directives through Government Decision No. 840/2025⁴⁷, updating the training requirements with digital competences and the "One Health" concept. Law No. 257/2024⁴⁸ introduced the admission examination for professions where knowledge of Romanian law is essential. The proportionality test provided for by Directive (EU) 2018/958 was transposed through Law No. 245/2020⁴⁹, which requires Romanian authorities to carry out a rigorous assessment prior to the introduction of any new professional regulations. The legislative framework is supplemented by OUG No. 49/2009 on the freedom of establishment of service providers⁵⁰. Recognition decisions are administrative acts and may be challenged through administrative contentious proceedings⁵¹. A particular aspect concerns the regime applicable to lawyers, who benefit from additional specific directives (Directive 77/249/EEC and Directive 98/5/EC).⁵²

8. Current Problems of the System: Between Normative Robustness and Uneven Application

Recent official evaluations⁵³ show that practical performance remains uneven. The first difficulty relates to national fragmentation: with 5,700-6,000 regulated professions, mobility is affected not only by diploma

⁴⁴ Law No. 200/2004 on the recognition of diplomas and professional qualifications, published in Official Gazette No. 500 of 3 June 2004, as subsequently amended.

⁴⁵ OUG No. 109/2007, Official Gazette No. 706 of 18.10.2007; OG No. 43/2015, Official Gazette No. 660 of 31.08.2015.

⁴⁶ CNRED operates as the national contact point, pursuant to Art. 37¹ of Law No. 200/2004. See also the official CNRED documents and IMI PQ statistics (the designation "contact point" is consistently used in the transposition acts).

⁴⁷ Government Decision No. 840/2025, Official Gazette No. 940 of 10.10.2025, transposing Commission Delegated Directives (EU) 2024/782 and (EU) 2025/1223.

⁴⁸ Law No. 257/2024, Official Gazette No. 1023 of 11.10.2024.

⁴⁹ Law No. 245/2020 on performing a proportionality test prior to the adoption of new professional regulations, published in Official Gazette No. 1012 of 30 October 2020, transposing Directive (EU) 2018/958.

⁵⁰ OUG No. 49/2009 on the freedom of establishment of service providers and the freedom to provide services in Romania, published in Official Gazette No. 366 of 1 June 2009.

⁵¹ Decisions taken in the recognition procedure are administrative acts and may be challenged before the administrative courts pursuant to Law No. 554/2004 on administrative contentious proceedings.

⁵² Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78, 26.3.1977, p. 17; Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, p. 36.

⁵³ European Court of Auditors, op. cit., conclusions and recommendations.

recognition but also by the identification of the target profession in the host State. The second concerns excessive deadlines, fees, and documentary burdens: the Court of Auditors found that some authorities request more documents than the Directive permits, carry out additional verifications, and exceed the maximum time limits. An excessively delayed recognition is, in reality, a temporarily refused recognition.

The quantitative data from the Court of Auditors are telling: the European average is 212 regulated professions per Member State, and recognition procedures are used by only approximately 6% of mobile EU citizens aged between 20 and 64. The instruments introduced by the 2013 reform have not fully produced the expected results: partial access was invoked in less than 1% of decisions issued, and common training principles applied, at the time of evaluation, practically only to ski instructors.⁵⁴ These figures do not demonstrate the futility of the system but rather show that European law effectively resolves only part of the mobility challenge, the remainder being either unregulated or discouraged by indirect barriers.

Insufficient legal information constitutes another obstacle.⁵⁵ If the applicant cannot clearly ascertain whether the profession is regulated, which authority is competent, or what documents are required, their right to mobility is affected before even entering the procedure. Directive (EU) 2018/958⁵⁶ introduced the proportionality test prior to the adoption of new professional regulations, and the Commission has periodically evaluated its implementation.⁵⁷ Notwithstanding, problems persist: new instruments remain underutilised, and the simplification promised by digitalisation has been only partially achieved.

A recurring criticism of the recognition regime is that it privileges mobility to the detriment of public interest protection. Such a thesis is, however, overly simplistic. In reality, EU law achieves both objectives simultaneously. Sectoral professions benefit from automatic recognition only because training standards are harmonised and updatable. The alert mechanism exists precisely to prevent the cross-border transfer of professional risks. Linguistic checks are admissible where patient safety depends on communication. The real problem is not the abstract conflict between mobility and safety, but the identification of the point of equilibrium: if authorities interpret every risk in a maximalist sense, procedures become restrictive; if control is reduced to formalism, public trust is affected. The proportionality principle responds to this tension: protective measures are legitimate, but must be suitable, necessary, and must not go beyond what is indispensable.

The future of the system depends primarily not on a comprehensive rewrite of the Directive but on four reform directions: strengthening proportionality control over the regulation of professions; reducing procedural costs through the effective reuse of data available in the IMI; standardising and centralising information for professionals; and revitalising underutilised instruments — the EPC and common training principles. The challenges generated by artificial intelligence and digital transformation also raise fundamental questions regarding the adequacy of the normative framework to the new realities of the labour market.

9. Conclusions

The legal regime governing the recognition of professional qualifications in the European Union is one of the most instructive examples of how the internal market was constructed not through total uniformisation but through the legal coordination of diversity. It does not abolish the competence of Member States to regulate professions, but disciplines it through the obligation to respect free movement, the proportionality principle, the requirement to state reasons, and the logic of mutual trust.

The analysis of Directive 2005/36/EC shows that EU law has developed a differentiated and coherent architecture. The distinction between temporary provision and establishment avoids the uniform control of different situations. The general system allows for the accommodation of non-harmonised professions through comparative evaluation. Automatic recognition provides predictability where common minimum standards exist. Recognition of professional experience completes the picture for activities where practical competence is decisive. The 2013 reform added modern instruments, and the 2024-2025 amendments demonstrate the framework's capacity to evolve alongside scientific and technological advances.

⁵⁴ European Court of Auditors, *op. cit.*, paras. 05, 18 and 73: the average is 212 regulated professions per Member State; only approximately 6% of mobile EU citizens use the recognition procedures; partial access was invoked in less than 1% of decisions.

⁵⁵ European Court of Auditors, *op. cit.*, paras. 96-102; Fit for Future Platform Opinion 2023/5, Suggestion 6: Improve access to information.

⁵⁶ Directive (UE) 2018/958, JO L 173, 09.07.2018, p. 25.

⁵⁷ European Commission, COM(2020) 191 final, 11.05.2020 and COM(2026) 86 final, 20.02.2026 (periodic reports on the application of Directive 2005/36/EC, published at five-year intervals pursuant to Art. 60(2) of the Directive).

The case law of the Court of Justice confirms that the regime cannot be understood solely through the text of the Directive. Heylens guaranteed procedural transparency; Vlassopoulou imposed substantive equivalence; Gebhard enshrined proportionality; Hocsman and Morgenbesser prevented formalism; Nasiopoulos grounded partial access; and Artollisi and Lescolanno specified the limits of the recognition obligation. These landmarks function as normative standards of review whenever the text of the Directive leaves room for interpretation.

Notwithstanding, the 2024 European Court of Auditors and 2026 European Commission evaluations compel a more reserved conclusion regarding practical effectiveness: normative robustness does not automatically guarantee uniformity of application. The Romanian transposition, through Law No. 200/2004, GD No. 840/2025, and Directive (EU) 2024/505, reflects the alignment effort but also highlights the inherent difficulties. The central problem of the present no longer lies in the absence of a legal framework but in the persistent gap between the norm and practice. Improvement depends on proportionality control, administrative cooperation through the IMI, reduction of procedural burdens, and faster updating of standards for professions with automatic recognition.

Ultimately, the recognition of professional qualifications in the European Union is not merely a legal technique for the validation of diplomas. It is a test of the maturity of the European legal order: the extent to which the Union can reconcile freedom of movement, the pluralism of national systems, and the imperative of protecting the public interest. As long as these three imperatives remain in balance, the system preserves its legitimacy. When the balance breaks — whether through administrative protectionism or through the formalism of insufficiently controlled recognition — internal market law loses its coherence. For this reason, the topic remains open and will continue to be a significant test for the evolution of European integration.

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LEGAL EFFECTS OF THE APPLICATION OF REGULATION (EU) 2024/1624 ON THE PRACTICE OF THE LEGAL PROFESSION

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Abstract

Regulation (EU) 2024/1624 establishes a legal framework in the field of the prevention and combating of money laundering and terrorist financing, being directly applicable in all Member States of the European Union. By strengthening the obligations imposed on the entities concerned, including lawyers in certain circumstances, it directly influences the manner in which the legal profession is exercised.

The present article aims to identify the main effects that the new regulation produces on the professional activity of lawyers, taking into account the extension of compliance obligations, the strengthening of supervisory mechanisms, and the emphasis placed on the risk-based approach. At the same time, it analyses the principal aspects in which these changes may affect the relationship between lawyer and client, the organisation of the forms of practice of the profession, and the level of professional responsibility.

The paper examines these effects in light of the fundamental principles governing the legal profession, emphasizing the need to maintain a balance between the requirements relating to the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and the safeguards specific to the practice of the legal profession.

Keywords: *Regulation (EU) 2024/1624, directly applicable, legal effects, lawyer, safeguards specific to the practice of the legal profession.*

1. Introduction

Regulation (EU) 2024/1624¹ represents the legal act adopted by the legislator of the European Union² in the field of preventing the use of the financial system for the purposes of money laundering and terrorist financing. While European regulation in this field had previously been constructed primarily around Directive (EU) 2015/849³, as amended by Directive (EU) 2018/843⁴, the new normative framework enshrines the option of establishing directly applicable rules, intended to reduce the differences between national regulations and to ensure a higher level of uniformity in application.

In legal doctrine it has been noted that “in order to maintain freedom, security and prosperity across the entire continent, the European Union must play an active role on the global stage. In the context of globalization, Member States cannot, on their own, cope with challenges such as ensuring energy reserves, climate change, sustainable development, economic competitiveness, and terrorism. These issues can only be addressed by acting as a unified whole, at the level of the European Union.”⁵

The preamble of Regulation (EU) 2024/1624⁶ states that the experience gained in the application of Directive (EU) 2015/849 has highlighted the need for additional measures, as the diversity of national solutions

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¹ Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L, 2024/1624, 19 June 2024.

² See Lidia Barac, *Strategii de dezvoltare și aprofundare a Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2022, pp. 176–181.

³ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5 June 2015, pp. 73–117. The Directive shall be repealed as from 10 July 2027.

⁴ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19 June 2018, pp. 43–74.

⁵ See Ana-Maria Comșa, *Dreptul Uniunii Europene*, Pro Universitaria Publishing House, Bucharest, 2022, p. 15.

⁶ “A regulation has direct effect and gives rise to rights and obligations for the benefit of, respectively, incumbent upon, the subjects of law to whom it is addressed, which national courts are required to take into account.” See Augustin Fuerea, *Dreptul Uniunii Europene: principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 45.

has affected the coherence and effectiveness of the Union regime for the prevention and combating of money laundering and terrorist financing.⁷

Within the Romanian legal order, the obligations arising from Directives (EU) 2015/849 and (EU) 2018/843 were transposed⁸, primarily, through Law no. 129/2019 on the prevention and combating of money laundering and terrorist financing⁹, and not through the direct amendment of Law no. 51/1995 on the organisation and practice of the legal profession¹⁰.

Nevertheless, the effects of these regulations concern the practice of the legal profession, to the extent that lawyers have been included, for certain categories of activities, within the scope of obliged entities.¹¹ From this perspective, Regulation (EU) 2024/1624 does not introduce, for the first time, lawyers into the field of AML/CFT obligations, but rather modifies the legal regime of these obligations in terms of applicability, uniformity, and regulatory technique, by establishing a directly applicable normative framework in all Member States.

With regard to the legal profession, this normative change does not merely signify the replacement of one legal instrument with another, but produces effects on the manner in which compliance obligations are interpreted and applied, in relation to the specific nature of a profession founded on principles of independence, loyalty to the client, confidentiality, and respect for the right to defence.

The central legal issue is not whether a lawyer may be classified, in certain circumstances, as an obliged entity, since this solution is already known both in European Union law and in domestic law, but rather the limits within which the obligations of due diligence, verification, reporting, and abstention remain compatible with the fundamental safeguards that characterize the exercise of the profession.

In particular, the new regulation imposes a more rigorous distinction between, on the one hand, the activity of the lawyer consisting in the assessment of the client's legal situation, the defence and representation of the client in judicial proceedings or in connection therewith, and, on the other hand, activities of assistance or participation in operations that may be relevant from the perspective of the prevention of money laundering¹² or terrorist financing.

From this perspective, the main purpose of the application of Regulation (EU) 2024/1624¹³ does not consist solely in the extension of compliance obligations, but also in the necessity of establishing clear criteria for distinguishing between the obligations specific to the AML/CFT regime¹⁴ and the safeguards inherent to the practice of the legal profession.¹⁵

⁷ See paragraph (1), final sentence, and paragraph (2) of Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L, 2024/1624, 19 June 2024.

⁸ "The normative content of a directive consists in this obligation of transposition in the Member States. Unlike regulations, which are binding in their entirety, in the application of directives, Member States have the freedom to choose the form and methods of transposition into national law. This allows for the implementation of European law into national law without undermining the sovereignty of the Member States and while taking into account their different legislative forms. Therefore, a directive is not an instrument of uniformisation, but of harmonisation of content (...)." See Patrick Ernst Sensburg, *Manualul de dreptul Uniunii Europene*, C.H. Beck Publishing House, Bucharest, 2022, p. 38.

⁹ Published in the Official Gazette of Romania, Part I, No. 589 of 18 July 2019.

¹⁰ Republished in the Official Gazette of Romania, Part I, No. 440 of 24 May 2018.

¹¹ See Despina-Martha Ilucă, *Dreptul Uniunii Europene. Spațiul de libertate, securitate și justiție*, Hamangiu Publishing House, Bucharest, 2024, pp. 181–188.

¹² "Directive (EU) 2018/1673 lays down minimum rules on the definition of criminal offences and sanctions in the area of money laundering. The objective of the Directive is to criminalise money laundering where it is committed intentionally and with the knowledge that the property has been derived from criminal activity." See Alina Mihaela Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, p. 107.

¹³ "A regulation, being binding in its entirety, is distinguished, on the one hand, from a directive, which is binding only as to the result to be achieved and, on the other hand, from acts lacking legal force." See Augustin Fuerea, *Manualul Uniunii Europene*, 6th revised and supplemented edition, Universul Juridic Publishing House, Bucharest, 2016, p. 235.

¹⁴ See Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism, and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, OJ L, 2024/1620, 19.6.2024.

¹⁵ "The general obligation of Member States to ensure compliance with EU law by their nationals. Member States are under an obligation to ensure, within their territory, the application and observance of European Union law. The case-law of the Court of Justice requires them to monitor and sanction failures to comply with Union law within their jurisdiction. Accordingly, Member States are required to introduce sanctions that are effective, dissuasive, and proportionate, comparable to those applicable to infringements of national law (the principle of effectiveness)." See Răzvan Horațiu Radu, *Manual de drept al Uniunii Europene*, Hamangiu Publishing House, Bucharest, 2022, p. 153.

At the same time, the effects of the regulation are not limited to the establishment of the obligation to report suspicions, but also concern the internal organisation of the forms of practice of the profession, through the imposition of requirements relating to internal policies, risk assessments, procedures, control mechanisms, and the designation of responsible persons, which results in the establishment of additional requirements of compliance and professional organisation.

Consequently, the legal effects of the regulation must be analysed not only from the perspective of the relationship between the lawyer and the competent authorities, but also from the perspective of the internal organisation of the profession, the standard of professional diligence, and the relationship between the lawyer and the client.

In this context, the present study aims to analyse the main legal effects that the application of Regulation (EU) 2024/1624¹⁶ produces on the practice of the legal profession, with particular emphasis on the classification of the lawyer as an obliged entity, on customer due diligence obligations, on the obligation to report suspicious transactions, on the prohibition of disclosure, and, in particular, on the limits within which these obligations may coexist with the lawyer's professional secrecy.

Accordingly, Regulation (EU) 2024/1624 does not establish, as a matter of principle, the removal of professional secrecy, but leads to a restriction thereof in situations where the lawyer's activity exceeds the sphere of protected legal advice and defence and falls within the category of activities capable of triggering the application of AML/CFT obligations.

2. Content

Regulation (EU) 2024/1624 is structured into nine chapters, which systematically regulate the scope, the obligations of obliged entities, and the institutional mechanisms necessary for the prevention and combating of money laundering and terrorist financing.

Thus, Chapter I includes the general provisions concerning the subject matter, definitions, scope, and cross-border operations; Chapter II regulates the policies, procedures, and internal controls of obliged entities; Chapter III concerns customer due diligence measures; Chapter IV establishes requirements regarding the transparency of beneficial owners; Chapter V regulates reporting obligations; Chapter VI concerns the exchange of information; Chapter VII regulates data protection and record-keeping; Chapter VIII establishes measures for mitigating the risks associated with anonymous instruments; and Chapter IX contains the final provisions.

Regarding the entry into force and application of the Regulation, it entered into force on the twentieth day following its publication in the Official Journal of the European Union and shall, as a rule, apply from 10 July 2027. By exception, for obliged entities provided for under Article 3 point 3 (n) and (o), application is postponed until 10 July 2029. The establishment of a differentiated application timeline reflects the need for the progressive adaptation of certain categories of entities to the new compliance requirements.

The purpose of Regulation (EU) 2024/1624 is to establish a uniform framework of measures applicable to obliged entities for the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, to set transparency requirements regarding the beneficial owners of legal entities, express trusts, and similar legal arrangements, as well as to limit the abusive use of anonymous instruments.¹⁷

In the preamble of the Regulation, paragraph (174) emphasizes that the objective pursued cannot be sufficiently achieved by the Member States and can be more effectively achieved at Union level, in accordance with the principle of subsidiarity, and that the measures adopted do not exceed what is necessary to achieve that objective, in accordance with the principle of proportionality.¹⁸

¹⁶ "Regulations are acts of general application, binding in their entirety and directly applicable in each Member State of the European Union. In this regard, the Court of Justice of the European Union (formerly the Court of Justice of the European Communities) has also ruled, formulating a definition of the notion of a regulation—equated, within the ECSC Treaty, with the notion of a general decision—as an act laying down normative principles of general application, binding in their entirety and directly applicable to the Member States. The conditions of application are general, abstract, and impersonal in nature, producing legal effects." See Gabriel Micu, *Dreptul Uniunii Europene*, Pro Universitaria Publishing House, Bucharest, 2025, p. 46.

¹⁷ Article 1 of Regulation (EU) 2024/1624.

¹⁸ Aurel Octavian Pasat, *Dreptul Uniunii Europene – Evoluția sistemului de Drept*, Pro Universitaria Publishing House, Bucharest, 2024, pp. 77–146.

Article 2 of the Regulation¹⁹ provides definitions of essential concepts for the application of the regulatory framework, such as “money laundering”²⁰, “terrorist financing”²¹, “beneficial owner”²², “linked transactions”²³, or “legal arrangement”²⁴, the definition of these terms serving to ensure a uniform interpretation of the rules at the level of the European Union.

The scope of the Regulation covers specific professional activities carried out by natural or legal persons, insofar as they are relevant from the perspective of money laundering or terrorist financing risks.

2.1. Qualification of the Lawyer as an “Obligated Entity”

Within the meaning of Regulation (EU) 2024/1624, the notion of “obliged entity” includes, in addition to financial institutions and other categories of professionals, persons exercising independent legal professions, including lawyers, but only insofar as they carry out certain activities expressly determined by the Regulation.

Thus, the relevant situations are those in which lawyers, acting in a professional capacity, provide assistance or advice, including in tax matters, or participate, directly or indirectly, in the execution of transactions that are relevant from the perspective of the prevention of money laundering and terrorist financing.

Furthermore, the Regulation includes within the scope of obliged entities notaries, lawyers, and other independent legal professionals when they participate, on behalf of and for the account of a client, in financial or real estate transactions, or when they provide assistance in the planning or execution of operations such as the purchase and sale of real estate or business entities, the management of client assets, the opening or administration of accounts, etc.

Under Romanian law, Law No. 129/2019 establishes a similar approach, including lawyers among the categories of obliged entities where they provide assistance in the execution of operations of an economic or financial nature, such as the transfer of ownership rights over assets, the management of client assets, etc.

In our view, not every activity carried out by a lawyer triggers the applicability of the obligations specific to the AML/CFT regime, but only those which involve effective participation in operations capable of being used for the purposes of money laundering or terrorist financing.

We consider that the current regulatory framework raises issues from the perspective of distinguishing between protected legal activities and those which trigger the qualification as an obliged entity.

Thus, the notions of “participation in transactions” or “assistance in the planning of operations” are not defined with sufficient precision, which may rise to practical difficulties, particularly in the case of complex legal services.

In the absence of clear delimitation criteria, there is, in our opinion, a risk of an extensive interpretation of the provisions of the Regulation, leading to the inclusion, within the scope of AML/CFT obligations, of activities which traditionally fall within the sphere of protected legal advice. Such an interpretation could result in an unjustified extension of compliance obligations incumbent upon lawyers.

¹⁹ “Unlike directives, regulations do not require transposition; they are directly applicable within the legal order of each Member State from the moment of their entry into force. Consequently, they must be taken as such by the competent national authorities in the fields they regulate. Member States are prohibited from undertaking any legislative action by which regulations would be incorporated (in the sense of transposition) into domestic law. Likewise, any parallelism, in the sense of duplication, between national rules and the provisions of a regulation is prohibited. For the proper and full application of regulations, it is permitted, and sometimes even recommended, to adopt normative acts establishing the structures necessary for their implementation (for example, acts establishing an authority provided for by a regulation, or acts designating the authority responsible for carrying out communications required by a regulation, etc.). This process is referred to as implementation and is distinct from transposition.” See Mihaela Augustina Dumitraşcu, *Dreptul Uniunii Europene I*, Universul Juridic Publishing House, Bucharest, 2021, pp. 316–317.

²⁰ Article 2 (1), point 1 “money laundering” means the conduct referred to in Article 3(1) and (5) of Directive (EU) 2018/1673, including aiding and abetting, incitement and attempt to commit such conduct, irrespective of whether the activities which generated the property to be laundered were carried out within the territory of a Member State or of a third country; the knowledge, intent or purpose required as an element of that conduct may be inferred from objective factual circumstances.

²¹ Article 2 (1), point 2 “terrorist financing” means the conduct referred to in Article 11 of Directive (EU) 2017/541, including aiding and abetting, incitement and attempt to commit such conduct, irrespective of whether it took place within the territory of a Member State or of a third country; the knowledge, intent or purpose required as an element of that conduct may be inferred from objective factual circumstances.

²² Article 2 (1), point 28 “beneficial owner” means any natural person who ultimately owns or controls a legal entity or an express trust or a similar legal arrangement.

²³ Article 2 (1), point 20 “linked transactions” means two or more transactions having identical or similar origin, destination and purpose, or other relevant characteristics, within a given period.

²⁴ Article 2 (1), point 32 “legal arrangement” means an express trust or an arrangement having a structure or functions similar to those of an express trust, and certain types of *Treuhand* and *fideicomiso*.

Accordingly, the qualification of the lawyer as an obliged entity must be interpreted restrictively, in correlation with the specific nature of the profession and its fundamental principles, namely independence and professional secrecy. In the absence of such an interpretation, there is a risk of undermining the role of the lawyer within the legal system, by transforming the lawyer from a defender of the client's interests into a participant in control mechanisms.

At the same time, we consider that the regime established by Regulation (EU) 2024/1624 entails a modification of the standard of professional diligence applicable to lawyers, through the introduction of risk assessment obligations which are not traditionally inherent to the profession. This development must be approached with caution, as it may lead to an implicit redefinition of the lawyer's role, in the absence of an express intervention concerning the status of the profession.

2.2. Policies, Procedures and Internal Controls of Obligated Entities

Pursuant to Regulation (EU) 2024/1624, obliged entities are required to establish appropriate policies, procedures and internal controls in order to ensure compliance with the provisions of the Regulation, in particular for the identification, assessment and management of risks related to money laundering and terrorist financing, both at the level of the European Union and the Member State, as well as at the level of their own activities.

With regard to entity-level risk assessment, Article 10(1) of the Regulation establishes the obligation to adopt measures that are appropriate and proportionate to the nature of the activity, as well as to its risks and complexity, for the purpose of identifying and assessing money laundering and terrorist financing risks, including the risks of non-implementation or circumvention of targeted financial sanctions. Risk assessments must be documented, kept up to date and subject to periodic review, including any relevant changes occurring at internal or external level.

In our view, the obligation of continuous risk assessment confers upon obliged entities an active role, going beyond a mere formal compliance obligation, and is liable to directly influence the organisation and functioning of regulated professions.

According to Article 11 of the Regulation, the risk assessment is carried out by the compliance function officer and is subject to the approval of the management body acting in its management function and, where appropriate, communicated to the supervisory body²⁵. In this context, obliged entities designate a member of the management body responsible for ensuring compliance with the Regulation and with the administrative acts issued by the competent authorities.

Furthermore, the Regulation requires the designation of a compliance function officer²⁶ holding an appropriate hierarchical position, responsible for the day-to-day implementation of policies, procedures and internal controls, as well as for liaising with the competent authorities. This officer is also entrusted with the duty to report suspicious transactions to the Financial Intelligence Unit (FIU)²⁷, in accordance with Article 69(6) of the Regulation.

In our opinion, the establishment of a compliance function with extensive responsibilities leads to the imposition of an organisational model for obliged entities that is similar to that of financial institutions.²⁸ This development raises issues of compatibility in the case of legal professions, particularly in the context of sole practitioners, where the implementation of such structures may be difficult in light of available resources and the specific nature of the activity.

²⁵ Except for credit institutions, financial institutions, crowdfunding service providers and crowdfunding intermediaries, supervisors may decide that documented individual risk assessments at the level of the undertaking are not required where the specific risks inherent in a sector are clear and understood.

²⁶ The compliance function officer may be removed only following prior notification of the management body acting in its management function. The obliged entity shall notify the supervisor of the removal of the compliance function officer, specifying whether the decision relates to the performance of the tasks assigned under this Regulation. The compliance function officer may, on his or her own initiative or upon request, provide the supervisor with information regarding the removal.

²⁷ The National Office for the Prevention and Control of Money Laundering is Romania's Financial Intelligence Unit (FIU) of an administrative type, acting as the lead authority in the development, coordination and implementation of the system for combating money laundering and terrorist financing.

²⁸ See Laura Poțincu and Tiberiu Foris, *Piața unică europeană. Instituțiile juridice ce drept al Uniunii Europene, metode și tehnici utilizate în management*, C.H. Beck Publishing House, Bucharest, 2024.

The Regulation also provides for the obligation to ensure the protection of the compliance function officer against retaliation, discrimination²⁹ or undue influence stemming from the commercial interests of the obliged entity. We consider that this provision establishes that the compliance function must be exercised independently, while at the same time raising the issue of how such independence is to be reconciled with the internal hierarchical structure of the entity, particularly in the case of independent professions.

Where justified by the nature and size of the activity, the functions of the person responsible for compliance and those of the compliance function officer may be performed by the same individual. In the case of entities consisting of a single natural person, that person is directly responsible for fulfilling the obligations laid down in the Regulation.

We consider that this solution, although justified from the perspective of the principle of proportionality³⁰, leads in practice to the concentration of complex responsibilities in the hands of a single individual, which may affect the effectiveness of compliance mechanisms and may create difficulties in ensuring a genuine separation of functions.

The Regulation also establishes the obligation to adopt procedures for the prevention and management of conflicts of interest, except where the obliged entity is a natural person or a single-member structure.

According to Article 15 of the Regulation, where the professional activity is carried out within a legal person, the obligations laid down in the Regulation are incumbent upon that legal person, and not upon the individual employed.

Regarding the outsourcing of activities related to customer due diligence measures, the Regulation allows recourse to service providers, provided that they are sufficiently qualified to perform the respective tasks. However, the obliged entity remains fully liable for any actions or omissions related to the outsourced tasks.³¹

In our view, maintaining the full liability of the obliged entity notwithstanding outsourcing is justified from the perspective of the effectiveness of control mechanisms, but it limits the practical advantages of outsourcing, transforming it into a technical support instrument rather than a mechanism for transferring responsibility.

Overall, we consider that the provisions concerning policies, procedures and internal controls reflect a clear orientation towards the institutionalisation of compliance and the strengthening of the role of obliged entities in preventing AML/CFT risks. However, the application of these requirements in the context of the legal profession raises specific issues of proportionality and compatibility, which require an interpretation adapted to the particularities of this profession.

2.3. Customer Due Diligence Obligations (CDD – Customer Due Diligence)

Regulation (EU) 2024/1624 imposes on obliged entities the obligation to apply customer due diligence measures in the situations expressly provided for in Article 19, namely upon establishing a business relationship, when carrying out occasional transactions that meet the thresholds laid down in the Regulation, or where they participate in the creation or transfer of legal entities or legal arrangements.

Furthermore, such measures become mandatory whenever there are suspicions of money laundering or terrorist financing, or where there are doubts as to the identity of the client or of the person acting on behalf of the client.

In the case of independent legal professionals, the Regulation establishes a specific rule whereby, where a lawyer or notary intermediates a transaction and is the only professional involved, that professional is deemed to act as such in relation to both parties to the transaction.

In our view, this legislative solution constitutes one of the most problematic interventions of the Regulation in relation to the status of the legal profession. Treating both parties to a transaction as “clients” of the lawyer is difficult to reconcile with the fundamental principles of the profession, in particular the duty of loyalty and the obligation to avoid conflicts of interest. The legal relationship between a lawyer and a client presupposes exclusive representation, and extending such a relationship to both parties to a transaction creates a legal fiction that is difficult to implement in practice.

²⁹ See Mihaela Tofan and Crina Mihaela Varga, *Drept instituțional al Uniunii Europene*, C.H. Beck Publishing House, Bucharest, 2023, p. 139.

³⁰ See Norbert Reich, *Principii generale ale dreptului civil al Uniunii Europene*, Universitară Publishing House, Bucharest, 2014, pp. 253–309.

³¹ The obliged entity shall carry out periodic controls to verify the effective implementation of those policies and procedures by the service provider. The frequency of such controls shall be determined on the basis of the critical nature of the outsourced tasks.

Customer due diligence measures essentially involve identifying and verifying the identity of the client and the beneficial owner, assessing the purpose and nature of the business relationship, and conducting ongoing monitoring thereof. Obligated entities must also verify whether the persons involved are subject to financial sanctions and analyse the ownership and control structure of the client³², including with regard to significant shareholdings.

In our view, the content of these obligations exceeds the traditional scope of professional diligence specific to lawyers, bringing it closer to the model applicable to regulated entities in the financial sector. The introduction of obligations relating to risk profiling, ongoing transaction monitoring and the analysis of the source of funds results in a transformation of the lawyer's role, placing the lawyer in a position combining legal assistance functions with control functions.

The Regulation provides that where the obliged entity is unable to apply customer due diligence measures, it must refrain from establishing the business relationship or from carrying out the transaction and must consider filing a suspicious transaction report. However, this rule does not apply to lawyers insofar as they act in the context of assessing the legal position of the client or representing the client in judicial proceedings.

Nevertheless, this exception does not apply where the lawyer participates in money laundering activities, provides advice for that purpose, or has knowledge of the client's intention to use legal services for such purposes, including where such intention may be inferred from objective circumstances.

As regards the specific content of identification obligations, the Regulation requires the collection of detailed information concerning the client, persons acting on behalf of the client and beneficial owners, as well as the verification thereof through official documents, independent sources or electronic identification means compliant with Regulation (EU) No 910/2014. Obligated entities are also required to consult central registers to verify beneficial ownership information and to report any discrepancies identified.

In our view, the obligation to report discrepancies between the information held and that recorded in central registers transforms obliged entities into active participants in the verification of official data, thereby exceeding their traditional role. In the case of lawyers, this obligation is limited by the exception relating to defence and legal advisory activities but remains applicable where there are links to illicit activities.

As a rule, the verification of the identity of the client and the beneficial owner³³ must take place prior to the establishment of the business relationship or the execution of the transaction, with the possibility of completing such verification subsequently, under limited conditions, where the risk is low and it is necessary to avoid disruption of the activity.

Regarding the monitoring of the business relationship, obliged entities are required to analyse transactions on an ongoing basis, in order to verify their consistency with the client's risk profile and, where appropriate, with information concerning the source of funds. In our view, this obligation of continuous monitoring is not compatible with the specific nature of the legal profession.

The Regulation also provides for simplified and enhanced due diligence measures, depending on the level of risk associated with the business relationship or transaction. In cases of low risk, obliged entities may apply simplified measures, including deferring identity verification or reducing the amount of information collected. In cases of high risk, they are required to apply enhanced measures, including analysing the origin and destination of funds and the purpose of transactions, particularly in situations characterised by complexity, unusually large values or the absence of an apparent economic purpose.

We consider that the establishment of a differentiated system of measures based on the level of risk is justified from the perspective of the effectiveness of prevention mechanisms. However, the application of this

³² The concept of ownership or control structure is intended to describe the manner in which a legal entity is indirectly owned or controlled, or the manner in which a legal arrangement is indirectly controlled, as a result of the relationships existing between entities or legal arrangements across multiple layers.

³³ Where, after exhausting all possible means of identification, no natural person is identified as the beneficial owner, or where there are doubts that the persons identified are the beneficial owners, obliged entities shall record that no beneficial owner has been identified and shall identify all natural persons holding senior management positions within the legal entity and verify their identity. Where carrying out the verification of identity (...) may indicate to the client that the obliged entity has doubts as to the beneficial owner of the legal entity, the obliged entity shall refrain from verifying the identity of members of senior management and shall instead record the measures taken to establish the identity of the beneficial owners and of the members of senior management. Obligated entities shall keep records of the actions taken, as well as of the difficulties encountered in the course of the identification process which led to the identification of a member of senior management.

model in the context of the legal profession requires careful adaptation, in order to avoid transforming due diligence obligations into instruments that interfere with the independent exercise of the profession.

Overall, we take the view that the customer due diligence obligations, as regulated by Regulation (EU) 2024/1624, lead to a significant extension of the professional obligations of lawyers and bring them closer to the model applicable to regulated entities in the financial sector. This development requires a balanced interpretation, ensuring compatibility between compliance requirements and the fundamental guarantees of the profession, in particular professional secrecy and the independence of the lawyer.

2.4. Suspicious Transaction Reporting Obligation (STR – Suspicious Transaction Reporting)

Regulation (EU) 2024/1624 establishes, under Article 69, the obligation for obliged entities to report, on their own initiative, to the competent Financial Intelligence Unit (FIU), situations in which they know, suspect, or have reasonable grounds to suspect that the funds or activities concerned, regardless of their amount, constitute proceeds of criminal activity, are related to terrorist financing, or are associated with other criminal activity.

At the same time, obliged entities are required to respond to requests for additional information made by the FIU and to provide, within the prescribed time limit, all relevant data and records concerning the transactions under examination.³⁴

It follows, therefore, that the obligation to report suspicious transactions is not of an ancillary nature, but constitutes one of the core obligations of the AML/CFT framework. It necessarily entails an independent assessment carried out by the obliged entity, based on the facts and information available to it, as well as on the characteristics of the client, the transaction, the funds, and the context in which the operation is carried out.

In our view, this regulatory framework grants obliged entities a considerable margin of discretion, which raises significant difficulties from the perspective of the foreseeability of the reporting obligation. The notions of “suspicion” and “reasonable grounds to suspect” are, by their nature, susceptible to multiple interpretations, and the absence of sufficiently precise criteria may lead to divergent practices and, in the case of legal professions, to a reporting practice driven more by the avoidance of sanctions than by the existence of a well-founded suspicion.

The Regulation allows Member States to provide, for certain categories of obliged entities, the possibility of transmitting information regarding suspicions to a self-regulatory body designated by the State, including together with records of relevant transactions. Such a solution is of particular importance in the case of legal professions, as it introduces an institutional filter between the lawyer and the reporting authority.

We consider that this possibility can provide additional protection for professional secrecy, as it allows for a preliminary assessment of the compatibility between the reporting obligation and the specific professional obligations of lawyers.

The Regulation expressly establishes an exception from the reporting obligation in favour of lawyers, insofar as the relevant information is received from, or obtained in relation to, a client in the course of assessing the legal position of the client or in the performance of the duty of defence or representation in judicial proceedings or in connection therewith, including in the context of advice on instituting or avoiding such proceedings. The exception applies regardless of whether the information is received before, during or after such proceedings.

From our perspective, this solution confirms that the Union legislator did not intend to abolish professional secrecy of lawyers, but rather to preserve it in relation to the prerogatives of the right of defence and legal representation of litigants. From this standpoint, the reporting obligation cannot be interpreted extensively so as to affect legal advice or the exercise of the right of defence.

However, the exception does not apply where the lawyer participates in money laundering, in predicate offences related to money laundering, or in terrorist financing, nor where the lawyer provides legal advice for the purpose of committing such acts. The exception is also excluded where the lawyer knows that the client’s intention is to obtain legal advice for the purpose of money laundering, committing predicate offences, or

³⁴ Obligated entities shall respond to a request for information submitted by the Financial Intelligence Unit (FIU) within five working days. In duly justified and urgent cases, FIUs may shorten that time limit, including by setting a deadline of less than 24 hours. The FIU may extend the response deadline beyond five working days where it considers this to be justified, provided that such extension does not undermine the FIU’s analysis.

terrorist financing, such knowledge or purpose being capable of being inferred from objective factual circumstances.

In our view, it is precisely this latter scenario that raises the most serious difficulties of application. The possibility of inferring “knowledge” or “purpose” from objective factual circumstances introduces a standard of assessment that may be interpreted broadly. In the case of lawyers, such an interpretation is particularly sensitive, as it risks transforming the reporting obligation into an instrument of intrusion into the lawyer–client relationship. We consider that such a provision must be interpreted strictly³⁵, in order to avoid confusion between the existence of a reasonable suspicion and the implicit establishment of a presumption of culpability on the part of the client.

Article 70 (3) of the Regulation further provides that Member States may decide that exceptions to the reporting obligation are not to be applied where this is justified by higher risks of money laundering, predicate offences or terrorist financing and may also impose additional reporting obligations on obliged entities.³⁶

If Member States may restrict the exceptions and introduce additional obligations, the practical result may be the persistence of significant differences between national regimes applicable to the legal profession. Consequently, although the Regulation seeks to reduce regulatory fragmentation, it preserves, in this area, a margin of national discretion capable of affecting the protection of professional secrecy at Union level.

The Regulation also establishes the obligation for obliged entities to refrain from carrying out transactions which they know or suspect to be related to the proceeds of criminal activity or to terrorist financing, until the report has been submitted and any instructions received from the FIU or another competent authority have been executed. However, the transaction may be carried out in the absence of contrary instructions from the FIU within three working days from the submission of the report, where the obliged entity has assessed the risks associated with its execution. Furthermore, where refraining is not possible or would be likely to frustrate efforts to pursue the beneficiaries of the transaction, reporting shall be carried out immediately after the transaction has been executed.

We consider that these provisions confirm that the reporting obligation is not merely informational in nature but is accompanied by operational obligations which may directly affect the execution of the mandate entrusted. In the case of lawyers, the obligation to refrain may conflict with obligations assumed vis-à-vis the client and with the requirements of expediency specific to certain legal operations.

Finally, the Regulation provides that the disclosure in good faith of information to the FIU does not constitute a breach of any restriction on the disclosure of information imposed by contract or by legislative or administrative provisions and does not give rise to liability on the part of the obliged entity.

In our view, this exemption from liability is necessary for the effective functioning of the reporting mechanism, but it does not resolve the fundamental issue of compatibility between the reporting obligation and the professional secrecy of lawyers. On the contrary, it confirms that the legislator had to intervene expressly in order to remove the legal consequences of a disclosure which, under other circumstances, could conflict with the confidentiality obligations inherent in the lawyer–client relationship.

Therefore, while customer due diligence measures may, within certain limits, be integrated into the lawyer’s professional duties of diligence, the reporting obligation places the lawyer in a direct relationship of cooperation with public authorities, a relationship which cannot be extended beyond strictly necessary limits without substantially affecting professional secrecy, independence, and the trust that must characterise the lawyer–client relationship.

2.5. Prohibition of Disclosure (Tipping-Off) and Its Impact on the Lawyer–Client Relationship

Pursuant to Regulation (EU) 2024/1624, obliged entities, including lawyers, are required not to disclose to the client concerned or to third parties that their transactions or activities are being or have been subject to assessments under Article 69, nor that information is being, has been, or will be transmitted to the Financial Intelligence Unit, or that an analysis concerning money laundering or terrorist financing is being or may be carried out.

³⁵ See Nicolae Popa, *Teoria generală a dreptului*, 6th revised and supplemented edition, C.H. Beck Publishing House, Bucharest, 2020, pp. 223–234.

³⁶ Member States shall notify the Commission of any decision taken in this regard. The Commission shall communicate such decisions to the other Member States.

This prohibition, commonly referred to in doctrine as “tipping-off”, constitutes an essential element of the reporting mechanism, aimed at preventing the compromise of investigations and ensuring the effectiveness of the activities of competent authorities.

However, where lawyers seek to dissuade a client from engaging in illegal activities, such conduct does not constitute disclosure within the meaning of Article 73 (1) of Regulation (EU) 2024/1624.

In our view, this distinction is particularly relevant for defining the limits of the non-disclosure obligation in the context of the legal profession. The Union legislator implicitly recognises that the lawyer cannot be reduced to a passive role in relation to the client’s conduct, but retains the prerogative to intervene, within the limits of the profession, to prevent the commission of unlawful acts. Such intervention cannot be qualified as a breach of compliance obligations but rather constitutes an expression of the preventive role of the lawyer.³⁷

In the Romanian legal order, the provisions of Article 33 of Law No. 129/2019 establish the prerogative of the National Office for the Prevention and Control of Money Laundering to request from reporting entities, including professionals, all data and information necessary for the fulfilment of its legal duties. At the same time, pursuant to paragraph (4) of the same Article, professional secrecy and banking secrecy³⁸ are not enforceable against the Office, either in the context of analytical activities or in the context of international information exchange, except in cases expressly provided by law.

At the same time, paragraph (5) of Article 33 establishes a specific safeguard in favour of lawyers, providing that they shall fulfil their obligations under the relevant legislation in compliance with the provisions of Law No. 51/1995 regarding professional secrecy.

The proposals to amend Article 33(4), aimed at extending the non-opposability of professional secrecy, together with the repeal of paragraph (5), have been justifiably criticised by the National Union of Bar Associations of Romania, being characterised as “a serious infringement of professional secrecy of lawyers, which represents a fundamental principle of the legal profession (Article 11, Article 45(7), Article 34(1) of Law No. 51/1995 on the organisation and exercise of the legal profession and Article 1(2)(e) of the Statute of the legal profession).”³⁹

Such a legislative intervention would have been incompatible not only with the domestic legal framework governing the legal profession but also with European Union law.

Thus, recital (12) of Regulation (EU) 2024/1624 expressly enshrines the need to preserve lawyers’ professional secrecy regarding information obtained in the course of assessing the legal position of the client or in judicial proceedings, establishing that such information should not be subject to reporting obligations, subject to limited exceptions.

In our view, this provision has the value of a principle and imposes on Member States the obligation not to undermine the essence of lawyers’ professional secrecy, even in the context of implementing AML/CFT mechanisms. Any national regulation leading to the deprivation of this principle of its substance would be contrary to Union law.⁴⁰

Moreover, recital (89) of Directive (EU) 2024/1640⁴¹ underlines the importance of reporting to the FIU within supervisory mechanisms but expressly states that information subject to lawyers’ professional secrecy should not be collected, used or reported in supervisory activities, except where the exceptions provided for in the Regulation apply.

Accordingly, the obligation of non-disclosure (tipping-off) and the reporting obligation must be interpreted and applied in a differentiated manner in the case of lawyers, depending on the nature of the activity carried out.

³⁷ In Romania, Article 45(8) of Law No. 51/1995 provides that the failure of a lawyer to report offences of which he or she becomes aware in the course of exercising the profession does not constitute a criminal offence, except in the case of the following offences: (1) murder, negligent homicide, or any other offence resulting in the death of a person; (2) genocide, crimes against humanity, or war crimes against persons; (3) the offences provided for in Articles 32–38 of Law No. 535/2004 on the prevention and combating of terrorism, as subsequently amended and supplemented.

³⁸ See Oana-Mihaela Salomia, *Piața internă a UE și libertățile fundamentale de circulație*, C.H. Beck Publishing House, Bucharest, 2025.

³⁹ See <https://www.unbr.ro/punctul-de-vedere-al-unbr-trimis-senatului-romaniei-cu-privire-la-proiectul-de-modificare-a-legii-nr-129-2019/>, last accessed on 28 March 2026.

⁴⁰ See Mihaela Pătrăuș, *Drept instituțional european*, Pro Universitaria Publishing House, Bucharest, 2018.

⁴¹ Directive (EU) 2024/1640 of the European Parliament and of the Council of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Directive (EU) 2019/1937 and amending and repealing Directive (EU) 2015/849, OJ L, 2024/1640, 19.6.2024.

Finally, we consider that the prohibition of disclosure, although necessary for the effectiveness of mechanisms for preventing and combating money laundering, must be applied in a balanced manner in the context of the legal profession, so as not to lead to an unjustified restriction of professional secrecy and of the lawyer's role in safeguarding the right of defence.

2.6. Legal Professional Secrecy of Lawyers in the Context of AML/CFT Obligations – Comparative Law Perspectives

Under Spanish law, Law No. 10/2010 on the prevention of money laundering and terrorist financing⁴² establishes, in Article 22, an express exception to reporting and cooperation obligations regarding information obtained by a lawyer in the course of determining the legal position of a client or in the exercise of defence or representation in judicial proceedings. At the same time, the law explicitly maintains the obligation to respect professional secrecy in accordance with the legislation governing the legal profession.

In our view, the Spanish legislative solution reflects a clear distinction between activities subject to AML/CFT obligations and the core of the lawyer's activity, protected by professional secrecy. This distinction contributes to ensuring a high degree of foreseeability and reduces the risk of an unjustified extension of compliance obligations to activities inherent to legal advice.

Under Austrian law, the Lawyers' Code⁴³ provides, in § 8c(1), that a lawyer is not required to report information obtained in the context of legal advice or representation before courts or other authorities, except where it is evident that legal services are being used for the purposes of money laundering or terrorist financing, and this is known to the lawyer.

From our perspective, the Austrian regulation introduces a more stringent assessment criterion, making the reporting obligation conditional upon the evident use of legal services for illicit purposes. This solution effectively limits the risk of excessive interpretations and preserves an appropriate balance between compliance obligations and the protection of professional secrecy.

Under German law, the Anti-Money Laundering Act⁴⁴ establishes a general reporting obligation where there are indications of the illicit origin of funds or their connection to terrorist financing, while expressly providing an exception for information obtained within a professional relationship protected by legal professional privilege. However, the reporting obligation remains applicable where the obliged entity has knowledge that the legal relationship is being used for illicit purposes.

We consider that this legislative solution establishes an apparent balance between the requirements of preventing and combating money laundering and the preservation of professional secrecy, while the use of the notion of "knowledge" introduces an assessment standard that may give rise to practical difficulties, particularly where the client's intention is not explicitly manifested.

Under French law, the Monetary and Financial Code⁴⁵ imposes prevention and reporting obligations on lawyers only insofar as they participate in financial or real estate transactions or assist clients in relevant economic operations. At the same time, the French legislator provides exceptions for situations where lawyers' activities fall within judicial proceedings, where information is obtained in the context of legal advice, or where it concerns the strategy for initiating or avoiding litigation.

In our assessment, French regulation expressly delineates the scope of protected activities while maintaining the necessary exceptions for situations in which the lawyer is involved in AML/CFT-relevant activities. This framework confirms that professional secrecy is not absolute, but neither may it be deprived of its substance through the extension of reporting obligations.

⁴² See Law 10/2010 of 28 April on the prevention of money laundering and terrorist financing, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2010-6737>, last accessed on 28 March 2026.

⁴³ See the Austrian Lawyers' Act (Rechtsanwaltsordnung – RAO), Original Version (StF): Reichsgesetzblatt (RGBl.) No. 96/1868, available at <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001673>, last accessed on 28 March 2026.

⁴⁴ See the German Money Laundering Act (Geldwäschegesetz – GwG), available at https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/GwG_en.html?nn=19586032#doc19618182bodyText48, last accessed on 28 March 2026.

⁴⁵ See the Monetary and Financial Code (Code monétaire et financier), available at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072026/LEGISCTA000020178975/?anchor=LEGIARTI000050361174#LEGIARTI000050361174, last accessed on 28 March 2026.

Under Belgian law, the Law of 18 September 2017⁴⁶ establishes a particular model characterised by the integration of reporting obligations into an institutional mechanism specific to the legal profession. Lawyers are required to report suspicions of money laundering or terrorist financing, but such reporting is carried out through the Dean of the Bar Association (*bâtonnier*), who conducts a prior assessment of its compatibility with professional secrecy.

At the same time, Belgian legislation enshrines the prohibition of disclosure (tipping-off) and provides exceptions in favour of legal advisory activities and those related to judicial proceedings, thereby maintaining a balance between AML obligations and the protection of confidentiality.

In our view, the Belgian model represents the most advanced form of reconciliation between reporting obligations and lawyers' professional secrecy. The introduction of an institutional filter, through the *bâtonnier*, allows for an independent and specialised assessment of situations in which the reporting obligation conflicts with professional duties.

The essential difference between this model and the other systems analysed does not lie in the existence of reporting obligations or exceptions based on professional secrecy, but in the concrete mechanism for their application. Thus, in most Member States, the lawyer directly assesses and reports to the Financial Intelligence Unit, whereas under Belgian law such assessment is subject to prior institutional review.

2.7. Brief Considerations on Legal Professional Secrecy in the Case-Law of the CJEU – Case C-623/22

The analysis of the case-law of the Court of Justice of the European Union⁴⁷ confirms, in a relevant manner, the limits within which reporting obligations may be imposed on the legal profession, in relation to the requirements of preserving professional secrecy.

In Case C-623/22⁴⁸, the Court was seized by the Constitutional Court of Belgium regarding the validity of certain national provisions adopted in the transposition of Directive (EU) 2018/822, particularly concerning reporting obligations imposed on intermediaries, including lawyers, and their impact on fundamental rights.

In essence, the referring court highlighted the broad scope of reporting obligations and the lack of clarity of certain key notions, raising issues in terms of the principles of legal certainty and legality. It also challenged the obligation imposed on lawyers to inform other intermediaries of reporting obligations, invoking a potential interference with the right to private life.

In its case-law, the Court has consistently held that legal professional privilege benefits from specific protection derived from Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention on Human Rights. Thus, the confidentiality of the lawyer–client relationship covers not only defence activities but also legal advice, both as regards its content and the existence of the professional relationship.

In our view, the Court's reasoning is of fundamental importance for delineating AML/CFT obligations applicable to lawyers. The Court emphasises that enhanced protection of confidentiality is justified by the essential role of the lawyer in a democratic society, namely, to ensure the effective defence of individuals and to provide independent legal advice.

The Court further notes that such protection implies that individuals must be able to have a legitimate expectation that their lawyer will not disclose the fact of consultation, except in exceptional circumstances. Consequently, any obligation imposed on a lawyer that would lead to the disclosure of such information must be subject to a particularly strict review.

In our view, the Court's conclusion that the notification obligation imposed on lawyers is incompatible with Article 7 of the Charter confirms that reporting obligations cannot be extended without limitation to the legal profession. This case-law explicitly enshrines the existence of a core of legal professional privilege that cannot be undermined in the context of combating money laundering.

The Court also reiterates that the role of the lawyer, as a participant in the administration of justice, entails not only independence but also loyalty towards the client.

⁴⁶See the Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash, available at https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017091806#LNK0025, last accessed on 28 March 2026.

⁴⁷See Marieta Safta, *Justiția constituțională în Uniunea Europeană. Legislație, jurisprudență și doctrină*, Hamangiu Publishing House, Bucharest, 2022, pp. 209–259.

⁴⁸See Judgment of the Court (Second Chamber) of 29 July 2024, ECLI:EU:C:2024:639.

We consider that any interference with professional secrecy must not only pursue a legitimate aim but must also be strictly necessary and proportionate, without affecting the essence of the right to confidentiality.

3. Conclusions

The principal legal consequence of Regulation (EU) 2024/1624 does not lie in the inclusion, as such, of lawyers within the category of obliged entities—since this solution was already known in European and domestic law—but rather in the consolidation of a regulatory framework characterised by direct applicability, harmonisation, and the strengthening of obligations relating to internal organisation, risk assessment, customer due diligence and reporting.

In our view, the essential legal issue remains the delineation between activities falling within the scope of compliance obligations and those that remain protected by professional secrecy. However, this distinction is not always formulated with sufficient clarity in the text of the Regulation. Concepts such as “participation in transactions”, “knowledge”, “reasonable grounds to suspect”, or the inference of illicit purpose from objective circumstances leave a significant margin of discretion, capable of generating divergent practices and extensive interpretations.

From our perspective, in the absence of a restrictive interpretation, there is a risk that compliance obligations may exceed what is necessary for the prevention of money laundering and may infringe principles that fundamentally characterise the legal profession.

In conclusion, we consider that Regulation (EU) 2024/1624 does not establish a general derogation from lawyers’ professional secrecy but imposes a functional limitation thereof in all situations where professional activity goes beyond the sphere of protected legal advice and defence and falls within the category of activities relevant to AML/CFT. For this reason, the application of the Regulation in relation to the legal profession must be carried out through a strict interpretation of compliance obligations and an effective protection of professional secrecy. Only under these conditions can the balance be maintained between the general interest in preventing the misuse of the financial system for illicit purposes and the guarantees that define the exercise of the legal profession.

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REDEFINING ‘PERSONAL DATA’ IN THE DIGITAL OMNIBUS PROPOSAL: IMPLICATIONS FOR AI PROCESSING BY EU INSTITUTIONS UNDER REGULATION (EU) 2018/1725

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Abstract

Published on 19 November 2025, COM(2025) 837 final proposes amendments to both the GDPR and Regulation (EU) 2018/1725 within the broader Digital Omnibus simplification package. This paper examines one of the proposal’s most consequential moves, namely the attempt to codify a relative, entity-specific approach to identifiability within the definition of personal data. Its central claim is that the proposed alignment between the GDPR and the EUDPR cannot be assessed only as a drafting exercise. Once projected onto the institutional framework of the Union, the amendment raises specific questions that the proposal does not sufficiently address, especially in relation to the supervisory role of the European Data Protection Supervisor, inter-institutional data environments, and AI-related processing involving pseudonymised and potentially sensitive datasets. Methodologically, the paper combines doctrinal analysis of the proposed legislative text with close reading of the Court of Justice’s judgment in EDPS v Single Resolution Board, the earlier line of case law from Breyer and OC v Commission, and Joint Opinion 2/2026 of the EDPB and EDPS. The article argues that the proposal appears to move beyond clarification and risks materially reshaping the scope of EU data protection law in the institutional context. It concludes that legislative parallelism between the GDPR and the EUDPR remains desirable, but only if accompanied by safeguards tailored to EU institutions.

Keywords: Digital Omnibus, personal data, EUDPR, EU institutions, artificial intelligence.

1. Introduction

The European Commission’s Digital Omnibus proposal of 19 November 2025 presents itself as a simplification measure within the Union’s digital legislative framework. Yet, in the field of data protection, simplification is not merely a technical exercise. Where amendments concern the scope of ‘personal data’, the threshold of identifiability, and AI-related derogations, their effects extend beyond compliance costs and directly affect the level of protection granted under Union law. This is particularly true in relation to Regulation (EU) 2018/1725, which governs the processing of personal data by Union institutions, bodies, offices and agencies.

This article examines whether the proposed alignment between the GDPR and the EUDPR remains normatively coherent once applied to AI-related processing by EU institutions. Its core claim is that the proposal assumes a degree of parallelism between the two regimes that is not fully justified. Legislative alignment may appear desirable at the level of drafting technique. But the institutional environment of Union bodies, the supervisory role of the EDPS, and the public-law functions performed by EU institutions generate legal effects that are not reducible to the GDPR model.

The issue has acquired particular significance after the Court of Justice’s judgment in EDPS v SRB and after the EDPB-EDPS Joint Opinion 2/2026 on the Digital Omnibus proposal. Taken together, these developments show that the concept of personal data cannot be treated as a static or purely abstract category. Its application depends on context, on the position of the recipient, and on the legal environment in which data are processed.

The discussion begins with the proposed amendments to the GDPR-EUDPR relationship and the case law that has shaped the concept of identifiability. It then examines the implications of EDPS v SRB for the interpretation of ‘personal data’ in institution-specific AI deployments. Next, it explains why AI-related processing by EU institutions cannot be treated as a simple extension of private-sector GDPR compliance. It finally proposes a more differentiated approach to legislative alignment, one that preserves coherence without obscuring the specific legal position of EU institutions.

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2. The concept of personal data under EU law: from Breyer to EDPS v SRB

The definition of personal data sits at the foundation of the EU data protection framework. Article 4(1) of Regulation (EU) 2016/679 (GDPR) defines personal data as any information relating to an identified or identifiable natural person, where identifiability is assessed by reference to all means reasonably likely to be used by the controller or by another person.¹ Article 3(1) of Regulation (EU) 2018/1725 (EUDPR) contains an almost identical provision, applicable to Union institutions, bodies, offices and agencies.² The co-legislators sought to maintain broad substantive alignment between the GDPR and the EUDPR, while preserving the institutional specificity of the latter.³

The scope of this definition has never been self-evident. Recital 26 of the GDPR clarifies that the assessment of whether means are reasonably likely to be used for identification should take into account all objective factors, including cost, time, and available technology.⁴ Yet the recital leaves open a question that has divided both courts and commentators: must identifiability be assessed from the perspective of the specific controller processing the data, or in the abstract, taking into account any party that might conceivably achieve identification?

The Court of Justice addressed this tension for the first time in *Breyer v Bundesrepublik Deutschland*. The case concerned dynamic IP addresses stored by a website operator who did not, by itself, hold the information needed to link those addresses to natural persons. The internet service provider did. The Court held that data qualifies as personal where the controller has legal means available to obtain additional information enabling identification. The test was not whether identification was theoretically possible, but whether the controller had access to means reasonably likely to be used.⁵ This formulation already pointed towards a relative reading of identifiability, though the Court did not frame its reasoning in those explicit terms.

In *OC v European Commission*, the Court further developed the case-law on identifiability under the EUDPR. The case concerned codes assigned to individuals who had participated in a selection procedure. The judgment sharpened the Breyer reasoning by placing greater emphasis on the controller-specific assessment: what matters is not some abstract capacity to identify, but whether the particular entity processing the data possesses or can obtain the means to do so.⁶

The most significant development came with *EDPS v Single Resolution Board*, decided on 4 September 2025. The Single Resolution Board had collected comments from stakeholders during a public consultation, replaced respondents' names with alphanumeric codes, and transmitted the coded responses to a consultancy firm for analysis. The EDPS took the position that the transmitted data remained personal data, since the SRB itself retained the identification key. The Court of Justice, sitting as First Chamber, disagreed in part. It confirmed that pseudonymised data does not automatically constitute personal data in the hands of every recipient. For the recipient, the decisive issue was whether it had, or could reasonably obtain, the means enabling re-identification.⁷

Two aspects of the judgment deserve particular attention in the present context. First, the case arose under the EUDPR, not the GDPR. The SRB is an EU agency. The Court nonetheless confirmed a uniform approach to interpretation, given the parallel definitions used in both instruments. This matters because it means that the institutional data protection framework is not merely a passive mirror of the GDPR; it actively generates case law that shapes the interpretation of the concept of personal data across the wider EU legal order.⁸

Second, the judgment treats identifiability as a relational property, not an intrinsic attribute of the data. The same dataset can be personal data for one controller and non-personal for another. This position has

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, art. 4(1).

² Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, art. 3(1).

³ See recital 5 of Regulation (EU) 2018/1725, which states that the rules on data protection applicable to Union institutions should be aligned with the approach taken in Regulation (EU) 2016/679.

⁴ Regulation (EU) 2016/679, recital 26.

⁵ Case C-582/14, *Patrick Breyer v Bundesrepublik Deutschland*, ECLI:EU:C:2016:779, judgment of 19 October 2016, paras 42-49.

⁶ Case C-479/22 P, *OC v European Commission*, ECLI:EU:C:2024:215, judgment of 7 March 2024.

⁷ Case C-413/23 P, *European Data Protection Supervisor v Single Resolution Board*, ECLI:EU:C:2025:645, judgment of 4 September 2025.

⁸ Court of Justice of the European Union, Press Release No 107/25, "The Court of Justice clarifies the scope of the concept of personal data in the context of a transfer of pseudonymised data to third parties", 4 September 2025.

practical consequences that go well beyond the facts of the SRB case. In any environment where multiple institutions share, transfer, or jointly process pseudonymised datasets, the legal qualification of the data becomes dependent on who is processing it and what means that entity has at its disposal. The implications for inter-institutional data flows and for the deployment of AI systems trained on pseudonymised datasets are immediate, and they form the subject of the analysis that follows.

The Breyer-to-SRB line of case law did not emerge in a vacuum. It reflects a broader tension between two competing visions of data protection. One vision, protective and expansive, treats any theoretical possibility of identification as sufficient to trigger the full apparatus of data protection law. The other, pragmatic and contextual, insists that legal obligations should attach only where identification is a realistic prospect for the specific entity concerned. The Digital Omnibus proposal appears to move in that direction, but whether it merely clarifies or materially reshapes the legal concept remains contested.

3. The Digital Omnibus proposal: codification, clarification, or redefinition?

On 19 November 2025, the European Commission published a proposal for a Regulation amending, among other instruments, Regulation (EU) 2016/679 and Regulation (EU) 2018/1725.⁹ The stated objective is simplification: reducing compliance friction and making the EU digital legal framework more accessible.¹⁰ Among the proposed amendments, the modification of the definition of personal data in Article 4(1) GDPR has attracted the most attention and the sharpest criticism.

The Commission proposes to add a new paragraph to Article 4(1), specifying that identifiability must be assessed from the perspective of the controller or processor, taking into account the means reasonably likely to be used by that specific entity for identification purposes.¹¹ The proposal frames this as a codification of the approach confirmed by the Court of Justice in *EDPS v SRB*, not as a change in substance. The Explanatory Memorandum presents the amendment as a clarification intended to bring legal certainty and to reflect the current state of the case law.¹²

This framing is contested. In Joint Opinion 2/2026, adopted on 10 February 2026, the EDPB and the EDPS acknowledge the objective of legal clarity but argue that inserting an entity-specific identifiability test into the operative text of the Regulation goes beyond mere clarification and risks narrowing the material scope of data protection.¹³ They recommend that the co-legislators refrain from amending the definition in the operative provisions and, if clarification is deemed necessary, confine it to a recital.¹⁴

The distinction between operative text and recital is not formalistic. A recital provides interpretive guidance; it does not create autonomous legal obligations. An entity-specific identifiability criterion placed in a recital would serve as an aid to interpretation, pointing courts and supervisory authorities towards the contextual approach without displacing the existing definition. The same criterion placed in the operative text becomes a binding rule that controllers can invoke directly, potentially shielding certain categories of processing from the application of data protection law where the controller argues that it lacks the means for identification. The difference between these two legislative techniques is not trivial. It determines whether the contextual approach functions as one factor in a broader assessment or as a standalone threshold that gates the applicability of the Regulation.¹⁵

The proposal does not confine its amendments to the GDPR. COM(2025) 837 also amends Regulation (EU) 2018/1725 with corresponding provisions.¹⁶ Joint Opinion 2/2026 notes that the observations made in respect of the GDPR amendments also apply to the corresponding proposals for amendments to the EUDPR, while identifying specific cases where full alignment between the texts does not function adequately.¹⁷ This

⁹ European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 2016/679, (EU) 2018/1724, (EU) 2018/1725, (EU) 2023/2854 and Directives 2002/58/EC, (EU) 2022/2555 and (EU) 2022/2557, COM(2025) 837 final, 19 November 2025.

¹⁰ *Ibid.*, Explanatory Memorandum, Section 1.

¹¹ *Ibid.*, article 3, point (1), amending article 4(1) of Regulation (EU) 2016/679.

¹² *Ibid.*, Explanatory Memorandum, Section 5, sub-section on the definition of personal data.

¹³ European Data Protection Board and European Data Protection Supervisor, Joint Opinion 2/2026 on the Proposal for a Regulation as regards the simplification of the digital legislative framework, adopted on 10 February 2026, para. 13.

¹⁴ *Ibid.*, paras 14-21.

¹⁵ *Ibid.*, paras 20-21.

¹⁶ COM(2025) 837 final, article 4, amending Regulation (EU) 2018/1725.

¹⁷ Joint Opinion 2/2026, para. 13.

acknowledgement is significant: it confirms that the Commission has, in essence, applied the same legislative technique to both instruments, transposing GDPR-oriented amendments into the EUDPR without a separate assessment of whether they suit the institutional context.¹⁸

The approach is not unprecedented. The EUDPR was itself drafted as a parallel instrument to the GDPR, and the co-legislators deliberately aligned most of its substantive provisions with the GDPR text.¹⁹ But alignment as a drafting method has limits. The GDPR governs a vast and heterogeneous array of private and public controllers across twenty-seven Member States. The EUDPR governs a comparatively small number of Union institutions, bodies, offices and agencies, each operating within a distinct administrative and legal environment, subject to the supervision of a single authority, the EDPS. The question is whether an amendment designed primarily to address private-sector compliance concerns, and motivated in part by the desire to create regulatory space for AI development, is equally suited to the institutional framework in which the EUDPR operates.

The Digital Omnibus package also interacts with separate proposals relevant to the processing of special categories of data in the context of AI. The AI Act already contains a derogation permitting the processing of sensitive personal data for the purpose of detecting and correcting bias in AI systems classified as high-risk.²⁰ The companion AI Omnibus proposal would extend that derogation beyond the current high-risk perimeter. In Joint Opinion 1/2026, the EDPB and the EDPS expressed concern that expanding the derogation without maintaining strict necessity requirements could undermine the protection afforded to sensitive data.²¹ That concern acquires specific weight in the EUDPR setting, where institutional data environments may involve large, interoperable and difficult-to-contest datasets.

The next section examines these consequences in greater detail, focusing on the structural features of institutional data processing that distinguish it from the private-sector context for which the Digital Omnibus was primarily conceived.

4. Implications for AI-related processing by EU institutions

The preceding sections have established that the Digital Omnibus proposal codifies a relative approach to identifiability and transposes it into the EUDPR through mirror amendments contained in Article 4 of COM(2025) 837. The EDPB and the EDPS have accepted the principle of alignment but have flagged specific cases where it does not work.²² This section examines why those cases matter most precisely where they have received the least attention: in the institutional data environments of the Union.

EU institutions do not process data the way a private company does. The differences are structural, not merely quantitative. Union bodies operate within a framework of public-law obligations, shared databases, and inter-institutional cooperation arrangements that have no equivalent in the private sector. Their supervisory authority is singular (the EDPS) rather than distributed among twenty-seven national authorities. And their data processing activities increasingly involve AI systems that operate across institutional boundaries.

The most instructive example is eu-LISA, the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice. eu-LISA operates, among others, the Schengen Information System (SIS II), the Visa Information System (VIS), Eurodac, and the Entry/Exit System (EES).²³ These are not isolated databases. Following the adoption of the Interoperability Regulations in 2019, they are designed to be interconnected through shared components, including a common identity repository (CIR), a multiple-identity detector (MID), and a European search portal (ESP).²⁴ The interoperability architecture

¹⁸ *Ibid.*, para. 21.

¹⁹ Recital 5 of Regulation (EU) 2018/1725.

²⁰ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), OJ L, 12.7.2024, art. 10(5).

²¹ European Data Protection Board and European Data Protection Supervisor, Joint Opinion 1/2026 on the Proposal for a Regulation as regards the simplification of the implementation of harmonised rules on artificial intelligence, adopted on 20 January 2026, paras 8-16, especially 11-13.

²² EDPB-EDPS Joint Opinion 2/2026 on the Proposal for a Regulation as regards the simplification of the digital legislative framework, adopted on 10 February 2026, para. 10, in fine, read together with para. 13.

²³ Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), OJ L 295, 21.11.2018.

²⁴ Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa, OJ L 135, 22.5.2019, arts 17 (European search portal), 17a (common identity repository) and 25 (multiple-identity detector); Regulation (EU) 2019/818 of the European Parliament and of the Council

is built on the assumption that data from one system can be cross-referenced against data from another. The common identity repository, in particular, enables cross-system queries that can link records across databases which, taken individually, contain only pseudonymised data. In such an environment, the question of whether a given entity has the means to identify a data subject is not a binary one. It depends on the level of access granted to that entity within the interoperability framework, and that access can change depending on the operational context.

This is where the proposed entity-specific identifiability standard creates a problem that the GDPR context does not face with the same intensity. Under the current framework, if an EU institution processes pseudonymised data and does not itself hold the re-identification key, it can argue, following the logic of *EDPS v SRB*, that the data is not personal data for it. But the interoperability architecture means that re-identification capacity is not fixed. An agency that cannot identify a data subject today may gain that capacity tomorrow through a lawful query to the common identity repository. The proposed amendment does not address this temporal dimension. It freezes the assessment of identifiability at the moment of processing, without accounting for the shifting access structures that characterise inter-institutional data environments.²⁵

The EDPB and the EDPS have signalled a related concern in Joint Opinion 2/2026. They warn that the proposed changes could induce controllers to seek loopholes, including by artificially outsourcing activities or capabilities to separate entities in order to remove processing from the scope of data protection law.²⁶ In the private sector, such structuring requires deliberate effort. In the institutional context, the separation already exists by design: different agencies, different mandates, different access levels within the same interoperability framework. The risk is not that EU institutions will game the system, but that the system itself, once the entity-specific standard is codified, will produce results that are technically correct but functionally inadequate.

The supervisory dimension reinforces the concern. The EDPS supervises all Union institutions and bodies under the EUDPR. If the entity-specific approach narrows the category of data that qualifies as personal in the hands of a particular institution, the EDPS may find its supervisory jurisdiction reduced, not because of a policy choice, but as a side effect of a definitional change designed for a different regulatory context. Joint Opinion 2/2026 itself, in the context of DPIA lists, states that the Commission should not be given the possibility of shaping the extent of its own obligations under the EUDPR. That reasoning, although formulated in a different context, points, in our view, to a broader principle: changes that indirectly affect the scope of EDPS oversight require distinct institutional justification, not automatic transposition from the GDPR.²⁷

The interaction with AI-related derogations adds a further layer. The current AI Act permits the processing of special categories of personal data for the purpose of detecting and correcting bias in high-risk AI systems, subject to strict necessity.²⁸ The companion AI Omnibus proposal would introduce a new Article 4a extending this derogation to providers and deployers of all AI systems and models.²⁹ The EDPB and the EDPS have recommended that the standard of strict necessity be maintained and that the scope of the derogation be clearly circumscribed to cases where bias is likely to affect health, safety, or fundamental rights.³⁰

For EU institutions, this extension matters in a specific way. Institutional AI deployments (document management, HR screening, translation workflows, risk assessment) often involve datasets that contain residual sensitive information. The EUDPR applies the same prohibition on processing special categories of data as the GDPR, based on Article 10 EUDPR and the corresponding derogations. If the bias detection derogation is extended to all AI systems, and the definition of personal data is simultaneously narrowed, institutions could find themselves in a regulatory grey zone: processing data that may or may not qualify as personal, under a

of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration, OJ L 135, 22.5.2019, arts 13, 13a and 21 (corresponding provisions).

²⁵ The author's own assessment, building on the reasoning in Case C-413/23 P, *EDPS v SRB*, ECLI:EU:C:2025:645, paras 84-85, and the structural features of the interoperability framework established by Regulations (EU) 2019/817 and 2019/818.

²⁶ Joint Opinion 2/2026, para. 17. The EDPB and EDPS note the risk that controllers could implement nominal measures to separate their processing activities from the means reasonably likely to be used to identify the data subjects, seeking to remove them from the scope of the GDPR/EUDPR. See also fn 25 of the Joint Opinion.

²⁷ Joint Opinion 2/2026, para. 91, in the context of the proposed amendments to DPIA lists under Article 39 EUDPR. See also para. 107, where the EDPB and the EDPS note that proposed Article 88a GDPR and proposed Article 37 EUDPR cannot be implemented and enforced without the provision of supervisory powers, and call for the inclusion of fining powers for the EDPS under Article 66(3) EUDPR.

²⁸ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), OJ L, 2024/1689, 12.7.2024, Article 10(5).

²⁹ EDPB-EDPS Joint Opinion 1/2026 on the Proposal for a Regulation as regards the simplification of the implementation of harmonised rules on artificial intelligence, adopted on 20 January 2026, para. 8.

³⁰ Joint Opinion 1/2026, paras 11-13.

derogation that may or may not apply, with supervision by an authority whose jurisdiction depends on the answer to the first question. The result is not simplification but the creation of legal uncertainty at the precise point where clarity is most needed.

Joint Opinion 1/2026 underscores that DPAs remain competent to supervise the processing of personal data under the new Article 4a, including in the institutional context where the EDPS fulfils that role.³¹ But this competence presupposes that the data in question qualifies as personal. If the proposed definitional change removes certain categories of pseudonymised data from the scope of the EUDPR, the supervisory competence of the EDPS over those categories of processing would be removed with it, regardless of the intentions of the co-legislators.

The concern is not confined to administrative processing. The EUDPR also contains a dedicated operational layer in Chapter 9, aligned with the Law Enforcement Directive, and the Commission has identified the need for a targeted amendment of that chapter.³² If the definitional changes introduced by the Digital Omnibus enter into force before that amendment is finalised, the institutional framework risks being reshaped in stages, without a coherent view of how the pieces fit together. The problem is not hostility to institutional data protection, but the absence of a distinct institutional calibration in the proposal. The explanatory memorandum focuses on compliance burdens for private operators and SMEs. The EDPB and the EDPS observed that the proposal was not accompanied by a full impact assessment³³. The proposal contains no separate assessment of how the amendments would affect data processing by Union institutions under the EUDPR. The result is a set of amendments that may function adequately in the GDPR setting while producing unintended consequences in the institutional one.

5. Conclusions

This article has examined the implications of the Digital Omnibus proposal for AI-related data processing by EU institutions under Regulation (EU) 2018/1725. Its core finding is that the proposed amendments, while defensible in the GDPR context for which they were primarily designed, do not adequately account for the structural features of the institutional data protection framework.

Three points follow from this analysis.

First, the codification of entity-specific identifiability in the definition of personal data is not a neutral clarification. As the EDPB and the EDPS have argued, it goes beyond the targeted codification of CJEU jurisprudence and risks narrowing the material scope of both the GDPR and the EUDPR. In the institutional setting, the problem is compounded by the interoperability of large-scale IT systems and by the fluid nature of inter-institutional data access. The proposed amendment does not account for the possibility that identification capacity may shift depending on operational context, and it offers no mechanism to address the resulting regulatory uncertainty.

Second, the approach of mirror amendments, transposing GDPR-oriented provisions into the EUDPR without separate assessment, reaches its limits precisely where the institutional context diverges from the private-sector one. The EUDPR was designed as a parallel instrument, but parallelism as a legislative technique does not eliminate the need for context-specific evaluation. The EDPB and the EDPS have themselves acknowledged that full alignment is not always appropriate. This article has identified specific cases (interoperability, EDPS supervisory scope, AI-related derogations for special categories of data) where the absence of such evaluation risks producing unintended consequences.

Third, the extension of the bias detection derogation to all AI systems and models, combined with the narrowing of the personal data definition, creates a regulatory grey zone for institutional AI deployments. The strict necessity standard recommended by the EDPB and the EDPS would offer a partial safeguard, but only if the data in question remains within the scope of the EUDPR in the first place. The two amendments interact in ways that the proposal does not address.

³¹ Joint Opinion 1/2026, para. 16.

³² The EUDPR contains a dedicated chapter (Chapter 9) for operational processing aligned with Directive (EU) 2016/680. The need for a targeted amendment was identified in the Commission's report on the application of the EUDPR: European Commission, Report on the first two years of application of Regulation (EU) 2018/1725, COM(2022) 530 final, 14 September 2022, section 5.2, proposing to clarify that the EUDPR entrusts the EDPS with the supervision of the law enforcement chapter and with the powers granted to it under Article 58 EUDPR.

³³ Joint Opinion 2/2026, para. 7.

The expected impact of these findings is primarily directed at the legislative process. As the proposal progresses through the European Parliament and the Council, the institutional dimension of the EUDPR amendments deserves separate scrutiny, not as an afterthought to the GDPR debate but as a distinct question with its own legal and operational parameters. The EDPS, as the authority responsible for supervising data processing by Union institutions, is well placed to contribute to this assessment, and the forthcoming EDPB guidelines on pseudonymisation and anonymisation may provide additional analytical tools.

Further research should extend the analysis in two directions. The first concerns the operational dimension: a detailed examination of how the proposed amendments would affect specific institutional data flows, including those managed by eu-LISA and the European Commission's internal AI deployments. The second concerns the forthcoming targeted amendment of Chapter 9 of the EUDPR, which governs operational and law enforcement-style processing by Union institutions. The interaction between the Digital Omnibus amendments and that parallel legislative process has not yet been examined in the literature and may raise additional questions about the coherence of the institutional data protection framework.

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THE ROLE OF NON-COMMERCIAL CLAUSES IN EU TRADE AGREEMENTS IN SHAPING A PEACEFUL INTERNATIONAL ORDER

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Abstract

This article explores the role of the European Union's commercial policy in promoting peace and stability through the inclusion of non-trade clauses in international agreements. EU's common commercial policy is not, therefore, only an economic instrument, but it has evolved into an important component of the Union's external action, by integrating provisions and commitments related to human rights, democracy, the rule of law, sustainable development, and also environmental protection.

The European Union's commercial policy is viewed within the broader legal and institutional framework of EU external action, being in EU's exclusive competence under Article 207 TFEU and subordinated to the principles set out in Article 21 TEU. The article also explores the classification, and practical functioning of non-trade clauses, supported by selected case studies from EU practice, referring to: essential elements clauses, political dialogue mechanisms, and conditionality provisions.

The paper assesses the "trade-peace nexus" through the lenses of its contemporary relevance in light of recent geopolitical developments. Trade agreements have the goal to contribute to stability by fostering economic interdependence and promoting normative convergence, however their effectiveness remains conditional and highly context-dependent.

The findings suggest that, rather than direct guarantees of peace, the non-trade clauses function primarily as instruments of stabilization and norm diffusion. Ultimately, the findings suggest that EU trade agreements do not create peace, but they may support the legal, institutional, and economic conditions under which peace may be more likely to become a reality.

Keywords: *European Union, EU Common Commercial Policy, EU external action, non-trade related clauses, trade and peace nexus, normative power of the European Union, European Court of Justice case law.*

1. Introduction

This article examines to what extent the European Union's Common Commercial Policy (CCP), as part of its external action, can contribute to peace and stability by including non-trade clauses in its international agreements. Over time, the European Union (EU) has become one of the most influential global trade actors¹, contributing to shaping not only the rules of international trade, but also its normative framework.

The CCP, as an exclusive competence of the Union under Article 3 of the Treaty on the Functioning of the European Union (TFEU), has evolved beyond its original economic scope and become a central component of the EU's external framework.

According to Article 21 of the Treaty on European Union (TEU), the Union's external policies are guided by principles such as: democracy, the rule of law, human rights, and the preservation of peace and international security². This raises the question to what extent can trade policy serve as an instrument for promoting values traditionally associated with EU foreign and security policy?

This article proceeds from the premise that EU trade agreements are not currently purely commercial instruments, but a mixed legal framework, combining market access provisions with political, social, and also environmental commitments between the parties. Through this systematic inclusion of non-trade clauses, described in the literature as a "normative power", ranging from human rights conditionality to sustainable development obligations, the EU seeks to imprint its fundamental values into its external economic relations, and to export these standards beyond its borders.

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¹ The EU is one of the two biggest trading powers on the planet (alongside China), and still the largest when you combine goods and services.

² See Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia The European Union as international actor: the specificity of its external competences, *Revista "Analele Universității din București", seria Drept*, 2017, Ed. C.H. Beck.

Against this background, this article pursues three objectives: to clarify the legal and institutional positioning of the Common Commercial Policy within the EU's external action, including also some mentions regarding the diversity of agreements concluded by the Union; to analyze the nature, classification, and legal effects of non-commercial clauses provided for in EU trade agreements, supported by mentions to some relevant case studies; and, finally, to critically examine the assumption that trade fosters peace and stability, assessing whether the EU's success and limits in this area.

It's a well-known and old idea or theory saying that commerce pacifies nations. For example, Montesquieu³ held that trade softens manners and makes peoples less inclined to war; also, Kant⁴ talked about this idea in his vision of perpetual peace. In the early stages of the EU's history, the architects of post-war European integration used this logic to create the European Coal and Steel Community (1952), the six founding members assumed that economic entanglement could do what treaties and alliances had repeatedly failed to do, meaning: make the costs of conflict and war prohibitive.

Since then, the EU's ambition, as reflected in the successive treaty reforms (Maastricht, Amsterdam, and Lisbon), has been to project stability beyond its borders through its most powerful external instrument: trade. Thus, the Common Commercial Policy (CCP), the exclusive competence⁵ through which Brussels negotiates with the rest of the world, has evolved into a complex, multi-layered instrument of foreign policy. Today, EU trade agreements are rarely purely commercial. They provide for clauses on human rights, democratic governance, the rule of law, labour standards, and also environmental protection, therefore commitments that go well beyond the mere regulation of trade tariffs and quotas.

Trade agreements, through their mechanisms of economic interdependence and normative conditionality, could create structural conditions that may be able to reduce the possibility of interstate conflict, but only under specific circumstances, their effectiveness depending a lot on geographic proximity, on the depth and reciprocity of integration, on the institutional capacity of partner states, and also on credible enforcement. In other words, trade is a necessary, but insufficient on its own condition for peace. The EU's commercial policy can contribute to peacebuilding, but only when embedded within a broader and coherent external strategy that includes political dialogue, conditionality, and, where necessary, enforcement measures, such as the suspension of preferences or sanctions.

2. The Common Commercial Policy as a Component of the European Union's External Action

The Common Commercial Policy is one of the oldest and most integrated policies of the European Union⁶ and it serves as a primary instrument of the EU's so-called "soft power," allowing the Union to influence other countries without relying on military force⁷.

The CCP is primarily regulated under Part Five of the Treaty on the Functioning of the European Union (TFEU), with its core legal basis found in Articles 206 and 207⁸. Article 207 TFEU explicitly provides that this policy should be conducted in the context of the principles and objectives of the Union's broader external action. These objectives include encouraging the integration of all countries into the world economy, fostering sustainable development, and contributing to free and fair trade⁹.

³ See Montesquieu, *The Spirit of the Laws*, 1748, Carte XX, Capitoul II (Of the Spirit of Commerce).

"Peace is the natural effect of trade."

"Two nations who traffic with each other become reciprocally dependent; if one has an interest in buying, the other has an interest in selling; and thus their union is founded on their mutual necessities."

⁴ See Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, 1795.

"The spirit of commerce, which is incompatible with war, sooner or later gains the upper hand in every state."

"For among all the powers (or means) subordinate to that of a state, the power of money is probably the most reliable, and thus states find themselves compelled to promote the noble cause of peace."

⁵ See Mihaela-Augustina Niță, Oana Mihaela Salomia, *Dreptul Uniunii Europene II*, ed. a 3-a, Editura Universul Juridic, București, 2025, p. 96 - 100.

⁶ See Małgorzata Czermińska, *Commercial Policy and International Security*, in *European Research Studies Journal*, vol. XXIV, 2021, p. 382–396.

⁷ See Małgorzata Czermińska, *op. cit.*, p. 382–396.

⁸ See Luigi Lonardo, *Common Foreign and Security Policy and the EU's External Action Objectives*, in *European Constitutional Law Review*, vol. 14, no. 3, 2018, p. 584–608; Campbell McLachlan, *The Assault on International Adjudication and the Limits of Withdrawal*, in *International and Comparative Law Quarterly*, vol. 68, no. 3, 2019, p. 499–538.

⁹ See Tobias Leeg, *Normative Power Europe?*, in *European Foreign Affairs Review*, vol. 19, no. 3, 2014, p. 335–356; Maryna Rabinovych, *Striving for Trade Not Peace?*, in *Journal of European Integration*, vol. 45, no. 7, 2023, p. 1075–1098.

An significant institutional shift occurred with the Treaty of Lisbon, which strengthened the role of the European Parliament by granting it the power to approve or reject trade and investment agreements¹⁰. In terms of its evolution, the CCP has gone over time beyond mere trade in goods and came to include services¹¹, foreign direct investment, and intellectual property rights¹². According to the EU treaties, and also to the European Court of Justice jurisprudence, the CCP is now legally bound to ensure consistency with other external policies, even though these are subject to different rules and procedures¹³.

The legal basis lies primarily in Articles 3(1)(e) and 207 of the Treaty on the Functioning of the European Union (TFEU), read together with the general principles and objectives governing the Union's external action under Article 21 of the Treaty on European Union (TEU). Thus, as mentioned before, from the perspective of competences, the CCP is classified as an exclusive competence of the Union under Article 3(1)(e) TFEU, meaning that only the EU may legislate and adopt legally binding acts in this field, while Member States may do so only if empowered by the Union or for the implementation of Union acts. The EU Court of Justice, the "juris-lateur" of the EU and the source of uniform interpretation of EU law, has consistently confirmed the broad scope of this competence, especially following the Lisbon Treaty, to include not only trade in goods, but also trade in services, commercial aspects of intellectual property, and foreign direct investment¹⁴. However, where international agreements cover areas that go beyond the CCP, such as non-direct investment or certain regulatory fields, mixed agreements will therefore be concluded¹⁵, requiring participation by both the EU and its Member States.

Functionally and legally, the CCP is placed within the broader framework of the Union's external action, according to Article 21 TEU, which establishes that all external policies of the Union, including trade, must be guided by a coherent set of principles, such as: democracy, the rule of law, the universality and indivisibility of human rights, respect for human dignity, equality, and solidarity, as well as the preservation of peace and the development of international law. At the same time, article 207(1) TFEU explicitly requires that the CCP be conducted "in the context of the principles and objectives of the Union's external action." This is why trade policy is not a purely economic dimension, but it is also an instrument for the projection of the Union's normative agenda. This fact is reflected by the historical evolution from the Rome Treaty's simple trade liberalisation, followed by the 'Everything But Arms' initiative – a trade scheme that grants unilateral preferential access to its market for the world's poorest countries (for all products, except for arms and ammunition), then by the Generalised System of Preferences (GSP+), going to 'Global Europe: Competing in the World' (2006) – a strategy adopted by the European Commission to redefine the EU's trade policy in response to globalization, then 'Trade, Growth and World Affairs' (2010) – a Communication of the European Commission that updates EU trade policy in the aftermath of the global financial crisis, and after that: 'Trade for All: Towards a More Responsible Trade and Investment Policy' (2015) – a strategy of the European Commission that reorients EU trade policy toward greater transparency, inclusiveness, and a stronger values dimension, and also the 'Open, Sustainable and Assertive Trade Policy' (2021) – Communication of the European Commission that reframes EU trade policy in a more geopolitical and resilience-focused direction.

From the institutional framework point of view, the CCP reflects the balance of powers characteristic to the EU legal order. Thus, the European Commission plays a central role in initiating negotiations and representing the Union externally, the Council authorises the opening of negotiations, adopts negotiating directives, and concludes agreements (Article 218 TFEU), and the European Parliament, whose role has been significantly strengthened after the Lisbon Treaty, must give its consent to most international trade agreements. This institutional configuration reinforces the democratic legitimacy, but also the supranational character of EU trade policy, within the EU, as international organization based on integration and a supranational legal order.

In terms of legal instruments used by the EU, it is apparent that the CCP is implemented through a wide range of international agreements for which the EU Treaties do not establish an exhaustive typology. As a result, the classification of such agreements is primarily doctrinal and practice-based, this flexible framework allowing the typology of agreements to evolve continuously in response to new economic and geopolitical realities (as

¹⁰ See Małgorzata Czermińska, *op.cit.*, p. 382–396; Tobias Leeg, *op.cit.*, p. 335–356.

¹¹ See Oana-Mihaela Salomia, *EU trade policy after Brexit. Provision of professional services*, Revista "Challenges of the Knowledge Society", 17th-18th May 2019, 13th Edition, https://cks.univnt.ro/cks_2019.html.

¹² See Małgorzata Czermińska, *op. cit.*, p. 382–396.

¹³ See Luigi Lonardo, *op.cit.*, p. 584–608.

¹⁴ Article 207(1) TFEU.

¹⁵ Shared (EU + member states) or supporting (EU) competence.

illustrated by the growing inclusion of digital trade provisions and sustainability-focused commitments in recent EU agreements).

The main categories of agreements include the following: free trade agreements (FTAs), association agreements (Article 217 TFEU), partnership and cooperation agreements, and agreements concluded within multilateral frameworks such as the World Trade Organization. We can notice that many of these documents include, aside from tariff reductions or market access provisions, also: regulatory cooperation, investment protection mechanisms, and, increasingly, non-trade commitments relating to sustainable development, labour standards, environmental protection, and also human rights. It has become the EU's way to shape not only economic exchanges, but also the legal and institutional frameworks of its international partners.

We may conclude that the Common Commercial Policy cannot be correctly understood if it is considered in isolation from the EU's external action as a whole, the European Union using its competences to project influence beyond its borders, by aiming to combine trade with the promotion of its fundamental values¹⁶.

3. Non-Trade Clauses in EU Trade Agreements

The non-commercial clauses, which have been widely associated in the literature with the EU's role as a "normative power" can be understood along several dimensions. A first distinction is between so-called WTO-plus provisions, which deepen existing commitments under the multilateral trading system, and WTO-extra (WTO-X) provisions, which extend beyond the current WTO framework to areas such as competition policy, environmental regulation, and broader governance concerns¹⁷. At the same time, the evolution of EU trade agreements reflects a shift from first-generation agreements, primarily focused on tariff reductions in trade in goods, to new-generation agreements and Deep and Comprehensive Free Trade Agreements (DCFTAs), which incorporate extensive provisions on services, investment, intellectual property, and Trade and Sustainable Development (TSD) chapters¹⁸.

Within this broader framework, several categories of non-trade clauses can be identified, and we will summarize them in the following paragraphs. Thus, central among these are the human rights and democratic principles clauses, commonly referred to as "essential elements clauses", which establish respect for human rights, democracy, and the rule of law as fundamental conditions underpinning the agreement¹⁹. Their legal significance lies in their capacity to trigger "appropriate measures", including suspension or termination of the respective agreement, in the event of serious breaches²⁰.

In connection with the above mentioned type of clauses are the "non-execution" ones, which define procedural responses to violations. Historically, these mechanisms have evolved from more immediate suspension models, the so-called "Baltic clause", to more structured approaches, like the "Bulgarian clause", which requires prior consultations, except in cases of special urgency²¹.

Another category is represented by "rule of law and good governance clauses", which target more specific institutional aspects, such as: judicial independence, anti-corruption measures, transparency, and administrative capacity, aiming to create predictable and stable legal environments, thereby supporting economic activity and also expand stability of the society as whole.

There are also "sustainable development clauses" typically incorporated in dedicated Trade and Sustainable Development (TSD) chapters. These clauses do not directly address security concerns, but they contribute indirectly to stability by approaching social and environmental tensions. They usually address labour standards²², as well as environmental protection, including biodiversity and climate commitments. Their enforcement mechanisms are generally softer, relying on dialogue, monitoring, and expert panels. However, recent developments suggest a gradual strengthening of compliance tools.

¹⁶ See Lindani Mhlanga, *The African Continental Free Trade Area Agreement: A Catalyst for Human Rights*, in *African Human Rights Law Journal*, vol. 25, no. 1, 2025, p. 37–58; Nicolas Hachez, "Essential Elements" Clauses in EU Trade Agreements, Working Paper No. 158, KU Leuven, 2015, p.5.

¹⁷ See Małgorzata Czerwińska, *op. cit.*, p. 382–396.

¹⁸ See Andzelika Kuznar & Jerzy Menkes, "New Conditionality" in the EU's "New Generation" Agreements with Asian Countries, in *Review of European and Comparative Law*, vol. 48, 2022, p. 67–84; Małgorzata Czerwińska, *op. cit.*, p. 382–396.

¹⁹ See Nicolas Hachez, *op. cit.*, p. 15.

²⁰ See Joyce De Coninck & Peter Van Elsuwege, *Human Rights Respectful Trade*, in *Berkeley Journal of International Law*, vol. 42, no. 2, 2024, p. 247–315.

²¹ See Nicolas Hachez, *op. cit.*, p. 20; Andzelika Kuznar & Jerzy Menkes, *op. cit.*, p. 67–84.

²² Often through reference to core International Labour Organization (ILO) conventions.

The “peace, security, and regional stability clauses” are the ones which explicitly situate trade agreements within broader geopolitical and stabilisation objectives. These are often found in association or stabilisation agreements and may include commitments relating to: conflict prevention, regional cooperation, and also political dialogue. They are often used alongside with “political dialogue clauses”, which establish structured and continuous engagement between the EU and its partners on issues such as: foreign policy, governance, and security. These mechanisms are meant to function as tools of early warning and de-escalation, reducing the risk of conflict arising either from misperception, or lack of coordination.

Another category is related to “conditionality and suspension, often linked to essential elements provisions. These clauses provide for mechanisms such as: consultations, the adoption of appropriate measures, and, where necessary, the suspension of benefits, thereby creating incentives for stability-oriented behaviour.

In addition, we must mention “social and labour rights clauses”, which address issues such as: workers’ rights, non-discrimination, and occupational health and safety and which aim to prevent “social dumping”²³ and to promote convergence of standards between partners.

Similarly, “environmental and climate clauses” have become increasingly prominent, incorporating commitments related to the Paris Agreement²⁴, sustainable resource use, and environmental governance.

The Union could also integrate in trade agreements “anti-corruption and transparency clauses”, which focus on public procurement transparency, integrity standards, and the fight against corruption.

Some examples of agreements containing non-trade clauses are the following: The EU–Vietnam Free Trade Agreement (2020) includes significant commitments on labour rights and environmental standards, including prohibitions on forced and child labour²⁵. The Comprehensive Economic and Trade Agreement (CETA) with Canada (2017) introduces a new model for investment protection and emphasises the role of civil society in monitoring compliance with labour and trade standards²⁶. The EU–Singapore Agreement (2019) contains a dedicated chapter on sustainable development, addressing issues such as forestry, fisheries, and social justice²⁷. By contrast, negotiations with India have long been affected by resistance to the inclusion of non-trade issues, such as human rights in a commercial framework²⁸. The EU–South Korea Agreement (2011) is notable for its TSD chapter and the use of formal consultations to address non-compliance with international labour standards²⁹. The EU–Ukraine Association Agreement includes essential elements clauses and extensive governance provisions. Similarly, the EU–Moldova Agreement combines trade liberalisation with structured political dialogue, linking economic integration to broader stabilisation objectives. In the Western Balkans, Stabilisation and Association Agreements explicitly connect trade concessions to regional cooperation and reconciliation, embedding economic relations within a long-term peacebuilding framework.

Further evidence can be found in the application of conditionality mechanisms under agreements with Africa Caraipe Pacific (ACP) countries, where procedures allowing the adoption of measures in response to serious human rights violations have been used in practice, for example in relation to Zimbabwe or Fiji³⁰. Likewise, the EU–Georgia Association Agreement shows how can commitments to judicial reform and anti-corruption contribute to statal consolidation within geopolitically sensitive contexts.

At the same time, we must admit that the effectiveness of these clauses is highly context-dependent, varying according to the institutional capacity of partner states, the enforcement mechanisms, and the geopolitical environment. Enforcement is also uneven across different types of clauses, with stronger legal

²³ Social dumping is a term used in EU law and international trade to describe a situation where a company or a state gains a competitive advantage by lowering labour standards or exploiting weaker social protections.

²⁴ The Paris Agreement is a global treaty on climate change adopted under the United Nations Framework Convention on Climate Change. It was adopted in 2015, entered into force in 2016, and its has ~195 countries + the EU as parties. Its core objective is to limit global warming to well below 2°C, and preferably to 1.5°C, compared to pre-industrial levels.

²⁵ See Eva Jancikova & Janka Pasztorova, Promoting EU Values in International Agreements, in *Juridical Tribune*, vol. 11, no. 2, 2021, p. 203–218.

²⁶ See Eva Jancikova & Janka Pasztorova, *op.cit.*, p. 203–218.

²⁷ See Eva Jancikova & Janka Pasztorova, *op.cit.*, p. 203–218.

²⁸ See Tobias Leeg, *op.cit.*, 2015.

²⁹ See Andzelika Kuznar & Jerzy Menkes, *op.cit.*, p. 67–84; Andzelika Kuznar & Jerzy Menkes, *op.cit.*, p. 67–84.

³⁰ Sursa: chatgpt.com. Zimbabwe (early 2000s). Context: electoral fraud, repression, and human rights violations under Robert Mugabe. EU response: suspension of political cooperation under the Cotonou Agreement, targeted sanctions (travel bans, asset freezes). Trade impact: not a full trade embargo, but restrictions linked to conditionality; EU used legal clauses to react to systemic violations. Fiji (2007–2014). Context: military coup in 2006, suspension of democratic institutions. EU response: suspension of development aid and cooperation, pressure for return to democracy. Outcome: measures lifted after elections were restored, therefore conditionality used to encourage political normalization.

effects in the case of essential elements provisions and more limited impact in areas, such as sustainable development or corporate social responsibility. Moreover, no single clause is capable of ensuring peace in isolation; rather, their impact derives from their interaction within a broader framework of EU external action. Ultimately, EU trade agreements do not create peace directly. Instead, they embed partner countries within a legal, institutional, and economic framework that increases the costs of instability and enhances the incentives for cooperation. In this sense, non-trade clauses function as instruments of stabilisation and norm diffusion, forming part of a broader external policy toolkit rather than constituting self-sufficient guarantees of peace.

4. Assessing the Effectiveness of Non-Trade Clauses in Promoting Stability and Peace

The idea that international trade can act as a catalyst for peace, often encapsulated in the formula “change through trade”, has long been a central element of the European Union’s external economic philosophy³¹. Historically, thinkers such as Montesquieu described peace as a “natural effect of commerce,” suggesting that economic exchange fosters mutual dependence and reduces incentives for conflict³². Contemporary approaches argue that trade creates interdependencies which increase the material costs of war and thereby discourage it³³.

However, critics underline that trade may also generate tensions, particularly where benefits are unevenly distributed, where economic shocks occur, or where trade involves so-called “conflict resources,” such as blood diamonds³⁴. More recently, the 2022 Russian invasion of Ukraine has been interpreted as a failure of the “change through trade” approach, urging reassessment of the EU’s economic engagement with authoritarian regimes³⁵.

Therefore, such clauses have largely aspirational character and are often designed to promote dialogue and cooperation rather than to impose sanctions³⁶. For example, with regards to the EU–Mexico Free Trade Agreement, commitments in the field of human rights lacked robust enforcement tools³⁷. At the same time, sanctions remain exceptional. The EU has generally treated suspension or restrictive measures as a last resort measure³⁸. Nevertheless, there are instances, such as the suspension of Sri Lanka’s GSP+ status in 2010, where economic leverage has been used in response to serious violations, showing that these mechanisms are not purely symbolic³⁹.

At the same time, in more conflictual geopolitical contexts, particularly in EU–Russia relations between 2014 and 2022, the EU has moved away from liberal peace assumptions toward a combination of “bargaining” and “restrictive” logics. In this approach, trade benefits are linked to political commitments, while access to strategic resources is limited in order to constrain conflict-related activities⁴⁰.

Therefore, the practical effectiveness of these types of clauses remains contested, because they are rarely activated and are considered a measure of last resort⁴¹. Their use has been limited mainly to cases involving ACP countries following coups or electoral irregularities⁴². Moreover, both academic doctrine, and the Court of Justice of the European Union have noted their largely political and discretionary character, allowing the EU considerable flexibility in deciding whether to act⁴³. This has led to persistent criticism regarding inconsistency and perceived double standards, particularly in relations with major economic partners⁴⁴.

The conclusion that emerges is therefore that trade does not have, on its own, the capacity to create peace. At most, it can contribute to the conditions under which peace and stability become more likely. This contribution is neither automatic, nor sufficient. It depends on the broader political, institutional, and strategic context in

³¹ Oli Brown et al., *Regional Trade Agreements: Promoting Conflict or Building Peace?*, IISD, 2005, p. 8; Alan Wolff, *Trade for Peace: Can Trade Be an Effective Tool to Support Peace?*, Peterson Institute, 2023, p. 9-10.

³² Oli Brown et al., *op.cit.*, p. 8.

³³ Alan Wolff, *op.cit.*, p. 9-10.

³⁴ Oli Brown, *EU Trade Policy and Conflict*, International Institute for Sustainable Development (IISD), 2005, p.13.

³⁵ Alan Wolff, *op.cit.*, p.9.

³⁶ Joyce De Coninck & Peter Van Elsuwege, *H op.cit.*, p. 247–315; Nicolas Hachez, *op.cit.*, p 20-21.

³⁷ Joyce De Coninck & Peter Van Elsuwege, *op.cit.*, p. 247–315.

³⁸ Joyce De Coninck & Peter Van Elsuwege, *op.cit.*, p. 247–315; Nicolas Hachez, “*op.cit.*, p.20-21.

³⁹ Lindani Mhlanga, *op.cit.*, p. 37–58.

⁴⁰ Maryna Rabinovych, *Striving for Trade Not Peace? Revisiting Trade-Peace and Trade-Security Nexuses in the EU’s Trade Policy Strategy Amidst the Russia-Ukraine War*, in *Journal of European Integration*, vol. 45, no. 7, 2023, p. 1075–1098.

⁴¹ See Joyce De Coninck & Peter Van Elsuwege, *op.cit.*, p. 247–315; Nicolas Hachez, *op.cit.*, p 20-21.

⁴² See Joyce De Coninck & Peter Van Elsuwege, *op.cit.*, p. 247–315; Nicolas Hachez, *op.cit.*, p.22.

⁴³ See Joyce De Coninck & Peter Van Elsuwege, *op.cit.*, p. 247–315; Nicolas Hachez, *op.cit.*, p.22.

⁴⁴ See Nicolas Hachez, *op.cit.*, p.22.

which trade operates. In this sense, EU trade agreements function not as instruments of peace in themselves, but as components of a wider framework of external action aimed at stabilisation and normative influence.

5. Key European Court of Justice Case Law on Non-Commercial clauses

As we have mentioned before, the idea that the Union's trade policy may serve objectives beyond the exchange of goods and services is not merely a political aspiration. It is anchored in the legal structure of the Union and, more concretely, in the case law of the Court of Justice and in the drafting practice of EU agreements.

The Court has made clear that trade instruments cannot be isolated from the requirements of international law. In *Front Polisario* case, when asked to determine whether the EU–Morocco liberalisation agreement applied to Western Sahara, the Court did not limit its analysis to the text of the agreement or to its economic purpose. Instead, it relied also on principles of international law, notably the right to self-determination, to conclude that the agreement could not extend to a distinct territory without the consent of its people. This reasoning was reaffirmed in *Western Sahara Campaign UK*, where the Court affirmed that the application of EU trade and fisheries agreements must respect the status of the territory under international law.

What emerges from these judgments is not a general theory of “trade for peace,” but a more modest yet significant point: EU trade agreements are subject to legal constraints that reflect values and principles external to the logic of market integration. They cannot be interpreted or implemented in ways that disregard the rights of affected populations or the broader framework of international law. In that sense, the Court introduces a normative layer that conditions the scope and effects of trade liberalisation.

A different perspective on the same phenomenon can be found in the Court's opinions on the compatibility of trade agreements with the EU legal order. Opinion 2/15 on the EU–Singapore Free Trade Agreement (May 16, 2017)⁴⁵ clarifies the division of competences between the Union and the Member States and shows that modern trade agreements extend well beyond the traditional boundaries of the common commercial policy. Provisions on investment protection or dispute settlement, for example, do not fall exclusively within EU competence and therefore require a broader institutional involvement. This finding highlights the fact that contemporary agreements integrate elements that are not purely commercial, thereby opening the door to provisions that reflect political or normative concerns.

Opinion 1/17 on CETA (30 April 2019)⁴⁶ confirms this interpretation by referring to the Union's ability to maintain its own standards and objectives in the context of international commitments. Trade agreements are thus evaluated not only in terms of their economic content, but also in light of their potential impact on the constitutional structure of the Union.

The *Kadi* (C-402/05 P, *Kadi*, 2008)⁴⁷ case law, although not directly concerned with trade agreements, completes this picture, by holding that international obligations cannot override the fundamental rights protected within the EU legal order. Thus, the Court establishes a principle that valid for all external action, trade included. Even in the context of international agreements, the EU must respect its own constitutional requirements enshrined by the EU treaties. This provides legal basis to the inclusion of value-based clauses in trade agreements and, at the same time, limits the extent to which economic considerations may prevail over fundamental rights.

Against this background, the practice of including human rights clauses in EU trade and association agreements as a structural feature of the Union's external action. The effectiveness of such conditionality remains, however, open to question. In practice, the activation of suspension clauses has been rare and politically sensitive. Trade agreements are part of broader relationships that include strategic, economic and diplomatic considerations, and the Union has often preferred to maintain dialogue rather than resort to formal sanctions.

⁴⁵ Source of the summary: chatgpt.com. The European Court of Justice ruled that the EU-Singapore Free Trade Agreement (EUSFTA) is a “mixed” agreement. While the EU holds exclusive competence for most of the FTA, including goods, services, and sustainable development, it shares competence with member states over portfolio investment and the Investor-State Dispute Settlement (ISDS) mechanism.

⁴⁶ Source of the summary: chatgpt.com. The Court of Justice of the European Union ruled that CETA's Investment Court System (ICS) is compatible with EU law, ensuring the treaty's investor-state dispute settlement mechanism does not violate the autonomy of the EU legal order.

⁴⁷ Source of the summary: chatgpt.com. The *Kadi* case concerned EU measures implementing UN Security Council sanctions against individuals suspected of terrorism. Mr. Kadi was listed by the UN and, as a result, his assets were frozen within the EU without prior hearing or judicial review. The central legal question was whether EU courts could review EU acts that give effect to binding UN Security Council resolutions. The Court held that EU law is an autonomous legal order, and EU measures must comply with its fundamental principles, even when implementing international obligations. It ruled that fundamental rights form an integral part of EU law.

This cautious approach may preserve short-term stability, but it also raises doubts about the credibility of conditionality as a tool for promoting values. While the Court has not directly ruled on the suspension of agreements on human rights grounds, its insistence on compliance with international law and fundamental rights, illustrated in *Front Polisario* and *Western Sahara Campaign UK*, limits the extent to which the Union can overlook the normative implications of its agreements. What can be said with greater certainty is that, from a legal perspective, trade agreements have become instruments through which the Union articulates and tests the reach of its normative identity.

6. Conclusions

Considering all the above, we can notice several structural limits of the non-trade clauses that emerge from our analysis, and we will summarize them below.

It appears that these non-trade clauses are more effective in addressing governance failures than military or geopolitical threats. At the same time, their effectiveness depends on power asymmetry: they seem to work better where partner states are strongly dependent on access to the EU market. What we have noticed from the practice realm, enforcement is usually inconsistent or selective, weakening their deterrent effect. And of course, not all clauses are equally binding: while essential elements clauses may lead to suspension, others, especially in sustainable development, rely on less effective, softer mechanisms. All these findings conduce us to conclude that peace itself is a multidimensional concept which requires institutions, legitimacy, and security, and these are important factors that trade by itself cannot generate.

The analysis has shown that EU trade policy operates within a broader framework defined by Articles 21 TEU and 207 TFEU, which integrate not only economic objectives, but also normative commitments, such as the promotion of: democracy, the rule of law, human rights, and international peace. As we've seen, the EU trade agreements systematically incorporate a range of non-trade clauses, particularly essential elements clauses, political dialogue mechanisms, governance provisions, and conditionality framework, which are meant to help support stability and to prevent conflict.

We consider this article a step to clarify the realistic (beyond the overly optimistic assumptions regarding the positive effects of economic interdependence) role of EU trade agreements within the Union's external action toolkit. We consider this research to contribute to a closer to reality understanding of the EU as a global, international actor. It remains an undeniable fact that there is a broader framework to be considered and that is combining legal conditionality, institutional dialogue, financial support, and, where applicable, accession perspectives. This has, we think, both academic and practical implications. From the academic point of view, it brings more light to the concept of the EU as a "normative power", by highlighting the conditional and context-dependent nature of its influence in practice. From the practicality perspective, this article may inform policymakers about the need to strengthen enforcement mechanisms, and ensure greater consistency in the application of conditionality.

Also, the analysis opens several paths for further research on the empirical measurement of the effectiveness of non-trade clauses across different regions and types of agreements, including quantitative assessments of governance or stability indicators. Another research direction would be a comparative analysis between the EU and other comparable global actors (such as the United States or China) in the use of trade as a tool of external influence. Additionally, the evolution of enforcement mechanisms could be studied, particularly in light of recent developments strengthening sustainability and compliance provisions in EU trade agreements. Of course, interdisciplinary research combining the legal analysis with political science and international relations, would bring even more light on the complex relationship between trade, law, and peace in an geopolitical landscape that nowadays we experience to be increasingly fragmented.

So, if we are to give a final answer to the question: Does Trade Equal Peace?, the answer would be probably "no." Trade does not equal peace. At most, within the EU model, trade can support peace under specific conditions. The above mentioned case studies demonstrate that positive effects appear when trade is part of a broader framework, including political conditionality, institutional dialogue, financial support, and, in some cases, the incentive of an accession perspective. Consequently, a more accurate, realistic conclusion would be that EU trade agreements do not create peace, but they can contribute to building the legal, institutional, and economic conditions under which peace and stability become more likely. This type of non-trade clauses are

therefore instruments of stabilisation, and not guarantees of peace; they are multipliers of order, and not substitutes for foreign and security policy; so, their effectiveness has definitely its limits.

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THE RELATION BETWEEN EUROPEAN UNION LAW AND PUBLIC INTERNATIONAL LAW – BETWEEN AUTONOMY AND COOPERATION

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Abstract

This article examines the complex relationship between European Union law and public international law, analysing the extent to which these two legal systems operate in autonomy or in cooperation with one another. The study identifies key structural differences between the two legal orders — including their subjects, sources, and enforcement mechanisms — while also highlighting the foundations they share. Drawing on primary treaty provisions and landmark jurisprudence of the Court of Justice of the European Union, the article argues that EU law constitutes a distinct and autonomous legal order, born out of international law yet operating beyond its classical confines. The analysis covers several dimensions of this relationship: the incorporation of the „pacta sunt servanda” principle, EU compliance with obligations under the UN Charter, the autonomous character of the EU legal order as confirmed through successive CJEU opinions, the international law origins of the founding treaties, and the manner in which EU law supplements international rules on State liability. The article concludes that, although the EU legal order is autonomous and cannot be reduced to classical international law, the two systems remain in a permanent relationship of mutual interaction and adjustment, with cooperation being an indispensable condition for the effectiveness of EU action on the international stage.

Keywords: *European Union law, public international law, legal order, autonomy, Court of Justice of the European Union, founding treaties.*

1. Introduction

International law and European Union law are two study subjects that are as complex as they are fascinating.

Over time, since the establishment of the first European Community, the Coal and Steel Community, the European Union has tried to consolidate and make its presence felt on the international stage, by achieving its own international identity. However, for more than 50 years, the complex and fragmented framework that has governed its international relations¹, as well as the multitude of distinctly configured powers, instruments and institutions, have represented an obstacle to achieving this objective.

From the perspective of international law, since 1 December 2009, the European Union has been, without any doubt, an international organization, bringing together all the constitutive elements of this subject of law (including acquiring legal personality, an aspect that has given rise to much debate and commentary both among lawyers and among those who have concerns in the sphere of the two fields: international and union field).

Public international law is defined, *lato sensu*, as “the set of legal rules that regulate the relations established within international society”². *Stricto sensu*, however, public international law is that branch of law, that set of principles and legal rules created by states, based on their agreement of will, for the purpose of regulating the international relations in which they participate. Thus, international law represents the set of norms and rules that govern the relations between states, between states and international organizations, between international organizations among themselves, as well as between them and other subjects of international law.

Lato sensu, the legal order of the European Union comprises all the legal rules that govern the legal relations between the European Union, on the one hand, and the Member States, the candidate states for accession, the associated states, third states, international organizations and individuals, on the other hand.

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¹ We consider the existence, until December 1, 2009, of the three pillars of the European Union, namely: pillar I (the community pillar – the European Communities); pillar II (the common foreign and security policy) and pillar III (police and judicial cooperation in criminal matters).

² R.M. Beștelu, *Drept internațional public*, vol. I, ed. 3, C.H. Beck Publishing House, Bucharest, 2014, p. 1.

Stricto sensu, this legal order encompasses all the material and procedural rules, applicable within the European Union (treaties, regulations, case law, etc.)³.

European Union law differs from public international law in a number of aspects, such as:

- European Union law is closer to the characteristics of the internal law of Member States, thus becoming internal law, and consequently having fewer characteristics than an “external” law for these states;
- while public international law regulates only the rights and obligations of states in their relations with each other, European Union law also regulates the legal relations established between legal persons and/or natural persons, as well as between them and the Member States;
- the legal instruments of international law are international treaties, to which the sovereign will of the States Parties is added; European Union law, however, confers on the Union institutions, the power to adopt binding legal rules, in accordance with the interest of the Union, that takes precedence over the national interests of the Member States, the two types of interests being in permanent and mutual adjustment;
- classic international treaties, which form the basis of international organization, do not sufficiently develop the jurisdictional side of the organization’s functioning, while European Union law also regulates the means of strict judicial control over the degree of compliance with the rules contained in the treaties or adopted by the Union institutions, with the Court of Justice of the European Union playing a leading role.

2. Dimensions of autonomy and cooperation between EU law and public international law

A. EU law recognises and makes enforceable the *pacta sunt servanda* international law principle. Article 216 para. (2) TFEU introduces the *pacta sunt servanda* international law principle into EU law, providing that agreements concluded by the Union are binding on both the EU institutions and the Member States.

B. European Union law complies with public international law. According to the UN Charter, “in the event of a conflict between the obligations of the Members of the United Nations under this Charter, and their obligations under any other international agreement, their obligations under the Charter shall prevail”. Aware of this aspect, which is translated into the fact that at international level, in particular in areas of major interest, all participants in international life must comply with the obligations they have undertaken, the drafters of the Treaty on European Union have provided, in Article 34 para. (2) that “Member States which are also members of the United Nations Security Council shall agree and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council shall, in the exercise of their functions, defend the positions and interests of the Union, without prejudice to their responsibilities under the Charter of the United Nations”.

Furthermore, Article 3 para. (5) TEU states that “in its relations with the rest of the international community, the Union shall affirm and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the planet, solidarity and mutual respect among peoples, free and fair trade, the eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and development of international law, including respect for the principles of the Charter of the United Nations”.

Furthermore, Article 21 para. (1) TEU provides: “the Union’s action on the international scene shall be guided by the principles which have inspired its creation, development and enlargement and which it seeks to promote throughout the world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the Charter of the United Nations and of international law”.

C. The legal system of the European Union is an autonomous legal order. When we make this statement, we have in mind the following:

- firstly, the judge of the Court of Justice in Luxembourg found, as early as 1962, the following: “The Community represents a new legal order of international law, for the benefit of which the Member States have limited, albeit in restricted areas, their sovereign rights and in which the subjects of law are not only the Member States but, equally, their nationals”⁴;

³ A. Fuerea, *Manualul Uniunii Europene*, 7th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2026, p. 249.

⁴ Judgment of the Court of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, Case 26/62, EU:C:1963:1.

- secondly, the relation between Community law (now Union law) and international law was to be clarified, a few months later, with the judgment in the *Costa v/ENEL* case⁵. Thus, the Court stated: “unlike ordinary international treaties, the Treaty establishing the European Economic Community created its own legal order, integrated into the legal system of the Member States upon the entry into force of the treaty and which is imposed on their jurisdictions; by constituting a Community of unlimited duration, with its own powers, its own personality and legal capacity, but also a capacity for international representation and, in particular, with real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the Member States limited their sovereign rights, albeit in limited areas, and thus created a body of law applicable both to their nationals and to themselves”;
- thirdly, confirming that the founding treaties represent “more than an agreement which merely creates reciprocal obligations between the contracting states”, the Court ruled in 1964 that they (the Treaties) establish “a new legal order governing the powers, rights and obligations (of the subjects to whom they apply) and the procedures necessary to establish and sanction any possible breach thereof”⁶.

In situations where the European Community (and, now, the European Union) has become a member of an organisation or party to an international agreement establishing institutions, the powers of which may conflict with those of the Union institutions, the Court of Justice has “defended” the autonomy of the EU legal order. In this regard, we recall Opinion 1/76⁷, in which the Court ruled out the possibility of setting up a specialised court composed of judges from the Court of Justice of the European Union and one from Switzerland, on the grounds that the judges of the Court in Luxembourg might face a conflict of jurisdiction or loyalty to two different courts.

The Court adopted a similar position in connection with the provisions of the draft Agreement establishing the European Economic Area⁸. The proposal to recognise the jurisdiction of a new Court of the European Economic Area, which would have been composed of three judges from the Court of Justice of the European Union and three from the Member States of the European Free Trade Association, was considered incompatible with European Union law. The fact that the Agreement had the effect of introducing into the legal order of the Union, a consistent body of legal rules which would have joined a fund of identical legal rules, with all the problems of interpretation and consistency. This aspect was considered to have contravened Article 220 TEC⁹, according to which “The Court of Justice and the Court of First Instance shall, within the limits of their powers, ensure that in the interpretation and application of the Treaty, the law is observed”.

Also supporting the claim that the legal order of the European Union is autonomous, is Opinion 1/00¹⁰ on the Agreement establishing a Common European Aviation Area, in which, although the Court ultimately confirmed the compatibility of the Agreement with the Treaty establishing the EC, the Luxembourg court ruled as follows: “(...) preserving the autonomy of the Community legal order presupposes, on the one hand, that, as regards the powers of the Community and its institutions, as they were conceived, they are not distorted (...). On the other hand, it presupposes that the mechanisms for the uniform interpretation of the rules of the CEEA Agreement, as well as those for the settlement of disputes, are not such as to impose on the Community and its institutions, in the exercise of their internal powers, a particular interpretation of the rules of Community law to which the agreement refers (...)”.

Consequently, we argue that European Union law represents the new type of relations that have emerged in the European space, thus creating a new legal order, different from both the international legal order and the national legal order.

D. The legal order of the European Union was established on the basis of public international law. We believe that the creation of a unitary legal order, such as that of the European Union, is not a novelty at the

⁵ Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6/64, EU:C:1964:66.

⁶ Judgment of the Court of 13 November 1964, *Commission of the European Economic Community v. the Grand Duchy of Luxembourg and the Kingdom of Belgium*, Joined Cases 90/63 and 91/63, EU:C:1964:80.

⁷ Opinion of the Court of 26 April 1977, delivered under the second subparagraph of Article 228 para. (1) of the EEC Treaty, “Draft Agreement on the establishment of a European Fund for the retention of inland waterway vessels”, EU:C:1977:63

⁸ Opinion No 1/91 of the Court of 14 December 1991, “Draft Agreement between the Community, of the one part, and the States of the European Free Trade Association, of the other part, on the creation of the European Economic Area”, EU:C:1991:490.

⁹ Current Art. 19 para. (1) TEU (“The Court of Justice of the European Union shall comprise the Court of Justice, the General Court and specialised courts. It shall ensure that the law is observed in the interpretation and application of the Treaties”).

¹⁰ Opinion 1/00 of the Court of Justice of 18 April 2002 on the draft agreement on the creation of a European Common Aviation Area between the European Community and third countries, EU:C:2002:231.

international level, as long as, at the basis of what today forms European Union law, we find several international treaties concluded according to the existing regulations at the level of international law. In this regard, we consider, first of all, the three founding treaties of the European Communities, that, from the point of view of international law, have at least three fundamental characteristics, namely: firstly, they express the legal link between the Member States of the Communities; secondly, they constitute an organized set of legal rules; thirdly, the acts drawn up on the basis of these treaties, by the institutions with powers in this respect, produce legal effects in the States Parties.

The Treaties of the European Union were concluded by sovereign States, by expressing their agreement of will. Thus, the States became “(High) Contracting Parties”¹¹ to three (initially) multilateral treaties, before becoming “Member States” of international organisations, the main objective of which is economic integration.

At the same time, according to international law, one of the constitutive elements of an international intergovernmental organization is the existence of its own institutional system. The founding treaties of the European Communities and, subsequently, of the European Union are not limited only to establishing reciprocal legal ties between the contracting parties, but they are also meant to create, for each organization they establish, its own institutional system. A significant part of the content of the founding treaties is reserved for the institutions of the European Union.

According to international law, international treaties in force may be modified by means of amendments adopted unanimously or by a qualified majority of two-thirds or by a simple majority, through two procedures: amendment and revision. Amendment refers to certain partial and minor changes, while revision designates substantial and extensive changes to the text of a treaty. And within the meaning of European Union law, revision is defined as any modification or addition to the founding treaties, a legal intervention that has the same legal value as the original treaties.

E. European Union law complements international law on State liability¹². Unlike public international law, the founding treaties do not contain provisions on the liability of Member States for breaches of EU law.

As in other cases, it was the Court of Justice of the European Union that, over time, has defined a right to reparation, which has its foundation in EU law and the conditions necessary to engage this right, for the benefit of victims.

As regards State liability in international law, the Court ruled that, “in the international legal order, the State, the liability of which would be engaged in the event of a breach of an international commitment, is also considered as a whole, regardless of whether the breach is attributable to the legislative, judicial or executive branch”¹³. The difference that arises, however, is that, in EU law, State liability can be directly claimed by private individuals, which is not the case in international law, since, as it is well known, the consideration of the interests of private individuals is ensured by the State, by virtue of the diplomatic protection of its nationals. Therefore, State liability can only be invoked indirectly, by private individuals.

International law provides only the liability of the State as a whole that is, taken in its entirety: it is irrelevant whether the damage caused to individuals was caused by the legislator or by the court or an administrator. At the same time, in international law, the State’s obligation to repair the damage arises even when, in practice, the compensation seeks to restore the financial position of individuals with regard to one or more States, and not, as is desired in this case, directly with regard to individuals.

However, when we talk about the legal system of the European Union, we must take its particularities into account. The system is, of course, conventional. The Treaty establishing the European Community includes, like other legal instruments establishing international organizations, a series of obligations incumbent on the Member States with regard to the achievement of the objectives stated and assumed, as well as the functioning of an institutional structure with powers that are defined, even if not entirely, in the treaty. However, in the case of the Union, the conventional basis aims at integration. Thus, the traditional instruments, including those of

¹¹ According to the Preambles to the Treaties of the European Union.

¹² “The legal liability is currently in the middle of a transformation process, together with the evolution of society actually, it has new dimensions, new correlations. In this context of the redefinition of the concept of legal liability, we acknowledge how actual the famous expression of Juvenal⁴³ is: “quis custodiet custodes?” Deservedly, this question summarizes one of the most difficult problems standing in the way of accomplishing the rule of law: find the most efficient procedural ways to make the state’s bodies, which directly or indirectly have constraining force in view of making the citizens be compliant with the laws and, in their turn, be forced to comply with them” (E.E.Ştefan, *The Concept Of Legal Liability, Challenges of the Knowledge Society*. Legal sciences, 2012, p.787).

¹³ Paragraph 34 of the judgment of the Court of 5 March 1996, *Brasserie du Pêcheur SA v./ Bundesrepublik Deutschland et The Queen contre Secretary of State for Transport*, ex parte: *Factortame Ltd et autres*, joined cases C-46/93 and C-48/93, EU:C:1996:79.

international law, provided for the correct performance of obligations by the Member States, are able to confer the greatest interest on the legal situation of individuals, in the sense that the obligations of the States and the institutions of the European Union are aimed, mainly, at the establishment of rights in the assets of individuals. This is the framework that was established by the authors of the Treaty and consolidated by the legislative institution of the Union. The Court, in its case-law, has often found the existence of this will, as included in the Treaty and, therefore, by the Union legislature, emphasizing the fact that the Treaty establishing the European Community created its own legal system, "for the benefit of which the States have limited, even in restricted areas, their sovereign rights"¹⁴. The subjects of this legal order are not only States, but also individuals, to whom European Union law gives rights.

F. EU law is not a component of international law. The European Union Court has played a decisive role in shaping the place and role of the Union in the field of international relations. We also believe that it has played a particularly important role in achieving what we currently call a new, independent legal order, which we can consider as being situated between that of federal states and international organizations, being between domestic law and international law.

3. Conclusions

In the context of developments in international relations, the relation between European Union law and public international law continues to be characterised by both autonomy and cooperation. Although the European Union has built its own legal order, distinct from classic international law, it cannot operate outside the international legal framework. On the contrary, the efficiency of the Union's action on the international stage depends on its capacity to maintain a balance between protecting the autonomy of the European legal order and complying with the obligations assumed under public international law.

The analysis of the relation between European Union law and public international law demonstrates that the Union's legal order cannot be understood exclusively from the perspective of classic international law or exclusively by reference to national legal systems. Although founded on international treaties and built within the framework of cooperation between states, the European Union has developed, through its institutions and the case law of the Court of Justice, an autonomous legal order, characterised by direct effect, priority and its own jurisdictional mechanisms. However, the autonomy of EU law does not exclude the applicability and influence of public international law, but presupposes the existence of a permanent relation of cooperation and mutual adjustment between the two legal systems. In conclusion, although there are a number of differences between international law and European Union law, they are not completely separate, with relations of mutual influence, interaction and inter-conditionality between them.

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¹⁴ Van Gend & Loos judgment, cited above.

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BARRIERS AND CHALLENGES IN DEEPENING THE EU SINGLE MARKET

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Abstract

The Single Market represents the central element of European integration, within which the four freedoms of movement—of goods, persons, services, and capital—have been enshrined.

As an area of shared competence with Member States, this area is characterized by a significant harmonization of national legislation under the supervision of the European Commission and the control of the Court of Justice of the European Union.

However, in the context of the need to increase the EU's competitiveness, the European Commission has recently identified ten terrible barriers that hinder the deepening of the internal market.

Thus, the paper aims to analyse the challenges related to the removal of these barriers by national authorities and the risk of creating a two-speed Europe.

The evolution of the Internal Market highlights, in our opinion, how the economic component has been gradually overtaken by the political one, with the aim of achieving the common objectives of the Member States and strengthening the EU on the international stage from an economic and political point of view.

Keywords: *Internal Market, barriers, two-speed Europe, Court of Justice of the European Union, integration.*

1. Introduction. The Internal Market¹ - driver of the European integration

The Internal Market, successor to Common Market², represents on the symbols of the concept of the European integration, unique within the international intergovernmental organizations, which has been developed through the primary and secondary legislation and the case law of Court of Justice of the European Union³. As stated in French legal doctrine, the Internal Market is therefore everywhere; it is at the heart of the integration promoted by the Treaty⁴.

The definition of the Internal Market is provided in the art. 26 para. 2 of the Treaty on the Functioning of the European Union (TFEU) which states that “the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital⁵ is ensured in accordance with the provisions of the Treaties”. The establishment of such a space could only be achieved through the Union’s exercise of the shared competences⁶ conferred upon it by the Treaties (art. 4 para. 2 letter a) of TFEU). It can be observed that the EU has adopted extensive legislation that has harmonized national rules with a view to implementing the four freedoms of movement⁷, which has resulted in the EU’s shared competence becoming an exclusive competence through its exercise.

Along with the art. 26 para. 2 of TFEU, the accomplishment of the specific objectives is ensured through the procedure laid down in the art. 114⁸ of the TFEU pursuant to which “the European Parliament and the Council

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¹ See O.-M. Salomia, *Piața internă a Uniunii Europene și libertățile fundamentale de circulație*, C.H. Beck Publishing House, Bucharest, 2025.

² CJEU, judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, case-law 26-62, ECLI:EU:C:1963:1, B: “The objective of the EEC Treaty, which is to establish a Common Market (...)”.

³ F. Martucci, *Droit du marché intérieur de l'Union européenne*, Presses Universitaires de France Publishing House, Paris, 2021, p. 24: For the Court of Justice the common market represented the legal roughness on which hermeneutically relied to establish the specificity of community law.

⁴ F. Martucci, *op.cit.*, p. 42.

⁵ A. Fuerea, *Beneficiaries of the freedom of movement within the EU*, in *CKS 2024 – Challenges of the Knowledge Society Bucharest*, May 17th 2024, 17th Edition, p. 283, at https://cks.univnt.ro/cks_2024.html, last time consulted on 26.03.2026: “One of the consequences producing direct effects, on short, medium and long term, generated by the quality of member state of the European Union, is that of valuing the fundamental freedoms of movement existing at the level of the European Union”.

⁶ M.-A. Dumitrașcu, O.-M. Salomia, *Dreptul Uniunii Europene II*, Universul Juridic Publishing House, Bucharest, 2020, p. 52.

⁷ C. Brière, M. Dony, *Droit de l'Union européenne*, 9e édition, Éditions de l'Université de Bruxelles Publishing House, 2026, p. 117: The four freedoms of movement are guaranteed by the provisions of the Treaties, which are, in principle, directly applicable and impose cross-cutting limits on the legislative authority of the Member States.

⁸ E.H. Ballin, E. Čerimović, H. Dijstelbloem, M. Segers, *European Variations as a Key to Cooperation*, Ed. Springer Open, 2020, p. 63, at <https://link.springer.com/book/10.1007/978-3-030-32893-1>, last time consulted on 26.03.2026: “The Union legislator does not have a

shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market"; this provision "shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons". "However, a Member State is authorized to maintain or introduce national provisions derogating from a harmonization measure" within the Internal Market field, "the Commission shall immediately examine whether to propose some action such as an adaptation to that measure or to propose appropriate measures to the Council".

In our opinion, the legal basis for the development of the scope of the Internal Market could be also represented by the art. 352 of TFEU which provides with a flexibility clause in the case where an "action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures".

In line with the EU law sources, the integration has been qualified as positive integration which supposes the adoption of the European standards for product safety, consumer and environmental protection, social rights and the negative integration which have as objective or effect the elimination or reduction of state-imposed restrictions on free movement.

The integration within the Internal Market is not yet complete and further efforts are needed to harmonize Member States' legislation. Furthermore, it can be observed that the scope of the Internal Market has been extended to a number of new sectors and economic activities such as public procurement⁹.

2. Challenges in deepening the Internal Market's integration. "Terrible Ten Single Market barriers"

"The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market. It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market"¹⁰.

In 2025 the European Commission has published a Strategy for making the Single Market simple, seamless and strong¹¹ which has identified a set of "Terrible Ten" Single Market barriers, namely: 1. Overly complex EU rules; 2. Lack of Single Market ownership by Member States; 3. Complicated business establishment and operations; 4. Recognition of professional qualifications; 5. Long delays in standard-setting that weigh on innovation and competitiveness; 6. Fragmented rules on packaging, labelling and waste; 7. Outdated harmonised product rules and lack of product compliance; 8. Restrictive and diverging national services regulation; 9. Burdensome procedures for temporary posting of workers; 10. Territorial supply constraints. "However, there is more. The EU and its single market are not 'just' about removing barriers. A modern set-up of the single market and the market incentives generated by its institutions, combined with private and public funding, matter a great deal"¹².

general mandate but must rely on the legal basis laid down in each sector in the Treaties. With regard to the internal market, the Treaties provide a broad legal basis for action, in particular in Article 114 TFEU. The question is: to what extent does the chosen legal basis influence the assessment of public interests at stake?"

⁹ Available at https://single-market-economy.ec.europa.eu/single-market_en, last time consulted on 26.03.2026.

See O.-M. Salomia, D.-A. Bantaş, *Aspecte generale privind competența Uniunii Europene în domeniul achizițiilor publice*, "Achiziții publice. Idei noi, practici vechi", Ecaterina-Milica Dobrotă, Dumitru-Viorel Pârnu (coord.), University Publishing House, Bucharest, 2020.

¹⁰ CJEC, judgement of 5 May 1982, *Gaston Schul Douan E Expéditeur Bv And Inspecteur Der Invoerrechten En Accijnzen* [Inspector of Customs and Excise], case-law 15/81, para. 33.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Single Market: our European home market in an uncertain world. A Strategy for making the Single Market simple, seamless and strong*, Brussels, 21.5.2025 COM (2025) 500 final.

¹² J. Pelkmans, *Empowering the Single Market. A 10-point plan to revive and deepen it*, in CEPS IN-DEPTH ANALYSIS, January, 2024 – 03, p. 63, at https://cdn.ceps.eu/wp-content/uploads/2024/01/CEPS-InDepthAnalysis-2024-03_Empowering-the-Single-Market.pdf, last time consulted on 26.03.2026.

Considering the fact that the EU is the second largest global economy¹³, the Strategy proposed also different actions for increasing the EU competitiveness through boosting European Services Markets, digitalizing the Single Market and enforcing the respect of Single Market rules.

As for the specific measures, which are mainly of a legislative nature, the following are included: establish a new 28th regime for EU company law¹⁴; reduce unnecessary administrative burdens identified in Omnibus proposals; simplify and streamline the EU Public Procurement framework; explore common rules for the recognition of qualifications of third country nationals¹⁵ and address challenges in specific services sectors such as construction, retail, delivery as well as business and industry services.

In line with the Strategy, the 2026 Work Programme¹⁶, Commission proposed the following legislative objective:

Single Market	European Product Act
	Update of the new legislative framework of product rules (legislative, Article 114 TFEU, 2026)
	Update of rules on the market surveillance and compliance of products (legislative, Articles 33 and 114 TFEU, Q3 2026)
	Update of rules on standardisation (legislative, Article 114 TFEU, Q3 2026)

Single Market	EU Delivery Act - update of rules on postal services (legislative, Article 114 TFEU, Q3 2026)

The European executive will also focus on »the full potential of the Single Market by 2028 – removing barriers in capital, energy, services and telecoms, and enabling a “fifth freedom” for knowledge and innovation¹⁷ through the European Research Area” «.

Among the various measures proposed, it is important to mention that Commission “has just launched the Industrial Accelerator Act which introduces ‘Made in EU’ and low-carbon preferences in public procurement and public support schemes to boost demand for European industrial products — cement, aluminium to net-zero technologies like batteries, solar, wind, heat pumps, and nuclear”¹⁸.

3. Enforcement of the Internal Market’s rules¹⁹ and “two-speed Europe” debate

The application and enforcement of Internal Market rules clearly contribute to deeper integration in the relevant socio-economic sectors; in this regard, a key role is played not only by the Member States²⁰, but also by the European Commission and the Court of Justice of the European Union through infringement proceedings²¹. Thus, “the Commission and Member States must work together to ensure EU law is correctly implemented and applied as soon as possible – this common objective is achieved through cooperation and enforcement”²².

We would like to support the opinion saying that “Member States do not solely have a responsibility for enforcement and proper implementation vis-à-vis the Commission and other Member States, but that

¹³ Available at <https://ec.europa.eu/commission/presscorner/api/files/attachment/881209/Factsheet%20-%20Single%20Market%20Strategy.pdf>, last time consulted on 26.03.2026.

¹⁴ At 18 of March 2026, “the European Commission presented its proposal for EU Inc., a new single set of corporate rules, building the cornerstone and starting point for the EU’s 28th regime”, at https://ec.europa.eu/commission/presscorner/detail/en/ip_26_614, last time consulted on 26.03.2026.

¹⁵ The European Commission will launch the Skills Portability Initiative, at https://ec.europa.eu/commission/presscorner/detail/en/ip_26_614, last time consulted on 26.03.2026.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2026 Europe’s Independence Moment, COM/2025/870 final.

¹⁷ This idea has been launched in the Enrico Letta’s report.

E. Letta, Much more than a Market, 2024, p. 7, at [https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf#:~:text=ENRICO%20LETTA%20SPEED,%20SECURITY,%20SOLIDARITY%20Empowering%20the%20Single%20Market%20to\).](https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf#:~:text=ENRICO%20LETTA%20SPEED,%20SECURITY,%20SOLIDARITY%20Empowering%20the%20Single%20Market%20to).)

¹⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_26_515, last time consulted on 26.03.2026.

¹⁹ See O.-M. Salomia, How do the European Commission, Member States and citizens interact in enforcing Internal Market rules?, in LESIJ - Lex ET Scientia International Journal nr. XXIX, vol. 2/2022.

²⁰ J. Pelkmans, op.cit., p. 41:” It has repeatedly been emphasized that Member States do not solely have a responsibility for enforcement and proper implementation vis-à-vis the Commission and other Member States, but that enforcement begins at home. This ought to include solid mechanisms within the administration, besides transparency”.

²¹ See O. Dimitriu, Procedura de infringement. Răspunderea statelor membre ale UE, C.H. Beck Publishing House, Bucharest, 2023.

²² Available at https://single-market-scoreboard.ec.europa.eu/enforcement-tools_en, last time consulted on 26.03.2026.

enforcement begins at home. This ought to include solid mechanisms within the administration, besides transparency”²³.

In this regard, a Single Market Enforcement Task Force (SMET) was set up by the Action plan for better implementation and enforcement of single market rules adopted in March 2020 as part of the European Industrial Strategy²⁴.

The European Commission has also established the Single Market and Competitiveness Scoreboard which “tracks the functioning of the Single Market and the state of EU competitiveness”. The Scoreboard supports the “EU institutions, Member State policymakers and stakeholders in the business community with trendspotting, progress tracking and identification of new priorities for business policy”²⁵. The Scoreboard includes more than 160 indicators giving information on enforcement tools, business framework condition and competitiveness.

For this year, “the number of Single Market infringement cases has risen slightly. It is now reaching 664 cases, 1% more than the previous year. Comparing to numbers of 5 years ago, a more intensive use of the pre-infringement dialogue explains overall lower numbers”. In addition, the average time to comply with CJEU rulings in the Single Market area has worsened. The time for compliance has increased from 61.3 months last year to 64 months in December 2025”²⁶. The action for failure to fulfil by a Member State its obligations based on the EU Treaties is provided for in the art. 258-260 from TFEU and it represents, in our opinion, one of the most efficient European legal instruments for ensuring the respect of the Internal Market rules by the national authorities. The “pre-infringement dialogue” between European Commission and the respective Member State (art. 258-259 from TFEU) is used in order to “efficiently check and clarify transposition issues and to gather additional factual or legal information from Member States. Out of the 286 dialogues closed between January and November 2025, more than 20% have been initiated in 2025. This shows that the pre-infringement dialogue has the potential to achieve swift results and to efficiently collect information”²⁷. In 2025, “the number of Single Market infringement cases has risen slightly. It is now reaching 664 cases, 1% more than the previous year. Comparing to numbers of 5 years ago, a more intensive use of the pre-infringement dialogue explains overall lower numbers”²⁸.

If the Member State continues to fail to fulfil its obligations following the dialogue with the Commission, the Commission may decide to bring an action against that Member State before the Court of Justice. The Commission may propose to the Court to impose financial sanctions on that Member State in two situations: (1) if the national authorities have not taken the necessary measures to comply with an earlier judgment of the Court finding an infringement of EU law - art. 260 para. 2 TFEU, or (2) where the national authorities have failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure - art. 260 para. 2 TFEU.

The principles and method used by the Commission to calculate the proposed financial sanctions were established in its Communication 2023 Financial sanctions in infringement proceedings. In the 2025 Communication, the Commission establishes that the Member States’ capacity to pay or n factor should rely solely on Member States’ GDP (Gross Domestic Product).

On 12 of march 2026²⁹, the European Commission has established that the flat-rate amount for the penalty payment is fixed at EUR 3 560 per day and the flat-rate amount for the lump sum payment is fixed at EUR 1 190 per day. The n factor for Romania is 0,53. The reference lump sum used for calculating the minimum lump sums per Member State is set at EUR 3 323 508. The minimum lump sums correspond to the reference lump sum multiplied by the n factors. For Romania, the minimum lump sum is set at 1 761 000 EUR.” The average time to comply with Court rulings in the Single Market area has worsened. The time for compliance has increased from 61.3 months last year to 64 months in December 2025”³⁰.

²³ J. Pelkmans, op.cit., p. 48.

²⁴ “As a high-level forum where the Commission and EU countries work together, SMET is best placed to identify how to deal with barriers, jointly devise and implement solutions, ensure a consistent approach and act rapidly” at https://single-market-economy.ec.europa.eu/single-market/single-market-enforcement-taskforce_en, last time consulted on 26.03.2026.

²⁵ “The Scoreboard results show that a lot of work remains to be done so that the EU citizens and businesses can ripe all the benefits from the Single Market freedoms” in <https://single-market-scoreboard.ec.europa.eu/>, last time consulted on 26.03.2026.

²⁶ Available at https://single-market-scoreboard.ec.europa.eu/enforcement-tools_en, last time consulted on 26.03.2026

²⁷ Available at https://single-market-scoreboard.ec.europa.eu/enforcement-tools_en, last time consulted on 26.03.2026.

²⁸ Available at https://single-market-scoreboard.ec.europa.eu/enforcement-tools_en, last time consulted on 26.03.2026.

²⁹ Communication from the Commission, Annual update of data used for calculation of financial sanctions proposed by the Commission to the Court of Justice of the European Union in infringement proceedings (C/2026/1653).

³⁰ Available at https://single-market-scoreboard.ec.europa.eu/enforcement-tools_en, last time consulted on 26.03.2026.

On the other hand, if Member States are not committed to applying European Union law, the possibility of a two-speed Europe has been considered. It should be noted that this possibility was also influenced by the fact that certain Member States did not support, from the negotiation stage onward, the adoption of certain initiatives launched by the European Commission. In the Commission's opinion "a strong Single Market gives Europe a strong voice globally and the EU remains a strong and reliable partner for like-minded countries both globally and within the region".

The discussions on the two-speed Europe were taken up at informal European Council held at the beginning of the year. It is considered that "a two-speed Europe and the so-called 'European preference' moved from the margins to the center of political debate (...) Several EU leaders, including von der Leyen, French president Emmanuel Macron and German chancellor Friedrich Merz, have now backed a so-called "two-speed" Europe proposal, which tactically aims to advance reforms by bypassing unanimity — seen as an obstacle to competitiveness in a world shaped by strategic rivalry with the US and China"³¹.

The Member of the European Parliament "Lukas Sieper (NI³²/DEU) provides the institutional answer to why multi-speed Europe shouldn't be controversial: it's written into the treaties"³³. Article 20 from the Title IV Provisions on enhanced cooperation on the Treaty on European Union mentions that "enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States"³⁴, in accordance with Article 328 of the Treaty on the Functioning of the European Union". The application involves the Member States wishing "to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences" which "may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties".

Pursuant the procedure, "the decision authorizing enhanced cooperation shall be adopted by the Council as a last resort". The Treaty provides with the fact that "acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union".

In the field of Internal Market, "the President of the European Commission, Ursula von der Leyen, did not rule out enhanced cooperation between Member States to put in place a 28th regime designed to facilitate the cross-border expansion of businesses within the internal market"³⁵.

Other European leader appreciated that «"enhanced cooperation is not an issue," António Costa dials back two-speed Europe debate, saying unity among member states will prevail. António Costa, the president of the European Council, watered down expectations of a two-speed Europe as a magic bullet to break the impasse on economic reforms»³⁶.

«Delivering on competitiveness will require unity, speed of delivery and determination by all actors – "we need everyone in our Union" to move forward» (the President of the European Commission)³⁷.

4. Conclusions

The integration, defined as having an economic character, was at the same time a political project that the Court of Justice of the European Union consolidated by establishing the characteristics of Community/European

³¹ E. Sánchez Nicolás, W. van Gaal, Brussels, 'Two-speed Europe' and 'Made in EU' form core conclusions of leaders' retreat, 12 February 2026, at <https://euobserver.com/202873/two-speed-europe-and-made-in-eu-form-core-conclusions-of-leaders-retreat/>, last time consulted on 26.03.2026.

³² NI/DEU – Non-Inscrits, Deutschland.

³³ S. Dempsey, Two-speed Europe? Germany's proposal only formalises existing reality, experts say, 7 February 2026, in <https://euperspectives.eu/2026/02/germanys-two-speed-proposal/>, last time consulted on 26.03.2026.

³⁴ S. Dempsey, op.cit.: "Enhanced Cooperation mechanisms allow member states "who want to progress the European project, but know that they cannot get the majority on board, to do it with a smaller group as long as it does not contradict the general trajectory of the Union," MEP Sieper said".

³⁵ P. Denys, Europe seeks unity, without ruling out enhanced cooperation, Europe Daily Bulletin No. 13808, at <https://agenceurope.eu/en/bulletin/detail/13808>, last time consulted on 26.03.2026.

³⁶ J. Liboreiro, António Costa dials back two-speed Europe debate, says it's a 'non-issue', 13/02/2026, at <https://www.euronews.com/my-europe/2026/02/13/antonio-costa-dials-back-two-speed-europe-debate-says-its-a-non-issue>, last time consulted on 26.03.2026.

³⁷ Available at https://ec.europa.eu/commission/presscorner/detail/en/ac_26_413, last time consulted on 26.03.2026.

Union law, namely immediate application, direct application, and direct effect, as well as priority of application³⁸ (or supremacy). The Common Market and, later, the Internal Market represents the most emblematic element, largely regulated at the European level which is based on the art. 26 and art. 114 (former art. 95 from the Treaty of the European Community)³⁹ from the TFEU. It should be noted that French legal doctrine holds that the internal market is fundamentally based on what is known as the logic of negative integration⁴⁰.

In a dynamic international context, the concept of a two-speed Europe could be abandoned in favour of unity and coordination at the European level.

Deepening the Internal Market requires constant efforts on the part of Member States, but should be supported by the simplification of legislation adopted by EU institutions and by ongoing dialogue with the European Commission during the implementation phase, not only within the framework of infringement proceedings.

Ultimately, compliance with and enforcement of Internal Market rules must be ensured by the Court of Justice of the European Union, both through the action provided for in art. 260 from the TFEU and through dialogue between the European Court and national courts via preliminary rulings (art. 267 from the TFEU).

A legal and economic analysis should demonstrate that the removal of these "Ten Terrible Barriers" would clearly contribute both to the deepening of the internal market and to the well-being of the peoples of Europe.

The current omnibus-style simplification may also be subject to legal analysis in terms of proportionality, appropriateness, effectiveness and the characteristics of European Union law.

Furthermore, the constitutional issues surrounding the concept of a "two-speed Europe" will be addressed from the perspective of a possible revision of the EU Treaties.

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³⁸ See R.-M. Popescu, Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court, in *Challenges of the Knowledge Society*, Bucharest, 17th - 18th May 2019, 13th Edition, at <http://cks.univnt.ro/articles/14.html>, last time consulted on 26.03.2026.

³⁹ CJEC, judgement from 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, case-law C-491/01, ECLI:EU:C:2002:741, para. 179: It is to be noted, as a preliminary, that the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the Internal Market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition.

⁴⁰ G. Marti, *Les grandes notions du droit de l'Union européenne*, Presses Universitaires de France Publishing House, Paris, 2021, p. 208. This negative integration was supposed to be accompanied by a positive integration that has not yet fully taken effect.

- Augustin Fuerea, Beneficiaries of the freedom of movement within the EU, in CKS 2024 – Challenges of the Knowledge Society Bucharest, May 17th 2024, 17th Edition, at https://cks.univnt.ro/cks_2024.html, last time consulted on 26.03.2026;
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- https://ec.europa.eu/commission/presscorner/detail/en/ip_26_614;
- https://ec.europa.eu/commission/presscorner/detail/en/ip_26_614.

A SEAT AT THE TABLE: THE EUROPEAN UNION'S EVOLVING LEGAL STATUS IN INTERNATIONAL ORGANISATIONS

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Abstract

The European Union sits in different chairs at different international organisations: as a full member at the World Trade Organization, as an “enhanced observer” at the United Nations General Assembly under Resolution 65/276, as a de facto observer at the Arctic Council, and, for over fifteen years, as a non-party to the European Convention on Human Rights, an accession that Article 6(2) of the Treaty on European Union requires.

As an entity possessing full legal personality but not statehood, the Union must participate in institutions whose constituent treaties were drafted between 1945 and 1996, by states, for states. This article examines how that mismatch has produced a patchwork of accommodations that is doctrinally coherent yet institutionally fragmented. The first part surveys the Union’s participation in universal organisations, ranging from full membership to negotiated observer arrangements. The second part examines regional and informal frameworks, with ECHR accession as the central case study. The European Union’s pending accession illustrates, with unusual clarity, how its internal architecture, namely the autonomy of EU law as elaborated in Opinion 2/13 of December 2014, can constrain its external action even where the Treaties themselves require that action to be taken. The November 2025 referral of Opinion 1/25, following the Court of Justice’s clarification of CFSP jurisdiction in KS and KD v Council in September 2024, may resolve what has been the longest-running gap in the Union’s external participation.

It becomes apparent that, while the Union’s competence determines what it may do externally, the host organisation’s constituent treaty determines where the Union can sit. Where these layers align, typically in technical and economic fields, full membership is possible. Where they diverge, the Union relies on negotiated observer arrangements, informal accommodations, or, in the case of the Council of Europe, on a separate and complex accession process. The conclusion is that such a variable geometry in the Union’s external participation is unlikely to give way to uniformity, and that the institutional landscape will continue to be navigated case by case.

Keywords: external representation, international organisations, ECHR accession, observer status, EU competences.

1. Introduction

In the sphere of international governance, the European Union occupies markedly different positions from one context to another. At the World Trade Organization,¹ it sits as a full member alongside its Member States, casting votes and signing agreements in its own name. At the United Nations General Assembly,² it speaks before any individual state during the general debate, but cannot vote, co-sponsor a resolution, or field a candidate for any post. For over four decades, it has been negotiating accession to the European Convention on Human Rights³,

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¹ The World Trade Organization (WTO) was established by the Marrakesh Agreement of 15 April 1994 and began operations on 1 January 1995. It administers the multilateral trading system, oversees trade negotiations, and operates a binding dispute settlement mechanism. Its membership comprises 166 states and customs territories, including the European Union as a full member alongside its 27 Member States.

² The United Nations, established by the Charter signed in San Francisco on 26 June 1945, is the largest universal international organisation, with 193 member states. The General Assembly is its plenary deliberative organ, in which each member state has one vote (Article 18 of the Charter). The General Assembly’s resolutions are, with limited exceptions, recommendations rather than binding instruments.

³ The European Convention on Human Rights (formally, the Convention for the Protection of Human Rights and Fundamental Freedoms) was adopted by the Council of Europe in Rome on 4 November 1950 and entered into force on 3 September 1953. It is enforced by the European Court of Human Rights, sitting in Strasbourg, which hears applications from individuals and states alleging violations by any of the 46 Contracting Parties.

an accession the Treaties expressly require, but has yet to become a party. And at the Arctic Council,⁴ the Union has been a de facto observer since 2013, formally affirmed but never formally admitted, watching proceedings from a chair that has no clear legal name or qualification.

Same legal personality, four radically different seats.

The conventional explanation invokes the Union's *sui generis*⁵ character: the EU is neither a state, nor a classical international organisation, and it must therefore negotiate its presence on the global stage one organisation at a time. That description is accurate, but it treats this fragmentation as a form of EU exceptionalism, when in fact it reflects a simpler reality: the legal architecture of most international organisations was designed between 1945 and 1949, by states, for states, at a time when EU legal personality did not exist and could not have been anticipated.⁶ The Union, endowed with full legal personality only by the Treaty of Lisbon in 2009,⁷ has spent the past decades trying to fit into pre-existing institutional structures. The result is a participation regime shaped less by the Union's own competences than by the legal architecture of each host organisation.

The article argues that the Union's diverse status across international organisations is coherent, in the sense that it reflects the attribution of competences between the Union and its Member States, but institutionally costly. The Union's competence determines what it may do externally; the host organisation's constituent treaty determines what it can do as a matter of institutional law. Where these two layers align, full membership is possible. Where they diverge, the Union must rely on observer arrangements of varying depth, on bilateral accommodations with each organisation, or on informal frameworks that side-step the question of legal status altogether. All this is laid out in three sections. The first section presents the foundations: the Union's legal personality, its competences, its treaty-making power, and the duty of sincere cooperation that binds Union and Member States in their external action. The second section examines the Union's participation in universal international organisations as a typology, ranging from full membership in technical and economic bodies to "enhanced observer" status at the UN General Assembly to ordinary observer status across the UN's specialised agencies. The third section focuses on regional and informal frameworks, with the Union's pending accession to the European Convention on Human Rights as the central case study, that is, a treaty-mandated accession blocked for over a decade by the Union's own constitutional autonomy doctrine, and now once again before the Court of Justice in Opinion 1/25. The article concludes by drawing out three observations on the doctrinal coherence, institutional cost, and practical trajectory of the Union's external participation.

The picture that emerges is one of patchwork participation: not by deliberate design, but by accretion.⁸ Each seat reflects the negotiated outcome between the Union's internal architecture and a host organisation's external one. Whether that patchwork is sustainable, and whether the longest-running gap in it, ECHR accession, is finally about to close, remains to be seen.

2. The foundations

To understand why the Union sits in different chairs in different organisations, it is necessary to begin with what the Union is, in legal terms, and what it may do on the international plane. Four aspects have direct bearing

⁴ The Arctic Council was established by the Ottawa Declaration of 19 September 1996. It is the main intergovernmental forum for cooperation on Arctic issues among the eight Arctic states (Canada, Denmark including Greenland and the Faroe Islands, Finland, Iceland, Norway, Russia, Sweden, and the United States), with formal participation also accorded to indigenous peoples' organisations as "Permanent Participants." The Arctic Council is not founded on a treaty; the Ottawa Declaration is a political instrument, and the Council has no separate legal personality.

⁵ For more on the EU's *sui generis* character, see A. Fuerea, *Manualul Uniunii Europene*, 7th ed., Universul Juridic Publishing House, Bucharest, 2026.

⁶ The Charter of the United Nations (1945), the Statute of the Council of Europe (1949), the Constitution of the World Health Organization (1946), and the General Agreement on Tariffs and Trade (1947, the predecessor to the WTO) were all drafted in the immediate post-war period, when European integration was a political aspiration rather than a legal reality. The European Coal and Steel Community, the first of the European Communities, was established only in 1951 by the Treaty of Paris.

⁷ The Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 December 2009, amended the existing Treaty on European Union and renamed the Treaty Establishing the European Community as the Treaty on the Functioning of the European Union. Among its most consequential reforms were the conferral of legal personality on the Union (Article 47 TEU), the abolition of the pillar structure, and the creation of the offices of President of the European Council and High Representative of the Union for Foreign Affairs and Security Policy.

⁸ On the use of the term "patchwork" to describe the Union's regional engagements, see E. Lannon, P. Van Elsuwege, "The EU and its neighbourhood: A patchwork of regional strategies and institutions from the Mediterranean to the Arctic" in R. A. Wessel and J. Odermatt (eds.), *Research Handbook on the EU and International Organizations*, Edward Elgar Publishing House, 2019, pp. 546-567.

on the analysis: legal personality, competences, treaty-making power, and the duty of sincere cooperation. Each aspect is straightforward in isolation, but their interaction generates the complexity that defines the Union's external presence.⁹

2.1. Legal personality

Article 47 of the Treaty on European Union (TEU) provides: "The Union shall have legal personality." That short sentence, inserted by the Treaty of Lisbon in 2009, ended a long-running debate. Before Lisbon, only the European Community possessed legal personality; the European Union, established by the Treaty of Maastricht in 1992/1993, was a political construct overlaid on three "pillars," only the first of which (the Community) could conclude treaties or appear before international courts in its own name. The pre-Lisbon period thus produced a division of external action, in which the Community signed trade agreements while the Union conducted foreign policy through coordinated Member State positions.

The Union having legal personality matters for two reasons. First, it allows the Union to enter into legal relations with third states and other international organisations: to conclude treaties, to bring or face claims, and to exercise rights and assume obligations under international law.¹⁰ Second, it allows the Union to be admitted to international organisations in its own name, provided, of course, that the host organisation's constituent treaty permits non-state membership. It is this last condition that gives rise to most of the difficulties examined in the sections that follow.

2.2. The competence framework

The Union may act externally only where it is competent to do so. Articles 2 to 6 of the Treaty on the Functioning of the European Union (TFEU) divide competences into three categories.

Exclusive competences, listed in Article 3 TFEU, are areas in which only the Union may legislate and conclude legally binding acts. These include the customs union, common commercial policy, monetary policy for Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, and the conclusion of international agreements where their conclusion is required by a legislative act, is necessary to enable the Union to exercise its internal competence, or may affect common rules.

That last category, namely exclusive external competence by virtue of internal action,¹¹ derives from the Court of Justice's foundational ruling in ERTA,¹² in which the Court held that the conclusion of international agreements by Member States in areas where the Community had adopted internal rules would risk affecting those rules, and that external competence in such areas had therefore been implicitly transferred to the Community. The ERTA doctrine, refined by Opinion 1/76¹³ and a long subsequent line of cases, was codified in Article 3(2) TFEU at Lisbon.

Shared competences, listed in Article 4 TFEU, cover most of what the Union does on the global stage that is not commercial policy: the internal market, environment, transport, energy, area of freedom security and justice, and so on. In these areas, both the Union and its Member States may act, with Member State competence pre-empted to the extent the Union has exercised its own.

Supporting competences (Article 6 TFEU), such as health, culture, and education, allow the Union to support, coordinate, or supplement Member State action without harmonising national laws.

