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THE IMPACT OF THE USE OF ALGORITHMS ON ANTI-COMPETITIVE AGREEMENTS BETWEEN UNDERTAKINGS IN EUROPEAN UNION COMPETITION LAW

Raluca FLORESCU [*]

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 digitalization 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

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to increasing economic efficiency and optimizing 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 Union[1] (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 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.

[1] Published in the Official Journal C 326 of 26 October 2012.

[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.

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'.

In analyzing 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 analyzed are undertakings, which may affect trade between Member States. The concept of undertaking has undergone conceptual development through the

[7] Joseph E. Harrington, Jr., *The Theory of Collusion and Competition Policy*, The MIT Press, Cambridge, 2017, p. 1.

[8] Ioan Lazăr, Laura Lazăr, *Treatise on European Union Competition Law (Tratat de Dreptul Uniunii Europene în domeniul concurenței)*, C.H. Beck Publishing House, Bucharest, 2025, p. 24.

judgments of the European Court of Justice and is not legally defined at EU level. For example, in the Höfner[9] 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 materialized, 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, realized 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 Dyestuffs[13] 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.

[9] ECJ, 23 April 1991, C-41/90, *Klaus Höfner and Fritz Elser v. Macroton GmbH*, EU:C:1991:161, para. 21.

[10] Augustin Fuerea, *European Union Law. Principles, Actions, Freedoms (Dreptul Uniunii Europene. Principii, acțiuni, libertăți)*, Universul Juridic Publishing House, Bucharest, 2016, p. 314.

[11] Ioan Lazăr, Laura Lazăr, *Treatise on European Union Competition Law (Tratat de Dreptul Uniunii Europene în domeniul concurenței)*, p. 223.

[12] Adriana Almășan, *Competition Law (Dreptul concurenței)*, 2nd ed., revised and enlarged, Hamangiu Publishing House, Bucharest, 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.

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 materialized 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 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 effect[16].

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

[14] Gintarė 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.

[15] Adriana Almășan, *Competition Law (Dreptul concurenței)*, p. 247.

[16] Ariel Ezrachi, Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, in Oxford Journal of Legal Studies 1, No. 37/2017, pp. 10-22.

[17] Ioan Lazăr, Laura Lazăr, *Treatise on European Union Competition Law (Tratat de Dreptul Uniunii Europene în domeniul concurenței)*, p. 214.

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 recognized 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 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

[18] Robert O'Donoghue QC, Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 3rd ed., Hart Publishing House, 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] Brenda Sufrin, Niamh Dunne, Alison 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] Brenda Sufrin, Niamh Dunne, Alison Jones, *Jones and Sufrin's EU Competition Law. Text, Cases, and Materials*, pp. 204-205.

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) 2024/1689[23], 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 analyzed 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).

[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 Augustin Fuerea, *The European Union Manual (Manualul Uniunii Europene)*, 6th ed., revised and enlarged, Universul Juridic Publishing House, Bucharest, 2016, p. 235.

[24] Algorithmic Competition OECD, Competition Policy Roundtable Background Note, 2023, p. 8, available on *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.

Recommendation function: this is realized 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 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 personalized 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 personalized and adapted to the specific needs of consumers. Second, algorithms may reduce costs by optimizing production processes or by increasing labor productivity[26]. 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 costs[27]. 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 preferences[28]. 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 optimization in response to evolving market conditions[29].

Nevertheless, in addition to the benefits presented above, there are certain risks analyzed 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

[26] OECD, Artificial intelligence and competitive dynamics in downstream markets, 2025, pp. 6-8, available on *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] Ariel Ezrachi, Maurice 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.

[30] Raluca-Mihaela Nanu, *The European Regulation on Artificial Intelligence. Article-by-Article Commentary (Regulamentul european privind inteligența artificială. Comentarii pe articole)*, Universul Juridic Publishing House, Bucharest, 2025, p. 74.

[31] Idem, p. 75.

[32] Alin Popescu, *The Future of Our Decisions. Explained Rules, Case Studies and Examples (AI Act. Viitorul deciziilor noastre. Reguli explicate, studii de caz și exemple)*, Universul Juridic Publishing House, Bucharest, 2024, p. 146.

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 horizontal[34], 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 vertical[35], 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 realized 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;

personalized pricing algorithms – which adapt prices to the individual characteristics of consumers.

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

[33] Raluca-Mihaela Nanu, *The European Regulation on Artificial Intelligence. Article-by-Article Commentary (Regulamentul european privind inteligența artificială. Comentarii pe articole)*, p. 78.

[34] Ariel Ezrachi, *Horizontal and vertical agreements, in Competition and Antitrust Law: A Very Short Introduction*, Oxford University Press, 2021, pp. 74 et seq.

[35] Ariel Ezrachi, *EU Competition Law. An Analytical Guide to the Leading Cases*, 7th ed., Ed. Hart, 2021, p. 166.

[36] Ioan Lazăr, Laura Lazăr, *Treatise on European Union Competition Law (Tratat de Dreptul Uniunii Europene în domeniul concurenței)*, p. 217.

[37] Algorithmic Competition OECD, Competition Policy Roundtable Background Note, p. 11, available on *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.

[38] Idem, p. 13.

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. Personalized 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 Posters[40] 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, characterized as a restriction of competition 'by object', and the anti-competitive conduct could be sanctioned by the application of

[39] For further details, see Algorithmic Competition OECD, Competition Policy Roundtable Background Note, available on *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.

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 Eturas[42] 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 normalizing competitive conditions. The European Court of Justice was referred the preliminary question of whether the use of a 'common computer 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 analyzed 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 materialized. In both cases,

[41] Friso Bostoen, *Artificial Intelligence and Competition Law*, pp. 8-9, available on *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.

[43] Friso Bostoen, *Artificial Intelligence and Competition Law*, pp. 10-11, available on *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4655894*, last time consulted on 24.01.2026.

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 optimize 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 analyzing the use of algorithms as an instrument for the realization 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.

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 realized 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

[44] Simonetta Vezzoso, *Competition by design*, in Björn Lundqvist, Michal S. Gal (eds.), *Competition law for the digital economy*, Edward Elgar Publishing Limited, Cheltenham, 2019, p. 93.

[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.

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 digitalized 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.

[47] Gintarė Surblytė-Namavičienė, *Competition and Regulation in the Data Economy: Does Artificial Intelligence Demand a New Balance?*, 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] Philip Hanspach, Niccolò Galli, *Collusion by Pricing Algorithms in Competition Law and Economics*, in Robert Schuman Centre for Advanced Studies Research Paper, No. 2024/06, p. 12, available on *https://ssrn.com/abstract=4732527*, last time consulted on 24.01.2026.

In this sense, anti-competitive agreements facilitated by algorithms must be analyzed within the existing conceptual framework of Article 101 TFEU, without the need to recognize 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 realization 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 recognized 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 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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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 actors[1], contributing to shaping not only the rules of international trade, but also its normative framework.

The CPP, 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

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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.

external policies are guided by principles such as: democracy, the rule of law, human rights, and the preservation of peace and international security[2]. 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.

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 analize 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, Montesquieu[3] held that trade softens manners and makes people less inclined to war; also, Kant[4] 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 competence[5] 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.

[2] See Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, "The European Union as international actor: the specificity of its external competences", Journal "Analele Universității din București", seria Drept, 2017, C.H. Beck Publishing House.

[3] See Montesquieu, *The Spirit of the Laws*, 1748, Book XX, Chapter 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*, 3rd edition, Universul Juridic Publishing House, Bucharest, 2025, pp. 96 - 100.

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 Union[6] 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 force[7].

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 207[8]. 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 trade[9].

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 agreements[10]. In terms of its evolution, the CCP has gone over time beyond mere trade in goods and came to include services[11], foreign direct investment, and intellectual property rights[12]. 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 procedures[13].

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

[6] See Małgorzata Czermińska, *Commercial Policy and International Security*, in European Research Studies Journal, vol. XXIV, 2021, pp. 382–396.

[7] See Małgorzata Czermińska, *op. cit.*, pp. 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, pp. 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, pp. 499–538.

[9] See Tobias Leeg, *Normative Power Europe?*, in European Foreign Affairs Review, vol. 19, no. 3, 2014, pp. 335–356; Maryna Rabinovych, *Striving for Trade Not Peace?*, in Journal of European Integration, vol. 45, no. 7, 2023, pp. 1075–1098.

[10] See Małgorzata Czermińska, *op.cit.*, pp. 382–396; Tobias Leeg, *op.cit*, pp. 335–356.

[11] See Oana-Mihaela Salomia, "EU trade policy after Brexit. Provision of professional services", Conference Proceedings "Challenges of the Knowledge Society", 17th-18th May 2019, 13th Edition, https://cks.univnt.ro/cks_2019.html.

[12] See Małgorzata Czermińska, *op. cit.*, pp. 382–396.

[13] See Luigi Lonardo, *op.cit.*, pp. 584–608.

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 investment[14]. 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 concluded[15], 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 has 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

[14] Article 207(1) TFEU.
[15] Shared (EU + member states) or supporting (EU) competence.

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 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 values[16].

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 concerns[17]. 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) chapters[18].

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',

[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, pp. 37–58; Nicolas Hachez, *"Essential Elements" Clauses in EU Trade Agreements*, Working Paper No. 158, KU Leuven, 2015, p. 5.

[17] See Małgorzata Czermińska, *op. cit.*, pp. 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, pp. 67–84; Małgorzata Czermińska, *op. cit.*, pp. 382–396.

which establish respect for human rights, democracy, and the rule of law as fundamental conditions underpinning the agreement[19]. Their legal significance lies in their capacity to trigger 'appropriate measures', including suspension or termination of the respective agreement, in the event of serious breaches[20].

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 urgency[21].

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 standards[22], 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.

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

[19] See Nicolas Hachez, *op. cit.*, pp. 15.

[20] See Joyce De Coninck, Peter Van Elsuwege, *Human Rights Respectful Trade*, in Berkeley Journal of International Law, vol. 42, no. 2, 2024, pp. 247–315.

[21] See Nicolas Hachez, *op.cit.*, p. 20; Andzelika Kuznar, Jerzy Menkes, *op.cit.*, pp. 67–84.

[22] Often through reference to core International Labour Organization (ILO) conventions.

[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.

related to the Paris Agreement[24], 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 labour[25]. 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 standards[26]. The EU–Singapore Agreement (2019) contains a dedicated chapter on sustainable development, addressing issues such as forestry, fisheries, and social justice[27]. 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 framework[28]. 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 standards[29]. 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 Caraibe 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 Fiji[30]. 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

[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, pp. 203–218.

[26] See Eva Jancikova, Janka Pasztorova, *op.cit.*, pp. 203–218.

[27] See Eva Jancikova, Janka Pasztorova, *op.cit.*, pp. 203–218.

[28] See Tobias Leeg, *op.cit.*, 2015.

[29] See Andzelika Kuznar, Jerzy Menkes, *op.cit.*, pp. 67–84; Andzelika Kuznar, Jerzy Menkes, *op.cit.*, pp. 67–84.

[30] Source: 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.

enforcement mechanisms, and the geopolitical environment. Enforcement is also uneven across different types of clauses, with stronger legal 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 philosophy[31]. Historically, thinkers such as Montesquieu described peace as a 'natural effect of commerce' suggesting that economic exchange fosters mutual dependence and reduces incentives for conflict[32]. Contemporary approaches argue that trade creates interdependencies which increase the material costs of war and thereby discourage it[33].

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 diamonds[34]. 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 regimes[35].

Therefore, cuch clauses have largely aspirational character and are often designed to promote dialogue and cooperation rather than to impose sanctions[36]. For example, with regards to the EU–Mexico Free Trade Agreement, commitments in the field of human rights lacked robust enforcement tools[37]. At the same time, sanctions remain exceptional. The EU has generally treated suspension or restrictive measures as a last resort measure[38]. 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 symbolic[39].

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

[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, pp. 9-10.
[32] Oli Brown et al., *op.cit.*, p. 8.
[33] Alan Wolff, *op.cit.*, pp. 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, *op.cit.*, pp. 247–315; Nicolas Hachez, *op.cit.*, pp 20-21.
[37] Joyce De Coninck, Peter Van Elsuwege, *op.cit.*, pp. 247–315.
[38] Joyce De Coninck, Peter Van Elsuwege, *op.cit.*, pp. 247–315; Nicolas Hachez, *op.cit.*, pp. 20-21.
[39] Lindani Mhlanga, *op.cit.*, pp. 37–58.

approach, trade benefits are linked to political commitments, while access to strategic resources is limited in order to constrain conflict-related activities[40].

Therefore, the practical effectiveness of these types of clauses remains contested, because they are rarely activated and are considered a measure of last resort[41]. Their use has been limited mainly to cases involving ACP countries following coups or electoral irregularities[42]. 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 act[43]. This has led to persistent criticism regarding inconsistency and perceived double standards, particularly in relations with major economic partners[44].

The conclusion that emerges is therefore that tade 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 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

[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, pp. 1075–1098.

[41] See Joyce De Coninck, Peter Van Elsuwege, *op.cit.*, pp. 247–315; Nicolas Hachez, *op.cit.*, pp. 20-21.

[42] See Joyce De Coninck, Peter Van Elsuwege, *op.cit.*, pp. 247–315; Nicolas Hachez, *op.cit.*, pp. 22.

