

# EUROPEAN LEGAL INSTRUMENTS FOR GREEN AND DIGITAL TRANSITIONS

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## Abstract

*The dynamics of the European Union's evolution in recent decades have been influenced by the evolution of society as a whole, the fourth industrial revolution and technological development in parallel with environmental protection being landmarks to which European policies relate.*

*In this context, the new European Commission sets as priorities A European Green Deal and A Europe fit for the digital age by proposing concrete measures to be taken at Union level or by the Member States.*

*Such proposed acts and measures must have their legal basis in the Treaties of the Union which define both the objectives of the Union and the types of powers which it has to achieve them.*

*However, the question that may arise is: is there such a legal basis? What acts can be adopted by the Union institutions for green and digital transitions? Is there a need to extend Union competence?*

*The analysis of the legal instruments available to the Union at the moment seeks to provide an answer to these questions and to provide a perspective for the development of the specific legal framework; the sources of European Union law and the types of competences that the EU has in the main areas concerned are taken into account.*

**Keywords:** legal instruments, EU powers, green transition, digital transitions, priority of the EU law.

## 1. General remarks

As international intergovernmental integration organization, the European Union acts within the limits of the powers conferred by the Member States in order to achieve the common objectives set out in the Treaties, objectives which diversify and multiply as society itself evolves globally.

The analysis of the powers of the European Union, hereinafter referred to as the EU, is a complex one, although it is stated that the Treaty of Lisbon clarified<sup>1</sup> this aspect by establishing in art. 2-6 of the Treaty on the Functioning of the European Union (TFEU) the types of competences and areas in which three main types of competence apply: exclusive EU competence/power, shared EU-Member State competence/power and Union competence to support, coordinate and complement the action of the Member States.

The principle of conferral provided by art. 5 para. (1) to (2) of the Treaty on European Union (TEU) governs the way in which the Union acts within the powers conferred by the Treaties, stating that "competences not conferred upon the Union in the Treaties remain with the Member States".

Thus, the extension or limitation of EU competences can be achieved by revising the EU Treaties according to art. 48 of the Treaty on European Union.

However, the TFEU contains, in art. 352, a flexibility clause or reservoir of competence that allows

the EU to act within the policies of the Treaties if it does not have an express competence, to meet the objectives of the EU. „Thus, the invocation of these provisions may occur when the powers conferred by the treaties in the form of specific attributions (functional competence) may be insufficient to achieve the objectives expressly assigned by the treaties (material competence); but, according to the jurisprudence of the Court, in no case art. 352 TFEU cannot serve as a basis for extending the EU's areas of competence and cannot be used as a "subterfuge" to choose a legal basis leading to a simpler legislative procedure or not involving the European Parliament<sup>2</sup>".

## 2. Legal instruments for green and digital transitions

### 2.1. The EU powers

In this framework that defines the competences at Union level, in the current situation marked by the

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<sup>1</sup> Andrew Duff, *Saving the European Union. The Logic of the Lisbon Treaty* (London: Shoehorn Current Affairs & History Books, first published in 2009), 59: "In summary, Lisbon makes good progress in simplifying and in making more transparent the exercise of powers at the Union level".

<sup>2</sup> Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii și specificitatea acestuia* (București: 2015, Universul Juridic, ed. a 2-a, revăzută și adăugită), 61.

pandemic health crisis<sup>3</sup> and technological evolution<sup>4</sup>, the EU aims to develop in the parameters of green and digital, starting the transition in this regard; the question is not whether the EU will succeed but whether it has the legal instruments in terms of powers to achieve this goal, which has, among its beneficiaries, the citizens of the Member States<sup>5</sup>.

These goals are mentioned among the new European Commission's priorities for 2019-2024 (Political Guidelines) as following:

"A European Green Deal": Transforming the EU into a modern, resource-efficient and competitive economy, while preserving Europe's natural environment, tackling climate change and making Europe carbon-neutral and resource efficient by 2050";

"A Europe fit for the digital age": "Embracing the digital transformation by investing in businesses, research and innovation, reforming data protection, empowering people with the skills necessary for a new generation of technologies and designing rules to match"<sup>6</sup>.