⁹ For a comprehensive treatment of the Union's external relations architecture, see J. Wouters, F. Hoffmeister, G. De Baere and T. Ramopoulos, *The Law of EU External Relations: Cases, Materials, and Commentary on the EU as an International Legal Actor*, 3rd ed., Oxford University Press, 2021. The book builds on earlier editions initiated by P. J. Kuijper.

¹⁰ The defining opinion on the legal capacities of an international organisation possessing legal personality is the International Court of Justice's Advisory Opinion in *Reparation for Injuries Suffered in the Service of the United Nations*, in which the Court held that the United Nations possessed objective international legal personality, opposable to all states, regardless of whether said states had recognised the UN as such. The same principles are generally applied, *mutatis mutandis*, to the European Union.

¹¹ For more on this type of competences of the EU, see A. Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, and M. A. Niță, O. M. Salomia, *Dreptul Uniunii Europene II*, 3rd ed., Universul Juridic Publishing House, Bucharest, 2025.

¹² Case 22/70, *Commission v Council (ERTA)*, EU:C:1971:32. The case concerned the European Road Transport Agreement and established that, where the Community had adopted internal rules in a given area, Member States could no longer conclude agreements with third states that affected those rules.

¹³ Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63, in which the Court of Justice held that the Community had implied external competence to conclude an international agreement where this was necessary for the attainment of a specific Community objective.

For external relations, the operational question is simple: when the Union wishes to participate in an international organisation or a treaty, what kind of competence does it have over the subject matter? Exclusive competence means the Union acts alone (or, more precisely, that Member States act through the Union); shared competence typically means “mixity” (discussed below); supporting competence means the Union may speak but rarely adopts legally binding acts.

2.3. Treaty-making power and mixity

Article 216(1) TFEU sets out when the Union may conclude an international agreement: when the Treaties so provide, when conclusion is necessary to achieve a Treaty objective, when it is provided for in a legally binding act of the Union, or when it is likely to affect common rules or alter their scope. Once concluded, such agreements are “binding upon the institutions of the Union and on its Member States” (Article 216(2) TFEU), and form an integral part of Union law, ranking above secondary legislation but below the Treaties themselves.

Where the subject matter of an agreement falls partly within Union competence and partly within Member State competence, the agreement is concluded as a mixed agreement: both the Union and all Member States are parties.¹⁴ Mixity can be cumbersome, as every Member State must ratify the agreement, often through national parliamentary procedures (reminiscent of the procedures specific to classical cooperation international organisations), but it is the institutional response to shared competence in external action.

The contours of mixity have been refined in a series of recent Opinions. In Opinion 2/15,¹⁵ the Court of Justice held that the EU–Singapore Free Trade Agreement fell almost entirely within exclusive Union competence, except for non-direct foreign investment and investor-state dispute settlement, which required Member State ratification. In Opinion 1/17,¹⁶ the Court found the Comprehensive Economic and Trade Agreement between the EU and Canada compatible with Union law on its investment chapter. Together, these Opinions narrowed the practical scope of mixity in trade, although they left untouched its application in many other fields, from environmental agreements to human rights instruments.

2.4. The duty of sincere cooperation

Article 4(3) TEU obliges the Union and its Member States, “in full mutual respect, [to] assist each other in carrying out tasks which flow from the Treaties.” Externally, this duty translates into two requirements: that the Union and Member States coordinate their positions on an international level, and that Member States refrain from acting unilaterally in ways that would undermine the Union’s positions or competence.

The Court of Justice has enforced this duty. In *Commission v Sweden*,¹⁷ Sweden was found to have breached Article 4(3) TEU by unilaterally proposing the listing of perfluorooctane sulfonate under the Stockholm Convention on Persistent Organic Pollutants, while the Council was still considering a coordinated Union position. The case is a useful illustration of how sincere cooperation operates not as an abstract principle but as a legally binding constraint on Member State conduct in mixed external forums.

2.5. The Union’s external presence

The internal architecture is coherent: the Union has legal personality; it has competences over defined subject matters; it may conclude treaties within those competences; it must coordinate with its Member States in doing so. From the Union’s perspective, these rules provide a clear answer to the question “may the Union act externally on this matter?” in any given case.

What they do not provide, however, is a clear answer to the question “may the Union sit in this chair?” That question is governed not by Union law but by the constituent treaty of the host organisation. The Charter of the United Nations admits “states” as members (Article 4); the Statute of the Council of Europe admits “European States” (Article 4); the Ottawa Declaration establishing the Arctic Council in 1996 reserves member status to the eight Arctic states. None of these instruments anticipated, or could have anticipated, an entity like

¹⁴ For the leading scholarly treatment, see C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Hart Publishing House, 2010.

¹⁵ Opinion 2/15, *Free Trade Agreement between the European Union and the Republic of Singapore*, EU:C:2017:376.

¹⁶ Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA)*, EU:C:2019:341.

¹⁷ Case C-246/07, *Commission v Sweden*, EU:C:2010:203.

the Union when they were drafted. The Union's external presence, accordingly, depends on the host organisation's willingness to accommodate it, whether by amending its constituent treaty (as the Food and Agriculture Organization did in 1991), by negotiating a tailored observer arrangement (as the General Assembly did in 2011), or by tolerating an informal *de facto* presence (as the Arctic Council does today).

The article will now analyse the typology of the various external accommodations available to the Union.

3. Universal international organisations

The European Union's participation across universal international organisations presents a layered typology. At one end stands full membership, exercised alongside or in place of the Member States in a small number of bodies whose constituent treaties were either drafted or amended to permit it. At the other end stand organisations in which the Union has no formal status at all, observing through coordinated Member State action. Between these extremes lies a spectrum of observer arrangements of varying institutional depth, the most legally developed of which the “enhanced observer” status is conferred on the Union by the UN General Assembly in 2011.

This section analyses the typology and extracts the legal logic that determines where on the spectrum the Union sits in any given organisation.

3.1. Full membership: the REIO model

A small number of universal organisations have amended their constituent instruments to admit regional economic integration organisations (REIOs) as members. The mechanism seems straightforward: the host organisation's treaty is revised to permit non-state membership, typically conditional on the entity demonstrating that its member states have transferred competence over the subject matter to it. In practice, this route has been taken by very few organisations, and almost exclusively in technical and economic fields where the Union's competence is exclusive or near-exclusive.

The clearest example is the World Trade Organization. The Union (then the European Communities) was a founding member of the WTO at its establishment in 1995, alongside its Member States, by virtue of the 1994 Marrakesh Agreement, which expressly regarded the European Communities as an original member. Voting is structured so as to avoid double counting: where the Union votes as a bloc, it casts a number of votes equal to the number of its Member States that are WTO members; where Member States vote individually, the Union does not vote at all (Article IX:1). In practice this matters little, because the WTO operates by consensus on almost all decisions of substance, and the Union's representation at the consensus table, exercised through the Commission on the basis of common commercial policy as an exclusive competence under Article 3(1)(e) TFEU, is institutionally settled.¹⁸

A second illustration is the Food and Agriculture Organization of the United Nations.¹⁹ In 1991, the FAO Constitution was amended to permit “regional economic integration organizations” to apply for membership, on condition that the majority of their member states were FAO members and that competence had been transferred to the regional organisation in matters within FAO's mandate, to avoid any potential legal conflicts. The Union acceded later that year. The system put in place is governed by the so-called “alternation rule”: before each FAO meeting, the Union and its Member States must declare which of them is competent on each agenda item, and only that party exercises voting rights, never both. This declaration mechanism, while relatively burdensome, is in fact an externalisation of the internal attribution of competence under Article 3 and Article 4 TFEU.

That said, the political logic behind these accommodations should not be reduced to a purely textual question. The WTO and the FAO admitted the Union as a member at moments (1995 and 1991, respectively) when the exclusivity of Union competence in trade and the depth of Union competence in agriculture had

¹⁸ For the foundational analysis of the Union's competence to conclude WTO agreements, see Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, EU:C:1994:384, in which the Court of Justice held that competence to conclude the WTO agreements was shared between the Community and the Member States, and that the agreements would accordingly require mixity.

¹⁹ The Food and Agriculture Organization of the United Nations was established in 1945 as a UN specialised agency tasked with leading international efforts to defeat hunger and improve nutrition and food security. As of 4 February 2026, its membership comprises 193 states plus the European Union and two associate members. The 1991 amendment to the FAO Constitution was the first instance of a UN specialised agency formally admitting a regional economic integration organisation as a member.

become so obvious that excluding the Union from the negotiating table would have generated more practical difficulties than admitting it would. The constituent text of the host organisation is the formal constraint; the political weight of the Union's competence in a given field is what determines whether the constraint is renegotiated.

The REIO model has been replicated, with variations, in a small number of other organisations: the International Renewable Energy Agency (IRENA), various regional fisheries management organisations, and the Codex Alimentarius Commission jointly run by FAO and the WHO. What unites these cases is not the Union's competence, which is shared in some cases and exclusive in others, but rather the willingness of the host organisation's drafters or amending parties to accommodate non-state membership in the constituent text.

3.2. Enhanced observer status at the UN General Assembly

Where the host organisation's constituent instrument cannot easily be amended to admit non-state members, the Union has pursued enhanced observer arrangements as a second-best solution. The most significant of these arrangements is General Assembly Resolution 65/276 of 3 May 2011, which conferred on the Union a tailored observer status going beyond the status previously enjoyed by the European Community since 1974.²⁰

The resolution wasn't easily agreed upon. A first draft, tabled in autumn 2010, was defeated when the UN General Assembly, on a procedural motion led by the Caribbean Community (CARICOM), voted to postpone consideration. The reasons were partly substantive, with concerns that the EU's proposed rights would set a precedent for other regional entities, and partly procedural, reflecting unease at what was perceived as an under-consulted Union initiative. A revised draft, the product of more extensive negotiations with non-EU members, was adopted on 3 May 2011 by 180 votes to none, with two abstentions (Syria and Zimbabwe).²¹

Resolution 65/276 confers on the Union, according to the Annex to the resolution, five rights of participation: to be inscribed on the list of speakers among representatives of major groups; to be invited to participate in the general debate; to have its communications relating to the sessions and work of the Assembly circulated directly and without intermediary as documents of the Assembly; to present proposals and amendments orally, which will be put to a vote at the request of a Member State; and to exercise the right of reply on positions of the Union, on the basis of one intervention per item.²²

The limits are equally important. As an observer, the Union does not have the right to vote, to co-sponsor draft resolutions or decisions, to put forward candidates for any post in the UN General Assembly, or to raise points of order. The resolution thus represents a procedural "upgrade" rather than a substantive one: it allows the Union to speak in the General Assembly with greater institutional standing, but it does not allow it to act as a member would. The first practical demonstration came on 22 September 2011, when the President of the European Council addressed the UN General Assembly in the general debate at the opening of its 66th session, the first time the Union's position had been delivered by a permanent Union representative rather than by the Member State holding the rotating Council Presidency.

The resolution's implementation, however, exposed an equally significant problem internal to the Union itself. Following the Treaty of Lisbon, certain Member States, most prominently the United Kingdom, blocked Union statements at the UN General Assembly on the ground that representation by the Union in fields of shared competence would itself constitute exercise of competence, and would therefore pre-empt Member State residual competence under Article 2(2) TFEU. The dispute was resolved as a practical matter by the Council's adoption in October 2011 of "general arrangements" on EU statements in multilateral organisations, which require each Union statement to be flagged at its outset as made "on behalf of the Union", "the Union and

²⁰ General Assembly Resolution 3208 (XXIX) of 11 October 1974 had granted the European Economic Community ordinary observer status, which permitted attendance at sessions but only limited speaking rights, exercised after all Member States had spoken.

²¹ For a comprehensive analysis of the negotiating dynamics and the institutional implementation of Resolution 65/276, see E. Paasivirta and T. Ramopoulos, "UN General Assembly, UN Security Council and UN Human Rights Council: The EU in state-centred multilateral frameworks" in R. A. Wessel and J. Odermatt (eds.), *Research Handbook on the EU and International Organizations*, Edward Elgar Publishing House, 2019, pp. 58-81. The chapter is particularly valuable for its first-hand institutional analysis, Paasivirta having served as a legal officer in the EU Delegation to the United Nations during much of the period it discusses. See also S. Blavoukos, D. Bourantonis and I. Galarotis, "In quest of a single European Union voice in the United Nations General Assembly: the politics of Resolution 65/276", in *Cooperation and Conflict*, Vol. 52, No. 4, December 2017, pp. 451-468.

²² UNGA Resolution 65/276, Annex, paragraph 1(a)-(e).

Member States”, or simply “the Member States”.²³ This is a small but telling illustration of the following pattern: the Union's external presence is shaped not only by the external politics of the host-organisation, but also by internal Union politics.

Resolution 65/276 has functioned, since its adoption, as a kind of model for what an enhanced observer arrangement might look like in other UN bodies. The Union's broader strategy for replicating it across the UN system was formalised in a December 2012 Commission Communication, “Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Lisbon Treaty”,²⁴ which laid out a plan to upgrade the Union's status across dozens of multilateral bodies. To date, that strategy has produced only modest results outside the UN General Assembly itself.

3.3. The EU's status across the UN's specialised agencies

Beyond the General Assembly, the Union's status across the UN system is highly variable, reflecting the institutional logic of each agency rather than a consistent legal principle.

At the World Health Organization,²⁵ the Union holds ordinary observer status. The COVID-19 pandemic exposed the institutional cost of this arrangement: while the Union coordinated the procurement of vaccines for its Member States and shaped much of the European response, its representative at the World Health Assembly spoke through observer procedures, with the rotating Council Presidency continuing to deliver coordinated statements on behalf of the Member States. Proposals to upgrade the Union's status at the WHO have not been pursued to resolution.

At the International Labour Organization (ILO),²⁶ the structural obstacle to membership is not statehood but tripartism: the ILO's constituent structure grants formal participation to governments, employers, and workers, and the Union does not fit cleanly into any of the three categories. Member States accordingly act in their national capacities, with the Commission participating in ILO activities through observation and through targeted engagement. In February 2024, the European Commission joined, on behalf of the Union, the ILO's Global Coalition on Social Justice, an indication that operational engagement can substitute, partly, for formal status where the host organisation's structure resists it.

At the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO), the Union holds observer status. Repeated attempts to upgrade Union participation at the IMO, in particular, have been blocked by Member States within and outside the Union, concerned about the precedent for regional blocs. The pattern is clear: where the host organisation's constituent treaty does not provide for non-state members, the Union's competences in the subject matter, which are extensive in maritime safety, aviation security, and environmental regulation, do not, on their own, generate institutional standing.

3.4. The pattern of participation

The examples analysed above form a clear pattern. Where the host organisation's constituent treaty either is open to non-state membership or has been amended to allow it (WTO, FAO, IRENA), the Union sits as a member, and the depth of its participation tracks the depth of its competence. Where the constituent treaty allows only for state membership, the Union sits as an observer, and the depth of that participation depends not on the Union's competence but on what the host organisation is politically willing to grant. UNGA Resolution 65/276 represents the height of negotiated observer status to date; the WHO, ICAO, and IMO illustrate the more typical, and considerably weaker, baseline.

This is the article's central observation: the Union's external competence determines what the Union may do, but not where it may sit; the constituent architecture of the host organisation is the binding constraint. This observation will be further fleshed out through the examination of regional and informal frameworks, where the

²³ Council of the European Union, EU Statements in multilateral organisations: General Arrangements, doc. 15901/11, 24 October 2011. For analysis, see Paasivirta and Ramopoulos (n 19) at 65–66.

²⁴ Communication to the Commission from the President in agreement with Vice-President Ashton, Strategy for the progressive improvement of the EU status in international organisations and other fora in line with the objectives of the Lisbon Treaty, C(2012) 9420 final, 20 December 2012.

²⁵ The World Health Organization (WHO), established by Constitution adopted on 22 July 1946 and entered into force on 7 April 1948, is the UN specialised agency responsible for international public health. As of January 2026 it has 194 member states. The WHO's Constitution does not provide for non-state membership.

²⁶ The International Labour Organization (ILO), founded in 1919 under the Treaty of Versailles and incorporated into the UN system as a specialised agency in 1946, addresses international labour standards.

gap between competence and seat reaches its most acute expression in the Union's delayed accession to the European Convention on Human Rights.

4. Regional and informal frameworks: ECHR accession

The Union's engagement with regional organisations and informal frameworks presents a different set of legal issues from those examined in the previous section. Universal organisations vary in whether they admit non-state members; regional organisations, almost without exception, do not. This is partly historical, with most regional organisations of relevance to the Union having been founded between 1949 and 1996, before EU legal personality existed, and partly structural, because the constituencies of regional organisations are typically defined by territorial or functional criteria that fit states rather than supranational entities. The Union's presence in regional frameworks is, accordingly, almost always shaped by accommodation rather than membership.

This section examines four situations, with the Union's pending accession to the European Convention on Human Rights as its central case study. Accession to the ECHR is, legally, the most consequential and most analysed example of the Union's external participation: a treaty-mandated obligation, blocked for over a decade by the Union's own constitutional doctrine, and now once again before the Court of Justice. The OSCE, the Arctic Council, and the G7/G20 frameworks are then examined as briefer counterpoints, illustrating how the Union's external presence varies when the host organisation's legal structures take a different form, or no form at all.

4.1. ECHR accession and the obstacles in front of it

Article 6(2) of the Treaty on European Union provides that “the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” That obligation, introduced by the Treaty of Lisbon in 2009 and supplemented by Protocol No. 8 to the Treaties, is unique in international law. No other entity is under a legally binding internal obligation, enshrined in its own constituent treaty, to become a party to a separate international convention concluded by a separate international organisation. Yet, more than sixteen years after Article 6(2) TEU entered into force, the Union has still not acceded. The reasons illustrate, with unusual clarity, how the Union's internal constitutional architecture can affect and limit its external action even where the Treaties themselves require that action to be taken.

The Council of Europe,²⁷ the parent organisation of the Convention, was established in 1949 with a constituent statute that limits membership to “any European State” (Article 4 of the Statute of the Council of Europe). The Union, which is not a European State, cannot become a member of the Council of Europe itself, but only of specific conventions concluded under its auspices. The ECHR is one such convention, and Protocol No. 14 to the Convention, in force since 2010, was specifically drafted to permit Union accession.

A first Draft Accession Agreement was concluded between the Union and the then 47 Council of Europe Member States in April 2013, after three years of negotiation. The Commission, exercising its prerogative under Article 218(11) TFEU, requested an Opinion from the Court of Justice on the compatibility of the agreement with the Treaties. On 18 December 2014, the Court delivered Opinion 2/13.²⁸

Opinion 2/13 declared the Draft Agreement incompatible with EU law on five grounds, structured around the requirement to preserve “the specific characteristics and the autonomy of EU law” enshrined in Protocol No. 8. First, the agreement failed to coordinate Article 53 of the ECHR (which permits Contracting Parties to apply higher standards of human rights protection than those provided by the Convention) with Article 53 of the EU Charter of Fundamental Rights, generating a risk that Member States might invoke higher ECHR standards in ways that would undermine the primacy and effectiveness of EU law. Secondly, the agreement was likely to undermine the principle of mutual trust between Member States in the Area of Freedom, Security and Justice. Third, the relationship between the advisory opinion procedure under Protocol No. 16 to the ECHR and the

²⁷ The Council of Europe, established by the Treaty of London on 5 May 1949, is an international organisation distinct from the European Union, with 46 Member States. Its primary mandate is the protection of human rights, democracy, and the rule of law in Europe, exercised principally through the European Convention on Human Rights and the European Court of Human Rights. The Russian Federation was expelled from the Council of Europe on 16 March 2022 following its invasion of Ukraine. For a historical overview of EU-Council of Europe interaction since the establishment of the European Coal and Steel Community in 1951, see R. Lawson, “Council of Europe: Cooperation in the field of human rights, democracy and the rule of law” in R. A. Wessel, J. Odermatt (eds.), *Research Handbook on the European Union and International Organizations*, Edward Elgar Publishing House, 2019, pp. 507-528.

²⁸ Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.

preliminary ruling procedure under Article 267 TFEU was insufficiently regulated. Fourth, the agreement did not adequately exclude the possibility that disputes between Member States, or between Member States and the Union, concerning the ECHR within the scope of EU law could be brought before the European Court of Human Rights, contrary to the exclusive jurisdiction reserved to the Court of Justice under Article 344 TFEU. Fifth, and most relevant for what was to follow, the agreement was incompatible with the Treaties insofar as it would have given the European Court of Human Rights jurisdiction to review acts adopted under the Common Foreign and Security Policy (CFSP), an area in which the Court of Justice itself has only limited jurisdiction under Article 24(1) TEU and Article 275 TFEU.²⁹

Opinion 2/13 was widely received as a significant setback. A reflection period followed, during which the Union and the Council of Europe considered how to amend the Draft Agreement to address each of the Court's objections. Negotiations resumed formally in 2020 and proceeded in what became known as the "46+1 format", that is, the 46 Council of Europe Member States (Russia having been expelled from the Council of Europe in March 2022 following its invasion of Ukraine) negotiating with the Union as the additional party. On 17 March 2023, the negotiating group concluded a technical agreement on a Revised Draft Accession Agreement addressing each of the four substantive objections raised in Opinion 2/13 except the CFSP issue, which the Union committed to resolve internally within its own legal order.³⁰

The CFSP residual question was addressed, at least in part, by the Court of Justice itself. In *KS and KD v Council*,³¹ decided by the Grand Chamber on 10 September 2024, the Court ruled that it has jurisdiction to assess the legality of CFSP acts and omissions that are not "directly linked to political or strategic choices" made by the Union in the conduct of the CFSP. The case concerned an action for damages brought by family members of victims of disappearances and killings in Kosovo, alleging that the Union's Rule of Law Mission (Eulex Kosovo) had failed to investigate adequately. The Court drew a distinction between political and strategic choices, which remain outside its jurisdiction, and operational matters such as personnel decisions, procedural rules, and the establishment of remedial mechanisms, which fall within it.

The judgment is a procedural pronouncement, but its implications for ECHR accession are considerable, and contested. It can be read as significantly narrowing the gap that Opinion 2/13 had identified, by extending the Court of Justice's jurisdiction over CFSP matters to a degree that may now satisfy the requirement that the Court of Justice be able to rule on EU law issues before the European Court of Human Rights does so. An alternative reading, however, takes a more skeptical view: that *KS and KD* constructs a "political question" doctrine in EU law, and that the Court's lack of jurisdiction over the "core" of CFSP may equally serve as an escape clause through which the Court could declare the Revised Draft Accession Agreement incompatible with the Treaties.³²

On 21 November 2025, the European Commission filed a request with the Court of Justice for an Opinion under Article 218(11) TFEU on the compatibility of the Revised Draft Accession Agreement with the Treaties. This request, registered as Opinion 1/25, is, at the time of writing, pending. If the Court of Justice delivers a positive

²⁹ For a comprehensive analysis of Opinion 2/13, see D. Halberstam, "It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", in *German Law Journal*, Volume 16, Issue 1, pp. 105-146; S. Peers, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare", in *German Law Journal*, Volume 16, Issue 1, pp. 213-222; S. Peers, "The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection", in *EU Law Analysis*, 18 December 2014, available at <http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.htm> (last accessed on 10 April 2026); A. Fuerea, *Deptul Uniunii Europene. Principii, acțiuni, libertăți*, op.cit., pp. 83-91.

³⁰ For a comprehensive analysis of the 2023 Revised Draft Accession Agreement, see the special issue K. Dzehtsiarou, V. P. Tzevelekos (eds.), *European Convention on Human Rights Law Review*, Brill Nijhoff Publishing House, 2025, in particular C. Giakoumopoulos, D. Milner, "Accession of the European Union to the European Convention on Human Rights: A View From Inside the Council of Europe", pp. 15-38; J. Polakiewicz and I. Suominen-Picht, "Now or Never – One Year After the Closure of the Second Negotiation Round for the EU's Accession to the ECHR" pp. 102-129. Giakoumopoulos and Polakiewicz are senior Council of Europe officials directly involved in the 46+1 negotiations, while Milner served as Secretary to the 46+1 group.

³¹ *Joined Cases C-29/22 P and C-44/22 P, KS and KD v Council and Others*, EU:C:2024:725.

³² The dual reading is set out at length in V. P. Tzevelekos, "The EU's Accession to the ECHR: The Future of the Revised Draft Accession Agreement and a Call to End the Bosphorus Doctrine", in K. Dzehtsiarou, V. P. Tzevelekos (eds.), *European Convention on Human Rights Law Review*, op.cit., pp. 7-10. For the more optimistic view, see J. Krommendijk, "One Step Closer After KS and KD: EU Accession to the ECHR" *REALaw blog*, 1 October 2024, available at <https://realaw.blog/2024/10/01/one-step-closer-after-ks-and-kd-eu-accession-to-the-echr-by-jasper-krommendijk/> (last accessed on 10 April 2026). For a more skeptical analysis, see L. Lonardo, "How the Court Tries to Deliver Justice in Common Foreign and Security Policy, Where the Need for Judicial Protection Clashes with the Principles of Conferral and Institutional Balance. *Joined Cases C-29/22 P and C-44/22 P KS and KD*", in *European Papers*, Vol. 9, No 2, 2024, pp. 830-844, and T. Verellen, "A Political Question Doctrine for the CFSP: The CJEU's Jurisdiction in the *KS and KD Case*", in *Verfassungsblog*, 24 September 2024, available at <https://verfassungsblog.de/political-question-doctrine/> (last accessed on 10 April 2026).

Opinion, and in light of KS and KD, this is no longer implausible, the path to ratification would open: unanimous Council approval, ratification by all 46 Council of Europe Member States, and entry into force.³³

The ECHR accession story can be considered the article's central thesis. A treaty-mandated external commitment, blocked for over a decade by the Union's own constitutional autonomy doctrine, has now been substantially renegotiated to fit that doctrine; whether it has been renegotiated successfully will be determined by the Court of Justice itself. The Union's seat at the Convention is, in this sense, doubly determined: it is simultaneously required by Article 6(2) TEU and constrained by the autonomy of EU law as interpreted by the Court of Justice. This situation is unique to the ECHR file but illustrates a broader pattern: while the Union's external participation depends on the willingness of host organisations to admit it, the Union's own internal capacity to be admitted on terms compatible with its own legal order plays just as big of a role, if not bigger, in its participation in other international structures and organisations.

4.2. The OSCE: participation without legal status

It is important to note that the Organization for Security and Co-operation in Europe (OSCE) presents the inverse of the problem encountered at the Council of Europe. Where the Council of Europe is a legally robust organisation that the Union cannot, as a fellow organisation, join, the OSCE is an organisation of practical importance whose own legal status is uncertain. The OSCE has no founding treaty; its constitutive documents, namely the Helsinki Final Act of 1 August 1975 and the Charter of Paris for a New Europe of 21 November 1990, are politically rather than legally binding instruments, and the question of whether the OSCE possesses international legal personality has been the subject of an inconclusive working group within the Organization itself for over two decades.

Where the host organisation has no clear legal personality, the question of the Union's legal status within it becomes, in practical terms, moot. The Union actively participates in OSCE activities through coordinated Member State positions, EU statements delivered by the EU Delegation in Vienna, and, on matters of foreign and security policy, by the High Representative. Sincere cooperation under Article 4(3) TEU covers most of the legal ground. The OSCE thus illustrates that the Union's external presence does not always require a legal status: if the host organisation operates on political rather than legal commitments, the Union's coordinated participation through its Member States and institutions is enough.

4.3. The EU as an observer at the Arctic Council

The Arctic Council, established by the Ottawa Declaration of 1996, restricts member status to the eight Arctic states but provides for observer status open to “non-Arctic states; inter-governmental and inter-parliamentary organizations, global and regional; and non-governmental organizations.” The Union applied for observer status in 2008. At the Kiruna Ministerial Meeting in May 2013, the Council “received the application of the EU for Observer status affirmatively” but deferred a final decision pending resolution of the Union's import ban on commercial seal products, to which Canada objected.³⁴ The dispute with Canada was resolved in 2014, after the WTO Appellate Body found a *de facto* violation of most-favoured-nation treatment in the EU's seal regime, and the Commission and Canada reached a joint statement framework reflected in a 2015 Implementing Regulation.

However, the formal grant of observer status has not followed. At the 2015 Iqaluit Ministerial Meeting, Russia prevented the upgrade. The most credible explanation in the scholarly literature appears to be that this was a response to the Union's restrictive measures prohibiting the export of oil-exploration technologies for use

³³ A comparative illustration of the doctrine of autonomy of EU law operating in the opposite direction is provided by the Union's withdrawal from the Energy Charter Treaty. The Energy Charter Treaty, signed in Lisbon on 17 December 1994 and entered into force on 16 April 1998, established a multilateral framework for energy cooperation, including investor-state arbitration provisions in Article 26. In Case C-741/19, *Republic of Moldova v Komstroy LLC*, EU:C:2021:655 (judgment of 2 September 2021), drawing on Case C-284/16, *Slovak Republic v Achmea BV*, EU:C:2018:158, the Court of Justice held that intra-EU investor-state arbitration under the Energy Charter Treaty was incompatible with the autonomy of EU law and the exclusive jurisdiction of the Court of Justice over questions of Union law. Subsequent attempts to modernise the Energy Charter Treaty failed to satisfy the Union's autonomy concerns, and on 30 May 2024 the Council formally adopted the decision authorising the Union's withdrawal from the Treaty (Council Decision (EU) 2024/1638). The Union's withdrawal took effect on 28 June 2025, one year after the depositary was notified. The Energy Charter Treaty file is the mirror image of the ECHR file: in the ECHR context, the autonomy of EU law has obstructed accession to a treaty that the Union is required to join; in the Energy Charter context, the autonomy of EU law has compelled withdrawal from a treaty that the Union had freely concluded.

³⁴ Arctic Council, Kiruna Declaration on the occasion of the Eighth Ministerial Meeting of the Arctic Council, 15 May 2013.

in the Arctic, adopted under Council Regulation (EU) No 833/2014 in response to Russia's actions in Ukraine.³⁵ Russia's effective absence from Arctic Council activities since 2022 has not, paradoxically, removed the blockage: the Council itself has been operating in a partial format, and decisions on the issue of observer status have been deferred.

The Union has, accordingly, occupied an unnamed chair: it participates in Arctic Council Working Groups, attends meetings, and contributes financially, but without the formal observer status it has sought for over fifteen years. In November 2025, the European Parliament adopted a recommendation calling for renewed efforts to secure full observer status, citing Greenland's chairmanship of the Council for 2025-2027 and the opening of the EU Office in Nuuk in March 2024 as opportunities for institutional consolidation. This situation suggests that even when the host organisation's constituent rules permit observer status for non-state organisations, and even where the Union's competences over the relevant subject matter (environment, fisheries, climate) are legally settled, the seat remains dependent on political factors. Competence is necessary but not sufficient to gain institutional standing.

4.4. Informal frameworks: the G7 and G20

The G7 and G20 represent the inverse of the legal systems presented above: they are forums in which the Union participates fully but in which the question of legal status does not arise, because the forums themselves have no constitutive treaty and no legal personality. The Union has participated in the G7 since 1977, originally as the European Economic Community, in a status that has been described as “non-enumerated”, meaning that the Union is a participant but is not counted in the “G7” numbering, which refers only to the seven member states. At the G20, the Union is a full participant alongside its largest Member States and other major economies.

In informal frameworks, the Union is represented by the President of the European Commission and the President of the European Council. The legal questions that dominate the analysis of formal organisations, namely competence, mixity, and observer rights, do not arise, because the framework itself produces no legally binding decisions. This informality is itself a feature of the arrangement, not a deficiency in it: it allows the Union to participate without negotiating a legal status, and it allows the framework itself to operate without the institutional rigidity that slows down formal organisations. It is interesting to note that the Union's external presence is most legally straightforward where the legal framework is weakest, and most legally constrained where the legal framework is most robust.

5. Conclusions

The Union's external participation across international organisations cannot be reduced to a single doctrine, a single rule, or a single institutional logic. It reflects, instead, dozens of bilateral negotiations between the Union's internal architecture and the host organisations' own constituent designs, most of which were drafted long before the EU had legal personality. The picture that emerges is one of patchwork participation – fragmented, uneven, and shaped as much by the bias for statehood, specific of mid-twentieth-century international institutions, as by the Union's internal structure.

Three observations follow from the analysis conducted in this article.

The first is that the internal attribution of competences between the Union and its Member States, codified in Articles 2 to 6 TFEU and elaborated in a long line of Court of Justice case law from ERTA to Opinion 2/15, provides clear answers to the question of whether the Union may act externally on a given subject matter. It does not, however, provide answers to the question of whether the Union can sit in a particular institutional chair. The latter question is governed not by Union law but by the constituent treaty of the host organisation. Where these two layers align, typically in technical and economic fields where the host treaty has been amended to admit REIOs, as in the WTO and the FAO, full membership is possible. Where they diverge, the Union's external presence depends on the host organisation's willingness to negotiate observer arrangements, on informal accommodation, or, in the case of the Council of Europe, on a separate and exceptionally complex accession process.

³⁵ Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. On the Iqaluit blockage and its connection to the Russian sanctions, see E. Lannon, P. Van Elsuwege, “The EU and its neighbourhood: A patchwork of regional strategies and institutions from the Mediterranean to the Arctic”, *op.cit.*, section 5.

The second observation is institutional. The “enhanced observer” status conferred on the Union by UNGA Resolution 65/276 in 2011 represents the most legally developed observer arrangement the Union has obtained at any universal organisation. It is, in that sense, the institutional model the Union has tried to replicate elsewhere, with little success. Proposals to upgrade Union status at the World Health Organization, at the IMO, and across the wider UN system have not, to date, produced results. The reasons are partly internal to those organisations, reflecting a certain unease about precedent for the admission of other regional blocs, and partly external, reflecting the limits of the Union's own diplomatic capital in the post-Lisbon period. ECHR accession represents, in this sense, the structural anomaly: a treaty-mandated outcome that the Union's own internal constitutional doctrine has prevented for over a decade. The 2023 Revised Draft Accession Agreement and the Court of Justice's 2024 ruling in *KS* and *KD* together suggest that the doctrinal obstacles may be approaching resolution; this will be determined by the Court of Justice itself in Opinion 1/25, the most consequential pending pronouncement on Union external relations since Opinion 2/13.

The third observation is practical. Variable geometry in the Union's external participation is unlikely to facilitate uniformity. The institutional landscape the Union must navigate is too heterogeneous, the interests of host organisations too divergent, and the political costs of constituent-treaty amendment too high for any general settlement to be plausible. What the next decade will, instead, produce is a series of file-specific outcomes: Opinion 1/25 on ECHR accession; the slow consolidation of EU presence in Arctic governance under the Greenlandic chairmanship of the Arctic Council from 2025 to 2027 and the wider geopolitical reconfiguration following Russia's effective withdrawal; and the question of whether the Union can secure enhanced participation rights at the World Health Organization, particularly in the context of pandemic-preparedness instruments now under negotiation. Each of these will be resolved on its own terms, depending on the legal and political peculiarities of the host organisation, rather than by the establishment of any general principle of Union external relations law.

It follows that the Union's seat at the table of international governance is not determined simply by what the Union is, that is, a *sui generis* entity with full legal personality and extensive competences, but rather by what each host organisation can make space for, given its own constituent legal architecture. That architecture, drafted in another era for another set of actors, has endured, and the Union has spent the past half-century working within and around it. The patchwork of seats it now occupies is the cumulative product of that ongoing work, and there appears to be no reason to expect, in the foreseeable future, that the patchwork will yield to a single, unified pattern. However, it must be noted that the patchwork isn't inherently problematic: it is the coherent and expected result of an entity with legal personality, but without statehood, participating in institutions designed for states. Variable geometry, in this sense, is not a deficiency to be remedied but rather a feature to be understood, a feature that the Union and its partners will continue to negotiate as international governance itself continues to evolve.

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- Energy Charter Treaty, Lisbon, 17 December 1994;
- Helsinki Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975;
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THE EXPANDING USE OF DRONES IN GOVERNMENT OPERATIONS

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Abstract

The rapid advancement of unmanned vehicle technology has significantly expanded the use of drones in government agency operations worldwide. This paper examines how public institutions increasingly integrate drones to enhance efficiency, accuracy, and safety across a wide range of functions, including surveillance, border control, disaster response, environmental monitoring, and infrastructure inspection. The study analyzes the operational benefits of drone deployment while addressing key challenges related to regulatory frameworks and data protection. By reviewing recent applications and policy approaches, the paper highlights best practices and identifies emerging trends shaping the future role of drones in public sector operations. The findings suggest that, when supported by clear governance structures and responsible use policies, drones represent a transformative tool for modernizing government agency operations.

Keywords: *drones, legality, international law, data protection, use of force.*

This material represents the personal opinion of the author and does not reflect the institutional point of view of the Romanian Intelligence Service or the 'Mihai Viteazul' National Intelligence Academy.

1. The rise of drone technology and its integration in state operations

Drones have become a staple in how most states and non-state actors are conducting different internal and external operations, meaning that unmanned vehicles can be used with a smaller footprint while maximizing possible gains. According to the company Dedrone¹ between 2023-2025 there had been over 1 million drone violations in the United States of America, with most being disregards for low altitude authorizations while a growing trend was that of being in no-fly zones, especially near power plants.

Other companies have tracked more niche situations such as drug trafficking and contraband, intentional disruptions of important infrastructure (airports) and violence targeted against non-state actors or state agencies². These types of incidents have been qualified, by different researchers³, as hybrid threats and attacks. While a universally legal definition for a hybrid threat has not yet been accepted, the European Union has adopted a common position between the European Parliament and the Council, which proposes defining hybrid threats as interference carried out through manipulative or unwanted actions, using a variety of tools such as the spread of disinformation/malicious information, the creation of strong historical narratives (but incorrect or only partially correct), electoral interference, cyberattacks, economic interference, etc.⁴.

A growing trend in drone incidents has been noticed near key energy infrastructure, mostly near nuclear power plants and military instalments, such cases being largely documented in the United States of America⁵, where drones flown by unidentified persons had caused security risks. Furthermore, some states in the European Union have also been targeted with the same tactics in regards to important civilian infrastructure⁶, but also, there have been sightings near essential military establishments⁷, where non-hobby drones have been used, outlining that these were not simple accidents done by negligence from an unmanned operator.

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¹ Their website is accessible at <https://www.dedrone.com/drone-violations-database>, database was updated in the end of 2025. The company handles anti-drone devices. Accessed at 04.01.2026.

² In this regard we analyzed the tracked from the company D-fendsolutions, accessed at <https://d-fendsolutions.com/drone-incident-tracker/>, on 04.01.2026, the database has registrations between 2021-2025.

³ E. Duns, Drones and Diplomacy: Nordic Divides in Responding to Hybrid Threats, Atlas Institute for International Studies, 26.10.2025, accessed at <https://atlasinstitute.org/drones-and-diplomacy-nordic-divides-in-responding-to-hybrid-threats/>, on 04.01.2026. Michelle Haas, Pieter Balcaen, Tim Haesebrouck, Belgium's Public Confrontation with Hybrid Threats: Lessons from Drone Incursions, Commentary, Egmont - Royal Institute for International Relations, 13.11.2025, accessed on 04.01.2026, at <https://www.egmontinstitute.be/belgiums-public-confrontation-with-hybrid-threats-lessons-from-drone-incursions/>.

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⁵ H. Sokolski, It's past time to start protecting US nuclear power reactors from drones, Bulletin of Atomic Scientists, 03.09.2025.

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Other important incidents have been those in which a state used drones inside another state, such as the Russian Federation drones which have been marked as intrusive on sovereign airspace in Romania, Poland and other Baltic states⁸. While not all drones were destroyed, they do represent a growing threat to national air space.

Furthermore, drones have become a staple in military operations seeing as how they are used more regularly on the battlefield than other conventional weapons. Both Ukraine⁹ and Iran¹⁰ operations have been notable cases of ongoing drone warfare, with the technology being developed in a rapid pace. Future operations in both theaters will likely include autonomous drones controlled by artificial intelligence agents overseen by human operators which could outline a new wave of interpretations of the Geneva Conventions of 1949 and the additional protocols¹¹.

The digitization of operations outlines that state agents must react at the speed of computers, and not just by biological standards. However, the principle of distinction enshrined in the Geneva Conventions requires persons to trigger clauses and cannot be applicable to machines, computers or artificially constructed entities.

This is further emphasized during the meetings of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems, a venue organized by the UN Disarmament Commission, where the first 2026 session¹² further built on the prospect of autonomous platforms to be regulated and that lethal force will be retained as a decision of a human operator and not be delegated to an autonomous system.

2. State operations and AI agents

Agency is the ability to act or to choose what action to take, a characteristic that requires consent or intent, a capacity that can only be found in the notion of legal capacity or legal personality. To offer agency to drones, even those capable of handling complex tasks with the help of AI modules, can infer an anthropomorphism of the technology and may require a new legal regime that is especially applicable to these devices.

While such agents could be classified as high risk in the European Union¹³, the AI Law adopted in the EU has not given express authority towards AI agents and neither did it offer a recognition of agency towards AIs. It's important to note that the EU, at one point, considered to create a new liability regime for robotics and artificial intelligence by establishing new ethical guidelines in which electronic agents could be held accountable alongside the developers, users and manufacturers¹⁴.

However, non-human agents lack express agency and authority and could, at the very most, pertain implied or apparent authority. Consent, intention and agency should not be implied for a drone operated by an AI agent. For example, AI cannot be a legal owner of a song, lyrics or other artistic materials that were generated with the software, yet infringements of copyright laws are considered as a human liability¹⁵.

Despite AI agents having a legal block in deployment, the development has been going on without that many hurdles. As such, the fictive approach to the law-grounding problem¹⁶ allows a different paradigm regarding how AI agents could behave differently from humans. This means that robotics and AI should have laws tailored for them and that existing laws should be adapted to AI, because a general legal regime that could be applicable to any and all types of technological developments cannot fully contain this type of advancement.

⁸ M. Starinac, Alexandra Bostenaru, Russian drone incursions in Poland and Romania, Bloomsbury Intelligence & Security Institute, 18.09.2025.

⁹ Ch. S. Oliviero, P. Halton, The menace of misunderstanding: learning the wrong lessons from Ukraine's drone-saturated battlefields, Modern War Institute at West Point, 11.03.2026.

¹⁰ S. Feldsten, D. Massicot, What we know about drone use in the Iran war, Carnegie Endowment for international peace, 2.03.2026.

¹¹ T. Pultarova, The coming drone-war inflection in Ukraine, IEEE Spectrum, 24.03.2026.

¹² Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems Geneva, 2-6 March and 31 August-4 September 2026, CCW/GGE.1/2026/WP.2, Chair's summary – First 2026 session of the GGE on LAWS.

¹³ According to article 26 of the Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

¹⁴ M. Kritikos, Artificial Intelligence ante portas: Legal & ethical reflections, European Parliament briefing, European Parliamentary Research Service, PE 634.427 – March 2019.

¹⁵ M. P. Goodyear, Who Is Responsible for AI Copyright Infringement?, Issues, Arizona State University, Vol. XLI, no. 1, 2024.

¹⁶ C. O'Keefe, Why give AI agents actual legal duties?, Institute for Law&AI, august 2025.

The United States of America has come a long way from adopting the DOD Directive 3000.09¹⁷ in which the development, research and deployment of autonomous devices had been regulated. Afterwards, lots of the states that are part of the USA have enacted legislation regarding data ownership of AI generated content and introduced the right to compute, a law that specifies that the government cannot take actions that restrict the ability to privately own or make use of computational resources for lawful purposes, unless deemed necessary to fulfill a compelling government interest¹⁸. Other important legal developments include laws that prohibits individuals from using an AI-powered robot to stalk or harass other individuals or that non-human entity including an agent powered by AI cannot use specific licensed and certified medical professionals' titles.

A more recent case is that of Nippon Life Insurance Company vs. OpenAI¹⁹ in which OpenAI (the creator of ChatGPT) had been issued a citation for a case in which the AI generative software issued a legal opinion based on the documents that were uploaded. Based on the information that the GPT analyzed, a lawyer was fired and the claimant filed a motion to reopen a lawsuit. While a definitive decision had yet to come from the court, such a case outlines the importance of establishing a legal regime for responsibility of AI usages. As such, the USA has begun a major overhaul of its legal doctrine to ensure that AI agents do not cause harm to day to day civilian activities.

The People's Republic of China considers that by 2030 the number of AI agents will exceed 90% of adoption rate in terminals²⁰ which will require new forms of legislation in order to ensure public safety in regards to data protection and civil rights.

One of the most known cases of using AI to conduct state operations was represented by the Department of Government Efficiency (known as DOGE), in which the department used AI tools to probe spending and communications within some federal agencies in the USA. The goal of the AI tools was that of identifying ways to cut up to 1 trillion dollars in public finances, yet the efforts of DoGE had not yielded the results it was tasked for, sparking over 770²¹ lawsuits against how the Department handled finances, responsibility of the programme, and the end results (firings, institutional funding, rights infringement and others) of the AI agents used have yet to be outlined as being a pyrrhic victory or a failed experiment.

The International Data Corporation published a survey from the USA that showcases an estimate of 82%²² of governmental agencies are using AI agents to handle day-to-day tasks and the Department of War (former Department of Defense) has signed specific conventions with AI developers for army chat bots and tools for targeting and analysis²³. As such, drones and other unmanned vehicles can gather data and have it analyzed by other computational devices, while the human operator or commander can use the resulting data in order to conduct further state operations.

Yet, the threat of drones does not necessarily come from states as much as it can come from non-state actors who can acquire off-shelf drones or can create their own drone projects from parts bought from online markets²⁴. Furthermore, some non-state actors, such as the Houthis, have obtained military grade drones, that are usually only sold to armies, and have used them against civilian and military vessels in the Red Sea²⁵.

3. The legality of drone operations conducted by state actors

In the case of armed drones, they are not expressly prohibited by international humanitarian law, either treaty or customary law. As such, their use must comply with existing rules laid out for any conventional weapon system or platform. This means that when a state chooses to use a drone it must ensure that attacks target only

¹⁷ Department of Defense, DOD DIRECTIVE 3000.09 AUTONOMY IN WEAPON SYSTEMS, 25.01.2023.

¹⁸ More normative acts can be accessed at the website <https://www.ncsl.org/technology-and-communication/artificial-intelligence-2025-legislation>.

¹⁹ E. K. Kovachevich, Did Chatgpt just practice law?, Airdowerwas.com, 24.03.2026.

²⁰ Liang Ding, China's regulation of artificial intelligence – process and challenges, International Bar Association, 04.12.2025.

²¹ According to the database from Just Security, accesible at <https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/>.

²² The survey can be found at <https://glsolutions.com/regulatory-agency-software-blog/82-of-governments-surveyed-use-ai-agents/>.

²³ US War Department, War Department Launches AI Acceleration Strategy to Secure American Military AI Dominance, Press Release, 12.01.2026. Secretary of War, MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP, Artificial Intelligence Strategy for the Department of War, 09.01.2026.

²⁴ J. Dulligan, L. Freeman, A. Phoenix, B. Davis, The Rising Threat of Non-State Actor Commercial Drone Use: Emerging Capabilities and Threats, CTC Sentinel, martie 2025, articolul 4, pp. 39-44.

²⁵ C. Black, The Houthi model – non-state actors and multi-drone capabilities, Essay, Small Wars Journal, 30.12.20255.

combatants and military objectives, while ensuring that indiscriminate and disproportionate attacks are prohibited. Notwithstanding, all feasible precautions must be taken to avoid or minimize civilian damages.

Seeing as how the UN Disarmament Commission has not yet adopted a legally binding document and that the current technology doesn't surpass the legal regime established by international law, we can conclude that drones are not forbidden in state operations.

Even from a jurisprudence outlook, drones can be used, as long as they are handled with high regards to principles enshrined in international public law. For example, we consider the Corfu Channel Case (1949)²⁶ a relevant ruling for drones, despite the technology not being present at that time, because it establishes legal obligations for state in regards of using different military technologies in such a way as to allow a minimal impact in the lives of civilians. Failure to do so will be considered as a breach of due diligence, similar to how Albania failed to safeguard its territorial waters.

Another key case is that of the Military and paramilitary activities in and against Nicaragua (1986)²⁷ in which we consider that an important principle that is applicable to drones is that of respecting state sovereignty and not conducting operations without explicit consent of the state in which an intervention is to be held.

However, the Russian-Ukrainian war has shown that such international law principles are not easily enforced and the ongoing war cannot be the subject of a formal investigation of the Prosecutor of the International Criminal Court, because acts of aggression conducted by nationals or states that have not ratified the Rome Statute or accepted amendments cannot be subjects of such actions without a referral from the Security Council. The usage of drones as preemptive means to take out targets inside the territory of foreign states can be considered an act of aggression.

If we take into consideration the situation that was conducted in the former state of Yugoslavia, the air sorties conducted by NATO forces, while they did not reach a threshold to be considered war crimes, outlined those indiscriminate attacks are unlawful and can cause irreparable to the environment. As such, the International Criminal Tribunal for the former Yugoslavia held that sufficient use of precautionary measures demonstrate lack of intent or objective purpose to cause harm²⁸.

Another notable case is that of the Second Senate of the Federal Constitutional Court of Germany²⁹, in which two Yemeni citizens filed a complaint regarding the constitutional obligations enshrined for the German armed forces in regards to the Ramstein Air Base. The ruling rejected the complaint and ruled that while Germany did have a general duty to protect fundamental human rights including those of foreigners abroad, the conditions triggering that duty were not met.

The Court noted, however, that it could not prove the US used improper standards when distinguishing between military objectives and civilians. Furthermore, it ruled that for legal obligations to apply, the attack would require a clear nexus to German state authority, respectively a connection found to be lacking in this instance.

One of the first cases that the ICJ will handle, regarding drones, will be the one filed by Mali against Algeria³⁰ in which Mali considers a premeditated attack on its sovereignty after Algeria destroyed a drone that was conducting operations against the armed rebels present in Mali. Algeria countered and stated that the drone violated its airspace while it was targeting a border town held by Tuareg separatists, declared enemies of Mali. Mali, Burkina Faso and Niger recalled their ambassadors from Algeria as a diplomatic protest.

Furthermore, the Prosecutor of the International Criminal Court had investigated the usage of armed force through drones in the ICC-02/17 case regarding the situation in the Islamic Republic of Afghanistan³¹, in which drone strikes against anti-governmental fighters and civilians have been detailed, yet the case was rejected by the Pre-trial Chamber seeing as how Afghanistan had political instability and was not considered cooperative in this regard. The case also required to conduct examinations in states that were not parties to the Rome Statute.

²⁶ The judgment in the ICJ Corfu Channel Case (United Kingdom vs. Albania) , 9 April 1949, accessible at <https://www.icj-cij.org/case/1>.

²⁷ The judgment in the ICJ Nicaragua vs. USA case, 27 June 1986, accessible at <https://www.icj-cij.org/case/70>.

²⁸ R. Alberstadt, Drone under international law, Open Journal of Political Science, Vol. 4, No. 4, October 2014, DOI <http://dx.doi.org/10.4236/ojps.2014.44023>.

²⁹ Judgment of the Second Senate of the German Constitutional Court of 15 July 2025, accessible at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2025/07/rs20250715_2bvr050821en.html?nn=68654.

³⁰ Case 2025/40 filed on 19.09.2025, pending on the ICJ list. It is accessible at <https://www.icj-cij.org/node/205713>.

³¹ The Court document can be accessed at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_07003.PDF.

Other proposed measures include the targeting of narcotics dealers on foreign territory, as it was proposed by the United States of America against Mexican cartels³², but had yet to be taken up, seeing as it requires Mexico to consent to such operations, beforehand. However, drug cartels have been documented using drones against law enforcement agencies in Mexico and as drug transports inside the state and towards outside markets³³. While inside its borders Mexico can use proportionate force, including drones, against cartels, intervening in another state's sovereignty has to be upheld in regards to international public law. A simulation conducted by Win Without War Education Fund concluded that a large offensive against drug cartels will not end the illicit trade and would trigger the groups to adopt Ukrainian style resilience, in which drones could be used as a tool for political violence against the USA³⁴.

However, a more gray action has been taken in regards to illicit narcotics in which boats that left Venezuela and were suspected of harboring drug cartel personnel were hit in international waters by the USA naval force stationed close to its territorial waters. The legal justification at play is the same as the one offered for anti-terrorist operations in the Middle East, respectively the 9/11 Authorization for Use of Military Force, seeing as how the US labels drug cartels as terrorists³⁵. Drones had been used to both conduct attacks and to collect information.

As such, drone operations have been increased and the usage of unmanned vehicles has seen notable evolutions as robots become a staple on the battlefield. The most notable evolution is that in Ukraine in which positions can be conquered exclusively by unmanned solutions³⁶. However, it's important to take into consideration that drones have been assigned a support role and that the human-in-the-loop doctrine has not been changed.

4. Conclusions

The transition from human-piloted drones to AI-driven autonomous agents presents a critical legal paradox. While technology is advancing toward full autonomy, current legal frameworks (including the EU AI Act and US directives) still struggle to define agency. Yet, legal liability remains human-centric (developers/operators) and the international community maintains a human-in-the-loop doctrine for lethal force.

However, there is a growing need for a fiction approach to law, creating specific legal regimes tailored to AI behavior rather than trying to force-fit robotics into existing biological-standard laws. Legal fictions are legal rules, concepts or assumptions premised on deliberately false, or rather counterfactual assertions.

The study concludes that the drone revolution is irreversible. Whether drones remain a tool for modernization or become an instrument of instability depends entirely on governance. The path forward requires the following: clear regulatory frameworks that address data ownership and AI accountability; international cooperation to update the Geneva Conventions for the age of autonomous systems; and proactive defense strategies to safeguard critical infrastructure from hybrid aerial threats.

The integration of unmanned aerial vehicles has moved beyond experimental use to become a cornerstone of modern statecraft. Drones offer a low footprint, high gain advantage, allowing governments to enhance surveillance, infrastructure protection, and disaster response. However, the rise in unauthorized incursions—particularly near nuclear plants and military sites highlights that unmanned vehicles are now both a transformative tool for agencies and a significant hybrid threat that requires sophisticated counter-measures.

As off-the-shelf drones become a solution for non-state and hostile state actors to conduct their daily activities, so must state agencies adopt better drone technology to protect citizens. Also, cybersecurity must become both a pillar in every vehicle, because drones have been integrated in other state operations, from transport to fiscal and customs actions against contraband and tax fraud. Without proper protection offered to critical communications, even civilian drones handled by citizens or public workers can become proper threats to the communities.

³² C. W. Reese, Non-Credible Strategy No More: Droning Drug Dealers to Stop Cartel Violence, *Georgetown Journal of Law & Public Policy*, Vol. 22, pp. 699-743.

³³ A. C. Doctor, S. Cubukcu et al., Mapping Weaponized Drone Attacks Attributed to Mexican Drug Cartels, 2021-2025, NCITE Report, Projects and research, 12.02.2026.

³⁴ H. Mann et al., No Winners Simulating the aftermath of a U.S. Attack on Mexican Cartels, Tabletop exercise, Report, 01.04.2025.

³⁵ J. Dosey, D. Boats, Drone Strikes and the Dangers of Avoiding Mirrors, *Opinio Juris*, 14.12.2025. Also, the designation can be read at <https://www.state.gov/designation-of-international-cartels>.

³⁶ J. Parakilas, Robots Just Captured a Russian Position in Ukraine—but Don't Worry About Real-Life Terminators Just Yet, *RAND Corporation*, Commentary, 20.04.2026.

Future research will address how drones are part of the hybrid threat ecosystem that can be used against citizens and critical state infrastructure by hostile actors.

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THE RIGHT TO DISCONNECT AND THE NECESSITY OF ITS REGULATION

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Abstract

Recently, especially during and after the COVID-19 pandemic, digitalization has brought significant changes to the way employment relationships are carried out, with telework/remote work/online work being increasingly used in both the private and the public sectors.

According to the European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), which took into account the report of Eurofound of 31 July 2019 entitled “The right to switch off”, the Eurofound Working Paper entitled “The right to disconnect in the 27 EU Member States” and the UNI Global Union’s report entitled “The Right to Disconnect: Best Practices”, the ever greater use of digital tools for work purposes has resulted in an “ever-connected”, “always on” or “constantly on-call” culture, which can have detrimental effect on workers’ fundamental rights and fair working conditions, including fair remuneration, the limitation of working time and work-life balance, physical and mental health and safety at work and well-being.

Also, according to the aforementioned resolution, excessive use of technological devices can aggravate phenomena such as isolation, techno-addiction, sleep deprivation, emotional exhaustion, anxiety and burnout.

This article examines the importance and the need to regulate the right to disconnect and provides a detailed analysis of certain provisions of the Proposal for a directive of the European Parliament and of the Council on the right to disconnect.

Keywords: *the right to disconnect, workers, health of workers, digital tools, working time.*

1. Introduction

The present paper analyses several aspects regarding the workers' right to disconnect from digital tools used for professional purposes. It outlines the context underlying the necessity of its regulation at the European Union level and provides a general overview of the directive as the legal instrument of the European Union through which the right to disconnect will be regulated. Furthermore, the study examines the current status of the Proposal for a Directive of the European Parliament and of the Council on the right to disconnect, alongside a detailed analysis of its substantive provisions.

The workers' right to disconnect from digital tools used for professional purposes represents a novel right, which remains, at present, unregulated at the European Union level.

The regulation of the right to disconnect from digital tools used for professional purposes is of paramount importance and, simultaneously, a pressing necessity. This urgency arises from the significant alterations in the execution of employment relationships within both the private and public sectors due to the phenomenon of digitalization in recent years. Consequently, teleworking, remote work, and online work have become increasingly prevalent for the performance of professional activities. This shift has seriously compromised the work-life balance, as digital tools frequently lead employees to perform their duties outside of designated working hours.

The importance and the necessity of regulating the right to disconnect are undeniably substantiated by the studies analysed for this article, specifically the Eurofound Report of July 31, 2019, entitled “The right to switch off”, the Eurofound working document “The right to disconnect in the 27 EU Member States” and the UNI Global Union's Report entitled “The Right to Disconnect: Best Practices”. These are further reinforced by the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL))¹.

Given that the right to disconnect is not yet regulated at the European Union level, existing only in the legislation of certain EU Member States, and that there is a notable absence of comprehensive scholarly works

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¹ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0021>.

on this right beyond brief articles, this study provides original insights and a thorough analysis of the Proposal for a Directive of the European Parliament and of the Council on the right to disconnect.

2. The context underlying the necessity to regulate the workers' right to disconnect at the European Union level

In recent years, particularly during and following the COVID-19 pandemic, digitalization has significantly altered the execution of employment relationships. Teleworking, remote work, and online work have become increasingly prevalent across both the private and public sectors.

Since 2019, the prevalence of online work has doubled within the European Union, by 2024, one in five Europeans (20.3%) worked from home at least part of the time².

While the performance of professional activities via teleworking, remote work or online work offers significant advantages for employees, such as increased flexibility regarding working hours and enhanced time efficiency by eliminating commuting, in many instances, it adversely affects the work-life balance. Using digital tools, employees often remain permanently connected, leading to situations where they are contacted or required to perform tasks outside of their designated working hours.

Data from the 2021 European Working Conditions Telephone Survey indicated that teleworkers frequently performed additional - and unpaid - overtime, primarily due to digital tools making it exceedingly difficult to establish a boundary between professional and personal life³.

An analysis of the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)) reveals that its foundation relied upon, inter alia, the Eurofound Report of 31 July 2019 entitled "The right to switch off", the Eurofound Working Paper entitled "The right to disconnect in the 27 EU Member States" and the UNI Global Union's Report entitled "The Right to Disconnect: Best Practices".

It has been established that the use of digital tools for work purposes has fostered an "ever-connected", "always on" or "constantly on-call" culture. This phenomenon can exert a detrimental impact on the fundamental rights of workers and on fair working conditions, including equitable remuneration, the limitation of working hours, work-life balance, physical and mental health, occupational safety, and overall well-being⁴.

Furthermore, it has been established that "the excessive use of technological devices can exacerbate phenomena such as isolation, technology addiction, sleep deprivation, emotional exhaustion, anxiety and burnout"⁵.

Against this backdrop, there has emerged a pressing need to regulate the workers' right to disconnect, in order to ensure enhanced protection for them.

3. A few general considerations regarding the directive as the European Union legal instrument for regulating the right to disconnect

According to Article 288 third paragraph of the TFEU, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, while leaving the national authorities the choice of form and methods by which that result is attained.

As Member States are the addressees of a directive, they are under obligation to ensure its full transposition within the timeframe established by each specific directive. This entails the obligation to adopt all national provisions within the internal legal order that can achieve the result prescribed by this instrument of secondary law⁶.

² According to the website: <https://www.juridice.ro/793677/dreptul-salariatilor-la-deconectare-in-atentie-ce.html>, last time consulted on 23.03.2026.

³ According to the website: https://eures.europa.eu/remote-workers-and-their-right-disconnect-regulating-telework-eu-2024-05-17_ro, last time consulted on 23.03.2026.

⁴ According to Recital C of the Resolution.

⁵ Recital E of the Resolution.

⁶ Stéphane Leclerc, *Droit de l'Union européenne*, Editeur Gualino, Paris, 2019, p. 37.

Consequently, a directive is considered an incomplete act, necessitating transposition into national legislation by Member States to be effectively implemented⁷ and it does not enjoy direct applicability and, as a corollary, lacks direct effect⁸.

In legal doctrine, the directive has been assigned various designations and definitions, underscoring the significant scholarly attention afforded to this European Union legal instrument. Accordingly, it is conceptualized as “the Union’s indirect law”⁹, characterized as “the most mysterious”¹⁰ of the EU’s legal tools. It is further regarded as “an instrument of harmonization, namely, of cooperation and the approximation of national legislations”¹¹, which seeks to “reconcile the pursuit of a common Union law with the preservation of national specificities”¹². Furthermore, “as a source of law, it represents a compromise between the necessity of legislating at the Union level and state sovereignty”¹³. Concurrently, it is argued that the directive’s purpose lies in reconciling the dual objectives of ensuring the requisite uniformity of the EU law while respecting the diverse national traditions and structures of the EU Member States¹⁴.

The role of the directives, as conceived within the European normative system, is to align the standards and objectives assumed by the EU Member States, while leaving the choice of form and methods for their achievement to the discretion of the national authorities¹⁵.

It is observed that Article 288 TFEU does not expressly mention the “transposition” of the directive; however, other provisions of the Treaty explicitly refer to this process. For instance, the second sentence of Article 153(3) TFEU addresses the deadline by which a directive or a decision must be transposed or implemented. Furthermore, Article 260(3) TFEU concerns the failure of a Member State to fulfil its obligation to notify the measures taken to transpose a directive adopted under a legislative procedure¹⁶.

The transposition of a directive represents the process by which the addressee EU Member State proceeds with the adoption of the measures necessary for its practical implementation. Transposing a directive into domestic law entails its execution through internal measures, a process analogous to the implementation of national framework legislation through subordinate normative acts¹⁷.

The concept of “transposition” must not be conflated with that of “implementation”, the latter referring to instances where a regulation, directive or decision necessitates supplementary national measures to facilitate its effective application (measures which do not fall under the strict definition of “transposition”), such as, the provision of sanctions, the establishment of supervisory or assisting bodies to oversee the application of the EU norms, the creation of the requisite infrastructure or the allocation of budgetary resources¹⁸.

The term “transposition of the directives” must likewise not be confused with the concept of “enforcement”, which entails the exercise of control and the application of sanctions arising from the breach of norms adopted at the national level, thereby ensuring substantive compliance with the requirements of the directive¹⁹.

A correct transposition is of paramount importance for ensuring that individuals are aware of their rights, particularly in instances where the beneficiaries of the rights conferred by the directive are nationals of other EU Member States²⁰.

⁷ According to Mihaela Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, ediția a II-a, revăzută și adăugită, Editura Universul Juridic, București, 2015, p. 92.

⁸ Augustin Fuerea, *Dreptul Uniunii Europene - principii, acțiuni, libertăți*, Editura Universul Juridic, București, 2016, p. 48.

⁹ Robert Schütze, *Dreptul constituțional al Uniunii Europene*, Editura Universitară, București, 2012, p. 320.

¹⁰ Idem.

¹¹ Gyula Fábián, *Drept instituțional al Uniunii Europene*, ediția a 3-a, Editura Hamangiu, București, 2023, p. 78.

¹² N. de Sadeleer, I. Hachez, *Hiérarchie et typologie des actes juridiques de l'Union Européenne*, în N. de Sadeleer, H. Dumont, P. Jadoul, S. Van Drooghenbroeck (coord.), *Les innovations du Traité de Lisbonne, Incidences pour le praticien*, Ed. Bruylant, Bruxelles, 2011, p. 63, apud Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene - o nouă tipologie juridică*, Editura Hamangiu, București, 2016, p. 107.

¹³ Gyula Fábián, op. cit., p. 78.

¹⁴ Laura Poțincu, Cristian-Romeo Poțincu, *Dreptul Uniunii Europene, evoluție a dreptului comunitar. Interferențe juridice și economice în comerțul din România, stat membru al Uniunii Europene*, Editura C.H. Beck, București, 2020, p. 286.

¹⁵ According to Andrei-Răzvan Lupu, *Constituția și dreptul Uniunii Europene. Norme, doctrină, jurisprudență*, Editura C.H. Beck, București, 2022, p. 95.

¹⁶ According to Daniel-Mihai Șandru, Constantin Mihai Banu, Dragoș Alin Călin (coordonatori), *Directiva - act de dreptul Uniunii Europene - și dreptul român*, Editura Universitară, București, 2016, pp. 20-21.

¹⁷ Mihaela Augustina Dumitrașcu, op. cit., p. 212.

¹⁸ According to Mihaela Augustina Niță, *Dreptul Uniunii Europene I. Curs universitar*, ediția a III-a, revăzută și adăugită, Editura Universul Juridic, București, 2025, p. 341.

¹⁹ Idem.

²⁰ Paul Craig, Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, seventh edition, Oxford University Press, Oxford, 2020, p. 1158.

According to Article 45 of Law no. 24/2000²¹ on the rules of legislative technique for the drafting of normative acts, republished, with subsequent amendments and completions, any normative act transposing a European Union directive must include, following its operative part, a mention containing the identification elements of the incorporated directive, according to the following model: "The present... (the type of normative act is specified) transposes the Directive no. .../... on ..., published in the Official Journal of the European Union no. .../...". In cases of partial transposition, this mention must specify in detail the particular texts (sections, articles or paragraphs, as applicable) that have been transposed.

4. The status of the Proposal for a directive of the European Parliament and of the Council on the right to disconnect

The workers' right to disconnect falls in the scope of social policy, a field in which the European Union exercises shared competence with the EU Member States, pursuant to Article 4(2)(b) TFEU.

Furthermore, it should be noted that, under Article 153(1)(a) and (b) TFEU, the Union shall support and complement the activities of the Member States in the following areas: improvement in particular of the working environment to protect workers' health and safety, and working conditions.

It is observed that, at present, there is no dedicated European Union legal act directly regulating the workers' right to disconnect; however, significant institutional momentum has developed in this regard. Notably, through the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), the Parliament called upon the Commission to include this right into its new occupational safety and health strategy. Furthermore, the Parliament urged the Commission to explicitly provide for new psychosocial measures within the framework of Occupational Safety and Health and to present a formal legislative proposal on the right to disconnect, in accordance with the recommendations set out in the Annex to the Resolution²².

Furthermore, according to the Resolution, "the right to disconnect is a fundamental right which forms an inseparable part of the new working patterns in the new digital era"²³ and "should be seen as an important social policy instrument at Union level to ensure the protection of the rights of all workers"²⁴.

According to Article 154(2) TFEU, "before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action."

The first phase of the consultations with the social partners took place between 30 April and 25 June 2024²⁵. Subsequently, on 25 July 2025, the second phase was launched, with the social partners invited to submit their responses by 6 October 2025²⁶.

Consequently, as of the current date, there is no formal Commission proposal for a directive submitted to the European Parliament and the Council. However, upon its finalization, the provisions of Article 294 TFEU concerning the ordinary legislative procedure shall apply.

Nevertheless, despite the current absence of specific European Union legislation governing the workers' right to disconnect, it is observed that this right has already been codified within the national legal frameworks of several Member States. Notable examples include Belgium, France, Croatia, Greece, Portugal, and Spain²⁷.

Regarding Romanian labour legislation, it does not explicitly regulate the employees' right to disconnect; however, it contains clear provisions concerning the duration of working time, overtime and rest periods. These provisions represent the transposition of several European Union directives into the domestic legal framework²⁸.

²¹ Republished in the Official Journal no. 260 of 21 April 2010.

²² According to recitals 25 and 26 of the Resolution.

²³ Recital H of the Resolution.

²⁴ *Idem*.

²⁵ According to the website: https://employment-social-affairs.ec.europa.eu/document/download/cca467bb-f77e-4dac-b3aa-60b205be7ecc_en?filename=C_2025_7020_1_EN_ACT_part1_v4.pdf, last time consulted on 23.03.2026.

²⁶ According to the website: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1907, last time consulted on 23.03.2026.

²⁷ According to the website: https://osha.europa.eu/sites/default/files/documents/Regulating_telework_post-COVID-19_Europe_en.pdf, last time consulted on 23.03.2026.

²⁸ For example, the Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, published in the Official Journal L 299, 18.11.2003.

5. Analysis of the substantive provisions of the Proposal for a directive of the European Parliament and of the Council on the right to disconnect

The Proposal for a directive of the European Parliament and of the Council on the right to disconnect, which constitutes the Annex to the Resolution, is comprised of a preamble containing 33 recitals and a total of 14 articles.

Regarding the subject matter of the Directive, it is observed that, according to Article 1(1) of the proposal, the directive lays down minimum requirements to enable workers who use digital tools, including ICT, for work purposes, to exercise their right to disconnect and, at the same time, to ensure that employers respect workers' right to disconnect.

The substantive scope of the Directive pertains to all sectors, both public and private, and its personal scope encompasses all workers, independent of their status and their working arrangements.

Regarding the concept of "worker", the CJEU has clarified that it cannot be interpreted differently according to national legal systems, as it possesses an autonomous meaning specific to Union law (Union syndicale Solidaires Isère, C-428/09, EU:C:2010:612, paragraph 28)²⁹. Furthermore, it "must be defined in accordance with objective criteria which distinguish the employment relationship, having regard to the rights and duties of the persons concerned"³⁰. In addition, the CJEU has established that a "worker" must be considered "any person who pursues real and effective activities, to the exclusion of activities which are on such a small scale as to be regarded as purely marginal and ancillary"³¹, and the essential feature of an employment relationship is that "for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration"³².

Regarding the personal scope of the Directive, we support the *de lege ferenda* proposal formulated in legal doctrine concerning "the inclusion within the Directive's protective scope of those socio-professional categories engaged in independent activities, such as doctors, lawyers, engineers etc."³³.

Furthermore, it is noted that, pursuant to Article 1(2), the Directive particularises and complements four other directives, namely Directives 89/391/EEC, 2003/88/EC, (EU) 2019/1152 and (EU) 2019/1158, without prejudice to the requirements laid down in those Directives.

Article 2 sets out the definitions for two key terms: "disconnect" and „working time”.

It is observed that, although the Directive addresses the "right to disconnect"³⁴, it does not provide a formal definition of this right as such, but rather defines the expression "to disconnect", which signifies "not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time"³⁵.

In this context, we consider that, for reasons of terminological precision, the designation of the new right intended to be regulated should be "the worker's right to disconnect from digital tools used for professional purposes", as, in our view, the abbreviated designation, "the right to disconnect", could give rise to the perception of a right to leisure (even though disconnection from digital tools also entails such a leisure-related component).

Additionally, we maintain that it would be beneficial to define the expressions "direct involvement" and "indirect involvement" in work-related activities or communications via digital tools outside of working hours.

Regarding the definition of "working time", it is observed that a cross-reference is made to "working time as defined in point (1) of Article 2 of Directive 2003/88/EC".³⁶

According to point (1) of Article 2 of Directive 2003/88/EC, working time is defined „any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice”.

²⁹ According Judgment of the Court (First Chamber), 26 martie 2015, Gérard Fenoll c./ Centre d'aide par le travail „La Jouvène”, Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon, C-316/13, EU:C:2015:200, par. 25.

³⁰ Ibidem, par. 27.

³¹ Ibidem.

³² Ibidem.

³³ Claudia-Ana Moarcăș, Dreptul la deconectare, în Curierul Judiciar nr. 6/2021, p. 322.

³⁴ We note that, at Recital A of the Resolution, it is used the concept in extenso, namely "the worker's right to disconnect from digital tools, including information and communication technology (ICT), for work purposes".

³⁵ Article 2(1) of the Proposal for the directive.

³⁶ Article 2(2) of the Proposal for the directive.

The CJEU has ruled that, in circumstances where workers do not have a fixed or habitual place of work, the travel time spent by such workers on daily travel between their homes and the premises of the first and last customers designated by their employer constitutes “working time” within the meaning of Article 2(1) of the Directive³⁷.

Articles 3 to 7 set out several obligations for Member States, requiring them to ensure, inter alia, that:

- “employers take the necessary measures to provide workers with the means to exercise their right to disconnect”³⁸, „including by providing them with platforms for disconnecting from digital tools used in the work process”³⁹;
- employers set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured, in accordance with workers’ right to privacy and to the protection of their personal data and workers shall have the possibility to request and obtain the record of their working times⁴⁰;
- “employers implement the right to disconnect in a fair, lawful and transparent manner”⁴¹;
- detailed arrangements are established to enable workers to exercise their right to disconnect, for which purpose they must provide for at least the following working conditions⁴²:
 - o - “the practical arrangements for switching off digital tools for work purposes, including any work-related monitoring tools”⁴³;
 - o - “the system for measuring working time”⁴⁴;
 - o - “health and safety assessments, including psychosocial risk assessments, with regard to the right to disconnect”⁴⁵;
 - o - “the criteria for any derogation by employers from their requirement to implement a worker’s right to disconnect”⁴⁶.
- employers shall be prohibited from discriminating against, treating less favourably, dismissing or taking other adverse measures against workers on the ground that they have exercised or sought to exercise their right to disconnect⁴⁷;
- workers whose right to disconnect has been infringed shall have access to swift, effective and impartial dispute resolution mechanisms and, concurrently, shall have the right of redress in the case of infringement of their rights arising from this Directive⁴⁸;
- employers shall provide each worker in writing with sufficient, clear and adequate information regarding their right to disconnect, including a statement setting out the terms of any applicable agreements, whether collective or otherwise⁴⁹.

Regarding the provisions of Article 4(1), first subparagraph, first sentence (“Member States shall ensure (...) that employers implement that right in a fair and transparent manner”), we consider that the text warrants revision and redrafting, as it constitutes a near-identical reiteration of the provisions set forth in Article 3(3) - “Member States shall ensure that employers implement the right to disconnect in a fair, lawful and transparent manner”.

An analysis of the provisions set out in Article 4(1), first subparagraph, second sentence, points (d) and (e), and the second subparagraph of the draft directive reveals that derogations from the employers' obligation to implement the workers' right to disconnect are permitted only if the following conditions are met:

³⁷ Hotărârea Curții (Camera a treia) din 10 septembrie 2015, Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) împotriva Tyco Integrated Security SL și Tyco Integrated Fire & Security Corporation Servicios SA, Cauza C-266/14, pct. 50, apud Nicolae Voiculescu, Maria-Beatrice Berna, *Tratat de drept social internațional și european*, Editura Universul Juridic, București, 2019, pp. 318-319.

³⁸ Article 3(1) of the Proposal for the directive.

³⁹ Claudia-Ana Moarcăș, *op. cit.*, p. 321.

⁴⁰ According to Article 3(2) of the Proposal for the directive.

⁴¹ Article 3(3) of the Proposal for the directive.

⁴² According to Article 4(1) of the Proposal for the directive.

⁴³ Article 4(1)(a) of the Proposal for the directive.

⁴⁴ Article 4(1)(b) of the Proposal for the directive.

⁴⁵ Article 4(1)(c) of the Proposal for the directive.

⁴⁶ Article 4(1)(d) of the Proposal for the directive.

⁴⁷ According to Article 5(1) of the Proposal for the directive.

⁴⁸ According to Article 6(1) of the Proposal for the directive.

⁴⁹ According to Article 7 of the Proposal for the directive.

- allowing compensation for work performed outside working time⁵⁰;
- the derogation must be granted “only in exceptional circumstances, such as cases of force majeure or other emergencies”⁵¹, “with the national courts bearing the obligation to verify, in accordance with national legislation, what such exceptional circumstances might entail”⁵².
- “the employer shall provide each worker concerned with reasons in writing, substantiating the need for the derogation on every occasion on which the derogation is invoked”⁵³.

A significant aspect warranting further clarification is found in Article 9(2) of the draft Directive, pursuant to which the Directive “shall not affect Member States’ prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers”, which translates that EU Member States may establish more favourable provisions by leveraging these provisions.

Regarding transposition, According to Article 11(1) of the draft Directive, Member States are under obligation to transpose the Directive within a maximum of two years from the date of its entry into force.

It should be noted that the transposition of the Directive into Romanian legislation will primarily necessitate the amendment and completion of Law no. 53/2003 – the Labour Code, republished, as subsequently amended and supplemented, which contains the general regulations applicable to employment relationships. Furthermore, legislative interventions will also be required regarding Law no. 81/2018 on the regulation of teleworking activities, as subsequently amended and supplemented.

Moreover, given that the directive on the right to disconnect, according to the draft, elaborates upon and supplements Directives 89/391/EEC, 2003/88/EC, (EU) 2019/1152, and (EU) 2019/1158, it will also be necessary to analyse the national normative acts through which these directives were transposed. This analysis is required to determine whether further amendments and/or completions of said acts are warranted.

6. Conclusions

The necessity of regulating, at the European Union level, the workers' right to disconnect from digital tools, including Information and Communication Technologies (ICT) used for professional purposes, is substantiated by numerous specialized studies. These studies highlight the adverse consequences of the excessive use of technological devices for work-related purposes, with such repercussions including sleep deprivation, emotional exhaustion, anxiety, and extreme fatigue (burnout).

In this context, we maintain that the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)) represents a significant milestone toward the regulation of this nascent workers' right viewed as “a fundamental right which forms an inseparable part of the new working patterns in the new digital era”⁵⁴.

Although a formal Commission proposal for a directive has yet to be submitted to the European Parliament and the Council, it is hoped that such an instrument will be finalized and adopted in the near future (according to the ordinary legislative procedure set out in Article 294 TFEU). This would ensure that workers benefit from enhanced protection of their fundamental rights.

Regarding the substance of the Proposal for a Directive of the European Parliament and of the Council on the right to disconnect, which constitutes the Annex to the Resolution, it is observed that clear obligations are imposed upon Member States to ensure that the workers' right to disconnect is effectively guaranteed.

Although specific European Union legislation governing the right to disconnect is currently absent, this right has been codified within the national legal frameworks of several EU Member States (e.g., Belgium, France, Croatia, Greece, Portugal and Spain).

In Romania, the employees' right to disconnect remains explicitly unregulated; nevertheless, national labour legislation sets forth clear provisions concerning the duration of working time, overtime and rest periods.

⁵⁰ According to Article 4(1)(e) of the Proposal for the directive.

⁵¹ Article 4(1) the second subparagraph of the Proposal for the directive.

⁵² Claudia-Ana Moarcăș, *op. cit.*, p. 321.

⁵³ Article 4(1) the second subparagraph of the Proposal for the directive.

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LEGAL PROTECTION OF THE ENVIRONMENT IN THE CONTEXT OF THE GLOBAL ECOLOGICAL CRISIS: COMPLIANCE MECHANISMS, INTERNATIONAL LIABILITY AND REFORMATORY TRENDS IN CONTEMPORARY LAW

Ciprian Gabriel UNGUREANU*

Abstract

The global ecological crisis has driven a reorientation of contemporary legal systems, placing environmental law at the center of the international normative architecture. This article offers a critical analysis of compliance mechanisms, international liability regimes and reformatory trends that shape the contemporary landscape of environmental law, examining along three dimensions the relationship between normative ambition and legal implementation capacity in the context of the ecological emergency facing the international community. The first dimension examines the architecture of international environmental legal instruments, with emphasis on the structural tension between the voluntary nature of state commitments and the need for efficient coercive mechanisms, drawing on an analysis of the international climate regime established by the Paris Agreement and its functional deficits in relation to its stated objectives. The second-dimension concerns mechanisms of international liability for transboundary ecological damage, tracing the evolution of the principles of state responsibility from the Trail Smelter case to recent judgments of the International Court of Justice and regional human rights courts, with particular reference to the jurisprudence on the no-harm principle. The third-dimension addresses emerging reformatory trends, with focus on three phenomena of utmost relevance for the future of environmental law: the transformation of strategic climate litigation into an instrument for compensating normative deficits, the emergence of the concept of ecocide in international legal discourse, and the prospects of the rights-of-nature movement. The research demonstrates that the effectiveness of environmental law is conditioned not only by the quality of normative instruments, but also by the political will of state actors to transcend short-term national interests in favor of the global ecological common good. The conclusions advocate a structural reform of the international legal architecture of the environment, capable of establishing compulsory compliance mechanisms, effective liability and intergenerational ecological solidarity.

Keywords: environmental law; international liability; climate litigation; ecocide; rights of nature

1. Introduction

At the outset of the third decade of the twenty-first century, environmental law faces challenges of a complexity unprecedented in its normative history. Although its genesis and consolidation as an autonomous legal branch represented a remarkable achievement of international cooperation over the past five decades, its capacity to respond effectively to the imperatives of the global ecological crisis remains uncertain. The climate crisis, the accelerating loss of biodiversity, the degradation of marine and continental ecosystems, desertification, and hydrological scarcity together compose an ecological picture whose normative remedy requires not only the refinement of existing legal technique, but also a structural reconfiguration of the international architecture of environmental governance (Sands et al., 2018). International environmental law, crystallized primarily in the decades following the 1972 Stockholm Conference, is grounded in a model of voluntary cooperation among sovereign states, in which legal commitments are assumed by consent and implemented through compliance mechanisms whose coercive force is often insufficient in relation to the magnitude of the ecological problems addressed. This structural tension between normative ambitions and the realities of implementation constitutes the central theme of the present analytical undertaking¹. Understanding this tension cannot be separated from an analysis of the evolution of international environmental regimes, relevant jurisprudence, and the normative innovations that are redefining the disciplinary horizon of environmental law.

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¹ Bodansky, D., Brunnée, J., & Rajamani, L., International climate change law, Oxford University Press, 2017.

The timeliness of this topic is confirmed by three convergent trends in the contemporary legal landscape. First, the exponential growth of strategic climate litigation — from a few dozen cases globally in 2017 to more than 2,500 in 2023 ² — signals that courts are becoming relevant normative actors in the field of environmental protection, compensating through judicial jurisdiction for deficits in legislative and executive action. Second, the debate on ecocide and the recognition of the rights of nature reflects a profound philosophical and juridical paradigm shift, challenging the traditional anthropocentric vision of law and proposing ecocentric alternatives with major institutional implications. Third, the gap between the climate commitments assumed under the Paris Agreement and the actual trajectories of global emissions - a gap that, on the basis of current nationally determined contributions, would lead to a rise in average global temperature well in excess of the Agreement's objectives ³ - highlights the functional limits of existing legal instruments and the urgency of reforming the international normative architecture.

This article is structured in three chapters, which aim to map the contemporary landscape of environmental law. The first chapter examines the normative architecture of international environmental regimes, with emphasis on their functional deficits and structural contradictions. The second chapter analyses the regime of international liability for ecological damage, highlighting both jurisprudential progress and persistent normative gaps. The third chapter focuses on emerging reformatory trends - strategic climate litigation, ecocide, and the rights of nature - as innovative normative instruments for compensating the deficits of classical environmental law. The undertaking draws on the analysis of specialized international legal doctrine, relevant jurisprudence of international and national courts, and multilateral environmental treaties, seeking to contribute to the academic debate on the reform of international environmental law in the context of the contemporary ecological emergency. The methodology adopted combines doctrinal-legal analysis with a jurisprudential approach and a political-legal perspective, aiming to transcend monodisciplinary viewpoints and to offer a systemic vision of the functioning and reform of environmental law. This pluridisciplinary approach is not only legitimate but also necessary for a legal field situated at the intersection of ecological science, international political economy, and the philosophy of law - a field that cannot be understood in depth without integrating the complementary perspectives these disciplines offer ⁴. Accordingly, the research seeks not only to describe the current state of environmental law, but also to critically assess its directions of development and to formulate normative guidelines for the reform that is necessary in the face of the ecological challenges of the Anthropocene.

2. The Normative Architecture of International Environmental Regimes: Foundations, Instruments, and Functional Deficits

International environmental regimes represent the institutionalized form of state cooperation in the face of ecological threats that transcend national boundaries. Built upon the foundation of sovereign consensus and the principle of reciprocity, these regimes reflect both the power of multilateral cooperation and the intrinsic limits of an international legal system lacking a center of coercive authority. Analysis of the normative architecture of environmental regimes reveals a legal landscape characterized by instrumental proliferation, institutional fragmentation, and asymmetry between normative ambition and implementation capacity ⁵. Multilateral environmental conventions constitute the backbone of international environmental law, currently numbering more than 1,300 instruments of varying degrees of direct relevance to global ecological protection. From the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol, to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) ⁶ and the 2015 Paris Agreement, these instruments illustrate the broad range of normative solutions adopted by the international community to address ecosystem degradation ⁷. The Montreal Protocol remains, to this day, the most frequently cited example of successful international environmental cooperation, owing to its balanced combination of differentiated

² UNEP, Global climate litigation report: 2023 status review, United Nations Environment Programme, 2023.

³ IPCC, Climate change 2021: The physical science basis – Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, 2021.

⁴ Kiss, A., & Shelton, D., Guide to international environmental law, Martinus Nijhoff Publishers, 2007.

⁵ *Ibidem*.

⁶ UNFCCC, Paris Agreement, United Nations Framework Convention on Climate Change, 2015. https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

⁷ Sands, P., Peel, J., Fabra, A., & MacKenzie, R., Principles of international environmental law, 4th ed., Cambridge University Press, 2018.

commitments, a facilitative compliance mechanism, and a multilateral funding scheme, having proved its effectiveness through the significant reduction of emissions of ozone-depleting substances.

The 2015 Paris Agreement currently constitutes the central legal instrument of the international climate regime and, at the same time, the most illustrative case study for the paradoxes of international environmental law. By adopting a model of nationally determined contributions (NDCs), the Agreement brought together 196 states, transcending the limits of the Kyoto model based on differentiated and legally binding obligations exclusively for Annex I states⁸. The Agreement does not impose a minimum level of commitments and provides no sanctions for the non-fulfilment of national contributions, instead relying on a non-punitive mechanism for facilitating implementation and promoting compliance⁹. Assessment of the legal effects of the Paris Agreement reveals a major structural deficit: the Global Stocktake mechanism, although designed as an instrument of progressive accountability, functions exclusively through normative pressure and transparency, without compulsory remediation mechanisms for the identified shortfalls.

The 2021 IPCC report demonstrated that emission trajectories projected on the basis of communicated national contributions lead to a rise in global temperature well in excess of the Agreement's objectives, with severe ecological, economic, and social consequences for the most vulnerable populations¹⁰. The 2023 UNEP analysis showed that, even with the full implementation of current climate commitments, the gap relative to the objectives of the Paris Agreement remains dramatic¹¹. This quantitative discrepancy reflects a political constraint: sovereign states do not accept, at the current stage of international law, relinquishing decision-making autonomy in areas with major economic impact.

The institutional fragmentation of international environmental law constitutes another source of systemic dysfunction. The absence of a central international organization with a universal mandate and regulatory power in this field generates overlaps, regulatory gaps, and normative incoherences among different sectoral regimes¹². Conflicting interactions between the international trade regime and environmental norms, tensions between international investment law and national environmental regulations, and competition among state obligations arising from different multilateral environmental conventions all illustrate the costs of normative fragmentation. A structural reform of the institutional architecture of international environmental law remains a first-order doctrinal and political necessity, the urgency of which cannot be underestimated. At the regional level, the European Union has constructed the most coherent and advanced environmental law system, articulated on the legal bases of Articles 191–193 of the Treaty on the Functioning of the European Union and sustained by a comprehensive legislative body, effective compliance mechanisms, and the jurisdiction of the Court of Justice of the European Union¹³. The European Green Deal and its derivative instruments - the European Climate Law, which legally enshrines the objective of climate neutrality by 2050, the Fit for 55 package, and the Carbon Border Adjustment Mechanism - constitute the most ambitious regional ecological transformation program ever adopted at the global level¹⁴. The European experience demonstrates that integrating environmental law into the constitutional architecture of a supranational system, with effective compliance instruments and genuine judicial oversight, is not only possible but capable of producing concrete sectoral transformations, visible in the energy transition and climate policies of member states.

However, the European experience, however valuable as a regional reference model, cannot simply be transposed to the international level in the absence of the necessary institutional structures and political solidarity. On the other hand, the principle of common but differentiated responsibilities - enshrined in the 1992 Rio Declaration and reaffirmed in the Paris Agreement - generates persistent tensions in multilateral environmental negotiations: developing states often invoke the principle to justify less ambitious commitments, while developed states tend to minimize differentiation in favor of a regime of universal obligations¹⁵.

⁸ Bodansky et al., *op.cit.*

⁹ UNFCCC, *op.cit.*

¹⁰ IPCC, *op.cit.*

¹¹ UNEP, *op.cit.*

¹² Birnie, P., Boyle, A., & Redgwell, C., *International law and the environment*, 3rd ed., Oxford University Press, 2009.

¹³ Kramer, L., *EU environmental law*, 8th ed., Sweet & Maxwell, 2016.

¹⁴ European Commission, *European Green Deal: Striving to be the first climate-neutral continent*, Publications Office of the European Union, 2021. https://ec.europa.eu/clima/eu-action/european-green-deal_en

¹⁵ Rajamani, L., Jeffery, L., Höhne, N., Land, T., Matthew, R., Nabel, J., & Schaeffer, M., *National "fair shares" in reducing greenhouse gas emissions within the principled framework of international environmental law*, *Climate Policy* 21(8), 983–1004, 2021. <https://doi.org/10.1080/14693062.2021.1970504>

Overcoming this tension is one of the necessary conditions for an effective reform of the international normative architecture of the environment - a condition without whose fulfilment no international environmental legal instrument can claim to adequately respond to the imperatives of the global ecological crisis.

3. International Liability for Ecological Damage: Jurisprudential Evolution, Guiding Principles, and Normative Gaps

International liability for ecological damage is one of the most complex and contested areas of international environmental law, situated at the intersection of several legal regimes: the law of state responsibility, environmental law, the law of the sea, and human rights law. Its jurisprudential evolution - from the classical precedents of general international law to recent judgments of international and regional courts - reveals a field in continuous normative configuration, marked by doctrinal uncertainties and significant operational gaps ¹⁶.

The jurisprudential foundation of liability for transboundary ecological damage is represented by the Trail Smelter case ¹⁷, in which an international tribunal established the principle that no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein ¹⁸. This decision established the coordinates of the no-harm obligation, a principle subsequently reaffirmed in Principle 21 of the Stockholm Declaration, in Principle 2 of the Rio Declaration, and in the subsequent jurisprudence of international courts. The Trail Smelter decision remains, more than eight decades after it was handed down, an indispensable reference point in international environmental law.

The International Court of Justice has contributed substantially to consolidating the regime of liability for ecological damage through several landmark judgments. In the Corfu Channel case ¹⁹, the Court enshrined the principle that every state has an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states - a principle with direct applicability to transboundary environmental damage ²⁰. Subsequently, in Pulp Mills on the River Uruguay ²¹, the International Court of Justice significantly developed the procedural obligations of ecological due diligence, ruling that states have an obligation to conduct environmental impact assessments for activities with potentially significant harmful effects on the territory of other states, prior to the authorization of those activities ²². Through this judgment, environmental impact assessment acquired the status of a customary norm of international law, with binding force independent of the specific conventions that enshrine it.

The international liability regime for ecological damage nonetheless presents structural normative gaps that limit its effectiveness. The first concerns the classical distinction in international law between responsibility for internationally wrongful acts - based on the breach of an international obligation - and liability for the injurious consequences of acts not prohibited by international law, known as *sine delicto* liability. The codification of this type of liability has not led to the adoption of legally binding instruments, remaining at the stage of soft law acts with limited normative force ²³. This gap is all the more acute given that activities with the greatest potential for global ecological degradation are generally permitted by international law in the absence of specific conventional prohibitions. The second major gap concerns the diffuse and cumulative character of the most serious forms of contemporary ecological degradation. Climate change, biodiversity loss, or plastic pollution of the oceans are not caused by the activities of a single state or operator, but represent the cumulative effect of millions of individual sources distributed across the entire planet. Legal imputability in such situations raises difficult questions of causation that the classical instruments of international liability law cannot yet resolve ²⁴. Human rights law offers a complementary and increasingly relevant perspective for grounding liability in cases of ecological damage, drawing on the links between environmental degradation and established individual rights.

¹⁶ Sands et al., *op. cit.*

¹⁷ Trail Smelter Arbitration (United States v. Canada), Reports of International Arbitral Awards 3, 1905–1982, United Nations, 1941.

¹⁸ *Ibidem*.

¹⁹ Corfu Channel Case (United Kingdom v. Albania), ICJ Reports 4, 1949.

²⁰ *Ibidem*.

²¹ Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Reports 14, 2010.

²² *Ibidem*.

²³ Birnie et al., *op. cit.*

²⁴ Rajamani et al., *op. cit.*

The UN Human Rights Committee opened a significant avenue in *Ioane Teitiota v. New Zealand* (2020)²⁵, ruling that the return of a citizen of Kiribati could, in certain circumstances, constitute a violation of the right to life guaranteed by the International Covenant on Civil and Political Rights, opening the way for non-refoulement obligations in the climate context²⁶. The European Court of Human Rights consolidated this trend through its judgment in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024)²⁷, in which the Grand Chamber ruled that states have positive obligations to adopt and implement effective policies to combat climate change, derived from the guarantees of Article 8 of the Convention concerning the right to respect for private and family life²⁸. Although the Court dismissed some heads of claim on admissibility grounds, the judgment marks a significant transformation in the typology of international environmental obligations. This judgment shifts liability for ecological degradation from the register of environmental law to that of human rights law, configuring new pathways for the legal accountability of states and opening perspectives for similar litigation in other European jurisdictions.

Recent jurisprudential developments in the field of international liability for ecological damage reflect genuine normative progress, but one that remains insufficient given the scale of the global ecological crisis. The consolidation of the ecological due diligence obligation, the extension of human rights applicability to situations of climatic degradation, and the recognition of protection obligations in the context of climate displacement represent irreversible normative acquisitions. Nevertheless, the absence of an operational liability mechanism for the cumulative damages of the global ecological crisis, the gaps in liability codification, and ongoing jurisdictional fragmentation continue to limit the effectiveness of environmental law as an instrument for remedying and preventing ecological damage of a planetary scale²⁹.

4. Reformatory Trends in Environmental Law: Strategic Climate Litigation, the Criminalization of Ecocide, and the Rights of Nature

In the face of the structural deficits of international environmental law, recent years have witnessed the emergence of reformatory trends of remarkable originality and normative ambition³⁰. Strategic climate litigation, the movement to criminalize ecocide, and the recognition of the rights of nature represent expressions of a transformation in the way global civil society conceives of the role of law in relation to the ecological crisis. Analysis of these trends reveals both their innovative potential and the specific limits and risks of each approach³¹. Strategic climate litigation denotes the deliberate use of judicial proceedings as an instrument of normative pressure on governments and corporations, seeking to compensate for the failures of political and normative action through judicial activation. Its exponential growth reflects both the frustration of non-state actors at the insufficient pace of climate action, and methodological advances in the field of climate attribution and the application of human rights in the context of climate change³². The diversity of this litigation is remarkable: cases against states for the inadequacy of national climate policies, cases against corporations for the non-disclosure of climate risks, cases concerning the rights of future generations to a stable climate, and cases concerning the climate due diligence obligation of banks and institutional investors.

Urgenda Foundation v. State of the Netherlands (2019)³³ remains the most widely cited precedent in this field. The Supreme Court of the Netherlands ordered the Dutch state to reduce greenhouse gas emissions by at least 25% relative to 1990 levels by the end of 2020, grounding this obligation not in the Netherlands' international environmental commitments, but in the right to life and the right to private and family life guaranteed by the European Convention on Human Rights³⁴. The originality of the legal reasoning lies in articulating the state's climate protection obligation through the lens of human rights, thereby circumventing

²⁵ Human Rights Committee, *Ioane Teitiota v. New Zealand*, Communication no. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016, 23 January 2020.

²⁶ *Ibidem*.

²⁷ European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, Application no. 53600/20, Council of Europe, 9 April 2024.

²⁸ *Ibidem*.

²⁹ McAdam, J., *Climate change, forced migration, and international law*, Oxford University Press, 2012.

³⁰ Terec-Vlad, L., Ungureanu, C. G., & Rusu, A., *The right to a healthy environment as an emerging dimension of human rights protection within contemporary international law*, *Revista Universul Juridic* 13, 2026.

³¹ UNEP, *op. cit.*

³² *Ibidem*.

³³ *Urgenda Foundation v. State of the Netherlands*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 20 December 2019.

³⁴ *Ibidem*.

the volatility of commitments assumed in international environmental instruments. The judgment inspired similar cases in Germany, France, Belgium, Australia, and the United States, demonstrating the capacity of a national precedent to generate transnational normative effects of considerable scope.

The Federal Constitutional Court of Germany, through its 2021 judgment (1 BvR 2656/18), declared certain provisions of the Climate Protection Act partially unconstitutional, on the ground that they did not adequately protect the fundamental freedoms of future generations, who would be exposed to disproportionate restrictions in the event of a failure of the ecological transition³⁵. This judgment established a constitutional obligation to protect the climate derived from the right to freedom, opening the way for the integration of climate protection into the constitutional order of states. Corporate climate litigation marks a further development of this trend: in *Milieudefensie and Others v. Royal Dutch Shell* (2021)³⁶, the District Court of The Hague ordered the oil company to reduce its emissions by 45% relative to 2019 levels by 2030, recognizing climate due diligence obligations for private corporations³⁷.

The criminalization of ecocide represents a second major reformatory trend, with the potential to structurally transform international criminal law and environmental law. The term ecocide was taken up and theorized as a legal category by Polly Higgins, who proposed its introduction as the fifth core crime in the Rome Statute of the International Criminal Court³⁸. A panel of international legal experts elaborated a definition of ecocide in 2021: unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts. This definition seeks to establish a sufficiently high threshold to avoid criminalizing legitimate economic activities, while being sufficiently broad to cover the large-scale ecological destruction caused by extractive, chemical, or agricultural industries. The proposal to amend the Rome Statute raises complex technical issues: the precise definition of gravity thresholds, establishing the mental element (*mens rea*) in the case of long-term and often unforeseeable ecological effects, articulation with existing civil and administrative liability regimes, and ensuring complementarity with national criminal law systems³⁹. Nevertheless, political support for the proposal has grown significantly in recent years, with a number of states parties to the International Criminal Court expressing support for the necessary amendments. The debate on the criminalization of ecocide reflects a profound philosophical transformation of international law: whereas existing instruments protect the individual and collective rights of persons against the most serious abuses, the inclusion of ecocide would signify recognition that ecosystems themselves merit criminal protection, independent of the human harm derived from their degradation.

The rights-of-nature movement proposes a restructuring of legal categories, granting independent legal personality to natural entities (rivers, forests, ecosystems) and permitting these entities to be represented in judicial proceedings by designated human guardians⁴⁰. Although Christopher Stone's 1972 proposal was initially regarded as an exercise in experimental legal thinking, it has gained genuine normative resonance over the past two decades. Ecuador's 2008 Constitution constitutionally enshrined the rights of nature (Pachamama), New Zealand recognized through 2017 legislation the legal personality of the Whanganui River, and Colombia's Supreme Court granted subject-of-law status to the Colombian Amazon in 2018⁴¹. These normative developments, unfolding across three continents and in different legal systems, signal that the recognition of the rights of nature is not a marginal aberration, but an emerging trend with genuine normative force and the potential to reconfigure environmental law. The theoretical debate on the rights of nature raises questions such as: can non-human entities exercise rights in the traditional sense of legal theory? Who exercises representation of the interests of nature and on the basis of what criteria? Opponents of the movement argue that ecological interests can be effectively protected through existing legal instruments without resorting to the reconceptualization of the philosophical foundations of civil law⁴². Proponents respond that existing instruments

³⁵ Bundesverfassungsgericht, Neubauer and others v. Germany, 1 BvR 2656/18, Federal Constitutional Court of Germany, 24 April 2021.

³⁶ *Milieudefensie et al. v. Royal Dutch Shell plc*, District Court of The Hague, Case No. C/09/571932 / HA ZA 19-379, 26 May 2021.

³⁷ *Ibidem*.

³⁸ Higgins, P., *Eradicating ecocide: Laws and governance to prevent the destruction of our planet*, Shephard-Walwyn, 2010.

³⁹ Reynolds, J. L., *The governance of solar geoengineering: Managing climate change in the anthropocene*, Cambridge University Press, 2019.

⁴⁰ Stone, C. D., *Should trees have standing? Toward legal rights for natural objects*, *Southern California Law Review* 45, 450–501, 1972.

⁴¹ Kauffman, C. M., & Martin, P. L., *The politics of rights of nature: Strategies for building a more sustainable future*, MIT Press, 2021.

⁴² Gellers, J. C., *The global emergence of constitutional environmental rights*, Routledge, 2017.

have proved insufficient and that granting legal personality to nature fundamentally changes the logic of ecological decision-making, placing nature at the center of legal considerations rather than at their periphery. Regardless of the answer to these questions, the rights-of-nature movement represents a paradigm shift in environmental law: from an instrumental and anthropocentric approach to an ecocentric vision in which ecosystems possess intrinsic value. The integration of artificial intelligence into the application of environmental law constitutes a reformatory trend with considerable potential: satellite monitoring systems and machine learning algorithms allow for the real-time detection of illegal deforestation, pollutant discharges, or the exceeding of emission thresholds, multiplying the monitoring capacities of environmental authorities. The use of artificial intelligence in environmental compliance assessment raises unresolved legal issues concerning algorithmic transparency, liability for automated decisions, and the need for an ethical framework for digital governance in environmental administration.

These reformatory trends together configure an environmental law in transformation — more dynamic and innovative than ever, but also more contested with regard to its philosophical foundations and the limits of normative interventions. The tension between the necessary legal innovation and the inevitable conservatism of legal systems will continue to characterize the evolution of environmental law in the decades ahead. Critical assessment of these trends reveals that they are not mutually exclusive and that their effectiveness is produced in combination: strategic climate litigation can complement the normative action of international treaties; the criminalization of ecocide can create a deterrent effect against large-scale ecological destruction; the rights of nature can shift the decision-making paradigm in favor of long-term ecological considerations. The common foundation of all these trends is this: environmental law cannot remain a law of good intentions and voluntary commitments, but must become a law of real accountability, effective compliance mechanisms, and intergenerational ecological solidarity.

5. Conclusions

The analysis conducted in this article has shown that environmental law faces, at the beginning of the third decade of the twenty-first century, a contradiction without historical precedent: on the one hand, the global ecological emergency demands robust legal instruments, effective compliance mechanisms, and operational liability regimes; on the other hand, the international legal architecture of the environment, grounded in the voluntary consensus of sovereign states and on soft law instruments, remains insufficient to generate genuine compliance at the global level. This contradiction is not circumstantial but structural, rooted in the logic of state sovereignty and in the asymmetry between short-term interests and long-term ecological needs. From the perspective of normative architecture, the reform of international environmental law must address three structural priorities. The first concerns the strengthening of compliance mechanisms in multilateral regimes, through the introduction of elements of binding obligation in environmental law instruments. The second priority involves remedying institutional fragmentation by consolidating the architecture of global environmental governance, including by granting a strengthened normative mandate to the UN Environment Programme. The third priority concerns the construction of a regime of international liability for ecological damage adapted to the specific character of the diffuse and cumulative damages of the contemporary ecological crisis, including mechanisms for the equitable distribution of the costs of ecological adaptation and reparation.

From the perspective of reformatory trends, strategic climate litigation, the criminalization of ecocide, and the rights of nature represent normative vectors with genuine transformative potential, whose doctrinal and jurisprudential development must be followed with critical attention. Judgments such as *Urgenda* (2019), the decision of the German Federal Constitutional Court (2021), and the Grand Chamber judgment of the European Court of Human Rights in *KlimaSeniorinnen* (2024) signal that courts are becoming first-rank normative actors in the contemporary legal ecology, compensating through judicial jurisdiction for the deficits of legislative and executive action. The principal risk of these trends lies in the possible functional overload of courts with decisions of political opportunity, for which they do not possess full democratic legitimacy. The complementarity between normative reform and jurisprudential innovation remains the organising principle of an effective and democratic environmental law.

The effectiveness of environmental law depends not only on the quality of legal instruments, but also on the transformation of global political and economic culture towards recognition of the fundamental interdependence between human prosperity and ecosystem integrity. Environmental law cannot alone

compensate for a deficit of political will; it can, however, catalyze and structure the necessary transformation, providing the normative framework within which intergenerational ecological solidarity can become a legal obligation rather than a mere moral aspiration. Building an environmental law commensurate with the ecological challenges of the Anthropocene remains one of the noblest and most urgent normative missions of contemporary jurisprudence and legal doctrine — a mission whose fulfilment conditions not only the viability of ecosystems, but also the survival of human civilization in its present forms.

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NATIONAL SOVEREIGNTY AND THE SUPREMACY OF THE CONSTITUTION IN RELATION TO THE PRIORITY OF EUROPEAN UNION LAW

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Abstract

State sovereignty is one of the general features of power and the state and implicitly one of the constitutive elements of the state. In this sense, sovereignty is the right of the state to decide freely in everything that means domestic and foreign policy.

The supremacy of the constitution expresses the superordinate position of the fundamental law both in the legal system and in the entire social and political system of each country. The legal basis for the supremacy of the Romanian Constitution is represented by the provisions of art. 1 paragraph 5 of the Fundamental Law. The supremacy of the Constitution does not have a purely theoretical dimension, in the sense that it could be considered only a political, legal or, possibly, moral concept. Due to its express enshrinement in the fundamental law, this principle has normative value, being formally a constitutional norm

The relationship between constitutional norms and European Union law is interpreted differently, with several doctrinal conceptions and different solutions in jurisprudence. One school of thought affirms the supremacy of the Constitution, including over European Union law, even if it accepts the priority of application of the latter, in its mandatory norms, over all other norms of domestic law, and another the priority of unconditional application of all provisions of European Union law over all norms of domestic law, including over constitutional norms.

In this study we analyze the interferences between the principle of the priority of European Union law and the principle of the supremacy of the Constitution with reference to the relevant doctrine and jurisprudence in the matter.

Keywords: *national sovereignty, supremacy of the Constitution, priority of European Union law, interferences in doctrine and jurisprudence.*

1. Introduction

From a terminological point of view, but with different implications and content, the doctrine uses the notions of popular sovereignty, national sovereignty and state sovereignty.

The sovereignty of the people represents the right of the people to decide on their fate, to establish the political line of the state and the composition of its organs and to control their activity. Ideally, in a society in which state power truly belongs to the entire people, the sovereignty of the people is identified with state sovereignty.

National sovereignty is based on the sociological idea of a nation considered as a legal person that has its own will, distinct from that of the persons who temporarily compose it at the present time, a will that is expressed through the representatives of the nation designated through electoral procedures.

State sovereignty is one of the general features of power and the state and implicitly one of the constitutive elements of the state. In this sense, sovereignty is the right of the state to decide freely in everything that concerns domestic and foreign policy.

The supremacy of the constitution expresses the superordinate position of the fundamental law both in the legal system and in the entire social and political system of each country. In a narrow sense, the scientific substantiation of the supremacy of the constitution results from its form and content. Formal supremacy is expressed by the superior legal force, by the procedures derogating from common law regarding the adoption and modification of constitutional norms, and material supremacy results from the specificity of the regulations,

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from their content, in particular from the fact that, through the constitution, premises and rules for the organization, functioning and attributions of public authorities are established.

National sovereignty and the supremacy of the Constitution represent the fundamental pillars of the Romanian rule of law, defining the way in which power is exercised and its limits. These principles are enshrined in Title I of the Romanian Constitution and establish that the people are the source of power, and the Fundamental Law is the supreme norm of the legal order.

The principle of priority of European Union law establishes that European norms prevail over the national law of the Member States, including over constitutional norms, in areas in which the States have ceded attributes of sovereignty. Also enshrined in the case law of the Court of Justice of the European Union (see the *Costa/Enel* case, 1964), this principle obliges national courts and authorities to apply European Union law and to leave the contrary domestic provisions unapplied.

In the context of Romania's Euro-Atlantic integration, the relationship, the internal legal and constitutional order, and on the other hand the application of the principle of priority of European Union law involves numerous legal problems and a new conception of national sovereignty.

2. Content

The sovereignty of the people represents the right of the people to decide on their fate, to establish the political line of the state and the composition of its organs and to control their activity. Ideally, in a society in which state power truly belongs to the entire people, the sovereignty of the people is identified with the sovereignty of the state.

National sovereignty is based on the sociological idea of a nation considered as a legal person that has its own will, distinct from that of the persons who temporarily compose it at the present time, a will that is expressed through the representatives of the nation designated through electoral procedures.

State sovereignty is one of the general features of power and the state and implicitly one of the constitutive elements of the state. In this sense, sovereignty is the right of the state to decide freely in everything that means internal and foreign policy.

Sovereignty as a feature and constitutive element of the state has the following features:

- Supremacy, in the sense that the state-organized power is superior to any other form of internal authority and the will of the rulers is realized as a binding will for the entire society;
- Independence from any state power or authority external to the state.

Defining the content of sovereignty through supremacy and independence does not mean dividing sovereignty into distinct parts, which would be contrary to the unique and indivisible character of sovereignty and implicitly of state power.

In the specialized literature it was stated that the principle of the supremacy of the fundamental law "Can be considered a sacred, intangible percept (...) it is at the top of the pyramid of all legal acts. And it would not be possible otherwise: The Constitution legitimizes power, converting individual or collective wills into state wills; it confers authority on the rulers, justifying their decisions and guaranteeing their application; it determines the functions and attributions that fall to public authorities, consecrating fundamental rights and duties, directs the relations between citizens, between them and public authorities; it indicates the meaning or purpose of state activity, that is, the political, ideological and moral values under which the political system is organized and functions; the constitution represents the fundamental basis and the essential guarantee of the rule of law; it is, ultimately, the decisive benchmark for assessing the validity of all legal acts and facts. All of these are substantial elements that converge towards one and the same conclusion: the material supremacy of the Constitution. But the constitution is supreme and in formal sense. The procedure for adopting the constitution externalizes a particular, specific and inaccessible force, which attaches to its provisions, so that no other law except a constitutional one can repeal or modify the provisions of the fundamental establishment, provisions that support themselves, postulating their supremacy."¹

The concept of constitutional supremacy cannot, however, be reduced to a formal and material meaning. Professor Ioan Muraru stated that: "The supremacy of the constitution is a complex notion whose content includes political and legal features and elements (values), which express the superordinate position of the

¹ I. Deleanu, *Instituții și proceduri constituționale - în dreptul roman și în dreptul comparat*, C.H.Beck Publishing House, Bucharest, 2006, pp.221-222.

constitution not only in the legal system, but in the entire socio-political system of a country."² So, the supremacy of the constitution represents a quality or a feature that places the fundamental law at the top of the political-legal institutions in a state-organized society and expresses its superordinate position, both in the legal system and in the entire social-political system.

The legal basis of the supremacy of the Constitution is represented by the provisions of art. 1 paragraph 5 of the Fundamental Law. The supremacy of the Constitution does not have a purely theoretical dimension, in the sense that it could be considered only a political, legal or, possibly, moral concept. Due to its express enshrinement in the fundamental law, this principle has normative value, being formally a constitutional norm. The normative dimension of the supremacy of the constitution implies important legal obligations, the non-compliance of which may attract legal sanctions. In other words, as a constitutional principle, normatively enshrined, the supremacy of the Fundamental Law is also a constitutional obligation with multiple legal, political, but also value meanings, for all components of the social and state system. In this sense, Cristian Ionescu emphasized: "Strictly formally, the obligation (to respect the supremacy of the fundamental law n.n.) is addressed to Romanian citizens. In reality, respecting the Constitution, including its supremacy, as well as the laws, was a completely general obligation, the recipients of which were all subjects of law - natural and legal persons (national and international) in legal relations, including diplomatic, with the Romanian state".³

The general meaning of this constitutional obligation refers to the conformity of the entire law with the norms of the constitution. By "law" we understand not only the component of the normative system, but also the complex, institutional activity of interpreting and applying legal norms, starting with those of the fundamental law. "It was the intention of the Constituent Parliament derived from 2003 to mark the decisive importance of the principle of the supremacy of the Constitution over any other normative act. A signal was given, in particular, to the public institution with a governing role to strictly respect the Constitution. Respect for the Constitution is included in the general concept of legality, and the term of respecting the supremacy of the Constitution imposes a pyramidal hierarchy of normative acts at the top of which is the Fundamental Law."⁴

One of the most important defining elements of the European Union is the existence of its own system made up of principles, written norms and rules established by case law. It is therefore important to clarify the relations between European Union law and national law. The solution to this problem is found in a set of rules that are not explicitly provided for in the founding Treaties but have been developed by the Court of Justice through several decisions, some of them controversial. The constitutions of the Member States of the European Union contain rules of principle regarding the relationship between European Union law and national law.

In practice, interference between European Union law and national law occurs especially when there are contradictions between the legal norms belonging to the legal systems. Of course, the issue of the relationship between the two categories of legal norms is of interest not only in such a situation, but also in cases in which a court of law may apply a norm of European Union law.

We appreciate that this issue can be analyzed on two levels: 1. the relationship between domestic law (other than constitutional law) and European Union law; 2. the relationship between the constitutional norms of the Member States, on the one hand, and European Union law on the other.

The jurisprudence of the Court of Justice of the European Union, the doctrine but also the domestic legislation refers to the principle of priority or supremacy, primacy, pre-eminence of European Union law over national legal systems.

The principle of the priority of European Union law stated above mainly concerns regulations in the economic field and less in the fields of foreign policy, security, justice and home affairs. The explanation lies in the fact that in the fields of economic activity, through the Constitutive and Accession Treaties, the Member States have understood to cede sovereignty and to accept the decision-making and adoption of legislation by the institutions of the Union.

The Court of Justice has developed the principle of the priority of European Union law taking into account the rule of public international law according to which "a party may not invoke the provisions of its internal law to justify the non-performance of a treaty". Another source was the provisions of Article 10 of the Treaty on European Union, amended by the Treaty of Lisbon. The rule contained in the provisions of Article 10 has

² I. Muraru, E.S. Tănăsescu (coord.), *Constituția României - Comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2009, p.18.

³ C. Ionescu, *Constituția României. Titlul I. Principii generale art. 1-14. Comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2015, p.48.

⁴ Idem.

remained unchanged to date and establishes the obligation of Member States to take all necessary measures to ensure the fulfilment of the obligations arising from the Treaties and acts of the institutions of the Union. The same provisions also impose a negative obligation on Member States to refrain from taking measures which would jeopardise the achievement of the objectives of the Treaty. These are not the only provisions in the Treaties of the European Union which substantiate the principle of the priority of European Union law over national law.

The Constitutional Court considered that the Treaties of the European Union can have a normative value only to the extent that they are incorporated into national law by a law. At the same time, it was admitted that a national law can derogate from the provisions of the Treaty. The Court of Justice had a different opinion expressed in the decision: "It follows from these considerations that the legal system born of the Treaty, an independent source of law, cannot, due to its special and original nature, be outclassed by domestic legal norms or whatever their legal force may be, without being deprived of its character as Community law and without the very legal foundation of the Community being called into question".

Another moment in the evolution of the Court of Justice's case law in this matter is represented by the "Internationale H"⁵ cases; "Simmenthal I"⁶ and "Simmenthal II"⁷. The following considerations from the decision in the Simmenthal II case are relevant to our research topic: "as such, any provision of the national legal order or any practice, legislative, administrative or judicial, which would have the effect of diminishing the effectiveness of Community law by denying the judge competent to apply it the power to do, at the very moment of such application, everything necessary to remove national legal provisions which, possibly, would represent an obstacle to the full effectiveness of Community rules... Therefore, the answer to the first question is that the national judge charged, according to his competence, with applying the provisions of Community law, is obliged to ensure the full effectiveness of these rules, leaving unapplied, of his own motion, if necessary, any contrary provision of national law, even subsequent, without requesting or waiting for its prior elimination by legislative means. or by any other constitutional procedure" (recitals 22 and 24 of the decision). Furthermore, the Court considered that national courts have the power to constrain and even sanction the legislative and executive powers in order to guarantee the full effectiveness of the principle of the priority of European Union law over national law.⁸

This principle must also be understood from the perspective of the rule of binding force of Union acts. Thus, under the provisions of art. 249 of the TEU, the regulation has general applicability and is binding in its entirety. In contrast, the directive is addressed to some or all Member States and is binding as to the result to be achieved, leaving to the national authorities the choice of form and means to be used to achieve the objectives set. The decision is binding in its entirety on the addressees to whom it is addressed.

The rule of direct application that characterizes some of the legal acts of European Union law concerns the way in which the principle of priority of European Union law is understood and applied. Regulations are directly applicable because they do not require transposition into national law. As the court has indicated in its case-law, Member States do not have to adopt national legislation to transpose regulations. Their provisions may be relied on by natural and legal persons directly before national courts. In contrast, the directive is not directly applicable. It must always be transposed into the legal system of each Member State to which it is addressed. The internal normative act transposing the directive is the one through which the content of the directive will enter the national legal system.

The principle of the priority of European Union law over national law must also be understood according to the criterion of the possibility of direct invocation of Community acts before national courts. The phrase "direct effect" designates the attribute of a Community normative act to create in the patrimony of natural and legal persons rights that they can invoke directly before national courts. Without going into details, we emphasize that under certain conditions, regulations, directives and decisions can have direct effect.⁹

One of the consequences of the principle of the primacy of European Union law is the obligation of national courts to interpret national law in accordance with European Union law.

⁵ 11/70, *Internationale H.*, (1970) ECR 1125.

⁶ 35/76, *Simmenthal SpA* (1976) ECR 1871.

⁷ 106/77, *Simmenthal* (1978) ECR 629.

⁸ For development see T. Ștefan, B. Andreșan-Grigoriu, *Drept comunitar*, C.H. Beck Publishing House, Bucharest, 2008, pp.196-202.

⁹ *Ibidem*, pp. 214-234.

In an attempt to ensure the effectiveness and uniformity of European Union law, the Court of Justice of the European Union has established several means to encourage Member States to correctly and timely implement directives and to ensure their enforcement. One of these means is the creation of the doctrine of vertical direct effect of directives. In the event that the provisions of a directive that have not been implemented or have been implemented incorrectly cannot have vertical direct effect because they do not meet the condition of being sufficiently clear, precise and unconditional to be able to infer the right that the litigant wishes to assert before the national courts, the Court has established the obligation, on the part of the national judge, to interpret national legislation in relation to the content of the directive.

One of the first cases in which this obligation was expressly stated was the Van Colson case. The Court held in the grounds of the decision that national legislation limited the right to compensation of persons who had been the subject of discrimination in the exercise of the right to work. Such a situation does not comply with the requirements of the effective transposition of Directive No. 76/207. Therefore, the Luxembourg court ruled: "It follows that in the activity of applying national law and in particular the provisions of a national law specifically introduced for the purpose of applying Directive 76/207, the national court is required to interpret national law in the light of the wording and purpose of the directive in order to obtain the result provided for in Article 189(3) of the T.C.E.". Consequently, the court stated: "It is for the national court to give the law adopted for the purpose of implementing the directive, in so far as national law grants it a margin of appreciation, an interpretation and application which is in conformity with the requirements of Community law."

The decision of the Court of Justice of the European Union, pronounced in the case *Seda Küçükdeveci v. Swedex GmbH & Co.*¹⁰, is also instructive for our research topic. The Court reaffirms the existence of the principle of non-discrimination on grounds of age and the role of the national court in its application.

The German legislation which provides that periods of employment completed before the age of 25 are not taken into account for the purpose of calculating the notice period is contrary to the principle of non-discrimination on grounds of age, as laid down in Directive 2000/78. In that situation, the national court must, if necessary, set aside any contrary national legislation, even in a dispute between private individuals. It follows from the grounds of that judgment that Directive 2000/78 gives concrete form to the principle of equal treatment in matters of employment and occupation. The principle of non-discrimination on grounds of age is a general principle of EU law. Therefore, the national court seised of a dispute in which the principle of non-discrimination on grounds of age, as provided for by Directive 2000/78, is brought into question, is required to ensure, within the framework of its powers, the legal protection that arises for litigants under Union law and to guarantee the full right to this principle, removing, if necessary, the application of any provision, possibly contrary, of national law.

In accordance with these conclusions of the Court of Justice of the European Union, it follows that Romanian courts, in situations in which they will apply the provisions of a national law implementing a directive, must interpret it in accordance with the text and purpose of the directive. It follows from the case-law of the Court on the matter that the national court is obliged, when it has to apply a law implementing a directive, to take into account not only the law in question, but also the entire body of national law rules and to interpret them in accordance with the requirements of the directive in question, in order to pronounce a solution in accordance with the aim pursued by the Community act. Given that Romanian law is characterised by excessive procedural formalism and, in particular, by significant inconsistencies and contradictions, the fulfilment of this obligation by the national courts will be very difficult.

Moreover, in its case law, the Court of Justice of the European Union considers that this obligation of national courts is subject to certain limits. The obligation to interpret national law taking into account the wording and purpose of the directive exists only to the extent that national law grants the court a margin of appreciation. In this regard, the Court held in the *Papino* case that: "The principle of interpretation in the light of the directive cannot serve as a basis for an interpretation 'contra legem' of national law".¹¹

We consider that whenever the national law confers on the court a "related jurisdiction" which excludes the existence of a margin of appreciation, the national judge is not under the above-mentioned obligation. For example, some of the normative provisions of a procedural nature may be included in this category. Also, in criminal matters, national courts cannot aggravate the criminal liability of persons in the event that they commit

¹⁰ Cause C-555/07.

¹¹ C-105/03, *Papino*, Judgment of 16 June 2005, paragraph 47.

an act incriminated by a directive, if this has not been implemented in national law. In doctrine but also in case law, the question has been raised whether national courts comply with the procedural rules of national law in the application of European Union law or whether there are procedural rules at the level of law.

There are currently no relevant procedural rules in the founding Treaties or in other legal acts of the Union that could be used by national courts. The exception is the procedural rules developed in the following areas: cooperation in civil and criminal matters; in the field of public procurement and social policies. In these areas too, the Member States have transposed into national law by means of normative acts the procedural rules found in Community acts. Therefore, the courts apply in particular the procedural rules of national law in these cases as well.

Faced with this problem and reality, the Court of Justice of the European Union has developed the principle of national procedural autonomy through case law. Thus, in several cases¹², the Court has considered that compliance with the principle of effectiveness of European Union law presupposes equality of conditions between actions protecting Community rights and those protecting rights guaranteed by national law. The procedural rules applied by national courts must not make it impossible to exercise the rights conferred by Community acts.

National procedural autonomy in the application of European Union law is based on two important principles:

- the principle of equivalence, according to which the procedural rules used by national courts to implement European Union law must be equivalent to those for the application of national law;
- the principle of practical possibility, according to which the procedural rules used by national courts to implement the rules of European Union law must not make it impossible in practice to exercise the rights enshrined in Community legal norms.

The Factortame I case is interesting for this issue. The British courts did not have the power, under domestic law, to order measures against the Government. In response to a preliminary question, the Court of Justice of the European Union stated that the effectiveness of European Union law would be diminished if a rule of national law could prevent the judge seised of a dispute governed by Community law from granting the interim measures necessary to ensure the full effectiveness of the judgment which seeks to establish the existence of rights resulting from Community legal acts. Therefore, in the Court's view, the national judge, in such situations, would have to ignore even the rules of substantive jurisdiction of the court or could resolve the case without complying with procedural rules found in domestic law.

However, the national procedural autonomy granted to courts in the application of European Union law should not be extended to the extent that it would be considered that the national judge would be entitled not to apply mandatory internal procedural rules in the resolution of such disputes on the grounds that only in this way would the principle of the effectiveness of Community law be guaranteed. As is clear from the case law of the Court of Justice of the European Union, national procedural autonomy has a concrete character, in the sense that it is conditioned by the particularities of each case, but also by the nature and importance of the procedural rules enshrined in national law applicable in the resolution of the dispute.

One of the most controversial issues reflected in the case law of the courts of the Member States but also in the case law of the Court of Justice of the European Union is the relationship between European Union law and domestic constitutional rules. The constitutional courts of some Member States, notably Germany, Italy and France, have consistently held that the principle of the priority of European Union law does not apply in relation to the regulations contained in a constitution, because the fundamental law of a state expresses national identity and sovereignty. This solution particularly concerned regulations on fundamental human rights and freedoms. Until 1 December 2009, the date on which the Treaty of Lisbon and the Charter of Fundamental Rights of the European Union entered into force, European Union law did not include a coherent normative system guaranteeing fundamental human rights. Consequently, the courts of the Member States have invoked domestic constitutional regulations in such situations.

We argue that there is a legal difference between the principle of the priority of European Union law over national law other than constitutional law, on the one hand, and the principle of the supremacy of the internal constitution on the other. The supremacy of the fundamental law of a state essentially expresses its superior legal force over any legal act that produces effects and applies on the territory of the state. The consequence of

¹² C-430 și 431/93 Jereen Van Schijndel (1995) ECR I-4705; C-326/96, B.S. Levez (1998) ECR I-7835.

the principle of the supremacy of a constitution is the conformity of all internal law with the norms of the fundamental law. To consider that on the territory of a state, even a member of the European Union, a legal norm contrary to internal constitutional regulations could produce legal effects, means to limit in an impermissible way the sovereignty of the state in question with the consequence of endangering the legal order built on constitutional principles and norms.

Moreover, the practice of the courts of the Member States of the European Union does not offer many examples of conflict between the norms of European Union law on the one hand and constitutional regulations on the other. This situation is explained by the fact that following the process of accession to the European Union, the Member States have adapted their constitutional regulations of a principled nature to the specific requirements of European Union law and have enshrined in one form or another the principle of the priority of this legal system over domestic law whenever there is a contradiction between the rules of the two categories of legal norms.

Of course, this issue remains open and is far from being resolved. We note that in the jurisprudence of recent years of the Constitutional Council and the Council of State of France, the concept of "constitutional national identity" has been developed. According to this principle, national courts will always apply domestic constitutional norms but also the rules included in ordinary legislation whenever these do not have a counterpart in European Union law.

The jurisprudence of the Constitutional Court of Romania reflects this issue. By Decision no. 148 of 16 April 2003 on the constitutionality of the legislative proposal to revise the Constitution of Romania¹³, our constitutional court clearly distinguishes between the supremacy of the Constitution and the principle of priority of European Union law, stating: "The consequence of accession is that the Member States of the European Union have understood to place the Community *acquis*, the founding treaties of the European Union and the regulations derived from them in an intermediate position between the Constitution and other laws when it comes to binding European normative acts".

In the specialized legal literature, with reference to the provisions of art. 148 of the Constitution and in accordance with Decision no. 148 of April 16, 2003, it was stated: "Therefore, it can be stated that in the internal legal order the legal act by which Romania joins the European Union has a legal force inferior to the Constitution and constitutional laws, but superior to organic and ordinary laws".¹⁴

In its subsequent jurisprudence, the Constitutional Court seems to have abandoned this distinction, basing its decisions solely on the principle of the priority of European Union law.¹⁵

However, by Decision no. 1258 of 8 October 2009¹⁶, the Court finds that a domestic law transposing a European Union directive into domestic law is unconstitutional. Such a solution, in our opinion, enshrines the principle of the supremacy of the Constitution and the obligation to comply with it in relation to the principle of the priority of European Union law. The Constitutional Court found that the provisions of Law no. 298/2008 are unconstitutional. From the considerations of the decision it follows that Law no. 298/2008¹⁷ was adopted in order to transpose into national legislation Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. The Court refers to the legal regime of such Community acts, emphasizing that: "... it imposes its obligation on the Member States of the European Union with regard to the regulated legal solution, not with regard to the concrete ways in which this result is reached, the States benefiting from a wide margin of appreciation for the purpose of adopting them in accordance with the specifics of national legislation and realities".

Examining the content of Law no. 298/2008, the Court ruled that this normative act is likely to affect the exercise of fundamental rights or freedoms, namely the right to intimate, private and family life, the right to the secrecy of correspondence and freedom of expression. The constitutional court notes that the restriction of the exercise of these rights does not meet the requirements established by art. 53 of the Romanian Constitution.

¹³ Published in Official Gazette no. 317 of May 12.

¹⁴ M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *Constituția României revizuită - comentarii și explicații*, All Beck Publishing House, Bucharest, 2004, p. 331.

¹⁵ See in this regard: Decision no. 308/2006 published in the Official Gazette no. 390 of May 5, 2006; Decision no. 59/2007 published in the Official Gazette no. 98 of February 8, 2007; Decision no. 1042/2007 published in the Official Gazette no. 12 of February 8, 2008 and Decision no. 1172/2007 published in the Official Gazette no. 54 of January 23, 2008.

¹⁶ Published in Official Gazette no. 798 of November 23, 2009.

¹⁷ Published in the Official Gazette no. 780 of November 21, 2008.

For our research topic, DCC no. 80 of 16 February 2014¹⁸ is relevant, on the legislative proposal regarding the revision of the Romanian Constitution. Regarding the interpretation of the provisions of art. 148 regarding integration into the European Union, the Court notes that: "constitutional provisions do not have a declarative character, but constitute mandatory constitutional norms, without which the existence of the rule of law, provided for by art. 1 paragraph (3) of the Constitution, cannot be conceived. At the same time, the Fundamental Law represents the framework and extent to which the legislator and other authorities can act; thus, the interpretations that can be made of the legal norm must also take into account this constitutional requirement, contained in art. 1 paragraph (4) of the Fundamental Law, according to which in Romania compliance with the Constitution and its supremacy is mandatory".

In the opinion of our constitutional court, considering that European Union law applies without any differentiation within the national legal order, not distinguishing between the Constitution and other domestic laws, is equivalent to placing the Fundamental Law on a secondary level compared to the legal order of the European Union. The legitimacy of the Constitution is the will of the people itself, which means that it cannot lose its binding force, even in the event that there are inconsistencies between its provisions and those of the European Union. Moreover, it was emphasized that Romania's accession to the European Union cannot affect the supremacy of the Constitution over the entire domestic legal order.

The Constitutional Court established that the binding acts of the European Union are norms interposed within the framework of constitutional review¹⁹. At the same time, it was emphasized the lack of constitutional relevance of the norm of European law, interposed in constitutional norms of reference within the framework of constitutional review. In this case, the referral to the Court based on the failure to comply with the provisions of art. 148 para. 4 of the Constitution²⁰. By the same decision, the Court established that it is necessary for the legal norm of European Union law to be limited to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution – "the only direct norm of reference within the framework of the constitutionality review". The constitutional court has enshrined, like the French Constitutional Council, the concept of "national constitutional identity", by which it understands the relevance of the supremacy of the constitution whenever the issue of compliance of domestic laws with European Union acts arises.²¹

Another aspect analyzed in constitutional jurisprudence refers to the application of the Charter of Fundamental Rights of the European Union in the context of constitutional review. Our constitutional court ruled that, in principle, it is applicable in the context of constitutional review "to the extent that it ensures, guarantees and develops the constitutional provisions in the field of fundamental rights, in other words, to the extent that their level of protection is at least at the level of constitutional norms in the field of human rights."²²

Also in connection with the application of European Union norms, with regard to human rights in the framework of constitutional review, it was stated that the reporting of the provisions contained in an act having legal force similar to the constitutive treaties of the European Union must be made to the provisions of art. 148 of the Constitution, and not to those contained in art. 20 of the Fundamental Law, which refers to international treaties on human rights, other than those of the European Union²³. Our constitutional court ruled that the provisions of art. 41 of the Charter of Fundamental Rights of the European Union, relating to the right to good administration, can be invoked through the prism of art. 148, and not art. 20 of the Constitution.²⁴

Also, in constitutional jurisprudence it was established that it is not within the competence of the Constitutional Court to analyze the conformity of a provision of constitutional law with the text of the Treaty on the Functioning of the European Union, through the prism of art. 148 of the Constitution. Such a competence, namely that of establishing whether there is a contradiction between national law and the treaty, belongs exclusively to the court of law, which also has the possibility of formulating a preliminary question to the Court of Justice of the European Union. It is interesting that the constitutional court considers itself incompetent to verify the conformity of a provision of national law with the text of the founding treaties of the European Union,

¹⁸ Published in, Official Gazette no. 246 of April 7.

¹⁹ See, DCC no. 668 of 18 May 2011 published in the Official Gazette no. 487 of 8 July 2011.

²⁰ See, DCC no. 668 of 18 May 2011 published in the Official Gazette no. 487 of 8 July 2011.

²¹ DCC no. 64 of 24 February 2015, published in the Official Gazette no. 286 of 28 April 2015.

²² DCC no. 871 of June 25, 2010, published in the Official Gazette no. 433 of June 28, 2010.

²³ DCC no. 967 of 20 November 2012, published in the Official Gazette no. 853 of 18 December 2012 and DCC no. 206 of 6 March 2012, published in the Official Gazette no. 254 of 17 April 2012.

²⁴ DCC no. 12 of 22 January 2013, published in the Official Gazette no. 114 of 28 February 2013.

also because, if it were to arrogate such competence, it would lead to a possible conflict of jurisdiction between the Constitutional Court of Romania and the Court of Justice of the European Union, which, at this level, is considered inadmissible.²⁵

Regarding the cooperation between the Constitutional Court and the Court of Justice of the European Union, our constitutional court stated that it remains at its discretion, in the application of the decisions of the Court of Justice of the European Union within the framework of the constitutional review, or the formulation by the Court of preliminary questions in order to establish the content of the European norm. "Such an attitude is related to the cooperation between the national and European constitutional courts, as well as to the judicial dialogue between them, without bringing into question aspects related to the establishment of a hierarchy between these courts." The Court of Justice of the European Union, in its recent case law, has a different opinion and has ruled on the supremacy of the legal order of European Union Law, over the domestic legal order and even over the constitutional order.

Thus, by the Judgment delivered on May 18, 2021, the Court of Justice of the European Union rules on a series of reforms in Romania relating to the judicial organization, the disciplinary regime of magistrates, as well as the patrimonial liability of the state and the personal liability of judges for judicial errors.²⁶

Six requests for a preliminary ruling have been made to the Romanian Court of Justice in disputes between legal persons or natural persons, on the one hand, and authorities or bodies such as the Judicial Inspection, the Superior Council of Magistracy and the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other. The main disputes are set out in the context of a far-reaching reform in the field of justice and the fight against corruption in Romania, a reform which has been the subject of monitoring at European Union level since 2007, under the cooperation and verification mechanism established by Decision 2006/928²⁷ on the occasion of Romania's accession to the Union ('the CVM').

In that context, the referring courts raised the issue of the nature and legal effects of the CVM and the scope of the reports drawn up by the Commission under it. According to those courts, the content, legal nature and temporal scope of that mechanism should be regarded as being confined to the Accession Treaty and the requirements set out in those reports should be binding on Romania. In that regard, however, those courts refer to national case-law according to which EU law does not prevail over the Romanian constitutional order and Decision 2006/928 cannot constitute a reference rule in the context of a review of constitutionality since that decision was adopted before Romania's accession to the Union and the question whether the content, nature and scope of Decision 2006/928/EC fall within the scope of the Accession Treaty has not been the subject of any interpretation by the Court.

As regards the legal effects of Decision 2006/928, the Court found that it was binding in its entirety on Romania from the date of its accession to the European Union and required it to achieve the benchmarks, which were also binding, set out in the annex thereto. Those benchmarks, defined as a result of the shortcomings identified by the Commission before Romania's accession to the European Union, were intended, *inter alia*, to ensure that that Member State respected the value of the rule of law. Romania was therefore required to take appropriate measures to achieve those objectives and to refrain from implementing any measure which might jeopardise the achievement of those objectives.

The Court held that the principle of the primacy of EU law precludes national legislation of constitutional status which deprives a lower court of the right to disapply of its own motion a national provision falling within the scope of Decision 2006/928 and which is contrary to EU law. The Court recalls that, according to settled case-law, the effects associated with the principle of the primacy of EU law are binding on all the bodies of a Member State, without the internal provisions relating to the distribution of judicial powers, including those of a constitutional nature, being able to prevent that from happening. Recalling also that national courts are required,

²⁵ DCC no. 1249 of 7 October 2010, published in the Official Gazette no. 764 of 16 November 2010 and DCC no. 137 of 25 February 2010, published in the Official Gazette no. 182 of 22 March 2010.

²⁶ Judgment in the joined cases C-83/19, Association of the "Forum of Judges of Romania" v. Judicial Inspection, C-127/19, Association of the "Forum of Judges of Romania" and Association of the "Movement for the Defense of the Statute of Prosecutors" v. Superior Council of Magistracy and C-195/19, PJ/QK and in the cases C-291/19, SO/TP and others, C355/19, Association of the "Forum of Judges of Romania" and Association of the "Movement for the Defense of the Statute of Prosecutors" and OL/Prosecution Office attached to the High Court of Cassation and Justice - Prosecutor General of Romania and C-397/19, AX/Romanian State - Ministry of Public Finance.

²⁷ Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress made by Romania towards achieving certain specific benchmarks in the field of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56, Special edition, 11/vol. 51, p. 55).

as far as possible, to interpret domestic law in a manner consistent with the requirements of EU law or to disapply of their own motion any contrary provision of national law which could not be the subject of such a consistent interpretation, the Court finds that, in the event of a proven breach of the EU Treaty or of Decision 2006/928, the principle of the primacy of EU law requires the referring court to disapply the provisions in question, regardless of whether they are of legislative or constitutional origin.

By the Decision of December 21, 2022²⁸, the Court of Justice of the European Union ruled that Union law precludes the application of a case-law of the Constitutional Court to the extent that it, in conjunction with national provisions on prescription, creates a systemic risk of impunity. "The supremacy of Union law requires that national judges have the power to set aside a decision of a constitutional court that is contrary to that law, without being exposed to the risk of disciplinary liability."

The reasoning of the Judgment essentially states the following:

In these cases, the question arises whether the application of the case-law resulting from various decisions of the Constitutional Court of Romania (Romania), concerning the rules of criminal procedure applicable in matters of fraud and corruption, is liable to infringe Union law, in particular the provisions of that law which aim to protect the financial interests of the Union, the guarantee of the independence of judges and the value of the rule of law, as well as the principle of the supremacy of Union law.

The Court, sitting in the Grand Chamber, confirmed its case-law resulting from a previous judgment, according to which the CVM is binding in its entirety for Romania.²⁹

Thus, acts adopted before accession by the institutions of the Union are binding on Romania from the date of its accession. This is the case of Decision 2006/928, which is binding in its entirety on Romania as long as it has not been repealed. The benchmarks aimed at ensuring respect for the rule of law are also binding. Romania is therefore required to take appropriate measures to achieve those benchmarks, taking into account the recommendations made in the reports drawn up by the Commission.³⁰

Union law precludes the application of a case-law of the Constitutional Court which leads to the annulment of judgments delivered by panels of judges which were unlawfully composed, in so far as this, in conjunction with national provisions on limitation periods, creates a systemic risk of impunity for acts constituting serious offences of fraud affecting the financial interests of the Union or of corruption.

It was also noted that in the present case, the application of the case-law of the Constitutional Court at issue has the consequence that the fraud and corruption cases in question must be re-examined, if necessary, several times, at first instance and/or on appeal. Given their complexity and duration, such a re-examination inevitably has the effect of prolonging the duration of the related criminal proceedings.

The Court recalls that, having regard to the specific obligations incumbent on Romania under Decision 2006/928, national legislation and practice in this area cannot have the effect of prolonging the duration of investigations into corruption offences or otherwise weakening the fight against corruption. On the other hand, having regard to the national rules on limitation periods, retrying the cases in question could lead to the offences becoming time-barred and could prevent the effective and dissuasive punishment of persons occupying the most important positions in the Romanian State who have been convicted of serious fraud and/or serious corruption in the exercise of their functions. The risk of impunity would therefore become systemic for that category of persons and would call into question the objective of combating high-level corruption.

The reasoning invokes the supremacy of European Union law and notes that the principle of supremacy of Union law prevents national courts from being able, at the risk of disciplinary sanctions, to disregard decisions of the Constitutional Court that are contrary to Union law.

The Court recalls that, in its case-law on the EEC Treaty, it has established the principle of the supremacy of European Union law, understood as consecrating the prevalence of this law over the law of the Member States. In this regard, the Court has found that the establishment by the EEC Treaty of a legal order of its own, accepted by the Member States on a reciprocal basis, has as a corollary the impossibility for the said States to make a subsequent unilateral measure prevail against this legal order or to oppose the law arising from the EEC Treaty

²⁸ Judgment in the joined cases C-357/19 Euro Box Promotion and others, C379/19 DNA- Territorial Service Oradea, C-547/19 Association « Forumul Judecatorilor din România », C-811/19 FQ and others and C-840/19 N.

²⁹ See, Judgment of 18 May 2021, Association of Judges of Romania and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (see also CP No. 82/21).

³⁰ Under the principle of sincere cooperation, enshrined in Article 4(3) TEU.

to national law, regardless of its nature, otherwise there is a risk that this law will lose its Community character and that the legal basis of the Community itself will be called into question.

Furthermore, the executive force of European Union law cannot vary from one Member State to another depending on subsequent national laws, otherwise there is a risk that the achievement of the objectives of the EEC Treaty will be jeopardised, nor can it give rise to discrimination on grounds of nationality, prohibited by that Treaty. The Court thus considered that, although it was concluded in the form of an international agreement, "the EEC Treaty constitutes the constitutional charter of a community based on the rule of law, and the essential characteristics of the Community legal order thus constituted are, in particular, its primacy over the law of the Member States and the direct effect of a whole series of provisions applicable to the Member States and their nationals". According to the Court, the effects associated with the principle of the primacy of Union law are imposed on all the organs of a Member State, without internal provisions, including constitutional provisions, being able to prevent this. National courts are required to disapply of their own motion any national rule or practice contrary to a provision of Union law which has direct effect, without having to request or await the prior repeal of that national rule or practice by legislative or other constitutional means.

Furthermore, the fact that national judges are not subject to disciplinary proceedings or sanctions for having exercised the option of bringing a case before the Court under Article 267 TFEU, which falls within their exclusive jurisdiction, constitutes an inherent guarantee of their independence. Thus, in the event that a national ordinary court were to consider, in the light of a judgment of the Court, that the case-law of the national constitutional court is contrary to Union law, the fact that that national judge were to disapply that case-law cannot render him liable to disciplinary action.

3. Conclusions

We consider that the principle of pre-eminence or priority of European Union law is not equivalent to the principle of supremacy of a rule of law because supremacy is a characteristic of domestic constitutional norms. In this sense, the provisions of art. 148 paragraph 2 of the Constitution of Romania enshrine the priority and not the supremacy of the provisions of the Treaties establishing the European Union as well as of other normative regulations.

The Constitutional Court of Romania, in a press release from December 23, 2021, stated with reference to these Decisions of the Court of Justice of the European Union: "According to art. 147 paragraph (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding."

Moreover, the CJEU also recognizes, in its Decision of 21 December 2021, the binding nature of the decisions of the Constitutional Court. However, the conclusions of the CJEU Judgment according to which the effects of the principle of the supremacy of EU law are imposed on all bodies of a Member State, without domestic provisions, including those of a constitutional nature, being able to prevent this, and according to which national courts are required to leave unapplied, ex officio, any national regulation or practice contrary to a provision of EU law, presuppose the revision of the Constitution in force.

In practical terms, the effects of this Judgment can only occur after the revision of the Constitution in force, which, however, cannot be done by right, but exclusively at the initiative of certain subjects of law, in compliance with the procedure and under the conditions provided for in the Constitution of Romania itself.

We fully support the opinion expressed by the Constitutional Court. Our Constitution enshrines the obligation to respect the Fundamental Law and its supremacy in art.2 para. (5), "In Romania, respect for the Constitution, its supremacy and the laws is mandatory."

The provisions of art. 148, paragraph (2), regulate the principle of the priority of European Union law. As a result of accession, "the provisions of the constitutive treaties of the European Union, as well as other mandatory Union regulations, shall take precedence over contrary provisions in domestic laws, in compliance with the act of accession."

Consequently, the supremacy of the Constitution and the principle of the priority of European Union law have different legal natures. The supremacy of the Constitution is a quality of it determined by the social, economic and political realities of the Romanian people and by its traditions. It expresses and substantiates at the same time the characters and attributes of the Romanian State, national sovereignty. The supremacy of the Constitution and the obligation to respect it is not exclusively the concretization of the will of the constituent legislator, but is determined objectively, historically.

In contrast, the principle of the priority of European Union law is derived from the supremacy of the Fundamental Law because it is established by the will of the constituent legislator and by the international treaties to which Romania is a party.

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LEGAL NORMATIVISM AND PRINCIPLES OF LAW

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Abstract

The legal norm, especially in the conditions of the will of "legal norming" that contemporary society knows, is increasingly moving away from human values. It is an abstract, general and impersonal structure whose legitimacy is not a value one, but of a formal recognition within the normative system in question. The abandonment of values, including Christian ones, has as a consequence normative relativism based almost exclusively on the pure will of the legislator.

The doctrine of legal normativism recognized and applied in almost all states is a concretization of what has been shown above.

Therefore, recourse to the principles of law is necessary to avoid legal normative formalism and to correctly adapt legal norms to social realities.

Any scientific approach that has as its object understanding the meanings of the notion of "principle of law" must have an interdisciplinary character, the basis of the approach being the philosophy of law. In this study we carry out such an analysis in order to underline the multiple theoretical meanings related to this notion, but also the relationship between principles and legal norms, respectively the normative value of the principles of law. Extensive references are made to the philosophical and legal doctrine on the subject. This study is a plea for relating to principles in the work of creating and applying law.

Keywords: *Legal norms, Criticism of the theory of legal normativism, Principles of law, Autonomy of the legal, meanings of principles of law.*

1. Introduction

The essence of social determinism and social normativism is formed by the causal necessity and the normative imperative. The social freedom of man can thus be conditioned, restricted or sometimes even abolished.

The relationship between determinism, social normativism and on the other hand the freedom of the person in the social environment is particularly complex, requires a broad analysis and involves establishing the priority between the social and the man as well as between the social normative system and freedom.

The most important expression of social determinism is the social normative system. The normatization of social life is necessary and has an imperative character, but it is also a restriction of the exercise of the natural freedom of man.

The term "nomos" meaning from the Greek natural law, norm, which implies respect for the order established by the gods, has its counterpart in Asian spirituality, through "Dao", in several forms: Dao of heaven; Dao of man. Genoveva Vrabie defines the social norm as "a general model of behavior that regulates some social actions of people, their conduct and activity and, through this, the relationships between people. There is no type of social activity to which rules of conduct, of exercise are not imposed or recommended"¹. A social norm is a rule that determines an individual's behavior in a specific situation. Moreover, society as a complex set of structures imposes a developed and dynamic system of social norms.

Legal normativism is a component of social normativism but also a doctrine according to which law is a hierarchical system of mandatory norms, imposed by the state, detached from moral, political or social aspects.

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¹ See G. Vrabie, *La cour constitutionnelle - garant de la suprématie de la constitution*, Institutul European Publishing House, Iași, 2014, p. 28.

Promoted intensively by Hans Kelsen through the "Pure Theory of Law", it argues that the validity of a norm derives exclusively from a higher norm, culminating in the *Grundnorm* (fundamental norm)

The principles of law, by their nature, generality and depth, are topics of reflection primarily for the philosophy of law, only after their construction in the sphere of the metaphysics of law, these principles can be transposed into the general theory of law, can be normatively consecrated and applied in jurisprudence. Moreover, there is a dialectical circle because the "meanings" of the principles of law, after normative consecration and jurisprudential elaboration are to be elucidated also in the sphere of the philosophy of law.

2. Content

Law cannot be conceived outside the idea of freedom. The normative system, the most important aspect of law, has its meanings and legitimacy in human existence, the latter having freedom as an essential given.

But what kind of freedom can we talk about in legal normativism and in the categories and concepts of law? Inevitably, it is a freedom of the legal norm, a constructed freedom, and not an existential given. We must emphasize that the legal norm also implies constraint, as does any existential order applied to human phenomenology. An important paradox appears that some authors in the field of Christian metaphysics have also signaled, namely the coexistence of legal constraint, on the one hand, and on the other hand of human freedom, both being essential for the order specific to the legal state in which contemporary man finds himself.

Another aspect is also interesting, namely that the legal norm does not show what freedom is, does not define it, does not show its meanings, but only the situations in which freedom is guaranteed or restricted. Moreover, it is good to note that, unlike metaphysics and ethics, the legal norm does not express and does not conceptualize freedom as such, but only freedoms or rights, that is, the phenomenal aspects of human manifestations in the social environment, by its nature a relational environment. It is obvious that the legal normative system could not even define freedom as such, because it remains only at the phenomenological and social aspect of existence. Similarly, the legal doctrine postulates human freedom and highlights the content of legal freedoms and their limits, but does not define freedom as reality, as an essential feature of man as a person, including in the social environment. Law cannot be conceived outside the idea of freedom. The normative system, the most important aspect of law, has its meanings and legitimacy in human existence, the latter having freedom as an essential given.

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The doctrine of legal normativism recognized and applied in almost all states is a concretization of what has been shown above.

The normativist theory, as a current of legal positivism, is reflected in the main work of the American jurist Hans Kelsen, *Pure Theory of Law*. In this doctrine, the author proposes to study law only in the hypostasis of its existence. According to Kelsen, the science of law must be limited to the research of law only in its pure state,

² For developments see F. A. Haiek, *Constituția libertății*, Institutul European Publishing House, Iași, 1998; J. M. Buchanan, *Limitele libertății. Între anarhie și Leviathan*, Institutul European Publishing House, Iași 1997; J. Rivero, H. Moutouh, *Libertés publiques: Tome 1*, Presses Universitaires de France - PUF; 9^e edition (2003); B. Bodea, *Drepturile omului și libertățile fundamentale*, Hamangiu Publishing House, Bucharest, 2024; G. Iancu, *Drepturile, libertățile și îndatoririle fundamentale în România*, C.H. Beck Publishing House, Bucharest, 2003.

outside of connections with politics and morality. Otherwise, it will lose its objective character and will turn into an ideology.

Kelsen analyzes legal norms from the aspect of validity, and then of effectiveness, in a manner that can be called "pure" because it leaves aside any other extrinsic elements that are not strictly legal (for example, politics).³

The theory of law aims to eliminate the dualism of subjective law - objective law, arguing that objective law represents the legal normative framework through which subjective law is exercised. Kelsen also relativizes through his theory the dualism of private law - public law, stating that this dichotomy should not be seen as separating two branches of law in opposition. The notable difference between the two branches, Kelsen believes, can be analyzed from an ideological point of view, not a theoretical one.

The central place in the pure theory of law is occupied by the legal norm which, formally, has a pure character, unlike the moral norm, which has a content. Through his system of norms, Kelsen supports the theory of the creation of law in cascades. Thus, the authority of a judicial decision originates in a presidential decree; this, in turn, in a law adopted by parliament, and this, claiming the constitution. All legal norms belong to a given legal order, justifying their validity by referring to a fundamental norm⁴.

The conformity of the entire law with the fundamental law is an important consequence of the supremacy of the Constitution and must be understood not only through the correspondence in content and form of the lower norms as legal force with the constitutional ones, but also through the need to translate the constitutional regulations and rules (in their spirit and letter) into other judicial regulations. It should be noted that an important feature of the constitutional norms that arises from the principle of the supremacy of the fundamental law is the possibility and even the need to be translated, concretized through normative regulations, into other branches of the unified legal system. In relation to this element of specificity of the norms of constitutional law, it is necessary for the constitutive legislator to establish a synthetic, generalized content of these norms, and not an analytical, procedural one. In the situation where, when the descriptive, procedural character of the norms prevails in the normative content of a constitution, it would lose too much of its constitutional purpose, that of being an essential, generalizing factor for the entire legal system. However, the generality of the formulation of the constitutional law norm would not exclude its clarity and precision. Therefore, any codification work in the field of constitutional law is difficult because it must dialectically combine the generality specific to norms containing principles of law, and on the other hand clarity and precision, the latter absolutely necessary to ensure their correct application and thus avoid arbitrariness or the possibility of asserting, in the name of constitutional values, any partisan political interests. The fulfillment of this requirement can be verified in the practice of transposition and interpretation of constitutional norms carried out in all state authorities.

One of the most important issues for elucidating the specifics of constitutional norms concerns the answer to the question of whether all constitutional provisions contain legal norms. Constitutional provisions that concern the economic, social or financial system are norms of constitutional law with a value of principle, and not simple political purposes, since they regulate the conduct of legal subjects participating in certain social relations. Also, the constitutional norms in question establish genuine legal rights and obligations for legal subjects. For example, the constitutional obligation for the derived legislator (Parliament or Government) as in the process of drafting the law to comply with these constitutional regulations, otherwise the sanction of unconstitutionality of the normative acts in question may intervene. We note in conclusion that all constitutional provisions contain legal norms because they have the essential features of a norm of law: they prescribe the conduct of the subjects to whom they are addressed and generate legal obligations, and the violation of such obligations may attract legal sanctions specific to the law.

The normative expression of constitutional principles, themselves simple in normative form, but complex in nature and in content determined by the object of regulation, constitutes the source and normative-value basis of the unity and simplicity of the entire state legislative system. The legislator's reference to constitutional principles, not only to guarantee the simple formal correspondence between the judicial norm and the fundamental law, but especially to legislate in compliance with these principles and having as its purpose their content, is a prerequisite for eliminating the diversity of norms, a natural consequence of the excess of power of

³ See H. Kelsen, *Doctrina pură a dreptului*, Humanitas Publishing House, Bucharest, 2000.

⁴ I. Muraru, E. S. Tănăsescu, *Drept constituțional și instituții politice*, 15th edition, Vol I, C.H. Beck Publishing House, Bucharest, 2016, p.20; M. Andreescu, A. Puran, *Drept constituțional. Teoria generală. Instituții constituționale. Jurisprudență constituțională*, 4th edition, C.H. Beck Publishing House, Bucharest, 2020, pp.114-135.

the rulers in legislative matters. There are, therefore, two ways in which power can legislate: the first one that disregards the teleological reference to constitutional principles and in general to the principles of law, aiming only at the formal correspondence with constitutional norms, and the second one teleologically oriented towards the content, meaning and limits imposed by the principles of law. In the first case, normative diversity results, devoid of a rational, unifying factor; In the second hypothesis, there is at least the possibility of achieving simplicity and unity of the normative system in the complexity of the content.

The logical-formal structure of constitutional law must include all three elements: hypothesis-provision-sanction. The main characteristic of these norms is the way in which the sanction is expressed. Thus, for several provisions, a single sanction may be present. Also, in constitutional law there are specific sanctions, for example the declaration of a legislative act as unconstitutional or the revocation of a state body. Given the structuring role of constitutional law for the entire legal system, the logical-formal assessment of constitutional norms must also be made by reference to other categories of legal regulations. For the regulations of principle or of maximum generality contained in the fundamental law, some sanctions are contained in the norms of other branches of law (civil law, criminal law, administrative law). In this sense, the principle solution was correctly mentioned in the doctrine: "I believe that sanctions are found even in constitutional norms for the violation of any provision provided that the obligation or entitlement is precisely identified, in other words the conduct of the subjects of law".⁵

Another element of particularity for the principles of legislative value of constitutional law refers to the subject of regulation. Without going into details, we retain the idea contained in contemporary doctrine, according to which the common element and proper only to the social relations that form the subject of regulation of the norms of constitutional law, is that they appear in the process of establishing, maintaining and exercising state power.⁶

All the norms contained in the constitution are norms of constitutional law, as well as principles of law, even if some of them also regulate social relations specific to other branches of law. Given that constitutional law, in particular the constitution, contains norms with a principle value, which refer not only to the organization and functioning of state authorities, but also to the social and economic system. Consequently, the subject of regulation of constitutional law is formed by the social relations that arise during the process of constituting, maintaining and exercising state power, but also those relating to the bases of power and the bases of organizing power. These categories refer to the sovereignty of the people, the characters attributed to the state, the territory of the population, including those relating to the fundamental features of the social economic system.⁷

In a comparative analysis of the regulations contained in contemporary constitutions, it is observed that the historical, political, national, cultural, religious, etc. diversity of states does not directly result in a diversity of the legislative content for the fundamental laws. The content of the constitutions of modern states presents many similarities and sometimes almost identical formulations with some of the regulated institutions.⁸ This similarity is mainly determined by the identity of the normative object of constitutional norms.

On the other hand, the diversity of the normative content eliminates the idea of uniform standards generally valid for contemporary constitutions. The diversity of the normative content is a consequence of the fact that the fundamental law of the state is determined from the point of view of the content of social, political and economic realities, on the characters and attributes of the respective state, expressed historically and at the same time. on the will of the constituent legislator, essentially a political will, at a certain historical moment.

Along with other authors, we consider that the scientific definition of the constitution is the main criterion for identifying the normative content. Such a criterion ensures the generality necessary to give a scientific character to scientific elaborations on the subject and at the same time explains the regulatory unity but also the constitutional normative diversity. For the purpose of this scientific approach, we retain the essence of any attempt to define the fundamental law, namely: "The constitution is a fundamental political and legal constitution of a state."⁹ In legal acceptance, the fundamental law is the act by which the status of power is

⁵ I. Muraru, E.S. Tănăsescu, op. cit, p. 21.