[43] See Joyce De Coninck, Peter Van Elsuwege, *op.cit.*, pp. 247–315; Nicolas Hachez, *op.cit.*, pp. 22.

[44] See Nicolas Hachez, *op.cit.*, pp. 22.

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. 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

[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.

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 bellow.

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 show 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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DO WE NEED TODAY LEGAL HISTORY? FOR WHAT PURPOSE?

Dan VELICU (*)

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 Roman law as the last solution in establishing the balance and moderate rules in the private law space. The truth is placed 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 reflections[1].

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,

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[1] See e.g. Francesco Galgano, *Diritto commerciale*, Zanichelli Publishing House, Bologna, 2013, pp.1-5.

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 partnership or company contract.

2. The Legal History of Company Contract

2.1. Civil Partnership in Roman Law

The study of ancient periods of Roman law determines assumptions rather than real facts or certain conclusions. 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.

According to the assumptions of twentieth-century scholars, 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 assets[2]. 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 lucri), 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).

In conclusion, according to an opinion apparently accepted until today, 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.

More concise, according to the British scholars 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 benefit[3].

2.2 The Issue of Civil Partnership During the Period of Economic Revival

Obviously, with the decline of Roman civilization, the contract became rarely used in most of Europe. However, 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

[2] See Paul Frédéric, Girard, *Manuel élémentaire de droit romain*, Rousseau Publishing House, Paris, 1929, p. 611 *et seq*.

[3] See Paul du Plessis, *Borkowski's textbook on Roman Law*, Oxford University Press, Oxford, 2010, p. 285 *et seq*.

from the Latin cum (with) and panis (bread). This term would later be adopted in both English[4] 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 labour. 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 favourable 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 behavioural 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.

2.4. 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.

[4] See Stephen W. Mayson, Derek French and Christopher L. Ryan, *On Company Law*, Oxford University Press, Oxford, 2019, p. 3 *et seq*.

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 merchant 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.

This structure seems to have constituted a mechanism that did not lead to internal conflicts between partners that did not have the quality of merchants[5].

3. Civil Partnership under the Nineteenth Century Civil Codes

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.'[6]

[5] See Mario Rotondi, *Inchieste di diritto comparato*, vol. 5/II, CEDAM Publishing House, Padua, 1976, p. 1033.

[6] For a comparative analysis see Kestin Peglow, *Le contrat de société en droit allemand et en droit français comparés*, LGDJ Publishing House, Paris, 2003, *passim*.

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[7].

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 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"[8].

The organic link between the second and fourth elements outlines a pattern of social behaviour 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 legal scholarship, and later by Lorenzo Mossa in Italian legal scholarship.

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.

[7] See in common law space Susanna Kim Ripken, *Corporate Personhood*, Cambridge University Press, Cambridge, 2019, pp. 22 *et seq*.

[8] Charles Houpin and Henri Bosvieux, *Traité général théorique et pratique des sociétés civiles et commerciales et des associations: avec formules*, vol. I, Sirey Publishing House, Paris, 1925, p. 60.

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."[9]

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 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.

At present, we believe that the theory of society needs to be reconstructed almost from scratch because the context has changed essentially[10].

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

[9] Yves Guyon, *Droit des affaires*, vol. I : *Droit commercial général et sociétés*, Economica Publishing House, Paris, 1995, p. 91.

[10] See the recent German reform enacted in 2021 (Personengesellschaftsrechtsmodernisierungsgesetz - MoPeG).

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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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.

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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.

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

[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.

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 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

[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.

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

[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.

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 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

[16] COM(2025) 837 final, article 4, amending Regulation (EU) 2018/1725.
[17] Joint Opinion 2/2026, para. 13.
[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.

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 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

[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 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).

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

[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.

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 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 assessment[33]. 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

[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.

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.

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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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

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legal framework, and the level of public financing of healthcare[1].

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 size of the market and the significance of private health coverage vary considerably across different national models[2].

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 expenditure[3]. 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 insurance[4]. 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

[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.

[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 16.03.2026.

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.

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.

This transformation formed part of the broader process of strengthening the role of the state in social relations under the socialist system[5] 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

[5] See Istoriya na meditsinata v Bulgaria, Medicina i Fizkultura Publishing House, Sofia, 1980 (in Bulgarian), p. 220.

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 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. 2010/2156[7], 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

[6] See M. Radeva, Pravna ramka na dobrovolnoto zdravno osiguryavane, 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.

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 activity[8], each of which developed on the basis of a different normative and economic foundation.

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

[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 *Națională*, later joined by the *American New York Life* and the Austrian *Anker*. The first Bulgarian insurance company was established in 1891 in Ruse.

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 participants[9]. 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 transfer[10] 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-

[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).

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.

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 2020[11]. 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.

[11] See National Assembly Decision of 17 December 2015, SG No. 101 of 22 December 2015 (Bulgaria).

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 memorandum[12] 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 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

[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.

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 2030[13], 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 reduction[14] 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.

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.

[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).

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 supervision[15] of supervised entities in the non-banking financial sector[16]. In this capacity, the Commission exercises state insurance supervision under the 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 reservations[17] 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

[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.

[17] See M. Radeva, Printsipi na zadalzhitelnoto zdravno osiguryavane, Academic Publishing House "Ruse University", Ruse, 2025 (in Bulgarian), p. 187.

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'.

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 Bulgaria[18] was covered by voluntary health insurance in 2023. According to current demographic data, the population of the country at the end of 2024 was 6,437,360[19], 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.

[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.

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 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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ARTIFICIAL INTELLIGENCE – DILEMMAS, CHALLENGES AND SOME ANSWERS TO POSSIBLE QUESTIONS

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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 data[1]. 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.

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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.

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.).

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

[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.

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 level[9]. 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 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

[4] *Idem*.
[5] Romanian Academy, "Iorgu Iordan" Institute of Linguistics, *Dicționarul explicativ al limbii române*, 2nd edition, "Univers Enciclopedic" Publishing House, Bucharest, 1998, p. 497.
[6] *Idem*.
[7] *Idem*.
[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.
[10] *Idem*.
[11] *Idem*.
[12] *Idem*.

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 general[13].

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.

[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. Dutu, *op. cit*, p. 12.

[17] https://dexonline.ro/definitie/con%C8%99tiin%C8%9B%C4%83 , accessed on April 8, 2026.

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 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 lives[18].

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 wartime[19].

[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 Beșteliu and PhD Professor Augustin Fuerea), published by

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/unfavourability; 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, 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

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 (?).

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/EC[20], by the adoption and entry into force of Regulation (EU) 2016/679[21] 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 applied[22].

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 Act[23].

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 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

[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, 2026. '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.

[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.

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) 2016/679[26].

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 models[27], 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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[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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PRECAUTIONARY MEASURES IN ROMANIAN CRIMINAL PROCEDURE: JURISPRUDENTIAL APPROACHES TO JUDICIAL REVIEW

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Abstract

Precautionary measures constitute essential procedural instruments within criminal proceedings, intended to guarantee the effectiveness of patrimonial obligations arising from criminal liability. Their purpose is to prevent the concealment, alienation, destruction or dissipation of assets liable to confiscation, special confiscation, extended confiscation or compensation for damages caused by criminal offences. At the same time, such measures represent interferences with the right to peaceful enjoyment of possessions protected under Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR) and must therefore comply with the requirements of legality, necessity and proportionality. The present study examines the judicial review mechanism regulated by Article 250² of the Romanian Code of Criminal Procedure, focusing on the divergent jurisprudential approaches developed in judicial practice concerning the maintenance, restriction and lifting of precautionary measures. The analysis addresses several controversial issues, including the legal nature of the review time limits, the consequences of failing to comply with such limits, the determination of the relevant temporal reference point for calculating the review period, the intensity of judicial review exercised by courts and the proportionality assessment of the interference with property rights. By analysing national case-law, doctrinal opinions and the standards established in the jurisprudence of the European Court of Human Rights (ECtHR), the paper highlights the existence of significant interpretative divergences affecting the predictability and consistency of judicial practice in matters concerning precautionary measures. The study further emphasizes the necessity of ensuring effective judicial safeguards capable of maintaining a fair balance between the public interest pursued through criminal proceedings and the protection of fundamental rights.

Keywords: *precautionary measures, judicial review, proportionality, criminal proceedings, property rights, seizure, procedural safeguards, ECtHR jurisprudence.*

1. Introduction

Precautionary measures constitute legal instruments of particular importance within criminal proceedings, their essential function being to guarantee the enforcement of patrimonial obligations arising from criminal liability[1]. The institution occupies a complex position at the intersection between substantive criminal law and criminal procedural law, serving both the protection of the general interest and the preservation of the effectiveness of judicial decisions concerning confiscation, compensation for damages or the recovery of judicial expenses.

Although such measures do not possess a punitive character, they nevertheless represent interferences with the exercise of

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[1] Gh. Mateuț, *Criminal Procedure. General Part (Procedură penală. Partea generală)*, Universul Juridic Publishing House, Bucharest, 2019, p. 95.

the right to property, temporarily restricting the owner's ability to freely dispose of the affected assets. Consequently, their maintenance throughout criminal proceedings must remain subject to effective judicial control capable of preventing excessive or disproportionate restrictions of property rights.

The necessity of regulating precautionary measures derives not only from the general requirement of ensuring the effectiveness of criminal proceedings, but also from the constitutional and conventional standards governing the protection of fundamental rights. Legal doctrine has constantly emphasized that precautionary measures cannot be assimilated to criminal sanctions or procedural penalties, since they do not possess a repressive character, but rather a preventive and provisional one[2].

The judicial review mechanism regulated by Article 250² of the Romanian Code of Criminal Procedure represents the procedural expression of the proportionality principle in matters concerning interferences with property rights during criminal proceedings. The institution is intended to ensure that precautionary measures remain justified throughout the entirety of the proceedings and that the restriction imposed upon the individual continues to preserve a fair balance between the general interest and the protection of fundamental rights.

The relevance of the present topic derives from the increasingly significant role played by precautionary measures in contemporary criminal proceedings, particularly in cases concerning economic and financial criminality. In practice, seizure orders often affect substantial assets and may remain in force for extensive periods of time, thereby generating important consequences for the exercise of property rights and for the economic activity of the individuals concerned.

The present paper analyses the divergent jurisprudential approaches developed by Romanian courts regarding the application of Article 250² of the Romanian Code of Criminal Procedure. Particular attention is devoted to the legal nature of the review time limits, the consequences of failing to observe those limits, the intensity of judicial review exercised by courts and the proportionality assessment of the interference with property rights.

2. The legal nature of precautionary measures

2.1. Preliminary considerations

Romanian criminal procedural legislation regulates precautionary measures as procedural measures in rem intended to guarantee the effectiveness of patrimonial obligations arising from criminal proceedings. According to Article 249 of the Romanian Code of Criminal Procedure, such measures may be ordered during any stage of the criminal proceedings in order to prevent the concealment, alienation, destruction or dissipation of assets liable to confiscation, special confiscation or extended confiscation, as well as to guarantee the enforcement of criminal fines, judicial expenses and compensation for damages caused by criminal offences[3].

The legal nature of precautionary measures has generated extensive doctrinal debate within Romanian criminal procedural law. Although such measures produce significant effects upon the exercise of property rights, legal doctrine has constantly emphasized that they cannot be assimilated

[2] See I. Neagu, M. Damaschin, *Treatise on Criminal Procedure. General Part (Tratat de procedură penală. Partea generală)*, Universul Juridic Publishing House, Bucharest, 2024, p. 793.

[3] Article 249 of the Romanian Code of Criminal Procedure.

either to criminal sanctions or to procedural penalties. Their primary function is not punitive, but preventive, consisting in the preservation of assets liable to satisfy patrimonial obligations arising from criminal proceedings.

From this perspective, precautionary measures possess both an accessory and a provisional character. Their accessory nature derives from the fact that they depend upon the existence of criminal proceedings and serve the enforcement of obligations which may arise from the criminal action or the civil action exercised within the criminal trial. Their provisional nature, on the other hand, results from the temporary justification of the interference, which may subsist only for as long as the grounds underlying the measure continue to exist[4].

Romanian legal doctrine has further emphasized that precautionary measures constitute procedural measures in rem, operating directly upon assets rather than upon the person concerned. Consequently, the restriction affects primarily the right of disposal, while ownership itself remains unaffected until the final resolution of the criminal proceedings.

More importantly, legal doctrine has emphasized that precautionary measures do not represent an "anticipated punishment", but rather a guarantee intended to ensure the enforceability of the patrimonial consequences arising from criminal proceedings. Consequently, the procedural safeguards established under Article 250² of the Romanian Code of Criminal Procedure contribute to maintaining the proportionality between the duration of the precautionary measure and the restriction imposed upon property rights[5].

The ordering of precautionary measures requires the fulfilment of several cumulative conditions. First, there must exist pending criminal proceedings concerning the commission of an offence in relation to which there is a reasonable suspicion that a criminal act has been committed. Second, identifiable assets capable of satisfying future patrimonial obligations must exist alongside the risk that such assets may be concealed or dissipated. Finally, the measure must comply with the principle of proportionality, preserving a fair balance between the restriction imposed upon the right to property and the legitimate aim pursued by the judicial authorities.

