

2nd INTERNATIONAL DOCTORAL AND POSTDOCTORAL CONFERENCE IN THE LAW AND LAW RELATED FIELDS SPLITLAW 2025

Editors:
Ines Medić, Ranka Jeknić

BOOK OF PROCEEDINGS

Split, 14 - 15 May 2025



2nd INTERNATIONAL DOCTORAL AND POSTDOCTORAL CONFERENCE IN THE LAW AND LAW RELATED FIELDS SPLITLAW 2025

Editors:

Ines Medić, Ranka Jeknić

BOOK OF PROCEEDINGS

Split, 14 - 15 May 2025

Publisher:

Faculty of Law, University of Split, Croatia

Editors in Chief

Ines Medić, PhD., Full Professor, Faculty of Law, University of Split, Croatia

Ranka Jeknić, Phd., Associate Professor, Faculty of Law, University of Split, Croatia

Executive Editor

Marko Ivkošić, PhD., Associate Professor, Faculty of Law, University of Split, Croatia

Junior Editor

Blanka Čop, PhD., PostDoc, Faculty of Law, University of Split, Croatia

Technical Editors

mr. sc. Ivona Matas, mag. iur., librarian, Faculty of Law, University of Split, Croatia

Tomislav Staničić, M. J., senior librarian, Faculty of Law, University of Split, Croatia

Editorial Board

Vesna Barić Punda, PhD., Full Professor, Faculty of Law, University of Split, Croatia

Marija Boban, PhD., Full Professor, Faculty of Law, University of Split, Croatia

Bosiljka Britvić Vetma, PhD., Full Professor, Faculty of Law, University of Split, Croatia

Marko Ivkošić, PhD., Associate Professor, Faculty of Law, University of Split, Croatia

Jens Lowitzsch, PhD., Full Professor, Europa-Universität Viadrina Frankfurt (Oder), Germany

Tomaž Keresteš, PhD., Full Professor, Faculty of Law, University of Maribor, Slovenia

Vesna Rijavec, PhD., Full Professor, Faculty of Law, University of Maribor, Slovenia

Wojciech Zalewski, PhD., Associate Professor, Faculty of Law, University of Gdansk, Poland

Małgorzata Balwicka-Szczyrba, PhD., Associate Professor, Faculty of Law, University of Gdańsk, Poland

Piotr Uziębło, PhD., Associate Professor, Faculty of Law, University of Gdańsk, Poland

Victor Garcia Yzaguirre, PhD., Faculty of Law, University of Girona, Spain

Technical Board

Ante Šimun Majstorović, mag. iur., Faculty of Law, University of Split, Croatia

Josip Tadić, mag. iur., Faculty of Law, University of Split, Croatia

The journal is published annually.

2nd INTERNATIONAL DOCTORAL AND POSTDOCTORAL CONFERENCE IN THE LAW AND LAW RELATED FIELDS SPLITLAW 2025

ISSN (Online): 3043-9906

Publisher

Faculty of Law, University of Split, Croatia

For the publisher

Ines Medić, PhD., Full Professor, Faculty of Law, University of Split, Croatia

Ranka Jeknić, Phd., Assistant Professor, Faculty of Law, University of Split, Croatia

Organizing Committee

Željka Primorac, PhD., Assistant Professor, Faculty of Law, University of Split, Croatia (President)

Ranka Jeknić, PhD., Assistant Professor, Faculty of Law, University of Split, Croatia (Co-President)

Ratko Brnabić, PhD., Associate Professor, Faculty of Law, University of Split, Croatia

Marko Ivkošić, PhD., Associate Professor, Faculty of Law, University of Split, Croatia

Marin Keršić, PhD., Assistant Professor, Faculty of Law, University of Split, Croatia

Ivana Radić, PhD., Assistant Professor, Faculty of Law, University of Split, Croatia

Jens Lowitzsch, PhD., Full Professor, Europa-Universität Viadrina Frankfurt (Oder), Germany

Tomaž Keresteš, PhD., Full Professor, Faculty of Law, University of Maribor, Slovenia

Wojciech Zalewski, PhD., Associate Professor, Faculty of Law, University of Gdansk, Poland

Program Committee

Ratko Brnabić, PhD., Associate Professor, Faculty of Law, University of Split, Croatia (President)

Ines Medić, PhD., Full Professor, Faculty of Law, University of Split, Croatia

Matko Pajčić, PhD., Associate Professor, Faculty of Law, University of Split, Croatia

Blanka Čop, PhD., PostDoc, Faculty of Law, University of Split, Croatia
Vesna Rijavec, PhD., Full Professor, Faculty of Law, University of Maribor, Slovenia
Małgorzata Balwicka-Szczyrba, PhD., Associate Professor, Faculty of Law, University of Gdańsk, Poland
Piotr Uziębło, PhD., Associate Professor, Faculty of Law, University of Gdańsk, Poland
Victor Garcia Yzaguirre, PhD., Faculty of Law, University of Girona, Spain

Technical Committee

Ante Šimun Majstorović, mag. iur., Faculty of Law, University of Split, Croatia
Luka Roso,mag. iur., Faculty of Law, University of Split, Croatia
Nikolina Tomaš, mag. iur., Faculty of Law, University of Split, Croatia
Daniela Nazor, dipl. iur., Faculty of Law, University of Split, Croatia

Editors

Ines Medić, PhD., Full Professor, Faculty of Law, University of Split, Croatia
Ranka Jeknić, Phd., Assistant Professor, Faculty of Law, University of Split, Croatia

Executive Editor

Marko Ivkušić, PhD., Associate Professor, Faculty of Law, University of Split, Croatia

Print

TEHNIČAR KOPIRNI CENTAR d.o.o.

CONTENT

Foreword III

Pawel Mazur
EQUAL TREATMENT OF SHAREHOLDERS AND GENERAL PRINCIPLES OF LAW 1

Najada Kilic
INTEGRATING ESG CRITERIA IN CANDIDATE COUNTRIES: THE CASE OF CORPORATE GOVERNANCE IN ALBANIA 17

Barbara Bokor
LEGAL ANALYSIS OF EU REGULATIONS ON CIRCULAR ECONOMY AND SUSTAINABILITY PRINCIPLES IN PLASTIC FOOD PACKAGING..41

Ana-Maria Bogović
CONFIDENCE IN THE JUDICIARY REGARDING UNFAIR BANKING OPERATIONS IN RELATION TO THE CURRENCY CLAUSE AND ITS IMPACT ON THE REAL RIGHTS OF CONSUMERS 87

Józsa Ede
AN EXAMINATION OF THE NATURE OF A SMART CONTRACTS AS A LEGAL TRANSACTION 111

Tea Micevska
LEAVE TO FILE A SECOND APPEAL AS A MECHANISM FOR UNIFYING JUDICIAL PRACTICE: THE NORTH MACEDONIAN PERSPECTIVE 129

Doris Skaramuca
EVALUATING THE ADMISSIBILITY OF AI EVIDENCE IN CRIMINAL PROCEEDINGS: LEGAL STANDARDS AND ETHICAL IMPLICATIONS 155

Orsolya Horváth
PRESERVING AND RECONSTRUCTING EVIDENCE WITH 3D PRINTING TECHNOLOGY: OPPORTUNITIES AND CHALLENGES 179

István Szijártó
CHALLENGES TO THE RULE OF LAW IN THE EU SYSTEM OF JUDICIAL COOPERATION WITH SPECIFIC REGARD TO PROCEDURAL GUARANTEES IN CRIMINAL LAW AND COOPERATION SYSTEMS BASED ON THE PRINCIPLE OF MUTUAL RECOGNITION 203

Lulezim Barjamemaj
OPTIONAL GROUNDS FOR REFUSAL IN THE EUROPEAN ARREST WARRANT INSTRUMENT: A JURISPRUDENTIAL ANALYSIS 233

Andrej Bozhinovski
PROTECTION OF THE RIGHTS OF WRONGFULLY CONVICTED PERSONS IN CROATIA 253

Ratoi Razvan Ionut
STATUTORY LIMITATIONS AND THE RULE OF LAW: ROMANIA'S STRUGGLE FOR JUSTICE AND EU ALIGNMENT 289

Ema Turnšek
THE FOUNDATION OF THE RIGHT TO DATA PROTECTION IN EUROPE IN THE LIGHT OF HEALTH DATA 307

Barbara Hribar
LEGAL CHALLENGES OF DIGITALIZATION IN THE LEGAL PROFESSION: BALANCIN LEGALITY AND ECONOMIC EFFICIENCY 331

Ana-Marija Kraljik
EUROPEAN HEALTH DATA SPACE - A NEW APPROACH TO THE DIGITAL TRANSFORMATION OF THE EUROPEAN UNION 357

Pawel Urzenitzok
ALGORITHMIC ACCOUNTABILITY IN FACIAL RECOGNITION TECHNOLOGY: ADDRESING BIAS AND TRANSPARENCY IN EUROPEAN LAW WNFORCEMENT APPLICATIONS 381

Mario Diez Royo
MICHIHITO MATSUDA AND THE SPECIFIC STATUS FOR ROBOTS 409

Judit Böröcz
JUDICIAL INDEPENDENCE AS A GUARANTEE OF CONFIDENCE IN THE JUDICIARY: ADEQUATE REMUNERATION OF JUDGES AS A PREVENTION OF CORUPTION 431

Eugen Gheorghe Crisan
POLITICAL IMMUNITY AND LEGAL LIABILITY 455

FOREWORD

It is with great pleasure that we present the foreword to the Second International Doctoral and Postdoctoral Conference in Law and Law-Related Fields – SplitLaw 2025, hosted by the Faculty of Law, University of Split, Croatia. This conference, held on May 14–15, 2025, quickly emerged as a significant academic event in the legal field, celebrated for its international character and scholarly rigor. With international scholars serving on its Organizing and Program Committees and participants coming from numerous countries, SplitLaw embodies the spirit of academic cooperation and global perspective that the Faculty of Law, University of Split, proudly fosters.

Over two days, the conference brought together doctoral candidates, postdoctoral researchers, and seasoned academics for rich scholarly dialogue. Each plenary session sparked vigorous discussions and insightful exchanges, highlighting significant contributions from emerging young scholars and established experts alike. The structure of plenary presentations followed by open discussion facilitated critical debate and collegial interaction, enriching the experience for attendees and emphasizing the conference's role as a perfect environment for future legal scholarship.

The breadth of topics at SplitLaw 2025 mirrors the complexity of contemporary legal challenges. Participants addressed critical issues such as integrating Environmental, Social, and Governance (ESG) criteria into corporate governance and sustainability practices, underscoring the evolving responsibilities of corporate actors in modern society. They also explored the cutting-edge intersection of law and technology, including the use of artificial intelligence as evidence, facial recognition technologies, and strategies for mitigating algorithmic bias, confronting how innovation constantly challenges existing legal frameworks. Another major theme of the conference focused on digitalization and the essential task of data protection, emphasizing the need to balance technological advancements with fundamental rights to privacy. Sessions addressing judicial

cooperation and the rule of law in Europe explored ways to strengthen cross-border legal collaboration and reinforce core democratic principles within the European Union. Equally prominent were discussions of human rights issues from migration and the plight of displaced persons to transitional justice and the prosecution of war crimes which highlighted law's crucial role in addressing humanitarian concerns and ensuring accountability.

The conference also actively engaged with emerging trends in private and commercial law, examining the rise of smart contracts, evolving consumer rights in a globalized marketplace, and complex issues surrounding cross-border legal frameworks.

In conclusion, SplitLaw 2025 represented far more than merely an academic conference; it served as a dynamic meeting of minds driven by intellectual curiosity, collegiality, and an unwavering dedication to excellence. As a president of the Program Committee, I extend my heartfelt gratitude to all contributors and participants, and especially to our diligent and always helpful core organizing team most notably to my Co-Editor-in-Chief and the Executive Editor without whose efforts this remarkable event would not have been possible. I trust that the research and insights presented here will inspire further scholarly endeavors, and that this volume will serve as an enduring reminder of the rich academic dialogue we have shared.

Ratko Brnabić, PhD, Associate Professor
President of the Program Committee of the SPLITLAW 2025
Dean of the Faculty of Law, University of Split, Croatia

Split, May 23, 2025.

UDK: 347.72.031 : 061.1 (4-6 EU)
Preliminary communication

Pawel Mazur, Postdoctoral researcher
Mykolas Romeris University in Vilnius, Lithuania
E-mail: pmazur@mruni.eu
ORCID ID: 0000-0002-0398-3941

EQUAL TREATMENT OF SHAREHOLDERS AND GENERAL PRINCIPLES OF LAW

ABSTRACT

This paper examines whether the principle of equal treatment of shareholders can be considered a general principle of corporate law or if it is merely an application of broader legal standards, such as the duty to act in good faith. The author challenges the view that equality of shareholders is an independent general principle, arguing that shareholders should not be treated identically but rather in accordance with other general principles, particularly fairness and good faith. The paper distinguishes between the concepts of 'equality of shareholders' and 'equal treatment of shareholders,' clarifying that the latter is a procedural rule protecting shareholders from arbitrary discrimination. It also explores the relationship between equal treatment and constitutional principles of equal protection, EU law, and company law in various jurisdictions. The paper concludes that while the equal treatment of shareholders aligns with general principles like good faith, it is better understood as an example of their application rather than a standalone principle. The concept of "fair treatment" is proposed as a more accurate description of how shareholders should be treated in practice.

Keywords: *equal treatment of shareholders, equality, good faith, corporate law, principles of law*

1. INTRODUCTION

Equality of shareholders is frequently referred to as 'a rudimental principle of corporate law'[1] and a cornerstone of corporate governance.[2] Despite the widespread acceptance of its role, until recently comparative studies on this issue

[1] Michalski, M., *Kontrola kapitałowa nad spółką akcyjną*, Zakamycze, Kraków 2004, p. 346.
[2] Burckhardt, C., *Gleichbehandlung und Ungleichbehandlung im Aktienrecht* in: Hussmann L.; Nickerson N.; Bastian A. S.; Wujohktsang, Y. (ed.), *Unter Gleichen,* University of Zurich, Zürich 2021, p. 162; Jung P. in Jung P., Kunz P., Bärtschi H., *Gesellschaftsrecht,* Schulthess, Zürich 2021, p. 76.

were scarce.[3] This situation is gradually changing[4] but the discussion on the role of equality and equal treatment in corporate governance is far from complete. This paper aims to contribute to this discussion. The analysis of the theoretical framework of the principle of equal treatment of shareholders is material as it may contribute to the discussion on divergence from the proportional relationship between the level of the equity investment of the shareholder in the company and his corporate rights (e.g. through the creation of plural voting shares) as well as on admissibility of preferential treatment of long-term investors (e.g. with respect to the company related information).[5]

The aim of this paper is to analyze whether the principle of equal treatment of shareholders may be qualified as a general principle of corporate law or it is just an example of practical application of overarching standards, such as duty to act in good faith (*Treu und Glauben, buona fede, bonne foi*). The denial of the hypothesis that equality of shareholders is an independent general principle of law is important not only from a purely theoretical perspective. It can help ensure correct application of the law, as in the process of its application, one would not attempt to treat shareholders identically or to fully apply the general principle of equal treatment. Instead, shareholders should be treated equally to the extent required to comply with other general principles of law, i.e. the principle of good faith. It would lead to the fair treatment of shareholders, which does not necessarily mean identical treatment.

This paper is structured as follows. Part 2 explores the distinctions between the concepts of 'equality of shareholders' and 'equal treatment of shareholders.' In certain jurisdictions, these terms are used interchangeably; therefore, clarifying their meanings is essential to prevent confusion. For the purposes of this paper, the focus will be on the principle of equal treatment of shareholders, understood as a procedural rule that safeguards shareholders from arbitrary discrimination by both the company and fellow shareholders.

Part 3 examines the sources of the principle of equal treatment of shareholders. It analyses the relation between equal treatment of shareholders and constitutional principles of equal protection. It also examines the role of equality of shareholders

[3] See in particular: Verse, D., *Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften,* Mohr Siebeck, Tübingen 2006, p. 116.
[4] See in particular: Jung P. (ed.), *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht,* Mohr Siebeck, Tübingen 2021, *passim*; Merkt, H., *Gleichbehandlung im Gesellschaftsrecht rechtsvergleichend* in Grundmanm S., Merkt H.; Mülbert P. (ed.), *Festschrift für Klaus J Hopt zum 80. Geburtstag am 24. August 2020*, De Gruyter, Berlin 2020, pp. 775 – 805.
[5] See for instance: Koch, J., *Das Gebot informationeller Gleichbehandlung* in: Grundmann S., *et al., op. cit.* note 4, p. 525.

in the EU law, including the frequently quoted decision of the European Court of Justice in the case of Audiolux.[6] Finaly, it analyses the approach to equal treatment of shareholders in company law of selected jurisdictions.

The considerations in Part 4 aim to test the hypothesis if that equal treatment of shareholders constitutes, in itself, a general principle of law. To this end, it clarifies the distinction between principles and rules. Furthermore, it argues that inferring specific principles from general ones may lead to undesirable outcomes. This is because the persuasiveness of principles is often seen as sufficient justification for decisions made by those who apply them. Consequently, the continual creation of new principles may result in arbitrariness. The final section of Part 4 delves into the relation between equal treatment of shareholders and general principles of private law, such as an obligation to act in good faith and argues that obligation to treat shareholders equally overlaps with those general principles and demonstrates one of examples of their practical application. Therefore, the term "equal treatment" could effectively be replaced with "fair treatment" of shareholders. Part 5 concludes.

2. EQUALITY OR EQUAL TREATMENT OF SHAREHOLDERS

The starting point for further deliberations should be the determination of what is meant by equal treatment. In a comparative study this task is more complicated than it may seem at the first glance. This is because equality may be referred both to allocation of rights and obligations between the shareholders (*Gleichberechtigung*) and to the procedural fairness requiring that all corporate decisions apply in the same manner and to the same extent as to all shareholders unless there is valid justification for different treatment of selected investors (*Gleichbehandlug*).[7]

This distinction is not always clear and several comparative analyses of refer to both those aspects interchangeably.[8] This is because in some jurisdictions the boundary between those concepts is blurred. For instance, Polish scholars tend to argue that provisions allowing issuance of preferred stock create exceptions to the

[6] Judgment of the Court (Fourth Chamber) of 15 October 2009. Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others, ECLI:EU:C:2009:626.
[7] Verse, D., *op. cit.* note 3, p. 6.
[8] See for instance Jung P. (ed.), *op. cit.,* note 2, *passim* – in parts of the books devoted to various jurisdictions the authors either equality of right or equal treatment or both of those ideas interchangeably.

general rule of equal treatment of shareholders.[9] This leads them to the conclusion that one should adopt a restrictive interpretation of norms governing preferred stock[10] which limits flexibility of Polish corporate law. Also, the Polish case law invokes the principle of equal treatment of shareholders in the context of proportional relation between the number of shares held by the given shareholder and the scope of his corporate rights.[11] At the same time, some authors take a contrary approach and argue that the original wording of the articles of association may not infringe the principle of equal treatment of shareholders, as it is voluntarily agreed upon by all shareholders. They contend that there is no 'treatment' of shareholders by the company that could violate this principle.[12] Similar approach may be traced in Switzerland. Swiss Scholars point out that principle of equal treatment of shareholders is not absolute, but relative (*relative Gleichbehandlung*) and connected with the number of shares held by shareholders.[13] In this sense the principle of equal treatment of shareholders is linked to the principle of proportionality (*Proportionalitätsprinzip*).[14]

In other jurisdictions the scholarly writing clearly distinguishes between both aspects of equality. For instance, in Germany[15] equal and in Austria[16] equal treatment is not applied to the original wording of articles of association and the allocation of rights between shareholders made thereby but only to the corporate decisions of the management board, supervisory board and of the general meeting in the course of the company's existence. The distinction between equal rights of shareholders (*parità di diritti*) and equal treatment of shareholders (*parità di trattamento*) has been also recognized in Italian literature.[17]

Thus, when discussing the principle of equal treatment of shareholders, it is easy to get lost in translation. In this paper I will refer to the principle of treatment of shareholders understood as a rule requiring procedural fairness and protecting against arbitrary discrimination against shareholders.

[9] Popiołek, W., *Akcja – prawo podmiotowe*, C. H. Beck, Warszawa 2010, p. 51.
[10] *Ibid.*
[11] See for instance the use of terms 'equality of shareholders' in the Polish case law – judgement of the Appelate Court in Katowice of 3.09.2021 r., V Aga 266/21, Legalis nr 2887446; judgment of the Polish Supreme Court of 30.09.2004 r., IV CK 713/03, OSNC 2005/9/160.
[12] Opalski, A. in Opalski, A. (red.), *Kodeks spółek handlowych Tom IA. Spółki osobowe, Komentarz*. Art. 1–36, C.H. Beck, Warszawa 2024, commetary to Article 20, para 16.
[13] Kunz, P. Jung P, *Der Gleichbehandlungsgrundsatz im schweizerischen Gesellschaftsrecht* in Jung P, *op. cit.*, note 2, p. 84.
[14] Ibid.
[15] Verse, D., *op. cit.* note 3, p. 9.
[16] Geist, R. in Jabornegg, P.; Strasser, R., *Kommentar zum Aktiengesetz*, Lexis Nexis, Wien 2021, p. 597.
[17] Pasetti, G., *Parità di trattamento e autonomia privata*, Cedam, Padova 1970, p. 70.

3. SOURCES OF EQUAL TREATMENT

3.1. Constitutional origins

Equal treatment is a constitutional idea in several countries. One may invoke Art. 3 of the German Constitution, Article 3 of the Constitution of the Italian Republic, Article 35 of the of the Swiss Federal Constitution, Article 32 of the Constitution of the Republic of Poland or Article 29(1) of the Constitution of Republic of Lithuania. Thus, it can be argued that the duty to treat shareholders equally is rooted in constitutional principles. Such a conclusion would be, however, unjustified. First, it seems that in all those countries the constitutional requirement of equal treatment is addressed to public authorities and not to private individuals.[18] Second, applying the constitutional idea of equal protection to shareholders would be difficult to reconcile with the contrarian nature of corporations, as well as with the principles of freedom of contract and private autonomy.[19] Thus, duty to treat shareholders equally is not a constitutional principle at least in some of the counties whose constitution expressly involves equal protection. The same applies to England, whose unwritten constitution does not envisage the principle of equal treatment.[20] Therefore it seems fair to say that there are no direct constitutional origins of the principle to treat shareholders equally.[21]

3.2. EU law and its implications

A general obligation to treat shareholders equally may also not be derived from EU law. The equal treatment principle has not been included in the primary law of the EU. Whereas the Charter of Fundamental rights invokes a requirement of equal treatment in several contexts, it is only addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member

[18] See with respect to Germany: Verse, D., *op. cit.* note 3, p. 120; with respect to Switzerland: Kunz, P.; Jung P., *op. cit.* note 13, p. 78; with respect to Italy: D'Attore, *Il principio di eguaglianza tra soci nelle società per azioni*, Giuffrè, Milano 2007, p. 86-96; with respect to Poland: Borysiak, W.; Bosek, L. in: Safjan, M.; Bosek L. (ed.), Konstytucja RP. Tom I. Komentarz do art. 1–86, C. H. Beck, Warszawa 2016 art. 32, para 100; with respect to Lithuania: Bitė, V., *Equal Treatment in Lithuanian Corporate Law,* in Jung, P., *op. cit.*, note 2, p. 54-55.

[19] D'Attore, *op. cit.,* note 18.

[20] Hare, C., *Equal Treatment of Shareholders in English Law,* in Jung P, *op. cit.*, note 2, p. 3-4.

[21] H. Grundmann, *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht – Generalbericht* in Jung P, *op. cit.*, note 2, p. 119.

States only when they are implementing Union law (Article 51). It therefore has no direct impact consequences for the relations between individuals.

Certain aspects of an obligation to treat shareholders equally have been, however, recognized in secondary law of the EU. According to Article 42 of the Directive 77/91/EEC[22] shareholders Member States shall ensure equal treatment of all shareholders who are in the same position in connection with the matters governed by the Directive, i.e. amendments of the share capital. This obligation was extended to share buybacks by the Directive 2006/68/EC.[23] Currently those issues are addressed by Directive 2017/1132[24] but the scope of application of the requirement to treat shareholders equally did not change and it continues to be limited to amendments of the share capital (Article 85) and to the share buyback (Article 60). Certain aspects of equal treatment investors was also codified in the EU-securities law.[25]

Despite those fragmentary regulations, EU law does not recognize a general principle of equal treatment of shareholders applicable to all aspects of operations of the company. As pointed out in the opinion of the Advocate General *Trestenjak* in the case *Audiolux* a general principle of this kind cannot be derived from written primary law itself in the absence of clear provisions in the founding treaties.[26] At the same time, due to the limited scope of application of the duty to treat shareholders equally stemming from Article 42 of the Directive 77/91/EEC it could also not be derived from that directive nor any other act of secondary you law.[27] Thus, according to the Advocate General the recognition of a general principle of equal treatment of shareholders by the European Court of Justice would run the risk of ignoring the institutional balance and would be an intrusion

[22] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, Official Journal L 026, 31/01/1977 P. 0001 – 0013 (Directive 77/91/EEC of 13 December 1976).
[23] Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (OJ L 264, 25.9.2006, p. 32–36).
[24] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, p. 46–127.
[25] See Mattig, D., *Gleichbehandlung im europäischen Kapitalmarktrecht*, Mohr Siebeck, Tübingen 2019, p. 19.
[26] Opinion of the Advocate General Trestenjak delivered on 30 June 2009, Case C-101/08 Audiolux and Others, ECLI:EU:C:2009:410, para 75.
[27] Ibid, para 82.

in the competences of the legislator.[28] This view was shared by the European Court of Justice who found that EU law does not recognize the general principle of equal treatment of shareholders.[29]

3.3. Equal treatment of shareholders in selected jurisdictions

The preceding considerations lead to the conclusion that the obligation to treat shareholders equally is neither a constitutional requirement nor an underlying principle of EU law. At the same time some of its forms are present in multiple jurisdictions.

Several countries have enacted an express obligation requiring the company to treat shareholders equally under the same circumstances. Such solution was adopted in Germany (§ 53a of the German Joint Stock Companies Act), Austria (47a of the Austrian Joint Stock Companies Act) and in Poland (Article 20 of the Polish Commercial Companies Code). Relevant provisions in all those countries are nearly identical. There are also additional similarities. Germany[30] and Austria[31] imposed a norm imposing an obligation of equal treatment of shareholders to transpose Article 42 of the Directive 77/91/EEC but both went further than required by the EU law and referred this obligation to all aspects of the company's operation and not just to the amendment of the share capital. Moreover, in both of those countries it is argued that the legislative change did not create a new obligation but merely confirmed what already derived from the general principles of law.[32] In Poland with the sole difference, that it enacted a norm expressly requiring the company to treat shareholders equally in 2002 in connection with its planned accession to the EU.[33] Just like Germany and Austria it decided not to limit the scope of application of this obligation to the matters regulated by the EU law. Additionally, it was argued that the enactment of Article 20 of the Polish Commercial Companies Code only confirms what could be derived from the general principles of law.[34]

[28] Ibid, para 105.
[29] Judgment of the Court (Fourth Chamber) of 15 October 2009. Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others, ECLI:EU:C:2009:626.
[30] Verse D., *op. cit.* note 3, p. 28.
[31] Klass, S.; Burger, C.; Eckert, E., Die *Entwicklung des österreichischen Aktienrechts. Geschichte und Materialien*, Linde, Wien 2003, p. 362.
[32] Ibid.
[33] Sójka, T., Zasada równego traktowania akcjonariuszy w kodeksie spółek handlowych – zagadnienia podstawowe, Ruch Prawniczy, Ekonomiczny i Socjologiczny 4/2000, p. 37.
[34] Ibid.

In several jurisdictions, there are no equivalents to the above-described provisions. However, this does not mean that shareholders of companies organized under the laws of such countries can be treated unequally at the discretion of the company or the controlling shareholder. Protective measures in that respect differ and include ideas such as prohibition of abusing of dominant position by the controlling shareholder recognized by the French[35] and Italian law[36] (*abus de majorité, l'abuso di maggioranza)* or protection from unfairly prejudicial treatment conferred by section 994 of the English Companies Act 2006.[37] American law imposes fiduciary duties on directors and on the majority shareholders that require them in good faith and in the best interest corporation which restrict their discretionary power when entering self-dealing transactions.[38] It also imposes a stricter 'intrinsic fairness' standard of review on the actions of the company that do not affect all shareholders in the same manner[39] (compared to a more lenient business judgement test applied to other transactions).[40]

In some jurisdictions the obligation to treat shareholders equally is rarely invoked yet at present. This group includes Lithuania where it has been analyzed only in a few decisions of the Supreme Court of Lithuania.[41] Interestingly, just like Poland, Lithuania adjusted its company law to the requirements of the Directive 77/91/EEC at the turn of the 20th and 21st century by amending Article 3(2) of the Law on Companies.[42] However, this provision expressly refers to allocation of rights and obligations between the shareholders, which should be equal under identical circumstances, which evokes associations with the 'equality of shareholders rather than with 'equal treatment of shareholders. In scare court rulings, however, this provision refers to equal treatment of shareholders (e.g. in connection with the access to information on operations of the company).[43]

[35] François, S., *L'unanimité exclut la caractérisation d'un abus de majorité*, Revue des Sociétés 4/2024, p. 246.
[36] D'Attore, *op. cit.,* note 18, p. 192
[37] Hare, C., *op. cit.,* note 20, p. 25.
[38] See: Cox, J. D., *Equal treatment for shareholders: an essay*. Cardozo Law Review, 19/1997, p. 615..
[39] The ruling of the Supreme Court of Delaware in the case of *Sinclair Oil Corp. v. Levien*, 80 A.2d 717.
[40]Allen, W., Kraakman R., *Commentaries and Cases on the Law of Business Organization,* Wolters Kluwer, New York 2016, p. 313.
[41] Bitė, V, *op. cit.*, note 18, p. 54-55.
[42] *Loc. cit.,* p. 51.
[43] *Ibid.*, p. 51.

4. IS EQUAL TREATMENT AS A STANDALONE GENERAL PRINCIPLE OF LAW?

4.1. Introduction

The analysis conducted thus far leads to the conclusion that the principle of equal treatment of shareholders is recognized across multiple jurisdictions. The subsequent sections of this paper will seek to either substantiate or challenge the hypothesis that it constitutes a standalone general principle of law. In order to achieve this, it is essential to clarify the precise meaning of this concept. Additionally, it is important to examine whether general principles of law can be freely inferred, or whether there are underlying reasons that necessitate caution in this regard.

4.2. General principles of law defined

As famously explained by Dworkin (1977)[44] one can distinguish between rules and principles. Both are sets of standards. However, their nature differs significantly. Whereas a rule applies 'in an all-nothing fashion' a principle 'states a reason that argues in one direction but does not necessitate a particular decision'[45] and may be applied in full or in part.[46] The legal order may comprise principles and policies arguing in contradictory directions and the mere fact that one of them does not prevail in the case does not mean that it is not part of the legal system.[47] In case of intersection of principles, one who applies them 'has to take into account the relative weight of each [of them]'.[48]

Principles play an important role in interpretation of law and their own persuasiveness may be a sufficient justification of a decision of one that applies norms.[49] They are inferred from the legal system, including express statutory provisions as well as unwritten legal norms and concepts.[50] Principles understood in such a way serve as a bridge between the norms of positive law and the values

[44] Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge 1977, p. 23.
[45] *Loc. cit.,* p. 26.
[46] Ibid.
[47] Ibid.
[48] Allen, W.; Kraakman R., *op. cit.,* note 40, p. 313.
[49] Möllers, T., *Working with Legal Principles – Demonstrated using Private Autonomy and Freedom of Contract as Examples,* European Review of Contract Law 14/2018, p. 105.
[50] *Loc. cit,* p., 106.

and ideas accepted in a given society, which, through them, penetrate the legal system.[51]

Due to their generality, principles may not be directly applied but they require a substantiation.[52] The process of substantiations aims to extract a specified standard of behavior from the generality of principle. However, there are also interim steps in this process (i.e. general principles may be standardized into more specific general standards that may derive rules that may be applied in an all-nothing fashion).[53]

4.3. Risks connected to the inflation of principles

As pointed out by Möllers (2018) the invocation of general principles of law may in some instances be risky as it creates a temptation to replace an in-depth analysis of a specific case with an invocation of an alleged overarching standard. In some cases, distinctive traits of the individual case could provide arguments to deviate from the general principle.[54] Moreover, because most of the principles lack express statutory confirmation, there is a risk of inventing additional, not sufficiently precise legal principles.[55] The author argues that 'without precise determination of their scope, particularly for unregulated legal problems, it opens the door to decisions lacking transparent justification, that is, ultimately, arbitrariness'.[56]

Moreover, the inflation of legal principles may lead to devaluation of their position in legal systems.[57] Therefore, new legal principles should not be inferred too freely. According to Safjan (2018) handling too many principles becomes impractical and is susceptible to controversies over the question of whether a given principle exists. For this reason, it gives rise to a call for caution in creating new principles within a legal system or field of law.[58]

---

[51] Książek, D.*, Zasady prawa*, Roczniki Prawa i Administracji, XXI/2021 (special eddition), p. 200.
[52] Möllers, T., *op. cit,* note 49, p. 112
[53] Ibid. The author provides an example of this logic. He points out that the general principle of private autonomy includes freedom of contract, but also freedom of ownership (Section 903 BGB), freedom to marry (Section 1297 BGB) and testamentary freedom (Section 1937 BGB). Freedom of contract in turn includes freedom to conclude contracts, freedom to choose a contractual partner, freedom of content, freedom of form and freedom to amend and cancel the contract.
[54] *Loc. cit*, p. 104.
[55] Ibid.
[56] Ibid.
[57] Safjan, M.*, Zasady prawa prywatnego* w: *M. Safjan* (red.), *Prawo cywilne – część ogólna. System Prawa Prywatnego,* vol. 1, C.H. Beck, Warszawa 2012, p. 325.
[58] Ibid.

4.4. Duty to treat shareholders equally and the principle of good faith

In the light of the above one should consider if the principle of equal treatment of shareholders is a standalone principle of law or just a practical implication of general principles.

The principle of equal treatment of shareholders is almost universally derived from the general obligation to act in good faith.[59] This obligation is almost universally understood as a duty to act honestly, be faithful to the parties' agreed common purpose as derived from the agreement, not to use powers for an ulterior purpose, deal fairly and openly with the other party and have regard to the other party's interest.[60]

In Germany,[61] Austria[62] and Switzerland[63] obligation to treat shareholders equally under the same circumstances is linked with the duty of loyalty (*Treuepflicht*) in relation between the company and shareholders and, in some cases, between shareholders. The corporate duty of loyalty is derived from the general obligation to act in good faith (*Treu und Glauben*).[64] Some argue that there is a *lex specialis – lex generalis* relationship between equal treatment and corporate duty of loyalty.[65] Any corporate action infringing an obligation to treat shareholders equally under the same circumstances constitutes a breach of a duty of loyalty, but arbitrary discrimination of shareholders is not the only way this duty may be breach.[66] similar approach can be observed in Poland, where some scholars identify direct links between the duty of loyalty in corporate relations, vested in the principles of social coexistence (*zasady współżycia społecznego*), and the obligations to treat shareholders equally.[67] Links between the duty to treat

[59] Merkt, H., *op cit,* note 4, p. 779.
[60] Perry Ch., *Good Faith in Contract Law,* Edward Elgar Publishing, Cheltenham 2024, p. 19.
[61] Verse, D., *op. cit.* note 3, p. 87.
[62] Doralt, P.; Winner, M. in: Doralt, P.; Nowotny, C.; Kalss, S. (ed.), *Aktiengesetz. Kommentar*, Wien 2021, p. 593.
[63] Kunz, P. Jung P, *op. cit.* note 13, p. 75.
[64] Götze, C. in: Goette, W.; Habersack, M.; Kalss, S. (ed.), *Münchener Kommentar zum Aktiengesetz*, München 2019, remarks before §53a, para 22.
[65] Verse, D., *op. cit.* note 3, p. 87.
[66] Ibid.
[67] A. Opalski, *Zasada jednakowego traktowania wspólników i akcjonariuszy*, Przegląd Prawa Handlowego 6/2012, p. 5.

shareholders equally and the general obligation to act in accordance with principles of good faith is also recognized in Lithuania,[68], France[69] and Italy.[70]

Interestingly, sources of an obligation to treat shareholders equally are similar in common law jurisdictions, despite their traditionally more skeptical towards the implied principle of good faith.[71] In the USA the functional equivalent of an obligation to treat shareholders equally may be traced in fiduciary obligations.[72] The main fiduciary duty is a duty of loyalty that requires directors, officers and controlling shareholders to exercise their corporate power in good faith to advance the interests of the company.[73] Bad faith in the corporate context is explained as conscious disregard for the welfare of the firm or abandonment of office leading to a conscious disregard to corporate matters.[74]

In English law the situation is not very different. According to section 172 (1) (f) of the Companies Act 2006 a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to the need to act fairly as between members of the company. This requirement expressly confirmed what had already derived from equitable principles developed first in the context of trusts and then applied by the case law to corporations.[75]

4.5. Admissible deviations form the equal treatment of shareholders

The analysis thus leads to the conclusion that there are direct links between the principle of equal of good faith and the requirement to treat shareholders equally. This section intends to demonstrate that an obligation to treat shareholders equally is not absolute but allows deviations that are compliant with the general requirement to act in good faith.

Shareholders should not be treated identically but only equally under the same circumstances. This rule is statutorily confirmed for instance in Germany (§ 53a

[68] Bitė, V., *op. cit.*, note 18, p. 55.
[69] Sortais, J.-P., *Abus de majorité, minorité, égalité. Répertoire des sociétés*, Dalloz.fr 2024, para 4,
[70] Nicolini, S., *L'abuso del diritto e buona fede nei rapporti societari*, Università degli Studi di Macerata 2016, p. 30,
[71] Perry, Ch., *Op. cit.*, note 62, p. 13.
[72] Cox, J.D., *Equal Treatment in Corporate Law: The American Experience* in Jung P, *op. cit.*, note 2, p. 107..
[73] Allen, W.; Kraakman, R., *op. cit.,* note 40, p. 283.
[74] *Loc. cit.,* p. 313.
[75] Hare, C., *op. cit.,* note 20, p. 19.

of the German Joint Stock Companies Act), Austria (47a of the Austrian Joint Stock Companies Act) and in Poland (Article 20 of the Polish Commercial Companies Code).

Corporate law does not typically require equal treatment *per capita* but implements the principle of proportionality linking corporate power with the equity investment of the shareholder in the companyMoreover, most jurisdictions allow differential treatment of various shareholders, provided that such differentiation is not arbitrary.[76] For instance, in English law assumes that providing preferences to selected investors is not unfairly prejudicial if it is based on a bona fide decision for the benefit of the company as a whole.[77]

Similarly, in the United States a good faith decision motivated by the interest of the company may pass the intrinsic fairness test even if it applies in different manner to various groups of shareholders.[78] The same approach may be observed in France[79] and, to some extent, in Lithuania.[80] German law allows for objectively justifiable deviations from the requirement of equal treatment (*sachlicher Grund*) if they pass the proportionality test, i.e. are reasonably required to achieve permissible goal.[81]

Those remarks lead to the conclusion that equal treatment of shareholders is not a standalone principle in corporate law but rather a practical application of the general principle of good faith. It should not be regarded as an overarching standard of corporate law but as a factor in interpreting the obligation to act fairly and in accordance with the duty of loyalty in corporate relations. Shareholders do not need to be treated equally and there is no requirement of corporate egalitarianism. Corporate law merely prevents arbitrary discrimination contrary to the requirements of good faith. Thus, the notion ‘equal treatment of shareholders’ could be well substituted with ‘fair treatment of shareholders’.

[76] Ibid.
[77] Ibid.
[78] The ruling of the Supreme Court of Delaware in the case of *Nixon v. Blackwell*, 626 A.2d 1366.
[79] François, B., *The principle of Equal Treatment of in French Company Law,* in: Jung P, *op. cit.*, note 2, p. 46.
[80] Bitė, V, *op. cit.*, note 18, p. 64.
[81] Verse, D., *op. cit.* note 3, p. 253.

5. CONCLUSION

Both common law and civil law jurisdictions recognize some form of an obligation to treat shareholders equally. This does not mean that equal treatment of shareholders is a general principle of corporate law. It is rather a standard of behavior extracted from the general principle of good faith. It is a duty to treat shareholders equally but needs to applied in accordance with the overarching principle of good faith. Deviations from equal treatment based on objective criteria and not motivated by the self interest of the corporate decision maker are not typically deemed a breach of the duty to treat shareholders equally.

REFERENCES

BOOKS AND ARTICLES

1. Allen, W.; Kraakman, R., *Commentaries and Cases on the Law of Business Organization,* Wolters Kluwer, New York 2016.
2. Bitė, V., *Equal Treatment in Lithuanian Corporate Law,* in Jung P, *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht, Mohr Siebeck,* Tübingen 2021.
3. Burckhardt, C., *Gleichbehandlung und Ungleichbehandlung im Aktienrecht,* w: Hussmann *L*., Nickerson, N.; Bastian, A. S.; Wujohktsang, Y. (red.), *Unter Gleichen,* University of Zurich, Zürich 2021.
4. Cox, J.D., *Equal Treatment in Corporate Law: The American Experience* in Jung P, *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht, Mohr Siebeck,* Tübingen 2021.
5. Cox, J. D., *Equal treatment for shareholders: an essay*. Cardozo Law Review, 19/1997.
6. D'Attore, *Il principio di eguaglianza tra soci nelle società per azioni*, Giuffrè, Milano 2007.
7. Doralt, P.; Nowotny C.; Kalss S. (ed.), *Aktiengesetz. Kommentar*, Linde, Wien 2021.
8. Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge 1977.
9. François, B., *The principle of Equal Treatment of in French Company Law,* in: Jung P, in Jung P, *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht, Mohr Siebeck,* Tübingen 2021.
10. Goette, W.; Habersack M.; Kalss S. (ed.), *Münchener Kommentar zum Aktiengesetz*, München 2019.

11. Grundmann, H., *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht – Generalbericht* in Jung, P., *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht, Mohr Siebeck,* Tübingen 2021.
12. Hare, C., *Equal Treatment of Shareholders in English Law,* in Jung, P., *Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht, Mohr Siebeck,* Tübingen 2021.
13. Jabornegg, P.; Strasser R., *Kommentar zum Aktiengesetz*, Lexis Nexis, Wien 2021.
14. Jung, P.; Kunz, P.; Bärtschi H., *Gesellschaftsrecht*, Schulthess, Zürich 2021.
15. Klass, S.; Burger, C.; Eckert E., Die *Entwicklung des österreichischen Aktienrechts. Geschichte und Materialien*, Linde, Wien 2003.
16. Książek, D*., Zasady prawa*, Roczniki Prawa i Administracji, XXI/2021 (special eddition).
17. Safjan M. (red.), *Prawo cywilne – część ogólna. System Prawa Prywatnego,* vol. 1, C.H. Beck, Warszawa 2012.
18. Mattig, D., *Gleichbehandlung im europäischen Kapitalmarktrecht*, Mohr Siebeck, Tübingen 2019.
19. Merkt, H., *Gleichbehandlung im Gesellschaftsrecht rechtsvergleichend* in Grundmann S.; Merkt, H.; Mülbert P. (ed.), *Festschrift für Klaus J Hopt zum 80. Geburtstag am 24. August 2020*, De Gruyter, Berlin 2020.
20. Michalski, M., *Kontrola kapitałowa nad spółką akcyjną*, Zakamycze, Kraków 2004.
21. Möllers, T., *Working with Legal Principles – Demonstrated using Private Autonomy and Freedom of Contract as Examples,* European Review of Contract Law 14/2018.
22. Nicolini, S., *L'abuso del diritto e buona fede nei rapporti societari*, Università degli Studi di Macerata 2016.
23. Opalski, A. (red.), *Kodeks spółek handlowych Tom IA. Spółki osobowe, Komentarz. Art. 1–36*, C.H. Beck, Warszawa 2024.
24. Opalski, A., *Zasada jednakowego traktowania wspólników i akcjonariuszy*, Przegląd Prawa Handlowego 6/2012.
25. Jung, P., *Der Gleichbehandlungsgrundsatz im schweizerischen Gesellschaftsrecht* in Jung, P.; Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht, Mohr Siebeck, Tübingen 2021.
26. Pasetti, G., Parità di trattamento e autonomia privata, Cedam, Padova 1970.
27. Perry, Ch., *Good Faith in Contract Law,* Edward Elgar Publishing, Cheltenham 2024.
28. Popiołek, W*., Akcja – prawo podmiotowe,* C. H. Beck, Warszawa 2010.
29. François, S., *L'unanimité exclut la caractérisation d'un abus de majorité*, Revue des Sociétés 4/2024
30. Safjan, M.; Bosek L. (ed.), Konstytucja RP. Tom I. Komentarz do art. 1–86, C. H. Beck, Warszawa 2016.

31. Sortais, J.-P., *Abus de majorité, minorité, égalité. Répertoire des sociétés*, Dalloz.fr 2024.
32. Sójka, T., Zasada równego traktowania akcjonariuszy w kodeksie spółek handlowych – zagadnienia podstawowe, Ruch Prawniczy, Ekonomiczny i Socjologiczny 4/2000.
33. Verse, D., *Der Gleichbehandlungsgrundsatz im Recht der Kapitalgesellschaften,* Mohr Siebeck, Tübingen 2006.

COURT DECISIONS

1. Judgment of the Court (Fourth Chamber) of 15 October 2009. Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others, ECLI:EU:C:2009:626
2. The ruling of the Supreme Court of Delaware in the case of *Sinclair Oil Corp. v. Levien*, 80 A.2d 717

LEGAL ACTS

1. Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, Official Journal L 026, 31/01/1977 P. 0001 – 0013 (Directive 77/91/EEC of 13 December 1976).
2. Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital (OJ L 264, 25.9.2006, p. 32–36)
3. Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017.

UDK: 338.2 : 504
349
339
Review paper

Najada Kilic, PhD student
Faculty of Law, University of Tirana, Albania
E-mail: nkilic@epoka.edu.al
ORCID ID: 0009-0002-9225-0279

INTEGRATING ESG CRITERIA IN CANDIDATE COUNTRIES: THE CASE OF CORPORATE GOVERNANCE IN ALBANIA

ABSTRACT

In 2022, Albania opened the accession negotiation with the EU. Consequently, Albania as a candidate country, needs to harmonise domestic legislation with the EU acquis. One of the most important areas is the Environmental, Social and Governance (ESG) reporting of the companies. ESG criteria relate to companies' responsibility and their impacts on people and the environment. Evaluation of the sustainability performance of the companies will ensure a sustainable economy where no person or place is left behind. In this context, Albanian authorities are required to adapt the regulatory framework, emphasising sustainability so they can align with the Environmental, Social and Governance (ESG) criteria standards and regulations. This paper analyses to what extent the corporate governance in Albania aligns with the European Union acquis and the obligation of Albania to align with the European Union acquis. The paper seeks to give insights into the improvement of the legal infrastructure for ESG in Albania and for further legal reform to ensure compliance, accountability, and the long-term sustainability of corporate governance in the country. By using a combined research method based on a qualitative literature review analysis and normative legal analysis of existing EU acquis and Albanian legislation, the paper examines Albania's legal alignment with the EU acquis on corporate governance and sustainability. The paper concludes that the integration of ESG criteria contributes to modernising the legal landscape for the companies in Albania toward a sustainable future and a better understanding of corporate responsibility.

Keywords: *Corporate Governance, ESG, Albania, Transposition, Sustainability.*

1. INTRODUCTION

After the fall of the communist regime, in 1992, Albania established relations with the EC by signing the Trade and Cooperation Agreement, which allowed Albania

to become eligible to profit under the PHARE Programme.[1] From 1992 until 2000, Albanian relationships were characterised more by economic aspects rather than the clear perspective of EU membership. Albania profited roughly €1 055 million from this programme.[2] In mid-1995, Albania had the highest GDP compared with other Western Balkan countries.[3] While the Commission initiated an assessment for Albanian EU membership perspective, the 1997 events stopped the process. With the end of Kosovo conflict, the EU understood that Regional Approach, introduced in 1996, was incapable to bring peace, security and transformation. For this reason, the EU upgraded its policy toward the Western Balkan countries named Stabilisation and Association Process. The new strategy consisted on: stabilisation of the region that had suffered from inter-ethnic conflicts and then association to the EU. As the new strategy was launched, the European Commission report recognised the European perspective for Albania. The EU/Albania High-Level Steering Group acknowledged the "serious" situation of Albanian efforts to align the legal system and legislation with EU standards.[4] In 2003, negotiations for signing the Stabilisation and Association Agreement (SAA) started and lasted for three years. In April 2009, the SAA entered into force.[5] The SAA's main goal, inter alia, is the legal transformation of Albania's legal order in line with the EU acquis. According to Article 70 of the SAA, parties [the EU, Member States and Albania] recognise the importance of the harmonisation process. Albania shall endeavour to approximate its existing and future domestic legislation with the EU acquis and must ensure the proper implementation.[6] In this context, there has been a systematic and continuous alignment of Albanian legislation. The recent Commission report noted that "the transitional period of the SAA ended on 31 March 2019 and Albania is fully associated with the EU from 1 April 2019" and "Albania continued to implement its overall commitments under SAA."[7]

Similarly to the Central European and Eastern countries, the EU perspective has boosted Albania toward legal reforms in different sectors, including the field of

[1] Agreement between the European Economic Community and the Republic of Albania, on trade and Commercial and Economic Cooperation [1992] OJ L 343/0002.
[2] Commission, Report from the Commission to the Council on the work of the High Level Steering Group, in preparation for the negotiation of a Stabilisation and Association Agreement with Albania, COM (2001) 300 final, p. 39.
[3] Skara, G., *Europeanisation of Private Enforcement of Competition Law: The Case of Albania*, Springer 2007, pp. 236-237.
[4] Commission, Report from the Commission to the Council on the work of the EU/Albania High Level Steering Group, in preparation for the negotiation of a Stabilisation and Association Agreement with Albania.
[5] Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ 107/166 (hereafter: SAA).
[6] SAA, Art 70.
[7] Commission, *Albania 2024 Report*, Brussels 2024, SWD(2024) 690 final, p. 95.

corporate governance and sustainability. The Albanian Law on Entrepreneurs and Companies provisions relating to the rules on formation and registration, disclosure of the structures of the companies, accounting and financial reporting, and statutory audit are aligned with EU laws.[8] While Albanian Law on Entrepreneurs and Companies provisions are in line with the EU acquis, incorporation of the Environmental, Social, and Governance (ESG) into Albanian legal system remains a challenge. As noted by the 2024 Commission Report, Albania needs to further harmonise national company law.[9]

Using a combined research method based on a qualitative literature review analysis and normative legal analysis of existing EU acquis and Albanian legislation, the paper examines Albania's legal alignment with the EU acquis on corporate governance and sustainability. It seeks to give insights into improving the legal infrastructure for ESG in candidate countries. Moreover, the paper recalls the need for further legal reform to ensure compliance, accountability, and the long-term sustainability of corporate governance in Albania. In writing this paper, the author is limited only to Albania as a candidate country. Albania has been selected because the author is conducting a doctoral study on this topic. Another limitation relates to the legislation. The author relies only on EU and Albanian primary and secondary legislation. Sometimes, academic articles, policy reports, OECD reports, or other financial research institutions' reports are taken into consideration with the purpose of showing the importance of the environmental, social, and governance aspects of corporates. After providing historical background on Albania's efforts to join the European Integration (section 1), the paper focuses on the legal provisions on the corporates and the effectiveness of corporate laws related to the promotion of transparency, ethical behaviour, and sustainability evaluating board responsibilities, the shareholders engagement and the stakeholder contribution under the legal impact of ESG reporting requirements (section 2). Section 3 highlights the obligation of Albania to harmonise domestic legislation with the EU Law, more specifically, Directive (EU) 2022/2464 on corporate sustainability reporting (CSRD) and Directive (EU) 2024/1760 on corporate sustainability due diligence (CSDDD). Section 4 identifies gaps and discusses the challenges of the Albanian legal approach to ESG integration. Section 5 concludes that the integration of ESG criteria contributes to modernising the legal landscape for the companies in Albania toward a sustainable future and understanding better the corporate responsibility.

[8] Law 9901/2008 On Entrepreneurs and Companies, [2008] OJ 60 as amended by Law 129/2014 [2014] OJ 163 (hereafter: Law on Entrepreneurs and Companies).
[9] Commission, *Albania 2024 Report*, *op. cit.* note 8, p. 66.

2. THE RELATIONSHIP BETWEEN CORPORATE GOVERNANCE AND ESG

In light of the emergency by the UN related to sustainable development and the slow implementation[10] of the Sustainable Development Goals (SDGs),[11] the issue of corporate activities and their impact on social and environmental problems must be taken into consideration. Kaźmierczak argues that there is an increase in stakeholders' interest in more accountability and transparency from the companies about their activities in society and the ecosystem.[12] OECD calls for implementing sustainability matters in the companies' rules and principles.[13] Such inclusion will help corporations to decrease costs in the long term and protect investors. On the other hand, increasing the awareness of the governing structures of the companies (shareholders, board members and executives) provides sustainability.[14] Recommendation of the Council on Principles of Corporate Governance brings to attention the fact that an important action that needs to be taken by companies is the disclosure of reliable material information on sustainability.[15] The G20/OECD Principles of Corporate Governance[16] have been reviewed with a focus on helping countries improve the conditions of companies in accessing finance. They encourage corporate governance policies that have contributed to sustainability matters and a broader economy for the countries.[17]

Corporate governance is defined in different ways by scholars and researchers of law. This concept shall be consistent with the rule of law, transparency and enforcement.[18] The International Finance Corporation (IFC) recommends that the company's performance shall consist of parameters as the commitment to environmental, social and governance (ESG), a qualified structure of the board and directors, financial and non-financial disclosures to the shareholders and

[10] United Nations General Assembly, Resolution adopted by the General Assembly on 6 July 2017: Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, UN 2017, A/RES/71/313; United Nations, The Sustainable Development Goals Repor*t 2024,* UN 2024.
[11] United Nations, Sustainable Development Goals- SDGs, available at: https://sdgs.un.org/goals, accessed 28 November 2024.
[12] Kaźmierczak, M., *A Literature Review on the Difference Between CSR and ESG*, Scientific Papers of Silesian University of Technology – Organization and Management Series, No. 162/2022.
[13] OECD, Recommendation of the Council on Principles of Corporate Governance, 2025, OECD/LEGAL/0413.
[14] *ibid.*
[15] *ibid*.
[16] OECD, OECD and G20, available at: https://www.oecd.org/en/about/oecd-and-g20.html, accessed 28 November 2024.
[17] OECD, G20/OECD Principles of Corporate Governance *2023*, Paris 2023.
[18] *ibid.*

stakeholders, and the company's stakeholder governance engagement.[19] On the other hand, environmental, social, and governance (ESG) is a set of criteria that companies integrate into their governance policies. The term ESG helps businesses have a well-structured and clear definition of environmental issues, understand what society needs, and address different issues of governance.[20] Some scholars have found that the organisations that implement the ESG pillars into their business policies and rules provide a good model of a corporation.[21] According to them, this corporation is organised in a governance structure with a positive impact on environmental and social issues, resulting in maximising their profits in the long term, an active management of the stakeholders, and effective methods of data measurement and systems of reporting.[22] Together with their financial statements and performance, the corporations have focused on the matters of sustainability. In addition, some scholars argue that the integration of ESG has challenged the legal principle of the shareholders' primacy vs stakeholder theory.[23] Companies have shifted their approach from profit maximisation to the integration of environmental, social and governance (ESG) criteria.[24] In this context, companies are not adopting sustainability only for ethics, but as well to mitigate social risks and environmental problems that can affect the corporate value by having a severe impact on it.[25]

The ESG serves shareholders' interests because it helps companies identify and manage social risks to their business.[26] Gadinis and Miazad, in their study,

[19] IFC, IFC Corporate Governance Methodology and Tools, Available at: https://www.ifc.org/en/what-we-do/sector-expertise/corporate-governance/cg-methodology-tools, accessed 1 March 2025.
[20] Al-Issa, N., et al., *Impact of environmental, social, governance, and corporate social responsibility factors on firm's marketing expenses and firm value: A panel study of US companies*, Cogent Business & Management, 2022, *9*(1).
[21] Byrne, D., ESG: *A Comprehensive Guide to Environmental, Social, and Governance Principles*, The Corporate Governance Institute, available at: https://www.thecorporategovernanceinstitute.com/insights/guides/esg-a-comprehensive-guide-to-environmental-social-and-governance-principles/, accessed 1 March 2025; Eccles, R. G., Ioannou, I., & Serafeim, G., *The Impact of Corporate Sustainability on Organizational Processes and Performance*. Management Science 2014*,* 60(11), pp. 2835-2857.nis
[22] *Ibid.*
[23] Rönnegard, D., Smith, N. C*., Shareholder Primacy vs. Stakeholder Theory: The Law as Constraint and Potential Enabler of Stakeholder Concern*. In: Harrison. JS,, et al., (eds) The Cambridge Handbook of Stakeholder Theory, Cambridge University Press 2019.
[24] Gadinis, S., and Miazad, A., *Corporate Law and Social Risk*, *Vanderbilt Law Review* 2020, p. 1401.
[25] *ibid.*
[26] *ibid.*

illustrate through examples of Facebook[27] and Uber companies,[28] how privacy, diversity, and environmental responsibility failures can lead to considerable damage to the finances and the reputation of the companies.[29] The ESG reporting helps companies to identify and address these risks by obtaining clear figures from employees, civil organisations, and state monitoring authorities.[30] The top management of the companies is focused on accountability towards shareholders and the increase of their profit in the short term.[31] So, if accountability mechanisms are the focus of corporate governance, they will ensure the alignment of the top managers with sustainability targets.[32] In this context, the companies that have positive values and impact on sustainability matters, integrating ESG in their business policies, also have a better position to attract and retain the younger generation employees and enhance their resilience, affecting innovation and economic growth.[33] Also, it is seen that the investors are more interested and satisfied with companies that have a considerable level of disclosure of ESG because they recognise the impact of the sustainability risks on the business value.[34] It is important to emphasise that sustainability objectives should be an important cornerstone of corporate governance, as well as the fact that a failure in the integration of ESG in companies' policies will expose their own shareholders to environmental, social, and governance risks. [35] To manage these risks, European corporations prioritise compliance and transparency in corporate governance, which is different from North American corporations that put shareholder value at the centre of their priorities, and their governance policies are led by the situation of the market.[36]

[27] Beslik, S., *How Sustainable Is Facebook? An ESG Analysis of the Social Media Giant*, available in: https://medium.com/swlh/how-sustainable-is-facebook-an-esg-analysis-of-the-social-media-giant-8ad8adc3da23, accessed 2 March 2025.
[28] Infortal, *Uber: A Legacy of Reputational Damage*, Available in: https://infortal.com/uber-a-legacy-of-reputational-damage/, accessed 2 March 2025.
[29] Gadinis and Miazad, *op. cit.* note 24, p. 1401.
[30] *Ibid.*
[31] Shim, E. D., *Sustainability, Stakeholder Perspective and Corporate Success: A Paradigm Shift*, International Journal of Business, Humanities and Technology 2014, 4:5, pp. 64-67.
[32] Passas, I., *The Evolution of ESG: From CSR to ESG 2.0*, *Encyclopedia* 2024 4(4), pp. 1711-1720.
[33] *ibid*.
[34] Harper Ho, V., *Sustainability in the Mainstream: Why Investors Care and What It Means for Corporate Boards*, The Conference Board - Director Notes 2017, Available at SSRN: https://ssrn.com/abstract=3080033. Accessed 1 March 2025.
[35] Gadinis and Miazad, *op. cit.* note 24, p. 1401.
[36] Passas, *op. cit.* note 32, p.

3. THE EVOLUTION OF ESG INTEGRATION AND SUSTAINABILITY IN THE EU LEGISLATION

Scientific statistics have shown that company boards' focus on sustainability engagement is very low.[37] Additionally, the UN Reports on sustainability matters have identified insufficient implementation of SDGs.[38] This is turning on the red emergency lights for all humanity and the ecosystem. Therefore, countries have started to integrate ESG criteria into their corporate governance policies and regulations.

As one of the principles of the Treaty of the European Union (TEU), sustainability has pushed the EU member states to have a serious engagement in the implementation of disclosure of the risks of ESG and their effects for the stakeholders and the environment.[39] The EU has developed a regulatory and mandatory legal framework that has given more substantial support to the promotion of sustainability through the implementation of ESG.[40] In addition, Directive 2013/34/EU has been amended due to matters of accountability and transparency,[41] and the importance of non-financial reporting in corporate governance focused on environmental and social matters with an impact on long-term economic growth and employment.[42] The remaining part of this section briefly analyses three main directives relating to the ESG.

3.1. Directive (EU) 2014/95 the Non-Financial Reporting Directive

The EU has adopted Directive (EU) 2014/95, the Non-Financial Reporting Directive (NFRD), which amended Directive 2013/34/EU as regards the disclosure of non-financial and diverse information by certain large undertakings

[37] Harper Ho, *op. cit.* note 34.
[38] United Nations General Assembly, Resolution adopted by the General Assembly on 6 July 2017: Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, *op. cit.* note 10; United Nations, The Sustainable Development Goals Report 2024*, op. cit.* note 10.
[39] Consolidated Version of the Treaty on European Union [2024] OJ C 202/1.
[40] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1 (hereinafter: Regulation (EU) 2019/2088).
[41] Ullah, Zain., et al,, *The Impact of Corporate Accountability & Transparency on the Performance of Manufacturing Firms Listed on KSE,* SSRN 2016, available at: https://ssrn.com/abstract=2756977, accessed 1 March 2025.
[42] Commission, Disclosure of non-financial and diversity information by large companies and groups - Frequently asked questions*,* 2014, available at: https://ec.europa.eu/commission/presscorner/detail/en/memo_14_301, accessed 1 March 2025.

and groups.[43] According to the European Commission, the disclosure of social and environmental impacts may reduce the gap between companies and stakeholders and help identify possible sustainability risks.[44] Pursuant to Article 2 of Directive 2014/95, the Commission published non-binding guidelines on preparing the non-financial report,[45] "taking into account the best practices, international developments and the results of related Union initiatives."[46] According to these guidelines, companies were left flexible to report under the scope of the NFRD Directive.[47] An important step was the publication of the non-financial reports to ensure that stakeholders will have the needed information on corporate sustainability efforts.[48]

The Non-Financial Reporting Directive (NFRD) has an important role as it has pushed further the EU agenda related to corporate social responsibility (CSR). In addition, the NFRD has pushed the EU Member States toward greater responsibility related to their business activity's impact on social and environmental issues.[49] Also, the NFRD Directive was an important step in increasing business accountability and transparency on sustainability matters and pushing stakeholders, investors, and civil organisations to request detailed information from companies about their performance and effects on social and environmental issues.[50] Nevertheless, the Commission identified some problems with reporting flexibility and the limited scope. These shortfalls led to the review of the NFRD Directive.[51]

[43] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text (with EEA relevance) [2014] OJ L 330/1 (hereafter: NFRD).
[44] Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels 2011, COM(2011) 681 final.
[45] Commission, Guidelines on non-financial reporting (methodology for reporting non-financial information*)*, [2017] OJ C 215/1.
[46] NFRD, Recital 17.
[47] NFRD, Recital 9.
[48] NFRD, Art 29a.
[49] Hahnkamper-Vandenbulcke, N., *Non-financial Reporting Directive*, Briefing Implementation Appraisal, EPRS 2023.
[50] *ibid.*
[51] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 2021 COM(2021) 189 final.

3.2. Directive (EU) 2022/2464 Corporate Sustainability Reporting Directive

The EU commitment to sustainability matters evolved with the adoption of the Directive (EU) 2022/2464 on Corporate Sustainability Reporting Directive (CSRD).[52] The European Commission proposed the revision of the NFRD scope of reporting by including all the large and listed companies, except micro-enterprises.[53] The main amendment relates to: i) the detailed reporting in line with mandatory EU sustainability reporting standards;[54] ii) assurance and iii) the disclosure to the public of information on ESG together with the management report.[55] As explained in the Proposal Directive document, the objective is to improve transparency in corporations, fulfilling the gaps of SFDR[56] and Taxonomy Regulation.[57]

Article 1 of the CSRD Directive increases the number of enterprises that are under the scope of the CSRD Directive. The CSRD obligation also includes the third countries companies that generate a turnover of more than 150 million Euros in the EU and the companies that have a subsidiary or a branch in the EU.[58] Consequently, the number of companies that must report is increased.[59] In parallel to CSRD, the EU introduced a standardised reporting framework for the companies with the purpose of providing reliable and consistent information on ESG.[60] The European Sustainability Reporting Standards (ESRS)[61] are developed

[52] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15 (hereafter: CSRD).
[53] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 2021 COM(2021) 189 final.
[54] EFRAG, B*,* available at: https://www.efrag.org/en, accessed 1 March 2025.
[55] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 2021 COM(2021) 189 final.
[56] Regulation (EU) 2019/2088.
[57] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198/13.
[58] CSRD, Art 1.
[59] Baumüller, J., and Grbenic, O. S., *Moving from Non-Financial to Sustainability Reporting: Analyzing the EU Commission's Proposal for a Corporate Sustainability Reporting Directive (CSRD),* FACTA UNIVERSITATIS Series: Economics and Organization 2021, 18(4), pp. 369 – 381.
[60] Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards [2023] OJ L 1/184.
[61] *Ibid.* Annex I

based on the principle of double materiality.[62] On one hand, the ESRS gives a figure of the impact of the companies' activity on ESG. On the other hand, the ESRS shows the effects of this impact in the companies' financial performance.[63] ESG disclosures on climate change, pollution, water resources, circular economy, the conditions at work, employees' rights, community engagement, board diversity, and anti-corruption are being reported under mandatory limited assurance information by the companies.[64] This is a step forward related to sustainability requirements.

Despite the fact that the CSRD Directive will produce costs for the companies (which are included in the scope of the directive) to comply and to operate,[65] it increases the accountability of the corporates and improves the approach of the corporates towards their stakeholders by providing them with accurate information on a standardised ESG statement. The establishment of a legal framework focused on accountability, transparency and values in the long term shows a transformative shift in sustainability reporting of corporates within the scope of the CSRD Directive.

3.3. Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence Directive (CSDDD)

The lack of companies having clear rules that address the risks of sustainability in the best interest of the companies[66] led to the adoption of Directive 2024/1760 on Corporate Sustainability due Diligence (CSDDD). The CSDD Directive's subject matter is to enforce companies through "due diligence" to check the negative internal and external impacts of their activity and the activity of all the other businesses (including SMEs)[67] established within the whole chain of activity.[68] Due Diligence is a process that continuously supports companies in identifying evidence to evaluate the possible risks on the issues of adverse human rights, fair

[62] *Ibid.* Annex I (see section 3)
[63] Ibid.(see section 9)
[64] CEAOB, CEAOB guidelines on limited assurance on sustainability reporting, CEAOB 2024.
[65] CSRD, Art 1.
[66] Commission, Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels 2022, SWD(2022) 42 final.
[67] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate due diligence in the area of sustainability and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 1/58 (hereafter: CSDDD), Art.3 (i).
[68] CSDDD.

work, and the ecosystem.[69] Due diligence reporting is a mandatory requirement of the agreements between large companies and small businesses, their partners or SMEs within the chain of production. In other words, these companies are obligated to report through due diligence within the reporting processes of the main corporation,[70] strengthening the accountability beyond EU-based companies.[71]

The CSDDD stipulate the necessity of integrating due diligence procedures into corporate policies and management systems.[72] In addition, the CSDDD sets out the measures for identification and access to the human rights and climate negative impacts of the companies' activity, the activity of subsidiaries or their partners within the value chain.[73] The CSDDD goes further, requiring the companies to put priorities on identifying actual and potential adverse impacts and addressing these issues[74] by taking measures to prevent, mitigate,[75] and bring to an end these adverse impacts[76] through action plans within certain deadlines in cooperation with multi-stakeholder initiatives.[77] Moreover, the CSDDD helps the stakeholders fulfil their needs regarding information through the notification mechanism and complaint procedure on violations,[78] as well as monitoring and publishing due diligence practices in their annual statements.[79] In this way, stakeholders have access to the European single access point (ESAP),[80] as established by Regulation (EU) 2023/2859.[81] Also, the companies established out of the EU but operating in the Member States will include the information for the authorised representative in their annual statement according to article 23 of CSDDD.[82] The enforcement mechanism provided by CSDDD has been strengthened not only through penalties and administrative sanctions but also by establishing companies' civil liability

[69] Rijksdienst voor Ondernemend Nederland, Internationaal MVO-wetten en -regels, September 2022, available at: https://www.rvo.nl/onderwerpen/mvo-wetten-en-regels, accessed 2 March 2025.
[70] CSDD, Recital 46.
[71] OECD, Due Diligence Guidance for Responsible Business Conduct, OECD 2018.
[72] CSDD, Arts 5, 6, 7
[73] CSDD, Art 8.
[74] CSDD, Art 9.
[75]CSDD, Art 10.
[76] CSDD, Art 11.
[77] CSDD, Art 9-11.
[78] CSDD, Art 14.
[79] CSDD, Art 16.
[80] Regulation (EU) 2023/2859 of the European Parliament and of the Council of 13 December 2023 Establishing a European Single Access Point Providing Centralised Access to Publicly Available Information of Relevance to Financial Services, Capital Markets and Sustainability (Text with EEA Relevance) [2023] OJ L 1/22.
[81] CSDD, Art 17.
[82] CSDD, Art 23.

towards stakeholders and their right to compensation for the damages caused.[83] Implementation of these articles is ensured by a supervisory authority that will supervise compliance with the obligations of the Member States.[84]

The implementation of ESG has evolved from the non-financial reporting provided by the NFRD Directive to a standardised legal framework of the CSRD Directive, increasing accountability, transparency and values in the long term, transforming non-financial reporting into sustainability reporting. The CSDDD is in line with international standards and best practices.[85] Despite some criticism,[86] the CSDDD brings a mandatory due diligence process on adverse human rights and environmental impact and imposes direct legal obligations on companies demonstrating the commitment of the EU to sustainability.[87]

4. THE IMPACT OF ESG INTEGRATION IN THE ALBANIAN LEGAL FRAMEWORK

Since 2003, when the European Council declared that the future of Western Balkan countries is the EU membership, Albania is struggling to harmonise the existing and future legislation in line with the EU acquis as a condition of eligibility agreed upon by the European Council.[88] According to the 2024 Commission Report, Albania has been engaged seriously in the four pillars of integration to the EU, making deep reforms, including the business environment, human capital, digitalisation, energy and green transition and also fundamental rights and the rule of law.[89] In addition to these reforms, Albania has gone through a deep reform and amendment of legislation for the promotion of sustainability and ESG.[90] This section analyses the Albanian efforts to incorporate ESG into domestic legislation as a result of the EU pressure of membership.

[83] CSDD, Art 29
[84] CSDD, Art 24-25.
[85] CSDDD, Recitals 1-17.
[86] Ferrarini, G., Corporate Sustainability Due Diligence and the Shifting Balance between Soft Law and Hard Law in the EU, Oxford Business Law Blog 2022, available at: https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between, accessed 1 March 2025.
[87] Commission, *Sustainable Development Goals,* available at: https://commission.europa.eu/strategy-and-policy/sustainable-development-goals_en?utm_source=chatgpt.com, accessed 1 March 2025.
[88] Consolidated Version of the Treaty on European Union, Art.49.
[89] Commission, Albania 2024 Report*, op. cit.* note 8.
[90] *ibid*.

4.1. Environmental dimension of ESG integration

After the signing of the Paris Agreement[91] in 2016, Albania prepared the Nationally Determined Contribution[92] (NDC) with a target of reducing GHG emissions by 2030.[93] The Nationally Determined Contribution was revised in 2020.[94] The Laws on Environmental Protection set out environmental standards for companies and industrial activities and provide administrative measures and penalties for violators.[95] Although the Law on Environmental Protection is in compliance with the EU *acquis*, the accuracy of the implementation of the action plans of Albania remains a matter of concern due to the lack of qualitative data in measuring emissions.[96] The corporations and sustainability reporting have an important role in defining ESG metrics and making them public.[97] The Law on Environmental Protection does not provide a comprehensive due diligence process for companies.

4.2. Social Dimension of ESG Integration

On the second pillar of ESG, the social aspect, Albania has integrated this pillar mainly into the Labour Code.[98] This law provides some mandatory human rights issues in line with diversity and inclusion at the workplace, such as the prohibition of forced or obligatory work,[99] fair treatment and the prohibition of discrimination

[91] United Nations, *Paris Agreement*, 2015, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf, accessed 1 March 2025.
[92] UNFCCC, Intended Nationally Determined Contribution (INDC) of the Republic of Albania following decision 1/CP.19 and decision 1/CP.20, available at: https://unfccc.int/sites/default/files/NDC/2022-06/Albania%20First.pdf, accessed 1 March 2025.
[93] UNDP, UNDP helps Albania meet obligations deriving from Paris Climate Change Accord, 2021, available at: https://www.undp.org/albania/press-releases/undp-helps-albania-meet-obligations-deriving-paris-climate-change-accord, accessed 1 March 2025.
[94] UNFCCC, Albania Revised NDC, available at: https://unfccc.int/sites/default/files/2022-08/Albania%20Revised%20NDC.pdf, accessed 1 March 2025.
[95] Law No.10 431/2011 "On Environmental Protection" as amended; Law No. 10440/2011 "On Environmental Impact Assessment" as amended; Law No. 162/2014, "On the Protection of Air Quality in the Environment," as amended; Law No. 9587, dated 20.7.2006, "On the Protection of Biodiversity," as amended; Law No. 10 463, dated 22.9.2011, "On Integrated Waste Management" as amended, Law no.155/2020, "On climate change"
[96] ICG Research, ESG in Albania Sustainability Reporting Assessment Report Paper, available at: https://www.icgresearch.org/publications, accessed 1 March 2025.
[97] *ibid.*
[98] The Labour Code of Albania as amended.
[99] *ibid,* Art 8 (Prohibition of obligatory work).

at work.[100] The amendments done to the Labour Code in 2015 brought special protection to child labour[101] and women's rights.[102] The protection of pregnant employees, maternity leave, prohibition of dismissal during this period, and parental leave granted to each parent are important protective issues of family well-being. There are mandatory provisions for employers (including companies) to ensure safe working conditions and protect workers' health. Equal importance is given to employees' rights to form trade unions and engage in collective bargaining.[103]

The corporation's social responsibility integrating ESG is provided in Law no. 9901/2008 "On Entrepreneurs and Companies", even though the related provisions are at a limited level.[104] The law provides the establishment of the council of workers, considering them in the stakeholder category.[105] But stakeholders, as actors that play an important role in corporate governance, are not limited to the employees; this category also includes subcontractors, creditors, businesses in the whole chain and sometimes the entire community.[106] The companies shall consider the participation of the worker representatives/councils in decision-making without providing any enforcement for the adverse worker's rights in this aspect.[107] There are no provisions on mandatory due diligence for human rights and environmental standards across corporate supply chains.

4.3. Governance dimension of ESG integration

As discussed in the previous sections, corporate governance does not have a certain definition used worldwide. Albanian commercial law and corporate governance principles are generally in line with the EU legal framework.[108] However, the 2024 Commission Report recommends further alignment.[109]

[100] *ibid,* Art 9 (Prohibition of discrimination and fair treatment).
[101] *ibid*, Art.98-103 (child labor).
[102] *ibid,* Art.104-108 (woman rights).
[103] *ibid,* Art 176-197/10
[104] ICG Research, *op. cit.* note 97.
[105] Law on Entrepreneurs and Companies, Arts 19, 20, 21.
[106] Malltezi, A., *E drejta tregtare e shoqerive shqiptare*, Shtepia Botuese Mediaprint 2011, p. 191
[107] Dine, J., and Blecher, M., *Ligji Për tregtarët dhe shoqëritë tregtare: Teksti me shpjegime*, Gent Grafik 2016.
[108] Beci, S., *Albania Albanian Commercial law towards EU Academic,* Journal of Business, Administration, Law and Social Sciences 2022, 8 (3), pp. 83-88.
[109] Commission, Albania 2024 Report, SWD(2024) 690 final.

According to G20/OECD Principles on Corporate Governance 2023, "*the corporate governance framework should provide incentives for companies and their investors to make decisions and manage their risks, in a way that contributes to the sustainability and resilience of the corporation*."[110] Albanian Law on Entrepreneurs and Companies provides rules for the company formation and disclosure structure of management, governance, financial reporting and statutory audit.[111] OECD Principles[112] constitute the base of Albania's corporate governance framework.[113] Board responsibilities are defined in accordance with OECD Principles. The Albanian Law on Entrepreneurs and Companies does not provide clear and comprehensive rules related to the sustainability and the disclosure of the adverse human rights and environmental impact of the companies. Furthermore, while the Albanian Law on Entrepreneurs and Companies includes provisions relating to business regulations, commercial contracts, and company formation and statutory audit, it remains silent on sustainability reporting or due diligence process. The 2024 Commission Report acknowledges this gap in the company law as amended.[114]

The Albanian Law on Entrepreneurs and Companies contains some main elements of corporate governance in Albanian commercial law.[115] It defines the structure and the relations between shareholders, the board and administrators. Moreover, it stipulates shareholders, the board and administrators' duties and rights and pays attention to the equilibrium between all stakeholders for an efficient decision-making procedure.[116] The Albanian Law on Entrepreneurs and Companies considers the interest of all stakeholders during mergers or spin-offs of the company.[117] Protection of the rights of the minor shareholders on getting the information, the amendment of the company statute or the right to complain in front of a court for the possible violation of the statute or unlawful decision of the General Assembly[118] shows the attitude of the law-makers on the equal treatment of the stakeholders. In addition, the interest of the employees is also considered.[119] However, there are still no specific obligations related to sustainability at the board level.

[110] OECD, G20/OECD Principles of Corporate Governance 2023, *op. cit.* note 17, p. 46
[111] Law on Entrepreneurs and Companies.
[112] Kodi i Drejtimit të Brendshëm të shoqërive tregtare në Shqipëri; OECD, Parimet e drejtimit të brendshëm të shoqërive tregtare, OECD 2004, p. 11
[113] Malltezi, *op. cit.* note 108, pp. 185-217.
[114] Commission, Albania 2024 Report, *op. cit.* note 8.
[115] Law on Entrepreneurs and Companies.
[116] Malltezi, *op. cit.* note 108, pp. 185-191.
[117] Law on Entrepreneurs and Companies, Arts 214-227.
[118] *Ibid*, Arts 10-15.
[119] *ibid,* Arts 19-21.

4.4. Harmonising further Albanian legal framework with EU acquis

The Law on Accounting and Financial Statements[120] represents a novelty in the Albanian legal system. It introduces limits for the classification of enterprises and groups for financial reporting purposes. Moreover, it obliges large public interest entities to include in their performance report a non-financial report containing information on the entity's performance and impact on environmental, social and employment issues as well as human rights, anti-corruption and bribery issues.[121] While such a step is welcomed for further harmonisation, the Law on Accounting and Financial Statements[122] is partially harmonised with the Directive 2013/34/EU.[123] In 2020, the Albanian National Council of Accounting published the Guideline on Non-Financial Reporting.[124] This Guideline is harmonised with the Directive no. 2014/95/EU dated 22.10.2014 "On Non-Financial Reporting" and the related guideline issued by the European Commission.[125] It guides companies to disclose non-financial information that provides sustainable growth, employment and transparency for interested stakeholders.[126] Moreover, the amendment to the Law on Statutory Audits and Audit Profession,[127] which partially transposed the CSRD Directive on corporate sustainability reporting.[128] Also, Albania is a signatory country of the UN Guiding Principles on Business and Human Rights.[129] While the state authorities intend to give an incentive to the

[120] Law no. 25/2018 dated 10.05.2018 "On Accounting and Financial Statements".
[121] KPMG, New Law on Accounting and Financial Statements, 2018, available at: https://assets.kpmg.com/content/dam/kpmg/al/pdf/News-Albania.pdf, accessed 1 March 2025.
[122] Law no. 25/2018 dated 10.05.2018 "On Accounting and Financial Statements" as amended.
[123] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (Text with EEA relevance) [2013] *OJ L 182/19.*
[124] Keshilli Kombetar i Kontabilitetit, *Udhëzues për Përgatitjen e Raportit Jofinanciar (metodologjia për raportimin e informacionit jofinanciar),* available at: https://www.kkk.gov.al/foto/uploads/File/Udhezuesi%20i%20raportimit%20jofinanciar_publikuar.pdf, accessed 1 March 2025.
[125] Commission, OJ C 215/1.
[126] Boga & Associates, Guideline on nonfinancial reporting and Performance Reporting of Non-For-Profit Organizations, 2021, available at: https://www.bogalaw.com/pdf/Guideline%20on%20Non-Financial%20Reporting.pdf, accessed 1 March 2025.
[127] Law no. 25/2018 dated 10.05.2018 "On Accounting and Financial Statements" as amended, Art.18.
[128] CSRD; Law no.126/2024 "On some additions and amendments in Law on Statutory Audits and Audit Profession no.10091 date 5.3.2009 as amended 47/2016 [2025] OJ 7.
[129] United Nations and United Nations Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy'

enforcement of sustainability requirements and standards for the companies, the Law on Statutory Audits and Audit Profession do not impose broad obligations on companies to conduct due diligence with respect to human rights and environmental standards. As the negotiations are opening, further alignment with the CSDDD Directive is necessary. Also, it is expected that in 2025, the companies will provide more comprehensive information on ESG,[130] supporting the environment and human rights.

5. CONCLUSION

The National Strategy for Development and European Integration (2021-2030),[131] among other objectives, shows the continuous commitment of the Albanian Government to sustainable development and EU integration.[132] While the commercial laws provide a foundation for corporate governance, they lack explicit provisions on mandatory disclosures, due diligence and enforcement mechanisms for the integration of ESG. As Albania aspires to join the EU in 2030, Albania needs to fully harmonise its commercial legal framework by adopting a new company law and amending the corporate governance provisions. In this aspect, it is necessary to integrate ESG into corporate governance for European accession and to ensure the sustainable development growth of the country. Even though this will be a challenging task due to the increase in costs, and lack of human capital as a result of the "brain drain" because of the migration of the young population, lack of awareness of the companies and their decision-making structures, scepticism, it is important for the corporates to increase the awareness on ESG reporting. The new harmonised laws shall bring stronger enforcement mechanisms and capacity-building. Researchers show that Albanian corporates and their stakeholders have done a shift toward sustainability compared to SMEs and small businesses. The latter needs further understanding of sustainability and an increase in awareness.[133] Banks and the other financial institutions in Albania play a distinguished role in sustainable financing based on the measurement of ESG.[134] Corporate accountability, investor protection, and business sustainability will be strengthened by further harmonising the EU legal framework.

Framework*,* United Nations 2011; OECD, OECD Guidelines for Multinational Enterprises, OECD Publishing 2011.

[130] KPMG, The move to a mandatory reporting*,* Survey of Sustainability Reporting 2024.

[131] SASPAC National Strategy for Development and European Integration 2022–2030, Tirana 2022.

[132] *ibid.*

[133] Deloitte Audit Albania SH.P.K., Sfidat dhe mundësitë e tregut Shqiptar në tranzicionin drejt raportimit të Qëndrueshmërisë dhe dhënies së Sigurisë*,* Deloitte Audit Albania SH.P.K 2024.

[134] *ibid.*

In conclusion, further alignment of Albanian legislation with the EU acquis will bring new opportunities for Albanian companies, making them more reliable and compatible with other European and world markets. Global trends in ESG reporting will attract investors, consumers, civil organisations, and employees, who will collaborate on common values. The harmonised legal framework of Albania will further push for the sustainable wealth of people and economic growth, protecting human rights and the ecosystem. Future research on the implementation of ESG principles should be extended to other Western Balkans countries. The accession process of Western Balkans countries requires an alignment of environmental, social and corporate governance with the EU legal framework. In this context, a comprehensive legal study should be conducted to analyse to what extent and whether the Western Balkan countries have incorporated ESG into their legislation as a result of EU conditionality.

REFERENCES

BOOKS AND ARTICLES

1. Al-Issa, N., et al., *Impact of environmental, social, governance, and corporate social responsibility factors on firm's marketing expenses and firm value: A panel study of US companies*, Cogent Business & Management, 2022, 9(1).
2. Baumüller, J., and Grbenic, O. S., *Moving from Non-Financial to Sustainability Reporting: Analyzing the EU Commission's Proposal for a Corporate Sustainability Reporting Directive (CSRD),* FACTA UNIVERSITATIS Series: Economics and Organization 2021, 18(4), pp. 369 – 381.
3. Beci, S., *Albania Albanian Commercial law towards EU Academic,* Journal of Business, Administration, Law and Social Sciences 2022, 8 (3), pp. 83-88.
4. Dine, J., and Blecher, M., *Ligji Për tregtarët dhe shoqëritë tregtare: Teksti me shpjegime*, Gent Grafik 2016.
5. Eccles, R. G., Ioannou, I., & Serafeim, G., *The Impact of Corporate Sustainability on Organizational Processes and Performance*. Management Science 2014*,* 60(11), pp. 2835-2857.
6. Gadinis, S., and Miazad, A., *Corporate Law and Social Risk*, *Vanderbilt Law Review* 2020.
7. Hahnkamper-Vandenbulcke, N., *Non-financial Reporting Directive*, Briefing Implementation Appraisal, EPRS 2023.
8. Harper Ho, V., *Sustainability in the Mainstream: Why Investors Care and What It Means for Corporate Boards*, The Conference Board - Director Notes

2017, available at SSRN: https://ssrn.com/abstract=3080033, accessed 1 March 2025.
9. Kaźmierczak, M., *A Literature Review on the Difference Between CSR and ESG*, Scientific Papers of Silesian University of Technology – Organization and Management Series, No. 162/2022.
10. Malltezi, A., *E drejta tregtare e shoqerive shqiptare*, Shtepia Botuese Mediaprint 2011.
11. Passas, I., *The Evolution of ESG: From CSR to ESG 2.0*, *Encyclopedia* 2024 4(4), pp. 1711-1720.
12. Rönnegard, D., Smith, N. C*., Shareholder Primacy vs. Stakeholder Theory: The Law as Constraint and Potential Enabler of Stakeholder Concern*. In: Harrison. JS,, et al., (eds) The Cambridge Handbook of Stakeholder Theory, Cambridge University Press 2019.
13. Shim, E. D., *Sustainability, Stakeholder Perspective and Corporate Success: A Paradigm Shift*, International Journal of Business, Humanities and Technology 2014, 4:5, pp. 64-67.
14. Skara, G., *Europeanisation of Private Enforcement of Competition Law: The Case of Albania*, Springer 2007.
15. Ullah, Zain., et al., *The Impact of Corporate Accountability & Transparency on the Performance of Manufacturing Firms Listed on KSE,* SSRN 2016, available at: https://ssrn.com/abstract=2756977, accessed 1 March 2025.

LEGAL ACTS

1. Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ 107/166.
2. Agreement between the European Economic Community and the Republic of Albania, on trade and Commercial and Economic Cooperation [1992] OJ L 343/0002.
3. Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards [2023] OJ L 1/184.
4. Consolidated Version of the Treaty on European Union [2024] OJ C 202/1.
5. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L 322/15.
6. Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate due diligence in the area of sustainability and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 1/58.

7. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (Text with EEA relevance) [2013] *OJ L 182/19.*
8. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text (with EEA relevance) [2014] OJ L 330/1.
9. Law 9901/2008 "On Entrepreneurs and Companies" [2008] OJ 60 as amended by Law 129/2014 [2014] OJ 163.
10. Law No. 10 463, dated 22.9.2011, "On Integrated Waste Management" [2012] OJ 148 as amended with Law No. 32/2013 OJ 30, amended with Law No. 156/2013 OJ 172, amended with Law No. 28/2022 OJ 62, amended with Law No.70/2024 OJ 130.
11. Law No. 10440/2011 "On Environmental Impact Assessment" as amended lately with Law No. 67/2024 OJ 130.
12. Law No. 162/2014, "On the Protection of Air Quality in the Environment," as amended lately with Law No. 68/2024 [2024] OJ 127.
13. Law no. 25/2018 dated 10.05.2018 "On Accounting and Financial Statements", [2018] OJ 79.
14. Law No. 9587, dated 20.7.2006, "On the Protection of Biodiversity," as amended with Law No.37/2013 OJ 30, amended with Law No. 41/2020 OJ 80.
15. Law No.10 431/2011 "On Environmental Protection" [2011] OJ 89 as amended with Law No.31/2013, OJ 30, amended with Law No. 53/2020 OJ 96, amended with Law No.66/2024, OJ 127.
16. Law no.126/2024 "On some additions and amendments in Law on Statutory Audits and Audit Profession no.10091 date 5.3.2009 as amended 47/2016 [2025] OJ 7.
17. Law no.155/2020, "On climate change" [2021] OJ 3.
18. Law No.7961/1995, "The Labor Code of Albania" as amended with Law No.9125/2003, OJ 72, with Law No.10 053/2008, OJ 205, with Law No. 136/2015, OJ 220, with Law 91/2024 [2024] OJ 143.
19. Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 2021 COM(2021) 189 final.
20. Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1.

21. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198/13.
22. Regulation (EU) 2023/2859 of the European Parliament and of the Council of 13 December 2023 Establishing a European Single Access Point Providing Centralised Access to Publicly Available Information of Relevance to Financial Services, Capital Markets and Sustainability (Text with EEA Relevance) [2023] OJ L 1/22.
23. SASPAC National Strategy for Development and European Integration 2022–2030, Tirana 2022.
24. The Labour Code of Albania
25. United Nations General Assembly, Resolution adopted by the General Assembly on 6 July 2017: Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, UN 2017, A/RES/71/313.

NETWORK RESOURCES

1. Beslik, S., How Sustainable Is Facebook? An ESG Analysis of the Social Media Giant, available in: https://medium.com/swlh/how-sustainable-is-facebook-an-esg-analysis-of-the-social-media-giant-8ad8adc3da23, accessed 2 March 2025.
2. Boga & Associates, Guideline on nonfinancial reporting and Performance Reporting of Non-For-Profit Organizations, 2021, available at: https://www.bogalaw.com/pdf/Guideline%20on%20Non-Financial%20Reporting.pdf, accessed 1 March 2025.
3. Byrne, D., ESG: A Comprehensive Guide to Environmental, Social, and Governance Principles, The Corporate Governance Institute, available at: https://www.thecorporategovernanceinstitute.com/insights/guides/esg-a-comprehensive-guide-to-environmental-social-and-governance-principles, accessed 1 March 2025.
4. CEAOB, CEAOB guidelines on limited assurance on sustainability reporting, CEAOB 2024.
5. Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels 2011, COM(2011) 681 final.
6. Commission, Albania 2024 Report, Brussels 2024, SWD(2024) 690 final.
7. Commission, Disclosure of non-financial and diversity information by large companies and groups - Frequently asked questions, 2014, available at: https://ec.europa.eu/commission/presscorner/detail/en/memo_14_301, accessed 1 March 2025.
8. Commission, Report from the Commission to the Council on the work of the EU/Albania High Level Steering Group, in preparation for the negotiation of

a Stabilisation and Association Agreement with Albania, COM (2001) 300 final.
9. Commission, Sustainable Development Goals, available at: https://commission.europa.eu/strategy-and-policy/sustainable-development-goals_en?utm_source=chatgpt.com, accessed 1 March 2025.
10. Commission, Guidelines on non-financial reporting (methodology for reporting non-financial information), [2017] OJ C 215/1.
11. Commission, Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels 2022, SWD(2022) 42 final.
12. Deloitte Audit Albania SH.P.K., Sfidat dhe mundësitë e tregut Shqiptar në tranzicionin drejt raportimit të Qëndrueshmërisë dhe dhënies së Sigurisë, Deloitte Audit Albania SH.P.K 2024.
13. EFRAG, About sustainability reporting, available at: https://www.efrag.org/en, accessed 1 March 2025.
14. Ferrarini, G., Corporate Sustainability Due Diligence and the Shifting Balance between Soft Law and Hard Law in the EU, Oxford Business Law Blog 2022, available at: https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/corporate-sustainability-due-diligence-and-shifting-balance-between, accessed 1 March 2025.
15. ICG Research, ESG in Albania Sustainability Reporting Assessment Report Paper, available at: https://www.icgresearch.org/publications, accessed 1 March 2025.
16. IFC, IFC Corporate Governance Methodology and Tools, available at: https://www.ifc.org/en/what-we-do/sector-expertise/corporate-governance/cg-methodology-tools, accessed 1 March 2025.
17. Infortal, Uber: A Legacy of Reputational Damage, Available in: https://infortal.com/uber-a-legacy-of-reputational-damage, accessed 2 March 2025.
18. Keshilli Kombetar i Kontabilitetit, Udhëzues për Përgatitjen e Raportit Jofinanciar (metodologjia për raportimin e informacionit jofinanciar), available at: https://www.kkk.gov.al/foto/uploads/File/Udhezuesi%20i%20raportimit%20jofinanciar_publikuar.pdf, accessed 1 March 2025.
19. Kodi i Drejtimit të Brendshëm të shoqërive tregtare në Shqipëri.
20. KPMG, The move to a mandatory reporting, Survey of Sustainability Reporting 2024.
21. KPMG, New Law on Accounting and Financial Statements, 2018, available at: https://assets.kpmg.com/content/dam/kpmg/al/pdf/News-Albania.pdf, accessed 1 March 2025.

22. OECD, Due Diligence Guidance for Responsible Business Conduct, OECD 2018.
23. OECD, OECD Guidelines for Multinational Enterprises, OECD Publishing 2011.
24. OECD, Parimet e drejtimit të brendshëm të shoqërive tregtare, OECD 2004.
25. OECD, G20/OECD Principles of Corporate Governance 2023, Paris 2023.
26. OECD, OECD and G20, available at: https://www.oecd.org/en/about/oecd-and-g20.html, accessed 28 November 2024.
27. OECD, Recommendation of the Council on Principles of Corporate Governance, 2025, OECD/LEGAL/0413.
28. Rijksdienst voor Ondernemend Nederland, Internationaal MVO-wetten en -regels, September 2022, available at: https://www.rvo.nl/onderwerpen/mvo-wetten-en-regels, accessed 2 March 2025.
29. UNDP, UNDP helps Albania meet obligations deriving from Paris Climate Change Accord, 2021, available at: https://www.undp.org/albania/press-releases/undp-helps-albania-meet-obligations-deriving-paris-climate-change-accord, accessed 1 March 2025.
30. UNFCCC, Albania Revised NDC, available at: https://unfccc.int/sites/default/files/2022-08/Albania%20Revised%20NDC.pdf, accessed 1 March 2025.
31. UNFCCC, Intended Nationally Determined Contribution (INDC) of the Republic of Albania following decision 1/CP.19 and decision 1/CP.20, available at: https://unfccc.int/sites/default/files/NDC/2022-06/Albania%20First.pdf, accessed 1 March 2025.
32. United Nations. Paris Agreement, 2015, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf, accessed 1 March 2025.
33. United Nations and United Nations Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, United Nations 2011.
34. United Nations, Sustainable Development Goals- SDGs, available at: https://sdgs.un.org/goals, accessed 28 November 2024.
35. United Nations, The Sustainable Development Goals Report 2024, UN 2024.

UDK: 338 : 504.5 (4-6EU)
Review paper

Barbara Bokor, PhD student
Faculty of Law, University of Bergen, Norway
E-mail: barbara.bokor@uib.no
ORCID ID: 0009-0008-5786-624X

LEGAL ANALYSIS OF EU REGULATIONS ON CIRCULAR ECONOMY AND SUSTAINABILITY PRINCIPLES IN PLASTIC FOOD PACKAGING

ABSTRACT

The pervasive use of plastic food packaging (PFP) presents a significant environmental challenge due to its contribution to pollution, resource depletion, and potential health risks, generating persistent negative externalities. This article undertakes a legal analysis of existing European Union (EU) regulatory instruments addressing these challenges through the lens of circular economy (CE) and sustainability principles. It critically examines how these regulations intend to mitigate the environmental damage associated with PFP within the EU. The study conducts a comprehensive review of key EU policy documents and legal frameworks governing PFP, examining how these instruments establish a legal framework for a closed-loop system and incentivize sustainable practices within the industry. It evaluates the alignment (or misalignment) between stated CE principles and demonstrable progress toward sustainability goals. Findings reveal a disconnect between the aspirations of CE initiatives in the EU and the reality of persistent environmental damage from PFP. The article argues for more robust, coherent, and targeted regulatory frameworks and innovative solutions to incentivize a transition towards a sustainable and circular economy within the PFP sector.

***Keywords**: EU law, plastic food packaging, circular economy, sustainable circular economy, negative externalities.*

1. INTRODUCTION

Plastic, once celebrated as a revolutionary material, now poses a significant environmental challenge. Although it has driven economic growth,[1] improved convenience,[2] and revolutionized industries, its extensive use has led to a

[1] Economics, *Mapping the Plastics Value Chain: A framework to understand the socio-economic impacts of a production cap on virgin plastics*, 2024, p.2.
[2] for both consumers (e.g., ready-made meals, single-serve portions) and industry (e.g., proper food handling and transportation). See for example Vanapalli and others, *Challenges and strategies for effective plastic waste management during and post COVID-19*

staggering accumulation of plastic waste, resulting in widespread pollution that threatens ecosystems, wildlife, and human health.[3] The visible manifestations of plastic pollution such as marine debris and its detrimental effects on fauna - are frequently highlighted, however, there are less visible but equally significant negative externalities[4] associated with plastic production, consumption, and disposal. These externalities represent the full range of unaccounted social and environmental costs associated with plastic production and consumption, encompassing impacts on ecosystems, public health, and future generations.[5] This burden increases pressure on several planetary boundaries[6] because the pervasive nature of plastic pollution contributes to multiple environmental challenges, including pollution, biodiversity loss, resource depletion, and greenhouse gas (GHG) emissions.[7]

pandemic, 2021, 750 Science of The Total Environment 141514, p.3; or Porta, *Anthropocene, the plastic age and future perspectives,* 2021, 11 FEBS Open Bio 948, p.949

[3] Andrady, *Plastics and environmental sustainability,* John Wiley & Sons, 2015; Porta, *op. cit.* note 2, p.950-951; Plastic-reimagined, "The Invention of Plastic: Tracing the Timeline of a Material Revolution" (March 13, 2023 updated: September 24, 2024). Available online: https://www.plasticreimagined.org/articles/the-history-of-plastic-the-invention-and-its-future; Singh and Walker, *Plastic recycling: A panacea or environmental pollution problem,* (2024) 2 npj Materials Sustainability 1

[4] The concept of externality encompasses situations where the actions of one or more economic agents affect the well-being of others without an exchange or transaction, with negative externalities arising when the social cost of an activity exceeds its private cost. (Centemeri, *Environmental Damage as Negative Externality: Uncertainty, Moral Complexity and the Limits of the Market,* 2009, e-cadernos CES p.23.)