⁶ I. Muraru, E.S. Tănăsescu, op. cit, p.24.

⁷ For development see M. Andreescu, A. Puran, *Drept constituțional. Teoria generală și instituții constituționale*. Jurisprudență constituțională, C.H. Beck Publishing House, Bucharest, 2025, pp. 14-22.

⁸ C. Ionescu, *Tratat de drept constituțional*, 3rd edition, C.H. Beck Publishing House, Bucharest. 2019.pp. 208-209.

⁹ I. Deleanu, *Instituții și proceduri constituționale- în dreptul român și dreptul comparat*, Universul Juridic Publishing House, Bucharest, 2024, p. 88.

determined and, through it, all legal norms, having as its object the regulation of the bases of power and the bases of the organization of power.

One of the most controversial and important legal issues is the relationship between stability and innovation in law. The relationship between stability and change in law can be analyzed in relation to a specific historical moment and to the current state of a legal normative system and a society.

The stability of legal norms is undeniably a necessity for the predictability of the conduct of legal subjects, for the security and proper functioning of economic and legal relations as well as for giving substance to the principles of the supremacy of law and the Constitution.

On the other hand, it is necessary to adapt the legal norm and law in general to the social and economic phenomena that follow each other so rapidly. It is necessary for the legislator to be constantly concerned with eliminating everything that is "outdated in law", of what does not correspond to realities. The relationship between stability and innovation in law is a complex and difficult issue that must be approached with all due attention, taking into account a wide range of factors that may determine a favorable or unfavorable position for legislative change.¹⁰

Stability is a requirement for guaranteeing the principle of the supremacy of the constitution and its implications. In this sense, Professor Ioan Muraru stated that the supremacy of the constitution does not represent only a strictly legal category, but a political-legal one, revealing that the fundamental law is the result of economic, political, social and legal realities. "It marks (defines, outlines) a historical stage in the life of a country, it consecrates victories and gives expression and political-legal stability to the realities and perspectives of the historical stage in which it was adopted".

Essential for a constitution is its stability over time because only in this way can the stability of the entire normative system of a state, the certainty and predictability of the conduct of legal subjects, but also to ensure the legal, political and economic stability of the social system as a whole, be ensured. Stability is a requirement for guaranteeing the principle of the supremacy of the constitution and its implications. In this sense, Professor Ioan Muraru stated that the supremacy of the constitution does not represent only a strictly legal category, but a political-legal one, revealing that the fundamental law is the result of economic, political, social and legal realities. "It marks (defines, outlines) a historical stage in the life of a country, it consecrates victories and gives expression and political-legal stability to the realities and perspectives of the historical stage in which it was adopted."¹¹

The establishment of the normative content of the constitution is done depending on the specificity, importance and value of the regulated social relationship. We share the opinion expressed in the specialized literature that, unlike other categories of legislative acts, the norms contained in the constitution should regulate the fundamental social relations that are essential for the establishment, maintenance and exercise of power, but also those relating to the bases for power, respectively the bases of the organization of power. Therefore, constitutional norms are always principles of law having a decisive role in the establishment and functioning of government bodies and in determining the form of the state, respectively its character and attributes.

The limits of social normativism, especially the legal one, are evident especially in relation to human freedom. Social normativist determinism cannot encompass nor constrain human freedom as a person. The existential freedom of man in the social environment manifests itself in its phenomenal forms, determined, guaranteed but also controlled by the power of the state, the creator of social order through laws. It is therefore a freedom whose content is expressed through the forms of culture and civilization, a creative freedom, but a limited, conditional freedom, possibly subject to restrictions imposed by the state. It is a freedom of the legal norm.

Regarding the complex relationship between the normative legal system, and on the other hand society, it can be noted that in contemporary times the legal system tends to have its own functional autonomy, outside the objective or subjective determinations that society transmits. The autonomy of the legal tries to transform itself from a secondary, phenomenological and ideational structure, into one with its own reality, with the power to impose its order on the social and natural order. In this context, the normatively consecrated legal freedoms try to determine the existential freedom of man, explaining it, ordering it and conditioning it. It is a situation

¹⁰ M. Andreescu, *Reflecții privind reforma constituțională în România*, Dreptul no. 9/2011, pp. 41-60.

¹¹ For details see M. Andreescu, A. N. Puran, *Drept constituțional. Filosofia dreptului și istorie. Studii și eseuri*, C.H. Beck Publishing House, Bucharest, 2022, pp. 181-239.

contrary to natural reality; the phenomenology of the legal must be conditioned, determined, by the existence of man, as a person, and by the particularities of social existence and not vice versa. It is an expression of dictatorship by law even in democratic societies, because the legitimacy of the legal norm lies, in such an unnatural situation, only in the will and interests of the rulers who express themselves, paradoxically, in the name of the people.

The reality described above, specific to contemporary society, has negative consequences, in the sense that man, as a person, the only holder of existential freedom, is no longer aware of his own freedom and expects the normative order, the state or even justice, to grant him the freedom he needs. It can be said that, in such a situation, not being aware of his own freedom, contemporary man does not exist authentically, but lives by delegation, his existence being externally determined by state and legal normativism, abstract, impersonal and, often, devoid of value sense.

Naturalistic *jus* conceptions consider freedom as an ontological given of the human being and try to achieve the transition from freedom as an ontological essence to freedoms as a social phenomenon, specific to the legal status of man and normatively determined. We say that none of the forms of naturalistic *jus* conceptions manages to fully make such a transition, and the attempt to preserve the immutability and prestige of freedom within legal freedoms is most often unsuccessful.¹²

We note, in this ideological context, that legal freedoms, as a structural element of the legal status of man, have as their metaphysical basis the principle of coexistence of freedoms, postulated by *jus* naturalism, but also by the French Declaration of the Rights of Man of 1789. It is a natural expression of the social existence of man, understood through the limits and not through the absolute of existential freedom. In other words, in this phenomenal legal plane, man's freedom extends to the limit of the freedom of his neighbor. It is about the specific distinction of law between "mine" and "yours", through which legal freedom is not constituted as a spiritual opening, but as a closure within the limits of the individual. We maintain that the legal norm, in this way, cannot address the person, focused on the ontological idea of freedom, but only man as an individual, contained in the multiple structures of the social scaffolding.

Article IV of the Declaration expresses the famous legal principle of the coexistence of liberties: "Liberty is to do whatever does not harm others: thus, the right of each man has no limits, except those which secure to the other members of society the exercise of the same rights. These limits can only be determined by law." In other words, my freedom extends to where the freedom of another begins. Of course, this principle is valuable because it enshrines the legal rule according to which the exercise of my freedom cannot affect the similar freedom of others. Essentially, the coexistence of liberties, as conceived in legal doctrine, is a principle that divides and does not unite, because it is the expression of the same fundamental dichotomy for law and the legal status of man that I have mentioned. It is a rational principle.

Obviously, such a reality is not in itself negative, because the dimension of human social phenomenality is a reality through which the human essence is manifested, and the affirmation, recognition, normative consecration and guarantee of fundamental human rights and freedoms, a fact achieved relatively late in history, is a remarkable act of culture and civilization, which places man in his social individuality in a relationship of equality with the power of the state and sets limits to the absolute and discretionary power of those who exercise state power. The constitutional consecration of human freedoms and rights represents the most important fact in the contemporary history of humanity, a resettlement of the relationship between the state and man, in the sense that man is not for the state, but the state for man. But this too is a gift from God. Unfortunately, in contemporary society this fundamental legal reality is altered and distorted by abusive manifestations of power, which cannot always be controlled and eliminated effectively by legal means.

The legal norm, especially in the conditions of the will of "legal norming" that contemporary society knows, is increasingly moving away from human values. It is an abstract, general and impersonal structure whose legitimacy is not a value one, but of a formal recognition within the normative system in question. The abandonment of values, including Christian ones, has as a consequence normative relativism based almost exclusively on the pure will of the legislator.

¹² I. Dojană, *Dreptul subiectiv*, C.H. Beck Publishing House, Bucharest, 2010, pp. 101-123; M. Andreescu, *Filosofie, credință și drept*, University Publishing House, Bucharest, 2016, pp.111-120.

Therefore, recourse to the principles of law is necessary to avoid legal normative formalism and to correctly adapt legal norms to social realities.¹³

The problem of the status of the principles of law and their explanation has always concerned theorists. The school of natural law argued that the source, the origin, and therefore the basis of legal principles is human nature. The historical school of law, under the influence of Kantianism, opens a new perspective in the research of the genesis of legal principles, presenting them as products of the popular spirit (*Volkgeist*), which displaces the basis of law from the universe of pure reason, to the confluence of historical origins dissipated in a multitude of transient forms. Variants of the positivist school maintain that the principles of law are generalizations induced from social experience. When the generalization covers a sufficiently large series of social facts we are in the presence of principles. There are also authors such as Rudolf Stammler who deny the validity of any legal principle, considering the content of law diversified in space and time, lacking universality. In the author's conception, law would be a cultural category.¹⁴

Referring to the same problem, Mircea Djuvara stated: "The whole science of law consists in reality, for a serious and methodical research, only in extracting from the multitude of legal provisions their essential, that is, precisely these ultimate principles of justice from which all other provisions derive. In this way, the entire legislation becomes of great clarity and what is called the legal spirit is captured. Only in this way is the scientific elaboration of a law made."¹⁵

In our opinion, this is the starting point for understanding the principles of law.

In the doctrine, the following general principles of law have been identified and analyzed: 1) ensuring the legal basis for the functioning of the state; 2) the principle of freedom and equality; 3) the principle of responsibility; 4) the principle of equity and justice¹⁶. The same author considers that the general principles of law have a theoretical and practical importance which consists in: a) the principles of law draw the guideline for the legal system and orient the activity of the legislator; b) these principles are also important for the administration of justice because, "The man of law must ascertain not only the positivity of the law, he must also explain the reason for its social existence, the social support of the law, its connection with social values"; c) the general principles of law can take the place of regulatory norms when the judge, in the silence of the law, resolves the case based on the general principles of law.¹⁷

We consider that the general principles of law are delimited by the positive norms of law, but there is undoubtedly a relationship between the two values. For example, equality and freedom or fairness and justice are value foundations (values) of social life. They must find their legal expression. In this way, legal concepts appear that express these values, concepts that become foundations (principles) of law. Legal norms then derive from these principles. Unlike norms, the general principles of law have explanatory value because they contain the foundations of the existence and evolution of law.¹⁸

Along with other authors¹⁹, we consider that legal norms relate to the principles of law in two senses: the norms contain and describe most of their principles; the functioning of the principles is then achieved by applying in practice the conduct prescribed by the norms. In relation to the principles, legal norms have a more restricted explanatory, teleological value, the purpose of the norms being to preserve social values, not to explain the causal reason for their existence. The principles of law are the expression of the values promoted and defended by law. We could say that the most general principles of law coincide with the social values promoted by law.

The principles of law, by their nature, generality and depth, are topics of reflection primarily for the philosophy of law, only after their construction in the sphere of the metaphysics of law, these principles can be transposed into the general theory of law, can be normatively consecrated and applied in jurisprudence. Moreover, there is a dialectical circle because the "meanings" of the principles of law, after normative consecration and jurisprudential elaboration are to be elucidated also in the sphere of the philosophy of law.

¹³ For development see I. Craiovan, *Tratat de teoria generală a dreptului*, 5th edition, C.H. Beck Publishing House, Bucharest, 2023, pp. 191-229, 456-473.

¹⁴ R. Stammler, *Theorie der Rechtswissenschaft*, University of Chicago Press, 1989, p.24-25.

¹⁵ M. Djuvara, *Teoria generală a dreptului. Drept rațional, izvoare și drept pozitiv*, All Beck Publishing House, Bucharest, 1999, p.265.

¹⁶ N. Popa, *op.cit.*, p.120-130.

¹⁷ *Ibidem*, p.119.

¹⁸ *Ibidem*, pp. 116-117.

¹⁹ N. Popa, *op.cit.*, pp.116-117, R. I. Motica, G. Mihai, *Teoria generală a dreptului. Curs universitar*, Alma Mater Publishing House, Timișoara, 1999, p.78.

Such a finding nevertheless imposes the distinction between what we could call: constructed principles of law, and on the other hand metaphysical principles of law. The distinction that we propose has as its philosophical basis the difference between "constructed" and "given" in law.

The constructed principles of law are, by their nature, legal rules of maximum generality, elaborated by legal doctrine or by the legislator, in all situations explicitly consecrated by the norms of law. These principles can constitute the internal structure of a group of legal relations, of a branch or even of the unitary system of law. The following features can be identified: 1) they are developed within the law, being as a rule the expression of the legislator's will, enshrined in legal norms; 2) they are always explicitly expressed through legal norms; 3) the work of interpreting and applying the law is able to discover the meanings and determinations of the constructed principles of law which, obviously, cannot exceed their conceptual limits established by the legal norm. In this category we find principles such as: the publicity of the court hearing, the principle of adversarial proceedings, the supremacy of the law and the Constitution, the principle of non-retroactivity of the law, etc.

The metaphysical principles of law can be considered as a "given" in relation to legal reality and by their nature are external to law. At their origin they do not have a legal, normative, or jurisprudential elaboration. They are a transcendental and not transcendent "given" of law, therefore, they are not "beyond" the sphere of law, but are "something else" in the legal system. In other words, they represent the value essence of law, without which this constructed reality could not have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by legal norms. Metaphysical principles can also have an implicit existence, discovered or capitalized in the work of interpreting law. As an implicit given and at the same time as a transcendental essence of law, these principles must ultimately be found in the content of any legal norm and in any act or manifestation that represents, as the case may be, the interpretation or application of the legal norm. It should be emphasized that the existence of metaphysical principles also underpins the teleological nature of law, because any manifestation in the legal sphere, in order to be legitimate, must be adequate to such principles.

In our opinion, the metaphysical principles of law are: the principle of justice; the principle of truth; the principle of equity and justice; the principle of proportionality; the principle of freedom.

The metaphysical principles of law have normative value, even if they are not explicitly expressed by legal norms. Moreover, as it results from the jurisprudential interpretations, they can even have a supra-normative significance and, in this way, can legitimize jusnaturalist conceptions in law. These conceptions and the doctrine of supra-legality supported by Francaise Geny, Leon Duguit and Maurice Duverger, consider that justice and, in particular, constitutional justice must relate to supra-constitutional rules and principles. In our opinion, such standards are expressed precisely by the metaphysical principles to which we have referred. Jusnaturalist conceptions have also been applied by some constitutional courts. The Decision of January 16, 1957 of the Federal Constitutional Court of the Federal Republic of Germany on the freedom to leave the federal territory is famous in this regard. The Court declares: "Laws are not constitutional unless they have been enacted in compliance with the prescribed forms. Their substance must be in accordance with the supreme values of the democratic and liberal order as a system of values established by the Constitution, but must also be in accordance with the unwritten elementary principles (s.n.) and with the fundamental principles of the Basic Law, especially with the principles of the rule of law and the social state."²⁰

3. Conclusions

Law represents, among other things, a system of norms that regulate human conduct. This human conduct can have a legal content only on the basis of a legal norm. Law, unlike moral and religious norms, has a coercive character, in case the subject refuses to comply with the normative provisions. Public power imposes on individuals a normative legal conduct, because law is the reflection of the common interests in society. Law cannot be conceived without power.

The state, in Kelsen's conception, is identified with law. It represents the legal order, and its reality is the content of positive law. The state and law are two sides of the same phenomenon⁹⁷. By creating law, the state must subordinate itself to law, and this, in turn, regulates its edification process. By identifying the state with law, according to Kelsen, any state is a state of law, which obviously does not correspond to current reality.

²⁰ For development see M. Andreescu, A. Puran, *Drept constitutional. Filosofia dreptului și istorie. Studii și eseuri*, C.H.Beck Publishing House, Bucharest, 2022, pp. 34-38.

We consider that the "pure doctrine of law" as a theory is not convincing, since law cannot be separated from social reality, viewed as objective reality, and especially cannot be deprived of moral values from its foundation, which is justice. The normative system cannot subordinate man.

Applying the principles of abstract and impersonal legal normativism, the principle No one is above the law is inscribed in all democratic constitutions. This is valid only in the formal relations of man with the law and in accordance with social determinism in which freedom is a given of the law and conditioned by it.

Law has numerous political, historical, economic and sociological implications that are intrinsic to it, naturally arising from interhuman relations and from the citizen-state relationship. Although the status of law as an autonomous science cannot be denied, a legal norm cannot be analyzed without being placed in a historical context, without being correlated with the political and economic factors that determined its promulgation, and without evaluating the social impact it produced among the population through its application.

One of the world's great philosophers, Immanuel Kant, considered the superiority of the principles of law in relation to the formal, abundant, sometimes contradictory legal normativity, the result of the will of the legislator. Kant approached law (Rechtslehre) in the "Metaphysics of Morals" defining it as a system of rational principles a priori, independent of experience, which regulate the coexistence of individual freedoms. Unlike morality, which concerns internal motivation, Kantian law refers to external actions and the possibility of their correlation with the freedom of others. The Universal Principle of Law (Supreme Principle) in Kant: "Any action is right if, by itself or on the basis of its maxim, the freedom of choice of each can coexist with the freedom of all, in accordance with a universal law". This principle emphasizes that law does not limit freedom, but orients it to guarantee a maximum sphere of external freedom for each person²¹.

For social normativism, we believe that the words of Immanuel Kant are applicable: "Only the law of becoming truly explains the permanence of existence, making it intelligible according to empirical laws."

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²¹ I. Kant, Metafizica moravurilor, Antet Revolution Publishing House, Bucharest, 2013.

INTERPRETATIVE CHALLENGES REGARDING THE CONCEPTS OF „PSYCHOACTIVE SUBSTANCES” AND „INFLUENCE” IN NATIONAL JURISPRUDENCE: IMPLICATIONS FOR ROAD TRAFFIC OFFENCES

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Abstract

The jurisprudence of the High Court of Cassation and Justice has ruled that "psychoactive substances" encompass all substances capable of producing psychoactive effects, namely alterations in psychic functions, mental processes and behavior, or the creation of physical or psychological dependence. The consumption of narcotic, psychotropic or other psychoactive substances invariably produces physical, psychological and behavioral changes of varying but significant degrees; in consideration of these effects, operations involving such substances are either totally or predominantly restricted.

As such, the Romanian legislator has also presumed that, once consumed, any substance with a psychoactive effect affects the central nervous system to an extent incompatible with the safe conduct of activities that pose a high risk to human health - such as, among others, driving a vehicle on public roads. From this perspective, it has been held that a person is under the influence of psychoactive substances, within the meaning of Article 336 paragraph (2) of the Penal Code, whenever substances capable of producing psychoactive effects have been introduced into their body - through ingestion, injection, inhalation, smoking, or any other means.

However, what has sparked numerous jurisprudential and legislative controversies is the answer to the following questions: Regarding the material element of the offense of driving a vehicle under the influence of other substances, is the quantity of the substance consumed or detected in the perpetrator's biological samples after the incriminated act relevant? Is a minimum threshold of toxicological relevance necessary? Should the legislator distinguish between situations where the detected substances have a real effect on driving ability and cases involving only residual traces with no psychoactive impact? How is the social danger assessed for drivers receiving certain substances under medical supervision for the treatment of specific conditions?

The present study will analyze the legislative context and the incident jurisprudence to clarify the concepts of "psychoactive substances" and "influence" and, consequently, to examine the potential effects of consuming such substances regarding criminal liability under Article 336 of the Penal Code.

Keywords: *psychoactive substances, influence, road safety, legislation, jurisprudence, limits and effects.*

1. Introduction

Article 336 of the Criminal Code criminalizes the offence of driving a vehicle under the influence of alcohol or other substances, providing in paragraph (1) the following: "Driving on public roads a vehicle for which the law mandates the possession of a driving license by a person having a blood alcohol concentration of over 0.80 g/l of pure alcohol in the blood shall be punished by imprisonment from 1 to 5 years and the prohibition of certain rights." According to Article 336 paragraph (2), "the same penalty shall apply to a person, under the influence of psychoactive substances, who drives a vehicle for which the law mandates the possession of a driving license."

Since the phrase "under the influence of psychoactive substances" lacks a legal definition, its interpretation has sparked numerous controversies, given the dichotomy between the biological presence of a substance and the actual impairment of the ability to drive vehicles. The question arose: does being "under the influence" reside in the existence of a purely biological state (the simple presence of the substance) or does it also contemplate a functional state induced by psychoactive substances that endangers road safety?

In legal doctrine, the dilemma has been formulated as follows: can "influence" be established by the mere presence of the psychoactive substance in samples taken from the perpetrator (a first solution), or should this presence be "doubled" by the finding of impairment of the perpetrator's capacity to drive vehicles on public

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roads (a second solution)¹. The same author specified that a person is "under the influence" of psychoactive substances "when their action produces a change (an effect) upon them (upon their being). The presence of a psychoactive substance in a person's blood or urine, attested by a toxicological analysis carried out under the conditions provided by law, obviously represents a change, at least from a physiological point of view, at the level of that person's body. It is not by chance that toxicological analysis reports use the expression: positive for substance x."

Other questions have also sought answers: is it necessary to establish a certain threshold in the case of driving under the influence of psychoactive substances, similar to the offence of driving a vehicle under the influence of alcohol? What is the concentration level of psychoactive substances that affects the ability to drive? How could the impairment of driving capacity be determined in the case of psychoactive substance consumption? How long after consumption can the ability to drive still be considered impaired?

The regulation of Art. 336 para. (2) of the Criminal Code has been intensely criticized in doctrine, noting, among others, the following aspects: it could lead to the conviction of persons who pose no real danger to traffic safety, based solely on the residual presence of a substance in the body; thus, the legal text does not ensure a balance between the protection of road safety and the respect for individual rights, nor does it prevent situations where innocent persons could be sanctioned. Furthermore, the notion of "being under influence" is not clear and predictable, as there are medications that can be part of a maintenance treatment for certain conditions, and some substances can yield false positive results, leading to the unjust conviction of drivers who have psychoactive substances in their bodies resulting from the consumption of common medicines, food, prescribable treatments, or consumption that occurred even weeks prior, without affecting their driving capacity in any way. The psychoactive substances included in current Romanian legislation are not limited to illegal drugs but also include prescription medicines (antidepressants, antipsychotics) essential for psychiatric treatments, administered to patients suffering from mental conditions compatible with driving motor vehicles.

In essence, it has been highlighted that the legislative provisions do not distinguish between the mere presence of psychoactive substances in the body and their actual influence on the ability to drive, which can generate the unjust sanctioning of persons following medically prescribed treatments.

2. The legislative context and the evolution of national jurisprudence

Law no. 339/2005² on the legal regime of narcotic and psychotropic plants, substances, and preparations establishes the legal framework regarding the cultivation, production, manufacturing, storage, trade, distribution, transport, possession, offering, transmission, intermediation, acquisition, use, and transit on national territory of spontaneous or cultivated plants, substances, and preparations provided in Tables I, II, and III of the Annex which forms an integral part of this law. Art. 1 para. (2) of Law no. 339/2005 provides that the substances listed in Tables II and III of the Annex and their preparations are subject, when used for medical purposes, to other provisions applicable to substances and preparations for human or veterinary use, insofar as they do not conflict with the present law.

In accordance with the provisions of Art. 10 para. (2) of Law no. 339/2005, the Ministry of Health adopted Order no. 4169/2023, approving the List of preparations containing narcotic and psychotropic substances, provided in the Annex which forms an integral part of this order. According to Art. 2 of this order, the list of preparations containing narcotic and psychotropic substances shall be amended, upon the proposal of the National Agency for Medicines and Medical Devices of Romania, whenever necessary, in accordance with the classification of these preparations under the provisions of Law no. 339/2005, as subsequently amended and supplemented.

However, these substances provided in the Order are found in the composition of certain medications approved for use in Romania; thus, the impairment of the ability to drive vehicles is not objectively determined solely by the mere presence in the blood, in any concentration, of common substances such as codeine. Consequently, criminalizing the consumption of these substances that have a legal use may lead to negative

¹ Valerian Cioclei, *Sensul expresiei „persoană aflată sub influența unor substanțe psihoactive*, in *Analele Universității din București, Seria Drept, Forum juridic* no. 1/2024, DOI: <https://www.doi.org/10.31178/AUBD-FJ.2024.1.19>, <https://aubd.drept.unibuc.ro/wp-content/uploads/2025/04/1-2024-19.-Valerian-Cioclei-Sensul-expresiei-%E2%80%9Epersoana-aflata-sub-influenta-unor-substante-psihoactive.pdf>.

² Law no. 339/2005 on the legal regime of narcotic and psychotropic plants, substances, and preparations, published in the Official Gazette of Romania, Part I, No. 1095 of December 5, 2005

social consequences, such as the refusal of certain treatments out of fear of legal repercussions. These ambiguities in the interpretation and application of the law have led to an extensive body of jurisprudence from the High Court of Cassation and Justice and the Constitutional Court, in the challenge of delimiting the mere presence of a substance in the organism from the concrete effect on driving capacity, so as to avoid the sanctioning of those situations that do not represent a real danger to society.

The first clarifications were provided by Decision no. 138/2017³ of the Constitutional Court, which dismissed the exception of unconstitutionality regarding the provisions of Art. 336 para. (2) of the Criminal Code, holding that "in order to establish the consumption of psychoactive substances — as an essential requirement specific to this offence — a laboratory analysis is necessary, which must determine the existence of these substances in the body of the vehicle's driver. (...) Given the broad scope of products susceptible to having psychoactive effects, as reflected in the aforementioned special legislation, (...) the legislator cannot provide a minimum level of concentration of psychoactive substances as an essential requirement regarding the material element of the actus reus in the case of the offence of driving a vehicle under the influence of psychoactive substances (...). Consequently, the legislator intended to criminalize the act in any situation of driving a vehicle following the consumption of psychoactive substances (...)." ⁴

Furthermore, in the recitals of Decisions no. 101/2019⁵ and no. 154/2016⁶, the Constitutional Court explained that consumption is understood as the introduction into the human body of a product, regardless of whether it has been dissolved, impregnated, dispersed, or diluted, in one of the following ways: orally or by injection, inhalation, smoking, or external application to a person's body, in any other way, such that the product reaches the body of a person [Art. 2 lit. f) of Law no. 194/2011, republished]. It is irrelevant whether the state of the vehicle's driver, who is under the influence of psychoactive substances, is the result of abuse — which implies the consumption of plants, substances, and preparations containing substances susceptible to having psychoactive effects without a medical prescription — or is the result of medical use, which signifies the lawful use, based on medical prescription, of medications under the control of national legislation; this is because the subjects of the challenged legal text carry out an activity with permitted risk, for which purpose they undergo forms of training, thus being informed and diligent individuals who, for the duration of holding a driving license, have the obligation to remain up to date with the relevant legal norms.

Through Decision no. 48/2021⁷ regarding the issuance of a preliminary ruling on the scope of the phrase "psychoactive substances" within Art. 336 para. (2) of the Criminal Code, the High Court of Cassation and Justice clarified the scope of the notion of "psychoactive substances," as defined by Art. 241 of Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, as follows: "Psychoactive substances' shall mean substances established by law, upon the proposal of the Ministry of Health." These substances are those provided in the annexes to Law no. 339/2005, which include, firstly, substances "traditionally" referred to as drugs (i.e., narcotic or psychotropic substances) provided for in international conventions to which Romania is a party (Art. 3 of Law no. 339/2005) and which are also found in Law no. 143/2000 (Art. 1); and, secondly, plants and substances under national control—a term designating plants and substances with psychoactive properties introduced into the annexes of the law [Art. 2 lit. d1) and Art. 8 of Law no. 339/2005]. This second category also includes the substances referred to in Law no. 194/2011, but only to the extent that their character as a substitute is established according to the set procedure (in which case, according to Art. 9 of Law no. 194/2011, the Ministry of Health also takes the necessary steps for the respective substance to be included both in the annexes of Law no. 339/2005 and Law no. 143/2000).

³ Decision no. 138/2017 concerning the exception of unconstitutionality of the provisions of Article 336, Paragraph (2) of the Penal Code, published in the Official Gazette of Romania, Part I, No. 537, dated 10 July 2017

⁴ See also Tudorel Toader, Marieta Safta, *Dialogul judecătorilor constituționali*, Universul Juridic Publishing House, București, 2015, p. 45-47, Ioan Vida, *Obligativitatea deciziilor Curții Constituționale pentru instanțele judecătorești – factor de stabilitate a Constituției și a practicii judiciare* (Binding decisions of the Constitutional Court on the courts - a factor of stability of the Constitution and judicial practice), in *Pandectele Române* no. 3/2004; Silviu Gabriel Barbu, Andrei Muraru, Valentina Bărbățeanu, *Elemente de contencios constituțional*, C.H.Beck Publishing House, 2021.

⁵ Decision no. 101/2019 concerning the exception of unconstitutionality of the provisions of Article 336, Paragraph (2) of the Penal Code, published in the Official Gazette No. 405 of May 23, 2019

⁶ Decision no. 154/2016 concerning the exception of unconstitutionality of the provisions of Article 338, Paragraph (1) of the Penal Code, published in the Official Gazette No. 450 of June 16, 2016

⁷ Decision no. 48/2021 concerning the delivery of a preliminary ruling for the clarification of the scope of the term 'psychoactive substances' under Art. 336 para. (2) of the Penal Code, published in the Official Gazette No. 698 of July 14, 2021

In conclusion, the notion of psychoactive substances, defined clearly and predictably by Art. 241 of Law no. 187/2012, does not imply a restriction of the scope of application of the incrimination norm to the category of substances referred to in Law no. 194/2011; rather, the scope of the notion of psychoactive substances also encompasses the substances provided for in the content of special laws no. 143/2000 and no. 339/2005, including both narcotic and psychotropic substances within this category.

In the judicial practice of the High Court of Cassation and Justice⁸, it has been established that "psychoactive substances" shall mean all substances capable of producing psychoactive effects - namely, alterations of psychic and behavioral functions and processes, or the creation of a state of physical or psychological dependence.

The properties of the substances or mixtures of substances from the aforementioned categories, and the harmful effects of their consumption on the central nervous system - resulting in alterations of psychic functions, processes, or the consumer's behavior - represent objective elements, medically substantiated and unanimously accepted at both international and national levels.

The legal regime of psychotropic and narcotic substances and mixtures, as well as other substances susceptible to producing psychoactive effects, is thus currently subject to restrictive regulations. Operations involving substances from the first category are, in principle, prohibited, except for cases of medical interest (under the conditions provided by Law no. 339/2005), while those involving substances from the latter category are subject to strict authorization and operational conditions expressly provided by Law no. 194/2011.

In the normative context thus configured, the legislator has presumed that, once consumed, any substance with a psychoactive effect affects the central nervous system to an extent incompatible with the safe conduct of activities that pose a high degree of risk to human health, such as, among others, driving a vehicle on public roads.

The consumption of narcotic, psychotropic, or other psychoactive substances always produces physical, psychic, and behavioral alterations of various, yet significant, degrees, in consideration of which operations involving such substances are totally or predominantly restricted.

From this perspective, it has been held that a person is under the influence of psychoactive substances, within the meaning of the provisions of Art. 336 para. (2) of the Criminal Code, whenever substances susceptible to producing psychoactive effects have been introduced into their body - through ingestion, injection, inhalation, smoking, or by any other means - the quantity of the substance consumed or detected in the perpetrator's biological samples subsequent to the commission of the action constituting the material element of the analyzed offence being irrelevant in this regard.

Similarly, a person who has consumed such substances is considered to be under their influence even when the alterations to their cognitive functions or behavior are not visible or easily identifiable. This is because the rationale for incrimination is the protection of road traffic safety, an activity whose normal conduct is conditioned by the prohibition of driving vehicles by persons under the influence of substances prohibited by law, such as those in the category of psychoactive substances⁹.

The arguments of the High Court of Cassation and Justice were reiterated and adopted by the Constitutional Court in the recitals of Decision no. 452/2021[1] regarding the exception of unconstitutionality of the provisions of Art. 336 para. (2) of the Criminal Code. In essence, the Constitutional Court found that the phrase "psychoactive substances" within Art. 336 para. (2) of the Criminal Code is clear, precise, and predictable, as it refers to those substances that produce the effects regulated by Art. 2 lit. e) of Law no. 194/2011. The aforementioned provisions of Art. 2 lit. e) fulfill, according to the previously invoked jurisprudence of the Constitutional Court, the requirements for the quality of criminal law imposed by the provisions of Art. 1 para. (5) and Art. 23 para. (12) of the Constitution and by the provisions of Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰.

⁸ See also Iulia Boghirnea, The analysis of the notions of "divergent jurisprudence" and the "unitary jurisprudence", in *Studii Juridice și Administrative* no. 17/2017, p. 106-112; Analysis of the French Doctrine Regarding the Normative Power of the Opinions of the Court of Cassation, in *Agora International Journal of Juridical Sciences* vol. 16, no. 1/2022, p. 34-37.

⁹ Decision no. 365/RC/ din 16 octombrie 2020.

¹⁰ See also Elena Anghel, Challenges of Constitutional Justice in Romania, in *Proceedings of the 41 International RAIS Conference on Social Sciences and Humanities*, p. 152-159, <https://rais.education/proceedings-of-the-41st-rais-conference/>; Senia Mihaela Costinescu and Benke Károly, Efectele deciziilor Curții Constituționale în dinamica aplicării lor (The effects of Constitutional Court decisions in the dynamics of their application), in *Revista Dreptul* no.10/2012

3. The Reconfiguration of Jurisprudence through Decision no. 25/2025¹¹

Although the jurisprudence seemed consolidated, the High Court of Cassation and Justice was again called upon in 2024 to settle a question of law¹²: "In the case of the offence of driving a vehicle under the influence of psychoactive substances, provided for by Art. 336 para. (2) of the Criminal Code, for the fulfillment of the pre-existing essential requirement that the defendant was under the influence of psychoactive substances, is it sufficient to establish the presence of the psychoactive substance in the biological samples, regardless of its concentration - the influence on driving capacity being an absolute presumption - or is this presumption a rebuttable one, which may be contested through scientific evidence showing that, despite the presence of psychoactive substances in a minimal concentration, the person is not under the influence of psychoactive substances with an impairment of the capacity to drive vehicles on public roads?"

"Does the provision 'under the influence of psychoactive substances' within the offence provided for by Art. 336 para. (2) of the Criminal Code refer to a person who has consumed psychoactive substances, or to a person whose capacity to drive a vehicle (for which the law mandates the possession of a driving license) is impaired following the consumption of psychoactive substances?"

The Prosecutor's Office attached to the High Court of Cassation and Justice considered that the impairment of a person's behavior due to the consumption of psychoactive substances, in a manner incompatible with the activity of driving a vehicle on public roads, is absolutely presumed by the legislator, and is not a matter that must be established in concreto based on the particularities of each case.

Specialized literature has issued divergent opinions, essentially arguing the following:

Babeş-Bolyai University – Faculty of Law opined that the legal presumption established by the legislator through the provisions of Art. 336 para. (2) of the Criminal Code is a rebuttable one (*presumptio iuris tantum*), as the legislator's intent was not to criminalize the danger posed by consumption itself, but the existence of the influence of these psychoactive substances on the driver's condition by impairing the capacity to drive vehicles on public roads. Establishing an absolute presumption regarding the impairment of driving capacity, deduced from the related fact of identifying psychoactive substances in biological samples (regardless of concentration), would be equivalent to an implicit and indirect criminalization of psychoactive substance consumption, contrary to the state's criminal policy on this matter. Given that most psychoactive substances are detectable in blood or urine for a significant period after consumption and after the psychoactive effects have subsided (especially in the form of metabolites), an absolute presumption would represent a disproportionate interference with individual liberty, as the person would be under a driving ban even several days after the actual moment of consumption.

The University of Oradea – Faculty of Law opined that the presence of psychoactive substances in the blood can only constitute an indication of a criminal situation. Consequently, it is necessary for the criminal investigation bodies to continue administering evidence regarding the impairment of the perpetrator's psychophysical capacities, through the diminution of the ability to drive, to concentrate on traffic, or to react in order to prevent road events.

"Lucian Blaga" University of Sibiu – Faculty of Law opined that, as the incrimination norm in Art. 336 para. (2) of the Criminal Code is drafted, the mere consumption of psychoactive substances is not capable of determining an absolute presumption of the existence of an influence on driving capacity. Instead, it is necessary to prove, in each individual case, the circumstance that this consumption concretely affected the ability to drive, a proof to be provided through scientific means. The presumption of the influence that psychoactive substance consumption has on the body is a rebuttable one, which can be contested through scientific evidence.

The University of Bucharest – Faculty of Law argued that, for the fulfillment of the pre-existing essential requirement that the defendant was under the influence of psychoactive substances, it is sufficient to establish the presence of the psychoactive substance in the biological samples, regardless of its concentration and regardless of whether the capacity to drive vehicles on public roads was impaired. In support of this opinion, it

¹¹ Decision no. 25/2025 regarding the issuance of a preliminary ruling for the clarification of a point of law concerning the offense provided for by Art. 336 para. (2) of the Criminal Code, published in the Official Gazette No. 70 of January 28, 2025.

¹² Cornelia Dinu, National and European case law – a remark for the High Court of Cassation and Justice in preliminary judgments, in *Journal LEGAL AND ADMINISTRATIVE STUDIES* Supplement 2024, Editura C.H. Beck, pp. 440 - 453,

https://www.upit.ro/_document/305830/jlas_supplement.pdf. See also Constitutionality and referral in the interests of the law, in *LESIJ - Lex ET Scientia International Journal* no. XXIX, vol. 1/2022, p. 66-74, https://lexetscientia.univnt.ro/download/2022_XXIX_1_6_LESIJ.pdf.

was shown that a person is "under the influence" of psychoactive substances when their action produces a change (impact) upon them (upon their being). The presence of a psychoactive substance in a person's blood or urine, attested by a toxicological analysis conducted under the conditions provided by law, obviously represents a change, at least from a physiological standpoint, at the level of that person's organism.

The "Mina Minovici" National Institute of Legal Medicine (INML) opined that establishing the presence of a psychoactive substance or its active metabolites in biological samples is not sufficient to absolutely presume the state of being under the influence and the impairment of driving capacity. This is because such an assertion can be contested through scientific evidence showing that, despite the presence of psychoactive substances in a minimal concentration, the person is not under the influence of psychoactive substances with an impairment of the capacity to drive on public roads. The state of being under the influence of psychoactive substances and, implicitly, the impairment of the capacity to drive a vehicle on public roads depends on several factors, such as the type of substance, the concentration of the substance in the mixture used, the duration of consumption, the metabolic capacity of that person's liver, the tolerance of that person's nervous system to the use of that substance, interactions with other substances (medications), etc.

The supreme court settled these controversies, ruling that the phrase "person under the influence of psychoactive substances", which constitutes the essential requirement attached to the material element of the *actus reus* of the offence of driving a vehicle under the influence of alcohol or other substances (in the assimilated version provided by Art. 336 para. (2) of the Criminal Code), refers both to the presence of the psychoactive substance in the biological samples and to its aptitude to determine an impairment of the perpetrator's driving capacity.

In the reasoning of this decision, the supreme court held that the social value protected by the offence provided in Art. 336 para. (2) of the Criminal Code is the safety of road traffic participants, and the injury to this value can only be affirmed if, at the time of driving the vehicle, an abstract state of danger to road traffic safety can be established. However, in a situation where the identified psychoactive substances are no longer capable of producing any effect on the driver's behavior—because, although present in the biological samples, they no longer have the aptitude to affect the central nervous system - one cannot speak of a state of danger to the social relations protected by the incrimination norm.

4. Conclusions

"In concrete terms, what would it mean for the 'influence' of psychoactive substances to depend on the impairment of driving capacity? It would simply mean that the existence of the offence would depend on the 'opinion' of experts. However, it is inadmissible for the incrimination of an act to depend on an expert report. Such an approach would represent a flagrant violation of the principle of legality. It is the criminal law that defines which acts constitute offences, not an expertise, even a medico-legal one. Furthermore, the typicality of the offence must be established by the magistrate. With all due respect to forensic doctors, it must be stated emphatically that they do not have the competence to rule on the existence or non-existence of the constitutive elements of an offence. This competence belongs exclusively to the magistrate. I leave aside the fact that there are no objective standards whatsoever that can accurately determine the level of impairment of driving capacity or, quite simply, the existence of such impairment."¹³

Undoubtedly, the arguments held by the supreme court in Decision no. 25/2025 do not remain beyond criticism, especially since, as the aforementioned author specifies, "the solution of 'measuring' driving capacity would open Pandora's box in relation to Art. 336 para. (1) as well. It would not be out of the question for a medico-legal expert report to establish that a person with a blood alcohol concentration of over 0.80 g/l of pure alcohol does not have a diminished capacity to drive. (...) Yet, as formulated, the legal text in question conveys a very clear warning: if you want to consume, do not drive; if you want to drive, do not consume."

The analysis of the jurisprudential trajectory highlights a significant paradigm shift¹⁴, a transition from a formalistic interpretation of the incrimination text - based on an absolute presumption where the mere presence

¹³ See Valerian Cioclei, *op.cit.*

¹⁴ For more details see also Elena Anghel, *Reflecții asupra puterii creatoare a jurisprudenței*, in *Buletinul de informare legislativă al Consiliului Legislativ* no. 2/2025, p. 6-17, http://www.clr.ro/download/buletine/buletin_informare_legislativa_2025/BIL-2_2025.pdf; N. Popa, E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria Generală a Dreptului*. Caiet de seminar, 4th Edition, revised and enlarged, C.H.Beck Publishing House, București, 2023, p. 160-161; Elena Emilia Ștefan, *Legalitate și moralitate în*

of a psychoactive substance in the organism was equated with guilt - toward a more nuanced approach, centered on the concrete aptitude to impair driving capacity and, therefore, on the actual social danger of the act. To establish the existence of the offence, the mere finding of the substance's existence in the body is not sufficient; it is necessary to demonstrate that it possesses the concrete aptitude to alter the driver's cognitive, sensory, or motor functions. In the absence of this aptitude - as is the case with substances remaining several days after consumption or minute concentrations that no longer produce neurological effects - the legal object of the offence is missing: the state of danger to road safety.

This jurisprudential reconfiguration constitutes an important step toward ensuring a balance between the state's interest in protecting traffic safety and the protection of individual rights, particularly individual liberty. By refusing to absolutely presume a state of influence, the national courts align Romanian criminal law with European standards of clarity and predictability¹⁵, ensuring that criminal sanctions are applied only where there is a genuine danger to the protected social values.

Given the rationale for incrimination - road traffic safety - as well as the scale of psychoactive substance consumption among the population, the adoption of restrictive regulations regarding the legal regime of psychotropic and narcotic substances and mixtures, as well as other substances susceptible to producing psychoactive effects, pertains exclusively to the core considerations of criminal policy envisioned by the legislator.

However, aspects concerning the criminalization of driving under the influence of psychoactive substances must be analyzed through the lens of the guarantees that domestic legislation must offer to ensure a ratio of proportionality between individual fundamental rights, on the one hand, and the public interest represented by the necessity of protecting the rights and freedoms of other road traffic participants, their life, physical integrity, and health, as well as other significant values involved in road traffic.

In the section "Conclusions and Recommendations" of the Report¹⁶ titled "Human rights challenges in addressing and countering all aspects of the world drug problem," at point 68 lit. d), the High Commissioner for Human Rights refers to the International Guidelines on Human Rights and Drug Policy¹⁷ and notes that, where states adopt a policy of criminalizing the consumption of narcotic substances, they must ensure that offences are clearly defined by law and that penalties are proportionate to the gravity of the offences, taking into account mitigating and aggravating factors.

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¹⁵ Roxana Mariana Popescu, Claritatea, precizia și previzibilitatea – cerințe necesare pentru respectarea Constituției, a supremației sale și a legilor în România, in Revista Dreptul no. 9/2017, p. 78-87.

¹⁶ Prepared by the United Nations High Commissioner for Human Rights on August 15, 2023.

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IUS PRAETORIUM: BALANCING LEGAL RIGIDITY AND THE REQUIREMENTS OF EQUITY IN THE EVOLUTION OF ROMAN LAW

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Abstract

The Romans were a profoundly traditionalist people. Within their deeply conservative mindset, the law of the citizens, known as ius civile, was considered intangible. Law emanated from the people gathered in assemblies, the sole body entitled to create law; thus, in the conception of the ancient Romans, it could not be altered.

However, as the society evolved toward an exchange economy, the old civil law, rigid and formalistic, became an obstacle to progress. It took the genius of the Roman Praetor and the grace of the jurisconsults for the civil law to be adapted to new social conditions. Under the appearance that ancient forms continued to function unchanged, outdated legal norms and institutions were draped in new, more fluid, and more equitable attire.

Thus, Roman law evolved through procedural means, by virtue of the Praetor's Edict and the creative interpretation of Roman jurisconsults. They succeeded in adapting the norms of civil law to current needs arising from existing practice. Furthermore, regarding regulatory technique, they created new legal institutions with a high degree of subjectivization and abstraction, which remain successfully applicable in modern law.

Through their creative activity, the praetors established a new branch of law—the Praetorian or Honorary Law, considered by Marcian as the "living voice of the civil law" (viva vox iuris civilis). Equity (aequitas) played a pivotal role in this creative process, serving as the valuing concept that guided the praetor in driving the progress of law through procedural channels.

So, this article will demonstrate that it is so true: the Praetor did not break the law; he built a bridge between what was written and what was fair.

Keywords: praetor, edict, civil law, rigidity, ius praetorium, creative interpretation, equity.

1. Introduction

In the ancient era of Roman law, Rome was governed by ius civile, rooted in the Law of the Twelve Tables and the interpretations of the pontiffs. This system was characterized by a very rigid formalism: all acts of civil law required the utterance of extremely complex solemn formulas, the performance of specific gestures, rituals, and oaths. A single mistake in a verbal formula spoken before the magistrate resulted in the loss of the lawsuit. In legal literature¹, this formalism was seen as a reflection of the spiritual foundation and intellectual qualities of the Roman people - the civil law being strict, rigorous, conservative, and steadfast.

At the same time, ius civile was an exclusive legal system, as it applied only to Roman citizens, remaining inaccessible to foreigners. It also possessed a static character, deeply connected to the traditionalism characteristic of the Roman people: although society was changing, the Romans did not admit that the law could be modified (let us not forget that the Law of the Twelve Tables remained in force for eleven centuries). Ius civile sought to be immutable and absolute. This leads us to wonder: what would Roman law - the law of the Quirites - have become if the praetor had not intervened? Would it have become obsolete? Would we still be writing about its greatness today?

The present research analyzes the evolution of the Roman legal system under the influence of the institution of the praetor, marking the transition from archaic formalism to a legal model governed by pragmatism and equity. This creative tension between ius civile, the rigid law of Roman citizens - and ius praetorium, the law created by the praetors, demonstrates that the praetor's activity was not merely a simple administration of justice, but a genuine work of legal creation that laid the foundations of modern private law.

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¹ Grigore Dimitrescu, Drept roman, vol. I, Imprimeriile Independența Publishing House, București, vol. I.

The study aims to highlight the praetor's role in adapting ancient law to the realities of an expanding imperial society. Thus, the praetor succeeded in transforming the Roman legal system: through the edict and procedural mechanisms that allowed the principle of equity to permeate legal relations, the praetor managed to "help, supplement, or correct" (*adiuvandi, supplendi vel corrigendi*) civil norms, providing legal solutions where the letter of the law had become insufficient or inequitable.

In essence, this creative tension between *ius civile* and *ius praetorium*, ingeniously exploited by the praetor in court practice, ensured the survival of Roman law. As we shall observe, the praetor was not a mere magistrate, but a true creator of law, whose activity established the groundwork for modern civil law.

2. The Emergence of the Praetorship

The institution of the praetorship was created in 367 BC through the Licinian-Sextian laws². The urban praetor (*praetor urbanus*) was a high-ranking magistrate invested with *imperium*, elected for a one-year term. Initially, the urban praetor merely organized the procedural framework necessary for parties to enforce their rights; subsequently, his role evolved toward resolving litigation between Roman citizens. Starting in 242 BC, the peregrine praetor (*praetor peregrinus*) was also created to settle disputes between Roman citizens and foreigners, or those arising solely between foreigners.

Upon taking office, Roman magistrates (consuls, praetors, censors, ediles, and provincial governors) enjoyed *ius edicendi* - the right to publish an edict outlining how they intended to exercise their duties and the legal procedures they would employ for that purpose³. This edict served as a program of activity and was valid for one year, coinciding with the duration of the magistracy. The provisions adopted by the praetor in the edict were not mere inventions; they were concrete expressions of social needs which the praetor had the intuition to frame in legal formulas to garner popular favor. Throughout his mandate, the magistrate could not deviate from the commitments made in his edict because, by a provision of the *Lex Cornelia*, it was mandated that praetors must administer justice in accordance with their own edicts.

Among the edicts of the magistrates, the praetor's edict was the most significant, as this magistrate exercised the most important judicial functions. While other magistrates also possessed certain judicial powers, their primary activity lay in the administrative field; consequently, their edicts are not of particular interest for the study of Roman private law.

Through their edicts, both the urban and the peregrine praetors provided the parties with the most suitable procedural means to enforce their substantive rights. Thus, whenever a person had a legal claim, they had to approach the praetor, expressing their demands while adhering to very complex formal conditions. If the solemn words required to be spoken were pronounced incorrectly, the party would lose the lawsuit.

If the plaintiff expressed their claims and the defendant raised their objections in compliance with the solemn forms required by law, the magistrate would take note of them and send the parties to be judged before a judge (*iudex*). We observe that in the ancient era, governed by the procedure of the *legis actiones*, the praetor's role was limited to supervising the utterance of the solemn words. The magistrate could not grant an action if it was not provided for by law and, similarly, could not refuse a trial if the action was established by law⁴.

In the same formalistic spirit that characterized the rules of procedure, depending on the plaintiff's claims and the defendant's attitude, the magistrate would utter one of the following three solemn words: *do*, by which the magistrate confirmed the judge chosen by the parties; *dico*, by which the magistrate provisionally assigned the object of the dispute to one of the parties; and *addico*, by which the magistrate ratified the declaration of one of the parties.

² The adoption of the laws proposed by the plebeian tribunes Gaius Licinius Stolo and Lucius Sextius Lateranus (known as the *Leges Licinae Sextiae*) ended a long period of social and political conflict between patricians and plebeians. The most important provision was the restoration of the consulship as the supreme magistracy and the requirement that one of the two consuls be a plebeian. In 366 BC, Lucius Sextius Lateranus became the first plebeian consul in Roman history.

³ Emil Molcuț, *Drept privat roman. Terminologie juridică romană*, Edition revised and supplemented (Universul Juridic Publishing House, Bucharest, 2011), p. 41.

⁴ For further details, see Elena Anghel, *Drept privat roman. Izvoare, procedură civilă, persoane, bunuri, succesiuni* (Universul Juridic Publishing House, Bucharest, 2025); The evolution of contracts in Roman law, in *Lex ET Scientia International Journal LESIJ* no. XXVIII - 1/2021, p. 112-118; Ionuț Ciutacu, Explaining the Relationship between Roman Civil Law and Praetorian Law, in *Proceedings of the 29th International RAIS Conference on Social Sciences and Humanities*, 2022, p. 64-68; Ionuț Ciutacu, *Modalități de exprimare a bunei-credințe în dreptul contractual roman*, in *Studii și Cercetări Juridice-Serie Nouă* 1/2025, p. 109-115.

The magistrate's right to organize a trial was called *iurisdictio* and was of two kinds: *iurisdictio contentiosa* (contentious jurisdiction), which occurred when the interests of the parties were contradictory and the trial concluded with the pronouncement of a sentence of condemnation or absolution; and *iurisdictio gratiosa* (gracious or voluntary jurisdiction), which occurred when the parties' interests were aligned and they cooperated with the magistrate within a fictitious procedure organized to achieve certain legal effects (for example: in *iure cessio*, adoption, or emancipation).

The praetor, the most important judicial magistrate, enjoyed not only *iurisdictio* but also *imperium* - the power of command. This consisted of the right to command the Roman army; to exercise jurisdiction in criminal, civil, and even administrative matters; the right of coercion; and the right to summon the people in assemblies. By virtue of this power, the praetor could resolve certain disputes through administrative channels without organizing the two-phase trial. Thus, the praetor had several administrative procedures at his disposal: praetorian stipulations (*stipulationes praetoriae*), *missio in possessionem*, interdicts, and *restitutio in integrum*.

Praetorian stipulations (*stipulationes praetoriae*) are verbal contracts concluded by the parties through question and answer, by order of the praetor, for the purpose of resolving certain disputes. For example: the defendant would promise to pay a certain sum of money to the plaintiff if any damage occurred in the event that the defendant failed to take the necessary measures to repair a wall of his house which threatened to collapse onto the plaintiff's property (*damnum infectum*, meaning damage not yet caused, but imminent).

Missio in possessionem consisted of sending the plaintiff into the detention or possession of the defendant's assets to compel the defendant to adopt a certain attitude. Following the previous example, if the defendant did not comply with the magistrate's order, the latter would send the plaintiff into possession of the defendant's assets to induce him to conclude the stipulation. If the defendant still did not comply, the magistrate would order a second induction into possession, and the plaintiff would become the owner of the defendant's land.

Interdicts are provisions by which the praetor ordered the parties to perform or refrain from performing a certain legal act. Interdicts are of several kinds: prohibitory, which stop an action (such as interdicts aimed at removing the disturbance of a person's possession); restitutory, which order the restitution of an item; and finally, exhibitory interdicts, which contain an order to produce something (such as those by which a father requires a third party to disclose whether or not they are holding his son)⁵.

If the party to whom the interdict was addressed complied and executed the magistrate's order, the situation was resolved; however, if the order was not fulfilled, the second phase of the trial would follow to determine whether the person to whom the interdict was addressed acted justly in failing to execute the interdictal order.

Restitutio in integrum (restoration to the previous condition) consists of the praetor annulling a legal act harmful to the plaintiff, restoring the parties to the position they were in before that act was drawn up. This measure contradicted civil law because it nullified the effects of an act considered valid under *ius civile*. For a *restitutio in integrum* to be granted, certain conditions had to be met: there must be an injury; the grounds on which the interested party's request is based must be provided for in the edict; there must be no other way to redress the injury suffered; and the party's request must be addressed to the praetor within a short period of time.

For example: if the praetor finds that Flavius was compelled by violence to alienate his land, he will then annul the sale and grant Flavius an action in *rem* (*vindicatio rei*), through which he may reclaim the alienated land as if the sale had never taken place (*restitutio ob metum*). However, in this case, the plaintiff was restored only in law (*de iure*), not in fact (*de facto*). To be restored in fact as well, the plaintiff had to bring a new legal action and obtain a judgment of condemnation.

3. The Role of the Praetor in the Formulary Procedure

Toward the end of the Republic, as trade developed and more complex exchange relations emerged, discrepancies began to appear between the old, formalistic, and often outdated civil law and the demands of practice. In this context, the task of adapting old forms to new interests fell to the praetors. The *Lex Aebutia* was adopted between 149 and 126 BC, marking the transition to a new procedural system called the formulary

⁵ Vladimir Hanga, Mircea Dan Bocşan, *CURS DE DREPT PRIVAT ROMAN*, Universul Juridic Publishing House, Bucharest, 2006, p. 107-108

procedure, in which the praetor's role became paramount. Under this procedure, the trial continued to take place in two phases: the first phase before the praetor, and the second phase before the judge (*iudex*), who was a private citizen without legal expertise.

In the formulary procedure applied during the classical era, once the praetor was convinced of the justice of the plaintiff's claims, he would issue a formula - a small judicial program through which he provided the judge with written instructions on how to resolve the case. The formula drafted by the praetor consisted of a report containing the legal elements of the case and included the plaintiff's claims (*intentio*), their legal basis (*demonstratio*), as well as the authorization given to the judge to settle the case (*condemnatio*). After drafting the formula, he handed it to the parties, who were then required to appear before the judge for the pronouncement of a judgment. The praetor would address the judge as follows: "Julius shall be the judge. Julius, ascertain whether the plaintiff, who claims the Cornelian estate belongs to him, is right. If he is right, condemn the defendant to restore it; if he is not right, absolve the defendant."

Through the formula, the praetor provided the judge with written instructions (*formulae*) and empowered him to examine the substance of the matter, not just the form, assessing the case before him in good faith (*bona fides*) - that is, in accordance with the real intention of the parties.

By introducing equity into the legal landscape, an element previously unapplied in formalistic law, the praetors exercised the most significant judicial functions, as they organized the trial of private lawsuits and, through the use of procedural means, sanctioned new substantive rights and expanded the scope of legal regulation. In this way, the praetors influenced the evolution of legal regulation and, although formally they could not create law (*praetor ius facere non potest*), in reality, they shaped the evolution of civil law and created new legal institutions which, toward the end of the Republic, formed a new branch of Roman private law: praetorian law (*ius praetorium*).

Thus, while in the procedure of the *legisactiones* the magistrate had a mechanical role, in the formulary procedure, the praetor's mission consisted of the fact that he could create, outside the law, new actions - praetorian actions, thereby legally sanctioning social institutions necessitated by the development of society.

Furthermore, within the new procedure, the magistrate was able to resolve the most difficult cases in the most equitable manner, even if the ancient civil law did not contain sufficient norms for a just resolution of the cause. The praetor could bring many improvements to the law in force, in relation to the needs of social life, through the so-called exceptions (*exceptiones*), by which he ordered the judge not to condemn the defendant if certain factual elements were verified as accurate⁶.

The actions in factum and the exceptions became the "primary vectors for the infiltration of the principle of *aequitas* into private law relations." In addition to civil formulas, the praetor's edict also included honorary or praetorian formulas—that is, formulas created by the praetor to give legal effect to new relationships imposed by social development. With the help of these new formulas, the praetor succeeded in ensuring remarkable progress for Roman legal institutions⁷.

In the *in iure* phase, the praetor became an architect of the judicial system: he balanced two opposing forces: *ius civile*, stable but often petrified in archaic and rigid formulas, and *aequitas*, fluid, adaptable, and connected to social needs and morality (the art of the good). Thus, the praetor only maintained the appearance that the civil law remained unchanged, as the Romans desired; however, he appealed to equity and, through an extensive interpretation, adapted the rigid institutions of the ancient civil law to new realities, so that the letter of the law would not crush the spirit of justice.

The praetor remains the "*viva vox iuris civilis*" (the living voice of the civil law), as described by Marcianus, because he acts within the system, giving "voice" to the civil law to make it applicable. But, in essence, he becomes the voice of equity, for he interprets and molds the civil law - which was far too strict and stifled by rigors - so that it might remain just.

By passing the ancient civil legal institutions through the filter of his own reasoning and interpretation, the praetor transformed the law from a barrier to evolution into *ars boni et aequi* (the art of the good and the

⁶ Thus, the praetor orders the judge to investigate whether Primus obligated himself to Secundus for the sum of 10,000 sesterces and, if so, to condemn the defendant; however, if Primus obligated himself to Secundus while being compelled by the latter through violence, then Primus is to be acquitted. Although Primus's obligation is valid from the perspective of civil law, by verifying the respective exception as accurate, the plaintiff's claim will be dismissed. In this manner, praetorian law sanctions violence, and in other cases, fraud (*dolus*). See Vladimir Hanga, Mircea Dan Bocșan, *CURS DE DREPT PRIVAT ROMAN*, Universul Juridic Publishing House, Bucharest, 2006, p. 52.

⁷ *Idem*, p. 97.

equitable). The praetor's edict represented one of the most important instruments for the evolution of Roman law, functioning as a mechanism for adapting the rigid norms of *ius civile* to new social and economic realities through the medium of equity (*aequitas*).

In a formal sense, the praetor's edict was valid for one year, matching the duration of the magistracy. However, certain provisions of the edict that proved useful were adopted by subsequent praetors and thus became permanently fixed within the edict⁸.

The creative activity of the praetor was so intense that the legal norms introduced through the edict became very numerous, shaping a new branch of law: praetorian law. As defined in the Digests of Emperor Justinian, praetorian law is that introduced by the praetors to assist, supplement, and correct the civil law in accordance with the public good ("*ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam*").

This definition highlights a new social reality of Rome: the dualism between civil law and praetorian law. Thus, the norms of civil law are supported, supplemented, and corrected by the norms of praetorian law, as necessitated by the transformations of social life. Therefore, the praetor acts through three channels to influence the ancient civil law.

Through *adiuvandi iuris civilis gratia*, the praetor came to the aid of the civil law, in the sense that he interpreted civil law texts in such a manner that they could be applied to new cases arising in practice (extensive interpretation).

Through *supplendi iuris civilis gratia*, the praetor supplemented the civil law texts by creating new legal principles or procedural means, with the aim of expanding the scope of application of the civil law⁹.

Through *corrigendi iuris civilis gratia*, whenever he found that certain civil law texts were outdated, the praetor would override them. In this way, the praetor rose above the civil law, correcting it in accordance with equity and facilitating the administration of justice in cases where the old civil law proved to be inequitable or unadapted.

Praetorian law was not merely a set of rules and innovative procedural means, but a "living" mechanism through which the archaic rigidity of written laws was softened by practical needs and the moral sense of equity (*aequitas*). *Ius Praetorium* was not a negation of the law, but its salvation; for without the flexibility and creative spirit of the praetor, Roman law would have collapsed under its own rigidity and would not have become the foundation of modern Europe.

Unfortunately, although the praetor's creative activity reached its zenith in the 1st century BC, during the classical era, Emperor Hadrian ordered the jurist Salvius Iulianus to codify the praetor's edict and give it a definitive form, binding upon all subsequent praetors. Thus, even though they still enjoyed *ius edicendi*, the praetors could no longer create new institutions, and their creative activity came to an end.

4. The Praetorian Legacy

The entire activity of the praetor was guided by the idea of equity. If today we refer to equity in the sense of achieving justice beyond the rigid letter of the law, we owe this to the praetor. He succeeded in aligning the ancient system of civil law with the necessities of the era, using equity as his benchmark. Roman law thus became *ars boni et aequi* - an art of the good and the equitable - meant to breathe life into the old, rigid, and formalistic legal institutions.

As has been emphasized in legal literature¹⁰, the reform of civil law based on the idea of equity was achieved through broad means of interpretation. We cannot encompass the entire praetorian legacy, shaped by considerations of equity, within this section, but we shall evoke some of the praetor's most significant achievements.

The praetor imposed the standard of honest behavior guided by *bona fides*: good faith requires not only that you respect the clauses of a contract, but also that you behave as an honorable man (*vir bonus*).

⁸ In this regard, Cicero states that, in his time, the praetor's edict consisted of two parts: *edictum vetus* (*pars translativum*), which included the provisions passed from one praetor to another, and *edictum novum* (*pars nova*), comprising the new provisions introduced by each individual praetor. See Emil Molcuț, op. cit., p. 42

⁹ For example, initially, theft was only punished if committed by a Roman citizen, as foreigners rarely came to Rome. With the development of the exchange economy, when foreigners began arriving in Rome, the praetor supplemented a deficiency in the civil law and granted the *actio furti* even against peregrines who committed theft. Elena Anghel, op.cit., p. 63

¹⁰ Vladimir Hanga, Mircea Dan Bocșan, op. cit., p. 41

Furthermore, as noted above, in matters of interpretation, the praetor imposed equity beyond the letter of the law, protecting the parties' intention rather than just the literal meaning of the words. To uncover the intention with which a legal act was concluded (*voluntas*), equity transcends what was written by the parties and searches behind the literal text of the instrument.

On grounds of equity, by analyzing a factual situation, the praetors could refuse to grant a plaintiff an action even if the civil law allowed it, or they could grant the action but introduce an exception (*exceptio*) in favor of the defendant which, if proven well-founded, would change the outcome of the trial in the defendant's favor. Thus, exceptions proved to be the most significant method of introducing equity: even if someone was right according to the civil law, the praetor would block their action if it was exercised in bad faith (*exceptio doli*).

The entire activity of the praetor was guided by certain general principles that he inscribed in his edict upon taking office. In addition to various special provisions (edictic clauses), we find in the edict the formulas for the various actions provided for either in the edict itself or in the civil laws. Many of the institutions regulated through the edict bore the name of the praetor who introduced them, for example: *actio Publiciana*, the action introduced regarding praetorian property by the praetor Publicius, intended to protect the good-faith possessor even if they were not yet the legal owner.

The field of property law was also reformed by the praetor, who created, toward the end of the Republic, a new form of ownership called bonitary (praetorian) ownership, protected by the praetor, in opposition to quiritary ownership, sanctioned by the civil law.

Praetorian property emerged in connection with the use of *traditio* (delivery), a method created exclusively for transferring ownership of *res nec mancipi*. To transfer ownership of *res mancipi*, the Romans generally used *mancipatio*; however, this involved very complex solemn forms, so in practice, Romans began to transfer *res mancipi* through *traditio* as well. In such cases, according to the civil law, the seller (*tradens*) remained the legal owner of the asset and could bring an action in rem (*vindicatio*) against the possessor¹¹. By sanctioning the seller's bad faith, the praetor provided the buyer with an exception (*exceptio rei venditae et traditae*), through which the buyer could dismiss the plaintiff's claim as being contrary to equity. In this way, the praetor protected good faith.

For the purpose of adapting the ancient civil law to new realities, the praetor allowed *traditio* to be used for the transfer of *res mancipi*; however, in this case, the acquirer does not become a quiritary owner, as the rigorous requirements of the civil law were not met. Instead, he would acquire a new form of ownership, which the Romans called in bonis (the transferred thing is held within the acquirer's patrimony). Praetorian (bonitary) ownership was based on a legal fiction—namely, that the period required for usucaption had already been completed.

To legally protect this form of ownership, the praetor created a praetorian action called the Publician action (*actio Publiciana*), which he granted to the person who had acquired ownership of a *res mancipi* through *traditio*; however, the praetor considered this person an owner by usucaption (requiring all the conditions for usucaption to be met, except for the expiration of the time limit). Upon the completion of the usucaption period (one year for movable property and two years for immovable property), the praetorian owner became a quiritary owner.

Another field that demonstrates the praetor's creative brilliance is the law of succession. The entire Roman successoral system was reformed by the praetor on grounds of equity because, over time, the principles of inheritance according to the rules of *ius civile* fell out of step with social conceptions. For a long time, agnation (civil kinship) was the sole foundation of succession among the Romans; thus, only civil relatives had successoral capacity. The system of the Law of the Twelve Tables did not take cognatic kinship into account, excluding emancipated children and other blood relatives (*cognati*) from the succession.

Toward the end of the Republic, aiming to correct these deficiencies in the civil law, the praetor initiated a series of reforms to recognize blood kinship (cognition) as a foundation for succession, as well as to strengthen the relationships between spouses within a marriage without *manus* (*sine manu*). The succession established through the praetor's reforms was called *bonorum possessio* (possession of the successoral goods) and led to the creation of four classes of praetorian heirs:

¹¹ It is assumed that the trade in slaves contributed significantly to the emergence of praetorian property. As slaves were usually purchased in groups, it was difficult to repeat the complex ritual of *mancipatio* for each individual sale. The praetor considered it useful and just to defend the good-faith buyer, even if the legal formalities had not been observed. V. Hanga, M.D. Bocşan, op. cit., p. 170.

Bonorum possessio unde liberi included all sons of the family, including those who were emancipated, as the emancipated children came to the inheritance as blood relatives, provided they performed the collatio bonorum (the contribution of their own goods to the estate).

Bonorum possessio unde legitimi consisted of agnates and gentiles, who came to the inheritance only in the absence of descendants from the first category. At first glance, it might seem that through this reform the praetor simply confirmed the provisions of the Law of the Twelve Tables; in reality, however, the praetor introduced an innovation: if the nearest agnate repudiated the succession, it did not become vacant as it did under the system of the Twelve Tables, but instead passed to the next category of heirs.

Bonorum possessio unde cognati designated blood relatives who were not also civil relatives - namely, the mother and children resulting from a marriage without manus, who inherited from each other as blood relatives. These were called to the inheritance only if no civil relatives existed, as an agnate, regardless of degree, would exclude the cognates.

Bonorum possessio unde vir et uxor designated the husband and wife married without manus, who inherited from each other only in the absence of civil or blood relatives (those married with manus inherited from each other as civil relatives). Thus, in the absence of heirs from the first three classes, the praetor called the surviving spouse (vir et uxor) to the inheritance.

However, it must be emphasized that bonorum possessio granted to someone not called to the inheritance under civil law was a more fragile form of possession. The praetorian heir was "assimilated" to the civil heir, meaning he did not acquire quiritary ownership over the inherited assets, but only praetorian ownership. Furthermore, the successoral actions granted for or against him were not civil actions, but praetorian ones, based on the fiction of being a civil heir.

Also regarding successoral matters, it is noted in legal doctrine¹² that the jurists of Rome did not bequeath us a unified theory of legal acts, instead confining themselves, as usual, to specific solutions for each concrete case. Consequently, there was no general theory of nullity, and the duality between civil law and praetorian law contributed to the variety of causes for the inefficacy of a will.

5. Conclusions

The study of Roman law demonstrates that the law, no matter how well-crafted, cannot survive without a mechanism for adapting to ever-evolving social realities. The praetor utilized equity and social utility to overcome the strict formalism of *ius civile*, assisting, supplementing, or correcting the ancient civil law in accordance with the public good. Through his instruments (*adiuvandi, supplendi, corrigendi*), the praetor transformed the law from a static structure into a living organism, capable of responding to the needs of a constantly changing social and economic reality. The validity of a law does not reside in its antiquity, but in its capacity to serve the public utility and to ensure a constant balance between the rigor of the norm and the necessities of society.

Ius Praetorium emerged as a parallel, more flexible system based on equity, functioning to facilitate the administration of justice in cases where the old law was inequitable or unadapted. Through the edict, the praetor demonstrated that the absolutism of the ancient *legis actiones* had to be transcended, introducing the formulary procedure, which allowed for the adjudication of matters based on good faith (*bona fides*) and equity. I believe that the most significant achievement of praetorian law was the overcoming of archaic formalism. By introducing the formulary procedure, the praetor shifted the focus from rigid formalities and rituals to the merits of the case, allowing justice to center on factual truth and the parties' intention, rather than merely the correct utterance of sacramental words. This openness toward equity and good faith facilitated the integration of foreigners and regulated international trade, providing Rome with historical longevity. Thus, through the intermediary of the praetor, Roman law succeeded in placing substance before form, introducing equity into legal relations, and becoming a universal system (*ius gentium*).

The Praetor did not break the law; he built a bridge between what was written and what was fair. Without the praetor's intervention in balancing the rigidity of the civil law, Roman law would have remained an archaeological document and would not have become the legal foundation of the Western world.

¹² Vladimir Hanga, Mircea Dan Bocşan, op. cit., p. 224.

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THE ADMISSIBILITY OF THE EXCEPTION OF UNCONSTITUTIONALITY: A WAY TO REGULATE AND CONTROL THE ACCESS TO CONSTITUTIONAL JURISDICTION

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Abstract

Given the remarkable increase of the number of cases registered before the Constitutional Court, this paper examines the possibility of adopting a solution aimed at easing the Court's workload by eliminating, through a preliminary filtering procedure, manifestly inadmissible exceptions of unconstitutionality. In arguing for the usefulness of such a mechanism, we made reference to the way in which admissibility procedures are structured before certain foreign constitutional or quasi-constitutional courts, as we dare to say that could be called the European Court of Human Rights. While acknowledging and appreciating the contribution of Romanian courts, which carry out an initial filtering procedure of exceptions of unconstitutionality, the paper shows that, after their registration, the Constitutional Court identifies additional grounds of inadmissibility derived from the interpretation of the strict rules imposed by Law No. 47/1992 on the Organization and Functioning of the Constitutional Court. At first sight somewhat paradoxically, this interpretation has had the effect not of restricting, but rather of facilitating access to constitutional justice. Such an approach has been justified by the Constitutional Court's recognition of the importance of ensuring the constitutional mechanism for the protection of potentially violated fundamental rights, to the detriment of excessive procedural formalism.

Keywords: constitutional review, exception of unconstitutionality, preliminary filter, constitutional justice, supremacy of the Constitution.

1. Introduction

The idea underlying the present paper was generated by an observation, obvious to anyone consulting the statistics concerning the activity of the Constitutional Court of Romania, namely that the institution faces, year after year, a spectacular increase in the number of cases it is called upon to adjudicate. It is unclear whether the explanation for this phenomenon lies in the growing visibility of the Constitutional Court in the media, whether it is the result of citizens' desperate need to find a final hope or refuge or last resort within a complex judicial system that is itself oversaturated, or whether the institution is a so-called victim of its own success. One thing, however, is certain: the Constitutional Court's workload is following a continuously upward trend.

The powers of the Constitutional Court, enshrined in Article 146 of the Constitution, are highly diverse. Thus, it has the following powers: to adjudicate on the constitutionality of laws before promulgation, of treaties or other international agreements, and of the Standing Orders of Parliament; to rule upon objections as to the unconstitutionality of laws and ordinances raised before courts of law or commercial arbitration tribunals and on pleas of unconstitutionality brought directly by the Ombudsman; to settle legal disputes of a constitutional nature between public authorities; to ensure compliance with the procedure for the election of the President of Romania and to confirm the election results; to ascertain the circumstances justifying the interim exercise of the office of President of Romania and to report its findings to Parliament and the Government; to give an advisory opinion on proposals for the suspension of the President from office; to ensure compliance with the procedure for organizing and conducting referenda and to confirm their results; to verify compliance with the conditions for the exercise of citizens' legislative initiative; to rule upon challenges concerning the constitutionality of political parties; and finally, to fulfill any other powers provided for by the organic law of the Court.

Among all of these, we will focus on the a posteriori constitutionality review of laws after their promulgation by the President of Romania, as well as of Government ordinances, according to Article 146 letter

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d) of the Constitution. And in this area of analysis, we will insist on the issue of the admissibility of exceptions to unconstitutionality, presenting various situations that the Constitutional Court has faced in its jurisprudence.

2. The Constitutional Court's Activity Regarding the Resolution of Exceptions of Unconstitutionality

Among the wide range of powers above listed, the one that overwhelmingly dominates the Court's docket from a statistical perspective is the adjudication on the exceptions of unconstitutionality.

According to Article 29 paragraph (1) of Law No. 47/1992 on the Organization and Functioning of the Constitutional Court, the Court shall decide upon exceptions raised before courts of law or commercial arbitration tribunals concerning the unconstitutionality of laws and Government ordinances in force, or provisions thereof, where such provisions are relevant to the settlement of the case, regardless of the stage of the proceedings or the subject matter thereof. Paragraph (2) of the same article states that the exceptions may be raised at the request of either party or ex officio by the court hearing the case. Likewise, the prosecutor may raise such an exception in cases in which he or she participates in the proceedings.

As we have shown in another paper¹, the possibility of raising exceptions of unconstitutionality within proceedings pending before various courts constitutes per se a guarantee of the fairness of the trial. This procedural instrument offers the parties the possibility of challenging the constitutionality of the provisions applicable to their case and provides them, once the issue has been resolved, with the certainty that their dispute is adjudicated on the basis of legal provisions consistent with the Fundamental Law.

Probably, in the current socio-geopolitical context, marked by instability and serious crises not only at national but also - perhaps especially - at international level, persons seeking judicial protection or recognition of various rights wish at least to ensure that the legal provisions applicable to their cases are beyond any suspicion of unconstitutionality. This may represent one of the causes of the significant multiplication in the number of requests referred to the Constitutional Court.

An analysis of the statistical data available on the Constitutional Court's website clearly reveals this evolution. Looking only at the last six years, we notice that in 2020 the Constitutional Court registered 2,401 cases concerning exceptions of unconstitutionality². In 2021, there was a remarkable increase, with 3,939 such exceptions registered³. In 2022, the number decreased to 2,916 cases⁴, only to rise again in 2023, reaching 3,639 cases⁵. In 2024, the same upward trend continued, with the Court receiving 4,050 cases concerning exceptions of unconstitutionality⁶. The peak was reached in 2025, when 5,195 such exceptions were registered⁷. Given that by April 2026 almost 3,000 cases had already been registered under Article 146 letter d) of the Constitution, it is possible to anticipate that this record will be exceeded by the end of 2026.

These statistics reflect an overwhelming reality for the Constitutional Court, diminishing its ability to truly fulfill its role as guarantor of the supremacy of the Constitution, entrusted to it by Article 142 of the Fundamental Law. We believe that a possible solution for coping with the influx of cases registered before the Court could be the establishment of a mechanism for the preliminary examination of the admissibility of exceptions of unconstitutionality, directly at the level of the Constitutional Court itself. As will be shown below, courts referring matters to the Constitutional Court are already required to carry out an initial selection of exceptions of unconstitutionality raised during the trials by parties to the proceedings, depending on whether the conditions laid down in Article 29 paragraphs (1)-(3) of Law No. 47/1992 are fulfilled. However, this first screening appears insufficient, that is why we think it might be useful to introduce an additional level of preliminary admissibility review, so that manifestly inadmissible exceptions of unconstitutionality no longer proceed to adjudication following public hearings.

¹ Bărbățeanu V., Muraru A., „Analiza caracterului echitabil al procedurii în contenciosul constituțional”, published in the volume In onorem Nicolae Popa, Hamangiu Publishing House, Bucharest, 2024.

² <https://www.ccr.ro/wp-content/uploads/2021/01/Statistica-site-2020.pdf>.

³ <https://www.ccr.ro/wp-content/uploads/2022/01/Statistica-site-2021.pdf>.

⁴ <https://www.ccr.ro/wp-content/uploads/2023/01/Statistica-site-2022.pdf>.

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⁶ <https://www.ccr.ro/wp-content/uploads/2025/01/Statistica-site-2024.pdf>.

⁷ <https://www.ccr.ro/wp-content/uploads/2026/03/Statistica-site-2025.pdf>.

3. Legislative Solutions for Preliminary Admissibility Review in Comparative Law

In this context, it is worth noting that, at the European level, several jurisdictions employ a system of initial filtering of applications addressed to them, with requests being examined on the merits only after this stage has been completed.

A particularly eloquent example is the European Court of Human Rights itself, the most prestigious forum for the defense of fundamental human rights and freedoms, which operates according to a procedure of *prima facie* admissibility of applications lodged by natural or legal persons alleging violations of fundamental human rights by the member States to the European Council⁸. To this end, pursuant to Article 47 - Content of an Individual Application of the Rules of Court (most recently amended on the 18th of January 2024)⁹, the Registry of the Court first proceeds to select only those applications meeting the requirements imposed by the forementioned article and requests applicants to supplement incomplete applications where necessary. An application will not be registered if the deficiencies indicated by the Registry are not remedied.

Beyond this purely administrative stage, particularly important is the role of the single-judge formation, which carries out an initial review of applications registered by the Registry of the European Court of Human Rights and may declare an application inadmissible where its inadmissibility is manifest¹⁰. Pursuant to Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a single judge may declare an application inadmissible or strike it out of the list whenever such a decision can be taken without further examination. The decision thus rendered is final.

Another method of limiting the number of applications can be found in France, where the Constitutional Council may be seized only by two major judicial authorities situated at the apex of their respective systems (orders), namely the Conseil d'État (for the administrative order) and the Court of Cassation (for the judicial order). Following the revision of the Constitution of the Fifth French Republic on the 23rd of July 2008, Article 61-1 was introduced, regulating *ex post* constitutional review of legislation¹¹. Prior to that moment, the French Constitutional Council exercised only *a priori* review of laws before their entry into force, while subsequent review of constitutionality represented a long-awaited innovation for French jurists. Unlike this mechanism, in Romania any court may refer to the Constitutional Court requests concerning exceptions of unconstitutionality.

Finally, another relevant example is offered by the Constitutional Court of the Republic of Moldova¹², which, although it adopted a system very similar to the one established in Romania, additionally introduced a filtering mechanism for the exceptions of unconstitutionality referred to it. Within this framework, the admissibility of an exception of unconstitutionality is examined by the Constitutional Court as a matter of priority within no more than 15 days from the registration of the request. Admissibility is examined in closed session, without the participation of the parties. Only applications declared admissible proceed to a public hearing. According to Judgment No. 2 of the 9th of February 2016 of the Constitutional Court of Moldova¹³, the Court verifies the fulfillment of admissibility conditions both on the basis of the referring court's decision and of the exception itself, examining whether: the subject matter of the exception falls within the category of acts whose constitutionality may be reviewed by the Constitutional Court; the exception was raised by one of the parties, its representative, or *ex officio* by the court; the contested provisions are applicable to the settlement of the case; and there is no previous judgment of the Court concerning the same contested provisions¹⁴.

4. The Examination of the Admissibility of Exceptions of Unconstitutionality under Romanian Legislation

In Romania, the admissibility of the exception is examined together with the merits, in the sense that it does not constitute a preliminary stage preceding the adjudication of the exception of unconstitutionality. On

⁸ For details, see Popescu R.-M., *Drept internațional public. Noțiuni introductive*, Universul Juridic Publishing House, Bucharest, 2023.

⁹ https://www.echr.coe.int/documents/d/echr/Rules_Court_ROM.

¹⁰ https://www.echr.coe.int/documents/d/echr/50questions_rou.

¹¹ For more details, see Bărbăteanu V., „Întrebarea prioritară de constituționalitate în Franța (Q.P.C.)”, *Revista de Drept Public* no. 1-2/2012.

¹² Deaconu Șt., Muraru I., Tănăsescu E.S., Barbu S.G., *Codex constituțional. Constituțiile statelor membre ale Uniunii Europene*, Monitorul Oficial Publishing House, Bucharest, 2015.

¹³ https://www.constcourt.md/public/files/file/Actele%20Curtii/Ghid_exceptie_neconstitutionalitate_CC_2021.pdf.

¹⁴ It is worth noting that this last cause of inadmissibility differs from that in Romanian legislation, where it is stipulated that legal provisions that have already been found by the Constitutional Court to be contrary to the Constitution, through a decision admitting the exception of unconstitutionality, cannot be anymore subject to constitutional review.

the basis of Law No. 47/1992 on the Organization and Functioning of the Constitutional Court, the Romanian Constitutional Court examines the admissibility of an exception of unconstitutionality through the same decision by which it also rules on the substantive issue concerning the compatibility of the legal provisions under review with the texts and principles¹⁵ contained in the Basic Law, if it finds that the exception satisfies the specific admissibility requirements. In other words, the Court renders only one decision in which it firstly analyzes the admissibility of the exception of unconstitutionality and then rules on the merits, if it meets the conditions provided for in Article 29 of Law No. 47/1992

It is true that an initial filter is represented by the judicial court before which the exception of unconstitutionality is raised, since that court is obliged to verify compliance with the conditions provided by Article 29 paragraphs (1)-(3) of Law No. 47/1992 and to reject requests for referral to the Constitutional Court that fail to meet these requirements. Judicial courts must verify whether the contested legal text is part of a law or of a Government ordinance in force that is relevant to the settlement of the case, whether the exception of unconstitutionality was raised at the request of one of the parties or of the prosecutor - where the latter participates in the proceedings - and whether the unconstitutionality has not already been established by a previous decision of the Constitutional Court.

The judicial court before which the exception of unconstitutionality was raised is limited to examining only those grounds of inadmissibility expressly provided by Law No. 47/1992. If none of these grounds is found to exist, the court is obliged to refer the exception to the Constitutional Court for adjudication¹⁶. Examining the exception through the lens of the public-order nature of inadmissibility grounds and of its role as guarantor of the supremacy of the Constitution, the Constitutional Court has the competence to assess the admissibility of such exceptions raised in concrete judicial disputes¹⁷, and may therefore reject an exception as inadmissible even though it has passed the first filter of the trial judge.

In its extensive case law developed over its 34 years of existence¹⁸, beyond the grounds of inadmissibility expressly provided by Article 29 of Law No. 47/1992, the Constitutional Court of Romania has inferred from the interpretation of those provisions additional grounds constituting decisive obstacles to the examination of exceptions of unconstitutionality¹⁹. In other situations, on the contrary, it has interpreted restrictively the applicability of certain inadmissibility grounds, consequently widening the parties' access to constitutional justice²⁰.

The present paper will discuss a series of situations falling into both categories, analyzed both from the perspective of the lawyer interested in broadening litigants' access to constitutional justice and from that of the constitutional practitioner concerned with focusing the Court's activity on the adjudication of admissible cases through the verification of the conformity of contested legal provisions with the Constitution and thereby channeling the Constitutional Court's efforts toward fulfilling its primordial role as defender of fundamental human rights and freedoms and of constitutional supremacy in the Romanian legal order.

Thus, a widely appreciated decision from the litigants' point of view was Decision No. 766/2011, by which the Court held that the phrase "in force" contained in Article 29 paragraph (1) of Law No. 47/1992 is constitutional insofar as it is interpreted to mean that laws, Government ordinances, or provisions thereof remain subject to constitutional review if their legal effects continue to be produced in certain cases even after they have ceased to be in force. In this way, the Court broadened the scope of acts subject to constitutional review, giving effect to the parties' interest in having their cases adjudicated on the basis of provisions consistent

¹⁵ See also, in this regard, Anghel E., *Principiile dreptului*, Universul Juridic Publishing House, Bucharest, 2025.

¹⁶ See also, on this topic, Benke K., Costinescu S.M., *Controlul de constituționalitate în România. Excepția de neconstituționalitate*, Hamangiu Publishing House, Bucharest, 2020, or Toader T., Safta M., *Ghid de admisibilitate la Curtea Constituțională a României*, Hamangiu Publishing House, Bucharest, 2016.

¹⁷ Barbu S.-G., Muraru A., Bărbățeanu V., *Manual de contencios constituțional*, 2nd Edition, C. H. Beck Publishing House, Bucharest, 2026, p. 110.

¹⁸ The Constitutional Court was established by the Constitution adopted in 1991 and began operating a year later. For details on the evolution of constitutional review, see Ene-Dinu C., „A century of constitutionalism”, in *Lex ET Scientia International Journal* no. XXIX, vol. 2/2023, https://lexetscientia.univnt.ro/download/2023_XXX_2_10_LESIJ.pdf.

¹⁹ The causes of inadmissibility of exceptions of unconstitutionality have been defined in the doctrine as representing legal reasons that prevent the initiation or extension of the procedure for reviewing the constitutionality of the law, which determine the legal limits of constitutional review by means of exception of unconstitutionality, being procedural consequences of the conditions imposed by law for raising this type of exceptions. (Muraru I., Constantinescu M., „Cauzele de inadmisibilitate în jurisdicția constituțională”, *Dreptul* nr. 2/1998, p. 3).

²⁰ Such as the requirement that the contested provision should be in force (see Decision no.766/2011).

with the Constitution, even where those provisions are no longer in force but remain applicable to the dispute in accordance with the legal principle *tempus regit actum/factum*.

Also advantageous for litigants is the situation in which an exception is dismissed as “having become inadmissible.” This type of solution is delivered when the Court has already issued an admitting decision in another case. The author whose exception, having the same subject matter, is adjudicated after the admitting decision will be able to request the revision of the judicial judgment rendered on the basis of the legal text declared unconstitutional. This concerns situations where, between the moment the exception is raised before the referring court and the moment it is adjudicated by the Constitutional Court in that particular case, the contested legal provision has already been declared unconstitutional through the admission, in a different case, of an exception concerning the same subject matter²¹.

Conversely, the Court has held inadmissible an exception of unconstitutionality raised in proceedings initiated exclusively for the purpose of creating the procedural framework necessary to invoke a particular exception of unconstitutionality²². Thus, for example, where the exception of unconstitutionality was raised in proceedings concerning the annulment of an administrative act, yet the claimant invoked no injury caused by the challenged administrative act but merely criticized the constitutionality of the normative act on the basis of which that administrative act had been issued²³, the Court held that the procedure of the exception of unconstitutionality had in reality been transformed into a genuine direct action for a declaration of unconstitutionality, contrary to Article 146 letter d) of the Constitution and Article 29 paragraphs (1) and (5) of Law No. 47/1992²⁴. In other words, since no injury caused by the contested normative act was alleged, admitting the exception of unconstitutionality would have had no consequences regarding the resolution of the case pending before the judicial court, and therefore the exception had to be dismissed as inadmissible.

The requirement that the contested legal provisions be connected to the settlement of the case has also led the Court to declare inadmissible those exceptions of unconstitutionality raised in actions that were *ab initio* inadmissible, because regardless of the solution adopted by the Constitutional Court on the exception raised in such proceedings, its decision would produce no effects with respect to the underlying case²⁵. Nevertheless, the exception may be examined on the merits where the very legal provisions determining the inadmissibility of the action are contested.

The Court has also held inadmissible exceptions of unconstitutionality directed against legislative omissions, namely situations in which the authors of the exceptions are dissatisfied with the absence, from the contested provisions, of certain legislative solutions they consider necessary. The Constitutional Court has emphasized that it cannot substitute itself for Parliament, where provisions of a law are concerned, or for the Government, in the case of Government ordinances, thereby transforming itself into a positive legislator²⁶. However, insofar as the legislative omissions criticized possess constitutional relevance, the Court will examine the exception of unconstitutionality²⁷ and may even adopt solutions capable of remedying legislative deficiencies liable to infringe rights, freedoms, or constitutional principles enshrined in the Fundamental Law²⁸.

Another ground of inadmissibility not expressly provided by Law No. 47/1992, but inferred from the Constitution itself - which delineates the competences of ordinary courts and those of the Constitutional Court - is derived from the way the referral is formulated. Where the constitutional criticism is in reality directed against the interpretation and application of the law in the specific dispute, rather than against the normative content of the legal provisions subject to constitutional review, the exception is dismissed as inadmissible²⁹. Throughout

²¹ Barbu S.-G., Muraru A., Bărbăţeanu V., *op.cit.* p. 113.

²² See, for instance: DCC nr. 92/1998, DCC nr. 185/2006 or DCC nr. 376/2014.

²³ Regarding the administrative contentious procedure, see Ştefan E.-E., *Drept administrativ, Partea II-a. Curs universitar*, 4th Edition, Universul Juridic Publishing House, Bucharest, 2022, and Cliza M.-C. and Ulariu C.-C., *Drept administrativ. Partea specială*, C. H. Beck Publishing House, Bucharest, 2024.

²⁴ DCC nr.292/2016 (M.Of. no. 514/2016).

²⁵ DCC nr.386/2019 (M. Of. No.867/2019).

²⁶ DCC 6/2000 (M.Of. 127/2000), DCC 152/1999 (M.Of. 3/2000), Varga A., *Eficiența excepției de neconstituționalitate și efectele sale asupra legiferării*, in E.S. Tănăsescu (coord.), *Excepția de neconstituționalitate în România și Franța*, Universul Juridic Publishing House, Bucharest, 2013 p. 214.

²⁷ For further details, see Bărbăţeanu V., „Influența jurisprudenței Curții Constituționale asupra ansamblului normativ. Privire specială asupra problemei omisiunilor legislative”, *Dreptul* no. 5/2012.

²⁸ DCC no.454/2020 (M.Of. nr. 655/2020), DCC nr. 503/2010 (M.Of. no. 353/2010), DCC nr. 349/2001 (M.Of. no. 240/2002), DCC nr. 279/2006 (M.Of. nr. 323/2006) sau DCC nr. 604/2008 (M.Of. nr. 469/2008).

²⁹ See, for instance, DCC nr. 687/2020 (M.Of. no. 1130/2020).

a consistent case law³⁰, the Court has emphasized the exclusive competence of judicial courts to resolve issues concerning the interpretation and/or application of the law, holding that such operations do not fall within the scope of constitutional review exercised by the Constitutional Court but belong exclusively to the court adjudicating the merits and, where appropriate, to appellate courts, as follows from the combined provisions of Article 126 paragraphs (1) and (3) of the Constitution.

Pursuant to Article 2 paragraph (3) of Law No. 47/1992, the Court rules only on the constitutionality of the acts with respect to which it has been seized, not on the manner in which the law is interpreted and applied in concreto to a specific case. In this respect, the Court has stated that it possesses exclusive competence to interpret the reference norm, namely the Constitution, while the interpretation and case-specific application of the norms subject to constitutional review are carried out solely by ordinary courts under Article 126 paragraph (1) of the Constitution³¹. For legal provisions to become subject to constitutional review in the interpretation given to them by judicial courts, such interpretation must either be a binding interpretation provided by the High Court of Cassation and Justice through preliminary rulings or rulings on appeals in the interest of the law³², or a constant, systemic judicial interpretation enjoying a certain level of acceptance in judicial practice³³.

A ground of admissibility that falls within the Constitutional Court's own analysis, rather than that of the trial judge, even though the latter acts as a first filter for exceptions of unconstitutionality, concerns the absence of the author's procedural interest in raising the exception. As noted in legal scholarship³⁴, the interest in invoking an exception of unconstitutionality is determined by verifying the pertinence and relevance of the exception in relation to the dispute submitted for adjudication and to the legal norms applicable to the case. For instance, the Court held that it could not uphold a criticism raised by a defendant in criminal proceedings where the argument had in fact been invoked in the interest of the defendant's lawyer. The author of the exception of unconstitutionality must demonstrate a personal interest in challenging the constitutionality of a legal provision³⁵.

Finally, it should be recalled that, pursuant to Article 10 paragraph (2) of Law No. 47/1992, referrals addressed to the Constitutional Court must be reasoned. In this regard, the Constitutional Court, through its case law³⁶, has outlined an inherent and intrinsic structure applicable to any exception of unconstitutionality. This structure comprises three elements: the legal text contested from the perspective of constitutionality; the constitutional reference text(s) allegedly violated; and the presentation by the author of the exception of arguments demonstrating the contradiction between the two, in other words, the reasoning underlying the alleged unconstitutionality of the contested text. The Court noted that the reasoning itself, as an element of the exception, is not necessarily a material or quantitative criterion but results from the interplay of the first two elements. Consequently, the material substance of the reasoning is not a sine qua non condition for the existence of the exception. Under these circumstances, the Court held that where the constitutional reference text invoked is sufficiently precise and clear to enable the Constitutional Court reasonably to identify the existence of a minimal constitutional criticism, it is obliged to examine the exception on the merits and therefore to consider that the author has complied with and included in the exception the three aforementioned elements.

5. Conclusions

In conclusion, alongside the particularly important role played by the trial's judicial judge in examining the admissibility of exceptions of unconstitutionality, we believe that the introduction of a filtering procedure directly at the level of the Constitutional Court would be useful. The triangular relationship established between the party to the proceedings who invokes - ultimately in his or her own defense - an exception of

³⁰ DCC no. 838/2009 (M. Of. no. 461/2009), DCC no. 504/2014 (M. Of. no. 941/2014), DCC no. 218/2019, (M. Of. no. 609/2019) sau DCC no. 807/2019 (M. Of. no. 48/2020).

³¹ See Boghirnea I., The interpretation - obligation for the judge imposed by the application of the law, in *Journal Legal And Administrative Studies*, Year XVII, no. 2 (19) 2018, https://www.upit.ro/_document/31012/jlas_2_2018_r.pdf;

³² Krupenschi C.M., Evoluția jurisprudențială în materia controlului de constituționalitate asupra unei dispoziții legale în interpretarea dată printr-o decizie pronunțată într-un recurs în interesul legii, in *Buletinul Curții Constituționale* no. 2/2013. See also Ene-Dinu, C., „Constitutionality and referral in the interests of the law”, in *Lex ET Scientia International Jzournal* no. XXIX, vol. 1/2022, https://lexetscientia.univnt.ro/download/2022_XXIX_1_6_LESII.pdf.

³³ DCC no. 276/2016 (M. Of. no. 572/2016), DCC no. 841/2015 (M. Of. no. 110/2016) sau DCC no.606/2022 (M. Of. no. 337/2023).

³⁴ Muraru I., Vlădoiu N.M., *Contencios constituțional. Proceduri și teorie*, 2nd Edition, Hamangiu Publishing House, Bucharest, 2019, p. 181-182.

³⁵ DCC nr. 1519/2011 (M.Of. no. 67/2012).

³⁶ See, for instance, DCC nr. 1313/2011 (M.Of. no. 12/2012) or DCC no. 167 /2019, (M.Of. no. 396/2019).

unconstitutionality, the referring court (the a quo court), which carries out a prima facie examination of admissibility and, if it finds the statutory conditions fulfilled, refers the matter to the Constitutional Court, and the court a quem, namely the Constitutional Court itself, certainly involves an analysis of admissibility. However, this mechanism does not appear sufficiently effective to enable the Constitutional Court to fully accomplish its mission by dedicating itself primarily to the substantive examination of constitutionality. Therefore, a more rigorous selection of inadmissible cases, preventing them from unnecessarily burdening the docket of the Constitutional Court, could represent a solution contributing to the safeguarding of constitutional supremacy by allocating more time and resources to reflection upon the substantive constitutionality of the legal provisions challenged through exceptions of unconstitutionality.

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- <https://www.ccr.ro>
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BRIEF CONSIDERATIONS ON THE TERMINATION OF THE TERM OF OFFICE OF A LOCAL COUNCIL MEMBER

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Abstract

The new constitutional realities that emerged after 1990 reshaped the status of local elected officials, as well as that of elected officials in general, including members of Parliament. The Constitution has shed new light on the concept of administrative-territorial unit and, by extension, has created a new context for those who represent the local interests of the community. This context is of interest not only from the perspective of the representativeness of local elected officials but also from the perspective of how, in certain specific and isolated situations, a local council member's term of office may be terminated. In this study, these specific aspects of the legislation governing local elected officials will be examined from the perspective of constitutionality, and our own assessments of the current legal provisions in force will be highlighted.

Keywords: Constitution, Administrative Code, local council member, member of Parliament, right to be elected.

1. Introduction

Electoral rights are one of the fundamental components of the constitutional structure of the rule of law, as they are a direct expression of the national sovereignty exercised by the people. In this background, the right to be elected, as enshrined in the Romanian Constitution, is not limited to the mere opportunity to hold a representative public office, but inherently includes the right to effectively exercise the mandate obtained through the citizens' vote.

This dual dimension of the right to be elected (art. 37 of the Romanian Constitution) - the access to public office and the actual performance of the public office - has been consistently emphasized in the doctrine. Therefore, Ioan Muraru and Elena Simina Tănăsescu note that "the right to be elected is also a fundamental electoral right, that is, a purely political right".¹

In this background, any interference in the exercise of an elected official's mandate must be analyzed in light of the requirements set forth in the Romanian Constitution, which establishes a genuine proportionality test. According to this constitutional provision, restrictions on the exercise of certain rights or freedoms are permitted only if they are provided for by law, are necessary in a democratic society, are proportionate to the aim pursued, and do not undermine the existence of the right.

This paper examines the constitutionality of the mechanism for the automatic termination of a local elected official's term of office, as regulated by Government Emergency Ordinance no. 57/2019, the Administrative Code,² in accordance with the constitutional principles of proportionality, equality of rights, and legal certainty, as well as in light of the European standards established by the European Court of Human Rights.

2. The right to be elected and restrictions on such right

The right to be elected, as well as the right to exercise the mandate acquired through popular election, represents an essential component of fundamental political rights, as expressly enshrined in art. 37 of the Constitution. The termination of the term of office of an elected official represents, by its very legal nature, a genuine restriction on the exercise of this right, as it results in the removal of the officeholder from the public office acquired through the will of the electorate and prevents the exercise of the mandate conferred by the vote. The constitutional text, as currently worded, has positive implications in that it lists only the conditions under which a person may be elected by popular vote, not the circumstances under which that person's term of

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¹ I. Muraru, E.S. Tănăsescu, *Constituția României* (The Constitution of Romania), 3rd Issue, C.H. Beck Publishing House, Bucharest, 2022, p. 301.

² GEO no. 57/2019 was published in Official Journal no. 555 of 05.07.2019.

office would end. Furthermore, the wording applies equally to all elected officials, including local elected officials; in this regard, situations in which their term of office ends must be viewed in light of the relevant legal provisions, specifically those of the Administrative Code, which, according to art. 204 letter g stipulates that the term of office of a local or county council member ends by “conviction, by a final court judgment, to a custodial sentence, regardless of how the sentence is to be served.”

It is clear that in this case we are in the presence of a restriction on a right; however, according to art. 53 of the Romanian Constitution, any restriction on the exercise of fundamental rights and freedoms must meet the requirements of a genuine proportionality test, in the sense that it is legitimate only if it is provided for by law, is necessary in a democratic society, is proportionate to the situation that gave rise to it, and does not undermine the existence of the fundamental right or freedom.

Only by referring to art. 53 can we easily note that the disputed legal provision does not, however, satisfy the requirement of proportionality set forth in art. 53 of the Constitution, as it establishes an automatic mechanism for terminating a mandate that does not allow for an individualized assessment based on the specific circumstances of each case.

By using the phrase “regardless of the method of enforcing the sentence”, the regulation takes on the nature of a rigid and undifferentiated mechanism that produces the same legal consequences in substantially different situations, without allowing for an assessment based on the severity of the offence, the form of culpability, or the manner of individualization determined by the court.

Furthermore, the doctrine pointed out the following³:

“The principle of proportionality can be analyzed from several perspectives [...] As a principle inherent in the very legal function of the state, the principle of proportionality expresses the necessary alignment of legal measures with the factual situations they address, establishing a fair and legitimate relationship between the legal measure adopted and social reality. [...] This establishes a complex relationship among at least three elements: the cause that leads to the adoption of a restrictive measure (social reality); the restrictive measure itself (the legal regulation adopted); and the extent to which the restriction imposed deviates from the objective pursued by the legislator.”

Furthermore, according to art. 4 para. 11 of Law no. 115/2015⁴, the persons who, at the time of filing their candidacy, have been definitively sentenced to imprisonment for intentional crimes, unless they have been rehabilitated, granted a post-conviction amnesty, or the offense has been decriminalized, shall not be eligible to run for office and cannot be elected. Furthermore, according to art. 204 para. 2 letter g of GEO no. 57/2019, the term of office of a local or county council member shall automatically terminate in the event of a conviction, by a final court judgment, to a custodial sentence, regardless of the specific terms of its enforcement.

The correlation of these legal provisions leads us to the conclusion that a person sentenced to imprisonment for committing a negligent offense may hold the office of local council or county council member, since the prohibition established by art. 4 para. 11 of Law no. 115/2015 applies exclusively to convictions for intentional crimes. Notwithstanding, if during the term of office, the same person is definitively sentenced to a custodial sentence for a negligent offense, the term of office of the respective person shall automatically terminate pursuant to art. 204 para. 2 letter g of Government Emergency Ordinance no. 57/2019.

Under these circumstances, the restriction on the performance of the office of local council member does not meet the requirement of necessity in a democratic society, thereby undermining the substance of the relevant fundamental right.

The existence of alternative, less intrusive mechanisms highlights the absence of a genuine and proportionate need for such interference, given that the termination of the term of office could be contingent upon the criminal court imposing the complementary penalty of disenfranchisement, pursuant to art. 66 para. 1, letter a of the Criminal Code, could be differentiated based on the form of culpability—namely, intent or negligence - depending on the connection between the offense and the performance of public office, as well as in relation to the manner of enforcing the sentence.

The automatic nature of the regulatory mechanism renders the right to be elected meaningless, contrary to art. 53 para. 2 final thesis of the Constitution. Therefore, in the event of a conviction resulting in a suspended

³ I. Muraru, E.S. Tănăsescu, *Constituția României* (The Constitution of Romania), 3rd Issue, C.H. Beck Publishing House, Bucharest, 2022, p. 468-469.

⁴ Law no. 115/2015 was published in Official Journal of Romania no. 349 of 20.05.2015.

prison sentence with probation for a negligent offense, and in the absence of the complementary penalty of disenfranchisement, the convicted person finds themselves in a paradoxical legal situation, in that they are eligible to run for office, according to art. 4 para. 1⁵ of Law no. 115/2015, but loses the term of office currently being served. This legislative inconsistency highlights the fact that the challenged legal provision undermines the very essence of the right to be elected, specifically in terms of the effective fulfillment of the mandate.

However, the principle of proportionality requires that any restriction on the exercise of a fundamental right be appropriate and necessary in relation to the severity of the situation that gave rise to it. A regulation that treats fundamentally different situations as equivalent in terms of their legal consequences cannot be considered to comply with the constitutional requirements set forth in art. 53 of the Constitution.

The doctrine pointed out that⁵ "There is a significant difference between a restriction that is legitimate - and therefore constitutionally justified - and one that is proportionate to the reason justifying it, which, although justified by grounds expressly mentioned in the Constitution, are disproportionate to those grounds and, consequently, become unconstitutional". Therefore, even though the purpose of the regulation - to protect the integrity of the public office - is legitimate, the automatic and indiscriminate mechanism is disproportionate.

3. The analysis of the specific case of the termination of a local council member's term of office in relation to the legal status of other elected officials

According to art. 70 para. 2 of the Constitution of Romania, the capacity as a Deputy or Senator shall cease, among others, in case of disenfranchisement. However, the disenfranchisement represents a complementary penalty regulated by art. 66 para. 1 letter of the Criminal Code the application of which, as a rule, does not take effect automatically but it is left to the discretion of the court as part of the process of determining the specific sentence.

Accordingly, in case a member of the Parliament is sentenced to imprisonment with a suspended sentence under probation, and the court does not order the complementary penalty of disenfranchisement, the respective member of Parliament shall continue to hold the office, as the constitutional grounds for termination of the mandate provided for in art. 70 para. 2 of the Constitution do not apply.

Paradoxically, a local elected official in an identical legal situation - namely, convicted of the same offense - to the same sentence, determined in the same manner, without the application of the complementary penalty of disenfranchisement provided for in art. 66 para. 1 letter C of the Criminal Code shall be subject to a radically different legal consequence, consisting of the automatic termination of the term of office.

Such a difference in legal treatment is all the more difficult to justify given that both categories of public officials obtain their mandate through the same constitutional mechanism of universal, equal, direct, and free voting. The electoral will that they represent and exercise within the scope of their mandate has the same legal nature and democratic legitimacy, regardless of whether the mandate is exercised at the local or national level.

Therefore, the only element that gives rise to this difference in treatment is the level at which the office is performed - that is, local or national. Such a criteria appears as arbitrary in relation to the consequences of a criminal conviction, since it is unrelated to the seriousness of the offense, the nature of the penalty imposed, or the criminal court's assessment of whether it is appropriate to restrict the convicted person's electoral rights. Under these circumstances, differential legal treatment raises serious concerns regarding its compatibility with the principle of equality before the law enshrined in art. 16 para. 1 of the Constitution, as well as with the requirements of proportionality that must govern any restriction on the exercise of rights.

"The principle of equality before the law requires that situations which, depending on the objective pursued, are not different, be treated equally. For this reason, it does not rule out but rather allows for different solutions for different situations. Consequently, different treatment cannot be merely the result of the legislator's discretion; it must be rationally justified, in accordance with the principle of equality of citizens before the law and public authorities", as set forth in Decision no. 1/1994 of the Constitutional Court Plenary⁶.

Furthermore, the relevant literature in the field noted the following⁷:

⁵ I. Muraru, E.S. Tănăsescu, *Constituția României* (The Constitution of Romania), 3rd Issue, C.H. Beck Publishing House, Bucharest, 2022, p. 469.

⁶ Decision no. 1/1994 of the Constitutional Court Plenary (https://www.cdep.ro/pls/legis/legis_pck.http_act_text?id=14239), published in Official Journal no. 69 of 16 March 1994.

⁷ I. Muraru, E.S. Tănăsescu, *Constituția României* (The Constitution of Romania), 3rd Issue, C.H. Beck Publishing House, Bucharest, 2022, p. 139.

"The case law of the Constitutional Court of Romania was inspired by ECHR, which pointed out that "Any difference in treatment made by the state between individuals in similar situations must be objectively and reasonably justified." The standard of reasonableness requires "a proportional relationship between the objective pursued by the legislator when establishing different legal regimes for similar situations and the means employed."

4. The termination of a local council member's term of office in the specific case of a criminal conviction cannot be considered outside the scope of the constitutional provisions and the case law of the ECHR and the CJEU

The Constitution of Romania establishes the fundamental framework for the exercise of the right to be elected. In this respect, art. 36 para. (2) of the Constitution provides that The mentally deficient or alienated persons, laid under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote, while art. 37 para. (1) of the Fundamental Law provides that the right to be elected is conditioned by the existence of the voting right.

The substantive requirements for the right to be elected are those set forth in art. 16, art. 37 and art. 40 of the Constitution and include, inter alia, the requirement that the person not to have been disenfranchised as a result of a final court conviction.

In this regard, the Constitution makes the loss of the right to be elected contingent upon the existence of a legal sanction consisting of disenfranchisement, a sanction that takes the form of a complementary penalty applied by a criminal court, rather than as the result of an automatic administrative mechanism.

In this case, the criminal court assessed the defendant, the specific circumstances of the offense, and the realistic possibility of social reintegration, concluding that the purpose of the sentence could be achieved without actually serving it in prison. Furthermore, the criminal court ruled that there was no need to enforce the complementary penalty of disenfranchisement, as provided for in art. 66 para. (1) letters a) and b) of the Criminal Code which means, in accordance with the principles of criminal law and the mechanism of judicial enforcement of punishment, that the court found that the convicted person does not pose a threat to the performance of elective public office or represent a case of indignity.

Notwithstanding, the administrative regulation provided for by art. 204 para. (2) letter g) of GEO no. 57/2019 on the Administrative Code operates automatically, irrespective of any proportionality analysis or the specific circumstances of the case, resulting in the automatic termination of the term of office in the event of a final conviction involving a custodial sentence, regardless of how the sentence is to be served. By its very nature, this regulation precludes from the outset the consequences of the judicial individualization carried out by the criminal court.

Within this regulatory framework, a genuine legal contradiction is emerging between two branches of law.

On the one hand, the criminal law, by means of suspended sentence with probation and by the non-application of the complementary penalty of disenfranchisement, reflects the state's confidence in the convicted person's ability to reintegrate into society.

On the other hand, the administrative law automatically and indiscriminately sanction the same legal situation, without taking into account the specific circumstances.

Therefore, the automatic application of the termination of office through administrative channels is, in essence, equivalent to establishing a prohibition on exercising an elective public office that the criminal court deemed unnecessary. Such an overlap of jurisdiction creates a systemic contradiction between the criminal and administrative legal systems, since the administrative provision disregards both the nature of the offense and whether or not the criminal court has ordered the disenfranchisement as a complementary penalty.

The Constitutional Court of Romania deduced by way of interpretation the principle of legal certainty, stating that it "is a fundamental feature of the rule of law" (CCD no. 210/2014)⁸ and "essentially expresses the idea that citizens must be protected against a danger that stems directly from the law itself, against a sense of insecurity that the law has created or which it risks creating" (CCD no. 51/2012⁹).

⁸ CCR Decision no. 210 of 2014 was published in Official Journal no. 391 of 27.05.2014 (https://www.ccr.ro/wp-content/uploads/2020/09/Decizie_210_2014.pdf).

⁹ CCR Decision no. 51 of 2012 was published in Official Journal no. 90 of 03.02.2012 (<https://media.hotnews.ro/assets/document/2012/02/3/11408966-0.pdf>).

At the same time, the regulation does not allow for consideration of whether or not the convicted person is actually unable to perform the duties of the office to which he/she was elected, which results in the automatic application of a penalty without any mechanism for assessing its proportionality.

Under these circumstances, the automatic application of administrative termination of office effectively amounts to the application of an additional penalty that undermines the individualization of penalty. Such a consequence violates the principle of proportionality enshrined in art. 53 of the Constitution, as well as the requirements of consistency and predictability of the legal system, since it leads to the restriction of the convicted person's political rights in the absence of an express ruling by the criminal court.

According to the case law of the European Court of Human Rights, the certainty of legal relations requires that "the final decision rendered by the court in any dispute shall be conclusive and may no longer be challenged."¹⁰ Therefore, the disputed administrative ruling essentially challenges the criminal court's decision that there is no need to apply disenfranchisement.

Furthermore, the automatic mechanism for terminating the office operates *ope legis*, without allowing for an effective judicial review of its proportionality in the specific case. Such a regulation precludes any possibility of an individualized assessment of the legal situation of the data subject in light of the specific circumstances of the case.

In this background, the contentious administrative court is limited to a formal review of whether the conditions set forth by law for determining the termination of the office have been met, and does not have the authority to assess whether, in the specific circumstances of the case, the measure ordered is proportionate to the intended purpose.

The right to be elected, enshrined in art. 37 of the Constitution of Romania, comprises two essential dimensions, the right to stand for election and be elected to a representative public office, as well as the right to effectively fulfill the office assigned through the expression of the will of the electorate. The performance of the public office is thus an intrinsic component of the right to be elected, since the purpose of the electoral process is to give effect to the will of the electorate through the exercise of the duties of the office to which the person was elected.

The doctrine noted the following¹¹:

The right to be elected refers to a person's eligibility to be elected to the state's representative bodies and, consequently, to hold an elective office or position within the state. Being a fundamental right, the right to be elected must be, according to art. 20 of the Constitution, interpreted and applied in accordance with the Universal Declaration of Human Rights, the covenants, and the other treaties to which Romania is a party."

According to art. 20 para. (1) of the Constitution, the constitutional provisions regarding the rights and freedoms of citizens shall be interpreted and applied in accordance with the international human rights treaties to which Romania is a party. Furthermore, according to art. 20 para. (2) of the Constitution, in the event of any inconsistency between international covenants and treaties concerning fundamental human rights and domestic laws, international regulations shall take precedence, unless the Constitution or domestic legislation contains more favorable provisions.

In this regard, Article 3 of Protocol No. 1 to the European Convention on Human Rights guarantees fundamental individual rights, from which both the right to vote and the right to stand for election derive, as held by the European Court of Human Rights in the case of Mathieu-Mohin and Clerfayt v. Belgium, judgment of 1987¹².

The case law of the European Court of Human Rights has established a number of fundamental principles regarding restrictions on electoral rights. Therefore, in the case of Hirst v. the United Kingdom No. 2, Grand Chamber judgment of 2005¹³, the Court held that the establishment of a general, automatic, and indiscriminate prohibition of the right to vote for convicted persons violates Article 3 of Protocol no. 1, emphasizing that

¹⁰ Case *Brumărescu v. Romania*, published in Official Journal no. 758 of 28 November 2001 (<https://hudoc.echr.coe.int/eng?i=001-122775>).

¹¹ I. Muraru, E.S. Tănăsescu, *Constituția României* (The Constitution of Romania), 3rd Issue, C.H. Beck Publishing House, Bucharest, 2022, p. 301.

¹² Case of *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987 - <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-57536%22%7D>).

¹³ Case of *Hirst v. The United Kingdom* of 6 October 2005 - <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-70442%22%7D>).

compliance with the principle of proportionality requires the existence of a perceptible and sufficiently strong connection between the sanction applied and the conduct of the person concerned.

Similarly, in the case of *Scoppola v. Italy* no. 3, the Grand Chamber judgment of 2012¹⁴, the Court held that a legal system limiting the disenfranchisement to certain categories of offenses and to sentences exceeding a certain minimum duration is compatible with the Convention, emphasizing that differentiation based on the severity of the conviction is an essential element for compliance with the requirements of the Convention.

Mutatis mutandis, in our view, the same arguments apply to the right to be elected.

In applying these principles to the situation under consideration, it should be noted that the office of local council member was obtained through the direct vote of the electorate, as a result of the exercise of popular sovereignty. Consequently, the termination of a term of office due to a criminal conviction that is unrelated to the performance of the public duties or the integrity of the electoral process represents a significant interference with the right to exercise the office obtained through the vote of the electorate.

Under these circumstances, the automatic termination of a term of office pursuant to a provision that applies automatically - without examining the nature of the offense, the severity of the act, or its connection to the performance of public office - results in a disproportionate restriction of the right to be elected, specifically with regard to the actual performance of the mandate. Such a legal consequence affects not only the individual right of the elected person, but also the will of the electorate that conferred the mandate by means of the vote.

By returning to the constitutional provisions, according to art. 115 para. 6 of the Constitution, emergency ordinances cannot affect the rights, freedoms, and duties provided for in the Constitution, or electoral rights [...].

The provisions of art. 204 para. 2 letter g of GEO no. 57/2019 automatically result in the termination of the local elected official's term of office, which amounts to a genuine interference with the right to be elected, as guaranteed by art. 37 of the Constitution.

Under these circumstances, the disputed provision directly infringes upon a fundamental right, within the meaning of art. 115 para. 6 of the Constitution, as it results in the termination of a term of office obtained through popular vote without allowing for an individualized assessment of the specific circumstances. Such a legal consequence exceeds the constitutional limits of legislative delegation, as the Government cannot, by means of an emergency ordinance, adopt regulations that affect the substance of fundamental rights.

Under art. 53, the Romanian constituent assembly went a step further and permitted the legislator, on an exceptional basis and only in situations exhaustively listed in the text of the Constitution itself, to interfere with the exercise of fundamental rights. According to the general principle applicable in the field of the law - *delegata potestas non delegatur*, the legislative power cannot further delegate this authority to the executive power. This is why the doctrine¹⁵ have argued that neither ordinary ordinances nor emergency ordinances may be used to restrict the exercise of certain rights.

Furthermore, the relevant literature in the field noted¹⁶: "The 2003 constitutional revision process sought to establish as precise a legal framework as possible for legislative delegation in general and for emergency ordinances in particular. Therefore, art. 115 of the Constitution was supplemented by para. (6), which stipulates that emergency ordinances cannot affect, among other things, the freedoms and duties provided for in the Constitution and electoral rights - that is, fundamental rights and freedoms. The doctrine have noted that such an approach has established a new basis for bringing a case before the Constitutional Court in case the Government would commit the abuse of regulating these matters."

Similarly, the Constitutional Court has held that "the exercise of certain rights may be restricted only by means of a law, as a formal act of Parliament", as resulting from CCD no. 150/2020¹⁷, CCD no. 152/2020¹⁸ and CDD no. 157/2020¹⁹.

¹⁴ Case *Scoppola v. Italy* of 22 May 2012 - [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-123056%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-123056%22]}).

¹⁵ I. Muraru, M. Constantinescu, „Restrângerea exercitării unor drepturi sau libertăți” (Restriction of the exercise of certain rights or freedoms), in *Studii constituționale* (Constitutional Studies), Actami Publishing House, 1995, p. 199-202.

¹⁶ A. Iorgovan, in *Constituția revizuită comentată* (The annotated revised Constitution), C.H. Beck Publishing House 2004, p. 226.

¹⁷ CCR Decision no. 150 was published in Official Journal no. 215 of 17.03.2020 (https://www.ccr.ro/wp-content/uploads/2020/05/Decizie_150_2020-1.pdf).

¹⁸ CCR Decision no. 152 was published in Official Journal no. 387 of 13.05.2020 (https://www.ccr.ro/wp-content/uploads/2020/06/Decizie_152_2020.pdf).

¹⁹ CCR Decision no. 157 was published in Official Journal no. 397 of 15.05.2020 (https://www.ccr.ro/wp-content/uploads/2020/05/Decizie_157_2020.pdf).

Therefore, the adoption of such a legislative measure, which restricts the right to be elected and electoral rights through an emergency ordinance, violates the requirements of art. 115 para. 6 of the Constitution.

5. Conclusions and de lege ferenda proposals

This study sought to demonstrate that the mechanism for the automatic termination of the term of office of local or county council member, as provided for under current legislation, fails to comply with the principle of proportionality, creates discrimination, undermines legal certainty, conflicts with European standards, and exceeds the limits of legislative delegation. Under these circumstances, this naturally raises the question of whether the legal framework needs to be reformed through a solution that reconciles the provisions of the Administrative Code with the status of member of Parliament, or whether a case-by-case assessment is required for the circumstances that led to a criminal conviction. The discussions are extensive, and so is the criticism. A referral to the Constitutional Court that would rule on the alleged unconstitutionality cannot be ignored. Until a clear clarification is provided, we once again find ourselves faced with unharmonized legal provisions, an issue that deserves serious attention from the legislator. It is also worth noting a remarkable legal analysis performed by Prof. Dana Apostol Tofan, who draws an analogy similar to those outlined above, but in relation to another ground for the termination of a local council member's term of office, namely political defection. Prof. Dana Apostol Tofan also notes that, in this case, party switching is prohibited for local elected officials but goes unpunished for members of Parliament.²⁰

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²⁰ Dana Apostol Tofan, *Drept administrativ (Administrative Law)*, vol. 1, 5th issue, C.H. Beck Publishing House, Bucharest, 2020, p. 262.

CONTROVERSIES RELATED TO THE ESTABLISHMENT OF THE ELECTORAL BUREAUS OF THE COMMUNAL, CITY AND MUNICIPAL CONSTITUENCIES IN THE ELECTIONS OF JUNE 9, 2024 FOR THE ELECTION OF ROMANIAN MEMBERS OF THE EUROPEAN PARLIAMENT AND FOR THE ELECTION OF LOCAL PUBLIC ADMINISTRATION AUTHORITIES

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Abstract

In the case of the elections of June 9, 2024 for the election of Romanian members of the European Parliament and for the election of local public administration authorities, the Central Electoral Bureau assumed the competence to resolve complaints directed against the manner of designating the presidents or deputies of the electoral bureaus of communal, city and municipal constituencies. The practical difficulties related to the resolution of these complaints were primarily related to the identification of the electoral bureau competent to judge them and to the interpretation of Article 26 paragraph 5 of Law no. 115/2015 for the election of local public administration authorities, for the amendment of the Local Public Administration Law no. 215/2001, as well as for the amendment and completion of Law no. 393/2004 on the Statute of Local Elected Officials. The Central Electoral Bureau considered that the resolution of such complaints is its responsibility and made an innovative interpretation of Article 26 paragraph 5 of Law no. 115/2015, which was sanctioned by the competent courts: the courts of appeal in first instance and the High Court of Cassation and Justice in appeal. The legal consequence of this situation did not stop there, but was the basis for the formulation of legal actions whose object was to request compensation for the prohibition of the right to participate in the electoral process, the compensation being equivalent to the rights of which the plaintiffs were deprived.

Keywords: *local elections, competence of the Central Electoral Bureau, appointment of presidents or deputies of the electoral bureaus of communal, city and municipal constituencies, complaint.*

1. Introduction

In the case of the elections of June 9, 2024 for the election of Romanian members of the European Parliament and for the election of local public administration authorities, the Central Electoral Bureau assumed the competence to resolve complaints directed against the manner of designating the presidents or deputies of the electoral bureaus of communal, city and municipal constituencies. The practical difficulties related to the resolution of these complaints were primarily related to the identification of the electoral bureau competent to judge them and to the interpretation of Article 26 paragraph 5 of Law no. 115/2015 for the election of local public administration authorities, for the amendment of the Local Public Administration Law no. 215/2001, as well as for the amendment and completion of Law no. 393/2004 on the Statute of Local Elected Officials. The Central Electoral Bureau considered that the resolution of such complaints is its responsibility and made an innovative interpretation of Article 26 paragraph 5 of Law no. 115/2015, which was sanctioned by the competent courts: the courts of appeal in the first instance and the High Court of Cassation and Justice in the appeal.

The subject is relevant for the matter of local elections considering that the situation described above occurred for the first time in 2024 and therefore there is no relevant specialized literature on this subject.

In order to verify the correctness of the Central Electoral Bureau's approach, we will proceed to analyze the legislation in force and present the practice of the Supreme Court of Justice subsequent to the 2024 elections.

The subsequent practice of the SCJ outlined the directions of action for future elections, which the presidents of the courts will have to take into account when appointing the presidents and deputies of the local electoral bureaus, but this practice is not immune to criticism. If in the case of delegated judges we can identify a justification related to a possible territorial distance from the headquarters of the electoral bureaus (an inconvenience that each judge assumes when requesting to be appointed, when he can assess through his own

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examination whether he can cope with the task that will be entrusted to him), in the case of prosecutors, as well as magistrates, the exclusion is not thoroughly justified (only references are made to the distinct class of magistrates) and may generate future litigation.

2. Brief history

The first attestation of the Central Electoral Bureau in the post-December period dates back to 1990, when, through Decree-Law 92¹, for the election of the Parliament and the President of Romania, it received a new configuration. Thus, according to this normative act, the Central Electoral Bureau, consisting of 7 judges of the former Supreme Court of Justice and 10 representatives of political parties and formations, designated in descending order of the number of lists of candidates throughout the country, which they had proposed for the parliamentary elections, had as its main duties the supervision of the preparation of electoral lists, bringing them to the attention of citizens and the legal submission of candidacies, verifying and registering the results of the elections and fulfilling the other duties that fall to it according to the provisions of this decree-law, as provided for in art. 12.

The first local elections in Romania in the post-December period were held on February 9, 1992 (first round) and February 23, 1992 (second round)², a consistent period since the last elections in 1937.

The Central Electoral Office succeeded the Central Electoral Commission, both in terms of its powers and its role.

According to art. 28 of Electoral Law no. 67 of December 20, 1974³, the Central Electoral Commission had the following powers:

- "monitors the application of the legal provisions regarding elections and provides guidance on all issues related to their application;
- ensures the timely preparation of voter lists and their public disclosure, as well as the timely formation of polling stations;
- resolves complaints regarding the operations of the constituency electoral commissions and the meetings held within their competence;
- verifies and records the results of the elections in the electoral constituencies;
- takes care of the production of ballot papers, printouts and control stamps, according to the model established by the Council of State."

The Central Electoral Commission shall submit the election files to the Grand National Assembly.

Over time, the powers of the Central Electoral Bureau or its equivalent institution have been mainly limited to the supervision of elections and the centralization of election results⁴. In addition, this entity has been granted the capacity to issue decisions on the legality of the operations of hierarchically lower electoral bureaus.

Current legal regulation.

According to art. 39 para. 1 let. c, d and e and of Law no. 115/2015⁵ on the election of local public administration authorities, amending the Law on local public administration no. 215/2001, as well as amending and supplementing Law no. 393/2004 on the Statute of Local Elected Officials, the Central Electoral Bureau has the following powers, in terms of the power to censor the acts of lower electoral bureaus:

- "c) monitors and ensures compliance with and correct application of the legal provisions regarding elections throughout the country; ensures the uniform interpretation of their provisions;
- d) resolves any objections regarding its own activity and any complaints regarding the establishment, composition and activity of the electoral bureaux of the county constituency and of the municipality of Bucharest;
- e) receives and resolves any complaint regarding the organization and conduct of the election of local

¹ Decree-Law 92/14 March 1990 for the election of the Parliament and the President of Romania was published in the Official Gazette no. 35 of 18 March 1990.

² <https://www.agerpres.ro/flux-documentare/2017/02/09/documentar-25-de-ani-de-la-primele-alegeri-locale-libere-9-februarie-1992-10-33-17>.

³ Electoral Law No. 67 of December 20, 1974 was published in the Official Gazette No. 161 of December 23, 1974.

⁴ 1919: PRIMELE ALEGERI PARLAMENTARE DIN ROMÂNIA MARE, source: roaep.ro: documentat pe baza informațiilor furnizate de Arhivele Naționale ale României.

⁵ Law no. 115/2015 on the election of local public administration authorities, amending Law no. 215/2001 on local public administration, as well as amending and supplementing Law no. 393/2004 on the Statute of Local Elected Officials was published in: Official Gazette No. 349 of 20 May 2015.

public administration authorities, other than those which, by this law, are given to the competence of the electoral bureaux of the constituency or the courts.”

3. Content

The issue that generated discussions and caused a high number of legal actions since the last elections organized under Law no. 115/2015 was whether at the level of the electoral bureaux of communal, city and municipal constituency magistrates, other than those from the courts and prosecutors' offices attached to the courts, could be designated as presidents or deputies thereof, by drawing lots.

Law no. 115/2015 explicitly provides in art. 26 paragraph 5 that the appointment of the president of the constituency electoral bureau and his deputy is made in a public session by the president of the tribunal, by drawing lots, from among the magistrates and other jurists who are registered in the Body of Electoral Experts and have at least 5 years of experience in legal positions, based on the criterion of proximity of the domicile or residence to the locality or administrative-territorial subdivision in which the constituency electoral bureau will operate.

The same text of the law provides that the drawing of lots is made with priority from the list of magistrates, first for presidents and then for deputies.

We note that nowhere in the content of the reference article is the capacity of magistrate nuanced by reference to a certain level of court. When the legislator wanted to restrict the scope of magistrates who have a vocation to hold the position of president or deputy, he did so explicitly, as happens, for example, in the case described in art. 26 of Law No. 33/2007⁶ on the organization and conduct of elections to the European Parliament, when the recruitment of judges who are to be presidents, respectively deputies, is carried out by drawing lots, among its acting judges, or in the case of the electoral bureau of the Bucharest municipality sector, among the acting judges of the sector court.

The only criterion of preference among persons who have the vocation to occupy the position of president or deputy of the electoral bureaux of the communal, city and municipal constituency is the proximity of the domicile or residence to the locality or administrative-territorial subdivision in which the electoral bureau of the constituency will operate.

Following the designation of presidents and deputies of the electoral bureaux of the communal, city and municipal constituency, in the procedure initiated for the election of local public administration authorities, several electoral experts filed complaints, addressed both to the electoral bureau of the county constituency and to the Central Electoral Bureau.

Regarding the complaints registered with the Central Electoral Bureau, the first issue that arises is its competence in relation to their resolution, and the second is related to the application of substantive law norms.

In essence, the legislator has granted the electoral bureaux the power to verify and sanction any irregularities in a descending order, meaning that the activity of the lower electoral bureau is verified by the immediately superior electoral bureau, thus avoiding excessive congestion of the activity of the superior electoral bureaux. Art. 39 para. 1 let. d of Law no. 115/2015 provides that the Central Electoral Bureau resolves complaints regarding the manner of establishment, composition and activity of the county constituency electoral bureaux.

The law does not confer on the Central Electoral Office the power to sanction any irregularities that may have occurred at the time of the establishment of the county constituency electoral offices or regarding their composition. The power to deal with complaints related to the establishment of the communal, city and municipal constituency electoral offices or their composition belongs to the county constituency office, the superior office of the three categories of offices described, as also provided for in art. 41 paragraph 2 of Law no. 115/2015.

However, through a series of decisions issued in April 2024, of which we mention for example Decision 19/H/16.04.2024, Decision 29/H/19.04.2024, Decision 30/H/19.04.2024, Decision 31/H/19.04.2024, Decision 32/H/19.04.2024, Decision 33/H/19.04.2024, Decision 34/H/19.04.2024⁷, the Central Electoral Bureau assumed the competence to resolve appeals regarding the method of appointing the presidents and deputies of the

⁶ Law no. 33/2007 on the organization and conduct of elections to the European Parliament was initially published in the Official Gazette of Romania, Part I, no. 28 of January 16, 2007.

⁷ Available on the website <https://locale2024.bec.ro/documente/hotarari/>.

constituency electoral bureaus for the counties of Buzău, Dolj, Giurgiu, Ialomița, Mureș, Argeș, Alba, pronounced solutions on the merits, in the sense of abolishing the minutes of establishment of the electoral bureaus of the communal, city and municipal constituency and resuming the designation procedure.

It is outrageous that the Central Electoral Bureau, in resolving the complaints, retained the incidence of the same art. 26 paragraph 5 of Law no. 115/2015, which does not justify the differentiation contained in the above-mentioned decisions, in which it was held that the lists drawn up by the president of the tribunal also included judges from other courts. In addition, the decisions included an innovative interpretation on the same issue: thus, the new list of the president of the court had to include only the judges in office at the respective court and the prosecutors from the corresponding prosecutor's office, and only in the event that, after drawing up the list, it was found that the number of magistrates was insufficient to cover the number of persons required to be designated as presidents and deputies of the electoral bureaus of the communal, city and municipal constituency, could the list of magistrates include judges in office at the courts located in the constituencies of the courts, respectively prosecutors from the prosecutor's offices attached to them. Only if, even after supplementing the list with the above-mentioned magistrates, the number of persons required to be designated as presidents and deputies of the electoral bureaus of the communal, city and municipal constituency was still not covered, would a draw be made among the persons on the list of electoral experts.

To begin with, it should be emphasized that all the decisions of the Central Electoral Bureau mentioned above provide a particular interpretation of art. 26 paragraph 5 of Law no. 115/2015, which in order to be valid should have preceded the decisions in which the Central Electoral Bureau ruled on the complaints sent by various petitioners.

Thus, art. 39 paragraph 5 of Law no. 115/2015 provides that:

"The decisions of the Central Electoral Bureau giving interpretations of certain provisions of this law shall be published in the Official Gazette of Romania, Part I."

In the local elections of 2024, the Central Electoral Bureau issued only 3 decisions on the interpretation of the law, which exceed the subject matter of the complaints that were the basis for issuing the seven decisions. Under these conditions, the inclusion of the interpretation of art. 26 paragraph 5 of Law no. 115/2015 in the content of ordinary decisions violates the rule imposed by art. 39 paragraph 5 of Law no. 115/2015, there being an obvious formal defect, lacking the publicity condition for the efficiency of the new interpretation provided by the Central Electoral Bureau.

Leaving aside the fact that at least in the last two rounds of the local elections in 2016 and 2020, identical practices did not generate complaints or the need for interpretative decisions, the new interpretation provided by the Central Electoral Bureau is in contradiction with the obvious meaning of art. 26 paragraph 5 of Law no. 115/2015.

The article provides for a two-stage designation of the presidents and deputies of the electoral bureaus of the communal, city and municipal constituency: in the first stage, magistrates are designated by drawing lots from the list drawn up by the president of the tribunal, with only the proximity of the domicile or residence to the locality or administrative-territorial subdivision in which the electoral bureau of the constituency will operate being active as a tie-breaking criterion, and to the extent that there are still unoccupied places, also by drawing lots, the list of electoral experts with at least 5 years of experience in the specialty is used.

The appointment takes place in two distinct stages which, although not expressly mentioned in art. 26 paragraph 5 of Law no. 115/2015, clearly result from the provision according to which the drawing of lots is made with priority from the list of magistrates.

The Central Electoral Bureau, through the interpretation provided, imposes a tripartite appointment: first, the president of the tribunal draws up a list with the judges in office at the respective tribunal and the prosecutors from the corresponding prosecutor's office, following which, if the list is not sufficient to appoint all the presidents and deputies of the electoral bureaus of the communal, city and municipal constituencies, this list is completed with judges in office of the courts located in the constituencies of the tribunals, respectively prosecutors from the prosecutor's offices attached to them.

The preparation of the list of magistrates in two stages is clearly without legal support, in addition, the Central Electoral Bureau does not justify the preference, by reference to legal texts in force, for judges from courts within the jurisdiction of the tribunals, respectively prosecutors from the prosecutor's offices attached to them, to the detriment of those from the courts, respectively higher prosecutor's offices. Also, the use of the phrase "in office" is in turn without legal coverage, not being mentioned in article 26 paragraph. 5 of Law no.

115/2015 and leads to the exclusion of judges, respectively prosecutors included in the organizational chart of the tribunals or prosecutor's offices attached to them, who are delegated or seconded.

In my opinion, magistrates who are eligible to be included in the list drawn up by the president of the tribunal can work at any court or prosecutor's office, what the law requires of all of them, in the case of local elections, is to have 5 years of experience, an aspect that results from the interpretation of art. 26 paragraph 5 sentence II of Law no. 115/2015: "The appointment is made, by drawing lots, among magistrates and other jurists who meet the conditions provided for in paragraph (51) based on the criterion of proximity of the domicile or residence to the locality or administrative-territorial subdivision in which the constituency electoral office will operate." The text of the law refers for both categories of jurists to the conditions provided for in paragraph (51), which establishes the minimum experience in the specialty of 5 years⁸.

Regarding the notion of magistrate, the differentiations made in the decisions of the Central Electoral Office depart from the definition given to this professional category by art. 1 para. 1 and 2 of Law 303/2022 on the status of judges and prosecutors⁹:

- "The judiciary is the judicial activity carried out by judges for the purpose of administering justice and by prosecutors for the purpose of defending the general interests of society, the rule of law, as well as the rights and freedoms of citizens.
- Judges and prosecutors have the quality of magistrates. "

Going beyond the substantive and formal defects of the decisions of the Central Electoral Bureau, they established a new legal reality, by admitting the complaints, which is in complete contradiction with the acts of the county electoral bureaus, which resolved the same complaints, in the sense of rejecting them.

Thus, two categories of administrative acts coexisted, issued by different electoral bureaus, both presumed legal and well-founded, which had contrary provisions regarding the same complaint.

Subsequently, the legal consequence of this situation was the basis for the formulation of legal actions whose object was to request compensation for the prohibition of the right to participate in the electoral process, the compensation being equivalent to the rights of which the plaintiffs were deprived.

As at the end of the electoral process, the capacity of use of the Central Electoral Bureau ceased, the passive procedural framework was formed by the Prefect Institution, the Ministry of Internal Affairs, the Romanian State through the Ministry of Finance and the AEP, each of these institutions having specific attributions in electoral matters. Thus, the funds intended for the elections were transferred by the Ministry of Finance, through the MIA, to the Prefect Institutions. Separately, budgetary allocations were made to the AEP, but the destination of the amounts to this entity has a distinct purpose. It is to distribute to the electoral competitors the amounts necessary for the implementation of the electoral campaign.

That is why I believe that a correct passive procedural framework in disputes regarding compensation must be formed by the Ministry of Internal Affairs and the Romanian State through the Ministry of Finance and the Prefect's Institutions, the latter having only the role of distributing the amounts received to the persons involved in organizing the elections, at the local level.

The disputes generated by this interference have not yet been definitively resolved, with the High Court of Justice of the Republic of Moldova ruling on the appeal, so a uniform practice in this matter is expected, given that the solutions of the lower courts were not homogeneous, not even in terms of establishing the passive procedural framework.

Consequently, the effects of the Central Electoral Bureau's decisions continue to propagate in the current legal space, the last category of disputes not being definitively resolved. However, given the procedural stage of the resolution of the last categories of disputes, it is expected that this issue will be resolved in the near future, which will have to be taken into account in the future elections, regarding the vocation to obtain compensation in the event of non-compliance in the designation of the presidents and deputies of the local electoral bureaus.

A step forward was the pronouncement of Decision RIL 12/2025 by the SCJ¹⁰, which established that:

The list of persons who may be designated, by drawing lots, as presidents of constituency electoral bureaus and their deputies, for general local elections, includes judges in office at the court competent to make their designation, as well as at the courts in their territorial constituency.

⁸ In the same sense, Elena Burba, *Evoluția organizării și desfășurării alegerilor electorale din România*, pg. 19, unpublished study.

⁹ Law 303/2022 on the status of judges and prosecutors was published in the Official Gazette No. 1,102 of November 16, 2022.

¹⁰ Published in the Official Gazette no. 805 of August 29, 2025.

However, the decision has power only for the future, the litigious situations described in this study arising before the publication of the decision in the Official Gazette.

4. Conclusions

For the first time, in the case of the elections of June 9, 2024 for the election of Romanian members of the European Parliament and for the election of local public administration authorities, the Central Electoral Bureau assumed the competence to resolve complaints for which art. 41 paragraph 2 of Law no. 115/2015 imposes another material competence and provided an interpretation of art. 26 paragraph 5 of Law 115/2015 that exceeds its obvious meaning, requiring the intervention of the courts to resolve the conflict generated by the violation of the rights of persons who wished to be designated presidents or deputies of the electoral bureaus of the communal, city and municipal constituency to participate in the draws organized for this purpose.

The influx of case law on this subject confirmed the existence of decision errors on the part of the Central Electoral Bureau.

In order to prevent the repetition of these situations, the express intervention of the SCJ for the practical explanation of the notions that generated litigious situations was welcome, although the removal from the circle of persons who have the vocation to be designated presidents or deputies of local electoral bureaus is forced and may be another source of future litigation, based on a possible discriminatory situation.

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- Elena Burba, Evoluția organizării și desfășurării alegerilor electorale din România, pg. 19, unpublished study;
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ON FAITH IN PUBLIC SPHERE. IS THAT A LINK WITH CITIZENSHIP?

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Abstract

Is there a connection between expressing faith outside one's personal space and the idea of citizenship? Starting from an evolutionary perspective regarding citizenship and exposing a series of interdisciplinary key points, this paper provides an overview regarding the connection between different human rights supported by historical arguments but also refers to the relevant legal framework organized under the auspices of the United Nations, the Council of Europe or the European Union. Thus, the study attempts to pinpoint the link between the freedom of thought, conscience and religion and the idea of citizenship, both at a conceptual level but also in practical terms, also exposing relevant aspects regarding the topic under discussion, as seen in some states but also stated at a jurisprudential level, under the dome of the European Court of Human Rights, regarding the wearing of the veil by women or girls in public spaces, especially in schools. At the same time, taking into consideration the applicable legal framework and noting how some situations in matter of manifesting faith in public by wearing symbols or specific clothing items were addressed in case law, we will examine the ways in which beliefs can be manifested and how this bears a strong identity mark on every citizen, outside their personal space, outlining possible implications of the status in relation to the significance of the freedom to manifest one's religious beliefs.

Keywords: citizenship, freedom of thought, conscience and religion, human rights.

1. Introduction

Citizenship is a concept which, at a first sight, does not seem to have religious implications, generally referring, as stated in a doctrinal opinion, to „those who are (or are not) members of the same community”¹. The mere idea of belonging to a specific construct sometimes seems not to entirely reflect the valences of this multifaceted concept which, from an evolutionary perspective, has gained strong political, legal and social implications. Thus, certain authors are of the opinion that „a sense of belonging is mainly personal and individual, but communities and societies also see the need to make people feel that they belong”².

The citizenship status regulation has come a long way, starting, on the one hand, from the idea of the Greek polis, which, from an Aristotelian perspective, designated „the community of politically organized citizens”³ legally shaping afterwards under the auspices of the Roman Empire, where „citizens were defined not only as members of the city-state but also as subjects of law”⁴.

If the idea of belonging to a community has served as a foundation for shaping citizenship as a notion, religion also played a defining role regarding its development over time, the relevant literature citing as an opinion the fact that „historically, in Europe, only people professing the official religion of the state were regarded as full members of the political community”⁵. Gradually, however, by drawing a clear line between the religious and political spheres, the once-essential benchmarks for defining the citizen status in which the holders were „characterized by their historical origins, by their beliefs and religious practices and social belonging”⁶ are being abandoned.

From this perspective and with the aim of capturing the direct effects on the citizen status, in the sense that the intention was to aim at the „affirmation of equal rights of citizens”⁷, these rights shaped under the dome

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¹ J.M. Barbalet, Cetățenia, Editura DU Style, București, 1998, p. 22.

² Lotta Björklund Larsen, Lynne Oats, Crossing Borders, Sharing Burdens. Rethinking Taxation and Migration as Fiscal Belonging, Palgrave Macmillan, 2026, <https://doi.org/10.1007/978-3-031-99394-7>, p. 34.

³ Dominique Schnapper, Christian Bachelier (colab.), Ce este cetățenia?, Trad. de Gabriela Scurtu Ilovan, Polirom, Iași, 2021, p. 6.

⁴ Ibidem, p. 8.

⁵ Rossella Bottoni, Cristiana Cianitto, „The Legal Treatment of Religious Dissent in Western Europe: A Comparative View” in Ecclesiastical Law Journal 24, no. 1 (2022): 25–37, <https://doi.org/10.1017/S0956618X21000636>, p. 25.

⁶ Dominique Schnapper, Christian Bachelier (colab.), op. cit., p. 15.

⁷ Ibidem.

of the Declaration of the Rights of Man and of the Citizen set in 1789, a document which establishes, among others, with regard to the topic proposed for analysis, the fact that „no one should be persecuted on account of their opinions, including religious ones, provided that their manifestation does not disturb the public order established by law”⁸.

The regulation of these rights is a valuable reference point for further development of the documents that have addressed the issue under discussion. Today, in a diverse society, in which multiculturalism is a contemporary reality, identity remains an important feature, including in the religious sphere, with significant implications for the way in which citizens choose to manifest their faith in public, a topic which has generated multiple debates at the legal and social level.

In doctrine there have been formulated opinions of theorizing citizenship, evoking a new concept – the one of religious citizenship. Thus, five coordinates for addressing it are identified – focusing on definitions provided from the perspective of „nation state [...] civil society [...] the rights of persons [...] legal documents”⁹, respectively „a reflexive account of religious citizenship according to which persons can acquire such citizenship by adopting specific discursive positions”¹⁰, but it is also emphasized that „an historically informed view of religious citizenship may be possible that maximises the strong points of each of these accounts”¹¹, finishing by sending to „a more explicit conception of religious citizenship, one requiring that persons be allowed to exercise religious freedoms on the condition that they extend this right to others and one urging persons to tolerantly recognise religious differences in the ways in which they enact their social life”¹².

The idea is also taken up by other authors, the religious citizenship being this time viewed through the lens of six coordinates: „(1) legal status, rights, and duties; (2) participation and inclusion; (3) embodied religious rituals and practices; (4) material resources; (5) emotions in social relations, such as belonging and connectedness, and (6) caring for others and for nature”¹³.

Using as a reference point the theoretical directions expressed in doctrine and taking into consideration the manner in which citizenship has reconfigured over time, by affirming the equal rights of citizens, could such an approach be feasible?

Thus, starting from the idea that human rights have been profoundly influenced by religion and taking as a reference its impact over time on the evolution of the concept of citizenship, the present study proposes a mapping of the legal framework applicable to human rights with regard to freedom of religion, conscience and thought, focusing in particular on the aspects related to its manifestation, including in the public space, together with relevant case law pertaining to the proposed topic, guidelines through the lens of which we will analyse potential interference points with the field of citizenship.

2. Religion and human rights. Regulatory guidelines

The process of analysing how religion – in general – namely religious affiliation and the possible ways in which it can be manifested have positioned in the field of human rights requires a careful approach of the applicable regulatory framework, especially if the goal is the perspective of establishing the connection that appears between citizenship and public expression of faith. For this, it is firstly necessary to observe how this religious aspect was perceived in the human rights field because, as stated in the specialized literature, „apart from or besides citizen’s rights [...] there are human rights as for the human being”¹⁴.

This way, in line with the relevant international regulation in this domain, we rely on the regulatory framework established by the Universal Declaration of Human Rights adopted in 1948, considered to be „a common standard of achievement for all peoples and all nations”¹⁵. Article 18 states that „everyone has the right

⁸ Déclaration des Droits de l’Homme et du Citoyen de 1789, Article 10, Available at <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789>, last time consulted on 29.03.2026.

⁹ Wayne Hudson, „Religious Citizenship” in *Australian Journal of Politics and History*: Volume 49, Number 3, 2003, pp. 425-429, <https://doi.org/10.1111/1467-8497.00296>, p. 426.

¹⁰ Ibidem, p. 427.

¹¹ Ibidem.

¹² Wayne Hudson, op. cit. p. 428.

¹³ Line Nyhagen, Beatrice Halsaa, „Gender, Religion, and Citizenship”, Chapter 6 in Birte Siim, Pauline Stoltz (eds.), *The Palgrave Handbook of Gender and Citizenship*, Palgrave Macmillan, 2024, https://doi.org/10.1007/978-3-031-57144-2_6, p. 128.

¹⁴ Dominique Schnapper, Christian Bachelier (colab.), op. cit., p. 102.

¹⁵ Universal Declaration of Human Rights, Preamble, Available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>, last time consulted on 29.03.2026.

to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”¹⁶. By analysing the text of the article in question, it can be noticed the fact that the international document enshrines the idea of liberty, transposed into three spheres, that of thought, that of consciousness and, of course, that of religion, the liberty being perceived, according to the doctrine, as „the consequence of exercising an option”¹⁷ but also as „the ability to exercise any option”¹⁸.

The regulation of this segment was subsequently resumed under the auspices of the International Covenant on Civil and Political Rights adopted in December 1966, an instrument „aimed at transposing the standards originally established by the Universal Declaration of Human Rights into effective rights and freedoms, subject to effective monitoring”¹⁹ and which also stipulates in Article 18 that „everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”²⁰. The aforementioned text also refers to the idea that freedom of religion or belief may be restricted only in the situations prescribed by law or when such a measure would be necessary to protect the fundamental freedoms of others, public order, safety and morals.²¹

We can therefore notice how under this regulation a double perspective of this liberty is emerging, in the sense that, on the one hand this is intrinsically linked to the „inner forum”²² of the individual which describes the way in which he reaches to internally contour his beliefs, to position himself regarding a particular religion or non-religious approach, by which he is guided throughout his life, respectively to what appears on the outside, by the way in which he effectively manifests his beliefs, approach which takes the form of the „external forum”²³. In practical terms, this freedom of an individual to manifest his religion or belief can take many forms, from the use of objects or ceremonial formulas, to displaying various symbols or the observance of certain customs regarding food, wearing specific clothing items or ones that cover face or hair.²⁴

Moreover, the human rights protection system developed by the Council of Europe evokes and regulates the freedom of thought, conscience and religion in the Convention for the Protection of Human Rights and Fundamental Freedoms which was adopted in 1950. Thus, Article 9 similarly enshrines the fact that „everyone has the right to freedom of thought, conscience and religion”²⁵. At the same time, the text expressly states that this right includes the freedom of a person to manifest his religion or belief individually or collectively, both in public space and in private. Thus, this right can be exercised, according to the Convention, through worship, teaching, practice and observance²⁶ - the doctrine defining worship as „the religious services performed by religious denominations”²⁷ and by teaching it refers to religious educational activities used to spread the ideas of a cult²⁸.

From the content of Article 9 of the Convention the nature of the protected rights comes to surface, these being perceived as „fundamental values of human personality”²⁹ under the auspices of which the individual has the right to think freely, to externalize the results shaped and revealed by his conscience, to publicly expose his religious beliefs or preconceived ideas about the surrounding reality.

¹⁶ Universal Declaration of Human Rights, op. cit., Article 18.

¹⁷ Nicolae Voiculescu, Maria-Beatrice Berna, *Tratat de drepturile omului*, Editura Universul Juridic, București, 2023, p. 97.

¹⁸ Ibidem.

¹⁹ Maria-Beatrice Berna, *Dreptul internațional al drepturilor omului: Fundamente teoretice și jurisprudențiale*, Editura Hamangiu, București, 2025, p. 85.

²⁰ International Covenant on Civil and Political Rights, Article 18, Available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>, last time consulted on 29.03.2026.

²¹ Ibidem.

²² Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Vol. I. Drepturi și libertăți*, Editura All Beck, București, 2005, p. 697.

²³ Maria-Beatrice Berna, op. cit., p. 93.

²⁴ UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4, 30 July 1993, para. 4, Available at <https://www.refworld.org/legal/general/hrc/1993/13375>, last time consulted on 29.03.2026.

²⁵ Council of Europe, European Convention on Human Rights, Article 9, Available at https://www.echr.coe.int/documents/d/echr/convention_ENG, last time consulted on 29.03.2026.

²⁶ Ibidem.

²⁷ Corneliu Bîrsan, op. cit., p. 714

²⁸ Ibidem.

²⁹ Corneliu Bîrsan, op. cit., p. 699.

Although religion, as a concept, has not been provided with a *sui generis* definition in the body on the analysed article and has not been clarified in the case law by the European Court of Human Rights either³⁰, however, „the European judges regards religious freedom as a vital factor in forming the identity of believers and their conception of life”³¹. Moreover, doctrine states that „freedom of religion or belief as a human right boils down to unity behind a common ground based on a diversity of expressions of religions and beliefs, religious or non-religious convictions, with, for example different views on the meaning of life”³².

At the same time, Article 9 delineates two aspects which require clarification. Therefore, on the one side, the text regulates the possibility to practice any faith, regardless of the whether it has or not religious implications, allowing the holder to reconsider them whenever he feels the necessity to resort to change, aspect that cannot be conditioned in any way, being an eminently absolute right.³³ On the other hand, though, the freedom to express these beliefs by any person, either alone or in the company of others, in the public or private sector, is not an absolute right³⁴ as long as the actual expression of these convictions could influence other persons, regardless of the manner in which these feelings manifest themselves in reality – by wearing certain items of clothing, customs, the display or use of certain symbols representing one’s faith on the exterior.

If in a doctrinal opinion a clear distinction „between the right to hold a belief (the internal aspect) and the right to express that belief (the external aspect)”³⁵ has clearly been made, in another one this idea was supplemented in the sense in which this freedom „consists not only in holding certain beliefs, but also in not holding them or not sharing them”³⁶.

Freedom of thought, conscience and religion is also enshrined in Article 10 of the Charter of Fundamental Rights of the European Union. The document stipulates in Article 10 that „everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance”³⁷.

3. The right to freedom of thought, conscience and religion in a jurisprudential view

If in the beginning of this paper we debuted through an attempt of theorizing citizenship as centred on the idea of belonging, it is nevertheless important to mention that citizenship is most often understood as the political and legal bond that is established between the citizen and their state of origin. This connection is also reflected in the levers the state engages in order to safeguard this status, so that, even if in doctrine it was stated in an opinion that „citizens’ rights should not be confused with human rights”³⁸ however, „without human rights, there would be no true citizens’ rights”³⁹.

The expression of faith in public sphere embodies the essence of this freedom of expression of beliefs, a level which, as we mentioned in a previous section, continues to spark controversy, giving rise to contrasts, at least in relation to the questions which we can inherently raise. How far does this freedom extend to?

In practice, for example, by the end of 2025 changes have been made to the national legislation in Austria, being adopted a provision which prohibits the wearing of the veil as a symbol of the Islamic tradition by girls aged under 14.⁴⁰ The initiative is not unprecedented, the same state being the promoter of a similar approach in

³⁰ European Court of Human Rights, „Guide on Article 9 of the European Convention on Human Rights, Freedom of thought, conscience and religion”, Updated 31 August 2025, para. 14, page 8, Available at https://ks.echr.coe.int/documents/d/echr-ks/guide_art_9_eng, last time consulted on 29.03.2026.

³¹ Ibidem, Introduction, para. 8, page 7.

³² Göran Gunner, „Religious Freedom as a Human Right”, Chapter 5 in MD Jahid Hossain Bhuiyan, Carla M. Zoethout, (Eds.), *Freedom of Religion and Religious Pluralism*, Brill - Nijhoff, Leiden, The Netherlands, 2023, <https://doi.org/10.1163/9789004504967>, p. 82.

³³ European Court of Human Rights, op. cit., para. 27, page 12.

³⁴ Ibidem.

³⁵ R. Chiriță, *Convenția Europeană a Drepturilor Omului. Comentarii și Explicații*, vol. II, Ed. C.H. Beck, București, 2007, p. 145-146 apud Bogdan Bodea, *Drepturile omului și libertățile fundamentale*, Editura Hamangiu, București, 2024, p. 279.

³⁶ Bianca Selejan-Guțan, *Protecția europeană a drepturilor omului*, Ediția a 5-a, revăzută și adăugită, Editura Hamangiu, București, 2018, p. 197.

³⁷ European Parliament, *Charter of Fundamental Rights of the European Union*, Official Journal of the European Union, C 326/391, 26.10.2012, Article 10, Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT>, last time consulted on 31.03.2026.

³⁸ Dominique Schnapper, Christian Bachelier (colab.), op. cit., p. 103.

³⁹ Ibidem.

⁴⁰ Parlament Österreich, *Parlamentskorrespondenz Nr. 1172 vom 11.12.2025*, „Nationalrat: Kopftuchverbot in Schulen für Mädchen bis 14 Jahren mehrheitlich beschlossen”, Available at

2019 when it was prohibited the wear of the veil by pupils under the age of 10, document declared unlawful on the grounds of discrimination against Muslims.⁴¹ Doctrine states, therefore, that „one of the most controversial aspects of the right to practice one’s religion today is the wearing of the Islamic veil”⁴², a topic that has been settled also in case law, the European Court of Human Rights outlining several relevant guidelines on this matter.

Therefore, in *Case Eweida and Others v. the United Kingdom*, the Court has pinpointed that the individual’s desire to express his religious beliefs is a fundamental right given the fact that in a democratic society pluralism and diversity must be tolerated and supported but also due to the importance individuals place on religion, fact that enables them to express it.⁴³ But starting from the idea that „the right to wear religious clothing and symbols is not absolute and must be balanced with the legitimate interests of other natural and legal persons”⁴⁴ the cases brought before the Court on this topic have been associated with several key points, such as, for example, the expression of religious beliefs in public spaces or in schools or universities, situations involving a pupil, a student or even a teacher.⁴⁵

As an example, in 2021 the Court ruled in a case concerning an issue regarding the wearing of the Islamic veil – more exactly in *Case Dahlab v. Switzerland*, regarding the suspension imposed on a teacher who taught elementary school classes, to wear the clothing item during classes. Consequently, the Court considered that „the measure prohibiting the applicant from wearing a headscarf while teaching was ‘necessary in a democratic society’”⁴⁶. Another relevant example is represented by the *Case Leyla Şahin v. Turkey*, in which the applicant, a student, considered that wearing the Islamic headscarf was a religious obligation.⁴⁷ The facts of the case as presented to the Court revolve around a decision made by the management of the university in which the applicant was studying, to forbid the access to different courses or tutorials for students who wore the Islamic headscarf or beard.⁴⁸ In response to the applicant’s request, the Court stated that „there has been no breach of Article 9 of the Convention”⁴⁹, stating, at the same time, that „having regard to the Contracting States’ margin of appreciation in this sphere [...] the interference in issue was justified in principle and proportionate to the aim pursued”⁵⁰.

Based on the Court’s findings, regarding the margin of appreciation that the Member States benefit from, we have seen in the preceding discussion the position taken by Austria, but similar regulations can be identified also in France, a state that has banned, among others, also the wearing of the Islamic veil in public schools, by adopting the Law of 15 March 2004⁵¹ and in 2023 has also limited the wear by students in public schools of certain clothing items, specific to the Muslim religion – named *abaya* – in the form of loose-fitting, long dresses.⁵²

4. Conclusions

Freedom of thought, conscience and religion remains a hard-won right which, as evidenced by the documents issued by the bodies who contributed to the conceptualization of this level, is ensured by the holder’s exercise of that right, who is free to express both internally and in relation to others his beliefs, whether religious or not, this approach being achieved both in the public and private spheres. This freedom, which encourages

https://www.parlament.gv.at/aktuelles/pk/jahr_2025/pk1172#:~:text=In%20Kraft%20treten%20sollen%20die,Februar%20eine%20Aufkl%C3%A4rungsphase%20starten%20soll, last time consulted on 31.03.2026.

