

Federica Cristani (ed.)
Cristina Elena Popa Tache (ed.)

Tempore Mutationis in International and Comparative Law



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**Tempore Mutationis in International and
Comparative Law**

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Activity

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Activity

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Publications

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Preface

Editors

*Senior researcher PhD. **Federica Cristani**, Head of the Centre for International Law at the Institute of International Relations in Prague, Czech Republic*

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This volume contains the scientific papers presented at *the 3rd Conference on Comparative and International Law* that was held on 23 June 2023 online on Zoom. The conference is organized by the Society of Juridical and Administrative Sciences. More information about the conference can be found on the official website: <https://comparativelawconference.eu>.

The scientific studies included in this volume are grouped into three chapters:

- *The Season of Changes for International and European Law.* The papers in this chapter refer to: the possibility of a law of all forms of life in the context of transdisciplinary mutations in international law; investment screening mechanisms in times of Covid-19: national approaches; the need for international legislation regarding the use of generative artificial intelligence in education and scientific research; recent judicial resistance against the primacy and authority of EU law by constitutional courts in some member states: a survey of literature; the relationship between EU citizenship and the right to vote; judicial error in European law; digital wallet: economic and legal implications in the digital era; the individual as a subject of public international law and procedural law of reparation.
- *The Limitlessness of Comparative Law.* This chapter includes papers on: piercing the corporate veil: lack of legislation, proposals to change an existing law, legislation; suspension of the procedure by the national court that notified ECJ for a preliminary ruling, in the context of the recent jurisprudence of the European Court of Justice; the right to non-self-incrimination and the false testimony – comparative law aspects; new trends in comparative law: cross-fertilisation; organized crime - aspects of comparative law; comparative analysis of the institute of confiscation with special emphasis on the Republic of North Macedonia; artificial intelligence: civil liability 3.0.
- *Practical Realities in Our Focus.* The papers in this chapter refer to: financial mechanisms of the European Union to support of agri-food niche

companies of fish farmers and foresters in crises situations; recidivism - cause of overcrowding in prisons in Romania; inheritance rights of the surviving spouse: study of comparative law; analysis of fraud risk regarding the real beneficiary in relation to international sanctions; the taste of sin: Polish sugar tax; social media and legal challenges on data protection in criminal proceedings: international standards and the case of Albania.

This volume is aimed at practitioners, researchers, students and PhD candidates in juridical sciences, who are interested in recent developments and prospects for development in the field of comparative and international law.

We thank all contributors and partners and are confident that this volume will meet the needs for growing documentation and information of readers in the context of globalization and the rise of dynamic elements in comparative and international law.

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**THE SEASON OF CHANGES FOR
INTERNATIONAL AND EUROPEAN LAW**

The Possibility of a Law of All Forms of Life in the Context of Transdisciplinary Mutations in International Law

Researcher PhD. **Cristina Elena POPA TACHE**¹

*Why are you jurists silent about that which concerns you?*²

Abstract

*"Tomorrow will know a culture richer in creation and, at the same time, more suited to human's body and soul than that of today."³ Undeniably, creation exists in everything. The law itself is also a creation, including in the sense of establishment. It is a process dedicated to life as a whole, especially the rights that can be identified so that life in all its forms can enjoy respect, protection and evolution. Everyone's perception of the legal norm should be one of trust, interest, understanding, satisfaction and even joy. Of all, next to the law of nature or canon law, a law of all beings could not exist without the best possible combination of law, respect for life, gratitude and even love in its spiritual rather than philosophical sense, as these two new rights are perceived and manifested by people. A law of all forms of life seen as a body of legal rules would be a higher field of law which would have as subfields: human rights, animal rights, nature rights and other tangential special rights. We are faced with the possibility of reorganising law. My research will focus on a new application of transdisciplinary methodology to international law, approached from the angle of the multiple mutations of our societies. The triggering factor is given by today's society experiencing an unprecedented international level, whether we are talking about technological advances, human or animal enhancement, or whether we are referring to climate change, sustainable development, global crises, armed conflicts, or financial and health reforms. The ultimate goal is to get as close as possible to a better solution for all forms of life, for the well-being of all beings, in a complete application of the concept of *vivir bien*. The research method is exploratory.*

Keywords: *international law, sustainable development, animal law, nature law, transdisciplinarity.*

JEL Classification: K33, K38, Q01

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² Giorgio Agamben, *State of Exception*, translated by Kevin Attell, University of Chicago Press, 2005, p. 87.

³ C. Rădulescu Motru, *Energy Personalism and Other Writings*, Ed. Eminescu, Bucharest, 1984, p. 593.

Research topic and rationale for its choice

The modern dynamics of international law are inclined towards the emergence of new branches of law, such as the baby global law. The rationale is that in this mode better protections can be established and specific legal relationships given by rights and obligations can be developed unhindered. In reality, this phenomenon is a subtle reorganisation of international law and specialists now have the happy opportunity to use their own legal imagination for this interesting construction. The scientific objectives of the article focus on what is between disciplines and beyond them, in as complete a way as possible, because life forms and their environment know no boundaries and it is preferable that any analysis finds those international foundations so much sought after for the research of society's evolutionary mechanisms. The methods used led to the development of this pilot study. In reality, legal norms are in fact the standard achieved by civilisation through culture, through that totality of material and spiritual values created by mankind and the institutions necessary to communicate these values.

1. Introduction

Someone said: if the rule is such a special and unique norm, it is because it constitutes its own object, a life, being at the same time produced by it. Life and norm, confused by essentiality, meet only in a forma *vivendi*, a regula *vitae*, a forma *vitae*⁴. Nothing could be truer or simpler. Beyond any philosophical speculation it is logical that the life of legal norms is about life.

I intentionally quoted Agamben at the beginning of this study, as he is one of those who somewhat refuted this idea. But, as Spanò concludes in his paper, 'if a life, in order to be a life, needs a form, and if a life is always and necessarily a form-of-life, the relation between such a concept and law, understood as the science of forms, is not as obscene or improbable as G. Agamben would like it to be. A life-form separated from law (from its qualifications, its names, its predicates) risks being a formless life, a deformed life, since a life-form separated from law is a life separated from the language and history that make it a life. To take seriously the expression 'form of life' is to give full weight to the two nouns that make up the phrase. If we are talking about forms and life, i.e. life that can be described and recognised (which, unfortunately, says nothing about its quality), then we are always talking about history and law, technique and language. Paradoxical as this conclusion may seem, thanks to Giorgio Agamben's reflections, but also against some of his conclusions, we can affirm that, for our form of life, any use of the world is also and always a use of law, or, what amounts to the same thing, that in our form of life the use of the world and the use of law

⁴ Michele Spanò, *Forms of life & uses of law*, Acta fabula, vol. 16, no. 6, "Passive Virtues': an anthropology in contretemps", September-October 2015, URL: <http://www.fabula.org/acta/document9474.php>, page accessed 12 June 2023. DOI: 10.58282/acta.9474.

permanently coincide."⁵ Even if by forms of life we generally mean forms of human life according to socio-economic conditions etc., these valences have obvious applicability to forms of life in the biological sense. Giorgio Agamben is an Italian philosopher and the subject dealt with in this article is predominantly a legal one⁶. For these reasons, with due respect, we will consider some philosophical aspects in a general way, keeping the focus on legal aspects and possibilities. Future research is expected in multidisciplinary teams that can develop this topic until concrete research results are established.

In the following we will uncover relevant literature, premises and analyses that may be useful to reach a result. Does the concept of *vivir bien* have the potential to be an anchor of this new right? On this issue we find richer debates in international doctrine on social, economic and political transitions driven by ecological and developmental concerns because this *vivir bien* is found built on the idea of harmony with both nature and those around us⁷. The law of life forms as a branch of its own seems to have been born, we cannot yet foresee its destiny or its chances of growth, but it could reorganise through its general principles sub-branches such as: human rights, nature law, animal law, sustainable development law, climate change law, etc. Today's realistic vision of law tends towards the protection of the entire planetary ecosystem and the means of protection must be found, completed and applied. This option of reorganising law by establishing common sources, principles, subjects of law and institutions is not excluded. Taken together, the regulatory results are likely to be much more effective.

2. Premise

The social construction of *buen vivir* in Ecuador has had remarkable results. It has become one of the few cases where national law has crossed borders and become international law. This is the case for the rights of the language of nature in the Constitution of Ecuador and in the Bolivian Law on the Rights of

⁵ Michele Spanò, *op. cit.*, conclusions.

⁶ The Agamben works to which I refer are Giorgio Agamben, *L'usage des corps*, Paris, Seuil, 2015; and Giorgio Agamben, *Homo sacer. Le pouvoir souverain et la vie nue*, Paris, Seuil, 1998. However, even in these works, the questions are more legal because any philosophy is anchored in what already exists.

⁷ See Adrián Beling, Ana Patricia Cubillo-Guevara, Julien Vanhulst, and Antonio Luis Hidalgo-Capitán, *Buen vivir (Good Living): A 'Glocal' Genealogy of a Latin American Utopia for the World*, in *Latin American Perspectives*, 48(3), 17-34, 2021, <https://doi.org/10.1177/0094582X211009242>; Beling Adrian E., Vanhulst Julien, Demaria Federico, Rabi Violeta, Carballo Ana E., Pelenc Jérôme, *Discursive synergies for a 'Great Transformation' towards sustainability: pragmatic contributions to a necessary dialogue between human development, degrowth, and buen vivir*, *Ecological Economics* 144: 304-313, 2018; and Artaraz, K., Calestani, M., & Trueba, M. L., *Introduction: Vivir bien/Buen vivir and Post-Neoliberal Development Paths in Latin America: Scope, Strategies, and the Realities of Implementation*, in *Latin American Perspectives*, 48(3), 4-16, 2021, <https://doi.org/10.1177/0094582X211009461>.

Mother Earth⁸. Thus, it was noted that "this vision of nature as an expression of life in its entirety allows constitutional law and other areas of law to recognize the environment and non-human animals as beings with their own value, therefore deserving respect and care, so that the legal system grants them ownership of their rights and dignity." At the constitutional level, Ecuador was the first to recognise the rights of nature. Article 71 begins, "Nature, or Pacha Mama, where life is reproduced and takes place, has the right to full respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."⁹ Bolivia adopted this approach through the Law on the Rights of Mother Earth¹⁰ (2010); the rights listed are the rights to life, diversity of life, water, clean air, balance, restoration and life without pollution. The Bolivian proposal for the rights of nature has been materialised internationally through the Universal Declaration on the Rights of Mother Earth, adopted in 2010 at the World Conference on Climate Change and the Rights of the Earth. The Plurinational State of Bolivia presented the draft resolution on harmony with nature. The term "Mother Nature" was important for the Bolivian proposal as it conveys the Andean concept of Pachamama, the symbiosis between humanity and nature, thus giving due respect to nature. The original wording gave a certain slant to the UN approach, which in any case was reflected in the final version adopted. The draft resolution on harmony with Mother Earth proposed "a possible declaration of ethical principles and values for living in harmony with Mother Earth", while the one on harmony with nature neither makes such a reference nor excludes it. According to the UN, in 2009, the United Nations General Assembly, at its sixty-fourth session, considered, among other issues, the environment, sustainable development, biodiversity, climate change, desertification, water as a basic resource and a draft resolution entitled "Harmony with Nature". The United Nations Department of Public Information mentioned the draft resolution in a press release, highlighting its novelty. While the press release referred to a resolution on harmony with Mother Earth, it is actually titled "Harmony with Nature", which is the same document that was later amended to address concerns. The declaration enshrines the rights of nature for the first time on an international scale. In its preamble, the text recognises the Earth as the source of life and relates the dependence of human rights on prior respect for the rights of ecosystems. As a living entity, the Earth is seen as an indivisible community of interdependent entities (Article 1) endowed with a series of intrinsic rights defined in Article 2. In the third article, the Declaration confers on humans and the public a series of

⁸ Constitución República Ecuadorului/The Constitution of the Republic of Ecuador, 2008, art. 71, translated into *World Constitutions Illustrated*, HeinOnline, Jefri Jay Ruchti, Maria Del Carmen Gress & J.J. Ruchti, trans., 2018.

⁹ Ibid; see also Kristen Stilt, *Animal Law. Rights of Nature. Rights of Animals. Commentary*, in „Harvard Law Review”, May 2021, vol. 134, pp. 280, 281, available at: <https://harvardlawreview.org/wp-content/uploads/2021/03/134-Harv.-L.-Rev.-F.-276.pdf>, accessed 23.04.2023.

¹⁰ Ley de Derechos de la Madre Tierra (Mother Earth Rights Law), Law 071 (2010), *apud* K. Stilt, *op. cit.*, p. 280.

private duties and institutions, starting with respecting the Earth and living in harmony with it.

At EU level, it was noted that the issue of nature's rights is not yet on the agenda of EU leaders, but it should be recalled that in March 2017, the Parliament in Brussels hosted a first meeting at the initiative of the NGO Nature's Rights. This inaugural meeting could prove to be the start of a momentum to promote nature rights on a European scale.

With this in mind, the NGO Rights of Nature has drafted a European directive with the support of experts from Harmony for Nature and IUCN¹¹ (International Union for Conservation of Nature). The text provides for the recognition of nature's rights and the framework for their protection, in particular jurisdictional rights, as well as the mechanism for sanctioning violations. Member States are invited by this draft to review their national legislation in the light of nature rights¹².

It is in this context that the recent regulation of the legal regime of the Mar Menor has emerged. In July 2020, the Spanish municipality of Los Alcazares recognised the Mar Menor lagoon as a subject of law, which illustrates the protective tendency to include various non-human entities in the modern framework of legal rights¹³. It follows that the attribution of legal rights to the ecosystem expresses a new way of ordering the relationship between humans and nature and recent debates on the attribution of legal rights to nature have focused on both the

¹¹ According to official data, the International Union for Conservation of Nature (IUCN) is one of the most important organisations promoting nature rights on the international scene. This desideratum has been at the heart of its 2017-2020 programme objectives. The Oslo Manifesto it published in 2016 further acknowledges the decades-long failure of environmental law to conserve ecosystems and advocates a non-anthropocentric, ecological law, supported by the newly created ELGA (Association pour le Droit et la Gouvernance Ecologiques/Association for Ecological Law and Governance). In addition, in April 2016, the IUCN enshrined the rights of nature among the principles of its Global Declaration on the Rule of Environmental Law. *Principle 2 of the text states that "every human being and every other living thing has the right to the preservation, protection and restoration of their health and the integrity of their ecosystems. Nature enjoys an inherent right to exist, to flourish and to evolve"*. In practice, the Union's commitment to the Rights of Nature goes back several years. As early as 2012, in its notorious resolution WCC-2012-Res-100, the organisation recommended placing "the rights of nature as the absolute cornerstone" of all its activities and decision-making, inviting its member states to participate in the elaboration of a Universal Declaration of the Rights of Nature contributing to the development of a new philosophy of human well-being".

¹² This draft directive aims to collect 1 million signatures through the European citizens' initiative procedure and the aim is to invite the Commission to present a legislative proposal to the European Parliament on the basis of the text.

¹³ Alvarez, C., *El Municipio de Los Alcázares Aprueba una Iniciativa Legislativa Para Dar Derechos Propios al Mar Menor*, 2020, material available here: <https://elpais.com/sociedad/2020-07-23/el-municipio-de-los-alcazares-aprueba-una-iniciativa-legislativa-para-dar-derechos-propios-al-mar-menor.html>, accessed 05.06.2023. See also Agnese Bellina, *A novel way of being together? On the depoliticising effects of attributing rights to nature*, „Environmental Politics”, 2023, DOI: 10.1080/09644016.2023.2209005.

normative foundations and the procedural implications of nature rights in the environmental law system¹⁴. Sustainable development often expressed through the alternative concept of *vivir bien* within integral development, has differed in its radical alternative components and has sometimes been interpreted as a "break with the development and transcendence of modernity"¹⁵.

These initiatives were utopian more than 20 years ago. I recall the dreams of some theoretical jurists who had the audacity to throw these themes into the mix. The beginnings of the rights of nature have been sprouting in doctrine since the 1970s, referring here to Christopher Stone's paper "Should Trees Have Standing? Toward Legal Rights for Natural Objects", published in 1972¹⁶. Stone began his study by pointing out that in *Descent of Man*, Darwin observes that the history of man's moral development was a continuous extension into the objects of his "social instincts and sympathies"¹⁷. Originally, each man regarded only himself and those in a very narrow circle around him; later, he came increasingly to regard "not only the welfare but the happiness of all his fellows"; then "his sympathies became more tender and widespread, extending to men of all races, to imbeciles, maimed and other members of society considered useless, and finally to the lower animals (....)".

By the same article, Stone points out, "I propose quite seriously to grant legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment-indeed, the natural environment as a whole"¹⁸. Today we are already

¹⁴ Calzadilla, Paola Villavicencio and Kotzé, Louis J., *Living in harmony with nature? A critical appraisal of the rights of mother earth in Bolivia*, „Transnational Environmental Law”, 7 (3), 397-424, 2018, doi:10.1017/S2047102518000201; and Betaille, Julien, *Rights of nature: why it might not save the entire world*, „Journal for European Environmental & Planning Law”, 16 (1), 35-64, 2019, doi:10.1163/18760104-01601004.

¹⁵ Gudynas, Eduardo, *Development alternatives in Bolivia: the impulse, the resistance, and the restoration*, NACLA Report on the Americas, 46 (1), 22-26, 2013, doi:10.1080/10714839.2013.11722007.

¹⁶ See the article by Stone, Christopher D. *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*. „Southern California Law Review”, Ed. University of Southern California, Vol. 45 (1972), pp. 450-501.

¹⁷ C. Darwin, *Descent of Man*, ed. John Murray, London, pp. 119, 120, 121, 124 (2d ed. 1874) apud C. Stone, op.cit, p. 450. See also R. Waelder, *Progress and Revolution*, ed. International Universities; First Edition, 1967, pp.39 and the following, apud C. Stone, op.cit., p. 450.

¹⁸ Stone, Christopher D., *op. cit.* In footnote 26 the author states: 'In this article I limit myself essentially to a discussion of non-animal but natural objects. I trust that the reader will be able to discern where the analysis is appropriate to our better understanding of what would be involved in granting 'rights' to other objects that are not currently endowed with rights - for example, not only animals (some of which already have rights in some senses), but also humanoids, computers and so on. Cf. National Register of Historic Places, 16 U.S.C. § 470 (1970), discussed in *Ely v. Velde*, 321 F. Supp. 1088 (E.D. Va. 1971). (...) On the other hand, the problems of selecting an appropriate ontology are problems of all language - not just the language of legal concepts, but of ordinary language as well. Consider, for example, the concept of "person" in legal or everyday speech. Is each person a fixed bundle of relationships that persists unchanged over time? Don't our molecules and cells change every moment? Our hypostatizations always have a pragmatic quality to them'. See D. Hume, *Of Personal Identity*, in *Treatises of Human Nature* - bk. 1, pct. IV, § VI, in David

on this path, thanks to Ecuador, Bolivia and Spain.

In terms of animal law or wild law, there are some studies that reach the axiom that, legally speaking, "at the most fundamental level, if nature has rights and if nature includes animals, then rights-based claims could be made on behalf of animals using nature's existing rights doctrine and strategy. A 2008 Brazilian Superior Court of Justice case, known as the *Wild Parrot case*¹⁹, illustrates this possibility." "Claims on behalf of animals" refers to the hypothesis launched in the previous chapter, where we discussed the subjects of this right, where we indicated that the subjects of this right, states, international organisations and humans could act under a special curacy (or special guardianship in the sense of care and protection) that could be legally regulated both in treaties and in domestic law, for non-native species, to defend their rights, i.e. to protect flora and fauna.

The case concerned a violation of Article 225 of the Brazilian Constitution by a person who had kept a blue-faced parrot in custody for more than two decades and in inadequate living conditions. By identifying this parrot's classification as a wild species, the connection with nature was facilitated, but the court showed particular insight by using language that went beyond concern for a wild species and applied Article 225 of the Constitution from the perspective of Brazil's "ecological approach".

Article 225 is an anthropocentric human right to an "ecologically balanced environment," not a nature rights provision, and the constitutional framing of animal protection comes through the environment, "fauna and flora"²⁰. Although the starting point was limited, the court, through a rethinking of the "Kantian, anthropocentric and individualistic concept of human dignity", approached the constitutional article as a launch to a welcome debate about nature's rights and the recognition of sentient beings in general, because nothing excuses us as humans, if we act in disregard of life forms that need our thought and conscience, especially since, as this court noted in its considerations, the treatment of animals "must no longer be based on human dignity or human compassion, but on the very dignity inherent in the existence of non-human animals". As Stilt concluded, conceptually, the court moved nonhuman animals from the environmental constraints of Article 225 to their own independent status, for which the court upheld both rights and dignity.

Hume's Philosophical Works 310-18, 324 (1854); T. Muriti, *The Central Philosophy of Buddhism*, 70-73 (1955).

¹⁹ In *S.T.J., No. 1.797.175/SP, Relator: Ministro OG Fernandes, 21.03.2019, Revista Eletrônica da Jurisprudência [R.S.T.J.]*, 13.05.2019 (Braz.), https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1806039&num_registro=201800312300&data=20190513&peticao_numero=-1&formato=PDF [<https://perma.cc/TZ76-P4E3>] (translation on file with the Harvard Law School Library) (hereinafter *Wild Parrot Case*).

²⁰ Constituição Federal [C.F.] [Constitution] art. 225 (Braz.), trans. in *World Constitutions Illustrated* (HeinOnline, Jefri Jay Ruchi, ed., Keith S. Rosenn, trans., 2020).

The Court held that: dignity should be reformulated to recognise "an intrinsic value conferred on sentient non-human beings, whose moral status would thus be recognised and would share with human beings the same moral community". Stilt also points out in his study that making judgments of such value was made possible by the Court's bringing together two aspects of jurisprudence: the protection of animals in the German and Swiss Constitutions and the rights of nature's language in the Ecuadorian Constitution and the Bolivian Law on the Rights of Mother Earth. Thus, it was noted that "this vision of nature as an expression of life in its entirety allows constitutional law and other areas of law to recognize the environment and non-human animals as beings with their own value, therefore deserving respect and care, so that the legal system grants them ownership of their rights and dignity."

In concluding his study, K. Stilt actually identifies for animal rights, a particularly relevant source of law in nature rights approaches that he finds instructive for the cause of animal rights, intellectually and practically, and states that they do not provide a model to be copied wholesale, but instead call for a careful study of parallels and disconnects, commonalities and conflicts, with the potential for significant results²¹. We note from the above that all life should be seen at the level of action or inaction, as having dignity, dignity being independent of consciousness. All these rights are closely interrelated and have many points in common, which is the reason behind the idea of a general autonomous branch encompassing the related sub-branches.

Another branch of law that may be a sub-branch of a law of life forms, is the law of the soul and bioenergy of beings²². The above results are genuine sources and have the potential to be applied for the respect of the law of the soul and bio-life of animals and nature in general for all life forms. In this context we take into account the *long-standing* customs, traditions and traditions stemming from natural law, canon law, nature law and human rights, according to which most people now manifest a belief in the existence of immaterial values such as the soul and energy fields of life forms, for example. This means that we have a long-standing, widespread and recognised practice. The totality of unwritten legal rules formed in the practice of social life and handed down, from generation to generation, by tradition, has brought us, in their journey, to a destination where the uncertainty of the existence of immaterial values is struck by legal redundancy; they exist and are required to be protected henceforth, and the issues that arise and are to be investigated relate to the applicable principles of law, the actors of this law, the institutions and mechanisms of protection and defence.

The custom has made that from a philosophical, religious and therapeutic

²¹ K. Stilt, *op. cit.*, p. 285.

²² For a comprehensive opinion see Cristina Elena Popa Tache, *Vers un droit de l'âme et des bioénergies du vivant*, Ed. L Harmattan, Collection: Logiques Juridiques, 2022, preface by Jean-Luc Martin-Lagardette.

concept, we have today a legal concept, so from this perspective, *quod erat demonstrandum*. Therefore, this analysis cannot be otherwise conceived without the combined architecture of law, respect and gratitude for life (given its sources), being built on an exploratory transdisciplinary research method made up of introspection, experiment and observation, whereby the researcher finds the problems and goes on a journey in search of answers. The inductive method, intuition and hypothesis will be joined by elements of the objective methods of the sciences, including energetic personalism as an objective science of personality. Continuing the example, we can see that in an era that seems to be one of paradox, we have laws regulating access to religion (concerning beliefs based on the soul/spirit) and laws concerning the organisation and functioning of complementary/alternative medicine activities and practices²³ (therapies based on energy and auric fields), but we still do not have a well-determined and regulated field of law of the soul and biofields, that soul environment that must be protected and unrestricted. Although these are the subject of legislative acts, from a legal point of view there is no concept subject to regulation per se. These enumerations reveal a contradictory statement, which is at the same time demonstrable in the fact that the laws listed constitute a source of law in this area.

3. Changes in the dynamics of international law

Identifying a special legal status for animals or for nature as a whole is a priority. Currently, international efforts are obsessively focused on creating a special legal status for robots, for example, while the legal status of animals remains a notion left behind, if not completely neglected in favour of the obsessive focus on the legal status of robots²⁴. As I pointed out in a previous article, man becomes the victim of his own disinterest in the effectiveness of legal regulation²⁵. If man will not be able to apply technological improvements to himself, then he will seek other avenues, including applying them to animals. There are theoretical debates on different concepts that refer to technological modification of animals, used indiscriminately and referring to animal enhancement, animal uplift, animal breeding and animal dismemberment²⁶. These discussions are not new. They have been going on for over ten years. In a paper of mine in 2022 I strongly

²³ In Romania, Law No. 118/2007 on the organisation and functioning of complementary/ alternative medicine activities and practices, published in the Official Gazette of Romania No. 305 of 8 May 2007.

²⁴ See Cristina Elena Popa Tache, *op. cit.* (*Vers un droit de l'âme...*), pp. 27-105.

²⁵ Cristina Elena Popa Tache and Marius Vasile Bârdan, *The robot as a natural or legal person. Another perspective on the concept of person*, in Nina Gumzej, Olga Sovova (eds.), *Recent Debates in Cyberspace and Artificial Intelligence Law*, Ed. Adjuris International Publishing House, Bucharest, Paris, Calgary, 2023, pp. 93-107.

²⁶ Gayozzo, Piero, *Animal Enhancement, Uplift or Augmentation? Clarifying concepts*, in „International Journal of Social Sciences and Humanities Invention”, 8(09), 6542-6547, 2021, <https://doi.org/10.18535/ijsshi/v8i09.02>.

proposed that the legal status of animals should be urgently established as similar to the legal status of a minor²⁷. Previously, in a 2009 paper, it was analysed that "Given, however, that enhanced intelligence is a benefit to (some) animals, as it is to humans, then the reasons we have for enhancing the intelligence of a human child may also apply to creating similar obligations to enhance these animals. In other words, we have a *prima facie* obligation to enhance both chimpanzee and human."²⁸ Academic debates have noted a distinction between *restitutio ad integrum* (reconstitution of human integrity) and *transformatio ad optimum* (reforming the human being in a better way)²⁹. The question remains: how will it be possible for humanity to be prepared for such an addition and enhancement of its personality if even today humans have no regulation regarding the right of ownership of their own bodies?

Many questions remain. At the international level, regulations could be subject to human rights or the rights of nature, but at the level of domestic law, nothing prevents the process of appropriate regulation for all forms of life, and here we note how certain legal concepts discussed and treated as modern legal controversies are being overtaken by others such as those that are the subject of our theory. Recent theory has seen some partial developments of the theme that is the subject of this article, and some are related to certain changes in the horizontal, along the lines of the rule of law that starts from the idea that non-human animals and humans, whether endowed with rational capacities or not, can all be victims of arbitrary power. The human ideal of non-domination means control over one's own destiny which man has at his disposal. In the case of other beings, it is true that we cannot speak of ideals, but we can speak of what ensures them a state of well-being, a peaceful life in their natural environment. This is the extrapolation we can make, based on biological, medical and environmental considerations, etc. For humans, real freedom is only possible in a form of society that gives self-government an essential place in shaping the social, economic and political contexts that in turn shape everyone's life³⁰. *Is the right to life a right of a particular species and not for all species?*

This leads, according to some authors, to the search for a new theory of

²⁷ See the full reasoning in Cristina Elena Popa Tache, *op. cit.* (*Vers un droit de l'âme...*), pp. 27-105.

²⁸ Chan Sarah, *Should we enhance animals*, in „Journal of Medical Ethics”, 2009 Nov;35(11):678-83. doi: 10.1136/jme.2009.029512. PMID: 19880704; PMCID: PMC4829097.

²⁹ Federica Lucivero and Anton Vedder, *Human Enhancement: Multidisciplinary Analyses of a Heated Debate* in Federica Lucivero and Anton Vedder (eds.), *Beyond Therapy v Enhancement? Multidisciplinary Analyses of a Heated Debate*, Pisa University Press, 2014, p. 78 and Urban Wiesing, *The History of Medical Enhancement: From Restitutio Ad Integrum to Transformatio Ad Optimum?* in Bert Gordijn and Ruth Chadwick (eds), *Medical Enhancement and Posthumanity*, Springer, 2010, pp. 9-24.

³⁰ Chaniel, Philippe, *Tous les droits pour tous... et par tous. Citoyenneté, solidarité sociale et société civile dans un monde globalisé*, „Revue du Mauss”, vol. 43, no. 1, 2014, pp. 276-291.

the rule of law that includes all sentient animals, humans and non-humans alike³¹. These developments do not exclude their extension to the whole of nature because, after all, who decides whether a being is "sentient" or not? Most authors have in theory distinguished between active and passive legal subjects, although there are several typologies. According to Adenitire, his theory may not be a sufficient condition for legal subjecthood (at some restrictive level), although it is a sufficient condition for moral subjecthood. It follows that legal systems that deny legal rights to sentient beings act immorally³². He notes that the basic idea of the rule of law bears some terminological differences, in some cases being highly questionable because it presupposes a certain type of legal subject, which brings with it certain limitations³³. Terminological problems affect (still) the notion of forms of life and for this reason, the categorisation that some authors make seems welcome, especially as many such problems arise from philosophical theories³⁴. At the level of domestic law, it becomes a matter of constitutional protection; some states have in their constitutions, for example, the protection of animals, many others do not. Only a few constitutions contain provisions on animal rights: Switzerland, India, Brazil, Slovenia, Austria, Germany, Luxembourg, Egypt and Russia³⁵. This is modern brutality. The right to life is naturally a right of all forms of life. All we have to do is identify which life forms are biologically and medically and we have the answer. Life is the synthesis of the biological, physical, chemical and mechanical processes that characterise organisms; the fact of being alive; the state of what is alive; it is the totality of biological phenomena (growth, metabolism, reproduction, etc.) that animal or plant organisms exhibit from birth to death. This is how the concept of life appears in dictionaries. Philosophy cannot change or modify the scientific realism of biology or medicine. Only specialists in biology can say whether or not a life form is a life form, following expert opinion. Only biology is the science that studies the manifestations of life from an anatomical, physiological, zoological, etc. point of view. The law does not

³¹ Adenitire, John, *The Rule of Law for All Sentient Animals*, „Canadian Journal of Law & Jurisprudence”, 35(1), 1-30, 2022, doi:10.1017/cjlj.2021.17.

³² Adenitire, J., *op. cit.*, p. 17 and Visa A. J. Kurki, *A Theory of Legal Personhood*, Oxford University Press, 2019, pp. 123-124.

³³ Ideas found in Ronald M. Dworkin, *Law's Empire*, Hart, 1998, p. 93; Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21:2 „Law and Philosophy”, p. 137, 2002; Alasdair Cochrane, *Sentientist Politics: A Theory of Global Inter-Species Justice*, Oxford University Press, 2018, in Chapter 2; and Janneke Vink, *The Open Society and Its Animals*, Palgrave Macmillan, 2020, in Chapter 5.

³⁴ See generally Boncompagni, Anna, *Wittgenstein on Forms of Life (Elements in the Philosophy of Ludwig Wittgenstein)*, Cambridge: Cambridge University Press, 2022, doi:10.1017/9781108946513.

³⁵ Eisen, Jessica & Stilt, Kristen, *Protection and Status of Animals*, in Grote, Rainer; Lachenmann, Frauke & Wolfrum, Rüdiger (eds.) *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press 2016, p. 132. See for some criticism of constitutional theory Jessica Eisen, *Animals in the constitutional state*, 15:4 „International Journal of Constitutional Law”, pp. 909-925, 2017.

allow itself to enter the game of life, because it is not interested in these hypotheses. Its main concern is the protection and conservation of all species. "Every life being equal to every other life, in spite of social inequalities, all life is justified in developing within the limits which establish it as life. This new sensitivity to life is not only a sensitivity to biological life that runs through every living being and inserts it into the vital series of the biological species. The valorisation of the biological features of the human species is only one element of a new anthropology of human life that is taking shape and to which it is a matter of proposing the contours"³⁶.

What, however, is the link between international law and the proposals for a general law of all life? Why is it important to analyse migration or transdisciplinary mutations in international law? The answer is very simple and objective: it is only at the international level that new regulatory ideas can be realised and evolve. This new law, if it were to develop, would borrow for its origins its international character in terms of its sources, principles and even subject matter. Therefore, where we are dealing only with generally accepted practice, customary international law, involving the principle of custom, comes into play. Together with general principles of law and treaties, custom is considered by the International Court of Justice, specialists, the United Nations and its Member States to be among the primary sources of international law. As this is an area in which inequalities of legal treatment must not be created by national rules that can take very different forms and content, international law has the best potential to develop the law sources, principles and mechanisms. *All rights for all*, this motto, the banner under which many associations, national or international, are fighting, fits very well here³⁷.

In international human rights law, for example, the concept of transdisciplinarity has been embraced to understand the plurivalence of the international system and the ways in which different forms of discrimination can be eradicated. The concepts of intersectionality³⁸, critical race theory and postcolonial theory have been used to better understand the ways in which different forms of discrimination intersect and can be developed through the lens of international law. Human rights are increasingly transdisciplinary, especially through the cooperation

³⁶ Le Blanc Guillaume, *Le droit à la vie*, „Raisons politiques”, 2007/1 (no. 25), pp. 57-71. DOI: 10.3917/rai.025.0057. URL: <https://www.cairn.info/revue-raisons-politiques-2007-1-page-57.htm>, Léon Bourgeois, *Solidarité*, Paris, Alcan, 1912 [7th ed.], pp. 111-119.

³⁷ Chaniel Philippe, *op. cit.*, 2014, pp. 276-291.

³⁸ See Crenshaw, Kimberlé, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, University of Chicago Legal Forum. 140, 1989, pp. 139-167. According to him, "intersectionality is the study of overlapping or intersecting social identities and their systems of oppression, domination or discrimination, respectively. The theory suggests and analyzes how different biological, social, and cultural categories such as gender, ethnicity, race, class, (dis)ability, sexual orientation, religion, caste, age, nationality, and other axes of identity interact on multiple and often simultaneous levels. The theory proposes that we should think of each element or trait of a person as inextricably linked to all other elements for a full understanding of one's identity."

of specialists from a variety of disciplines such as political science, law, sociology, philosophy, history, anthropology and psychology. Child rights and citizenship studies have *re-theorised* children's citizenship through transdisciplinarity from the local to the global³⁹. But it does not seem enough. Something is missing. Humans cannot be happy if they are aware that other forms of life are in various sufferings or dangers.

Global citizenship or, as it is often called, planetary citizenship, no longer seems an unattainable ideal. In this context, I recall its increasingly popular idea that true cosmopolitans see themselves primarily as 'citizens of the world', bound by their duty to recognise a common humanity and to act in accordance with the requirements of moral universalism. Cosmopolitan citizenship is an interesting and legally achievable issue. It can be developed through transdisciplinarity and this can be deduced from Article 8 of the Transdisciplinarity Charter of 1994: "The dignity of the human being is both planetary and cosmic. The emergence of the human being on earth is one of the stages in the history of the Universe. The recognition of the Earth as the homeland of all human beings is one of the imperatives of transdisciplinarity. Every human being has the right to a nationality, but living on Earth is also a transnational being. The recognition by international law of this double belonging - to a nation and to the Earth - is one of the aims of transdisciplinary research". Human rights could thus enjoy inalienability, and therefore better protection, including from a political point of view⁴⁰. These are a few perspectives of the transdisciplinary method. Research of this kind has a path from taught to emergent and from universality to hybridity and contextuality⁴¹.

From this mode of study arises another type of legal metanoia, allowing a vision of international law from universality to transdisciplinarity⁴².

In international legal theory, one of the mutations has been the shift from the statocentric to the cosmopolitan view, recognising that not only states but also other entities, such as non-governmental organisations and individuals, play an important role in a global system of governance. These include: 1) the human rights and sustainable development perspective; 2) the need to develop a more effective and equitable system of international justice, including through the creation of new courts with universal jurisdiction; 3) recognition of the importance of international cooperation; 4) cultural diversity, different values of societies and recognition of legal pluralism; and 5) the increasingly broad scope of private international law given the evolution of the international law system from a predominantly treaty-based system to one based on general principles, international

³⁹ Cantwell, Nigel, *The human rights of children in the context of formal alternative care*, Routledge International Handbook of Children's Rights Studies, Routledge, 2015, pp. 257-275.

⁴⁰ Nicolescu, Basarab, *Manifesto of transdisciplinarity*, Suny Press, 2002, pp. 73 and 88.

⁴¹ Klein, Julie Thompson, *Reprint of "Discourses of transdisciplinarity: Looking back to the future"*, Futures 65, 2015, pp. 10-16.

⁴² Fam, Dena, Linda Neuhauser, and Paul Gibbs, *Transdisciplinary theory, practice and education*, The Art of Collaborative, 2018, p. 40.

custom and jurisprudence.

The notion of state responsibility has been extended to include the individual responsibility of state leaders and public officials for serious violations of human rights and humanitarian law.

As far as international law is concerned, all these modern developments have as their specificity the very universality that encompasses everything that exists and is common to all. We are witnessing the emergence of international law from anonymity to universality, against the background of increasingly frequent interconnections between the subjects of this law⁴³. This universality is in fact the direction towards the *trans* destination, and represents an important natural evolution given by the society in transition. It can be said that transdisciplinarity and universality support each other in the fate of international law.

International environmental law, which is a subfield of public international law, is concerned with the investigation of specific issues and the protection of the natural environment, which it can incorporate into its body of law. The law of the soul and bioenergy of life forms is another law for which the future looks encouraging. It focuses on both human and non-human legal rights and interests, such as animals, nature and even artificial intelligence. The concept of granting legal personality to non-human entities is gaining ground in some jurisdictions, particularly in relation to environmental protection and animal rights.

4. Conclusions

The reorganisation of international law has begun. The methodologies mobilised for this purpose are those that allow for the most extensive observation possible. From now on, it becomes very difficult for research to bypass the transdisciplinarity that is already supported by a growing academic body, scientific research results and literature. At a basic level, the focus seems to be on maintaining branch or even discipline autonomy by including the *trans* method in the research 'toolkit'. The problem of affecting branch autonomy is not a real one because new research methods tend to reorganise branches, not eliminate them. Discretely, transdisciplinarity in public international law has led to the development of new ideas, visions and avenues of analysis such as: 1) planetary boundaries as a concept developed by scientists that identifies nine key environmental thresholds that, if exceeded, could lead to catastrophic and irreversible changes to the Earth's systems; 2) the concept of rights of nature that involves granting legal personality to physical entities such as rivers, forests and ecosystems to protect them from harm and ensure their conservation; 3) indigenous knowledge which refers to the knowledge and practices developed by indigenous communities over generations in relation to their natural environments; 4) the concept of

⁴³ Charney, Jonathan I., *Universal International Law*, in „The American Journal of International Law”, vol. 87, no. 4, 1993, pp. 529-51. JSTOR, <https://doi.org/10.2307/2203615>.

ecological civilisation which is built on rethinking the relationship between people and the natural world to create a more sustainable and harmonious society; 5) Earth jurisprudence as a legal philosophy that emphasises the importance of recognising nature's rights and ecological considerations in legal decision-making, has led to the development of new legal and policy frameworks such as the Universal Declaration of the Rights of Mother Earth; 6) the concept of 'planetary health' where planetary health is an emerging field that seeks to understand and research the health effects of environmental change, such as climate change and biodiversity loss, drawing on insights from a range of disciplines, including ecology, public health and economics, and has been used to develop new policies and strategies to promote human and environmental health; or 7) the use of citizen science in environmental monitoring.

By tracing the lines of research of a field of law of all forms of life seen as a body of legal rules, viable solutions could be found for institutional development and new international regulations that would simplify the entire normative landscape. This higher field of law, which would have as subdomains: human rights, animal rights, nature rights, the law of the soul and bio-energy of beings and other tangential special rights, has the potential for accuracy, adaptation and the fastest implementation.

From the above presentation, it is clear that a considerable number of areas interfere. In fact, many and transdisciplinarity are frequent and obvious, and increasingly visible.

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Investment Screening Mechanisms in Times of COVID-19: National Approaches

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Abstract

In the context of the COVID-19 pandemic, national economies around the world faced significant challenges in protecting and stimulating investment in a volatile economic environment. Through comparative research, we assess how countries have developed and implemented specific policies to support vulnerable sectors, strengthen existing investments and attract new sources of capital. To do so, we examine national investment screening strategies, analysing their eligibility criteria, objectives and relevance in the context of the pandemic. It also assesses how countries are responding to economic uncertainty and pandemic constraints, including rapidly adapting existing policies and promoting investment innovation. Finally, this research provides a comprehensive perspective on the various investment selection mechanisms adopted by states during COVID-19, providing valuable insights for policy decision-making and for developing more resilient and effective approaches to future global economic challenges.

Keywords: *pandemic response, economic policies, innovation in investments, policy decision-making, global challenges.*

JEL Classifications: F21, K33.

1. Introduction

During and in the aftermath of the COVID-19 pandemic, states around the world have been taking measures in order to face the relevant major economic crisis. With particular regard to international investment, while governments are well aware of the economic benefits it brings to their national economies, at the same time they recognize the risks that can be associated with foreign investment entering the national markets, including risks for the national security interests.

Accordingly, several countries have introduced new FDI screening mechanisms or enhanced the scope of already existing ones. In this respect, the question arises whether such new mechanisms raise compatibility questions with the international (investment) regulatory framework of reference.

This chapter examines investment screening mechanisms that states from different regions of the world have introduced or modified during the COVID-19 pandemic. The first part of the paper offers an overview of the international

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(investment) regulatory framework of reference, with a particular focus on the EU, while the second part illustrates investment screening mechanisms that have been adopted during the COVID-19 pandemic by states from different regions of the world and analyses their conformity with the relevant international (investment) principles.

2. Screening of foreign investment: the international (investment) regulatory framework of reference

Investment screening mechanisms have been generally defined as “specific [...] mechanisms [...] where competent authorities assess whether certain proposed transactions jeopardise essential security interests”²; they respond to the need of states to manage the relevant risks associated to incoming investment; however, the relevant policies may appear discriminatory towards foreign investors.

What is the relevant international (investment) framework when it comes to measures taken by states to safeguard their national interests? In this respect, international investment agreements (IIAs) and soft-law instruments, as well as customary law rules come into play. IIAs – including bilateral investment agreements (BITs) – generally include a non-precluded measure clause, which allows states to take appropriate measures for the protection of its essential security interests. For examples, we can recall Article 18 on “Essential Security” of the US Model BIT (2012), which reads as follows:

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

This kind of clauses can be more or less precise in narrowing down the regulatory right of the state – in this respect, a case-by-case analysis is necessary.

It is just worth recalling that when they include the reference that states can adopt measures “that it considers necessary”, much emphasis is put on the discretionary power of states – raising questions about the scope of such

² OECD, Transparency, Predictability and Accountability for investment screening mechanisms. Research note by the OECD Secretariat (27 May 2021), <https://www.oecd.org/daf/inv/investment-policy/2009-Guidelines-webinar-May-2021-background-note.pdf>. For an analysis of the concept of “national security”, see most recently P. Accaoui Lorfing, “Screening of Foreign Direct Investment and the States’ Security Interests in Light of the OECD, UNCTAD and Other International Guidelines”, in C. Titi (ed.), *Public Actors in International Investment Law, European Yearbook of International Economic Law* (2021), pp. 179-199, https://doi.org/10.1007/978-3-030-58916-5_10.

discretion. While the scholarly and judicial debate on the scope and interpretation of such clauses is outside the scope of this paper,³ it is important to underline that the adoption of national screening mechanisms can fall within the scope of the regulatory power of states, and, as such, can be assessed on the ground of this kind of clauses – when the relevant IIA/BIT includes also pre-establishment obligations towards (prospective) foreign investors.⁴

Nevertheless, we should also recall that the regulatory power of states in determining foreign investment screening mechanisms should comply with a number of principles that are included in customary international law (like the non-discrimination principle) – and some of them are also included in IIAs.

Moreover, we can recall several international instruments that can help governments ensuring that this kind of measures are non-discriminatory, transparent and proportional, like the Organization for Economic Co-operation and Development (OECD) Guidelines for Recipient Country Investment Policies relating to National Security,⁵ the G20 Guiding Principles for Global Investment Policymaking⁶ and the United Nations Conference on Trade and Development (UNCTAD)'s Investment Policy Framework for Sustainable Development.⁷ Even though such documents are not binding for states, national policymakers can take guidance and inspiration from these instruments when drafting national policies on foreign investment screening; some of them also include principles that are part of customary international law rules or are also included in a number of IIAs.

The OECD Guidelines for Recipient Country Investment Policies relating to National Security [OECD Guidelines] in particular, provides a detailed and clear catalogue of general principles in the field, namely:

1) Non-discrimination: according to the Guidelines, “[g]overnments should be guided by the principle of non-discrimination”; the non-discrimination principles is also “a standard element both in customary international law and in most [investment-related] treaty provisions” (indeed, a number of IIAs also include national treatment provisions related also to the pre-establishment phase – according to the UNCTAD’s Mapping of IIA Content, 168 out of 2574 IIAs

³ Ibid.

⁴ Vrinda Vinayak, “The Pre-Establishment National Treatment Obligation: How Common Is It?” *EFILA Blog* (14 January 2019), <https://efilablog.org/2019/01/14/the-pre-establishment-national-treatment-obligation-how-common-is-it/>.

⁵ OECD, Guidelines for Recipient Country Investment Policies relating to National Security (2009), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0372>.

⁶ G20 Trade Ministers, Guiding Principles for Global Investment Policymaking (2016), <https://www.oecd.org/investment/g20-agrees-principles-for-global-investment-policymaking.htm>.

⁷ UNCTAD, Investment Policy Framework for Sustainable Development (2015), <https://investmentpolicy.unctad.org/investment-policy-framework>.

include this kind of clauses);⁸

2) Transparency/Predictability, which can be understood as the following:

2.1. Openness, transparency, and predictability of investment policies: according to the OECD Guidelines, “while it is in investors’ and governments’ interests to maintain confidentiality of sensitive information, regulatory objectives and practices should be made as transparent as possible so as to increase the predictability of outcomes”. This imply, in particular: (1) the codification of the relevant rules; (2) the availability of such rules to foreign investors, in a convenient and accessible form; and (3) the involvement of stakeholders in the policy- and law-making process;⁹

2.2. Procedural fairness and predictability: indeed, it is important for foreign investor to be able to foresee how the review will be conducted and how long it will likely take.¹⁰ Procedural fairness and predictability also imply that governments should not disclose commercially sensitive information of foreign investors if not necessary: foreign investors should be assured that national authorities would handle commercially sensitive information in good faith and would avoid any disclosure to unauthorised persons.¹¹

2.3. Transparency of and accountability for investment policy actions: according to the OECD Guidelines, “[d]isclosure of investment policy actions is the first step in assuring accountability. Governments should ensure that they adequately disclose investment policy actions (e.g. through press releases, annual reports or reports to Parliament), while also protecting commercially-sensitive and classified information”; this require timely, accurate and authoritative information on policy actions. Disclosure of investment policy actions enhances transparency and thus predictability, and serves as a basis of accountability.¹² We should also recall that the “notion of transparency in international investment law is evolving within the legal framework of international investment agreements”,¹³ and indeed, a few number of international investment agreements include transparency obligations for the state parties (according to the “Mapping of IIA Content” carried out by UNCTAD, 51 out of 2574 mapped treaties include a provision on “transparency”).¹⁴ For example, the Finland - Panama BIT (2009)’s Article 15 on “Transparency” reads as follows:

⁸ UNCTAD, Mapping of IIA Content, <https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>. See also A. Reinisch, “Legality of Expropriation”, in A. Reinisch (ed.), *Standards of Investment Protection*, Oxford University Press, 2008, p. 186.

⁹ OECD, Transparency, Predictability and Accountability, cit.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ UNCTAD, “Transparency”, UNCTAD Series on Issues in International Investment Agreements II (2012), https://unctad.org/en/PublicationsLibrary/unctaddiaia2011d6_en.pdf.

¹⁴ UNCTAD, Mapping of IIA Content, cit.

A. Each Contracting party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as "international agreements which may affect the investments of investors of the other Contracting Party in the territory of the former Contracting Party.

B. Nothing in this Agreement shall require a Contracting Party to furnish or allow access to any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice legitimate commercial interests of particular investors.

Also, the Pacific Agreement on Closer Economic Relations Plus [PACER Plus (2017)] includes an article on transparency:

A. On request by a Party, information shall be exchanged relating to measures of another Party that may have a material impact on any covered investment under this Chapter.

B. A Party may request, in writing, consultations with another Party regarding any actual or proposed measure or any other matter that it considers might materially affect the operation of this Chapter. The other Party shall engage in consultations in accordance with Article 5 of Chapter 14 (Consultations and Dispute Settlement) [Article 15 of PACER Plus].

3.) Regulatory Proportionality: according to the OECD Guidelines, "restrictions on investment, or conditions on transaction, should not be greater than needed to protect national security and they should be avoided when other existing measures are adequate and appropriate to address a national security concern". This implies, in particular:

3.1. Clarity of concepts used (especially regard to the "national security" or "essential security" concepts): national government have different definitions of such concepts, which may lead to uncertainties regarding how the rules might apply to foreign investors. In order to overcome such uncertainty, governments have made efforts to define such concerns (e.g. with non-exhaustive list of example of threats to specific public interests). According to the OECD Guidelines, "[t]his determination should be made using risk assessment techniques that are rigorous and that reflect the country's circumstances, institutions and resources. The relationship between investment restrictions and the national security risks identified should be clear";

3.2. Narrow focus: according to the OECD Guidelines, "[i]nvestment restrictions should be narrowly focused on concerns related to national security";

3.3. Tailored responses: according to the OECD Guidelines, "restrictive investment measures should be tailored to the specific risks posed by specific investment proposals";

3.4. Last resort: according to the OECD Guidelines, "[r]estrictive investment measures should be used, if at all, as a last resort when other policies

(e.g. sectoral licensing, competition policy, financial market regulations) cannot be used to eliminate security-related concerns”.

4) Accountability: according to the OECD Guidelines, “procedures for internal government oversight, parliamentary oversight, judicial review, periodic regulatory impact assessments, and requirements that important decisions (including decisions to block an investment) should be taken at high government levels should be considered to ensure accountability of the implementing authorities”, which in turn implies, among others, accountability to citizens, participation in international accountability mechanisms (like OECD notification), ensuring national judicial and administrative procedures that can work also for foreign investors and an effective national public sector management system.

The principles of the OECD Guidelines have then been reiterated in the 2016 G20 Guiding Principles for Global Investment Policymaking, according to which G20 members agree that “[g]overnments should avoid protectionism” [Principle I], promoting investment policies that “should establish open, non-discriminatory, transparent and predictable conditions for investment” [Principle II] and that “should provide legal certainty [...] to investors” [Principle III]. Moreover, though recognizing the “the right [of national governments] to regulate investment for legitimate public policy purposes” [Principle VI], the documents makes it clear that “[r]egulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate” [Principle IV].¹⁵

Also, the 2015 UNCTAD’s Investment Policy Framework for Sustainable Development includes several indications regarding investment screening mechanisms and restates some of the OECD Guidelines’ principles. In particular, according to the Investment Policy Framework, “[o]wnership restrictions or limitations on the entry of foreign investment [...] should be justified by legitimate national policy objectives”; they should be “clearly specified”; moreover, “[a] periodic review should take place of any ownership restrictions”.¹⁶

Overall, such principles constitute the international framework of reference that should guide states in shaping their national foreign investment screening policies. Though most of these principles are included in non-binding documents, they also reflect customary international law rules and/or rules that are also included in international investment agreements – which are binding for national governments.

The following paragraph focus on the European Union (EU)’ regulatory framework regarding foreign investment screening mechanisms.

¹⁵ G20 Guiding Principles for Global Investment Policymaking, cit.

¹⁶ UNCTAD, Investment Policy Framework for Sustainable Development, cit.

2.1. In particular: the European Union's regulatory framework

The EU has had a relevant role in shaping the supranational regulatory framework for foreign investment screening mechanisms – and also on how to implement them during the COVID-19 pandemic.

On 19 March 2019, the EU adopted Regulation 2019/452 *establishing a framework for the screening of foreign direct investments into the Union* (the FDI Screening Regulation) from non-EU countries. Such a framework aims at establishing a cooperation mechanism where member states and the Commission can exchange information as regards the screening of FDI on grounds of security and public order. The idea of the Regulation, as specified in the 2017 background Communication of the EU Commission, is to “[w]elcoming foreign direct investment while protecting essential interests” of member states (and the EU).¹⁷ The Regulation is in force from 11 October 2020.

Before the Regulation entered into force, and at the early stages of the spread of the COVID-19 pandemic, on 25 March 2020, the Commission issued some guidelines on how to use the FDI screening mechanism in a time of public health crisis. In particular, the Commission clearly stated that „today more than ever, the EU's openness to foreign investment needs to be balanced by appropriate screening tools. In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities [...] or related industries such as research establishments (for instance developing vaccines) via foreign direct investment. [...] At present, the responsibility for screening FDI rests with Member States. FDI screening should take into account the impact on the European Union as a whole, in particular with a view to ensuring the continued critical capacity of EU industry, going well beyond the healthcare sector.”¹⁸

The Commission further specified that “[a]s regards investments that do not constitute FDI, i.e., portfolio investments, they may be screened by the Member States in compliance with the Treaty provisions on free movement of capital”;¹⁹ moreover, “[b]esides investment screening, Member States may retain special rights in certain undertakings (“golden shares”). [...] Like other restrictions to capital movements, they must be necessary and proportionate to

¹⁷ European Commission, Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Welcoming Foreign Direct Investment while Protecting Essential Interests [13 September 2017] COM(2017) 494 final, p. 1.

¹⁸ European Commission, Communication. Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) [25 March 2020] C(2020) 1981 final, p. 2.

¹⁹ *Ibid.*

achieve a legitimate public policy objective”.²⁰ Accordingly, the Commission has given advices to member states not only to FDI (which are under the exclusive competence of the EU), but also on portfolio investment and golden shares, whose regulation remain under the competence of the member states, in compliance with the EU rules of the internal market. And in this respect, as regards “justifications to restrictions on capital movements” the EU Commission made it clear that “[g]rounds of public policy, public security and public health can be relied on if there is a genuine and sufficiently serious threat to a fundamental interest of society”²¹ and that “[t]he permissible grounds of justification may also be interpreted more broadly”.²²

Thus, the EU seemed to suggest that the exceptional circumstances of the COVID-19 pandemic may justify a broad interpretation of the concepts of “public policy, public security and public health” – and, allegedly, also the concept of the “essential security interests” that we can find in IIAs.

The following paragraph focuses on the national investment screening mechanisms that countries have adopted/amended during the COVID-19 pandemic and assesses whether national governments have complied to the above mentioned supranational regulatory framework of reference.

3. National investment screening mechanisms: approaches in times of COVID-19

The adoption of national investment screening mechanisms dates back to the 1960s; however, it is since 2018 that the number of countries with national foreign investment screening mechanisms has started to increase,²³ and this trend has accelerated during the COVID-19 pandemic.

OECD, UNCTAD and the G20 have constantly followed and reported²⁴ the new investment and investment-related measures adopted by governments around the world during the COVID-19 pandemic.

The following table summarizes some of the most relevant measures adopted by national governments during the pandemic.

Country ²⁵	Most recent measure(s) - adopted from 30 January	Content / Notes
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²⁰ Ibid., p. 3.

²¹ Ibid.

²² Ibid, p. 4.

²³ OECD, “Investment screening in times of COVID-19 and beyond”, OECD Policy Responses to Coronavirus (COVID-19) (7 July 2020), <https://www.oecd.org/coronavirus/policy-responses/investment-screening-in-times-of-covid-19-and-beyond-aa60af47/>.

²⁴ G20, *Twenty-sixth Report on G20 Investment Measures* (28 October 2021), https://unctad.org/system/files/official-document/unctad_oecd2021d26_en.pdf.

²⁵ The table takes into account the G20 and EU countries.

	2021²⁶ - related to foreign investment screening	
Australia	Treasurer of the Commonwealth of Australia, Changes to foreign investment framework, Press Release (29 Mar 2020) ²⁷ Reforms to the Foreign Acquisitions and Takeovers Act 1975 (9 December 2020)	The government announced temporary changes to the foreign investment review framework (connected to the COVID-19 pandemic): all foreign investments to Australia should require approval, regardless of the value of the investment or the nature of the foreign investor ²⁸ The Parliament made some of the amendments introduced in March 2020 as permanent ²⁹
Austria	Investment Control Act (25 July 2020) ³⁰	It implements the EU Regulation
Canada	Government of Canada, Policy Statement on Foreign Investment Review and COVID-19 (18 April 2020) Order Respecting Time Limits and Other Periods Established by or Under Certain Acts and Regulations for Which the Minister of Industry is Responsible (COVID-19) (31 July 2020) Government of Canada, Investment Canada Act -	It announced an “enhanced scrutiny” of “foreign direct investments of any value, controlling or non-controlling, in Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the Government” ³² It extends the initial review period under the National Security Review of Investments Regulations for any investments notified between 31 July 2020 and 31 December 2020 ³³ It lowered the thresholds above which foreign investors in Canadian businesses have to obtain federal government approval under the

²⁶ We consider the date on which the WHO Director-General declared that the outbreak of COVID-19 constituted a Public Health Emergency of International Concern (PHEIC), [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulatory-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulatory-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

²⁷ Austria, Ministers, Treasury Portfolio, *Changes to foreign investment framework* (29 March 2020), <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/changes-foreign-investment-framework>.

²⁸ UNCTAD, “Australia. Temporarily tightened its rules on foreign takeovers” *UNCTAD Investment Policy Hub* (29 March 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3505/australia-temporarily-tightened-its-rules-on-foreign-takeovers>.

²⁹ UNCTAD, “Australia. Tightening of the foreign investment review framework” *UNCTAD Investment Policy Hub* (1 January 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3624/australia-tightening-of-the-foreign-investment-review-framework>.

³⁰ Bundesministerium für Arbeit und Wirtschaft, *Investitionskontrolle* (2023), <https://www.bmdw.gv.at/Themen/Investitionskontrolle.html>.

³² UNCTAD, “Canada. Enhanced scrutiny of foreign investment during the COVID-19 pandemic” *UNCTAD Investment Policy Hub* (18 April 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3510/canada-enhanced-scrutiny-of-foreign-investment-during-the-covid-19-pandemic>.

³³ UNCTAD, “Canada. Temporarily extends timelines for FDI screening” *UNCTAD Investment Policy Hub* (31 July 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3547/canada-temporarily-extends-timelines-for-fdi-screening>.

	Thresholds for review Guidelines on the National Security Review of Investments, issued by the Canadian Minister of Innovation, Science and Industry (24 March 2021) ³¹	Investment Canada Act ³⁴ It increases scrutiny of foreign investment in four areas: 1) sensitive personal data; 2) specified sensitive technology areas; 3) critical minerals; and 4) investments by state-owned or state-influenced foreign investors ³⁵
China	Measures on Security Review of Foreign Investment, issued by the National Development and Reform Commission and Ministry of Commerce (19 December 2020) ³⁶	It extends review requirements to foreign investments in a number of sectors, like national defense, agriculture and energy ³⁷
Czech Republic	Act on the Examination of Foreign Investment (19 January 2021)	It introduced an FDI screening mechanism with line with the EU standards. ³⁸
Denmark	Investment Screening Act (1 July 2021)	It introduced FDI screening mechanism ³⁹
Finland	Law no. 682/2020 (11 October 2020)	It amends the Act on the Screening of Foreign Corporate Acquisitions of 2012 and makes the investment screening mechanism compatible with the EU Regulation ⁴⁰
France	Decree of 27 April 2020 Decree no. 2020-892 (22 July 2020)	Amendment to the foreign investment screening regime as a response to the COVID-19 pandemic - the list of sectors and critical technologies subject to review was extended to

³¹ <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81190.html>

³⁴ UNCTAD, “Canada lowers FDI review thresholds for 2021” *UNCTAD Investment Policy Hub* (1 January 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3629/canada-canada-lowers-fdi-review-thresholds-for-2021>.

³⁵ UNCTAD, “Canada. Elevated scrutiny of foreign investment” *UNCTAD Investment Policy Hub* (24 March 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3668/canada-elevated-scrutiny-of-foreign-investment>.

³⁶ Jenny Sheng, Chunbin Xu, “China Publishes New Rules on National Security Review of Foreign Investment” *JudSupra* (23 December 2020), <https://www.jdsupra.com/legalnews/china-publishes-new-rules-on-national-23076/>.

³⁷ UNCTAD, “China. Measures on National Security Review of Foreign Investment” *UNCTAD Investment Policy Hub* (19 December 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3632/china-measures-on-national-security-review-of-foreign-investment>.

³⁸ UNCTAD, “Czechia. Adoption of a FDI screening mechanism” *UNCTAD Investment Policy Hub* (1 May 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3661/czechia-adoption-of-a-fdi-screening-mechanism>.

³⁹ UNCTAD, “Denmark. FDI screening regime introduced” *UNCTAD Investment Policy Hub* (1 July 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3742/denmark-fdi-screening-regime-introduced>.

⁴⁰ UNCTAD, “Finland. Amends its FDI screening regime” *UNCTAD Investment Policy Hub* (11 October 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3637/finland-amends-its-fdi-screening-regime>.

		include biotechnology ⁴¹ It lowered the control threshold that requires prior governmental review of a foreign acquisition from previously 25% of the shares of listed companies to 10%. This temporary alteration of the FDI screening regime was first applicable until 31 December 2020, ⁴² then prolonged until 31 December 2021. ⁴³
Germany	Amendment of the Foreign Trade and Payments Ordinance (20 May 2020) First amendment to the Foreign Trade and Payments Act (17 July 2020) 7 th amendment to the Foreign Trade and Payments Ordinance (1 May 2021)	It focused on critical public health services ⁴⁴ It implements the EU FDI screening Regulation ⁴⁵ It reorganizes the list of sectors and activities covered by the FDI review mechanism, which now enumerates 27 sectors (with 16 new economic sectors) ⁴⁶
Hungary	Governmental Decree no. 227/2020 (26 May 2020) Act LVIII of 2020 on the temporary measures applicable to the termination of the state of	It introduced a temporary foreign investment screening mechanism applicable to investors from both inside and outside EU until 31 December 2020 ⁴⁷ It extends the temporary foreign investment screening mechanism until 30 June 2021 ⁴⁸

⁴¹ UNCTAD, “France. Government extends the FDI screening regime as a response to the COVID-19 pandemics” *UNCTAD Investment Policy Hub* (30 April 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3517/france-government-extends-the-fdi-screening-regime-as-a-response-to-the-covid-19-pandemics>.

⁴² UNCTAD, “France. Government lowers control thresholds for FDI screening” *UNCTAD Investment Policy Hub* (2 August 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3554/france-government-lowers-control-thresholds-for-fdi-screening>.

⁴³ UNCTAD, “France. Special measures pertaining to control of foreign investment during the pandemic are prolonged” *UNCTAD Investment Policy Hub* (28 December 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3666/france-special-measures-pertaining-to-control-of-foreign-investment-during-the-pandemic-are-prolonged>.

⁴⁴ UNCTAD, “Germany. Responses to COVID-19 by tightening FDI screening” *UNCTAD Investment Policy Hub* (20 May 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3526/germany-responses-to-covid-19-by-tightening-fdi-screening>.

⁴⁵ UNCTAD, “Germany. Amends its FDI screening regime” *UNCTAD Investment Policy Hub* (17 July 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3551/germany-amends-its-fdi-screening-regime>.

⁴⁶ UNCTAD, “Germany. FDI screening expanded over high-tech” *UNCTAD Investment Policy Hub* (1 May 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3699/germany-fdi-screening-expanded-over-high-tech>.

⁴⁷ UNCTAD, “Hungary. Temporarily tightens FDI screening” *UNCTAD Investment Policy Hub* (26 May 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3527/hungary-temporarily-tightens-fdi-screening>.

⁴⁸ UNCTAD, “Hungary. Extends its temporary FDI screening regime” *UNCTAD Investment Policy Hub* (17 June 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3588/hungary-extends-its-temporary-fdi-screening-regime>.

	emergency and the preparedness for pandemics (17 June 2020)	
India	Reviewed of Foreign Direct Investment policy (17 April 2020) Announcement of the government (7 October 2021)	Due to the COVID-19 pandemic situation, it introduced the so-called "governmental route" for all investments originating from countries that share land borders with India ⁴⁹ The Government announced that it would allow 100% foreign participation in the telecom services industry. However, any FDI in telecom services from a country with whom India shares its land border still requires government approval.
Italy	Law of 5 June 2020, n.40 (converting into law the Decree-Law of 8 April 2020, n.23) Law of 18 December 2020, no. 176 Decree of 23 December 2020, No. 180	It expands the special power regime in strategic sectors that require prior approval for any foreign investment (e.g., the financial, credit and insurance sectors, infrastructure and critical technologies) ⁵⁰ It extends the temporal scope of application of the special FDI screening regime introduced in April 2020 until 30 June 2021 ⁵¹ It identifies additional assets of strategic importance in energy, transport and the communication sectors ⁵²
Japan	On 4 November 2021, the amendment of the Foreign Exchange and Foreign Trade Act (the FEFTA) took effect; business sectors related to 34 rare-earth metals were also listed as companies subject to specific notification requirements ⁵³	
Korea, Republic of	Revised Act on Prevention of Divulgence and	It tightens the procedure for foreign M&A on national core technology ⁵⁴

⁴⁹ UNCTAD, "India. Introduces FDI screening originating from neighbouring countries amid the COVID-19 pandemics" *UNCTAD Investment Policy Hub* (17 April 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3518/india-introduces-fdi-screening-originating-from-neighbouring-countries-amid-the-covid-19-pandemics->.

⁵⁰ UNCTAD, "Italy. Amid the COVID-19 pandemic, the Government strengthens its special powers in strategic sectors" *UNCTAD Investment Policy Hub* (6 April 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3506/italy-amid-the-covid-19-pandemic-the-government-strengthens-its-special-powers-in-strategic-sectors>.

⁵¹ UNCTAD, "Italy. Extension of "Golden Powers" in relation to foreign acquisitions" *UNCTAD Investment Policy Hub* (25 December 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3639/italy-extension-of-golden-powers-in-relation-to-foreign-acquisitions>.

⁵² UNCTAD, "Italy. Expands the list of sectors and assets subject to investment screening" *UNCTAD Investment Policy Hub* (14 January 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3665/italy-expands-the-list-of-sectors-and-assets-subject-to-investment-screening>.

⁵³ UNCTAD, "Japan. Foreign investment in activities related to 34 rare-earth metals now subject to screening" *UNCTAD Investment Policy Hub* (5 October 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3760/japan-foreign-investment-in-activities-related-to-34-rare-earth-metals-now-subject-to-screening>.

⁵⁴ UNCTAD, "Korea, Republic of. Revising Act on Prevention of Divulgence and Protection of Industrial Technology" *UNCTAD Investment Policy Hub* (21 February 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3760/japan-foreign-investment-in-activities-related-to-34-rare-earth-metals-now-subject-to-screening>.

	Protection of Industrial Technology (21 February 2020) Amendments to the Enforcement Decree of the Foreign Investment Promotion Act (5 August 2020)	It is possible for the competent Minister or the heads of the relevant agencies to request a review to the Foreign Investment Committee of a foreign investment where there is a “high” possibility of leakage of core national technologies ⁵⁵
Lithuania	Amendment to the investment screening mechanism (30 June 2020)	It revised the evaluation criteria of investors that may pose risks to national security interests and expanded the list of businesses and entities considered relevant for national security (e.g. 5G service providers) ⁵⁶
Mexico	General Resolution, "Criteria for the Application of Article 17 of the Mexican Foreign Investment Law in relation to the Establishment of Foreign Companies in Mexico" (26 March 2020)	It eliminated the need for companies from an amplified list of countries to obtain an authorization from the Ministry of Economy ⁵⁷
Netherlands	Act on Undesirable Control in the Telecommunication Sector (1 October 2020)	It introduced a screening mechanism for acquisitions in Dutch providers of electronic communications networks or services, hosting services, internet nodes, internet certification services or data centres and similar category of network or service determined by the government ⁵⁸
Russia	Amendment to the Federal Law on Procedures for Foreign Investment in	It put temporary foreign acquisitions of voting stakes in strategic companies to FDI screening procedures ⁵⁹

policy.unctad.org/investment-policy-monitor/measures/3654/korea-republic-of-revising-act-on-prevention-of-divulgence-and-protection-of-industrial-technology.

⁵⁵ UNCTAD, “Korea, Republic of. Amending the Enforcement Decree of the Foreign Investment Promotion Act” *UNCTAD Investment Policy Hub* (5 August 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3584/korea-republic-of-amending-the-enforcement-decree-of-the-foreign-investment-promotion-act>.

⁵⁶ UNCTAD, “Lithuania. Lithuania amended its investment screening regime” *UNCTAD Investment Policy Hub* (1 August 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3678/lithuania-lithuania-amended-its-investment-screening-regime>.

⁵⁷ UNCTAD, “Mexico. Resolution updates criteria for establishment of foreign companies” *UNCTAD Investment Policy Hub* (26 March 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3650/mexico-resolution-updates-criteria-for-establishment-of-foreign-companies->.

⁵⁸ UNCTAD, “Mexico. Resolution updates criteria for establishment of foreign companies” *UNCTAD Investment Policy Hub* (26 March 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3675/netherlands-introduces-review-of-acquisitions-in-the-telecommunication-sector>.

⁵⁹ UNCTAD, “Russian Federation. Temporary foreign acquisitions also subject to FDI screening” *UNCTAD Investment Policy Hub* (31 July 2020), <https://investmentpolicy.unctad.org/investment->

	Business Entities of Strategic Importance for National Defence and State Security (11 August 2020) Federal Law No.339-FZ Amending the Federal Law ‘On Fisheries and the Conservation of Aquatic Biological Resources’ and Federal Law ‘On the Procedure for Making Foreign Investments in Economic Companies of Strategic Importance for Ensuring the Defense of the Country and Security of the State’ (23 June 2021)	The amendments classify fishing aquatic biological resources as an activity of “strategic importance” and subject to prior approval by the Government Commission for the Control of Foreign Investment ⁶⁰
Slovenia	Law on intervention measures to mitigate and eliminate the consequences of the COVID-19 pandemic (31 May 2020)	It introduced a foreign investment screening mechanism ⁶¹
Spain	Royal Decree-Law No. 8/2020 on extraordinary urgent measures to face the economic and social impact of COVID-19 (18 March 2020) Royal Decree-Law 11/2020 (31 March 2020) Royal Decree-Law 34/2020 relating to urgent measures against the COVID-19 pandemic (19 November	It suspended the liberalization regime for foreign direct investment; all foreign investors from outside EU require prior governmental authorization to acquire 10% or more of the share capital or an effective management or control of a Spanish company ⁶² Additional measures for the foreign investment screening regime ⁶³ It prolongs the regime of suspension of liberalization of certain FDI until 30 June

policy-monitor/measures/3555/russian-federation-temporary-foreign-acquisitions-also-subject-to-fdi-screening-.

⁶⁰ UNCTAD, “Russian Federation. Government lowers foreign investments control threshold for fishing industry” *UNCTAD Investment Policy Hub* (13 July 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3763/russian-federation-government-lowers-foreign-investments-control-threshold-for-fishing-industry>.

⁶¹ UNCTAD, “Slovenia. Temporarily introduces FDI screening” *UNCTAD Investment Policy Hub* (31 May 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3552/slovenia-temporarily-introduces-fdi-screening->.

⁶² UNCTAD, “Spain. Due to Corona-19 pandemia, the liberalization regime for foreign direct investments is suspended” *UNCTAD Investment Policy Hub* (18 March 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3504/spain-due-to-corona-19-pandemia-the-liberalization-regime-for-foreign-direct-investments-is-suspended>.

⁶³ UNCTAD, “Spain. Government restricts foreign investment regime a second time in one month” *UNCTAD Investment Policy Hub* (1 April 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3508/spain-government-restricts-foreign-investment-regime-a-second-time-in-one-month>.

	2020) Decree-Law 12/2021 (25 June 2021)	2021 ⁶⁴ It extended the screening regime of foreign investment until 31 December 2021 ⁶⁵
United Kingdom	Order amending the Enterprise Act 2002 (22 June 2020) The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020 (20 July 2020) National Security and Investment Act (4 January 2022)	It allows UK authorities to intervene in certain mergers ⁶⁶ The Orders lowered the jurisdictional thresholds for merger controls in three specific sectors: artificial intelligence, cryptographic authentication technology and “advanced materials” ⁶⁷ Amendment of foreign investment screening mechanism in the UK. The Government designated 17 sensitive sectors in which investment is subject to prior approval: Advanced Materials, Advanced Robotics, Artificial Intelligence, Civil Nuclear, Communications, Computing Hardware, Critical Suppliers to Government, Cryptographic Authentication, Data Infrastructure, Defence, Energy, Military and Dual-Use, Quantum Technologies, Satellite and Space Technologies, Suppliers to the Emergency Services, Synthetic Biology, and Transport ⁶⁸
United States of America	White House, Executive Order on Establishing the Committee for the Assessment of Foreign	It established the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector ⁶⁹

⁶⁴ UNCTAD, “Spain. Temporary screening regime for foreign investment prolonged” *UNCTAD Investment Policy Hub* (19 November 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3593/spain-temporary-screening-regime-for-foreign-investment-prolonged>.

⁶⁵ UNCTAD, “Spain. Restrictions on foreign investment extended until the end of 2021” *UNCTAD Investment Policy Hub* (26 June 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3741/spain-restrictions-on-foreign-investment-extended-until-the-end-of-2021>.

⁶⁶ UNCTAD, “United Kingdom. Amid the COVID-19 pandemic, the UK starts screening foreign takeovers and their impact on public health emergencies” *UNCTAD Investment Policy Hub* (22 June 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3531/united-kingdom-amid-the-covid-19-pandemic-the-uk-starts-screening-foreign-takeovers-and-their-impact-on-public-health-emergencies>.

⁶⁷ UNCTAD, “United Kingdom. Additional technologies covered by FDI screening mechanism” *UNCTAD Investment Policy Hub* (20 July 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3557/united-kingdom-additional-technologies-covered-by-fdi-screening-mechanism>.

⁶⁸ UNCTAD, “United Kingdom. New investment screening regime will be operational on 4 January 2022” *UNCTAD Investment Policy Hub* (4 January 2022), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3740/united-kingdom-new-investment-screening-regime-will-be-operational-on-4-january-2022>.

⁶⁹ UNCTAD, “United States of America. Foreign participation in the telecom sector under scrutiny” *UNCTAD Investment Policy Hub* (4 April 2020), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3507/united-states-of-america-foreign-participation-in-the-telecom-sector-under-scrutiny->

	Participation in the United States Telecommunications Services Sector (4 April 2020)	
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Most of the foreign investment screening mechanisms that have been adopted/amended now allow for intervention in an increased number of economic sectors.⁷⁰

Generally, we can distinguish: 1) measures that include assets to the scope of screening mechanisms that are crucial for the pandemic response (like health-related industry sector) – and in some cases they are introduced as temporary responses to the pandemic situation; and 2) measures that introduce or enhance screening mechanisms in any economic sector – and normally they are introduced as long-lasting measures.⁷¹

4. Some concluding remarks

As the previous paragraphs have shown, national governments have adopted a number of measures introducing or modifying national foreign investment screening mechanisms during the COVID-19 pandemic. As already underlined, though international (investment) law generally allows state to exercise their regulatory power for safeguarding their essential security interests – and also the European Commission has encouraged EU member states to adopt a restrictive approach in implementing foreign investment screening mechanisms at the national level -, there are a number of principles that states should comply with, especially the non-discrimination and transparency principles.

In particular, we should question whether the extension of the governmental control over foreign investors to almost all economic sectors – also those non strictly related to a public health emergency (e.g. the mineral sector) – can be justified as an ‘essential’ measure for the state (or whether instead it represents a mere discriminatory measure towards foreign investors - considering that some IIAs include national treatment clauses that are also applicable in the pre-establishment phase).

Given the increased number of national foreign investment screening mechanisms, it should be questioned how such national measures will impact/are impacting also supranational regulations: will states agree to (additional) common international (non-binding) guidelines or will they start to include pre-establishment protection more frequently in IIAs?⁷²

⁷⁰ OECD, “Investment screening in times of COVID-19 and beyond”, cit.

⁷¹ Ibid.

⁷² Vrinda Vinayak, „The Pre-Establishment National Treatment Obligation: How Common Is It?“, cit.

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The Need for International Legislation Regarding the Use of Generative Artificial Intelligence in Education and Scientific Research

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Abstract

Generative artificial intelligence (GenAI) represents artificial intelligence (AI) capable of creating new content, in different formats (text, images, audio, video, etc.), by applying large-scale machine learning models. The application of GenAI tools in different fields have led to intense debates within the professional communities, but also in the public space, regarding the performance ensured by the use of GenAI tools (ChatGPT, Gan.ai, CodeWP, DecorAI, SchoolAI, etc.), but also the aspects of the ethical and legal nature associated with the use of these tools. Education and scientific research represent two of the fields in which GenAI tools have been and are increasingly used today, causing real concerns, mainly in terms of ensuring the development of students' skills, on the one hand and respecting copyright and intellectual property rights, on the other hand. The European Parliament discussed a series of documents related to AI, documents that define a European approach to the use of AI systems. The paper aims to present the results of a study carried out by the authors about the ethical and legal implications of using GenAI in education and research. Also, the authors analyzed the European approach in AI systems, to establish to what extent it satisfies the regulatory requirements for the use of GenAI in the fields of education and scientific research and represents an appropriate starting point in defining the future European legislation in the field of AI.

Keywords: generative artificial intelligence, education, scientific research, European legislation in AI systems.

JEL Classification: K24, K33

1. Introduction

Generative artificial intelligence (GenAI) represents artificial intelligence (AI) capable of creating new content, in different formats (text, images, audio, video, etc.), by applying large-scale automatic learning models. The application of GenAI tools in different fields of activity have determined intense debates within the professional communities, as well as in the public space. Both the performances ensured using some GenAI tools, such as: ChatGPT, Gan.ai, CodeWP, DecorAI, SchoolAI, etc., have been analyzed, as well as the ethical and

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legal aspects associated with the use of these tools.

The European Commission has developed a series of documents related to AI systems, documents that define the European approach to AI systems.

The paper aims to present the specific aspects of the use of GenAI in education and research, with an emphasis on discussing the results of a study carried out by the authors regarding the opinions of students about the use of GenAI tools in teaching, training, and research activities. Also, the authors analyzed the European approach to the regulation of AI, to establish to what extent this approach satisfies the regulatory requirements for the production and use of GenAI tools in the fields of education and scientific research.

2. Generative artificial intelligence, between excitement and concern

Generative artificial intelligence (GenAI) is a type of artificial intelligence systems capable of automatically generating new content (text, images, video, audio, or content on other media) as a result of identifying patterns and structures in the input data (training data), with characteristics similar to those of the input data. In 2014, the first neural networks capable of generative learning were created³, for complex data, such as images. In 2018, the American company OpenAI began the development of GenAI tools, by using large-scale models of natural language, in order to create new texts, similar to those of human communicators⁴. These models, known as GPT (Generative Pre-trained Transformers) models, are artificial neural networks with a specific architecture, pre-trained on large unstructured text collections. One of the most well-known tools that use GPT models is ChatGPT⁵.

Investments in the development of GenAI tools have increased steadily in the 2020s, as a result of the interest shown by large companies such as Microsoft and Google, but also by start-up companies, as well as the expansion of the use of GenAI tools throughout several sectors of activity, such as: creative industries (visual art, literature, music, etc.), software development, finance, marketing, architecture, education and research.

With the diversification of GenAI tools and the expansion of their use, several concerns about the possibility of inappropriate use of these tools have begun to manifest themselves, such as:

- generating incorrect, defamatory, and biased information;
- the generation of incomplete information, because of limited knowledge about the events after 2021;

³ Alzubaidi, L., Zhang, J., Humaidi, A.J. *et al.*, *Review of deep learning: concepts, CNN architectures, challenges, applications, future directions.*, „Journal of Big Data”, vol. 8, 53 (2021). <https://doi.org/10.1186/s40537-021-00444-8>, p. 5.

⁴ <https://openai.com>, consulted on 15.03.2023.

⁵ <https://chat.openai.com/auth/login>, consulted on 15.03.2023.

- the creation of fake news (the so-called deepfake), to manipulate different categories of users, etc.

Among the aspects of improper use of GenAI tools that present legal implications, we can mention⁶:

- the analysis of confidential information by GenAI tools, which represents a violation of data protected by law (business secret or other information protected by specific laws, such as ensuring the confidentiality of medical and banking data). Adequate supervision of the use of ChatGPT for commercial purposes is necessary, and this may include the development of specific legislation.

- the analysis of personal data that presupposes compliance with the provisions of the GDPR. ChatGPT's use of this type of data may result in the transfer of personal data to third countries, which constitutes a violation of legal provisions.

- aspects related to intellectual property rights, such as: possible violation of the intellectual property rights of third parties when the system "learns" from the data, protecting the content generated by the GenAI tool and establishing the owner of the right to use this content.

- aspects related to Copyright rights.

- legal liability for the generation and use of incorrect, incomplete, defamatory and biased content

To analyze some of these aspects, the authors addressed questions to ChatGPT, regarding the state of adoption of artificial intelligence technologies in the legal, business (project management) and engineering (broadcast industry) fields. Table 1 contains the responses generated by ChatGPT.

Table 1. Answers generated by ChatGPT⁷ to the questions: "What is the state of adoption of artificial intelligence technologies in the field of...?"

Domain	ChatGPT answer
Law	„AI technologies in law are being adopted rapidly. They assist in document analysis, legal research, contract management, provide legal assistance through chatbots, enable predictive analytics for case outcomes, and enhance data security and compliance. AI is transforming the legal field.”
Business (project management)	„AI adoption in project management is growing. It automates tasks, analyzes data, optimizes resource allocation, monitors risks, and enhances collaboration. AI's impact varies but is expected to play a significant role in the future of project management.”