[5] Akullian and others, *Plastic bag externalities and policy in Rhode Island,* Brown Policy Review, 2006; Centemeri, *op. cit.* note 4, p.23.; Rochman and others, *The ecological impacts of marine debris: unraveling the demonstrated evidence from what is perceived,* 97 Ecology 302, 2016; Reis and others, *Life in plastic, it's not fantastic: the economics of plastic pollution,* Science for Sustainability (S4S) Journal, 2017 1

[6] Richardson and others, *Earth beyond six of nine planetary boundaries,* 9 Science Advances eadh 2458, 2023.

[7] Reis and others, *op. cit.* note 5, p.3-4.; Farrelly and others, *Plastic legacies: Pollution, persistence, and politics,* Athabasca University Press, 2021. p.10; Persson and others, *Outside the Safe Operating Space of the Planetary Boundary for Novel Entities,* 56 Environmental Science & Technology 1510, 2022, 1511-1512.; Richon and others, *Legacy oceanic plastic pollution must be addressed to mitigate possible long-term ecological impacts,* 3 Microplastics and Nanoplastics 25, 2023, p.2-3.; Nyberg and others, *Leaving a plastic legacy: Current and future scenarios for mismanaged plastic waste in rivers,* 869 Science of The Total Environment 161821, 2023, p.2.; Villarrubia-Gómez and others, *Plastics pollution exacerbates the impacts of all planetary boundaries,* One Earth, 2024, 2122-2123.

The largest consumer of plastic materials is the packaging industry both globally[8] and in the EU.[9] Derived primarily from fossil fuels, approximately 60 % of all plastic packaging is dedicated to food and beverages.[10] Plastic has become the predominant material for food packaging in Europe.[11] Packaged food consumption in Europe has dramatically increased in recent decades, driven by changing consumption patterns and a growing preference for convenience.[12] The PFP industry is under growing pressure to adopt sustainable practices that mitigate negative environmental impacts, enhance resource efficiency, and safeguard public health.[13] The focus of this study is PFP, a critical area within the broader plastics landscape due to its substantial environmental footprint and complex regulatory demands.

The traditional linear models of plastic production and consumption, characterized by a "take-make-dispose" approach, are increasingly recognized as unsustainable.[14] These models contribute to significant environmental degradation and economic inefficiencies, underscoring the urgent need for a transition to a circular economy (CE) for plastics. Core CE principles include eliminating waste and pollution through design and innovation, circulating products and materials in closed-loop systems, and regenerating natural systems.[15] Despite growing interest

[8] Packaging's share of global plastic consumption is 31% (https://www.statista.com/topics/10136/plastic-packaging-industry-worldwide/#topicOverview).

[9] According to Plastics Europe End-users' plastic packaging consumption was 34.7% of the total European plastic consumption and the European plastics conversion was 39% based on application in 2022. /Europe, *The Circular Economy for Plastics: A European Analysis*, 2024. p.49 and p.63/

[10] Groh and others, *Overview of known plastic packaging-associated chemicals and their hazards,* 651 Science of The Total Environment 3253., 2019, p. 3254

[11] Ncube and others, *Environmental Impact of Food Packaging Materials: A Review of Contemporary Development from Conventional Plastics to Polylactic Acid Based Materials,* 13 Materials (Basel), 2020, p.2.

[12] ING, *Plastic packaging in the food sector - Six ways to tackle the plastic puzzle*, 2019. p.7

[13] https://www.packaging-gateway.com/features/sustainable-packaging-food-industry/.

[14] EEA, *Plastics, the circular economy and Europe's environment — A priority for action*, 2021. p.7; Shi and others, *Perspectives on sustainable plastic treatment: A shift from linear to circular economy,* 173 TrAC Trends in Analytical Chemistry 117631, 2024.

[15] EU, Communication from the Commission: A European Strategy for Plastics in a Circular Economy – Strategy, SWD(2018) 16 final (European Commission 2018); Guillard and others, *The Next Generation of Sustainable Food Packaging to Preserve Our Environment in a Circular Economy Context,* 5 Frontiers in Nutrition, 2018.; Barnes, *Understanding plastics pollution: The role of economic development and technological research,* 249 Environmental Pollution 812, 2019.; Velenturf and Purnell, *Principles for a sustainable circular economy,* 27 Sustainable Production and Consumption 1437, 2021; **5.** Neves and Marques, *Drivers and barriers in the transition from a linear economy to a circular economy,* 341 Journal of Cleaner Production 130865, 2022.

in CE solutions for plastic packaging,[16] research is still needed to assess their effectiveness in mitigating the negative externalities of PFP and achieving specific sustainability goals, such as reducing marine pollution or minimizing resource depletion.[17] Geissdoerfer et al. suggest further investigation into the interconnectedness of CE and sustainability, as well as their impact on supply chains and innovation systems.[18] Existing research has not yet synthesized the concepts of CE and sustainability with the specific negative externalities associated with PFP within the EU regulatory context. For example, while the benefits of closed-loop systems for plastic packaging are often promoted,[19] there is a gap in understanding how these systems address microplastic pollution – a significant negative externality impacting both environmental and human health – throughout a product's lifecycle.[20] This article aims to address this gap by examining how key EU policy and regulatory instruments promote both circularity and sustainability for PFP. The analysis covers overarching key EU policy documents (such as the European Strategy for Plastics in a Circular Economy,[21]

[16] Van Eygen and others, *Circular economy of plastic packaging: Current practice and perspectives in Austria,* 72 Waste Management 55, 2018.; Schmidt and others, *Challenges and Solutions for Plastic Packaging in a Circular Economy,* 93 Chemie Ingenieur Technik 1751, 2021.; Karayılan and others, *Prospective evaluation of circular economy practices within plastic packaging value chain through optimization of life cycle impacts and circularity,* 173 Resources, Conservation and Recycling 105691, 2021.; Zhu and others, *Packaging design for the circular economy: A systematic review,* 32 Sustainable Production and Consumption 817, 2022.;

[17] For instance Guillard and others, *op. cit.*; Foschi and Bonoli, *The commitment of packaging industry in the framework of the European strategy for plastics in a circular economy,* 9 Administrative Sciences 18, 2019.; Pauer and others, *Assessing the environmental sustainability of food packaging: An extended life cycle assessment including packaging-related food losses and waste and circularity assessment,* 11 Sustainability 925, 2019.**;** Meherishi and others, *Sustainable packaging for supply chain management in the circular economy: A review,* 237 Journal of Cleaner Production 117582, 2019.

[18] Geissdoerfer and others, *The Circular Economy – A new sustainability paradigm?,* 143 ibid.757., 2017, p.767**;** Monciardini and others, '13 Circular Economy regulation: an emerging research agenda' in Allen, Stefano and Fiona (eds), *Handbook of the Circular Economy,* De Gruyter, 2023

[19] See note 15

[20] For example: Steensgaard and others, *From macro- to microplastics - Analysis of EU regulation along the life cycle of plastic bags,* 224 Environ Pollut 289, 2017; Elsamahy and others, *Strategies for efficient management of microplastics to achieve life cycle assessment and circular economy,* 195 Environmental Monitoring and Assessment 1361, 2023; Gabisa and others, *Recycling of Plastics as a Strategy to Reduce Life Cycle GHG Emission, Microplastics and Resource Depletion,* 15 Sustainability 11529, 2023.

[21] SWD(2018) 16 final (hereinafter: EU Plastics Strategy)

the European Green Deal,[22] and the New Circular Economy Action Plan[23]) as well as specific regulatory instruments (such as the Waste Framework Directive,[24] the Packaging and Packaging Waste Directive,[25] the Packaging and Packaging Waste Regulation,[26] the Single-use Plastic Directive,[27] and food packaging-specific laws). By investigating how these measures aim to internalize the negative externalities of PFP, the article argues that an SCE framework provides a viable mechanism for internalizing the negative externalities of PFP through stricter, more coherent, and targeted regulatory frameworks within the EU.

Section 2 explores the environmental and social impacts of PFP, examining its inherent dichotomy: essential functions coupled with unsustainable practices. This section analyzes the negative externalities generated throughout the PFP lifecycle and introduces the principles of a circular plastics economy, culminating in a discussion of an SCE model for PFP. Section 3 delves into the EU's legal and policy framework for transitioning to a SCE in the PFP sector. It provides an overview of relevant CE policies in the EU, and the existing regulatory landscape governing PFP throughout its entire lifecycle from design to disposal. Section 4 analyzes the challenges and opportunities in internalizing the negative externalities of PFP, focusing on the EU's regulatory approach and identifying remaining gaps and future directions. Finally, Section 5 synthesizes the key findings of this research, highlighting the progress made, ongoing challenges, and potential legal developments needed to foster sustainability and circularity within the PFP industry. This concluding section emphasizes the need for targeted policies that incentivize sustainable design, promote closed-loop systems, and establish producer responsibility throughout the packaging lifecycle to effectively address the root causes of plastic waste and pollution.

[22] EU, Communication from the Commission - The European Green Deal COM(2019) 640 final (2019), (hereinafter: European Green Deal)
[23] EU, A new Circular Economy Action Plan - For a cleaner and more competitive Europe (European Commission 2020), COM(2020) 98 final, (hereinafter: New Circular Economy Action Plan)
[24] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312 of 22/11/2008 (hereinafter: Directive 2008/98/EC)
[25] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365 of 31/12/1994 (hereinafter: Directive 94/62/EC)
[26] EU, Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC (EU 2025), OJ L 2025/40 of 22/01/2025 (hereinafter: Regulation (EU) 2025/40)
[27] Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment, OJ L 155 of 12/6/2019, (hereinafter: Directive (EU) 2019/904)

2. ENVIRONMENTAL AND SOCIAL IMPACTS OF PLASTIC FOOD PACKAGING AND THE TRANSITION TO A SUSTAINABLE CIRCULAR ECONOMY

2.1. The Dichotomy of Plastic Food Packaging: Essential Functions and Unsustainable Practices

Food packaging serves multiple essential functions across a product's lifecycle, including protection, preservation, communication, and marketing.[28] Traditionally, packaging was designed to shield products from external factors, ensure safe handling, and provide consumers with necessary information.[29] However, contemporary industry practices often prioritize cost-efficiency, resulting in the use of complex, non-recyclable multilayer materials.[30] While these materials may reduce production costs, they pose challenges for recycling and sustainability, highlighting the tension between economic priorities and environmental responsibility. The increasing volume of PFP production has led to a surge in plastic packaging waste. This exacerbates issues related to littering, waste management, and recycling, especially given that packaging typically has the shortest lifespan among plastic products.[31]

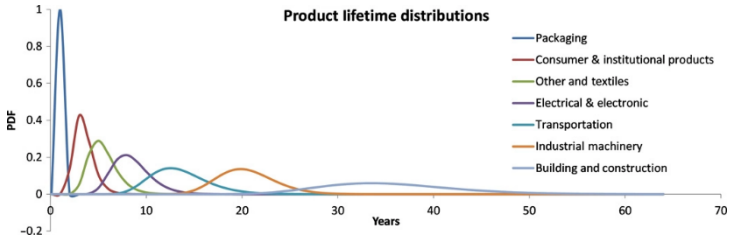


***Figure 1**: Product lifetime distributions for the eight industrial use sectors plotted as log-normal probability distribution functions. Source: Geyer et al. 2017*[32]

[28] Marsh and Bugusu, *Food Packaging—Roles, Materials, and Environmental Issues,* 72 Journal of Food Science R39., 2007, p.39; White and Lockyer, *Removing plastic packaging from fresh produce – what's the impact?,* 45 Nutrition Bulletin 35., 2020, p.37; Arfelli and others, *Environmental impacts of food packaging: Is it all a matter of raw materials?,* 49 Sustainable Production and Consumption 318, 2024, p. 319

[29] Yam and others, *Intelligent Packaging: Concepts and Applications,* 70 Journal of Food Science R1., 2005, p.1.; Ahmed and Rahman, *Handbook of Food Process Design* (John Wiley & Sons, Incorporated 2012, p.1237

[30] Soares and others, *Recycling of multi-material multilayer plastic packaging: Current trends and future scenarios,* 176 Resources, Conservation and Recycling 105905., 2022, p.8.

[31] Yadav and others, *Life cycle assessment of reusable plastic food packaging,* 448 Journal of Cleaner Production 141529, 2024, p. 1.

[32] Geyer and others, *Production, use, and fate of all plastics ever made,* 3 Science Advances e1700782, 2017, p.2.

In 2021, the EU generated 15.96 million tonnes of plastic packaging waste, with a recycling rate of only 39.7 percent.[33] Globally, a mere 2 percent of plastic packaging is recycled back into packaging, leaving the remaining waste to be incinerated, landfilled, recovered, or otherwise released into the environment.[34] Plastic, the most common food packaging material in Europe, is a major contributor to global waste, significantly impacting the environment and potentially threatening human health due to chemical migration from food contact materials (FCMs).[35] The lack of circularity in the current packaging waste management industry is evident, as most food packaging is designed for single use and quickly discarded. This linear model creates environmental challenges that hinder the sustainability of packaged food.[36] The following section will explore the externalities of the current linear system, emphasizing the urgent need for a transition towards circularity in the PFP industry.

2.2. The Negative Externalities of Plastic Food Packaging Throughout Its Lifecycle

The current life cycle of PFP in the EU, often linear and resulting in significant waste, contrasts sharply with CE principles. This system, from resource-intensive production to disposal, generates substantial environmental and socioeconomic damage, necessitating a systemic shift towards a closed-loop model.[37] This analysis will demonstrate the misalignment by examining key problem areas.

First, plastic production itself is problematic. Its strong reliance on fossil fuels contributes to habitat destruction, water and air pollution, and GHG emissions.[38] The extraction and refining of petroleum deplete finite resources, release harmful pollutants, and exacerbate climate change, posing health risks to surrounding communities.[39] Moreover, the numerous chemicals used in plastic manufacturing

[33] EU packaging waste generation with record increase - Eurostat (europa.eu).
[34] Defruyt, *Towards a New Plastics Economy,* (2019) Field Actions Science Reports 78., p.79
[35] Food packaging waste | SAFE – Safe Food Advocacy Europe, June 2024, accessed on 25.02.2025, link: https://www.safefoodadvocacy.eu/actions/food-packaging-waste/
[36] Kan and Miller, *Environmental impacts of plastic packaging of food products,* (2022) 180 Resources, Conservation and Recycling 106156., p.1
[37] WWF, *Plastics: The Cost to Society, the Environment and the Economy*, 2021., p.4.
[38] Shamoon and others, *Environmental impact of energy production and extraction of materials - a review,* 57 Materials Today: Proceedings 936., 2022, p.937.
[39] Sojinu and Ejeromedoghene, *Environmental challenges associated with processing of heavy crude oils,* 241 Processing of Heavy Crude Oils, 2019, p.244.; Kumar and others, *Impacts of Plastic Pollution on Ecosystem Services, Sustainable Development Goals, and Need to Focus on Circular Economy and Policy Interventions,* 13 Sustainability 9963., 2021, p.20-21.

– many of which are toxic – further compound these environmental and health concerns.[40]

Second, the logistical demands of transporting plastic packaging add to its environmental burden. Transportation, often reliant on fossil fuels, increases the carbon footprint and contributes to climate change, particularly within the European food supply chain, characterized by long transport distances and numerous intermediaries.[41]

Third, current consumption patterns and packaging practices exacerbate waste generation. The increasing prevalence of ready-to-eat meals, on-the-go consumption, online food sales, and single-use packaging has fostered a culture of disposability, leading to increased plastic waste accumulation with severe consequences for ecosystems.[42] Marketing strategies encouraging over-purchasing, such as bulk discounts and multi-pack deals, further contribute to this problem.[43] Moreover, certain packaging practices, while intended to protect food and extend shelf life, can inadvertently contribute to food waste. For instance, plastic packaging can trap moisture, accelerating spoilage, and bulk packaging can encourage over-purchasing beyond immediate needs.[44]

Fourth, the persistence of plastics in the environment poses long-term ecological threats. Plastics can persist for hundreds of years, leaching harmful chemicals into soil and waterways, adversely affecting wildlife and human health.[45] The accumulation of plastic in the oceans is particularly devastating, threatening biodiversity, disrupting food chains, and causing long-term ecological

[40] Proshad and others, *Toxic effects of plastic on human health and environment: A consequences of health risk assessment in Bangladesh,* 6 International Journal of Health 1, 2018.; WWF, *op. cit.*., p.20
[41] Chapman, *Transport and climate change: a review,* 15 Journal of Transport Geography 354, 2007.; J.-P. Schweitzer, *Unwrapped: How throwaway plastic is failing to solve Europe's food waste problem (and what we need to do instead)* 2018., p. 7. and 10.
[42] ING, *op. cit.* note 12, p.7
[43] Aschemann-Witzel and others, *Consumer-Related Food Waste: Role of Food Marketing and Retailers and Potential for Action,* 28 Journal of International Food & Agribusiness Marketing 271, 2016, p.276
[44] WRAP, *Reducing household food waste and plastic packaging*, 2022., p.5; Normi and Baidurah, 'Transforming Food Waste into Nutrient-Rich Fertilizer: A Sustainable Path Towards Carbon Neutrality and Circular Economy' in Kapoor and others (eds), *Biomass Valorization: A Sustainable Approach towards Carbon Neutrality and Circular Economy* (Springer Nature Singapore 2024., p.265
[45] Obuzor and Onyedikachi, 'Chemical Leaching into Food and the Environment Poses Health Hazards' in Nwaichi (ed), *Modernity in Health and Disease Diagnosis: The Account from STEM Women* (Springer Nature Switzerland 2023

imbalances.[46] The low recyclability and persistence of materials like expanded polystyrene exemplify these challenges, contributing significantly to landfill waste and marine pollution.[47] Furthermore, the fragmentation of plastic into microplastics poses a further threat to aquatic life through ingestion and chemical toxicity.[48]

Finally, the negative externalities of PFP extend beyond environmental concerns to social inequities. Marginalized communities, often located near production facilities or landfills, bear a disproportionate burden of plastic pollution, experiencing heightened exposure to toxic pollutants, resulting in health disparities.[49] The economic costs associated with plastic waste management, including collection, recycling, processing, and landfill management, place increasing financial pressure on governments and municipalities, ultimately impacting taxpayers.[50]

This analysis demonstrates that the current linear system for plastic food packaging in the EU is unsustainable. It necessitates a systemic shift from the disposable model towards a closed-loop system aligned with CE and sustainability principles, as will be demonstrated below.

2.3. Principles of Circular Plastics Economy

The CE offers a transformative approach to resource management, contrasting sharply with the traditional linear "take-make-dispose" model.[51] The CE, as a

[46] Dar and others, 'Ecotoxic Effects of the Plastic Waste on Marine Fauna: An Overview' in Shahnawaz and others (eds), *Impact of Plastic Waste on the Marine Biota* (Springer Nature Singapore 2022

[47] Hidalgo-Crespo and others, *Circular economy of expanded polystyrene container production: Environmental benefits of household waste recycling considering renewable energies,* 8 Energy Reports 306, 2022.

[48] Turner, *Foamed Polystyrene in the Marine Environment: Sources, Additives, Transport, Behavior, and Impacts,* 54 Environmental Science & Technology 10411, 2020.; Hollerová and others, *Microplastics as a potential risk for aquatic environment organisms - a review,* 90 Acta Veterinaria Brno 99, 2021.; Issac and Kandasubramanian, *Effect of microplastics in water and aquatic systems,* 28 Environ Sci Pollut Res Int 19544, 2021.

[49] WWF, *Plastics: The costs to society, the environment and the economy*, 2021. p.22; Dauvergne, *The necessity of justice for a fair, legitimate, and effective treaty on plastic pollution,* 155 Marine Policy 105785, 2023, p. 2-3

[50] UNEP, *Global Waste Management Outlook 2024 - Beyond an age of waste: Turning Rubbish into a Resource*, 2024. p. 40; Kaza and others, *What a waste 2.0: a global snapshot of solid waste management to 2050* (World Bank Publications, 2018. p. 1. and 6.

[51] The literature offers numerous interpretations for CE, see for example: EMF, *Towards the circular economy*, 2013; Commission, *Closing the loop - An EU action plan for the Circular Economy* (COM(2015) 614 final, 2015; Kirchherr and others, *Conceptualizing the*

regenerative system minimizes waste and resource consumption[52] by closing product lifecycles through reuse, repair, remanufacturing, and recycling.[53] These strategies aim to decouple economic activity from finite resource consumption, guided by principles of *waste and pollution elimination*, *continuous material use*, and *natural system regeneration*.[54]

The pervasive nature of plastic waste and its associated environmental harms make the plastics industry, particularly food packaging, a compelling case for CE implementation. Ideally, a circular plastics economy should apply the aforementioned CE principles to reduce the use of virgin, fossil-fuel-based feedstocks and minimize energy consumption throughout the plastic lifecycle.[55] This approach aims to reduce dependence on finite resources, mitigate pollution, and enhance resource efficiency, contributing to a more sustainable and resilient system. A circular plastics economy for food packaging should involve several key strategies. Prioritizing recycled and bio-based feedstocks is crucial for reducing reliance on virgin fossil fuels which requires investment in recycling infrastructure and the development of innovative, functional, and compostable bioplastics.[56] It necessitates responsible sourcing practices to minimize the environmental and social impacts of resource extraction, including ensuring fair labor practices, protecting biodiversity, and reducing GHG emissions.[57] Designing for circularity, using compatible materials, and standardized components, and minimizing complexity, enables reuse and recycling.[58] Investment in advanced recycling technologies, such as chemical recycling, is needed to handle complex plastic waste streams, recover high-value materials, and complement traditional

circular economy: An analysis of 114 definitions, 127 Resources, Conservation and Recycling 221, 2017; Prieto-Sandoval and others, *Towards a consensus on the circular economy,* 179 Journal of Cleaner Production 605, 2018.; Korhonen and others, *Circular Economy: The Concept and its Limitations,* 143 Ecol Econ 37, 2018.

[52] Stahel, *The circular economy,* 531 Nature 435, 2016, p.435.

[53] Stahel, *op. cit.* note 52, p.435.; Suárez-Eiroa and others, *Operational principles of circular economy for sustainable development: Linking theory and practice,* 214 Journal of Cleaner Production 952, 2019, p.957.

[54] Sariatli, *Linear economy versus circular economy: a comparative and analyzer study for optimization of economy for sustainability,* 6 Visegrad Journal on Bioeconomy and Sustainable Development 31, 2017; Geissdoerfer and others, *op. cit.* note 18.; Korhonen and others, *op. cit.* note 52; Suárez-Eiroa and others, *op. cit.* note 54; Velenturf and Purnell, *op. cit.* note 15.

[55] Bucknall, *Plastics as a materials system in a circular economy,* 378 Philos Trans A Math Phys Eng Sci 20190268, 2020, p.4.; EEA, *op. cit.* note 14, p.9

[56] Ferreira-Filipe and others, *Are Biobased Plastics Green Alternatives?—A Critical Review,* 18 International Journal of Environmental Research and Public Health 7729, 2021, p.11-12.

[57] von Rosing and others, 'Chapter 13 - Sustainable sourcing practices' in von Rosing (ed), *The Sustainability Handbook, Volume 1* (Elsevier 2025). p. 197.

[58] Mesa, *Design for circularity and durability: an integrated approach from DFX guidelines,* 34 Research in Engineering Design 443, 2023, p. 446.

mechanical recycling.[59] Developing closed-loop systems, where plastic waste is collected, processed, and reintroduced into production, minimizes environmental leakage and fosters circularity.[60] Finally, raising consumer awareness about responsible plastic consumption, proper waste disposal, and the benefits of recycled products is crucial.[61] Also, clear labeling and educational campaigns can empower consumers to make informed choices.

On the other hand, implementing a CE for PFP faces several economic, technical, and social challenges. Economic barriers include the sometimes higher cost of recycled plastic compared to virgin plastic, along with the substantial investment needed for new infrastructure and technologies.[62] Technical challenges arise from the limitations of current recycling technologies, particularly in handling mixed plastic waste and maintaining the quality of recycled materials.[63] Social barriers, such as consumer behavior and lack of awareness, can also hinder the adoption of circular practices.[64] Emphasizing environmental, economic, and social equity and applying CE principles to the plastics industry presents a critical opportunity to advance sustainable development and foster resilience.[65] The shift requires collaborative efforts from businesses, policymakers, researchers, and consumers to overcome existing barriers and accelerate the transition toward a true CE for PFP.

2.4. SCE for Plastic Food Packaging

While the European Commission's revised monitoring framework for the CE aims to foster a sustainable, competitive, and resilient economy aligned with the UN's sustainable development goals,[66] simply adopting CE practices (such as waste

[59] Mangold and von Vacano, *The Frontier of Plastics Recycling: Rethinking Waste as a Resource for High-Value Applications,* 223 Macromolecular Chemistry and Physics 2100488, 2022, p. 9 and 14.
[60] Shamsuddoha and Kashem, *Zero Plastic Drive: A Comprehensive Review on Unveiling Innovative Sustainable Solutions for a Circular Plastics Economy,* 16 Sustainability 10329, 2024, p.10 and 20.
[61] de Sousa, *Consumer Awareness of Plastic: an Overview of Different Research Areas,* 3 Circular Economy and Sustainability 2083, 2023.
[62] Shamsuddoha and Kashem, *op. cit.* note 61, p.10.
[63] Bening and others, *Towards a circular plastics economy: Interacting barriers and contested solutions for flexible packaging recycling,* 302 Journal of Cleaner Production 126966, 2021, p.6.
[64] Gonella and others, *A behavioral perspective on circular economy awareness: The moderating role of social influence and psychological barriers,* 441 ibid.141062, 2024, p.3
[65] Kirchherr and others, *op. cit.* note 51, p.229
[66] Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: on a revised monitoring framework for the circular economy, 2023, p.2.

minimization, extended material use, and resource efficiency) does not inherently guarantee sustainability.[67] A comprehensive assessment of CE's actual benefits requires a holistic, impact-based approach that considers the broader sustainability implications of these practices.[68]

The notion of sustainable development, as introduced in the Brundtland Report[69] and inclusive of the goals articulated in the 2030 Agenda,[70] aims to establish a framework encompassing social, economic, and environmental sustainability. However, the concept of "balancing" these dimensions has faced criticism for its lack of practical success, often resulting in the prioritization of one aspect over others.[71] Frameworks like the planetary boundaries[72] focus exclusively on maintaining Earth's ecological limits within which human activity must operate, while Raworth's Doughnut Economy, which builds on this framework, redefines the parameters of sustainable development by incorporating a social foundation.[73] The Doughnut Economy defines a "safe and just space" for human activity, bounded by an ecological ceiling (planetary boundaries) and a social floor (minimum social standards).[74] This framework advocates for a shift from balancing competing priorities to ensuring that all economic activity and social progress operate within these defined ecological and social boundaries. Consequently, sustainable circular plastic production necessitates a multifaceted approach encompassing environmental, technological, economic, and social considerations.[75] Beyond reducing pollution (environmental), it requires

[67] Ivanescu and Sorlescu, *The green economy: EU vision for competitive and sustainable development,* 10 Progress in Industrial Ecology, an International Journal 45, 2016, p. 45; Schroeder and others, *The Relevance of Circular Economy Practices to the Sustainable Development Goals,* 23 Journal of Industrial Ecology 77, 2019, p.81 and 92.; Mantalovas[1] and others, *Are circular practices always environmentally sustainable?*, 2024, p.99.

[68] Komiyama and Takeuchi, *Sustainability science: building a new discipline,* 1 Sustainability Science 1, 2006, p.3.; Geissdoerfer and others, *op. cit.* note 18. p.; Haupt and Hellweg, *Measuring the environmental sustainability of a circular economy,* 1-2 Environmental and Sustainability Indicators 100005, 2019, p.5.

[69] WCED, *Our Common Future* 1987

[70] UN, Transforming our world: the 2030 Agenda for Sustainable Development, 2015, defined 17 Sustainable Development Goals (SDGs)

[71] Heidi Rapp, *The hierarchy of resource use for a sustainable circular economy,* 47 International Journal of Social Economics 27, 2020.; Velenturf and Purnell, *op. cit.* note 15; Sjåfjell and Cornell, *What the actual ….? Tensions in the science–business–policy interface for global sustainability,* European Law Open 1, 2024.

[72] Rockström and others, *A safe operating space for humanity,* 461 Nature 472, 2009.

[73] Raworth, *A safe and just space for humanity: can we live within the doughnut?,* 2012; Raworth, *A Doughnut for the Anthropocene: humanity's compass in the 21st century,* 1 The Lancet Planetary Health e48, 2017.

[74] Raworth, *op. cit.* note 74, p.e48

[75] Ghisellini and others, *A review on circular economy: The expected transition to a balanced interplay of environmental and economic systems,* 114 Journal of Cleaner Production 11, 2016, p.27.; Velenturf and Purnell, *op. cit.* note 15

integrating advanced recycling technologies (technological), ensuring cost-effective production (economic), and fostering consumer awareness and acceptance of recycled plastics (social).[76] Progress towards a sustainable circular economy (SCE) should be measured not solely by recycling rates, but also by broader sustainability goals encompassing environmental protection, economic resilience, and social equity. Integrating a robust sustainability lens into plastic production is crucial for enhancing the CE's long-term efficacy. A true SCE builds upon CE foundations by prioritizing environmental sustainability, human health, and social impacts. It addresses not only waste reduction and resource reuse but also broader impacts on ecosystems and communities.[77] However, potential adverse effects of certain CE practices must be considered as well.[78] For instance, recycling, while central to CE, can be energy-intensive and potentially less environmentally sound than using virgin materials in some cases.[79] Therefore, achieving a truly SCE necessitates a holistic framework that transcends a narrow focus on waste reduction, encompassing resource conservation, comprehensive lifecycle assessments of materials and products, as well as the social and ethical dimensions of circularity.[80] Applying a holistic lifecycle perspective across the entire value chain – from sourcing and production to recycling and end-of-life management – can significantly enhance the sustainability of products, particularly in the food packaging sector.[81] This entails careful consideration of material selection, packaging design, and the systems that support reuse and recycling.

Several key strategies are essential for achieving a SCE for PFP. First of all, integrating eco-friendly materials into a circular PFP system, designing packaging for recyclability or compostability, and establishing the necessary infrastructure to support these processes are crucial for minimizing waste generation and resource depletion.[82] Additionally, further waste minimization can be achieved through PFP optimization, including reducing over-packaging and exploring innovative designs

[76] Kumar and others, *op. cit.* note 40, p.26.
[77] Velenturf and Purnell, *op. cit.* note 15, p.1453
[78] Castro and others, *The rebound effect of circular economy: Definitions, mechanisms and a research agenda,* 345 Journal of Cleaner Production 131136, 2022, p.2
[79] Velenturf and Purnell, *op. cit.* note 15, p.1448 *and* Haupt and Hellweg, *op. cit.* note 69, p.1
[80] Ayaz and Tatoglu, *Unveiling the power of social value: Catalyzing circular economy in emerging market SMEs,* 453 Journal of Cleaner Production 142245, 2024, p.4.
[81] Vidal and others, *Designing a circular carbon and plastics economy for a sustainable future,* 626 Nature 45, 2024, p.50.
[82] El-Sayed and Youssef, *Eco-friendly biodegradable nanocomposite materials and their recent use in food packaging applications: a review,* 1 Sustainable Food Technology 215, 2023; UNEP, *op. cit.* note 50, p.24

and material alternatives to transition away from single-use plastics.[83] Sustainable sourcing of both ingredients and packaging materials is equally critical to minimizing environmental and social harm.[84] Finally, energy-efficient production methods across the entire supply chain, from food processing to packaging manufacturing, are essential for reducing the overall environmental footprint, requiring the adoption of energy-efficient technologies and process optimization.[85]

The case of polyethylene terephthalate (PET), commonly used in beverage bottles, exemplifies the interconnectedness of *environmental*, *technological*, *economic*, and *social* factors in achieving sustainability. *Environmentally*, increasing the use of recycled PET (rPET) minimizes pollution from plastic production and disposal, aligning with the EU's 2030 target[86] for reusable or recyclable plastic packaging.[87] *Technologically*, advancements in recycling, particularly chemical recycling, are pivotal for a SCE for PET.[88] These technologies enable the breakdown of PET into its base components, allowing for the production of high-quality, food-grade rPET.[89] *Economically*, investing in efficient sorting and recycling infrastructure can create a cost-effective system for collecting and processing PET waste, making rPET a viable alternative to virgin PET.[90] Socially, public awareness campaigns promoting recycling and the use of rPET products can drive consumer demand for recycled content.[91] PET recycling can also create local jobs in collection, sorting, and processing, fostering community engagement and economic inclusion.[92]

[83] UNEP, *op. cit.* note 83, p.58**;** EMF, *The Global Commitment 2023 Progress Report*, 2023, p.5 and 16.
[84] Marsh and Bugusu, *op. cit.* note 28, p.R54; KerXin and others, *A study on the benefits of eco-friendly packaging on sustainable supply chain management in fast moving consumer goods industry,* 136 E3S Web Conf 04092, 2019.; Arfelli and others, *op. cit.* note 28, p.319.
[85] Marsh and Bugusu, *op. cit.* note 28, p.R53. ; Arfelli and others, *op. cit.* note 28., p.325.
[86] By 2030, all plastic packaging placed on the EU market should be either reusable or recyclable in a cost-effective manner. (Commission, *A European Strategy for Plastics in a Circular Economy - Brochure*, 2022. p.9)
[87] Babaei and others, *Chemical recycling of Polyethylene terephthalate: A mini-review,* 12 Journal of Environmental Chemical Engineering 112507, 2024; Wolberg, *The Performance of Recycled Plastics vs Virgin Plastics* (https://oceanworks.co/blogs/ocean-plastic-news/the-performance-of-recycled-vs-virgin-plastics).
[88] Muringayil Joseph and others, *Polyethylene terephthalate (PET) recycling: A review,* 9 Case Studies in Chemical and Environmental Engineering 100673, 2024, p.6
[89] *Loc. cit.*
[90] Ibid.. p.5
[91] Goldsberry, *New Survey Shows Consumers Want Products Made from Recycled Materials*, 2021, online available: https://www.plasticstoday.com/packaging/new-survey-shows-consumers-want-products-made-from-recycled-materials; Muringayil Joseph and others, *op. cit.*. p.11.
[92] Barford and Ahmad, *A Call for a Socially Restorative Circular Economy: Waste Pickers in the Recycled Plastics Supply Chain,* 1 Circular Economy and Sustainability 761, 2021.; Karasik and others, *Inequitable distribution of plastic benefits and burdens on economies and public health,* 9 Frontiers in Marine Science 1017247, 2023, p.04.

Furthermore, promoting recycling cultivates a culture of environmental responsibility and encourages behavioral changes that contribute to broader sustainability goals.[93] Ensuring equitable access to recycling infrastructure is also crucial for addressing social inequalities and allowing all communities to participate in and benefit from the CE.[94] Accordingly, achieving a SCE for PET requires a comprehensive strategy integrating advancements in recycling technologies, improved sorting infrastructure, optimized collection systems, and increased public awareness regarding the benefits of rPET. This integrated approach, considering technological, economic, and social factors, is essential to mitigate PET's environmental impact while fostering economic development and social responsibility—critical pillars of a sustainable future.

In conclusion, a SCE for plastics demands a comprehensive, holistic approach that integrates environmental soundness, social justice, and responsibility throughout the entire lifecycle of PFP, from raw material extraction to end-of-life management. This approach acknowledges the interconnectedness of environmental, technological, economic, and social factors, as highlighted by Geissdoerfer et al. and Velenturf et al.[95] By embracing this comprehensive perspective, a more resilient, inclusive, and ultimately sustainable PFP industry can be fostered, benefitting both the environment and society as a whole. This transition necessitates a comprehensive reevaluation of practices and policies, including those governing EU food packaging, prioritizing resource efficiency, waste reduction, and the equitable distribution of environmental benefits. Such a shift requires not only technological innovation but also fundamental changes in consumption patterns and a renewed commitment to sustainable development. The subsequent section will delve into the analysis of EU regulations relevant to PFP, identifying current shortcomings, and assessing their effectiveness in promoting a sustainable and safe food packaging system. This analysis will provide a comprehensive understanding of the regulatory landscape and its impact on achieving sustainability and circularity in the PFP industry.

[93] de Sousa, *op. cit.* note 62, p. 2090-2091.
[94] Solaja and others, *Examining Socio-Demographics and Understanding Business Factors among Plastic Bottle Waste Collectors in Ogun State, Nigeria,* Recycling and Sustainable Development, 2024, p.15-16.; Stoett and others, *Global plastic pollution, sustainable development, and plastic justice,* 184 World Development 106756, 2024, p.7.
[95] Geissdoerfer and others, *op. cit.* note 18, p.765**;** Velenturf and Purnell, *op. cit.* note 15, p.1441

3. THE EU'S TRANSITION TO A SUSTAINABLE CE IN PLASTIC FOOD PACKAGING: ADDRESSING CHALLENGES THROUGH LAW

3.1. The EU CE Policy Framework Towards Sustainable Plastic Food Packaging

The EU is actively transitioning from a linear to a CE model, recognizing the crucial role of packaging and packaging waste in this transformation.[96] This shift is driven by the necessity of transitioning towards sustainability, as articulated in key EU policy documents and legislative initiatives. Several interconnected strategies and regulations form the core of the EU's approach to sustainable PFP within the CE framework. The European Strategy for Plastics in a Circular Economy (Plastics Strategy) lays the foundation for this transition by emphasizing sustainability in the design, use, and recycling of plastics throughout the EU.[97] A key objective is to ensure that all plastic packaging placed on the EU market is either reusable or recyclable in a cost-effective manner by 2030.[98] The Plastics Strategy also prioritizes maintaining high food safety standards for PFP, particularly for recycled plastics intended for food-contact applications, while simultaneously promoting investment and innovation in CE solutions.[99] The European Green Deal (EGD), serving as Europe's roadmap towards climate neutrality, complements the Plastics Strategy. The EGD introduces proposals concerning sustainable products, including measures to provide consumers with transparent information on the environmental impact of products.[100] These initiatives aim to combat greenwashing and ensure the availability of sustainable alternatives for consumers.[101] The Circular Economy Action Plan (CEAP), an integral part of the EGD, further reinforces the EU's commitment to advancing sustainable packaging. The CEAP initially prompted revisions to the Packaging and Packaging Waste Directive (PPWD) and the Single-Use Plastics (SUP) Directive,[102] setting ambitious targets for improved recyclability and increased recycled content in plastic packaging, including a minimum of 30 % recycled content by 2030. This process culminated in the adoption of the Regulation on

[96]Karamfilova, *Revision of Directive 94/62/EC on packaging and packaging waste* (Implementation Appraisal, 2022
[97] EU Plastics Strategy
[98] EU Plastics Strategy
[99] EU Plastics Strategy
[100] COM(2019) 640 final
[101] New proposals to make sustainable products the norm (europa.eu).
[102] EC, Proposal for a Regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC (European Commission 2022),

Packaging and Packaging Waste (PPWR),[103] which replaces the PPWD. Labeling provisions for material composition and reusability, coupled with targets for reuse and refill systems, are also central components of the CEAP.[104] These measures aim to empower consumers to make informed choices, support the development of reusable packaging systems, and reduce reliance on single-use packaging.
Finally, a policy framework for biobased, biodegradable, and compostable plastics aims to provide a comprehensive understanding of the associated challenges and benefits.[105] Grounded in the principles of the Plastics Strategy, the EGD, and the CEAP, this framework establishes conditions to ensure a positive overall environmental impact from the production and consumption of these materials.[106] It addresses policy gaps, guides future EU policy and legislation, and provides a common market approach – harmonizing standards and practices – to prevent unsustainable developments and foster a shared understanding across the EU. While this policy framework is not legally binding, the newly adopted PPWR introduces mandatory applications for some of these materials.

The EU's integrated approach to PFP, encompassing the Plastics Strategy, the EGD, and the CEAP aims to foster a sustainable and safe packaging ecosystem by promoting sustainable practices and addressing regulatory gaps.[107] This evolving regulatory landscape presents both opportunities and challenges for EU businesses, necessitating careful consideration of the legal and practical implications of the growing requirements.[108] A more detailed analysis of the mandatory instruments specifically targeting PFP is provided in the following subsection.

3.2. The regulatory landscape of Plastic Food Packaging Production and Use

EU regulations play a crucial role in shaping food packaging waste management.[109] The EU's regulatory framework for PFP addresses its entire lifecycle, from design and production to waste management and recycling,

[103] Regulation (EU) 2025/40
[104]https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-revision-of-packaging-and-packaging-waste-directive-(refit).
[105] EC, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU policy framework on biobased, biodegradable and compostable plastics*, 2022
[106] Ibid.
[107] New Circular Economy Action Plan
[108] J.-P. Schweitzer, *op. cit.* note 42, p.20.**;** Thapliyal and others, *Current Status of Sustainable Food Packaging Regulations: Global Perspective,* 16 Sustainability 5554, 2024.
[109] Schmidt and others, *op. cit.* note 16, p. 1751.

establishing specific requirements for the production, composition, reusability, and recoverability of all packaging destined for the EU market. Key legislative instruments include the PPWD and the new PPWR, the Food Contact Materials Regulation[110] (FCM Regulation), the Regulation on plastic materials and articles intended to come into contact with food[111] (Plastic Regulation), and the Single-Use Plastics Directive (SUP Directive). For the end-of-life phase of PFP, this framework incorporates the PPWD (and PPWR), and the Waste Framework Directive (WFD), as well as the Regulation on recycled plastic materials and articles intended to come into contact with foods[112] (Plastics Recycling Regulation). This section focuses specifically on the design, production, and use phases of PFP, while the following section will address its end-of-life management.

The PPWD forms a cornerstone of the EU's regulatory framework for packaging, establishing general rules for all packaging[113] destined for the EU market. Its primary objective is to minimize the environmental impact of packaging across various sectors by addressing its design, production, and end-of-life management, including plastic packaging used for food. Over time, revisions and amendments to the PPWD have incorporated provisions relevant to PFP. These include measures to reduce the consumption of lightweight plastic carrier bags,[114] mandating Extended Producer Responsibility (EPR) schemes for all packaging, and increased recycling targets[115] for packaging waste. Article 9 and Annex II of the PPWD outline Essential Requirements for packaging manufacturing and composition, promoting reusability and recoverability through material recycling,

[110] EU, Regulation (EC) No 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 89/109/EEC (2004), OJ L 338 of 13/11/2004 (hereinafter: Regulation 1935/2004)
[111] EU, Commission Regulation (EU) No 10/2011 of 14 January 2011 on plastic materials and articles intended to come into contact with food (2011), OJ L 12 of 15/1/2011 (hereinafter: Regulation 10/2011)
[112] EU, Commission Regulation (EU) 2022/1616 of 15 September 2022 on recycled plastic materials and articles intended to come into contact with foods, and repealing Regulation (EC) No 282/2008 (2022), OJ L 243 of 20/09/2022 (hereinafter: Regulation 2022/1616)
[113] According to paragraph 1 in Article 3 packaging shall mean all products made of any materials of any nature to be used for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer. 'Non-returnable` items used for the same purposes shall also be considered to constitute packaging.
[114] EU, Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags (European Parliament and the Council 2015), OJ L 115, 6/05/2015, (hereinafter: Directive 2015/720)
[115] EU, Directive (EU) 2018/852 of the European Parliament and of the Council of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste (EU 2018), OJ L 150 of 14/06/2018 (hereinafter: Directive 2018/852)

energy recovery, or composting. Minimizing noxious and hazardous substances in packaging is also a key requirement, especially when it comes into direct contact with food.[116] Nonetheless, while important, the PPWD's emphasis on end-of-life management has been criticized for insufficiently addressing upstream aspects of the packaging lifecycle, such as design and material choices.[117] This focus potentially hinders a more holistic approach to circularity. Furthermore, the directive has faced challenges related to implementation delays and inconsistencies across Member States (MSs), and inadequate recycling targets, leading to regulatory uncertainty and burdens for producers.[118] The persistent challenges of growing packaging waste, low recycling quality, and reliance on virgin plastics underscore the need for more robust and harmonized measures to achieve the EU's sustainability and CE objectives.[119] To address these shortcomings, the Commission proposed a revision of the PPWD, culminating in the adoption of the PPWR on 16 December 2024, effective as of 11 February 2025.[120] Building upon the existing framework, the PPWR introduces significant changes, particularly for plastic packaging, with a stronger emphasis on sustainability, circularity, waste reduction, and minimized environmental impact. A key provision of the PPWR mandates that all packaging be recyclable by 2030,[121] supported by clear assessment criteria to encourage design for circularity from the outset.[122] Furthermore, businesses in specific sectors, such as takeaway and retail, shall offer reusable or refillable packaging options, incentivizing a shift away from single-use packaging.[123] To empower consumers, the PPWR mandates harmonized environmental labeling on all packaging, including PFP, providing clear information about recyclability and material composition to facilitate informed purchasing decisions.[124] The PPWR also introduces mandatory requirements for compostable packaging (mentioned above). Specifically, by 12 February 2028, tea bags, coffee pods, other soft single-serve beverage units, and sticky labels on fruit and vegetables must be industrially compostable, and

[116] Annex II. of the Directive 94/62/EC
[117] Tencati and others, *Prevention policies addressing packaging and packaging waste: Some emerging trends,* 56 Waste Management 35, 2016, p.36.**;** Bartl, *Withdrawal of the circular economy package: A wasted opportunity or a new challenge?,* 44 ibid.1, 2015, p.2.
[118] Karamfilova, *op. cit.* note 97.
[119] Ibid.
[120] https://www.consilium.europa.eu/en/press/press-releases/2024/12/16/sustainable-packaging-council-signs-off-on-new-rules-for-less-waste-and-more-re-use-in-the-eu/.
[121] In line with the European Green Deal and the new Circular Economy Action Plan
[122] https://foodpackagingforum.org/news/european-council-adopts-final-provisions-of-ppwr.
[123] Article 28 and 32 obligations related to refill and refill obligations for the takeaway sector; Article 29. reuse targets, Section 5 Artice 51 Reuse and refill, Annex VI. Requirements specific to reuse systems and refill stations of Regulation (EU) 2025/40
[124] Article 12 of Ibid. and see also Commission, *Circular economy : new rules on packaging and packaging waste* (Publications Office of the European Union 2022

potentially home-compostable where required by MS.[125] While the Regulation does not impose specific rules on biobased plastics currently, the Commission is required to review their technological and environmental performance within three years and may propose subsequent legislation with sustainability requirements and targets if deemed necessary.[126] Further strengthening the CE, the PPWR establishes concrete targets for minimum recycled plastic content in packaging, promoting the use of recycled materials and reducing reliance on virgin plastics.[127] Finally, to protect human health and the environment, the Regulation sets stricter limits on hazardous substances, including PFAS,[128] in packaging materials.[129] Both the PPWD and PPWR address the complex issue of chemicals in plastics, particularly FCMs. However, regulatory inconsistencies, such as the simultaneous presence of certain substances on both prohibited and approved lists, create ambiguity and complicate efforts to ensure the safety and quality of plastics.[130] This challenge is particularly pertinent given the widespread use of FCMs and the potential for component migration into food, posing risks to human health or altering the food itself.[131]

The EU has implemented two key regulations to address the potential risks of chemical migration from plastic FCMs into food, aiming to ensure both consumer safety and the effective functioning of the internal market. Regulation 1935/2004 (FCM Regulation) establishes general safety and quality principles for all FCMs,[132] aiming to ensure a high level of consumer protection and safeguard

[125] Article 9 (1) of Regulation (EU) 2025/40
[126] Article 8 (1) of Regulation (EU) 2025/40
[127] Article 7 in Regulation (EU) 2025/40
[128] According to Recital 20 of Regulation (EU) 2025/40, Per- and polyfluoroalkyl substances (PFAS) are a group of thousands of synthetic chemicals that are used widely in the Union as well as in the rest of the world in a broad range of applications. Regarding PFAS tonnage, food contact material and packaging is one of the most relevant sectors. All PFAS in the scope of this Regulation are either very persistent themselves, or degrade into very persistent PFAS in the environment. When looking specifically at human health endpoints considered of most concern following long-term exposure of humans, i.e. carcinogenicity, mutagenicity, reproductive toxicity, including effects on or via lactation, and specific target organ toxicity, a large number of PFAS have a classification for at least one of these five endpoints, Based on the physical properties of PFAS, particularly persistence, along with identified health effects for some PFAS, PFAS represent an environmental and human health hazard.
[129] Article 5 in Regulation (EU) 2025/40
[130] Wiesinger and others, *Deep Dive into Plastic Monomers, Additives, and Processing Aids,* 55 Environmental Science & Technology 9339, 2021, p.9346
[131]Karamfilova and Sacher, *Food Contact Materials Regulation (EC) 1935/2004 - European Implementation Assessment Study*, 2016, p. 98.
[132] Beyond adhering to the FCM Regulation, all FCMs must be produced in compliance with Good Manufacturing Practices stipulated in Regulation 2023/2006 of 22 December 2006 on good manufacturing practice for materials and articles intended to come into contact with food, OJ L 384 of 29/12/2006

human health.[133] The regulation acknowledges the diverse nature of FCMs and their potential impact on both food quality and human health,[134] addressing crucial aspects such as labeling, compliance documentation, traceability, and enforcement mechanisms.[135] However, the regulation also presents certain limitations regarding the design, production, and use of PFP. For instance, the handling of Non-Intentionally Added Substances (NIAS), such as impurities and by-products, poses challenges for manufacturers during production.[136] While the FCM Regulation holds them responsible for demonstrating NIAS safety,[137] the lack of specific migration limits creates practical difficulties.[138] This ambiguity makes compliance demonstration difficult and raises concerns about potential, albeit unknown, health risks. Although a de facto threshold of 10 µg/kg food, derived from the migration limit for unauthorized substances used behind a functional barrier, is often applied in practice, the absence of legally established limits for NIAS remains a significant regulatory gap.[139] This gap can stifle the development and use of novel materials and processing techniques. Further, the FCM Regulation's limited scope regarding environmental sustainability and CE objectives impacts design choices.[140] The regulation prioritizes preventing harmful chemical migration into food but lacks provisions actively promoting sustainable materials or recycled plastics.[141] This omission can discourage the design and production of food packaging with improved environmental profiles, hindering the transition to a CE for plastics. This limited scope, including the lack of attention to reusable systems, highlights areas for regulatory improvement. To effectively address these limitations and align with broader EU initiatives such as the PPWR, the EGD, and the SUP Directive, the FCM Regulation needs a more integrated approach. This includes incorporating

[133] Paragraph 1 of Article 1 of Regulation 1935/2004

[134] SAFE, *Food Contact Materials (FCMs) - Feedback to the European Commission's Evaluation and Fitness Check Roadmap,* 2020, p.3.

[135] https://food.ec.europa.eu/food-safety/chemical-safety/food-contact-materials/legislation_en.

[136] Leeman and Krul, *Non-intentionally added substances in food contact materials: how to ensure consumer safety,* 6 Current Opinion in Food Science 33, 2015, p.34

[137] Article 3 of Regulation 1935/2004 and Article 19 of Regulation 10/2011

[138] https://foodpackagingforum.org/resources/background-articles/non-intentionally-added-substances-nias.

[139] Grob and others, *Food Contamination with Organic Materials in Perspective: Packaging Materials as the Largest and Least Controlled Source? A View Focusing on the European Situation,* 46 Critical Reviews in Food Science and Nutrition 529, 2006; Geueke and others, *Food contact substances and chemicals of concern: a comparison of inventories,* 31 Food Additives & Contaminants: Part A 1438, 2014; https://foodpackagingforum.org/resources/background-articles/non-intentionally-added-substances-nias

[140] ZWE, *Food packaging: safety first - Towards toxic-free and future-proof packaging*, 2023, p.2.

[141] SANTE, *Study on sustainability in the context of food contact materials (FCM) in view of a possible revision of the FCM legislation*, 2024, p.6

environmental considerations into the design and production phases, fostering innovation, and incentivizing the adoption of sustainable plastic use.[142] Such a holistic framework would better balance food safety with environmental concerns, promoting a CE for plastic food contact articles.[143]

Given the limitations of the general FCM framework, Regulation 10/2011 (Plastic Regulation) provides supplementary, specific requirements for plastic FCMs. This regulation establishes requirements for the manufacturing and marketing of plastic materials and articles intended to come into contact with food.[144] It impacts manufacturers, importers, and retailers of plastic FCMs, influencing material choices, manufacturing processes, and product compliance. Specifically, the Plastics Regulation establishes a Union List of authorized substances that can be used in the manufacture of plastic FCMs,[145] and outlines compliance rules.[146] Furthermore, the regulation mandates that additives used in plastic FCMs must undergo a safety assessment by the European Food Safety Authority and be included in the Union List.[147] This requirement impacts both the design and production stages, as manufacturers must ensure compliance with permitted substances and their respective restrictions. Crucially, the Plastics Regulation establishes migration limits – determined by EFSA based on toxicological data – for substances transferring from plastic FCMs into food to ensure food safety during the use phase.[148] Compliance with these limits is a critical aspect of production quality control and impacts product safety for consumers. The regulation also outlines specific rules for compliance testing and documentation, influencing quality control procedures during production.[149] The Plastic Regulation undergoes regular revisions and amendments to reflect scientific advancements, address emerging concerns and adapt to evolving industry practices.[150]

Beyond the overarching framework of the FCM and Plastic Regulation, the Single-Use Plastics Directive (SUP Directive) targets specific plastic products to mitigate their environmental impact, particularly on marine ecosystems and human

[142] EC, *Commission staff working document evaluation of the legislation on food contact materials - Regulation (EC) No 1935/2004*, 2022, p.45
[143] SANTE, *op. cit.* note 142, p. 7.
[144]Paragraph 2 of Article 1 of Regulation 10/2011
[145]Article 5 and Annex I. of Regulation 10/2011
[146] Chapter V. of Regulation 10/2011
[147] https://www.foodpackagingforum.org/food-packaging-health/food-packaging-materials/plastics
[148]https://food.ec.europa.eu/safety/chemical-safety/food-contact-materials/legislation_en
[149] Chapter V. of Regulation 10/2011
[150] Paragraph 3 of Article 15 of Regulation 10/2011

health.[151] This Directive complements the aforementioned regulations by addressing plastic pollution stemming from commonly littered items. The Directive implements a ban on ten single-use plastic products frequently found on European beaches. For the food packaging sector, this ban notably includes expanded polystyrene food and beverage containers and cups, directly impacting material choices during design and production.[152] From December 31, 2024, producers of lightweight plastic carrier bags and specific types of packaging, including takeaway food containers, packets and wrappers, plastic drinks containers, and cups (including covers and lids), became subject to mandatory EPR schemes.[153] According to Article 8, MSs are obligated to establish these EPR schemes for all single-use plastic products listed in Part E of the Annex. These schemes require producers to cover the costs of waste management and litter cleanup associated with their products, collect and report data on these materials, and fund awareness-raising campaigns to promote responsible disposal and recycling.[154] The overarching goal of these EPR schemes is to incentivize producers to consider the environmental impact of their products throughout their lifecycle, influencing design and production choices towards more sustainable solutions.[155] The use phase might be also impacted, as consumers become more aware of proper disposal and recycling practices through the funded awareness campaigns. Furthermore, the SUP Directive establishes recycled content targets for plastic beverage bottles, mandating the incorporation of 25 % recycled plastic in PET beverage bottles by 2025, rising to 30 % for all plastic beverage bottles by 2030.[156] These targets directly impact production processes, requiring manufacturers to incorporate recycled materials into their production streams and can foster a CE for plastic beverage bottles.

Focusing on the design, production, and use phases of PFP, the current EU regulatory landscape presents a fragmented approach. While the FCM and the Plastic Regulation prioritize consumer safety, they lack comprehensive CE integration, particularly impacting the aforementioned stages. Although the SUP Directive and PPWR aim to bridge this gap, a more holistic framework is needed to effectively harmonize these regulations and incentivize sustainable innovation across the entire lifecycle of PFP.[157] The following section addresses the analysis of end-of-life management.

[151] Recital 5 of Directive 2019/904
[152] Article 5 and Part B of the Annex of Directive 2019/904
[153]Article 8 and Part E of the Annex in Directive 2019/904
[154] Paragraph 2 and 3 of Article 8 Directive 2019/904
[155] Maitre-Ekern, *Re-thinking producer responsibility for a sustainable circular economy from extended producer responsibility to pre-market producer responsibility,* 286 Journal of cleaner production 125454, 2021, p.2.
[156]Paragraph 1 of Article 9 of Directive 2019/904
[157] ZWE, *op. cit.* note 141, p.19.

3.3. The regulatory landscape of the end-of-life of plastic food packaging

Current end-of-life management practices for PFP present significant obstacles to achieving a SCE. While energy recovery is the predominant disposal method,[158] followed by recycling, a substantial portion (approximately 25 %) of plastic waste persists in landfills, underscoring systemic inefficiencies.[159] Several interconnected challenges hinder the effective end-of-life management of PFP waste. These include: the chemical complexity and heterogeneity of plastics, material contamination within the waste stream, technical and economic barriers to recycling certain plastic types, the presence of non-plastic components in packaging design, and inadequate recycling infrastructure.[160] Existing recycling technologies, such as mechanical and chemical recycling,[161] face inherent limitations.[162] Plastic degradation during recycling diminishes material quality and economic value, leading to downcycling.[163] Multi-material multilayer plastic packaging, commonly used in food packaging, poses a particular challenge due to separation difficulties, often resulting in downcycling or incineration.[164] Furthermore, insufficient collection infrastructure, cost inefficiencies,[165] and the production of low-quality recycled materials exacerbate the problem.[166] Critically, the presence of various, often overlooked, substances within plastics can compromise recycling processes and the safety and quality of recycled materials.[167]

The EU has introduced key regulatory instruments to address these challenges. The WFD establishes a hierarchical framework for waste management, prioritizing waste prevention and reduction, followed by preparing for reuse, recycling, other recovery (e.g., energy recovery), and disposal as a last resort.[168]

[158] Energy recovery means turning plastic waste into usable heat, electricity, or fuel through incineration or other processes. (https://www.europarl.europa.eu/topics/en/article/20181212STO21610/plastic-waste-and-recycling-in-the-eu-facts-and-figures)
[159] Plastic waste and recycling in the EU: facts and figures | Topics | European Parliament (europa.eu)
[160] Chanda, *Plastics Technology Handbook*, 2017, p.796
[161] https://plasticseurope.org/sustainability/circularity/recycling/recycling-technologies/
[162] Leal Filho and others, *An overview of the problems posed by plastic products and the role of extended producer responsibility in Europe,* 214 Journal of Cleaner Production 550, 2019, p.551
[163] Geyer and others, *op. cit.* note 32, p.2
[164] Kaiser and others, *Recycling of Polymer-Based Multilayer Packaging: A Review,* 3 Recycling 1, 2018, p.8
[165] Van Camp and others, *Exposing the pitfalls of plastics mechanical recycling through cost calculation,* 189 Waste Management 300, 2024.
[166] Soares and others, *op. cit.* note 30, p.7-8.
[167]Wiesinger and others, *op. cit.* note 131, p.9339.
[168] Article 4 and Recital 30 of Directive 2008/98/EC

This hierarchy aims to promote the transition towards a CE by guiding actions towards minimizing waste and maximizing resource utilization. However, implementation faces obstacles. While prevention is paramount, the WFD lacks robust mechanisms and quantitative targets to effectively incentivize packaging waste reduction at the source.[169] The Directive promotes EPR schemes, holding producers accountable for end-of-life management and incentivizing design for recyclability and reuse.[170] Article 11 of the WFD mandates separate collection systems for recyclable waste, including plastics, to ensure high-quality recycling and reduce contamination. Furthermore, Article 11 and Annex V establish ambitious recycling targets, including a 55 % recycling rate for plastic packaging by 2030, and encourage improvements in recycling infrastructure and practices. Nonetheless, the WFD's general framework lacks specific provisions tailored to the complexities of PFP.

The PPWD, along with its amendments, and the new PPWR build upon the WFD by setting specific targets for packaging waste recovery and recycling, including plastic.[171] The PPWR introduces more stringent targets, aiming for higher recycling rates and promoting recycled content in packaging (encompassing PFP).[172] These targets incentivize the development of recycling infrastructure and technologies, and the establishment of re-use and refill systems.[173] While both instruments address EPR, the PPWD mandates EPR schemes only from 31 December 2024 and suffers from inconsistent implementation across MSs.[174] Producers are responsible for waste management costs, but variations in national implementation lead to inefficiencies, inconsistent financial contributions, and a diluted environmental impact.[175] The PPWR aims to strengthen and harmonize EPR requirements across the EU by introducing binding obligations for producers to finance and manage the collection, sorting, and recycling of packaging waste.[176] It mandates standardized EPR schemes, ensuring consistency across MSs, and introduces eco-modulation fees, where producers pay higher fees for non-

[169] Magrini and others, *Municipal solid waste prevention: A review of market-based instruments in six European Union countries,* 38 Waste Management & Research 3, 2020, p.4.
[170] Recital 27 and Article 8 of Directive 2008/98/EC
[171] https://environment.ec.europa.eu/topics/waste-and-recycling/packaging-waste_en
[172] For instance, in the new PPWR there are restrictions on certain single-use plastics, such as pre-packed fruits and vegetables weighing less than 1.5 kg, also all packaging on the EU market shall be recyclable in an economically viable way by 2030
[173] Recital 140 and 149 and Article 26 and 51 of the Regulation (EU) 2025/40
[174] Karamfilova, *op. cit.* note 97, p.5
[175] EUROPEN, *Factsheet on Extended Producer Responsibility (EPR) for used packaging*, 2015, p.4; Emma Watkins, *EPR in the EU Plastics Strategy and the Circular Economy: A focus on plastic packaging*, 2017. p. 9 and 19.
[176] Article 47 of Regulation (EU) 2025/40

recyclable or environmentally harmful packaging.[177] This harmonized approach aims to create a level playing field for businesses, reduce costs, and enhance the overall effectiveness of EPR in promoting a CE for packaging.[178]

Beyond the provisions discussed in Section 3.2, the SUP Directive specifically addresses the end-of-life management of single-use plastics as well, including those used in food packaging. For instance, to facilitate the incorporation of recycled plastic into PET beverage bottles (introduced above), the Directive mandates a separate collection target of 77 % for plastic bottles by 2025, rising to 90 % by 2029.[179] Echoing the UN Sustainable Development Goal 12's[180] emphasis on sustainable consumption and production, the Directive prioritizes the adoption of sustainable and non-toxic reusable products and reuse systems over single-use alternatives to reduce waste generation at the source.[181]

Finally, the Plastics Recycling Regulation,[182] aligned with the CEAP, aims to increase the recycled plastic content, particularly in food packaging while maintaining the same safety standards as those for plastics manufactured under the Plastic Regulation.[183] This regulation covers all recycled plastic types and recycling technologies, including the assessment of recycling processes.[184] A key element is the establishment of a Union register for technologies, recyclers, processes, systems, and decontamination facilities, providing comprehensive information on novel technologies, their properties, developers, and installations.[185] From July 2023, only plastics incorporating recycled plastic produced with a suitable recycling technology[186] (e.g., post-consumer mechanical PET recycling with individual EFSA authorization) or a new technology regulated under Chapter IV, may be placed on the market.[187] Stringent authorization

[177] Paragraph 7 of Article 7 of Regulation (EU) 2025/40
[178] Recital 28 and 36 and Article 1 of Regulation (EU) 2025/40
[179]Paragraph 1 of Article 9 of Directive 2019/904
[180] Ensure sustainable consumption and production patterns (https://sdgs.un.org/goals/goal12)
[181] Recital 2 of Directive 2019/904
[182] On October 10, 2022, the Regulation 2022/1616 replaced Regulation No. 282/2008, which previously governed authorization processes for recycling. However, the earlier regulation did not encompass all recycling technologies, excluding chemical depolymerization, the use of offcuts and scraps, and the use of barrier layers. (source: Recital 3 of the Regulation 2022/1616)
[183] Recital 1 and 16, and Article 4 of Regulation 2022/1616
[184] Recital 5 and Article 1 of Regulation 2022/1616
[185] Article 24 of Regulation 2022/1616
[186] Under Paragraph 1 of Article 3 of Regulation 2022/1616 ‘suitable recycling technology’ is a recycling technology that is shown to be capable of recycling waste into recycled plastic materials and articles that comply with Article 3 of the Framework Regulation and is microbiologically safe.
[187] Paragraph 3 of Article 31 of Regulation 2022/1616

processes and reporting obligations[188] ensure the safety of recycled materials.[189] From October 2024, specific waste management operators involved in plastic collection and pre-processing must establish a third-party certified quality assurance system to control and ensure the quality and traceability of plastic input.[190] The Regulation's comprehensive approach, covering the entire recycling chain, aims to ensure the safety and quality of recycled plastic materials, facilitate enforcement, and support supply chain functionality.[191] The Plastics Recycling Regulation, while aiming for comprehensive coverage of recycled plastics and technologies, faces challenges. Its uncertain applicability to emerging or novel methods could hinder innovation, predominantly for technologies outside the current framework.[192] Furthermore, recycling complex multilayer food packaging structures is difficult, as these often fail to meet stringent food contact material safety standards, limiting the feasibility of certain recycling processes.[193] This regulation must balance promoting innovation with upholding strict safety standards to achieve its long-term goals of reducing raw material reliance and fostering a robust market for safe recycled plastics.[194]

Given the dynamic nature of the EU's regulatory approach to PFP, with ongoing efforts to enhance environmental, health, and safety protections and promote sustainability and circularity, the effectiveness of these measures will ultimately depend on their rigorous implementation and enforcement.

[188] According to Paragraph 4 of Article 13 and Paragraph 1 of Article 14 of Regulation 2022/1616: Developers have reporting obligations every six months, providing the latest information from all installations using the novel technology, which forms the basis for EFSA's opinion on the technology's suitability

[189] Recital 5 and 15 of Regulation 2022/1616

[190] Recital 34 and Article 6 of Regulation 2022/1616

[191] https://food.ec.europa.eu/food-safety/chemical-safety/food-contact-materials/plastic-recycling_en

[192] https://www.fgvw.de/en/news/archive-2022/food-law-new-eu-regulation-eu-2022-1616-recycled-plastic-materials-and-articles-intended-to-come-into-contact-with-foods

[193] Europe, *Functional Barriers for the Use of Recycled Plastics in Multi-layer Food Packaging,* 2017, online available: https://packagingeurope.com/functional-barriers-for-the-use-of-recycled-plastics-in-multi-layer-food-packaging/2083.article; Kaiser and others, *op. cit.* note 165, p.3.; Soares and others, *op. cit.* note 30., p.5.

[194] COM(2020) 98 final

4. CHALLENGES AND OPPORTUNITIES IN INTERNALIZING THE NEGATICE EXTERNALITIES OF PLASTIC FOOD PACKAGING

4.1. Remaining Gaps and Future Directions

Despite extensive legislative efforts in the EU, several gaps still remain in fully internalizing the negative externalities associated with PFP. The current legislation primarily leans on downstream solutions, such as waste management and recycling, but more emphasis is needed on upstream solutions, such as reducing plastic production or promoting alternative materials.[195] For instance, biobased, biodegradable, and compostable PFP offers a potential alternative to conventional options.[196] However, challenges persist, including high production costs, ensuring proper alignment with CE principles throughout their lifecycle (e.g., end-of-life management infrastructure), and the lower performance characteristics of some biodegradable plastics compared to conventional counterparts.[197] Further research and innovation are needed to overcome these limitations and fully realize the potential of these materials within a sustainable food packaging system.[198] This includes research to inform the development of harmonized EU standards and certifications, as well as innovation to meet regulatory requirements for end-of-life management and ensure compliance with existing frameworks such as the WFD.[199]

[195] Reis and others, *op. cit.*, note 5, p.8. ; Greenwood and others, *Many Happy Returns: Combining insights from the environmental and behavioural sciences to understand what is required to make reusable packaging mainstream,* 27 Sustainable Production and Consumption 1688, 2021, p.1701.; Fletcher and others, *Turning off the Tap: How the world can end plastic pollution and create a circular economy* (United Nations Environment Programme 2023

[196] EC, *op. cit.* note 105; Asgher and others, *Bio-based active food packaging materials: Sustainable alternative to conventional petrochemical-based packaging materials,* 137 Food Research International 109625, 2020; Dirpan and others, *A Review on Biopolymer-Based Biodegradable Film for Food Packaging: Trends over the Last Decade and Future Research,* 15 Polymers 1, 2023.

[197] Matthews and others, *A review on European Union's strategy for plastics in a circular economy and its impact on food safety,* 283 Journal of Cleaner Production 125263, 2021; Moshood and others, *Sustainability of biodegradable plastics: New problem or solution to solve the global plastic pollution?,* 5 Current Research in Green and Sustainable Chemistry 100273, 2022; El-Sayed and Youssef, *op. cit.* note 83.; Dirpan and others, *op. cit.* note 197.

[198] EMF, *The New Plastics Economy: Rethinking the future of plastics & catalysing action*, 2017; SWD(2018) 16 final

[199] Misko, *Plastic Packaging in a Circular Economy,* Food Safety Magazin, 2019, p.4; Lovett, *End-of-life options for bioplastics: Clarifying end-of-life options for bioplastics and the role of PLA in the circular economy*, 2020, p.19

The difficulty and low level of recycling multilayer PFP also present a significant hurdle.[200] While these complex structures are essential for preserving food quality and safety, extending shelf life, and ultimately minimizing food waste, their current incompatibility with existing recycling infrastructure raises a critical environmental concern.[201] Eliminating them without viable alternatives could lead to increased packaging and food waste. Furthermore, the lack of clear labeling and consumer awareness regarding proper disposal methods for multilayer packaging exacerbates the problem, often leading to these materials ending up in landfills or incinerators.[202] Encouraging material innovation in recyclable or compostable alternatives for multi-material applications, or requiring product redesigns into mono-material formats, represents a potential regulatory approach for promoting sustainable packaging practices.[203]

Another major issue is the widespread use of potentially harmful chemicals in PFP production and recycling. While chemicals in PFP often serve functional purposes, their potential adverse impacts on human and environmental health, along with the complexities they introduce to recycling processes, raise concerns.[204] These complexities are further amplified in recycled plastics, where the presence of hazardous substances, including NIAS, poses additional challenges.[205] This issue is further compounded by the fragmented nature of current EU regulations on FCMs.[206] The gap between the general FCM Regulation and specific substance regulations hinders comprehensive risk assessment and control of hazardous

[200] Geueke and others, *Food packaging in the circular economy: Overview of chemical safety aspects for commonly used materials,* 193 Journal of Cleaner Production 491, 2018; Matthews and others, *op. cit.* note 198.; Schmidt and others, *Multilayer Packaging in a Circular Economy,* 14 Polymers 1825, 2022.
[201] Matthews and others, *op. cit.* note 198, p. 12
[202] Schmidt and others, *op. cit.* note 201, Ciawi and others, *Redefining Packaging Solutions: The of Split-layer Packaging for Waste Reduction and Climate Action,* 3 J Mod Ind Manuf 12, 2024.
[203] EMF, *op. cit.* note 199.; Fletcher and others, *loc. cit.* note 196.
[204] Geueke and others, *op. cit.* note 201, p.492; Geueke and others, *Prioritization approaches for hazardous chemicals associated with plastic packaging,* 2018; Ciawi and others, *op. cit.* note 203, p. 2-3
[205] EU, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the circular economy package: options to address the interface between chemical, product and waste legislation*, 2018, p.1; Geueke and others, *op. cit.* note 201, p. 492; Matthews and others, *op. cit.* note 198, p. 4; Undas and others, *Safety of recycled plastics and textiles: Review on the detection, identification and safety assessment of contaminants,* 312 Chemosphere 137175, 2023, p.2
[206] Sundqvist-Andberg and Åkerman, *Sustainability governance and contested plastic food packaging – An integrative review,* 306 Journal of Cleaner Production 127111, 2021, p. 11; SANTE, *op. cit.*, note 142, p. 13

chemicals throughout the lifecycle of plastic packaging.[207] Inconsistencies between EU and national regulations create additional complexities and legal uncertainties while tracing and controlling chemicals in recycled plastics for food contact applications presents significant legal and technical challenges.[208] Although the Plastic Recycling Regulation promotes increased use of recycled plastics in FCMs, ensuring safety requires stringent controls and traceability mechanisms to address legacy chemicals and contamination risks.[209]

To foster a truly sustainable and circular PFP system within the EU, the current regulatory environment requires revisions. Promoting innovation through research and development of recyclable and compostable alternatives, particularly for complex multilayer applications, is crucial for minimizing negative externalities. Transitioning towards mono-material designs, which are inherently easier to recycle, should be incentivized through targeted regulatory measures.[210] Furthermore, integrating CE principles into the design phase of PFP, prioritizing material reduction, recyclability, and compostability, is essential. This necessitates implementing eco-design guidelines that internalize the environmental costs associated with PFP.[211] Establishing a transparent and harmonized system with clear standards and labeling requirements will facilitate proper sorting and recycling while improving consumer awareness.[212] Standardizing packaging requirements per product category can streamline material management and reduce complexity, further contributing to a CE.[213]

Finally, incentivizing innovation through targeted regulatory measures and financial support will accelerate the development and adoption of sustainable PFP solutions, ultimately mitigating the negative externalities associated with current

[207] Varalda and others, *Risk assessment of food contact materials,* 22 EFSA Journal e221107, 2024, p.3; SANTE, *op. cit.*, note 142, p. 5
[208] Poças and do Céu Selbourne, *Drivers, advances, and significance of measures for effective circular food packaging,* 7 Frontiers in Sustainable Food Systems 1140295, 2023, p. 03
[209] Recital 11 and 15 of the Plastics Recycling Regulation; EFSA Panel on Food Contact Materials and others, *Scientific Guidance on the criteria for the evaluation and on the preparation of applications for the safety assessment of post-consumer mechanical PET recycling processes intended to be used for manufacture of materials and articles in contact with food,* 22 EFSA Journal e8879, 2024.
[210] Schmidt and others, *op. cit.* note 201, p. 20
[211] Sundqvist-Andberg and Åkerman, *op. cit.* note 207, p. 7-8; Schmidt and others, *op. cit.* note 201, p. 20
[212] Mielinger and Weinrich, *A review on consumer sorting behaviour: Spotlight on food and Fast Moving Consumer Goods plastic packaging,* 47 Environmental Development 100890, 2023, p. 16 and 18.; Ciawi and others, *op. cit.* note 203, p. 8
[213] COM(2020) 98 final p. 9 and 13.; Schmidt and others, *op. cit.* note 201, p. 20; Mielinger and Weinrich, *op. cit.* note 213, p. 18

practices.[214] However, regulations alone are insufficient to fully address the complexities of PFP. Achieving sustainable food packaging within a CE, which is crucial for internalizing the negative externalities of PFP, necessitates a collaborative effort involving all stakeholders, including food and packaging manufacturers, recyclers, policymakers, civil society, and consumers.[215] Moreover, a fundamental shift in environmental policy design is necessary – moving beyond limited consumption-phase measures to fully acknowledge the diverse functionalities of PFP and effectively address related behavioral practices.[216] Encouraging changes in consumption patterns, such as reducing reliance on single-use packaging and promoting reusable alternatives, is essential and demands targeted consumer education, awareness campaigns, and incentives for sustainable choices.[217]

4.2. The EU's Regulatory Approach: Addressing PFP Lifecycle Challenges

The environmental and social costs associated with PFP are largely driven by market failures. These failures particularly stem from the inability of markets to internalize the full environmental costs associated with PFP's lifecycle – from production and use to disposal.[218] This failure arises from negative externalities, where environmental harms – such as pollution, resource depletion, GHG emission, biodiversity loss, and health risks – are not reflected in the market price of PFP, leading to excessive production and consumption.[219] Additionally, regulatory gaps, consumer behavior, and structural economic factors, such as the low cost of virgin plastic, or the long transport distances exacerbate the issue.[220] Furthermore, the costs of managing plastic waste (collection, sorting, and recycling) are often externalized, leading to inadequate waste management systems and increased plastic pollution.[221] Addressing these market failures requires intervention. The EU's regulatory approach involves a combination of strategies (analyzed above) targeting different stages of the PFP lifecycle, from production to disposal, with varying degrees of success. The EGD establishes

[214] Reis and others, *op. cit.* note 5, p. 8; COM(2020) 98 final p. 16-17; **3.** Sundqvist-Andberg and Åkerman, *op. cit.* note 207, p. 8 and 11;
[215] Geueke and others, *op. cit.*. note 201, p.502
[216] Sundqvist-Andberg and Åkerman, *op. cit.* note 207, p. 11
[217] Shamsuddoha and Kashem, *op. cit.* note 61, p. 4 and 18;
[218] Carton, 'Environmental economics', *Companion to Environmental Studies*, 2018; OECD, *Improving markets for recycled plastics: Trends, prospects and policy responses*, 2018.
[219] Reis and others, *op. cit.* note 5; EEA and others, *Plastics, the circular economy and Europe's environment – A priority for action* (Publications Office, 2021.
[220] WWF, *op. cit.* note 50
[221] Reis and others, *op. cit.* note 5

ambitious targets for sustainability and resource efficiency, within and beyond which key legislative measures address the externalities associated with PFP. These measures aim to: reduce packaging waste,[222] promote reuse and recycling,[223] harmonize packaging formats to discourage single-use plastics,[224] restrict specific single-use plastic products,[225] promote sustainable alternatives,[226] introduce design requirements for PFP,[227] and enhance the safety aspects of PFP.[228] A crucial element of the internalization strategy is the implementation of EPR schemes. EPR schemes hold producers responsible for the post-consumer management of their packaging, covering costs associated with waste collection, data gathering, reporting, and litter cleanup.[229] However, the effectiveness of EPR schemes varies across MSs due to differences in implementation and enforcement.[230] Harmonization and stricter enforcement across the EU are essential for maximizing the impact of EPR and achieving a truly SCE for packaging.

5. CONCLUSION

PFP, despite its functionality, presents significant environmental and socioeconomic challenges due to its persistent negative externalities, from resource depletion and pollution to potential health risks. While the EU has implemented various regulatory instruments aimed at mitigating these impacts through CE principles, a gap remains between the aspirations of these initiatives and the reality of continued environmental damage. Current EU policies, including recycling targets and EPR schemes, represent steps towards circularity. However, they often lack a cohesive and comprehensive framework, resulting in fragmented efforts and potentially counterproductive outcomes. For example, an overemphasis on recycling may inadvertently disincentivize higher-value circular strategies such as refillable packaging systems or standardized reusable packaging models. Furthermore, existing legal frameworks struggle to fully internalize the external costs associated with PFP's lifecycle, from production to disposal. This

[222] See Directive 2008/98/EC, Directive 94/62/EC, Regulation (EU) 2025/40
[223] See Directive 2008/98/EC, Directive 94/62/EC, Regulation (EU) 2025/40, Directive 2019/904, Regulation 2022/1616
[224] See Directive 2019/904 and Regulation (EU) 2025/40
[225] See Directive 2019/904and Regulation (EU) 2025/40
[226] See Directive 2019/904 and Regulation (EU) 2025/40
[227] See Directive 2019/904, Regulation (EU) 2025/40 and Regulation 2022/1616
[228] See Regulation 1935/2004, Regulation 10/2011, Regulation (EU) 2025/40, and Regulation 2022/1616
[229] See Directive 2008/98/EC, Directive 94/62/EC, Directive 2019/904, Regulation (EU) 2025/40
[230] Leal Filho and others, *op. cit.* note 163

underscores the need for more robust regulations that ensure equitable resource distribution and clear responsibility allocation, supported by standardized national implementations for consistent enforcement and a level playing field for businesses. Transitioning towards a truly sustainable CE model for PFP requires a multifaceted approach that goes beyond simply addressing end-of-life management. It demands a fundamental shift in environmental policy design, moving beyond limited consumption-phase measures to fully acknowledge the diverse functionalities of PFP and effectively address related behavioral practices. This includes fostering collaborative efforts among all stakeholders to drive changes in consumption patterns, reduce reliance on single-use packaging, and promote reusable alternatives through targeted education, awareness campaigns, and incentives. Ultimately, even a fully circular PFP model must consider broader sustainability concerns. The sustainability of a product extends beyond its packaging to encompass factors such as portion size and the potential harmfulness of chemical components. Addressing these complex challenges requires integrated legal and policy reforms, coupled with innovative solutions, to incentivize a genuine transition towards a sustainable and circular PFP sector. This holistic approach is essential for creating a truly sustainable and equitable PFP system.

REFERENCES

BOOKS AND ARTICLES

1. Ahmed, J.; Alam, T., An overview of food packaging: material selection and the future of packaging. Handbook of food process design, 3/2012, 1237-1283.
2. Akullian, A.; Karp, C.; Austin, K.; Durbin, D., Plastic bag externalities and policy in Rhode Island, Brown Policy Review, 2006, 1-11.
3. Andrady, A. L., Plastics and environmental sustainability, John Wiley & Sons, 2015, 1-325.
4. Arfelli, F.; Roguszewska, M.; Torta, G.; Lurlo, M.; Cespi, D.; Ciacci, L.; Passarini, F., Environmental impacts of food packaging: Is it all a matter of raw materials? Sustainable Production and Consumption, 9/2024, 318-328.
5. Aschemann-Witzel, J.; De Hooge, I.; Normann, A., Consumer-Related Food Waste: Role of Food Marketing and Retailers and Potential for Action, Journal of International Food & Agribusiness Marketing, 4/2016, 271-285.
6. Asgher, M.; Qamar, S. A.; Bilal, M.; Iqbal, H. M. N., Bio-based active food packaging materials: Sustainable alternative to conventional petrochemical-based packaging materials, Food Research International, 8/2020, 1-12.
7. Asim, Z.; Shamsi, I. R. A; Wahaj, M.; Raza, A.; Abul Hasan, S.; Siddiqui, S. A.; Aladresi, A.; Sorooshian, S; Seng Teck, T., Significance of Sustainable

Packaging: A Case Study from a Supply Chain Perspective, Applied System Innovation, 11/2022, 117-134.
8. Ayaz, o.; and Tatoglu, E.; Unveiling the power of social value: Catalyzing circular economy in emerging market SMEs, 453 Journal of Cleaner Production 142245, 2024, 1-19.
9. Babaei, M.; Jamillian, M.; Shabaz, K., Chemical recycling of Polyethylene terephthalate: A mini-review, Journal of Environmental Chemical Engineering, 6/2024, 1-17.
10. Barford, A.; Ahmad, S. R. A, Call for a Socially Restorative Circular Economy: Waste Pickers in the Recycled Plastics Supply Chain, Circular Economy and Sustainability, 9/2021, 761-782.
11. Barnes, S. J., Understanding plastics pollution: The role of economic development and technological research. Environmental Pollution, 12/2019, 812-821.
12. Bartl, A., Withdrawal of the circular economy package: A wasted opportunity or a new challenge?, Waste Management, 8/2015; 1-2.
13. Bening, C. R.; Preuss, J. T.; Blum, N. U., Towards a circular plastics economy: Interacting barriers and contested solutions for flexible packaging recycling, Journal of Cleaner Production, 8/2021, 1-19.
14. Bucknall, D. G. Plastics as a materials system in a circular economy, Philos Trans A Math Phys Eng Sci, 6/2020, 1-34.
15. Carton, W., Environmental Economics, In: Castree, N.; Hulme, M.; Proctor, J. (eds.), Companion to Environmental Studies Routledge, Oxon, New York 2018, 281-285.
16. Castro, C. G.; Trevisan, A. H.; Pigosso, D. C. A.; Mascarenhas, J.; The rebound effect of circular economy: Definitions, mechanisms and a research agenda, 345 Journal of Cleaner Production 131136, 2022, 1-13.
17. Centemeri, L., Environmental Damage as Negative Externality: Uncertainty, Moral Complexity and the Limits of the Market, e-cadernos CES, 9/2009, 21-40.
18. Chanda, M. Plastics Technology Handbook, CRC Press, Boca Raton 2017, 1-896.
19. Ciawi, Y.; Dwipayanti, N. M. U.; Tonyes, S, Redefining Packaging Solutions: The Advantages of Split-layer Packaging for Waste Reduction and Climate Action, Journal of Modern Industry and Manufacturing, 11/2024, 1-10.
20. Dar M. A., Dhole, N. P., Pawar, K.D., Xie, R., Shahnawaz, M.; Pandit R. S., & Sun, J., Ecotoxic Effects of the Plastic Waste on Marine Fauna: An Overview. In: Sahanawaz, M. Sangale, M. K., Daochen Z. & Ade, A. B. (eds.) Impact of Plastic Waste on the Marine Biota. Singapore: Springer Nature Singapore. 2022, 287-300.
21. Dauvergne, P. The necessity of justice for a fair, legitimate, and effective treaty on plastic pollution. Marine Policy, 2023 155, 105785., 1-9.

22. De Sousa, F. D. B. Consumer Awareness of Plastic: an Overview of Different Research Areas. Circular Economy and Sustainability, 2023 3, 2083-2107.
23. Defruyt, S. Towards a New Plastics Economy. Field Actions Science Reports, 2019, 78-81.
24. Dirpan, A., Ainani, A. F. & Djalal, M. A Review on Biopolymer-Based Biodegradable Film for Food Packaging: Trends over the Last Decade and Future Research. Polymers, 2023 15, 2781., 1-33.
25. El-Sayed, S. M. & Youssef, A. M. Eco-friendly biodegradable nanocomposite materials and their recent use in food packaging applications: a review. Sustainable Food Technology, 2023 1, 215-227.
26. Elsamahy, T.; Al-Tohamy, R. Abdelkarim, E. A.; Zhu, D.; El-Sheekh, M.; Sun, J.; & Ali, S. S. Strategies for efficient management of microplastics to achieve life cycle assessment and circular economy. Environmental Monitoring and Assessment, 2023 195, 1361., 1-14.
27. Ellen McArthur Foundation. Towards the circular economy. In: FOUNDATION, E. M. (ed.). Ellen MacArthur Foundation. 2013, 1-96.
28. Ellen McArthur Foundation. The New Plastics Economy: Rethinking the future of plastics & catalysing action. 2017, 1-67.
29. Ellen McArthur Foundation. The Global Commitment 2023 Progress Report. Ellen MacArthur Foundation., 1-41.
30. Farrelly, T.; Taffel, S. & Shaw, I. Plastic legacies: Pollution, persistence, and politics, Athabasca University Press. 2021, 1-284.
31. Fletcher, S.; March, A. L. A.; Roberts, K.; Shirian, Y.; Icanals, L.; Cairns, A.; Lefort, P.; Meso, A., Raine, A. D. & Smagadi, A. Turning off the Tap: How the world can end plastic pollution and create a circular economy, United Nations Environment Programme. 2023, 1-69.
32. Foschi; E. & Bonoli, A. The commitment of packaging industry in the framework of the European strategy for plastics in a circular economy. Administrative Sciences, 2019 9, 18, 1-13.
33. Gabisa, E. W., Ratanatamskul, C. & Gheewala, S. H. Recycling of Plastics as a Strategy to Reduce Life Cycle GHG Emission, Microplastics and Resource Depletion. Sustainability, 2023 15, 11529, 1-13.
34. Geissdoerger, M.; Savaget, P., Bocken, N. M. P. & Hultink, E. J. The Circular Economy – A new sustainability paradigm? Journal of Cleaner Production, 2017 143, 757-768.
35. Geueke, B.; Groh, K & Mucke, J. Food packaging in the circular economy: Overview of chemical safety aspects for commonly used materials. Journal of Cleaner Production, 2018 193, 491-505.
36. Geueke, B.; Inostroza, P. A.; Maffini, M.; Backhaus, T.; Carney-Almroth, B.; Groh, K. J. & Prioritization approaches for hazardous chemicals associated with plastic packaging. Food Packaging Forum Zurich, 2018. 1-14.

37. Geueke, B., Wagner, C. C. & Muncke, J. Food contact substances and chemicals of concern: a comparison of inventories. Food Additives & Contaminants: Part A, 2014 31, 1438-1450.
38. Geyer, R.; Jambeck, J. R. & Law, K. L. Production, use, and fate of all plastics ever made. Science Advances, 2017 3, e1700782., 1-5.
39. Ghisellini, P.; Cialani, C. & Ulgiati, S. A review on circular economy: The expected transition to a balanced interplay of environmental and economic systems. Journal of Cleaner Production, 2016 114, 11-32.
40. Gonella, J. D. S. L. Godinho Filho, M., Ganga, G. M. D., Latan, H. & Chiapetta Jabbour, C. J. A behavioral perspective on circular economy awareness: The moderating role of social influence and psychological barriers. Journal of Cleaner Production, 2024 441, 141062., 1-14.
41. Greenwood, S. C.; Walker, S.; Baird, H. M.; Parsons, R.; Mehl, S.; Webb, T. L.; Slark, A. T.; Ryan, A. J. & Rothman, R. H. Many Happy Returns: Combining insights from the environmental and behavioural sciences to understand what is required to make reusable packaging mainstream. Sustainable Production and Consumption, 2021 27, 1688-1702.
42. Grob, K.; Biedermann, M.; Scherbaum, E., Roth, M. & Rieger, K. Food Contamination with Organic Materials in Perspective: Packaging Materials as the Largest and Least Controlled Source? A View Focusing on the European Situation. Critical Reviews in Food Science and Nutrition, 2006 46, 529-535.
43. Groh, K. J.; Bachaus, T; Carney-Almroth, B; Geueke, B. Inostroza, P. A.; Lennquist, A.; Leslie, H. A.; Maffini, M.; Slunge D; Trasande, L., Warhust, A. M. & Muncke J. Overview of known plastic packaging-associated chemicals and their hazards. Science of The Total Environment, 2019 651, 3253-3268.
44. Guillard, V.; Gaucel, S.; Fornaciari, C.; Angellier-Coussy, H; Bucje, P. & Gontard N. The Next Generation of Sustainable Food Packaging to Preserve Our Environment in a Circular Economy Context. Frontiers in Nutrition, 2018 5, 1-13.
45. Haupt, M. & Hellweg, S. Measuring the environmental sustainability of a circular economy. Environmental and Sustainability Indicators, 2019 1-2, 100005., 1-7.
46. Hidalgo-Crespo, J.; Moreira, C. M.; Jervis, F. X., Soto, M., Amaya, J. L. & Banguera, L. Circular economy of expanded polystyrene container production: Environmental benefits of household waste recycling considering renewable energies. Energy Reports, 2022 8, 306-311.
47. ING. Plastic packaging in the food sector - Six ways to tackle the plastic puzzle. ING Economics Department. 2019, 1-21.
48. Ivanescu, I. M. & Sorlescu, M. The green economy: EU vision for competitive and sustainable development. Progress in Industrial Ecology, an International Journal, 2016 10, 45-54.

49. Kaiser, K.; Schmid, M.; Schlummer, M., Recycling of Polymer-Based Multilayer Packaging: A Review, Recycling, 12/2018, 1-26.
50. Kan, M.; Miller, S. A., Environmental impacts of plastic packaging of food products, Resources, Conservation and Recycling, 5/2022, 1-11.
51. Karasik, R.; Lauer, N. E.; Baker, A.-E.; Lisi, N. E.; Somarelli, J. A.; Eward, W. C.; Fürst, K.; Dunphy-Daly, M. M., Inequitable distribution of plastic benefits and burdens on economies and public health, Frontiers in Marine Science, 1/2023, 01-11.
52. Karayılan, S.; Yılmaz, Ö.; Uysal, Ç.; NANECI, S., Prospective evaluation of circular economy practices within plastic packaging value chain through optimization of life cycle impacts and circularity, Resources, Conservation and Recycling, 10/2021, 1-13.
53. Kerxin, W.; Kar Sen, Y.; Devi Rajendran, S., A study on the benefits of eco-friendly packaging on sustainable supply chain management in fast moving consumer goods industry. E3S Web Conf., 1/2019, 1-7.
54. Kik, K.; Bukowska, B.; Sicinska, P., Polystyrene nanoparticles: Sources, occurrence in the environment, distribution in tissues, accumulation and toxicity to various organisms. Environmental Pollution, 3/2020, 1-9.
55. Kirchherr, J.; Reike, D.; Hekkert, M., Conceptualizing the circular economy: An analysis of 114 definitions. Resources, Conservation and Recycling, 12/2017, 221-232.
56. Komiyama, H.; Takeuchi, K., Sustainability science: building a new discipline. Sustainability Science, 8/2006, 1-6.
57. Korhonen, J.; Honkasalo, A.; Seppälä, J. Circular Economy: The Concept and its Limitations, Ecological Economics, 1/2018, 37-46.
58. Kumar, R.; Verma, A.; Shome, A.; Sinha, R.; Sinha, S.; Jha, P. K.; Kumar, R.; Kumar, P.; Shubham; Das, S.; Sharma, P.; VaraPrasad, P. V., Impacts of Plastic Pollution on Ecosystem Services, Sustainable Development Goals, and Need to Focus on Circular Economy and Policy Interventions, Sustainability, 9/2021, 1-40.
59. Leal Filho, W.; Saari, U.; Fedoruk, M.; Iital, A.; Moora, H.; Klöga, M.; Voronova, V. An overview of the problems posed by plastic products and the role of extended producer responsibility in Europe, Journal of Cleaner Production, 3/2019, 550-558.
60. Leeman, W.; Krul, L., Non-intentionally added substances in food contact materials: how to ensure consumer safety, Current Opinion in Food Science, 12/2015, 33-37.
61. Lovett, J.; Buijzen, F.; de Bie, F., End-of-life options for bioplastics: Clarifying end-of-life options for bioplastics and the role of PLA in the circular economy, Total Corbion PLA, 11/2020, 1-29.

62. Magrini, C.; D'addato, F.; Bonoli, A., Municipal solid waste prevention: A review of market-based instruments in six European Union countries Waste Management & Research,1/ 2020, 3-22.
63. Maitre-Ekern, E., Re-thinking producer responsibility for a sustainable circular economy from extended producer responsibility to pre-market producer responsibility, Journal of cleaner production, 3/2021, 1-11.
64. Mangold, H.; Von Vacano, B., The Frontier of Plastics Recycling: Rethinking Waste as a Resource for High-Value Applications, Macromolecular Chemistry and Physics, 3/2022., 1-17.
65. Mantalovas, K.; Celauro, C.; Di Mino, G., Are circular practices always environmentally sustainable?, Book of Abstracts, 1st International Conference: "Circular Economy: the pathway towards a sustainable development" of the Hellenic Society for Circular Economy, 2024, 99-102.
66. Marsh, K.; Bugusu, B., Food Packaging—Roles, Materials, and Environmental Issues, Journal of Food Science, 72, 3/2007, R39-R55
67. Matche, R., Packaging aspects of fruits and vegetables, Plastics in food packaging, Indian centre for plastics in the environment, 2005, 115-132.
68. Matthews, C.; Moran, F.; Jaiswal, A. K., A review on European Union's strategy for plastics in a circular economy and its impact on food safety, Journal of Cleaner Production, 2/2021, 1-13.
69. Meherishi, L.; Narayana, S. A.; Ranjani, K. S., Sustainable packaging for supply chain management in the circular economy: A review, Journal of Cleaner Production, 7/2019, 1-23.
70. Mesa, J.A., Design for circularity and durability: an integrated approach from DFX guidelines. Res Eng Design 34, 2023, 443–460.
71. Mielinger, E.; Weinrich, R.,. A review on consumer sorting behaviour: Spotlight on food and Fast Moving Consumer Goods plastic packaging, Environmental Development, 6/2023, 1-21.
72. Misko, G. G., Plastic Packaging in a Circular Economy, Food Safety Magazin, 2/2019, 1-5.
73. Monciardini, D.; Maitre-Ekern, E.; Dalhammar, C.; Malcom, R., Circular Economy regulation: an emerging research agenda, In: Allen, A.; Stefano, P.; Fiona, C. (eds.) Handbook of the Circular Economy, De Gruyter, Berlin/Boston 2023., 219-240.
74. Moshood, T. D.; Nawanir, G.; Mahmud, F.; Mohamad, F;, Ahmad, M. H.; Abdulghani, A., Sustainability of biodegradable plastics: New problem or solution to solve the global plastic pollution?, Current Research in Green and Sustainable Chemistry, 1/2022, 1-18.
75. Muringayil Joseph, T.; Azat, S.; Ahmadi, Z.; Moini Jazani, O.; Eesmaeili, A.; Kianfar, E.; Haponiuk, J.; Thomas, S., Polyethylene terephthalate (PET) recycling: A review, Case Studies in Chemical and Environmental Engineering, 2/2024, 1-16.

76. Ncube, L. K.; Ude, A. U.; Ogunmuyiwa, E. N.; Zulkifli, R.; Beas, I. N., Environmental Impact of Food Packaging Materials: A Review of Contemporary Development from Conventional Plastics to Polylactic Acid Based Materials, Materials (Basel), 11/2020, 1-24.
77. Neves, S. A.; Marques, A. C., Drivers and barriers in the transition from a linear economy to a circular economy, Journal of Cleaner Production, 2/2022, 1-13.
78. Nilsen, H. R., The hierarchy of resource use for a sustainable circular economy, International Journal of Social Economics, 1/2020, 27-40.
79. Nyberg, B.; Harris, P. T.; Kane, I.; Maes, T., Leaving a plastic legacy: Current and future scenarios for mismanaged plastic waste in rivers, Science of The Total Environment, 4/2023. 1-10.
80. Obuzor, G. U.; Onyedikachi, U. B., Chemical Leaching into Food and the Environment Poses Health Hazards, In: Nwaichi, E. O. (ed.) Modernity in Health and Disease Diagnosis: The Account from STEM Women, Springer Nature Switzerland, Cham 2023., 129–148
81. Packaging Europe, Functional Barriers for the Use of Recycled Plastics in Multi-layer Food Packaging. 2017
82. Packaging Europe, The Circular Economy for Plastics: A European Analysis. In: Packaging Europe (ed.). Plastics Europe. 2024
83. Pauer, E.; Wohner, B.; Heinrich, V.; Tacker, M., Assessing the environmental sustainability of food packaging: An extended life cycle assessment including packaging-related food losses and waste and circularity assessment, Sustainability, 2/ 2019, 1-21.
84. Persson, L.; Carney Almroth, B. M.; Collins, C. D.; Cornell, S.; De Wit, C. A.; Diamond, M. L.; Fantke, P.; Hassellöv, M.; Macleod, M.; Ryberg, M. W.; Søgaard Jørgensen, P.; Villarrubia-Gómez, P.; Wang, Z.; Hauschild, M. Z., Outside the Safe Operating Space of the Planetary Boundary for Novel Entities, Environmental Science & Technology, 1/2022, 1510-1521.
85. Poças , F.; Do Céu Selbourne, M., Drivers, advances, and significance of measures for effective circular food packaging, Frontiers in Sustainable Food Systems, 5/2023, 01-11.
86. Porta, R., Anthropocene, the plastic age and future perspectives, Febspress, 4/2021, p.FEBS Open Bio, 948.953.
87. Prieto-Sandoval, V.; Jaca, C.; Oemazabal, M., Towards a consensus on the circular economy, Journal of Cleaner Production, 4/2018, 605.615.
88. Rapp, H. The hierarchy of resource use for a sustainable circular economy. International Journal of Social Economics, 2020 47, 27-40.
89. Raworth, K., A safe and just space for humanity: can we live within the doughnut?, Oxfam, Oxford 2012., 1-26.
90. Raworth, K., A Doughnut for the Anthropocene: humanity's compass in the 21st century, The Lancet Planetary Health, 5/2017, e48-49.