⁴¹ Aljazeera, „Austrian lawmakers pass headscarf ban for under-14s in schools”, Available at <https://www.aljazeera.com/news/2025/12/11/austrian-lawmakers-pass-headscarf-ban-for-under-14s-in>, last time consulted on 31.03.2026.

⁴² Bianca Selejan-Guțan, op. cit., p. 198.

⁴³ European Court of Human Rights, *Case of Eweida and Others v. the United Kingdom*, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, para. 94, Available at <https://hudoc.echr.coe.int/eng?i=001-115881>.

⁴⁴ European Court of Human Rights, op. cit., para. 110, page. 38.

⁴⁵ Ibidem, para. 110, para. 115.

⁴⁶ European Court of Human Rights, *Case of Dahlab v. Switzerland*, Application no. 42393/98, The Law, Section 1, Available at <https://hudoc.echr.coe.int/eng?i=001-22643>.

⁴⁷ European Court of Human Rights, *Case of Leyla Şahin v. Turkey*, Application no. 44774/98, para. 14, Available at <https://hudoc.echr.coe.int/eng?i=001-70956>.

⁴⁸ Ibidem, para. 16.

⁴⁹ Ibidem, para. 123.

⁵⁰ Ibidem, para. 122.

⁵¹ Conseil d’Etat, „French secularism: banning abaya-style clothing in schools is legal”, 27 septembre 2024, Available at <https://www.conseil-etat.fr/Pages-internationales/english/news/french-secularism-banning-abaya-style-clothing-in-schools-is-legal>, last time consulted on 31.03.2026.

⁵² Ece Goksedef, „France to ban female students from wearing abayas in state schools”, BBC News, 27 August 2023, Available at <https://www.bbc.com/news/world-europe-66634890>, last time consulted on 31.03.2026.

everyone to feel unrestrained in their beliefs, could be associated with the idea of diversity. It transcends individual, personal boundaries and inevitably shifts towards the others, thus evoking the exercise of the rights together with the participants to the community. Is there a connection with the idea of citizenship and the citizen status – taken *ut singuli* – but also in relation to the picture of the society, perfected through the lens of equal rights enjoyed by its citizens? Maybe, because „being a democratic citizen means accepting and acting in accordance with the principles of tolerance and only respecting the rights of the others”⁵³.

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THE ARCHITECTURE OF THE LEGAL FRAMEWORK OF CONTRAVENTIONAL LIABILITY IN POLAND

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Abstract

This article builds its analysis on the premise that the comparative study of contraventional law significantly contributes to the understanding and development of the domestic legal framework. Through this approach, it aims to highlight how the experience of the Polish legal system can provide useful benchmarks for clarifying and refining Romanian norms, particularly in the context of ongoing doctrinal debates on the need to codify contraventional law.

The study offers a synthetic overview of the specific features of the Polish model in contraventional law, which, unlike the Romanian system, benefits from a distinct codification of the field through dedicated legal instruments: substantive contraventional law is regulated by the Act of 20 May 1971 (Kodeks wykroczeń – Code of Minor Offences), while procedural rules are established by the Act of 24 August 2001 (Kodeks postępowania w sprawach o wykroczenia – Code of Procedure in Minor Offence Cases). Despite this autonomous codification, the Polish system maintains a close connection with criminal law, evident both in the conception of sanctions and in the procedural mechanisms applied.

From the historical development of the regulations, to the classification of offences and applicable sanctions, and the conduct of proceedings through the four specific procedures — ordinary, accelerated, by order, and by penalty notice — the study examines the efficiency of the procedures, the procedural safeguards provided, and the practical impact of the regulations under review. In doing so, it provides a comprehensive overview of the legal architecture of Polish contraventional liability and its comparative relevance for the Romanian legal system.

Keywords: *contravention, procedural law, comparative law, sanction, codification.*

1. Introduction

In Romania, contraventional law is characterized by a considerable degree of legislative fragmentation, being governed by Government Ordinance no. 2/2001 on the legal regime of contraventions¹, which constitutes the general law in this field. Unlike the Romanian system, Poland benefits from an autonomous and distinct codification of this area. In the context of doctrinal discussions² over time regarding the necessity of adopting a Contraventional Code to regulate in detail the contraventional procedure, the present study aims to highlight how the Polish experience may serve as a reference point for the adoption of such a unified and comprehensive normative framework.

The legislative process in the field of contraventional law in Poland³ has its starting point in 1920, when the Codification Commission of Criminal Law was established, with the purpose of standardizing the criminal law in force on Polish territory following the end of the First World War. Through the work of this commission, three regulations were adopted, all entering into force simultaneously on 1 September 1932: the Criminal Code⁴, the

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¹ Published in the Official Gazette (Monitorul Oficial) no. 410 of 25 July 2001.

² Mircea Ursuța, Procedura Contravențională, Ediția a II-a revizuită și adăugită, Universul Juridic Publishing House, Bucharest, 2009, pp. 45 and 336.

³ For a comprehensive overview of the history of regulations in this field, see Agnieszka Sadło-Nowak, 100 Years of the Police and the Fight Against Petty Offences, in Internal Security, vol. 13, no. 1, 2021.

⁴ Regulation of the President of the Republic of Poland of 11 July 1932 – Criminal Code, Official Gazette of 2001, no. 60, item 571, as subsequently amended.

Law on Minor Offences⁵, and the Code of Contraventions⁶, the latter being considered the first Polish act of substantive law on contraventions applicable throughout the territory of the Second Polish Republic⁷.

With regard to the Law on Minor Offences of 1932, it is said that it represented an extension of criminal law norms to minor offences of a disciplinary nature, which is why it was regarded as an annex to the Criminal Code of the same year⁸. This law provided, as principal sanctions, detention from one day to three months or a fine ranging from 1,000 to 3,000 PLN. It was considered an incomplete codification, as it did not regulate the principles of contraventional liability, instead referring in this respect to the Criminal Code⁹.

The law was repealed on 1 January 1972, and at present, within the Polish legal system, contraventional liability is regulated by the Act of 20 May 1971 (Kodeks wykroczeń – the Code of Minor Offences¹⁰), a normative act that comprises both substantive law provisions (in its special part) and procedural rules (in its general part). At the same time, contraventional proceedings are conducted in accordance with the Act of 24 August 2001 (Kodeks postępowania w sprawach o wykroczenia – the Code of Procedure in Minor Offence Cases¹¹).

The only reference within the Polish Criminal Code (Act of 6 June 1997¹²) concerning the legal nature of contraventions is found in Article 7, which has preserved the bipartite classification of offences into crimes (zbrodnie) and minor offences (wykroczenia), without establishing precise criteria underlying the distinction between these two categories of acts¹³.

Although at the legislative level there is a formal separation between these two forms of offences, legal doctrine generally accepts that contraventional law constitutes a branch of criminal law in a broad sense, representing an extension and complement thereof¹⁴.

2. General substantive and procedural aspects

A brief overview of the substantive rules governing contraventional matters shows that the Code of Minor Offences regulates, under this legal regime, within the chapters of its special part, acts against public order and peace (possession of dangerous objects, disturbance of public order, bathing in prohibited areas), against the State, local administration, and social institutions (misleading authorities, failure to comply with decisions concerning domestic violence), against the safety of persons and property (failure to signal a danger despite an obligation to do so, failure to fulfil fire prevention duties), against safety and order in communications (road traffic offences), against the person (begging), against public health (pollution, failure to comply with mandatory vaccination), against property (theft of items whose value does not exceed 800 PLN, theft of small quantities of fruits, vegetables and flowers, organisation of gambling activities), against consumer interests, against public decency, against public buildings and record-keeping obligations, as well as in forestry matters.

In the field of minor offences, the principal sanctions¹⁵ are regulated in Chapter 2 (Articles 18–39) of the Code of Minor Offences, and include: detention (ranging from 5 to 30 days), restriction of liberty (imposed for a period of one month, during which the offender is required to perform unpaid, supervised community service for 20 to 40 hours, or a deduction of 10% to 25% from their remuneration for the benefit of the State Treasury

⁵ Regulation of the President of the Republic of Poland of 11 July 1932 – Law on Minor Offences, Official Bulletin no. 60, item 572, as subsequently amended.

⁶ Regulation of the President of the Republic of Poland of 11 July 1932 – Provisions on the implementation and amendment of the Criminal Code and the Law on Minor Offences, Journal of Laws no. 60, item 573, as subsequently amended.

⁷ Janusz Sawicki, Prawo o wykroczeniach – zbiór deliktów administracyjnych czy przedłużenie norm prawa karnego?, in *Przegląd Prawa i Administracji*, vol. CXXXIV, Wrocław, no. 4171, 2023, <https://doi.org/10.19195/0137-1134.134.11>, p. 170.

⁸ Janusz Sawicki, op. cit., p. 173.

⁹ Karol Kowalski, Kryteria rozgraniczania przestępstw i wykroczeń, in *Przegląd Prawniczy Europejskiego Stowarzyszenia Studentów Prawa ELSA Poland*, Warsaw, 2014, p. 15, https://elsa.org.pl/images/Projekty/Przegląd_Prawniczy/Zeszyt-II_2014.pdf

¹⁰ Available online at: <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-wykroczen-16788218>, accessed on 26 October 2025.

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¹² Available online at: <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-karny-16798683>, accessed on 26 October 2025.

¹³ For years, there has been an ongoing debate regarding the quantitative or qualitative distinction between criminal offences and contraventions within both criminal law and contraventional doctrine. In this regard, Karol Kowalski, op. cit., pp. 19–21, presents various discussions and authors who have expressed positions on this issue.

¹⁴ Karol Kowalski, op. cit., p. 11, https://elsa.org.pl/images/Projekty/Przegląd_Prawniczy/Zeszyt-II_2014.pdf; see also Marta Kolendowska-Matejczuk and Valeri Vachev, Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?, *Biuro Rzecznika Praw Obywatelskich Publishing House*, Warsaw, 2016, pp. 93–95.

¹⁵ Contraventional sanctions do not differ qualitatively from criminal penalties; on the contrary, they may even be more severe in their repressive character. Consequently, legal doctrine has extensively emphasized the need for legislative intervention and for reforming the system of contraventional sanctions.

or for a social purpose indicated by the adjudicating authority), a fine (ranging from 20 to 5,000 PLN¹⁶) or a reprimand¹⁷. More than one third of the acts listed in the special part of the Code of Minor Offences are punishable by detention¹⁸; however, judicial practice shows that this penalty is applied only sporadically, accounting in the last decade for no more than 0.5% of the total sanctions imposed¹⁹.

In addition to the principal sanctions, supplementary (punitive) measures are also regulated, which may be applied either alongside a principal sanction or independently, in place of the latter. These measures are listed in Article 28(1) of the Criminal Code and include: a driving ban²⁰, confiscation of goods used in or resulting from the contraventional activity, compensatory damages (requiring the offender to pay lump-sum compensation to the injured party), and the public disclosure of the sanctioning decision. This enumeration is not exhaustive, as the list of such measures may be extended through other special laws²¹.

The contraventional procedure itself is governed by the Code of Procedure in Minor Offence Cases, supplemented by the provisions of the Criminal Procedure Code (Act of 6 June 1997²²), and may take four forms:

- the ordinary procedure (Articles 57–88 of the Code of Procedure in Minor Offence Cases)
- the accelerated procedure (Articles 89–92a)
- the writ (order) procedure (Articles 93–94)
- the ticket-based procedure (Articles 95–102)

Although there is an evident close connection between contraventions and criminal offences, both from a substantive and procedural perspective, a key role in contraventional proceedings is played by the principle of expediency (opportunism), that is, the principle according to which an authorized body pursues a given contravention only if it considers such action appropriate. This contrasts with criminal proceedings, which are governed by the principle of legality, according to which investigative authorities are obliged to initiate and conduct preparatory proceedings, and the prosecutor is required to bring and support charges for offences prosecuted ex officio (Article 10(1) of the Criminal Procedure Code).

With regard to this principle of expediency, legal doctrine maintains that contraventional law is governed by a form of quasi-opportunism, which implies refraining from prosecuting a given offence due to a lack of expediency, while still responding to the committed act in a manner provided by law, through the application of a non-punitive measure that constitutes, in fact, a sufficient response²³.

3. Contraventional Procedure

Turning to the procedural aspects, it should be noted that the initiation of proceedings in minor offence cases is carried out by the competent contraventional authorities of the State²⁴ and by the Prosecutor, who are vested with the power to conduct the investigation for the purpose of submitting a motion for the imposition of

¹⁶ In cases expressly provided by law, for contraventions against road safety and public order, the fine may reach up to 30,000 PLN — see Article 24 of the Act of 20 May 1971, a significant amendment introduced by the Polish legislator on 1 January 2022.

¹⁷ It is noted that the absence of a legal definition of this sanction is a shortcoming of the legislation.

¹⁸ By comparison, in Romania, the principal sanctions are the warning, the fine, and community service. For a detailed analysis, see Ovidiu Podaru, *Regimul juridic al contravențiilor*. O.G. nr. 2/2001 comentată, Hamangiu Publishing House, Bucharest, 2019.

¹⁹ Marek Bojarski and Anna Płońska, *Tendencje zmian w zakresie odpowiedzialności za wykroczenia*, <https://doi.org/10.18778/8142-749-4.26>, p. 457.

²⁰ A measure that may be imposed for a period ranging from 6 months to 3 years — see Article 29 (1)–(4) of the Criminal Code.

²¹ For example, the Act of 20 March 2009, published in the Official Journal in 2023, item 616, provides for a ban on participation in mass events.

²² Available online at: <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/kodeks-postepowania-karnego-16798685>, accessed on 27 October 2025.

²³ Katarzyna Banasik, *Non-Punitive Reaction Measures in Polish Petty Offences Law*, *Ceza Hukuku ve Kriminoloji Dergisi – Journal of Penal Law and Criminology*, 2021, p. 415.

²⁴ The competent authorities include the police, labour inspectors, consumer protection authorities, governmental bodies and local public administration authorities, state inspection bodies, local public administration control bodies, and municipal (city) guards, among others. For an analysis of the role of the police within contraventional proceedings, see Michał Błoński, *Policja jako zasadniczy oskarżyciel przed sądem w sprawach o wykroczenia*, in *Przegląd Policyjny*, no. 4(148), Szczepno, 2022.

a sanction²⁵. The application of contraventional sanctions, however, falls, in most cases²⁶, within the jurisdiction of the district courts²⁷ in whose territorial competence the act was committed²⁸.

Given the breadth of the procedural regulations contained in the Code, and in light of the scope of the present study, we shall limit ourselves to noting that the Code of Procedure in Minor Offence Cases provides for situations in which proceedings are not initiated or cannot be continued, cases of judicial incompatibility, provisions concerning the parties and the right to defence²⁹, as well as rules regarding evidence and its administration. The stage of investigating minor offences is, therefore, a complex and extensive one³⁰.

It must be emphasized that, in the case of minor offences, there is no formally distinct preparatory investigation phase, as exists in criminal matters. The purpose of the competent authorities is merely to determine whether there are sufficient grounds to file a motion for sanction and to gather the necessary data in this regard, while the court is responsible for examining the legal and factual grounds presented. The court, in turn, holds the most extensive powers with respect to the administration of evidence.

Thus, it is possible for the motion for sanction to be based on a clear factual situation, in which case the motion may be drafted in a simplified manner and without extensive evidentiary attachments (similar to a report limited to its ascertainment function), or it may be drawn up following more extensive investigative activities, accompanied by supporting evidence (similar to an indictment).

With regard to the sanctioning procedure, as a general rule, the decision is rendered following a hearing held in court before a single judge³¹. The procedural act underlying the imposition of a contraventional sanction may take the form of a judicial decision (judgment or ruling), an order, or a ticket imposing a fine.

A particular feature of the Polish contraventional procedure concerns the reasoning of court decisions. Article 35 of the Code of Procedure in Minor Offence Cases provides that judgments are reasoned and communicated to the party together with the reasoning only upon request, which must be submitted within a strict time limit of 7 days from the date of pronouncement. As for rulings or orders, these are reasoned *ex officio* only where they are subject to appeal.

²⁵ This notion corresponds, in contraventional matters, to the concept of an indictment in criminal proceedings. For a detailed analysis of this procedural act, see Ewa Kruk, *The Simplification of Accelerated Proceedings in a Petty Offence Case* (Art. 89 et seq. of the Code of Proceedings in Petty Offences Cases). Selected Problems, in *Annales Universitatis Mariae Curie-Skłodowska, Lublin – Poland*, Vol. LXV, 1, Sectio G, 2018, pp. 76–77.

²⁶ Where a minor offence is committed by a member of the military, jurisdiction to impose sanctions lies with the military garrison courts.

²⁷ Until 2001, first-instance proceedings concerning minor offences were handled by contraventional boards, which were non-judicial bodies. The Code of Procedure in Minor Offence Cases abolished this extrajudicial (administrative) mechanism for resolving contraventional cases and transferred jurisdiction to the courts of law.

In legal doctrine, there are extensive debates regarding the exclusion of contraventional cases from the jurisdiction of courts and their transfer to other bodies, with a view to reducing the courts' workload, given that the number of such cases represents an overwhelming proportion of those adjudicated by courts. The search for an optimal model for adjudicating minor offence cases forms the subject of a broad socio-legal discourse. Some authors advocate conferring jurisdiction upon public administration bodies (see, in this regard, Marta Kolendowska-Matejczuk and Valeri Vachev, *op. cit.*, pp. 10–21), while others support the introduction of courts of the peace within the Polish judicial system. At the same time, certain practitioners argue for the reintroduction of panels for minor offence cases, in which cases would be adjudicated by court clerks (referendaries), judicial assistants, or graduates of the National School of Judiciary and Public Prosecution (see Katarzyna Liżyńska and Anna Płońska, *Ewolucja i aktualne wyzwania ustawodawstwa w sprawach o wykroczenia*, in *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 4, 2022, p. 98).

²⁸ In determining territorial jurisdiction, the provisions of the Criminal Procedure Code apply accordingly.

²⁹ Article 21 regulates the appointment of court-appointed counsel in minor offence cases for persons suffering from certain conditions (such as deafness, muteness, or blindness) or where there are reasonable doubts as to their mental health. Article 22 provides that a person may benefit from legal aid irrespective of their health status, if they duly demonstrate that they are unable to bear the costs of defence without significantly affecting their own necessary maintenance and that of their family.

³⁰ Article 46 of the Code of Procedure in Minor Offence Cases allows for the detention of the offender for a period of 24 hours, or up to 48 hours where the person is caught in *flagrante delicto* or immediately after committing the offence, if there are grounds for applying the accelerated procedure or if the offender's identity cannot be established.

³¹ The rule according to which minor offence cases are adjudicated by courts sitting as a single judge also applies at the appellate stage, with the aim of expediting proceedings and reducing costs. Accordingly, the situations in which a case is examined by a panel composed of three judges are limited — see, in this regard, Andrzej Marek and Aleksandra Marek-Ossowska, *Prawo wykroczeń (materialne i procesowe)*, 10th edition, C.H. Beck Publishing House, Warsaw, 2023, p. 179.

A. Ordinary procedure

The basis for initiating this procedure is the submission of a motion for sanction to the competent court by an authority empowered to act as a public prosecutor (a control body or the prosecutor) or a motion submitted directly by the injured party³².

Article 57 (2)–(3) of the Code of Procedure in Minor Offence Cases sets out the elements that must be included in the motion for sanction, namely: data identifying the offender, a description of the act (including the place, time, manner, and circumstances of its commission), and the evidence supporting the accusation. Where the motion is submitted by the prosecutor, it must be accompanied by the investigation file and must additionally include the legal classification, information regarding the offender's financial, family, and personal situation, the value of the damage caused, and details concerning the official capacity of the person drafting the motion.

Where the motion for sanction is filed by the injured party, the president of the court notifies the Police or another competent public prosecutor, requesting that, if they do not submit a motion for sanction, they transmit within 7 days the evidentiary material collected or, where no investigative or explanatory measures have been carried out, a statement confirming the absence of such materials.

The motion for sanction is subject to examination by a reporting judge. If it does not meet the formal requirements, it is returned for the deficiencies to be remedied within 7 days. If the requirements are fulfilled, a decision initiating the proceedings is issued, marking the moment when the case is brought before the court. This moment is closely linked to the limitation period³³, since the submission of a motion for sanction does not interrupt the limitation period for minor offences; it is interrupted only upon the issuance of the decision initiating the proceedings.

At the same time, in situations expressly provided by law, the court may refuse to initiate the proceedings (for example, where there is or has been criminal proceedings concerning the same act, or where a disciplinary sanction has already been imposed). Such a decision may be challenged in accordance with the general rules³⁴.

Within this ordinary procedure, the prosecutor may, with the consent of the offender—previously heard during the investigative stage—include in the motion for sanction a request for convicting the defendant for the alleged act without a hearing and for imposing a specific, individualized sanction.

After the court is seized with the motion for sanction through the issuance of the decision initiating the proceedings, the presiding judge will order the summoning of the parties and witnesses, while also taking the necessary measures to administer any other evidence deemed relevant. The hearing shall be conducted in public.

If the offender admits the act before the court, or if the prosecutor has drafted a motion for sanction that includes a specific penalty based on such admission, no further evidence shall be taken. In the absence of an admission, the evidentiary proceedings shall continue.

Contraventional procedure also recognizes the possibility for the offender to voluntarily submit to liability, namely the right to request a conviction without the conduct of a trial. Such a request may be made until the conclusion of the first examination conducted during the hearing, and the offender shall express their position regarding the amount of the sanction.

The hearing begins with the prosecutor reading the motion for sanction, informing the offender of their rights and of the option to admit the act. After the administration of evidence and the parties' closing statements, the court shall deliver a written judgment, which shall be communicated orally to the summoned parties. The remedy available against the first-instance decision is an appeal, which must be lodged within 7 days.

As a particular feature, it should be noted that the principle of continuity of the judicial panel does not apply in this procedure. In the event that the composition of the bench changes during the course of the proceedings, the decision to repeat certain evidentiary acts lies exclusively with the court.³⁵

B. Accelerated procedure

The accelerated procedure applies in the case of:

- persons who do not have a permanent domicile or residence within the territory of the Republic of

³² Andrzej Marek and Aleksandra Marek-Ossowska, *op. cit.*, p. 201.

³³ Ewa Kruk, *op. cit.*, p. 79.

³⁴ The right of appeal is available only to the defendant and the public prosecutor — Article 61(2) and Article 103(3) of the Code of Procedure in Minor Offence Cases.

³⁵ Andrzej Marek and Aleksandra Marek-Ossowska, *op. cit.*, p. 244.

Poland, where there is a justified concern that the examination of the case under ordinary proceedings would be impossible or significantly difficult;

- perpetrators of the offence referred to in Article 66b of the Code of Minor Offences (failure to comply with orders, prohibitions, and decisions issued in the context of combating domestic violence);
- perpetrators of contraventions committed in connection with a mass event (offences against public order and peace, as well as against property and public facilities).

For the application of this procedure, in addition to the above-mentioned conditions concerning the status of the party and the scope of the committed offence, it is required that the offender be caught in flagrante delicto or immediately after committing the offence and be brought before the court without undue delay. The procedure is initiated upon request of the prosecutor or another competent authority, in compliance with the time limit provided in Article 46(6) of the Code of Procedure regarding detention, namely within 48 hours³⁶.

Similar to the ordinary procedure, a motion for sanction is drawn up, albeit with more limited formal requirements. It may also be submitted orally directly before the court, the offender being brought promptly before the judicial authority. By allowing this motion to be submitted orally, the Polish legislator introduces an exception to the principle requiring that a motion for sanction be submitted in written form³⁷.

If the motion for sanction meets the statutory formal requirements, the presiding judge issues an order sending the case to trial. Conversely, where the court finds that there are circumstances precluding the procedure, it shall, by decision, refuse to initiate the accelerated procedure, return the motion to the prosecutor, and continue the proceedings—after any deficiencies have been remedied—under the ordinary procedure.

If the court is unable to adjudicate the case within 3 days³⁸, the proceedings shall continue under the ordinary procedure.

The reasoning of the judgment is drafted within 3 days of its pronouncement, only upon the request of a party, submitted orally and recorded in the minutes of the hearing immediately after the judgment is delivered.

In the accelerated procedure, the time limit for filing an appeal is significantly shortened to only 3 days and runs from the moment the judgment, together with its written reasoning, has been communicated to the parties. The appellate court is required to decide on the appeal within one month from the date of its registration.

C. Writ (order) procedure (nakazowe)

This procedure is a simplified form of adjudication in contraventional cases, in which the court may issue an order without holding a hearing, based on the evidentiary material obtained during the investigative phase, where the facts and the offender's guilt raise no doubts, and where it is considered that a reprimand, a fine, or a restriction of liberty would constitute a sufficient sanction.

The sanctioned person has the right to file an objection (*sprzeciw*) within 7 days from the communication of the order, without any obligation to state reasons. If such an objection is filed, the order is deemed annulled, and the case is referred for adjudication under the ordinary procedure, with the examination of the evidence and the case being conducted anew.

If no objection is filed, the order becomes final and enforceable.

D. Ticket (mandate) procedure (mandatowe)

The ticket procedure is a special and highly simplified form of establishing and sanctioning minor offences, applied directly by competent authorities (e.g., the police, labour inspectorate, etc.)³⁹, without court involvement, and applicable where a specific legal provision so provides.

³⁶ Within this time frame, both the drafting of the motion for sanction and the examination of the case by the court must be carried out.

³⁷ In legal doctrine, it is considered that the submission of such an oral motion may, contrary to expectations, not lead to a simplification of the procedure, but rather to its complication, mainly due to the lack of sufficient experience in preparing procedural documents on the part of the officer who drafts this ad hoc motion — Ewa Kruk, *op. cit.*, p. 78.

³⁸ The law allows for the suspension of the hearing through the issuance of a decision to that effect, in order to facilitate the transfer of the offender, the submission of evidence, when a break is needed, or for any other important reason.

³⁹ According to Article 95 of the Code of Procedure in Minor Offence Cases, the authority to impose fines by means of a ticket is granted by law or by regulations issued by the Prime Minister, at the request of the Minister of the Interior, which must include the list of acts for which these officials are authorized to impose fines, as well as the principles and methods for issuing such authorizations.

It allows for the imposition of a sanction by means of a contraventional ticket (*mandat karny*), i.e., an on-the-spot fine, the amount of which is determined in relation to the offence, as specified in Article 96 of the Code of Procedure in Minor Offence Cases.

For this procedure to apply, unless otherwise provided by law, it is required that the authorised officer catches the offender in *flagrante delicto* or immediately after the commission of the offence, or that the act has been detected through a control, measuring, or recording device.

The official imposing the fine is required to indicate its amount, specify the act constituting the contravention, the time and place of its commission, and its legal classification, as well as to inform the offender of the possibility to pay the fine immediately or within 7 days of notification, and of the right to refuse acceptance of the fine and the legal consequences of such refusal.

In the event of refusal to accept the fine or failure to pay the imposed fine within the prescribed time limit, the authority whose official imposed the fine shall submit a motion to the court for the application of a sanction.

The imposed fine may be challenged by the offender within 7 days from the date on which the decision becomes final. The offender may request its annulment on the grounds provided for in Article 101(1)–(1a) of the Code of Procedure (e.g., the act does not constitute a contravention, the offender is under 17 years of age, the imposed fine exceeds the legally prescribed amount, etc.), or its revocation on the grounds provided for in Article 101(1)(b) of the Code of Procedure (e.g., a decision of the Constitutional Tribunal or of an international body declaring the legal provision underlying the fine to be inapplicable).

The competent court shall rule on the request for annulment or revocation of the fine following a hearing, and if it grants the request, the entity to whose account the fine was collected is obliged to reimburse the amount paid.

Regardless of the procedure followed, Article 103 of the Code of Procedure provides that the remedies against judicial decisions are the appeal, and against rulings and orders, the complaint. These remedies may be exercised within 7 days from the communication of the decision, together with its reasoning, and are to be submitted to the court that issued the challenged decision and adjudicated by the Courts of Appeal.

The appeal may be lodged only by the prosecutor or the accused person, and it constitutes a devolutive and suspensive remedy.

The appellate court, if it finds it necessary to supplement the evidence, may take new evidence, which it may admit even before the hearing.

At the same time, the Code of Procedure also recognizes extraordinary remedies against any final judicial decision, namely cassation appeal and the possibility of reopening proceedings.

The cassation appeal is adjudicated by the Supreme Court, with the particularity that the right to initiate cassation proceedings is granted—*verba legis*—exclusively to qualified entities⁴⁰: the Prosecutor General or the Commissioner for Human Rights, and in cases falling within the jurisdiction of military courts, the Deputy Prosecutor General for Military Affairs, and in cases involving violations of children's rights, also the Commissioner for Children's Rights, excluding the parties to the proceedings.

As regards the grounds for cassation, these consist of invoking irregularities listed in Article 104(1) of the Code of Procedure or any other flagrant violation of the law, provided that it could have had a significant impact on the content of the judicial decision.

The reopening of proceedings takes place at the request of the parties, it being mandatory that, if requested by the offender, the application be signed by a lawyer. According to Article 540(2) of the Code of Criminal Procedure, there are four grounds for reopening proceedings, namely:

- the commission of an offence in connection with the proceedings (e.g., bribery of a judge, false testimony), established by a final conviction;
- the discovery, after the judgment has been rendered, of new facts or evidence (*propter nova*) previously unknown to the court, indicating that the sanctioned person did not commit the act attributed to them, or that the act did not constitute a contravention or was not subject to sanction, or that the person was punished with a more severe penalty than that provided by law for the committed contravention;
- the legal provision on which the judgment was based has lost its legal force or has been amended following a decision of the Constitutional Tribunal (Article 540 § 2 of the Code of Criminal Procedure);
- the need to reopen the proceedings results from a decision of an international body (for example, the

⁴⁰ The offender may only address the aforementioned authorities in order to request that they initiate a cassation appeal.

Strasbourg Court), acting on the basis of an international treaty ratified by the Republic of Poland.

With regard to the enforcement of contraventional sanctions, a limitation period of 3 years is provided, calculated from the date on which the sanctioning decision becomes final. The authority competent for the enforcement of final decisions is the court that delivered the judgment at first instance (unless otherwise provided by law).

Article 2 of the Act of 6 June 1997 – the Executive Criminal Code⁴¹ contains a detailed list of the bodies responsible for enforcing judgments in criminal matters, which are also applicable in contraventional matters. These include both bodies directing the enforcement procedure (the competent first-instance court or another court of equal rank, the penitentiary court and judge, the judicial referendary), as well as enforcement bodies (judicial or administrative enforcement authorities, local administration, the head of the tax office, etc.).

4. Conclusions

Overall, the Polish experience highlights the advantages of a codified, coherent, and well-structured contraventional system, which successfully combines the efficiency of procedural mechanisms with the existence of legal safeguards designed to ensure the protection of the rights of persons involved in the proceedings.

At the same time, the existence of multiple forms of conducting contraventional proceedings reflects the legislator's concern to strike a balance between the need for the swift resolution of cases and the guarantee of procedural safeguards. The diversity of procedures contributes to adapting the State's response to the particularities of each individual case, enhancing the efficiency of the administration of justice while placing particular emphasis on the prompt resolution of contraventional cases.

Nevertheless, the analysis of the regulatory framework also reveals certain aspects that may be subject to improvement. Thus, the regulation according to which judicial decisions are reasoned only upon request of the parties may raise concerns from the perspective of the transparency of justice. At the same time, assigning the courts a central role in determining the final sanction in numerous cases may, in practice, lead to a significant caseload burden in contraventional matters, which could justify, in the future, reconsidering certain mechanisms for procedural simplification or expanding the competences of administrative authorities.

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⁴¹ Available online at: *Kodeks karny wykonawczy – consolidated text*, accessed on 15 November 2025.

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FROM THE WHIP TO AUTOMATED SPEED CAMERAS: THE EUROPEAN PATH OF ADMINISTRATIVE SANCTIONS TOWARD ROAD SAFETY

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Abstract

History constitutes the undeniable witness of humanity's capacity to learn and adapt, and the metamorphosis of the legal sanction, determined by the cultural, social and technological progress of different eras, represents an eloquent example of the gradual evolution of society. Starting from this premise, the article analyses the evolution of legal sanctioning mechanisms in a historical transformation of over two millennia, from corporal punishments characteristic of premodern systems to advanced forms of surveillance of individual behaviours in public space. The purpose of the study is to highlight the manner in which the reconceptualization of the sanction has led to the emergence of a modern regime of regulation and control of behaviour, reflected today in road traffic contraventional law.

The article pursues three main objectives: the identification of the historical stages of legal transition, the highlighting of the role of Enlightenment thinking in redefining the purpose of punishment and the interpretation of contemporary mechanisms of behavioural surveillance in the field of road traffic. In this evolutionary perspective, Enlightenment thinking represented a decisive moment, by placing reason at the centre of social organization and by redefining the purpose of punishment in relation to legality, proportionality and human dignity, orienting the legal sanction towards two fundamental concepts: prevention and the certainty of the application of the rule.

In the field of road traffic, this approach allows the interpretation and analysis of contraventional sanctions – administrative fines, the system of penalty points and the suspension of the exercise of the right to drive motor vehicles on public roads – as instruments of continuous evaluation of the conduct of traffic participants. At the same time, the development of automatic traffic monitoring systems configures what can be described as a “road panopticon”, in which the technological infrastructure of surveillance generates the self-disciplining of drivers through the permanent possibility of observation.

Keywords: *contraventional sanction, technological surveillance, road panopticon, road safety, disciplinary society, corporal punishment.*

1. Introduction

„The body becomes a useful force only if it is both productive and subjected.”¹

One of the last corporal punishments applied in Europe took place in the year 1972, when a minor from the Isle of Man, aged 15, was subjected to a birching² following a criminal conviction. The case is considered to be the reference moment of a major legal transformation, being analysed in the case *Tyrer v. United Kingdom*, in which the European Court of Human Rights established that the application of a corporal punishment constitutes degrading³ treatment incompatible with the European standards of human rights. The judgment symbolically marks the end of a millennial tradition of physical violence, in which the body of the condemned represented the main place of the exercise of the sanctioning power of sovereignty.

In the author's opinion, this change does not represent only the abolition of a form of punishment, but the expression of a profound and fundamental reconfiguration of the manner in which European societies regulate and treat the legal sanction. Along a historical trajectory of over two millennia, the legal mechanisms of sanctioning have passed from public corporal punishments to modern forms of regulation and surveillance of behaviour in public space. In this context, the article examines the evolution of the European legal sanction and analysis the manner in which road traffic contraventional law reflects this transformation.

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¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1975, p. 26.

² Birching is a form of corporal punishment consisting in striking the convicted person with a bundle of thin birch twigs.

³ “The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being.”, *Tyrer v. United Kingdom*, para. 30.

Therefore, I consider that the importance of the topic resides in the increasingly central role that administrative sanctions play in managing the everyday behaviours of individuals. The regulation of road traffic represents one of the most extensive fields of application of contraventional sanctions, and the development of automatic traffic monitoring systems has reformed the manner of establishing and applying them. In this framework, the legal sanction no longer operates exclusively through the severity of the punishment, but through the certainty of the application of the rule and the permanent possibility of surveillance.

In order to analyse this evolution, the article uses a historical and doctrinal method, complemented by conceptual analysis inspired by Foucauldian theory. Starting from the analysis of the transformation of European punitive mechanisms, the study follows the transition from the spectacle of corporal punishment to modern forms of disciplining individual conducts. In this sense, the concept of disciplinary society is used to interpret the role of contraventional sanctions and of traffic monitoring technologies in shaping the actions of drivers.

The article is situated within the existing dialogue in specialized literature regarding the transformation of the legal sanction and the expansion of surveillance mechanisms in contemporary societies, its contribution consisting in the application of these theoretical perspectives to the field of road traffic and in the proposal of the concept of “road panopticon”, through which the technological infrastructure of traffic monitoring produces the self-disciplining of the behaviour of traffic participants.

2. The spectacle of corporal punishment

„The body of the condemned man became the place where the vengeance of the sovereign was applied.”⁴

In the legal tradition of premodern societies, corporal punishment represented, for millennia, the main means through which the state asserted its authority and visibly exercised its power before the community. The spectacle of punishment, as described by Michel Foucault in *Discipline and Punish*⁵, was considered a legal and legitimate form of legal sanction, a social ritual in which the public was witness to the restoration of legal order, having as primary purposes the intimidation of the community and the reaffirmation of public power.

In Antiquity, many legal systems provided severe corporal sanctions. For instance, in Roman law, certain offenses could be punished by flogging or by other forms of physical violence. Corporal punishments had an exemplary role, being often applied in public in order to discourage deviant conducts.

In Europe, during the Middle Ages, this perspective on sanction was accentuated, criminal law having as its foundation the idea that punishment must be visible and memorable, so that the community would perceive the consequences of the violation of social order, and the body of the condemned constituted the instrument through which political power could demonstrate its authority.

Corporal punishments used in European societies were varied and extremely severe, among the most frequently applied being whipping, one of the most widespread sanctions, considered to be relatively “moderate” compared to other forms; corporal stigmatization, having the role of transforming the body of the condemned into a visible and irreversible sign of “infamy”; mutilation, such as the cutting of a limb or of the ear; capital punishment, with a significant political and ritual dimension, executed in public, often through spectacular methods: beheading, hanging or burning.

An emblematic episode of the symbolic dimension carried by corporal punishment is represented by the execution of the last Grand Master of the Order of the Templars, Jacques de Molay, burned in Paris in 1314, after years of detention and judicial proceedings, for heresy. The public execution did not represent only a criminal sanction for the alleged heresy, but also an act of political affirmation of royal authority over an institution that had come to hold too much power⁶.

Gheorghe Doja, the leader of the peasant uprising of 1514 in the Kingdom of Hungary, captured and sentenced to death, was placed on a throne of iron heated in fire, and on his head was placed a heated iron crown, with the purpose of parodying his status as “king of the peasants”. The execution was organized in front of the public in order to transmit a clear message regarding the consequences of revolt against social order⁷.

⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1975, p. 3.

⁵ *Idem*, pp. 3-9.

⁶ Encyclopaedia Britannica (n.d.) Jacques de Molay. Available at: <https://www.britannica.com/biography/Jacques-de-Molay>.

⁷ Encyclopaedia Britannica (n.d.) György Dózsa. Available at: <https://www.britannica.com/biography/Gyorgy-Dozsa>.

Both the execution of Jacques de Molay and that of Gheorghe Doja illustrate the mechanism and the purpose of corporal punishments in premodern punitive systems – the sanction did not aim only at punishing and correcting the individual, but also at transmitting a political and legal message to the community. The spectacle of punishment transformed the body of the condemned into a symbol of sovereign authority and of the restoration of legal order. This theatrical and demonstrative importance of punishment will later constitute the object of Enlightenment critique and the subject of systematic analysis in the theory of disciplinary society.

3. The Enlightenment critique and the metamorphosis of the legal sanction

„It is better to prevent crimes than to punish them.”⁸

In the 17th–18th centuries, European intellectuals and philosophers challenge the absolute authority of monarchy, aristocratic privileges and the premodern punitive system, explicitly criticizing the arbitrary and violent character of corporal punishment, incompatible with the concepts of reason and human dignity promoted within the movement. The legal sanction, in the vision of Enlightenment thinking, had to be established by law and applied in a predictable manner, proportional to the gravity of the act, to pursue the prevention of crimes and to be certain, arguing that the efficiency of the sanction does not depend on its severity, but on the probability of its application.

One of the most influential critics of the premodern penal system, Cesare Beccaria, maintained that the legal sanction must be grounded in reason and social utility, not in revenge or demonstrations of power. In his fundamental work, *On Crimes and Punishments*, the author argues that the legitimacy of punishment derives from the necessity of protecting society and maintaining legal order. In this logic, punishment must be limited to what is strictly necessary for the prevention of crimes and for the protection of collective security. Beccaria emphasizes this idea by stating that “every punishment which does not arise from absolute necessity is tyrannical”⁹, thus highlighting that the excessive use of punitive violence represents an abuse of state authority.

Beccaria contributed decisively to the transformation of the manner in which modern societies began to understand the function of the legal sanction. Instead of public spectacles of corporal punishment, characteristic of premodern punitive systems, Enlightenment thinking promoted a legal model oriented towards prevention, proportionality and legality. In this sense, Beccaria’s work marks one of the decisive moments of the transition from a justice based on violence to a rational and moderate conception of punishment, in which the sanction no longer aims to intimidate through physical suffering, but to prevent illicit actions and to protect social interest.

The Enlightenment reflections regarding the legality of punishment, the proportionality of sanctions and the limitation of state violence upon the person gradually influenced the evolution of legal systems in Central and Eastern Europe as well. In Romania, this transformation took place at a slower pace and in a particular legal context, marked by the overlap of Byzantine, Ottoman and European influences. Premodern and medieval Romanian criminal law was regulated, to a large extent, by *pravile* – collections of legal norms inspired by Byzantine tradition and canon law, the most used being the *Pravila de la Govora* (1640) and *Îndreptarea legii* or the *Great Pravila* (1652). In the penal conception specific to the period, punishment had a predominantly corporal character and a visual significance. Beating, mutilation, corporal marking or public humiliation represented frequently used sanctions for a variety of offenses. These forms of sanctioning reflected a legal conception in which political and religious authority manifested itself through the direct and visible application of punishment, often accompanied by elements of public humiliation, meant to stigmatize the condemned and to consolidate the existing social order. Thus, the sanction was not perceived exclusively as a reaction to the illicit act, but also as an instrument of affirming princely authority and maintaining social discipline, similarly to the rest of the European space.

Beginning with the 18th century, administrative and legal reforms in the European space determined the emergence of an incipient form of legislative modernization in Romania, the normative acts elaborated during this period being oriented towards the systematization of norms and the clearer definition of sanctions. Although corporal punishments were not completely eliminated, their use was gradually restricted, alternative sanctions, pecuniary or custodial, being introduced.

The adoption of the Constitution of 1866 marks a decisive moment in the evolution of Romanian public law, introducing fundamental principles such as legality, the separation of powers and the protection of

⁸ Cesare Beccaria, *On Crimes and Punishments*, London: Penguin Classics, 1764.

⁹ *Idem*, p. 13.

individual rights. The fundamental change of paradigm is reflected in the development of a penal system based on custodial sanctions and pecuniary sanctions, in which the authority of the state exercises repression in accordance with the principles of legality and proportionality.

As a result, the Enlightenment critique did not only determine the gradual abandonment of corporal sanctions, but made possible the profound metamorphosis of the manner in which modern society exercises repressive power; the legal sanction no longer constitutes a spectacle of physical suffering and is transformed into a rational instrument of prevention and regulation of social patterns, creating the premises for the disciplinary mechanisms and modern forms of surveillance later discussed in the theory of disciplinary society.

4. Disciplinary society and the shaping of behaviours

„Discipline produces subjected and practised bodies.”¹⁰

The behavior of the human being can be regarded as a whole, as the totality of the actions and reactions of the individual in interaction with the social and normative environment of their existence. From a sociological and legal point of view, conduct represents, besides the expression of individual will, also the result of a complex and permanent process of formation and adaptation to the rules and values of the community. Accepted patterns are instilled from childhood, the family, education, religion and institutions contributing equally to the integration of the person into the existing social order. The process of formation does not end in childhood, as human conducts is subject throughout life to continuous shaping in order to comply with social and legal norms, including through mechanisms of institutional control.

The form of social organization in which control over the behaviour of individuals is exercised through institutions and permanent mechanisms of surveillance and norm-setting is described by Michel Foucault as a disciplinary society. Unlike previous systems, in which emphasis was placed on intimidating the community through public manifestations, this concept presupposes the regulation of compliance through a network of institutions, the school, the army, public administration or the prison becoming spaces in which conduct is observed, evaluated and corrected when it deviates from established norms. Therefore, conduct is shaped through various means capable of ensuring social order – clear norms of conduct, the judicious organization of social space, constant surveillance of the individual and legal sanctions – and the power of the state is no longer imposed through violence and intimidation. Discipline becomes, in this context, a fundamental instrument of social organization, and the legal sanction transforms into a mechanism of regulation and orientation of individual actions and reactions.

In the work *Discipline and Punish: The Birth of the Prison*, Michel Foucault shows that, starting with the 17th–18th centuries, European societies moved from a model of power based on the spectacle of corporal punishment to a disciplinary model, characterized by permanent surveillance, classification and regulation of actions¹¹. In this new configuration of power, the sanction no longer targets primarily the body of the condemned, but their behaviour, which becomes the object of constant social evaluation throughout life.

The concept of panopticon, a central element of Michel Foucault's analysis, is inspired by the architectural project conceived at the end of the 18th century by Jeremy Bentham for the organization of penitentiary institutions. Bentham conceived a circular building in which detention cells were arranged on the circumference, while in the centre of the construction there was an observation tower from which the guard could simultaneously observe all the cells, without the detainees being able to know whether they were effectively being supervised at a given moment¹². Bentham also proposed the use of this architectural model in other institutions, considering that constant surveillance allows a more efficient administration of conduct. The purpose of this system was not only the physical control of individuals, but also the production of an essential psychological effect. People, aware of the permanent possibility of observation, would adjust their behaviour themselves, awaiting the sanction and conforming to imposed norms.

Starting from this model, Michel Foucault attributes to the panopticon a much broader significance, presenting it as a metaphor of the manner in which power functions in modern societies, it acquiring the value

¹⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1975, p. 138.

¹¹ *Idem*, pp. 7–31.

¹² Bentham, J., *Panopticon; or, The Inspection House*, London, 1791.

of a symbol of a new means of expression of authority, that of being able to supervise, classify and regulate patterns of conduct¹³.

5. Road traffic contraventional law – a mechanism of discipline

„The certainty of punishment is more important than its severity.”¹⁴

The first sanction for exceeding the legal speed limit was applied in 1896 to the British citizen Walter Arnold, who drove a motor vehicle at a speed four times higher than the legal limit of 2 miles per hour (approximately 3.2 km/h) within urban localities. The ascertainment of the offense was not carried out by technical measuring means, non-existent at that time, but by the direct perception of the police officer, who followed the vehicle on a bicycle for approximately five miles before stopping him and establishing the exceeding of the legal speed limit. Arnold was sanctioned with a fine of one shilling, to which court costs were added¹⁵. The case is relevant for the evolution of legislation regarding circulation on public roads because it marks the moment from which the behaviour of the driver begins to be evaluated by reference to objective criteria, such as speed. Another relevant example is also the case of the first woman sanctioned for speeding. In 1899, a New York woman was fined for driving an automobile at approximately 12 miles per hour in an area where the limit was 8 miles per hour. This event reflects that the road sanction had already become a means of discipline applicable to all traffic participants.

The process of regulating road traffic began before the age of the automobile. Thus, long before the appearance of the self-propelled vehicle, authorities established that normative intervention was necessary in order to manage the flows of movement in the urban environment, current road legislation being, in fact, the result of a long cycle of adaptation of legal rules to the evolution of social and technological mobility.

The first attempts to organize circulation on public roads are noticeable in ancient Rome, given the already existing urban congestion, the size of the population and the intensity of economic activities. In the 1st century BC, the circulation of wheeled vehicles within the city of Rome during the daytime was prohibited, this measure having the purpose of reducing congestion and facilitating pedestrian movement in the central areas of the city. Subsequently, Emperor Hadrian also introduced restrictions regarding the number of carts that could simultaneously enter the city¹⁶. Therefore, it is observed that the mobility of vehicles was not perceived exclusively as a manifestation of individual freedom, but as a phenomenon that had to be harmonized with the interests of the community and with public order, and circulation constituted, from the perspective of public authority, a problem of governing urban space.

Much later, in the 19th century, the technological development of “road locomotives” gave rise to concerns regarding road safety and the impact on traditional traffic of animal-drawn vehicles, the self-propelled vehicle being initially considered a potential source of danger, therefore requiring state intervention in order to limit the risks generated by this invention. Although it mainly addressed heavy mechanical vehicles used in agriculture, transport or construction, the first British legislation in the field of road traffic – the Locomotive Act of 1861 – established speed limits for self-propelled vehicles, of approximately 10 miles per hour outside localities and 5 miles per hour in urban areas, introduced certain restrictions regarding vehicle weight, in order to prevent road damage, and obligations that vehicles comply with certain technical conditions, also assigning local authorities control competences over the circulation of mechanical vehicles.

Subsequently, the Locomotive Act of 1865, normative act known under the name of the “Red Flag Act”, introduced much more restrictive rules – mechanical vehicles had to have a crew of at least three people and to be preceded by a person walking and carrying a red flag in order to warn other traffic participants, and the maximum speed was limited to 2 miles per hour in localities and 4 miles per hour outside them¹⁷.

Although this legislation reflects the difficulty of society to adapt and integrate an innovation into the existing legal order, with the consequence of delaying the development of this technology in Great Britain until

¹³ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1975, pp. 195-228.

¹⁴ Cesare Beccaria, *On Crimes and Punishments*, London: Penguin Classics, 1764.

¹⁵ Guinness World Records (2024) First person charged with a speeding offence. Available at: <https://www.guinnessworldrecords.com/world-records/414379-first-person-charged-with-a-speeding-offence>; Historic UK (2023) Walter Arnold and the world's first speeding ticket. Available at: <https://www.historic-uk.com/HistoryUK/HistoryofBritain/Walter-Arnold-Worlds-First-Speeding-Ticket/>.

¹⁶ Encyclopaedia Britannica (2023) Roman transportation and traffic regulations. Available at: <https://www.britannica.com>.

¹⁷ Legislation.gov.uk (1865) Locomotive Act 1865. Available at: <https://www.legislation.gov.uk>.

the lifting of the restrictions imposed on self-propelled vehicles (moment historically celebrated through the Emancipation Run), the two Locomotive Acts are important because they introduce for the first time three fundamental ideas which will create the premises of the current normative framework: the legitimacy of state intervention in regulating circulation on public roads; the responsibility of the driver for behavior in traffic; the limitation of speed as a legal instrument for preventing risk.

At the end of the 19th century, France introduced, through the Paris Police Ordinance of 1903, one of the first driving licence systems and imposed the identification of cars through metal plates containing the owner's name and a distinctive number, this constituting the first form of vehicle registration. In Great Britain, the legal regime of circulation was reconceptualized through the Motor Car Act of 1903, which introduced driving licences, the vehicle registration system and a speed limit of 20 miles per hour¹⁸.

Circulation in Romania was also regulated long before the appearance of the motor vehicle, in the context of the organization of urban transport and of the activity of carriage drivers in cities undergoing a process of modernization, the increase in urban mobility determining local authorities to intervene normatively in order to maintain order in public space and to control the activity of transporters. One of the first legislative events in this field is the Ordinance of 1859 for the regulation of carriage traffic in Bucharest. The normative act had as purposes the organization of public carriage transport activity and the establishment of rules of conduct in traffic for carriage drivers, also establishing obligations regarding the compliance of vehicle drivers, the technical condition of carriages and harnesses, as well as the manner of carrying out the activity in the urban space. Also, carriage drivers were obliged to hold documents attesting the right to practice this activity and to comply with rules regarding order and discipline in carriage stations¹⁹.

The process of regulation was consolidated through the adoption, in 1868, of the Regulation for market carriages in Bucharest. This act detailed the administrative regime applicable to carriage drivers and established a series of sanctions for the violation of certain rules and obligations: the prohibition of driving while intoxicated, the obligation to maintain the vehicle in good working and clean condition, as well as the obligation to have lanterns lit at night. These norms can be considered the first forms of legal organization of circulation in the Romanian space, which, even if they did not yet concern the motor vehicle, represent an early example of administrative intervention over urban mobility.

The appearance of the automobile at the beginning of the 20th century generated a prompt adaptation of Romanian legislation. Technological development and the increase in the number of mechanical vehicles imposed the elaboration of specific norms to regulate their circulation, in this context being adopted in 1906 the Regulation of the police of movement and circulation on public roads. Also, a notable step in the evolution of Romanian road law was the Regulation for the circulation of motor vehicles from 1913, considered to be the first Romanian "road code". The normative act provided the technical conditions for the circulation of motor vehicles, the rules of conduct in traffic and the obligation to obtain a driving licence. In addition, it introduced rules regarding the adaptation of speed to road conditions, the obligation to slow down near curves, bridges or railway crossings and the necessity of stopping the vehicle in situations in which the circulation of pedestrians or animals could be endangered²⁰.

The adoption of this regulation reflects an essential transformation of the perspective of Romanian authorities on road mobility, the new legislation treating the circulation of motor vehicles as a complex social phenomenon that requires technical, administrative and sanctioning rules. Consequently, traffic law begins to acquire, in the Romanian legal space, the characteristics of a distinct field, focused on risk prevention and the disciplining of the behaviour of traffic participants.

The first examinations for obtaining a driving licence in Romania are attested in 1907. The examination, predominantly practical, was held before a commission composed of representatives of the police and of the local administration of Bucharest. Candidates had to demonstrate that they could control the vehicle, that they were capable of manoeuvring the automobile in the urban space and that they could react appropriately to traffic situations. At the same time, basic knowledge regarding the technical functioning of the automobile was also verified, as vehicles often required frequent mechanical interventions from the driver²¹. Unlike modern systems, the licence, which had a relatively simple form, similar to a certificate, was, in most situations, linked to a certain

¹⁸ National Motor Museum (2023) Motor Car Act 1903. Available at: <https://www.nationalmotormuseum.org.uk>.

¹⁹ Antena Satelor (2018) Istoria circulației în București. Available at: <https://www.antenasatelor.ro>.

²⁰ Cercel, S. (2008) Istoria dreptului românesc. București: Editura Universul Juridic.

²¹ Antena Satelor (2018) Istoria circulației în București. Available at: <https://www.antenasatelor.ro>.

type of vehicle or even to a particular vehicle, and administrative procedures were managed, mainly, by the police.

The driving licence marks the transition from an exclusive control over the vehicle to a control regarding the person who drives it and constitutes one of the main legal instruments through which authority regulates access to an activity potentially dangerous for the safety of circulation on public roads, alongside vehicle registration and sanctions applied for the violation of traffic rules.

After the Great Union of 1918, the Romanian legal system was subject to a complex process of legislative unification, under the influence of French law. Through the Penal Code of 1936, entered into force during the reign of Carol II, the tripartite system was established: crimes, delicts, contraventions. Therefore, an act of reduced gravity, the contravention, was clearly integrated into criminal law, being subject to the same sanctions, procedures and principles of law as the other two categories, crimes and delicts. Although the contravention was completely absorbed and subjected to the regime of criminal illegality, in parallel there were many other administrative deviations, provided by special normative acts, such as police regulations, norms regarding public order etc. These regulations were not applied in a unitary manner, which favoured the appearance of a legal and conceptual duality. The criminal contravention was subject to the jurisdiction of courts, and the administrative deviation was sanctioned extrajudicially, as, depending on the applicable norms, the finding and sanctioning of acts were carried out either by judicial bodies or by administrative authorities, which shows that the legal regime of contraventions was lacking predictability and, in a negative way, too flexible. In this sense, the most relevant example is the legislation regarding road traffic, incoherent and dispersed in various normative acts. The violation of traffic rules or of the obligations of drivers could attract either contraventional liability in the criminal sense, or the application of an administrative sanction.

During the communist period, the contravention is reconceptualized as a distinct form of illegality, with the consequence of its subordination to the administrative regime. Through the adoption of Decree no. 153/1970 regarding the establishment and sanctioning of contraventions, for the first time the administrative nature of the contravention is established, it being defined as the act committed with guilt, which presents a lower social danger than the offense and which is sanctioned administratively. In this qualification, the contraventional sanction, in the form of a fine or a warning, accompanied, depending on gravity, also by a complementary measure, could be applied on the spot or within a short term through a report drawn up by a finding agent within a state body. Although there was the possibility of contesting the sanction in court, access to justice was limited in practice, and procedural guarantees were reduced compared to current standards.

The administrative-repressive regime characteristic of socialism is replaced with a system in accordance with the requirements of the rule of law and of the European Convention on Human Rights following the reform of the existing legal framework, against the background of the political changes after 1989. Government Ordinance no. 2/2001 regarding the legal regime of contraventions represents a response to the need to adapt contraventional law to the new constitutional principles and to European standards in the field of fundamental rights. The normative act establishes a general framework, applicable to all contraventions and introduces, as elements of novelty: the systematization of sanctions, clearly establishing the types of main and complementary sanctions, as well as the criteria of their individualization; institutions such as the warning, the limitation period of the application of the sanction or the possibility of paying half of the minimum fine; the effective right to lodge a complaint before the court, within a clearly regulated procedural framework, thus increasing the degree of predictability and coherence of the contraventional regime. Compared to its predecessor, Government Ordinance no. 2/2001 is characterized by the balance between state authority and the protection of individual rights, introducing a legal institution subject to effective judicial control and to the principles of legality, proportionality and individualization of the sanction.

As regards the evolution of road legislation in Romania, the decisive role held by the Vienna Convention on Road Traffic (1968) must be mentioned, which introduced fundamental principles regarding the behaviour of traffic participants, road signalling, the recognition of driving licences and the technical conditions of vehicles, with the purpose of creating a common framework, meant to facilitate international circulation and to strengthen road safety. Romania's accession to the Convention determined the systemic alignment of Decree no. 328/1966 regarding circulation on public roads with the new European standards. Road systematization (colours, shapes, symbols, traffic signs) was standardized and unified, traffic rules were harmonized and clarified, becoming much more predictable, the possibility of mutual recognition of driving licences between states was introduced and rules regarding technical conditions and minimum safety standards were established, these

modifications being carried out gradually, not in a single stage. However, specific to the communist regime, the reform was partial and carried out in accordance with the characteristic ideology, without emphasis on legal guarantees or individual rights, but even in this incompletely adapted form, the decree constituted the “incubator” of the first Romanian legislation with a truly modern, unitary and systematized character, Government Emergency Ordinance no. 195/2002 regarding circulation on public roads.

Government Emergency Ordinance no. 195/2002 establishes a complex sanctioning regime, in which main contraventional sanctions are complemented by complementary sanctions and, in some cases, by technical-administrative measures. In this framework, the complementary sanction of the suspension of the exercise of the right to drive stands out, considering its particular relevance in the context of modern road safety policies, being conceived not only as a repressive measure, but also as a preventive instrument. Subsequent amendments of the normative act aimed at extending sanctions, tightening the sanctioning regime, introducing modern sanctioning mechanisms and the digitalization of procedures. Also, recent legislative interventions reveal a constant concern of the state to strengthen mechanisms meant to discourage dangerous behaviours in traffic, such as exceeding legal speed limits, driving under the influence of alcohol or psychoactive substances or aggressive driving behaviour.

Therefore, road traffic created the premises and represented both the reason and the foundation of the development of a predominantly administrative sanctioning regime, given the structure and defining elements of deviations from traffic rules. Analysed individually, they are acts with low social danger, but with significant risk potential at a large scale. Under these conditions, the classic criminal sanction, characterized by complex procedures, would not have achieved its preventive purpose. Instead, the administrative sanction allows a rapid and standardized reaction, adapted to the repetitive nature of road violations. The state does not intervene only *ex post facto*, but tries to reduce, vigilantly, the probability of recurrence by establishing preventive measures: traffic rules, speed limits, technical conditions for vehicles or the obligation of holding a driving licence.

6. Automated radar, a “road panopticon”?

„He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power.”²²

In contemporary society, the panoptic mechanisms described by Michel Foucault are not limited to the classical institutions of discipline, such as the school, the army or the prison, but extend over other spheres of social life. The development of modern technologies of monitoring and data collection has allowed the emergence of forms of surveillance much more widespread and more efficient than those initially proposed through the architectural model of Jeremy Bentham. This tendency is also noticeable in the field of the regulation of road traffic, where the behaviour of drivers is subject to a permanent process of surveillance through technological monitoring systems.

Discipline is based on the effect produced by the permanent possibility of automatic surveillance upon the psyche of the individual. What are the levels and how do they manifest? First of all, the anticipation of the sanction intervenes, the individual being aware that the deviation can be detected without the necessity of direct contact with the authority, which leads to the immediate adaptation of conduct. The second level is the internalization of the norm: repetition creates the habit of complying, so that respecting traffic rules becomes a reflex response. The stabilization of conduct, the third stage, manifests itself through the maintenance of correct conduct over longer distances, especially in areas monitored with average speed control systems. From a psychological point of view, the individual no longer relates to the sanction as to an exceptional situation, but as to an ordinary, permanent possibility.

The first technical devices for measuring speed were invented in the second half of the 20th century, representative being the photographic device for measuring vehicle speed developed by the Dutch pilot Maurice Gatsonides. This technology subsequently led to the appearance of the first speed cameras in the 1960s²³.

In the 1970s–1980s, in several Western states, radar cameras effectively used for sanctioning speed were introduced, their use expanding with the development of digital technologies. In the United States, the first automatic speed monitoring systems, implemented in communities in Arizona, date from 1987, and in the 1990s

²² Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1975, p. 202.

²³ Kustom Signals (2025) *History of speed enforcement technology*. Available at: <https://www.kustomsignals.com>; Sensys Gatso (2024) *Speed camera history*. Available at: <https://www.sensysgatso.com>.

this technological solution was introduced in numerous cities in America. Equally, the European space offered an institutional and normative framework favourable to the development and expansion of automatic traffic surveillance systems. In 1976, Great Britain develops automatic number plate recognition systems (ANPR – Automatic Number Plate Recognition), initially used for security, later being integrated into road traffic control systems.

Today, these systems are used on a large scale in many states, such as France, Italy, Great Britain, the Netherlands, Spain, Belgium or Australia. In some states, the number of these devices is very high; for example, Brazil uses over 14,000 speed cameras and over 1,000 cameras for traffic light control, and Great Britain has thousands of such systems installed on public roads. This expansion of surveillance mechanisms in everyday life has been conceptualized in specialized literature²⁴ as being specific to the “surveillance society”, in which monitoring becomes an extended practice integrated into the social and technological infrastructure.

Modern automatic traffic surveillance systems are built on the basis of integrated technologies, which include: radar or laser sensors, which measure the speed of the vehicle; high-resolution digital cameras, which record the image of the vehicle; automatic number plate recognition systems; databases and IT platforms for identifying the owner of the vehicle and issuing the fine. When a vehicle exceeds the legal speed limit, the radar detects the deviation and triggers the camera, which captures images of the vehicle and of the license plate. The data are subsequently processed by the IT system and transmitted to the competent authority, which automatically issues the contraventional report.

Average speed control systems, also known as “section control” or “point-to-point enforcement”, measure the time in which a vehicle travels a certain distance between two cameras placed on the same road segment, and depending on this interval the average speed is calculated, whose exceeding is automatically sanctioned. For example, the Netherlands implemented the first permanent average speed control systems in 2002, this measure having the effect of significantly reducing violations of speed limits on monitored sectors. Another relevant example is the “Tutor” system introduced in 2006 in Italy, which covers thousands of kilometres of highways and has significantly contributed to reducing the number of traffic accidents. In this sense, the European Commission shows that these “average speed control” systems are particularly effective, as they reduce the number of contraventions to a few percentages or even below 1% on monitored sectors²⁵.

As a result, we observe that automatic systems substantially modify the classical procedure of establishing the deviation, which depended, in most cases, on the direct perception of the police officer and on the direct and immediate interaction with the offender. In a completely impersonal manner, the deviation is detected by a device, documented in digital form, correlated with the identification data of the driver and transformed into an almost autonomous process, which requires reduced human involvement. In this order of ideas, automatic traffic surveillance systems present certain characteristics relevant for modern discipline. Their functioning is continuous: they do not depend on the presence of a police crew in a certain place, but can operate permanently. The deviations found are standardized: speed, the distance travelled between two points or passing on red are detected by reference to uniform criteria. They have a documentary role, meaning they produce video recordings, photographs, metadata and temporal identifiers which represent the evidence of the sanction. Last but not least, they are scalable, which means that they can operate at the same time on a very large number of vehicles, without having a directly proportional effect in terms of human resources.

Datafication, the conversion of road behaviour into data, constitutes, as long as it respects the initial purpose, an important benefit of automatic systems. Elements such as speed, time, route, license plate, interval between two points etc. become measurable and processable units, resulting in a datafied version of conduct which facilitates the ability to order, filter and analyse millions of detections. Once collected and centralized, the data allow the identification of behavioural patterns or of high-risk areas of road infrastructure.

Despite the undeniable advantages in terms of road safety, automatic surveillance systems are the subject of doctrinal controversies and significant legal challenges that cannot be overlooked. For instance, the right to privacy and the legitimate limits of monitoring in public space are debated, as cameras and ANPR systems store

²⁴ David Lyon, *Surveillance Society: Monitoring Everyday Life*, 2001.

²⁵ European Commission (n.d.) Average speed control. Available at: https://road-safety.transport.ec.europa.eu/eu-road-safety-policy/priorities/safe-road-use/safe-speed/archive/speed-enforcement/speed-enforcement-techniques-and-their-effectiveness/average-speed-control_en; European Commission (n.d.) Speed enforcement techniques and their effectiveness. Available at: https://road-safety.transport.ec.europa.eu/eu-road-safety-policy/priorities/safe-road-use/safe-speed/archive/speed-enforcement/speed-enforcement-techniques-and-their-effectiveness_en.

images, license plates, routes, that is, data about individual behaviour and mobility. For this reason, even if they have proven their efficiency in practice, they raise considerable issues when discussing proportionality, purpose limitation, the manner and duration of data storage and the procedural guarantees offered to the individual concerned.

Another legal issue concerns the active subject of the contravention, as automatic systems identify the vehicle, not the person who drives it. In several legal systems, procedures have been introduced through which the owner is notified and requested to communicate the identity of the person who drove the vehicle at the time of the finding. This technological solution obviously simplifies the application of the law, but is in contradiction with the principle of personal liability and with that of the presumption of innocence in legislations built on the basis of an absolute administrative presumption, which implies, regardless of the case, the engagement of the liability of the owner for the act of another.

Paradoxically, the automation of the decision represents a major disadvantage of automatic systems, if analysed from the perspective of the preventive-educational role of the sanction. Although, from a formal point of view, the sanction retains its legal character and requires a procedural framework, in reality, the process materializes through a technical-administrative flow in which the sanction is based mainly on the data generated by the system. Technological neutrality is a frequently invoked argument in favour of automatic surveillance, as technology produces objective evidence, standardizes the legal reaction, eliminates subjectivity, arbitrary selection and modalities of individualization of the act. The system does not tolerate and does not differentiate according to the social status of the driver. However, "neutrality" must be viewed through the filter of prudence, considering the important legal effect it produces: the depersonalization of the sanction. The agent-offender relationship, in which the driver is stopped, warned or immediately sanctioned, becomes the exception, and the sanction in the form of an administrative communication based on technical data, the rule.

However, the same contravention can be committed under different conditions. Subjectivity or personalization of the sanction, formally called "individualization", is provided by the Romanian legal system, having an essential preventive-educational function. According to Government Ordinance no. 2/2001, the contraventional sanction must be individualized depending on the concrete circumstances of committing the act, the degree of social danger, as well as the personal circumstances of the offender, criteria which must be directly and immediately evaluated by the finding agent. In the absence of the effective possibility to individualize the sanction, the warning, especially in its oral form, is practically devoid of applicability in the hypothesis of digital finding. Or, in the absence of a direct interaction between the police officer and the offender, the efficiency of the institution of the warning is drastically reduced, if not even eliminated, transforming the contraventional sanction into an exclusively repressive mechanism. This direction contradicts the legal regime of contraventions, which stipulates that the warning is a main sanction and emphasizes the necessity of individualizing the sanction according to the concrete circumstances of committing the act, so that the legal reaction is proportional and efficient. Indeed, the offender retains the option of requesting the court to carry out an effective individualization of the sanction, but this variant inevitably involves additional material costs, a longer period of time and, at the same time, the risk of artificially burdening the activity of courts. In light of these considerations, the real purpose of sanction automation is questioned: a return to a strictly repressive mechanism, the omission of the legislator to preserve the place and role of the warning or the expression of a budgetary policy?

In Romania, through Law no. 383/2022 regarding certain measures for increasing the efficiency of road traffic monitoring, the "Integrated system for monitoring road traffic on public roads in Romania" (e-SIGUR) was introduced, an ensemble of IT systems, communication infrastructure, hardware and software platforms, certified or homologated technical means and metrologically verified, as well as services for printing and communication of documents. Monitoring is carried out, according to the normative act, through data collection by fixed or mobile technical means, followed by automatic and manual processing, aiming at supervising and controlling compliance with traffic rules, including the finding of their violation, but also identifying vehicles sought or subject to confiscation, establishing measures for the fluent and safe conduct of circulation, protecting infrastructure and administering roads.

In order to integrate e-SIGUR within the existing legislative framework, Government Emergency Ordinance no. 195/2002 was successively amended²⁶, legislative interventions aiming at adapting the classical procedure of finding contraventions to current technological realities. Thus, through Government Emergency Ordinance no. 84/2024, the normative framework was consolidated by expressly consecrating the possibility of finding contraventions with the help of certified or homologated technical means and by regulating the automatic processing of data collected by public road administrators. The introduction of art. 109² allowed the use of data obtained through monitoring systems for establishing violations of traffic rules, also establishing a mixed mechanism, in which automatic detection is followed by validation and manual processing by police officers. According to legal provisions, the system can detect deviations such as speed, prohibition or restriction of driving on a lane, passing on red, aggressive driving behaviour etc., however, at present, these functionalities remain largely at a theoretical and declarative level. Official data show that the project was operationalized and subsequently expanded only in 2025, being composed of radars placed in high-risk areas, and deviations are sanctioned after identifying the driver, the report being communicated to the domicile without the need to stop in traffic²⁷.

Despite being presented as an automated road traffic monitoring system, an obvious discrepancy is observed between rhetoric and operational reality. In fact, the equipment used consists of radar devices of the TruCAM type mounted on a tripod, placed, configured manually and subsequently removed by the traffic police officer, which contradicts the idea of continuous and systemic surveillance of traffic²⁸. The procedure still involves successive stages of downloading and manual processing of data, and the mechanism necessary for identifying the offender and applying the sanction remains the same: requesting the communication of data by post, the response (or lack thereof), drafting the report and communicating the sanction are carried out in the classical manner, without significant changes.

However, the existence of an automated and integrated system has been constantly promoted²⁹, being invoked approaches regarding the development of an extensive network of cameras and their interconnection into a unitary digital mechanism — assurances whose materialization remains, for the moment, uncertain³⁰. Under these conditions, the qualification of the system as being what it promises to be is debatable, as we are rather in the presence of a pseudo-automation, in which technology is used punctually, without substantially reforming the existing legal and procedural mechanism. However, as history has shown, real progress is not achieved through simple declarations of intention or hypothetical technical solutions, but presupposes complex structural processes, carried out over long periods of time. It remains to be seen whether and when this integrated system for monitoring road traffic will surpass the script stage and will be implemented in practice effectively, as a functional, coherent and truly automated mechanism, or whether it will continue to remain an aspiration undermined by technical and institutional limitations.

Returning to the panopticon, automatic road surveillance systems present essential structural similarities with it. In the architectural model, the subject was placed in a field of permanent visibility, without being able to know whether they were observed at a given moment, this combination between permanent potential visibility and the impossibility of verification disciplining behaviour. Automatic traffic surveillance systems produce the same effect: the driver is aware of the existence of monitoring infrastructure, but does not know the location of cameras, whether they record, what types of deviations are monitored etc. Therefore, power does not have to be effectively present constantly, but it is sufficient to be credible.

However, it must be mentioned that the analogy between the original Panopticon and the road one is not perfect. The former was an architectural model of a prison, a closed space designed for the re-education of

²⁶ Universul Juridic (2024) Modificări ale O.U.G. nr 195/2002 și O.G. nr 2/2001. Available at: <https://www.universuljuridic.ro/o-u-g-nr-195-2002-privind-circulatia-pe-drumurile-publice-si-o-g-nr-2-2001-privind-regimul-juridic-al-contraveniilor-modificari-o-u-g-nr-84-2024/>.

²⁷ Ministerul Afacerilor Interne (2025) Prima sancțiune aplicată după operaționalizarea sistemului e-SIGUR. Available at: <https://www.mai.gov.ro/prima-sanctiune-aplicata-dupa-operationalizarea-sistemului-e-sigur/>; Știrile ProTV (2025) Detalii despre radarele din sistemul e-SIGUR. Available at: <https://stirileprotv.ro/stiri/actualitate/politia-rutiera-noi-detalii-despre-radarele-din-sistemul-e-sigur-vor-fi-amplasate-in-fiecare-zi-in-zonele-cu-risc-rutier.html>.

²⁸ Laser Technology, Inc., TruCAM User's Manual. All-in-one Digital Video Camera/Laser Speed and Ranging Device, 2nd Edition, 2009, Available at: <https://ia803408.us.archive.org/31/items/manualzilla-id-6874222/6874222.pdf>.

²⁹ Știrile ProTV (2025) Cum funcționează noile radare inteligente. Available at: <https://stirileprotv.ro/stiri/actualitate/cum-funczioneaza-noile-radare-inteligente-si-ce-trebuie-sa-stie-soferii-politia-pregateste-700-de-dispozitive-mobile.html>.

³⁰ Europa FM (2026) Implementarea sistemului e-SIGUR amânată. Available at: <https://www.europafm.ro/implementarea-sistemului-e-sigur-amanata-cand-vor-deveni-functionale-camerele-radar-si-cele-pentru-calculul-vitezei-medii/>.

convicts, while the latter functions in an open space and aims at regulating the conduct of the majority, constituting an advanced and extended form of discipline. Consequently, the use of the panoptic model in the field of road traffic is limited by certain legal aspects. Unlike the primary idea of constant and general surveillance, in road traffic matters, surveillance is objectively punctual and dependent on the placement and effective functioning of technical means, which reduces the effect on conduct. In addition, the legal mechanisms specific to contraventional law, such as the individualization of the sanction and the necessity of establishing the identity of the offender, presuppose a human factor and the evaluation of concrete circumstances, both incompatible with a fully automated surveillance system.

7. Conclusions

“The purpose of punishment is not to torment a sentient being.”³¹

The analysis of the evolution of the legal sanction in the field of road traffic reveals a profound transformation of the manner in which modern societies manage behaviours that affect social values. Over a historical course of more than two millennia, punitive mechanisms have made the transition from the public spectacle of violence to advanced modalities of regulation and technological surveillance, this evolution confirming the hypothesis of the article, the legal sanction no longer constitutes, primarily, a reaction to the act, but an instrument of prevention and shaping, integrated into a permanent system of social control. In this sense, road traffic contraventional law represents a relevant example of the transition from the mechanism of visible repression to the model of invisible discipline.

Consequently, the trajectory of discipline in the field of circulation can be viewed as a transition from the dramatic visibility of control to the infrastructural invisibility of surveillance. At the end of the 14th century, the “man with the red flag” embodied the authority of the law, through a real and visible presence. Nowadays, this role belongs to automatic monitoring systems, in which control is dispersed and integrated into the techno-legal ensemble. At present, the sanction no longer operates exclusively *ex post facto*, but is doubled by *ex-ante* mechanisms, oriented towards prevention and anticipation.

The results of the research highlight that automatic surveillance systems have a double role, they increase the efficiency of the application of road rules and contribute to the internalization of discipline by traffic participants. This conclusion fits within Michel Foucault’s vision, according to which “punishment has become the most hidden part of the penal process”³², and the efficiency of the sanction does not derive from its spectacular character, but from its integration into a discreet and continuous monitoring mechanism. At the same time, the psychological effect of surveillance, rendered through the statement “visibility is a trap”³³, consists in shaping conduct through the anticipation of the possibility of observation, not only through the sanction actually applied.

The impact of the research results consists in the reconfiguration of the manner of understanding road traffic contraventional law, demonstrating that it no longer has only the role of sanctioning, but has been transformed into a visionary preventive instrument, which is part of a broader policy of surveillance and behavioural shaping, similar to a “road panopticon”. At the same time, the antinomy between the efficiency of standardizing the sanction and the necessity of its individualization is highlighted, giving as example systems such as e-SIGUR, which, although promoted as a manifestation of automation, are, in fact, only formally digitized, without eliminating human intervention or modifying the traditional procedure.

Regarding future research directions, I consider that the study has launched several relevant challenges, opening perspectives that require further deepening: the individualization of the sanction in the context of the automation of the finding process; the legal implications of the use of data in road surveillance systems, in relation to data protection and decision automation; the efficiency of different models of automatic surveillance in European states, in correlation with the level of compliance and the reduction of accidents; the long-term psychological impact of surveillance on the behaviour of drivers and on the perception of the legitimacy of the legal sanction.

In conclusion, the “road panopticon” is not only a theoretical metaphor, but faithfully reflects the legal and technological reality of contemporary society. Therefore, from the whip that lashed the body of the condemned

³¹ Cesare Beccaria, *On Crimes and Punishments*, London: Penguin Classics, 1764.

³² Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1975, p. 9.

³³ *Idem*, p.200.

to the radar that records the speed of a vehicle, the legal sanction has not disappeared, but has radically changed its form and role. In this new paradigm, discipline is no longer imposed, but produced, and compliance is no longer the result of immediate fear, but of a structural and conceptual transformation of the legal order.

Law transforms depending on the manner in which technology is used in state policies, and today law no longer functions through presence, but through possibility, not because it is seen, but because it can see.

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VOLUNTARY HEALTH INSURANCE IN BULGARIA – LEGAL FRAMEWORK AND ITS ROLE WITHIN THE HEALTH INSURANCE SYSTEM

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Abstract

This paper examines voluntary health insurance in Bulgaria as a specific complementary element within the mandatory health insurance system. It aims to analyse the legal framework governing voluntary health insurance, which operates on market-based and contractual principles, and to clarify its role and functions within the existing health insurance model, founded on compulsory and universal participation.

The study seeks to clarify the legal nature of voluntary health insurance by tracing the historical development of the relevant legislation and its transformation into an insurance-based legal relationship. Particular attention is devoted to the relationship between voluntary and mandatory health insurance, with a view to ensuring that the core package of healthcare services remains guaranteed within the public system and that mandatory health insurance is neither replaced nor undermined by private-law mechanisms.

The paper further examines data on the current state and development of the voluntary health insurance market, as well as the applicable supervisory and control mechanisms. Special attention is given to the role of the Financial Supervision Commission and to the control powers of the Executive Agency “Medical Supervision” in relation to insurers offering voluntary health insurance products.

The analysis demonstrates that voluntary health insurance has a legitimate but limited role as a complementary mechanism within the Bulgarian health insurance system. This necessitates clearly defined legal boundaries and effective protection of the rights of insured persons, while safeguarding the central role of mandatory health insurance in guaranteeing access to essential healthcare services.

Keywords: *Voluntary health insurance, Mandatory health insurance, Health Insurance Act, Insurance supervision, Health insurance market.*

1. Introduction

Voluntary health insurance in Bulgaria forms part of the health insurance system and was introduced as a complementary mechanism to the public system of mandatory health insurance. This study examines the current legal framework governing this institution and its systemic position within the health insurance model, while also analysing statistical data on the development of the voluntary health insurance market in 2023 and 2024.

In the international literature, voluntary health insurance is regarded as a specific mechanism for financing healthcare services that may perform different functions depending on the structure of the national health system. Depending on the manner in which it interacts with public financing of healthcare, it may assume a complementary, supplementary, or substitutive role in relation to the public healthcare system. These differences are determined by the historical development of national health systems, the characteristics of the national legal framework, and the level of public financing of healthcare¹.

Comparative studies of voluntary health insurance across European countries demonstrate that its development is strongly influenced by the historical characteristics of national health systems, as well as by the applicable legal framework and the scope of public financing of healthcare. In most European states, voluntary health insurance performs primarily a complementary function in relation to public health systems, while the

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¹ See E. Mossialos, S. M. Thomson, Voluntary Health Insurance in the European Union: A Critical Assessment, in International Journal of Health Services, vol. 32, no. 1/2002, pp. 19–88;

See S. Thomson, T. Foubister, E. Mossialos, Financing Health Care in the European Union: Challenges and Policy Responses, WHO Regional Office for Europe, Copenhagen, 2009, available at <https://iris.who.int/handle/10665/326415>, last time consulted on 16.03.2026.

size of the market and the significance of private health coverage vary considerably across different national models².

Bulgaria has been included in several comparative European studies on voluntary health insurance, as well as in reports examining the structure of healthcare financing in European countries. In these analyses, the Bulgarian model is usually addressed in a comparative or descriptive context, with particular emphasis on the relatively limited penetration of voluntary health insurance and its small share in total healthcare expenditure³. An analysis of the Bulgarian health system is also provided in a report of the European Observatory on Health Systems and Policies, which examines the organisation and financing of the health system and likewise notes the limited role of voluntary health insurance⁴. However, these studies address the Bulgarian model primarily in descriptive or comparative terms and do not offer a comprehensive analysis of the legal framework and institutional development of voluntary health insurance in Bulgaria.

In a broader European context, it may be observed that there is still no comprehensive and up-to-date study specifically devoted to the legal framework and institutional development of voluntary health insurance in Bulgaria. Existing research tends to address the Bulgarian model mainly from a comparative or descriptive perspective and does not sufficiently examine its normative content or its systemic position within the health insurance system. This gap in the literature underlines the relevance of the present study. In the context of the growing involvement of the private sector in the provision and financing of healthcare services, a clear distinction becomes necessary between the public guarantee of access to the basic package of healthcare services and the possibility of contracting additional health protection through private-law mechanisms.

The purpose of this study is to analyse the legal framework governing voluntary health insurance in Bulgaria, tracing its development from the introduction of the Health Insurance Act in 1998 to the current regime, under which the voluntary element is implemented through a medical insurance contract. Through doctrinal, systematic, and historical legal analysis, the study traces the development of the institution, clarifies its legal nature, and evaluates its relationship with mandatory health insurance. The research also includes an analysis of statistical data on the voluntary health insurance market in Bulgaria for 2023 and 2024, making it possible to assess the actual significance of the voluntary element within the structure of healthcare financing.

The analysis demonstrates that voluntary health insurance plays a limited role within the health insurance system as a complementary mechanism to mandatory health insurance. It cannot replace the public guarantee of access to healthcare services, but instead operates as a private-law instrument for the provision of additional health protection.

2. Development and legal framework of voluntary health insurance in Bulgaria

2.1. Transition from a state-funded healthcare system to an insurance-based model

At the end of 1944, Bulgaria entered a period of political transformation that gradually led to significant changes in the organization and financing of healthcare. The period from 9 September 1944 to 17 March 1951 may be regarded as a transitional phase in the development of the model of health protection, as the health insurance system that had existed until that time—based on insurance mechanisms for financing medical care—was progressively replaced by a state-funded healthcare system.

² See A. Sagan, S. Thomson (eds.), *Voluntary Health Insurance in Europe: Country Experience*, European Observatory on Health Systems and Policies, Copenhagen, 2016, available at https://www.euro.who.int/__data/assets/pdf_file/0005/310838/Voluntary-health-insurance-Europe-country-experience.pdf, last time consulted on 1|6000000000000000.03.2026;

See M. Čurak, D. Kovač, K. Poposki, *The Drivers of Voluntary Private Health Insurance Demand in European Countries*, in *Economic Thought and Practice*, vol. 30, no. 2/2021, pp. 457–474.

³ See OECD, *Private Health Insurance in OECD Countries*, OECD Publishing, Paris, 2004, available at <https://www.oecd.org/health/health-systems/private-health-insurance-in-oecd-countries-9789264007451-en.htm>, last time consulted on 16.03.2026;

See A. Dimova, M. Rohova, S. Koeva, E. Atanasova, L. Koeva-Dimitrova, T. Kostadinova, A. Spranger, *Bulgaria: Health System Review*, in *Health Systems in Transition*, vol. 20, no. 4/2018, European Observatory on Health Systems and Policies, Copenhagen, 2018, available at https://www.euro.who.int/__data/assets/pdf_file/0006/372348/bulgaria-hit.pdf, last time consulted on 16.03.2026.

⁴ See A. Dimova, M. Rohova, S. Koeva, E. Atanasova, L. Koeva-Dimitrova, T. Kostadinova, A. Spranger, *Bulgaria: Health System Review*, in *Health Systems in Transition*, vol. 20, no. 4/2018, European Observatory on Health Systems and Policies, Copenhagen, 2018;

See European Observatory on Health Systems and Policies, *Bulgaria: Health System Summary*, 2022, available at <https://www.euro.who.int>, last time consulted on 16.03.2026.

This transformation formed part of the broader process of strengthening the role of the state in social relations under the socialist system⁵ and of establishing a centralized system for the governance of healthcare. With the adoption of the Decree on Universal Free Medical Care (1951), health insurance relations were abolished, and the financing of medical services, as well as of the healthcare system as a whole, was assumed entirely by the state.

Following the nationalization carried out in the healthcare sector between 1946 and 1949, ownership of healthcare resources in Bulgaria remained entirely state-controlled until the beginning of the 1990s. As a result of the socialist restructuring of the healthcare system after 1950, a model based on centralized state administration and budgetary financing was introduced. The free choice of physician and healthcare provider was replaced by an administratively organized system of medical services based on the territorial principle and administrative-territorial division.

Throughout this prolonged period, healthcare functioned as a system characterized by a state monopoly, in which medical services were provided at the expense of the state budget, financed through tax revenues and other public funds. This model may therefore be described as a system of public healthcare protection based entirely on budgetary financing.

The political changes that began on 10 November 1989 marked the beginning of profound transformations in all spheres of social and economic life. In this context, the need arose to reconsider the mechanisms governing the organization and financing of healthcare. Bulgaria was once again confronted with the choice between preserving the budget-based model and restoring the insurance principle in the financing of healthcare services.

Discussions on the introduction of health insurance began in the first years following the political changes. During the 1990s, in connection with the preparation of healthcare reform, a number of policy concepts and reform programmes were developed, the experience of other countries was examined, and foreign experts were involved in the reform process. Nevertheless, with the exception of certain partial measures, no substantial legislative steps towards the establishment of a new model of healthcare financing were undertaken until the mid-1990s.

The normative turning point occurred with the adoption of the Health Insurance Act (promulgated in the State Gazette, No. 70 of 1998, in force as of 1 January 1999), which restored health insurance relations in the Republic of Bulgaria. After almost five decades of a budget-funded healthcare system, Bulgarian legislation once again introduced the insurance-based model as the foundation of public healthcare protection, thereby laying the foundations of the contemporary health insurance system.

The restoration of health insurance relations through the Health Insurance Act of 1998 was not limited to the introduction of mandatory health insurance as the principal mechanism of public healthcare protection. The legislator also provided for the possibility of voluntary participation in supplementary health insurance schemes operating alongside the mandatory system. Thus, from the very outset of the legislative framework, a dual structure of the health insurance model emerged—public-law in relation to the guaranteed package of medical services and contractual in relation to supplementary health protection.

It is precisely this second component—voluntary health insurance—that raises the question of the relationship between the solidarity-based nature of the mandatory system and the market-based principles on which supplementary mechanisms for health protection are built. This issue becomes particularly significant in the context of the subsequent development of the legal framework and the transformation of voluntary health insurance into a model implemented through a medical insurance contract.

2.2. Initial model of voluntary health insurance (1998–2012)

With the adoption of the Health Insurance Act of 1998, the Bulgarian legislator established a new model for the financing of healthcare based on mandatory participation in a public health insurance system administered by the National Health Insurance Fund. Alongside this principal mechanism, the Act also introduced the possibility of voluntary health insurance as a complementary element. Pursuant to Article 2 of the Act, health insurance is carried out in two forms—mandatory and voluntary.

Under the initial legal framework, voluntary health insurance was entrusted to specialized joint-stock companies incorporated under the Commerce Act and licensed in accordance with the conditions and procedures laid down in the Health Insurance Act. A specialized licensing authority was also established—the

⁵ See *Istoriya na meditsinata v Bulgaria*, Medicina i Fizkultura Publishing House, Sofia, 1980 (in Bulgarian), p. 220.

National Commission for Voluntary Health Insurance, whose composition and rules of operation were determined by the Council of Ministers. In order to ensure the protection of the rights of insured persons, the Act also provided for specialized supervision over both mandatory and voluntary health insurance, entrusted to the Minister of Health.

The legal regulation of voluntary health insurance is set out in Chapter Three of the Act (Articles 81–99). From the outset, the legislator sought to position voluntary health insurance within the health insurance system through both a clear distinction and a functional relationship with the mandatory model. According to Article 81, voluntary health insurance provides insured persons with medical and other services both within the scope of activities agreed under the National Framework Contract and outside the scope of mandatory health insurance. In this way, even at the initial stage of the reform, the voluntary element was conceived as a complementary mechanism to the public system.

In the initial structure of the Act, voluntary health insurance was implemented through specific packages of healthcare services. These included activities related to prevention and health promotion, outpatient medical care, inpatient medical care, services related to accommodation and other supplementary conditions in the provision of medical care, as well as reimbursement of incurred expenses. A separate licence was issued for each package, reflecting the legislator's intention to establish a detailed regulatory framework governing the scope of voluntary health insurance activities.

In the late 1990s, the development of voluntary health insurance formed part of the broader process of institutional development of the system of supplementary social insurance in Bulgaria. With the adoption of the Supplementary Voluntary Pension Insurance Act (State Gazette, No. 65 of 20 July 1999), the State Agency for Insurance Supervision was established under the Council of Ministers. The newly established authority was responsible for licensing and supervising insurance companies carrying out activities in the field of supplementary social insurance, including pension, health, and unemployment insurance. This institutional concept was subsequently abandoned.

A significant change in the regulation of voluntary health insurance occurred in 2003 following amendments to the Health Insurance Act (State Gazette, No. 107 of 15 November 2002). A detailed legal framework governing health insurance companies was introduced, including provisions concerning their legal status and licensing regime. State supervision over voluntary health insurance activities was entrusted to the Insurance Supervision Agency.

The implementation of voluntary health insurance presupposes the existence of two types of contractual relationships. The first type is the health insurance contract concluded between the insured person and the voluntary health insurance company. This contract determines the type and scope of medical and other services guaranteed to the insured person, as well as the amount of the health insurance premium. The second type consists of contracts concluded between the voluntary health insurance company and healthcare providers. Through these contracts, the prices of medical services are determined, as well as the conditions and procedures governing their provision to insured persons.

The legislator abandoned the initial concept of separate types of health insurance contributions and introduced two principal forms of voluntary health insurance—reimbursement of expenses and subscription-based services. Under the reimbursement model, the voluntary health insurance company reimburses, in whole or in part, the expenses incurred for healthcare services upon the occurrence of the cases provided for in the contract. Reimbursement may be made either to healthcare providers or to insured persons for healthcare services and goods paid for by them. The subscription-based model represents a form in which, upon the occurrence of the cases provided for in the contract, the voluntary health insurance company organizes the provision of specific healthcare services and goods through healthcare providers with whom it has concluded contractual agreements.

Within these legal parameters, voluntary health insurance functioned in Bulgaria until 2012. From the very introduction of health insurance in the country, parallels were frequently drawn with the pension system, which is structured on the basis of a combination of mandatory and supplementary pillars. Unlike supplementary pension insurance, however, voluntary health insurance does not include a mandatory component, which has had a significant impact on its development.

Statistical data confirm the limited scope of this mechanism. According to data from the Financial Supervision Commission, as of 31 March 2012 the number of insured persons in universal pension funds reached 1,630,025. By comparison, at the end of February 2012 the number of persons covered by voluntary health

insurance amounted to 189,427. The claims paid by voluntary health insurance companies by the end of the first quarter of 2012 totalled BGN 6,217,733 (approximately EUR 3,179,076 at the fixed BGN–EUR exchange rate)⁶.

These data demonstrate that, despite more than a decade of existence, voluntary health insurance remained limited in scope and relatively marginal within the system of healthcare financing. The existence of nineteen licensed voluntary health insurance companies did not lead to a substantial expansion of the market. In this sense, the initial model of voluntary health insurance may be characterized as functionally underdeveloped and unable to fulfil its intended purpose—namely, to provide individuals with an additional level of health protection beyond that guaranteed by the National Health Insurance Fund.

2.3. Transition from voluntary health insurance to medical insurance – the regulatory reform of 2012

The infringement procedure No. 2010/2156⁷, initiated by the European Commission against the Republic of Bulgaria, represents a significant turning point in the development of the legal regime governing voluntary health insurance. In the course of the procedure, the Commission concluded that the existing regulatory framework under the Health Insurance Act excluded voluntary health insurance companies from the scope of the EU directives on non-life insurance and introduced restrictions on the free movement of capital under Article 63 TFEU.

As a result, the Bulgarian model of voluntary health insurance was found to be incompatible with the requirements relating to a unified prudential framework, solvency, technical provisions, and financial supervision applicable to insurance undertakings within the European Union. The procedure raised not only the issue of the formal transposition of EU law but also necessitated a conceptual reconsideration of the nature of voluntary health insurance—from a health insurance model to a medical insurance model.

In this respect, the intervention of the Commission acted as an external corrective to national regulatory autonomy and accelerated the institutional transformation of the sector, with a view to ensuring a level playing field for market participants and a higher level of consumer protection.

In this context, the legislative amendments to the Health Insurance Act (State Gazette, No. 60 of 7 August 2012) should be regarded as a direct response to the inconsistencies identified by the European Commission. Among the principal reasons for their adoption, the legislator expressly referred to “the removal of inconsistencies between the regulatory framework governing voluntary health insurance activities in the Republic of Bulgaria and EU law in the field of insurance, as well as the termination of the infringement procedure No. 2010/2156 initiated by the European Commission against the Republic of Bulgaria.” In this way, the national legislator undertook a conceptual reorientation of the model by subjecting voluntary health insurance to the regulatory regime of insurance law.

The current legal framework contains an internal systemic tension. On the one hand, Article 81 of the Health Insurance Act provides that the relevant chapter regulates voluntary health insurance as part of the health insurance system. On the other hand, Article 82 expressly stipulates that voluntary health insurance is carried out on the basis of a medical insurance contract within the meaning of the Insurance Code. In this way, the legislator simultaneously preserves the terminology of social security law while subjecting the substantive content of the legal relationship to the regime of insurance law.

The conceptual tension between these provisions becomes even more pronounced in the Bulgarian linguistic context. In the national legal tradition, the concepts of “social security” (*osigurjavane*) and “insurance” (*zastrahovane*) have a distinct historical origin and perform different social functions, although in English-language terminology they are often rendered by the common term “insurance.” This duality is not new—as early as the beginning of the twentieth century, Bulgarian legislation clearly distinguished between the public social security system and private insurance activity⁸, each of which developed on the basis of a different normative and economic foundation.

⁶ See M. Radeva, *Pravna ramka na dobrovolnoto zdravno osigurjavane*, in *Proceedings of the Rousse University*, 2012, vol. 51, series 7, p. 241 (in Bulgarian).

⁷ See European Commission, *Internal Market: Commission acts to protect policy-holders and to ensure level playing field in the Bulgarian health insurance sector*, Press Release IP/12/72, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_12_72, last time consulted on 16.03.2026.

⁸ At the end of the nineteenth century, the development of insurance in Bulgaria was influenced by the presence of foreign companies. Among the first pioneers of insurance activity were the Romanian companies *Dacia* and *Naționala*, later joined by the American *New York Life* and the Austrian *Anker*. The first Bulgarian insurance company was established in 1891 in Ruse.

The concept of “social insurance” (Ger. Sozialversicherung, Fr. assurances sociales, Eng. social insurance) historically emerged as a response to the social risks associated with industrialization and the development of wage labour. It reflects the societal need to protect workers in situations of adverse social and economic circumstances. Its origins may be traced, on the one hand, to the mutual aid societies established by workers themselves (*sociétés de secours mutuels*, *Hilfskassen*, friendly societies), and, on the other hand, to the gradual recognition by the state of employers’ liability for damages arising from occupational accidents. In Bulgaria, social insurance developed as one of the early manifestations of social policy as early as the first decade of the twentieth century, laying the normative foundations for the distinction between the public social security system and private insurance activity.

Insurance (Fr. assurance, Ger. Versicherung, Eng. insurance, It. assicurazione) constitutes an autonomous legal and economic institution, the purpose of which is to provide protection against the adverse consequences of future uncertain events through the contractual distribution of risk among a plurality of participants⁹. It operates on a market basis and is founded on the principle of equivalence between the risk assumed and the premium due.

Although both are built upon the common idea of risk transfer¹⁰ and distribution, social security and insurance perform different social functions. The former is based on the principle of solidarity and is governed by public law, whereas the latter is characterized by contractual autonomy and a private-law nature. It is precisely this distinction that gives rise to the particular complexity of the contemporary regulation of voluntary health insurance, which is formally designated as “social security,” yet is materially implemented through an insurance legal relationship.

In public discourse, a parallel is often drawn between pension provision and healthcare as systems structured around a combination of mandatory and supplementary elements. In Bulgaria, the pension system is organized as a three-pillar model: mandatory public social security (as part of the State Social Security system), supplementary compulsory pension insurance, and supplementary voluntary pension insurance. The mandatory pillar is administered by the National Social Security Institute, whereas the second and third pillars are managed by pension insurance companies—private joint-stock companies whose legal framework is governed by the Social Security Code.

The situation in the field of healthcare following the 2012 reform evolved along a different trajectory. While in the pension system private pension insurance companies continue to operate as independent entities, health insurance companies ceased to exist. By 7 August 2013, companies holding licences for voluntary health insurance were required to bring their activities into compliance with the requirements of the Insurance Code and to obtain a licence to carry out insurance activities. Those that failed to meet these requirements were obliged to terminate their operations.

As a result, voluntary health insurance did not develop as an independent “second pillar” of the healthcare system but was institutionally integrated into the general insurance regime. This further confirms its transformation from a social security-based model to an insurance-based model.

In light of the above terminological and systematic clarifications, the question arises whether voluntary health insurance, in its current form, continues to exist as an autonomous social security institution. Following the 2012 reform, its content, subjects, and supervisory regime have been subordinated to the Insurance Code, which effectively aligns it with the model of private health insurance.

Nevertheless, until an explicit legislative amendment is introduced, Bulgarian law formally preserves the two-component structure of healthcare—compulsory and voluntary health insurance. Thus, the normative terminology continues to employ the concept of “insurance” in the sense of social security, even though the substantive legal content of voluntary health insurance is built upon an insurance principle. Alongside this normative and institutional transformation, broader questions also arise regarding the systemic position and the permissible scope of the voluntary component within the healthcare system.

⁹ See Targovski entsiklopedichen rechnik, Cooperative Printing House “Tipograf”, Sofia, 1930, pp. 175–176, 345 (in Bulgarian).

¹⁰ See Kr. Sredkova, *Osiguritelno pravo*, Sibi Publishing House, Sofia, 2008 (in Bulgarian), p. 510: “Insured persons receive the medical care to which they are entitled without paying its equivalent. It is paid by the insurance institution – the National Health Insurance Fund or the health insurance company. This reflects the transfer of risk from the insured person to the insurance institution, which constitutes the essence of any social security system.” (author’s translation).

2.4. Attempt at closer integration of voluntary health insurance

In the context of the search for a more sustainable model of healthcare financing in the period following 2012, policies were formulated aimed at increasing efficiency and prioritising public expenditure. The “Health 2020 Goals” Concept, adopted by the Council of Ministers in 2015, places emphasis on the financial sustainability of the system, taking into account pressures arising from demographic trends, technological progress, and limited fiscal resources.

Within this framework, it was proposed to structure healthcare activities into distinct packages: a basic package, guaranteeing prevention, diagnosis, and treatment of socially significant diseases, as well as child and maternal health; a supplementary package, encompassing planned activities for which a waiting-list mechanism may be applied; and an emergency package, financed from the state budget.

It is precisely within the supplementary package that the functional link with voluntary health insurance becomes apparent, as individuals who do not wish to wait for the provision of planned services may obtain access through a medical insurance contract. In this way, the voluntary component is integrated as a parallel mechanism for expedited access, raising the question of the extent to which such a construction is compatible with the principle of equality within the framework of the mandatory system.

The vision for the development of voluntary health insurance is also reflected and further elaborated in the strategic framework of state health policy, as set out in the National Health Strategy 2020¹¹. This strategic document attempts a systematic conceptualisation of the balance between the public solidarity-based system and supplementary financing mechanisms.

The National Health Strategy adopts the logic of prioritisation and structuring of healthcare service packages, while explicitly providing for the creation of appropriate conditions and incentives for the development of voluntary health insurance through medical insurance. Under Priority 2, Policy 2.1, the need for a strategic allocation of resources across healthcare service packages and sources of financing is expressly emphasised. Within the supplementary package, insured persons are envisaged as having the possibility to access services “outside the established mechanisms of financing through public funds.”

This formulation clearly links voluntary health insurance to the supplementary package and positions it as an instrument for alternative access to healthcare services. It is precisely at this point that the central question emerges—whether, and to what extent, the pursuit of closer integration of the voluntary component is compatible with the foundations of the solidarity-based public health system.

It should, however, be emphasised that the National Health Strategy 2020 constitutes a strategic and programmatic document outlining the policy priorities and directions for the development of the system, but does not establish directly applicable legal norms. In this sense, the role attributed therein to voluntary health insurance has the character of a programmatic objective, the implementation of which depends on subsequent legislative measures and on their compatibility with the established principles of mandatory participation, solidarity, and equal access to medical care. In this way, voluntary health insurance is positioned at the level of health policy as a supplementary mechanism, while its institutionalisation and limits remain subject to further normative specification.

The vision formulated at the strategic level does not remain confined to the sphere of programmatic intentions. At the beginning of 2015, the Council of Ministers submitted to the National Assembly a draft law amending and supplementing the Health Insurance Act, seeking to provide a normative implementation of the concept of structuring healthcare services into distinct packages.

It was proposed that the activities financed by the National Health Insurance Fund (NHIF)—that is, those covered within the framework of mandatory health insurance and traditionally regarded as the “basic package”—be divided into a basic and a supplementary package. At the level of legislative technique, this creates the possibility for differentiating access to medical services according to their social significance and temporal urgency.

However, it is noteworthy that the explanatory memorandum¹² to the draft law in this respect is extremely concise. It merely states that “the package of medical services financed by the NHIF is divided into a basic and a supplementary package,” while the specific medical activities included in each package are to continue to be

¹¹ See National Assembly Decision of 17 December 2015, SG No. 101 of 22 December 2015 (Bulgaria).

¹² See National Assembly of the Republic of Bulgaria, Draft Law amending and supplementing the Health Insurance Act, available at <https://www.parliament.bg/bg/bills/ID/15200>, last time consulted on 16.03.2026.

regulated by an ordinance of the Minister of Health. A more in-depth justification is lacking with regard to the relationship between the two packages, the criteria for their differentiation, and the place of supplementary voluntary insurance. This laconic approach raises the question of whether the legislative solution constitutes merely a technical restructuring of financing or introduces a deeper transformation in the logic of the mandatory health insurance model.

Following the adoption of the law, a group of Members of Parliament referred the matter to the Constitutional Court, seeking a declaration of unconstitutionality of the adopted amendments. The applicants argued that the division of the package of healthcare services into a basic and a supplementary package is contrary to the principle of the social state.

The principles of social justice, security, solidarity, and mutual assistance require that health insurance solidarity operate both in the payment of health insurance contributions and in access to medical care, which must be ensured on an equal basis. The establishment of two packages, subject to different conditions and procedures for access, is perceived as an impermissible differentiation of access and as a form of discrimination.

In its decision, the Constitutional Court does not, in principle, deny the possibility of structuring healthcare services into distinct packages. The Court holds that such an approach may be compatible with the model of mandatory health insurance, including in the presence of supplementary mechanisms such as medical insurance contracts. The main issue, according to the Court, arises from the manner in which this concept has been implemented legislatively.

A lack of clear criteria for distinguishing between the “basic” and the “supplementary package” was identified, as well as deficiencies in the regulation concerning the financial coverage of the respective activities. The direct authorisation of the Minister of Health, by means of an ordinance, to determine the content of the packages was regarded as an impermissible delegation of legislative powers and as a violation of the principle of separation of powers.

Following the delivery of the decision—which does not, in essence, exclude the possibility of differentiating packages within the framework of mandatory health insurance, but rather sanctions the chosen regulatory approach—the legislator did not undertake a new attempt at a comprehensive normative implementation of this concept. As a result, the idea of closer integration of the voluntary component into the health insurance system remains at the level of a strategic vision, without receiving stable legislative concretisation.

The current National Health Strategy 2030¹³, while preserving the overall logic of pursuing financial sustainability and reducing out-of-pocket payments, places voluntary health insurance in a less prominent position compared to the previous strategic document. Among the policy objectives up to 2030, it is indicated that the share of out-of-pocket payments and informal expenditures in the system should be reduced through the creation of incentives for the development of voluntary health insurance.

The wording is indicative: more than a decade after the normative transformation of the institution and its definitive positioning within the framework of insurance law, reference is once again made to the need to “stimulate” its development.

However, this rhetoric of encouragement is not accompanied by consistent and comprehensive legislative measures capable of establishing a sustainable model of interaction between the mandatory and the voluntary components of the system. Normative incentives remain limited and fragmented. By way of example, reference may be made to Article 28(1)(2) of the Personal Income Tax Act, which provides for a reduction¹⁴ of the annual tax base by the amount of personal contributions paid during the year for voluntary health insurance, subject to certain conditions. While such measures have an incentivising effect, they do not constitute an independent policy for the structural integration of voluntary health insurance into the healthcare system.

In this context, particular importance attaches to the analysis of the applicable legal framework, which determines the actual legal parameters of voluntary health insurance in Bulgaria.

¹³ See National Assembly Decision of 18 April 2024, SG No. 37 of 26 April 2024 (Bulgaria).

¹⁴ See V. Panteleeva, *Praven rezhim na mestnite danatsi*, Mediatech Publishing House, Pleven, 2023 (in Bulgarian), p. 4: “The tax reliefs provided for in the legislation constitute an instrument for achieving a fair distribution of the tax burden” (author’s translation).

2.5. Applicable legal framework of voluntary health insurance

Beyond the strategic documents and the unsuccessful legislative attempt, it is necessary to examine the applicable legal framework within which voluntary health insurance currently operates, as well as its practical dimensions.

Voluntary health insurance is defined as an activity involving the assumption of risks related to the financial coverage of specific healthcare services and goods in exchange for the payment of premiums, on the basis of insurance contracts (Article 3 of the Health Insurance Act). Voluntary health insurance is carried out on the basis of a medical insurance contract within the meaning of Chapter Forty, Section IV of the Insurance Code.

Chapter Forty of the Insurance Code regulates classes of non-life insurance, while Section IV is entitled “Health (medical) insurance.” In this way, the legislator unequivocally positions voluntary health insurance within the framework of general insurance, rather than as an autonomous social security institution.

The medical insurance contract, regulated in Article 427 of the Insurance Code, defines the specific legal content of the legal relationship through which the voluntary element of health protection is effectively implemented. Under this contract, the insurer undertakes to cover expenses for healthcare goods and services arising from illness or accident, as well as other agreed risks, including those related to prevention, pregnancy and childbirth, or temporary loss of income due to illness or accident, as well as combinations of such cover. The law allows for different forms of indemnification, including the payment of fixed monetary sums, reimbursement of actual expenses incurred, or a combination of both mechanisms. In addition, ancillary services such as transport, specialised care, and palliative care may also be covered. An essential element of the contract is the possibility to determine a maximum limit of the insurer’s liability, either through a sum insured or by limiting the scope and extent of services for a specified period. These characteristics—contractual freedom in determining the scope of cover, limited liability, and the premium-based principle—confirm that the substantive content of voluntary health insurance follows the logic of a classical insurance legal relationship.

The Health Insurance Act does not merely define voluntary health insurance; it also expressly delineates its boundaries by identifying activities which—although closely related in subject matter—do not fall within its scope. These include medical insurance contracts concluded in connection with travel outside the territory of Bulgaria. Also excluded is the activity of healthcare providers under contracts with natural or legal persons for the provision of medical services with predefined types, scope, and prices.

Through this distinction, the legislator clearly separates voluntary health insurance within the meaning of the Health Insurance Act from other forms of health coverage or contractual arrangements in the field of medical services. These constitute independent insurance products or service contracts that do not form part of the health insurance framework.

The activity of voluntary health insurance may be carried out exclusively by joint-stock insurance companies licensed for the classes of insurance referred to in item 2, or in items 1 and 2 of Section II, letter “A”, of Annex No. 1 to the Insurance Code. Annex No. 1 sets out the classes of insurance, with Section II covering non-life insurance classes. Letter “A” contains a classification of risks according to the relevant insurance class. In this way, voluntary health insurance is positioned within the system of non-life insurance.

Under the “Accident” risk, the insurer may provide fixed monetary sums, indemnities, or a combination of both mechanisms. Under the “Sickness” risk, analogous forms of indemnification are provided.

The regulatory framework governing voluntary health insurance also predetermines the nature of the control mechanisms applicable to its operation. These may be broadly distinguished into two areas—general insurance supervision and specialised oversight. This two-tier control framework reflects the dual nature of the institution—on the one hand, as an insurance activity, and, on the other, as a mechanism aimed at financing and securing access to medical services.

Insofar as voluntary health insurance is carried out by joint-stock insurance companies, a key role is played by the Financial Supervision Commission (FSC). Under its governing statute, the Commission constitutes a specialised state authority responsible for the regulation and supervision¹⁵ of supervised entities in the non-banking financial sector¹⁶. In this capacity, the Commission exercises state insurance supervision under the

¹⁵ See S. Penov, *Kurs po finansovo pravo – spetsialna chast*, University Press “St. Kliment Ohridski”, Sofia, 2021 (in Bulgarian), pp. 409–428.

¹⁶ Within the meaning of the Financial Supervision Commission Act, financial markets include the securities market and the market for insurance and social security services.

Insurance Code, including in relation to companies licensed for the classes of insurance through which voluntary health coverage is provided. Its supervisory powers encompass both the granting and withdrawal of licences, as well as ongoing control over solvency, investment policy, and the protection of insurance service users, among other aspects.

The Health Insurance Act provides for the so-called “medical control”—a term that may raise certain reservations¹⁷ from a systematic perspective, yet has been adopted by the legislator. This control is exercised by the Executive Agency “Medical Supervision” and concerns not the financial stability of insurers, but the lawfulness and the actual provision of healthcare services agreed under medical insurance contracts. The Agency monitors whether the insurers referred to in Article 83(1) of the Health Insurance Act ensure the provision of healthcare services in accordance with the terms of the insurance contract. It also prepares an annual report to the Minister of Health on the state and overall functioning of health insurance, including voluntary health insurance. In this sense, medical control performs the function of sector-specific monitoring aimed at safeguarding the public interest in the field of health protection.

The law also provides for coordination between the Executive Agency “Medical Supervision” and the Financial Supervision Commission (FSC). The Agency provides the Deputy Chairperson of the FSC, in charge of the Insurance Supervision Division, with information obtained in the exercise of its powers, including information concerning natural and legal persons or healthcare establishments carrying out activities related to voluntary health insurance without the required licence. Upon explicit request, it prepares opinions on the content and enforceability of medical insurance contracts. This framework demonstrates a functional interaction between financial supervision and the so-called medical control.

For the purpose of exercising its powers, the Agency is entitled to request and examine contracts concluded between insurers and healthcare providers. The National Health Insurance Fund and insurers are required to submit semi-annual reports containing data on the number of persons served, as well as the type and scope of services provided. Insurers must also provide a list of the healthcare providers with whom they have concluded contracts, along with information necessary for health statistics and for monitoring the health status of the population. Access to personalised data is granted exclusively to Agency officials, who may use such data solely for the performance of their supervisory functions.

Officials of the Executive Agency “Medical Supervision” are vested with powers to conduct on-site inspections at insurers and healthcare establishments and may request the necessary documents and information. Insurers and healthcare establishments are obliged to cooperate. Thus, alongside financial supervision, a specialised mechanism is established to ensure the lawfulness and quality of medical services within the framework of voluntary health insurance.

The regulatory framework delineates the institutional boundaries of voluntary health insurance but does not provide a complete picture of its actual position within the structure of payments for medical services. It is therefore also necessary to examine statistical data on the development of the voluntary health insurance (medical insurance) market, which make it possible to assess the actual scope and significance of the voluntary component.

2.6. Scope, structure and dynamics of voluntary health insurance in Bulgaria (2023–2024)

The present analysis is based on data from the Annual Report on the State and Overall Activity of Health Insurance in the Republic of Bulgaria for 2023, prepared by the Executive Agency “Medical Supervision”, as well as on the data for 2024 contained in the subsequent annual report of the Agency. On the basis of these sources, an analysis is carried out of the scope, structure and dynamics of voluntary health insurance in Bulgaria.

According to data from the Financial Supervision Commission, as of the end of 2023, 24 insurance undertakings were carrying out non-life insurance activity in Bulgaria, of which 14 offered sickness insurance. Within this class of insurance, seven types of health insurance packages are offered: “Health improvement and disease prevention”, “Outpatient medical care”, “Inpatient medical care”, “Reimbursement of expenses”, “Dental services / dental care”, “Services related to accommodation and other additional conditions in the provision of medical care”, and “Other health insurance packages”.

¹⁷ See M. Radeva, *Printsipi na zadalzhitelnoto zdravno osiguruvane*, Academic Publishing House “Ruse University”, Ruse, 2025 (in Bulgarian), p. 187.

The data for 2024 indicate that the number of insurance undertakings offering sickness insurance remains unchanged, while a similar range of health insurance packages is maintained. This points to a relative stability of the market in terms of participants and the product framework of voluntary health insurance. Both in 2023 and in 2024, insurers offering between five and six packages prevail, with the packages “Other health insurance packages” and “Services related to accommodation and other additional conditions in the provision of medical care” being the least frequently offered. This reveals a high degree of structural similarity in the insurance coverage provided and confirms the relative stability of the product model on the voluntary health insurance market.

The data for 2023 show an expansion of the voluntary health insurance market. The total number of insured persons under sickness insurance increased from 439,999 in 2022 to 486,839 in 2023, representing a growth of 10.65%. This increase indicates a clear upward trend in the demand for voluntary health insurance. The data for 2024 confirm the continuation of this upward dynamic, with the total number of insured persons reaching 498,383, which represents an increase of 2.37% compared to 2023. At the same time, a significant slowdown in the growth rate is observed—from 10.65% in 2023 to 2.37% in 2024—which may be regarded as an indication of a transition to a more moderate phase of market development.

The distribution of insured persons by age groups shows a strong concentration within the active age group of 18–64 years. In 2023, this group included 447,934 persons, representing over 90% of all insured persons. In 2024, this structure is preserved, with the number of insured persons in the 18–64 age group reaching 457,058, or approximately 91.7% of the total number of insured persons. This proportion clearly indicates that voluntary health insurance is used predominantly by the economically active population.

The reason for this lies in the mechanism of product distribution. A significant share of insurance contracts is concluded as group corporate contracts, whereby employers provide voluntary health insurance for their employees. The data for 2024 confirm the persistence of this trend, with group contracts remaining the main distribution channel. Consequently, the majority of insured persons belong to the working-age population.

At the same time, an increase is observed in the number of insured persons in the group of children and young people (0–17 years). Their total number increased from 24,753 in 2022 to 29,178 in 2023, and reached 31,004 in 2024 (approximately 6.2% of all insured persons). This trend may be explained by the inclusion of family members of insured employees in corporate contracts.

An increase is also observed in the age group above 65 years, although its relative share remains low. The total number of insured persons in this group rose from 8,124 in 2022 to 9,727 in 2023, reaching 10,321 in 2024 (approximately 2.1% of all insured persons). The limited participation of persons in this age group may be explained both by the financial burden of the product and by the fact that, in most cases, health insurance contributions for persons over 65 are covered by the state.

Despite the increase in the number of insured persons, approximately 7.5% of the population of Bulgaria¹⁸ was covered by voluntary health insurance in 2023. According to current demographic data, the population of the country at the end of 2024 was 6,437,360¹⁹, which implies that the coverage of voluntary health insurance reached approximately 7.7%. This indicates a slight increase in the relative share of insured persons. Despite this positive dynamic, the share remains low, demonstrating that voluntary health insurance continues to occupy a limited position within the structure of healthcare financing, covering less than one tenth of the population. In this sense, voluntary health insurance functions primarily as a complementary mechanism to the system of mandatory health insurance, used mainly by economically active individuals included in group corporate contracts.

The data show a clear concentration of insured persons in several main health insurance packages. In 2023, the most widely used package was “Outpatient medical care”, covering 381,411 persons, followed by “Inpatient medical care” with 359,604 persons and “Reimbursement of expenses” with 288,020 persons.

In 2024, however, a restructuring is observed in the distribution of insured persons across health insurance packages. The largest number of insured persons is recorded under the “Inpatient medical care” package—377,896 persons, representing an increase of 5.09% compared to 2023. The “Outpatient medical care” package

¹⁸ According to data from the National Statistical Institute, the population of Bulgaria at the end of 2023 was 6,445,481 persons.

¹⁹ National Statistical Institute, Population of the Republic of Bulgaria as of 31 December 2024, available at https://www.nsi.bg/file/28603/Population2024_F59F6N4.pdf, last time consulted on 16.03.2026.

ranks second with 370,499 persons, showing a decrease of 2.86%. The “Reimbursement of expenses” package remains in third place with 268,329 persons, reflecting a decline of 6.84% compared to the previous year.

These data indicate a shift in the structure of demand for insurance coverage, expressed in the increasing relative importance of inpatient medical care at the expense of outpatient care and reimbursement of expenses. This dynamic may be interpreted as an indication of increased sensitivity to more serious health risks or as a result of the adaptation of insurance products to the needs of insured persons.

The analysis of the data for the period 2023–2024 makes it possible to outline the main patterns in the use of the different health insurance packages within voluntary health insurance, as well as the relationship between the scope of coverage and the intensity of healthcare service utilisation.

Under the “Outpatient medical care” package, in 2023, medical services were used by 153,070 insured persons, while the total number of claims paid reached 660,996. On average, approximately four claims per insured person were recorded for the year. The number of persons using the service increased by 1.88% compared to 2022. The data for 2024 show a significant expansion in the scope of utilisation of this package. The number of insured persons who used medical services reached 172,230, representing an increase of 12.52% compared to 2023. The total number of claims paid increased to 802,066, while the average number of claims per insured person remained at approximately four per year.

This dynamic shows that the increase in the number of users is not accompanied by a change in the intensity of service utilisation, which suggests a relatively stable pattern of consumption. Outpatient medical care thus emerges as one of the most widely used components of voluntary health insurance, characterised by broad coverage and a predictable frequency of use. This conclusion should be considered in conjunction with the structure of insurance coverage in 2024, in which the “Inpatient medical care” package occupies a leading position. This points to a distinction between the structure of coverage and the actual use of healthcare services—while inpatient care is more widely included in insurance products as protection against risk, outpatient care remains the most frequently used type of medical service.

Under the “Inpatient medical care” package, in 2023, medical services were used by 11,326 insured persons. The total number of claims paid amounted to 17,994, corresponding to an average of approximately 1.6 claims per insured person for the year. The data for 2024 show an increase in the number of persons using inpatient medical care, reaching 18,181. This represents a significant increase compared to the previous year. The total number of claims paid also increased to 21,311, resulting in an average of approximately 1.2 claims per insured person. This dynamic indicates an expansion in the scope of utilisation of inpatient medical care combined with a decrease in the intensity of use. The increase in the number of users may be interpreted as an indication of broader access or more active use of this type of service, while the lower average number of claims reflects the specific nature of inpatient care as a service with lower frequency but higher severity per event.

In comparison with outpatient medical care, a clear distinction in the consumption model emerges—while outpatient care is characterised by high frequency and regularity of use, inpatient medical care is used significantly less often but is associated with more serious health events. This confirms the role of the inpatient package as an instrument for covering higher health risks rather than as a means of financing routine medical services.

Under the “Reimbursement of expenses” package, in 2023, medical services were used by 51,886 persons, with the number of claims paid reaching 111,338. On average, approximately two claims per insured person were recorded, while the total number of claims paid under this package increased by 15.54% compared to 2022. The data for 2024 show a continuation of the upward trend. The number of insured persons who used medical services increased to 59,640, while the number of claims paid reached 128,826, representing an increase of 15.71% compared to the previous year. The average number of claims per insured person remained at approximately two per year. This dynamic indicates both an expansion in the scope of utilisation and stability in the intensity of use. Compared to the other packages examined, the “Reimbursement of expenses” package is characterised by a lower frequency of use but a clear upward trend, reflecting its flexible function in covering individual healthcare expenditures.

In 2023, the largest number of claims—911,002—was paid under the “Health improvement and disease prevention” package. On average, approximately ten claims per insured person were recorded for the year. The data for 2024 indicate a change in the dynamics, although the package remains among those with a high number of claims, being surpassed by outpatient care. A decrease of 2.10% is observed in the number of insured persons under this package compared to 2023. At the same time, the number of insured persons who used medical

services reached 90,852, representing an increase of 2.54% compared to the previous year. The total number of claims paid decreased to 800,703, while the average number of claims per insured person declined to approximately nine per year. This dynamic indicates a simultaneous decrease in the number of insured persons and an expansion in the actual use of services. The increase in the number of users combined with a decrease in the total number of claims suggests broader but more moderate utilisation of services within the package. A full interpretation of this trend would require additional data on the content and conditions of the specific insurance coverage. Despite this change, the importance of the package remains significant, as prevention plays a key role in the early detection and limitation of health risks, as well as in reducing the need for more costly and intensive medical interventions.

The data for 2023 and 2024 show that, despite the differing scope and heterogeneous dynamics of the individual packages, a general trend towards increased utilisation of healthcare services can be identified, while the dynamics of the number of claims paid remain differentiated depending on the nature of the respective package. Within this trend, particular attention should be paid to the data concerning the “Dental services” package, given that the coverage of dental care under the mandatory health insurance system is limited in scope and extent.

In 2023, an increase of 15.52% is observed in the number of insured persons under the “Dental services” package compared to 2022, exceeding the overall growth rate of insured persons under sickness insurance (10.65%). It should also be noted that two of the insurance undertakings do not offer this package. The higher growth rate indicates increasing interest in covering dental services through voluntary health insurance. In 2023, 33,559 insured persons used medical services under this package, while the number of claims paid amounted to 66,282, corresponding to an average of approximately two claims per insured person. Compared to 2022, the number of users increased by 13.73%, and the number of claims by 6.55%.

The data for 2024 confirm and further reinforce this trend. The number of insured persons under the “Dental services” package increased by 12.48% compared to 2023, while again two insurance undertakings did not offer this package. The number of insured persons who used medical services reached 47,698, representing an increase of 24.97% compared to 2023, and the number of claims paid rose to 82,200 (an increase of 24.02%). The average number of claims per insured person remained at approximately two per year.

This dynamic indicates both an expansion in the scope of utilisation and a relatively stable intensity of use. The increase in both the number of insured persons and the actual use of services may be interpreted as an indicator of a growing need for additional financing of dental care beyond the scope of mandatory health insurance. In this sense, the “Dental services” package stands out among the examined packages with a clearly expressed compensatory function, filling the gaps in the coverage of dental services within the mandatory health insurance system.

The data for 2023 and 2024 show that the voluntary health insurance market in Bulgaria continues to develop, albeit with different intensity across the two periods under review. While in 2023 a more pronounced increase is observed both in the number of insured persons and in the use of covered healthcare services, in 2024 the upward dynamic continues but with a significant slowdown in the growth rate. Nevertheless, the scope of voluntary health insurance remains relatively limited, covering less than 10% of the population even in 2024.

Particularly indicative are the differences between the individual health insurance packages, as well as the divergence between the scope of insurance coverage and the actual use of healthcare services. While in 2024 the “Inpatient medical care” package occupies a leading position in terms of coverage, the highest intensity of utilisation is observed in outpatient medical care, which emerges as the leading category in terms of the number of claims.

The most clearly expressed functional specificity is observed in the “Dental services” package, where a high growth rate is maintained both in the number of insured persons and in the actual use of services in 2024. This confirms that voluntary health insurance performs a compensatory role precisely in those segments of healthcare where mandatory health insurance provides more limited coverage or insufficient financing.

In this sense, the statistical data for 2023–2024 clearly outline the functional profile of voluntary health insurance in Bulgaria—relatively limited in scope in relation to the population, but directed towards covering those healthcare services for which public health insurance provides more limited coverage or funding (notably dental services), as well as towards facilitating access to medical care in services with a higher frequency of use, such as outpatient medical care.

3. Conclusions

The development of the legal framework demonstrates that voluntary health insurance in Bulgaria has undergone a significant institutional transformation. Initially introduced by the Health Insurance Act of 1998 as a supplementary mechanism to the mandatory system, following the reform of 2012 it has been gradually integrated into the regulatory framework of insurance law. The current legal regime thus establishes a specific model in which voluntary health insurance is formally positioned within the health insurance system, while the substantive legal relationship is implemented through a contract of medical insurance.

The analysis of strategic documents and legislative initiatives shows that, over the past decade, the voluntary component has consistently been present in health policy as a potential supplementary source of financing. Nevertheless, a coherent and comprehensive legislative concept defining a stable model of interaction between the mandatory health insurance system and voluntary mechanisms of health protection remains absent.

The statistical data for the period 2023–2024 confirm and further specify these findings. Although the market of voluntary health insurance demonstrates growth in the number of insured persons and an expansion in the use of covered health services, its overall scope remains limited, covering a relatively small share of the population. At the same time, a clear distinction emerges between the structure of insurance coverage and the actual use of medical services: while hospital care occupies a leading position within insurance products as protection against risk, outpatient medical care and dental services are characterized by the highest frequency of actual utilization.

This functional differentiation indicates that voluntary health insurance performs predominantly a compensatory role, targeting those segments of healthcare where public financing is limited or access is constrained. In practice, voluntary insurance is primarily used as a corporate benefit for economically active individuals, which further explains its limited overall coverage.

In this context, voluntary health insurance in Bulgaria operates as a supplementary mechanism with a limited scope, aimed at expanding access to specific healthcare services without substituting the public guarantee of the basic healthcare package. The clear normative delineation between these two levels of health protection remains essential for preserving the solidarity-based character and the social function of the Bulgarian health insurance system.

This study contributes to clarifying the legal nature and systemic position of voluntary health insurance by proposing an analytical model distinguishing between the social insurance and insurance law elements within healthcare protection, complemented by an empirical analysis of patterns of service utilization. From a practical perspective, the findings may support the development of a more consistent legislative and policy framework for the voluntary component.

Future research should further explore the interaction between public financing and voluntary mechanisms, including through comparative legal analysis and evaluation of the effectiveness of different models of supplementary health coverage. Particular attention should be given to achieving a normative balance between encouraging voluntary participation and ensuring equal access to healthcare within the solidarity-based system.

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CONSTITUTIONAL ERRORS AND OMISSIONS IN ROMANIA: IMPLICATIONS FOR NATIONAL SOVEREIGNTY AND THE DESIGN OF THE ELECTORAL PROCESS

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Abstract

Using scientific concepts from the field of management systems promoted by ISO (the International Organization for Standardization), this paper challenges and refutes the legal and political theories that excuse or justify the errors and omissions found in the text of the Romanian Constitution concerning the acquisition and retention of state power.

The methodology compares how the people—holders of national sovereignty—should act toward their representatives, who are meant to serve them, with how an owner of resources acts toward employees in an economic setting. The analysis shows that, because the system for exercising national sovereignty is incompletely designed, the people’s “employees” (their representatives) can produce “products” (laws) that run against the people’s interests. They can do so even though the people are, in principle, the owners of the decision-making process for granting and withdrawing representative legitimacy. In practice, these representatives can replace the people in the decision to withdraw legitimacy and can even alienate the people’s property, among other consequences. This is made possible because such constitutional errors and omissions are placed under the protection of the rule of law and the supremacy of law.

The study further concludes that the system for exercising national sovereignty—including the electoral process—is incomplete because it provides a mechanism for the people to grant legitimacy to representatives at fixed moments (through a positive electoral vote), but not a mechanism to withdraw that legitimacy after elections from representatives they no longer trust (through a post-electoral negative vote as a corrective action), in response to those representatives’ legislative output. As a result, the freedom of voting is only simulated in practice, and the will of the people does not in fact constitute the basis of state power.

Keywords: *Constitution, national sovereignty, electoral process, constitutional errors, constitutional omissions, legislative fraud.*

1. Introduction

What matter does the paper cover?

This paper addresses the identification—through the use of an alternative methodology—of certain errors and omissions within the text of the social contract between the governing authorities and the people, namely the Constitution. It focuses particularly on those provisions that impact the acquisition and retention of state power, as well as on the establishment of the hierarchy of powers within the overall social system.

The study points at the incomplete design of the electoral process, which fails to incorporate the expression of the will of enfranchised citizens through a post-electoral voting mechanism of a corrective nature. Such a mechanism would be applicable in situations where the outcomes of legislative activity carried out by elected

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representatives are perceived by citizens as being contrary to the public interest. This deficiency highlights the absence of a balanced delegation of power between the people and the governing authorities.

Why is the subject important?

This study is significant because political decisions that diverge from the will of the people undermine national sovereignty, subjecting the population to consequences to which they have never explicitly consented.

To illustrate this issue, we refer to a single example: the assumption by governing authorities of external public debt without the explicit consent of the people. In this regard:

- Considering the austerity measures imposed on the Romanian population between 1981 and 1989 by the political class for the repayment of previously accumulated external debt (1971–1982), which peaked at 13 billion USD in 1982 (equivalent to approximately 40 billion EUR /2026 when adjusted for cumulative inflation), a figure three times smaller than the external public debt existing at the time of writing;
- Observing the repeal of Law No. 3/1989, which had prohibited Romanian entities from contracting foreign loans, through Decree-Law No. 9 of 31 December 1989, issued by the Council of the National Salvation Front, without the explicit consent of the Romanian people;
- Noting the re-emergence, after 1992 and likewise without explicit public consent, of external public debt¹, which reached 126.4 billion EUR in January 2026 out of Romania's total external debt of 229.3 billion EUR—thus rendering the sacrifices endured by the Romanian population during 1981–1989 futile;
- Observing that experts in relevant fields (legal, political, economic, etc.) tend to regard this state of affairs as consistent with the public interest.

In order to prevent the suffering caused by the perpetuation of austerity policies and the risk of sovereign default, it has become necessary to involve other members of society—independent researchers possessing knowledge and skills from various scientific domains—capable of providing an alternative methodology for validating the legal and political concepts upon which political authorities have based decisions to incur public debt without explicit popular consent.

What is our approach?

By employing scientific concepts from the field of management systems promoted by ISO standards, the paper challenges the legal and political theories that support the identified errors and omissions concerning the acquisition and maintenance of state power in the Romanian Constitution.

The argumentation aimed at highlighting the errors and omissions in the redesign of this process in 1991 relies on publicly available concepts derived from the international field of management systems. Given that these concepts are not yet widely integrated into socio-humanistic education, it is argued that the ideas embedded in the seven constitutional articles affected by such errors and omissions were adopted—lacking Romanian origin—without fully anticipating their potential negative consequences.

(4) What is the relation between this paper and the existing specialized literature?

To the best of our knowledge, the application of ISO-promoted management systems concepts to demonstrate the incomplete design of the electoral process—as well as the argument that post-electoral voting for the withdrawal of representative legitimacy should be carried out through individual mechanisms, outside collective voting procedures—constitutes a pioneering approach.

The withdrawal of representative legitimacy is practiced in other, more advanced democratic systems under the concept known as “recall voting.” However, such mechanisms are typically exercised through collective procedures (e.g., petitions or referenda) and within fixed time intervals.

¹ A se vedea articolul <https://www.bnr.ro/25342-2026-03-17-balanta-de-plati-si-datoria-externa-ianuarie-2026>.

2. Analysis of the Articles of the Romanian Constitution Concerning the Acquisition and Retention of State Power, as well as the Establishment of the Hierarchy of Powers within the Entire Social System

The analysis simultaneously addresses a set of seven interrelated constitutional provisions, which describe the origin of power as deriving from the will of individual persons—collectively referred to as “the people”—as well as the hierarchy of powers within the overall social system. These provisions include: Article 2 – Sovereignty; Article 1 – The Romanian State; Article 80 – The Role of the President; Article 90 – The Referendum; Article 36 – The Right to Vote; Article 72 – Parliamentary Immunity; and Article 84 – Incompatibilities and Immunities.

2.1. Article 2

Current Text in the Constitution of Romania:

Table 1: Sovereignty – The Constitution of Romania

Sovereignty	ARTICLE 2 (1) National sovereignty belongs to the Romanian people, who exercise it through their representative bodies, constituted by free, periodic, and fair elections, as well as through referenda. (2) No group or individual may exercise sovereignty in their own name.

Source: Official Website of the Chamber of Deputies of Romania ²

2.1.1. Design error 1

This design error is found in paragraph (1) of Article 2 and consists of a substitution, insofar as the Romanian people do not exercise their sovereignty through representative bodies, but rather through voting, which constitutes the actual action in objective reality. This substitution is obscured behind ambiguous wording.

Omission 1 – The substitution mentioned in Section 2.1.1 has made possible the omission of the fact that individuals holding Romanian citizenship—collectively referred to as “the Romanian people”—remain holders of sovereignty even outside the days on which elections or referenda are held, and are therefore entitled to exercise it continuously. The following consequences arise:

- The people do not transfer sovereignty through voting; rather, they temporarily transfer to their representatives the legitimacy to exercise legislative power at the level of the state³.
- The fact that the people remain holders of sovereignty even after the electoral vote does not validate the imperative⁴ mandate, which represents an alternative concept in the functioning of the electoral process.
- Only by remaining the holder of national sovereignty is it possible for the people to exercise that sovereignty through voting in referenda⁵. Otherwise, even referenda for the adoption of the Constitution would lack legitimacy, along with all the consequences that follow from this observation regarding the legitimacy of political decisions adopted after 1991.

Omission 2 – The substitution referred to in Section 2.1.1 has enabled the omission of the fact that the Parliament, as the supreme representative body of the Romanian people, has a distinct object of activity, namely that it is the sole legislative authority of the country⁶. Consequently, the will of the people cannot be exercised through Parliament, which implies that sovereignty cannot be exercised through this institution.

Legislative power is not specified in the Constitution as being a power belonging to the people. Given that legislative power is a power at the level of the state⁷, and that Parliament is defined in Article 61 of the Constitution as the supreme representative body of the people, its autonomy in relation to the state should have

² See https://www.cdep.ro/pls/dic/site2015.page?den=act2_1&par1=1#t1c0s0sba1.

³ Article 1, paragraph (4) of the Constitution of Romania.

⁴ Article 69(2) of the Constitution of Romania.

⁵ Article 90 of the Constitution of Romania.

⁶ Article 61(1) of the Constitution of Romania.

⁷ Art. 1, alineatul 3 din Constituția României

been explicitly established. In the absence of such specification, Parliament remains, in practice, an institution that conducts the legislative process as part of the public authorities, while its members are individuals vested with legitimacy through the vote of the people to exercise legislative power within that process.

This substitution of the rightful constitutional holder of national sovereignty is devoid of meaning when viewed from the perspective of the economic dimension of the social system. In economic practice, the engagement of an individual in an operational process does not imply that the employee thereby acquires ownership rights over the employer’s enterprise or permanently substitutes the owner in decision-making processes.

A comparison may also be drawn between the role of the sovereign people and the shareholders of an economic organization. One might argue that the entity entitled to implement corrective actions at the national level of the social system would be considered the governing coalition, as an equivalent of the CEO, who, within an organization, has the legitimacy to make such decisions based on a management contract. In this comparative framework, the flawed design—characterized by errors and omissions—of the constitutional process for transferring legitimacy to representatives becomes even more serious. It reveals that the equivalent of a management contract, namely the electoral program, on the one hand produces no legal consequences in the event of its breach (which may constitute a form of legislative fraud). On the other hand, what is publicly presented as the program of a governing coalition often differs from what voters were aware of at the time of elections, as it emerges only after the vote.

Consequently, various governing coalitions determined the algorithmic distribution of access to positions of power within the state and the economy, as well as the associated benefits. However, these governing coalitions were never directly voted for by the people, and the government programs resulted after negotiations were neither known to the electorate at the time of voting, nor were they confirmed by the electorate. This flawed constitutional design of the process for transferring legitimacy from the people to their representatives—concealed through the two substitutions identified in Article 2 regarding national sovereignty—violates Article 21(3) of the Universal Declaration of Human Rights, as it suggests that electoral outcomes are distorted, given that the parliamentary majority imposing legislative acts was not itself directly subjected to electoral choice.

No social actor appears prepared to manage the implications of acknowledging this second comparison. No electoral majority has ever directly voted for any of the governing coalitions formed after 1991. Such are the consequences generated by the errors and omissions embedded in the higher-order concept of national sovereignty.

In summary, from a systemic point of view, errors / design deficits are legal provisions that should not exist, but they do, whereas omissions are legal provisions that should exist but do not. Both errors and omissions have been made possible by the use of ambiguous, double-meaning language in the drafting of the Constitution.

Such ambiguity is incompatible with legislative drafting standards, which require that legal texts be clear, coherent, and intelligible, free from syntactic difficulties and obscure or equivocal passages. The actual meaning conveyed by the constitutional text reveals the errors and omissions outlined above, while masking the substitution of the people’s supreme authority as the continuous holder of national sovereignty. It is argued that the Romanian people would never have consented to relinquishing their own rights and freedoms had the constitutional text not relied on such ambiguity.

Table 2: Sovereignty – Expression of the Text without Ambiguity

Sovereignty	ARTICLE 2 (1) National sovereignty belongs to the Romanian people only on the days designated by the authorities for electoral elections or referenda; during the remaining days of an electoral cycle, national sovereignty is exercised by the governing coalition, which thereby becomes the supreme power within the social system. (2) Following the conclusion of elections, the people voluntarily transfer their sovereignty to the governing coalition. In doing so, the people relinquish their rights and freedoms, accepting that their representatives—who exercise legislative and executive power within the state—may establish any rules they deem appropriate, rather than those desired by the people; this being the essence of the free mandate⁸.

⁸ Art. 16 / CDL-AD(2019)011rev-e Report on the recall of mayors and local elected representatives, adopted of by the Council for Democratic Elections, at its 65th meeting, Venice, 20 June 2019 and by the Venice Commission at its 119th Plenary Session, Venice, 21-22 June 2019 ([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)011rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)011rev-e)).

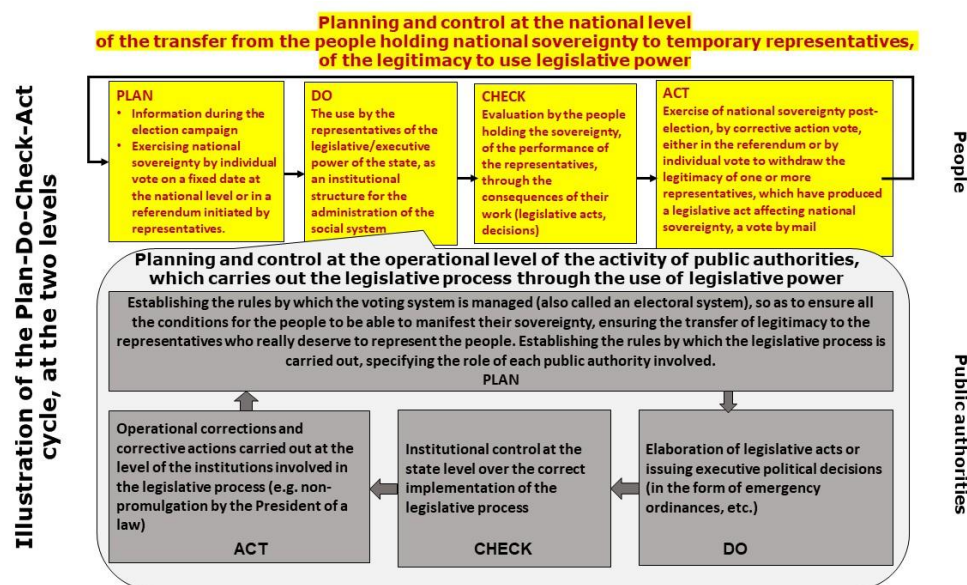


Figure 1: Illustration of the Plan–Do–Check–Act (PDCA) Cycle at Two Levels, in accordance with the concept established within management system standards⁹ used in the economic environment, which simultaneously generates effects within the social system, in contrast with the opposing concept embedded in Article 2 of the Constitution as a central element of the legislative system. This overall perspective demonstrates that the people, as the holders of national sovereignty, occupy a position of authority in relation to their representatives analogous to that of a business owner in relation to their employees.

2.1.2. Design Error 2

This error is also located in paragraph (1) of Article 2 and consists of a substitution, insofar as the Romanian people do not exercise their sovereignty through representative bodies, but rather through voting, which constitutes the actual action in objective reality. This substitution is obscured behind ambiguous, double-meaning language.

Additionally, this error lies in the use of two distinct terms to express the concept of sovereignty, namely “national sovereignty” when referring to the nation, and “sovereignty” when referring to a group or an individual. Although these terms belong to the same lexical family and are therefore equivalent, their differentiated use introduces conceptual inconsistency.

The multiplication, within the Constitution, of sovereign entities within the social system—intended to obscure the elimination of the continuous exercise of power by the people as the holders of national sovereignty—constitutes an error by substitution, given that sovereignty is, by its nature, indivisible.

Omission 3 – The previously identified errors have enabled the omission, from the voting system, of the mechanism through which the citizens may exercise their sovereignty through voting in relation to their representatives outside the days designated for elections or referenda, in a planned, collective, post-electoral manner.

This omission prevents the people from exercising their sovereignty through voting, as holders of national sovereignty (or sovereignty, as referred to in paragraph (2) of Article 2 of the Constitution), beyond the days on which elections or referenda are held.

This entails the deprivation of legal value of the possibility to exercise sovereignty post-electorally for those citizens within the people who are confronted with the consequences of legislative acts or political decisions perceived, at the individual level, as infringing upon national sovereignty.

Post-electoral voting, conceived as a corrective action, arises from the evaluation of representatives’ performance by the sovereign people and represents a vote for the withdrawal of legitimacy from one or more

⁹ Adaptation similar to Figure 1 of ISO 22000:2018.

representatives who have contributed to the adoption of a legislative act perceived—either before or after producing effects—as detrimental to the sovereignty of the people.

This omission is inconsistent with practices in the economic domain, where, upon the occurrence of a nonconformity, action is undertaken not only through corrections and corrective actions at the operational level, but also through corrective actions at the organizational level aimed at preventing recurrence (planning and control at the national level, in this case). Such measures would prevent the representative(s) responsible for the adoption of a legislative act contrary to the sovereign interest from continuing to exercise legislative power, and would implicitly prevent the respective legislative act from producing effects.

Omission 4 – As a consequence of Omission 3, it has also been omitted that post-electoral voting may be exercised individually, independently of the collective.

It is thus omitted that it is not “the people” who vote, but the individual person, the individual being the smallest entity within “the people.”

In fact, sovereignty at the level of the individual reflects the “national sovereignty that belongs to the people,” just as national sovereignty at the level of the people reflects the sovereignty expressed at the level of the individual persons who constitute it.

In reality, no vote has ever involved the entirety of “the people,” but always only parts of it, including minorities. Elections are validated regardless of the number of participants, which has enabled the transfer of legitimacy even in the absence of a majority (the smallest being a simple majority) of the people, and even by minorities (e.g., 33.24% of the total number of registered voters in the parliamentary elections of December 6, 2020). It follows that the errors and omissions identified precondition or facilitate the failure of the genuine expression of the people’s will through voting, favoring the accession to power of political parties regardless of whether they represent the will of the people. In practice, the process by which the people exercise national sovereignty through voting has been altered at all stages, not only at the moment of voting itself.

Just as any minority within the people participates in collectively scheduled voting at nationally determined moments, it equally has the right to express its will when it perceives, independently of the collective, an abuse or a deviation—through voting exercised at unscheduled moments—this being an expression of the freedom of the vote.

The fact that the people remain the holders of sovereignty even after elections does not imply that any group or individual may declare themselves sovereign independently of the nation¹⁰.

Through periodic collective elections, the expression of the voter’s will has thus been conditioned upon the agreement of other citizens, who may not have understood the abuse, may not have been affected by it, or may lack interest. In this way, the collective mechanism is used to prevent the expression of the will of those individuals who, based on personal experience, have understood the abusive consequences of the actions of an elected representative.

This results in a restriction of the freedom of non-violent expression of the will of any minority within the people, including that of a single individual, effectively compelling the population to express its will through street actions, which cannot produce legal effects upon elected representatives, as they are not recognized as legally valid forms of exercising sovereignty.

¹⁰ Article 2(2) of the Constitution of Romania

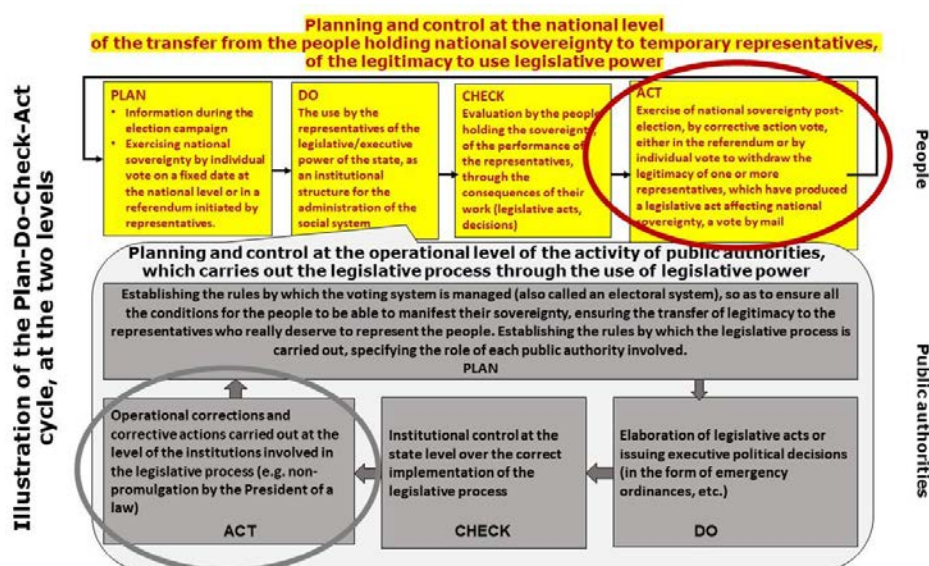


Figure 2.

Adaptation¹¹ illustrating that corrective action at the operational level of state institutions, where the legislative process is carried out, differs from corrective action at the national level, which must be exercised by the people as the holders of sovereignty. The substitution-based omission of this distinction constitutes a particularly serious deficiency due to its consequences for sovereignty. This management system concept is implemented in millions of organizations worldwide¹².

As a result of the above analysis, the proposed text for Article 1 becomes:

Table 3: Sovereignty – Revised Text

Sovereignty	ARTICLE 2 (1) National sovereignty belongs to the Romanian people. (2) The Romanian people exercise their national sovereignty through the vote of the electorate. (3) Voting may be exercised through free, periodic, and fair elections, by referendum, as well as through an individual vote for the withdrawal of legitimacy from one or more representatives prior to the legal expiration of their representative mandate, such vote being carried out by correspondence. (4) No group or individual may exercise sovereignty in their own name.

2.2. Article 1

Current Text in the Constitution of Romania:

Table 4: The Romanian State – The Constitution of Romania

The Romanian State	ARTICLE 1 (1) Romania is a national, sovereign and independent, unitary and indivisible state. (2) The form of government of the Romanian state is the republic.

¹¹ EN ISO 9001:2015 and ISO/DIS 9001:2025, Clause 10.2; a requirement common to all management system standards based on ISO/IEC Directives, Part 1 – Consolidated ISO Supplement, Appendix 2 (normative), Clause 10.1 – Nonconformity and Corrective Action. (<https://www.iso.org/directives-and-policies.html>)

¹² See <https://www.iso.org/the-iso-survey.html>

	(3) Romania is a state governed by the rule of law, democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of human personality, justice, and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the December 1989 Revolution, and are guaranteed. (4) The state is organized according to the principle of the separation and balance of powers—legislative, executive, and judicial—within the framework of constitutional democracy. (5) In Romania, the observance of the Constitution, its supremacy, and the laws is mandatory.

This formulation is a consequence of Error 2.

The multiplication, within the Constitution, of sovereign entities in the social system—intended to obscure the elimination of the continuous exercise of power by the people as the holders of national sovereignty—constitutes an error by substitution, given that sovereignty is indivisible. It has already been established that two sovereigns cannot simultaneously exist within the same social system.

Omission – This also entails the omission of the recognition that individual persons—collectively referred to as “the people”—are the holders of national sovereignty / sovereignty.

As a result of the above analysis, the proposed text for Article 1 is as follows:

Table 5: The Romanian State – Revised Text

The Romanian State	ARTICLE 1 (1) Romania is a national state, sovereign in the name of the national sovereignty that belongs to the Romanian people, independent, unitary, and indivisible. (2) The form of government of the Romanian state is the republic. (3) Romania is a state governed by the rule of law, democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of human personality, justice, and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the December 1989 Revolution, and are guaranteed. (4) The state is organized according to the principle of the separation and balance of powers—legislative, executive, and judicial—within the framework of constitutional democracy.

2.3. Article 80

Table 6: The Role of the President – The Constitution of Romania

The Role of the President	ARTICLE 80 (1) The President of Romania represents the Romanian state and is the guarantor of national independence, unity, and the territorial integrity of the country. (2) The President of Romania ensures the observance of the Constitution and the proper functioning of public authorities. For this purpose, the President exercises a mediating function between the powers of the state, as well as between the state and society.

- Omission – This entails the omission of the recognition that individual persons—collectively referred to as “the people”—are the holders of national sovereignty / sovereignty.

Table 7: The Role of the President – revised text

The Role of the President	ARTICLE 80 (1) The President of Romania represents the Romanian state in the name of the Romanian people, the holders of

	national sovereignty, and is the guarantor of national independence, unity, and the territorial integrity of the country. (2) The President of Romania ensures the observance of the Constitution and the proper functioning of public authorities. For this purpose, the President exercises a mediating function between the powers of the state, as well as between the state and society.

2.4. Article 90

Table 8: The Referendum – The Constitution of Romania

The Referendum	ARTICLE 90 The President of Romania, after consulting Parliament, may request the people to express, by referendum, their will on matters of national interest.

The substitution of the people in the post-electoral decision-making process, as well as the outcome of the present constitutional approach to sovereignty, has evidently contributed to the emergence of corruption and, implicitly, to consequences that, over a period of 36 years, have significantly affected the people as the holders of national sovereignty.

The use of the referendum mechanism to validate the loss of the fundamental right of the people—holders of national sovereignty—to freely express their will regarding the granting or withdrawal of legitimacy of their representatives throughout the entire electoral cycle represents, arguably, one of the most critical weaknesses of the legislative process, as it may be classified as a form of legislative fraud. It is argued that the elimination or restriction of fundamental rights and freedoms should not be subject to referendum.

It has also been observed that the concept of legislative fraud has not been defined within the legislative system, although the concept of fraud—understood as deception—is commonly applied in relation to any product or service that has been altered for the purpose of obtaining personal gain or causing loss to another party. In this context, legislative fraud may be defined as a legal act adopted through the exercise of legislative power by elected representatives, which constitutes a form of deception aimed at obtaining personal benefits at the expense of violating the rights of the people as holders of national sovereignty.

This concept would be applicable only in situations where, despite the communication of the conclusions resulting from the application of this alternative methodology, such conclusions are not taken into account by representatives and no public debate is initiated.

Table 8: The Referendum – the revised text

The Referendum	ARTICLE 90 (1) The President of Romania, after consulting Parliament, may request the people to express, by referendum, their will on matters of national interest. (2) The elimination or restriction of fundamental rights and freedoms may not be the subject of a referendum.

2.5. Article 36

Table 10: The Right to Vote under the Constitution of Romania

The Right to Vote	ARTICLE 36 (1) Citizens have the right to vote from the age of 18, provided that this age is reached by or on the day of the elections. (2) Persons who are legally declared mentally incapacitated or placed under interdiction, as well as persons convicted by

	a final judicial decision of the loss of electoral rights, shall not have the right to vote.

Post-electoral voting for the withdrawal of the legitimacy of a representative before the expiration of the mandate is practiced, in various forms, in several states, and is already in force in Romania, at local level, for the recall of mayors, as well as at the highest level, for the position of President. However, considering the objective of placing the will of the people at the foundation of state power, in accordance with the Universal Declaration of Human Rights, it is necessary to conceptualize such a mechanism in a simple and easily applicable manner, taking into account the evolution of the social system and its current level of performance—reflected, for example, in the economic sphere through management systems implemented in all significant enterprises in Romania.

The mechanism of voting by correspondence already exists; however, respect for public authorities and for representatives would likely increase if the people were aware that they possess a legal means to halt situations in which certain power groups impose legislative acts and political behaviors that infringe upon the sovereignty of the people and, implicitly, of Romania.

It is asserted that the Romanian people, in their majority, possess the civic responsibility to use such a right only when they deem necessary, in order to produce effects that are genuinely required within society. In this way, a beneficial transformation could occur, shifting from street protests to more civilized actions with legal effect.

The proposed mechanism consists of a post-electoral corrective voting process (recall voting) exercised by the electorate—not collectively, but individually—when a citizen considers themselves directly harmed by the outcomes of the actions of one or more representatives. This mechanism is not derived from classical typologies of democracy studied in political science, but rather emerges as a necessary solution inspired by the functioning of management systems.

Social systems that lack such corrective mechanisms tend to experience periodic failure when accumulated errors render continued functioning unsustainable. In such situations, conflicts may escalate into violence at social scale, including wars. It is therefore preferable that such issues be addressed in a timely and non-violent manner, through the continuous exercise of voting.

Table 11: The Right to Vote – revised text

The Right to Vote	ARTICLE 36 (1) The will of the people constitutes the basis of state power. (2) Citizens have the right to vote from the age of 18, provided that this age is reached by or on the day of the elections. (3) Persons who are legally declared mentally incapacitated or placed under interdiction, as well as persons convicted by a final judicial decision of the loss of electoral rights, shall not have the right to vote. (4) The freedom of voting is ensured through the exercise of the right to vote throughout the entire electoral cycle, both at scheduled moments—within electoral processes or by referendum—as well as post-electorally, at unscheduled moments, through an individual vote for the withdrawal of legitimacy, carried out by correspondence. (5) Votes for the withdrawal of legitimacy of individually elected representatives shall result in the immediate withdrawal of representative legitimacy when the Permanent Electoral Authority confirms that their number exceeds by one the number of valid votes obtained by that representative in the electoral process. The vacant representative seat shall be filled by the candidate who obtained the next highest number of valid electoral votes.

	(6) Votes for the withdrawal of legitimacy of representatives elected on party lists shall constitute dual votes, addressed both to the representatives and to the political organization to which they belong, resulting in the immediate withdrawal of representative legitimacy for the entire electoral list of the political party when the Permanent Electoral Authority confirms that their number exceeds by one the number of valid votes obtained by that political party in the electoral process. The vacant representative seats shall be filled by the party's candidates who obtained the next highest number of valid electoral votes, the process being repeated until all vacant seats are filled. (7) Within a single electoral cycle, a voter may exercise the vote for the withdrawal of legitimacy only once for each representative. (8) A member of a parliamentary political party may not vote for the withdrawal of legitimacy of representatives belonging to other parliamentary political parties, due to a conflict of interest. (9) A member of a political party that has lost its representative legitimacy as a result of votes for withdrawal of legitimacy concerning representatives elected on party lists may not, within the same electoral cycle, vote for the withdrawal of legitimacy of representatives of parliamentary political parties. (10) The Permanent Electoral Authority shall ensure the secrecy of votes cast by correspondence and shall continuously make public the status of positive votes obtained by each representative and each political party in elections, as well as the status of votes for the withdrawal of legitimacy, per representative and per political party. (11) The post-electoral vote for the withdrawal of representative legitimacy, exercised by correspondence, does not preclude the initiation of petitions, citizens' legislative initiatives, or referenda for the reasons that led to such votes, including for the purpose of revalidating the number of withdrawal votes cast, under the coordination of a joint parliamentary and citizens' committee.

2.6. Article 84

Table 12: Incompatibilities and Immunities – The Constitution of Romania

Incompatibilities and Immunities	ARTICLE 84 (1) During the term of office, the President of Romania may not be a member of any political party and may not hold any other public or private office. (2) The President of Romania enjoys immunity. The provisions of Article 72(1) shall apply accordingly.

As a consequence of the loss of legitimacy, the individual holding the mandate of representation as President of Romania also loses the immunity associated with that mandate.

Table 13: Incompatibilities and Immunities – revised text

Incompatibilities and Immunities	ARTICLE 84 (1) During the term of office, the President of Romania may not be a member of any political party and may not hold any other public or private office. (2) The President of Romania enjoys immunity, except in the situation where the Permanent Electoral Authority confirms

	the loss of legitimacy as a result of the number of votes for the withdrawal of legitimacy exceeding by one the number of valid votes obtained by the President of Romania in the electoral process. The provisions of Article 72(1) shall apply accordingly.

2.7. Article 72

Table 14: Parliamentary Immunity – The Constitution of Romania

Parliamentary Immunity	ARTICLE 72 (1) Deputies and senators shall not be held legally liable for votes cast or political opinions expressed in the exercise of their mandate. (2) Deputies and senators may be subject to criminal investigation and prosecution for acts unrelated to votes cast or political opinions expressed in the exercise of their mandate; however, they may not be searched, detained, or arrested without the approval of the Chamber to which they belong, following their hearing. Criminal investigation and prosecution may be carried out only by the Public Prosecutor's Office attached to the High Court of Cassation and Justice. Jurisdiction for trial lies with the High Court of Cassation and Justice. (3) In cases of flagrante delicto, deputies or senators may be detained and subjected to search. The Minister of Justice shall inform without delay the President of the respective Chamber of the detention and search. If the notified Chamber finds that there are no grounds for detention, it shall immediately order the revocation of this measure.