⁶ Podrecki, T. K & Partners (2023). *ChatGPT in practice - major legal issues*, Global Poland, available at: <https://www.lexology.com/library/detail.aspx?g=33bf4b4f-ffd9-4bf1-bfc1-7c790d86a22f>.

⁷ <https://chat.openai.com/auth/login>, consulted on 15.03.2023.

Engineering (broadcast)	„AI technologies in broadcast are being widely adopted. They automate content creation, enhance video and audio quality, streamline production workflows, enable content moderation, provide audience analytics, and facilitate personalized advertising. AI is revolutionizing the broadcast industry.”
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ChatGPT's extended answer to the question: "What is the state of adoption of artificial intelligence technologies in the legal field?" is the following: *„AI technologies are gaining traction in the legal field. Here's a concise overview of the adoption status: Document analysis: AI is used to expedite document review and analysis, including contracts, legal precedents, and case law, making research more efficient and accurate. Legal research and insights: AI-powered tools assist legal professionals in conducting comprehensive legal research, offering insights, and identifying relevant case laws and statutes quickly. Contract analysis and management: AI helps analyze contracts, highlighting potential risks, inconsistencies, and clauses that require attention. It streamlines contract management processes. Legal assistance and chatbots: AI-driven chatbots provide basic legal assistance, answering common questions, and offering guidance on legal matters, improving accessibility and efficiency. Predictive analytics and case outcome prediction: AI algorithms analyze past legal cases to predict likely outcomes, assisting lawyers in making informed decisions and evaluating risks. Data security and compliance: AI is utilized to enhance data security, detect potential vulnerabilities, and ensure compliance with privacy regulations. While the adoption of AI in the legal field is ongoing, these technologies have the potential to transform legal research, contract management, and overall legal processes, making them more efficient and effective.”*

It can be noted that the answers generated by ChatGPT are interesting, they can be useful in directing training and research efforts, but they are at a relatively general level, without examples and without citing sources where details about the statements included in the generated text can be found. Also, when interpreting the responses generated by ChatGPT, it is necessary to consider the specifics of the domain, regarding the multitude of available sources and the speed of paradigm change. For example, the broadcast industry is extremely dynamic in terms of applied technologies, therefore the answer generated by ChatGPT, based on available sources by the year 2021, may no longer correspond to the current state of industry practices. In addition, in the broadcast industry, the literature is generally limited in volume, given the interest of technology manufacturers to maintain their competitive edge in the market.

3. The use of generative artificial intelligence in education and scientific research

Education and scientific research are two of the fields in which GenAI

tools have been and are increasingly used, which generates real concerns, mainly in terms of ensuring the development of students' skills, on the one hand, and respecting copyright and intellectual property rights, on the other hand.

Currently, GenAI tools are used in educational and research activities in different fields/profiles, such as: economic, legal, technical, artistic, architecture, industrial and clothing design, etc. These tools can contribute to the improvement of training and research activities through:

- assisting students in identifying research directions, based on literature.
- providing personalized feedback on the activities carried out by the students.
- automation of repetitive tasks, to allocate additional time for more complex and original works.

In a study conducted by Brock University⁸, a text was analyzed, without knowing whether it was written by a human or was generated by a GenAI tool. Although the text was generated by ChatGPT, about 60% of respondents believed that the text was written by a human or stated that they were not sure. The study participants rated the text with a grade of B - 135 people participated in the study.

The use of GenAI tools implies a change in evaluation practices, in the sense that students should be evaluated based on the arguments presented, the experiments designed and carried out, the projects necessarily include original elements, demos and customized prototypes. Students must cite the works consulted/studied and validate the conclusions they have reached. To verify that the students have really accessed the cited sources, they can be asked to make a short summary and an analysis of the content of the cited document, with the presentation of strong and weak points or by comparison with other sources. This would allow the assessment of the abilities to understand and process the content. In addition, the student may be asked to explain how a particular reference relates to the topic under discussion, how it supports the student's argument or conclusion. Also, when evaluating, teachers can use tools that allow verification of the use of GenAI tools.

4. Study on students' opinions about the use of ChatGPT in training and research activities

Most of the studies related to the use of GenAI tools in education and scientific research processes focused on the opinions of teachers and researchers, less on the opinions of students. That is why the authors considered it opportune to carry out a study among master's students, who carry out both training and research activities. In this context, in June 2023, the opinions of the master's stu-

⁸ Friesen, J. (2023). *ChatGPT prompting some professors to rethink how they grade students*, available at: <https://www.theglobeandmail.com/canada/article-chatgpt-ai-post-secondary-students/>, consulted on 15.03.2023.

dents from a program coordinated by the Department of Informatics and Economic Cybernetics were requested regarding the advantages and risks of using ChatGPT in the development of discipline projects (training activity) and in the development of the dissertation work, as a research activity. 22 master’s students expressed their opinions. These opinions were later synthesized (tables 2 and 3) and analyzed.

Table 2. Summary of opinions on the advantages of using ChatGPT

Activity type	Advantages
Learning (projects)	<ul style="list-style-type: none"> - Facilitates obtaining a first draft of the project - Code generation, for the development of repetitive, standard functionalities - It facilitates the learning process
Scientific research (dissertation)	<ul style="list-style-type: none"> - Facilitates documentation, ensuring the investigation of additional bibliographic sources. - Generator of research ideas
Learning and scientific research	<ul style="list-style-type: none"> - Provides a new perspective, in addition to the one obtained through documentation and/or consulting the course support. - Facilitates the focus on the achievement of personal contribution/solution and the development of original/innovative elements, as well as complex ones. - Ensures the reduction of the project/dissertation work completion time - Ensures the overcoming of some impediments/difficulties along the way

Master’s students considered ChatGPT to be like other tools, such as:

- code generation tools;
- web sites, such as W3schools or stackoverflow with resources for making web pages using Html and CSS;
- search engines and other documentation tools. ChatGPT can be considered a better performing search engine than Google, with better results for student queries;
- automatic translation tools, such as Google Translate;
- text spelling tools;
- specialized assistants who answer complex questions and offer new ideas.

The master's students considered as acceptable the practices of combining the information provided by ChatGPT with elements defined by the student, so that the result can be considered original.

The master's students also mentioned the fact that the student has the obligation to declare that he used ChatGPT, also including the sources (bibliographic references) used. Also, the student has the obligation to verify the integrity of the completed project and to make his own contribution. The student must thoroughly analyze the information provided by ChatGPT to ensure its validity.

Basically, the use of ChatGPT can be considered beneficial if it is only used to provide faster information in the field in which the student is doing the project/dissertation.

Table 3. Summary of opinions regarding the risks of using ChatGPT

Activity type	Risks
Learning (projects)	<ul style="list-style-type: none"> - Encouraging the superficial treatment of educational requirements - Difficulties in the correct assessment of students' knowledge and skills
Scientific research (dissertation)	<ul style="list-style-type: none"> - Decreased motivation for researching the respective topic. - Decreased motivation for creation, own intellectual effort and critical thinking, especially in the documentation stage, for example when selecting bibliographic sources - Copyright infringement (ChatGPT pulls information from many sources without indicating the sources). - Use of sensitive/unauthorized information about certain people (protected by GDPR) or technologies (protected by patents/patents)
Learning and scientific research	<ul style="list-style-type: none"> - - Reducing the degree of authenticity - - Using and spreading erroneous information - - Diminishing independent work skills

The master's students believe that a student must presents his own vision, which depends on several factors, such as: his skills, his level of training, his knowledge of the subject, as well as his interest in the successful completion of the project/work dissertation. Otherwise, using ChatGPT may be similar to using the sites *referate.ro* or *studentie.ro*.

Since ChatGPT realizes the synthesis and the structuring of the identified information, it can be considered that the use of ChatGPT reduces the student's motivation for creation and own intellectual effort. To some extent, the situation is like the one in which the student uses a single source of information, namely the text generated by ChatGPT, without having to make an effort to synthesize and structure the information, as is the case with information from multiple sources.

Retrieving content generated by ChatGPT without declaring your use of ChatGPT is a violation of academic ethics. A risk is also that of creating differences between the level of effort and dedication submitted by students who use ChatGPT compared to those who do not use this tool, an aspect that might not be identified and considered when evaluating the academic performance of students.

In conclusion, we believe that it is necessary for students to be encouraged by teachers to use GenAI tools, but in a transparent and ethical way. Teaching staff must explain to students the importance of the ethical use of GenAI tools, which can support the learning and research effort, but are not a substitute for

critical and creative thinking. It is necessary for teachers to provide practical guidance on how to select working tools for a given activity and how to assess the accuracy and reliability of the results generated by these tools, how to cite the works consulted and how to refer to the components generated by GenAI and used by the student in the training and research process.

5. The European approach regarding the regulation of artificial intelligence. The AI Act

Artificial intelligence systems can contribute to economic growth, stimulating innovation and increasing economic competitiveness. At the same time, due to specific characteristics of AI systems, such as: complexity, opacity, lack of predictability and autonomy, there are risks in their use, especially in terms of safety, security, and protection of fundamental rights. In this context, the European Commission initiated in 2021 a proposal for the regulation of Artificial Intelligence, the so-called AI Act.

The European Commission proposes differentiating the regulations, in relation to the following four levels of risks associated with the use of AI systems⁹:

- AI systems with unacceptable risk. They are associated with the use of AI systems that contravene the values of the European Union. These AI systems will be banned.

- High risk AI systems. Several AI systems can have a negative impact on people's safety or their fundamental rights. To ensure the protection of fundamental rights, this class of AI systems will be subject to a series of mandatory requirements (including a conformity assessment).

- AI systems with limited risk. These systems are to be subject to a limited set of obligations/regulations (e.g., transparency requirement).

- AI systems with minimal risk. All other AI systems can be developed and used in the EU without additional legal obligations to the already existing legislation.

To implement the regulatory proposals in the field of AI systems, the European Commission has developed a series of documents, such as:

- Draft Standardization Request, 5 December 2022¹⁰;
- Proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence

⁹ EP (2023). *Legislative Train Schedule*, European Parliament, available at: <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-regulation-on-artificial-intelligence>, consulted on 15.03.2023.

¹⁰ EC (2022), *Draft Standardization Request*, available at: <https://artificialintelligenceact.eu/wp-content/uploads/2022/12/AIA---COM---Draft-Standardisation-Request-5-December-2022.pdf>, consulted on 15.03.2023.

Act) and amending certain Union legislative acts, April 2021¹¹;

- Annexes to the Proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, April 2021¹²;

- Commission staff working document - Impact assessment accompanying the proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 21 April 2021¹³;

- Study to support an impact assessment of regulatory requirements for Artificial Intelligence in Europe, 21 April 2021¹⁴

Within the European Parliament, the discussions on these Commission proposals are coordinated by the Internal Market and Consumer Protection Committee (IMCO) and the Civil Liberties, Justice, and Home Affairs Committee (LIBE). The report of this joint committee was discussed and adopted by the European Parliament on May 16, 2023, which represents significant progress in the process of adopting the AI Act.

6. Discussions

Generative artificial intelligence has registered an impressive evolution, in a relatively short time, an evolution that has materialized in the creation of an important number of GenAI tools, used in numerous fields by hundreds of millions of users. The market success registered by GenAI was, however, accompanied by an increase in the degree of apprehension regarding possible unethical uses and violation of some legal regulations. At the same time, the very methods of creating GenAI tools, such as the data sets on which the models are trained, raise questions. We believe that the use of GenAI tools in education and research

¹¹ EC (2021). *Proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, available at: <https://artificialintelligenceact.eu/wp-content/uploads/2022/05/AIA-COM-Proposal-21-April-21.pdf>.

¹² EC (2021). *Annexes to the Proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, available at: <https://artificialintelligenceact.eu/wp-content/uploads/2022/05/AIA-COM-Annexes-21-April-21.pdf>, consulted on 15.03.2023.

¹³ EC (2021). *Commission staff working document - Impact assessment accompanying the proposal for a regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, available at: <https://artificialintelligenceact.eu/wp-content/uploads/2022/06/AIA-COM-Impact-Assessment-1-21-April.pdf>, consulted on 15.03.2023.

¹⁴ EC (2021). *Study to support an impact assessment of regulatory requirements for Artificial Intelligence in Europe*, available at: <https://artificialintelligenceact.eu/wp-content/uploads/2022/06/AIA-COM-Impact-Assessment-3-21-April.pdf>.

presents a series of additional challenges, as it determines the formation of attitudes that will persist throughout the entire professional activity of the graduates.

The need to define and adopt regulations regarding AI systems has been recognized by the European Commission, which in recent years has developed a series of documents leading to the adoption of regulations in the field of AI by the European Parliament. On May 16, 2023, an important progress was made on this line, by adopting a report drawn up by a joint committee with responsibilities in coordinating the AI Act adoption process. As a result of analyzing the documents associated with the proposed European Union regulations in the field of AI systems, we believe that it is still necessary to introduce specific references to the development and use of GenAI tools, as we believe that there is an important difference between the challenges determined by the use of generative deep learning models compared to the use of non-generative deep learning models (discriminative models). Therefore, we consider the mention "Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods, including deep learning" in Annex 1 to the European Commission's regulatory proposal to be insufficiency.

7. Conclusions

The paper presents the potential that GenAI tools have for improving the training and scientific research process. Therefore, we believe that the use of GenAI tools in a transparent and ethical way must be encouraged, under the conditions of awareness of the legal aspects that may arise when using this type of tools.

Teachers must present to the students the importance of the ethical use of GenAI-type tools, which can improve the learning and research processes, without being a substitute for critical and creative thinking. It is necessary for teachers to provide practical guidance on how to select tools for students to work with, how to assess the accuracy and reliability of results generated by GenAI tools, how to cite consulted works, and how to reference generated components. by GenAI and used by students in the training and research process.

We also believe that technological developments in the field of AI, and especially in the field of GenAI, must be accompanied by the adoption of legal regulations specific to AI systems, with direct reference to GenAI tools. In this sense, we support the efforts to adopt the AI Act at the level of the European Union, as well as those to adopt other international regulations in this field.

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Recent Judicial Resistance Against the Primacy and Authority of EU Law by Constitutional Courts in Some Member States: A Survey of Literature

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Abstract

The study explores in the first place recent criticism, backlash and resistance to the authority of European Union (EU) law by the highest constitutional European courts in some EU Member States. Several important rulings show how the primacy and effectiveness of EU law seem highly disputed and undermined with negative consequences for the judicial protection of individual rights in Europe. In the second place, the study refers to the doctrine of primacy of EU law created by the Court of Justice of the European Union (CJEU) and explains the reasons why some Member States' courts have mostly accepted primacy of EU law as a principle while reserving a final say on it under certain limited circumstances (constitutional reservations studied mostly by the school of constitutional pluralism). In the third place, the study offers a survey of recent literature regarding the role of national courts in EU law, judicial dialogue with the CJEU and, more specifically, this worrying and current wave of dissent, defiance, and resistance to the authority of EU law.

Keywords: *European Union law, authority and primacy, resistance by national (constitutional) courts, Court of Justice of the EU, survey of literature.*

JEL Classification: K33, K39

1. Introduction

Under the doctrine of primacy, the Court of Justice of the European Union (CJEU) claims that European Union (EU) law has absolute primacy over the domestic legal order of the Member States, including the Member States' constitutions². While Member States' highest courts have generally accepted the primacy of EU law³, they have carved out considerable reservations in their jurisprudence vis-à-vis this claim. In the history of European integration through law,

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² The judicially made doctrine was finally formalized and acknowledged in a declaration annexed to the Treaty of Lisbon (TUE). A new Declaration 17 on the principle of supremacy or primacy of EU law over national law basically recalls the status quo of the case-law of the CJEU without specifying whether primacy is also applicable to national constitutional law. At the same time, the Treaty of Lisbon constitutionalises respect for fundamental values, rights and principles assured by national constitutions and the identities and fundamental political structures of the Member States in Article 4.2.

³ Here we refer to courts that sit functionally at the top of the hierarchy of courts within a jurisdiction, notwithstanding their denomination as 'constitutional', 'supreme', or 'high' courts.

we have witnessed periodical challenges emanating from domestic constitutional and supreme courts in a number of Member States of the EU. But more recently, a wave of new episodes of judicial confrontation shows how the CJEU is struggling for legitimacy more and more⁴. Some constitutional courts are simply defying the primacy and ultimate authority of EU law over their national constitutions in a way that cannot be ignored.

Firstly, it is true that national courts can argue against aspects of some EU law doctrines on the basis that the CJEU's authority is restricted to the interpretation and application of the European Treaties and going beyond this means trespassing into matters of national constitutional law. National courts have developed their own doctrines to recognize and condition the authority of EU law through their constitutional legal orders. Secondly, it is also true that, very often, the Court of Justice anchors the binding character of its doctrines with a legal reasoning based on self-justification or legal fictions⁵. Judicial dialogue and dissent are not new in the history of European legal integration. But what we see now is how the interaction between the CJEU and some national constitutional actors is creating tension and distress and leading to situations of clash or direct confrontation never seen before.

This study aims to offer a descriptive account of the recent judicial resistance to the CJEU and its rulings on the authority and primacy of EU law; explain and summarize the legal and theoretical reasons that scholarship defend to justify such a resistance; and provide an updated survey of literature useful for further analysis and research. The contribution focuses first on the most recent rulings of some constitutional courts that have openly challenged the case-law of the CJEU on the primacy and the authority of EU law over national (constitutional) law and the formal response from other EU institutions (section 1). It summarizes then the emergence of different constitutional reservations or justifications conceptualized in a theoretical way by the different strands of the school of constitutional pluralism (section 2). And, last but not least, it offers a survey of most recent literature and EU law scholarship on the topic of (constitutional) judicial resistance. (section 3).

2. Judicial resistance to the authority and primacy of EU law. Recent case-law

Several important rulings show how European integration is on trial and the principles of autonomy, uniform application and effectiveness of EU law seem highly disputed and undermined with negative consequences for the judicial protection of individual rights in Europe. This section refers to the most relevant

⁴ J. Komárek, *The Struggle for Legitimacy through Law in the EU*, in D. Innerarity, J. White, C.A. and A. Errasti (eds), *A New Narrative for a New Europe*, Washington, DC, 2018, pp. 143-159.

⁵ B. De Witte, *Direct Effect, Primacy and the Nature of the Legal Order* in G. De Búrca and P. Craig (eds), *The Evolution of EU Law*, Oxford, 2011, p. 323.

and recent cases of judicial resistance or backlash against the primacy of European law.

Open defiance of the Court of Justice by the highest courts of Member States has been rare but there are few examples in the last decade: A decision of the Czech Constitutional Court on the level of Slovak pensions declared a judgment of the Court of Justice *ultra vires* for the first time in 2012⁶. Later on, we find three important cases. The German Constitutional Court located in Karlsruhe (*Bundesverfassungsgericht* or *BVerfG*) in 2016 harshly criticised the quality of the reasoning of the Court of Justice (in case *Gauweiler and others*⁷) in its *OMT* ruling⁸ (that dealt with the role of European Central Bank (ECB) after the financial crisis)⁹. Also in 2016 the Danish Supreme Court (constitutional court *ad hoc*) got upset with the activism of the Court of Justice (*Ajos/Danks Industri* case)¹⁰ and rejected the principle of the primacy of non-written general principles

⁶ Czech Constitutional Court, Slovak Pensions XVII/Holubec, 31 Jan 2012, Pl. ÚS 5/12 and CJEU. Case C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení*. ECLI:EU:C:2011:415. However, this judgment is considered an exception to the rule because the jurisprudence of the Czech Constitutional Court has been considered generally ‘integration friendly’. See R. Zbiral, *Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12. A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires*, “Common Market Law Review” 2012, No. 49, p. 1475 at p. 1477; J. Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires: Judgment of 31 January 2012, Pl. OIS 5/12, Slovak Pensions XVII*, “European Constitutional Law Review”, 2012, No 8, p. 323 at p. 324 and I. Šlosarčík, *EU Law in the Czech Republic: The Ultra Vires of the Czech Government to Ultra Vires of the EU Court*, “Vienna Journal on International Constitutional Law”, 2015, No 9, p. 417.

⁷ Court of Justice of the European Union (CJEU from now on). Case C-62/14 *Gauweiler and Others*. ECLI:EU:C:2015:400. See also Press Release No 70/15 of 16 June 2015 on this case. The OMT (Outright Monetary Transactions) programme announced by the ECB in September 2012 is found to be compatible with EU law. This programme for the purchase of government bonds on secondary markets does not exceed the powers of the ECB in relation to monetary policy and does not contravene the prohibition of monetary financing of Member States established by EU Treaties. On 21 June 2016 the German Constitutional Court finally accepted the European Central Bank’s OMT programme, after having made a reference of validity to the EU Court of Justice. However, the legal reasoning of the *Bundesverfassungsgericht* showed a strong criticism of its judicial review.

⁸ The key issue of the case *Gauweiler and others* is the following. By a press release issued on 6 September 2012, the European Central Bank (ECB) announced that it had adopted certain decisions concerning a programme authorising the European System of Central Banks (ESCB) to purchase on secondary markets government bonds of Member States of the euro area, provided that certain conditions were met.

⁹ The aim of that programme was to deal with the disruption of the ESCB’s monetary policy transmission mechanism caused by the particular situation of government bonds issued by certain Member States and to preserve the “singleness” of monetary policy in the aftermath of the financial and sovereign debt crisis. In its final judgment regarding the OMT programme, the German Constitutional Court accepted the interpretation of the Court of Justice in case *Gauweiler*. While it criticized the reasoning of the Court of Justice, it argued that the judgment did at least not manifestly violate the EU treaties.

¹⁰ Danish Supreme Court, Case 15/2014, UfR 2017.824H. See also CJEU, Case C-441/14 *Dansk Industri v. Rasmussen*, ECLI:EU:C:2016:278. On 6 December 2016 the Danish Supreme Court ruled that non-written general principles of EU Law are not binding in the Danish legal order. In its

of EU law over national law¹¹. And, finally in 2017, the Italian Constitutional Court could hardly accept the approach towards fundamental rights taken by the Court of Justice in *Taricco I*¹². A saga took place with a clarification of the Court of Justice of the interaction of the principle of primacy of EU law with national criminal law and fundamental rights in following case *Taricco II*¹³. Bonelli and Sarmiento have commented the last three important cases¹⁴.

But it is more recently that we find another ruling from the German

decision in the *Ajos* case, the SCDC disregarded the guidelines of the Court of Justice of the European Union (CJEU) which had been set out in a preliminary ruling earlier in the year. The authoritative version remains the Danish version but an English translation of the judgment was made available at the Danish Supreme Court's website: www.supremecourt.dk/supremecourt/nyheder/pressemessages/Document/Judgment%2015-2014.pdf and www.supremecourt.dk/supremecourt/nyheder/pressemessages/Pages/TherelationshipbetweenEUlawandDanishlawinacaseconcerningasalariedemployee.aspx (last accessed 20 April 2023).

¹¹ In spite of being recent, there is extensive bibliography on the *Ajos* case and judicial resistance in Denmark. See S.W. Haket, *The Danish Supreme Court's Ajos judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order*, "Review of European Administrative Law", 2017, No. 10 (1), pp.135–7981; R. K. Holdgaard, D. Elkan and G. K. Schaldemose, *From cooperation to collision: The ECJ's Ajos ruling and the Danish Supreme Court's refusal to comply*, "Common Market Law Review", 2018, No. 55(1), pp.17–53; H. Krunke and S. Klinge, *Dinamarca y el caso Ajos. Lo que se perdió en Maastricht y Lisboa*, "Teoría y Realidad Constitucional", 2018, No. 41, pp. 381-406; M. R. Madsen, H. P. Olsen and U. Šadl, *Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation*, "European Law Journal", 2017, No. 23(1-2), pp.140–150; U. Neergaard and K. Engsig Sørensen, *Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case*, "Yearbook of European Law", 2017, No. 36, pp. 275–313; U. Šadl and S. Mair, *Mutual Disempowerment: Case C-441/14 Dansk Industri, acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S v The estate left by A*, "European Constitutional Law Review", 2017, No. 13(2), pp. 347–368; O. Terkelsen, *The Ajos case and the Danish approach to international law*, "European Public Law", 2018, No. 24(2), pp.183–193; R. Nielsen and C.D. Tvarnø, *Danish Supreme Court Infringes the EU Treaties by its Ruling in the Ajos Case*, "Europarættlig Tidsskrift", 2017, No (2), pp. 303-326.

¹² CJEU, Case: C-105/14, *Taricco and Others*. ECLI:EU:C:2015:555.

¹³ The Italian Constitutional Court made a reference on 26 January 2017 openly inviting the Court of Justice to overrule its past decision. The European Court of Justice (CJEU) finally delivered a judgment that put an end to the so-called *Taricco* saga – at least for the time being in the case known as *Taricco II* judgment on 5 December 2017. CJEU, case C-42/17 – *M.A.S. & M.B.* ECLI: EU:C:2017:936. The case deals with the relationship between the principles of primacy, effectiveness, and direct effect of EU law, on the one hand, and the concept of national (and particularly constitutional) identity of the member States, on the other. It also addresses the extent of the possibility for member States not to apply EU law if it conflicts with an overriding principle guaranteed by their national constitution.

¹⁴ On the *Taricco* cases, see M. Bonelli, *The Taricco saga and the consolidation of judicial dialogue in the European Union*, "Maastricht Journal of European and Comparative Law", 2018, No. 25, p. 357; and D. Sarmiento, *An Instruction Manual to Stop a Judicial Rebellion ("before it is too late, of course")*, *Verfassungsblog*, 2 February 2017, at <https://verfassungsblog.de/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/> (last accessed on 15 February 2023).

Federal Constitutional Court in Karlsruhe (*BVerfG*) from 5 May 2020 (case *PSPP programme*)¹⁵ that sent shock waves throughout the EU. The Federal Constitutional Court, for the first time, defied a judgment of the European Court of Justice by declaring that the latter had acted *ultra vires* (beyond its competences and mandate given by the EU Treaties). The main questions were once again the role and competences of the European Central Bank (ECB) and its programme to save the euro (Public Sector Purchase Program or PSPP programme)¹⁶. In Karlsruhe, the *BVerfG* declared the requested CJEU's ruling of 11 December 2018 (case *Weiss*) to be “objectively arbitrary” due to a poor standard of judicial review¹⁷ and, therefore, *ultra vires* and not applicable in Germany. As a result, the *BVerfG* reviewed the validity of the ECB action (substituting itself to the CJEU), concluding that it was also affected by poor legal reasoning, and consequently declaring it as *ultra vires*¹⁸ as well.

In addition to raising fundamental constitutional questions about the relationship between national law and EU law and between national courts and the EU institutions; the *BVerfG*'s ruling questioned the legality not only over the PSPP but also over the new Pandemic Emergency Purchase Programme (PEPP), an initiative that had just been announced by President of the ECB, Christine Lagarde. For that reason, the so called *PSPP* ruling affected the stability of the whole euro area in the middle of the coronavirus crisis¹⁹. Some days after the

¹⁵ *Bundesverfassungsgericht (BVerfG)* (Federal Constitutional Court of Germany), 5 May 2020, 2 BvR 859/15, 2020 *Neue Juristische Wochenschrift* 1647 (2020) – PSPP II. Official English translation at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (accessed on 15 February 2023).

¹⁶ The judgment from the constitutional court of Germany (*BVerfG*) rules on an action against German institutions in the context of Mario Draghi's and European Central Bank quantitative easing project in the aftermath of the 2008-2012 financial crisis. The main issue at stake was whether the program carried by the ECB was compatible with the prohibition on monetary finance (Article 123 TFEU) and the principle of conferred powers to the EU. Before deciding on the case, the *BVerfG* had referred a question to the CJEU for a preliminary ruling asking to clarify whether the ECB was competent to purchase sovereign debt in a large scale on the secondary markets (not directly from EU Member States). In December 2018, the CJEU answered in the affirmative in case C-493/17 *Heinrich Weiss and Others*. ECLI:EU:C:2018:1000. On this problem, see also previous judgment from the CJEU of 27 November 2012, case *Pringle* C-370/12, EU:C:2012:756.

¹⁷ CJEU, case C-493/17 *Heinrich Weiss and Others*. ECLI:EU:C:2018:1000.

¹⁸ In its Judgment of 11 December 2018, the CJEU held that the PSPP program neither exceeded the ECB's mandate nor violated the prohibition of monetary financing. However, it is also interesting to note that the *BVerfG* did not disagree with the outcome of the CJEU in the case *Weiss*. On the substance, it accepted the conclusion that the ECB's action did not breach the TFEU prohibition of monetary financing, but disagreed with the Luxembourg's ruling on methodological grounds.

¹⁹ *Bundesverfassungsgericht (BVerfG)* (Federal Constitutional Court), Judgment 21 June 2016 - 2 BvR 2728/13 -, paras. (1-220) and most recent ruling of 5 May 2020 (English translation) at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (accessed on 15 February 2023). See also *Bundesverfassungsgericht (BVerfG)*, Press release no 32/2020 *ECB decisions on the Public Sector Purchase Programme exceed EU competences* at <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html> (accessed on 15 February 2023). This ruling has been commented by

ruling of the *BVerfG* in Karlsruhe, the European Central Bank²⁰, the Court of Justice in Luxembourg²¹, and the European Commission²² issued statements recalling the primacy of EU law and the binding character of the CJEU's case-law on all national courts of EU Member States. As the President of the European Commission Ursula Von Leyen declared: "*The final word on EU law is always spoken in Luxembourg. Nowhere else*".

Shortly after, German Chancellor Angela Merkel suggested it was possi-

Sarmiento and Utrilla on 22 May 2020, Euronews, Germany's Constitutional Court has gone nuclear. What happens next will shape the EU's future, at <https://www.euronews.com/2020/05/15/germany-constitutional-court-gone-nuclear-what-happens-next-will-shape-the-eu-future-view> (last accessed 15 February 2023).

²⁰ European Central Bank. Press release from 5 May 2020 at <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html> (accessed on 15 February 2022). It says: "*The Governing Council received a preliminary briefing by the governor of the Bundesbank and by the legal department of the European Central Bank (ECB). The ECB takes note of today's judgment by the German Federal Constitutional Court regarding the Public Sector Purchase Programme (PSPP). The Governing Council remains fully committed to doing everything necessary within its mandate to ensure that inflation rises to levels consistent with its medium-term aim and that the monetary policy action taken in pursuit of the objective of maintaining price stability is transmitted to all parts of the economy and to all jurisdictions of the euro area. The Court of Justice of the European Union ruled in December 2018 that the ECB is acting within its price stability mandate.*"

²¹ Court of Justice of the European Union. CJEU. Press release No 58/20 Luxembourg following the ruling of the German Constitutional Court of 5 May 2020, issued on 8 May 2020 at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf> (accessed on 15 February 2023). The press release reads: "*The departments of the institution never comment on a judgment of a national court. In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. 1 In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. 2 Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. 3 That is the only way of ensuring the equality of Member States in the Union they created. The institution will refrain from communicating further on the matter.*"

²² European Commission. Statement by President Von der Leyen of 10 May 2020 at https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846 (accessed on 15 February 2023). The statement reads: "*The recent ruling of the German Constitutional Court put under the spotlight two issues of the European Union: the Euro system and the European legal system. We take good note of the clear statement of the European Court of Justice of 8 May. In the same vein, the European Commission upholds three basic principles: that the Union's monetary policy is a matter of exclusive competence; that EU law has primacy over national law and that rulings of the European Court of Justice are binding on all national courts. The final word on EU law is always spoken in Luxembourg. Nowhere else. The European Commission's task is to safeguard the proper functioning of the Euro system and the Union's legal system. We are now analysing the ruling of the German Constitutional Court in detail. And we will look into possible next steps, which may include the option of infringement proceedings. The European Union is a community of values and of law, which must be upheld and defended at all times. This is what keeps us together. This is what we stand for.*"

ble to find a solution to this crisis. In view of the German Government, a confrontation could be avoided if the ECB explained and justified why the bond-buying program was needed²³. Later on, the ECB disclosed documents to the Bundestag and German Government demonstrating that it had addressed the proportionality issue and the necessity of the action. While those measures satisfied the *BVerfG*'s ruling within the German domestic order, they didn't address the more fundamental question of whether the German constitutional court had violated EU law with the PSPP ruling in the European legal order.

On 9 June 2021, the European Commission sent a letter of formal notice to Germany “*for breach of fundamental principles of EU law, in particular the principles of autonomy, primacy, effectiveness and uniform application of Union law, as well as the respect of the jurisdiction of the European Court of Justice*” by the German court in its decision in the PSPP case. Specifically, the Commission blamed the Court for declaring the ECB “*to be ‘ultra vires’, going beyond its competence*” and declaring the ECJ’s 2018 ruling in the case “*to be ‘ultra vires’ – without referring the matter back to the Court of Justice.*” The seriousness of the breach was clear according to the Commission that declared the following: “*As a consequence, the German Court deprived a judgment of the European Court of Justice of its legal effect in Germany, breaching the principle of the primacy of EU law. The Commission considers that the judgment of the German Constitutional Court constitutes a serious precedent, both for the future practice of the German Constitutional Court itself, and for the supreme and constitutional courts and tribunals of other Member States*”.²⁴

However, on 2 December 2021, the Commission closed this infringement procedure on the basis of formal commitments of Germany clearly recognizing the primacy of EU law and the authority of the Court of Justice of the European Union. Three reasons were given: “*First, in its reply to the letter of formal notice, Germany has provided very strong commitments. In particular, Germany has formally declared that it affirms and recognizes the principles of autonomy, primacy, effectiveness and uniform application of Union law as well as the values laid down in Article 2 TEU, including in particular the rule of law. Second, Germany explicitly recognizes the authority of the Court of Justice of the European Union, whose decisions are final and binding. It also considers that the legality of acts of Union institutions cannot be made subject to the examination of constitutional complaints before German courts but can only be reviewed by the Court of Justice. Third, the German government, explicitly referring to its duty of loyal cooperation enshrined in the Treaties, commits to use all the means at its disposal*

²³ Yale MacMillan Center, *Merkel right: Crisis created by German court ruling is “solvable”*, 26 June 2020 at <https://macmillan.yale.edu/news/merkel-right-crisis-created-german-court-ruling-solvable> (accessed 22 February 2023).

²⁴ European Commission, *June infringements package: key decisions*, Press release 9 June 2021 at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743__ (accessed on 15 February 2023).

to avoid, in the future, a repetition of an ‘ultra vires’ finding, and take an active role in that regard”²⁵.

And, last but not least, we must mention the ruling from the constitutional Court of Poland from 7 October 2021²⁶ where it establishes the unconstitutionality of central EU primary law norms (Art. 1 Treaty of European Union or TEU read in conjunction with Article 4(3) TEU, as well as Article 2 TEU and Article 19(1) TEU) and questions the primacy of European law and the jurisdiction of the CJEU with regard to the Polish constitution. The ruling is not about a single act of a single EU institution breaching the domestic legal order in a certain context or circumstances. Rather, the primacy of European law is excluded comprehensively as a principle from a Polish constitutional perspective and for all possible areas. Furthermore, some provisions of the Union Treaty are also classified as unconstitutional to the extent that they jeopardize the Republic of Poland’s functioning “as a sovereign and democratic state”²⁷.

Following this ruling, the President of the European Commission, Ursula Von der Leyen, responded with a statement vowing to use all Treaty powers available to ensure the principle of primacy and reminded that “EU law has primacy over national law, including constitutional provisions”²⁸. The Commission expressed serious concerns with respect to the Polish Constitutional Tribunal and its recent case law that considered the provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law.

Later on, following a heated debate between the President Von der Leyen and some members of the European Parliament, on one side; and Polish Prime Minister *Mateusz Morawiecki* on the other in the plenary of 19 October; the European Parliament adopted a resolution on 21 October 2021 in which it “[d]eeply deplores the decision of the illegitimate [Polish] ‘Constitutional Tribunal’ of 7 October 2021 as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles

²⁵ European Commission, *December infringements package: key decisions*, Press release 2 December 2021 at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201_ (accessed on 15 February 2023).

²⁶ Constitutional Tribunal of Poland. Case K 3/21 from 7 October 2021 at <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> (accessed on 15 February 2023). A summary of the ruling in English at blog “EULawLive”, at <https://eulawlive.com/polish-constitutional-court-declares-eu-treaties-ultra-vires-in-poland/> (accessed on 15 February 2023).

²⁷ See comment by M. Lasek-Markey, *Poland’s Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls*, European law blog, 21 October 2021 at <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/> (last accessed 5 March 2023). See other comments on the ruling in English later on in section 3 (A new “*guerre des juges*”? Survey of literature) and in footnote 84.

²⁸ European Commission, Statement President Von Leyen of 8 October 2021, at https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5163 (last accessed 5 March 2023).

*in accordance with well-established case-law of the CJEU*²⁹.

After a reasonable period, the European Commission decided to launch an infringement procedure against Poland on 22 December 2021³⁰. In its first letter of notice, the Commission considers that the ruling of the Constitutional Tribunal of 7 October 2021³¹, and a previous one from 14 July 2021³², are in breach of the general principles of autonomy, primacy, effectiveness and uniform application of Union law and the binding effect of rulings of the Court of Justice of the European Union. Furthermore, the Commission considers that both rulings are in breach of Article 19(1) TEU, which guarantees the right to effective judicial protection, by giving it an unduly restrictive interpretation (depriving individuals before Polish courts from the full guarantees and rights). Finally, the Commission expresses serious doubts on the independence and impartiality of the Constitutional Tribunal that is called upon to rule on questions relating to the application or interpretation of EU law. The Commission considers that it can therefore no longer ensure effective judicial protection by an independent and impartial tribunal previously established by law, as required by Article 19(1) TEU, in the fields covered by EU law³³. At the time of writing, the infringement

²⁹ European Parliament, Resolution of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0439_EN.html#def_1_20 (last accessed 5 March 2023). According to this resolution (adopted with 502 votes for, 153 against, and 16 abstentions): “*the illegitimate ‘Constitutional Tribunal’ not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland*”.

³⁰ European Commission, *Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal*, Press release 22 December 2021 at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070 (last accessed 5 March 2023).

³¹ According to the Commission, in its October ruling, the Constitutional Tribunal disregarded its obligations under EU law by considering unconstitutional - and thus not having effects in the Polish legal order - the Court of Justice's interpretation of Article 19(1) TEU according to which a national court may be called upon to review the legality of the procedure for appointing a judge and pronouncing itself on any irregularity in the appointment process to verify whether that judge, or the court in which the judge adjudicates, meets the requirements of Article 19(1) TEU.

³² In particular, in its July ruling, it is the view of the Commission that the Constitutional Tribunal denied the binding effect of any interim measures orders of the Court of Justice issued under Article 279 TFEU to guarantee the effective judicial review by an independent and impartial tribunal established by law.

³³ On 20 December 2017, the Commission triggered the Article 7(1) TEU for the first time against Poland. See European Commission, *Rule of Law: European Commission acts to defend judicial independence in Poland*, Press release 20 December 2017 at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367 (last accessed 5 March 2022). As also highlighted by the Commission in its reasoned proposal under Article 7(1) TEU of 2017 and as held by the European Court of Human Rights in its judgment of 7 May 2021, the process of appointment to the Constitutional Tribunal of three judges in December 2015 occurred in breach of fundamental rules forming an integral part of the establishment and functioning of the system of constitutional review in Poland. The gravity of this breach gives rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judges concerned. This is also shown by other irregularities

action duly brought by the European Commission against Poland before the CJEU on 23 January 2023 is still ongoing³⁴.

3. Primacy of EU law vis-s-vis national constitutional law and the school of constitutional pluralism

We must now focus on the doctrine of primacy of EU law and try to understand the reasons why some Member States' courts have mostly accepted primacy of EU law as a principle while reserving a final say on it under certain circumstances. This section therefore explains the emergence of constitutional reservations that have been studied and conceptualized in a theoretical way by the different strands of what can be referred to as the school of constitutional pluralism.

While developing the fundamental doctrines of direct effect and primacy of EU Law, the Court of Justice has always claimed ultimate authority of EU law over domestic/national law (landmark cases *Van Gend en Loos* and *Costa v. ENEL*³⁵ confirmed in later cases). Furthermore, it argued long time ago in case *Internationale Handelsgesellschaft*³⁶ that European law enjoyed primacy even vis-à-vis provisions of national constitutions.

The primacy of EU law over national law is a classic topic explained in all EU legal textbooks and accepted by Member States as a pillar of this supranational integration. More difficult is the question of the primacy over national constitutions as constructed by the CJEU, where further justifications have been necessary (especially in the area of fundamental rights and, more recently, criminal law)³⁷. In order to approach the subject and status quo of the

and deficiencies such as the election of the President and Vice-President of the Constitutional Tribunal, which raised serious concerns as to the impartiality of judges of the Constitutional Tribunal when handling individual cases.

³⁴ European Commission. Press release of 15 February 2023. Infringement process against Poland available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842 (accessed 31 May 2023).

³⁵ CJEU, Case 26/62, *Van Gend en Loos*, [1963] ECR I and Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

³⁶ CJEU, Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, at para. 3. See also Case 106/77, *Simmenthal*, [1978] ECR 629, paras. 21-26; Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame II*, [1996] ECR I-1029, para. 33 and Case C-213/07, *Michaniki*, [2008] ECR I-9999, paras. 62-69.

³⁷ Most recent literature refers to the *Taricco I and II* saga before the CJEU that deal with the interaction of EU law and national criminal laws and fundamental rights. See C. Rauchegger, *National constitutional rights and the primacy of EU law: M.A.S.*, "Common Market Law Review", 2018, No. 55(5), pp.1521–1547; R. Sicurella, *Effectiveness of EU law and protection of fundamental rights: The questions settled and the new challenges after the ECJ decision in the M.A.S. and M.B. case (C-42/17)*, "New Journal of European Criminal Law", 2018, No. 9(1), pp.24–30; T. Wahl, *Rebalancing effectiveness and Fundamental Rights*, The European Criminal Law Associations Forum, "EUCrim" No. 2018/1, p. 42; Di Francesco Maesa, *Effectiveness and Primacy of EU Law v. Higher National Protection of Fundamental Rights and National Identity – A Look through*

principle; it is good to begin with the textbook written by Chalmers and others³⁸ where a good summary of the situation and the challenges that the EU is facing is done up to 2019³⁹. A separate chapter covers specifically the authority of EU law. In the chapter, the reader finds the most important rulings of European courts and some potential reasons to justify why resistance to the authority of EU law might be granted some consideration in certain cases (protection of fundamental rights⁴⁰, defense of national constitutional identity⁴¹ and/or *ultra vires* reservation).

The reality is that EU law prevails in most cases over a wide array of activities and over national conflicting provisions⁴². At the same time, and despite the apparent lack of flexibility of the doctrine of primacy of EU law, the Court of Justice has often taken the concerns of the national jurisdictions into consideration⁴³. It has recognized in its jurisprudence that some fundamental principles of domestic constitutions have to be taken into account when assessing the justification and necessity of restrictions of the EU fundamental freedoms. This concerns the protection of fundamental rights and the national identity or fundamental constitutional values of Member States⁴⁴. However, it is important to remember that the Court of Justice still claims ultimate authority and a final say when

the Lens of the Taricco II Judgment, “EUcrim”, The European Criminal Law Associations’ Forum, 2018, No. 1, pp. 50–56; A. Willems, *The Court of Justice of the European Union’s Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*, “German Law Journal”, 2019, No. 20(4), pp. 468–495. See also M. Ross, *Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?*, “European Law Review”, 2006, No. 31 (4), pp. 474–496. On the question of balance see L. Bachmaier, *Fundamental Rights and Effectiveness in the European AFSJ: the Continuous and Never Easy Challenge of Striking the Right Balance*, “EUcrim”, The European Criminal Law Associations’ Forum, 2018, No. 1, pp. 56–63, on p. 61–62.

³⁸ D. Chalmers, G. Davies and G. Monti, *The Authority of EU Law*, in *European Union Law: Text and Materials*, 4th ed., Cambridge, 2019, p. 202.

³⁹ *Ibid.* Since it is published in the UK, obviously the topic is covered taking into account the Brexit which finally fully materialized in 2022.

⁴⁰ The CJEU was very criticized for downgrading the protection of standards of national fundamental rights (also based on the European Convention of Human Rights ECHR) to a lower EU standard as it happened in the famous case *Melloni*. CJEU, *Case C-399/11, Melloni*, 26 Feb. 2013, *EU:C:2013:107*. See also A. Albi, *Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums*, “European Law Journal”, 2009, No. 15, pp. 46–69.

⁴¹ Criticism to the judgements of the CJEU gives also a reason to look into how social attitudes and constitutional identities play in the resistance of national courts to these judgments. See J. Komarek, *Waiting for the Existential Revolution in Europe*, “International Journal of Constitutional Law”, 2014, No. 12, pp. 190–212.

⁴² D. Chalmers, G. Davies and G. Monti G, *The Authority of EU Law*, in *European Union Law: Text and Materials*, 4th ed., Cambridge, 2019, p. 202.

⁴³ N. Petersen, *Karlsruhe’s Lochner moment? A rational choice perspective on the German Federal Constitutional Court’s Relationship to the CJEU after the PSpP decision*, “German Law Journal”, 2020, No. 21, pp. 999–1001, p. 995.

⁴⁴ A. v. Bogdandy and S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, “Common Market Law Review”, 2011, No. 48, pp. 1417–1453. See also C.

deciding which Member States' constitutional concerns can justify a possible conflict with EU law⁴⁵.

As seen in section 1 above, Member States' courts have mostly accepted the principle of primacy of EU law, but carved out certain limited exceptions when it interacts with their national constitutions. The court that is commonly considered the most influential is the German Federal Constitutional Court. In this regard, the *BVerfG* has developed three famous exceptions – the *Solange* doctrine on fundamental rights, the constitutional identity review, and the *ultra vires* doctrine, which was applied in the latest *PSPP* judgment⁴⁶. Before that ruling, the Federal Constitutional Court had never openly defied the Court of Justice. Other Member States' highest courts have often been influenced by the *BVerfG*⁴⁷.

The defiance by the German constitutional court must be set in the proper context of ordinary judicial collaboration between the CJEU and national jurisdictions. In fact, most important principles of EU law have been developed by the CJEU thanks to the requests for preliminary rulings of interpretation/ validity of EU law sent by national courts⁴⁸. As scholarship has noted: “*Mutual trust between national courts/ECJ is essential for judicial collaboration. Willingness by national courts and parties to a legal conflict to bring issues before CJEU is crucial for the harmonious interpretation of EU law and therefore for the cohesion and effectiveness of EU law. This willingness depends on the transparency*

Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, 2020, p. 85.

⁴⁵ N. Petersen, *Germany*, in F.M. Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles*, Cambridge, 2019, pp. 89-96.

⁴⁶ In its *Weiss* judgment from 11 December 2018, the Court of Justice (CJEU) held that the PSP program did not violate the European Treaties. 4 However, instead of implementing the *Weiss* decision of the ECJ, the Federal Constitutional Court argued in response to *Weiss* that both, the decision of the Court of Justice and the PSP program of the ECB were *ultra vires* and thus violated the German Constitution. Nevertheless, it gave the ECB the opportunity to remedy the situation by providing a proportionality assessment of the program within three months. If the ECB did not provide an adequate assessment, the GFCC ordered the German Central Bank to stop participating in the purchasing of Member States' bonds under the program.

⁴⁷ The jurisprudence of the German Federal Constitutional Court or *BVerfG* has become a reference for many high courts of other Member States that have also agreed with the reservations vis-à-vis EU law in certain circumstances. See M. Wendel, *Comparative reasoning and the making of a common constitutional law: EU-related decisions of national constitutional courts in a transnational perspective*, “*International Journal of Constitutional Law*”, 2013, No. 11, pp. 981–1002 at p. 982. See also M. Claes, *The Validity and Primacy of EU Law and the ‘Cooperative Relationship’ between National Constitutional Courts and the Court of Justice of the European Union*, “*Maastricht Journal of European and Comparative Law*”, 2016, No. 23, 151–170, at p. 151 and 158. More recently see D. Amoroso, *Italy*, in F. Palombino (ed.), *Duelling for Supremacy: International Law vs. National Fundamental Principles*, Cambridge, 2019, pp. 184–209, at p. 184; and A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, and Global Governance. National Reports*, The Hague, 2019.

⁴⁸ See Article 267 TFEU on the exclusive role of the CJEU on the interpretation and validity of EU law.

and foreseeability of legal procedures in Luxemburg”⁴⁹. In this context, the principle of national procedural autonomy vis-à-vis EU law has also a fundamental role in the solution of any primacy question. And this related question has been problematic too. The Court of Justice’s case law on procedures and remedies before national courts has also been highly scrutinised and often criticised, in particular for intruding on the procedural autonomy of the Member States⁵⁰.

In view of all facts and arguments presented, it is clear that the classic description of the primacy of EU law offered in the textbooks during decades is no longer updated. When we inquire more deeply into the field of European legal integration and waves of judicial resistance, another description of reality emerges. Since the 90s the pluralist movement, in particular, has offered a different normative account regarding the relations between European law and national constitutional law⁵¹. This movement leaves behind the unitary concept and nature of EU law from a theoretical point of view and acknowledges that, apart from theory, a broader approach is also needed in order to provide a complete picture, one taking into account the behaviour of national courts in practice⁵². The plural-

⁴⁹ U. Neergaard and K. Engsig Sørensen, *Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case*, “Yearbook of European Law”, 2017, No. 36, pp. 275–313, on p. 312.

⁵⁰ A. Wallerman, *Can two walk together, except they be agreed? Preliminary references and (the erosion of) national procedural autonomy*, “European Law Review”, 2019, No. 44(2), pp. 159-177.

⁵¹ Different authors have contributed in their writings to the school of constitutional pluralism. See e.g. (in chronological order) M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, “European Law Journal”, 2005, No. 11, p. 262; A. Paulus, *The Emergence of the International Community and the Divide Between International and Domestic Law*, in J.E. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law*, Oxford, 2007, p. 216; M. Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, “International Journal of Constitutional Law”, 2008, No. 6, p. 415; A. von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, “International Journal of Constitutional Law”, 2008, No. 6, p. 397; N. Krisch, *The Open Architecture of European Human Rights Law*, “Modern Law Review”, 2008, No. 71, p. 183; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, 2010; P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*, Cambridge, 2012; A. Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, “Global Constitutionalism”, 2012, No. 1, p. 53; A. Stone Sweet, *The Structure of Constitutional Pluralism*, “International Journal of Constitutional Law”, 2013, No. 11, p. 491; N. Petersen, *The Concept of Legal and Constitutional Pluralism*, in J. Englisch (ed.), *International Tax Law: New Challenges to and from Constitutional and Legal Pluralism*, Amsterdam, 2016, p. 1; C. Mac Amblagh, *The Anatomy of Constitutional Pluralism in the European Union*, Edinburgh School of Law Research Paper Series, University of Edinburgh, No. 2017/13 and in G. Davies and M. Avbel, *Research Handbook on Legal Pluralism and EU Law*, Cheltenham, 2018, pp. 59-77; N. Jääskinen, *Judicial Dialogue between National Supreme Administrative Courts and the Court of Justice of the European Union*, in K. Lenaerts et. al. (eds.), *An ever-changing Union?*, Oxford, 2019, p. 129.

⁵² Although there are several theories of European constitutionalism, all of them share some characteristic elements taking into account the complexity and sophistication of all (twenty-seven plus one) constitutional legal orders interacting in the process of European legal integration.

ist movement claims the necessity of having regard to all perspectives on supremacy, not only the perspective of the Court of Justice (CJEU). Scholars defending the pluralist approach see in this theory greater adaptability and responsiveness to the conflicting claims between the local and the global; and better inclusion of public autonomy (where citizens bring in their definition of the legal and the political⁵³ and conflicts are resolved giving specific solutions for specific interactions among specific actors)⁵⁴.

In the approach designed by the Court of Justice, based on a “*federalist*” model with the aim of promoting European integration, there is an organic hierarchy ensuring that national judges apply, enforce and interpret EU law under its ultimate control. According to the perspective of the CJEU, European Union law takes precedence over national law in all circumstances except those which call for the application of Art. 4.3 TEU post-Lisbon. However, we have seen how this classic construction of primacy does not hold true when confronted with constitutional realities in some Member States (constitutional approaches to European law from a different perspective).

Controversy is assured if we confront national orthodox doctrines denying the primacy of Union law over national constitutions with the classic federal and hierarchical understanding of absolute primacy of the Court of Justice.⁵⁵ If both sides (Supreme/Constitutional courts and the CJEU) firmly hold their own views and all judicial actors claim ultimate authority, a collision, confrontation or clash between the European and the constitutional legal orders is inevitable⁵⁶. The issue is not new but is far from being resolved and it has been traditionally referred to as judicial war or “*guerre des juges*” in French literature⁵⁷.

The reason behind this confrontation is simple. As De Witte once brilliantly put it: “For these [national] courts and, indeed, for most constitutional law scholars throughout Europe, the idea that EU law can claim its primacy within

⁵³ N. Krisch, *The Case for Pluralism in Postnational Law*, in G. de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism*, Cambridge, 2011, p. 183.

⁵⁴ D. Halberstam, *Local, Global, and Plural Constitutionalism: Europe Meets the World*, in G. de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism*, Cambridge, 2012, p. 198.

⁵⁵ On this problem see J. H. H. Weiler and M. Wind, *European Constitutionalism Beyond the State*, Cambridge, 2003, p. 97; A. Von Bogdandy, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, “International Journal of Constitutional Law”, 2008, No. 6 (3-4), pp. 397-413; A. Von Bogdandy and S. Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, “Common Market Law Review”, 2011, No. 48 (5), pp. 1417-1453; D. Pikani, *Supremacy of EU Law and the Jurisprudence of Constitutional Reservations in Central Eastern Europe and the Western Balkans: Towards a “Holistic” Constitutionalism*, Doctoral thesis, European University Institute, Department of Law, 2010, p. 99.

⁵⁶ U. Haltern, *Revolutions, real contradictions, and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional Court*, “International Journal of Constitutional Law”, 2021, No. 19 (1), pp. 208–240.

⁵⁷ S. Denys, *L'effet dans le temps des arrêts préjudiciels de la Cour de Justice des Communautés Européennes: enjeu ou prétexte d'une nouvelle guerre des juges?*, in *Du droit international au droit de l'intégration*, Liber amicorum P. Pescatore, Baden Baden, 1987.

the national legal orders on the basis of its own authority seems as implausible as Baron von Munchausen's claim that he had lifted himself from the quicksand by pulling on his bootstraps.⁵⁸

To conclude this section, it is possible to argue that the school of constitutional pluralism offers a different narrative of the primacy question that reflects better the complexity and sophistication of a diverse, plural and multi-layered system composed of many different legal orders, all reunited in a European system⁵⁹.

4. A new “*guerre des juges*”? Survey of literature

This final aim of this study is to offer a survey of recent literature regarding the role of national constitutional courts in EU law, judicial dialogue with the Court of Justice of the European Union (CJEU) and, more specifically, this worrying and current wave of dissent, defiance and resistance to the authority of EU law. For that reason, the reader will find in this section references to the most important and recent legal scholarship exploring the broad topic of a new wave of judicial war/confrontation (“*guerre des juges*”) defiance or resistance to the primacy and authority of EU law by the highest courts in some Member States; and comments to most recent rulings discussed in section 1.

Much has been written about global constitutional convergence in the field of EU law and in comparative constitutional law and on the role of national courts in these processes of integration/convergence⁶⁰. Judicial dialogue in Europe has also been a topic very well covered in legal literature during the last decade⁶¹. At the same time, a *nouvelle vague* of constitutional resistance and criticism seems to be gaining ground to the edicts of international institutions, not

⁵⁸ B. De Witte, *Direct effect, Supremacy and the Nature of the Legal Order*, in P. Craig and G. De Búrca, (eds), *The Evolution of EU Law*, Oxford, 2011, p. 323.

⁵⁹ This study does not aim to explore in depth the basis and substance of the normativity of the pluralist movement but to describe their questions and some of their claims. Some questions put forward by these different narratives cannot simply be ignored. From a vertical perspective, how do national courts perceive and react to EU law? From a horizontal perspective, what is the relationship, if any, between national jurisdictions amongst themselves and, more specifically, what is the role of the CJEU within this complex European legal order?

⁶⁰ To name just a few of see K. Alter, L. Helfer and MR Madsen (eds), *International Court Authority*, Oxford, 2018; T. Konstadinides, *The Rule of Law in the European Union: The Internal Dimension*, Oxford, 2017 and B. De Witte, J. A. Mayoral, U. Jaremba, M. Wind and K. Podstawa (eds), *National Courts and EU Law*, Cheltenham, 2016.

⁶¹ Most important reference could be the work from J. A. Mayoral and M. Wind, *Introduction. National courts vis-à-vis EU law: new issues, theories and methods*, in De Witte and others (eds), *National Courts and EU Law*, Cheltenham, 2016, pp. 1-11. More recently, on the topic of judicial resistance to both EU and EEA law, see Master thesis by E. Hauksdóttir, *Judicial resistance in the EU and EEA in theory and in practice*, University of Iceland, 2021. And, on Iceland and the EEA law, see M.E. Mendez-Pinedo, *Constitutional/judicial resistance to European Law in Iceland. Sovereignty and constitutional identity vs. access to justice under the EEA Agreement*, “Juridical Tribune - Tribuna Juridica”, 2020, vol. 10, issue 3, pp. 390-418.

only in Europe but also worldwide⁶². Some classic and modern authors refer to this confrontation as “*guerre des juges*” or judicial war⁶³. Other authors prefer to conceptualize the problem with the general terms clash, confrontation, conflict, resistance, or the more precise “*pushback*” and “*backlash*”⁶⁴.

In the field of comparative constitutional law, some important scholarship must be referred in order to understand the broad context and challenges of this wave of judicial confrontations. Hirschl, for instance, has pointed to a paradox embedded in the trend of global constitutionalism we witness these days: in his view, the more expansive such trends of constitutional convergence become, the greater the likelihood of dissent and resistance⁶⁵. Other important scholars construct a theoretical framework and refer to a movement of backlash against international courts. Madsen, Cebulak, and Wiebusch have even empirically mapped a variety of patterns of such resistance distinguishing between mere “*pushback*” (disagreement or resistance to the judicial outcome) and/or real “*backlash*” (structural and institutional defiance)⁶⁶. Some scholarship has

⁶² G. Davies and M. Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law*, Cheltenham, 2018; M. Derlén and J. Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives*, London, 2018; J. A. Mayoral and M. Wind, *Introduction. National courts vis-à-vis EU law: new issues, theories and methods*, in *National Courts and EU Law*, Cheltenham, 2016, pp. 1-11; T. Perisin and S. Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*, London, 2018.

⁶³ P. Wachsmann, *Le dialogue au lieu de la guerre*, in *Le dialogue des juges, Mélanges en l'honneur du président Bruno Genevois*, Paris, 2009, p. 1121, especially on p. 1130; M. Ross, *Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality?*, “European Law Review”, 2006, No. 31, pp. 474-496, on p. 476; U. Sadl, *The role of effet utile in preserving the continuity and authority of European Union law: evidence from the citation web of the pre-accession case-law of the Court of Justice of the European Union*, “European Journal of Legal Studies”, 2015, No. 8 (1), pp. 18-45 available at https://ejls.eu.eu/wp-content/uploads/sites/32/pdfs/Summer2015/Full_Summer_2015.pdf (accessed 20 April 2023); E. Gualco, *Clash of Titans 2.0”. From Conflicting EU General Principles to Conflicting Jurisdictional Authorities: The Court of Justice and the Danish Supreme Court in the Dansk Industri Case*, “European Papers”, 2017, No. 1, p. 6; and C. M. Von Quitzow, *Hjalte Rasmussens Legacy*, “Lund Student EU law Review (LSEU)”, 2016, No. 3, pp. 104-119 at <http://www.law.lu.se/#!EUlawreview2016> (accessed 15 March 2023).

⁶⁴ M. Madsen, P. Cebulak, and M. Wiebusch, *Backlash against international courts: explaining the forms and patterns of resistance to international courts*, “International Journal of Law in Context”, 2018, No. 14(2), pp.197–220. This article theorizes different forms and patterns of resistance to international courts and develops an analytical framework. It deals first with the concept of resistance, introducing “a key distinction between mere pushback from individual member states or other actors, seeking to influence the future direction of a court’s case law, and actual or real backlash – a critique triggering significant institutional reform or even the dismantling of tribunals”.

⁶⁵ R. Hirschl, *Opting Out of “Global Constitutionalism*”, “Law & Ethics of Human Rights”, 2018, No. 12 (1), pp. 1–36.

⁶⁶ M. Madsen, P. Cebulak and M. Wiebusch, *Backlash against international courts: explaining the forms and patterns of resistance to international courts*, “International Journal of Law in Context”,

focused on the Nordic constitutions and/or judicial resistance to EU law⁶⁷ or even taken the Nordic countries as a basis for exploring international courts and global trends⁶⁸.

A related topic is the one of authority, effectiveness and compliance of international and European law⁶⁹. Some like Hofman have focused exclusively on the CJEU⁷⁰ and signal that an important distinction is done in literature between narrow “compliance” with the outcomes of international adjudication and broader “*effectiveness*” of international courts⁷¹. According to Hofmann, it is only recently that the question of the wider effectiveness of CJEU judgements has received renewed attention while, at the same time, only a small fraction of literature has researched its “*real-world*” effects⁷².

Moving beyond general theories that conceptualize the current trends of resistance, there is extensive literature commenting the recent PSPP case from the German Constitutional Court (in connection to the *Weiss* case of the Court of

2018, No. 14(2), pp.197–220; and M. Madsen, P. Cebulak and M. Wiebusch, *Special Issue – Resistance to International Courts: Introduction and Conclusion*, “International Journal of Law in Context”, 2018, No. 14 (2), pp. 193-196.

⁶⁷ H. Krunke and B. Thorarensen (eds), *The Nordic Constitutions: A Comparative and Contextual Study*, London, 2018. See also J. Elo Rytter and M. Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, “ICON”, 2011, No. 2, p 470.

⁶⁸ An important center of research is the iCourts - The Danish National Research Foundation’s Centre of Excellence for International Courts located in Copenhagen. One example of research project led by the scholars affiliated is the book from M. Wind (ed), *International Courts and Domestic Politics*. Studies on International Courts and Tribunals, Cambridge, 2018.

⁶⁹ D. Leczykiewicz, *Effectiveness of EU law before national courts: direct effect, effective judicial protection, and state liability*, in D. Chalmers and A. Arnulf (eds.), *The Oxford Handbook of European Union Law*, Oxford, 2015, pp. 212–248. See also G. Majone, *Legitimacy and effectiveness: a response to Professor Michael Dougan’s review article on Dilemmas of European Integration*, “European Law Review”, 2007, No. 32, pp. 70–82 and M. Mousmouti, *Introduction to the Symposium on Effective Law and Regulation*, „European Journal of Risk Regulation”, 2018, No. 9(3), pp. 387–390.

⁷⁰ A. Hofmann, *Resistance against the Court of Justice of the European Union*, “International Journal of Law in Context”, 2018, No. 14 (2), pp. 258-274. Hofmann has reviewed different forms of resistance against the Court of Justice of the European Union (CJEU). In his own words: “While backlash is rare, various forms of pushback are more common than accounts of the CJEU’s apparent success suggest.”

⁷¹ *Ibid*, p. 261.

⁷² *Ibid*, p. 267.

Justice)⁷³. The ruling has received considerable criticism by the EU legal scholarship⁷⁴. Some have even argued that the *BVerfG* has severely damaged not only

⁷³ Most scholars have published their work in the “German Law Journal”. See U. Di Fabio, *Karlsruhe Makes a Referral*, “German Law Journal”, 2014, No. 15, p. 107; F.C. Mayer, *Rebels without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference*, “German Law Journal”, 2014, No. 15, p. 111; D. Murswiek, *ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court’s Referral Order from 14 January 2014*, “German Law Journal”, 2014, No. 15, p. 147; J. Bast, *Don’t Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court’s Ultra Vires Review*, “German Law Journal”, 2014, No. 15, p. 167; K.F. Gärditz, *Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs?*, “German Law Journal”, 2014, No. 15, p. 183; M. Kumm, *Rebel without a Good Cause: Karlsruhe’s Misguided Attempt to Draw the CJEU into a Game of “Chicken” and What the CJEU Might Do About It*, “German Law Journal”, 2014, No. 15, p. 203; K. Schneider, *Questions and Answers: Karlsruhe’s Referral for a Preliminary Ruling to the Court of Justice of the European Union*, “German Law Journal”, 2014, No. 15, p. 217; A. Thiele, *Friendly or Unfriendly Act? The “Historic” Referral of the Constitutional Court to the ECJ Regarding the ECB’s OMT Program*, “German Law Journal”, 2014, No. 15, p. 241; M. Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Review*, “German Law Journal”, 2014, No. 15, p. 265; C. Gerner-Beuerle, E. Küçük and E. Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, “German Law Journal”, 2014, No. 15, p. 281; N. Petersen, *Karlsruhe Not Only Barks, But Finally Bites: Some Remarks on the OMT Decision of the German Constitutional Court*, “German Law Journal”, 2014, No. 15, p. 321; D. Schiek, *The German Federal Constitutional Court’s Ruling on Outright Monetary Transactions (OMT): Another Step towards National Closure?*, “German Law Journal”, 2014, No. 15, p. 329; T. Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: “In the ECB We Do Not Trust. What About You?”*, “German Law Journal”, 2014, No. 15, p. 343; A. Pliakos and G. Anagnostaras, *Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg*, “German Law Journal”, 2014, No. 15, p. 369. See also other authors in other journals such as M. Wendel, *El Tribunal constitucional federal alemán entre protección jurídica y exceso competencial. Sobre la eficacia de los controles constitucionales nacionales en tiempos de crisis europea*, *Teoría y Realidad Constitucional*, 2017, No. 39, pp. 123-162; M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference*, “European Constitutional Law Review”, 2014, No. 10, p. 263; I. Pernice, *A Difficult Partnership between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU*, “Maastricht Journal of European and Comparative Law”, 2014, No. 21, p. 3; and B. Schriewer, *The German Federal Constitutional Court’s First Reference for a Preliminary Ruling to the European Court of Justice*, “German Yearbook of International Law”, 2014, No. 57, p. 701.

⁷⁴ M. Poiares Maduro, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, “Verfassungsblog”, 6 May 2020, at <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/> (accessed on 15 March 2023). Most important literature: *Editorial Comments, Not mastering the treaties: The German Federal Constitutional Court’s PSPP judgment*, “Common Market Law Review”, 2020, No 57, p. 965; S. Egidy, *Proportionality and procedure of monetary policy-making*, “International Journal of Constitutional Law”, 2021, No. 19, p. 285; F.C. Mayer, *The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court’s PSPP decision of 5 May 2020*, “European Constitutional Law Review”, 2020, No. 16, p. 733; F.C. Mayer, *To Boldly Go Where No Court Has Gone Before: The German Federal Constitutional Court’s ultra vires Decision of May 5, 2020*, “German Law Journal”, 2020, No. 21, p. 1116; N. Petersen, *The PSPP Decision of the German Federal Constitutional Court and Its Consequences for EU Monetary Policy and European Integration*, “Revue Trimestrielle de Droit Financier”, 2020, No 2, p. 28; S. Poli and R. Cisotta, *The German Federal*

the stability of the euro area⁷⁵ but also its own authority and reputation in the European judicial dialogue (from a European perspective)⁷⁶. Focusing nevertheless on the substance, it is also true that the PSPP and *Weiss* rulings from the *BVerfG* and the Court of Justice offer an opportunity to rethink the European Monetary Union (EMU) legal framework and infrastructure, notably the design and execution of monetary policy⁷⁷ and the accountability of the European Central Bank (ECB)⁷⁸, an important topic that deserves attention by itself.

Another interesting issue discussed that will need to be resolved in the future, connected to the authority of EU law and the two rulings referred above,

Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission, "German Law Journal", 2020, No. 21, p. 1078; H. Sauer, *Substantive EU law review beyond the veil of democracy: the German Federal Constitutional Court ultimately acts as Supreme Court of the EU*, EU Law Live (9 May 2020) p. 2; M. Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, German Law Journal, 2020, No. 21, p. 979.

⁷⁵ The Economist, *Seeing red: Germany's highest court takes issue with European Central Bank – Its decision imperils the entire legal order*, May 7, 2020 at <https://www.economist.com/europe/2020/05/07/germanys-highest-court-takes-issue-with-the-european-central-bank> (accessed 15 March 2023) and S. Fleming, J. Shotter and V. Hopkins, *Eastern European states sense opportunity in German court ruling*, Financial Times, May 10, 2020, at <https://www.ft.com/content/45ae02ab-56d0-486e-bea5-53ba667198dc> (accessed 15 March 2023).

⁷⁶ See J. H. H. Weiler, *Mirror Mirror on the Wall – Who is the Most Beautiful of All? Legal Hegemony or Legal Hubris?*, "Verfassungsblog", 10 October 2020, at <https://verfassungsblog.de/mirror-mirror-on-the-wall-who-is-the-most-beautiful-of-all/> (accessed 15 February 2023). See also A. Bobić and M. Dawson, *Making sense of the "incomprehensible": The PSPP Judgment of the German Federal Constitutional Court*, "Common Market Law Review", 2020, No. 57, p. 1953 at p. 1991; and S. Simon and H. Rathke, *"Simply not comprehensible." Why?*, "German Law Journal", 2020, No. 21, p. 950.

⁷⁷ M. Dani and J. Mendes, *The infringement procedure over Weiss: a skeptical appraisal*, EU-blog.eu, 23 June 2021 at <https://www.eublog.eu/articolo/34784/The-Infringement-Procedure-over-Weiss:-a-Sceptical-Appraisal-/Marco-Dani-e-Joana-Mendes> (last accessed 15 February 2023). On the accountability of the European Central Bank see also M. Lehmann, *Varying standards of judicial scrutiny over central bank actions*, in European Central Bank (ed.), *Shaping a new legal order for Europe: a tale of crises and opportunities*, Frankfurt am Main, 2017, p. 112 at p. 117 (calling connection between democracy and strict scrutiny a "trap"); S. Egidy, *Judicial review of central bank actions: can Europe learn from the United States?*, in European Central Bank (ed.), *Building bridges: central banking in an interconnected world*, Frankfurt am Main, 2019, p. 53.

⁷⁸ In the EU treaties, the independence of the ECB is explicitly guaranteed by Art. 282 (3) TFEU. The principle of central bank independence (with a weak democratic accountability) is not necessarily incompatible with the requirements of a modern constitutional democracy. The independence of a central banks is based on the need to prevent abuses for short-term political goals and for the effectiveness of the monetary policy. It is easy to imagine how political actors might want to lower the interest rate in order to promote short-term growth (for instance, in electoral period), while jeopardizing long-term monetary stability and creating inflation. At the same time, central banks are also players in an international arena of free movement of capital with few restrictions. However, central bank independence is not strictly a golden rule since some societies, at the end of the day, may prefer political flexibility over monetary stability.

is the principle of proportionality and its standard of judicial review⁷⁹. The proportionality test is an instrument to review the delimitation of competences between the EU and Member States, a test that the Court of Justice has always applied with a deferential standard when reviewing the actions of EU institutions⁸⁰. On one hand, scholarship has noted that it is not a surprise that the Court of Justice found the PSPP program to be consistent with the EU treaties, following its prior jurisprudence and standards. On the other hand, some have criticized very harshly the Court and recommended that the ECB justifies its policy decisions in the future using the proportionality framework proposed by the Federal Constitutional Court⁸¹.

The proportionality test leads to interesting questions that are not easy to answer. While one may reasonably disagree with the Court of Justice and its legal reasoning and argumentation in the *Weiss* ruling, it is also difficult to defend the reasoning of the German Federal Constitutional Court in its *PSPP* judgment⁸². For the *BVerfG*, in order to compensate for the weak democratic legitimacy of the ECB, the latter's competences should be interpreted narrowly and the proportionality of the ECB's measures should be scrutinized strictly. However, at the same time, such a restrictive proportionality review would endanger the independence of the ECB and give the courts the opportunity and duty to adjudicate on the matter on the basis of their own monetary policy assessment⁸³.

At the same time, there are good reasons to question whether the PSPP ruling (and the connected *Weiss* case) was the right instance for the European

⁷⁹ In the legal literature, the principle of proportionality in Art. 5 TEU is still considered to be understudied and undertheorized. See N. Petersen and K. Chatziathanasiou, *Balancing competences? - Proportionality as an instrument to delimit competences after the PSPP judgment of the German Federal Constitutional Court*, European Constitutional Law Review, 2021, No 17, p. 1953.

⁸⁰ The Court of Justice usually examines whether any challenged measure is “manifestly inappropriate” or whether it displays a “manifest error or constitute[d] a misuse of power or whether the authority in question clearly exceeds the bounds of its discretion”. For that reason, the Federal Constitutional Court argued in the PSPP ruling that the Court of Justice had been too deferential in its proportionality assessment. See *BVerfG*, PSP ruling 5 May 2020, at para 143 and 156 in 2 BvR 859/15, 2020 *Neue Juristische Wochenschrift* 1647 (2020) – PSPP II. Official English translation available: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (last accessed 20 April 2023).

⁸¹ The European Central Bank provided a *post hoc* justification of the PSPP program in its policy meeting of the Governing Council on 3 and 4 June 2020. See ECB, Press Release 4 June 2020, at <https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625-fd97330d5f.en.html> (accessed 15 March 2023).

⁸² O. Garner, *Squaring the PSPP Circle: How a declaration of incompatibility can reconcile the supremacy of EU law with respect for national constitutional identity*, “*Verfassungsblog*”, 22 May 2020, at <https://verfassungsblog.de/squaring-the-pspp-circle> (accessed 15 March 2023).

⁸³ The choice to give the ECB a broad discretion in the matter is typical of other Western democracies (US, UK). While the ECB cannot extend its competences beyond what has been agreed in the EU treaties, there is no evidence either that the ECB went beyond the realm of monetary policy with its PSPP programme since quantitative easing is a tool of monetary policy in those democracies.

Commission to open for the first time an infringement procedure against a Member State because of a breach of EU law by its constitutional court (even if that is in line with previous cases involving the highest courts in some Member States, where the CJEU confirmed their duty to refer questions under Article 267 Treaty of Functioning of the European Union or TFEU)⁸⁴. It is not a surprise therefore that the infringement action against the German Federal Republic was withdrawn.

There is some literature commenting on the ruling from Polish constitutional court from 7 October 2021⁸⁵ although most comments in English were done by specialists in different blogs/internet in the first place. All contributors agree on the serious threat to the European integration and rule of law that comes from the highest court in Poland⁸⁶. Thiele has compared these two recent cases from

⁸⁴ CJEU, case C-416/17 *European Commission v. France*. Judgement of 4 October 2018. ECLI:EU:C:2018:811.

⁸⁵ There are some academic articles about the ruling of the Polish constitutional court in this issue of "European Judicial Review", 2021, No. 12, available at <https://www.wolterskluwer.com/pl-pl/news/europejski-przeglad-sadowy-12-2021> (accessed 15 March 2023). Although they are articles in Polish language with English abstracts, they are still very useful since they refer to previous literature on the topic and recent comment to this ruling, some of it in English. See, among others, M. Florczak-Wątor, (*In*)effectiveness of the judgment of the Constitutional Tribunal of October 7, 2021, K 3/21. Assessment of the importance of a ruling from the perspective of constitutional law, "European Judicial Review", 2021, No. 12, p. 4. The author concludes that the Constitutional Tribunal's judgment in this case continues the development of this court's new anti-EU line of case law, which began with the 2020 judgments. However, the author concludes that it fails to produce any legal effects, either in terms of effect of the law or in terms of its application, because in considering each of the three objections raised in the application, the tribunal exceeded the powers vested in it by Article 188 of the Constitution. See also N. Półtorak, *Some Remarks on the Implications of the Judgment Issued by the Polish Constitutional Tribunal in Case K 3/21 for the Application of EU Law by Polish Courts*, "European Judicial Review", 2021, No. 12, p. 12. This author focuses exclusively on the legal consequences of the ruling for the judicial application of EU law and the case law of the CJEU from the perspective of EU law. For the purpose of the analysis, the article identifies the essence of the judgment as a challenge to the principle of primacy of application of EU law.

⁸⁶ See comment by M. Lasek-Markey, *Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls*, European law blog, 21 October 2021 at <https://europeanlawblog.eu/2021/10/21/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/> (last accessed 5 March 2023). See other comments in English from S. Biernat and E. Łętowska, *Retired Constitutional Tribunal's judges explain lies and misunderstandings regarding the K 3/21 decision*, "VerfBlog" ("Rule of law" blog), 27 October 2021 at <https://ruleoflaw.pl/constitutional-tribunal-biernat-letowska-k-3-21-poland/> (accessed on 15 February 2023); P. Bogdanowicz, *Legal opinion on the legal consequences of the Constitutional Tribunal ruling in case K 3/21 on the incompatibility of the provisions of the Treaty on European Union with the Constitution of the Republic of Poland in light of European Union law*, Batorego Foundation, Warsaw, 2021, at <https://www.batory.org.pl/publikacja/legal-opinion-on-the-legal-consequences-of-the-constitutional-tribunal-ruling-in-case-k-3-21-on-the-incompatibility-of-the-provisions-of-the-treaty-on-european-union-with-the-constitution-of-the-republic-of-poland-in-light-of-european-union-law> (accessed on 15 March 2023); and G. Van der Schyff, *The need for an explicit EU constitutional identity: The flipside of the Polish Constitutional Tribunal judgment K 3/21*, Tilburg University, 2022, at <https://research.tilburguniversity.edu/en/>

German and Polish constitutional courts concluding that the Polish ruling – unlike the German one (PSP ruling) – calls into question a cornerstone of European integration with its sweeping rejection of the primacy of European law, up to a point where there are serious doubts as to whether Poland can continue to remain part of the EU⁸⁷. Thiele concludes: “*The Polish ruling has a completely different quality. It shakes the foundations of European integration, massively impairs the functioning of the supranational European judicial system and, in this respect, primarily affects the future. With the blanket rejection of the primacy of European law, European integration in its previous form is no longer possible. Strictly speaking, Poland’s remaining in the EU is no longer conceivable under these circumstances; the EU would be nothing more than a weak confederation of states*”⁸⁸.

Nettesheim also refers to a serious situation of “*Polexit*” in a blog on constitutional law⁸⁹. In his view, “*The EU institutions and the other EU member states must face the question of how to respond to a development which is no longer just about whether measures taken by EU institutions are in conformity with the treaty (“ultra vires” acts of EU institutions), but which questions of the binding effect of EU treaty law as such.*”

Other authors disagree since the judgment is short of a notification of intent to withdraw from the EU under Article 50 TEU and prefer to conclude that the ruling witnesses the end of an era of mutual trust and suspend mutual recognition-based laws in criminal cases. For Bárd and Bodnar, the ruling would probably only mark the end of judicial cooperation in the area of freedom, security and justice (AFSJ)⁹⁰, but not lead to exit from the EU.

Last but not least, it is important to note that some scholars are already discussing an interesting policy recommendation, the introduction of a separate

publications/the-need-for-an-explicit-eu-constitutional-identity-the-flipside (accessed on 15 March 2023).

⁸⁷ A. Thiele, *Whoever equates Karlsruhe to Warsaw is wildly mistaken*, “*Verfassungsblog*“, 10 October 2021, at <https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/> (accessed 15 February 2023). Thiele refers that “*in the Polish, and to some extent also in the German public discourse, the ruling of the Federal Constitutional Court of 5 May 2020 on the partial unconstitutionality of the ECB’s PSP programme is considered to be qualitatively comparable to the ruling of the Polish Constitutional Tribunal of 7 October 2021. In this respect, the Polish judgement is merely seen as a continuation of the established case law of the Bundesverfassungsgericht.*” However, the conclusion is totally different from a legal point of view for several important reasons that he explains.

⁸⁸ *Ibid.*

⁸⁹ M. Nettesheim, *Exclusion from the EU is Possible as a Last Resort*, “*Verfassungsblog*“, 3 November 2021, at <https://verfassungsblog.de/exclusion-from-the-eu-is-possible-as-a-last-resort/> (accessed 15 March 2023).

⁹⁰ P. D. Bárd and A. Bodnar, *The end of an era: the Polish constitutional court’s judgment on the primacy of EU law and its effects on mutual trust*, Center for European Policy Studies, European University Institute, “*Policy Insights*”, 2021, No. 15, at: <https://www.ceps.eu/ceps-publications/the-end-of-an-era/> (accessed 15 March 2023).

appeal chamber of the Court of Justice that would exclusively dedicate to reviewing this constitutional issue the delimitation of competences between the EU and the Member States⁹¹. In their view, that would help to avoid future clashes/confrontation between the Court of Justice and highest supreme or constitutional courts in Europe, a problem that the school of constitutional pluralism has studied in depth, but which has become systemic and unsustainable⁹². However, this question is far from being simple to solve; is not it is not always easy to distinguish questions of competences from questions of mere legality in the EU legal order⁹³.

5. Conclusion

The principle of primacy is a constitutional principle in EU law. The CJEU has constructed a theory of the primacy of EU law that is summarised in as follows: EU Member States have transferred sovereign competences in certain areas to the EU and have agreed to the creation of an independent and autonomous legal order that, in spite of being integrated into the domestic legal systems, applies with precedence over domestic law when there is a conflict between norms. For the Court of Justice, all EU law enjoys primacy (understood as precedence in application but not substantive supremacy) over all national law, including Constitutions, in all circumstances where a reservation is not raised about national constitutional identities (post-Lisbon Treaty or Article 4.2.TEU). This primacy is absolute, final, and unconditional in EU law. The Court presents its acceptance as necessarily derived from the inherent nature of the EU legal order and the need for uniform application of European law in all Member States. The relationship between the CJEU and the national courts and tribunals in the interpretation and application of European law follows a vertical pattern, with the Court of Justice having the exclusive competence on the interpretation and validity of EU law. This traditional narrative constructed by the CJEU is justified

⁹¹ This chamber should be composed in equal parts of judges of the Court of Justice and judges of highest courts of the Member States. That way it would be absolutely impartial and not biased towards EU institutions. D. Sarmiento and J.H.H. Weiler, *The EU Judiciary after Weiss: Proposing a New Mixed Chamber of the Court of Justice*, “Verfassungsblog”, 2 June 2020, at <https://verfassungsblog.de/the-eu-judiciary-after-weiss/> (accessed 15 March 2023).

⁹² A. Dyeve, *Domestic Judicial Defiance in the European Union: A Systematic Threat to the Authority of EU Law?*, “Yearbook of European Law”, 2016, No 35, p. 106. See also R.D. Kelemen, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone*, “Maastricht Journal of European and Comparative Law”, 2016, No. 23, p. 136.

⁹³ Some authors have argued that the proportionality test required by the Federal Constitutional Court was merely a requirement of legality. In fact, Art. 5 TEU distinguishes between the existence of a competence and its exercise; and proportionality only concerned the latter. See, Editorial Comments, *Not mastering the treaties: The German Federal Constitutional Court’s PSPP judgment*, “Common Market Law Review”, 2020, No. 57, p. 965; and M. Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, “German Law Journal”, 2020, No. 21, p. 979.

based on the special supranational nature and *sui generis* character of EU law and the need to avoid its fragmentation into 27 different national constitutional variations. The doctrine of absolute supremacy reflects a narrative constructed based on the ECJ's case-law from a European perspective and it is based on a different claim of sovereignty made by the EU as opposed to the classic sovereignties of its Member States.