91. Reis, F.; Wu, S.; Potyatynnyk, K., Life in plastic, it's not fantastic: the economics of plastic pollution, Science for Sustainability (S4S) Journal, 1/2017. 1-9.
92. Richardson, K.; Steffen, W.; Lucht, W.; Bendtsen, J.; Cornell, S. E.; Donges, J. F.; Drüke, M.; Fetzer, I.; Bala, G.; Von Bloh, W.; Feulner, G.; Fiedler, S.; Gerten, D.; Gleeson, T.; Hofmann, M.; Huiskamp, W.; Kummu, M.; Mohan, C.; Nogués-Bravo, D.; Petri, S.; Porkka, M.; Rahmstrof, S.; Schaphoff, S.; Thonicke, K.; Tobian, A.; Virkki, V.; Wang-Erlandsson, L.; Weber, L.; Rockström, J., Earth beyond six of nine planetary boundaries, Science Advances, 9/2023, 1-16.
93. Richon, C.; Kvale, K.; Lebreton, L.; Egger, M., Legacy oceanic plastic pollution must be addressed to mitigate possible long-term ecological impacts, Microplastics and Nanoplastics, 11/2023, 1-8.
94. Rochman, C. M.; Browne, M. A.; Underwood, A. J.; Van Franeker, J. A.; Thompson, R. C.; Amaral-Zettler, L. A., The ecological impacts of marine debris: unraveling the demonstrated evidence from what is perceived, Ecology, 3/2016, 302-312.
95. Rockström, J.; Steffen, W.; Noone, K.; Persson, Å.; Chapin, F. S.; Lambin, E. F.; Lenton, T. M.; Scheffer, M.; Folke, C.; Schellnhuber, H. J.; Nykvist, B.; De Wit, C. A.; Hughes, T.; Van Der Leeuw, S.; Rodhe, H.; Sörlin, S.; Snyder, P. K.; Costanza, R.; Svedin, U.; Falkenmark, M.; Karlberg, L.; Corell, R. W.; Fabry, V. J.; Hansen, J.; Walker, B.; Liverman, D.; Richardson, K.; Crutzen, P.; Foley, J. A., A safe operating space for humanity, Nature, 9/2009, 472-475.
96. Sariatli, F. Linear economy versus circular economy: a comparative and analyzer study for optimization of economy for sustainability, Visegrad Journal on Bioeconomy and Sustainable Development,1/ 2017, 31-34.
97. Schmidt, J.; Auer, M; Moesslein, J; Wendler, P; Wiethoff, S; Lang-Koetz, C; Woidasky, J, Challenges and Solutions for Plastic Packaging in a Circular Economy, Chemie Ingenieur Technik, 10/2021, 1751-1762.
98. Schmidt, J., Grau, L; Auer, M; Maletz; R. Woidasky, J., Multilayer Packaging in a Circular Economy, Polymers, 4/2022, 1-26.
99. Schroeder, P., Anggraeni, K. and Weber, U., The Relevance of Circular Economy Practices to the Sustainable Development Goals. Journal of Industrial Ecology, 23., 2019, 77-95.
100. Schweitzer, J.-P.; Pantzar, S. G. M.; Mottershead, D.; Watkins, E.; Petsinaris; P.; Ten Brink, E.; Ptak, E.; Lacey, C.; & Janssens, C., Unwrapped: How throwaway plastic is failing to solve Europe's food waste problem (and what we need to do instead), A study by Zero Waste Europe and Friends of the Earth Europe for the Rethink Plastic Alliance ed. Brussels: Institute for European Environmental Policy (IEEP), Brussels 2018, 1-23.
101. Shamon, A.; Haleem, A.; Bahl, S.; Garg, J.; Sharma, R. C.; Javaid, M.; Shamoon, A.; Garg, S. G., Environmental impact of energy production and

extraction of materials - a review, Materials Today: Proceedings, 3/2022, 936-941.

102. Shamsuddoha, M; Kashem, M. A., Zero Plastic Drive: A Comprehensive Review on Unveiling Innovative Sustainable Solutions for a Circular Plastics Economy, Sustainability, 11/2024, 1-33.
103. Shi, X.; Chen, Z.; Wei, W.; Ni, B.-J., Perspectives on sustainable plastic treatment: A shift from linear to circular economy, TrAC Trends in Analytical Chemistry, 4/2024, 1-11.
104. Singh, N.; Walker, T. R., Plastic recycling: A panacea or environmental pollution problem, npj Materials Sustainability, 8/2024, 1-7.
105. Sjåfjell, B.; Cornell, S. E., What the actual ….? Tensions in the science–business–policy interface for global sustainability, European Law Open, 12/2024, 529-560.
106. Soares, C.; Ek, M.; Östmark, E.; Gällstedt, M.; Karlsson, S.; Recycling of multi-material multilayer plastic packaging: Current trends and future scenarios, Resources, Conservation and Recycling, 1/ 2022, 1-10.
107. Sojinu, S. O.; Ejeromedoghene, J O., Environmental challenges associated with processing of heavy crude oils, Processing of Heavy Crude Oils, 12/2019, 241-262.
108. Solaja, O. M.; Fielding, A. J.; Awobana, S., Examining Socio-Demographics and Understanding Business Factors among Plastic Bottle Waste Collectors in Ogun State, Nigeria, Recycling and Sustainable Development, 7/2024. 01-18.
109. Stahel, W. R., The circular economy, Nature, 3/2016, 435-438.
110. Steensgaard, I. M.; Syberg, K.; Rist, S.; Hartmann, N. B.; Boldrin, A.; Hansen, S. F., From macro- to microplastics - Analysis of EU regulation along the life cycle of plastic bags, Environ Pollut, 5/2017, 289-299.
111. Stoett, P., Scrich, V. M.; Elliff, C. I.; Andrade, M. M.; Grilli, N. d. M; Turra, A., Global plastic pollution, sustainable development, and plastic justice, World Development, 12/2024, 1-9.
112. Suárez-Eiroa, B.; Fernández, E.; Méndez-Martínez, G.; Soto-Oñate, D., Operational principles of circular economy for sustainable development: Linking theory and practice, Journal of Cleaner Production, 3/2019, 952-961.
113. Sundqvist-Andberg, H; Åkerman, M. Sustainability governance and contested plastic food packaging – An integrative review, Journal of Cleaner Production, 7/2021, 1-13.
114. Tencati, A.; Pogutz, S.; Moda, B.; Brambilla, M.; Cacia, C., Prevention policies addressing packaging and packaging waste: Some emerging trends, Waste Management, 10/2016, 35-45.
115. Thapliyal, D.; Karale, M.; Diwan, V.; Kumra, S.; Arya, R. K., Current Status of Sustainable Food Packaging Regulations: Global Perspective, Sustainability, 11/2024, 1-27.

116. Tolinski, M., Plastics and Sustainability: Towards a Peaceful Coexistence Between Bio-Based and Fossil Fuel-based Plastics, John Wiley & Sons Incorporated, Hoboken 2011.
117. Turner, A., Foamed Polystyrene in the Marine Environment: Sources, Additives, Transport, Behavior, and Impacts, Environmental Science & Technology, 8/2020, 10411-10420.
118. Undas, A. K.; Groenen, M.; Peters, J. B. R.; van Leeuwen, S. P. J., Safety of recycled plastics and textiles: Review on the detection, identification and safety assessment of contaminants, Chemosphere, 1/2023, 1-15.
119. Van Camp, N.; Irdanto Saputra Lase, I. S.; De Meester, S.; Hoozée, S.; Ragaert, K., Exposing the pitfalls of plastics mechanical recycling through cost calculation, Waste Management, 12/2024, 300-313.
120. Van Eygen, E.; Laner, D.; Fellner, J., Circular economy of plastic packaging: Current practice and perspectives in Austria, Waste Management, 2/2018, 55-64.
121. Vanapalli, K. R.; Sharma, H. B.; Ranjan, V. P.; Samal, B.; Bhattacharya, J.; Dubey, B. K.; Goel, S., Challenges and strategies for effective plastic waste management during and post COVID-19 pandemic, Science of The Total Environment, 1/2021, 1-10.
122. Varalda, G. M.; Zellmer, S.; Tietz, T., Risk assessment of food contact materials, EFSA Journal, 12/2024, 1-8.
123. Velenturf, A. P. M.; Purnell, P., Resource Recovery from Waste: Restoring the Balance between Resource Scarcity and Waste Overload, Sustainability, 9/2017, 1-17.
124. Velenturf, A. P. M.; Purnell, P, Principles for a sustainable circular economy, Sustainable Production and Consumption, 7/2021, 1437-1457.
125. Vidal, F.; van der Marel, E. R.; Kerr, R. W. F.; McElroy, C.; Schroeder, N.; Mitchell, C.; Rosetto, G.; Chen, T. T. D.; Bailey, R. M.; Hepburn, C.; Redgwell, C.; Williams, C. K., Designing a circular carbon and plastics economy for a sustainable future, Nature, 1/2024, 45-57.
126. Villaruibia-Gómez, P.; Villarrubia-Gómez, P.; Carney Almroth, B.; Eriksen, M.; Ryberg, M.; Cornell, S. E., Plastics pollution exacerbates the impacts of all planetary boundaries. One Earth, 11/2024, 2119-2138.
127. Von Rossing, M.; Foldager, U.; Spiegel, H. W. J.; Arnold, H.; Warm, J.; Schmidt, F. A., Sustainable sourcing practices, In: Von Rossing, M., The Sustainability Handbook, Volume 1, Elsevier, 2025., 197-211
128. White, A.; Lockyer, S., Removing plastic packaging from fresh produce – what's the impact?, Nutrition Bulletin, 2/2020, 35-50.
129. Wiesinger, H.; Wang, Z.; Hellweg, S., Deep Dive into Plastic Monomers, Additives, and Processing Aids, Environmental Science & Technology, 6/2021, 9339-9351.

130. Yam, K. L.; Takhistov, P. T.; Miltz, J., Intelligent Packaging: Concepts and Applications, Journal of Food Science, 5/2005, 1-10.
131. Zhu, Z.; Liu, W.; Ye, S.; Batista, L., Packaging design for the circular economy: A systematic review, Sustainable Production and Consumption, 7/2022, 817-832.

LEGAL ACTS

1. European Commission. A European Strategy for Plastics in a Circular Economy - Brochure. Brussels. 2022.
2. European Commission. Closing the loop - An EU action plan for the Circular Economy. COM(2015) 614 final.
3. European Commission. Commission staff working document evaluation of the legislation on food contact materials - Regulation (EC) No 1935/2004. In: European Commission (ed.). Brussels, 2022.
4. European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU policy framework on biobased, biodegradable and compostable plastics. Brussels, 2022.
5. European Commission. Circular economy: new rules on packaging and packaging waste, Publications Office of the European Union. 2022.
6. European Commission. Proposal for a Regulation of the European Parliament and of the Council on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC. COM 2022 677 final. Brussels, 2022.
7. European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: on a revised monitoring framework for the circular economy. COM(2023) 306 final. Brussels. 2023.
8. European Environment Agency. Plastics, the circular economy and Europe′s environment — A priority for action. Copenhagen, 2021.
9. European Environmental Agency; Reichel A.; Trier, X.; Fernandez, R.; Bakas, I. & Zeiger, B., Plastics, the circular economy and Europe's environment – A priority for action, Publications Office. 2021.
10. Europen, Factsheet on Extended Producer Responsibility (EPR) for used packaging. 2015.
11. European Food Safety Authority Panel on food contact materials, Aids, E.; Lambré, C.; Barat Baviera, J. M; Bolognesi, C.; Chesson, A.M.; Cocconnelli, P. S; Crebelli, R; Gott, D. M. Grob, K. & Mengelers, M., Scientific Guidance on the criteria for the evaluation and on the preparation of applications for the safety assessment of post-consumer mechanical PET recycling processes

intended to be used for manufacture of materials and articles in contact with food. EFSA Journal, 2024 22, e8879.
12. European Parliament, Functional Barriers for the Use of Recycled Plastics in Multi-layer Food Packaging, Packing Europe, 5/2017.
13. European Parliament, Revision of Directive 94/62/EC on packaging and packaging waste, Implementation Appraisal, 2022.
14. European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365 of 31/12/1994.
15. Regulation (EC) No 1935/2004 of the European Parliament and of the Council of 27 October 2004 on materials and articles intended to come into contact with food and repealing Directives 80/590/EEC and 89/109/EEC, OJ L 338 of 13/11/2004.
16. Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312 of 22/11/2008.
17. Commission Regulation (EU) No 10/2011 of 14 January 2011 on plastic materials and articles intended to come into contact with food, OJ L 12 of 15/01/2011.
18. Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags, OJ L 115, 6/05/2015.
19. EU 2018a. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the circular economy package: options to address the interface between chemical, product and waste legislation. COM(2018) 32 final. Brussels. 2018.
20. Commission Regulation (EU) 2022/1616 of 15 September 2022 on recycled plastic materials and articles intended to come into contact with foods, and repealing Regulation (EC) No 282/2008, OJ L 243 of 20/09/2022
21. EU 2025. Regulation (EU) 2025/40 of the European Parliament and of the Council of 19 December 2024 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, OJ L 2025/40 of 22/01/2025

OTHER DOCUMENTATIONS

1. Kaza, S.; Yao, L.; Bhada-Tata, P.; Van Woerden, F., What a waste 2.0: a global snapshot of solid waste management to 2050, World Bank Publications, 2018.
2. OECD, Improving markets for recycled plastics: Trends, prospects and policy responses, OECD Publishing, 2018.

3. Oxford Economics, Mapping the Plastics Value Chain: A framework to understand the socio-economic impacts of a production cap on virgin plastics. 2024Plastics Europe, The Circular Economy for Plastics: A European Analysis, Plastics Europe AISB, 2024.
4. United Nations, Transforming our world: the 2030 Agenda for Sustainable Development, In: United Nations (ed.)A/RES/70/1, 2015.
5. United Nations Environment Programme, Global Waste Management Outlook 2024 - Beyond an age of waste: Turning Rubbish into a Resource, United Nations Environment Programme, International Solid Waste Association, 2024.
6. Watkins, E., S., G.; Scheitzer, J.-P.; Pantzar, M.; Janssens, C;. & Ten Brink, P., E PR in the EU Plastics Strategy and the Circular Economy: A focus on plastic packaging. Institute for European Environmental Policy, 2017.
7. World Commission on Environment and Development, Our Common Future, World Commission on Environment and Development, 1987.
8. World Wildlife Fund, Plastics: The Cost to Society, the Environment and the Economy, 2021.
9. Wrap, Reducing household food waste and plastic packaging, 2022.
10. Zero Waste Europe, Food packaging: safety first - Towards toxic-free and future-proof packaging, 2023.

NETWORK RESOURCES

1. Directorate-General for Health and Food Safety (DG SANTE), Study on sustainability in the context of food contact materials (FCM) in view of a possible revision of the FCM legislation, 2024, https://food.ec.europa.eu/document/download/7ecbc401-fb64-4f63-a104-cb68dc0f50e3_en?filename=cs_fcm_study_fcm_sustainability.pdf&prefLang=bg.
2. Goldsberry, C., New Survey Shows Consumers Want Products Made from Recycled Materials, August 2021, https://www.plasticstoday.com/packaging/new-survey-shows-consumers-want-products-made-from-recycled-materials.
3. Karamfilova, E., Food Contact Materials Regulation (EC) 1935/2004: European Implementation Assessment Study, May 2016, https://www.europarl.europa.eu/RegData/etudes/STUD/2016/581411/EPRS_STU(2016)581411_EN.pdf.
4. Oxford Economics, Mapping the Plastics Value Chain: A framework to understand the socio-economic impacts of a production cap on virgin plastics, Consulting Report, April 2024. https://www.oxfordeconomics.com/wp-content/uploads/2024/04/2024-ICCA-Oxford-Economics-report.pdf.

5. SAFE, Food Contact Materials (FCMs): Feedback to the European Commission's Evaluation and Fitness Check Roadmap, 2020, https://www.safefoodadvocacy.eu/wp-content/uploads/2020/04/SAFE-Food-Contact-Materials-Evaluation-Feedback-for-the-Commission.pdf.
6. Wolberg, C. The Performance of Recycled Plastics vs Virgin Plastics, https://oceanworks.co/blogs/ocean-plastic-news/the-performance-of-recycled-vs-virgin-plastics, 26 February, 2025.
7. Zero Waste Europe, Food packaging: safety first: Towards toxic-free and future-proof packaging, July 2023, https://zerowasteeurope.eu/wp-content/uploads/2023/07/zwe_jul23_full_briefing_safety_food_packaging.pdf

UDK: 336.71
336.748.7
366.5
Review paper

Ana-Maria Bogović, PhD student
Faculty of Law, University of Split, Croatia
E-mail: anamariagurdulic@gmail.com

CONFIDENCE IN THE JUDICIARY REGARDING UNFAIR BANKING OPERATIONS IN RELATION TO THE CURRENCY CLAUSE AND ITS IMPACT ON THE REAL RIGHTS OF CONSUMERS

ABSTRACT

As a new opportunity arose for taking loans denominated in Swiss francs and loans denominated in kuna with a currency clause in Swiss francs, bankers and banking institutions saw the chance chto present loans in Swiss francs to average citizens, who lacked expert knowledge and skills, as an opportunity that could not be turned down. What the citizens as consumers could not even dream of was the reality that ultimately awaited them: after years and years of regular repayment of annuities of loans taken in Swiss francs, they ended up with even more loan to repay. How is this possible? In this case, banks and bankers did not explain to the consumers, or warn them of the meaning, or the legal consequences of the currency clause risk and the floating interest rate risk. So, instead of the currency clause serving to protect the value of provided money, it was offered to achieve unimaginable earnings for the banks, while the interest rate was very simply and effectively changed by unilateral decisions made by the banks. This resulted in consumers accumulating debt that they were unable to repay and escape the debt spiral, which in turn led consumers to establish the association "FRANAK - ASSOCIATION FOR THE PROTECTION OF CONSUMERS USERS OF FINANCIAL SERVICES" with the headquarters in Zagreb, Avenija Marina Držića 81B to protect their rights and interests and to go into battle against banking giants. Whether they will succeed in this battle, and on what grounds collective actions for the protection of consumer rights and interests, as well as individual restitution lawsuits, have been filed, is detailed below.

Keywords: *Currency Clause, Swiss francs, Loan Agreement, Nullity of Provisions, Floating Interest Rate*

1. INTRODUCTION

In the period from 2004 to 2009, the citizens of the Republic of Croatia took loans denominated in Swiss francs, as well as a loan denominated in kunas with a currency clause in Swiss francs, because these loans were presented as one of the most favorable financial product available on the market at the time. In these agreements, credit institutions had far more knowledge of currency risk and

floating interest rate which concepts are still unfamiliar to consumers. This raises the question and creates justified doubt about whether such credit obligations of the citizens of the Republic of Croatia were, in essence, a form of fraud in economic operations that endangered the existential security not only of individuals but also of entire households of the citizens of the Republic of Croatia who took on such credit obligations.[1] Given that the average citizen of the Republic of Croatia lacks sufficient expert knowledge, skills, and education, they rely on recommendations, opinions, and suggestions of credit institutions whose interests do not align with those of the users of credit institution services. This creates an imbalance between the contracting parties in contractual arrangements of those forms of crediting as were loans of Croatian citizens denominated in Swiss francs, as well as loans denominated in kuna with a currency clause in Swiss francs.[2]

Namely, in order for consumers to take out a loan from a bank, it is necessary for the consumer to enter into a loan agreement with the bank, and, as stipulated by Article 247 of the Obligations Act,[3] an agreement is concluded when the contracting parties agree on the essential elements of the contract.[4] Thus, if the concept of a legal transaction, as a manifestation of will aimed at achieving permissible legal effects, were based solely on the provisions of the Obligations Act, one would have to say that a legal transaction actually arises through the expression of will.[5] The loan agreement is defined in Article 1021 of the Obligations Act, in which the legislator clearly stipulated that it is the type of agreement in which the bank commits to make available a certain amount of money to the loan user for a specified or unspecified period, for a particular purpose or without a specified purpose, and the user commits to pay to the bank agreed interest and to repay the used amount of money in the time and manner

[1]Buljan Barbača, D.; Piplica, D., *„Slučaj franak"– poslovna prijevara kao ugroza egzistencijalne sigurnosti građana Republike Hrvatske?*, Policija i sigurnost, vol. 32, no. 1, 2023, p. 32.
[2]*Ibid*, pp. 32 - 33
[3]Obligations Act, Official Gazette, No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023 (hereinafter: Obligations Act). The provisions of the Act on Consumer Protection, Official Gazette, No. 96/2003, 46/2007, 79/2007 which, among other things, defined the concept of consumer as well as the concept of unfair provision and the concept of the assessment of unfairness, and the provisions of the Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023 were applied in order to protect the rights and interests of consumers.
[4] Article 247, Obligations Act
[5] Klarić, P.; Vedriš, M., *Građansko pravo, Opći dio, stvarno pravo, obvezni i nasljedno pravo*, Narodne novine, Zagreb, 2006, p. 107.

agreed upon[6], such a type of legal transaction is also concluded through the manifestation of will between the consumer and the bank. Therefore, the consumer's will is necessary for the conclusion of the agreement, and that consumer's will is influenced by the information provided to him by the bank itself. Thus, consumers, by expressing their will, entered into loan agreements with the aim of obtaining a certain sum of money[7] can be acquired. In this particular case, these were goods of existential importance to the consumers, such as real estate. Namely, in order for the citizens of the Republic of Croatia to gain any knowledge about loans that involve currency risk and floating interest rate risk, they had to turn to the same credit institutions, whose interest and goal was not to fully and timely inform the citizens of the Republic of Croatia, but rather to ensure that the citizens of the Republic of Croatia became indebted specifically in their banks, in the hopes that such indebtedness would lead to the enrichment of the banks providing such credit services. In this way, credit institutions gained undue benefits without any grounds. The question that arises in this situation is whether the banks knew what was going to happen, and whether the banks were aware that loans denominated in Swiss francs, as well as loans denominated in kuna with a currency clause in Swiss francs, would lead to the enrichment of banks at the expense of impoverishing and endangering the existential security of the citizens of the Republic of Croatia?

2. "WHITE-COLLAR" CRIME

In contractual relationships arising with the aim of realizing loans denominated in Swiss francs, as well as loans denominated in kuna with a currency clause in Swiss francs, one contracting party is the average citizen of the Republic of Croatia, and the other contracting party is a professional person who possesses the necessary expert knowledge and skills to realize such a contractual relationship, i.e., a person "in a suit." This already creates an imbalance in the contractual relationship due to the social position and required expert knowledge and skills, and opens up space for manipulation with information, which can only be manipulated by those who possess it, in this case, the people "in suits." In this manner, one form of business fraud can be concealed making it appear as a completely ordinary business relationship, leading to the emergence of a new term, namely "white-collar crime".[8]

[6] Article 1021, Obligations Act
[7] Tomašević, J., *Novac i kredit*, Dom i svijet, University of Zagreb, Faculty of Economics and Business, Zagreb, 2004, p. 60.
[8] Buljan Barbača; Piplica, *op. cit.* note 1, p. 35

The key task of bank supervisors and financial analysts is the consolidation and analysis of data on bank risk management. Since banks participate in both domestic and international markets and play a crucial role in national economies, banking statistics can provide insight into the economic situation.[9] The term "white-collar crime" is closely related to the appearance of individuals working in offices, typically wearing business suits and white shirts, such as bankers, managers, and the like, which would mean that "white-collar crime" involves a higher business or social status of the perpetrators and the commission of unlawful acts within the scope of one's professional activity. Thus, these are criminal acts committed by individuals or groups of people who use their higher business status and the influence that comes with it to unlawfully gain material or immaterial benefits for themselves, as well as for other people or groups of people.[10] Credit crime can also be referred to as the crime of privileged individuals and groups, and due to its characteristics, it can be considered a special form of white-collar crime.[11] Namely, there is a significant difference between banking services providers and the users of banking services, primarily in their interests, which substantially differ in the fact that banking institutions want to make as much money as possible from providing their services, while on the other hand, the user of banking services is interested in having as few banking costs as possible. Therefore, users of banking services can often make poor business decisions based on incorrect, incomplete information provided with insufficient quality by bank employees.[12] The citizens of the Republic of Croatia who took out loans in Swiss francs were attracted by the lower interest rate, which would ultimately affect the total repayment of the loan. By taking loans in Swiss francs, the citizens of the Republic of Croatia also assumed the exchange rate risk, which is generally not possible to protect against. Furthermore, the citizens of the Republic of Croatia do not have sufficient knowledge or understanding of what this risk means and what it can bring over time.[13] The problem faced by the users of loans in Swiss francs was that despite the fact that they were making regular and timely payments of their loan annuities in Swiss francs, the principal of the loan, when converted to kuna or euro, still increased, despite regular repayments. This raised the question of whether it was worth making this conversion, as it not only involved assuming a new currency risk, this time with the euro exchange rate, but also brought new costs related to loan restructuring, as well as an increased annuity due to the fact that, at that time, the interest rates on loans in euros were still higher than those in

[9] Van Greuning, H.; Brajović Bratanović, S., *Analiza i upravljanje bankovnim rizicima, pristupi za ocjenu organizacije upravljanja rizicima i izloženosti financijskom riziku*, 2nd ed., Library Gospodarska misao, Zagreb, pp. 17–18.
[10] Buljan Barbača, Piplica, *op. cit*. note 1, pp. 33 - 34
[11] Orlović, A., *Gospodarski kriminalitet u Republici Hrvatskoj*, Redak, Split, 2013, p. 92.
[12] Buljan Barbača; Piplica, *op. cit.* note 1, p. 36
[13] *Ibid*., p. 39

Swiss francs, making it difficult to provide an answer to that question.[14] The prerequisites for the implementation of the conversion were created by upgrading the legislative framework, with the Act on Amendments to the Consumer Credit Act, Official Gazette, No. 102/2015[15] and the Act on Amendments to the Credit Institutions Act, Official Gazette, No. 102/2015[16], which came into effect on 30 September 2015. These amendments prescribed the conversion of loans denominated in Swiss francs into loans denominated in euros and the conversion of loans denominated in kuna with a currency clause in Swiss francs into loans denominated in kuna with a currency clause in euros. It is important to note that a currency clause is a type of clause inserted into contracts to protect the value of a monetary claim from fluctuations in the value of the currency in which the obligation is expressed.[17] Also, there was another risk associated with taking loans in Swiss francs for the citizens of the Republic of Croatia, the risk of floating interest rate, which correlated with the emergence of the currency risk, thus increasing the annuity burden. Namely, the interest rate is determined by the decision on interest of each individual credit institution, and changes in interest rates are linked to changes in market conditions that determine the terms under which banks can secure financing sources on both the domestic and international markets, as well as the country's credit risk.[18] Regarding the roles of the banks themselves, the damage incurred by the "injured parties" has transferred to the entire society, while the situation with Swiss francs reached proportions that altered the position of banks, once very powerful and referred to as the "state within a state", and in this context, they were treated as undesirable and neglecting, highlighting the diminishing importance of banks in relation to debtors.[19] Given all the circumstances, risks, and problems faced by the citizens of the Republic of Croatia as consumers who ultimately paid ever-increasing loan annuities for loans taken in Swiss francs, on 22 July 2011, a civil initiative was launched to establish a non-profit association named "FRANAK - ASSOCIATION FOR THE PROTECTION OF CONSUMERS USERS OF FINANCIAL SERVICES" with the headquarters in Zagreb, Avenija Marina Držića 81B.[20] And so, in 2011, the Franak Association was founded, with over 13,000 members today, making it a

[14] *Ibid*., p. 40
[15] The Act on Amendments to the Consumer Credit Act, Official Gazette, No. 102/2015 (hereinafter: the Consumer Credit Act)
[16] The Act on Amendments to the Credit Institutions Act, Official Gazette, No. 102/2015 (hereinafter: the Credit Institutions Act)
[17] Babić, M., *Valutna klauzula*, Obnovljeni Život, vol. 70, no. 3, 2015, p. 394.
[18] Buljan Barbača; Piplica, *op. cit.* note 1, pp. 41- 42
[19] Kačer, H.; Kačer, B., *CHF case - 2019. god., Freedom to provide services and legal security*, 15th International Conference of the Faculty of Law, University of Kragujevac, 2019, p. 154.
[20] Association "FRANAK - ASSOCIATION FOR THE PROTECTION OF CONSUMERS USERS OF FINANCIAL SERVICES" with the headquarters in Zagreb, Avenija Marina Držića 81B (hereinafter: the Franak Association)

truly respected civil association in the Republic of Croatia. Its goal was to study the terms of disputed loans, identify illegalities, and sue the banks that had led citizens to the verge of bankruptcy, i.e. brought them to the brink of existence.[21]

3. LEGISLATIVE FRAMEWORK THAT ENABLED THE REALIZATION OF CONSUMERS' RIGHTS AND INTERESTS

The then newly established Franak Association decided to take matters into its own hands and stand up for the rights and interests of all users of loans taken in Swiss francs, as well as the rights and interests of all consumers whose rights and interests were violated by unfair conduct of banks under the guise of good business cooperation. Thus, the legislator in the Republic of Croatia, through provisions of various mandatory regulations of the Republic of Croatia, prescribed and enabled protection for all natural and legal persons whose interests and/or rights were violated in this case, through a civil litigation process, which is the general, regular, and basic method of protecting threatened or violated subjective civil rights provided by the state judicial organization.[22]

The provisions of the Civil Procedure Act,[23] as well as the provisions of the Civil Procedure Act,[24] prescribe and regulate actions for the protection of collective interests and rights. In the provisions of Article 502(a) of the Civil Procedure Act, the legislator clearly stipulated that associations, bodies, institutions, or other organizations can file an action against a natural or legal person who, through performing certain activities or generally through actions, conduct, and omissions, seriously violates or significantly endangers such collective interests and rights, and such an action is called an action for the protection of collective interests and rights.

In the Civil Procedure Act, the legislator has also given natural and legal persons the ability to initiate special lawsuits for damage compensation or lawsuits for payment. In these lawsuits, natural and legal persons can refer to the legal finding

[21] See https://udrugafranak.hr/slucaj-franak-sazetak/, 13 January 2025
[22] Triva, S.; Dika, M., *Građansko parnično procesno pravo*, VII revised and updated edition, Narodne novine, Zagreb, 2004, p. 3.
[23] Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023 (hereinafter: the Civil Procedure Act)
[24] Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 96/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014 and 70/2019 (hereinafter: the Civil Procedure Act of 2019)

from the judgment that accepted the claims from the lawsuit for the protection of collective interests and rights. In that case, the court will be bound by those findings in the lawsuit in which the person refers to them.[25] Thus, the legislator has enabled natural and legal persons, under the provisions of the Civil Procedure Act, to file actions for the protection of collective interests and rights. Once the competent court renders a judgment that adopts the claims sought in the lawsuit for the protection of collective interests and rights, natural and legal persons can then initiate individual lawsuits in which they can refer to findings from earlier judgments.

Representative actions are generally regulated by laws that have arisen as a result of adopting the European *acquis communautaire*[26] into Croatian law, such as the Consumer Protection Act,[27] which came into force on 29 March 2014, and which prescribes various solutions regarding representative action. However, it stipulates at the same time that the protection provided by such an action is always primarily abstract in nature and aimed at a wide circle of potential authorized persons, who can, after the finalized representative action, file their individual actions.[28] "Procedures for the protection of collective interests and rights are applied in numerous foreign legal systems where collective protection is foreseen in similar or even same areas of law. These are areas of law where collective interests and the public interests are emphasized over individual interests, such as, for example, the interests and rights of consumers, anti-discrimination and social interests and rights, environmental protection, etc."[29] The introduction of these procedures should be considered as a positive development, because Croatian law so clearly recognized the necessity of introducing the protection of collective interests and rights into its legal system in adapted form, as well as many European countries[30]. The Consumer Protection Act of 2014 enabled the protection of collective consumer interests by regulating unfair terms in consumer contracts. Therefore, in Article 49 of the Consumer Protection Act of 2014, the concept of an unfair contractual term was defined in the manner that an unfair contractual term is a term that was not individually negotiated if it causes a significant imbalance in the

[25] Article 502(c) of the Civil Procedure Act
[26] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests was included in Article 3 Consumer Protection Act, Official Gazette, No. 41/2014
[27] Consumer Protection Act, Official Gazette, No. 41/2014 (hereinafter: the Consumer Protection Act of 2014)
[28] Pavlović, M., *Tužba za zaštitu kolektivnih interesa i prava*, April 2018, https://www.iusinfo.hr/strucni-clanci/tuzba-za-zastitu-kolektivnih-interesa-i-prava, 20 January 2025.
[29] *loc. cit.*
[30] Pavlović, M., *Značaj tužbe za zaštitu kolektivnih interesa i prava*, Collected Papers of the Faculty of Law in Split, vol. 52, no. 3, 2015, p. 818.

rights and obligations of the contracting parties to the detriment of the consumer, contrary to the principle of good faith and fairness. According to the provisions of the Consumer Protection Act of 2014, it is considered that a particular contractual term was not individually negotiated if it was formulated in advance by the trader, for which reason the consumer had no influence on its content, especially if it pertains to a term in the trader's pre-formulated standard contract. However, if individual negotiations took place regarding certain aspects of a contractual term, or an individual contractual term, and the overall assessment of the contract indicates that it is a pre-formulated standard contract of the trader, this will not affect the possibility of assessing other terms of the contract unfair. Yet, if the trader claims that a particular contractual term in the pre-formulated standard contract was individually negotiated, he must prove it.[31]

Thereafter, the legislator prescribed such protection in the provisions of the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights,[32] in force since 25 June 2023. With this Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, the legislator regulated the right to file domestic and cross-border representative actions in collective consumer disputes and the procedural rules based on which the court considers and decides in these disputes. Such an action, according to the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, is called a representative action. According to the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, a representative action is an action for the protection of collective consumer interests filed by an authorized plaintiff on behalf of consumers, seeking to determine that the defendant acted contrary to the provisions of the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, a ban on actions representing such violation, compensation for material and non-material damage, and/or restitution for unjust enrichment caused by that violation.[33] Currently valid Act on Representative Actions for the Protection of Collective Interests and Consumer Rights also contains provisions protecting consumer rights and interests from unfair contractual terms. It is thus stipulated that representative actions can be filed for violations of material rights included in the scope of European Union

[31] Article 49 of the Consumer Protection Act of 2014
[32] Act on Representative Actions for the Protection of Collective Interests and Consumer Rights, Official Gazette, No. 59/2023 (hereinafter: the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights)
[33] Article 5 of the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights

acts, including Council Directive 93/13/EEC.[34][35] Therefore, the legislative framework of the Republic of Croatia has enabled consumers to assert and exercise their rights before the competent courts in the manner envisioned by the legislator within the legislative framework, and the consumers have done so by filing numerous individual lawsuits and conducting numerous individual restitution proceedings, which resulted in judgments in favor of the consumers.

4. THE "FRANC" CASE IN THE REPUBLIC OF CROATIA

The legislator in the Republic of Croatia created a legislative framework and the foundation that enables all citizens of the Republic of Croatia to initiate class actions to realize and protect their rights and interests, due to which the "franc" case was initiated in the Republic of Croatia with the action filed by the plaintiff "Potrošač" - Croatian Union of Consumer Protection Associations in liquidation[36] to protect collective consumer interests against eight largest Croatian banks, based on the provisions of articles 502(a) of the Civil Procedure Act of 2019 to 502(h) of the Civil Procedure Act of 2019. The plaintiff in these proceedings sought protection of consumer collective interests by requesting the determination of the nullity of the provisions of the agreements concerning the currency clause in Swiss francs, believing that the provisions in the loan agreements that the defendant banks concluded with consumers during the contested periods, which provisions established the Swiss franc as the currency linked to the principal, were invalid. In addition to the aforementioned and in the same lawsuit, the plaintiff also sought the determination of the nullity of the provisions of the agreement concerning the regular interest rate which was variable during the term of the contractual obligations in accordance with the unilateral decisions of the defendants that were not individually negotiated, all in accordance with the provisions of the Consumer Protection Act.[37] The first decision adopted in the aforementioned proceedings was the judgment of the Commercial Court in Zagreb, reference number P-1401/2012 of 4 July 2013,[38] determining that the defendant banks violated the collective rights and interests of consumers, that is, loan users, by entering into loan agreements that contained unfair and null contractual provisions in consumer credit

[34] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts of 5 April 1993, Official Journal 95, 21. 4. 1993, p. 29 (hereinafter: the Directive)
[35] Appendix I to the Act on Representative Actions for the Protection of Collective Interests and Consumer Rights
[36] *Potrošač* - Croatian Union of Consumer Protection Associations in liquidation, with the headquarters in Zagreb, Kneza Ljudevita Posavskog 48
[37] Consumer Protection Act, Official Gazette, No. 41/2014 and 110/2015 (hereinafter: the Consumer Protection Act)
[38] Judgment of the Commercial Court in Zagreb, reference number P-1401/2012 of 4 July 2013 (hereinafter: Judgment P-1401/2012 of 4 July 2013)

agreements - loan agreements - by stipulating the Swiss franc as the currency linked to the principal, and prior to and during the conclusion of the respective agreements, the defendant banks, as traders, did not fully inform the consumers of all the necessary parameters important for making an informed decision based on complete information, resulting in an imbalance in the rights and obligations of the contracting parties. Furthermore, the judgment P-1401/2012 of 4 July 2013, determined that the defendant banks violated collective interests and rights of consumers, loan users, by concluding loan agreements that contained invalid and unfair contractual provisions in consumer credit agreements. By acting in this manner, the defendant banks acted contrary to the provisions of the then-applicable Consumer Protection Act, Official Gazette, No. 96/2003, Consumer Protection Act Official Gazette, No. 79/2007, 125/2007, 75/2009, 79/2009, 89/2009, 133/2009, and contrary to the provisions of the Obligations Act.[39]Furthermore, by the judgment P-1401/2012 of 4 July 2013, the defendant banks were ordered to offer consumers a modification of the contractual provision that determined the principal amount of the loan obligation to be linked to the Swiss franc, and the interest rate to be variable, in such a way that the principal would be expressed in kuna in the amount that was disbursed in the loan utilization phase, and with a fixed interest rate, at the percentage that was explicitly stated in the consumer loan agreement as the applicable regular interest rate on the date the agreement was concluded.[40]

The defendant banks filed an appeal against the judgment P-1401/2012 of 4 July 2013, which was partially upheld by the High Commercial Court of the Republic of Croatia, and a decision was made, namely a judgment and a ruling, reference number Pž-7129/2013 of 13 June 2014,[41] by which the judgment P-1401/2012 of 4 July 2013, was modified in such a way that the request was rejected in the part related to the determination that the banks violated the collective interests and rights of consumers, loan users, by using an unfair contractual provision in consumer loan agreements, by which the currency linked to the principal was agreed to be the Swiss franc (currency clause), which was not individually negotiated.[42]

[39] Judgment P-1401/2012 of 4 July 2013
[40] Judgment P-1401/2012 of 4 July 2013
[41] Judgment and ruling of the High Commercial Court of the Republic of Croatia, reference number Pž-7129/13 of 13 June 2014 (hereinafter: the judgment and ruling Pž-7129/2013 of 13 June 2014)
[42] Rončević, V., *Predmet Franak - rekapitulacija kroz sudsku praksu*, October 2019, https://www.iusinfo.hr/strucni-clanci/predmet-franak-rekapitulacija-kroz-sudsku-praksu, 16 January 2025.

The plaintiff and first-seventh defendants filed revisions against the judgment and ruling Pž-7129/2013 of 13 June 2014 which were rejected by the Supreme Court of the Republic of Croatia in the judgment and ruling, reference number Revt-249/14-2, dated 9 April 2015.[43] Subsequently, the plaintiffs filed a constitutional complaint, partially accepted by the Constitutional Court of the Republic of Croatia. The Supreme Court's decision reference number Revt-249/2014-2, dated 9 April 2015, was annulled in the part where the plaintiffs' revision against the judgment and ruling Pž-7129/2013 of 13 June 2014 was rejected. This judgment had modified the first-instance decision by dismissing the plaintiffs' claim that the defendants violated consumer rights by including an unfair currency clause in loan agreements, specifically linking the principal to the Swiss franc without individual negotiation. The annulment also applied to the part rejecting the plaintiffs' claim against the eighth defendant, sending the case back to the Supreme Court for retrial. As a result, the Supreme Court was required to reconsider the revisions, particularly regarding the disputed currency clause. The Supreme Court of the Republic of Croatia was supposed to decide again on the request to declare those contractual provisions invalid, and in the part concerning the agreed interest rate in the loan agreements with a currency clause concluded with the eighth defendant.

The Supreme Court of the Republic of Croatia acted in accordance with the instructions of the Constitutional Court of the Republic of Croatia and issued the ruling Revt-575/16-5 of 3 October 2017, in which it annulled the judgment of the High Commercial Court of the Republic of Croatia number Pž-7129/13-4 of 13 June 2014, in the part concerning the request to determine that the defendant banks violated the collective interests and rights of consumers by stipulating the currency clause linked to the principal in Swiss francs, and against the part of the judgment where the plaintiffs' claim against the eighth defendant was rejected, as well as regarding the floating interest rate and currency clause. In view of the above, the case was sent back to the High Commercial Court of the Republic of Croatia for reconsideration, with the instruction that the disputed issue, specifically the currency clause, be resolved in accordance with the legal interpretation of the Constitutional Court of the Republic of Croatia expressed in its annulment decision.[44] The High Commercial Court of the Republic of Croatia acted in accordance with the instructions of the Supreme Court of the Republic of Croatia, resulting in a new judgment, reference number Pž-6632/2017-10 of 14 June

[43] Judgment and ruling of the Supreme Court of the Republic of Croatia, reference number Revt-249/2014-2 of 9 April 2015 (hereinafter: Judgment and ruling, reference number Revt-249/2014-2 of 9 April 2015)
[44] Rončević, *op. cit.* note 42.

2018[45], in which the appeal of the defendant banks was rejected, and the judgment of the Commercial Court in Zagreb, reference number P-1401/2012 of 4 July 2013, was upheld. This meant that it was determined that all the defendant banks violated the collective interests and rights of consumers, loan users, by entering into loan agreements using unfair and null contractual provisions.

Hence, it was established that the banks violated the collective interests and rights of consumers, loan users, by stipulating that the currency linked to the principal be the Swiss franc, in the credit agreements, i.e. loan agreements, and, as traders, they did not fully inform the consumers prior to and during the conclusion of the aforementioned agreements about all the necessary parameters important for making an informed decision that consumers would make based on complete information, during negotiations and in relation to the conclusion of these loan agreements.

"In other words, the High Commercial Court of the Republic of Croatia, with its new decision, has determined by final judgment that all eight defendant banks used unfair and invalid provisions regarding the currency clause and the floating interest rate, as was established by the first-instance judgment of the Commercial Court in Zagreb. This is significant because now, in individual restitution proceedings, consumers have the opportunity to claim overpaid amounts on two grounds. With the change of the interest rate, which was increased over time, it is quite understandable that there was an increase in the monthly annuities that consumers were required to pay compared to the annuities that were agreed upon at the time of the conclusion of the loan agreement. As for the currency clause, it should be clarified that due to the exchange rate change of the Swiss franc, particularly its appreciation (increase in value), there was also an increase in the monthly annuity amounts, as the payment was linked to the CHF currency, whose value dramatically rose during the critical period, thus increasing the equivalent of the annuity in kuna."[46]

Finally, in the decision number Rev 2221/2018-11, dated 3 September 2019, the Supreme Court of the Republic of Croatia confirmed the determination of the High Commercial Court of the Republic of Croatia in its substantial part, namely that the banks used unfair and null provisions regarding the currency clause and the floating interest rate.

[45]Judgment of the High Commercial Court of the Republic of Croatia, reference number Pž-6632/2017-10 of 14 June 2018 (hereinafter: Judgment Pž-6632/2017-10 of 14 June 2018)
[46] Rončević, *op. cit.* note 42.

Thus, the result of the "franc" case is that a decision was ultimately made in favor of consumers, i.e., loan users, who now had a ruling in their favor, which they could refer to in restitution proceedings initiated by private actions, as a final decision had been made establishing that the banks used unfair and null provisions regarding the currency clause and the floating interest rate.

Such judicial practice allowed consumers to initiate individual lawsuits in which overpaid funds based on invalid contractual provisions would be returned to consumers, which funds were acquired by the credit institutions without legal grounds, as the competent courts established that the provisions were null and void. Also, it can be said that case Franak influenced the development of Croatian consumer protection law and led to numerous legislative amendments that followed in order to strengthen the duty to inform consumers about various contractual terms, particularly those concerning floating interest rates.[47] Such a result has undoubtedly contributed to increased legal certainty and enhanced consumer protection in loan agreements.

5. UNFAIRNESS TEST

The unfairness test was adopted from the Directive and implemented into Croatian legislation, and Article 55 of the Consumer Protection Act of 2014, prescribes nullity as the consequence of an unfair contractual provision. Hence, in order for a contractual provision to be considered unfair and, consequently, null and void, the following conditions must be cumulatively fulfilled:

"1) The absence of individual negotiations of the contractual provision
2) Contradiction to the principle of good faith and fairness
3) Significant imbalance in the rights and obligations of the contracting parties to the detriment of the other contracting party/consumer
4) ... Endangerment of achieving the purpose of the concluded contract"[48]

The first condition of the unfairness test refers to the general terms of a contract, which are pre-drafted contractual provisions for a large number of contracts, and are either contained in a form or standard contract or referred to in the contract. It is therefore considered that no individual negotiations took place regarding a

[47] Mišćenić, E., *Croatian case "Franak": Effective or "Defective" protection of consumer rights?*, Harmonius: Journal of Legal and Social Studies in South East Europe, vol. 5, 2016, pp. 184–209, p. 206.
[48] Mišćenić, E.; Petrić, S., *Nepoštenost valutne klauzule u CHF i HRK/CHF kreditima*, Narodne novine, Zagreb, 2020, p. 100.

specific contractual provision if the provision was pre-drafted by the trader and the consumer had no influence on its content.[49] However, the scope of application is considerably broader in relation to consumer contracts because it is considered that if certain contractual provisions were individually negotiated, but the overall assessment indicates that the contract is a standard pre-formulated contract, this will not affect the possibility of assessing other provisions of that contract unfair.[50] The second condition, which must be cumulatively fulfilled, relates to the contradiction of the contractual provision with the principle of good faith, i.e., the principle of diligence and fairness, and since legal provisions do not contain explicit regulations concerning this principle, its interpretation and application come from the case law. Therefore, it is considered that the author of the general terms respected the criteria of diligence and fairness if they always acted honestly and conscientiously towards the other party and always took the other party's legitimate interests into account, meaning that the court must take into account all the different interests that arise from the agreement.[51]

The third condition relates to the consequence that a provision in the loan agreement causes to the weaker contracting party, i.e., the consumer, so, in order for a contractual provision to be considered unfair by the court or body assessing its fairness, the condition of the consequence of a significant imbalance in the rights and obligations of the contracting parties to the detriment of the consumer must be met. The court or body deciding on the fulfillment of this condition will, in each case, consider all circumstances existing before and during the conclusion of the loan agreement, especially the legal nature of the agreement and the type of goods or services involved.[52] Endangering the achievement of the purpose of the concluded loan agreement relates only to the general terms of the agreement.

6. INDIVIDUAL RESTITUTION LAWSUITS OF CONSUMERS IN THE REPUBLIC OF CROATIA

After all the aforementioned decisions in the "franc" case which was initiated based on class action for the protection of consumer rights and interests, consumers, as individuals, initiated individual legal proceedings that resulted in numerous judgments by competent courts in favor of consumers, such as the judgment of the County Court in Pula - Pola, reference number Gž-283/2023-2 of

[49] *Ibid*., p. 101
[50] *Ibid*., p. 102
[51] *Ibid*., p. 109
[52] *Ibid*., p. 121

20 April 2023,[53] which confirmed the judgment of the Municipal Court in Zlatar, reference number: P-367/2021-19 of 25 January 2023,[54] judgment of the County Court in Sisak, reference number: Gž-316/2023-3 of 14 March 2024,[55] which confirmed the judgment of the Municipal Court in Slavonski Brod, reference number: P-641/2021-30 of 20 April 2023,[56] judgment of the County Court in Varaždin, reference number: Gž-775/2022-3 of 4 April 2023,[57] which confirmed the judgment of the Municipal Civil Court in Zagreb, reference number P-793/2020-22 of 1 April 2022,[58] then the judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023[59] and numerous other rulings of the competent courts of the Republic of Croatia rendered in favor of consumers.

Despite the fact that a uniform case law has already been established in ongoing proceedings related to the Swiss franc currency clause and floating interest rates, some issues, such as proving the status of the consumer, have already been addressed in the practice of the Supreme Court of the Republic of Croatia. However, some lower courts are struggling with the implementation of this position and the concept of proof.[60]

Thus, in lawsuits before lower courts, evidence was presented to prove the consumer status of the plaintiff by hearing personal evidence and the parties to the proceeding. For instance, in the case conducted before the Municipal Civil Court in Zagreb, reference number: P-6284/2019, the competent court also heard witnesses:

“Therefore, based on the testimony of the witness as well as the documentation enclosed with the file, the court determined that the plaintiff has proven his status

[53] Judgment of the County Court in Pula - Pola, reference number: Gž-283/2023-2 of 20 April 2023
[54] Judgment of the Municipal Court in Zlatar, reference number: P-367/2021-19 of 25 January 2023
[55] Judgment of the County Court in Sisak, reference number: Gž-316/2023-3 of 14 March 2024
[56] Judgment of the Municipal Court in Slavonski Brod, reference number: P-641/2021-30 of 20 April 2023
[57] Judgment of the County Court in Varaždin, reference number: Gž-775/2022-3 of 4 April 2023
[58] Judgment of the Municipal Civil Court in Zagreb, reference number P-793/2020-22 of 1 April 2022
[59] Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023 (hereinafter: the Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023)
[60] Metelko, I., *Otvorena pitanja u slučaju Franak*, February 2022, https://www.iusinfo.hr/aktualno/u-sredistu/otvorena-pitanja-u-slucaju-franak-49577, 17 January 2025.

as a consumer in this agreement, that the agreement was used for its intended purpose, that no professional activity was carried out in the subject apartment by the plaintiff, his wife, or any other family members. The defendant, as the bank and creditor, was obliged to monitor the intended use of this loan, and the defendant did not provide the court with any evidence of having noticed any irregularities related to the use of the loan by the plaintiff."[61]

Since the court established that this specific Purpose Loan Agreement, a standard form agreement composed by the defendant, contains contractual provisions that were determined in the final collective dispute for the protection of consumers regarding the stipulation of a floating interest rate by the unilateral decision of the defendant, as well as the loan being linked to the CHF currency, and since the defendant, according to this court's finding, did not prove that in this specific case, the provisions in question were different in significance and content from those that were declared null and void in the final judgment of the collective consumer protection lawsuit regarding loan agreements with a floating interest rate in the previously described manner, and with the agreed loan currency linked to CHF, the court found all the defendant's objections regarding the impossibility of applying the findings from the collective dispute to this specific case unfounded in entirety.[62] Specifically, in this case, due to the null and void provision of the loan agreement, the consumer suffered damage, and the credit institution gained financial benefit without legal basis and to the detriment of the consumer.

Additionally, in the same case, the court decided and deliberated on unfair provisions in consumer contracts, and so, in the judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, the court took the stance that:

"It should be emphasized that at the time of concluding the subject agreement, the Consumer Protection Act (Official Gazette, No. 96/03 – hereinafter: CPA/03) was in force, which also contained provisions on unfair terms in consumer contracts. Thus, the provision of Article 81, paragraphs 2 and 3 of the CPA/03 prescribe that a contractual provision not individually negotiated is considered unfair if, contrary to the principles of good faith and fairness, it causes a significant imbalance in the relations and obligations of the contracting parties to the detriment of the consumer, especially if the consumer had no influence on its content."[63]

[61] Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, pp. 23 - 24, passage 88
[62] Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, p. 24, passage 89
[63] Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, pp. 32 - 33, passage 128

Thus, the Municipal Civil Court in Zagreb accepted the plaintiff's claim, confirming their consumer status and that the loan was used as intended. No professional activity was conducted in the apartment by the plaintiff or their family, and the bank failed to provide evidence of irregularities in the loan's use. The court also determined that the loan agreement's provisions, in terms of content, legal significance, and effect, align with those deemed null and void by the High Commercial Court of Croatia in the collective dispute regarding linking consumer contracts to the Swiss franc. It was further proven that the provisions related to the unilateral change of interest rates also matched those in the collective dispute. The burden of proof that the provisions differ or that the loan was misused lies with the defendant. Based on these findings, the Municipal Civil Court in Zagreb granted the plaintiff's claim in judgment P-6284/2019-45 on 6 July 2023.

At the session held on 31 January 2022, the Civil Department of the Supreme Court adopted the legal interpretation under number: Su-IV-33/2022-2 of 31 January 2022,[64] which clarified the application of the statutory rules regarding the statute of limitations:

"According to the revision court's understanding, the initiation of legal proceedings for the protection of collective consumer interests results in the suspension of the statute of limitations based on Article 241 of the OA/05, and the statute of limitations for individual restitution claims begins to run again only from the moment the court decision rendered in relation to that lawsuit becomes final."

The legal interpretation of the Civil Department's session is as follows: "The limitation period in the case of a restitution claim, where the contracting parties are obliged to mutually return everything they have received based on a null and void agreement, or in the case of a claim under Article 323, paragraph 1 of the OA/05 (Article 104, paragraph 1 of the OA/91) as a result of the determination of the nullity of the agreement, starts to run from the day the court decision that determined or otherwise established the nullity of the agreement becomes final."[65]

In the spirit of the legal interpretation of the Civil Department of the Supreme Court number: Su-IV-33/2022-2 of 31 January 2022, lower courts have also made decisions, and thus, in the judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, it was decided:

[64] Excerpt from the minutes of the Supreme Court of the Republic of Croatia, Civil Department, number: Su-IV-33/2022-2 of 31 January 2022
[65] *loc. cit.*

"According to the interpretation of the Supreme Court of the Republic of Croatia in the judgment Rev-2245/17 of 20 March 2018, the initiation of civil proceedings for the protection of collective consumer interests leads to the interruption of the statute of limitations based on Article 241 of the OA/05, and the statute of limitations for individual restitution claims starts anew only from the moment the court decision adopted in relation to that lawsuit becomes final (here, on 13 June 2014)."[66]

Thus, the issue of the statute of limitations has been clarified by establishing that the initiation of legal proceedings for the protection of collective consumer interests leads to the interruption of the statute of limitations, and that the statute of limitations for individual restitution claims starts anew only from the moment the court decision in response to that lawsuit becomes final. This means that the statute of limitations starts anew from the moment when the court decision regarding the lawsuit for the protection of collective consumer rights and interests is rendered.

Regarding the issue of the statute of limitations for restitution claims in cases where the nullity of the agreement is established in general, the limitation period begins to run from the day the court decision that establishes or otherwise recognizes the nullity of the agreement becomes final. In cases where the nullity is established already in the collective consumer protection proceedings, the limitation period starts to run from the day the court decision confirming the nullity in the collective protection process becomes final, and this also applies to the legal consequences of the action for the protection of collective consumer interests and the parties involved in that procedure.

7. PROCEDURE BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union has made several decisive rulings, such as:
Judgment - 62019CJ0081 of 9 July 2020. In case C-81/19, regarding a request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 27 December 2018, received at

[66] Judgment of the Municipal Civil Court in Zagreb, reference number: P-6284/2019-45 of 6 July 2023, p. 32, passage 127

the Court on 1 February 2019, in the proceedings NG, OH against SC Banca Transilvania SA;[67]
Judgment - 62017CJ0051 of 20 September 2018 in case C-51/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest, Hungary), made by decision of 17 January 2017, received at the Court on 1 February 2017, in the proceedings OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt. against Teréz Ilyés, Emil Kiss;[68]
Judgment - 62017CJ0118 of 14 March 2019. In case C-118/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Budai Központi Kerületi Bíróság (Central District Court, Buda, Hungary), made by decision of 9 January 2017, received at the Court on 7 March 2017, in the proceedings Zsuzsanna Dunai against ERSTE Bank Hungary Zrt, (hereinafter: C-118/17);[69]
Judgment - 62018CJ0452 of 9 July 2020. In case C-452/18, regarding a request for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain), made by decision of 26 June 2018, received at the Court on 11 July 2018, in the proceedings XZ against Ibercaja Banco SA.[70]

In short, the judgments in these cases decided as follows: in case C-81/19, it was determined that if the subject is void, the law must regulate it as void for the law to apply; in cases C-51/17 and C-118/17, the court established the nullity, within which there is no act of the parties that would exclude the right to the difference they are economically owed between the establishment of nullity and full compensation. In case C-452/18, it was decided that an agreement with a void

[67] Judgment - 62019CJ0081 of 9 July 2020. In case C-81/19, regarding a request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania), made by decision of 27 December 2018, received at the Court on 1 February 2019, in the proceedings NG, OH against SC Banca Transilvania SA, (hereinafter: C-81/19)
[68] Judgment - 62017CJ0051 of 20 September 2018 in case C-51/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Fővárosi Ítélőtábla (Regional Court of Appeal, Budapest, Hungary), made by decision of 17 January 2017, received at the Court on 1 February 2017, in the proceedings OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt. against Teréz Ilyés, Emil Kiss, (hereinafter: C-51/17)
[69] Judgment - 62017CJ0118 of 14 March 2019. In case C-118/17, regarding a request for a preliminary ruling under Article 267 TFEU from the Budai Központi Kerületi Bíróság (Central District Court, Buda, Hungary), made by decision of 9 January 2017, received at the Court on 7 March 2017, in the proceedings Zsuzsanna Dunai against ERSTE Bank Hungary Zrt, (hereinafter: C-118/17), (hereinafter: C-118/17)
[70] Judgment - 62018CJ0452 of 9 July 2020. In case C-452/18, regarding a request for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia e Instrucción No 3 de Teruel (Court of First Instance and Preliminary Investigations No 3, Teruel, Spain, made by decision of 26 June 2018, received at the Court on 11 July 2018, in the proceedings XZ against Ibercaja Banco SA (hereinafter: C-452/18)

subject but treated as valid, thus failing to meet the transparency criterion, cannot be considered valid in the context of the Directive[71]. Therefore, it is evident that Croatian courts, even before the Court of Justice of the European Union, took a stance, correctly, lawfully, and fairly applied the legal provisions prescribed in the Republic of Croatia, demonstrating the alignment of Croatian legislation and judiciary with the spirit of the European Union.

8. CONCLUSION

Like many others, citizens of the Republic of Croatia took loans in Swiss francs, hoping for a better future, as these loans were presented as one of the most favorable financial products available on the market at the time. What they couldn't foresee was the prolonged struggle for their basic rights and fairness in contracts. Given that average consumers were in an inferior position to banks and had far less knowledge than bank employees, they trusted the banks, which only provided information deemed sufficient to get them to agree to the loan terms. Based on this selective information, consumers entered into loan agreements in Swiss francs. Such conduct by banking institutions calls into question the fairness of the contractual relationships formed between the banks and consumers, which ultimately proved to be unfair and has been described in literature as white-collar crime, given the nature of employment and the social status of the contracting party who sought to exploit the consumer's inferior position using their vast knowledge and experience. It became clear and obvious to consumers that they were paying larger and larger loan annuities for loans taken in Swiss francs, which was ultimately the result of exchange rate risks and the risk of floating interest rates which changed through unilateral decisions made by the banks. Moreover, the Croatian Supreme Court confirmed that the unilateral change in interest rates, without predetermined criteria, was illegal.[72]

It is clear that the banks have failed consumers and that they have gained unjustified material benefits for themselves through their dishonest business practices. Although the courts have declared the provisions on the CHF currency clause and the floating interest rate null and void in their decisions, thus restoring faith in the Croatian judiciary and legislative system to a certain extent. However,

[71] Tomić, M. C., *Applicability of EU Court decisions on the conversion agreements (C-81/19 and C-452/18)*, July 2020, https://www.iusinfo.hr/aktualno/u-sredistu/primjenjivost-odluka-suda-eu-a-na-sporazume-o-konverziji-c-81-19-i-c-452-18-42240, 17 January 2025.
[72] Kačer, H.; Ivančić Kačer, B., *Problemi poznati kao CHF case u 2016. god. - quo vadis CHF*, in: *Services and service rules*, proceedings from an international scientific conference, Kragujevac: Faculty of Law, University of Kragujevac, 2016, p. 190.

we are still witnessing the ongoing proceedings before the Constitutional Court of the Republic of Croatia, in which a decision needs to be made on the consumer's right to have the CHF contract declared null and void in its entirety, while at the same time there are EU Court decisions from which it can be concluded that the CHF contract is null and void in its entirety. Therefore, there is a certain level of trust in the judiciary, but the author believes that faster and more efficient conduct of court proceedings and decision-making by the courts of the Republic of Croatia in accordance with the existing decisions of the Court of Justice of the European Union would certainly improve and contribute to strengthening citizens' trust in the independence and responsibility of the judiciary and legislative system, because this would, among other things, ensure a high degree of legal responsibility on the part of the banks themselves, which in the event of the nullity of the entire contract in Swiss francs would have to return to the consumer everything they acquired based on such a null and void contract in its entirety.

REFERENCES

BOOKS AND ARTICLES

1. Babić, M., *Valutna klauzula*, Obnovljeni Život, vol. 70, no. 3, 2015.
2. Buljan Barbača, D.; Piplica, D., *„Slučaj franak“ - poslovna prijevara kao ugroza egzistencijalne sigurnosti građana Republike Hrvatske?*, Policija i sigurnost, vol. 32, no. 1, 2023.
3. Kačer, H.; Kačer, B., *CHF case - 2019. god., Freedom to provide services and legal security*, 15th International Conference of the Faculty of Law, University of Kragujevac, 2019.
4. Kačer, H.; Ivančić Kačer, B., *Problemi poznati kao CHF case u 2016. god. - quo vadis CHF*, in: *Services and service rules*, Kragujevac: Faculty of Law, University of Kragujevac, 2016.
5. Klarić, P.; Vedriš, M., *Građansko pravo. Opći dio, stvarno pravo, obvezni i nasljedno pravo*, Official Gazette, Zagreb, September 2006.
6. Mišćenić, E., *Croatian case “Franak”: Effective or “Defective” protection of consumer rights?*, Harmonius: Journal of Legal and Social Studies in South East Europe, 2016.
7. Mišćenić, E.; Petrić, S., *Zakonitost CHF i HRK/CHF kredita*, Official Gazette, Zagreb, January 2020.
8. Orlović, A., *Gospodarski kriminalitet u Republici Hrvatskoj*, Redak, Split, 2013.
9. Pavlović, M., *Značaj tužbe za zaštitu kolektivnih interesa i prava*, Proceedings of the Faculty of Law in Split, 2015.

10. Tomašević, J., *Novac i kredit*, Dom i svijet, University of Zagreb Faculty of Economics and Business, Zagreb, 2004.
11. Triva, S.; Dika, M., *Građansko parnično procesno pravo*, VII revised and updated ed., Official Gazette, Zagreb, November 2004.
12. Van Greuning, H.; Brajovic Bratanovic, S., *Analiza i upravljanje bankovnim rizicima*, 2nd ed., Library Gospodarska misao, Zagreb.

LEGAL ACTS

1. Obligations Act, Official Gazette, No. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 145/2023, 155/2023.
2. Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 129/2000, 88/2001, 117/2003, 88/2005, 2/2007, 96/2008, 84/2008, 123/2008, 57/2011, 25/2013, 89/2014, 70/2019, 80/2022, 114/2022, 155/2023.
3. Civil Procedure Act, Official Gazette, No. 53/1991, 91/1992, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 96/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014, 70/2019.
4. Consumer Protection Act, Official Gazette, No. 41/2014.
5. Consumer Protection Act, Official Gazette, No. 41/2014 and 110/2015.
6. Act on the Amendments to the Consumer Credit Act, Official Gazette, No. 102/2015.
7. Act on the Amendments to the Credit Institutions Act, Official Gazette, No. 102/2015.
8. Act on Representative Actions for the Protection of Collective Consumer Interests and Rights, Official Gazette, No. 59/2023.
9. Appendix I to the Act on Representative Actions for the Protection of Collective Consumer Interests and Rights.
10. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993.

COUURT DECISIONS

1. CJEU, Judgment, C-81/19, 9 July 2020 (NG, OH v. SC Banca Transilvania SA).
2. CJEU, Judgment, C-51/17, 20 September 2018 (OTP Bank Nyrt. v. Teréz Ilyés, Emil Kiss).
3. CJEU, Judgment, C-118/17, 14 March 2019 (Zsuzsanna Dunai v. ERSTE Bank Hungary Zrt).
4. CJEU, Judgment, C-452/18, 9 July 2020 (XZ v. Ibercaja Banco SA).

5. Supreme Court of the Republic of Croatia, Judgment and ruling, Revt-249/2014-2, 9 April 2015.
6. Supreme Court of the Republic of Croatia, Minutes excerpt, Civil Department, Su-IV-33/2022-2, 31 January 2022.
7. High Commercial Court of the Republic of Croatia, Judgment and ruling, Pž-7129/13, 13 June 2014.
8. High Commercial Court of the Republic of Croatia, Judgment, Pž-6632/2017-1, 14 June 2018.
9. Commercial Court in Zagreb, Judgment, P-1401/2012, 4 July 2013.
10. Municipal Court in Zlatar, Judgment, P-367/2021-19, 25 January 2023.
11. Municipal Court in Slavonski Brod, Judgment, P-641/2021-30, 20 April 2023.
12. Municipal Civil Court in Zagreb, Judgment, P-793/2020-22, 1 April 2022.
13. Municipal Civil Court in Zagreb, Judgment, P-6284/2019-45, 6 July 2023.
14. County Court in Sisak, Judgment, Gž-316/2023-3, 14 March 2024.
15. County Court in Varaždin, Judgment, Gž-775/2022-3, 4 April 2023.
16. County Court in Pula - Pola, Judgment, Gž-283/2023-2, 20 April 2023.

NETWORK RESOURCES

1. Tomić, M.C., *Primjenjivost odluka Suda EU-a na sporazume o konverziji (C-81/19 and C-452/18)*, https://www.iusinfo.hr/aktualno/u-sredistu/primjenjivost-odluka-suda-eu-a-na-sporazume-o-konverziji-c-81-19-i-c-452-18-42240.
2. Metelko, I., *Otvorena pitanja u slučaju Franak*, February 2022. https://www.iusinfo.hr/aktualno/u-sredistu/otvorena-pitanja-u-slucaju-franak-49577.
3. Pavlović, M., *Tužba za zaštitu kolektivnih interesa i prava*, April 2018. https://www.iusinfo.hr/strucni-clanci/tuzba-za-zastitu-kolektivnih-interesa-i-prava.
4. Rončević, V., *Predmet franak - rekapitulacija kroz sudsku praksu*, October 2019. https://www.iusinfo.hr/strucni-clanci/predmet-franak-rekapitulacija-kroz-sudsku-praksu.
5. *Slučaj Franak – Sažetak*, https://udrugafranak.hr/slucaj-franak-sazetak/.

UDK: 347.44 : 004 (498:439)
Review paper

Józsa Ede, PhD student
Faculty of Law, Institute of Private Law, University of Miskolc, Hungary
E-mail: jozsaede@gmail.com

AN EXAMINATION OF THE NATURE OF A SMART CONTRACTS AS A LEGAL TRANSACTION

ABSTRACT

Technological progress is not leaving the field of civil law, including private law, untouched, and its rapid development poses many challenges. Digitalisation, the driving force behind the fourth industrial revolution, is one of these current technological phenomena, which is likely to bring about major changes. The question to be answered is how, if at all, legislation can keep pace with these unprecedented situations brought about by technological change and cope with the changes brought about by technological innovation. The aim of the research is to identify the legal problems that have already arisen, to provide appropriate legal answers based on the doctrinal foundations, i.e. to formulate de lege lata, de lege ferenda proposals, and to carry out the research for the two countries (Hungary and Romania) along the lines of a legal comparison. To explore what further legal questions and challenges may arise from the progress of digitalisation, based on the institutions of civil law in the area of contract law, whether reassuring answers can be given to these questions or whether legal development is necessary. In this paper we will place the concept of smart contracts in the context of the current Romanian and Hungarian civil law. The study will examine the place of smart contracts in these legal systems, while providing an insight into the regulation of contracts in both countries. Furthermore, the study will also examine the nature of the smart contract as a legal transaction.

Keywords: *smart contracts, digitalisation, civil law, contract law.*

1. INTRODUCTION

The European digital decade in which we currently live constitute a significant part of the EU's digital policy, announced as Web 4.0. Technological advancements influence people's lifestyles, work, content creation and sharing, as well as the operation, innovation, and production of businesses, along with the position of consumers. This development brings both new opportunities and, undoubtedly, risks that need to be addressed. It is essential to examine how civil law, particularly the field of contract law, is affected by these developments and what challenges they pose. Digitalization impacts contract law in various ways

and areas. With the widespread use of technological tools, legal declarations and contract conclusions conducted via online and digital means have become increasingly common. In this context, the question arises as to whether legal declarations made electronically in different ways can be considered as being in written form and whether they can be classified under the traditional methods of legal declarations – namely, oral, written, or implied conduct. As a result of digitalization, there is an increase of contracts being performed by machines, robots and computers. For instance, robots serve customers in restaurants, oversee elderly individuals, or automate car washing, among other tasks. These scenarios generate multiple legal issues that require careful examination.

One of the primary objectives of my research is to explore how the recently emerging phenomenon, known as smart contracts – also referred to as intelligent contracts – fits within, or can be integrated into, the currently applicable rules of civil law. While the future of cryptocurrencies, which are also based on blockchain technology, largely depends on trust and the resilience of governments supporting traditional financial systems, no direct opposing interest seems to stand against blockchain technology itself – including smart contracts. However, despite this, a certain legislative hesitation can be observed worldwide concerning smart contracts. This factor makes the legal examination of smart contracts particularly timely.[1]

2. THE CONCEPT OF SMART CONTRACTS

As is customary, the present legal research cannot begin without defining key concepts. Since law is a language-dependent phenomenon, it is necessary to align everyday language with the legislative terminology created by lawmakers, as well as with the terminology used in legal scholarship. From the perspective of conceptual clarification, a key question arises regarding the first component of the term "smart contract": what makes a contract *smart?* To answer this, it is useful to start from the classical definition of a contract and examine how the attribute "smart" relates to this concept. I start from the premise that smart contracts are, in essence, digitally formatted contracts**.** Smart contracts are essentially programs stored on a blockchain, which - like cryptocurrencies, coins, and tokens – offer a futuristic vision in which high-security technologies replace traditional solutions.

[1] The financial sector is one of the largest adopters of smart contracts. Decentralized finance (DeFi) applications, for example, enable the automation of lending transactions, insurance contracts, and other financial operations without human intervention. For more: Schär, F., *Decentralized Finance: On Blockchain- and Smart Contract-Based Financial Systems*, Federal Reserve Bank of St. Louis Review, 2021, p. 153.

These alternative technologies – such as algorithms, artificial intelligence, and smart contracts – carry significant legal relevance, as they have the potential to fundamentally reshape existing legal institutions and impact all aspects of life.

One of the greatest advantages of smart contracts is that they are based on blockchain technology, which ensures decentralization, transparency, and immutability. Blockchain-based solutions enable contract execution without third-party intermediaries, leading to significant cost savings and increased efficiency.[2] The concept of smart contracts was first introduced by Nick Szabo, a Hungarian-born computer scientist and engineer, whose name is often associated with the invention of Bitcoin. According to his definition, a smart contract is *"a transactional protocol that executes contractual terms".*[3] Nick Szabo's vision,[4] basic contract forms can be embedded in computer software and hardware to automate the process of contract formation. Nick Szabo often cited vending machines as a typical example of smart contracts, arguing that they autonomously execute transactions by dispensing goods upon receiving payment.[5] However, this is a misconception: in this example, it is not the contract that is smart, but the machine that performs the contract's obligations on behalf of its operator. While the vending machine example does not fully illustrate the essence of smart contracts, it does highlight a related issue in digitalization – namely, the automation of contractual obligations through machines rather than human agents. Other authors[6] have provided different definitions of smart contracts, such as "self-executing autonomous computer protocols" or "agreements between two or more parties that are programmed to be enforced and executed through blockchain technology." A notable definition comes from Ágnes Juhász, who defines the technology as follows: *"In the simplest, most concise formulation, a smart contract is nothing more than a self-executing agreement".*[7] Although these definitions

[2] Tapscott, D., Tapscott, A., *Blockchain Revolution: How the Technology Behind Bitcoin and Other Cryptocurrencies is Changing the World*, Portfolio, New York 2016, p. 75.

[3] Béla, Cs., *Smart Contracts*, Opuscula Civilia, National University of Public Service, Faculty of Public Governance and International Studies, Budapest 2019, p. 6.; available: https://antk.uni-nke.hu/document/akk-copy-uni-nke-hu/Opuscula_Civilia_2019_Csitei_Bela.pdf.

[4] Szabo, N., *"Smart Contracts,* Satoshi Nakamoto Institute, 1994, p. 1.; available: https://nakamotoinstitute.org/library/smart-contracts.

[5] Szabo, N., *"The Idea of Smart Contracts,* Satoshi Nakamoto Institute, 1997, p. 2.; Available: https://nakamotoinstitute.org/library/the-idea-of-smart-contracts/.

[6] *Kost: "*self-executing, autonomous computer protocols that facilitate, execute and enforce commercial agreements between two or more parties*"; Roger* Wattenhofer: *"*an agreement between two or more parties, encoded in such a way that the correct execution is guaranteed by the Blockchain*"*.

[7] Ágnes, J., *Online Contracting, Digital Content and Services, Smart Contracts – A New Era of Contract Law?,* Infocommunication and Law, 2020/2, (75.) e-special issue; available: https://infojog.hu/juhasz-agnes-online-szerzodeskotes-digitalis-tartalom-es-

emphasize different attributes, they all share a common characteristic: the self-executing nature[8] of smart contracts**.**

It is also reasonable to examine and use as a starting point the definition of the European Union's regulatory framework on blockchain and smart contracts,[9] issued in September 2019, as it provides a consensus-based definition**:** *"a smart contract is a computer code stored on a blockchain that is accessible to one or more parties (...) and is often self-executing".*[10] Taking into account these characteristics and definitions, in this research i associate the following definition to the concept of smart contract: *a smart contract is a code containing an if-then logical statement that executes autonomously when predefined conditions are met.*[11] While smart contracts present a revolutionary technological solution, they also raise several legal issues, such as validity, enforceability, and potential legal remedies. Currently, most legal systems do not have specific regulations governing smart contracts, meaning they must be interpreted according to traditional contract law principles.[12]

3. THE PLACE OF SMART CONTRACTS IN THE LEGAL SYSTEM

To examine the nature of smart contracts, it is essential to first analyze the concept of classical contracts, their evolution, role, and placement within the civil law system, as well as their stages of development. Understanding this latest form of

szolgaltatas-intelligens-szerzodessel-a-szerzodesi-jog-uj-korszaka-2020-2-75-e-kulonszam/.

[8] Basumallik, C., *"Smart Contracts: Types, Benefits, and Tools",* Spiceworks, 2023, p. 3.; available: https://www.spiceworks.com/tech/innovation/articles/what-are-smart-contracts/.

[9] European Union Blockchain Observatory and Forum, "Legal and regulatory framework of blockchains and smart contracts", 2019, p. 6.; available: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology__Smart_Contracts_and_Consumer_Protection_Council_Draft.pdf.

[10] „In the blockchain context, it generally means computer code that is stored on a blockchain and that can be accessed by one or more parties. These programs are often self-executing and make use of blockchain properties like tamper-resistance, decentralised processing, and the like." Lyons, T., Ludovic, T., *Legal and Regulatory Framework of Blockchains and Smart Contracts. – A thematic report prepeared by the European Union Blockchain Observatory and Forum,* 27 th September 2019, p. 22.; https://www.eublockchainforum.eu/sites/default/files/reports/report_legal_v1.0.pdf.

[11] For example, a smart contract operation could be: *if a certain amount is received in a bank account, then 10% of it is automatically transferred to a second account for long-term savings.*

[12] Werbach, K., Cornell, N., *Contracts Ex Machina*, Duke Law Journal, Vol. 67, 2017, p. 344.

contract necessitates tracing back to the origins of contracts, referring to the rules of Roman law. Roman law provides the earliest structured approach to contracts, emphasizing key elements such as *voluntas* (intent), *consensus* (agreement), and *causa* (legal reason).[13] These foundational concepts have been carried through into modern civil law frameworks.

Notably, smart contracts, though executed in digital environments, often mirror classical forms in structure—requiring offer, acceptance, and performance—albeit mediated by code. The automated and decentralized nature of these contracts, however, challenges traditional legal interpretations, especially in areas like enforcement, consent, and modification.[14] Therefore, to fully understand the legal implications of smart contracts, one must contextualize them within the broader tradition of contract law, particularly its Roman and civil law roots.[15] This task means to analyse the classical concept of an obligation and contract in relation to smart contracts to determine their nature as legal acts. Moreover, scholars emphasize that the terminology and real-world limitations of smart contracts necessitate a cautious approach when equating them with traditional legal agreements.[16]

3.1. The classical concept of an obligation and contract

The appearance of abstract definitions is less characteristic of Roman law; however, attempts to define fundamental concepts, such as obligations, had already begun at that time. The term "obligation" derives from the Latin word "*obligatio*," which was defined in Roman law in relation to, and simultaneously with, property rights. The essence of an obligation does not lie "in making something our own or granting us a servitude, but in compelling another person to give something, do something, or assume responsibility for something on our behalf".[17] This definition serves as a starting point and excellently illustrates and embodies the distinction used to typify obligations – and, consequently, contracts – by emphasizing the provision of services as a defining characteristic in these areas of law. According to this definition, an obligation may entail three types of duties: the transfer of an object (*dare*), the performance of an act (*facere*), and the

[13] Zimmermann, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford 1996, p. 578
[14] Werbach, K., *op.cit.,* p. 347.
[15] Beale, H., Fauvarque-Cosson, B., Ruggeri, S., *Contract Law: Ius Commune Casebooks for the Common Law of Europe*, Hart Publishing, Oxford 2010, p. 40.
[16] Mik, E., *Smart Contracts: Terminology, Technical Limitations and Real-World Complexity*, Law, Innovation and Technology, Vol. 9, No. 2, 2017, p. 278
[17] András, F., Gábor, H., *History and Institutions of Roman Law*, National Book Publishing House, Budapest 2019, p. 380.

assumption of liability (*praestare*).[18] Additionally, this tripartite classification is supplemented by an obligation of non-performance (*non-facere*), which is not found in the definition of *Paulus.*[19] It can be stated that *Julius Paulus*' tripartite classification, aside from the aforementioned supplement, not only facilitated the categorization of obligations but also fundamentally influenced legal development in this area through the creation of this definition.[20] This assertion is supported by the provisions of the current Hungarian Civil Code[21] regarding the definition of obligations, as well as by Romanian legal literature,[22] which also references this classification. Furthermore, from *Paulus'* definition, the structural characteristic of an obligation emerges, namely that it always involves two or more specifically identifiable and designated persons, between whom a legal relationship arises, requiring active or passive conduct. This legal relationship structure is termed a relative legal relationship, wherein the identity of the parties is known, in contrast to an *in rem* legal relationship, in which the entitled party enjoys protection against all other legal subjects.[23]

In absolute legal relationships, the obligors bear negative obligations – this tripartite following *Béni Grosschmid* is referred to, as a "compressed negative obligation".[24] Taking ownership as an example, this tripartite obligation consists of the following: 1) everyone must recognize and respect the status of the beneficiary of the absolute legal relationship; 2) all legal subjects must tolerate the exercise of the aforementioned right due to the lawful position of the entitled party; and 3) no one may interfere with the exercise of the right.[25] *Grosschmid's* terminology is accurate, as the fulfilment of this tripartite obligation is possible without any specific action.

In my view, smart contracts are relative legal relationships, as their formation identifies the contracting parties. Whether these identities become public, thanks

[18] Péter, K., *The place of smart contracts in the legal system,* Ministry of Justice programme to raise the level of legal education, Budaoest 2019, p.17; *obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.*
[19] Julius Paulus was one of the famous jurists and lawyers of the late 2nd century and early 3rd century, the author of the above definition.
[20] Olteanu, A., *Roman Law and Its Reception in Modern Civil Codes*, Cluj University Press, Cluj-Napoca 2016, p. 115.
[21] Hungarian Civil Code 6:1. § [The obligation]: " (2) An obligation may pertain to the provision of an object, an activity, the abstention from an activity, or other conduct".
[22] Emőd, V., *Civil Law - General Theory of Obligations – V. edition*, C.H. Beck, Bukarest 2020, p. 6.
[23] This latter is called an absolute legal relationship. An example of this is ownership.
[24] Grosschmid, B., *Vázlat a magyar magánjog rendszeréből*, Franklin-Társulat, Budapest 1905, p. 210.
[25] Péter, K., *op. cit.,* p. 18.

to blockchain technology, is a separate question, as anonymity is an inherent characteristic of the technology. However, anonymity does not imply that the legal relationship assumes an absolute structure. Recent literature also affirms that blockchain-based contracts typically operate on predefined logic between known participants, reinforcing their relative legal nature.[26] These types of legal relationships also differ in terms of their duration: while property-based (absolute) legal relationships typically establish long-standing, enduring rights, obligational (relative) legal relationships have much shorter lifespans, sometimes requiring immediate execution – similar to smart contracts.[27]

Another relevant definition[28] of obligation was formulated by *Justinian's* codification: "An obligation is a legal bond by which we are necessarily bound to perform some service, according to the laws of our state".[29] This definition places the legal bond at the centre of an obligation, excluding other forms of obligations based on religion, decorum, or honour. Moreover, it emphasizes the presence of legal coercion as a driving force, appearing as a necessary consequence of legal relationships created by law. Consequently, if the obligor fails to fulfil their obligations voluntarily, the obligee may enforce their lawful rights derived from the obligational relationship with the help of the state's coercive power.[30] The last element of the definition – "according to the laws of our state" – highlights the requirement that obligations must possess legitimacy, meaning they must fit within the legal framework of a given state and be derivable from its legal norms.[31] In the case of smart contracts, the aforementioned requirement concerning legitimacy and derivability from a legal norm is questionable, as no explicit statutory provision – let alone a comprehensive normative system – exists that ensures state coercion in the event of a legal violation. In the absence of a more favorable solution, these legal relationships and the disputes arising from them are

[26] Savelyev, A., *Contract Law 2.0: "Smart" Contracts as the Beginning of the End of Classic Contract Law*, Information & Communications Technology Law, Vol. 26, No. 2, 2017, p. 120.
[27] Mik, E., *op. cit.*, 276.
[28] Justinian, *Institutes*, Book 3, Title 13, Section 2, translation by Birks & McLeod, Oxford University Press, Oxford 1987, p. 115
[29] „*Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura".* Emperor Justinian I of Byzantium ordered the creation of the first codified collection of Roman law, known from the time of the glossators as *Corpus Iuris Civilis*. The first book of the codification, *Codex Iustinianus*, was enacted in 529, followed by the second book, *Digesta*, and the third book, *Institutiones seu Elementa*, in 533. The final book, *Codex Iustinianus repetitae praelectionis*, came into effect in 534. All of these were written in Latin with the aim of achieving the reunification of the Roman Empire through legal science and legislation, thereby restoring the golden age of Roman law.
[30] Stein, P., *Roman Law in European History*, Cambridge University Press, Cambridge 1999, p. 50.
[31] András, F., Gábor*, op. cit.,* p. 381.

regulated and remedied using traditional contractual provisions. The foundation for the modern definition of obligation was laid by the *Pandectists*,[32] who stated: "An obligation is a legal relationship in which one party (*creditor*) may demand a certain conduct from the other party (*debtor)*, and if the debtor fails to fulfill this obligation, the creditor is entitled to compel them to do so through in *personam action*".[33]

Roman law recognizes multiple approaches regarding obligations. In the archaic period, an obligation was understood as the creditor's limited power over the debtor. This notion of limited power over the debtor was present from the inception of obligations in Roman law, where *delicts*[34] appeared as acts that resulted in obligational legal consequences. In Roman law, the primary legal consequence of a criminal act was the right to lawful retribution, which over time was supplemented by the possibility of paying compensation (*compositio*). Initially, monetary compensation served as an alternative; over time, it became a mandatory requirement.[35] The delictual origin of obligations is supported by the etymological examination of the word "*obligatio*", which means "binding, shackling." Similarly, the termination of an obligation was denoted by the term "*liberatio*", meaning "release," while its fulfilment was described with the word "*solutio*", meaning "unbinding". Another theory associates the origin of obligations with the emergence of contracts (*contractus*). Nevertheless, in early contracts, the binding force ensuring performance was not the mere existence of an agreement but rather the religious foundations of the obligation, which were ensured through various formalities.

[32] The pandects (digests) have been part of Roman law since the time of Emperor Justinian I, specifically from the year 533. The word means 'all-encompassing,' which is paradoxical since thematically, it is mostly limited to private law. The selections of the pandects were used in the process of legal application and formed part of the *Corpus Iuris Civilis*. For more information, see: Elemér, P., *Pandectistics and Its Impact on the Science of Hungarian Private Law*, Acta Universitas Szegediensis De Attila József Nominatae, Acta Juridica et Politica, Tomus XXIII., Fascicultus 6, Szeged 1976.

[33] Péter, B., *Contracts*, Internet Encyclopaedia of Legal History (Legal History section, editor: László, K,); available: https://ijoten.hu/szocikk/jogtortenet-szerzodes.

[34] Delicts were considered crimes in Roman law. In the 19th century, a three-tier classification of punishable acts was established based on the severity of offenses, distinguishing crimes, misdemeanors, and infractions. By the late 19th century, this tripartite classification lost ground, and a new trend emerged, leading most European states to adopt a two-tier system. However, some countries still retain the three-tier classification, recognizing infractions, delicts, and crimes within their legal systems. The tripartite system remains in place in France, Belgium, Luxembourg, San Marino, and Greece. Pradel, J., *Comparative Criminal Law*, Ed. Dalloz, French 1995, p. 228.

[35] Kunkel, W., *An Introduction to Roman Legal and Constitutional History*, Oxford University Press, Oxford 1973, p. 145

3.2. Contracts in Hungarian and Romanian private law

It can be stated about the law of obligations in both Hungarian[36] and Romanian law that its provisions mostly contain dispositive rules. The principle of contractual freedom is recognized and guaranteed by the legal systems of both countries.[37] In my opinion, although Section 6:59 of the Hungarian Civil Code, which regulates contractual freedom, is more extensive, Article 1169 of the Romanian Civil Code captures the essence of the principle of contractual freedom more effectively, describing it concisely with appropriate precision. The mentioned article of the Romanian Civil Code essentially incorporates both paragraphs (1) and (2) of Section 6:59 of the Hungarian Civil Code into a single provision. Moreover, regarding deviations from the rights and obligations of the parties, Article 1169 of the Romanian Civil Code not only includes prohibitions imposed by law but also extends these restrictions to the boundaries set by public order and morality.[38] In the Hungarian Civil Code, a contract that violates good morals is also considered invalid; however, this provision is addressed separately by the legislator when regulating defects in the intended legal effect: "A contract that manifestly violates good morals is null and void."[39] As a consequence of the existence of contractual freedom as a fundamental principle of civil law, the contracts regulated in the Hungarian and Romanian Civil Codes are not listed in a closed enumeration. Contract types and their content are limited only by the imagination of the contracting parties, as long as they do not violate legal prohibitions or the expectations of public order and morality/good morals.[40] Modern civil law continues to incorporate numerous solutions known from Roman law, one example being the consensual nature of contract formation. According to this principle, in the absence of a contrary provision, the creation of a contract does not require the delivery of an object (real act); rather, the contract is formed

[36] Barzó, T., *Szerződési szabadság és a diszpozitív szabályozás a magyar polgári jogban*, Miskolci Jogi Szemle, 2011/2, p. 89; Dănișor, D.C., *Libertatea contractuală în Codul civil român*, Revista Română de Drept Privat, 2011/3, p. 35

[37] This statement is supported by Section 6:59 of the Hungarian Civil Code: "(1) The parties are free to conclude contracts and freely choose the other contracting party. (2) The parties are free to determine the content of the contract. The provisions of contracts concerning the rights and obligations of the parties may be deviated from by mutual agreement unless such deviation is prohibited by this Act."; Similarly, Article 1169 of the Romanian Civil Code states: "The parties are free to conclude any contract and determine its content, within the limits set by law, public order, and morality."

[38] For more about contractual freedom in these countries see: Roș, V., *Drept civil. Teoria generală a obligațiilor*, Hamangiu, București 2018, p. 144 (Romania); Lenkovics, B., *A Polgári Törvénykönyv magyarázata*, HVG-ORAC, Budapest 2014, p. 427 (Hungary).

[39] Act V of 2013 on the Civil Code Section 6:96 [Contract Contrary to Good Morals].

[40] Veress, E., *Contractul în dreptul privat român și maghiar*, Studia Universitatis Babeș-Bolyai Iurisprudentia, 2015/2, p. 31.

through the mutual expression of intent by the parties[41]. This principle is in line with both Hungarian and Romanian civil law[42] as confirmed by the literature of these countries.[43]

Smart contracts offer a different solution, as the formal requirement necessary for their formation makes them an exception within the framework of the two civil codes. As seen, both Hungarian and Romanian law define contracts as fundamentally consensual in nature. In contrast, smart contracts require the existence of a pre-developed informatics code, meaning that the "legal transaction" must necessarily take a tangible form.[44]

4. THE NATURE OF A SMART CONTRACT AS A LEGAL TRANSACTION

Following the classical concept of contracts, I find it necessary to examine the nature of smart contracts as legal transactions. Since every contract qualifies as a legal transaction, the same classification forms applicable to legal transactions must also be applied in the case of smart contracts. Designated as a contract, a smart contract can constitute a bilateral legal transaction. Consequently, the formation of a smart contract requires the manifestation of intent by at least two persons. It is important not to confuse a unilateral contract with a unilateral legal transaction, as the former requires the intent of at least two persons, while the latter can produce legal effects solely through the declaration of intent by a single party,

[41] György, W., The General Rules of Contracts in the New Civil Code – Part II.; avalaible: https://ptk2013.hu/szakcikkek/wellmann-gyorgy-a-szerzodesek-altalanos-szabalyai-az-uj-ptk-ban-ii-resz/3611.
[42] Section 6:63 of the Hungarian Civil Code [Formation and Content of a Contract]: "(1) A contract is formed through the mutual and concordant expression of the parties' intent. (2) For the formation of a contract, the parties must agree on essential terms and on any terms that either party considers essential. Agreement on an issue deemed essential is a prerequisite for contract formation if a party explicitly expresses that, in the absence of such an agreement, they do not wish to conclude the contract"; Article 1182 of the Romanian Civil Code: "(1) The parties conclude a contract following negotiations or by unconditional acceptance of a contractual offer. (2) It is sufficient for the parties to agree on the essential elements of the contract, even if certain secondary elements are deferred for later negotiation or entrusted to a third party for determination. (3) Under the conditions specified in paragraph (2), if the parties fail to reach an agreement on secondary elements or if the designated third party does not make a determination, the court, at the request of either party, shall order the contract to be supplemented, taking into account the circumstances, the nature of the contract, and the intentions of the parties".
[43] Sárközy, T., *A szerződési jog új tendenciái*, HVG-ORAC, 2012, p. 113; Boroi, G., Anghelescu, L., *Curs de drept civil. Partea generală*, Hamangiu, 2019, p. 252
[44] More about this in the next section.

without the consent of another.[45] The distinction between a bilateral legal transaction (contract) and a unilateral contract lies in the fact that in the latter case, only one party holds a claim, while obligations are imposed solely on the other party. Therefore, a smart contract, as a bilateral legal transaction, may function either as a bilateral or unilateral contract, depending on the legal effects it generates.

Smart contracts may be onerous or gratuitous legal transactions. Every bilateral contract constitutes an onerous legal transaction, in which one party commits to providing a counter-performance in exchange for the performance of the other party. A unilateral contract may also be onerous, for instance, when a borrower agrees to pay interest.[46] A key characteristic of a gratuitous legal transaction is the absence of consideration, meaning that the beneficiary party does not reciprocate the benefits derived from the contract to the other party. From a formal perspective, a legal transaction may fall into one of the following categories: informal, form-bound, or real transaction. In my view, since smart contracts are legal transactions embedded in computer codes that operate based on predetermined conditions, their inherent digital nature can be equated with form-bound transactions, making them interpretable as one of its forms.

The chapter of the Romanian Civil Code which regulates contract formation defines formal freedom as the primary rule of contract conclusion, which has an equivalent provision in the Hungarian civil Code as well.[47] According to this principle, the validity of a contract requires the "concordant" (Romanian Civil Code) or "mutual and consistent" (Hungarian civil Code) will of the parties. However, the Romanian Civil Code goes further by noting within the same statutory article that the consensual nature of contract formation is only applicable if "the law does not prescribe specific formal requirements." Thus, the Romanian Civil Code contains a legal condition that restricts formal freedom, namely the existence of a statutory provision requiring formality in the contract formation process. It can be concluded that this regulation is broader – or at least more extensive in content – than the corresponding provision in the Hungarian civil Code. But how does this relate to the nature and formation of smart contracts, and why is this distinction relevant? As observed, the Romanian Civil Code establishes the existence of a statutory requirement as the source of formality. Consequently, the interpretation of this provision implies that if the law does not impose a formality requirement for the validity of a particular contract, then such a contract

[45] Köteles, A., *A jogi ügyletek rendszertana a Polgári Törvénykönyvben*, ELTE Law Review, 2017/2, p. 66
[46] Gordley, J., *Foundations of Private Law*, Oxford University Press, 2006, p. 124
[47] Romanian Civil Code article 1178., Hungarian Civil Code 6:63. § [Creation and content of the contract].

may be concluded based on consensus. In other words, a contract is only formally bound if a positive legal norm explicitly mandates it.

The formation of smart contracts is inconceivable without some form of formal requirement. Three legally defined forms of formal requirements exist: 1) for evidentiary purposes (*ad probationem*); 2) for validity (*ad validitatem*); 3) for enforceability against third parties (*ad opposabilitatem*).[48] The question arises: which form of formal requirement applies to smart contracts? For such a contract to come into existence, a pre-developed computer code must exist, meaning that the "legal transaction" must always take a tangible form. However, while in the case of a real estate sale, the form requirement pertains to validity (i.e., the transaction can still take place without complying with the formality, but it will not be valid), in the case of smart contracts, formality itself is the precondition for the legal transaction's existence. Without it, not even an invalid legal transaction can come into being.[49] Referring back to the Romanian Civil Code's provision on the exception to consensual contract formation: for smart contracts to be form-bound for validity purposes (*ad validitatem*), a statutory provision should exist.[50] However, the formality of smart contracts does not stem from legislation but from their inherent nature as legal transactions embedded in computer code.

Smart contracts appear to be form-bound contracts but do not fit into any of the currently recognized statutory formal categories. *De lege ferenda,* I find it necessary to establish a new formal category linked to the existence of a contract.[51] It is apparent that the *ad validitatem* form requirement necessary for the valid conclusion of a contract does not fully address the issue surrounding the formation of smart contracts, as formality in their case is the prerequisite for the contract's existence. If the formal requirement is not met, we cannot speak of an invalid smart contract – since a smart contract cannot exist except in a form-bound manner. Consequently, the relevant legal provisions that could regulate the form-bound validity of smart contracts are inadequate, as they do not fully cover the conditions for the creation of this new type of contract. Therefore, legislation is necessary to regulate smart contracts appropriately.

[48] Pop, L., *Tratat de drept civil. Obligațiile*, Universul Juridic, 2015, p. 87
[49] Raskin, M., *The Law and Legality of Smart Contracts*, Georgetown Law Technology Review, 2017, p. 318
[50] The statement is also supported by Article 1179 (2) of the Romanian Civil Code.: "If the law prescribes a certain formal requirement for a contract, it must be complied with under the sanction of the applicable legal provisions".
[51] According to the author, the Latin name for this kind of formalism should be called *"ad existentiam"*.

Legal transactions can also be categorized as abstract or causal. An abstract legal transaction is one in which the purpose is not an essential element of the transaction. A causal legal transaction, such as a lease agreement, is one where the obligation is directly linked to a cause – for example, a tenant commits to paying rent because the landlord grants them the right to use the property. A classic example of an abstract legal transaction is a promissory note, in which the issuer undertakes to pay a specified amount by a certain deadline without indicating the underlying cause. In my view, smart contracts appear to function as abstract legal transactions. This is because they are executed based on pre-defined conditions rather than a pre-defined legal purpose. If we accept this premise and consider smart contracts as abstract legal transactions –meaning that the purpose of the payment is not essential – the question arises: can the contractual position be transferred, similar to a promissory note, or can claims arising from a smart contract be assigned? The issue of transferability is closely related to another classification: whether smart contracts fall under *inter vivos* (between living persons) or *mortis causa* (in case of death) legal transactions. *Inter vivos* transactions take effect during the lifetime of the parties. *Mortis causa* transactions, such as a will, produce legal effects only upon the death of the person creating them. Since the execution of a *mortis causa* transaction requires tracking the death of an individual, and no reliable digital database currently exists for this purpose, smart contracts cannot be classified as *mortis causa* transactions at present.

Smart contracts may be categorized as: 1) general civil law transactions; 2) business-to-business (B2B) transactions; or 3) consumer transactions. For instance, a consumer contract can be executed through a smart contract if a pre-loaded payment on Amazon automatically triggers a purchase as soon as the product becomes available. In an ideal scenario, such contracts would comply with distance contract regulations and special consumer protection rules. However, in practice, smart contracts are still in their early stages, and their interaction with special legal regulations remains uncertain. In my opinion, smart contracts can facilitate both property-transferring and non-property-transferring transactions. A property-transferring transaction (e.g., a sale contract) alters the ownership structure, meaning that the active party in the legal relationship changes. A non-property-transferring transaction (e.g., a lease contract) does not result in a change of ownership. This view is also reflected in the international literature.[52]

A future example of a property-transferring smart contract could be one integrated with a blockchain-based payment system. Consider an automated real estate

[52] Clack, C.D., Bakshi, V., Braine, L., *Smart Contract Templates: Foundations, Design Landscape and Research Directions*, arXiv:1608.00771, 2016.

transaction: a smart contract linked to a land registry database ensures that the purchase price remains frozen in the buyer's account; the transaction only completes once the land registry confirms the ownership transfer; upon confirmation, the purchase price is immediately released to the seller. On the other hand, a non-property-transferring smart contract could be seen in the electric scooter rental system: a digital code unlocks the scooter upon payment; the system automatically disables the scooter's power supply when the rental period ends. The same examples explain why a smart contract can be either an immediate or a continuing legal transaction. Based on the above examples, smart contracts qualify as named legal transactions. However, their complexity depends on the sophistication of the underlying computer code, which is ultimately determined by the expertise of the software developer. Currently, smart contracts are mainly used for simple transactions, as more complex transactions require increasingly sophisticated programming. The evolution of smart contract technology will depend on the ability of developers to create increasingly sophisticated code to handle complex legal relationships.