The provisional nature of precautionary measures constitutes one of their defining characteristics. Such measures remain justified only for as long as the grounds that determined their imposition continue to subsist. Consequently, their maintenance throughout criminal proceedings requires the existence of an effective judicial review mechanism capable of periodically reassessing both the legality and the proportionality of the interference[6].

This review mechanism is regulated by Article 250² of the Romanian Code of Criminal Procedure, which establishes the obligation of the judicial authorities to verify ex officio whether the grounds justifying the measure continue to subsist. The review must be conducted every six months during the criminal investigation phase and every one year during the trial phase.

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[4] Gr. Theodoru, *Treatise on Criminal Procedural Law (Tratat de drept procesual penal),* Hamangiu Publishing House, Bucharest, 2007, p. 469.

[5] For a detailed analysis, see I. Neagu, M. Damaschin, A.V. Iugan, *Criminal Procedure Law. General Part. Seminar Workbook (Drept procesual penal. Partea generală. Mapă de seminar*), Universul Juridic Publishing House, Bucharest, 2024, p. 379.

[6] I. Neagu, M. Damaschin, *Treatise on Criminal Procedure. General Part (Tratat de procedură penală. Partea generală),* p. 796.

The introduction of this review mechanism reflects the legislator's intention to prevent precautionary measures from becoming indefinite restrictions upon property rights. Consequently, judicial review constitutes one of the key procedural safeguards intended to ensure compatibility between domestic criminal procedural law and the standards deriving from Article 1 of Protocol No. 1 to the European Convention on Human Rights.

2.2. The procedure for reviewing precautionary measures

The regulation concerning the review of precautionary measures is provided under Article 250² of the Romanian Code of Criminal Procedure, a legal provision establishing the obligation of the judicial authority to examine ex officio, at intervals of no more than six months during the criminal investigation phase and no more than one year during the trial phase, whether the grounds that justified the ordering or maintenance of the precautionary measure continue to subsist.

The legal text thus confirms the temporary and reviewable character of precautionary measures and imposes an effective assessment of both the legality and proportionality of the interference. At the same time, the review procedure must be interpreted in correlation with Articles 250 and 250¹, according to which appeals may be lodged against the prosecutor's ordinance ordering the maintenance, extension or lifting of precautionary measures, as well as against the decisions delivered by the preliminary chamber judge or by the court following the review of such measures[7].

The purpose of this mechanism is to prevent precautionary measures from becoming indefinite restrictions upon the exercise of property rights and to preserve the proportionality between the interference generated by the seizure measure and the legitimate aim pursued through criminal proceedings. Consequently, the judicial review regulated under Article 250² represents an important procedural safeguard intended to ensure the temporary nature and proportional character of precautionary measures and the effective protection of the rights of the persons concerned.

Although the legal provisions appear to establish a relatively clear review mechanism, judicial practice has generated divergent interpretations regarding the legal nature of the review periods, the consequences of non-compliance with them and the scope of judicial review exercised by courts in this procedure.

3. Jurisprudential approaches to the judicial review of precautionary measures

3.1. Divergent interpretations concerning the legal nature of the review time limits

One of the principal controversial issues concerns the legal nature of the review time limits established under Article 250² of the Romanian Code of Criminal Procedure.

A first jurisprudential orientation considers that the statutory review periods possess a substantive and peremptory character, their non-observance leading ope legis to the cessation of the precautionary measure[8]. From this perspective, the obligation imposed upon judicial authorities to carry out periodic verification represents an essential safeguard intended to protect the

[7] *Idem.*

[8] Bucharest Court of Appeal, Criminal Division I, Decision no. 56/2026, available on *www.rejust.ro* (RJ 842392gg8).

right to property and to ensure the temporary nature of the interference.

Within this interpretation, courts have emphasized that the absence of an express sanction within the legal provision does not deprive the time limit of its mandatory character. Consequently, once the legal period expires without an effective review of the measure, the seizure order automatically ceases by operation of law. In this sense, the mandatory nature of the review mechanism represents an essential procedural safeguard intended to ensure its effectiveness. Furthermore, certain courts have held that the absence of an explicit sanction within the legal text cannot justify depriving the review mechanism of practical effectiveness. Otherwise, the verification obligation would become purely formal and incapable of ensuring effective judicial protection against disproportionate restrictions of property rights.

In contrast, another jurisprudential orientation considers that Article 250² of the Romanian Code of Criminal Procedure establishes merely an obligation of periodic review, without expressly providing the sanction of automatic cessation of the precautionary measure[9]. According to this interpretation, procedural sanctions are subject to strict interpretation and cannot be extended in the absence of an explicit legislative provision.

Consequently, the review mechanism is intended to ensure periodic verification of the necessity of the measure, without conditioning its continuation upon automatic termination in the event of non-compliance with the statutory intervals.

The coexistence of these divergent approaches demonstrates the absence of a uniform interpretative standard regarding the legal effects of failure to observe the statutory review time limits. This divergence indicates a deeper structural uncertainty within the Romanian legal framework concerning the function of periodic judicial control, particularly whether it operates as a mechanism of strict temporal regulation or merely as a flexible procedural safeguard.

This lack of uniformity also raises concerns regarding legal certainty, as the effectiveness of precautionary measures depends not only on their initial justification but also on the predictability of their temporal control.

3.2. The temporal reference point for calculating the review period

Judicial practice reveals divergent interpretations regarding the moment from which the review period provided under Article 250² of the Romanian Code of Criminal Procedure begins to run, particularly in relation to the periodic judicial control of precautionary measures.

The identification of this starting point is crucial, as it directly determines the intensity and frequency of judicial intervention, thereby influencing the balance between efficiency of criminal proceedings and protection of property rights.

A first jurisprudential orientation considers that the relevant temporal reference point is the date on which the precautionary measure is initially imposed. Within this interpretation, the assessment of the proportionality of the measure is carried out by reference to the entire duration of the interference with property rights, viewed as a continuous situation extending from the moment of imposition. In this view, the passage of time does not, in itself, generate legal consequences capable of affecting the validity of the measure, as the interference is

[9] Bucharest Court of Appeal, Criminal Division II, Decision no. 857/2025, available on *www.rejust.ro* (RJ 659568583).

considered unitary and continuous, irrespective of subsequent procedural acts[10]

In support of this approach, courts emphasize that the proportionality analysis must be conducted in concreto, taking into account the complexity of the criminal case, the procedural stage, and the conduct of the parties. The duration of the precautionary measure is thus justified by the specific circumstances of the proceedings, without being fragmented by successive judicial verifications.

A second jurisprudential orientation, however, considers that the review mechanism established under Article 250² has a cyclical and successive nature. According to this interpretation, the relevant temporal reference point is represented by the last judicial review of the measure or by the last procedural act through which the precautionary measure was maintained or confirmed[11].

Within this framework, each judicial review generates a new procedural interval, requiring a renewed assessment of the necessity and proportionality of the measure in light of the factual and procedural circumstances existing at that moment. Consequently, the mechanism of periodic review is understood as an autonomous procedural safeguard, independent from the initial moment of imposition of the measure.

This divergence of jurisprudential approaches reflects the absence of a uniform interpretative standard in relation to the starting point of the review period under Article 250² of the Romanian Code of Criminal Procedure, generating uncertainty regarding the temporal framework of judicial control and, implicitly, the stability of precautionary measures.

3.3. The scope and intensity of judicial review

Another important aspect in which judicial practice does not appear fully uniform concerns the intensity of judicial review exercised by courts when assessing the legality and merits of precautionary measures under Article 250² of the Romanian Code of Criminal Procedure. Although the legal framework requires the examination of both legality and merits, case law reveals the existence of two distinct jurisprudential orientations that reflect different understandings of the role of the court within the review procedure.

This divergence highlights the absence of a clearly defined standard regarding the intensity of judicial review, which results in variability in the protection of property rights depending on the interpretative approach adopted by national courts.

Within a first orientation, courts conduct a substantive and individualized reassessment of the necessity and proportionality of the precautionary measure, in relation to the current procedural situation and any newly intervened circumstances. This approach presupposes that judicial review is dynamic in nature and must reflect the evolution of the criminal proceedings, including changes in the evidentiary framework and procedural context.

In this respect, judicial control involves a concrete and updated examination of whether the factual and legal grounds that initially justified the measure continue to exist. Courts adopting this approach consider that the passage of time and procedural developments may significantly affect the

[10] Bucharest Tribunal, Criminal Divion, Ruling of 22 December 2023, available on *www.rejust.ro* (RJ 869482356).

[11] Bucharest Court of Appeal, Criminal Division I, Decision no. 316/2024, available on *www.rejust.ro* (RJ 8635d5498).

justification of the measure, requiring a renewed assessment of its necessity.

This duality reflects an underlying tension between a dynamic model of judicial control, oriented towards continuous reassessment, and a static model focused primarily on the persistence of the initial legal conditions.

This approach is illustrated in the case law of the Alba Iulia Court of Appeal, which held that no new factual elements had intervened capable of altering the factual situation or the justification of the precautionary measures. Similarly, the court analysed whether defence arguments and procedural developments could justify a different solution regarding the maintenance or partial lifting of the measure[12].

Such inconsistencies indicate that judicial review under Article 250² is not applied as a uniform procedural mechanism, but rather as a context-dependent assessment, which may weaken the predictability of judicial outcomes.

Within another jurisprudential orientation, courts limit the review under Article 250² of the Romanian Code of Criminal Procedure to a formal examination of whether the grounds that initially justified the measure continue to exist, without conducting a full reassessment of proportionality or necessity. This perspective is grounded in the idea that precautionary measures function as procedural safeguards whose continuity depends on the persistence of the initial conditions that justified their imposition.

In this view, judicial control is mainly formal, focusing on the legality of the initial measure and the absence of changes that would render it unjustified, without engaging in a detailed reassessment of evidentiary elements or proportionality considerations.

In support of this approach, case law of the Galați Tribunal emphasizes the preventive function of precautionary measures, holding that such measures remain justified as long as the original conditions that warranted their imposition have not changed[13]. This interpretation highlights the need to avoid excessive judicial interference that could undermine the effectiveness of the measure during ongoing criminal proceedings.

The presence of these two jurisprudential orientations demonstrates a lack of full uniformity in judicial practice regarding the intensity of review, with direct implications for the predictability and coherence of judicial protection in this field.

3.4. The proportionality assessment

Another aspect in which judicial practice reveals differences in approach concerns the manner in which courts assess the proportionality of precautionary measures in relation to the estimated damage in the case.

According to Article 249 of the Romanian Code of Criminal Procedure, precautionary measures are intended to ensure the repair of damages or the execution of a criminal fine, which presupposes an implicit correlation between the value of the seized assets and the extent of the damage. Consequently, the periodic review provided for by Article 250² of the Romanian Code of Criminal Procedure should also include an assessment of proportionality. However, case law shows divergent approaches in this respect.

In a first line of case law, courts carry out an effective and concrete analysis of the value ratio between the seized assets and the estimated prejudice. In this approach, judges

[12] Alba Iulia Court of Appeal, Criminal Division, Decision no. 10/2026, available on *www.rejust.ro*.

[13] Galați Tribunal, Criminal Division, Ruling of 21 February 2025, available on *www.rejust.ro* (RJ g8474g8d4).

explicitly verify whether the value of the assets subject to seizure exceeds the amount of the damage and whether the measure remains justified in light of its purpose.

For example, the Cluj Tribunal held that even where the value of immovable assets subject to seizure may exceed the alleged prejudice, the restriction on property rights remains proportionate as long as it serves the objective of securing the recovery of the damage[14]. Similarly, the Bucharest District Tribunal analysed the impact of partial payments made by the defendant, finding that the remaining unpaid obligations justified the maintenance of the precautionary measure as proportionate to the remaining damage[15]. Likewise, the Iași Tribunal held that the value of the seized assets was reasonably correlated with the estimated damage, confirming compliance with the proportionality requirement under Article 1 of Protocol No. 1 to the ECHR[16].

In contrast, in other cases, courts maintain precautionary measures without conducting a detailed comparative analysis between the value of the seized assets and the alleged damage. In such situations, judicial reasoning is limited to a general verification of legality and necessity, without an explicit and detailed proportionality assessment. For instance, the Sector 3 District Court of Bucharest upheld the measure despite allegations of disproportionality, without a structured analysis of the value ratio[17]. Similarly, the Constanța District Court maintained the seizure measure based on a general assessment of its legality and purpose, without a detailed examination of proportionality[18].

This inconsistency in judicial reasoning highlights a broader structural issue in the application of proportionality review, namely the absence of a stable methodological framework capable of ensuring uniform assessment across cases involving precautionary measures. As a result, proportionality tends to oscillate between a strict evidentiary comparison of values and a more abstract legality-based reasoning, which may affect the predictability of judicial outcomes in this field.

This divergence in judicial practice demonstrates the lack of a uniform standard in assessing proportionality in precautionary measures, with direct implications for the consistency and predictability of judicial protection in this field.

3.5. The duration of precautionary measures in the proportionality analysis

Another aspect highlighting differences in judicial practice concerns the relevance of the duration of precautionary measures within the review carried out under Article 250² of the Romanian Code of Criminal Procedure. Although the Code does not establish a maximum duration for such measures, their provisional nature and the obligation of periodic review implicitly require an assessment of proportionality in light of the passage of time. In principle, the maintenance of a precautionary measure over an extended period must be justified by a current and concrete necessity, assessed in relation to the purpose pursued.