It can therefore be seen that these are priorities that are not explicitly set out in the EU Treaties in force, but involve policies defined by them or actions that have started at EU level. If environment, in which the principle of subsidiarity was first used by the Single European Act (1986, 1987), is included within the shared competences according to the art. 4 para. 2 letter (e) of the TFEU, digitalization issues are not

specifically regulated in the EU Treaties<sup>7</sup>, but secondary EU law and complementary EU law has recently developed this cross-cutting concept in EU policies and areas of action.

The working legal instruments used par excellence by the EU institutions to achieve the Union's objectives within the limits of the competences set out in the Treaties are "legal acts" (concept used for the first time in the Lisbon Treaty - Part six Institutional and financial provisions, Title I Institutional provisions, Chapter 2 Legal acts of the union, adoption procedures and other provisions, Section 1 the legal acts of the Union of the TFEU) in the category of which have been included:

legislative acts<sup>8</sup> (art. 289 TFEU),

non-binding acts (art. 288 final paragraph TFEU), and

non-legislative acts<sup>9</sup> (art. 290-291 TFEU).

At the same time, the EU institutions use to a significant extent the complementary/ or soft law<sup>10</sup> that does not produce legal effects, but has the ability to do so; in this case, we can mention communications, resolutions, conclusions, white papers or green papers, acts that do not have a legal enshrinement in the EU Treaties. Among those acts only „recommendations and opinions” are mentioned by the final paragraph of the art. 288 TFEU which states that they „shall have no binding force”<sup>11</sup>.

<sup>3</sup> See Valerian Cioclei, "Despre viitorul profesiilor juridice, în contextul principalelor provocări ale următoarelor două decenii", *AUBD – Forum Juridic*, online section of *Analele Universității din București – Seria Drept*, no 3/2020, 11, [https://drept.unibuc.ro/dyn\\_img/aubd/Despre%20viitorul%20profesiilor%20juridice%20INTEGRAL%20rev.pdf](https://drept.unibuc.ro/dyn_img/aubd/Despre%20viitorul%20profesiilor%20juridice%20INTEGRAL%20rev.pdf) : "The pandemic has already "pushed" us towards digitalization and "suggests" a future with fewer lawyers, more adaptable to legislative changes, more efficient in the field of information technology. Artificial intelligence accentuated the tendency to restrict the "labor market" in the field of law, and this process will have to be "controlled" by lawyers, not only better in the field of IT, but also able to understand the advantages and dangers of AI".

Oana-Mihaela Salomia, „Exercitarea profesiilor liberale în condițiile digitalizării”, online conference Ziua Profesiilor Liberale din România, 13th edition, 5 November 2020

<https://www.universuljuridic.ro/ziua-profesiilor-liberale-din-romania-editia-a-xiii-a-exercitarea-profesiilor-liberale-in-conditiile-digitalizarii/>.

<sup>4</sup> Nicolae Dragoș Costescu, „Théories portant sur la juridiction compétente sur Internet”, *Analele Universității din București, seria Drept*, (București, C.H. Beck, 2017), 81: „Presque tous les aspects de la gouvernance de l’Internet comportent une dimension juridique, pourtant la formulation d’une réponse juridique aux développements rapides de l’Internet se trouve encore en retard”.

<sup>5</sup> In March 2021, „26 CEOs of companies have signed a Declaration to support the Green and Digital Transformation of the EU and formed a European Green Digital Coalition”, which „will help not only the tech sector to become more sustainable, circular and a zero polluter, but also to support sustainability goals of other priority sectors such as energy, transport, agriculture, and construction while contributing to an innovative, inclusive and resilient society” - <https://ec.europa.eu/digital-single-market/en/news/companies-take-action-support-green-and-digital-transformation-eu>

<sup>6</sup> [https://europa.eu/european-union/about-eu/priorities\\_en](https://europa.eu/european-union/about-eu/priorities_en)

<sup>7</sup> Alina Mihaela Conea, *Politicile Uniunii Europene*, (București: Universul Juridic, 2019), 191: „With the exception of the field of data protection, the digital policy of the European Union does not benefit from a specific basis, within the primary law”.