However, this doctrine of primacy of European law over national constitutions as developed by the Court of Justice has been criticised by different strands of legal scholarship (and especially by the school of constitutional pluralism) and opposed by constitutional courts in some EU Member States (jurisprudence on constitutional resistance). The CJEU constructed or developed its own vision based on the need of autonomy, uniformity and effectiveness of the European legal order, but this construction seemed to ignore the perspective of the national constitutional legal orders on some occasions. The court has been criticized for the low quality of its legal reasoning (using a self-referential logic: "supremacy is inherent in the special nature of EU law = the special nature of EU law requires supremacy"). The other side of the story is that absolute and ultimate primacy of EU law is not fully accepted in all Member States in all circumstances, that is to say, from other national constitutional perspectives.

In parallel to the classic discourse, and influencing each other in the distance, they have built alternative narratives: the primacy of EU law is relative as – from the perspective of national constitutional laws – the ultimate competence to decide on competence lies with the sovereign nations, the Masters of the Treaties. In reality, most of the national perspectives do not recognize the EU as a full sovereign entity and assert ultimate national constitutional control – to be exercised by national (constitutional) courts in some circumstances – over the recognition, authority and legitimacy of the European legal order. If we oppose these two or more perspectives in a non-hierarchical but inter-systemic way, there is no possible agreement on the ultimate primacy of one legal order over another, and we have difficulties justifying why Union law should have precedence over constitutional national provisions when a collision between two different orders arises.

In the current EU institutional framework and legal system, the contradiction between the primacy of EU law and the supremacy of national constitutions remains a question that cannot be resolved, certainly not by unilateral declarations or rulings on who has the last word, competence or power to define the inevitable blurred boundaries of the scope and limits of EU law. This is so because the most fundamental and decisive question in European law, whether it is the Union or the Member States that have the ultimate sovereignty and legislative and judicial say on the conferred competences to the EU (question sometimes referred as "*kompetenz-kompetenz*" in German literature) ... is still pending as there is no agreement between the Court of Justice and national constitutional courts. The survey of literature proved that scholarship acknowledges that this

question is still unresolved, and that it is probably better if it remains so for the time being.

No matter what the future departs, we must not despair. The most fundamental agreement among judges and scholarship is that the authority, primacy and effectiveness of European law are the principles that should prevail, but not at any cost (such as respect to constitutional identities and fundamental rights). In this regard, much still has to be done towards building up trust, because distrust among Member States and/or national constitutional courts and European judges –justified or not- might also destroy European integration. Nobody wants a judicial war in Europe (“guerre des juges”).

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The Relationship between EU Citizenship and the Right to Vote

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Abstract

One of the important questions of European integration and the history of the EU's development is whether the European community can move from an Europe of nations to the concept of a United States of Europe, and whether this is even a good goal for European integration. In a Europe unifying towards statehood, elections (and voting rights) must necessarily unify. This study examines the relationship between EU citizenship and the concept of electoral law (i.e. the definition of active and passive eligibility) – based on the analysis of the primary legal sources and the literature. In my opinion (based on my research), at the current stage of integration, it is not realistic to consider an alternative that would place EU citizenship (at least in terms of voting rights) alongside or even above national citizenship, either for European Parliament elections or for national parliamentary elections. However, while in the case of elections to the European Parliament there is a regulatory principle (namely nationality) which could at least be added to national citizenship as a kind of subsidiary rule, in the case of elections to national parliaments a change of the rules to an EU citizenship-based approach seems unthinkable.

Keywords: *EU citizenship, right to vote, electoral systems, generality of right to vote, interoperability of right to vote.*

JEL Classification: K16

1. Introduction

One of the important questions of European integration and the history of the EU's development is whether the European community can move from a Europe of nations to the concept of a United States of Europe, and whether this is even a good goal for European integration. In a Europe unifying towards statehood, elections (and voting rights) must necessarily unify. This study examines the relationship between EU citizenship and the concept of electoral law (i.e. the definition of active and passive eligibility), focusing on the following questions: (i) How does the concept of EU citizenship appear in the electoral law of each EU Member State? (ii) In which elections in each EU Member State can EU citizenship be a grouping factor? (iii) Is there any justification (or even possibility) to interpret the question of EU citizenship in the context of electoral law? "Can EU citizenship 'take over' from citizenship in the definition of the concept of the people?"

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Citizenship is one of the most important grouping factors in the definition of a nation state, creating both rights and obligations (such as the obligation to provide public services or national defence) between the natural person and the state.² Citizenship of the EU, on the other hand, is a corollary of national citizenship, i.e. there is no citizenship of the EU without national citizenship.³ The right to vote (as the third key concept for this study) has a dual nature. On the one hand, in a substantive or instrumental sense, it is the set of laws that determine the way in which representative bodies (e.g. parliaments, local authorities, etc.) are established.⁴ On the other hand, in a substantive sense, the right to vote can also be seen as a fundamental political right, which is the right to participate in power or in the conduct of public affairs. However, the instrumental and fundamental approaches to the right to vote have a common basis: the principle of people's representation. The principle of people's representation, in relation to the substantive and substantive aspects of the right to vote, leads to an examination of a number of important issues. First and foremost, I need to examine the relationship between citizenship and the right to vote, and in particular whether citizenship is a necessary precondition for active eligibility to vote, and whether citizenship is necessarily linked to the right to vote. Once this question has been clarified, I must then examine who can be considered to be the subjects of people's representation, i.e. the people (i.e. the bearers of people's sovereignty), and how can the relationship between the right to vote and democratic legitimacy be assessed?

2. The relationship between the constitutional concept of the people and democratic legitimacy

To compare the relationship between citizenship and the right to vote, it is essential to examine what is meant by the constitutional concept of the people and how this relates to the concept of democratic legitimacy.

2.1. The relationship between citizenship and the right to vote

Of particular importance among citizenship rights are so-called status rights, which are specifically linked to citizenship, such as the right to vote. At the same time, however, the question arises as to whether citizenship is a

² Balázs Schanda, *Az államalkotó tényezők*. In: László Trócsányi - Balázs Schanda (eds.): *Bevezetés az alkotmányjogba - az Alaptörvény és Magyarország alkotmányos intézményei*. Budapest, HVG-ORAC, 2016, 116. p.

³ For a comprehensive overview of EU citizenship see, for example, Laura Gyenyey: *Európai Unió polgárság*. „Internet Encyclopedia of Legal Studies”, [1], the document is available online at <https://ijoten.hu/szocikk/europai-unios-polgarsag>, date last accessed: 15 June, 2023.

⁴ For a long time, this state organisation approach was the stronger one in jurisprudence, as the right to vote was not considered a fundamental right for many decades. Iván Halász: *Választójog*. In: Vanda Lamm (ed.): *Emberi Jogi Enciklopédia*. Budapest, HVG-ORAC, 2018, 715. p.

necessary precondition for the granting of the right to vote (especially in a parliamentary election) and, on the other hand, whether citizenship can exist without the right to vote.

As regards the first question, an examination of the constitutions of European countries shows that, almost without exception, the constitutions of each country⁵ require citizenship as a condition for eligibility to vote in elections to parliaments.⁶ The main reason for this is that parliaments in all countries can be regarded as the supreme representative bodies of the people, the composition of which is always based on the principle of people's sovereignty. From the point of view of EU citizenship, however, it is precisely this exception that is significant: however typical it may be, it does not in fact follow from any rule of logic that only citizens should be entitled to vote. Balázs Orbán himself says in a study that in many cases the right to vote is divorced from the institution of citizenship, because citizenship is not the sole source of the right to vote. However, the separation of the right to vote and citizenship may lead to the devaluation of citizenship⁷ as a legal institution.⁸ Accordingly, it can be regarded as an unquestionable general rule that if the state wishes to grant a person the right to vote in parliamentary elections, it must first grant him or her citizenship. And the decision as to whom a state considers to be its citizen has traditionally been a matter for the sovereignty of individual states.⁹ This majoritarian approach (i.e. that the right to vote is an ancillary element of citizenship) can be directly applied to the relationship between national citizenship and EU citizenship.

However, it is worth looking at the question the other way round, i.e. does citizenship necessarily go hand in hand with the right to vote? In this context, Michael C. Dorf, in a study, clearly argues that the right to vote goes hand in hand with citizenship.¹⁰ Citizens have rights and duties under the constitution. Of course, the constitution itself imposes restrictive conditions on many rights (and even obligations), such as the right to peaceful assembly, which is not exercisable alone, since it is a conceptual element of multiple exercise. Similarly, there are limits to the right to vote, such as age or the capacity to discern. In our view, however, the intrinsic element of general suffrage is that it extends to all citizens

⁵ An exception is Ireland, where the Constitution has given the right to vote to British citizens who have been resident in Ireland since at least 1985. Nóra Chronowski – Tímea Drinóczi (eds.): *Európai kormányformák rendszertana*. Budapest, HVG-ORAC, 2007, 196-197. pp.

⁶ Of course, as in the case of our country, in local elections and elections for national representatives to the European Parliament, we see a number of exceptions to the citizenship requirement.

⁷ L. Sarah Song: *Democracy and Noncitizen Voting Rights*. „Citizenship Studies” 2009/13, 156. p.

⁸ Balázs Orbán: *Állampolgárság és választójog – nemzetközi kitekintés és a 2010 utáni magyarországi tapasztalat*. In Ákos Cserny (ed.): *Határtalan választások – Tanulmányok a külföldi állampolgárok választása témakörében*. Budapest, National University of Public Service, 2014.

⁹ Zsolt Körtvélyesi: *Az „egységes magyar nemzet” és az állampolgárság*. „Fundamentum” 2011/2, 50. p.

¹⁰ Michael C. Dorf: *Equal protection incorporation*. „Virginia Law Review”, Vol. 88, Issue 5, 2002, 976-977. pp.

who meet the general conditions (i.e. who are, for example, of age and not otherwise excluded from the right to vote). Thus (at least as a general rule) the right to vote must go hand in hand with citizenship, irrespective of other considerations, such as whether or not the citizen concerned is domiciled in the country. This is also the view of Iván Halász, who argues that¹¹ if one is a member of a political community, one should also have the right to vote, regardless of one's place of residence.¹²

2.2. Constitutional definition of the concept of the people

As we have seen above, citizenship and the right to vote are closely related concepts. However, the individual constitutions do not define the source of public power as the community of citizens, but rather as the people. It is therefore also worth examining whether the people can be defined as the totality of citizens.

From the point of view of the fundamental rights approach to the right to vote – in line with the above – we must clearly start from the premise that if one is subject to people's sovereignty, one must, as a rule, have the right to vote (not including certain cases of exclusion), because only in this way can one fulfil the "role" arising from the principle of the "social contract". In the context of defining the concept of the people, it is important to point out that sovereign social groups as political units can only be expressed in terms that are substantially different from one another. In line with this, European constitutions usually refer to the subjects of people's sovereignty by different names (most often people or nation). In János Zlinszky's view, a people is an ethnic concept, by which is to be understood primarily a group of persons, united by a common mother tongue and a common culture, and bound by blood ties, who, although not racially united, are nevertheless consciously part of the people, irrespective of nationality, political affiliation or social status. On this basis, it is not possible to exclude from the concept of the people, for example, the educated, the rich or those living in another country. By contrast, the nation is a political concept according to which the citizens of a given state belong to the sovereign nation. This means that, potentially, as an expectation, every Hungarian citizen can have a say in public affairs without discrimination, so every citizen of the Hungarian state is also a

¹¹ In exceptional cases, however, the mere fact of being resident in the country may confer membership of a political community and thus the right to vote, such as in local elections in Hungary. For more information, see Iván Halász: *A külföldön élő állampolgárok országos szintű (parlamentari) választójoga az EU-ban*. In: Ákos Cserny (ed.): *A választási rendszerek egyes intézményei az uniós országokban*. Budapest, HVG-ORAC, 2018. 12 p.

¹² This is basically the approach taken by Károly Tóth: *A választójog*. In: László Trócsányi – Balázs Schanda (eds.): *Bevezetés az alkotmányjogba - az Alaptörvény és Magyarország alkotmányos intézményei*. Budapest, HVG-ORAC, 2016, 204. p.

member of the Hungarian nation.¹³ However, Zlinszky himself also points out that, in the opinion of other authors, the two concepts can be described in exactly opposite terms.¹⁴

In the context of the constitutional definition of the people, it should be pointed out that it can be understood as a community of those living under the sovereignty (i.e. the population) and as a community of citizens.¹⁵ Varga Zs. András Varga asks in this context: who can be considered the subject of sovereignty? In his view, the starting point for answering this question is the definition of the public subjects of the Basic Law. According to this, the Basic Law refers to four conceptual elements: 1. the people, 2. the nation, 3. the "Hungarians" and 4. national and ethnic minorities. Of these, Varga Zs. András considers the nation to be the bearer (primary subject) of sovereignty and as such identical to the people under Article B) of the Basic Law.¹⁶ Balázs Majtényi stresses that it is important to distinguish between the political and the cultural or ethnic nation. The political nation is understood as a civil nation, which can be seen as a free association of citizens, which links the concept of nation to a real sense of belonging, and is thus a rational and voluntary political construct based on the creation of a historical community. In contrast, a cultural or ethnic nation does not refer to a public relationship between people, but to the expression of a sense of identity.¹⁷

In our view, the concept of belonging to a people can be conceptualized on a scale, with a number of transitions between the two endpoints (i.e., one is clearly a member of the people, yet the other is not). And to make a clear distinction, we need to define a reference point beyond which someone is considered to be clearly part of the people, but not below. However, it is not easy to define this point, because however we define it, there will always be criticisms: if we define too strong a link, we exclude from the people those who are undoubtedly members of it,¹⁸ and if we define too weak a link, we include in the concept of the people those who are clearly not members of it.¹⁹ It is for this reason that the most commonly used reference point is the requirement of the existence of citizenship. This poses an even greater difficulty for the institution

¹³ János Zlinszky: *Tudjátok-e mi a haza?* In: Barnabás Hajas – Balázs Schanda (eds.): *Formatori Iuris Publici – Ünnepi kötet Kilényi Géza professzor hetvenedik születésnapjára*. Budapest, Szent István Társulat, 2006, 599-600. pp.

¹⁴ See for example the position of Antal Ádám. *Ibid.* 601. p.

¹⁵ Tamás Györfi – András Jakab – Orsolya Salát – Pál Sonnevend – Gábor Sulyok – Mónika Kovács – Péter Tilk: 2. § [*Alkotmányos alapelvek; ellenállási jog. A nép mint a szuverenitás alanya.*]. In: András Jakab (ed.): *Az Alkotmány kommentárja*. Budapest, Századvég Kiadó, 2009, 218-224. pp.

¹⁶ András Zs Varga: *Eszményből bálvány? – A joguralom dogmatikája*. Budapest, Századvég, 2015, 73-75. pp.

¹⁷ Balázs Majtényi: *Alaptörvény a nemzet akaratából*. „Állam- és jogtudomány” 2014/1., 78. p.

¹⁸ This would be the case, for example, if only citizens who pay personal income tax in Hungary were considered members of the people.

¹⁹ An example of the latter would be to consider as part of the population anyone who temporarily stays in the country for at least a few months (for example for educational or work purposes).

of citizenship of the EU. Even if it is accepted that EU citizens are undoubtedly nationals of Member States (since this status derives from the provisions of the TFEU itself), it is at least questionable whether the 'European people' include YY, who sought to change an EU citizenship for that of another state and became stateless as a result. It is also questionable whether a Dutch citizen living outside Europe, who has no other ties to Europe, to the European Union, apart from a few documents (the *Tjebbes* case), is a member of the European people. Last but not least, I must not forget in this context those third-country nationals or stateless persons who, either by marrying, moving to the territory of the European Union or obtaining refugee status, acquire a real link with an EU Member State and thus with the European Union itself. In addition, if Member States have different criteria for defining the requirement of attachment to a given state, this necessarily has an impact on the categories of EU citizenship and 'European people'.

It is therefore right that there is a general tendency in European countries to require nationality as a condition for active voting in parliamentary elections. This does not, of course, mean that the concept of the people cannot be defined in terms of other criteria, if only because states have a great deal of freedom in determining who they consider to be the bearers of people's sovereignty, but it does mean that, in the light of European trends, the definition of the people (i.e. the subjects of people's representation) can most often be linked to the existence of nationality. There may, however, be exceptions to the general rule: for example, in local elections or elections to the European Parliament, it is not citizenship but the fact of living under a common sovereign power that determines the eligible voters.

2.3. The relationship between citizenship of the EU and the constitutional concept of the people

Since the EU is not a state, we cannot talk about EU "citizenship" or EU people. Nor is there any intention in the TFEU itself to turn EU citizenship into an exclusive system of relations, replacing national citizenships where appropriate.²⁰ On the contrary, EU citizenship is an ancillary concept, i.e. it exists through the nationality of the Member States. The question of who Member States consider to be their citizens remains essentially a matter of national competence, with Member States enjoying almost full sovereignty in this respect. Why this sovereignty is only 'almost' full is discussed in detail in the study on the relationship between EU citizenship and nationality, but I will refer back to this here, noting that the case law of the European Court of Justice has held that Member States are obliged to define the content of their nationality rules in

²⁰ Erzsébet Szalayné Sándor: *A személyek jogállása az uniós jogrendben*. Budapest, Nemzeti Közzolgálati Egyetem, 2014, 39 p.

accordance with EU law.²¹

2.4. The concept and essential elements of democratic legitimacy

Another issue to be examined in the context of the principle of people's representation is the relationship between the right to vote and democratic legitimacy. Democratic legitimacy guarantees that an unbroken chain of people transfer of power effectively empowers the holder to exercise it. It follows logically from the principle of democratic legitimacy that in modern constitutional democracies governed by the rule of law, the acts of public authority in the exercise of public power must always be traceable to the will of the people and must ensure that the members of the people (i.e. the electorate) can participate equally in the formation of the will of the public authorities. This so-called political will-building involves both the will of the people and the will of the state. Under constitutional law, individuals belonging to the people can participate in the formation of political will by exercising their fundamental political rights and freedoms, which include in particular the right to vote and to participate in referendums. In the election of a representative body, the various individual wills of individuals become binding, on the basis of the votes cast, and determine the composition of parliament. By casting their vote, the electors, as members of the constituent people, (also) exercise the political freedom that creates legitimacy. The fundamental right to vote is also particularly important, since it is the right to vote for the widest possible range of subjects that will best guarantee the legitimacy of the exercise of power through democratic legitimacy. With regard to people's sovereignty, it is therefore important to stress that all democratic exercise of power must be based on the principle of people's sovereignty. In systems based on people's sovereignty, this is based on the transfer of power through direct elections (democratic legitimacy is primarily achieved when the body exercising public power is directly elected by the electorate), on the basis of which the branches of power can also be self-legitimizing. However, the people are not merely the source of power, but also participate in its exercise, and the principle of people's participation is therefore one of the main pillars of the democratic exercise of power (see, for example, the institution of the referendum).²² Therefore, the definition of the subject of the

²¹ See Case C-135/08, *Rottmann*. See also László Blumán, *Az Európai Unió joga a gyakorlatban*. Budapest, HVG-ORAC, 2014, 372. p. On the specific intertwining of EU law and international law, for example: Marcel Szabó: *International Law and European Law Aspects of External Voting with Special Regard to Dual Citizenship*. „Minority Studie”, 2013, 25–46 pp.; Marcel Szabó: *A többes állampolgárság Új nemzetközi és uniós perspektívák felé?* „Állam - és jogtudomány”, 2013/1-2, 125–146. pp.

²² Eszter Bodnár, *Választási rendszerek, választójog-történet*. In: Dukán Ildikó, Varga Aida (eds.), *Parlamentari jog: az Országgyűlés működése, tasklön és hatáskörei, kapcsolódó intézmények*. Budapest, Országgyűlés Hivatala, 2018, 77. p. See also Ludvig Beckman: *The Frontiers of Democracy - The Right to Vote and its Limits*, CPI Antony Rowe, Chippenham and Eastbourne, 2009, 36. p.

right to vote (i.e. the right to vote) is a matter of particular importance, since it is the first channel of democratic legitimation, since it is through the exercise of the right to vote that the people empower the exercise of the powers deriving from sovereignty. It is therefore also in the fundamental interest of the holder of power that the right to vote be properly and democratically regulated (i.e. as broadly as possible). International treaties and national constitutions also protect the right to vote in this respect. In view of the principle of people's representation, as set out above, the right to vote is therefore first and foremost the right to vote.²³

However, the question of democratic legitimacy in the EU is a specific one: because the EU is an international organisation of member states, it is ultimately not the EU as a whole, but the individual member states and their aggregate that have the power to regulate. Accordingly, it is not only the will of the Member States that is necessary to determine which citizens of a Member State can participate in an election and under what conditions, but also which institution (in this case, only the European Parliament) can be elected at EU level. Therefore, however progressive the strengthening of the democratic legitimacy of the European Parliament in recent decades,²⁴ we cannot ignore the fact that this democratic legitimacy cannot be interpreted in isolation, but only in accordance with the will of the Member States and the will of the Treaty.

2.5. The relationship between EU citizenship and democratic legitimacy

The notion of democratic legitimacy is not a concept that can only be understood in nation states. Indeed, the treaties establishing the EU provided for a division of powers between the Member States and the EU. On the basis of this, the EU institutions can create secondary legislation binding on the Member States, but only within the framework of primary law (above all the TEU and the TFEU), i.e. only if the EU institutions have the appropriate democratic legitimacy from the 'sovereign'. As we have seen above, in the case of the EU, this sovereign power is equally traceable to the people, but not only to the citizens of a single Member State, but to the citizens of all Member States, i.e. ultimately to the citizens of the EU. And the sovereign people (in this case, the citizens of the EU) can only give power to the legislative bodies if they themselves elect them,

²³ Márta Dezső, Katalin Nagyné Szegvári, Emília Rytók, *A választójog*. Budapest, Press Publica, 2002, 55. p.

²⁴ Members of the European Parliament have only been directly elected since 1979. An example of the "democratic deficit" of the preceding period is the *Solange I* decision of the German Federal Constitutional Court, which states that as long as EU law does not provide adequate protection of fundamental rights, the German Constitutional Court reserves the right to review EU law. More recently, in the *Solange II* decision, the German Federal Constitutional Court has already concluded that the level of protection of fundamental rights (and thus, by implication, of democratic legitimacy) is adequate and that, as long as this remains the case, the German Constitutional Court does not avail itself of the possibility of review. 2 BVR 197/83 (1986).

directly or indirectly. Of all the bodies empowered to legislate in the EU, only the European Parliament can be regarded as a directly empowered, i.e. elected, body.

It can therefore be concluded that the importance of democratic legitimacy in the EU is beyond debate, and that the legitimacy of certain EU bodies (and ultimately EU law) can only be justified if it can be directly or indirectly attributed to the people, in this case EU citizens.

3. The concept and regulation of general suffrage in EU Member States

Having examined the above, we need to look at two issues: first, the conceptual issues of general suffrage, and second, the regulatory practices of EU Member States in relation to active and passive suffrage – in specific domestic elections (such as parliamentary or local elections).

3.1. The concept of general suffrage

Nowadays (especially in Europe), the requirement of generality of suffrage is fully evident. The generality of suffrage inherently means that "in principle, all citizens should be entitled to vote and to stand for election".²⁵ In defining the concept of the generality of the right to vote, it is, however, necessary to refer briefly to the relevant international standards, and in particular to the relevant case law of the ECtHR. In case of *Sukhovetsky v. Ukraine*, the ECtHR held that the right to vote in a democratic state is not a privilege, having been gradually extended over the course of history.²⁶ According to the ECtHR, any departure from the principle of general suffrage risks undermining the democratic legitimacy of the elected legislature.²⁷ The primary obligation of the State here is therefore not to refrain from infringing a fundamental right (in this case the right to vote) or to refrain from interfering, but to adopt positive measures to ensure that democratic elections can be held.²⁸ It is on the basis of this logic that the ECtHR has moved from the "institutional" right to hold free elections to the

²⁵ József Petrétei, *Az alkotmányos demokrácia alapintézményei*. Budapest-Pécs, Dialóg Campus Kiadó, 2009, 224. p. He takes this approach (without claiming to be exhaustive): Győző Concha, *A választójog reformja*. „Jogállam”, 1906/9, 641–681. pp.; Tóth *ibid.* 204. p.; István Kukorelli, *A választások alapelvei*. In: *Az Alkotmány magyarázata*. Budapest, KJK-KERSZÖV, 2003, 712. p.

²⁶ ECtHR, *Sukhovetsky v. Ukraine*, No. 13716/02, 28 March 2006.

²⁷ ECtHR, *Aziz v. Cyprus*, No. 69949/01, 22 June 2004; *Matthews v. United Kingdom*, No. 24833/94, 18 February 1999.

²⁸ In this context, it is worth mentioning (as a digression) the case of *Baker v. Carr*, a decision of the Supreme Court of the United States of America. In this case, some citizens of the State of Tennessee brought an action on the grounds that the legislature had failed to redistrict the electoral districts drawn in 1901 (*arbitrarily and capriciously*) to take account of the population density of the various parts of the state and changes therein. András Molnár, *Alapjogi aktivizmus a Supreme Court gazdaságsszabályozási tárgyú ügyeiben (1890-1936)*. Szeged, PhD dissertation, 2017, 50. p.

concept of "genral suffrage".²⁹ Of particular importance for the generality of the right to vote is also the Final Document of the 1990 Copenhagen Conference of the Conference on Security and Cooperation in Europe, in which the participating states declared that they would hold free elections at reasonable intervals and that they would be held on the basis of general and equal suffrage.³⁰ For the sake of completeness, it should be noted that the Hungarian Constitutional Court has adopted a broadly similar approach to the generality of the right to vote.³¹

3.2. EU Member States' rules on active and passive suffrage

After clarifying the concept of general suffrage, it is worth examining how EU Member States regulate the right to vote (i.e. to be eligible) and to stand as a candidate (i.e. to be elected) in elections to national elected bodies and officials (MPs, mayors and local representatives). Examining this will allow an analysis of whether the eligibility criteria for national elections are defined more along the lines of citizenship or other criteria, which may also provide guidance on the future role of EU citizenship in the context of electoral rights.

3.2.1. Regulation of eligibility to vote in parliamentary elections

Both active and passive eligibility to vote in parliamentary elections is determined on the basis of three main criteria: (i) nationality; (ii) a certain age limit; and (iii) a requirement to be a resident of the country. If we look at the relevant legislation in the 27 EU Member States on the basis of these requirements, the following conclusions can be drawn.

All Member States except Ireland require nationality for both active and passive voting rights. In Ireland, the Irish constitution has given the legislature the power to grant the right to vote to persons other than Irish citizens³² (including, since 1985, British citizens resident in Ireland³³). With this one exception, however, it can be said that citizenship is a prerequisite for the exercise of the right to vote.

Similarly, a general rule can be established with regard to the age requirements for exercising the right to vote, which is the age of 18. However, the practice in the Member States as regards age is much more divergent, as follows. For the right to vote, there is no age limit higher than 18 in any Member

²⁹ ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81, 2 March 1987; *Yumak and Sadak v. Turkey*, No. 10226/03, 8 July 2008.

³⁰ See section 5.1 of the Final Document.

³¹ See in particular AB 6/1991 (28.II.) and AB 54/2008 (24.IV.).

³² In this context, it is worth noting the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in 1990 under the auspices of the United Nations, Article 41 of which declares the possibility of granting legal migrant workers the right to vote and to stand for election.

³³ Chronowski, Drinóczi *ibid.* 196-197. pp., also Beckman *ibid.* 62-88. pp.

State, but there are several cases where the age limit is lower: in Austria and Malta it is 16, while in Greece it is 17 for persons who will be 18 in the year of the election, regardless of whether they have reached 18 on the day of the election.³⁴ However, the definition of passive eligibility is much more differentiated. In most Member States the minimum age for eligibility is 18, but in ten Member States the minimum age for eligibility is 21.³⁵ Only three countries require candidates to be over this age: Romania has a minimum age of 23, Greece and Italy 25.³⁶ In countries with bicameral parliaments, these age limits can be even higher in the upper house.³⁷

A third condition is the requirement of national residence. Generally speaking, some European countries require residence in order to be eligible to vote or stand as a candidate - in many cases at constitutional level.³⁸ However, there are also countries whose constitutions require residence only for the right to stand as a candidate.³⁹ There are also examples where some Member States grant the right to vote to non-resident voters.⁴⁰

It can be seen from the above that in parliamentary elections in all EU Member States (both in terms of active and passive suffrage), the main grouping factor in all except Ireland is the existence of citizenship of the country

³⁴ Federal Constitution of the Republic of Austria, Article 26(1); Constitution of Malta, Article 57(1); <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/PD%2026-2012.pdf>, Article 4.

³⁵ Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Ireland, Latvia, Lithuania, Poland, Slovakia and Cyprus. Constitution of the Republic of Estonia, Article 16(1); Constitution of the Republic of Poland, Article 99(1); Constitution of the Republic of Latvia, Article 9; Constitution of the Republic of Lithuania, Article 56(1); Constitution of the Slovak Republic, Article 74(2).

³⁶ Constitution of Romania, Article 37(2); Constitution of Greece, Article 55(1); Constitution of the Italian Republic, Article 58(1).

³⁷ See, for example, Poland, where Article 99(2) of the Constitution sets the age limit for election as a senator at 30.

³⁸ Denmark and Malta have constitutionally enshrined this requirement. Article 29(1) of the current Danish Constitution stipulates that only Danish citizens who are domiciled within the country may participate in parliamentary elections. In the case of Malta, it is worth noting that Article 57(c) of the Constitution states that residence in Malta is not sufficient for the right to vote, but that it is also necessary for the voter to have spent six months out of the eighteen months preceding the compilation of the electoral roll in Malta, either consecutively or in total.

³⁹ For example, Article 64 of the Belgian Constitution explicitly requires residence on Belgian territory for the right to stand as a candidate. A similar rule can be observed in Luxembourg, see Article 51 of the Constitution of the Grand Duchy of Luxembourg.

⁴⁰ In France, for example, Article 24 of the Constitution states that "French people living outside France have the right to representation in the Senate." In Sweden, all citizens aged 18 or over who are or have been resident in Sweden are entitled to vote. See Article 2(1) of Chapter 3 of the Swedish Constitution. And under Article 56(2) of the Italian Constitution, twelve of the 630 members of the Chamber of Deputies are elected in foreign constituencies. Similar rules can be observed in Portugal (where 4 out of 231 members are elected by voters living abroad), Croatia (where 3 out of 153 members are elected by voters living abroad) and Romania (where 4 out of 334 seats are decided by voters living outside Romania). György Fábián. *A külföldön élő állampolgárok választójogának gyakorlása nemzetközi összehasonlításban*. „De iurisprudencia et iure publico”, 2012/3, 11. p.

concerned, i.e. eligibility to vote can be defined according to the classical interpretation of the constitutional concept of the people. This condition is then linked to the attainment of a certain age limit (generally 18 for active suffrage and often a higher age limit for passive suffrage), which varies from one Member State to another, and, in some countries, to the requirement of national residence. It can therefore be concluded that citizenship is the main prerequisite for eligibility to vote in parliamentary elections (i.e. EU citizenship is not relevant in this respect). Parliamentary elections are therefore clearly dominated by nationality, which, given the additional nature of EU citizenship, necessarily has an impact on the nature of EU citizenship and the future development of EU citizenship.

3.2.2. Regulation of eligibility to vote in local elections

Article 22 TFEU gives every EU citizen the right to vote and to stand as a candidate in municipal elections in the Member State in which he or she resides, under the same conditions as nationals of that State. In general, for local elections in each EU Member State, eligibility to vote is – in principle – determined in a similar way to the rules applicable to parliamentary elections. In the case of local elections, it is therefore necessary to consider first and foremost whether the nationality of the Member State is more important (as in the case of parliamentary elections) or whether other criteria, such as residence in the municipality, are more important.

If we compare the legislation in the 27 EU Member States, we see that the definition of active voting rights in local elections is linked to residence or domicile in the municipality, regardless of nationality (if in an EU Member State). In this context, it is important to note the Luxembourg clause in EU law, whereby EU Member States in which the proportion of EU citizens from other Member States exceeds 20% of the electorate may link active voting rights to five years of residence.⁴¹ However, there is no longer uniform practice among Member States on how to register if you are a national of another Member State. In some Member States, all EU citizens are automatically registered on the basis of their permanent residence⁴², while in others, registration must be requested separately. As regards the right to stand as a candidate, in general EU citizens can stand as candidates under the same conditions as nationals of the Member State concerned. However, under Directive 94/80/EC, Member States may decide that only their own nationals may hold the office of elected leader, deputy leader or

⁴¹ See Article 14(1) of Council Directive 93/109/EC. See also Antonia Meyer, *Limits of the European citizenship electoral right in the European Union?* „Freilaw”, 2017/1, 4. p.

⁴² This legislation is applicable in Austria (except Burgenland), Denmark, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovakia, Slovenia, Sweden, the Netherlands, Denmark and Finland. For a summary, see https://europa.eu/youreurope/citizens/residence/elections-abroad/municipal-elections/index_hu.htm.

member of the executive body of a local authority, i.e. that these offices (Lord Mayor, Mayor, Deputy Mayor) are reserved for their own nationals.⁴³

The above figures show that, unlike in parliamentary elections, the main requirement for eligibility to vote in local elections is not nationality but a connection to the municipality, i.e. residence or domicile (whether a national of a Member State, another Member State or a third country). In the case of municipal elections, EU citizenship is or can be relevant, but the main grouping factor is not this but the requirement to live in a given municipality.

4. Regulation of the right to vote in elections to the European Parliament. The "interoperability" of elections to the European Parliament

For elections to the European Parliament, the rules on eligibility to vote will be based on uniform principles.⁴⁴ Article 22 of the TFEU also applies in this respect, i.e. it guarantees every EU citizen the right to vote and to stand as a candidate in elections to the European Parliament in the territory of the Member State in which he or she resides. In this context, it is important to underline that the right to vote in the European Parliament for EU citizens is a supranational political right which can be exercised directly at EU level and which must be respected by Member States, including the Member State of nationality.⁴⁵ However, it is up to each Member State to determine the scope of the right to vote and stand as a candidate, while respecting EU law.

4.1. Regulatory practice in EU Member States

The minimum voting age for European Parliament elections is identical in all respects to the national age for national parliamentary elections, i.e. 18 years

⁴³ This is the case, for example, in Belgium, Bulgaria, Cyprus, France, Greece, Italy, Lithuania, Poland, Romania and Slovenia, where foreign nationals can be elected as local councillors, but only if they are nationals of the country concerned. See Gyeny *ibid.* [80].

⁴⁴ Council Decisions of 25 June and 23 September 2002 amending the Act concerning the election of the members of the European Parliament by direct general suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 283, 21.10.2002, [https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:01976X1008\(01\)-20020923&from=en](https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:01976X1008(01)-20020923&from=en), also: http://www.eods.eu/library/Act%20concerning%20the%20election%20of%20the%20Members%20of%20EP%20by%20direct%20universal%20suffrage_FR.pdf.

⁴⁵ See: Case C-650/13 (*Thierry Delvigne kontra Commune de Lesparre Médoc, Préfet de la Gironde, C-650/13, ECLI:EU:C:2015:648*). See also Gyeny *ibid.* [11]. In the case in question, a French citizen complained about his removal from the electoral roll on the grounds that his long-term and automatic exclusion from the European Parliament elections as a result of a previous criminal conviction was not in line with the articles of the Charter of Fundamental Rights relating to European Parliament elections. In its judgment, the European Court of Justice made it clear that, under Article 14(3) TEU and Article 39(2) of the Charter of Fundamental Rights, EU citizens, by virtue of their status, enjoy this supranational right, which can be exercised directly at EU level and which must be respected by the Member States, including the Member State of nationality, even if it may be subject to restrictions in certain cases under national law.

of age in all but three Member States (Austria, Malta and Greece).⁴⁶ While, as mentioned above, it is correct and can be taken as evidence that the Member States' electoral rules are 'reflected' in the age requirements for European Parliament elections, it is questionable, at least at EU level, to what extent it is in the interest of European Parliament elections to have rules where, for example, a 17-year-old Hungarian citizen does not have the right to vote in Hungary but does in Austria. Under Article 22 TFEU, every citizen of the EU residing in a Member State of which he is not a national has the right to vote and to stand as a candidate in elections to the European Parliament in the Member State of residence under the same conditions as nationals of that State.

There are also large differences between Member States in the voting requirements, which is not a major problem under the current rules (i.e. when each Member State holds its own European elections, i.e. 27 different elections taking place at almost the same time in 27 Member States), but could have a major impact on the outcome of the elections in an unified European Parliament. There are Member States (Belgium, Bulgaria and Greece) where voting is not an option but an obligation.⁴⁷

The fact that the concept of residence also differs from one Member State to another has a significant impact on the uniformity of European Parliament elections. Examples include the test of permanent or habitual residence,⁴⁸ the requirement of habitual residence,⁴⁹ and the requirement of registration in the population register.⁵⁰ There are also examples where some Member States require a period of residence as a precondition for the right to vote in European Parliament elections.⁵¹ And in those Member States where EU citizens are required to register in advance to exercise their right to vote, the manner and timing of such registration also varies from one Member State to another. While it is perfectly legitimate to apply these provisions separately (at the level of each Member State), the fact that the electoral arrangements in the Member States are so fragmented also undermines the relevance of the European elections.

In addition to the above, it is also important to underline that Council Decision 2018/994 (amending the Electoral Act for the election of the members of the European Parliament by direct general suffrage) encourages Member States

⁴⁶ It's worth noting that in Germany, the Bundestag adopted a proposal on 11th of November 2022 to lower the voting age for European Parliament elections to 16. See: https://www.tagesschau.de/inland/innenpolitik/bundestagsbeschluesse-101.html?fbclid=IwAR1u3cmA33PSzqqrr8205-W7AXegdjqZ-XeOKoAOagLbCgU58i_AKxz6CtM.

⁴⁷ See Constitution of the Kingdom of Belgium, Article 62; Constitution of the Republic of Bulgaria, Article 42(3); Constitution of Greece, Article 51(5).

⁴⁸ For example, in Estonia, France, Germany, Poland, Romania, Slovenia and Germany this requirement applies.

⁴⁹ Cyprus, Denmark, Greece, Ireland, Ireland, Luxembourg, Slovakia, Sweden and Denmark.

⁵⁰ Belgium and the Czech Republic.

⁵¹ Luxembourg and Cyprus, which may be explained by the fact that they are Member States with small populations.

to make it possible for their non-resident citizens to participate in the election of the members of the European Parliament.⁵² This decision has clearly increased the importance of EU citizenship, as it has shifted the focus from residence in a Member State to the existence of EU citizenship. The Hungarian legislation, for example, has also been amended in line with this decision from 1 January 2019.⁵³

Of course, the fact that some foreign nationals can vote in the host Member State as well as in their country of origin can lead to abuses. In this respect, the 1976 Electoral Act, as amended by Council Decision 2018/994, requires Member States to provide for effective, proportionate and dissuasive sanctions against double voting in European Parliament elections. However, as long as the practice of the Member States differs significantly in the legal environment for European elections, in many cases it is not even deliberate abuse but rather the opacity of the rules that leads to malpractice.

The right to stand as a candidate in European Parliament elections can be exercised in any Member State of residence, based on the requirement of freedom of movement and residence within the EU. According to Article 3 of Council Directive 93/109/EC, any citizen of the EU who is not a national of the Member State of residence but satisfies all the conditions laid down by the law of that State for its own nationals as regards the right to stand as a candidate in elections to the European Parliament in the Member State of residence shall be entitled to stand as a candidate in elections to the European Parliament in the Member State of residence unless he/she has been deprived of those rights. In this respect, it is important to note that no person may stand as a candidate in more than one Member State in a given European Parliament election.⁵⁴ The minimum age for standing as a candidate is 18 in the majority of Member States, except in Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Ireland, Latvia, Lithuania, Poland, Slovakia and Slovenia (where it is 21), Romania (where it is 23), Italy and Greece (where it is 25).

4.2. The Devesa report - new directions for the European Parliament elections?

In addition to the above-mentioned existing regulatory practice in the

⁵² "Member States may take the necessary measures, in accordance with their national electoral procedures, to allow their nationals residing in third countries to vote in European Parliament elections". See: https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX:32018D0994#ntr2-L_2018178HU.01000101-E0002.

⁵³ Section 1 of Act CXIII of 2018 amending certain acts related to elections amended Section 2/A (1a) of Act CXIII of 2003 in such a way that the active electoral eligibility for European Parliament elections was extended to Hungarian citizens who live in Hungary but do not have a residence address or who reside outside the EU.

⁵⁴ See Article 4 of Council Directive 93/109/EC.

Member States, it is worth mentioning the Devesa report⁵⁵ adopted by the European Parliament on 3 May 2022, which proposes a fundamental change in the rules of European Parliament elections and which (if followed by actual legislation) could significantly increase the currently low importance of EU citizenship in the field of electoral law.

The Devesa report proposes that the European Parliament, together with the Council, should adopt a new EU regulation on elections to the European Parliament, the main innovation of which⁵⁶ would be the creation of EU-wide constituencies (Article 15), in addition to national quotas allocated at Member State level in a way determined by the Member States (but mainly on a proportional basis). This would mean that the whole EU would be one constituency, from which 28 MEPs would be elected in the European elections. All European political parties or formations would be able to submit EU-wide lists (with geographical balance between candidates being an important consideration) to the newly created European Electoral Authority. The 28 seats would be allocated through a proportional electoral system.

The report was adopted by a small majority in the European Parliament, so it is questionable whether the adopted report will be followed by any meaningful legislation, but it should be pointed out that if this transnational list were to be implemented, it would significantly increase the importance of EU citizenship in the field of electoral law.⁵⁷ However, a solution as envisaged in the report could also run the risk of essentially duplicating (and making opaque, due to the divergent practices of the Member States) the system of entitlements relating to elections to the European Parliament.

5. Challenges in the relationship between the right to vote and EU citizenship - instead of conclusions

As we have seen above, the right to vote in European Parliament elections is always guaranteed by EU law by referring back to national law, and thus along national electoral procedures, i.e. EU law does not require harmonisation of

⁵⁵ See more: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0129_HU.html?fbclid=IwAR1b9JUNQmHoTWAGGrDNOI8Rheyb7XHKiOOHVdV3fV6ibeDsPCfXSg--TLE.

⁵⁶ Of course, there are other interesting features in the draft regulation. For example, it would set the voting age at 16 (Article 4), leaving the possibility for each Member State to set it at 17 or 18; it would exclude the possibility of excluding people with a mental disability from voting; or it would create a European Electoral Authority (Article 28).

⁵⁷ In this context, it is worth noting that the EU institutions (in particular the European Commission) have long been struggling with a kind of democratic deficit. This is because, although in principle each major European political grouping has a *Spitzenkandidat* ("top candidate") for the post of President of the European Commission in the European Parliament elections, it is often not on the basis of this *Spitzenkandidat* that the decision on who will be President of the European Commission is taken (on this issue, see Tibor Navracscics, *The short life and strange death of the Spitzenkandidat system*. The document is available online at: http://real.mtak.hu/112211/1/Euro_pai_Tukor_2020_01_02_navracscics.pdf, date last accessed: 15th of June 2023).

national electoral systems at EU level (and the constitutional definition of "the people" means that no change is expected in the near future).⁵⁸ In this respect, therefore, the EU only lays down the main principles, the most important of which is that active voting rights are based on EU citizenship on the one hand and residence in a Member State on the other. This is reinforced by the *Delvigne* judgment, which now reflects a vision of a supranational democratic order, with the EU citizen represented by the European Parliament at its centre.

Based on the above, the following conclusions can be drawn. First of all, it should be noted that citizenship of the European Union cannot be regarded as a matter of principle in the field of electoral law, since the main grouping factor, even in the case of European Parliament elections, is not the fact of EU citizenship (but rather the physical, living ties to the state in question). This is also borne out by the fact that the seats in the European Parliament are adjusted to the population of the Member States. In an electoral system that unified all aspects of European elections, there would be no obstacle to introducing a system whereby every EU citizen would be free to choose the State in which he or she wished to exercise his or her right to vote (as is the case when one is not resident on the day of a parliamentary election). However, the administrative burdens involved (such as the need to eliminate multiple voting, the identification of voters and even the different time zones in each Member State) make such a solution almost impossible. Moreover, this would only make sense if it were possible to vote for essentially the same candidates or parties in all Member States, i.e. if the content of the ballot papers were standardised at EU level. We are therefore convinced that reducing the importance of the place of residence of a Member State, or possibly abandoning it, is not an option for European Parliament elections. And the concept outlined in the Devesa report would in itself presumably complicate rather than strengthen the European Parliament elections.

However, it is also possible to ask whether EU citizenship can be relevant for the parliamentary elections in the Member States. As we have seen above, in local elections, as in European Parliament elections, the existence of a national (or more precisely, municipal) residence is relevant for active eligibility. However, the main grouping factor in the election of members of national parliaments is clearly the nationality of the Member State concerned. At the very least, it is questionable whether, as European integration (possibly) progresses, EU citizenship can play a role in place of national citizenship.⁵⁹ In other words, is it conceivable that a Member State could make a rule that those who are EU citizens and reside in that Member State have the right to vote in parliamentary

⁵⁸ Gyeny *ibid* [79].

⁵⁹ At this point, it is important to note that a breakthrough in deepening EU integration could be achieved if Member States would harmonise participation rights (i.e. political rights, such as the right to vote) at EU level and allow for a "crossover" between national and EU concepts of citizenship. This idea was one of the starting points for the present study.

elections.⁶⁰ One of the preliminary questions is, however, whether the constitutional concept of the people can include the concept of EU citizenship? In my view, the answer to this question is currently clearly no. As we have seen above, the constitutional concept of the people is based on the principle of people's sovereignty. And the principle of people's sovereignty applies to people (i.e. citizens) who are closely bound to the country in public law, with the only partial exception of Ireland. In this sense, local government elections are not an appropriate example, since local government is essentially a right of self-government for local communities.⁶¹

All this leads us to say that, at the current stage of integration, it is not realistic to consider an alternative that would place EU citizenship (at least in terms of voting rights) alongside or even above national citizenship, either for European Parliament elections or for national parliamentary elections. However, while in the case of elections to the European Parliament there is a regulatory principle (namely nationality) which could at least be added to national citizenship as a kind of subsidiary rule, in the case of elections to national parliaments a change of the rules to an EU citizenship-based approach seems unthinkable.

However, if the EU is clearly moving away from a "Europe of nation states" towards a "United States of Europe", the EU citizenship-centred harmonisation (or even full unification) of the electoral law of individual member states can hardly be avoided - at least at the level of European Parliament elections.⁶²

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⁶⁰ This question is addressed by several authors. See, among others: Dimitry Kochenov: *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*. „Columbia Journal of European Law”, 2009/2, 201. p.

⁶¹ For more information see Ádám Varga: *A helyi önkormányzathoz való jog alapvető kérdései*. Budapest, Pázmány Press, 2021, 70-72. pp.

⁶² In 2013, an European citizens' initiative called "Let me Vote" was launched to extend citizens' right to vote in the parliamentary elections where they live, but it failed. See: Gyenyey ibid. [94].

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Judicial Error in European Law

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Abstract

Because judicial activity involves a certain amount of risk, being carried out by people, the possibility of miscarriages of justice subsists in any legal system. However, hypotheses of judicial error, which essentially involve non-compliance with procedural or substantive law rules with serious consequences for citizens' rights and freedoms, impose a positive obligation on the State to repair the damage thus caused, since the State is the guarantor of an act of justice governed by the principle of fair trial. Since the activity of judges must enjoy the guarantees deriving from the principle of judicial independence, a direct action against the magistrate responsible for exercising his office with gross negligence or bad faith is not admissible. However, a subsidiary action is regulated in many European legal systems, and the possibility of triggering disciplinary liability mechanisms against the guilty magistrate can be found in any legal system. The research methods used in order to achieve this aim are the comparative method, the analytic and historical methods.

Keywords: miscarriage of justice, independence, judge, negligence, civil liability.

JEL Classification: K41, K42

1. The notion of judicial error in Romanian law

The judicial authority exercises its regulated function, including at the level of the fundamental law, in applying the principle of separation of powers. Developed by Montesquieu, but with origins in the ancient state organization of the Greeks and Romans, this rule of constitutional law seeks to ensure a balance between the authorities exercising the single political power, held by the people but entrusted to be exercised through representatives. Ensuring this balance will aim to prevent abuses committed against citizens by any of the three powers², and in this context, courts have the role of ensuring respect for the rights, freedoms and legitimate interests of citizens, both related to interactions with public authorities but also related to interactions between private persons.

In order to achieve the constitutional purpose conferred on them, the courts have at their disposal the levers represented by the application of the law to a particular situation, with the possibility of interpreting the legal norm that is unclear, given that, in order to respect the principle protecting citizens from denial

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² M. Criste, *Constitutional Law and Political Institutions*, Mirton Publishing House, Timișoara, 2004, pp. 40-41.

of justice, courts cannot refuse to judge on the grounds that the law does not provide, is unclear or incomplete³. In order to prevent the arbitrary exercise of this power, in order to safeguard the principle of legal certainty, the provisions of the Code of Civil Procedure provide for two mechanisms for standardising judicial practice, i.e. the interpretations that national courts will grant regarding the application of a certain legal rule to a particular state of affairs (this is the appeal procedure in the interest of the law, and, respectively, the procedure for interpreting a point of law).

Given the importance of the judicial function in the constitutional framework of the rule of law, it is necessary to regulate civil liability for those situations where, through serious negligence or, less often, intentionally, the magistrate causes patrimonial or non-patrimonial damage, by erroneously applying the rules of substantive or procedural law.

It is the incidence of a hypothesis of judicial error, a state of affairs with legal consequences and for which both Romanian legislation and, as we shall see, that of other states on the European continent, have ensured express regulation.

Thus, in Romanian law, the regulation of the legal institution of judicial error has undergone a series of changes in recent years.

In Law No. 303 of 2004 on the Status of Judges and Prosecutors, in the form in force until the adoption of Law No. 242 of 2018, judicial error was not defined, but hypotheses of judicial error were regulated in Article 99¹, which provided that there is bad faith when the judge or prosecutor knowingly violates the rules of substantive or procedural law, pursuing or accepting harm to a person. There is gross negligence when the judge or prosecutor grossly, undoubtedly and inexcusably disregards substantive or procedural rules⁴.

The exercise of office in bad faith or gross negligence constituted the disciplinary offence provided by art. 99 letter *t* of the same normative act. At the same time, Article 96 of Law no. 303/2004 established the patrimonial liability of the State for damages caused by judicial error that does not remove the magistrates' liability for damages caused by exercising their office in bad faith or gross negligence. A similar regulation was and is still provided for in the criminal procedure legislation, in Articles 538-542 of the Criminal Procedure Code.

In order to be able to hold the State liable for damage caused by a miscarriage of justice, it was necessary to have a final decision establishing the criminal or disciplinary liability of the magistrate for an act committed during the trial and likely to cause a miscarriage of justice.

Law no. 242/2018 amended the provisions of Law no. 303/2004 regarding the liability of the State, but also the subsidiary liability of the magistrate, for hypotheses of judicial error.

Thus, the text of Article 96, as amended in 2018, provided that there is a

³ This principle is also enshrined in infraconstitutional legislation, as provided for in Article 5 of the Code of Civil Procedure.

⁴ Law no. 303/2004 on the statute of judges and prosecutors.

judicial error when a procedural act was ordered in obvious violation of substantive and procedural law provisions, an act by which the rights, freedoms and legitimate interests of the person were seriously violated, causing an injury that could not be remedied by an ordinary or extraordinary remedy.

On the other hand, there was miscarriage of justice, as regulated by para. (3) of Art. 96 of Law no. 303/2004, and if, by a final court decision, contrary to the law or to the factual situation resulting from the evidence administered, the rights, freedoms and legitimate interests of the person were seriously affected, damage that could not be remedied by an ordinary or extraordinary remedy.

By Decisions number 45 and 252 of 2018 respectively⁵, the Constitutional Tribunal analysed the conformity of the amendments brought by Law no. 242/2018 with constitutional values and concluded that judicial error must be clearly defined, because not every mistake of judgment constitutes miscarriage of justice, but only serious violations, "*manifest, undoubted, gross, coarse, absurd or which have provoked illogical or irrational factual or legal conclusions*", and mere judicial misinterpretations will only be corrected by means of appeals. The Court stated that judicial error, as a genuine autonomous concept, must be regulated in a comprehensive manner, taking into account the necessarily serious consequences for fundamental rights and freedoms arising from the resolution of litigious situations contrary to factual/legal reality, as well as from the manifest irregularity in the conduct of the procedure.

In order to analyze the incidence or not of judicial error in a particular case, the findings of the Constitutional Court contained in Decision no. 417/2018 are to be considered, findings by which it was held that disregarding the substantive or procedural law norms implies that in this situation no other judge/prosecutor with average training and diligence would have acted similarly and this behavior must have led to serious harm to rights, freedoms or interests of a person, among the criteria for determining the severity of the damage being those given by the persistence over time of these negative effects, by the way they are remedied, by the importance of the social value harmed in relation to the injured person⁶.

The constitutional court considered that there are seven conditions for admissibility of an action for judicial error, namely: the existence of a civil/criminal trial, the existence of procedural acts (letter a)/a final court decision (letter b), carried out in violation of the law, the violation must be obvious, have seriously affected the rights, freedoms or legitimate interests of the person and the occurrence of an injury of equivalent intensity, which could not be remedied by appeal, the Court thus demonstrating that there is a very strict filter for finding the incidence of a miscarriage of justice, a concept which does not cover any error

⁵ Available at www.ccr.ro accessed June 18, 2023.

⁶ G. M., Mara, *Prejudiciul nepatrimonial cauzat prin eroarea judiciară*, Universul Juridic, Bucharest, 2020, p. 121.

in the course of civil or criminal proceedings⁷.

Law no. 303/2022 on the status of judges and prosecutors, published in the Official Journal on 16 November 2022, replaced the previous regulation (Law no. 303/2004).

The need to adopt a new legislative framework resulted, according to the explanatory memorandum, from the imperative of harmonizing the legislation on the functioning and organization of the justice system in accordance with the principles of the national instruments ratified by Romania, but also taking into account the recommendations formulated under the CVM, as well as the decisions of the Constitutional Court in the field.

The State remained liable for damage caused by judicial error, in accordance with constitutional provisions (Article 52 of the Fundamental Law) and the magistrates will only be liable for miscarriage of justice caused by their exercise of office in bad faith or gross negligence.

Even from the regulation provided by Article 268 of Law no. 303/2022, we conclude that not every type of judicial error is caused by the exercise of judicial function in bad faith or gross negligence. However, when this is the cause of the miscarriage of justice for which the State has been called to answer, this could also entail the liability of the magistrate who acted in breach of his professional duties.

Paragraph 3 of Article 268 of the same normative act confirms these aspects by pointing out that, in the absence of bad faith or gross negligence, magistrates are not liable for the solutions given. It is a regulation meant to strengthen the principle of independence of the judge, who cannot be held liable (disciplinary or civil) for the solutions pronounced, except when they are the result of non-compliance, with serious negligence or intention, with the rules of substantive or procedural law and which caused a judicial error.

Paragraph 4 of the same article 268 of Law no. 303/2022 defines the two hypotheses of judicial error, in a manner similar to the previous regulation operated under Law no. 242/2018. Thus, we will be in the presence of miscarriage of justice when procedural acts were ordered during the trial in obvious violation of the legal provisions of substantive and procedural law, by which the rights, freedoms and legitimate interests of the person were seriously violated, causing an injury that could not be remedied by an ordinary or extraordinary remedy. There will also be a miscarriage of justice if a final judgment has been given which is manifestly contrary to the law or to the facts resulting from the evidence administered, seriously affecting the rights, freedoms and legitimate interests of the person, which could not be remedied by an ordinary or extraordinary remedy.

Paragraph 5 provides that the person who, in the course of the trial, contributed in any way to the miscarriage of justice is not entitled to compensation

⁷ Decision no. 417/2018 of the Constitutional Tribunal, available at www.ccr.ro, accessed on 18 June 2023.

for the damage. The regulation, which returns to the text of Law 303/2004 prior to the amendments brought by Law no. 242/2018, is in accordance with the principle of law *nemo auditur propriam turpitudinem allegans*, since it would be unfair to allow the very person responsible for causing the miscarriage of justice to claim State liability and compensation, pleading his own fault in causing the damage.

The hypotheses of judicial error and the mechanisms for providing compensation to the injured enshrined in the Code of Criminal Procedure were also preserved following the adoption of Law no. 303/2022 (paragraph 6 of Article 268).

If the State is sentenced to pay compensation following the finding of the incidence of a hypothesis of judicial error, the Ministry of Finance will notify the appropriate Section of the Superior Council of Magistracy to ascertain whether the magistrate acted in bad faith or gross negligence, and the Section, in turn, will send the notification to the Judicial Inspection for verification.

The procedure has been reinstated in a manner that undoubtedly respects the principle of judicial independence, as long as only the Judicial Inspection can conduct disciplinary investigations against a magistrate, being able to conclude whether or not he or she exercised the office in bad faith or gross negligence. The report of the Judicial Inspection is subsequently submitted for approval by the appropriate Section of the Superior Council of Magistracy, and the decision of the Section is communicated, if it finds that the magistrate exercised his function in bad faith or gross negligence, to the Ministry of Public Finance for exercising the recourse action.

Law no. 303/2022 also brought amendments to the definition of bad faith, respectively serious negligence in the exercise of office, actions which, as we have shown, may represent hypotheses of judicial error due to culpable conduct of the magistrate.

Thus, bad faith arises when the judge or prosecutor knowingly violates substantive or procedural law by seeking or accepting harm to a person.

There will be gross negligence when the judge or prosecutor grossly, undoubtedly and inexcusably disregards substantive or procedural rules.

Paragraph 3 of Article 272 of Law no. 303/2022 also lays down certain criteria that will be taken into account in deciding on the incidence of serious negligence, namely the degree of clarity and precision of the rules infringed, the novelty and difficulty of the question of law in relation to the case-law and doctrine in the matter, the seriousness of the non-compliance, as well as other objective professional circumstances.

The regulation of such criteria is welcome, as it provides a framework within which the analysis will be carried out, the purpose of paragraph 3 being to remove, as far as possible, arbitrariness in making this decision.

All these amendments brought by Law no. 303/2022 on state liability for judicial error as well as on the subsidiary liability of magistrates outline a more

comprehensive, complex legislative framework, meant to provide criteria to standardize the analysis of the incidence of a hypothesis of judicial error or of the exercise of office by the magistrate acting in bad faith or with gross negligence. This respects the requirements of predictability and clarity of the legal norm.

2. Regulation of hypotheses of miscarriage of justice in European law

The Court of Justice of the European Union has established⁸, as a matter of principle, that the law of a Member State on the liability of the State or of a magistrate for damage caused by miscarriage of justice complies with European Union law only as long as an action against a magistrate is limited to exceptional cases and governed by objective and verifiable criteria, generated by the need for a good administration of justice and accompanied by guarantees designed to prevent any external pressures on the act of justice. Therefore, in order to achieve this goal, clear rules establishing the conduct that can trigger the magistrate's liability are necessary, in order to guarantee the independence of justice and to prevent them from being held accountable on the basis of decisions handed down in the exercise of office. The fact that a judgment is a hypothesis of judicial error is not sufficient to automatically hold the magistrate who issued it liable.

The practice of the European court aimed at ensuring that national legislation complies with European Union law has therefore established that holding a magistrate accountable for a hypothesis of miscarriage of justice can only be done exceptionally and only when there are clear criteria and procedures designed to prevent abuse of this possibility, as long as not every hypothesis of miscarriage of justice is the result of fault on the part of the magistrate.

Other national laws of the Member States of the European Union also have regulations designed to compensate victims of a miscarriage of justice, as long as the risk in the exercise of judicial office cannot be denied.

We will summarize the existing regulations in Spain, Portugal, Germany and Belgium, with the observation that the current normative framework in Romania is a modern one, built on the principles of European law in the field of protecting the fundamental rights of citizens and respecting the rule of law and the independence of justice as a public service.

⁸ Decision delivered on 18 May 2021 in Joined Cases C-83/19 *Association 'Forum of Judges in Romania' v. Judicial Inspection*, C-127/19 *Association 'Forum of Judges in Romania' and Association 'Movement for the Defence of the Status of Prosecutors' v. Superior Council of Magistracy* and C-195/19 *PJ v. QK* and in Cases C-291/19 *SO v. TP and Others*, C-355/19 *Association 'Forum of Judges in Romania', Association 'Movement for the Defence of the Status of Prosecutors' and OL v. Prosecutor's Office attached to the High Court of Cassation and Justice - General Prosecutor of Romania* and C-397/19 *AX v. Romanian State - Ministry of Public Finance*, accessible on www.curia.europa.eu.

*In Spain*⁹, the State is liable for damage caused by the defective functioning of Justice as a public service in three situations: causing a miscarriage of justice, abnormal functioning of Justice and unreasonable duration of deprivation of liberty (specific to criminal proceedings).

Article 121 of the Constitution entitles the victim of a miscarriage of justice to receive compensation from the Spanish State for the damage suffered, regardless of the nature of the error or the type of the court where it occurred.

The indemnity is to be determined by applying the rules on civil damages, with the mention that the state is exonerated from liability if the error occurred as a result of a case of force majeure.

In order to be in the hypothesis of a miscarriage of justice in Spanish law, it is necessary to have an erroneous classification of reality, as resulting from the evidence administered, or a wrong assessment of the evidence by the magistrate, such that the result is a profoundly unfair decision, which causes certain harm to the victim and which reveals an inexcusable error and a lack of legal knowledge.

Since Spanish law does not fully define miscarriage of justice, the Spanish constitutional tribunal has established in its case-law that error must be demonstrated on a case-by-case basis, taking into account the principle of legality.

Three conditions arise from the case-law of the Spanish Constitutional Court, namely: the decision must have been delivered by a judge lawfully exercising his office, the judge does not comply with the applicable rules by distorting the proven facts, misinterpreting or misapplying the law and distorting its meaning, or gives a decision contrary to the evidence resulting from the administration of evidence and the logic of the trial, this decision causing prejudice.

Spanish law also requires exhaustion of all remedies permitted by law before an action for miscarriage of justice can be brought.

The procedure is terminated by bringing an action for a declaration of miscarriage of justice by the claimant, and the Court of Cassation will determine whether or not there has been a miscarriage of justice in the case. Only later, through a separate action following the rules of administrative proceedings, can the victim of judicial error claim compensation.

We therefore note that Spanish legislation also provides for a two-stage procedure, the first consisting in a finding of miscarriage of justice and the second with the purpose of compensating the person who has suffered and proved damage.

Within the second basis of State liability for defective functioning of justice as a public service, all other hypotheses which, not constituting miscarriage of justice, lead to the violation of legitimate rights or interests, such as the unreasonable duration of judicial proceedings, can be framed. These acts are not always

⁹ V. M. Catena, *La responsabilité des juges en Espagne*, appeared in *La reponsabilité des magistrats, textes réunis par Simone Gaboriau et Hélène Pauliat*, Ed Pulim, Limoges, 2008, p. 179 et seq.

attributable to magistrates and may also be caused by other categories of staff involved in the delivery of justice.

Spanish law does not narrowly define these assumptions so that any abnormal functioning of the justice system, which causes damage, may give rise to State liability.

*In Portugal*¹⁰, justice is also considered a public service, and the responsibility of the State, enshrined at constitutional level (Article 22 of the State Constitution) proclaims that the State is civilly liable, jointly and severally with its civil servants and agents, for all errors, actions and inactions occurring in the exercise of public office and causing an infringement of the rights and freedoms of individuals or other type of damage.

Even if, at constitutional level, in Portugal, only the liability of the State is provided for by granting an indemnity to a person who has been wrongly convicted (Article 29 of the Fundamental Law), by virtue of the text of Article 22 of the Constitution it is considered that the State is responsible to compensate any damage caused in the course of judicial activity, by disregarding procedural rules, violating the rights and interests of a person, such as, for example, but not limited to, the unreasonable length of proceedings.

The intangibility of the magistrate judge in relation to the pronounced decision is also enshrined at the level of the fundamental law, which, however, allows the infraconstitutional regulation of exceptional situations, including those in which a person has been wrongly convicted (an aspect found in a subsequent judicial procedure) or has been illegally deprived of liberty or for an excessive duration. Unreasonable length of proceedings may also give rise to a right to compensation.

We therefore note that, even under Portuguese law, State liability for damage caused by a miscarriage of justice may give rise to situations similar to those of other legislation, even if the legislation is not extremely detailed.

*German law*¹¹ enshrines both the principle of the independence of the judge and rules governing his civil, criminal or disciplinary liability, while respecting the guarantees provided by the first rule.

Criminal liability will be incurred if the judge causes an intentional non-compliance with the law, an application of non-existent rules to deliver a decision obviously contrary to law.

It is noted that, under German law, the magistrate's liability for exercising his office in bad faith may take the form of criminal liability.

As far as civil liability is concerned, it is extremely limited, as in France,

¹⁰ J. Costa, *La responsabilité des magistrats. Bref panorama de la situation au Portugal*, appeared in *La responsabilité des magistrats, textes réunis par Simone Gaboriau et Hélène Pauliat*, Ed Pulim, Limoges, 2008, p. 194 et seq.

¹¹ H. Heitland, *La responsabilité pénale, civile et disciplinaire des juges en Allemagne*, published in *La responsabilité des magistrats, textes réunis par Simone Gaboriau et Hélène Pauliat*, Ed Pulim, Limoges, 2008, p. 129 et seq.

as long as, in accordance with constitutional provisions, the State is solely responsible for the damage caused by the defective manner of carrying out the act of justice (Article 34 of the Constitution and Article 839 of the Civil Code).

The only exception is where the judgment is the fruit of a crime. The reason why German law is so restrictive with regard to the civil liability of judges lies in the need to respect the principle of independence of the judge, but also in the need to ensure judicial peace, in the sense that once a judgment is handed down, it finally settles the disputed situation.

As regards liability for acts which are not judicial decisions, civil liability of the magistrate may arise under the provisions of the German Civil Code, even if, in accordance with the case-law of the Federal Court of Justice, serious negligence can occur only if the interpretation given by the judge cannot be supported by legal reasoning. A situation that is obviously rare.

However, the State will be liable for damage caused by judicial proceedings of unreasonable duration, even if recourse actions against the responsible magistrate are extremely rare.

*In Belgium*¹², a decision of the Court of Cassation in 1991 held that neither the principle of separation of powers, nor the independence of judges nor restrictive legal conditions allow the State to circumvent the rules of liability for damage caused by its agents by the defective conduct of justice.

In order for the State to be held accountable, it is necessary that the magistrate has acted within the scope of his functions, issuing a decision which cannot be appealed.

In another decision, from 1994, the Court stated that, in order to incur State liability, it is necessary to use the criterion of prudent and diligent magistrates in the exercise of their duties, placed under similar conditions of time, its mistake implying the erroneous application of a well-established rule of law, being considered inexcusable by taking into account various elements, including by reference to the unitary character of the case-law in the field.

The State's liability for miscarriage of justice may arise either as a result of an error of conduct on the part of the magistrate or as a result of the misapplication of a legal rule, both of which are liable to cause damage requiring reparation.

3. Conclusions

In Romania, the mechanism of State liability for damage caused by judicial error has undergone many changes in the last 5 years, and the current regulation is a modern one, similar to that encountered in the case of other legal systems on the continent.

¹² C. Matray, *La responsabilité des magistrats en Belgique*, appeared in *La reponsabilité des magistrats, textes réunis par Simone Gaboriau et Hélène Pauliat*, Ed Pulim, Limoges, 2008, p. 175-176.

At European level, we observe similar regulations regarding the liability of the State for the damage caused by a hypothesis of judicial error, limiting the personal liability of the responsible magistrate, only to situations where the error is an inexcusable one in relation to the unitary jurisprudence in the field, the judge's reasoning being manifestly contrary to the evidence in the file and the applicable legal rules. The need to protect the principle of the independence of the judge has prompted such restrictive rules regarding his criminal and civil liability for the manner in which he exercises his function, but there may be cases of disciplinary liability.

However, due to the role of the State as guarantor of the execution of an act of justice respecting the guarantees of a fair trial, its civil liability will always be involved for the damage caused by a judicial error, a malfunction of justice, most European legislation enshrining this form of liability at the level of the fundamental law, as a constitutional principle.

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Digital Wallet: Economic and Legal Implications in the Digital Era

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Abstract

This study examines the digital wallet and its economic and legal implications in the context of digital transformations in the current era. The digital wallet aims to be a way of managing financial transactions. Through this study, key aspects related to digital wallets are explored, including economic benefits and legal risks, starting with the digital euro and the European wallet for digital identity. Firstly, the economic implications of digital wallets are analyzed. The advantages are highlighted, such as the efficiency and convenience of financial transactions, easy access to financial services, and the growth of the digital economy. Secondly, the legal implications of digital wallets are examined, including the examination of European regulations in the field, recommendations, and legislative proposals. Issues such as electronic fraud, money laundering, tax evasion associated with the use of digital wallets, as well as the legal responsibility of financial service providers, are also addressed. The study emphasizes that digital wallets represent an innovation in the financial domain, with significant economic benefits. However, an appropriate legal approach is essential to address the associated risks and challenges, ensuring the security and protection of users' interests.

Keywords: digital wallet, euro digital, coin, European Central Bank, electronic currency.

JEL Classification: K22, K24

1. Introduction

In October 2021, European Central Bank (ECB) and the euro area national central banks launched the investigation phase of the digital euro project.

Digital Euro³ would allow end users to access and transfer Central Bank money in electronic form. Each digital euro will always be the Central Bank's liability, allowing end users to make and receive payments throughout the euro area in a similar way to cash transactions. Digital money issued by the Central

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³ The digital euro is a central bank digital digital currency (CBDC) that the Eurosystem may issue in the future - Digital euro glossary, European Central Bank – 30.09.2022, The document is available online at https://www.ecb.europa.eu/paym/digital_euro/investigation/profuse/shared/file_s/dedocs/ecb.dedocs220420.en.pdf?b268d673898445396fb1a59efbcf01f3, accessed on 12.06.2023.

Bank would provide an anchor of monetary stability for the Eurozone, strengthening its monetary sovereignty and encouraging innovation, competition and efficiency in the European payments landscape⁴.

With regard to digital euro access, the Eurosystem's⁵ proposal is to make the digital euro available to euro area residents, merchants and governments in its initial releases. Non-resident euro area citizens may also have access, provided they could have an account relation with a euro area PSP⁶.

Access for consumers in the wider European Economic Area (EEA) and selected third countries could be part of the subsequent releases. Individuals would be subject to uniform holding limits, which would cover day-to-day payments in each euro area Member State. Merchants and governments in the euro area would have zero-holding limits. Onboarding for the digital euro (e.g. the identification and authorization steps necessary for intermediaries to open a digital euro account for an end user), should follow the procedures already established for opening a payment account with intermediaries⁷.

End users would be able to access and use the digital euro either through PSPs' existing online banking/payment apps (integrated approach) or through an app provided by the Eurosystem. The latter app would provide a harmonized entry point for basic payment functionalities, although end users would still need to be onboarded for digital euro services by distributing PSPs. In terms of technological options for making payments, the Eurosystem envisages that the first digital euro releases will offer end users the option of paying via contactless technology, QR codes or an easy way to pay online (via an "alias/proxy/app redirect" functionality).

With regard to digital euro services and functionalities, the Eurosystem foresees that PSPs could provide core, optional and value-added services to end users. The provision of core services (e.g. the opening/closing of a digital euro account, onboarding and funding/defunding functionalities), both for online and offline functionalities, would be mandatory for supervised intermediaries that distribute digital euro. On top of core services, optional services (e.g. recurring payments) and value-added services (e.g. splitting payments among multiple payers in person-to-person payments) could be offered voluntarily by intermediaries to

⁴ Market Research Outcome Report – European Central Bank, 26 May 2023. The document is available at: https://www.ecb.europa.eu/home/search/html/digital_euro.en.html, accessed on 12.06.2023.

⁵ The Eurosystem represents the monetary authority of the euro area and is made up of the European Central Bank and the national central banks of the member states that have adopted the euro. [Ecb.europa.eu](https://www.ecb.europa.eu) European Central Bank – Eurosystem.

⁶ Payment service provider - payment service provider - A legal person that provides services (for example, issuing payment instruments, purchase, payment authorization, end user authentication) enabling payments between end users.

⁷ Progress on the investigation phase of a digital euro – third report – European Central Bank, April 2023. The document is available at: https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf, accessed on 12.06.2023.

further enhance the user experience.

With regard to cross-currency payments, the Eurosystem envisages that the provision of cross-currency functionalities could be supported by establishing interoperability between the digital euro and another central bank digital currency (CBDC)⁸ system, either by establishing a set of contractual, technical and operational links (an interlinking model) or by following a single-system approach whereby a common technical infrastructure would host multiple CBDCs issued by their respective central banks. The priority for the Eurosystem is to ensure the timely delivery of a digital euro that serves the needs of euro area users. If a digital euro is introduced successfully in the euro area the provision of cross-currency functionalities could be supported where there are mutual interests with other monetary jurisdictions⁹.

Several research methods have been used in documenting the issues under scientific research, analyzed from both an economic and a legal point of view. Among these, we mention the comparative method used to identify the similarities and differences regarding the digital wallet, digital euro, the European wallet for digital identity and the use of electronic currencies. Through the legal method, the national and European legislative framework that could be applicable and also possible risks were subjected to analysis.

2. Euro digital – access and possession

The rules for access to the digital euro for euro area citizens and residents, as well as access in EU Member States whose currency is not the euro and in third countries outside the EU, will also depend on the legislative framework for the digital euro to be adopted by co-legislators following a proposal by the European Commission. The Eurosystem has endorsed views on how access could be facilitated for different categories of user from within and outside the euro area, with the objective of facilitating prioritised use cases within the euro area.

The Eurosystem is proposing that in the initial releases of the digital euro the focus would be on enabling access for euro area residents, merchants and governments. Non-resident euro area citizens could also have access to the digital euro, provided they have an account with a euro area PSP. Merchants outside the euro area could offer digital euro acceptance but, like euro area merchants, should not hold digital euro. They would obtain the equivalent in private money via a

⁸ A central bank digital currency („CBDC”) is the digital form of a country's fiat currency, which is also a claim on the central bank. Instead of printing money, the central bank issues electronic currencies or government-backed accounts. This currency is accessible to everyone. What is a central bank digital currency (CBDC)? - The document is available online at: <https://hedera.com>, last accessed on 12.06.2023.

⁹ Progress on the investigation phase of a digital euro – third report – European Central Bank, April 2023, p. 5. The document is available at: https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf, accessed on 12.06.2023.

collecting PSP in the euro area.¹⁰

Access for consumers in the wider European Economic Area (EEA) and selected third countries could form part of subsequent releases. Permanent access to the digital euro for consumers in the EEA and third countries should always be based on an agreement with the authorities of such jurisdictions. This could also apply to visitors from jurisdictions outside the EEA.

Individual holding limits for users outside the euro area should not exceed those for euro area residents and citizens. For initial releases, merchants and governments in the euro area would have zero-holding limits with deviations limited to what is required for the technical implementation of the waterfall and reverse-waterfall functions (i.e. exceeding holding limits only for a few seconds). Waterfall and reverse-waterfall functions would enable incoming and outgoing payments to take place smoothly.¹¹

3. Onboarding process

The onboarding service for the digital euro refers to the identification and authorisation steps necessary for intermediaries to open a digital euro account for an end user. Onboarding must ensure that a number of important checks, like “Know Your Customer”¹² (i.e. the unique identification of an individual), are carried out. Individual account limits also need to be addressed.

Onboarding should use established procedures for opening a payment account as much as possible and should oblige PSPs to utilise available information as often as possible. This ensures easy adoption in the market and reduces overall implementation costs.

The overall amount of digital euro in circulation could be controlled in a pragmatic way (and in line with current practice in the public sector) by limiting the number of accounts per individual, especially in the initial uptake. There would therefore be no need for reconciliation of individual holdings between different PSPs. Merchants could open multiple digital accounts as they would not actively hold digital euro and as such would not be impacting the amount in circulation. A portability procedure for digital euro accounts would allow an end user to easily change the PSP providing the digital euro account. To facilitate portability, end users would keep the same digital euro account identifier, irre-

¹⁰ *Ibid.*, p. 5.

¹¹ *Ibid.*, p. 5.

¹² Know Your Customer (KYC) verification is the mandatory process of identifying and verifying the customer's identity when opening an account and periodically over time. In other words, banks need to make sure their customers are really who they say they are. Banks may refuse to open an account or terminate a business relationship if the customer does not meet minimum KYC requirements. The document is available online at <https://www.thalesgroup.com/en/markets/digital-identity-and-security/banking-payment/issuance/id-verification/know-your-customer>, accessed on 12. 06.2023.

spective of their PSP. The Eurosystem is investigating possible emergency portability procedures.¹³

4. Distribution of Digital Euro

A digital euro scheme would establish a common set of rules, standards and procedures that supervised intermediaries would have to adhere to in order to distribute the digital euro. The Eurosystem is working with all market participants and relevant stakeholders to develop a digital euro scheme rulebook. PSPs would have to meet a range of scheme access criteria reflecting the legal obligations they would need to comply with for the purpose of distributing the digital euro. PSPs¹⁴, as defined in PSD2, would be responsible for the distribution of the digital euro. Scheme access criteria for PSPs distributing digital euro would be based on PSD2, in addition to other relevant legislation.

End users could access and use the digital euro either through PSPs' existing online banking/payment apps (integrated approach) or through a digital euro app provided by the Eurosystem. While the latter app would provide a harmonised entry point for basic payment functionalities, these payment functionalities would still be performed by PSPs. In terms of technological options for making payments, the Eurosystem envisages that end users would be able to pay/be paid via contactless technology, QR codes or an easy way to pay online¹⁵.

5. Scheme access criteria of Digital Euro

Digital euro scheme access criteria should ensure that the distribution of the digital euro is undertaken by capable intermediaries and that it facilitates the achievement of the digital euro policy objectives. PSPs distributing the digital euro would have to meet a set of scheme access criteria reflecting the legal obligations they would need to comply with for the purpose of distributing the digital

¹³ Progress on the investigation phase of a digital euro – third report – European Central Bank, April 2023, p. 6. The document is available at: https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf, accessed on 12.06.2023.

¹⁴ The revised Payment Services Directive (PSD2) updates and improves the EU rules established by the original PSD adopted in 2007. PSD2 entered into force on 12 January 2016, and EU member states had until 13 January 2018 to transpose it in national legislation. The main objectives of PSD2 are: to contribute to a more integrated and efficient European payment market; to improve the level playing field for payment service providers by including new players; to make payments safer and more secure; and (iv) to enhance the protection of European consumers and businesses. In other words, PSD2 supports innovation and competition in retail payments and increases the security of payment transactions and the protection of consumer data. The revised directive on payment services was transposed into national legislation by Law no. 209/2019 regarding payment services and for the modification of some normative acts, published in the Official Gazette no. 913 of November 13, 2019.

¹⁵ Progress on the investigation phase of a digital euro – third report – European Central Bank, April 2023, *op. cit.*, p. 6.

euro. They would also need to comply with other rules designed to guarantee the degree of harmonization desired, so that payment solutions for the digital euro can be used anywhere and in a consistent manner throughout the euro area. The distribution of the digital euro should be undertaken by trusted and sound intermediaries that have the capacity to offer digital euro accounts and payment services and provide front-end solutions; are subject to anti-money laundering/countering the finance of terrorism controls and sanctions regulation-related framework; are solvent under the relevant insolvency law, demonstrate operational readiness and risk control; and are licensed and authorised by an appropriate competent authority and compliant with all applicable legislation.

The Eurosystem considers that PSPs, as defined in PSD2, would be best placed to distribute the digital euro. The digital euro scheme access criteria would be based on PSD2, in addition to other relevant legislation (e.g. the Anti-Money Laundering Directive¹⁶, the Payment Account Directive and the Settlement Finality Directive). The Eurosystem's suggestion is that the different types of PSPs, as identified in PSD2, should be authorized to provide digital euro services in accordance with the services they are currently licensed to provide under PSD2. Thus, the following PSPs would be able to distribute the digital euro: credit institutions, electronic money institutions and payment institutions¹⁷. They could offer digital euro payment services, provide digital euro accounts¹⁸ make application programming interfaces (APIs)¹⁹ to digital euro accounts available and offer basic services associated with the digital euro (for a full list of services see the list of services as provided in PSD2).

6. Functionalities and features of the digital wallet for Digital Euro

Supervised intermediaries could offer end-users a variety of services for digital euro transactions and rely on the advanced functionalities of the digital euro. All PSPs distributing digital euros to end-users will be required to provide a set of core services, while optional and value-added services could be offered voluntarily by supervised intermediaries to further enhance the core product and

¹⁶ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, as well as amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.6.2018, pp. 43–74.

¹⁷ Payment Initiation Service Providers and Account Information Service Providers.

¹⁸ The implementation of financing and definancing services may differ between different types of PSPs. Further analysis is underway on how to facilitate the provision of distribution-relevant payment services by electronic money institutions and payment institutions - Progress on the investigation phase of a digital euro – third report – European Central Bank, April 2023, p. 7. The document is available online at: https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro-4d7268b458.en.pdf, last accessed on 12.06.2023.

¹⁹ Application Programming Interface - represents a set of rules and specifications that must be followed to access and use the services and software resources implemented by the API.

improve the end user experience.

The Eurosystem intends to support cross-functionality. The priority for the Eurosystem is to ensure the timely delivery of a digital euro that meets the needs of euro area users. If a digital euro is successfully introduced in the euro area, the provision of cross-functionality could be supported where there are mutual interests with other monetary jurisdictions.²⁰

The digital euro must be made available to users through a specific digital wallet. It could be built and used as a stand-alone solution (i.e. a separate application) or an integrated solution (i.e., an application within the banking system).

In both cases, the digital wallet can be automatically linked to the user's bank account. Peer-to-peer (P2P)²¹ payments make it possible to send money instantly to anyone in the Eurozone without transfer fees. Payment transfers will be initiated by selecting the person's phone number from the user's contact list and confirming the payment using facial recognition.

After that, the payer and payee instantly receive confirmation of successful payment. Alternatively, the payee can send a request that appears in the recipient's app. The recipient can then decide whether to pay all or part of the amount, or not pay at all. There is also an option to attach a text message to the payer. Again, the payment is confirmed using facial recognition and the money is transferred immediately. The digital wallet can also be used to make purchases in stores using a QR code.

There are two ways this feature can be used:

- the customer uses their digital wallet to scan the QR code presented by the merchant and confirms the payment using facial recognition.
- the customer uses their digital wallet to display their personal QR code, which the merchant scans to complete the payment. The customer confirms the transfer with facial recognition²².