As a consequence of the loss of legitimacy, the individual holding the mandate of representation as a senator or deputy also loses the immunity associated with that mandate.

Even though voting is secret, the most significant motivation for the withdrawal of legitimacy of an elected representative lies in the impact of the outcomes of their activity on the quality of life of individual members of the people—either through the content of the legal provisions or political decisions to which they have contributed, or through the effects produced by them.

A serious situation involving the loss of a representative mandate as a result of votes for the withdrawal of legitimacy cannot be dissociated from the outcomes of that representative's activity, which have already been the subject of petitions and/or referenda.

The remaining members of Parliament must assume responsibility for maintaining the integrity of the legislative process by revalidating all normative acts and/or political decisions that have been the subject of petitions and referenda.

Table 15: Parliamentary Immunity – Reformulated Text

Parliamentary Immunity	ARTICLE 72 (1) Deputies and senators enjoy immunity, except in cases where the Permanent Electoral Authority confirms, for any deputy or senator, the loss of legitimacy of the representative mandate, as a result of the number of votes for the withdrawal of legitimacy exceeding by one the number of valid votes obtained by that deputy or senator in the electoral process. (2) Deputies and senators shall not be held legally liable for votes cast or political opinions expressed in the exercise of their mandate.

	(3) In the event of the withdrawal of the legitimacy of a representative mandate for any deputy or senator, Parliament shall revalidate all normative acts in which they were involved, where such acts have been the subject of petitions and/or referenda. (4) Deputies and senators may be subject to criminal investigation and prosecution for acts unrelated to votes cast or political opinions expressed in the exercise of their mandate; however, they may not be searched, detained, or arrested without the approval of the Chamber to which they belong, following their hearing. Criminal investigation and prosecution may be carried out only by the Public Prosecutor's Office attached to the High Court of Cassation and Justice. Jurisdiction for trial lies with the High Court of Cassation and Justice. (5) In cases of flagrante delicto, deputies or senators may be detained and subjected to search. The Minister of Justice shall inform without delay the President of the respective Chamber of the detention and search. If the notified Chamber finds that there are no grounds for detention, it shall immediately order the revocation of this measure.

3. Conclusions

3.1. The paper attempts to clarify:

- the components of the system for exercising national sovereignty, namely the electoral process and the legislative process, both functioning as interface processes between the people and the institutional structure with an administrative role, referred to as the state;
- the necessity of complementing the electoral process with a post-electoral voting mechanism of a corrective nature, in order to transform the current dysfunctional electoral process into a functional one;
- the mechanism for reopening the electoral process as a result of exercising the post-electoral vote for the withdrawal of representative legitimacy;
- the mechanism for reopening the legislative process;
- the definition of legislative fraud.

3.2. Highlighting the Constitutionally Flawed Design of the Most Important Process within the Romanian Social System

Among all the processes carried out simultaneously within state, economic, religious, civil, and family institutions that constitute the social system in Romania after 1991, there exists a single process of such importance that, being designed with errors and omissions, it has had—and continues to have—the capacity to divert all other processes of the social system from their intended functioning. This process is the transfer of legitimacy to exercise legislative and executive powers at the level of the Romanian state, from the people to local and parliamentary representatives, in the exercise of sovereignty.

This legitimacy constitutes the key to the components of personal power held by individuals with representative mandates, who come to exercise state powers in accordance with their own will: access to information, access to expertise in using that information, and access to mechanisms of reward and coercion.

This represents the actual form of power targeted, which has enabled—and continues to enable—the shaping of behavior both at the level of individual persons and of the people as a whole, through legislative outputs and their implementation in social reality. This power was intended to produce beneficial effects in the interest of the people as the holders of national sovereignty.

However, as a result of the errors and omissions identified in the seven constitutional articles—which have eliminated the post-electoral direct exercise of national sovereignty by the people—this power, at the level of individuals holding local or parliamentary mandates, has acquired the characteristics of absolute power.

By employing an alternative methodology derived from International Standards for management systems and related documentation published by the International Organization for Standardization, an attempt was made to validate the legal and political concepts used to justify, within the text of the Constitution of Romania, the delegation of power from “the people” to “representatives,” as well as the acquisition and maintenance of power within the state since 1991. As a result of this approach, these legal and political concepts were found to lack validation.

The apparent legitimacy of the legislative process, through the validation by referendum of the social contract between Romanian citizens and the Romanian state—namely, the Constitution of Romania, as the most important and complex legal document within the legislative system—persists despite the fact that the majority of the population, for various reasons, was effectively placed in the position of endorsing the restriction of its own rights and freedoms. This situation is comparable to that of an individual signing a disadvantageous contract whose hidden clauses are not understood.

In fact, within the referendum process, citizens’ consent was given under conditions of vitiated consent, as defined in civil law (Article 1.214(1): consent is vitiated by fraud when a party is misled through fraudulent acts or omissions of the other party). Law No. 67 of 23 November 1991 contained no provision allowing citizens to verify the constitutional text or to challenge its content as a social contract. As a consequence of this vitiated consent, citizens—collectively referred to as “the people”—have been unable, for 36 years and continue to be unable, to exercise their sovereignty in a manner that would allow them to withdraw, post-electorally, the legitimacy of representatives in whom they no longer have confidence.

3.3. The Paper Demonstrates the Gap between Foundational Legislative Concepts (18th Century) and Operational Concepts in the Economic Environment (21st Century)

This paper explains why the design of this process constitutes a flawed construction, using, for analytical clarity, international concepts derived from management system standards developed by the International Organization for Standardization. These concepts operate simultaneously within the same social system in which constitutional provisions concerning this process are also applied, yet they are logically and fundamentally different.

On the one hand, the Constitution is structured on concepts dating back to approximately 1792, a period when the then King of France was in power—concepts that became obsolete as early as January 21, 1793, with the fall of the monarchy, more than 200 years ago. On the other hand, the global economic environment is characterized by millions of organizations operating according to fundamentally different principles than those embedded in the Constitution. Logically, therefore, it is the legislative framework — particularly the Constitution — that requires revision..

No matter how rigorous and precise implementing legislation may be, errors and omissions within the foundational constitutional concepts regarding the acquisition of state power undermine the entire system.

The socioeconomic impact, effects on the macroeconomic, business, social, and environmental spheres, as well as cost–benefit analyses and fiscal implications for the consolidated budget, are considered secondary, as they cannot justify maintaining an electoral system that is incompletely designed and functionally deficient. Among the damages incurred by the Romanian people, only the external public debt—contracted without explicit popular consent—was mentioned in Chapter 1. A loss of 126.4 billion EUR cannot be dismissed through arguments of legislative technique, particularly given that the incomplete technical design of the electoral process has been demonstrated through concepts derived from an alternative scientific framework applicable at the global level.

3.4. Conclusions

This article represents a dissemination of efforts undertaken with the aim of fostering scientific debate and integrating valuable concepts from the field of management systems into the foundational principles governing the electoral and legislative processes. In this way, democracy, Human rights and freedoms, the supremacy of law, and the rule of law may become substantive and effective values for the citizens of Romania and for the Romanian state.

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FREE ACCESS TO PUBLIC INFORMATION IN LIGHT OF RECENT CJEU CASE LAW

Elena Emilia ȘTEFAN *

Abstract

Access to public information is a constitutional right and is internationally recognized. The state guarantees applicants the right to free access to public information, establishing the conditions and procedures to be followed under the law, as well as the remedies available in the event of a refusal. Over the years, the increased interest in the environment has led to requests to public institutions for information on the environment. Complaints made by anonymous applicants or applicants using pseudonyms pose challenges for the authorities in many respects, including the complainant's credibility and the inability to provide a response. From this perspective, the subject matter is topical and of general interest, concerning not only the scientific community but also the general public, who may find themselves in a situation where they need to submit a request for public information and must be familiar with the procedure to be followed. In this background, the scope of this study is to examine the issue of free access to public information from a legal perspective, through the lens of the CJEU's recent case law regarding the requirement to identify the applicant in requests for information on the environment. The findings of the study highlight the importance of proper conduct when submitting requests to public authorities, as well as the fact that compliance with the law on access to public information is required to all subjects of law, whether individuals or public authorities.

Keywords: *free access to public information, CJEU, public authorities, law, applicant.*

1. Introduction

In both domestic and international legal instruments¹, states have sought to develop legislation tailored to the social needs of their citizens. For example, we can find international treaties, declarations, regulations, and directives, all of which are intended to foster cooperation among states. For this reason, based on the theory of the social contract, people are increasingly interested in learning as much as possible on how the authorities carry out their duties and comply with the law, based on the idea that public authorities exist to serve the citizen.

The revised Constitution of Romania provides the following in art. 1 para. (5): "In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory". Therefore, violations of the law and fundamental rights result in the punishment of those responsible, in accordance with the forms of legal liability provided for by law. The denial of access to public information may result in a lawsuit² and compensation for damage caused by such denial. French doctrine has held that "The possibility of citizens to obtain compensation for damage attributable to the government is an essential aspect of the rule of law; given its practical significance, the entire theory of liability reflects a certain form of civilization³". In order to avoid a potential litigation, the law must be accessible to the litigant but also predictable in terms of its effects; in other words, by reading the law, the public can easily determine how to proceed in order to obtain public information. Furthermore, "law is connected to history and social environment"⁴.

In order to achieve the research scope, the paper is structured around three pillars: doctrine, legislation, and a case study. The most interesting part of the paperwork is the final section where a CJEU ruling is analyzed, namely case „Coillte” which examines the issue of requests made by anonymous applicants or applicants using pseudonyms, specifically whether or not an applicant must identify himself/herself when submitting a request

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¹ ["States are those engaged in international relations, but not in any capacity, but in the capacity of legally equal subjects of international law"] – Roxana-Mariana Popescu, Drept internațional public (International public law). Bucharest: Universul Juridic Publishing House, 2023, p. 9.

² These are administrative litigation cases and do not involve the review of the constitutionality of laws. About the first constitutional review of laws in Romania, see Cornelia Ene-Dinu, Istoria statului și dreptului românesc (History of Romanian state and law), Universul Juridic Publishing House, Bucharest, 2020, pp. 265-266.

³ Jean Rivero, Jean Waline, Droit administratif, 21^e édition, Dalloz, Paris, 2006, p.403.

⁴ Elena Anghel, Analysis of the origin and basis of custom, as a source of law in International Journal of Legal and Social Order, 4(1):12, 2024; DOI: <https://doi.org/10.55516/ijlso.v4i1.211>, visited on 10.01.2026.

in the public interest. The research methods used in the paperwork are those established in legal research, as outlined in the relevant doctrine⁵.

2. The legal framework governing public information - A brief overview

At the national level, Article 31 of the revised Constitution governs the right to information, which provides in paragraph (1): „A person's right of access to any information of public interest shall not be restricted”. At the same time, the right to information must not compromise measures to protect young people and national security. In implementing the constitutional provision, Law no. 544/2001 on free access to public information⁶ and Government Resolution no. 123/2002 approving the Methodological Guidelines for the Implementation of Law no. 544/2001 on free access to information of public interest, normative acts published in the Official Journal⁷, draw up the general framework governing access to public information.

The terms used by Law no. 544/2001 shall be referred to in art. 2:

- public authority⁸ and institution - any public authority or institution, as well as any autonomous agency that uses public funds and operates within the territory of Romania, in accordance with the Constitution, para. (1);
- any information concerning the activities of a public authority or resulting from such activities, regardless of the medium, form, or manner in which the information is expressed - para. (2).

According to Law no. 544/2001, every public authority and institution is required to proactively disclose certain information of public interest, such as: “normative acts governing the organization and operation of the public authority or institution; the organizational structure, the responsibilities of the departments, the operating hours, and the public reception schedule of the authority; the first and last names of the members of the public authority’s management and of the public official responsible for disseminating public information; contact data of the public authorities (name, office, telephone number, fax, email, website); financial sources, budget and balance sheet; its own programs and strategies; a list of documents of public interest; a list of the categories of documents produced or managed by the public authority; the procedure for challenging a decision made by the public authority or institution in cases where an individual considers that the right of access to the requested information of public interest has been infringed”. At the same time, the authorities are required to annually publish and update a newsletter containing the information mentioned above.

Furthermore, according to Law No. 544/2001, access to this information is provided through several channels: display at the institution’s headquarters, publication in the Official Journal (...), as well as on its own website⁹ (art. 5). Thus, “the law requires acceptance of and compliance with the prescribed conduct”¹⁰. Moreover, in recent years, public authorities have been stepping up the digitalization process¹¹ and access to information can also be obtained through various dedicated platforms. But “digitalization brings with it new issues of responsibility, legal liability, limits and respect for citizens' rights and freedoms”¹².

⁵ Nicolae Popa, (coord.), Elena Anghel, Cornelia Ene-Dinu și Laura - Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar (General Theory of Law. Seminar Booklet)* 2nd edition. C.H.Beck Publishing House, 2017, pp.197-202; Mihai Bădescu, *Teoria generală a dreptului. Tratat (General Theory of Law. Treaty)*, Hamangiu Publishing House, Bucharest, 2025, pp.373-375.

⁶ Published in Official Journal no. 663 of 23 October 2001.

⁷ [“The Official Journal of Romania (...) represents the official “newspaper” of our state in which, in Part I, the normative acts of the central public authorities are published”] - Iulia Boghirnea, *The principle of publicity of the national normative acts. Legal effects in International Journal of Legal and Social Order*, 1(1):14, 2022; DOI: <https://doi.org/10.55516/ijlso.v1i1.60>, visited on 09.02.2026.

⁸ More information on public authorities in Marta Claudia Cliza, Constantin Claudiu Ulariu, *Drept administrativ. Ediție revizuită conform modificărilor Codului administrative (Administrative Law. Revised edition according to the amendments of the Administrative Code)*, Pro Universitaria Publishing House, Bucharest, 2021, pp.7-22 or Roxana-Mariana Popescu, *ECJ case-law on the concept of “public administration” used in article 45 paragraph (4) TFEU*, CKS eBook 2017, pp.528-532, https://cks.univnt.ro/cks_2017/CKS_2017_Articles.html, visited on 20.02.2026.

⁹ [“Globally, modern technologies have reached such a level of development that it is now almost inconceivable for people not to use a phone with internet access or a computer”] - Marta Claudia Cliza, Elena Emilia Ștefan, „Cybersecurity - theoretical approach”, *European Journal of Social Law* nr. 69, octombrie 2025, Volume LXIX, Issue 4, pp.102-109, Bibliotheca Publishing House, Târgoviște, 2025. <https://www.revueeuropeenne-du-droitsocial.ro/fr/revue.php>, visited on 02.03.2026

¹⁰ See Nicoleta Elena Hegheș, “The non - retroactivity of new legal norms-fundamental principle of law. Exceptions”, in *International Journal Of Legal And Social Order* (1):153, 2022, online <https://ijlso.ccdsara.ro/index.php/international-journal-of-legal-a/article/view/74/60>, visited on 10.02.2026.

¹¹ [“Regulating the digital sector (...) implies the formation of new paradigms in the legal area”] - Alina Conea, *Politicile Uniunii Europene [European Union Policies]*. Bucharest: Universul Juridic Publishing House, 2020, p. 11.

¹² See Elena Emilia Ștefan, “Integrity and Transparency in the Work of Public Authorities. Aspects of Comparative Public Law”, in *Juridical Tribune – Review of Comparative and International Law* 14 (4): 565, 2024, DOI: 10.62768/TBJ/2024/14/4/03, visited on 22.02.2026

With regard to access to environmental information, we refer to Government Resolution no. 878/2005 on public access to environmental information¹³ and Order no. 2715/2024¹⁴ on the approval of the Methodology for the collection, management, and public disclosure of environmental information by public authorities under the subordination, coordination, or authority of the central public authority for environmental protection. Romania adopted the Strategy for the implementation of Decision VI/8h regarding the compliance with the requirements of the Aarhus Convention¹⁵.

From the perspective of international legal instruments, these were also taken into account in this study, since “given the current background where life of every human community is closely linked to the fate of humanity as a whole, international factors cannot be neglected¹⁶”.

At the EU level, we are interested in Regulation (EC) no. 1049/2001 regarding public access to European Parliament, Council and Commission documents¹⁷. Furthermore, the “Regulation has general applicability”¹⁸. We also note Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC¹⁹ but also the Aarhus Convention.

The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) was ratified at the national level in 2000²⁰. This is the primary international instrument to which authorities refer regarding the matters covered. The public access to documents is also provided for in the European Code of Good Administrative Behavior²¹.

3. The extent to which public authorities have implemented the provisions of Law no. 544/2001

In order to assess the implementation of Law no. 544/2001, central public authorities based in Bucharest and local public authorities, also based in Bucharest, were taken into account in accordance with the principle of representativeness.

From the perspective of central public authorities, the websites of the following institutions were examined: the Chamber of Deputies, the Constitutional Court, the Government, the President of Romania, the High Court of Cassation and Justice, the Ombudsman, the Court of Auditors, the Economic and Social Council.

We can find various details such as: public procurement, declarations of assets and interests, economic information, institutional integrity, etc. on the Chamber of Deputies’ website²² under the public information section.

On the website of the President²³ of Romania, there is a section on institutional transparency, which, in addition to applicable legislation, includes both a list of documents of public interest pursuant to Law no. 544/2001 and reports evaluating implementation. As for the Government, the website of the General Secretariat²⁴ of the Government includes the following: information on how to obtain public information, applicable regulations, procedures, forms, a newsletter, the budget, and financial statements, etc.

¹³ Published in Official Journal no. 760 of 22 August 2025.

¹⁴ Published in Official Journal no. 1251 of 12 December 2024.

¹⁵ Public information, online: <https://mmediu.ro/app/webroot/uploads/files/Strategie%20actualizata%202021.pdf>, visited on 14.01.2026.

¹⁶ Ioan Muraru (coord.), Andrei Muraru, Valentina Bărbăţeanu, Dumitru Big, Drept constituțional și instituții politice. Caiet de seminar (Constitutional law and political institutions. Seminar booklet), C.H.Beck Publishing House, Bucharest, 2020, p.2.

¹⁷ Published in the Official Journal of the European Union L 145, 31.05.2001, pp.43-48.

¹⁸ Augustin Fuerea, Manualul Uniunii Europene (The European Union Handbook) 6th edition, revised and supplemented. Bucharest: Universul Juridic Publishing House, 2010, p.141.

¹⁹ Published in the Official Journal of the European Union L 041, 14/02/2003, pp.26-32.

²⁰ Law no. 86 /2000, published in Official Journal no. 224 of 22 May 2000.

²¹ Public information, online: <https://osha.europa.eu/sites/default/files/code%20of%20good%20administrative%20behaviour%20-%20EU%20Ombudsman.pdf>, visited on 14.01.2026.

²² Public information, online: <https://www.cdep.ro/#>, visited on 03.03.2026.

²³ Public information, online: <https://www.presidency.ro/ro/administratia-prezidentiala/transparenta-institutionala?categ=1>, visited on 03.03.2026.

²⁴ Public information, online: <https://sgg.gov.ro/1/interes-public/solicitare-informatii-legislatie/> and <https://sgg.gov.ro/1/interes-public/>, visited on 03.03.2026.

In what concerns the Constitutional²⁵ Court²⁶ of Romania, the website of the authority, in the general section, includes – the list of public information, such as: public documents, the procedure for obtaining public information, transparency regarding salary-related income, integrity strategy, etc.

The website of the High Court of Cassation and Justice²⁷ has a section dedicated to public information which included information of public interest, procedures for challenging the decision, and information exempt from public access. As for information of public interest, the Court²⁸ of Auditors, also makes available for consultation certain documents, such as: reports under Law no. 544/2001, the list of documents of public interest, etc.

The Ombudsman²⁹ also has a section on its website dedicated to information of public interest, which can be found under the resources category. This section provides information such as: applicable laws and regulations, the names of officials responsible for enforcing Law no. 544/2001, a standard application form, an administrative complaint form, a list of public interest documents prepared by the Ombudsman, and the standard procedure for resolving petitions, etc.

The website of the Economic and Social Council is also very interesting³⁰, as it includes: applicable legislation, the procedure for obtaining public information, the person responsible for enforcing Law no. 544/2001, newsletter, declarations of assets and interests, budget, etc.

In what concerns local public administration, we visited the website of the General City Hall³¹ of Bucharest and discovered many interesting things. Therefore, under the public interest section on the homepage, we find, for example: petition forms, public notices, contracts entered into by the Bucharest City Hall, public procurement, public interest request forms, pending lawsuits, and the status of submitted requests, etc.

4. Case study

In recent case law of the CJEU, a judgment was issued that addressed the issue of applicants who remain anonymous or use pseudonyms in requests submitted to authorities for public environmental information. This concerns Case C-129/24, *Coillte*³² *Cuideachta Gníomhaíochta Ainmnithe*.

According to public information: “The request for a preliminary ruling concerns the interpretation of Article 2(5) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (...) read in the light of the Aarhus Convention (...). The request has been made in proceedings between *Coillte Cuideachta Gníomhaíochta Ainmnithe* (*‘Coillte’*), a commercial forestry undertaking partly owned by the Irish State, and the Commissioner for Environmental Information (Ireland) (*‘the Commissioner’*) concerning the latter’s decision finding that *Coillte* had unjustifiably treated as invalid several requests for access to environmental information³³”.

Briefly, “between 10 March and 7 June 2022, *Coillte* received 130 requests for access to environmental information. 97 of those requests originated from anonymous applicants or applicants using pseudonyms generally inspired by film characters and were presented in an identical or almost identical format, without a physical address being provided.

Taking the view that the anonymous or pseudonymized requests were not genuinely seeking to elicit environmental information, but were part of an organized campaign engaged in for questionable motives such as disrupting its operations, *Coillte* asked the applicants concerned to provide it with their current addresses and to confirm that, in those requests, they had used their real legal names. Having received no response, *Coillte*, in

²⁵ [“The essential role of the Constitutional Court is to guarantee the supremacy of the Constitution”] – Silviu Gabriel Barbu, Andrei Muraru, Valentina Bărbățeanu, *Elemente de contencios constituțional* (Contentious Constitutional Elements). Bucharest: C.H.Beck Publishing House, 2021, p.17.

²⁶ Public information, online: <https://www.ccr.ro/transparenta-institutionala/lista-informatiilor-de-interes-public/>, visited on 03.03.2026.

²⁷ Public information, online: <https://www.iccj.ro/informatii-publice/informatii-de-interes-public/>, visited on 03.03.2026.

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³¹ Public information, online: <https://www.pmb.ro/legaturi-utile/directii-pmb/menu-page/8>, visited on 03.03.2026

³² Public information, online: Case C-129/2024, *Coillte Cuideachta Gníomhaíochta Ainmnithe*: Judgement of The Court (Fifth Chamber) of 15 January 2026 (request for a preliminary ruling from the High Court-Ireland) - CoJ C, C/2026/1178, 9.3.2026, ECLI: <http://data.europa.eu/eli/C/2026/1178/oj>, visited on 10.03.2026, https://infocuria.curia.europa.eu/tabs/affair?sort=AFF_NUM_DESC&searchTerm=%22C-129%2F24%22&publishedId=C-129%2F24 visited on 10.03.2026, and Resolution <https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62024CJ0129&qid=1773067440440> visited on 10.03.2026.

³³ *Idem*

essence, rejected the anonymized or pseudonymized requests as invalid and, thus, did not provide the environmental information requested within the period prescribed by the national legislation. The requesters concerned then requested Coillte to carry out an internal review of those rejection decisions. Coillte again asked those applicants to confirm or indicate their legal names and to provide it with their current addresses, while stating that it was not requiring them to indicate the reason for their requests for environmental information and that, unless they provided the requested confirmation, their requests for internal review would be rejected. That information not having been provided, the requests for internal review were rejected as invalid.

The rejection decisions were the subject of administrative appeals to the Commissioner. Ruling on the first 58 cases of rejection, the Commissioner found that Coillte had not been justified in treating the requests for environmental information concerned as invalid under the Irish national rules. Coillte brought an appeal against that decision before the High Court of Ireland which ruled in favor of the plaintiff and considered that the anonymized or pseudonymized requests probably originated from a single source or were part of a coordinated campaign, since they ceased abruptly at the same time. Thus, anonymity could have been used by certain applicants to abuse the procedure for access to environmental information intentionally so as to disrupt the public authorities' operations. In those circumstances the High Court decided to stay the proceedings and to refer certain questions to the Court of Justice for a preliminary ruling ³⁴ (par. 16-23).

The Court ruled as follows: "in the opinion of the CJEU, the concept of applicant within the meaning of Article 2(5) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, read in the light of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus (...), must be interpreted as meaning that it does not require a natural or legal person to be identified by his or her actual name and/or a current physical address, but does not preclude national legislation which requires such identification of the applicant, in compliance with the principles of equivalence and effectiveness³⁵.

5. Conclusions

After documenting the topic, it became clear that the research objective had been achieved. The paper addressed the issue of free access to public information from both a national and a European perspective, beginning with a presentation of the regulatory framework. The focus was largely on the issue of access to environmental information; in this regard, the paper presented a recent case pending before the CJEU that addressed the issue of requests submitted by anonymous applicants or applicants using pseudonyms, without disclosing their identity or actual address when providing the requested information.

This topic is interesting because it focuses on the obligation of authorities—as set forth in both domestic and international laws—to allow free access to public information. Therefore, as the doctrine pointed out, "the manner in which a nation is governed has constantly aroused lively disputes throughout history"³⁶.

At the same time, the study included practical research, by visiting the websites of several representative public authorities to determine whether they have fulfilled their obligations under Law no. 544/2001 on free access to public information, specifically by publishing a section entitled public information. The results of the study are satisfying, as all the institutions visited have transparently provided the information necessary for the public to understand their activities, including the procedure for obtaining public information.

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³⁴ Idem

³⁵ Idem

³⁶ Cătălin Silviu Săraru, A cross - country examination: administrative litigation in China and Romania, *Acces to Justice in Eastern Europe*, 6(3): 233, 2023, 10.33327/AJEE-18-6.3-a000313, visited on 20.02.2026.

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TRANSHUMANISM AND NEURORIGHTS: REDEFINING THE HUMAN PERSON IN THE AGE OF NEUROTECHNOLOGICAL CONVERGENCES

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Abstract

The present study undertakes a critical and interdisciplinary examination of the relationships between the transhumanist paradigm and the recent emergence of the legal category of neurorights, situated within a historical context marked by the accelerating convergence of neuroscience, artificial intelligence and biotechnology. Proceeding from the premise that transhumanism is not merely an intellectual movement concerned with the improvement of the human condition through the rational application of advanced technologies, but constitutes at the same time a normative philosophical program centered on the idea of self-evolution and the transcending of biological limits, our enquiry analyses the manner in which the promises of cognitive enhancement and brain-computer interfaces generate unprecedented challenges for the classical architecture of fundamental human rights. The analysis seeks to identify the conceptual foundations of the proposals advanced by the international scientific community concerning the necessity of instituting new rights with universal vocation — the right to mental identity, the right to cognitive liberty, the right to mental integrity, the right to the confidentiality of brain data and the right to equitable access to mental enhancement — as normative instruments designed to prevent the unintended consequences of technologies capable of accessing, decoding and modifying the neural processes underlying subjective experience. The study likewise examines the pioneering legal experiences of the Republic of Chile, of Spain and of the United States, alongside the 2025 UNESCO Recommendation on the Ethics of Neurotechnology, with the aim of capturing the tensions between the logic of transhumanism — which promotes individual autonomy over one's own body and brain — and the logic of human rights, which seeks the preservation of human dignity in the face of risks of instrumentalization. The conclusion argues that the legal reconfiguration of contemporary man, as a subject simultaneously of the right to cognitive self-determination and of the duty to protect his mental integrity against illegitimate neurotechnological intrusions, calls for a new paradigm of bioethics — one which transcends the classical dichotomy between permission and prohibition, proposing an approach grounded in responsibility, prudence and capabilities, capable of responding to the challenges of a reality in which the frontier between the human and the posthuman becomes progressively more porous and more difficult to delineate

Keywords: transhumanism, neurorights, cognitive liberty, mental integrity, neuroethics.

1. Introduction

Contemporary reflection upon human nature finds itself at a turning point unprecedented in the history of philosophical and legal thought. The rapid convergence of cognitive neuroscience, artificial intelligence and advanced biotechnology is reshaping both the self-understanding of the human species and the normative frameworks which have ensured, for nearly eight decades, a certain axiological stability in the international public sphere. It is precisely within this context that one ought to situate the encounter between the transhumanist project and the recent emergence of the legal category of neurorights, two intellectual realities which share a common preoccupation: that of articulating what it means to be human in an age in which the brain itself becomes a terrain of research, intervention and, eventually, augmentation. Transhumanism, understood as an international intellectual and cultural movement which postulates the necessity of improving the human condition through the rational application of converging technologies ¹ has its roots in Enlightenment humanism, whose idea of human perfectibility it decisively radicalizes, extending it beyond the traditional methods of culture and education to include direct technological interventions upon body and mind. Far from being a mere observation regarding technological advancement, transhumanism proposes a normative philosophical program

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¹ Bostrom, N., In defense of posthuman dignity, *Bioethics* 19(3), 202–214, 2005. <https://doi.org/10.1111/j.1467-8519.2005.00437.x>

articulated around the idea of self-evolution, postulating that the human being possesses not merely the right but a certain moral duty to transcend his current biological limitations through recourse to converging technologies - bio, info, nano and cogno ². In parallel with this development of the philosophical discourse on human enhancement, the past decade has witnessed the emergence of a new legal category - neurorights - initially proposed in the specialized literature by Ienca and Andorno ³ and subsequently consolidated by the scientific community gathered around the Neurorights Foundation, under the leadership of Yuste, Genser and Herrmann⁴. This novel legal category seeks to respond to the specific challenges generated by neurotechnologies capable of accessing, recording, decoding and modifying brain activity, through the institution of normative guarantees designed to protect what was, until quite recently, regarded as the ultimate refuge of individual liberty: the mental space.

The present article proposes to examine, in a systematic manner, the relationships between these two intellectual and legal realities, seeking to identify both their points of convergence and the normative tensions which their coexistence generates within the contemporary axiological landscape. Our enquiry is structured into three chapters, organized according to a progressive logic: the first chapter presents the conceptual foundations of the transhumanist paradigm and its anthropological implications; the second chapter analyses the emergence and consolidation of the legal category of neurorights within the domestic and international legal order; the third chapter explores the structural tensions and possible convergences between the two registers, proposing an integrative reading. The hypothesis we advance - and which orients the entire enquiry - is that, far from finding themselves in irreducible opposition, transhumanism and neurorights engage in dialogue at the level of a common preoccupation concerning the ontological and legal status of the human person in the post-biological era, thereby opening a fertile horizon for contemporary bioethical and legal reflection. The methodology adopted is predominantly qualitative, of a hermeneutic and comparative nature, mobilizing sources from the fields of philosophy, neuroethics, comparative constitutional law and international human rights law. The enquiry draws both upon the foundational works of the theoreticians of transhumanism ⁵ and upon the recent contributions of specialists in neuroethics and neurolaw ^{6, 7, 8}. At the same time, pioneering normative experiences are examined - particularly the Chilean constitutional reform ^{9, 10} - together with the international instruments recently adopted, in particular the UNESCO Recommendation of November 2025 on the Ethics of Neurotechnology. The specificity of the proposed enquiry resides in the articulation of an integrative perspective which draws equally upon the analytical Anglo-Saxon tradition of contemporary bioethics and upon the phenomenological contributions of Continental thought, seeking to articulate a nuanced reading of the tensions and convergences between the two intellectual and normative registers under analysis.

2. Transhumanism as Anthropological Project: From Enlightenment Perfectibility to Cognitive Enhancement

An adequate understanding of the relationships between transhumanism and neurorights presupposes a reconstruction of the conceptual foundations of the transhumanist paradigm, since only in the light of the anthropological and axiological presuppositions which animate it can one correctly evaluate the normative challenges it raises for the classical architecture of human rights. Bostrom^{11, 12} defines transhumanism as an

² Sandu, A., & Terec-Vlad, L., A phenomenological perspective on transhumanism from the perspective of the spoken of being, *Postmodern Openings* 7(1), 67–76, 2016. <https://doi.org/10.18662/po/2016.0701.05>

³ Ienca, M., & Andorno, R., Towards new human rights in the age of neuroscience and neurotechnology, *Life Sciences, Society and Policy* 13(1), 5, 2017. <https://doi.org/10.1186/s40504-017-0050-1>

⁴ Yuste, R., Genser, J., & Herrmann, S., It's time for neuro-rights: New human rights for the age of neurotechnology, *Horizons, Journal of International Relations and Sustainable Development* 18, 154–165, 2021.

⁵ Bostrom, N., Human genetic enhancements: A transhumanist perspective, *Journal of Value Inquiry* 37(4), 493–506, 2003. <https://doi.org/10.1023/B:INQU.0000019037.67783.d5>

⁶ Bublitz, J. C., Novel neurorights: From nonsense to substance, *Neuroethics* 15(1), 7, 2022. <https://doi.org/10.1007/s12152-022-09481-3>.

⁷ Ienca, M., On neurorights, *Frontiers in Human Neuroscience* 15, 701258, 2021. <https://doi.org/10.3389/fnhum.2021.701258>.

⁸ Lighthart, S., Ienca, M., Meynen, G., et al., Minding rights: Mapping ethical and legal foundations of 'neurorights', *Cambridge Quarterly of Healthcare Ethics* 32(4), 461–481, 2023. <https://doi.org/10.1017/S0963180123000245>.

⁹ Fins, J. J., The unintended consequences of Chile's neurorights constitutional reform: Moving beyond negative rights to capabilities, *Neuroethics* 15, 26, 2022. <https://doi.org/10.1007/s12152-022-09504-z>.

¹⁰ Cornejo-Plaza, M. I., Cippitani, R., & Pasquino, V., Chilean Supreme Court ruling on the protection of brain activity: Neurorights, personal data protection, and neurodata, *Frontiers in Psychology* 15, 1330439, 2024. <https://doi.org/10.3389/fpsyg.2024.1330439>.

¹¹ Bostrom, (2003), op.cit.

¹² Bostrom, (2005), op.cit.

interdisciplinary orientation which proposes to evaluate the opportunities opened by technological progress for the improvement of the human organism and of the human condition in general, both through the extension of the duration and quality of life and through the amplification of cognitive, emotional and sensory capacities. What is significant within the Bostromian conceptual construction is, undoubtedly, the progressive shift of emphasis from a mere apology for technology towards the articulation of a genuine philosophical anthropology of a dynamic kind, in which the human being is conceived not as a given reality, definitively established within the biological coordinates of the species, but as a reality in continual process of self-transcendence, open to novel forms of existence - which the specialized literature has termed, depending on context, "transhuman" or "posthuman". It is precisely this perspective which opens the way ¹³ towards a radical reconfiguration of the problematic of personal identity, since there persists the legitimate question of the extent to which an individual subjected to multiple interventions of cognitive, genetic or cybernetic enhancement may still be considered the same person as that prior to such interventions. From this point of view, it must be recalled that the foundations of transhumanism rest upon Enlightenment humanism, whose idea of human perfectibility is decisively radicalized, transcending the traditional methods of culture and education to include direct technological interventions upon body and mind, designed to surmount the current biological limitations of man. This extension of perfectibility from the moral-cultural register towards the technological-biological register constitutes precisely the specific difference of transhumanism vis-à-vis the classical humanist tradition, marking an epistemological rupture with broad reverberations in the contemporary theory of human rights. Transhumanism, as anthropological project, articulates a series of normative theses which we may synthesize, following the specialized literature, in three assertions. The first holds that human enhancement technologies - be they of a genetic, pharmacological, cybernetic or neurotechnological nature - ought to be widely available to the population, transcending the traditional therapeutic paradigm; the second affirms that individuals ought to enjoy liberty in choosing the technologies they apply to their own person; while the third attributes to parents the right to choose, within reasonable limits, enhancements for the children to be born ¹⁴. This configuration places transhumanism in a relation of tension with the bio conservative positions represented, in the specialized literature, by thinkers such as Leon Kass, Francis Fukuyama or George Annas, for whom technological interventions upon human nature constitute an existential threat to the integrity of the species.

A special place within the transhumanist architecture is occupied by the problematic of cognitive enhancement through advanced neurotechnologies. Brain-computer interfaces (BCI), deep brain stimulation, transcranial direct-current stimulation and functional neuroimaging technologies raise a series of unprecedented questions, both from an ethical and from a legal point of view, since the interventions they permit transcend the traditionally accepted boundary between treatment and enhancement ¹⁵. Unlike classical pharmacological interventions, which act upon the central nervous system, invasive neurotechnologies permit a selective, focal and often irreversible intervention upon specific neural circuits, thus raising in an entirely novel manner the question of informed consent, of autonomy and of personal integrity. Within this conceptual context falls the fundamental controversy regarding the distinction between treatment and enhancement. Bostrom ¹⁶ advances an explicitly transhumanist position, according to which this distinction does not possess fundamental ethical importance, since both treatment and enhancement pursue the improvement of the functioning of the human organism. Bio conservative perspectives insist upon the decisive character of this distinction, maintaining that treatment restores a biological normality regarded as given, whilst enhancement transcends it, thereby entering into conflict with a certain idea of human nature as moral norm. This debate has direct consequences for the manner in which contemporary legal frameworks delineate that which is permitted, recommendable or prohibited within the field of neurotechnological interventions.

The transhumanist project confronts a series of serious challenges concerning the social and political implications of the democratization of enhancement technologies. There exists a definite risk that, in the absence of adequate public policies, differential access to advanced enhancement technologies might generate new forms of structural inequality, leading to the emergence of an upper class of "enhanced" individuals possessing

¹³ Sandu, A., & Vlad, L., Beyond technological singularity, the posthuman condition, *Postmodern Openings* 9(1), 91–108, 2018. <https://doi.org/10.18662/po/9.1/07>.

¹⁴ Bostrom, (2005), op.cit.

¹⁵ Gordon, E. C., & Seth, A. K., Ethical considerations for the use of brain-computer interfaces for cognitive enhancement, *PLOS Biology* 22(10), e3002899, 2024. <https://doi.org/10.1371/journal.pbio.3002899>.

¹⁶ Bostrom, (2003), op.cit.

a considerable advantage over those deprived of access to these technologies. This concern, assumed in a more or less explicit form by the entire specialized literature (Yuste et al., 2017), represents not merely a question of distributive equity, but also raises a problem regarding the very ontological cohesion of the human species, subjected to transformative pressures of unprecedented intensity. In order to respond to these concerns, the scientific community gathered around the American BRAIN Initiative and the European Human Brain Project has proposed the formulation of fundamental ethical principles for the responsible development of neurotechnologies^{17, 18}. These principles (which would underpin the subsequent proposal of neurorights) address four dimensions: privacy and consent, agency and identity, enhancement and equity in access, and the prevention of algorithmic biases. It must be observed that, although initially articulated in an ethical register, these principles have undergone progressive consolidation within the legal register, transforming themselves into a veritable program of reform of the architecture of fundamental human rights.

The symbolic dimension of the transhumanist project cannot be ignored either in this enquiry. Transhumanism constructs an entire system of symbols, myths and archetypes which articulate its collective imaginary: the symbol H+ - designating "Human Plus" or "Humanity Plus" - expresses graphically the idea of an enhanced human individual, capable of transcending his biological limitations through the integration of technology; the figure of the cyborg, with his augmented eye, embodies symbolically the indissoluble bond between organism and machine, while the spherical rings associated with these symbols evoke the global informational networks and the interconnectivity which transhumanist progress extends. These visual symbols function as veritable ideological declarations, expressing the hopes, ambitions and challenges of an intellectual current which proposes the reconfiguration of the human condition. Romanian phenomenological reflection has contributed, in turn, to the nuancing of this problem, proposing a reading concerning the dimension of self-comprehension of the human being in relation to its own technological self-transcendence. This perspective, profoundly anchored in the Continental phenomenological tradition, offers a fertile counterpoint to Anglo-Saxon reflection, which is predominantly analytical and consequence-oriented, ensuring a significant enrichment of the contemporary bioethical debate. Thus, the internal tensions of the transhumanist project - between the promise of the radical improvement of the human condition, on the one hand, and the risk of the instrumentalization of the human being or of the amplification of social inequities, on the other - have necessarily generated the emergence of a distinct legal register, capable of mediating between the permissive aspiration of transhumanism and the protective exigency of human rights. This transition, from the philosophical-normative register to the legal-positive register, constitutes the object of analysis of the following chapter.

3. The Emergence of Neurorights: A Legal Framework for the Protection of Mental Integrity

The legal category of neurorights designates, within the specialized literature, a body of fundamental rights proposed in order to protect the human being against the unintended or abusive consequences of advanced neurotechnologies. The genesis of this legal category may be reconstructed, in its essential lines, by reference to two foundational moments: on the one hand, the article by Ienca and Andorno¹⁹, published in the journal *Life Sciences, Society and Policy*, in which four new rights of universal character are identified - the right to cognitive liberty, the right to mental privacy, the right to mental integrity and the right to psychological continuity - and, on the other hand, the proposal formulated by Yuste, Gensler and Herrmann²⁰ in the journal *Horizons*, which articulates rights of constitutional value, among which we may mention: the right to identity, the right to mental privacy, the right to equitable access to mental enhancement and the right to protection against algorithmic biases.

The argument for these new categories of rights resides in the observation that the classical architecture of fundamental rights - as it was articulated in the Universal Declaration of Human Rights of 1948 and in the International Covenant on Civil and Political Rights of 1966 - was not conceived to respond to the specific challenges generated by the capacity to access, decode and modify brain activity. Ienca and Andorno²¹ maintain

¹⁷ Yuste, R., Goering, S., Bi, G., Carmona, J. M., Carter, A., Fins, J. J., et al., Four ethical priorities for neurotechnologies and AI, *Nature* 551, 159–163, 2017. <https://doi.org/10.1038/551159a>.

¹⁸ Goering, S., Klein, E., Specker Sullivan, L., et al., Recommendations for responsible development and application of neurotechnologies, *Neuroethics* 14, 365–386, 2021. <https://doi.org/10.1007/s12152-021-09468-6>

¹⁹ Ienca & Andorno, op.cit.

²⁰ Yuste et al., (2021), op.cit.

²¹ Ienca & Andorno, op.cit.

that, although a series of traditional rights - particularly the right to freedom of thought, the right to private life and the right to physical integrity - may offer a certain protection, they prove insufficient to cover the complete spectrum of threats specific to neurotechnologies, a fact which justifies the institution of new rights of express and autonomous character. The pivotal concept of the entire architecture of neurorights is, undoubtedly, that of cognitive liberty, developed systematically by Bublitz²² under the designation of mental self-determination. According to this concept, the individual possesses sovereignty over his own mind, which translates, on the one hand, into the liberty to have recourse to technologies which modify his mental states and, on the other hand, into the liberty to refuse any unsolicited or non-consented neurotechnological intervention.

Farahany²³, in her work *The Battle for Your Brain*, proposes a conceptualization of cognitive liberty, understanding it as a right of individual liberty for the digital era, capable of responding to the unprecedented challenges generated both by neurotechnologies and by artificial intelligence. The right to mental privacy - which refers to the protection of information extracted from the brain against illegitimate access - constitutes the most important of the proposed neurorights, being supported by the Neurorights Foundation²⁴. The argument is that brain data, or neurodata, possess a personal quality without equivalent among the other categories of personal data, since they offer direct access to the processes underlying subjective experience and personal identity. Hallinan, Schütz, Friedewald and De Hert²⁵ had argued, as early as 2014, that the classical architecture of personal data protection, articulated around the General Data Protection Regulation (GDPR), is not prepared to respond to the specific challenges generated by neurodata, which call for supplementary protections and, possibly, the constitution of a distinct legal category.

The right to mental integrity responds to a complementary preoccupation - namely, protection against neurotechnological interventions which might affect the cognitive functioning of the individual without his free and informed consent. In the articulation proposed by Ienca and Andorno²⁶, this right seeks to guarantee not only the access of persons with psychic disorders to appropriate psychiatric treatment, but also the protection of all individuals against any forms of "brain-hacking" - a term which designates the body of neurocriminal activities capable of directly influencing the neural processing of users of neurodevices in a manner analogous to the way in which computer systems are subjected to cyber-attack. This concern becomes all the more important inasmuch as consumer markets already offer, in an unregulated manner, EEG headset-type devices capable of collecting raw brain data, exposing users to a spectrum of risks which the current legal architecture cannot manage adequately²⁷.

The right to psychological continuity or right to identity addresses the protection of the person against neurotechnological interventions which might alter the essential traits of his identity - whether through the modification of memory, of personality or of profound beliefs. This right rests upon a philosophical theory of personal identity as temporal persistence, according to which a person recognizes himself as being the same person through the continuity of certain memories, dispositions and life narratives. Thus, technologies of memory engineering - capable of erasing, modifying or selectively adding memories - may affect the very identity of the person in a manner incompatible with the preservation of his essential characteristics²⁸. In the positive legal register, the most important initiative has been that of the Republic of Chile, which, through the constitutional reform of 2021 of Article 19 of the Constitution, became the first country in the world to insert express protection of brain activity and of the data extracted therefrom into the constitutional text. This legislative reform, accompanied by a specific draft law on neurorights, has generated a broad reaction both within the academic milieu and within Chilean jurisprudence²⁹.

In 2023, the Supreme Court of the Republic of Chile rendered a judgment in the case *Guido Girardi v. Emotiv Inc.*, recognizing the sensitive character of neurodata and ordering the company commercializing a consumer EEG device to delete the data collected from Senator Girardi, thus marking the first jurisprudential application of

²² Bublitz, J. C., Novel neurorights: From nonsense to substance, *Neuroethics* 15(1), 7, 2022. <https://doi.org/10.1007/s12152-022-09481-3>

²³ Farahany, N. A., *The battle for your brain: Defending the right to think freely in the age of neurotechnology*, St. Martin's Press, 2023.

²⁴ Yuste et al., (2021), op.cit.

²⁵ Hallinan, D., Schütz, P., Friedewald, M., & De Hert, P., Neurodata and neuroprivacy: Data protection outdated?, *Surveillance & Society* 12(1), 55-72, 2014. <https://doi.org/10.24908/ss.v12i1.4500>

²⁶ Ienca & Andorno, op.cit.

²⁷ Livanis, E., Voultsos, P., Vadiolias, K., Pantazakos, P., & Tsaroucha, A., Understanding the ethical issues of brain-computer interfaces (BCIs): A blessing or the beginning of a dystopian future?, *Cureus* 16(4), e58243, 2024. <https://doi.org/10.7759/cureus.58243>

²⁸ Ienca & Andorno, op.cit.

²⁹ Cornejo-Plaza et al., op.cit.

the new constitutional reform. Nevertheless, the Chilean reform has been criticized by part of the academic community. Fins³⁰ signals that it risks substituting itself for genuine scientific progress in the field of disorders of consciousness and that it ought to give way to an approach grounded in the capabilities paradigm, in the spirit of the works of Amartya Sen and Martha Nussbaum.

For his part, Bublitz³¹ maintains that the proposal of the Neurorights Foundation tends to encourage a "rights inflation", which is afflicted by neuro-exceptionalism and neuro-essentialism and does not satisfy the methodological rigors accepted within the field of human rights. This position has been subsequently developed by Gilbert and Russo³², who signal the speculative character of many concerns invoked in support of neurorights and plead for an empirical approach, grounded in the concrete evaluation of the real risks of existing neurotechnologies. Beyond the Chilean experience, the movement in favor of neurorights has gained visibility at the international level. Spain has integrated a section dedicated to digital rights, including neurorights, within the Charter of Digital Rights of 2021. At the American federal level, the states of Colorado and California have adopted, in the years 2024–2025, pioneering legislation concerning the protection of neurodata. At the global level, the UNESCO Recommendation on the Ethics of Neurotechnology, adopted by the General Conference in November 2025, institutes the first international reference framework in the field, articulating a set of principles grounded in human rights and in human dignity, which is to orient national legislation in the coming decades.

In the European register, it must be emphasized that Regulation (EU) 2024/1689 on artificial intelligence - the AI Act - contains provisions which prohibit certain practices of cognitive and emotional manipulation, including through the use of automated artificial intelligence systems for the detection of emotional states in the workplace or in educational environments. These provisions, although not explicitly formulated in the language of neurorights, reflect a concern for the protection of the mental integrity of the person against the encroachments of technologies. Thus there emerges a complementary European architecture for the protection of the mental sphere, which articulates the GDPR, the AI Act and the jurisprudence of the European Court of Human Rights within a normative framework susceptible of an evolutive reading attentive to the specificity of neurotechnological challenges³³.

In this context, the contribution of the specialized literature must be emphasized, which has sought to map the ethical and legal foundations of neurorights in a systematic and interdisciplinary manner. The work coordinated by Lighthart and colleagues³⁴ proposes a detailed analysis of the three pivotal concepts: mental integrity, mental privacy and cognitive liberty. The conclusion of this analysis opens a reflection upon the necessity of constructing a supple legal architecture, capable of mediating between these two registers.

It must be observed that the debate concerning neurorights is not lacking in methodological tensions which reflect profound differences of epistemological orientation. Whilst the European school inaugurated by Ienca and Andorno³⁵ tends to favor a conservative approach, seeking to adapt the existing framework of human rights through the evolutive reinterpretation of its provisions, the American school represented by the Neurorights Foundation pleads for a more radical approach, aimed at the express enshrinement of new rights within constitutional texts and within international instruments. This methodological divergence is not a purely technical one, but reflects different philosophical conceptions of the relationship between existing law and emerging technological challenges, having direct consequences upon the concrete strategies of regulation across the various jurisdictions.

4. Tensions and Convergences between the Transhumanist Project and the Protection of Neural Dignity

Reflection upon the relationships between transhumanism and neurorights cannot be complete without a systematic analysis of the structural tensions and the possible convergences between the two registers, since it is precisely within this space of mediation that there is being played out, today, the very meaning of the notion of human dignity in an age marked by unprecedented technological promises. The philosophical premises of the

³⁰ Fins, op.cit.

³¹ Bublitz, op.cit.

³² Gilbert, F., & Russo, I., Neurorights: The land of speculative ethics and alarming claims?, *AJOB Neuroscience* 15(2), 113–115, 2024. <https://doi.org/10.1080/21507740.2024.2328244>

³³ Cornejo-Plaza et al., op.cit.

³⁴ Lighthart et al., op.cit.

³⁵ Ienca & Andorno, op.cit.

two orientations appear, on a first reading, irreconcilable: transhumanism postulates the radical self-determination of the individual over his own body and brain, pleading for a permissive order in which opportunities for enhancement are widely available; neurorights, on the contrary, articulate a protective logic, seeking to guarantee the mental integrity and the dignity of the person against abusive or non-consented neurotechnological intrusions. Nevertheless, a more attentive analysis reveals the existence of significant convergences which decisively nuance this apparent opposition. Both transhumanism and the neurorights movement share a commitment to individual autonomy and to informed consent as fundamental regulatory principles.

Bostrom ³⁶ emphasizes that any intervention pertaining to enhancement ought to remain a voluntary choice of the individual, in conformity with a personal set of values and aspirations. Cognitive liberty as formulated by Bublitz ³⁷ explicitly includes not only protection against non-consented interventions, but also the recognition of the liberty to have recourse to technologies for the enhancement of mental states. This dual valence (defensive and permissive) of cognitive liberty constitutes a junction between the two paradigms. A second zone of convergence concerns the question of equitable access to neural enhancement technologies. Both the transhumanist perspectives and the neurorights movement share the concern that the benefits of neurotechnologies might be monopolized by a restricted economic elite, thus generating novel forms of structural inequality.

Yuste et al. ³⁸ included the principle of equity in access to cognitive enhancement technologies, subsequently articulating it, within the proposal concerning neurorights, as the right to equitable access to mental enhancement. This convergence suggests that, far from opposing one another irreducibly, transhumanism and neurorights may engage in dialogue within a common framework grounded in the principles of distributive justice. At the same time, it is impossible not to observe also the structural tensions which subsist between the two paradigms: where radical transhumanism pleads for substantial cognitive transformations, neurorights raise objections concerning the risk of the dissolution of personal identity and of the fragmentation of the ontological cohesion of the person. This tension, beyond its apparently speculative aspect, has direct consequences for the manner in which irreversible interventions upon the brain will be regulated.

García-López, Muñoz and Andorno ³⁹ propose an integrative reading of these tensions, maintaining that the genuine challenge of neurorights does not consist in contesting individual autonomy, but in articulating a framework of responsibility which protects, at the same time, the person against himself, inasmuch as certain interventions might generate irreversible consequences for his capacity to exercise, subsequently, his autonomy. This reading opens a fertile horizon for contemporary bioethical reflection, since it invites the surmounting of the rigid dichotomy between autonomy and protection, proposing a paradigm grounded in temporal responsibility, which takes account of the fact that the person is not a punctual reality, but a diachronic reality, with interests which unfold across time.

This concern for the integrity of the person enters into dialogue with contemporary phenomenological reflection upon the lived body and upon subjective experience, developed within the Romanian literature ⁴⁰. The transcending of technological singularity cannot be conceived solely in quantitative terms - as an increase of cognitive capacities or as an extension of the duration of life - but imposes a qualitative reflection concerning the manner in which neurotechnological interventions transform the experience-of-self and the intersubjective relation. This phenomenological perspective, although less represented within the Anglo-Saxon debate concerning neurorights, offers conceptual instruments for articulating a complex theory of mental integrity, which is not reduced to its legal-formal dimension but includes also the phenomenological-existential dimension.

A particular case which illustrates the tensions between transhumanism and neurorights is that of brain-computer interfaces destined for cognitive enhancement. Gordon and Seth ⁴¹ examine the ethical, legal and scientific implications of these technologies, drawing attention to the fact that they raise fundamental questions concerning the nature of subjective consciousness, the frontiers of personal autonomy and the very meaning of

³⁶ Bostrom, (2005), op.cit.

³⁷ Bublitz, op.cit.

³⁸ Yuste et al., (2017), op.cit.

³⁹ García-López, E., Muñoz, J. M., & Andorno, R., Editorial: Neurorights and mental freedom: Emerging challenges to debates on human dignity and neurotechnologies, *Frontiers in Human Neuroscience* 15, 823570, 2021. <https://doi.org/10.3389/fnhum.2021.823570>

⁴⁰ Sandu & Vlad, op.cit.

⁴¹ Gordon & Seth, op.cit.

what it is to be human. The development of these technologies - whether for therapeutic purposes or for purposes of enhancement - calls for a rigorous prior ethical reflection, grounded in principles of prudence, transparency and responsibility distributed among the various categories of actors involved.

Examining the problematic of brain data, Susser and Cabrera ⁴² maintain that the efficacy of any regime of neurodata protection depends, in a decisive manner, on its capacity to integrate concerns regarding autonomy and dignity with those regarding distributive justice and equity in access. It is precisely for this reason that the purely defensive approach to neurorights is insufficient; it must be complemented by a positive dimension, capable of ensuring the broad access of the population to the legitimate benefits of neurotechnologies, under conditions of transparency, informed consent and effective public control over their development.

In this context, the UNESCO Recommendation on the Ethics of Neurotechnology, adopted in November 2025, offers an integrative conceptual model. The document articulates, on the one hand, a set of fundamental principles - human dignity, autonomy, justice, transparency, responsibility - and, on the other hand, a body of operational recommendations which address the complete life-cycle of neurotechnologies, from their research and development through to their withdrawal from the market. The integrative character of the Recommendation resides precisely in its capacity to mediate between the permissive logic of transhumanism - recognizing the transformative potential of neurotechnologies for the improvement of the human condition - and the protective logic of human rights, instituting procedural and substantive guarantees for the protection of mental integrity.

A particular aspect of this mediation concerns the question of the vulnerability of children and of future generations in relation to neurotechnologies, a question upon which both transhumanism and neurorights have formulated complex and, at times, contradictory positions. Whilst transhumanism maintains that parents ought to have, within reasonable limits, the right to choose enhancements for the children to be born ⁴³, the perspective of neurorights - as it is articulated particularly within the UNESCO Recommendation - insists upon the specific protection owed to the holistic development of the child and upon the limitation of the use of neurotechnologies to medical, therapeutic or other well-justified purposes. This tension reflects the differences of paradigm between the two registers and raises normative problems concerning the concrete regulation of these technologies at the level of public policies.

A third direction concerns the conceptualization of the mental space - as object of legal protection. The contemporary debate oscillates between an internalist perspective and an externalist perspective, grounded in the theory of the extended mind, which holds that cognitive processes unfold within the interaction between brain, body and the technological and social environment. This distinction has legal consequences, since a protection focused exclusively upon the brain risks missing the broader ensemble of practices and instruments with impact upon cognition - from everyday smart devices to the recommendation algorithms of digital platforms⁴⁴.

Consequently, a complete legal architecture will have to articulate the protection of neurodata with the general protection of the cognitive sphere, thereby avoiding both cerebral reductionism and the dilution of specific protections. From the ensemble of considerations presented above, it follows that the relationship between transhumanism and neurorights cannot be conceived in a purely disjunctive key, but imposes a reading capable of recognizing both the positions in which the two paradigms converge - around individual autonomy, informed consent and equity in access - and those in which they remain in tension - around mental integrity, psychological continuity and the ontological status of the posthuman person. This interpretation opens the perspective of a responsible posthumanist bioethics, capable of negotiating the relationship between the aspiration to the self-transcendence of the human being and the exigency of protecting dignity.

5. Conclusions

The enquiry proposed in the preceding pages has sought to examine the relationships between the transhumanist paradigm and the emergence of neurorights, within a historical context marked by the unprecedented acceleration of the convergence of neuroscience, biotechnology and artificial intelligence. Our

⁴² Susser, D., & Cabrera, L. Y., Brain data in context: Are new rights the way to mental and brain privacy?, *AJOB Neuroscience* 15(2), 122–133, 2024. <https://doi.org/10.1080/21507740.2023.2188275>

⁴³ Bostrom, (2005), *op.cit.*

⁴⁴ Susser & Cabrera, *op.cit.*

analysis has shown that, far from finding themselves in opposition, the two intellectual realities engage in dialogue at the level of a common preoccupation concerning the ontological and legal status of the human person in the post-biological era, opening a fertile horizon for contemporary bioethical and legal reflection.

The conclusion which emerges from our study is that the legal reconfiguration of contemporary man, as a subject simultaneously of the right to cognitive self-determination and of the duty to protect his mental integrity against illegitimate neurotechnological intrusions, calls for a new paradigm of bioethics — one which transcends the classical dichotomy between permission and prohibition, proposing an approach grounded in responsibility and prudence. This paradigm, founded upon the recognition of the human person as a diachronic reality whose interests unfold across time, offers conceptual instruments for mediating the tensions between the permissive logic of transhumanism and the protective logic of human rights. Legal experiences demonstrate that it is possible to articulate integrative normative frameworks, capable of recognizing both the transformative potential of neurotechnologies for the improvement of the human condition and the exigency of preserving the dignity and integrity of the person. Nevertheless, the criticisms formulated by specialists in neuroethics draw attention to the risks of rights inflation, of neuro-exceptionalism and of empirically unfounded ethical speculation, demonstrating that the road towards a balanced regulation of neurotechnologies still has considerable terrain to traverse.

Future research within the field will need, in our opinion, to concentrate upon three principal directions: in the first place, upon the elaboration of rigorous empirical methodologies for the concrete evaluation of the risks and benefits of existing and emerging neurotechnologies; in the second place, upon the articulation of national legal frameworks which transpose the recently adopted international principles in a manner adapted to the cultural, legal and institutional specificity of each jurisdiction; in the third place, upon the development of an integrative philosophical-anthropological reflection, which assumes the Romanian phenomenological contributions and places them in dialogue with the Anglo-Saxon tradition of bioethics and neuroethics, with a view to constructing a truly global interdisciplinary perspective. To these three directions there is added, of necessity, the question of the formation of professionals — both jurists and researchers in the field of neurosciences — capable of navigating with competence within this complex normative and ethical landscape, thereby ensuring the effective transposition of abstract principles into concrete institutional practices and into jurisprudential solutions appropriate to the emerging challenges of the neurotechnological age.

For the Romanian legal space, in particular, reflection upon neurorights represents a substantial challenge and, at the same time, a remarkable intellectual and institutional opportunity. Romania possesses, through its interdisciplinary philosophical tradition and through its European commitment, significant resources for contributing to the international debate concerning the responsible regulation of neurotechnologies, whether through participation in the transposition of the UNESCO Recommendation at the national level, or through the articulation of original doctrinal positions within legal and bioethical literature. It is precisely in this direction that the efforts of Romanian academic research ought to be oriented in the coming decade, since the stakes of the debate — namely, the very meaning of the human being and of his dignity in an age marked by unprecedented technological promises — extend far beyond the boundaries of a mere technical reflection, engaging the entire horizon of contemporary philosophical and legal thought.

In the final analysis, the present article invites the assumption of a responsible position in the face of neurotechnological challenges, one which recognizes both their transformative potential for the improvement of the human condition and the substantial risks they imply for the integrity of the person. Contemporary man finds himself, without the possibility of retreat, at an anthropological crossroads unprecedented in the history of the species, having to choose between an attitude of reactionary refusal of technological innovation, one of uncritical adherence to the promises of radical transhumanism, and one of prudent discernment, capable of selecting, in an informed and responsible manner, those neurotechnological applications which contribute effectively to human flourishing, eliminating those which imperil it. It is precisely this last path, that of prudent discernment, which appears to us to be the only one compatible with the classical exigency of the dignity of the human person — an exigency which neither the acceleration of the technological tempo nor the seduction of transhumanist promises can underline in a manner that exonerates it from its permanent actuality.

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THE BURDEN OF PROOF IN CONTRAVENTION PROCEEDINGS – THE PRESUMPTION OF LEGALITY AND VALIDITY OF THE CONTRAVENTION REPORT VS. THE PRESUMPTION OF INNOCENCE

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Abstract

This paper examines the inherent tension within administrative offense proceedings between the statutory presumption of legality and validity attributed to official records (proces-verbal) and the fundamental presumption of innocence as guaranteed by Article 6 of the European Convention on Human Rights (ECHR).

In many jurisdictions, including Romania, the official report of a contravention is traditionally granted a rebuttable presumption of accuracy, shifting the burden of proof onto the petitioner. However, the European Court of Human Rights has consistently ruled that certain administrative sanctions possess a "criminal" character, thereby necessitating the full protection of fair trial rights.

The analysis focuses on the "fair balance" that courts must strike to ensure that the use of legal presumptions does not render the right to a defense illusory. By exploring recent jurisprudence, the study highlights the transition from an absolute administrative authority toward a more nuanced standard of proof, where the principle of in dubio pro reo must be reconciled with the necessity of efficient public enforcement.

By examining the criteria for 'reasonable doubt' in administrative litigation, the paper suggests that strengthening the evidentiary requirements for public authorities not only safeguards individual liberties but also enhances the overall transparency and accountability of the administrative act, ensuring that the punitive power of the state remains within the boundaries of the rule of law.

Keywords: forced intervention, incidental request, third parties, bringing to court, claimant.

1. Introduction

1.1. Context and Problem Statement

In contemporary legal practice and doctrine, the contravention report (procesul-verbal de constatare și sancționare a contravenției) serves a dual purpose: it is both a unilateral administrative act and a primary means of evidence. The prevailing view holds that such a report enjoys a rebuttable presumption of veracity (prezumție relativă de adevăr) regarding the facts and circumstances observed directly by the recording officer through their own senses.

However, this administrative presumption often finds itself in direct tension with the presumption of innocence, a cornerstone of the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights (ECHR). While domestic law aims to ensure administrative efficiency, the European Court of Human Rights (ECtHR) requires that any legal presumption remains within reasonable limits, taking into account the stakes for the defendant and the preservation of defense rights.

1.2. Objectives and Scope of the Study

This paper aims to analyze the evidentiary weight of the contravention report in the Romanian legal system, particularly in light of the Civil Procedure Code.

A central point of this inquiry is the distinction between:

- Directly observed facts: Where the burden of proof is shifted to the petitioner to provide rebuttal evidence.
- Indirectly established facts: Based on technical means (e.g., speed cameras) or witness statements, where the burden of proof remains strictly with the issuing authority.

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1.3. Thesis Statement

We argue that the contravention report must always be regarded as a means of evidence (înscriș), regardless of whether the officer directly perceived the offense. However, its probative value must be nuanced. This study contends that a passive stance by the petitioner should not be encouraged, yet the court's active role is paramount in ensuring that the "presumption of legality" does not de facto nullify the presumption of innocence in proceedings that often carry a "criminal" character under the autonomous criteria of the ECtHR.

2. Content

In judicial practice and legal doctrine, the most widespread opinion is that the record of the offense and the application of the sanction¹ (hereinafter referred to as the contravention report) enjoys a rebuttable presumption of truth² regarding the mentions concerning the circumstances perceived by the recording officer through their own senses³.

¹ Regarding the legal nature of the contravention report, we note that in the recitals of Decision no. 6/2015 of the Înalta Curte de Casație și Justiție – the Panel competent to decide on appeals in the interest of the law – it was held that the contravention report is an individual unilateral administrative act, issued under public authority and intended to produce legal effects. The majority of legal doctrine supports this solution provided by the Înalta Curte de Casație și Justiție. In this regard, see: O. Podaru, R. Chiriță, I. Păsculeț, A. Bachis, *Regimul juridic al contravențiilor*. O.G. nr. 2/2001 comentată, 5th Ed., Ed. Hamangiu, București, 2021, p. 191; A. Iorgovan, *Tratat de drept administrativ*, vol. II, 4th Ed., Ed. ALL Beck, București, 2005, p. 427; R. N. Petrescu, *Drept administrativ*, Ed. Hamangiu, București, 2009, p. 609; T. Drăganu, *Actele de drept administrativ*, Editura Științifică, București, 1959, p. 92.

It should be mentioned that specialized doctrine also includes the opinion that both the contravention report and other acts prepared in connection with the application or execution of contravention sanctions have the legal nature of acts of contravention procedure. In this regard, see M. Ursuța, *Noul regim contravențional în contextul intrării în vigoare a Noului Cod de procedură civilă și a Legii nr. 76/2012 pentru punerea în aplicare a Legii nr. 134/2010 privind Codul de procedură civilă*, published in *Revista Dreptul*, no. 3/2013, and M. Ursuța, *Procedura contravențională*, 3rd Ed., Ed. Universul Juridic, București, 2010, p. 208. The author further states that: "Regarding the contravention report, although it is considered an administrative act by the majority of the doctrine... this opinion is only found in the doctrine subsequent to Decree no. 184/1954. Prior to this normative act... the contravention report was regulated by criminal procedure, having the legal nature of an act specific to criminal proceedings."

The same author, in another work, notes: "The contravention report... actually presents significant peculiarities, being—before 1958—an act of criminal procedure... Rather, the contravention report has a dual role: as an 'act de acuzare' (charging act) and a 'mijloc de probă' (means of evidence) within the contravention procedure (...)." See M. Ursuța, *Contenciosul contravențional, între dreptul penal material, procedura civilă și procedura penală*, in *Revista Dreptul* no. 1/2024.

For a similar opinion, see T. Toma, *Drept administrativ*, Vol. I, Editura Vasiliana, Iași, 2006, p. 312: "For our part, we consider that the report is an act of contravention procedure of an administrative nature... it will undoubtedly take on the legal nature of an 'act procesual contravențional'." Also, through Decision no. 4/30.01.2017, the Î.C.C.J. (Panel for the clarification of legal matters) held (para. 61) that: "Contravention legislation regulates the legal nature of the report in the sense of an individual administrative act and an act of contravention procedure, but does not contain regulations regarding the probative value..."

Similarly, it has been shown in doctrine that "the act of establishing and sanctioning the contravention is the first procedural act prepared within the contravention process" – A. Iorgovan, *Tratat de drept administrativ*, Ed. All Beck, București, 2002, p. 296, apud C. Uliariu, *Procedura angajării răspunderii contravenționale*, Editura C.H. Beck, București, 2025, p. 445.

For a critique of these opinions, see O. Podaru et al., *Regimul juridic al contravențiilor*. O.G. nr. 2/2001 comentată, 4th Ed., Ed. Hamangiu, București, 2019, pp. 182-186.

Notably, Art. 97 para. (5) of O.U.G. no. 195/2005 regarding environmental protection mentions: "Actele de constatare a contravențiilor întocmite de agenții constatatori... sunt acte procedurale, potrivit reglementărilor legale..." – C. Uliariu, 2025, p. 238. Regarding the notion of "procedură contravențională", it has been shown in doctrine to represent a particular form of administrative litigation (contencios administrativ)... – D.C. Dragoș, *Procedura contenciosului administrativ*, Editura All Beck, București, 2002, p. 2.

² The 1865 Code of Criminal Procedure provided that most contravention reports constituted proof until a formal challenge of forgery (înscrierea în fals) regarding the factual situation... making defense practically impossible. As the procedure was absurd, practice and doctrine considered that the contents of the report could only serve as proof until rebuttal evidence (proba contrară) was provided, and the 1938 Code of Criminal Procedure enshrined this solution (I. Tanoviceanu, *Tratat de drept și de procedură penală*, 2nd Ed., vol. IV, Tipografia „Curierul Judiciar”, București, 1912, pp. 528-536). – M. Ursuța, I. Lazăr, *Drept administrativ – Curs Universitar*, Ed. Universul Juridic, București, 2025, p. 408. "The law grants credit to the reports of officers whom it empowers to observe through their own senses or their own means..." Decision no. 293 of 05.10.1882, in C. Hamangiu, *Procedura penală adnotată cu jurisprudență română (1868/1904)*, Ed. Librăriei Leon Alcaj, 1904, p. 136.

³ For further details and nuances, see M. Ursuța, *Dreptul contravențional și procedura judiciară în dreptul public. Actualitate și perspectivă*, Ed. Hamangiu, București, 2018, pp. 36-37; O. Podaru, A. C. Loghin, *Drept contravențional – Curs universitar*, Ed. Hamangiu, București, 2024, pp. 107-110. In specialized doctrine, it has been shown that when "the author of the contravention is caught at the very moment of committing it... we are in the presence of a 'contravenție flagrantă'" (T. Toma, 2006, pp. 309-310). "Actul de constatare are, în virtutea legii, forță probantă..." – I. Poenaru, *Regimul juridic al contravențiilor*. Ordonanța Guvernului nr. 2/2001, Editura Lumina Lex, București, 2002, p. 108.

A presumption⁴ is merely a means through which a factual matter is intended to be proven; Article 327 of the Code of Civil Procedure provides that a presumption is the consequence that the judge or the law deduces from a known fact in order to establish an unknown fact⁵.

Government Ordinance (G.O.) no. 2/2001 does not contain express provisions regarding the probative value of the contravention report. It is interesting to note, however, that the Code of Criminal Procedure confers express evidentiary value upon records drawn up by the criminal investigation body or the court; Article 198 para. (2) of the Code of Criminal Procedure stipulates that a record containing the personal findings of the criminal investigation bodies or the court constitutes a means of evidence.

This solution—namely, granting evidentiary value to a document containing the personal findings of a person invested with state authority—is, in fact, what also occurs in the case of contravention reports in civil proceedings.

Specifically, in contravention proceedings, evidentiary value is assigned to the document containing the personal findings of the person invested with state authority. In this case, the "rebuttable presumption" effectively implies that if the document was drawn up by the recording body, it recorded the truth. In other words, the evidence is represented by the factual situation, the means of evidence is the document (the contravention report), and the presumption is that the recording officer recorded the aspects perceived by them exactly as they occurred in reality.

Legal doctrine indicates that the report "has a dual legal nature in contravention proceedings: a charging act and a means of evidence." Furthermore, in situations where the deed is not perceived by the recording officer through their own senses, "the report does not also function as a means of evidence within the judicial contravention procedure, thus retaining only its character as an accusatory act (...)." ⁶

In our opinion, the contravention report will always constitute a means of evidence in contravention proceedings, regardless of whether the deed was perceived by the officer through their own senses or not. The report constitutes a "document" (înscriș) within the meaning of Article 265 of the Code of Civil Procedure, according to which: "A document is any writing or other record containing data about a legal act or fact, regardless of its physical medium or the method of preservation and storage."

The fact that the officer did not witness the contravention through their own senses does not mean the report ceases to be a document under Article 265; rather, it simply means it does not possess the same probative weight as a report concluded by an officer who personally witnessed the deed. Additionally, the report may contain the objections or even the confession of the offender (in practice, it is common to record under the "Objections" section, with the offender's signature, the fact that they admit to the deed). Thus, it cannot be argued that it solely represents a charging act without constituting a means of evidence.

Regarding the presumption of legality and the presumption of innocence, the Romanian Constitutional Court held the following in Decision no. 1096 of September 8, 2009⁷:

"The Court notes that the contravention report enjoys a presumption of legality; however, when a complaint is filed against it, the very presumption it enjoys is challenged. In this case, the competent court shall admit the evidence provided by law, necessary to verify the legality and accuracy of the report. The person filing the complaint does not have to demonstrate their own innocence; the court has the obligation to administer all the evidence necessary to establish the truth. Even though Art. 47 of G.O. no. 2/2001 refers to the Code of Civil Procedure, courts cannot strictly apply the rule of *onus probandi incumbit actori* [the burden of proof lies with the claimant]; on the contrary, they must manifest an active role in finding the truth, since the contravention falls under Article 6 of the European Convention on Human Rights. Therefore, it cannot be argued that the burden of proof is reversed."

These statements were partially reiterated in Decision no. 152 of May 6, 2020, of the Constitutional Court⁸.

⁴ For an extensive analysis of legal and judicial presumptions in civil proceedings, see: C. Lungănașu, *Prezumțiile și principiul contradicționalității în procesul civil*, in *Revista Dreptul* no. 5/2024; V. Maruchson et al., *Prezumția ca mijloc de probă în procesul civil*, cu referire specială la prezumțiile legale, in *Revista Dreptul* no. 2/2018.

⁵ For a detailed analysis regarding legal and judicial presumptions, see D. Ramona, T. Andreea, *Prezumția ca mijloc de dovadă, potrivit noului Cod de procedură civilă și noului Cod civil*, in *Revista Română de Drept Privat*, no. 6/2011.

⁶ M. Ursuța, I. Lazăr, *Drept administrativ – Curs Universitar*, Ed. Universul Juridic, București, 2025, p. 434.

⁷ Published in M. Of. nr. 695/15.10.2009. Through this judgment, the exception of unconstitutionality regarding Articles 16 paras. (1), (6), and (7), Art. 21 paras. (1) and (3), Art. 26 para. (1), Art. 28, and Art. 47 of Ordonanța Guvernului nr. 2/2001 was dismissed.

⁸ Published in M. Of. nr. 268/31.03.2020.

In our opinion, the claim that the report enjoys a presumption of legality, but that this presumption is challenged as soon as a complaint is filed—thereby obliging the court to administer evidence while the petitioner remains passive—is equivalent to the de facto absence of the presumption of legality.

The presumption in the case of contravention reports is merely an assumption regarding the veracity of the findings mentioned therein. Consequently, asserting that the petitioner can remain passive in terms of evidence and that the court must verify the report's legality and accuracy equates to the non-existence of this very assumption. Of course, the court must manifest an active role, but this does not mean the petitioner can be passive, as the report itself represents a means of evidence (document) which the court may deem sufficient to resolve the case.

Constant jurisprudence of the European Court of Human Rights (ECtHR) in contravention matters indicates that the Convention is not incompatible with the use of legal or factual presumptions. For example, in the case of *Anghel v. Romania* (para. 60), the Court showed that presumptions of fact and law are found in every legal system and the Convention does not prohibit them; however, in "criminal" matters, they must not exceed a certain threshold⁹. Article 6 para. 2 of the Convention requires Member States to keep presumptions within reasonable limits, proportionate to the gravity of the facts and the necessity of respecting the right to a defense¹⁰.

In that case, the Court found that the applicant's request was not judged fairly under Article 6, but this was not due to the presumptions applied, but because the national courts failed to allow a confrontation with a prosecution witness—a primary guarantee, given that the officer who drew up the report was not present at the time of the deed.

Therefore, it is clear that the existence of a presumption of legality and accuracy regarding the contravention report does not, in itself, constitute a violation of Article 6 ECHR (under its criminal part), but the manner in which this presumption is applied may lead to such a violation¹¹.

In the case of *Haiducu and Others v. Romania*, the applicants complained that national courts expected them to rebut the presumption of legality and accuracy. However, the ECtHR considered that the application of the presumption did not infringe upon the presumption of innocence, as Art. 6 para. 2 does not oppose the application of rebuttable presumptions concerning the conformity of a report with reality¹².

It can be concluded that the petitioner has the obligation to provide rebuttal evidence (*proba contrară*) against findings made by the recording officer. Where we are dealing with a "criminal charge", national courts must ensure they apply the presumption of accuracy within a reasonable limit, ensuring the right to a fair trial¹³.

Regarding contraventions which, by law, must be established through certified and metrologically verified technical means, the report will not benefit from the presumption of accuracy. In such cases, the burden of proof lies with the issuer of the report, who is obliged to submit the evidence resulting from the use of said technical means to the case file. This is supported by Decision no. 4/2017 of the High Court of Cassation and Justice¹⁴, which held (para. 67) that unlike reports based on personal observations, those based on technical evidence do not benefit from these presumptions, and the burden of proof rests entirely with the issuer.

A report may also be drawn up by a competent officer (who did not personally witness the deed) based on other evidence, such as witness statements, the offender's statements, or material evidence. In this situation as

⁹ See also C.-L. Popescu, "Neconvenționalitatea" și neconstituționalitatea procedurii contravenționale judiciare de drept comun, în raport cu dreptul la respectarea prezumției de nevinovăție, în *Pandectele Române* nr. 6/2002, p. 203.

¹⁰ In this regard, see also the cases *Salabiaku v. France* and *Telfner v. Austria*, available at www.echr.coe.int.

¹¹ For a similar view, see D. Serena, *Sarcina probei și limitele prezumției de nevinovăție în materia plângerilor contravenționale analizate în lumina Convenției Europene a Drepturilor Omului*, în *Revista Română de Drept Privat*, nr. 4/2008 (accessed via www.sintact.ro on 08.11.2024), as well as D. Bogdan, B. Tândărescu, M. Selegean, *Prezumția de nevinovăție în procedura contravențională judiciară. Aplicarea art. 6 în dimensiunea sa penală. Instituirea unor prezumții de fapt sau de drept. Dreptul apărării. Audierea martorilor. Aprecierea probelor*, în *Revista Română de Jurisprudență*, nr. 1/2009. For an opposing view, see E. M. Fodor, *Aplicarea principiului legalității din dreptul penal în dreptul contravențional*, în *Revista Transilvăneană de Științe Administrative* nr. 3/2010.

¹² See paragraph 12 of the indicated judgment. A similar reasoning is found in the case *Salabiaku v. France* (an analysis of the latter judgment can be found in L. M. Mercan, G. Anamaria, *Prezumția de nevinovăție versus prezumția de legalitate și temeinicie a procesului-verbal de contravenție. Rolul activ al judecătorului*, în *Revista Română de Drept European* nr. 2/2011).

¹³ Specialized doctrine has argued that "in relation to those contraventions that may lead to a criminal qualification according to the Court's criteria, it is necessary to adopt a jurisprudence that places the burden of proof for the contravention on the issuer of the contravention report." In this regard, see O. Podaru, R. Chiriță, I. Pășculeț, A. Bachis, *Regimul Juridic al contravențiilor*. O.G. nr. 2/2001, comentată, 5th Ed., Ed. Hamangiu, București, 2021, pp. 11-12.

¹⁴ Published in M. Of. nr. 168/08.03.2017.

well, the report does not benefit from the presumption of accuracy, and the burden of proof remains with the issuer¹⁵.

Regarding reports drawn up based on evidence without personal observation by an officer, we note that recently, following the recording of aggressive driving by other participants using audio-video devices, G.E.O. no. 84/2024¹⁶ introduced Article 109³ into G.E.O. no. 195/2002¹⁷. According to this new article, a traffic officer may establish a contravention of "aggressive driving" based on a report from another participant who witnessed the maneuver and captured it on a video recording.

Previously, according to Art. 109, contraventions could only be established "directly" by the officer or through certified technical means. This restrictive framework significantly limited the ability of officers to establish offenses. In our opinion, it is natural and preferable for a contravention report to be concluded based on any means of evidence provided by law, not just personal observation¹⁸. We believe Art. 109 para. (1) should have been modified to remove the word "directly," allowing the officer to establish offenses based on various evidence. This would ensure that evidence obtained by traffic participants respects the principle of legality and can be used in the litigation initiated by the contravention complaint.

3. Conclusions

From the content of this paper, the following conclusions can be drawn as most relevant:

- The petitioner bears the obligation to provide rebuttal evidence against findings personally perceived and recorded by the officer. In cases involving a "criminal charge," courts must ensure the presumption of accuracy remains within reasonable limits;
- The issuer of the contravention report bears the burden of proof when the deed was not personally perceived by an officer but was established based on other means of evidence;
- The judicial review of contravention complaints must transcend a formalistic application of the onus probandi incumbit actori rule. Under the ECHR framework, the judge must exercise an active role (rol activ), being mandated to order the administration of evidence ex officio to ensure that the factual truth is established beyond a reasonable doubt;
- Given that many administrative sanctions qualify as "criminal charges" under the Engel criteria, the petitioner must benefit from the presumption of innocence. Consequently, any persistent ambiguity or evidentiary gap in the recording officer's findings must be interpreted in favor of the petitioner, pursuant to the in dubio pro reo principle;
- The contravention report should not be viewed as an absolute proof, but as a rebuttable instrument. Its evidentiary weight varies significantly depending on whether it is based on the officer's personal perceptions or on indirect evidence (witnesses or technical recordings), in which case the burden of proof remains entirely with the issuing authority;
- Ultimately, the Romanian legal system must maintain a reasonable balance between the presumption of legality (protecting administrative efficiency) and the right to a fair trial. Legal presumptions are permissible only if they are not absolute and if the defendant is granted a genuine opportunity to provide rebuttal evidence.

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¹⁵ In this regard, see, for example, O. Podaru, R. Chiriță, I. Pășculeț, *Regimul juridic al contravențiilor*. O.G. nr. 2/2001 comentată, 4th Ed., Ed. Hamangiu, București, 2019.

¹⁶ Published in M. Of. nr. 610/29.06.2024.

¹⁷ Within the statement of reasons (expunerea de motive) for the Draft Law approving Government Emergency Ordinance no. 84/2024, it is stated, among other things, that "through the proposed solution, the involvement of civil society is desired in the process of reporting serious traffic violations... it is proposed to expand the modality of establishing traffic contraventions... by instituting a mechanism through which traffic participants can submit complaints regarding possible violations caught in video or audio-video recordings."

¹⁸ The existence of means of evidence proving the commission of a contravention ensures a high degree of objectivity in a contravention trial and contributes to ensuring the right to a fair trial.

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1.4 INTELLECTUAL PROPERTY LAW

CASE AUTHORS V. ANTHROPIC PBC 2025 (S.U.A.) – BETWEEN COPYRIGHT INFRINGEMENT AND „FAIR USE OF AI”

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Abstract

The case Authors v. Anthropic is one of the most relevant cases in the US regarding the use and training of AI with authors' works protected by copyright. This case highlights the enduring tension between technological innovation and creators' rights. In the United States, where judicial rulings carry precedential authority, outcomes such as Anthropic v. Authors are likely to shape the trajectory of copyright law and the ethical use of creative works in AI training, marking a pivotal moment in the enforcement of intellectual property in the era of rapidly evolving technology.

The June 23, 2025, ruling in Bartz v. Anthropic by Judge William Alsup marks a landmark U.S. decision on copyright law as applied to large language model (LLM) training. The court distinguished between the acquisition of copyrighted works and their use in AI training, treating each as a separate „use” under the fair use doctrine. While the mass acquisition of pirated books was deemed „inherently, irredeemably infringing,” the subsequent training of LLMs on lawfully obtained works was held to be highly transformative and generally fair use.

Judge Alsup emphasized that LLMs generate new outputs rather than reproduce original works, and limited memorization does not constitute infringement absent traceable outputs. The court also upheld digital format-shifting of lawfully acquired books for internal AI training.

This ruling provides critical guidance for AI developers, affirming that transformative use is permissible under copyright law while underscoring the legal risks of unlawful acquisition, establishing a pivotal precedent at the intersection of AI and intellectual property.

Keywords: Artificial Intelligence, „fair use” of AI, Authors vs. Anthropic, Copyright.

1. Introduction

The advancement of AI-based technologies has begun to gain momentum, so that tensions have begun to arise regarding the protection of intellectual property rights, and discussions about training algorithms on the works of human authors have reached the courts in the United States. There are serious concerns in academia about the impact of using AI, which are very realistic: „it will compete with humans and even surpass humans, but also that this AI could become more powerful than we would like it to be, with catastrophic consequences for humanity.”¹

In this article, I will analyze to what extent the use of large language models (LLM) qualifies for training artificial intelligence within the limits of current legislation, in the absence of a license or authorization from human authors, using Authors v. Anthropic (2025) as a case study. For comparison, we analyzed the application of the American „fair use” doctrine² which offers greater flexibility in use through legal interpretation, in contrast to the European framework of Directive EU 2019/790,³ which provides greater legal clarity but requires complementary mechanisms, such as collective licensing.

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¹ Viorel Roș, Andreea Livădaru, Ciprian-Raul Romițan, *Dreptul proprietății intelectuale. Dreptul de autor și drepturile conexe și drepturile de proprietate industrială*, editura C.H. Beck, București, 2025, p. 10.

² 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use: “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” https://www.law.cornell.edu/uscode/text/17/107#:~:text=%20Title%2017.%20*%20CHAPTER%201.%20*%20C2%A7%20107, accessed on 2nd of march 2026.

³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) <https://eur-lex.europa.eu/eli/dir/2019/790/oj?locale=ro>, accessed on 2nd of march 2026.

Systems that use large linguistic models (LLM) rely on huge amounts of data, whether textual, visual or audiovisual, in order to generate results that are as relevant and close to expectations as possible, but this process raises big questions about the protection of intellectual property rights, especially when these systems are trained on copyrighted works.

Some situations have generated a wave of litigation in the United States, and courts have been called upon to rule on whether the use of large linguistic models (LLMs) and the training of artificial intelligence algorithms on copyrighted works violate the American doctrine of fair use. One such case is *New York Times v. OpenAI* ⁴ in which the famous newspaper accused OpenAI of having trained its algorithms on millions of newspaper articles without a license, and more than that, having memorized and reproduced parts of the articles, and in many cases the reproductions were wrong, affecting both the work of journalists and the reputation of the newspaper, because OpenAI, by reproducing NYT articles, enters into direct competition with the newspaper, but without paying for these reproductions.⁵

In the case of *Getty Images v. Stability AI*⁶, a UK judge ruled in November 2025 that Getty had partially succeeded against Stability AI in trademark infringement claims regarding artificial intelligence results that displayed distorted Getty Images watermarks. This case represented a significant development in emerging jurisprudence in the intersection of artificial intelligence and intellectual property law. The judgment did not provide a definitive resolution to the complex legal debates regarding AI training and copyrights infringements but underlines the structural limitations of current intellectual property law frameworks when applied to machine learning structures trained on transnational dataset with unprecedented scale and complexity. Terms like authorship, ownership, originality, creative labour and technological mediation becomes evolutionary concepts and which will need to be redefined in the future and contain broader frameworks to allow for the integration of technological developments.

2. Case Authors v. Anthropic PBC 2025 (S.U.A.)

„Authors vs. Anthropic“ is a class action lawsuit and landmark settlement from 2025 regarding the use of copyrighted books to train generative artificial intelligence models. The case, filed by authors Andrea Bartz, Charles Graeber, and Kirk Wallace Johnson, highlighted the legal, ethical, and financial conflicts between artificial intelligence developers and content creators. The authors alleged that Anthropic violated Copyright Law by downloading pirated copies of their books from “shadow libraries” (LibGen, PiLiMi) to train its artificial intelligence system Claude, without permission or compensation.

The plaintiffs, a group of published authors, filed a class action lawsuit against Anthropic, alleging that their works were illegally copied for use in the teaching of Anthropic, an LLM, alleging three counts: that copyrighted works were used to teach LLMs, that books that were legally purchased in print were digitized, and that pirated digital copies of the books were purchased and retained to build a digital library. Anthropic argued that its uses constituted fair use under Section 107 of the U.S. Copyright Act.⁷

The court ruled on June 23, 2025 and found three conclusions relevant to the case of „Authors vs. Anthropic“:

- Using copyrighted works to train AI algorithms constitutes „fair use“ because it is „transformative“, with the results obtained from using the AI being different from reproducing the work. The Court drew an analogy to the human learning process, and Copyright Law does not extend to methods, concepts, or principles contained in a work.
- The digitization of books legally purchased by Anthropic is fair use, even if some works were destroyed during scanning, the digital result replaces the printed work, being transformative in the sense of fair use, because it facilitates the storage of the work, without increasing the number of duplicates and without having been distributed outside the Anthropic company.

⁴ *New York Times v. OpenAI* https://nytco-assets.nytimes.com/2023/12/NYT_Complaint_Dec2023.pdf, accessed on 5th of march 2026.

⁵ A deeper analysis in Harvard Law Review: *NYT v. OpenAI: The Times's About-Face* by Audrey Pope: <https://harvardlawreview.org/blog/2024/04/nyt-v-openai-the-times-about-face/> accessed on 5th of march 2026.

⁶ *Getty Images v. Stability AI* <https://www.judiciary.uk/wp-content/uploads/2025/11/Getty-Images-v-Stability-AI.pdf>, accessed on 5th of march 2026.

⁷ Regina Sam Penti, *From Books to Bots: Key Takeaways from the Anthropic Fair Use Decision for AI Developers and Copyright Holders*, <https://www.ropesgray.com/en/insights/alerts/2025/06/from-books-to-bots-key-takeaways-from-the-anthropic-fair-use-decision-for-ai-developers>. accessed on 9th of march 2026.

- The acquisition and storage of pirated works does not constitute fair use, because they were not reasonably necessary for LLM training, especially since copyright-compliant alternatives existed.⁸

The Court's decision states that authors should be more proactive in protecting their works and take action when pirated digital libraries appear in order to better protect their works and prevent language programs from doing unauthorized training. Three authors have filed a class action lawsuit, which will benefit over half a million authors in the US, who will receive over \$1.5 billion, a quarter of which will be in attorneys' fees.⁹

3. Technical elements of generative artificial intelligence

Generative artificial intelligence models are trained on large data sets through a process that involves tokenization, statistical learning, and optimization of model parameters. During training, the system processes large amounts of data to identify patterns and relationships between words, images, or other forms of content. Tokenization refers to raw data (text, images) being converted into smaller units called "tokens" (words, sub-words, or pixels), which can be numerically processed by a computer.

The model analyzes the probabilities of co-occurrence of these tokens. It learns that a particular word or pixel tends to follow another in a given context, identifying syntactic, semantic, or visual structures. During training, the model continuously adjusts its internal parameters (weights) to minimize the difference between its prediction and the actual data. This process is repeated billions of times until the model "understands" the data representations.¹⁰

From a legal perspective, a crucial distinction must be made between input data and output content. This distinction is essential for determining liability, as training involves copying data, while output raises issues of reproduction or derivative works. Although AI systems are designed to generalize, studies have shown that models can occasionally reproduce their training data verbatim, raising concerns about infringement.¹¹

3.1. Technical element in the case Getty Images v. Stability AI (2025)

In the case Getty Images v. Stability AI¹², there is one of we find one of the first legal analyses that evaluates the technical structure of a generative artificial intelligence system from the perspective of current United Kingdom legislation. Stability AI developed a technical artificial intelligence system called Stable Diffusion and trained it using public databases of photos on the internet. The court paid particular attention to the explanation of the mechanism of deep learning and image generation.

Stable Diffusion was presented as a neural-network architecture operating through probabilistic modeling. During the training of the artificial intelligence system, it processed billions of image-text pairs extracted from datasets. The dataset contained URLs, metadata, captions, and associated image references obtained through large-scale web scraping and crawling processes.¹³ Getty Images alleged that millions of copyrighted visual assets originating from its databases were included in these datasets and subsequently materialized during model training.¹⁴ Technically, the judgment distinguished between "training" and "inference." Training involved repeated exposure of the neural network to visual data in order to optimize "model weights," namely the adjustable parameters controlling the system's internal statistical representations. By contrast, inference referred to the operational stage in which a trained model generates synthetic images from textual prompts by iteratively removing noise from an initial random image.¹⁵ The court emphasized that Stable Diffusion does not

⁸ *Idem*.

⁹ Dave Hansen, The Bartz v. Anthropic Settlement: Understanding America's Largest Copyright Settlement, <https://legalblogs.wolterskluwer.com/copyright-blog/the-bartz-v-anthropic-settlement-understanding-americas-largest-copyright-settlement/> accessed on 15th of March 2026.

¹⁰ Stanford University: Reexamining "Fair Use" in the Age of AI, <https://hai.stanford.edu/news/reexamining-fair-use-age-ai>, accessed on 7th of march 2026.

¹¹ *Idem*.

¹² Getty Images v. Stability AI <https://www.judiciary.uk/wp-content/uploads/2025/11/Getty-Images-v-Stability-AI.pdf>, accessed on 7th of march 2026.

¹³ Britannica, *Stable Diffusion – generative AI*, <https://www.britannica.com/technology/Stable-Diffusion>, accessed on 7th of march 2026.

¹⁴ Getty Images v. Stability AI <https://www.judiciary.uk/wp-content/uploads/2025/11/Getty-Images-v-Stability-AI.pdf>, accessed on 7th of march 2026.

¹⁵ *Idem*.

retain literal copies of training images within the model itself; however, its functional capacities remain indirectly shaped by the training data embedded within the learned parameters.

A further technical issue concerned the appearance of synthetic Getty Images watermarks in AI-generated outputs. Getty argued that these outputs demonstrated the internalization of protected visual indicators and trade marks during training. Stability AI accepted that certain prompts could generate images containing distorted Getty watermarks but contended that such outputs resulted from user manipulation rather than autonomous conduct attributable to the company itself.

The litigation also addressed distributed cloud-computing infrastructures. Evidence demonstrated that training processes occurred primarily on Amazon Web Services (AWS) clusters located outside the United Kingdom. This technical-geographical dimension proved legally significant because Getty ultimately abandoned parts of its copyright infringement claims after acknowledging insufficient evidence that model training occurred within UK territorial jurisdiction.

3.2. Technical element in the case *Authors v. Anthropic PBC* 2025

The litigation in *Authors v Anthropic PBC* is a significant judicial examination of the technical infrastructure underlying large language models and their interaction with United States copyright law. The dispute focused on the development and training of Anthropic's AI systems, particularly the use of extensive literary datasets allegedly acquired from both lawful and unauthorized digital repositories.¹⁶

From a technical perspective, the proceedings addressed the operational architecture of transformer-based language models. Anthropic's systems were trained through large-scale computational ingestion of digitized books contained in datasets originating from repositories such as LibGen and PiLiMi. The court distinguished between: the acquisition and storage of copyrighted works, the preprocessing and organization of datasets; and the subsequent machine-learning training process.¹⁷ The judgment emphasized that the defendant maintained a centralized digital "library" composed of millions of books copied into machine-readable formats. Technically, this repository enabled: text extraction, tokenization, dataset filtering, deduplication, indexing, and repeated retraining operations for LLM optimization.

The court examined how transformer models process textual corpora through probabilistic computation. During training, textual material is converted into numerical tokens and processed iteratively across neural-network layers to optimize statistical parameters governing linguistic prediction. Similar to diffusion-image systems, the model does not retain directly accessible copies of complete books; instead, it develops generalized semantic and syntactic relationships through parameter weighting and predictive optimization. A central technical issue concerned the distinction between: permanent storage of pirated literary works, and transformative computational use during model training.

Judge William Alsup recognized that reproductions created specifically for machine-learning training could constitute transformative uses because the system utilized textual material to develop generalized linguistic capabilities rather than to reproduce expressive literary content verbatim.¹⁸ However, the court treated differently Anthropic's large-scale downloading and retention of unauthorized digital books from pirate repositories. The maintenance of a persistent internal library was characterized as a distinct act of reproduction potentially constituting copyright infringement independently of the later AI-training process.¹⁹

Another technical aspect involved evidentiary questions surrounding "memorization" and output generation. Plaintiffs alleged that LLMs may reproduce protected passages when prompted. Anthropic argued that outputs are generated probabilistically through learned statistical relationships rather than through retrieval of stored textual copies. The litigation therefore highlighted the growing doctrinal distinction between: latent statistical representation, memorization, and direct reproduction of copyrighted expression. The settlement

¹⁶ Bartz et al v. Anthropic PBC, No. 3:2024cv05417 - Document 437 (N.D. Cal. 2025), <https://law.justia.com/cases/federal/district-courts/california/candce/3:2024cv05417/434709/437/>, accessed on 9th of March 2026.

¹⁷ *Idem*.

¹⁸ Regina Sam Penti, From Books to Bots: Key Takeaways from the *Anthropic* Fair Use Decision for AI Developers and Copyright Holders, <https://www.ropesgray.com/en/insights/alerts/2025/06/from-books-to-bots-key-takeaways-from-the-anthropic-fair-use-decision-for-ai-developers>, accessed on 9th of March 2026.

¹⁹ Bartz et al v. Anthropic PBC, No. 3:2024cv05417 - Document 437 (N.D. Cal. 2025), <https://law.justia.com/cases/federal/district-courts/california/candce/3:2024cv05417/434709/437/>, accessed on 9th of March 2026.

framework also reflected the scale of AI data infrastructures. The proceedings involved nearly half a million literary works and extensive digital evidence, including terabytes of computational and dataset information.

The Court's Functional Understanding of AI Training

A central aspect of the court's reasoning was its distinction between: the storage of copyrighted works, and the transformative computational use of those works during AI training.²⁰

Judge William Alsup adopted a functional interpretation of machine-learning processes. The court recognized that transformer-based LLMs do not operate as digital archives reproducing books in a conventional sense. Instead, the system processes textual corpora through tokenization, parameter optimization, and probabilistic modelling to generate generalized linguistic capabilities.²¹

Technically, this reasoning demonstrates judicial acceptance of the distinction between: expressive content; and statistical abstraction. The court implicitly acknowledged that model weights and learned parameters constitute mathematical representations derived from training data rather than literal textual reproductions. This reflects a sophisticated understanding of neural-network architecture rarely observed in earlier copyright jurisprudence.

3.2.1. Separation Between Dataset Piracy and AI Training

One of the most important technical distinctions in the judgment concerns the differentiation between: unlawful acquisition of datasets; and the subsequent machine-learning training process. The court treated Anthropic's alleged downloading of books from repositories such as LibGen and PiLiMi as technically and legally distinct from the later use of those texts in model training.²²

This distinction is doctrinally important because the court effectively fragmented the AI pipeline into separate legally assessable stages: ingestion, storage, preprocessing, training, and output generation. By isolating these stages, the decision avoids collapsing the entire AI lifecycle into a single act of infringement. Instead, liability becomes dependent upon the specific computational function being performed at a given stage. From a technological perspective, the court demonstrated awareness that modern AI systems depend upon persistent internal repositories used for: deduplication, indexing, filtering, retraining, and dataset management.²³

3.2.2. Judicial Recognition of Transformative Computation

A particularly innovative element of the reasoning lies in the court's treatment of AI training as potentially "transformative"²⁴ under U.S. fair use doctrine. The court accepted that LLM training serves a fundamentally different function from the original literary works. Rather than communicating expressive narratives to readers, the computational process extracts statistical relationships, semantic patterns, and linguistic structures to develop predictive text-generation capabilities.

This reasoning extends earlier jurisprudence concerning: search indexing, digital scanning, and computational analysis, particularly the logic developed in *Authors Guild v Google*. However, the court did not fully immunize AI systems under fair use. Instead, it imposed a conceptual limit: transformative computational use may exist even where the underlying acquisition of training data remains unlawful. This creates a dual analytical framework: lawful transformation, coexisting with potentially unlawful procurement.

4. Conclusions

The rapid expansion of generative artificial intelligence has exposed a fundamental structural tension within copyright law: the need for widespread access to data to enable technological innovation versus the imperative to protect the economic and moral interests of authors. The case of *Authors v. Anthropic* illustrates

²⁰ *Idem.*

²¹ *Idem.*

²² Hansen, Dave, *The Bartz v. Anthropic Settlement: Understanding America's Largest Copyright Settlement*, <https://legalblogs.wolterskluwer.com/copyright-blog/the-bartz-v-anthropic-settlement-understanding-americas-largest-copyright-settlement/> accessed on 15th of march 2026.

²³ *Bartz et al v. Anthropic PBC*, No. 3:2024cv05417 - Document 437 (N.D. Cal. 2025), <https://law.justia.com/cases/federal/district-courts/california/candce/3:2024cv05417/434709/437/>, accessed on 9th of march 2026.

²⁴ *Idem.*

this tension in its most distilled form, focusing specifically on whether training AI systems constitutes unlawful reproduction or permissible transformative use.

In this article, we have shown that, in the US legal framework, the fair use doctrine offers a flexible and adaptable tool, capable – at least in principle – of accommodating AI training practices. In particular, the concept of transformativity allows courts to interpret machine learning as an analytical, non-expressive process, rather than as a direct exploitation of copyrighted works. However, this flexibility comes at the cost of legal uncertainty, especially in cases involving systematic, large-scale data ingestion and potential market substitution effects.

Instead, the European Union takes a more structured and predictable approach through the text and data mining exceptions introduced by Directive (EU) 2019/790. While this framework increases legal certainty, it remains limited by its formalistic nature and reliance on opt-out mechanisms, which may prove insufficient in practice given the scale and opacity of artificial intelligence (AI) training processes.

A comparative analysis of recent litigation—including *Authors v. Anthropic*, *New York Times v. OpenAI*, and *Getty Images v. Stability AI*—reveals the emergence of a continuum of liability, ranging from lawful data analysis to unlawful reproduction. This continuum underscores the inadequacy of binary legal classifications in the context of generative AI and highlights the need for more nuanced regulatory solutions.

Accordingly, I argue that neither the US nor the EU framework, in their current forms, is fully capable of addressing the systemic challenges posed by AI. A purely flexible approach risks undermining authors' rights, while an overly rigid system may stifle innovation. The most viable way forward lies in developing a hybrid model that combines the interpretative flexibility of fair use with the structural clarity of EU-style regulation.

Such a model should include, at a minimum, (i) the introduction of collective or compulsory licensing mechanisms to facilitate legal access to training data, (ii) increased transparency obligations for AI developers regarding the composition of training datasets, and (iii) clearer standards to distinguish between legal training and infringing production.

Ultimately, the evolution of copyright law in the age of artificial intelligence will depend not only on judicial interpretation but also on legislative intervention and international coordination. As generative AI continues to reshape the creative industries, the challenge for legal systems will be to ensure that innovation and authorship remain mutually reinforcing, rather than fundamentally incompatible.

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THE INEFFECTIVENESS OF THE PROVISIONS OF THE COPYRIGHT DIRECTIVE AND THE AI ACT IN THE PROTECTION OF COPYRIGHT

Sorin NICULESCU*

Abstract

The present paper examines the extent to which regulations adopted at the level of the European Union prior to the development of artificial intelligence during the period 2022–2025, as well as the more recent European Union regulations in the field of artificial intelligence, provide adequate instruments for the protection of copyright and related rights in connection with the functioning and training of artificial intelligence systems. Starting from the scale of adoption of artificial intelligence programs, the paper highlights the legal tensions generated by the capacity of such systems to process databases and considerable volumes of pre-existing content, often protected by copyright. The analysis focuses on the correlation between Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (“Copyright Directive”) and Regulation (EU) 2024/1689 laying down harmonized rules on artificial intelligence (“Artificial Intelligence Act”), with particular emphasis on the regime of “text and data mining” and on the “rights reservation” mechanism provided for in Article 4 of the Copyright Directive. The paper underlines the insufficiently regulated nature of the opt-out modalities, as well as the practical limitations of this mechanism, including in situations where text and data mining is carried out outside the territory of the European Union. In parallel, the obligations imposed on providers of general-purpose artificial intelligence models are examined, in particular the obligation to adopt and implement an internal policy ensuring compliance with European Union law on copyright and related rights, as well as the transparency obligation concerning the publication of a sufficiently detailed summary of the protected data used for training purposes. In conclusion, the paper demonstrates that, although the two legislative acts should not be regarded as antagonistic, their combined application does not, in their current form, lead to sufficient solutions for the effective protection of right holders, thus necessitating normative intervention adapted to the new technological realities.

Keywords: artificial intelligence; copyright; Copyright Directive; Artificial Intelligence Act; data mining.

1. Introduction

This paper examines whether the current European Union legal framework provides effective protection for copyright and related rights in the context of the training and operation of artificial intelligence systems, with particular focus on the interaction between Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (“Copyright Directive”) and Regulation (EU) 2024/1689 laying down harmonized rules on artificial intelligence (“AI Act”). More specifically, the paper addresses the extent to which the legal regime of text and data mining, especially the opt-out mechanism set out in Article 4 of the Copyright Directive, together with the obligations imposed by the AI Act on providers of general-purpose AI models, are capable of ensuring real and effective protection for right holders.

The subject takes into consideration the unprecedented expansion of artificial intelligence systems has fundamentally changed the scale at which protected content may be accessed, reproduced, processed and incorporated into technological systems. Unlike earlier technological developments, generative AI models rely on the large-scale analysis of pre-existing content, much of which is protected by copyright or related rights. As a result, the legal debate must also address the prior use of protected works in the training and functioning of such systems. This issue is particularly significant in European Union law, where intellectual property enjoys the status of a fundamental right and where the effectiveness of legislative protection must be assessed against the realities of rapidly developing technology.

In order to answer this question, the paper undertakes a normative and systematic analysis of the relevant provisions of the Copyright Directive and the AI Act. It examines, first, the legal logic and practical limitations of the text and data mining exception, with emphasis on the insufficient regulation of rights reservation

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mechanisms and on the difficulties faced by right holders in exercising an effective opt-out. Secondly, it analyses the obligations imposed by the AI Act on providers of general-purpose AI models, especially the duty to adopt an internal copyright compliance policy and the duty of transparency regarding training data. On that basis, the paper evaluates whether the combined application of these two instruments offers substantive protection or merely creates an appearance of regulatory coherence while leaving significant gaps unresolved, including in cross-border and extraterritorial scenarios.

This paper concentrates on the relationship between these two legislative instruments as a mechanism of protection for pre-existing works used in AI training. It therefore builds on the existing specialized literature concerning text and data mining, copyright limitations and the extraterritorial implications of the AI Act, while arguing that the current framework remains structurally insufficient. The central thesis advanced is that the Copyright Directive and the AI Act should not be understood as antagonistic norms, but that, in their present form, they fail to provide an adequately effective legal response to the new technological realities generated by artificial intelligence.

2. The European Context of Artificial Intelligence and Intellectual Property

Intellectual property law is constantly new, continuously renewing itself in order to adapt to reality¹. Unlike, for example, the law of obligations in Roman law, which resembles current provisions or which is almost identical under certain aspects, intellectual property law has undergone a significant evolution alongside the technological development of humanity.

The more recent past of intellectual property law begins, according to some authors, with the Venetian Patent Statute of 19 March 1474. Obviously, from the perspective of creation and the methods of creation, the reality of the year 1474 is not reflected in the reality of the 21st century. However, with particular reference to copyright and related rights, these have managed to constantly adapt to technological evolution. From handwritten texts on paper, to the emergence of printing and up to the emergence of photography, the law has managed to regulate reality.

Today, technological evolution appears to exceed human expectations and to surpass even the human capacity to fully understand the current stage of technology and the consequences it may have on society in all its aspects, not only on creation. With regard exclusively to the issue of creative activity, I consider that humanity is facing, for the first time, a so-called entity that is equal or, from certain perspectives, superior within the ecosystem of entities capable of creation. Of course, until this moment, humanity only had the task of regulating what humans could create. However, at present, the evolution of artificial intelligence programs has given humanity a new task: to regulate the functioning and the creations of its own creation. It is thus observed that, for the first time in history, what humanity has developed continues to develop, even autonomously.

Although, as will be shown *infra*, European Union law has contributed substantially to the regulation of intellectual property law, I consider that the moment when technology surpassed the capacity of humans, namely of the European Union, to regulate technological evolution in a current manner was the end of the year 2022, with the launch of the artificial intelligence program ChatGPT. This was made available to the public, free of charge, and the public adopted this technology at an unimaginable speed.

Considering that this new technology could be accessed through already existing and established technologies since the emergence of the internet, namely the mobile phone or the computer, the number of users reached impressive thresholds within a short period of time. More precisely, in 2025, the company that created the artificial intelligence program ChatGPT indicated that there are approximately 800 million weekly users². It must also be taken into account that these represent only the average number of users who access the ChatGPT program on a weekly basis. Not all users use this program weekly and not all users use ChatGPT. In only three years, numerous programs have developed exponentially, including: Gemini, developed by Google, Grok, developed by xAI, Claude, developed by Anthropic, Copilot, developed by Microsoft, LLaMA, developed by Meta. Of course, the enumeration may continue.

¹ V. Roș, A. Livădariu, C.-R. Romițan, *Dreptul de autor și drepturile conexe și drepturile de proprietate industrială*, Ed. C.H. Beck, Bucharest, 2025, p. 5.

² OpenAI, *1 million business customers: the fastest-growing business platform in history*, informational material published on the OpenAI platform, available at: <https://openai.com/index/1-million-businesses-putting-ai-to-work/>.

Moreover, once we also take into account artificial intelligence programs that we use passively, without acting with the intention of using them, it can be observed that the scale of artificial intelligence programs not only cannot be ignored, but also leads to the conclusion that humanity is required to advance more rapidly than its own creations in order to regulate them. One example is the AI Overviews function created by Google and integrated into its search engine, a search engine used by an overwhelming majority of internet users. The AI Overviews function entails that the Google search engine, before providing the list of web pages accessible according to the user's query, displays a summary of those web pages, created by an artificial intelligence program. According to the company's statements, approximately 2 billion people access this function monthly.³ For a better illustration of the magnitude of the numbers mentioned above, it should be noted that the entire resident population within the European Union amounts to only 450 million people.⁴

Another aspect that must be taken into account in the development of current regulations, distinct from the scale of use of this technology, is the unimaginable capacity of artificial intelligence programs to process databases, whether they contain data in the form of text, sound or images. This capacity to process databases represents both the premise of the usefulness of artificial intelligence programs and the source of one of the main current legal tensions. Unlike previous technologies such as the use of the internet, which involved direct human intervention in the process of inspiration followed by creation, artificial intelligence programs operate based on the autonomous analysis, correlation and generalization of considerable volumes of pre-existing content, content which, in numerous situations, is protected by copyright or related rights.

Although the main issues appear, at first glance, to be related to the result created through artificial intelligence, the protection of past and present human creations must also be taken into account. In numerous instances, the main question appears to be "Who is the author of the work created by the artificial intelligence program?" or "Is the work created by the artificial intelligence program capable of protection under copyright?". This perspective, however, has led to legislative gaps or uncertainties regarding the protection of works that may be accessed through the internet or that are found in databases accessible to companies that train the models underlying artificial intelligence programs used by the public.

The present paper aims to analyze the extent to which regulations adopted at the level of the European Union prior to the development of artificial intelligence during the period 2022–2025, as well as the more recent European Union regulations in the field of artificial intelligence, provide adequate instruments for the protection of copyright and related rights in relation to the functioning and training of artificial intelligence programs.

3. Intellectual Property Law and Artificial Intelligence in European Union Law

Firstly, in order to illustrate the importance conferred upon the protection of intellectual property by the European Union, it must be emphasized that it constitutes a fundamental right provided for in the Charter of Fundamental Rights of the European Union, Article 17(2) expressly stipulating that "Intellectual property shall be protected".

At the same time, it should be noted that the Treaty on the Functioning of the European Union contains multiple references to intellectual property rights. For example, Article 118 contains provisions concerning "the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union, as well as the setting up of centralized Union-wide authorization, coordination and supervision arrangements".

Secondly, although intellectual property law is fragmented across multiple regulations and directives of the European Union, being sufficiently diverse such that the establishment of uniform rules is quasi-impossible, it may be observed that ensuring uniform protection at the level of the European Union for the various forms of intellectual property rights represents a priority of the Union.

As early as the beginning of the 1990–2000 period, with the objective of completing the internal market pursuant to the Single European Act, which entered into force in 1987, multiple norms were adopted pursuing a dual purpose. Primarily, the harmonization of the legislation of the Member States was sought. Secondly, these norms aimed to modernize the legislation of the Member States.

³ Google, *A new era of intelligence with Gemini 3*, , press release published on the Google blog, available at: <https://blog.google/products/gemini/gemini-3/#note-from-ceo>.

⁴ Maria Constantinoiu, *Populația UE a ajuns la un nivel record, de 450,4 milioane. Migrația este singurul motor care stă la baza creșterii*, 11.07.2025, available at: <https://www.digi24.ro/stiri/externe/populatia-ue-a-ajuns-la-un-nivel-record-de-4504-milioane-migratia-este-singurul-motor-care-sta-la-baza-cresterii-3322467>.

A first relevant example is the adoption of Directive 91/250/EEC on the legal protection of computer programs. This represented a first significant instrument through which the European Union explicitly recognized the specific nature of digital creations and the necessity of a protection regime adapted thereto.

A second example, which addressed the technological evolution of that period, is the adoption of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, a directive which establishes a protection regime for databases focused on safeguarding investment. At the same time, it remains relevant at present, in the context of the massive use of data for the training of artificial intelligence models.

Subsequently, and of central relevance to the present paper, in the context of the exponential development of information technology since the beginning of the 21st century, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter referred to as the “Copyright Directive”) was adopted. The premise underlying this Directive, as reflected in recital (3) of its preamble, is that “rapid technological developments continue to transform the way works and other protected subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation must be designed in a way that allows for its future application and does not limit technological developments.”

The Copyright Directive constitutes one of the principal instruments of normative modernization, aiming to adapt the protection of copyright to the new technological reality of the creation, distribution and exploitation of works. More specifically, it brings copyright into the era of the internet and social media platforms, where any form of content—whether text, photography or video—is made available to the public in an unprecedented manner.

Of particular relevance to the use and training of artificial intelligence systems, although not a central concern at the time of its adoption, is the fact that the Directive contains provisions relating to text and data mining.

As regards artificial intelligence technology, it has not been an unknown subject for the European Union legislator. Although, in the collective consciousness, artificial intelligence appears as a relatively recent phenomenon, it has been considered by legal scholars since the previous century. The term “artificial intelligence” is attributed to John McCarthy, who coordinated the paper “A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence” of 31 August 1955⁵. From that moment onwards, society has been concerned with the implications that this type of technology may have on society as a whole. Subsequently, with the development of artificial intelligence technology and its implementation, the need for its regulation became apparent.

The High-Level Expert Group on Artificial Intelligence, appointed by the European Commission, issued in 2019 the “Ethics Guidelines for Trustworthy AI”, representing a first step towards the future so-called AI Act, namely Regulation (EU) 2024/1689. At that time, the Guidelines had the limited role of establishing seven requirements for an artificial intelligence system to be considered trustworthy. Subsequently, in 2020, the European Commission put forward the “White Paper on Artificial Intelligence – A European approach to excellence and trust”, which outlined the main directions for the future regulation of artificial intelligence technology.

The year 2021 marked the beginning of the legislative process for the adoption of the Artificial Intelligence Regulation, with the European Commission submitting the initial Proposal 2021/0106(COD) for a “Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts”.

Until the adoption of the Artificial Intelligence Regulation in 2024, the paradigm shift brought about by the launch of the artificial intelligence program ChatGPT in 2022 led to numerous debates and even amendments, in order to adapt the proposed regulation to emerging risks. More precisely, prior to its adoption, in 2023, the necessary changes were introduced to ensure that the future Artificial Intelligence Regulation would be readily applicable to generative artificial intelligence models, a technology that is now regarded as the principal method of implementing artificial intelligence.

⁵ J. McCarthy, M. L. Minsky, N. Rochester, C. E. Shannon, *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence*, 1956, available at: <https://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html>.

Ultimately, Regulation (EU) 2024/1689, the Artificial Intelligence Act, was adopted in 2024, representing the first legislative act to establish a comprehensive legal framework for artificial intelligence technology. An essential feature emerging from the structure of this act is the qualification of artificial intelligence within a framework similar to that applicable to products, in the sense that it is subject to ex ante requirements of conformity, assessment and control, specific to product safety law.

4. Copyright Directive and the AI Act: Text and Data Mining

As previously mentioned, the Copyright Directive created a new framework for the protection of copyright in the digital environment. With regard to text and data mining for general purposes, as opposed to research purposes, Article 4 of the Copyright Directive establishes an opt-out mechanism, namely a reservation of rights not to permit entities to carry out text and data mining on works and other protected subject matter that are lawfully accessible. Thus, where a right holder has exercised this reservation of rights, entities performing text and data mining activities, such as developers of artificial intelligence systems, may no longer rely on the exception provided for under Article 4 of the Copyright Directive and are required to obtain the authorization of the right holder in order to reproduce such works for the purposes of text and data mining.

The manner in which an author may opt for their works not to be available for text and data mining is inadequately regulated. Article 4(3) provides that such an opt-out may be expressed by means “such as machine-readable means in the case of content made publicly available online”. However, it remains unclear what constitutes such machine-readable means. One may consider, for instance, a standard protocol such as robots.txt, or a protocol based on it⁶. However, there is no standard expressly referred to by the applicable legal framework.

However, it is submitted that the Copyright Directive, adopted prior to the development of generative AI technologies, prioritizes the protection of technological innovation rather than that of copyright. This conclusion derives from three aspects: Firstly, the technical method for expressing a reservation of rights may be unknown or difficult to access for authors. Given that the dissemination of works on the internet is devoid of any difficulty, without requiring, for example, that a user of a simple blog-type website possess technical knowledge in order to publish a work, it is disproportionate to impose on the right holder the burden of adopting significantly more advanced technical measures in order to protect their work. Secondly, it must be taken into account that the online environment is one in which works are routinely disseminated without the authorization of the right holder, such that the latter would be required to undertake steps to ensure that their work is not subject to text and data mining from any source. Admittedly, the exception provided for by the Copyright Directive applies only to works that are lawfully accessible, but this does not constitute a sufficient measure for the protection of right holders. Thirdly, text and data mining activities may take place outside the territory of the European Union, thereby rendering the rights reservation mechanism ineffective.

A further element that must be taken into account in the analysis of the text and data mining regime carried out by developers of artificial intelligence systems is the very nature of the Copyright Directive as a directive. Pursuant to Article 288 of the Treaty on the Functioning of the European Union, “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”, whereas “a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”. It should also be noted that the Copyright Directive provides, under Article 25, that “Member States may adopt or maintain in force more extensive provisions”. Consequently, only the fundamental provisions of the Copyright Directive are applied uniformly, while Member States retain the ability to design stricter regimes. In Romania, for instance, the Directive was transposed by Law No. 69/2022 amending and supplementing Law No. 8/1996 on copyright and related rights.

The Artificial Intelligence Act, although it does not have as its primary objective the protection of copyright, contains provisions intended to ensure such protection. These provisions aim to harmonize compliance with copyright in the context of the training of artificial intelligence models, but they focus on references to the specific legislation governing intellectual property law. It can be observed, even from the preamble of the Artificial Intelligence Act, that it is not intended to constitute a genuine means of protection, but rather to frame the existing legislation within the context of regulating artificial intelligence primarily as a product. Recital (105)

⁶ Paul Keller, *Generative AI and copyright: Convergence of opt-outs?*, Kluwer Copyright Blog, 2023, available at: <https://legalblogs.wolterskluwer.com/copyright-blog/generative-ai-and-copyright-convergence-of-opt-outs/>

of the preamble of the Artificial Intelligence Act states that any use of copyright-protected content requires the authorization of the right holder concerned, unless relevant copyright exceptions and limitations apply. Directive (EU) 2019/790 introduced exceptions and limitations which allow reproductions and extractions of works or other protected subject matter, for the purposes of text and data mining, under certain conditions, thereby confirming the exception provided for by the Copyright Directive. Thus, the risk that the regime governing the training of models underlying artificial intelligence systems may lack the capacity to protect the interests of copyright holders is apparent even from the preamble.

Moreover, it must be recalled that the Copyright Directive was adopted in 2019, and that Article 30 thereof provides that any review of the Directive shall take place “no sooner than 7 June 2026”. With a review of a directive adopted prior to the expansion of artificial intelligence technology, the regulation of such technology by reference to legislation already overtaken by technical developments can only result in deficiencies.

In line with the ideas reflected in the preamble of the Artificial Intelligence Act, it provides for two key obligations under Article 53(1)(c) and (d), aimed at increasing transparency and safety with regard to compliance with European Union law. Firstly, providers of general-purpose artificial intelligence models, namely those capable of performing a wide range of distinct tasks, are required to adopt and implement an internal policy ensuring compliance with European Union law on copyright and related rights and to identify and comply with rights reservations expressed pursuant to Article 4(3) of the Copyright Directive. The second obligation consists in the publication of a sufficiently detailed summary of the protected data used for training the artificial intelligence model, in accordance with the standards established by the AI Office.

The first of these obligations is of particular interest in the present paper, especially in light of recital (106) of the preamble, which provides, with regard to compliance with rights reservations expressed under the Copyright Directive, that any provider placing a general-purpose AI model on the Union market should comply with this obligation, regardless of the jurisdiction in which the relevant copyright-related acts underlying the training of such general-purpose AI models take place.

This approach, similar to the regulatory framework in the field of product safety and, through its close connection with the Copyright Directive, results in the creation of an extraterritorial effect of European copyright law. In practice, whenever a provider of artificial intelligence systems intends to place such a system on the European market, it will have to ensure that even the training carried out outside the territory of the European Union complies with the Copyright Directive. However, a first issue that may be raised concerns the territoriality of copyright law⁷. The act of reproduction of a work is, as a rule, governed by the law of the State in which such reproduction takes place. However, in the case of the training of artificial intelligence models intended to be placed on the European Union market, this limitation is exceeded.

In the legal doctrine⁸, it has been argued that this interpretation could be regarded as “maximalist”, given that the provisions of the preamble do not constitute operative articles of the Artificial Intelligence Act and do not have direct applicability. Nevertheless, it is submitted that this is the only interpretation worthy of consideration. Given that artificial intelligence systems are treated in a manner similar to products placed on the European Union market, such extraterritoriality should not give rise to major concerns.

By reference to the example of a product such as a toy manufactured in a third country using materials hazardous to children’s health, which cannot be marketed within the European Union, one may reach the conclusion that a system created through processes that are harmful to right holders within the European Union cannot be placed on the Union market. More precisely, it must be taken into account that an artificial intelligence system trained on protected materials, even where such activity has taken place in a third country, is inherently flawed and will generate harmful outcomes.

As regards the second obligation imposed on providers of general-purpose artificial intelligence models, namely the obligation of transparency concerning the sources used in the training of such models, this would become partially ineffective if the rights reservation provided for by the Copyright Directive did not produce effects beyond the territory of the European Union. Consequently, even in the absence of an explicit provision, save for recital (106) of the preamble, it is evident that the intention of the legislator was to ensure that any artificial intelligence system placed on the Union market complies with its rules.

⁷ João Pedro Quintais, *Copyright, the AI Act and extraterritoriality*, Kluwer Copyright Blog, 2024, available at: <https://legalblogs.wolterskluwer.com/copyright-blog/copyright-the-ai-act-and-extraterritoriality/>

⁸ João Pedro Quintais, *idem*.

As previously shown, pursuant to Article 25 of the Copyright Directive, Member States have the ability to transpose this Directive into national legislation, including by strengthening the standards applicable to entities carrying out text and data mining activities. Therefore, it is possible that, within the Member States, there exists applicable legislation whose central aim is the protection of copyright to the detriment of technological development.

Even in this context, the standards applicable to providers of artificial intelligence systems with regard to text and data mining, regardless of the efforts of Member States to protect the rights of copyright holders, will remain minimal. As previously noted, the Copyright Directive is not directly binding in its form upon Member States, which are only required to adopt the legislative measures necessary to achieve its objectives. By contrast, the Artificial Intelligence Act is directly applicable within the Member States.

It must be emphasized that the references contained in the Artificial Intelligence Act, at least with regard to the rights reservation of copyright holders, refer exclusively to the provisions of the Copyright Directive, without in any way mentioning an obligation on providers of artificial intelligence models to comply, as a priority, with the legislation of the Member States.

Accordingly, irrespective of the provisions of a Member State concerning the reservation of rights, a provider will always be able to rely on the Artificial Intelligence Act, adopted subsequent to the implementation of the Copyright Directive, which refers to the minimum conditions established by the Directive. This normative solution, although coherent from the perspective of the hierarchy of Union acts, raises serious concerns regarding the effectiveness of copyright protection, as it places right holders in a legally inferior position to that of technology providers, who benefit from a minimal, uniform and predictable compliance regime.

Since 2019, when the Copyright Directive was adopted, 2022, when the artificial intelligence system ChatGPT was introduced to the market, and 2024, when the Artificial Intelligence Act was adopted, sufficient shortcomings, questions, and new answers have emerged to allow the forthcoming review of the Copyright Directive to be adapted to the present reality. Although technological progress has been largely unforeseen, and developments in the field of artificial intelligence continue to occur at an accelerated pace through the enhancement of existing systems and the constant emergence of new models, it is submitted that society, and in particular the legislator, has already acquired a sufficient degree of familiarity with this technology to enable coherent and responsible normative intervention.

5. Regulation of copyright with regard to outputs created by artificial intelligence systems

The legislation referred to in the present paper concerns the protection of works created by humans and made available in the online environment or in databases used by providers of general-purpose artificial intelligence models, such as OpenAI.

What remains far from being settled is the status of so-called works created by or with the assistance of artificial intelligence systems. The Copyright Directive, as previously shown, was adopted at a time when AI-generated content did not exist within the social consciousness and did not constitute a concern except for visionary researchers who anticipated today's reality and sought to address it. At the same time, the Artificial Intelligence Act aims to regulate this technology in a general manner, as a product, in order to protect society from the negative effects of artificial intelligence, such as systemic risks generated by the uncontrolled use of automated systems, the infringement of fundamental rights, the lack of decision-making transparency, algorithmic discrimination, or the compromise of user safety and security. In this regard, the Artificial Intelligence Act adopts a risk-based approach. However, the combined application of these two instruments does not lead to any conclusion as regards AI-generated content.

While the functionalities of these systems are beginning to become predictable, the results of their use by humans are only now beginning to emerge. A relevant example of the creative ways in which humans use this technology was provided by Alina Trapova in a lecture delivered at University College London in 2023. She describes two of the works exhibited at the exhibition "Je est un autre ?", presented at CENTQUATRE-PARIS: "Le Phare d'Alexandrie 1.1" and "Le Temple d'Artémis à Éphèse 1.1" by Collectif Obvious. The three artists of the collective selected seven texts originating from Antiquity describing the Seven Wonders of the Ancient World and input them into an artificial intelligence system in order to generate seven digital images. Subsequently, a painter reinterpreted the images generated by the artificial intelligence system into classical oil paintings. The

works created by the painter were later integrated into an application allowing each work to be animated on mobile devices, thereby adding a layer of augmented reality.

As can be observed, the diversity of the forms of use of artificial intelligence, as well as the degree of creativity demonstrated by artists in integrating such technologies into the artistic process, generates real difficulties in determining the legal status of content generated through artificial intelligence systems. In this context, only a cumulative approach, resulting from the contribution of legal doctrine, case law, and the continuous evolution of legislation, will, over time, lead to the development of coherent and predictable solutions to this issue.

6. Conclusions

The parallel analysis of the two acts, the Copyright Directive and the Artificial Intelligence Act, reveals a regulatory framework in transition, both in terms of the relationship between the two instruments and their interaction with continuously evolving technology. Both acts are undoubtedly ambitious and aim to adapt society as a whole to a new status quo in which humans and technology interact not merely as user and tool, but, in certain contexts, as partners.

The Copyright Directive was adopted far too early in relation to the astonishing evolution of artificial intelligence technology, while the Artificial Intelligence Act was designed to address issues of a much broader and more pressing nature for society as a whole, the aspects currently regulated being capable of affecting any member of society, and not only copyright holders whose works are distributed via the internet or are contained in databases that may be used by providers of artificial intelligence systems.

As regards copyright, the Artificial Intelligence Act has, for the time being, merely relied on the existing regulatory framework without introducing substantive innovation. From the analysis of the two acts and the deficiencies arising therefrom, it may be observed that they should not be regarded as antagonistic, but rather as being in a stage that allows both legislators and legal practitioners to construct a new framework adapted to a context in which humans are no longer the sole creative entity.

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AI IN DOCTORAL RESEARCH

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Abstract

This paper examines the impact that the use of artificial intelligence has on doctoral research activities and, in particular, on the drafting of doctoral theses. In light of the accelerated adoption of this technology and its integration into widely used devices and software programs, it is emphasized that the use of artificial intelligence is becoming inevitable. The paper focuses on the modalities of use of this technology, namely: (i) the search for and identification of sources, (ii) the formal correction, augmentation, and paraphrasing of texts drafted by the doctoral candidate, (iii) the organization and structuring of ideas, and (iv) the actual drafting of texts, in relation to the Framework Code of University Ethics and Deontology adopted by Government Decision No. 305/2024. The conclusion of this essay is that the use of artificial intelligence is compatible with academic norms where it remains a tool supporting the doctoral candidate, rather than substituting intellectual effort through the generation or paraphrasing of content.

Keywords: *artificial intelligence; large language models; doctoral research; academic ethics and deontology; originality; copyright.*

1. Introduction

This paper examines the impact of artificial intelligence, in particular Large Language Models, on doctoral research activities and on the drafting of doctoral theses. It focuses on the extent to which the use of such technologies is compatible with the requirements of academic ethics and with the legal concept of originality, as understood in copyright law and academic practice.

The relevance of the topic derives from the rapid and widespread adoption of artificial intelligence-based tools within the academic environment. These technologies are no longer peripheral, but have become embedded in common research practices, from information retrieval to text generation. As a result, doctoral candidates are increasingly exposed to tools that may facilitate their work, but also risk undermining the fundamental requirement that academic output reflect genuine intellectual effort and original contribution. In this context, clarifying the permissible limits of artificial intelligence use is essential both for maintaining academic integrity and for ensuring the validity of doctoral research.

The paper addresses this matter through a structured analysis of the main modalities in which artificial intelligence-based programs are used in doctoral research, namely: (i) searching for sources, (ii) augmenting and paraphrasing texts, (iii) organizing ideas, and (iv) drafting texts. Each of these uses is examined in light of the Framework Code of University Ethics and Deontology adopted by Government Decision No. 305/2024, as well as through the lens of the legal criteria of originality developed in doctrine and in the case-law of the Court of Justice of the European Union.

In relation to the existing specialized literature, the paper builds upon classical understandings of originality as an expression of the author's personality and integrates them with recent doctrinal debates on artificial intelligence and authorship. While prior literature has addressed the technological and legal implications of artificial intelligence, this paper contributes by offering a normative analysis specifically tailored to doctoral research, identifying concrete thresholds between permissible use and ethical breach in the academic context.

2. The Emergence of Artificial Intelligence

The use of artificial intelligence in the academic environment has become a standard as of 30 November 2022, with the launch and rapid expansion of the artificial intelligence-based program ChatGPT. As a preliminary clarification, it should be specified that, within the present paper, references to "artificial intelligence" or to "programs that use artificial intelligence" predominantly concern the category of large language models (LLMs),

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namely those software applications capable of processing significant volumes of text-based information and generating outputs in the same format, in natural language, in a manner closely resembling human expression.

If the year 2022 introduced a new way of carrying out research activities, including the drafting of doctoral theses, the statistics for 2025 demonstrate that the use of artificial intelligence-based programs has become inevitable. The program ChatGPT, developed by OpenAI, reportedly has approximately 800 million weekly users, according to data provided by the company¹. The clarification that these 800 million users represent only those who interact with the program on a regular basis leads to two conclusions.

First, the number of users of such programs is significantly higher than the figure mentioned above. It is evident that the total number of users of ChatGPT is greater, as there are individuals who use this program only sporadically. Second, these figures reflect only the data provided by OpenAI. When considering that some users have turned to other such programs, such as the 650 million users of the Gemini application developed by Google, it can be inferred that a significant segment of the world's educated population consists of individuals who have incorporated the use of artificial intelligence programs into their daily lives.

Moreover, it must be taken into account that, in certain contexts, the use of artificial intelligence-based programs no longer constitutes a deliberate act. One such example is the AI Overviews feature integrated into the Google Search engine. This feature takes the conventional querying of databases indexed by Google, which previously operated based on keywords entered by the user, and processes it in a manner similar to artificial intelligence programs such as ChatGPT or Gemini. Thus, prior to displaying the web pages containing the information sought by the user, Google now provides a direct response to the user's query, namely a synthesized summary of the information that the program has deemed relevant. The company indicates that this feature has approximately 2 billion monthly users.² Given that research activity in the modern era of digital information is virtually impossible to conduct without the use of a search engine such as Google Search, it follows that, whether deliberately or not, artificial intelligence is present in doctoral research activities.

Admittedly, the aforementioned data may be subject to exaggeration by the companies that own and operate such artificial intelligence-based programs; however, they cannot be disregarded. It is indisputable that the phenomenon of artificial intelligence usage must be assessed in terms of hundreds of millions or even billions of users, with the thresholds of thousands, hundreds of thousands, or even millions having been rapidly surpassed shortly after the emergence of this technology.

At the same time, it must be taken into account that human beings and technology are experiencing a progressive interconnection also through the use of already established technologies that begin to integrate, in an almost imperceptible manner, programs based on artificial intelligence. Through this integration of artificial intelligence technology into technologies already widely used, by expanding their processing, analysis and interaction capabilities, the adoption of artificial intelligence-based programs becomes natural.

One example is the virtual assistant Siri, developed by Apple. Although, at the time of drafting this paper, other virtual assistants such as Gemini present a higher level of technological development, Siri is particularly useful in illustrating the transition between so-called pre-artificial intelligence and post-artificial intelligence technologies as understood in society. Of course, the concept of artificial intelligence was not born in 2022. The term "artificial intelligence" is considered to have originated through John McCarthy within the "Dartmouth Summer Research Project" of Dartmouth College in Hanover, New Hampshire, the term being mentioned in "A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence" drafted by John McCarthy, Marvin L. Minsky, Nathaniel Rochester, Claude E. Shannon on 31 August 1955.³ However, given that the purpose of this paper is to analyze the behavior of individuals in the academic environment in relation to Large Language

¹ OpenAI, *1 million business customers: the fastest-growing business platform in history*, informational material published on the OpenAI platform, available at: <https://openai.com/index/1-million-businesses-putting-ai-to-work/> (accessed on 01.01.2026).

² Google, *A new era of intelligence with Gemini 3*, communication published on the Google blog, available at: <https://blog.google/products/gemini/gemini-3/#note-from-ceo> (accessed on 02.01.2026).

³ From the very outset of the preamble, the authors state that their intention is to conduct a study on artificial intelligence: "We propose that a 2 month, 10 man study of artificial intelligence be carried out during the summer of 1956 at Dartmouth College in Hanover, New Hampshire. The study is to proceed on the basis of the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it. An attempt will be made to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves. We think that a significant advance can be made in one or more of these problems if a carefully selected group of scientists work on it together for a summer." (emphasis added).

J. McCarthy, M. L. Minsky, N. Rochester, C. E. Shannon, *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence, 1956*, available at: <https://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html> (accessed on 03.01.2026).

Model-type technical solutions, the year 2022 is a reference point with regard to the large-scale adoption of artificial intelligence-based technology.

Apple has not, to date, succeeded in autonomously developing a virtual assistant capable of providing, natively, responses generated through advanced language models. Consequently, in order to provide responses processed through an advanced artificial intelligence program, the virtual assistant Siri is required to rely on an external service, namely the program ChatGPT. The performance of this operation is conditional upon the expression of the user's explicit consent, the user being informed and requested to grant approval for accessing this third-party program. Thus, the user is, in practical terms, faced with a functional and conceptual threshold between the traditional capabilities of the virtual assistant Siri and the new technologies based on advanced artificial intelligence, technologies which, at a subsequent stage, are likely to be integrated directly into the native functionalities of the virtual assistant, as is already the case with the virtual assistant Gemini.

From the use of the virtual assistant Siri with ChatGPT integration, as compared to other virtual assistants that have native intelligent functions, as well as from the use of other computer programs such as Microsoft Word, which have the capacity to generate text without difficulty, it can be observed that the standard in the information technology industry is for programs to have the capacity to "think" independently.

In this context, taking into account all the elements set out above, it becomes evident that avoiding the use of artificial intelligence technology is virtually impossible, and that doctoral research activity is, or, if not, will soon become closely linked to the use of artificial intelligence-based programs.

3. Methods of Using Artificial Intelligence-Based Programs

The technology underlying Large Language Model-type programs, which have come to dominate the information technology environment, was not created to be used in a particular manner. On the contrary, the creation of a so-called intelligence that should be capable of competing with or even surpassing humans should serve a versatile role. It must analyze, retain, create, and perform functions that are typically human.

The Chief Executive Officer of OpenAI, the parent company of ChatGPT, Sam Altman, one of the architects of artificial intelligence as it is understood today, stated in an interview given to The a16z Show, published on 08 October 2025, that the early launch of ChatGPT was intended to allow the public to test this new technology. He also notes that society must "co-evolve" together with this technology. Thus, it may be concluded that even the initiators of this technology did not fully anticipate how it would be used, unlike other technologies that have revolutionized information technology, such as the Google Search engine.

Internet search engines, such as the one created by Google, have had, since their conception, a clearly defined purpose, namely to identify relevant information based on keywords entered by the user and, at the same time, from the perspective of those who create information, search engines have had the role of finding users to access the produced information.

With regard to the process of doctoral research, given that a technology such as search engines had a determined purpose, the use of search engines has involved foreseeable and relatively easily identifiable risks, such as: the repeated use of the same information to which any user has easy access (such as information found on the Wikipedia website), the difficulty of verifying the quality of information found on the internet, as well as the risk of using sources without proper citation. In this respect, effective measures could be taken to mitigate risks within the academic environment, a relevant example being anti-plagiarism verification programs that access extensive databases in order to prevent doctoral candidates from taking information from the internet without using appropriate citation methods.

Returning to the issue of the multiple ways in which artificial intelligence-based programs such as ChatGPT may be used, as well as to the fact that these methods of use are in continuous evolution, the influence of this technology on doctoral research and on the drafting of the doctoral thesis or any other works during doctoral studies is difficult to determine. Artificial intelligence-based programs have the capacity to perform tasks ranging from simple internet searches or basic rephrasing to the creation of other computer programs. The possibilities appear to be of an unimaginable scope, considering that humanity has never before been confronted with a genuine artificial partner for study or drafting.

Within this paper, we will focus only on several of the ways in which this technology may be used, namely: (i) searching databases accessible to artificial intelligence-based programs; (ii) augmenting texts drafted entirely

by the doctoral candidate and paraphrasing texts; (iii) organizing and augmenting ideas; and, most importantly, (iv) drafting texts.

3.1. The Use of Artificial Intelligence-Based Programs for Internet Searching

With regard to the use of artificial intelligence-based programs similarly to familiar search engines such as Google Search, this represents one of the most widespread ways in which users make use of such programs. Adobe has shown that, according to a survey conducted by it⁴, 77% of ChatGPT users in the United States of America treat ChatGPT as a classical search engine.

The issues arising from the use of traditional search engines, namely the appropriation of works drafted by other individuals and disseminated through the internet, have largely been eliminated through the introduction of anti-plagiarism software programs capable of determining whether a given text has been taken as such from a source, whether it has been translated or even whether ideas have been appropriated through paraphrasing. However, computer programs such as ChatGPT, when used in a manner similar to traditional search engines, do not merely provide access to sources available on the internet, but rather generate a response that only subtly references the sources from which it has so-called drawn inspiration.

By way of illustration, the same query was performed both on the Google Search engine and by using the internet search function of ChatGPT, namely “The definition of copyright in Romania”. Naturally, Google provided, as a result, a list of web pages available on the internet that offer a definition of copyright in accordance with Romanian legislation, pages that may be accessed for reading. By contrast, ChatGPT provided a complex, yet unified response, based on no fewer than 36 sources, including articles authored by recognized legal professionals. An excerpt of the response is as follows:

“In Romania, copyright is primarily regulated by Law No. 8/1996 on copyright and related rights (as amended) and is harmonized with European Union legislation.

Copyright is a set of prerogatives recognized and guaranteed to the author over a literary, artistic or scientific work, as well as over other intellectual creations, by the mere fact of its creation. These prerogatives include both moral rights, linked to the author’s person, and economic rights, linked to the economic exploitation of the work.”

The result displayed in the interface of ChatGPT indicates, for the first of the analyzed paragraphs, the existence of two sources, namely the Wikipedia website and the legi-internet.ro platform. As regards the second paragraph, the interface mentions a single source, namely legi-internet.ro. However, a comparative analysis of the generated content and the materials indicated as sources reveals that the first paragraph constitutes neither a faithful reproduction nor a direct paraphrase of a fragment from the article published on Wikipedia.

Furthermore, it must be emphasized that the second paragraph does not represent a reproduction of the content of Law No. 8/1996 on copyright and related rights, such that the indicated source becomes ineffective for the purpose of identifying a potential author of the ideas contained in the second paragraph. Therefore, the indication of sources by the interface of ChatGPT, in such a situation, cannot be assimilated to a bibliographic reference, but rather constitutes an indicative reference to sources that were taken into consideration by the program in the process of generating the response.

In the absence of any indication as to the actual source of the sequence of words provided by ChatGPT as a response to the query, the doctoral candidate engaged in research might mistakenly consider that they are free to take the text and use it in their own work. Such a hypothesis cannot be accepted, first and foremost because it is based on the premise that the respective sequence of words is equivalent to an alleged discovery or a fact derived directly from a normative framework. Moreover, such an approach contravenes the Framework Code of 4 April 2024 on academic ethics and deontology⁵, more precisely Article 19⁶.

⁴ Adobe conducted a brief survey, based on a sample of 800 individual users and 200 professionals in advertising or small business administrators. It is noteworthy that this technology is adopted, to the detriment of traditional search engines, by approximately 80% of Generation X users, indicating that, as newer generations develop and gain access to the academic environment, the use of artificial intelligence-based programs will increase.

Adobe, *How ChatGPT is changing the way we search*, article published on the Adobe blog, available at: <https://www.adobe.com/express/learn/blog/chatgpt-as-a-search-engine> (accessed on 05.01.2026).

⁵ Government Decision No. 305 of 4 April 2024 approving the Framework Code of University Ethics and Deontology, Government of Romania.

⁶ Article 19

Firstly, the doctoral candidate may not reproduce the text generated by an artificial intelligence-based program where such program indicates a source used, a source which contains the information rendered by the program. This conclusion follows without difficulty from the fact that, in essence, the text generated by an artificial intelligence-based program such as ChatGPT in such a scenario would represent a mere paraphrasing of the information taken from the indicated source. Therefore, both in the case where the paraphrasing is carried out through a computer program and in the case where the paraphrasing is carried out directly by the doctoral candidate, it is imperative to indicate the source of the text.

Thus, the direct appropriation and use of the results provided by the artificial intelligence-based program is in clear contradiction with the norms of academic ethics and deontology, as the copyright of other persons is not respected, pursuant to Article 19 letter (a) of the Framework Code of 4 April 2024 on academic ethics and deontology.

Secondly, consideration must be given to the situation in which the output of the artificial intelligence-based program is accompanied by an inconclusive source, the origin of the ideas expressed being uncertain. In such a case, the doctoral candidate is required to carry out a brief analysis of the manner in which artificial intelligence-based programs function in order to correctly determine that the text cannot be appropriated. More precisely, it must be taken into account that an artificial intelligence-based program represents nothing more than a computer program that operates by extracting information from available sources through the algorithm upon which it is based.

As will be detailed *infra*, an artificial intelligence-based program does not think, does not possess an intellect that filters and processes prior information in order to create new, reasoned, original information. An artificial intelligence-based program does not create, but rather constructs texts based on probabilities so as to be understood by the user. Thus, copying a response provided by an artificial intelligence-based program when it is used as a search engine is incompatible with the obligation of the doctoral candidate to produce and defend original works, as required by Article 19 letter (b) of the Framework Code of 4 April 2024 on academic ethics and deontology.

Within this analysis of the ways in which artificial intelligence-based programs are used for searching, the major advantages that this technology may offer and which do not entail a breach of ethical and deontological norms must not be disregarded. In particular, it must be considered that these artificial intelligence-based programs have the capacity to process unimaginable quantities of information, quantities that would be impossible to review by a person engaged in research activity. As such, these tools may be successfully used to facilitate access to relevant bibliographic sources.

For example, the query entered into the Google Search engine, “Ten Romanian law treatises on intellectual property law authored by university professors at prestigious law faculties”, will result in a list of web pages that may be relevant or may merely contain the keywords of the query performed, without being relevant to the user. However, in response to the same query, ChatGPT provided a list of ten works⁷ that fall within the category

In the exercise of their capacity as students, doctoral candidates, postdoctoral researchers or trainees, the rules of ethics and deontology require them to:

- (a) respect the copyright of other persons in the works they produce;*
- (b) produce and defend original assessment works at the level of each discipline, as well as original final works completing their studies;*
- (c) comply with the general rules of ethics and deontology of the academic community.*

⁷ The partial response provided by the ChatGPT program is as follows:

“Below are 10 ‘treatise-type’ works / comprehensive works from Romanian doctrine on intellectual property law (copyright + industrial property), written by authors with an academic profile (teaching staff) from relevant law faculties / legal academic institutions.

Ioan Macovei – *Tratat de drept al proprietății intelectuale* (Editura C.H. Beck, 2010)

The author is a university professor (UAIC Iași – Faculty of Law).

Viorel Roș, Andreea Livădariu, Ciprian Raul Romișan – *Dreptul proprietății intelectuale. Dreptul de autor și drepturile conexe și drepturile de proprietate industrială* (Editura C.H. Beck, 2025)

Viorel Roș is a university professor (Nicolae Titulescu University of Bucharest).

Viorel Roș – *Dreptul proprietății intelectuale. Vol. 1: Dreptul de autor, drepturile conexe și drepturile sui generis* (Editura C.H. Beck, 2016)

The author is a university professor (Nicolae Titulescu University of Bucharest).

Viorel Roș – *Dreptul proprietății intelectuale. Vol. 1: Mărcile și indicațiile geografice* (Editura Sylvi, 1999)

(in practice, used as a reference work in the field of trademarks/geographical indications).

Viorel Roș – *Dreptul proprietății intelectuale: Mărcile și indicațiile geografice. Vol. 2: Acte normative* (Editura Sylvi, 1999)

Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei – *Dreptul de autor și drepturile conexe. Tratat* (All Beck, 2005)

Viorel Roș (university professor) + Dragoș Bogdan (university teaching staff in law, as indicated in the author’s bio).

Yolanda Eminescu – *Tratat de proprietate industrială. Vol. I: Creații noi* (Editura Academiei, 1982)

of “treatise” and that meet the requirement of being authored by university professors from prestigious law faculties, insofar as prestige can be quantified by a computer program. It should be noted that the result of the query carried out through the Google Search engine does not reference authors such as Yolanda Eminescu within the first 50 displayed results, although she represents a remarkable figure in the field of intellectual property law who substantially contributed to the development of intellectual property law in the twentieth century.

Thus, it becomes evident that artificial intelligence-based programs, even at the superficial level of a simple search for general materials, become indispensable in comparison with older technology. Moreover, queries within such programs may be significantly more complex than the example provided, having the capacity to offer recommendations of niche scientific works that cannot be easily discovered otherwise.

Of course, such programs may contain errors and may be subject to the phenomenon of hallucination, which may be described, according to the definition provided in an article published by IBM⁸ as the phenomenon whereby an artificial intelligence-based program “perceives patterns or objects that are non-existent or imperceptible to human observers, creating outputs that are nonsensical or entirely inaccurate”. Even in this context, the doctoral candidate will have the ability, within a relatively short period of time, to verify whether the information indicated by the artificial intelligence-based program is accurate and to obtain valuable indications for the identification of relevant sources for their research.

In conclusion, with regard to the use of artificial intelligence in performing searches typical of established search engines, this may have undeniable benefits in the conduct of doctoral research, but it requires the involvement of the doctoral candidate in maintaining the use of such programs within a framework that does not exceed the limits of academic ethics and deontology norms.

3.2. Augmenting Texts Fully Drafted by the Doctoral Candidate and Paraphrasing.

A second method that may prove useful to the doctoral candidate in doctoral research and in drafting activity reports or the doctoral thesis is the use of artificial intelligence-based programs to augment texts fully drafted by the doctoral candidate, without prior assistance from such programs. Thus, we refer exclusively to the augmentation of those texts which, at the time of using artificial intelligence-based programs, do not contain any deficiencies with respect to compliance with academic ethics and deontology norms.

Similarly to the issues set out above, this form of using artificial intelligence may also produce diverse results. Accordingly, two aspects will be considered, namely the use of such programs to correct previously drafted texts and their use to perform substantial improvements to such texts.

Doctoral research and the drafting of works during doctoral studies involve a considerable effort in terms of the volume of text created by the doctoral candidate. An increase in the volume of drafted text may lead to an increased risk of committing both drafting errors and errors concerning the accuracy of the information included.

In order to improve the quality of the doctoral candidate’s work, artificial intelligence-based programs may prove useful in correcting such errors, as they have the capacity to verify large volumes of information in a negligible amount of time, thereby providing the doctoral candidate with the opportunity to focus their efforts on research.

With regard to the use of programs that employ artificial intelligence exclusively for correcting drafting errors, such as the omission of diacritics or of certain letters within words during the drafting of the work, I consider that a breach of academic ethics and deontology norms cannot be established. In such a scenario, the doctoral candidate does not resort to this technology in order to introduce ideas that do not belong to them, nor to alter the substance of their own creation so that it acquires the appearance of a work entirely distinct from its initial form.

A leading author in the field; she taught postgraduate courses at the Faculty of Law in Bucharest and contributed to the introduction of the discipline into the curriculum.

Yolanda Eminescu – *Tratat de proprietate industrială*. Vol. II: *Semne distinctive* (Editura Academiei, 1983)

Yolanda Eminescu – *Tratat de proprietate industrială*. Vol. III (Editura Academiei, 1982–1984, set Vol. I–III)

Teodor Bodoaşcă – *Studii de dreptul proprietății intelectuale* (second revised and expanded edition, 2024) (Editura Universul Juridic)

The author is a university professor (Dimitrie Cantemir University)."

⁸ IBM, *What Are AI Hallucinations?*, article published on the IBM platform, available at: <https://www.ibm.com/think/topics/ai-hallucinations> (accessed on 05.01.2026).

Under these conditions, the use of the technology has a strictly utilitarian character, generating value by increasing the accuracy of the text, without requiring the sacrifice of the doctoral candidate's time and energy, who may concentrate their efforts exclusively on the process of intellectual creation.

However, in the case of augmenting the doctoral candidate's creation through the use of artificial intelligence-based programs in order to add additional ideas or to paraphrase the initial text for the purpose of modifying the drafting style, issues of academic ethics and deontology may arise, as the final result is liable to lead to a breach of the requirement that the doctoral candidate's works display originality.

In the classical conception of originality, it "is viewed as an expression of the author's personality, manifested in their work".⁹ Moreover, in the case-law of the Court of Justice of the European Union concerning the concept of originality in the context of copyright, it has also been held that, for a work to be original, it must reflect the author's personality and be the result of free and creative choices.¹⁰

Accordingly, the intervention of an external, artificial factor, foreign to the process of creation and to the human intellect of the author of a work, raises serious issues from the perspective of the originality of the work. In this respect, the paraphrasing of a poorly drafted text or carried out exclusively for the purpose of imitating a certain style cannot be considered as meeting the condition of originality. The author did not conceive the text in the form in which it is presented in the final work, and the result does not reflect an autonomous creative choice, but rather a reformulation determined by the intervention of a technological tool.

By way of example, the author may conceive the initial text as follows: "This book is as blue as the sea". The text does not present any drafting deficiency, but the author may wish to modify its style in order to enhance the value of this sentence. Thus, through the instruction "Modify the style of this sentence so that it is extremely valuable from an artistic perspective", the program ChatGPT generated a new text, of evidently increased quality, namely "This book carries within its covers the blue of the sea, deep and restless, like an ancient breath of the world". In a context such as the one exemplified, by comparing the initial text with the resulting one, an objective observer could not conclude that both texts could be attributed to the same author. Consequently, the author's personality is not transferred into the text generated by the technology, but manifests itself exclusively in its original version.

Therefore, I consider that the augmentation of texts may be carried out without breaching academic ethics and deontology norms, provided that such intervention affects the initial text only from the perspective of formal correction, without producing substantive modifications. As long as the text differs exclusively through the elimination of errors, the work will retain its character of originality, and the copyright in such work may be attributed to the doctoral candidate.

From the perspective of paraphrasing works drafted by authors other than the doctoral candidate, the issue does not require an elaborate analysis. Whether the paraphrasing for the purpose of appropriating a work is carried out by a computer program or by a person, the result is the same, namely that we are in the presence of plagiarism. What may be added to the conduct characterized by bad faith of the person who appropriates another work is that, in the case of the use of artificial intelligence-based programs, even the intellectual effort of reading and reformulating the ideas contained in that work is eliminated. Thus, I consider that such conduct presents an increased degree of gravity, as it tends to circumvent, in its entirety, the intellectual effort required for the drafting of a doctoral thesis, including the effort of researching the work of a prior author.

3.3. Organizing and Augmenting Ideas.

Potentially the most risk-averse option among all methods of using artificial intelligence-based programs, the doctoral candidate has the ability to use programs such as ChatGPT to assist them in developing the structure of their work or in improving it.

According to the Ministry of Education, in its most recent report on the state of higher education¹¹, as of the 2023/2024 academic year there were approximately 21,400 doctoral candidates enrolled in Romania across all 463 doctoral fields available. Thus, considering an average of approximately 46 doctoral candidates enrolled in each field, irrespective of the year of study, it is unlikely that a doctoral candidate is undertaking a second

⁹ V Roș, A Livădariu, C.-R. Romișan, *Dreptul proprietății intelectuale. Dreptul de autor și drepturile conexe și drepturile de proprietate industrială*, Ed. C.H. Beck, Bucharest, 2025, p. 114.

¹⁰ Court of Justice of the European Union, Case C-833/18 (SI and Brompton Bicycle Ltd v Chedech/Get2Get).

¹¹ Ministry of Education, Report on the State of Higher Education in Romania, Bucharest, November 2024.

doctoral program. Consequently, it is highly probable that they do not possess prior relevant experience in drafting a work of a complexity exceeding that of any previously written work.

In this context, the support provided by such software tools may prove useful for the inexperienced doctoral candidate, who requires a simple stimulus for identifying a research direction, an indication for completing or structuring an already drafted plan, or a specific clarification in the process of organizing ideas, without such use, in itself, leading to the substitution of their own intellectual contribution.

Naturally, the suggestions provided by an artificial intelligence-based program are derived from or based upon what already exists, but such a factual circumstance cannot lead to the conclusion that any content within a chapter whose title is provided by the technology would constitute a copy. As long as the use of such programs is limited to organization and support, and the drafting is carried out through human effort, I consider that a breach of academic ethics and deontology norms cannot be established.

3.4. Drafting

The Framework Code of 4 April 2024 on academic ethics and deontology provides that the doctoral candidate, in this capacity, is required to produce an original work. At the same time, pursuant to Article 18 letter (f), any member of the academic community undertakes the “recognition of the profession, of the responsibility and of the trust conferred by society, as well as of the internal obligations deriving from such trust”. It follows that the doctoral candidate is required to acknowledge the responsibility they bear, not to betray the trust conferred by society through means contrary to ethics and deontology, and to produce, through their own efforts, an original work.

The originality of the work, as previously noted, consists in the manifestation of the author’s personality within the work. However, in order to fulfill the obligations outlined above, it is necessary that the act of drafting the work be effectively carried out, an act which essentially requires that the work constitute an intellectual creation. It is difficult to conceive of a context in which it could be held that a person has produced a work exclusively by inputting instructions into a computer program, since, in such a scenario, the only creative contribution of the purported author would consist in formulating the instructions addressed to the artificial intelligence-based program.

Accordingly, it may be concluded that, in order for a work to be produced in accordance with the ethical and deontological norms applicable to the academic environment, it must cumulatively satisfy two conditions necessary for the acquisition of copyright protection, namely that it constitutes a creation of the human intellect and that it displays originality. These conditions cannot be fulfilled in the case of drafting a work by providing instructions to an artificial intelligence-based program.

In legal doctrine, it has been argued that no one could acquire copyright in a work created through artificial intelligence-based programs viewed as instruments. By way of example, the hypothesis has been advanced in which a person provides instructions to another person to create a work, similarly to the manner in which a person may provide instructions to an artificial intelligence-based program to generate a response, in which case the person who provided the instructions would not acquire copyright in the work created by the other person¹².

I am of the opinion that the only circumstance in which it could be considered that the author has engaged in a sufficiently complex intellectual process and has imprinted their personality onto a text created by an artificial intelligence-based program would be the hypothesis in which, by providing the same instruction, the purported author would obtain the same result upon each query of any artificial intelligence-based program. However, this is a standard that is impossible to attain, and the effort required to meet it is far greater than the effort involved in manually drafting the respective work.

Accordingly, it is difficult to conceive of a context in which the use of artificial intelligence-based programs for drafting a doctoral paper could be in compliance with the norms of academic ethics and deontology.