<sup>8</sup> See Dragoș – Adrian Bantaș, "Considerations regarding the Choice, by the European institutions, of the legal basis of acts, during the legislative procedures overview of the case law of the Court of Justice of the European Union", *Challenges of the Knowledge Society*, 11th-12th May 2018, 12th Edition, 403-409, <http://cks.univnt.ro/articles/12.html>

<sup>9</sup> See Oana-Mihaela Salomia, "Delegated acts and implementing acts – new legal acts of the European Union", *Challenges of the Knowledge Society*, Bucharest, 12th - 13th May 2017, 11th Edition, 551-556, [http://cks.univnt.ro/cks\\_2017.html](http://cks.univnt.ro/cks_2017.html).

<sup>10</sup> „On the European Union’s website, these acts are included in the category of the EU secondary law: „Secondary law comprises unilateral acts, which can be divided into two categories:

those listed in Article 288 TFEU: regulations, directives, decisions, opinions and recommendations;

those not listed in Article 288 TFEU, i.e. atypical acts such as communications and resolutions, and white and green papers”.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114534>

<sup>11</sup> CJEU, *Salvatore Grimaldi v Fonds des maladies professionnelles*, 13 December 1989, case C-322/88, point 13-14: „13 Recommendations, which according to the fifth paragraph of Article 189 of the Treaty are not binding, are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules. 14 Since it follows from the settled case-law of the Court ( see, in particular, judgment of 29 January 1985 in Case 147/83 *Binderer v Commission* (( 1985 )) ECR 257 ) that the choice of form cannot alter the nature of a measure, it must nevertheless be ascertained whether the content of a measure is wholly consistent with the form attributed to it” .

For implementing the green and digital transitions, not only legal acts are adopted, but also soft law acts which are, in principle, mandatory for the Member States by virtue of the principle of loyal cooperation enshrined in art. 4 para. (3) of the TEU<sup>12</sup> lacking a specific legal basis in the EU Treaties.

## 2.2. Green transition

European Green Deal has been adopted by the *Communication from the Commission*, COM (2019) 640 final, Brussels, 11.12.2019 which sets up the following measures:

”2. *Transforming the EU’s economy for a sustainable future*

2.1. *Designing a set of deeply transformative policies*

2.1.1. *Increasing the EU’s climate ambition for 2030 and 2050*

2.1.2. *Supplying clean, affordable and secure energy*

2.1.3. *Mobilising industry for a clean and circular economy*

2.1.4. *Building and renovating in an energy and resource efficient way*

2.1.5. *Accelerating the shift to sustainable and smart mobility*

2.1.6. *From ‘Farm to Fork’: designing a fair, healthy and environmentally-friendly food system*

2.1.7. *Preserving and restoring ecosystems and biodiversity*

2.1.8. *A zero pollution ambition for a toxic-free environment*

2.2 *Mainstreaming sustainability in all EU policies*

2.2.1. *Pursuing green finance and investment and ensuring a just transition*

2.2.2. *Greening national budgets and sending the right price signals*

2.2.3. *Mobilising research and fostering innovation*

2.2.4. *Activating education and training*

2.2.5. *A green oath: ‘do no harm’*

3. *The EU as a global leader”.*

This Communication does not mention any legal basis for adopting and implementing these measures by the EU institutions and Member States.

It is clear that these objectives and measures cannot be achieved without the Member States taking concrete action in this regard; the phrase used in the action Plan is the following "the Commission will work with the Member States" which involves cooperation between the Union and the Member States, but the action Plan contains also references to the obligation imposed to the national authorities to comply with the

Union objectives as set out in the phrase: ”The Commission and the Member States must also ensure that policies and legislation are enforced and deliver effectively. The environmental implementation review will play a critical role in mapping the situation in each Member State”; so, it is an obligation for the Member States laid down into a non-binding act. The breach of the EU law leads to an infringement procedure initiated by the European Commission; it will be the case in regard with the non-respect of the action Plan for European Green Deal? In our opinion, the answer is positive.” Environmental policy then is a good illustration of the development of the influence of the EU as a body, the addition of environmental powers representing an important marker in the shift of focus from the more limited economic sphere of activity that typified the original Community Treaties to the broader aspirations and ambitions of the organization today”<sup>13</sup>.