In offline mode, the digital wallet can be used to make payments in stores or P2P transfers without an internet connection. Offline payment is contactless: the user holds his mobile phone next to the beneficiary's. To initiate an offline payment, there must be a balance to be put separately for offline use in the digital wallet, allowing the user to spend it in a similar way to withdrawing money from the physical wallet.

Transaction history with limited data option makes it possible to hide

²⁰ Progress on the investigation phase of a digital euro – third report – European Central Bank, April 2023, p. 9. The document is available online at: https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf, last accessed on 12.06.2023.

²¹ P2P trading is the act of buying and selling cryptocurrencies directly between users, without third parties or intermediaries. Peer-to-peer payment applications can be used to send funds to other people, for any reason, at any time. <https://ro.eyewated.com/ce-sunt-platile-peer-to-peer-p2p/> by Brad Stephenson, information about the document available online, last accessed 06/08/2023.

²² Study on Digital Wallet Features, Kantar Public, March 2023, page 13. The document is available online at: https://www.ecb.europa.eu/home/search/html/digital_euro.en.html#/search/digital%20%20wallet/1, accessed on 12.06.2023.

some payment data. Purchases made in this way are reported in the bank statement with only a transaction number and the amount paid - no names or other information are shown. The payee does not know the name of the payer. This option can be enabled in the digital wallet by turning off the "Show all details in activity history" option.²³

The wallet also offers a financing option. Users can preload money from their bank account into the digital wallet, and the money is then deducted from the digital wallet balance when they make payments with it. This allows budget management. If the user prefers not to fund the wallet, they can link it directly to their bank account, so money is deducted directly from the account when they make payments. The following options will be possible:

- if a user wants to control his expenses, he can set a monthly budget. A certain amount is automatically transferred from his bank account linked to the digital wallet every month and he uses this balance for all payments. It can also set a minimum limit and get an alert when the balance drops below it.

- a user can choose not to preallocate money in the digital wallet. When paying, the digital wallet deducts the amount directly from the linked bank account.

- a user can choose to always keep a certain balance in the digital wallet. They can set it to be automatically fed from their linked bank account.

Two types of conditional payment methods can be used through the digital wallet:

- cash on delivery allows a customer to order something online, but only execute the payment once the delivery has been made. If the product does not arrive, the payment is not made.

- with pay-per-use (PPU)²⁴, a customer pre-authorizes a payment, the value of the purchase being unknown in advance (for example, a car rental). If the beneficiary does not confirm and the payer does not authorize the payment after a certain period of time, the reserved funds are released and the pre-authorization is canceled.

There are several options for instant payment management:

- an instant payment option where each individual payment made from the digital wallet is instantly credited to the merchant's bank account.

- an aggregate payment where all payments from the digital wallet are scheduled to leave on a certain day and are aggregated by the payment service provider and transferred to the merchant as a single payment at the end of that

²³ Study on Digital Wallet Features, Kantar Public, March 2023, p. 14. The document is available online at: https://www.ecb.europa.eu/home/search/html/digital_euro.en.html#/search/digital%20wallet/1, accessed on 12.06.2023.

²⁴ Pay-per-use is a payment model where the customer pays for using the product rather than having to buy it. In other words, the more a customer uses the product, the more they pay and vice versa. <https://www.bundl.com/articles/trends-what-is-pay-per-use-ppu-and-how-can-it-benefit-your-business>, document information available online, last accessed in 08.06.2023.

day.

- a comprehensive aggregate payment, where all payments made with all payment instruments are grouped into one payment day.

7. The European Digital Identity Wallet

In 2021, there was launched the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 910/2014 regarding the establishment of a framework for European digital identity²⁵ which will require the issuance of a "European digital identity wallet" and which will establish the framework for electronic identity.

The European Digital Identity Wallet is one of the largest global digital identity development projects designed for a modern world, which will allow citizens of the European Union to store digital identity data on their mobile device, including ID, passport, driver's license and bank cards.

According to the proposed regulation, the options to share data and allow their disclosure will be improved. By using the European digital identity wallet, the user will be able to control the volume of data provided to the beneficiaries and will be informed about the attributes required to provide a certain service.

And the security and control provided by the European digital identity framework should give citizens and residents full confidence that the European digital identity framework will give anyone the means to control who has access to their digital twin and exactly what data.

At the national level, through Decision 125/2021²⁶, the Romanian Senate found that the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 910/2014 regarding the establishment of a framework for the European digital identity respects the principles of subsidiarity and proportionality.

8. Recommendations, guidelines and applicable legal provisions

There are several recommendations, guidelines and applicable legal provisions, namely:

²⁵ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 910/2014 regarding the establishment of a framework for the European digital identity COM/2021/281 final.

²⁶ Decision no. 125 of October 25, 2021, regarding the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) no. 910/2014 regarding the establishment of a framework for the European digital identity - COM (2021) 281 final, published in the Official Gazette no. 1034 of October 29, 2021.

8.1. The European Central Bank (ECB) published on 24th of April an interim report on the digital euro and a study on the possible characteristics of a digital wallet²⁷

The interim report states the following: the digital euro could initially be available to euro area residents, traders and governments through existing banking applications and the Eurosystem application; offline and person-to-person payments in the euro area are considered very valuable.

The interim report presents a third set of design and distribution options, approved by the ECB's Governing Council, that could contribute to the overall design of a digital euro. In its initial versions, a digital euro would be accessible to euro area residents, traders and governments. Non-euro area citizens could also have access, provided they hold an account with a euro area payment service provider (PSP). In later versions, consumers from certain third countries could also have access, depending on the accessibility rules to be established in the legislative framework for a digital euro. The report also anticipates the possible provision of cross-border functionality with other digital currencies of central banks outside the eurozone.

8.2. According to the press release dated 25th of April 2023, the European Central Bank welcomed the progress made by the European Payments Initiative regarding the creation of a European payment solution²⁸

The European Central Bank has welcomed the announcement by the European Payments Initiative (EPI) of new shareholders and planned acquisitions to create an instant payment solution in Europe.

In the coming years, EPI aims to launch a digital wallet solution based on instant account-to-account payments under one brand and covering multiple use cases. As outlined in its retail payments strategy, the Eurosystem supports the creation of European payment solutions for payments at the point of interaction. Such solutions should have a pan-European reach and customer experience, and should also have a European brand and governance. They should be convenient and low-cost, safe and effective, and in the long term should be accepted worldwide.

The ECB encourages the EPI to pursue its goal of including all markets and more participants in order to achieve its goal of being a pan-European initiative.

²⁷ The press release dated 24.04.2023 can be found for consultation here: ECB publishes progress report on digital euro and study on possible features of a digital wallet (europa.eu), last accessed on 08.06.2023.

²⁸ The press release dated 25.04.2023 can be found at the consulate here: <https://www.ecb.europa.eu/paym/intro/news/html/ecb.mipnews230425.en.html>, last accessed on 08.06.2023.

8.3. The European Banking Authority published on 31.01.2023 clarifications regarding the application of strong authentication requirements for customers of digital wallets²⁹

The EBA has published three questions and answers which, together with three other previously published questions and answers, comprehensively clarify the application of strong customer authentication (SCA) to digital wallets under the revised Payment Services Directive (PSD2). The information aims to ensure a consistent understanding by all market stakeholders of the applicable requirements. The six questions and answers clarify the application of the SCA to the registration of a payment card in a digital wallet and the initiation of payment transactions with digitized versions of a payment card. They also clarify the requirements applicable to the outsourcing of SCA enforcement to digital wallet providers.

8.4. Regarding cryptocurrencies, the green light has been given for the new EU transfer tracking rules³⁰

According to the information dated 20th of April 2023, the Parliament approved the first EU rules for tracking crypto-asset transfers, preventing money laundering, as well as common rules on customer supervision and protection. MEPs have approved the first EU legislation to track transfers of crypto-assets such as bitcoin and electronic currency tokens.

The text aims to ensure that cryptocurrency transfers, like any other financial operation, can always be traced and suspicious transactions blocked. The so-called "travel rule", already used in traditional finance, will also cover crypto asset transfers in the future. Information regarding the source of the asset and its beneficiary will have to "travel" with the transaction and be stored by both sides of the transfer. The law also provides for transactions above 1,000 euros from so-called self-hosted wallets (a cryptocurrency wallet address of a private user) when they interact with hosted wallets managed by crypto-asset service providers. The rules do not apply to person-to-person transfers made without a provider or between providers acting on their own behalf.

The plenary also gave the final green light to the new common rules on supervision, consumer protection and environmental safeguards for cryptocurrencies, including cryptocurrencies (MiCA Regulation). It includes safeguards against market manipulation and financial crime. MiCA will cover crypto-assets that are not regulated by existing financial services legislation.

²⁹ EBA clarifies the application of strong customer authentication requirements to digital wallets, European Banking Authority (europa.eu).

³⁰ Crypto-assets: green light to new rules for tracing transfers in the EU | News | European Parliament (europa.eu).

The main provisions for those issuing and trading crypto-assets (including asset reference tokens and electronic currency tokens) relate to transparency, disclosure, authorization and supervision of transactions. Consumers will be better informed about the risks, costs and fees associated with their transactions. In addition, the new legal framework will support market integrity and financial stability by regulating public offerings of crypto-assets. Finally, the agreed text includes measures against market manipulation and to prevent money laundering, terrorist financing and other criminal activities.

Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31st of May 2023 on crypto-asset markets and amending Regulations (EU) no. 1093/2010 and (EU) no. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937³¹ establishes uniform requirements for the public offer and admission to trading on a trading platform for cryptoassets, other than asset-backed tokens and electronic currency tokens, of tokens of electronic currency tokens and assets, as well as requirements for cryptoasset service providers.

The regulation establishes the following:

a) transparency and disclosure requirements for the issuance, public offer and admission to trading of cryptoassets on a cryptoasset trading platform (hereinafter referred to as "admission to trading");

b) requirements for the authorization and supervision of crypto-asset service providers, asset-backed token issuers and electronic currency token issuers, as well as their operation, organization and governance;

c) the requirements for the protection of crypto-asset holders in the framework of the issuance, public offer and admission to trading of crypto-assets;

d) requirements for customer protection of cryptoasset service providers;

e) measures to prevent insider trading, illegal disclosure of insider information and crypto-asset market manipulation, to ensure the integrity of crypto-asset markets.

The Regulation applies to natural and legal persons and certain other enterprises that are involved in the issuance, public offering of crypto-assets and the admission to trading of crypto-assets or that provide crypto-asset services in the Union.

By 30 December 2024, ESMA will issue guidelines in accordance with Article 16 of Regulation (EU) no. 1095/2010 regarding the conditions and criteria for qualifying crypto-assets as financial instruments.

Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849.³²

³¹ Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023, on crypto-asset markets and amending Regulations (EU) no. 1093/2010 and (EU) no. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, Official Journal, no. L150/9 June.

³² Regulation (EU) 2023/1113 of the European Parliament and of the Council of May 31, 2023, regarding the information accompanying transfers of funds and certain crypto-assets and amending

The Regulation establishes rules regarding information on payers and payees accompanying transfers of funds, in any currency, as well as information on originators and beneficiaries accompanying transfers of crypto-assets, for the purpose of preventing, detecting and investigating money laundering and financing activities of terrorism, where at least one of the payment service providers or crypto-asset service providers involved in the transfer of funds or the transfer of crypto-assets is established or has its registered office, as the case may be, in the Union. In addition, the regulation establishes rules regarding internal policies, procedures and controls designed to ensure the implementation of restrictive measures in the event that at least one of the payment service providers or crypto-asset service providers involved in the transfer of funds or in the transfer of cryptoassets is established or has its registered office, as the case may be, in the Union.

The Regulation applies to transfers of funds, in any currency, which are sent or received by a payment service provider or by an intermediary payment service provider established in the Union. This regulation also applies to cryptoasset transfers, including cryptoasset transfers made through crypto ATMs, where the cryptoasset service provider or the intermediary cryptoasset service provider, either of the originator or the beneficiary, has its registered office in the Union.

The Regulation does not apply to transfers of funds or transfers of electronic currency tokens, as defined in Article 3(1)-(7) of Regulation (EU) 2023/1114, carried out using a payment card, a currency instrument electronics, a mobile phone or any other prepaid or postpaid digital or IT device with similar characteristics, subject to the following conditions being met: (a) the respective card, instrument or device is used exclusively to pay for goods or services; and (b) that card, instrument or device number accompanies all transfers arising from the transaction.

However, the regulation applies when a payment card, electronic money instrument, mobile phone or any other prepaid or postpaid digital or computer device with similar features is used to transfer funds or electronic currency tokens between individuals who, as consumers, act for purposes other than their commercial, business or professional activity.

The Regulation does not apply to persons who have no activity other than to convert paper documents into data in electronic format and who act under a contract concluded with a payment service provider, nor to persons who have no other activity apart from that of providing payment service providers with messaging systems or other support systems for the transmission of funds or compensation and settlement systems. The Regulation does not apply to a funds transfer

Directive (EU) 2015/849, published in the Official Journal no. L150/09 June 2023. This regulation enters into force on the twentieth day from the date of publication in the Official Journal. It applies from December 30, 2024. Regulation (EU) 2015/847 is repealed from the date of application of the regulation.

if any of the following conditions are met: (a) the transfer involves the payer withdrawing cash from his own payment account; (b) the transfer represents a transfer of funds to a public authority representing payment of taxes, fines or other charges within a Member State; (c) both the payer and the payee are payment service providers acting in their own name; (d) the transfer is effected by exchanges of check images, including truncated cheques.

The Regulation does not apply to a cryptoasset transfer if any of the following conditions are met: (a) both the originator and the beneficiary are cryptoasset service providers acting on their own behalf; (b) the transfer is a person-to-person transfer of cryptoassets without the involvement of a cryptoasset service provider. Electronic currency tokens, as defined in Article 3(1)(7) of Regulation (EU) 2023/1114, are treated as crypto-assets for the purposes of the Regulation. A Member State may decide not to apply the regulation to transfers of funds made within its territory to a payment account of the payee that allows payment exclusively for the supply of goods or services if the following conditions are cumulatively met: (a) the payment service provider of the payee falls under Directive (EU) 2015/849³³; (b) the payment service provider of the payee can track, through the payee, with the help of a unique transaction identification code, the transfer of funds from the person who has an agreement concluded with the payee for the supply of goods or services ; (c) the amount of the funds transfer does not exceed EUR 1,000.

9. Legislative projects

9.1. The Ministry of Finance launched in public debate on May 12, 2023, the draft Decision for the approval of the authorization and/or registration procedure of providers of exchange services between virtual currencies and fiat currencies and providers of digital wallets, as well as the procedure for granting and withdrawing the technical approval³⁴

The draft normative act mainly aims to regulate the following aspects:

- establishing the facts that constitute contraventions, the sanctions applicable to them, as well as the bodies with powers to ascertain and sanction them;
- imposing on the Ministry of Finance the obligation to publish on its own website the list of entities that hold authorization or registration certificate issued by the Foreign Exchange Activity Authorization Commission

³³ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing, amending Regulation (EU) no. 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Directive 2006/70/EC of the Commission, OJ L 141, 5.6.2015, pp. 73–117.

³⁴ The proposal dated 12.05.2023 is available for consultation here: projects-normative-acts - Home - MF (gov.ro).

At the same time, the normative act covers: the authorization/registration procedure by indicating the entities that are obliged to go through the authorization and/or registration procedure with the Commission, in order to provide exchange services between virtual currencies and fiduciary currencies and/or to provide wallets digital; the main elements that the operating authorization and the registration certificate will contain; the procedure to be followed by entities seeking re-authorization/re-registration at the time of expiry of the validity of the previous/earlier registration certificate/authorisation; the obligation to expressly mandate an authorized representative as well as to notify the Commission of any change to the data and information regarding it in the case of entities authorized/registered in a member state; the conditions that the authorized representative must fulfill as well as his main duties; general conditions for authorisation/registration; the obligations of authorized/registered entities to carry out activities of providing exchange services between virtual currencies and fiat currencies and of digital wallets; the situations in which the Commission can order the suspension/revocation of the authorization or the registration certificate, the procedure for issuing the technical opinion; the documents and information that the entities, requesting the issuance of the technical opinion, are obliged to transmit to ADR; the structure that the documentation related to the security plan must have; some aspects aimed at performing the conformity assessment of the IT system and the digital platform with remote access used by providers of exchange services between virtual currencies and fiat currencies and/or by providers of digital wallets are regulated; the situations in which ADR orders the withdrawal of the technical approval are listed; the validity period of the technical approval, namely 2 years, as well as the fact that it is non-transferable.

9.2. The press release issued by the National Bank of Romania regarding the new types of fraud in the field of payments targeting electronic payment instruments such as cards, internet banking or mobile banking³⁵

The NBR, in the exercise of its legal duties, permanently monitors developments in the field of payments, tracking payment service providers' compliance with the operational and security requirements related to payment services. In this sense, the central bank issued a statement in December 2021 warning users of payment services about fraud based on social engineering (phishing) and the need to keep the security elements related to payment instruments safe.

It is mentioned that recently new typologies/scenarios of fraud have been observed through the manipulation of the payer, targeting payment instruments such as card, internet banking or mobile banking. In most cases, users of payment services are misled by attackers and under various deceptive pretexts – e.g. the

³⁵ The press release can also be found here: National Bank of Romania (bnr.ro), <https://www.bnr.ro/page.aspx?prid=22558>.

need to update personal data, the notification of the blocking of accounts or payment instruments, obtaining card information by fake buyers of goods or services posted on online classifieds platforms, are convinced to disclose customized security features of payment instruments that they hold, information that is later used to access victims' accounts and steal their funds.

In this context, ae draws the attention of payment service users to the fact that personalized security elements related to payment instruments (card data, PIN code, CVV/CVC code, activation codes of internet/mobile banking applications, static or dynamic passwords, card enrollment codes in e-wallet applications) is information that, by law, must be kept secure.

This information is confidential and is never requested by the issuer of the payment instrument or by any other authority. The disclosure of this information to third parties, including by accessing fake websites that visually imitate the official page of banks issuing payment instruments or institutions and authorities, is the most important risk factor that allows attackers to access victims' accounts and subsequently initiate fraudulent payment operations.

Also, according to the legal provisions in force, if the owner of the payment instrument transmitted the personalized security elements to third parties and, as such, did not fulfill his obligation to keep the respective information safe, he is at fault in the event of a fraud, and the payment service provider cannot be obliged to bear the eventual prejudice.

9.3. By Emergency Ordinance no. 53 of April 21st 2022³⁶ amended Law no. 129/2019

For the prevention and combating of money laundering and the financing of terrorism and the obligation was introduced that the reporting entities provided for in art. 5 para. (1) lit. g)-k) from Law no. 129/2019 to notify the National Office for the Prevention and Combating of Money Laundering, exclusively electronically, regarding the start, suspension or termination of the activity that falls under the scope of this law, within 15 days from the date of the start, suspension or termination of this activity. According to art. 5 para. (1) lit. g)-k) from Law no. 129/2019, are reporting entities: - service providers for companies or trusts, other than those provided for in letter e) and f); - providers of exchange services between virtual currencies and fiduciary currencies; - providers of digital wallets.

10. Conclusions

In conclusion, the digital wallet has a significant impact on the economy

³⁶ Emergency Ordinance no. 53 of April 21, 2022 regarding the amendment and completion of Law no. 129/2019 for the prevention and combating of money laundering and the financing of terrorism, as well as for the modification and completion of some normative acts, published in the Official Gazette no. 394 of April 21, 2022.

and society in the digital age. Its economic benefits, such as the efficiency and convenience of financial transactions, lead to a growth in the digital economy and improved access to financial services. However, there are also legal challenges and risks associated with digital wallets, such as data security.

Adequate regulation and collaboration between the private sector, authorities and government organizations are needed to address these challenges. Combating fraud and money laundering, as well as ensuring transparency and accountability of financial service providers are key issues to be addressed in the context of digital wallets.

At the same time, users of digital wallets must be aware of the risks and take steps to ensure their financial security. Education and awareness are important in promoting the responsible use of digital wallets.

Overall, the digital wallet represents an innovation with significant economic potential, and a balanced approach between economic and legal aspects is required to maximize benefits and minimize risks. With an appropriate legal framework and robust security measures, digital wallets can play an important role in accelerating financial digitization and promoting a more inclusive and sustainable digital economy.

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11. Study on Digital Wallet Features, Kantar Public, March 2023.

The Individual as a Subject of Public International Law and Procedural Law of Reparation

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Abstract

The essence and primary condition of developing national and international legal treatment systems for the purpose of achieving justice in the interests of the victim and of repairing the damage and damage suffered by the victim, as a result of armed conflicts, is a thorough knowledge of the psychology of the persons who fulfill the quality of victim, of the peculiarities and peculiarities that this quality brings to the individual. In dealing with the situation of the individual there can be no parallelism between victim status and international criminal liability. The historical evolution in this matter proves some gloomy constants, in which the victims of the atrocities of military acts have appeared permanently as shadows, without face and voice, destined to suffer in silence or to live their frustration through acts of rebellion and revenge. But the situation cannot become eternal, so the horrors of the 20th century have brought to life the internal bodies of states and international, in search of a justice that can even be considered revolutionary, considering the total lack of interest of history in the legal treatment of the horrors of war. From Nuremberg to the Hague, a broad movement against the impurity of legal systems was born and developed, leading to the creation of the first permanent international criminal justice. In 1973, in Jerusalem, the first international symposium on victimology was organized, in which the notions of "victimology", "victim of crime" and "relationships between offender and victim" were addressed. In 1979, in Münster (Germany), the foundations of the International Association of victimologists were established, which coordinated the work of scientists from different countries of the world in the process of developing victimological measures for the prevention of crime. In 1980, the World Congress on the victimological prophylaxis of crime was held in Washington, where it was admitted that the victim of crime was an essential element in the process of the occurrence and Commission of crime and control over crime. On 29 November 1985, the United Nations General Assembly adopted the Declaration on the Fundamental principles of Justice for victims of crime and abuse of Power. Most likely, the metamorphosis of the legal position over the human one will take place in two stages: replacing the impurity of the system with justice and justice; the replacement of justice, channeled on the conviction of the guilty, with a restorative justice, which will have the permanent focus, the victim. The evolution of international law centered on restorative justice is, however, rather timid and extremely fragile, with recent international military events unfortunately proving this undesirable reality fully. Thus, in order to be able to better and as close to the truth as possible to assess the situation of victims of massive human rights violations, it is appropriate to know them psychologically and socially and to identify individual

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needs, related to the rights conferred by justice systems. In this context, we will make a brief analysis of the psychological and social specificity of victims of armed incidents, related to the need for justice.

Keywords: *victim, international criminal liability, crime prophylaxis, international justice, military atrocities, restorative justice.*

JEL Classification: K33

1. Introduction

The notion of victim originated in early religious conceptions of suffering, sacrifice, and death. This conception of the victim was widespread in ancient civilizations, especially in Babylonia, Palestine, Greece and Rome. A victim can be considered a man who has been caused physical harm (life, health and physical freedom), moral harm (humiliation of honor and dignity) or material harm by the actions of other persons, their behavior, events or unfortunate events³.

Victimization is the process and result of the transformation of the personality into a victim of crime. Thus, victimization unites in itself the process of realizing the victim and the victimhood achieved. Individual victimization occurs when the damage is caused⁴ to a specific person.

2. Victims of international crimes and the need for justice

International justice seems to seek solutions to situations where so many individuals are mutilated and threaten their desire for social belonging. The victims of systematic or generalized massacres suffer a multitude of traumas, adding to these sufferings the frustration caused by the inability to express this pain.

Obviously, the suffering does not stop when the executioner ceases to punish physically. It just changes nature. For those who escape death, a delicate daily survival marked by the presence of post-traumatic stress disorders begins: stress, anxiety, sexual problems, difficulty concentrating, feeling and fear of abandonment, nightmares, recurrent phobias, self-esteem and low confidence are the first, most fractly observed symptoms⁵.

Torture can be considered one of the most terrifying and traumatic

³ Bulat, Irimia., *Victimology and the Psychology of the victim*. Course notes, Institute of Criminal Sciences and applied Criminology, Chisinau 2013, p. 8, available online at <http://old.criminology.md>.

⁴ *Ibid*, p. 10.

⁵ Romila, Aurel, *Diagnostic and Statistical Manual of mental disorders*, 4th edition, Publishing House of the Free Psychiatric Association of Romania, Bucharest 2003, pp. 429-448, translation by Diagnostic and Statistical Manual of mental disorders, published in Washington and London, in 2000, by the American psychological Association, available online, on <http://ro.scribd.com>.

crimes, in that it causes extremely serious psychological damage by its nature and especially by the fact that it trains over time and is extremely difficult to overcome. The loss of self-confidence and the impossibility of rational thinking are often consequences of the executioner's perversity. The direct victim is destroyed by the contradiction between what the author of the torture affirms, his own perception of reality, and the truth and the immense pain that presses his body. The ability to discern is thus greatly diminished.

The damage also affects persons other than direct victims, relatives or even witnesses of harmful scenes. Families of enforced disappearances, for example, one of the most common crimes of South American or European communist dictatorships, can be the subject of regular unrest in the face of the silence of the authorities about the fate of their loved one. Family members or witnesses of physical or sexual atrocities can experience serious personality disorders and fears that are difficult to manage and especially combat, especially without specialized help. The situation of prisoners who remain with different states of disability represents permanent, endless pain, feeling of pain or powerlessness having the tendency to become chronic⁶.

Thus, direct victims give indirect causes of serious international crimes suffer significant consequences. It seems to them that they cannot express their pain easily and cannot find someone to listen to them even more importantly, to do them justice. They tend to have the prospect of the afflicted of fate, who face the indifference of their own society.

Genocide and war crimes against humanity stem from a criminal single but⁷ there are two major differences that differentiate victims of ordinary crimes from those of more serious violations of fundamental human rights, namely: the horror of the crime committed and the quality of the perpetrator.

The persecution of a person on the basis of race, religion or other reasons denies that person's own belonging to the human race. Killing an enemy, competitor or opponent can be considered a criminal act (in the case of respect for social values) or a courageous act (if it is done for the purpose of defending social values), but by denying a person access to humanity leads to the destruction of human value and dignity itself.

Thus, victims of these crimes often feel the feeling of exclusion, of becoming strangers to their fellow citizens or to those with whom they have experienced similar suffering. In view of physical and mental experiences and difficulties, victims then await what justice can bring them, and I believe that the only thing that can bring them peace is not individual forgiveness but the appearance of justice.

Is such hope justified? Is it capable of removing the chronic effects of crimes against human values, the subject of which was the individual victim?

⁶National Commission for Truth and Reconciliation of Chile, Rettig Report, 1991, vol. 2, p. 1143.

⁷Rome Statute for the creation of the International Criminal Court, Articles 6-8, available on www.iccpi.int.

The victim can clearly benefit from the trial of the person who caused the damage, even having the real possibility to actively participate in the trial, in hearings or to follow it through the media. In this way, the victim can obtain, besides the satisfaction of the personal need for justice and the certainty of finding the final removal of the threat of the aggressor, the precious recognition of his suffering and of the harmful experience. Justice benefits from the presumption of legitimacy which has the gift of increasing collective awareness of individual suffering.

Emblematic of this, it is worth mentioning the trial of Adolf Eichmann, regarding the crimes against Israeli society, in which 46 holocaust survivors testified about the atrocities endured, allowing Israel to better understand the painful past of many of its citizens⁸.

When fully participating in the trial, as a civil party or witness, the victim can also benefit by hearing and considering the judge, by a personal recognition of his trauma, by handing over what remained unsaid⁹.

As a result, the process can be of considerable benefit to the victim if they are recognized as an important place, but it can also be a new source of stress, especially during the victim's testimony and questioning, by the emergence of frustration in the perspective of an investigation that lacks the means and sometimes runs in directions contrary to the interests of the victim or disappointment caused by the too gentle punishments applied to those judged. If it is thus advisable to build a system that is aware of these stakes, the need for justice is nevertheless certain as regards the victims for whom the status quo is frequently unbearable.

3. Procedural right to repair

Over the past 3 decades, victim-oriented social consciousness has developed in tandem with the consequent establishment of defense mechanisms. An increasing recognition of the material right to redress has been associated with increasing awareness of the procedural right to redress among decision-makers involved in the development of these mechanisms. That procedural right includes not only the right of access to a mechanism (process or program), collective redress mechanism, but also the right to be heard at every stage of the repair process, including its establishment phase, in order to identify the most suitable repair system or program for each individual.

The information and advice provided by the competent authorities, victim support services and restorative justice services shall, as far as possible, be provided through a range of means and in a manner that can be understood by the

⁸Wyman, David S., *The World Reacts to the Holocaust*, John Hopkins University, Baltimore, 1996, p. 839-923.

⁹O'Connell, Jamie., *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console the Victims?* „Harvard International Law Journal”, 2005, vol. 46, p. 295-345.

victim¹⁰.

At the international level, the procedural rights of victims are regulated by several rules, the mention of which will be made succinctly:

- *the UN Convention on the Elimination of all forms of discrimination against Women (CEDAW)*¹¹. This Convention established equality between men and women, removing the discrimination of women in the political and public life of the country.

- *the UN Convention on the Rights of the child*¹². It provides for the rights to physical and psychological recovery and social reintegration of children, victims of a form of neglect, exploitation or abuse, torture or punishment, or cruel, inhuman or degrading treatment or victims of armed conflict.

- *United Nations Guide to Justice on matters involving child victims and witnesses of crime*¹³. Contains the normative framework to be followed in order to protect children victims and witnesses of crimes.

- *United Nations minimum Rules on the Administration of Juvenile Justice (also known as the Beijing Rules)*¹⁴. Ensure compliance with the principle of proportionality in the area of particular problems and needs of children during the administration of justice for minors, including victims of crime.

- *the Council of Europe Convention on preventing and combating violence against women and domestic violence*, also called *the Istanbul Convention*¹⁵. Establish and defend the rights to protection and assistance of women victims of violence, including domestic violence. It requires the state to take some measures in the field of protection of women victims, such as:

- ensuring that the needs and safety of victims are put at the forefront of the measures taken;
- setting up specialized support services providing medical assistance, as well as psychological and legal advice to victims and their children;
- create sufficient shelters and introduce permanent phone lines for free calls¹⁶.

- *Standards for the protection of the rights of children victims of sexual exploitation and sexual abuse are laid down in the Council of Europe Convention*

¹⁰ Ghevas, M., Ciobanu, V., Catana, T., *Practical Guide for Justice professionals. Rights of crime victims to Rehabilitation and compensation*, Organisation for Security and Cooperation in Europe. Mission in Moldova, Chişinău, 2022, p. 23.

¹¹ Adopted by the United Nations on 18.12. 1979, it entered into force on 3 September 1981 in all UN member states, available on <http://anes.gov.ro>.

¹² Adopted by the United Nations on 20.11.1989. It has so far been adopted by 196 states, available on <http://unicef.org>.

¹³ Adopted by the Economic and Social Council of the United Nations by Resolution 2005/20 of 22 July 2005.

¹⁴ Adopted by the United Nations General Assembly by Resolution 40/33 of 29 November 1985, available on <http://anp.gov.ro>.

¹⁵ Adopted by the Council of Europe on 11.05.2011, available on <http://rm.coe.int>.

¹⁶ Ghevas, M., Ciobanu, V., Catana, T., *op. cit.*, p. 18.

for the Protection of children against sexual exploitation and sexual abuse, the Lanzarote Convention¹⁷. Supports multidisciplinary and interinstitutional collaboration in the interest of ensuring the legitimate interests of the child. Aspects such as coordination (art. 10), investigation (articles 30; 31; 34), hearing of the child (art. 35), protection measures and assistance given to victims (articles 11; 14; 31) are also established.

- *Council of Europe Convention on the fight against Trafficking in Human beings, also called the Warsaw Convention*¹⁸. It regulates the rules for the protection of the rights of victims of trafficking in human beings, guaranteeing equality between women and men, as well as ensuring fair investigations and prosecutions.

- *Basic principles and guidelines on the right to remedy and remedy for victims of serious violations of international human rights law and serious violations of international Community law, Annex to United Nations General Assembly Resolution 60/147 of 16 December 2005.*

4. The victim of a serious violation of international human rights law or a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for by international law

Other remedies available to the victim include access to administrative bodies and other bodies as well as mechanisms, modalities and procedures carried out in accordance with national law. An appropriate remedy, effective and prompt for serious violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal status and should prejudice any other internal procedure.¹⁹

- *Declaration of the basic principles of justice for victims of crime and abuse of power*. The victims' statement includes two parts: part I is related to the approach of victims of crime; part II is about the victims of the abuse of power. Both sides define victims as "individuals who, individually or collectively, have suffered harm, including physical or psychological harm, emotional distress, and other physical or mental harm." Economic loss or substantial impairment of their fundamental rights" and part II adds an additional phrase that defines victims as those who have suffered harm "through acts or acts or omissions which do not constitute violations of national criminal law but of internationally recognized rights rules the man".²⁰

¹⁷ Done at 25.10.2007, available at <http://rm.coe.int>.

¹⁸ Done at 16.05.2005, available at <http://rm.coe.int>.

¹⁹ United Nations General Assembly Resolution 60/147, of 16 December 2005, paragraphs 12 and 14, available at <http://echr.coe.int>.

²⁰ United Nations General Assembly Resolution 40/34, of 29 November 1985, paragraph 18, available at <http://echr.coe.int>.

- *Updated set of principles for the protection and promotion of human rights through action to combat impunity*²¹. He framed reparation for victims of armed conflict as part of transitional Justitia in post-conflict states and local communities, which also included a criminal court, a non-judicial fact-finding body investigating patterns of abuse in armed conflicts and promoting democracy and the rule of law.

- *The Nairobi Declaration on the right of Women and Girls to remedy and remedy*²². It provides for a right of access for victims to a reparation mechanism.

Regarding the right of the individual to repair, the study revealed that the judicial system in the field has **two other important shortcomings**:

First, the opinions of support and denial focused on the substantive aspects of the law, any approach in the matter based on the individual's ability or inability to be a beneficiary of the material right to redress under international law.

Academics for and against the existence of material law agree that the ability of individual victims to claim damage suffered in armed conflicts can be exceptionally allowed only when States agree, for example by concluding special treaties. Their views differ as to whether a person has a material right even in the absence of procedural quality. Thus, one party claims **that** the material right exists regardless of the procedural quality and the other claims that **the existence of the right depends strictly on the existence of the procedural quality**.

Since 1990, the right to redress has been considered to be an integrated right of substantive and procedural issues.

Procedural law has been, and unfortunately in many cases still is, regarded as an intangible objective, without real and concrete possibilities for victims to access effective and concrete redress mechanisms. Consequently, greater attention should be paid to the procedural aspect, apart from the substantive one, and the practices of ad hoc mechanisms should be assessed fairly and fairly as key components rather than exceptional phenomena of current international reparation law.

The second disadvantage is the inclination in the past to look at the right to redress only in the light of the legal relationship between a right holder (victim) and an obligation bearer (responsible party). This is correct in the sense that a State or an organized armed group harms victims by violating the rules of international rights applicable in the armed conflict, that State or group is obliged to compensate those victims. However, this narrow understanding is consciously

²¹ Updated set of principles for the protection and promotion of human rights through anti-impunity actions adopted by the United Nations Commission on Human Rights on 08 February 2005, UN Doc. E/CN.4/2005/102/Add.1, available at <http://digitallibrary.un.org>.

²² It was issued at the International Meeting on Women's Right to a Remedy and Reparation, held in Nairobi, 19-21 March 2007, available on http://fidh.org/IMG/pdf/NAIROBI_DECLARATION_Neng.pdf.

linked to the excessive emphasis of a material right that has hitherto dominated.

By focusing on the realization of the individual right to redress, consideration should be given to how to create an effective redress mechanism leading to the recognition that the contribution of the responsible parties is insufficient for that purpose and that, therefore, both political and financial support and assistance from the international community is indispensable.

The international community has become increasingly aware that transitional justice in post-conflict states and communities, including effective reparation for the damage suffered by victims, is a vital issue of international interest²³. In this context, the individual right to redress concerns not only the responsible states and groups but also the international community, and therefore international law of reparation must be understood as a triangular structure in which dynamic relations between victims, responsible persons and the United Nations (representing the interests of the international community) can interact with each other.

Unfortunately, triangular relationships are not based on a well-established legal basis, in some situations interfering with political or financial obstacles that may hinder the functioning of these relationships. However, the practices of those ad hoc mechanisms that in recent decades have met victims' reparations needs more effectively than previous schemes indicate that the direction in which international law advances in the long term is positive, even if it faces a short-term deadlock.

5. Conclusions

The study concludes that a healthy coexistence and unified interpretation of the norms in the matter, by regional and international human rights institutions and domestic reparation programs would be one in which courts of law could provide a strong legal rationale for their views on reparation of damages to victims in general but especially to victims of armed conflicts. Thus, the unitary approach to the issue could compete to reveal the scope and extent of the victims' right to reparation even in extraordinary moments such as those faced by states during or after armed conflict.

Even though the legal reasoning of these courts may not be shared by everyone, if the reasoning is strong, it can bring legal certainty to the discussion and the litigants of a case, it will not create false expectations for victims, and it could even have positive effects on the minimalist approach that some states take to reparation for victims of armed conflict, encouraging higher standards.

At best it could generate or encourage greater positive complementarity,

²³ Bassiouni, C. Cherif and Rothenberg, Daniel, *Facing Atrocity: The Importance of Guiding Principles on Post Conflict Justice*, International Institute for Human Rights, 2007, available on <http://law.depaul.edu>.

a landscape of domestic and international institutions all working to secure reparations for victims of mass atrocities. It could also help states to take more seriously their approach to reparations for victims of mass atrocities knowing that failure to act diligently would entail the exercise of jurisdiction by these bodies.

As the study highlighted there are different ways in which regional human rights authorities could approach the legality, adequacy and effectiveness of domestic reparations programs under international law.

The primary objectives for the future are to indicate how the human right to reparation for such heinous violations could be legally and legitimately limited by domestic reparation programs and what are the basic obligations of this right, without which it will lose the meaning. These tasks are crucial in the near future, otherwise states will continue to apply different reparation standards, which may meet the requirements of the moment, but which do not always take into account the essence of the right to reparation, namely to repair as much as possible and as promptly as possible.

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**THE LIMITLESSNESS OF
COMPARATIVE LAW**

Piercing the Corporate Veil: Lack of Legislation, Proposals to Change an Existing Law

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Abstract

This article aims to compare the jurisdiction of piercing the corporate veil in South America. We'll analyze the lack of legislation and the regulation of this important theory. We'll examine whether it's easier for the court to apply the basic principles of law to pierce the corporate veil or it's better to regulate a norm which has to contain specific conditions or situations in order to be able to pierce.

Keywords: *business law, limited liability, contractual obligations, corporate personality, abuse of legal personality, piercing the corporate veil, social creditors, social debts.*

JEL Classification: K22, K33

1. Introduction

We will examine the views of Latin American countries on piercing the corporate veil. In this respect, we will show that they fall into two categories: on the one hand, those which attach overwhelming importance to it and choose to legislate the theory of piercing the corporate veil, and on the other hand, those which deny its importance and consider that an express provision is not necessary since the general principles of common law can be applied whenever the court finds that the conditions for the liability of shareholders for damage caused by the company to third parties are met.

Specifically, we will provide an overview of how the theory of piercing the corporate veil is viewed in different legal systems within South America, namely Argentina, Uruguay, Chile, Peru, Ecuador, Venezuela, Colombia.

In this respect, we will compare the solutions of the courts concerning this theory, the doctrine related to it, the legislative regulation and the proposals *de lege ferenda* that directly concern it in each of the 7 countries mentioned above.

2. Argentina

In 1964, Isaac Halperin emphasised the need to get those at the top of society to stop engaging in illicit behaviour.

A year later, in a judgment handed down on 11 February 1965 by the La

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Paz Court, the court ruled that the corporate veil should be pierced, given that "the legal entity is a fiction constituted with the manifest purpose of concluding acts for the personal benefit of the associates".

In 1966, at the time of the *Patrocinio* case, *Faustino R. v. Government*² the court understood to resort to the technique of piercing the corporate veil in order to hold accountable those who were responsible for the acts and deeds undertaken by the company.

By decision of the Supreme Court of 25 April 1967³, the court pierced the corporate veil given that the documents submitted to the case file showed that *Pechenick S.A.* was created for the sole purpose of serving the personal interests of the majority shareholder.

Shortly afterwards, i.e. by Decision of 8 November 1971⁴, the civil liability of all the legal persons in the group of companies was incurred. In that regard, the court held that although bankruptcy proceedings had been initiated in respect of *Cia Swift de la Plata*, third parties could recover their debts from the other companies with which it was in a subordinate relationship since, although it was a group of companies, they were managed by the same management bodies.

According to *Otaegui and Julio Cesar*⁵, this case has many elements in common with the *Salomon* case, but the Argentine court did not understand to apply the theory of piercing the corporate veil.

On 9 May 1973⁶ the court⁷ disregarded the separate legal personality of the company which had been set up for the sole purpose of fraud, holding that civil liability lay with the partners of the company once there had been abusive conduct by the company in that it had operated illegally, i.e. it had not paid its

² The claim was in tort. In the present case, the plaintiff seeks an award of damages for the harm caused by the railway accident. She sued the Argentine State. The defendant pleaded lack of *locus standi*, taking the view that the plaintiff should have brought proceedings against the *Argentina Railway Company*, a company with its own legal personality. The plaintiff agreed to bring proceedings against the *Argentina Railway Company*, which, in turn, pleaded the plea that the substantive right of action was time-barred on the ground that the claim against the Argentine State could not be regarded as interrupting the limitation period. The Court rejected the two objections on the ground that the two defendant companies are in a relationship of co-dependence, so that the acts transmitted by the plaintiff to the Argentine State are regarded as interrupting the limitation period and the Argentine State has *locus standi*, since it is the person who administers the *Railway Company*, which is a company subordinate to the State. Consequently, although the two legal persons have separate legal personality, they cannot rely on the wrongful acts by which they caused damage to third parties.

³ *Revista de Derecho Comercial*, Buenos Aires, 1971, p. 305.

⁴ Pronounced in the case of *Cia Swift de la plata S.A.*

⁵ "Corresponsabilidad grupal en el derecho argentino", *Derecho de grupo de sociedades*, Academia de Ciencias Politicas y Sociales, Caracas, 2005, p. 68.

⁶ In the case of *Aybar, Ruben E v. Pizzeria Vituro S.R.L.*

⁷ It held that "the theory of piercing the corporate veil was developed in order to prevent the misuse of the legal person, i.e. to punish abuse of legal personality and harm to third parties by attracting the personal liability of the partners".

employees⁸, had not carried out orders and had suddenly entered insolvency proceedings.

In the area of tax law, the Supreme Court of Justice handed down its decision of 31 July 1973⁹ when it found that the parent company must be held liable for the acts and deeds of the company under its control when the facts show that Parke Davis Company of Detroit held 99.95% of the share capital of the company which caused the damage.

With regard to family law, in 1948, the court pierced the corporate veil with regard to the claim for divorce when it found that the husband, by transferring assets to the company in which he was a shareholder, sought to remove them from the shareable estate, i.e. to deprive his wife of the right to participate equally in the division of assets, in breach of the rule of equality¹⁰.

Also, in 1978¹¹, the Supreme Court ordered the reduction of the excessive gifts made by the deceased Astesiano to Gianina S.C.A. in violation of the inheritance quota, ruling that legal personality is a fiction and as such cannot serve as a system for excluding legal heirs.

Until 1984, neither the Companies Law¹² nor the Argentine Civil Code¹³ contained express provisions on groups of companies. However, Decree No. 841 of 1984 was the first to regulate in the Companies Act¹⁴ the direct liability of the person who caused the damage on behalf of the company as a result of fraud against the law, violation of public order or the rights of third parties or as a result of bad faith.

This is the version in which the law has been expressly supplemented with provisions on piercing the corporate veil. In this regard, Article 54 of the Companies Act provides that: "damage caused by the company through the intention or fault of the shareholders or those who form part of the management body, establishes a joint and several liability for payment by the latter without being able to claim compensation by reference to other benefits which they have brought to the company by way of profit. A partner or representative who enters into contracts on behalf of the company in order to obtain personal benefits or for a third party is obliged to contribute the consideration¹⁵ to the company's assets

⁸ The court held that "the theory of piercing the corporate veil can also be applied in exceptional cases, such as those in employment law, in order to remedy a situation of fraud of the employee's rights". This judgment was also cited in the decision of 29 February 2000 in *Puente, Graciela A v. Dijvelejian, Obannes*, and in the decision of 30 April 2004 in *Rodriguez, Carmen Silvina v. Creaciones Manalu*.

⁹ *Parke Davis and Cia de Argentina*.

¹⁰ This problem led to the amendment of Article 1.277 of the Civil Code of 1967 in the sense that the consent of both spouses was required at the time of the contribution of an asset to the company.

¹¹ *Astesiano Monica vs.*

¹² Law No. 19.550 of 1972.

¹³ Since 1890.

¹⁴ Article 54.

¹⁵ Either the resulting gain or the loss suffered by the company.

from his own assets. The incorporation of a company with the sole purpose of evading various obligations, of evading the law, of violating public order or the rights of third parties, as well as bad faith, entails the personal liability of those to whom it is attributable".

The way this article was drafted shows that the legislator wanted to have at hand a mechanism that would allow the court to impute direct guilt to those who have used the company to satisfy personal needs.

Consequently, it is the shareholder, not the company, who abuses the separate legal personality of the company, and the fraudulent act will therefore be considered unenforceable against the company, being directly enforceable against the shareholder.

Zarate states that Article 54(3) "should not be seen as applicable to a narrow framework, but on the contrary, to a broad framework, in order to consider situations where public policy and the general interest are also taken into account"¹⁶.

At the same time, it has been held¹⁷ that the courts should have recourse to this institution only in exceptional cases, i.e. it should be regarded as a last resort¹⁸, when the matter cannot be resolved by other common law legal mechanisms.

Subsequent to the legislation of this institution, opinions were also expressed against¹⁹ the way of regulation in the sense that the Anglo-Saxon theory on this theory was not taken into account, i.e. that it is a much too complex theory that was treated superficially by the legislator, considering only abuse of rights.

At the same time, it has been shown²⁰ that this theory exists in the rest of the states without the need for regulation. Moreover, also as a criticism of Article 54 of the Companies Act, it was held that when a complex theory is under discussion in which not all the situations in which it may operate can be foreseen, the legislator should not regulate it as long as it is constantly evolving, i.e. that the institutions already regulated in the Civil Code do not constitute obstacles in

¹⁶ Zarate, Hilda Zulema, "Las consecuencias de la inoponibilidad de la personalidad jurídica. Protección a los terceros", *Facultatea de drept, Universitatea Națională de Nord-est*, <http://www1.unne.edu.ar/cyt/2003/comunicaciones/01-Sociales/S-026.pdf>.

¹⁷ Echaiz Moreno, Daniel "La doctrina del allanamiento y crisis de la personalidad jurídica: A propósito de una reciente jurisprudencia argentina", <http://www.astrolabio.net/legal/articulos/102848196730728.html>.

¹⁸ In that regard, by way of example, in the decision delivered by the Administrative and Fiscal Litigation Court on 24 March 2003, the court appealed against the dismissal of the action, holding, *inter alia*, that the plaintiff, Faisan S.A., lacked *locus standi* when it asked the court to order that Las Pinas S.A. be held liable as guarantor of Banco Mercurio S.A., given that they were part of the same group of companies.

¹⁹ Etcheverry, Raúl Aníbal, "Formas jurídicas de organización de la empresa", Buenos Aires, 1989; Junyent Bas, Laura Filippi, "Libros de ponencias del Congreso Iberoamericano de derecho societario y de la empresa", 1992; Lopez Raffo, Francisco M., "El corrimiento del velo societario", Buenos Aires, 2005.

²⁰ By Francesco Manóvil.

terms of their applicability to companies.

3. Uruguay

A similar variant of the provisions of Article 54 of the Companies Act found in Argentina is found in the Uruguayan Companies Act²¹.

By way of example, we list the following articles regulated at the legislative level which concern the theory of piercing the corporate veil:

The Companies Act No. 16.060 of 1989²² provides for the rule of removing the separate legal personality of the company when it is "used to defraud the law, to violate public order or to harm third parties"²³, stating that the separate legal personality of the company will not be allowed to affect bona fide third parties.

At the same time, this law²⁴ expressly states that "the court intervenes in the course of a company when the purpose declared by the company and the activity actually undertaken are contradictory"²⁵.

It also contains articles on the liability of company directors²⁶ and the liability of the parent company and its directors²⁷.

Law No. 13.426 of 1965²⁸ on the Chamber of Industry and Commerce provides that in the case of groups of companies, legal responsibility is transferred between all the companies that form it regardless of their separate legal personality²⁹.

Law No. 14.625 of 1977³⁰ on the distribution process of companies makes manufacturing and importing companies liable for duties and taxes generated by the activity of distribution companies, even if they belong to separate legal entities with their own assets.

The Insolvency Law no. 13.892 of 1978³¹ expressly provides for cases in which the confusion of assets and liabilities may be considered, regardless of the

²¹ Law No. 16.060 of 1989.

²² <https://www.impo.com.uy/bases/leyes/16060-1989> .

²³ Article 189.

²⁴ Respective to Art. 191.

²⁵ In this regard, the Court of First Instance, Administrative Jurisdiction Division, handed down Decision No. 17 of 1977, in which the court found that although the company's object was transport, in fact only its members benefited from its services, the company operating exclusively for them, without making any profit, even though it offered its services to the public as part of its professional activity.

²⁶ Article 50.

²⁷ Article 51.

²⁸ <https://www.impo.com.uy/bases/leyes/13426-1965> .

²⁹ By way of example, Article 167 provides that "Where there are two or more legal persons forming a group of companies, any or all of them together may be liable for the obligations assumed by one of them in the context of a diminution of the debtor's assets".

³⁰ <https://www.impo.com.uy/bases/decretos-ley/14625-1977>.

³¹ <https://www.impo.com.uy/bases/decretos-ley/14774-1978/7> .

distinct legal personality of a company in relation to group companies or associates.

In the area of liquidation, the two laws³² which refer to this procedure aim to make companies in a group liable as a whole, as a single entity.

Also, in 1965, when the economic banking crisis occurred, most of the banking units were on the verge of liquidation or of requesting payment by instalments, which is why they made use of other companies specially created to carry out specific banking or purely administrative activities, which led to the establishment of the general rule on the liquidation of banking units under Law no. 13.608 of 1967, establishing that the liability of companies that conclude contracts with the company in the process of insolvency will be incurred regardless of the relations they have entered into with the latter³³.

These rules were also taken over in the field of liquidation by Law No. 14.446 of 1975 and Law No. 14.672 of 1977.

Thus, the legislator considered that although each company has a distinct legal personality and its own assets, all those companies that were used by the dominant company in the liquidation process will be considered as a single company, being the equivalent of a merger of assets.

4. Chile

The Companies Act No. 3918 of 1997³⁴, the Commercial Code and the Civil Code³⁵ do not contain any special provisions on piercing the corporate veil, limiting themselves to referring to the notion of company³⁶, the illicit object, the illicit and moral cause, simulation, Paulian action, abuse of legal personality, good faith, nullity³⁷ and so on.

Thus, although this institution has not been regulated at legislative level, we can still resort to common law rules in order to pierce the corporate veil³⁸.

Very common in practice in the area of piercing the corporate veil are cases involving simulation. By way of example, the Court of Appeal, in its decision of 21 April 1993³⁹, found that a family business had been set up for the sole

³² Law No. 14.672, as well as in Law No. 14.774.

³³ This term was also taken over in Law no. 13.982 of 1970, which provided in Article 475 "As a result of liquidation, both the assets of the banking institution and of the collateral companies shall be considered as a single patrimony", and in Article 478 "The liquidation of the banking institution shall ipso iure engage the liability of the collateral companies".

³⁴ <https://www.bcn.cl/leychile/navegar?idNorma=24349>.

³⁵ <https://www.bcn.cl/leychile/navegar?idNorma=172986>.

³⁶ Lyon Puelma, Alberto, *Legal Persons*, Ed. Catholic University of Chile, 2003.

³⁷ Paolo Leonelli, Rodrigo Andres Urrea Escobar and Gabriela Yolanda Novoa Munoz, *Abuso de la personalidad juridica*, Catholic University of Temuco, 2004.

³⁸ Lopez Diaz, Patricia, *La doctrina del levantamiento del velo y la instrumentalizacion de la personalidad juridica*, Ed. Lexis Nexis, Santiago, 2003, p. 451 et seq.

³⁹ Banco Sudameris vs. Armando Varas Espejo.

purpose of making a fictitious loss to the main shareholder with a view to relieving him of the payment obligation he had assumed when taking out a loan. Thus, in order not to declare the company void, the court declared void the legal relationships by which the partner contributed the various sums of money.

In a similar case, pronounced by the Court in 2001⁴⁰, the court found the nullity of the act of incorporation of the company considering that it cannot be a question of simulation, but of bad faith, fraud, abuse of legal personality, illicit cause, unlike simulation where the second act is lawful and moral concluded with a view to producing lawful legal effects.

Equally common are Paulian actions⁴¹ in which the company's creditors request that legal acts concluded by the debtor company in fraud of their interests, such as those by which it created or increased its state of insolvency, be declared unenforceable against them. However, some authors⁴² consider that this mechanism is inappropriate for sanctioning abuse of legal personality, given the special conditions that must be taken into account with regard to the creditor, the debtor and the act being denounced.

However, there are also authors⁴³ who consider that the corporate veil cannot be pierced by common law methods, i.e. that company law, being a special law, cannot be corroborated with the general provisions, as the legislator did not foresee this aspect. There is a need for a wide-ranging debate on this issue in all the Member States, but no agreement has been reached.

Chilean doctrine first referred⁴⁴ to the notion of piercing the corporate veil in 1964 and in the 1990s numerous studies appeared on this procedure regarded as a remedial sanction⁴⁵.

Because this theory was becoming more and more common in practice, some authors argued that it should be legislated, i.e. that the rule provided for in Article 478 of the Labour Code⁴⁶ should be supplemented in such a way as to sanction the concealment of a company's assets in order to take advantage of the

⁴⁰ Hernandez Villega v. Maturana Lanza.

⁴¹ Art. 2.468 Civil Code Chile.

⁴² Lopez Diaz.

⁴³ Alvaro Puelma Accorsi, *The limits of legal personality. La doctrina del levantamiento del velo, Studies of the reforms of the Civil Code and the Commercial Code*; Fundacion Fernando Fueyo Laneri, vol. II, ED. Juridica de Chile, Santiago, 2002, pp. 379.

⁴⁴ Prof. Manuel Vargas, *La sociedad anonima en el derecho angloamericano*, Ed. Juridica de Chile, 1964.

⁴⁵ Carlos Bravo Toutin, *Personalidad juridica en las sociedades mercantiles y la teoria del disregard*, Santiago de Chile, 1991; Alberto Lyon Puelma, *Teoria de la personalidad. Personas naturales y personas juridicas*, Santiago de Chile, 1993, p. 175 et seq.; Alvaro Puelma Accorsi, *Sociedades*, Vol. I, Santiago de Chile, 1996, pp. 92 et seq.; Carlos Alberto Villegas, *Tratando de las sociedades*, Ed. Juridica de Chile, 1st edition, 1995, pp. 48.

⁴⁶ It provides that "any change made by using the company for a purpose other than that intended by the legislator, identity, fictitious separation of assets, or any other matter involving a diminution or loss of the employee's rights" is considered subterfuge.

obligations established in the employment contracts, referring to any change consisting in changing the name of the company for various reasons, creating several companies in order to benefit from the idea of its own identity, or any other such operations.

It was also against⁴⁷ this regulation, considering that the lack of vigilance and fraud with regard to the rights of employees is not simply solved pecuniary, but solutions must also be found for situations in which the illicit has affected the rights of the employee in other forms. Moreover, the supposed future way of legislating this institution is so vague that it is practically impossible not to come to the conclusion that any company can be regarded as being set up for unlawful purposes.

Thus, the principle of supremacy of reality is applied with priority by Chilean courts not only in matters of groups of companies, but also in cases with a distinct subject matter⁴⁸. Chile can therefore be characterised as a country which applies the theory of piercing the corporate veil using general principles, although there are many supporters⁴⁹ of the regulation of this institution.

5. Peru

Peruvian legislation does not contain provisions expressly referring to the piercing of the corporate veil even though it was considered that there were reasons that required reform of the Civil Code of 1984, namely to amend the content of Article 78⁵⁰ in order to stipulate that "the court, in the case of illicit purpose or fraud to the law, may incur the liability of the members of the organs of the legal person, without prejudice to the latter", the proposal for a law was not approved⁵¹ in the end.

The Reform Commission rejected the amendment of this principle in the Civil Code for fear that the legislation might cause greater harm, such as the inapplicability of the theory of limited liability, the uncertainty of the concept of abuse of rights, etc.

In this regard, it was opined⁵² that in Peru the piercing of the corporate veil would only take place on the basis of the principle of safeguarding society so

⁴⁷ J. L. Ugarte, *El nuevo derecho del trabajo*, Ed. Universitaria, Santiago de Chile, 2004, p. 87.

⁴⁸ Case No 3792-2002 concerning the liability of the guarantor for the obligations assumed by the guaranteed party. Decision of the Supreme Court of 23 September 2001.

⁴⁹ Patricia Lopez Diaz, Paolo Leonelli, Rodrigo Andres Urra Escobar, Gabriela Yolanda Novoa Munoz, *op. cit.*, p. 75.

⁵⁰ Which at that time stipulated that "The legal person is distinct from its members and none of them has any right to the assets of the company nor any obligation to take over its debts".

⁵¹ Commission for Studies and Revisions of the Civil Code, Civil Code, Vol. IV, *Exposicion de motivos y comentarios*, Ed. Lima, 1985, p. 173.

⁵² Fernandp Trazegnies Granada, *El derecho de adquisicion preferente en la sociedad anonima*. The transfer of corporate control through a holding company.

that the aim is not to amend Article 78 of the Civil Code, but to apply it in conjunction with the articles referring to abuse of rights and good faith.

It has also been argued⁵³ that the Anglo-Saxon doctrine of piercing the corporate veil regards the legal person as an instrument, so that it cannot be applied in the Peruvian legal system given that under the Civil Code, the legal provisions relating to the legal person regard this entity as a subject of law to which it confers total independence from its associates and, moreover, under the Companies Act, in accordance with the provisions of common law, its particularity is expressly provided for, as well as the liability regime⁵⁴.

At the same time, it was concluded that it is necessary to develop a rule that makes express reference to the theory of piercing the corporate veil but that is consistent with the Peruvian legal system, which refers to abuses of law. However, until that time, the courts may apply the common law rules on abuse of rights, unlimited liability, simulation, social pact depending on each case under analysis.

Thus, in the case of fraud against the law, the general rules which have been infringed could be applied in order to render ineffective the acts or facts which have been attempted to be circumvented.

However, as far as the tax field is concerned, the authorities have been granted the right to disregard a transaction that does not have an economic purpose, as well as the right to reframe the form of a transaction or activity to reflect the economic content of the transaction or activity by regulating⁵⁵ Article 8 of the Tax Code⁵⁶ in which it was expressly stipulated that "When applying tax rules, any method of interpretation allowed by law may be used. When tax debtors conclude legal acts having a different object than the one they actually have with the aim of avoiding the payment of higher amounts due by way of tax, only the state of fact shall be taken into account and not the one stipulated in the contract with the consequence of being obliged to pay the amounts actually due by reference to the acts, facts, economic relations that are actually carried out".

This formula, inspired by the practice of the tax courts, was seen as a Peruvian disregard⁵⁷ of the law, designed to expose simulation, abuse of law and fraud, with the consequence of penalising those who try to take advantage of the provisions of the law in order to achieve an illicit purpose.

However, as in other legal systems, the Peruvian legal system considers that the theory of piercing the corporate veil should only be used in exceptional

⁵³ Carlos Enrique Quiroga Periche, *Teoría del levantamiento del velo societario: Es aplicable en el derecho peruano*, PhD thesis presented at the Faculty of Law of the National University of Trujillo, 2004.

⁵⁴ The rule being limited liability of the partners, and the exception being unlimited liability if a fraud is found.

⁵⁵ Legislative Decree No. 816. Law No. 26.663 amending Article 8 of 23 September 1996.

⁵⁶ Since 22 April 1996.

⁵⁷ Calderon Aguilar.

situations⁵⁸.

6. Ecuador

The Ecuadorian legal system establishes as a matter of principle the unlimited liability of the debtor towards all its creditors⁵⁹ until full payment of the obligation assumed. On the one hand, company law expressly provides for the limited liability of members for the obligations assumed by the company⁶⁰. On the other hand, there are express provisions of exception to this limited liability which concern groups of companies, tax debts, labour law or financial law.

As a general rule, the Ecuadorian Companies Act contains a single reference to the group of companies⁶¹ which refers only to the economically dominant company, without referring to other ways in which several companies participated in the fraud of the law.

Also, the Regulation on the application of the tax law⁶² states that companies whose decisions are subject to the control of another company will be considered subsidiaries or affiliates, thus resulting in subordination to it.

In the financial field, the Law on Financial and Banking Institutions regulates the group of companies not only to subject it to the supervision of banks and insurance companies, but also to prevent a liability of the dominant company⁶³ for all patrimonial losses suffered by its subsidiaries⁶⁴.

The main regulation of the business group and joint and several liability can be found in the Ecuadorian Labour Code⁶⁵ which expressly states that "work carried out for two or more distinct companies which have a common head office, common management body, common associates, will lead to their joint and several liability for their obligations towards the employee", this regulation being the basis on which the courts can ignore the distinct legal personality of each company.

The Labour Code also refers to the joint and several liability of the employer and his legal representatives⁶⁶ for failure to fulfil obligations towards the

⁵⁸ Prof. Gutierrez Camacho "which does not imply that one cannot pierce the corporate veil, but neither does it imply that to resort to it is to adopt illegal behaviour" Walter Gutierrez Camacho, *El levantamiento del velo societario*, vol. I, Estudios societarios & ley general de sociedades, Lima, Gaceta Juridica Editores, 1999.

⁵⁹ Article 2.391 of the Civil Code of Ecuador.

⁶⁰ Art 116 letter c) in conjunction with Art. 117 lit. g). Art 155 on limited liability company.

⁶¹ Art. 429.

⁶² Art. 4.

⁶³ Art. 1 din LGIF (Ley General de Instituciones del sistema Financiero).

⁶⁴ Art. 64 of LGIF.

⁶⁵ Article 41.

⁶⁶ Art. 36.

employee, joint and several liability in the event of assignment⁶⁷, usufruct, succession⁶⁸ or any other way in which the employer wishes to evade obligations towards the employee.

Thus, although it has been argued since the 1980s⁶⁹ the need to ignore the concept of separation between the legal person and the natural persons who constitute it in the case of abuse of legal personality, until the 2000s there were no court decisions to this effect⁷⁰.

7. Venezuela

In Venezuelan law there is no express reference to the technique of piercing the corporate veil, even though one can observe legislative proposals that sought to address the gaps in this area, such as the 1989 bill that sought to amend Article 225 of the Companies Act⁷¹, but which never reached enactment, which

⁶⁷ Article 171 provides that "In the event of the transfer or disposal of the company, business or any arrangement whereby liability may be assumed by another employer, he shall be obliged to take over the rights and obligations assumed by the original employer. If the employee chooses to continue the employment contract with the new company, he will not be able to claim compensation. The transferee or the new buyer will be obliged to perform the employment contract as concluded by the original employer. The employees will have the right to terminate the employment relationship or to request termination by reaching the stipulated deadline".

⁶⁸ Article 198 provides that "If the business is run by another person as lessee, usufructuary, etc., as successor, he shall be liable to pay the amounts due to the joint and several employees. A change of employer does not interrupt the period for establishing seniority".

⁶⁹ Miguel Macias Hurtado, *Instituciones de derecho mercantil ecuatoriano*, vol. II, Ediciones del Banco Central del Ecuador, Quito, 1988, p. 219.

⁷⁰ Decision of 21 March 2001 in which the Supreme Court ruled that "In the face of such abuses, we must react in such a way as to disregard the principle of separate legal personality, i.e. to pierce the corporate veil and to hold liable those who are guilty of damage to third parties in order to prevent the associates from using the company for illicit purposes". Supreme Court decision of 28 January 2003, subsequently the subject of an article published by Dr Santiago Andrade Ubidia, Dr Tito Cabezas Castillo and Dr Galo Galarza Paz. In it, the Supreme Court found that "when there is evidence of a manipulation of reality through the use of a company for this purpose, it is necessary to pierce the corporate veil in order to determine what the true factual situation is and who is really responsible for the fraudulent evasion of the law, abuse of legal personality or illicit conduct". Supreme Court decision of 23 July 2004 in which it found that "The piercing of the corporate veil is increasingly present and analysed in foreign doctrine and case law. It involves examining the company from within and not from without in order to examine the true purpose for which it was created and the interests of those who constituted it. At the same time, this institution cannot be applied in every case because to do so would be tantamount to changing the whole way in which the legal person has been regulated. Such an operation would create legal uncertainty. Thus, this institution must be understood as a derogation from the rules of ordinary law, which is why it must be used with great care and only in special cases in order to prevent abuses of legal personality or harm to third parties. Consequently, as we have also ruled in previous decisions, we will use this institution only when we wish to uncover the natural or legal person who is hiding behind the legal personality with the sole purpose of using it fraudulently".

⁷¹ Intended to be similar to Article 54 of the Argentine Companies Act, and which provided that when the company is constituted with the sole purpose of serving the personal interest of the

is why the common provisions on abuse of rights⁷² continued to be used. This has created a lot of controversy given the difficulty of applying these provisions when the corporate veil is to be pierced given the way the general rule is regulated and the purpose it is intended to protect⁷³.

This theory has been considered with reluctance by legal scholars, and eventually it was argued⁷⁴ that it should be regulated only in the context of a complex⁷⁵ regulation, which would contain all the cases⁷⁶ in which the legal rule may allow, when there is no alternative, to avoid unfair harm. However, in view of the various case law solutions without this institution being regulated at the

partners, defrauding the law, violating public order, the principle of good faith or harming third parties, then the direct liability of the partners will be incurred, but which also takes over from Article 229 of the Argentine Companies Act the patrimonial liability of the dominant company in the event of the insolvency of its subordinate company, with the following content "Legal persons within a group of companies shall retain their own legal personality, without prejudice to the provisions of this chapter. In the case of a company which has been set up to satisfy the interests of its members, which acts with the aim of defrauding the law, violating public order, good faith or to harm third parties, the direct liability of the members or the dominant company which have allowed this illicit conduct shall be incurred, and they shall be jointly and severally liable without limitation for the damage created".

⁷² Article 1.185 of the Civil Code provides that "The person who is liable for the damage caused by exercising the right in a manner not in conformity with the legal provisions, in violation of good faith or in excess of the legal provisions, must compensate for the damage caused".

⁷³ Marisol Sarria Pietri, *Doctrina del abuso de la personalidad jurídica, Jornadas Homenaje a los Drs. Aristides Rengel Romberg and Leopoldo Marquez Anez*, Caracas, 20 and 21 October 2006.

⁷⁴ Francisco Hung Valliant, *The so-called doctrine of the lifting of the veil for abuse of legal personality, Public Law at the Beginning of the 21st Century, Studies in Homage to Professor Allan r. Brewer Carias*, Vol. II, Madrid, 2004, p. 2039.

⁷⁵ Alfredo Morales Hernandez, states in *Curso de derecho mercantil*, Vol. II, Universidad Católica Andrés Bello, Caracas, that the piercing of the corporate veil can only occur in three concrete situations, namely when we are in the presence of an "abuse of law, illegal simulation or fraud of the law". For this author, these three hypotheses are the only situations in which the court can apply this instuction. See also Alfredo Morales Hernandez, *El abuso de la forma societaria, Cuestiones de derecho societario*, Estudios, no. 63, Academia de ciencias políticas y sociales, Caracas, 2006.

⁷⁶ Jose Antonio Muci Borjas sees these as factors leading to the piercing of the corporate veil: Insufficient share capital to achieve the purpose for which it was created; confusion of assets between companies within the group; when the company's assets are used by an individual as if they were his own assets; negotiations between the company and its associates for the transfer of company-owned assets at an insignificant price, much lower than would have been charged had the company wished to dispose of the asset to a third party; services provided by an associate to the company for unreasonable prices; common offices, common contact numbers, common dependency relationships, common lawyers or accountants; failure to comply with legal formalities such as those relating to convocation; conclusion of acts in the name of the company without having received a mandate to do so; the method of remuneration of directors is unilaterally changed by them without complying with formalities and without such increases being justified; identity of shareholders and controlling bodies between two or more companies; succession between two companies with the aim of evading payment obligations; concealment of the identity of the real founders of the company; absence of dividends, inactivity; when the subordinate company concludes legal acts only with the dominant company.

legislative level, it has been considered unnecessary⁷⁷.

8. Columbia

As in the other legal systems analysed in the previous countries, Colombia does not have a general rule on the institution of the corporate veil.

However, at the legislative level we can find many provisions that restrict the rights of people who play an important role in society, in order to protect it. By way of example, the legislator has provided for the prohibition of natural or legal persons from participating in public tenders for a period of 5 years when the company to which they belong organises the sale of assets⁷⁸; that legal personality is not recognised when examining the legality of the acts and deeds by which the company has undertaken to take into account the real beneficiaries and not only those who are formally mentioned⁷⁹; the possibility for judicial bodies to pierce the corporate veil when it is necessary to determine the real beneficiary of the activities undertaken by the company⁸⁰.

It has also been provided that, in the case of a group of companies, even if only one of them is liable towards another person, the latter will be able to recover its claim from the dominant company or from any other company within

⁷⁷ Francisco Hung Valliant stated that "After more than 56 years and numerous studies on the subject by doctrine and case law, the subject of piercing the corporate veil seems not to have advanced since it was broached by Serick. Although a considerable number of authors and judges have stated that it is imperative to pierce the corporate veil in specific cases, we are still in an uncertain area as regards determining the specific situations in which this institution can be used."

⁷⁸ Art. 8 para. (10) (i) of Law No. 80 of 1993; Decision of the Council of State of 17 May 2001.

⁷⁹ Article 37 of Law No. 142 of 1994.

⁸⁰ Article 44 of Law No. 190 of 1995 on the National Anti-Corruption Strategy. On the basis of this article, the decision of the Court of First Instance, Administrative and Tax Chamber, of 19 August 1999 was handed down when a member of the company took part in the public tender organised by the company, which took place as a result of his failure to fulfil his obligations within the company, the company through the contracts concluded by the partner with another company in which he was a partner, for which reason it was found that 'the acts which brought the company to the brink of insolvency are carried out precisely by the natural person who comes to adjudicate on the company's assets' and that 'it would be forced to conclude that when a partner becomes involved on his own behalf, but the acts by which he commits himself are carried out in the name of a legal person, the liability should be indivisible', which means that 'this provision will be applied in order to prohibit incompatibilities between the natural persons behind the company and the legal person itself, i.e. to make it more difficult to investigate offences committed or illegal activities carried out with the aim of piercing the corporate veil so that the legal person is no longer viewed separately and the real beneficiary behind it is reached'. On the other hand, it should be noted that this rule refers only to the possibility of judicial bodies to apply it, not to administrative bodies, even though Article 265 of the Commercial Code recognizes this faculty to investigate also banking, real estate and business establishments, expressly stipulating that "the respective investigation, supervision and control bodies may verify the reality of the operations that take place between the company and its associates. In the event of the detection of an untruthful situation that would damage the State or third parties, they will be able to impose pecuniary sanctions on the real perpetrators and suspend those operations".

the group of companies⁸¹, i.e. the possibility of incurring joint and several liability in the event of the insolvency of the debtor company⁸².

These rules have been regulated in order to avoid the circumvention of the prohibitions stipulated by laws and the Constitution.

One of the most important decisions in this area is the one handed down by the Constitutional Court on 7 September 2004, in which it had to analyse the legislator's omission to expressly stipulate in the Commercial Code that associations are liable for obligations arising from employment relationships.

Finally, the court resolves the case by finding that Article 373 of the Commercial Code does not envisage the corresponding legal personification of the limited liability company as a tool for not recognising the rights of employees and pensioners, admitting that such an obligation imposed on the company would be manifestly unconstitutional, which means that the lack of regulation of a mechanism interfering in property matters would render the rule unconstitutional. However, the Constitutional Court notes the existence within the legal system of various mechanisms for the protection of employees' interests, some of which even constitute a similar mechanism or form part of the institution of piercing the corporate veil, so that there is no need to resort to this institution whenever there is a conflict between the company and the rights of third parties. This decision of the Constitutional Court is of particular importance as it examines the constitutionality of this theory.

Another important decision of the Constitutional Court is that of 26 September 2001⁸³ in which the plaintiffs were the employees of a limited liability company which had filed for bankruptcy⁸⁴ and which had been 80% acquired by the National Coffee Association⁸⁵, the latter in turn being a plaintiff in another case in which it was seeking payment of its outstanding debts. Thus, the court proceeded to hold the dominant company liable in view of the liabilities of the company it controlled in the context that it was on the list of its debtors in the bankruptcy proceedings. Thus, the court found that the state of liquidation of the controlled company led to the dominant company being jointly and severally liable with its own assets in respect of the social pensions accrued by its employees, given that this was a constitutionally recognised right. Furthermore, the Court finds that the subsidiary's state of insolvency is due to the control exercised by the parent company⁸⁶.

⁸¹ Article 30 of Law No. 222 of 1995. On the basis of this Article, the decision of the Court of First Instance of 17 May 2001 was delivered.

⁸² Article 163 of Law No. 223 of 1995 on taxation: Article 1.2.1.3 of Resolution No. 400 of 1995 on real estate values; Articles 71, 148, 105.4 and 207 of Law No. 222 of 1995; Article 36 of the Labour Code.

⁸³ In the case of Vituda de fajardo and Others v. Flota Mercante Gran Colombiana and Others.

⁸⁴ Compania de Inversiones de la Flota Mercante S.A.

⁸⁵ National Federation of Coffee Growers.

⁸⁶ See Jaime Tobar, *La ilegítima extensión de la responsabilidad en las sociedades de capital en derecho colombiano*, Ed. El Notariado, 2004; Juan Jacobo Calderon Villegas,

At the doctrinal level, there has been a long debate on the import of the theory of piercing the corporate veil, given that the courts can resort to the rules already existing at the legislative level, which concern simulation, paulian action, revocation action, abuse of right, abuse of legal personality, bad faith.

9. Conclusions

The majority view is that the theory of piercing the corporate veil should be seen as a remedy that can be applied only in exceptional cases and only when the rules of common law cannot apply.

The regulation of this theory is not only a matter for the different systems of law, but also for each state's own courts.

We are in the presence of a theory which, without being regulated, is of overwhelming importance, being taken up by the courts more and more often even if it has not been regulated at legislative level.

Jurisprudence is above the legal rules since there can be no law without loopholes. Moreover, the legislator considers that there is a risk that once the theory of the piercing of the corporate veil is regulated, the litigant is in a position to find a formula to infringe it.

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Suspension of the Procedure by the National Court That Notified ECJ for a Preliminary Ruling, in the Context of the Recent Jurisprudence of the European Court of Justice

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Abstract

Notification of the European Court of Justice for preliminary rulings represents or can represent a case of temporary suspension of the procedure. The mandatory suspension of the procedure is regulated in the national law by imperative law rules, operates independently of any analysis of opportunity made by the judge and in an abstract way, irrespective of the concrete elements of the case. The national norms which regulate notification of the ECJ as a case of mandatory suspension seem to be opposite to a recent judgement of the ECJ, pronounced in case C-477/21. The purpose to order suspension of the procedure is to correctly apply the EU law. This purpose can be achieved without the whole suspension of the trial. The judicial research can continue in order to establish the facts of the case, especially when there are proofs that can be lost or degraded by their late administration. Other law problems can be solved, if they are not in liaison with those addressed to the ECJ. By consequence, facultative suspension and the possibility of a partial suspension of the procedure guarantee the effet utile of EU law, finding of the truth and solving of the trials in a reasonable term. The research is descriptive, explanatory and comparative, being accompanied by relevant doctrine and jurisprudence.

Keywords: *stay of proceedings, preliminary reference, supremacy of European Union law, consistent interpretation.*

JEL Classification: K33, K41

1. Introduction

A reference for a preliminary ruling to the Court of Justice of the European Union constitutes or, as the case may be, may constitute a temporary stay of proceedings in the form of a *suspension of the proceedings*. The purpose for which the stay of proceedings is ordered is to enable the case to be disposed of in accordance with the correct application of the provisions of European law. The proper disposal of the case and the ascertainment of the legal truth justify a temporary interruption of the proceedings and thus an extension of the time-limit for the disposal of the case. In civil matters, the court which refers the case to the CJEU is under an obligation to stay the proceedings, whereas the courts which are seised of cases similar to the one in which an application for a preliminary ruling has already been lodged with the CJEU have the option of staying or not

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staying the proceedings.

Unlike the Code of Civil Procedure, the Code of Criminal Procedure does not contain a legal basis for suspending the trial if the case is or has already been referred to the CJEU for a preliminary ruling. The criminal courts order a stay if they refer the case to the Court of Justice of the European Union under *Law 340/2009*. According to the provisions of the law, the stay of proceedings is mandatory for courts whose judgments can no longer be challenged through ordinary appeal, while for other courts the stay is optional. If the case has not been stayed, the court may continue the proceedings on matters other than those referred to the Court of Justice, but may not close the proceedings before a preliminary ruling has been given. One of the problems is the *obsolete character* of Law 340/2009, since Article 35 of the EU Treaty, for the transposition of which it was adopted, has been repealed by the EU Treaty signed in Lisbon. Nowadays, European legal acts in criminal matters are adopted by ordinary legislative procedure, take the form of regulations, directives and decisions, and their interpretation can be requested to the Court of Justice under Article 267 TFEU, without any declaration of acceptance being necessary. It would be most appropriate for the legislator to intervene and provide for a specific and current basis of criminal procedural law in cases where the court refers the matter to the CJEU or a referral in a similar case has already been made to the Court (*section 1*).

The Court of Justice of the European Union recently delivered a judgment that will certainly change the way in which the making of a reference for a preliminary ruling impact on the main proceedings. A national court which refers a case to the CJEU under Article 267 TFEU may suspend the main proceedings only in respect of those aspects of the main proceedings which may be affected by the Court's response to that request (*section 2*).

The Court's reasoning applies in all legal matters, and the national rules governing referral to the CJEU as a case of automatic stay of proceedings appear to be contrary to the judgment of 17 May 2023. The optional stay and the possibility of a partial stay of proceedings are solutions which ensure both the useful effect of Union law and the establishment of the truth and the resolution of cases within a reasonable time. We appreciate that the decision of a domestic court not to suspend or partially suspend the court proceedings both in criminal matters and in civil matters can be based on art. 23 first paragraph of the Statute of the Court of Justice of the European Union and on art. 267 TFEU, with the consequence of not applying art. 412 para. 1 point 7 of the Civil Procedure Code or, as the case may be, of art. 2 para. 3 final sentence of Law no. 340/2009. Of course, such a decision must be rigorously reasoned from the point of view of the advantages of continuing the main proceedings, and the judgment on the questions of law referred to the CJEU should invariably be suspended (*section 3*).

2. References for a preliminary ruling, a case of stay of proceedings in national law

Preliminary rulings were and are of crucial importance for European integration. Through them, the Court of Justice has not only interpreted European law and preserved its unity, but has also created it to a large extent². The Court's judgments have filled in the gaps in written law and ensured its continued development. "(...) It is, in the words of Advocate General J.P. Warner, 'case law' which supplements written law and gives it its true meaning"³. Preliminary rulings are binding on the referring court as well as on all courts in the EU Member States and have *ex-tunc* effects.

According to Article 267 of the Treaty on the Functioning of the European Union, "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings on: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union. Where such a question is raised before a court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where such a question is raised in a case pending before a national court or tribunal against whose decisions there is no appeal under national law, that court or tribunal shall be obliged to bring the matter before the Court. (...)"⁴. This treaty text is the seat of the matter of references and preliminary rulings, often described as the institutional framework for dialogue between the courts of the Member States of the Union and the Court of Justice. The meaning and purpose of this dialogue is the correct and uniform interpretation of Union law, which is a prerequisite for its uniform application at European level, and the preservation of the Union's regulatory pyramid. In exercising this power, the Court of Justice acts both as a supreme court (the official interpreter of Union law) and as a constitutional court (guaranteeing the conformity with the Treaties of legislation adopted by the Union institutions, bodies, offices and agencies).

Referral to the CJEU for a preliminary ruling is or, as the case may be, may be a case of temporary interruption of the course of the proceedings in the form of a *stay of proceedings*. According to Article 412(1) para. 7 of the Code of Civil Procedure, the proceedings are automatically suspended if the court makes a request for a preliminary ruling to the Court of Justice of the European Union. According to art. 413 para. 1 point 1¹ of the Code of Civil Procedure, the court

²² On the role of preliminary decisions see Cătălin-Silviu Săraaru, *Tratat de contencios administrativ*, Universul Juridic Publishing House, Bucharest, 2022, p. 52, 53. About the role of the European Court of Justice in the formation of common administrative principles in the European Union see Cătălin-Silviu Săraaru, *European Administrative Space - recent challenges and evolution prospects*, ADJURIS – International Academic Publisher, 2017, p. 18,19.

³ Jean Boulouis, *Droit institutionnel de l'Union Européenne*, 6th ed. Montchrestien, 1997, p. 234.

⁴ In the previous European Treaties, this article was numbered Art. 234 TEC and Art. 177 TEC respectively. Its essence has remained unchanged.

can suspend the trial when, in a similar case, the Court of Justice of the European Union has been referred with a request for a preliminary decision either by a national court or by a court in another member state. *Thus, the referring court is obliged to stay the proceedings, whereas courts which are seised of cases similar to the one in which a reference for a preliminary ruling has already been lodged with the CJEU have the option of staying or not staying the proceedings.* In the first case, there is an automatic stay of proceedings and, in the second case, the legislature has provided for an optional stay of proceedings. A stay of proceedings is one which the court is obliged to grant when it finds that the cases provided for by law have been established, whereas an optional stay is left to the discretion of the court. *"The similarity with the case pending before the Court of Justice of the European Union is represented by the incidence in the case in which the suspension is ordered under the terms of art. 413 para. (1) point 1¹ of the Civil Procedure Code, of the same provision of Union law regarding the interpretation or validity of which the Court has already been referred through the preliminary question procedure"*⁵.

The stay of proceedings shall be ordered by *interlocutory judgment* which may be appealed against separately to the superior court for the duration of the stay. The exception is the stay of proceedings by the Court of Cassation, in which case the measure is final (Article 414(1), 2nd sentence of the Civil Procedure Code). Orders rejecting applications for a stay of proceedings, including on the basis under consideration (referral to the CJEU), may be appealed only together with the merits and not separately. Resumption of the proceedings is *ex officio* after the preliminary ruling by the Court of Justice of the European Union, including in the case of an optional stay⁶. *The purpose of the stay of proceedings is to ensure that the case is resolved with the correct application of the provisions of European law. The successful outcome of the case and the establishment of the legal truth justify a temporary stay of proceedings and, therefore, an extension of the time-limit.*

Dialogue with the Court of Justice is also open to the criminal law judge. Unlike the Code of Civil Procedure, the Code of Criminal Procedure does not contain a legal basis for suspending the trial if the case is or has already been referred to the CJEU for a preliminary ruling. Despite this, the stay of proceedings also applies in criminal matters. A first piece of legislation that can be used is

⁵ Gabriel Boroi, Mirela Stancu, *Civil Procedural Law*, Ed. Hamangiu, Bucharest, 2020, p. 616-617.