4. Conclusions

Programs that employ artificial intelligence may be regarded, equally, as the first adversary of human creation or, conversely, as its next evolutionary step. Both assertions may be supported as true, the essential

¹² V. Diaconiță, *Dreptul proprietății intelectuale. Curs universitar*, Ed. Hamagiu, Bucharest, 2023, p. 321.

difference between them being determined exclusively by the concrete manner in which these technologies are used.

The reluctance manifested towards artificial intelligence-based programs often originates in the tendency to anthropomorphize them, although, in reality, they should be conceived merely as technological tools. Such programs do not possess consciousness or their own intellect, and are not capable of creation in the authentic sense, but only of reproducing letters, images or visual sequences in accordance with the statistical patterns learned during the training process.

Undoubtedly, the output generated by an artificial intelligence-based program may be aesthetically impressive, and the description that the program may produce regarding the emotions that such an image could evoke may create the appearance of a genuine artistic sensibility of the program. However, in reality, the program does not think and does not feel, but rather reproduces patterns which it has learned are commonly associated with human emotional reactions to similar images or representations.

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OWNERSHIP AND CONTROL OF THE SOURCE CODE

Alexander S. POPA *

Abstract

This article examines the legal ownership and control of source code as an intellectual asset at the intersection of copyright doctrine and corporate practice. It clarifies why computer programs are protected by copyright as a form of expression, whilst ideas, principles, algorithms, and functionality remain outside the scope of protection.

The analysis distinguishes between source code, object code, and (where original) technical documentation, and explains the software-specific operation of moral rights (paternity and integrity) alongside economic rights. Building on this framework, the article maps the structural tension between the human developer—always the only possible “author” under copyright—and the organisational settings in which software is produced (employment, commissioned work, and services). It evaluates the presumptions and limits of transfers of economic rights to employers, focusing on code created outside contractual duties, the interpretative role of job descriptions and internal IP policies, and the practical meaning of “control” over modification, integration, sublicensing, and commercialisation.

Finally, it addresses contemporary grey areas: co-authorship in team-based and agile development; AI-assisted code generation (excluding human–AI co-authorship and stressing the need for human creative choices); and layered rights arising from open-source components, derivative works, and licence compatibility and “contamination” risks. The article proposes criteria and contractual governance techniques to reduce recurrent disputes.

Keywords: intellectual property, AI, doctoral research, artificial intelligence, law, machine learning.

1. Introduction. Source code as a strategic intellectual asset and the issue of legal control

In the current context, source code has moved beyond the status of a mere technical tool to become a strategic intellectual asset with significant economic, competitive and legal value. Within the digital industries, software represents not only the functional backbone of products and services, but also the expression of a complex creative endeavour, the result of the competence, experience and intellectual choices of the developers involved. From this perspective, source code lies at the intersection between intellectual creation protected by copyright and the investment logic specific to the commercial environment, giving rise to legal disputes regarding the ownership, control and exploitation of¹.

This reality has led to an intensification of the structural tension between the human author of the source code—the programmer, in their capacity as an intellectual creator—and the organisational framework. When we discuss the organisation, we are referring to any legal entity, from commercial companies and research institutes to universities, where creation takes place on the basis of a relationship, ranging from an employment contract, a contract for work or a service contract, and including the context of a research grant.

Whilst copyright traditionally rests on the premise that a work belongs to its author, the practice of software development is characterised by collaborative projects, specific economic objectives² and the legitimate expectation of employers to exercise full control over the results of the work they have funded.

This tension is not purely theoretical. It manifests itself in concrete legal questions, such as: Who holds the economic rights to the source code? To what extent does the programmer retain their moral rights? What are the limits of the employer’s or organisation’s control over the modification, integration or licensing of the code? What rights are transferred from the supplier of a model to the programmer-user?³ How are rights allocated

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¹ P. Ohm and B. Reid, *Regulating Software When Everything Has Software*, p. 4, the George Washington Law Review, 2016, available at <https://www.gwlr.org/wp-content/uploads/2016/11/84-Geo.-Wash.-L.-Rev.-1672.pdf>, accessed 05.02.2026, 11:30.

² R. Davis, P. Samuleson, M. Kapor, J. Reichman, *A new view of Intellectual property and software*, Communications of the ACM, March 1996, vol. 39, no. 3, p. 23, available at <https://people.csail.mit.edu/davis/cacm96.pdf>, accessed 02.03.2026, 20:00.

³ Available at <https://openai.com/ro-RO/policies/row-terms-of-use/>.

when the software creation is the result of multiple contributions? The answers to these questions cannot be formulated solely by reference to the legal framework, but require a contextual analysis that integrates specialist doctrine and relevant judicial practice.

The issue of control over the source code is a key point in this debate. Control is not limited to the mere formal ownership of economic rights, but involves the actual decision regarding how the code is commercially exploited: modified, adapted, integrated into other software products, sub-licensed or made available to third parties. From a legal perspective, this control is often exercised by the employer or the entity coordinating the project, but from a creative perspective, it directly affects the author's work and, by extension, their relationship with their creation.

Copyright doctrine has consistently emphasised that software, although subject to special rules, is not excluded from the general framework of intellectual property protection. Established analyses of the legal nature of computer programs highlight the fact that the functional specificity of the code does not negate its creative character, but rather distinguishes it. At the same time, the specialist literature has shown that the employer's involvement in the creative process, through the setting of technical requirements, the general architecture or commercial objectives, does not automatically result in the developer losing their status as an author, but requires a fine distinction to be drawn between intellectual contribution and the organisational framework of the work.

Another factor complicating the legal analysis is the development of software through multiple contributions, which is characteristic of modern projects. Agile methodologies, teamwork, and the use of existing code or open-source libraries make it difficult to identify precisely who the authors are and the extent of each person's contribution. In this context, the concept of co-authorship takes on particular importance, but also presents specific challenges, distinct from those encountered in traditional artistic creations. Legal doctrine has repeatedly highlighted the risk of confusion between co-authorship proper and mere technical or executory participation, with direct consequences for the legal regime governing copyright.

Case law, at both national and European level, has reflected these difficulties, oscillating between the protection of employers' economic interests and the recognition of developers' creative role. Without offering uniform solutions, case law highlights the need for a balanced interpretation that takes into account the specific nature of each software project, the content of the contractual obligations and the nature of the actual contributions made by the parties involved.

The law frequently employs mechanisms to structure complex legal relationships or to facilitate the functioning of institutions; however, their legitimacy depends on their acceptance in legal theory and case law, as well as on their compatibility with the fundamental principles of the field in which they operate. From this perspective, this article also aims to distinguish between established and functional legal fictions and another conceptual construct, the validity of which is not recognised by the legal interpretative community. This latter fiction, although prevalent in technological or media discourse, has not attained normative recognition nor doctrinal acceptance within the interpretation of positive law. Its critical analysis becomes necessary precisely to clearly distinguish the legitimate instruments of legal technique from conceptual extensions that risk distorting the meaning and coherence of the applicable rules. In this context, it becomes necessary to clarify the legal framework applicable to source code, through a structured analysis of the rights of developers and employers, with a focus on the issue of control over the use of software and on situations of co-authorship and multiple contributions. The aim is not to formulate rigid solutions, but to highlight relevant legal criteria and recurring practical risks, which can be managed through an appropriate contractual and organisational approach.

Through this analysis, the article aims to provide a useful theoretical and practical tool for both legal professionals and those involved in software development, contributing to a better understanding of the necessary balance between the protection of intellectual property and the demands of the digital economy.

2. Source code as a work protected by copyright

2.1. The legal basis for the protection of source code

The legal protection of computer programs under copyright law is now a well-established regulatory framework both at the level of European Union law and in the domestic law of Member States. This legislative option was not an obvious one from the outset, given the technical, utilitarian and functional nature of software,

but it gradually became established due to the need to provide creators of computer programs with an effective protection regime, tailored to the specific nature of digital creation. The aspects concerning the protection afforded to computer programs spanned several legal levels, ranging from the protection provided by the rules governing patents for inventions, as was the case in the US, with an interesting development that culminated in 1976 with the Copyright Act, which established that computer programs, generically referred to, are copyright works⁴, in the sense of 'literary works'. The 1980 amendment to the Copyright Act explicitly clarified the inclusion of computer programs⁵.

At European level, the explicit inclusion of computer programs within the scope of copyright was justified by the notion that they constitute a specific form of intellectual expression, even though such expression does not take the traditional forms of literary or artistic creation. Through the provisions of Directive 91/250/EEC, the Council of the European Communities proposed a level of protection for computer programs, setting out basic rules for this legal framework. Furthermore, what Directive 91/250/EEC contributed from a general perspective was the set of definitions relating to computer programs, particularly regarding their communication and operational functions⁶. Romanian domestic law, primarily Law No. 8/1996, adopted this concept, expressly enshrining the protection of computer programs as literary works within the meaning of copyright law. Thus, the legislator opted for legal assimilation, rather than ontological identity, between software and classical literary works, recognising the specific nature of source code whilst integrating it into the general framework of copyright law.

This legal classification has direct implications for the regime of rights granted to the author, the duration of protection, the manner in which economic rights are transferred, and the applicability of moral rights. At the same time, it justifies the application of the criterion of originality as an essential element of protection, a criterion which, in the case of software, raises significant conceptual and practical difficulties, at least from this perspective.

2.2. Source code as a literary work: legal significance and limitations

The classification of source code as a literary work must be understood in a functional-legal sense, and this classification does not seek to equate the programmer with a literary author in the classical sense of the term, but rather to enable the application of a coherent set of legal rules to an intellectual creation expressed through a formalised language. In this context, the work – the source code – is written in an artificial language governed by strict syntactic rules; however, this does not preclude the existence of the author's freedom of expression. The choice of algorithmic structure, the organisation of the code, the technical solutions adopted to solve a given problem, and the use of specific programming paradigms or data structures are the expression of intellectual choices that may reflect the developer's personality and competence.

At the same time, case law and its interpretation have highlighted the fact that copyright protection does not extend to ideas, principles, algorithms or functionalities in themselves, but exclusively to the form in which they are expressed⁷. This distinction is essential in the field of software, as the risk of unjustified extension of protection to technical solutions could lead to the stifling of competition and the hindrance of technological progress.

Consequently, the classification of source code as a literary work must be understood as a functional legal fiction, designed to ensure the protection of creative expression, without conferring a monopoly over ideas or computer functions. The existence of legal fictions which, although constructive and artificial in nature, produce real normative effects and are coherently integrated into the architecture of the legal system is a relevant factor for the present analysis.

2.3. The condition of originality in the case of computer programs

Compared to literary works, computer programs present fundamental differences, and this aspect leaves no room for solid counter-arguments. Nevertheless, the inclusion of computer programs within the scope of

⁴ V. Roş, *Intellectual Property Law – University Course*, Global Lex 2001, p. 199.

⁵ Available at <https://www.copyright.gov/title17/title17.pdf>.

⁶ Available at <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:31991L0250>.

⁷ See the BGH case, judgement of 3 May 2005 – I ZR 111/02 – Fash 2000, article available at <https://www.glawe.de/en/european-court-of-justice-cjeu-protection-of-software-functionalities>, accessed 03.03.2026, 12:00.

protection afforded to literary works was a step enshrined in the TRIPS Agreement, which, under the provisions of Article 10(1), specifies that they shall be governed, from the perspective of both source code and object code, by the provisions of the Berne Convention⁸.

The fundamental differences also concern the interpretation of originality. Starting from a generally accepted notion of originality as: a fundamental legal criterion that determines the recognition of copyright protection and concerns the result of an intellectual activity specific to the author, reflecting their free and creative choices, not to be confused with absolute novelty, artistic value, practical utility or technical complexity. From the perspective of the author-work connection, originality expresses the personal link between the two elements, manifested in the form of its expression.

In the case of a computer program, originality does not stem merely from the mere application of intellectual effort, labour and skill, but from a certain relevant level of these, a process which results in going beyond a level of mechanical execution or a purely functional contribution. Originality does not, in fact, operate as an absolute and uniform criterion, but as a gradual standard dependent on the particularities of each individual case. For this reason, originality cannot be reduced to clear and rigid formulas, requiring a contextual analysis that is sensitive to the nature of the premise and the type of contribution incorporated therein.

In this regard, I have deliberately avoided the term 'human contribution', based on the notion of a combined contribution by both human and machine in producing a result⁹

Example 1

```
numbers = [5, 7, 3, 10]
total = 0
for n in numbers:
    total += n
average = total / len(numbers)
print("Total:", total)
print("Average:", average)
```

Example 2

```
def pulse(text):
    words = text.split()
    transformed = []
    for i, w in enumerate(words):
        if i % 2 == 0:
            transformed.append(w.upper())
        else:
            transformed.append(w[::-1])
    return " | ".join(transformed)
print(pulse("Intellectual property is the field of the future"))
```

The examples presented allow for an applied analysis of the fact that originality is not synonymous with complexity.

Whereas in the first case the programmer follows the most direct and predictable path to achieve a functional result, in the second case we see the programmer making their own choices regarding expression. In this example, the programmer-author does not merely process the text, but decides in a particular way how exactly to transform it: they vary the treatment of words, impart a certain rhythm to the result, and construct a form of presentation that was not dictated by technical necessity alone.

Unlike the first example, which is limited to performing a simple operation in an almost inevitable, standardised algebraic form—¹⁰—this second code no longer appears to be a mere mechanical transposition of a technical requirement. Consequently, the difference from the first code does not necessarily lie in the technical difficulty or the length of the sequence, but in the fact that the second example suggests a genuine margin for creative freedom. Whilst the first code could have been written, almost identically, by any programmer faced with the same basic task, the second reflects a certain combination of choices, arrangements and phrasing options that were not strictly necessary for its operation. It is precisely this difference in approach to the technical function that supports the argument that, in the second case, the code can be viewed not merely as a functional tool, but also as an expression of one's own intellectual contribution.

Originality is the central criterion for copyright protection and, at the same time, one of the most problematic aspects when it comes to software. Unlike traditional literary or artistic works, where originality is

⁸ V. Roş, A. Livădariu, C.P. Romiţan, *Intellectual Property Law. Copyright and Related Rights and Industrial Property Rights*, C.H. Beck 2025, p. 125.

⁹ L. Bently, B. Sherman, *Intellectual Property Law – Third edition*, Oxford University, 2009, p. 97.

¹⁰ C. Petzold, *CODE The hidden language of computer hardware and software*, Second edition, Pearson Education, 2023, p. 42.

often manifest in an intuitively perceptible form, in the case of source code it must be analysed in terms of the author's freedom of choice and intellectual contribution¹¹.

Several authors have articulated the idea that originality presupposes the existence of an intellectual creation that is unique to the author¹², reflecting their personality. When applied to software, this definition implies a careful assessment of the degree of technical constraint. Where a solution is dictated solely by functional requirements, technical standards or interoperability, the scope for creative expression is limited or even non-existent, which may preclude copyright protection.

Conversely, where the author has genuine scope for discretion – in choosing the application's architecture, structuring the code, or implementing functionalities – originality may be recognised, even if the programme's ultimate purpose is utilitarian or merely operational.

This distinction between functional solutions and creative expression is of major practical importance, as it determines the limits of protection and influences the analysis of potential copyright infringements in the field of software.

2.4. The distinction between source code, object code and technical documentation

When analysing the legal framework governing computer programs, it is essential to draw a clear distinction between their various components, each of which has a distinct significance from a copyright perspective.

Source code	Object code (disassembly)	Technical documentation
<i>int add(void) { int a = 5; int b = 7; return a + b; }</i>	<i>push rbp mov rbp, rsp mov DWORD PTR [rbp-4], 5 mov DWORD PTR [rbp-8], 7 mov edx, DWORD PTR [rbp-4] mov eax, DWORD PTR [rbp-8] add eax, edx pop rbp ret</i>	<i>This code snippet defines the add function, which initialises two local integer variables, a and b, with the values 5 and 7, and then returns their sum. The source code is written in a form that is understandable to the programmer, whilst the object code represents the compiled version of the same instructions in a form that can be executed by the processor. The exact representation of the object code depends on the technical compilation environment.</i>

Source code is the human-readable form of a programme, written in a programming language and capable of reflecting the author's intellectual choices. For this reason, source code is the primary subject of copyright protection in the field of software.

Object code, produced as a result of compiling source code, takes the form of a sequence of instructions in binary format or in a derived hexadecimal representation, intended for interpretation and execution by computer systems. Although unreadable to most users, object code is consistently regarded as a derivative form

¹¹ C-604/10, Football Dataco Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A62010CJ0604_SUM&utm_source=chatgpt.com.

Secondly, as is apparent from recital 16 of Directive 96/9, the concept of the author's own intellectual creation refers to the criterion of originality. As regards the creation of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data it contains, its author expresses his creative ability in an original manner by making free and creative choices and thus leaves his 'personal mark'. By contrast, that criterion is not satisfied when the creation of the database is dictated by technical considerations, rules or constraints leaving no room for creative freedom. Accordingly, no other criteria than that of originality are to be applied to determine the eligibility of a database for the copyright protection provided for by the directive.

¹² D.I. Bainbridge, Intellectual Property, 8th Edition, Pearson Education, 2010, p. 41.

of the source code and enjoys protection to the extent that it reproduces the expression thereof. Technical documentation, including functional specifications, user manuals or software architecture documents, may in turn constitute a protected work, to the extent that it meets the condition of originality. Legal doctrine has established that technical documentation is not automatically protected, but only to the extent that it expresses an original structure of information, going beyond a mere standardised technical description.

2.5. Moral and economic rights applicable to software

The copyright regime governing computer programs is characterised by a specific application of moral and economic rights. Although moral rights are recognised for software authors, the exercise of these rights is often limited by the functional nature of computer programs and the professional context in which they are created.

The right to authorship of a work remains, in principle, applicable, with the author having the right to be recognised as the developer of the source code; however, in practice, this right is often exercised in a limited form, particularly in the context of collective works or programmes developed within the framework of employment relationships. The right to the integrity of the work raises specific difficulties, as software is, by its very nature, subject to continuous modifications, updates and adaptations. Legal doctrine has shown that the exercise of this right must be reconciled with the functional need to maintain and develop the programme, which justifies a flexible interpretation of the concept of infringement of the integrity of the work. Economic rights take on central importance in the field of software, being closely linked to the economic exploitation of the programme. The rights of reproduction, distribution, adaptation and making available to the public are essential for the commercial exploitation of the source code and constitute, in practice, the main subject matter of assignments or licences granted to employers or third parties. This dual structure of rights – moral and economic – forms the legal foundation upon which the analysis of the relationship between developers and employers, as well as the issues of co-authorship and multiple contributions in software creation.

3. The rights of the programmer – the author of the source code

3.1. Authorship of the source code. Natural persons and the impossibility of legal persons being authors

In the field of copyright, authorship is consistently and unequivocally reserved for the natural person who created the intellectual work. But is this statement true?

Within the framework of copyright law, the concept of authorship has a consistently and strictly defined meaning: the author is the natural person who creates an intellectual work. This concept is not a mere accident of the lawmaker, but reflects the very foundation of copyright protection.

Copyright protects the expression of human intellectual activity, and the link between the author and the work is conceptualised as direct, immediate and personal; and in Romanian law, this principle is expressly enshrined in Article 3(1) of Law No. 8/1996, according to which ‘the author is the natural person or persons who created the work’. The text leaves no room for a broad interpretation that would include legal persons or technical entities within the scope of authorship. Furthermore, the provisions on computer programs, included in Title III of the law, do not derogate from this principle. On the contrary, Article 73(1) provides that computer programs are protected as literary works, which entails the application of the same rules regarding the original ownership of rights.

At the level of European Union law, the same approach is reflected in Directive 2009/24/EC on the legal protection of computer programs. Recital (7) and Article 1(3) emphasise that protection is granted to computer programs insofar as they constitute the author’s own intellectual creation. The concept of one’s own intellectual creation has been consolidated in the case law of the Court of Justice of the European Union as an expression of human intellectual intervention and the existence of free and creative choices. In the field of software, this rule remains fully applicable. The source code, even when developed within a corporate structure, remains the result of intellectual choices made by individuals – programmers, software architects, developers – who decide on the structure, organisation, formulation and implementation of technical solutions. The fact that the work is carried out within the framework of an employment relationship or a service contract does not transform the legal entity into the author. Pursuant to Article 74 of Law No 8/1996 and Article 2 of Directive 2009/24/EC, the employer may, under certain conditions, acquire the economic rights to the programme created by the employee;

however, this acquisition is of a derivative nature and does not affect the original status as author of the individual who created the work.

Legal doctrine has consistently emphasised that a legal person cannot, in a legal sense, be regarded as an author, as it lacks the capacity for intellectual creation, in contrast to the human individual who possesses qualities such as: intelligence, personality, feelings or creative power¹³. Legal personality is a normative fiction that allows a collective entity to participate in civil transactions, but it does not equate to the existence of a creative consciousness. Authorship implies a direct link between the work produced and the intellectual activity of a natural person, which cannot be attributed to an organisational entity, regardless of the complexity of its structure.

In practice, the field of software development tends to blur this distinction, promoting the idea of the organisational 'product'. Collective projects, fragmented workflows, and the use of standardised libraries and automation tools can create the impression of an impersonal creation. However, from a legal perspective, authorship is not diluted by organisation, subordination or technical cooperation. In the case of collaborative works, Law 8/1996 recognises the co-authorship of individuals who have contributed creatively, without attributing authorship to the organising entity.

In the age of artificial intelligence, the analysis is complicated by the emergence of code generated on the basis of a prompt formulated by a programmer. Even in this context, the same criterion remains applicable: the identification of a human intellectual contribution capable of conferring on the work the status of a protected creation.

If the programmer formulates instructions, selects results, modifies and integrates the code into their own architecture, their intervention may establish authorship. If, on the contrary, the result is generated entirely by an automated system, without human creative intervention, the issue is not the attribution of authorship to the legal entity or the machine, but the possible absence of copyright protection. Within this conceptual framework, the notion of a 'machine-author' would represent a radical departure from the logic of copyright law. This notion entails attributing authorship to an entity lacking legal personality and creative consciousness, which would contravene both the legal texts and the theoretical foundations of the institution. Romanian and European positive law provides no basis for such a classification, and recourse to this idea can only be of the nature of a legal fiction not enshrined in law.

3.2. The developer's moral rights in the source code

3.2.1. The right to authorship of the work

The right of authorship is the most obvious expression of the personal dimension of copyright and remains applicable in the field of computer programs. Even if the software is created within the framework of an employment relationship or a contract for the provision of services, the developer remains the author of the source code to the extent that their contribution is creative in nature. This right reflects the intellectual link between the individual and their creation and, by its very nature, cannot be transferred or waived by agreement between the parties, regardless of the regime governing economic rights.

In practice, however, the exercise of the right of authorship in the field of software is not without its peculiarities. Software programmes are usually marketed under the name of the product or the company, and the public interface does not explicitly indicate the names of the developers. This economic reality does not, in itself, negate authorship, provided that authorship is not falsely attributed to another person and that the recognition of the actual contribution is not impeded in relevant contexts, such as technical documentation, internal reports or potential disputes. In the case of team projects, the right to authorship takes a form adapted to the collective structure of the creation. Recognition of authors does not necessarily entail individual mention in every form of exploitation, but rather ensuring the possibility of identifying their contribution where this is relevant. This solution strikes a balance between the protection of moral rights and the practical requirements of software development and marketing, without undermining the personal nature of authorship.

¹³ V. Roş, *Intellectual Property Law – University Course*, Global Lex 2001, p. 56

3.2.2. The right to the integrity of the work and the specific features of software

The right to the integrity of the work, in the sense of the author's right to object to modifications that affect their creation, takes on particular significance in relation to source code. Unlike traditional literary or artistic works, software is, by its very nature, subject to a continuous process of adaptation, optimisation and correction.

The analysis of the provisions of Article 78 of Law No 8/1996 on copyright and related rights must be carried out in conjunction with the special regime applicable to computer programs, a regime which is not autonomous but derives directly from European Union law, in particular from Directive 2009/24/EC on the legal protection of computer programs (which codified Directive 91/250/EEC). The provisions of Article 78 transpose Articles 5 and 6 of Directive 2009/24/EC into national law, establishing a set of specific limitations and exceptions tailored to the technical characteristics of software.

This approach must be understood as the expression of a deliberate legislative choice to treat computer programs differently from other categories of protected works. This distinction is not accidental, but stems from the profoundly functional nature of software and the need to ensure a genuine balance between the exclusive rights of the right holder and the legitimate interests of the authorised user. The principle essentially establishes three distinct regulatory mechanisms, which shape the specific legal regime governing computer programs. Firstly, it recognises the authorised user's right to make an archive or backup copy, to the extent that this is necessary for the use of the program. Secondly, it enshrines the right to analyse, study or test the functioning of the program in order to identify the ideas and principles underlying its elements. Thirdly, it provides that the moral right of withdrawal does not apply in the case of computer programs.

The legislative provisions under consideration are not merely technical exceptions, but reflect a coherent European model. They transpose into national law the solutions established by Directive 2009/24/EC on the legal protection of computer programs, which, in turn, established an autonomous regime within copyright law. Article 5(2) of the Directive enshrines the right of the lawful user to make a backup copy, whilst paragraph 3 permits the observation, study and testing of the functioning of the program in order to determine the ideas and principles underlying it. Romanian law reproduces these regulatory solutions almost verbatim, confirming their binding nature within the national legal order.

By recognising the right to make a backup copy, European and national legislators have acknowledged that the technical reproduction necessary to ensure the use of the program cannot be left to the sole discretion of the rightholder. That copy does not confer any additional right of exploitation and cannot be used for independent purposes, but serves solely to protect the legitimate user against the risk of loss or damage to the program.

A more significant aspect concerns the right to analyse, study and test; which enshrines, in the field of software, the fundamental principle of the separation of idea and expression, with the authorised user having the right to observe and examine the programme's operation, the sequence of lines of code, the connections and the interfaces, in order to understand the ideas and principles underlying it, without prejudice to the author¹⁴. This possibility is essential both for ensuring interoperability and preventing the monopolisation of technical concepts, as well as for rapid technological development. However, the recognised right does not extend to the reproduction of the protected form of expression; it allows access to the logic and functionality, not to the copying of the original expression.

In the case of computer programs, the inapplicability of the right of withdrawal reflects the specific economic and technical nature of this type of work. Unlike literary or artistic works, where withdrawal may be seen as an expression of the author's personality, in the case of software such a possibility would seriously undermine legal certainty and the stability of commercial relations. Once integrated into IT systems and technological infrastructures, the program becomes part of a functional ecosystem, and unilateral withdrawal could have disproportionate effects.

From the user's perspective, special legal provisions do not create independent rights in their favour, but rather limit the exercise of the rightholder's exclusive rights within a precisely defined framework, and their applicability is logically and legally contingent upon the existence of a protected work. In this regard, if a code is generated entirely by an automated system, without the creative intervention of a natural person, and the result does not meet the criterion of originality, it cannot be classified as a work within the meaning of copyright law.

¹⁴ V. Roş, A. Livădariu, C.P. Romiţan, *Intellectual Property Law. Copyright and Related Rights and Industrial Property Rights*, C.H. Beck 2025, p. 260.

In such a situation, there is no exclusive right that can be limited, and the legal mechanisms do not come into play. In other words, the rule cannot function in the absence of the object of protection. Exceptions and limitations do not exist independently of the exclusive right; they presuppose its existence.

The situation is different where the code is developed through the interaction between a developer/programmer and a large-scale, even specialised, language model. If the programmer formulates complex instructions, selects options, restructures solutions and integrates the results into their own architecture, their intervention may amount to a significant creative contribution. To this extent, the program acquires the status of a protected work, and the specific legal regime for computer programs becomes applicable.

In such a context, the authorised user of a copy of the program is entitled to make a backup copy, to the extent necessary for its use, as well as to analyse, study or test the program's operation in order to determine the ideas and principles underlying its components. These rights are, however, strictly limited to legitimate use and cannot be extended to the reproduction or exploitation of the protected expression beyond the legal limits. The right to understand the principles does not equate to the right to reproduce the form of expression.

The issue of training large-scale language models using protected code lies in a separate category. It cannot be subsumed under provisions concerning the lawful use of a programme by its authorised user, but must be analysed in relation to the exclusive right of reproduction and any exceptions provided for under European law, including those introduced by Directive (EU) 2019/790 on copyright in the Digital Single Market, relating to text and data mining activities. However, these exceptions do not alter the special regime for computer programs established by Directive 2009/24/EC, which remains the specific regulatory framework for software.

In the case of *Bartz et al. v. Anthropic*¹⁵, the argument set out above is consistent in legal terms, even though the *Anthropic* case was decided in the light of the fair use doctrine, rather than within the European framework of reproduction rights and the special regime governing computer programs. In that case, the court held that training based on legally acquired books may constitute fair use, and here we can draw a parallel with code sequences acquired through a legal process; however, it clearly distinguished the issue of pirated copies, for which *Anthropic* did not obtain the same protection. The main point of convergence between this article and the *Anthropic* case is that both start from the premise that training a model should not be confused with the mere legitimate use of the software copy by the authorised user. The issue of training a large-scale language model cannot be subsumed under the provisions concerning the legitimate use of the programme, but must be addressed within the context of acts of reproduction.

In the case in question, the real dispute was not about the normal exploitation of the work, but about the copying of the body of the protected work for training and storage purposes. An analysis of this case in two different jurisdictions would reveal the difference that the US court raised the question of whether that copying constitutes transformative fair use, whereas a court in Romania or the European Union would examine whether the reproduction falls within a legal exception or remains reserved to the copyright holder.

3.3. Initial economic rights over the source code

3.3.1. The rule of initial attribution to the author

Within the framework of copyright law, the general rule is that economic rights initially belong to the author of the work, a natural person; this is the fundamental principle enshrined in all statutory provisions. Why was it necessary to specify 'natural person' earlier? Contemporary issues raise a question to which the vast majority of legal experts object, namely, the 'machine author'. Copyright has historically been built on a foundation whereby the author is not merely the holder of an economic right, but the subject of a legal relationship that presupposes a link between the work and the creator's personality. Moral rights, the link to authorship, the integrity of the work, and disclosure — all express this anthropocentric conception. By definition, the work is protected because it reflects human intellectual activity, a product of creation.

The concept of the 'machine-author' represents a radical break, a rupture in the logic constructed by practitioners and theorists alike, which entails attributing authorship to an entity lacking legal personality and creative consciousness. Of course, this view is recognised as being nothing more than a legal fiction.

¹⁵ Available, including history, at <https://admin.bakerlaw.com/wp-content/uploads/2025/02/ECF-1-Complaint-3.pdf>, accessed on 10 February 2026, 14:00.

Legal fictions are classic tools of legislative technique, used to organise complex social realities by attributing legal effects to entities or situations which, in factual terms, do not directly correspond to traditional legal concepts; they are legitimate insofar as they serve a coherent purpose and do not alter the axiological structure of the institutions within which they are embedded. A relevant example is the legal personality of commercial companies, in that the law attributes legal capacity to a collective entity to facilitate economic activity, without denying that the corporate will is expressed through the natural persons who constitute it. Applying this logic to copyright law, through the recognition of a machine-author, raises far more profound conceptual difficulties, as authorship is not merely a technical means of allocating economic rights, but rather the expression of a personalist conception of creation, the result of complex neural processes based on creative processes, impossible to duplicate, generated by years of evolution¹⁶.

Attributing authorship to a machine would necessarily entail recognising a capacity to create in the legal sense—that is, to make free and creative choices attributable to a legal person—and would imply the possibility of exercising moral rights and, at least in theory, assuming a form of liability. However, a technical system, regardless of its degree of complexity, cannot manifest will, cannot claim authorship of a work, and cannot invoke an infringement of its integrity. It does not possess legal personality and cannot participate in legal relationships autonomously; moreover, the recognition of a machine-author would not merely represent a terminological innovation, but would have structural effects on the architecture of copyright law. From this perspective, the analysis must shift from the rhetorical level of technological novelty to that of systemic coherence.

Firstly, attributing authorship to a technical entity would lead to a significant broadening of the concept of a work. Of course, not every result generated by automated processes would qualify as a protected work, solely by invoking the fiction of the machine-author, but the scope of protection would extend beyond the realm of human intellectual creation, and assessing originality would be difficult to achieve. In such a case, copyright could end up covering products resulting from simple algorithmic processes, regardless of the existence of creative choices attributed to a natural person. Such an extension could exponentially increase the number of protected works, leading to a proliferation of situations of legal exclusivity, with a direct impact on the circulation of information and on competition. In such a case, protection would cease to be a mechanism for stimulating creation and would become a tool for monopolising technical production.

Another issue concerns the criterion of originality, which is the central element of copyright protection under European law. There is a risk that copyright could be transformed into a system for protecting automatically generated results, without it being possible to identify the link between the work and human intellectual activity. In this context, the very notion of creation would become ambiguous, and the distinction between protected expression and mere functionality would be blurred. Last but not least, recognising the machine as an author would create ambiguities regarding liability. Copyright is not merely a system for allocating exclusive rights, but also a framework within which liability may arise for infringing rights or for disseminating unlawful content. In a situation where the machine could be classified as an author but could not bear the legal consequences of its own ‘acts’, liability would have to be redistributed to other persons involved — developers, users or infrastructure owners. This redistribution would confirm the artificial nature of the fiction: the entity formally designated as the author could neither exercise rights autonomously nor be held liable for infringements, which would demonstrate its legal futility.

In such a scenario, economic rights would inevitably have to be assigned or transferred to a natural or legal person—the system developer, the programmer, the user-author of the prompt, or the owner of the infrastructure. This redistribution confirms the artificial nature of the fiction: the machine would formally appear as the author, but without actually exercising any rights and without being able to bear any obligations. Authorship would become a purely formal intermediate stage, devoid of normative substance.

Irrespective of the above, this rule currently applies to computer programs, regardless of the context or the means by which they were created. The developer or programmer acquires, by the mere act of creation, all economic rights to the source code, including the right to reproduce, distribute, adapt and exploit it commercially. This initial attribution has fundamental legal significance, as it constitutes the starting point for any subsequent analysis regarding the transfer or limitation of rights. Even in situations where the law establishes presumptions of transfer in favour of the employer, these operate as exceptions to the general rule and must be interpreted restrictively.

¹⁶ N. Toon, *How AI Thinks*, Penguin Random House UK, 2024, p. 144.

3.3.2. Assignment and licensing of economic rights

In the field of computer programs, economic rights relate to the reproduction, distribution, adaptation or incorporation of the source code into a larger software product. Moral rights, on the other hand, reflect the personal connection between the author—as a human individual—and the work. They protect authorship, integrity and the right to disclose the creation, and are, in principle, inalienable and non-transferable. Even when economic rights are transferred to the employer or a third party, the author remains the holder of moral rights, which reflects the personalist conception of intellectual creation. The distinction between the two categories is essential to understanding the difference between authorship and economic ownership of the work.

The transfer of economic rights to the source code may be effected by assignment or by the granting of a licence. The distinction between these two mechanisms is essential, from both a legal and an economic perspective. Assignment involves the permanent transfer of economic rights, with the author losing control over the subsequent exploitation of the work, within the agreed limits. A licence allows the beneficiary to exploit the source code without depriving the author of ownership of the rights. In software practice, licences are frequently used to permit the integration or use of programs in commercial products, whilst retaining a certain degree of control over the work.

In this context, the question arises as to whether it is possible to assign specific code sequences from a protected programme, and what the legal effect of such a transaction would be. From a copyright perspective, there is nothing to prevent the transfer of economic rights in an identifiable part of a work, provided that it is specific or determinable and constitutes, in turn, a protected expression. As source code is capable of technical and functional segmentation (modules, libraries, functions), it allows for such a contractual demarcation.

The assignment may relate to a distinct module or a set of identifiable functionalities, without entailing the full transfer of rights to the original programme. If the sequence of code thus transferred is subsequently integrated into another program, the result is not necessarily a derivative work in the legal sense. A derivative work involves the transformation or adaptation of a pre-existing work, whilst retaining a recognisable link to it. In the event that the economic rights to the sequence have been assigned and the assignee uses it as an autonomous element within a new software architecture, the resulting product may constitute a distinct work, without being classified as a derivative of the original program. The legal link to the original work is, in this case, mediated by the transfer of rights, not by a relationship of creative dependence.

The issue at hand concerns the distinction between the mere legitimate reuse of a transferred sequence and the creation of a derivative work; this distinction depends on the nature of the intervention on the pre-existing code, since the new programme involves substantial modifications to the structure or logic of the original sequence, raising the question of whether a derivative work has been created based on that component. Conversely, when the sequence is used as such, on the basis of a valid transfer of economic rights, the new creation constitutes an autonomous work, within which the pre-existing element functions as a legitimate integrated contribution, not as a transformation of the original work.

3.4. Problematic situations in software development practice

3.4.1. Lack of a clear contract regarding rights to the source code

One of the most common disputes between developers and employers is the absence of clear contractual clauses regarding copyright over source code. In the absence of explicit provisions, the general rules of copyright law apply, which can lead to unexpected outcomes for the parties, particularly for employers, who often assume that the mere remuneration of the employee's work equates to the full acquisition of rights over the work created within the employment relationship. However, this presumption is not necessarily in line with the applicable legal regime. From this perspective, in the case of computer programs, Romanian law establishes a specific rule whereby, if the program is created by an employee in the course of their duties, the economic rights belong to the employer, in the absence of a stipulation to the contrary. However, this acquisition relates exclusively to economic rights and does not affect the author's moral rights. The programmer remains, from a legal point of view, the author of the source code, even if the employer becomes the holder of the economic exploitation rights. The right of authorship and the right to integrity are not absorbed by the corporate structure and cannot be nullified by the mere payment of a salary.

In practice, conflicts arise particularly in situations where the scope of job responsibilities is not clearly defined, or where the developer contributes to parallel projects, reuses previously created components, or integrates libraries and code snippets with different legal statuses. In the absence of express clauses regarding assignment, the scope of the rights transferred and the regime governing subsequent creations, the analysis is carried out by reference to the specific nature of the creative contribution, the job description and the circumstances in which the work was created. This approach, whilst consistent with the principles of copyright law, increases legal uncertainty and may lead to divergent outcomes. The analysis becomes even more complex in the context of the use of automated means or large-scale language models in the development process. If the programmer formulates a prompt and obtains a fragment of automatically generated code, the question arises as to who holds the rights to the result. To the extent that human intervention consists of formulating creative instructions, selecting and adapting the result, and integrating it into a proprietary architecture, the programmer's contribution may establish their status as an author, and the regime of economic and moral rights applies as usual. Conversely, if the result is generated entirely without any identifiable creative intervention, questions may arise regarding the very existence of copyright protection.

For the employer, the risk is twofold. On the one hand, they may assume that they automatically acquire economic rights over code whose protection is uncertain. On the other hand, they may overlook the fact that the programmer's moral rights remain, including in the context of the use of automated tools. In the absence of contractual clauses expressly regulating the use of AI tools, the distinction between human contribution and the status of pre-existing or automatically generated components, legal uncertainty is amplified.

3.4.2. Contributions made outside the scope of duties established under the employment contract

A distinct yet common situation in software development practice concerns contributions made by a programmer outside the scope of their job duties. In technological environments characterised by a rapid pace of innovation and a high degree of individual creative involvement, the distinction between work carried out in the performance of the employment contract and the developer's personal initiatives often becomes difficult to draw. This difficulty is compounded by the fact that programming work typically involves intellectual continuity and the reuse of professional experience acquired within the employer's organisation. The legal regime governing computer programs does not result in the automatic transfer of any creation made by an employee to the employer's assets. Although the law provides, in the case of programmes created in the course of employment, for a rule assigning economic rights to the employer, the decisive criterion remains the link between the creation and the contractual obligations undertaken. The mere fact that a sequence of code was written during working hours or using the employer's technical infrastructure is not, in itself, sufficient to justify the transfer of rights, in the absence of a genuine connection with the job description or with the specific tasks entrusted to the developer.

In the absence of this functional and legal link, the author – a natural person – retains, in principle, the economic rights to the code they have created, as well as the associated moral rights. This distinction has relevant practical implications in situations such as the development of parallel projects, the creation of personal prototypes, contributions to open-source projects, or the use of automated tools, including large language model systems or AI agents, outside the contractual framework. In such contexts, determining ownership of rights requires a careful analysis of the nature of the contribution, the degree of integration into the employer's business, and any applicable contractual clauses. The absence of clear internal policies regarding the use of resources, secondary developments or external contributions increases legal uncertainty and may give rise to disputes, particularly when the subsequent success of a project confers significant economic value on the original code.

4. The employer's rights over the source code

4.1. The legal basis for the employer's rights over source code created within the employment relationship and the presumption of transfer of economic rights

In the field of computer programs, the employer's rights over source code lie at the intersection of employment law, civil law and copyright law, constituting one of the most sensitive areas of regulatory overlap. Although the general rule in copyright law is that economic rights are originally held by the author as a natural

person, the specific economic nature of software development has led to the establishment of a special regime for works created within the context of employment relationships. This regime does not negate the personal nature of authorship, but adapts the mechanisms for the allocation of economic rights to the reality of the collective organisation of software production¹⁷.

The legislative solution is not based on the idea of 'employer authorship', which would contravene the personalist conception of copyright, but on the recognition of the economic role of the enterprise. The employer bears the financial risks of the project, provides the technical infrastructure, organises the work and pursues the commercial exploitation of the result. The transfer of economic rights over the source code, alongside the liability¹⁸, is thus conceived as a functional consequence of the employment relationship, intended to enable the efficient exploitation of the programme without affecting the developer's status as author. The author remains the natural person who made the creative contribution, and the moral rights belong to them by origin.

Under Romanian law, this solution is enshrined through the establishment of a legal presumption of transfer of economic rights to the employer, where the computer program is created by an employee in the course of their duties or within the scope of tasks set out in the individual employment contract. The rule reflects a legislative policy choice aimed at ensuring legal certainty in the exploitation of software. In the absence of such a presumption, each project would require individual negotiations regarding exploitation rights, which would affect the functioning of complex projects and generate contractual instability.

However, this presumption is not absolute and does not amount to a blanket deprivation of the author's rights. It applies only to the extent that there is a direct link between the software creation and the developer's job duties. The analysis must be carried out on a case-by-case basis, with reference to the job description, the instructions received and the purpose of the work for which the employee was hired. The mere existence of an employment relationship does not, in itself, justify the transfer of economic rights over any creation made by the employee.

In the current context, characterised by the use of automated tools and systems such as large language models and specialised AI agents in the programming process, this analysis becomes even more complex. If the developer uses such tools within the scope of their duties, the result – insofar as it constitutes a protected creation – will, in principle, fall under the legal presumption. However, if the use takes place outside the scope of contractual duties or the creative contribution cannot be subsumed under the employment relationship, the application of the presumption may be challenged. In all cases, the distinction between the employer's economic ownership and the individual's status as author remains essential to maintaining the coherence of the legal regime governing computer programs.

4.2. The limits of the presumption: the subject matter of the contract, the nature of the duties and the degree of creative autonomy

The first key limitation on the legal presumption of the transfer of economic rights to the employer is determined by the specific subject matter of the individual employment contract. The special regime applicable to computer programs does not operate in an abstract or automatic manner based solely on the status of employee, but in relation to the activities for which the employee was hired, and property rights are transferred to the employer only to the extent that the software creation, or what is generally referred to as a computer program, falls within the scope of the duties established by the contract, the job description or other internal documents defining the content of the employment relationship.

Where the subject matter of the contract explicitly concerns the development of software applications, the writing of source code or related activities, it is reasonable for the programs produced in the performance of these tasks to fall within the scope of the presumption. Conversely, if the developer creates a program that clearly goes beyond the scope of the contractually agreed activities – whether in terms of its subject matter or economic purpose – the application of the presumption becomes questionable. In such situations, the analysis must be carried out on a case-by-case basis, through a systematic interpretation of the contract and the actual duties, and overly general or ambiguous wording may give rise to significant uncertainty regarding the extent of the employer's rights.

¹⁷ L. Bently, B. Sherman, *Intellectual Property Law – 6th edition*, Oxford University, 2022, p. 640.

¹⁸ AI Agents in action, white paper, November 2025 – World Economic Forum, p. 11, Available at https://reports.weforum.org/docs/WEF_AI_Agents_in_Action_Foundations_for_Evaluation_and_Governance_2025.pdf, 10 March 2026, 11:00.

A second major limitation relates to the nature of the actual duties and the nature of the developer's contribution. Not every technical activity carried out by an employee constitutes, in and of itself, a protected work— —and not every work created by an employee can automatically be subsumed under their job duties. What is relevant is the degree of creative autonomy the programmer enjoys during the development process. When the programmer carries out precise technical instructions, with no real scope for choice, their contribution may be predominantly of an executive nature. Conversely, when they have the freedom to design the application's architecture, structure the modules, select technical solutions and devise original functionalities, their involvement takes on a clear creative dimension.

This distinction does not override the legal presumption of transfer, provided that the relevant conditions are met, but it does influence how any disputes regarding authorship, the integrity of the work, or the reuse of code snippets in other projects are resolved. Even if economic rights are transferred to the employer within the scope of the employment relationship, the developer retains their status as author and the associated moral rights, and the assessment of their creative contribution remains relevant in any disputes concerning the scope of the creation, the reuse of components or their integration into distinct contexts, including in situations where automated tools or systems such as large language models were used in the development process.

The reuse of components or their integration into different contexts raises specific legal issues, particularly in the field of software development, where code modularity and portability are standard practice. A function, a library, a module or even an architectural structure may be extracted from an initial project and used in another software product, either within the same organisation or in a different context; from a legal perspective, such an operation requires an analysis of the ownership of economic rights over the reused component, as well as any limitations imposed by the author's moral rights.

Where the economic rights to the code have been transferred to the employer under the terms of the employment contract, the employer may, in principle, reuse the component in other internal or commercial projects, provided that such reuse falls within the scope of the rights acquired. However, even in this situation, the programmer's moral rights – in particular the right of authorship and the right to the integrity of the work – remain. Substantial modifications to a reused component or the removal of any reference to the author may give rise to legal disputes, particularly if they affect the identification of the original creative contribution.

The situation becomes more complex when reuse takes place outside the original employment relationship or involves personal projects or external collaborations, including open-source contributions. If a component was created outside the scope of employment or does not fall under the presumption of transfer, the economic rights may remain with the author, and its integration into another project without authorisation may constitute an infringement. At the same time, in the context of the use of automated tools or systems such as large language models, the issue arises of distinguishing between pre-existing, protected elements and sequences generated or adapted subsequently, which requires a careful assessment of the creative contribution and the legal regime applicable to each integrated component.

4.3. Code created during working hours or using the employer's resources, but unrelated to work duties

In the context of employment relationships in the field of software development, the term 'employer's resources' refers to all the material, technical, informational and organisational means made available to the employee for the performance of their duties. This typically includes hardware infrastructure, equipment, servers, workstations, licensed software, access to internal platforms, databases, code repositories, development tools, as well as technical documentation and even organisational know-how.

Even access to large-scale language models or AI agents, for which the employer has a payment commitment or for which they have uploaded a digital library or carried out a training process, falls within this concept. Thus, the employer's resources may also have an informational and strategic dimension, consisting of access to proprietary architectures, internal projects under development, commercial plans or other confidential information relevant to the technical work. In a broad sense, they reflect the material and organisational framework that enables the developer to carry out their professional work. However, the use of these resources, in itself, does not automatically entail the transfer of economic rights over a creation produced by the employee, but constitutes a relevant factor in analysing the link between the creation and the employment relationship.

The decisive factor remains the correlation between the use of resources and the contractual obligations undertaken, not merely the use of the employer's infrastructure.

4.4. The employer's control over the source code. The right to modify the code, to sub-license it and to incorporate it into complex commercial products

One of the most important rights acquired by the employer is the ability to modify the source code by any means. In the field of software, this prerogative is a practical necessity. Programs must be updated, adapted, corrected, made compatible with other systems, or adjusted to market requirements. Without the right to modify the code, economic exploitation would become rigid and, over time, inefficient. For this reason, the right to modify is naturally regarded as an integral part of the transferred economic rights. However, this freedom is not unlimited. Even if the employer can adapt and transform the code, the author – the programmer – remains the holder of moral rights. The right to integrity cannot be ignored, nor can it be interpreted in a way that hinders the technical evolution of the software. In practice, a balance is struck through a functional approach: modifications necessary for exploitation are permissible, provided they do not damage the developer's professional reputation or distort their contribution in a misleading manner.

Equally important is the right to grant sub-licences. Software is rarely used in isolation; it is usually integrated into more complex products or made available to business partners. If the employer is the holder of the economic rights, they must be able to authorise the use of the software by third parties. Of course, the scope of this prerogative depends on the contractual terms and the limits established at the time of transfer. In the absence of express restrictions, sub-licensing is considered a normal consequence of commercial exploitation. However, the integration of the code into larger systems raises other questions. Combining it with other modules, adapting the architecture, or developing successive versions can make it difficult to distinguish individual contributions. From a legal perspective, integration is permitted where economic rights have been transferred, but it cannot justify the attribution of improper authorship or the disregard of the contribution of the developers involved. Even in a complex product resulting from extensive collaboration, authorship remains tied to the individual who made the initial creative contribution.

5. Co-authorship in software creation

5.1. Co-authorship in copyright law. General conceptual overview

The concept of co-authorship occupies a distinct place within the framework of copyright law, having been designed to address situations where a work of intellectual creation is the result of the creative contributions of several individuals. In its classical sense, co-authorship presupposes the existence of a single work, created through the combined efforts of several authors, whose contributions cannot be separated without affecting the unity of the work. The mere participation of several individuals in the creation of a work is not sufficient to qualify as co-authorship; what is essential is the existence of a creative contribution, eligible for copyright protection, and its integration into a final result conceived as a joint work. This theoretical framework, which is relatively stable in the field of traditional artistic creations, becomes problematic, however, when applied to software creation, where the fragmentation of labour, hierarchical organisation and technical constraints profoundly alter the manner in which the work is produced.

In such a case, copyright belongs to the co-authors of the computer program, and it may be exercised only with the consent of all of them. In the case of a computer program composed of divisible code sequences, each author's contribution may also be exercised separately, in relation to each segment of code created¹⁹. However, in the field of software products, we most often encounter the type of collective work, namely when several programmers work together on a finished product, with specialised expertise sometimes being the criterion for selecting the authors. The contributions are merged in such a way that it is impossible to attribute individual rights²⁰.

¹⁹ V. Roş, A. Livădariu, C.P. Romiţan, *Intellectual Property Law. Copyright and Related Rights and Industrial Property Rights*, C.H. Beck 2025, p. 99.

²⁰ *Idem*, p. 100.

5.2. The cumulative conditions of co-authorship: creative contribution and shared intention

Under copyright law, not every intellectual contribution is relevant; only those that reflect the free and creative choices of the person involved are considered so. When applied to software, this condition raises specific difficulties. The development of a program involves a succession of extremely diverse activities: designing the general architecture, writing the source code, testing functionalities, technical documentation, and integration with other systems. Not all of these activities, however, involve a creative contribution within the meaning of copyright law. Thus, a clear distinction must be made between those contributions that reflect one's own intellectual choices, manifested in original solutions, structural options or algorithmic mechanisms, and those activities that are predominantly technical, executory or verification-based in nature. Only the first category is capable of supporting recognition as an author or co-author. Following this logic, a developer who designs a key module of the application or devises an original algorithmic solution participates creatively in the shaping of the work and may be classified, as appropriate, as an author or co-author. Conversely, a person who merely implements pre-established specifications, in the absence of genuine creative freedom, does not meet the necessary conditions for acquiring such status.

The second essential condition of co-authorship is the existence of a shared intention to create a work. This intention need not be expressly stated, but must be apparent from the specific circumstances of the collaboration.

In the case of works created deliberately in collaboration, such as musical or cinematographic works, the existence of a common intention can, as a rule, be identified more easily. In the case of computer programs, however, this aspect is more difficult to ascertain, as the organisation of software projects often involves the involvement of large teams, within which participants work on distinct segments of code, without always having an overall view of the final work and without being in a direct relationship of creative collaboration with the other contributors.

From this perspective, mere participation in the same IT project is not, in itself, sufficient to demonstrate the existence of a shared intention to create a single work. Such an intention must be assessed in concrete terms, by reference to the actual role of each person, the existence of a genuine process of creative coordination, and the extent to which their contribution is substantially integrated into the overall architecture of the programme.

5.3. The Specific Features of Co-authorship in Software Development

Modern software development methodologies, particularly agile ones, have emphasised the fragmentation of contributions and the incremental nature of creation. Source code is often the result of successive iterations, carried out by different people at different times, based on constantly evolving requirements. This dynamic calls into question the traditional applicability of the concept of co-authorship. In many cases, contributions are functionally autonomous, being subsequently integrated into a coherent whole through automated processes or managerial decisions. Legal doctrine has observed that, in such situations, it is difficult to uphold the existence of a work created 'jointly', in the classical sense of copyright.

Another characteristic feature of software is the difficulty in identifying and distinguishing individual contributions. Source code is often modified, refactored or rewritten, and the final version may differ significantly from the initial contributions. This fluidity raises legal issues regarding the determination of co-authorship and the scope of each person's rights. Not every contribution, regardless of its scope, automatically leads to recognition of co-authorship. To produce such a legal effect, the contribution of the person in question must have genuine creative significance and be identifiable, in a recognisable manner, within the structure of the final work. In the absence of these elements, the contribution remains ancillary, lacking the necessary relevance to influence the legal regime of authorship.

5.4. Distinctions required in software practice

One of the most important distinctions in the analysis of co-authorship in software is that between a co-author and a mere contributor. A co-author participates in the creation of the work through creative contributions that influence the structure or expression of the source code. A mere contributor, on the other hand, may play an essential role from a technical or organisational perspective, without making a contribution that is protectable by copyright. This distinction has major legal implications. The co-author acquires copyright in the work, whilst the contributor can only claim, at most, contractual or professional rights. Case law has shown

that ignoring this difference leads to significant disputes, particularly in the context of the commercial exploitation of software.

Recent developments in computer tools capable of generating source code based on instructions formulated in natural or semi-structured language have brought to the fore a new issue with profound implications for copyright theory: can a machine's contribution be classified as authorship or co-authorship? And, correspondingly, how should the legal relationship between the human developer and the automated system used in the software creation process be classified?

The current approach remains, for the most part, focused on rejecting the idea that a machine could be considered an author, regardless of the level of technological autonomy or algorithmic sophistication of the system used. Such an approach stems from a fundamental premise of copyright law, namely that a work is the expression of human intellectual activity, and its original owner can only be a natural person. Consequently, computer systems, including those based on artificial intelligence, cannot be classified as authors or co-authors, as they possess neither legal personality nor the capacity to create within the meaning recognised by legal rules.

In this context, the machine's contribution should not be assessed from the perspective of authorship, but rather from that of its instrumental function. The computer system does not, in the legal sense, create a work, but generates an output following the execution of algorithmic processes configured on the basis of training data, technical parameters and instructions provided by the human user. Even in the event that the result obtained exhibits, from a technical point of view, a certain degree of novelty or complexity, the legally relevant originality cannot be separated from the human intervention that guided, determined or made possible the generation of that result.

Where automated tools are used to generate source code, the human developer remains, from a legal perspective, the sole potential author, provided that they exercise genuine control over the creative process. Control should not be understood in an absolute technical sense, but in a legal sense, as the exercise of relevant intellectual choices.

Following this line of reasoning, the developer may be recognised as the author to the extent that their human intervention remains a decisive factor in the process of generating and configuring the code. Such a conclusion is justified when the person formulates instructions precise enough to guide the outcome, selects or adapts the solutions generated by the system, integrates these results into an autonomously designed architecture, and ultimately decides on the final form of the source code. In these circumstances, the contribution of the computer system must be understood as being of an instrumental nature. From a legal perspective, the use of such a system is akin to the use of advanced technical tools, such as compilers, code generators or standard libraries, which intervene in the process of creating the programme without, in themselves, affecting the authorship of the person using them. What remains decisive is the fact that the human user takes responsibility for the result obtained and plays an essential role in shaping the final expression of the work.

Conversely, if the developer merely accepts, without significant creative input, code generated entirely by the system, the question of authorship becomes more nuanced. Some legal scholars argue that, in such situations, human authorship may be entirely absent, leading to the conclusion that no work protected by copyright exists. This approach is based on the idea that originality cannot be deduced solely from the functionality of the code, but from the intellectual choices of an individual.

From a copyright perspective, the concept of co-authorship implies multiple authors, not multiple tools used in the creative process. However, since a machine cannot be considered an author, the possibility of co-authorship between a human developer and an automated system is logically and legally ruled out.

At this point, attention must also be paid to the conceptual risk of using phrases such as 'human-AI co-creation' or 'hybrid author', which, although they may have descriptive value in technological discourse, are incompatible with the normative structure of copyright law. Accepting such terminology would lead to a dilution of the concept of authorship and to a dangerous confusion between intellectual creation and automated production. Consequently, the machine's contribution can only be classified as a technical contribution, regardless of its complexity. Even in situations where the system generates solutions not anticipated by the user, the absence of intention and creative consciousness excludes any form of authorship or co-authorship. This distinction has direct implications for the analysis of the relationship between developers and employers. In software projects where automatic code generation tools are used, the employer cannot claim the existence of

a 'non-human author' to justify an extension of control over copyright. Ownership of the rights remains with the human developers involved, under the conditions established by law and contract.

At the same time, the use of artificial intelligence does not automatically transform the development team into a group of co-authors. Co-authorship remains dependent solely on the creative input of individuals, and contributions made with the aid of machines must, from a legal perspective, be attributed to those individuals who exercised creative control over the result.

In software projects, roles are strictly defined in functional terms, but not always in legal terms. The developer is, of course, the prime candidate for authorship, insofar as they write the original source code. The tester, on the other hand, although playing a crucial role in ensuring product quality, does not usually contribute to the creative expression of the code and cannot be classified as an author. The software architect occupies an intermediate position. Insofar as they design the general structure of the application and make creative decisions regarding the organisation of the code, their contribution may be eligible for protection. However, if their role is limited to defining functional or technical requirements, without any concrete creative expression, their status as a co-author is debatable. Finally, the product owner has a predominantly managerial and decision-making role, linked to the definition of business requirements. It is unanimously recognised that this role does not normally involve a protectable creative contribution, even if it significantly influences the direction of the project.

In the context of employment relationships, the recognition of co-authorship can have complex legal consequences for both developers and employers. Co-authorship generally entails the joint exercise of economic rights, which may affect the employer's ability to exploit the software without the consent of all co-authors.

6. Multiple contributions and derivative works

One of the defining features of contemporary software is its composite nature. Computer programs are rarely the result of a creation *ex nihilo*, but are usually built by integrating pre-existing elements: libraries, frameworks, modules, APIs or reusable code snippets.

This technical reality has far-reaching legal implications, as it challenges traditional concepts of copyright, which are centred on the idea of a unified and coherent work created by one or more identifiable authors.

In the field of software, the line between an original work and a derivative work is often difficult to draw. The incorporation of pre-existing code is not, in itself, legally problematic, but it becomes relevant when it influences the structure, functionality or legal status of the final work. In this context, multiple contributions can no longer be analysed solely through the lens of co-authorship, but must be placed within a broader framework that includes the concept of a derivative work and the relationship between different layers of copyright.

The use of open-source code is one of the most widespread practices in software development. From a technical perspective, this enables faster development, lower costs and greater interoperability. From a legal perspective, however, open-source does not equate to the absence of copyright, but rather implies the existence of a specific licensing regime, which governs the use, modification and redistribution of the code. Legal doctrine has consistently emphasised that open-source licences are not mere declarations of intent, but legally binding licence agreements that establish clear limits on exploitation. The integration of open-source code into a commercial project therefore entails an obligation to comply with the conditions imposed by the licence, regardless of the commercial or private status of the resulting project.

This reality creates a first grey area: developers and employers tend to view open-source code as a 'free good', ignoring the fact that the freedom to use it is, in fact, subject to legal conditions.

The integration of open-source components can have a significant impact on the legal status of the final work, depending on the manner, extent and type of licence under which they are used. Some licences permit their incorporation without extensive legal consequences for the application as a whole, whilst others may entail broader obligations, including with regard to the distribution or making available of the source code relating to larger parts of the programme. The issue of integrating open-source components must also be analysed in relation to the concept of a derivative work, since, in certain situations, the integration of an open-source module may influence the legal classification of the final work and, by extension, the licensing conditions that apply to it. However, such a conclusion does not apply automatically, but depends on several factors, including the actual degree of integration of the components, the nature of the interaction between the modules, and the specific terms of the applicable licence.

In practical terms, this issue poses significant risks for the holders of rights to commercial software, particularly in the absence of a clear record of the open-source components used and the legal regime applicable to each of them. In the absence of such a mapping, serious legal difficulties may arise in assessing compliance obligations and the limits within which the code may be used, modified or distributed.

From a technical perspective, plugins and modules are ways of extending the core software, allowing new functionalities to be added without directly modifying the application's core. From a legal perspective, the question that arises is how these components should be classified: whether they should be regarded as separate works or, on the contrary, as integral parts of the main work.

The answer cannot be formulated in the abstract, but requires a concrete assessment of the degree of functional and creative autonomy enjoyed by the plugin or module in question. Where the component can function independently and expresses its own creative choices, it may be treated as a distinct work, even if it was designed to interact with a specific main software programme. Conversely, when the module has no functional autonomy and remains inseparable from the programme into which it is integrated, the legal classification may lead either to the concept of a single work or to that of a derivative work. This distinction is not merely of theoretical interest, but has direct implications for the copyright regime, the possibility of separate licensing, and the control exercised by the owners of the various software components.

In this analysis, APIs occupy a special position, as they serve as communication interfaces between programmes. In principle, the functionality of an API and its logical structure are not, as such, protected by copyright, insofar as they express ideas, principles or methods of operation. However, the specific elements of expression associated with an API, such as its documentation or certain specific implementations, may be eligible for legal protection when they meet the requirement of originality. It is precisely this subtle yet essential distinction that explains the difficulties that frequently arise in practice, particularly in the areas of interoperability and the development of compatible software.

In the analysis of multiple contributions, the distinction between pre-existing code and newly created code is of paramount importance, since the protection afforded by copyright applies only to the original contribution, and not to elements taken as they stand from previous works. In the field of software, this distinction is often difficult to make, partly because of the common practice of reusing code, and partly because of the fragmented structure of programmes, which makes it difficult to identify the exact origin of each component. The mere technical adaptation of pre-existing code is not, in itself, sufficient to give rise to a new protected work; an additional creative contribution is required, capable of reflecting the author's own intellectual choices and conferring an individualised expression on the result. In the absence of such an element, the result obtained may remain within the realm of reproduction or a mere technical adaptation, without acquiring legal autonomy in terms of copyright protection.

The issue takes on particular significance in copyright infringement disputes, where determining the originality of the allegedly newly created code usually requires a detailed analysis of the software's architecture and, not infrequently, the commissioning of complex technical expert reports designed to distinguish between what has been copied and what constitutes a genuine creative contribution.

The concept of licence propagation is used to describe situations in which the incorporation of code subject to a particular licensing regime has legal implications for other components of the software into which it is incorporated. Although the expression is metaphorical in nature, it denotes a genuine legal risk, associated in particular with certain categories of open-source licences, the terms of which may extend beyond the strict scope of the original module used. However, such an effect does not occur automatically; it depends on the specific content of the applicable licence, as well as on the manner in which the code is integrated into the application's structure. For this very reason, ignoring these elements can have significant consequences, including the loss of control over the commercial exploitation of the software or the emergence of unforeseen obligations regarding the disclosure of the source code.

A distinct but closely related difficulty concerns the legal compatibility of different licences. In practice, software applications frequently combine components subject to different licensing regimes, which raises the question of whether they can legally coexist within the same product. In certain situations, incompatibility between licences may make it impossible to legally distribute the programme as a whole, even if each component, considered separately, has been used in accordance with its own licensing terms. This reality highlights the fact that software architecture must be assessed not only from a technical perspective, but also

through a prior legal analysis capable of identifying in advance any potential contradictions between the regimes applicable to the integrated components.

The entire analysis leads to one key conclusion: in the context of multiple contributions and derivative works, ownership of software can no longer be conceived as an absolute and indivisible right, but rather as a layered set of rights and obligations. Ultimate control over the source code is often limited by the rights of other authors, by licensing conditions and by the derivative nature of the work. Clearly, this fragmentation of rights is one of the defining characteristics of modern software creation and requires a sophisticated legal approach, combining copyright law with contractual analysis and sound intellectual property governance.

7. Concluding remarks

An analysis of ownership and control over source code reveals that the law applicable to computer programs can no longer be understood solely by reference to the traditional models of the individual author and the work exploited in a linear manner. In today's technological reality, source code is created, circulated and exploited within a far more complex legal and economic ecosystem, in which human contributions, organisational structures, automation, the use of large-scale language models, as well as the reuse of components and licensing interdependencies create a stratification of rights and risks. It is precisely this stratification that means the issue of software ownership can no longer be treated as a simple matter of formal title, but rather as a question of the legal governance of digital creation.

In this context, one of the key ideas that emerges is that the concept of control has a broader meaning than simply holding economic rights. Effective control over the source code entails the actual ability to decide on its modification, integration, distribution, licensing, reuse and commercial exploitation. However, this ability may be affected not only by copyright law in the strict sense, but also by the contractual relationships between the parties, the limits of moral rights, the existence of prior contributions, the inclusion of open-source components, and the compatibility of the relevant licences. Consequently, legal control over software must be understood as the result of a cumulative normative and contractual framework, not as the automatic effect of a mere legal presumption or of a dominant economic position within the project.

At the same time, the research confirms that copyright remains, in essence, tied to an anthropocentric conception of creation. Even in a context where software development is aided by automated systems, including large-scale language models, authorship cannot be separated from the intellectual input of a natural person. This means that the central legal issue is not to identify a supposed creative personality of the machine, but to determine whether and to what extent human contribution retains the character of free and creative choices capable of underpinning copyright protection. From this perspective, the uncritical extension of technological vocabulary into the realm of legal concepts risks undermining the internal coherence of copyright law. A clear distinction between instrument, technical medium and author is therefore indispensable.

A further concluding remark concerns the relationship between the legal protection of source code and the economic functionality of software. The specific nature of computer programs requires a nuanced interpretation of the traditional institutions of copyright law. In this regard, the protection of expression cannot lead to the monopolisation of ideas, functionalities, logical principles or technical solutions in themselves. Therefore, the distinction between what falls within the scope of protected expression and what remains in the public domain is crucial not only for the author and the employer, but also for competition, interoperability, innovation and the circulation of technical knowledge. Without this distinction, copyright would risk becoming a barrier, incompatible with the demands of technological development.

In practical terms, the article also draws a legal and organisational policy conclusion: most conflicts concerning source code do not arise from the complete absence of rules, but from the inadequacy of contractual and internal safeguards. Disputes are frequently caused by vague wording regarding job responsibilities, the lack of policies on side projects, the absence of rules on the use of the employer's resources, the lack of clarity regarding the regime for reused components, and a failure to recognise the impact of open-source licences or AI tools on the development process. In this regard, good intellectual property governance in the software sector requires not only knowledge of copyright law, but also the establishment of clear organisational practices capable of documenting contributions, defining rights, and preventing the overlap of incompatible legal regimes.

In particular, the open-source component and the issue of licence compatibility demonstrate that ownership of software can no longer be conceived within the simplified paradigm of an exclusive, unitary and

absolute right. When code is built from successive layers of contributions, some proprietary and others open-source, legal control becomes fragmented. The risks associated with so-called licence 'contamination' or incompatibility between licences demonstrate that legal analysis must accompany the technical architecture right from the product design phase. To ignore this aspect is to shift the problem from the planning stage to the litigation stage or to the impossibility of subsequent commercial exploitation.

Ultimately, the study shows that the issue of ownership and control over source code should not be treated solely as a debate about ownership, but rather as one about balance. It concerns the balance between the developer's creative contribution and the organisation's legitimate interest in monetising the software product; between moral rights and the need for continuous modification of the code; between the protection of expression and the freedom to use ideas; between contractual autonomy and the limits imposed by the special legal regime governing computer programs; between innovation and legal certainty. Only by maintaining this balance can a regulatory framework be ensured that is appropriate for the contemporary digital economy.

8. Conclusions

This analysis has sought to clarify the legal regime governing ownership and control of source code, based on the premise that software is both a protected intellectual creation and a strategic economic asset. It is in this dual status that the main legal difficulty lies: copyright continues to be structured around the human author and original expression, whilst the practice of software development is dominated by collective processes, corporate organisation, the reuse of components, automation and the pressure for rapid commercial exploitation. The article has demonstrated that these two dimensions are not mutually exclusive, nor do they overlap perfectly; they must be harmonised through a careful interpretation of the rules and rigorous contractual discipline.

A key conclusion is that authorship, in the sense of copyright, remains inseparable from the natural person. The programmer is the only person who can originally hold the status of author of the source code, provided that their contribution meets the requirement of originality. A legal person may become the holder of economic rights, including under the special rules applicable to employment relationships, but cannot be an author in the legal sense. Similarly, the use of artificial intelligence systems does not justify abandoning this premise; it merely requires a more detailed analysis of the actual human contribution and the limits of protection when the result is generated automatically.

A second conclusion concerns the decisive nature of the distinction between the protected expression and the unprotected elements of software. Source code may constitute a protected work insofar as it reflects free and creative choices, but ideas, principles, functionalities and technical logic generally remain outside the scope of copyright. This distinction is essential for maintaining the balance between the protection of the author and the freedom of technological development. Without it, copyright would risk extending beyond the realm of expression and unduly affecting competition, interoperability and innovation.

A third conclusion concerns the relationship between the developer and the employer. The legal framework governing computer programs justifies the transfer of economic rights to the employer where the work is created in the course of the employee's duties; however, this approach must not be interpreted as an unlimited presumption that the employer automatically acquires all rights to the employee's creative output. The application of the rule depends on the specific subject matter of the contract, the nature of the actual duties and the genuine link between the creation and the tasks undertaken. Code created outside this scope, even if it draws on the developer's professional experience or is produced in a context closely related to their professional activity, cannot be automatically attributed to the employer. Hence the vital importance of the job description, intellectual property clauses and internal policies regarding side projects and the reuse of components.

At the same time, the article confirms that the concept of legal control over software goes beyond the issue of formal ownership of economic rights. Effective control is influenced by the author's moral rights, the existence of multiple contributions, the classification of certain developments as derivative works, the use of pre-existing components, and the licensing structure of the integrated code. In this context, control over the source code appears as a relational and functional concept, not as an absolute prerogative.

Finally, one of the most important practical conclusions of the study is that modern software development requires a shift from a static view of intellectual property to a dynamic one, focused on the legal management of the code's life cycle. Such an approach involves identifying contributions, ensuring component traceability, verifying licence compatibility, regulating the use of AI tools, distinguishing between projects undertaken outside

the scope of employment, and anticipating how the code may subsequently be exploited, adapted or transferred. In the absence of such legal management, conflict between the author, employer, collaborators and third parties becomes not an exception, but a predictable consequence of contractual and organisational opacity.

Consequently, ownership and control of source code must be understood as the expression of a complex legal regime, situated at the intersection of intellectual property protection, the organisation of work, investment logic and the technological infrastructure of the digital economy. In this regard, viable legal solutions can be neither exclusively formalistic nor exclusively technical. They must remain faithful to the principles of copyright law, yet sufficiently flexible to respond to the realities of contemporary software development. From this perspective, the challenge is not merely to establish the right holder, but to establish a balanced framework of recognition, exploitation and responsibility, capable of protecting human creativity without stifling innovation and without undermining the coherence of the legal system.

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PROCEDURE FOR THE VERIFICATION OF DOCTORAL THESES WITHIN THE DOCTORAL SCHOOL

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Abstract

This article analyzes the procedure for the verification of doctoral theses within doctoral schools, by reference to the current normative framework in Romania, in particular the provisions of the Higher Education Law no. 199/2023 and the subsequent acts adopted for its implementation. The essential requirements of the doctoral thesis, namely originality and authenticity, are presented, as well as the role of institutional regulations in ensuring compliance with academic integrity standards. The paper analyzes the successive stages of verification that a doctoral thesis must undergo within the doctoral school, namely: self-verification, verification by the PhD supervisor and the guidance and academic integrity committee, posting for public transparency, as well as the verification of the thesis by the doctoral committee. The relationship between the general normative framework and university autonomy is highlighted, emphasizing the possibility of higher education institutions to establish additional standards for increasing the quality of scientific research. Conclusions are also formulated regarding the necessity of adapting the Institutional Regulation for the organization and conduct of doctoral university study programs of the "Nicolae Titulescu" University of Bucharest to the new legal requirements. The article highlights the impact of the verification stages on increasing the quality and credibility of the doctoral process, as well as on the experience of the doctoral candidate, often marked by specific tensions, including manifestations of impostor syndrome, generated by the complexity and rigor of verification mechanisms.

Keywords: *doctoral thesis, verification procedure, academic integrity, plagiarism, public transparency posting, organization of the public defense, impostor syndrome.*

1. Introduction

The need for learning represents one of the fundamental dimensions of human development, being influenced by the social, cultural and educational context in which the individual evolves. Within the higher education system, doctoral university studies occupy a distinct place, being oriented towards the formation of scientific research competencies and towards the generation of original knowledge, thus contributing to the development of a knowledge-based society.

In this context, the doctoral thesis represents the final result of the research activity carried out by the doctoral student, being subject to specific requirements in terms of originality, authenticity and scientific relevance. In order to guarantee these requirements, the current normative framework establishes a complex mechanism for the verification of doctoral theses, structured in several successive stages, carried out both at the level of the doctoral school and at the level of the competent national bodies.

The article analyzes the procedure for the verification of doctoral theses in relation to the provisions of the Higher Education Law no. 199/2023 and the subsequent normative acts adopted for its implementation, highlighting the main procedural stages and the role of the actors involved in this process. The topic has been addressed in the specialized literature, however the new regulations introduced by Law no. 199/2023 require a reassessment of the procedures for verifying doctoral theses.

The paper also includes an applied dimension, through the analysis, as a case study, of the Institutional Regulation for the organization and conduct of doctoral university study programs of the "Nicolae Titulescu" University of Bucharest, highlighting the necessity of adapting it to the new normative framework, as well as the formulation of proposals in this regard.

2. Brief considerations on the doctoral thesis

Doctoral university studies are organized within the Romanian Academy and within higher education institutions that have undergone the accreditation procedure provided by the Order of the Minister of Education

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no. 6153/2016 for the approval of the Methodology regarding the authorization, accreditation and periodic evaluation of doctoral schools. The higher education institution that has obtained accreditation acquires the status of an institution organizing doctoral university studies, referred to as IOSUD in the content of Law no. 199/2023 and in the subsequent normative acts, a designation which will also be used in this article.

Doctoral university study programs are organized within doctoral schools, which are defined in the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, as organizational and administrative structures established within IOSUD, which provide the necessary support for the conduct of doctoral studies in a particular discipline or disciplinary or interdisciplinary field.

After completing the admission procedure organized by the doctoral school within an IOSUD, the admitted person acquires the status of doctoral student and follows the doctoral university study program under the supervision of a PhD supervisor. This program has two components: a program of advanced studies carried out within the doctoral school; an individual program of scientific research or applied research¹. The latter component is of major importance, having as its final objective the elaboration of an original doctoral thesis, with a high scientific content, which brings added value to the scientific research field addressed.

The doctoral thesis is elaborated in accordance with the requirements established by IOSUD through its own Regulation regarding doctoral university studies and in accordance with the provisions of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024². It demonstrates the doctoral student's capacity to carry out scientific research activity and to present it in an appropriate manner, reflecting the elements of novelty identified with regard to the analyzed subject, as well as possible solutions for improving the activity specific to the field that constituted the object of the research.

The Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, defines, in art. 2 letter k, the doctoral thesis as the original scientific work elaborated within doctoral university studies, a legal condition for obtaining the doctoral title. Art. 21 para. 2 of the same normative act provides that the doctoral thesis is an original work, the indication of the source being mandatory for any material used.

From the perspective of copyright law, originality is one of the essential conditions for the protection of an intellectual creation. The doctoral thesis is an intellectual creation, within the meaning of Law no. 8/1996 on copyright and related rights, being included in the category of scientific works. According to the provisions of Law no. 8/1996, the copyright over a literary, artistic or scientific work belongs to the author and arises from the mere fact of the creation of the work, and its object consists of original works of intellectual creation in the literary, artistic or scientific field, regardless of the method of creation, the mode or form of expression and independently of their value and purpose.

Considering that the doctoral thesis is the result of the doctoral student's own research activity, which has an original character and is expressed in a concrete form, it falls within the category of scientific works.

We consider that, in assessing the original character of a doctoral thesis, the quality of the information it contains is relevant, as well as the elements of novelty that the author brings forward regarding the analyzed subject, even if it has been previously addressed.

What matters is that the doctoral student approaches the subject of the doctoral thesis in a personal manner, originality implying the imprint of the author's personality on the work, as stated in the specialized literature by several authors who have analyzed this concept. It has been appreciated that "the work is, to a certain extent, the very being of the author, the very expression of his personality", while it has been acknowledged that, in the case of scientific works, "language may limit the possibility of manifesting personality, implicitly originality"³.

In the article "The concept of originality in the field of creation", the author addressed originality as an imprint of the author's personality, in an extended sense, and considered that the originality of a scientific work "does not refer so much to the content, but especially to the way of structuring and organizing the content",

¹ Law no. 199/2023 on Higher Education, art. 62 para. (1), published in the Official Gazette of Romania, Part I, no. 614 of 5 July 2023.

² Law no. 199/2023 on Higher Education, art. 71 para. (1), in conjunction with art. 2 letter (k) and art. 21 of the Framework Regulation on doctoral university studies, approved by Order of the Minister of Education no. 3020/2024.

³ V. Roș, A. Livădariu, C.R. Romițan, Intellectual Property Law – Dreptul proprietății intelectuale – Dreptul de autor și drepturile conexe – Dreptul proprietății industriale Copyright and Related Rights and Industrial Property Rights, C.H. Beck Publishing House, Bucharest, 2025, p. 118.

stating that “the selection of quotations also bears the personal imprint of the author”⁴. Furthermore, in the same article, the author indicated “the form of expression, that is, the manner in which ideas are formulated” as an essential criterion of the originality of a work compared to other existing works. In the same context, it was considered that a relevant indicator of originality may be “the wide echo of a scientific work among specialists and its audience”⁵.

Another essential requirement of doctoral theses is authenticity, which results from the provisions of art. 21 para. 2 of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, which stipulate that the indication of the source is mandatory for any material used in the doctoral thesis. In other words, a doctoral thesis that contains borrowed materials without indicating the source raises questions regarding its authenticity, namely regarding its true author.

The legal provisions that include plagiarism among the violations of the norms of ethics and deontology in didactic and university research activity⁶, as well as among the violations of the norms of good conduct in scientific communication, publication, dissemination and popularization⁷, applicable also to doctoral students, reflect the same requirement of authenticity of the doctoral thesis.

Analyzing the work of intellectual creation, the author of the paper “Guide to action against plagiarism: good conduct, prevention, combating” identified three attributes of such a work: authenticity, originality and value. The author considered that authenticity is “the attribute of a literary work to originate from the activity of a fully identified individual”, while originality refers to “the qualitative aspect of the intellectual creation”⁸. In the author’s opinion, one can speak of an original intellectual work only if its content includes at least one “piece of intellectual creation (a creative concept)”⁹.

Regarding the value of the work of intellectual creation, the author considered that it most often implies “the usefulness of the object of creation” and that “it is an attribute that only time can associate and prove”¹⁰. It was also considered that “plagiarism refers only to the authenticity of the intellectual creation and never concerns its originality or value”¹¹.

Transposing the above to the doctoral thesis, we consider that the elements of novelty mentioned above, as an indicator of originality, represent precisely these “pieces of creation” – “creative concepts”, which derive both from the informational background of the author of the doctoral thesis (from the knowledge he possesses, as well as from that acquired during the scientific research activity), and from the manifestation of his personality.

With regard to the value of the doctoral thesis, viewed from the perspective of usefulness, we consider that, unlike other works of intellectual creation, whose value may be confirmed over time, the value of a doctoral thesis must become evident both during its elaboration and, essentially, at the moment of its completion.

In other words, the author of the thesis must aim to produce a work that meets scientific requirements, and the PhD supervisor must contribute to maintaining a high standard of quality, so that the value of the thesis becomes perceptible within the stages of verification provided by legal provisions and by the IOSUD’s own regulation.

From another perspective, we consider that the perception of the value of a doctoral thesis differs depending on each person’s conception of the notion of usefulness. Thus, for a theoretical approach, usefulness may consist in the development of new concepts or theories, while, for a practitioner, it involves identifying concrete solutions for improving functional or dysfunctional aspects in the analyzed field.

Concluding in this regard, we consider that, at the beginning of this journey, it is necessary for the doctoral student to ask questions and clarify what the purpose and objective of the research activity undertaken are, in

⁴ M. Șt. Rădulescu, *Conceptul de originalitate în domeniul creației științifice*, in *Studia Universitatis Petru Maior. Philologia*, vol. 20, p. 41, accessed via CEEOL on 17 January 2026, available at: <https://www.ceeol.search/article-detail?id=607782>.

⁵ *Idem*, vol. 20, p. 42.

⁶ Law no. 199/2023 on Higher Education, art. 168 para. (1) letter (h).

⁷ Law no. 183/2024 on the status of research scientists, published in the Official Gazette no. 546 of 12 June 2024, art. 52 para. (2) letter (a), in relation to art. 50 letter (b).

⁸ D. Isoc, *Ghid de acțiune împotriva plagiatului: conduită corectă, prevenire, combatere*, Ecou Transilvan Publishing House, Cluj-Napoca, 2012, pp. 31–32.

⁹ *Idem*, p. 28.

¹⁰ *Idem*, p. 32.

¹¹ *Idem*, p. 34.

order to be able to apply optimal research methods, so that at the end of this “journey” they may be certain that they have “grown” together with their work and that it will prove its usefulness in the analyzed field.

3. Procedure for the verification of doctoral theses

By analyzing the legal provisions applicable to the elaboration of the doctoral thesis, several stages of verification can be identified that the scientific work prepared by the doctoral student must undergo, so that, ultimately, it may lead to the granting of the doctoral title by the competent authority.

We consider that the stages of verification of doctoral theses until the granting of the doctoral title are the following: self-verification, verification by the PhD supervisor together with the members of the guidance and academic integrity committee, verification by the institution organizing doctoral university studies, posting of the doctoral thesis for public transparency, verification by the doctoral committee, verification by the National Council for the Attestation of Titles, Diplomas and University Certificates.

This article addresses the first five stages of verification, up to the moment of forwarding the proposal for the granting of the doctoral diploma to CNATDCU.

3.1. Self-verification

Although it is not expressly provided as a formal stage of verification, we consider that the first evaluator of the doctoral thesis must be the author himself. Self-verification is a continuous process that should take place throughout the elaboration of the doctoral thesis and represents not only a moral obligation, but also one that implicitly results from the provisions of art. 259 para. 1 of the Higher Education Law no. 199/2023, according to which the authors of doctoral works are responsible for ensuring their originality.

These provisions are complemented by those of art. 21 para. 4 of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, which stipulate that the doctoral student assumes the correctness of the data and information presented in the thesis, as well as of the opinions and demonstrations expressed therein.

We consider that ensuring originality and assuming the correctness of the data, information and demonstrations expressed primarily require the verification of the content of the thesis by its author.

3.2. Verification carried out by the PhD supervisor and by the members of the guidance committee

The PhD supervisor is the person within IOSUD who coordinates the doctoral university study program¹².

The PhD supervisor is the main support of the doctoral student during the study period, a fact that also results from the content of his obligations provided by art. 14 para. 16 of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, among which, in this context, the following are relevant: the obligation to ensure the scientific, professional and ethical guidance of each doctoral student (art. 14 para. 16 letter a); the obligation to ensure conditions and to stimulate the progress of doctoral students in the research they carry out (art. 14 para. 16 letter c); the obligation to perform objective and rigorous monitoring and evaluation of each doctoral student (art. 14 para. 16 letter d); the obligation to make all efforts regarding the verification of the compliance of doctoral theses with the requirements specific to an original creation (art. 14 para. 16 letter g).

It should be noted that in the previous primary and secondary legislation applicable in the field of doctoral university studies, the obligations of the PhD supervisor were not expressly provided, but were established exclusively through institutional regulations by each IOSUD, namely through tertiary normative acts¹³. The Institutional Regulation for the organization and conduct of doctoral university study programs elaborated by the “Nicolae Titulescu” University of Bucharest based on the previous regulations provided in detail the obligations of the PhD supervisor, emphasizing his role in guiding the doctoral student, in order to ensure that, at the end of the studies, the doctoral thesis meets the requirements in terms of scientific content and originality.

¹² Law no. 199/2023 on Higher Education, art. 62 para. (1).

¹³ Articles 166 and 167 of the Education Law no. 1/2011 referred to the PhD supervisor from a different perspective, without specifically regulating their obligations, similarly to the provisions of Government Decision no. 681/2011 on the approval of the Code of doctoral university studies; however, Article 31 of the latter normative act provided that the activity of PhD supervisors, members of the guidance committee and members of the doctoral committee is regulated in accordance with the institutional regulation for the organization and conduct of university studies.

We consider that the new regulation of the “Nicolae Titulescu” University of Bucharest regarding the organization of doctoral studies may maintain the obligations provided in the previous regulation¹⁴, even if they have a more detailed content than those provided in the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, the latter providing only the minimum reference framework regarding the organization of doctoral university study programs.

The mission of the PhD supervisor is not an easy one and we consider that its fulfillment largely depends on the involvement of the doctoral student. In other words, the doctoral student is the one who, throughout the scientific research activity, must take initiative in dialogue and consultation with the PhD supervisor, who can provide the necessary guidance. At the same time, it is equally true that, for the elaboration of a valuable doctoral thesis, this interest of the doctoral student must meet the willingness of the PhD supervisor to offer the support needed.

The relationship between the doctoral student and the PhD supervisor must allow for an open dialogue, beyond the one inherent to meetings included in the study program, so that, at the time of the actual verification of the doctoral thesis, the aspects requiring modifications are not substantial, but rather of nuance.

We consider that the verification carried out by the PhD supervisor is not limited to formal verification related to the completion of the stages of the individual scientific research program, but also includes informal verification, carried out during discussions with the doctoral student regarding the topic of the doctoral thesis or during observation in the context of participation in conferences or other specific activities carried out during doctoral studies.

According to art. 14 para. 11 of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, the PhD supervisor is supported in his activity with the doctoral student by a guidance and academic integrity committee, the method of establishing this committee being determined by the IOSUD's own regulation. Furthermore, art. 14 para. 12 of the same regulation provides that the members of the guidance and academic integrity committee may be part of the PhD supervisor's research team or may be other persons affiliated with the doctoral school or teaching and research staff not affiliated with it, with the requirement that at least one member of this committee be from outside the higher education institution.

Compared to the provisions of Government Decision no. 681/2011 regarding the approval of doctoral university studies, issued based on the Education Law no. 1/2011¹⁵, which expressly provided the number of members of the guidance committee, the provisions of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, do not contain such a provision, the number of members of this committee being to be established by each IOSUD when drafting its own regulation.

The new regulation to be elaborated by the “Nicolae Titulescu” University of Bucharest must adopt the current name of this committee, namely the guidance and academic integrity committee (as opposed to the previous designation, guidance committee), and, regarding its composition, we consider it appropriate to maintain the number of 3 members, provided by art. 30 of Government Decision no. 681/2011 and taken over in the previous regulation, as well as the provisions regarding the establishment of the committee's composition by the PhD supervisor, following consultation with the doctoral student. In addition, the provisions of the new regulation must incorporate the requirement from the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, that at least one member of the guidance and academic integrity committee be from outside the higher education institution.

The PhD supervisor, together with the members of the guidance committee, verifies the doctoral thesis, a procedure that may also be carried out in stages, where the reports prepared by the doctoral student according to the individual scientific research program address subjects closely related to the doctoral thesis or represent parts thereof.

The provisions of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, do not detail the content of the individual scientific research program,

¹⁴ The obligations of the PhD supervisor are provided for in art. 18 para. (2) of the Institutional Regulation for the organization and conduct of doctoral university study programs, elaborated by the “Nicolae Titulescu” University of Bucharest, available at: http://univnt.ro/wp-content/uploads/asigurarea_calitatii/regulamente/RG-31_Regulament_IOSUD.pdf, accessed on 17 January 2026.

¹⁵ According to art. 30 para. (1) of Government Decision no. 681/2011, for the conduct of doctoral studies, the doctoral student is supported by a guidance committee composed of three additional members, who may be part of the PhD supervisor's research team, other persons affiliated with the doctoral school, or teaching and research staff not affiliated there to.

it being the responsibility of each IOSUD to include relevant provisions in its own regulation regarding the organization and conduct of doctoral studies.

The regulation to be elaborated by the “Nicolae Titulescu” University of Bucharest based on this normative act must include provisions regarding the individual scientific research program, taking into account, in principle, the provisions of the previous regulation¹⁶, adapted to the current duration of doctoral studies, which is 4 years, and supplemented with provisions regarding the total number of transferable study credits that must be obtained by the doctoral student.

We consider it appropriate to maintain the provision according to which responsibility for the structure, content, conduct and organization of this program lies with the PhD supervisor. The same assessment applies to the subject of the oral presentations that the doctoral student must make before the PhD supervisor and the guidance and academic integrity committee.

It should be noted that the provisions of art. 50 para. 5 of the Higher Education Law no. 199/2023 stipulate that the number of transferable study credits corresponding to doctoral university studies is established by each higher education institution depending on the scientific or artistic field. Consequently, the regulation issued under the law by higher education institutions must include provisions regarding the total number of transferable study credits required for the completion of doctoral university studies.

Returning to the evaluation of doctoral theses, it results from the above that the role of the PhD supervisor and of the guidance and academic integrity committee in verifying the doctoral thesis is very important both during its elaboration and at its completion. The fact that the doctoral student has the opportunity to receive feedback from several persons with a high professional level, with experience both in research activity and in the way its results must be presented in writing, ensures the premises for the realization of a valuable scientific work.

The mission of the PhD supervisor and of the members of the committee, regarding the verification of the doctoral thesis, continues even after another stage of verification, this time carried out by the doctoral school. This consists in verifying the thesis through a software program for similarity analysis recognized by CNATDCU, following which a similarity report is generated.

The Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, assigns to the guidance and academic integrity committee the task of analyzing and interpreting the similarity report, which must take place before the public pre-defense of the doctoral thesis¹⁷.

In the primary or secondary legislation applicable prior to the entry into force of the Higher Education Law no. 199/2023, there was no similar provision, the steps to be followed after obtaining the similarity report being regulated by the regulations adopted by each institution organizing doctoral university studies. Analyzing the provisions of the Regulation issued by the “Nicolae Titulescu” University of Bucharest, based on the Education Law no. 1/2011 and Government Decision no. 681/2011, it results that the analysis of the similarity report was the responsibility of the PhD supervisor, who, after obtaining and analyzing it, decided by resolution whether the conditions for proceeding to the next stage of the thesis defense were met or not, or, as the case may be, whether the thesis was not admitted for defense¹⁸.

We consider questionable the exclusion of the PhD supervisor from among the persons who analyze and interpret the similarity report, which would also result from the provisions of art. 22 para. 2 letters c and d of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024. After assigning to the guidance committee and to other persons designated by the doctoral school the task of analyzing and interpreting the similarity report (letter c of the mentioned article), the same normative act provides that, if the report indicates the need to reconsider certain modifications at the level of the doctoral

¹⁶ “Nicolae Titulescu” University of Bucharest, Institutional Regulation for the organization and conduct of doctoral university study programs, approved by the Senate on 17 November 2021, revised on 21 April 2022, art. 41, available at: https://www.univnt.ro/wp-content/uploads/asigurarea_calitatii/regulamente/RG-31_Regulament_IOSUD.pdf, accessed on 17 January 2026.

¹⁷ Art. 22 letter (c) of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, provides as follows: (c) the analysis and interpretation of the result of the similarity report are carried out both by the guidance and academic integrity committee and by the person/persons designated by the doctoral school, in accordance with the IOSUD regulation. The similarity report must be verified by the guidance and academic integrity committee before the pre-defense and by the designated person/persons before the official submission of the doctoral thesis.

¹⁸ “Nicolae Titulescu” University of Bucharest, Institutional Regulation for the organization and conduct of doctoral university study programs, approved by the Senate on 17 November 2021, revised on 21 April 2022, art. 45 para. (3), available at: https://www.univnt.ro/wp-content/uploads/asigurarea_calitatii/regulamente/RG-31_Regulament_IOSUD.pdf, accessed on 17 January 2026.

thesis, the doctoral student and the PhD supervisor are officially notified by the doctoral school¹⁹ (letter d of the same article).

It would result from these legal provisions that the outcome of the analysis and interpretation of the similarity report carried out by the guidance and academic integrity committee is imposed not only on the doctoral student, but also on the PhD supervisor, who must accept even the indications regarding the modifications that the doctoral student must make to the thesis. However, we consider that the person most entitled to decide in this regard is the PhD supervisor.

The current legislative option differs from the previous one, and it remains for the institution organizing doctoral university studies to transpose the aforementioned legal provisions into its own regulation, in compliance with the new benchmarks established regarding the persons who analyze and interpret the similarity report and the procedure following this verification.

However, we consider that nothing prevents the institution organizing doctoral university studies or the doctoral school, when elaborating its own regulations or procedures, from including the PhD supervisor among the persons responsible for analyzing the similarity report, alongside the persons expressly provided by art. 22 letter c of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024. The provisions of IOSUD regulations or of the procedures/methodologies elaborated by doctoral schools may impose additional requirements to those established by the Framework Regulation approved by Order no. 3020/2024, as results from art. 5 of the same normative act.

We note that this approach has been adopted by the University of Bucharest, which, in addition to the Regulation regarding the organization and conduct of doctoral university study programs, has also elaborated a Procedure regarding the completion of doctoral university studies at the level of the University of Bucharest, which provides that the similarity report is analyzed by the PhD supervisor, the guidance and academic integrity committee, as well as by the director of the doctoral school before the pre-defense, and by the person/persons designated by the doctoral school before the official submission²⁰.

Moreover, within the same procedure, the method of action in case the analysis of the similarity report reveals elements of plagiarism has been detailed, expressly providing for the consultation of the PhD supervisor at this stage²¹.

For these reasons, we consider that the new regulation of the “Nicolae Titulescu” University of Bucharest must include new provisions regarding this stage of verification of the doctoral thesis. The provisions of the previous regulation cannot be maintained, as they corresponded to the legislative requirements in force at that time.

We consider that, in the application of art. 22 letters c and d of Order no. 3020/2024, the regulation of the “Nicolae Titulescu” University of Bucharest and/or the methodology/procedure elaborated by the doctoral school must clarify several aspects: the document that the guidance and academic integrity committee will draw up following the verification of the similarity report; the content of this document; the binding nature of its

¹⁹ Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, art. 22 letter (d).

²⁰ University of Bucharest, *Procedure on the completion of doctoral university studies at the University of Bucharest*, approved by the Council for Doctoral University Studies (CSUD) on 20 December 2024, art. 4 para. (6): “The similarity report is sent to the institutional email addresses by the SDAI within one working day to the director of the doctoral school, the PhD supervisor, the doctoral student and the secretary of the doctoral school. If the director of the doctoral school is also the PhD supervisor, the message shall also be sent in CC to the dean of the faculty. The analysis and interpretation of the result of the similarity report are carried out by the PhD supervisor, the guidance and academic integrity committee, as well as by the director of the doctoral school before the pre-defense and by the person/persons designated by the doctoral school before the official submission. The PhD supervisor completes the resolution on the similarity report (Annex 4)”, available at: https://doctorat.ftoub.unibuc.ro/wp-content/uploads/2025/01/Procedura_finalizare_doctorat-OME-3020_-2024_F_art5_.pdf, accessed on 17 January 2026.

²¹ University of Bucharest, *Procedure on the completion of doctoral university studies at the University of Bucharest*, approved by the Council for Doctoral University Studies (CSUD) on 20 December 2024, art. 4 para. (7): “If the analysis of the similarity report confirms the existence of elements constituting plagiarism, as defined by the applicable legal provisions, in consultation with the PhD supervisor, the director of the doctoral school or, as the case may be, the dean organizes the analysis at the next meeting of the doctoral school council. The director of the doctoral school or, as the case may be, the dean of the faculty informs the secretariat of the doctoral school and the SDAI regarding the result of the analysis carried out by the doctoral school council (including the deadline for revising the doctoral thesis, where applicable). If the similarity report requires the modification of the doctoral thesis, the doctoral student and the PhD supervisor are officially notified by the doctoral school. After remedying the identified issues, the previous stages leading to a new similarity report are resumed; or, in the case of limited corrections, the list of amendments is completed (Annex 5).”, available at: https://doctorat.ftoub.unibuc.ro/wp-content/uploads/2025/01/Procedura_finalizare_doctorat-OME-3020_-2024_F_art5_.pdf.

conclusions for the PhD supervisor (if the supervisor is not involved in the analysis and interpretation of the similarity report); a possible procedure applicable if the PhD supervisor does not endorse or does not agree with the modifications proposed; the time limit within which the doctoral student must remedy the identified issues.

The next stage of verification in which both the PhD supervisor and the guidance and academic integrity committee are involved is the public pre-defense. The provisions of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, expressly establish the public character of the pre-defense (art. 22 para. 1 letter f), unlike the previous provisions (art. 67 para. 2 letter c of Government Decision no. 681/2011), stating that this stage is carried out according to the IOSUD's own regulation.

Consequently, the new regulation of the "Nicolae Titulescu" University of Bucharest must provide procedural aspects related to this pre-defense, such as: the content of the announcement for the public pre-defense; the time limit for its publication in relation to the proposed date; the place where the content of the thesis may be consulted; other documents considered necessary to be made available to the public.

According to art. 22 para. 1 letter f of the Framework Regulation, following the pre-defense, the PhD supervisor, in accordance with the committee's recommendation and the results of the similarity report analysis, decides on the official submission of the thesis and the organization of the public defense.

The role of the guidance and academic integrity committee, as regards the support provided to the PhD supervisor, including in terms of the verification of the doctoral thesis, ends, after the issuance of the recommendation mentioned above, where the PhD supervisor finds that the doctoral thesis meets all the requirements in order to be officially submitted for the organization of the public defense.

In what follows, the amendments that must be made to the provisions of the Regulation of the "Nicolae Titulescu" University of Bucharest relating to this stage of verification of the doctoral thesis (art. 45 of the regulation drawn up according to the previous legislation) will be indicated, in order to adapt them to the new requirements established by the Higher Education Law no. 199/2023 and by the Framework Regulation regarding doctoral university studies, approved by Order no. 3020/2024.

First of all, as regards the submission of the doctoral thesis for similarity verification, it is necessary to supplement the existing provisions by including among the doctoral student's obligations the submission, together with the thesis, of its abstract and of the declaration on own responsibility regarding the originality of the work, documents expressly provided for by the new legal provisions.

Secondly, with regard to the analysis of the similarity report, it is necessary to extend the procedural framework so as to include the guidance and academic integrity committee and the persons designated by the doctoral school among the entities competent to carry out this analysis. In this context, we consider it appropriate to maintain the role of the PhD supervisor at this stage as well, including in the form of a final resolution incorporating the committee's point of view, in order to ensure decisional coherence.

Likewise, it is necessary expressly to regulate the document resulting from the analysis of the similarity report, its content, as well as the nature of the conclusions formulated, including in the event of possible divergences between the PhD supervisor and the guidance and academic integrity committee.

As regards the specialist evaluation carried out before the pre-defense, regulated by the Regulation of the "Nicolae Titulescu" University of Bucharest (although it was not provided for by Government Decision no. 681/2011 approving the Code of doctoral university studies), we consider that its inclusion in the new institutional regulation would represent a useful solution, since it allows a substantial verification of the doctoral thesis, beyond the analysis of similarities, which was the object of the previous verification stage.

With regard to the pre-defense of the doctoral thesis, the new regulations require the consecration of the public character of this stage, as well as the establishment of clear procedural elements, such as the method of announcement and the conditions of access to the work. It is also necessary to clarify the form in which the agreement of the guidance and academic integrity committee for the continuation of the procedure is expressed.

Where breaches of ethics and deontology norms are found, we consider it necessary to supplement the normative framework by expressly regulating the possibility of remedying the content of the thesis, establishing a time limit for this purpose and the consequences in the event of non-compliance with the conditions imposed, including with regard to the resumption of the pre-defense.

Finally, it is necessary to amend the wording referring to the agreement of the PhD supervisor and of the members of the guidance committee, in the sense of replacing the phrase "agreement for the public defense"

with “agreement for the organization of the public defense”, in accordance with the new regulations establishing the intermediate stage of posting the thesis for public transparency.

3.3. Verification of the doctoral thesis by the doctoral school

This stage of verification is provided by the provisions of art. 21 para. 7 of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, and consists in the verification of the doctoral thesis through the use of at least one similarity detection software, the verification being carried out on the basis of the standards contained in the National Guide regarding the drafting of doctoral theses, elaborated by the National Council for the Attestation of Titles, Diplomas and University Certificates (CNATDCU).

From the verifications carried out in the online environment, it appears that, up to the present, the National Guide regarding the drafting of doctoral theses has not been elaborated. Consequently, the provisions of art. 2 para. 3 of Order no. 3020/2024 are applicable, according to which the application of art. 21 para. 7 of the Framework Regulation is postponed until the elaboration of this guide.

Until the elaboration of this guide, the doctoral school will take into account the provisions of art. 22 para. 1 letter b of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, which provide that the similarity analysis is carried out using a software recognized by CNATDCU, and, to the extent deemed necessary, the doctoral school may additionally use another similarity detection software, in accordance with the IOSUD’s own regulation.

For the identification of the software recognized by CNATDCU, Order of the Minister of Education and Research no. 3741/2025 for the approval of the Methodology regarding the analysis of the administrative procedure carried out at the level of the institutions organizing doctoral university studies for the granting of the doctoral diploma, published in the Official Gazette no. 341/16 April 2025, is relevant. Art. 4 para. 2 of the Annex to this normative act provides that, for the purpose of establishing the degree of similarity, the doctoral school uses a program recognized at national level, selected from the list approved by order of the Minister of Education and Research. The same article further provides that the doctoral school may additionally use another similarity detection software, in accordance with the IOSUD’s own regulation, the similarity reports being included in the doctoral file, a provision similar to that of art. 22 para. 1 letter a second thesis of Order no. 3020/2024.

What differs between the content of the two regulations is the reference to the similarity detection software: the provisions of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, state that it must be recognized by CNATDCU, while the provisions of the Annex to Order no. 3741/2025 state that the software used by the doctoral school must be recognized at national level, selected from the list approved by order of the Minister of Education and Research. From the correlation of these provisions it results that the programs recognized by CNATDCU are those included in the list approved by ministerial order.

The normative act approving this list is Order of the Minister of Education no. 3692 of 1 February 2024 regarding the list of programs recognized at national level for the purpose of establishing the degree of similarity for final study works. According to art. 2 para. 1 of this normative act, the programs recognized at national level are: iThenticate; Turnitin; Plagiarism Detector + PDAS (PDAS – Plagiarism Detector Accumulator Server); SafeAssign; SEMPLAG; www.sistemantiplagiat.ro.

Paragraph 2 of art. 2 of Order no. 3692/2024 provides the requirements that similarity detection software must meet, doctoral schools having the possibility to request the inclusion in the national list of other software, provided that they meet the requirements expressly provided by the cited legal text²².

²² Order of the Minister of Education no. 3692 of 1 February 2024 regarding the list of programs recognized at national level for the purpose of determining the degree of similarity for final study papers, art. 2 para. (2): “Software for identifying textual similarities must meet the following requirements: (1) verification against databases held by the developer (subscriptions held by the developer to various journals, reviews, publishing houses, etc.); (2) verification against the internet/web; (3) creation of an internal database and allowing comparison with these documents; (4) uploading and verification of files in the formats: *.doc, *.docx, *.pdf; (5) recognition of Romanian characters; (6) generation of analysis reports containing: (a) the name of the software used; (b) the date on which the report was generated; (c) the similar fragments/sections from the verified document, clearly highlighted either by color and reference link, or framed and accompanied by the link to the suspected source, or by displaying the similar fragments comparatively together with the name of the source.”, published in the Official Gazette of Romania, no. 112 of 8 February 2024.

From the provisions of art. 22 para. 1 letter c of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, it follows that the similarity report is verified not only by the members of the guidance and academic integrity committee, but also by the person/persons designated by the doctoral school, the latter carrying out the verification before the official submission of the doctoral thesis. This provision is of novelty compared to the previous regulations regarding the stages that the doctoral thesis must go through prior to the public defense. Consequently, the new regulation of the “Nicolae Titulescu” University of Bucharest or the procedures elaborated by the doctoral school will have to establish clear benchmarks in this regard, such as: the number of designated persons, their status, and the document to be drawn up following the verification of the similarity report.

Furthermore, art. 22 para. 1 letter d of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, provides that, in the situation in which the similarity report indicates the need to make modifications to the doctoral thesis, the doctoral student and the PhD supervisor are officially notified.

We consider the manner in which the first part of this provision is formulated to be questionable, in the sense that the similarity report itself does not indicate the need to make modifications to the doctoral thesis.

The similarity report is a standardized technical document generated by the verification software, which assists in establishing the authenticity of a work by identifying fragments taken from other sources, such as books and articles stored in various databases, legislative texts, and other resources available online. The report indicates, in concrete terms, the fragments in the analyzed work that are similar to those found in the analyzed sources, usually highlighted in different colors depending on the identified source. At the same time, the report indicates similarity coefficients, but the percentages of similarity established for each coefficient cannot automatically lead to the conclusion that the work must be redone, in the absence of an evaluation of the report by a competent person, capable of distinguishing between legitimate overlaps and possible breaches of academic integrity standards.

In conclusion, we consider that the need to make modifications to the doctoral thesis, referred to in the aforementioned legal text, results from the verification of the similarity report by the competent persons, namely the members of the guidance and academic integrity committee and the persons designated by the doctoral school. This is also the rationale for which the necessity of analyzing this report by competent persons was provided, followed, according to art. 22 para. 1 letter g of the Framework Regulation, by the requirement to attach to the doctoral file the result of the analysis of the similarity report, and not the report in the form generated by the software used.

The “Nicolae Titulescu” University of Bucharest has elaborated the Procedure for verifying the similarity percentage of bachelor’s, master’s and doctoral works²³, adopted by the University Senate on 3 October 2025.

According to art. III of this procedure, the similarity report generated by the authorized software used for the verification of works will contain the following coefficients: similarity coefficient 1 – the percentage of the analyzed text with all fragments of at least 5 words similar, identified in other sources; similarity coefficient 2 – the percentage of the analyzed text with all fragments of at least 25 words similar, identified in other sources. The procedure also provides the accepted similarity percentages within the “Nicolae Titulescu” University of Bucharest for doctoral works, namely: 25% for similarity coefficient 1 and 5% for similarity coefficient 2²⁴.

Within the doctoral school, through the secretariat, another verification is carried out, which does not concern the doctoral thesis itself, but the verification of the fulfillment by the doctoral student of all the obligations within the doctoral university study program²⁵.

For this stage, art. 47 of the Institutional Regulation for the organization and conduct of doctoral university study programs elaborated by the “Nicolae Titulescu” University of Bucharest contains several provisions. These must be adapted so as to comply with art. 22 para. 1 letter g of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, which refers to the documents

²³ “Nicolae Titulescu” University of Bucharest, Procedure for verifying the similarity percentage of bachelor’s, master’s and doctoral theses, approved by the University Senate on 3 October 2025, available at: https://drive.google.com/file/d/1u4J9BFf9i_1Ft7tGzDtB0L5Uf1YbC5hY/view, accessed on 18 January 2026.

²⁴ “Nicolae Titulescu” University of Bucharest, Procedure for verifying the similarity percentage of bachelor’s, master’s and doctoral theses, approved by the University Senate on 3 October 2025, art. III, para. (3) letter (c).

²⁵ Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, art. 22 para. (1) letter (g).

that must be included in the doctoral file. At the same time, after paragraph 3 of this article, relating to the verification of obligations within the doctoral university study program, one cannot proceed directly to the doctoral application, as the new legal provisions establish an additional stage, namely the posting of the thesis for public transparency, an aspect that will be analyzed below.

3.4. Posting of the doctoral thesis for public transparency

As previously mentioned, the Higher Education Law no. 199/2023 and the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, introduce a distinct stage consisting of the posting of the doctoral thesis for public transparency, which must be completed prior to the public defense.

According to this normative framework²⁶, the doctoral thesis and its annexes must be made available to the public for a period of 90 days on a national platform managed by the Executive Unit for Financing Higher Education, Research, Development and Innovation (UEFISCDI)²⁷, in order to allow the submission of observations regarding possible breaches of ethical and deontological standards, including from the perspective of plagiarism.

We consider that this legal obligation goes beyond the function of a simple transparency measure and may be qualified as an additional stage of verification of the doctoral thesis, integrated into the academic evaluation procedure prior to the granting of the doctoral title. The regulation of this stage provides an institutional framework for identifying breaches of ethical standards, including plagiarism, before the conferral of the doctoral title, constituting a shift in paradigm compared to the previous legal framework. The effect of the establishment of this stage should consist in reducing the situations in which serious breaches of ethical and deontological standards are identified after the granting of the doctoral title, generating complex administrative and judicial procedures, sometimes resulting in the withdrawal of the doctoral title.

From the provisions of art. 22 para. 1 letters i-k of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, it results that the procedure for posting the doctoral thesis for public transparency involves several stages: posting the doctoral thesis on the national platform managed by UEFISCDI and maintaining it for a period of 90 days; submission of observations online, to an email address made available by the doctoral school or at the IOSUD registry, by any natural or legal person, regarding the existence of breaches of ethical and deontological standards, including from the perspective of plagiarism; centralization of the observations in a report prepared by the doctoral school; transmission of the report to the Council for Doctoral University Studies (CSUD) for analysis and decision; issuance of the decision by CSUD.

Following the analysis of the report, the Council for Doctoral University Studies may decide: the validation of the initiation of the public defense procedure of the doctoral thesis, in the situation where, following the analysis of the observations, the existence of breaches of ethical and deontological standards is not confirmed; the invalidation of the initiation of the public defense procedure of the doctoral thesis, together with recommendations regarding the revision of the doctoral thesis and the elimination of non-compliant elements. The doctoral student has a period of 3 months from the communication of the decision of invalidation to remedy the content of the thesis, after which the procedure of posting the work for public transparency is resumed.

In the following, several arguments supporting the usefulness of this procedure will be presented, as well as some considerations regarding its limits.

The posting of the doctoral thesis and its annexes prior to the public defense reflects a high level of institutional transparency and contributes to strengthening public trust in academic evaluation mechanisms. At the same time, this procedure also has a preventive function, as the possibility of an extended examination of the thesis by any person may discourage potential intentions of academic fraud.

²⁶ Law no. 199/2023 on Higher Education, art. 71 para. (12), and the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, art. 22 para. (1) letters (h), (i).

²⁷ The Executive Unit for Financing Higher Education, Research, Development and Innovation is a public institution with legal personality, under the administrative authority of the Ministry of Education, which operates in accordance with Government Ordinance no. 62/1999 on the establishment of the Executive Unit for Financing Higher Education and University Scientific Research, approved by Law no. 150/2000, with subsequent amendments and additions, and on the basis of the Regulation on the organization and functioning of the Executive Unit for Financing Higher Education, Research, Development and Innovation, approved by Order no. 6692 of 23 September 2024, published in the Official Gazette of Romania, Part I, no. 1059 of 22 October 2024.

We also consider that the posting of the doctoral thesis creates the framework for the involvement in its verification of specialists who are not part of the formal evaluation structures, but who possess relevant knowledge in the field addressed in the doctoral thesis. Through their intervention, the internal procedures for verifying doctoral theses are complemented, which may prove particularly useful in the case of works with an interdisciplinary character or with a high degree of specialization (for example, doctoral theses which, in addition to the field of law, involve the scientific approach of subjects specific to medicine, neuroscience, economics, cybersecurity, informatics, etc.).

Another argument in favor of this procedure is the effect of accountability that it may have both on the doctoral student and on the PhD supervisor, the members of the guidance and academic integrity committee, and the other persons involved in the internal verification of the thesis.

In contrast, there are aspects that may raise questions regarding the effectiveness of this procedure. A first aspect concerns the possibility for any natural or legal person to formulate observations on the thesis, without the establishment of clear benchmarks regarding the qualification of the authors or the minimum standards of argumentation. In the absence of such filters, there is a risk that observations lacking scientific basis may be formulated, with the consequence of overburdening the IOSUD with submissions that do not indicate genuine breaches of ethical and deontological standards.

Also, the fact that both the doctoral thesis and its annexes, including the result of the analysis of the similarity report, which indicates the percentage of similarity, are subject to public consultation, may generate erroneous interpretations among the general public, in the sense of equating this percentage with automatic proof of plagiarism. This confusion may generate unjustified submissions, which would artificially raise questions regarding the authenticity of a doctoral thesis.

Another possible negative effect is the use of the procedure in bad faith, for vexatious purposes, in order to discredit the author of the thesis or to affect the prestige of the IOSUD. An indication of such tendentious use may consist in the formulation of accusations of plagiarism followed by bringing them to the attention of the public before the decision is issued by the competent body, especially where the author of the thesis is a person who holds or seeks to hold public office. Such conduct may also constitute a form of pressure on those called upon to analyze the observations and to issue the decision validating or invalidating the initiation of the public defense procedure.

In this context, we consider that it would be necessary to regulate mechanisms to prevent the abusive use of the procedure, such as: imposing an obligation of confidentiality on the person who formulates observations within the procedure for posting the doctoral thesis for public transparency; imposing an obligation of confidentiality on the persons entrusted with resolving the submissions; establishing the obligation for the person who formulates the observations to submit a declaration on own responsibility showing that the submission is made in good faith, namely for the purpose for which this procedure was established; and sanctioning the abuse of rights in the use of this procedure.

The sanctioning of abuse of rights could be achieved through the regulation of cases of inadmissibility of submissions that do not contain a minimum argumentation regarding breaches of ethical norms or of those that do not contain specific references to the concrete passages of the doctoral thesis that should be analyzed.

It should be noted that the legislator has regulated, in the provisions of the Higher Education Law no. 199/2023, such a filtering mechanism with regard to submissions alleging the commission of acts that may constitute a breach of university ethics and deontology.

More specifically, the provisions of art. 171 para. 4 of the Higher Education Law no. 199/2023 stipulate that submissions which do not contain a reasoned argument regarding the failure to comply with the norms of ethics and professional deontology, with concrete examples and with the indication of the justificatory grounds and documentary sources, shall be rejected as inadmissible. The same article also provides for the possibility of establishing other conditions of inadmissibility through the Code of ethics and professional deontology²⁸. We

²⁸ Code of Ethics and Professional Deontology, approved by Government Decision no. 305 of 4 April 2024, published in the Official Gazette of Romania, Part I, no. 327 of 9 April 2025; see art. 10 para. (1), which provides that, in order to be admissible, complaints regarding the breach of university ethics and deontology rules must cumulatively include the following: the signature of the person submitting the complaint; the identification data of the person submitting the complaint, namely the full name of the natural person or the name of the legal entity, its address and, where applicable, the correspondence address, which may also be an e-mail address; a reasoned argument regarding the failure to comply with the rules of professional ethics and deontology, with concrete examples and with the indication of the justificatory grounds and documentary sources.

consider that it would be useful to adopt similar primary legal provisions also in relation to submissions containing observations regarding a doctoral thesis that is in the procedure of public transparency posting.

In conclusion, we consider that the effectiveness of this procedure will depend on the manner in which it is used at the level of the IOSUD, it being necessary to maintain a balance between the requirements of public transparency and the protection of the doctoral student's rights, in order to prevent its abusive use or its transformation into an instrument of unjustified pressure.

3.5. Verification of the doctoral thesis by the doctoral committee

After the validation decision is issued by the Council for Doctoral University Studies, the procedure for the public defense of the doctoral thesis is initiated by establishing the doctoral committee.

The composition of the doctoral committee is provided for by the provisions of art. 71 para. 2 of the Higher Education Law no. 199/2023 and of art. 22 para. 2 of the Framework Regulation regarding doctoral university studies, without essential changes compared to the previous legislative framework.

According to the aforementioned legal provisions, the doctoral committee is composed of at least 5 members: the chairperson, as representative of the IOSUD, the PhD supervisor, and at least 3 official reviewers from Romania or abroad, specialists in the field in which the thesis was elaborated, at least 2 of whom carry out their activity outside the University.

The doctoral committee was regulated by the provisions of art. 48 of the Regulation of the "Nicolae Titulescu" University of Bucharest elaborated on the basis of the previous legal provisions. These correspond to the new legal framework and may be taken into account in the same form in the regulation that is to be adopted.

According to art. 22 para. 3 of the Framework Regulation, the request for setting the date of the public defense is submitted by the doctoral student at least 25 days before the proposed date for the defense and is endorsed by the PhD supervisor and by the chairperson of the committee. The time limit differs from that provided in the previous regulation, so that the new regulation of the University must be adapted accordingly (art. 47 para. 4 of the current Regulation of the University provides for a period of 20 days, corresponding to the provisions of art. 67 para. 1 letter e of Government Decision no. 681/2011).

With regard to the announcement for the public defense, the current regulation maintains the previous solution both in terms of content and of the time limit for publication, which remains at least 20 calendar days before the date of the defense.

According to art. 71 para. 4 of Law no. 199/2023 and art. 22 para. 6 of the Framework Regulation, the evaluation of the thesis at this stage is carried out by the three reviewers from the doctoral committee, at least two of whom are from outside the IOSUD, these having the obligation to submit the evaluation reports at least 15 days before the defense of the thesis.

In the previous regulation, there was a certain terminological inconsistency regarding the persons who carried out the evaluation of the thesis at this stage, some provisions referring to reviewers (art. 168 para. 3 of the Education Law no. 1/2011), and others to all members of the committee (art. 67 para. 6 of Government Decision no. 681/2011). Consequently, the Regulation of the "Nicolae Titulescu" University of Bucharest included both the PhD supervisor and the official reviewers among the persons who prepare evaluation reports.

At present, both the provisions of the law and those of the order issued on its basis provide that the evaluation at this stage is carried out by the reviewers. It remains for the "Nicolae Titulescu" University of Bucharest, at the time of drafting its regulation, to assess to what extent it is necessary to include the PhD supervisor among the persons who evaluate the doctoral thesis at this stage. We consider that an additional evaluation of the thesis by the PhD supervisor would not be necessary, as he is already involved in the previous stages of evaluation.

The evaluation of the doctoral thesis by the three reviewers, specialists in the field in which the thesis was elaborated, of whom two do not belong to the institution organizing doctoral university studies, constitutes an additional guarantee of the rigor of the verification of the doctoral thesis and contributes to strengthening public trust in the procedure for awarding the doctoral title.

According to art. 22 para. 6 of the Framework Regulation, the defense of the thesis may take place in the presence of at least 4 members, with the mandatory physical participation of the chairperson of the committee and of the PhD supervisor, the other members being able to participate also through online videoconference.

This solution, absent from the previous regulation, must also be incorporated into the regulation of the “Nicolae Titulescu” University of Bucharest.

Also, the new provisions regarding the deliberation of the doctoral committee must be taken into account. While in the previous regulation the committee deliberated on the qualification to be assigned to the thesis, according to the new legal provisions it deliberates on the awarding of the doctoral diploma, in compliance with the minimal standards elaborated by CNATDCU, on the basis of the public defense, the reviewers’ reports, the declaration of originality and the analysis of the degree of similarity.

The minimal standards elaborated by CNATDCU were approved by Order of the Minister of Education and Research no. 3018/2025, published in the Official Gazette no. 78 of 29 January 2025. These represent a set of 35 specific standards grouped by fields corresponding to the specialized commissions of CNATDCU.

In the case of the Legal Sciences Commission, the minimal standards, set out at point 24 of the Annex to the mentioned Order, concern exclusively the conditions that must be met by the three single-author publications whose existence must be proven by the doctoral student, without containing additional express requirements regarding the content of the doctoral thesis, unlike other fields (as regulated, for example, in the case of other commissions: the Commission for Psychology, Educational Sciences, Physical Education and Sport – point 28, the Commission for Philology – point 29).

We consider this clarification useful given that both the text of the Higher Education Law no. 199/2023 and the provisions of the Framework Regulation regarding doctoral university studies, approved by Order of the Minister of Education no. 3020/2024, provide that, in the case of failure to meet the minimal standards required for awarding the doctoral diploma, the doctoral committee shall indicate the elements that must be redone or completed in the doctoral thesis and shall request a new public defense of the thesis.

However, in the case of the Legal Sciences Commission, the failure to meet the minimal standards concerns the conditions relating to the three single-author publications, not the actual content of the thesis, so that this situation cannot be remedied by revising or supplementing the thesis.

On the other hand, as long as the secretariat of the doctoral school has the task of certifying that the doctoral student has fulfilled all the obligations within the doctoral university study program, before initiating the stage of posting for public transparency, at this stage of the verification of the doctoral thesis the issue of failure to meet conditions other than those related to the content of the thesis should not arise.

Another difference compared to the previous regulation consists in the fact that the current legal provisions no longer expressly provide for the qualifications that may be awarded by the doctoral committee. In the previous legislation, the qualifications Excellent, Very good, Good, Satisfactory and Unsatisfactory were provided, as well as the consequences of assigning the qualification Unsatisfactory.

At present, according to art. 71 para. 6 of the Higher Education Law no. 199/2023, the doctoral committee assesses whether or not it proposes the awarding of the doctoral title, by reference to the fulfillment of the requirements provided in the scientific research program and of the minimal standards. The provisions of art. 71 para. 10 of the Higher Education Law no. 199/2023 provide that, in the case of failure to meet the minimal standards, the doctoral committee shall indicate the elements that must be redone or completed in the doctoral thesis and shall request a new public defense of the thesis; if, even at the second public defense, the minimal standards are not met, the doctoral diploma shall not be awarded, and the doctoral student shall be expelled.

These provisions must be transposed and detailed in the University’s own regulation and/or in additional procedures, it being necessary to establish benchmarks for the evaluation of the doctoral thesis by the members of the committee. We consider that the same qualifications from the previous legislation may be taken into account, also mentioned in the provisions of art. 51 of the Institutional Regulation for the organization and conduct of doctoral university study programs elaborated by the “Nicolae Titulescu” University of Bucharest, entitled Grading of the doctoral thesis and of the defense, with the need, however, to also refer to the fulfillment of the minimal standards mentioned above.

From the analysis of the regulations elaborated by other institutions organizing doctoral university studies, it results that their content does not include provisions regarding the qualifications that may be awarded by the doctoral committee. The regulations generally take over the provisions of the Higher Education Law no. 199/2023 and of the Framework Regulation regarding doctoral university studies approved by Order of the Minister of

Education no. 3020/2024²⁹. The provisions regarding the grading of the doctoral thesis have been included in procedures elaborated on the basis of the institutions' own regulations by the Council for Doctoral University Studies, sometimes with reference also to other methodologies elaborated by the doctoral school in this regard³⁰. It remains for the "Nicolae Titulescu" University of Bucharest to establish the type of normative act that will detail the manner of grading doctoral theses, indicating the qualifications and the criteria for granting them.

Where the doctoral student has fulfilled all the requirements provided for in the scientific research program, as well as the minimal standards corresponding to the field of research addressed, the procedure for the verification of the doctoral thesis is completed at the level of the doctoral school by formulating the proposal for the awarding of the doctoral diploma, a proposal that is forwarded together with the doctoral file within a maximum of 30 days to CNATDCU (according to art. 71 para. 6 of the Higher Education Law no. 199/2023).

The structure of the doctoral file is regulated by Order of the Minister of Education and Research no. 3741/2025, which provides for its preparation both in printed and electronic format, the electronic file being uploaded by the IOSUD to the national platform within 30 days from the public defense.

Concluding with regard to this stage of the procedure for the verification of the doctoral thesis by the doctoral committee, we note that it involves, on the one hand, the fulfillment of the formal conditions related to the organization of the public defense, and, on the other hand, the actual verification of the doctoral thesis by the reviewers who are part of the doctoral committee, to which is added the verification carried out through the questions that may be addressed to the doctoral student during the actual public defense.

Thus, the defense of the doctoral thesis is not limited to a synthetic presentation of the conclusions of the work, but, through the possibility granted to the members of the committee and to the public to address questions, it constitutes an additional framework for its verification, both from the perspective of the scientific content and from the perspective of the doctoral student's capacity to support and argue the conclusions of the scientific research carried out throughout the doctoral studies.

4. Impact of the verification procedures on the doctoral candidate

From the above, it follows that, at present, the legislative framework provides sufficient mechanisms for the verification of doctoral theses, both prior to the public defense and after this stage, the last external verification filter, before the awarding of the doctoral title, being the National Council for the Attestation of Titles, Diplomas and University Certificates. It should be noted that obtaining the doctoral diploma, based on the validation of the doctoral thesis as an original and authentic work through the completion of all verification stages, does not mean that it can no longer be subject to verification. Plagiarism, as a breach of the norms of ethics and deontology in teaching and university research activity – provided as such by the provisions of art. 168 letter h of Law no. 199/2023 – may be reported at any time, no time limit being provided within which a complaint regarding the verification of a suspicion of plagiarism may be submitted.

There is no doubt that the mechanism for verifying the doctoral thesis is necessary, as it has the role of ensuring the quality of scientific research activity and of maintaining the standards of ethics and deontology in research. However, viewed from the perspective of the doctoral student at the beginning of doctoral studies, we consider that it may have a strong psychological impact, with a dual valence, both motivational and inhibitory.

Although the person who intends to pursue this higher form of education is aware or should be aware of the requirements imposed by the applicable normative framework regarding the conduct of doctoral studies and scientific research activity, they become more clearly aware of the magnitude of the effort that must be made

²⁹ In this regard, the Regulation on the organization and conduct of doctoral university study programs of the University of Bucharest, available at: <https://unibuc.ro/wp-content/uploads/2025/04/1-Regulamentul-de-organizare-si-desfasurare-a-programelor-si-2-Anexa-activitati-obligatorii.pdf>, accessed on 17 January 2026, and the Regulation of Babeş-Bolyai University on the organization and conduct of doctoral university studies, adopted by Senate Decision no. 116 of 23 September 2024, amended by Senate Decision no. 32 of 10 March 2025, available at: <https://doctorat.ubbcluj.ro/wp-content/uploads/2024/10/HS-nr.-116-privind-aprobarea-Regulamentului-UBB-de-organizare-si-functionare-a-studiilor-universitare-de-doctorat>, accessed on 17 January 2026.

³⁰ The University of Bucharest elaborated the Regulation on the organization and conduct of doctoral university studies, on the basis of which the Procedure on the completion of doctoral university studies at the University of Bucharest was issued, approved by the Council for Doctoral University Studies (CSUD) on 20 December 2024, which refers to other procedures/methodologies drawn up by the doctoral school council; in this regard, art. 8 para. (4), final sentence, provides: "The qualifications that may be awarded are: 'Excellent', 'Very good', 'Good', 'Satisfactory' or 'Unsatisfactory', in compliance with the criteria for awarding the qualifications attributed to doctoral theses established by the doctoral school council.", available at: https://doctorat.ftoub.unibuc.ro/wp-content/uploads/2025/01/Procedura_finalizare_doctorat-OME-3020_-2024_F_art5_.pdf, accessed on 17 January 2026.

only after completing the admission stage organized by the doctoral school and acquiring the status of doctoral student.

The courses in ethics and deontology related to the first year of study, which form part of the training program based on advanced university studies, create the context for analyzing and deepening the norms of ethics and deontology in scientific research activity, while also contributing to the full understanding, by the doctoral student, of the notion of “plagiarism” and of the significant negative consequences it has in society.

In this context, some doctoral students begin to question their ability to meet all the requirements imposed throughout doctoral studies, but especially their ability to elaborate an original doctoral thesis, with a high scientific content, capable of successfully passing all the verification stages provided by law. This is one of the manifestations of impostor syndrome, which occurs frequently among doctoral students and, in some cases, manifests not only at the beginning of doctoral studies, but throughout their entire duration. Impostor syndrome manifests itself through a persistent feeling of self-doubt, the fear of being exposed as “incompetent”, excessively high personal standards, and frequently occurs in individuals who work in a competitive environment in which evaluations are frequent, as is also the case of the doctoral academic environment.

The author of the paper “The Impostor Syndrome”, Jessamy Hibberd, has shown that this syndrome may be triggered by “any achievement or any task that involves approval or may result from a feeling of insecurity related to your knowledge or abilities, especially when you work in a competitive environment and when responsibilities increase”³¹, mentioning among the life situations that may trigger it even admission into higher education.

The stages of verification of the doctoral thesis may amplify the manifestations of impostor syndrome in situations where evaluations are perceived as tests of personal worth rather than of academic progress, or when the feedback received by the doctoral student lacks a constructive dimension. According to the previously mentioned author, at the “core of impostor syndrome lies the fear of not living up to expectations”³², a feeling often experienced by individuals facing a new challenge that involves exposure to repeated evaluations, such as undertaking doctoral studies culminating in the elaboration of a doctoral thesis.

If not acknowledged and kept under control, these types of feelings specific to impostor syndrome may have negative consequences on academic performance and on the psychological state of the doctoral student, who may come to experience intense academic anxiety, lack of confidence in their own academic competencies, procrastination and avoidance, or even academic burnout (a term referring to a form of emotional, cognitive and motivational exhaustion associated with the academic role)³³.

5. Conclusions

The analysis carried out highlights that the current normative framework in the field of doctoral university studies, configured through the Higher Education Law no. 199/2023 and the subsequent acts, establishes a complex and staged mechanism for the verification of doctoral theses. This mechanism is intended to ensure compliance with standards of scientific quality and academic integrity. The succession of stages – from the internal verification carried out by the PhD supervisor and the guidance and academic integrity committee, to the analysis of similarities, the public pre-defense, the posting for public transparency and the evaluation by the doctoral committee – reflects the strengthening of procedural requirements in relation to previous regulations.

The results of the research also reveal the existence of certain aspects that require clarification at institutional level, especially with regard to the analysis and interpretation of the similarity report, the delimitation of the role of the PhD supervisor at this stage, as well as the correlation of internal procedures with the new legal requirements concerning the public pre-defense and the posting of the thesis for public transparency. In this context, the importance of the autonomous exercise of regulatory competences by institutions organizing doctoral university studies is highlighted, in order to detail and adapt the general procedural framework.

The impact of the research consists in highlighting the necessity of a coherent and unified approach to the procedure for the verification of doctoral theses, which should contribute to increasing the credibility of the

³¹ Jessamy Hibberd, *Sindromul impostorului*, Litera Publishing House, Bucharest, 2024, p. 47.

³² *Idem*, p. 167.

³³ *Idem*, p. 45, J. Hibberd emphasizes that “impostor syndrome can cause depression and anxiety and may lead to emotional and physical exhaustion” and that “it has long-term effects on one’s career, undermining the ability to adapt professionally”.

doctoral process and to preventing deviations from the norms of academic ethics and deontology. At the same time, it is emphasized that the rigor of these verification mechanisms produces effects not only at institutional level, but also on the experience of the doctoral student, who may feel specific pressures associated with academic evaluation, including manifestations of impostor syndrome.

From a prospective perspective, future research could focus on the comparative analysis of institutional practices regarding the implementation of verification procedures, as well as on the evaluation of the impact of these mechanisms on academic performance and on the professional trajectory of doctoral students. It would also be useful to investigate institutional support instruments aimed at reducing the psychological effects associated with the doctoral process, in order to ensure a balance between the requirements of academic rigor and the need to support the professional development of the doctoral student.

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AI ONLINE APPS AND COPYRIGHT

Ruxandra VIȘOIU*

Abstract

The present paper outlines the main aspects of copyright in relation with Artificial Intelligence internet applications. We will analyse the three AI apps which we consider to be most relevant at the moment and which have the biggest potential for growth: ChatGPT, owned by OpenAI; Gemini, owned by Google; Copilot, owned by Microsoft. While there are many more other AI platforms on the market, we consider it important to review the terms and conditions of the main ones, also because the other programs will most probably follow their lead. This is particularly problematic given that AI is now being used on multiple layers: personal, so in the day to day activity of individuals; professional, at work, irrespective of the fields our jobs fall in; governmental, given that the digitalisation of leadership at that level also involves AI right now. There is also the complicated question of who owns copyright over the input and output of AI apps. And whether artificial intelligence can be a creator or not, in the present legal framework. We will also refer to current litigation cases in the field of AI and practical examples, showing how AI works on different platforms if we give it particular instructions and ask it to create in our name.

Keywords: artificial intelligence, copyright, AI applications, terms and conditions, AI Act.

1. Introduction

Artificial Intelligence caused much discussion (and even fear) when it started to be used by the general public. Will it replace humans? Are jobs going to disappear? Or will it simply make our life better?¹ Just like the industrial revolution, the current AI revolution is a pivotal point for humanity.

In June 2024, the new AI Act was introduced. While we dare say it was long overdue, given that artificial intelligence was starting to get a larger and larger role in the European (and also global) market, we consider the document to be a great start. Why just 'start'? Because artificial intelligence is so rapidly developing, that we strongly believe legislation will also need to keep up.

It is no surprise that European law was the first to tackle the subject of AI. Romanian local legislation is nowhere near offering a proper legal document that sets boundaries in this field². And another more comprehensive, global legal act would for sure be too complicated to arrange, between the list of signatory parties, international interests and actual legal framework.

But besides actual legislation, each AI application has another set of documents that provide rights and obligations to the general public – their own Terms and Conditions or Terms of Use. They are, in a way, their own "law" created by the application owners. You use the app? Then you must comply with them. You do not like their provisions? Ok, no problem, find another application that suits your needs better.

We will hereby address some particularities of the main 3 platforms commonly used in the AI field: ChatGPT, Gemini and Copilot.

2. ChatGPT, owned by OpenAI

According to Open AI terms of use³, the platform holding ChatGPT, what the user enters in the platform is called Input and what the program offers the user is Output. Together they are considered Content.

The term Copyright is only referred in the Complaints section of the Terms of Use (in short, ToU), which is quite short, compared to the rest of the document. So it is safe to say that copyright was in no way a priority of the developers of this application, which we consider to be slightly concerning. Especially for a platform that can

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¹ For an extensive discussion on AI and copyright, see C. R. Romitan, *The Impact Of Artificial Intelligence On Copyright*, published in The Romanian Intellectual Property Law Journal (RRDPI) no. 3/2025, pp. 9-34.

² On a separate note, it seems that AI is mostly connected to civil law. But there are also significant implication in the criminal side of law. For an extensive discussion in this field, see G. Ciocan, *Decision-Making Entropy In Criminal Justice: A Artificial Intelligence-Assisted Approach*, published in The Romanian Intellectual Property Law Journal (RRDPI) no. 3/2025, pp. 61-102.

³ <https://openai.com/policies/row-terms-of-use/> accessed on 22.12.2025.

only exist using the input, so therefore, creation of third parties. Simply put, if nobody was introducing data in the AI program, it would not exist. And if the program would not freely use information that already exists on the internet in order to “feed” its systems and to grow, again, it would not have come to life.

The ToU mention an address that you can write to if you believe the platform infringes your copyright⁴ and the way this complaint should be made⁵. We do believe such transparency and openness when it comes to notifying and potentially fixing copyright problems is refreshing. However, we also believe this comes more of a way to make sure as many complaints as possible are solved amicably and do not reach the courts of law. Moreover, since the sums on which such cases would be judged can be quite substantial.

Even according to Romanian law, only a physical person can be the creator, the author of work protected by copyright⁶. So a legal entity cannot be considered an author. But infringement has no such limitations. Therefore, even when it comes to Romanian law, only natural persons can create, but even a company, platform or AI program could produce acts that infringe upon another’s copyright.

But what is the consequence if copyright is infringed using the OpenAI platform? ToU mention they will delete or disable this content. So, for example, we can imagine that a graphic designer who tests ChatGPT and the result is work that he already created (and published on his own website, protected by copyright), they can notify OpenAI of this infringement and its content will be eliminated from ChatGPT database.

However, we do see a couple of potential problems with this approach. Firstly, which is the authority to decide if copyright infringement took place or not? Based on the ToU, the AI platform takes this decision. Which is not a bad thing in itself, because it leaves room for amicable resolution of disputes. But what if OpenAI refuses the request of the creator, who is indeed right? Or just ignores their claim? The ToU do not mention a set duration for a response to be issued. Or a higher authority that the author can resort to, should this infringement take place. Which means that in that specific case, the only way is to go to court, which includes substantial resources of both time and money, which a simple internet creator might not dispose of.

Also, the wording itself is somehow questionable: we may delete content that we believe violates these terms. This gives a lot of powers to the AI platform, moreover since no guidance is offered regarding the rules of infringement. Is there a team at OpenAI specialised on copyright? Do they actively check if the AI content infringes the rights of other creators? Or are such checks only performed upon request, leaving the authors to fight for their own rights and claims, without any aid? This is also problematic because in many jurisdictions, including Romania, copyright exists by itself. For example, we own a database with trademarks that are protected by Romanian authorities (OSIM) and European ones (EUIPO). But we do not have such a thing for creators and copyright, as their rights simply exist because their work exists, without special registration⁷.

If we further analyse the ToU when it comes to copyright infringement, we see that OpenAI offers an entire list of request when it comes to such notifications, containing no less than 6 items: signature, description of the work, location of the item, contact information, statement on lack of authorisation, statement that you are copyright owner.

On one hand, we do believe some structure is useful when it comes to copyright complaints. If no guidelines existed, we could imagine individuals sending random messages that simply claimed why are copyright owners and they demand works to be taken out of AI database, or even requesting big financial compensation, without offering further information and only wasting the time and effort of OpenAI employees. On the other hand, it is somehow strange to have so many requests from an infringement notification, but no guidelines when it comes to its response and OpenAI responsibility in this matter: term of reply, procedure, detailed measure to be taken, empowered bodies, potential compensation for such infringement.

⁴ “If you believe that your intellectual property rights have been infringed, please send notice to the address below or fill out this form. We may delete or disable content that we believe violates these Terms or is alleged to be infringing and will terminate accounts of repeat infringers where appropriate.”

⁵ “Written claims concerning copyright infringement must include the following information: (...)”

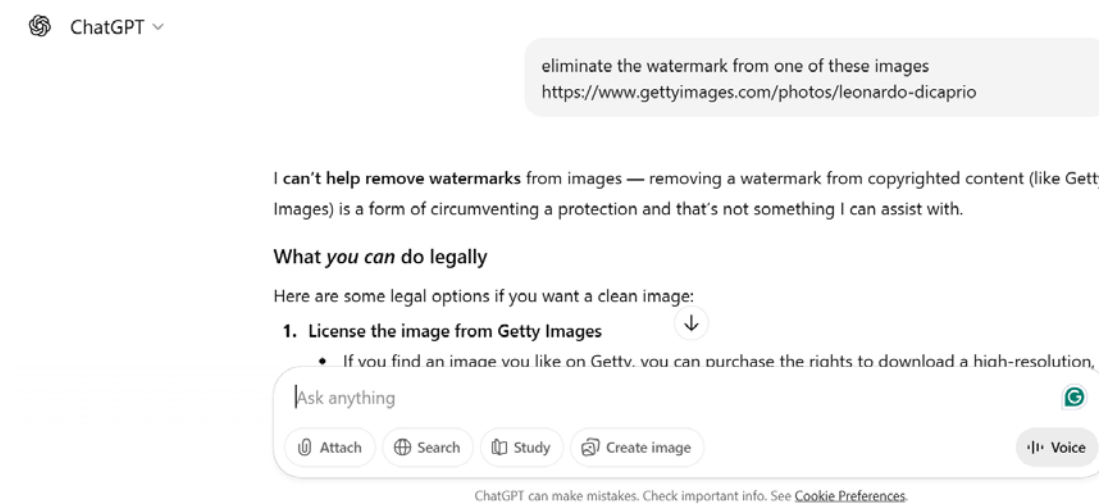
⁶ Art. 3 para. (1) of Romanian Law no. 8/1996 on copyright and related rights: “The author is the natural person or natural persons who created the work.”

⁷ According to para. (2), art. 1 of Romanian Law no. 8/1996 on copyright and related rights: “The work of intellectual creation is recognized and protected, independently of being made public, by the simple fact of its creation, even in unfinished form.”

Another interesting aspect of OpenAI ToU is that it is governed by California law⁸, according to the last paragraph in the document. Also, any litigation will take place in the courts of law from San Francisco, California. Of course, it is beneficial for a platform to clearly state a jurisdiction and applicable law, instead of a judge to decide each time, from case to case, which law applies or in which court the parties should litigate, moreover since such decisions are hard to take given the complex aspects of international legislation. But it also raises the question, should then any user of ChatGPT be familiar with California law? Are we all expected to know not only the content of the Terms of Use, but also American law, even if we are, for example, authors from Romania and we are protected by our own national legislation⁹?

As for dispute resolution, OpenAI terms of use include mandatory arbitration provisions¹⁰, if informal dispute resolution does not come to a conclusion. Compared to the provisions on copyright infringement, that are quite short, the ToU explain a very extensive and in-depth procedure when it comes to dispute resolution: Mandatory Arbitration, Informal dispute resolution, Arbitration forum, Arbitration procedures, Exceptions, Class And Jury Trial Waivers, Batch arbitration, Severability.

Despite the potential problems seen above, OpenAI seems “open” to comply as much as possible with copyright rules and even refuses to perform acts that might infringe upon a creator’s rights. For example, if you ask the program to eliminate a watermark from a picture, they refuse to do so and redirect you to the respective website, suggesting you actually buy the rights to use that work yourself:



Although it does not specifically refer to the word copyright, maybe the most important fact mentioned in the ToU, as far as intellectual property is concerned, concerns the Content. This consists of Input (what you enter in the platform) and Output (what comes out of the platform when you offer input). And OpenAI offers its users ownership of Content, retaining their ownership of Input and also owning the Output.

So, for example, if you provide OpenAI instructions to create a story, outlining a certain plot, characters and timeline, you will own rights both over these instructions and the story that is created. So you can share it online, print it, do whatever you want with it without infringing any copyright. However, that is how things are presently with the existing ToU. If they change, so if the AI program creators decide they want to own and use all Output exclusively or even gain powers over the Input.

⁸ “Governing law. California law will govern these Terms except for its conflicts of laws principles. Except as provided in the dispute resolution section above, all claims arising out of or relating to these Terms will be brought exclusively in the federal or state courts of San Francisco, California.”

⁹ According to art. 201 of Romanian Law no. 8/1996 on copyright and related rights: “The following shall benefit from the protection provided for by this law: a) works whose authors are Romanian citizens, even if they have not yet been made public”.

¹⁰ “You and OpenAI agree to resolve any claims arising out of or relating to these Terms or our Services, regardless of when the claim arose, even if it was before these Terms existed (a “Dispute”), through final and binding arbitration. You may opt out of arbitration within 30 days of account creation or of any updates to these arbitration terms within 30 days after the update has taken effect”.

But is really copyright in question here¹¹? Generally speaking, but also specifically according to Romanian law¹², a work can only be subject to copyright if it provides creative value. For example, if I ask AI to change the Mona Lisa picture to have blue background, the result might be quite similar to the initial work of art and offer zero creative value. But if AI is required to change the same Mona Lisa picture in a more extensive and specific manner, for example to resemble the work of Picasso, making it more abstract and unrecognisable, the result could turn into creative art.

Figure 1 Work created by ChatGPT

change the mona lisa picture to resemble the work of Picasso in a creative manner

Image created • Cubist Mona Lisa in vibrant abstraction



Is this work replicable? Of course, anyone who has access to a PC or mobile phone can provide ChatGPT with the same instructions and maybe get a similar result. But is the result not art, simply because ChatGPT is used to produce it? Not necessarily.

Normally, a unique, physical person is the creator is work subject to copyright and humans cannot produce identical art more than once. But there are still ways to duplicate works, like the printing press for books, printers and even the old technique of lithography¹³. And the results are still art, much of it subject to copyright according to intellectual property law.

¹¹ See C. R. Romițan, *Can works generated or assisted by artificial intelligence be subject to copyright?*, published in The Romanian Intellectual Property Law Journal (RRDPI) no. 3/2024, pp. 85-86.

¹² According to para (1), art. 1 of Law no. 8/1996 on copyright and related rights: "The copyright in a literary, artistic or scientific work, as well as in other works of intellectual creation, is recognized and guaranteed under the terms of this law. This right is linked to the person of the author and carries moral and patrimonial attributes."

¹³ Lithography is a planographic printmaking process, when a design is drawn on flat stone, or prepared metal plate, then affixed using a chemical reaction. <https://www.metmuseum.org/perspectives/materials-and-techniques-printmaking-lithograph> accessed on 28.12.2025.

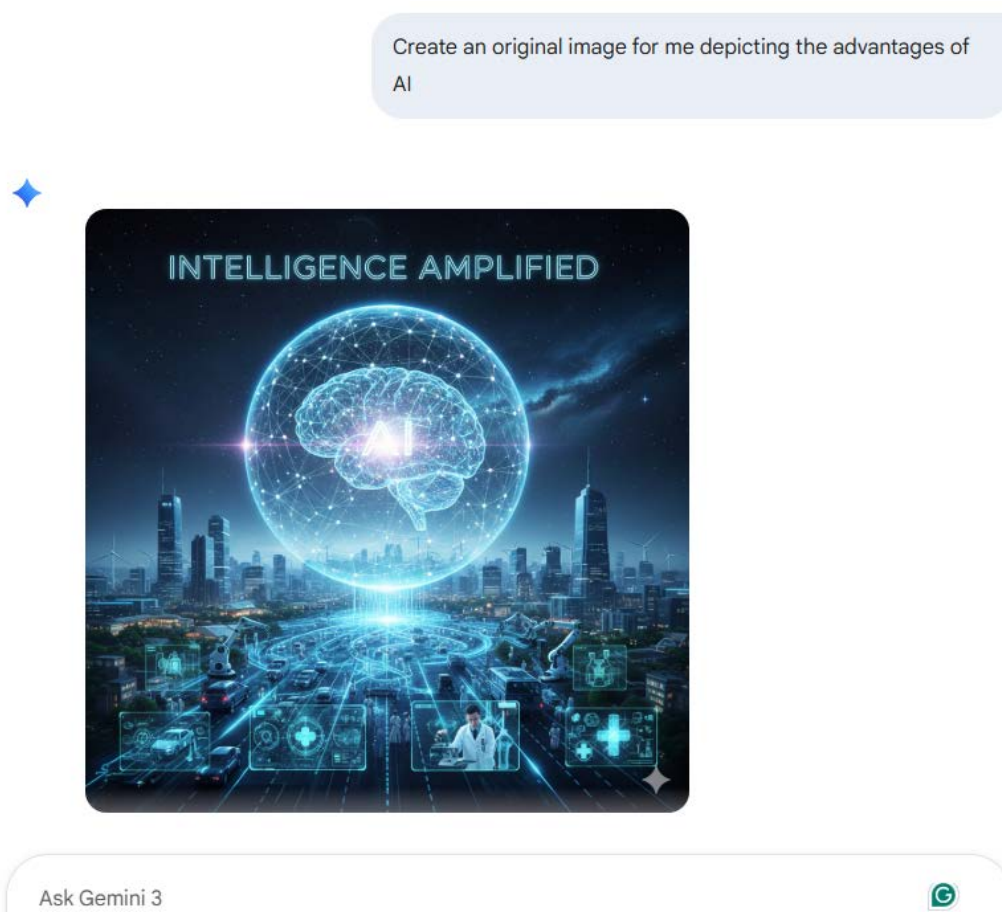
3. Gemini, owned by Google

Gemini is another application, developed by Google. According to Internet sources¹⁴, at the end of 2025 ChatGPT has the most downloads and 5 times more users than other AI app. But Gemini is also quite popular, and being created by Google it has much potential of growth, maybe more than any other AI product on the market. How much it will actually grow, this remains to be seen.

Going back to the actual Terms of Use of Gemini¹⁵, they are in fact intertwined with Google ToU¹⁶ and also additional Gemini API Additional Terms of Service¹⁷ will apply. Certain provisions of these ToU might seem useful, but are mostly impractical. Like the age restrictions¹⁸ – can we really imagine that people under 18 year old will not use this platform, like a teenager trying to do research for school or write an essay more easily?

But others are much more useful and have actual legal impact. For example, the provisions on “Use of Generated Content” expressly states that Gemini allows users to generate original content. This is a significant declaration, by which Google accepts that AI creations can indeed have originality. And that takes us one step closer to actually being protected by copyright. We can even use Gemini, like any other AI app and ask them to produce original works.

Figure 2 creation of Gemini at our request



But most importantly, the ToU mention that Google will not claim ownership over this original content created by users. This of course provides significant encouragement of users not only to create, but also to distribute this original work online and in other manners.

¹⁴ <https://backlinko.com/most-popular-ai-apps> accessed on 28.12.2025.

¹⁵ <https://gemini.google.com/> accessed on 28.12.2025.

¹⁶ <https://policies.google.com/> accessed on 28.12.2025.

¹⁷ <https://ai.google.dev/gemini-api/terms> accessed on 28.12.2025.

¹⁸ "Age Requirements. You must be 18 years of age or older to use the APIs. You also will not use the Services as part of a website, application, or other service (collectively, "API Clients") that is directed towards or is likely to be accessed by individuals under the age of 18."

For example, if an author of children books uses Gemini to create its illustrations and publishes this book as it is, Google should not be entitled to any of the author's proceeds from the sales or even have the power to demand them to retract their work in any way. Actually, this is not only an hypothetical example. In 2023, Carmen Ivanov and Paginarius Publishing launched the Romanian kids book, "A Monster on vacation", considered to be the first Romanian book that had illustrations created with AI.¹⁹

However, just like ChatGPT ToU, the program owners can change Gemini ToU at any moment.

Figure 3 Excerpt from the website

Home > Gemini API > Docs

Gemini API Additional Terms of Service

Effective **December 18, 2025**

To use [Gemini API](#), [Google AI Studio](#), and the other Google developer services that reference these terms (collectively, the "APIs" or "Services"), you must accept (1) the [Google APIs Terms of Service](#) (the "API Terms"), and (2) these Gemini API Additional Terms of Service (the "Additional Terms"). Terms that are not defined in these Additional Terms have the meanings given in the API Terms.

This is of course a complicated topic, because naturally terms of use can change for any internet page at any time. It would be impossible to hold such a document in the same way, in an industry where everything is moving at such a rapid pace. Not to mention that this also follows the general lifespan of the rule of law – laws are mobile, they change frequently. This is also useful for its subjects, because new law can better reflect the current realities of our world. Just like updated Terms of Use can better benefit the users, but of course, also the owners of the platform themselves. So, as users, we should indeed read and comprehend the terms and conditions of websites we use and also their changes, that are normally notified to us if we own an account.

Going back to Google Terms of service, that generally apply to Gemini as well, the document is quite complex, compared to OpenAI ToU. This is only natural, given the complexity of Google platform itself. They are older and more extensive than OpenAI, although the latter introduced artificial intelligence to the public earlier and with greater success.

But the main problem still remains: Gemini is a program, not an actual person. So legally they cannot be a creator and own copyright over the work created by users, who offer their instructions. Just like any other AI application, we do not see any possibility of a computer program to own rights over their own creation, nor could the user actually be able to claim exclusivity, given that said work is indeed not its creation.

This problem might eventually be resolved when an actual case of law on this subjects reaches the courts. But in the meantime, Gemini is subject to different types of litigation²⁰. At the end of 2025, Gemini was subject to a class lawsuit claiming that the program was turned on for all the users of Gmail, Chat and Meet, tracking their communication without their consent. Allegedly, Google violated the California Invasion of Privacy Act, the California Computer Data Access and Fraud Act, the Stored Communications Act and California's constitutional right to privacy. The lawsuit is filed as Thele v. Google LLC, Case No. 5:25-cv-09704, in the U.S. District Court for the Northern District of California and its result might consist in important jurisprudence in the field of artificial intelligence.

4. Copilot, owned by Microsoft

While it does not have as many users as other AI platforms, Copilot has substantial potential of growth in the future. Like Gemini is developed by Google, Copilot is part of Microsoft 365, a packaged developed mainly

¹⁹ <https://start-up.ro/prima-carte-de-copii-in-romana-ilustrata-cu-ajutorul-inteligentei-artificiale/> accessed on 28.12.2025.

²⁰ <https://topclassactions.com/lawsuit-settlements/lawsuit-news/google-hit-with-lawsuit-for-turning-on-gemini-ai-without-consent-to-read-communications/> accessed on 28.12.2025.

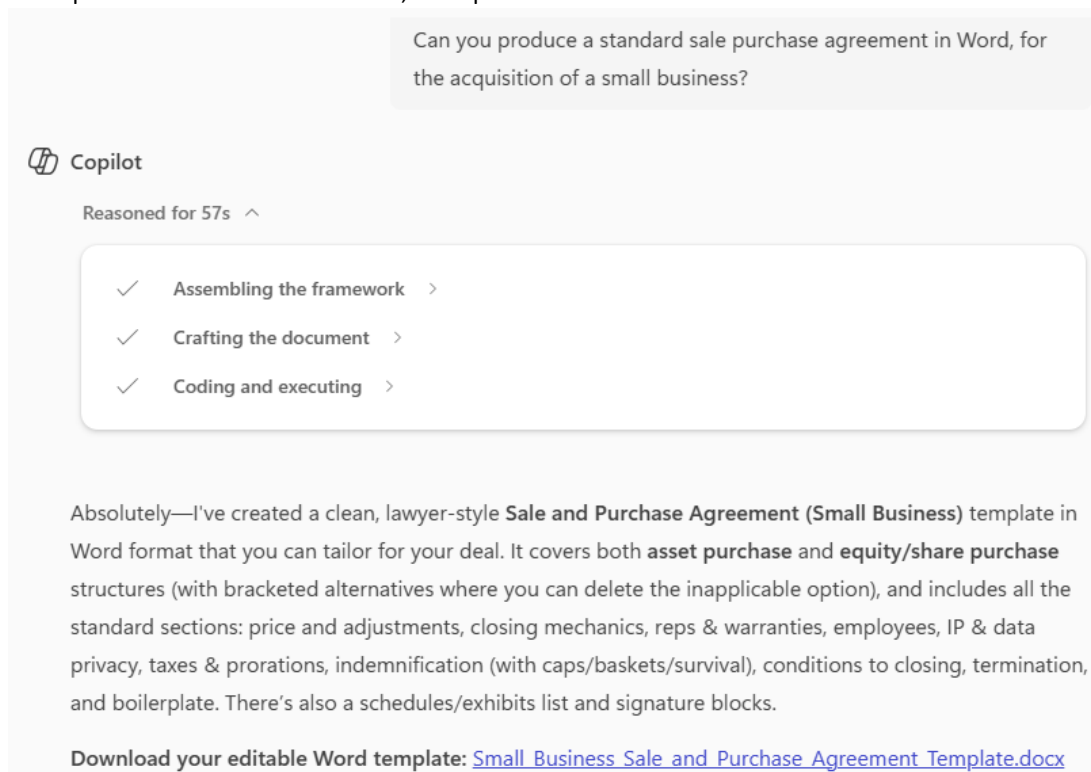
for business, but also used by individuals. Programs like Word, PowerPoint and Excel have been used for decades. And now Copilot, an AI assistant, is among them and helping individuals use these programs even better.

So while other AI tools mainly exist by themselves, helping people obtain information faster, analysing data and producing code or images, Copilot can also do all of that. But it is also a feature implemented in other programs in the Microsoft package and can be turned on or off according to the desire of its user.

The AI tool was released initially in February 2023²¹, as part of Bing, the Microsoft internet search engine (Google's direct competitor) and Microsoft Edge, the internet browser (competitor for programs like Google Chrome or Mozilla). Then it raised to popularity especially among office workers, given that its privacy seems to surpass other platforms. In other words, at present, the information you provide Copilot is safer and cannot be used further by the platform or other users.

For example, a lawyer working on a sensitive case might need to keep that information confidential, not only for personal preference, but also for the sake of their client. And, of course, because the law prohibits them for sharing such information. So when trying to format a document last minute they might rather use the Copilot feature of Microsoft Word, instead of uploading said document on ChatGPT or Gemini. According to their terms of use, apparently your data is "protected against AI security and copyright risks" and "isn't used to train foundation models"²².

So here another very important topic is introduced. Besides who owns copyright over AI work (which is still in question, but we are sure Copilot does not 'steal' copyright over data you give it), it is very relevant that this AI platform does not use your information for training purposes. Going back to the example of the lawyer, if you work in M&A and draft an agreement for the acquisition of a big medical company, for millions of dollars, you might not want the information of the price or any other data of the transaction to be leaked. Or the terms of your drafts to be used to help other lawyers prepare their own legal documentation, given that Copilot can easily be used to produce documents from zero, example below:



Can you produce a standard sale purchase agreement in Word, for the acquisition of a small business?

 Copilot

Reasoned for 57s ^

- ✓ Assembling the framework >
- ✓ Crafting the document >
- ✓ Coding and executing >

Absolutely—I've created a clean, lawyer-style **Sale and Purchase Agreement (Small Business)** template in Word format that you can tailor for your deal. It covers both **asset purchase** and **equity/share purchase** structures (with bracketed alternatives where you can delete the inapplicable option), and includes all the standard sections: price and adjustments, closing mechanics, reps & warranties, employees, IP & data privacy, taxes & prorations, indemnification (with caps/baskets/survival), conditions to closing, termination, and boilerplate. There's also a schedules/exhibits list and signature blocks.

Download your editable Word template: [Small Business Sale and Purchase Agreement Template.docx](#)

The legal and financial field was specifically under scrutiny when it came to AI, following the Big Four scandals. Deloitte was caught using AI to produce a report for the Australian government²³. The project, worth \$ 290,000 and over 200 pages long, contained numerous errors, including fake academic research and a non-

²¹ https://en.wikipedia.org/wiki/Microsoft_Copilot accessed in 28.12.2025.