[14] Cluj Tribunal, Criminal Division, Ruling no. 1/2024, available on *www.rejust.ro.*

[15] Bucharest Tribunal, Criminal Division II, Ruling of 09 June 2023, available on *www.rejust.ro* (RJ 4e3486d57).

[16] Iași Tribunal, Criminal Division, Ruling of 20 February 2025, available on *www.rejust.ro* (RJ ee56de268).

[17] Sector 3 District Court of Bucharest, Ruling of 11 February 2026, available on *www.rejust.ro* (RJ 73e927798).

[18] Constanța District Court, Ruling no. 661/2025, available on *www.rejust.ro.*

In a first line of case law, courts consider the duration of the measure as an autonomous element within the proportionality test, holding that the passage of a significant period of time requires a rigorous reassessment of both the necessity and the continued justification of the interference with property rights.

Thus, in a ruling of 10 November 2021, the Sibiu Tribunal held that approximately ten years had passed since the imposition of the seizure measure, which required a renewed proportionality analysis in relation to the current value of the seized assets and justified the ordering of a judicial expert assessment in this regard[19]. The duration of the measure was therefore considered the triggering factor for a more in-depth review of the interference.

Similarly, in a Ruling of 5 December 2023, the Bistrița-Năsăud Tribunal examined the duration of the precautionary measure and found that it had not exceeded reasonable limits, thus confirming its continued proportionality[20].

According to this approach, the passage of time is not merely a contextual element, but a relevant criterion in assessing whether the measure continues to correspond to its intended purpose and whether the interference with property rights remains proportionate.

In a second line of case law, the duration of the precautionary measure is not treated as an autonomous criterion of proportionality, but rather as a contextual element. Courts in this orientation consider that the passage of time alone cannot justify lifting or modifying the measure, provided that the initial conditions that justified its imposition still exist.

Thus, in a ruling of 14 December 2023, the Alba Iulia Court of Appeal held that the duration of the measure does not automatically affect its legality, especially where the original grounds for imposing it remain valid[21]. Similarly, in a ruling of 21 January 2026, the Dâmbovița Tribunal stated that the length of the proceedings is justified by the complexity of the case and does not, in itself, render the measure disproportionate[22].

In this view, the duration of the measure is subordinated to the general assessment of legality and necessity, without constituting a decisive factor in the proportionality analysis.

The coexistence of these approaches reveals a non-uniform judicial practice regarding the relevance of time in the proportionality assessment of precautionary measures, with direct consequences for the predictability of judicial control and the protection of property rights.

This divergence becomes particularly significant in relation to long-standing precautionary measures, where the persistence of the interference over time may progressively alter the balance between the public interest and the individual right to property, potentially leading to a situation in which an initially justified measure no longer satisfies the requirements of proportionality.

3.6. The relevance of procedural phase changes in calculating the review period

Within judicial practice, the moment of referral to court is sometimes treated as an autonomous reference point in determining the review period under Article 250² of the

[19] Sibiu Tribunal, Criminal Division, Ruling of 10 November 2021, available on *www.rejust.ro* (g845d43d3).
[20] Bistrița-Năsăud Tribunal, Criminal Division, Ruling no. 157/2023, available on *www.rejust.ro.*
[21] Alba Iulia Court of Appeal, Criminal Division, Ruling no. 325/2023, available on *www.rejust.ro.*
[22] Dâmbovița Tribunal, Criminal Division, Ruling of 21 January 2026, available on *www.rejust.ro* (RJ 46934g458).

Romanian Code of Criminal Procedure. In this approach, the one-year term is calculated separately from the indictment stage, the change of procedural phase being considered relevant for the commencement of a new verification interval specific to the trial phase.

Thus, in a Ruling of 17 July 2024, the Bucharest Tribunal analysed the calculation of the one-year period from the moment of referral to court with the indictment, using this moment as the starting reference for judicial review[23]. Likewise, the Bucharest Court of Appeal confirmed that the maintenance of precautionary measures must be assessed in relation to the procedural framework established at the moment of referral to trial, including the parameters set out in the indictment.

In contrast, another line of case law considers that the change of procedural phase does not automatically reset the calculation of the review period. The obligation of verification is viewed as continuous, and the passage of time is assessed within the overall evolution of the criminal proceedings, rather than being linked to procedural "reset moments".

In this sense, the Ilfov Tribunal has held that the time limits provided by Article 250² C. of the Romanian Code of Criminal Procedure are essentially recommendatory, emphasizing that judicial review must focus on the continued existence of the grounds for the measure and its proportionality throughout the proceedings[24].

Overall, case law is not fully uniform regarding the relevance of procedural phase changes in determining the starting point of the review period. The divergence concerns not the existence of the obligation to periodically review precautionary measures, but rather the identification of the reference moment for calculating the one-year interval, whether it is tied to distinct procedural stages or to a continuous procedural timeline.

This divergence confirms the absence of a stable interpretative framework for determining the starting point of the review period, which directly affects the predictability of judicial control over precautionary measures.

3.7. The provisional nature of precautionary measures

A constant element identified in the analysed case law is the affirmation of the provisional nature of precautionary measures. Thus, in a ruling of the Prahova Tribunal, the court expressly emphasised that precautionary measures are temporary and provisional in nature and cannot be maintained indefinitely, without an assessment of their purpose and proportionality in relation to the duration of the interference with the right of property. Although the court ordered the continuation of the measure, it proportionally limited it up to the amount of the remaining damage, considering that partial payment justified the adjustment of the seizure, without removing the grounds that led to its imposition[25].

In a similar case, it was held that precautionary measures, by their nature, are not permanent, as they affect the very substance of the right of property, being a temporary measure of asset freezing imposed until the final resolution of the case. However, the court found that, in relation to the purpose of the measure and the

[23] Bucharest Tribunal, Criminal Division, Ruling of 17 July 2024, available on *www.rejust.ro* (RJ 232ee5998).
[24] Ilfov Tribunal, Criminal Division, Ruling no. 790/2025, available on *www.rejust.ro*.
[25] Prahova Tribunal, Criminal Division, Ruling no. 108/2026, available on *www.rejust.ro*.

circumstances of the case, its duration had not exceeded a reasonable time[26].

On the other hand, other decisions show that although the provisional nature of precautionary measures is consistently reaffirmed, it is not always used as an autonomous ground for lifting the measure. Some courts consider that the duration is justified by the complexity of the case and the nature of the accusations, finding that no unreasonable duration has been exceeded. In the same line, the Ilfov Tribunal held that the maintenance of the measure must be assessed through the persistence of the legal grounds and the necessity of securing the recovery of the damage, and not solely through the passage of time.

It follows that, although the provisional character of precautionary measures is consistently affirmed, its practical significance varies: in some decisions it operates as a real limitation on duration, while in others it is integrated into the proportionality analysis without constituting an independent reason for ending the measure.

The provisional nature of precautionary measures therefore operates not only as a theoretical principle, but also as a functional limit on their duration, requiring that their continued maintenance be justified by concrete and up-to-date procedural circumstances.

3.8. Solutions issued in the verification procedure

Another analytical element emerging from the case law identified on the ReJust platform concerns the typology of solutions issued in the verification procedure provided by Article 250² of the Romanian Code of Criminal Procedure, namely the extent to which courts make use of the options offered by the legal text or, in practice, tend to limit themselves to maintaining the precautionary measure.

The analysis of the case law shows that the predominant solution is the maintenance of precautionary measures. Thus, the Mureș Tribunal held that the duration of the measure did not exceed a reasonable time, considering that this was justified by the complexity of the case and the nature of the accusations, and therefore ordered its continuation[27]. In the same sense, the Brașov Tribunal[28] maintained the precautionary measures following the referral to court by indictment, emphasizing the necessity of securing the recovery of the damage. The Onești District Court also found the legality and necessity of the measure, considering that the initial conditions that justified it continued to exist[29].

On the other hand, orders for lifting or significantly modifying precautionary measures appear less frequently in the analysed jurisprudence. This indicates a certain tendency towards the preservation of the measure rather than its removal, especially where courts consider that the procedural grounds and the risk of prejudice recovery remain valid.

The analysed case law indicates a prevailing judicial tendency towards the maintenance of precautionary measures, with lifting or modification remaining exceptional and generally dependent on

[26] Bucharest Tribunal, Criminal Division I, Ruling of 05 October 2023, available on *www.rejust.ro* (RJ 985953g85).

[27] Mureș Tribunal, Criminal Division, Ruling of 20 February 2025, available on *www.rejust.ro* (RJ eeg7624d8).

[28] Brașov Tribunal, Criminal Division, Ruling of 26 February 2025, available on *www.rejust.ro* (RJ 7289d3836).

[29] Onești District Court, Ruling no. 1032/2025, available on *www.rejust.ro.*

specific factual developments, which confirms a cautious but relatively restrictive approach to judicial review under Article 250².

3.9. European Court of Human Rights (ECtHR) case law and the proportionality standard in the matter of precautionary measures

Precautionary measures, by their nature, constitute interferences with the right to property and are therefore subject to the requirements of Article 1 of Protocol No. 1 to the European Convention on Human Rights. The case law of the European Court of Human Rights has consistently held that any interference must satisfy three cumulative conditions: it must be provided by law, pursue a legitimate aim in the general interest, and strike a fair balance between the general interest and the protection of individual rights, in accordance with the principle of proportionality[30].

In Raimondo v. Italy, the Court held that seizure measures ordered in the context of criminal proceedings may be compatible with the Convention only insofar as they do not impose an excessive individual burden on the applicant. The duration of the measure, its scope, and the relationship between the value of the seized assets and the pursued aim are relevant factors in the proportionality assessment[31].

Similarly, in Forminster Enterprises Limited v. the Czech Republic, the Court emphasised that the prolonged maintenance of a freezing order, without periodic and effective review of its necessity, may lead to a breach of Article 1 of Protocol No. 1. The Court stressed the need for continuous reassessment of whether the measure remains justified in light of the evolving circumstances of the case[32].

The Court's approach emphasises that the mere existence of criminal proceedings cannot justify the indefinite continuation of precautionary measures, as judicial control must remain effective and capable of ensuring a genuine and current proportionality assessment throughout the entire duration of the interference.

The ECtHR case law consistently reinforces the idea that proportionality must be assessed as a dynamic requirement, evolving throughout the duration of the interference, rather than at the moment of its initial imposition.

Recent case law further confirms that the mere existence of ongoing criminal proceedings does not automatically justify the indefinite maintenance of precautionary measures. A current and individualized assessment of proportionality is required throughout the entire duration of the interference.

When compared with national jurisprudence, it appears that those orientations which emphasise the duration of the measure, the relationship between the seized assets and the alleged prejudice, and the provisional nature of the measure are more closely aligned with the standards developed by the European Court of Human Rights. By contrast, approaches limited to a formal verification of the initial conditions risk reducing judicial review to a purely formal mechanism, insufficient to prevent disproportionate interferences with property rights.

[30] European Court of Human Rights, general principles under Article 1 of Protocol No. 1 to the ECHR

[31] ECtHR, *Raimondo v. Italy*, judgment of 22 February 1994, available on *https://hudoc.echr.coe.int/eng.*

[32]ECtHR, *Forminster Enterprises Limited v. the Czech Republic*, judgment of 9 October 2008, available on *https://hudoc.echr.coe.int/eng*

4. Conclusions

The analysis of judicial practice concerning the verification of precautionary measures under Article 250² of the Romanian Code of Criminal Procedure reveals a legal framework that, while formally designed to ensure control over the proportionality and necessity of such measures, has generated a fragmented and non-uniform application in practice. This fragmentation affects both legal certainty and the predictability of judicial intervention in matters involving interference with the right to property.

One of the main sources of divergence lies in the legal understanding of the verification time limits. While some courts treat these time limits as binding and capable of producing legal consequences in case of non-compliance, others regard them as merely procedural benchmarks, without automatic effects on the continuation of the measure. This duality contributes to an inconsistent approach regarding the temporal limits of precautionary measures.

Another area of inconsistency concerns the starting point from which the verification period is calculated. Judicial practice oscillates between considering the initial imposition of the measure as the relevant moment and treating the most recent judicial review as a new reference point. This lack of uniformity directly influences the rhythm and predictability of judicial control.

Significant differences are also observed in the intensity of judicial review. In some cases, courts carry out a genuine reassessment of necessity and proportionality, taking into account the evolution of the case and any new circumstances. In other cases, the review remains largely formal, focusing mainly on whether the initial grounds still exist, without a deeper analysis of proportionality in concreto. This leads to different levels of protection of property rights depending on the approach adopted.

The same variability appears in relation to proportionality analysis, particularly with regard to the relationship between the value of the seized assets and the alleged prejudice. While certain courts engage in a concrete balancing exercise, others limit themselves to a general assessment of legality and necessity, without a detailed economic comparison.

Although precautionary measures are consistently described as temporary in nature, their provisional character is interpreted differently in practice. In some cases, this principle functions as a real constraint requiring periodic justification of the measure, while in others it remains largely declarative, without producing independent legal effects on the duration of the measure.

Similarly, judicial approaches differ regarding the relevance of procedural developments for the continuation of the measure. Some courts consider that procedural evolution requires continuous reassessment, while others maintain that the existence of the initial conditions is sufficient for the measure to persist, regardless of procedural changes.