⁶ See Decision No. 2/2022 of the Court of Justice of the European Communities, according to which "in the interpretation and uniform application of the provisions of Article 416 para. (1) of the Code of Civil Procedure, in the case of an optional stay ordered by the court pursuant to Art. 413 para. (1), point. (1) of the Code of Civil Procedure until the Court of Justice of the European Union has delivered a preliminary ruling, following an application by another national court or a court of another Member State of the European Union, the application shall not be time-barred; or, where the party concerned does not request that the case be resumed within six months of the date of delivery of the preliminary ruling by the Court of Justice of the European Union, the court or tribunal shall be obliged to resume the proceedings of its own motion".

Law No. 340/2009 on the making of a declaration by Romania on the basis of Article 35(2) of the Treaty on European Union⁷. According to Article 35(2) of the former Treaty on European Union, Member States could accept the Court's jurisdiction to give preliminary rulings *in the framework of police and judicial cooperation in criminal matters* by a declaration made at the date of signature of the Treaty of Amsterdam or at any later date. Member States were free to determine whether all courts could make preliminary rulings to the Court of Justice under Article 35(1) of the EU Treaty or only those whose judgments could no longer be challenged under national law. Under this Article, preliminary questions from national courts were admissible if the State made a declaration accepting the jurisdiction of the Court and in compliance with the terms of that declaration.

The Romanian State has adopted a declaration to this effect, materialised in Law No. 340/2009, and the applicability of this normative act therefore concerns the criminal field. Under it, all courts may use the instrument of preliminary references, and courts adjudicating at last instance are obliged to use it if they consider that a decision of the Court of Justice is necessary to deliver a judgment. *The stay of proceedings is mandatory for courts whose judgments can no longer be appealed through ordinary appeal, while for other courts the stay is optional* (Article 2(3) of Law No. 340/2009). The decision of the court to stay proceedings may be appealed to the higher court. According to Art. 2 para. 8 of the Law, "if the case has not been suspended, the court may continue the proceedings on issues other than those referred to the Court of Justice of the European Communities. The court may not close the proceedings before the Court of Justice of the European Communities has given its ruling".

However, Law No. 340/2009 has been overtaken by developments in EU law, although it has not been formally repealed. The EU Treaty signed in Lisbon, which entered into force on 1 December 2009, repealed Article 35 of the EU Treaty, incorporating into the Community method the last aspects of the third pillar on the area of freedom, security and justice, namely police and judicial cooperation in criminal matters. Under the "transitional provisions", it was stipulated that the jurisdiction of the Court of Justice would remain unchanged for a period of five years after the entry into force of the new Treaty. Therefore, during that transitional period, preliminary questions concerning police and judicial cooperation in criminal matters were admissible only if the States declared that they accepted the jurisdiction of the Court. Today, European legal acts in criminal matters are adopted through the ordinary legislative procedure and, unless otherwise provided, take the form of regulations, directives and decisions. Their interpretation can be requested from the Court of Justice under Article 267 TFEU, without any declaration of acceptance being necessary. Law 340/2009 therefore seems to have become obsolete.

⁷ The Law was published in the Official Gazette No. 786 of 18 November 2009.

In an article⁸, we came across the proposal to use the grounds for staying the proceedings provided for in the Code of Civil Procedure in the event of a referral to the Court of Justice of the EU. The author refers to Art. 2 para. 2 of the Code of Civil Procedure, according to which the provisions of the Code of Civil Procedure also apply to other matters, unless the laws governing them provide otherwise. The idea is interesting, but it would be more appropriate for the legislator to intervene and provide a specific and current basis for criminal procedural law, especially as the suspension of proceedings in criminal matters may have a different impact on the legal situation of the parties in relation to civil procedure.

3. Judgment of the CJEU of 17 May 2023 in Case C176/22

The Court of Justice of the European Union recently delivered a judgment that will certainly change the way in which the making of a reference for a preliminary ruling impact on the main proceedings. The reference for a preliminary ruling was made by a Bulgarian court which had already previously referred an application to the CJEU concerning the interpretation of Article 6(3) and (4) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and Article 47(2) of the Charter of Fundamental Rights of the European Union, registered under number C175/22.

In the main proceedings, a Bulgarian prosecution unit brought an indictment against two persons before the referring court for alleged acts of corruption which they allegedly committed in their capacity as criminal investigation bodies of the police. The evidence to be submitted was extensive, part of which had been submitted by the time the request for a preliminary ruling was made, but other evidence had not yet been submitted, namely interviews with individuals, examination of video recordings and the material produced by a hidden camera and microphone. The referring court stated that it could technically continue to examine the case before it and collect evidence to establish the reality and content of the alleged facts, since that evidence was not related to the preliminary questions it had asked in Case C175/22. Such an approach would make it possible to avoid the loss of time associated with a suspension of those proceedings, which would facilitate compliance with the right to be tried within a reasonable time, in accordance with the second paragraph of Article 47 of the Charter of Fundamental Rights. In those circumstances, the Bulgarian court stayed the proceedings in their entirety and referred the following question to the CJEU for a preliminary ruling: "Is Article 23 of the Statute of the Court of Justice of the European Union to be interpreted as meaning that a national court which has made a reference for

⁸ Elena Dobrițoiu, *Suspension of the trial in criminal proceedings*, „Themis Magazine” no. 1-2/2022. The article is available at https://inm-lex.ro/wp-content/uploads/2022/12/DP_Dobrițoiu-E-Suspendarea-judecatii-in-procesul-penal.pdf (last accessed 2.06.2023).

a preliminary ruling under Article 267 TFEU is obliged to stay the main proceedings in their entirety or is it sufficient to stay only the part of the main proceedings to which the question referred for a preliminary ruling relates?"

The Court of Justice has previously held that the Union has no legal rules on the matter and that it is therefore for the national legal order to deal with the problem, in accordance with the *principle of national institutional and procedural autonomy*, framed by the principles of *equivalence* and *effectiveness* of Union law. The Member States therefore determine the legislative, administrative and/or judicial institutions competent to apply Union law, as well as the procedural and partly substantive rules to be used to enforce the rights which result from Union law for the benefit of litigants. In accordance with the principle of equivalence, domestic procedural rules must apply in the same way to domestic litigation and to litigation seeking to enforce rights and legitimate interests deriving from Union law. On the other hand, national rules must not make it impossible or extremely difficult to exercise in practice rights arising from Union law. "A summary of the case law shows that, while the principle of national autonomy and jurisdiction in matters of procedural and remedial remedies remains important, the requirements of equivalence and effectiveness are powerful principal tools, leading national courts to undertake a case-by-case assessment of national rules"⁹.

The principle of effectiveness in the context of the dialogue established by Article 267 TFEU is satisfied if unity of interpretation, coherence of EU law, its own character and autonomy are ensured. "However, the maintenance of the useful effect of those proceedings is not rendered impossible in practice or excessively difficult by a national rule which allows, between the date on which a reference for a preliminary ruling is made to the Court and the date of the order or judgment by which the Court responds to that reference, the continuation of the main proceedings in order to carry out procedural steps which the referring court considers necessary and which concern matters unrelated to the questions referred for a preliminary ruling, namely procedural steps which are not such as to prevent the referring court from complying, in the main proceedings, with that order or that judgment. That conclusion is confirmed by the fact that it is for the referring court to assess at what stage of the proceedings it is appropriate to make such an application to the Court (...). Thus, since an application for a preliminary ruling may be made to the Court even at an early stage of the main proceedings, the referring court must be able, pending the Court's reply to that application, to continue those proceedings for procedural steps which it considers necessary and which are not connected with the questions referred for a preliminary ruling"¹⁰.

Therefore, *a national court which brings an action before the CJEU under Article 267 TFEU may suspend the main proceedings only in respect of those*

⁹ Paul Craig, Grainne de Búrca, *European Union Law, Commentaries, Case Law and Doctrine*, 4th ed., Ed. Hamagiu, Bucharest, 2009, p. 382.

¹⁰ Parag. 28, 29, 30.

aspects of the main proceedings which may be affected by the Court's response to that application.

4. Impact assessment on national law

The Court of Justice of the European Union has always had the merit of innovating law and opening up new perspectives of legal thinking. Starting with the principle of supremacy of Community law, the Court's legal innovations are impressive for their simplicity, depth, pragmatism and unifying vocation. The first thought that springs to mind when reading the judgment of 17 May 2023 is the possibility of no longer suspending the proceedings in their entirety and as of right when the CJEU is seised. Let us test, next, whether this is possible.

To begin with, the specifics of the main dispute which led to this judgment cannot be ignored, but neither can they be absolutised. The domestic litigation was a criminal one, characterised by the taking of a large amount of evidence, involving hearings of individuals and technical evidence. To the extent that preventive measures were also ordered against the defendants, the suspension of the trial proceedings had to be assessed more strictly, as did compliance with the reasonable length of time to dispose of the case. On the other hand, the Court does not limit its ruling on the question of law before it to criminal matters. The first paragraph of Article 23 of its Statute¹¹ and Article 267 TFEU apply to all areas of law and even the grounds of the judgment are drafted in general legal terms. Our conclusion is that *the Court's reasoning applies in all areas of law*, and not just criminal law (where it is all the more obvious).

Having deduced that the judgment of 17 May 2023 is of general application, the next step is to check its incidence in national law. In criminal matters, the outdated Law No. 340/2009 is partly in line with the CJEU's view. As we have pointed out, according to Art. 2 para. 8 of the law, "if the case has not been suspended, the court may continue the proceedings on issues other than those referred to the Court of Justice of the European Communities. The court may not close the proceedings before the Court of Justice of the European Communities has given its ruling". However, this provision is not of general application, since courts whose judgments can no longer be challenged under national law are obliged to stay the proceedings.

The national rules governing the referral to the CJEU as of right for a stay of proceedings appear to be contrary to the judgment of 17 May 2023. The automatic stay of proceedings is governed at national level by mandatory legal

¹¹ "In the cases referred to in Article 267 [TFEU], the decision of the national court or tribunal staying its proceedings and bringing the matter before the Court of Justice shall be notified to the Court by that national court or tribunal. That decision shall then be notified by the Registrar of the Court to the parties concerned, to the Member States and to the [European] Commission and to the institution, body, office or agency of the [European] Union which adopted the act the validity or interpretation of which is in dispute."

rules, operates independently of any analysis of expediency made by the court and in an abstract manner, disregarding the specific facts of the case. The *purpose of the order is to resolve the case with the correct application of the provisions of European law, and this purpose can be achieved, on a case-by-case basis, without a block stay of proceedings*. The judicial inquiry may continue in order to establish the state of facts, especially if there is evidence which may be lost or degraded by late submission. Other questions of law can be resolved if they are not related to those referred to the CJEU. Accordingly, *the optional stay and the possibility of a partial stay of proceedings are solutions which ensure both the useful effect of Union law and the establishment of the truth and the resolution of cases within a reasonable time*.

It is well known that Union law is in a relationship of supremacy with national law and that it produces direct effects in the Member States. The principle applies in the case of conflict of legal rules, which can be explicit as well as implicit and implies leaving unapplied the national rule contrary to EU law, regardless of its rank in national law. The judge's task is not simple when the conflict is not apparent but implicit (lies in the priority of the field or obstacle). Priority of scope may concern matters subject to exclusive Union competence or full harmonisation; whereas priority of obstacle leads to the non-application of national rules which may restrict the effectiveness of a European policy¹². Before leaving the national rule unapplied, the judge will have to try to interpret it in accordance with the text and purpose of European law. It is only after the conforming interpretation fails that the second stage of the principle of supremacy - the inapplicability of the national rule - can be achieved.

Is there a conflict of rules in the case under consideration? If so, which rules are in conflict and what type of conflict is it? The norms in conflict are art. 412 para. 1 point 7 of the Civil Procedure Code and art. 2 para. 3 final sentence of Law no. 340/2009, on the one hand, respectively art. 23 first paragraph of the Statute of the Court of Justice of the European Union, on the other hand. In the first case, optional and/or partial suspension is not permitted, whereas the second rule allows such a procedural measure. The conflict is therefore an apparent one, and a consistent interpretation would lead to the defeat of a mandatory national rule. Operating *against the law*, it cannot be used as a remedy. Therefore, the decision of a domestic court not to suspend or partially suspend the court proceedings both in criminal matters and in civil matters can be based on art. 23 first paragraph of the Statute of the Court of Justice of the European Union and on art. 267 TFEU, with the consequence of not applying art. 412 para. 1 point 7 of the Civil Procedure Code or, as the case may be, of art. 2 para. 3 final sentence of Law no. 340/2009. Of course, such a decision must be rigorously reasoned from

¹² Robert Schütze, *Constitutional Law of the European Union*, University Publishing, Bucharest, 2012, p. 361-363.

the point of view of the advantages of continuing the main proceedings, and judgment on the questions of law referred to the CJEU should invariably be suspended.

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The Right to Non-self-Incrimination and the False Testimony – Comparative Law Aspects

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Abstract

The present study approaches, in relation to the current realities, the issue of the consecration of the privilege against self-incrimination regarding the witness, by bringing to attention some aspects of comparative law regarding both the regulation of the right not to contribute to own accusation, and the criminalization of the act of false testimony. Using, as research methods, documentation, comparative scientific analysis and interpretation, the work presents the ways of regulating the right of the witness not to accuse himself in a series of legislations of the European states, as well as the ways of criminalizing false testimony in the same European states, to reveal the extent to which the recognition of the right not to contribute to self-incrimination is reflected in the criminal policy of these states. By taking into account these aspects of comparative law, as well as some elements of jurisprudence (both jurisprudence of the European Court of Human Rights and domestic jurisprudence), emphasizing the importance of the unification of judicial practice in criminal matters, the study concludes with the proposal of apprehension, in practice, under certain conditions, of the commission of the crime of false testimony by the de facto suspect witness who makes untrue statements.

Keywords: *the right to non-self-incrimination, false testimony, criminal codes of some European states, criminal procedure codes of some European states, unitary judicial practice.*

JEL Classification: K14

1. Introduction

By discussing some aspects of comparative law regarding the recognition of the right not to contribute to self-incrimination, solutions can be identified to improve the internal regulation of the right to non-self-incrimination, as well as to unify the national judicial practice in the matter of the application of criminal provisions by which the act of false testimony is foreseen and sanctioned.

In this context, the present study approaches, in relation to the current realities, the issue of consecrating the privilege against self-incrimination and regarding the witness, bringing to attention some older doctrinal opinions, which currently could be interpreted in a nuanced way.

The research methods used in this study are: documentation, comparative scientific analysis (both at the level of legislation and legal systems, and at the level of jurisprudence) and interpretation.

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Thus, the first section begins with some general considerations regarding the right to non-self-incrimination, seen as a consequence and, at the same time, as a guarantee of the presumption of innocence and the fairness of the procedure, both in the adversarial legal system (common-law), as well as in the continental (Romano-Germanic) system.

In the 2nd section, the way of regulating the right to non-self-incrimination is presented in a series of legislations of the European states, with reference including to the proposals to amend the Romanian procedural-criminal legislation in the matter (through the latest draft law on the amendment and completing the Romanian Criminal Procedure Code).

Section 3 addresses some aspects of judicial practice regarding the recognition of the right to non-self-incrimination, both in the jurisprudence of the European Court of Human Rights (ECtHR) and in the jurisprudence of our national courts.

In the 4th section, a comparative analysis of the criminalization of false testimony in the legislation of the same European states referred to in the 2nd section is carried out, highlighting the extent to which the recognition of the witness' right to do not contribute to self-incrimination in the criminal policy of these states.

In the final section, underlining the importance of the uniform interpretation and application of criminal and criminal procedural legislation at the domestic level, it is concluded that the right of the witness not to incriminate himself is not equivalent to his right to make false statements in order to avoid his condemnation, to the extent that the legislation enshrines the right of the witness to remain silent and the judicial bodies respect the principle of loyalty in the administration of evidence, including by making this right known. Thus, it is proposed as a solution of judicial practice, the apprehension of committing the crime of false testimony by the *de facto* suspect witness, who tries to mislead the judicial bodies through statements inconsistent with reality, under the conditions that he has the right to refuse to answer (the right to remain silent) and does not exercise this right.

2. The right to non-self-incrimination – consequence and guarantee of the fairness of the criminal process and of the presumption of innocence

Having its origins in the Anglo-Saxon legal system (of the adversarial type)², the privilege against self-incrimination is provided for in the International Covenant on Civil and Political Rights³, in the sense of the right of any person

² The right to non-self-incrimination was recognized, at the normative level, for the first time in the US Constitution (Amendment V) – Cristinel Ghigheci, *Principiile procesului penal în noul Cod de procedură penală*, Universul Juridic Publishing House, Bucharest, 2014, p. 197.

³ Art. 14 para. (3) letter g) from the International Covenant on Civil and Political Rights of December 16, 1966, published in the Official Gazette of Romania no. 146 of November 20, 1974.

accused of an offense not to be "forced to testify against herself or plead guilty".

Although, both in the jurisprudence of ECtHR⁴, as well as in the doctrine⁵, a distinction is made between the right not to self-incriminate (or the privilege against self-incrimination) and the right to remain silent, we believe, in agreement with other authors⁶, that the two concepts are intertwined, between them there is a close connection. The right to remain silent is a side of the right not to self-incriminate, or, as has been appreciated in the legal literature⁷, if we look at the right not to self-incriminate in a more comprehensive sense, as a generic category, the right to remain silent appears as a species of it.

At the European level, the Convention for the Protection of Human Rights and Fundamental Freedoms does not contain an express provision regarding the right to non-self-incrimination, but as was observed in the jurisprudence of the ECtHR⁸, such a right derives from the content of art. 6 of the Convention⁹, being a consequence, but also a guarantee of the right to a fair trial and the presumption of innocence. For example, in the *Case of Saunders against the United Kingdom of Great Britain and Northern Ireland*, the Strasbourg court found that the privilege against self-incrimination has as its rationale "the protection of the person accused of committing a crime against abusive coercion exercised by the authorities, in order to avoid judicial errors and meeting the requirements of art. 6".

The indissoluble link between the privilege against self-incrimination (in

⁴ The ECtHR Judgment of 25 February 1993 pronounced in the *Case of Funke v. France*, document available online at <https://hudoc.echr.coe.int/tur/?i=001-57809>, accessed on June 7, 2023; The ECtHR Judgment of 8 February 1996 pronounced in the *Case of Murray v. the United Kingdom*, document available online at <https://www.rightsandsecurity.org/action/litigation/entry/murray-v-uni-ted-kingdom-application-no-18731-91-grand-chamber-1996>, accessed on June 7, 2023.

⁵ Mihail Udriou, Ovidiu Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, C.H. Beck Publishing House, Bucharest, 2008, pp. 664-668.

⁶ George Zlati, *Privilegiul contra autoincriminării și criptografia*, "Penalmente/Relevant" no. I/2016, p. 21, document available online at <https://www.revista.penalmente.ro/wp-content/uploads/2016/01/George-Zlati-privilegiul-autoincriminare-criptare-nr.-1-2016.pdf>, accessed on June 7, 2023.

⁷ Voicu Pușcașu, *Prezumția de nevinovăție*, Universul Juridic Publishing House, Bucharest, 2010, pp. 192-193.

⁸ For example, in the ECtHR Judgment of 29 November 1996 pronounced in the *Case of Saunders v. the United Kingdom*, document available online at <https://legeaz.net/hotarari-cedo/saunders-contr-regatul-unit-dhg>, accessed on June 7, 2023; The ECtHR Judgment of 21 December 2000 pronounced in the *Case of Heaney and McGuinness v. Ireland*, document available online at <https://legeaz.net/hotarari-cedo/heaney-si-mcguinness-contr-u9v>, accessed on June 7, 2023.

⁹ According to art. 6 paragraphs 1 and 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted in Rome on November 4, 1950, ratified by Law no. 30/1994, published in the Official Gazette of Romania no. 135 of May 31, 1994): "1. Everyone has the right to a fair, public and reasonable trial of his case by an independent and impartial court established by law, which will decide either on the violation of his civil rights and obligations, or on the merits of any criminal charge against him. (...). 2. Anyone accused of a crime is presumed innocent until proven guilty."

the sense of a person's right not to contribute to his own accusation) and the presumption of innocence was also confirmed by Directive (EU) 2016/343 of the European Parliament and of the Council¹⁰, in which it is regulated in expressly [art. 7 para. (1) and (2)] the right to remain silent and not to incriminate oneself: "(1) Member States shall ensure that suspected and accused persons have the right to remain silent in relation to the crime of which they are suspected or accused. (2) Member States shall ensure that suspected and accused persons have the right not to incriminate themselves".

On the other hand, considering the meaning that the ECtHR gives to the notion of "accusation in criminal matters"¹¹, it must be emphasized that the European court considered¹² that the privilege against self-incrimination is also granted to the witness, in the sense that "the witness also enjoys this right to the extent that the statement he makes could incriminate himself". Thus, in *the Serves against France Case*, the Strasbourg court recognized the existence of the right not to contribute to self-incrimination also for the person who has the capacity of a witness, in the conditions that he previously had the capacity of defendant in the same case. Although, in that case, the Court considered that in fact there was no violation of the right to non-self-incrimination, the case is relevant because the European court recognized the possibility of the witness to exercise such a right.

Therefore, at the European level, the right to non-incrimination is recognized to the same extent, both to persons suspected or accused of committing acts provided for by the criminal law (in the sense of *de jure* suspects), as well as to persons who have the procedural capacity of witnesses, but are suspected of committing such acts prior to an official notification (in the sense of *de facto* suspects)¹³.

3. Regulation of the right to non-self-incrimination in the legislation of European states

Analyzing the procedural-criminal legislation of several European states¹⁴, which apply the Romano-Germanic law system (of the inquisitorial

¹⁰ Directive (EU) 2016/343 of March 9 on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings, published in the Official Journal of the EU no. 65/1 of March 11, 2016.

¹¹ In the sense of an "autonomous" meaning, different from the qualifications given by the national legal systems of the member states.

¹² The ECtHR Judgment of October 20, 1997 pronounced in the *Case of Serves v. France*, document available online at <https://legeaz.net/hotarari-cedo/servesc-contra-frantei-ecx>, accessed on June 7, 2023.

¹³ As noted in paragraph 49 of the Decision of the Constitutional Court of Romania no. 236/2020, published in the Official Gazette of Romania no. 597 of July 8, 2020.

¹⁴ See, in this sense, paragraph 50 of the Decision of the Constitutional Court of Romania no. 236/2020.

model), we find the existence of express regulations on the witness' right to non-self-incrimination, including in the situation where he can be considered a *de facto* suspect.

Thus, the Criminal Procedure Code of *Bulgaria*¹⁵ provides that the witness will not be obliged to answer questions if by doing so he would incriminate himself.

In the *Czech Republic*, there is a more detailed regulation of the witness' right not to incriminate himself, providing¹⁶ that a witness has the right to refuse to testify if doing so would expose him to the danger of being held criminally liable; as an exception, it is specified¹⁷ that the testimony cannot be refused if it refers to a crime that the person has the obligation to report according to the Criminal Code.

Also, the criminal procedural legislation in the Czech Republic stipulates¹⁸ that a person who gives explanations to the police, except for the suspect, has the obligation to tell the truth and not to hide anything; however, that person may refuse to give explanations if doing so would expose them to the risk of being held criminally liable.

And in the content of the provisions that regulate the procedure before the court¹⁹ reference is made to the right of the witness not to contribute to his own accusation, noting that the document in which the testimony of a witness who exercised, during the trial, the right to refuse to testify can only be read if the witness has been informed of this right before the hearing and if he has unequivocally declared that he waives the exercise of his.

The Criminal Procedure Code of *Croatia* stipulates²⁰ that the witness is not obliged to answer certain questions if by doing so it could lead to consequences such as criminal prosecution for himself or a close relative. If the answers to those questions are relevant to prove that another person has committed a more serious crime, punishable by law with a sentence of at least 10 years, the prosecutor can declare that he will not initiate the criminal process if the witness refuses to testify to avoid prosecution²¹; in this situation, if the witness gives the statement, he or his close relatives will not be held criminally liable for committing the offense mentioned in the statement, but the witness may be held criminally liable, if applicable, for false testimony²².

At the same time, the procedural-criminal legislation in Croatia regulates

¹⁵ Art. 121 para. (1) of the Criminal Procedure Code of the Republic of Bulgaria.

¹⁶ In Section 100 para. (2) of the Criminal Procedure Code of the Czech Republic.

¹⁷ In para. (3) of Section 100 of the Code of Criminal Procedure of the Czech Republic.

¹⁸ Section 158 para. (8) of the Criminal Procedure Code of the Czech Republic.

¹⁹ Section 211 para. (4) of the Criminal Procedure Code of the Czech Republic.

²⁰ Art. 286 para. (1) of the Criminal Procedure Code of the Republic of Croatia.

²¹ As it appears from the content of para. (2) and (3) of art. 286 of the Criminal Procedure Code of the Republic of Croatia.

²² Art. 286 para. (4) of the Criminal Procedure Code of the Republic of Croatia.

the requirement²³ that the witness be informed that he is not obliged to answer certain questions if by doing so he would incriminate himself.

In *Estonia*, the Code of Criminal Procedure contains provisions²⁴ according to which a witness may refuse to give a statement if doing so would incriminate himself or a person close to him²⁵ with the commission of a crime or misdemeanor.

Also, with regard to the interrogation procedure, the Estonian code states²⁶ that, at the beginning of this activity, the suspect must be informed of the right to refuse to give statements and explained that the statements given can be used against him.

Procedural legislation from *Finland*²⁷ establishes the rule that any person may refuse to give a statement if doing so would risk prosecution or criminal investigation of himself or one of his relatives listed in the law. At the same time, before the court, in the situation where the witness has the right to refuse to testify, the president of the panel must inform him of that right²⁸, and if the witness does not exercise this right, he must be informed of the obligation to tell the truth like any other witness.

And the law governing criminal investigations in Finland²⁹ stipulates that the witness has the obligation to tell the truth and not to hide anything he knows about the act under investigation, but if he has the right to refuse to give a statement in accordance with the provisions of the Code of Judicial Procedure, this right must also be recognized during the criminal investigation.

According to the Code of Criminal Procedure in *France*³⁰, the person whom there are reasonable grounds to suspect has committed or attempted to commit a crime she may not be heard in relation to this until after she has been informed of her right to remain silent, along with the right to make statements and answer questions.

French legislation also uses the notion of "assisted witness"³¹ for the person targeted by a complaint or indicated by the victim as a possible suspect; at the first hearing of such a person³², the investigating judge must also inform him of his right to remain silent, in addition to the other rights provided by law.

²³ As it follows from the content of art. 288 para. (3) of the Criminal Procedure Code of the Republic of Croatia.

²⁴ Art. 71 para. (2) of the Criminal Procedure Code of the Republic of Estonia.

²⁵ Listed in para. (1) of art. 71 of the code: the descendants/ancestors of the suspect or the defendant, the sisters/brothers of the suspect or the defendant or the persons who are or were married to them etc.

²⁶ Art. 75 para. (2) of the Criminal Procedure Code of the Republic of Estonia.

²⁷ Section 18 para. (1) of Chapter 17 of the Code of Judicial Procedure of the Republic of Finland.

²⁸ According to Section 43 para. (2) of Chapter 17 of the Code of Judicial Procedure of the Republic of Finland.

²⁹ Section 8 para. (1) from Chapter 7 of Law no. 805/2011 regarding the criminal investigation.

³⁰ Art. 61-1 para. (1) point 4 of the Criminal Procedure Code of the French Republic.

³¹ Art. 113-2 of the Criminal Procedure Code of the French Republic.

³² According to art. 113-4 of the Criminal Procedure Code of the French Republic.

Also, the French code stipulates³³ that the statements made by a person who has been accused, indicted or convicted as a co-perpetrator or accomplice cannot be accepted under oath, either for the same crime with which the court was charged, or for another act related to the crime, without the hearing of this person under oath attracting nullity³⁴, if neither the prosecutor nor any of the parties objected to the taking of the oath.

In *Germany*³⁵ the right of any witness to refuse to answer questions is regulated if by doing so he would incur criminal or contravention liability, for himself or for one of the relatives listed in the law, and there is an obligation for the authorities to inform the witness about this right.

At the same time, considering the importance of guaranteeing the rights of the person interviewed (including the right not to self-incriminate), in 2017 the German legislator amended the Code of Criminal Procedure, obliging the investigating judge to appoint a lawyer for the suspect whenever that appears necessary³⁶.

And the Code of Criminal Procedure in *Italy* contains a number of provisions guaranteeing the right not to incriminate oneself. For example, it is stipulated³⁷ that in the situation where a person who does not have the status of accused or defendant is heard, and that person incriminates himself, the judicial authority must interrupt the hearing and inform the person in question about the fact that his statements may lead to the triggering of an investigation against him, as well as the fact that he has the right to appoint a lawyer; moreover, if the person in question had to be heard from the beginning in the procedural quality of accused or defendant, the statements given cannot be used.

Italian law³⁸ expressly regulates the right of the witness not to be compelled to testify regarding facts that could lead to the engagement of his own criminal liability.

And with regard to the proceedings before the court, the Italian Code of Criminal Procedure stipulates³⁹ that, during the court session, persons who have the procedural quality of defendant in a related process and are tried separately, not being able to have the procedural quality of witnesses, will be heard at the request of the parties or ex officio, but they have the right not to answer the questions asked.

In *Latvia*, the Law on Criminal Procedure⁴⁰ regulates the right to testify

³³ Art. 335 point 8 of the Criminal Procedure Code of the French Republic.

³⁴ Art. 336 of the Criminal Procedure Code of the French Republic.

³⁵ In Section 55 of the Code of Criminal Procedure of the Federal Republic of Germany.

³⁶ Thomas Weigend, *Defense Rights in European Legal Systems under the Influence of the European Court of Human Rights*, "The Oxford Handbook of Criminal Process" (edited by Darryl K. Brown, Jenia I. Turner, Bettina Weisser), Oxford University Press, 2019, p. 202.

³⁷ In art. 63 of the Code of Criminal Procedure of the Republic of Italy.

³⁸ Art. 198 para. (2) of the Code of Criminal Procedure of the Republic of Italy.

³⁹ Art. 210 of the Code of Criminal Procedure of the Republic of Italy.

⁴⁰ Section 602 of the Criminal Procedure Law of the Republic of Latvia.

or remain silent of the person who has the right to a lawyer; at the same time, it is stipulated that refusal to testify is not considered obstruction of justice or concealment of the truth.

Also, Latvian procedural law stipulates⁴¹ that the witness cannot be compelled to give statements against himself or family members; however, if the person who has the right to refuse to testify, having been informed of that right, chooses to testify, then his testimony will be considered as evidence⁴².

The *Luxembourg Criminal Procedure Code* provides⁴³ for the right of the detained person to give statements, to answer questions or to remain silent, as well as the right not to incriminate himself; the same provisions also apply to the person questioned as a suspect in the preliminary investigation or as a witness who becomes a suspect during the hearing⁴⁴.

At the same time, the criminal procedural legislation in Luxembourg expressly provides⁴⁵ that, in the preliminary phase of the trial, the suspect cannot be heard as a witness.

The Criminal Procedure Code of *the Low Countries (Netherlands)* provides⁴⁶ that a witness may refuse to answer a question, if his answer would expose him to the risk of being prosecuted or would expose a person from those listed by law⁴⁷.

In *Poland*, too, the right of the witness to refuse to answer a question is regulated⁴⁸, to the extent that the answer would attract criminal or misdemeanor liability for him or a relative.

The Criminal Procedure Code of *Portugal* contains the provision⁴⁹ that no witness may be compelled to answer any question if doing so would expose him to criminal prosecution.

In *Slovakia*, the right of the witness to refuse to give a statement is also regulated⁵⁰, if his testimony would expose him to the risk of being held criminally liable or if this risk would concern a person from those provided by law⁵¹.

The legislation from *Slovenia* states⁵² that a witness cannot be compelled to answer certain questions if doing so would result in him or a close relative

⁴¹ Section 110 para. (3) point 2 of the Criminal Procedure Law of the Republic of Latvia.

⁴² Section 131 para. (3) of the Criminal Procedure Law of the Republic of Latvia.

⁴³ Art. 39 para. (2) of the Criminal Procedure Code of the Grand Duchy of Luxembourg.

⁴⁴ As it appears from the content of art. 46 para. (2) and (3) of the Criminal Procedure Code of the Grand Duchy of Luxembourg.

⁴⁵ Art. 73 of the Criminal Procedure Code of the Grand Duchy of Luxembourg.

⁴⁶ Section 219 of the Code of Criminal Procedure of the Kingdom of the Netherlands.

⁴⁷ That is, a direct or collateral relative to the 2nd or 3rd degree, current or former spouse or current or former civil partners.

⁴⁸ In art. 183 of the Code of Criminal Procedure of the Republic of Poland.

⁴⁹ Art. 132 para. (2) of the Criminal Procedure Code of the Portuguese Republic.

⁵⁰ Section 130 para. (2) of the Criminal Procedure Code of the Slovak Republic.

⁵¹ Relative in direct line, brother/sister, adoptive parent, adopted child, husband/wife, partner or other person with whom they are in a family or similar relationship.

⁵² Art. 238 of the Criminal Procedure Law of the Republic of Slovenia.

being held criminally liable.

The Criminal Procedure Code of *Spain* stipulates⁵³ that the person suspected of having committed a criminal offense must be informed of the right not to incriminate himself, as well as of the right to remain silent, not to confess guilt and not to answer to questions.

In *Sweden* it is provided⁵⁴ that the witness may refuse to give a statement regarding a matter which would reveal that he or one of the relatives mentioned by law has committed a criminal or dishonorable act.

And the Criminal Procedure Code of *Hungary* contains the provision⁵⁵ that no one can be compelled to testify against himself.

In *Romania*, the current Code of Criminal Procedure⁵⁶ contains an article⁵⁷ with the marginal title "The right of the witness not to accuse himself", according to which "The witness statement given by a person who, in the same case, before the statement had or, subsequently, acquired the status of suspect or defendant cannot be used against him. The judicial bodies have the obligation to mention, on the occasion of recording the statement, the previous procedural quality".

Also, Romanian law provides⁵⁸ that any person can be heard as a witness, except for the parties and the main procedural subjects (i.e., the suspect and the injured person). Therefore, the person against whom criminal prosecution is ordered, and who thus acquires the procedural status of suspect, cannot be heard as a witness⁵⁹.

Comparing these legislations, we notice that most of the member states of the European Union enshrine the right to non-self-incrimination and regarding the witness, either through an express and concise regulation (as in the case of Bulgaria, Latvia or Hungary), or through a more detailed regulatory method (for example, the Czech Republic or Italy) or in an indirect way (Romania).

Moreover, this indirect way of recognizing the privilege against self-incrimination led to the declaration as unconstitutional⁶⁰ of the legislative solution contained in art. 118 of the Romanian Criminal Procedure Code, "which does not regulate the witness's right to remain silent and not to incriminate himself". This

⁵³ Art. 118 of the Criminal Procedure Code of the Kingdom of Spain.

⁵⁴ Section 6 of Chapter 36 of the Code of Judicial Procedure of the Kingdom of Sweden.

⁵⁵ Art. 7 para. (3) of the Criminal Procedure Code of Hungary.

⁵⁶ Law no. 135/2010, published in the Official Gazette of Romania no. 486 of July 15, 2010, with subsequent amendments and additions (entered into force on February 1, 2014).

⁵⁷ Art. 118 of the Romanian Criminal Procedure Code.

⁵⁸ Art. 115 para. (1) from the Romanian Criminal Procedure Code.

⁵⁹ As we showed previously, express provisions in this regard also exist in the Criminal Procedure Code of Luxembourg.

⁶⁰ By Decision of the Constitutional Court of Romania no. 236/2020.

is also the reason why, through the latest draft law for the amendment and completion of the Code of Criminal Procedure in Romania⁶¹, it is expected to introduce⁶² into the code the express provision according to which "*The witness has the right not to declare facts and factual circumstances which, if they were known, would incriminate him. The judicial body is obliged to inform him of this right before each hearing...*", as well as the provision: "*If the witness appears at the hearing accompanied by a lawyer, he can attend the hearing*". Also, through the same draft law, it is proposed to add to the Code⁶³ the provision regarding informing the witness of "*the right not to declare facts and factual circumstances which, if they are known, would incriminate him*".

4. Jurisprudential aspects regarding the recognition of the right to non-self-incrimination

Although, as we showed previously, in the European Convention for the Protection of Human Rights and Fundamental Freedoms there is no express regulation of the privilege against self-incrimination, in the judicial practice of the last two decades, both of the ECtHR and of the Romanian courts, a procedural right to non-self-incrimination was recognized not only with regard to the suspect or defendant, but also with regard to the witness.

Thus, in *the Weh Case against Austria*⁶⁴, the European court issued the so-called "theory of the three difficult choices that the person faces" the alleged perpetrator [namely: a) to be sanctioned for refusing to cooperate; b) to provide the authorities with information that would incriminate themselves; c) to lie and risk conviction for false testimony], it being unnatural to ask this person to make such a choice. In the same case, ECtHR held that no issue arises in connection with the privilege against self-incrimination if sanctions are used to obtain information from a person, so long as that person is not accused of a criminal act, so is not an alleged perpetrator.

In another case, *Loutsenko against Ukraine*⁶⁵, the Strasbourg court considered that there is a real vulnerability of the procedural position of the person heard as a witness in the first phase of the criminal trial, being deprived of the procedural guarantees recognized to the suspect or the accused; in this sense, the

⁶¹ The draft Law for the amendment and completion of Law no. 135/2010 on the Code of Criminal Procedure, as well as for the modification of other normative acts, document available online at <https://sgg.gov.ro/1/wp-content/uploads/2022/12/LG-19.pdf>, accessed on June 10, 2023.

⁶² By changing the content of art. 118, whose marginal name is proposed to become "The right of the witness to silence and non-self-incrimination".

⁶³ In the content of art. 120 ("Communication of rights and obligations").

⁶⁴ The ECtHR Judgment of April 8, 2004 pronounced in the *Case of Weh v. Austria*, document available online at <https://legeaz.net/hotarari-cedo/weh-contra-austria-oi5>, accessed on June 11, 2023.

⁶⁵ The ECtHR Judgment of December 18, 2008, pronounced in the *Case of Loutsenko v. Ukraine*, cited in paragraph 40 of the Decision of the Constitutional Court of Romania no. 236/2020.

Court held that "unlike a suspect or an accused, who enjoys, according to the applicable law, the right to remain silent, the witness had the obligation to disclose any information he knew, under penalty of criminal liability".

Also, in *the Shabelnik against Ukraine Case*⁶⁶, the European court held that a person already accused in a case and who was heard as a witness as a result of his request to bring certain facts to the attention of the authorities, on which occasion he self-declared in connection with the commission of a crime of murder, he has the status of "accused" and benefits from the privilege against self-incrimination. Moreover, although the state invoked the fact that the person in question did not have the status of a suspect and that this procedural status was acquired after completing a self-denunciation verification procedure, the Court gave a substantial meaning to the notion of suspect/accused, different from the formal meaning given by domestic legislation.

And in *the Brusco against France Case*⁶⁷, the European court ruled that the acquisition of the quality of the accused takes place not at the time when the national authorities officially confer this quality, but at the time when the authorities have plausible reasons to suspect the involvement of that person in the commission of the reported crime.

At the same time, in the *Case of Serghey Afanesyev against Ukraine*⁶⁸, it was appreciated that in the situation where, at the time of the hearing, the person being heard was already suspected based on the evidence administered until that moment, then the privilege against self-incrimination had to be recognized in the case, including from the perspective of the right to remain silent, even if the authorities did not order the prosecution of that person and only heard him as a witness.

We note that, more directly, also in the *Case of Ibrahim and others against the United Kingdom*⁶⁹, the European court found a violation of the right not to self-incriminate in relation to the statement of a witness who was not made aware of this right at the time the risk of self-incrimination was obvious.

On the other hand, also in the judicial practice of the Romanian courts⁷⁰ it was emphasized that "the initiative to show the witness that he has the right not

⁶⁶ The ECtHR Judgment of 19 February 2009 pronounced in the *Case of Shabelnik v. Ukraine*, cited in paragraph 40 of the Decision of the Constitutional Court of Romania no. 236/2020.

⁶⁷ The ECtHR Judgment of October 14, 2010, pronounced in the *Case of Brusco v. France*, document available online at <https://www.csm1909.ro/ViewFile.ashx?guid=30e50871-0362-4f40-8737-1d4e5e045162-InfoCSM>, accessed on June 11, 2023.

⁶⁸ The ECtHR Judgment of November 15, 2012, pronounced in the *Case of Serghey Afanesyev v. Ukraine*, cited in paragraph 40 of the Decision of the Constitutional Court of Romania no. 236/2020.

⁶⁹ The ECtHR Judgment of 13 September 2016 pronounced in the *Case of Ibrahim and others v. the United Kingdom*, document available online at <http://ier.gov.ro/wp-content/uploads/cedo/Ibrahim-s.a.-impotriva-Regatului-Unit.pdf>, accessed on June 11, 2023.

⁷⁰ Criminal decision of the High Court of Cassation and Justice no. 397 of November 21, 2014, document available online at <https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=124305#highlight=##>, accessed on June 11, 2023.

to incriminate himself had to be the judicial body possessing some data that offered suspicions regarding the involvement of the witness in committing a criminal act. Thus, a person summoned to be heard as a witness, in which capacity he has the obligation to tell the truth, if he incriminates himself could be indicted, and in the situation in which he would not tell the truth, avoiding self-incrimination, he would commit the crime of false testimony. This mechanism always leads, in fact, to the person being accused and it is unfair if, prior to the person's hearing as a witness, the criminal investigation bodies had indications that created the suspicion of his involvement in committing the act that is the subject of the hearing as a witness".

At the same time, the Romanian High Court of Cassation and Justice found⁷¹ a violation of the right to a fair trial when "although the prosecution has reasonable suspicions that a person is involved in a criminal activity, it does not inform the person of these aspects and 'chooses' alternative ways of listening to him, in order to later consider them as evidence and use this evidence against the same person".

The Romanian supreme court also held⁷² that "although finding out the truth must prevail, the prosecutor cannot attribute the quality of witness to a person whom he knows is involved in the commission of a criminal act, just so that, using the described mechanism, he ends up formulating a criminal charge".

Another jurisdictional aspect that needs to be highlighted in relation to the recognition of the witness's right to non-self-incrimination is also the one related to the conclusion established by the Constitutional Court of Romania⁷³, which has the effect of obligating the effective guarantee of this right by all Romanian judicial authorities, according to which, until the adoption of an appropriate legislative solution that ensures the constitutionality of the procedural-criminal provisions regarding the right of the witness not to accuse himself, "judicial bodies are to directly apply the provisions of art. 21 para. (3), art. 24 para. (1) and art. 23 para. (11) of the Constitution"⁷⁴.

⁷¹ Criminal decision of the High Court of Cassation and Justice no. 42/A of February 3, 2016, document available online at <https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=131018#highlight=##>, accessed on June 11, 2023.

⁷² Criminal decision of the High Court of Cassation and Justice no. 40/A of February 20, 2018, document available online at <https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=145760#highlight=##>, accessed on June 11, 2023.

⁷³ Paragraph 84 of the Decision of the Constitutional Court of Romania no. 236/2020.

⁷⁴ Art. 21 para. (3) - "The parties have the right to a fair trial..."; art. 24 para. (1) - "The right to defense is guaranteed"; art. 23 para. (11) - "Until the conviction remains final, the person is considered innocent" of the Constitution of Romania adopted in 1991, republished in the Official Gazette of Romania no. 767 of October 31, 2003.

5. Comparative analysis regarding the criminalization of false testimony in the legislation of European states

Making a comparison between the ways of criminalizing false testimony in the criminal legislation of several European states⁷⁵, we notice that most of them include this act in the category of crimes against the administration of justice/against justice/against the judicial system, with a few exceptions (Czech Republic, which considers them crimes against public order; Luxembourg, which qualifies them as crimes against public trust; Slovakia, which also includes them in the category of crimes against public order).

Thus, in *Bulgaria*⁷⁶ the legal content of the crime of false testimony, considered a crime against the administration of justice, is provided in the following form: "The person who, before a court or another competent body of the state authority, as a witness, either verbally, whether in writing, knowingly confirms an untruth or conceals a truth, shall be punished for perjury with imprisonment of up to 5 years".

It is also noted that the criminal law in Bulgaria expressly provides⁷⁷, in order to guarantee the right to non-self-incrimination, that the penalty for perjury is not applied "when the person, if he were to tell the truth, would accuse himself of committing the crime".

The Criminal Code of the *Czech Republic* criminalizes false testimony committed by a witness⁷⁸, in the chapter of crimes against public order (the division "Other interference in the activity of a public authority"), as the act of the person who, in this quality (as a witness) before the court or an authority international judicial proceedings, before a notary public or a prosecutor or a representative of the police force conducting an investigation in the framework of preliminary judicial proceedings or before an investigative committee of the Chamber of Deputies of the Parliament of the Czech Republic "a) makes untrue statements about a circumstance essential for the pronouncement of a decision or for the conclusions of the investigation commission of the Chamber of Deputies of the Parliament of the Czech Republic, b) hides such a circumstance"; the penalty is more severe (prison from 2 to 10 years) if the act caused considerable damage or was committed with the intention of causing serious damage⁷⁹.

⁷⁵ We referred to the same states that we referred to in Section 2 of this study (in which we analyzed the ways of regulating the right not to self-incriminate).

⁷⁶ Art. 290 para. (1) of the Criminal Code of the Republic of Bulgaria, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Bulgaria-RO.html>, accessed on June 12, 2023.

⁷⁷ In art. 292 para. (1) of the Criminal Code of the Republic of Bulgaria.

⁷⁸ Section 346 par. (2) of the Criminal Code of the Czech Republic, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Cehia-RO.html>, accessed on June 12, 2023.

⁷⁹ As it appears from the content of para. (3) of Section 346 of the Criminal Code of the Czech Republic.

The criminal law in *Croatia*⁸⁰ incriminates, as false testimony, in the chapter of crimes against justice, the act of the witness "who, in the preliminary criminal proceedings, in the proceedings before the court, before an international tribunal whose jurisdiction is accepted by the Republic of Croatia, in the contra-vention proceedings, before arbitration courts, in administrative proceedings, in proceedings before a notary public or in disciplinary proceedings" makes falsies testimony.

Interestingly, Croatian criminal law provides⁸¹ that the penalty for false testimony also applies to a party to the proceedings, other than the defendant, if the final decision in the respective proceedings is based on his or her false statement.

Moreover, the punishment for false testimony/perjury of any person heard, regardless of the procedural quality, is a characteristic of the American legal system, of an adversarial type (accusatory model).

We are thus witnessing a takeover, in the continental law system (inquisitorial model), of some adversarial elements specific to the common-law system; as stated in the legal literature⁸², in the modern criminal process in democratic societies "there is a tendency to mix" the two systems (accusatory and inquisitorial).

In *Estonia*, false testimony is also criminalized in the chapter of crimes against the administration of justice⁸³, as follows: "the act of the victim or the witness who, in a criminal, civil or administrative case, knowingly makes false statements under oath".

At the same time, Estonian criminal law, similar to Croatian legislation, also criminalizes "the act of a party to a lawsuit knowingly making false statements under oath."

The Criminal Code of *Finland* contains several provisions, in the chapter of crimes against the administration of justice⁸⁴, by which the act of a witness who, before the court or in an official procedure comparable to a trial, under oath

⁸⁰ Art. 305 para. (1) of the Criminal Code of the Republic of Croatia, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Croatia-RO.html>, accessed on June 12, 2023.

⁸¹ In para. (2) of art. 305 of the Criminal Code of the Republic of Croatia.

⁸² Sonet Saint-Louis, *L'élaboration des règles de preuve et de procédure au niveau des tribunaux pénaux internationaux dans le contexte de la diversité des systèmes juridiques nationaux: le cas de oui-dire*, Université du Québec à Montréal, Mars 2006, p. 26, document available online at <https://archipel.uqam.ca/2027/1/M9251.pdf>, accessed on June 12, 2023.

⁸³ Art. 320 (with the marginal title "False testimony and perjury") of the Criminal Code of the Republic of Estonia, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-UE-RO.html>, accessed on June 12, 2023.

⁸⁴ Chapter 15 Section 1 – Section 4, Section 13 of the Criminal Code of the Republic of Finland, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-UE-RO.html>, accessed on June 12, 2023.

or solemn declaration, is criminalized⁸⁵, as a false statement or concealment of a relevant circumstance, even due to negligence.

By way of exception, the provisions on false statement do not apply⁸⁶ if "it is impossible to uphold the truth without the danger of the person being held liable for a crime or similar illegal act".

In *France*, there are also a number of provisions, in the chapter dedicated to "touching the administration of justice"⁸⁷, which criminalizes false testimony. Thus, it is stipulated that "false testimony given under oath in front of any court or in front of an official of the judicial police acting in the execution of a rogatory commission is punishable by 5 years in prison and a fine of 75,000 euros"⁸⁸; the punishment is more severe (7 years in prison and a fine of 100,000 euros)⁸⁹ if the act "is caused by entrusting a gift or any reward".

And "false oath in civil matters" is punishable⁹⁰ by 3 years in prison and a fine of 45,000 euros.

Also, in the Criminal Code of *Germany* we find several texts⁹¹, in Section IX ("False statement and perjury") of the Special Part, which criminalizes the act of the witness who does not tell the truth.

It is noted that German law makes a distinction between "perjury" (meaning a false statement under oath) and "false statement" given without taking an oath.

It is also of interest that, in order to guarantee the privilege against self-incrimination, the German Criminal Code provides⁹² that, in the situation where a witness "has been guilty of perjury or false statement taken without oath, the court may reduce the punishment according to its own convictions and, in the case of the statement taken without oath, it may waive the application of the punishment if the perpetrator did not tell the truth for the purpose of removing the danger to a family member or to himself of being punished or subject to a safety measure".

⁸⁵ "False statement in court" - Section 1; "False statement in official proceedings" - Section 2; "False statement in court, in aggravated form" - Section 3; "False declaration due to negligence" – Section 4 of Chapter 15 of the Criminal Code of the Republic of Finland.

⁸⁶ According to Section 13 para. (1) of Chapter 15 of the Criminal Code of the Republic of Finland.

⁸⁷ Chapter IV of Title III ("On encroachments on state authority") of Book IV ("On crimes and misdemeanors against the nation, the state and public peace") of the Criminal Code of the French Republic, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Franta-RO.html>, accessed on June 12, 2023.

⁸⁸ Art. 434-13 of the Criminal Code of the French Republic.

⁸⁹ Art. 434-14 of the Criminal Code of the French Republic.

⁹⁰ According to art. 434-14 of the Criminal Code of the French Republic.

⁹¹ Paragraph 153 – paragraph 156; paragraph 161 of the Criminal Code of the Federal Republic of Germany, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Germania-RO.html>, accessed on June 12, 2023.

⁹² In paragraph 157 paragraph (1) of the Criminal Code of the Federal Republic of Germany.

In *Italy*, false testimony is criminalized⁹³, as a crime against the administration of justice, in the following wording: "He who, submitting a statement as a witness before the court, asserts falsely or denies the truth or hides, in whole or in part, what he knows about the facts on to which he is interrogated, he is punished with imprisonment from 2 to 6 years".

Also, Italian criminal law provides⁹⁴ that it is punishable by up to 4 years in prison "who, in the course of a criminal investigation, is requested by the prosecutor or the prosecutor of the International Criminal Court to provide information for the purpose of investigations, makes false statements or conceals, in whole or in part, what he knows about the facts on which he is heard".

The Criminal Code of *Latvia* provides, also in the chapter devoted to crimes against the administration of justice, that a person who, as a witness, intentionally provides false testimony is punished with a temporary prison sentence, community service or a fine⁹⁵; the sanction is more severe if the deed was committed during criminal proceedings prior to the trial or in court, in cases concerning some serious or particularly serious crimes or if serious consequences were caused⁹⁶.

At the same time, the Latvian law criminalizes,⁹⁷ as a refusal to testify, the deed of the person who, as a witness, "unreasonably refuses to give statements in a pre-trial procedure or in a trial".

Criminal law in *Luxembourg* criminalizes⁹⁸ perjury, distinguishing⁹⁹ between the act of "false testimony" and "perjury"; at the same time, a distinction is made, in terms of the severity of the punishment, between false testimony/perjury in criminal matters, in correctional matters, in contravention matters, respectively in civil and administrative matters.

The Criminal Code of *the Low Countries (Netherlands)*, which divides crimes into two categories (serious and minor), criminalizes false testimony in the category of serious crimes¹⁰⁰, and the punishment provided by the law is more severe "if the false statement is made to the detriment of a defendant or a suspect in a criminal trial".

⁹³ Art. 372 of the Criminal Code of the Republic of Italy, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Italia-RO.html>, accessed on June 12, 2023.

⁹⁴ Art. 371-bis of the Criminal Code of the Republic of Italy.

⁹⁵ Section 300 para. (1) of the Criminal Code of the Republic of Latvia, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-UE-RO.html>, accessed on June 12, 2023.

⁹⁶ Section 300 para. (2) of the Criminal Code of the Republic of Latvia.

⁹⁷ In Section 302 of the Criminal Code of the Republic of Latvia.

⁹⁸ In Title III ("Crimes and offenses against public trust") of Book II of the Criminal Code of the Grand Duchy of Luxembourg, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-UE-RO.html>, accessed on June 12, 2023.

⁹⁹ Art. 215 - art. 226 of the Criminal Code of the Grand Duchy of Luxembourg.

¹⁰⁰ Section 207 – section 207b of the Criminal Code of the Kingdom of the Netherlands, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Olanda-RO.html>, accessed on June 12, 2023.

In *Poland*, declaring untruths or concealing the truth by testifying is criminalized, in the chapter devoted to crimes against the justice system of the Criminal Code, without giving it a distinct name, thus: "The person who, testifying as evidence in a judicial procedure or in another procedure carried out under the law, declares untrue aspects or hides the truth, is sanctioned with the penalty of deprivation of liberty from 6 months to 8 years"¹⁰¹.

It is noted that the law in Poland provides¹⁰² for a lighter sanction (prison sentence from 3 months to 5 years) for the person who "declares untrue facts or hides the truth for fear of criminal liability for himself or his close relatives".

Also, the Polish Criminal Code establishes, as a condition for the criminal liability of the person testifying, the need to inform him of the liability for false testimony¹⁰³ and provides¹⁰⁴ that a person who has given false testimony in ignorance of the right to refuse to testify or to refuse to answer questions shall not be punished.

The Criminal Code of *Portugal* contains provisions¹⁰⁵ relating to the punishment, as a crime against the administration of justice, of the act of a person who, as a witness, before the court or official competent to receive the testimony as evidence, gives false testimony; the same penalty (i.e., imprisonment from 6 months to 3 years or a minimum fine of 60 days) applies to the person who, without good cause, refuses to provide the information. The penalty is more severe (prison up to 5 years or fine up to 600 days) if the act was committed after the perpetrator took an oath and was warned of the criminal consequences of perjury.

Slovakia criminalizes false testimony and perjury¹⁰⁶, as a form of violation of public authority (in the chapter dedicated to crimes against public order in the Special Part of the Criminal Code), distinguishing between the two notions ("false testimony" and "perjury") depending on the performance an oath. Thus, the person who, as a witness before a prosecutor or a police body or before a judge of an international authority recognized by the Slovak Republic, gives a false statement or conceals information relating to a fact that is materially relevant to the decision is punished with imprisonment from one to 5 years; the person who makes such a false statement or conceals such information as a witness testifying under oath shall be punished with imprisonment from 2 to 5 years.

¹⁰¹ Art. 233 paragraph 1 of the Criminal Code of the Republic of Poland, document available online at <https://codexpenal.just.ro/downloads/Cod-Penal-Polonia-RO.pdf>, accessed on June 12, 2023.

¹⁰² In paragraph 1a of art. 233 of the Criminal Code of the Republic of Poland.

¹⁰³ As it appears from the content of art. 233 paragraph 2 of the Criminal Code of the Republic of Poland.

¹⁰⁴ In paragraph 3 of art. 233 of the Criminal Code of the Republic of Poland.

¹⁰⁵ Art. 360 of the Criminal Code of the Portuguese Republic, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Portugalia-RO.html>, accessed on June 12, 2023.

¹⁰⁶ Paragraph 346 of the Criminal Code of the Slovak Republic, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Slovacia-RO.html>, accessed on June 12, 2023.

The Criminal Code of *Slovenia* provides¹⁰⁷, in the chapter on crimes against the administration of justice, that the witness who gives false testimony in front of the court in an open trial for the commission of a crime, during the parliamentary investigation or within disciplinary or administrative procedures is punishable by a prison sentence of up to 3 years.

Spain criminalizes false testimony, in the category of crimes against the judiciary, with the following legal content: "The witness who hides the truth in his testimony in a judicial case will be punished with imprisonment from 6 months to 2 years and a fine from 3 to 6 months"¹⁰⁸; the penalty is more severe (imprisonment from one to 3 years and a fine from 6 to 12 months)¹⁰⁹ if the perjury is filed against the defendant in a criminal case for the crime or if, as a result of the false testimony, a conviction was pronounced.

The Criminal Code of *Sweden* contains provisions¹¹⁰ criminalizing perjury, false accusation and other false statements. Thus, the person who, under oath, gives false information or conceals the truth is punished for perjury¹¹¹. The person who negligently¹¹² commits the act of giving false information or concealing the truth is also punished for false deposition.

The criminal law in *Hungary* criminalizes false testimony¹¹³, in the chapter of crimes against the judicial system, thus: "The witness who gives false testimony before the authority regarding an essential circumstance in a case or who hides evidence is guilty of perjury".

The Hungarian Code distinguishes, in terms of the amount of the applicable penalty, between false testimony committed in a criminal case (prison from one to 5 years) and false testimony in a contravention action or other judicial action or in a disciplinary action (prison up to one year).

It is also worth noting the provision¹¹⁴ according to which the person "whose testimony would incriminate himself or his family members in a criminal act" or "who may refuse to testify for any other reason, but was not informed accordingly before being heard" cannot be the subject of criminal prosecution for perjury.

¹⁰⁷ Art. 284 ("False testimony") of the Criminal Code of the Republic of Slovenia, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Slovenia-RO.html>, accessed on June 12, 2023.

¹⁰⁸ Art. 458 para. (1) of the Criminal Code of the Kingdom of Spain, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Spania-RO.html>, accessed on June 12, 2023.

¹⁰⁹ As it appears from the content of art. 458 para. (2) of the Criminal Code of the Kingdom of Spain.

¹¹⁰ Chapter 15 of the Criminal Code of the Kingdom of Sweden, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Suedia-RO.html>, accessed on June 12, 2023.

¹¹¹ According to art. 1 of Chapter 15 of the Criminal Code of the Kingdom of Sweden.

¹¹² Art. 3 of Chapter 15 of the Criminal Code of the Kingdom of Sweden.

¹¹³ Section 272 of the Criminal Code of Hungary, document available online at <https://codexpenal.just.ro/laws/Cod-Penal-Ungaria-RO.html>, accessed on June 12, 2023.

¹¹⁴ Section 275 par. (1) of the Criminal Code of Hungary.

And in the current Criminal Code of *Romania*¹¹⁵ false testimony is criminalized¹¹⁶, in the chapter devoted to crimes against the administration of justice, with the following content: "The act of the witness who, in a criminal, civil case or in any other procedure in which witnesses are heard, makes false statements or does not say what he knows about the essential facts or circumstances about which he is questioned shall be punished with imprisonment of from 6 months to 3 years or with a fine".

In the aggravated version¹¹⁷ (for example, when the act is committed by a witness with protected identity) the punishment provided by the law is more severe (prison from one to 5 years).

The only cause of non-punishment provided by the Romanian Criminal Code in the case of false testimony¹¹⁸ is its withdrawal, under certain conditions (for example, in criminal cases before detention, arrest or initiation of criminal proceedings).

The Romanian criminal law in this matter is completed with the procedural-criminal provisions that establish the obligation of the witness¹¹⁹ to tell the truth, as well as the obligation of the judicial bodies¹²⁰ to inform the witness, before his hearing, that he must give truthful statements, drawing his attention to the fact that the crime of false testimony is punishable according to the law.

Consequently, we find that all these states criminalize false testimony, sometimes under a different name (for example, false statement or perjury) and consider it a serious offense, punishing it either with a prison sentence (Belgium, Czech Republic, Italy, Hungary), either with the prison sentence alternatively with the fine (Portugal, Romania), or even with the prison sentence cumulatively with the fine sentence (France, Spain).

Also, analyzing comparatively the legislations of these states, we notice that only some of them provide, as a cause for the removal of criminal liability (in Bulgaria, Finland, Hungary) or for the reduction of the penalty or for renouncing the application of the penalty (France, Poland), the situation in which a person would commit the crime of false testimony in order not to incriminate himself.

6. Conclusions

In the doctrine developed around the Romanian criminal and procedural-criminal legislation from 1969 (the criminal and criminal procedure codes prior

¹¹⁵ Law no. 286/2009 regarding the Criminal Code, published in the Official Gazette of Romania no. 510 of July 24, 2009, with subsequent amendments and additions.

¹¹⁶ Art. 273 para. (1) from the Romanian Criminal Code.

¹¹⁷ Para. (2) of art. 273 of the Romanian Criminal Code.

¹¹⁸ As it appears from the content of para. (3) of art. 273 of the Romanian Criminal Code.

¹¹⁹ Art. 114 para. (2) lit. c) from the Romanian Criminal Procedure Code.

¹²⁰ Art. 120 para. (2) lit. d) from the Romanian Criminal Procedure Code.

to the current ones) it was appreciated¹²¹ that "if the witness, in order not to incriminate himself for the commission of a crime, makes false statements or intentionally omits certain essential circumstances about which he was asked, he would not commit the crime of false testimony", because "he cannot be asked to be objective, at the same time that, above him, he looms the criminal sanction".

We believe that this opinion, correct at the time, when there were no other possibilities of guaranteeing the privilege against self-incrimination, must be viewed nuanced today, in relation to the current regulation of the way of carrying out the criminal prosecution (respectively, to the obligation to start the criminal prosecution *in rem*, even if the author is indicated or known¹²²), as well as the current provisions of the Romanian Constitution that the judicial bodies have the obligation to apply directly in order to ensure the right to non-self-incrimination, as established by the Constitutional Court of Romania in Decision no. 236/2020.

Therefore, even if, for now, the Romanian Code of Criminal Procedure does not expressly enshrine a right of the witness not to declare facts and factual circumstances by which he would incriminate himself, there is an obligation of the judicial bodies to inform the person cited as a witness this right under the provisions of the Constitution [art. 21 para. (3), art. 24 para. (1) and art. 23 para. (11)] and by virtue of the principle of loyalty to the administration of evidence.

In this context, we appreciate that the privilege against self-incrimination cannot exonerate the witness from criminal liability for committing the crime of false testimony if he makes untrue statements, especially if these statements influence the way the case is resolved and the judicial body does not verify them by corroborating with other evidence.

Besides, and from the legislative amendment proposal of the content of art. 118 of the Romanian Criminal Procedure Code¹²³ it appears that the right of the witness not to accuse himself (the right to remain silent and not to incriminate himself) is manifested by his possibility to refuse to answer certain questions or not to state certain factual facts and circumstances and not by the possibility of making false statements.

In conclusion, considering the importance of the unified interpretation and application of the legal provisions in criminal and procedural-criminal matters, we propose, as a judicial practice solution, the apprehension of the commission of the crime of false testimony and the engagement of criminal liability in the situation where the alleged perpetrator of a crime, heard as a witness (therefore, *de facto* suspect), makes false statements by which he tries to influence the criminal investigation, not exercising his right to remain silent.

¹²¹ Avram Filipaş, *Infraţiuni contra înfăptuirii justiţiei*, Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1980, pp. 60-61.

¹²² Art. 305 para. (1) from the Romanian Criminal Procedure Code.

¹²³ Through the latest draft law for the amendment and completion of the Code of Criminal Procedure in Romania.

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New Trends in Comparative Law: Cross-Fertilisation

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Abstract

Comparative law has earned the right to be considered an autonomous science, on the one hand, and a working tool in dialogue with other legal systems, on the other. In the present study we aim to analyse the legal nature of the new cross-fertilisation trend, to identify the forms in which it takes shape, and to identify how the concept under analysis operates in the national legal order. Our working hypothesis is as follows: cross-fertilization is a phenomenon specific to comparative law which has its effects also in the case law of national supreme courts. The methods used are case study, literature review and the application of the theory of functionalism through comparative, presumptive and evaluative functions.

Keywords: *cross-fertilization, comparative law, method.*

JEL Classification: K10

1. Introduction

Modern comparative law has departed from the traditional approach of studying legal families and has broadened its scope, so that the contemporary approach is characterised as global. In all this context of recalibration of comparative law studies, new terms such as legal transplantation, legal acculturation, or, as in the case of our research topic, the phenomenon of *cross-fertilization*, are making their place.

From a methodological point of view, the present research is applied research: the first part theorizes and classifies the studied phenomenon, i.e. *cross-fertilization*, and the second part analyses how the studied concept works in the national legal system. In full respect of the comparative law method, we will insist in the first part of the research on the understanding of the term "comparative" in the legal orders of origin, i.e. in the states or international structures where we have already identified its applicability. In the last part of the research, devoted to the conclusions, we will highlight the advantages, disadvantages and possible dangers that the use of the *cross-fertilization* method may have on the national legal order.

A few quotes from judges of either the Norwegian or Canadian Supreme Court have energised the legal world. The Chief Justice of Norway said that "it is the duty of national courts (...) to introduce new legal ideas from outside into the

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decisions of national courts"². At the same time, a judge of the Supreme Court of Canada said: "more and more courts, especially in the common law world, are turning to the decisions of other courts, especially when they have to give reasons on human rights issues"³.

2. Terminology: method or phenomenon?

Legal phenomena, in general, are characterized by heterogeneity, the legal world everywhere having known a whole variety of such legal manifestations, from classical (codification, constitutionalism) to modern (constitutionalization, neoconstitutionalism)⁴. Theorists of legal phenomenology⁵ distinguish between primary and secondary legal phenomena; power and non-power phenomena; institution and case phenomena; contentious and non-contentious phenomena.

Legal sociology⁶ recognises the existence of a legal phenomenon if conditions are met, such as: conferring an objective character to the subjectivity of the legislator and the judge; generating secondary phenomena; going beyond the stage of a model, scheme or set of rules.

The summation of all the above conditions removes the *cross-fertilization* tendency from the notion of phenomenon, bringing it closer to the legal nature of a new method specific to comparative law. Specifically, the aim of this new method is to fill in the gaps in the case-law interpretation of one State by having recourse to the case-law interpretation of another State. In detail, where there are no legal solutions, solutions already identified in the case law of other states are borrowed. We stress that borrowing from similar legal orders, i.e. legal systems with common elements, is necessary so that the legal transplant can be easily assimilated into the borrowing legal order.

3. Definition

Following the research undertaken, and considering that the definition that we will set out is a perfectible one, we believe that this new concept, *cross-fertilization*, borrowed from the palette of medical terms⁷, is defined as follows:

² Carsten Smith, *The Supreme Court in Present day Society*, in *The Supreme Court of Norway* 96, p. 134 *apud* A-M Slaughter, "A Global Community of Courts" in *Harvard International Law Journal*, vol. 44, no. 1, Winter 2003, pp. 191-219.

³ Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of Rehnquist Court*, *apud* A-M Slaughter, *op. cit.*, p. 234.

⁴ Andra Iftimiei, *Constitutionalization in Romanian and French Criminal Law*, Ed. Universul Juridic, Bucharest, 2016, p. 15.

⁵ Jean Carbonnier, *Sociologie juridique*, Ed. Armand Colin, Paris, 1972, pp. 111 - 140.

⁶ *Ibid.*

⁷ Moreover, comparative law is not limited to the singular borrowing of this term from the medical world, as the use of the term legal transplant is already well-known. For details, see Andra Iftimiei, *Comparative Law. Contemporary Legal Systems*, 2nd ed., Universul Juridic, Bucharest, 2020, p. 93.

a method of comparative law, consisting in the identification, analysis and application of legal solutions from the jurisprudence of other countries, in the national legal order, with the aim of harmonising the law, as an effect of globalisation.

4. Classification

Cross-fertilization, according to the criterion of the mode of communication between courts, has been classified⁸ into:

- a. first degree horizontal communication;
- b. second degree horizontal communication;
- c. vertical communication.

a. *First-degree horizontal communication* as a species of *cross-fertilization* is used quite frequently and consists of using precedents from states with a very large number of decisions on a given topic.

This category includes the way in which constitutional courts act, which engage in a dialogue to identify common standards, resorting "explicitly or implicitly to foreign precedent (...) when a national court is faced with a new issue, unprecedented in domestic jurisprudence"⁹.

The role assumed by such a communication is twofold: on the one hand, to implement the same provisions in practice through uniform standards; and on the other hand, to justify, in the alternative, the conclusion reached by analysing and citing the case law of other constitutional courts.

In its case law, the Constitutional Court of Romania has frequently referred, since its establishment¹⁰, to the decisions of other constitutional courts, especially when the subject of constitutionality review concerned fundamental rights and freedoms.

A recent example is reflected in the recitals of the Decision of the Constitutional Court of Romania, no. 534 of 18 July 2018¹¹. The subject of the exception of unconstitutionality concerned the provisions of Art. 277 para. (2) and (4) of the Civil Code, its authors claiming that the non-recognition of marriages between persons of the same sex, legally concluded abroad, is a violation of the

⁸ Tatiana Cardoso Squeff, "'Cross-fertilization" as a neocolonial tool? Impressions deriving from the *Artavia Murilo vs. Costa Rica* case before the Inter-American Court of Human Rights" in *Revista da Faculdade de Direito do Sul de Minas*, 2019, special issue, pp. 107-131.

⁹ Tudorel Toader, Marieta Safta, *Dialogue of Constitutional Judges*, Ed. Universul Juridic, Bucharest, 2015, p. 131.

¹⁰ By way of example: Decision No. 107 of 1 November 1995 (the Court referred to the examples of Austria and Germany); Decision No. 140 of 19 November 1996 (the Court referred to the example of Hungary); Decision No. 113 of 20 July 1999 (the Court referred to a decision in the case law of the French Constitutional Council), etc. For details, see Tudorel Toader, Marieta Safta, *op. cit.*, pp. 133-138.

¹¹ Published in the Official Monitor of Romania no. 842 of 3 October 2018, consulted in the publication *Jurisprudența obligatorie pentru aplicarea Codului civil*, 3rd edition, Ed. Hamangiu, Bucharest, 2022, pp. 17-28.

right to intimate, family and private life and discrimination on the basis of sexual orientation. The Court ruled that the legal provisions at issue "are constitutional in so far as they allow the right of residence on the territory of the Romanian State, under the conditions stipulated by European law, to spouses - citizens of Member States of the European Union and/or citizens of third countries - from same-sex marriages concluded or contracted in a Member State of the European Union". In so ruling, the Constitutional Court carried out a comparative study on the legislation of European states, showing that thirteen EU Member States have recognised same-sex marriage, while also referring to the Austrian Constitutional Court's judgment of 4 December 2017, which annulled the provisions of the Civil Code limiting the right to marry heterosexual couples¹². Moreover, the Constitutional Court of Romania also refers to states outside the European area in order to argue its position, showing that same-sex marriage is authorised by constitutional case law in the United States of America¹³, by Supreme Court Judgment of 26 June 2015 - *Obergefell et al. V. Hodges, Director, Ohio Department of Health, et. al.* or in Taiwan¹⁴, by Constitutional Court of the Republic of China (Taiwan) Judgment of 24 May 2017, *J. Y. Interpretation No. 748, on the consolidated petitions of Huei-Tai-12674 and Huei-Tai-12771*.

Another example, which supports our assertions regarding the existence of horizontal *cross-fertilization* at the level of constitutional courts, is reflected in the decision of the Constitutional Court of Romania no. 637 of 19 October 2021¹⁵. Essentially, the provisions of Article 102, para. (3) of the Code of Criminal Procedure, the object of the criticism being the exclusion of illegally obtained evidence, as well as the need to remove material evidence from the case file. In support of the operative part of the decision, the Constitutional Court pointed out in its recitals that the institution of the nullity of evidence implies "the physical removal of material evidence from the case files in countries such as Austria, Croatia and Slovenia"¹⁶. Moreover, the Court cited the decision of the Constitutional Court of Slovenia No. U-I-92/96, stating that allowing the Slovenian judge, under the rules of criminal procedure, to take cognisance of evidence declared inadmissible is a violation of the right to a fair trial.

b. *second-degree horizontal communication* consists of the invocation and use of judicial precedent between European courts or even between international courts (for example, the dialogue between the European Court of Human Rights and the Court of Justice of the European Union).

In this regard, the decision of the European Court of Human Rights

¹² Judgment G258-259/2017-9 of the Constitutional Court of Austria in *Mandatory Case Law for the Application of the Civil Code*, p. 23.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Published in the Official Monitor of Romania no. 1155 of 6 December 2021, consulted in the work *Jurisprudența obligatorie pentru aplicarea Codului de procedura penală*, 4th edition, Ed. Hamangiu, Bucharest, 2022, pp. 29-34.

¹⁶ *Ibid.*

*M.S.S. v. Belgium and Greece*¹⁷. The applicant is an Afghan national who entered the European Union via Greece before arriving in Belgium, where he applied for asylum. In accordance with the Dublin II Regulation, the Belgian Aliens Office requested the Greek authorities to take responsibility for his asylum application. The complainant complained in particular about detention conditions and living conditions in Greece and claimed that he had no effective remedy under Greek law in respect of these complaints. He also complained that Belgium had exposed him to the risks arising from the shortcomings of the Greek asylum procedure and the poor detention and living conditions to which asylum seekers are subjected in Greece. He also claimed that there is no effective remedy under Belgian law in relation to these complaints.

As regards Greece, the Court found a violation of Article 13 in conjunction with Article 3 of the Convention, due to deficiencies in the examination by the Greek authorities of the applicant's asylum application and the risk that he would be expelled directly or indirectly to his country of origin without a serious examination of the merits of his application and without access to an effective remedy. As regards Greece, the Court also held that there had been a violation of Article 3 (prohibition of degrading treatment) of the Convention, both because of the conditions of the applicant's detention and because of his living conditions in Greece. These are measures taken in proceedings before the Court which are binding on the State concerned. They are without prejudice to subsequent decisions of the Court on the admissibility or merits of the cases in question. If the Court grants the application for interim measures, the expulsion of the applicant is suspended while the Court examines the application (however, the Court follows the applicant's situation and may lift the measure during the examination of the case). See also fact sheet on "Provisional measures". Finally, under Article 46 (Binding force and enforcement of judgments) of the Convention, the Court held that it was incumbent on Greece, without delay, to carry out a substantive examination of the applicant's asylum application which met the requirements of the European Convention on Human Rights and, pending the outcome of that examination, to refrain from expelling the applicant.

In a Grand Chamber judgment of 21 December 2011, the Court of Justice of the European Union (CJEU) adopted a similar position to that of the European Court of Human Rights, making explicit reference to the judgment in *M.S.S. v. Belgium and Greece* (see in particular paragraphs 88-91 of the CJEU judgment).

References of this nature to similar interpretations are intended to reinforce the view of the issuing court and also to create a unified view of similar issues before the court.

At the same time, the dialogue of judges at the international level has surprised when the Supreme Court of the United States of America has repeatedly resorted to jurisprudential elements from other continents. By way of example,

¹⁷ Accessed on 25 October 2022 at https://echr.coe.int/Documents/FS_Dublin_ENG.pdf.

we mention the famous *Roe v. Wade* decision¹⁸ on the right to abortion, in which the U.S. Supreme Court took into account studies from countries where this practice is legalised to show that the mortality rate of women who have had their pregnancies terminated is no higher than the average¹⁹.

Even if these references by the United States Supreme Court to the laws of other states substantially influenced the decision, they are not in the legal nature of directly applicable rules of law, but are presented as arguments with "persuasive authority"²⁰.

Thus, foreign law sources may come as a confirmation of the solution to which the panel of the Supreme Court of the United States of America is heading, as they may even constitute one of the legal foundations of the decision.

The case of *Lawrence v. Texas*²¹ remains eloquent in exemplifying the use of foreign sources of law by the United States Supreme Court to inform its decision²². Essentially, the Supreme Court declared unconstitutional the text of the law criminalising same-sex sexual acts, and the decision was based, among other things, on Justice Kennedy's references to the British Parliament's 1957 recommendation for the repeal of a law similar to the one in question, as invoked in the case law of the European Court of Human Rights in the decisions *Dudgeon v. United Kingdom*²³, *Modynos v. Cyprus* or *Norris v. Ireland*²⁴.

Mr. Jeffrey Dudgeon, aged 35, is a shipping clerk living in Belfast, Northern Ireland. Mr. Dudgeon is gay, and his complaints are mainly directed against the existence of laws in Northern Ireland which have the effect of making certain homosexual acts between consenting adult men a criminal offence.

¹⁸ On June 24, 2022, the United States Supreme Court ruled in a reversal of case law in *Dobbs v. Jackson Women's Health* that the previous interpretation in *Roe* is wrong and that the correct view of abortion is the one that places the act within the tort of criminal trespass. In *Dobbs v. Jackson Women's Health*, the references to other states' interpretations are even more obvious, as states such as China, Canada, Iceland, the Netherlands, Singapore, Vietnam are mentioned and listed - see <https://caselaw.findlaw.com/court/us-supreme-court/19-1392.html>, accessed 14 June 2023.

¹⁹ See footnote 21, where reference is made to English law - <https://caselaw.findlaw.com/court/us-supreme-court/410/113.html#21>, accessed 14 June 2023.

²⁰ Régis Bismuth, "L'utilisation de sources de droit étrangères dans la jurisprudence de la Cour Suprême des États-Unis" in *Revue internationale de droit comparé*, no. 1/2010, pp. 105-133, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673153, accessed on 14 June 2023.

²¹ The full text of the decision is available at <https://caselaw.findlaw.com/court/us-supreme-court/539/558.html>, accessed on 14 June 2023.

²² In short, the facts were as follows: responding to a weapons incident at a private residence, Houston police entered Petitioner Lawrence's apartment and observed him and another adult male, Petitioner Garner, engaging in a private, consensual sexual act. The petitioners were arrested and convicted of deviant sexual intercourse in violation of a Texas law that prohibits two people of the same sex from engaging in certain intimate sexual conduct.

²³ The decision dates back to 1981 and the full text is available at https://www.hr-dp.org/files/2013/09/09/CASE_OF_DUDGEON_v._THE_UNITED_KINGDOM_.pdf, accessed 15 June 2023.

²⁴ Second section of the Decision, paragraph 22, text available at <https://caselaw.findlaw.com/court/us-supreme-court/539/558.html>, accessed 14 June 2023.

The complainant was, according to his own testimony, consciously homosexual from the age of 14. For some time, he and others have campaigned to bring the law in Northern Ireland into line with that in force in England and Wales and, if possible, to achieve a minimum age of consent lower than 21.

On 21 January 1976, police went to Mr. Dudgeon's address to execute a warrant under the Misuse of Drugs Act 1971. A quantity of cannabis was found during the search of the home which subsequently led to the charging of another person with drug offences. Personal documents, including correspondence and diaries, belonging to the complainant describing homosexual activities were also found and seized. As a result, he was asked to report to a police station where, for approximately four and a half hours, he was questioned on the basis of these documents about his sex life. The police investigation file was sent to the Director of Public Prosecutions. It was examined with a view to initiating proceedings for the offence of gross indecency between men. The Director, in consultation with the Director of Public Prosecutions, decided that it would not be in the public interest to initiate proceedings. Mr. Dudgeon was so informed in February 1977 and his papers, with annotations marked on them, were returned to him.

Specifically, Justice Kennedy demonstrated, by reference to the case law of the European Court of Human Rights, that the sanctioning of intimate acts between persons of the same sex has no legal basis, as long as such manifestations take place in privacy, infringing, first and foremost, the right to privacy.

c. vertical communication is defined as the citation of cases from international courts to the case law of national courts.

Vertical communication is one of the methods used, including by the High Court of Cassation and Justice, through frequent references to elements of the case law of the European Court of Human Rights. The examples referred to below are based exclusively on chronological criteria, with a preference for the most recent decisions.

Thus, we have identified and presented the Decision of the First Civil Chamber of the High Court of Cassation and Justice (hereinafter High Court) with no. 513/2023²⁵, in which the High Court refers to several decisions of the case law of the European Court of Human Rights, namely *Perez de Rada Cavanilles v. Spain*, p. 49; *Sotiris et Nikos Koutras ATTEE v. Greece*, p. 20, *RTBF v. Belgium*, p. 71-72, 74. All these references are intended to support the idea that "the appellate court has shown excessive formalism, which must be avoided from the perspective of respect for the right of access to a court"²⁶, and that "a particularly rigorous interpretation given by domestic courts to a procedural rule, with excessive formalism, may be such as to deprive the parties of their right of access

²⁵ The full text of the decision is available at <https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=202193#highlight>, accessed on 16 June 2023.

²⁶ *Ditto*.

to a court"²⁷.

In another recent decision, the High Court, in Criminal Division Decision No 92/A of 1 March 2023²⁸, referred to the Niemietz v. Germany case (1992) of the European Court of Human Rights to emphasise that "there is no reason to exclude professional activities from the scope of the concept of privacy, given that most people at work make and maintain contact with the outside world. It is often difficult to draw a line between a person's professional and personal life or to distinguish between a professional and a private act"²⁹. In this case, the defendant placed the tape recorder in the office of the injured person B in order to record private conversations between him and the other injured persons. The private nature of the conversation results from aspects relating both to the accepted participants and the place where the conversation took place - the office of the injured person B in which he was working alone, even if it was in the premises of a public institution, the injured persons were entitled to protection of any conversation in respect of which they alone could decide who could hear it or who could participate in it³⁰. Once again, the High Court appeals to the case law of the European Court of Human Rights to support its point of view, thus falling within the persuasive reasoning by using European interpretations.

Without prejudice to the principle of legality or the principle of legal certainty, the Supreme Court often refers to the interpretations given by higher European courts, as an expression of the fact that, at least at the level of the European Community, similar interpretations are needed for the guarantees established in European documents.

5. Conclusions

The section dedicated to the conclusions is designed to answer the working hypothesis formulated at the beginning of the research.

Thus, we started from the idea that the legal nature of the concept of *cross-fertilization* is that of a legal phenomenon³¹. The working hypothesis turned out to be partly true, since after the analysis carried out in our research we identified legal valence of phenomenon only at the level of the jurisprudence of constitutional courts, while in the case of other types of courts *cross-fertilization* has the role of a method of comparative law.