5. CONCLUSION

As digitalization continues to reshape legal frameworks, contract law must evolve to address the implications of emerging technologies. The rise of smart contracts, automation, and electronic legal declarations challenges traditional legal concepts, necessitating clear regulatory responses. While blockchain technology offers transformative potential, legislative hesitation highlights the need for further legal adaptation. Ensuring that digital advancements align with existing civil law principles will be crucial for fostering legal certainty in the digital era. Smart contracts represent a significant shift in contractual agreements, merging legal principles with technological automation. While their self-executing nature offers efficiency and security, conceptual and regulatory challenges persist. Clarifying their legal status and ensuring alignment with existing frameworks will be crucial for their broader adoption. As blockchain technology evolves, so too must the legal interpretations that govern these digital agreements, ensuring both innovation and legal certainty in an increasingly automated world.

The concept of obligations has evolved significantly from its Roman law origins to modern legal frameworks. The definitions provided by legal scholars such as Julius Paulus and Justinian emphasize the binding nature of obligations and their role in structuring legal relationships. Smart contracts, as a contemporary form of contractual obligation, align with the characteristics of relative legal relationships, as they establish defined parties and require specific actions or performances. However, the enforceability of smart contracts within traditional legal systems

remains an open question due to the lack of explicit statutory regulations and state-backed coercive mechanisms. As legal frameworks continue to adapt to technological advancements, the integration of smart contracts into existing legal structures will necessitate further clarification regarding their legitimacy, enforcement, and applicability in the broader legal system.

The principle of contractual freedom is a cornerstone of both Hungarian and Romanian civil law, primarily governed by dispositive rules. While the Hungarian Civil Code provides a more detailed regulation, the Romanian Civil Code encapsulates the essence of contractual freedom with greater conciseness, incorporating restrictions based on public order and morality. Both legal systems uphold the consensual nature of contract formation, a legacy of Roman law, which allows contracts to be formed through mutual intent rather than formal requirements. However, smart contracts challenge this traditional framework, as they necessitate a pre-developed informatics code, making them a formalized exception within these civil codes. Their integration into the existing legal system raises questions about adaptability, enforcement, and alignment with established principles of contract law.

Smart contracts challenge traditional legal transaction classifications by introducing a digital, self-executing mechanism that operates outside existing statutory frameworks. As bilateral legal transactions, they require mutual intent but may function as unilateral or onerous agreements depending on their terms. Their digital nature inherently imposes a form requirement, yet they do not fit into current formal categories such as *ad probationem* or *ad validitatem,* necessitating new legislative recognition. Moreover, their abstract nature separates them from causal transactions, while their *inter vivos* application excludes them from *mortis causa* legal acts. They can facilitate both property-transferring and non-property-transferring transactions, demonstrating their adaptability in both commercial and consumer contexts. As smart contracts evolve, legal systems must address their unique characteristics to ensure enforceability and legal certainty.

REFERENCES

BOOKS AND ARTICLES

1. Ágnes, J., *Online Contracting, Digital Content and Services, Smart Contracts – A New Era of Contract Law?,* Infocommunication and Law, 2020/2, (75.) e-special issue.

2. András, F., Gábor, H., *History and Institutions of Roman Law*, National Book Publishing House, Budapest 2019, p. 380.
3. Barzó, T., *Szerződési szabadság és a diszpozitív szabályozás a magyar polgári jogban*, Miskolci Jogi Szemle, 2011/2.
4. Basumallik, C., *"Smart Contracts: Types, Benefits, and Tools",* Spiceworks, 2023, p. 3.
5. Beale, H., Fauvarque-Cosson, B., Ruggeri, S., *Contract Law: Ius Commune Casebooks for the Common Law of Europe*, Hart Publishing, Oxford 2010.
6. Béla, Cs., *Smart Contracts*, Opuscula Civilia, National University of Public Service, Faculty of Public Governance and International Studies, Budapest 2019, p. 6.
7. Boroi, G., Anghelescu, L., *Curs de drept civil. Partea generală*, Hamangiu, 2019.
8. Clack, C.D., Bakshi, V., Braine, L.**,** *Smart Contract Templates: Foundations, Design Landscape and Research Directions*, arXiv:1608.00771, 2016.
9. Dănișor, D.C., *Libertatea contractuală în Codul civil român*, Revista Română de Drept Privat, 2011/3.
10. Elemér, P., *Pandectistics and Its Impact on the Science of Hungarian Private Law*, Acta Universitas Szegediensis De Attila József Nominatae, Acta Juridica et Politica, Tomus XXIII., Fascicultus 6, Szeged 1976.
11. Emőd, V., *Civil Law - General Theory of Obligations – V. edition*, C.H. Beck, Bukarest 2020, p. 6.
12. European Union Blockchain Observatory and Forum, "Legal and regulatory framework of blockchains and smart contracts", 2019, p. 6. available: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology__Smart_Contracts_and_Consumer_Protection_Council_Draft.pdf.
13. Gordley, J., *Foundations of Private Law*, Oxford University Press, 2006.
14. Grosschmid, B., *Vázlat a magyar magánjog rendszeréből*, Franklin-Társulat, Budapest 1905.
15. György, W., The General Rules of Contracts in the New Civil Code – Part II.
16. Justinian, *Institutes*, Book 3, Title 13, Section 2, translation by Birks & McLeod, Oxford University Press, Oxford 1987.
17. Köteles, A., *A jogi ügyletek rendszertana a Polgári Törvénykönyvben*, ELTE Law Review, 2017/2.
18. Kunkel, W., *An Introduction to Roman Legal and Constitutional History*, Oxford University Press, Oxford 1973.
19. Lenkovics, B., *A Polgári Törvénykönyv magyarázata*, HVG-ORAC, Budapest 2014.

20. Lyons, T., Ludovic, T., *Legal and Regulatory Framework of Blockchains and Smart Contracts. – A thematic report prepeared by the European Union Blockchain Observatory and Forum,* 27 th September 2019, p. 22.
21. Mik, E., *Smart Contracts: Terminology, Technical Limitations and Real-World Complexity*, Law, Innovation and Technology, Vol. 9, No. 2, 2017.
22. Olteanu, A., *Roman Law and Its Reception in Modern Civil Codes*, Cluj University Press, Cluj-Napoca 2016.
23. Péter, B., *Contracts*, Internet Encyclopaedia of Legal History (Legal History section, editor: László, K,).
24. Péter, K., *The place of smart contracts in the legal system,* Ministry of Justice programme to raise the level of legal education, Budaoest 2019, p.17.
25. Pop, L., *Tratat de drept civil. Obligațiile*, Universul Juridic, 2015.
26. Pradel, J., *Comparative Criminal Law*, Ed. Dalloz, French 1995, p. 228.
27. Raskin, M., *The Law and Legality of Smart Contracts*, Georgetown Law Technology Review, 2017.
28. Roș, V., *Drept civil. Teoria generală a obligațiilor*, Hamangiu, București 2018.
29. Sárközy, T., *A szerződési jog új tendenciái*, HVG-ORAC, 2012, p. 113.
30. Savelyev, A., *Contract Law 2.0: "Smart" Contracts as the Beginning of the End of Classic Contract Law*, Information & Communications Technology Law, Vol. 26, No. 2, 2017.
31. Schär, F., *Decentralized Finance: On Blockchain- and Smart Contract-Based Financial Systems*, Federal Reserve Bank of St. Louis Review, 2021.
32. Stein, P., *Roman Law in European History*, Cambridge University Press, Cambridge 1999.
33. Szabo, N., "Smart Contracts", Satoshi Nakamoto Institute, 1994.
34. Szabo, N., "The Idea of Smart Contracts", Satoshi Nakamoto Institute, 1997.
35. Tapscott, D., Tapscott, A., *Blockchain Revolution: How the Technology Behind Bitcoin and Other Cryptocurrencies is Changing the World*, Portfolio, New York 2016.
36. Veress, E., *Contractul în dreptul privat român și maghiar*, Studia Universitatis Babeș-Bolyai Iurisprudentia, 2015/2.
37. Werbach, K., Cornell, N., *Contracts Ex Machina*, Duke Law Journal, Vol. 67, 2017, p. 344.
38. Zimmermann, R., *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford University Press, Oxford 1996.

LEGAL ACTS

1. Hungarian Civil Code - Act V of 2013 on the Civil Code
2. Romanian Civil Code - Law No. 287/2009 on the Civil Code

NETWORK RESOURCES

1. chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology__Smart_Contracts_and_Consumer_Protection_Council_Draft.pdf
2. https://antk.uni-nke.hu/document/akk-copy-uni-nke-hu/Opuscula_Civilia_2019_Csitei_Bela.pdf
3. https://ijoten.hu/szocikk/jogtortenet-szerzodes
4. https://infojog.hu/juhasz-agnes-online-szerzodeskotes-digitalis-tartalom-es-szolgaltatas-intelligens-szerzodessel-a-szerzodesi-jog-uj-korszaka-2020-2-75-e-kulonszam/
5. https://nakamotoinstitute.org/library/smart-contracts
6. https://nakamotoinstitute.org/library/the-idea-of-smart-contracts/
7. https://ptk2013.hu/szakcikkek/wellmann-gyorgy-a-szerzodesek-altalanos-szabalyai-az-uj-ptk-ban-ii-resz/3611
8. https://www.eublockchainforum.eu/sites/default/files/reports/report_legal_v1.0.pdf
9. https://www.spiceworks.com/tech/innovation/articles/what-are-smart-contracts/

UDK: 340.142 : 347.991 (497.7)
347.956 (497.7)
Preliminary communication

Tea Micevska, PhD student
Iustinianus Primus Faculty of Law, Ss. Cyril and Methodius University in Skopje
North Macedonia
E-mail: t.micevska@pf.ukim.edu.mk

LEAVE TO FILE A SECOND APPEAL AS A MECHANISM FOR UNIFYING JUDICIAL PRACTICE: THE NORTH MACEDONIAN PERSPECTIVE

ABSTRACT

The uniform application of laws and the consistency in judicial decisions are fundamental preconditions for ensuring legal certainty, regardless of the type of the legal system. Additionally, the equal application of laws is regarded as an integral aspect of the right to a fair trial and thus, of the principle of the rule of law. Uniform judicial practice is a wellestablished principle, guaranteed both nationally and internationally. However, it is not uncommon for the courts to render conflicting judgments. In that manner, not only is the foreseeability and fairness of the judicial decisions undermined, but the overall trust in the judicial system may be infringed. Therefore, different countries have developed various mechanisms for overcoming this challenge. Generally, a distinction is made between formal, semi-formal and informal mechanisms in ensuring consistency. However, what is common is that the highest courts play a vital role in ensuring unity of judicial practice. In North Macedonia, one of the key mechanisms for achieving this goal is the possibility of granting leave to file a second appeal before the Supreme Court. This extraordinary legal remedy can be filled only if certain conditions are met. In this way, the Supreme Court exercises its constitutionally stipulated function of unifying judicial practice. However, the questions that pertain are: What are the arguments for the legal validity of the conditions of this remedy? Do the Macedonian courts apply this legal remedy and how effective is it? What is the judicial approach taken in practice? An attempt will be made to find answers to the questions raised by establishing theoretical foundations and reviewing relevant national judicial practice.

Keywords: *unified court practice, leave to file a second appeal, Supreme Court.*

1. INTRODUCTION

Uniform case law is the basis for establishing legal certainty, predictability and consistency in the decision-making process.[1] These concepts are essential elements of the principle of the rule of law,[2] whose importance was recognized as early as the time of ancient Greece, when it was emphasized that laws should ensure stability, justice, and consistency in governance, since they (should) be applied equally to everyone, including those who govern.[3] However, this particular function of the laws could not be achieved without the courts, which, by rendering uniform decisions apply this fundamental principle in practice. Therefore, the highest courts in the countries are of particular importance, as their primary role is to ensure the uniform application of laws by resolving contradictions that may arise in different cases.[4] Hence, it can be concluded that the judicial function is immanent, not only in providing legal protection of civil subjective rights, but also in establishing legal certainty in the legal orders of the states.

Due to the divergence of legal systems and traditions, specific institutional and legal frameworks, cultural and social differences, as well as numerous historical and other factors, the presence of different mechanisms for the unification of judicial practice can be noted. Generally, a distinction is made between formal, semi-formal and informal mechanisms in terms of the role of the courts in ensuring consistent judicial practice.[5] However, the Supreme Court emerges as a central axis in overcoming the inconsistencies and establishing uniform application of laws in almost every judicial system. In the Republic of North Macedonia, the Supreme Court has the authority to establish principled positions and principled legal opinions. Additionally, one of the key instruments for unifying judicial practice in civil proceedings is the exceptional second appeal ("*vonredna revizija*"). This extraordinary legal remedy is the key point of this paper. Its purpose is the unification of the judicial practice and the insurance of uniform

[1] Constitutional Court of the Republic of Macedonia, no. 255/2009, 7.07.2010; Consultative Council of European
Judges (CCJE), Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3, p. 2, January 2025 (hereinafter: Opinion No. 20 (2017)); European Coourt of Human Rights (hereinafter: ECHR), Brumărescu v. Romania, no. 28342/95, 28.10.1999, § 61; ECHR, Ryabykh v. Russia, no. 52854/99, 24.07.2003, §§ 51–56; ECHR, Roşca v. Moldova, no. 6267/02, 22.03.2005, § 24.
[2] Opinion No. 20 (2017), p. 2.
[3] Wexler, S.; Irvine, A., *Artistotle on the rule of law*, Polis The Journal for Ancient Greek and Roman Political Thought, 2006, p. 20.
[4] Opinion No. 20 (2017), p. 4.
[5] See: Opinion No. 20 (2017), p. 3.

application of the law concerning certain legal issues. By deciding on a submitted exceptional second appeal, not only does the Supreme Court achieve legal and political goals, it also fulfills its constitutionally stipulated function of ensuring a uniform application of the laws in the country.[6] The leave to file a second appeal can be submitted in exceptional cases in conditions provided for by law.

Through an analysis of the legal provisions and the practice of the Supreme Court, a conclusion will be reached on the possibilities for improving the regime of the extraordinary revision, including its application and its efficiency as a mechanism for unifying Macedonian judicial practice.

2. REASONS FOR INCONSISTENT CASE LAW IN THE REPUBLIC OF NORTH MACEDONIA AND THE POSITIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Macedonian legislation does not contain an explicit provision on the unity of the judicial system,[7] however, the unity as a characteristic of civil courts is perceived since they function based on the same principles and procedural rules. Thus, their overall organization is unified by the coordinating role of the Supreme Court, which.[8] In theory, opinions arise that former socialist states are still influenced by the authoritarian, strictly textualist approach of the courts and the (overly) consistent application of the principle "*iura novit curia*" - especially due to the position of the Supreme Court and the significance of the standings it takes as the highest court in the country.[9] Combined with the free judicial evaluation and the peculiar "aversion" of the courts of the continental system towards relying on

[6] Art. 8. of the Constitution of the Republic of North Macedonia, OfficialGazette, No. 2/1991, 1/1992, 1/1992, 31/1998, 31/1998, 91/2001, 91/2001, 84/2003, 84/2003, 107/2005, 107/2005, 3/2009, 3/ 2009 13/2009, 49/2011, 49/2011, 6/2019, 6/2019.

[7] This was not the case in the Socialist Federal Republic of Yugoslavia (SFRY), as the Law on Courts explicitly stipulated that the judicial function in the SFRY was performed within a single court system.

[8] See also in SFRY: Георгиевски, С., *Судството во новиот Устав на Југославија*, Годишник на Правниот факултет во Скопје, Skopje 1964, p. 216.

[9] Kühn, Z, *The authoritarian legal culture at work: the passivity of parties and the interpretational statements of Supreme Courts*, Croatian Yearbook of European Law & Policy, 2006, p. 9.

previously issued court decisions, it often happens that cases with the same or similar factual and legal basis result in different outcomes.[10]

According to the principle of free judicial evaluation, each court carefully decides which facts will be taken as proven.[11] In this way, the submitted evidence (*praemisa minor*) is subsumed under the appropriate legal norm (*praemisa maior*) and the factual order is brought into line with the legal order. *A fortiori*, courts are autonomous and independent bodies that decide impartially based on their free evaluation.[12] They cannot be called "*to criminal liability for the opinion expressed and decision-making in the adoption of a judicial decision*".[13] In order to protect the independence of the jugdes, unless there is obvious bias, neither does the ECtHR have the function of comparing different decisions of domestic courts, even when it comes to similar proceedings.[14] However, the inconsistent case law in the Republic of North Macedonia often occurs as a "consequence" precisely due to the different interpretation of legal provisions or insufficient explanations by the courts.

It is important to point out that even at international level, the question arises as to whether deviations from established practice always constitute a violation of legal certainty. On the one hand, the ECtHR itself takes the position that the requirements of legal certainty and the protection of the legitimate expectations of the parties do not create a right to established practice.[15] It must not be understood that the different interpretation of legal provisions will in any case lead to a violation of the legal certainty, and even more so, the right to a fair trial. This is due to the fact that different courts may reach different, yet rational and reasoned conclusions regarding the same legal issue arising from a different case with similar factual circumstances.[16] The development of judicial practice is not, in itself, contrary to the principle of proper administration of justice, as the failure to adopt a dynamic and evolutionary approach by the courts may hinder reform

[10] Čizmić, J., *Mogući načini ujednačavanja sudske prakse u parničnom postupku*, Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, br. 20, Mostar 2023, Mostar 2022, p. 37.
[11] Art. 8. of the Law on Civil Procedure, Official Gazette, No. 79/2005,110/2008, 83/2009, 116/2010, 124/2015 (hereinafter: MLCP).
[12] See: Arts. 1, 3, 6, 11, 19, 20 of the Law on Courts, Official Gazette, No. 58/2006, 62/2006, 35/2008, 61/2008, 118/2008, 16/2009, 150/2010, 39/2012 83/2018, 198/2018, 96/2019 (hereinafter: Law on Courts).
[13] Art. 65. of the Law on Courts.
[14] See: ECHR, Ādamsons v Latvia, no. 3669/03, 24.06.2008.
[15] ECHR, Unédic v. France, no. 20153/04, 18.12.2008, § 74: "However, the Court considers that the requirements of legal certainty and the protection of the legitimate expectations of litigants do not establish an acquired right to consistent case law.".
[16] ECHR, Tudor Tudor v. Romania, no. 21911/03, 24.06.2009; ECHR, Tomić and others v. Montenegro, no. 18650/09 and others, 17.04.2012; Opinion No. 20 (2017), p. 2.

progress and the advancement of the legal system.[17] On the other hand, in the case of Atanasovski v. the Republic of Macedonia, the court emphasized that well-established case law may impose an obligation on the Supreme Court to provide a more substantial explanation of the reasons justifying the deviation, if such has been made in the specific case.[18] Additionally, in the same case, according to the dissenting opinion of Judge Maruste, "*the interpretation and application of domestic law is primarily the prerogative of the domestic judiciary*", and domestic courts, especially the Supreme Court, should assess their overload and the need for shorter or longer explanations.[19] However, it must be underlined that if courts continuously refuse to review established practice or to provide convincing arguments in case of deviation from it, their authority and integrity may be at risk.[20]

This means that the uniform application of laws is necessary not only to ensure legal certainty and predictability in court decisions, but also to gain confidence in the entire judicial system.[21] In addition to the different interpretations of legal provisions, reasons for inconsistent application of the Macedonian law include insufficient knowledge of relevant practice, the court overload with many cases which prevent them from dedicating sufficient time to research related to the specific case, lack of resources and a digital environment for monitoring practice, lack of communication with other courts of the same level in terms of exchanging information on case law, as well as lack of awareness and training.[22] The level of use and citation of the case law of the ECtHR, for example, within the decisions of the basic and appellate courts, is still not at a satisfactory level. However, there is a positive trend of a gradual increase in the use of the case law of the ECHR by national courts, within the reasoning of the decisions, as a means of additional

[17] Guide on Article 6 of the Convention – Right to a fair trial (civil limb), p. 40, para. 210, https://rm.coe.int/1680700aaf, 2 January 2025.
[18] ECHR, Atanasovski v. The Former Yugoslav Republic of Macedonia, no. 36815/03, 14.01.2010, §38.
[19] Dissenting opinion of the judge Rait Maruste in the case Atanasovski v. The Former Yugoslav Republic of Macedonia.
[20] Emmert, F., *The Independence of Judges a Concept Often Misunderstood in Central and Eastern Europe*, European Journal of Law Reform, Kluwer International Law, 2002, p. 408.
[21] See: ECHR, Vinčić and others v. Serbia, no. 44698/06, 1.12.2009, § 56.
[22] E-Justice and Fundamental Rights International GesbR, *Issues Affecting the Consistency of Judicial Decisions and Best Practices in Securing Consistency in Judicial Decision Making*, Council of Europe, 2023, pp. 11, 12, https://rm.coe.int/issues-affeting-the-consistency-of-judicial-decisions-and-best-practi/1680afd8a5, 2 January 2025; Центар за правни истражувања и анализи, *Унифицирање на судската пракса во Македонија: можности наспроти предизвици*, Скопје 2015, pp. 43, 44; Preshova, D.; Rakochevikj, M. and Misoski, B., *The Role of the Higher Courts in Securing the Uniform Application of the Law in North Macedonia*, Research Chapter No. 12/2022, Skopje 2022, pp. 17, 18.

argumentation.[23] This can be regarded as a positive trend, since the proper implementation of the ECtHR's reasoning would potentially reduce the inconsistencies regarding certain questions. This also extends to the reasonings of the national courts concerning cases with similar facts. Of course, one must also take into account the fact that the Republic of North Macedonia is a country with a continental legal system,[24] so we cannot (fully) rely on and take into account "precedents" when making decisions.[25] Although citing relevant practice can be a powerful tool for judges, especially when it comes to practice from the highest courts, there is a different approach to precedents in countries with continental and common law legal systems.[26] However, when an issue that affects legal and political objectives arises, it is logical to have a special mechanism through which the uniform application of legal provisions will be ensured. In the Macedonian legal system, in civil procedure, this is the exceptional second appeal, whose meaning, criteria and application in practice will be discussed in the following text.

3. DEFINITION AND MEANING OF THE LEAVE TO FILE A SECOND APPEAL

The Macedonian legislator uses the term 'second appeal' as a general notion and therefore, at first glance, it seems that there is only one type of second appeal in the Macedonian civil procedure. However, in exceptional situations, the courts have the possibility of granting a leave to file a second appeal before the Supreme Court. Therefore, a distinction is made between an ordinary second appeal (revision or in Macedonian: „*revizija*")[27] and the leave to file a second appeal

[23] Ристиќ, Ј.; Треневска, З.; Деловски, В., *Анализа на степенот на користење и цитирање на судската пракса од страна на националните судови*, Центар за правни истражувања и анализи, Скопје 2020, p. 84.
[24] In our legal system, case law is a factual source of law, with certain exceptions regarding civil procedural law, such as: Art. 386. of the MLCP and Art. 400.(3) of the MLCP.
[25] However, it is important to underline that it is completely legitimate for citizens to want to rely on the outcomes of decisions already made, because in this way they can predict the outcome in their case, feel more secure and have greater trust in the judiciary.
[26] Council of Europe, Consultative Council of European Judges (CCJE), Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) on the Quality of Judicial Decisions, 18 December 2008, https://rm.coe.int/16807482bf, 3 January 2025, para. 49; Opinion No. 20 (2017), p. 2.
[27] „It refers to a second appeal on points of law, similar to the remedy of Revision in, for example, German or
Austrian law, but it can also be compared to cassation in, for example, French or Italian law." - Uzelac, A.; Bratković, M., *Croatia: Supreme Court between Individual Justice and System Management*, Supreme Courts Under Pressure, Chapter 5, Springer International Publishing, 2021.

(second appeal by permission; revision by permission; 'exceptional' second appeal or in Macedonian, „*vonredna revizija*").[28] Regardless of the distinction, this extraordinary legal remedy is characterized as devolutive, non-suspensory, bilateral and limited.[29] The function of this remedy is achieved through two main aspects: on one hand, by ensuring fairness and legality of the decisions of the lower courts, the so-called private function of the revision comes into effect, which is aimed at pursuing the individual interests of the parties.[30] On the other hand, by ensuring the unity of judicial practice and stability in the legal system, the revision performs its so-called public function, which is aimed at ensuring unity and predictability in the legal order, through the uniform application of the law.[31] Its function is for the Supreme Court to render decisions of precedent-setting significance.[32] Thus, the limitedness as a characteristic further deepens the differentiation between the two.

As for the admissibility, the parties may submit an (ordinary) second appeal against the final second-instance judgment if the value criterion is fulfilled, *i.e.* if the value of the subject matter of the dispute in the contested part of the judgment exceeds 1.000.000 denars.[32] Regardless of this criterion, a second appeal is always permitted in certain cases prescribed by MLCP.[33] *A contratio*, there are some cases in which the submission of a second appeal is never admissible.[34] Regarding the reasons for submission, it can be filed due to substantial violations of the

[28] For the purposes of this paper, the terms will be used interchangeably.
[29] Јаневски, А.; Зороска-Камиловска, Т., *Граѓанско процесно право, Книга Прва, парнично право, Второ изменето и дополнето издание*, Правен факултет „Јустинијан Први" во Скопје, Скопје, 2012, p. 482.
[30] Marković, M., *Građansko procesno pravo, knjiga prva, Parnični postupak, sveska druga, Parnične radnje*, Niš,
1973, p. 355; Triva, S.; Belajec, V.; Dika, M., *Novo pranično procesno pravo*, Zagreb 1977, p. 115; Poznić, B.,
Građansko procesno pravo, Beograd 1978, p. 307; Jolowicz, J. A., *On Civil Procedure*, Cambridge University Press 2000, p. 316-320; Зороска-Камиловска, Т., Ракочевиќ, М., *Дозволеност на ревизија во парнична постапка низ практиката на Врховниот суд на Република Северна Македонија*, Zbornik radova s V. Međunarodnog Savjetovanja „Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična postignuća", Split 2019, pp. 203-222, p. 204.
[31] Зороска-Камиловска, Т.; Ракочевиќ, М., *op. cit.* note 30, p. 204.
See also: Galič, A., *Reshaping the Role of Supreme Courts in the Countries of the Former Yugoslavia*, Uzelac, A.&Van Rhee C.H. (eds.), Nobody's Perfect.Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters, Cambridge/Antwerp/Portland: Intersentia, 2014, p. 292. [32] Bratković, M., *Što je važno pravno pitanje u reviziji?*, Zbornik Pravnog fakulteta u Zagrebu*,* Zagreb 2018, p. 857, https://hrcak.srce.hr/216257.
[32] Art. 372(2) of the MLCP; 1.000.000,00 denars are equal to approximately 16.251,78 euros.
[33] Art. 372(3) of the MLPC.
[34] For example, small claims disputes.

procedural provisions and incorrect application of substantive law.[35] Therefore, a second appeal cannot be filed in cases of incorrectly or incompletely established factual situations (*errors facti*). There is an occurring view that the regular revision may also contribute to the unification of the court practice in vertical line.[36] This position is confirmed by Article 386 from the MLCP according to which: „*The court to which the case is returned for retrial is bound to that case by the legal understanding based on which the decision of the revision court is based, which overturns the contested second-instance judgment, i.e. which overturns the second-instance and first-instance judgments.*" In theory, this is known as a 'procedural criteria'. This provision represents a specific exception from the rule that case law is only a factual source of the Macedonian civil procedural law, as the lower court is formally bound by the legal reasoning of the highest court.[37] Nonetheless, in practice, not all cases pass this filter before the Supreme Court.[38] Only the cases that fulfill the value-based, causal or procedural criteria are subject to review by the highest court. Therefore, many cases do not fall under the scope of the vertical unification of the judicial practice.

Consequently, in an attempt to cover a wider range of decisions that do not meet the formal value criterion, the legislator provided a compelling mechanism for unifying court practice by introducing the extraordinary revision. Namely, in 2005, the Macedonian legislator implemented a "dual regime" of the revision in the civil proceedings.[39] The main aim is for the extraordinary revision to achieve legal and political goals in a way that will create optimal conditions for the Supreme Court to fulfill its constitutional duty for the uniform application of laws and unification of judicial practice.[40] Hence, the revision is regarded as a formal mechanism for ensuring uniform case law.[41]

The extraordinary second appeal may be filed against a second-instance judgment that does not fulfill the value criteria if the second-instance court:

- permits its filing in the ruling part of the judgment it rendered
- specifies the scope of the legal issue that would be raised before the Supreme Court of the Republic of Macedonia

[35] Art. 375(1) and Art. 375(3) of the MLCP; there are further limitations regarding the violation of the procedural rules which will not be elaborated in detail in this paper.
[36] Nedelkova, L., *The Role of the Supreme Court in Promoting (Ensuring) Effective Justice and Unification of Judicial Practice*, China, 2-8 May, 2016, p. 5.
[37] Јаневски, А.; Зороска-Камиловска, Т., *op. cit.* note 29, p. 56.
[38] Nedelkova, *op. cit.* note 36, p. 5.
[39] Зороска-Камиловска, Т.; Ракочевиќ, М., *op. cit.* note 30, p. 216.
[40] *Loc. cit.*
[41] Opinion No. 20 (2017), p. 3.

- assesses that the decision in the dispute depends on the resolution of a material or procedural issue important for ensuring the uniform application of the law and the unification of case law
- explicitly states (in the explanation of the judgment) the legal issue for which the revision is permitted
- states the decisions that indicate the non-uniform application of the law
- explains the reasons why it is considered important for ensuring the uniform application of the law and the unification of case law.[42]

These criteria are met with criticism both in theory and in practice. For instance, regarding the material or procedural issue that is important for ensuring the uniform application of the law and the unification of case law, a question is raised as to which issue is considered important to the extent that a leave to file a second appeal would be allowed. Such an issue represents a legal standard whose interpretation is influenced by the Supreme Court's practice.[43] Considering that the MLCP only vaguely defines such a possibility, without remotely specifying the potential situations, it can be concluded that this provision may justifiably lead to confusion in practice, making it inoperable. For example, a compelling, yet pragmatic approach is taken by the Croatian Law on Civil Procedure (Croatian LCP), which exemplifies the possible scenarios in which an exceptional second appeal may be filed.[44] Article 385a from the Croatian LCP provides a practical framework for applying the legal provision in practice – a dimension lacking in our legislation. Additionally, the Croatian LCP extends the possibility of filing a revision even when there is no case law at all regarding a specific legal issue or if the Supreme court has taken a stance regarding a specific question, but the stance should be reconsidered due to legal changes, international treaties, and decisions from the Constitutional Court, the European Court of Human Rights or the European Court of Justice.[45] It is interesting to draw a parallel with this specific legal solution, because although both countries had the same legislative foundation after the dissolution of Yugoslavia, Croatia has taken a much more effective approach regarding the leave to file a second appeal and is continuously working on its improvement as a mechanism for unifying the judicial practice.[46]

[42] Art. 372(4) of the MLCP.
[43] Bratković, M., *op. cit.* note 32, p. 859.
[44] Art. 385.a. of the Croatian Law on Civil Procedure, Official Gazette, No. 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, i NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22, 114/22, 155/23 (hereinafter: Croatian LCP).
[45] Art. 385.a of the Croatian LCP.
[46] It is important to highlight that the Croatian LCP contains a provision for another valuable mechanism for unifying the judicial practice, *i.e.* Art. 502.i which refers to the

Nevertheless, the MLCP will also incorporate changes in the future, tailored by the Croatian model.

Namely, due to a lack of clarity, analysis of second-instance judgments demonstrated that the extraordinary revisions that were allowed only partially met the conditions stipulated in the MLCP.[47] The conditions were met only in the part that prescribes that the appellate court shall permit 'its filing in the ruling part of the judgment it rendered'.[48] Therefore, the Supreme Court concludes that the appellate courts have the responsibility to specifically, clearly, and unequivocally define the material or procedural question important for resolving the dispute and simultaneously ensure uniform application of the law and harmonization of the judicial practice in the reasoning of the judgment, thus, to list the numbers of the *res judicata* judgments from the same or other courts of the country, in which different decisions were made on the same legal issue.[49] Consequently to this legal opinion of the Supreme Court, a novelty of the MLCP in 2010 was introduced, shaping the current criteria, even though it is argued that the changes were more 'editorial than substantive'.[50] However, it is without a doubt that an *exempli causa* enumeration will facilitate the practical application of extraordinary revision.[51] This approach is accepted in the proposal of the new MLCP, which is still pending in a parliamentary procedure. The draft law contains examples of questions that may arise as grounds for a revision – similarly to the grounds listed in the Croatian LCP.

Further, as stated, the enumeration of the final decisions that indicate non-uniformity is obligatory for the extraordinary revision to be filed. However, the question whether judges are continuously updated with the relevant practice has been ongoing for years, and a definitive answer cannot be found. However, different measures have been taken to overcome this obbstacle. Initially, one of the (more progressive) measures was the introduction of the Automated Court Case Management Information System (ACCMIS) in 2010, which facilitates the recordkeeping and handling of court cases and tracks all the life cycles of the

'Model procedure for the resolution of legal issues important for the uniform application of law'. Due to the scope of the paper, the model procedure would not be elaborated in detail, however, it is undoubtedly another example of a progressive approach taken by the Croatian legislator.

[47] Legal Opinion, Civil Division of the Supreme Court of the Republic of North Macedonia, 8.07.2008, https://bit.ly/4h0R9Zw (hereinafter: Legal opinion, 2008).

[48] Art. 372(4) of the MLCP.

[49] Legal Opinion, 2008.

[50] Зороска-Камиловска, Т.; Ракочевиќ, М., *op. cit.* note 30, p. 218.

[51] *Loc. cit.*

case,[52] as well as the Judicial Portal of the Republic of North Macedonia[53] in 2017 to ensure transparency in the decision-making process. Additionally, the Law on the Management of the Movement of Cases in Courts[54] adopted in 2020 prescribes an obligation for mandatory publication of properly anonymized final court decisions on the court's website.[55] The main idea of these measures is to provide easy electronic access to the final decisions published on the official website which contains tools for advanced searching (e.g. by relevant court, article, legal basis, etc.). On the other hand, there are, in a broader sense, more traditional approaches for detecting non-uniform practice which can be seen through the prism of some provisions, such as the obligation of the president of the court to send a written proposal to be considered at a session of judges, department or Specialized court department if he notices unequal handling or deviation of the established case law;[56] the possibility of considering the matter of unification of judicial practice at a session of judges convened at least once a month;[57] the possibility for the Supreme Court of the Republic of Macedonia, the courts of appeal and the Judicial Council to request from the lower courts in its jurisdiction data regarding unification of judicial practice;[58] the obligations prescribed for the Department of Judicial Practice directed towards evaluation of the court practice[59] and its obligation to organize meetings with the appellate courts to review certain legal issues for the unification of certain legal issues;[60] the obligation of the president

[52]Pre-accession Economic Program, Skopje, 2010, https://www.sobranie.mk/WBStorage/Files/1_PEP_20102012_za_na_web[1].pdf, p. 88; European Commission, Progress Report of the Republic of North Macedonia 2010, Expansion Strategy and Main Challenges 2010-2011, Brussels, 9 November, 2010, p. 10; Automated Court Case Management Information System, https://edusoft.com.mk/court-case-management-software.

[53] Judicial Portal of the Republic of North Macedonia, http://sud.mk/wps/portal/vsrm/sud/!ut/p/z1/hY4xC8IwFIR_S4eO5j2w1OgWQQvqpILxLdJKTAtpU9Jo8N8bcRKU3nZ338EBgQTqykejS9_YrjTRnym_5EWWId_ijh_2SxQrnPHjXGCxRjiNARRr_CPx3tMYsgHSxlafN6Krp lwDOXVTTjl2dzGuve-HRYophhCYtlYbxa62TfHXpLaDB_lNQt9KnFD1DCJJXpELPs4!/dz/d5/L2dBISEvZ0FBIS9nQSEh/.

[54] Law on the Management of the Movement of Cases in Court, Official Gazette, 42/2020 from 16.02.2020 (hereinafter: Law on Management of the Movement of Cases in Court).

[55] Art. 9. of the Law on the Management of the Movement of Cases in Court.

[56] Art. 18. of the Court Rules, Official Gazette, No. 66/2013 from 09.05.2013 (hereinafter: Court Rules).

[57] Art. 19. of the Court Rules; thus, Art.. 36 of the Court Rules of the Supreme Court, Official Gazette No. 14/2022 from 20.01.2022 (hereinafter: Court Rules of the Supreme Court), prescribes an obligation to organize sessions of the judicial departments of the Supreme Court to consider issues of unification of judicial practice.

[58] Art. 20. of the Court Rules; Art. 19. of the Law on Courts, Official Gazette, No. 58/2006 from 11.05.2006.

[59] Art. 74. of the Court Rules.

[60] Art. 71. of the Court Rules of the Supreme Court.

of the court at a session of judges and the president of the higher court, separately and together, to take measures to harmonize judicial practice,[61] the possibility for the Supreme Court to organize consultations or consultative meetings with the judges of the courts, in order to harmonize judicial practice,[62] etc. Through the manners prescribed in these provisions, the court can stay up to date with the overall case law and be able to detect potential deviations that may arise. However, the dominant opinion is that the Macedonian judges show resilience towards considering previous judgments,[63] therefore skepticism may arise as to whether thorough research is done before rendering a judgment concerning specific legal issues. While some technical improvements may be made in the digital tools, *i.e.* the ACCMIS and the official court website, the relevant provisions seem like a sufficient base for monitoring case law and listing the necessary final decisions in the judgment in which a leave to file a second appeal is allowed. The will and initiative of the judges themselves are crucial for remaining informed.

With sharper criticism directed at the broad scope of the material or procedural question which can be addressed for unifying the court practice and less intense observations focused on listing the decisions that indicate non-uniformity in practice, we cannot avoid questioning how the Macedonian courts act in practice, at least according to the recent trends.

4. REVIEW OF THE AMCEDONIAN JUDICIAL APPROACH TOWARDS THE LEAVE TO FILE A SECOND APPEAL

Considering the challenges that may be imposed by the ambiguities in the conditions for filing revision, both ordinary and extraordinary, it appears quite compelling to conduct research of the approach taken by the courts in practice. Therefore, from the Reports of the work of the Supreme Court from 2021, 2022, 2023 and 2024,[64] it can be seen that the efficiency of the court is somewhat constant, however, it cannot be classified as highly satisfactory, though the Reports from 2023 and 2024 provide the epithet “efficient”. [65]

[61] Art. 87. of the Court Rules.
[62] Art. 74. of the Court Rules of the Supreme Court.
[63] Preshova, D., Rakochevikj, M., Misoski, B., *op. cit.* note 22, p. 6.
[64] Report of the work of the Supreme Court from 2021, Supreme Court of the Republic of North Macedonia, Skopje 2022 (hereinafter Report 2021); Report of the work of the Supreme Court from 2022, Supreme Court of the Republic of North Macedonia, Skopje 2023 (hereinafter: Report 2022); Report of the work of the Supreme Court from 2023, Supreme Court of the Republic of North Macedonia, February 2024 (hereinafter: Report 2023); Report of the work of the Supreme Court from 2024, Supreme Court of the Republic of North Macedonia, February 2025 (hereinafter: Report 2024).
[65] Report 2023, p. 4; Report 2024, p. 6.

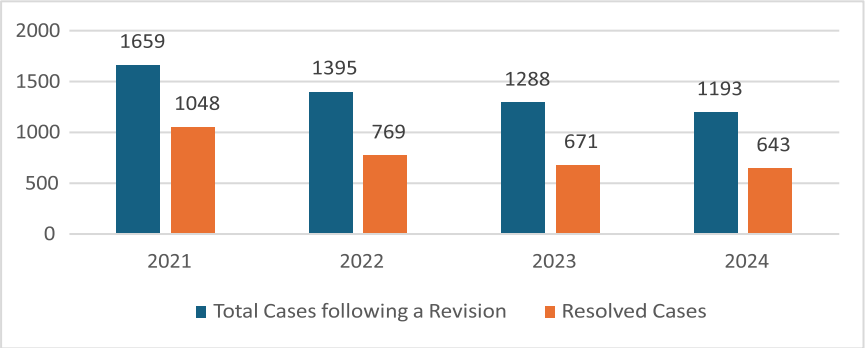


Table 1: Nimber of submitted second appeals according to the Reports of the work of the Supreme Court from 2021, 2022, 2023 and 2024[66]

It must be noted that the provided information refers to the total number of cases for which a revision was filed since there are no official statistics for the number of submitted extraordinary revisions, nor the number of resolved cases following the extraordinary revisions. However, by conducting a case-by-case analysis of the decisions that are published by the courts, a general overview can be obtained about the reasons for which the appellate courts grant leave to file a second appeal and the Supreme Court's action on the submitted legal remedy. In 2021, it is interesting to observe that in some appeals, the appellants themselves requested permission to file extraordinary revision.[67] In some cases, the court did not allow

[66] Report 2021; Report 2022; Report 2023; Report 2024.

[67] Appellate Court of Gostivar, GŽ-122/21 from 28.07.2021; the appellant requested leave to file a second appeal on the following procedural question: whether the second-instance court can dismiss a lawsuit on the grounds of an untimely objection by the defendants for an unproven lack of passive legitimacy, in conditions when the firstinstance court, until the decision on the case was made, had not previously issued any decision to regulate the lawsuit and in conditions when the defendants did not act in any way following the final decision of the Basic Court Tetovo on the said case; Appellate Court of Gostivar, GŽ-123/21 from 28.07.2021; the appellant requested leave to file a second appeal on the same ground, as this is a similar case to the above-mentioned; Appellate Court of Gostivar, GŽ.157/21 from 21.10.2021; in this case, the court concluded that the legal conditions for filling an extraordinary revision are not fulfilled, thus, the case concerned an award of interest and costs of the procedure, and since it concerns a secondary claim, a revision is in any case inadmissible; Appellate Court of Bitola, GŽ169/21 from 19.03.2021; The defendant, with the submitted appeal, requests permission for revision, i.e. asks whether oral amendments to written contracts can be accepted as in the specific dispute and attaches a judgment of the Supreme Court of the Republic of Macedonia Rev 1 No. 103/2019 of 2306.2020 in which the decision contained different positions regarding these issues, and thus states that there were numerous court decisions in which the same issues were resolved as current in view of the frequent oral amendments to written contracts, even though such decisions were not attached; Appellate Court of Gostivar, TSŽ-20/21 from 19.05.2021 (hereinafter TSŽ-20/21); the specific case concerned a debt from royalties whose value was 14,846.00 denars, i.e. it was a small claim dispute; Appellate Court of Gostivar, TSŽ-161/20

for extraordinary revision to be filed, under the reasoning that "*there are no attached decisions which indicate non-uniform court practice*".[68] In another particular case, the court resonated that the decision does not depend on a resolution of a material or procedural question, thus, the attached decision from the Supreme Court is not conflicting to the judgment of the lower court, therefore an extraordinary revision is not allowed.[69] Lastly, the Appellate court did not allow extraordinary revision to be filed, because under Macedonian law revision is not allowed in small claim disputes, such as the cases at hand.[70] It can be seen that in these cases, the courts did not focus on the fact that the parties themselves requested permission to file an extraordinary revision, but rather on the question of whether the legal conditions for allowing it are met. On the contrary, there are some cases in which the Appellate Courts confirmed the request of the parties to file an extraordinary revision. For example, in some cases,[71] the Appellate court allowed leave to file a second appeal by merely stating the right to file an extraordinary revision in the ruling part of the judgment and citing the relevant provision from the MLCP. The court did not list the decisions that demonstrated a non-uniformity in practice, nor did precisely state the scope of the question which needed to be addressed. This vague manner raises the question of whether the courts will allow an extraordinary revision to be filled each time they feel

from 27.01.2021 (hereinafter: TSŽ-161/20); same reasoning as the previous case, the specific case concerned a debt from royalties whose value was 5,090.00 denars, i.e. it was a small claim dispute; Appellate Court of Gostivar, TSŽ-168/20 from 20.01.2021 (hereinafter: TSŽ168/20); similarly, the specific case concerned a debt from royalties whose value was 40,653.00 denars, *i.e.* it was a small claim dispute.

[68] GŽ-122/21, p. 7; GŽ-123/21, p. 7.

[69] GŽ-169/21.

[70] TSŽ-20/21, p. 11; TSŽ-20/21, p. 13; TSŽ-168/20, p. 13.

[71] Appellate Court in Skopje, GZ-394/21 from 24.03.2021; In this case, in 1989, a sales agreement for land was signed between the plaintiff's predecessor and the defendant, which was fully executed. The plaintiffs have possessed the land uninterrupted since then. The legal question arises as to whether this agreement can be considered valid. This question is further complicated by the Decision for transformation of the right to use construction land into ownership rights, based on the former ownership of the Ministry of Transport and Communications which granted the defendant and his brother ownership rights over the land, transforming their previously held right to use the land into ownership; Appellate Court in Skopje, GŽ-507/21 from 03.11.2021; In this case, there was a legal question regarding whether the plaintiffs have the right to file a lawsuit for the violation of their rights to health, a healthy environment, privacy, and the inviolability of their home. The case also concerns whether the plaintiffs can demand that the government update legal acts to fully align national legislation with European air quality directives and improve air quality; Appellate Court of Skopje, GŽ-819/21 from 03.03.2021; The question was whether it can be established that there is a concluded and fully implemented oral agreement in 1964 by which the right to use real estate was transferred if the agreement was concluded at a time when the subject of the agreement was considered *res extra commercio* and now, the Republic of North Macedonia is registered as the owner of the property register, thus the usufruct right of the defendants is no longer recorded, what change has occurred in accordance with the currently applicable laws?"

uncertain about a specific case. Similarly, in response to the GZ394/21,[72] the Supreme Court dismissed the filed extraordinary revision by stating that: "*The second-instance court not only failed to explain the reasons for allowing the revision, but also failed to differentiate the specific legal issue that is important for the uniform application of the law and the unification of case law by pointing to specific cases.*"[73] In other two similar cases, the Supreme Court rejected the extraordinary revision based on two grounds: firstly, the Appellate Court did not allow leave to file a second appeal in the ruling part of the judgment and secondly, according to law, a revision is not allowed in any case in the present dispute.[74]

In 2022, following the decisions GZ-507/21 and GZ-819/21 from 2021,[75] the Supreme Court denied the filed revision explaining that even though the second instance court elaborated the reasons why it allowed the revision and differentiated a specific legal issue, it failed to indicate specific cases which indicate non-uniform practice of the courts.[76] In another decision (GZ-562/22), the Appellate Court allowed leave to file a second appeal for the question "*whether the right to confiscation based on a final criminal verdict can apply only to the part of the property that belongs to the convicted person or the entire joint property of the spouses, in circumstances where it concerns real estate - a family house built during the duration of the marital union between the plaintiff and her husband - the convicted person, i.e. in the period from 1980-1982, which was legalized in 2013 and had a gift agreement concluded in 2018, based on which the plaintiff acquired the right to ownership of the property*."[77] Additionally, the court referred to the Protocol of the European Convention on Human Rights and case law of the ECtHR.[78] In contrast to the previously unelaborated question which required unification and the absence of relevant cases that indicated non-uniformity, this approach appears more precise, even though the MLCP explicitly requires cases that demonstrate inconsistency in the Macedonian courts, not practice from the ECtHR. In another case, the Appellate Court allows an extraordinary revision to be filed on the following question: "*Can the court accept and base its decision on*

[72] See footnote 70.
[73] Supreme Court of the Republic of North Macedonia, Rev2.no.331/2021 from 30.11.2021, p. 4.
[74] Supreme Court of the Republic of North Macedonia, Rev2.no.26/2021 from 06.04.2021, p. 2, 3; Supreme Court of the Republic of North Macedonia, Rev.2.no.39/2021 from 02.11.2021, pp. 2, 3.
[75] See footnote 70.
[76] Supreme Court of the Republic of North Macedonia, Rev.2.no.85/2022 from 14.06.2022, p. 4; Supreme Court of the Republic of North Macedonia, Rev.2.no.347/2021 from 24.02.2022, p. 3.
[77] Appellate Court in Skopje, GZ-562/22 from 21.09.2022, p. 10, 11 (hereinafter: GŽ-562/22).
[78] *Loc. cit.*

an expert opinion prepared by an expert whose license had expired by the date of the expert opinion and whether the expert must possess a valid license on the date of the presentation of the expert opinion?"[79] The court further supports the need for filing an extraordinary revision regarding this question by submitting two opposing conclusions adopted at working meetings of the appellate courts and the Supreme Court of the Republic of North Macedonia in 2018[80] and 2019.[81] In this decision, the question is precisely drafted and while the conclusions of the working meetings may not be qualified as typical judicial decisions, their contradiction understandably requires unification. The question remains whether an extraordinary revision is the appropriate means for achieving that goal. In a different case, the defendant filed a revision stating that such revision is certainly permissible, since "*the defendant and the intervener will initiate a procedure for unification of case law before the Supreme Court of the Republic of North Macedonia on the grounds that the second-instance court, by issuing the contested judgment, acted contrary to its established case law*."[82] However, the court indicated that in the specific case, the conditions for the admissibility of an extraordinary revision are not met, nor is the mere initiation of a procedure for the unification of case law a basis for the admissibility of a revision.[83] There are also some cases in which the parties, again, requested permission to file extraordinary revisions. Generally, the courts did not allow those requests, due to different reasons: non-fulfillment of the legal conditions,[84] lack of need to file an extraordinary revision and absence of listed judgments (by the party requesting permission) which indicate inconsistency[85] or as it was decided in couple of cases, for example, despite not fulfilling the legal conditions, the court highlighted that "*revision is allowed by the second-instance court at its discretion, not at the request of the parties*."[86] This is adequate interpretation of the provisions prescribing the extraordinary revision as a legal remedy.

[79] Appellate Court of Bitola, GZ-1183/21 from 27.12.2021, p. 7, 8 (hereinafter: GŽ-1183/21).
[80] According to the conclusion adopted at the working meeting of the appellate courts and the Supreme Court of the Republic of North Macedonia: "The court may accept as evidence and base its decision on an expert opinion prepared by an expert whose 5-year license at the time of the expert opinion has expired, but who is still registered in the register of experts."
[81] According to the conclusion adopted at the working meeting of the appellate courts and the Supreme Court of the Republic of North Macedonia: "At the time of preparation of the expert opinion, the expert must have a valid license, regardless of whether he or she is still on the list of experts."
[82] Supreme Court of the Republic of North Macedonia, Рев1.бр.185/2021 from 21.09.2022, p. 3.
[83] *Loc. cit*.
[84] Appellate Court of Skopje, GŽ-220/22 from 20.10.2022.
[85] Appellate Court of Skopje, GŽ-2615/21 from 17.03.2022.
[86] Appellate Court of Stip, GŽ-719/21 from 05.05.2022; Appellate Court of Stip, ROŽ-47/22 from 08.03.2022; Appellate Court of Stip, ROŽ-48/22 from 24.03.2022; Appellate

The trend of parties requesting permission for leave to file a second appeal continues in 2023 as well. As previously, the courts generally do not grant permission, based on different reasons: *inter alia*, the plaintiffs seek permission to file an extraordinary appeal based on a matter that constitutes a determination of facts, not a substantive or procedural question,[87] there is no disputed question that requires harmonization and no decisions have been submitted that indicate non-uniform application in practice,[88] non-fulfillment of the legal conditions[89] or the fact that the permission to file an extraordinary appeal is a question to be decided by court's discretion, not by request of the parties – even in a situation where the party has listed decisions which (from the parties point of view) indicate inconsistencies in practice.[90] In another case, the plaintiffs have filed an extraordinary revision on their initiative, *i.e.* "*they have granted themselves a non-existent right that the law does not provide for*",[91] especially since they have submitted the revision for a secondary claim for which it is certainly not permitted.[92] The following judgment is a striking illustration of one of the most significant challenges of the extraordinary revision. Namely, in relation to the permission given to file a second appeal in the abovementioned decision GZ-1183/21,[93] the Supreme Court ruled that despite the conflicting opinions regarding the validity of the expert's license on the day of presenting the expert opinion, and although the decision from the Appellate Court meets the legal requirements, it is dismissed as unfounded as the dispute in question is a small claim dispute.[94] This is a clear demonstration that sometimes the form of the procedure can appear as an obstacle in the pursuit of justice. Once again, it confirms the standing that revision by permission should be allowed in all types of cases, regardless of their value. In one case, the Appellate Court did not list the decisions indicating non-uniformity in practice, by stating that there is no case law regarding the question, but the issue is highly important therefore it needs to be answered.[95] However, the

Court of Stip, ROŽ-55/22 from 08.03.2022; Appellate Court of Stip, ROŽ-56/22 from 24.03.2022; Appellate Court of Stip, ROŽ-112/22 from 12.05.2022.

[87] Appellate Court of Bitola, GŽ-65/23 from 22.11.2023; The decision in the civil procedure that the plaintiffs request to be made, as a decision that falls within the jurisdiction of the non-contentious procedure, in the opinion of this court, cannot be resolved through a decision of the Supreme Court that would change the law and legal provisions, but can only be resolved in the specific dispute.

[88] Appellate Court of Gostivar, GŽ-104/22 from 27.10.2022.

[89] Appellate Court of Skopje, GŽ-3094/22 from 27.09.2023.

[90] Appellate Court of Stip, ROŽ-128/23 from 20.03.2023; the court took into consideration the attached decisions,but found that they have a different factual and legal background and do not correspond to the specific case.

[91] Appellate Court of Gostivar, GŽ-537/2022 from 26.01.2023.

[92] *Loc. cit.*

[93] See footnote 79.

[94] Supreme Court of the Republic of North Macedonia, REV2-210/22 from 04.10.2023.

[95] Supreme Court of the Republic of North Macedonia, REV2-174/22 from 31.05.2023; the question was whether the death of the individual I.I. renders invalid the power of attorney

Supreme Court dismissed the revision by stating that the enumeration of the judgments is an obligatory condition for permitting extraordinary revision.[97] In one particularly interesting case, the Appellate Court allows leave to file a second appeal for the following question: "*When filing a lawsuit by an employee for transformation of the employment from a fixed-term to an indefinite-term contract, in accordance with Article 46 paragraph 4 of the Labor Law, is it mandatory to prove that financial resources have been secured for an indefinite period, given that the above-mentioned provision does not differentiate what resources the employee should provide*?", thus indicating that the relevant practice is inconsistent.[96]

This is an example of successfully granted permission for leave to file a second appeal, as in 2024 the Supreme Court confirmed the decision, ordered the judgments of the lower courts to be annulled and the case to be returned to the first instance court for retrial.[97] On the other hand, in connection to the decision GZ-562/22,[98] the Supreme Court emphasized that the Appellate Court explained the reasons why he allowed the revision, differentiated a specific legal issue that it considers important for the uniform application of the law and the unification of judicial practice, but failed to point out specific cases that indicate non-uniform court practice, due to which it is important to ensure uniform application of the law.[99] The Supreme Court took into account the fact that the decision of the Appellate Court cited decisions of the ECHR, but they did not amount to a different outcome. This is because, given the essence of the subject matter of the dispute in the cited decisions, they do not indicate any inconsistent case law on the legal issue on which the review by the second-instance court was allowed. In addition, one of the cases does not arise from the case law of the ECtHR at all.[100]

It can be seen that the practice is even more ambiguous and confusing than the provision itself. From the analyzed judicial practice, three main conclusions can be drawn. Firstly, in the majority of the cases, the courts disregard the requirement to list the decisions that indicate non-uniform practice, even though the enumeration is crucial for detecting discrepancies in practice, thus infringing the legal obligation set by the law. Secondly, the courts demonstrate a lack of understanding of how to properly structure the legal question that causes nonuniformity, which leads to ambiguities and creates confusion for the Supreme

given in the administrative procedure at the conclusion, or at the notarization, of the disputed exchange agreement, issued to the attorney.
[96] Appellate Court of Gostivar, ROŽ-162/23 from 01.06.2023.
[97] Supreme Court of North Macedonia, REV3-83/23 from 25.04.2024.
[98] See footnote 83.
[99] Supreme Court of the Republic of North Macedonia, REV2-177/23 from 06.02.2025.
[100] *Loc. cit.*.

court. Thirdly, as a consequence of the previous conclusions, the extraordinary revision is nearly ineffective as a mechanism for the unification of the Macedonian judicial practice - partly because of the inadequate application of the provisions and partly because of their insufficiency and the need for reform. Therefore, from the analyzed case law, it cannot be said that this extraordinary legal remedy fulfills the purpose for which it was introduced in the MLCP.

5. CONCLUSION

It is without doubt that the leave to file a second appeal is a formal mechanism for securing unified court practice in the Macedonian judicial system. However, the question is whether this mechanism is sufficient for the purpose for which it was primarily prescribed. What is concerning is the current state of the Macedonian judicial practice. Namely, almost 17 years after the legal opinion of the Supreme Court providing directions for properly implementing the extraordinary revision in practice, it seems that the situation hasn't changed much. The courts continue to vaguely frame the scope of the question addressed for achieving uniform application of the law, thus, they fail to provide cases that demonstrate the alleged non-uniformity. An interesting tendency demonstrates that, not rarely, the parties themselves require permission to file an extraordinary revision. On one hand, the provision itself does not explicitly provide who should present the decisions that indicate non-uniform practice. On the other hand, by interpreting the provision as a whole, it can be concluded that granting permission to file an extraordinary revision is a discretion of the court, therefore, the court should not abuse its powers and impose an obligation on the parties to submit the relevant examples of non-uniform practice, thus, it should not reject considering whether an extraordinary revision should be filed solely on the ground that the parties did not provide the relevant (non-uniform) practice. The main intention is for the court to be aware and prepared to adequately assess whether permission to file an extraordinary revision should be granted. According to the MLCP, the burden falls on the court, taking into consideration the gravity of the extraordinary revision and the impact it is supposed to have – the unification of the judicial practice and equal application of the law.

The analysis of the judicial practice conducted for the paper demonstrates that, until now, the extraordinary revision has not had a meaningful impact on the unification of the practice, much less is it considered an effective mechanism for overcoming the discrepancies in the uniform application of the law. The main conclusion that arises as a result of the research is that the current legislation requires reforms in its provisions regarding the extraordinary revision. This is due to some key-obstacles that are detected. Firstly, the condition regarding the type

of the question which may be subject to extraordinary revision is open to broad interpretation. Further, the obligation of the courts to list the decisions that indicate nonuniformity seems as the biggest challenge in the use of this extraordinary legal remedy. Thus, the current provisions deprive the parties of the possibility to require permission to file an extraordinary revision, which otherwise seems as a suitable possibility, since the court would nonetheless have the final decision whether permission should be granted or not. At the moment, the form of the provision, *i.e.* the procedure itself serves as a barrier in the pursuit of justice and unification of the judicial practice. These key-points are expected to be covered by the new MLCP – by extending the scope of questions for which an extraordinary revision may be filed, by providing exemplificatory situations which could amount to 'a question that requires unification', by allowing the parties to request filing an extraordinary revision themselves and by removing the obligation of listing the decisions which indicate non-uniform judicial practice regarding the specific question if such question hasn't been previously addressed. In that manner, the main obstacles burdening the application of this legal remedy are expected to be overcome.

Nonetheless, it has to be noted that despite the improvements needed for this legal remedy to be put into practice, it is unacceptable for the courts to disregard the applicable rules. In many instances, the Supreme Court denied the submitted extraordinary revision due to a lack of listed decisions that indicated non-uniform practice. In this manner, the Appellate Courts deprive the parties of uniformity in judicial practice regarding certain questions. It seems that the conditions set in the MLCP are burdensome for the court, therefore, this extraordinary legal remedy is marginalized as a mechanism for ensuring uniformity. At present, it exists as a mere formality, often disregarded by the relevant actors. Until the adoption of the new MLCP, measures should be taken for the extraordinary revision to be made current, through sessions of the Supreme Court and the lower courts, as well as judicial trainings. The lack of application and relevance of this legal remedy at the moment raises concerns regarding its future implementation. Therefore, without doubt, the leave to file a second appeal is an extraordinary legal remedy that requires continuous attention and proactive efforts to fulfill its aim as a mechanism for unifying the Macedonian judicial practice.

REFERENCES

BOOKS AND ARTICLES

1. Bratković, M., *Što je važno pravno pitanje u reviziji?*, Zbornik Pravnog fakulteta u Zagrebu*, 68* (5-6), 2018, 853-880.
2. Čizmić, J., *Mogući načini ujednačavanja sudske prakse u parničnom postupku*, Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, br. 20, Mostar 2023, 36-64.
3. Emmert, F., *The Independence of Judges a Concept Often Misunderstood in Central and Eastern Europe*, European Journal of Law Reform, Vol. 3, No. 4, Kluwer International Law 2002, 405-409.
4. Galič, A., *Reshaping the Role of Supreme Courts in the Countries of the Former Yugoslavia*, Uzelac, A.&Van Rhee C.H. (eds.), Nobody's Perfect.Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters, Cambridge/Antwerp/Portland: Intersentia, 2014, 291-317.
5. Jolowicz, J. A., *On Civil Procedure*, Cambridge University Press, 2000.
6. Kühn, Z, *The authoritarian legal culture at work: the passivity of parties and the interpretational statements of Supreme Courts*, Croatian Yearbook of European Law & Policy*, 2* (1), 19-26.
7. Marković, M., *Građansko procesno pravo, knjiga prva, Parnični postupak, sveska druga, Parnične radnje*, Niš, 1973.
8. Nedelkova, L., *The Role of the Supreme Court in Promoting (Ensuring) Effective Justice and Unification of Judicial Practice*, China, 2016.
9. Poznić, B., *Građansko procesno pravo*, Beograd, 1978.
10. Preshova, D., Rakochevikj, M., and Misoski, B., *The Role of the Higher Courts in Securing the Uniform Application of the Law in North Macedonia*, Research Chapter No. 12/2022, 2022.
11. Triva, S., Belajec, V., Dika, M., *Novo pranično procesno pravo*, Zagreb, 1977.
12. Uzelac, A., Bratković, M., *Croatia: Supreme Court between Individual Justice and System Managemen*", Supreme Courts Under Pressure, Springer International Publishing, 2021.
13. Wexler, S., Irvine, A., *Artistotle on the rule of law*, Polis The Journal for Ancient Greek and Roman Political Thought, 2006, 1-23.
14. Георгиевски, С., *Судството во новиот Устав на Југославија*, Годишник на Правниот факултет во Скопје, Том IX, 1964.
15. Зороска-Камиловска, Т., Ракочевиќ, М., *Дозволеност на ревизија во парничната постапканиз практиката на Врховниот суд на Република Северна Македонија*, Zbornik radova s V. međunarodnog savjetovanja

„Aktualnosti građanskog procesnog prava – nacionalna i usporedna pravnoteorijska i praktična dostignuća“, 17. i 18. listopada 2016. godine, 203-222.
16. Јаневски, А., Зороска-Камиловска, Т., *Граѓанско процесно право, Книга Прва, парнично право, Второ изменето и дополнето издание*, Правен факултет „Јустинијан Први” во Скопје, Скопје, 2012.
17. Ристиќ, Ј., Треневска, З., Деловски, В., *Анализа на степенот на користење и цитирање на судската пракса од страна на националните судови*, Центар за правни истражувања и анализи, Скопје, 2020.

LEGAL ACTS

1. Consultative Council of European Judges (CCJE), Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law, https://rm.coe.int/opinionno-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3.
2. Council of Europe, Consultative Council of European Judges (CCJE), Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) on the Quility of Judicial Decisions, 18 December 2008, https://rm.coe.int/16807482bf
3. Council of Europe, E-Justice and Fundamental Rights International GesbR, Issues Affecting the Consistency of Judicial Decisions and Best Practices in Securing Consistency in Judicial Decision Making, 2023, https://rm.coe.int/issues-affecting-theconsistency-of-judicial-decisions-and-best-practi/1680afd8a5
4. Court Rules of the Supreme Court, Official Gazette 14/2022 од 20.01.2022
5. Court Rules, Official Gazette, (Official Gazette 66/2013) from 09.05.2013
6. European Convention on Human Rights, Council of Europe Treaty Series 005, 1950
7. Guide on Article 6 of the Convention – Right to a fair trial (civil limb), https://rm.coe.int/1680700aaf
8. Law on Civil procedure (Official Gazette no. 79/2005 from 21.09.2005; 110/2008;
a. 83/2009; 116/2010; 124/2015)
9. Law on Courts, (Official Gazette 58/2006) from 11.05.2006
10. Law on the Management of the Movement of Cases in Courts, (Official Gazette,
a. 42/2020) from 16.02.2020
11. Устав на Република Северна Македонија (Службен весник на Р.М., 2/1991;

a. 1/1992; 1/1992; 31/1998; 31/1998; 91/2001; 91/2001; 84/2003; 84/2003; 107/20
b. 05; 107/2005; 3/2009; 3/2009; 13/2009; 49/2011; 49/2011; 6/2019; 6/2019)

COURT DECISION

1. Appellate Court in Skopje, GŽ-394/21 from 24.03.2021
2. Appellate Court in Skopje, GŽ-507/21 from 03.11.2021
3. Appellate Court in Skopje, GŽ-562/22 from 21.09.2021
4. Appellate Court of Bitola, GŽ-1183/21 from 27.12.2021
5. Appellate Court of Bitola, GŽ-169/21 from 19.03.2021
6. Appellate Court of Bitola, GŽ-65/23 from 22.11.2023
7. Appellate Court of Gostivar, GŽ.157/21 from 21.10.2021
8. Appellate Court of Gostivar, GŽ-104/22 од 27.10.2022
9. Appellate Court of Gostivar, GŽ-122/21 from 28.07.2021
10. Appellate Court of Gostivar, GŽ-123/21 from 28.07.2021
11. Appellate Court of Gostivar, GŽ-537/2022 from 26.01.2023
12. Appellate Court of Gostivar, ROŽ-162/23 from 01.06.2023
13. Appellate Court of Gostivar, TSŽ-161/20 from 27.01.2021
14. Appellate Court of Gostivar, TSŽ-168/20 from 20.01.2021
15. Appellate Court of Gostivar, TSŽ-20/21 from 19.05.2021
16. Appellate Court of Skopje, GŽ-220/22 from 20.10.2022
17. Appellate Court of Skopje, GŽ-2615/21 from 17.03.2022
18. Appellate Court of Skopje, GŽ-3094/22 from 27.09.2023
19. Appellate Court of Skopje, GŽ-819/21 from 03.03.2021
20. Appellate Court of Stip, ROŽ-112/22 from 12.05.2022
21. Appellate Court of Stip, ROŽ-128/23 from 20.03.2023
22. Constitutional Court of the Republic of Macedonia, no. 255/2009, 7.07.2010
a. ECHR, Ādamsons *v* Latvia, no. 3669/03, 24.06.2008
b. ECHR, Atanasovski v. The Former Yugoslav Republic of Macedonia, no. 36815/03, 14.01.2010
23. ECHR, Brumărescu v. Romania, no. 28342/95, ECHR, 28.10.1999
24. ECHR, Iordan Iordanov and Other v. Bulgaria, no. 23530/02, 2.07.2009
25. ECHR, Roşca v. Moldova, no. 6267/02, 22.03.2005
26. ECHR, Ryabykh v. Russia, no. 52854/99, 24.07.2003
27. ECHR, Şahin and Şahin v. Turkey, no. 13279/05, 20.10.2011
28. ECHR, Tomić and others v. Montenegro, no. 18650/09 and others, 17.04.2012
29. ECHR, Tudor Tudor v. Romania, no. 21911/03, 24 June 2009
30. ECHR, Unédic v. France, no. 20153/04, 18.12.2008

31. ECHR, Vinčić and others v. Serbia, no. 44698/06, 1.12.2009
32. Supreme Court of North Macedonia, PEB3-83/23 from 25.04.2024
33. Supreme Court of the Republic of North Macedonia, Rev.2.no.347/2021 from 24.02.2022
34. Supreme Court of the Republic of North Macedonia, Rev.2.no.39/2021 from 02.11.2021
35. Supreme Court of the Republic of North Macedonia, Rev.2.no.85/2022 from 14.06.2022
36. Supreme Court of the Republic of North Macedonia, Rev1.no.185/2021 from 21.09.2022
37. Supreme Court of the Republic of North Macedonia, Rev2.no.26/2021 from 06.04.2021 40. Supreme Court of the Republic of North Macedonia, Rev2.no.331/2021 from
a. 30.11.2021
38. Supreme Court of the Republic of North Macedonia, REV2-174/22 from 31.05.2023
39. Supreme Court of the Republic of North Macedonia, REV2-210/22 from 04.10.2023
40. Supreme Court of the Republic of North Macedonia, PEB2-177/23 from 06.02.2025
41. Правно мислење, Оддел за граѓански дела на Врховниот суд на Република
a. Македонија, 8.07.2008 година, https://bit.ly/4h0R9Zw

NETWORK RESOURCES

1. Automated Court Case Management Information
2. System, https://edusoft.com.mk/court-case-management-software
Judicial Portal of the Republic of North Macedonia, http://sud.mk/wps/portal/vsrm/sud/!ut/p/z1/hY4xC8IwFIR_S4eO5j2w1OgWQQvqpILxLdJKTAtpU9Jo8N8bcRKU3nZ338EBgQTqykejS9_YrjTRnym_5EWWId_ijh_2SxQrnPHjXGCxRjiNARRr_CPx3tMYsgHSxlafN6KrplwDOXVTTjl2dzGuveHRYophhCYtlYbxa62TfHXpLaDB_lNQt9KnFD1DCJJXpELPs4!/dz/d5/L2dBISEvZ0FBIS9nQSEh/

OTHER DOCUMENTATIONS

1. European Commission, *Progress Report of the Republic of North Macedonia 2010, Expansion Strategy and Main Challenges 2010-2011*, Brussels, 9 November, 2010.
2. Pre-accession Economic Program, Skopje, 2010, https://www.sobranie.mk/WBStorage/Files/1_PEP_2010-2012_za_na_web[1].pdf
3. Report of the work of the Supreme Court from 2021, Supreme Court of the Republic of North Macedonia, Skopje 2022.
4. Report of the work of the Supreme Court from 2022, Supreme Court of the Republic of North Macedonia, Skopje 2023.
5. Report of the work of the Supreme Court from 2023, Supreme Court of the Republic of North Macedonia, February 2024.
6. Report of the work of the Supreme Court from 2024, Supreme Court of the Republic of North Macedonia, February 2025.
7. Центар за правни истражувања и анализи, *Унифицирање на судската пракса во Македонија: можности наспроти предизвици*, Скопје, 2015.

UDK: 343.1 : 004.8
347.962 : 004.8
Review paper

Doris Skaramuca, PhD student
University of Miskolc, Hungary
E-mail: doris.skaramuca@centraleuropeanacademy.hu
ORCID ID: 0009-0009-2761-6335

EVALUATING THE ADMISSIBILITY OF AI EVIDENCE IN CRIMINAL PROCEEDINGS: LEGAL STANDARDS AND ETHICAL IMPLICATIONS

ABSTRACT

This paper explores the role of artificial intelligence (AI) in criminal courts, highlighting its impact on the judicial process as technology evolves. Key issues highlighted in this paper include the reliability of AI evidence, ethical implications, and the potential for bias. The study aims to assess the effectiveness of AI evidence, its influence on the right to a fair trial, and the standards for admissibility in court. This research integrates quantitative case law analysis with a review of existing literature. It identifies the challenges that surface when using AI evidence. The findings contribute to the ongoing discussion about the intersection of technology and law, hinting at practical recommendations for policymakers and legal professionals. Ultimately, this paper seeks to enhance our understanding of AI's role in the criminal justice system.

Keywords: *artificial intelligence, admissibility, AI-generated evidence, deep fake, authenticity.*

1. INTRODUCTION

In recent years, we've seen artificial intelligence (AI) make a huge impact across various industries, and the legal system is no different. One of the most affected areas is the criminal justice system, where AI technologies are now being used to assist with everything from evidence collection to case management and even predictive policing. With courts confronting challenges from modern technology, the introduction of AI in criminal proceedings raises essential questions about its reliability, fairness, and ethical implications. AI systems are being used more and more in criminal justice system, involving everything from algorithms that sift through huge amounts of data in real-time to models that attempt to predict criminal behavior based on past incidents. This growing reliance on technology is pushing existing legal frameworks to adapt, as they were originally built around

human judgment and traditional standards of evidence. In a courtroom, evidence plays a crucial role in influencing the outcome of a case, but not all types of evidence are equally significant. There are various forms of evidence that can be presented, including testimonial, physical, documentary, and demonstrative evidence.[1] Testimonial evidence comes from witnesses or experts, while physical evidence consists of tangible items like weapons or clothing. Documentary evidence includes materials such as contracts or emails, and demonstrative evidence involves visual aids like diagrams or animations. Each category of evidence has a specific role, and comprehending their significance is vital for constructing a persuasive argument. Ultimately, it is the responsibility of the judge and jury to assess the different pieces of evidence and determine which ones carry the most influence.[2] Evidentiary standards determine the quality and quantity of evidence presented in the courtroom. In criminal cases, where the gravity of potential consequences makes it essential to ensure that legal proceedings are fair and just, upholding these standards is crucial. By releasing AI evidence into courtrooms, many new questions are raised, from the admissibility of such evidence, its reliability and accuracy, and possible abuses and negative consequences for criminal proceedings.

2. AI USED AS EVIDENCE IN CRIMINAL COURTS

Artificial intelligence is not a neutral technical tool; it alters the balance of power and poses risks to fair trials and equality.[3] AI evidence is created when AI system generates the output autonomously and by using machine learning.[4] Experts commonly categorize AI evidence into two distinct types: AI-filtered and AI-generated. AI-filtered evidence refers to information that has been enhanced by AI tools without altering the fundamental outcomes or core data of the dataset. For instance, this could include AI-assisted methods for navigating extensive databases. Conversely, AI-generated evidence involves instances where AI technologies actively modify, refine, or fabricate the evidence itself. The distinction between evidence gathered and evidence produced by AI systems is often considered significant, but some believe it is misguided.[5] Modern AI

[1] See The Role of Evidence in Proving Criminal Offenses: The Complete Guide, https://focusconlaw.com/the-role-of-evidence-in-proving-criminal-offenses-the-complete-guide/, 12 March, 2025.
[2] *Ibid.*
[3] Paraphrased statement by Professor Katalin Ligeti from her lecture on AI Evidence held in Luxembourg on Thursday, 7 November, 2024.
[4] *Ibid.*
[5] Galic, M., Das A., Schuilenburg M., *AI systems and evidence law in the Netherlands*, Artificial Intelligence and Administration of Criminal Justice, Apeldoorn: Maklu, 2023, p. 315.

systems, like *Hansken*, not only collect evidence in criminal cases but also generate data.[6] Crime investigations produce extensive multimodal data, including text, images, videos, and audio. Traditional tools, developed for searching structured textual data, no longer suffice, and new and more complex AI-based systems needed to be developed.[7] These systems must be able to interpret data on their own (for instance, recognizing images of drugs) and identify relevant correlations among various data points, which can help create a coherent timeline and narrative. This shift illustrates that we are not simply gathering data; we are also dealing with its complex production by these systems.[8]

A Luxembourg based research team led by Professor Ligeti identified three types of AI evidence.[9] The first type includes evidence gathered using AI tools to handle tasks that are time-consuming or error-prone, such as analyzing large datasets for incriminating emails or flagging harmful content. This evidence can be presented in court in its original form. The second type, termed "AI-generated evidence," includes examples like forensic DNA analysis and enhanced images from surveillance footage, where AI improves the quality of data. This category also extends to data generated by consumer products like smart devices that may be relevant in legal cases. The third type involves AI assisting in the investigative process to generate leads for human analysts, such as using facial recognition for suspect identification. Seng and Mason[10] have similar approach, claiming that evidence generated by AI can be categorized into three distinct groups. The first category includes evidence created using devices that accept human-supplied input and produce output. This type of evidence, which consists of content that has been spoken or written by one or more individuals, is primarily considered hearsay evidence. The second category consists of data produced by self-contained devices that gather input or record information from the environment without any human intervention. This means they are largely automated, and because they are not used as testimony, they are almost never challenged. Such evidence is regarded as real or mechanical evidence, falling outside the hearsay rule due to its lack of human involvement. The third category encompasses a combination of human-supplied input and data processed by systems that operate without human supervision. This makes it a hybrid of the first two categories. Judges play a key role in determining the admissibility of AI-generated evidence. To make informed decisions, they

[6] *Ibid.* p. 315.
[7] *Ibid.* p. 315.
[8] *Ibid.* p. 315.
[9] See The digital witness: how AI evidence is reshaping criminal justice, https://www.uni.lu/en/news/the-digital-witness-how-ai-evidence-is-reshaping-criminal-justice/, 20 February, 2025.
[10] Seng, D., Mason, S., *Artificial Intelligence and Evidence,* Singapore Academy of Law Special Issue on Law and Technology, 2021, p. 259-261.

must understand AI algorithms, training data, fundamental principles, potential biases, and risks like deepfakes.

3. DEEP FAKES

Deep fakes are fake images, video and other media in which a person is replaced with someone resembling them using artificial intelligence techniques. The term is coined from "deep learning" and "fake". They are defined in the EU Artificial Intelligence Act[11] as a “deep fake” as an AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful. While initially popularized in entertainment and social media, deepfakes have increasingly become a concern in various sectors, notably in legal contexts. Their role in criminal proceedings poses significant challenges, impacting the integrity of evidence and the broader judicial system. Nowadays, deep fakes are super realistic, and they offer the possibility to create false representations of individuals that may affect their lives greatly. One of the most popular examples was an image of pope Francis in Balenciaga coat, or more recently, fake video of former President of the U.S., Joe Biden, allegedly inviting people to boycott the elections. It is especially dangerous to have such manipulations in courtrooms, as they could potentially mislead judges and result in wrongful convictions or the dismissals of legitimate claims. In criminal cases, this technology could be misused to fabricate evidence, such as video or audio recordings that appear to depict someone committing a crime or making incriminating statements. Deepfakes can appear in legal contexts in several ways, such as being fabricated by a party to influence a case or being unknowingly presented as evidence by a litigant.[12] They can also mistakenly end up in trusted archives, like news outlet collections so if custodians of these records do not recognize a deepfake, they may inadvertently validate its authenticity in court proceedings.[13] If a deepfake were to be presented as legitimate evidence, it could undermine trust in the judicial system. Defense attorneys may find themselves challenging evidence that looks convincingly authentic, while prosecutors must battle the challenge of proving the authenticity of their evidence. Identifying such content is becoming more and more difficult for experts as AI

[11] Article 3 of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).
[12] Pfefferkorn, R., *'Deepfakes' in the Courtroom*, Boston University Public Interest Law Journal, Vol. 29, No. 2, 2020, p. 255.
[13] *Loc. cit.*

tools are evolving and getting better every day. Very nature of deepfakes complicates the already intricate process of verifying evidence in court. It makes it almost impossible to differentiate authentic from fake evidence. As the expert Karsten Theiner explained, photomontage is nearly as old as photography and AI makes it even harder to detect because everyone can use these tools, they are quick and cheap. It is even considered that AI has advanced so much that it is easier to prove that certain content is authentic than that it is not. This would mean that deep fakes would not be considered as evidence that experts have successfully proven to be a hoax, but only those pieces of evidence that experts are convinced are unmanipulated evidence would be considered authentic. On the positive side, Artificial intelligence can be used to detect deep fakes, and in this way, AI tools in the hands of forensic experts can be helpful. Laws need to catch up with the challenges that deepfakes bring to criminal justice. It is crucial to establish clear rules about when and how deep fake evidence can be used in court. In the interest of finding the truth we should also consider developing and deploying AI tools to help forensic experts identify deep fakes more easily. Collaboration between tech experts, lawyers, and law enforcement is essential to develop effective standards that can adapt to these new challenges.

In April 2024, the UK criminalized sexually explicit deepfakes through the Online Safety Act, imposing unlimited fines and potential jail time for offenders.[14] However, gaps remain in addressing other deepfake crimes, making it challenging for prosecutors to find applicable charges.[15] In the United States, regulations vary by state.[16] California restricts political deepfakes, and Texas prohibits harmful uses, but no federal legislation exists.[17] The EU AI Act, which mandates disclosure of AI-generated content, imposes strict controls on deepfake creation, enhances content traceability, and enforces substantial penalties for violations. However, law enforcement struggles with proving criminal intent, establishing jurisdiction, and keeping pace with rapid technological changes. Under the AI Act there is an obligation for deployers of AI systems generating deep fakes to disclose to individuals that the content has been artificially produced or modified, with exceptions in cases of artistic or creative works where transparency does not hinder enjoyment and AI systems authorized for law enforcement purposes.[18] However, AI Act alone is not sufficient safeguard when it comes to criminal proceedings.

[14] See The Deepfake Crisis: How AI is Reshaping Criminal Justice, https://www.crimetraveller.org/2025/02/the-deepfake-crisis-ai-criminal-justice/, 15 March, 2025.
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] Article 50. of Artificial Intelligence Act, see https://artificialintelligenceact.eu/article/50/.

4. LEGAL FRAMEWORK AND STANDARDS FOR ADMISSIBILITY OF CRIMINAL EVIDENCE

Forensic and scientific evidence have really changed the game in the criminal justice system. They play a crucial role in solving crimes, securing convictions, and even helping to exonerate those who are wrongly accused. With the rapid advancements in technology, the legal system is now better equipped to analyze evidence, leading to more accurate and reliable outcomes. Techniques like DNA profiling, fingerprint analysis, toxicology, ballistics, and digital forensics have shifted the focus from relying solely on witness testimony to using solid scientific methods. However, this growing reliance on forensic science doesn't come without its challenges. There are valid concerns about how admissible, reliable, and valid this evidence truly is. Courts face the tough task of balancing the intricate relationship between law and science, making sure that only evidence that meets rigorous standards is allowed in the courtroom, while also being vigilant against the potential misuse of flawed techniques. Ultimately, it is essential that courts ensure that the evidence presented is not only relevant but also reliable. To do this, various legal standards have arisen to help evaluate what can and cannot be accepted in trials. We could argue that evidentiary standards are the backbone of a fair trial in criminal law. They not only protect the rights of the accused but also uphold the integrity of the judicial process. By ensuring that all decisions are based on solid evidence, the legal system aims to strike a balance between the pursuit of justice and the protection of individual rights, which is a cornerstone of democratic societies. There is a need for procedural safeguards to establish in detail the admissibility of AI evidence in criminal courts, and what kind of oversight should we have if we strive to ensure the system with no mistakes. Existing statutes and laws regarding evidence admissibility do not specifically address AI-generated evidence and leave the gaps that need to be filled as soon as possible. This paper focuses mainly on the admissibility of AI evidence in European Union legal area and draws a comparison with the legal solutions in the United States of America. It is important to mention that the U.S. leads in terms of application of AI in the criminal justice system. Although there are many differences between these two mutually opposite legal systems, it could be said that neither is up to this challenge so far. For example, legal protections in Germany (such as access to case files and witness confrontation) and the U.S. (like challenging witnesses and the hearsay rule) are inadequate for ensuring accurate fact-finding when machine-generated evidence is presented as neither system effectively allows for the thorough evaluation or contextualization of such evidence in court.[19]

[19] Gless, S., *AI in the Courtroom: A Comparative Analysis of Machine Evidence in Criminal Trials,* Georgetown Journal of International Law, Volume 51, No. 2, 2020, p. 232

4.1. Evidentiary standards in criminal law

One of the best-known standards in criminal law is the "beyond a reasonable doubt" threshold, which the prosecution must meet to secure a conviction. We could think of it as a level of certainty that the prosecution must achieve to convict someone of a crime. The "beyond a reasonable doubt" standard represents the highest level of proof required from a party during a trial, primarily utilized in criminal cases. It mandates that the prosecution must demonstrate that the only reasonable conclusion from the evidence is that the defendant committed the crime in question, leaving no room for any alternative reasonable explanations based on the facts presented. This standard reflects the serious consequences of a criminal conviction, emphasizing that it is better for a guilty person to go free than for an innocent person to be wrongly convicted. In contrast, the defense bears a lower burden, typically only needing to raise reasonable doubt about the prosecution's case. In certain criminal cases, specific standards like *probable cause* and *reasonable doubt* can apply. The probable cause standard refers to credible information that suggests there is a significant likelihood a person has committed a crime or that a search may uncover illegal items or evidence.[20] It is used to decide when a police officer can perform a search, make an arrest, or obtain a warrant, and it relies on examining "the totality of the circumstances" in each case. On the other hand, reasonable suspicion is a less strict standard that applies during traffic stops and stop-and-frisk situations. While it is more relaxed than probable cause, an officer must still have more than just a vague feeling to justify stopping someone. On the other hand, "reasonable suspicion" is a firm belief, although it may stem from less reliable or limited information, that a person is engaged in criminal activity or could be armed and pose a threat. The key element is the level of probability required for the law enforcement to justify taking specific actions. However, to conclude criminal proceedings, it is essential that there is no longer any doubt regarding both the perpetrator and the crucial elements of the case.

4.2. Admissibility of AI evidence in the U.S.

In the United States, the Federal Rules of Evidence[21] dictate the standards for what evidence can be presented in federal courts. A key principle is that evidence must

[20] See Probable Cause and Reasonable Suspicion, https://www.policemag.com/patrol/article/15348208/probable-cause-and-reasonable-suspicion, 15 March, 2025

[21] The Federal Rules of Evidence govern the admission or exclusion of evidence in most proceedings in the United States courts. These rules were first adopted in 1975 and codify the evidence law that applies in U.S. federal courts. They cover various aspects of evidence, including relevance, privileges, witnesses, expert testimony, and hearsay. See

be relevant, meaning it must make a fact more or less likely than it would be without it (Rule 401).[22] However, relevance alone does not guarantee admissibility; courts also consider whether the evidence's probative value outweighs its potential prejudicial impact (Rule 403).[23] This balance helps ensure that juries are not swayed by emotionally charged evidence that may not pertain directly to the case. Another important aspect is hearsay, defined under Rule 801[24] as an out-of-court statement used to prove the truth of the matter asserted, which is generally inadmissible due to reliance on the original speaker's credibility. However, there are exceptions, such as business records and statements made under the fear of imminent death, where certain hearsay can be accepted. Additionally, evidence obtained through illegal means, such as violations of the Fourth Amendment rights against unreasonable search and seizure, is usually excluded to maintain a fair judicial process. Expert testimony is addressed in Rule 702,[25] allowing specialists to give opinions based on their expertise, provided the testimony is relevant and reliable.

4.2.1. Landmark U.S. cases and standards

The landmark case, Daubert v. Merrell Dow Pharmaceuticals, Inc.,[26] established criteria for judges to determine the admissibility of such testimony, ensuring that only scientifically valid information is presented. It allows judges to act as "gatekeepers" in determining the relevance and reliability of expert testimony. Factors considered include peer review, known error rates, and sound methodology. Judges often get swayed by credentials of these experts and do not question reliability. However, it is unknown what the error rate of these experts is.

The Frye standard, established in Frye v. United States,[27] is used to evaluate the admissibility of expert scientific testimony and other evidence. It aims to limit admissible evidence to that which is deemed reliable by the broader field, ensuring that new methods receive general recognition before being utilized in court.[28] When this standard applies to physical evidence, courts must ascertain if the

https://www.uscourts.gov/forms-rules/current-rules-practice-procedure/federal-rules-evidence

[22] See https://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a/node230/article4&edition=prelim, 21 March, 2025.

[23] *Ibid.*

[24] See https://www.rulesofevidence.org/fre/article-viii/rule-801/, 21 March, 2025.

[25] See https://www.law.cornell.edu/rules/fre/rule_702, 21 March, 2025.

[26] See https://supreme.justia.com/cases/federal/us/509/579/, 21 March, 2025.

[27] See https://casetext.com/case/frye-v-united-states-7, 21 March, 2025.

[28] See Frye Standard, https://www.law.cornell.edu/wex/frye_standard, 21 March, 2025.

method of obtaining that evidence is broadly accepted by experts in the specific domain.[29] Similarly, for expert testimony, it requires a court to ensure the methodologies used by the expert align with the accepted practices of peers in that field.[30] While useful, this standard has been criticized for being too rigid and excluding emerging techniques. Despite that, is still used in some states, but many have shifted to the Daubert Standard that considers factors like testing and peer review.[31]

The Washington State Superior Court ruled against admitting AI-enhanced video evidence in the State of Washington v. Puloka case.[32] The court first acknowledged that the usage of AI tools for video enhancement in a criminal trial was a novel technique, placing the onus on the defendant to demonstrate that the method was accepted within the relevant community. It was determined that the relevant scientific community was the "forensic video analysis community." The forensic video analysis community did not recognize it as a dependable source of evidence despite the pleas of the defense team to introduce an AI-enhanced version of a smartphone recording, claiming the original footage had low resolution, significant motion blur, and unclear images.[33] When considering whether to accept the video as evidence, the court heard evidence that the AI tool modified and added content to the original video, and while the enhancements improved its appeal to viewers, the integrity of the images was compromised. According to the judgement, the AI modifications altered the original video significantly, leading to the court requiring compliance with the Frye test, which the defense could not satisfy.

Specifically, the court stated that the Topaz Video AI enhancement tools, which implement machine-learning algorithms, have not undergone peer review by the forensic video analysis community, cannot be replicated by that community, and are not generally accepted among its members. Furthermore, the court pointed out that the defense had not presented any state or federal appellate rulings that had analyzed or sanctioned AI-enhanced videos in either criminal or civil trials. Additionally, the court observed that the defense did not provide any articles, publications, or secondary legal sources endorsing the introduction of AI-enhanced video evidence in such trials. It also highlighted that the defendant's expert admitted to not knowing the videos upon which the AI model was trained,

[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] See AI on trial: How courts are litigating the GenAI boom, https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvokxekavd/04192024ai_wash.pdf, 21 March, 2025.
[33] *Ibid.*

was uncertain if generative AI was used in their algorithms and agreed that such algorithms were "opaque and proprietary." The court also concluded that AI-enhanced video did not meet the criteria outlined in Washington Rule of Evidence (ER) 702,[34] which states that evidence may only be permissible if it is reliable and assists the jury, as well as ER 403,[35] which specifies that evidence is inadmissible if its probative value is significantly outweighed by the risk of unfair prejudice. The court found that the AI-enhanced video did not accurately depict what had occurred but rather employed unclear methods to showcase what the AI model believed should be displayed, indicating a substantial risk of a lengthy trial to resolve questions about the non-peer-reviewed processes used by the AI model. While we can't say that other courts will come to the same conclusion, it does show where the debate over the admissibility of AI-generated evidence in U.S. courtrooms might go.

4.3. Admissibility of AI evidence in the EU

At the level of the European Union, there is no special unified test of admissibility of evidence, but it is left to the national jurisdictions of the Member States and therefore varies from country to country which evidence is considered admissible, and which is not. Most EU countries have very soft approaches and therefore some argue that the European countries, unlike the U.S., follow the principle of freedom of evidence,[36] where the courts can decide on any piece of evidence that the parties present before them and they are the ones who have discretion in deciding on the admissibility and authenticity of individual evidence. Other experts, however, argue that Europe (EU Member States) exhibits a dual approach where some legal systems rigorously evaluate which information can be presented in court (known as "controlled systems"), while others allow judges the discretion to decide if they should ignore evidence that was obtained illegally ("free proof systems").[37]

[34] See Washington Rules of Evidence 702, https://casetext.com/rule/washington-court-rules/washington-rules-of-evidence/title-7-opinions-and-expert-testimony/rule-er-702-testimony-by-experts, 21 March, 2025.
[35] See Washington Rules of Evidence 403, https://casetext.com/rule/washington-court-rules/washington-rules-of-evidence/title-4-relevancy-and-its-limits/rule-er-403-exclusion-of-relevant-evidence-on-grounds-of-prejudice-confusion-or-waste-of-time, 21 March, 2025.
[36] Champod, C., Vuille, J., *Scientific Evidence in Europe -- Admissibility, Evaluation and Equality of Arms,* International Commentary on Evidence*,* Volume 9, No. 1, 2011, p. 32.
[37] Garamvölgyi, B., Ligeti, K., Ondrejová, A., von Galen, M., *Admissibility of Evidence in Criminal Proceedings in the EU,* EUCRIM, Focus: The Future of EU Criminal Justice – Expert Perspectives, Issue 3, 2020.

Given the fact that AI evidence is in fact electronic evidence, it is important to mention that, to address many challenges of implementing electronic evidence in criminal trials, the European Union took a significant step by implementing a new legal framework designed to handle electronic evidence in criminal cases. In June 2023, the European Parliament and the Council of the EU adopted two legal instruments – a regulation and a directive – concerning electronic evidence in criminal cases.[38] This framework, known as the EU Electronic Evidence legislative package,[39] aims to set clear guidelines for how electronic evidence such as social media interactions, online communications, and AI-processed surveillance footage should be collected, analyzed, and presented in court. Throughout the legislative process, these two acts faced widespread, frequently critical feedback from data protection authorities, civil society, and industry stakeholders. The new provisions will enable law enforcement and judicial authorities to directly request (or temporarily secure) electronic data necessary for crime investigation and prosecution from electronic service providers operating within the EU, regardless of where the data is stored. Furthermore, they will require these service providers to designate a legal representative responsible for collecting evidence and responding to requests from competent authorities. These two legal acts are part of a broader set of international initiatives aimed at enhancing the legal framework and addressing ongoing legal ambiguities that impact both law enforcement and private entities. Certainly, in the EU, the emphasis is currently more on access to electronic evidence and on creating a kind of cooperation between Member States through possibilities of sharing and retrieving evidence from one country in another and assessing evidence that originates from another country rather than setting certain unified rules for the admissibility of evidence.

4.3.1. The Marengo case

Use of AI algorithms is admissible by the current Dutch Criminal Code Procedure, but a judge is the one who decides on the reliability of evidence collected and obtained via these algorithms.[40] The Marengo trial, involving alleged leaders of

[38] See Electronic evidence in criminal matters, https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690522/EPRS_BRI(2021)690522_EN.pdf, 15 February, 2025.

[39] See The EU Electronic Evidence Legislative Package, https://www.eurojust.europa.eu/publication/eu-electronic-evidence-legislative-package, 1 March, 2025.

[40] Paraphrased parts of presentation by Professor Rick Robroek from his lecture on Algorithmic Criminal Procedure in the Netherlands held in Luxembourg on Thursday, 7 November 2024, See Algorithmic criminal procedure,

the Mocro Maffia, is a legal case against seventeen defendants accused of multiple murders and attempted murders.[41] It concluded on February 27, 2024, after six years, with three individuals receiving life sentences for their involvement in ten murders. The Supreme court addressed the defense's claim regarding a violation of fair trial rights under Article 6 ECHR, emphasizing that the defense did not have adequate opportunities to review and contest evidence obtained through Hansken[42] due to lack of access to its source data and software. Defense claimed that use of Hansken was not regulated, prohibiting counter-expertise, and claimed that it was an unlawful technical aid. Despite the defense's concerns about the reliability of data, the court highlighted that they could have requested targeted searches of the source data but failed to do so. The Court pointed out that only 10% of the Marengo dataset consisted of suspect communications, with the rest being from third parties. The court acknowledged the risk of relying on algorithmic analysis of bulk data but asserted that Hansken is used merely for viewing already obtained evidence and cannot be used in isolation without corroborating evidence.

4.3.2. European courts on admissibility of evidence

The European Court of Human Rights (ECtHR) has determined that national law governs the admissibility of criminal evidence.[43] Nevertheless, for the proceedings to be fair, all evidence should generally be presented in the presence of the accused at a public hearing, allowing for challenge in an adversarial context. The Court will pay attention to the evidence rules in a specific State or how they are implemented if they might impact the overall fairness of the proceedings and thereby infringe upon the right to a fair trial as outlined in Article 6(1) of the European Convention on Human Rights (ECHR).[44] While hearsay evidence is not inherently against Article 6(1) of the ECHR, unlawfully obtained evidence is also not automatically excluded. Instead, the impact of how the evidence was gathered

https://aiandcriminaljustice.uni.lu/wp-content/uploads/sites/260/2024/11/RICK-Algorithmic-criminal-procedure-CRIMAI-071124.pdf.

[41] See Criminal case Marengo, https://www.rechtspraak.nl/Bekende-rechtszaken/Marengo#c6d1aeec-f4b1-4619-809a-fc6a359acdc84a7cf171-58c6-4eaa-8012-5ee85c3b5c301, 1 March, 2025.

[42] Hansken is the open digital forensic platform designed to give access to and insight in digital data and traces originating from seized and demanded material. Since 2012, the Netherlands Forensic Institute (NFI) has been developing a prototype to provide Digital Forensics as a Service (DFaaS). In recent years, parts of this platform have applied at the Dutch National Police and the Dutch Fiscal Information and Investigation Service, amongst others. https://www.hansken.nl/an-introduction-to-hansken.

[43] See Hümmer v Germany judgement, App No 29881/07, ECtHR, 19 July 2012, p. 10.

[44] Art. 6. of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Conventions, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13 /2017 (hereinafter: ECHR).

is assessed to determine the overall fairness of the trial. Factors that the ECtHR considers when evaluating the fairness of a trial involving unlawfully obtained evidence include the nature of unlawfulness, whether it violates a Convention article other than Article 6, and the specifics of the violation. The burden of proving an accused person's guilt rests with the prosecution. As such, any presumptions regarding evidence must be contestable, and it should not be permissible to make deductions based on the accused's lack of cooperation unless the circumstances warranting their presence clearly demand an explanation. Additionally, acquiring material from a suspect that exists independently of their consent should not involve methods that violate Article 3 of the European Convention.[45] The ECtHR does not specify a particular standard of proof required for prosecution in criminal cases, though it recognizes that this standard is typically higher than in civil cases. Evidence obtained illegally does not automatically cause the proceedings to be deemed unfair. The Court assesses whether the rights of the defense have been upheld and evaluates the strength of the evidence, especially if its authenticity is clear. However, any use of unlawful methods to gather evidence is condemned.[46]

The Court of Justice of the European Union (CJEU) has limited case law regarding evidentiary remedies. Recently, it proposed that the exclusionary rule should apply to evidence obtained in violation of EU law under two conditions: first, when the accused cannot effectively respond to the evidence, and second, when the evidence involves topics outside the judges' expertise that could significantly influence factual conclusions.[47] However, the CJEU has not provided detailed explanations on how these criteria should be applied or the reasoning behind the necessity for mandatory exclusion of such evidence.