Overall, judicial practice shows a clear tendency towards maintaining precautionary measures rather than lifting or modifying them, with courts generally preferring to preserve the measure whenever the original justification has not been explicitly removed. This tendency reflects a cautious approach but also contributes to the limited use of corrective judicial solutions.

A more structured and harmonised approach, either through legislative intervention or consistent higher court guidance, would significantly enhance legal certainty and ensure a predictable and proportionate application of precautionary measures in Romanian criminal proceedings.

The judicial review of precautionary measures under Article 250² of the Romanian Code of Criminal Procedure must be understood as an expression of the proportionality principle, requiring a continuous and dynamic assessment of the balance between the public interest pursued in criminal proceedings and the individual right to property. In this context, national courts are required to ensure that precautionary measures remain strictly necessary and proportionate throughout their entire duration, in line with the standards developed by the European Court of Human Rights. The ECtHR jurisprudence reinforces the obligation of effective and periodic judicial control, confirming that the mere existence of criminal proceedings cannot justify the indefinite maintenance of such measures without a concrete and current proportionality assessment.

These inconsistencies highlight the need for a more coherent and stable interpretative framework capable of ensuring the uniform application of Article 250² of the Romanian Code of Criminal Procedure. Strengthening judicial guidance, whether through higher court jurisprudence or legislative clarification, would enhance legal certainty and contribute to a more predictable and effective system of judicial control over precautionary measures. Ultimately, a consistent proportionality-based approach, aligned with the standards developed by the European Court of Human Rights, is essential to safeguarding both the effectiveness of criminal proceedings and the protection of individual property rights.

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CHILD SEXUAL ABUSE MATERIAL (CSAM): AN ANALYSIS OF ARTICLE 374 OF THE ROMANIAN CRIMINAL CODE IN LIGHT OF DIRECTIVE 2011/93/EU AND THE LANZAROTE CONVENTION

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Abstract

This study analyses the offence under Article 374 of the Romanian Criminal Code 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 Article 374 of the Criminal Code 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, Article 374 of the Criminal Code, sexual exploitation of children, sexual abuse of children, Directive 2011/93/EU, Lanzarote Convention.*

1. Introduction

The offence under Article 374 of the Romanian Criminal Code 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

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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 conduct[1]. 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 child[2].

The use of the CSAM concept shifts the focus from the apparently obscene nature of the material[3] 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/EU[4] and the Lanzarote Convention[5] 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 protection[6].

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

[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

[3] Păun Costică, în V. Dobrinoiu 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

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 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 minors[7]. 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

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

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.

2.2. 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.

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 (1^1), 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 (1^1) 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 (3^2) 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 act[8].

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 future[9]. 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 exploitation[10]. 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

[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

[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

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 harm[11].

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 abuse[12]. 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 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 represented[13].

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 minors[14]. 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

[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

[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

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 technologies[15].

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 child[16].

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 intelligence[17]. Recent developments in European Union law point in the same direction, tending to treat artificially generated sexual representations of minors in a manner close to traditional child sexual abuse material[18].

[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

[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

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 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 phenomenon[19]. 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 content[20]. 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

[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.

the conduct of the spectator, including situations involving means such as webcams[21]. 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 performances[22]. 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 material[23]. 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 material[24]. 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 situations in which children should not be held criminally liable or should be prosecuted only as a last resort[25]. 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 material[26]. Recommendation II-8 concerns voluntary and consensual sharing intended exclusively for private use between children[27]. 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 resort[28].

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

[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.
[25] Ibid., Recommendation II-2
[26] Ibid., Recommendation II-6
[27] Ibid., Recommendation II-8
[28] Ibid., Recommendation II-9

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 acts[29]. 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 definition[30].

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 images[31]. 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 tools[32]. 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 abuse[33]. 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 materials[34].

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

[29] Ibid., 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.

constitute the criteria against which the current Romanian regulation and the need for its amendment must be assessed.

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 distribution[35].

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 law[36], 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 Code[37] 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 law[38] offers another relevant example. Article 227-23 of the French

[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/

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 law[39], 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 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 minor[40]. 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 law[41] 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.

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

[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

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

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 performance[42]. 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 use[43]. 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 use[44].

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-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

[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)

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 law[45], where objects, valuables or property connected with the act may be confiscated, in Estonian law[46], which allows the extended confiscation of assets or property obtained through crime, and in Luxembourg law[47], 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

[45] Czech Republic, *Criminal Code*, Act No. 40/2009 Coll., §§ 192–193, available on the official e-Sbírka 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

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 responses[48]. 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 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

[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

response must be calibrated according to the concrete role of the conduct in producing, circulating and maintaining the material within the criminal circuit[49].

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 (1^1) 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.

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

[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.

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

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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

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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 needs[1] 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 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

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

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 (ECHR) 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. Technology may contribute to the individualization of the execution of

[2] Tony F. Marshall, *Restorative Justice: An Overview*, Kindle Edition, Coventry Lord Mayor's Committee for Peace & Reconciliation, Coventry City Council, United Kingdom, 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] See, in this regard, *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 a l'occasion de son bicentenaire en partenariat avec L'Universite Paris-Dauphine PSL, Paris, Dalloz, 2018.

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

[5] Ethan Mollick, *Co-inteligență, Cum să trăiești și să muncești cu AI,* Publica Publishing House, Bucharest, 2025, p. 68.

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.

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

[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,* Dalloz, Paris, 2008, p. 345.

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

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 artificial intelligence into the enforcement system must remain subordinated to the principle of exclusive human responsibility for decisions concerning the execution of criminal sanctions. The role of artificial intelligence may be consultative, technical, and informative; however, the decision concerning the restriction of rights, the individualization of the enforcement regime, or the assessment of the convicted person's conduct 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 future[9], in the context of the emergence of an informational network governed by the decisions of a non-human intelligence, potentially 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

[8] Ethan Mollick, *Co-inteligență, Cum să trăiești și să muncești cu AI*, Publica Publishing House, Bucharest, 2025, p. 67-68.

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

'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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DURESS PROBLEMS IN THE FIGHT AGAINST CORRUPTION: A CASE STUDY FROM KOZENY-SOCAR AND ITS CONTEXTUALIZATION IN HUNGARIAN GOVERNANCE

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Abstract

This paper examines the complex relationship between duress and anti-corruption efforts through an analysis of the Kozeny-Socar case and its parallels within Hungary's governance framework. By investigating how pressure mechanisms affect institutional responses to corruption, this research identifies systemic vulnerabilities that can compromise anti-corruption initiatives. The Kozeny-Socar case serves as a foundation for understanding how economic and political duress creates environments where corruption can flourish despite formal anti-corruption frameworks. The Hungarian context provides a contemporary European example where similar dynamics manifest in governance structures. This paper contributes to the literature by conceptualizing duress as both an enabler of corruption and an impediment to anti-corruption efforts, offering policy recommendations for strengthening institutional resilience against corruption under conditions of duress.

Keywords*: corruption, duress, governance, institutional resilience, Hungary, Kozeny-Socar case.*

1. Introduction

Corruption remains one of the most persistent challenges to good governance, economic development, and social equity worldwide. While much scholarly attention has focused on the technical aspects of anti-corruption measures, including legislative frameworks, enforcement mechanisms, and institutional design, less attention has been paid to the psychological and structural dynamics that can undermine these efforts.[1] Among these dynamics, duress—defined here as pressure exerted on individuals or institutions that compels actions contrary to established norms, laws, or ethical principles—represents a significant yet understudied factor.

The concept of duress in anti-corruption efforts encompasses multiple dimensions: political pressure on judicial bodies, economic coercion of regulatory authorities, threats to personal or professional security of anti-corruption officials, and systemic intimidation of whistleblowers and witnesses.[2] These pressures can effectively neutralize even well-designed anti-corruption frameworks, creating what this paper terms 'implementation gaps' between formal anti-corruption structures and their practical effectiveness.

This paper examines these dynamics through a detailed analysis of the Kozeny-Socar case, which involved allegations of corruption in Azerbaijan's oil privatization

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[1] Rose-Ackerman and Palifka, Corruption and Government, 2016.

[2] Mungiu-Pippidi, The Quest for Good Governance, 2015.

process. Victor Kozeny, known as the 'Pirate of Prague,' orchestrated investments in Azerbaijan's state oil company SOCAR, allegedly through bribery and fraudulent means.[3] The case provides a rich illustration of how duress operates at multiple levels to facilitate corruption and impede accountability efforts.

The research then contextualizes these findings within Hungary's governance framework, examining how similar dynamics of duress may manifest in a European Union member state. Hungary presents a particularly relevant case study due to its significant shifts in governance approaches to corruption over the past decade, including controversial reforms to judicial independence and public procurement systems.[4]

By bridging these two contexts—an international corruption case and a national governance system—this paper aims to develop a more nuanced understanding of how duress operates across different settings to undermine anti-corruption efforts. The paper concludes with recommendations for strengthening institutional resilience against corruption under conditions of duress, contributing to both scholarly understanding and practical anti-corruption strategies.

2. THEORETICAL FRAMEWORK: DURESS IN ANTI-CORRUPTION CONTEXTS

2.1 Conceptualizing Duress in Governance

In governance contexts, duress extends beyond its conventional legal definition to encompass various forms of pressure that compromise institutional integrity and individual agency. Theoretical perspectives from institutional economics, political science, and legal studies offer complementary frameworks for understanding how duress operates within governance systems.

North's institutional theory provides a foundation for understanding how formal and informal constraints shape human interaction.[5] Within this framework, duress can be conceptualized as an informal constraint that alters the incentive structures governing institutional performance. When officials face duress, the expected utility of adhering to formal rules diminishes compared to the perceived benefits of compliance with external pressure. This creates what Hellman, Jones, and Kaufmann describe as 'administrative corruption,' where public officials distort the implementation of laws and policies.[6]

Political science perspectives, particularly those related to democratic backsliding and state capture, offer additional insights. Levitsky and Ziblatt's work on democratic erosion highlights how pressure on key democratic institutions can undermine accountability mechanisms incrementally, often while maintaining façades of democratic procedure.[7] Similarly, Wedel's concept of 'flex organizations' describes how informal networks can exert pressure on formal institutions, creating parallel systems of governance that facilitate corruption.[8]

Legal scholarship on judicial independence and prosecutorial discretion further illuminates how duress affects anti-

[3] Hilzenrath, Bourke Convicted of Bribery-Related Charges in Azerbaijan Case, 2009.
[4] Bozoki – Hegedus, 2018, 1176 --1178.
[5] North 1990, 36-45.
[6] Hellman – Jones -Kaufmann, 2003, 753-756.
[7] Levitsky – Ziblatt 2018, 75 - 92.
[8] Wedel 2009, 45 - 72.

corruption efforts. As Gloppen argues, judicial autonomy exists along a continuum and can be compromised through various mechanisms, including threats to tenure, resource manipulation, and case reassignment.[9] These pressures diminish the judiciary's capacity to serve as an effective check on corruption.

2.2 Typology of Duress in Anti-Corruption Efforts

Building on these theoretical foundations, this paper proposes a typology of duress in anti-corruption contexts that is particularly relevant to understanding the Hungarian governance situation. Political duress emerges as a central concern in the Hungarian context, manifesting through concentrated authority that can threaten institutional autonomy. The gradual centralization of power within Hungary's governance structure has created conditions where political pressure can be exerted through budget manipulation, strategic personnel appointments, and institutional reorganizations that affect anti-corruption bodies.[10] As Agh argues, the 2012 constitutional reforms and subsequent legislative changes transformed Hungary's institutional landscape in ways that concentrated decision-making authority, creating enhanced potential for political duress on accountability mechanisms.[11] Scholars have documented how the increasing centralization of authority has enabled direct and indirect political pressure on formerly independent bodies, creating what Sedelmeier terms 'backsliding' in governance standards.[12]

Economic duress operates in parallel to political pressure within Hungarian governance, functioning through financial dependencies that can compromise institutional independence. The management of European Union funds represents a key vector for economic duress in Hungary, where allocation decisions carry significant financial implications for municipalities, institutions, and private sector entities.[13] The preferential treatment in procurement decisions, differential access to state subsidies, and targeted tax enforcement create economic incentives that can undermine anti-corruption efforts. Szente notes that the interconnection between political loyalty and economic opportunity establishes conditions where economic pressure can effectively neutralize formal anti-corruption protections.[14] The concentration of economic decision-making creates what Kovacs terms a 'patronal' system where economic dependencies facilitate political control.[15]

Legal duress within Hungary's governance framework operates through manipulation of legal processes and strategic legislative modifications. The reform of judicial governance structures, procedural changes in administrative courts, and amendments to information access laws collectively create a legal environment where anti-corruption mechanisms can be formally maintained while their effective operation is compromised.[16] Research by the Helsinki Committee documents how selective enforcement patterns and

[9] Gloppen 2014, 70 - 73.
[10] Kornai 2015, 36 - 40.
[11] Agh 2016, 279 - 282.
[12] Sedelmeier 2014, 109 - 114.
[13] Fazekas – Toth – King 2016, 370 - 378.
[14] Szente 2017, 416 - 465.
[15] Kovacs 2019, 87 - 102.
[16] Helsinki Committee 2019, 14 - 23.

jurisdictional complications add further dimensions to legal duress, creating uncertainty that discourages robust anti-corruption initiatives.[17] Sonnevend observes that the Hungarian legal framework has evolved in ways that maintain formal compliance with European standards while creating procedural obstacles to substantive accountability.[18] This creates what Sajo characterizes as 'rule by law' rather than 'rule of law,' where legal procedures become instruments of power rather than constraints upon it.[19]

Social duress represents a more subtle but equally significant pressure dimension in Hungarian anti-corruption contexts. The professional networks that govern career advancement, the social costs of challenging established authority, and the reputational risks associated with corruption allegations create informal pressure mechanisms that operate alongside formal institutions.[20] In Hungary's relatively small professional communities, social isolation and reputational damage represent significant threats that can deter anti-corruption efforts independently of formal sanctions. Research by Jancsics documents how the interconnection between professional advancement and political alignment creates conditions where social pressure effectively reinforces other duress forms.[21] This creates what Scheiring terms 'loyalty cascades' where professional success becomes contingent on political compliance.[22]

Physical duress, while less prevalent than other forms, nonetheless represents a concerning dimension in anti-corruption contexts. While Hungary has not experienced systematic violence against anti-corruption officials, more subtle forms of intimidation—including surveillance, implicit threats, and harassment—create personal security concerns that can compromise anti-corruption efforts.[23] These multiple duress forms operate simultaneously within Hungarian governance, creating synergistic pressure systems that can effectively neutralize anti-corruption initiatives while maintaining the appearance of functional accountability mechanisms. As Innes argues, the combination of these pressure dimensions creates a comprehensive control system that maintains democratic appearances while compromising democratic substance.[24] The following sections examine how these dynamics manifested in the Kozeny-Socar case and their parallels in Hungarian governance.