As regards the role that *cross-fertilization* plays, we believe that it is a method of working of real use in *common law* countries, where judicial precedent

²⁷ *Ibid.*

²⁸ The decision concerns violation of privacy in the manner provided for in Article 226(2) of the EC Treaty. (1), (5) of the Criminal Code. Typicality and is available at <https://www.scj.ro/1093/Detailiijurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=202438#highlight=##>, accessed on 16 June 2023.

²⁹ *Ditto.*

³⁰ *Ibid.*

³¹ Anne-Marie Slaughter, *op. cit.*

is also the main source of law. In civil law states, to accept that reference can be made to case law solutions from other states, i.e. that a solution from another system of law can be implemented in a different legal order, would violate the principle of legal certainty. However, there is nothing to prevent the possibility of analysing solutions from other legal systems being transplanted by means of legislation. In this way, it will still be necessary to consult the case law of other states, especially the state from which the legal institution has been transplanted, in order to access the interpretation offered by the courts that have actually worked with the newly introduced institution in another legal order.

Even if globalisation leads to the shaping of law as a network in which legal systems are intertwined, a norm only exists and is only valid in its own legal order. The most permissive area from this point of view, i.e. that of the circulation of legal solutions, is undoubtedly the field of human rights, where documents with international value have led to a unitary and, in some cases, uniform interpretation.

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Organized Crime - Aspects of Comparative Law

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Abstract

The article analyzes the main features of organized crime at the current stage. It is noted that currently in the scientific literature there is still no comprehensive definition of organized crime that meets the requirements of modern realities, thus the author defines the concept of organized crime as one of the varieties of crime. Also, the article examines the criminal liability and the constitutive elements of the crime of forming an organized criminal group, under a comparative aspect. The relevance of the chosen theme is due to the current state of the fight against crime. Currently, one of the most important tasks facing not only law enforcement agencies, but also the entire society as a whole.

Keywords: *organized crime, crime, criminality, organized criminal group.*

JEL Classification: K14, K33

1. Introduction

The contemporary concept of organised crime is heterogeneous and contradictory. If we focus on the general perception of this concept we can state: organised crime equals a formal, homogeneous, multifunctional, criminal organisation that aims to undermine and dominate the legal institutions of society. Thus, organised crime is essentially perceived as a social reality in which legal and criminal structures are integral parts of the same corrupt social, political and economic system, regardless of the type of actions promoted or the types of organisations supporting this system.²

Invoking the statements of the great German politician Konrad Adenauer, about going through transition eras, the author of a work on organized crime in Romania, stated that our country needs "enlightened legislation"³ for the same purpose. Indeed, it is only by providing the judicial authorities with the appropriate tools, provided by appropriate legislation, that it will be possible to mount an effective response in the fight against crime in general and organised crime and corruption in particular.

Current international concerns regarding the multidisciplinary training of

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² Pareniuc, Alexandru and Ghimpu, Andrei, *Legal-criminal and investigative aspects of the fight against criminal organization*. In: „Scientific Annals of the Academy "Stefan cel Mare" of MAIRM: legal sciences", Number 15/2022, p. 152-153.

³ Pitulescu, Ion, *Organized Crime in Romania*. National Publishing House, Bucharest 1996, p. 387.

magistrates and police officers in charge of forensic investigations highlight the fundamental importance of linking traditional criminal investigation work with the evidence produced through the use of high-performance forensic equipment. Technical progress and the transition to the computerised society⁴ point to the impact that information technology will have in the near future in the legal field in general and in forensic investigation in particular.

2. Development and formation of the concept of organised crime

Organised crime is of great theoretical and practical importance, enabling the activation of ways to counter this negative phenomenon. In the literature there are numerous attempts to reveal the content of the term "organised crime". In legal science, there is a discrepancy between criminological and legal concepts of organised crime.

The criminological concept should reveal the social essence and main features of this phenomenon as a special form of crime, while the legal concept should establish rather formal signs that are subject to fixation by the law enforcement bodies. In addition, legal concepts should be more formalised, concise, with an emphasis on legal aspects. Some authors consider that it is possible to give an exact definition of organised crime only in the criminological sense.

I would like to note that when defining the concept of organised crime, a number of scholars focus on the economic, entrepreneurial orientation of organised criminal activity, whereas organised crime is not part of economic crime. It is necessary to consider organised crime as a broader phenomenon, including economic crime, drug trafficking, illegal trafficking in arms and natural resources, banditry, extortion, human trafficking, support for convicts, corruption, etc.

In the definitions of organised crime, where the concept is revealed by organised criminal activity, it is not about crime but about criminal activity. This is the so-called activity approach to the concept of organised crime. It seems that the term '*criminal activity*' has a different content than the term '*crime*'.

The definition of the notion of "*organised crime*" and especially its definition in the overall structure of crime has been and still is the subject of numerous studies by specialists in the field. The multiple concerns for explaining this phenomenon are justified by the imperative need to know its dimensions and implications in society and, on this basis, to be able to establish the most effective actions and measures for prevention and combating it, both at legislative and practical level by law enforcement agencies.⁵

In most EU Member States there is no specific legislation defining and

⁴ Toffler, Alvin, *Power Shift*. Antet Publishing House, Bucharest, 1995, p. 66.

⁵ Telipan, Vitalie, *The notion and features of organized crime in European legislation*, in „Scientific Annals of the Academy "Stefan cel Mare" of MAIRM”, Number XII(2)/2012, p. 151.

punishing organised crime. Moreover, there is also an inconsistency of terminology in the international legal literature, with the following terms being used interchangeably: '*organised crime*', '*organised crime*', '*organised criminal group*', '*cross-border crime*', '*transnational organised crime*'.⁶

In a broad sense, "*criminality*" means a set of anti-social manifestations that violate the provisions of the rule of law and attract the coercive force of the state, while "*crime*" is defined in criminal law as any violation of criminal law. It seems obvious that the notion of "*crime*" relates to phenomena in general, while the notion of "*crime*" relates to any violation of criminal law. However, the notion of '*crime*' has been and is the subject of numerous definitions that are considered useful but not universal. This is why some of the authors reviewed state that assessing the concept and law of organised crime is like trying to chase an eel.⁷

Currently, analysis of definitions in the international legal literature reveals that some authors use the concept of organised crime to define the relationships between illegal organisations, while others use the concept to define a group of illegal activities carried out by certain agents. Organised crime is thus defined as a non-ideological enterprise involving several people, organised on a hierarchical basis with at least three levels, set up with the aim of gaining profit and power, involving mainly illegal but also legal activities.⁸

Also, in relation to the idea of enterprise, organised crime is defined as a criminal enterprise of long duration, working rationally to profit from illicit activities, its continued existence maintained through the use of force, threats, monopolistic control and/or corruption of public officials.⁹

There are authors who refer to the activities carried out, in which sense they define organised crime as those criminal and other illegal activities committed by large and continuous multi-enterprise organisations, which have mainly criminal purposes and use corruption and violence in their activities.¹⁰

According to specialists in countries where organised crime has deep roots and is permanently present in the daily life of society, it is defined by the existence of groups of criminals structured around the idea of carrying out illegal

⁶ Lefter, Alina, *Organized Crime. Doctrinal approaches and international legal instruments*. In: Juridice.ro of 11.04.2017, <https://www.juridice.ro/504857/criminalitatea-organizata-abordari-doc-trinare-si-instrumente-juridice-internationale.html>.

⁷ Blakesley, Ch. L., *Criminal justice systems in the face of the challenge of organised crime*. In: „Revue internationale de droit pénal”, 1-2/1998, p. 36.

⁸ Abadinsky, H., *Organized crime*, 7th ed. Wadsworth Thomson Learning Publishing, Belmont, CA, 2007, p. 6.

⁹ Albanese, J., *Risk assessment in organized crime*. In: „Journal of Contemporary Criminal Justice” no. 3(24)/2008, p. 263.

¹⁰ Maltz, M. D., *Measuring the effectiveness of organized crime control efforts*, Huntsville, Texas, 1990, p. 24.

activities in conspiracy, with the main aim of obtaining illicit profits at particularly high levels.¹¹

In the international legal literature, there are two main theories of organised crime, namely the organisational theory and the network theory.¹² Organisational theory uses certain concepts that define the criminal organisation, namely: size (number of people), formalisation (strict rules applicable within the organisation), vertical differentiation (hierarchical leaders), horizontal differentiation (subordinates).

In network theory, the focus is not on the formal structure of the criminal organisation, but on the way in which the individuals interact, i.e. the way in which they relate to each other, individuals who each have a specific role in the functioning of the network.¹³

V. Bujor and V. Guțuleac¹⁴ define a criminal organisation as "a stable union of persons (up to 30-40 persons) who have the intention to engage in criminal activities (the intention to commit both specific crimes and unspecified types of crimes)". It should be noted that limiting a criminal organisation to a certain maximum number of participants is not correct, as the legal definition does not establish any criteria in this respect. On the other hand, the minimum number of participants in a criminal organisation cannot be less than 4 persons, which is clear from the interpretation of Articles 46 and 47 of the Criminal Code.

In German doctrine, the following notion of criminal organisation is present: "The intentional commission of crimes for profit and power by two or more persons, working together for a prolonged or indefinite period of time, carrying out predetermined tasks by using commercial or business-like structures, by using violence or other means of intimidation, or by exerting influence on politicians, public administration, judicial or economic authorities".¹⁵

V. D. Malkov defines a criminal organisation as 'a stable formation of a permanent character, with a branching hierarchical structure, comprising relatively autonomous criminal syndicates differentiated by functional role, whose activity is coordinated and directed by a single administrative body, and whose purpose is to commit serious and particularly serious crimes'.¹⁶

A. I. Dolgova defines a criminal organization as "a symbiosis (associa-

¹¹ Voicu, Costică, Voicu, Adriana Camelia, Geamănu, Ioan, *Organized crime in the business field*. Ed. Pildner, Târgoviște, 2006, p. 18.

¹² Von Lampe, Klaus, *The interdisciplinary dimensions of the study of organized crime*, „Trends in Organized Crime”, no. 9(3)/2006, pp. 77-95.

¹³ Potter, G. W., *Criminal organizations: vice, racketeering, and politics in an American city*, Prospect Heights, IL: Waveland Press, 2015, p. 116.

¹⁴ Buzhor, V. G., Gutsulyak, V. I., *Group crime: methodological foundations of study and classification*. Publisher F.E.-P. "Central Typography", Chisinau, 1998, p. 37-40.

¹⁵ Hans, Lilie, *Specific Offences of Organized Crime and German, Criminal Law*. „Revue Internationale de Droit Penal”, Ed. Eres, Paris, 1998, p. 142.

¹⁶ Malkov V.D., *Criminology*, Publishing house Norma, Moscow, 2004, p. 404.

tion) of criminal gangs, other forms of criminal groups, commercial organizations, institutions, enterprises, having a common leadership. The leader of the criminal organisation carries out the general management of the organisation, but is somewhat neutral towards each individual element, realising his aims through his subordinates, who run separate structures".¹⁷

At the same time, criminal organisations compatible with the concept of organised crime are characterised by: the establishment of criminal unity; the existence of a leader and a well-defined internal hierarchy; the specialisation of the members of the organisation in specific criminal activities; the use of specific mechanisms to neutralise social control.¹⁸

According to author Al. Borodac: "the distinctive features of the criminal organization are the gathering of already formed criminal groups, their maximum cohesion, with a character of permanent stability and the presence of well-defined criminal intentions. Within the criminal organisation, lasting organisational links are usually formed, with the criminal organisation planning criminal activities with a view to committing more than one crime, without limiting itself to committing a rather impertinent crime which requires lengthy preparation. For its members, criminal activity becomes a hobby, i.e. a trade, profession, occupation".¹⁹

D. Miclea states that: "in the opinion of most researchers, organized crime, as a phenomenon, is a creation of the last centuries of this millennium and has appeared at various points around the globe (U.S., China, Japan, Italy) under specific historical and social conditions and with specific causes, under various names: mafia, yakuza, triads, etc. These criminal organisations have tackled high-profit crime in the past, often involving prostitution, trafficking of all kinds (drugs, live meat, weapons, contraband), gambling, etc."²⁰

The presence of different views on the concept of organized crime is a quite natural phenomenon, but even if several authors have expressed different opinions on the enunciation of the concepts formulated above, related to organizational theory or network theory, they agree on some essential features of organized crime:

- the presence of a material basis, which manifests itself in the creation of a 'common ground';
- the conduct of criminal activity on the basis of the perpetrators' rally,
- the distribution of criminal roles between them, creating a hierarchical system of relationships in which the organisers are removed from direct criminal activity;

¹⁷ Dolgova A.I., *Criminology*. Norma Publishing House, Moscow, 2005, p. 598.

¹⁸ Pareniuc, Alexandru, Ghimpu, Andrei, *op. cit.*, 2022, p. 153-154.

¹⁹ Borodac, Al. a.o., *Manual of Criminal Law. General part*. "Stephan the Great" Academy Publishing House, Chişinău, 2005, p. 330.

²⁰ Miclea D., *Fighting organized crime - evolution, typologies, legislation, particularities. Course*. Volume I. Published by the Ministry of Administration and Interior, Bucharest, 2004, p. 9.

- the existence of rules of conduct, traditions, "laws" and penalties for breaking them;
- creating an information base, which is made up of information from various sources;
- targeted development of protective measures against exposure;
- profit through crime;
- stimulates the vices of human society such as corruption, extortion, violence, drug addiction, prostitution;
- corruption of public officials in order to maintain immunity;
- monopoly on certain markets;

Using the above essential features of organised crime, it can be defined as a negative social phenomenon, which is a criminal (and in some cases non-criminal) activity of obtaining, increasing and legalising criminal proceeds, hierarchically organised criminal formations, using corrupt links to achieve their goals and having the highest degree of latency due to the functioning of their own system of neutralising all forms of social control.

3. Investigation of the offence of setting up an organised criminal group under comparative aspects

Romania. According to Romania's Criminal Code, criminal liability for setting up an organised criminal group is incriminated in Article 367: "(1) Initiating or setting up an organised criminal group, joining or supporting, in any form, such a group shall be punishable by imprisonment for a term of one to five years and disqualification from exercising certain rights. (2) Where the offence for the purposes of the organised criminal group is punishable by law by life imprisonment or imprisonment for more than 10 years, the penalty shall be imprisonment for a term of three to ten years and disqualification from exercising certain rights. (3) If the facts provided in para. (1) and para. (2) were followed by the commission of a crime, the rules regarding the competition of crimes shall apply. (4) Persons who have committed the acts referred to in para. (1) and para. (2), if they denounce the organized criminal group to the authorities before it has been discovered and the commission of any of the offences falling within the scope of the group has begun. (5) If the person who committed one of the acts provided for in para. (1)-(3) facilitates, during the criminal investigation, the discovery of the truth and the prosecution of one or more members of an organized criminal group, the special limits of the punishment are reduced by half. (6) Organised criminal group means a structured group of three or more persons, formed for a certain period of time and to act in a coordinated manner for the purpose of committing one or more offences."²¹

Analyzing from a legal-criminal point of view, we find that according to

²¹ Criminal Code of Romania, <https://codexpenal.just.ro/laws/Cod-Penal-Romania-RO.html>.

art. 367 of the Romanian Criminal Code:

- the non-punishment clause provided by the legislator in Article 367, para. (4) of the Romanian Criminal Code applies only if the organized criminal group has not been discovered prior to the denunciation and the commission of any of the offences falling within the scope of the group has not been started.

- criminal liability applies, inter alia, for joining or supporting, in any form, an organised criminal group.

- the form of criminal participation, taking on conventional connotations²², retains the name of organised criminal group, moving away from the typical forms of organised criminal group and criminal organisation typical of the states in the former Soviet area. It should also be noted that the definition of the notion of organised criminal group in Article 367, para. (6) of the Romanian Criminal Code is well realised, being taken from the United Nations Convention against Transnational Organised Crime.

- as a novelty, the article criminalising the establishment of an organised criminal group includes mitigating circumstances of criminal liability in the case of facilitating the criminal investigation, finding out the truth, holding the members of the reference group criminally liable.

- the Romanian Criminal Code does not provide for criminal liability for the establishment, association or management of a terrorist entity.

Russian Federation. Criminal Code of the Russian Federation Article 210 provides for criminal liability for organising or participating in a criminal community (criminal organisation). In para. (1) of art. 210 of the Criminal Code of the Russian Federation provides: "Creation of criminal community (criminal organization) for the purpose of committing one or more serious or particularly serious crimes or the conducting of this community (organization) or its constituent structural subdivisions, as well as the coordination of the actions of organized groups, the creation of stable links between them, the development of plans and the creation of conditions for the commission of crimes by organized groups, the division of spheres of criminal influence and/or criminal proceeds between these groups". Para. (1¹) of the same article states: "Participation in the meeting of organisers, leaders (leaders) or other representatives of criminal communities (criminal organisations) and (or) organised groups to commit at least one of the offences referred to in the first paragraph of this article". Paragraph 2 of the aforementioned Article establishes liability for: "Participation in the criminal community (criminal organisation)". In para. (3) of the reference article establishes criminal liability for: "The acts referred to in para. (1), (1¹) and (2) of this Article, committed by the person with the use of the status of service". Para. 4 of Art. 210 of the Criminal Code of the Russian Federation stipulates: "The acts, provided

²² United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000 (ratified by Law of the Republic of Moldova No. 15 of 17.02.2005). http://www.antitrafic.gov.md/public/files/Conventia_ONU_crima_transdroguri.pdf.

for in para. (1) or (1¹) of this article, committed by the person occupying the leading position in the criminal hierarchy".²³

It should also be taken into account that the Russian legislator has provided for separate criminal liability under Article 205.5 of the Criminal Code of the Russian Federation for organising the activity of a terrorist organisation and participating in the activity of such an organisation. Thus, we conclude that the organization of the terrorist community does not cover the organization of the activity of a terrorist organization.

Republic of Ukraine. The Criminal Code of Ukraine provides for criminal liability for the creation, leadership and participation in criminal organisation in Article 255. According to Art. 255, para. (1) of the Criminal Code of Ukraine: "Establishment of a criminal organization, leadership of such an organization or its structural units - shall be punishable by deprivation of liberty for a term of 7 to 12 years, with confiscation of property". Article 255, para. (2) of the Criminal Code of Ukraine provides for criminal liability for: "Participation in a criminal organisation, - punishable by deprivation of liberty for a term of 5 to 12 years, and confiscation of property". Paragraph 3 of the same article states: "The acts referred to in paragraphs 1 and 2 of this article committed by a person in a position of responsibility, using his or her official position, - shall be punishable by deprivation of liberty for a term of 8 to 13 years and confiscation of property". Paragraph 4 states that: "The creation of a criminal community, i.e. the joining of two or more criminal organizations, the leadership of such a community, - shall be punishable by deprivation of liberty for a term of 10 to 15 years, with confiscation of property". Art. 255, para. (5) CC of Ukraine: "The acts referred to in paragraphs 1, 2 or 4 of this Article, committed by a person who exercises criminal influence or is a person who is in the status of a subject of increased criminal influence, including the status of "thief in law", - shall be punished by deprivation of liberty for a term of 12 to 15 years, with confiscation of property". According to Art. 255, para. (6) of the same Code: "A person, other than the organizer or leader of the criminal organization, shall be released from criminal liability for the commission of an offence referred to in paragraph 2 or 3 of this Article, if he or she has voluntarily informed a person of the suspicion of the commission of this offence and of the creation of or participation in a criminal organization, and has actively contributed to its disclosure".²⁴

France. In the French Criminal Code, the criminalisation of the creation of an organised criminal group is also made in the criminal law of 1810²⁵.

²³ Criminal Code of the Russian Federation No. 63-FZ dated 06/13/1996 (as amended on 07/01/2021), http://www.consultant.ru/document/cons_doc_LAW_10699/5649f81c02c8558e22ab26207b2834c0d047d6fb/.

²⁴ Criminal Code of Ukraine dated April 5, 2001, No. 2341-III (as amended and supplemented as of July 28, 2022). https://continent-online.com/Document/?doc_id=30418109.

²⁵ Bogdanova, E. Yu., *The Criminal Code of France as a guarantor of the observance of the principle of legality*. In: „Socio-economic Phenomena and Processes”, Vol. 9, No. 10/2014, p. 171.

French criminal law does not separately criminalise liability for the creation or management of a criminal organisation. The notion of "organised gang" appears in Articles 132-71, which constitutes: "any group formed or any conspiracy established with a view to the preparation, characterised by one or more material acts, of one or more offences"²⁶, the logical conclusion is that it is necessary to punish complex forms of organised crime.

Pașca Ioana-Celina states: "The French Criminal Code of 1994 defines the concept of "organized crime" by two distinct criminal rules, namely association to commit crimes and organized gang".²⁷ Thus, participation in a group formed or a conspiracy established with a view to preparing offences such as crimes against humanity (Article 212-3), the crime of eugenics (Article 214-4), acts of deliberate violence against persons (Article 222-14-2), war crimes (Article 461-18), is punishable separately according to the penalties laid down in the above articles. The commission of acts in organised gangs is also punishable in a particular way, in the sense of aggravated criminal liability for the basic offence committed: art. 214-3 CC of France for eugenics and cloning, art. 222-4 CC of France for torture and acts of barbarism, art. 222-35, para. (2) CC of France for the manufacture of narcotics, etc.

Analysis shows that French criminal law does not provide for independent criminal liability for the form of criminal participation in the creation or management of a criminal organisation, but there are other forms of association which are punishable separately (groups formed for the preparation of certain crimes, offences or misdemeanours, or, in general, of crimes or offences of a certain gravity, as in the case of criminal associations) either as qualified components of the offence or as aggravating circumstances.

The conclusions are as follows:

- the French Criminal Code does not separately criminalise liability for the creation or management of a criminal organisation.
- the Criminal Code criminalizes criminal groups or memberships that are formed only for a certain type of offences, listed in the criminal legislation, and the activity of criminals forming a group is punishable only for offences/crimes punishable by imprisonment of more than 5 years.
- the legislator provides both for criminal groups and for those criminalising terrorist groups, the way in which release from criminal punishment is achieved.
- the legal person is the subject of the offence.
- leading, organising or participating in a group for the preparation of acts of terrorism is considered in isolation from the criminal acts related to criminal groups.

²⁶ Criminal Code of the French Republic. <https://codexpenal.just.ro/laws/Cod-Penal-Franta-RO.html>.

²⁷ Pașca I.-C., *Combating organised crime in French criminal law: conspiracy and organised gangs*. In: „Annals of the West University of Timisoara”, 2014, p. 69.

Canada. By comparison, in the Criminal Code of Canada, the legislator has set out the forms for carrying out certain procedural actions, for example, the evidence to be submitted by the prosecution, the powers of the Attorney General of Canada or the Attorney General of a province, and the factors to be considered by the court in rendering judgment.

Article 63 of the Canadian Criminal Code criminalizes unlawful assembly of persons. In this section "unlawful assembly" is defined as: "(1) An unlawful assembly is a gathering of 3 or more persons who, intending to accomplish a common purpose, assemble in such a manner or act in such a manner as to cause persons in the vicinity of the assembly to fear, on reasonable grounds, that they will: (a) disturb the public peace; or (b) cause, unnecessarily and without reasonable grounds, other persons to disturb the public peace. (2) Persons lawfully assembled may become an unlawful assembly if they act with a common purpose in a manner which would make it unlawful to assemble in such a manner and for such a purpose. (3) Persons are not unlawfully assembled unless they have assembled for the purpose of protecting the dwelling of any of them from persons who threaten to destroy and break into it by scoping committing a condemnable offence". According to Art. 66, para. (1) CC of Canada: "Whoever is part of an unlawful assembly is guilty of the offence punishable by summary conviction". In accordance with Art. 467.1, para. (1) of the Canadian Criminal Code: "Criminal organization means a group, organized in a particular manner, that (a) is composed of three or more persons within or outside Canada, and (b) has as its primary purpose or basic activity the facilitation or commission of one or more serious offences which, if committed, would result in the direct or indirect obtaining of a material benefit, including a financial benefit, for the group or any member of the group. This does not include a group of persons who meet sporadically for the immediate commission of a crime".²⁸

4. Analysis of criminal liability for setting up an organised criminal group

According to Article 367 of the Romanian Criminal Code, the initiation or formation of an organised criminal group, membership or support, in any form, of such a group is punishable by imprisonment from one to five years and prohibition of the exercise of certain rights. When the offence for the purposes of the organised criminal group is punishable by law with life imprisonment or imprisonment for more than 10 years, the penalty shall be imprisonment for a term of 3 to 10 years and disqualification from exercising certain rights, and if the acts referred to in the preceding paragraphs were followed by the commission of a criminal offence, the rules on concurrence of offences shall apply. imprisonment for a term of 1 to 5 years and disqualification from exercising certain rights (Art. 367,

²⁸ Criminal Code of Canada. <https://laws-lois.justice.gc.ca/eng/acts/C-46/>, consulted on 1.03.2023.

para. (1) of the Romanian Criminal Code); imprisonment from 3 to 10 years and prohibition to exercise certain rights (art. 367, para. (2) Romanian Criminal Code).²⁹

A comparative analysis of the criminal laws of other countries shows that the offence of creating or directing a criminal organisation is punishable:

- for the offence established in Article 284 of the Criminal Code of the Republic of Moldova, to imprisonment from 8 to 15 years for committing the acts referred to in paragraph (1) and to imprisonment for a term of 15 to 20 years or to life imprisonment for the commission of the offences referred to in paragraph (2).³⁰ The creation of a criminal organisation is an activity aimed at establishing an organisation for the purpose of committing a specific type of crime or criminal activity which differs from banditry (Article 283 of the Criminal Code) in that it is not based on the commission of armed attacks, but on activities aimed at obtaining economic, financial or political advantages and interests. The leadership of a criminal organisation involves the management of the criminal activity of the entire criminal organisation and is characterised by the acquisition of information necessary for the functioning and existence of the criminal organisation, the preparation of its activity plan, the establishment of the conduct and punishment of its members, etc.³¹

- with deprivation of liberty for a term of 12 to 20 years, with a fine of up to 5 million rubles or in the amount of the convicted person's salary or other income for a period of up to five years or without it and with limitation of liberty for a term of 1 to 2 years (Art. 210, para. (1) CC of the Russian Federation).³²

- deprivation of liberty for a term of 7 to 12 years, with confiscation of property (Art. 255, para. (1) CC of Ukraine).³³

- imprisonment from 10 to 15 years (art. 416-bis Italian Criminal Code)³⁴.

- fine of up to \$25,000, imprisonment for a term not exceeding 20 years, or both, and special forfeiture (sec. 1962-1968, U.S.).³⁵

- not less than 3 years but not more than 10 years of imprisonment for a

²⁹ Criminal Code of Romania. <https://codexpenal.just.ro/laws/Cod-Penal-Romania-RO.html>, consulted on 1.03.2023.

³⁰ Criminal Code of the Republic of Moldova No. 985 of 18.04.2002. Official Gazette of the Republic of Moldova No. 72-74 of 14.04.2009, Art. 47, para 1.

³¹ Barbăneagră A., *Criminal Code of the Republic of Moldova*. Commentary. Sarmis Publishing House, Chisinau, 2009, p. 171.

³² Criminal Code of the Russian Federation No. 63-FZ dated 06/13/1996 (as amended on 07/01/2021), http://www.consultant.ru/document/cons_doc_LAW_10699/5649f81c02c8558e22ab26207b2834c0d047d6fb/, consulted on 1.03.2023.

³³ Criminal Code of Ukraine dated April 5, 2001, No. 2341-III (as amended and supplemented as of July 28, 2022). https://continent-online.com/Document/?doc_id=30418109, consulted on 1.03.2023.

³⁴ Criminal Code of the Republic of Italy, <https://codexpenal.just.ro/laws/Cod-Penal-Italia-RO.html>, consulted on 1.03.2023.

³⁵ US Criminal Code. <https://www.law.cornell.edu/uscode/text/18/part-I>, consulted on 1.03.2023.

fixed term (Article 294 of the People's Republic of China Criminal Code).³⁶

- the maximum punishment prescribed for the most serious crime committed by the members of the group, including moharebeh, i.e. "(a) death penalty (hanging), (b) crucifixion, (c) amputation of the right hand and left leg, (d) exile" (Article 130 Penal Code of the Islamic Republic of Iran).³⁷

The experience of other states in sanctioning the organisational activity of organised criminal (criminal) groups and participation in their activity shows the following limits of criminal sanctions:

- 10 years' imprisonment and a fine of 150 000 euros (for offences punishable by 10 years' imprisonment) and 5 years' imprisonment and a fine of 75 000 euros (for offences punishable by at least 5 years' imprisonment) - Article 450-1 of the French Criminal Code.³⁸

- imprisonment for up to 5 years or a fine (Art. 129, para. (1) of the Federal Republic of Germany).³⁹

- imprisonment of any description for a term not exceeding six months, or with fine, or with both (Section 120 B of the Indian Penal Code).⁴⁰

- imprisonment from 3 to 7 years (for setting up or organising), imprisonment from 1 to 5 years (for participation), imprisonment from 5 to 15 years (in case of arming the group) - art. 416 Italian Criminal Code.⁴¹

- imprisonment with hard labour for a term not exceeding 3 years or a fine not exceeding 200,000 yen (Article 7 of Japan Law No. 77/1991).⁴²

Article 3 of the Council of the European Union Framework Decision on the fight against organised crime divides the penalty for "participating in the activity of the criminal organisation" from "the activity of concluding an agreement on the activity of the criminal organisation"⁴³. In the first case, a maximum term of imprisonment of at least 2 to 5 years is provided for; in the second case - a term of imprisonment for the offence for which the agreement is made, or a maximum

³⁶ Criminal Law of the People's Republic of China. Order of the President of the People's Republic of China, nr. 83, promulgated by National People's Congress on 14.03.1997. <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/5375/108071/F-78796243/CHN5375%20Eng3.pdf>, consulted on 1.03.2023.

³⁷ Books I & II of the New Islamic Penal Code, adopted by the Legal Affairs Commission of the Islamic Consultative Assembly on April 21, 2013. New Haven: Iranian Human Right Documentation Centre, 2014, p. 31.

³⁸ Criminal Code of the French Republic. <https://codexpenal.just.ro/laws/Cod-Penal-Franta-RO.html>, consulted on 1.03.2023.

³⁹ Criminal Code of the Federal Republic of Germany. <https://codexpenal.just.ro/laws/Cod-Penal-Germania-RO.html>, consulted on 1.03.2023.

⁴⁰ The Indian Penal Code, Act nr. 45, adopted on October 6, 1860. <http://www.hyderabadpolice.gov.in/acts/Indianpenalcode1860.pdf>, consulted on 1.03.2023.

⁴¹ Criminal Code of the Republic of Italy. <https://codexpenal.just.ro/laws/Cod-Penal-Italia-RO.html>, consulted on 1.03.2023.

⁴² Act on Prevention of Unjust Acts by Organized Crime Group Members, nr. 77 of 1991. <https://www.japaneselawtranslation.go.jp/en/laws/view/1207>, consulted on 1.03.2023.

⁴³ Council Framework Decision 2008/841/JHA of 24.10.2008 on the fight against organised crime. <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:32008F0841>.

term of imprisonment of at least 2 to 5 years.

So, we note that the penalty of imprisonment applies both for the creation or leadership of, and for membership and participation in, criminal organisations and organised criminal groups.

We also note that participation in the activity of a criminal organisation is punished more severely in the legislation analysed, compared to an organised criminal (criminal) group.

5. Investigation of the object of the offence of setting up an organised criminal group and determination of the objective side incriminated in Article 367 of the Romanian Criminal Code

The general legal object of the offence of setting up an organised criminal group (Article 367 of the Romanian Criminal Code) is the totality of social values and the social relations created around them, protected by the criminal law against crime.

The generic legal object of the offence of setting up an organised criminal group is made up of all the social relations whose existence and normal development is conditioned by the protection of public security and public order.⁴⁴

The special legal object of the offence is the social relations, regulated by criminal law, which are actually damaged or threatened by a harmful act committed.⁴⁵ This category of object serves to determine the individuality of an offence within a group.⁴⁶

The material object of the offence consists of the material entity to which the direct criminal act is directed, through the intermediary of which the legal object of the offence is prejudiced.⁴⁷ The offence we are considering does not have a material object, since the object of the offence presupposes, in the case of some types of offence, the existence of the victim.

The victim of the crime is understood as: "the person who is criminally injured, i.e. the person who suffers or is directly affected by the material consequence or the state of danger created by the commission of the crime".⁴⁸ As the author A. Boroi: "as a general condition, it is required that the natural or legal person, in order to be the passive subject of the offence, must be the holder of the

⁴⁴ Cazacicov, A., *Object of crime provided by art. 284 Penal code of the Republic of Moldova (Creating or leading a criminal organization)*, London: Collection of scientific articles of LXIV international scientific and practical conference "European research: innovation in science, education and technology", 05-09 June 2020, p. 47.

⁴⁵ Borodac, Al. a.o. *op. cit.*, 2005, p. 113.

⁴⁶ Mitrache, C., Mitrache, C. R., *Romanian criminal law. The general part*, 4th edition, revised and added. Ed. Universul Juridic, Bucharest, 2005, p. 85.

⁴⁷ Grama, M., Botnaru, S., Șavga, A., Grosu, V.L., *Criminal Law. General part*. Volume I. F.E.-P. Publishing House "Tipografia Centrale", Chisinau, 2012, p. 180.

⁴⁸ Antoniu, G., Mitrache, C., Stănoiu, R., a. o., *The New Penal Code*. Volume I. Ed. "C.H. Beck", Bucharest, 2006, p. 87.

social value protected by the criminal law"⁴⁹.

The offence of setting up an organised criminal group, from the point of view of its objective side, is characterised in one way only, by the material element (the prejudicial act) of the offence. The material element is the main component of the objective side of the offence and consists of the material act committed, i.e. the human conduct prohibited by the criminal law. This act can be manifested by an action, but also by inaction, in our case the harmful act consists in initiating or constituting an organised criminal group, joining or supporting it. Both acts are active forms of criminal behaviour and are therefore actions. Action is therefore positive behaviour, conduct by the perpetrator which does something to bring about a change in social relations.⁵⁰

The legislator has provided for three alternative actions that form the prohibited act of conduct, thus the objective aspect is achieved only by violating one of the actions stipulated by the legislator, the accumulation of both criminal actions is not likely to attract the incidence of the concurrence of offences, but influences the individualization of criminal liability and punishment.

6. Identification of the subject of the offence provided for in Article 367 of the Romanian Criminal Code

Romanian literature attributes the quality of subject of the crime to the persons involved in the commission of a crime, either by committing the act of execution or by bearing the consequences of the harm caused by its commission.⁵¹ Respectively, a distinction is made between the active subject (the perpetrator) and the passive subject (the victim) of the crime.

The subject of the crime is man, whose personality is formed by virtue of the concrete conditions of social life. The study of the subject of the crime involves determining his legal criteria, as well as establishing the social characteristics, the morality of the person guilty of committing a crime.⁵²

Persons who lack the signs of responsibility cannot be considered as subjects of crimes, because their actions do not reflect a conscious position, so that the punishment that would be applied to them would not be able to punish them.⁵³

The quality of subject of the offence presupposes the biopsychic aptitude of the person to understand and assume the obligations of conduct laid down by

⁴⁹ Boroi, A., *Criminal Law. General part: according to the new Penal Code*. 2nd edition, revised. Ed. C.H. Beck, Bucharest, 2014, p. 172.

⁵⁰ Zolyneak, M., Mitrachi, M., *Criminal Law. General part*. Ed. Chemarea, Iași, 1999, p. 123.

⁵¹ Bulai, C., *Manual of Criminal Law (general part)*. ALL Publishing House, Bucharest, 1997, p. 81.

⁵² Mariț, A., *Criminal Law. General part*. Volume I, F.E.-P. Publishing House "Tipografia Centrale", Chisinau, 2002, p. 127.

⁵³ Boroi, Al., *op. cit.*, 2014, p. 167.

the rules of criminal law⁵⁴, as well as the capacity to control and consciously direct his acts of conduct in relation to those existing.⁵⁵

According to Article 40, para. (3) (a) of the International Convention on the Rights of the Child: "States Parties shall endeavour to promote the adoption of laws [...] specially designed for children suspected, accused or alleged of having committed violations of penal law and, in particular: shall establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law".⁵⁶

The minimum age for the offence of setting up an organised criminal group is 16 years; a minor aged between 14 and 16 is liable only if it is proved that he or she committed the offence with discernment.

However, for terrorist offences the age of 14 is considered the minimum age for criminal liability.

The creation of an organised criminal group can be carried out by a single person or by two or more persons.

The activity of participating in a criminal organisation is separately criminalised. According to Article 5, para. (1)(a)(ii) of the United Nations Convention against Transnational Organized Crime requires each "State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences, if committed intentionally: [...] as distinct from offences involving attempted or completed criminal activity: active participation by a person who has knowledge either of the purpose and general criminal activity of an organized criminal group or of its intention to commit the offences in question: - criminal activities of the organised criminal group;

- other activities of the organised criminal group, when that person knows that his or her participation will contribute to the achievement of the abovementioned criminal purpose".⁵⁷

Rallying, several states such as: Ukraine (art. 255, para. (1) CC), France (Art. 450-1 CP), Germany (Art. 129, para. (1) CP), Italy (art. 416 CP), United Kingdom (sect. 45, part 3 of the Serious Crime Act), U.S. (§ 371 CC), Australia (art. 51, para. (1) CC), India (art. 120 B CC), Canada (art. 66, para. (1) CC), China (art. 294 CC), Japan (art. 7 of Law no. 77/1991), United Arab Emirates (art. 186 CC), etc., separately incriminate participation in the activity of the criminal organisation.

Concluding on the aspects highlighted above, the subject of the offence of setting up an organised criminal group is a natural person, responsible, who at

⁵⁴ Mitrache, C., *The New Penal Code*. Volume I. Ed. C.H. Beck, Bucharest, 2006, p. 81.

⁵⁵ Bulai C., *op. cit.*, 1997, p. 140.

⁵⁶ International Convention on the Rights of the Child No. 1989 of 20.11.1989, adopted by the United Nations General Assembly. https://www.legis.md/cautare/getResults?doc_id=115568&lang=ro, consulted on 1.03.2023.

⁵⁷ United Nations Convention against Transnational Organized Crime No. 2000 of 15.11.2000. http://www.antitrafic.gov.md/public/files/Conventia_ONU_crima_transdroguri.pdf, consulted on 1.03.2023.

the time of committing the offence has reached the age of 16.

7. Analysis of the subjective aspects of the offence of setting up an organised criminal group

The subjective side of the offence consists of a certain mental attitude, made up of intellectual, volitional and affective elements, which determine and accompany the physical act of execution.⁵⁸

The subjective side of the content of any crime consists of all the conditions required by law regarding the mental attitude of the perpetrator - in terms of his conscience and will - towards the materiality of the act committed (action or inaction, result, causal relationship) for that act to constitute a crime.⁵⁹

In the case of the offence of setting up an organised criminal group, the subjective aspect is expressed through guilt, which takes the form of direct intent.

Direct intent in the case of formal offences is expressed in the fact that the perpetrator realised the harmful nature of his act, foresaw that by committing it he was undermining the social relations protected by criminal law and intended to commit the act.⁶⁰

The purpose and the motive for committing the offence under analysis do not count as optional signs of the subjective side for the finding of the existence of the offence.

The criminal law doctrine defines the motive of the crime as the motive, the inner impulse that determines the criminal decision and, therefore, implicitly the commission of the crime.⁶¹ Motive cannot be absent from any intentional crime, but as a matter of principle it is not part of the content of the crime unless expressly required by law.⁶² As regards the motive for the offence, it may consist in the desire to commit other offences, material⁶³, economic, financial or political interest, self-affirmation, etc.

If we were to remove the illegal nature of the activities of these entities, then the goals pursued by them could be similar to the goals pursued by any economic agent or even the goals pursued by the state.⁶⁴

In this respect, in addition to the correct determination of the criminal intent, the purpose of the offence provided for in Article 367 of the Criminal Code

⁵⁸ Boroi AL., *op. cit.*, 2014, p. 187.

⁵⁹ Dongroz V., Kahane S., Oancea I. et al., *Theoretical explanations of the Romanian Criminal Code*. Ed. All Beck, Bucharest, 2003, p. 128.

⁶⁰ Rarog, AI, *Guilt and qualification of crimes. Tutorial*. Rio Vuzi Publishing House, Moscow, 1982, p. 39.

⁶¹ Bulai C., *op. cit.*, 1997, p. 69.

⁶² Boroi AL., *op. cit.*, 2014, p. 189.

⁶³ Brînză, S., Stati, V., *Criminal Law. Special part*. Volume II, F.E.P. Publishing House "Tipografia Centrale", Chisinau, 2011, p. 518.

⁶⁴ Donciu, A., *Crime-predicate in the crime of money laundering. Methodological aspects, problems, solutions*. USEM Publishing House, Chisinau, 2010, p. 24.

is of importance in determining the subjective aspect and, therefore, the criminal element.

8. Conclusion

From the study carried out we have to conclude that the offence of setting up an organised criminal group involves the founding of an organisation and the organisation of its activity, either seeking and employing members in the criminal organisation, or holding meetings of its members, or creating money and other funds for their financial support and the criminal activity of the organisation, equipping the criminal organisation with weapons and tools for committing crimes, organising the collection of information about potential victims and the work of law enforcement bodies, or coordinating criminal plans and actions with other criminal organisations and groups or individual criminals in the country and abroad.

This problem, which has been studied relatively recently from a scientific point of view, is attracting the attention of a wide range of scientists from different countries.

I would like to stress that organised crime is a product of society and permeates its various spheres and social relations with its negative influence. At the same time, as an independent holistic phenomenon, it has its own patterns of development.

Crime is changing at the same time as society is changing. The emergence of new manifestations of organised crime is always the result of its interaction with society, which manifests itself at both national and regional level.

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Comparative Analysis of the Institute of Confiscation with Special Emphasis on the Republic of North Macedonia

Mr. sc. Genti RECHI¹

Abstract

The purpose of this study is to make an overview of the legal framework that regulates the institute of confiscation in the countries of the Western Balkans such as Serbia, Albania and Slovenia, with special emphasis on North Macedonia. By examining the similarities and the differences, this research aims to provide insights into the effectiveness and potential areas for improvement of the confiscation of proceeds crime. The study reveals that countries such as Albania, Serbia and Slovenia have clearer and more concrete legislation regarding the confiscation, as the confiscation procedure is regulated by special laws. The legal solutions regarding confiscation in North Macedonia are outdated and as a result the implementation of the confiscation measure is minimal. This study employs comparative research methods combined with legal analysis. The results obtained from the work can be used by policymakers to improve the legislation regarding confiscation.

Keywords: *organized crime, conviction-based confiscation, non-conviction based confiscation, comparative law.*

JEL Classification: K14

1. Introduction

Confiscation is widely recognized as an important instrument in combating organized crime and corruption. Although in recent years we have seen an increasing trend regarding the use of this instrument in the fight against serious forms of criminality, the amount of confiscated property remains at low levels. According to a study conducted by Europol² the amount of money currently being recovered in the EU is only a small proportion of estimated criminal proceeds: 98.9% of estimated criminal profits are not confiscated and remain at the disposal of criminals. For this reason, European countries especially countries from the Western Balkan are in constant search of a confiscation model that would effectively respond to the challenges that come from organized crime and corruption. This alarming statistic underscores the pressing need for further research and effective strategies to enhance the confiscation process, ensuring that a larger proportion of illicit gains is successfully seized and removed from the reach of criminals.

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² Available online at https://www.europol.europa.eu/cms/sites/default/files/documents/criminal_as_set_recovery_in_the_eu_web_version_0.pdf [accessed 14.06.2023].

This comparative analysis offers a novel and comprehensive approach to understanding the institute of confiscation, with a particular emphasis on the Republic of North Macedonia.

The research is structured into five sections, each focusing on the analysis of confiscation in different countries. The first section examines confiscation in Albania, followed by the second section which analyzes confiscation legislation in Serbia. The third section delves into the analysis of confiscation in Slovenia, while the fourth section investigates confiscation legislation in North Macedonia. Finally, the research concludes with the fifth section summarizing the key findings and insights. To achieve the research objectives, a combination of qualitative and quantitative research methods will be utilized. Legal analysis will be used to examine the legislative framework and judicial practice concerning confiscation in North Macedonia. Comparative analysis will be conducted to assess the similarities and differences with other jurisdictions such as Albania, Slovenia and Serbia. The objective of this study is to analyze the legal aspects of confiscation in four countries: North Macedonia, Albania, Serbia, and Slovenia. The research focuses mostly on the regulatory framework of confiscation in North Macedonia. In recent years, there is a tendency to embrace the non-conviction confiscation in the countries of the Western Balkans as a way to escape the barriers that appear during traditional confiscation.

2. Confiscation in Republic of North Macedonia

In the Republic of North Macedonia, the institution of confiscation is regulated by the Criminal Code, the Law on Criminal Procedure and the Law on the Management of Confiscated Assets.

In the Criminal Code of North Macedonia, confiscation is systematized in the seventh chapter and includes articles 97 to 100. Article 97 of the Criminal Code refers to the basic or regular form of confiscation. The legal basis for confiscation of property and property benefit is the principle according to which „*No one can keep the direct and indirect benefit obtained by a criminal act*”. According to this principle, the object of the confiscation is the direct and indirect property benefit. For the confiscation of the direct and indirect property benefit, two conditions are provided:

- committing a crime;
- acquiring direct or indirect property benefit with the committed crime.

Confiscation which is based only at the proceeds that are directly linked to the crime, or the so-called traditional confiscation it has proven to be an instrument that cannot face the difficult and new forms of crime such as are organized crime and corruption. Therefore, a need arose for a new form of confiscation that could face these forms of crime. The legislator decided on extended confiscation as a solution for a more effective fight against serious forms of crime. Extended confiscation became part of Macedonian criminal law with the 2009 Criminal

Code Amendment. Extended confiscation is introduced in our criminal legislation in accordance with the obligation arising from the ratification of the Council of Europe Convention on Laundering, Detection, Seizure and Confiscation of Proceeds of Crime and Financing of Terrorism (Warsaw Convention, 2005), as well as other conventions focused on combating organized crime and corruption.

Extended confiscation is imposed for a certain range of crimes, which refer to crimes from organized crime as well as crimes related to terrorism, such as: terrorist threat to constitutional order and security, terrorist organization, terrorism, financing of terrorism and international terrorism or related to money laundering for which a prison sentence of at least 4 years is prescribed.

The Law on Criminal Procedure encompasses the procedural aspect of confiscation. The procedure for seizure of objects and confiscation of property is regulated in the third part of the Civil Code, Chapter XXXIV, in articles 529 to 541. The Law on Criminal Procedure of the Republic of North Macedonia does not specifically address financial investigations as a separate category. Instead, financial investigations are carried out in accordance with the general rules that apply to criminal investigations.

Article 530 of the Civil Code covers the general provisions for confiscation of property and property benefits. According to this article, the property and property benefit obtained by the execution of the crime shall be determined in the criminal procedure. This means that the object of confiscation is only the property, or the property benefit acquired by committing the crime. The burden of proof in the basic form of confiscation falls on the Public Prosecutor, who is obliged during the procedure to collect evidence that is important for determining the property and property benefit. Article 531 regulates the procedure for confiscation of property and property benefit obtained by a criminal act. In this article, procedural guarantees are provided for the person to whom the property was transferred and the claimant of the legal entity, with which they will be summoned for examination in the preliminary procedure and at the main hearing. The principle of fairness requires that these persons have the opportunity to be heard in order to defend their interests in the procedure. For this purpose, they are called by invitation, as well as other participants in the procedure in accordance with Art. 145 i.e. Art. 128 and Art. 129 of the Law on criminal procedure but their presence is not a condition for conducting the procedure.³ In the case of extended confiscation by law, a rebuttable presumption (*praesumptio iuris*) is established that the property of the perpetrator accused of an act committed as part of a criminal organization or for another crime determined by law, is the proceeds of criminal activity.⁴ The presumption is based on the very nature of such criminal activities and has the first immediate consequence of shifting the burden of proof to

³ Gordan Kalajdziev, Gordana Lazetic and others, *Коментар на Законот за Кривична Постапка*, (Commentary on the Law on Criminal Procedure), Mission of OSCE in Skopje, 2018 p. 1034.

⁴ Ibid.

the perpetrator. The legally determined conditions for extended confiscation in no way imply shifting the burden of proof to the accused in relation to proving his guilt for the crime itself or previous criminal activities (the accused can also defend himself by remaining silent), but only in relation to the disproportionality of the property with which he disposes of his itemized income.⁵

In order to determine the amount of property and property benefit, the Public Prosecutor has the right to request information from other state authorities, financial institutions and other legal and natural persons who are obliged to submit it to the Public Prosecutor without delay.

Article 533 deals with extended confiscation. According to this article, the defendant has a period of one year from the start of the main hearing to prove the legal origin of the property and property benefit. Otherwise, if the defendant fails to prove the legal origin of the property and the property benefit, the court will issue an extended confiscation.

There are several significant differences between regular confiscation and extended confiscation provided for in the Criminal Code. In regular confiscation, the court determines the property benefit *ex officio*. Property gain in this case appears as an element of the legal nature of the crime (for example, the object that was stolen, the bribe taken, etc.), as an element of the qualified form of the crime (homicide for profit), or as a circumstance important for determining the degree of guilt of the perpetrator (commitment of the crime for a reward).⁶

The law additionally includes provisions for the imposition of extended confiscation measures against third parties. In this case, the third party is obliged to prove within two years from the day of the start of the main hearing that he provided compensation for the property or property benefit.

Table 1. *Statistical data for criminal lawsuits filed against physical and legal persons and the damage caused*

Year	Total criminal charges filed	Total damage
		Euro
2011	72	9.283.235,5
2012	60	20.243.605,00
2013	65	10.803.918,3
2014	51	9.051.308,6
2015	68	8.318.231,1
2016	41	4.689.810,2
2017	49	96.168.514,4
2018	74	49.155.263,3
2019	79	151.963.083,3
2020	71	19.187.126,3

⁵ Vlado Kambovski, *Коментар на Кривичниот законик на Република Македонија (Commentary on the Criminal Code of the Republic of Macedonia)*, Matica, Skopje, 2015, p. 599.

⁶ Gordan Kalajdziev, Gordana Lazetic and others, *op. cit.*, p. 1036.

In total	630	378,864,093.00
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*Source: Financial police office*⁷

In the period from 2011 to 2020, the Financial Police Administration has submitted a total of 630 criminal charges to the competent Public Prosecutor's Offices of the Republic of North Macedonia for a total of 1471 individuals and 226 legal entities for crimes that caused damage to the State Budget in total from 378,864,093.00 euros.

Table 2: *Statistical data on confiscated assets*

Nr.	Year	The value of the confiscated property expressed in euros
1.	2011	1,664,012.0
2.	2012	998,816.0
3.	2013	8,706,384.3
4.	2014	5,118,983.3
5.	2015	7,496,444.0
6.	2016	6,115,022.0
7.	2017	635,422.3
8.	2018	1,690,576.5
9.	2019	8,680,503.6
10.	2020	2,320,749.4
Total confiscated property		43,429,911.0

*Source: Agency for managing confiscated property*⁸

If we compare the total amount of confiscated property benefit and the amount of damage resulting from the submitted criminal charges by the financial police administration, we come to the conclusion that only 11.5% of that property was confiscated. Although the number of damages caused by committed crimes refers only to the reports by the Financial Police Administration, we come to the conclusion that the measure of confiscation is applied very little. Since its incorporation into the Criminal Code of North Macedonia, the extended confiscation measure has not been implemented in any case to date. Despite its existence within the legal framework, the practical application of this institution has yet to be realized.

⁷ This document is available online in <https://finpol.gov.mk/en/node/21> [accessed 10.06.2023].

⁸ These data were obtained through free access to public information, archive number 08-600/2 date 19.02.2021.

3. Confiscation in Republic of Serbia

The legal basis for the confiscation of property acquired illegally is found in the Criminal Code⁹, the Code on Criminal Procedure¹⁰ and the Law on the Confiscation of Property Derived from a Crime.¹¹

Article 91 of the Criminal Code provides the basis for confiscation of objects. According to Art. 91 paragraph 1: "*No one can keep the items acquired from the commission of the crime*". According to this provision, the items acquired by committing a crime will be confiscated in accordance with the conditions stipulated in the Code of Criminal Procedure and the court decision determining the commission of the crime. Article 92 of the Criminal Code prescribes the conditions and method of confiscation of the property benefit acquired through a criminal act. According to this article, the direct benefit acquired by committing the crime, such as money, other valuable objects and any other property benefit, will be confiscated from the perpetrator of the crime. If confiscation of such property benefit is not possible, then value confiscation will be applied, with which other property benefit will be confiscated from the perpetrator of the crime, corresponding to the value of the property acquired by the execution of the crime or resulting from a criminal act.

The Law on Criminal Procedure prescribes the procedural rules for imposing the measure of confiscation as well as the temporary security measures. In chapter XXII, in articles 537 - 543, the rules for the confiscation of property and the determination of temporary security measures are prescribed. Article 538 par. 2 stipulates that the authority of the procedure is obliged to collect evidence during the procedure and check the circumstances that are important for determining the property benefit. In this case, the burden of proof is on the Public Prosecutor who directs and conducts the investigation. He is obliged during the investigation to collect evidence for determining the property and property benefit.

A special law (*lex specialis*) for the confiscation of property is the Law on the Confiscation of Property Derived from a Criminal Offense passed in 2013 and which was amended twice in 2016 and 2019. The Law was passed following the example of several states that in the fight against organized crime and other forms of crimes adopt special legislation. The provisions of this Law are specifically applicable to a defined set of serious crimes outlined in Article 2. Most of

⁹ Krivični Zakonik ("Sl. glasnik RS", br. 85/2005, 88/2005 - ispr., 107/2005 - ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019).

¹⁰ Zakonik o Krivičnom Postupku ("Sl. glasnik RS", br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 - odluka US i 62/2021 - odluka US).

¹¹ Zakon o odizimanju imovine proistekle iz krivičnog [Law on Confiscation of Assets Derived from Criminal Proceedings] ("Sl. glasnik RS", br. 32/2013, 94/2016 i 35/2019).

the crimes covered in this article are crimes primarily associated with the acquisition of property benefits. The Law regulates the entire confiscation procedure, starting with financial investigations, temporary measures, permanent confiscation of property and management of confiscated property. Chapter 5 regulates international cooperation, which is based on an international agreement or the principle of reciprocity. Pursuant to this Law, the competent authorities for the discovery, confiscation and management of the property originating from the offenses are the Public Prosecutor, the court, the organizational unit of the Ministry of Internal Affairs responsible for financial investigations and the directorate for the management of the confiscated property, which is responsible for the management of the confiscated property.

4. Confiscation in Republic of Albania

The legal basis for confiscation of property is found in the Criminal Code¹² adopted by Law no. 7895 of 27.01.1995 and in the Code of Criminal Procedure¹³ adopted by Law no. 7905 of 21.03.1995 and the Law on preventing the fight against organized crime, trade and corruption through preventive measures against property (no. 10 192 of 3.12.2009)¹⁴ which is modeled after the anti-mafia law of Italy and whose purpose is to overcome the obstacles that arise during the confiscation of property in criminal proceedings.

According to the Criminal Code of the Republic of Albania, confiscation is provided as an additional penalty, whereby the person is deprived of all property acquired from criminal activities, but also when such property is mixed with property acquired legally up to the value of the illegal property that is mixed. Such foreseen confiscation is pronounced after the completion of the criminal procedure in which the accused is declared guilty.

With the adoption of the Law on prevention and fight against organized crime, trade and corruption through preventive measures against property, law enforcement authorities are given an instrument through which they will more effectively fight against gangs and criminal organizations by seizing and confiscating property.

According to Article 3 of the Law on preventing the fight against organized crime, trade and corruption through preventive measures against property the provisions of this law are applied to the property of persons who are reasonably suspected, based on evidence, of being members of criminal organizations

¹² Kodi Penal i Republikës së Shqipërisë [The Criminal Code of the Republic of Albania] (Ndryshuar me ligjet nr. 8175, datë 23.12.1996).

¹³ Criminal Procedure Code Approved by Law No. 7895 dated 27.01.1995.

¹⁴ Law No. 10 192, dated 3.12.2009 on preventing and fighting organized crime, trafficking, corruption and other crimes through preventive measures against wealth (amended by Law no. 24/2014, dated 20.3.2014, no. 70/2017, dated 27.4.2017, 34/2019, dated 17.6.2019, No. 85/2020, dated 2.7.2020).

or structured criminal groups, terrorist organizations or armed gangs, perpetrators of other criminal acts for terrorist purposes, perpetrators of criminal acts for the purpose of acquiring illegal property benefit, etc. Paragraph 2 of this article expands the scope of application of the law, namely:

- on the property of the persons who are close to the suspect, which the law enumerates taxatively,
- on the property of natural and legal persons for whom there is sufficient information that their property or their activity is owned partially or fully, directly or indirectly, and has been used or in some other way enabled the execution of illegal activities by the persons from point.

The Law consists of a total of 7 chapters. The first chapter of the Law contains general provisions and principles regarding the relationship with the criminal procedure, the subject of the investigations, the jurisdiction and the composition of the court. The second chapter refers to seizure of the property, seizure procedure, execution of the seizure measure etc. The third chapter contains provisions regarding the administration of the seized property, the duties of the Agency for the management of seized and confiscated assets, the agency's reports, etc. The fourth chapter of the Law refers to the confiscation of seized assets. The confiscation procedure begins at the request of the Public Prosecutor. Persons on whom there is reasonable suspicion based on evidence that they are members of criminal organizations or persons referred to in Article 3 of this Law are obliged to prove that the funds in their full or partial ownership were acquired from legal sources. The fifth chapter refers to the decision, the appeal and the execution of preventive measures. The sixth chapter refers to the use of confiscated assets, the transfer into state ownership. The seventh chapter contains the final provisions of the Law.

5. Confiscation in Slovenia

In the legislation of Slovenia, two types of confiscation are provided: conviction based confiscation and non-conviction based confiscation. The conviction-based confiscation (*in personam*) in Slovenia is regulated by the Criminal Code¹⁵ and the Criminal Procedure Code¹⁶, while non-conviction based confiscation (*in rem*) is regulated by the Forfeiture of Assets of Illegal Origin Act.¹⁷

Chapter seven of the Criminal Code of Slovenia encompasses provisions for confiscation, encompassing Articles 74 to 77. Confiscation, as outlined in the Criminal Code, adheres to the principle that no one can retain property benefits

¹⁵ Kazenski zakonik [Criminal Code] (KZ-1-UPB2). (2012, 2015, 2016, 2017). *Uradni list RS*, (50/12, 54/15, 6/16, 38/16, 27/17).

¹⁶ Zakon o kazenskem postopku [Criminal Procedure Code] (ZKP-UPB8). (2012, 2013, 2014). *Uradni list RS*, (32/12, 47/13, 87/14).

¹⁷ Zakon o odvzemu premoženja nezakonitega izvora [Forfeiture of Assets of Illegal Origin Act] (ZOPNI). (2011, 2014). *Uradni list RS*, (91/11, 25/14).

that is obtained through or as a result of a crime. Consequently, a court decision confirming the commission of a crime is required for the confiscation of both the property and any other benefit that originate from the criminal act. In addition to regular or traditional confiscation, the Penal Code of Slovenia also encompasses provisions for extended confiscation. The Slovenian Criminal Code provides an interesting solution for the confiscation of the property of organized criminal groups. According to article 77, apart from the property and property benefit acquired through a crime or as a result of the crime from the organized criminal group, the property and property benefit at the disposal of this group will be confiscated.

In the Criminal Procedure Code of Slovenia, the seizure and confiscation of property is provided for in chapter 3 within the framework of the so-called special procedures. Regarding financial investigations, the Criminal Procedure Code of Slovenia does not expressly provide for them. The financial investigation is conducted according to the general rules that apply to the criminal investigation.

The Forfeiture of Assets of Illegal Origin Act establishes a system of non-conviction based confiscation (*in rem*). This law aims to overcome the obstacles and weaknesses that appear during the implementation of confiscation in the criminal procedure. The law was adopted for the first time in 2011. According to article 1 of the Forfeiture of Assets of Illegal Origin Act regulates the terms and conditions, the procedure and the responsible authorities for financial investigation, the provision of temporary security of the forfeited assets, the secure storage, management and forfeiture of assets of illegal origin, the responsibilities of the Republic of Slovenia, and the manner in which international cooperation is to be carried out under the procedures of this Act.

6. Conclusion

Our analysis revealed that the Republic of North Macedonia, along with other countries in the region, has recognized the importance of confiscation as a crucial tool in combating organized crime and corruption. However, despite the fact the North Macedonia in its own legislation provides several types of confiscation including extended confiscation, the practical implementation of confiscation measures in North Macedonia remains limited.

Countries like Serbia and Slovenia, which have a legal system identical to North Macedonia, have adopted special laws that regulate the confiscation of illegally acquired property. With the special laws in their legislation as an instrument against organized crime and corruption is incorporated the non-conviction based confiscation (*in rem*). This approach is deemed more effective compared to conviction-based confiscation, allowing for greater flexibility in targeting and seizing illicit assets. The same example is followed by Albania which, has adopted a special law for the regulation of non-conviction based confiscation.

But the most important thing is that in the three countries analyzed in this paper, financial investigations are foreseen, which are very important in identifying and finding the proceeds of crime.

We think that the adoption of a special law that would regulate the confiscation procedure in its entirety, starting from financial investigations, the establishment of temporary and preventive measures and the final decision to confiscate the proceeds of crime, would solve the problems more which the judicial system of the country is currently facing. Such a comprehensive law would provide clarity, consistency, and specific guidelines, streamlining the confiscation process and ensuring more efficient outcomes.

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Artificial Intelligence: Civil Liability 3.0

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Abstract

A new era of technical progress, development of the digital world and artificial intelligence presents new challenges in terms of safety and liability. Social acceptance of these modern technologies depends on ensuring a high level of safety and on the implementation of a European legal regime of civil liability that provides users with legal certainty about the risks assumed, encourages the prevention of damage, and provides injured parties with effective mechanisms for recourse in the event of damage. The aim of this work is to approach a legal regime of civil liability for damage resulting from Artificial Intelligence, through a comparative and critical analysis of the Portuguese regime and the proposals under consideration by the European Union Council and suggest some aspects that a future liability regime should consider.

Keywords: *artificial intelligence, civil liability, tort law, product liability, forensic economics.*

JEL Classification: K13, K24

1. Introduction

Artificial intelligence (AI) includes a set of technologies that combine data, algorithms, and computing power. It consists of the ability of technical systems to analyse their environment and, with a certain autonomy and in order to achieve specific goals and solve specific problems, to adopt intelligent behaviour similar to that of humans.² This definition has been put forward by the European Commission's Expert Group on Responsibility and New Technologies, which defined AI systems as "software (and possibly also hardware) systems designed by humans that, having been assigned a complex goal, act in the physical or digital dimension by perceiving their environment through the acquisition of data, interpreting the structured or unstructured data collected, reasoning about the knowledge or processing the information resulting from such data and deciding the best actions to take in order to achieve the stated goal. AI systems can use symbolic rules or learn a numerical model, as well as adapt their behaviour by analysing how the environment has been affected by their previous actions".³ AI-

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² For the definition of AI, see Samoili, Sofia et al, *AI Watch. Defining artificial intelligence. Towards an operational definition and taxonomy of artificial intelligence*, European Commission, 2020. On p. 21, the authors refer to the definition in COM(2018) 237 final, which we also adopt in this paper.

³ *Ibidem*, p. 29.

based systems can also be limited to software, acting only at the virtual level (as in the case of search engines) or they can be embedded in physical devices (v.g. autonomous vehicles).

2. Conceptual approach to artificial intelligence

AI is already part of our daily lives and has demonstrated a versatility that few other technologies can match.⁴ It is used in different fields, from industry to agriculture or transport, in the prevention, diagnosis and treatment of diseases, in education and training, in justice and human security, in mitigating, adapting and combating climate change or in the environment, where it is essential to achieve the sustainability goals of the European Green Deal.⁵ On a global scale, AI is already assuming a preponderant role not only in commercial and economic terms, but also in security and geopolitical issues. As Henrique Sousa Antunes warns, "the various expressions of AI are already a vector of human existence and will even more clearly condition life on Earth".⁶

Crucial to the digital transformation of the economy, society in general and citizens' lives, AI opens up a world of new opportunities and benefits, contributes to improving services and products, strengthening the EU's industrial and technological capacity and competitiveness by entering new markets, attracting new customers, and fostering research and innovation. It has now become one of the priorities of the European Union, which aims to be a world leader in innovation in the data economy and its applications and to make Europe the most attractive, secure and dynamic data economy in the world.⁷ The European Commission defines it as "a set of enabling technologies that can contribute to a wide range of benefits across the whole spectrum of the economy and society", recognising it as "a great potential for technological progress and (...) new business models in

⁴ COM(2021) 205 final.

⁵ COM(2019) 640 final.

⁶ Sousa Antunes, Henrique, "Inteligência artificial y responsabilidade civil: enquadramento", *Revista de Direito da Responsabilidade*, Ano 1 (2019), p. 139.

⁷ European Commission, *White Paper on Artificial Intelligence - A European approach to excellence and trust*, COM (2020) 65 final, pp. 2-3. President Juncker stated that "[d]igital technologies and communications have been permeating every aspect of our lives. We must strive for a Europe that delivers the resources our citizens and our economy need. And today, both citizens and the economy itself have already entered the digital age", State of the Union address of 14 September 2016. Also, the European Council, in its conclusions of 25 March 2021, stressed the importance of the digital transformation for the recovery of the Union for its prosperity, security and competitiveness and for the well-being of societies. See European Commission, *Proposal for a Decision of the European Parliament and of the Council establishing the 2030 Agenda "Roadmap to the Digital Decade"*, COM(2021) 574 final, p. 2.

many sectors of the digital economy".⁸ Consequently, AI has an increasingly relevant impact on our lives, whether negative or positive⁹. When it is negative, it becomes necessary to create rules for its regulation, in order to minimise the possible adverse effects derived from it.

3. Risks and challenges of artificial intelligence

AI may generate risks and affect rights and interests. According to an analysis prepared for the European Parliament by Philip Boucher¹⁰, the risks and challenges of AI include its under or over-utilisation, the impact on the labour market, the distortion of competition, the impact on security, the threat to fundamental rights and democracy, as well as the issue of liability.

Concerning this latter aspect - liability - which is the main focus of this reflection, it is imperative to establish a legal regime, at European level, to ensure that "all products and services, including those incorporating new digital technologies, operate in a safe, reliable and consistent manner and that any damage that occurs is effectively remedied"¹¹. Only in this way will it be possible to establish a climate of trust and responsibility among users regarding the use and development of AI, while promoting better consumer protection. Indeed, citizens fear that they will not be able to defend themselves against information asymmetries in algorithmic decision-making systems, and businesses themselves struggle with the legal uncertainty that may arise from them. But both individuals and businesses need to be able to trust the technologies they use and to have at their disposal a legal framework that they can use to protect their fundamental rights and freedoms.¹² That is one reason liability is one of the main obstacles to the use of AI by European businesses.¹³

In this regard, the European Commission advocates a regulatory and investment-oriented approach to AI with the dual objective of promoting its use, on

⁸ COM(2022) 496 final.

⁹ The potential benefits of artificial intelligence for society are manifold. Examples include reducing pollution and road deaths, improving education and opportunities for the elderly and people with disabilities to live independently, and making the fight against terrorism and crime more effective, among others. In the fight against COVID-19, the contribution of artificial intelligence was instrumental in predicting the geographical spread of the disease, diagnosing it and developing vaccines and drugs to tackle it. Similarly, its contribution will be decisive in the post-COVID economic recovery.

¹⁰ Boucher, Philip, *Artificial Intelligence: How does it work, why does it matter, and what can we do about it?*, European Parliamentary Research Service, June 2020, pp. 18 et seq.

¹¹ COM(2020) 64 final, 19.02.2020, p. 2. The European Council of October 2017 had already put on record the need to ensure a high level of data protection, digital rights and ethical standards. On new technologies, see Manyika, James et al, *Disruptive technologies: advances that will transform life, business and the global economy*, McKinsey Global Institute, 2013.

¹² COM(2018) 237 final, p. 16.

¹³ Survey of European companies on the use of AI-based technologies, Ipsos 2020, Final Report, p. 58.

one hand, and mitigating the risks inherent to it, on the other, with the aim of creating what it calls an "ecosystem of excellence and trust".¹⁴ To this end, with the collaboration of the Member States¹⁵, it has been seeking the best solutions to optimise the use of AI, working to achieve an appropriate ethical and legal framework that guarantees the best results at social, environmental and economic level, based on the values of the Union¹⁶ and in line with the Charter of Fundamental Rights of the European Union.

This is why the existence of safety standards is the first form of protection for users and consumers of new technologies against damage caused by them.¹⁷ If these safety standards do not work or do not fulfil their functions, it will be the liability rules that will make it possible to compensate those affected for the damage they have suffered. On this depends not only the confidence of users (consumers and businesses), but also the social acceptance of these new technologies.

The European Union has high safety and product liability standards.¹⁸ The European Commission itself recognises that "the Union has a strong and reliable regulatory framework for safety and product liability and a robust set of safety rules, both complemented by non-harmonised national liability legislation. Together, these instruments ensure the well-being of citizens in the single market and stimulate innovation and technology uptake."¹⁹

The European Commission's Expert Group on Liability and New Technologies considers the current EU liability regime²⁰ as adequate to the challenges of AI, referring mainly to the liability rules contained in the Product Liability

¹⁴ European Commission, *White Paper*, pp. 1-3.

¹⁵ European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the Economic and Social Committee and the Committee of the Regions - A coordinated plan for artificial intelligence* (COM(2018) 795 final).

¹⁶ Article 2 of the Treaty on European Union states that the values of the Union are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of the most vulnerable groups.

¹⁷ According to the European Commission, "AI systems must integrate safety and security mechanisms from their design, to ensure that they are demonstrably safe for all parties involved, not only physically but also mentally, at all stages". European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Reinforcing trust and confidence in human-centred artificial intelligence*, COM(2019) 168 final.

¹⁸ "The liability framework that currently exists in the European Union (...) is a stable framework that encourages investment, innovation and risk-taking." European Commission, *Commission Staff Working Document - Liability for emerging digital technologies*, SWD(2018) 137 final, p. 2.

¹⁹ COM(2020) 64 final, p. 1.

²⁰ Expert Group on Liability and New Technologies - New Technologies Formation, *Liability for Artificial Intelligence*, European Union, 2019, and Bertolini, Andrea and Episcopo, Francesca, *The Expert Group's Report on Liability for Artificial Intelligence and Other Emerging Digital Technologies: a critical assessment*, Cambridge University Press. Available at <https://doi.org/10.1017/err.2021.30>.

Directive²¹, the Machinery Directive²², the Radio Equipment Directive²³ and the General Product Safety Directive²⁴, among others²⁵. However, some shortcomings are acknowledged. This is because new digital technologies have transformed the characteristics of many products and services, and it is true that existing legislation does not always contain explicit provisions on the new challenges and risks associated with new technologies and their specific characteristics.

4. Characteristics of artificial intelligence

AI is characterised by autonomy, connectivity and openness, complexity, opacity of the decision-making process ("black box effect") and data dependency.²⁶

Autonomy is one of the main characteristics of AI and translates into the possibility for AI products and systems to operate or manifest themselves autonomously, without human supervision or control. Although AI products and systems are designed by producers or manufacturers for a certain purpose, it is true that their self-learning skills can lead them to deviate from that purpose and from what one would expect from their performance.²⁷ And the result will be the same whether they are used, correctly or incorrectly, in a different way than expected. And it is those deviations from predictability that become problematic for safety and liability purposes.

Also, connectivity and openness of new digital technologies can compromise the security of products by exposing them to cyber threats or hacking; similarly, loss of connectivity can affect the security of products that rely on this

²¹ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

²² Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery and amending Directive 95/16/EC.

²³ Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the placing on the market of radio equipment and repealing Directive 1999/5/EC.

²⁴ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.

²⁵ For example, the Market Surveillance Regulation (Regulation (EC) No. 765/2008 of the European Parliament and of the Council of 9 July 2008) or the Cybersecurity Regulation (Regulation (EU) 2019/881 of 17 April 2019). As regards the protection of fundamental and consumer rights, reference can be made to the Racial Equality Directive (Directive 2000/43/EC of 29 June), the Equal Treatment in Employment and Occupation Directive (Directive 2000/78/EC of 27 November), the Consumer Rights Directive (Directive 2011/83/EC of 25 October) or the General Data Protection Regulation for Law Enforcement Authorities (Regulation (EU) 2016/679 of 27 April), among other legal provisions.

²⁶ COM(2020) 64 final, pp. 2-13.

²⁷ Mafalda Miranda Barbosa explains that algorithmic autonomy makes it difficult to distinguish between damages resulting from human error and those caused by the algorithm itself. See the author's "Responsabilidade civil por danos causados por inteligência artificial; uma cronologia europeia", *Revista de Direito da Responsabilidade*, Ano 3 (2021), pp. 497 et seq.

feature, such as alarms.²⁸

The complexity associated with AI also represents a risk. It stems from the integration of AI systems with other products, components, parts, devices, software, systems, and services, as far as this interaction between various elements may lead to a deviation from their intended or foreseeable use. Moreover, this characteristic is also reflected in the multitude of economic actors involved in a supply chain (designer, producer, distributor, importer, implementer, service provider, professional or individual user, etc.), which makes it difficult to identify those responsible for the obligation to compensate.

In turn, the opacity of the decision-making process of AI-based products and systems and the ability to improve their own performance, due to learning from experience, makes it more difficult to predict and understand their functioning and behaviors. In these cases, the risks are no longer the result of an error or flaw in the original design, but the impact of interactions or patterns that the products and systems identify in the data set to which they have access, making it sometimes impossible to determine why a system using AI has arrived at a certain outcome, which prevents or makes it very costly to detect and correct erroneous decisions.²⁹

In terms of data dependency, the quality, accuracy, and adequacy of data are critical for the systems and products in question to behave as expected. The amount of data involved, the reliance on algorithms and the lack of transparency of the decision-making process of AI systems make it difficult to predict the behaviour of AI-based products and, consequently, to understand the possible causes of potential harm, as is the case with the other characteristics listed above. In addition, connectivity and openness can also expose AI-based products to cyber threats.

The main challenges posed by these features as a whole are those of determining the origin of and those responsible for the damage caused by an AI-operated device or service, as well as establishing causation, which obviously constitutes an added problem for the determination of liability - according to its traditional rules - as well as compensation for the damage caused.

These characteristics, by conditioning the predictability of the use of AI systems, also make it difficult to assess the risks involved in such use and, consequently, to establish financial guarantees to cover any liability. Another factor affecting the adoption of and trust in this new technology.

²⁸ COM(2020) 64 final, p. 2. See, on the issue of connectivity, OECD, *Measuring and maximising the impact of product recall globally: OECD workshop report*, OECD Science, Technology, and Industry Policy Papers, No. 56, OECD Publishing, Paris, 2018, and OECD, *Enhancing product recall effectiveness globally: OECD background report*, OECD Science, Technology and Industry Policy Papers, No. 58, OECD Publishing, Paris, 2018.

²⁹ European Commission, *White Paper*, p. 13.

5. Current regime of civil liability arising from the use of artificial intelligence

Liability arising from the use of AI is the main focus of this paper. As mentioned above, products and services that integrate AI technologies may present risks to their users. These risks may arise from flaws in the original design, the availability and quality of available data, or other reasons such as learning from experience of the systems themselves.

As regards the existence of a civil liability regime for IA systems, two assumptions are made. The first is that the European safety and product liability provisions complement each other, *i.e.*, they form a whole in which the liability rules act where the safety rules have not been effective. The second assumption is that, although with acknowledged shortcomings, the general civil liability regime in force in the European Union and in the individual Member States has been found by the European Commission to be generally adequate for damage caused by AI-based services and products.

The legal framework for civil liability in the European Union is mainly based on the Product Liability Directive³⁰, which harmonised national rules on producer liability. However, it does not seem that this producer liability regime can be considered adequate for IA.

This is the case of AI systems which, being autonomous and endowed with *self-learning skills*, are subject to software updates *and* interactions with other products or systems supplied or not by the original producer, making it difficult to determine the origin of the damage and the party responsible for it.³¹

Thus, just as producer liability in the end does not cover purely economic damage, compensation for loss of profit associated with damage to property, compensation for damage to things of professional use and compensation for loss of use, does not cover damage to data that may have been generated by the algorithm itself.³²

The producer liability regime also excludes liability for so-called developmental damage or so-called unknown risks, *i.e.* those arising from new technologies, for which there is uncertainty as to their effects, either because they have not yet been adequately tested or because their application in conjunction with other technologies, organisms, products or systems has not yet been proven.

And more reasons could be put forward to justify the inadequacy of current legislation to adequately protect AI victims.

However, the Product Liability Directive established strict liability for

³⁰ Directive 85/374/EEC of 25 July. In Portugal, this Directive has been transposed by Decree-Law no. 131/2001, of 24/04, amended by Decree-Law no. 383/89, of 06/11. On the subject, see Calvão da Silva, João, *Compra e venda de coisas defeituosas (Conformidade e Segurança)*, 5th edition, Almedina, Coimbra, 2008.

³¹ European Commission, *White Paper*, p. 16.

³² Articles 4 and 8 of Decree-Law no. 383/89, of 6/11.

damage caused by defective products, a type of liability that makes perfect sense in the area of AI-related damage.

In modern, highly technological, and industrialised life, human activity is a source of special risks for third parties.³³ Strict liability is justified in cases where an economic activity is at stake that is considered potentially dangerous, either by its nature or by the way in which it is conducted. On this assumption, it is right that the person who creates or maintains a situation of risk for third parties should be liable for the damage arising therefrom or the imminent threat thereof, assuming, consequently, the costs of its repair or prevention, in exchange for the benefit deriving therefrom (*ubi emolumentum, ibi onus; ubi commodum, ibi in-commodum*).³⁴

The basis of strict liability therefore lies in the theory of risk, *i.e.*, in the fact that the use of certain goods, services or the exercise of certain activities represents in itself a risk to society in general and, in our particular case, to the physical and mental health of persons, regardless of the fault of the agent, whether intentional or purely negligent, or even of the wrongfulness of his conduct. Moreover, in this type of liability, the agent will always be held liable, even if he has complied with all the rules. This is because, given that he obtains a benefit from the exercise of the activity or the use of certain goods or services, it is fair that he should bear the resulting costs. In short, strict liability does not depend on the assumptions of culpability and unlawfulness, that is to say, there will be liability even if the agent's conduct is not reprehensible and complies with the applicable legal requirements.³⁵ And as Mafalda Miranda Barbosa explains, "[t]he type, dimension and extent of the damage resulting from a given activity; the difficulties in proving culpability; the importance of the legal assets at stake are some of the reasons that may justify the imposition of strict liability (...). [I]n many cases culpability may be revealed (...) to the system, in most situations the damage will result without culpability".³⁶

Alongside the producer's strict liability, the traditional system of subjective liability based on fault is in force. In our opinion, it is precisely this type of liability, as it is conceived, which is insufficient to repair the damage arising from the use of AI, mainly because of the difficulty of meeting the various legal requirements necessary for its application.³⁷ Let us look at it.

³³ Ulrich Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne*, Suhrkamp, Frankfurt am Main, 1986. *Hacia una nueva modernidad*, translated by Jorge Navarro, Daniel Jiménez and M.^a Rosa Borrás, Paidós, Barcelona, 1998.

³⁴ Aragão Seia, Cristina, *A responsabilidade ambiental na União Europeia. Da responsabilidade civil à responsabilidade administrativa em Portugal*, Almedina, Coimbra, 2022, p. 87.

³⁵ However, the other requirements must always be fulfilled: voluntary act, causal link and damage.

³⁶ Miranda Barbosa, Mafalda, "O futuro da Responsabilidade Civil desafiada pela inteligência artificial: as dificuldades dos modelos tradicionais e caminhos de solução", *Revista de Direito da Responsabilidade*, Ano 2 (2020), pp. 315 et seq.

³⁷ On the inadequacy and insufficiency of the traditional civil liability regime, Diamantis, Mihailis E. "Algorithmic Harms as Corporate Misconduct", in Antunes, Maria João, and Aires de Sousa,

The Portuguese legal system, in Article 483(1) of the Civil Code, establishes a general cause of civil liability for unlawful acts, stating that "whoever, with intent or mere negligence, unlawfully violates the right of another or any legal provision intended to protect the interests of others shall be obliged to compensate the injured party for the damages resulting from the violation".

This precept makes the duty to compensate depend on the cumulative fulfilment of the following assumptions: the existence of conduct, by action or omission (voluntary act), contrary to the legal system (unlawfulness) and reproachable on the part of the agent (fault), which is a consequence of such conduct (causal link). And the truth is that, in the context of AI, it is not easy for this to happen. The complexity, opacity and autonomy that characterise AI systems often make it difficult to identify the liable parties and to establish the causal link, which is indispensable to determine whether there is an obligation to compensate. This is even more so in the case of the existence of a plurality of actors in the supply chain.

To sum up, the EU's approximation of the internal market in this area to date is based on common safety rules, supplemented essentially by rules on producer liability. The regime of contractual and non-contractual liability arising from goods and services will be a matter for the national legislator. In fact, the Member States have civil liability systems which, although not harmonised, guarantee compensation for the damage caused to those affected and oblige those responsible to pay compensation.³⁸ However, national subjective liability systems are sometimes difficult to implement because the characteristics of new digital technologies, as mentioned above, make compliance with traditional requirements difficult or very costly. This necessarily compromises access to justice, ultimately compromising the compensation of victims, placing them at a lower level of protection than victims of traditional technologies, affecting legal certainty, trust and social acceptance of the use of AI, with obvious repercussions both on the costs of their introduction in the market and on the stability of investments for the producers/suppliers of the products and services in question. It is therefore essential to adapt these regimes to the specific characteristics of AI in order to facilitate and speed up the application of liability rules, in particular concerning the protection of fundamental rights, the imputation of liability and the fulfilment of the conditions that will determine the obligation to compensate³⁹.

Susana (Eds.), *Artificial Intelligence in the Economic Sector. Prevention and Responsibility*, Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2021, pp. 135-164.

³⁸ In Portugal, the traditional civil liability regime is aimed at repairing personal and material damage caused to individuals. This reparation, which falls under the jurisdiction of the ordinary courts at the request of the holder of the property or right that has been violated, is usually by way of compensation. The right to compensation prescribes three years from the date on which the injured party has knowledge of it, by virtue of Article 498(1) of the Civil Code. See Almeida Costa, Mário Júlio, *Direito das Obrigações*, 12th Ed., Almedina, Coimbra, 2009.