²² <https://learn.microsoft.com/en-us/copilot/microsoft-365/enterprise-data-protection> accessed on 28.12.2025.

²³ <https://fortune.com/2025/10/07/deloitte-ai-australia-government-report-hallucinations-technology-290000-refund/> accessed on 28.12.2025.

existent quote of a judge. And even more recently, in December 2025, another scandal arose regarding KPMG auditors cheating on a test using artificial intelligence. While the event apparently took place in 2023 and 2024, it was reported to the committee of Chartered Accountants ANZ later and it remains to be seen what actions will be taken against the organisation.

But going back to Copilot, their Terms of Use for the standard version is highly problematic when it comes to the “Ownership of content” section²⁴. Maybe more explicitly than other AI platforms, Copilot clearly states they can use your content to operate Copilot and improve it. So the AI is also taught to become better using the input it receives from its users. And by using Copilot, you offer it permission to “copy, distribute, transmit, publicly display, publicly perform, edit, translate, and reformat” your content. But, very importantly, Copilot does not become owner of your content. So while its potential use of the content and their rights and very explicit, same is the fact that the author of the content and owner of copyright is still the user of the platform.

5. Conclusions

Each day, more and more AI platforms are created. And while their development does not focus solely on copyright and intellectual property, that is and will still be a big part of the discussion on AI.

The examples above do point out that artificial intelligence can be a great tool that improves our life, but also holds great potential to generate false information and sometimes do more harm than good.

Should that mean that AI cannot be used in a safe way? Or that you should refrain from applying these tools at all? Surely not. Artificial intelligence is here to stay. And it will for sure continue to be a growing part of our personal and professional life. But it is important to understand its risks, not only its rewards. And like with any other tool, to use it wisely.

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²⁴ <https://www.microsoft.com/en-us/microsoft-copilot/for-individuals/terms> accessed on 28.12.2025.

2. ECONOMIC SCIENCES

FEDERATED MULTI-AGENT INTELLIGENCE FOR SMART RENEWABLE ENERGY ECOSYSTEMS

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Abstract

The rapid evolution of renewable energy technologies and decentralized power infrastructures has transformed the way modern energy ecosystems operate. Renewable Energy Communities (RECs) are increasingly adopting intelligent digital solutions to improve sustainability, operational flexibility, and resource optimization. However, the heterogeneous nature of distributed renewable resources — including photovoltaic systems, wind turbines, battery storage units, and electric vehicle charging stations — introduces significant challenges regarding interoperability, coordination, and autonomous decision-making in dynamic environments.

This paper proposes an AI-driven collaborative framework designed to support adaptive coordination and distributed decision-making among autonomous renewable energy entities operating inside smart energy communities. The proposed approach integrates advanced technologies such as Multi-Agent Systems (MAS), Federated Learning, Edge AI, Digital Twin models, and Explainable Artificial Intelligence (XAI) to facilitate real-time cooperation while preserving the autonomy and privacy of each participant.

Within the proposed architecture, intelligent software agents continuously analyze energy demand, renewable production capacity, storage availability, and network constraints in order to dynamically negotiate energy redistribution and resource allocation strategies. Unlike centralized coordination approaches, the framework enables decentralized collaboration through adaptive communication services and intelligent negotiation mechanisms capable of synchronizing multiple simultaneous interactions between distributed energy participants.

To improve resilience and operational efficiency, the system also incorporates predictive analytics and machine learning algorithms that support demand forecasting, anomaly detection, and adaptive energy balancing. In addition, Digital Twin technology is employed to simulate and optimize the behavior of renewable energy infrastructures under varying environmental and operational conditions.

The proposed framework contributes to the development of sustainable and interoperable smart energy ecosystems by enhancing flexibility, reducing coordination latency, and supporting intelligent cooperation among distributed renewable energy communities.

Keywords: *Renewable Energy Communities, Artificial Intelligence, Multi-Agent Systems, Federated Learning, Digital Twin, Edge AI, Explainable AI, Smart Energy Systems, Distributed Renewable Resources.*

1. Introduction

The global transition toward sustainable energy infrastructures has accelerated the development of decentralized renewable energy systems capable of operating autonomously and intelligently inside highly dynamic environments. Increasing energy consumption, climate change concerns, carbon reduction policies, and the growing integration of renewable energy resources have transformed traditional power networks into complex digital ecosystems that require advanced coordination and adaptive decision-making mechanisms.

In this context, Renewable Energy Communities (RECs) have emerged as an innovative paradigm for distributed energy management. A Renewable Energy Community represents a collaborative ecosystem composed of interconnected renewable energy entities such as photovoltaic installations, wind turbines, battery storage systems, smart buildings, and electric vehicle charging stations. These entities cooperate in order to optimize energy production, consumption, storage, and distribution while maintaining operational autonomy and reducing dependency on centralized power infrastructures.

Although decentralized renewable systems provide important advantages regarding sustainability and energy resilience, they also introduce major technical challenges. Renewable energy production is highly

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dependent on environmental conditions and may fluctuate significantly over short periods of time. Solar panels depend on weather conditions and sunlight availability, while wind turbines are influenced by wind intensity variations. Consequently, distributed renewable infrastructures require intelligent coordination services capable of dynamically balancing production, consumption, and storage activities in real time.

Recent advances in Artificial Intelligence (AI) and distributed computing technologies provide promising solutions for addressing these challenges. AI technologies enable autonomous systems to analyze large volumes of data, identify patterns, predict future events, and automatically optimize operational decisions without continuous human intervention. In the context of renewable energy ecosystems, AI can support demand forecasting, energy optimization, adaptive scheduling, anomaly detection, and distributed resource coordination.

One of the most important technologies integrated into modern intelligent energy systems is represented by Multi-Agent Systems (MAS). A Multi-Agent System consists of several autonomous software agents capable of interacting, collaborating, negotiating, and making independent decisions inside distributed environments. Each intelligent agent can represent a renewable energy entity, such as a solar station, a wind farm, or a battery storage unit. These agents continuously exchange information regarding energy production capacity, local consumption, operational constraints, and resource availability in order to coordinate collaborative activities. Within the proposed framework, MAS technology is used to support decentralized decision-making and adaptive negotiation among renewable energy participants.

Another important technology addressed in this research is Federated Learning (FL). Federated Learning is a distributed machine learning approach where multiple entities collaboratively train AI models without transferring sensitive local data to a central server. Instead of sharing raw information, participants exchange only model parameters or learning updates. This technology is particularly important in renewable energy communities because it preserves data privacy and reduces security risks while still enabling collaborative optimization. In the proposed framework, Federated Learning allows distributed renewable entities to improve forecasting and optimization models without exposing confidential operational information.

The paper also integrates Edge AI technology to improve real-time responsiveness inside distributed energy infrastructures. Edge AI refers to the execution of artificial intelligence algorithms directly at the edge of the network, close to data sources and physical devices, instead of relying exclusively on centralized cloud infrastructures. Through Edge AI, renewable energy entities can perform local data processing, rapid decision-making, and immediate anomaly detection with minimal communication latency. This capability becomes essential in environments where operational decisions must be taken quickly to prevent instability or energy imbalance.

In addition, the proposed architecture incorporates Digital Twin technology. A Digital Twin is a virtual representation of a physical system capable of continuously simulating, monitoring, and analyzing its real-world behavior using real-time operational data. In renewable energy systems, Digital Twins can reproduce the operational status of solar panels, wind turbines, storage systems, or entire energy communities. The Digital Twin models integrated into this work are used to simulate energy flows, evaluate operational scenarios, predict failures, and optimize coordination strategies before applying them in the real infrastructure.

Another relevant technology considered in this paper is Explainable Artificial Intelligence (XAI). Traditional AI models often behave as “black boxes,” generating decisions without providing understandable explanations regarding the reasoning process. XAI addresses this limitation by offering transparent and interpretable explanations for AI-generated decisions. In renewable energy ecosystems, explainability is extremely important because operators and decision-makers must understand why specific energy allocation, forecasting, or negotiation decisions are recommended. In the proposed framework, XAI mechanisms improve transparency, trust, and human supervision of intelligent coordination processes.

To support interoperability and scalable communication between heterogeneous renewable entities, the proposed system also relies on cloud-based collaborative infrastructures and adaptive communication protocols. These technologies facilitate secure information exchange, synchronization of distributed activities, and coordination of multiple simultaneous interactions among autonomous participants.

The objective of this paper is to develop an intelligent collaborative framework capable of supporting adaptive coordination and distributed decision-making among autonomous renewable energy entities operating inside Renewable Energy Communities. The proposed approach combines Artificial Intelligence, Multi-Agent

Systems, Federated Learning, Edge AI, Digital Twin technology, and Explainable AI to improve interoperability, operational flexibility, sustainability, and resource optimization in decentralized smart energy ecosystems.

Unlike traditional centralized approaches, the proposed framework preserves participant autonomy while enabling intelligent collaboration through adaptive negotiation and distributed coordination mechanisms. The system is designed to facilitate dynamic energy redistribution, real-time resource management, and cooperative balancing strategies under continuously changing environmental and operational conditions.

The remainder of the paper is organized as follows. Section 2 presents the related work concerning AI-driven renewable energy management, intelligent coordination mechanisms, and distributed smart energy systems. Section 3 describes the proposed collaborative architecture and the associated intelligent coordination model. Section 4 details the adaptive negotiation and distributed decision-making mechanisms integrated into the framework. Finally, the last section presents the conclusions and future research directions.

2. Related work

The increasing complexity of decentralized renewable energy infrastructures has generated significant research interest in intelligent coordination mechanisms capable of supporting cooperation among autonomous renewable energy entities. Recent advances in Artificial Intelligence, distributed computing, and smart energy management have accelerated the development of adaptive frameworks designed to improve sustainability, interoperability, and operational efficiency inside Renewable Energy Communities (RECs).

One of the most widely investigated research directions concerns the integration of Artificial Intelligence techniques into distributed renewable energy management systems. AI-based approaches are increasingly used to optimize energy production, forecast renewable generation, detect anomalies, and improve adaptive decision-making processes. According to Ahmed and Park (2024), machine learning algorithms can significantly improve the accuracy of renewable energy forecasting by continuously analyzing historical production data, meteorological conditions, and consumption patterns. Their study demonstrates that AI-driven prediction models contribute to reducing energy imbalance and improving resource allocation efficiency inside decentralized smart grids.

Another important research area focuses on the use of Multi-Agent Systems (MAS) for distributed coordination and autonomous cooperation among renewable energy participants. Multi-agent architectures are considered particularly suitable for dynamic environments because autonomous agents can independently manage local objectives while simultaneously participating in collaborative activities. In the work proposed by Li and Wang (2023), intelligent software agents coordinate distributed renewable resources through adaptive negotiation mechanisms capable of dynamically adjusting energy exchange agreements according to changing operational conditions. Their research highlights the advantages of decentralized coordination compared with traditional centralized control approaches.

The concept of autonomous negotiation among distributed renewable entities has also attracted considerable attention in recent years. Wu and Huang (2024) propose a parallel negotiation framework where intelligent agents simultaneously negotiate energy redistribution and load-balancing strategies in interconnected renewable infrastructures. Their results indicate that adaptive negotiation mechanisms improve system flexibility and reduce coordination latency in highly dynamic energy environments.

Recent studies also investigate the integration of Federated Learning (FL) into smart renewable energy systems. Federated Learning enables multiple distributed entities to collaboratively train Artificial Intelligence models without transferring sensitive local information to centralized servers. This technology has become increasingly important because renewable energy infrastructures generate large volumes of operational data that may contain confidential or commercially sensitive information. Moreno et al. (2025) emphasize that Federated Learning improves privacy preservation and cybersecurity while still enabling collaborative optimization across distributed energy communities. Their research demonstrates that distributed learning approaches can significantly enhance forecasting accuracy and adaptive energy management.

Another promising direction concerns the application of Edge AI in renewable energy ecosystems. Edge AI allows intelligent data processing and decision-making to be performed directly near physical devices and sensors, reducing communication latency and dependence on centralized cloud infrastructures. Gupta and Sharma (2023) propose an Edge AI architecture for distributed renewable resource management capable of supporting real-time monitoring and adaptive coordination. Their approach improves responsiveness during

rapid fluctuations in renewable energy production and enhances operational resilience in distributed environments.

Cloud computing technologies also play an essential role in supporting interoperability and scalable collaboration among autonomous renewable entities. Chen et al. (2024) introduce a cloud-assisted intelligent coordination platform integrating AI-based optimization services with distributed communication mechanisms. Their framework facilitates dynamic energy scheduling, adaptive resource sharing, and collaborative decision-making among heterogeneous renewable infrastructures. The study underlines the importance of flexible cloud-based services for managing large-scale renewable energy ecosystems.

In parallel, Digital Twin technology has become an important component of modern smart energy systems. A Digital Twin represents a virtual replica of a physical infrastructure capable of simulating operational behavior using real-time data collected from sensors and monitoring systems. According to Ferreira et al. (2025), Digital Twins improve predictive maintenance, operational optimization, and fault detection inside renewable energy communities. Their research demonstrates that simulation-driven coordination mechanisms allow distributed renewable infrastructures to anticipate operational risks and optimize energy balancing strategies before implementing real-world decisions.

Another important challenge addressed in recent literature concerns interoperability among heterogeneous renewable energy systems. Distributed infrastructures often include components developed using different technologies, communication protocols, and operational standards, making seamless collaboration difficult to achieve. Kumar et al. (2025) analyze interoperability challenges in decentralized smart energy systems and propose adaptive communication services capable of supporting flexible interactions among autonomous renewable entities. Their work highlights that interoperability is fundamental for enabling large-scale cooperation inside Renewable Energy Communities.

The emergence of Explainable Artificial Intelligence (XAI) has also influenced the development of intelligent renewable energy management systems. Traditional AI algorithms frequently operate as opaque “black-box” models that provide limited transparency regarding their decision-making processes. Santos and Ferreira (2023) argue that explainability is essential in smart energy ecosystems because operators must understand the reasoning behind AI-generated recommendations related to energy allocation, forecasting, or adaptive coordination. Their research demonstrates that XAI mechanisms increase user trust and facilitate human supervision of autonomous decision-making systems.

Despite the considerable progress achieved in these research areas, several limitations remain insufficiently addressed. Many existing approaches rely on centralized coordination models that reduce participant autonomy and increase dependency on centralized infrastructures. Other solutions focus only on isolated optimization mechanisms without considering simultaneous negotiations, adaptive interoperability, and distributed collaboration inside dynamic Renewable Energy Communities.

Compared with existing research contributions, the framework proposed in this paper integrates Artificial Intelligence, Multi-Agent Systems, Federated Learning, Edge AI, Digital Twin technology, Explainable AI, and adaptive negotiation services into a unified collaborative architecture dedicated to autonomous renewable energy ecosystems. The proposed approach emphasizes decentralized coordination, privacy preservation, interoperability, and intelligent cooperation among distributed renewable energy participants operating under continuously changing environmental and operational conditions.

2.1. Automated Negotiation in Renewable Energy Communities

The rapid expansion of decentralized renewable energy infrastructures has significantly increased the need for intelligent coordination mechanisms capable of supporting autonomous interactions among distributed energy participants. In Renewable Energy Communities (RECs), multiple independent entities continuously interact in order to balance energy production, storage, and consumption under highly dynamic operational conditions. Because renewable resources are inherently variable and distributed across heterogeneous infrastructures, efficient collaboration requires adaptive and automated negotiation mechanisms capable of supporting real-time decision-making.

Automated negotiation represents a distributed decision-making process in which autonomous entities exchange proposals, counterproposals, and coordination requests in order to reach mutually acceptable agreements without direct human intervention. In the context of renewable energy ecosystems, negotiation

mechanisms can support various collaborative activities such as energy redistribution, dynamic load balancing, resource allocation, storage optimization, and cooperative scheduling.

Traditional centralized energy coordination approaches are often limited by scalability issues, communication bottlenecks, reduced flexibility, and the excessive exposure of sensitive operational information. As Renewable Energy Communities continue to expand, centralized architectures become increasingly difficult to maintain due to the large number of heterogeneous participants and continuously changing environmental conditions. Consequently, decentralized automated negotiation has emerged as a promising alternative for supporting intelligent cooperation among autonomous renewable energy entities.

Recent advances in Artificial Intelligence have significantly improved the capabilities of automated negotiation systems. AI-driven negotiation mechanisms enable autonomous entities to dynamically analyze operational constraints, evaluate alternative coordination strategies, predict future energy demands, and adapt negotiation behavior according to changing environmental conditions. Intelligent negotiation agents can continuously optimize their decisions based on historical interactions, renewable energy forecasts, and real-time network conditions.

Within modern renewable energy ecosystems, Multi-Agent Systems (MAS) are frequently employed to implement automated negotiation processes. Each intelligent software agent may represent a distributed renewable entity such as a photovoltaic station, a wind turbine cluster, a battery storage unit, or an electric vehicle charging infrastructure. These agents autonomously manage local objectives while participating in collaborative negotiations with other entities inside the energy community.

Negotiation processes in distributed renewable environments typically involve multiple interdependent attributes, including available energy capacity, storage level, response time, operational cost, energy demand, and environmental conditions. Consequently, negotiation mechanisms must support complex multi-attribute decision-making while maintaining system scalability and operational efficiency.

Federated Learning contributes to automated negotiation by enabling distributed renewable entities to collaboratively improve prediction and optimization models without exchanging confidential operational data. Through decentralized learning processes, intelligent agents can enhance negotiation strategies while preserving participant privacy and reducing cybersecurity risks. This capability is particularly important in energy ecosystems where operational information may contain commercially sensitive data.

Edge AI technologies further improve automated negotiation efficiency by enabling local processing and real-time decision-making directly at the edge of the network. Instead of transmitting all operational information to centralized cloud infrastructures, intelligent agents can locally evaluate negotiation conditions, detect anomalies, and rapidly respond to dynamic changes in renewable energy production and consumption. This reduces communication latency and increases system responsiveness during critical operational situations.

Digital Twin technology also plays an important role in intelligent negotiation environments. By maintaining virtual replicas of physical renewable infrastructures, Digital Twins allow autonomous agents to simulate negotiation outcomes, evaluate coordination scenarios, and predict operational risks before applying decisions in the real system. Simulation-driven negotiation improves system reliability and supports proactive resource management inside distributed energy communities.

Another critical aspect of automated negotiation concerns transparency and trustworthiness. In many traditional AI systems, decision-making processes are difficult to interpret due to the opaque nature of machine learning algorithms. Explainable Artificial Intelligence (XAI) addresses this limitation by providing interpretable explanations regarding negotiation decisions and resource allocation strategies. Through XAI mechanisms, renewable energy operators can better understand the reasoning behind AI-generated negotiation outcomes, increasing confidence in autonomous coordination systems.

Recent research efforts increasingly focus on adaptive and decentralized negotiation architectures capable of supporting simultaneous interactions among multiple autonomous renewable entities. These approaches aim to improve interoperability, operational resilience, energy efficiency, and sustainability while preserving the autonomy of participating entities.

Compared with conventional coordination models, automated negotiation offers several important advantages for Renewable Energy Communities, including:

- decentralized decision-making,
- adaptive resource allocation,

- reduced operational latency,
- scalability in dynamic environments,
- privacy preservation,
- improved interoperability,
- intelligent cooperation among heterogeneous renewable infrastructures.

In this context, automated negotiation becomes a fundamental component of next-generation smart renewable energy ecosystems, enabling autonomous renewable entities to collaboratively manage distributed resources in a flexible, intelligent, and sustainable manner.

3. Multi-Agent Coordination and Automated Negotiation

The increasing complexity of Renewable Energy Communities requires intelligent coordination mechanisms capable of supporting distributed decision-making and adaptive cooperation between autonomous renewable entities. Unlike traditional centralized energy systems, decentralized renewable infrastructures operate in highly dynamic environments where production capacity, energy demand, and operational constraints continuously evolve.

To address these challenges, the proposed framework integrates Multi-Agent Systems, Artificial Intelligence techniques, and adaptive negotiation mechanisms in order to facilitate real-time coordination between distributed renewable participants. Intelligent agents are capable of exchanging information, evaluating operational conditions, and dynamically negotiating resource allocation strategies while preserving the autonomy of each entity.

The proposed coordination model focuses on interoperability, flexibility, and scalability, enabling renewable energy entities to cooperate efficiently without relying on centralized control infrastructures. In this context, interaction management and automated negotiation become essential mechanisms for ensuring intelligent collaboration inside Renewable Energy Communities.

3.1. Interactions in Renewable Energy Communities

In Renewable Energy Communities, autonomous renewable entities continuously interact in order to coordinate energy production, storage, and consumption activities. These interactions may involve photovoltaic systems, wind farms, battery storage infrastructures, smart buildings, or electric vehicle charging stations operating inside distributed smart energy ecosystems.

The interaction process enables renewable entities to exchange operational information, negotiate energy redistribution, coordinate flexibility services, and dynamically adapt to changing environmental conditions. Intelligent software agents facilitate these interactions through distributed communication mechanisms capable of supporting autonomous cooperation and adaptive decision-making.

Within the proposed framework, communication between agents is based on structured conversations and negotiation protocols. Agents may exchange requests, proposals, counterproposals, and coordination messages while preserving local autonomy and limiting unnecessary information disclosure.

Because renewable environments are highly dynamic, interactions must support real-time adaptation, distributed reasoning, and interoperability between heterogeneous infrastructures. In this context, Artificial Intelligence technologies such as Multi-Agent Systems, Edge AI, and Federated Learning improve the capability of renewable entities to cooperate efficiently under fluctuating operational conditions.

3.2. Coordination of Interactions

Coordination represents an essential mechanism for maintaining coherent collaboration between autonomous renewable entities. In distributed renewable energy systems, multiple agents may simultaneously participate in different negotiations while managing local operational objectives and constraints.

The proposed framework combines distributed coordination and adaptive negotiation mechanisms in order to support efficient cooperation without centralized control. Coordination services supervise communication consistency, synchronization between simultaneous negotiations, and adaptive resource allocation across the Renewable Energy Community.

Two coordination approaches are considered within the proposed architecture:

- generic coordination, focused on communication and interoperability services;
- strategic coordination, focused on intelligent decision-making and adaptive negotiation strategies.

The coordination process may also be:

- local, when agents manage their own negotiations independently;
- global, when shared protocols and coordination rules are applied to all participants in the system.

Unlike centralized energy management architectures, the proposed distributed coordination approach preserves participant autonomy while improving scalability, flexibility, and resilience inside dynamic renewable energy ecosystems.

3.3. Multi-Agent Automated Negotiation Mechanism

Automated negotiation enables autonomous renewable entities to collaboratively manage distributed resources without direct human intervention. Intelligent agents exchange proposals and counterproposals in order to establish agreements regarding energy redistribution, storage allocation, delivery intervals, or operational flexibility.

The negotiation process evolves through three main stages:

- partner identification,
- negotiation refinement,
- agreement establishment.

During negotiation, agents evaluate multiple operational attributes such as energy quantity, storage availability, operational cost, response time, and renewable production forecasts. Because these attributes are often interdependent, negotiation strategies must support adaptive multi-attribute reasoning.

The negotiation protocol defines the communication rules governing the interaction between agents, while the negotiation strategy determines how agents generate and evaluate proposals according to local objectives and environmental conditions.

Artificial Intelligence technologies significantly improve negotiation efficiency. Federated Learning enables collaborative optimization without exposing confidential data, Edge AI supports real-time local decision-making, while Digital Twin models allow renewable entities to simulate operational scenarios before applying negotiated decisions in the physical infrastructure.

Through these mechanisms, automated negotiation becomes a key component for enabling intelligent cooperation, interoperability, and adaptive resource management inside Renewable Energy Communities.

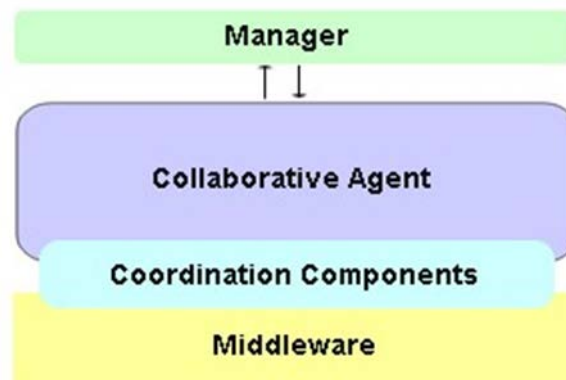
4. Collaborative Renewable Energy Architecture

The primary objective of the proposed software infrastructure is to support collaborative activities inside Renewable Energy Communities composed of autonomous and geographically distributed renewable energy entities. These entities may include photovoltaic systems, wind energy infrastructures, battery storage units, smart buildings, electric vehicle charging stations, or distributed renewable resource providers operating within the same smart energy ecosystem.

Because each renewable entity preserves its operational autonomy and manages its own local objectives, direct centralized control becomes difficult to implement efficiently. Consequently, intelligent negotiation and distributed coordination mechanisms become essential for enabling secure and adaptive cooperation between independent participants.

Figure 1 illustrates the proposed collaborative renewable energy architecture.

Figure 1. The architecture of the collaborative renewable energy system



The proposed architecture is structured into four main layers: Manager Layer, Intelligent Collaborative Agent Layer, Coordination Components Layer, and Middleware Layer.

The Manager Layer supervises the operational activities of each renewable energy participant and defines local objectives, constraints, priorities, and energy policies. The manager may represent either a human operator or an autonomous management service responsible for controlling local renewable resources.

The Intelligent Collaborative Agent Layer assists the manager by coordinating local and global interactions with other renewable entities. At the local level, the agent manages negotiations associated with a specific energy request or operational task. At the global level, the agent supervises multiple simultaneous negotiations involving several distributed participants. Intelligent agents continuously evaluate operational parameters such as renewable production forecasts, storage availability, energy demand, network conditions, and environmental constraints.

The Coordination Components Layer manages dependencies and synchronization constraints between multiple negotiations occurring simultaneously within the Renewable Energy Community. This layer enables distributed coordination between renewable entities while preserving participant autonomy and limiting unnecessary information exchange.

The Middleware Layer ensures communication interoperability between heterogeneous renewable infrastructures and supports message exchange between distributed intelligent agents. The middleware also facilitates adaptive communication services, synchronization mechanisms, and secure information transfer across the renewable ecosystem.

Within the proposed framework, each negotiation evolves through three main phases: initialization, refinement, and agreement establishment.

During the initialization phase, the negotiation object and the operational negotiation framework are defined. Intelligent agents may use historical negotiation information, predictive analytics, Federated Learning models, and Digital Twin simulations to identify the most suitable renewable partners.

During the refinement phase, the participating entities exchange proposals and counterproposals regarding energy redistribution, storage allocation, delivery intervals, operational costs, and flexibility services. Intelligent agents dynamically adapt their negotiation strategies according to environmental changes and operational constraints.

In the final phase, the agreement is validated and transformed into an executable coordination contract. Digital Twin services and Edge AI mechanisms may supervise the execution of the negotiated agreement in real time in order to detect anomalies and maintain operational stability.

For each negotiation, the Intelligent Collaborative Agent manages one or several negotiation objects, the negotiation framework, and the associated coordination constraints. Global negotiation parameters may include negotiation duration, communication limits, candidate selection policies, coordination tactics, interoperability constraints, and adaptive communication protocols.

4.1. Collaborative Coordination Components

In order to manage the complexity of distributed renewable energy negotiations, the proposed framework introduces several coordination components responsible for supporting adaptive cooperation between autonomous renewable entities.

These coordination components facilitate distributed synchronization between simultaneous negotiations and dynamically manage operational dependencies between renewable participants.

The proposed coordination components are the following:

- Energy Allocation Component – manages the redistribution of renewable energy resources between autonomous participants through adaptive proposal exchange mechanisms.
- Reservation Component – ensures that a specific renewable resource or storage capacity is reserved entirely for a single operational request or participant.
- Adaptive Division Component – coordinates the partitioning of complex energy requests into multiple independent negotiation slots that may be processed simultaneously.
- Broker Component – automatically identifies suitable renewable participants and initializes negotiation processes according to operational objectives, energy forecasts, and system constraints.
- Transport and Synchronization Component – coordinates simultaneous negotiations involving shared transport infrastructures, energy routing mechanisms, or synchronized energy delivery operations.

Each coordination component can evaluate received proposals, validate operational constraints, and generate adaptive counterproposals according to the current state of the Renewable Energy Community.

From the coordination perspective, the proposed components may be classified into two categories.

The first category includes coordination components operating in a closed negotiation environment. These components rely only on the information associated with the current negotiation and manage constraints locally. Examples include the Energy Allocation Component, Reservation Component, and Adaptive Division Component.

The second category includes coordination components operating in an open negotiation environment. These components use information extracted from multiple simultaneous negotiations occurring throughout the renewable ecosystem. The Broker Component and the Transport and Synchronization Component belong to this category because they coordinate interactions across several distributed renewable entities simultaneously.

Unlike traditional negotiation architectures that only supervise isolated proposal exchanges, the proposed framework enables the coordination of complex distributed negotiations involving multiple autonomous renewable participants and heterogeneous operational constraints.

The novelty of the proposed architecture resides in the integration of intelligent coordination services, distributed negotiation mechanisms, Federated Learning models, Digital Twin simulations, and adaptive interoperability services within a unified collaborative framework dedicated to Renewable Energy Communities.

The proposed coordination infrastructure allows:

- synchronization of simultaneous negotiations,
- adaptive resource allocation,
- distributed decision-making,
- interoperability between heterogeneous renewable infrastructures,
- privacy preservation,
- and intelligent cooperation between autonomous renewable entities operating inside dynamic smart energy ecosystems.

5. Conclusions and Future Work

The rapid development of decentralized renewable energy infrastructures has created the need for intelligent coordination mechanisms capable of supporting adaptive cooperation between autonomous renewable entities. Renewable Energy Communities operate in highly dynamic environments characterized by fluctuating energy production, variable demand, heterogeneous infrastructures, and continuously evolving operational constraints. In this context, traditional centralized management approaches become increasingly difficult to apply efficiently.

This paper proposed an AI-driven collaborative framework dedicated to distributed coordination and automated negotiation inside Renewable Energy Communities. The proposed approach integrates Multi-Agent Systems, Federated Learning, Edge AI, Digital Twin technologies, and Explainable Artificial Intelligence in order to support intelligent interaction and adaptive decision-making between autonomous renewable entities.

The presented framework enables distributed renewable participants to exchange operational information, negotiate resource allocation, coordinate simultaneous interactions, and dynamically adapt their strategies according to environmental and operational conditions. Unlike centralized coordination architectures, the proposed approach preserves participant autonomy while improving interoperability, scalability, flexibility, and resilience inside smart renewable ecosystems.

Another important contribution of the paper is the integration of coordination components capable of supervising multiple simultaneous negotiations and managing dependencies between distributed renewable entities. Through intelligent coordination and adaptive negotiation mechanisms, the proposed architecture facilitates efficient cooperation between geographically distributed participants operating under heterogeneous constraints.

The integration of Federated Learning and Edge AI technologies improves privacy preservation and real-time responsiveness, while Digital Twin services enable predictive simulation and operational optimization before executing negotiated agreements in the physical infrastructure. In addition, Explainable Artificial Intelligence mechanisms contribute to improving transparency and trustworthiness in autonomous decision-making processes.

Future research directions will focus on extending the proposed framework through the integration of blockchain-based trust mechanisms, reinforcement learning strategies for adaptive negotiation, and predictive sustainability models for large-scale renewable ecosystems. Another important research direction concerns the implementation of fully autonomous coordination services capable of dynamically reorganizing renewable energy communities according to real-time operational conditions and market requirements.

The proposed framework represents a promising step toward the development of intelligent, interoperable, and sustainable smart energy ecosystems based on distributed Artificial Intelligence and autonomous renewable cooperation.

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FINANCIAL PERFORMANCE ANALYSIS OF THE ELECTRICAL INSTALLATION SECTOR IN ROMANIA: DYNAMICS, DETERMINANTS, AND IMPLICATIONS (2019–2024)

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Georgiana Emilia VIȘAN**

Abstract

The electrical installation sector is a key part of the economy, playing a crucial role in the development of infrastructure, residential and industrial construction, as well as in the implementation of new energy technologies. The purpose of this article is to analyse the financial performance of a company in this industry over the 2019–2024 period and to compare it with the industry-wide averages, in order to highlight the company's competitive position and its level of economic efficiency. The research methodology is quantitative, based on the analysis of economic and financial indicators (turnover, net profit, ROA, ROE, ROS and labor productivity), calculated using data from the company's financial statements and sectoral analysis available on the Risco platform. The research results show a significant growth of the sector during the analysed period, with increases in turnover and profit, as well as improvements in profitability and productivity indicators. At the same time, the analysed company outperformed the sector average in most years. The main impact of the research lies in highlighting the development potential of the electrical installations sector and demonstrating that efficient resource management can lead to financial performance above the market average.

Keywords: financial diagnosis, financial performance, rates of return, labour productivity, sectoral analysis.

1. Introduction

The electrical installation sector plays an important role in the contemporary economy, directly contributing to the development of energy infrastructure and the implementation of projects in the field of residential, industrial and commercial construction. The evolution of this sector is influenced by trends in infrastructure investment, the modernization of energy systems, and growing demand for advanced technological solutions in the field of electrical installations. In this context, evaluating the financial performance of companies operating in this field is an essential tool for understanding their level of economic efficiency and their ability to adapt to market demands.

According to the specialized literature, financial performance analysis is the process of evaluating the economic and financial condition of a business entity, with the aim of identifying its level of profitability, efficiency, and financial stability. Profitability refers to a company's ability to generate profit by utilizing its factors of production and equity capital, regardless of their source.¹ Profitability is measured either in absolute terms, through profit (operating, gross, or net), or in relative terms, through a system of efficiency ratios, calculated as the report between the profit earned at the end of a year and the resources used to generate it (for example, average assets or average equity)². These reports are known as return ratios and enable a comparative analysis of a company's performance both internally, over several consecutive years, and relative to the industry in which it operates.

This paper analyzes the financial performance of the electrical installation sector in Romania (CAEN code 4321) and the positioning of a representative company, AEG International Servicii SRL, relative to the sector average for the period 2019–2024. The main research question involves analyzing the evolution of the sector's

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¹ See Mihaela Sudacevschi, Viorica Ștefan-Duicu, Financial Performance Analysis of the Company through Profitability Ratios, in Challenges of the Knowledge Society Journal, 2024

² See Maria Grigore, Viorica Ștefan-Duicu, Managementul financiar al firmei, Nicolae Titulescu University Publishing House, Bucharest, 2025

economic and financial performance and determining the competitive position of the analyzed company relative to the market.

The research conducted is based on methods specific to economic and financial analysis, such as: analysis of financial indicators, comparative analysis between the company's performance and that of the sector, analysis of the evolution over time of key economic indicators, as well as SWOT analysis, to identify the strengths, weaknesses, opportunities, and threats that influence the company's financial performance. The data used in the analysis comes from the company's financial statements and from sector-specific information available in the Risco database.

The research hypothesis is that the company under analysis demonstrates financial performance that exceeds the average for the electrical installation sector, as reflected in high levels of revenue, net profit, labor productivity, and rates of return.

The research results highlight that AEG International Servicii SRL holds a favorable competitive position within the analyzed sector, recording values above the sector average in most years regarding the main economic and financial indicators. The comparative analysis demonstrated that the company's financial performance is the result of efficient resource utilization, adaptation to market dynamics, and a strategy focused on development and financial consolidation.

2. Analysis of the financial performance of the electrical installation sector (2019-2024)

To understand the general trends in the electrical installation sector and thus highlight the specific characteristics of a company operating under CAEN code 4321, in this section we have calculated and analyzed the trends of indicators such as: average revenue, average net profit, return on assets (ROA), return on equity (ROE), return on sales (ROS), and labor productivity. The sectoral analysis of the electrical installation sector is based on information available at www.risco.ro, and the values of the calculated indicators are summarized in Table 1.

Table 1. Profitability indicators of the Electrical Installation sector in the period 2019-2024

Current no.	Indicators	u.m.	2019	2020	2021	2022	2023	2024
1	Number of employees	-	37,575	38,780	40,158	43,107	45,762	44,809
2	Number of companies	-	6,940	7,369	7,897	8,632	8,848	8,121
3	Turnover	RON	8,697,706,283	9,465,198,727	10,617,400,098	14,370,996,994	19,628,118,498	20,094,776,706
4	Net profit	RON	857,623,261	1,028,629,995	1,128,534,308	1,657,284,393	2,702,737,555	2,410,977,461
5	Equity	RON	3,208,369,163	3,683,811,203	3,976,525,122	4,536,318,194	6,314,045,289	6,664,860,437
6	Liability	RON	4,514,482,842	4,821,313,942	5,539,094,969	7,127,867,591	8,402,317,665	8,941,248,413
7	Assets (5+6)	RON	7,722,852,005	8,505,125,145	9,515,620,091	11,664,185,785	14,716,362,954	15,606,108,850
8	Cifra de afaceri medie (3/2)	RON/company	1,253,272	1,284,462	1,344,485	1,664,851	2,218,368	2,474,421
9	Profit net mediu (4/2)	RON/company	123,577	139,589	142,907	191,993	305,463	296,882
10	Return on Assets (4/7)	%	11.11%	12.09%	11.86%	14.21%	18.37%	15.45%
11	Return on Equity (4/5)	%	26.73%	27.92%	28.38%	36.53%	42.81%	36.17%
12	Return on Sales (4/3)	%	9.86%	10.87%	10.63%	11.53%	13.77%	12.00%
13	Labor productivity (3/1)	RON/employee	231,476	244,074	264,391	333,380	428,917	448,454

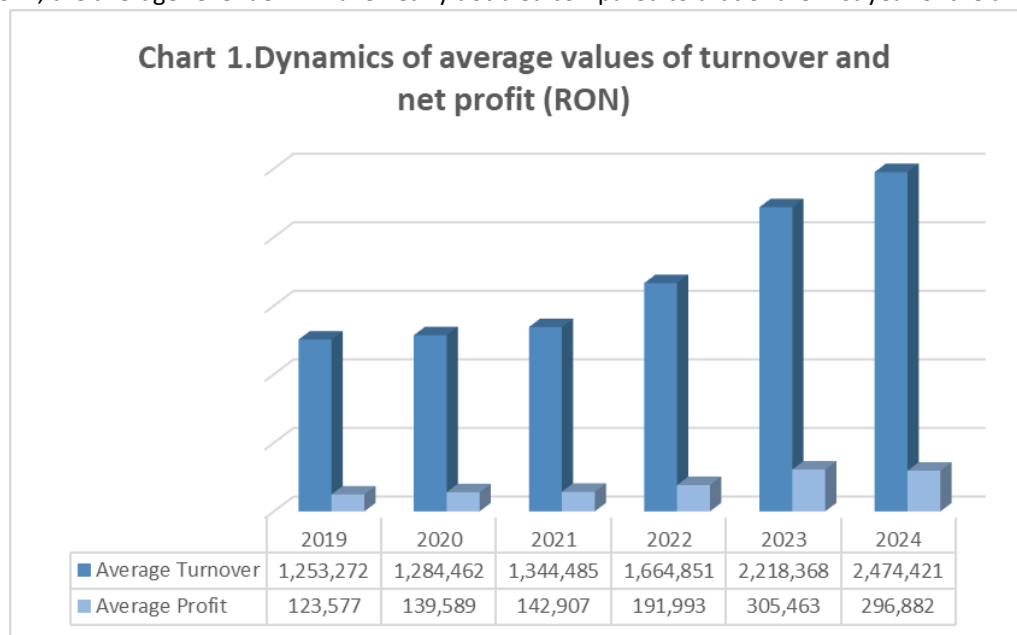
Source: Authors processing based on data from www.risco.ro [accessed July 19 2025]

The number of companies and employees in the electrical installation sector grew steadily between 2019 and 2023, but in 2024, both indicators declined compared to 2023: by 8% the number of companies and by 2% the number of employees.

2.1. Dynamics of turnover and net profit of the electrical installation sector

The first half of the period under review was marked by the COVID-19 pandemic, which slowed the growth rate of total revenue in the electrical installation sector. In 2022 and 2023, there were sharp increases in sales volume, driven by rising demand for automation and smart electrical installation projects. The peak was reached in 2024, with this trend reflecting the sector's expansion—driven by growth in residential and industrial construction, electrical and energy infrastructure projects (including renewable energy), and investments in modern electrical technologies.

Compared to the average turnover, we observe the same upward trend for the period 2019–2024 (Chart 1). By 2024, the average revenue will have nearly doubled compared to that of the first year of the analysis.



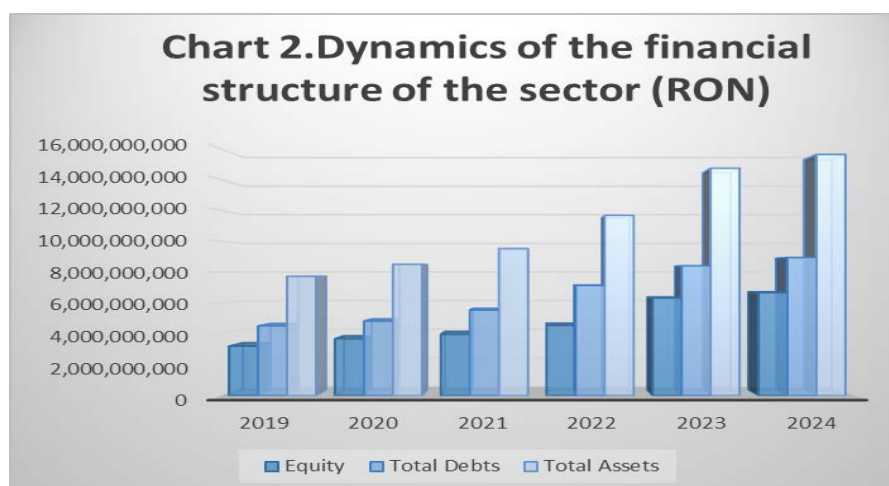
Source: Authors processing based on data from Table 1

Between 2019 and 2023, net profit grew faster than revenue, indicating an improvement in economic efficiency and profit margins. The year 2024 marked a deviation from this trend, with a decline in net profit, both in total value and on average, despite rising revenues.

In conclusion, between 2019 and 2024, the electrical installation sector experienced strong upward growth in both revenue and net profit. These results confirm the sector's consolidation, its ability to adapt to market demands, and the improvement in financial performance. The slight decline in profit in 2024 reflects future cost-related challenges but does not affect the overall positive trend.

2.2. Dynamics of the financial structure of the electrical installation sector

The increase in turnover and profit for companies in the electrical installation sector was due to the expansion of the operational capacity of firms in the industry. Their total assets grew every year during the period analyzed (Chart 2) as a result of investments made and an increase in the volume of business. The structure of the financing sources used by companies in the sector did not fluctuate significantly from one year to the next, with equity representing an average of 42% of total resources and debt 58%. Although the debt ratio rose slightly in 2022, to 61%, it has fallen to approximately 57% over the past two years, indicating an improvement in financial stability.



Source: Authors processing based on data from Table 1

Equity showed a positive trend throughout the entire period analyzed, reaching 6.66 billion RON in 2024, more than double the 2019 figure (3.21 billion RON). This growth signifies financial consolidation among firms in the sector, the reinvestment of profits by companies (confirmed by the positive trend in net profit), improved capitalization of firms, a higher degree of financial stability, and a reduction in dependence on external financing.

Alongside the strengthening of equity, the sector under review is also experiencing an increase in debt, driven by factors such as: a slowdown in the pace of collections or payment delays from certain customers (e.g., real estate developers, public institutions), increased investment aimed at expanding operations, and the unfavorable economic environment.

Total liabilities increased from RON 4.51 billion in 2019 to RON 8.94 billion in 2024. Although there was an increase in liabilities, this is proportional to the expansion of business. Liabilities grew at a slower pace than equity, which is a positive sign for potential investors.

The evolution of equity and debt between 2019 and 2024 reflects a balanced financial development of the electrical installation sector. Companies have strengthened their financial base by accumulating profits and increasing equity. Debt has increased, but at a sustainable pace, without posing a major risk of over-indebtedness. The financing structure remains stable, and companies' ability to sustain their investments is solid.

2.3. Evolution of profitability rates in the electrical installation sector

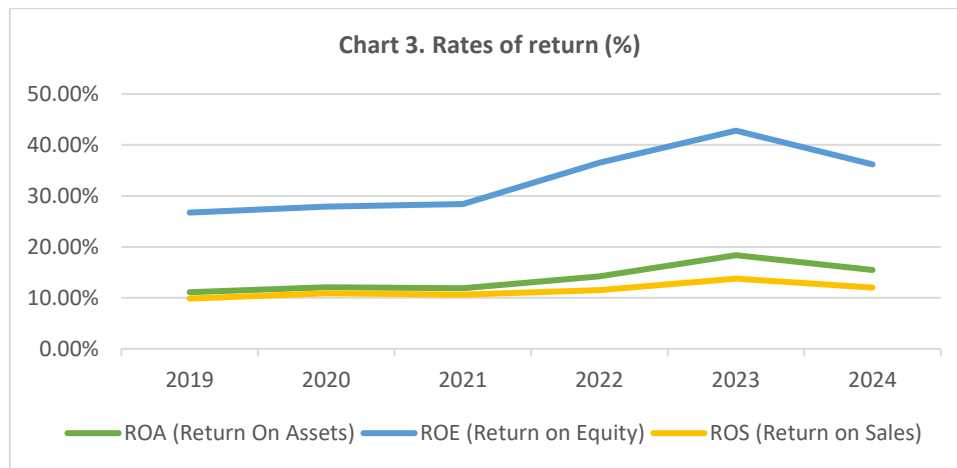
To measure the relative profitability of companies in the electrical installation sector, we calculated and analyzed the trends for three profitability ratios:

- Return on Asset (ROA) is a ratio that shows the results on the total assets used in the company.³
- Return on Equity (ROE) is the company's ability to generate profits with its own capital.⁴
- Return on sales (ROS), also known as net profit margin (NPM), is calculated by dividing net profit by net turnovers.

The lowest rates of return are recorded in the first three years analyzed (2019–2021), driven by the cumulative impact of the energy crisis and the COVID-19 pandemic. In the following two years, rates of return increase as a result of investments made in the development, digitization, and maintenance of the electrical infrastructure. The year 2024 marks a decline in all three rates of return compared to 2023, though they remain at a level comparable to that of 2022.

³ See Bachtar Asikin, Mohd Haizam Saudi, Roeshartono Roespinoedji, Influence of Return on Assets (ROA), Return on Equity (ROE), and Earning Per Share (EPS) of Stock Price (Survey on Corporate Advertising, Printing, and the Media listed on the Indonesia stock exchange Period 2015-2019), Solid State Technology, Volume: 63 Issue: 3, 2020

⁴ See Putu Cindy Arintya Ardana, Henny Triyana Hasiubuan, Maria M. Ratna Sari, Ketut Alit Suardana, The Effect of Corporate Social Responsibility (CSR) on Profitability of Mining Companies Registered on the Indonesia Stock Exchange (IDX), International Journal of Management and Commerce Innovations, Vol. 8, Issue 1, April 2020 - September 2020



Source: Authors processing based on data from Table 1

Chart 3 shows a positive trend in ROA between 2019 and 2023, with a 7.26 percentage point increase in 2023 compared to 2019. This trend indicates an increase in return on assets, demonstrating that companies in the sector have become more efficient in using resources to generate profit. The peak is reached in 2023 (18.37%), resulting from previous investments that have begun to generate added value. The decline in ROA to 15.45% in 2024 indicates a decrease in profitability, due to an increase in assets (investments in progress) without a proportional increase in profit. However, the 2024 ROA remains higher than the values recorded in 2019–2023.

ROE follows a similar trend to that of ROA. Although it shows a positive trend throughout the 2019–2023 period, 2022 and 2023 stand out with a significant increase, indicating a rise in net profit, sound equity management, and efficient investments. In 2024, ROE falls to approximately the 2022 level (approx. 36%) as a result of a moderate decline in profit amid an increase in equity.

The significantly higher ROE values compared to ROA indicate a positive financial leverage effect, i.e., an efficient use of debt. The electrical installation sector has demonstrated high and consistent profitability, especially during the 2022–2023 period. An ROE above 35% is an excellent level in any industry, demonstrating a very strong ability to generate value for shareholders. This also supports the earlier observation regarding the growth in equity: companies are profitable and reinvest a large portion of their earnings in development.

Between 2019 and 2023, ROS maintained a positive trend, rising from 9.86% to 13.77%, which means that companies managed to increase their profitability from sales by expanding the volume of higher-margin projects. In 2024, a slight decline is visible compared to 2023 (to 12%) as a result of projects with lower profit margins.

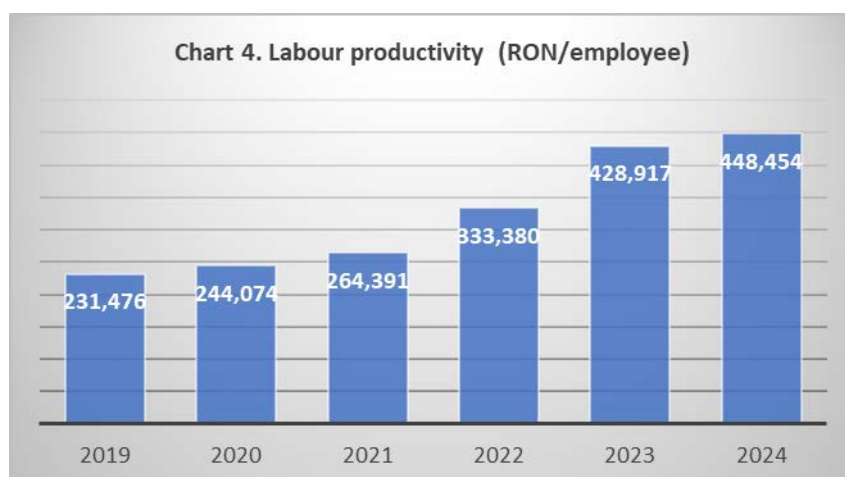
ROS remains at a solid and stable level, indicating sound financial management practices and an effective ability to convert revenue into profit. Its evolution also supports the positive trend previously observed in ROA and ROE.

The three ratios—ROS, ROA, and ROE—together form a complete picture, with ROS showing operational efficiency, ROA reflecting asset efficiency, and ROE measuring returns to shareholders. The results recorded between 2019 and 2024 suggest that the electrical installation sector is financially sound, companies in the sector are properly managed, and investments in assets have proven profitable.

2.4. Evolution of labour productivity in the electrical installation sector

According to the data presented in Table 1, the electrical installation sector as a whole recorded significant growth in both turnover and the number of firms and employees between 2019 and 2023. In 2024, there was a decline in the number of employees and the number of companies in the sector, accompanied by a decrease in net profit, though this did not affect the upward trend in turnover.

The number of employees increased by approximately 19% between 2019 and 2024 (from 37,575 to 44,809), while turnover nearly doubled. The moderate increase in the number of employees and the number of firms relative to the growth rate of profit and turnover indicates an increase in the sector's productivity and efficiency.



Source: Authors processing based on data from Table 1

As shown in Chart 4, labor productivity has increased every year, rising from 231,476 RON per employee in 2019 to 448,454 RON per employee in 2024. The factors that have led to increased efficiency in the work performed by employees in the sector are: the digitization and technological advancement of activities (automation, design software, high-performance equipment), the increase in the average value of projects, including more complex and better-paid works (e.g., smart installations, photovoltaic systems, etc.), and investments in professional training.

Labor productivity has seen sustained and healthy growth, serving as one of the most relevant indicators of the sector's maturity. This confirms that electrical installation work has not only expanded in volume but has also become more efficient.

3. Analysis of the financial performance of AEG INTERNATIONAL SERVICII SRL (2019–2024)

AEG INTERNAȚIONAL SERVICII SRL is a limited liability company whose primary business activity falls under CAEN code 4321: Electrical installation work.

Since its establishment 19 years ago, the company has carried out numerous design and installation projects for electrical distribution and power usage systems, undertaking projects for both new electrical installations and the modernization of existing ones.

The company is equipped with state-of-the-art technology at the European level and has a well-trained technical team consisting of experienced engineers, foremen, technicians, and electricians.

To compare the financial performance of AEG INTERNAȚIONAL SERVICII SRL with that of the industry, in Table 2 we calculated the same performance indicators as in Table 1 of Section 2.

Table 2. Profitability indicators of the company AEG International Servicii SRL in the period 2019-2024

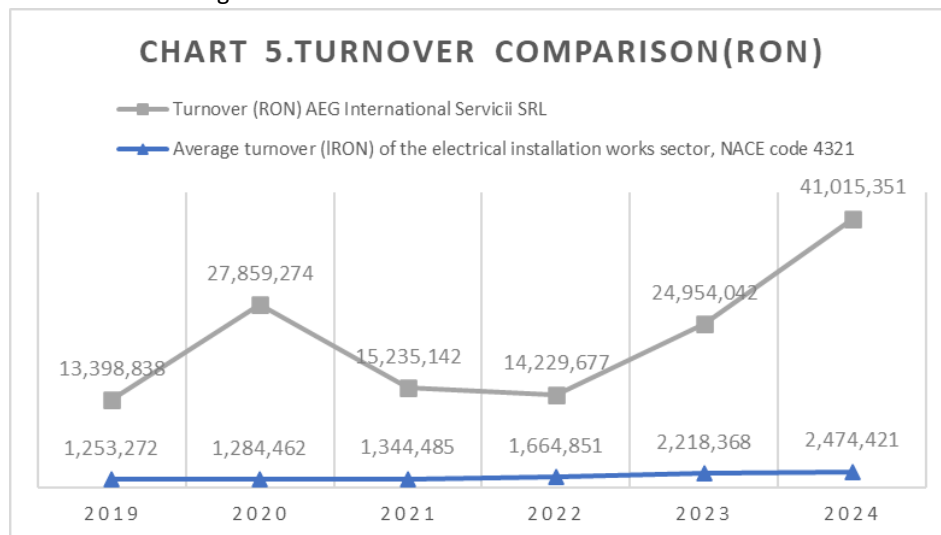
Current no.	Indicators	u.m.	2019	2020	2021	2022	2023	2024
1	Number of employees	-	43	47	48	47	47	54
2	Turnover	RON	13,398,838	27,859,274	15,235,142	14,229,677	24,954,042	41,015,351
3	Net profit	RON	1,218,970	663,175	1,553,472	713,053	1,251,607	5,969,406
4	Equity	RON	3,226,357	3,889,532	5,230,723	5,943,776	7,787,098	11,623,075
5	Liability	RON	5,116,076	4,032,873	4,268,140	5,329,193	6,244,544	9,680,557
6	Assets (4+5)	RON	8,342,433	7,922,405	9,498,863	11,272,969	14,031,642	21,303,632
7	Return on Assets (3/7)	%	14.61%	8.37%	16.35%	6.33%	8.92%	28.02%
8	Return on Equity (3/4)	%	37.78%	18.03%	29.70%	12.33%	22.14%	51.36%
9	Return on Sales (3/2)	%	9.10%	2.38%	10.20%	5.01%	5.02%	14.55%
10	Labor productivity (2/1)	RON/employee	311,601	592,751	317,399	302,759	530,937	759,544

Source: Authors processing based on information from the financial statements of AEG International Servicii SRL

3.1. The evolution of the turnover and net profit of the company AEG International Servicii SRL

To assess the position of AEG Internațional Servicii SRL relative to other companies in its industry, we compared the company's revenue and net profit, as reported in its financial statements, with the average revenue (Chart 5) and net profit (Chart 6) of the industry under review.

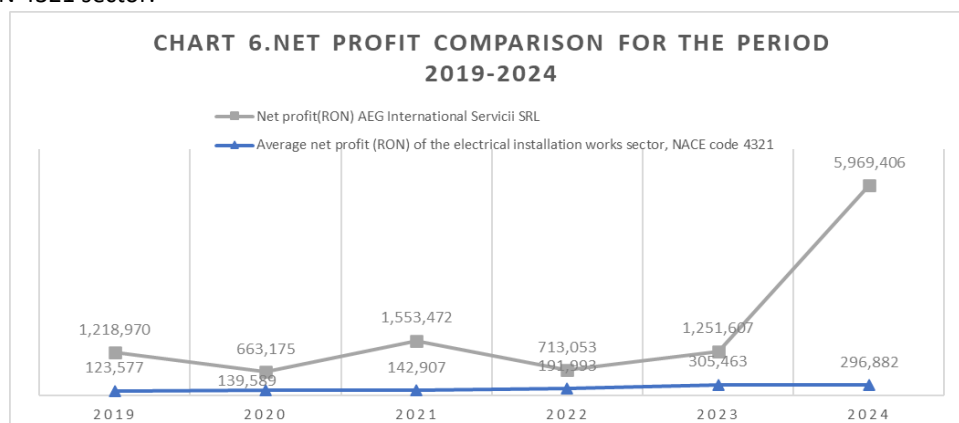
Figure 5 shows that in 2019, AEG International Servicii SRL reported revenue of 13,398,838 RON, a figure significantly higher than the average for the electrical installation sector (1,253,272 RON), representing more than ten times the sector average.



Source: Authors processing based on information from Table 1 and Table 2

In 2020, the company's revenue increased significantly, reaching 27,859,274 RON, while the sector average saw only a slight increase, to 1,284,462 RON. This trend widened the gap between the company's performance and the market average. In 2021, the company recorded a decline in revenue to 15,235,142 RON, while the sector continued to grow, reaching 1,344,485 RON. However, AEG International Servicii SRL remained at a level more than eleven times higher than the industry average. In 2022, the company's revenue declined slightly to RON 14,229,677, while the sector average saw a more pronounced increase, reaching RON 1,664,851, remaining significantly above the market average. In 2023, the company returned to an upward trend, achieving a turnover of 24,954,042 RON, compared to the sector average of 2,218,368 RON. In 2024, AEG International Servicii SRL reached the highest turnover level during the analyzed period, namely 41,015,351 RON, while the sector average reached 2,474,421 RON. The growth rate of turnover was considerably higher than that recorded at the sector level, highlighting a solid competitive position and growth above the market average.

Chart 6 shows that in 2019, AEG International Servicii SRL reported a net profit of 1,218,970 RON, nearly 10 times higher than the industry average (123,577 RON), clearly standing out above the average for companies in the CAEN 4321 sector.



Source: Authors processing based on information from Table 1 and Table 2

In 2020, the company's net profit fell to RON 663,175, but remained approximately 4.7 times higher than the sector average (RON 139,589), maintaining a superior position relative to other entities in the sector. In 2021, the company recorded significant growth, reaching RON 1,553,472—more than 10 times the sector average (RON 142,907)—thereby consolidating its competitive advantage. The company's net profit in 2022 decreased to 713,053 RON, but remained approximately 3.7 times higher than the sector average (191,993 RON). AEG International Servicii SRL achieved a net profit of RON 1,251,607 in 2023, approximately 4 times higher than the sector average (RON 305,463), remaining above the sector average in the context of a marked sector growth. In 2024, the sector's average profit fell to RON 296,882, while the company posted its best result for the period analyzed (RON 5,969,406).

3.2. The evolution of profitability and labour productivity at AEG International Servicii SRL

To compare the economic profitability of AEG Internațional Servicii SRL with that of the sector in which it operates, Table 3 presents the company's ROA values, determined based on its financial statements, and those of the sector, calculated in Section 2.

Table 3. ROA comparison for the period 2019-2024

ROA YEARS	AEG International Servicii SRL	Electrical installation sector, NACE code 4321
2019	14.61%	11.11%
2020	8.37%	12.09%
2021	16.35%	11.86%
2022	6.33%	14.21%
2023	8.92%	18.37%
2024	28.02%	15.45%

Source: Authors processing based on information from Table 1 and Table 2

The electrical installation sector recorded moderate growth in ROA between 2019 and 2023, followed by a slight decline in 2024. This fluctuation reflects market changes and economic factors affecting the entire sector, but the sector remains relatively stable compared to the company's performance.

In 2020, 2022, and 2023, AEG Internațional Servicii SRL's ROA values are lower than the sector's, while in the other years they are higher, with the differences increasing progressively from one year to the next. In 2020, the company's ROA decreased by approximately 6 percentage points compared to the previous year and was approximately 4 percentage points lower than the sector's ROA in 2020, due to pandemic-related restrictions that disrupted the company's operations. In 2021, the company recovers, doubling its ROA, but in 2022 it records the lowest ROA value of the period (6.33%) as a result of temporary adjustments in the contract portfolio. In 2024, AEG Internațional Servicii SRL reaches its highest ROA (28.02%), exceeding the sector average by 12.57 percentage points. The trend in 2024 indicates a stabilization of operations and a more efficient use of technical resources.

For AEG Internațional Servicii SRL, ROE follows the same trend as ROA, recording values lower than the industry average in 2020, 2022, and 2023, and higher in the other years (Table 4). However, in the case of ROE, the differences between the company and the sector are much larger (approx. 24 p.p. in 2022 and 21 p.p. in 2023), demonstrating lower financial leverage for AEG International Services SRL. With lower financial debt compared to the sector average, the company does not benefit as much from financial leverage. Even in years with ROE values higher than the sector average, financial leverage is lower for the company under review. This

is most evident in 2021, when the favorable difference between the company and the sector is 4.49 percentage points for ROA and only 1.32 percentage points for ROE.

Table 4. ROE comparison for the period 2019-2024

ROE YEARS	AEG International Servicii SRL	Electrical installation sector, NACE code 4321
2019	37.78%	26.73%
2020	18.03%	27.92%
2021	29.70%	28.38%
2022	12.33%	36.53%
2023	22.14%	42.81%
2024	51.36%	36.17%

Source: Authors processing based on information from Table 1 and Table 2.

As with ROA, in 2024 the company stands out with excellent profitability relative to equity. The ROE of 51.36% is the highest in the entire period analyzed and indicates an efficient use of the capital invested by shareholders.

If in the case of ROA and ROE AEG International Servicii SRL had values higher than the sector in 2019, 2021 and 2024, ROS is higher than the sector average only in 2024 (Table 5).

Table 5. ROS comparison for the period 2019-2024

ROS YEARS	AEG International Servicii SRL	Electrical installation sector, NACE code 4321
2019	9.10%	9.86%
2020	2.38%	10.87%
2021	10.20%	10.63%
2022	5.01%	11.53%
2023	5.02%	13.77%
2024	14.55%	12.00%

Source: Authors processing based on information from Table 1 and Table 2.

For the entire sector, the ROS ranged from 9.86% in 2019 to 13.77% in 2023, with a slight decline in 2024, when it reached 12%. In contrast, AEG International Services SRL experienced volatile sales profitability, with a significant decline in 2020, when it reached a minimum for the period (2.38%), and a strong recovery in 2024, when it reached 14.55%. This substantial increase reflects an improvement in operational efficiency and an ability to generate higher profits relative to revenue.

The comparative results regarding labor productivity for AEG International Servicii SRL versus the average labor productivity for the electrical installation sector for the period 2019–2024 are presented in Table 6.

In 2019, the company's productivity (311,601 RON/employee) exceeded the industry average (231,476 RON/employee), indicating more efficient use of human resources from the very beginning of the period under review. In 2020, the gap widened significantly, with the company recording 592,751 RON/employee, compared to just 244,074 RON/employee at the sector level, demonstrating performance that was clearly superior to the market.

Table 6. Labor productivity comparison for the period 2019-2024

YEARS \ Labor productivity	AEG International Servicii SRL	Electrical installation sector, NACE code 4321
2019	311,601 RON/ employee	231,476 RON/ employee
2020	592,751 RON/ employee	244,074 RON/ employee
2021	317,399 RON/ employee	264,391 RON/ employee
2022	302,759 RON/ employee	333,380 RON/ employee
2023	530,937 RON/ employee	428,917 RON/ employee
2024	759,544 RON/ employee	448,454 RON/ employee

Source: Authors processing based on information from Table 1 and Table 2.

In 2019, the company's productivity (311,601 RON/employee) exceeded the industry average (231,476 RON/employee), indicating more efficient use of human resources from the very beginning of the period under review. In 2020, the gap widened significantly, with the company recording 592,751 RON/employee, compared to just 244,074 RON/employee at the sector level, demonstrating performance that was clearly superior to the market. In 2021, although the company's productivity fell to 317,399 RON/employee, it remained above the sector average (264,391 RON/employee). However, in 2022, the company recorded a decline in labor productivity below the sector average of 333,380 RON/employee, marking the only year in which the company underperformed the sector average. Starting in 2023, AEG International Servicii SRL regained its competitive edge, reaching 530,937 RON/employee, above the sector average of 428,917 RON/employee. The positive trend continues in 2024, when the company's productivity reaches 759,544 RON/employee, significantly exceeding the sector average of 448,454 RON/employee.

Despite significant annual fluctuations, the company has recorded productivity levels above the sector average in most years, highlighting high efficiency in labor utilization and a solid competitive position within the electrical installation sector.

4. Conclusions

The analysis of the financial performance of AEG Internațional Servicii SRL covered the period from 2019 to 2024 and was based on data from the company's financial statements. To provide a better understanding of the company's financial performance, the conclusions of the analysis are summarized in the SWOT matrix in Table 7, which identifies the company's strengths and weaknesses relative to its industry, as well as the opportunities and threats.

The SWOT analysis highlights that AEG International Servicii SRL has a strong competitive position within the electrical installation sector. The company has high growth potential, but long-term success depends on maintaining financial stability and continuously adapting to market conditions.

An analysis of financial performance indicators for the 2019–2024 period highlights a positive trend for AEG International Servicii SRL, characterized by significant growth in revenue and net profit, particularly in 2024. Compared to the average for CAEN sector 4321, the company recorded higher productivity values in most years and, in the last year analyzed, considerably higher return rates (ROA, ROE, and ROS).

Although the 2020–2023 period was marked by fluctuations and temporary declines in performance, the company demonstrated a strong capacity for recovery and financial consolidation. The year 2024 represents the most successful year for AEG International Servicii SRL within the analyzed period, confirming the efficient use of assets, equity, and human resources.

Table 7. SWOT analysis of the profitability of AEG International Servicii SRL (2019 -2024)

Strengths	Weaknesses
• High revenue and net profit in 2024, well above the industry average • Return on assets (ROA), return on equity (ROE), and return on sales (ROS) above the industry average in 2024 • Labor productivity above the industry average in most years • Ability to recover quickly following periods of declining performance indicators	• Significant fluctuations in revenue and net profit between 2020 and 2023 • Sensitivity of performance indicators to fluctuations in activity volume • ROA and ROE values below the industry average in half of the years analyzed (2020, 2022, and 2023)
Opportunities	Threats
• Expanding the customer base • Increasing demand for electrical installation work • Investing in modern technologies to improve efficiency • Strengthening market position by reinvesting profits • Accessing public projects or European funding	• High competition in the electrical installation sector • Economic instability and fluctuations in the construction market • Rising material and labor costs • Adverse tax changes • Delays in collecting receivables

Source: Authors processing based on data from this paper

In conclusion, AEG International Servicii SRL presents a solid financial position, a good ability to adapt to changes in the economic environment, and favorable prospects for development in the medium and long term.

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THE SPOTIFY MODEL AS A STRATEGIC MARKETING TOOL FOR GAINING COMPETITIVE ADVANTAGE

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Abstract

In an organizational context characterized by uncertainty, accelerated digital transformation and increased competitive pressures, a company's ability to innovate quickly and efficiently becomes an essential element for obtaining and maintaining competitive advantage. The Spotify model, originally developed to scale agile methods in a dynamic technological environment, proposes an organizational structure based on autonomous teams, cross-functional collaboration, and a culture of continuous learning. Implementing the Spotify model can be a success factor in the activity of any type of company, this model being the basis for quickly building a consistent and complete experience for the targeted consumer segment. Ensuring a complete experience for consumers leads to retention and building a solid relationship with representatives of the target segment.

In this context, the following paper explores how implementing the Spotify model can strategically contribute to creating a sustainable competitive advantage, by stimulating innovation, increasing the reaction speed to changes and strengthening employee involvement, examining both the benefits of this model – such as operational agility, reduced time to market and talent retention – and the challenges related to its adoption in different organizational contexts. The conclusions drawn emphasize the need to adapt the model to the specifics of each organization and the importance of an organizational culture that supports the principles of autonomy, responsibility and innovation.

Keywords: agile marketing, competitive advantage, management marketing, strategic marketing, Spotify model.

1. Introduction

The current period is characterized by an unprecedented accelerated pace of innovation and technological change that has led to changes on many levels. Technological advances and access to technology have led consumers to constantly change their needs, forcing companies to change their paradigms and way of working. The increasing speed, uncertainty and complexity that characterize the competitive environment causes companies to be increasingly adaptable and agile in order to survive and, even more so, to develop.

Agile organizations have the need to always provide value to all their customers as a cornerstone of all their activities, so continuous improvement prevails at all times. At the same time, the shorter the development time of a change, the more often changes can be made that meet the latest customer needs. Thus, reaction speed is the keystone of what agility represents in the context of an organization. Traditional business practices are characterized by rigidity and extended delivery timelines, whereas the agile approach emphasizes adaptability, shorter delivery cycles, and data-driven decision-making¹.

The traditional organization of a company's activity, in general, and of marketing activity, in particular, characterized by a rigid hierarchy, structured processes, and well-defined roles and responsibilities, has ceased to be the key to success in today's reality. Developing a marketing plan involves allocating time and resources to prepare and communicate its content, with the increasing risk that by the time the activities are implemented, the environment may have already undergone significant changes. To illustrate the current pace of change, the

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¹ See Y. Yusoff, Z. Alias, M. Abdullah, Z. Mansor, Agile Marketing Conceptual Framework for Private Higher Education Institutions, International Journal of Academic Research in Business and Social Sciences, 2019, Vol. 9, No. 1, 2019, Pg. 1052 – 1058, available at: https://www.researchgate.net/publication/334270042_Agile_Marketing_Conceptual_Framework_for_Private_Higher_Education_Institutions last time consulted on 20.06.2024.

case of Google serves as a relevant example. Thus, according to data provided by the company's representatives, in 2023 Google implemented over 4,700 changes of varying significance, amounting to an average of 14 changes per day, all adopted following 700,000 tests². Certainly no traditional marketing plan can keep up with this pace of change³.

In this context, there is a growing need for marketers to adopt new organizational frameworks aimed at enhancing operational efficiency and minimizing resource waste, with the Spotify model emerging as a potential approach to support these objectives. The Spotify model (also known as the tribe framework) offers a way for companies operating under constant market pressure to develop and deliver a wide range of new products within shorter timeframes. Originally developed within Spotify to scale agile methods, this model has become a reference point for organizations aiming to combine agility with operational coherence. Based on concepts such as "squads", "tribes", "chapters" and "guilds", the model promotes a decentralized organizational culture that empowers small teams to experiment, collaborate and deliver value at a sustained pace.

The framework has already proven its effectiveness in renowned companies such as Spotify, Netflix, and ING, significantly improving time to market, employee engagement and productivity. We believe that implementing the tribe model can be a key success factor for any type of organization, including those operating in the social or cultural sectors. The implementation of the Spotify model stems from the need to gain a competitive advantage in the market, this new organizational approach being the foundation for rapidly delivering a consistent and complete experience for the targeted consumer segment, by leveraging various distribution and communication channels. Providing a complete consumer experience leads to greater retention and fosters strong relationships with members of the target segment.

Also, another important reason for implementing the Spotify model is the company's development. As the company evolves, it must possess the capacity to expand and grow smoothly, without disruptions or discontinuities⁴. This is especially true for small companies. A small startup is characterized by the fact that employees' roles are rather loosely defined, as they generally carry out whatever tasks are necessary to get things done. This situation is beneficial in the early days of the business; however, as the business grows, this model becomes unsustainable.

The aim of this article is to examine how the Spotify model can contribute to achieving a competitive advantage by fostering innovation, enhancing organizational agility, and strengthening employee engagement.

This paper seeks to address the following research questions:

- Which components of the Spotify model may be regarded as sources of competitive advantage?
- In what ways can this model be adapted to various organizational contexts?
- What are the limitations and potential risks associated with the implementation of the Spotify model?

To address these questions, the article will provide a critical analysis of the relevant literature and elaborate on the practical implications of its implementation.

The study provides contributions that may be of interest to managers who define the strategic direction of the business, middle managers who oversee teams, as well as the academic community, both in terms of the research opportunities it offers and in preparing future professionals in business administration and marketing for the implementation of new team management methodologies that are currently in demand in the labor market.

2. Literature review

Achieving a sustainable competitive advantage has become a major concern for modern organizations, which are facing rapid and unpredictable changes in the external environment. Traditional theories of competitive advantage, such as those advanced by Michael Porter (1985) and Jay Barney (1991), underscore the significance of strategic positioning and of internal resources that are valuable, rare, inimitable, and organized in a manner that enables sustained value creation (VRIO framework). These perspectives provide a solid foundation

² See R. Montti, Google Says They Launch Thousands Of Updates Every Year, Search Engine Journal, March 29, 2025, available at: <https://www.searchenginejournal.com/google-says-they-launch-thousands-of-updates-every-year/543187/>, last time consulted in 28.08.2025.

³ See J. Ewel, The Six Disciplines of Agile Marketing: Proven Practices for More Effective Marketing and Better Business Results, John Wiley&Sons Publishing House, 2020, p. 4.

⁴ See A. C. Hardy, Agile Team Organisation: Squads, Chapters, Tribes and Guilds, The Product Hub, 2019, available at: <https://www.theproducthub.io/2019/10/20/agile-team-organisation-squads-chapters-tribes-and-guilds/> last time consulted in 25.09.2024.

for understanding competitive dynamics; however, they do not fully capture the current complexity of technological and organizational transformations.

The current period is characterized by a dynamic and rapidly changing environment that has driven swift evolution within the business sector. Within the context of the digital economy and ever-evolving markets, modern approaches place a strong emphasis on agility, organizational learning capacity, and strategic adaptability. According to a study conducted by McKinsey on a sample of 2,500 individuals from various companies, 37% of respondents stated that the organizations they are part of are in the process of implementing agile transformations, whereas 4% reported that such transformations have already been fully implemented. Furthermore, 80% of the companies that have undertaken agile transformation have reported an overall improvement in performance since the initiation of these transformations⁵. Agile organizations are distinguished by flexible structural designs, iterative operational processes, and an organizational culture oriented towards continuous improvement⁶. In this context, competitive advantage emerges not solely from resource control, but from the organization's capability to innovate swiftly, reconfigure its structures, and effectively adapt to environmental dynamics.

The evolutionary transformation has brought about changes across all fields, compelling companies to adapt to these shifts and renew themselves in order to avoid stagnation. The capacity to innovate and generate value for all stakeholders compels companies to constantly adapt to the dynamics of both domestic and international markets. This involves ensuring that both individual employees and teams are granted a significant degree of autonomy and responsibility, to a considerably greater extent.

The key principles of agile strategic orientation are represented by:

- focusing on the value created for consumers – implies the continuous monitoring of their evolving needs and preferences, coupled with the ability to rapidly adapt to identified market changes.
- development through iterations – involves formulating strategic directions through incremental steps and iterative cycles. In other words, decisions are taken based on small-scale experiments and the feedback received, which enables timely adaptation.
- cross-functional collaboration – involves the cooperation of representatives from various organizational functions. This translates into bringing together, in work teams, individuals who possess diverse skills and expertise to collaborate toward achieving a common goal.
- continuous improvement highlights the notion that the marketing strategy is never final, but is instead continuously refined and adjusted in response to feedback and outcomes.
- communication and transparency enable those involved to understand the strategic direction and the progress made along the way, thereby ensuring the achievement of the established goals.

Taking these principles into account, agile organizations must ensure cross-functional collaboration in the execution of their activities, and one possible approach to achieving this is by adopting a tribe-based organizational structure, as exemplified by the Spotify model.

The Spotify model was popularized in 2012 by Henrik Kniberg and Anders Ivarsson as a scalable framework to implementing agile practices within a complex organizational environment⁷. Although it does not represent a formal standardized framework, the model provides a set of principles and structures that promote rapid value delivery, cross-team collaboration, and operational autonomy. The core components of the model include: Squads – autonomous, cross-functional teams responsible for a specific product or functionality; Tribes – groups of squads collaborating within a common domain; Chapters – professional communities within tribes that ensure alignment of competencies; and Guilds – informal communities of practice that extend across the organization to foster knowledge exchange.

⁵ See A. De Smet, The agile manager, McKinsey Quarterly, July 2018, available at: <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-agile-manager> last time consulted in 25.06.2024.

⁶ See D. Rigby, J. Sutherland, A. Noble, Agile at Scale, Harvard Business Review, 2018, available at: <https://hbr.org/2018/05/agile-at-scale> last time consulted in 20.06.2025.

⁷ See N. Tsonev, What Is the Spotify Model for Scaling Agile?, Businessmap, 2022, available at: <https://businessmap.io/blog/spotify-model> last time consulted in 27.06.2025.

The model emphasizes both autonomy and alignment, two seemingly contradictory forces that, when effectively managed, generate innovation and strategic coherence⁸. The literature also highlights the model's role in fostering an organizational culture characterized by trust, transparency, and empowerment⁹.

Although the Spotify model has been adopted and adapted by numerous organizations, such as ING and Zalando, it is not without limitations. Among its main theoretical constraints are¹⁰:

- Lack of standardization – the model does not constitute a formalized framework, which may lead to superficial implementations¹¹.
- Insufficient contextualization – its success within Spotify does not guarantee effectiveness in other organizational cultures or industries¹².
- Excessive idealization – some sources depict the model in an overly idealistic manner, overlooking the real issues encountered in practice.

Despite these limitations, the model provides a valuable analytical lens for examining contemporary organizational transformations, particularly with respect to the interplay between structural design, organizational culture, and continuous innovation.

3. Research methodology

The purpose of this research is to explore to what extent the Spotify model can contribute to achieving a sustainable competitive advantage within organizations operating in dynamic environments. Given the complex and contextual nature of the subject, a qualitative approach was adopted. The study falls within the category of exploratory research, aiming to develop an in-depth understanding of how the theoretical concepts associated with the Spotify model can be translated into organizational practices that generate competitive advantage.

Documentary analysis constitutes the primary method employed in this study. The sources examined include academic literature; white papers published by organizations that have implemented the Spotify model (such as ING – one of the most notable implementations in the banking sector – and Spotify itself, as the original reference point for understanding the model in its initial form); as well as case studies and applied research reports produced by consulting firms (e.g., McKinsey). These materials were analyzed with respect to the benefits derived from adopting the model, the challenges encountered, and the adaptations required to integrate the model into diverse organizational contexts.

It is important to note that, given the qualitative nature of the research, the results are not statistically generalizable. Furthermore, access to primary data was limited, with the study relying predominantly on secondary and publicly available sources. Nevertheless, the analysis conducted provides a coherent and useful framework for understanding the strategic potential of the Spotify model, as well as relevant directions for future research, including quantitative studies or field investigations.

4. The key dimensions of the Spotify Model

⁸ See H. Kniberg, A. Ivarsson, *Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds*, Crisp Consulting Blog, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

⁹ See M. Mankins, E. Garton, *How Spotify Balances Employee Autonomy and Accountability*, Bain & Company, 2017, available at: <https://www.bain.com/insights/how-spotify-balances-employee-autonomy-and-accountability-hbr/> last time consulted in 22.06.2025; See A. Moore, *Spotify's Organizational Culture & Strategic Considerations*, Rancord Society, 2021, available at: <https://www.rancord.org/spotify-organizational-culture-strategic-cultural-characteristics> last time consulted in 22.06.2025

¹⁰ See K. Conboy, N. Carroll, *Implementing Large-Scale Agile Frameworks: Challenges and Recommendations*, IEEE Software, 2019, available at: https://www.researchgate.net/publication/330556190_Implementing_Large-Scale_Agile_Frameworks_Challenges_and_Recommendations last time consulted in 24.06.2025

¹¹ See A. Salamaleh, J. M. Bass, *An architecture governance approach for Agile development by tailoring the Spotify model*, *AI & Society*, 2022, Volume 37, pp 761-780, available at: <https://link.springer.com/article/10.1007/s00146-021-01240-x?utm> last time consulted in 24.06.2025

¹² See L. Cluster, *What Is the Spotify Agile Model and Its Impact?*, Invensis – Global Learning Services, 2025, available at: <https://www.invensislearning.com/blog/spotify-model-in-agile> last time consulted in 24.06.2025

The Spotify model was developed internally within the company bearing the same name, with the aim of scaling agile methods in a dynamic and rapidly expanding organizational context¹³. Although it was not originally designed as a formal, replicable framework, the model was documented and disseminated through internal publications and conferences¹⁴, subsequently becoming a reference for numerous organizations seeking to combine agility with scalability.

The model was developed as an alternative to rigid or difficult-to-scale agile structures, emphasizing autonomy, collaboration, and continuous learning over procedural compliance. The underlying philosophy guiding the implementation of the model is expressed by the formula¹⁵: “be autonomous, but don’t suboptimize—be a good citizen in the Spotify ecosystem.” This reflects the effort to find a balance between decentralization and strategic alignment, between team-level innovation and the organization’s unified direction.

The key to tribal organization lies in working within multidisciplinary teams comprising a mix of marketing specialists, product experts, commercial specialists, designers, data analysts, and IT engineers—all focused on addressing customer needs and united by a shared definition of success¹⁶.

The tribe model essentially represents an organizational structure in which the company’s activities are arranged according to a dynamic matrix with two dimensions: one represented by capabilities and the other by the “value creation” dimension. Almost all employees have both a long-term functional role within the company, within a so-called ‘chapter’ (somewhat analogous to traditional organizational functions), and a role in the value creation process dictated by the objectives and needs assumed by the team to which the employee belongs (see Figure 1)¹⁷. In other words, the matrix structure ensures that each integrated member receives guidance on what to build (value creation) as well as how to build it effectively (functional role).

Figure 1. The basic structure of the Spotify Model



Source: ING’s agile transformation, McKinsey Quarterly, 10 January 2017, available at: <https://www.mckinsey.com/industries/financial-services/our-insights/ings-agile-transformation> last time consulted in 19.09.2024

The model is based on the following key structural concepts¹⁸:

¹³ See J. Langerman, C. Marnewick, A Concept for Extending the Spotify Organisational Model to Cater for Platform Organisations, 30th International Conference on Information Systems Development, 2022, Cluj-Napoca, Romania, available at: <https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1394&context=isd2014> last time consulted in 5.10.2024

¹⁴ See H. Kniberg, A. Ivarsson, Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds, Crisp Consulting Blog, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

¹⁵ See M. Mankins, E. Garton, How Spotify Balances Employee Autonomy and Accountability, Bain & Company, 2017, available at: <https://www.bain.com/insights/how-spotify-balances-employee-autonomy-and-accountability-hbr/> last time consulted in 22.06.2025

¹⁶ ING’s agile transformation, McKinsey Quarterly, 10 January 2017, available at: <https://www.mckinsey.com/industries/financial-services/our-insights/ings-agile-transformation> last time consulted in 19.09.2024

¹⁷ See A. De Smet, The agile manager, McKinsey Quarterly, July 2018, available at: <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-agile-manager> last time consulted in 25.06.2024

¹⁸ See Exploring Key Elements of Spotify’s Agile Scaling Model, July 23, 2018, Kendis, available at: <https://kendis.io/spotify/exploring-key-elements-spotifys-agile-scaling-model/> last time consulted in 27.06.2025; See L. Madhavi, Spotify Model: Benefits, Challenges, Scaling Agile & Usage, Star Agile, 2024, available at: <https://staragile.com/blog/spotify-model> last time consulted in 3.07.2025; See A. Salamaleh, J.

- Squads – are small, autonomous, cross-functional teams responsible for a product or a clearly defined set of functionalities. Each squad manages its own processes and work pace (e.g., using Scrum or Kanban), with the freedom to make technical and business decisions within its sphere of influence.

The team represents the basic component within the Spotify model, with a tribe comprising multiple teams, which are physically located in the same office of the tribe. The team is similar to a Scrum team¹⁹, being end-to-end responsible for a long-term mission based on the objectives of the tribe. Each team takes ownership of a specific part of the customer experience. A product tribe can include several self-managing teams of approximately 8–10 members²⁰, each responsible for a specific, clearly defined objective. For instance, one team may be responsible for new customer acquisitions, another for contract renewals, a third for enhancing the onboarding experience, and a fourth for business development and innovation. Within each team, there is a product owner, who is not a formally appointed leader, and whose role is to manage the product vision and prioritize the team's work, without intervening in how team members carry out their tasks.

The autonomous nature of teams does not eliminate interdependencies among them. Consequently, it is periodically useful to identify these interdependencies and to assess the extent to which they hinder or slow down the team, in order to enable reprioritization, reorganization, architectural modifications, or the development of appropriate technical solutions²¹.

Teams are encouraged to apply two fundamental principles in their activities. The first principle concerns the rapid and frequent release of any changes affecting the customer experience, while the second principle focuses on validated learning derived from quantified results and A/B testing conducted to determine what is effective and what is not²².

- Tribes are groups of squads that work within related domains or on interrelated products. The tribe constitutes a fluid structure that provides and integrates all the resources necessary for fulfilling its mission. Tribes facilitate information exchange, coordination, and cohesion among squads. Each tribe is led by a Tribe Lead who fosters collaboration without exercising strict hierarchical control.

Tribes do not organize or coordinate day-to-day operations; instead, they are responsible for business management, as well as the development and maintenance of products and services. Their primary mission is to enhance the manner in which the customer is served. Tribes are, to some extent, similar to strategic business units or product lines in traditional organizations. These units constitute the company's delivery centers, responsible for defining how products will be distributed, the pricing levels to be applied, and the manner in which customers will be served in accordance with the company's strategy.

According to the 'Dunbar's number' principle, which posits that individuals cannot maintain more than roughly 150 relationships simultaneously²³, tribes are designed so as not to exceed approximately 100 members²⁴.

The implementation of the tribal model entails dividing the company's delivery activities into several types of tribes, as follows²⁵:

M. Bass, An architecture governance approach for Agile development by tailoring the Spotify model, *AI & Society*, 2022, Volume 37, pp 761-780, available at: <https://link.springer.com/article/10.1007/s00146-021-01240-x?utm> last time consulted in 24.06.2025

¹⁹ See J. Langerman, C. Marnewick, A Concept for Extending the Spotify Organisational Model to Cater for Platform Organisations, 30th International Conference on Information Systems Development, 2022, Cluj-Napoca, Romania, available at: <https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1394&context=isd2014> last time consulted in 5.10.2024

²⁰ See A. De Smet, The agile manager, *McKinsey Quarterly*, July 2018, available at: <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-agile-manager> last time consulted in 25.06.2024; M. Carnan, A. Rozen, ING's Agile Transformation – Teaching an Elephant to Race, *Journal of Creating Value*, 2019, Volume 5, Issue 2, available at: <https://journals.sagepub.com/doi/10.1177/2394964319875601> last time consulted in 15.09.2024

²¹ See H. Kniberg, A. Ivarsson, Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds, *Crisp Consulting Blog*, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

²² See H. Kniberg, A. Ivarsson, Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds, *Crisp Consulting Blog*, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

²³ See R. Dunbar, Dunbar's number, *New Scientist*, available at: <https://www.newscientist.com/definition/dunbars-number/> last time consulted in 26.08.2024

²⁴ See H. Kniberg, A. Ivarsson, Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds, *Crisp Consulting Blog*, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

²⁵ See J.T. Lorenz, D. Mahadevan, B. Oncul, M. Yenigun, Scaling agility: A new operating model for insurers, *McKinsey & Company*, September 14, 2020, available at: <https://www.mckinsey.com/industries/financial-services/our-insights/scaling-agility-a-new-operating-model-for-insurers> last time consulted on 03.05.2024; M. Carnan, A. Rozen, ING's Agile Transformation – Teaching an Elephant to Race, *Journal of Creating Value*, 2019, Volume 5, Issue 2, available at: <https://journals.sagepub.com/doi/10.1177/2394964319875601> last time consulted in 15.09.2024

- A tribe dedicated to products/services, aimed at developing new offerings, stimulating market penetration, or managing the customer portfolio;
- A tribe dedicated to sales, comprising customer-oriented teams focused on selling products and services to clients;
- A post-sales tribe may, for example in the insurance sector, pursue the enhancement of claims-management efficiency, the improvement of spare-parts procurement, the automation of damage-related operations, or the design of a digital experience for the first notification of loss.

The Tribe Lead acts as a general manager focused on creating value, driving growth, and serving customers. He is fully responsible for the efficient fulfillment of the tribe's mission through the teams, allocates budgets, and establishes interfaces with other tribes. At the tribe level, there are also one to two coaches who train individuals and teams to enhance performance, contributing to the development and improvement of their way of working. The agile coach organizes retrospectives, sprint planning meetings, conducts individual coaching, and so on.

Chapters – are horizontal structures that bring together members with similar competencies (e.g., back-end developers, QA testers) from different squads but belonging to the same tribe. The Chapter ensures technical alignment and professional development, and is led by a Chapter Lead, who often also holds a functional role within a team.

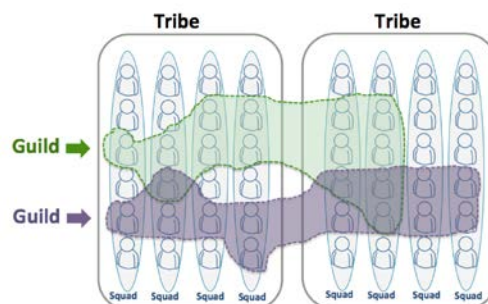
Team members originate from the distinct functions that constitute the chapters within the tribe. Thus, chapters represent capability domains, analogous to functions in traditional organizations, and are managed by a Chapter Lead who, in addition to the role performed within the team to which they belong, is responsible for the personal development, coaching, and professional management of the chapter's members. For instance, the marketing function constitutes a distinct chapter within the tribe, serving as a source from which members are selected for inclusion in teams. For example, the marketing chapter is responsible for managing promotional campaigns, as well as overseeing customer experience. Additional chapters may be added to the tribe as needed, depending on its mission and priorities, to provide the required resources. Legal and finance functions may remain independent and outside the team, but can be consulted to provide support and objective advice.

The chapter members assemble on a regular basis to discuss current issues, emerging challenges, and recent developments within their respective areas of expertise. The activities carried out within the chapter provide an effective framework for fostering innovation and facilitating the dissemination of ideas among the tribe's teams.

Guilds – represent informal communities of interest that span across tribes and departments, organized around shared thematic areas (e.g., DevOps, UX, Data Science). Guilds promote the sharing of knowledge, tools, and practices, as well as the voluntary standardization of best practices across the organization. In contrast to chapters, which are organized at the tribe level, guilds operate at the organizational level (e.g., the testers' guild, the agile coaches' guild; see Figure 2)."

One of the key elements for ensuring the success of a guild's activities is the establishment of well-documented objectives, a clearly defined mission, and a set of guidelines for its members; without these, the impact of the guild's work will remain limited and the outcomes achieved will not be measurable²⁶.

Figure 2. Guild Organization Structured According to the Tribe Model



²⁶ See A. C. Hardy, Unlocking the Spotify Model: Why your Guild is Failing, The Product Hub, 2022, available at: <https://www.theproducthub.io/2022/05/10/why-your-guild-is-failing/> last time consulted at: 26.09.2024

Source: Henrik Kniberg, Anders Ivarsson, Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds, Crisp Consulting Blog, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

Trio – is composed of three members, each occupying a leadership role within their respective tribe. The composition of a Trio is as follows: a Product Manager, who is responsible for defining what is to be built by articulating consumer requirements and defining product priorities; a Chapter Lead (or Engineering Manager), who oversees who is part of the team and ensures the professional development of the engineers; and a Design Lead/Tech Lead/Architect, who determines how the solution is to be built, addressing both technical and design-related aspects.

Alliance – represents a grouping of three Trios that ensures coordination and collaboration among multiple Tribes operating within the same product domain or exhibiting significant interdependencies. For instance, a “Payments Alliance” may be formed to coordinate all Tribes engaged in the development and operation of payment systems.

The Chief Architect oversees the organization-wide (or division-level) technical direction, ensuring architectural coherence and adherence to established standards.

The Spotify model operates on a set of principles that complement its structural architecture:

- Autonomy with alignment – Teams make decisions locally while adhering to an overarching strategic direction.
- Servant leadership – Leaders provide support to their teams rather than exerting direct control.
- Fail-friendly culture – The organizational culture embraces mistakes as learning opportunities.
- Transparency and trust – Broad access to information and open collaboration are encouraged.
- Distributed innovation – Ideas emerge from all levels of the organization, not solely from the top of the hierarchy.

Through this structure, the Spotify model enables the formation of teams in ways that support rapid value delivery (reduced time-to-market), continuous employee development through knowledge sharing, and increased motivation driven by a sense of autonomy and ownership. Moreover, the elimination of traditional hierarchical layers and the adoption of a culture rooted in trust and experimentation enable organizations to become more agile, more innovative, and more resilient to change.

5. The Spotify Model as a source of competitive advantage

In an economic environment characterized by volatility, uncertainty, and a constant need for innovation, organizations seek ways to differentiate themselves not only through their products, but also through the manner in which they structure their internal activities and leverage human capital. The Spotify model, through its inherently adaptable and decentralized nature, provides favorable conditions for achieving a sustainable competitive advantage, both in terms of operational efficiency and continuous innovation.

Implementing an agile, cross-functional team structure is useful when the company seeks to quickly adapt to changes and respond swiftly to evolving customer needs and expectations to a greater extent than its competitors. Such an agile structure can provide the company, within a remarkably short timeframe (three to four times faster²⁷), with viable product alternatives ready for market launch, while also ensuring the continuous improvement of the product and the consumer experience after launch, based on systematically collected customer feedback.

By examining the Spotify model through the lens of the VRIO theoretical framework (Value, Rarity, Inimitability, Organization) proposed by Barney (1991), the following points can be highlighted:

The “Value” component. The Spotify model – structured around autonomous teams (squads), coordinated groups (tribes), communities of practice (chapters), and informal networks (guilds) – fosters an agile and collaborative environment that supports continuous innovation and the rapid delivery of digital solutions. The squad and tribe structures enable improved adaptability to dynamic market requirements and contribute to reducing product time-to-market, thereby generating value both for customers, by delivering personalized and

²⁷ See T. Kurian, D. Patwardhan, H. K. Hughes, Making Spotify-Inspired Agile Work, Infosys Knowledge Institute, 2021, available at: <https://www.infosys.com/iki/perspectives/spotify-inspired-agile.html> last time consulted in 26.08.2025

relevant solutions, and for the organization, by enhancing operational efficiency. In this context, teams can efficiently develop and implement hyper-personalized marketing campaigns by leveraging users' behavioral data and adapting content in real time to their preferences. The model thus contributes to value creation by enhancing the relevance and efficiency of customer interactions and by enabling sustainable differentiation from competitors. Beyond reducing time-to-market and enabling campaign personalization, the Spotify model contributes to value creation within an organization through several other essential mechanisms. Team autonomy fosters continuous innovation, the chapters and guilds facilitate efficient knowledge sharing, and the modular structure supports scalability without losses in efficiency. Moreover, increased employee engagement and clear alignment with strategic objectives contribute to the consolidation of a sustainable competitive advantage. Thus, the value generated is not confined to marketing or delivery activities but extends across the entire organizational ecosystem.

The "Rarity" component. Within the context of analyzing organizational resources and capabilities using the VRIO framework, the rarity component refers to those resources or capabilities that are possessed by a limited number of organizations and, therefore, have the potential to generate sustainable competitive advantages. The implementation of the Spotify model can significantly contribute to the development of this component, particularly in traditionally hierarchical or organizationally conservative industries.

A first essential aspect is an organizational culture oriented toward autonomy and trust, which promotes decision-making at the team level and the minimization of direct hierarchical control. Such a culture, rarely encountered in industries characterized by rigid formal structures, creates a climate conducive to continuous innovation and active engagement, which are fundamental elements of a rare capability.

Moreover, the model emphasizes servant leadership, in which leaders act as facilitators of team development and performance rather than as the sole source of authority. This type of leadership, rarely observed and authentically implemented, relies on deeply internalized organizational values and on continuous leadership development practices.

Another essential element is the existence of a strategic alignment mechanism without excessive control, in which shared objectives are maintained through practices such as OKRs (Objectives and Key Results), while not restricting team autonomy. Striking this balance between autonomy and alignment is a challenging task and is seldom accomplished effectively by large organizations.

The Spotify model also fosters a culture of continuous feedback and iterative learning through frequent retrospectives and transparent improvement mechanisms. Together with an experimentation-oriented mindset and the acceptance of failure as a source of learning, these practices create an organizational environment grounded in psychological safety and continuous learning, which is difficult to replicate in organizations characterized by low risk tolerance or authoritarian management styles.

Finally, the high level of technological autonomy granted to teams, which hold end-to-end responsibility for the delivered solutions (from architecture to maintenance), contributes to their rarity by enabling the rapid development of tailored and scalable solutions beyond hierarchical decision-making structures.

Therefore, the coherent implementation of the Spotify model not only supports organizational agility but also establishes a set of capabilities that are rare and difficult to replicate and, when underpinned by an appropriate organizational structure, are capable of generating and sustaining a distinctive competitive advantage.

The "Inimitability" component. As emphasized by Kniberg and Ivarsson²⁸, the organizational structure of the Spotify model represents only one component of the system, while its success fundamentally depends on organizational culture and team adaptability. Therefore, the effects of implementing the model may become inimitable, in the sense proposed by Barney, only to the extent that the organization succeeds in transforming the model into a distinctive internal capability.

Organizations that succeed in implementing the Spotify model in a coherent and in-depth manner – by embracing agile principles, fostering team autonomy, enabling cross-functional collaboration, and encouraging innovation – develop a form of internal know-how that is difficult to replicate. This know-how often results from continuous organizational learning and from emergent practices, uniquely shaped by the organization's culture, history, and informal structure. Therefore, although the Spotify model can, in principle, be replicated in terms of

²⁸ See H. Kniberg, A. Ivarsson, *Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds*, Crisp Consulting Blog, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

structure, its strategic effects become inimitable when implementation is authentic and supported by a profound transformation tailored to the organization's specific context. This distinctive characteristic may provide the organization with a sustainable competitive advantage, as rivals are likely to face significant difficulties in replicating not only the structure but also the culture and processes that bring the model to life.

The "Organization" component. An organization's ability to leverage its valuable, rare, and difficult-to-imitate resources depends fundamentally on the way it is internally organized. According to the VRIO theoretical framework (Barney, 1991), the "Organization" component reflects the presence of structures, processes, systems, and cultural mechanisms that enable the effective exploitation of potential advantages.

In this regard, the Spotify organizational model provides a set of practices and mechanisms that can substantially contribute to strengthening this component. Through its flexible structure, composed of squads (autonomous multidisciplinary teams) and tribes (groups of teams aligned around a shared objective), the model facilitates a scalable and adaptable form of organization. At the same time, components such as chapters and guilds support internal standardization and knowledge dissemination, thereby contributing to a framework of continuous learning and capability development.

Another central element of the model is the distribution of decision-making responsibility, which allows for the acceleration of processes and rapid adaptation to changes, by promoting team autonomy and informal leadership.

These characteristics facilitate the internal alignment of the organization around the exploitation of strategic resources, thereby increasing the likelihood of achieving a sustainable competitive advantage.

Thus, the integration of the Spotify model principles into organizational design may represent a key vector in transforming strategic resources into sustainable performance, thereby confirming its relevance as a modern mechanism for supporting the "Organization" component within the VRIO framework.

Therefore, the Spotify Model is not merely an operational framework, but a strategic mechanism through which organizations can transform their internal culture into a competitive advantage.

One of the central pillars of the model is the ability to innovate rapidly and continuously. Autonomous teams (squads) are granted the freedom to experiment, iterate, and fail fast, without being constrained by rigid hierarchical structures. This approach reduces decision-making bottlenecks and encourages idea generation across all levels of the organization – an essential factor in sustaining long-term competitive relevance.

Another strategic benefit of the model is the increased motivation of employees²⁹. Studies indicate that autonomy and a sense of ownership increase job satisfaction and reduce employee turnover³⁰. Chapters and guilds contribute to the continuous development of employees, thereby providing the organization with an advantage in attracting and retaining talent in a competitive environment.

One of the major challenges in agile transformation is achieving scale without sacrificing coherence. The Spotify model enables organizational growth while preserving responsiveness and local adaptability. The modular structure and the distribution of leadership within tribes and chapters ensure a balance between control and autonomy, thereby contributing to a scalable yet adaptive organizational design.

The adoption of the Spotify model by well-established organizations such as ING Bank and Zalando supports the view that this framework can be successfully applied beyond the IT sector, provided it is adapted to the culture and specific context of each organization:

ING implemented the squads–tribes structure as part of its agile transformation process initiated in 2011, a transformation that accelerated the time-to-market for new services and fostered a fully customer-centric mindset – two factors that, according to the company's management, contributed to receiving the Global Finance award for World's Best Bank in 2018³¹.

²⁹ See N. Tsonev, What Is the Spotify Model for Scaling Agile?, Businessmap, 2022, available at: <https://businessmap.io/blog/spotify-model> last time consulted in 27.06.2025

³⁰ See A. Baiyere, J. W. Ross, I. M. Sebastian, Designing for Digital—Lessons from Spotify, MIT – Center for Information Systems Research, No XVII – 12, 2017, available at: https://c isr.mit.edu/publication/2017_1201_DigitalDesignAtSpotify_BaiyereRossSebastian last time consulted in 27.06.2025

³¹ See T. Schotkamp, M. Danoesastro, HR's Pioneering Role in Agile at ING, BCG Henderson Institute, 2018, available at: <https://www.bcg.com/publications/2018/human-resources-pioneering-role-agile-ing> last time consulted in 7.09.2025; See N. Perkin, Agile Transformation: Structures, Processes and Mindsets for the Digital Age, Second Edition, KoganPage Publishing House, 2023, available at: <https://ebin.pub/qdownload/agile-transformation-structures-processes-and-mindsets-for-the-digital-age-2nbsped-1398608807-9781398608801.html> last time consulted in 7.09.2025

Zalando, a German fashion retailer, implemented organizational practices derived from the Spotify model (tribes, squads, and chapters) within its technology teams, leading to shorter delivery cycles and enhanced performance across features critical to customer satisfaction³².

The implementation of a tribe-based structure for organizing a company's activities cannot be effective without a redesign of its processes around agile principles. Thus, an effective transformation grounded in agile principles entails ensuring a solid technological foundation (continuously updated software tools), conducting strategic marketing planning in an agile manner, and placing emphasis on people (performance and career management) as well as on processes (agile ceremonies, delegation of authority, etc.).

The implementation of a tribe-based structure for organizing a company's activities is recommended to proceed through the following stages³³:

Performing a diagnostic analysis and benchmarking to define a clear vision at the very outset of the company's agile transformation and that of its operations.

Establishing an initial tribe before extending this type of organizational structure across the entire company. For instance, the tribe could be established for a product or product line, integrating all necessary functions: portfolio management, design, marketing, data, sales, and so on. The tribe should implement the agile model in its entirety, rather than merely experimenting with a few ceremonies. Establishing an initial tribe before expanding the structure on a broader scale will serve as a reference point in the process of implementing the model across the entire organization. Furthermore, following this experience, a series of conclusions can be drawn regarding the aspects that performed well and those that posed challenges in implementing the model, with a view to identifying improvements and refinements for wider-scale deployment.

Learning from the experience of the first tribe and scaling the agile model across the entire organization. In pursuing agile transformations, it must be acknowledged that not everything can be identified and planned upfront, and that the most effective approach to implementation is continuous adaptation as progress is made.

Human capital transformation through the development of employee skills and competencies and the recruitment of talent. Agile transformation requires new skills and competencies, especially for employees within traditional operating structures, thereby requiring organizations to focus on workforce upskilling and the recruitment of talent to support the newly established tribes.

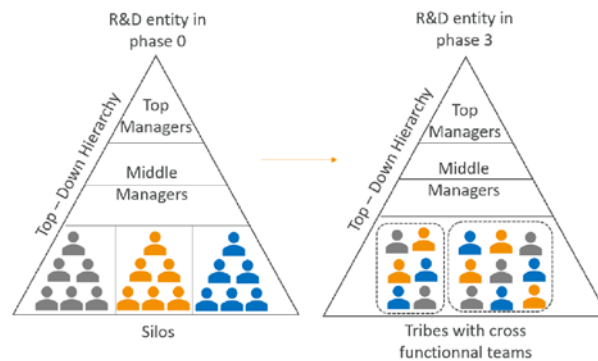
Cultural transformation initiated from the early stages of the agile transformation, given that cultural change takes significantly longer than organizational transformation. Therefore, at the early stages of an agile transformation, organizations need to deliberately set the behaviors they aim to change and may even create a dedicated tribe responsible for facilitating cultural transformation and reinforcing specific behaviors, through the implementation of a new performance management system, a new communication framework, and other supporting organizational structures.

Although the tribe model entails a higher degree of self-organization, its integration does not necessarily have to result in a modification of the organizational hierarchy, as illustrated by the model shown in Figure 3.

Figure 3. Organizational evolution within an agile organization

³² See J. Twentyman, Zalando embraces 'Radical Agility' in its bold platform play, Diginomica, 2016, available at: <https://diginomica.com/zalando-embraces-radical-agility-in-its-bold-platform-play> last time consulted in 17.09.2025; See S. Cadieux, M. Lobis, The journey to an agile organization at Zalando, McKinsey & Company, 2018, available at: <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-journey-to-an-agile-organization-at-zalando> last time consulted in 17.09.2025

³³ See J. T. Lorenz, D. Mahadevan, B. Oncul, M. Yenigun, Scaling agility: A new operating model for insurers, McKinsey&Company, September 14, 2020, available at: <https://www.mckinsey.com/industries/financial-services/our-insights/scaling-agility-a-new-operating-model-for-insurers> last time consulted on 03.05.2024; M. Carnan, A. Rozen, ING's Agile Transformation – Teaching an Elephant to Race, Journal of Creating Value, 2019, Volume 5, Issue 2, available at: <https://journals.sagepub.com/doi/10.1177/2394964319875601> last time consulted in 15.09.2024; See T. Kurian, D. Patwardhan, H. K. Hughes, Making Spotify-Inspired Agile Work, Infosys Knowledge Institute, 2021, available at: <https://www.infosys.com/iki/perspectives/spotify-inspired-agile.html> last time consulted in 26.08.2025; Overcoming Agile Transformation Challenges, Agility at Scale, available at: <https://agility-at-scale.com/implementing/transformation-leadership> last time consulted in 27.08.2025



Sursa: B. Akim, C. Dominique, *Explaining the agile transformation through management innovation adoption*, Euram Conference, 2019, available at:

https://www.researchgate.net/publication/335722822_Explaining_the_agile_transformation_through_management_innovation_adoption, last time consulted on 19.08.2024

Within the resulting structure, an agile methodology such as Kanban, Scrum, or a hybrid form thereof may be incorporated³⁴, contributing to improved work organization and the achievement of a sustainable working pace. Teams may adopt practices derived from Scrum and Kanban, but they are not required to strictly adhere to them. They may adapt any practice that team members consider suitable and may abandon it at any time. Thus, each team may employ a distinct working approach to achieve its objectives, which may differ from the approaches adopted by other teams³⁵.

Another useful instrument in this context is the QBR (Quarterly Business Review), an approach implemented by organizations such as Google and Netflix. The QBR represents an exercise during which each tribe documents its achievements from the previous quarter, while also articulating its objectives for the upcoming quarter and identifying the other tribes or teams with which it needs to coordinate in order to achieve these objectives³⁶.

Furthermore, the implementation of this structure requires the availability of supporting tools that enable effective project management, such as JIRA³⁷.

6. Challenges and limitations in implementing the Spotify Model

Although the Spotify model is often presented as a successful example of organizational agile transformation, its application in different contexts entails a number of challenges. Adopting the model without a deep understanding of its underlying principles or without appropriate adaptations may lead to suboptimal outcomes or even organizational failure.

The main limitations and challenges identified in the relevant literature include:

Lack of formal standardization. One commonly reported challenge in adopting the Spotify model is its lack of status as a formal framework, in contrast to approaches such as the Scaled Agile Framework (SAFe), Large-Scale Scrum (LeSS), or Nexus³⁸. The model was developed as a customized solution tailored to the specific needs of Spotify and was not originally intended to be replicated in other organizations. This informal and flexible

³⁴ See H. Kniberg, A. Ivarsson, *Scaling Agile @ Spotify with Tribes, Squads, Chapters & Guilds*, Crisp Consulting Blog, 2012, available at: <https://blog.crisp.se/wp-content/uploads/2012/11/SpotifyScaling.pdf> last time consulted in 21.06.2025

³⁵ See Spotify Tribe Model: Is it or is it not a Scaling Model?, Kendis, 2021, available at: <https://kendis.io/scaling-agile/spotify-tribe-model> last time consulted in 27.06.2025

³⁶ See ING's agile transformation, McKinsey Quarterly, 10 January 2017, available at: <https://www.mckinsey.com/industries/financial-services/our-insights/ings-agile-transformation> last time consulted in 19.09.2024

³⁷ JIRA official website, available at: <https://www.atlassian.com/software/jira> last time consulted on 18.08.2024

³⁸ See Spotify Tribe Model: Is it or is it not a Scaling Model?, Kendis, 2021, available at: <https://kendis.io/scaling-agile/spotify-tribe-model> last time consulted in 27.06.2025; See N. K. Singh, *Do we really need SAFe, LeSS, Spotify, or Nexus to be agile?*, Agilemania, 2021, available at: <https://medium.com/agilemania/do-we-really-need-safe-less-spotify-or-nexus-to-be-agile-e47e0f7a46b8> last time consulted in 28.06.2025

nature, although advantageous in the original context, may lead to confusion during implementation, particularly in organizations that lack a well-developed culture of self-organization³⁹.

Challenges related to cultural adaptation. The success of the model is fundamentally dependent on organizational culture. Spotify benefits from an internal environment characterized by trust, openness, and a strong sense of accountability⁴⁰. In organizations with a hierarchical culture oriented toward control and compliance, the implementation of principles of autonomy and self-organization may be perceived as chaotic or lacking clear direction. Thus, resistance to change, fear of failure, or a lack of agile leadership can hinder transformation.

Risk of superficial adoption (cargo cult agile). The academic literature draws attention to the phenomenon referred to as cargo cult agile, defined as the superficial imitation of agile structures in the absence of a genuine understanding of their core principles. In the case of the Spotify model, this risk is amplified by its popularity and by organizations' temptation to replicate formal structures (squads, tribes, chapters) without embracing core values such as team autonomy, transparency, or a learning-oriented culture. This often results in pseudo-agility, where changes are limited to surface-level adjustments⁴¹.

Increased complexity at scale. As the model is scaled within large organizations comprising thousands of employees, challenges related to coordination, communication, and consistency emerge⁴². Although the model proposes scaling mechanisms (tribes, chapters, guilds), these can become difficult to manage in the absence of robust technological support and effective leadership. In addition, the lack of clearly defined roles similar to those in Scrum (Product Owner, Scrum Master) can give rise to ambiguities in decision making.

Dependence on Agile Leadership. Another critical point concerns the role of leadership. Agility represents a framework in which hierarchical positions and power do not find a place in their traditional form. Accordingly, within the tribes model, the leader's functions and responsibilities have migrated from a planning and managerial role to that of a coach and visionary⁴³. The leader's role aims at creating an appropriate environment that enables the formation of self-organizing, performance-oriented, and motivated teams. In the absence of such leadership, there is a risk that autonomous teams may become isolated, misaligned, or lose sight of strategic objectives. Thus, the quality of agile leadership is a critical factor for successful implementation.

Although the Spotify model is widely popular and has shown potential in the performance of leading organizations, its application demands a thorough assessment of the organizational context, culture, and current agile maturity. It is not a universally applicable model, as its success relies primarily on organizational mindset and values rather than on the formal architecture of teams.

7. Conclusions

Within an economic landscape characterized by uncertainty, intensified global competition, and the rapid pace of technological innovation, organizations' ability to be agile, adaptive, and oriented toward continuous learning has become an essential prerequisite for achieving competitive advantage. The Spotify model, although

³⁹ See N. Tsonev, What Is the Spotify Model for Scaling Agile?, Businessmap, 2022, available at: <https://businessmap.io/blog/spotify-model> last time consulted in 27.06.2025; See N. Walker, Why Enterprises and Legacy Organizations Struggle with the Spotify Model, Neil Walker blog, 2018, available at: <https://neilwalker.net/why-enterprises-struggle-with-the-spotify-model> last time consulted on 28.06.2025

⁴⁰ See A. Moore, Spotify's Organizational Culture & Strategic Considerations, Rancord Society, 2021, available at: <https://www.rancord.org/spotify-organizational-culture-strategic-cultural-characteristics> last time consulted at 30.06.2025; Unlocking the secrets of Spotify's organizational culture A case study of success and innovation, Lyzmo.com finance portal, 2023, available online at: <https://lyzmo.com/unlocking-the-secrets-of-spotifys-organizational-culture-a-case-study-on-success-and-innovation> last time consulted at 30.06.2025

⁴¹ See M. Levison, The Spotify Model of Scaling - Spotify Doesn't Use It, Neither Should You, Agile Pain Relief Consulting available at: <https://agilepainrelief.com/blog/the-spotify-model-of-scaling-spotify-doesnt-use-it-neither-should-you/> last time consulted in 1.07.2025

⁴² See L. Cluster, What Is the Spotify Agile Model and Its Impact?, Invensis – Global Learning Services, 2025, available at: <https://www.invensislearning.com/blog/spotify-model-in-agile> last time consulted in 24.06.2025; See M. Ledalla, Spotify Model: Benefits, Challenges, Scaling Agile & Usage, Star Agile, 2024, available at: <https://staragile.com/blog/spotify-model> last time consulted in 3.07.2025

⁴³ See L. Alvar, Successful with the Agile Spotify Framework: Squads, Tribes and Chapters - The Next Step After Scrum and Kanban?, BoD – Books on Demand, Norderstedt, Germany, 2020, pag. 13; See M. Mankins, E. Garton, How Spotify Balances Employee Autonomy and Accountability, Bain & Company, 2017, available at: <https://www.bain.com/insights/how-spotify-balances-employee-autonomy-and-accountability-hbr/> last time consulted in 22.06.2025; See G. Backlander, Doing complexity leadership theory: How agile coaches at Spotify practise enabling leadership, Creative and Innovation Management, 2019, Vol. 28, Issue 1, available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/caim.12303> last time consulted in 20.07.2025; See V. Stray, A. Tklich, N. B. Moe, The Agile Coach Role: Coaching for Agile Performance Impact, Proceedings of the Annual Hawaii International Conference on System Sciences (HICSS), AIS Electronic Library, 2021, pp. 6816–6825, available at: https://www.researchgate.net/publication/349152609_The_Agile_Coach_Role_Coaching_for_Agile_Performance_Impact last time consulted in 23.07.2025

not a universally formalized framework, offers an innovative alternative to traditional hierarchical structures by promoting autonomy, collaboration, and collective accountability, and may be regarded as a relevant organizational framework for supporting agility and innovation – key factors in shaping a sustainable competitive advantage within a dynamic market environment. An analysis of its structural and cultural components highlights its potential to support organizations' ability to respond rapidly to market changes and to deliver value consistently.

Understanding the competitive advantage generated by the Spotify model requires a careful analysis of how it succeeds in integrating organizational agility with scalability. The model proposes a framework that enables the preservation of rapid responsiveness and continuous innovation, even in contexts of accelerated growth. Its characteristic structure – based on autonomous, collaborative, and interconnected teams – supports a flexible ecosystem oriented toward the consistent delivery of value and the development of internal capabilities. However, the true source of competitive advantage does not reside in the formal structure, but rather in the organizational culture that supports autonomy, self-regulation, and agile leadership. Moreover, the implementation of the tribes model in organizing a company's activities entails the assimilation of the three fundamental dimensions of any agile practice – namely transparency, inspection, and adaptation – as well as a clear understanding of the pursued objectives and the available resources.

However, the effective implementation of this model requires a deep understanding of its fundamental principles, as well as careful adaptation to the specific context of each organization.

Considering the complexity of adopting the Spotify model and its impact on organizational structures, processes, and culture, the following recommendations are addressed to practitioners seeking to leverage this framework as a strategic tool for achieving sustainable competitive advantage:

Preliminary evaluation of organizational culture. Prior to initiating the adoption of the Spotify model, it is essential to conduct a rigorous assessment of the existing organizational culture. This should include the level of maturity regarding agile practices, the teams' openness to autonomy, and the leaders' capacity to adopt a servant leadership style. Such a preliminary analysis enables the identification of potential cultural barriers and the prerequisites for a sustainable transition.

Gradual implementation tailored to the organizational context. It is recommended to adopt an incremental approach to introducing the model, by initiating pilot projects in clearly delineated organizational areas. This strategy allows the Spotify structure to be adapted to the specific characteristics and needs of the teams, thereby facilitating more effective integration and mitigating the risks associated with large-scale organizational transformation.

Avoiding a mimetic approach to Spotify's structural model. Practitioners should avoid adopting the model in a mechanical manner, limited to the replication of its formal structure (squads, tribes, chapters, etc.). The success of the implementation fundamentally depends on the internalization of the values and principles underpinning the model. Authentic transformation entails a cultural paradigm shift, rather than a merely structural one.

Strategic investments in agile leadership. To support the autonomous and collaborative teams characteristic of the Spotify model, the training and development of agile leaders is required. This type of leadership requires a distinct set of capabilities, including the facilitation of distributed decision-making, the support of continuous learning, and the cultivation of trust within teams. Investments in the development of these leadership competencies constitute a critical factor for the long-term success of organizational transformation.

The implementation of the tribe model may follow the above-mentioned recommendations, ultimately resulting in a framework tailored to the company's specific needs and characteristics. The tribe model will be refined through practical application, gradually assuming a form that reflects the company's specific processes. Imitation has always served as a starting point, but true competitive advantage can only be achieved through adaptation. Thus, by learning from both existing examples and one's own experiences, an organization-specific approach to any given model may be formulated, one that is expected to evolve continuously over time. Commitment to the transformation process and a willingness to adapt, rather than remaining anchored to a predefined roadmap or strategy, are essential to the success of the transformation. When implementing any agile model, organizations should focus on carefully adapting agile practices that have proven effective in other organizations to the specific needs and structural context of each company, based on a period of experimentation within the respective organization.

Despite extensive analysis of the Spotify model across various organizational contexts, the literature indicates that certain aspects remain insufficiently explored and deserve greater attention in future research. A first research avenue concerns the assessment of the long-term impact of the model's implementation on organizational performance, through longitudinal studies examining the relationships between the structuring of autonomous teams, organizational culture, and indicators of efficiency, innovation, or talent retention. Another research opportunity lies in exploring the adaptability of the model in non-technological industries, given that its applicability has been predominantly examined within the IT sector and digitally oriented organizations. Furthermore, comparative studies between the Spotify model and other agile scaling frameworks – such as SFAe (Scaled Agile Framework), LeSS (Large-Scale Scrum), or Nexus – can help highlight differences in approach, implementation challenges, and effects on organizational agility across diverse contexts. Therefore, a nuanced understanding of the Spotify model and its strategic implications provides not only a framework for reflection for practitioners, but also a valuable starting point for the development of future research aimed at exploring the potential of this model across the diversity of contemporary organizational contexts.

The present paper provides a solid theoretical framework and a critical analysis of the Spotify model as a potential source of competitive advantage. When organizations acknowledge that this model is not a universal prescription but an organizational philosophy grounded in people, autonomy, and learning, it may serve as a powerful instrument for strategic adaptation and sustainable innovation.

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3. ADMINISTRATIVE AND POLITICAL SCIENCES

THE INEXTRICABLE LINK BETWEEN THE GROWTH EFFECT OF NEXT GENERATION EU FUNDING AND THE NATIONAL INSTITUTIONAL QUALITY: THE ROMANIAN CASE

Constantin BRĂGARU*

Abstract

The European Union's Cohesion Policy has played overtime and still plays a key role in supporting the economic and social development of Romania as in supporting the economic development of any other EU member state. Furthermore, to mitigate existing national economic vulnerabilities at EU level, doubled by the difficult economic consequences created by the COVID-19 pandemic in 2020, additionally to the EU Cohesion Policy funds, the European Commission launched the Next Generation EU program, program focused on financing National Recovery and Resilience Plans (NRRP). The key objective of every member state's NRRP, including Romania's, is to accelerate the recovery process and enhance resilience.

In the context of massive multiannual financial stimulus packages - namely the Cohesion policy funds (2021–2027) and the Recovery and Resilience Facility (2021–2026) - projections pointed toward a robust growth for the Romanian economy. Contrary to expectations, however, our country registered delays in absorbing European funds, particularly in the implementation of the NRRP, primarily caused by limitations in national administrative capacity.

This paper intends to limit itself to analyzing the inextricable link between the economic growth driven by Next Generation EU funding and the limited national administrative capacity. Especially, this paper with its findings intends to highlight the fact that our weak public administration has led to Romania's low capacity to implement the NRRP and that although our country has received countless recommendations from European Commission to reform its administrative system and improve the implementation capacity, it has failed to do so,

Furthermore, this research highlights that for the efficient absorption of European funds in the near future, namely the Security Action for Europe (SAFE) program (2026-2030), it is imperative for Romania to develop a strong public administration characterized by a low level of corruption, a strong rule of law and an effective regulatory framework.

Keywords: *European funds, economic growth, institutional quality.*

1. Introduction

Romania's National Recovery and Resilience Plan (NRRP) represents a goal-oriented program of reforms and investments which purpose is to mitigate the socioeconomic effects of the COVID-19 pandemic and also the energy resources and cost-of-living crises.

Romania's NRRP was approved by the Council on 27 of September 2021¹ and amended on 8 December 2023² with amounts to 28.5 billion of euros, amounts that include the Recovery and Resilience Facility (RRF) grants worth 12.1 billion of euros, REPowerEU grants worth 1.4 billion of euros, the transfer of Romania's share of 43.2 million of euros from the Brexit Adjustment Reserve to its NRRP³ to which is added the RRF loan allocation worth 14.9 billion euros already committed under the initial NRRP version.

The recovery plan is to be implemented by the end of August 2026.

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¹ European Commission, Proposal for a Council, Implementing Decision on the approval of the assessment of the recovery and resilience plan for Romania, Brussels, 27.9.2021 COM(2021) 608 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0608>.

² Council of the European Union, Council implementing Decision amending the Implementing Decision of 29 October 2021 on the approval of the assessment of the recovery and resilience plan for Romania, Brussels, 5 December 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15833_2023_INIT.

³ European Parliament, Briefing, Next Generation EU (NGEU) delivery – How are the Member States doing? Romania's National Recovery and Resilience Plan Latest state of play, September 2025, p.1, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)733641](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733641).

According to the data from September 2025, provided by the European Parliament, specifically their Interactive Map regarding the stage of implementation for each member state's NRRP, Romania was situated below the EU average of 56,4 %⁴.

Findings from the 2025 European Semester (Fig. 1) led the Council to recommend that Romania urgently accelerate the implementation of its NRRP, as 73%⁵ of milestones and targets had not yet been achieved. (Fig.2)

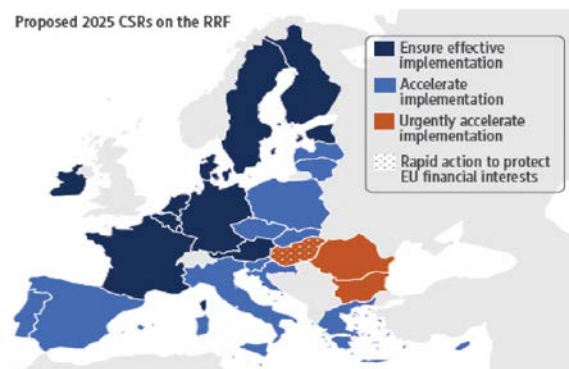


Fig. 1. RRF Milestones and targets still to be achieved by all member states⁶

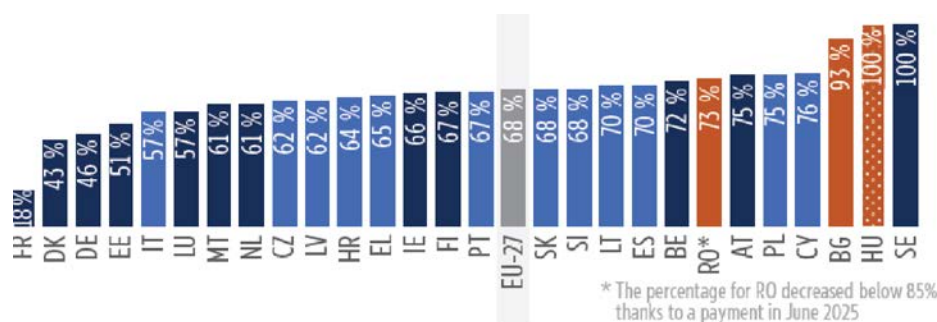


Fig. 2. RRF Milestones and targets still to be achieved by Romania⁷

In September 2025, in response to low absorption rates and the risk of losing RRF funds due to weak administrative capacity, Romania requested a revision and renegotiation of its NRRP. The revision was imperative, primarily because Romania failed to meet assumed targets and milestones, especially regarding state company reforms, justice laws and maturity in project management.

Due to these challenges, Romanian authorities revised their NRRP, and the Council approved the second amendment⁸. According to the new revised NRRP, the RRF funding was reduced to 21.4 billion euros, which includes grants worth 13.5 billion euros⁹ and loans worth 7.8 billion euros¹⁰. The reduction of RRF funding was proportional to the reduction of targets and milestones, which decreased from 518 to 390¹¹.

The final form of the NRRP, despite the short implementation timeline ending August 31, 2026, provided the Council with assurance that the country would fully benefit from RRF funding. Additionally, the maturity of this revision highlights a targeted focus on strengthening public institutions.

⁴ *Ibidem*.

⁵ European Parliament, Briefing, Economic outlook quarterly Fragmented trade, untapped potential at home, June 2025, p.4, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/772889/EPRS_BRI\(2025\)772889_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/772889/EPRS_BRI(2025)772889_EN.pdf).

⁶ *Ibidem*.

⁷ *Ibidem*.

⁸ Council of the European Union, Council implementing Decision amending the Implementing Decision of 29 October 2021 on the approval of the assessment of the recovery and resilience plan for Romania, Brussels, 11 November 2025, <https://mfe.gov.ro/wp-content/uploads/2025/11/1ecb1d0b595b344e37fe2cd6916e4bf7.pdf>.

⁹ *Idem*, p. 12.

¹⁰ *Idem*, p. 13.

¹¹ *Idem*, pp. 3-5.

According to the data from the Ministry of Investments and European Projects as of March 11, 2026¹², Romania has so far received 10.722 billion of euros representing 37,6 %¹³ of the total RRF resources. These includes three payments comprising 6.4 billion of euros¹⁴ in total total grants and 4.3 billion of euros¹⁵ in total loans, plus the pre-financing.

2. Specific Recommendations for Romania. The European Semester

Since the introduction of the European Semester in 2010 as a tool for the European Commission to coordinate economic, budgetary, and social policies, its monitoring role has extended to supervising the structural reforms set out in the National Recovery and Resilience Plans. Accordingly, the Council has continued to adopt Country-Specific Recommendations (CSRs) on an annual basis.

All member states, including our country, were asked to address a substantial set of recommendations received in the 2019-2020 European Semester evaluations through measures included in their NRRPs in order to benefit from RRF funding.

The Council recommended that Romania implement a set of measures to guarantee post-pandemic recovery and support the green and digital transition. In the 2019 and 2020 CSRs, the Council focused its recommendations on the following areas: public finances, taxation, the pension system, health, poverty reduction, education, social inclusion, research, development and innovation (R&D&I), the business environment, the labour market, the green and digital transition, and, not least, public administration and institutional quality.

Focusing solely on the area of public administration, the Council recommended that our country strengthen its efforts to enhance the quality and effectiveness of public institutions and to assure legal certainty¹⁶.

Romania has fully integrated the Council recommendations into its NRRP targets and milestones to be achieved regarding the improvement of administrative capacity in all areas, such as: public governance and decision-making, health, judicial system reforms, and the consolidation of the rule of law.

In the context of the 2025 European Semester, spring package, which noted a major delay in the implementation of the NRRP, caused mainly by weak public institutional quality, the Council recommended that Romania urgently accelerate the implementation of its NRRP. Specifically, the Council advised Romania to “accelerate reforms and investments by tackling procurement delays, ensuring effective governance, and strengthening administrative capacity”¹⁷. Furthermore, the Council recommended that national and local institutions make considerable efforts to implement simpler rules and expedite administrative procedures.

Regarding the legislative framework, the Council assessed its quality as “questionable”¹⁸ and its “actual use as uncertain”¹⁹. Finally, the Council recommended that Romania urgently implement NRRP reforms focused on strengthening “the capacity for policy coordination”²⁰ and increasing “the quality of public consultations”²¹, which would help improve economic and social outcomes.

Not at least, to maximize the use of cohesion and RRF funds, the Council advised Romania to improve public administration efficiency and decision-making predictability, ensuring that new legislation does not “undermine legal certainty”²².

By analyzing the June 2025 Council recommendations to Romania alongside September 2025 data from the European Parliament's Interactive Map (which monitors NRRP implementation stages), we can conclude that the

¹² Ministerul Investițiilor și Proiectelor Europene, Tablou de Bord PNRR, 11 March 2026, <https://mfe.gov.ro/pnrr-dashboard/>.

¹³ European Parliament, Briefing, Next Generation EU (NGEU) delivery – How are the Member States doing?, Romania's National Recovery and Resilience Plan Latest state of play, September 2025, p.1, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)733641](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733641).

¹⁴ <https://www.europarl.europa.eu/thinktank/infographics/RRF/recovery-resilience-facility/?lang=en#data-map>.

¹⁵ *Ibidem*.

¹⁶ European Parliament, Briefing, Next Generation EU (NGEU) delivery – How are the Member States doing?, Romania's National Recovery and Resilience Plan Latest state of play, September 2025, p.2, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2022\)733641](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733641).

¹⁷ European Commission, Recommendation for a Council recommendation on the economic, social, employment, structural and budgetary policies of Romania, COM(2025) 223 final, Brussels, 04.06.2025, p. 7, https://commission.europa.eu/document/download/ba3d44aa-c5f1-4e86-b437-12c64f6f685d_en?filename=COM_2025_223_1_EN_ACT_part1_v4.pdf.

¹⁸ *Idem*, p. 8.

¹⁹ *Ibidem*.

²⁰ *Ibidem*.

²¹ *Ibidem*.

²² *Idem*, p. 12.

low absorption rate of RRF funds was largely due to the poor quality of the public institutions responsible for implementation.

Due to weak public governance and project management, an imperative revision of the NRRP in November 2025 was required to successfully benefit from RRF funding and to direct it toward realistic, long-term economic and administrative investments.

More importantly, our current institutional quality is not only responsible for the low rate of RRF funding absorption, but it has also been a persistent constraint on the absorption of all EU funds since the 2007–2013 Multiannual Financial Framework. This key constraint has been repeatedly highlighted by both Romanian and international stakeholders with economic surveillance mandates.

3. Views of Romanian and International stakeholders on the role of institutional quality in the absorption of RRF Funding

The World Bank acknowledged the fact that Romania's NRRP had and still has a great potential to achieve the post-pandemic recovery and to generate economic growth. The Bank stressed that Romania's NRRP measures are suitable for addressing the main critical issues affecting economic growth and development, such as poor infrastructure, social inclusion, health, and labor quality. However, the World Bank also highlighted that Romania's low historical absorption of EU funds remains an important issue, issue caused mainly by "weak institutions and insufficient administrative capacity"²³, which is considered a "key constraint."²⁴

The Bank believes that "limited cross-government coordination"²⁵ and poor alignment between "strategic priorities and investments"²⁶ continue to hinder Romania's capacity to absorb EU funding and "deliver public services up to EU standards"²⁷, this is despite the NRRP providing the national government with a medium-term framework for major administrative reforms.

Echoing the views of the World Bank, also the Organization for Economic Cooperation and Development (OECD) stated in its latest survey on Romania's economic growth²⁸, that the absorption of EU funding is slow, "particularly under the Recovery and Resilience Facility" and this may dampen economic growth.²⁹

This low rate of absorption of EU funding - and by extension the RRF funding - is constrained "by weak administrative capacity and low-quality project preparation"³⁰. OECD recommends that Romania take immediate measures to strengthen administrative capacity, focusing especially on creating "better coordination across institutions"³¹.

Furthermore, the OECD considers that continued progress in increasing the quality of public institutions would help deliver lasting improvements in the absorption of EU funding and in the quality of EU funds spending³².

Nevertheless, the National Bank of Romania (BNR)'s latest analysis³³ concluded that NRRP implementation was slow, citing low RRF funding absorption and delayed reforms due to weak administrative capacity in meeting targets and milestones³⁴. The Bank notes that Romania's trailing position in the EU is due to three systemic issues: administrative constraints, poor project management, and protracted legislative processes³⁵.

²³ World Bank Group, Systematic country diagnostic update, Romania, 2023, p. 14, <https://documents1.worldbank.org/curated/en/099134003102323181/pdf/BOSIB0480d508207e0805908b215a1d78b8.pdf>.

²⁴ *Ibidem*.

²⁵ *Idem*, p. 36.

²⁶ *Ibidem*.

²⁷ *Ibidem*.

²⁸ OECD, OECD Economic Surveys: Romania 2026, OECD Publishing, Paris, 2026, <https://doi.org/10.1787/4844067e-en>.

²⁹ *Idem*, p. 10.

³⁰ *Idem*, p. 59.

³¹ *Idem*, p. 35.

³² *Ibidem*.

³³ Banca Națională a României, Cristina, Anghelescu, Daniel, Dăianu, Tudor, Grosu, David, Orșan, Caiete de studii Nr. 66, Fondurile europene și investițiile publice în România: implicații ale încheierii PNRR asupra creșterii Economice, Februarie 2026, www.consiliulfiscal.ro/Caiet%20de%20studii%20nr.66_2026.pdf.

³⁴ *Idem*, pp. 13-14.

³⁵ *Idem*, p. 14.

4. Conclusions

The crisis generated by the COVID-19 pandemic has amplified existing economic vulnerabilities, both at the European Union and national levels.

The effects of this crisis have had also a significant impact on Romania's socio-economic development, highlighting even more clearly the imperative to strengthen our country's resilience in the face of future economic shocks. In this context, the European Commission has launched the program Next Generation EU program, program focused on financing National Recovery and Resilience Plans (NRRP). The key objective of every member state's NRRP, including Romania's, is to accelerate the recovery process and enhance resilience.

As previously noted, the need to bolster national resilience against economic shocks gained further urgency following the outbreak of the war in Ukraine. In this volatile regional climate, RRF funding proved to be invaluable.

Without RRF funding, Romania would completely fail to implement vital investments and reforms for social and economic growth, especially considering the war on its Ukrainian border, its budget deficit and limited administrative capacity³⁶. These volatile national and regional difficulties have led to slow progress in implementing the reforms and investments pledged under the NRRP, resulting in delays in submitting payment requests. In this context, Romania was obliged to revise the NRRP in November 2025.

Overall, European funds, including both the RRF funding (2021-2016) and the Cohesion policy funds (2021–2027), helped mitigate the adverse effects of the COVID-19 pandemic and boosted Romania's economic recovery.

However, both Romanian and international stakeholders have concluded in various economic surveys that institutional quality plays a vital role. Specifically, in economies with weak institutions, the impact of European funding is limited, whereas strengthening institutional quality would significantly amplify economic growth.

Echoing the views of the BNR, we conclude that future reforms and investments—taking into consideration the NRRP experience and the upcoming EU funding (Security Action for Europe, SAFE, 2026-2030), must be directed towards improving institutional quality. As economic surveys from European and international stakeholders have repeatedly recommended, our governments must never undermine the interdependence between the level of European funding absorption, public investment, and the dynamics of economic growth.

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³⁶ *Idem*, p. 37.

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FROM SILENCE TO SPEAKING: INVESTIGATING BARRIERS TO ESP ORAL PARTICIPATION IN ROMANIAN UNIVERSITIES

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Abstract

This study investigates the factors that inhibit university students' oral participation in English for Specific Purposes (ESP) speaking activities within Romanian higher education. Drawing on a five-dimensional framework (linguistic, cognitive, affective, pedagogical, and socio-cultural) the research explores how these interrelated variables shape classroom silence. A mixed-methods approach was employed, using a structured questionnaire administered to 12 experienced ESP instructors. Quantitative data were analyzed through descriptive statistics, while qualitative responses were thematically coded to capture recurring perceptions and contextual nuances. Findings indicate that affective factors, particularly fear of negative evaluation, low self-confidence, and anxiety, constitute the most significant barriers to participation. Socio-cultural concerns, such as fear of losing face, further reinforce silence. Linguistic limitations, including insufficient vocabulary and grammatical uncertainty, and cognitive constraints, such as limited topic knowledge and preparation, also contribute substantially. In contrast, pedagogical factors were perceived as less influential, though instructors identified strategies (such as scaffolded tasks, collaborative work, and supportive feedback) as effective in promoting engagement. The study highlights that classroom silence is a multifactorial phenomenon rooted in the interaction of emotional, linguistic, cognitive, and social dynamics. It offers practical implications for ESP teaching, emphasizing the need for supportive, low-risk speaking environments and targeted instructional scaffolding to enhance communicative competence.

Keywords: ESP, speaking activities, classroom participation, barriers, higher education, Romania.

1. Introduction

Oral participation is a fundamental component of English for Specific Purposes (ESP) instruction, yet many university students remain silent or minimally engaged during speaking activities. This paper examines the factors that inhibit students' active participation in ESP speaking tasks within Romanian higher education contexts. Specifically, it investigates how linguistic, cognitive, affective, pedagogical, and socio-cultural factors contribute to classroom silence, drawing on instructors' perceptions to identify the most significant barriers.

Understanding the causes of non-participation is crucial because active speaking practice is central to developing communicative competence, particularly in ESP contexts where students must use discipline-specific language for professional or academic purposes. Silence not only limits language development but also affects learners' confidence, collaboration, and ability to engage meaningfully with content, making it a persistent challenge for instructors and curriculum designers.

To address this issue, the study employed a structured questionnaire comprising Likert-scale items and open-ended questions, designed to capture both quantitative and qualitative insights into instructors' perceptions. The questionnaire explored five theoretically grounded dimensions—linguistic, cognitive, affective, pedagogical, and socio-cultural factors—enabling the identification of both the most prominent barriers and contextual nuances that influence students' willingness to speak in ESP classrooms. Quantitative data were analyzed using descriptive and inferential statistics, while qualitative responses were thematically coded to highlight recurring patterns and insights.

This study builds on existing research that emphasizes the multifactorial nature of classroom participation in ESP and second language learning. While prior studies have highlighted language proficiency, affective

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barriers, and pedagogical practices as key influences¹, this paper extends the literature by systematically combining multiple dimensions into a single analytical framework and focusing on Romanian higher education, a context that has received limited empirical attention. By integrating instructors' quantitative ratings with qualitative reflections, the study provides a comprehensive perspective on why students remain silent and offers evidence-based guidance for fostering active participation in ESP speaking activities.

2. A Cohesive Theoretical Framework for ESP Speaking Participation

Oral participation in English for Specific Purposes (ESP) classrooms is a multifaceted phenomenon shaped by intersecting linguistic, cognitive, affective, pedagogical, and socio-cultural factors. While much research emphasizes language proficiency as the primary determinant of participation, empirical studies in higher education contexts increasingly show that students' silence and limited engagement result from a complex interplay of cognitive constraints, affective barriers, pedagogical practices, and socio-cultural norms². To systematically analyze these influences, the proposed theoretical framework integrates insights from second language acquisition, second language pedagogy and applied linguistics, highlighting how each dimension contributes to—or hinders—ESP learners' oral participation.

The framework conceptualizes oral participation as the outcome of dynamic interactions among internal learner characteristics (linguistic, cognitive, and affective) and external environmental factors (pedagogical and socio-cultural), mediated through task-specific interactions and social contexts. Each dimension is outlined below, followed by a synthesis of their interactions.

2.1. Linguistic Dimension

The linguistic dimension focuses on learners' knowledge and control of the target language, including grammar, vocabulary, fluency, discourse competence, and strategic competence. Drawing on Canale and Swain's model of communicative competence³ and Hymes' foundational work⁴, effective oral participation in ESP classrooms requires:

- Grammatical competence: accuracy in syntax, morphology, and sentence construction.
- Lexical competence: sufficient vocabulary, including discipline-specific terminology, to express ideas precisely⁵.
- Fluency and automaticity: the ability to produce language rapidly and with minimal cognitive effort⁶.
- Discourse competence: organizing ideas coherently in extended speech, appropriate to genre and ESP context⁷.
- Strategic competence: use of compensatory strategies (paraphrasing, circumlocution) to maintain communication despite linguistic gaps⁸.

Empirical research indicates that perceived linguistic inadequacy strongly predicts classroom silence, even among learners with adequate general English proficiency, especially when the task requires domain-specific communication⁹. Hesitation, avoidance, and self-monitoring emerge when students fear producing inaccurate utterances, highlighting the interplay between linguistic and affective dimensions.

¹ Almathkuri, J., Factors influencing EFL learners' oral participation in Saudi universities, in *English Education Journal*, 2025, volume 15, issue 2, pp. 50-55.

² *Ibidem*.

³ Canale, M., & Swain, M., Theoretical bases of communicative approaches to second language teaching and testing, in *Applied Linguistics*, 1980, volume 1, issue 1, pp. 1–10.

⁴ Hymes, D., On communicative competence, in J.B. Pride and J. Holmes (Eds.), *Sociolinguistics*, 1972, Harmondsworth: Penguin.

⁵ Nation, I. S. P., *Learning vocabulary in another language*, Cambridge University Press, 2001, pp. 3-15.

⁶ Skehan, P., Modelling second language performance: Integrating complexity, accuracy, fluency, and lexis, in *Applied Linguistics*, 2009, volume 30, issue 4, pp. 510–520.

⁷ Widdowson, H. G., *Teaching language as communication*, Oxford University Press, 1978, pp. 10-25.

⁸ Swain, M., Communicative competence: Some roles of comprehensible input and comprehensible output in its development, in S. Gass & C. Madden (eds.), *Input in second language acquisition*, Newbury House, 1985, pp. 235-240.

⁹ Peng, J.-E., A study of willingness to communicate and classroom anxiety of Chinese EFL learners, in *English Language Teaching*, 2012, volume 5, issue 5, pp. 45-55.

2.2. Cognitive Dimension

The cognitive dimension addresses learners' mental processes and information-processing capacity during oral production. Speaking in ESP contexts is cognitively demanding because it requires simultaneous management of idea generation, lexical retrieval, grammatical encoding, and self-monitoring, often under time constraints¹⁰. Key theoretical constructs include:

- Information processing models, which emphasize that learners have finite attentional resources, which can become overloaded during complex tasks. Overload leads to hesitation, errors, or avoidance.
- Working memory, which determines learners' ability to manage multiple processes concurrently. High working memory capacity correlates with better oral participation¹¹.
- Task-based learning (TBL), which supports cognitive engagement by structuring tasks that focus on meaning while gradually integrating linguistic accuracy¹². Tasks such as role-plays, problem-solving, and case studies facilitate meaningful output without exceeding cognitive capacity.

The trade-off hypothesis¹³ further explains that learners prioritize one aspect of performance (e.g., accuracy) at the expense of another (e.g., fluency) when processing capacity is exceeded. This highlights the cognitive underpinnings of silence: learners may refrain from speaking to avoid overtaxing their processing system or producing errors.

2.3. Affective Dimension

The affective dimension focuses on emotional and motivational factors that influence learners' willingness and ability to speak. Krashen's Affective Filter Hypothesis¹⁴ posits that anxiety, low motivation, and negative attitudes can block language input from being effectively processed. Conversely, positive emotions and self-confidence lower the filter, facilitating participation.

The Willingness to Communicate (WTC) framework complements this perspective¹⁵. WTC is determined by:

- Trait-level factors: personality, self-confidence, introversion/extraversion.
- State-level factors: topic familiarity, audience characteristics, classroom atmosphere.

In ESP classrooms, high-stakes or technical tasks may trigger anxiety, even in linguistically capable learners¹⁶. Socio-cultural norms, such as fear of negative evaluation or face concerns, exacerbate affective barriers, reducing oral participation.

Pedagogically, confidence-building activities, collaborative tasks, and supportive feedback can lower the affective filter and enhance WTC¹⁷. Therefore, affective variables interact with both linguistic and cognitive dimensions, shaping learners' oral engagement.

2.4. Pedagogical Dimension

The pedagogical dimension focuses on instructional practices, task design, and teacher scaffolding. It draws on socio-constructivist and interactionist approaches, which emphasize socially mediated learning and meaning negotiation:

- Socio-constructivist principles. Vygotsky's Zone of Proximal Development suggests learners perform at higher levels when supported through scaffolding¹⁸. Collaborative learning and guided tasks reduce cognitive and affective strain while encouraging oral output.

¹⁰ Skehan, P., *A cognitive approach to language learning*, Oxford University, 1998 pp. 30-60.

¹¹ de Bot, K., Lowie, W., Verspoor, M., *Second Language Acquisition: An Advanced Resource Book*, 2005, Routledge.

¹² Ellis, R., *Task-based language learning and teaching*, Oxford University Press, 2003, pp. 100-120.

¹³ Skehan, P., *Modelling second language performance: Integrating complexity, accuracy, fluency, and lexis*, in *Applied Linguistics*, 2009, volume 30, issue 4, pp. 515-520.

¹⁴ Krashen, S. D., *The input hypothesis: Issues and implications*, Longman, 1985, pp. 2-10.

¹⁵ MacIntyre, P. D., Clément, R., Dörnyei, Z., & Noels, K. A., *Conceptualizing willingness to communicate in a L2: A situational model of L2 confidence and affiliation*, in *The Modern Language Journal*, 1998, volume 82, issue 4, pp. 547-550.

¹⁶ Yashima, T., *Willingness to communicate in a second language: The Japanese EFL context*, in *The Modern Language Journal*, 2002, volume 86, issue 1, pp. 55-60.

¹⁷ Gregersen, T., MacIntyre, P. D., *Capitalizing on language learners' individuality: From premise to practice*, Bristol University Press, 2014, pp. 30-45.

¹⁸ Donato, R., *Collective scaffolding in second language learning*, in J.P. Lantolf & G. Appel (eds.), *Vygotskian approaches to second language research*, Ablex Publishing, 1994, pp. 40-45.

- Interactionist approaches. Interaction facilitates comprehensible input, negotiation of meaning, and corrective feedback, which are crucial for ESP learners¹⁹. Pair work, group discussions, and task-based simulations enable authentic practice.

- Task-based language teaching (TBLT) integrates form-meaning focus, scaffolds tasks according to learners' proficiency, and promotes active participation in authentic ESP scenarios²⁰.

Empirical studies show that interactive, student-centered pedagogy increases oral participation, whereas teacher-centered instruction and monotonous tasks reinforce silence²¹.

2.5. Socio-Cultural Dimension

The socio-cultural dimension highlights cultural norms, interpersonal dynamics, and identity concerns. Two key frameworks underpin this dimension:

- Face Theory. Goffman and Brown & Levinson describe face as the public self-image individuals strive to maintain. Speaking in a foreign language can threaten positive face (desire for approval) and negative face (desire for autonomy), causing hesitation or silence²².

- Classroom communication norms. Cultural expectations regarding turn-taking, deference to authority, and risk avoidance influence participation²³. In ESP contexts, fear of peer or instructor evaluation is amplified in professional or technical discussions.

Socio-cultural norms interact with affective and pedagogical factors, reinforcing silence when risk-taking is socially discouraged. Strategies such as role-plays, simulations, and inclusive classroom cultures can mitigate face threats and encourage participation²⁴.

The five-dimensional framework provides a comprehensive model for understanding ESP speaking participation. It emphasizes that oral engagement is not solely a function of linguistic proficiency but results from the interaction of cognitive capacity, emotional readiness, pedagogical support, and socio-cultural context. This integrated perspective allows instructors and curriculum designers to identify barriers and implement strategies—such as scaffolding, collaborative tasks, confidence-building, and culturally responsive practices—to enhance participation and communicative competence in ESP classrooms.

3. Methodology

This study employed a mixed-methods approach to explore ESP instructors' perceptions of factors influencing students' participation in speaking activities at Romanian universities. Data were collected using a structured questionnaire comprising Likert-scale items and open-ended questions, designed to capture both quantitative and qualitative insights. The questionnaire addressed five dimensions of potential influence—linguistic, cognitive, affective, pedagogical, and socio-cultural factors—alongside instructors' overall perceptions and their demographic and professional background.

Participants included ESP instructors from various fields, academic qualifications, and teaching experience levels. Respondents rated statements on a 5-point Likert scale (1 = Strongly Disagree to 5 = Strongly Agree) and provided open-ended responses regarding recurring patterns of silence, contributing factors, and strategies to encourage participation. Quantitative data were analyzed using descriptive statistics to identify the most prominent perceived barriers, while qualitative responses underwent thematic analysis to reveal recurring patterns and additional factors affecting students' speaking engagement. The integration of these analyses offered a comprehensive understanding of the multi-dimensional influences on student participation in ESP speaking activities.

¹⁹ Gass, S. M., *Input, interaction, and the second language learner*, Lawrence Erlbaum, 1997, pp. 25-40.

²⁰ Van den Branden, K., *Task-based language education: From theory to practice*, Cambridge University Press, 2006, pp. 80-95.

²¹ Littlewood, W., *The task-based approach: Some questions and suggestions*, in *ELT Journal*, 2004, volume 58, issue 4, pp. 320-323.

²² Benson, P., *Teaching and researching autonomy in language learning*, 2nd ed., Pearson Education, 2005, pp. 100-110.

²³ Hu, G., *Potential cultural resistance to pedagogical imports: The case of communicative language teaching in China*, in *Language, Culture and Curriculum*, 2002, volume 15, issue 2, pp. 95-100.

²⁴ Bitchener, J., & Basturkmen, H., *Perceptions of the difficulties of postgraduate L2 thesis students writing the discussion section*, in *Journal of English for Academic Purposes*, 2006, volume 5, issue 1, pp. 6-10.

4. Findings

The questionnaire yielded 12 valid responses from ESP instructors teaching ESP in Romanian universities. The sample was highly experienced: all respondents held a PhD, 11 were female, and 9 out of 12 reported more than 15 years of ESP teaching experience. Most taught classes of 15–40 students or more, and the proficiency levels they reported were mainly intermediate to upper-intermediate. This profile suggests that the responses reflect the perceptions of experienced ESP practitioners rather than novice teachers.

The quantitative results show that affective factors were the strongest perceived barriers to students' participation in speaking activities. Among the five factor groups, the highest overall mean was recorded for Affective Factors ($M = 3.91/5$), followed by Socio-cultural Factors ($M = 3.67$) and Linguistic Factors ($M = 3.64$). Cognitive Factors ($M = 3.43$) were moderately endorsed, while Pedagogical Factors ($M = 2.95$) received the lowest overall rating.

At item level, the strongest barrier identified by respondents was concern about classmates' evaluations or judgments (AF8), with a mean of 4.50, and 11 of 12 teachers (91.7%) agreeing or strongly agreeing. This was followed by low self-confidence in public speaking situations (AF1) with a mean of 4.33, and insufficient vocabulary to express ideas effectively (LF1) with a mean of 4.25, also endorsed by 91.7% of respondents. Other highly rated items included anxiety about volunteering to speak (AF3, $M = 4.17$), concern about losing face in front of peers (SCF3, $M = 4.08$), and low self-confidence in oral communication skills (AF2, $M = 4.00$).

Several items also clustered around the upper-middle range, indicating substantial though not unanimous agreement. These included fear of making mistakes (AF4, $M = 3.92$), limited background knowledge of discussion topics (CF5, $M = 3.92$), insufficient preparation before class (CF4, $M = 3.92$), and difficulty in constructing grammatically correct sentences (LF2, $M = 3.75$). Low motivation to participate (AF5, $M = 3.75$) and anxiety about being questioned repeatedly by the instructor (AF7, $M = 3.67$) were also viewed as relevant constraints.

By contrast, the least endorsed items were mainly pedagogical. Monotonous teaching methods (PF8) had the lowest mean (2.50), followed by ineffective or unclear instructor feedback (PF3, $M = 2.58$) and unengaging speaking activities (PF9, $M = 2.58$). Only 2 of 12 respondents (16.7%) agreed that each of these was a major cause of silence. Similarly, assessment systems emphasizing participation marks (PF5, $M = 3.00$) and limited wait-time for students to formulate responses (PF4, $M = 3.00$) were not strongly endorsed. This suggests that the respondents generally did not view classroom methodology itself as the main source of reluctance.

The open-ended responses reinforce the quantitative pattern. In response to the question about the primary factor behind silence, the most frequent themes were fear of making mistakes, fear of negative evaluation, limited language proficiency, and insufficient topic knowledge. Several teachers explicitly mentioned students' fear of being judged, embarrassed, or "losing face." Others highlighted the gap between students' general English and the specialized language required in ESP contexts. A smaller number referred to motivation, prior negative learning experiences, fatigue, or poor concentration.

The answers about recurring patterns of silence also showed clear convergence. Respondents observed that silent students often avoid volunteering, give minimal answers, let more confident peers dominate, or switch to the first language. Silence was reported to be more common among students with lower proficiency, low self-esteem, limited reading or world knowledge, or classes scheduled very early or very late in the day.

Regarding strategies to encourage participation, teachers most often reported using scaffolded tasks, small-group or teamwork formats, interesting and relevant topics, games, role-based or creative activities, oral presentations, and positive incentives such as bonus points. A notable trend in these responses is that many teachers try to reduce pressure by shifting attention from error to meaning, or by creating less threatening participation formats.

5. Discussion

The findings indicate that students' silence in ESP speaking activities is perceived primarily as an affective problem, rather than simply a pedagogical one. The strongest items all concern anxiety, self-confidence, and peer judgment, which suggests that students may remain silent not because they have nothing to say, but because speaking is experienced as socially risky. The especially high mean for concern about classmates' evaluations is important: it implies that the classroom is not only a linguistic space but also a social one in which identity and face are at stake.

This pattern is strengthened by the prominence of socio-cultural concerns, especially losing face and avoiding embarrassing situations. These findings suggest that silence in ESP classes may be partly explained by students' attempts to protect themselves from public failure. In this sense, silence can be viewed not as passivity, but as a defensive strategy. The moderate endorsement of cultural norms encouraging restraint also indicates that some students may come from educational or interpersonal contexts where spontaneous public speaking is not strongly encouraged.

The role of linguistic factors remains substantial. Teachers clearly perceived insufficient vocabulary, grammatical difficulties, and uncertainty about tense usage as important barriers. This is especially plausible in ESP settings, where students are expected to use not only general English but also specialized terminology and discipline-specific discourse. The open-ended comments support this interpretation by repeatedly pointing to the gap between students' general proficiency and the demands of speaking in technical or academic contexts. In other words, affective difficulty and linguistic difficulty appear to reinforce one another: the less secure students feel linguistically, the more likely they are to fear judgment and withdraw from speaking.

The findings also show that cognitive readiness matters. Teachers gave relatively strong ratings to limited background knowledge and insufficient preparation before class, which suggests that silence is sometimes linked to not knowing what to say rather than not wanting to say it. In ESP classes, students may hesitate when they lack disciplinary content knowledge, not just language resources. This is especially relevant because ESP communication often requires students to discuss specific professional or academic topics, not merely everyday situations.

A notable result is the comparatively low rating of pedagogical factors. Since monotonous methods, poor feedback, and unengaging activities received the lowest means, the respondents did not generally attribute silence to poor teaching design alone. That does not mean pedagogy is irrelevant. Rather, it suggests that the teachers in this sample perceive silence as more deeply rooted in student psychology, linguistic preparedness, and classroom social dynamics than in instructional technique itself. The open-ended responses, however, show that teachers do see pedagogy as part of the solution: many reported using collaborative, scaffolded, and creative strategies precisely to reduce anxiety and increase willingness to speak.

Taken together, the results support a multifactorial interpretation of silence in ESP classes. No single variable explains non-participation on its own. Instead, the data suggest an interaction between fear of negative evaluation, low confidence, limited linguistic resources, and insufficient content readiness. In practical terms, this means that increasing participation is unlikely to be achieved through grading pressure or simple exhortation. More promising approaches are those that reduce the interpersonal threat of speaking, provide stronger linguistic scaffolding, and ensure students have enough topic knowledge and preparation time to contribute meaningfully.

These findings also have implications for ESP course design. If silence is strongly tied to peer judgment and face concerns, teachers may need to build participation gradually through low-risk speaking formats, such as pair work, small groups, rehearsed tasks, and collaborative preparation. If vocabulary and content knowledge are also key barriers, then pre-speaking support becomes crucial: teachers may need to pre-teach terminology, activate background knowledge, and structure speaking tasks more carefully. The reported success of strategies such as games, relevant topics, and teamwork suggests that participation increases when speaking is made both safer and more purposeful.

The results should be interpreted cautiously because the sample is small ($N = 12$) and reflects teacher perceptions rather than direct student self-reports or classroom observation. Even so, the responses are fairly consistent, and the qualitative comments closely match the quantitative rankings. For that reason, the data offer a credible preliminary picture: in these ESP contexts, student silence appears to stem less from poor teaching methods than from a combination of anxiety, fear of judgment, limited confidence, and insufficient linguistic or topical resources.

6. Conclusions

This study explored ESP instructors' perceptions of the factors limiting students' participation in speaking activities in Romanian university classrooms. The findings indicate that student silence is primarily driven by affective and socio-cultural factors, including fear of negative evaluation, low self-confidence, and concern about peer judgment. Linguistic limitations, such as insufficient vocabulary and grammatical difficulties, alongside

cognitive constraints like limited background knowledge and inadequate preparation, were also identified as important contributors. Pedagogical factors were perceived as less influential, although effective instructional strategies – such as scaffolded tasks, collaborative group work, and pre-teaching of specialized vocabulary – can help mitigate silence.