3. THE KOZENY-SOCAR CASE: CORRUPTION AND DURESS IN AZERBAIJANI PRIVATIZATION

3.1 Historical Context and Case Overview

The collapse of the Soviet Union in 1991 precipitated rapid privatization processes across former Soviet republics,

[17] Ibid., 24 -36.
[18] Sonnevend 2017, 28 -34.
[19] Sajo 2021, 118 - 125.
[20] Magyar 2016, 132 - 145.
[21] Jancsics 2017, 8 -15.
[22] Scheiring 2020, 201 - 212.
[23] HCLU 2022, 45 - 49.
[24] Innes 2014, 93 - 98.

creating conditions ripe for corruption.[25] Azerbaijan's oil wealth made its privatization particularly lucrative, attracting international investors seeking to capitalize on the country's transition to a market economy.

Victor Kozeny, a Czech-born financier who had previously orchestrated controversial privatization schemes in the Czech Republic, turned his attention to Azerbaijan in the mid-1990s. Through his company, Oily Rock Group Ltd., Kozeny organized a consortium of investors to participate in the privatization of SOCAR, Azerbaijan's state oil company.[26] Kozeny allegedly promised investors, including major American financial institutions, returns of up to 1000% on their investments.

The investment scheme involved purchasing privatization vouchers and options that would allegedly convert to SOCAR shares. However, the privatization structure changed, and the anticipated conversion never occurred. American investors lost approximately $180 million, leading to multiple legal proceedings in various jurisdictions, including criminal charges under the Foreign Corrupt Practices Act (FCPA) in the United States.[27]

Prosecutors alleged that Kozeny orchestrated bribes totaling $11 million to Azerbaijani officials, including gifts, cash payments, and promises of future profits. The case became one of the most significant FCPA prosecutions of its time, highlighting the challenges of combating transnational corruption.

3.2 Manifestations of Duress in the Case

The Kozeny-Socar case exemplifies multiple forms of duress that facilitated corruption and impeded accountability:

3.2.1 Economic Duress

Azerbaijan's post-Soviet economic vulnerability created conditions where foreign investment carried significant leverage. The country's dependence on oil revenues made SOCAR's privatization politically sensitive, creating pressure on officials to accommodate investor interests. Economic advisors from international financial institutions reportedly emphasized the importance of attracting foreign capital, potentially creating pressure to overlook irregularities in the privatization process.[28]

For individual officials, economic duress operated through both inducements and threats. Kozeny allegedly offered officials equity stakes in the investment consortium, creating financial dependencies that compromised their judgment. Simultaneously, the economic disparities between western investors and local officials created implicit pressure, as rejection of ‘facilitation payments’ could mean forgoing amounts that significantly exceeded official salaries.[29]

3.2.2 Political Duress

The case unfolded against a backdrop of political transition in Azerbaijan, where power consolidation remained incomplete. Officials faced pressure from competing

[25] BENEDEK, Wolfgang – DIEHL, Sarah (2020): Shrinking Spaces for Civil Society in Hungary. Challenging the EU's Claim to Promote Democracy. Human Rights and International Legal Discourse, Vol. 14, No. 1. 54–70. DOI: https://doi.org/10.1080/13642987.2020.1773442

[26] Matthews 2009.

[27] United States v. Bourke, 667 F.3d 122 (2nd Cir. 2011).

[28] Adams 2005: 130-132.

[29] Testimony of Thomas Farrel, United States v. Bourke, 667 F.3d 122 (2nd Cir. 2011).

political factions, with privatization decisions becoming proxies for broader political contests. Witnesses in subsequent legal proceedings described an atmosphere where privatization decisions were understood to require political protection, creating networks of obligation that compromised regulatory independence.[30]

International political considerations also generated duress. Azerbaijan's strategic importance to Western governments, particularly regarding energy security and regional stability, allegedly moderated diplomatic pressure regarding corruption allegations. This created what anti-corruption scholars term 'isomorphic mimicry,' where countries adopt formal anti-corruption measures while practical enforcement remains selective.[31]

3.2.3 Legal Duress

The legal dimensions of duress appeared most prominently in the aftermath of the scheme's collapse. Witnesses in subsequent proceedings reported intimidation, including threats to business interests and visa complications for those who cooperated with international investigations. The Azerbaijani legal system's handling of corruption allegations reflected selective enforcement patterns, with cases advancing or stalling based on political considerations rather than evidence.[32]

The transnational nature of the case created jurisdictional complexities that facilitated legal forms of duress. Kozeny himself eventually took residence in the Bahamas, successfully fighting extradition for years by exploiting differences in legal definitions of corruption across jurisdictions.[33] This jurisdictional arbitrage represents a form of structural duress within the international anti-corruption framework, where enforcement gaps create safe havens for alleged perpetrators.

3.3 Outcomes and Implications

The legal outcomes of the Kozeny-Socar case illustrate how duress undermines anti-corruption efforts. While U.S. prosecutors secured convictions against some participants, including investment executive Frederic Bourke, Kozeny himself never stood trial in the United States. Azerbaijan's own accountability mechanisms produced few tangible results, with implicated officials largely maintaining their positions.[34]

The case generated significant legal precedent regarding the 'knowing' standard in FCPA cases, with courts establishing that 'conscious avoidance' of knowledge regarding corruption could constitute a violation.[35] However, the practical impact on Azerbaijani governance practices appears limited, illustrating how international legal proceedings, while symbolically important, may have limited reformative impact on governance systems where duress pervades institutional functions.

[30] Henriques 2009.
[31] Andrews – Pritchett – Wollcock 2017:98 - 100.
[32] In re Extradition of Kozeny, 299 F. Supp 2d 255 (S.D.N.Y. 2004).
[33] United States v. Kozeny, 582 F. Supp. 2d 535 (S.D.N.Y 2008).
[34] Hilzenrath 2009.
[35] United States v. Bourke, 667 F.3d 122 (2d Cir. 2011).

4. CONTEXTUALIZING DURESS: CORRUPTION CHALLENGES IN HUNGARIAN GOVERNANCE

4.1 Historical Evolution of Anti-Corruption Frameworks in Hungary

Hungary's anti-corruption framework has evolved through distinct phases since its democratic transition in 1989. The initial post-communist period (1989-2004) focused on establishing basic democratic institutions and market economy structures, with anti-corruption efforts primarily driven by EU accession requirements.[36] This period saw the establishment of formal anti-corruption mechanisms, including conflict of interest laws, financial disclosure requirements, and specialized anti-corruption units within law enforcement.

The EU membership period (2004-2010) brought increased emphasis on harmonization with European governance standards. Hungary implemented additional anti-corruption measures, including whistleblower protection legislation, procurement transparency requirements, and strengthened auditing mechanisms.[37] These reforms established a relatively comprehensive formal anti-corruption framework aligned with European standards.

Since 2010, Hungary has undergone significant governance changes under the Fidesz government led by Viktor Orban. This period has seen controversial constitutional and institutional reforms that critics argue have weakened checks and balances while centralizing authority.[38] Anti-corruption policies during this period have emphasized administrative efficiency and technological solutions while reducing institutional autonomy in key oversight areas, including the judiciary and media.[39]

4.2 Manifestations of Duress in Hungarian Anti-Corruption Efforts

4.2.1 Political Duress: Institutional Autonomy and Independence

Political pressure on anti-corruption institutions in Hungary operates through multiple mechanisms that parallel dynamics observed in the Kozeny-Socar case. The European Commission's Rule of Law reports have highlighted concerns regarding the independence of Hungary's judiciary, noting that the National Judicial Council has 'limited powers to counterbalance the powers of the President of the National Office for the Judiciary.'[40] This institutional arrangement creates potential for political pressure on corruption-related cases.

The prosecution service has faced similar concerns regarding its institutional independence. Unlike many EU member states, Hungary's Prosecutor General is not subject to effective political oversight, creating what critics describe as accountability gaps.[41] Reports from legal practitioners indicate informal pressure on case selection and prioritization, with politically sensitive corruption investigations allegedly receiving differential treatment.[42]

Media independence, crucial for exposing corruption, has declined according to international assessments. The Media

[36] Meyer – Sahling 2011:235 - 240.
[37] Meyer – Sahling – Varga 2018:130 - 134.
[38] Kornai 2015: 35 - 42.
[39] Bajomi – Lazar 2019: 622 - 625.
[40] European Commission 2023: 5 -7.
[41] Venice Commission 2012: 14 - 18.
[42] Ligeti 2019: 12 - 15.

Freedom Rapid Response mechanism has documented patterns of regulatory pressure, economic coercion through advertising allocation, and ownership concentration that compromise investigative reporting on corruption issues.[43] These pressures represent a form of structural duress that limits public accountability for corruption.

4.2.2 Economic Duress: Public Procurement and EU Funds

Economic forms of duress in Hungary emerge most visibly in public procurement practices, particularly those involving European Union funds. The European Anti-Fraud Office (OLAF) has consistently identified Hungary as having among the highest irregularity rates in EU fund utilization.[44] Analysis of procurement patterns reveals systematic biases, with companies connected to government figures receiving disproportionate shares of contracts, often with limited competition.[45]

The economic dependency created by EU funds (approximately 4% of GDP annually) creates a complex duress dynamic.[46] On one hand, fund administration creates opportunities for preferential allocation that can be used to reward political loyalty and punish dissent. On the other hand, potential suspension of funds represents external pressure that has occasionally moderated governance practices.

For businesses, economic duress operates through both inducements and threats. Companies report informal expectations of political contributions or subcontracting to specific firms to secure government contracts.[47] Those who resist such expectations describe patterns of administrative obstacles, tax audits, and regulatory scrutiny that parallel the pressure mechanisms observed in the Kozeny-Socar case.

4.2.3 Legal Duress: Selective Enforcement and Procedural Obstacles

Legal forms of duress in Hungarian anti-corruption efforts manifest through selective enforcement patterns and procedural complexities. Transparency International's analysis of corruption prosecutions in Hungary identifies significant disparities in case progression based on political sensitivity.[48] High-level corruption allegations involving government-connected individuals typically face procedural delays, jurisdictional complications, or narrow investigative scopes that limit accountability.

The legal framework itself has evolved in ways that create structural duress. Legislative changes have narrowed the definition of corruption offenses, restricted standing for public interest litigation, and limited access to information, creating what legal scholars term ‘legalized corruption’—practices that while technically legal, violate governance norms.[49] These reforms create legal obstacles to accountability while maintaining formal compliance with anti-corruption requirements.

Whistleblower protection, crucial for corruption detection, remains weak in practice despite formal legislative

[43] Media Freedom Rapid Response 2022: 8 - 12.
[44] European Anti-Fraud Office 2023: 24 - 26.
[45] Fazekas – Toth 2016: 325 - 330.
[46] European Commission 2022b:126 - 128.
[47] Transparency International Hungary 2021: 18 - 22.
[48] K-Monitor 2021: 33 - 38.
[49] Kaufmann – Vicente 2011: 199 - 205.

provisions. Those who report corruption face professional retaliation, social ostracism, and in some cases, legal counteractions.[50] This creates a chilling effect that parallels the witness intimidation observed in the Kozeny-Socar case.

4.3 Comparative Analysis: Parallels with the Kozeny-Socar Case

The Hungarian context reveals striking parallels with the pressure dynamics identified in the Kozeny-Socar case, despite the different political systems and historical contexts. Both cases illustrate how duress operates through networked relationships rather than isolated incidents, creating systems where formal rules and informal practices diverge significantly.

In both contexts, economic dependencies create leverage that compromises institutional independence. In the Kozeny case, this operated through Azerbaijan's oil-dependent economy and individual financial inducements. In Hungary, EU funds and public procurement create similar dependency structures that generate compliance pressure.

Political duress manifests in both cases through centralized authority with limited accountability mechanisms. The manipulation of institutional appointments, resource allocations, and regulatory frameworks serves similar functions across these different contexts, illustrating how pressure on anti-corruption efforts transcends specific political systems.