³⁹ Expert Group on Liability and New Technologies - New Technologies Formation, *Liability for Artificial Intelligence and other emerging digital technologies*, European Union, 2019. See also

These same national systems of faulty responsibility must also be able to cope with the constant evolution of AI systems, which may give rise to risks that could not have been foreseen when they were designed or marketed, uncertainty in the allocation of responsibilities between the different economic operators involved in the supply chain, and changes in the very concept of safety. Indeed, AI evolves rapidly, not only because of permanent updates resulting from human research and innovation, but also because of an entire process of self-learning, which can take place without human supervision.

This should not be done at Member State level, but at EU level, otherwise the internal market will fragment, and European companies will incur higher costs. Indeed, different national regimes may constitute an obstacle for companies operating in the field of AI, wishing to access the single market and possibly exploit their competitiveness in global markets.⁴⁰

6. Approach to a civil liability regime for damage caused by artificial intelligence

Aware of this, the European Commission, already in the Mid-Term Review on the Implementation of the Digital Single Market Strategy⁴¹, in 2017, considered the possibility of adapting the existing legal regime to new digital technologies, in particular in the area of civil liability, taking into account the results of the evaluations of the Defective Products Directive⁴² and the Machinery Directive.

1. European Commission White Paper on Artificial Intelligence. In February 2020, the European Commission adopted the White Paper on Artificial Intelligence⁴³, in which it discussed the need for a new regulatory framework to establish an AI ecosystem of excellence and trust. It concluded that, more than any adjustment to existing legislation, specific legislation on artificial intelligence may become necessary to keep pace with technological and commercial developments in the sector. The Commission argued in that paper that a new regulatory framework in this area would always have to follow a risk-based approach, but such a new regulatory framework would only be applicable if a particular product or service was considered to be high risk when used for a particular purpose or if used in a sector or activity where significant risks could occur (v.g. health or energy) and, even then, if, cumulatively, such use was done in such a way as to give

Cristina Elena Popa Tache, „Defense or cooperation between states and international investors in times of crisis?“, *Juridical Tribune-Tribuna Juridica*, Volume 11, Special Issue, October 2021, pp. 380-394.

⁴⁰ European Commission, *White Paper*, p. 16.

⁴¹ COM(2017) 228 final.

⁴² SWD(2018) 157 final.

⁴³ COM(2020) 65 final. The Report on the implications of artificial intelligence, the internet of things and robotics for security and liability (COM(2020) 64 final) and the Communication on a European data strategy (COM(2020) 66 final) were published as annexes.

rise to such risks.⁴⁴

In parallel to a new regulatory framework, the European Commission also advocated strengthening the control of compliance with safety standards, in particular through conformity assessments to be conducted not only at the development stage of products and services, but also through continuous control measures to be taken by the competent national authorities. However, these measures would have to respect the principle of proportionality in order not to impose an excessive burden on the business and industrial fabric, in particular small and medium-sized enterprises (SMEs), which could lead to disinvestment and a slowdown in the use of AI.

2. European Parliament resolution with recommendations to the European Commission on a civil liability regime for artificial intelligence. The European Parliament, which has also developed some initiatives on new technologies⁴⁵, adopted in October 2020 a resolution with recommendations to the European Commission on the civil liability regime applicable to AI⁴⁶. This resolution was adopted under the mechanism of Article 225 TFEU, which allows the European Parliament to request the European Commission to submit proposals for acts on matters it considers necessary to regulate.

In this resolution, the European Parliament called on the Commission to present a proposal for a regulation specifically addressing the civil liability regime applicable to AI systems. Considering that AI should be anthropocentric and anthropogenic⁴⁷, the European Parliament refuses to recognise or attribute legal personality to AI, arguing instead for the application of the general civil liability regime with the necessary adaptations.⁴⁸

The regulation is intended to apply "where an AI-based physical or virtual activity, device or system has caused injury or damage to the life, health or physical integrity of a natural person, to the property of a natural or legal person, or has caused significant non-material damage resulting in verifiable economic loss".⁴⁹

The Resolution provides that those affected by AI systems enjoy the same

⁴⁴ European Commission, *White Paper*, pp. 17-20.

⁴⁵ European Parliament resolution of 16 February 2017 with recommendations to the Commission on civil law provisions on robotics (2015/2103(INL)).

⁴⁶ European Parliament, *Report with recommendations to the Commission on the civil liability regime applicable to artificial intelligence*, 2020/2014(INL). In this sense, Sousa Antunes, Henrique, "A responsabilidade civil aplicável à inteligência artificial: primeiras notas críticas sobre a Resolução do Parlamento Europeu de 2020", *Revista de Direito da Responsabilidade*, Ano 3 (2021), pp. 1-22.

⁴⁷ Maia, Ana Rita, «A Responsabilidade Civil na Era da Inteligência Artificial – Qual o caminho?», *Julgur Online* (Maio 2021), p. 1.

⁴⁸ In Article 3(d) (Definitions), the Parliament defines "operator" as the *front-end operator* and the *back-end operator*, to the extent that the latter's liability is not already covered by Directive 85/374/EEC, in a clear reference to the producer liability regime. In the very definition of "producer" referred to in point (j), reference is made to Article 3 of Directive 85/374/EEC.

⁴⁹ Article 2(1).

level of protection as those injured by traditional technologies. Accordingly, civil liability may be objective, in the case of AI systems that are considered to be high risk⁵⁰, and up to a certain limit⁵¹, and subjective, *i.e.* based on the fault of the responsible party, in the case of systems that are not considered to be high risk.⁵² The qualification as a "high risk system" will depend on the potential of a system to randomly generate damage to the population and presupposes that the European Commission, when drafting a proposal for a Regulation, lists the systems it considers to be high risk, as happened, for example, in Directive 2004/35/EC of 21 April 2004 establishing a European system for the prevention and remedying of environmental damage, Annex III of which specified the activities included in strict environmental liability, on the understanding that they would be the most dangerous and risky for the environment and for people from the outset.⁵³ As far as IA is concerned, given that the technological, economic and even political context of the sector is constantly evolving, it is proposed to regularly update the systems identified as high risk. In other cases, *i.e.* where the use of AI does not represent a high risk, the European Parliament proposes to apply subjective liability but, unlike traditional civil liability, where the general rule is that the victim must bear the burden of proof of the perpetrator's fault, it advocates a presumption of fault on the part of the operator (Article 8(2)). This presumption can be rebutted if the operator succeeds in proving that the damage was caused without fault on his part⁵⁴ or because the AI system was activated without his knowledge or if due diligence was observed through certain actions⁵⁵. This is similar to what happens in Portuguese civil law in the case of the exercise of activities considered dangerous by their nature or by the nature of the means used⁵⁶. The action for damages must be brought against the person responsible for the IA system or against the various persons responsible, in the event of plurality, who are jointly and severally liable⁵⁷, without affecting the right of recourse in internal relations.

This new regulatory framework proposed by the European Parliament is

⁵⁰ Article 4 of the Resolution. It is expressly provided that operators of artificial intelligence systems may not escape liability by claiming that they acted with due diligence or that the damage or injury was caused by an autonomous activity, device or process based on their artificial intelligence system (paragraph 3).

⁵¹ Article 5 of the Resolution: a maximum of EUR 2 million in the event of death or damage to the health or physical integrity of a person; a maximum of EUR 1 million in the event of significant non-material damage resulting in verifiable economic loss or damage to property.

⁵² Article 8 of the Resolution.

⁵³ Directive 2004/35/EC. On this issue, Aragão Seia, Cristina, *op. cit.*, p. 89.

⁵⁴ Provided that all reasonable and necessary measures have been taken to prevent such activation beyond the operator's control.

⁵⁵ In particular, the selection of an appropriate IA system for the tasks and capabilities in question, the correct commissioning of the IA system and the monitoring of the activities and the maintenance of reliable operation through the regular installation of all available updates.

⁵⁶ The aforementioned Article 493(2) of the Civil Code.

⁵⁷ Article 11 of the Resolution, which establishes the prevalence of this Regulation over the Defective Products Directive.

nothing more than an adaptation, in the sense of transforming and updating the Defective Products Directive, *i.e.* a regime that is more than 35 years old. It cannot be said to have been ambitious or innovative in the solutions proposed in the resolution for liability for damage caused by AI systems, solutions that will certainly fall short of the ecosystem of excellence and trust sought in the field of AI.

3. Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Regulation). On 21 April 2021, the Commission presented a proposal for a regulation laying down harmonised rules on AI (Artificial Intelligence Regulation) whose adoption procedure is still pending.⁵⁸

With this proposal, the European Commission, with a human-centred approach, aims to achieve a high level of protection of fundamental rights and security of citizens, while driving the development of AI technology and boosting innovation and competitiveness. It provides for a technology-neutral definition of AI systems, which is already future-oriented and may encompass techniques and approaches that are not yet developed or known. As already advocated by the Commission in its White Paper, this proposal advocates a proportionate and risk-based approach, whereby the regulation will only apply to high-risk AI, proposing severe sanctions in case of non-compliance with the strict rules it lays down and prohibiting certain AI practices as posing unacceptable risks. The proposal sets out which intelligence systems it considers to pose a high risk to the health, safety and fundamental rights of individuals, in which case it imposes a number of specific requirements including the use of high quality data, the availability of adequate technical documentation and record keeping to improve traceability, the sharing of information with users, the design and implementation of human oversight measures and the security of the system. Uses of AI that are considered contrary to Union values or that violate fundamental rights are prohibited, including AI systems that distort people's behaviour through subliminal techniques or that exploit specific vulnerabilities in a way that causes or is likely to cause physical or psychological harm, as well as social classification AI systems for general use by public authorities. A stricter approach is taken with regard to remote biometric identification systems, and their real-time use for law enforcement purposes is in principle prohibited in publicly accessible spaces, unless exceptionally permitted by law. Emphasis is also placed on the duty of transparency of systems that interact with human beings, which are used to detect emotions or that generate or manipulate content. In these specific cases, individuals must be informed that they are acting with AI systems, that their emotions are recognised by such systems or that the system is used to manipulate content, so that they can make informed decisions.

This proposed Regulation also offers solutions to promote the develop-

⁵⁸ COM(2021) 206 final.

ment of AI using regulatory test environments, access to digital innovation centres and test facilities, among other measures, which will bring added value to innovative companies, SMEs, and start-ups. It also establishes a set of harmonised rules applicable to the design, development, and use of high-risk AI systems, representing a milestone in ensuring security and protecting fundamental rights, which will inevitably contribute to confidence in the development and use of AI.

Unfortunately, however, there is no reference to liability for AI-related damage in the proposed Regulation.

4. Proposal for a Directive of the European Parliament and of the Council on the adaptation of rules on non-contractual liability to artificial intelligence. For the same reason, the Commission has supplemented the proposal for a Regulation with a proposal for a Directive, which it adopted on 28 September 2022, to adapt the rules on non-contractual civil liability to artificial intelligence.⁵⁹ While the Regulation aims to reduce security risks and protect fundamental rights, the Directive, applicable from the date of its transposition, aims to compensate for damage caused by fault. The main objectives are to make it easier to obtain compensation and thus to strengthen society's confidence in AI by encouraging its uptake and allowing access to an effective judicial system. The Directive will apply to civil law actions relating to non-contractual liability for AI-related damage, whether arising from the result produced by an AI system or from its failure to produce a result, without prejudice to national rules more favourable to injured parties. This proposal was adopted together with the proposal for a revision of Directive 85/374/EEC on product liability, as they are considered complementary instruments. The aim of this new legal framework is to adapt liability rules to the digital age and AI.

Specific rules for uniform access to information are foreseen, providing for the possibility for courts to order the disclosure of relevant evidence on high-risk IA systems within the meaning of the Regulation. It is intended to facilitate the determination of liability, fault, and causation, especially in the case of high-risk AI systems.

The plaintiff will have to prove fault, as is in fact the case in the Portuguese legal system, where Article 487(1) of the Civil Code expressly stipulates, as a general rule, that the burden of proving fault, in matters of non-contractual liability, is on the injured party.⁶⁰ In any event, the burden of proof is reduced, since the causal link can always be presumed in the case of fault and provided that certain conditions are met, such as the breach of the duty of care, in particular

⁵⁹ COM(2022) 496 final.

⁶⁰ The Explanatory Memorandum of the Proposal for a Directive states: "Such fault may be established, for example, by a breach of a duty of care under the Artificial Intelligence Regulation or other rules established at Union level, such as those regulating the use of automated monitoring and decision-making for work on digital platforms or those regulating the operation of unmanned aircraft".

in the case of actions for damages relating to high-risk AI systems. This is obviously a rebuttable presumption, which can be seen as a positive aspect if we consider that the defendant may see this as an incentive for diligent performance of his obligations.

It seems to us that the Commission, perhaps in an attempt to reconcile the different interests at stake (those of consumers and those of the AI sector) was not very assertive on this issue. In fact, by leaving it up to national courts to enforce the indeterminate concepts used in the title (as in the case of non-high-risk AI systems, as regards the "excessively difficult" test or "substantial" interference by the defendant), it compromises the desired harmonisation in this area, and may even encourage possible discrimination.

However, we recognise the preventive role of these proposed provisions which, by their very existence, may lead to AI users/producers/providers being more vigilant and cautious about possible adverse outcomes that may result from these systems.

7. Concluding remarks

As the European Commission itself proclaims, "[t]he EU must therefore ensure that AI is developed and implemented in an appropriate framework, which is conducive to innovation and respects the Union's fundamental values and rights, as well as ethical principles such as accountability and transparency".⁶¹

This appropriate framework, whether new or adapted, must, as we have seen, be attentive to the specific characteristics of the new technology that is AI.

It does not seem to us that this proposal, which we would describe above all as timid, achieves the intended objective. Firstly, because it only covers damage caused intentionally or by negligent action or omission. And very often the damage is not the result of culpable actions. For this very reason, in our opinion, a strict liability system should be established for damage resulting from AI-based products, systems or activities considered potentially dangerous to humans. This path, although difficult, is not impossible and has already been undertaken in other areas, such as environmental liability.

Similarly, the question of the state of science or developmental damage should be approached with particular caution so that those affected do not bear the burden of repairing this type of damage.

Regarding subjective liability, in order to facilitate compliance with its requirements, it would be desirable, as far as proof of fault is concerned, to establish a presumption of fault in favour of the injured parties, relieving them of this task. Another option would be, also with a view to facilitating proof of its existence, to establish a presumption of causation, but in an assertive and clear manner, so as not to encourage situations of inequality between consumers in the

⁶¹ COM(2018) 237 final, p. 3.

different Member States.⁶² These questions of regulating proof of fault and causal link should not be left to the Member States, and the European Union should establish uniform rules in this respect.

It should be borne in mind that this is an extraordinarily complex and technical matter, not always easy to handle for those affected. And the use of indeterminate concepts that can be interpreted and applied in different ways by national courts does not contribute at all to the desired confidence and legal certainty.

A solidarity regime should also be established in the case of plurality of contributors for damages, in the light of what already exists in the Portuguese legal system.⁶³

It would also be important to establish the obligation to provide financial guarantees, such as compulsory insurance. Similarly, the creation of a compensation fund⁶⁴, which would be supported by the companies producing/supplying new technologies, would allow those affected to have recourse to it for damages not covered by financial guarantees, in cases where it is impossible to identify the liable party or in situations where the latter is insolvent, for example.

The implementation of safety and liability rules for damage arising from AI (and other technologies) should be supervised, monitored, and enforced by the national administrative authorities set up for this purpose.

And this without leaving aside the mechanisms already existing in traditional civil liability, such as the liability of the principal⁶⁵, the liability for acts of legal representatives and assistants⁶⁶, the fault of the injured party⁶⁷, the limitation of compensation in the case of pure fault⁶⁸, among others.

This regulation should take place at the level of the European Union, which should take a firm role, avoiding the establishment of a framework regime that is too flexible, in order to avoid non-uniform application in the different Member States, which would lead to market fragmentation in this sector.

Digital Europe must reflect the best of the continent: it must be open, fair, diverse, democratic, and safe⁶⁹ and, to achieve this goal, the existence of an appropriate civil liability regime for AI-related harm, common to the EU Member

⁶² In view of the solution chosen by Spain in the field of environmental liability. Article 3.1 of Law 26/2007 of 23 October 2007 on Environmental Liability.

⁶³ Article 497 of the Civil Code and, in case of accidents caused by vehicles, Article 507.

⁶⁴ In this sense, Miranda Barbosa, Mafalda, "Inteligência Artificial, E-Persons e Direito: Desafios e Perspectivas", *Revista Jurídica Luso-Brasileira*, Ano 3, no. 6 (2017), pp. 1479 et seq.

⁶⁵ Article 500 of the Civil Code. On the subject, Pinto Monteiro, António, "Qui facit per alium, facit per se - será ainda assim na era da robótica?", in *Direito e Robótica*, Instituto Jurídico Centro de Direito do Consumo, Coimbra, pp. 11-31.

⁶⁶ Article 800 Civil Code. *Ibid.*

⁶⁷ Article 570 of the Civil Code.

⁶⁸ Article 494 of the Civil Code.

⁶⁹ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Data Strategy*, COM(2020) 66 final.

States, is an indispensable and unavoidable tool. This is the only way to reap the economic and social benefits of AI and to promote the transition to a digital economy. The EU must therefore be ambitious, proactive and forward-looking in this area.

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PRACTICAL REALITIES IN OUR FOCUS

Financial Mechanisms of the European Union to Support of Agri-Food Niche Companies of Fish Farmers and Foresters in Crises Situations¹

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Motto: Niche companies are iconic leaders in a sustainable society.

Abstract

In a continuous dynamic of climate change affecting farmers and fish farmers and taking into account the current geopolitical context and its negative effects, new European financial solutions should be identified to mitigate or combat them. Research methods used: case study, sociological method and research hypothesis/theory. Ferenda law proposals: 1. amending the Charter of the United Nations (UN)³; 2. the creation of an EU financing line for the creation and modernization of niche companies with social and environmental components, with a strong argument for the creation and preservation of public goods; launching proposals for revising the Multiannual Financial Framework, with celerity; 3. New EU support measures through the Social Climate Fund for accidental cases; 4. innovative insurance system.

Keywords: niche companies, European Union, Charter of the United Nations, farmers.

JEL Classification: K22, K33

1. Introduction

The main objective of the European Union (EU) regarding the environment is to achieve climate neutrality, especially after the conclusion of the Paris Agreement⁴.

It is already well-known that climate change affects us more and more lately. Farmers, fishermen, aquaculturists and foresters are deeply affected by extreme weather events such as drought, hurricanes, forest fires, floods.

¹ This article does not engage, in any way, the responsibility of the institution where I carry out my activity.

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³ <https://www.un.org/en/about-us/un-charter>, consulted on 1.03.2023.

⁴ The Paris Agreement entered into force on 4 November 2016. The agreement provides for the reduction of at least 55% of reducing of global gas emissions. All EU member states have ratified the agreement.

2. Definition

Niche company is the term that refers to a small segment of the market based on an uncovered or partially covered segment to satisfy market demand. Niche market "is the subject market to which a particular product is channeled."

Examples of *niche companies*⁵ would be shellfish farms, factories processing hazelnuts with oil, hazelnuts in chocolate, organic hazelnut kernels, fruits such as cherries, gooseberries or raspberries etc.

3. Arguments for encouraging the activity of niche companies

Notorious situations such as the damage caused by large carnivores, cormorants or crows affect large areas, social security being endangered, through food insecurity, because there is less and less fish left for fishermen or cereals are damaged after bird attacks, for example.

Furthermore, the civilian population faces situations of fortuitous cases such as the migration of carnivorous animals, situations in which they move with the aim of obtaining food or with the increased consumption of agricultural or fish products in areas that are under the influence of some provisions of the UN or the EU for the protection of nature, or of events triggering economic, sanitary, environmental crises - individual, mixed or cumulative, or of armed tensions or from indirect causes such as wars in the vicinity of borders with negative effects with components environmental, often devastating.

We have in mind concepts from Roman law such as public property, in addition to private property. By reducing pollution through short-distance transport, we contribute to maintaining healthy air and clean waters, as well as landscapes. The creation or preservation of public goods⁶ with the support of farmers, fish farmers or foresters contributes, symbolically, to the reduction of greenhouse gases. By producing and delivering mostly locally, regionally or using certain components (e.g. chocolate, coffee) from underdeveloped or developing countries, we help the planet and vulnerable populations.

4. Research methods

The research methods used are the following: case study, prospective sociological method, sociological questionnaire and research hypothesis/theory. Through a prospective management, with a pilot project, it is possible to multiply the cases of niche companies.

⁵ Frank Hunt, *Niche market: characteristics, search and examples* - <https://ro.warbletoncouncil.org/nicho-de-mercado-14696>, consulted on 1.03.2023.

⁶ <https://cursdegovernare.ro/dictionar-economic/bunuri-publice>, consulted on 1.03.2023.

Through LEADER⁷, with the support of local authorities, we can identify regional needs and, respectively, propose solutions to improve the quality of life of people in these areas, by creating and modernizing niche companies.

Table No. 1 - Monitoring table measures for niche companies

Household type	SME type	No employees	Capital	Resources	Needs/offers from the community 1. Jobs 2. Product quantity	Type of financial or non-financial mechanism	Remarks

Research theory/hypothesis – we envision a niche company that takes into account local resources and needs. Depending on the supply-demand balance on the market, we can model the growth and modernization of production factors and provide them with a counter-sum in case of crisis situations for these companies, by applying certain methods and through financial or non-financial mechanisms. Insurance can be private or state-owned and can cover damage caused by fortuitous cases, for example.

The case study is carried out with the company "H. E. SRL", Satu Mare County, Romania. This company currently grows and processes hazelnuts on 46 ha. The company's activity can be expanded. If high-quality organic hazelnuts are currently successfully processed, in the future cherries from 33 acres or other fruit trees in the area could be considered.

The analysis of the questionnaires can be done, for example, during a 3-year cycle.

Through a prospective management, the activity of the niche company can be programmed with the increase to 10 employees in 3 years, reaching 20 employees in a maximum of 10 years, or even more, taking into account automation with equipment and processing lines state-of-the-art, as well as according to market demand.

Another aspect to take into account would be the future "boutiques"⁸ that could absorb, in places with notorious commercial ford, niche products, bringing profit in a short time, and implicitly, in time, contributing to the reduction of unemployment.

Taking into account, in a possible modeling at the EU level, this case study we can extend the good practices to all areas where niche companies could develop, by multiplying insurance mechanisms and by granting financial incentives of the Union, which should already be proposed by 1 January 2024, in order

⁷ <https://www.madr.ro/axa-leader.html>, consulted on 1.03.2023.

⁸ https://www.zf.ro/opinii/aduceti-aminte-buticurile-metrou-dat-ranga-demolat-aplaudat-s-pus-21953151?fbclid=IwAR3BZQfLLCFVkm61boSePMzFzLQa5_9E_e26QWuZqUfWKIS9gDS_zS53NDM, consulted on 1.03.2023.

to be included in the next EU financial year.

5. *De lege ferenda* proposals

As *de lege ferenda* proposals, I consider the following:

1. Amending the Charter of the United Nations to insert the right to a healthy and sustainable environment as a universal right for all.

2. The proposal to create an EU funding line for the creation and modernization of niche companies with social and environmental components, with a strong argument for the creation and preservation of public goods.

The launch of proposals for the revision of the EU Multiannual Financial Framework, with celerity.

3. Proposals to include new EU support measures through the Social Fund for Climate for accidental cases, in addition to those of force majeure and the creation of a fund for the creation and support of niche agro-fisheries companies.

4. The proposal to stimulate the development of an insurance system for agro-fishery-forestry companies for fortuitous cases, the idea of establishing a state insurance company for farmers, fish farmers and foresters, in the context in which large private insurance companies were poorly managed and most of them gave resounding bankruptcies with risks for the population that remained uninsured.

6. Conclusions

By creating jobs in niche companies, salable goods are produced primarily in the area where the processed resources come from, contributing to the reduction of greenhouse gas emissions.

Following the evaluation of the final results, during the allotted time period we can identify, in a "Swot"⁹ analysis, the strengths and weaknesses.

"Pestle"¹⁰ analysis can also bring new values to products regarding niche companies.

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⁹ <https://corporatefinanceinstitute.com/resources/management/swot-analysis>, consulted on 1.03.2023. SWOT is the acronym for Strengths, Weaknesses, Opportunities, and Threats.

¹⁰ <https://pestleanalysis.com/what-is-pestle-analysis/>, consulted on 1.03.2023.

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Recidivism - Cause of Overcrowding in Prisons in Romania

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Abstract

In the last month of 2021, the ministers of justice from the member states of the Council of Europe met in Venice and, at the initiative of the Italian presidency, discussed the role of restorative justice in criminal matters and adopted the Venice Convention. Statement. The Declaration follows the Recommendation (Rule 18) in recognizing the universal application of restorative justice for all types of crimes, even noting "the possible positive impact of restorative justice pathways and on countering the radicalization of individuals". Objectives: removing the material consequences of committing crimes and making prisoners aware of what it entails to restore the situation before the crime was committed, or what it entails to commit a new crime after conviction and partial execution. Proposal and Methodology: establishing a legal framework for obliging those released on parole to work, with their consent, to have the possibility of covering the damage from the legal garnishment of wages, with the active involvement of the state in establishing available jobs, as well as by offering advantages employers. Results and Discussions: discussion in workshops, in direct meetings with prisoners, non-governmental organizations and the management of the Maximum-Security Penitentiary Galați, Romania, about the way in which it is possible to reintegrate prisoners into society after parole. Implications: Legislative changes, government decision-making to establish jobs in question.

Keywords: *injury, detainees, recommendations, legal framework, decisions.*

JEL Classification: K14, K38

1. Introduction

For the perfect and deep outline of the phenomenon called recidivism, it is important to study the evolution over time of the legal regulations of recidivism. Historically, recidivism is considered the result of a long evolution, there being no distinction between criminal history and recidivism in today's sense, although the regulations in force make a difference. The need to punish recidivists more severely, compared to first offenders, has been recognized since ancient times, being conditioned by the fact that they persevere with their actions, ignoring and disregarding the provisions of the law even after the execution of the sentence, in the conditions where society contributes from full of clear non-regulations in the field but also by the lack of firm measures to stop the phenomenon. In this context, since in the past recidivism was one of the most serious

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forms of manifestation of the criminal phenomenon, the communities known in the past sought to defend themselves with the weapons of the law against the most dangerous criminals.

In Romania, despite a rich sociological and criminological literature on the etiology of the phenomenon of delinquency and criminality, less emphasis was placed by the specialists in the field on identifying the profile of recidivists and the factors that cause them to deviate repeated from the law. Due to these research failures, even the prevention measures of the phenomenon were not effective, so that the number of recidivists in the total incarcerated population increased rapidly, from 1990 to 2010, more than three times, from 15% to 45%.²

The fact that almost half of the number of prisoners is made up of those who have gone through the experience of the criminal justice system demonstrates its shortcomings. It must be seen how the efficiency of the penitentiary institution can be increased, so that the periods spent by those convicted within it are usefully utilized and do not represent mere rest intervals in their criminal careers.

But punishment alone is not enough to reduce recidivism and consequently to protect communities. People with criminal conduct must be given the chance to correct their behavior and be able to successfully reintegrate into the community after they are released from prison. In Romania, interest in social reintegration is almost non-existent, compared to Western countries where social reintegration is a priority objective of the governments' activity.

The academic evaluation of restorative justice is positive. The same could not be said about the attitude of practitioners, as it is well known by them that criminals very rarely stop committing crimes even if they have served a custodial sentence. It is the easiest way for them to get on with their lives because who hires a thief, a robber, a criminal or a swindler in their business?

Most studies suggest that applying this type of restorative justice makes offenders less likely to reoffend. A 2007 study also found that it had a higher rate of victim satisfaction and offender accountability than traditional justice methods³. Its use has grown worldwide since the 1990s⁴. Restorative justice has inspired and is part of the broader study of restorative practices in a society whose economy is developing, and society is careful to adopt legal provisions that ensure the possibility of coverage damages and by those who hid their assets from foreclosures. Discussions are useful if they have a material basis.

What happens when the funds are missing for one reason or another and the person under discussion does not work because he has no obligation to do so.

² Dâmboeanu, C., *Trends in the evolution of the phenomenon of recidivism in Romania*, „Journal of criminology, criminalistics and penology”, no. 3, 2009, p. 75.

³ Lawrence W Sherman & Heather Strang (2007). *Restorative Justice: The Evidence (PDF)*. University of Pennsylvania, p. 142.

⁴ Braithwaite, John. "Restorative Justice and De-Professionalization." *The Good Society* 13, no. 1 (2004): 28-31. doi:10.1353/gso.2004.0023.

If a regular person with a job has the possibility of having their accounts seized, a person with no visible income can't have anything taken from him and therefore can't cover any damage.

From a legal point of view, no person can be forced to perform work, and a criminal is unlikely to do it after a discussion, no matter how serious and moral it is. Only coercion will acquire to cover the damage and only a legal provision can do it.

The alternative offered by restorative justice could work in the idea of adopting some demands from the victims, within reasonable limits.

Recidivism as a special form of criminality represents one of the most serious problems facing contemporary societies. For the representatives of the institutions involved in the realization of the act of justice, but also for the public opinion, the recidivism generated raises many concerns due to the high costs it causes. Along with the huge costs it entails in the criminal justice system, recidivism also brings with it many unquantifiable costs. They are felt in the long term by victims, their families, and the community, and relate both to the suffering of those directly affected by criminal acts and to the feelings of fear and insecurity experienced by the residents of areas with a high rate of recidivism.⁵

2. Studies

Specialized studies have shown that, most of the time, individuals leave prisons without the prospect of obtaining a job or a home, with health problems or even drug addictions. The support networks in the community that they have are, most of the time, made up of people who in turn have been incarcerated or not. During the time spent in detention, the human capital of these individuals remains almost unchanged, as they manage to train or develop those knowledge, skills and qualifications required in the labor market in addition. In addition, they lose not only opportunities to gain work experience, but also interpersonal relationships that could help them in their efforts to find a job after release. Convicted status, associated with social stigma, further reduces the chances of these individuals to reintegrate into society. Employers are reluctant to hire such people who have been incarcerated, either because of the fear that they will commit crimes in the workplace or simply because they feel that they do not have the necessary training to cope with the demands of the job respective. How ex-prisoners can be facilitated to reintegrate into the community is a problem that, at least to date, has not been answered, although efforts have been made in this regard. Some researchers, experts and practitioners have argued in favor of strong community involvement in the supervision of ex-prisoners.

⁵ Banciu, D., *Attitudes, and perceptions of the public towards the prison sentence*, Romanian magazine of sociology, no. 3-4, p. 146.

3. Objections

The strategy developed for the 2020-2024 strategic cycle aims to strengthen the inter-institutional collaboration framework, in order to operationalize the principles previously promoted, through H.G. no. 389/2015, respectively: continuum of individualized, systematic, needs-adapted services and assistance, with addressability for the category of people who have been penalized.

Considering the progress made in the implementation of H.G. no. 389/2015⁶, especially in the period 2017 - 2019, through this new strategic document it is intended to adjust the policies promoted in the enforcement-criminal field, by referring to the good practices identified in the European context and considering the evolution of social and educational services, existing in the plan national. Thus, through H.G. no. 389/2015, the action and interaction mechanism necessary for public institutions and non-governmental organizations, which have the vocation to activate in the successive stages of the process of social reintegration of criminally sanctioned persons, was identified. The purpose of the current strategic approach is to improve the efficiency of criminal policies and prevent the marginalization of people who have served sentences or custodial measures, by increasing the degree of social involvement and making the community responsible. Shifting the emphasis from assisting the person, during detention and, implicitly, improving the quality of the services made available to him, during his stay in the penitentiary, towards social rehabilitation, through tools that support the assumption of an autonomous way of life and facilitating access to support services in the community, constitutes the foundation of the emerging directions of action of the current Strategy.

Considering the European norms and regulations in the field, the objectification of the educational-reintegration function of the penitentiary institution, but also of the other public institutions with a role in facilitating the social reintegration of people who have committed crimes, stands out as imperatively necessary. The achievement of recuperative measures, at optimal parameters, is an essential premise of the success of the social type of intervention and is conditioned by the efforts to promote standardized and integrated ways of support, in inter-institutional partnership.

The first objective of this measure is to help those leaving prison to easily transition from the conditions specific to the prison environment to independent living in the community. A second objective is to identify those who do not comply with release conditions and to punish them, thereby preventing individuals from committing more serious crimes. Supervision provides the structure and

⁶ H.G. no. 389/2015 regarding the approval of the National Strategy for the social reintegration of persons deprived of liberty, 2015-2019, published in the Official Gazette no. 532 of July 16, 2015.

incentives needed to keep those recently released from prison burning focus on those activities that give them the opportunity to stop being involved in committing crimes. Supervisors can help these individuals by either referring them to specific educational and treatment programs or serving as intermediaries to support them in accessing social services or employment.

4. Efficiency

Regarding the effectiveness of this measure, some authors have highlighted a reduction in criminal behavior, mainly in the period after release, while others have demonstrated that the effect of supervision only lasts as long as the monitoring period lasts⁷.

In order to determine the effectiveness of the parole institution, in terms of reducing the risk of recidivism, the results of the studies undertaken are quite controversial, due to the methodological problems associated with research in this field.⁸ First, it is obvious that more intense surveillance will lead to better identification of those who break the rules or those who commit crimes again. At the same time, there is also a certain selection effect, as parole boards tend to release those individuals who have a lower risk of recidivism.

In addition, a series of interviews were conducted with recidivists who were serving their custodial sentences in various penitentiaries such as Jilava, Târgșor, Rahova, Galați. They also claimed that the penitentiary environment does not offer them any chance of rehabilitation. Those with a low level of education believed the programs carried out are not effective, because they are intended for those with an average level of instruction and many of them do not understand what is communicated to them within them. On the other hand, those with a higher level of education appreciated that they have nothing to learn from these activities, that the offer is not sufficiently attractive and interesting, that the penitentiary does not create all the opportunities for them to do what they like.

Prisoners do not perceive the effectiveness of long-term programs, considering that their usefulness is strictly limited to the period of detention. Thus, the main reason why they declare that they signed up for various socio-educational activities carried out in penitentiaries is to receive highlights, to revoke some disciplinary measures or to have the guarantee that their parole will not be postponed.

Another reason these programs are not effective is that they run for one hour a week, with the rest of the time spent in the cell with other inmates. In addition, on days when several activities overlap, they must opt for one of them, not being able to participate in all of them.

⁷ Florian, Gh., *Penitentiary Phenomenology*, Ed. Oscar Print, Bucharest, 2006, p. 95.

⁸ See Pasat, Aurel Octavian, *Comparative analysis in the field of customs offenses and criminal regulations in certain states in relation to the legislation of the Republic of Moldova*, „Tribuna Juridica - Juridical Tribune”, Volume 7, Issue 1, June 2017, p. 115.

Therefore, to reduce with internal measures the frequency with which recidivists commit criminal acts, it is necessary to improve the institutional and legislative framework in the field. Thus, currently, ex-prisoners return to the community, without referrals to certain social services and without an intervention plan. Left to their own devices, they are unlikely to have the ability to escape the situations and contexts that led to their incarceration⁹.

5. European models

The analysis of the way in which other penitentiary systems in Europe prepare and support the process of social reintegration of persons serving custodial sentences constitutes a valuable source of good practices that, adapted, can support the efforts of Romanian specialists.

In Denmark, inmates in Danish penitentiaries have the obligation, according to internal regulations, to be active every day, either working, depending on the opportunities offered by the detention unit, or participating in vocational training or educational activities of a practical nature.

For example, making crafts, music, painting, etc. Only sick inmates are exempt from participating in these daily activities. Refusal to participate leads to certain consequences established according to specific regulations.

In the Danish penitentiary system¹⁰, inmates are held responsible by allocating a monthly amount of money to a card to buy food products from the penitentiary point of sale. The practical skills of independent living are developed by involving the inmates in common activities, in self-catering spaces in meal preparation, cleaning, free time.

In the case of production workshops, vocational training is integrated with work, and the activities carried out can be of the type of short-term courses, apprenticeship courses or even carrying out an internship in a production unit - factory, to follow a process of long-term education. There is the possibility of obtaining a diploma, because of participating in courses that last even a day, however, these courses normally last from one week to 20 weeks.

Every employee in the Danish penitentiary system who deals directly with the inmate assumes the role of model, educator, directly involved in the organization and running of the daily activities in his program. It is considered that a prisoner with whom he communicates daily, in a harmonious relationship, within the limits of deontological norms, presents a lower probability of harming prison employees, in a critical incident such as riot, hostage taking, for example. It is also appreciated that the penitentiary service has an important role in the community, to which, moreover, every person who serves a custodial sentence

⁹ Poledna, S., *Professional training manual for working with convicted persons who are about to be released from prison*, Ed. Lumina Lex, Bucharest, 2009, p. 141.

¹⁰<https://www.kriminalforsorgen.dk/wp-content/uploads/2018/10/afsoning-rumaensk.pdf>, accessed on 10 May 2023.

will return.

France offers models of social reintegration of prisoners and ex-prisoners, an example being the professional reconversion activities carried out by the organization Acta Vista¹¹, since the period of detention. Acta Vista is a non-profit, non-profit organization that manages an insertion site, where inmates, in addition to other categories of disadvantaged people, are oriented to the reconditioning of Marseille's cultural heritage. The recruitment of those who express their desire to work is carried out from the last year of detention, based on an individual employment contract. Such models are found throughout France, organizations of this profile being financed from three sources: local administration, the state budget and self-financing.

Belgium approaches the issue of prisoners, or ex-prisoners at risk of social exclusion, from the perspective of training, respectively professional reorientation, and integration into the labor market. The social economy structures operate both inside and outside prisons, developing the inmate, right from detention, skills necessary for the job he will occupy after release. Although there is no universally accepted definition of the social economy, the example of Belgium indicates the full understanding of the fact that the involvement of the business environment in social objectives and not exclusively focused on producing profit, as well as the entrepreneurial spirit bring advantages, including to the economy.

Germany, although organized differently in its 16 Länder, has as its main objective the execution of the custodial sentence, that the prisoner becomes able to maintain a socially responsible life, without committing any more crimes once released from detention. In order to achieve this objective, detention must be comparable, as far as possible, to life in freedom and be accompanied by appropriate measures for the reintegration of prisoners¹².

As in other European states, the philosophy of the execution of custodial sentences is based on two different but complementary concepts: safety and social security. Safety is a concept that totalizes the measures related to the physical safety of prisons, prisoners, etc., and social security, including from the perspective of social reintegration, is the main objective of the execution of the sentence.

In Germany, prisoners are required to work in accordance with Article 5, Paragraph 41 of the German Prison Act.¹³ If the prisoner is not able to work, he has the possibility to engage in a therapeutic activity. The main objective is to maintain, transmit and cultivate resources to enable the prisoner to have a professional activity after release. Considering capabilities and abilities to them, all

¹¹ <https://altaviziune.ro/> accessed on 10 May 2023.

¹² [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/741374/IPOL_STU\(2023\)741374_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/741374/IPOL_STU(2023)741374_EN.pdf), accessed on 11 mai 2023.

¹³ <https://gpil.jura.uni-bonn.de/2023/02/federal-minister-of-justice-announces-major-changes-to-german-criminal-law-and-procedure-with-regard-to-crimes-against-international-law/>, accessed on 11 May 2023.

prisoners are offered, during detention, the possibility to choose three courses of action: a job, a qualification course or on-the-job training, often accompanied by tuition. The focus is therefore placed on optimizing their socio-professional reinsertion, once released. We also specify that, in the case of Germany, there is not one individual employment contract offered to the prisoner, the private sector having contractual relations only with the administration.

The Spanish government understood how important community participation is in the social reintegration of prisoners. A considerable number of non-governmental organizations and associations collaborate in two large areas of intervention, carrying out both activities in penitentiary centers, during the execution-penal period, and post-detention activities. To facilitate social reintegration, these organizations complement the work of specialists in penitentiary centers, being considered an "extension" of the activity of the penitentiary system. Although their projects are implemented in different fields of interest - communication, technology, culture, education - differentiated according to the type of execution of the sentence, a large part of them are dedicated to the professional insertion of nuts. Depending on the final evaluation of the organizations' activity, the quality of the projects carried out and the achievement of the established objectives, they are allocated financial funds from the budget, the Spanish state granting subsidies of 0.7% on the income tax, the amounts being distributed to the Ministry of the Interior, at the Ministry of Social Services and at the Ministry of Finance. For the non-governmental organizations that implement projects in the penitentiary system, approximately 300 million euros are allocated annually, this amount being granted based on 12 general criteria, such as: the number of penitentiary centers, in which the programs are implemented, the number of beneficiaries, the number of programs implemented, the results obtained, etc. The training and professional insertion programs include vocational training and employment programs, vocational workshops, career guidance, job search techniques, support and supervision for social reintegration. The fundamental element of social integration is work, so that prisoners who enter the penitentiary are trained, professionally qualified to be able to reintegrate into the community. In fact, most prisoners in the Spanish prison system carry out work-related activities. The model of the Office of Social Participation, established within the Department of Justice of the Generalist de Catalonia, can also be mentioned as a good practice in terms of the natural continuation of the procedures carried out with prisoners in the execution-criminal phase and in the post-detention period. The main purpose of this body is to establish and strengthen the links between the community and people serving custodial sentences. The interventions considered are closely related to the identification of social housing for persons deprived of their liberty without family support, local rural communities - farms, for people addicted to drugs, mental or with diminished discernment, therapeutic communities, day centers for people who have committed crimes with violence, with a history of domestic violence, sexual offenders, centers and apartments

outside the city, jobs, according to the skills acquired during detention.

An example of a social initiative from the voluntary sector, very active in Spain, is the Center for Reinsertion Initiatives¹⁴, whose mission aims at training, employment, and social reinsertion, by establishing the socio-professional reinsertion itinerary of persons deprived of liberty. Every year, this center trains about 3,000 inmates in about 250 trades. The training has three objectives: to train them in a job, to develop their professional skills, to contribute to reducing the risk of recidivism. Employment refers to the employment of prisoners on the labor market since the execution-penal period and their maintenance, respectively the identification of other jobs, after they are released from detention. The insertion refers to the integration into the labor market after the realization of an individualized plan, by a multidisciplinary team, of a portrait to enter the labor market.

Available data show that, since 2011, 3,000 people have gone through this process, 887 have obtained a work contract, 50% in normal enterprises, and 50% in social reinsertion enterprises. The business environment is also co-opted and present in the social reintegration efforts of people at risk of exclusion social. Obra Social La Caixa¹⁵, a charitable foundation of the La Caixa financial group, has as its main program Reincorporate/Reintegrate, an unprecedented approach, which, in collaboration with the penitentiary environment, is based on the notion of training-service. It is a pedagogical project that brings together the pedagogical dimension and the social utility. Data available from 2012 show that, with the support of the Department of Justice and the Center for Reintegration Initiatives, Obra Social La Caixa has developed 20 training-service activities in Catalonia. Between 2005 - 2010, the financial group subsidized the training of 5,000 prisoners, in penitentiary centers throughout Spain. Within this project work with persons deprived of liberty, who are in the final stage of the execution of the sentence. Orientation consists of three phases: training in different majors, the service they give back to the community, and integration.

The qualification courses take place over a period of 6 months, totaling between 300-400 hours. In the second phase, a pedagogical theory of training and community service is used - learn, and then give something back to the community because, accompanied, they go to high schools and talk about the negative effects of alcohol. In the third phase, the orientation takes place, which assumes that the ex-prisoners are helped by the NGO to find a place on the labor market. Thus, in 2012, 1900 people were involved in this project with vats of freedom.

In Poland, from the remuneration received by a prisoner, as a result of the work performed, 35% is used for a special fund established to create more

¹⁴ <http://www.reinsercionsocial.cl/>, accessed on 12 May 2023.

¹⁵ <https://fundacionlacaixa.org/ca/home>, accessed on 13 May 2023.

jobs for prisoners - Professional Activation Fund, and 10% is used for the provision of aid, after release, through the so-called Post-Penitentiary Help Fund. Prisoners selected for work have the opportunity to gain vocational qualifications and also benefit from 14 days of paid leave for each year worked. During the period of paid leave, certain rights of the prisoner are supplemented, such as additional or longer visits, the addition of the right to purchase food or tobacco, priority in participating in cultural activities. Although in many countries there is no unanimously accepted definition of the social economy, in countries such as Spain, France, Portugal, Belgium, the concept of the social economy enjoys the greatest recognition from public authorities, the academic and scientific world, as well as from the economic sector. The first two countries mentioned stand out, because France is the birthplace of this concept, and Spain approved, in 2011, the first European national law on the social economy. Statistics show that, at the European level, these are also the countries where the workforce involved in the social economy represents 9-10% of the active population, while, in the new EU member states, such as Slovenia, Romania, Malta, Lithuania, Croatia, Cyprus and Slovakia, the social economy remains a small, emerging sector, employing less than 2% of the working population.

In parallel, in 2011, the European Commission published the Green Paper, entitled Promoting a European framework for corporate social responsibility, and defined Corporate Social Responsibility - referred to by the abbreviation CSR, as a concept applied to businesses to integrate, on a voluntary basis, social and environmental concerns in their business activities and interaction with stakeholders¹⁶.

The two alternatives of social support from the economic sector, of social economy and social responsibility of enterprises, are also worth exploiting in the interest of the social, socio-professional reintegration of criminally sanctioned persons. In this context, the tertiary sector in Belgium, France, England, Spain offers prisoners the opportunity to work, train and specialize at work, based on a contract or individual work agreement.

In conclusion, regarding the recommended European practices for supporting the insertion of people who have been criminally sanctioned, on the labor market, we recall the Resolution of the European Parliament of October 5, 2017¹⁷, regarding penitentiary systems and conditions in prisons, in which the following are provided:

- Member States are encouraged to develop effective tools to support the return of prisoners to professional activity, initially by identifying employment opportunities, in relation to the needs of the region, to organize and monitor training and work in the closest way of the type of people analyzed, possibly also to

¹⁶ https://eures.ec.europa.eu/social-enterprise-entrepreneurship-social-impact-2018-10-18_ro, accessed on 13 May 2023.

¹⁷ <https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52017IP0385&from=FR>, accessed on 13 May 2023.

maintain a constant dialogue with the representatives of the employers; member states are thus called upon to establish a system of training programs aimed at encouraging employers and private enterprises to offer free vocational training to prisoners, with a view to recruiting them at the end of their period of detention, encouraging member states to simultaneously create incentives for employers who wish to employ prisoners or encourage ex-prisoners to set up their own business, including financial and fiscal incentives, also encourage Member States to set up contact points for released prisoners to provide information and support in finding a job, as well as compulsory and strictly supervised distance learning activities.

- at the same time, invites the Commission to publish detailed reports on the situation in prisons in Europe, every five years, from the approval of the analyzed resolution, including an in-depth analysis on the quality of education and training provided to prisoners, as well as an evaluation of the results, which to include recidivism rates, alternative measures taken, instead of detention.

In Romania, the social economy is regulated by Law no. 219/2015, with subsequent amendments and additions, and persons released from detention, who meet the conditions to be part of the vulnerable group defined according to the law, can carry out activities within social economy structures, based on a work report. Given the fact that persons deprived of liberty cannot currently conclude individual employment contracts, this access is not possible *ra* to the social economy structures only after they leave the penitentiary system, but this aspect is also unlikely because there is no legislation that imposes appropriate behavior for reinsertion into society.

6. Conclusions

Considering the results of the analyzes and studies carried out at the national level, as well as the European policies in the field, a series of conclusions with important implications are highlighted, regarding the process of social reintegration of persons who have executed custodial sanctions.

Thus, professional qualification and retraining represent one of the basic *conwithouttribute* to post-detention reintegration, ensuring ex-prisoners the opportunity to identify a job, implicitly and a source of income, able to support individual independence, but without there is any reference to the coverage of the damage caused.

For this objective to be viable, it is necessary to ensure a better professional and vocational orientation of prisoners, so that the offer of professional training is in accordance with the requirements of the labor market and the level of education of persons deprived of liberty. In order to achieve this goal, it is necessary to develop, annually, at the level of the penitentiary system, a training plan for persons deprived of liberty, to be analyzed and included in the professional training plan of the National Employment Agency. So:

- to have a real picture regarding the efficiency of the professional training programs, carried out during the execution of the custodial sentences, it is necessary to carry out an analysis regarding the employment of the released persons who benefited from these measures.

- regarding the efficiency of the recuperative intervention, organized during the detention period, it must be ensured by measures aimed at the behavioral balancing of prisoners or interned persons, as well as their education in the spirit of responsibility and adaptation to social norms. Equally, it is necessary to carry out, with a preponderance, some activities of a practical nature, which can lead to an increase in the degree of independence of people leaving the penitentiary system, as well as an intervention aimed at identifying and developing individual inclinations and abilities, which can contribute to achieving personal success, in different fields of activity such as art, sports, etc.

- the individual employment contract would represent a viable solution for increasing the chances of socio-professional reintegration of persons who have served custodial sentences, given that the work performed at various economic agents calls for this form of labor relations regulation. In particular, it would be of particular importance to regulate the individual employment contract of persons deprived of liberty in the open regime, in order to facilitate the transition to life in the community.

- with regard to post-detention assistance, in order to ensure the transition between the penitentiary environment and the community, it is necessary to have structures in charge of taking over the persons who are released, offering integrated, specialized services and monitoring the cases, in parallel with the amendment of the legislation in force in order to be able to align ourselves with the requirements, in the field, requested by the European Union and taken over, in order to successfully overcome the critical post-detention period, in which there is a high risk of recidivism. In this sense, it is essential to involve local authorities in these efforts and to create a support network that includes, in addition to social services, volunteers, community police, non-governmental organizations, economic agents, representatives of religions, etc.

- according to the enforcement-penal provisions in force, among the documents that accompany the person deprived of liberty upon reception in the place of detention is the identity document or the report establishing the identity. The situation of the people concerned, who do not have identity documents, is managed through a difficult mechanism, the stages of which require a very long period, with the allocation of human and financial resources. Thus, in the context where speed is required in the conduct of the criminal process, the correct identification of the person against whom it was initiated being essential, it is necessary to create a flexible and efficient mechanism for registering persons, investigated or criminally sanctioned, whose birth was not registered in the Civil Status Register.

- to adequately support the best interests of the child deprived of liberty,

as well as to fulfill the obligations towards him, it is necessary to appoint a representative to assist the minor until the custodial measure is terminated. It is necessary to analyze the legislation in view to establishing the conditions of appointment, the role, the duties and the requirements of preparation, training and professional experience for the persons appointed as representatives.

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Inheritance Rights of the Surviving Spouse. Study of Comparative Law

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Abstract

With a legal situation that placed the surviving husband towards the end of the list of those called to his de cuius inheritance - only the state was found after him in the order of successors, the regulation of his succession rights betrayed, over time, a non-privileged position. Under the empire of the Civil Codes, the one from 1864 and then the one from 2009, the surviving spouse acquires a well-deserved place among the successors, coming into the contest alongside each class of heirs. The paper aims to analyze the succession rights of the surviving spouse in the different succession systems, the one of Romano-Germanic tradition in the family of which our succession right is a part, the common-law system present in Great Britain and the mixed one of the province of Quebec.

Keywords: inheritance rights; surviving spouse; comparative law; civil law.

JEL Classification: K15

1. Introduction

With the entry into force of the new civil code, the surviving husband was resettled among the heirs of the deceased, after a long historical period in which, on the scene of legal devolution in Romania, his succession situation was not favourable to him.

The old unwritten Romanian law, despite its Roman, post-classical roots, recognized the need for protection of the surviving husband, the widow having the inheritance rights of a child, a virile portion, to which is added the right of lifetime residence over the family home.

The end of the 18th century and the beginning of the 19th century were marked by the appearance of four important codes: the *Pravilniceasca Condică* and *Legiuirea Caragea*, in Wallachia, and the Legal Manual of Andronache Donici and the Calimah Code, in Moldova.

*Pravilniceasca Condică*² or *Code of Ipsilanti*, in force in Wallachia between the years 1780-1817, represents the first "legislation" which, in the chapter

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² *Pravilniceasca Condică* 1780, A. Rădulescu edition, Ed. Academiei RPR, Bucharest, 1957, p. 102-106; M. Eliescu, *Inheritance and its devolution in the law of the Socialist Republic of Romania*, Ed. Academia RSR, Bucharest, 1966, p. 127- 128; Gr. C. Conduratu, *Comparison of the inheritance rights of the surviving spouse in Roman law, Callimachi and Caragea Codex, Napoleon's Codex and Alexander I. Codex*, Ed. Typography of the associated workers, Marinescu

entitled "For succession", includes provisions regarding the succession rights of the surviving spouse (art. 1- 5).

According to the provisions of art. 2 of the Ypsilanti Code, if the spouses had elderly descendants (who lived at least until the age of fourteen, in the case of boys, and twelve years, in the case of girls, according to art. 1), the wife inherited a share as much as a child's, but not in full ownership, but only in usufruct ("which share to have for the sustenance of life, and not with complete control, that is to sell it or give it to others").³

2. The evolution of the surviving spouse's succession rights in Romania

If the children had died underage, the wife, widowed or remarried, inherited the third part of the husband's property, this time in full ownership "because she suffered the pains, sorrows and dangers of life from having children"). In addition to this, she also received her dowry. If the widow remarried without observing the year of mourning, she would be removed from the deceased's estate. This third was to be taken, preferably, from the movables in the estate ("from the moveables"), the immovables remaining, as a rule, to the blood relatives⁴.

If the widow remarried, disregarding the year of mourning, she lost the status of heir. If the spouses had no children, the widow had the right to receive her dowry back and the gifts before the wedding. In the hypothesis that the deceased husband (or wife) had no children even from previous marriages, then the surviving husband had the right to half of the quarter, that is, one sixth of the inheritance if he had not received at least that much by will.

& Șerban, Bucharest, 1898, p. 54- 56. The *Pravilniceasca Condică* represents the first code of laws with constitutional value that appeared in 1780 in Wallachia. The 18th century, especially the second half, is crossed, among other things, by tendencies to draw up written laws and their codification. Among the Phanariot gentlemen, Alexandru Ipsilanti showed particular care in this regard. His desire was, however, to give the country he ruled a rule, a written law, and he even talks about its creation in some charters. In a charter from 1775, Ipsilanti said: "I made a rule that after we show it to everyone, translating it into Romanian, we will also print it". What determined its preparation were the significant economic and political transformations in the Romanian Countries in the second half of the 18th century. Feudalism was decaying, and the new capitalist production relations were leaving their mark on the course of society. From here, on the one hand, the need for the dominant classes to consolidate their position and privileges through texts, and on the other hand, the transformations that took place in the economic base of society, imposed certain new legal regulations, especially necessary for that part of the nobility that had begun to be drawn into capitalist production relations. In the charter that promoted the rule, Ypsilanti shows that "more deformation cannot be to a people, and even more so to a people of good faith, than life without pravili, that is, not to have pravili or not to follow after pravili" - original text, Academy of the Romanian People's Republic, *Dicționar Enciclopedic Român*, Political Publishing House, Bucharest, 1962-1964, vol. I, pp. 262-264.

³ Irina Bardoczi, *Does the civil code of 1864 mark an evolution in the matter of the surviving spouse's intestate succession rights?* in „Studia Universitatis Iurisprudentia” no. 1/2013, p. 2.

⁴ *Ibid.*

*Legiuirea Caragea*⁵, also applicable in Wallachia, from 1817 until the entry into force of the Civil Code of 1864⁶, develop this system in chapter 3, entitled "Inheritance without diata".

From the beginning, it was stipulated that when the deceased did not have a husband or wife alive and they had only one child, the child inherited (art. 17, letter a). If the deceased's wife/husband was alive and their marriage resulted in descendants, then the inheritance was intended for the descendants and the surviving spouse (art. 17, letter k): the children took their due shares in full ownership ("of which they are perfect masters"), as well as the soul's share "for the expenses of burial and memorials of the dead", and the surviving spouse received his share only in usufruct ("hrisis").

The amount of the surviving spouse's inheritance rights in competition with the descendants varies depending on the length of the children's lives.

If the descendants died after three years from the death of one of the parents, but before the age of fourteen, boys, respectively twelve years, girls, the surviving husband received the third part of the soul in cash ("in full").

If the descendants died before the passing of three years from the death of one of the parents, the surviving spouse was only entitled to the restitution of the funeral and memorial expenses, if they were borne by him.

If the descendants died before reaching the age of fourteen, boys, respectively twelve years, girls, before or after the death of one of the parents, the inheritance was divided into three parts: one third went to the surviving spouse in cash and in full ownership, one third to the ascendants of the deceased, and in their absence, to the collaterals, and the other third also belonged to these relatives of the deceased, but it was intended for funeral and memorial expenses (art. 18, letter c).

In the event that there were no ascendants or collaterals of the deceased, the surviving spouse received the entire succession, the collaterals of the deceased up to the 4th degree having the possibility to redeem the home of the family (art. 18 letter c).

If the last marriage had lasted ten years, but from this marriage or from another previous *de cuius* he had no descendants, the surviving spouse was entitled to a sixth part of the inheritance, the rest being deferred to the relatives of the deceased (art. 23). In the absence of descendants, ascendants and collaterals, according to the same article, the surviving spouse, male or female, inherited the entire succession.

Similar to *Code of Ipsilanti*, the right of inheritance of the surviving

⁵ *Legiuirea Caragea (The Caragea Law)*, critical edition A. Rădulescu, Ed. Academiei RPR, Bucharest, 1959, p. 121- 122, p. 126; A. Rădulescu, *The right of inheritance of the surviving spouse*, Ed. Cultura Națională, Bucharest, 1925, p. 19- 20; M. Eliescu, *op. cit.*, p. 128.

⁶ For details, Marilena Marin, *History of Romanian Law. University course*, Pro Universitaria Publishing House, Bucharest, 2015, pp. 26-28.

spouse was reciprocal and did not depend on the economic situation of the surviving spouse, and its amount varied depending on the existence or non-existence of descendants and other relatives of the deceased, as well as the length of life of the descendants or for the duration of the marriage. Unlike the *Pravilniceasca Condică*, we note that, in the Caragea Code, the legislator did not make any clarification regarding the eventual remarriage of the surviving spouse⁷.

In Moldova, the Manual of Andronachi Donici⁸ (1814) followed by Calimach Code⁹ (1817) which was applied until the entry into force of the Civil Code of 1864, granted the surviving spouse similar inheritance rights, he was entitled to a fourth of the inheritance if the spouses had up to three children, and if they had more than three children he received the share of one child, in both cases, in usufruct. Only if the descendants died in childhood (underage) did the husband receive his share in full ownership. Likewise, the dowry and wedding gifts were returned to the surviving husband. And when competing with the collaterals of the deceased husband, the rules were similar, the widow/widower receiving a fourth part of the inheritance if competing with up to three brothers, otherwise, one brother's share was due.

In the Manual of Andronachi Donici, art. 9 from title 36 stipulated that when there were no other blood relatives entitled to come to the inheritance, the widow received one-tenth, and the other one-tenth belonged to the treasury¹⁰.

3. The inheritance situation of the surviving spouse in the Civil Code of 1864¹¹

With a disadvantaged situation also in Cuza's Civil Code, the surviving spouse came to inherit only if there were no "other legitimate heirs". The father of Romanian civil law, Dimitrie Alexandresco, wrote in 1912: "*As for the French code, [...] this code does not recognise the husband, however poor he may be, any right to the inheritance of the other spouse, in competition with other heirs, not even the right to maintenance. Consequently, a husband who has sacrificed*

⁷ M. Eliescu, *op. cit.* pp. 128-130.

⁸ *Andronachi Donici's Legal Manual*, critical edition A. Rădulescu, Ed. Academiei RPR, Bucharest, 1959, p. 94-95, 103-104, 132-134.

⁹ *The Calimach Code*, critical edition A. Rădulescu, Ed. Academiei RPR, Bucharest, 1958, p. 113; Al. Otetelișanu, *Curs de drept civil comparat cu aplicațiuni la drepturile provinciilor alipite. Succession*, Ed. Cultura Poporului, 1937, p. 96-97; A. Rădulescu, *op. cit.*, p. 20-21; Gr. C. Conduratu, *op. cit.*, p. 56-57.

¹⁰ *Andronachi Donici's Legal Manual*, critical edition A. Rădulescu, Ed. Academiei RPR, Bucharest, 1959, p. 94-95.

¹¹ The Civil Code was decreed on 26 November 1864, promulgated on 4 December 1864 and implemented on 1 December 1865. The form taken is the official text of the Civil Code published by the Ministry of Justice in 1981, on which references were made to the legislation in force on 1 September 1996. Subsequently, amendments were also made by O. G. No. 9 of 21 January 2000, repealed by O.G. No. 13 of 24 August 2011, OUG No. 138 of 14 September 2000, Law No. 356 of 6 June 2002, Ordinance No. 13 of 24 August 2011 and Law No. 71 of 3 June 2011.

*his whole life suddenly finds himself reduced to the most terrible misery, knocking at the door of relatives of the deceased, who have often been enriched by his work and sweat. Then he continues: "Our code, inspired by the tradition of the past, comes to the aid of the poor widow in Article 684; but this provision, however laudable it may be, is far from satisfactory".*¹²

Referring to the introduction of Article 684 of the Civil Code, the same author considers that *"however imperfect it may be, it nevertheless constitutes an undeniable advance on the French Code as it was conceived from the outset. These texts need to be amended as soon as possible: 1° because of the antinomies to which they give rise [...]; 2° because they do not confer any right of inheritance on the man, the law being inferior in this respect to our previous laws; 3° because they only confer certain rights on poor women, which is more of a handout, if we may so express it; a wife who has worked all her life alongside her husband should not be considered a beggar [...]."; 4° because he does not in principle recognize the surviving husband, either the man or the woman, as having a right of full ownership of the inheritance left by the other husband, although the surviving husband is the most just heir of the deceased [...]"*.¹³

In Professor Rarincescu's lecture we find the following considerations: *"In 1864, at the time of the drafting of our civil code, the criticisms that had already been formulated in France against the system of Napoleon's code, regarding the right of inheritance recognized to the surviving spouse, were known to Romanian lawyers. In view of this, our legislator of 1864 could not fail to take account of these justified criticisms and, in order to give them some satisfaction, after adopting the corresponding texts of the Napoleonic Code almost unchanged, he introduced a new provision into our Civil Code, namely the provision contained in Article 684 of the Civil Code, which until 10 June 1944 regulated the so-called 'poor widow's right of inheritance'. But, Rarincescu pointed out, "the attitude adopted by our legislator towards the surviving spouse, from the point of view of inheritance, was neither logical nor fair. It was not logical, because [...] the criterion adopted by our legislator, when he proceeded to establish the various classes of heirs and the order in which these classes are called, was the presumed affection of the deceased for each of them and because to admit that a person may have more affection for a collateral of the twelfth degree or for any other collateral, than for his spouse, is - for most cases - an impossibility. Nor was this attitude equitable, because the estate left by the deceased is often the result of the joint efforts and savings of both spouses, and because it was therefore completely unfair that the assets acquired through joint efforts and savings should pass only to the relatives of the predeceased spouse, whose existence was often barely known to the deceased, and that the surviving*

¹² M. D. Bob, *Succession rights of the surviving spouse, a solution of continuity*, „Journal of Legal Studies and Research”, Year 2 (58), No. 3, July-September 2013, available at <http://www.rscj.ro/SCJ-3-2013.pdf>.

¹³ *Ibid.*

spouse, completely removed from the inheritance, should be reduced to a state of utter misery".¹⁴

An appropriate legislative response to the doctrinal recommendations concerning the derisory inheritance situation of the surviving spouse was Decree-Law No. 319 of 10 June 1944¹⁵ inspired by the German Civil Code. Thus, the widowed life partner was granted a legal right of inheritance, progressive and in full ownership, recognised in concurrence with any class of heirs, the inheritance reserve, temporary right of abode and right of inheritance over furniture and objects belonging to the household, as well as wedding gifts when not in concurrence with descendants¹⁶.

¹⁴ *Ibid*

¹⁵ Law No. 319 of 10 June 1944 on the right of inheritance of the surviving spouse, published in the Official Gazette No. 133 of 10 June 1944.

¹⁶ Article 1. *"The surviving spouse inherits from the estate of the other spouse as follows: a) when he comes to the succession with the legitimate and recognized children or only with some of them, or with their descendants, he shall inherit one-fourth; b) when he comes to the succession in concurrence with the father and mother of the deceased, or only with one of them, in both cases together with the brothers and sisters of the deceased husband and their descendants, or only with one of them, he shall inherit one-third; c) when he comes to the succession with the father and mother of the deceased, or only with one of them, or only with his brothers and sisters and their descendants, or only with some of them, he shall inherit one half; d) when he comes to the succession with the other ascendants or collaterals up to and including the fourth degree, he shall inherit three quarters; e) in the absence of the above-mentioned relatives, the surviving spouse shall inherit the entire estate.* Article 2. *The bequests made by the predeceased spouse may not exceed half of the rights provided for in Article 1 in favour of the surviving spouse.* Article 3. *The surviving spouse shall be obliged to report gifts received by inter vivos deeds from his or her spouse when he or she comes into competition with his or her children or their descendants.* Article 4. *The surviving spouse who does not have another dwelling of his or her own, shall have until the execution of the exit from the indivision and in any case for at least one year after the death of his or her spouse, in addition to the right of inheritance according to the above provisions, a right of residence in the house in which he or she lived, if it is part of the estate. The right of abode may not be assigned or terminated, even in the case provided for in Article 572, paragraph 1, of the Civil Code. The surviving spouse's cohabitants may request the restriction of the right of abode if the dwelling is not entirely necessary. They will also have the right to provide the surviving spouse with a dwelling elsewhere. If the surviving spouse and the heir do not agree on the provision of the dwelling or the restriction of the right of abode, the competent court will judge the division of the estate and will decide urgently in chambers. The right of abode shall cease if the surviving spouse remarries before the execution of the exit from the indivision.* Article 5. *In the cases referred to in Article 1, points b to d inclusive, the surviving spouse shall inherit, in addition to his or her share of the estate, the household goods and objects and the wedding gifts".*

4. Succession situation of the surviving spouse in the New Civil Code¹⁷

The provisions of Decree-Law No. 319/1944 are taken over in Articles 970-974 of the new Civil Code, ending the inappropriate situation of placing the surviving spouse's inheritance rights outside the Civil Code.¹⁸

In order to inherit, the surviving spouse must meet all the general conditions laid down by the law, i.e. he must have the capacity to inherit not be unworthy of the deceased, he must not be disinherited by the deceased (although, in this case, upon request, he would receive the reserved portion of the estate). Instead of kinship, the spouse is also required to meet a special condition, i.e. he must be a spouse¹⁹ at the date of the opening of the inheritance. This means that in the case of divorce, the spouse's status is preserved until the divorce judgment becomes final, so even if death occurs during the proceedings or even after the judgment has become final, as long as the judgment has not become final the spouse's status is maintained.

From this rule art 925 Civil Code provides an exception, namely: para. (1) "If during the divorce proceedings one of the spouses dies, the court shall take note of the termination of the marriage and shall order, by a final decision, the closure of the case". (2) "However, where the petition for divorce is based on the fault of the respondent and the petitioner dies in the course of the proceedings, leaving heirs, the heirs may continue the proceedings, which the court shall allow only if it finds that the respondent is solely at fault." (4) "If the action is continued by the heirs of the plaintiff husband, according to para. (2), the marriage is considered dissolved on the date of filing the divorce petition."

In the case of annulment of marriage, as an exception to the principle of retroactivity of nullity, Article 304 of the Civil Code provides that "A spouse in good faith at the conclusion of a void or annulled marriage shall retain, until the date when the court decision becomes final, the status of a spouse in a valid marriage." Therefore, only the bona fide spouse of a putative marriage can inherit, which is also the only exception to the principle of reciprocity of the right to inherit that the law provides.

¹⁷ The new Civil Code (Law no. 287/2009), republished, updated to date and consolidated by Law 138/2014 - for amending and supplementing Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and supplementing some related normative acts and Law 60/2012 on the approval of GEO 79/2011 for regulating some measures necessary for the entry into force of Law no. 287/2009 on the Civil Code, Official Gazette 255/2012.

¹⁸ M. D. Bob, *Family and inheritance in Romania*, Ed. Universul Juridic, Bucharest, 2016, p. 255.

¹⁹ Fr. Deak, R. Popescu, *Treatise on Succession Law, vol. I, Legal Inheritance*, 3rd edition updated and completed, Universul Juridic Publishing House, Bucharest, 2013, pp. 238-239.

4.1. Enumeration of the inheritance rights of the surviving spouse

The above conditions having been met, the surviving spouse is entitled to the following inheritance rights:

A. A right of inheritance in concurrence with any class of heirs, and in the absence of legal heirs the surviving spouse will reap the entire inheritance. (art. 971 of the Civil Code)

Article 972 of the Civil Code also shows us what the surviving spouse's shares are according to the class of heirs with whom he competes:

"(1) The surviving spouse's share shall be:

a) a quarter of the estate, if it is shared with the descendants of the deceased;

b) one third of the inheritance, if it comes in concurrence with both privileged ascendants and privileged collaterals of the deceased;

c) one half of the inheritance, if it comes in concurrence either only with privileged ascendants or only with privileged collaterals of the deceased;

d) three quarters of the inheritance, if it is concurrent either with ordinary ascendants or with ordinary collaterals of the deceased.

(2) The share of the surviving spouse in competition with legal heirs belonging to different classes shall be determined as if he had come into competition only with the nearest of them. (3) If, following the putative marriage, two or more people have the status of a surviving spouse, the share established according to paragraph (1) and (2) are divided equally between them."

We note *prima facie* that the Romanian legislator has maintained the rules established in Decree-Law no. 319 of 1944 regarding the classes of heirs and the shares of the inheritance to which they are entitled.

Although in the light of the new Civil Code, the surviving spouse is considered a main actor on the scene of legal devolution, as he or she collects the inheritance in competition with each class of heirs, Romanian law does not place him or her in a favourable position in relation to the inheritance rights due to heirs in European law.

B. A temporary right of habitation conferred by Article 973 of the Civil Code. The surviving spouse's right of habitation is a right in rem, he/she will also be able to use the land of the dwelling house and the common parts if the property has more than one dwelling, of course within the limit necessary for the use of the dwelling. The right of habitation is temporary, and will expire at the time of partition, but not before one year has passed since the opening of the inheritance. If the surviving spouse enters into a new marriage, the right of residence will expire even earlier than one year.

Also, the right of residence is a personal, inalienable and unassignable right; it follows, therefore, that the right cannot be assigned or pursued by the creditors of the surviving spouse.

In order to acquire the right of habitation, the following conditions must

be met: at the date of the opening of the succession, the person must have actually lived in the property which is the subject of the right of habitation; the person must not have any real right to use a dwelling corresponding to his needs. In order to determine the adequacy of the dwelling, "the position, extent and quality of the alternative dwelling, the profession, age and state of health of the surviving spouse (...) the criteria laid down in the Housing Act No. 114/1996 may also be used".²⁰

The house must be part of the estate, even in part. If the house in which the surviving spouse was living at the date of the opening of the inheritance was owned by the predeceased spouse in joint ownership with a third person, the surviving spouse's right of residence will extend only to the extent of the share which belonged to the deceased because only this share is included in the estate; not to become by inheritance the sole owner of the dwelling, since the exclusive owner of a property cannot also have a dismemberment of the right of ownership of the property which he owns by title; the deceased has not provided otherwise, the right of habitation can be removed, the surviving spouse being the reserved spouse only in relation to the inheritance rights in the content of Art. 972 of the Civil Code.

The legislator has therefore taken care to ensure that the surviving spouse is not subjected to a brutal change in living conditions at a time when he or she is suffering great grief as a result of the loss of a life partner and has been left without the support of that partner.²¹

C. A special right of inheritance over furniture and household goods provided for in Art. 974 of the Civil Code. This right is an additional measure, in addition to the right of residence, to preserve the living conditions that the surviving spouse had until the time of death. The property covered by this special right is property which the spouses have decided together will be needed in the household, which they have acquired to facilitate their joint living and which has been used by both spouses until the opening of the succession.

This category of property includes property which was used to furnish the spouses' home or property which by its nature was intended to serve the household and which was actually used for the spouses' joint home.

In order to benefit from this special right of inheritance, the surviving spouse must not inherit concurrently with descendants. The legislator considered this to be the case, bearing in mind that the assets in this category have also been used for the benefit of children (or grandchildren) and it is natural to protect them too, especially as the estate sometimes consists solely of such assets.

It follows that in the absence of descendants, the furniture and household goods will revert in full to the surviving spouse, provided that the *de cuius* has not disposed of these assets by gift or bequest, in which case the assets will be

²⁰ Ibid, p. 271.

²¹ Art. 309 para (1) Civil Code: "*Spouses owe each other respect, fidelity and moral support*".

included in the reserve calculation if applicable.

5. Surviving spouse's inheritance reserve

The new Civil Code defines for the first time the reserved portion of the inheritance as "the part of the inheritance assets to which the reserved heirs are entitled by law, even against the will of the deceased, manifested by gifts or disinheritances" (art.1086 Civil Code).

Article 1087 of the Civil Code lists the reserved heirs, namely: the surviving spouse, descendants and privileged ascendants.

The available share is also defined by Article 1089 of the Civil Code as "the part of the inheritance assets which is not reserved by law and which the deceased could dispose of in an unrestricted manner by way of gifts".

In justifying the granting of the reservation of inheritance, the civil law system takes into account the "existence of a natural debt of pity"²² between parents and children, as well as between spouses, which is also the basis of the maintenance obligation.

The inheritance reserve is a part of the inheritance (*pars hereditatis*)²³ which is attributed to the reserved heirs in kind. The reserve is therefore referred to as *pars bonorum* and not merely a claim against the estate.²⁴

The reserve has a family function (to prevent the close family of the deceased from being dispossessed of assets for the benefit of strangers) but also an individual function (to ensure a minimum equality between heirs and to prevent some of them from being advantaged beyond a certain share in relation to their heirs).²⁵ The family function of the reserve is often associated with its *pars bonorum* character, while the individual function is a sign of the replacement of a right in rem by a right of claim.

The reserve is collective in nature in terms of both goods and persons. This character is manifested by the fact that the reserve represents a mass of assets, a share of a universality which is attributed to a group of heirs and not to the heirs who are individually reserved. The exception is the surviving spouse to

²² F. Deak, R. Popescu, *Succession Treatise vol. II, op.cit.*, p.250.

²³ M. Grimaldi, *Droit civil, Successions*, Litec, Paris, 6^{em}, Ed. 2001 no. 283, p. 280, where the author states that even when the reserve is expressed in money, we are not witnessing a decline in the *pars hereditatis* nature of the reserve right but simply the fact that this *pars hereditatis* can also be expressed in monetary terms. "Thus, the right of ownership of inherited property linked to the family function of the right of reservation often gives way to a simple right of claim which is the sign of the individual function of this institution. What becomes essential is to prevent the property from leaving the family for good, but also to ensure a minimum equality between the reservers."

²⁴ I. Popa, *Rezerva succesorală*, „Romanian Journal of Private Law” 5 of 2008 online edition, searched on sintact.ro on 10.06.2023.

²⁵ A. Delfosse, J. F. Peniguel, *La reforme des successions et des liberalites*, Litec, Paris, 2006, p. 141.

whom the legislator has made the individual allocation²⁶.

The imperative nature of the reserve derives from the mandatory rules governing it. It is obvious that the legislator intended to protect the interests of the reserved persons in such a way that neither the *deceased* nor the potential reserved heirs could alter the rules laid down. As a result, the calculation of the reserve cannot, we believe, be left to the discretion of the deceased's successors, according to whose choices the limits of the reserve should be set.

While the institution of the reserve and the rules governing it are mandatory, the exercise of the right to the reserve is purely optional: the successor reservor is not obliged to accept or repudiate the inheritance, including the reserve. If he renounces the inheritance, this will also have an effect on the reserve, or if he does not exercise the right to reduce the excessive gifts made by the deceased, this will have the effect not only of forfeiting the right to the reserve but also of possibly interpreting his act as an acquiescence in those acts gratuitously.

The imperative (public policy) nature of the reserve means that it is impossible for anyone to derogate from its rules by setting other reserve quotas, increasing or reducing them. Acts "increasing" the reserve quotas are absolutely void, while acts reducing these quotas (by increasing the available quota accordingly) will be subject to reduction. For the sake of consistency of reasoning, the establishment of "reserved heirs" other than those specified by law is absolutely null and void.

The surviving spouse's right to a reserve was first enshrined in Law No. 319/1944. Prior to this law, the surviving spouse did not have the status of reserved heir.

According to Article 2 of Law No. 319/1944, 'gifts made by the predeceased spouse may not exceed half of the rights provided for in Article 1 (which refers to the rights of the surviving spouse in concurrence with the classes of heirs) in favour of the surviving spouse'.

According to art. 1 of Law no. 319/1944, depending on the classes of heirs with which the surviving spouse comes to inherit, the spouse is recognized the following inheritance quotas and implicitly the reserve quotas as follows:

- a) when he comes to inheritance with class I (descendants) the inheritance share is 1/4 and the reserve share 1/8 (1/2 of 1/4);
- b) when he comes to inheritance with the 2nd class:
 - the privileged ascendants together with the privileged collaterals, the inheritance share is 1/3 and the reserve share is 1/6 (1/2 of 1/3);
 - the privileged ascendants or privileged collaterals, the inheritance share is 1 and the reserve share is 1/4 (1/2 of 1/2);

²⁶ I. Popa, *op. cit.* The author refers to the contrary opinion expressed by Prof. D. Chirică, *Civil law. Succession and wills*, Ed. Rosetti, Bucharest, 2003, pp. 307-308, the author being of the opinion that the surviving spouse's reserve, being included in the inheritance reserve (in general), will have a collective, global character.

c) when he comes to inheritance with class III (ordinary ascendants) or class IV (ordinary collaterals) the surviving spouse's share is 3/4 and the reserve share 3/8 (1/2 of 3/4);

d) in the absence of relatives of the deceased, the surviving spouse inherits the entire estate, and in competition with the legatees, will have a reserve share of 1/2 of the inheritance.

Under the current Civil Code, the surviving spouse's reserved portion of the estate, like that of any reserved heir, is half of the share of the estate which, in the absence of gifts or disinheritances, would have been due to him as legal heir. In other words, the reserve due to the surviving spouse will be different, depending on the class of heirs with whom he competes in the deceased's estate. It should be noted that the surviving spouse's reserve is the same as in the old Civil Code, the difference with the old Civil Code being that this determination criterion has been extended to the way in which the reserve of all reserved heirs is determined²⁷.

6. Inheritance rights of cohabitants

Jean Carbonnier considered marriage as "the oldest custom of mankind", a custom that has been subject to numerous changes by the legislator guided by the desire to adapt this union to changes in society²⁸.

With the French Revolution, marriage underwent significant normative improvements, and principles such as secularity, liberty and equality began to emerge and to be assimilated into marriage, which tended to become a simple contract.

In the context of the development of legal systems and the significant transformation of the rules governing property relations within marriage, there has been a gradual increase in the importance of the principle of equality between spouses.

Romanian civil law played a pioneering role in the European area, being one of the first legislations that enshrined the equality between spouses in principle in relation to family life, thus abolishing the incapacity of married women in 1932. The principle was elevated to constitutional value by its inclusion in the 1948 Constitution.

With the removal from power of totalitarian regimes in Europe that stigmatised and sanctioned intimate same-sex relationships, a new perspective has begun to emerge in the collective mind, with non-discrimination and the protection of individual freedom being a *sine qua non* of democracy.

New types of cohabitation, such as civil partnership, legal cohabitation, civil solidarity pact, civil union, are now emerging in some European countries

²⁷ I. Nicolae, *The surviving spouse's reserve*, part I, article UJ Premium, published on 19 April 2022, accessed on 09.06.2023.

²⁸ Tiberia Cercea, *Civil Partnership*, www.taurillon.org.

as alternatives to marriage that can benefit cohabiting same-sex couples, and in other EU countries same-sex marriage itself is possible.

Registered partnership differs from cohabitation/common-law union by establishing specific rules on property relations between the two partners, but also between them and third parties, and from marriage by its more limited personal effects, and in some legislations, there is no similar regulation of the matrimonial regime.²⁹

In some EU countries, civil unions and registered partnerships are considered equivalent or comparable to marriage. Countries that allow same-sex marriages generally also recognise registered partnerships between people of the same sex in other countries.

In countries where the law provides for a form of registered partnership but does not allow same-sex marriages, same-sex couples who have married abroad will generally enjoy the same rights as registered partners.

However, the laws of the following countries do not allow registered partnerships: Bulgaria, Latvia, Lithuania, Poland, Romania, Slovakia.

From the perspective of the matrimonial regime, the partners are subject, in Romanian law, to a legal regime of separation of property, thus, the assets purchased and personal debts assumed before by each partner remain their own, just like the purchases/loans made individually during the partnership, and the assets acquired together during the time are subject to the rules of co-ownership.

In matters of inheritance, if the surviving spouse has the legal right to inherit, according to the legal rules mentioned above, in the case of civil partnership the surviving partner can only be the testamentary heir of the *deceased*.³⁰

²⁹ Tiberia Cercea, *Civil Partnership*, <https://www.thenewfederalist.eu> › parteneriatul-civ.

³⁰ The legislative proposal on the legalization of civil partnership in Romania was rejected by the Romanian Parliament on 28 September 2021. In the explanatory memorandum to the Law on civil partnership it was stated that "Civil partnership is a contract concluded before a notary public, without any kind of discrimination, between two adult persons who agree to live together on the basis of mutual affection, respect and support and equality in rights. Also known as cohabitation or consensual union, civil partnership preceded marriage from a civil law perspective, while at the same time representing an alternative to it. Both Roman law and *jus valachicus* include it as a form of legal cohabitation between two people. The Romanian legislation in force also includes references to the institution of partnership in GEO 102/2005 republished in 2011 on the free movement on the territory of Romania of citizens of the Member States of the European Union, the European Economic Area and citizens of the Swiss Confederation, published in the Official Gazette, Part I no. 774 of 2 November 2011: "partner - the person living with the European Union citizen, if the partnership is registered according to the law of the Member State of origin or of provenance or, if the partnership is not registered, the relationship of cohabitation can be proved" (Chapter I, Art.2, para.7). Directive 2012/29/EU of the European Parliament and of the European Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime includes partners in a civil partnership among family members in Art. 2 (1), (b): "family members" means the spouse, the person who lives with the victim, is in an intimate relationship and lives with the victim in a stable and continuous household (...)". The recognition of these families outside the sphere of marriage is a reflection and a legislative transposition of the evolution of society, current norms and values from the perspective of equal rights and non-

7. The inheritance rights of the surviving spouse in comparative law

Succession matters are subject to a wide variety of regulations in the laws of the countries of the world³¹. The main differences in the rules can be seen in

discrimination. The reality of contemporary Romanian society reflects the coexistence of different types of families, such as couples who decide to cohabit outside marriage or are unable to marry and couples formed in traditional ethnic communities on the basis of customary rules. In the 2002 census, 828,000 people reported living in a "consensual union" (3.9% of the population), and more recent surveys show an increase to 5.7% in 2008. This is an upward trend, reflecting a greater diversity of couple relationships, in line with changing realities and mentalities across the democratic world. It is the obligation of the Romanian state to provide equal protection under the law to all these forms of family cohabitation, as has been done since 1989, and in various forms, by almost all the Member States of the European Union and the consolidated democracies on our continent. In 1989, Denmark regulated registered partnerships for the first time in the world. Similar measures were then taken in Norway (1993), Sweden (1995), Iceland (1996), and Finland (2002). In 1998, Belgium provided for the establishment of legal cohabitation. In 1999, France introduced the civil solidarity pact. Germany created Lebenspartnerschaft (life partnership) in 2001; Luxembourg introduced civil partnership in 2004, and Slovenia established registered partnership in 2005. Switzerland created registered partnership, which was voted on by referendum in 2005. The UK recognised civil partnership by law in 2005. Other European countries have adopted regulations on cohabitation and registered and unregistered partnership. The Netherlands has recognised registered cohabitation by law since 1979 and registered partnership since 1999. Croatia has recognised registered partnership since 2006 - this includes joint support and maintenance obligations, inheritance rights, right of repossession, joint taxation. In 2007, the Hungarian Civil Code was also amended to adopt registered partnership. This legislative proposal does not directly involve additional financial resources from the state budget, as the related expenses can be covered by the registration and notification fees for the civil partnership relationship. The law will represent a significant step forward in the respect of human rights in Romania for couples who decide to organise their family life in this way."