The Green Deal must be implemented in all related policies in order to achieve the EU goals and thus it will become compulsory for the Member States in the case where that policy is covered by the exclusive or shared competence of the EU. For example, the common agricultural policy where EU has a shared competence will be influenced by the action Plan for European Green Deal and the Member States will be obliged to make reforms for complying with the specific EU law. “Farmers, agri-food businesses, foresters, and rural communities have an essential role to play in several of the Green Deal’s key policy areas, including:

- building a sustainable food system through the Farm to Fork strategy;
- adding to the new biodiversity strategy by protecting and enhancing the variety of plants and animals in the rural ecosystem;
- contributing to the climate action of the Green Deal to achieve the goal of net-zero emissions in the EU by 2050;
- supporting the updated forestry strategy, to be announced in 2021, by maintaining healthy forests;
- contributing to a zero-pollution action plan, to be set out in 2021, by safeguarding natural resources such as water, air and soil”<sup>14</sup>.

At institutional level, the new European Commission has appointed an executive vice-president “leading the Commission’s work on the European Green Deal and its first European Climate Law to enshrine the 2050 climate-neutrality target into EU law”<sup>15</sup>.

<sup>12</sup> See Mihaela-Augustina Dumitraşcu, Oana-Mihaela Salomia, ”Principiul cooperării loiale – principiu constituțional în dreptul Uniunii Europene”, In Honorem Ioan Muraru. Despre Constituție în mileniul III, Ștefan Deaconu, Elena Simina Tănăsescu (coord.), (București: Hamangiu, 2019).

<sup>13</sup> Margot Horspool (Author), Matthew Humphreys (Author), Michael Wells-Greco (Author), Siri Harris (Contributor), Noreen O'meara (Contributor), *European Union Law*, (Oxford: Oxford University Press, 2016, 9th Edition), 473.

<sup>14</sup> [https://ec.europa.eu/info/food-farming-fisheries/sustainability/sustainable-cap\\_en](https://ec.europa.eu/info/food-farming-fisheries/sustainability/sustainable-cap_en).

<sup>15</sup> [https://ec.europa.eu/commission/commissioners/2019-2024/timmermans\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/timmermans_en).

### 2.3. Digital transition

The digital transition is also proposed to the Member States and all society through a communication, non-binding act – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Shaping Europe's digital future, COM (2020) 67 final, Brussels, 19.2.2020 without reference to any legal basis in the EU Treaties:

*“For the next five years, the Commission will focus on three key objectives to ensure that digital solutions help Europe to pursue its own way towards a digital transformation that works for the benefit of people through respecting our values:*

- *Technology that works for people: Development, deployment and uptake of technology that makes a real difference to people's daily lives. A strong and competitive economy that masters and shapes technology in a way that respects European values.*

- *A fair and competitive economy: A frictionless single market, where companies of all sizes and in any sector can compete on equal terms, and can develop, market and use digital technologies, products and services at a scale that boosts their productivity and global competitiveness, and consumers can be confident that their rights are respected.*

- *An open, democratic and sustainable society: (...) A European way to digital transformation which enhances our democratic values, respects our fundamental rights, and contributes to a sustainable, climate-neutral and resource-efficient economy”.*

In line with the European Green Deal and the strategy Shaping Europe's digital future, it has been developed *A New Industrial Strategy for Europe* adopted through a communication - Communication from the Commission, COM (2020) 102 final, Brussels, 10.3.2020 which proposes for European industry<sup>16</sup>:

“2.1 A globally competitive and world-leading industry

2.2 An industry that paves the way to climate-neutrality

2.3 An industry shaping Europe's digital future

The digital transition will include not only the industry and economy but also the education – fundamental sector the developing the society”.