Legal duress operates in both contexts through procedural complexity and selective enforcement. The exploitation of jurisdictional boundaries in the Kozeny case parallels Hungary's legal reforms that create procedural obstacles to corruption investigations. Both illustrate how legal systems can be manipulated to provide a façade of accountability while undermining substantive anti-corruption efforts.

The comparative analysis suggests that duress in anti-corruption efforts follows similar patterns across diverse contexts, operating through networks that blur public and private interests. This networked nature makes duress particularly resistant to traditional accountability mechanisms, which typically presume clearer boundaries between public and private spheres.

5. THEORETICAL IMPLICATIONS: UNDERSTANDING DURESS IN ANTI-CORRUPTION FRAMEWORKS

5.1 The Network Theory of Duress in Hungarian Governance

The analysis of the Kozeny-Socar case and Hungarian governance reveals patterns that suggest a network theory of duress in anti-corruption contexts, with particular relevance to Hungary's institutional evolution. This theoretical framework conceptualizes duress not as isolated incidents of pressure but as interconnected systems that operate across institutional boundaries and hierarchies, a pattern clearly evident in Hungary's governance structure since 2010.[51] Scholars like Szelenyi and Csillag have documented how duress functions as a networked phenomenon that integrates formal and informal governance mechanisms in ways that compromise anti-corruption effectiveness while maintaining institutional facades.[52] This networked nature of duress helps explain why formal compliance with international standards has

[50] Kallay 2021: 240 - 245.
[51] Varnagy 2020:372 - 378.
[52] Csillag -Szelenyi 2015:25 - 30.

not prevented substantial corruption vulnerabilities in the Hungarian context.[53]

Resource dependencies constitute a primary mechanism through which duress operates within Hungary's governance networks. The centralized control over critical resources—ranging from European Union funds to domestic budget allocations and media advertising revenues—creates leverage points that can be deployed to compromise anti-corruption efforts throughout Hungary's institutional landscape.[54] These dependencies operate both formally, through official budget allocations to ostensibly independent institutions such as the judiciary and regulatory agencies, and informally, through preferential access to state contracts and subsidies. As Scheiring documents, the management of EU funds, which constitute approximately 4% of Hungary's GDP annually, represents a particularly significant resource dependency that creates duress potential throughout the governance system.[55] Research by Fazekas and colleagues identifies how local governments, educational institutions, and civil society organizations dependent on centrally allocated resources face implicit pressure that compromises their capacity to support anti-corruption initiatives.[56] This resource-based duress has gradually transformed Hungary's institutional landscape, creating compliance incentives that affect both public and private sector behavior. Innes and Kovács note that these resource dependencies create what they term ‘vertical networks of dependence’ that facilitate systemic control while maintaining formal institutional autonomy.[57]

Reciprocity obligations emerge as a second critical mechanism through which duress operates within Hungary's governance networks. The integrated systems of favors and obligations that characterize Hungary's public-private relationships create pressure for compliance with established practices that may facilitate corruption.[58] These reciprocity networks blur the boundaries between public and private interests, making traditional conflict of interest frameworks insufficient for addressing the resulting governance challenges. Within Hungary's procurement system, for example, Toth and Hajdu document how the informal expectations of political loyalty in exchange for contract opportunities create reciprocity obligations that compromise procedural integrity.[59] Similarly, Jancsics observes that appointment patterns within regulatory agencies establish personal obligations that influence subsequent oversight decisions.[60] These reciprocity networks have expanded significantly within Hungary's governance system, creating duress through expectations of mutual support that transcend formal accountability mechanisms. As Magyar argues, these networks create what he terms a ‘relational economy’ where transaction decisions depend on loyalty and connections rather than impartial criteria.[61]

Information asymmetries constitute a third mechanism through which duress operates within Hungary's governance networks. Differential access to

[53] Bozoki – Hegedus 2018: 1180 - 1185.
[54] Czibik – Fazekas – Toth 2020: 610 - 615.
[55] Scheiring 2020: 215 - 220.
[56] Fazekas 2022: 350 - 335.
[57] Innes – Kovacs 2018: 95 - 102.
[58] Martin – Ligeti – Bardos 2022: 138 - 142.
[59] Hadju – Papay – Toth 2018:45 - 50.
[60] Jancsics 2017:15 - 18.
[61] Magyar 2019: 110 - 115.

information—particularly regarding regulatory decisions, procurement opportunities, and investigation priorities—creates vulnerability to pressure throughout the governance system. Those with privileged information can selectively disclose or withhold it to influence anti-corruption proceedings, creating informational duress that compromises accountability. Research by the K-Monitor documents how the decline in transparency regarding state asset management, public procurement decisions, and regulatory proceedings has enhanced information asymmetries within Hungary's governance system that create duress by enabling strategic information management that protects connected interests while maintaining formal compliance with disclosure requirements. [62] The reduced independence of Hungary's media has further exacerbated these informational asymmetries, limiting the public dissemination of corruption-related information and enhancing the effectiveness of informational duress. As Bajomi-Lazar details, the concentration of media ownership has created information monopolies that facilitate selective disclosure patterns.[63]

These mechanisms operate synergistically across the typology of duress forms identified earlier (political, economic, legal, social, and physical), creating integrated pressure systems within Hungary's governance networks. Research by the Hungarian Civil Liberties Union documents how these pressure dimensions reinforce each other, creating comprehensive control systems that preserve formal institutional facades while compromising substantive independence. [64] The networked nature of duress in Hungary explains why formal anti-corruption reforms have often yielded disappointing results—they target individual pressure points rather than addressing the interconnected networks that integrate these pressure mechanisms. Hungary's experience illustrates how anti-corruption initiatives focused on technical compliance with international standards may prove insufficient when duress operates through networked relationships that transcend formal institutional boundaries. As Bozoki and Hegedus argue, this network theory of duress offers a framework for understanding the persistence of corruption vulnerabilities despite Hungary's relatively comprehensive formal anti-corruption framework. [65]

5.2 Duress and Institutional Resilience in the Hungarian Context

The case studies of Hungary's governance evolution suggest that institutional resilience against corruption depends significantly on resistance to duress. Traditional anti-corruption approaches emphasize transparency, accountability, and enforcement but may underestimate the importance of institutional autonomy and capacity to withstand pressure—a particularly relevant consideration in Hungary's current institutional landscape.[66]

Within Hungary, institutions that have demonstrated greater resistance to corruption-enabling duress share important characteristics that offer insights for institutional design. The Constitutional Court during its earlier period of independence exemplified the importance of

[62] K-Monitor 2021: 40 -43.
[63] Bajomi-Lazar – Horvath 2021: 10-15.
[64] HCLU 2022: 50 - 55.
[65] Bozoki – Hegedus 2018: 1185-1190.
[66] Voros 2015: 180 - 185.

multiple accountability vectors in resisting political pressure.[67] By maintaining diverse accountability relationships—including independent appointment mechanisms, international judicial networks, and public legitimacy—the Court initially demonstrated enhanced capacity to withstand centralized pressure. Uitz documents how, as institutional reforms gradually reduced these multiple accountability connections, the Court's vulnerability to duress increased correspondingly.[68] This pattern suggests that Hungary's anti-corruption institutions would benefit from diversified accountability relationships that prevent pressure from being channeled through single control points. Pech and Scheppele argue that this institutional resilience factor has been systematically weakened through governance reforms that concentrate accountability vectors.[69]

Professional insulation represents another critical dimension of institutional resilience that has proven particularly relevant in Hungary's judicial and civil service contexts. The career protection mechanisms that once insulated professional civil servants from arbitrary removal have been systematically weakened through administrative reforms, creating heightened vulnerability to duress.[70] Hajnal observes that where professional standards and career protection remain stronger, as in certain technical agencies with European institutional connections, resistance to corruption-enabling pressure appears more robust.[71] The gradual erosion of professional autonomy across Hungary's governance institutions illustrates how career insecurity can function as a duress mechanism that compromises anti-corruption effectiveness. Research by Varnagy documents how the restructuring of public administration has created increased dependency on political patrons for career advancement, reinforcing compliance with informal governance norms that may facilitate corruption.[72]

Resource independence emerges as a third critical resilience factor with particular relevance to Hungary's governance structure. Institutions with dedicated funding streams and operational autonomy have demonstrated enhanced capacity to resist economic forms of duress.[73] The Hungarian State Audit Office's relative operational independence during certain periods illustrates how financial autonomy can strengthen institutional resistance to pressure. However, as Ligeti documents, increasing budgetary centralization across Hungary's governance system has created expanded opportunities for resource-based duress, highlighting the importance of financial independence for effective anti-corruption functions.[74] Voros notes that financial pressures operate as subtle control mechanisms that preserve formal institutional independence while compromising operational autonomy through budgetary constraints and resource dependencies.[75]

Normative cohesion within institutions provides a final critical resilience dimension evident in Hungary's institutional landscape. Organizations with strong internal ethical frameworks and professional cultures

[67] Fleck 2017: 800 - 810.
[68] Uitz 2019: 8-12.
[69] Pech – Scheppele 2017: 15-20.
[70] Meyer-Sahling 2011: 245-250.
[71] Hajnal 2020: 190-195.
[72] Varnagy 2020: 380 - 385.
[73] Ligeti 2019: 18-22.
[74] Voros 2015:190 - 195.
[75] Makai – Peto 2021: 25 -30.

demonstrate enhanced resistance to informal pressure.[76] Within Hungary's judicial system, Fleck observes that courts with stronger collegial governance and established ethical traditions have shown greater resistance to duress than more isolated or recently established units.[77] This pattern suggests that anti-corruption reforms should prioritize ethical cohesion alongside formal rules, recognizing that normative frameworks often determine institutional responses to pressure. Research by the Hungarian judges' association documents how professional identity and collective ethical commitment provide important protection against individualized pressure that might otherwise compromise judicial independence in corruption-related proceedings.[78]

These characteristics of institutional resilience suggest that Hungary's anti-corruption reforms should prioritize resistance to duress alongside traditional transparency and accountability mechanisms. By focusing on institutional capacity to withstand pressure rather than merely formal compliance with anti-corruption standards, reforms could address the underlying vulnerabilities that have compromised previous anti-corruption initiatives in the Hungarian context.[79] As Meyer-Sahling argues, superficial institutional modifications without corresponding resilience-building measures have consistently failed to deliver substantive anti-corruption results in the Hungarian context.[80] The following section explores practical applications of these theoretical insights to Hungary's governance challenges.

6. POLICY IMPLICATIONS: STRENGTHENING ANTI-CORRUPTION EFFORTS AGAINST DURESS

6.1 Institutional Design Principles for Hungarian Governance

The analysis of duress in the Kozeny-Socar case and Hungarian governance suggests several institutional design principles particularly relevant to strengthening anti-corruption efforts within Hungary's specific governance context. The principle of distributed authority structures emerges as especially critical in Hungary's increasingly centralized institutional landscape. Scholars like Muller have documented how Hungary's post-2010 governance model has concentrated authority within unified command structures, creating singular pressure points that facilitate duress.[81] Re-establishing distributed authority, particularly within anti-corruption functions, would create institutional redundancy that complicates pressure efforts. Within Hungary's investigative and prosecutorial systems, Meyer-Sahling and Varga argue that overlapping jurisdictional competencies among multiple bodies—potentially including specialized anti-corruption units with independent leadership—would reduce vulnerability to centralized duress while maintaining operational coordination.[82] Research by the Hungarian Helsinki

[76] Fleck 2017: 820 -825.
[77] Makai – Peto 2021: 35 - 40.
[78] Muller 2013: 140 - 145.
[79] Kelemen 2020: 485 - 490.
[80] Meyer-Sahling – Varga 2018: 135-140.
[81] Muller 2013: 140 - 145.
[82] Meyer-Sahling – Varga 2018: 135-140.

Committee demonstrates how centralized authority structures have facilitated targeted pressure on corruption investigations involving politically connected figures.[83]

The insulation of career pathways represents a second critical design principle for Hungary's anti-corruption institutions. Hajnal documents how the professional advancement systems within Hungary's civil service and judiciary have become increasingly vulnerable to political influence, creating career-dependent pressure points that facilitate duress.[84] Establishing merit-based advancement mechanisms with transparent criteria and multi-stakeholder oversight would strengthen professional autonomy among anti-corruption officials. For Hungary's prosecutors and investigators in particular, Meyer-Sahling argues that security of tenure provisions that prevent arbitrary reassignment of sensitive cases would provide essential protection against career-based pressure that has compromised previous anti-corruption initiatives.[85] These career protections would address what Bozoki terms the 'loyalty premium' that has emerged within Hungary's governance institutions, where advancement increasingly depends on political alignment rather than professional merit.[86]

Resource diversification constitutes a third essential design principle for addressing Hungary's specific duress vulnerabilities.[87] Ligeti demonstrates how the centralization of budgetary authority has created economic leverage points that enable pressure on previously independent institutions.[88] Anti-corruption bodies within Hungary would benefit from diversified funding models that reduce dependency on single decision points. Potential approaches include dedicated funding streams established through constitutional provisions, multi-year appropriations that transcend electoral cycles, and public-private partnerships that create resource redundancy while maintaining operational independence.[89] The economic leverage created by Hungary's management of European Union funds further underscores the importance of resource independence for anti-corruption functions, as documented by Fazekas and Toth in their analysis of corruption risk in public procurement.[90]

Transnational accountability mechanisms offer a fourth critical dimension for addressing duress within Hungary's governance context. Given the limitations of purely domestic accountability in settings where duress pervades national institutions, Sedelmeier argues that Hungary's European Union membership provides important opportunities for transnational oversight.[91] The strengthening of European judicial review mechanisms, peer evaluation systems within EU frameworks, and funding conditionality tied to governance standards would create accountability vectors that transcend domestic pressure systems. These transnational accountability relationships are particularly important given Hungary's ongoing negotiations regarding rule of law standards and European funding access, as documented by Kelemen in his analysis of

[83] Helsinki Committee 2019: 40-45.
[84] Hajnal 2020: 195-200.
[85] Meyer-Sahling – Varga 2018: 135-140.
[86] Bozóki 2015: 20-25.
[87] Sedelmeier 2014: 115-118.
[88] Ligeti 2019: 22-26.
[89] Scheppele 2018: 555-560.
[90] Fazekas – Toth – King 2016: 380-385.
[91] Sedelmeier 2014: 115-118.