We must conclude that legal systems in Europe, but also around the world are still not ready to deal with the introduction of AI evidence in courtrooms.

[45] See McBride, J., The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings, European Union – Council of Europe joint project "Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in line with European standards in Georgia", https://rm.coe.int/council-of-europe-georgia-european-court-of-human-rights-case-study-ev/16807823c3, 1 March, 2025

[46] *Loc. cit.*

[47] Fair Trials Report, Unlawful evidence in Europe's courts: principles, practice and remedies, 2021, https://www.fairtrials.org/app/uploads/2021/11/DREP-report.pdf, 25 February, 2025.

5. CHALLENGES AND CONCERNS

The use of artificial intelligence (AI) in criminal courts could dramatically change the way our justice system operates. While there are many potential benefits to integrating this technology, it's essential to carefully consider the challenges it brings. One of the biggest concerns is bias. AI systems learn from historical data, which can carry forward existing inequalities. If the information used to train these algorithms reflects issues like racial or socioeconomic disparities, we run the risk of AI reinforcing these biases. For example, predictive policing tools might unfairly target specific communities, leading to ethical dilemmas about fairness and equality under the law. Transparency is another significant challenge. Many AI systems operate as "black boxes" meaning that their decision-making processes are not clear to us. This lack of understanding means that judges, juries, and lawyers may struggle to evaluate the evidence generated by AI. If we can't see how an AI reached a conclusion, defendants might not fully understand the accusations against them. Furthermore, there's the issue of data privacy and security.[48] Training AI requires huge amounts of personal data, raising concerns about consent, potential misuse, and the risk of data breaches. Finding a way to protect sensitive information while still using data effectively in AI is a tricky balancing act for the justice system. Even within the European Union, where the General Data Protection Regulation[49] and the accompanying Law Enforcement Directive[50] set stringent data protection standards related to criminal offenses and penalties, fully automated decision-making is still permitted, though infrequently.[51] Member States can allow decisions to be made solely through automated processing that negatively impacts the data subject. The only requirement is that such actions must be authorized by Union or Member State law, provided that they include adequate safeguards for the rights and freedoms of the data subject.

[48] Roksandić, S.; Protrka N.; Engelhart, M., *Trustworthy Artificial Intelligence and its use by Law Enforcement Authorities: where do we stand?,* 45th Jubilee International Convention on Information, Communication and Electronic Technology (MIPRO), Opatija, Croatia, 2022, pp. 1225-1232.

[49] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

[50] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

[51] Bampasika, E., *Artificial Intelligence as Evidence in Criminal Trial,* CEUR Workshop Proceedings, 2021, p. 133-138.

5.1. Errors and biases in AI algorithms

Since artificial intelligence is not perfect, it is not infallible, many believe that even the evidence resulting from the use of AI is not convincing enough to be legally relevant in a courtroom. With all the many benefits that the use of new technologies brings, the question arises whether we can ignore all the concerns. By now, it is very well known that the output generated by artificial intelligence largely depends on the training set of data. If this dataset is outdated, compromised, inaccurate, or contains any bias, it can be expected that this will significantly affect the final result that the AI algorithm will reach. Bias is perhaps one of the biggest reasons for skepticism about the use of AI tools since according to some tests, AI can amplify pre-existing bias. Why is that so? Precisely because of the training set that contained bias. There is a fear that an already discriminated part of the population could suffer even more if AI makes decisions because it has been shown that, for example, facial recognition AI tested in a certain geographical location for which it is calibrated, on the population for which it is trained, can achieve very good results and be quite accurate, but if the same tool is used in a completely different location and in another population for which it was simply not trained, it can make catastrophic mistakes. A 2016 ProPublica investigation[52] of the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions), risk-assessment algorithm, found it biased against black defendants, revealing that white individuals who reoffended were often misclassified as 'low risk.' In contrast, black individuals were nearly twice as likely to be labeled as higher risk without re-offending. Moreover, only 20% of those predicted to commit violent crimes actually did so. People are prone to believe machines are almost always correct. It is important to emphasize that AI algorithms are not infallible. It so happens that in considerable percentages, they also make mistakes. Some argue that errors are due to initial bad settings, while others still find answers in the imperfections of the algorithms themselves. The fact is that AI hallucinations[53] can lead to serious problems, especially when it comes to the criminal justice system where every mistake can be cardinal and change someone's fate. Therefore, it is crucial for courts to scrutinize AI-generated evidence by evaluating the training data and the algorithm's design and performance in real-world scenarios.

[52] See https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm, February 15, 2025.

[53] AI hallucination is a phenomenon wherein a large language model (LLM) often a generative AI chatbot or computer vision tool perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate. IBM's definition, see at: https://www.ibm.com/think/topics/ai-hallucinations, February 20, 2025.

Prof. Damaška believes that reliance on computer-based fact-finding could result in artificial intelligence determining critical facts and even guilt, which would strip this sensitive process of its human element.[54] However, he also argued it is unreasonable to push for absolute certainty of evidence. Considering that even DNA analysis does not guarantee absolute certainty, it raises the issue of how much evidence can be considered completely certain. Even evidence that is thoroughly scientifically verified and validated does not reach total certainty. Striving for absolute certainty, which would need to be supported by mathematical proof, is in his opinion impractical, as it could result in a standstill in criminal proceedings. This is why he argues it's nearly impossible to forego a reasonable and logical method for ascertaining facts in criminal and other judicial processes. If we take into account that no scientific and forensic method of proof is 100% accurate and safe, should the very fact that there is a possibility of error in AI evidence automatically disqualify them from criminal trials?

5.2. Transparency and understanding of AI systems

The problem with AI systems is not only their opaqueness, but also the fact they are unpredictable. Their ability to learn and adapt over time makes it almost impossible to understand how or why they reach certain conclusions even for the makers. One of the most important cases showcasing the possible challenges of AI evidence use is the Loomis case. Even when the data sources and training data are identified, along with the specific parameters, AI providers often claim that the details regarding the data and algorithms are proprietary trade secrets, which leads to a refusal to reveal such information, making it difficult to contest their scientific validity and reliability, as well as to tackle other significant questions that arise.[55]

In many forensic fields, there are no statistical models that are both explainable and capable of providing likelihood ratios (LRs). While some areas, like biometrics, use complex machine learning models that effectively generate LRs and are less biased than human experts, these models lack explainability. It is almost impossible to interpret parameters of these models and predict the outputs that may appear with slight changes in input data. This is why there is reason to doubt such models, especially in forensic contexts where their outputs can significantly impact lives.

[54] Mirjan Damaška is Sterling Professor Emeritus of Law at Yale Law School. He teaches and writes in the fields of comparative and foreign law, procedural law, evidence, international criminal law, and continental legal history. The views mentioned in the paper are from his lecture in Zagreb in 2019.
[55] Grimm, P. W.; Grossman, M. R.; Cormack, G. V., *Artificial Intelligence as Evidence*, 19 Nw. Journal of Technology & Intellectual Property, Volume 19, 2021, p. 63.

Expert witnesses often play a crucial role in criminal trials, with valuable insights that come from their specialized knowledge. Many experts have lately begun incorporating advanced techniques, such as probabilistic genotyping in DNA analysis, which generates a likelihood ratio (LR) to minimize human bias.[56] This transparency in methodology not only helps statisticians understand the relevant factors but also boosts acceptance of these approaches. It is logical to expect that the complex nature of AI systems will create a need for expert testimony to clarify how such evidence was produced. This reliance on specialized knowledge can be challenging, as such expertise might not be readily accessible to all parties involved or easily understood by judges and juries. It seems inevitable that litigation expenses will rise as it costs a lot to hire highly specialized experts, which will result in further difficulties for individuals to pursue justice. Furthermore, it will put even more pressure on the courts as they will need to be the ones to evaluate the qualifications of these experts and the reliability of their opinions.[57] Judges and legal experts might need education in digital forensics and AI detection to properly analyze intricate digital evidence. This training would help the judiciary assess the credibility of AI evidence more effectively. The question remains how prepared and capable the judges are at the moment of being able to make such an assessment at all, and how many resources and time need to be spent in order to train them for it.

5.3. The impact on defendants' rights

Of course, the harshest consequences will be borne by the defendant. In some cases, it will be due to the inability to examine the evidence, in other they will not even be aware of the fact that they are up against AI evidence, and sometimes the necessary data will not be provided to them because the court will decide that it is more important to protect trade secrets. One of the most important cases showcasing the possible challenges of AI evidence use is the Loomis case.[58] Even

[56] Durán, J. M.; Van der Vloed, D.; Ruifrok, A.; Ypma, R. J. F.; *From understanding to justifying: computational reliabilism for AI-based forensic evidence evaluation,* Forensic Science International: Synergy, Volume 9, 2024, 100554.

[57] Gentry, E., *The Challenges of Integrating AI-Generated Evidence Into the Legal System,* https://www.akerman.com/en/perspectives/the-challenges-of-integrating-ai-generated-evidence-into-the-legal-system.html#:~:text=This%20article%20delves%20into%20the%20multifaceted%20challenges%20presented,discusses%20the%20broader%20implications%20for%20the%20legal%20system. 24 February, 2025.

[58] Mr. Loomis contested the Circuit Court's use of COMPAS algorithm in his sentencing, claiming it violated his due process rights by preventing him from verifying the accuracy of the risk scores, as the proprietary nature of COMPAS kept him from understanding how these scores were calculated. He argued that without disclosure of the weighting of factors, he couldn't adequately challenge the findings that influenced his sentence. While the

when the data sources and training data are identified, along with the specific parameters, AI providers often claim that the details regarding the data and algorithms are proprietary trade secrets, which leads to a refusal to reveal such information, making it difficult to contest their scientific validity and reliability, as well as to tackle other significant questions that arise.[59] Obviously it affects the rights of defense. There is no doubt that the presumption of innocence, the principle of equality of arms, the right to a fair trial and many other guaranteed rights are at stake. Data-driven surveillance undermines the presumption of innocence by implying a prediction of criminal intent, effectively leading to a 'presumption of guilt.'[60] Scholars suggest creating a 'presumption of innocence by design' and incorporating 'explanation systems' in AI to ensure that any incriminating evidence has clear logic and can be examined.[61] In law enforcement, the default configurations of these technologies should avoid reversing the presumption of innocence, particularly when data-mining highlights suspicious behaviors.[62] Equality of arms exists to give both the prosecution and the defense equal opportunities to present their cases. It is essential for preserving the dignity of the accused as it gives them the right to actively participate in proceedings that can greatly impact their life. The application of defense rights to evidence obtained from devices remains uncertain. In today's digital world, the traditional right for defendants to review the prosecution's evidence may not suffice when evidence comes from automated devices. Defendants need access not only to the data these devices produce but also to understand how the devices arrive at their conclusions. This raises the question of whether the right to a fair trial includes access to the decision-making processes of such devices in a way that can be verified.

6. CONCLUSION

The use of artificial intelligence (AI) evidence supposedly has the potential to enhance the efficiency of legal proceedings. However, we are often warned it comes with a great price - it also raises critical ethical and practical concerns. AI is much better and faster than humans in analyzing huge amounts of data and thus makes fact-finding much easier. But it relies heavily on the quality of data which

Wisconsin Supreme Court acknowledged that Loomis couldn't challenge the algorithm itself, it stated he could dispute the risk scores based on his criminal history and provided information. The Court noted that COMPAS primarily relies on static data, which Loomis could verify, allowing him to argue for potential inaccuracies in his risk assessment.

[59] Grimm, P.W., Grossman, M.R. and Cormack, G.V., *op. cit.,* p. 63.

[60] Hildebrandt, M., *Criminal Law and Technology in a Data-Driven Society*, The Oxford Handbook of Criminal Law (2014; online edition, Oxford Academic, 2015), accessed March 2025.

[61] *Ibid.*

[62] *Ibid.*

makes it especially prone to bias. If historical data reflects some societal prejudices, those may be uncovered in the results reached by AI systems as well. Of course, this means the fairness of such processes is questionable and marginalized communities are at even higher risk of being discriminated against. One of the biggest problems is lack of transparency and human control, especially in criminal cases where people's fate relies fully on the fairness and accuracy of the criminal proceedings. Should a human investigator control AI output? Should AI evidence even be considered evidence or just be considered as leads in criminal investigation? Can prosecutors choose when to include AI evidence as evidence in criminal proceedings? Can we talk about fair trial if all the participants of a criminal proceeding are not aware AI evidence is part of evidence? Is the reluctance of courts to give defense access to information needed for an independent validation of AI evidence because of trade secrets justifiable? Truth be told, defense lawyers are right to be concerned about the tilt of balance on the side of law enforcement and the fact AI tools are being used extensively in criminal cases. Many AI algorithms operate as "black boxes," which means we have no understanding of the process that led to the decision and have no means to judge if it was reached fairly and correctly. The problem with AI is that even if the defense was given complete access and source code, because of the nature of AI systems that infer on the given data and autonomously reach the decisions, they would still be unable to explain how or why the decision was reached and if the system is reliable. Basically, we have no idea if these algorithms work at all. It inevitably causes struggles to lawyers and judges. Additionally, there are many ethical implications that cannot be overlooked. AI technologies such as facial recognition (while being error-prone) have potential to infringe on our privacy rights. Some would argue that mere collection of personal data is problematic. There is a fine line the Courts must draw between legality and necessity of such breaches and people's rights to privacy and due process. Yes, there are privacy and data protection tools already in place, but are they enough, or do we need more specific tools in criminal law proceedings? If we decide the benefits are so undeniable that AI evidence must be allowed, we must make sure it meets the established legal standards for evidence admissibility. That is the only way we can preserve the integrity of the criminal justice system. The problem is, there is no such standardized test in the European Union.

REFERENCES

BOOKS AND ARTICLES

1. Bampasika, E., Artificial Intelligence as Evidence in Criminal Trial, CEUR Workshop Proceedings, 2021, p. 133-138.
2. Champod, C., Vuille, J., Scientific Evidence in Europe -- Admissibility, Evaluation and Equality of Arms, International Commentary on Evidence, Volume 9, No. 1, 2011.
3. Galic, M., Das A., Schuilenburg M., AI systems and evidence law in the Netherlands, Artificial Intelligence and Administration of Criminal Justice, Apeldoorn: Maklu, 2023, p. 315-332, ISBN 978-90-466-1224-8.
4. Garamvölgyi, B., Ligeti, K., Ondrejová, A., von Galen, M., Admissibility of Evidence in Criminal Proceedings in the EU, EUCRIM, Focus: The Future of EU Criminal Justice – Expert Perspectives, Issue 3, 2020.
5. Gless, S., AI in the Courtroom: A Comparative Analysis of Machine Evidence in Criminal Trials, Georgetown Journal of International Law, Volume 51, No. 2, 2020, p. 195-253.
6. Grimm, P. W.; Grossman, M. R.; Cormack, G.V., Artificial Intelligence as Evidence, 19 Nw. Journal of Technology & Intellectual Property, Volume 19, 2021.
7. Hildebrandt, M., Criminal Law and Technology in a Data-Driven Society, The Oxford Handbook of Criminal Law (2014; online edition, Oxford Academic, 2015).
8. Pfefferkorn, R., 'Deepfakes' in the Courtroom, Boston University Public Interest Law Journal, Vol. 29, No. 2, 2020, p. 245-276.
9. Roksandić, S.; Protrka N.; Engelhart, M., Trustworthy Artificial Intelligence and its use by Law Enforcement Authorities: where do we stand?, 45th Jubilee International Convention on Information, Communication and Electronic Technology (MIPRO), Opatija, Croatia, 2022, pp. 1225-1232.
10. Seng, D., Mason, S., Artificial Intelligence and Evidence, Singapore Academy of Law Special Issue on Law and Technology, 2021, p. 241-279.

LEGAL ACTS

1. Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Conventions, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13 /2017.
2. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing

of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.
3. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.
4. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

COURT DECISION

1. Frye v. United States, https://casetext.com/case/frye-v-united-states-7.
2. Hümmer v Germany judgement, App No 29881/07, ECtHR, 19 July 2012

NETWORK RESOURCES

1. AI hallucination definition, https://www.ibm.com/think/topics/ai-hallucinations.
2. AI on trial: How courts are litigating the GenAI boom, https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvokxekavd/04192024ai_wash.pdf.
3. Algorithmic criminal procedure, https://aiandcriminaljustice.uni.lu/wp-content/uploads/sites/260/2024/11/RICK-Algorithmic-criminal-procedure-CRIMAI-071124.pdf.
4. Criminal case Marengo, https://www.rechtspraak.nl/Bekende-rechtszaken/Marengo#c6d1aeec-f4b1-4619-809a-fc6a359acdc84a7cf171-58c6-4eaa-8012-5ee85c3b5c301.
5. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), https://supreme.justia.com/cases/federal/us/509/579/.
6. Durán, J. M.; Van der Vloed, D.; Ruifrok, A.; Ypma, R. J. F., From understanding to justifying: computational reliabilism for AI-based forensic evidence evaluation, Forensic Science International: Synergy, Volume 9, 2024, 100554.

7. Electronic evidence in criminal matters, https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690522/EPRS_BRI(2021)690522_EN.pdf.
8. Fair Trials Report, Unlawful evidence in Europe's courts: principles, practice and remedies, 2021, https://www.fairtrials.org/app/uploads/2021/11/DREP-report.pdf.
9. Federal Rules of Evidence, https://www.uscourts.gov/forms-rules/current-rules-practice-procedure/federal-rules-evidence.
10. Federal Rules of evidence Article 4 https://uscode.house.gov/view.xhtml?path=/prelim@title28/title28a/node230/article4&edition=prelim.
11. Federal Rules of Evidence Rule 702, See https://www.law.cornell.edu/rules/fre/rule_702.
12. Federal Rules of Evidence Rule 801, https://www.rulesofevidence.org/fre/article-viii/rule-801/.
13. Frye Standard, https://www.law.cornell.edu/wex/frye_standard.
14. https://artificialintelligenceact.eu/article/50/.
15. Gentry, E., *The Challenges of Integrating AI-Generated Evidence Into the Legal System,* https://www.akerman.com/en/perspectives/the-challenges-of-integrating-ai-generated-evidence-into-the-legal-system.html#:~:text=This%20article%20delves%20into%20the%20multifaceted%20challenges%20presented,discusses%20the%20broader%20implications%20for%20the%20legal%20system. 24 February, 2025.
16. How We Analyzed the COMPAS Recidivism Algorithm, https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.
17. Introduction to Hansken, https://www.hansken.nl/an-introduction-to-hansken.
18. McBride, J., *The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings*, European Union – Council of Europe joint project "Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in line with European standards in Georgia", https://rm.coe.int/council-of-europe-georgia-european-court-of-human-rights-case-study-ev/16807823c3, 1 March, 2025.
19. Probable Cause and Reasonable Suspicion, https://www.policemag.com/patrol/article/15348208/probable-cause-and-reasonable-suspicion.
20. The Case Law of the European Court of Human Rights on Evidentiary Standards in Criminal Proceedings, European Union – Council of Europe joint project "Application of the European Convention on Human Rights and harmonisation of national legislation and judicial practice in line with

European standards in Georgia", https://rm.coe.int/council-of-europe-georgia-european-court-of-human-rights-case-study-ev/16807823c3.

21. The Challenges of Integrating AI-Generated Evidence Into the Legal System, https://www.akerman.com/en/perspectives/the-challenges-of-integrating-ai-generated-evidence-into-the-legal-system.html#:~:text=This%20article%20delves%20into%20the%20multifaceted%20challenges%20presented,discusses%20the%20broader%20implications%20for%20the%20legal%20system.
22. The Deepfake Crisis: How AI is Reshaping Criminal Justice, https://www.crimetraveller.org/2025/02/the-deepfake-crisis-ai-criminal-justice/.
23. The Digital witness: how AI evidence is reshaping criminal justice, https://www.uni.lu/en/news/the-digital-witness-how-ai-evidence-is-reshaping-criminal-justice/.
24. The EU Electronic Evidence Legislative Package, https://www.eurojust.europa.eu/publication/eu-electronic-evidence-legislative-package.
25. The Role of Evidence in Proving Criminal Offenses: The Complete Guide, https://focusconlaw.com/the-role-of-evidence-in-proving-criminal-offenses-the-complete-guide/.
26. Washington Rules of Evidence 403, https://casetext.com/rule/washington-court-rules/washington-rules-of-evidence/title-4-relevancy-and-its-limits/rule-er-403-exclusion-of-relevant-evidence-on-grounds-of-prejudice-confusion-or-waste-of-time.
27. Washington Rules of Evidence 702, https://casetext.com/rule/washington-court-rules/washington-rules-of-evidence/title-7-opinions-and-expert-testimony/rule-er-702-testimony-by-experts.

UDK: 343.98 : 681.625.9
347.94 : 681.625.9
Review paper

Orsolya Horváth, Postdoctoral researcher
Faculty of Law, University of Pécs, Hungary
E-mail: horvath.orsolya@pte.hu
ORCID ID: 0000-0003-2570-2618

PRESERVING AND RECONSTRUCTING EVIDENCE WITH 3D PRINTING TECHNOLOGY: OPPORTUNITIES AND CHALLENGES

ABSTRACT

The application of 3D printing technology in forensic science has revolutionized evidence preservation and reconstruction. By creating accurate replicas of physical evidence, such as weapons, bones, or damaged objects, 3D printings safeguard the original items while enabling detailed visualization for courtroom presentations. This paper explores the key benefits of 3D printing in preserving evidence integrity, enhancing the understanding of complex cases, and supporting forensic education. It also addresses significant challenges, including the accuracy of 3D-printed models, legal admissibility, and ethical concerns related to evidence manipulation. The study concludes by emphasizing the need for standardized protocols and interdisciplinary collaboration to ensure the effective and reliable use of 3D printing in forensic investigations, ultimately contributing to more transparent and fair judicial processes.

Keywords: *3D printing technology, forensic sciences, evidence, courtroom*

1. INTRODUCTION

Thanks in part to technological advances over the past decade, three dimensional (furthermore 3D) printing technologies have revolutionised industries such as healthcare, engineering and design. Its impact on forensic science is particularly notable, offering innovative methods that can contribute to evidence preservation, crime scene reconstruction and forensic demonstration. 3D printing is a form of additive manufacturing, which expresses the kind of construction where materials are placed on a building platform from scratch, as opposed to extractive, traditional manufacturing. There are three main technologies within additive manufacturing, which are stereolitography (furthermore SLA), selective laser sintering (furthermore SLS) and digital light processing (furthermore DLP). In SLS, we can

talk about selective binding technology, where we use powder (which can be metal or for example gypsum) as a binder or heat (in our case, a laser) to create a 3D printed object. Once printing starts, the first layer is fused onto a platform and layer after layer of thin powder layers are fused onto it until the model reaches its final state. The selective solidification technology involves the production of a solid model from a liquid, which requires selective energy to form. As with SLS, the first layer is placed on a solid platform, which is then moved around in the liquid to form the other layers. SLA, also known as stereolithography, is an example of the use of selective solidification technology, as it uses UV light to solidify the resin as a liquid using a laser or DLP.

Selective deposition, also known as layering, does not require a building platform, as mentioned above. Printing typically involves melting a filament and creating a new object from the molten plastic.[1]

The selection of a particular technology for application depends on the characteristics of the object to be printed, its intended use, the available budget, and other factors. According to ISO/ASTM 52900, 3D printing has been classified into seven categories, and there are printers that are approved for medical purposes and applications. Due to the precision of modeling, 3D printing can be utilized in anatomical fields, as the printed models exhibit a deviation of less than 1 mm or 3% from the actual objects.[2]

Nowadays, we are capable of printing concrete structures, and even producing human organs, pharmaceuticals, and food products. Since the appearance of the first commercially available printers in 1989, it can be stated that technological advancement and the widespread use of printers among a broader range of users have continuously posed challenges for representatives of scientific fields, the market, and law enforcement authorities.[3]

Accurate replicas created from digital models are suitable for duplicating fragile or perishable evidence and can thus be used, for example, to print replicas of skeletal remains. The initial forensic applications of 3D printing can be traced back

[1] Horvath, J., A Brief History of 3D Printing, in: Mastering 3D Printing, Apress, Berkeley, CA, 2014, pp. 3–10. DOI: https://doi.org/10.1007/978-1-4842-0025-4_1.
[2] Carew, R.M.; Errickson, D., *An Overview of 3D Printing in Forensic Science: The Tangible Third-Dimension*, Journal of Forensic Sciences, 65, 2020, pp. 1752–1760.
[3] Horváth, O.; Maróti, P., *3D nyomtatott fegyverek: Vélt vagy valós veszélyek?*, in: Gaál, G.; Hautzinger, Z. (eds.), A XXI. század biztonsági kihívásai, Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport, 2018, pp. 73–78.

to reconstruction procedures aimed at anthropological and pathological identification and trauma analysis.[4]

The emerging forensic fields incorporate the expertise of various scientific disciplines in order to effectively address legal questions. Accordingly, 3D forensic science (3DFS) integrates the methods of forensic radiography, medicine, anthropology, and photography in support of investigations, building upon the knowledge of digital forensic science. Among the objectives of 3DFS is the creation of visual aids that assist both the court and the jury in interpreting the evidence. Injury mechanisms, as well as crime scene photography using 3D printing or imaging techniques, are all considered part of the field of 3D forensic science.[5]

Pham and colleagues[6] also noted in their 2021 article that post-mortem computed tomography (PMCT) can be applied, among other uses, for age estimation through the accurate 3D visualization of dentition, as well as for overcoming limitations such as rigor mortis and other visualization challenges encountered during autopsy. In addition to dental analysis, the inclusion of the mandible in 3D modeling contributes to the process of personal identification, enabling more accurate estimations of sex and age. However, it is important to highlight that dimensional discrepancies can be observed between the original dentition and mandible and their 3D replicas, which must be considered limitations, even if such differences are minimal.

In addition to dentition, the skull, face, and other body parts can also be printed following scanning, thereby enabling personal identification as well. In connection with dental analysis, bite mark examination can also be mentioned, involving the comparison of bite marks found at crime scenes with the dentition of suspects. With the help of 3D printing, tool marks can also be matched to injury marks. The identification of footwear impressions is likewise supported by scanning, which provides additional information (such as depth dimension), and the impressions can be printed and preserved. From individual digital models, scaled-up replicas

[4] Simon, G.; Tóth, D.; Heckmann, V. et al., *Application of 3D printing in assessment and demonstration of stab injuries*, International Journal of Legal Medicine, 136 (2022), pp. 1431–1442. DOI: https://doi.org/10.1007/s00414-022-02846-6.
[5] Baier, W.; Warnett, J.M.; Payne, M.; Williams, M.A., *Introducing 3D printed models as demonstrative evidence at criminal trials*, Journal of Forensic Sciences, 63(4), 2017, pp. 1230–1237. DOI: https://doi.org/10.1111/1556-4029.13700.
[6] Pham, C.V.; Lee, S.-J.; Kim, S.-Y.; Lee, S.; Kim, S.-H.; Kim, H.-S., *Age estimation based on 3D post-mortem computed tomography images of mandible and femur using convolutional neural networks*, PLOS ONE, 16(5), 2021, e0251388. DOI: https://doi.org/10.1371/journal.pone.0251388.

can also be produced if they serve the purpose of enhancing understanding and visualization.[7]

Laser scanning supports the reconstruction of crime scenes by enabling the creation of scaled-down models of specific locations, which can be presented in court. This technique allows not only for the depiction of accident scenes but also for the visualization of multiple scenarios or versions of criminal events, thereby facilitating the uncovering of past occurrences.[8]

As previously mentioned, 3D printing and imaging technologies can also be applied in the field of forensic ballistics. On the one hand, the reconstruction of bullet trajectories can be performed both at the crime scene and within the human body using laser scanning or post-mortem computed tomography (PMCT). In addition to virtual trajectory reconstructions, the analysis of bloodstain patterns is also supported by these innovative technologies, thereby opening new dimensions in uncovering past events.[9]

The diversity of the aforementioned forensic fields also highlights one of the primary reasons for applying 3D printing: the preservation of evidence. Evidence may be fragile, perishable, or only partially accessible. Environmental factors, the natural decomposition of the human body, and potential damage during transport or storage all raise questions and influence the possibilities of using such materials as admissible evidence. Traditional methods, such as photographs (2D) or sketches, are incapable of capturing the full spectrum of the scene or recording three-dimensional information. This limitation in representation affects not only the crime scene itself but also the subsequent stages of the justice process, including the courtroom, where understanding spatial relationships and complex details is equally crucial. By applying 3D models, the interpretative framework of jurors, judges, prosecutors, legal professionals, and laypersons is expanded, enabling more comprehensible legal reasoning and more accurate interpretation.[10] According to an investigative analysis published in The Guardian, between September 2021 and September 2022 in England and Wales, 7,316 cases were reported in which proceedings did not reach the trial stage due to lost or destroyed evidence. These cases included 16 homicides and over a hundred sexual offenses.

[7] Vanisree, C.R.; Nagesh, D.; Gowtham Sai, P., *Advances in Forensic Science: Integration of 3D Imaging and 3D Printing*, Journal of Emerging Technologies and Innovative Research, 10(12), 2023, pp. 395–404.
[8] Sheshtar, F.M.; Alhatlani, W.M.; Moulden, M.; Kim, J.H., *Comparative analysis of LiDAR and photogrammetry for 3D crime scene reconstruction*, Applied Sciences, 15(3), 2025, p. 1085. DOI: https://doi.org/10.3390/app15031085.
[9] Carew, R.M.; Errickson, D., *op. cit*. note 2, p. 1754-56.
[10] Baier et al., *op. cit*. note 5, p. 1230–1237.

As experts cited in the report emphasize, the most critical issue regarding these cases is not merely the inability to solve a cold case or to appeal a previous decision, but rather the loss of the legal procedure itself. The 2023 Casey Report also documented that evidence storage conditions were inadequate, referencing broken and outdated refrigerators, and even an incident where a heatwave caused one of the refrigerators to fail, leading to the destruction of the evidence and the collapse of the associated cases.[11]

A previous article examined the period between October 2018 and August 2021, during which legal proceedings were discontinued in a total of 20,838 cases due to lost or destroyed evidence.[12] A simple calculation shows that the number of cases recorded between 2022 and 2023 exceeds the average of the preceding three years.

At the same time, the importance of evidence preservation can also be approached from the perspective of the defense, for example, when such evidence forms the basis of a motion to suspend proceedings. Based on the above, the aim of this study is to explore the potential applications of 3D printing technologies in the preservation, reconstruction, and presentation of evidence. The study seeks answers to the following questions:

- To what extent is 3D printing technology capable of accurately reproducing evidence for future legal use?
- Are 3D replicas capable of improving the understanding and reliability of evidence for participants in criminal proceedings?
- Are there any potential disadvantages or limitations to the application of 3D printing technologies in forensic sciences?

Based on these questions, the following hypotheses can be formulated:
H1: 3D printing enhances the preservation of evidence, as it produces accurate and durable physical copies of fragile or perishable items, which are also easy to transport.

[11] Devlin, H., *Missing evidence led to 16 homicides in England and Wales not going to trial*, The Guardian, 3 September 2023, https://www.theguardian.com/uk-news/2023/sep/03/lost-missing-evidence-cases-freedom-of-information-police (downloaded: 28 February 2025).
[12] Morton's Solicitors, *Police often lose vital evidence – new research reveals*, 15 October 2023, https://www.mortons-solicitors.co.uk/police-often-lose-vital-evidence-new-research-reveals/ (downloaded: 28 February 2025) and Martinsp, S., *Lost and Destroyed Evidence: The Search for a Principled Approach to Abuse of Process*, The International Journal of Evidence & Proof, 9(3), 2005, pp. 158–182. DOI: https://doi.org/10.1350/ijep.2005.9.3.158.

H2: The use of 3D replicas in the courtroom improves the comprehension of evidence by actors in criminal proceedings.
H3: Despite its advantages, the application of 3D printing technologies presents challenges related to ethical concerns and accessibility.
To address these questions and test the hypotheses, a literature-based analysis was conducted.

The relevance of this research lies in the fact that the application of 3D printing technologies and models enables the re-examination of critical evidence, ensuring its long-term availability and allowing for its analysis in protracted cases or during appeals. Beyond supporting investigations, such informative evidence provides additional interpretative dimensions for participants in the justice system. In the future, AI-based models may be capable of automatically detecting correlations between individual pieces of evidence, thereby contributing to faster and more accurate investigations, fairer procedures, more reliable justice, and ultimately, better outcomes. With the on-site use of handheld scanners, evidence can be rapidly and reliably replicated in a digitally storable and analyzable format, from which physical replicas may later be produced. The development of a global standard for the admissibility of 3D-printed evidence is also expected in the near future.

2. FORENSIC APPLICATIONS OF 3D PRINTING

2.1. Printing of evidence

The application of 3D technologies in the forensic field extends to the duplication of physical evidence and the creation of replicas. These unrestricted reproductions, accessible to experts,[13] support the execution of identification procedures and the understanding of evidence and past events through demonstrations. Replicas do not merely represent the reproduction of simple objects but may also include the printing of weapons left at a crime scene,[14] which can then be examined freely without compromising the integrity of the original evidence. In addition to weapons, damaged or fragmented objects can also be printed after scanning, thanks to additive manufacturing technology.

One of the first scientifically documented cases involving the use of 3D printed models as evidence in criminal proceedings is linked to a homicide trial in the United Kingdom, the details of which were published by Baier and colleagues in

[13] Carew, R. M.; Errickson, D., *op. cit.* note 2, p. 1754-56.
[14] Horváth, O.; Maróti, P., *op. cit*. note 3, p. 75.

2017. In the case, two men were accused of beating a victim who later died in the hospital due to cranial injuries. A claw hammer and a wrench were found during the search of the crime scene. As the two defendants blamed each other, the central questions were who actually committed the act - if not both of them - and which weapon had been used.

During the proceedings, images were captured of a portion of the skull using micro-CT to visualize the sustained injuries and analyze the fracture patterns. The micro-CT data were processed to produce a full-scale 3D print using the SLA method. The investigation revealed two distinct fracture patterns: one was elongated and narrow, while the other had a square shape with rounded corners. Based on this, it was concluded that either two different weapons had been used or that the injuries occurred at different times, thereby resulting in collision surfaces with differing geometries.

The case is particularly significant as it was the first to examine the admissibility of 3D replicas in court. Criminal Procedure Rule (CrimPR) 19 sets the admissibility criteria for expert evidence, and in this case, the Harston Rules - governing demonstrative evidence - also had to be considered.[15]

A previous study[16] had established that 3D replicas can adequately represent anatomical features, even if they are not perfectly accurate. However, the technology continues to evolve. In this case, careful consideration was given to the material used to create the replica to ensure it would be deemed admissible by the judge. The model was created to resemble the original skull as closely as possible. To minimize the possibility of eliciting emotional responses, only the relevant portion of the skull was printed. During the trial, the forensic pathologist was able to present their expert opinion to the jury using the printed replica.

Although several studies have addressed jurors' competencies regarding medical or scientific evidence, the paper emphasizes that visual and tactile evidence significantly enhances comprehension and that active engagement improves memory retention. In the case presented, the defendants were found guilty. The role of the 3D prints clearly lay in enhancing the understanding of the evidence.[17] In a case predating the first scientifically documented example, a man was sentenced to life imprisonment for fatally stabbing former Plymouth Argyle

[15] Baier et al., *op. cit*. note 5, p. 1230-1237.
[16] Silva, D.N.; de Oliveira, M.G.; Meurer, E.; Meurer, M.I.; da Silva, J.V.L.; Santa-Bárbara, A., *Dimensional error in selective laser sintering and 3D-printing of models for craniomaxillary anatomy reconstruction*, Journal of Cranio-Maxillofacial Surgery, 36(8), 2008, pp. 443–449. DOI: https://doi.org/10.1016/j.jcms.2008.07.003.
[17] Baier et al., *op. cit*. note 5, p. 1230-1237.

footballer Alex Peguero Sosa in the neck with a broken glass bottle in 2014. In the proceedings, the weapon used in the attack was 3D printed, and the prosecution asked the defendant to demonstrate how he had assaulted the victim. The production of the replica took 28 hours, and its use allowed for the safe reconstruction of past events.[18]

2.2. Crime Scene Reconstruction

The application of 3D technologies plays a prominent role in the reconstruction of crime scenes,[19] as they are capable of providing accurate and detailed models for the reconstruction of past events and for later examinations. By revealing the spatial complexity of a scene, such technologies can eliminate - or at least mitigate - the limitations associated with 2D photographic images or sketches. Another major advantage of three-dimensional scene reconstruction is the ability to preserve critical evidence, as well as to document the condition of the scene regardless of environmental or human factors. In cases where legal proceedings extend over several years, it becomes particularly important that the recordings captured at the time of the scene inspection can be revisited virtually.[20]

When discussing crime scene reconstruction, it is important to distinguish between 3D scanning and 3D printing. The former ensures the digital documentation of the scene, enabling the verification and elimination of different scenario versions. In contrast, 3D printing - as noted in the previous section - involves the creation of physical objects derived from digital data. These replicas contribute to improved understanding and the making of more well-founded decisions.[21] The combination of the two processes can also enhance analysis, interpretation, and ultimately, judgment.

[18] BBC News, *Plymouth Argyle youth player murder trial used 3D-printed bottle*, 20 April 2015, https://www.bbc.com/news/uk-england-devon-32385554 (downloaded: 1 March 2025).
[19] Carew, R.M.; Errickson, D., *op. cit*. note 2, p. 1752-1760.
[20] Abdelaal, O.; Aldahash, S.A., *Realization of impression evidence with reverse engineering and additive manufacturing*, Applied Sciences, 14(13), 2024, p. 5444. DOI: https://doi.org/10.3390/app14135444.
[21] Villa, C.; Lynnerup, N.; Jacobsen, C., *A virtual, 3D multimodal approach to victim and crime scene reconstruction*, Diagnostics, 13(17), 2023, p. 2764. DOI: https://doi.org/10.3390/diagnostics13172764.

In scene modeling, both LiDAR (Light Detection and Ranging) laser scanning and photogrammetry technologies must be highlighted. Esposito and colleagues[22] conducted investigations at more than 200 crime scenes and concluded that the use of laser scanning (LS) technology significantly improved the ability to depict scenes in a detailed and accurate manner. Between January 2019 and June 2022, five cases from their study were specifically highlighted, each demonstrating the effectiveness of LS technology in contributing to investigations through the creation of detailed scene diagrams. Among other outcomes, these diagrams allowed investigators to clarify a case by verifying investigative scenarios, where the distinction between suicide and intentional homicide needed to be established. Naturally, 3D models in the form of animated videos can also be created for the reconstruction of individual crimes. In a well-known case reported by, among others, the BBC, such 3D modeling was used in the murder committed by South African Paralympic athlete Oscar Pistorius. Reeva Steenkamp, the model, had been dating Pistorius for three months when, on the early morning of February 14, 2013, he shot and killed her. In his testimony, Pistorius admitted to shooting his girlfriend while she was in the bathroom, claiming he believed an intruder had entered the house.

He stated that he had already been in bed without his prosthetic legs while his girlfriend was doing yoga exercises. In the early hours, he woke up, stepped onto the balcony to get some fresh air and bring in the fan. Upon returning to the dark room, he heard a noise from the bathroom, retrieved his gun from under the bed, and approached the area without his prostheses. He did not turn on the light. Shouting for the intruder to leave, he fired shots at the toilet door, then told his girlfriend to call the police - still without turning on the light. When he returned to the bed and realized she wasn't there, he went to the toilet, broke down the door, and found his girlfriend still alive over the toilet. She later died from her injuries. In the first-instance trial, he was sentenced to five years in prison - not for murder, but for culpable homicide. In 2014, the prosecution filed an appeal, arguing that the act was intentional. In 2015, the Supreme Court of Appeal found Pistorius guilty of murder and sentenced him to imprisonment. He was conditionally released in January 2024.

The resolution of the case heavily relied on verifying the different scenarios - what the accused could have seen and how, and whether, based on the shooting angles, he had indeed fired the weapon without his prosthetic legs, thus supporting his claim of vulnerability and fear. Thanks to the model, the court was able to

[22] Esposito, M.; Sessa, F.; Cocimano, G.; Zuccarello, P.; Roccuzzo, S.; Salerno, M., *Advances in Technologies in Crime Scene Investigation*, Diagnostics, 13(20), 2023, p. 3169. DOI: https://doi.org/10.3390/diagnostics13203169.

understand the scene more accurately and better interpret the events, allowing for the exclusion of certain scenarios (in this case, the defendant's claim), which ultimately affected the outcome of the case.[23]

The identified cases have demonstrated that the use of visualization techniques, including the application of 3D models, plays a prominent role in forensic investigations and criminal proceedings. However, imaging technologies are rapidly advancing, and it is therefore necessary to briefly address the use of immersive technologies in criminal procedure. The use of virtual reality (VR), particularly through photogrammetric applications, allows for the examination and analysis of crime scenes, the improvement of documentation processes, and the training of law enforcement personnel. Through VR, experts can conduct analyses that reduce the risk of contamination and expert bias, while also enabling assessments in particularly hazardous situations (e.g., the presence of dangerous chemicals). Deep learning algorithms further allow for the automatic detection of objects. In their 2024 publication, Zappalà and colleagues[24] demonstrated the effectiveness of combining photogrammetry, VR, and deep learning algorithms at a simulated crime scene, successfully identifying objects with potential evidentiary value. VR headsets can support not only experts but also offer jurors the opportunity to virtually explore crime scenes.

The use of HoloLens technology can further enhance the effectiveness of crime scene inspections, drawing attention to the potential of both augmented reality (AR) and VR. The technology helps overcome temporal and geographic constraints between investigative teams.[25]

The application of these technologies clearly indicates that the future will focus on the integration of various methods and the utilization of their combined advantages. Nonetheless, it is equally important to emphasize the need to educate both practicing professionals and students about these new technologies.

This is supported by a 2022 study conducted in India. The results showed that the use of 3D scanning and 3D printing in forensic practice is still relatively new among forensic medical experts. Among the respondents - 54 experts and 10

[23] BBC News, *Oscar Pistorius trial: Evidence*, 16 April 2014, https://www.bbc.com/news/world-africa-26417240 (downloaded: 26 February 2025).
[24] Zappalà, A.; Guarnera, L.; Rinaldi, V.; Livatino, S.; Battiato, S., *Enhancing crime scene investigations through virtual reality and deep learning techniques*, arXiv preprint, 2024. DOI: https://doi.org/10.48550/arXiv.2409.18458.
[25] Albeedan, M.; Kolivand, H.; Hammady, R., *Effect of Augmented Reality and Virtual Reality in Crime Scene Investigations*, in: Proceedings of the 16th International Conference on Developments in eSystems Engineering (DeSE), Istanbul, Türkiye, 2023, pp. 653–657. DOI: https://doi.org/10.1109/DeSE60595.2023.10469037

scientific officers - those working in central laboratories were familiar with the technology and were applying it in practice. Based on the findings, the authors highlighted the importance of education and the transfer of new knowledge.[26]

3. ADVANTAGES AND OPPORTUNITIES, CHALLANGES AND LIMITATIONS

The application of 3D printing and scanning technologies offers numerous advantages during criminal proceedings. By enabling the creation of accurate replicas of evidence, these technologies support analysis, demonstration, and the understanding of both scientific and legal contexts. Based on the studies discussed above, it can be concluded that depending on material selection and printer type, the resulting replicas may vary in precision, yet they are suitable for forensic examinations and legal use.[27] Integrating 3D printing with 3D scanning further enhances these benefits.

One key aspect that must be highlighted is the accuracy and level of detail in the models[28]. Unlike traditional methods - such as the use of plaster casting - 3D replicas can offer greater detail, thereby supporting identification and expert analysis. For detailed examination, high reconstruction accuracy is essential, which can be achieved, for example, through structured light scanning.[29] 3D printing can also be particularly useful in cases that require the reconstruction of certain pieces of evidence - for instance, reassembling skull fragments based on CT images.[30]

Replicas allow for the protection of original evidence and ensure its integrity. This is particularly significant in cases involving perishable or degradable evidence - such as bone fragments or evidence contaminated with genetic material. Printed models can be stored long-term, enabling examinations to be conducted months or even years later.

[26] Johnson, A.; Jani, G.; Pandey, A., *Application of 3D scanning and 3D printing in forensic practices: A preliminary survey among forensic practitioners in India*, Forensic Imaging, 28 (2022), p. 200498. DOI: https://doi.org/10.1016/j.fri.2021.200498.
[27] Baier et al., *op. cit*. note 5, p 1230-1237.
[28] Kluska, E.; Gruda, P.; Majca-Nowak, N., *The accuracy and the printing resolution comparison of different 3D printing technologies*, Transactions of the Institute of Aviation, 3(252), 2018, pp. 69–86. DOI: https://doi.org/10.2478/tar-2018-0023.
[29] Abdelaal, O.; Aldahash, S.A., *op. cit*. note 20, p. 5444.
[30] Jakobsen, S.R.; Pedersen, C.C.; Thomsen, A.H.; Hansen, K., *3D-print as a template for reassembly of skull fragments in a homicide case*, Annals of 3D Printed Medicine, 12 (2023), p. 100137. DOI: https://doi.org/10.1016/j.stlm.2023.100137.

Forensic radiology, through the use of rapid prototyping (RP), allows for the creation of 3D skull models using computed tomography. When using the selective laser sintering (SLS) method, these models uphold medical ethics, including respect for the dignity of the deceased, while facilitating the presentation of trauma analysis.[31] In the aforementioned English murder case, it was also emphasized that biological tissues may pose health risks and that examination or demonstrative use of the original skull could cause damage. Finally, it is important to highlight the emotional and moral impact of such procedures - not only on those involved in the trial but also on the relatives of the deceased. By using replicas, both health and evidentiary risks can be avoided, and additional copies can be produced as needed. Expert testimonies can be more easily understood when judges and other participants are able to physically handle the objects and better grasp the mechanisms of injury and their three-dimensional relationships. The previously mentioned moral and ethical concerns regarding the use of biological remains are also mitigated by the use of 3D-printed replicas.[32] By creating digital models of crime scenes, past events can be reconstructed, and alternative scenarios visualized - making causal relationships and event sequences verifiable and comprehensible. The authors also emphasized that integrating innovation is essential for investigators and prosecutors.[33] In addition to investigators and prosecutors, judges gain new interpretive perspectives through these models, and jurors should not be overlooked either.

According to the study by Bright and Goodman-Delahunty (2006)[34], while verbal evidence - such as witness testimony describing the circumstances of a murder - does not elicit strong emotional reactions from jurors, photographic depictions of such events trigger a significantly more intense emotional response, including feelings of anger. The conviction rate was notably higher among jurors when photographic evidence was presented than when it was not. The detailed physical representation of a victim's injuries - whether through original images or 3D replicas - can therefore introduce potential bias among jurors, making the defendant appear in a more unfavorable light. In each case, it is thus essential to carefully assess whether the use of replicas poses a risk, as this may result in a ruling of inadmissibility. Consequently, English lawyers may be reluctant to

[31] Kettner, M.; Schmidt, P.; Potente, S.; Ramsthaler, F.; Schrodt, M., *Reverse engineering—Rapid prototyping of the skull in forensic trauma analysis*, Journal of Forensic Sciences, 56(4), 2011, pp. 1015–1017. DOI: https://doi.org/10.1111/j.1556-4029.2011.01769.x.
[32] Baier et al., *op. cit*. note 5, p. 1230-1237.
[33] Dufeniuk, O.; Melnyk, N.; Nahorniak, Yu.; Melnyk, S., *Innovative potential of 3D technologies in crime investigation*, Social and Legal Studios, 7(4), 2024, pp. 222–230. DOI: https://doi.org/10.32518/sals4.2024.222.
[34] Bright, D.A.; Goodman-Delahunty, J., *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, Law and Human Behavior, 30(2), 2006, pp. 183–202. DOI: https://doi.org/10.1007/s10979-006-9027-y.

employ them in court proceedings.[35] When it comes to medical and scientific matters, it is particularly important that jurors understand the facts and expert opinions arising in relation to the crime. The use of replicas allows for the comprehension of complex processes, such as the analysis of bloodstain patterns.[36] Considering the financial and resource-related aspects, 3D printing enables the rapid production of prototypes and replicas of evidence without requiring highly expensive materials. While the use of specialized software does involve initial investment costs, these are offset over time -especially when the technology is employed for educational purposes.

The application of 3D printing technologies offers numerous advantages in the fields of investigation, evidence presentation, and courtroom proceedings. However, it is essential to also consider the potential challenges and limitations associated with their use. The accuracy of printed models depends not only on the equipment employed but also significantly on the quality of the input data.[37] (Formslab).

The forensic use of printed evidence remains an evolving field, meaning its legal admissibility and courtroom practices are still in development. Consequently, it is necessary to assess compliance with standards and establish procedural protocols for their application.

While we highlighted the precision of 3D models as a benefit, under limitations it is important to mention the potential distortions in microscopic details that can occur during the printing process, as shown in experiments involving various printing technologies.[38]

The regulation of printed evidence is not standardized worldwide. During the literature review, we found that documented cases primarily originate from Anglo-American legal systems. The judicial consideration of models used for demonstrative purposes is not yet universally accepted, nor are the criteria governing their admissibility clearly defined across all jurisdictions.

[35] Baier et al., *op. cit*. note 5, p. 1230-1237.
[36] Home, P.H.; Norman, D.G.; Wade, K.; Spearing, E.; Williams, M.A., *3D scanning a crime scene to enhance juror understanding of bloodstain pattern analysis evidence*, Science & Justice, 64(3), 2024, pp. 333–338. DOI: https://doi.org/10.1016/j.scijus.2024.04.007.
[37] Formlabs, *Guide to 3D printing materials: Types, applications, and properties*, n.d., https://formlabs.com/eu/blog/3d-printing-materials/ (downloaded: 27 February 2025).
[38] Loc. cit.

From a budgetary perspective, it is evident that the cost of high-precision scanners and printers used in forensic contexts can be substantial - investments that smaller institutions and educational facilities may be unable to afford. Additionally, some authors emphasize that the application of 3D printing is not always cost-effective and should be viewed more as a supplementary rather than a replacement method in forensic medical examinations.[39]

Lastly, we must not overlook the ethical and data protection concerns. 3D printers are capable of producing weapons and explosives, among other items. As with other types of evidence, the possibility of manipulation arises, which underscores the importance of securely storing and encrypting digital files.[40]

The summary of advantages, disadvantages, challenges, and opportunities clearly illustrates that numerous aspects of the application of 3D printing and related technologies are still in a developmental phase. Ongoing research, the collection of case studies, and the elaboration of legal regulations and procedural protocols all contribute to the transformation of this indispensable technology into a key tool within justice processes.

In summary, this chapter presented the main advantages, potential applications, and practical challenges associated with the implementation of 3D technology in forensic science and criminal procedure. Although it briefly touched upon certain legal concerns - such as the risk of jury bias, the lack of standardized protocols, and the potential for manipulation - these issues warrant more in-depth legal analysis. Accordingly, the following chapter will focus specifically on the legal implications of employing 3D technologies as evidence in criminal proceedings, with particular attention to their classification, admissibility, and the impact on the guarantees of a fair trial.

4. LEGAL ASPECTS OF USING 3D TECHNOLOGY AS EVIDENCE IN CRIMINAL PROCEDURE

Criminal justice systems are increasingly incorporating digital and visualization technologies, including 3D modeling and printing. These tools have gained particular prominence in the areas of crime scene reconstruction and the demonstration of bodily injuries, as they are capable of conveying information in

[39] Simon et al., *op. cit*. note 4, p. 1431-1442.
[40] Henningsen, M.J.; Thorlacius-Ussing, L.; Jensen, L.G. et al., *3D printed skulls in court – a benefit to stakeholders?*, International Journal of Legal Medicine, 137 (2023), pp. 1865–1873. DOI: https://doi.org/10.1007/s00414-023-03054-6.

a vivid and detailed manner to judges, jurors, and other procedural actors - as illustrated in the previous chapter through several examples.[41] However, 3D models are not merely technical aids; they are evidentiary tools with legal relevance, whose use raises numerous procedural and evidentiary questions.

In relation to the use of this technology, one of the key issues is how 3D tools fit into the legal system of evidence: should they be regarded as demonstrative aids or as expert evidence? Furthermore, what admissibility requirements must they meet, and what impact might they have on procedural fairness - such as impartial judicial decision-making or the exercise of the right to defense? These questions are particularly timely given the current absence of uniform, codified procedural standards for handling 3D technology-based evidence.

The use of technology raises the question of how 3D tools are to be integrated into the legal system of evidence: should they be regarded as demonstrative aids or interpreted as expert evidence? Furthermore, what criteria must they meet in terms of admissibility, and how might they affect the fairness of the proceedings - for example, the impartiality of judicial decision-making or the enforcement of the right to defense? These questions are particularly timely, given the current absence of uniform, codified procedural standards for handling evidence produced with 3D technology.

The aim of this chapter is to review the main legal aspects of the application of 3D technology in criminal proceedings, with particular focus on its interpretation as evidence, the criteria for admissibility, and its impact on the requirements of a fair trial.

Before evaluating the use of 3D-related files and tools as evidence, it is necessary to briefly address the nature of the Hungarian evidentiary system. In Hungarian criminal procedure, there is scholarly debate regarding whether the principle of free evaluation of evidence applies in an unrestricted form. According to the currently effective Criminal Procedure Act (Act XC of 2017 on Criminal Procedure; hereinafter: CPA), several sources consider the free evaluation of evidence to be the prevailing model. However, other authors - such as Flórián Tremmel in his commentary - refer to the concept of a “not entirely free evidentiary system”.[42] According to this view, although in principle all evidentiary means defined by the CPA may be used, the law may still prescribe specific methods for applying certain evidentiary instruments or conducting certain

[41] Baier et. al., *op. cit*. note 5, p. 1230-1237.
[42] Tremmel, F., *Bizonyítékok a büntetőeljárásban*, Dialóg Campus Kiadó, Budapest–Pécs, 2006.

evidentiary procedures. Section 167 (1) of the CPA states that "in criminal proceedings, any means of evidence defined by law may be freely used, and any evidentiary procedure may be freely conducted," yet the law may also mandate the use of certain evidentiary means. These include witness testimony, the accused's statement, expert opinion, probation officer's report, physical evidence (including documents and records), and electronic data (CPA Section 165).

Proof is an activity aimed at the past, with the objective of uncovering legally relevant facts.[43] Establishing these facts forms the basis for proper legal qualification, which may lead either to sentencing or the acquittal of the defendant. According to the principle of in dubio pro reo - which prevails in Hungarian law - facts that are not proven beyond reasonable doubt may not be interpreted to the detriment of the accused (the presumption of innocence). Accordingly, proof is a legally regulated activity, which may only be conducted by persons and authorities authorized by law, in compliance with procedural rules, rights, and obligations.
Taking all of the above into account, only such information may be used in the evidentiary process whose source, acquisition, recording, and processing meet the procedural requirements, fulfill the criterion of authenticity, and whose truthfulness can be properly substantiated.

Verification of the authenticity and reliability of data collected during the investigation is ultimately the essence of proof. The issue of reliability is closely linked to the question of the manipulability of digital data and evidence,[44] especially in the present context, where captured recordings (generated via photogrammetry or laser scanning) or printable files qualify as electronic data. Member States impose specific requirements on the collection and evaluation of e-evidence to ensure its admissibility in court proceedings.[45]

The current Hungarian Code of Criminal Procedure does not explicitly categorize "digital evidence" as a separate type; however, it includes electronic data and information systems within the broader category of traditional evidence. (It is worth noting that, both in Hungarian and international legal literature, the terms digital and electronic data or evidence are often used interchangeably.)

Electronic data can be accessed both in virtual space and in physical form, for example, through mobile phones or computers.[46]This study does not intend to

[43] Fantoly, Zs.; Gácsi, E.A., *Eljárási büntetőjog – Statikus rész*, Iurisperitus, Szeged, 2013, p. 202.
[44] Gyaraki, R., *A számítógépes bűnözés nyomozásának problémái*, Doktori disszertáció, Pécsi Tudományegyetem Állam- és Jogtudományi Doktori Iskola, Pécs, 2019.
[45] Loc. cit.
[46] Loc. cit.

address the issue of physical evidence in relation to 3D technologies - such as the topic of printed weapons - where the digital footprint or the file of the tool used in the commission of a crime serves as evidence during the investigation.

Accordingly, it can be stated that the classification of models created using 3D technology is not unambiguous, as they may fulfill multiple evidentiary functions. In certain cases, they serve as demonstrative evidence - that is, they visualize known data or facts for the court to enhance understanding. In other cases, however, the model may function as an independent expert result, especially when scientific methodology such as forensic reconstruction is applied during its creation.[47]

Demonstrative tools generally do not prove new facts but illustrate existing claims - for example, by depicting the crime scene, the trajectory of a gunshot, or the location of an injury. Digital demonstrative tools are computer-aided graphics capable of summarizing hours of witness testimony, simplifying complex concepts, and highlighting weaknesses in the opponent's argumentation.[48]

In addition to demonstrative evidence, it is also necessary to examine cases in which, through the "intervention" of an expert, new evidence emerges as a result of 3D technology that was previously unknown. Expert opinions - especially those provided by forensic medical experts - constitute a specific and complex form of evidence in criminal proceedings, combining both personal (expert) and physical (linked to the object of examination) characteristics. According to judicial practice, an expert opinion is admissible only if it is justified, truthful, clear, and objective.[49] The core of assessing an expert opinion lies in its probative value, which is based on the expert's competence and the credibility of the applied methods.

Expert opinions can be classified as definitive, probabilistic, or indeterminate. The type of opinion depends on the nature of the fact being proven and the quality of the available materials for analysis. The court cannot accept an expert opinion without reservation if it does not meet the statutory requirements - for instance, if it contains contradictions or lacks clarity. In such cases, the court must request clarification or supplementation from the expert, or appoint a new expert. If there

[47] Baier et al., *op. cit*. note 5, p. 1230-1237.
[48] Keller, J.L.; Scolnick, C.A., *Demonstrative Evidence: Tell and Show*, Litigation, 47(3), 2021, pp. 43–48. URL: https://www.jstor.org/stable/27191906.
[49] Barta, E.; Nagy, J., *Az igazságügyi orvosszakértőkről*, Rendőrtiszti Főiskola, Budapest, 2001.

are conflicting expert opinions, they must be heard together in court to allow for direct comparison and clarification.[50]

The theory of expert opinion admissibility has its roots in the U.S. justice system, dating back to the 1923 Frye v. United States case. The Frye test requires that expert opinions, in addition to being relevant, must also be generally accepted within the professional community. The purpose of the test was to prevent courts from being influenced by theories and methods that, despite their innovation, lacked proven credibility.[51]

Taking all of this into account, it can be concluded that professional reconstructions created using 3D technology can be considered expert opinions in criminal proceedings, provided that their objective evaluation is ensured during the process and they meet the content requirements for expert reports. For example, a 3D model created based on a forensic medical report may contain new information - such as the direction and position of penetration angles related to the victim's injuries - that can serve to confirm or rule out certain scenarios during reconstruction.

In summary, it can be stated that digitally created or printed models may fall into multiple categories of evidence depending on their context and the manner of their creation. Currently, in Hungary, there is no specific provision in the Code of Criminal Procedure regarding the use of 3D technology; therefore, the handling of such tools is subject to case-by-case consideration. (It should be noted, however, that 3D site models are typically used in high-profile crimes - mostly homicides - based on images recorded during the crime scene investigation using photogrammetry or laser scanning.) Whether we are dealing with an expert opinion or a demonstrative tool, in both cases, the model's method of production, data source, and processing must be credible and comply with the requirement of objectivity.

While Section 197 of the Code of Criminal Procedure stipulates the conditions under which an expert opinion may not be accepted - including lack of clarity - the 2016 Act XXIX on Judicial Experts, Section 47, outlines the mandatory content elements of expert reports, such as findings, a brief description of the examination method, professional determinations, and the expert's opinion. In such cases, the method of modeling may be included as part of the method description. As for the Frye test, it is evident even from the technical and

[50] Szilvássy, Z., *Az (orvos)szakértői bizonyítás a büntetőeljárásban*, Debreceni Jogi Műhely, 2023/3–4., pp. 95–113. URL: https://szakcikkadatbazis.hu/doc/6309400.
[51] Hoge, S.K.; Grisso, T., *Accuracy and expert testimony*, Bulletin of the American Academy of Psychiatry and the Law, 20(1), 1992, pp. 69–79.

descriptive parts that 3D technology and printing have been in use for decades, applied across various industries, and represent a continually evolving field. Practice within forensic domains is also characterized by ongoing development and experimentation. One of the barriers to this progress is limited resources (as expensive equipment investments are necessary) and the low level of research time allocated. Thus, it can be said that, typically, only a few experts experiment with and apply modeling and printed objects as demonstrative tools in specific cases within Hungarian criminal proceedings; however, where applied, promising results and reception can be reported.

When examining the use of 3D models on a theoretical level, it becomes evident that the principle of fair trial arises from both the Consitutional Law and the Code of Criminal Procedure, as well as Article 6 of the European Convention on Human Rights, which affirms the right to defense, access to evidence, and the requirement of procedural transparency. As noted in the previous chapter,[52] visual reconstructions may at times be overly persuasive, thereby potentially distorting evaluation and the perception of the accused. Therefore, in my opinion - and in the absence of further research findings - each case requires an assessment based on the principle of proportionality to determine which interest takes precedence: understanding the specific facts of the case or ensuring the impartial adjudication of the accused beyond a reasonable doubt.

5. CONCLUSION

The possibilities and limitations of 3D printing are equally noteworthy, particularly regarding the demonstrative use and preservation of evidence. While we highlighted as an advantage the ability to reproduce evidence, improve visualization opportunities during trial, and increase the accuracy of expert analyses, we also identified challenges, including the lack of unified legal regulation and unresolved issues concerning the authenticity of data.

Literature reviews have indicated that 3D printing is a widely applied procedure in several forensic domains, functioning as a demonstrative tool and as part of expert representations, including ballistic analysis of firearms, forensic anthropology, and crime scene modeling. Case studies accessed through online sources also demonstrate that the use of 3D models enables more effective and comprehensible evidence presentation for judicial actors. However, widespread application (as emphasized in the Frye test) may encounter obstacles in the absence of standardization and legal acceptance.

[52] Baier et al., *op. cit*. note 5, p. 1230-1237.

Accordingly, there is a need in the future to standardize 3D-printed evidence, to examine the admissibility of 3D models, and to develop international protocols that address the questions of when and for what purposes 3D printing may be applied in forensic contexts, and how the authenticity and accuracy of models can be preserved while ensuring legal admissibility. The procedural classification, admissibility, and associated evidentiary processes and safeguards related to 3D models are currently subject to case-by-case consideration. This may result in unpredictability, particularly concerning expert and digital evidence, which - due to their potential for manipulation - require heightened scrutiny.

Based on the three examined hypotheses, the following conclusions can be drawn:
H1: 3D printing enhances the preservation of evidence by creating accurate and durable physical copies of fragile or perishable items, which can also be transported easily.

The results of the literature review support that 3D printing is an effective tool for evidence preservation, as bones and crime scene objects can be reproduced, thus maintaining the integrity of the original items. However, the reliability and accuracy of printed models depend significantly on the printing technology and the material used. Therefore, standardized procedures are required. The hypothesis is confirmed, as 3D printing significantly contributes to the preservation and archiving of evidence.

H2: The use of 3D replicas in court improves understanding among participants in criminal proceedings.
Courtroom applications show that 3D-printed evidence greatly aids jurors, prosecutors, defense attorneys, and judges in understanding the circumstances of a crime. Interactive models enable the exploration of causal relationships, verification of event sequences, and examination from multiple perspectives. However, attention must be paid to the potentially strong influence of such replicas. Nonetheless, the hypothesis is confirmed, as they demonstrably enhance comprehension and memory retention related to the case in question.

H3: Despite its advantages, the use of 3D printing technologies in forensic sciences poses challenges in terms of ethics and accessibility.
The study suggests the future exploration of a fourth hypothesis: that 3D technology may enhance the objectivity of evidence assessment, especially through visual and interactive representations. Beyond the ability to produce weapons or explosives, a key issue is the potential manipulability of 3D models, which could mislead judicial participants. Data security concerns also emerge as a major future challenge. Moreover, the acquisition of such technologies can be costly, further deepening the technological divide between developed and

developing countries. The hypothesis is validated, as numerous ethical and access-related issues arise that, without proper regulation, may hinder widespread application.

These validated hypotheses define future research directions, including comparative studies between traditional and 3D-printed evidence, as well as exploring the integration of technologies such as artificial intelligence with 3D printing. The reviewed studies demonstrate that virtual and augmented reality technologies are transforming forensic investigations, legal procedures, and crime scene analyses. Immersive and interactive technologies improve the accuracy of interpretation, allowing both legal professionals and lay participants to examine evidence more thoroughly. With VR, one can become virtually present at a crime scene, enhancing understanding of the case and facilitating the reconstruction of past events.

The combined use of 3D scanning, printing, and immersive technologies enables the preservation, analysis, and interpretation of crime scenes, improving evidentiary procedures and promoting fairer trials by reducing the impact of subjective factors.

In summary, the forensic application of 3D printing and related technologies not only supports investigation and litigation but also opens new dimensions for the administration of justice.

REFERENCES

BOOKS AND ARTICLES

1. Abdelaal, O.; Aldahash, S.A., Realization of impression evidence with reverse engineering and additive manufacturing, Applied Sciences, 14(13), 2024, p. 5444. DOI: https://doi.org/10.3390/app14135444.
2. Albeedan, M.; Kolivand, H.; Hammady, R., Effect of Augmented Reality and Virtual Reality in Crime Scene Investigations, in: Proceedings of the 16th International Conference on Developments in eSystems Engineering (DeSE), Istanbul, Türkiye, 2023, pp. 653–657. DOI: https://doi.org/10.1109/DeSE60595.2023.10469037.
3. Baier, W.; Warnett, J.M.; Payne, M.; Williams, M.A., Introducing 3D printed models as demonstrative evidence at criminal trials, Journal of Forensic Sciences, 63(4), 2017, pp. 1230–1237. DOI: https://doi.org/10.1111/1556-4029.13700.

4. Bright, D.A.; Goodman-Delahunty, J. Barta, E.; Nagy, J., Az igazságügyi orvosszakértőkről, Rendőrtiszti Főiskola, Budapest, 2001.183–202. DOI: https://doi.org/10.1007/s10979-006-9027-y.
5. Carew, R.M.; Errickson, D., An Overview of 3D Printing in Forensic Science: The Tangible Third-Dimension, Journal of Forensic Sciences, 65 (2020), pp. 1752–1760.
6. Dufeniuk, O.; Melnyk, N.; Nahorniak, Yu.; Melnyk, S., Innovative potential of 3D technologies in crime investigation, Social and Legal Studios, 7(4), 2024, pp. 222–230. DOI: https://doi.org/10.32518/sals4.2024.222.
7. Esposito, M.; Sessa, F.; Cocimano, G.; Zuccarello, P.; Roccuzzo, S.; Salerno, M., Advances in Technologies in Crime Scene Investigation, Diagnostics, 13(20), 2023, p. 3169. DOI: https://doi.org/10.3390/diagnostics13203169.
8. Fantoly, Zs.; Gácsi, E.A., Eljárási büntetőjog – Statikus rész, Iurisperitus, Szeged, 2013, p. 202.
9. Gyaraki, R., A számítógépes bűnözés nyomozásának problémái, Doktori disszertáció, Pécsi Tudományegyetem Állam- és Jogtudományi Doktori Iskola, Pécs, 2019.
10. Henningsen, M.J.; Thorlacius-Ussing, L.; Jensen, L.G. et al., 3D printed skulls in court – a benefit to stakeholders?, International Journal of Legal Medicine, 137 (2023), pp. 1865–1873. DOI: https://doi.org/10.1007/s00414-023-03054-6.
11. Hoge, S.K.; Grisso, T., Accuracy and expert testimony, Bulletin of the American Academy of Psychiatry and the Law, 20(1), 1992, pp. 69–79.
12. Horvath, J., A Brief History of 3D Printing, in: Mastering 3D Printing, Apress, Berkeley, CA, 2014, pp. 3–10. DOI: https://doi.org/10.1007/978-1-4842-0025-4_1.
13. Horváth, O.; Maróti, P., 3D nyomtatott fegyverek: Vélt vagy valós veszélyek?, in: Gaál, G.; Hautzinger, Z. (eds.), A XXI. század biztonsági kihívásai, Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport, 2018, pp. 73–78.
14. Home, P.H.; Norman, D.G.; Wade, K.; Spearing, E.; Williams, M.A., 3D scanning a crime scene to enhance juror understanding of bloodstain pattern analysis evidence, Science & Justice, 64(3), 2024, pp. 333–338. DOI: https://doi.org/10.1016/j.scijus.2024.04.007.
15. Jakobsen, S.R.; Pedersen, C.C.; Thomsen, A.H.; Hansen, K., 3D-print as a template for reassembly of skull fragments in a homicide case, Annals of 3D Printed Medicine, 12 (2023), p. 100137. DOI: https://doi.org/10.1016/j.stlm.2023.100137.
16. Johnson, A.; Jani, G.; Pandey, A., Application of 3D scanning and 3D printing in forensic practices: A preliminary survey among forensic practitioners in India, Forensic Imaging, 28 (2022), p. 200498. DOI: https://doi.org/10.1016/j.fri.2021.200498.

17. Keller, J.L.; Scolnick, C.A., Demonstrative Evidence: Tell and Show, Litigation, 47(3), 2021, pp. 43–48. URL: https://www.jstor.org/stable/27191906.
18. Kettner, M.; Schmidt, P.; Potente, S.; Ramsthaler, F.; Schrodt, M., Reverse engineering—Rapid prototyping of the skull in forensic trauma analysis, Journal of Forensic Sciences, 56(4), 2011, pp. 1015–1017. DOI: https://doi.org/10.1111/j.1556-4029.2011.01769.x.
19. Kluska, E.; Gruda, P.; Majca-Nowak, N., The accuracy and the printing resolution comparison of different 3D printing technologies, Transactions of the Institute of Aviation, 3(252), 2018, pp. 69–86. DOI: https://doi.org/10.2478/tar-2018-0023.
20. Martinsp, S., Lost and Destroyed Evidence: The Search for a Principled Approach to Abuse of Process, The International Journal of Evidence & Proof, 9(3), 2005, pp. 158–182. DOI: https://doi.org/10.1350/ijep.2005.9.3.158.
21. Pham, C.V.; Lee, S.-J.; Kim, S.-Y.; Lee, S.; Kim, S.-H.; Kim, H.-S., Age estimation based on 3D post-mortem computed tomography images of mandible and femur using convolutional neural networks, PLOS ONE, 16(5), 2021, e0251388. DOI: https://doi.org/10.1371/journal.pone.0251388.
22. Sheshtar, F.M.; Alhatlani, W.M.; Moulden, M.; Kim, J.H., Comparative analysis of LiDAR and photogrammetry for 3D crime scene reconstruction, Applied Sciences, 15(3), 2025, p. 1085. DOI: https://doi.org/10.3390/app15031085.
23. Silva, D.N.; de Oliveira, M.G.; Meurer, E.; Meurer, M.I.; da Silva, J.V.L.; Santa-Bárbara, A., Dimensional error in selective laser sintering and 3D-printing of models for craniomaxillary anatomy reconstruction, Journal of Cranio-Maxillofacial Surgery, 36(8), 2008, pp. 443–449. DOI: https://doi.org/10.1016/j.jcms.2008.07.003.
24. Simon, G.; Tóth, D.; Heckmann, V. et al., Application of 3D printing in assessment and demonstration of stab injuries, International Journal of Legal Medicine, 136 (2022), pp. 1431–1442. DOI: https://doi.org/10.1007/s00414-022-02846-6.
25. Szilvássy, Z., Az (orvos)szakértői bizonyítás a büntetőeljárásban, Debreceni Jogi Műhely, 2023/3–4., pp. 95–113. URL: https://szakcikkadatbazis.hu/doc/6309400.
26. Tremmel, F., Bizonyítékok a büntetőeljárásban, Dialóg Campus Kiadó, Budapest–Pécs, 2006.
27. Vanisree, C.R.; Nagesh, D.; Gowtham Sai, P., Advances in Forensic Science: Integration of 3D Imaging and 3D Printing, Journal of Emerging Technologies and Innovative Research, 10(12), 2023, pp. 395–404.
28. Villa, C.; Lynnerup, N.; Jacobsen, C., A virtual, 3D multimodal approach to victim and crime scene reconstruction, Diagnostics, 13(17), 2023, p. 2764. DOI: https://doi.org/10.3390/diagnostics13172764.

29. Zappalà, A.; Guarnera, L.; Rinaldi, V.; Livatino, S.; Battiato, S., Enhancing crime scene investigations through virtual reality and deep learning techniques, arXiv preprint, 2024. DOI: https://doi.org/10.48550/arXiv.2409.18458.

NETWORKS SOURCES

1. BBC News, Oscar Pistorius trial: Evidence, 16 April 2014, https://www.bbc.com/news/world-africa-26417240 (downloaded: 26 February 2025).
2. BBC News, Plymouth Argyle youth player murder trial used 3D-printed bottle, 20 April 2015, https://www.bbc.com/news/uk-england-devon-32385554 (downloaded: 1 March 2025).
3. Devlin, H., Missing evidence led to 16 homicides in England and Wales not going to trial, The Guardian, 3 September 2023, https://www.theguardian.com/uk-news/2023/sep/03/lost-missing-evidence-cases-freedom-of-information-police (downloaded: 28 February 2025).
4. Formlabs, Guide to 3D printing materials: Types, applications, and properties, n.d., https://formlabs.com/eu/blog/3d-printing-materials/ (downloaded: 27 February 2025).
5. Morton's Solicitors, Police often lose vital evidence – new research reveals, 15 October 2023, https://www.mortons-solicitors.co.uk/police-often-lose-vital-evidence-new-research-reveals/ (downloaded: 28 February 2025)

UDK: 341.645
343 : 061.1 (4-6EU)
341.231.14
Review paper

István Szijártó, PhD student
Faculty of Law, University of Pécs, Hungary
E-mail: szijarto.istvan@ajk.pte.hu
ORCID ID: 0000-0001-8059-7035

CHALLENGES TO THE RULE OF LAW IN THE EU SYSTEM OF JUDICIAL COOPERATION WITH SPECIFIC REGARD TO PROCEDURAL GUARANTEES IN CRIMINAL LAW AND COOPERATION SYSTEMS BASED ON THE PRINCIPLE OF MUTUAL RECOGNITION

ABSTRACT

The EU is committed to the rule of law. This concept includes effective judicial protection. For a long time, judicial cooperation between member states of the EU has not focused on providing effective judicial protection for individuals in cross-border cooperation. Instead, it was rather focused on the efficiency of cooperation indicated by various judgements of the ECJ and the ECtHR. As a necessity to counter the harmful effects of this efficiency, the EU legislature started to focus on the protection of fundamental rights in this field as well. In addition, the ECJ also took a different approach in 2016, when it decided in joined cases Aranyosi and Caldararu, that judicial cooperation in criminal matters may be suspended if it resulted in the violation of fundamental rights of the concerned person. The hypothesis of this paper is that the EU has meaningfully developed the quality of rule of law in the field of judicial cooperation. The paper focuses on how the ECJ's case law and various directives adopted by EU institutions affected the protection of fundamental rights in this field. The paper first introduces the dilemma of efficient cooperation and the protection of fundamental rights. After that, the paper describes the added value of the directives harmonising procedural guarantees in criminal law in the member states. Moreover, it emphasises the ECJ's role in making judicial cooperation more protective of fundamental rights by establishing a coherent jurisprudence regarding the refusal of judicial decisions when they may jeopardise the protection of fundamental rights.

Keywords: *Rule of law, judicial cooperation in criminal matters, ECJ, procedural guarantees, EU criminal law*

1. INTRODUCTION

According to Article 2 of the Treaty on the European Union, the EU is founded on values including the rule of law.[1] Defining rule of law is almost an impossible task. It has various meanings depending on which policies it is utilised in the EU.[2] As far as this article is concerned, the rule of law can be defined as a set of values which must be adhered to in the formulation of the legal system. The Venice Commission, established by the Council of Europe, for example held that the rule of law first and foremost comprises of the principle of legality and the requirements of legal certainty, prohibition of arbitrariness, access to justice before an independent and impartial tribunal and the protection of fundamental rights.[3]

When considering the system of judicial cooperation between member states of the EU, one can see that the protection of fundamental rights was not always a priority goal. For a long time, the EU has created measures for criminal cooperation between member states for the sake of efficiency of that cooperation, while it failed to strengthen the protection of fundamental rights in the same process. This resulted in cooperation systems, lacking the fundamental guarantees against fundamental rights violations and consequently the real possibility of violation of fundamental rights in that process.

Even though efficiency of judicial cooperation is a very important goal to achieve in an EU area of free movement, the EU legislator and even the ECJ realised after some time that the protection of fundamental rights is just as important in criminal cooperation as its efficiency. As a result, through a series of directives and judgements, the EU legislator and the ECJ started to develop a framework for fundamental rights protection in the field of judicial cooperation in criminal matters as well. The hypothesis of this article is that through these measures, the EU has meaningfully developed the quality of rule of law in the field of judicial cooperation. It showcases this development via analysing the major novelties of the case law of the ECJ from the 2020s concerning the European Arrest Warrant and the directives of the European Parliament and of the Council which harmonise the procedural status of the suspect and the accused in the criminal procedure. Hence, the article starts with a brief introduction to the challenges to the protection of fundamental rights in the EU system of judicial cooperation in criminal matters which will be followed by the analysis of the so-called procedural directives. After

[1] Art. 2 of the Treaty on the European Union (consolidated version of 2012), OJ C 326, 26/10/2012.
[2] Smith, M., *Staring into the abyss: A crisis of the rule of law in the EU*, European Law Journal, 2019, p. 563.
[3] *Ibid,* p. 563.

the directives, the article will proceed to analyse the most recent judgements of the ECJ concerning the European Arrest Warrant. Through this analysis, the article will shed light on the fact that the EU has developed a coherent system of fundamental rights protection during judicial cooperation between member states.

2. FUNDAMENTAL RIGHTS IN DANGER? THE CONSEQUENCES OF A VERY EFFICIENT JUDICIAL COOPERATION IN CRIMINAL MATTERS

2.1. The parameters of the EU system of judicial cooperation

The purpose of European criminal law is to facilitate judicial cooperation in criminal matters within an EU area of free movement. This freedom is not accompanied by a single area of criminal justice. Instead, 27 criminal justice systems continue to exist on a territorial basis.[4] In such an area, it is easy for the perpetrator to leave the member state having jurisdiction over the offence to escape prosecution, or for the property acquired through the offence to be removed from that member state to prevent its recovery in criminal proceedings. Moreover, there are also cases where a transnational offence involves the territory of several member states, and the evidence is therefore located in their territories.[5]

The EU system of judicial cooperation in criminal matters is specifically designed to deal with such situations, as it is designed to secure fugitives (see the European Arrest Warrant),[6] recover criminal assets located in another member state (see the mutual recognition of freezing and confiscation orders),[7] obtain evidence abroad (see the European Investigation Order),[8] and to enforce sentences in another member state based on the principle of mutual recognition (see for example the

[4] Mitsilegas, V., *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe,* Hart, Oxford, 2018, p. 125.

[5] An offence is considered to be transnational or cross-border, if it is committed in the territory of two or more states or otherwise creates the criminal jurisdiction of two or more states, for example if the offender and the victim are in different states, or if a criminal organisation commits the offence in a state other than the state in which it operates, such as preparing the offence in one state and committing the offence in another. In addition, a transnational crime also includes offences that affect the social, economic or political order of another state.

[6] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18/07/2002.

[7] Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28/11/2018.

[8] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 01/05/2014.

mutual recognition of custodial sentences to be served or of sentences imposing financial penalties).[9] Without this system, due to the strict territoriality of criminal law, the law enforcement authorities of the member states would not be able to deal effectively with offences that could be considered cross-border for any of the above reasons, since only in exceptional cases could they take any procedural steps in the course of criminal proceedings in the territory of another member state.[10]

Within this complex system, the application of the principle of mutual recognition is the driving force of cooperation,[11] since secondary sources of EU law based on this principle are the most helpful for judicial cooperation at the operational level, i.e. on a case-by-case basis. The principle of mutual recognition is intended to simplify cooperation between the criminal justice systems of the member states. Its essence is the same as that of the English and Scandinavian systems, i.e. that a judicial decision adopted in one member state can, and indeed must, be enforced in another member state without any further examination of its content.[12] The result of this regulatory technique is a quasi-automatic system whereby decisions falling within the scope of the principle of mutual recognition become enforceable in another member state without the executing member state having to examine the substance of the decision to see whether it complies with its own legal order.[13] The main benefit of the principle of mutual recognition – and its intrinsic purpose – in the process of criminal cooperation is that it allows criminal justice systems to cooperate without the need for a particular harmonisation of the - often very

[9] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 05/12/2018; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22/03/2005.

[10] One such exception is the cross-border pursuit under the Convention implementing the Schengen Agreement, which is possible if the offender is caught in the act of crossing a state border. In addition, there is almost no other measure under criminal procedure that could be carried out by an investigating or judicial authority of a member state on the territory of another member state without prior authorisation. See: Art. 41(1) of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 239, 22/09/2000.

[11] Schwarz, M., *Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice,* European Law Journal 2-3/2018, p.125.

[12] Karsai, K., *Az alapelvek rendszere az európai büntetőjogban,* Szegedi Tudományegyetem, Szeged 2015, p. 108.; In essence, the judicial decision is transformed from a request for legal assistance into a warrant that must be executed thanks to the principle of mutual recognition. See: Ambos, K., *European Criminal Law,* Cambridge University Press, Cambridge, 2019, p. 418.

[13] Mitsilegas, V., *The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust,* Revista Brasileira de Direito Processual Penal, 2/2019, p. 571.

different - legislation of the member states, which would be a much more difficult task from a political and regulatory point of view.[14]

2.2. The lack of sufficient guarantees for the protection of fundamental rights

Even though this system is very efficient, it is not without its shortcomings. For a long time, efficiency has been the primary consideration in this cooperation. A major criticism of the system of criminal cooperation based on the principle of mutual recognition is that it provides no possibility of refusing to enforce the judicial decisions that are the subject of the principle if enforcement would result in a violation of fundamental rights.[15] This system was based on a requirement of extreme trust between member states that they would fully respect fundamental rights in criminal proceedings simply because they had acceded to the ECHR.[16] In practice, however, the opposite seemed to be the case, as the ECtHR has ruled in a number of judgments that member states were conducting criminal proceedings in a way that violates fundamental rights.[17] Moreover, the literature has criticised the cooperation system for the abolition of the double jeopardy standard for certain offences, as the substantive criminal law of the member states is not harmonised. According to some authors, the lack of harmonisation and the exclusion of double jeopardy may result in someone being prosecuted in another member state for an act that is not a criminal offence in the enforcing member state or is not regulated as a criminal offence but only as a misdemeanour. This may violate the principle of legality.[18] Other authors have criticised the lack of the principles of necessity and proportionality in connection with the flagship instrument of the system of criminal cooperation based on the principle of mutual recognition, the European

[14] Bárd, P., *Jogállamiság és európai büntetőpolitika,* Jogtudományi Közlöny 9/2016, p. 437.
[15] Fichera, M., *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?* European Law Journal 1/2009, p. 81.
[16] Already in joined cases Gözütok and Brügge, the ECJ referenced this mutual trust between member states. See: Joined cases C-187/01 & C-385/01 Gözütok and Brügge [EU:C:2003:87] para. 33.
[17] Alegre, S., Leaf, M., *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant,* European Law Journal, 2/2004, p. 201.
[18] Alegre, Leaf, *op. cit.* note 17, p. 208.

Arrest Warrant.[19] Last but not least, some authors have also criticised the lack of right to legal remedy.[20]

Another well-founded criticism is that the cooperation systems do not take into account the diversity of national legal systems. This is a problem because, through the automatic recognition and enforcement of judicial decisions, member states do not merely enforce individual judicial decisions as if they had been issued in their own legal system, but recognise the criminal justice systems of other member states as equivalent to their own.[21] This process results in a situation where the citizen staying in the executing member state becomes the subject to the legal system of another member state. This is a matter of concern from a fundamental rights point of view, because member states have different systems of procedural guarantees in criminal law, so it can be argued that the procedural guarantees of the executing member state cannot be fully enforced during the execution of a judicial decision.

Criminal law infringes on fundamental rights. Sanctions provided for by criminal law seriously infringe a person's fundamental rights, such as imprisonment and fines, which violate the right to personal liberty and the right to property.[22] Moreover, criminal law restricts the fundamental rights of individuals during criminal proceedings. The ultimate aim of criminal proceedings is to prosecute the perpetrator of the offence to establish criminal liability and punish the offender.[23] To this end, the criminal procedure codes operate with a number of coercive measures that can be used by the investigating and judicial authorities to ensure that the prosecution is successful. Coercive measures usually restrict the personal liberty, privacy or property rights of the persons involved in the case.[24]

As the defendant in criminal proceedings is a private individual confronted with the overwhelming power of the state, the principles and procedural guarantees of criminal law are of paramount importance.[25] Both the principles and the complex system of procedural guarantees are designed to protect the fundamental rights of

[19] Marin, L., *Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant,* New Journal of European Criminal Law 3/2014, p. 335; Bachmaier Winter, L., *Mutual Recognition and the Role of the CJEU: The Grounds for Non-execution,* New Journal of European Criminal Law 4/2015, p. 514.
[20] Marin, *op. cit.* note 19, p. 343.
[21] Karsai, *op. cit.* note 12, p. 108.
[22] Kettunen, M., *Legitimizing European Criminal Law. Justifications and Restrictions,* Springer, Switzerland 2020, p. 60.
[23] Farkas, Á., Róth, E., *A büntetőeljárás (Negyedik, átdolgozott kiadás)*, Wolters Kluwer, Budapest 2018, p. 16.
[24] Farkas, Róth, *op. cit.* note 23, p. 26.
[25] Bárd, *op. cit.* note 14, p. 439.

the accused.[26] Both systems gained their current form over a long period of evolution. While the principles of substantive criminal law can be traced back to the Enlightenment, procedural guarantees are more closely linked to the development of human rights systems and are encapsulated in the right to a fair trial.[27] The Universal Declaration of Human Rights has already laid down the basic requirements of a fair trial, namely:

'Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.'[28]

The European Convention on Human Rights is even more specific about the guarantees to be given to the accused. It states:

'Article 6

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'[29]

The above procedural guarantees were significantly strengthened and extended in their substance by the case law of the ECtHR as well. Consequently, the system of procedural guarantees for the accused includes the right to information,[30] the right

[26] Láris, L., *Az alapvető jogok érvényesülésének problémái az Európai Unióban,* Eljárásjogi Szemle 3/2017, p. 3.

[27] Bárd, *op. cit.* note 14, p. 438-439.

[28] Art. 11. of the Universal Declaration of Human Rights, UN General Assembly A/RES/217(III).

[29] Art. 6(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Conventions, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13 /2017 (hereinafter: ECHR).

[30] See for example Case of Pélissier and Sassi v. France, Judgement of 25 March 1999 (Application no. 25444/94)

of defence,[31] the right to represent oneself and to be represented by a lawyer at the trial and be provided with legal aid if necessary,[32] and the right to interpretation.[33] These rights can reduce the vulnerability of the accused by ensuring that they are informed in a timely manner of their procedural rights and obligations, of the offence of which they are suspected or accused of having committed, and of the facts and legal reasoning underlying the suspicion or accusation. They also guarantee that the accused can appoint a defence lawyer, participate in the proceedings and challenge witnesses' statements. Finally, the right to interpretation gives a defendant who does not speak the language of the proceedings the opportunity to understand the proceedings against him or her and can therefore be seen as a particularly important additional right.[34] This system was greatly relied on when the EU system of procedural guarantees were created.

However, for a long time before that, the only plane of contact between fundamental rights and criminal law was the national legal system. The procedural guarantees of national legal systems have evolved organically. The particularities of criminal justice systems are determined by the social and cultural structure of a given state, as there is a social consensus around the development of criminal law norms.[35] However, procedural guarantees emerged in a new nexus when EU member states started to create their system of criminal cooperation based purely on EU law. For this reason, they quickly became the focus of attention in this system, as the guarantees of the member states considerably differed from one another.[36] The reason for this was that this issue used to be a regulatory necessity only under national law, but the principle of mutual recognition resulted in the extension of the territorial scope of member states' criminal justice systems beyond their borders.[37] This principle makes a judicial decision taken in one member state enforceable in another member state, even though the decision was drafted in accordance with the procedural guarantees of the issuing member state, which may

[31] See for example Case of Ibrahim and Otehrs v. The United Kingdom, Judgement of 13 September 2016 (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09).
[32] See for example Case of Monnell and Morris v. The United Kingdom, Judgement of 2 March 1987 (Application no. 9562/81; 9818/82).
[33] See for example Case of Baytar v. Turkey, Judgement of 14 October 2014 (Application no. 45440/04).
[34] Hodgson, J., *Criminal procedure in Europe's Area of Freedom, Security and Justice: the rights of the suspect* in Mitsilegas, V., Bergström, M., Konstadinides, T. (ed.), *Research Hadbook on EU Criminal Law,* Edward Elgar, Cheltenham, 2016, p. 171-172.
[35] Láris, L., *Az uniós büntetőjog érvényesülésének problémái a belső jogban alkotmányjogi megközelítésben I.,* Magyar Jog, 10/2021, p. 621.
[36] Bárd, *op. cit.* note 14, p. 441-442.
[37] In essence, the principle of mutual recognition gives effect to judicial decisions in a Member State other than the one in which the decision was originally issued. See: Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law,* Springer, Cham 2017, p. 6.*;* Mitsilegas, *op. cit.* note 4, p. 126.

conflict with the procedural guarantees of the executing member state.[38] In several cases, this has led to a breach of fundamental rights in criminal cooperation between member states, which has been repeatedly pointed out by the ECtHR and the EU legislative institutions.[39]

2.3. A turning point for the protection of fundamental rights in the EU system of judicial cooperation

Despite the well-founded criticism, the system of criminal cooperation based on the principle of mutual recognition has been slow to change. European criminal law has for a long time failed to provide sector-specific protection of fundamental rights, even though fundamental rights play a particularly important role in the field of criminal law. The protection of fundamental rights has followed a complex evolutionary path in the European integration. The EU was initially an exclusively economic integration and, as such, the founding treaties did not address the protection of fundamental rights for a long time. Nevertheless, it became necessary to develop a system of fundamental rights protection based on EU law, as national systems of fundamental rights protection could not be enforced because of the primacy of EU law. This was first attempted by the ECJ in case C-29/69 Stauder, in which it held that the fundamental rights of individuals form part of the general principles of Community law. Subsequently, the ECJ identified the source of inspiration for the protection of fundamental rights in the EU in case C-11/70 Internationale Handelsgesellschaft, namely the constitutional traditions of the member states. The protection of fundamental rights first appeared in written primary law in the Maastricht Treaty, which largely regulated it as already fleshed out by the ECJ. It set out that the EU – as a legal principle – is obliged to respect fundamental rights under the ECHR and the constitutional traditions of the member states. After the adoption of the Maastricht Treaty, essentially this primary legal framework defined fundamental rights protection in the EU until the adoption of the Lisbon Treaty. However, this system could not be applied in the field of European criminal law, since criminal cooperation between member states was governed by the primary framework of the third pillar that had an

[38] Farkas, Á., *Az Európai Bíróság és a kölcsönös elismerés elvének hatása az európai büntetőjog fejlődésére,* Miskolci Jogi Szemle, Special issue 2011, p. 73.
[39] Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, 2003.02.19., COM(2003) 75; Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM(2004) 328, para. 10.; Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392, 2010/0215 (COD), 20/07/2010, p. 5.

intergovernmental nature, which limited the competence of the ECJ. Moreover, the first pillar principles were not applicable under it.[40]

However, with the overhaul of the primary legal framework of judicial cooperation in criminal matters, it became possible to legislate on matters of criminal procedure.[41] In addition, the ECJ also recognised the necessity to at least allow to suspend criminal cooperation when it would result in the violation of fundamental rights. Consequently, the legislative institutions adopted six directives which strengthen the status of the individual in the criminal procedure essentially executing the Roadmap for harmonising procedural guarantees in criminal law in the member states set out by the Council in 2009.[42] Moreover, the ECJ has gradually extended the scope of suspension of judicial cooperation for the protection of fundamental rights. Thus, the combined efforts of the legislature and the ECJ has resulted in the significant improvement of the EU legal framework of judicial cooperation in terms of the protection of fundamental rights strengthening the quality of the rule of law as a whole in the EU.

3. DIRECTIVES STRENGTHENING THE STATUS OF THE DEFENDANT IN THE CRIMINAL PROCEDURE

3.1. A Roadmap calling for the implementation of ECHR guarantees of the right to a fair trial into EU law

Following the failure of the legislative procedure for the Commission's 2004 draft Framework Decision that already aimed to harmonise procedural guarantees in criminal law throughout the EU, the Lisbon Treaty has provided an explicit legal

[40] Szalayné Sándor, E., *Alapjogvédelem az Európai Unióban* in Horváth, Zs., Mohay, Á., Pánovics, A., Szalayné Sándor, E. (ed.), *Európai Közjog 2.* Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Pécs 2016, p. 76-77.; Jeney, P., *Alapjogvédelem az Európai Unióban* in Kende, T., Jeney, P., Szűcs, T., *Európai közjog és politika,* ORAC, Budapest 2022, p. 700-705.; Mohay, Á., *Az Emberi Jogok Európai Egyezménye az uniós jogban – csatlakozás előtt és után(?)*, Jura 1/2018, p. 71.; Gárdos-Orosz, F., *Az Európai Unió alapjogvédelmi rendszere és az Emberi Jogok Európai Bírósága – A kettős európai alapjogvédelem és a magyar alkotmányjog,* Jog Állam Politika: Jog- és Politikatudományi Folyóirat, 4/2011, p. 81.; Kostoris, R., *The Protection of Fundamental Rights* in Kostoris, R., *Handbook of EU Criminal Procedure,* Springer, Cham 2018, p. 69.; Art. 35(3) of the Treaty on the Functioning of the European Union (consolidated version of 2006) OJ C 321 E, 29/12/2006.

[41] Art. 82(2) of the Treaty on the Functioning of the European Union (consolidated version of 2012), OJ C 326, 12/10/2012.

[42] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 04/12/2009 (hereinafter: Roadmap).

basis for harmonisation of criminal procedure law. In the new Lisbon framework in 2009, the harmonisation of the status of the suspect and the accused was brought back into focus after the Council set out its roadmap for the adoption of directives to harmonise procedural rights, which are the substance of the right to a fair trial. The growing importance of the harmonisation of procedural rights is demonstrated not only by the Council's roadmap, but also by the Commission's Communication issued during the process of drafting the Stockholm Programme, which confirmed the need to implement the roadmap drawn up by the Council.[43]

In the roadmap, the Council called for the harmonisation of procedural safeguards, referring to the arguments presented earlier.[44] In doing so, it set the standards of the ECHR as the main quality requirement for legislation.[45] It has also identified the procedural rights that need to be harmonised, namely the right to translation and interpretation, the right to information, the right to legal assistance, the right to communication and guarantees for suspects and accused persons with special needs. It also instructed the European Commission to prepare a Green Paper on the harmonisation of rules on pre-trial detention.[46]

After 2009, the Council and the European Parliament started to implement the objective set by the Council in its 2009 Roadmap, namely to harmonise the criminal procedure law of the member states with a view to strengthening the status of the suspect and the accused.[47] Eventually six directives and a Green Paper was adopted based on the call of the Roadmap.[48] The first was Directive 2010/64/EU, which regulates the right to interpretation and translation in criminal proceedings.[49] This was followed by Directive 2012/13/EU, which regulates the

[43] The Stockholm Programme – an open and secure Europe serving and protecting citizens, HL C 115, 04/04/2010, p. 10.; Communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen, COM(2009) 262, p. 18.
[44] The Council reaffirms that the system of cooperation in criminal matters is based on mutual respect for fundamental rights as protected by the ECHR. It also stresses the need to harmonise procedural guarantees in the area of free movement within the EU, given the increasing frequency of offences committed by foreign nationals. See: Roadmap, paras. (1), (4)-(5).
[45] Roadmap, para. (13).
[46] Roadmap, p. 3.
[47] Harmonisation serves to increase trust between member states. See: Spencer, J., *The Principle of Mutual Recognition* in Kostoris, *op. cit.* note 40, p. 288.
[48] Ouwerkek, J., *EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter's Scope of Application,* European Journal of Crime, Criminal Law and Criminal Justice, 2/2019, p. 89-90.
[49] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26/10/2010 (hereinafter: 2010/64/EU).

right to information,[50] followed by Directive 2013/48/EU, which implemented measures 'C' and partly 'D', regulating the right to communication and the right of defence.[51] These sources of law are referred to in the literature as the ABC directives because they implemented the first three measures.[52] After a three-year break, implementation resumed in 2016. Firstly, Directive (EU) 2016/343 on the presumption of innocence and the right to be present at the trial was adopted.[53] These rules were not part of the call in the Roadmap, however it called for the expansion the range of measures as necessary.[54] There is no doubt that the presumption of innocence and the right to be present at the trial is a cornerstone of the right to a fair trial, so the Directive is by no means a measure that stands out. This was followed by Directive (EU) 2016/800, which laid down special procedural safeguards for child offenders which partially implemented Measure 'E'.[55] Finally, Directive (EU) 2016/1919 regulates free legal aid, which fully implements Measure 'D'.[56]

3.2. The positive impact of the directives

All the directives strengthen the procedural status of the accused by laying down minimum rules implementing the standards of the right to a fair trial as set out in the ECHR. Therefore, I will refer to them collectively as procedural directives.

[50] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 01/06/2012 (hereinafter: 2012/13/EU).
[51] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 06/11/2013 (hereinafter: 2013/48/EU).
[52] Allegrezza, S., Covolo, V. (ed.), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies,* Wolters Kluwer Italia, Milan 2018, p. XVII.
[53] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11/03/2016 (hereinafter: (EU) 2016/343).
[54] Róth, E., *A terhelti jogokat érintő uniós elvárások*" in Farkas, Á. (ed), *Fejezetek az európai büntetőjogból,* Bíbor Kiadó, Miskolc 2017, p. 218.; Roadmap, para. (12).
[55] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21/05/2016 (hereinafter: (EU) 2016/800).
[56] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 04/11/2016 (hereinafter: (EU) 2016/1919).

The content of the directives has already been described in detail in the literature,[57] so I will focus on how the ECHR standards are implemented and whether the directives go beyond them.