Another policy having impact for the European citizens is the education policy in which the EU can carry out actions to support, coordinate or supplement the actions of the Member States<sup>17</sup>. The education is one of the sectors affected by the pandemic sars-cov-2 in terms of teaching process but also in terms children

education by the parents. The digitalization is used in education and it is clear that a new trend will be settled up at all levels of education. In this regard, the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Digital Education Action Plan 2021-2027 Resetting education and training for the digital age*, Brussels, COM (2020) 624 final, 30.9.2020 has as priorities:

“Strategic priority 1: Fostering the development of a high-performing digital education ecosystem

Strategic priority 2: Enhancing digital skills and competences for the digital transformation”.

Digital transition includes also social aspects<sup>18</sup>; “MEPs (Members of the European Parliament) call for binding social targets to help the EU labour market adjust to the current realities of the digital and green economy.

- Digital and green transition must include a social dimension

- New European Social Agenda to be adopted under the Portuguese presidency

- European Pillar of Social Rights should be properly implemented<sup>19</sup>”.

For ensuring the implementation the European Commission's initiatives in this area, an executive vice-president of the new European Commission is responsible for „A Europe Fit for the Digital Age”:

- „setting the strategic direction of the political priority "Europe Fit for the Digital Age",

- Coordinating work on a European strategy on data and on a European approach to artificial intelligence, including its human and ethical implications,

- Steering work on upgrading liability and safety rules for digital platforms, services and products as part of a new Digital Services Act, ensuring working conditions of platform workers are properly addressed,

- Coordinating the Commission's work to achieve fair digital taxation”<sup>20</sup>.

### 3. De lege ferenda proposal

The new “*Joint declaration on the conference on the future of europeengaging with citizens for democracy– Building a more resilient Europe*” states that “The European Union has to show that it can provide answers to citizens' concerns and ambitions. European policy must provide inclusive answers to our generation-defining tasks: achieving the green and

<sup>16</sup> Art. 6 letter (b) – competence of the EU to carry out actions to support, coordinate or supplement the actions of the Member States.

<sup>17</sup> Augustin Fuerea, Dreptul Uniunii Europene – principii, acțiuni, libertăți, (București: Universul Juridic, 2016), 35-36.

<sup>18</sup> Monica Florentina Popa, “The subversive effect of utilitarianism on the right to life in eu countries”, Journal of Law and Administrative Sciences, no 14/2020, 87, <http://jolas.ro/wp-content/uploads/2014/09/jolas-no.14.pdf>: “The debates on the retirement age, the reforms of state pensions and the steady loss of jobs due to the high levels of automation and digitalisation will challenge in the near future the resilience and strengths of the EU citizens and will put to test the principle of European solidarity, not only between member-states, but also between different categories of citizens belonging to the same country”.

<sup>19</sup> “Fair transition to digital and green economy: a new social agenda for Europe”, <https://www.europarl.europa.eu/news/en/press-room/20201211IPR93637/fair-transition-to-digital-and-green-economy-a-new-social-agenda-for-europe>.

<sup>20</sup> [https://ec.europa.eu/commission/commissioners/2019-2024/vestager\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager_en).

digital transition, while strengthening Europe's resilience, its social contract and European industry's competitiveness<sup>21</sup>.

In the spirit of this Declaration, we appreciate that, in a future revision of the EU Treaties<sup>22</sup>, provisions on the digital transition and the green transition will be introduced at primary EU law level, including the steps and measures to be taken after the transitions are completed.

The provisions of EU primary law would allow the adoption of legislation, binding for Member States whose compliance is monitored by the European Commission.

Digitization has become an EU priority that is pursued at a cross-cutting level and has recently been encountered in the design and implementation of various European policies and areas of action. The same approach can be found with regard to green transition, as it is not limited to environmental policy but also becomes an objective to be met in other policies and actions.

Awareness-raising activities on the digital and green transitions should become a constant concern for the European institutions and the authorities of the Member States for the benefit of European citizens in accordance with the principle of sincere cooperation.