EU leverage mechanisms.[92] The effectiveness of these accountability mechanisms depends on what Scheppele terms 'systemic resilience' against legal circumvention tactics designed to maintain formal compliance while evading substantive reform requirements.[93]

Technological safeguards represent a final design principle for addressing duress vulnerabilities within Hungary's specific institutional context. Digital systems can reduce vulnerability to discretionary pressure by automating processes previously subject to individual intervention. Within Hungary's public procurement system, where corruption risks have been particularly pronounced, Fazekas demonstrates how automated evaluation mechanisms for routine contracts would reduce opportunities for preferential allocation under pressure.[94] Similarly, algorithmic case assignment within Hungary's judicial system would complicate targeted pressure on specific cases, while blockchain-based record systems for property and corporate registries would enhance transparency while resisting manipulation attempts. These technological safeguards would address what Martin and colleagues describe as the 'discretionary privatization' of public resources that has characterized Hungary's recent governance trajectory.[95]

6.2 Comprehensive Application to the Hungarian Governance System

Applying these principles to Hungary's specific governance challenges reveals several integrated reform pathways for strengthening anti-corruption efforts against systemic duress. Hungary's judiciary requires structural reforms that address its institutional vulnerability to centralized pressure while preserving operational effectiveness. The current power imbalance between the National Judicial Council and the National Office for the Judiciary creates a concentrated authority structure that facilitates duress through administrative decisions affecting judicial careers and case management. A rebalanced governance framework that strengthens the National Judicial Council's oversight capacity—particularly regarding judicial appointments, promotions, and case allocation—would distribute power more effectively across Hungary's judicial system. This institutional recalibration would need to incorporate transparent merit-based selection processes for judges with multi-stakeholder participation, reducing exposure to the political duress that has compromised judicial independence in corruption-related proceedings. The pattern of judicial reorganizations that has characterized Hungary's recent governance approach has created career insecurity that functions as a duress mechanism; structural protections against arbitrary reassignment would strengthen judicial resilience against such pressure.

Hungary's prosecution service presents particular challenges regarding independence from political duress that require comprehensive reform approaches. The current appointment structure for the Prosecutor General creates minimal accountability while enabling significant prosecutorial discretion—a combination that has facilitated selective enforcement patterns in corruption cases. Reformed appointment procedures incorporating parliamentary supermajority requirements, defined term limits, and performance accountability

[92] Kelemen 2020: 490-495.
[93] Scheppele 2018: 555-560.
[94] Fazekas – Toth – King 2016: 380-385 Helsinki Committee 2019: 48-52.
[95] Martin – Ligeti – Bárdos 2022: 142-145 Holmberg – Rothstein 2011: 15-18.

would reduce vulnerability to political pressure while maintaining necessary prosecutorial authority. Within the operational framework, case assignment systems that limit discretionary reassignment of sensitive investigations would provide essential protection against the selective enforcement patterns documented in politically connected corruption cases. The current potential for centralized intervention in specific prosecutorial decisions creates procedural leverage points that enable duress; a more distributed authority structure within the prosecution service would reduce these vulnerabilities while preserving necessary coordination functions.

Hungary's public procurement system requires integrated safeguards that address the documented vulnerabilities to duress identified in procurement practices. The current system has demonstrated systematic biases in contract allocation, with competition limitations particularly pronounced in European Union-funded projects. Automated evaluation mechanisms for routine procurement decisions would reduce opportunities for discretionary intervention, while mandatory publication of beneficial ownership information for contracting entities would enhance transparency regarding potential conflicts of interest. Strengthened procedural protections—including modified appeals processes, extended standstill periods for review, and enhanced documentation requirements—would collectively reduce opportunities for preferential allocation under pressure. Pre-emptive European Commission review of major procurements involving EU funds could provide additional protection against the economic duress that has compromised procurement integrity, particularly in strategically important sectors where corruption risks have been most pronounced.

Whistleblower protection mechanisms require significant strengthening within Hungary's governance framework to address their current vulnerability to multiple forms of duress. Despite formal legal protections, whistleblowers in Hungary face professional retaliation, social ostracism, and in some cases legal counter-measures that collectively discourage corruption reporting. Enhanced legal frameworks—incorporating anonymous reporting channels with procedural protections, robust anti-retaliation provisions with meaningful penalties for violators, and dedicated support services for those who expose corruption—would strengthen this essential accountability mechanism. These protections would need to address both public and private sector whistleblowing, recognizing that corruption in Hungary frequently involves public-private interactions that cross institutional boundaries. The current implementation gaps in whistleblower protection create information asymmetries that facilitate corruption; stronger practical protections would reduce these vulnerabilities while enhancing detection capacity.

Media plurality initiatives represent a final critical dimension for addressing duress vulnerabilities within Hungary's anti-corruption framework. The current media landscape is characterized by ownership concentration and regulatory pressure that limit investigative capacity regarding corruption. Systemic measures to promote plurality and independence—including transparent ownership disclosure requirements, platform-neutral regulatory frameworks administered by multi-stakeholder bodies, and public interest media funding with appropriate governance safeguards—would strengthen this crucial accountability channel. The informational dimension of anti-corruption efforts depends significantly on media capacity to investigate

and publicize potential corruption; the current constraints on media independence create informational duress that compromises this function. A more pluralistic media environment would create additional accountability vectors that complicate pressure efforts within Hungary's governance system

These measures acknowledge that in contexts where duress pervades governance systems, technical anti-corruption measures alone prove insufficient. Reforms must address the underlying pressure systems that compromise institutional performance.

6.3 Addressing Transnational Dimensions in Hungarian Anti-Corruption Efforts

Hungary's position within transnational governance networks creates both vulnerabilities and opportunities for addressing corruption-enabling duress. The Kozeny-Socar case provides instructive parallels for Hungary's engagement with transnational corruption dynamics, suggesting several approaches particularly relevant to strengthening Hungary's anti-corruption capacity. Coordinated prosecutorial strategies represent an essential dimension for addressing corruption cases that transcend national boundaries.[96] Hungary's current prosecutorial cooperation with European partners remains procedurally constrained, limiting effective collaboration on complex corruption investigations.[97] Bard and Ballegooij argue that enhanced integration with Eurojust and the European Public Prosecutor's Office would strengthen Hungary's capacity to address corruption through distributed authority structures that reduce vulnerability to domestic pressure.[98] Joint investigation teams between Hungarian authorities and European counterparts, comprehensive evidence-sharing protocols that transcend jurisdictional boundaries, and coordinated charging decisions across national systems would collectively distribute authority in ways that complicate pressure efforts within any single legal system since Hungary's selective engagement with European prosecutorial cooperation could created accountability gaps that facilitate duress; more integrated cooperation would strengthen resilience against such pressure.[99]

The protection of witnesses and whistleblowers within transnational corruption investigations requires particular attention given Hungary's institutional vulnerabilities. Witnesses in high-profile corruption cases involving cross-border elements have faced intimidation that compromises testimonial integrity.[100] Enhanced protection mechanisms—including anonymous testimony options within Hungarian procedural law, residential relocation programs with European coordination, and economic support to mitigate financial pressure—would strengthen this critical evidentiary dimension.[101] The duress experienced by witnesses in the Kozeny-Socar case parallels documented challenges within Hungarian corruption proceedings, highlighting the need for stronger transnational witness protection coordination.[102]

[96] Batory 2016: 690-695.
[97] Benedek – Diehl 2020: 60-65.
[98] Ballegooij – Bard 2018: 170-173.
[99] Holmberg – Rothstein 2011: 15-18.
[100] Transparency International Hungary 2021: 30-35.
[101] European Commission 2023: 15-20.
[102] Kallay 2021: 245-250.

Asset recovery mechanisms represent a critical tool for addressing corruption facilitated by transnational financial flows, including those affecting Hungary's governance system.[103] Hungary's current asset recovery framework contains procedural gaps that limit effectiveness, particularly regarding assets held through complex international ownership structures.[104] Improved confiscation mechanisms—including expanded non-conviction-based forfeiture options aligned with European standards, enhanced beneficial ownership transparency requirements for companies operating in Hungary, and streamlined mutual legal assistance procedures with key financial jurisdictions—would strengthen Hungary's capacity to recover corruption proceeds.[105]

Corporate accountability frameworks require particular attention given the role of multinational corporations in Hungary's economy, including their potential involvement in corruption schemes.[106] Hungary's current corporate liability provisions contain enforcement gaps that limit their deterrent effect, particularly regarding foreign companies operating through local subsidiaries.[107] Fazekas and Toth demonstrate how strengthened accountability mechanisms—including meaningful penalties for inadequate compliance systems within corporations operating in Hungary, executive liability provisions that pierce corporate veils in corruption cases, and debarment consequences for companies involved in corruption—would provide important pressure counterbalances.[108] The economic leverage exercised by major corporations creates duress vulnerability within Hungary's governance system; Gyory argues that enhanced corporate accountability would reduce this vulnerability while maintaining Hungary's investment attractiveness through integrity-based competition.[109]

Civil society engagement provides a final critical dimension for addressing transnational corruption affecting Hungary's governance.[110] Hungarian civil society organizations face increasing constraints on their anti-corruption monitoring capacity, limiting an important accountability vector.[111] Formalized roles for civil society in monitoring corruption cases—including observer status in court proceedings involving significant corruption allegations, independent case monitoring with procedural protections, and structured public reporting with appropriate legal safeguards—would create additional accountability mechanisms that transcend institutional boundaries.[112] The transnational connections maintained by Hungary's civil society organizations provide important accountability links that complicate domestic pressure efforts, underscoring their importance in addressing corruption-enabling duress.[113] Moreover, these civil society functions would complement Hungary's formal anti-corruption institutions while providing redundancy that enhances

[103] Gyory 2019: 470-475.
[104] Fazekas – Toth 2016: 330-333.
[105] Fazekas 2022: 355-360.
[106] European Commission 2022b: 130-132.
[107] Gyory 2019: 475-478.
[108] Fazekas – Toth 2017: 45-48.
[109] Gyory 2019: 472-474.
[110] Benedek – Diehl 2020: 65-68.
[111] HCLU 2022: 55-58.
[112] K-Monitor 2021: 45-48.
[113] Bajomi-Lazar – Horvath 2021: 15-18.

system resilience against pressure.[114] These measures acknowledge that duress in transnational corruption cases operates through jurisdictional gaps and enforcement disparities, requiring coordinated responses that transcend national boundaries.

7. Conclusion

This analysis of duress in anti-corruption efforts, through the lens of the Kozeny-Socar case and Hungarian governance, reveals how pressure dynamics can neutralize even well-designed accountability systems. The findings suggest that effective anti-corruption strategies must address not only the technical aspects of corruption prevention and detection but also the pressure systems that compromise institutional performance. The network theory of duress proposed in this paper offers a framework for understanding how pressure operates through interconnected systems rather than isolated incidents. This networked perspective explains why traditional anti-corruption reforms often yield disappointing results—they target individual components of corruption systems without addressing the pressure dynamics that integrate these components.

The comparative analysis of Azerbaijan and Hungary, despite their different political systems and historical trajectories, reveals striking similarities in how duress manifests in governance contexts. This suggests that duress follows similar patterns across diverse settings, operating through resource dependencies, reciprocity obligations, and information asymmetries that transcend specific political arrangements. Future research should explore additional dimensions of duress in anti-corruption efforts, including psychological factors that influence individual resistance to pressure, technological approaches to reducing vulnerability to duress, and the role of international organizations in providing accountability alternatives when domestic institutions succumb to pressure.

Practical anti-corruption efforts should incorporate duress resistance as a central design principle, focusing on institutional resilience alongside traditional transparency and accountability mechanisms. This includes distributed authority structures, insulated career pathways, diversified resource dependencies, transnational accountability mechanisms, and technological safeguards that collectively reduce vulnerability to the pressure dynamics that facilitate corruption. By conceptualizing corruption not merely as rule violation but as the product of complex pressure systems, this analysis contributes to a more nuanced understanding of why corruption persists despite expanded formal anti-corruption frameworks. This perspective shifts focus from technical compliance to institutional resilience, offering new approaches to strengthening governance against corruption in contexts where duress pervades institutional functions.

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[114] Benedek – Diehl 2020: 68-70.

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