First and foremost, individually, the procedural directives represent a major step forward in the approximation of national criminal procedure systems, but it should also be stressed that, taken together, they achieve even more. Essentially, the directives strengthen the procedural standards laid down in each other. This is underlined not only by the literature,[58] but also the directives themselves.[59] For example, Directive 2012/13/EU strengthens the right to interpretation and translation and the right to legal assistance by requiring that the accused be informed of these rights.[60]

The evaluation of the directives should also include an assessment of their legal basis. First of all, the directives are based on Article 82(2) TFEU, which allows for the harmonisation of the rights of parties to criminal proceedings in order to facilitate the mutual recognition of judgments and judicial decisions. Although the legal basis does not explicitly indicate that legislation based on it should apply only to criminal proceedings with a transnational element, some authors criticise the scope of the directives, since they apply not only to surrender procedures in the case of a European Arrest Warrant, but also to criminal proceedings in the member states which do not have an international, i.e. cross-border, element.[61]

---

[57] See: Tóth, D., *Az ártatlanság vélelméről szóló irányelv implementálása az Európai Unióban* in Ambrus, I., Kőhalmi, L. (ed.), *Mészáros Ádám Emlékére,* Publicitas Art Média, Budapest 2022, p. 233-243.; Róth, E., *A sértett helyzete a büntetőeljárásban az Európai Unió elvárásainak tükrében,* Special Issue 1/2011, p. 155-167.; Nagy, A., *A büntetőeljárás során gyanúsított vagy vádlott gyermekek részére nyújtandó eljárási biztosítékok az Európai Unióban,* Miskolci Jogi Szemle, Special Issue 2/2019, p. 209-220.; Vinnai, E., *Tolmácsolás a jogi eljárásban,* Miskolci Jogi Szemle, Special Issue 2017, p. 133-142.; Róth, E., *A tájékoztatáshoz való jog* in Róth, E. (ed.), *Decem anni in Europaea Unione V.: Tanulmányok a bűnügyi tudományok köréből,* Miskolci Egyetemi Kiadó, Miskolc 2016, p. 56-74.; Róth, E., *A hatékony védelemhez való jog* in Czine, Á. (ed.), *Király Tibor emlékkötet,* ORAC, Budapest 2022, p. 271-285.; Klimek, *op cit* note 37, p. 586-664.; Statzger, International and European criminal law, Hart, Munich 2018, p. 165-167.; Kostoris, *op. cit.* note 40, p. 85-90.; Balsamo, A., *The Content of Fundamental Rights*" in Kostoris, *op. cit.* note 40, p. 99-172.; Ambos, *op. cit.* note 12, p. 137-141.; Quattrocolo, S., *The Right to Information in EU Legislation* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law,* Springer, Cham 2015, p. 81-95.; Vogler, R., *Lost in Translation: Language Rights for Defendants in European Criminal Proceedings* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law,* Springer, Cham 2015, p. 95-111.; Bachmaier Winter, L., *The EU Directive ont he Right to Access to a Lawyer: A Critical Assessment* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law,* Springer, Cham 2015, p. 111-135.
[58] Róth, *op. cit.* note 57, p. 220.
[59] See, para. (25) 2012/13/EU, para. (14) 2013/48/EU.
[60] Art. 3(1)(a)-(b),(d) 2012/13/EU.
[61] Ouwerkek, *op. cit.* note 48, p. 92.

This criticism is misplaced because harmonisation in order to achieve the underlying objective cannot be limited to criminal proceedings with a transnational element. If this would be implemented, it would result in an unjustified discrimination between the subjects of criminal proceedings. The result would be that the subjects of criminal proceedings with an international element would have at least partly different rights than the subjects of purely national criminal proceedings. If, for example, the Directives were to apply only to the surrender procedure for the European Arrest Warrant, it would not be appropriate to achieve the approximation member states' criminal procedure systems in any meaningful way.

This has led to a situation, unprecedented in the last three decades, where EU law directly influences member states' rules of criminal procedure. The explicit aim of the directives is to contribute to the functioning of a system of cooperation in criminal matters based on the principle of mutual recognition by harmonising the status of the person charged in criminal proceedings.[62] Given that they have indeed been able to enforce ECHR rules and ECtHR standards, and in some cases even go beyond them, it can be said that the procedural directives have brought about substantial progress in the field of criminal cooperation. A number of procedural guarantees that fall within the scope of the right to a fair trial need to be applied in a uniform way in the member states, where different rules applied previously. In doing so, the Directives contribute to eliminating at least some of the cases in the criminal cooperation between member states where the protection of fundamental rights is jeopardized.

However, the advantage of directives is not only that they harmonise the law, but also that member states apply EU law in criminal proceedings, and indirectly the Charter of Fundamental Rights.[63] This established the jurisdiction of the ECJ, which has already been utilised by national courts in a number of cases.[64] As a consequence, the ECJ has started to develop its own case law on the right to a fair trial.

Consequently, the impact of the procedural directives is very positive. All procedural guarantees that are part of the right to a fair trial are adequately protected in the EU member states. Only the substantive elements of the right to a fair trial which are guaranteed by the legal systems of all member states as a

[62] See Art. 82(2) TFEU which expressly states that harmonisation may take place for the purpose of facilitating the mutual recognition of judicial decisions in criminal law.
[63] Ouwerkek, *op. cit.* note 48, p. 95.
[64] See for example Case C-377/18 AH and others [EU:C:2019:670]; Case C-209/22 Rayonna prokuratura Lovech, TO Lukovit [EU:C:2023:634]; Case C-615/18 Staatsanwaltschaft Offenburg [EU:C:2020:376]; Case C-564/19 IS [EU:C:2021:949].

fundamental requirement of the rule of law (e.g. the right to an independent and impartial tribunal established by law; the requirement of public trial and the right to be tried within a reasonable time) are not regulated. In an even greater result, the EU legislator has repeatedly overachieved its original goal, that is implementing the guarantees of the right to a fair trial as set out by the ECHR. This is demonstrated by the fact that Directive 2010/64/EU requires member states to provide a written translation of so called essential documents that guarantees that the accused understands the criminal procedure against them.[65] The necessity to translate essential documents is even strengthened by the ECJ's case law which identified the definitive elements of what constitutes an essential document.[66] In addition to that, Directive 2012/13/EU sets out a list of procedural rights that the suspect and the accused must be informed of.[67] The written form of the list specifically strengthens the position of the suspect and the accused, as they can easily get to know what they are entitled to. Moreover, Directive 2013/48/EU codifies the standards regarding the limitations on the right to access to a lawyer established in the case law of the ECtHR by stipulating that derogations from this right shall be proportionate and necessary, strictly limited in time and the decision on derogation shall be made by judicial authority or by an authority whose decision may be challenged before a judicial authority.[68] The right to access to a lawyer was reiterated by the ECJ as well in a preliminary ruling procedure where it established that the execution of procedural measures after the initial testimony of the suspect indicating their guilt shall be interpreted as the communication of suspicion against the subject of the criminal procedure. Hence, the right to access to a lawyer – and information about other procedural rights – should be communicated to the subject right after their testimony even if they are not officially notified about the suspicion.[69] Another novel addition to the right to legal assistance is that Directive (EU) 2016/1919 defines the criteria that shall be taken into account when assessing the financial means of the subject.[70] The directives lists a number of very pragmatic aspects which authorities should consider. By setting out such a definitive list, the directive achieves greater harmonisation than the ECHR that results in a more coherent practice among member states. Last, but not least, Directive (EU) 2016/800 sets out a very detailed list of further procedural guarantees for child suspects and accused persons. They represent a special group of subjects of the criminal procedure who is more vulnerable. Even though the

[65] Art. 3 2010/64/EU.
[66] Case C-242/22 PPU TL [EU:C:2022:611], para. 60.
[67] Art. 3-4. 2012/13/EU.
[68] Art. 8. 2013/48/EU cf. European Court of Human Rights: Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal limb) (updated version of 31 August 2024), paras. 480-485.
[69] Art. 2(1) 2013/48/EU; Case C-209/22, paras. 18-19, 23, 35-36, 43-44.
[70] Art. 4(3) (EU) 2016/1919

ECtHR has some general references to vulnerable defendants, it does not establish the special procedural status of the child which – in contract – the Directive does.

It is also worth pointing out that Article 47 of the Charter of Fundamental Rights is almost identical in content to Article 6 of the ECHR. Both regulate the right to a fair trial. It is important, however, to draw attention to the differences in substance between Article 6 ECHR and Article 47 of the Charter. I believe that the directives play a very important gap-filling role, because if we compare the relevant articles of the ECHR and the Charter, we can see that Article 47 of the Charter does not regulate the guarantees of the right to a fair trial, i.e. the procedural guarantees that these measures are intended to implement, in the same detail as the ECHR does. While Article 6(3) ECHR expressly lays down multiple procedural guarantees, the Charter of Fundamental Rights regulates them rights as follows:
„Article 47
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."[71]
From this wording, only the right to representation by a lawyer and to be represented free of charge can be explicitly inferred from the above-mentioned procedural guarantees. This does not mean that these guarantees cannot be derived from Article 47 of the Charter, but their absence undoubtedly results in a more precarious status for the person charged in criminal proceedings.[72] It can therefore be said that the procedural directives codified the guarantees of the right to a fair trial in EU law, as enshrined in the ECHR and elaborated in the case law of the ECtHR, but obviously based on Article 47 of the Charter of Fundamental Rights. The European Commission itself has confirmed that the directives will achieve more consistent jurisprudence by regulating the guarantees of the right to a fair

[71] Art. 47 of the Charter of Fundamental rights of the European Union, OJ C 364, 18/12/2000 (hereinafter: CFR)
[72] This is because Article 52(3) of the Charter of Fundamental Rights provides that where a right under the Charter is identical to a right under the ECHR, the content and scope of that right must be considered to be identical to that set out in the ECHR. Thus, of course, the right to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights also includes the procedural guarantees laid down in the procedural directives, but enshrining them in written form, in secondary EU sources of law, increases legal certainty and substantially improves the status of the accused in criminal proceedings. Ld.: Art. 52(3) CFR; Statzger, *op. cit.* note 57, p. 51.

trial.[73] In addition, the EU Agency for Fundamental Rights also sees the procedural directives as clarifying the content of Article 47 of the Charter, as it includes the directives under consideration in the connection with this article.[74] Moreover, the directives have the added value that EU law is clearly more effectively implemented and enforced in the member states than the ECHR rules. Thus, the directives play a major and efficient role in the strengthening of the status of the individual in the criminal procedure.[75]

3.3. The shortcoming of the directives

Even though it is clearly visible that the directives carry a variety of novelties even in contrast to the ECHR standards regarding the procedural guarantees of the right to a fair trial, it is without question that the EU legislator has failed to introduce a comprehensive harmonisation of the rights of redress for breaches of these procedural guarantees. In general, even though the directives do prescribe the provision of remedial procedures – most of them having meaningful substance –, they do not set out the means of provision of those procedures.[76] Instead, member states are free to establish remedial measures for guarantees under their procedural autonomy.[77]

[73] Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, (COM(2018) 857), p. 2.; Report from the Commission to the European Parliament and the Council on the implementation 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 (COM(2018) 858), p. 1.; Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (COM(2019) 560), p. 1.

[74] Collection of the EU Agency for Fundamental Rights: https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#eu-law.

[75] Kostoris, *op. cit.* note 40, p. 84.

[76] See for example Arts. 2(5) and 3(5) 2010/64/EU; Art. 8 2012/13/EU; Art. 8 2013/48/EU.

[77] The procedural autonomy of Member States in the area of remedial rights under EU law means that they are free to develop their own rules on legal remedy, provided that they comply with the requirement of the right to an effective remedy laid down in Article 47 of the Charter of Fundamental Rights. If it is left to the discretion of the Member States to establish such a right, it can only be judged ex post whether it meets this requirement. To assess this, the ECJ applies the principles of effectiveness and equivalence. It has applied these principles as assessment criteria in a number of judgments, such as in Case C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG c Landwirtschaftskammer für das Saarland, case C-300/17 Hochtief AG. See: Neframi, E., Article 47 of the Charter in the Opinion Procedure: Some Reflections Following Opinion 1/17, European Papers, 1/2021, p. 748.

The procedural autonomy of the member states in creating their own procedures for remedial rights was reiterated by the ECJ in more cases. For example, in a preliminary ruling procedure which was initiated for not informing the suspects about their privilege against self-incrimination upon taking their testimony, the ECJ held that French legislation forbidding the court to take into account this fact as jeopardising the fairness of the procedure is in line with Directive 2012/13/EU as the very same legislation provides the right to the defendant to challenge the testimony taken without prior information about the right to silence.[78]

Thus, I am led to believe that the current system for setting out procedures for remedial rights for cases when the procedural guarantees of the suspect and the accused are violated is going to remain in member states' competence. Consequently, the current EU system on procedural guarantees will continue to lack a very important aspect of strengthening the status of the individual in the criminal procedure which is the harmonisation of the right to legal remedy. This is currently protected by the principles of equivalence and efficiency. Even though they do require member states to provide the same quality of protection for defendants regardless of their place of residence – be it in the member state of the criminal procedure or elsewhere –, harmonisation of remedial rights through the directives would approximate the status of the individual in a uniform manner in every member state.

4. FURTHER CLARIFICATION OF THE ARANYOSI TEST

The ECJ's judgment in the Aranyosi and Căldăraru cases has had the biggest impact so far on the protection of fundamental rights in criminal cooperation.[79] An outstanding number of studies have been produced that deal with this judgment from several different angles,[80] and a number of judgments have served to clarify

[78] Case C-660/21 K.B. and F.S. [EU:C:2023:498], paras. 15-17, 19, 49.
[79] Joined cases C-404/15 & C-659/15 PPU Aranyosi and Căldăraru [EU:C:2016:198] (hereinafter: C-404/15).
[80] Aizpurua, E., Rogan, M., *Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies,* New Journal of European Criminal Law 2/2020; Bárd, P., Ballegooij, W., *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM,* New Journal of European Criminal Law, 3/2018; Karapatakis, A., *Case C-128/18 Dorobantu – the Aftermath of Aranyosi and Căldăraru* https://europeanlawblog.eu/2019/10/28/case-c-128-18-dorobantu-the-aftermath-of-aranyosi-and-caldararu/.; Peers, S.: Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper? https://free-group.eu/2016/11/12/human-rights-and-the-european-arrest-warrant-has-the-ecj-turned-from-poacher-to-gamekeeper/.

the Aranyos*i* test developed in the joined cases in subsequent case law of the ECJ.[81] In this judgment, the Court developed the Aranyosi test after it became clear that the fundamental rights risks inherent in the cooperation systems based on the principle of mutual recognition could no longer be tolerated. The Aranyosi test provides a compromise instead of an immediate refusal of a judicial decision. In the two-step test, once the executing authority has recognised that there is an abstract risk of a breach of fundamental rights in the issuing member state due to general or systemic deficiencies, it is obliged to examine whether these deficiencies may also give rise to a risk of a breach of fundamental rights in the individual case of the person concerned.[82] When assessing the risk of an *in concreto* breach of fundamental rights, the executing and issuing authorities are obliged to consult, during which the issuing authority can provide guarantees to avoid a breach of fundamental rights.[83] The executing authority may refuse to execute a judicial decision only if, on the basis of information from the issuing authority, it cannot exclude the risk of a fundamental right being infringed in the individual case of the person concerned by the judicial decision.[84] In fact, this is what we call a fundamental rights ground for refusal, and it is the only unwritten exception to the general rule of mandatory enforcement in cooperation systems based on the principle of mutual recognition. The application of the two-step test serves the exceptional nature of the ground for refusal for the protection of fundamental rights and can be interpreted as a confirmation of the principle of mutual trust, which is the basis for presuming that member states respect fundamental rights when applying EU law.

For the past eight years, the ECJ has strictly adhered to this two-phase test. Although the omission of the first (see Case C-699/21 E.D.L.) or second (see Case C-158/21, Puig Gordi and Others) phase of the test has been raised in several cases,[85] the ECJ has proved to be uncontentious on this issue and has not recognised the possibility that it could be applied even if one of the conditions is not fulfilled.[86] The only exception to this was in case C-852/19*,* Gavanozov II, where the ECJ considered it appropriate to suspend cooperation by way of a judicial decision based on the principle of mutual recognition, even without

[81] Case C-220/18 PPU Generalstaatsanwaltschaft [EU:C:2018:589] (hereinafter: C-220/18. PPU); Case C-216/18 PPU Minister for Justice and Equality [EU:C:2018:586] (hereinafter: C-216/18. PPU); Case C-128/18 Dorobantu [EU:C:2019:857] (hereinafter: C-128/18).
[82] Marguery, T., *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is „Exceptional" Enough?* European Papers, 1/2016, p. 954.; C-404/15, para. 91-94.
[83] C-404/15, para. 95.
[84] C-404/15, para. 97.
[85] Case C-158/21, Puig Gordi and others [EU:C:2023:57] (hereinafter: C-158/21), para. 92.; Case C-699/21, E. D. L. [EU:C:2023:295] (hereinafter: C-699/21), para. 19.
[86] C-158/21, para. 119.; Meulen, L. *Another exception to the rule: the E.D.L case on EAW surrenders of seriously ill persons*, Common Market Law Review*,* 1/2024, p. 232.

carrying out the second phase of the Aranyosi test.[87] However, the reason for this was really simple. The EIO planned to be issued by the Bulgarian court would have ordered the execution of investigative measures against which the persons concerned would not have had any legal remedy. In this respect, however, the ECJ considered that the investigative measures in question interfered with the private and family life of the persons concerned to such an extent that a right of appeal would be justified.[88] Since this was not the case, it held that any EIO issued by a Bulgarian court ordering the investigative measures concerned would be in breach of the fundamental rights of the *fortiori*.[89] This would mean that such an EIO would have to be continuously refused. This would be contrary to the principle of mutual trust. For this reason, Bulgarian courts are not allowed to issue such an EIO.[90]

The circumstances of case C-852/19, Gavanozov II thus essentially justified the solution advocated by scholars and the referring courts, namely to allow the possibility of refusing a judicial decision even if the executing authority only detects systemic or general deficiencies which entail an abstract risk of a breach of fundamental rights. In essence, these systemic deficiencies described in Case C-852/19, Gavanozov II were of such a degree that they not only risked a breach of fundamental rights, but actually did so, as the ECtHR has also held.[91] Two conclusions can be drawn from this. On the one hand, if, notwithstanding the judgment of the ECJ, any authority were to issue an EIO in which the investigative measures ordered are not subject to a right of appeal and those investigative measures so seriously restrict the fundamental rights of the person concerned that a right of appeal would be justified, the execution of that EIO should be refused after that fact has been established. On the other hand, the ECJ's judgment also shows that the omission of the second phase of the Aranyosi test is only possible in very specific circumstances, namely where the legislation of a member state covers all persons concerned without exception, in this case the person charged in the criminal proceedings or other interested parties. This situation has never occurred except for case Gavanozov II. Therefore, even though the solution advocated by scholars has a very high threshold of application set by the ECJ, it can be inferred from its case law that it is possible to refuse to enforce a judicial

[87] Case C-852/19, Gavanozov II [EU:C:2021:902] (hereinafter: C-852/19), para. 62.
[88] C-852/19, para. 50.
[89] C-852/19, para. 62.
[90] C-852/19, para. 59.
[91] Case of Posevini v Bulgaria, Judgment of 19 January 2017 (Application number 63638/14), para. 3.

decision without having to examine the individual circumstances of the person concerned in the particular case.[92]

In addition, the newer judgments of the ECJ also provide important conclusions on the unwritten ground for refusal. First and foremost, the Court recognised that the ground for refusal can be applied where there is a risk of infringement of at least four fundamental rights. These are the prohibition of torture or inhuman or degrading treatment,[93] the right to a fair trial,[94] the right to private and family life,[95] and the right to an effective remedy.[96] Of these four fundamental rights, all but the first can be restricted, so it can be argued that the ground for refusal may also apply to other fundamental rights, but so far only these have been examined by the ECJ. The violation of these four fundamental rights can be considered as the "main" cases of application of the ground for refusal. These main cases include certain situations in which the risk of a breach of the fundamental rights of the person concerned by the judicial decision must be assessed. In the case of the prohibition of torture or inhuman or degrading treatment, it is not only poor prison conditions that may result in a breach of the fundamental right,[97] but also if the person sought through the EAW has a serious medical condition, which may contribute to the deterioration of his or her health.[98] Infringements of the right to a fair trial also include infringements of the right to a court established by law,[99] or the right to an independent tribunal. Two aspects of the latter were examined by the ECJ. On the one hand, this right may be infringed if judges are supervised by a disciplinary board which cannot be considered independent of the executive,[100] or if judges are appointed by a body which cannot be considered independent.[101] Furthermore, the ECJ has held that the right to private and family life may be violated if the person raising the child concerned by a judicial decision is detained in conditions which do not have regard to the best interests of the child.[102] Last but not least, it is a violation of the right to an effective remedy if a particular investigative measure

[92] It is worth pointing out that the ECJ has not developed a fully consistent practice with regard to the two steps of the *Aranyosi* test. In its case law, there were judgments in which it focused on the first stage of the test, while in other judgments it focused on the second stage. Ld.: Rizcallah, C., *The principle of mutual trust and the protection of fundamental rights in the Area of Freedom, Security and Justice,* Maastricht Journal of European and Comparative law, 3/2023, p. 268.
[93] C-404/15.
[94] C-216/18.
[95] Case C-261/22 GN [EU:C:2023:1017] (hereinafter: C-621/22).
[96] C-852/19.
[97] C-220/18.
[98] C-699/21.
[99] C-216/18.
[100] Case C-354/20 PPU Openbaar Ministerie [EU:C:2020:1033].
[101] C-158/21.
[102] C-261/22.

restricts the fundamental rights of the person concerned to such an extent that a right to a remedy would be justified but is not guaranteed by the law of the issuing member state.[103]

5. CONCLUSION

In conclusion, the EU legislator has managed to strengthen the quality of fundamental rights protection through the adoption of the procedural directives to a great extent. They do not only implement the standards for procedural guarantees set out by the ECHR and elaborated by the case law of the ECtHR, but they also extend them on multiple accounts. As already detailed, they introduce higher standards for the suspect and the accused such as the mandatory translation of essential documents, and they also codify in secondary sources high standards of protection which only existed previously in the case law of the ECtHR such as the definitive list of procedural rights which must be communicated to the defendant and the exceptional nature of derogation from the right to legal assistance with strong procedural safeguards. Not to mention that the directives even clarify the standards applied by the ECtHR when specifying what are the criteria to be assessed during a means test for free legal aid. Last, but not least, the EU system of procedural guarantees created a list of special procedural safeguards for vulnerable defendants, namely, child suspects and accused persons. All of these landmarks are also backed up by the ECJ which formulated a jurisprudence which generally favours these procedural rights and occasionally even extends their substance as it happened with the definition of essential documents, or the scope of the right to information and the right to legal assistance.

Moreover, the ECJ – through a series of judgements – clarified the unwritten ground for refusal in terms of cooperation systems implementing the principle of mutual recognition in the process of judicial cooperation in criminal matters by setting out multiple fundamental rights which may be the basis for suspending criminal cooperation if their execution would result in their violation. Furthermore, arguably, the ECJ set out an option to refuse to execute a judicial decision even without carrying out the full Aranyosi test if it is certain that the execution of the judicial decision would result in the violation of a fundamental right of the concerned person.

In conclusion, the above efforts of the EU legislator and the ECJ definitely increased the quality of rule of law in the EU with developing the fairness of the criminal procedure in every member state. Modifying the procedural directives so

[103] C-852/19.

that they incorporate the standards set out by the ECJ and harmonise remedial rights attached to the procedural safeguards could be another step in this direction. In another greater effort, the codification of the Aranyosi test could also be very beneficial for the rule of law and the protection of fundamental rights especially in the field of judicial cooperation in criminal matters, as jurisprudence is always harder to acknowledge and follow than written sources of law. Not to mention that it would be easier to enforce these standards if they were codified in written sources as currently, it is up to the ECJ to monitor their implementation on a case-by-case basis. As for the viability of such reforms taking place in the future, I am inclined to believe that the EU legislator will not aim for the modification of the analysed directives as it has a tendency to neglect its previous legislation in the field of judicial cooperation in criminal matters. This is evidenced by the fact that it has only modified such secondary sources of EU law on one account before,[104] and it did not replace legislation originating from before the Lisbon framework, and instead, the full powers of the EU institutions are applicable after the five-year transitional period laid down in Article 10 of Protocol (No 36) TFEU.[105] In addition, it is also worth noting that the European Council's proposals for the development of this policy do not include the refinement of these directives either.[106] As such, I believe that the ECJ will maintain its influential role in the field of judicial cooperation in criminal matters – a role that it is fully accomplished to take as evidenced by its several judgements delivered concerning criminal cooperation.

REFERENCES

BOOKS AND ARTICLES

1. Aizpurua, E., Rogan, M., *Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies,* New Journal of European Criminal Law 2/2020, 204-226.

[104] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81 of 27/3/2009.
[105] Article 10 of Protocol (No 36) on Transitional Provisions TFEU.
[106] European Council' Strategic guidelines for legislative and operational planning within the area of freedom, security and justice, LIMITE JAI 1782.

2. Alegre, S., Leaf, M., *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant,* European Law Journal, 2/2004, 200-217.
3. Allegrezza, S., Covolo, V. (ed.), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies,* Wolters Kluwer Italia, Milan, 2018.
4. Ambos, K., *European Criminal Law,* Cambridge University Press, Cambridge, 2019.
5. Bachmaier Winter, L., *Mutual Recognition and the Role of the CJEU: The Grounds for Non-execution,* New Journal of European Criminal Law 4/2015, 505-526.
6. Bachmaier Winter, L., *The EU Directive ont he Right to Access to a Lawyer: A Critical Assessment* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law,* Springer, Cham 2015.
7. Balsamo, A., *The Content of Fundamental Rights*" in Kostoris, R., *The Protection of Fundamental Rights* in Kostoris, R., *Handbook of EU Criminal Procedure,* Springer, Cham 2018.
8. Bárd, P., Ballegooij, W., *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM,* New Journal of European Criminal Law, 3/2018, 353-365.
9. Bárd, P., *Jogállamiság és európai büntetőpolitika,* Jogtudományi Közlöny 9/2016, 435-447.
10. Farkas, Á., *Az Európai Bíróság és a kölcsönös elismerés elvének hatása az európai büntetőjog fejlődésére,* Miskolci Jogi Szemle, Special issue 2011, 62-77.
11. Farkas, Á., Róth, E., *A büntetőeljárás (Negyedik, átdolgozott kiadás)*, Wolters Kluwer, Budapest 2018.
12. Fichera, M., *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?* European Law Journal 1/2009, 70-97.
13. Gárdos-Orosz, F., *Az Európai Unió alapjogvédelmi rendszere és az Emberi Jogok Európai Bírósága – A kettős európai alapjogvédelem és a magyar alkotmányjog,* Jog Állam Politika: Jog- és Politikatudományi Folyóirat, 4/2011, 75-94.
14. Hodgson, J., *Criminal procedure in Europe's Area of Freedom, Security and Justice: the rights of the suspect* in Mitsilegas, V., Bergström, M., Konstadinides, T. (ed.), *Research Hadbook on EU Criminal Law,* Edward Elgar, Cheltenham 2016.
15. Jeney, P., *Alapjogvédelem az Európai Unióban* in Kende, T., Jeney, P., Szűcs, T., *Európai közjog és politika,* ORAC, Budapest 2022.
16. Karsai, K., *Az alapelvek rendszere az európai büntetőjogban,* Szegedi Tudományegyetem, Szeged 2015.

17. Kettunen, M., *Legitimizing European Criminal Law. Justifications and Restrictions,* Springer, Switzerland 2020.
18. Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law,* Springer, Cham 2017.
19. Kostoris, R., *The Protection of Fundamental Rights* in Kostoris, R., *Handbook of EU Criminal Procedure,* Springer, Cham 2018.
20. Láris, L., *Az alapvető jogok érvényesülésének problémái az Európai Unióban,* Eljárásjogi Szemle 3/2017, 3-10.
21. Láris, L., *Az uniós büntetőjog érvényesülésének problémái a belső jogban alkotmányjogi megközelítésben I.,* Magyar Jog, 10/2021, 600-610.
22. Marguery, T., *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is „Exceptional" Enough?* European Papers, 1/2016, 943-963.
23. Marin, L., *Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant,* New Journal of European Criminal Law 3/2014, 327-348.
24. Meulen, L. *Another exception to the rule: the E.D.L case on EAW surrenders of seriously ill persons*, Common Market Law Review*,* 1/2024, 223-238.
25. Mitsilegas, V., *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe,* Hart, Oxford, 2018.
26. Mitsilegas, V., *The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust,* Revista Brasileira de Direito Processual Penal, 2/2019, 565-595.
27. Mohay, Á., *Az Emberi Jogok Európai Egyezménye az uniós jogban – csatlakozás előtt és után(?)*, Jura 1/2018, 71-87.
28. Nagy, A., *A büntetőeljárás során gyanúsított vagy vádlott gyermekek részére nyújtandó eljárási biztosítékok az Európai Unióban,* Miskolci Jogi Szemle, Special Issue 2/2019, 209-220.
29. Neframi, E., *Article 47 of the Charter in the Opinion Procedure: Some Reflections Following Opinion 1/17,* European Papers, 1/2021, 741-755.
30. Ouwerkek, J., *EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter's Scope of Application,* European Journal of Crime, Criminal Law and Criminal Justice, 2/2019, 89-96.
31. Quattrocolo, S., *The Right to Information in EU Legislation* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law,* Springer, Cham 2015.
32. Rizcallah, C., *The principle of mutual trust and the protection of fundamental rights in the Area of Freedom, Security and Justice,* Maastricht Journal of European and Comparative law, 3/2023, 255-272.
33. Róth, E., *A hatékony védelemhez való jog* in Czine, Á. (ed.), *Király Tibor emlékkötet,* ORAC, Budapest 2022.
34. Róth, E., *A sértett helyzete a büntetőeljárásban az Európai Unió elvárásainak tükrében,* Special Issue 1/2011, 155-167.

35. Róth, E., *A tájékoztatáshoz való jog* in Róth, E. (ed.), *Decem anni in Europaea Unione V.: Tanulmányok a bűnügyi tudományok köréből,* Miskolci Egyetemi Kiadó, Miskolc 2016.
36. Róth, E., *A terhelti jogokat érintő uniós elvárások*" in Farkas, Á. (ed), *Fejezetek az európai büntetőjogból,* Bíbor Kiadó, Miskolc 2017.
37. Schwarz, M., *Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice,* European Law Journal 2-3/2018, 124-141.
38. Smith, M., *Staring into the abyss: A crisis of the rule of law in the EU*, European Law Journal, 2019, 561-576.
39. Spencer, J., *The Principle of Mutual Recognition* in Kostoris, R., *The Protection of Fundamental Rights* in Kostoris, R., *Handbook of EU Criminal Procedure,* Springer, Cham 2018.
40. Statzger, International and European criminal law, Hart, Munich 2018.
41. Szalayné Sándor, E., *Alapjogvédelem az Európai Unióban* in Horváth, Zs., Mohay, Á., Pánovics, A., Szalayné Sándor, E. (ed.), *Európai Közjog 2.* Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Pécs 2016.
42. Tóth, D., *Az ártatlanság vélelméről szóló irányelv implementálása az Európai Unióban* in Ambrus, I., Kőhalmi, L. (ed.), *Mészáros Ádám Emlékére,* Publicitas Art Média, Budapest 2022.
43. Vinnai, E., *Tolmácsolás a jogi eljárásban,* Miskolci Jogi Szemle, Special Issue 2017, 133-142
44. Vogler, R., *Lost in Translation: Language Rights for Defendants in European Criminal Proceedings* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law,* Springer, Cham 2015

LEGAL ACTS

1. Charter of Fundamental rights of the European Union, OJ C 364, 18/12/2000.
2. Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Conventions, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13 /2017.
3. Convention implementing the Schengen Agreement of 14 June 1985, OJ L 239, 22/09/2000.
4. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18/07/2002.
5. Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of

liberty for the purpose of their enforcement in the European Union, OJ L 327, 05/12/2018.

6. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22/03/2005.
7. Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27/3/2009.
8. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 04/11/2016.
9. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11/03/2016.
10. Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21/05/2016.
11. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26/10/2010.
12. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 01/06/2012.
13. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 06/11/2013.
14. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 01/05/2014.
15. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28/11/2018.
16. Treaty on the European Union (consolidated version of 2012), OJ C 326, 26/10/2012.

17. Treaty on the Functioning of the European Union (consolidated version of 2012), OJ C 326, 12/10/2012.
18. Treaty on the Functioning of the European Union (consolidated version of 2006) OJ C 321 E, 29/12/2006.

COURT DECISION

1. Case C-128/18, Dorobantu [EU:C:2019:857].
2. Case C-158/21, Puig Gordi and others [EU:C:2023:57].
3. Case C-209/22, Rayonna prokuratura Lovech, TO Lukovit [EU:C:2023:634].
4. Case C-216/18, PPU Minister for Justice and Equality [EU:C:2018:586].
5. Case C-220/18, PPU Generalstaatsanwaltschaft [EU:C:2018:589].
6. Case C-242/22, PPU TL [EU:C:2022:611].
7. Case C-261/22, GN [EU:C:2023:1017].
8. Case C-354/20, PPU Openbaar Ministerie [EU:C:2020:1033].
9. Case C-377/18, AH and others [EU:C:2019:670].
10. Case C-564/19, IS [EU:C:2021:949].
11. Case C-615/18, Staatsanwaltschaft Offenburg [EU:C:2020:376].
12. Case C-660/21, K.B. and F.S. [EU:C:2023:498].
13. Case C-699/21, E. D. L. [EU:C:2023:295].
14. Case C-852/19, Gavanozov II [EU:C:2021:902].
15. Case of Baytar v. Turkey, Judgement of 14 October 2014 (Application no. 45440/04).
16. Case of Ibrahim and Otehrs v. The United Kingdom, Judgement of 13 September 2016 (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09).
17. Case of Monnell and Morris v. The United Kingdom, Judgement of 2 March 1987 (Application no. 9562/81; 9818/82).
18. Case of Pélissier and Sassi v. France, Judgement of 25 March 1999 (Application no. 25444/94).
19. Case of Posevini v Bulgaria, Judgment of 19 January 2017 (Application number 63638/14).
20. Joined cases C-187/01 & C-385/01 Gözütok and Brügge [EU:C:2003:87].
21. Joined cases C-404/15 & C-659/15 PPU Aranyosi and Căldăraru [EU:C:2016:198].

NETWORK RESOURCES

1. Collection of the EU Agency for Fundamental Rights, https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#eu-law.
2. European Council' Strategic guidelines for legislative and operational planning within the area of freedom, security and justice, LIMITE JAI 1782.
3. European Court of Human Rights: Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal limb) (updated version of 31 August 2024).
4. Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, 2003.02.19., COM(2003) 75.
5. Karapatakis, A., Case C-128/18 Dorobantu – the Aftermath of Aranyosi and Căldăraru, https://europeanlawblog.eu/2019/10/28/case-c-128-18-dorobantu-the-aftermath-of-aranyosi-and-caldararu/.
6. Peers, S.: Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper? https://free-group.eu/2016/11/12/human-rights-and-the-european-arrest-warrant-has-the-ecj-turned-from-poacher-to-gamekeeper/.
7. Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM(2004) 328.
8. Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392, 2010/0215 (COD) of 20/07/2010.
9. Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, (COM(2018) 857).
10. Report from the Commission to the European Parliament and the Council on the implementation 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 (COM(2018) 858).
11. Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (COM(2019) 560).

12. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295 of 04/12/2009.
13. The Stockholm Programme – an open and secure Europe serving and protecting citizens, HL C 115 of 04/04/2010, p. 10.; Communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen, COM(2009) 262.
14. Universal Declaration of Human Rights, UN General Assembly A/RES/217(III).

UDK: 343.8 (4-6EU)
341.645
Review paper

Lulezim Barjamemaj, PhD student
Faculty of Law, University of Tirana, Albania
E-mail: lulezim.barjamemaj@fdut.edu.al
ORCID ID: 0009-0004-9700-2754

OPTIONAL GROUNDS FOR REFUSAL IN THE EUROPEAN ARREST WARRANT INSTRUMENT: A JURISPRUDENTIAL ANALYSIS

ABSTRACT

The instrument of the European Arrest Warrant represents a 'cornerstone' of judicial cooperation in criminal matters within the European Union, as built upon the principle of mutual recognition of criminal judgments. Enshrined in the Council Framework Decision 2002/584/JHA on June 13, 2002, it establishes procedures for the arrest and surrender of individuals between Member States. This study examines key optional grounds for refusal under the Framework Decision of the European Arrest Warrant, including dual criminality, territoriality, the statute of limitations, and the nationality or residence of the requested person, with particular emphasis on the ne bis in idem principle, which is mandatory within the European Union but discretionary for third-country judgments. While the optional grounds largely mirror those in traditional extradition, the Framework Decision of the European Arrest Warrant grants Member States full discretion in their transposition. This study employs qualitative legal analysis, conducting a literature review of the current debates, followed by an in-depth assessment of the jurisprudence of the European Court of Justice. This paper argues that while the Framework Decision of the European Arrest Warrant aims to foster mutual trust and judicial cooperation, the discretion vested to Member States in implementing optional grounds has led to fragmentation in practice. The European Court of Justice has attempted to mitigate these inconsistencies by establishing uniform interpretations, reinforcing the principles of equality and non-discrimination, and ensuring that discretionary refusals align with broader European Union legal principles.

Keywords: *European Arrest Warrant, optional grounds, mutual trust, judicial cooperation.*

1. INTRODUCTION

Following the adoption of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between

Member States,[1] the 1957 European Convention on Extradition[2] was repealed within the European Union's (hereinafter: EU) territorial scope. A key shift compared to traditional extradition lies in the removal of administrative or political authorities from the decision-making process concerning the surrender of individuals. Under the ECE, political authorities still had a role, whereas the FD EAW grants exclusive decision-making power to judicial authorities of the Member States (hereinafter: MS), free from political interference. This new framework, based on the principle of mutual recognition of criminal judgments, was anticipated to establish an automatic mechanism for the surrender of individuals sought by the criminal justice systems of MS. While the legal grounds for non-execution have been narrowed, it is important to note that despite the FD EAW's reliance on mutual recognition, there is no absolute obligation for the executing state[3] to carry out an arrest warrant.[4]

The reduction or modification of refusal grounds is intended to signal mutual trust among the MS in their respective judicial systems.[5] However, the grounds for non-execution appear almost identical to those under the ECE, indicating that there remains some level of mistrust between the jurisdictions of the MS.[6] Nevertheless, the crucial difference between these two instruments of the surrender of individuals lies in the exclusive decision-making power of the judicial authorities in the EAW procedures, thus excluding political authorities from the possibility of enforcing political mistrust as a legal ground for the refusal of surrender.[7] The optional grounds for refusal under the FD EAW have been widely debated in legal

[1] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, as amended by Framework Decision 2009/299/JHA. Official Journal of the European Union L 81, 27 March 2009, 24–36 (hereinafter: FD EAW).

[2] E*uropean Convention on Extradition* (ETS No. 024) [1957], Council of Europe Treaty Series (hereinafter: ECE).

[3] The EAW FD has also changed the terminology of the states participating in the extradition procedure. The FD EAW now refers to the "issuing state" (the requesting state in extradition procedures) and the "executing state" (the requested state in extradition procedures).

[4] C-306/09, I.B., Judgment of the Court of Justice of the European Union of 21st October 2010, par. 50.; Case C-192/12 PPU Melvin West, Judgment of the Court of Justice of the European Union of 28th June 2012 par. 64; Case C-42/11, João Pedro Lopes Da Silva Jorge, Judgment of the Court of Justice of the European Union of 5th September 2012 — par. 30-36.

[5] Łazowski, A.; Nash, S., *Detention*. In *The European Arrest Warrant in Practice*, edited by N. Keijzer, N.; Van Sliedregt E., The Hague, p. T. M. C. Asser Press, 2009, p. 33–50.

[6] For more information, see articles 6, 7, 8, 9, 10, 10/a, 10/b of the European Convention on Extradition.

[7] Van Sliedregt, E., *The European Arrest Warrant, p. Between Trust, Democracy and the Rule of Law. Introduction*, *The European Arrest Warrant: Extradition in Transition*. *Eur. Const. Law Rev.* 3, 2007, p. 244–252.

academia. Legal scholars Vernimmen-Van Tiggelen and Surano[8] argue that they serve as a safeguard for national sovereignty and fundamental rights, allowing MS discretion in cases where the execution of an EAW might conflict with constitutional principles or legal traditions. However, Mitsilegas[9] highlights that the discretionary nature of these grounds can create inconsistencies in EAW implementation, undermining mutual trust among MS and weakening the effectiveness of judicial cooperation. Similarly, Peers[10] discusses how the fragmented application of optional refusal grounds contributes to legal uncertainty, as different national courts may interpret them in divergent ways, leading to potential delays and challenges in the surrender process.

Articles 3, 4, and 4a of the FD EAW set out the grounds for mandatory or optional refusal of surrender. There are three mandatory grounds for refusal, which obligate the executing state to deny surrender in the following situations: i) where the requested person has been granted amnesty by the executing state for the same conduct; ii) where a *ne bis in idem* decision has been made by a MS concerning the same facts; or iii) where the requested person has not reached the age of criminal responsibility in the issuing state.[11] The optional grounds for refusal, in summary, include: i) dual criminality; ii) concurrent proceedings in the executing state; iii) a decision to discontinue proceedings within the EU; iv) the statute of limitations for prosecution or enforcement of the sentence in the executing state; v) *ne bis in idem* with third countries; vi) the principle of nationality or residence; and vii) the principle of territoriality.[12]

The 2009 amendment to the FD EAW introduced Article 4a, which expands the optional grounds for refusal by making the requested person's surrender conditional upon the verification of compliance with the judgment with the right of the defendant to due process. This provision intersects with the protections stipulated in Article 5 of the FD EAW, and as such, its detailed analysis falls outside the scope of this paper.[13]

---

[8] Vernimmen-Van Tiggelen, G.; Surano, L., *The Future of Mutual Recognition in Criminal Matters in the European Union,* Brussels: Editions de l'Université de Bruxelles, 2009, p. 31-40.
[9] Mitsilegas, V., *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe,* Oxford, p. Hart Publishing, 2016, p. 210-216.
[10] Peers, S., *EU Justice and Home Affairs Law,* 4th ed. Oxford; Oxford University Press, 2016, p. 60-66.
[11] Article 3 of the FD EAW.
[12] Article 4 of the FD EAW.
[13] Barjamemaj, L.; Karsai, K.; Muçollari, O., *Safeguards and Guarantees in European Arrest Warrant Procedures,: Legal and Comparative Analysis*, Balkans Legal, Economic and Social Studies (BLESS), Vol. 1, No. 1, 2024, p. 85-99. https://www.americanaejournal.hu/index.php/bless/article/view/46154.

Given that the EAW was adopted through a framework decision under the legal basis of the former third pillar of the EU before the Lisbon Treaty, framework decisions are comparable to directives.[14] They are binding in terms of the outcome to be achieved but allow MS discretion in determining the means of transposition. In this regard, the mandatory grounds must be incorporated into national legislation as prescribed by the framework decision, thereby achieving the Union's objectives of safeguarding the principles of *ne bis in idem*, legality, and the protection of minors. MS are not permitted to alter these grounds, as the intent behind these provisions is clear. Conversely, the optional grounds are subject to the discretion of the MS, as the FD EAW uses the term 'may' concerning their transposition.[15] As Gworys[16] explains, due to the principle of mutual recognition, the arrest warrant must be executed, except in the exceptional cases provided for in Articles 3, 4, and 4a. This paper addresses the challenges surrounding the implementation of the optional grounds, particularly as these issues have arisen in the national courts of MS when adjudicating requests for surrender based on the issuance of an arrest warrant.

2. THE PRINCIPLE OF *NE BIS IN IDEM* AND ITS APPLICATION IN EAW PROCEDURES

As we will discuss further in this paper, the FD EAW applies the narrow interpretation of the principle of *ne bis in idem* exclusively within the territorial scope of the EU, where it constitutes a mandatory ground for non-execution. Conversely, the FD EAW allows for the application of the broader interpretation of the principle, as well as its scope, to judicial decisions made outside the EU, which serve as optional grounds. To fully understand the essence of this principle, we must first provide a brief overview of its origin and narrow interpretation.

2.1. The Principle of *Ne Bis in Idem*: A Jurisprudential Examination of Its Narrow Interpretation by the European Court of Justice

In its narrow interpretation, the principle of *ne bis in idem* under Article 3 (2) of the FD EAW stipulates that the executing state must refuse to surrender the

[14] Case C-105/03, Maria Pupino, Judgment of 16 June 2005, paras. 33-49.
[15] Case C-42/11, *Opinion of Advocate General Mengozzi — João Pedro Lopes Da Silva Jorge*, par. 31.
[16] Gworys, G., *Grounds for Optional Non-Execution of the European Arrest Warrant, p. Their Nature and Issues*, Journal of Criminal Law and Penal Studies, Vol. 27, Issue 4, 2023, p. 39-60.

requested person if they have already been definitively judged by an MS for the same criminal conduct, provided that any sentence imposed has been served, is currently being served, or can no longer be enforced under the law of the MS that issued the sentence. The principle of double jeopardy, which prevents an individual from being punished twice for the same act, is rooted in British law. Over time, this provision has evolved and no longer fully reflects its original content. British colonization played a key role in advancing the prohibition of double jeopardy worldwide. In the United States, this protection is enshrined in the U.S. Constitution; specifically, the Fifth Amendment of the Constitution states that no person shall be subject to trial twice for the same offense. The purpose of this provision was explained by the U.S. Supreme Court in the case Green v. United States,[17] where the Court emphasized that the underlying principle, deeply embedded in the Anglo-American legal system, is that the state, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for the same criminal act, subjecting him to stress, expense, and ordeal, and forcing him to live in a state of continuous anxiety and insecurity, while also increasing the possibility that, even if innocent, he may be found guilty.[18]

The principle of *ne bis in idem* prohibits further criminal prosecution or trial for the same criminal act against the same person if a final judgment on the merits has already been rendered.[19] This principle is inherently linked to the principle of *res judicata*, which ensures that an individual who has 'paid their debt to society' should not face further prosecution or trial for the same act, as any such action would violate the finality of the judgment.[20] At the European level, this principle has been codified in legal instruments for the protection of human rights[21], that have at their foundation the principle of legal certainty.[22] In the context of applying the principle of *ne bis in idem* at the European level, discrepancies have arisen regarding the interpretation of the terms 'same act' and 'final judgment'. In the Mantello case,[23] the European Court of Justice (hereinafter: ECJ) clarified in its

[17] Green v. United States, 355 U.S. 184 (1957).
[18] Klimek, L., *European Arrest Warrant*, Cham, p. Springer International Publishing, 2015, p. 152.
[19] Bravo, T., *Ne Bis in Idem as a Defence Right and Procedural Safeguard in the EU, New Journal of European Criminal Law,* 2 2011, p. 393–410.
[20] Case C-261/09, *Judgment of the Court of Justice of 16 November 2010 — Gaetano Mantello*, paras. 26 and 27.
[21] Verveale, J., *The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights*, *Utrecht Law Review*, 1, 2005, p. 100–120.
[22] Lelieur, J., *Transnationalising Ne Bis in Idem, p. How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty, Utrecht Law Review*, 9, 2013, p. 198–215.
[23] Case C-261/09, *Judgment of the Court of Justice of 16 November 2010 — Gaetano Mantello*, paras. 26 and 27.

interpretation that the term 'same act' is an autonomous concept under EU law, as outlined in Article 3(1) of the FD EAW. As further specified in Article 54 of the Schengen Convention,[24] the term 'same act' refers to the nature and connection of the facts, which is to be regarded as a set of circumstances that are inextricably linked in time and space, regardless of the legal classification by each MS.[25] As for the concept 'final judgment', the ECJ stated that it is for the issuing state to determine whether there is another final judgment for the same facts that prevents the execution of the arrest warrant.[26]

Another issue of debate before the national courts of MS, and subsequently addressed by the ECJ, concerns the relationship between an amnesty granted in the issuing state for the criminal facts subject to the request and the potential revocation of such an amnesty, concerning the principle of *ne bis in idem*. In the case of AB and Others,[27] the ECJ reaffirmed that the principle of *ne bis in idem* only applies when a person has been 'convicted' or 'acquitted' for the same criminal act, meaning the matter has been adjudicated on the merits.[28] The ECJ emphasized that, in the case at hand, the amnesty initially granted for the criminal act had prevented further criminal prosecution for a certain period, however, the revocation of this amnesty allowed for the resumption of criminal prosecution without violating the principle of *ne bis in idem*, as the amnesty did not constitute a final judgment on the merits.[29]

As argued above, the differing interpretations of legal-penal concepts among MS have led to uncertainties in the application of grounds for non-execution under the FD EAW. Another case in which the ECJ interpreted the meaning of the terms forming the mandatory grounds due to a violation of the principle of *ne bis in idem* involved the partial overlap of a criminal act in the territories of two MS. In the case of Juan,[30] the ECJ ruled that, when determining whether the criminal act is the same, the executing state must not rely on its national definition, reinforcing that the concept of the 'same act' is an autonomous concept under EU law.[31] The ECJ further clarified that a partial overlap of the criminal act between the

[24] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders, 14 June 1985, Official Journal of the European Union, L 239, 22 September 2000.
[25] Case C-261/09, *Mantello*, Judgment of 16 November 2010, paras. 39 and 40.
[26] Ibid., paras. 49 dhe 50.
[27] Case C-203/20, AB and Others (Révocation d'une amnistie), Judgment of 16 December 2021.
[28] Ibid., par. 57.
[29] Ibid., par. 60.
[30] Case C-164/22, Juan, Judgment of 21 September 2023.
[31] Ibid., paras. 29-30.

jurisdictions of the issuing state and the executing state does not constitute a ground for non-execution, as the facts must be inextricably linked in time and space, irrespective of whether the act is classified as a continuing crime under the law of the executing state.[32]

2.2. The Principle of *Ne Bis in Idem*: A Jurisprudential Examination of Its Broad Interpretation by the ECJ

In paragraphs 2, 3, and 5 of Article 4 of the FD EAW, various legal situations are addressed that broaden the scope of the *ne bis in idem* principle. Article 4 (2) of the FD EAW stipulates that the executing judicial authority may refuse surrender if, for the same facts underlying the arrest warrant, the executing state is prosecuting the requested person. Furthermore, Article 4 (3) of the FD EAW states that surrender may be refused if, for the same facts on which the arrest warrant is based, either the executing state or another MS has decided not to prosecute or has discontinued the prosecution, thereby preventing further legal action. Additionally, Article 4 (5) of the FD EAW extends the application of the *ne bis in idem* principle beyond the EU territory. Specifically, this provision allows the executing judicial authority to refuse surrender if a third country has issued a final judgment on the same facts for the requested person, provided that, if a sentence was imposed, it has been served, is currently being served, or can no longer be enforced under the law of the sentencing country.

The interpretation of Article 4 (3) of the FD EAW has sparked debate due to its somewhat ambiguous wording.[33] In the case of AY (Mandat d'arrêt – Témoin),[34] the ECJ addressed the question of whether, under Article 4 (3) of the FD EAW, a decision to discontinue proceedings (rather than a judgment on the merits), in which the requested person was only a witness and not an accused party, constitutes an obstacle to the execution of the EAW. In its interpretation, the ECJ clarified that the *ne bis in idem* principle protects the requested person only if the prior proceedings were specifically initiated against them[35] and the fact that they were questioned as a witness in those proceedings does not engage this principle.[36] However, pursuant to Article 4 (3) of the FD EAW, it can be argued that the European legislator intended to further extend the protection provided by the principle of *ne bis in idem*, i.e., to prevent the execution of an arrest warrant even in cases where the decision to discontinue proceedings previously issued by an

[32] Ibid., par. 33.
[33] Author's note as we will discuss below.
[34] Case C-268/17, AY (Mandat d'arrêt – Témoin), Judgment of 25 July 2018.
[35] Ibid., par. 43.
[36] Ibid., par. 44.

MS was made for the criminal act as a whole and not exclusively for the requested person in particular. Nevertheless, the ECJ's interpretation emphasized that the core purpose of this principle is related to legal certainty. Therefore, the discontinuation of criminal proceedings in which the requested person was merely a witness does not create a legitimate expectation of protection, as no charges were ever brought against them. In other words, the requested person, due to their procedural status as a witness, was never subjected to the stress or burden of criminal proceedings.

In the case of PPU, X (Mandat d'arrêt européen - Ne bis in idem),[37] the ECJ was tasked with determining whether MS, has discretion, during the transposition of Article 4 (5) of the FD EAW, to assess the appropriateness of surrendering a person covered by this provision. Additionally, the referring court sought clarification on whether the condition regarding the execution of the sentence under Article 4(5) of the FD EAW is satisfied when the requested individual has served part of their sentence in a third country, while the remaining portion of the sentence has been waived by a non-judicial authority of that country as part of a general amnesty that also applies to individuals convicted of serious crimes, irrespective of any objective criminal policy considerations.

In its ruling, the ECJ affirmed that the judicial authority of the executing state is vested with the discretion and retains the authority to assess, on a case-by-case basis, whether the refusal to surrender the requested person would undermine the legitimate interests of MS in preventing crime within the area of freedom, security, and justice.[38] Regarding the interpretation of the condition for the execution of a sentence, the ECJ clarified that, as stipulated in Article 4 (5) of the FD EAW, all amnesty measures must be recognized, regardless of the severity of the offenses involved or the authority granting the amnesty. The ECJ further emphasized that the principle of legal certainty must be weighed against the need to prevent impunity.[39] In conclusion, the ECJ suggests that judicial authorities in the executing state must carefully balance these considerations when determining whether to surrender a requested person.[40]

This decision introduces a heightened level of uncertainty for judicial authorities tasked with adjudicating similar cases. While the ECJ has, in principle, affirmed the broad discretion of MS in transposing the optional grounds for non-surrender, permitting a case-by-case evaluation, it has also refrained from providing explicit

[37] Case C-665/20 PPU, X (Mandat d'arrêt européen - Ne bis in idem), Judgment of 29 April 2021.
[38] Ibid., par. 60.
[39] Ibid., par. 86-87.
[40] Ibid., par. 101-103.

criteria to guide national courts in striking the delicate balance between preventing impunity and upholding legal certainty. The case at hand involves a final judgment issued by the state of Iran, which could lead to a more cautious or distrustful approach, given the divergent policies between the EU and Iran. However, this article also applies to decisions made by authorities from established democracies or non-MS that are undergoing EU accession procedures. Consequently, the ECJ's interpretation of Article 4 (5) of the FD EAW appears to grant MS significant discretion, contingent upon the particular non-MS that has determined the guilt, innocence, and sentencing of the requested individual.

3. DUAL CRIMINALITY, THE PRINCIPLE OF TERRITORIALITY, AND THE STATUTE OF LIMITATIONS AS OPTIONAL GROUNDS

3.1. Dual Criminality

As previously discussed, the FD EAW has significantly reshaped the legal framework governing the mutual surrender of individuals sought by criminal justice authorities within the EU MS. Notably, it has removed the decision-making role of political institutions from the process. Additionally, it has provided that the principle of dual criminality will only apply to criminal acts not explicitly listed in Article 2 (2) of the FD EAW.[41] Regarding the crimes enumerated in this article, the executing state must ensure that, under the law of the issuing state, these acts are punishable by a minimum of three years' imprisonment. Article 4 (1) of the FD EAW further stipulates that, without prejudice to Article 2 (2), which outlines the list of crimes exempt from the dual criminality test, the executing state may

[41] List, p. participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

refuse surrender if the criminal act underlying the arrest warrant does not constitute a criminal offense under its legislation. Moreover, as stipulated by the ECE, for crimes related to taxation, fiscal obligations, customs, or currency exchange, the execution of the arrest warrant cannot be refused on the grounds that the laws of the executing state do not impose the same type of tax or contain identical regulations concerning taxes, fiscal obligations, customs, or currency exchange as those of the issuing state.

Given that dual criminality requires separate consideration, this paper focuses solely on a general overview. When addressing the phrase '*does not constitute a criminal act under the law of the executing state*', it is essential to understand that this encompasses not only acts or omissions (*actus rea*) defined as criminal under the criminal law of the executing state but also an analysis of the subjective elements of the act (*mens rea*) and the circumstances that may exclude criminal liability. In other words, an act that has resulted in criminal liability in the issuing state must, in principle, give rise to criminal liability in the executing state, provided that all the requisite elements of criminal liability are present. Hypothetically, the criminal facts must be construed as if they had occurred within the jurisdiction of the executing state, and it is from this perspective that the question of whether the dual criminality principle is satisfied should be answered. In this regard, the ECJ in the case of Grundza[42] stated that, in assessing the condition of dual criminality, the competent authority of the executing state must verify whether the factual elements underlying the alleged criminal act, as described by the competent authority of the issuing state, would be subject to criminal punishment in the executing state if those facts had occurred there. In evaluating dual criminality, the competent authority of the executing state must not focus on whether a protected interest of the issuing state has been violated but instead must examine whether had the act been committed within the territory of the executing state, it would have resulted in the violation of a similar interest protected by that state's national legislation.[43]

3.2. The Principle of Territoriality

To safeguard the principle of territoriality, Article 4 (7) of the FD EAW stipulates that the executing state may refuse the surrender of a requested person if the act underlying the arrest warrant is considered, under its law, to have been committed wholly or partly within its territory, or in any other place deemed as such by its national legislation. Furthermore, the article provides that the executing state may

[42] Case C-289/15, Grundza, Judgment of 11 January 2017.
[43] Ibid., par. 49.

refuse surrender if the act on which the arrest warrant is based was committed outside the territory of the issuing state and if the law of the issuing state does not permit criminal prosecution for analogous situations.

In practice, challenges have emerged in cases where the issuing state has issued an arrest warrant for the execution of a criminal judgment that recognizes and enforces a judgment rendered by a third country. In the case of Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)[44], the ECJ unequivocally ruled that, for the purposes of Article 4 (7) of FD EAW, the territorial analysis must be carried out to the state that has adjudicated the case on the merits, rather than the issuing state that has merely recognized and converted the judgment of another state.

3.3. The Statute of Limitations and its Application as an Optional Ground

The statute of limitations is inherently tied to the principle of legal certainty, which dictates that the state, in the abstract sense, must enforce criminal judgments within a specified time frame[45], depending on the gravity of the offense. Consequently, the FD EAW retains the statute of limitations as one of the optional grounds for refusing the execution of the arrest warrant. However, unlike the original provision in the ECE[46], the expiration of the statute of limitations under the law of the executing state constitutes an optional ground for refusal only if the criminal conduct in question was simultaneously subject to the criminal jurisdiction of both the executing and the issuing state. In other words, this ground for refusal is applicable only in cases where the criminal act falls within the jurisdiction of both the issuing and executing states. This extension of strictly territorial jurisdiction arises as a consequence of the application of extraterritorial jurisdiction (*active personality, passive personality, universal jurisdiction*, etc.).

[44] Case C-488/19, Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE), Judgment of 17 March 2021.
[45] Brilmayer, L. et al., *Conflicts of Law (Cases and Law): Traditional Approaches to Choice of Law* (New York: Wolters Kluwer, 2019, p. 142.
[46] Article 10 of the European Convention on Extradition, prior to the 2012 amendments, which have almost the same provisions as the FD EAW, provided that extradition should be refused if the statute of limitations had expired for either the requesting or the requested party, regardless of whether or not the requested state had jurisdiction to prosecute the criminal act that was the subject of the request.

4. NATIONALITY, RESIDENCE, OR STAY AS OPTIONAL GROUNDS

Under the ECE[47], the requested state is not obliged to extradite its nationals. With this provision of the ECE, the contracting parties (states) of the convention continue to retain their sovereign rights regarding their nationals. This provision reflects the contracting parties' retention of sovereign rights regarding their nationals. However, ECE does allow for the possibility that states may enter into special agreements with each other, permitting derogation from this rule and facilitating the mutual extradition of their nationals. Meanwhile, Article 4 (6) of the FD EAW provides that the judicial authority of the executing state may refuse the execution of the arrest warrant if the latter has been issued to execute a final judgment, or a pre-trial detention order, against a person who is staying in its territory, or who is a national or resident of that state. In principle, the objective of this provision is to create and increase the possibilities of reintegration and rehabilitation of the requested person by the criminal justice system.[48] Thus, by not surrendering the requested person to the issuing state with which he has no economic, family, or social ties, but by executing the sentence imposed on him in the territory of the executing state, where he is staying, has residence, or nationality, it becomes possible to increase the chances of reintegration into society. However, the terms used in this provision have caused some difficulty for the judicial authorities of executing states in terms of their definition. Drawing on the existing jurisprudence of the ECJ, the following questions have been subjected to debate:

i. What do the terms ‘resident’ and ‘staying’ mean?
ii. To define the concepts ‘resident’ and ‘staying’, can the application of Article 4 (6) of the FD EAW be restricted to individuals holding a residence permit or those who have resided for more than five years in the executing state?
iii. Can the executing state, in transposing Article 4 (6) of the FD EAW into its domestic law, restrict its application to nationals of its state, excluding nationals of other MS from a case-by-case assessment regarding reintegration?
iv. If the executing state determines that the requested person meets the conditions of Article 4(6) of the FD EAW, can it impose additional conditions, such as requiring a formal request from the issuing state based on a convention prior to recognizing a foreign criminal judgment?
v. Does the opinion of the Minister of Justice bind the executing state?

[47] Article 6 of the European Convention on Extradition.
[48] Case C-700/21 O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers), Judgment of 6 June 2023, par. 59.

vi. If the executing state finds that the requested person qualifies under Article 4 (6) (i.e., is a national, resident, or staying in its territory), but the imposed prison sentence cannot be converted following its national law (e.g., the law only provides for a fine for the offense), can the executing state refuse to recognize the judgment of the issuing state?

vii. In transposing Article 4 (6) of the FD EAW, can the executing state exclude nationals of non-MS from the case-by-case reintegration assessment, while applying it only to nationals of MS?

In the case of Kozłowski,[49] the ECJ clarifies that the terms 'resident' and 'staying' should not be interpreted independently by each MS. These concepts are autonomous and must be interpreted uniformly by all the MS courts of the Union.[50] According to the ECJ, a person is a resident of an MS when he has established his actual residence in that state and is considered to be staying in that state when he has established ties with that state that are comparable to residence. To assess whether the person has created sufficient ties to establish that he is staying in an MS, the court of the executing state must make an overall assessment of the objective factors characterizing his legal situation. Such circumstances include: the duration, nature, and grounds of the stay, along with their familial and economic connections to the executing state.[51]

In the case of Wolzenburg,[52] the ECJ clearly stated that MS, during the transposition of Article 4 (6) of the FD EAW, have the right to provide in their domestic law that for persons with the nationality of another MS (i.e., not their nationals), to be considered as staying in their territory, they must have a lawful stay for a continuous period of at least 5 years. According to the ECJ, this criterion follows a legitimate objective related precisely to the possibilities of reintegration of the requested person into society.[53] On the other hand, the ECJ clarified that the imposition of administrative formalities, i.e., the possession of a residence permit of indefinite duration, as a condition to be considered as staying in that MS, is incompatible with the purpose of Article 4 (6) of the FD EAW, as the residence permit has only declarative force and not probative force of the fact whether the person is staying *de facto* or not.[54]

[49] Case C-66/08, Kozłowski, Judgment of 17 July 2008.
[50] Ibid., par. 41-43.
[51] Ibid., par. 49.
[52] Case C-123/08, Wolzenburg, Judgment of 6 October 2009.
[53] Ibid., par. 67-73.
[54] Case C-123/08, Wolzenburg, Judgment of 6 October 2009, par. 50-51.

Returning once again to the debate on the definition of the concepts 'resident' and 'staying', the ECJ in the case of Lopes da Silva Jorge[55] clarified once more that these concepts are autonomous and that MS has limited discretion when applying Article 4 (6) of the FD EAW. That said, MS must be guided by the purpose of this article, i.e., they must assess the possibility of reintegration of the requested person into society, and therefore, the national legislation cannot automatically exclude nationals of other MS from the scope of this article.[56] This decision seems to create an obligation for MS, as it does not leave the possibility to transpose or not this optional condition into their national legislation. Thus, from an optional condition, the ECJ creates a 'new' mandatory condition. The ECJ justifies this reasoning by relying on Article 18 of the *Treaty on the Functioning of the European Union (*hereinafter: TFEU), which affirms the principle of non-discrimination on the grounds of nationality. This approach of the ECJ is also supported by the case of Pupino,[57] where it is clarified that the courts of MS must ensure the effectiveness of the entire body of EU law by interpreting national law in compliance with EU law, with the only limitation that the general principles of criminal law are not violated and the interpretation does not go *contra legem*.

In the case of Popławski I,[58] the ECJ reaffirmed the principle of *aut dedere aut judicare*, which originated with the institution of extradition. The essence of the ECJ's reasoning, in this case, relates to the obligation of the executing state to enforce the sentence imposed by the issuing state if it finds that the requested person falls under the grounds of Article 4 (6) of the FD EAW.[59] Thus, the executing state must not merely express 'will' to enforce the judgment but must do so effectively, without justifying itself by the fact that, according to its domestic law, this procedure must be preceded by the existence of a special convention. After the referred case was returned for adjudication to the referring court, the latter encountered a disagreement with the Minister of Justice. This fact forced the referring court to refer the case back to the ECJ. In the case of Popławski II[60], the ECJ particularly emphasized that the Minister of Justice is not a judicial authority, and therefore, his opinion cannot constitute an obstacle[61] to how the national court must interpret the entire body of national legislation concerning EU law. Also, the ECJ reiterated that the correct interpretation of the law by the referring court in the specific case must follow the objective of the FD EAW, which requires that, if the executing state refuses to surrender the requested person, it must ensure that the

[55] Case C-42/11, Lopes Da Silva Jorge, Judgment of 5 September 2012.
[56] Ibid., par. 33.
[57] Case C-105/03, Maria Pupino, Judgment of 16 June 2005.
[58] Case C-579/15, Popławski, Judgment of 29 June 2017 (Popławski I).
[59] Ibid., par. 43.
[60] Case C-573/17, Popławski, Judgment of 24 June 2019 (Popławski II).
[61] Ibid., par. 95-98.

sentence imposed in the issuing state will be effectively enforced in the executing state.[62]

Within the meaning of the assessed jurisprudence, we can conclude that the interpretation of Article 4 (6) of the FD EAW has been exhausted. However, in fact, in the case of Sut,[63] the ECJ was presented with an even more complicated question than the previous cases. Nevertheless, in its reasoning on this case, the ECJ clarified that the fact that the prison sentence imposed in the issuing state can only be converted into a fine under the law of the executing state is not a determining factor for the application of Article 4(6) of the FD EAW. Therefore, it is for the referring court to assess whether it is possible to enforce the judgment imposed by the court of the issuing state.[64] The latest case so far adjudicated by the ECJ and interpreting Article 4 (6) of the FD EAW relates to the relationship that nationals of third countries have with this provision. Specifically, in the case of O.G,[65] the ECJ once again emphasized the purpose of this article, i.e., the rehabilitative function and the reintegration of the requested person into society. According to the ECJ, MS cannot transpose Article 4 (6) of the FD EAW into their national legislation by automatically and excluding from the application of the test whether the national of a non-MS has established sufficient ties with the executing state. In such a case, the executing state must treat the nationals of the non-MS following the principle of equality under Article 20 of the Charter of Fundamental Rights of the EU.[66] This means that the executing state must take into account the level of integration of the person in the executing state by making an overall assessment of their family, linguistic, cultural, social, and economic ties with the executing state.[67]

In light of the foregoing jurisprudence, it can be concluded that in nearly all the analyzed cases, the ECJ affirms that Article 4(6) of the FD EAW aims to ensure the best possible reintegration and rehabilitation of convicted individuals. Furthermore, if the executing state refuses to surrender the requested person to the issuing state, it must ensure that the imposed sentence is enforced within its territory, leaving no room for impunity. It is also worth noting that the ECJ has interpreted the FD EAW by taking into account the entire body of EU law, in particular by referring to the principle of non-discrimination and equality,

[62] Ibid., par. 107.
[63] Case C-514/17, Sut, Judgment of 13 December 2018.
[64] Ibid., par. 49.
[65] Case C-700/21 O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers), Judgment of 6 June 2023.
[66] Charter of Fundamental Rights of the European Union (2000/C 364/01).
[67] Ibid., par. 51.

provided respectively by Article 18 of the TFEU[68] and Article 20 of the Charter of Fundamental Rights of the EU.[69]

5. CONCLUSION

The Framework Decision of the European Arrest Warrant has provided for a new legal regime regarding the procedures for the mutual surrender of persons sought by the criminal justice systems of Member States. In essence, through the creation of the European Arrest Warrant instrument, the Member States of the European Union aim to introduce a deeper mutual trust among themselves. On the other hand, although this mechanism has made it possible to completely abolish the power of political authorities, it can be said that the Member States have retained a significant part of their sovereignty through the provisions regarding mandatory grounds, optional grounds, and guarantees. The optional grounds provided by the Framework Decision of the European Arrest Warrant are almost the same as the analogous grounds in the classical extradition instrument. However, as we have discussed in detail in this paper, Member States have full discretion regarding their transposition. This means more flexibility and more new avenues of cooperation, which naturally depend on the level of trust among them.

As we explained in the section on the '*ne bis in idem'* principle, through the decisions of the European Court of Justice, the phrase 'same act' has now been defined as an autonomous European Union's law concept, while the notion of 'final judgment' remains to be assessed at the discretion of the issuing state. Regarding the *res judicata* force of a judicial decision rendered by a non-member State, the courts of the Member States have the discretion to balance the need to combat impunity within the area of freedom, security, and justice with the principle of legal certainty. The most debated optional condition throughout the paper relates to the relationship between 'resident' or 'staying' and the possibilities of rehabilitation of the requested person to be surrendered. The European Court of Justice has set clear limits on the discretion of MS regarding the interpretation of this condition. In essence, the European Court of Justice has emphasized in almost all its decisions that the purpose of this optional condition is to create the possibilities for the requested person to be rehabilitated and reintegrated into society. The European Court of Justice interprets this optional condition by referring to the principle of non-discrimination and equality before

[68] Article 18 (ex Article 12 TEC) - Within the scope of application of the Treaties and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
[69] Article 20 (Equality before the law) - Everyone is equal before the law.

the law, i.e., in the entirety of the European Union's law. This means that all European Union nationals must be treated equally, even including nationals of third countries who have established sufficient family, linguistic, cultural, social, and economic ties with the executing state.

Finally, the new legal regime created through the Framework Decision of the European Arrest Warrant is being consolidated day by day, although by analyzing the decisions and interpretations of the European Court of Justice as a whole, it is evident that there is uncertainty in the understanding of how the optional grounds can be transposed into the national legislation of Member States.

REFERENCES

BOOKS AND ARTICLES

1. Barjamemaj, L.; Karsai, K.; Muçollari, O., *Safeguards and Guarantees in European Arrest Warrant Procedures: Legal and Comparative Analysis*, *Balkans Legal, Economic and Social Studies (BLESS)* 1, no. 1, 2024, p. 85–99. https://www.americanaejournal.hu/index.php/bless/article/view/46154.
2. Bravo, T., *Ne Bis in Idem as a Defence Right and Procedural Safeguard in the EU*, *New Journal of European Criminal Law,* 2, 2011, p. 393–410.
3. Brilmayer, L.; Goldsmith, J.; O'Hara O'Connor, E.; dhe Carlos Vázquez, *Conflicts of Law (Cases and Law): Traditional Approaches to Choice of Law*, New York: Wolters Kluwer, 2019, p. 142.
4. Gworys, G., *Grounds for Optional Non-Execution of the European Arrest Warrant: Their Nature and Issues*, *Journal of Criminal Law and Penal Studies*, Vol. 27, Issue 4, 2023, p. 39–60.
5. Klimek, L., *European Arrest Warrant,* Cham: Springer International Publishing, 2015, p. 152.
6. Łazowski, A.; Nash, S., "Detention." In *The European Arrest Warrant in Practice*, edited by Keijzer, N.; Van Sliedregt, E., The Hague: T. M. C. Asser Press, (2009): 33–50.
7. Lelieur, J., *Transnationalising Ne Bis in Idem: How the Rule of Ne Bis in Idem Reveals the Principle of Personal Legal Certainty, Utrecht Law Review,* 9, 2013, p. 198–215.
8. Mitsilegas, V., *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe,* Oxford: Hart Publishing, 2016, p. 210-216.
9. Peers, S., *EU Justice and Home Affairs Law,* 4th ed. Oxford: Oxford University Press, 2016, p. 60-66.

10. Van Sliedregt, E., *The European Arrest Warrant: Between Trust, Democracy and the Rule of Law. Introduction,* European Constitutional Law Review, 3, 2007, p. 244–252.
11. Vernimmen-Van Tiggelen, G.; Surano, L., *The Future of Mutual Recognition in Criminal Matters in the European Union,* Brussels: Editions de l'Université de Bruxelles, 2009, p. 31-40.
12. Verveale, J., *The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights*, Utrecht Law Review, 1 2005, p. 100–120.

LEGAL ACTS

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, as amended by Framework Decision 2009/299/JHA, Official Journal of the European Union L 81, 27 March 2009, p. 24–36.
2. Charter of Fundamental Rights of the European Union (2000/C 364/01), Official Journal of the European Communities C 364, 18 December 2000, p. 1–22.
3. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders*,* Official Journal of the European Union L 239, 22 September 2000, p. 19–62.
4. European Convention on Extradition (ETS No. 024), 1957. Council of Europe Treaty Series.

COURT DECISIONS

1. Case C-42/11, João Pedro Lopes Da Silva Jorge, Judgment of 5 September 2012, Official Journal of the European Union C 206, 6 July 2012, 1–2.
2. Case C-66/08, Kozłowski, Judgment of 17 July 2008, Official Journal of the European Union C 212, 19 August 2008, 1–2.
3. Case C-105/03, Maria Pupino, Judgment of 16 June 2005. Official Journal of the European Union C 215, 12 July 2005, 1–2.
4. Case C-123/08, Wolzenburg, Judgment of 6 October 2009, Official Journal of the European Union C 306, 9 December 2009, 1–2.
5. Case C-192/12 PPU, Melvin West, Judgment of 28 June 2012, Official Journal of the European Union C 191, 18 July 2012, 1–2.

6. Case C-203/20, AB and Others (Révocation d'une amnistie), Judgment of 16 December 2021. Official Journal of the European Union C 28, 29 January 2022, 1–3.
7. Case C-261/09, Gaetano Mantello, Judgment of 16 November 2010, Official Journal of the European Union C 311, 6 December 2010, 1–2.
8. Case C-268/17, AY (Mandat d'arrêt – Témoin), Judgment of 25 July 2018, Official Journal of the European Union C 323, 20 September 2018, 1–2.
9. Case C-289/15, Grundza, Judgment of 11 January 2017, Official Journal of the European Union C 132, 18 April 2017, 1–2.
10. Case C-306/09*,* I.B., Judgment of 21 October 2010. Official Journal of the European Union C 332, 30 November 2010, 1–2.
11. Case C-488/19, Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE), Judgment of 17 March 2021.
12. Case C-514/17, Sut, Judgment of 13 December 2018, Official Journal of the European Union C 44, 14 February 2019, 1–2.
13. Case C-573/17, Popławski II, Judgment of 24 June 2019, Official Journal of the European Union C 312, 18 October 2019, 1–2.
14. Case C-579/15, Popławski I, Judgment of 29 June 2017, Official Journal of the European Union C 235, 21 July 2017, 1–2.
15. Case C-588/19, Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE*)*, Judgment of 17 March 2021, Official Journal of the European Union C 169, 18 May 2021, 1–2.
16. Case C-665/20 PPU, X (Mandat d'arrêt européen - Ne bis in idem), Judgment of 29 April 2021, Official Journal of the European Union C 267, 17 June 2021, 1–2.
17. Case C-700/21, O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers*)*, Judgment of 6 June 2023, Official Journal of the European Union C 236, 12 July 2023, 1–2.
18. Case C-164/22, Juan, Judgment of 21 September 2023, Official Journal of the European Union C 220, 15 October 2023, 1–2.
19. Green v. United States, 355 U.S. 184 (1957).

UDK: 343.19 : 343.24 (497.5)
341.49 (497.5)
Review paper

Andrej Bozhinovski, PhD student
Faculty of Law, University of Zagreb, Croatia
E-mail: abozinovski1@pravo.hr
ORCID ID: 0000-0002-3224-7310

PROTECTION OF THE RIGHTS OF WRONGFULLY CONVICTED PERSONS IN CROATIA

ABSTRACT

The protection of the rights of wrongfully convicted individuals represents a critical concern within the Croatian justice system, demanding robust legal safeguards, effective remedies, and institutional accountability. Wrongful convictions not only undermine public trust in judicial institutions but also cause significant harm to the affected individuals, including psychological distress, societal stigma, and loss of freedoms. This paper explores the Croatian legal framework and practices concerning wrongful convictions, focusing on mechanisms for compensation, the reopening of procedures, and the protection of defense rights. The paper will review Croatia's approach to compensating wrongfully convicted persons, analyzing the adequacy of legal provisions under the Croatian Act on Compensation for Damage Caused by a Wrongful Conviction and assessing the procedural barriers to obtaining fair compensation. It will also examine the reopening of procedures as a remedy for wrongful convictions, with particular attention to the application of new evidence, developments in forensic methods, and compliance with European Court of Human Rights standards. Defense rights, including access to effective legal representation, equality of arms, and the presumption of innocence, will be evaluated as preventative measures against miscarriages of justice. In addition to reviewing existing practices, this paper will discuss modern methods for identifying and rectifying wrongful convictions, such as advanced forensic techniques, independent review mechanisms, and multidisciplinary cooperation between legal, forensic, and advocacy experts. The central hypothesis of the study is that while Croatia has made strides in addressing wrongful convictions, significant gaps remain in the implementation of international standards, accessibility of remedies, and systemic reforms to prevent future injustices. This paper seeks to contribute to the discourse on wrongful convictions in Croatia by proposing evidence-based recommendations for legislative and institutional improvements, ensuring a justice system that prioritizes the protection of individual rights and fosters public confidence in its integrity.

***Keywords**: wrongful convictions, innocence project Croatia, defense rights, compensation.*

1. INTRODUCTION

We often hear about it in the news or see it dramatized in Netflix shows: a cold case is reopened, revealing that an innocent man has spent most of his adult life in prison. Now, thanks to newly discovered evidence often DNA he is finally

exonerated. This breakthrough is usually the result of a dedicated defense attorney, often working with an Innocence Project, who uncovers the new evidence and successfully petitions the court to reopen the case and overturn the original conviction. In 1990 DNA technology changed the discussion. People began to be released from prison based on scientific proof of innocence, which is more definitive. Simply put wrongful convictions or miscarriages of justice represent one of the most awful failures of any criminal justice system. This happens when an innocent person is convicted of a crime they did not commit, the consequences are devastating both for the individual and for society. These people are what Brooks called specialized types of victims endure the loss of liberty, reputational damage, psychological trauma, and disruption of family and social ties.[1] At the same time, the real perpetrators remain free, undermining public safety and eroding trust in judicial institutions. This phenomenon is not new. Kilias argues that even the Romans were aware of these risks to the criminal justice systems, as evident in the proverbial warning of an legal advisor to the emperor Traianus[2] that it is a preferable to wrongly acquit a guilty defendant than to convict an innocent man.[3] Protecting the rights of wrongfully convicted individuals is a complex, multidisciplinary issue. It involves not only ensuring access to legal remedies and fair compensation, but also providing opportunities to reopen cases based on new evidence and offering long-term support for reintegration into society. Effective protection also requires the continuous strengthening of procedural safeguards such as the right to competent legal defense, equality of arms, access to exculpatory evidence, and the presumption of innocence to help prevent such miscarriages of justice from occurring in the first place. Croatia, like many other European countries, has made notable efforts to incorporate the rights of wrongfully convicted persons into its legal framework. Although still in its early stages, the Croatian Innocence Project has already identified several weaknesses particularly in the legal handling of DNA evidence, including how it is collected, stored, and used in court proceedings. Field research by the project also highlights that the criteria for reopening criminal cases remain especially strict. This is particularly evident in the assessment of *novum*, or new evidence, where Croatia aligns with the restrictive standards seen in many European jurisdictions. Despite these efforts, significant challenges persist. Obstacles to obtaining compensation, difficulties in identifying and acknowledging wrongful convictions, rigid legal and judicial approaches to reopening cases, and a lack of institutional support for reintegration all indicate that the current system does not fully meet the needs of those who have been unjustly punished.

[1] Brooks, J., *You might go to prison, even though you're innocent*, University of California Press, Berkeley 2023, pp. 24–25.

[2] The identity of the advisor is unknown. However, the Emperor's instruction to a local magistrate reads as follows *Sed nec de suspicionibus debere aliquem damnari* (None should be convicted based on a suspicion alone…. Because it is preferable leaving unpunished a guilty defendant over punishing an innocent man. Quation taken from Nogrady, A., *Römisches Strafrecht nach Ulpian*, 2011, p. 75.

[3] See Killias, M., *Wrongful convictions as a result of political pressure*, in: Luparia, L. (ed.), *Understanding Wrongful Conviction. The Protection of the Innocent across Europe and America*, Wolters Kluwer, Milan 2015, pp. 57–80.

This paper is a great opportunity to addresses the Croatian legal and institutional approach to wrongful convictions, with particular focus on the mechanisms available for compensation, reopening of criminal proceedings, and the prevention of miscarriages of justice through strong procedural protections, and present them to the academic public. Here we will examine Croatia's compliance with international human rights standards, especially those set by the European Court of Human Rights in regarding handling of DNA evidence, and further identify key areas where reform is both necessary and urgent. Ultimately, the protection of the rights of wrongfully convicted persons is not only a matter of justice for individualism, it is a measure of the integrity and credibility of the entire justice system. Concerning the methods, this paper employes combination of descriptive, normative, comparative, analytical, and statistical methods. The descriptive method outlines Croatia's legal and institutional framework. The normative method assesses this framework against international standards. The comparative method contrasts Croatian practices with those in Europe and the U.S. The analytical method examines legal provisions, case law, and practical challenges, while the statistical method supports the analysis with available data on wrongful convictions and compensation. The first part of the paper will introduce the issue of wrongful convictions what they are, how they happen, and how they compare between Europe and the United States. It will also look at the main causes of wrongful convictions and the role of Innocence Projects in identifying and correcting these mistakes. The second part will focus on the Croatian Innocence Project what it does and what types of in the justice system it has uncovered so far. The third part will explore the legal rights of wrongfully convicted people in Croatia. This includes their right to a fair defense, the possibility of reopening criminal cases, and the right to seek compensation. Special attention will be given to both the legal framework and how these rights work in practice. In the conclusion part of the this article, we will outline specific steps for improving Croatian legislation related to the identification of wrongful convictions, lowering the high threshold for the admissibility of new evidence, and introducing specialized training for lawyers on how to address these issues of miscarriages of justice, and overall emphasize the importance of supporting Innocence Projects in strengthening post-conviction review mechanisms.

2. WHAT ARE WRONGFUL CONVICTIONS?

We hear it in the news and see it in Netflix documentaries cold cases reopened, innocent men freed after decades in prison. Often, new evidence, usually DNA, emerges to exonerate them. We may use the term wrongful conviction or miscarriage of justice. Both terms are used to describe serious failures within the criminal justice system. While both refer to unjust outcomes, a wrongful conviction specifically means that an innocent person has been found guilty of a crime they did not commit. A miscarriage of justice is a broader concept that includes any major error in the legal process such as a wrongful acquittal, an unfair trial, or the use of unreliable evidence that results in an unjust verdict. Garrett argues that these cases highlight critical flaws in the justice system and raise serious ethical and legal concerns. They often involve mistaken eyewitness

identification, coerced confessions, flawed forensic techniques, or systemic issues such as inadequate defense and institutional bias. They ultimately undermine the public trust in the system.[4] Brooks further argues the troublesome reality of wrongful convictions raises essential questions about the causes of these judicial failures, the quality of legal procedures, and the safeguards that could prevent them. He argues that the focus must shift from merely ensuring efficiency in criminal proceedings to emphasizing fairness, accuracy, and the protection of the innocent.[5] Modern response to wrongful convictions can be traced to the 1980s and 1990s, when for the first time legal scholars and practitioners started investigating and challenging these errors. This period was marked, as growing awareness that led to systematic efforts to identify and overturn wrongful convictions, while also studying the systemic factors that contributed to them.[6] However they did not do it on their own. The emergence of DNA as a powerful forensic tool marked a scientific revolution in the field of criminal justice. Initially developed for medical and genetic research, DNA profiling was first applied to a criminal investigation in 1986 by British geneticist Alec Jeffreys, leading to the exoneration of a suspect and the conviction of the actual perpetrator in a double murder case.[7] Since then, DNA has become the most go-to tool in forensic science, providing accuracy and objectivity previously unattainable in criminal investigations. Lynch and McNally argue that Its adoption transformed evidentiary standards in courts, enabling the identification of suspects with remarkable precision and, equally important, the exoneration of the innocent.[8] This was later also argued by the founder of the innocence project - Scheck, Neufeld, and Dwyer which noted that the DNA revolution not only reshaped forensic practices but also fueled broader legal reforms and gave rise to the Innocence Movement, which uses DNA evidence to correct miscarriages of justice.[9]

The movement culminated with the establishment of the first Innocence Project in 1992 by Barry Scheck and Peter Neufeld at the Benjamin N. Cardozo School of Law. This initiative set the foundation for a nationwide legal effort to address wrongful convictions through casework, legal reform, and legal advocacy. Further Godsey notes, the Innocence Project represented a groundbreaking model that combined academic legal analysis with practical litigation.[10] It focused on

[4] See Garrett, B. L., *Convicting the innocent: Where criminal prosecutions go wrong*, Harvard University Press, Cambridge (MA) 2011, pp. 5–8.
[5] See Brooks, J., *Miscarriages of justice in the United States*, in: Nobles, R.; Schiff, D. (eds.), *Murder, Wrongful Conviction and the Law*, Routledge, London 2023, pp. 136–150.
[6] See Godsey, M., *Blind Injustice: A former prosecutor exposes the psychology and politics of wrongful convictions*, University of California Press, Berkeley 2019, pp. 12–13.
[7] See Jeffreys, A. J.; Wilson, V.; Thein, S. L., *Hypervariable 'minisatellite' regions in human DNA*, *Nature*, Vol. 314, No. 6006, 1985, pp. 67–73.
[8] See Lynch, M.; Cole, S. A.; McNally, R.; Jordan, K., *Truth Machine: The Contentious History of DNA Fingerprinting*, University of Chicago Press, Chicago 2010, pp. 23–25.
[9] See Scheck, B. C., *Barry Scheck Lectures on Wrongful Convictions*, *Drake Law Review*, Vol. 54, 2005, pp. 597–599.
[10] See Godsey, M. A.; Pulley, T., *The innocence revolution and our evolving standards of decency in death penalty jurisprudence*, *University of Dayton Law Review*, Vol. 29, 2003, pp. 264–265.

exposing cases where convictions were secured through flawed or untested forensic evidence, misinterpreted DNA results, mistaken eyewitness accounts, or other serious procedural errors. Furthermore, according to West and Meterko the one of the most influential aspects of the Innocence Movement has been the use of postconviction DNA testing to establish new evidence or *novum* criterion to reopen the criminal proceedings.[11] The introduction of modern DNA technology offered a scientifically reliable means to challenge and overturn unjust verdicts. DNA evidence soon became central, and only affirmed scientific tool which can be called science, to the movement's efforts, providing definitive proof of innocence in many cases and exposing the fallibility of traditional investigative and prosecutorial methods.[12] Unlike many traditional forensic methods, DNA analysis is grounded in rigorous scientific methodology, validated through peer-reviewed research, and supported by quantifiable error rates and clear statistical probabilities. According to the landmark 2009 report by the National Academy of Sciences (NAS) titled *Strengthening Forensic Science in the United States: A Path Forward*, DNA is the only forensic technique that consistently meets the highest standards of scientific reliability and reproducibility. In contrast, forensic practices like hair comparison, bite mark analysis, and serology (blood typing) often rely on subjective judgment, lack standardization, and have no consistent error rates that can be scientifically tested.[13] Garrett and Neufeld further argue that the NAS report criticized these methods for lacking a solid scientific foundation, noting that in many cases, experts overstated the certainty of their findings without empirical validation. For example, microscopic hair comparison has been discredited in numerous wrongful conviction cases, where initial matches were later disproven by DNA testing.[14]

Through rigorous case work and litigation, Innocence Projects have helped exonerate hundreds of individuals, revealing deep flaws in criminal justice systems and advocating for meaningful reform. As Brooks further observes, the success of these projects has sparked broader conversations about the credibility of forensic science, the need for preserving biological evidence, and the importance of aligning legal systems with scientific advancements. The first organization of its kind, Centurion Ministries, focused exclusively on freeing innocent individuals and promoting legal and policy reforms to reduce the risk of future injustices. Inspired by its model, a wave of Innocence Projects emerged across the United States in Ohio, Chicago, San Diego, and elsewheresharing the

[11] See West, E.; Meterko, V., *Innocence Project: DNA exonerations, 1989–2014: Review of data and findings from the first 25 years*, *Albany Law Review*, Vol. 79, 2015, pp. 721–723.
[12] See *Ibid*, pp. 725. As a result, DNA evidence has become the gold standard in forensic science, not only because of its accuracy but also because it is grounded in principles of molecular biology and subject to rigorous scientific scrutiny. This distinguishes it sharply from older, more subjective forensic practices that have contributed to many miscarriages of justice.
[13] See National Research Council et al., *Strengthening Forensic Science in the United States: A Path Forward*, National Academies Press, Washington, D.C. 2009, pp. 7–9.
[14] See Garrett, B. L.; Neufeld, P. J., *Invalid forensic science testimony and wrongful convictions*, *Virginia Law Review*, Vol. 95, 2009, pp. 20–22.

common goal of correcting wrongful convictions.[15] Among them, the California Innocence Project (CIP), based at San Diego Law School, stands out for its dual commitment to legal reform and education. It not only handles wrongful conviction cases but also trains future lawyers through practical experience and collaborative programs aimed at improving trial advocacy. One of its most notable cases, the exoneration of Brian Banks, gained widespread attention and was later adapted into a Netflix documentary, symbolizing both the human cost of wrongful convictions and the power of legal advocacy to correct them.[16] To understand wrongful convictions, it is important to examine their underlying causes, compare experiences from the United States and Europe, and analyze the legal thresholds for presenting new evidence in the reopening of criminal proceedings.

2.1. Causes of Wrongful Convictions

Causes for wrongful convictions are not uniformed and they are dependable on factors within the criminal justice system. Among the most common causes detected so far by the work of innocence projects in Europe and in the US are mistaken eyewitness identification, which is particularly unreliable under stress or suggestive police procedures, and false confessions, often obtained through coercive or prolonged interrogations. Inadequate legal defense, especially for indigent defendants, also plays a significant role, as does prosecutorial misconduct, such as withholding exculpatory evidence. Furthermore, flawed forensic techniques—including hair comparison, bite mark analysis, or outdated serology have been linked to numerous miscarriages of justice. Systemic biases, including racial or socio-economic prejudice, can further influence investigations and verdicts.[17]

False confessions are a well-documented contributor to wrongful convictions in the US and Europe. Data from exoneration registries in the United States (National Registry of Exonerations) and the United Kingdom (Exeter Miscarriage of Justice Registry) show that false confessions were present in approximately 13%[18] and

[15] See Brooks, J.; Brooks, Z., *Wrongfully convicted in California: Are there connections between exonerations, prosecutorial and police procedures, and justice reforms*, *Hofstra Law Review*, Vol. 45, 2016, pp. 380–382.

[16] Brian Banks was a promising high school football, wrongfully convicted in 2002 at age 16 for a rape he did not commit. After a consultation from his defense counsel, he accepted a plea deal to avoid a possible life sentence. He was sentenced over five years in prison and was placed on the sex offender registry. In 2011, his accuser admitted she had fabricated the story, and with the help of the California Innocence Project, Banks obtained a recording of her confession. This evidence led to the overturning of his conviction in 2012 by the Los Angeles County Superior Court. Banks later briefly played in the NFL and became an advocate for criminal justice reform. His story was adapted into the 2019 film *Brian Banks*, underscoring the devastating impact of wrongful convictions and the importance of post-conviction advocacy.

[17] See West and Materko *op.cit.* note. 10 at pp. 730-731

[18] See Exoneration Register United States, *Data on Exonerations by False Confessions as a Contributing Factor*,

20%[19] of exoneration cases, respectively highlighting the troubling frequency with which individuals admit to crimes they did not commit. Kasin categories false confessions into three types: voluntary, coerced-compliant, and coerced-internalized. Voluntary false confessions occur without external pressure, while the latter two commonly arise during police interrogations. The majority of false confession cases that lead to wrongful convictions fall into the coerced categories.[20] While anyone can be vulnerable to giving a false confession, research shows that certain groups are at higher risk. These include juveniles, people with cognitive or developmental impairments, and those experiencing mental health issues.[21] According to Kukucuka, Kassin and Burke, Situational factors also play a critical role. Interrogation techniques employed by the police particularly minimization (downplaying the seriousness of the offense) and maximization (emphasizing the strength of evidence and severity of punishment) can pressure suspects into confessing falsely. Other contributing factors include sleep deprivation, lack of food, and lengthy or high-pressure interrogations.[22] Once a confession is made, regardless of whether it is adversarial proceedings with few safeguards or mixed procedure it is often viewed as highly credible even when it contradicts the suspect's own interests. This can bias the interpretation of other evidence, such as lie detector results or alibi statements. Research from the Innocence Project has shown that in 65% of DNA exoneration cases involving false confessions, these admissions triggered additional investigative and evidentiary errors.[23]

Further, *False eyewitness identification* occurs when a witness mistakenly identifies someone as the perpetrator. In the United States, it is the leading cause of wrongful convictions (Innocence Project, n.d.). According to Brooks, eyewitness accounts rely heavily on memory, which is vulnerable to distortion.[24] Factors affecting accuracy fall into two categories: estimator variables, which are beyond the control of the justice system (e.g., distance, lighting, stress, disguise, own-race bias, or weapon focus), and system variables, which are within police

https://exonerationregistry.org/cases?f%5B1%5D=false_confession%3A1&f%5B3%5D=date_of_exon%3A%28min%3A1672272000%2Cmax%3A%29, accessed 05.03.2025.

[19] See Evidence Based Justice Lab, *Exeter Miscarriage of Justice Registry, False Confessions as a Contributing Factor Cases,* https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-issues/false-confession/, accessed 05.03.2025

[20] See Kassin, S. M.; Wrightsman, L. S., *Confession evidence*, in: Kassin, S. M.; Wrightsman, L. S. (eds.), *The Psychology of Evidence and Trial Procedure*, Sage Publications, Inc., Beverly Hills 1985, pp. 67–94.

[21] See Drizin, S. A.; Leo, R. A., *The problem of false confessions in the post-DNA world*, *North Carolina Law Review*, Vol. 82, No. 3, 2004, pp. 891–1004. Available at: https://scholarship.law.unc.edu/nclr/

[22] See Marion, S. B.; Kukucka, J.; Collins, C.; Kassin, S. M.; Burke, T. M., *Lost proof of innocence: The impact of confessions on alibi witnesses*, *Law and Human Behavior*, Vol. 40, No. 1, 2016, pp. 65–71.

[23] See Gudjonsson, G. H.; Sigurdsson, J. F.; Sigfusdottir, I. D.; Asgeirsdottir, B. B., *False confessions and individual differences: The importance of victimization among youth*, *Personality and Individual Differences*, Vol. 45, No. 8, 2008, pp. 801–805.

[24] See Brooks, op. cit. note 5, pp. 141–143.

control (e.g., how line-ups are conducted and whether instructions are neutral).[25] Improperly designed line-ups in criminal proceedings, lack of clear instructions, or suggestive behavior by officers can pressure witnesses into making inaccurate identifications. Additionally, memory fades over time, so long delays between the crime and the identification further reduce reliability. To minimize these risks, line-ups must follow strict protocols, and witness interviews should occur as soon as possible after the event.[26]

Inadequate legal defense is another cause of wrongful convictions. Defense lawyers are essential in protecting the rights of the accused and challenging unreliable evidence presented by the prosecution. When they fail in this role, it can lead to wrongful convictions. Data from U.S. exoneration databases show that inadequate legal defense played a role in 27% of cases in the National Registry of Exonerations and 7% in the Innocence Project records highlighting how often poor legal representation contributes to unjust outcomes.[27] Several factors explain these failures. Public defenders, who represent those unable to afford private attorneys, often face overwhelming caseloads and limited funding, making it difficult to devote adequate time and resources to each case. This resource strain has also been linked to the widespread use of plea bargains, where defendants plead guilty to avoid lengthy trials and harsher sentences. In some cases, defense lawyers regardless of resources may lack experience, motivation, or belief in the client's innocence, leading them to neglect basic duties like investigating evidence, consulting experts, or challenging questionable testimony. These shortcomings leave vulnerable defendants at greater risk of being wrongfully convicted.[28]

Forensic evidence in the eyes of the court is always viewed as objective and reliable, helping to establish a suspect's connection to a crime through physical traces like DNA, fingerprints, or bloodstains. However, according to Godsey not all forensic methods are scientifically validated or free from error. He emphasizes that The National Registry of Exonerations in the U.S. has recorded over 730 wrongful convictions involving flawed or misused forensic science, underscoring its potential to contribute to miscarriages of justice.[29] One of the major issues consistently appearing is the subjectivity in interpretation of the forensic evidence in courts. Many forensic techniques, such as fingerprint analysis or tool mark comparisons, require expert judgment which can vary across analysts and be

[25] See Brooks, op. cit. note 1, pp. 23-25.
[26] See Semmler, C.; Dunn, J.; Mickes, L.; Wixted, J. T., *The role of estimator variables in eyewitness identification*, *Journal of Experimental Psychology: Applied*, Vol. 24, No. 3, 2018, pp. 400–415.
[27] See Gould, J. B.; Leo, R. A., *One hundred years later: Wrongful convictions after a century of research*, *The Journal of Criminal Law and Criminology*, Vol. 100, No. 3, 2010, pp. 825–830.
[28] See Berry, S. M., *Bad lawyering: How defense attorneys help convict the innocent*, *Northern Kentucky Law Review*, Vol. 30, No. 26, 2003, pp. 487–504.
[29] See Godsey, M. A., *False justice and the true prosecutor: A memoir, a tribute, and commentary*, Ohio St. J. Crim. L., 9, 2011, pp. 790-791.

influenced by biases. Psychological factors like confirmation bias[30] and contextual bias[31] can distort evaluations, especially if an expert is aware of other incriminating details, such as a confession. Furthermore, some forensic methods which were previously considered reliable are now discredited such as microscopic hair comparison, long used in courtrooms, have been labeled as "junk science" following DNA-based exonerations.[32] Compounding the problem, forensic findings are sometimes miscommunicated in court. Legal professionals may struggle to interpret statistical evidence or may be misled by how conclusions are framed linguistically, affecting perceptions of guilt.[33]

2.2. Wrongful Convictions and Innocence Projects Models in the United States and Europe

The Innocence Movement began in the United States in the 1980s and 1990s, as legal scholars and practitioners increasingly recognized that procedural safeguards were not enough to prevent innocent people from being convicted. The founding of the Innocence Project in 1992 by Barry Scheck and Peter Neufeld at the Benjamin N. Cardozo School of Law marked a turning point. Combining legal advocacy with scientific analysis, particularly DNA testing, the Project demonstrated how wrongful convictions could be reversed and prevented. DNA became a revolutionary tool for exoneration, offering objective proof in cases where traditional evidence had failed. According to the National Registry of Exonerations, over 730 cases involved flawed forensic science, underscoring the importance of validated scientific methods. The work of Innocence Projects in the U.S. extends beyond litigation. These organizations have influenced legislation such as the Innocence Protection Act of 2004[34], which guarantees postconviction DNA testing and sets standards for compensating the wrongfully convicted. U.S. projects often operate within law schools, merging academic instruction with real-life casework, creating a unique model of legal education.