³¹ For an overview of the main regulatory differences, see D.A. Popescu, *Guide to Private International Law in Succession Matters*, Guide developed in collaboration with the Ministry of Justice, 2014, within the project "Improving Cooperation between Judges and Notaries Public in Cross-Border Civil Matters", implemented by the Ministry of Justice in partnership with the National Union of Notaries Public of Romania, the German Foundation for International Legal Cooperation, the Council of Notariats of the European Union and the National Council of the Italian Notariat. The author refers to the studies Alain Verbeke, Yves-Henri Leleu, *Harmonization of the Law of Succession in Europe*, in *Towards a European Civil Code*, second revised and expanded edition (coord. A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron), Ars Aequi Libri - Nijmegen, Kluwer Law International - The Hague/London/Boston, 1998, p. 173-188 (chap.11); Y.-H. Leleu, *La transmission de la succession en droit comparé*, Antwerp/Brussels, Maklu/Bruylant, 1996, no. 154, p. 491, no. 864, p. 500; Louis Garb, *International Succession*, Union Internationale de Notariat Latin, 1998; *Family and Succession Law* edited by Walter Pintens, *International Encyclopedia of Laws*, 1997 (in two volumes); Ferid/Firsching/Lichtenberger, *Internationales Erbrecht*, 4 Aufl., C. H. Beck, 1993; Flick/Piltz, *Der Internationale Erbfall*. (*Erbrecht. Internationales Privatrecht. Erbschaftsteuerrecht*), C. H. Beck, Munich, 1999; Zillmann, *Die Haftung der Erben im internationalen Erbrecht*, 1998; M. Goré, *L'administration des successions en droit international privé français*, Economica, Paris, 1994; F. Boulanger, *Les successions internationales, Problèmes contemporains*, Paris, 1981; Héron, *Le morcellement des successions internationales*, Paris, 1986. See also C. Toader, *Harmonisation of Succession Law in*

the way the classes of heirs are made up, including the extent of the inheritance shares due to the legal heirs, the position of the surviving spouse, the existence, nature and extent of the reserve, the persons included in the category of reserved heirs and the extent of the heirs' obligation to bear the inheritance liabilities. Differences may also arise in relation to the manner and timing of the transfer of the estate, the conditions, forms and effects of dispositions of property on death, determination of the nature of the State's right to the vacant estate, etc.

Unlike other institutions of private law, the matter of succession was left to the discretion of the national legislator. Even at the level of conflict rules for the localisation of international successions, the differences in approach are not negligible. Thus we find systems which, taking account of the nature of the succession, favour its unity by making it subject to a single law, whether that law is the national law of the author of the inheritance at the time of his death (§ 28 of the Austrian Federal Law on Private International Law of 15 June 1978, IPR-Gesetz; Art. 25 of the Introductory Act to the German Civil Code - EGBGB; Art. 46 of the Italian Law no. 218 of 31 May 1995 on the reform of the Italian system of private international law; art. 64(2) of the new Polish Law of private international law of 4 Feb. 2011; art. 28 of the Greek Civil Code of 15 March 1940; art. 9 p. 8 of the preliminary title of the Spanish Civil Code of 1889, etc.), whether it is the law of his last domicile or of his last habitual residence. On the other hand, there are also schismatic systems, influenced in particular by the old theory of statutes, which divide the succession according to the nature of the assets (movable or immovable) making up the estate, thus differentiating in terms of the law applicable to the estate between movable assets, which are subject to a single law, and immovable assets, which are each subject to the law of succession of the State in whose territory they are located (*lex rei sitae*)³².

In the following we will present some rules applicable to legal and testamentary devolution, with specific regard to the surviving spouse's inheritance rights, in the main legal systems.

8. Succession rights of the surviving spouse in the UK - the common-law system

Statutory devolution in the UK (England and Wales) is governed by the Administration of Estates Act 1925³³ amended in 2014 by the Inheritance and Trustee Power Act.

Europe, in "Juridica" no. 4/2000, p. 136 et seq, article largely inspired by Alain Verbeke, Yves-Henri Leleu, *Harmonization of the Law of Succession in Europe, in Towards a European Civil Code*, second revised and expanded edition (coord. A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron), Ars Aequi Libri - Nijmegen, Kluwer Law International - The Hague/London/Boston, 1998, p. 173-188 (chap.11).

³² D.A. Popescu, *op. cit.*, pp. 7-8.

³³ Available for consultation on legislation.gov.uk

The extent of the surviving spouse's inheritance rights depends on whether the surviving spouse competes with the deceased's descendants or with other classes of heirs.

In the case of division of the estate of a person who is married but has no children under the existing law if an estate is worth more than £450,000, the first £450,000 plus any personal belongings pass to the surviving spouse. The remainder passes to the deceased's parents if they are living, or their siblings if the parents are not. Where there are no parents or siblings the entire estate passes to the surviving spouse. The 2014 Act removes the parents and siblings from consideration and the surviving spouse inherits the entire estate, whatever the value. The new law may still result in injustices though. In larger estates there may be sufficient assets to provide adequately and comfortably for a spouse without needing to exclude other close family completely³⁴.

In the case of division of the estate of a person who is married and has children, the new law introduces a significant simplification where children are involved. Under the existing law, if an estate is worth more than £270,000, the first £270,000 plus the deceased's personal belongings pass to the spouse. The remainder is then split between the surviving spouse and the deceased's children as to 50% to be held for the spouse on trust for life, to pass to the children on the spouse's death, with an option for the spouse to capitalise that life interest within 12 months of the date of letters of administration, and the other 50% to the children right away. The new law removes the complicated trust arrangements whilst retaining similar principles over the division of the estate between the surviving spouse and children.

For example: Deceased X leaves a surviving wife and two children A and B. The estate is worth £450,000. The surviving spouse will have priority to receive £270,000 and ½ of the remaining £180,000 (the difference between the total value of the estate and £270,000). Finally, the surviving spouse will collect £270,000 as well as £90,000, £360,000 in total.

With regard to the reserved portion of the estate, the Anglo-Saxon legal system recognises the absolute liberty of the deceased. The surviving spouse is not a reserve heir, and he may be, by virtue of his *de cuius*'s will, totally removed from the inheritance.

In the context of the 1975 Act³⁵ the surviving spouse may, however, claim to have been injured by his or her *de cuius* will, and the judge is entitled to grant him or her equitable financial provision³⁶, in which case he or she will take

³⁴ Abigail Flanagan, *Inheritance and Trustees' Powers Act 2014*.

³⁵ Inheritance (Provisions for Family and Dependents) Act 1975 - available at <http://www.legislation.gov.uk/ukpga/1975/63>.

³⁶ For details see R. Kerridge, *Parry & Clark, The Law of Succession*, Eleventh Edition, Sweet & Maxwell, London, 2002, p. 154 et seq.; J. Denker, in *European Succession Laws* (Hayton ed.), Jordans, 2002, p. 92: "There is no fixed definition as to what is 'reasonable financial provision' (which is measured either by the surviving spouse standard or alternatively by the lesser maintenance standard) because this will always depend on all the circumstances of the case: the

into account the claimant's resources and financial obligations at the time the claim was made, but will also assess the possibility of future income. A similar inquiry will be made with regard to the situation of persons gratified by the will of the *de cuius*. The judge will also take into account other maintenance obligations that the testator had at the time of death towards the claimant or the beneficiaries of the will, the size and nature of the net assets of the estate. Last but not least, the court will take into account any physical or mental disability of the parties, if any, in order to form as clear a picture as possible of the real need of the persons concerned. The conduct of the parties towards the deceased is another element that will help to settle the case fairly.

As far as the surviving spouse is concerned, in addition to the above elements, the following aspects will also be taken into account in the decision to grant reasonable financial provision: age of the claimant, length of the marriage, contribution of the claimant to the welfare of the family, including any contribution to the performance of household chores and care of the family.

If the judge considers that the surviving spouse has not been provided with reasonable financial provision, he or she may order whatever remedy he or she finds equitable, such as: ordering the gratified persons in the will to pay a life annuity or a fixed sum, establishing a life annuity, or even issuing an order transferring the right to the property from the gratified to the claimant spouse.

Unlike Romanian law, therefore, which provides for a fixed legal share of the inheritance to be paid to the surviving spouse as heir, the provisions of the 1975 Act adapt the financial compensation according to a number of criteria.

In determining the share of the inheritance to be awarded to the surviving spouse, the court may also take into account the rules for awarding financial compensation in divorce matters, imagining what the spouse could have obtained if the marriage had ended in divorce and not in death. Of course, under the island system of law, the court's decision will also be based on judicial precedent.

It is important to note that under the 1975 Act both testamentary and statutory inheritance can be attacked.

9. Succession rights of the surviving spouse in Quebec - Canada mixed system

Although, in the first stage of the work on the new Civil Code, the province of Quebec offered us as a model its new Civil Code, which came into force on 1 January 1994, we will note below that the Roman legislator preferred to maintain the line taken by Law no. 319/1944 as regards the classes of heirs and the shares to which they are entitled. By way of novelty, Article 1086 contains the legal definition of the reserve, a first for Roman civil law. Article 1089 also

size of the estate, the needs and assets of the person making a claim (taking account of provision made for him by the deceased in his lifetime, eg under trusts), the needs and assets persons who would be prejudiced by the claim, the earning power of the claimant, etc."

defines the available share.

Quebec's 1994 succession reform seems to have departed much more clearly from the criterion of blood relationship in determining legal heirs simply because they opted for the creation of new classes of heirs in which they effectively integrated the surviving spouse. Thus Articles 666-669 CcQ establish the shares of heirs in the order (class) of the surviving spouse and descendants³⁷, Articles 670-676 CcQ deal with the devolution of inheritance in the class of the surviving spouse and privileged ascendants, or privileged collaterals.

Art. 672 et seq. CcQ establishes the rule whereby in the presence of the surviving spouse only the parents have the right of succession, the privileged collaterals coming to the inheritance either together with the privileged ascendants, but in the absence of the spouse, or together with the surviving spouse, but in the absence of the parents. In addition, in the second class of heirs the right of succession stops at the third degree, with the fourth degree privileged collaterals being moved to the last class of heirs. To further strengthen his position, the surviving spouse removes the ascendants and ordinary collaterals from the inheritance.

These regulations show us how the Quebec succession reform corresponds much better to social reality and takes into account the growing trend towards nuclearisation of the contemporary family.

If *de cuius* has not made a will or if all the designated legatees have predeceased, the Civil Code stipulates the classes of heirs and the shares to which they are entitled from the estate. Thus, if there are descendants and a surviving spouse, the surviving spouse receives 1/3 and the children 2/3. In the absence of a surviving spouse, the entire inheritance is collected by the descendants. The principle of proximity of degree of kinship, division by head and then representation of the estate operates between them. No distinction is made according to whether the children are out of wedlock, adulterous or adopted. In the absence of descendants, the preferred ascendants (father and mother) and the preferred collaterals (brothers and sisters) of the deceased and their first-degree descendants are entitled to inherit. In competition with the surviving spouse, the privileged ascendants receive 1/3 of the inheritance. In concurrence with the privileged collaterals, the surviving spouse is entitled to 2/3 of the inheritance. If there are no descendants or surviving spouse, the preferential ascendants and the preferential collaterals have equal rights to the inheritance. If there are no descendants, privileged ascendants or privileged collaterals, the surviving spouse receives the entire estate.

It follows that there are several classes of heirs: the first includes the descendants and the surviving spouse; the second includes the surviving spouse, privileged ascendants and privileged collaterals. The third class is relevant only

³⁷ Art. 666 CcQ "If the deceased leaves a spouse and descendants, the succession devolves to them. The spouse takes one-third of the succession and the descendants, the other two-thirds. 667. Where there is no spouse, the entire succession devolves to the descendants".

in the absence of the surviving spouse, descendants, privileged ascendants or privileged collaterals. This includes ordinary ascendants (ascendants other than father and mother) and ordinary collaterals (collaterals other than brothers, sisters, nephews and nieces of the first degree).

There are two exceptions to the principle of freedom to dispose of one's property on death, where the deceased leaves a surviving spouse and/or descendants.

Firstly, with the death of one of the spouses, the "family patrimony", which includes assets acquired during the marriage, ceases. The surviving spouse is entitled to 50% of the value of the family assets that belonged to the deceased spouse. Accordingly, the heirs of the deceased can claim from the surviving spouse 50% of the value of the family assets that he or she acquired. By offsetting, the mutual obligations will be extinguished, possibly with the payment of a sulu. An action resulting from the termination of the family patrimony may also be brought by the creditors of the deceased (for example, if the estate is insolvent) or by the creditors of the surviving spouse.

10. The Romano-Germanic system of law

Croatia. A former member state of the Socialist Federal Republic of Yugoslavia, Croatia gained its independence in 1991. Until the entry into force of the new succession law, on October 3, 2003³⁸, the matter was governed by the 1955 Law of Inheritance adopted for the entire SFRY and preserved of RS Croatia and after 1971, when following the amendment of the Constitution of the federal state, the matter of successions was left to the choice of the member states of the federation³⁹.

According to the new law, all descendants, the adopted child and his descendants, the spouse, the parents, the adoptive parents, the siblings and their descendants, the grandparents and their descendants, as well as other ascendants, have the right to inherit.

The scope of persons with *legal succession vocation also includes the partner of the deceased, who has the same position as that of the surviving spouse*⁴⁰, having the right including to the inheritance reserve⁴¹. Very interesting

³⁸ Published in Official Gazette of the Republic of Croatia, Nos 48/03, 163/03, 35/05 and 127/13.

³⁹ C. Toader, *Study of comparative succession law*, „Pandectele romane” no. 5/2004, p. 78.

⁴⁰ Croatian family and succession law recognise four types of couples' relationships: marriage between persons of different sex; registered partnership between persons of the same sex; de facto cohabitation between persons of opposite sex; de facto cohabiting partnership between persons of same sex. The first and third categories are regulated under the Family Act (NN 103/2015), while the second and the fourth are regulated under the Same-Sex Life Partnership Act (NN 92/2014).

⁴¹ According to art. 8(2) of the law, by relationship outside of marriage is understood that relationship that a man or a woman, celibate, had for a long period of time and that ends with the death of one of them, provided that it was fulfilled the conditions for a valid but unconsummated marriage (in original: "Na temelju zakona ostavilja nasljeđuje i njegov izvanbračni drug koji je u pravu

and important constellation arises if the decedent has lived in common law marriage. It often happens that deceased has, for a long period of time, lived with his unmarried partner without that coexistence being empowered with the legal form of marriage.

Although the heirs of the first rank, especially children, often cannot and do not want to believe that the non-married partner of the deceased *is legally treated as an heir, i.e. as a spouse*. But it is not always easy to apply the inheritance rights on common-law partner because certain conditions must be met with regard to the existence of a common law marriage, i.e., there is the influence of Croatian family law.

Firstly, condition must be met that cohabitation has actually existed and that it was characterized as permanent emotional and economic community of unmarried partners. Additionally, to the common-law marriages Croatian family law must be applied, what is very difficult and almost impossible if the cohabitation has been lived outside of Croatia and unmarried partners do not both have Croatian citizenship. One procedure for determining the application of Croatian inheritance and family law to common-law marriages is a major time challenge and such a procedure can take several years. Therefore, it is certainly advisable for life partners living in common-law marriages to sign to an agreement under the Croatian law on regulation of property issues in the form of the common law marriage under Croatian law. By doing that all doubts can be removed from the application for common-law partners certainly much more favourable Croatian family and inheritance laws.

Equality of all physical persons at the moment of creation of the inheritance was one of significant changes of the Croatian inheritance law from 2003. Since then, married and non-married partners are treated equally, as well as the descendants born as a result of these relationships. Above that, non-married partner has a right on part of inheritance created in common-law marriage and on which can be compared with marriage acquisitions. Legal inheritance ranks are only applied if deceased has left no will⁴².

*nasljeđivnja izjednačen s bračnim. Izvanbračnom zajednicom u smislu ovoga Zakona smatra se životna zajednica neudane žene i neoženjenog muškarca koja je trajala dulje vrijeme a prestala ostaviteljevom smrću, pod uvjetom da su bile ispunjene pretpostavke koje se traže za valjanost braka." - literary translation: "Based on the law, the decedent's common-law partner also inherits, who is equal to the married partner in the right of inheritance. In the sense of this Act, a cohabitation of an unmarried woman and an unmarried man that lasted for a long time and ended with the testator's death is considered an extramarital union, provided that the prerequisites required for the validity of the marriage were met." If the relationship had been definitively interrupted before the opening of the succession, the surviving partner no longer has a legal succession vocation [art. 25(3) of the law] (in original: (3) *Izvanbračni drug nema pravo na nasljedstvo ako je njegova zajednica života s ostaviteljem bila trajno prestala*- literary translation: *A common-law partner does not have the right to inherit if his union of life with the testator was permanently terminated*"*

⁴² <https://www.kanzlei-kovac.de/en/croatian-inheritance-law>, consulted on 1.03.2023.

The law on same-sex partnerships of 2003 does not guarantee the reciprocity of the legal succession vocation in the case of these unions.

Regarding the inheritance reserve, according to art. 69(1) of the Law, the descendants, adopted children and their descendants, *the spouse, respectively the surviving cohabitant are reserved*. They are called "absolute reservists". The deceased's parents, adoptive parents or other ascendants are also reserved heirs. These people are qualified as "relative reserves", since their right to reserve is conditioned by the proof that they do not have sufficient financial means for maintenance. All these people are entitled to the inheritance reserve if they have a concrete legal vocation and the testator did not expressly exclude them from the reserve.¹⁸ Regarding the amount of the reserve, it differs according to the absolute reservers (they are entitled to half the legal share) or by the relative reservations (they are entitled to 1/3 of their legal quota). According to the law, the reserve is not granted *ex officio*, but only at the request of the reserving heir, the action to reduce liberalities being prescribed within 3 years from the opening of the succession.

Kingdom of the Netherlands. Inheritance law is governed by Book IV of the Dutch Civil Code⁴³ which came into force on 1 January 2003.

As the concept of registered partnership, which includes same-sex partners, is well known in this country, it should be noted at the outset that the law recognises the surviving partner as having the same rights as the surviving spouse⁴⁴.

According to the law, there are four classes of legal heirs, who are called in order of inheritance. Class I includes the spouse (not actually separated) or registered partner of the deceased, as well as their children.

⁴³ Burgerlijk Wetboek adopted in 1838.

⁴⁴ The Netherlands is one of the first countries in the European Union to recognise the right of people of the same sex to marry. The Dutch Civil Code also recognises civil partnerships for both same-sex and different-sex couples. Marriages and civil partnerships are mutually exclusive. Civil partnerships can be converted into marriages. A major difference between marriages or civil partnerships between same-sex and opposite-sex couples is the parentage of children. For example, in the case of a marriage between two men, the male partner of the child's biological father is only recognised as the child's father if he formally acknowledges paternity or adopts the child, whereas in the case of opposite-sex couples, the mother's partner is automatically recognised as the child's father (even if he is not the child's biological father). Similarly, in the case of a marriage between two women, the mother's wife automatically becomes the child's parent when the child has been conceived by anonymous sperm donation. In the Netherlands there are minor differences between a marriage and a civil partnership. There are, however, slight differences in the formalities required for the conclusion and termination of the two types of union. As regards the termination of marriage, the Dutch Civil Code provides for three ways of ending a marriage, all three of which are legal proceedings before the court: divorce; separation in fact of the spouses (in which case the obligations of the marriage, including financial obligations, continue to exist for the spouses); dissolution of the marriage as a result of separation in fact of the spouses. As regards the termination of civil partnership, it can be dissolved without court intervention when both partners agree and the partners do not have minors as dependants. Otherwise, termination of the civil partnership is subject to the same rules as termination of marriage.

Children born of a registered partnership are only entitled to inherit if they are recognised. If a child is born to a woman in a same-sex registered partnership, the child can only inherit from the mother's partner by will. The second class of legal heirs includes the deceased's parents and siblings, the third class includes grandparents and the fourth class includes great-grandparents.

The legal matrimonial property regime is that of community of property, according to which all the property of the husband and wife owned by them either at the time of the marriage or acquired during the marriage becomes community property. Both spouses are entitled to all community property, except for some very personal property. When the community of property ceases through the death of one of the spouses, the surviving spouse becomes the sole owner of half of the property, with only the other half to be divided between the heirs⁴⁵.

Inheritance is divided equally between relatives of the same class and degree, except for brothers or sisters from different parents. Dutch law also provides for the institution of representation by inheritance (up to the sixth degree) and the institution of *seisin*.

As for the freedom to attest, it is not unlimited. The children of the deceased are entitled to the reserved portion of the estate (*legitime portion*), according to Article 4:63 of the Civil Code, the reserved portion of a child being 1/2 of his legal share.

However, the surviving spouse does not benefit from the reserve.

For the purpose of calculating the estate reserve, the value of the assets left shall be added to the value of the gifts made by the *de cuius* during his lifetime, unless otherwise provided by gift or will.

If the deceased left a surviving spouse and children, the so-called parental division applies (Title 4:13 Civil Code⁴⁶).

Article 4:13 states that the estate of a deceased person who has left behind as heirs a spouse and one or more children, will be divided and apportioned in accordance with the following paragraphs, unless the deceased has stated in his last will that the present Section will not apply at all. The spouse acquires by operation of law all assets of the deceased's estate. The debts and liabilities of the estate are settled (performed) for his account. For the purpose of this paragraph the 'debts of the estate' shall include all expenditures made for account of the joint heirs in order to settle or perform testamentary obligations imposed by the last will of the deceased.

Each of the children shall acquire, as heir, by operation of law a financial debt-claim against the spouse of which the value corresponds with the value of this child's share in the deceased's estate. This debt-claim will become due and demandable (exigible) if the spouse gets bankrupt or if he falls under the Debt

⁴⁵ C. Toader, *art. cit.*

⁴⁶ Book 4 Law of Succession, Title 4.3 Intestate succession in the relation between the spouse and the children of the deceased, Section 4.3.1 The law of intestate succession for a spouse who was not legally separated from the deceased and for the children of the deceased.

Repayment Scheme for Natural Persons or if the spouse dies.

The financial debt-claim will also become due and demandable (exigible) in the situations mentioned in the last will of the deceased as an event that makes such a claim collectable.

For the purpose of the present Title (Title 4.3) the word 'spouse' does not include a spouse who was legally separated from the deceased when the deceased died.

According to article 4:28 the spouse has the right to continue the use of a residential space and its household effects. So, if a residential space where the spouse of the deceased lives at the moment on which the deceased dies belongs to the deceased's estate or to the dissolved marital community of property to which the deceased was entitled or if the deceased was allowed to use a residential space on another basis than a lease agreement, then this spouse is entitled towards the heirs to continue to live in that residential space for a period of six months under similar terms and conditions as applicable before the death of the deceased. The spouse is in the same way and for an equal duration entitled to continue the use of the household effects of such a residential space, as far as these belong to the deceased's estate or to the dissolved marital community of property to which the deceased was entitled or as far as the deceased had a right to use them.

Persons who lived in a joint household with the deceased up until his death, have towards the heirs and the spouse of the deceased corresponding rights with regard to the use of a residential space and its household effects that belong to the deceased's estate or to the dissolved marital community of property to which the deceased was entitled.

Spain. According to the 1978 Constitution, the state organisation comprises seventeen autonomous regions in addition to the central state. From the point of view of inheritance law, only six of these have their own rules, the rest of the territory being governed by the Spanish Civil Code.

The regions with their own inheritance regime⁴⁷ are Catalonia (Inheritance Code of 1991 and Compendium of Civil Law, revised in 1993), Aragon (Compendium of Civil Law of 1985, Inheritance Law of 1999 and Law on the matrimonial regime and widow's right to a life pension of 2003), Navarre (Compendium of Civil Law of 1973), the Basque Country (Civil Law Act of the Basque Country of 1992, revised in 1999), the Balearic Islands and Galicia (Compendium of Civil Law of the Balearic Islands revised in 1990).⁴⁸

If the deceased has not made a will or if the will does not cover the entire estate or if the will is not valid or if the legatee is unwilling or unable to accept it, the inheritance is transferred according to the law.

⁴⁷ W. Peuster, *Civil Code. Das spanische Zivilgesetzbuch*, Edition für internationale Wirtschaft, Frankfurt am Main, 2002, p. XXXI.

⁴⁸ I. Escudero, in *International Succession*, Kluwer Law International, 2004, p. 544; B. Löber, E. Huzel, in *Erbrecht in Europa*, Zerb Verlag, 2004, p. 958 ff.

The order of the classes is practically the same in all the inheritance systems in Spain, because it incorporates the rules of Roman law. Thus, in the first class are the children of the deceased and their descendants; in the absence of descendants, ascendants are called; in the absence of descendants or ascendants the surviving spouse; if there is no heir in the first three classes, collaterals up to the fourth degree are called, first brothers and sisters, by heads, and their children by strains⁴⁹.

In the first two cases, the surviving spouse is entitled to take his or her inheritance in usufruct.

If the heirs are descendants, ascendants or the surviving spouse, the notary public can certify them as legal heirs.

However, in the case of collateral heirs, only the court, with the participation of the public prosecutor, confers on them the status of legal heirs (Articles 977-1000 of the Code of Civil Procedure 1881).

In general, no distinction is made between movable and immovable property when dividing an inheritance.

However, there are regions (such as Aragon, Navarre, Biscay in the Basque Country and the Aran Valley in Catalonia) where the law stipulates that property from a particular family branch can only be acquired by persons belonging to that branch.

In the Civil Code there is a whole section dealing with the reserved portion of the estate (*De las legítimas*) art. 806-847. It is regarded as part of the inheritance and thus restricts testamentary freedom.

The beneficiaries of the reserve are the children and their descendants and - in their absence - the ascendants and the surviving spouse. The reserve of children and descendants is 2/3 of the father's and mother's estate. However, 1/3 of this share may be disposed of in favour of one or more descendants, with preference. The available share is 1/3.⁵⁰ The reserve of the parents or ascendants is half of the estate, unless there is a surviving spouse and it can be agreed that the parents' reserve is only 1/3. In the absence of the father or mother, the reserve is due in equal parts to the two lines of maternal and paternal ascendants, the principle of proximity of degree of kinship applying.

According to Article 811 of the Spanish Civil Code⁵¹, if an ascendant inherits from his descendant property which the descendant received free of charge from a relative, the heir is obliged by law to keep the property at the disposal of the donor or a relative up to the third degree, in the line from which it originates.

The ascendant who inherits from his descendant property acquired by

⁴⁹ C. Toader, *art. cit.*

⁵⁰ B. Löber, E. Huzel, *Erbrecht in Spanien*, in *Erbrecht in Europa*, coord. R. Süß, U. Haas, Zerb Verlag, 2004, p. 984.

⁵¹ Available at <http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf>, consulted on 1.03.2023.

the latter as a gift from another ascendant, or from a sibling, shall be obliged to reserve the property acquired by operation of law in favour of relatives within the third degree, and who belong to the line where the property comes from.

The surviving spouse is entitled to receive the usufruct of his or her share, never the property. In concurrence with children, the surviving spouse is entitled to one third; half in concurrence with ascendants and two thirds in concurrence with other relatives (art. 834-840 Civil Code).

According to the Constitution, all descendants (legitimate, illegitimate, including adulterous, adopted) have equal rights.

In regions with their own law of succession, there are some specific provisions on testamentary freedom and reservation. Thus, in Aragon, only children are reserved heirs and the surviving spouse acquires the usufruct of the entire estate. In Catalonia, one quarter of the estate is reserved for the descendants or, in their absence, for the parents. The surviving spouse is only entitled to one quarter of the inheritance, provided that he or she has no financial resources at the time of the opening of the succession. In Navarre, the absolute right to testament is established. The surviving spouse is entitled to life usufruct of the deceased's entire estate. In the Basque Country, descendants are entitled to a reserve of four-fifths; in their absence, parents and other ascendants are entitled to an inheritance reserve of half the estate. Within each category, the testator is free to divide the estate into equal or unequal shares. The surviving spouse receives half of the usufruct of the entire estate if he or she comes in concurrence with descendants or ascendants. In their absence, he is entitled to three quarters of the usufruct of the estate.

Italy. The main source of law on succession is the Civil Code, Book 2, Articles 456-809 (*Delle Successioni*).⁵²

In Italy, legal inheritance (*successione legittima*) is considered to have a supplementary character, in the sense that it intervenes only to the extent that testamentary inheritance is totally or partially lacking⁵³.

Legal heirs are: the surviving spouse, descendants, ascendants, brothers and sisters, other relatives up to the sixth degree, the State.

The surviving spouse is entitled to the entire inheritance unless he or she competes with the descendants, ascendants, brothers and sisters of the deceased.

In competition with one child, the surviving spouse is entitled to half; in competition with more than one child, the surviving spouse's share is 1/3.

According to Article 582 of the Civil Code⁵⁴, the surviving spouse has a 2/3 share in the estate, in concurrence with the ascendants, brothers and sisters of the deceased.

⁵² G. Cian, A. Trabucchi, *Commentario breve al Codice civile*, Cedam, Padova, 2003, p. 456 ff.

⁵³ C. Toader, art.cit. The author refers to M. Bianca, in "*Diritto civile*", vol. 2 *La famiglia. Le successioni*, third edition, Guiffre Editore, Milan, 2001, p. 629.

⁵⁴ Legislative decree n. 286 dated 25 July 1998 Consolidated act of provisions concerning regulations on immigration and rules about the conditions of aliens. In force as of: 26 June 2014.

Their children and descendants exclude from inheritance any of the relatives except the surviving spouse.

By virtue of the succession representation, descendants of a more distant degree can collect the inheritance if their author is unwilling or unable to accept the inheritance or legacy. Among children, the inheritance is divided equally.

In the absence of a spouse, children, brothers or sisters or their descendants, the inheritance is divided equally between the parents of the deceased. In concurrence with the brothers and sisters of the deceased, the inheritance shall be divided equally among them, but in no case shall the parents' share be less than half.

In the case of ascendants, those in the nearest degree exclude those in the furthest degree. If there are several ascendants of the same degree, both from the paternal and maternal line, in the aggregate, all ascendants belonging to one line are entitled to half of the inheritance.

Brothers and sisters inherit, in competition with the surviving spouse, 1/3. Between them, as a rule, it is divided equally. If one-sided siblings compete with German (good) siblings, the former will inherit half of what the good siblings (or parents) receive. When brothers or sisters are unwilling or unable to inherit, their descendants are called by proxy.

In the absence of the surviving spouse, descendants, ascendants, brothers and sisters, other collaterals up to the sixth degree are entitled to inherit. The inheritance is divided equally among those of the same degree.

If there are no relatives, the legal inheritance is due to the State (Article 586 of the Civil Code), which is included by law in the category of heirs, which is why the prevailing view is that the State inherits as heir and not by virtue of its sovereignty, even if there are certain peculiarities of the act of acceptance of inheritance by the State.

There are also known anomalous successions, which - with regard to certain specific assets - derogate from the general criteria of legal inheritance. This category usually includes rights such as the surviving spouse's right to live in the family home, to cultivated land and to an old-age pension.

In Italian law, the freedom to testament is also limited by the reservation of inheritance recognised for certain persons. This is an inviolable right, and the testator is prohibited from imposing any obligations or conditions which have the effect of diminishing the right to the reserve.

The reserved heirs are: the surviving spouse, children and ascendants. The surviving spouse, if not in competition with the children, is entitled to a reserve of half of the inheritance. In addition, according to Article 540(2) of the Civil Code, he has a right of habitation over the dwelling house and a right of use over the movable property in the house, whether it was the deceased's own property or (including the dwelling house) common property. This right is also enjoyed by the de facto separated spouse if the separation is not attributable to him or her.

If there is a child in addition to the surviving spouse, each is entitled to a reserve of 1/3. If there are several children, the surviving spouse is entitled to a quarter of the inheritance and the children's reserve is half, which is divided equally between them.

In the absence of children, the legitimate parents are entitled to one third of the inheritance, and in competition with the surviving spouse they have a reserve of one fourth. To calculate the available share, the following method of calculation is used: subtract the debts of the deceased from the value of the assets left, add the value of the gifts (direct or indirect) made by the *de cuius* during his lifetime and subtract the value of the inheritance reserves. As regards the reduction of donations, the same rules apply as in Romanian law: donations are reduced starting with the newest, and donations made at the same time are reduced proportionally.

As regards civil partnerships, the ECHR ruling in *Oliari and others v. Italy*⁵⁵ led to the adoption of the same-sex civil partnership law in 2016. With regard to inheritance, the same rules apply as for married couples in the event of the death of one of the partners. The surviving partner is also entitled to a survivor's pension.

The community property system also applies to registered partnerships, unless the partners enter into a property agreement (in which case, similar to marriage, they can opt for separation of property). Law 76/2016⁵⁶ provides that the legal provisions relating to *intestate* succession, reserved inheritance, intestacy, intestacy, rapport and family covenant are applicable to registered partnerships. Para. 21 (Law 76/2016) provides that the articles on *intestate* succession, reserved succession and succession indemnity are applicable to registered partnerships.

Germany. In Germany, a federal state, the provisions of the Civil Code (BGB) apply throughout the country, although under Article 74 of the Constitution inheritance law is part of the field of concurrent legislation. Local law will receive restricted application only if the Civil Code expressly allows this. In the Civil Code, successions form the subject matter of the fifth book⁵⁷. However, provisions on succession can also be found in other texts of the Code or in other, special laws⁵⁸.

⁵⁵ Judgment of 21 July 2015 in *Oliari and Others v. Italy* (Applications Nos. 18766/11 and 36030/11) Strasbourg.

⁵⁶ On June 5, 2016, Law No. 76 of May 20, 2016 "Regulation of civil partnerships between same-sex people and regulation of living together" (published in the Official Journal No. 118 of May 21, 2016) came into force in the Italian legal system.

⁵⁷ Book 5 - Inheritance Law (§§ 1922 - 2385) in original Buch 5 - Erbrecht (§§ 1922 - 2385) Bürgerliches Gesetzbuch.

⁵⁸ In this regard, G. Otte, in J. von Staudingers *Kommentar zum Bürgerlichen Gesetzbuch*, V, Ed. Sellier-de Gruyter, Berlin, 2000, no. 24. This mainly concerns family property (*Höferecht*), which differs from Land to Land. See H. Bauer, W. Baumann, P. Limmer, in *Régimes matrimoniaux*,

According to German law⁵⁹, on the death of the *de cuius*, the surviving spouse (and registered partner), descendants (class I), parents and their descendants - i.e. brothers and sisters of the deceased and grandchildren of a brother/sister (class II) - grandparents and their descendants - i.e. uncles, aunts, cousins, etc. (class III), great-grandparents and other more distant relatives (class IV and following) have legal succession.

The principle of proximity of degree of kinship within the same class and the principle of representation of succession⁶⁰ operates.

According to § 1924 BGB⁶¹, children inherit in equal shares. Since 1.4.1998⁶² children out of wedlock are assimilated to children of wedlock as long as filiation to the father has been established. Exceptions are persons born before 1.7.1949 out of wedlock who do not become related to their fathers. Thus, a distinction is now made in the analysis of inheritance law issues according to whether the succession was opened before or after 1.4.1998 and according to the date of birth of the child. The adoption of a minor (adoption with full effect) has the effect, among other things, of recognising mutual inheritance rights between the adoptee and the adopter, including the adopter's family. In Germany it is also possible to adopt an adult, the effect of which is to create a family relationship between the adoptee and his or her descendants and the adopter. He remains related to his natural parents, whom he can inherit.

If both parents are living, they inherit in equal shares and remove the brothers and sisters of the deceased from the inheritance. If only one parent is still alive at the time of the opening of the succession, the share due to the predeceased parent goes to his or her descendants. The same principle applies if the parent renounces the inheritance. The brothers and sisters of the deceased thus called upon will inherit on the paternal or maternal line, the good siblings inheriting from both lines.

The surviving spouse is entitled to one-fourth of the inheritance in competition with the first class and half of the estate in competition with the second class or grandparents. It is therefore held that if there is a surviving spouse, the descendants of the grandparents are no longer entitled to inherit, even though

successions et libéralités, Union Internationale du Notariat Latin, Bruylant, Bruxelles, 2003, vol. I, p. 604.

⁵⁹ Art. 1922 Gesamtrechtsnachfolge "(1) Mit dem Tode einer Person (Erbfall) geht deren Vermögen (Erbchaft) als Ganzes auf eine oder mehrere andere Personen (Erben) über. (2) Auf den Anteil eines Miterben (Erbteil) finden die sich auf die Erbchaft beziehenden Vorschriften Anwendung."

⁶⁰ H. Bauer, in *International Succession*, Kluwer Law International, 2004, p. 238.

⁶¹ "(1) Gesetzliche Erben der ersten Ordnung sind die Abkömmlinge des Erblassers. (2) Ein zur Zeit des Erbfalls lebender Abkömmling die durch ihn mit dem Erblasser verwandten Abkömmlinge von der Erbfolge aus. (3) An die Stelle eines zur Zeit des Erbfalls nicht mehr lebenden Abkömmlings treten die durch ihn mit dem Erblasser verwandten Abkömmlinge (Erbfolge nach Stämmen). (4) Kinder erben zu gleichen Teilen."

⁶² Date of entry into force of the Inheritance Equality Act (ErbGleichG) of 16.12.1997.

they could inherit in their absence.

If the deceased was married, the matrimonial regime of the spouses is also important. For example, if they have adopted the legal regime of community of property (*Zugewinnngemeinschaft*), when opening the succession one of the spouses first divides the acquired assets equally in order to know the deceased's share of the estate to be divided.

According to § 1931(4) BGB, if the matrimonial property regime was that of separation of property and the surviving spouse inherits together with one or two children, the estate shall be divided equally between them, the principle of representation of the estate applying if one of the children was predeceased. It should be noted that under the rule laid down in § 2349 BGB, a waiver by a descendant or other relative of the legal inheritance also has effect in respect of his descendants, unless otherwise agreed.

Conjunctive wills are allowed: spouses or partners in a registered same-sex partnership can make a will, either holograph (written by one of them and signed by both) or authentic. The so-called "Berlin will" is very common, whereby spouses establish each other as sole heirs and stipulate that the entire estate will go to a third party (usually children) after the death of the survivor. Such a will can be revoked during the lifetime of the spouses, and the declaration of revocation must be in authentic form and addressed to the other spouse.

The German constitution guarantees freedom to test. However, there are certain safeguards to protect the testator's family. The Civil Code regulates the reservation of succession in §§ 2303 to 2338 (*Pflichtteil*). Essentially, reserved heirs (descendants, parents, surviving spouse or partner) have a claim in money, representing half of their share of the estate, to which they would have had a legal right of succession in the absence of the will. They are also protected against *inter vivos* gifts made by the person whose succession is in question, which may be subject to reduction until the reserve is full, if they are not more than ten years old.

Life partnership provided by the Law on Life Partnership (*Eingetragene Lebenspartnerschaftsgesetz*⁶³) is reserved for same-sex couples.

11. Conclusions

As the analysis of the rules applicable to legal or testamentary devolution shows, Europe does not have a uniform succession regime. Each Member State has its own codification of inheritance law, which reflects the specific traditions and historical developments in each country.

As has been pointed out⁶⁴ the promotion and development of an area of freedom, security and justice, based on the free movement of persons, could not

⁶³ Lebenspartnerschaftsgesetz vom 16. Februar 2001 (BGBl. I S. 266).

⁶⁴ D. A. Popescu, *Guide ...*, *op. cit.*, p. 7.

disregard the difficulties encountered in the area of successions with foreign elements. There was a need to ensure greater predictability in determining the court or authority competent to deal with the succession and in determining the law applicable to it, thus providing effective levers for organising succession planning.

On 4 July 2012, Regulation (EU) No. 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of judgments and the acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession was adopted.

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Analysis of Fraud Risk Regarding the Real Beneficiary in Relation to International Sanctions

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Abstract

The restrictive measures instituted by a number of international organizations and actors aim, first of all, at diminishing the military capabilities of the aggressors, by freezing some financial assets, putting some public or private entities, and officials on the sanctions blacklists, banning some import operations and export of dual-use items and other categories of goods prohibited by trade policy measures. Complying with these embargoes requires the use of risk analyses capable of neutralizing any attempt by aggressors to circumvent sanctions by using other destinations and international markets. The analysis of international transactions regarding the identification of the real beneficiary represents the most important challenge for the control authorities at border crossing points, and international cooperation regarding the exchange of information must represent a priority in the coming period. The present study analyzes the complex issue of sanctions imposed by the EU in the context of aggression in Ukraine and the mechanisms of using risk analysis to reduce the risk of fraud and violation of international embargoes.

Keywords: *sanctions, cooperation, real beneficiary, risk analysis, fraud.*

JEL Classification: K12, K22, K33, K34

1. Introduction

It is well known that at the international level, legal sanctioning instruments have been established as a prompt reaction by the UN Security Council, the European Union, and some international bodies and actors to acts of aggression by some states or as a result of the commission of serious transnational crimes against humanity, which are in direct contradiction with respect for sovereignty, world order, respect for democratic principles and the rule of law. The restrictive measures are to be found in dozens of resolutions, amendments, decisions, and regulations establishing the legal regime for each category of acts, which are binding on the authorities of each state, which must bring their legislation into line with national law so that all these instruments can produce the desired legal effects as quickly as possible. In many cases, national public bodies and institutions struggle with such a volume of regulations that have a direct impact on criminal policy issues, or worse, in identifying compensatory measures

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due to the direct effects imposed on entrepreneurs who are forced to cancel their business agreements with partners from states against which international sanctions have been imposed.

This paper analyzes, on two levels, the commercial transaction with elements of foreignness, from the perspective of the real beneficiary/the last consignee. In the first instance, the impact of the restrictions established through international legal instruments is evaluated, and secondly, the risk management is examined to identify illegal money laundering and terrorism financing operations, as well as the risk of violating the established embargoes.

2. The direct effect of implementing restrictive measures

After the invasion of Crimea, the international community instituted a series of trade and financial restrictions with Russia and Belarus. Since February 2022, more than 10 packages of restrictive measures have been approved and expanded by the EU, with a large number of entities and individuals being added to the blacklists. These include high-ranking officials, oligarchs, politicians, high-ranking military personnel, professional associations, state-owned and private companies, banks, and other financial institutions.

Ongoing contracts between traders from the EU and companies in Russia have been suspended or canceled on a case-by-case basis as a direct result of these measures, leading to disputes over the non-performance of contractual obligations.

The case law in European law is diverse, and jurisprudence and doctrine are not uniform. There are different solutions and opinions, each related to specific situations, with an in-depth and contextual analysis considering the domestic law of each member state, as well as the broader issues of private international law and European law. In our opinion, the act of authority, in our case the EU Regulation and the Common Foreign and Security Policy Decision, is binding on the member states, and exceptions do not exist.

Another discussion concerns the jurisdiction of litigation in Russian courts and to what extent European partners can invoke the EU's trade restrictions denounced by Russia as a legal basis. Force majeure is often invoked in these cases. From a legal perspective, whether we are discussing the Romanian Civil Code, the UNIDROIT Principles, or the ICC Model Clause in Paris, a legitimate question arises as to whether the element of unpredictability, which is specific to force majeure, still exists for contracts concluded with partners in Russia after 2014, the date when sanctions against Russia² were first imposed, or more specifically, before February 2022. Therefore, in our opinion, discussing force majeure even after more than a year since the start of the aggression in Ukraine

² Paul J. J. Welfens, *Russia's Invasion of Ukraine. Economic Challenges, Embargo Issues and a New Global Economic Order*, Springer, 2023, p. 3 and following.

is considered to lack a foundation for analysis.

On the other hand, the sanction packages have been implemented gradually over the course of a year, so the issue under discussion is limited to analyzing contracts concluded before the approval date of a new set of measures that restrict the export or import of goods to and from Russia, starting from a later date, often coming into effect 30 days after publication. This relatively short period, in principle, may not allow traders from the EU to fulfill their contractual obligations for large-scale projects. There are several issues that arise in such situations, such as advance payments made, partial deliveries, issued authorizations, etc.

3. The beneficial owner of transactions

In addition to approving new sanction packages and including new individuals and entities on the blacklist, European regulations also stipulate a series of prohibited activities and detailed explanations regarding the application procedures. From the analysis of these provisions, one of the most important clarifications pertains to the prohibition of *direct or indirect* operations with Russia, Belarus, Iran, Syria, and other states listed under international sanctions. Since there is a risk that for products for which exports were not completed until the publication date of the new restrictive packages, by which date the category of goods or entities and individuals affected by the new regulations allowed for export, traders tend to identify other persons and structures belonging to territories that are not subject to sanctions.

In such a situation, in our opinion, the control authorities should undertake a series of additional checks to identify the beneficial owner/end-user of transactions suspected of circumventing sanctions. Such verification involves using a complex risk assessment system, with the starting point being the knowledge of the foreign client.

By "beneficial owner"³ we mean the person (natural or legal) who *directly or indirectly* owns or controls the de facto recipient of the delivered products. With the emergence of international restrictions and the cancellation of exports, any delivery, even if indirect, can be considered fraud⁴. We are faced with two scenarios. On one hand, goods can be rerouted through other territories and, most likely, through separate transactions with successive buyers, so that the goods can easily disappear from the scrutiny of control authorities who would assume that the final recipient of the export is an entity from a country not subject to international sanctions. Certainly, in the supply chain and through successive sales, invoices will contain undervalued prices, as illicit goods are in high demand, and the generated profits will likely be collected through tax havens. This

³ Pierre-Laurent Chatain, *Preventing Money Laundering and Terrorist Financing. A Practical Guide for Bank Supervisors*, The World Bank, 2009, p. 238.

⁴ Abdurrahman Özalp, *Fraud and mistakes in international trade*, Kobo Ed., 2020, p. 14.

poses a risk of using cash amounts for financing acts of terrorism and the proliferation of mass destruction goods.

The activities of criminal organizations generate profits from cross-border crimes such as the illicit trafficking of weapons, ammunition, narcotics, and dual-use products for civilian and military purposes. In this context, money laundering offenses must be considered and investigated to identify other serious crimes resulting from the violation of the export/import regime through the imposition of international restrictions, involving individuals and entities.

4. The need for the identification of a common regulatory framework and action

It is essential to note that the phenomenon of money laundering and terrorist financing requires a common international framework of action. European regulations must be compatible with all other regulations established by third countries, especially those adopted following the “Financial Action Task Force (FATF)” recommendations. Furthermore, the revision of the “Warsaw Convention⁵” and the extended provisions of FATF necessitate the harmonization of Union and national provisions by the latest international standards in the field. Approving a package of regulations at the national level without considering the provisions adopted internationally would not be effective.

In the EU, the provisions of Directive 2005/60 have “a preventive character, as they aim to establish, based on a risk-based approach, a set of preventive and deterrent measures for effectively combating money laundering and terrorist financing, as well as defending the soundness and integrity of the financial system. These measures are intended to prevent or at least hinder to the greatest extent possible these activities by creating barriers at all stages of the mentioned activities against money launderers and terrorist financiers”⁶.

Furthermore, the mechanism of direct cooperation among supervisory authorities through the exchange of data and information, based on these uniform

⁵ "Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, signed in Warsaw on 16 May 2005", available at <https://lege5.ro/gratuit/he3tambx/varsovia-16-mai-2005-conventie?dp=ge4tknjwgmzte>, accessed on 16.6.2023.

⁶ For details see Judgment of the CJEU (Second Chamber) of 2 September 2021 - 'Reference for a preliminary ruling - Prevention of the use of the financial system for the purpose of money laundering and terrorist financing - Directive (EU) 2015/849 - Directive 2005/60/EC - Money laundering offence - Money laundering committed by the predicate offender ('self laundering')', available at: https://curia.europa.eu/juris/document/document_print.jsf?jsessionid=AEC14A83B31118355AE8A7F7C0AF1C03?docid=245529&text=&dir=&doclang=RO&part=1&occ=first&mode=DOC&pageIndex=0&cid=9269767, accessed on 16.6.2023. See also CJEU judgment of 17 January 2018, Corporate Companies, C-676/16, EU:C:2018:13, paragraph 26, available at <https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A62016CJ0676>, accessed on 16.3. 2023.

provisions that are mandatory for all member states and opposable to third countries, as well as the agreements and operational collaborations concluded between states based on regional security formats, plays an important role in identifying money laundering offenses and, implicitly, determining the real beneficiaries of illegal commercial transactions.

Legal norms must have the "same meaning and scope" according to Article 6(3) of the Treaty on European Union, concerning Article 52 of the Charter of Fundamental Rights of the European Union about the European Convention on Human Rights (ECHR). According to the "explanations relating to Article 52 of the Charter, paragraph 3 of this article is intended to ensure the necessary coherence between the Charter and the ECHR, without prejudice to the autonomy of Union law and the Court of Justice of the European Union"⁷.

At the operational level, as also indicated by the provisions of Article 67(3) combined with Article 81(1) of the Treaty on the Functioning of the European Union (TFEU): "The Union develops judicial cooperation in civil matters with cross-border implications, based on the principle of mutual recognition of judicial and extrajudicial decisions. This cooperation may include the adoption of measures to approximate the laws and administrative provisions of the Member States." There are often cases where the criminal policies of the Member States do not include certain offenses in their national penal codes, establish different constitutive elements, or have different sanctions. In many instances, issues have arisen regarding the jurisdiction of resolving courts, sometimes resolved by the Court of Justice of the European Union (CJEU) in the Preliminary Chamber⁸. Different criminal procedures concerning evidence or their recognition create serious obstacles to cooperation between Europol, Eurojust, OLAF, and the European Public Prosecutor's Office, the competent agencies in the field of enforcement of current regulations.

Customs authorities also play an important role, possessing a modern risk identification system connected with the Member States' customs authorities. Together with Export Control Agencies and Ministries of Trade, which ensure authorization and classification of products as dual-use, customs authorities have the capacity, competence, and common legislation, according to their exclusive competencies within the common customs policy, to intervene on the front line in identifying fraud and preventing the release of goods subject to international sanctions at the time of export.

⁷ See, for details, Judgment of the CJEU of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraphs 24 and 25, as well as the case law cited, available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=200402&doclang=RO>, accessed on 16.6.2023

⁸ See, for details, CJEU judgment of 18 July 2007, *Kraaijenbrink*, C-367/05, EU:C:2007:444, paragraph 27, and judgment of 16 November 2010, *Mantello*, C-261/09, EU:C:2010:683, paragraph 39, as well as the case law cited, available at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=556389BF75B8582D79E79621EF126C1F?text=&docid=205207&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=9877585>, accessed 16.6.2023.

5. Conclusions

The effort to manage risks should belong equally to authorities and control bodies, as well as to traders. The latter is obliged, according to the current regulations, to know their customers and have an active attitude to avoid violations of international sanctions. Traders must verify their contractual partners, both in terms of creditworthiness by checking public financial situations, analyzing ongoing litigation cases, the reasons behind them, and any sanctions imposed by tax authorities, as well as identifying the client portfolio, the business activities, and the destinations used in the trade transaction, and so on.

During the negotiation period, it is necessary to request a statement of responsibility from the legal representative of the partner, indicating the real beneficiary of the transaction, the ultimate recipient, and the final destination of the products in the case of export.

The data obtained from the partner must be corroborated with the information from the extended registration document, which should be requested from the commercial register and provide information on the shareholding structure, the administrator, and other categories of information that can allow the formal verification of the data provided by the partner, about the declaration regarding the real beneficiary of the transaction. Assessments can be extended by examining the quality of the client's shareholding and searching for any affiliations with third-party structures that establish affiliation relationships, as defined by the law.

It is well known that holding an equal or greater than 25% stake in a commercial entity is an indication of decision-making and influence, and this aspect can provide an additional element in the analysis of a potential suspicion regarding the indirect exercise of ownership/claim over the shipped goods. In other words, European traders must understand the shareholding/ownership and control structure of their partners.

Last but not least, it is important to request and verify if the client has implemented within their company an ethics code, an anti-bribery and anti-corruption policy, implemented internationally certified quality and management standards (ISO:9001, ISO:14001, ISO:45001), and has policy focused on respecting human rights and social responsibility. Collaboration with the bank is essential. All these factors can shape the creditworthiness of the client and determine the decision to enter into commercial agreements.

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Social Media and Legal Challenges on Data Protection in Criminal Proceedings. International Standards and the Case of Albania

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Abstract

Nowadays, with the development of technology and globalization, implementing the law and regulations on data protection is particularly important. Implementing the Law on Data Protection in Albania has faced several obstacles and challenges because of how the information is distributed daily in social media. Although there are some regulations, bylaws, and obligations for data processing and an independent institution specialized in this field, there are concerns about the administration and illegal dissemination of personal data. The issue of data protection during investigation, prosecution, and judgment is directly linked with the presumption of innocence and the due process of law. The way the media covers an article on a criminal case can sometimes influence the court's decision. Sometimes, the journalist, during the processing of the personal data of persons under investigation, may violate even the secrecy of the investigation. This article aims to analyze the legal framework on data protection in criminal proceedings in Albania and how implementing the Law on data protection can affect the administration of justice.

Keywords: data protection, criminal proceedings, social media, investigation.

JEL Classification: K14, K38

1. Introduction

Albanian legislation protecting fundamental human rights has been completed and consolidated in recent years². The right to privacy and maintaining the confidentiality of personal data as fundamental rights (Articles 35, 36 of the Constitution of the Republic of Albania) are at the foundation of the legal order and can only be limited by law for the public interest or the protection of the rights of others (Article 17 of the Constitution).

With the approval of Law no. 9887, dated 10.03.2008 “*On the protection of personal data*”, amended by Law no. 48/2012 and no. 120/2014, are defined the rules and procedures that must be followed by institutions, public authorities, or private bodies that process personal data. Referring to the broad scope of the application of this Law, every institution or public authority is obliged to take the appropriate measures during their activity, following the legal provisions, to

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² See some considerations in Edvana Tiri, Erjola Aliaj, *Cyber-Security Regulation in Albania*, „Perspectives of Law and Public Administration”, Volume 12, Issue 2, June 2023, p. 275.

guarantee the protection of individual's personal and sensitive data³.

Albanian legislation expressly provides legal criteria for the processing of personal data. Precisely, in article 6 point 1 of Law No. 9887 dated 10.03.2008, "On protection of personal data" as amended is foreseen that: "1. *The personal data may be processed only if: a) Personal data subject has given his consent; b) Processing is necessary for the performance of a contract to which the data subject is party or in order to negotiate or amend a draft/contract at the request of the data subject; c) in order to protect the vital interests of the data subject; ç) to comply with a legal obligation of the controller; d) for the performance of a legal task of public interest or in the exercise of powers of the controller or of a third party to whom the data are disclosed; h) processing is necessary to protect the legitimate rights and interests of the controller, the recipient, or any other interested party. However, in any case, the processing of personal data cannot contradict the data subject's right to protect personal life and privacy*".

On the other hand, the Law defines the obligation that the processing of personal data⁴, within the framework of activities of prevention and criminal prosecution and of other offenses in the field of criminal law, as well as in the field of defense and national security, is carried out only by official authorities defined in the Law. The Commissioner for the Right to Information and Protection of Personal Data is the responsible, independent authority that oversees and monitors, under the law, the protection of personal data and the right to information while respecting and guaranteeing fundamental human rights and freedoms. The Law recognizes the right of the Personal Data Protection Commissioner to conduct an administrative investigation and impose administrative measures in the event of a violation by the processors of personal data in Albania.

The main issue we raise for discussion and analyze in this paper is the needed balance between the measures that the state must take in order to guarantee public security by obtaining and administering the personal data of citizens, in relation to the state obligation to preserve and protect their personal data.

Today, like other European countries, Albania faces a new challenge in protecting personal data. This is due to the rapid development of information technology⁵. Meanwhile, the guarantees of protection of personal data during the investigation and trial of criminal cases are of a particular importance as related

³ See for more details Cliza, Marta-Claudia, and Spătaru-Negura, Laura-Cristiana, *The General Data Protection Regulation: what does the public authorities and bodies need to know and to do? The rise of the data protection officer*, „Tribuna Juridica - Juridical Tribune”, Volume 8, Issue 2, June 2018, p. 490.

⁴ Article 6, point 2 of the Law no. 9887, dated 10.03.2008 "On the protection of personal data", as amended.

⁵ Gumzej, Nina, *DPA powers toward effective and transparent GDPR enforcement: the case of Croatia*, „Tribuna Juridica - Juridical Tribune”, Volume 13, Issue 2, June 2023, p. 195.

to the principle of presumption of innocence, the right to privacy, or the problem of re-victimization of persons injured by a criminal offense⁶.

2. Albanian legislation and international standards for protecting personal data in criminal proceedings

In the framework of protection of human rights and specifically on the data protection, Albania has ratified some of the main conventions in this field, such as:

1. European Convention of Human Rights, ratified by Law no. 8137, dated 31.07.1996;
2. Convention "On the protection of individuals concerning the automatic processing of personal data," ratified by Law no. 9288, dated 7.10.2004, amended by Law no. 9/2017, dated 02.02.2017;
3. additional Protocol of the Convention "For the Protection of Individuals Concerning the Automatic Processing of Personal Data by Supervisory Bodies and the cross-border Flow of Data," ratified by Law no. 9287, dated 7.10.2004.

Also, with the aim of meeting international standards in personal data protection in criminal investigation cases, there are made several improvements to the internal legislation, in accordance with the provisions of Directive (EU) 2016/680 of the European Parliament. The Directive on the protection of data in the police and criminal justice sectors, aims to harmonize laws in member states regarding the exchange of information between police and judicial authorities.

The Directive is applied to both internal and cross-border processing of personal data, and it aims to improve cooperation between member states in the fight against terrorism and other serious crimes across the EU, ensuring that personal data transferred outside the EU by criminal law enforcement authorities will be adequately protected. The main principle of processing personal data only when it is necessary, proportionate, and following a particular purpose is also explicitly reflected in the Directive.

The Directive on data protection in the police and criminal justice sectors has been adopted to ensure high data protection while improving cooperation in the fight against terrorism and other serious crimes. The protection of personal data during the investigation and exercise of criminal prosecution takes on a special importance due to the nature of the information available and the consequences that may come from the dissemination of personal data contrary to the provisions of the Law.

First, the protection of personal data is directly related to guaranteeing

⁶ See some examples in Cong, V. T., Bien, M. D., Linh, D. V., & Van, D. T. H., (2023). *Application of Artificial Intelligence and Monitoring Devices on Prevention of Public Disorder Crimes and Disorderly Conduct*. „Lex Humana” (ISSN 2175-0947), 15(1), p. 60 et seq., 59–70. Retrieved from <https://seer.ucp.br/seer/index.php/LexHumana/article/view/2409>.

the principle of the presumption of innocence. This requires that information that can be spread, primarily through written or visual media, is only communicated if it does not prejudice the presumption of innocence of the person under investigation⁷. The determination of the rules regarding protecting personal data in written, visual and audiovisual media are sanctioned in Law no. 9887, dated 10.03.2008, amended and detailed in Instruction⁸ no. 9 dated 15.09.2010, "On the basic rules regarding the protection of personal data in written, visual and audiovisual media" of the Commissioner for Personal Data Protection.

Secondly, the protection of the minor's data during the investigation of criminal offenses where the minor is included as a defendant/person under investigation, injured, and/or witness assumes essential importance and enjoys special protection by law.

Minors enjoy the right to special protection from the state due to their immaturity, relative abilities to exercise their rights, and other objective reasons that make them vulnerable. The protection that must be provided during the investigation must be based on the highest interest of the minor and the unique needs of each one in order for their rights to be fulfilled equally. For this reason, several bylaws have been issued by the prosecution body to improve the rules and procedures followed during criminal prosecution to protect and guarantee the rights of the individual, especially minors, in the criminal process.

In Article 9 of Instruction No. 3, dated 25.11.2013 of the Prosecutor General of Albania "On the investigation of criminal offenses where a minor is involved as a defendant, person under investigation, victim and/or witness" it is stipulated that prosecutors have an obligation to respect and take measures to protect the confidentiality of the information and the publication of acts, for the juvenile defendant, a person under investigation, victim and/or witness of the criminal offense, especially those that may lead to the identification of the juvenile as the perpetrator of the offense criminal. Also, the instruction provides some restrictions, in order to avoid the publication of names, identities, and data that enable the identification of the minor's family, commenting on the event in which the minor was involved or the motives and goals he sought to achieve with the criminal offense and any possibility that third parties identify him as the author of the criminal offense.

Another document where we find special regulations on protecting personal data during investigation procedures is the Regulation "On the processing, storage, and security of data in the Prosecutor's Office", approved by Order no.

⁷ See Nela Manole, *Some Theoretical and Legal Reflections on the Order of Criminal Law, the Criminal Legal Relationship of Compliance and the Criminal Legal Relationship of Conflict*, in „Perspectives of Law and Public Administration”, Volume 12, Issue 1, March 2023, pp. 50-56. See also Bedir, F., Önal, L., Turan, M., & Mizrak, O. (2022). *Deviant Leisure: Why Leisure is Important for Criminology (Conceptual Statement)*. „Lex Humana” (ISSN 2175-0947), 14(2), p. 429, 430. Retrieved from <https://seer.ucp.br/seer/index.php/LexHumana/article/view/2285>.

⁸ Amended by Instruction no. 32, dated 27.12.2012.

122, dated 10.04.2013, which provides the organizational procedures and technical measures for protecting personal data and security by the Prosecutor's Office.

According to this regulation, each employee bears direct responsibility for the preservation and confidentiality of the data that he processes due to his duties. The employee of the prosecutor's office who learns about confidential information completes and signs the declaration of confidentiality on his responsibility for respecting and preserving confidential data during and after the end of the function. With the changes approved by Order no. 213 dated 22.07.2016, the regulation has brought some improvements where, among other things, the provisions of Directive 2016/680 of the European Parliament and the Council "On the protection of data in the Police and Criminal Justice Sectors" have been reflected.

On the other hand, the protection of personal data enjoys special protection also from criminal legislation when due to the dissemination of confidential data in violation of the law, the safety and life of the protected persons may be harmed, as provided by article 313/c of the Code Criminal under the title "Prohibition of providing and announcing data in violation of the law".

Making public information of a classified and confidential nature that endangers the life, physical integrity, or freedom of protected persons, according to Law no. 9205, dated 15.03.2004 "On the protection of witnesses and associates of justice", as amended, is criminally punished with a fine or imprisonment depending on the consequences that have occurred. As a qualifying circumstance, the legislator has defined the case when the person responsible for maintaining the classified and confidential data character committed the offense. In severe circumstances defined when the offense (disclosure of secret acts that may have revealed the identity of protected witnesses) resulted in death, the penalty ranges from three to ten years of imprisonment.

Law no. 108/2014 on the State Police, as amended, in articles 125-129, has provided for the rights and obligations of police structures in the processing of personal data only for the interests of criminal investigation and prosecution and the protection of the confidentiality of personal data of the individual. The law stipulates that the collection and processing of personal data by the police is limited to only those data necessary for the prevention of a real risk to the order of public safety, as well as for the prevention, detection, prosecution, and investigation of criminal offenses. The law has provided for the obligation to maintain confidentiality even after the end of the exercise of their functions.

In January 2022, Albania signed the Council of Europe Convention on Access to Official Documents (CETS No. 205), otherwise known as the Tromso Convention, and the Protocol amending the Convention for the Protection of Individuals Concerning Automatic Processing of Personal Data (CETS No. 223), two important documents for strengthening the rule of law, democracy and respect for fundamental human rights and freedoms.

3. Data on criminal offenses and convictions. The balance between the public's right to information and personal data protection

According to the European Court of Human Rights Guide, data concerning offenses, criminal proceedings, convictions, or related preventive measures constitute a category of data that warrants heightened protection under Article 6 of the Convention. Any processing of personal data concerning an individual against whom charges have been dropped (*Brunet v. France*, 2014, §§ 38-40), who has been cautioned (*MM v. the United Kingdom*, 2012, §§ 188-190), convicted and sentenced (*Gardel v. France*, 2009, § 58; *Peruzzo and Martens v. Germany* (dec.), 2013, § 44; *Trajkovski and Chipovski v. North Macedonia*, 2020, § 46) or subjected to a related preventive measure such as being detained in a police station (*Suprunenko v. Russia*, (dec.), 2018, § 61), will constitute an interference with the data subject's right to respect for his or her private life⁹.

Protecting personal data is directly related to some of the basic principles of due process in the exercise of criminal prosecution and trial of criminal offenses, such as the principle of presumption of innocence, preservation of investigative secrecy, and protection of privacy, among others.

3.1. Presumption of innocence

According to the European Convention on Human Rights, the presumption of innocence is a fundamental element of the right to a fair trial and trial. Article 6.2 of the ECHR states, "Anyone accused of a criminal offense will be considered innocent until proven guilty according to the law." Therefore, reporting on criminal proceedings and publishing data on these cases should not prejudice the fundamental right of the suspect or the accused. Principle 2 of Recommendation Rec. (2003) 13 also includes such a requirement. Respect for the principle of presumption of innocence is an integral part of the right to a fair trial. Therefore, opinions and information related to ongoing criminal proceedings should only be communicated or disseminated through the media if this does not prejudice the presumption of innocence of the suspect or the accused".

For example, in the case of *Du Roy and Malaurie v. France*, the Court of European Human Rights pointed out that: "journalists reporting on criminal proceedings taking place at the time must ensure that they do not exceed the limits established in the interest of proper administration of justice and respect the right of the accused to be considered innocent."

Moreover, in the *Tourancheau and July v. France* case, the national courts convicted the appellants (journalists) after publishing an article reproduc-

⁹ Guide to the Case-Law of the European Court of Human Rights, Data protection, Updated on 31 August 2022, p.15.

ing extracts from statements made in the context of a criminal investigation before the court hearing. The national courts had particularly emphasized the harmful consequences of the article's publication for protecting the reputation and rights of the two young suspects and for their right to be presumed innocent. Therefore, the court stated that there had been no violation of the journalists' right to freedom of speech and transmission of information.

The media and journalists play an essential role in the way that citizens are informed about crimes in society and judicial processes against their authors. Media reports of crimes usually attract more the public attention, and there is a risk that due to the reports and published data, the right to presumption of innocence of the persons involved in various cases is endangered¹⁰.

3.2. Investigative secrecy

Based on Albanian criminal procedural legislation, investigative acts are secret until the defendant has learned about them. In case of the need for the continuation of the investigations, the prosecutor can order the preservation of secrecy for special acts until the end of the investigations¹¹.

In Article 103 of the Code of Criminal Procedure, the cases of banning the publication of acts are foreseen and specifically: *1. It is prohibited to publish, even in part, confidential documents related to proceedings or their exclusive contents through the press or mass media; 2. It is prohibited to publish, even in part, non-confidential documents until the conclusion of the preliminary investigations; 3. It is prohibited to publish, even in part, trial documents when hearings are closed to the public. Prohibition on publication is removed when the time limits provided for by the law on the State archives expire or after ten years from the date the decision has become final, provided that the Minister of Justice authorizes such publication; 4. Publishing personal data and photographs of minor defendants and witnesses accused or impaired by a criminal offense is prohibited. The court may allow publication only when the minor's interests require it or when the minor has reached the age of sixteen.*

In article 104 of the Code of Criminal Procedure entitled "*Violation of the publication prohibition*", it is foreseen that a breach of the prohibition to publish by a State official or a public entity employee constitutes a disciplinary infringement unless it constitutes a criminal offense. In this case, the prosecutor notifies the authority entitled to adopt disciplinary sanctions.

Albanian criminal law has criminalized the disclosure of secret acts and data, providing it in a special criminal provision, specifically in Article 295/a of the Criminal Code. In the third and subsequent paragraphs of Article 295/a "*Disclosure of secret documents or data*" of the Criminal Code of Albania is foreseen

¹⁰ See point 6.3, Manual on "Reporting of Criminal Events and Court Cases in the Media," Tirana 2017.

¹¹ See article 279 of the Criminal Procedure Code of Albania.

that: *“Disclosing of secret documents or data contained in secret documents by the prosecutor of the judicial police officer, as well as the failure to comply with the obligations defined in article 103 of the Criminal Procedure Code, is punishable by imprisonment from one up to five years. Disclosing secret documents or data contained in secret documents by other persons that have information about a criminal proceeding and are warned by the prosecutor or the judicial police officer on the obligation not to disclose information is punishable by imprisonment up to three years. Disclosing confidential data related to the identity, collaboration, protection process, or location of witnesses and justice collaborators, who benefit from special protection according to legislation in force, is punishable by imprisonment from two to six years. Disclosing of a secret that resulted in death, severe injury or danger to life and health of witnesses or justice collaborators, their family members or police officers in charge of their protection is punishable by imprisonment from three up to eight years”.*

The regulation "On the processing, storage, and security of data in the Prosecutor's Office," approved by order no. 122, dated 10.04.2013 of the Prosecutor General, the obligation to complete the "Declaration for the preservation of secrecy and prohibition of publication" is foreseen, which obliges the prosecutor or judicial police officers to draw up the declaration of confidentiality in any case where documents are requested from persons interested in the criminal case.

This statement firstly serves to identify in the record the procedural acts with which the declarant is familiar (lawyer, a victim of a criminal offense, among others) and, secondly, the identifying data of the declarant. The prosecutor informs the declarant about the criminal and disciplinary responsibility he/she has, based on article 295/a, fourth paragraph of the Criminal Code; if he/she will release secret acts or data containing secret acts, the publication of which is prohibited.

Despite the legal provisions, up to the sanctioning of the violation of the right to publish the data of the investigative file, in Albania, the violation of investigative secrecy by journalists who constantly publish in the media and television shows data and acts from the prosecutions investigative files, remains a serious problem.

In some cases, the information published in the media violates investigative secrecy¹², and the limitations of the fifth and sixth paragraph of Article 295/a of the Criminal Code have seriously endangered the health and life of protected witnesses due to the disclosure of their identity. In 2015¹³, explosives were placed in the car of the protected witness in the case of the murder of Officer

¹² According to Albanian legislation, investigative documents are secret until the defendant has learned about them. In case of need for the continuation of investigations, the prosecutor can order the preservation of secrecy for special acts until the end of the investigations. See Article 279 of the Code of Criminal Procedure.

¹³<https://www.standard.al/2014/10/05/vrasja-e-dritan-lamaj-zbulimi-i-identitetit-te-deshmitarit-te-mbrojtur-shkb-nis-hetimet/>, date of publication October 5, 2014, consulted on 1.04.2023.

D.L. in Albania after the media published his identity.

However, should there be responsibility and sanctions for the media as a legal entity¹⁴, to which the Albanian criminal law recognizes criminal responsibility in case of criminal offenses, with severe consequences for the life and health of protected witnesses or violation of investigative secrecy?

In Albania, we do not have any cases where journalists or media entities have been successfully charged with the criminal offense of "Disclosure of secret acts or data" provided for in Article 295/a of the Criminal Code.

The investigations initiated by the prosecutor's office to reveal the investigative secret have generally not focused on the journalists who may have published the news. However, the investigation was oriented towards finding and identifying the author of the leak of information that was protected by the investigative secret. In these cases, journalists were interrogated as persons with knowledge of the criminal offense. We mention here the case of the investigative journalist A.H., who, in September 2016, was accompanied to the prosecutor's office, and his mobile devices were seized to identify the person who had sent him secret investigative information during a television program when he revealed information related to an investigation in process. He was released immediately after the interrogation procedure. Journalist A.H. was one of the participants in a TV show about the crash of a small plane piloted by a 69-year-old Italian pilot. The plane made a forced landing in a village in Durrës due to a technical problem. During the TV show, A.H. said that the police suspected that the plane was used for possible drug trafficking. According to the prosecutor's office, disclosing information to the public is considered a disclosure of investigative secrets and allows suspected persons to tamper with evidence¹⁵.

In Albania's written and visual media, journalists often publish data with the generalities of victims and witnesses of criminal offenses as soon as the event occurs.

Point 8.5 of the "Manual for the Protection of Personal Data in the Field of the Media"¹⁶ provided that the media should not publish the personal data of the witness of a criminal offense. Publication of investigative documents during preliminary investigations by journalists often causes tensions between the prosecution and police institutions. During the last years, the publication of investigative acts by various journalists has triggered several criminal proceedings by the prosecutor's office for the release of investigative secrets - investigations that have not resulted in the defendant being criminally prosecuted or sentencing decisions.

¹⁴ In Article 45 of the Criminal Code of the Republic of Albania entitled "The application of the criminal law to legal entities" is foreseen that: "The legal entities shall, with the exception of the state institutions, be held criminally responsible for criminal offences committed on their behalf or to their benefit by their bodies or representatives".

¹⁵ <https://kohajone.com/gazetari-artan-hoxha-shoqerohet-ne-prokurori/>, consulted on 1.04.2023.

¹⁶ Commissioner for the Right to Information and Protection of Personal Data, Tirana 2013.

In general, the investigations to extract investigative secrets from the prosecutor's office did not have the journalists who may have published the leaked news as primary targets¹⁷. However, the latter were often interrogated as persons who have knowledge of a criminal offense. Analyzing the statistics of the prosecution body for the criminal offense of disclosure of secret documents or data, provided by article 295/a of the Criminal Code, for the period 2010-2022, we conclude that the number of proceedings registered over the years for this criminal offense is relatively low, while what stands out is the fact that there are no sentencing decisions for registered criminal proceedings. From the review of the statistical data results that all the registered proceedings have ended with a dismissal of case decision by the prosecutor's office (see Table no. 1 for more).

3.3. Privacy protection

In the case of *Egeland and Hanseid v. Norway*, the court assessed restrictions on the publication by the press of photographs taken of one of the accused in a well-known criminal case in Norway without his consent as he left the court premises after attending the announcement of the latter's decision. The European Court found that under the ECHR, "by prohibiting the taking and publication of photographs of B on the road from the court building to a waiting police car, the responsible state acted within the scope of its assessment in assessing the need to protect the privacy of the defendant and the fair administration of justice. The court is convinced that the limitations on the editorial right to freedom of expression [...] were based on reasons that were relevant and sufficient and were proportionate to the legitimate goals pursued".

The protection of privacy in the context of ongoing criminal proceedings is also an important aspect covered by the above Recommendation, which states that "the provision of information to suspects, accused persons, convicted persons or other parties to criminal proceedings should respect their right to the protection of privacy per Article 8 of the Convention. "Special emphasis is placed on the need to protect parties who are minors or vulnerable persons, as well as victims and their families (Principle 8).

3.4. The risk of publishing false data and photos by journalists

Violation of the law and non-respect of the right to privacy by journalists and the media have led to cases where false photos and data have been published about people as suspects or perpetrators of criminal activities when they had nothing to do with the affair. The "major" goal that drives journalists to get the

¹⁷ See point 6.2 Manual on Reporting of Criminal Events and Court Cases in the Media, "*Raportimin e Ngjarjeve Kriminale dhe Çështjeve Gjyqësore në Media*", Tirana 2017. [https:// www.reporter.al/manualidrejtjesise/index.html](https://www.reporter.al/manualidrejtjesise/index.html).

big scoop often causes them to rush and make mistakes in their published materials¹⁸.

For example, in the murder of citizen I.D. in Durrës on 19.09.2020, the Albanian media rushed to take out and identify the photo of the killer and the victim.

The journalist of the chronicle, trying to identify the author and publish his photo, obtained the data on the name of the suspected author from the police, and, using Facebook, he took the photo of the person who was thought to be the author of the criminal act. On the day of the crime, there were five people on Facebook with the same name and surname as the person suspected of the murder. The photo of the suspect was published in every press outlet and visual media. Unfortunately, the journalist had opened the wrong Facebook page; neither the journalist, the editorial staff, nor the editor-in-chief had verified the data before publishing. Thus, the photo of a person who lived in Tirana and was unrelated to the event was mistakenly published. In less than 20 minutes, the photo of the boy who had nothing to do with the murder, was in every media and on-line media portal as the suspected killer of I.D.

In September 2020, A.K. took this case to the First Instance Court of Tirana¹⁹, filing a civil lawsuit against three national televisions, two national newspapers, and 23 media portals, which illegally published the photo of him as the murderer of the citizen I.D in Durrës. The process is still in the first stages of the judicial review, and we still do not have a decision from the court of first instance, although three years have passed since the violation was committed. Until now, no media has come out to deny the news and apologize for publishing the photo of the wrong person in this case.

3.5. Risk from cyber attacks

The data of Albanian citizens, which are administered in various electronic registers and systems in public and private institutions, in a relatively short time, have become the object of cyber-attacks, where their data have been stolen and put on the black market or were published in the media, infringing their right to the protection of personal data. In some cases, it is estimated that they may have also violated national security.

In July 2022, Albania faced a severe cyber-attack, where some of the most critical government systems were hacked, and a considerable amount of data was obtained by the hackers, the most important of which would be the TIMS system, with which the Albanian State Police operate. The acquisition of

¹⁸ See Negri Soares, M., de Souza Rocha, Q. M., & Oliveira de Lima, H. (2023). *Privacy and the Protection of Personal Data on the Internet Under the Light of Personality Rights in the Era of Surveillance Capitalism*. „Lex Humana” (ISSN 2175-0947), 15(4), p. 170 et seq. Retrieved from <https://seer.ucp.br/seer/index.php/LexHumana/article/view/2608>.

¹⁹ Case no. 12030 of the main Register /year 2020 in the First Instance Court of Tirana.

data by the hackers was also accompanied by the publication of some of them in printed and visual media, where a significant part was personal or sensitive data of Albanian citizens or officials, openly violating their right to privacy, contrary to the basic principles and legislation in force for the protection of personal data. The media, primarily through social networks, never stopped to reflect on the legal obligation not to publish information about personal data but continued publishing up until they were forced to stop by order of the prosecutor's office. Iranian hackers published on their Telegram page all the electronic correspondence of the former director of the Albanian State Police when he was in charge of the Anti-Terror Directorate in Albania. On 19 September 2022, the Prosecutor's Office of Tirana issued a decision prohibiting the publication by the media of materials, according to the prosecutor's office, that were sensitive and that violated national order and security, in support of Article 103 of the Code of Criminal Procedure of the Republic of Albania. The prosecutor's office decided that no data published by the authors of the cyber-attack should be published by audiovisual media, print, online, in social networks, or in any form of publication or transfer of data posted by the authors of this cyber-attack on the TIMS system of the Albanian State Police". This decision has been opposed by journalists in Albania, considering it without a legal basis, a decision that raised concerns about limiting the freedom of the media.²⁰

Table no. 1: *Statistical data of proceedings registered for the criminal offense provided for by Article 295/a "Disclosure of acts or secret data" of the Albanian Criminal Code*

<i>Year</i>	<i>Number of registered proceedings</i>	<i>Number of proceedings sent to trial</i>	<i>Number of registered defendants</i>	<i>The number of defendants sent to trial</i>	<i>Number of convicted defendants</i>
2022	6	1	0	1	1
2021	6	1	2	1	0
2020	3	1	0	1	0
2019	6	0	0	0	0
2018	2	0	0	0	0
2017	2	0	0	0	0
2016	4	0	0	0	1
2015	3	0	1	1	0
2014	3	1	0	1	1
2013	2	0	0	0	0
2012	4	0	0	0	0
2011	1	0	0	0	0
2010	1	0	0	0	0

Source: The statistical data were obtained from the official website of the General Prosecutor's Office of Albania, available: www.pp.gov.al

²⁰ <https://www.reporter.al/2022/09/20/urdhri-i-prokurorise-per-te-dhenat-e-hakeruara-ngre-shqete-sime-mpi-lirine-e-medias/>, consulted on 1.04.2023.

4. Conclusion

Albania has made significant steps in improving and aligning the legislation in personal data protection with international standards. The development of information technology and the possibility of transferring information in real-time with different means and forms require more significant legal guarantees for the protection of personal data efficiently.

The guarantees of protection of personal data during the investigation and trial in criminal cases take on particular importance, because they are related to the principle of presumption of innocence, the right to privacy, or the problem of re-victimization of persons injured by a criminal offense.

Despite the legal regulations in force that protect personal data from publication or misuse, the case of the cyber-attack in Albania showed that the current protection of citizens' data does not respond to the rapid developments of information technology. On the other hand, the media did not implement the obligations to protect personal data and the right to privacy of citizens or data administered by public or private institutions.

The legal regulation today in Albania for the protection of personal data seems to have been overlooked by the media because no legal provisions directly limit the media in publishing this data. Regarding the obligations of the media for the protection of personal data, there are some regulations in power, as Instruction No. 9 dated 15.09.2010 of the Commissioner for the Protection of Personal Data "*On the basic rules regarding the protection of personal data in the written, visual and audiovisual media*" and the Journalist's Code of Ethics approved by the Albanian Media Council. Meanwhile, the only legal norm limiting publication is Article 103, "*Prohibition to publish a document*" of the Code of Criminal Procedure, which is applied in criminal proceedings.

In Albania, there no monitoring structure to control and evaluate the implementation of legislation in force by online media portals or social media for the information they distribute through the electronic communication network. In case of a violation on their part, which may damage the individual, filing a lawsuit for compensation in court is the only way of restoring one's rights. These processes last for years and fail to provide a preventive effect on possible violations by the media, violations which, due to the lack of measures to prevent them, are turning into phenomena in Albania.

In the framework of the protection of personal data and the right of privacy of individuals, concrete measures should be taken in terms of improving and providing the advanced technological infrastructure of institutions that administer, process, and control the personal and sensitive data of citizens, especially for those systems that administer data in the police and criminal justice

sectors²¹.

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²¹ Theoretically, it would be possible to create a mechanism for the application of transdisciplinary methods in public international law by bringing together key possibilities such as: the participation of an interdisciplinary group of experts; a transparent process of debate and decision-making; the use of technology and advanced analytical methods (such as mathematical models and simulations); in Popa Tache, C. E., & Săraru, C.-S., (2023), *New Transdisciplinary Directions in International Law?*, „Lex Humana” (ISSN 2175-0947), 15(4), p. 94. Retrieved from <https://seer.ucp.br/seer/index.php/LexHumana/article/view/2705>.

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