It is obvious that, at the moment, the European Commission's communications can only impose certain conduct for the Member States on the basis of the principle of sincere cooperation<sup>23</sup> which allows them to gradually adapt to the transition, from a legislative, structural and institutional point of view<sup>24</sup>.

A future revision of the Treaties may also concern the nomenclature of the EU law sources which could include the complementary EU law like the Commission's communications mentioned above, European Parliament's resolutions and other *sui generis* acts.

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<sup>21</sup> [https://ec.europa.eu/info/sites/info/files/en\\_-\\_joint\\_declaration\\_on\\_the\\_conference\\_on\\_the\\_future\\_of\\_europe.pdf](https://ec.europa.eu/info/sites/info/files/en_-_joint_declaration_on_the_conference_on_the_future_of_europe.pdf).

Declaration signed by the European Parliament, Council and European Commission.

<sup>22</sup> Art. 48 TEU.

<sup>23</sup> Margot Horspool (Author), Matthew Humphreys (Author), Michael Wells-Greco (Author), Siri Harris (Contributor), Noreen O'meara (Contributor), *op.cit.*, 216: "A typical and increasingly popular ground for action by the Commission is breach by the Member State of the Article 4(3) TEU duty of sincere cooperation. Inadequate implementation of the Union law, in particular, is vigorously pursued by the Commission".

<sup>24</sup> In February 2021, the European Commission has proposed „to set up 10 new European Partnerships between the European Union, Member States and/or the industry. The goal is to speed up the transition towards a green, climate neutral and digital Europe, and to make European industry more resilient and competitive. The EU will provide nearly €10 billion of funding that the partners will match with at least an equivalent amount of investment."

[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_702](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_702).

<sup>25</sup> Art. 5.4 TFEU: „Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

See Mihaela-Augustina Dumitraşcu, Oana-Mihaela Salomia, *Dreptul Uniunii Europene II*, (Bucureşti: Universul Juridic, 2020), 27-30.

<sup>26</sup> Roxana-Mariana Popescu, "Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court", *Challenges of the Knowledge Society*, Bucharest, 17th-18th May 2019, 13th Edition, 713, [http://cks.univnt.ro/cks\\_2019.html](http://cks.univnt.ro/cks_2019.html).

<sup>27</sup> Augustin Fuerea, „Brief considerations on the principles specific to the implementation of the European Union law", *Challenges of the Knowledge Society*, 20th-21st May 2016, 10th edition, Bucharest, 396, [http://cks.univnt.ro/cks\\_2016.html](http://cks.univnt.ro/cks_2016.html): „In this way, three obligations are established in the task of Member States: two positive (the adoption of measures to implement EU law and facilitate the exercise of the Union's mission) and one negative - not to take any action that would jeopardize the objectives of the Union".

The current art. 296 TFEU obliges to respect the principle of proportionality<sup>25</sup> when a specific act will be adopted by the EU institutions:" where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality" which could be interpreted including in regard with complementary EU law because a reference to a legal act is not mentioned. The next statement of this article makes a direct reference to a legal act: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties".

«The accession to the EU implies a number of consequences. One of these consequences follows from the judgment of the Court of Justice in Luxembourg ruled in 1978, in which the Court ruled that, under the "principle of the supremacy of Community law, the provisions of the Treaty and the acts of the directly applicable institutions have the effect, with the mere fact of their entry into force, not only to determine the inapplicability of any provision contrary to that of the existing national legislation, but also-to the extent that those provisions and acts form an integrant part, with the national law of the Member States rank higher than the internal rules of the legal order applicable in the territory of each Member State-to prevent the adoption of new national legislation in force in so far as they are incompatible with Community rules"»<sup>26</sup>.

In conclusion, at the present, the goals of the green and digital transitions will be implemented by the Member States in compliance with the principle of sincere cooperation<sup>27</sup> and the legislative acts adopted for different policies where green and digital aspects are introduced accordingly.

- European Union”, *Challenges of the Knowledge Society*, 11th-12th May 2018, 12th Edition, <http://cks.univnt.ro/articles/12.html>;
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