The impact of these developments spread beyond the U.S., as wrongful conviction cases gained visibility, European scholars and institutions began reassessing their own legal systems.[35] Despite widespread belief in the safeguards of inquisitorial justice, countries like Italy, Germany, the Netherlands, and now Croatia eventually

[30] *Confirmation bias* refers to the tendency to interpret evidence in a way that supports one's pre-existing beliefs or expectations.
[31] See *Contextual bias* occurs when external information—such as knowledge of a confession or police suspicions—influences how forensic experts interpret evidence.
[32] See Nance, D. A.; Morris, S. B., *An empirical assessment of presentation formats for trace evidence with a relatively large and quantifiable random match probability*, *Jurimetrics*, Vol. 42, No. 4, 2002, pp. 403–448.
[33] See Garrett *Supra* note. 12, at pp. 95.
[34] See Innocence Protection Act of 2004, part of the Justice for All Act, Pub. L. No. 108-405, 118 Stat. 2260 (codified in relevant parts at 18 U.S.C. §§ 3600–3606).
[35] See Lupària, L.; Greco, C., *Unveiling wrongful convictions between the US and Italy: Cross-learning from each other's mistakes*, *The Wrongful Conviction Law Review*, Vol. 1, 2020, pp. 101–103.

acknowledged that miscarriages of justice were not unique to adversarial systems but also to mixed systems of criminal procedure as well.[36] This realization spurred the creation of European Innocence Projects and the European Innocence Network and prompted slow but steady legal reforms, including improved mechanisms for reopening cases and scrutinizing traditional evidence. However, challenges persist on both sides of the Atlantic. European courts, for example, still impose high thresholds for revisiting final convictions, particularly regarding the presentation of *novum* (new evidence).[37] According to Luparia In Italy, despite constitutional recognition of judicial error, revision requests remain rare, and many wrongfully detained individuals struggle to obtain compensation.[38] Kilias argues further that while progress has been made, wrongful convictions remain a global issue, and institutional resistance continues to hinder full accountability.[39]

2.3. Innocence Projects

Basically innocence projects (IP) are organizations operating as civil society organization, foundations or legal clinics within universities who offer post-conviction free legal aid to people who consider themselves wrongfully convicted. They are providing criminal defense and advice. They are specialized legal clinics with the aim of helping exonerate wrongfully convicted individuals and advocate for systemic reforms that would benefit wrongfully convicted people. The tools they are using are diverse, and some innocence projects are providing only legal advice without participation (no participation model), and other IP are providing case analysis and full representation of their clint (Full participation models). Some of them are using supplementary DNA testing to find new evidence and to reopen the criminal procedure. As said many operate as legal clinics within universities, involving students with experiences professors and practitioners combining education with hands-on legal work—a model compared to medical training by Justin Brooks.[40]

2.4. How do They work?

The intake process begins when an individual often someone in prison submits an application claiming they were wrongfully convicted. The applications consists fo

[36] See *Ibid,* p.105
[37] See Primorac, D.; Sokanovic, L.; Bozhinovski, A., *Correcting Miscarriages of Justice: Innocence Project Croatia*, in: *IntechOpen*, 2024, Chapter 2.3.0., pp. 12–13
[38] See Lupària, L.; Cagossi, M.; Pittiruti, M., *Miscarriages of justice in Italy*, in: Nobles, R.; Schiff, D. (eds.), *Murder, Wrongful Conviction and the Law*, Routledge, London 2023, pp. 103–121, 110–112.
[39] See Killias, M., *Errors occur everywhere—But not at the same frequency: The role of procedural systems in wrongful convictions*, in: Huff, C. R.; Killias, M. (eds.), *Wrongful Convictions and Miscarriages of Justice*, Routledge, London 2013, pp. 61–62.
[40] See Stiglitz, J.; Brooks, J.; Shulman, T., *The hurricane meets the paper chase: Innocence projects' new emerging role in clinical legal education*, *California Western Law Review*, Vol. 38, 2001, pp. 413–415.

generalized and sepcializaed questions about his case.[41] These applications can also come from family members, lawyers, or advocacy groups. The first stage involves an initial review to determine whether the case meets specific eligibility criteria. Most Innocence Projects focus strictly on claims of factual innocence, meaning the person did not commit the crime at all, not merely that a legal error occurred. Further, the screening process is handled by project staff or law students who evaluate whether new evidence such as DNA, a recantation, or misconduct could support reopening the case. If a case lacks any realistic legal route for exoneration, or if the claim is not one of actual innocence, it is typically declined. But when a case appears viable, it moves to the investigation phase, which is often thorough and resource demanding. Once accepted legal teams review court transcripts, police files, and forensic records, sometimes uncovering inconsistencies, flawed expert testimony, or evidence that was never presented in court. Witnesses may be re-interviewed, and forensic material may be retested using advanced scientific methods that were unavailable at the time of the original trial. In some cases, new experts are consulted to challenge outdated or unreliable forensic claims within the forensic report. If compelling new evidence is uncovered, the legal team prepares motions or petitions to reopen the case. Education and advocacy are central to the mission. Many Innocence Projects are based in law schools and operate as clinical programs, training future lawyers through real casework. This model, as described by Justin Brooks, mirrors medical education emphasizing hands-on learning alongside academic theory.

The success of the American model inspired similar initiatives in Europe. While wrongful convictions were once perceived as a predominantly American problem, the establishment of Innocence Projects in Germany, Italy, the Netherlands, Poland, and Croatia has revealed that European systems are not immune to such errors. Though as Knoops argues it, European countries often rely on inquisitorial or mixed criminal procedures where judges play an active role in investigating cases research shows these systems also suffer from confirmation bias, procedural shortcuts, flawed forensic practices, and difficulties in reopening cases.[42] One of the central challenges for European Innocence Projects is the high threshold for revising final convictions. The legal concept of *novum* (new evidence)[43] is interpreted restrictively, and courts often require evidence that conclusively proves innocence rather than simply casts doubt. Basically the current rules stipulate

[41] See Croatian Innocence Project, *Application for Intake of Cases*, https://croinop.pravo.unizg.hr/wp-content/uploads/2022/09/CROINOP-Upitnik-za-provjeru-1.docx

[42] See Knoops, G. J., *Redressing miscarriages of justice: Practice and procedure in (international) criminal cases*, in: *Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases*, Brill Nijhoff, Leiden 2013, pp. 34–36.

[43] The legal literature defines the *novum* criterion as introduction of new facts or evidence that were not known during the original trial and could potentially alter its outcome. While the European Court of Human Rights (ECtHR) does not directly adjudicate on the application of the novum criterion within national legal systems, it has addressed related issues concerning the right to a fair trial and the reopening of cases based on new evidence.

facts, and not indications of wrongful convictions.[44] The revision process varies by jurisdiction, with some countries allowing broader interpretations while others maintain strict criteria.[45] The European Court of Human Rights (ECtHR) has provided important guidance, applying a three-part test to determine when a retrial is warranted: the reliability of new evidence, the nature of the proceedings, and the interests of justice.

Another challenge relates to the treatment of DNA evidence. While DNA testing has been instrumental in securing exonerations, the laws governing its collection, storage, and use differ widely across Europe. The ECtHR's landmark judgment in *S. and Marper v. United Kingdom* condemned the indefinite retention of DNA profiles of unconvicted individuals as a violation of privacy under Article 8 of the European Convention on Human Rights.[46] Subsequent cases, including *Gaughran v. UK*[47] and *Trajkovski and Chipovski v. North Macedonia*[48], reaffirmed the need for clear legal standards and proportional data retention policies. All these cases and important from the perspective of the critical role of DNA treatment in protecting individual rights, especially in the context of wrongful conviciotns and post-convciton reviews. The retention, use and potential reanalysis of DNA evidence must be governed by strict legal standards to prevent misuse, privacy and factual innocence.

[44] See Bozhinovski, A., *Addressing wrongful convictions in Croatia through revision of the novum criterion: Identifying best practices and standards*, in: *Human Rights in Contemporary Society – Challenges From an International Perspective*, IntechOpen, 2023, pp. 5–8, accessible at: https://www.intechopen.com/chapters/86866.

[45] See Primorac, D.; Bozhinovski, A., *Addressing wrongful convictions in Croatia: A focus on genetic privacy in criminal proceedings*, *EU and Comparative Law Issues and Challenges Series (ECLIC)*, Vol. 8, 2024, pp. 11–15.

[46] See S. and Marper v. the United Kingdom, App. Nos. 30562/04 and 30566/04, European Court of Human Rights, Judgment of 4 December 2008. In this case the Court ruled that the indefinite retention of DNA profiles and fingerprints of individuals who were arrested but not convicted constituted a disproportionate interference with the right to respect for private life under Article 8 of the European Convention on Human Rights. The Court emphasized that such data, particularly genetic information, contains sensitive and deeply personal information, and that retaining it without time limits or individualized justification violated fundamental privacy rights.

[47] See Gaughran v. the United Kingdom, App. No. 45245/15, European Court of Human Rights, Judgment of 13 February 2020. Is another landmark case where, the Court clarified that automatic retention of personal data, including DNA profiles, photographs, and fingerprints of convicted individuals without a clear and proportionate justification also infringes Article 8. While recognizing that convicted persons can be treated differently from those acquitted, the Court reiterated the need for safeguards, oversight, and periodic review to ensure compliance with the principles of necessity and proportionality.

[48] See Trajkovski and Chipovski v. North Macedonia, App. Nos. 53205/13 and 63320/13, European Court of Human Rights, Judgment of 13 February 2020. The Court ruled that there is a violation of Article 8 due to the failure of national authorities to ensure effective access to and review of DNA data stored in state databases. The applicants had been acquitted, yet their DNA profiles remained in the system with no clear legal avenue for deletion, underscoring a systemic lack of procedural safeguards.

Additionally from the aspect of European legislation, including the Council of Europe's ETS No. 108[49] and EU data protection law, categorizes DNA as sensitive personal data requiring strict safeguards.[50] However regarding wrongful conviction cases in Europe, several high-profile European cases illustrate these issues. The Schiedammer Park murder case[51] in the Netherlands, reopened after DNA testing identified the true perpetrator, led to the exoneration of a man convicted based on a false confession. Furthermore, the Phantom of Heilbronn case in Germany exposed contamination in DNA analysis, showing that even advanced forensic techniques are not infallible with 100% certainty.[52] The De Putten Murder and Ina Post cases also exposed systemic weaknesses in forensic interpretation and the use of coerced confessions. These cases prompted legislative reforms, such as lowering the threshold for case review and expanding the grounds for retrials based on indications of wrongful conviction.[53]

Despite differences in legal traditions, both U.S. and European Innocence Projects confront similar obstacles: securing access to evidence, overcoming procedural barriers, and shifting judicial attitudes toward acknowledging error. Yet their combined efforts highlight, as Brooks suggests a growing international consensus on the need for systemic reforms, stronger evidentiary standards, and more accessible mechanisms to correct miscarriages of justice.[54] As the movement continues to evolve, cross-border collaboration and shared best practices between Innocence Projects will be essential to strengthening the global response to wrongful convictions.

2.5. The Role of New Evidence as a Common Legal Standard

Luparia argues that the revision of criminal proceedings based on new evidence (*novum*) is central to the work of European and American Innocence Projects.[55] This criterium ensures that revisions of criminal cases are solely based on solid, objective grounds and not arbitrary. Both common denominator is that requests for revision of criminal proceedings are requested only final judgments concerning

[49] See Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), Council of Europe, Strassbourg, 1981, https://www.coe.int/en/web/data-protection/convention108,
[50] See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), OJ L 119, 4 May 2016, pp. 1–88, https://eur-lex.europa.eu/eli/reg/2016/679/oj.
[51] See Geven, L.; van den Doel, K., *Miscarriages of justice in the Netherlands*, in: Nobles, R.; Schiff, D. (eds.), *Murder, Wrongful Conviction and the Law*, Routledge, London 2023, pp. 53–64.
[52] See Taupin, J. M., *Interpreting Complex Forensic DNA Evidence*, CRC Press, Boca Raton 2019, p. 15-16.
[53] Knoops' Innocence Project, *Case Overview*, https://knoopsadvocaten.nl/en/innocence-project/zaken/.
[54] See Brooks, *op. cit.* note 5,, pp. 136-140.
[55] See Lupària, L.; Greco, C., *op. cit.* note 35, pp. 103–104.

factual errors (*error facti*), typically by the convicted person, their relatives, or the prosecution. The only condition is that the judgment must be final, and revision is not meant to act as a fourth level of appeal, nor should it conflict with the *non bis in idem* principle. Only new facts can justify reopening a final case. Classical legal theory recognizes three types of new evidence: *Noviter repertae* – evidence discovered after the trial that existed at the time but was previously unknown; *Noviter productae* – evidence that did not exist during the trial, such as new scientific methods (e.g., updated DNA testing); *Noviter cognitae* – evidence known during the trial but not presented, possibly due to being withheld or deemed irrelevant at the time. Regarding the Dutch experiences with innocence Holvast and Lestrade arguee that while courts should consider all three categories in theory, in practice the application of the *novum* criterion varies, and courts often apply a very high threshold for reopening cases,[56] which is also a problem in Croatia as shall we see below.

The finality of judgment is a prerequisite for reopening criminal proceedings. In both adversarial and inquisitorial systems, this means the case must have been concluded with a valid and enforceable verdict. However, Killias and Huff arguee that in adversarial systems, the concept of finality is more flexible compared to inquisitorial or mixed systems, where judgments are more definitively closed. For wrongfully convicted individuals, adversarial systems typically offer more avenues for legal remedies, such as petitions and appeals.[57] In contrast, mixed or inquisitorial systems often allow only a single extraordinary remedy: the reopening of proceedings based on new evidence (*novum*). In the United States, a regular appeal is typically filed by the defendant shortly after conviction, challenging legal errors that occurred during the trial. It must be submitted within a strict timeframe, usually 30 to 90 days, depending on the jurisdiction.[58] Beyond the direct appeal, two key postconviction remedies are available: habeas corpus[59] and coram nobis petitions.[60] In European jurisdictions however the understanding and application of the concept is different. Knoops distinguishes between revisions that benefit the convicted and those that are detrimental to the convicted person, with the latter being controversial due to potential conflicts with the *non bis in*

[56] See Holvast, N.; Nan, J.; Lestrade, S., *Between legal certainty and doubt: The developments in the procedure to overturn wrongful convictions in the Netherlands*, *Erasmus Law Review*, Vol. 13, 2020, p. 1, pp. 3–6.
[57] See Huff, C. R.; Killias, M. (eds.), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems*, Routledge, London 2013, pp. 45–46.
[58] *Ibid*, pp. 47-49.
[59] A *habeas corpus petition*, filed by someone in custody, challenges the legality of their detention, often on constitutional grounds such as ineffective counsel or due process violations. It is usually filed after all direct appeals have been exhausted.
[60] *coram nobis* petition is available to those who are no longer in custody but seek to correct a fundamental error in their conviction, such as newly discovered evidence or prosecutorial misconduct. Both are extraordinary remedies and require strong justification to proceed.

idem (double jeopardy) principle.[61] While countries like France, Belgium, and Spain prohibit detrimental revisions, others such as Germany, Croatia, and the Netherlands permit them under certain conditions, but mindful of *Reformatio in Peius* principle. Judicial discretion plays a key role in assessing *novum*, with Germany even allowing previously known but ignored evidence to qualify.[62] The European Court of Human Rights applies a three-part test to determine whether excluding new evidence violates the right to a fair trial, considering its reliability, the scope of the proceedings, and the broader interests of justice. Should the new evidence, were not evaluated by a court, or a retrial is not allowed, the Court will generally find a violation of the right to a fair trial.[63]

3. INNOCENCE PROJECT CROATIA AND SUBSEQUENT PROJECT' RESULTS

The Croatian Innocence Project began as an initiative proposed by Professors Davor Derenčinović, professor Dragan Primorac, Damir Primorac with the aim of exploring the issue of wrongful convictions in Croatia and determining whether such cases exist within the national legal system. The project was founded to investigate whether wrongful convictions exist in Croatia and to address systemic gaps in the justice system. Although so far Croatia has not been found in breach of Article 8 of the European Convention on Human Rights for DNA misuse, a thorough analysis of domestic DNA handling laws remains essential, especially to ensure conformity with ECtHR jurisprudence such as Marper v. UK and the Gaughran v UK cases. The Croatian Innocence Project focuses on raising public awareness, improving legal standards for the collection and use of DNA evidence, and simplifying access to retrials based on *novum* new evidence that may justify reopening closed cases. In its experimental phase, the project has received considerable media attention and has launched various educational, advocacy, and research initiatives. Operationally, the project has partnered with the Ministry of Justice and Public Administration, the Ivan Vučetić Center for Forensic Science, and the Directorate for the Prison System and Probation. Together, they implement a questionnaire system to identify inmates claiming wrongful conviction and potential new evidence.[64] The project also campaigns for reforms in DNA legislation and court practices, aiming to align Croatian standards with ECtHR principles. It evaluates cases based on factors such as untested or newly available DNA evidence, recanted testimonies, prosecutorial misconduct, ineffective legal defense, and coerced confessions. These criteria, adapted from the Italian Innocence Project and tailored to the Croatian context, continue to evolve through ongoing casework. Through its multidisciplinary efforts, the Croatian Innocence

[61] See Knoops, G. J., *Causes and predisposing factors of miscarriages of justice: A legal overview*, in: *Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases*, Brill Nijhoff, Leiden 2013, pp. 15–20.
[62] See Nan, J.; Holvast, N.; Lestrade, S., *A European approach to revision in criminal matters?*, *Erasmus Law Review*, Vol. 13, 2020, p. 102.
[63] See Bozhinovski, *op. cit.* note 45, pp.12-14.
[64] *Ibid.*

Project aims to strengthen the justice system, prevent future miscarriages, and support individuals who may have been wrongfully convicted.

Concerning the results of the project, this paper will showcase only the conclusions reached form the field research into cases where a proper repletion of the criminal procedure has taken place, as well as the analysis of the standing provisions in Law on Criminal Procedure concerning collecting, storing and use of DNA data.[65] The full conclusions of the research are published in a separate paper.[66] Regarding DNA data and the collection, use, and retention of DNA evidence it is worth mentioning that Croatia has established the first internationally certified DNA database in the region with full compliance with international conventions. However, a closer analysis of domestic legislation reveals important gaps concerning the protection of individual privacy. While Croatia has not yet been found in violation of Article 8 of the European Convention on Human Rights, the project's legal analysis reveals that the current practice of retaining DNA data from crime victims and non-convicted individuals for up to 10 years raises serious ethical and legal concerns. This blanket retention policy contradicts principles laid out in the ECtHR's *S. and Marper v. the United Kingdom* judgment, which emphasizes the need for proportionality, especially regarding minors and individuals never convicted of a crime. Additionally, the Law on Criminal Procedure allows biological samples to be collected from victims and others with or without consent, based on prosecutorial request and court approval. The field results raised the critical question of whether such intrusions into personal privacy can be constitutionally justified, especially when applied to victims.[67] Furthermore, the project calls for a revision of Croatian Law on Criminal Procedure and the Guidebook for collection and retention of DNA samples to better reflect the ECtHR's jurisprudence, recommending clearer safeguards and stricter controls over DNA evidence handling.[68]

3.1. Reopening of the Criminal Procedure in Croatian Legal and Practical Context

Here we shall focus exclusively on the proper reopening of criminal proceedings (*prava obnova*), as it is the only extraordinary legal remedy relevant to addressing wrongful convictions. In contrast, the improper repetition of criminal proceedings (Articles 498–500 ZKP) is termed *improper* because it refers solely to sentencing errors specifically, situations where the court failed to correctly apply sentencing rules without taking into consideration the previous judgements and convictions of the defendant. In the new verdict the court unifies the sentences and extract one

[65] See Arts. 321-323, Law on Criminal Procedure, Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 80/22, 36/24.
[66] See Primorac *et al., op cit*, note 37., pp.15-19
[67] See Becker, S. W.; Derenčinović, D.; Primorac, D., *DNA as evidence in the courtroom*, in: Primorac, D.; Schanfield, M. S.; Bettinardi, O. (eds.), *Forensic DNA Applications*, CRC Press, Boca Raton 2023, pp. 433–435.
[68] *Ibid*. pp. 438.

joint sentence. It does not challenge the established facts of the case, nor does it address the grounds of the conviction or involve claims of innocence by the applicant. According to the results of the field research indicate that in 68% of reviewed cases, courts permitted improper repetition of criminal proceedings, primarily to unify multiple judgments and reduce sentences, without fully reopening the case. This practice often reflects misunderstandings by defendants about legal grounds for appeal and strategic attempts to obtain sentence mitigation when proper retrial is not possible. Courts generally respond with more lenient consolidated sentences, particularly when errors in concurrent sentencing are identified. However, only a small portion of requests (4%) were based on truly new evidence, highlighting the stringent threshold for proper retrials and the limited impact of material changes like health or family status unless clearly justified.[69]

This extraordinary legal remedy is governed by Articles 501 to 508 from the Law on Criminal Procedure, which balance the need to uphold the finality of judgments with the imperative to correct wrongful convictions. Article 501 outlines the grounds for reopening a criminal trial. These include the discovery of new facts or evidence (*novum*) unknown during the original proceedings, which would likely have led to a more favorable verdict for the defendant. Reopening is also permitted where it is later proven that the judgment relied on forged documents, perjured testimony, or tampered evidence, or if a judge, prosecutor, or another legal actor committed a criminal offense that influenced the verdict. Additional grounds include situations involving contradictory final judgments for the same act, changes in legal interpretation that would result in a more lenient sentence, or a final decision by the Constitutional Court or the European Court of Human Rights confirming that a violation of fundamental rights occurred.

Such reopening may be granted in favor of the defendant under several specific grounds which are envisage din the Law on Criminal Procedure: *(a) Proof of False Testimony or Documentation* indicates that revision may be sought if the original judgment relied on falsified documents, fraudulent audio-visual materials, or false testimonies by witnesses, experts, interpreters, or translators. The request must be supported by concrete evidence directly connected to the original judgment and must clearly argue that the fraudulent elements influenced the outcome. It is essential to establish a causal link between the falsification and the conviction and to demonstrate how the newly presented evidence undermines the previously established facts of the case. *(b) Judicial Misconduct* applies when the verdict was influenced by a criminal act committed by a judge, prosecutor, juror-judge, or other individuals involved in the investigation. The applicant must provide new evidence clearly linking the misconduct to the case outcome, proving that it directly impacted the judgment. *(c) New Exonerating Evidence or Laws which allow repetition upon the discovery of new facts or evidence that exonerate the defendant or support conviction under a more lenient legal provision than that applied in the initial trial.* This evidence must be genuinely new so that means unknown at the time of the original trial and not previously evaluated by the court.

[69] See Primorac *et.al*, *op.cit.* note 37, at 20-21.

This category includes both *noviter producta* (evidence newly presented to the court) and *noviter reperta* (evidence discovered post-judgment). Such evidence must be new in both essence and content, not merely a repetition of previously assessed materials. Additionally, repetition may be sought if new, more favorable legal provisions have retroactive effect. *(d) Violation of the non bis in idem.* This principle is sufficiently clear and this ground applies when conflicting judgments exist for the same act, potentially implicating different individuals. The request must present new evidence suggesting that the convicted individual did not commit the crime. It must also introduce new facts or evidence that refute the original conviction. *(e) Complex or Prolonged Cases* is applied in cases involving prolonged or complex criminal activity consisting of multiple identical or diverse acts, repetition may be allowed if new facts or evidence emerge that suggest the convicted person did not commit the acts as charged. Such evidence must be capable of substantially influencing the reassessment of guilt or the sentence. Repetition under this ground focuses on convictions involving criminal offenses that span over time or involve multiple acts, and the new evidence must highlight aspects not addressed in the original proceedings. (f) *Decisions from Higher Courts* implies reopening of the proceedings based on decision from the Constitutional Court of Croatia and the European Court of Human Rights. Several such cases were identified in this study, including Lonić v. Croatia,[70] Lisica v. Croatia[71], Maresti v. Croatia[72], and Ajdarić v. Croatia.[73] Furthermore, Article 502

[70] See Lonić v. Croatia, App. No. 8067/12, Judgment of 4 December 2014, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-148284%22]}. In the Lonić case, the ECtHR found a violation of Article 6 § 1 (right to a fair trial) of the ECHR. The applicant was convicted based on the statements of witnesses whom she was not allowed to question during the proceedings. The ECtHR held that the inability to examine these key witnesses violated the principle of adversarial proceedings and the right to a fair trial. Following this judgment, domestic courts were obligated to reopen the case to ensure procedural fairness and the proper assessment of evidence.

[71] See Lisica v. Croatia, App. No. 20100/06, Judgment of 25 February 2010, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97213%22]}. This case involved a violation of Article 6 § 1 as well, due to the domestic court's failure to provide adequate reasoning for its decisions and its disregard of the applicant's key arguments during the trial. The ECtHR emphasized the necessity for courts to address relevant points raised by defendants and to provide clear, reasoned judgments. The judgment prompted a retrial in order to address the procedural deficiencies identified by the ECtHR.

[72] See Maresti v. Croatia, App. No. 55759/07, Judgment of 25 June 2009, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-93260%22]}. In Maresti v. Croatia, the applicant argued that he had been convicted and punished twice for the same conduct (*Non bis in idem*), thus violating Article 7 of the European Convention on Human Rights. The ECtHR found that *Maresti* had been convicted under two separate legal provisions for what was essentially the same factual conduct. The Court ruled that this breached Article 7, particularly the principle of *lex certa* and *non bis in idem*, even though the Croatian Constitutional Court had upheld the dual conviction.

[73] See Ajdarić v. Croatia, App. No. 20883/09, Judgment of 13 December 2011, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-107989%22]}. Most notable judgement, where the ECtHR held that the applicant's right to a fair trial under Article 6 § 1 had been violated due to the domestic court's reliance on highly questionable evidence

of the Law on Criminal Procedure, repetition may be granted when a violation of constitutional or international human rights has been established by the Constitutional Court. Similarly, under Article 44 of Protocol 11 to the ECHR, repetition based on an ECtHR judgment requires the submission of the final judgment confirming the violation. This aligns with the Council of Europe's Recommendation on reopening domestic proceedings in response to ECtHR findings, which encourages member states to ensure the possibility of restitutio in integrum where ECHR violations are found. The Law on Criminal Procedure furthermore, provides for repetition to the *detriment* of the defendant, but only in exceptional circumstances which is in line with the German and the French jurisprudence and legislaiton. However, in these cases the prohibition of *reformation in peius* is applicable. Concerning the reopening of the criminal procedure based on a judgment of the European Court of Human Rights, Luparia refers to this mechanism as "European revision." Although it shares the nature of an extraordinary legal remedy, European revision is functionally distinct. It does not require the presentation of new exonerating evidence but rather serves as an indirect corrective measure for judicial error, allowing for an exceptional return to the merits phase of the criminal trial.[74]

Article 502 specifies the parties authorized to initiate a request for repetition. These include the defendant or their legal representative, the public prosecutor, and, in certain cases, close relatives particularly where the defendant is deceased or incapacitated. Importantly, while repetition may be requested at any time in favor of the defendant, requests to their detriment are allowed only under narrowly defined circumstances and within strict time limits. Furthermore, Article 503 addresses time limits. While no statute of limitations applies to requests favoring the defendant, repetition to the defendant's detriment must be initiated within a specified period after the ground for repetition is discovered reflecting a cautious approach to legal certainty. Article 504, stipulates that a request for repetition must be clearly reasoned and substantiated. It must state the legal basis, include a factual explanation of the proposed ground, and attach supporting documents. The burden of proof lies with the applicant, who must convincingly demonstrate that the new material would have altered the original outcome. Article 505 defines the procedural steps following the submission of a request. The court that issued the final judgment is responsible for ruling on admissibility.

The court may summarily reject an evidently unfounded request or initiate preliminary proceedings to examine the credibility of the new claims. Where appropriate, a hearing may be held to assess the evidence and determine whether the case merits reopening. Once a request is accepted, Article 506 governs the legal

and the disregard of exculpatory material. The ECtHR found that the cumulative deficiencies in the domestic proceedings undermined the fairness of the trial. The ruling necessitated a reopening to ensure that the case would be retried in accordance with the Convention's standards of due process and evidentiary fairness. The ECtHR claimed that the judgment cannot be based on single piece of evidence, especially coming from unreliable source.

[74] See Donati, L. L.; Pittiruti, M., *Post-conviction remedies in the Italian criminal justice system*, Erasmus L. Rev., 13, 63, 2020, p. 66-69.

consequences. The judgment is revoked in whole or in part, and a retrial is ordered. The new trial is typically conducted before the same court, but not necessarily by the same panel of judges. This mechanism ensures that the case is re-examined thoroughly while preserving judicial impartiality. Additionally Article 507 is important as it then outlines the structure of the retrial. It must follow the general rules of criminal procedure, allowing for a full reassessment of the facts and legal conclusions. The new proceedings can result in acquittal, conviction, or termination of the case. Importantly, both previously admitted and newly submitted evidence can be re-evaluated, ensuring a comprehensive review of the merits. Time limits on repeated requests are stipulated in Article 508 which stipulates that a second motion for repetition based on the same facts or evidence is not permitted in order not to overburden the courts with the same request. However, a new request may be filed if it is based on entirely new grounds. This provision protects the court system from frivolous or abusive litigation while safeguarding the right to a fair trial. Evidently these articles represent a modern legal mechanism designed to correct judicial errors while preserving the integrity and finality of the criminal justice process. Their relevance is also noted in the context of wrongful convictions and miscarriages of justice, as they can serve as a legal avenues for wrongfully convicted people to correct their judgements.

3.2. Domestic Jurisprudence

Regarding the domestic practice of the Croatian courts in reopening criminal proceedings, it would be valuable to present the findings of field research carried out as part of the HRZZ and Faculty of Law project *Projekt nedužnosti u Hrvatskoj*.[75] These findings shed light on how Croatian courts handle requests for revision, particularly the standards applied when introducing new evidence and how the courts evaluate such evidence in practice. In the case from the jurisprudence of the County Court in Zagreb,[76] the defendant was ultimately acquitted in a retrial conducted in absentia, based on credible new witness testimony. The defendant, who is not a Croatian citizen and holds refugee status in the Republic of Serbia, was involved in a case dating back to 1995 during the Homeland War. The case concerned an aggravated murder allegedly committed out of base motives, as defined under Article 111, Paragraph 4, and Article 34, Paragraph 2, Point 4 of the Croatian Criminal Code.[77] He had initially been tried and sentenced in absentia to 15 years in prison by the County Court in Zadar a decision later upheld by the Supreme Court. Following that, both an arrest warrant and an Interpol Red Notice were issued for the enforcement of the sentence. Unaware that a trial had taken place or that a judgment had been issued against him, the defendant still living in Serbia was arrested 13 years later. Through his

[75] Croatian Innocence Project, *Project Overview and Research Results*, https://croinop.pravo.unizg.hr/?page_id=84.
[76] See County Court in Zagreb case number K-20/2017.
[77] See Art. 111, paragraph 4 and Art. 34, paragraph 2, Croatian Criminal Code, Official Gazette, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24.

legal counsel in Croatia, he submitted a request to reopen the criminal procedure, citing the fact that he had been tried in absentia and introducing new evidence in the form of witness statements from individuals who were with him at the time of the alleged crime. In 2017, Serbia denied Croatia's extradition request on the grounds of the defendant's constitutional protection as a refugee. Subsequently, the County Court approved the reopening of the procedure and authorized a retrial in absentia, in line with the legal conditions laid out in Article 497, Sections 1 and 3, in conjunction with Article 501, Section 1, Point 3 of the Croatian Criminal Procedure Code. As a result, enforcement of the original 15-year prison sentence was suspended. The retrial ended in an acquittal, with the court accepting the new witness testimony as credible and exonerating the defendant. While the court affirmed that the police had correctly identified the victim, it also highlighted major procedural shortcomings due to wartime conditions: no official crime scene report was prepared at the location where the body was found; the cause of death remained undetermined; and no autopsy had been performed. Photographs in the case file showed no visible gunshot wounds or traces of gunfire on the decomposed body.

Further, another case form the jurisprudence of Zadar County Court highlights how the Supreme Court can intervene by ordering a reevaluation of the evidence when it determines that the material law was misapplied or misunderstood—circumstances that may lead to judicial error. Here, the defendant had been sentenced to a cumulative 20 years in prison based on findings that he participated in and commanded actions violating the rights of civilians and prisoners during wartime. In his appeal, the defendant raised serious concerns about procedural irregularities and how the evidence had been handled during the trial. He specifically challenged the interpretation of his role, arguing that the evidence used to establish command responsibility was flawed. Among the issues raised were the reliance on uncorroborated witness statements and the court's failure to take into account new testimonies suggesting that the defendant did not occupy a commanding position. He also questioned procedural aspects of his trial in absentia, suggesting that due process may not have been fully respected. The Supreme Court found these objections credible enough to doubt the factual accuracy of the original judgment. It emphasized the importance of reassessing newly presented evidence in light of what had already been established—particularly when the defendant's role is central to the conviction. This comparative review led the Court to conclude that the trial court may have misunderstood or misapplied key evidence, resulting in a flawed judgment. Given these inconsistencies and procedural shortcomings, the Supreme Court granted the appeal, overturned the initial verdict, and ordered a full retrial before a new panel. This decision was made to ensure a fair and impartial reassessment of all evidence and to establish the true factual basis of the case.[78]

How novum is interpreted and the rigidity of the courts is demonstrated through this case from the jurisprudence of the County Court in Osijek. This case is under review of the Croatian Innocence Project as a first true case of wrongful

[78] See County Court in Zadar, case number KŽ-932/2008-15.

conviction. This case involves a trial in absentia and raises serious concerns about a potentially wrongful conviction, particularly due to the emergence of a true *novum* a recantation of the victim's original testimony. The term "potential" is used deliberately here, as the research team believes this case warrants further legal examination within the framework of the Innocence Project Croatia. The conviction was based on a false statement, later deemed inconclusive by the court, as well as flawed DNA analysis. Referred to as the "Horvat case" to protect the identities of those involved and avoid media exposure, the case stems from events that occurred during and after the Croatian Homeland War. Mr. Horvat was convicted in absentia in 1999 for rape and sodomy and sentenced to seven years in prison. His conviction rested primarily on his own confession, which he later claimed was obtained under coercion during his eight-month pretrial detention. After his conviction, Mr. Horvat moved to Serbia and remained unaware of the charges until he was arrested in 2015 based on an Interpol Red Notice and extradited back to Croatia. Following his arrest, Mr. Horvat challenged the legitimacy of the original trial, stating that he had never received the indictment and was denied the opportunity to defend himself. These claims led to a successful request for a retrial under Article 497 of the Croatian Criminal Procedure Code. At the retrial, the court revisited the same evidentiary materials from the original trial. However, a significant development occurred when the alleged victim Mr. Horvat's daughter recanted her earlier testimony. She stated that her father had never raped her but had pushed her during a family dispute, and that the accusations were made under the influence of Mr. Horvat's then-partner. Despite this major shift in the core testimony and the absence of DNA evidence to support the original charges, the court ultimately dismissed the new information and reaffirmed the initial seven-year sentence. The retrial featured a series of testimonies highlighting the complexity of the family dynamics. Medical and psychological experts offered conflicting interpretations: one cited physical injuries consistent with assault but not with sexual violence, while another provided psychological assessments indicating that Mr. Horvat exhibited traits of a personality disorder and that his daughter was susceptible to confabulation due to past trauma. The daughter herself admitted that her recollection had been shaped by external pressures and personal relationships. She described how she was manipulated into making the accusation and noted that, on the day in question, she had engaged in consensual sex with her boyfriend, not suffered an assault by her father.

Despite this revised testimony, the court anchored its judgment in the perceived consistency of the victim's original statement and expert reports from the initial proceedings. It reaffirmed Mr. Horvat's conviction based on those prior assessments, dismissing the recantation as unreliable without thoroughly investigating the reasons behind the change in her account or the newly presented facts. In its decision, the court reviewed psychiatric assessments, testimonies from the victim and her brother, medical and gynecological documentation, and the defendant's criminal history. Although the judgment mentioned the existence of material DNA evidence (a skirt belonging to the victim), it failed to include any substantive analysis or clear factual findings regarding this evidence in its reasoning. Here we see the need for very critical questions about the treatment of

new evidence and victim recantation in retrials, especially in the context of trials in absentia. It suggests the need for a more nuanced judicial approach to post-conviction claims, particularly when the original proceedings lacked full procedural safeguards and the new testimony significantly alters the factual landscape of the case.[79]

3.3. Field Research's Results

The results of the filed research have indicated that the courts currently employ stringent threshold required to reopen criminal cases. The concept of *novum* new evidence not available or considered during the original trial remains the key legal criterion for retrial. Courts interpret *novum* narrowly, often rejecting requests that are based on re-evaluated but previously known facts or conflicting expert opinions. For a retrial to be granted, the evidence must be genuinely new, materially relevant, and capable of altering the verdict, with keeping in mind that the evidence wasn't already known during the previous trial. While this protects the courts from being overburdened by unfounded claims, it also places a heavy burden on convicted individuals, because of their limited access to funds and the freedom to gather new evidence, because they are serving prison time.[80] Legal practitioners interviewed by the project generally support the existing high threshold, arguing that lowering it could flood the system with baseless petitions and undermine public confidence in the judiciary. However, the project's results draws attention to international experiences particularly in the Netherlands where overly strict evidentiary standards have discouraged legitimate claims and reinforced procedural finality at the expense of justice. In both jurisdictions, the challenge lies in striking the right balance: maintaining legal certainty while ensuring that truly innocent individuals have a meaningful path to exoneration.

"They reiterated that reopening of the criminal procedure based on faulty DNA evidence is very rare in practice. In practice, there are cases of faulty DNA; however, judges must carefully examine each piece of expertise, statement, and evidence material. The interviewees highlighted that the request for reopening the criminal procedure, based on new evidence, such as DNA evidence, is uncommon in practice. When questioned about the definition of "new evidence," the consensus among the respondents was that the Supreme Court adopts an approach to maintain the stability of the judicial process. They emphasized that the responsibility to gather and present new evidence falls on the parties seeking to reopen the case, which further means that they must demonstrate the existence of new evidence that could significantly alter the presented factual state."[81]

The conclusions of the results indicate that advocacy for more procedural reforms is needed and is most welcome. The reason behind these claims is that such

[79] See County Court in Osijek case nm. K-15/95, judgement.
[80] *Ibid*
[81] See Primorac et.al, o*p.cit.,* note 37, at pp. 20-23, Conclusions of the field research undertaken in this project.

reforms would facilitate more effective access to justice for the wrongfully convicted. This includes better access to expert reviews, forensic testing, and mechanisms for identifying *novum*. It also calls for a more flexible interpretation of what constitutes "new" evidence in light of evolving scientific methods and the complexity of criminal investigations. As the project matures, it aims to not only contribute to national justice reform but to strengthen Croatia's alignment with broader European human rights standards. Its comprehensive approach combining legal research, policy advocacy, education, and public outreach marks a significant step toward a more just, transparent, and accountable criminal justice system.

To compare the Croatian legislation and practice with the Italian legislation and practice (which served as a model for the Croatian reform of the criminal procedure) on the reopening of the criminal procedure, particularly concerning new evidence, the Italian approach offers a more flexible approach. In Italian law, particularly under Article 630 of the Italian Code of Criminal Procedure, the emergence of *new evidence* (*prova nuova*) is the most commonly invoked ground for revision. Italian jurisprudence, as analyzed by Luparia, has recognized various forms of such evidence: medical records substantiating alibis, new expert and witness testimony, statements made in foreign proceedings, and even new psychiatric evaluations that may alter the understanding of the accused's mental state at the time of the crime.[82] Over time, the Italian Court of Cassation narrowed the concept of new evidence primarily to *noviter repertae* (discovered after the judgment) and *noviter productae* (existing but not previously acquired), although more recent jurisprudence has re-expanded this to include any non-evaluated evidence, provided it is *novel* and materially relevant to the case. Particularly progressive is Italy's evolving treatment of new scientific methods, especially following the *Ghiro* case, where the Court of Cassation introduced clear criteria for when re-analysis of previously evaluated evidence, using modern techniques, may justify reopening the case.[83]

In comparison, Croatian practice interpretation of *novum* is stricter and often more formalistic. The dubbed Horvat case from the jurisprudence of the County Court of Osijek illustrates these limitations: although the victim recanted her testimony and new expert opinions were introduced, the court refused to recognize this as

[82] *Ibid* pp. 25-27.

[83] See Court of Cassation, Sec. I, 8th of March 2011, Ghiro, in C.E.D. Cass, no.249864. The Court of Cassation tackled the issue of whether new scientific methods applied to previously collected evidence could be considered a valid ground for revision under Article 630 of the Italian Code of Criminal Procedure.
Basically, Italian courts were cautious between *res iudicata and novum*. They feared that revisiting old evidence with new techniques might amount to a disguised appeal, violating Article 637(3), which prohibits revisions that simply contest the court's factual assessments. However, in *Ghiro*, the Court made an important shift to that practice by setting 5(five) criteria for when the application of new scientific methods to existing evidence may justify reopening of a case. Case is available here: https://archiviodpc.dirittopenaleuomo.org/d/533-cass-pen-sez-i-832011-dep-1342011-n-15139-pres-di-tomassi-rel-cassano-ric-ghiro-prova-scientifica-e?

valid *new evidence*, thus by reaffirming the original verdict without properly reassessing the changed statement from the victim or explaining why the revised testimony was rejected and basing its judgment solely on the expertise done by the psychiatric expert testimony, even though all other evidence did not substantiated this expertise. Furthermore, Croatian courts generally do not accept reevaluation of previously assessed evidence unless it clearly qualifies as *noviter reperta* or *noviter producta*, and the standards for what constitutes a *true novum* remain narrowly interpreted. Hopefully the work of the Croatian Innocence Project can aid into reforming the high threshold of admissibility of new evidence.

4. RIGHTS OF WRONGFULLY CONVICTED PERSONS IN CROATIA

4.1. Right to Fair Trial

Since innocence projects are operating within the realm of criminal law, free legal aid should be given to encompass these situations. In Croatia, the right to a fair defense and access to legal counsel is a well established into the criminal justice system, and it is inline with the international legal obligations. Furthermore, it should be stated that it is the right to a fair trial, and that the minimum rights of defense are special rights enjoyed by the defendant in criminal proceedings" specified in Article 6, paragraph 3 of the European Convention on Human Rights and Article 29, paragraph 2 of the Constitution of the Republic of Croatia. In the terminology of criminal procedural law, the terms: Right to a fair trial" and "Minimum rights of defense" are used in criminal proceedings.

The Constitution guarantees that any individual accused of a criminal offense has the right to be promptly informed, in a language they understand, of the nature and reasons for the charges against them.[84] They are entitled to sufficient time and resources to prepare their defense, to defend themselves personally or with the assistance of a lawyer of their choice, and to communicate freely and confidentially with that lawyer. For those unable to afford legal representation, the Constitution provides a right to free legal aid under conditions prescribed by law.[85] The Constitution guarantees the right to legal representation, including free legal assistance when a defendant lacks the means to pay. The ECHR similarly guarantees free legal aid when required *in the interests of justice*. This right is further detailed in the Law on Criminal Procedure, which allows for two main scenarios: appointment of counsel in cases of mandatory defense and upon request for indigent defendants in more serious cases, but only after the indictment has been filed and if the offense carries a sentence of five or more years. Pajcic further argues that this restriction can leave defendants without legal assistance in earlier procedural stages, even when their financial circumstances prevent them from

[84] See Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14, Art. 29.
[85] *Ibid.*

securing private counsel.[86] However, analysis of the provisions of the Law on Criminal Procedure indicates that they are clearly tailored to the pre-trial and trial phases of criminal proceedings up to the moment a judgment becomes final. These articles establish the right to legal counsel at the expense of public funds under specific financial and procedural conditions, but they are confined to the initial phases from investigation through trial and regular appeal before the judgment attains finality. Crucially, these rules do not extend to the post-conviction stage, particularly to requests for the reopening of criminal proceedings initiated by convicted persons. The right to appointed counsel in the context of such extraordinary legal remedies is not addressed in these provisions, and any entitlement to legal assistance in that stage would need to be grounded either in a different section of the law typically the part governing the reopening of proceedings or derived analogously through judicial interpretation or constitutional guarantees. As such, convicted persons seeking to reopen their cases cannot rely directly on Articles 72–74 to claim the right to a publicly funded defense, and any support in this regard would have to come from elsewhere in the legal framework.

Furthermore the Law on Advocacy, Article 21 obliges the Croatian Bar Association to provide free legal aid to vulnerable groups, including the socially disadvantaged and war victims.[87] This obligation, while not limited to specific proceedings, is governed by ethical rules and internal decisions of the Bar, and it can extend to criminal defense. It does not specifically mentions free legal aid for post-conviction proceedings. Furthermore, the Law on Free Legal Aid, envisages primary and secondary legal aid, where primary legal aid includes legal advice and assistance in administrative matters, while secondary aid covers court representation and preparation of legal submissions. However, in practice, authorities rarely apply this law to criminal cases, often interpreting it as not extending to criminal or misdemeanor proceedings, which are regulated by the Law on Criminal Procedure (mandatory defense and indigent defense, as well as the law on misdemeanors). These legal inconsistencies may create a fragmented legal ecosystem, wrongfully convicted defendant. The current legal aid structure also results in potential overlaps, where courts may be asked to decide on legal aid under both the Law on Criminal Procedure and the Law on Free Legal Aid, leading to procedural inefficiencies. To close this gap, the legislator must acknowledge wrongfully convicted persons as a special group of victims and accordingly provide free legal representation in post-conviction proceedings.

4.2. Compensation for Unfounded Conviction or Unjust Detention

Another right of the wrongfully convicted person is the right to compensation for unfounded conviction or unfounded detention. Article 25(4) of the Constitution of

[86] See Pajčić, M., *Pravo okrivljenika na branitelja i na besplatnu pravnu pomoć*, *Hrvatski ljetopis za kazneno pravo i praksu*, Vol. 17, No. 1, 2010, pp. 53–107.
[87] Art. 26 of the Law on Advocacy, Official Gazette, No. 9/94, 117/08, 50/09, 75/09, 18/11, 126/21.

the Republic of Croatia guarantees this right. The exercise of this constitutional right is regulated by specific statutory provisions. The Law on Criminal Procedure and the subsequent amendments, does not contain provisions on compensation for unjust conviction because the prevailing view is that this matter should be regulated by a special law. Therefore, Article 573 of the Law on Criminal Procedure stipulates that Chapter XXX (entitled *Procedure for Compensation and the Exercise of Other Rights of Wrongfully Convicted or Unjustifiably Arrested Persons*) of the 1997 Criminal Procedure Act, with subsequent amendments and supplements, shall continue to apply until a special law is enacted.[88] Regarding misdemeanor proceedings, the Misdemeanour Act, stipulates that the same rules from the Law on Criminal Procedure apply to compensation claims in misdemeanor proceedings unless otherwise specified.[89] Basically Croatian law recognizes the state's liability for damages from misconduct by judicial or prosecutorial authorities. These rights are specifically regulated in Articles 476 to 484.a of the Criminal Procedure Act. A person may seek compensation for a unfounded conviction if they were subjected to a final criminal sanction or found guilty but not sentenced, and if the case was later reopened through an extraordinary legal remedy leading to the discontinuation of proceedings, an acquittal, or a dismissal of charges. However, if the proceedings were discontinued because the injured party or private prosecutor withdrew the complaint as part of a settlement with the defendant, the right to compensation does not apply. Similarly, individuals who intentionally caused their own conviction such as through false confessions or fabricated evidence are not entitled to compensation, unless it can be proven that such actions were the result of coercion. Seen through these legal provisions it is noticeable that a distinction is made between positive and negative conditions for granting compensation. On one hand, the existence of a final conviction that was later reversed in the defendant's favor forms the basis for a compensation claim. Ljubanovic argues that this applies even if the sentence was never executed and includes cases involving multiple offenses, in which the individual may be compensated for parts of the conviction that were overturned. On the other hand, the right is excluded when the conviction resulted from the deliberate actions of the convicted person or from procedural outcomes based on private agreements rather than judicial findings.[90] The law also addresses compensation for unjustified arrest or detention. Individuals who were held in pre-trial detention without charges being filed, or whose charges were later dropped or dismissed, are entitled to seek damages. Likewise, if someone served more time than warranted by a revised sentence or if they were detained unlawfully due to procedural errors or official misconduct, they may be compensated in accordance. Yet again, the right to compensation is not absolute. If the individual's own actions such as attempting to flee, hiding evidence, or otherwise obstructing the

[88] Criminal Procedure Act 1997, Official Gazette, No. 110/97., 27/98., 58/99., 112/99., 58/02., 143/02., 62/03. - službeni pročišćeni tekst, 178/04., 115/06., 152/08., 76/09., 80/11., 143/12. (ZKP)., Arts. 476-484.

[89] Misdemeanour Act, Official Gazette, No. 107/07, 39/13, 157/13, 110/15, 70/17, 118/18, 114/22.

[90] Ljubanović, B., *Pravo na naknadu štete zbog neopravdane osude ili neutemeljenog uhićenja ili pritvaranja, s naglaskom na upravno postupanje u ostvarivanju toga prava*, Pravni vjesnik, Vol. 35, No. 2, 2019, pp. 85–103.

investigation led to their arrest or extended detention, compensation may be denied. Croatian courts examine such cases carefully, and the burden is on the claimant to demonstrate that they did not act with intent to provoke their detention. The principle is clear: when a person consciously contributes to their own deprivation of liberty, the state bears no responsibility to make them whole. Through this carefully balanced approach, Croatian law seeks to protect the rights of those wrongfully deprived of liberty, while also ensuring that the justice system is not exploited by those who deliberately manipulate legal proceedings. In case the applicant does not accept the offer of the Ministry of Justice and Administration, then he/she has the right to file a complaint with the competent court. The amount paid for 2022 refers to payments based on decisions made in a peaceful procedure.

Year	Number of Requests	Number of Condemnations	Amount Paid in Compensation (€)
2020	332	180	1,290,594
2021	332	131	1,106,447
2022	380	149	3,224,053

Table 1: Gathered data on requests for compensation for unjust arrest/detention and conviction in 2020-2022. Source CEPEJ Report 2024.

Evidently from the CEPEJ-gathered data made available by the Ministry of Justice and Public Administration, covering compensation claims related to wrongful actions in the Croatian justice system from 2020 to 2022. The data reveal a relatively stable number of requests in 2020 and 2021 (332 each year), followed by a slight increase in 2022 (380). However, the number of successful claims, or condemnations, fluctuated dropping from 180 in 2020 to 131 in 2021, then rising again to 149 in 2022. Most notably, the total amount of compensation paid saw a dramatic increase in 2022, more than doubling the figures from previous years, despite the number of condemnations not increasing proportionally. This suggests that individual compensation amounts in 2022 may have been significantly higher, potentially reflecting more serious or high-profile violations. This data provides important insight into the financial impact of judicial errors on the state and highlights the need for ongoing improvements in procedural safeguards and accountability mechanisms. For the purposes of my doctoral research, a formal request has been submitted to the Ministry of Justice to obtain updated data for 2023 and 2024. This will allow for a comparative analysis to identify whether the observed trends continued, stabilized, or reversed in more recent years.

Category	2020	2021	2022
Total compensations granted	180	131	149
Excessive length of proceedings	48	59	60
Non-execution of court decisions	NAP	NAP	NAP
Wrongful arrest/detention	132	72	89
Wrongful conviction	NA	NA	NA

Table 2: Overview of Compensations Granted for Violations of Procedural Rights in Criminal Justice: CEPEJ Classification Data for the Republic of Croatia (2020–2022). Source: CEPEJ Report 2024

The total number of compensations granted decreased sharply from 180 in 2020 to 131 in 2021, then rebounded to 149 in 2022 an increase of 13.7%. This recovery, however, did not fully return to the levels seen in 2020, suggesting a fluctuating pattern in judicial decisions or claim submissions. Furthermore, what is important for this work, wrongful conviction continues to be marked NA (Not Available), indicating either the absence of recognized cases in these areas or a lack of comprehensive reporting. The absence of data on wrongful convictions is particularly noteworthy, given the seriousness of such violations and the growing international emphasis on wrongful conviction as a critical human rights issue. Compensations continue to arise from procedural violations, particularly prolonged proceedings and wrongful detentions, highlighting areas where the justice system still faces systemic challenges. The fluctuations in granted compensations over the three-year period suggest a need for continued monitoring and perhaps greater consistency in how such claims are assessed.[91]

5. CONCLUSION

Concluding is challenging since wrongful convictions are a real and troubling occurrence, hard to identify yet in many European jurisdictions they remain under-researched and poorly documented. The phenomenon is still considered novel in the European context, where systematic academic literature is scarce. One of the key challenges in researching wrongful convictions is the lack of reliable data there are no official registers, indicators, or standardized reporting mechanisms across jurisdictions. These limitations significantly affect the scope and depth of available research. Within this constrained context, the Croatian Innocence Project for Croatia offers valuable insights. While it has helped uncover serious procedural gaps and raised awareness about the issue, the project's findings also highlight structural barriers that prevent wrongfully convicted individuals from accessing justice. Strict interpretations of what constitutes "new evidence" (*novum*), limited forensic access, and privacy concerns around DNA data retention are just some of the obstacles identified. My doctoral research aims to contribute to the emerging

[91] European Commission for the Efficiency of Justice (CEPEJ), *Evaluation of the judicial systems – 2024 edition (data 2022): Croatia*, Generated on: 30/09/2024, Reference data 2022 (01/01/2022–31/12/2022), data collection campaign: 15/03/2023–01/10/2023, https://www.coe.int/cepej, 31 March 2025.

field of wrongful conviction studies in Europe by bridging gaps in the literature, offering critical analysis of Croatian legal practices, and supporting the development of fairer, more transparent mechanisms for addressing miscarriages of justice. Additionally, as comparative experiences show Western countries have recognized the issue of wrongful convictions and are implementing legal reforms to lower the high threshold for admitting new evidence. The Dutch approach, particularly the specialized advisory ACAS Commission, offers valuable insights for potential legal changes and reforms.

Another key consideration is the role of DNA evidence, as demonstrated by Italy's approach to admitting new scientific methods for re-examining existing evidence. Domestic judicial practice should adopt this solution, allowing old DNA evidence to be retested using advanced scientific techniques. Furthermore, as discussed in the chapter on DNA evidence handling, amendments to domestic criminal procedure laws are necessary. Currently, the law mandates the preservation of DNA material for 20 years post-conviction, extending to 40 years for serious crimes like rape or murder (*corpora delicti*). However, the provision requiring DNA data retention for 10 years after a defendant's exoneration is unclear and illogical. If a court has declared a defendant innocent, retaining their DNA data undermines trust in the judiciary. Citing the Marper and Gaughran standards, the law should regulate DNA data control, ensuring its destruction once it is no longer needed.

Croatia provides formal constitutional and legal protections for wrongfully convicted persons, including the right to a fair defense and compensation for unjust convictions or detention. However, significant gaps remain in practice particularly regarding post-conviction legal aid, which is not explicitly guaranteed by current legislation. While legal representation is available during pre-trial and trial phases, individuals seeking to reopen their cases must navigate the process without state-funded support, despite their vulnerability. The framework for compensation is set out in the Criminal Procedure Act and the Constitution, allowing for claims where convictions are overturned or detention was unjustified. Still, eligibility depends on strict legal criteria and excludes those deemed to have caused their own conviction or arrest. CEPEJ data (2020–2022) show a steady number of claims but rising compensation amounts, suggesting more serious cases or higher awards. Yet, data on wrongful convictions remain absent, hindering transparency. To improve access to justice, Croatia should recognize the wrongfully convicted as a distinct category of victims and ensure legal aid extends to post-conviction remedies. Better data collection and targeted legal reforms are essential to uphold fair trial rights and prevent further miscarriages of justice.

REFERENCES

BOOKS AND ARTICLES

1. Becker, S. W.; Derenčinović, D.; Primorac, D., *DNA as evidence in the courtroom*, in: Primorac, D.; Schanfield, M. S.; Bettinardi, O. (eds.), *Forensic DNA Applications*, CRC Press, Boca Raton 2023, pp. 433–435.
2. Berry, S. M., *Bad lawyering: How defense attorneys help convict the innocent*, *Northern Kentucky Law Review*, Vol. 30, No. 26, 2003, pp. 487–504.
3. Bozhinovski, A., *Addressing wrongful convictions in Croatia through revision of the novum criterion: Identifying best practices and standards*, in: *Human Rights in Contemporary Society – Challenges From an International Perspective*, IntechOpen, 2023, pp. 5–8, accessible at:https://www.intechopen.com/chapters/86866.
4. Brooks, J., *Miscarriages of justice in the United States*, in: Nobles, R.; Schiff, D. (eds.), *Murder, Wrongful Conviction and the Law*, Routledge, London 2023, pp. 136–150.
5. Brooks, J., *You might go to prison, even though you're innocent*, University of California Press, Berkeley 2023, pp. 24–25.
6. Brooks, J.; Brooks, Z., *Wrongfully convicted in California: Are there connections between exonerations, prosecutorial and police procedures, and justice reforms*, *Hofstra Law Review*, Vol. 45, 2016, pp. 380–382.
7. Donati, L. L.; Pittiruti, M., *Post-conviction remedies in the Italian criminal justice system*, *Erasmus Law Review*, Vol. 13, 2020, pp. 66–69.
8. Drizin, S. A.; Leo, R. A., *The problem of false confessions in the post-DNA world*, *North Carolina Law Review*, Vol. 82, No. 3, 2004, pp. 891–1004., available at: https://scholarship.law.unc.edu/nclr/.
9. Garrett, B. L., *Convicting the innocent: Where criminal prosecutions go wrong*, Harvard University Press, Cambridge (MA) 2011, pp. 5–8.
10. Garrett, B. L.; Neufeld, P. J., *Invalid forensic science testimony and wrongful convictions*, *Virginia Law Review*, Vol. 95, 2009, pp. 20–22.
11. Geven, L.; van den Doel, K., *Miscarriages of justice in the Netherlands*, in: Nobles, R.; Schiff, D. (eds.), *Murder, Wrongful Conviction and the Law*, Routledge, London 2023, pp. 53–64.
12. Godsey, M. A., *False justice and the true prosecutor: A memoir, a tribute, and commentary*, *Ohio State Journal of Criminal Law*, Vol. 9, 2011, pp. 790–791.
13. Godsey, M. A.; Pulley, T., *The innocence revolution and our evolving standards of decency in death penalty jurisprudence*, *University of Dayton Law Review*, Vol. 29, 2003, pp. 264–265.
14. Godsey, M., *Blind Injustice: A former prosecutor exposes the psychology and politics of wrongful convictions*, University of California Press, Berkeley 2019, pp. 12–13.

15. Gould, J. B.; Leo, R. A., *One hundred years later: Wrongful convictions after a century of research*, *The Journal of Criminal Law and Criminology*, Vol. 100, No. 3, 2010, pp. 825–830.
16. Gudjonsson, G. H.; Sigurdsson, J. F.; Sigfusdottir, I. D.; Asgeirsdottir, B. B., *False confessions and individual differences: The importance of victimization among youth*, *Personality and Individual Differences*, Vol. 45, No. 8, 2008, pp. 801–805.
17. Holvast, N.; Nan, J.; Lestrade, S., *Between legal certainty and doubt: The developments in the procedure to overturn wrongful convictions in the Netherlands*, *Erasmus Law Review*, Vol. 13, 2020, p. 1, pp. 3–6.
18. Huff, C. R.; Killias, M. (eds.), *Wrongful Convictions and Miscarriages of Justice: Causes and Remedies in North American and European Criminal Justice Systems*, Routledge, London 2013, pp. 45–46.
19. Jeffreys, A. J.; Wilson, V.; Thein, S. L., *Hypervariable 'minisatellite' regions in human DNA*, *Nature*, Vol. 314, No. 6006, 1985, pp. 67–73.
20. Kassin, S. M.; Wrightsman, L. S., *Confession evidence*, in: Kassin, S. M.; Wrightsman, L. S. (eds.), *The Psychology of Evidence and Trial Procedure*, Sage Publications, Inc., Beverly Hills 1985, pp. 67–94.
21. Killias, M., *Errors occur everywhere—But not at the same frequency: The role of procedural systems in wrongful convictions*, in: Huff, C. R.; Killias, M. (eds.), *Wrongful Convictions and Miscarriages of Justice*, Routledge, London 2013, pp. 61–62.
22. Killias, M., *Wrongful convictions as a result of political pressure*, in: Luparia, L. (ed.), *Understanding Wrongful Conviction. The Protection of the Innocent across Europe and America*, Wolters Kluwer, Milan 2015, pp. 57–80.
23. Knoops, G. J., *Causes and predisposing factors of miscarriages of justice: A legal overview*, in: *Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases*, Brill Nijhoff, Leiden 2013, pp. 15–20.
24. Knoops, G. J., *Redressing miscarriages of justice: Practice and procedure in (international) criminal cases*, in: *Redressing Miscarriages of Justice: Practice and Procedure in (International) Criminal Cases*, Brill Nijhoff, Leiden 2013, pp. 34–36.
25. Lupària, L.; Cagossi, M.; Pittiruti, M., *Miscarriages of justice in Italy*, in: Nobles, R.; Schiff, D. (eds.), *Murder, Wrongful Conviction and the Law*, Routledge, London 2023, pp. 103–121, 110–112.
26. Lupària, L.; Greco, C., *Unveiling wrongful convictions between the US and Italy: Cross-learning from each other's mistakes*, *The Wrongful Conviction Law Review*, Vol. 1, 2020, pp. 101–103.
27. Lynch, M.; Cole, S. A.; McNally, R.; Jordan, K., *Truth Machine: The Contentious History of DNA Fingerprinting*, University of Chicago Press, Chicago 2010, pp. 23–25.

28. Ljubanović, B., *Pravo na naknadu štete zbog neopravdane osude ili neutemeljenog uhićenja ili pritvaranja, s naglaskom na upravno postupanje u ostvarivanju toga prava*, Pravni vjesnik, Vol. 35, No. 2, 2019, pp. 85–103.
29. Marion, S. B.; Kukucka, J.; Collins, C.; Kassin, S. M.; Burke, T. M., *Lost proof of innocence: The impact of confessions on alibi witnesses*, *Law and Human Behavior*, Vol. 40, No. 1, 2016, pp. 65–71.
30. Nan, J.; Holvast, N.; Lestrade, S., *A European approach to revision in criminal matters?*, *Erasmus Law Review*, Vol. 13, 2020, p. 102.
31. Nance, D. A.; Morris, S. B., *An empirical assessment of presentation formats for trace evidence with a relatively large and quantifiable random match probability*, *Jurimetrics*, Vol. 42, No. 4, 2002, pp. 403–448.
32. Nogrady, A., *Römisches Strafrecht nach Ulpian*, 2011, p. 75.
33. Pajčić, M., *Pravo okrivljenika na branitelja i na besplatnu pravnu pomoć*, *Hrvatski ljetopis za kazneno pravo i praksu*, Vol. 17, No. 1, 2010, pp. 53–107.
34. Primorac, D.; Bozhinovski, A., *Addressing wrongful convictions in Croatia: A focus on genetic privacy in criminal proceedings*, *EU and Comparative Law Issues and Challenges Series (ECLIC)*, Vol. 8, 2024, pp. 11–15.
35. Primorac, D.; Sokanovic, L.; Bozhinovski, A., *Correcting Miscarriages of Justice: Innocence Project Croatia*, in: *IntechOpen*, 2024, Chapter 2.3.0., pp. 12–13,
36. Scheck, B. C., *Barry Scheck Lectures on Wrongful Convictions*, *Drake Law Review*, Vol. 54, 2005, pp. 597–599.
37. Semmler, C.; Dunn, J.; Mickes, L.; Wixted, J. T., *The role of estimator variables in eyewitness identification*, *Journal of Experimental Psychology: Applied*, Vol. 24, No. 3, 2018, pp. 400–415.
38. Stiglitz, J.; Brooks, J.; Shulman, T., *The hurricane meets the paper chase: Innocence projects' new emerging role in clinical legal education*, *California Western Law Review*, Vol. 38, 2001, pp. 413–415.
39. Taupin, J. M., *Interpreting Complex Forensic DNA Evidence*, CRC Press, Boca Raton 2019, pp. 15–16.
40. West, E.; Meterko, V., *Innocence Project: DNA exonerations, 1989–2014: Review of data and findings from the first 25 years*, *Albany Law Review*, Vol. 79, 2015, pp. 721–723.

LEGAL ACTS

1. Constitution of the Republic of Croatia, Official Gazette, No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14.
2. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), Official Gazette –

International Agreements nos. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13/2017.
3. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), Council of Europe, Strassbourg, 1981, https://www.coe.int/en/web/data-protection/convention108.
4. Criminal Procedure Act of the Republic of Croatia 1997, Official Gazette, No. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02, 62/03 - službeni pročišćeni tekst, 178/04, 115/06, 152/08, 76/09, 80/11, 143/12.
5. Criminal Code of the Republic of Croatia, Official Gazette, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24
6. European Commission for the Efficiency of Justice (CEPEJ), *Evaluation of the judicial systems – 2024 edition (data 2022): Croatia*, Generated on: 30/09/2024, Reference data 2022 (01/01/2022–31/12/2022), data collection campaign: 15/03/2023–01/10/2023, 31 March 2025.
7. Innocence Protection Act of 2004, part of the Justice for All Act, Pub. L. No. 108-405, 118 Stat. 2260 (codified in relevant parts at 18 U.S.C. §§ 3600–3606).
8. International Covenant on Civil and Political Rights (ICCPR), Official Gazette – International Agreements nos. 7/1976, 12/1993, 3/1994, 4/1997, 2/1999.
9. Law on Criminal Procedure, Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 80/22, 36/24.
10. Law on Advocacy, Official Gazette, No. 9/94, 117/08, 50/09, 75/09, 18/11, 126/21.
11. Misdemeanour Act, Official Gazette, No. 107/07, 39/13, 157/13, 110/15, 70/17, 118/18, 114/22.
12. National Research Council, et al. *Strengthening forensic science in the United States: a path forward*. National Academies Press, 2009, pp. 1-98.
13. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), OJ L 119, 4 May 2016, pp. 1–88.

COURT PRACTICE

1. Ajdarić v. Croatia, App. No. 20883/09, Judgment of 13 December 2011, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-107989%22]}.
2. County Court in Osijek case nm. K-15/95, judgement.
3. County Court in Zadar, case number KŽ-932/2008-15.
4. County Court in Zagreb case number K-20/2017.

5. Court of Cassation, Sec. I, 8th of March 2011, Ghiro, in C.E.D. Cass, no.249864, accessible at: https://archiviodpc.dirittopenaleuomo.org/d/533-cass-pen-sez-i-832011-dep-1342011-n-15139-pres-di-tomassi-rel-cassano-ric-ghiro-prova-scientifica-e.
6. Gaughran v. the United Kingdom, App. No. 45245/15, European Court of Human Rights, Judgment of 13 February 2020.
7. Lisica v. Croatia, App. No. 20100/06, Judgment of 25 February 2010, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97213%22]}.
8. Lonić v. Croatia, App. No. 8067/12, Judgment of 4 December 2014, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-148284%22]}.
9. Maresti v. Croatia, App. No. 55759/07, Judgment of 25 June 2009, European Court of Human Rights, accessible at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-93260%22]}.
10. S. and Marper v. the United Kingdom, App. Nos. 30562/04 and 30566/04, European Court of Human Rights, Judgment of 4 December 2008.
11. Trajkovski and Chipovski v. North Macedonia, App. Nos. 53205/13 and 63320/13, European Court of Human Rights, Judgment of 13 February 2020.

ONLINE SOURCES

1. Croatian Innocence Project, *Project Overview and Research Results*, https://croinop.pravo.unizg.hr/?page_id=84.
2. Exoneration Register United States, Data on Exonerations by False Confessions as a contributing factor https://exonerationregistry.org/cases?f%5B1%5D=false_confession%3A1&f%5B3%5D=date_of_exon%3A%28min%3A1672272000%2Cmax%3A%29.
3. Evidence Based Justice Lab, Exeter Miscarriage of Justice Registry, False Confessions as a Contributing Factor Cases, available at: https://evidencebasedjustice.exeter.ac.uk/miscarriages-of-justice-registry/the-issues/false-confession/.
4. Knoops' Innocence Project, *Case Overview*, https://knoopsadvocaten.nl/en/innocence-project/zaken/.

UDK: 342.56 : 340.131 (498)
343.352 : 343.28/.29 (498)
Original scientific paper

Ratoi Razvan Ionut, PhD student
Bucharest University of Economic Studies, Romania
E-mail: ratoirazvan23@stud.ase.ro
ORCID ID: 0009-0007-8093-2383

STATUTORY LIMITATIONS AND THE RULE OF LAW: ROMANIA'S STRUGGLE FOR JUSTICE AND EU ALIGNMENT*

ABSTRACT

Romania's integration into the European Union (EU) has been a catalyst for significant advancements in democracy and the rule of law. However, the country continues to grapple with persistent challenges in ensuring justice and accountability. A critical issue at this moment is the statutory limitation of criminal liability, which frequently undermines efforts to prosecute corruption, abuse of power, and other serious offenses. This article explores the intersection of statutory limitations with Romania's broader struggle to strengthen the rule of law, focusing on the implications for national governance and the EU framework. The misuse of statutory limitations in Romania has created systemic barriers to justice, particularly in cases involving high-profile corruption. Judicial inefficiencies, delayed investigations, and political interference often allow perpetrators to evade accountability, eroding public trust in democratic institutions. This dynamic poses a significant threat to Romania's democratic consolidation and alignment with the EU's foundational values. The article analyzes specific case studies of corruption where statutory limitations have thwarted justice, highlighting their impact on public confidence in the rule of law. Romania's challenges are contextualized within the broader EU landscape, where the rule of law is a cornerstone principle. Mechanisms such as the European Commission's Rule of Law Report and the Cooperation and Verification Mechanism (CVM) have been instrumental in monitoring Romania's judicial reforms and anti-corruption efforts. While these tools have driven some progress on the matter, we still have serious concerns regarding the judicial independence. The article evaluates the role of the EU in addressing these deficiencies, including the potential of the Rule of Law Conditionality Regulation to incentivize member states to uphold democratic principles. The analysis emphasizes the need for comprehensive reforms in Romania to mitigate the detrimental effects of statutory limitations. Legislative measures, such as guaranties for a more independent judicial system, improving judicial efficiency and reducing political and government control over the judicial are proposed as essential steps to prevent justice from being delayed, denied or influenced. By examining Romania as a case study, this article sheds light on the broader implications of statutory limitations for the EU's efforts to safeguard democracy and the rule of law. Ensuring accountability for corruption and other serious offenses is crucial for maintaining public trust, strengthening democratic institutions, and upholding the EU's

values. The findings contribute to ongoing discussions on the role of statutory limitations in shaping the effectiveness of justice systems within the EU, offering policy recommendations to address these pressing challenges.

Keywords: *Statutory limitations; rule of law; judicial reform; European Union integration*

1. INTRODUCTION

The accession of Romanian to European Union beginning with 01 of January 2007 is perhaps one of the most significant events in its democratic state existence.[1] This moment is a very important transition toward a democratic governance and enhanced adherence to the rule of law. Therefore, the country has carried out a number of reforms towards the modernization of the country's legal framework to align it to the European Union values. However, Romania continues to face great difficulties in the development of a justice system that can guarantee the full respect of human rights principles. The current and main issue that is challenging these efforts is the statutory limitation of criminal liability[2] – a legal provision that is meant to prevent the indefinite threat of prosecution, but which in practice has often hampered proper prosecution of corruption, abuse of power, and other crimes. This paper explores how the legal provision related to statutory limitations of criminal liability and the judicial authorities have created systemic barriers to justice, particularly in high-profile corruption cases, where judicial inefficiencies, protracted investigations, and political interference have enabled the responsible to evade justice. Such outcomes not only diminish public trust in the judicial system but also threaten the very foundations of democratic consolidation and the country`s commitment to respect the core values of the EU. One of these core values is the principle *Rule of law,*[3] that is essential for ensuring democracy, judicial independence and respect for the human rights.

* This paper was co-financed by The Bucharest University of Economic Studies during the PhD program.

[1] For more on the subject see, Fuerea, A., *Manualul Uniunii Europene, Ed. a 6-a*, Editura Universul Juridic, Bucharest, 2016, p. 300-318.

[2] Statutory limitation of criminal liability is currently regulated in Law No. 286/2009 regarding the Criminal Code Criminal Code of Romania at art. 154-156, available on https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2018)042-e

[3] According to the Report of the Secretary General of the United Nations published on 23 of August 2004, titled "The rule of law and Transitional Justice in conflict and Post-Conflict Societies Report*",* p.4*,* Rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before

Over the past couple of years, several high-profile corruption cases have shown how statutory limitations can be exploited to delay or derail prosecutions and so undermining public confidence in the justice system. Moreover, Romania's struggles are set against the broader backdrop of EU governance, where the rule of law remains a cornerstone principle. EU mechanisms, including the European Commission's Rule of Law Report and the Cooperation and Verification Mechanism (CVM), have been pivotal in monitoring judicial reforms and anti-corruption efforts. Our paper will outline the main concerns written by EU officials in the CVM and Rule of law reports related to the Romanian Rule of Law. This paper analyses case studies and takes a close look at how both Romania and the EU tackle these issues, aiming to add something meaningful to the wider conversation about judicial reform and democratic governance. It's all about coming up with practical policy ideas to tackle the downsides of statutory limitations, so Romania's justice system can step up its game in fighting corruption and keeping democratic principles strong. We strongly believe that if Romania adopts an adaptive approach that bridges legislative reform with a scope to create an independent judicial system with no interference from the political side, a sound technological implementation and clear legislative procedures, the way for a more effective justice system will be paved, one that fully aligns with the democratic values and human rights principles that are the heart of the EU construction.

2. STATUTORY LIMITATION ON CRIMINAL LIABILITY: LEGAL FRAMEWORK AND SYSTEMIC ISSUE

Romanian`s pursuit to join the EU was the momentum for a much-needed accelerated reform for the harmonization of national laws and principals with the EU standards and rule of law. There is no doubt that the reforms performed after the 2000`s have substantially modified the legal landscape a created a much more efficient legal system where the respect for the human rights are mandatory.[4]

the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency available on https://digitallibrary.un.org/record/527647?v=pdf; For more on the rule of law see: Stein, A., *What Exactly Is the Rule of Law?* University of Minnesota Law School, 2019, Volume 185.

[4] For a detailed analyses on the subject see: Furea, A., *Modificări legislative esențiale adoptate după aderarea României la Uniunea Europeană*, Romanian Academy, Institute of Legal Research "Acad. Andrei Rădulescu", 10 Years Since Romania's Accession to the European Union. Impact on the Evolution of Romanian Law, Bucharest, March 31, 2017, p. 371-381.

Nevertheless, challenges persist, especially in ensuring judicial independence especially is high criminal cases where politicians are involved.

2.1. Legal framework

One of the most important legal reforms that Romania performed are related to the Criminal laws. In 2014, Romania adopted the new criminal Code, which is applicable since 1st of February 2014.[5] This new code, along with the Penal Procedure Code,[6] replaced the old criminal codes which had been in place since 1969.[7] Such a legislative change holds major significance for any state, as it illustrates the evolution and the manner in which society chooses to regulate matters falling within the scope of criminal law while simultaneously safeguarding individual rights. In fact, the importance of enacting legislation in the criminal field is best exemplified by the following quotation: *"The words of criminal law are the keys to prisons. They are the keys to the forbidden city, where an individual is deprived of his most precious asset, personal liberty."*[8]

Despite the fact that the new codes have been in force for 11 years, one of the major challenges Romania faces today concerns the mechanism through which the statute of limitations is regulated and applied by the judiciary. This challenge reverberates not only domestically but also internationally, notably within the context of the European Union, as we will present below.

2.2. Systemic issues

The statute of limitation of criminal liability is understood as the elimination of criminal liability for an offense due to the passage, under certain conditions, of a given period of time, thereby extinguishing the criminal legal relationship arising from the commission of the offense and removing it from the scope of criminal

[5] Law No. 286/2009 regarding the new Criminal Code, with subsequent amendments and additions, published in the Official Gazette (M. Of.) No. 510 of July 24, 2009.
[6] Law No. 135/2010 regarding the new Criminal Procedure Code, with subsequent amendments and additions, published in the Official Gazette (M. Of.) No. 486 of July 15, 2010.
[7] Law No. 30/1968 regarding the Criminal Code of the Socialist Republic of Romania published Official Gazette (M. Of.) No. 147 of November 13, 1968.
[8] Papa, M., *Fantastic Voyage, În lumea dreptului penal special*, translation into Romanian of the second edition by Ioana-Celina Paşca, Universul Juridic, Bucharest, 2022, p. 24.

law.[9] This institution is particularly important in the legal system, as it limits over time the possibility and legal obligation to hold accountable those who have committed offenses provided for by criminal law. At the same time, it is subject to a fundamental constitutional principle, namely, the principle of applying the more favorable criminal law, as established in Article 15, paragraph 2 of the Constitution of Romania.[10]

Statutory limitations on criminal liability are set out in art. 154 of the Romanian Criminal Code, and refer to limits for prosecution on criminal offenses: eight years for crimes with 5–10-year penalties, and ten years for those exceeding 10 years but less than 20 years penalties. These limits aim to ensure timely justice and legal certainty, a principle shared across EU states. The statute of limitation in criminal trails became a challenge for the judicial system in 2018, when the Romanian Constitutional Court gave the Decision no. 297/2018[11] that stated that art. 155[12] from the Penal Code is unconstitutional. Basically, the Court said that "*the legislative solution which provides that the interruption of the term of the statute of limitation in criminal trials upon the performance of any procedural act in question is unconstitutional.*" In the same decision, the Court refers to the fact that the legislative solution provided in the 1968 Penal Code,[13] according to which the statute of limitation of criminal liability was interrupted by the performance of any procedural act that was required to be communicated to the accused or defendant, is constitutional. This Decision of the Court marks the beginning of an extensive series of ruling that have shaped and influenced the way of ruling on criminal trails. The practice of the courts has been considerably affected, as the interpretation of the decision's effects has resulted in contradictory solutions.[14] As

[9] Dongoroz, V., Kahane, S., Oancea, I., Fodor, I., Iliescu, N., Bulai, C., Stănoiu, R., Roşca, V., *Explicații teoretice ale Codului penal român, Partea general, Vol II,* Editura Academiei Republicii Socialiste România, 1970, p. 358.

[10] According with art. 15 paragraph 2 from the Constitution of Romania, "*The law applies only to the future, except in the case of a more favorable criminal or misdemeanor law."*

[11] Published in the Official Gazette (M. Of.) No. 518 of June 25, 2018.

[12] The text provided in Article 155 of the Criminal Code, which was the subject of the Constitutional Court's analysis, was as follows: "*The course of the statute of limitations for criminal liability is interrupted by the performance of any procedural act in the case*"

[13] According to Article 123 of the 1968 Criminal Code, "*The course of the statute of limitations provided in Article 122 is interrupted by the performance of any act which, under the law, must be communicated to the accused or defendant during the criminal proceedings*".

[14] The contradictory solutions arose because some courts viewed the Constitutional Court's decision as interpretive, leading them to conclude that the statute of limitations for criminal liability could only be interrupted by an act that must be communicated to the suspect or defendant, as the Constitutional Court had ruled in its decision. On the other hand, other courts saw Decision No. 297/2018 as a simple ruling, and as a result, they determined that the statute of limitations could no longer be interrupted since there were no longer any provisions specifying which acts could trigger an interruption.

a result, a general confusion was created in the judicial system and therefore the rule of law was affected because in similar cases, solutions on the criminal charges were different.

Although the Romanian Parliament had the legal obligation[15] to amend and to correct any legal text that was declared unconstitutional by the Romanian Court, within 45 days from the Decision, no measures were taken. In this context, the vast majority of the criminal courts in Romania implemented the Constitutional Court's decision in accordance with paragraph 34 of the ruling, which stipulated that the statute of limitations for criminal liability is interrupted solely if an official act, as prescribed by law, is communicated to the accused or defendant. However, as will be demonstrated, this interpretation was fundamentally flawed.

After 4 years from the Decision no. 297/2018, the Constitutional Court of Romania pronounced Decision no. 358/2022,[16] which analyzed the remaining text of Article 155[17] of the Penal code. By this decision, the Court not only invalidates the doctrinal position and the majority jurisprudence regarding the nature and effects of Decision no. 297/2018, but also explicitly highlights the legislator's passivity in adapting the norm that was previously declared unconstitutional. Consequently, the Court stated that throughout the entire duration of this period, the legal grounds that allowed for the interruption of the statute of limitations for criminal liability have, in fact, been removed from the normative framework. The main effect of this second Decision was that in most cases concerning corruption offenses, fraud involving European funds, and VAT, the courts have ordered the dismissal of criminal proceedings due to the application of the statute of limitations for criminal liability, in light of the effects of Constitutional Court Decision No. 358/2022. In this regard, it is relevant to highlight that the National Anticorruption Directorate (NAD) closed 557 criminal cases following the application of Constitutional Court Decisions No. 297/2018 and 358/2022[18]. In many of these cases, damages

[15] According to Article 147 paragraph 1 of the Romanian Constitution, *"Provisions in laws and ordinances in force, as well as those in regulations, that are found to be unconstitutional shall cease to have legal effect 45 days after the publication of the Constitutional Court's decision, unless, within this period, the Parliament or the Government, as applicable, aligns the unconstitutional provisions with the Constitution. During this period, the provisions deemed unconstitutional are automatically suspended"*

[16] Published in the Official Gazette (M. Of.) No. 565 of June 9, 2022.

[17] After the issuance of Decision No. 297/2018, the wording of Article 155 of the Criminal Code was as follows: *"(1) The course of the statute of limitations for criminal liability is interrupted by the performance of."* It`s important to say that without changes, from the legislative body, to Article 155 of the Criminal Code, it was hardly surprising that the provision would be contested at the Constitutional Court, since it had essentially become unusable.

[18] As stated in the NAD Press Release No. 918/VIII/3 of October 28, 2022 available here: https://www.pna.ro/comunicat.xhtml?id=11549

resulting from the committed offenses had already been calculated, amounting to approximately 1.2 billion euros. Furthermore, as indicated by the jurisprudence portal[19] of the Superior Council of Magistracy, between 2022 and 2024, courts ruled to terminate criminal proceedings due to the statute of limitations in approximately 10,000 cases.

In major corruption cases involving politicians or businesspeople with influence over Romania's political system, courts have ruled for the termination of criminal trials, which has further weakened public trust in the judiciary. For example, Darius Vâlcov, former Minister of Finance, escaped charges due to the statute of limitations in a case where he was accused of bribery and had been initially sentenced to six and a half years in prison by the first-instance court. Vâlcov was accused of demanding 10% of the amounts collected by a businessman's company from the Slatina Municipality over 2.1 million lei during his tenure as mayor. Another significant case in which the criminal proceedings were terminated involved Elena Udrea, former Minister of Regional Development. The High Court of Cassation and Justice ruled to drop the charges against her after the NAD accused her of receiving 5 million dollars in exchange for intervening with the Ministry of Energy on behalf of a businessman. Additionally, in the case of Ioana Băsescu, daughter of former Romanian President Traian Băsescu, she was definitively cleared of charges of incitement to embezzlement and two counts of money laundering in the 2009 election campaign financing case. In the same case, Elena Udrea also saw charges against her dropped on July 11, 2023, including two counts of incitement to bribery and five counts of money laundering. These cases really show how tough it can be to get justice when there is indifference and lack of action from part of the legislative and judicial bodies. It’s a serious issue, especially when powerful or well-known people manage to slip through the cracks. Beyond just those individual situations, it also messes with how people view democracy. If people notice that some influential politicians aren’t being held accountable, they might start wondering if the system actually works for everyone. And honestly, it makes the justice system look kind of shaky—like maybe the rules don’t apply the same way to all citizens.

3. THE EU'S ROLE IN UPHOLDING ROMANIA'S RULE OF LAW

The EU had a great influence in keeping Romania’s Rule of law on track ever since the country joined back in 2007. They’ve used a mix of mechanisms—like

[19] https://www.rejust.ro/

keeping a close watch on things, dangling financial incentives, and sometimes turning up the political heat—to make sure Romania sticks to democratic principles, keeps its courts independent, and tackles corruption in an efficient manner. And yes, it's worked to some extent—there's been some real progress worth noting. But it hasn't all been smooth sailing; there've been some rough patches, especially when the EU and Romania's government haven't exactly seen eye to eye. So, while the EU's efforts have definitely made a difference, it's pretty clear that keeping the rule of law strong is an ongoing effort, not something you can just check off and call done.

3.1. Monitoring and Enforcement Mechanisms in the EU

One of the first mechanism applied to Romania after accession to the EU in 2007 was the Cooperation and Verification Mechanism[20] (CVM). The purpose for this procedure was to support and monitor Romania`s efforts to address specific shortcomings in judicial reform and the fight against corruption, areas where the country lagged behind other EU member states at the time of its accession. The key objectives for the CVM for Romania focused on four major topics: i) Ensuring a judicial process more transparent and efficient, ii) establish, as foreseen an integrity agency who would have the job of verifying assets, incompatibilities and potential conflicts of interest; iii) to continue the ongoing effort to tackle high level corruption with professional and unbiased investigations; iv) to take further measures to prevent and fight against corruption, especially with the local government. In order to conclude on the efficiency of the CVM mechanism, we analyzed the progress reports published by the European Commission and the conclusions could be summarized as follows: i) in the early years of the mechanism, the initial reports acknowledged some advancements in the key objectives; ii) in the 2018 report, concerns arose as progress reversed, particularly in judicial independence and combating high-level corruptions iii) in the reports published after 2019 it was concluded that Romania renewed its reform efforts, addressing setbacks from 2017-2019, with positive trends noted in 2021 and 2022.

As we know, on 15 September 2023, the European Commission formally closed the CVM, noting that Romania has fulfilled many of the benchmarks and recommendations set under this mechanism. While we cannot ignore the major role of this mechanism to the growth of democracy in Romania, the fact is that Romania is still behind other post-communist EU members. We might add that, as developments show in the recent years, a reversal of progress registered is much

[20] Adopted through the Commission Decision 2006/928/EC of 13 December 2006 available here: https://eur-lex.europa.eu/eli/dec/2006/928/oj/eng.

likely to happened and the fight against corruption remains vulnerable to obstruction or passivity by parliamentarian from across the political spectrum.

The legislative body's decision not to amend Article 155 of the Criminal Code after the Constitutional`s Court Decision no. 297/2018—even while knowing that this could put the judicial system in a very difficult position—can be seen as a reversal of the progress made through the CVM mechanism, which was designed to sustain the ongoing effort to combat high-level corruption with professional and impartial investigations. After the closure of the CVM mechanism, Romania is being monitored under the Rule of Law Cycle as for all Member states. The annual Rule of Law reports assess various areas in all Member States, including the justice system and anti-corruption frameworks. They also cover crucial factors that affect reform capacity and sustainability, such as the quality of legislation and legislative processes, the role of independent institutions in maintaining checks and balances, as well as the conditions supporting civil society, media freedom, and pluralism. For example, the Rule of Law Report for 2023,[21] although it recognized significant and positive changes on different topics relate to the justice system, it also evidences that the delayed legislative response for the statute of limitation on criminal liability led to the closing of corruption cases and the annulment of convictions. Even if the report does not specifically recommend actions related to our paper subject, we believe the call to implement measures, particularly at an operational level, to address ongoing concerns regarding the time period of investigation and prosecution of criminal offenses aligns with European standard of the Rule of Law and implicitly covers issues related to the statute of limitations on criminal liability.

In my view, several factors have contributed to the challenges faced by the Romanian justice system. Foremost among these is the insufficient personnel within prosecution offices, making harder the effective gathering of evidence needed to ensure justice. This shortage remains a significant issue even nowadays, reflecting the current state of Romania's prosecution bodies. The main reason many cases were dismissed following the Constitutional Court's decision was the inefficient investigation and prosecution processes that allowed the statute of limitations to expire. Furthermore, beyond the issue of personnel shortages is the corruption among high-ranking state officials. These individuals often seek to delay the investigation and prosecution of criminal cases by postponing essential legislative reforms that could enhance the judicial system's efficiency or by influencing judges or prosecutors to delay judicial procedures applicable.

[21] Published on 5th of July 2023 by the Directorate-General for Justice and Consumers available here: https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en.

Also, the Rule of Law Report for 2024[22] highlights the same concern related to the delayed legislative response on the statute of limitation. In addition, the recent report highlights the European Court of Justice (CJEU) ruling on July 24, 2023,[23] which addresses issues related to the limitation of liability. This development follows Decision no. 358/2022 of the Constitutional Court of Romania. Despite this decision, many criminal courts in Romania chose not to dismiss ongoing cases where the statute of limitations had expired, effectively ignoring and refusing to apply the Constitutional Court's ruling. In response, the Brasov Court of Appeal sought a preliminary ruling from the CJEU. The questions asked by the national Court focused on whether national courts are bound by the rulings of the Romanian Constitutional Court, especially concerning the supremacy of European law, and whether non-compliance with these decisions could lead to sanctions against national judges.

In my opinion, this preliminary question was unnecessary, as Decision no. 358/2022 was clear and according to Article 147, paragraph 4 of the Romanian Constitution,[24] is binding for the Romanian judiciary, as stipulated in. The CJEU's ruling from July 24, 2023, emphasized the principle that offenses and penalties must be clearly defined by law. The CJEU concluded that EU law does not compel Romanian courts to disregard the Constitutional Court's judgments, even if such judgments lead to the dismissal of numerous criminal cases, including serious fraud cases affecting the Union's financial interests, due to the expiration of the limitation period. However, it also decided that Romanian courts cannot apply the principle of *lex mitior*[25] retroactively to invalidate the interruption of the limitation period by procedural acts that occurred before the Constitutional Court judgment. Basically, the CJUE ruling confirmed what the Romanian Constitution already stipulates, respectively that the Decisions of the Constitutional Court are binding. When evaluating the efficiency of the Rule of Law Mechanism compared to the Cooperation and Verification Mechanism (CVM), it is clear that non-compliance with the EU Rule of Law can lead to formal financial penalties aimed at enforcing corrective actions. In contrast, the CVM, while lacking direct enforcement

[22] Published on 24th of July 2024 by the Directorate-General for Justice and Consumers available here: https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en.
[23] Court of Justice of the European Union, judgment of 24 July 2023, Lin, C-107/23 PPU, ECLI:EU:C:2023:606, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62023CJ0107.
[24] According to art. 147 paragraph 4 of the Romanian Constitution, "(4) The decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, the decisions are generally binding and have effect only for the future."
[25] Is the principle stipulated in the Romanian Constitution that states that "*The law applies only to the future, except in the case of a more favorable criminal or misdemeanor law."*

powers[26] and relying on political dialogue and recommendations, has effectively fulfilled its purpose, particularly in the case of Romania.

3.2. Potential of the Rule of Law Conditionality Regulation

The Rule of Law Conditionality Regulation is an EU regulation[27] that establishes a mechanism allowing the European Union to enforce adherence to rule of law principles among its member states. Adopted in December 2020, this regulation enables the EU to link access to EU funds to the respect of the rule of law. Basically, by this mechanism that is related to the Rule of Law Cycle, the EU budget is protected in cases when breaches of the Rule of Law principals affect or risk affecting the EU financial interests. One of the most promising aspects of this regulation is its ability to detect violations of Rule of law principles. By making access to EU financial resources contingent on compliance with these standards, it provides a strong incentive for governments to prioritize necessary reforms. Countries must align their legal and institutional frameworks with EU expectations to secure funding, which can drive substantial progress in areas like judicial independence and anti-corruption.

The regulation also features an enforcement mechanism that enhances its potential impact. The European Commission is responsible for monitoring compliance, and when it identifies shortcomings, it has the authority to propose measures, including the suspension of funds. The possibility of financial repercussions serves as a powerful tool for the EU, allowing it to address systemic problems in member states effectively, especially those who are dependent on the EU funds. By applying pressure through funding, the regulation may encourage governments to take the necessary steps toward reforming their judicial systems. I believe that the success of this regulation is dependent on consistent and fair enforcement by the European Commission and the Council of the EU. Therefore, the regulation must be applied equitably to all member states, in order to avoid and political sensitivities and concerns among EU member states.

Based on the Rule of Law Reports from 2022 to 2024, Romania may indeed face the risk of sanctions due to insufficient progress in upholding the rule of law.

---

[26] Sedelmeier, U., Lacatus, C., *Does monitoring without enforcement make a difference? The European Union and*
anti-corruption policies in Bulgaria and Romania after accession, Journal of European Public Policy, 2020, p. 18. https://doi.org/10.1080/13501763.2020.1770842.

[27] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget published in the Official Journal of the European Union LI 433/1.

Basically, the above-mentioned reports, indicate that Romania continues to face significant deficiencies in its judicial system that could, in our view, adversely affect EU financial interests. For instance, the regulation regarding the statute of limitations on criminal liability has already impacted the EU financially, as numerous criminal cases related to VAT fraud and tax evasion were dismissed due to delays in necessary legislative reforms. In this regard, I firmly believe that the EU must take decisive action to safeguard the rule of law. This involves conducting thorough assessments of the current state of rule of law in member states and implementing substantial measures that go beyond mere monitoring.

4. STRENGTHENING THE RULE OF LAW IN ROMANIA: STEPS FORWARD

It is indisputable that Romania has made significant progress in reforming its judicial system, being closely monitored through the CVM mechanism. However, these developments, in my view, still do not fully meet European standards, particularly regarding the assurance of judicial independence and respect for the Rule of law. The Romanian judicial system continues to face major issues that could undermine both the autonomy of the judiciary and public confidence in the judicial system. So, as Romania works toward a stronger justice system and a full alignment with the EU Rule of Law standards, the need for comprehensive reforms of the judicial body is both critical and urgent. The following recommendations aim to address key challenges faced by the judicial system in Romania, fostering greater efficiency, transparency, and public trust.

4.1. Extending the statute of limitations for complex cases

Legislative adjustments are needed to extend the statute of limitations for criminal liability in cases of economic crimes, corruption, and offenses that affect the financial interests of the European Union, especially given the high level of complexity due to the sophisticated fraud mechanisms employed by perpetrators. Such a measure would provide investigative authorities with sufficient time to conduct criminal investigations aimed at establishing the guilt or innocence of the accused. Although the current statutes of limitations for criminal liability are adequate and in line with European legislation, the Romanian judicial system lacks a sufficient number of investigative bodies to handle criminal cases. This shortfall is the primary reason why, in corruption cases, investigations are going very slow, frequently resulting in the statute of limitations being exceeded. Also, the political

influence on these cases, is another reason for which the investigations are not effective and made in timely manner.

4.2. Measures to reduce the workload

Effective measures to reduce the workload on the judicial system are crucial to ensure effective and high-quality rulings. To achieve this, it is imperative to increase the number of judges, prosecutors, and personnel within the investigative bodies responsible for criminal investigations.[28] Also, the executive body has to provide logistic and financing for the new personnel. For example, there are Courts in Romania fully staffed, that lack room space to hold court hearings. Without these additional resources, the judicial system cannot deliver timely justice and people end up waiting forever for a fair ruling. Adding more staff would help clear the backlog and get things move faster.

4.3. Keep politics out of the judicial system

Strengthening judicial independence is one of a key factor of the rule of law. In this respect, legislative measures are needed in order to protect judges and prosecutors form political interference. This can include clearer regulations regarding the appointment, promotion and disciplinary measures of judges, ensuring decisions are based on merit rather than political connections. In today's complex and delicate geopolitical environment, it is crucial to recognize that protecting democracy and the rule of law depends on an independent and efficient judicial system. Without this foundation, we risk facing consequences that could undermine the democratic values we have worked so hard to secure in Romania.

4.4. Digitizing the judicial system

Another key reform is the digitalization of the judicial system. The lack of a case management system often burdens and blocks the judicial system. Implementing a modern case management system and prioritizing the digitization of courts records and case files can significantly enhance the efficiency. Although Romania is officially digitized, in practice we still face significant challenges accessing the so-called software solutions implemented by the judicial system. For instance, the

[28] For more on the subject, see Rule of Law Report from 2023 available here: https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en.

justice system's web portal[29] in Romania encounters numerous flaws and is often non-operational.

4.5. Continuous education of the judicial actors

Lastly, continuous education is necessary for all justice system participants judges, prosecutors, attorneys, and support staff extending far beyond the technicalities of legal knowledge. They have to be equipped with a deep understanding of their social role, as their rulings and actions can profoundly impact a person's life and future. When justice system actors recognize the impact of their decisions, they grow a robust sense of accountability, ensuring rulings are delivered with precision, impartiality, and adherence to ethical standards. Furthermore, this awareness cultivates empathy and emotional strength, empowering them to address the human dimensions of legal disputes with sensitivity and resilience. Ultimately, this commitment to education fortifies the justice system's core. It enhances fairness, strengthens public confidence, and upholds the rule of law as a cornerstone of a just and equitable society.

The importance of a fair and effective justice system cannot be overstated. Beyond punishing wrongdoers, it protects individuals from abuses of power, resolves disputes impartially, and upholds the principles of democracy. In Romania, where the echoes of a communist past still linger in collective memory, the justice system is a symbol of progress a promise that the rule of law will prevail over corruption, favoritism, or political agendas. When courts operate with integrity and efficiency, they send a clear message: no one is above the law, and every citizen has a voice. In times of crisis whether economic downturns, political scandals, or social unrest this reliability becomes even more vital, offering stability when other systems falter.

Romania's justice system has come a long way, but the journey is far from over. The stakes are high: a judiciary that works well strengthens democracy, boosts economic growth by fostering a predictable legal environment, and gives every citizen a fair shot at justice. Conversely, a system that falters risks deepening distrust and division. By committing to continuous improvement—faster courts, independent judges, and a focus on the public good—Romania can build a justice system that not only meets European standards but also earns the pride and trust of its people.