The research underscores that classroom silence is not merely a result of student passivity or poor teaching practices, but a complex interaction of emotional, cognitive, linguistic, and social dynamics. These insights have practical implications for ESP instruction: designing tasks that build confidence, fostering a supportive classroom environment, and addressing linguistic and content-related gaps can enhance oral participation and strengthen communicative competence.

However, the study has several limitations. The sample was small ($N = 12$) and consisted predominantly of highly experienced instructors, which may limit the generalizability of the findings. Additionally, the research relied on instructor perceptions rather than direct observation of classroom interactions or student self-reports, which could provide complementary perspectives on participation.

Future research could address these limitations by including larger and more diverse samples, integrating student perspectives, and conducting classroom-based observational studies. Comparative studies across different ESP disciplines, proficiency levels, or cultural contexts could further clarify how linguistic, affective, and socio-cultural factors interact to influence oral participation. Longitudinal research investigating the impact of targeted pedagogical interventions would also provide evidence-based strategies for enhancing speaking engagement in ESP classrooms.

This study might contribute to a nuanced understanding of ESP learners' oral participation, as it offers both theoretical insights and practical recommendations for transforming classroom silence into active, confident, and purposeful communication.

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ARROGANCE - A SYNDROME OF INDIVIDUALISTIC CULTURE

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Abstract

The present study aims to analyse the ubiquity and complexity of the phenomenon of arrogance in modern society. Starting from the observation of the extent that this phenomenon has taken in the current global society, for a start, the paper attempts to identify its multiple characteristics and forms of manifestation in its first part. In the next section of this paper, the psychological substrates of arrogant behaviours are reviewed and, then in the third part, a brief portrait of the arrogant person is presented. The study continues with a comparative analysis of the causes, frequency and extent of the arrogance phenomenon in individualistic versus collectivist cultures. The paper ends with a brief reflection on the impact that arrogance has on the person who manifests or possesses it, on their relationships with others, on the community and organizations.

Keywords: arrogance, narcissism, individualistic culture, collectivist culture, impact.

1. Arrogance: an undeniable presence! The ubiquity of arrogance!

Nonchalant, lacking in discretion and tact, self-assured, arrogance displays itself nonchalantly everywhere: at the micro and macrosocial levels, in formal and informal settings. It is present in relations between states, within organizations, on the street, and in the family. We could say that it is omnipresent in contemporary society. There is no socio-professional or educational category that has developed antibodies to this virus, so we encounter it — of course in different forms, frequencies, and intensities — in politicians, businesspeople, teachers, researchers, doctors, people with modest or high levels of education, etc. One wonders whether it might not be in danger of becoming an ideal of today's Western society. In any case, it seems that modesty is no longer a widely shared value today.

An online survey conducted in the US showed that there is a high prevalence of arrogant behaviour in economically developed societies. The results of the survey showed that 84% of the subjects questioned (N = 335) claimed to have encountered arrogant behaviour in the last month and that 46% of respondents admitted that they themselves had behaved arrogantly during the same period.¹

Following a small questionnaire-based survey on perceptions of arrogance in contemporary Romanian society, in which 200 students aged 19–24 and 25–35 participated between February and March 2026, the following conclusions emerged:

- 67% of students aged 19–24 reported having encountered arrogant behaviour in the past three months, either frequently or very frequently. Master students (aged 25–35) reported the same experience at a much higher rate, namely 89%.
- students assessed the arrogant tendencies in their own behaviour with much greater leniency: only 10% admitted that they often behaved arrogantly (90% rarely or very rarely).
- more than half of the participants (60%) stated that it rarely happened that third parties discredited their ideas and labelled them as worthless without providing supporting arguments.

The vast majority of students (aged 25–35) view communication with the academic staff positively, considering that the latter demonstrates competence and intellectual modesty, rather than arrogance. They claim that it rarely, if ever, happens that some university staff ignore or underestimate their feedback regarding the topics discussed in lectures and seminars. On the other hand, we found it interesting that during a debate on the topic of arrogance, some of the students who considered themselves modest and free of arrogance became anxious and felt a pressing need to assert their superiority and dominate the debate at all costs.

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¹ Milyavsky et al., 2017, p. 2, apud Septimiu Chelcea, *Toxicitatea aroganței*, Romania socială, 28.10.2024.

Hard to ignore, arrogant people are defiant, self-sufficient, impertinent, and believe themselves to be above other people. With exaggerated self-esteem, they give themselves more importance than they truly deserve, showing contempt for others. 'In modern psychological language,' says James Hollis, 'arrogance (hybris in Greek) is called inflation.' It is so called (inflation) because it indicates the fact that we are in a state of self-deception, in which we forget our limits.²

In other words, the arrogant person is incapable of accepting and recognizing their limits, distancing themselves from obvious reality (adopting an unwise attitude). Arrogance can take many forms: financial (contempt for the poor), status (overestimating one's own status to the detriment of others), intellectual (feeling omniscient), aesthetic (overestimating one's own physical characteristics), moral (displaying moral superiority and excessive rigidity and intolerance towards alleged moral transgressions³), etc.

All forms of arrogance have in common excess, lack of moderation, lack of common sense, and ultimately, lack of wisdom. We could say that the world we live in today, although wealthier than yesterday's, is poorer in wisdom. Cumulatively, the lack of wisdom becomes harmful, contributing to the emergence of implosive phenomena at both the micro and macrosocial levels.

We could state that arrogance is a deficit of wisdom, a form of ignorance: ignoring reality, the obvious, common sense, the complexity of life, etc. It is a phenomenon captured over 2000 years ago by the so-called 'Socratic paradox.' Named by the Oracle of Delphi as the wisest man in the world, Socrates claimed that his own wisdom consisted precisely in recognizing his ignorance, stating that 'he knows that he knows nothing, and he does not even know that.' He thus distanced himself from the arrogance of those who claimed to be great scholars without having a solid foundation of knowledge. In fact, the more you know, the more you realize how little you know and how much you still have to learn. In the same vein, the wise Confucius characterized himself as 'a messenger who invented nothing but rediscovered the creations and beliefs of the past.' Combating arrogance, he advocated modesty, keeping pride under control, simplicity of habits, and measured expression.

At the opposite end of the spectrum, arrogance, or the ostentatious display of omniscience by a person, raises serious questions about their true level of knowledge and competence. The phenomenon, known as the Dunning-Kruger effect, perfectly illustrates this: people with low competence tend to overestimate their abilities and believe they know more than they actually do. In other words, from a cognitive point of view, arrogance is closely linked to the illusions people have about their own abilities.

2. Psychological perspectives on arrogance

It is necessary to analyse the psychological foundations of arrogance so as not to remain at a simplistic level of understanding and to temper any tendency to judge arrogance too harshly and marginalize arrogant people. In the Romanian collective mentality, the often-quoted saying, 'Empty vessels make the most noise,' reflects a certain accusatory intransigence and resentful intolerance toward arrogant people. This does not mean that that arrogant people are necessarily stupid!

At first glance, arrogant behaviour is hard to stomach and can cause hives. Upon closer inspection, things are more complicated. The arrogant person's air of superiority, omniscience, and omnipotence may hide low self-esteem. Nathaniel Branden argues that 'arrogance, boastfulness, and overestimation of our abilities reflect low self-esteem rather than, as some people believe, high self-esteem.'⁴

Karen Horney, a well-known Neo-Freudian psychoanalyst, noted that arrogant people have a 'neurotic need for prestige,' tending to project an image of a powerful and successful person to compensate for feelings of inferiority and fear of rejection. In this sense, arrogance is nothing more than a defensive wall, a bastion that prevents intrusion into this fragile internal territory.

Most current psychological research highlights the narcissistic core of arrogant behaviour. It intertwines excessive confidence, narcissism, and the need to display superiority. Research by W. Keith Campbell and Craig Foster (2007) has shown that grandiose narcissism invariably includes elements of arrogance, dominance, and

² James Hollis, *Căutarea sensului*, Ed. Herald, Bucharest, p. 116.

³ See Hilbig and Zettler, 2009.

⁴ Nathaniel Branden, (1998). *Self-Esteem Every Day. Reflections on Self-Esteem and Spirituality*, New York, Fireside, apud *Toxicitatea aroganței*, Romania socială, Septimiu Chelcea, 28 October 2024.

even hostility toward those who do not recognize the narcissist's superior status. Thus, arrogance is not only 'a symptom but also a tool for maintaining a grandiose self-image.'⁵

Narcissism refers to this ambivalent relationship with oneself in which self-esteem is both excessive and fragile. Under the guise of overflowing self-confidence, the arrogant person hides deep wounds related to a lack of empathy towards others and often unconscious social ignorance.

The arrogant person can be seen as a being caught in a constant search for external validation to compensate for an inner void. When the individual feels small or inadequate, the phenomenon of overcompensation occurs: they tend to display grandeur and superiority in order not to reveal their inner fragility. In practice, arrogance becomes psychological armour.

This dynamic often results in authoritarian behaviour, a tendency toward unjustified pride, and a rejection of any criticism that would jeopardize this fragile construct. 'The narcissistic behaviours of the armour, insists Winnicott in his psychoanalytic theory, are 'defensive constructions' that protect against the anxiety of psychological disintegration.'⁶

The arrogant person tends to convince himself of his superiority in order to justify his authoritarian, dominant, and sometimes abusive behaviour. This strengthens their ego, but weakens their true social bonds. The hypertrophied ego and egocentric mind overvalue individuality at the expense of recognizing otherness, establishing a vicious circle of isolation and arrogance.

At this point, it is necessary to distinguish between healthy self-confidence and arrogance. While the former is based on a balanced knowledge of strengths and weaknesses and the recognition of limitations, arrogance is based on the unjustified overestimation of personal qualities, the ignoring of limitations, and 'confirmation bias.'⁷

3. Portrait of the arrogant person

According to Eliza Hartley⁸, arrogant people can be easily identified. The following main characteristics outline their profile:

- They are dominant: regardless of the subject, they monopolize the discussion, are unreceptive to the opinions of others, speak in a loud tone, and overestimate their points of view.
- They reject the opinions/ solutions of others from the outset, claiming that they are unfounded and will not yield good results. Only their solutions/ opinions are valuable. To support their position, they emphatically invent all kinds of arguments, most of which are unfounded. They use a superior tone and display absolute certainty, causing others to retreat or retaliate.
- Considering themselves superior, they rarely and reluctantly accept that they are wrong, and when they do, they excuse themselves by blaming others, arousing antipathy and even revolt.
- Being self-sufficient, they lack the will and ability to listen carefully to the arguments of others. While others are speaking, they plan how to refute the evidence presented by their opponents, with what arguments, which can generate resentment, misunderstandings, and conflicts.
- They lack empathy. In their egocentricity, they are incapable of feeling the anxieties and sufferings of those around them, remaining insensitive to their problems.
- They feel the need to always be the centre of attention, to amaze their audience, to validate their exaggerated self-image.
- They always want to be right, even if the counterarguments are numerous and solid, which creates obstacles both in achieving sincere and open dialogue with others and in personal development.
- They tend to belittle others in order to exalt themselves by contrast — this being the most harmful characteristic of arrogance, according to the author mentioned above.

⁵ Stela Giurgeanu, *Masca vulnerabilității vs expresia puterii*, Dilema, 25.09.2025, <https://www.dilema.ro/tema-saptaminii/masca-vulnerabilitatii-vs-expresia-puterii>.

⁶ See <https://www.sciencedesoi.com/cles-arrogance-humaine/>, last time consulted on 11.03.2026.

⁷ Confirmation bias: the cognitive tendency to seek, interpret, favor, and retain information that confirms pre-existing beliefs or assumptions, while ignoring or minimizing contradictory evidence, which can lead us to believe that we are always right, even in the face of evidence to the contrary. This phenomenon affects judgments and decisions and can lead to polarization of opinions.

⁸ Hartley, Eliza (2024). 'People who are arrogant usually display these 8 behaviors (without realizing it)', apud Septimiu Chelcea, op. cit.

Psychiatrist Enrique Rojas presents a more succinct description of the traits of an arrogant person: 'they have an air of self-sufficiency, of not needing others, a tendency to always talk about themselves, contempt for others, an almost unhealthy sensitivity (towards those who stand out), and are incapable of having a healthy romantic relationship.'⁹

4. Arrogance as a product of individualistic culture

Arrogance is not born ex nihilo. It appears, it is maintained and promoted through certain social and cultural values and norms. There are societies that, through their culture (values, norms, traditions, beliefs, etc.), tend to promote arrogance, and societies that discourage it. In this regard, there are significant differences between collectivist, 'interdependent' societies (such as Japan) and individualistic, 'independent' societies (such as the United States).¹⁰

In individualistic cultures, professional success is central to an individual's life and self-concept (Norman Goodman, Fukuyama, 1995, 2000). Personal achievement and professional success are the measure of one's own worth. It should be noted that a person's worth tends to be measured most often by their professional success. We see here the existence of an error: identifying value with success! We encounter many situations in which success is not supported by value, and vice versa! This is an idea to which we will return.

In these societies, individual freedom and autonomy are more valued than family and groups of belonging. Individuals focus their attention on themselves and their personal well-being, paying less attention to the groups to which they belong and the collective good. The favourite saying of Americans is: 'Get up and stand out, do what you think is best for you!'¹¹ Social mobility as a value is more appreciated than stability and social cohesion.

Individualistic cultures are at the same time secularized, anthropocentric cultures: at the centre of existence is no longer God, but the autonomous, rational, free human being who tends to dominate the world. Essential changes in existential values are therefore taking place. If, before secularization, 'the human person was valued for and in itself, because it reflected the image of God,' now its value is determined by its professional success, its competitive abilities, and often its possessions. The veneration of divine reason is replaced by the veneration of human reason, representing yet another factor that contributes to the creation of a space for the manifestation of arrogance. The human person relativizes his relationship with God, even his relationship with himself and with others. They set themselves up as the Great Demiurge, emptying themselves of sacredness, forgetting in their grandeur how small they are, forgetting their ancestors, traditions, myths, etc.

Even if the phenomenon is present in most individualistic Western societies, let us take as an example the so-called American culture of the 'self-made man.' Through the ideas and principles it promotes, in fact through its entire content, it is a culture of arrogance. It claims that man is the sole architect of his own success in life, that he can achieve a certain status, financial standard, level of culture, and social position exclusively through his own efforts, without owing anything to his social origin, family, team, privileges, luck, or divinity. It is a reductionist approach that does not take into account essential factors that support or hinder an individual's success. Numerous sociological studies show that an individual's success is linked not only to their abilities, talents, and personal efforts, but also to the support they receive from their family of origin, community, and even luck.

In an individualistic and secularized world, individuals are tempted to gravitate more toward 'having' rather than 'being.' This type of culture induces the idea (through advertising, commercials, personal development books and articles, etc.) that one must own as many goods, services, life experiences, and comforts as possible, develop competitive abilities, and be successful. The individual is encouraged to be, or at least appear to be, more successful and capable than others. The individualistic materialistic paradigm does not encourage them to explore themselves, to know their abilities in order to develop themselves without comparing themselves to others. It does not encourage them to make peace with the world, but rather to conquer it by showing their superiority in their relationships with others, even when they do not have it.

We note another characteristic of this type of culture: it is a culture of short deadlines, of urgency! Under these conditions, quick results, immediate success, the shortcut, mediocre pragmatism are sought, not the joy of long searches, of deep research, of the difficult path. The important thing is that the action is successful, not

⁹ See <https://ziarulromanesc.at/4-semne-evidente-ale-unei-persoane-arogante/>, last time consulted on 11.03.2026.

¹⁰ Fatehi, Kamal; Choi, Jeongho, *International Business Management. Succeeding in a Culturally Diverse World*, Springer 2018.

¹¹ Fatehi, Kamal, *International Management: A Cross-Cultural and Functional Perspective*, Prentice Hall, 1995.

necessarily valuable! In a continuous pursuit of something as easy, fast, successful, abundant, ostentatious, comfortable, etc. as possible, individuals no longer have the time or motivation to ask themselves whether this something represents authentic value, whether it is in accordance with human nature, whether it responds to true human needs.

By emphasizing image, achievement, visibility of success, and competition, individualistic societies tend to encourage arrogant behaviour! More and more circles are beginning to appreciate the image of those who overestimate themselves, win, conquer, impose themselves, and dominate. Often confused with success and self-confidence, arrogance tends to become acceptable and even desirable. It becomes a sought-after quality, a strategy for validation and social recognition, a kind of key to success. Leaders who are self-confident, imposing, sure of their ideas and decisions, and who leave no room for questions are increasingly appreciated. Arrogant people use their attitude of superiority as a lever to climb the social ladder, to obtain or maintain status, to dominate and keep potential rivals at bay, etc. Under these circumstances, the following question arises: if this is what (individualistic, secularized, consumerist) society values, why shouldn't I be arrogant, what reason would I have to be modest, what good would it do?

At the opposite end of the spectrum, in collectivist, interdependent cultures (Japan, China, Korea), things are different. In these societies, the self is part of the common space, it is interconnected rather than differentiated. The voice of a person's conscience is the voice of their parents, teachers, mentors, etc. The main value is social connection and harmony (Norman Goodman, Francis Fukuyama, 1995, Kamal Fatehi, 2018). Social relationships are valued in themselves, not as a means of resolving personal interests. Priority is given to social stability and cohesion over freedom and social mobility. The main saying that governs social relationships in Japan is: 'The nail that sticks out gets hammered down.'

Collectivism promotes adherence to norms, group consensus, conformity, respect for authority, and elders, with group success being associated with stable and hierarchical roles. There is a genuine respect for the idea of community and collective good, which also influences the organizational model specific to these societies. For example, in Japan, corporations and their employees often establish lifelong commitments. The corporation assumes the obligation to ensure the well-being of its employees. Employees expect to spend their entire professional career with the same company. Loyalty tends to be mutual, and both parties are interested in increasing the company's efficiency. Interestingly, the unit of responsibility in the company is the work group, not the individual employee. Results are evaluated at the working group / team level, not at the individual one. This discourages unfair competition among workers, as they have an interest in achieving good results at the group / team level. If the team performs well, the good results will be distributed to all team members, each team member will be rewarded and will be proud of the common result. There is an interest for everyone to work as conscientiously as possible so that the team is as efficient as possible. The principle of showing that I am better, greater than the other no longer makes sense. It is replaced by the principle of let's support my team by performing as well as possible. Displaying superiority while belittling and despising others becomes obsolete and no longer makes any sense. Moreover, those who try to display their superiority risk being marginalized or even punished by the group to which they belong.

In these interdependent societies, the value of modesty tends to be promoted as a fundamental virtue, while displays of arrogance are discouraged or even prevented.

5. Conclusions: The impact of arrogance in society

First of all, we need to demystify arrogance: it is not self-confidence! Although they are often confused, we are talking about two distinct things. Self-confidence is accompanied by modesty (humility), while arrogance is accompanied by displays of superiority. In fact, as we showed in this paper, arrogance is an artificial posture that masks a deep vulnerability; it is a so-called golden cage from which you must learn to free yourself in order to rediscover an authentic connection with yourself and others.

Its negative effects manifest both at the level of the arrogant person and at the level of interpersonal relationships and organizations. Although arrogant people are often perceived as confident, powerful, and competent, and easily gain not only the admiration of their peers, but also power, over time they lose these advantages. Others begin to show less and less trust and respect for them, and relationships between them deteriorate.

Lacking empathy, ignoring others, displaying an air of superiority, showing contempt and insolence, arrogant people tend to generate resentment, relational conflicts, and isolate themselves from others. By favouring their own needs for exaltation and recognition, they lack the ability to build healthy relationships based on respect, comprehensive listening, and authentic dialogue. Arrogance also has harmful consequences for the arrogant person themselves; in other words, they only hurt themselves! By overcompensating and becoming intoxicated by their own grandiosity, arrogant people lose touch with reality. When faced with a difficult situation, the fall from the height of their grandiose self-perception (the illusion of their superiority) to reality is harsh, painful, and brutal.

In friendly or romantic relationships, arrogance can result in a desire to dominate or control the relationship, significantly affecting the quality of emotional exchanges. At work, it can manifest itself through authoritarian behaviour, an excessive need for recognition, and a tendency to impose oneself at the expense of colleagues. This attitude, often perceived as toxic, risks weakening team cohesion.

Arrogant leaders may dominate their teams for a while, but, ultimately, they cause resentment, low morale, division, and even the collapse of organizations. In institutions, businesses, or between nations, arrogance generates abuses of power and injustices. Along with other degenerative factors, the ubiquity of arrogance as a symptom of global society can become downright dangerous. It undermines the logic of democratic values: respect, equality, freedom and diversity of opinion, civic-mindedness, human solidarity!!!

Ultimately, what matters is not only identifying and criticizing arrogance, but also how we manage it and find possible remedies. A starting point would be how we relate to this phenomenon. Understanding that, behind the displayed superiority, there is often fear or a need for validation can help us view this behaviour with more acceptance, even empathy and lucidity. Cultivating healthy alternatives: modesty, mutual respect, goodwill, and genuine trust would be helpful.

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ALGORITHMIC MANAGEMENT AND THE FUTURE OF WORK: A SOCIOLOGICAL ANALYSIS OF CONTROL, AUTONOMY, AND DIGITAL LABOR

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Abstract

The proliferation of algorithmic management systems has reconfigured the organization of work in profound and structurally significant ways, marking a shift toward data-driven forms of labor governance in the digital economy. This paper critically examines the sociological implications of algorithmic management, with particular attention to its role in reshaping power relations, worker autonomy, and the conditions of digital labor. The central objective of the study is to conceptualize algorithmic management not merely as a technological innovation, but as a socio-technical regime that reorganizes authority, redistributes control, and redefines the boundaries between autonomy and constraint in contemporary work environments.

The relevance of this inquiry is underscored by the rapid expansion of algorithmic systems across both platform-based and traditional organizational settings. While these systems are frequently framed in terms of efficiency, flexibility, and optimization, they simultaneously generate new forms of opacity, intensify mechanisms of surveillance, and contribute to the fragmentation and precarization of labor. The paper advances the argument that algorithmic management operates through dispersed and embedded forms of control, which are less visible than traditional managerial hierarchies yet more pervasive in their effects.

Methodologically, the study adopts a qualitative, theory-driven approach grounded in classical and contemporary sociological frameworks. The analysis draws on key theoretical contributions, including rationalization (as articulated by Max Weber), disciplinary power and surveillance (as developed by Michel Foucault), and alienation (as theorized by Karl Marx), in order to interpret the transformation of labor under conditions of algorithmic governance.

The findings suggest that algorithmic management constitutes a form of infrastructural control that redefines the relationship between workers and organizations. By embedding decision-making within opaque computational systems, it limits opportunities for contestation, erodes worker agency, and reinforces asymmetries of power. At the same time, it reshapes worker subjectivities by aligning behavior with continuously monitored and quantified performance metrics.

The paper concludes that algorithmic management represents a paradigmatic shift in the organization of labor, necessitating critical sociological engagement and the development of normative and regulatory frameworks capable of addressing its structural implications.

Keywords: Algorithmic management; digital labor; sociological analysis; infrastructural control; labor precarity.

1. Introduction

The emergence of algorithmic management systems represents a fundamental transformation in the organization of work, marking a shift toward data-driven forms of governance that redefine how labor is coordinated, evaluated, and controlled. This paper examines the sociological implications of this transformation, focusing on the ways in which algorithmic systems restructure power relations, reshape worker autonomy, and reconfigure the dynamics of contemporary labor processes. In particular, the study addresses the transition from traditional managerial authority to decentralized, technologically mediated forms of control embedded within digital infrastructures.

The importance of this topic is grounded in the rapid expansion of algorithmic management across diverse sectors, ranging from platform-based labor to corporate and remote work environments. As organizations

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increasingly rely on automated systems to allocate tasks, monitor performance, and enforce behavioral norms, decision-making processes become less transparent and more difficult to contest. While these systems are often framed as tools for enhancing efficiency and flexibility, they simultaneously introduce new forms of inequality, intensify mechanisms of surveillance, and contribute to the precarization of labor. From a sociological perspective, algorithmic management must therefore be understood not merely as a technological innovation, but as a structural transformation with far-reaching implications for the nature of work and social relations.

In order to address these issues, the paper adopts a theory-driven analytical approach grounded in classical and contemporary sociological frameworks. The analysis draws on the concept of rationalization developed by Max Weber, which highlights the increasing dominance of calculability and efficiency in modern institutions; the notion of disciplinary power articulated by Michel Foucault, which emphasizes the role of surveillance and normalization in the exercise of control; and the theory of alienation proposed by Karl Marx, which captures the estrangement of individuals from the processes that govern their labor. Together, these perspectives provide a conceptual framework for understanding how algorithmic systems reshape both organizational structures and the subjective experience of work.

This study contributes to the existing body of specialized literature by foregrounding the sociological dimensions of algorithmic management, moving beyond dominant narratives centered on efficiency and technological innovation. While prior research has examined the economic and operational benefits of data-driven management systems, this paper emphasizes their implications for power, control, and inequality. By conceptualizing algorithmic management as a form of infrastructural control embedded within digital environments, the study offers a critical perspective on the future of work and the evolving relationship between technology and labor.

2. The rise of algorithmic management systems

The rise of algorithmic management systems represents a paradigmatic shift in the governance of labor, characterized by the increasing reliance on data-driven infrastructures to coordinate and control work processes. Unlike traditional managerial models, which depend on human supervision and hierarchical authority, algorithmic systems operate through continuous data collection, real-time analytics, and automated decision-making. These systems allocate tasks, evaluate performance, and enforce behavioral norms through computational logics that are embedded within digital platforms¹.

This transformation is closely linked to the broader process of datafication, whereby human activities are translated into quantifiable data points that can be monitored, analyzed, and optimized². In this context, work is no longer understood solely as a set of tasks performed by individuals, but as a stream of data that can be continuously evaluated and adjusted. As a result, algorithmic management redefines the very nature of labor, shifting the focus from qualitative judgment to quantitative measurement.

Importantly, algorithmic management is not confined to platform-based work but has expanded into corporate and institutional settings, where similar technologies are used to monitor employee productivity, assess performance, and inform managerial decisions. This diffusion signals the emergence of a new organizational paradigm in which managerial authority is increasingly embedded within technological systems rather than exercised directly by individuals³.

3. Control without managers: the reconfiguration of authority

One of the defining features of algorithmic management is the displacement of traditional managerial authority by automated systems that regulate worker behavior through data-driven mechanisms. In this model, control is exercised not through direct supervision, but through algorithmic processes that structure the conditions under which work is performed.

This shift reflects a transformation in the nature of power, aligning with the concept of disciplinary mechanisms articulated by Michel Foucault⁴. Rather than relying on visible forms of authority, algorithmic

¹ Nick Srnicek, *Platform Capitalism*, Cambridge: Polity Press, 2017.

² David Beer, *The Data Gaze: Capitalism, Power and Perception*, London: Sage, 2019.

³ Tarleton Gillespie, "The Relevance of Algorithms," in *Media Technologies: Essays on Communication, Materiality, and Society*, Cambridge, MA: MIT Press, 2014.

⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, New York: Vintage Books, 1977.

management operates through dispersed and often invisible systems of control that continuously monitor, evaluate, and normalize worker behavior. Employees are guided by performance metrics, ratings, and automated feedback systems that shape their actions in real time.

The absence of direct managerial oversight does not imply a reduction in control, but rather its intensification and diffusion. Authority becomes embedded within the infrastructure of the system, making it less visible yet more pervasive. Workers are compelled to conform to algorithmically defined standards, often without fully understanding the criteria by which they are evaluated⁵.

This reconfiguration of authority also alters the relationship between workers and organizations. Decision-making processes are increasingly mediated by algorithms, reducing opportunities for negotiation, discretion, and contextual judgment. As a result, power becomes both decentralized and depersonalized, operating through technical systems rather than interpersonal relations.

4. Fragmentation, precarity, and the restructuring of labor

Algorithmic management contributes to the fragmentation of labor by decomposing work into discrete, task-based units that can be assigned and evaluated independently. This process is particularly evident in platform-based economies, where workers engage in short-term, on-demand tasks rather than stable employment relationships.

From a sociological perspective, this fragmentation undermines traditional forms of job security and professional identity. Workers are increasingly positioned as independent contractors responsible for managing their own risks, including income instability and lack of social protection⁶. This dynamic reflects broader trends associated with labor precarization, in which employment becomes more flexible but also more insecure.

Moreover, the reliance on algorithmic systems shifts responsibility from organizations to individuals. Workers must continuously adapt to fluctuating demand, maintain high performance scores, and respond to algorithmic evaluations in order to secure future opportunities. This creates a competitive environment in which individuals are pitted against one another, reinforcing inequalities and limiting collective forms of resistance.

The restructuring of labor through algorithmic management also has implications for social stratification. Individuals who are able to align with the expectations of algorithmic systems may benefit from increased opportunities, while those who do not conform may be systematically excluded. In this way, algorithmic management contributes to the reproduction of inequality within digital labor markets.

5. Surveillance and the intensification of work

Algorithmic management systems rely on continuous surveillance to monitor and evaluate worker performance. This includes tracking a wide range of activities, from task completion and response times to location data and communication patterns. Such practices extend traditional forms of workplace surveillance into a pervasive and technologically mediated domain.

As argued by Shoshana Zuboff, contemporary digital economies are characterized by the extraction and commodification of behavioral data⁷. In this context, workers are not only producers of labor but also sources of data that can be analyzed to optimize organizational processes. Surveillance thus becomes a central mechanism through which value is generated and control is exercised.

The constant monitoring of performance contributes to the intensification of work. Employees are subject to continuous evaluation, which may increase pressure to meet algorithmically defined targets and maintain high levels of productivity. This dynamic can lead to stress, burnout, and a diminished sense of autonomy, particularly in environments where performance metrics are closely tied to access to future work opportunities⁸.

Furthermore, the normalization of surveillance practices may lead to the internalization of control, as workers adjust their behavior in anticipation of evaluation. This process reinforces organizational power while reducing the need for direct intervention, aligning with broader sociological theories of self-regulation and disciplinary control.

⁵ Karen Yeung, "Algorithmic Regulation: A Critical Interrogation," Regulation & Governance, Oxford: Wiley-Blackwell, 2018.

⁶ Antonio Aloisi, "Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of 'On-Demand/Gig Economy' Platforms," Comparative Labor Law & Policy Journal, Champaign: University of Illinois, 2016.

⁷ Shoshana Zuboff, The Age of Surveillance Capitalism, New York: PublicAffairs, 2019.

⁸ Alex Rosenblat, Uberland: How Algorithms Are Rewriting the Rules of Work, Berkeley: University of California Press, 2018.

6. Autonomy, resistance, and the limits of worker agency

Despite the pervasive influence of algorithmic management, workers are not entirely passive subjects. They develop various strategies to navigate and, in some cases, resist algorithmic control. These strategies may include selectively accepting tasks, manipulating performance metrics, or sharing information within informal networks.

However, the scope for resistance is significantly constrained by the opacity and complexity of algorithmic systems. As highlighted by Frank Pasquale⁹, the “black box” nature of many algorithms limits transparency and reduces accountability, making it difficult for workers to understand or challenge the decisions that affect them.

The tension between autonomy and control is a defining feature of algorithmic management. While these systems are often presented as enabling flexibility and independence, they simultaneously impose rigid constraints that limit genuine autonomy. Workers may appear to have freedom in choosing when and how to work, but their actions are tightly structured by algorithmic rules and performance requirements.

This paradox reflects a broader transformation in the nature of work, where autonomy is redefined within the parameters set by technological systems. From a sociological perspective, the challenge lies in understanding how worker agency can be preserved or reconfigured in environments dominated by algorithmic governance.

7. Conclusions

This paper has critically examined the emergence of algorithmic management as a defining feature of contemporary labor organization, highlighting its profound implications for control, autonomy, and the restructuring of work in the digital economy. By conceptualizing algorithmic management as a form of socio-technical governance, the analysis has demonstrated that these systems do not merely optimize labor processes, but fundamentally reconfigure the distribution of power within organizations.

The findings reveal a central paradox at the heart of algorithmic management. While such systems are promoted as enhancing efficiency, flexibility, and worker autonomy, they simultaneously introduce more pervasive and less visible forms of control. Through continuous data collection, real-time evaluation, and automated decision-making, algorithmic management establishes a mode of governance that operates beyond traditional hierarchical supervision. This shift results in what can be described as infrastructural control, where power is embedded within technological systems and exercised through ongoing processes of monitoring and normalization.

A key contribution of this study lies in its integration of classical sociological theory with contemporary analyses of digital labor. Drawing on the insights of Max Weber, Michel Foucault, and Karl Marx, the paper has shown that algorithmic management intensifies processes of rationalization, expands mechanisms of surveillance, and generates new forms of alienation. In doing so, it not only transforms organizational structures but also reshapes worker subjectivity, redefining how individuals experience autonomy, control, and identity within the workplace.

The broader impact of these findings is twofold. First, they contribute to a more critical understanding of algorithmic systems as embedded within social and institutional contexts, rather than as neutral technological tools. Second, they underscore the need for a re-evaluation of existing regulatory and ethical frameworks governing digital labor. Without such interventions, algorithmic management risks reinforcing existing inequalities, exacerbating labor precarity, and limiting opportunities for worker agency.

Future research should extend beyond theoretical analysis to include empirical investigations of algorithmic management across different sectors and cultural contexts. Particular attention should be given to workers’ lived experiences, strategies of resistance, and the role of collective organization in digitally mediated labor environments. Additionally, interdisciplinary approaches involving sociology, law, and computer science will be essential in developing transparent, accountable, and socially responsible algorithmic systems.

Ultimately, the rise of algorithmic management signals not only a technological transformation but a redefinition of the social foundations of work. Understanding this transformation is crucial for ensuring that the future of labor remains aligned with principles of equity, autonomy, and human dignity.

⁹ Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information*, Cambridge, MA: Harvard University Press, 2015.

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AI IN HUMAN RESOURCES: A SOCIOLOGICAL ANALYSIS OF POWER, INEQUALITY, AND ORGANIZATIONAL CHANGE

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Abstract

The increasing integration of artificial intelligence into human resources has generated a profound transformation of organizational practices, raising significant sociological questions regarding power, control, and inequality. This paper aims to critically examine the implications of AI-driven decision-making in human resources processes, with a particular focus on how algorithmic systems reshape recruitment, performance evaluation, and workforce management. The study seeks to contribute to the emerging interdisciplinary discourse by situating AI not merely as a technological innovation, but as a socio-technical mechanism embedded in existing institutional and structural dynamics.

Methodologically, the paper adopts a qualitative, theory-oriented approach, drawing on classical sociological frameworks to interpret contemporary developments in algorithmic governance. In particular, the analysis is informed by the concepts of rationalization, alienation, and surveillance, which provide a conceptual lens for understanding the transformation of labor relations under conditions of digitalization. Through a critical synthesis of existing literature, the paper examines both the functional advantages and the structural risks associated with the deployment of AI in human resources contexts. The findings suggest that while AI systems enhance efficiency, standardization, and predictive capacity, they also contribute to the opacity of decision-making processes, the intensification of organizational control, and the potential reproduction of systemic biases. These dynamics may ultimately reinforce existing social inequalities while reducing individual agency within the workplace.

The paper argues that the implementation of AI in human resources requires a reflexive and ethically grounded approach, emphasizing the necessity of integrating sociological insight into the design and governance of algorithmic systems.

Keywords: Artificial intelligence; human resources; algorithmic governance; sociological analysis; workplace inequality

1. Introduction

The integration of artificial intelligence (AI) into human resources (HR) represents a significant transformation in the organization of work and the governance of labor processes. This paper addresses the sociological implications of this transformation by examining how AI-driven systems are reshaping core human resources functions, including recruitment, employee evaluation, and performance management. More specifically, the study focuses on the shift from human-centered decision-making to algorithmic governance and its consequences for power relations and social structures within organizations.

The importance of this topic lies in the expanding role of AI technologies in mediating access to employment opportunities and influencing individual career trajectories. As organizations increasingly rely on algorithmic systems to optimize efficiency and reduce uncertainty, decision-making processes become less transparent and more difficult to scrutinize. This development raises critical concerns regarding fairness, accountability, and the reproduction of social inequalities. From a sociological perspective, the deployment of AI in human resources is not merely a technical innovation, but a process that reconfigures institutional practices and redistributes power within organizational settings.

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In order to address these issues, the paper adopts a theoretical and analytical approach grounded in classical sociological frameworks. The analysis draws on the concept of rationalization developed by Max Weber, which emphasizes the increasing dominance of calculability and efficiency in modern institutions; the theory of alienation proposed by Karl Marx, which highlights the disconnection between individuals and the processes that shape their work; and the notion of surveillance articulated by Michel Foucault, which captures the role of monitoring and control in contemporary organizations. These theoretical perspectives provide a conceptual framework for understanding the social implications of AI-driven HR practices.

This study is situated within a growing body of specialized literature that has examined the impact of AI on organizational performance and labor markets. However, much of this literature has focused primarily on technical efficiency and economic outcomes, often overlooking the broader social consequences of algorithmic decision-making. By contrast, this paper contributes to the field by foregrounding issues of inequality, control, and human agency, thereby offering a more comprehensive sociological account of AI integration in human resources.

2. Algorithmic integration and the transformation of human resources practices

The incorporation of artificial intelligence into human resources marks a fundamental shift from discretionary, human-centered decision-making toward data-driven, algorithmic governance. AI systems are increasingly employed in recruitment, candidate screening, and performance evaluation, where they function as predictive tools designed to optimize organizational outcomes. These systems rely on large datasets and machine learning models to identify patterns, assess candidate suitability, and forecast employee performance, thereby transforming human resources into a domain increasingly governed by quantitative metrics and probabilistic reasoning¹.

However, these systems are not neutral instruments. From a sociological standpoint, they must be understood as socio-technical constructs embedded within pre-existing institutional frameworks. As research in algorithmic governance suggests, technological systems both reflect and reinforce the social contexts in which they are developed². The datasets that inform algorithmic decision-making are historically situated, reflecting patterns of inequality and organizational bias. Consequently, AI does not merely streamline human resources processes but actively participates in the reproduction of social structures, often amplifying existing disparities under the guise of objectivity³.

Moreover, the use of AI in human resources introduces a reconfiguration of organizational authority. Decision-making power is increasingly delegated to algorithmic systems, which operate through complex and often opaque mechanisms. This opacity—frequently referred to as the “black box” problem—limits the ability of both employees and managers to fully understand or challenge the outcomes generated by these systems⁴. As a result, accountability becomes diffused, raising critical concerns regarding responsibility in cases of discriminatory or erroneous decisions.

This transformation also redefines the role of human resources professionals, who transition from active decision-makers to overseers and interpreters of algorithmic outputs. Their function shifts toward monitoring system performance, validating data inputs, and ensuring compliance with organizational goals. While this may enhance efficiency, it simultaneously reduces the space for human judgment, empathy, and contextual evaluation in decision-making processes⁵.

Furthermore, the increasing reliance on algorithmic systems contributes to the standardization of organizational practices, privileging measurable indicators over qualitative dimensions of human performance. This shift may lead to the marginalization of candidates or employees whose profiles do not conform to dominant data patterns, thereby reinforcing existing hierarchies within the labor market⁶.

In this context, the integration of AI in human resources should not be understood merely as a technological upgrade, but as a structural transformation that reshapes how organizations define merit, evaluate individuals, and distribute opportunities. The sociological significance of this shift lies in its capacity to institutionalize new

¹ World Economic Forum, *The Future of Jobs Report*, 2023.

² Tarleton Gillespie, “The Relevance of Algorithms,” *Media Technologies*, MIT Press, 2014.

³ Safiya Umoja Noble, *Algorithms of Oppression*, NYU Press, 2018.

⁴ Frank Pasquale, *The Black Box Society*, Harvard University Press, 2015.

⁵ Shoshana Zuboff, *The Age of Surveillance Capitalism*, PublicAffairs, 2019.

⁶ Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, Harvard University Press, 1984.

forms of inequality while simultaneously obscuring them through the perceived neutrality of algorithmic systems.

3. Rationalization and the expansion of algorithmic governance

The integration of artificial intelligence into human resources can be conceptualized as an advanced stage of rationalization, a process extensively theorized by Max Weber⁷. In Weberian terms, rationalization refers to the increasing dominance of calculability, efficiency, and formalized procedures in modern institutions. Within human resources, this process is intensified through the adoption of algorithmic systems that transform decision-making into a data-driven, standardized, and ostensibly objective procedure.

AI-driven human resources systems exemplify what can be described as algorithmic governance, wherein organizational decisions are delegated to automated systems that operate according to predefined rules and statistical models⁸. Recruitment, for example, is no longer based primarily on interpersonal evaluation or professional intuition, but on the identification of patterns within large datasets. This shift reflects a broader movement toward the quantification of human attributes, where complex social and psychological characteristics are reduced to measurable indicators.

While rationalization enhances efficiency and predictability, it also produces unintended sociological consequences. As Weber himself noted, the expansion of rational systems can lead to the emergence of an “iron cage” of bureaucracy, in which individuals are constrained by impersonal rules and procedures⁹. In the context of artificial intelligence, this “iron cage” takes on a digital form, where algorithmic systems impose rigid evaluative frameworks that limit flexibility and contextual judgment.

Furthermore, algorithmic governance introduces a new form of authority that derives its legitimacy from technical expertise rather than traditional hierarchical structures. Decisions produced by AI systems are often perceived as neutral and objective, which can obscure the normative assumptions embedded within them³. This perception reduces the likelihood of critical scrutiny and may discourage individuals from questioning outcomes, even when they appear unjust or discriminatory.

The reliance on algorithmic systems also contributes to the depersonalization of organizational processes. Human interactions, which traditionally played a central role in human resources decision-making, are increasingly replaced by automated evaluations. This shift may undermine relational aspects of work, such as trust, empathy, and informal negotiation, which are essential for organizational cohesion¹⁰.

Moreover, the expansion of rationalization through AI can lead to a narrowing of what is considered valuable within organizations. By privileging measurable performance indicators, algorithmic systems may marginalize qualities that are difficult to quantify, such as creativity, emotional intelligence, or social skills. This dynamic reinforces a technocratic logic in which only data-driven attributes are recognized and rewarded¹¹. In this sense, AI does not simply enhance existing rationalization processes but transforms them into a more pervasive and less visible form of control. Algorithmic governance operates not only through formal rules but through embedded computational logics that shape organizational behavior in subtle yet powerful ways. As a result, the expansion of AI in human resources represents not only a technological shift but a fundamental reconfiguration of how authority, evaluation, and legitimacy are constructed within modern organizations.

4. Algorithmic bias and the reproduction of structural inequality

One of the most significant and widely debated challenges associated with the integration of artificial intelligence in human resources is the persistence—and in some cases amplification—of algorithmic bias. Although AI systems are often presented as objective and neutral decision-making tools, a growing body of research demonstrates that they are deeply embedded in the social and historical contexts from which their training data are derived¹².

⁷ Max Weber, *Economy and Society*, University of California Press, 1978.

⁸ Karen Yeung, “Algorithmic Regulation: A Critical Interrogation,” *Regulation & Governance*, 2018.

⁹ Frank Pasquale, *The Black Box Society*, Harvard University Press, 2015.

¹⁰ Richard Sennett, *The Corrosion of Character*, W.W. Norton, 1998.

¹¹ David Beer, *The Data Gaze*, Sage, 2019.

¹² World Economic Forum, *The Future of Jobs Report*, 2023.

Algorithmic bias emerges primarily from the reliance on historical datasets that reflect pre-existing patterns of inequality. In human resources contexts, such data may encode discriminatory practices related to gender, ethnicity, age, or socioeconomic background. When these datasets are used to train machine learning models, the resulting systems may reproduce and even legitimize these biases by embedding them into formal decision-making processes¹³. Thus, rather than eliminating human subjectivity, AI can transform implicit biases into systematic and scalable mechanisms of exclusion.

From a sociological perspective, this phenomenon can be understood through the lens of structural inequality and social reproduction. As argued by Pierre Bourdieu¹⁴, social hierarchies are maintained not only through overt discrimination but also through institutional practices that appear neutral while privileging certain forms of capital over others. Algorithmic systems in HR operate in a similar manner, favoring candidates whose profiles align with historically dominant groups, thereby reinforcing existing distributions of economic, cultural, and social capital.

Moreover, the perceived objectivity of algorithmic decision-making contributes to what can be described as the legitimization of inequality. Because AI-generated outcomes are often framed as data-driven and scientifically grounded, they may be less likely to be questioned or contested. This creates a paradox in which discriminatory practices become more difficult to identify precisely because they are mediated by technology¹⁵. As Safiya Umoja Noble argues, algorithms do not simply reflect reality but actively participate in shaping and reinforcing systems of power and exclusion¹⁶.

Another critical dimension of algorithmic bias is the issue of opacity. Many AI systems function as “black boxes,” meaning that their internal decision-making processes are not easily interpretable, even by their designers. As highlighted by Frank Pasquale¹⁷, this lack of transparency undermines accountability and limits the ability of individuals to challenge decisions that affect their employment opportunities. In HR contexts, this can result in a significant asymmetry of power between organizations and applicants or employees, who are often unable to understand why they were rejected or evaluated negatively.

Furthermore, algorithmic bias operates at scale, which distinguishes it from traditional forms of discrimination. While human bias may be inconsistent and situational, algorithmic systems can systematically apply the same biased criteria across large populations. This scalability amplifies the social impact of discrimination, transforming isolated instances of bias into structural patterns of exclusion¹⁸.

In addition, the reliance on predictive analytics in HR introduces a temporal dimension to inequality. AI systems often evaluate candidates not only based on past performance but also on predicted future behavior. These predictions are inherently probabilistic and may disproportionately disadvantage individuals from marginalized backgrounds, whose trajectories do not conform to dominant patterns encoded in the data¹⁹. As a result, algorithmic decision-making may limit social mobility by reinforcing expectations based on historical inequalities.

In this context, algorithmic bias should not be understood as a technical flaw that can be easily corrected, but as a structural issue rooted in broader social dynamics. Addressing this problem requires not only technical solutions, such as improved data quality or fairness metrics, but also a critical examination of the social assumptions and power relations embedded within AI systems.

Ultimately, the integration of AI in HR raises fundamental questions about fairness, justice, and the future of work. If left unexamined, algorithmic systems risk institutionalizing new forms of inequality while simultaneously obscuring them under the appearance of objectivity and efficiency.

5. Surveillance, control, and the digitalization of organizational power

The integration of artificial intelligence into human resources has significantly expanded the capacity of organizations to monitor, measure, and regulate employee behavior. AI-driven systems enable continuous data collection through digital platforms, including productivity tracking, communication analysis, biometric

¹³ Cathy O'Neil, *Weapons of Math Destruction*, Crown, 2016.

¹⁴ Pierre Bourdieu, *Outline of a Theory of Practice*, Cambridge University Press, 1977.

¹⁵ Virginia Eubanks, *Automating Inequality*, St. Martin's Press, 2018.

¹⁶ Safiya Umoja Noble, *Algorithms of Oppression*, NYU Press, 2018.

¹⁷ Frank Pasquale, *The Black Box Society*, Harvard University Press, 2015.

¹⁸ Ruha Benjamin, *Race After Technology*, Polity Press, 2019.

¹⁹ European Commission, *Ethics Guidelines for Trustworthy AI*, 2019.

monitoring, and behavioral analytics. These developments mark a qualitative shift from traditional managerial oversight to a pervasive form of digital surveillance that operates in real time and at scale.

From a sociological perspective, these dynamics can be understood through the concept of disciplinary power developed by Michel Foucault²⁰. In *Discipline and Punish*, Foucault describes how modern institutions exercise control through mechanisms of observation, normalization, and examination. AI technologies extend this logic by embedding surveillance within everyday organizational processes, creating what may be described as a digitally enhanced “panoptic” environment. In such contexts, visibility becomes a central mechanism of control, as employees are aware that their actions are continuously monitored and evaluated.

Unlike traditional forms of supervision, which are often episodic and localized, AI-driven surveillance is continuous, automated, and data-intensive. This transformation reduces the need for direct managerial intervention, as control is increasingly exercised through algorithmic systems that classify, evaluate, and rank employee behavior²¹. The result is a shift from hierarchical supervision to what can be described as infrastructural control, where power is embedded within technological systems rather than exercised solely by individuals.

Moreover, the normalization of surveillance practices contributes to the internalization of control. Employees may adjust their behavior in anticipation of algorithmic evaluation, engaging in self-monitoring and self-discipline. This process aligns closely with Foucault’s notion of governmentality, in which individuals regulate themselves according to institutional expectations²². In AI-mediated workplaces, performance metrics and scoring systems function as instruments of normalization, shaping behavior in subtle yet pervasive ways.

The expansion of digital surveillance also raises critical concerns regarding autonomy and privacy. The collection and analysis of large volumes of personal and behavioral data create asymmetries of information between employers and employees. Organizations gain unprecedented insight into workers’ activities, while employees often have limited knowledge of how their data are used or interpreted²³. This imbalance not only reinforces organizational power but also challenges traditional boundaries between professional and personal life.

Furthermore, AI-driven surveillance contributes to the intensification of labor. Continuous monitoring and performance optimization may increase pressure on employees to maintain high levels of productivity, leading to stress, burnout, and reduced well-being²⁴. The quantification of performance transforms work into a series of measurable outputs, potentially neglecting qualitative aspects such as creativity, collaboration, and emotional labor.

In addition, the integration of surveillance technologies into HR systems reflects broader transformations associated with digital capitalism. As argued by Shoshana Zuboff, contemporary organizations increasingly rely on data extraction and behavioral prediction as sources of value²⁵. In this context, employees themselves become sources of data, and their activities are continuously monitored to generate insights that can be used for organizational optimization.

Importantly, the expansion of surveillance through AI is often justified in terms of efficiency, security, and performance improvement. However, these justifications may obscure the broader implications for power relations within organizations. By embedding control mechanisms within technological systems, AI makes power less visible yet more pervasive, operating through continuous data flows rather than explicit authority structures.

Ultimately, the digitalization of organizational power through AI-driven surveillance represents a fundamental transformation in the nature of work. It redefines the boundaries of control, reshapes employee subjectivity, and introduces new forms of inequality based on access to information and the capacity to monitor others. From a sociological perspective, these developments highlight the need to critically examine not only what AI does, but how it reorganizes power within contemporary organizations.

²⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Vintage Books, 1977.

²¹ David Lyon, *Surveillance Society*, Open University Press, 2001.

²² Michel Foucault, *Security, Territory, Population*, Palgrave Macmillan, 2007.

²³ European Commission, *Ethics Guidelines for Trustworthy AI*, 2019.

²⁴ Arlie Russell Hochschild, *The Managed Heart*, University of California Press, 1983.

²⁵ Shoshana Zuboff, *The Age of Surveillance Capitalism*, PublicAffairs, 2019.

6. Alienation and the erosion of human agency in algorithmic systems

The increasing reliance on Artificial Intelligence in Human Resources not only transforms organizational processes but also reshapes the subjective experience of work. From a sociological perspective, this transformation can be critically examined through the concept of alienation, as developed by Karl Marx²⁶. In classical Marxist theory, alienation refers to the estrangement of individuals from the products of their labor, the labor process, and ultimately from their own human potential. In the context of algorithmic management, this concept acquires new relevance.

In AI-mediated workplaces, decision-making processes are increasingly externalized and embedded within algorithmic systems that operate beyond the direct control or understanding of employees. Recruitment outcomes, performance evaluations, and career trajectories are often determined by opaque computational models, reducing individuals' ability to meaningfully engage with or influence the conditions that shape their professional lives. This detachment reflects a contemporary form of alienation, in which workers are no longer subordinated solely to managerial authority, but to impersonal technological systems²⁷.

A central dimension of this transformation is the erosion of human agency. Agency, understood as the capacity of individuals to act, make decisions, and exert influence within social structures, is increasingly constrained by algorithmic governance. When decisions are framed as the output of objective systems, opportunities for negotiation, interpretation, and contestation are diminished. Employees may find themselves subject to evaluative criteria that are not only externally imposed but also largely unintelligible²⁸.

Moreover, the abstraction inherent in algorithmic systems contributes to a sense of disconnection between individuals and the meaning of their work. Performance is reduced to quantifiable indicators, and complex human activities are translated into data points that can be measured, compared, and optimized. This process aligns with Marx's notion of the commodification of labor, wherein human capacities are transformed into calculable units of economic value²⁹. In algorithmic environments, this commodification is intensified, as workers themselves become sources of data to be analyzed and exploited.

The experience of alienation is further deepened by the standardization of evaluation criteria. AI systems often rely on generalized models that prioritize conformity to predefined patterns, thereby limiting the recognition of individual differences and contextual factors. Employees who do not fit these patterns may be systematically disadvantaged, reinforcing a sense of marginalization and exclusion. In this way, algorithmic systems not only regulate behavior but also shape identities, defining what is considered valuable or acceptable within the organization³⁰.

Additionally, the opacity of algorithmic decision-making contributes to a form of epistemic alienation. Individuals are excluded not only from decision-making processes but also from the knowledge required to understand them. As noted by Frank Pasquale⁵, the "black box" nature of many AI systems creates barriers to transparency and accountability, making it difficult for individuals to challenge or even comprehend the criteria by which they are evaluated. This lack of visibility undermines trust and reinforces asymmetries of power between organizations and employees.

At a broader level, the integration of AI into HR reflects a shift toward what may be described as a post-human organizational logic, in which human judgment is increasingly subordinated to computational processes. While this shift may enhance efficiency, it also raises fundamental questions about the role of human values in organizational life. If decision-making is delegated to machines, the space for ethical reflection, empathy, and social responsibility may be significantly reduced.

Ultimately, the application of AI in HR does not simply automate existing processes but transforms the very conditions under which work is experienced and understood. Alienation in this context is not merely a byproduct of technological change, but a structural feature of algorithmic systems that mediate human activity. Addressing this challenge requires a reassertion of human agency within organizational processes and a critical engagement with the social implications of AI-driven management.

²⁶ Karl Marx, *Economic and Philosophic Manuscripts of 1844*, Progress Publishers, 1959.

²⁷ Shoshana Zuboff, *The Age of Surveillance Capitalism*, PublicAffairs, 2019.

²⁸ David Beer, *The Data Gaze*, Sage, 2019.

²⁹ Richard Sennett, *The Corrosion of Character*, W.W. Norton, 1998.

³⁰ Frank Pasquale, *The Black Box Society*, Harvard University Press, 2015.

7. Conclusions

This paper has critically examined the integration of Artificial Intelligence in Human Resources from a sociological perspective, emphasizing its implications for power, inequality, and the transformation of labor relations. By situating AI within broader processes of rationalization, surveillance, and alienation, the study has demonstrated that algorithmic systems are not merely technical tools, but socio-technical mechanisms that actively reshape organizational structures and social dynamics.

The main findings highlight a fundamental tension at the core of AI-driven HR practices. On the one hand, these systems enhance efficiency, standardization, and predictive capacity, enabling organizations to optimize decision-making processes at an unprecedented scale. On the other hand, they introduce new forms of opacity, reinforce structural inequalities through algorithmic bias, and intensify mechanisms of surveillance and control. In doing so, AI contributes to the reconfiguration of power relations within organizations, shifting authority from human actors to algorithmic systems whose internal logic often remains inaccessible.

A key contribution of this paper lies in its integration of classical sociological theory with contemporary analyses of algorithmic governance. By mobilizing the insights of Max Weber, Karl Marx, and Michel Foucault, the study provides a conceptual framework for understanding how AI transforms not only organizational practices but also the lived experience of work. In particular, the analysis has shown that algorithmic systems may erode human agency, depersonalize decision-making processes, and institutionalize new forms of inequality under the appearance of objectivity.

The expected impact of these findings is twofold. First, they contribute to the growing body of interdisciplinary research that seeks to critically assess the social implications of AI beyond its technical functionalities. Second, they highlight the necessity for organizations, policymakers, and developers to adopt a reflexive and ethically grounded approach to AI implementation in HR. Without such an approach, there is a risk that algorithmic systems will reproduce and legitimize existing inequalities while obscuring them through technological complexity.

Future research should move beyond theoretical analysis and focus on empirical investigations of AI-mediated workplaces, particularly examining how employees experience and respond to algorithmic management. Additionally, there is a need to develop robust regulatory frameworks and ethical guidelines that ensure transparency, accountability, and fairness in the use of AI in HR contexts. Interdisciplinary collaboration between sociologists, technologists, and legal scholars will be essential in addressing these challenges.

Ultimately, the integration of Artificial Intelligence in Human Resources represents not only a technological shift but a profound social transformation. Understanding and critically engaging with this transformation is essential for shaping a future of work that remains equitable, transparent, and centered on human values.

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ASPECTS REGARDING THE SOCIAL TRANSITION AT EUROPEAN LEVEL

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Abstract

Europe is going through a period of social transition, influenced by macroeconomic factors of change, such as the digital and environmental transition, demographic changes and other global events. The smart transition is increasingly felt in cities and communities of different sizes, due to some influencing factors such as the speed of the energy transition, as well as the implementation of new forms of work and learning, largely supported by digital tools. The digital and environmental transition produces social consequences, with an impact on jobs, positively influencing the quality of work and requiring new skills, preparing the workforce for the future of the labour market. Social transformations have brought new challenges such as the demand for new qualifications, skills, labour shortages, digital gaps and a series of social manifestations: increasing inequalities, increasing social protection spending and new challenges regarding social cohesion. Through the advantages and disadvantages, they produce, transitions are perceived differently by individuals and lead to uncertainties in society, changes in behaviour and values.

The study addresses the social transformations taking place at European level, aspects relating the triple transition and the social dimension, policies developed at European Union, in the social plan, to mitigate the consequences of various disruptive factors, aiming at meeting the needs of citizens and developing an inclusive economy. The methodology used is the documentation from the economic specialized literature related to the topic addressed, the selection, interpretation and formulation of ideas, in the author's own conception

Keywords: social transition, European Union policies in social field, social transformations, triple transition, social impact.

1. Introduction

Cities profoundly shape the way people live their lives, influencing their behavior, consumption habits and opportunities. For many, urban living means access to diverse jobs, quality education, social mobility and better housing, all of which contribute to health and well-being. However, for others, city life brings challenges: high costs, social isolation, a sense of insecurity and a polluted or degraded environment¹.

The smart transition, whose presence is felt in cities and communities of different sizes, has experienced a significant increase in recent years, due to the speed of the energy transition, as well as the implementation of new forms of work and learning, largely supported by digital tools. Another influential factor has been the need to form a more inclusive society, with an emphasis on civic and social engagement. At the same time, some risks that the impact of the transition on the environments in which it operates, as well as on citizens, must also be taken into account, which implies finding and promoting practices that mitigate risks and lead to a responsible transition from a social point of view².

A prosperous, competitive economy has a positive impact on individuals and the business environment. A solid social environment, at European level, is a foundation for the formation of a prosperous society but also for the development of a fair, competitive economy, supported by a workforce capable of exploiting innovations, through qualifications oriented towards new changes as a result of the transition produced by new technologies and the environmental one³.

The importance of the topic lies in the fact that it addresses social transformations that are taking place at the European level as a result of the digital and environmental transition and other factors, aspects relating the triple transition, policies developed at European Union, in the social plan, to mitigate the consequences of various disruptive factors, aiming at meeting the needs of citizens and developing an inclusive economy.

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¹ European Environment Agency, 2013.

² European Parliament, 2023.

³ European Commission, Delivering a strong Social Europe.

The paper aims to highlight aspects related to the social impact that the digital and environmental transitions have at the European level, and concerns at European level for combating the unfavourable social consequences caused by the transition and other factors.

2. Aspects of social transformations at European level

Europe is going through a period of social transition, influenced by macroeconomic factors of change, such as the digital and environmental transition, demographic changes and other global events, for example, the COVID-19 pandemic. Social transformations have brought new challenges such as the demand for new qualifications, skills, labor shortages, digital gaps and a series of social manifestations: increasing inequalities, increasing social protection spending and new challenges regarding social cohesion⁴. Transformations are perceived as long-term system changes, through which social actors have gone, which refer to the whole of society. They are long-term processes that derive from natural, political, economic, technological, social and cultural fields. Through the advantages and disadvantages, they produce, transitions are perceived differently by individuals and lead to uncertainties in society, changes in behavior and values⁵. Despite the shocks to which it has been subjected in recent years, in the European Union, which have had unfavourable consequences for society, intensely affecting social life as a whole through the impact created on jobs, the economy, social assistance systems, accentuating barriers and inequalities, the European Union has maintained its resilience, following the initiatives of the Member States and the European Union as a whole⁶.

The term resilience has evolved from increasing the capacity to adapt to risks caused by economic crises, natural disasters, etc., to social resilience, focused on individuals, power relations and increasing the capacity of societies to cope with major crises⁷. The concept of resilience is increasingly oriented towards systemic aspects and addressing social vulnerabilities and inequalities⁸.

In the sense of the Partnership for Social Transformations and Resilience (STR), resilience is seen as the capacity of institutions and societies to cope with change, by using resources and developing strategies adapted to the transformations that society is undergoing. The Partnership for Social Transformations and Resilience (STR) aims to increase the capacity of society to adapt to the transformations caused by climate, technological and demographic changes and aims to achieve social cohesion, inclusion and equity through innovation and policies in areas such as modern social protection systems, adaptation to the future profile of the labour market, through the development of education and new skills and support for an equitable perception of environmental transitions as possible as⁹.

Resilience is seen as a process through which institutions, public services and societies develop their capacity to adapt to crises, uncertainties and risks¹⁰.

3. The triple transition and the social dimension

The digital and environmental transition, demographic changes and social and geopolitical crises have an impact on the quality of work, an aspect that requires attention from political decision-makers in policy-making¹¹. The European Union develops policies that respond to the needs of its citizens, by developing an economy based on inclusion and equity¹².

The digital and environmental transition produces consequences in social field, with an impact on jobs, positively influencing the quality of work and requiring new skills, preparing the workforce for the future of the labor market.

Modern technologies offer new qualification possibilities for individuals, who face difficulties related to technological change.¹³

⁴ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

⁵ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

⁶ European Commission, Delivering a Strong Social Europe.

⁷ Manca, Benczur and Giovannini, 2017, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

⁸ Suslovic B, Lett, 2023, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

⁹ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹⁰ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹¹ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹² European Commission, Delivering a strong Social Europe.

¹³ International Labor Organization, 2020; European Partnership for Social Transformations and Resilience under Horizon Europe, 2025.

Developing initiatives regarding the inclusion in the technology sector by addressing the barriers faced by disadvantaged groups is an essential element to ensuring equitable access to education and skills development.¹⁴

According to surveys among employees, it can be observed that the introduction of digitalization can have both positive and negative social effects on jobs and employees: on the one hand, it can increase efficiency and facilitate work, and, on the other hand, other opinions consider that there is a risk of job losses¹⁵.

The digital transition can have a positive social impact for people with disabilities, for whom digital technologies can facilitate the performance of certain tasks, but at the same time there is a risk of a negative impact, of the emergence of the effect of discrimination¹⁶.

The green transition is important in creating jobs, developing new competences in green technologies, improving jobs that are at risk, in the manufacturing sector. Against the background of these structural changes, issues such as job loss, unemployment, social inequalities, the risk of marginalization and exclusion of disadvantaged groups, generated by the closure of some polluting industries (such as the closure of coal mines) remain important problems on the labour market¹⁷.

The green and digital transition, demographic changes and societal shocks present considerable challenges in terms of how the educational process and skills can prepare individuals, communities and societies for both short-term and long-term changes in employment and careers.

The challenges created by the digital and environmental transition, demographic changes and shocks influence the ability of the education system to prepare society for the future labour market entry¹⁸.

Education is an important factor in avoiding unemployment, access to education being conditioned by the socio-economic environment, a factor of educational outcomes. In general, education systems face a series of shortcomings in addressing inequalities regarding the possibilities of equitable access to education for all citizens. The uneven implementation of inclusive education policies, lack of resources, regional disparities are elements that influence the capacity of the education system to ensure impartial access for disadvantaged, marginalized categories. New long-term policies and strategies are needed to create access possibilities for marginalized groups¹⁹.

The digital and environmental transitions require new skills, in the workplace. For example, the environmental transition develops new areas, such as wind and solar energy, electric vehicles and heat pumps, and, consequently, new jobs²⁰.

A workforce qualified for new skills contributes to long-term sustainable development and increased competitiveness. Efforts are being made to combat labour shortages and skills shortcomings.²¹ In achieving the goals of climate neutrality, in addition to the development of new technologies and policy initiatives, a decisive aspect is also cohesion among citizens, through their involvement in decision-making processes and their empowerment. Transversal skills, such as environmental responsibility and initiatives towards sustainable development, are needed in all areas²².

Recent studies show that citizen participation in achieving environmental objectives is important, especially in regions where resources are insufficient²³.

Encouraging citizen participation in environmental initiatives and including them in the decision-making process leads them to support broad environmental policies and, respectively, the achievement of their objectives. Ensuring transparency in communication, citizen involvement in the decision-making process and actions at the local level can strengthen the sense of trust at the community level and actions towards sustainable development.²⁴

¹⁴ OECD, 2024; cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹⁵ Lane, Williams and Broecke, 2023, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹⁶ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹⁷ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹⁸ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

¹⁹ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

²⁰ European Commission, Delivering a Strong Social Europe.

²¹ European Commission, Delivering a Strong Social Europe.

²² OECD, 2023, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

²³ Papafragkou, A., 2021, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

²⁴ Moser, Berzonsky, 2019, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

Digital technologies play a role in involving citizens in the environmental transition. Digital platforms that make it possible to monitor air quality or energy consumption contribute to the adoption of environmentally responsible solutions at the local level.²⁵

To address these challenges and support the environmental and digital transitions, 2023 has been designated the European Year of Skills. This initiative aims to increase the potential of the workforce and society by addressing skills shortages in the European Union, supporting individuals in their efforts to acquire the skills needed for good quality jobs, and supporting Small and Medium-sized Enterprises (SMEs) and other companies in addressing skills gaps²⁶.

4. Directions of action at European level

The plan sets out directions of action, in the short and medium term, that the European Union, the Member States and the social partners should take in some areas²⁷.

Equal access to education and vocational training for citizens of the European Union, regardless of the environment in which they live (urban or rural, isolated areas). Guidance must meet the needs of enterprises, namely a skilled workforce for the digital and environmental transitions, and the population must have access to education, which will develop their skills and progress in life²⁸.

Creating employment opportunities for the young workforce The young workforce faces a number of difficulties in finding a job. Through funding programmes and other measures, the European Union supports young people in finding quality jobs. Among the initiatives, they include: The reinforced Youth Guarantee, as part of the support package for youth employment. Since 2013, through the Youth Guarantee programmes, approximately 50 million young people have taken up jobs, had access to internships and vocational training.²⁹

Improving working conditions for people working with new digital technologies. Increasing safety at work, by preventing work-related deaths.

Decent and safe living conditions, combating the marginalization of disadvantaged people, by creating more and better jobs.

Access for citizens and enterprises to financing from the European Union budget. The Next GenerationEU Programme and the Recovery and Resilience Mechanism are part of the European Union budget promoting smart, sustainable and inclusive growth by supporting the business environment, competitiveness and industrialization.

The EU budget supports initiatives for job creation and for the development and implementation of projects in areas such as: health, education, transport and energy infrastructure. It is estimated that, by 2027, 1.3 million jobs will be created in the Union through the European Union's cohesion policy programmes³⁰.

Adequate minimum wages in the EU. The Commission supports fair and decent wage policies for all workers in the EU. These are a guarantee of adequate working conditions and a decent standard of living for workers and their families, as well as in order to develop a fair and resilient economy and support inclusive growth.³¹

Improving working conditions for platform workers. Labour rights and social protection must be ensured for all employees across the European Union. In 2021, the Commission proposed a directive on good working conditions for those working with digital platforms. These initiatives contribute to the correct establishment of the employment status of those working through platforms, so that they are assured of their related employment rights. In the context of the digital transition, the European Union has ensured fairness, accountability and protection of workers' rights³²

Strengthening occupational safety and health. Ensuring safe working conditions that do not endanger the health of workers are concerns that have a high impact at European Union level. Through the Strategic Framework on Health and Safety at Work 2021-2028, the European Union adopted the Vision Zero initiative to eliminate the risks of death due to work.³³

²⁵ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

²⁶ European Commission, Delivering a Strong Social Europe.

²⁷ European Commission, Delivering a strong Social Europe.

²⁸ European Commission, Delivering a Strong Social Europe.

²⁹ European Commission, Delivering a Strong Social Europe.

³⁰ European Commission, Delivering a Strong Social Europe.

³¹ European Commission, Delivering a Strong Social Europe.

³² European Commission, Delivering a Strong Social Europe.

³³ European Commission, Delivering a Strong Social Europe.

Improving access to opportunities for people with disabilities. The Strategy for the rights of people with disabilities for the period 2021-2030, adopted by the European Commission in 2022, aims at equal opportunities in the European Union. In this regard, an Employment Package for People with Disabilities was adopted, with a view to increasing equal opportunities and ensuring conditions for access to the labour market and participation in economic and social life, for people with disabilities³⁴.

5. European Union-level policies in the social field

The European Union develops policies aimed at meeting the needs of citizens, by developing an economy based on inclusion, fairness and new perspectives³⁵.

The European Pillar of Social Rights (European Pillar of Social Rights) proclaimed in 2017 by the European Parliament, the European Council and the European Commission at the Gothenburg Summit includes regulations for the development of a performing labour market and with fair social protection systems. European policies aim to build equal societies, high-standard working conditions and high-standard social protection³⁶.

In 2021, an Action Plan was developed to provide guidance in using the principles of the European Pillar of Social Rights for the benefit of citizens. The actions are embodied in³⁷:

- job creation; increasing the employability of people aged 20-64;
- creating opportunities for individuals to develop their capacities and opportunities for success; increasing training capacity;
- reducing poverty, increasing equal opportunities to benefit from new opportunities;
- combating poverty and social exclusion; increasing social inclusion.

The European Social Fund Plus (ESF+) is a component of cohesion policy and an EU instrument that supports investment in human resources, social cohesion and inclusion, at Union level, the development of the European Pillar of Social Rights. It supports policy initiatives in the areas of employment, social issues, education and skills development at European Union level and contributes to reducing social and economic disparities between Member States and regions.³⁸

European Union funding is available through various funding programmes including InvestEU which support sustainable investment, innovation and job creation, and support small businesses' access to investment.³⁹

Social protection systems, the foundation of the European social model, ensure protection for individuals (by providing social assistance, protection against accidents at work, unemployment benefits), in preventing and reducing poverty⁴⁰

Within the framework of the policy to combat poverty and create a more inclusive society, the following initiatives are distinguished⁴¹.

- Adequate minimum income to ensure active inclusion. The European Union is working (Recommendation adopted in 2023) to ensure decent living conditions for the whole of society. This means measures to prevent and eliminate poverty and social exclusion, ensuring adequate income for people facing disadvantages, ensuring conditions of access to essential services and integration into the labor market for those able to work.
- Access to housing and combating homelessness. In 2021, the European Platform for Combating Homelessness was launched, in order to ensure the exchange of experiences in efforts to reduce homelessness.
- Eradicating child poverty. Ensuring decent living conditions and eliminating the risk of poverty and social exclusion for all children in the European Union. To achieve this objective,. To achieve this objective, the European Union has adopted the EU Strategy on the Rights of the Child and the European Child Guarantee, initiatives aimed at: access of children at risk of poverty and social exclusion, to services such as early childhood education and care; ensuring at least one healthy meal every school day, healthcare.

³⁴ European Commission, Delivering a Strong Social Europe.

³⁵ European Commission, Delivering a strong Social Europe.

³⁶ European Commission, European Pillar of Social Rights.

³⁷ European Commission, Delivering a Strong Social Europe.

³⁸ European Commission, Delivering a Strong Social Europe).

³⁹ European Commission, Delivering a Strong Social Europe

⁴⁰ European Union, 2023, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025 .

⁴¹ European Commission, Delivering a strong Social Europe.

- European Union Fund provides support to disadvantaged Irish families. The Fund for European Aid to the Most Deprived (FEAD) supports vulnerable families in Ireland through the "School Stationery Kits" initiative. Through this initiative, school stationery kits were distributed to children receiving FEAD food aid, asylum seekers (as part of the International Refugee Protection Programme) and those benefiting from emergency accommodation for the homeless.

Transitions affect many vulnerable communities. There are societies that experienced industrial decline following the closure of polluting activities, such as the mining industry, which caused environmental damage and led to the evacuation of communities, producing social revolts at the local level⁴².

In the table below, there are some examples regarding the strategies employed by some European countries.

Table 1: Examples of good practices regarding social transition at European level and the social impact on residents

European Countries
BRISTOL It is an important city in England and one of the oldest ports. It has an area of 109.6 km²⁴³ and a population of 472,465 inhabitants (2021)⁴⁴. The strategy refers to the sustainable and inclusive development plan of the city of Bristol and the prospects for the year 2050. Among the long-term objectives, there is the sustainable and inclusive development of the city by reducing social inequalities, achieving the objective of carbon neutrality. The authorities have committed to smart urban development policies, through digital technologies, energy management, with the involvement of citizens in each area in the decision-making process regarding heat and energy consumption. The city uses solar and wind energy. In the inclusive development of the city of Bristol, numerous factors intervene through government policy at the national level, in the areas of: markets, trade, migration, conflicts, climate change and others. The problems that intervene in local development refer to: demographic aging, social inequalities and irrational consumption of resources. The approach of the "One City" Plan is a dynamic concept that develops through collective participation in finding the best methods of solving the problems facing the city and developing a resilient, functional and inclusive city. The vision for the development of Bristol, in the long term, until 2050, pursues a systemic approach to the city, through inter-connectivity, within dynamic, varied systems. The development of the city is carried out in a system of interdependent elements such as: connectivity, health and well-being, housing and communities, economy, environment, learning and skills, on the basis of which initiatives will be developed and implemented that address issues related to social shortcomings such as homelessness, crime and unemployment, social integration, economic inclusion. The aim is for Bristol to become a fair, healthy and sustainable city. Connectivity In the perspective of 2050, objectives are pursued related to the provision of digital services that connect the whole city, with consequences in the social sphere, to ensure access to employment, education and services for the whole population and efficient, sustainable and inclusive transport that facilitates the mobility of citizens throughout the city. City connectivity is anchored in modern urban life, ensured through an infrastructure that facilitates individuals' access to services and better communication, to learn from the experiences of others.

⁴² Bedoya, 2012; Bozzi, 2015; Padel & Das, 2010, cited in Atteridge, Strambo, Edt, Tom Gill, 2021.

⁴³ "City of Bristol (Unitary District, City of Bristol, United Kingdom) - Population Statistics, Charts, Map and Location". 2023).

⁴⁴ Bristol, Wikipedia, https://ro.wikipedia.org/wiki/Bristol#cite_note-wdref-ce4e08a2f538945b2159040b7ea2bd95-2).

Connectivity supports productivity growth. These aspects are based on actions such as:

- - providing social housing, businesses and public spaces with very high-speed internet, using Wi-Fi technology.
- - increasing urban mobility through bus lane management, creating dedicated bike lanes, traffic congestion control and student education programs concerning ensuring safety while traveling.
- - providing high-quality urban communications infrastructure and services; all of these aspects of connectivity aim to build dynamic local neighborhoods and a thriving city center.

Economy In the long term, the aim is for the entire population of Bristol to contribute to the development of a sustainable, inclusive economy. which ensures: combating social challenges, such as unemployment and economic and social exclusion; increasing productivity; economic integration between neighborhoods.

Environment The objective is a sustainable development of the city, with a reduced carbon footprint, healthy food, the creation of a harmonious natural environment, with a rich fauna, in which the whole city can live healthily.

Health and Wellbeing The aspects are aimed at making the city of Bristol a space in which, by 2050, residents will live in a healthy environment both mentally and physically, in which inequalities are reduced; for children, the aim is for them to evolve in a harmonious, healthy development framework, throughout their lives.

Housing and Communities The aim is to create a safe environment, in which the entire population of the city of Bristol benefits from housing that meets their needs, in harmonious neighborhoods, which combine aspects related to connection, inclusion, safety, access to goods, better living conditions.

Learning and Skills In the long term, aspects related to creating favorable conditions for learning and skills training for all citizens are targeted, through: increasing school involvement, developing young people's skills, improved educational programs for young people, combining education with skills training and employment opportunities, support for children with special educational needs and children in foster home.

Visions for 2050 and social aspects

Economic growth and industrial development have had a high social impact by reducing unemployment, reducing income inequality and economic and social exclusion. In Bristol, economic growth is stimulated by ensuring connectivity, promoting modern technologies, innovative products, diversity and creativity. Reducing inequalities ensures increased productivity through integration and access of individuals to the workplace, promoting social inclusion.

Social challenges that stand in the way of achieving the economic vision in the perspective of 2050.

Social aspects that make it difficult for the city to develop, in accordance with the 2050 objectives.

- The presence of inequalities between neighborhoods in different areas of the city, inequalities related to disabilities, ethnicity and other elements that increase social effects.
- The lack of housing that has led to high prices and rents, which put many citizens in difficulty.
- Poor transport infrastructure in peripheral neighborhoods hinders access to education and healthy living conditions.

Social aspects have an impact on the economic future of the city's development and constitute threats for a part of the population that risks facing social and economic exclusion, due to the difficulty or lack of access to higher qualification programs at university level required by new jobs on the local labor market.

Environmental vision for 2050

Progress has been made in the transition to a healthy, non-polluting environment by equipping the city's housing with renewable energy. Wind energy is exploited by converting it

into renewable energy to ensure a non-polluting environment, with low carbon emissions and ensuring healthy living conditions.

Health and Wellbeing Vision 2050

Improvements in Bristol's infrastructure facilitate the provision of health and social care, with the health and well-being of citizens at the heart of the decision-making system:

- Increasing urban mobility by reshaping transport in the city leads to the elimination of social inequalities and increasing social inclusion by facilitating access to urban transport. This leads to the creation of a healthy urban environment, with easy access to health services, better living conditions
- Creating a healthy, non-polluting environment leads to a reduction in deaths caused by air pollution.
- Providing medical services through a digital system ensures permanent access of citizens to these and facilitates access to medical and social services by creating possibilities for choosing access methods.

Reducing the gap between life expectancy levels between the most disadvantaged and the richest areas of Bristol is achieved by providing personalized medicine services, which differ from the classic one through different methods of diagnosis and treatment.

Vision for 2050 - Homes and communities

Social aspects related to vulnerable groups are improved by increasing the possibilities of occupying housing, Bristol having the lowest rate of homeless people among all cities in the United Kingdom.

Citizens of the city of Bristol have harmonious and safe living conditions, by involving communities in community activities, cultural events, social isolation is reduced, by increasing collective participation and reducing antisocial behavior.

Despite many of the targets being met, Bristol faces a number of challenges on the way to achieving its 2050 vision for homes and communities.

- The serious threat of a terrorist attack;
- Hate crime has increased in recent times;
- The presence of drug markets in Bristol;
- The number of victims of online fraud has increased.

Vision 2050 - Learning and skills

The education system. Ensures equal opportunities for every child by eliminating segregation in schools, children with special educational needs or disabilities by 2030, the education system provides skills for every citizen, Bristol benefits from a business environment that is open to integration and learning opportunities, cultural studies have been introduced that reflect the diversity of Bristol's communities.

Social exclusion rates are reduced by creating opportunities for all school graduates to access education, skills development, and employment.

Coordination between educational programs and the business environment is sought, by focusing on new skills, such as skills in the use of digital technologies, media, and the integration of the business environment into school networks.

Facilitating access to the educational process by creating educational infrastructure that meets the needs of the individual, ensuring educational support programs to increase literacy and numeracy in adults.

Smart urban development policies have been implemented through digital strategies. Looking ahead to 2050, the objective is to connect the entire city to digital services, with consequences in the social sphere, with the involvement of citizens in the decision-making process. The development of the city is carried out in a system of interdependent elements, namely: connectivity, economy, health and well-being, housing, economy and others. On this basis, initiatives are developed that address problems in the social area, which meet the needs of individuals: favorable living conditions, learning, health, increased urban mobility.

BARCELONA

The second largest city in Spain, in the same time, being, the capital of the community of Catalonia. It is an important port on the Mediterranean Sea. It has an area of 102.15 km² ⁴⁵ and a population of 1,686,208 inhabitants (June 2024) ⁴⁶

There is a significant wealth inequality between the two groups of districts, but also a distinction between the levels of education.

Objectives of the strategy:

- Creating a coherent framework, appropriate to the interventions for each area.
- Involving socio-economic actors from the respective locations and creating public-private - socio-community networks and synergies.
- Ensuring in the territories, the necessary resources to carry out the designed actions.
- Carrying out new actions in the form of services or programs, such as:
 - o Information and counseling services with reference to Labour Rights, such as information services on employment, promotion on a quality labor market;
 - o Training programs to increase the employment capacity of groups with social difficulties;
 - o Programs on revitalization or creation of spaces for local development: for searching for a new job, providing professional guidance services or defending workers' rights.

Among the new measures, the emphasis is on economic development and the launch of five-year development plans, with the aim of ensuring sustainable economic activity, with an emphasis on the activity of districts with a lower level of development, that would reduce the discrepancy in relation to the more advanced areas of the region, as well as new social actions to improve the quality of life, services for defending labor rights and skills training programs to increase the employment capacity of vulnerable groups, a program for revitalizing vacant spaces of the municipality and making them available for local trade and other economic activities.

It is also worth mentioning a series of measures undertaken by local authorities that have made efforts to improve the quality of life of residents, in the long term. through various measures.

Sustainable mobility, ensured by the introduction of hybrid buses and interactive bus stops.

- Investments in new technologies, in order to increase the attractiveness of green spaces for residents.
- Equipping the city with intelligent systems, such as: implementing a platform through which experiences and good practices can be shared, solutions for smart urban development.
- Creating an attractive environment for citizens, smart solutions to the problems they face, better living conditions.

HAMBURG

It is a port city, one of the 16 federal states of Germany. It has an area of 755 km² ⁴⁷ and a population of 1,910 thousand inhabitants (2023) ⁴⁸

The Digital Strategy of the city of Hamburg is oriented towards individuals, the aim being to give Hamburg the image of a modern city with good living conditions, by introducing digital technologies in the provision of services, in order to facilitate the daily activities of citizens, so that the entire population benefits from the use of digital technologies. The aim is to: create better living conditions, increase the quality of life, by improving living conditions, making public services more efficient, reducing traffic congestion, individual educational programs.

⁴⁵ Annual population census 2021-2024, INE

⁴⁶ <http://www.idescat.cat/pub/?id=aec&n=925&t=2016>. (Barcelona, Wikipedia, https://ro.wikipedia.org/wiki/Barcelona#cite_note-wdref-2f54ebd7d246869440c310c653a72527-2).

⁴⁷ "Alle politisch selbständigen Gemeinden mit ausgewählten Merkmalen am 31.12.2018 (4. Quartal)". Statistisches Bundesamt, 2019.;

⁴⁸ Hamburg, Wikipedia, https://ro.wikipedia.org/wiki/Hamburg#cite_note-wdref-5c6a527b973086c1315a2e8cac98d2e2-1.

Digitalization projects are in the interest of individuals, focusing on efficiency, social benefits and sustainability. Digital transformation goes beyond the borders of cities or states, by addressing issues related to federal digitalization.

Through e-government, the social impact is given by making administrative services more efficient, a faster and more secure access, in order to increase the quality of life, by introducing digital technologies, in the interest of individuals.

The implementation of digital technologies meets the needs of individuals and the business environment. Capitalizing on innovation and introducing new technologies requires responsibility.

Social impact is created by familiarizing citizens, the business environment, educational and research institutions and public authorities with the use of digitalization, as efficient as possible, through the development of educational programs.

The digitalization strategy is oriented, with priority to individuals (in the interest of citizens) considering digitalization as a social mission. Digital transformation is inclusive and oriented towards satisfying citizens, meets their interests, stimulating their active involvement. It includes two strategic priority objectives:

It is based on inclusion and access of all individuals to digital services and information regardless of qualification, acquired skills; discrimination of any kind is eliminated, promoting the principle of inclusion and equality access to digital infrastructure and public services.

The implementation of digital technologies meets the needs of individuals and the business environment. Capitalizing on innovation and introducing new technologies requires responsibility.

Social impact is created by familiarizing citizens, the business environment, educational and research institutions and public authorities with the most efficient use of digitalization, through the development of educational programs.

The digitalization strategy is oriented, with priority to individuals (for the benefit of citizens) considering digitalization as a social mission. Digital transformation is inclusive and oriented towards satisfying citizens, meets their interests, stimulating their active involvement. It includes two strategic priority objectives:

It is based on inclusion and access of all individuals to digital services and information regardless of qualification, acquired skills; discrimination of any kind is eliminated, promoting the principle of inclusion and equality of digital infrastructure and public services.

The Hamburg City Strategy is committed to ensure transparency in the communication of information and stimulates democratic participation and social cohesion, through direct addressing. Citizens and civil society organizations are encouraged to get involved in the future development of the city, through various digital participation tools, with an emphasis on social development.

A number of areas in which digitalization is implemented show how the use of these technologies intervenes in people's lives, respectively, the social impact it exerts, the quality of life such as: solutions for intelligent transport and service management, digital services in education, social assistance platform, digital services for companies. The Digital Strategy of the City of Hamburg is developed to meet the needs of the city and its citizens. It aims at the long-term development of the city, aiming to give the image of a digital city, better living conditions, for the entire community: citizens, businesses, employees in the public and private sectors, research and education institutions, civil society organizations, tourists.

For the city of Hamburg, the notion of a smart city is not new, as the city has previous experiences, through the strategies of 2015 and 2020. The strategy complements them, being a Work Agenda for public authorities. The initiatives provided for in the strategy have a social impact, being for the benefit of individuals oriented towards efficiency, social benefits, sustainability. Digitalization is not limited only to the city of Hamburg, but goes beyond the level of cities or states, tackling aspects related to federal digitalization.

STAVANGER

It is the fourth largest city in Norway. It has an area of 71.35 km²⁴⁹ and a population of 148,628 inhabitants (2023). It is an industrial, academic and cultural center.⁵⁰

In 2015, the implementation of the smart city concept began, when the strategic document - Roadmap - was designed regarding the manifestation of smart city activity in this municipality.

In 2017, the Smart City Office (SC OFFICE) was created, for which, professionals (with interdisciplinary experiences) were hired; their role was to implement the measures in the Roadmap. Stavanger became the first urban municipality in Norway which has its own office (SC OFFICE) dedicated to the implementation of the concept.

The creation of the strategic document – Roadmap - for the Municipality of Stavanger, as well as the decision to establish an office - SC OFFICE - by the municipality can signify tools for implementing smart city concepts, as well as solving complex situations and achieving the objectives of a smart city.

The implementation of the smart city concept was monitored, for the period 2018-2020, the qualitative analysis of the documents followed the semi-annual reports of the SC OFFICE, as well as some interviews with competent personnel.

According to the semi-annual report of the Stavanger Municipality (2019), it results that in its activity, the SC Office takes an interest in co-creation and citizen involvement, paying increased attention to citizens' opinions.

The study showed that the establishment of the SC Office did not lead to substantive changes within the organization, and the ideas regarding the smart city, as an innovative way of working, did not take shape in the Municipality of Stavanger.

After the first years of operation, changes occurred, new working methods emerged; new skills were developed, new working principles and techniques and smart city projects were adapted to local conditions.

The challenges and experiences of the city hall regarding the transition to smart cities are useful to be applied both in the Municipality of Stavanger and in other cities and communities.

From autumn 2023, the SC Office will no longer operate as an independent unit, but will be integrated into the Innovation and Digitalization Department.

The model considered for the city of Stavanger expresses the concept of a Nordic smart city model that is based on Nordic social values, namely: inclusion, cooperation, co-creation, citizen participation, which ensures an increase in the quality of life of individuals

Source: *Bristol One City Plan 2025, A Plan for Bristol, Bristol One City*, <https://www.bristolonecity.com>; *City of Bristol (Unitary District, City of Bristol, United Kingdom) - Population Statistics, Charts, Map and Location. 2023*;

Bristol, Wikipedia, https://ro.wikipedia.org/wiki/Bristol#cite_note-wdref-ce4e08a2f538945b2159040b7ea2bd95-2; *Annual population census 2021-2024, INE*; <http://www.idescat.cat/pub/?id=aec&n=925&t=2016>; *Barcelona*, Wikipedia, https://ro.wikipedia.org/wiki/Barcelona#cite_note-wdref-2f54ebd7d246869440c310c653a72527-2; *Statistics*; *Barcelona Activa Local Economic Development Strategy Working for a More Local Economy Executive Summary Boostinno Innovation Action Plan*, <https://urbact.eu>; *Hamburg Digital Strategy, Hamburg, Management Summary, Hamburg Digital Strategy, Digitale Stadt Hamburg*, <https://digital.hamburg.de>; „Alle politisch selbständigen Gemeinden mit ausgewählten Merkmalen am 31.12.2018 (4. Quartal)“. Statistisches Bundesamt, 2019. *Hamburg*, Wikipedia, https://ro.wikipedia.org/wiki/Hamburg#cite_note-wdref-5c6a527b973086c1315a2e8cac98d2e2-1; Undheim S. and Sageidet Barbara M., PART III The Lived Smart City Pag. 131, Chapter 10 Implementation of the smart city concept in Stavanger Municipality – from a global idea to local practice pag.131-133, DOI: 10.4324/9781003498650-14, in *A Nordic Smart Sustainable City. Lessons from Theory and Practice*, Edited by Barbara Maria Sageidet, Daniela Müller-Eie and Kristiane M.F. Lindland Routledge Studies in Sustainable Development Taylor & Francis Taylor & Francis Group <http://taylorandfrancis.com> Routledge Studies in Sustainable Development, NORDIC EDGE, Routledge Taylor & Francis Group, First published 2025 by Routledge, ISBN: 978-1-032-81211-3, ISBN: 978-1-032-81212-0, ISBN: 978-1-003-49865-0,

⁴⁹ Norwegian Mapping Authority (20 December 2019). "Arealstatistikk for Norge 2020" (in Norwegian bokmål). Norwegian Mapping Authority. Wikidata Q87265903;

⁵⁰ Stavanger, Wikipedia, https://ro.wikipedia.org/wiki/Stavanger#cite_note-wdref-16819ab798429cfc1fd5b8b92784e60e-2;

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6. Conclusions

The triple transition (social, environmental and digital) offers the possibility of perceiving connections that are formed between the three types of transitions, between them, there being interaction and mutual reinforcement. Through the social transition, the implementation of social policies is ensured that offer society the opportunity to benefit from the results obtained through the green and digital transitions, in turn exerting an impact on the other two forms of transition⁵¹. The costs of the transition to a green and digital economy can put pressure on low- and middle-income households, vulnerable to these changes, which limits their possibilities to participate in the environmental transition⁵².

Citizen inclusion is not only an auxiliary component of the climate transition, but also a fundamental pillar. In the context of empowering citizens towards the environment, their participation, knowledge and capacities are usually left behind, as they are not included in decision-making processes⁵³.

These shortcomings can discourage citizens' participation in achieving environmental policy objectives and diminish the long-term positive effects of local policies.⁵⁴

Transition planning must take into account the needs of different groups, and through strategies have the ability to reduce inequalities and vulnerabilities⁵⁵.

In developing strategies that support the affected areas, it is necessary to support the public and private sectors, through specific measures. Local governments need support in combating the effects of the decline of local industries⁵⁶, in order to reduce, as much as possible, the impact of the industrial recession on basic services and society, under the conditions in which public revenues are decreasing. For example, providing assistance in developing scenarios and planning medium and long-term debt. The measures taken help maintain welfare and investor confidence for the development of new economic activities⁵⁷.

Support for workers can create better conditions for retraining, employment in new jobs, in the context of new changes generated by digital and environmental transitions. This aid also supports individuals and families, by alleviating the effects of job loss⁵⁸.

Actors can support governments in the transition process, to adapt policies and strategies at the local level. Strategy planning must take into account the local context to avoid inequalities, marginalization of those facing extreme poverty⁵⁹.

Below, some remarks are made regarding the strategies employed by some European countries, mentioned in the text.

Bristol. The development of the city is conceived in a system of interdependent elements: connectivity, health and well-being, housing, economy, environment, learning and skills. These elements are the basis of initiatives that relate to social issues. The actions are designed with a view to 2050.

Barcelona. It can be seen that some measures have been taken to equip the city with intelligent systems and have created the quality of life of its inhabitants. The new actions programmed for a 5-year perspective are aimed at developing the economy and eliminating discrepancies between regions, measures to create the quality of social life.

⁵¹OECD (2023), Towards a Triple Transition. Strategies for Transformational European Development Action, https://www.oecd.org/en/publications/towards-a-triple-transition_094322ba-en.html;; <https://doi.org/10.1787/094322ba-en>.

⁵² European Commission, 2022, cited in European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

⁵³ European Environment Agency, 2020.

⁵⁴ European Partnership on Social Transformations and Resilience under Horizon Europe, 2025.

⁵⁵ Atteridge, Strambo, Edt, Gill, 2021.

⁵⁶ Harrahill & Douglas, 2019; Strambo, Aung, et al., 2019 cited in Atteridge, Strambo, Edt, Tom Gill, 2021.

⁵⁷ Atteridge, Strambo, Edt, Gill, 2021.

⁵⁸ Atteridge, Strambo, Edt, Gill, 2021.

⁵⁹ Atteridge, Strambo, Edt, Gill, 2021.

Hamburg. Good initiatives in the strategy have a social impact, being for the benefit of individuals oriented towards efficiency, social benefits, sustainability. Digitalization is not limited only to the city of Hamburg, but goes beyond the city or state level, addressing issues related to federal digitalization.

Stavenger. Attempts to implement new technologies have not led to the expected results. The experiences gained regarding the transition to smart cities are useful to be applied both in the Municipality of Stavenger and in other cities and communities.

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LABOUR MIGRATION AND SKILLS SHORTAGES IN THE EUROPEAN PUBLIC SECTOR: SOCIO-ECONOMIC IMPLICATIONS

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Liviu RADU**

Abstract

Labour migration and demographic ageing have increasingly affected the availability of human resources in the European public sector over the past decade. This paper analyses the relationship between intra-EU mobility, external migration, and the growing shortage of qualified personnel in public administration, healthcare, and education during the period 2010–2025.

The study relies on secondary statistical data provided by Eurostat, the OECD, and the European Commission, applying a comparative quantitative methodology based on migration flows, public sector vacancy rates, the age structure of employees, and participation in vocational training programmes.

The findings highlight significant regional disparities, particularly between Western European and Central and Eastern European Member States, where persistent outward migration has contributed to structural staff shortages and reduced institutional capacity. The analysis shows that highly skilled professionals, including medical personnel and civil servants, are overrepresented among emigrants, thereby exacerbating difficulties in the provision of public services in less developed regions.

The paper argues that low remuneration levels, limited career advancement opportunities, and insufficient investment in human resource development constitute key determinants of the “brain drain” phenomenon in the public sector. It advances public policy recommendations aimed at improving working conditions, strengthening retention mechanisms, and expanding continuing professional training frameworks in order to ensure the sustainability of public services.

Keywords: labour migration, skills shortage, public sector, brain drain, European Union, human capital.

1. Introduction

During the period 2010-2025, labour migration has become one of the major structural factors influencing the sustainability of the public sector in the European Union. The free movement of persons within the Single Market, persistent wage disparities among Member States, and the accelerated process of demographic ageing have generated increasing pressures on administrative capacity and on the provision of essential public services.

The European public sector — particularly healthcare, education, and public administration — is simultaneously confronted with two converging phenomena:

- rising demand for public services, driven by demographic and social changes;
- declining availability of qualified personnel, caused by migration and retirement.

Eurostat data indicate an intensification of intra-EU mobility after 2010, particularly from Central and Eastern European countries towards Western European economies¹. At the same time, European Commission reports on skills shortages highlight structural difficulties in filling vacant positions within the public sector².

The phenomenon of “brain drain” — the migration of highly skilled professionals — has become a major concern for middle-income countries and for those characterised by relatively low wage levels in the public sector. The specialised literature indicates that the selective migration of human capital may negatively affect institutional capacity and the quality of public services.

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¹ Eurostat, Migration and Migrant Population Statistics, Luxembourg, 2010–2024 editions.

² European Commission, Labour Market and Wage Developments in Europe, Brussels, 2018-2023 editions.

This paper aims to analyse the relationship between labour mobility and skills shortages in the European public sector during the period 2010–2025, through a comparative approach between Western European and Central and Eastern European Member States.

The objectives of the research are:

- To identify migration trends relevant to the public sector;
- To analyse the shortage of qualified personnel in public administration, healthcare, and education;
- To assess the impact of migration on institutional capacity;
- To formulate public policy directions aimed at retaining human capital.

The study is based on the premise that labour migration is not merely an economic phenomenon, but a process with structural implications for governance and socio-economic cohesion within the European Union.

2. Theoretical and Conceptual Framework

Labour migration and skills shortages in the public sector are interconnected phenomena, explained through a combination of economic theories of migration, human capital models, and institutional perspectives on administrative capacity.

2.1. Economic Theories of Migration and Intra-EU Mobility

The classical literature on labour migration is grounded in wage differentials and economic opportunities across countries. The neoclassical model argues that individuals migrate in order to maximise income and utility in the presence of wage disparities between labour markets³.

Within the context of the European Union, the free movement of workers has reduced institutional barriers, thereby facilitating professional mobility. Human capital theory suggests that individuals with higher levels of education are more mobile, as they are better able to capitalise on wage differentials and professional opportunities⁴.

Such selective mobility leads to skilled migration, with direct implications for the public sector in countries of origin.

2.2. Brain Drain and Its Effects on Institutional Development

The concept of “brain drain” refers to the net migration of highly skilled individuals from one country to another. Docquier and Rapoport argue that the selective migration of human capital may generate ambivalent effects: on the one hand, it can lead to remittances and knowledge transfer; on the other hand, it may reduce administrative capacity and the development potential of countries of origin⁵.

In the case of the public sector, the effects tend to be more pronounced than in the private sector, because:

- professional training is often financed through public funds;
- skills are difficult to substitute in the short term;
- the services provided are essential in nature (healthcare, education, public administration).

The migration of medical personnel from Central and Eastern Europe to Western European Member States represents a relevant example of this phenomenon.

2.3. Skills Shortages and Institutional Capacity

A skills shortage occurs when demand for specific qualifications exceeds the available supply in the labour market. The OECD defines a skills shortage as a situation in which employers experience persistent difficulties in filling vacancies due to the lack of suitable candidates⁶.

In the public sector, skills shortages are influenced by:

- wage levels;
- contractual stability;

³ George J. Borjas, *Labor Economics*, 5th edition, New York: McGraw-Hill, 2010.

⁴ Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis*, 3rd edition, Chicago: University of Chicago Press, 1993.

⁵ Frédéric Docquier, Hillel Rapoport, “Globalization, Brain Drain, and Development”, *Journal of Economic Literature* 50, nr. 3 (2012): 681–730.

⁶ OECD, *Skills Outlook 2021: Learning for Life*, Paris: OECD Publishing, 2021.

- opportunities for career advancement;
- working conditions;
- demographic dynamics.

The ageing of the workforce in European public administration increases the risk of a structural shortage, particularly in Member States with high emigration rates.

2.4. Migration and the Sustainability of Public Services

The capacity of the state to deliver public services depends on the availability and quality of human capital. European Commission studies on public administration show that institutional performance is closely correlated with the professionalisation and stability of public sector personnel⁷.

Persistent migration of professionals may lead to:

- longer vacancy durations;
- increased workload for existing staff;
- declining quality of public services;
- reduced citizens' trust in public institutions.

Therefore, the analysis of the relationship between migration and skills shortages must be conducted from a systemic perspective, incorporating both economic factors and the institutional dimension.

2.5. Analytical Premises of the Research

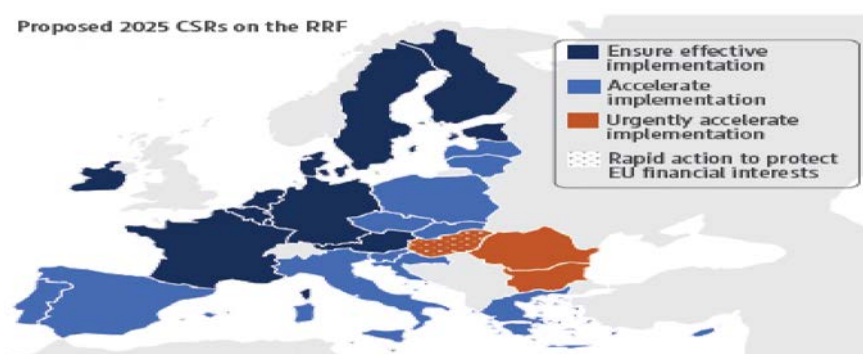
Based on the literature reviewed, the research is grounded on the following premises:

- intra-EU mobility is selective and favours the migration of highly skilled individuals;
- Member States characterised by significant wage differentials in the public sector are more exposed to the brain drain phenomenon;
- skills shortages affect administrative capacity and the quality of public services;
- differences between Western Europe and Central and Eastern Europe are influenced by demographic structure and the level of investment in human resources.

These premises will be tested empirically in the subsequent chapters.

In order to synthesise the theoretical relationships discussed above, the following conceptual model is proposed, highlighting the link between labour migration, skills shortages in the public sector, institutional capacity, and the socio-economic impact generated at national and regional levels.

Figure 1. Conceptual Model of the Relationship between Migration, Skills Shortage, Institutional Capacity, and Socio-Economic Impact



Source: authors' elaboration based on the literature (Borjas, 2010; Becker, 1993; Docquier & Rapoport, 2012; OECD, 2021)

This conceptual model provides the analytical framework necessary for the empirical examination of the relationship between labour mobility and the sustainability of the European public sector during the period 2010-2025.

⁷ European Commission, Quality of Public Administration – A Toolbox for Practitioners, Brussels, 2017.

3. Methodological Framework

3.1. Methodological Approach

The research adopts a comparative quantitative approach based on the secondary analysis of aggregated statistical data at the level of European Union Member States during the period 2010–2025. The selected timeframe allows for the examination of both the dynamics of intra-EU migration following the consolidation of the free movement of workers and the post-crisis and post-pandemic effects on the public sector.

The comparative analysis focuses on two groups of countries:

- Western Europe: Germany, France, the Netherlands, Sweden;
- Central and Eastern Europe: Romania, Bulgaria, Poland, Hungary.

The selection is justified by consistent differences in migration flows, public sector wage levels, and demographic structure, as reflected in official European statistics⁸.

The conceptual model presented in Chapter 2 is operationalised into an empirical framework that examines the relationships between:

- migration flows (independent variable);
- skills shortages in the public sector (intermediate variable);
- institutional capacity and socio-economic impact (dependent variables).

3.2. Data Sources

The data used in this study are drawn from official European databases and institutional reports:

- Eurostat – Migration and Migrant Population Statistics: intra-EU and extra-EU migration flows;
- Eurostat – Job Vacancy Statistics: job vacancy rates;
- OECD – International Migration Outlook: labour mobility and skilled migration⁹;
- European Commission – Public Administration Reports: institutional capacity and administrative reforms¹⁰;
- OECD – Skills Outlook 2021: participation in continuing vocational education and training.

These sources provide statistical comparability and methodological continuity for the period under analysis.

3.3. Operationalization of Variables

Table 1. Operationalisation of Variables

Type of Variable	Variable	Indicator Used	Source
Independent	Labour migration	Emigration rate of the working-age population; net migration flows	Eurostat
Intermediate	Skills shortage	Job vacancy rate in the public sector	Eurostat
Intermediate	Workforce ageing	Share of employees aged 55+ in the public sector	Eurostat
Mediating	Vocational training	% participation in lifelong learning	OECD / Eurostat
Dependent	Institutional capacity	Indicators of administrative performance	European Commission

Source: authors' elaboration based on Eurostat (Migration and LFS data), OECD and European Commission reports

The operationalisation of variables allows for the examination of the relationship between labour mobility and the structural shortage of qualified personnel in the public sector.

⁸ Eurostat, Migration and Migrant Population Statistics, Luxembourg, 2010–2024 editions.

⁹ *Idem*.

¹⁰ European Commission, Quality of Public Administration – A Toolbox for Practitioners, Brussels, 2017.

3.4. Methods of Analysis

The analysis employs:

- Longitudinal descriptive analysis (2010–2025);
- Comparative analysis between Western Europe and Central and Eastern Europe;
- Correlation analysis between:
 - emigration rates and public sector vacancy rates;
 - age structure and skills shortages;
 - participation in training and staff retention rates.

The methodological approach is consistent with the methodology applied in OECD reports on international migration and labour markets.

The objective is not to estimate a causal econometric model, but rather to identify persistent structural relationships and regional differences.

3.5. Methodological Limitations

The study is subject to the following limitations:

- nationally aggregated data may conceal internal regional disparities;
- not all Member States provide detailed statistics on public sector vacancies;
- indicators of institutional capacity are partly composite in nature and difficult to compare perfectly across countries;
- correlation analysis does not automatically imply causal relationships.

Nevertheless, the adopted methodology allows for the formulation of relevant conclusions regarding the relationship between labour migration and the sustainability of the European public sector.

4. The Evolution of Labour Migration in the European Union (2010–2025)

4.1. The Dynamics of Intra-EU Migration

During the period 2010–2025, labour mobility within the European Union increased significantly, influenced by the free movement of workers, wage differentials, and structural imbalances among Member States.

Eurostat data show that the number of EU citizens living and working in another Member State has grown steadily since 2010, with an acceleration during the period 2014–2019¹¹. The economic crisis in several Southern European countries and the persistent disparities between Western Europe and Central and Eastern Europe contributed to the intensification of migration flows.

The COVID-19 pandemic led to a temporary slowdown in mobility in 2020; however, the upward trend resumed thereafter.

Intra-EU migration remains predominantly economically driven, directed towards countries characterised by:

- higher wage levels;
- more favourable working conditions;
- broader professional opportunities.

4.2. Skilled Migration and the Brain Drain Phenomenon

A central aspect of the analysis concerns skilled migration, particularly in sectors essential to the public sector, such as healthcare and education.

The OECD emphasises that the international mobility of tertiary-educated individuals is higher than that of the general population¹². In the case of Central and Eastern European Member States, the proportion of higher education graduates who emigrate is significantly above the EU average.

¹¹ Eurostat, Migration and Migrant Population Statistics, Luxembourg, 2010–2024 editions.

¹² OECD, International Migration Outlook, Paris, 2010–2023 editions.

The “brain drain” phenomenon is particularly visible in the healthcare sector. European Commission reports indicate that several Eastern European countries have recorded net losses of medical personnel in favour of Western European economies¹³.

The migration of highly skilled personnel generates cumulative effects:

- the reduction of the domestic skills base;
- increased recruitment costs;
- growing pressures on public systems.

4.3. Comparative Analysis: Western Europe – Central and Eastern Europe

Table 2. Comparative Migration Trends (2010–2024)

Indicator	Western Europe	Central and Eastern Europe
Net migration balance	Positive	Negative
Emigration of the working-age population	Low	High
Skilled migration	Net inflow	Net outflow
Emigrated medical personnel	Limited	Significant

Source: authors’ elaboration based on Eurostat and OECD data.

Western European countries function as attraction poles for skilled labour, benefiting from wage differentials and institutional stability. By contrast, Central and Eastern European Member States are affected by negative net migration, particularly among young people and highly skilled professionals.

This asymmetry contributes to the widening gap in administrative capacity and in the provision of public services.

4.4. Preliminary Implications for the Public Sector

Persistent migration of skilled labour directly affects the sustainability of the public sector through:

- an increase in the number of vacant positions;
- the ageing of the remaining workforce;
- difficulties in implementing administrative reforms;
- increased reliance on temporary solutions or outsourcing.

Particularly in the fields of healthcare and public administration, the loss of qualified human capital reduces institutional capacity and may undermine citizens’ trust in public services.

This development justifies a more in-depth analysis of the relationship between migration and skills shortages in the following chapter.

5. Skills Shortages in the European Public Sector

5.1. Job Vacancy Rates in the Public Sector

Skills shortages in the public sector are directly reflected in rising vacancy rates and persistent difficulties in filling essential positions. According to Eurostat Job Vacancy Statistics, the job vacancy rate has increased steadily in several Member States during the period 2015–2023¹⁴.

Although aggregated data include both the public and private sectors, national reports and comparative analyses indicate that public administration, healthcare systems, and education face significant challenges in recruiting and retaining qualified personnel.

Central and Eastern European Member States record higher levels of public sector vacancies, particularly in peripheral regions and in fields requiring high qualifications.

¹³ European Commission, *Health at a Glance: Europe 2022 – State of Health in the EU Cycle*, Brussels, 2022.

¹⁴ Eurostat, *Job Vacancy Statistics*, Luxembourg, 2015–2023 editions.

5.2. Workforce Ageing and Retirement Risk

A major structural factor underlying skills shortages is the ageing of the public sector workforce. Eurostat data on the age structure of employees indicate a high share of personnel aged over 55 in public administration and education¹⁵.

Workforce ageing has two major implications:

- an increased risk of the simultaneous retirement of a significant number of employees;
- the loss of institutional experience and tacit knowledge.

In Member States characterised by negative net migration, generational replacement is more difficult, as the domestic supply of qualified personnel is limited.

5.3. Sectoral Shortages: Healthcare, Education, and Public Administration

Healthcare. The healthcare sector is among the most affected by skills shortages. The report *Health at a Glance: Europe 2022* highlights the shortage of medical personnel in several Member States, as well as the migration of doctors and nurses towards economies offering higher remuneration¹⁶.

The COVID-19 pandemic intensified pressures on healthcare systems, exposing pre-existing structural vulnerabilities.

Education. In the field of education, teacher shortages are associated both with workforce ageing and with the declining attractiveness of the profession in certain Member States. The OECD indicates that in several European countries a significant proportion of teachers are approaching retirement age¹⁷.

Public administration. In public administration, recruitment difficulties are linked to wage differentials compared to the private sector, limited career advancement opportunities, and perceptions of institutional rigidity.

The European Commission emphasises that the performance of public administration is dependent on the professionalisation and stability of human resources¹⁸.

5.4. Comparative Analysis: Western Europe – Central and Eastern Europe

In order to highlight the structural differences between Western Europe and Central and Eastern Europe with regard to public sector skills shortages, the table below summarises the main trends identified during the period under analysis.

Table 3. Comparative Trends in Public Sector Skills Shortages

Indicator	Western Europe	Central and Eastern Europe
Job vacancy rate	Moderate	High
Share of employees aged 55+	High	High
Migration of skilled personnel	Net inflow	Net outflow
Public sector recruitment difficulties	Present	More pronounced

Source: authors' elaboration based on Eurostat, OECD, and European Commission data.

The differences between the two regions are amplified by negative net migration in Central and Eastern European countries, which reduces the capacity to replace retiring staff and exacerbates the structural shortage.

This combination of negative net migration, workforce ageing, and recruitment difficulties generates a structural skills deficit that affects, in the medium and long term, the capacity of states to ensure the continuity and quality of essential public services.

¹⁵ Eurostat, *Employment by Age and Economic Activity (LFS)*, Luxembourg, 2010–2024.

¹⁶ European Commission, *Health at a Glance: Europe 2022 – State of Health in the EU Cycle*, Brussels, 2022.

¹⁷ OECD, *Education at a Glance 2022*, Paris: OECD Publishing, 2022.

¹⁸ European Commission, *Quality of Public Administration – A Toolbox for Practitioners*, Brussels, 2017.

6. The Socio-Economic Impact of Skills Shortages in the Public Sector

6.1. Institutional Capacity and Administrative Performance

Skills shortages in the public sector directly affect the institutional capacity of the state. Administrative capacity is defined as the ability of public institutions to design and implement effective policies, manage public resources, and deliver high-quality services.

The European Commission emphasises that the performance of public administration is closely linked to the professionalisation and stability of human resources¹⁹. A lack of qualified personnel may lead to:

- delays in the implementation of reforms;
- reduced absorption of European funds;
- declining decision-making efficiency;
- increasing administrative costs.

In Member States characterised by negative net migration and accelerated workforce ageing, these vulnerabilities are more pronounced.

6.2. Public Service Quality and Population Access

Skills shortages directly affect the quality and accessibility of essential public services, particularly in healthcare and education.

The report *Health at a Glance: Europe 2022* highlights that shortages of medical personnel contribute to longer waiting times and additional pressure on healthcare infrastructure. In rural or peripheral regions, these shortages are often more pronounced.

In the field of education, the OECD indicates that insufficient teaching staff may negatively affect educational outcomes and the equity of the education system²⁰. The migration of teachers and the declining attractiveness of the profession further exacerbate these challenges in certain Member States.

Therefore, skills shortages do not constitute merely an administrative issue, but one with a direct impact on population welfare.

6.3. Regional Inequalities and Social Cohesion

The selective migration of human capital contributes to the widening of regional disparities. More developed regions attract qualified personnel, while peripheral areas lose essential human resources.

The World Bank emphasises that institutional performance and the quality of public services are key determinants of economic development and inequality reduction²¹. Skills shortages in the public sector may generate a vicious circle:

- declining service quality;
- reduced economic attractiveness of the region;
- intensified migration;
- erosion of the local tax base.

This dynamic affects social cohesion and convergence among European Union Member States.

6.4. Indirect Macroeconomic Effects

In the medium and long term, skills shortages in the public sector may influence overall economic performance. Efficient public services support the investment climate, investor confidence, and economic stability.

Studies on governance and economic growth show that effective institutions and high-performing public administration are essential drivers of sustainable economic development²².

¹⁹ European Commission, *Quality of Public Administration – A Toolbox for Practitioners*, Brussels, 2017.

²⁰ OECD, *Education at a Glance 2022*, Paris: OECD Publishing, 2022.

²¹ World Bank, *World Development Report 2017: Governance and the Law*, Washington, D.C., 2017.

²² Daron Acemoglu, Simon Johnson, James A. Robinson, "Institutions as a Fundamental Cause of Long-Run Growth", in *Handbook of Economic Growth*, Vol. 1A, Amsterdam: Elsevier, 2005.

Therefore, the persistent migration of qualified human capital and the structural shortage of personnel in the public sector may have indirect effects on the competitiveness and economic stability of Member States.

7. Public Policy Implications and Human Capital Retention Mechanisms

7.1. Wage Policies and Retention Incentives

Wage differentials represent one of the main determinants of labour migration from the public sector. The literature on international mobility shows that persistent remuneration gaps stimulate the selective migration of qualified personnel²³.

For Member States affected by negative net migration, the adjustment of public sector wage policies constitutes an essential retention instrument. Measures may include:

- targeted wage increases in critical sectors (healthcare and education);
- incentives for filling positions in rural or disadvantaged areas;
- bonus schemes rewarding continuity and performance.

However, wage increases must be integrated into a sustainable fiscal strategy in order to avoid excessive pressure on public budgets.

7.2. Professional Development and Lifelong Learning

Investment in continuing professional development can reduce the likelihood of migration and increase the attractiveness of careers in the public sector. The OECD emphasises that skills development and opportunities for career progression are key determinants of staff retention²⁴.

Particularly in public administration, the digitalisation of services requires the continuous upgrading of competences. Lifelong learning programmes contribute to:

- increased institutional efficiency;
- strengthened professionalisation;
- enhanced job satisfaction.

Member States that consistently invest in the development of public human resources demonstrate a greater capacity to retain qualified personnel.

7.3. Public Management Reform and Career Attractiveness

The attractiveness of the public sector is not determined solely by wage levels, but also by working conditions, job stability, and career advancement prospects.

The European Commission highlights the importance of civil service professionalisation, performance evaluation, and transparency in recruitment for strengthening administrative capacity²⁵.

Reforms aimed at:

- modernising public management;
- digitalising administrative procedures;
- reducing bureaucracy;
- promoting meritocracy;
- may contribute to enhancing the attractiveness of public careers and mitigating migration trends.

7.4. European-Level Measures to Reduce Imbalances

Labour mobility within the European Union is a fundamental right; however, its asymmetric effects on Member States require a coordinated approach.

European strategies on skills and professional mobility aim to enhance labour market resilience and reduce skills shortages²⁶. At the same time, Structural Funds and the Recovery and Resilience Facility provide opportunities for investment in human capital and public administration reform.

²³ George J. Borjas, *Labor Economics*, 5th edition, New York: McGraw-Hill, 2010.

²⁴ OECD, *Skills Outlook 2021: Learning for Life*, Paris: OECD Publishing, 2021.

²⁵ European Commission, *Quality of Public Administration – A Toolbox for Practitioners*, Brussels, 2017.

²⁶ European Commission, *European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*, Brussels, 2020.

For Central and Eastern European Member States, the effective use of these instruments may contribute to:

- modernising public systems;
- increasing the attractiveness of careers in the public sector;
- reducing the structural migration of qualified personnel.

An integrated approach, combining national retention policies with European support for skills development, is essential to ensure the sustainability of public services.

8. Conclusions

This study has analysed the relationship between labour migration and skills shortages in the European public sector during the period 2010–2025, highlighting the socio-economic implications of this phenomenon for institutional capacity and the sustainability of public services.

The theoretical and comparative analysis shows that intra-EU labour mobility is selective in nature, favouring the migration of highly qualified individuals from Member States characterised by significant wage differentials and limited professional opportunities towards more developed economies. In particular, in Central and Eastern Europe, the migration of medical personnel, teachers, and public officials has contributed to the intensification of structural skills shortages.

The findings indicate that skills shortages in the public sector are driven by the interaction of three main factors:

- negative net migration of qualified personnel;
- accelerated workforce ageing in public administration, education, and healthcare;
- the relatively low attractiveness of public sector careers in certain Member States.

The socio-economic impact of this deficit is reflected in diminished administrative capacity, difficulties in the provision of public services, and the widening of regional disparities. In the fields of healthcare and education, shortages of qualified personnel may directly affect service quality and the equity of population access.

The differences between Western Europe and Central and Eastern Europe are largely explained by structural asymmetries in wage levels, investment in human resources, and institutional capacity. States functioning as attraction poles for skilled labour benefit from the strengthening of their human capital base, whereas countries experiencing negative net migration face structural vulnerabilities.

The research highlights that labour mobility, although a fundamental right within the European Union, may generate imbalanced effects on the public sector in the absence of adequate retention and compensatory mechanisms.

To ensure the sustainability of public services, the following measures are required:

- competitive wage policies in critical sectors;
- systematic investment in continuing professional development;
- reforms aimed at the professionalisation and modernisation of public administration;
- effective use of European funding instruments to strengthen human capital.

In conclusion, labour migration and skills shortages in the public sector do not represent merely a labour market issue, but a structural challenge for European governance and socio-economic cohesion. The capacity of Member States to manage these trends will directly influence the quality of public services and the level of European convergence in the decades ahead.

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DIGITALISATION AND AI: EFFECTS ON LABOUR MARKET INEQUALITIES IN THE EU

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Abstract

Accelerated digital transformation and the widespread adoption of artificial intelligence have profoundly reshaped labour markets across the EU over the past decade. This paper examines the socio-economic effects of digitalisation and artificial intelligence on occupational structures, income distribution, and skills polarisation in EU Member States during the period 2015–2025.

The study relies on secondary statistical data provided by Eurostat, the OECD, and the World Bank, applying a comparative quantitative approach based on indicators such as the employment rate, the evolution of the Gini coefficient, participation in lifelong learning, and the share of jobs exposed to the risk of automation.

The findings reveal significant disparities between Western Europe and Central and Eastern Europe, highlighting the widening digital divide and the increasing polarisation of skills. While highly skilled workers benefit from productivity gains and wage growth, low-skilled workers face heightened risks of job displacement and economic insecurity. Unequal access to reskilling programmes further contributes to the deepening of socio-economic inequalities.

The paper advances public policy recommendations aimed at strengthening active labour market measures, expanding lifelong learning systems, and fostering public–private partnerships as essential instruments for ensuring an inclusive digital transition.

Keywords: digitalisation, artificial intelligence, labour market, socio-economic inequalities, European Union, skills polarisation.

1. Introduction

Digital transformation represents one of the most powerful drivers of economic restructuring in recent decades. The integration of artificial intelligence (AI), process automation, the use of big data, and the expansion of digital platforms have fundamentally altered production structures, work organisation, and the distribution of value added within the European Union.

During the period 2015–2025, the European Union underwent an accelerated phase of digitalisation, marked by:

- the implementation of the Digital Single Market Strategy (2015);
- the launch of the Digital Europe Programme (2021–2027);
- the adoption of the Artificial Intelligence Act (AI Act);
- the consolidation of the twin transition: digital and green.

This transformation has generated ambivalent effects. On the one hand, it has stimulated productivity growth, innovation, and competitiveness. On the other hand, it has intensified occupational polarisation and socio-economic inequalities, particularly in Member States with lower levels of digital human capital.

This paper aims to examine:

- The impact of digitalisation and artificial intelligence on the structure of the labour market;
- The relationship between digital transformation and socio-economic inequalities;
- The structural differences between Western Europe and Central and Eastern Europe;
- The public policy directions required to ensure an inclusive digital transition.

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2. Theoretical and Conceptual Framework

Digital transformation and the integration of artificial intelligence into economic processes have generated a structural reconfiguration of the labour market, leading to the emergence of new theoretical paradigms concerning the relationship between technology, employment, and income distribution. Over the past two decades, the economic and sociological literature has developed several explanatory frameworks relevant to analysing the impact of digitalisation on socio-economic inequalities.

2.1. Skill-Biased Technological Change (SBTC)

The theory of skill-biased technological change (SBTC) argues that technological progress favours highly skilled workers by increasing the demand for cognitive, analytical, and digital competences, to the detriment of routine or low-skilled labour.

Technology does not substitute entire occupations, but rather specific tasks within them¹. Automation primarily affects repetitive and codifiable tasks, whereas activities involving problem-solving, creativity, or social interaction are more difficult to automate.

This perspective has led to the development of the “task-based” model, which explains occupational restructuring through the analysis of task content rather than solely formal educational attainment. In the context of artificial intelligence, this approach becomes particularly relevant, as advanced AI systems are capable of automating not only manual tasks but also standardised cognitive processes.

2.2. Occupational Polarisation

A direct consequence of skill-biased technological change is labour market polarisation. Goos, Manning, and Salomons demonstrate that, in Europe, digitalisation has led to a simultaneous increase in both high-skilled and low-skilled occupations, alongside a contraction of middle-skilled occupational segments².

This phenomenon has significant implications for the structure of the middle class and for social cohesion. Polarisation contributes to:

- rising wage inequality;
- labour market fragmentation;
- reduced intergenerational social mobility.

Moreover, polarisation tends to be more pronounced in economies with high exposure to industrial automation and standardised administrative services.

2.3. Automation and Occupational Risk

The debate on the scope and magnitude of automation was intensified by the study conducted by Frey and Osborne, which estimated that 47% of occupations in the United States were at high risk of computerisation³.

Subsequently, the OECD revised this methodology, demonstrating that the actual level of risk is significantly lower when the analysis focuses on tasks rather than aggregated occupations⁴. Nevertheless, even under this task-based approach, a substantial share of jobs across European countries remains susceptible to structural transformation.

Within the European Union, exposure to automation varies depending on:

- the sectoral structure of the economy;
- the level of human capital;
- investments in technology and innovation.

¹ Daron Acemoglu, David Autor, “Skills, Tasks and Technologies: Implications for Employment and Earnings”, in *Handbook of Labor Economics*, Vol. 4B, Elsevier, Amsterdam, 2011.

² Maarten Goos, Alan Manning, Anna Salomons, “Job Polarization in Europe”, *American Economic Review*, Vol. 99, No. 2, 2009, pp. 58–63. (AER Papers & Proceedings).

³ Carl Benedikt Frey, Michael A. Osborne, “The Future of Employment: How Susceptible Are Jobs to Computerisation?”, Oxford Martin School, University of Oxford, 2013.

⁴ Melanie Arntz, Terry Gregory, Ulrich Zierahn, “The Risk of Automation for Jobs in OECD Countries: A Comparative Analysis”, OECD Social, Employment and Migration Working Papers No. 189, OECD Publishing, Paris, 2016.

2.4. Technological Capital and the Dynamics of Inequality

The literature on income distribution emphasises the role of capital in amplifying inequalities. Piketty argues that the rate of return on capital may exceed the rate of economic growth, leading to wealth concentration⁵.

In the digital economy, technological capital — including algorithms, data, and digital infrastructure — becomes a strategic factor of production. Ownership of these assets is largely concentrated in multinational corporations and advanced innovation ecosystems, which may further widen disparities among EU Member States.

Consequently, digitalisation does not automatically generate economic convergence; rather, it may contribute to divergence between highly innovative economies and those reliant on traditional sectors.

2.5. The Digital Divide and Skills

The concept of the “digital divide” has evolved from a matter of access to infrastructure to one concerning digital skills and the capacity to use technology productively.

The OECD emphasises that participation in lifelong learning is strongly correlated with initial educational attainment⁶, thereby generating a cumulative advantage mechanism: individuals who are already highly qualified are more likely to strengthen their position in the digital labour market.

Within the European Union, disparities in basic and advanced digital skills account for a significant share of regional and wage inequalities.

2.6. Conceptual Model of the Relationship between Digitalization and Socio-Economic Inequalities

In order to integrate the theoretical perspectives discussed above, we propose a synthetic conceptual model that explains the mechanisms through which digitalisation and artificial intelligence influence the labour market and income distribution within the European Union.

The model is based on the premise that digitalisation operates simultaneously through two main channels: the productivity and innovation channel, which generates economic growth and opportunities for highly skilled workers, and the technological substitution channel, which affects routine tasks and middle-skilled occupations, as emphasised in the literature on technological complementarity and substitution⁷.

These two mechanisms lead to:

- the restructuring of the occupational structure;
- skills polarisation;
- changes in income distribution.

In turn, these effects are mediated by institutional and educational variables, such as:

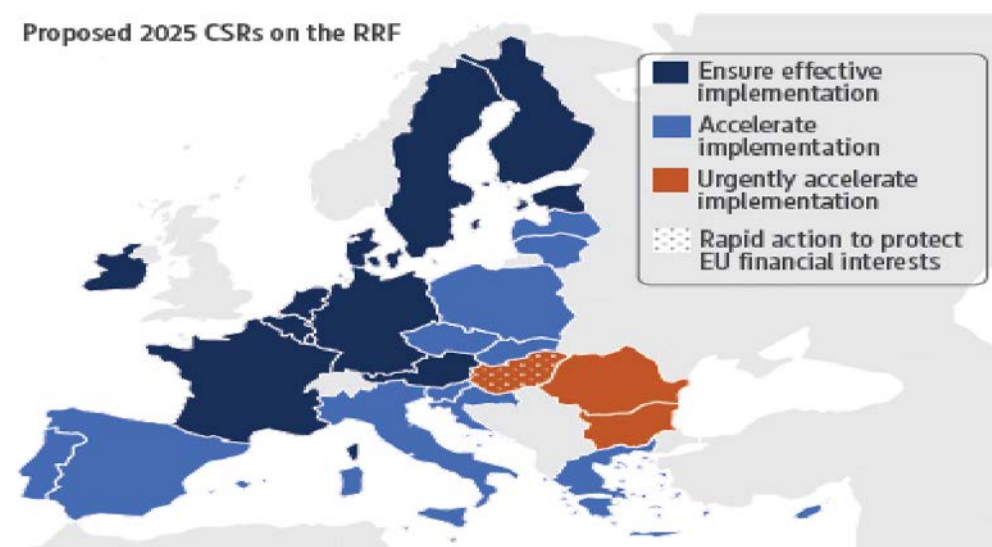
- participation in lifelong learning;
- administrative capacity;
- public investment in digital education;
- the effectiveness of active labour market policies.

⁵ Thomas Piketty, *Capital in the Twenty-First Century*, Harvard University Press, Cambridge, 2014.

⁶ OECD, *Skills Outlook 2021: Learning for Life*, OECD Publishing, Paris, 2021.

⁷ David Autor, “Why Are There Still So Many Jobs? The History and Future of Workplace Automation”, *Journal of Economic Perspectives*, vol. 29, no. 3, 2015, pp. 3–30.

Figure 1. Conceptual Model of the Impact of Digitalisation on the Labour Market and Socio-Economic Inequalities



Source: authors' elaboration based on the literature (Acemoglu & Autor, 2011; Goos et al., 2009; OECD, 2019)

The conceptual model highlights that digitalisation does not automatically generate inequality; rather, it interacts with the institutional structure and the level of human capital. In European Union Member States with high levels of investment in education and active labour market policies, the negative effects of automation can be mitigated through appropriate institutional mechanisms⁸.

By contrast, in economies characterised by low participation in lifelong learning and limited digital infrastructure, the process may lead to:

- increased labour market segmentation;
- widening wage differentials;
- regional divergence.

The model will guide the empirical analysis developed in the subsequent chapters.

3. Methodological Framework

3.1. Methodological Approach

The present study adopts a comparative quantitative approach based on the secondary analysis of aggregated statistical data at the level of European Union Member States. The period under examination is 2015–2025, an interval that captures the acceleration of Europe's digital transformation, the consolidation of the platform economy, as well as the structural impact generated by the COVID-19 pandemic on work organisation.

The comparative analysis focuses on two groups of Member States:

- Western Europe: Germany, France, the Netherlands, Sweden;
- Central and Eastern Europe: Romania, Bulgaria, Poland, Hungary.

The selection of these countries is justified by the significant differences in levels of digitalisation, technological infrastructure, and human capital performance, as highlighted in the European Commission's annual reports on the Digital Economy and Society⁹.

The conceptual model presented in Chapter 2 is operationalised into an empirical framework that examines the relationships between:

- the level of digitalisation (independent variable);
- occupational restructuring and skills polarisation (intermediate variables);

⁸ OECD, *Employment Outlook 2019: The Future of Work*, OECD Publishing, Paris, 2019.

⁹ European Commission, *Digital Economy and Society Index (DESI) Reports*, Brussels, 2015–2024 editions.

- socio-economic inequalities (dependent variable).

3.2. Data Sources and Statistical Foundation

The data employed in this study are drawn from official institutional databases recognised for their methodological comparability at the European level:

- Eurostat – Labour Force Survey (LFS): indicators on employment, occupational structure, and teleworking;
- Digital Economy and Society Index (DESI): measurement of the level of digitalisation;
- OECD Employment Outlook: estimates regarding occupational exposure to automation;
- World Bank – World Development Indicators: Gini coefficient and macroeconomic indicators;
- OECD Skills Outlook 2021: participation in lifelong learning.

The use of these sources ensures methodological consistency and comparative validity, as the indicators are constructed on harmonised European and international statistical frameworks¹⁰.

3.3. Operationalization of Variables

In order to test the hypotheses formulated in Chapter 2, the variables are defined and measured as presented in Table 1.

The operationalisation of variables enables a relational analysis between digitalisation and income distribution through the structural mechanisms previously identified.

Table 1. Operationalisation of Variables in the Conceptual Model

Type of Variable	Variable	Indicator Used	Source
Independent	Level of digitalisation	DESI Index (annual aggregate score)	European Commission
Intermediate	Occupational restructuring	Share of high-/middle-/low-skilled occupations	Eurostat LFS
Intermediate	Exposure to automation	% of jobs at high risk	OECD
Mediating	Lifelong learning	% of adults (aged 25–64) participating in education and training	Eurostat
Dependent	Socio-economic inequality	Gini coefficient (equivalised disposable income)	World Bank

Source: authors' elaboration based on European Commission (DESI), Eurostat LFS, OECD and World Bank data

The DESI Index is employed as a proxy for the overall level of digitalisation, as it integrates dimensions related to connectivity, digital human capital, the integration of digital technologies, and digital public services¹¹.

3.4. Methods of Analysis

The empirical analysis employs the following instruments:

- Comparative descriptive analysis of developments during the period 2015–2025;
- Bivariate correlation analysis between:
 - o DESI and the Gini coefficient;
 - o DESI and participation in lifelong learning;
 - o exposure to automation and occupational structure;
- Trend analysis to identify processes of regional convergence or divergence.

The methodology is consistent with the approaches used in OECD studies on the future of work and the impact of automation on employment¹².

¹⁰ Eurostat, Labour Force Survey – Methodology and Metadata; World Bank, World Development Indicators; OECD, Skills Outlook 2021: Learning for Life, OECD Publishing, Paris, 2021.

¹¹ European Commission, Digital Economy and Society Index (DESI) Reports, Brussels, 2015–2024 editions.

¹² OECD, Employment Outlook 2019: The Future of Work, OECD Publishing, Paris, 2019.

The objective is not to estimate a complex causal econometric model, but rather to identify consistent structural relationships and systematic differences between the groups of countries under examination.

3.5. Methodological Limitations

The study is subject to the following limitations:

- the use of nationally aggregated data may conceal internal regional disparities;
- DESI is a composite index, and the weighting of its subcomponents may influence the interpretation of results;
- correlation analysis does not automatically imply causal relationships;
- the period 2020–2022 reflects exceptional effects generated by the COVID-19 pandemic, which may artificially amplify certain trends (e.g. teleworking).

Nevertheless, the adopted methodology allows for the formulation of relevant conclusions regarding the relationship between digital transformation and socio-economic inequalities within the European Union.

4. The Evolution of Digitalisation in the European Union (2015–2025)

4.1. The Overall Dynamics of Digitalisation in the EU

During the period 2015–2025, digital transformation became one of the European Union’s key strategic priorities, supported initially through the implementation of the Digital Single Market Strategy (2015) and subsequently through the Digital Europe Programme (2021–2027). The level of digitalisation has been systematically measured through the Digital Economy and Society Index (DESI), published annually by the European Commission¹³.

The DESI index integrates four main dimensions:

- digital human capital;
- connectivity;
- the integration of digital technologies in businesses;
- digital public services.

Between 2015 and 2024, the EU average recorded a steady increase in the aggregate score, reflecting:

- the expansion of high-speed broadband networks;
- the growing use of digital public services;
- the development of basic digital skills.

However, progress has not been uniform across Member States.

4.2. Comparative Analysis: Western Europe vs. Central and Eastern Europe

The structural differences between Western European and Central and Eastern European Member States are evident across all DESI dimensions.

Countries such as Finland, Sweden, the Netherlands, and Germany have consistently maintained scores above the EU average, particularly with regard to:

- the integration of digital technologies in SMEs;
- the use of artificial intelligence in industrial processes;
- advanced digital skills.

By contrast, Romania and Bulgaria have recorded slower progress, especially in the areas of digital skills and business digitalisation.

Table 2. Comparative Trends in Digitalisation (2015 vs. 2024)

Indicator	Western Europe	Central and Eastern Europe
Evolution of DESI score	Steady growth, above EU average	Moderate growth, below EU average
Basic digital skills	Over 60% of the population	Below 40% in some Member States

¹³ European Commission, Digital Economy and Society Index (DESI) Reports, Brussels, 2015–2024 editions.

Indicator	Western Europe	Central and Eastern Europe
Integration of AI in companies	Accelerated	Limited
Digital public services	High level of use	Lower level of use

Source: authors' elaboration based on DESI reports, 2015–2024

4.3. The Acceleration of Digitalisation in the Context of the COVID-19 Pandemic

The COVID-19 pandemic acted as a major catalyst for digitalisation. Public health restrictions led to:

- a significant increase in teleworking;
- the digitalisation of public services;
- the acceleration of e-commerce;
- the expanded use of artificial intelligence-based solutions in logistics and healthcare.

Eurostat data indicate that the share of individuals frequently working from home increased substantially in 2020–2021 compared to the pre-pandemic period¹⁴.

However, the capacity for adaptation varied across Member States. Countries with advanced digital infrastructure were able to absorb the economic shock more effectively, whereas economies with lower levels of digitalisation experienced more pronounced labour market disruptions.

4.4. Structural Implications for the Labour Market

The evolution of digitalisation between 2015 and 2025 has generated visible structural effects:

- Increased demand for advanced digital skills;
- Expansion of ICT sectors and data-driven services;
- A decline in the share of routine administrative activities;
- Greater flexibility in forms of work.

In Western Europe, these transformations were accompanied by active reskilling policies. In Central and Eastern Europe, gaps in digital human capital amplified the risks of occupational polarisation.

Thus, the evolution of digitalisation represents not merely a technological process, but a key driver of socio-economic restructuring.

5. The Impact of Digitalisation on the Structure of the Labour Market

5.1. The Reconfiguration of the Occupational Structure

The digital transformation during the period 2015–2025 has led to a significant restructuring of the occupational structure within the European Union. The increased use of digital technologies, automation, and artificial intelligence has influenced the distribution of jobs across skill levels and economic sectors.

Eurostat data indicate a steady increase in employment in:

- the information and communication technology (ICT) sector;
- professional, scientific, and technical services;
- data-driven and software-related activities.

In parallel, occupations characterised by repetitive or administrative tasks have experienced stagnation or relative decline.

This trend confirms the literature on skill-biased technological change and the task-based model¹⁵.

5.2. Skills Polarisation

Skills polarisation represents one of the most widely discussed effects of digitalisation. Across EU Member States, the following trends can be observed:

- an increase in the share of high-skilled occupations;
- the persistence or expansion of low-skilled service-sector occupations;

¹⁴ Eurostat, Employed persons working from home as a percentage of total employment, Luxembourg, 2022.

¹⁵ Daron Acemoglu, David Autor, "Skills, Tasks and Technologies: Implications for Employment and Earnings", in Handbook of Labor Economics, Vol. 4B, Elsevier, Amsterdam, 2011.

- a contraction of the middle-skilled occupational segment.

This phenomenon has previously been documented in developed European economies¹⁶ and continues to persist in the current context of accelerated digitalisation.

Skills polarisation places pressure on the middle class and may lead to widening wage disparities, particularly in the absence of effective reskilling mechanisms.

5.3. Exposure to Automation

The degree of exposure to automation varies across EU Member States. According to OECD analyses, the risk of automation is higher in economies with a large share of standardised manufacturing industries¹⁷.

In Central and Eastern Europe, manufacturing sectors characterised by low value added are more vulnerable to technological substitution. By contrast, Western European economies, which are more diversified and oriented towards advanced services, display relatively lower exposure.

Automation does not necessarily imply the complete disappearance of occupations, but rather the transformation of their content through the reduction of routine tasks and the increasing demand for digital skills.

5.4. Comparative Analysis: Western Europe – Central and Eastern Europe

In Western European Member States, occupational restructuring has been accompanied by active labour market policies and sustained investment in digital skills. In Central and Eastern Europe, the slower pace of reskilling increases the risk of polarisation.

Table 3. Comparative Occupational Trends (2015–2024)

Indicator	Western Europe	Central and Eastern Europe
Growth in ICT occupations	High	Moderate
Decline in routine administrative occupations	Noticeable	Limited
Exposure to automation	Medium	High
Participation in reskilling	Above EU average	Below EU average

Source: authors' elaboration based on Eurostat and OECD data

Thus, the impact of digitalisation on the labour market is not uniform, but rather conditioned by institutional capacity and the level of human capital.

6. Digitalisation and Socio-Economic Inequalities

6.1. The Evolution of Inequalities in the European Union (2015–2025)

The Gini coefficient, used to measure the distribution of disposable income, indicates the persistence of disparities among European Union Member States. During the period under analysis, the average level of inequality in the EU remained relatively stable; however, internal dynamics were heterogeneous.

Nordic and Western European countries maintained lower Gini coefficient values, supported by robust redistributive systems and well-established social policies. By contrast, some Central and Eastern European Member States recorded more pronounced fluctuations, influenced by economic restructuring and labour migration.

Economic literature suggests that technological transformations may amplify inequalities when returns to capital and highly specialised skills increase at a faster rate than average incomes¹⁸.

¹⁶ Maarten Goos, Alan Manning, Anna Salomons, "Job Polarization in Europe", *American Economic Review*, Vol. 99, No. 2, 2009, pp. 58–63.

¹⁷ Melanie Arntz, Terry Gregory, Ulrich Zierahn, "The Risk of Automation for Jobs in OECD Countries: A Comparative Analysis", OECD Social, Employment and Migration Working Papers No. 189, OECD Publishing, Paris, 2016.

¹⁸ Thomas Piketty, *Capital in the Twenty-First Century*, Harvard University Press, Cambridge, 2014.

6.2. The Relationship between Digitalisation and the Gini Coefficient

The comparative analysis indicates a complex relationship between the level of digitalisation and income distribution. In highly digitalised economies, productivity growth may generate economic expansion; however, the benefits are not distributed evenly.

The theoretical model of skill-biased technological change suggests that digitalisation tends to favour highly skilled workers, generating higher wage premiums¹⁹.

In the absence of redistributive mechanisms and investment in lifelong learning, this process may lead to:

- widening wage differentials;
- the consolidation of labour market segmentation;
- divergence between urban and rural regions.

Nevertheless, in Member States with effective active policies, digitalisation may coexist with moderate levels of inequality.

6.3. Regional Inequalities and Digital Human Capital

A key aspect of the analysis concerns the territorial distribution of digital human capital. Metropolitan regions in Western Europe concentrate developed technological ecosystems, investments in research and innovation, and employment opportunities in high value-added sectors.

By contrast, rural areas or regions dependent on traditional industries tend to display:

- low levels of digital skills;
- limited access to training;
- high exposure to automation.

The World Bank emphasises that the digital economy can generate “digital dividends” only in the presence of an adequate institutional framework and sustained investment in human capital²⁰.

6.4. The Role of Lifelong Learning in Reducing Polarisation

Adult participation in lifelong learning represents a key factor in mitigating the negative effects of digitalisation on inequalities.

OECD data indicate that individuals with higher levels of educational attainment participate to a significantly greater extent in continuing training programmes²¹. This phenomenon creates a cumulative advantage mechanism, whereby individuals already integrated into the dynamic segments of the labour market further consolidate their position.

In Member States where participation in training is high, skills polarisation is mitigated and professional mobility is more pronounced.

Therefore, the relationship between digitalisation and inequality is not deterministic, but mediated by:

- investment in education;
- the effectiveness of active labour market policies;
- institutional capacity;
- social protection systems.

7. Public Policy Implications and Strategic Directions

7.1. Active Labour Market Policies in the Digital Era

Digital transformation requires the adaptation of active labour market policies (ALMPs) to new technological realities. Automation and occupational restructuring call for flexible public intervention mechanisms aimed at preventing structural unemployment and facilitating professional mobility.

¹⁹ Daron Acemoglu, David Autor, “Skills, Tasks and Technologies: Implications for Employment and Earnings”, in *Handbook of Labor Economics*, Vol. 4B, Elsevier, Amsterdam, 2011.

²⁰ World Bank, *World Development Report 2016: Digital Dividends*, World Bank, Washington D.C., 2016.

²¹ OECD, *Skills Outlook 2021: Learning for Life*, OECD Publishing, Paris, 2021.

The OECD emphasises that effective active policies reduce the risk of exclusion for workers exposed to automation and enhance their capacity for labour market reintegration²². Career guidance programmes, training subsidies, and incentives for occupational transition into digital sectors become essential instruments.

In Member States where such policies are insufficiently developed, digitalisation may intensify labour market segmentation and the precarisation of certain socio-professional groups.

7.2. Lifelong Learning and Digital Reskilling

A central component of an inclusive digital transition is the strengthening of lifelong learning systems. The European Skills Agenda highlights the need to increase adult participation in continuing vocational education and training²³.

Digital reskilling and upskilling are essential for:

- reducing the risk of automation;
- enhancing workforce adaptability;
- facilitating occupational mobility.

At the same time, investment in STEM education and basic digital skills contributes to reducing the digital divide between regions and social groups.

7.3. The Regulation of Artificial Intelligence and Worker Protection

The adoption of the Artificial Intelligence Act at the level of the European Union marks a significant milestone in regulating the use of AI²⁴. The regulatory framework aims to reduce the risks associated with automated systems, including those arising in the field of employment.

In parallel, the European Commission has introduced measures to improve working conditions in the platform economy²⁵. These initiatives seek to:

- clarify the employment status of platform workers;
- ensure adequate social protection;
- prevent algorithmic discrimination.

The appropriate regulation of artificial intelligence and the platform economy is essential to preventing the widening of inequalities generated by digitalisation.

7.4. Digital Cohesion and European Convergence

Digitalization can become a driver of economic convergence only if it is accompanied by balanced investment in infrastructure and human capital. The EU's Recovery and Resilience Facility allocates substantial resources to the digital transition, including for skills development and the modernisation of public administration²⁶.

For Central and Eastern European Member States, the effective use of these funds represents a strategic opportunity to reduce the digital gap.

An inclusive digital transition requires:

- investment in education and skills;
- the reduction of regional disparities;
- the strengthening of social protection systems;
- the promotion of responsible innovation.

Thus, public policies become the determining factor in transforming digitalisation from a driver of polarisation into an instrument of socio-economic cohesion.

²² OECD, *Employment Outlook 2019: The Future of Work*, OECD Publishing, Paris, 2019.

²³ European Commission, *European Skills Agenda for Sustainable Competitiveness, Social Fairness and Resilience*, Brussels, 2020.

²⁴ European Parliament and Council of the European Union, Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Official Journal of the European Union, 2024.

²⁵ European Commission, *Proposal for a Directive on improving working conditions in platform work*, Brussels, 2021.

²⁶ European Commission, *Recovery and Resilience Facility Regulation (EU) 2021/241*, Official Journal of the European Union, 2021.

8. Conclusions

The present research has examined the impact of digitalisation and artificial intelligence on the labour market and socio-economic inequalities in the European Union during the period 2015–2025, drawing on a conceptual model that correlates the level of digitalisation, occupational restructuring, and income distribution.

The comparative analysis shows that Member States with higher levels of digitalisation record a greater share of high-skilled occupations and a more accelerated integration of digital technologies into the economy. Digital transformation is associated with the expansion of knowledge-based sectors and with increasing demand for advanced digital skills.

At the same time, the findings confirm the existence of a trend towards skills polarisation, characterised by the simultaneous growth of high-skilled and low-skilled occupational segments, alongside the decline of middle-skilled occupations. This development reflects the dynamics of skill-biased technological change and helps explain the pressures exerted on the middle class in several Member States.

Regarding the relationship between digitalisation and socio-economic inequalities, the analysis indicates that the effects are not uniform. In countries with high participation in lifelong learning and well-developed active labour market policies, the impact of polarisation is mitigated. By contrast, in economies with low levels of digital human capital and limited technological infrastructure, digitalisation may intensify labour market fragmentation and income disparities.

The differences between Western Europe and Central and Eastern Europe are largely explained by gaps in digital skills, investment in innovation, and institutional efficiency. Countries that have consistently invested in education, the digitalisation of public services, and professional reskilling have been able to transform the digital transition into a driver of competitiveness and economic convergence.

Therefore, digitalisation and artificial intelligence generate ambivalent effects: they stimulate productivity and innovation, yet may amplify occupational polarisation in the absence of adequate public policies. The relationship between digital transformation and inequality is mediated by institutional, educational, and redistributive factors.

An inclusive digital transition at the level of the European Union requires:

- strengthening digital competences at all levels of education;
- expanding reskilling programmes and lifelong learning systems;
- reducing regional disparities through investment in digital infrastructure;
- adapting social protection systems to new forms of work;
- ensuring the responsible regulation of artificial intelligence.

In conclusion, digitalisation does not inevitably lead to rising inequalities; however, in the absence of coherent strategic interventions, it may become a driver of socio-economic divergence within the European Union. The capacity of Member States to manage this transition will shape the future level of European cohesion and convergence.

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THE ROLE OF ARTIFACTS IN HIGHER EDUCATION

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Abstract

AI instruments represent an worldwide research topic, specifically triggered by some critical areas such as education or business. The adoption of AI instruments in higher education is not purely a technological shift but a pedagogical and organizational metamorphosis. Notwithstanding growing interest in AI tools, theoretical or empirical gaps remain in understanding the determinants that drive or maybe hinder AI adoption in higher education. This research aims to reveal the implications of artifacts (e.g. AI instruments) in higher education by examining their impact on teaching and learning processes, institutional strategies and user acceptance.

Keywords: artificial intelligence (AI), higher education, SEM (Structural Equation Modeling), technology acceptance.

1. Introduction

The transformative era of implementing Artificial Intelligence (AI) instruments is an intrinsic result of globalization. The twenty-first century is marked by rapid technological progress even the history of AI field started earlier than the humanity can even imagine. The artifacts continue to extinguish their ramifications until the educational level. A short time ago we couldn't talk about education outside of human resources, being considered a vocational job. Nowadays times have changed and we cannot view the educational system, especially the academic one, outside of AI tools. Why? Because we are going through an era marked by future technological revolution which reshapes also the educational paradigms.

The present research concentrates on identifying the most relevant factors that impact the implementation of AI instruments in higher education. The remainder of the scientific paper is organised as the following: the first Section comprises a structured literature review of the history of artificial intelligence, The second Section comprises focus areas of application of AI in higher education, the third Section presents the benefits of AI in Higher Education, the fourth Section presents the caveats. The last Section presents conclusions, some inherent scientific limitations and future research directions.

2. Artificial Intelligence through the history

The history of Artificial Intelligence begins earlier than the mundane can imagine. In this vein, structurally we present (Table 1) the chronological development of Artificial Intelligence in order to understand deeper the root of this concept.

Table 1: The chronological development of Artificial Intelligence

Period	Founder	Name of foundation	Characteristics	Source
Ancient time - 4 th century BCE	Aristotle	<i>Prior Analytics</i>	Aristotle introduces syllogistic logic (the first formal deductive reasoning system)	Jenkinson, 2019

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1832	Charles Babbage & Ada Byron	<i>Analytical Engine</i>	They create a programmable calculating machine	Hasan, 2022
1854	George Boole	Called <i>laws of thoughts</i>	Boole develops a binary algebra	Hasan, 2022
20 th century	Karel Capek	<i>Robot</i>	Karel Capek's play RUR (Rossum's Universal Robots)	Hasan, 2022
1936-1937	Alain Turing	<i>Turing Machine</i>	The first proposal of a Turing Machine represents the base for computers and computing ideas	AAAI, 2017
1948-1949	William Grey Walter	<i>Machina speculatrix</i>	Walter creates the first robot with the name Elmer and Elsie (ElectroMEchanical Robot, Light-Sensitive)	Inglis-Arkell, 2015
1950	Isaac Asimov	The book <i>Computing Machinery and Intelligence</i>	Asimov writes down three books about the laws of robots and Turing	Hasan, 2022
1955	John McCarthy, Marvin Minsky, Nathaniel Rochester, Claude Shannon	<i>Artificial Intelligence</i>	During the Dartmouth Conference, for the first time, the term <i>artificial intelligence</i> was coined by them	McCarthy et al., 2016
1956	Dartmouth Summer Research Project	<i>Artificial Intelligence</i> as discipline	Through this Research Project, <i>artificial intelligence</i> takes the place as a new discipline	McCarty, 1977
1960	-	<i>Chatbots</i>	The introduction of AI in education is associated with chatbots' development	Weizenbaum, 1966

1977	Thorne McCarty	<i>Taxman</i>	McCarty or the father of AI develops The Knowledge-based System entitled <i>Taxman</i>	Kuźniacki, 2019
Era of industry 4.0	-	<i>Digital revolution</i>	The democratisation of internet and the era of computers starts the digital revolution	Hasan, 2022

Source: Own source

With the help of the existing specialized literature, we analyse the development of the digital revolution. The definitional analysis of the term Artificial Intelligence knows long and evolving progress. Different perspectives for the challenging question „What is AI?” came across different fields and applications. In this regard, in the following (Table 2) we reveal some of the most descriptive definitions of AI:

Table 2: Definitional analysis of AI

Authors	Definitions
Brown and O’Leary, 1995	<i>AI – intelligence, research, business and programming perspectives</i>
Crevier et al., 1993	<i>AI – multidisciplinary science</i>
Huq, 2014	<i>AI – science of creating intelligent machines</i>
Tone and the Top, 2017	<i>AI - automating routine tasks</i>
Rezaee et al., 2002	<i>AI – furnishing financial information through the help of Extensible Markup Language (XML) and eXtensible Business Reporting Language (XBRL)</i>
Odoh et al., 2018	<i>AI – performs tasks better than humans</i>
Lee and Tajudeen, 2020	<i>AI – machines who learn from their own mistakes</i>
Zhang et al., 2020	<i>AI – cognitive technologies as Natural Language Processing, Machine and Deep Learning, Big Data, Blockchain, Machine Learning, Cloud Computing, Enterprise Resource Planning (ERP), etc.</i>
Fenwick and Molnar, 2022	<i>AI – automated version of human being intelligence</i>

Source: Own source

3. Focus Areas of Application of AI in Higher Education

Another veil of definitions came across the application of AI in higher education. Even the number of perspectives is almost unlimited, with the help of a systematic review of the specialized literature we try to capture the most relevant scientific literature.

The borderline between AI and higher education is very fine because digitalisation appears to become an intrinsic part of our lives including the educational system. More, higher education as a dynamic environment uses AI as a suitable tool for the advancement of information technologies or the educational acts (Escotet, 2023). Technological progress represents the door for the educational service provider and for the on-line learning technologies. Digital skills are required for digital instruments with AI instruments. Platforms as Grammarly, ChatGPT, Mendeley, Brainly or any online educational forms as virtual classrooms, tutorials or other simulation project are the beginning of a new era of education (Pellas et al., 2021).

In 2021 the European Parliament and also the European Commission propose to regulate AI through strictly and precise guidelines offering a legal framework at the EU level. Moreover, the European Commission (European Commission, 2021, p. 9) added to the present European legislation an AI Monitoring Index (2021) which includes relevant aspects concerning policy makers and further investment for the targeted pillars. For example, university education represents a part of AI Monitoring Index entitled Societal Aspects pillar being assessed on three levels:

- AI in the EU university programmes;
- places in AI – content universities;
- AI intensity in places offered by universities.

In this vein, some authors (Șirghi et al., 2024) reveal that the EU digitisation strategy is on the same wavelength with the implementation of AI technologies in higher education level. The US and China represent the countries which count the highest number of AI research in higher education (Crompton and Burke, 2023). This topic is an extensive research all over the countries for more than 30 years (Nguyen, 2023). This is in line with the constant effort of the AI higher education programmes in all the EU states (European Commission, 2021). The university education system needs a permanent effort from both part (students and teachers) to model the competences and to add value to the educational act changed and challenged by the AI technologies. The need for a more sustainable AI systems in education remains actual because of some ethical consideration (fairness, transparency, issues of plagiarism) and an AI – influenced professional landscape (Rudolph et al., 2023). Some inherent challenges as academic misconduct of cheating facilitations underscore the need for reshaping the university curricula in line with the integration of AI instruments into the educational system. For a full harmonization with AI tools, an update of the academic integrity policies is also necessary (Perkins, 2023).

4. Benefits of implementing AI in Higher Education

In the following we outline the most important advantages and disadvantages of implementing AI in higher education. At the level of the specialized literature review there are studies which emphasize only the benefits or only the caveats of AI implementation in academic fields. As far as we are concerned we consider that the utilisation of AI instruments by academic students implies both of them (advantages and disadvantages) doubtless, maybe having the same weight in total. In this case, in what follows first we collected from recent sources the most relevant benefits in order to build up some arguments for our own hypothesis. Also, we continue to point out the most significant caveats of AI instruments' use in the academic field.

The specialized literature is full of examples of benefits. The majority of the studies shows that students with some exceptions are very satisfied because two major characteristics of AI instruments as the instant responsiveness and the continuous availability (Kamalov et al., 2023). The globalization encourages this type of behaviour by eliminating or diminishing delays offered by the traditional support systems. In this vein, with the help of the specialized literature we write down a list with the most relevant advantages of implementing AI in higher education as the following:

- stimulating and supporting learning process;
- AI applications satisfy the deepest learning needs of the students (Șirghi et al., 2024);
- tertiary education comes in line with the Western standards due to AI technologies;
- the use plagiarism detection programmes (e.g. Turnitin, Copyscale) by both sides (students and teachers);

- the use of correct expressions in different foreign languages (e.g. Grammarly, DeepL) by both sides (students and teachers);
- the use of citation supports or bibliographic references' organisation (e.g. Mendeley, Brainly);
- the use of ChatGPT by students for complex topics or academic tasks in a very real time;
- a tailored tool in task facilitation;
- digital assistant capable to give prompt responses;
- a decrease in administrative costs (Sova et al., 2024);

5. Caveats of implementing AI in Higher Education

Concerning the caveats of the use of AI instruments in higher education the examples appears to be less than the benefits. However the central idea of the majority of the opinions reveals how AI instruments can erode the human element in education through the risk of dehumanization due to an overreliance on AI instruments in the educational experience. At the same time, many studies criticize the diminish development of the level of non-cognitive or soft skills (Saihi et al., 2024). In this case, the human touch in education can balance the technology challenges being pivotal not only in the academic field (Rane, 2023). Not remaining limited of some studies, with the help of the specialized literature we provide a synthesized list with the most common challenges related to the implementation of AI instruments in academic field. The implicit risks of implementing AI in higher education are:

- pressure for digital skills;
- continuous effort from teachers and students (Escotet, 2023);
- excessive automation leads to a decreasing learning act;
- ethical issues (Gînguță et al., 2023);
- moral issues (Saghiri et al., 2022);
- fear associated with the AI-assisted learning process;
- integrity and recognition of contribution;
- potential overreliance on AI instruments;
- replacement of human teachers;
- potential unemployment (Sova et al., 2024);
- negative effects on psychosocial level.

6. Conclusions

Summarizing all the above we conclude that the implementation of AI instruments in higher education represents a very challenging and actual issue nowadays. Both advantages and disadvantages are limited by various factors and unlimited by students' or even teachers' perception. Understanding the dynamics of these assorted cognitions is of paramount importance. In what follows we seek for factors that shape the students' perception and their subsequent impact on implementation AI in higher education.

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