[29] www.portaljust.ro

5. CONCLUSION

Romania's integration into the European Union has marked a significant turning point in its pursuit to a democratic state and adherence to the rule of law. This journey has catalyzed notable advancements, yet persistent challenges, particularly the statutory limitation of criminal liability, continue to hinder the nation's ability to ensure justice and accountability. As explored throughout this article, these limitations have created systemic barriers, especially in high-profile corruption cases, where judicial inefficiencies, protracted investigations, and political interference have enabled perpetrators to evade prosecution. The consequent erosion of public trust in the justice system not only jeopardizes Romania's democratic consolidation but also its alignment with the EU's foundational values. The legal framework governing statutory limitations, shaped by the 2014 Criminal Code and subsequent Constitutional Court decisions—most notably Decisions No. 297/2018 and No. 358/2022—has inadvertently facilitated the dismissal of numerous cases. High-profile examples, such as those involving Darius Vâlcov, Elena Udrea, and Ioana Băsescu, underscore how these limitations have been exploited, allowing influential figures to escape accountability despite initial convictions or substantial evidence. This has amplified public disillusionment, raising critical questions about the judiciary's capacity to deliver timely and equitable justice, particularly in complex cases impaired by political influence.

Within the broader EU context, Romania's struggles are subject to rigorous oversight through mechanisms like the Cooperation and Verification Mechanism (CVM), which concluded in 2023, and the ongoing Rule of Law Cycle. These tools have driven progress, yet the closure of the CVM and the transition to broader EU monitoring frameworks signal that Romania must now sustain its reform momentum independently. The EU's Rule of Law Conditionality Regulation, linking access to funds with rule of law adherence, emerges as a potent incentive. However, the delayed legislative response to statutory limitation issues—resulting in the closure of cases with damages exceeding 1.2 billion euros, as reported by the National Anticorruption Directorate—highlights the urgency of addressing these deficiencies to avoid financial repercussions and fully integrate into the EU's democratic framework.

To surmount these challenges, comprehensive reforms are imperative. Legislative adjustments to extend statutes of limitations for complex cases, such as corruption and economic crimes, would grant investigative authorities adequate time to pursue justice. Reducing judicial workload through increased staffing—judges, prosecutors, and investigators—coupled with logistical support, is essential to expedite case resolutions. Strengthening judicial independence via transparent

regulations on appointments, promotions, and disciplinary actions would shield the judiciary from political interference, a persistent threat to its integrity. Furthermore, modernizing the system through effective digitalization and prioritizing continuous education for judicial actors would enhance efficiency, accountability, and public confidence.

In conclusion, Romania stands at a pivotal juncture. The progress achieved since its EU accession is commendable, yet the systemic issues surrounding statutory limitations demand immediate and resolute action. By implementing the proposed reforms extending limitation periods, bolstering judicial resources, safeguarding independence, and embracing technological and educational advancements—Romania can fortify its justice system and align fully with EU standards. This endeavor transcends mere compliance with external expectations; it is about building a judiciary that ensures justice is accessible, impartial, and effective for all citizens. A robust and independent justice system is the bedrock of a resilient democracy, and Romania's success in this regard will not only benefit its society but also reinforce the EU's collective commitment to upholding the rule of law across member states. The opportunity for transformative change is within reach—Romania must act decisively to secure a future where justice prevails and democratic values endure.

REFERENCES

BOOKS AND ARTICLES

1. Dongoroz, V., Kahane, S., Oancea, I., Fodor, I., Iliescu, N., Bulai, C., Stănoiu, R., Roşca, V., *Explicații teoretice ale Codului penal român, Partea general, Vol II,* Editura Academiei Republicii Socialiste România, 1970.
2. Fuerea, A*., Manualul Uniunii Europene, Ed. a 6-a*, Editura Universul Juridic, Bucharest, 2016,
3. Fuerea, A., *Modificări legislative esențiale adoptate după aderarea României la Uniunea Europeană*, Romanian Academy, Institute of Legal Research "Acad. Andrei Rădulescu",10 Years Since Romania's Accession to the European Union. Impact on the Evolution of Romanian Law, Bucharest, March 31, 2017.
4. Papa, M., *Fantastic Voyage, În lumea dreptului penal special*, translation into Romanian of the second edition by Ioana-Celina Paşca, Universul Juridic, Bucharest, 2022.
5. Sedelmeier, U., Lacatus, C., *Does monitoring without enforcement make a difference? The European Union and anti-corruption policies in Bulgaria and*

Romania after accession, Journal of European Public Policy, 2020, available here: https://pureadmin.qub.ac.uk/ws/portalfiles/portal/211947816/Lacatus_Sedelmeier_JEPP_May_2020_1_.pdf.
6. Stein, A., *What Exactly Is the Rule of Law?* University of Minnesota Law School, 2019, Volume 185.

LEGAL ACTS

1. Law No. 286/2009 regarding the new Criminal Code, with subsequent amendments and additions, published in the Official Gazette (M. Of.) No. 510 of July 24, 2009, available here: https://www.vertic.org/media/National%20Legislation/Romania/RO_Criminal_Code.pdf.
2. Law No. 135/2010 regarding the new Criminal Procedure Code, with subsequent amendments and additions, published in the Official Gazette (M. Of.) No. 486 of July 15, 2010 available here: https://www.just.ro/uploads.
3. Commission Decision 2006/928/EC of 13 December 2006 available here: https://eur-lex.europa.eu/eli/dec/2006/928/oj/eng.
4. Constitution of Romania, Official Gazette, Part I, no. 767/31.10.2003, available on https://www.presidency.ro/en/the-constitution-of-romania.
5. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 available here: https://eur-lex.europa.eu/eli/reg/2020/2092/oj/eng.
6. Law No. 30/1968 regarding the Criminal Code of the Socialist Republic of Romania published Official Gazette (M. Of.) No. 147 of November 13, 1968, available here: https://legislatie.just.ro/Public/DetaliiDocument/38070.

COURT DECISION

1. Court of Justice of the European Union, judgment of 24 July 2023, Lin, C-107/23 PPU, ECLI:EU:C:2023:606, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62023CJ0107.
2. Decision no. 297/2018 of the Constitution Court of Romania, available here: https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_297_2018.pdf.
3. Decision no. 358/2022 of the Constitution Court of Romania, available here: https://www.ccr.ro/wp-content/uploads/2022/06/Decizie_358_2022.pdf.

NETWORK RESOURCES

1. NAD Press Release No. 918/VIII/3 of October 28, 2022 available here: https://www.pna.ro/comunicat.xhtml?id=11549
2. www.portaljust.ro
3. https://www.rejust.ro/
4. Rule of Law Report for 2023 available here: https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en
5. Rule of Law Report for 2024 available here: https://commission.europa.eu/publications/2024-rule-law-report-communication-and-country-chapters_en
6. Report of the Secretary General of the United Nations published on 23 of August 2004, titled "The rule of law and Transitional Justice in conflict and Post-Conflict Societies Report" available here: https://digitallibrary.un.org/record/527647?v=pdf

UDK: 342.738 : 061.1EU
341.645
Review paper

Ema Turnšek, PhD student
University of Miskolc, Hungary
E-mail: ema.turnsek@centraleuropeanacademy.hu

THE FOUNDATION OF THE RIGHT TO DATA PROTECTION IN EUROPE IN THE LIGHT OF HEALTH DATA

ABSTRACT

The paper consists of three major parts, the development and assessment of the fundamental legal acts in relation to the right to data protection, the analysis of the right to data protection in detail and the chosen cases in this field. Firstly, the article tries to elaborate on the development of data protection in EU and in Signatory States of the ECHR through the most significant legal acts and judgments that shaped the legal framework we have today. Secondly, the article delves into the comprehensive structure of the right to private and family life pursuant to Article 8 ECHR. It addresses the lengths of the article and the right to data protection as a sub-right of the right to private and family life pursuant to the Article 8 ECHR as well as it exposes its different aspects and its position according to other sub-rights under the same Article. Thirdly, the article introduces four different cases concerning the protection of health data in particular, exposing different issues and findings of the CJEU and the ECtHR. Finally, the article shall provide the reader with a wholesome picture on how the right to the protection of personal (health) data developed, how it is understood and what meaning does it have today, particularly in Europe.

Key words*: data protection in EU, data protection in Europe, health data, the right to data protection, the right to privacy, ECtHR's data protection case law, CJEU's data protection case law.*

1. INTRODUCTION

In general, it has become quite common for us to use various health and medical phone-apps daily and to enjoy services of technologically advanced healthcare systems. It may seem unimaginable; however, thirty years ago, medicine did not have as advanced and developed digital equipment, like operating robots or artificial wombs for example, as it has today. Indeed, medicine and healthcare have rapidly developed since the Covid-19 outburst, but these fields have not stopped progressing. Taking into account the development of artificial intelligence and informational-technology all together, now is the era of the biggest changing and

of major developments in medical, biomedical, informational-technological and healthcare sectors, which enhances the need for an adequate protection of personal (health) data.

In 2008, EU has already recognized the right to data protection as an autonomous, independent right by the Lisbon Treaty and its newly implemented Charter of Fundamental Rights of the European Union.[1] Nonetheless, this was not the first acquaintance between the EU Member States and the right to data protection. The CJEU has acknowledged human rights and particularly, the right to data protection in the context of Article 8 ECHR, prior to the adoption of the Charter. In 1970, the CJEU has set forth that the fundamental human rights are, admittedly, an integral part of the general principles of law, of which the protection is guaranteed by no other than the CJEU.[2] At the time, EU did not yet have the human rights enshrined in an act of fundamental nature such as the Charter, which is why this clarification of the CJEU was significant. The judgment further on provided that in the absence of the human rights inclusion in provisions of the EU's Founding Treaties, their protection could be extracted from the joint constitutional traditions of the EU Member States. Therefore, even at the time, when the right to data protection was not yet directly enshrined into the primary EU law, it has already been recognised and protected by the EU. In 1995, the EU adopted secondary legislation in this field – Directive 95/46/EC;[3] the CJEU, however, in many cases still referred to the protection of data under the European Convention of Human Rights,[4] which has also become an act of fundamental nature for the EU Member States.

One of the fundamental legal acts that implicitly includes and protects the right to data protection is ECHR and in particular, its Article 8, the right to private and family life. ECHR was created in post-war times, in 1950 and it was the first mechanism to take certain rights of the Universal Declaration of Human Rights[5] and make them legally binding for the governments of signatory states.[6]

[1] Charter of Fundamental Rights of the European Union, OJ EU C 326, 26. 10. 2012., hereinafter: the Charter.
[2] Case 11-70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel from 17 December 1970.
[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50 (hereinafter: Data Protection Directive).
[4] European Convention on Human Rights (1950), hereinafter: ECHR.
[5] UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, https://www.refworld.org/legal/resolution/unga/1948/en/11563 [accessed 29 November 2024], hereinafter: UDHR.
[6] The official website of the European Court of Human Rights, European Convention on Human Rights, https://www.echr.coe.int/european-convention-on-human-rights, 26 November, 2024.

Admittedly, the right means very little without the proper safeguards, which is now solved by having an independent international court – European Court of Human Rights (hereinafter: ECtHR) that is ensuring the proper implementation and respect of the rights set forth by the Convention.

Interestingly, the provisions of ECHR may be found as very broad or even quite indefinite. Consequently, we may find many different interpretations of each Article and that may put a question on their realization in practice. Such situation also creates critical (and even opposing) opinions among the scholars. In his article, Mahoney argues that such open language and structure of ECHR give the Court significant opportunities and a wide-open window for choosing various interpretations, making the Court "the law maker".[7] In this regard, De Blois exposed inconvenient situations, where "the most substantive provisions" of ECHR leave a lot of space for interpretations, and in this sense, become a basis of judicial discretion.[8] Admittedly, such approach can significantly shake the legal certainty regarding the proceedings in front of the ECtHR and even puts a question on the legitimacy of its decisions.

The ECtHR has, in a way, become a source or a mechanism for finding compensations for victims that did not get any or were served with inadequate satisfaction within the domestic legal system. That being said, the ECHR's confrontation with technological changes is crucial especially when it comes to addressing the right to private and family life within the means of data protection. The technologies we know and use nowadays are incomparably more invasive then the machinery was 20, 30 or 50 years ago. Back then, the protection of private and family life served mainly as a protection from the interferences of the State, in the terms of surveillance and from interfering in their basic family affairs. There was no indication that people needed the protection of their IP address, their medical or health data in a health app or the protection of their biometric data. Now, the right to privacy extends to emails, other types of communication and other equipment[9] that could in any way have an influence on individual's privacy or personal data, which was made possible only by the modern technology. The protection of privacy was pictured differently at the time when ECHR was written; however, the previously criticized broad wording of the ECHR enables itself to

[7] Mahoney, P., *Marvellous Richness of Diversity or Invidious Cultural Relativism*, 19 Human Rights Law Journal, 1998. See also Mahoney, P., *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin,* 11 Human Rights Law Journal, 1990, p. 57.
[8] De Blois, M., *The Fundamental Freedom of the European Court of Human Rights* in: Lawson, R.; de Blois, M. (eds), *The Dynamics of the Protection of Human Rights in Europe*, 1994, p. 51.
[9] Van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak L. (eds.), *Theory and Practice of the European Convention on Human Rights*, Fifth edition, Intersentia, p. 732.

surpass the time changes and it allows the ECtHR to continuously make provisions relevant and applicable to this day.

All of the above is crucial, especially for the legal fields of data protection, medical law and for other areas of new technologies. To substantiate the latter, the article shall tackle the topic of the right to data protection in the light of the right to the respect of private and family life pursuant to the Article 8 ECHR. That shall be done by initially dividing and researching two aspects of the right with the use of analytical and case law research. Firstly, the paper shall examine the scope of this sub-right throughout the analysis of the Article 8 ECHR and through a comparison to some other rights incorporated in the same provision. Secondly, the article shall identify the position of the right in relation to the principal right to privacy, previous and presently valid legal acts and the well-established case law. These points will enable the reader to fully understand the purpose, meaning and lengths of the right to (health) data protection in Europe. Subsequently, the paper shall focus on a specific group of sensitive data, the health-related data, and demonstrate its importance, mainly on the basis of decisions of the two highest legal instances, the ECtHR and the CJEU. Besides presenting some of the reference cases, in this chapter, the paper shall also demonstrate some of the utmost important aspects of the protection of health-related data, the philosophy behind it, reasons and possible consequences of unlawful disclosures of such data. The whole text is mainly written with the use of analytical and case law research methods. All-together, the article at hand shall draw a full picture of the right to (health) data protection pursuant to the Article 8 ECHR and of the ECtHR's standing on this matter.

2. DATA PROTECTION IN THE LIGHT OF THE RIGHT TO THE RESPECT OF PRIVATE AND FAMILY LIFE UNDER ARTICLE 8 ECHR

In the digital era that we live in, personal data has become a new currency. The States as well as various supranational and international organizations have recognized that and stepped-up accordingly. When defining personal data or even more specifically – sensitive personal data, first acts and definitions that come to our minds are probably the ones from General Data Protection Regulation[10] that is

[10] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, p. 1–88 (hereinafter: GDPR).

relevant for EU or American Privacy Protection Act,[11] relevant for the US. Admittedly, the two governing acts have so far more or less regulated the data protection framework on the secondary level – one in the EU and the other in the US territory. However, there are also acts that stipulate the fundamental basis for such acts and enshrine the right to data protection through international legal acts into the national or federal legal systems. In this regard, the article shall mainly focus on one of the primary sources of data protection in Europe, which is the ECHR and its Article 8.

2.1. The scope of the right to data protection under Article 8 ECHR

When focusing on the right to private and family life pursuant to Article 8 ECHR, it must be noted that it every person with the right to respect for their private life, family life, and also for their home and correspondence.[12] In the academic literature these four elements are often addressed as pillars, which are not strictly separated among themselves nor further on defined.[13] Nonetheless these pillars in many cases align or cover each other. Meaning, every pillar focuses on a particular point of person's private sphere and even though they in principal differ from each other, its cores are so closely connected that dividing them may not be successful in many situations. For instance, what the sub-rights addressed within the means of the first pillar – the right to private life – have in common are more or less self-standing aspects of personhood and private sphere; for instance privacy, reputation, identity, sexual life, relationships with others and the outside world, physical and psychological integrity, reproductive rights etc.[14] On the other hand, the right to correspondence could be understood as the pillar providing protection of the confidentiality of communication in different forms as well as in various situations.[15] In the scope of the latter, the protection extends to letters, emails,

[11] American Privacy Rights Act of 2024. (2023-2024). H.R. 8818 -118th Congress (hereinafter: APRA).
[12] Article 8(1) ECHR.
[13] Johansson, E., *Privacy and data protection in a digital age: In the context of health data protection in Europe*, Independent written essay within the field of Constitutional Law and Human Rights UMEA University, 2024, pp. 6-10.
[14] Van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak L. (eds.), *op.cit.,* p. 669. See also European Court of Human Rights (secretariat), *Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence*, 2022, pp. 21-23.
[15] European Court of Human Rights, *Guide on Article 8 of the Convention – Right to respect for private and family life,* Council of Europe/ European Court of Human Rights, 2017, p. 66.

internet and data storage on computers as well as to different types of telephone conversations from either private place, business premises or even from prison.[16] It may seem confusing when looking at the whole scope of Article 8 ECHR as it extends to so many different fields and rights (from privacy to the right to healthy environment, the right to abortion, data protection, sexual orientation etc.), and it may make us question how far in depth each of these rights will actually be protected. Interestingly, when it comes to the right to healthy environment, the ECtHR will assess the situation only to the extent of the influences or harm imposed to an individual from polluting the environment – the environmental damage as such will not be taken into account without a person being harmed in some way nor will it be taken into consideration as a core issue of a case. Therefore, when it comes to this particular sub-right, its boundaries and limitations are undeniable. Admittedly, it may not always be clear, whether a particular case will stand the complex assessment and obligatory requirements that are needed to be fulfilled to actually make a case in front of the ECtHR; but it is clear that if the obligatory conditions are met, there are some limits to the ECHR's focus and assessment in these matters. Surprisingly or not, that is not always the case.

In consideration, what are then the limits of the ECtHR's decisions and explanations in connection to the right to privacy and data protection in particular? The right to privacy was already considered as an important part of Article 8 ECHR at the time of its creation. The latter can be seen from its wording, but the specific right to data protection was back then not yet in the minds of the Convention's Founding Fathers and cannot be sensed directly from this Article. The right to data protection is therefore a relatively "newly incorporated right" in the means of Article 8 ECHR, just like the right to gender identity or the right to a healthy environment. Another interesting point of view was presented in a book, titled Deep diving into data protection, of which authors argued that data protection should not even be considered as a fundamental human right, rather as a tool at the service of our self-development.[17] Further, the book explained that data protection should be merely understood as a result of the positive obligations of our modern democratic States to handle all the digital challenges in a way, to enable their citizens to fully enjoy their human rights in that particular State's territory.[18] Contrary to the latter, the right to data protection has been well defined,

[16] Margareta and Roger Andersson v. Sweden App. no. 12963/87 (ECtHR, 25 February 1992), para. 72; Malone v. the United Kingdom App. no. 8691/79 (ECtHR, 2 August 1984) para. 64; Halford v. United Kingdom App. no. 20605/92 (ECtHR, 25 June 1997) paras. 44-46; Copland v. the United Kingdom App. no. 62617/00 (ECtHR, 3 July 2007), para. 41.
[17] Herveg, J. (Ed.), *Deep diving into data protection: 1979-2019 : celebrating 40 years of research on privacy and data protection at the CRIDS*, Larcier (Collection du CRIDS; No. 51), 2021, p. 468.
[18] Ibid.

assessed and commented by the ECtHR in many aspects, in general as well as in detail, in the scope of numerous judgments decades ago.[19] Even before the GDPR was adopted, ECtHR has already made some very important decisions, shaping the trajectory of the understanding of data protection as such.

Since sensitive groups of data need a superior protection *per se*, it is significant that the ECtHR covers the protection of such groups of data as well. For instance, the ECtHR has dealt with many cases relating to the specific protection of health-related data and took quite a restrictive stand in the events of invasive interferences into individual's private life through disclosures and other infringements of his/her medical data.[20] Notably, the protection of health data is not such a small field to cover. It extends to the processing of health data, which covers all the forms of transmission, exposure, disclosure, use in healthcare systems, hospitals as well as on the internet, at work, verbally in daily life, via apps or in any other form or place, not to mention health data's substantive side. There are many different definitions for it, however, the one that is presently the most relevant for the EU citizens is definitely the one from Article 4 GDPR.[21] When defining "health data's substance", it should be also taken into account, which data is included in the term. Admittedly, the concept of health related data should be considered as broad as to extend to particular data because of their medical relevance, particular purpose and scale of data processing.[22] As the Working party Article 29 stipulated back in 2015, it is not mandatory to establish illness in order to qualify particular data as health related data.[23] The ECtHR and CJEU tackled variety of cases answering such legal dilemmas, but the eye-opening revelation might be the fact that this is only one group of sensitive data and there are several more. This may confirm a subtle remark that the scope of one sub-right that falls under Article 8 ECHR differs from the other ones. However, such statement remains very relative as with the passing of time, social changes, global movements, technological developments and it's will, the ECtHR may eventually modify certain limits of the "old rights" and add certain "new rights" as it did since 1950 till today.

[19] See for example Gaskin v. the United Kingdom App. no. 10454/83 (ECtHR, 7 July 1989); Z v. Finland App. no. 22009/93 (ECtHR, 25 February 1997); Klass and others v. Germany App. no. 5029/71 (ECtHR, 6 September 1978).
[20] See more about it in the next chapter.
[21] First point of the Article 4 GDPR describes data concerning health as personal data that are in relation to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status.
[22] Verhenneman, G., *The Patient, Data Protection and Changing Healthcare Models: The Impact of e-Health on Informed Consent, Anonymisation and Purpose Limitation*, Intersentia, 2021, p. 104.
[23] Article 29 Working Party, Annex to the letter of 5 February 2015 to Paul Timmers on mHealth – health data in apps and devices.

2.2. The broader concept and the development of the right to data protection

Looking at it more broadly, the primary purpose of Article 8 ECHR is to protect an individual against third-party's arbitrary interferences with any of the four pillars mentioned, namely private and family life, home, and correspondence.[24] While the right may principally be of negative nature,[25] the member States are also given positive obligations to ensure that the rights enshrined in Article 8 ECHR are respected even as between private parties, which may involve the adoption of measures designed to secure respect for private life (even in the sphere of the relations of individuals between themselves).[26] Interestingly, for an individual to invoke the first paragraph of Article 8 ECHR, he must show that the alleged breach falls within the scope of at least one of the following values – private life, family life, home and correspondence.[27] Indeed, the individual's complaint may touch more than one of these, as for example a data breach may extend on private life and correspondence at the same time. However, it is the applicant's responsibility to substantiate at least one, whereas the Court may not always substantiate which pillar was breached in particular.[28] Admittedly, data protection can fall within the scope of at least one pillar if not more (theoretically it could touch any of the four). Accordingly, while the right to data protection is being recognised as one of the significant rights protected by the ECtHR and other international and domestic acts, the interpretation of data protection as *a tool at the service of our self-development* cannot hold up. What is more, the right to data protection may as well be seen as a very specific right or scope of rights, if proceeding from an assumption that the concept of data protection originates from the right to privacy.[29] The latter should be considered as an older and broader concept of the protection of person's private sphere in comparison to the right to data protection.[30] The occurrence and the need for data protection arose no later than in the 80's. In 1981, the Council of Europe recognized the need for a more detailed data protection framework and adopted the first international treaty to regulate the right of individuals to the

[24] European Court of Human Rights (secretariat), *Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence*, 1st edition, December 31, 2016, p. 8.
[25] Kroon and Others v. the Netherlands App. no. 18535/91 (ECtHR, 27 October 1994) para. 31.
[26] This principle was fort he first time mentioned in Marckx v. Belgium App. no. 6833/74 (ECtHR,13 June 1979). See also Evans v. the United Kingdom App. no. 6339/05 (ECtHR, 10 April 2007) para. 75.
[27] Bates, E. et al., *Law of the European Convention on Human Rights*, Fifth edition, Oxford University Press, 2023, p. 508.
[28] Ibid, 510.
[29] Turnšek E., The Right to Privacy and Data Protection in European Healthcare Systems With an Emphasis on the Relevant Case Law And European Legislation. Medicine, Law & Society, 17(1), 2024, pp. 96-97. https://doi.org/10.18690/mls.17.1.89-108.2024
[30] Ibid.

protection of their personal data. The treaty was named the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, better known as the Convention 108, which has been amended in 2018[31]. The latter still remains in place and is well-known as a Convention 108+, serving as a guide for many countries even outside the European territory – in Mexico, Tunisia etc. Interestingly, Council of Europe was not the only one making its first steps in this field – at the same time the Organization for Economic Cooperation and Development (hereinafter: OECD) provided guidelines[32] with a similar content and later on EU followed as well. The later recognised the need for a specific regulatory of this field and in 1995, implemented the Data Protection Directive. While it may seem like a success, the later was not perceived as such. Intriguingly, when the Data Protection Directive was in force, CJEU – instead of using its secondary legislation (this particular directive) – chose to make its assessments regarding the respect of data protection on the basis of the Article 8 ECHR. In Rundfunk[33] case, which was one of the earliest cases regarding the Data Protection Directive before CJEU, the Court assessed the compatibility of a national auditing requirement with the Directive.[34] In its judgment, the CJEU assessed the position of the right to privacy in accordance with the Article 8 ECHR – it examined, if there was any interference with the right to privacy that would constitute an unlawful or justifiable breach of Article 8 ECHR. While CJEU put its entire focus to the Article 8 ECHR, it in a way disregarded the particular data protection rules, set out in the Data Protection Directive. As the Court rather replaced the right to privacy for data protection rules, Lynskey emphasized this could leave the public with an idea that the right to privacy substitutes the right to data protection and disturb the future relevance of data protection rules.[35] Furthermore, in cases

[31] Convention 108 + Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data, accessible here: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/09-10/Convention_108_EN.pdf, 3 January, 2025.
[32] Organization for Economic Cooperation and Development, OECD Guidelines on the Protection of
Privacy and Transborder Flows of Personal Data, OECD Publishing, Paris 2002.
[33] Case C-139/01 Österreichischer Rundfunk and Others from 20 May 2003.
[34] Lynskey, O., *Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order,* International and Comparative Law Quarterly, 63(3), 2014, https://doi.org/10.1017/s0020589314000244, p. 575.
[35] Ibid.

Satamedia[36] and Promusicae[37], CJEU made some conclusions, stipulating that Data Protection Directive is the act that actually protects the right to privacy and that right to privacy is synonymous with data protection. Interestingly such approach did not change until the Bavarian Lager[38], where even the European Data Protection Board intervened.[39] To clarify, the key issue was that Data Protection Directive made literally no reference to the right to data protection as such and in result, CJEU could neither. That being said, the Data Protection Directive was not as successful after all.[40] Maybe the expectations would be lower and therefore accurate, if the directive's naming and whole purpose were not to enhance the protection of data, but the protection of privacy.

Notably, the right to privacy could be understood as a broader right that among other rights includes the protection of a right to data protection as a more specific and narrowly oriented right.[41] In contrast, Lynskey is opposing to this point of view with credible argumentation, stating that the right to data protection includes a broader range of data and data related actions within its scope as well as guarantees more data-processing related rights to the individual (than the right to privacy).[42] In my viewing, both statements are correct. Even though it may look like they are contradictory at first sight, it may be established that the right to privacy is a broader right in a general sense. The later undoubtedly includes more aspects of individual's private (and family) life, whereas the right to data protection is a more specific right, covering different aspects and narrower rights in the more specific field of data protection, which also covers aspects that the right to private and family life does not necessarily deal with. In some points they certainly cover each other, e.g. if someone breaks into your email account, it invades into your private sphere (the breach is made against the correspondence as one of four pillars protected by the Article 8 ECHR) and compromises the information that lays within that email account (it can lead to a disclosure,

[36] Case C-73/07 Tietosuojavaltuutettu v. Satakunnan Markkinapörssi OY, Satamedia from 16 December 2008. In this preliminary ruling, the CJEU held that collecting, publishing, and commercially using individuals' income and asset data from public tax records constitutes processing of personal data under Directive 95/46/EC, and may fall under the journalistic exemption only if the sole purpose of it is public information – however, that is a subject of domestic courts' assessment.
[37] Case C-275/06 Promusicae from 29 January 2008. In the *Promusicae* case, the Court ruled that EU law does not oblige its Member States to require ISPs to disclose personal data in civil IP cases, emphasizing the need to balance copyright protection with privacy and proportionality principles.
[38] Case T-194/04 Bavarian Lager v. Commission from 8 November 2007.
[39] Lynskey, O., *op.cit.*, p. 575.
[40] Ibid, p. 570.
[41] Turnšek, E., *The right to privacy and data protection in European healthcare systems with an emphasys on relevant case law and European legislation, op.cit.,* pp. 89-108.
[42] Lynskey, O., *op.cit.,* p. 582.

transmission of personal data in particular). Taking into account some other aspects – the two rights may as well be hardly connected or not connected at all – e.g. the right to privacy includes a prohibition of a third-person to invade into individual's home, whereas the right to data protection may enable an individual the right to be forgotten (a right to erase individual's data from a database). Although we are still discussing the same rights, in the last example we may hardly sense a connection.

Admittedly, it is interesting to see, how and to what extent ECtHR acknowledges a quite comprehensive right to data protection inside the scope of already established right to private and family life under Article 8 ECHR. Even if it may seem that the right to data protection brings to the table a wide scope of "new" narrower rights, I believe it is significant that such (groups of sub-) rights enjoy the adequate protection, including the protection of the highest instances like the ECtHR and CJEU. Nonetheless, such approach is raising the concerns regarding the legal certainty and legal safety in connection to Article 8 ECHR as well as it is exposing the question of the limitations and boundaries of the ECtHR and its discretion.

3. RIGHT TO DATA PROTECTION THROUGH THE ECtHR'S CASE LAW

To substantiate the previously written, let us examine the chosen cases of ECtHR and CJEU that deal with the protection of sensitive personal data, more particularly health data, and with that, also with the individual's privacy and one's right to the respect of private and family life. The cases will be explored (more or less) chronologically, each exposing the significant question, unresolved matter and/or the significant definition provided within the particular judgment that cannot be found directly in the legislation.

3.1. Defining the sope "health related data" in Lindqvist case

An important decision on the protection of personal data relating to health was adopted by the CJEU in the Lindqvist case[43], where the Court provided an indefinite scope of the so-called group of "personal health data".

[43] Case C-101/01 Bodil Lindqvist from 6 November 2003.

The background of Ms. Lindqvist circles around her working as a catechist in the parish of Alseda in Sweden. Despite her very traditional profession, she took part in data processing course where one of her tasks was to create a website with an arbitrary theme. In 1998, she set up a website on her home computer, in which she included useful information for believers preparing for confirmation. Among other details, the website included quite a lot of personal information, even personal (health) data (such as descriptions, family relationships, telephone numbers) about 18 co-workers from the parish. For example, one of the colleagues was described as having an injured foot and as working part-time due to this health condition. At Ms. Lindqvist's initiative, the website was linked to the official website of their church. She did not ask nor inform her colleagues about her website or the use of personal information relating to them, which caused some resentment among some of the parties. Although she withdrew the page when she learned about the frustration among her colleagues, the public prosecutor had already noticed her wrongdoing on his radar and charged her for violating Swedish data protection law. The Swedish court referred the matter to the CJEU for a preliminary ruling and among other questions, asked if the information on the website, which included "the name of a person who has an injured foot and is on part-time work because of it" falls under the scope of data concerning health.

Essentially, the CJEU stressed that the term "health-related data" should be interpreted broadly. Accordingly, the term must cover information regarding all health aspects, considering physical as well as mental state of an individual's condition. The crucial point of this ruling lays in the recognition of mental and psychological illnesses, which are nowadays becoming more and more topical. It is easy to determine whether information is of health nature when someone catches a virus or breaks a leg. It is a completely different situation, when someone is diagnosed with a medical condition that does not outwardly show clear signs of illness. This CJEU's decision from 2003 remains relevant today, as it, in line with the provisions of currently valid act for this field – GDPR, endorses the amplitude on how (broadly) the health data should be interpreted.

Interestingly, the protection of health data has been recently quite drastically enhanced, not only because of the adoption of the GDPR, but also by a number of judgments, including cases C-667/21[44], Case C-446/21[45] (Maximilian Schrems v.

[44] Case C-667-21 ZQ v Medizinischer Dienst der Krankenversicherung Nordrhein, Körperschaft des öffentlichen Rechts from 21 December 2023. This case is significant, because the CJEU confirmed that non-material damages under Article 82 GDPR require causation, exclude fault in compensation assessment, and are limited to monetary redress.
[45] Case C-446/21 Maximilian Schrems v Meta Platforms Ireland Limited, anciennement Facebook Ireland Limited from 4 October 2024, paras. 70-74. In this particular case, the CJEU ruled that disclosing one's sexual orientation publicly doesn't permit broader data

Meta Platforms Ireland Limited) and C-252/21[46] (Meta Platforms Inc and Others v. Bundeskartellamt). The latter have in common a restrictive interpretation of the exemptions for the processing of personal health data pursuant to Article 9(2) GDPR. In principal, processing of sensitive groups of data (that are discovering one's religious beliefs, sexual orientation, health data etc.) is prohibited. In the scope of the listed preliminary rulings, the CJEU also touched the basic idea of the higher protection of processing of personal health data as processing of sensitive group of data, explaining its basis for such categorization is in their particular sensitivity. [47] Such level of sensitivity may lead to a serious interference with the fundamental rights to respect for private life and to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights in the event of a breach.[48] Therefore, despite the general prohibition of the processing of health- and other groups of sensitive data, the Article 9(2) GDPR provides a list of exceptions, particularly ten derogations, which are independent of each other and must therefore be assessed independently.[49] If in doubt, whether a particular data falls into one of those limited categories or not, the explanation must be restrictive. But if met, each stands as an adequate reason for processing of such data and is allowed.

The development is undeniable as well as expected. Back in the time of the conclusion of Lindqvist case, there was no GDPR and the technology was not as developed as it is today. However, in this reference case the CJEU made an important explanation that remains relevant.

3.2. The lenghts of data concerning health in relation to the case I. v. Finland

In the following case, ECtHR explained that personal information in relation to a patient is, without a doubt, connected to his or her private life.[50] The latter is also a basis for the application of Article 8 ECHR and what is more, it is an implication

processing, and explained that targeted advertising must respect limits on data type and retention.

[46] Case C-252/21 Meta Platforms Inc and Others v Bundeskartellamt from 4 July 2023, paras. 66-70. In general, this case revolved around a question whether the competition authorities can rule on the compliance or non-compliance of the undertaking with the GDPR in the context of a decision on an abuse of a dominant position. Importantly, the CJEU ruled on all six legal basis to process data, further clarifying the interpretation of Article 6(1) GDPR.

[47] C-667-21 ZQ v Medizinischer Dienst der Krankenversicherung Nordrhein, Körperschaft des öffentlichen Rechts from 21 December 2023, para. 41.

[48] Ibid.

[49] Ibid, para. 47.

[50] I. v. Finland App. no. 20511/03 from 17. 7. 2008, para. 35.

regarding its scope, extending it to the specific (so-called sensitive) groups of data. In 2008, ECtHR ruled in a case I v. Finland, where the applicant's human rights were found to be breached in the light of Article 8 ECHR, reflecting throughout violations of many more rights than just one.

The case concerned a nurse, who was infected with HIV and employed at a public hospital. At the same hospital, she also attended an infectious diseases clinic in regard to her HIV infection. In connection to observations made by her colleagues, she suspected that they had illegally accessed and read her medical records and had become aware of her health state. The ECtHR stressed it is of crucial importance to respect the sense of privacy of a patient as well as to generally preserve his or her trust in the medical profession and health services.[51] If the system fails to provide the latter, there is a serious danger that people would stop acquiring medical and health services and as a result, harm themselves or even worse, spread the disease onwards to a number of people. In the event of the latter, the health system may as well collapse. Since the applicant in this case was infected with HIV, the safeguarding of such sensitive data was significant – taking into account the potential issues that could arise from its disclosure.

What is more, stepping out of the box named "the Convention", which directly defines a relatively small circle of rights the applicant's personal rights were violated on various levels. In addition to the violation of the respect for the right to dignity given by every modern democratic state, the colleagues' knowledge of her medical condition constituted violations of different rights, each putting its own pressure to the applicant's dignity. Colleagues' interference constituted a violation of the applicant's right to privacy, the right to data protection, even of the right to independently decide whether to inform third parties regarding her own health state and made an illegitimate disclosure of personal (health) data. In consequence, the employer did not renew her work contract and she was left without a job for nearly two years. Because of the wide circling rumours, she had to sell her home and move to a different place. Besides the economic loss and degrading social life, she also had to face a loss of reputation. Lastly, it was not only her reputation and private life that was affected, but also her son's.

While the national legislation provided an option to claim a compensation for damages, originating from an unlawful disclosure of personal data (even if only alleged) – that was not sufficient to protect the applicant's private life. As there was no concrete protection that could in practice prevent such disclosure from

[51] Ibid, para. 38.

happening, the Court stressed that the State failed to provide the proper assurance for private life and declared a breach of Article 8 ECHR.[52]

In my opinion, this case is an exemplary one for studying the protection of medical and health data. It shows how far-reaching and damaging may be the consequences that occur from the unlawful disclosure of health data. It also represents the vital role of healthcare workers, doctors and medical stuff and the importance of their understanding of data protection. If only those colleagues knew how significant influence their rumours will have on applicant's life, the story would most probably turn differently. What is more, this case reached the ECtHR more than 15 years after this breach actually happened. That suggests the State failed to recognize the violations as well as it did not manage to provide applicant with the satisfaction she deserved. Importantly, a given right means very little without the proper safeguards, that is why the State has to be active in a way to provide the protection and the guarantees of such rights. Admittedly, each individual should know his rights and claim them or even fight for them whenever they are breached. However, in real life there are many situations, especially in healthcare, where data subject does not possess the proper knowledge or skills that would enable him to protect his rights (in hospitals and similar institutions, we commonly see many elderly people, kids, people with special needs). Because they are weaker parties and cannot protect themselves, the law should take care of that for them.

3.3. The relation between the right to data protection and the right to freedom of expression through the prism of Biriuk v. Lithuania case

In the following ECHR's case, the Court dealt with a different issue – it was weighing the limits and the boundaries between the right to protection of personal data and the right to freedom of expression.[53]

A powerful Lithuanian newspaper shared an article on the front page of the issue about Gitana Biriuk, a lady from a small town in Lithuania and in a very inconvenient, even disturbing way mentioned she was infected with the disease. The newspaper wrote quite many statements (mentioning only a few, but there were more) like:
"Notoriously promiscuous thirty-year old Gitana Biriuk is already sick with this fatal disease ..."
" G. Biriuk was infected with HIV by drug users who come to visit her ..."

[52] I. v. Finland App. no. 20511/03 from 17. 7. 2008, paras 47, 48, 49.
[53] Biriuk v. Lithuania, App. no. 23373/03 (ECtHR 25 February 2009).

"A man who had wandered in from somewhere lived in Gitana's house for a few years. After some time he went away and left "a present" [referencing to the infection of HIV] for the woman ..."
"... medics at the Pasvalys hospital confirmed that G. Biriuk is HIV-positive. The woman was taken to hospital with tuberculosis. Blood tests revealed that she was HIV-positive ..."

"It is an unmarried mother of two children, G. Biriuk [...] the women in nearby villages are afraid that their husbands will bring the deadly virus home ..."[54]

Although the breach of personal data in this case is quite straight-forward, the other opinionated comments may be found as offensive, if not even more hurtful, as the disclosure of her infection. Although the sole wording does not suggest a promising society, it is, however, a newspaper's job to make the headlines as eye-catching as possible, even if in indecent way.

As it can be seen from one of the retrieved statement, the medical staff from local health facility, Pasvalys hospital, confirmed her infection. Gitana Biriuk sued the newspaper. With her first lawsuit, she was relatively successful, noting the Lithuanian court awarded her with a slightly smaller amount for damages. However, Ms Biriuk appealed and made a complaint, with which she demanded full and maximum legally admissible compensation. At second instance, the court reduced the amount of compensation she was already awarded with and intriguingly, this decision was later on confirmed by the Lithuanian Supreme Court. While the case did not end in her favours, Gitana Biriuk was left without a basis that could have given her the compensation for damages. Despite the fact that a violation of Article 8 ECHR had already been recognised by national courts, Gitana's case reached the ECtHR.

ECtHR did not follow the decision of the Lithuanian Supreme Court as it did not consider the local people's concerns for their safety as legitimate reasoning in any way, even less likely as justifying for the publications made about the applicant's state of health and her life style. The ECtHR took quite an opposite standing, affirming that the respect of the confidentiality of health data is crucial and publishing about the Biriuk's health status and her personal life is not justifiable. What is more, ECtHR stipulated that the respect of the confidentiality of health data is not significant only for the protection of a patient's privacy, but also for the preservation of that person's confidence in the medical profession and in the health services in general.[55] The Court referred to the explanation in the case of Z v.

[54] Ibid, para. 6.
[55] Ibid, para. 43.

Finland, stipulating such practice could lead to people rejecting any medical or health assistance, which could result in worsening their health status, endangering their lives or even, in the event of transmissible diseases, public health.[56]

Additionally, this case stands out as well because of the alleged cooperation and actual confirmation of Gitana Biriuk's infection by the medical staff of Pasvalys hospital. The latter points to another breach, a breach of a professional secrecy, but the Court did not deal with that question in particular, because it falls outside of its jurisdiction. However, ECHR acknowledged it and assigned "particular significance" to that circumstance. Even though the Russian legislation at the time did include some norms regarding the protection of the confidentiality of health information of a person, the national courts still failed to apply proper safeguards. In regard to weighing the right to freedom of expression on one hand, and the right to private and family life on the other, the ECHR emphasized the need for a distinction between reporting facts, of which role is to contribute to a debate in a democratic society and "cheap" allegations about an individual's private life.[57] The latter is what happened in newspaper's article about Ms. Biriuk. The ECtHR even argued that such distinction is important in the events of known people. Meaning, in cases where an individual is known to the public, he or she may just like anyone else legitimately expect the protection of and respect for their private life.[58] At this point, it is necessary to reminiscent on the ECHR's broad interpretation of the right to freedom of expression, where the ECHR set close to "no limitations–practice" in favour of the invasive media publishing. Whereas in the case of disclosures of medical or health related data, the ECHR took an opposite standing and signified the importance of keeping person's data private as its disclosure may have tremendous consequences, including stigmatization, damage on social, economic, private life and more. Even in cases of publicly known people the ECtHR took a stance and recognized that they are too entitled to have their health data protected despite their public exposure. In my understanding, that recognition itself emphasizes the distinction between the protection of personal and sensitive health data, and highlights the significant importance of the protection of health data in general.

What is more, ECHR substantiated its interpretation with the correct development of every human being's personality. Considering the latter, it is true that without the reassurance of the respect of the individual's private life, a human cannot truly and fully develop his or her personality, as he or she may get shrunk by fear, uncertainty, anxiety, etc. However, the protection of personal health data is not

[56] See also the case of Z v. Finland App. no. 22009/93 (ECtHR 25 February 1997) para. 95.
[57] Biriuk v. Lithuania, App. no. 23373/03 (ECtHR 25 February 2009) para. 38.
[58] Ibid, para. 38.

only significant in the terms of the development of one's personality, but also when it comes to other aspects of personal development or identity. It is especially important to maintain such data confidential when referring to person's HIV status or similarly sensitive conditions. In the light of such remarks, it must also be noted that the ECtHR addressed the general respect of confidentiality of health data as a vital principle for our society. The latter will be more thoroughly examined below, in the scope of a more recent case, Y. G. v. Russia, where the Court expressed its comment in a slightly clearer way.

3.4. The impacts of digital tools on the protection of personal (health) data in the light of Y. G. v. Russia case

In this case, the applicant was a patient, infected with HIV and hepatitis, being cured in Moscow Centre for the Prevention and Control of Aids. One day, his acquaintance told him he is familiar with his condition, about which he learned from a database bought at Savelovskiy Market in Moscow. Then, in order to contest the credibility of such information, the applicant (Y. G.) himself, bought a compact disc with this database from the exact same market. On the first page of this database, there was a name of the centre, particularly the one's that he was registered with – Moscow Centre for the Prevention and Control of Aids. The collection consisted of personal data from more than 400,000 individuals infected with HIV, AIDS and hepatitis from Moscow area and elsewhere. The applicant found information related to him and among his personal data, there was also a statement between the notes, saying the applicant was "a hooligan, thief and drug addict, suffering from AIDS and hepatitis".[59]

Once more, the ECtHR very specifically stipulated that the protection of personal data and medical data in particular, is of fundamental importance for individual's enjoyment of his or her right(s) guaranteed by Article 8 ECHR.[60] Furthermore, the ECtHR emphasized the previously exposed key point on maintaining the confidence in healthcare system and medical profession. But most importantly, the Court identified that respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the ECHR.[61] Notably, the disclosure of such sensitive health data to the public may have an extremely negative impact on the individual's respect for private and family life, on his or her social and professional standing as well as to his viewing in the society - it may cause stigmatisation and possibly even an exclusion from the society. While

[59] Y.G. v. Russia App. no. 8647/12 (ECtHR, 30 November 2022) para. 10.
[60] Ibid, para. 44.
[61] Ibid.

it has already been established that the protection of personal (health) data is undoubtedly included in the scope of the right to respect for private and family life in the sense of Article 8 ECHR, here the Court essentially implied it represents a crucial part of it. Because of its significant importance for an individual as well as for the general public, the national law is pressured to guarantee proper safeguards that will enable the respect of the right to data protection and also prevent such disclosures of individual's personal health data in line with the means of Article 8 ECHR.

The latter is especially relevant nowadays. Indeed, the technologies and information-technology systems are increasingly developing and therefore new developments and innovations are on the horizon every other year. However, law on the other hand develops slowly and the legislation in the making that lays in the cross-roads of medical law, digital health and data protection needs changing. The need of the latter is crucial, because of the continuous transferring of the tasks and parts of healthcare administration and medical services online, where the personal data is undergoing automatic processing. Some EU Member States have already taken the steps to regulate digital health and new health databases, which have already been predicted in 2004 under the EU's eHealth Action Plan.[62] However, in the case of Y. G. v. Russia, the national bodies failed to do so, the safeguards were not set appropriately and as a result, the applicant faced damages that he should not. The ECtHR argued that Russia did not comply with its positive obligations and was therefore found to be in the breach of Article 8 ECHR.

Admittedly, back in the times when so advanced digital equipment has not yet existed, it was not possible to run the automatic processing – therefore, the same safeguards that are a must today were not even needed. Thus, in this rapidly developing era, it is a must for the Signatory States to take active steps to remain informed about the progress and innovations in order to ensure an adequate legal framework. For a particular State that can be achieved in different ways. When looking at it most generally, to keep its legislation lawful and up to date, the State should accordingly change its legislation and measures to ensure the effective safeguards that shall prevent its citizens from having their fundamental human rights breached.

In conclusion, pursuant to this case the ECtHR's decision is not only relevant because of setting the respect for the confidentiality of health data as a vital principle of all Signatory States, but also because it emphasized the general need

[62] Turnšek, E., *Varstvo osebnih podatkov kot temeljna človekova in pacientova pravica*. Master's thesis. Maribor, Digital Library of the University of Maribor, 2024, p. 13. Retrieved from: https://dk.um.si/IzpisGradiva.php?lang=slv&id=89430 (12. 4. 2025).

for the Signatories to provide the appropriate safeguards and measures as States' positive obligation. It is not the first time that the ECtHR provided such obligation for a State, but it is a very recent case, which makes it even more relevant and applicable for other Signatory States in this time.

4. CONCLUSION

Admittedly, the right to data protection is a more modern or a new right in comparison to the right to privacy, nevertheless it is seriously and wholesomely taken into account internationally, for example in Europe especially by the ECtHR and CJEU, despite not being directly included in the wording of the Article 8 ECHR. Its significant importance was soon recognised by the EU, which can be seen from the adoption of the legal acts in the field of data protection as well as from the enshrinement of the specific right to data protection in the Charter.

It can be concluded that the right to data protection has conquering rights on different levels. When it comes to more distant rights within the means of Article 8 ECHR, like in the example of comparing the right to a healthy environment with the right to data protection, the differentiation between the two is more obvious and the lengths of each right may be seen more clearly. In the comparison, we found that the right to data protection was so far examined in the scope of higher number of cases, from more aspects and by now, more questions in its regard were addressed. The comparison made was very broad. On the other hand, when we compare the right to data protection with the right to privacy, the distinctions between them are not seen as easily without understanding the full meaning and purpose of each and diving into details. The right to privacy includes different aspects of person's private sphere, it covers more of the broader rights, such as the right to home, correspondence, sexual life, identity, family life, gender orientation, and many more. While the right to data protection consists a wide pool of rights too, these right are narrower and extend to less fields than those sub-rights under the right to privacy. That does not mean the right to privacy is not broad – it actually covers many important questions and very topical issues.

In fact, there are some groups of data that should be and are more specifically protected from the other, because of their sensitivity. The sensitivity of health-related data in particular may lead to serious violations of basic human rights. That is why we categorize health data as one of the sensitive groups of data.
Furthermore, the article tried to focus on the specific protection of only one of the sensitive groups of data, namely health-related data, and expose some important imputes of the CJEU and mostly, of the ECtHR. The CJEU established that health-related data concern not only physical, but also mental aspects of an individual.

Meaning, when someone has a mental health disease or a condition, that data shall not be excluded from the special protection in the scope of sensitive (health) data. What is more, the ECtHR established a very high level of the protection of health data, which every person is entitled to. However, that is not absolute. In comparison, when balancing the right to data protection in the scope of Article 8 ECHR and the right to freedom of expression under Article 10 ECHR, the full enjoyment of the right to data protection is not definitely or completely granted. Meaning, the right to data protection can be limited by the rights of the Article 10 ECHR and, therefore, in cases of some publicly recognised persons, such as politicians, actors, the royal family the protection of personal data will not be the prevailing right. It is generally understood that by having an established public recognition, these "famous" people consciously or purposely decide they are going to be spoken about by various media providers and by different platforms. That is why their enjoyment of the right to data protection is considered differently. However, when it comes to the right to the protection of health or medical data, even such people are entitled to it. The reasoning for such a strong protection of this type of data lies in the overarching importance of the confidentiality of health. The latter is crucial for maintaining the trust in medical profession and health services and to maintain the higher level of public health as well as to protect the most intimate parts of individual's private sphere and allow him to enjoy the privacy of the data that may stir up most if not all parts of his life and relationships. In this regard, the ECtHR addressed health-related data as being a vital principle in the legal systems of all the Signatory States. That is why the national law is pressured to guarantee proper safeguards that will enable the respect of the right to data protection in practice and prevent such disclosures of individual's personal health data in line with the means of Article 8 ECHR. With that, States are given not only negative obligations (to not interfere with persons' private and family life), but also positive obligation to – actively and in the most efficient way – protect the rights of the Article 8 ECHR.

REFERENCES

BOOKS AND ARTICLES

1. Bates, E. et al., *Law of the European Convention on Human Rights*, Fifth edition, Oxford University Press, 2023, pp. 508-510.
2. De Blois, M., *The Fundamental Freedom of the European Court of Human Rights* in: Lawson, R.; de Blois, M. (eds), The Dynamics of the Protection of Human Rights in Europe, 1994, p. 51.

3. European Court of Human Rights, *Guide on Article 8 of the Convention – Right to respect for private and family life*, 2017, p. 66.
4. European Court of Human Rights (secretariat), *Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence*, 1st edition, December 31, 2016, p. 8.
5. European Court of Human Rights (secretariat), *Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence*, 2022, pp. 21-23.
6. Herveg, J. (Ed.), *Deep diving into data protection: 1979-2019 : celebrating 40 years of research on privacy and data protection at the CRIDS*, Larcier (Collection du CRIDS; No. 51), 2021, p. 468.
7. Johansson, E., *Privacy and data protection in a digital age: In the context of health data protection in Europe,* Independent written essay within the field of Constitutional Law and Human Rights, UMEA University, 2024, pp. 9-10.
8. Lynskey, O., *Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order*, International and Comparative Law Quarterly, 63(3), 2014, https://doi.org/10.1017/s0020589314000244, pp. 570, 570, 582.
9. Mahoney, P., *Marvellous Richness of Diversity or Invidious Cultural Relativism*, 19 Human Rights Law Journal, 1998, p. 2.
10. Mahoney, P., *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 Human Rights Law Journal, 1990, p.57.
11. Organization for Economic Cooperation and Development, OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, OECD Publishing, Paris 2002.
12. Turnšek, E., *Varstvo osebnih podatkov kot temeljna človekova in pacientova pravica*, Master's thesis, Digital Library of the University of Maribor, 2024, p. 13. Retrieved from: https://dk.um.si/IzpisGradiva.php?lang=slv&id=89430 (12. 4. 2025).
13. Turnšek, E., *The right to privacy and data protection in European healthcare systems with an emphasys on relevant case law and European legislation*, Medicine, law and society, 17(1), 2024, pp. 89-108.
14. Van Dijk, P.; van Hoof, F.; van Rijn, A.; Zwaak L. (eds.), *Theory and Practice of the European Convention on Human Rights*, Fifth edition, Intersentia, pp. 669, 732.
15. Verhenneman, G., *The Patient, Data Protection and Changing Healthcare Models: The Impact of e-Health on Informed Consent, Anonymisation and Purpose Limitation*, Intersentia, 2021, p. 104.

LEGAL ACTS

1. American Privacy Rights Act of 2024. (2023-2024). H.R. 8818 -118th Congress.
2. Article 29 Working Party, Annex to the letter of 5 February 2015 to Paul Timmers on mHealth – health data in apps and devices.
3. European Convention on Human Rights (1950).
4. Charter of Fundamental Rights of the European Union, OJ EU C 326, 26. 10. 2012.
5. Convention 108 + Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data, accessible here: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/09-10/Convention_108_EN.pdf, 3 January, 2025.
6. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50.
7. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, p. 1–88.
8. UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, https://www.refworld.org/legal/resolution/unga/1948/en/11563 [accessed 29 November 2024].
9. Privacy and Transborder Flows of Personal Data, OECD Publishing, Paris 2002.

COURT DECISIONS

1. Biriuk v. Lithuania, App. no. 23373/03 (ECtHR 25 February 2009).
2. Case C-101/01 Bodil Lindqvist from 6 November 2003.
3. Case 11-70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel from 17 December 1970.
4. Case C-446/21 Maximilian Schrems v Meta Platforms Ireland Limited, anciennement Facebook Ireland Limited from 4 October 2024.
5. Case C-667-21 ZQ v Medizinischer Dienst der Krankenversicherung Nordrhein, Körperschaft des öffentlichen Rechts from 21 December 2023.

6. Case C-252/21 Meta Platforms Inc and Others v Bundeskartellamt from 4 July 2023.
7. Case C-139/01 Österreichischer Rundfunk and Others from 20 May 2003.
8. Case C-275/06 Promusicae from 29 January 2008.
9. Case C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi OY, Satamedia from 16 December 2008.
10. Case T-194/04 Bavarian Lager v. Commission from 8 November 2007.
11. Copland v. the United Kingdom App. no. 62617/00 (ECtHR, 3 July 2007).
12. Evans v. the United Kingdom App. no. 6339/05 (ECtHR, 10 April 2007).
13. Gaskin v. the United Kingdom App. no. 10454/83 (ECtHR, 7 July 1989).
14. Halford v. United Kingdom App. no. 20605/92 (ECtHR, 25 June 1997).
15. Klass and others v. Germany App. no. 5029/71 (ECtHR, 6 September 1978).
16. Kroon and Others v. the Netherlands App. no. 18535/91 (ECtHR, 27 October 1994).
17. Malone v. the United Kingdom App. no. 8691/79 (ECtHR, 2 August 1984).
18. Marckx v. Belgium App. no. 6833/74 (ECtHR,13 June 1979).
19. Margareta and Roger Andersson v. Sweden App. no. 12963/87 (ECtHR, 25 February 1992).
20. Y.G. v. Russia App. no. 8647/12 (ECtHR, 30 November 2022).
21. Z v. Finland App. no. 22009/93 (ECtHR 25 February 1997).

NETWORK RESOURCES

1. The official website of the European Court of Human Rights, European Convention on Human Rights, https://www.echr.coe.int/european-convention-on-human-rights, 26 November, 2024.

UDK: 35 : 004
35 : 004.8
Review paper

Barbara Hribar, PhD student
Faculty of Law, University of Ljubljana, Slovenia
E-mail: barbara.hribarjeva@gmail.com
ORCID ID0009-0006-5098-2892

LEGAL CHALLENGES OF DIGITALIZATION IN THE LEGAL PROFESSION: BALANCIN LEGALITY AND ECONOMIC EFFICIENCY

ABSTRACT

The digitalization of the legal profession has evolved dramatically, as the advocates of new technology have succeeded in persuading large law firms to integrate AI algorithms, big data analysis, and blockchain technologies into their everyday legal routines. A number of companies offer legal services based on incorporated digital technology or combine new technology with business process outsourcing and other forms of standard economic efficiency practices. Furthermore, digital legal products have largely entered daily legal routines as procedures and outcomes of litigation, arbitration, legal consulting, legal risk and compliance, advisory and management, human resource management, or the resolution of agency problems have become quantifiable, predictable, and analyzable data sets. AI legal diagnosis tools, big data in litigation and arbitration, compliance applications in enterprise resource planning systems, or simple service bots that power all kinds of automatic knowledge management, NLP, or other standard office packages are part of many modern legal practices. This paper uses a qualitative research methodology, combining doctrinal legal research with case study analysis. Doctrinal research includes a critical review of academic literature, legal norms, professional codes, and regulatory frameworks from various jurisdictions. The case study analysis examines digitalization practices in legal firms and institutions, focusing on selected domains: real estate, insurance, and e-health law. This dual-method approach helps contextualize the difficulties and legal effects of technological adoption within the legal profession, particularly to understand the deficiency of controlling digital apparatuses, how these affect legalities and ethical standards. Computer-based case law and commentaries are slowly but surely replacing printed versions, irrespective of a jurisdiction's laws on the use of legal technology or available technologies for law. The use of digital platform as a support means nothing but enhancing righteousness in supporting the use of digital technology as a platform to promote digital products and services. How do legal experts deal with these demands? What improvements could digitalization bring to the lives of busy law practitioners? Among many, digital legal information sources already support finding the material needed and then making it available. New filtering mechanisms for legal knowledge could diminish the problem of having too much data while experts find themselves with too little time. Technological progress has brought support tools for contract drafting, as well as management, while guaranteeing legal security in this regard. Additionally, new computer programs could provide 24-hour advice to them. Nevertheless, these new virtual advisors have not led to a decrease in the demand for legal advice and services from lawyers, but to an increase, especially from non-wealthy clients. Furthermore, if automation forces a change in old legal services' business models, such changes could only be positive, as not all tasks could be replaced by digital resources, particularly the special added value of the

lawyer-human judgment, confidence, and insight in the field. Regarding the questions of balancing legality with economic efficiency in digitalization of legal profession, a significant emphasize must be given to questions, relating to a legality and relevance of AI translated documents, as it could happen that the true (legal) meaning of these documents can be lost with an AI translation. Through an analysis of case studies in real estate, insurance, and e-health sectors, this study gives real life examples. explores these challenges in depth. Our findings reveal that digitalization in the legal sector presents a unique problem without clear and suitable solution. Any acceptable solutions must align closely with established legal methodologies within the existing legal system. It is also essential to articulate and implement desired objectives to shape the trajectory of this evolving legal tradition. Currently, the IT applications used by legal firms lack specialized reliability functions that require extensive research and synchronization. Complex data is also seen as inadequate in delivering the full range of potential benefits. They primarily serve as costly third-party services capable of managing only a limited number of instances, similar to a notary, without accommodating the multifaceted changes that modern legal practice demands.

Keywords: *Digitalization, Legal profession, Legal technology, Economic efficiency, AI integration.*

1. INTRODUCTION

This paper utilizes socio-legal theory and legal pragmatism to analyze the relationship between legal norms and the emergence of new technologies. These theoretical perspectives are useful in assessing whether the technological paradigm shifts observed favor basic legal ideals, to include justice, equality before the law, and a right to due process. With regard to this issue, the article will critically engage with three central research questions, aiming to provide well-founded responses through analytical inquiry.

- What is the impact of digitalization on the provision of legal services and structure of legal services?
- How do legal professionals navigate between legality and economic efficiency in adopting digital tools?
- What are the ethical implications of automation and AI in legal practice?

Digitalization is changing the world, including the legal profession. Contrary to many other professions, a fortiori for lawyers, the legal challenges arising in this context are of a double nature: on one hand, legal standards and rules must be observed; on the other hand, the economic efficiency of the production of legal services is to be promoted. Instead of establishing ethical norms, we should ask in the context of digitalization about economic production processes and the way they can be improved - this is where we are getting to the potential of digitalization. The insurmountable norms which are unique to the specific combination of the legal profession and the permanence in the method of processes of production of economy reaching normalization can contrast the obstacles and

possibilities of digitalization present with the preceding modernity of non-normative systems such as creative art, architecture and political insights.[1]

It is beyond any doubt that the nature of digital technology has led to the digitalization of the legal profession. The interesting question is whether such changes in the legal profession do indeed entail its modernization. The endeavor to create a new role for the lawyer who will be open to the use of all modern digital technology can create some further sharp distinctions that merit discussion.[2]Given the absence of engaged legal commentary on this subject, the focus has to be on offering multiple understandings and perspectives of the legal implications of the digital revolution in the legal community.[3]

2. THE IMPACT OF DIGITALIZATION ON THE LEGAL PROFESSION

Ever since the introduction of the typewriter, the legal profession has been undergoing constant digitalization. The dominating milestones of electronic communication and the implementation of electronic working aids have turned the legal field into the digital area of responsibility it is today. The current digitalization era is creating new trends and milestones. Regarding the historical development, one will be able to better assess the present reshaping process. Generally, the digitalization era has accelerated existing developments and broadened them into smaller and intertemporal units. More intensively, current developments are focusing on the digital shaping of the legal preparatory and advisory processes, which means that programmable working aids are able to perform new tasks. In this context, the first chapter aims to show the impact that digitalization has on the profession of legal advice.[4]

At first, the historical development is described, and then the reasons for this digital reshaping of the profession are outlined. As legal practice applies the law to single cases by means of communication and argumentation, the primary

[1] Babikian, J., *Navigating legal frontiers: exploring emerging issues in cyber law,* Revista Española de Documentación Científica, 17(2), 2023, p. 101.
[2] Reis, O.; Eneh, N. E.; Ehimuan, B.; Anyanwu, A., *Privacy law challenges in the digital age: a global review of legislation and enforcement,* Journal of Applied Research in Legal Studies, 5(2), 2024, p. 110.
[3] Lescrauwaet, L.; Wagner, H.; Yoon, C., *Adaptive legal frameworks in emerging technologies,* Law and Economics Review, 14(4), 2022, p. 326.
[4] Akpobome, O., *The Impact of Emerging Technologies on Legal Frameworks: A Model for Adaptive Regulation,* International Journal of Research Publication and Reviews, 5(4), 2024, p. 132.

relevant link between law and communication will be pointed out. Furthermore, the advent of electronic processing of knowledge has brought problems with it, to which the digital age has responded with different conflicting possibilities. For the position of the legal profession, the new possibilities of artificial intelligence will be the next step to consider. Finally, the chapter shows that this reshaping will make legal advice more efficient, but also examines the adverse economic consequences and offers a word of caution against excessive digitalization.[5]

2.1. Historical Context

At professional and regulatory levels, the legal profession has steadily adapted to technological change over the past few centuries. Digitization of the tools of the legal profession, especially in the last century, has also been driven by unprecedented technological developments and economic demands. The introduction of computerized systems in the legal profession might be the most drastic jump toward digitalization, as it changed both the operations and the paradigm of the legal profession from an external point of view. The legal operations shifted from mere writing of legal memos obtained from searches in hard copy dictionaries to electronic database searches and communications. From the paradigm point of view, the attorney's act of searching for materials in the library was replaced with the attorney's act of reviewing the materials supplied directly in print form by the database management system. Thus, the production of a legal memorandum or case file reflects the creation of the case file literally by the computer.[6]

Following the digital advances in the database field, case management software continued to develop alongside other computer technologies. Early case management software mainly helped lawyers and support staff in such administrative tasks as scheduling and collecting client and case information; tracking deadlines, appointments, etc.; basic full-text indexing; and text searching. It also facilitated communications between various lawyers, legal personnel, and their clients. The attorney benefits of electronic file management were somewhat offset by the need to substantially change the way that traditional lawyers operated. For example, searching for cases in the reports required a different understanding of how issues were related to other issues in the case annotations as opposed to how they might be related in search results. Preferring manual methods for file searches was another source of attorney reluctance. Only time would reveal the

[5] Lescrauwaet, L.; Wagner, H.; Yoon, C., *op. cit.,* p. 313.
[6] Nguyen, M. T.; Tran, M. Q., *Balancing security and privacy in the digital age: an in-depth analysis of legal and regulatory frameworks impacting cybersecurity practices,* International Journal of Intelligent Systems, 39(2), 2023, pp. 221.

full potential of electronic filing and search capabilities. Understanding the history of legal technology provides greater depth when examining the legal technology of today.[7]

2.2. Advantages of Digitalization

Much has already been written about the advantages of digitalization in the legal profession. Legal technology holds numerous promises for attorneys and law firms, such as facilitating legal research more efficiently, improving the way legal work is done, and making legal services more accessible and affordable. Digital platforms can be used to improve the way legal research is done: digital resources can be connected within one system, legal professionals can quickly search thousands of files and find related resources that are based on keyword searches.[8] Over time, the cognitive capabilities of powerful legal search engines improve through the processing of human-provided feedback. As digital tools for communication and networking have also been enhanced, legal professionals can easily identify and communicate with clients and other potential sources or with other attorneys working on similar cases by using chat support, video, and audio tools.[9]

Digital tools and platforms can also be used to facilitate project management in law firms, thus improving team collaboration and workflow. For example, as digital platforms allow project managers to distribute work and oversee the pace of work, collaboration mechanisms and an overview of the entire workflow and allocated resources can be made more efficient. This can make legal work easier and more efficient and speed up communication and collaboration. In addition, automated legal work, such as criminal legal checks, can free up the time of legal professionals, making them more productive by removing administrative tasks and thereby increasing their capacity to do more work and services. It can also reduce the staff costs of junior professionals, contributing to the overall cost-effectiveness of the law firm and the final costs to the client. This example helps underline the fact that legal tech can enable legal practitioners to enhance economic efficiency and the affordability and access of legal services. In conclusion, the predicted future potentials of legal tech provide potential to attain the optimal level of benefits achievable by using information in lawful and legal work, thus providing a platform for effective and efficient legal service. It is also apparent that legal tech and communication networks can assist legal professionals in managing the

[7] Reis, O.; Eneh, N. E.; Ehimuan, B.; Anyanwu, A., *op. cit.,* p. 114.
[8] Nguyen, M. T.; Tran, M. Q., *op. cit.*, p. 229.
[9] Golia Jr, A., *The Transformative Potential of Meta's Oversight Board,* Indiana Journal of Global Legal Studies, 30(1), 2023, p. 131.

potential for inaction and illegal advice that would contravene ethical obligations.[10]

3. LEGAL FRAMEWORKS AND REGULATIONS IN THE DIGITAL ERA

Digitalization has greatly shaken up the world of work in the entire economy and society. Digital innovations have not left self-employed legal professionals unaffected, who are increasingly using digital applications. This book explores some of the legal and ethical issues that have arisen in the era of digitalization in the legal profession. In this chapter, we will look more closely at the legal frameworks and regulations that apply to digitalization and the use of new technologies. As we demonstrate, different legal orders all over the world have to grapple with these issues. We will therefore not focus on specific national regulations but rather on how the use of new technologies in the legal profession can be reconciled with prevalent international professional standards. This will provide us with the necessary foundation to address the more intricate ethical issues that are discussed in the subsequent chapters.[11]

Whoever works with digital applications, regardless of the jurisdiction, must do so in compliance with the legal provisions in effect, and it is known that the new technologies for the most part give rise to many legal questions. In many fields, national laws are increasingly adapting in order to keep pace with digital developments. At the international level, these endeavors are accompanied by considerations of international harmonization of laws in this respect. As the digitalization of a profession cannot be limited to the scope of one single country, these developments should be closely followed and analyzed by all self-employed legal practitioners. From this kind of uniformity of both de legelata and de legeferenda legal regulations, the hopes pinned on the emergence of a coherent global digital legal environment stem. In this way, new and evolving technologies in the legal sector require attentive supervision, without begetting a crackdown on innovation that could stilt their development in real life.[12]

[10] Nguyen, M. T.; Tran, M. Q., *op. cit.,* p. 210.
[11] Akpuokwe, C. U.; Adeniyi, A. O.; Bakare, S. S., *Legal challenges of artificial intelligence and robotics: a comprehensive review,* Computer Science & IT Research Journal, 5(3), 2024, p. 53.
[12] Lino, A. F.; Aquino, A. C. B.; Neves, F. R., *Accountants' postures under compulsory digital transformation imposed by government oversight authorities,* Financial Accountability & Management, 38(4), 2022, p. 513.

3.1. International Standards

Technological advances and their related legal and ethical implications require legal professionals to be technologically literate and always up to date with recent international standards that have legal implications. In the field of technology law, many international treaties and agreements adopting clear legal standards have been concluded. Even the most recent treaties insist on protecting private data. Additionally, many treaty regulations impose limitations on the commercial exploitation of intellectual property rights to guarantee the protection of consumers' interests and the protection of fundamental human rights. Different norms are applicable to identify the regulation that stands as the most favorable one.[13]

Many international laws are applicable in different business relations. The cyber threat does not respect any borders, so lawyers must learn other laws in order to cooperate with one another. Also, all financial transactions are subject to rules of anti-money laundering, and the withdrawal of money should be reported to the foreign lawyer. The issue of taxation on digital goods has also become prevalent. In cyberspace, conduct cannot be subject to the laws of the country where the service provider is located. An international lawyer must coordinate different conduct and attitudes for each country involved, and the global character of international lawyers' ethics requires that it consists of a variety of local ethics to engage with specific ethical aspects of conduct. In part, the ICJ considers international lawyers' professional obligations rather than professional capacity. It is important for lawyers to adjust to technology and keep updated with the legal processes used by international organizations.[14]

3.2. National Legislation

Legal services in numerous jurisdictions are heavily regulated, primarily with the intention of safeguarding the interests and welfare of the public. Consequently, one can expect to observe a significant degree of variation in how different regions approach the liberalization of legal service provision. Despite these differences, it is evident that while countries may adopt diverse policy strategies in response to the liberalization phenomenon as they assess their national laws, a number of common influences and underlying drivers emerge across many jurisdictions. This is particularly evident in the predominant focus on fostering competition within

[13] Gromova, E. A.; Koneva, N. S., *Legal barriers to the implementation of digital industry (Industry 4.0) components,* The Journal of World Economy, 2022, p. 70.
[14] Akpobome, O., *op. cit.,* p. 135.

the legal sector. An overview that highlights some of these shared elements and influences is certainly informative and valuable.[15]

For instance, The United Kingdom Legal Services Act and the Legal Services Board emerged as one of the pioneering pro-provider services Acts in the recent period, marking a significant turning point, with many initiatives commencing from the year 2010. This important legislation was inspired in part by the Tesco law and is characterized as being notably client-driven. Under this framework, the Legal Services Board (LSB) plays a crucial role in setting the law regarding the legislation itself. In this structure, various regulatory bodies, including the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB), ILEX Professional Standards, and others, are tasked with the regulation of legal practitioners to ensure compliance and uphold standards. Furthermore, the aspect of quality assurance falls under the purview of the Legal Services Act, which is diligently administered by both the Legal Ombudsman and the Legal Standards Board, ensuring that clients receive a high level of service in their legal dealings.[16]

b) Enacting a Tesco Law allows incorporated firms to broaden their avenues by investing in and competing in a diverse range of other markets. One Stop Shops have successfully provided essential services both face-to-face and over the Internet, catering to various consumer preferences. In the UK, extensive consultation with stakeholders showed little to no significant opposition against the Legal Services Act, despite some lawyers expressing their belief that face-to-face interactions should remain the primary mode of contact for clients seeking legal services. This dialogue highlights the evolving landscape of legal service provision.[17]

4. ETHICAL CONSIDERATIONS IN LEGAL TECH

As the legal profession increasingly integrates modern technology into its various operations, numerous new issues inevitably arise from an ethical perspective that must be carefully considered. For instance, is client confidentiality adequately protected if email traffic is randomly selected and monitored by an employer? This

[15] Plekhanov, D.; Franke, H.; Netland, T. H., *Digital transformation: A review and research agenda,* European Management Journal, 41(1), 2023, p. 57.
[16] Barr-Pulliam, D.; Brown-Liburd, H. L.; Munoko, I., *The effects of person-specific, task, and environmental factors on digital transformation and innovation in auditing,* Journal of International Financial Management & Accounting, 33(1), 2022, p. 6.
[17] Reier Forradellas, R. F.; Garay Gallastegui, L. M., *Digital transformation and artificial intelligence applied to business: Legal regulations, economic impact and perspective,* Laws, 10(3), 2021, p. 50.

question poses significant concerns regarding privacy rights and the integrity of attorney-client communications. Furthermore, what are the potential risks and implications if the technology in use is breached or compromised in any way? Such breaches could lead to unauthorized access to sensitive legal information, with potentially damaging consequences for clients and lawyers alike.[18] Additionally, is the software used within the legal field being distributed and utilized in a manner that is fair and equitable to all parties involved? Lastly, can it truly be considered just or fair for the legal system if lawyers are equipped with tools that, perhaps unwittingly, have the capacity to discriminate against certain individuals or groups? These pressing questions highlight the need for a thorough examination of the intersection between technology and ethics in the legal landscape.[19]

The question of how technology is revolutionizing the operation of the legal profession inevitably raises profound ethical issues. It is precisely with these critical questions that it should be centered in the realm of "law" – specifically, this should pertain directly to the legal profession as a whole. The increasing use of various technologies highlights and underscores the importance of these ethical considerations. Each and every day, lawyers grapple with the challenging task of ensuring that their services remain accessible and available to those who require them, all while also striving to earn a livelihood. This complex dilemma has always been a persistent issue within the field. There is absolutely no doubt that advancements in technology can provide significant assistance to lawyers in this particular regard. Furthermore, it also opens up the avenue for supplying legal services to a much broader and more diverse range of people. This text additionally examines the potentially dangerous aspects of technology in relation to these ethical inquiries. There are numerous innovative ways to utilize technology effectively to streamline and enhance the legal service offering; however, extensive improvements have yet to be fully realized and implemented. It is crucial to recognize that technology, while beneficial, cannot serve as the sole standard for legal oversight and evaluation, especially when viewed through the lens of a socioeconomic analysis.[20]

[18] Dąbrowska, J.; Almpanopoulou, A.; Brem, A., *Digital transformation, for better or worse: a critical multi-level research agenda,* R&D Management, 52(2), 2022, p. 178.
[19] Weber-Lewerenz, B., *Corporate digital responsibility (CDR) in construction engineering—ethical guidelines for the application of digital transformation and artificial intelligence (AI),* SN Applied Sciences, 3(4), 2021, p. 160.
[20] Vermesan, O.; Bacquet, J., *Cognitive hyperconnected digital transformation: Internet of things intelligence evolution,* Journal of Internet of Things, 6(3), 2022, p. 54.

4.1. Confidentiality and Data Protection

It goes without saying that ensuring confidentiality has always been an important part of the professional code of conduct for lawyers. Clients are supposed to place trust and confidence in their legal advisors. Protecting information within a lawyer-client relationship can be seen as one of the most essential ethical requirements for the lawyer. Legal tech, however, often involves dealing with sensitive and confidential data. For some legal tech tools, clients might not be able to determine whether data protection requirements are being met. Digital communication and electronic storage of files have become the standard in everyday work today. New forms of communication and digital record-keeping pose substantial risks if sensitive client data is involved. They are supposed to provide legal professionals and/or law firms with lawful and appropriate measures to protect them and, at the same time, store them on an ongoing and long-term basis.[21]

Hence, data breaches or security incidents are a considerable threat if not a certainty in the legal field today. In the European context, the most important framework for the protection of personal data can be found in the General Data Protection Regulation. The regulation obliges all natural persons and legal entities such as legal professionals to comply with statutory provisions concerning the processing of personal data and the protection of individual rights. In the lawyering context, professional laws, codes of professional conduct, and case law can be relevant not only for the question of whether lawyers are allowed to store data in the cloud but also with respect to who may be held accountable in cases of data protection breaches. Best practices to ensure confidentiality when dealing with legal tech include the use of secure communication channels and the encryption of correspondence made via email or storage services by legal tech tools. Legally binding confidentiality agreements should accompany every cloud service contract. Ideally, by securing the tools involved to a high standard, the lawyer can also avoid problems when and if the latter lends their client's data access to multiple third parties. In practical terms, this is done by granting access to third parties like expert witnesses on a one-time or short-term basis such permission remains in the lawyer's hands and should be temporary and traceable.[22] While the legal profession seems to slowly adjust, it is, however, undeniable that several things such as awareness, education, or training currently represent a crucial issue within the sector. A lack of specific training and ongoing training for professionals can have a detrimental impact on the protection of data. Its protection

[21] Barroso, M.; Laborda, J., *Digital transformation and the emergence of the Fintech sector: Systematic literature review,* Digital Business, 2(2), 2022, p. 28.
[22] Klochan, V.; Piliaiev, I.; Sydorenko, S., *Digital Platforms in Public Administration,* Journal of Information Technology & Politics, 18(2), 2021, p. 212.

should, however, be of paramount concern for all lawyers when dealing with digitalization, as a failure to meet these requirements can potentially and permanently destroy a client's trust in the legal profession. Ensuring the technological expertise of practitioners and providing them with the relevant resources, tools, and expertise in legal tech is just as important to be able to meet the new digitized needs of clients. The distinction between the lawyers who advocate for a system that values security and accountability in the digital world, among others, and those who do not, will be noticeable when outcomes in the personal and business worlds occur, as well.[23]

4.2. Bias and Discrimination

While much has been written about the potential of legal technology replacing elements of work that are today done by lawyers, there is far less discussion circling some of the more contentious issues. Bias and discrimination are core components of the emerging field of AI ethics. This is largely the result of increasing public awareness of the potential human rights implications of AI and machine learning, particularly with respect to fairness. Prevailing views of AI and machine learning suggest that despite good intentions, the finished product may not always be entirely 'neutral.' Instead, they may be inadvertently trained on data that reflects societal biases, entrenching them within the algorithmic decision-making system.[24]

Inappropriately used, legal technology may result in systematic different treatment of different clients based on race, gender, or socioeconomic status. While the threat, on the one hand, is of individual bias in legal service provision, the threat, on the other hand, is of systematic bias in using legal technology. At the very least, there is a strong argument that lawyers have an ethical obligation to be aware that it is possible that the use of legal technology could lead to unequal treatment of clients. Even where bias is inevitable, however, transparency can help technology conform to the requirements of fairness. As lawmakers cannot strike algorithmic bias at the root, they need to devise proceedings to minimize the impact of any bias upon which algorithms are built, especially if they are employed by legal professionals. Concretely, it is important that if the output of an algorithm is used by a legal professional to make decisions that affect a person's legal rights, there is transparency concerning the key determinants of these decisions. The necessity of transparency implies an obligation upon legal practitioners to keep abreast of

[23] Reier Forradellas, R. F.; Garay Gallastegui, L. M., *op. cit.*, p. 45.
[24] Popa Tache, C. E.; Săraru, C. S., *Evaluating today's multi-dependencies in digital transformation, corporate governance and public international law triad,* Cogent Social Sciences, 10(1), 2024, p. 13.

how legal technology works so that they can scrutinize it. Legal practitioners must become astute tech intermediaries. A final qualitative consideration is whether using legal tech to interact with the legal system could lead to a less inclusive forum. A court assisted by a legal AI which understands only one language may well become flagrantly discriminatory. The upside of this is that AI can also be used to address these equality concerns; for example, an AI that possesses the abilities of any human judge is, in theory, better suited than humans to provide equal access to justice, as an AI could well demonstrate that the characteristics of being human are irrelevant to the task of deciding court cases since they can just as easily be simulated by men and women alike. If this can be done, there may be potential equality arguments in favor of using AI. Given the central and new nature of this topic, there are no definite solutions. It is clear that legal professionals have a long road ahead of them to catch up. The most important issue is therefore to increasingly sensitize legal professionals to these problems, thus ensuring a more responsible legal practice in digital times.[25]

5. EFFICENCY VS. ETHICAL COMPLIANCE

From a critical legal perspective, the rapid integration of digital tools challenges foundational legal values. While efficiency gains are undeniable, they must be carefully balanced against risks of due automation bias, and unequal access to justice. Current legal frameworks often lag behind these transformations, highlighting a normative gap in technology law.[26]

Legality, in the sense of conformity to the law and ethical standards, is one of the prime concerns of the legal profession. While different values that lawyers need to strive for, such as legality and efficiency of processes, act in complementary ways, the quest for efficiency can actually steer communication strategies away from legality. The use of automation and artificial intelligence can create the impression that law could and should be automated in its entirety. Legal practices are increasingly relying on legal tech tools or creating spin-offs to use those tools in the field of law. Conversations often reveal the motivation for this development as the drive for efficiency and the hope for cost savings. Thus, it seems important to scrutinize potential problems arising in the field of ethical compliance.[27]

[25] Iyelolu, T. V.; Agu, E. E.; Idemudia, C., *Legal innovations in FinTech,* Journal of Finance & Accounting Research, 6(2), 2024, p. 83.
[26] Weber-Lewerenz, B., *op. cit.,* p. 160.
[27] Popa Tache, C. E.; Săraru, C. S., *op. cit.,* p. 18.

In order to provide a more systematic way of thinking about professional responsibility in individual use cases for new technologies, one should reflect upon specific areas relating to legal work where automation or artificial intelligence is employed. Such areas can be seen, for instance, in assembly line due diligence reviews for law firms or companies, in legal market search apps, the automated contract conclusion, valuation of cases, and predictions of case outcomes. We will see that, on the one hand, the automated algorithm does outperform humans due to their reduced cognitive bias and their speed in arriving at results. Efforts that reduce the heavy burden on the legal system or help to make law more palatable seem attractive. On the other hand, there is criticism of the talk of the importance of efficiency as a replacement for any other reliable legal thinking of value. Valuing law only based on its economic relevance transmutes the legal profession into a business that behaves unreliably. The quest for market potential and economic efficiency as natural goals of technological evolution threatens independence, functional judgment, and the trustworthiness of legal indications. Not only do they have the potential of making it seem easier to act illegally, but they maintain a bias towards those who can afford it. Even the adherence to humanist principles would appear in a different light. From this, it follows that those who have accepted law based on economic efficiency were never ethical agents in the first place. The compatibility or non-compatibility of digitalization with ethical guidelines and professional conduct are hence open to professional scrutiny. A simple cost-benefit analysis approach, therefore, implicitly endorses a normalized violation of law. With arguments that punishment is counterproductive and economically unproductive, it does not seem necessary to re-establish a leaked rule of law if technical devices of efficiency still are. Criminal lawyers react vehemently, as they assume that rules and rights justifying the law had already eroded. The promise of increased efficiency does not fully address the aim that should be pursued in legal matters, which is the securing of appropriate dispute outcomes and interests according to law. An ethically oriented upholding of such accounts fundamentally questions the adequacy of law firms practicing law as if it were an industry. The characteristics of efficiency technologies need to be shaped in a way that safeguards the appeal of legal work beyond the appeal of making money. Ultimately, the question lingers as to whether, concerning the most recent digital enhancements and threats, a premium could be put on good judgment. Financial losses that strict adherence to ethics would entail may not necessarily be seen as solely thoroughgoing. For this reason, spurring on a discussion about the scope of ethics in new technologies can be seen as an indirect request or plea for economic innovation. This does not involve wanting to stop progress for economic motives, but to scrutinize and define it, so that it fits its broader and more complex deontological function.[28]

[28] Weber-Lewerenz, B., *op. cit.,* p. 147.

5.1. Automation and AI in Legal Services

The main use of automation and AI for operational decision support in the organization of legal services is predicted to occur in the area of document review, followed by legal research and due diligence processes, as well as drafting. An analysis has highlighted that these processes are severely effective regarding human intervention, as a significant portion of legal work in the document review and legal research phases is spent searching. This indicates that automation and AI feed into existing legal processes to enhance their efficiency instead of transforming them. Nevertheless, these processes are expected to have radical implications for the organization and competition of legal services. Law firms can use automation and AI technologies to handle larger volumes of work with reduced human effort and partly customize their services by employing the data they collect during their use. In a specific application, lawyers record their professional skills in their personal profiles, in particular all their competencies, practice languages, and even the dates of their holidays. As lawyers check their availability and interest in a case, clients are then automatically matched with a lawyer or a team of lawyers who have the skills and experience required. However, the clients must wait several working days for the first feedback. Furthermore, this may generate risks of deskilling in two phases of the spectrum of the organization of work in the legal profession: within the pool of lawyers and outside of the profession, in the market of legal services. It has been suggested that AI could de-skill human operators by doing their jobs. At the level of the individual worker, the use of such tools may prevent junior staff from learning new skills. If this process extends to the whole field of lawyers, the entire profession might become more dependent on the AI system, thus reinforcing the process of de-skilling. This may entail a further devaluation of the value of legal services, considered a mere support for algorithmic decision-making. It can be argued that automation and AI have the potential to accomplish the value that they are expected to provide only if they are subjected to organizational and professional oversight. AI systems are complex to understand, and when they are provided by commercial vendors, users may not have access to the source code. As legal professionals increase their use of AI, there is a professional duty of care obligation for lawyers. Duty of care professionals are required to act as expected by a reasonable person of ordinary competence exercising a similar profession. This duty could translate to an obligation for lawyers to have some control over the AI tools entrusted, even in part, to the care of a third-party vendor. The need for transparency in AI algorithmic decision-making is being debated both at the European and international levels, also in the context of AI systems developed for legal practice. The possibility for the provision of "adequate explanations" of the content given

by the AI enquirers, likely drawing on court decisions, is a tool for managing ex-ante and ex-post legality and the economic sustainability of the strategy for civil justice. This point will be addressed in the next section by referring to these examples.[29]

5.2. Professional Responsibility

Professional responsibility requires professional service to be offered according to the standards of a profession. The attorney-client regulation is embedded in the duty – and at the same time the right – of a legal professional to ensure or at least seek his or her own economic survival. But exactly what does call for rightful professional service? By what standards must professional service benefit be legally approved? Professional responsibility does represent a duty; but to whom? Is it to clients or colleagues/competitors, the profession as such, the public, or the operational system at large? Also, could findings be different depending upon the kind of legal services handled, i.e., in respect of legal advice or counsel, do norms and discretion differ from those concerning the administration of procedural acts before tribunals or negotiation assistance on behalf of parties wanting to resolve their disputes?[30]

Professional responsibility is determined by legitimate requirements generally and by ethical standards specifically as these are accepted within a professional legal service community. Legal services, indeed the scope of operational action required to ensure professional and economic well-being, are not only the subject of unfailing ethical debate, but they are also having to be renegotiated in a concrete way in wishful legislatures. The question is whether we can live with that. Professionals, in this particular case of lawyers, are supposed to ensure quality services in order to safeguard the welfare of their clients as well as of their opponents. This is even more an ethical question than a legal requirement. The problem is that where means of professional service are changing, our role becomes even more important, and by offering an evolving situation to the public at large, we are facing difficult ethical dilemmas that have to be managed in respect of our independence at large and mostly in the assessment of our own economic advantage and safeguard. It is clear that innovating services might also be seen as a potential conflict of influence with the interests of the clients if their development and application involve, on one hand, the acceptance of regulatory challenges with the public and the regulators in a discretionary manner and, on the other hand, a

[29] Reier Forradellas, R. F.; Garay Gallastegui, L. M., *op. cit.,* p. 65.
[30] Chen, C. L.; Lin, Y. C.; Chen, W. H.; Chao, C. F. et al., *Role of government to enhance digital transformation in small service business,* Sustainability, 13(18), 2021, p. 10212.

risk assessment to the public at large within an evaluation of the risk-benefit ratio.[31]

6. ACCESS TO JUSTICE IN THE DIGITAL AGE

"In a world where the purchase of dispute resolution packages is just one click away, the entry barriers for some parties to access legal systems have been reduced thanks to technologies." Online dispute resolution (ODR) is making it much easier for people to file lawsuits or challenge official acts. Technology can especially build bridges between people who are fundamentally excluded from traditional legal aid and the digital realm. A larger element of the population is seeking assistance. Several elements of the population are excluded from traditional legal assistance and "machines assist more than men." In addition to automating existing justice services, technology is also making free legal aid accessible to anyone with a compatible gadget. Pro bono services provided on digital platforms directly support inclusive participatory projects.[32]
The chapter's various initiatives illustrate how the app-based provision of pro bono services can broaden justice access and foster inclusivity. However, all advocates agree on one thing: there is no room or justification for complacency. "We must be proactive in dealing with these hurdles." Technologies can serve as enablers of access to justice, but they can also act as disincentives. Some suggest that the danger is that changes in people's lives caused by the lockdown and social distancing will fuel the development of a culture of risk avoidance and exclusion of unpopular consumers. Legal professionals must alter the current notions of justice and grow to meet the demand for normality. They must make a firm commitment to justice.[33]

6.1. Online Dispute Resolution

Online Dispute Resolution (ODR) refers to the innovative use of online technology and various techniques designed specifically to resolve conflicts that may arise between individuals and companies, whether or not they are utilizing the assistance of specialists who are trained in different dispute resolution

[31] Gkrimpizi, T.; Peristeras, V.; Magnisalis, I., *Classification of barriers to digital transformation in higher education institutions,* Education Sciences, 13(1), 2023, p. 20.

[32] Saeed, S.; Altamimi, S. A.; Alkayyal, N. A.; Alshehri, E., *Digital transformation and cybersecurity challenges for business resilience: Issues and recommendations,* Sensors, 23(2), 2023, p. 687.
[33] Chen, C. L.; Lin, Y. C.; Chen, W. H.; Chao, C. F. et al., *op. cit.,* p. 10218.

techniques. ODR represents an interdisciplinary field that effectively employs the essential tools and methodologies of Alternative Dispute Resolution (ADR) to address and resolve disputes through electronic means. ODR takes full advantage of the speed, unparalleled convenience, and extensive global reach provided by the internet to discover and implement new approaches aimed at reducing disputes while also resolving them in a manner that is fair, secure, efficient, and inexpensive. This approach to resolving conflicts ultimately aims to enhance trust and confidence in the entire dispute resolution process, leading to a significantly higher level of completion and satisfaction regarding online transactions that take place in today's digital marketplace.[34]

This innovative approach allows online transactions to be conducted with remarkable speed, efficiency, and heightened security. In addition to its primary functions, ODR can supplement and enhance traditional venues for resolving disputes, offering new and varied options for consumers, including families and small businesses, who seek to resolve their disputes without the need for hiring a lawyer or going through the often cumbersome process of small claims court. Many new online services are continuously emerging, actively providing dispute resolution options for individuals and companies that find themselves involved in business-to-business disputes. The most likely candidates for such services at present appear to be disputes relating to electronic fund transfers; however, other areas of potential use for ODR are continually expanding to include sectors such as e-commerce, e-procurement, e-employment, and e-government interactions. The remarkable ease of access to the internet, along with the widespread use of email, can significantly save users not only time but also money, creating a more efficient process for addressing disputes as they arise.[35]

6.2. Pro Bono Services

Pro bono services significantly contribute to enhancing access to justice. As a result of digitalization, these services are facing yet another transformation. In this sense, e-pro bono offers opportunities to accommodate even tech-savvy legal professionals serving through online platforms. Yet, the challenges for combating injustice remain. Whether pro bono work can serve alongside these developments depends on initiatives, legal standards, and continued discussions – just as before. It appears that digital change, yet again, calls out for consistent effort to overcome the hangovers of a narrow focus on economic efficiency, especially in fields where

[34] Weber-Lewerenz, B., *op. cit.,* p. 155.
[35] Schneider, S.; Kokshagina, O., *Digital transformation: What we have learned (thus far) and what is next,* Creativity and Innovation Management, 30(4), 2021, p. 734.

access to justice is a key aim. This, however, is not new – both experienced pro bono practitioners and researchers agree that any talk of reaching meaningful justice effects by mere leverage of technology, be it asynchronous advice provision or other service forms, makes little sense when quality provision and comprehension needs are brought into view.[36]

In its traditional understanding, a pro bono lawyer is an attorney who consults, drafts, and negotiates without charging (part of) his or her regular fee. It is disputed, however, which services should be encompassed by this label: Should contingent fee agreements be considered as pro bono or are they excluded given the risk aspects for which these services are compensated? Pro bono contributions are thought to enhance inclusive legal systems. This sounds even more evident for the general significance of pro bono contributions when combined with the other trans- and multidisciplinary services required in light of the most recent technology that besets many people's everyday lives. This will probably entail a greater role of paralegals, law students, conciliators, mediators, and community workers serving as contact persons.[37]

7. CASE STUDIES AND BEST PRACTICES

In the preceding chapters, we have seen that there are benefits to be obtained from digitalization in the legal profession, but also that it can be relatively hard to achieve these benefits. In this chapter, we take a look at a number of case studies and best practices. These examples can serve as inspiration and help legal professionals make decisions about what kind of digital tools to invest in. The examples in this chapter show how different law firms and organizations are reaping the rewards of digitalization in a variety of ways. We will touch on examples of document automation, company database management, handling email, creating standardized rules-based documentation, managing clients, running a law firm through the cloud, and managing large-scale legal projects. For different types of activities, these organizations and law firms are using digital tools and solutions obtained in the market and are transferring this to digital technology in the legal profession. The examples reflect their experiences, good and bad, of running such digitalization projects in their organizations. As well as discussing the different benefits it can bring, we will also consider the best strategies to use and the common pitfalls in digitalization processes. The use of digital tools has introduced change to the organizations that have implemented the

[36] Hafnawi, B., *Regulating digital transformation: technologies, scenarios, and contracts,* in: Contracting for Digital Transformation and Industry 4.0, 2021, p. 57.
[37] Weber-Lewerenz, B., *op. cit.*, p. 157.

tools to different extents, and it is the results of this change that are highlighted in this chapter.[38]

7.1. Successful Implementations

Impressions Prof. Dr. Leon Kopecky

7.1.1. Successful Implementations

I would like to begin my discussion with several successful implementations that have taken place across various legal frameworks and sectors. These noteworthy examples include the following: 1) The implementation of an innovative online disputes tribunal specifically designed for managing motor vehicle-related cases in Australia. 2) The comprehensive digital transformation of the legal department within the renowned TRUMPF Group. 3) Insights into how to create the absolute best case record that can prove vital for legal proceedings. 4) The implementation of eDiscovery processes in a well-regarded European law firm, showcasing advancements in digital evidence management. 5) Addressing the concept of the digital afterlife of clients, a significant yet often overlooked aspect. The individual use cases presented here clearly illustrate a fundamental point: the successful integration of a tailored digital solution can provide substantial advantages, yielding double benefits not only for the law firm or legal department involved but also, as a direct result, for the client receiving legal assistance.[39]

1) An online dispute tribunal significantly increases the efficiency in handling disputes and ensures that no complaint, big or small, remains unattended or falls through the cracks. This aspect is particularly interesting and valuable in business-to-consumer (B2C) contexts, where the initial example predominantly focuses its attention. With the rise of digital interactions, having an effective online dispute resolution mechanism in place enhances customer trust and satisfaction, thereby playing a critical role in the overall customer experience. 2) Both law firms and legal departments illustrate, through their various implementations, how the strategic integration of an e-discovery solution not only enhances their operational

[38] Aben, T. A. E.; Van der Valk, W.; Roehrich, J. K., *Managing information asymmetry in public–private relationships undergoing a digital transformation: the role of contractual and relational governance,* International Journal of Operations & Production Management, 41(13), 2021, p. 27.
[39] Zafar, A., *Balancing the scale: navigating ethical and practical challenges of artificial intelligence (AI) integration in legal practices,* Discover Artificial Intelligence, 2(1), 2024, p. 22.

efficiency to process vast quantities of documents in a much quicker manner but also serves to demonstrate their trustworthiness and unwavering commitment to their clients. By imposing security measures from the very outset in the proposed integration of these technologies, their approaches strongly indicate that in today's fast-paced digital world, the two solutions not only can but indeed must interact seamlessly to deliver the optimal level of legal service. 3) The insightful case study from the corporate counsel perspective strongly emphasizes the towering power of knowledge management as a critical asset. As the renowned company TRUMPF recognized that many in-house topics were being "treated inefficiently," fostering and reusing knowledge became crucial for their operations. By establishing a robust knowledge database, they are able not only to strengthen the bargaining positions of various stakeholders but have also embarked on an exciting new journey towards a more efficient future. Additionally, all existing fragmented and role-based systems are effectively consolidated through the powerful capabilities of Microsoft SharePoint, allowing for seamless information flow and collaboration.[40]

7.2. Lessons Learned

It became apparent very quickly that practitioners are keenly interested in the diverse experiences of others who have already undergone digitalization or who were actively planning to embark on digitalization projects. The various contributions shared during discussions highlighted a number of recurring challenges that consistently emerged, above all motivating the entire institution as a whole and effectively convincing all staff members to embrace and use digital tools. This was typically found to be a transformative journey rather than just an easy win that could be achieved overnight. It was absolutely necessary to prepare staff and colleagues comprehensively for the introduction of digital tools through well-structured initial awareness and training sessions, along with ongoing support that continued beyond the implementation phase. Helpful strategies included discussing and thoughtfully integrating digitalization options in formal law firms as well as in public-sector policy frameworks. It was indeed generally necessary to ensure that it was perceived as "worth the while" of everyone involved to fully commit to the change process: traditional law firms needed to see benefits through updated business models, data protection officers required incentives through career promotion and additional budget allocations, and researchers, along with

[40] Barroso, M.; Laborda, J., *op. cit.,* p. 28.

scientific staff, benefited from having their work facilitated and made easier through these digital advancements.[41]

The various contributions presented have also placed significant emphasis on the paramount importance of utilizing video tools, engaging in learning by doing, facilitating the process of making mistakes, designing user interfaces that are intuitive, implementing robust feedback mechanisms, and effectively managing the unpredictable variables that arise when dealing with people in digitalization projects. It is essential that digitalization efforts within the legal discipline are intricately linked to a clear vision and aligned strategic goals, pursued diligently in accordance with these relevant objectives. Furthermore, it is crucial that peers are actively encouraged to prioritize appropriate resources and to identify the tangible benefits that digitalization can offer. Lastly, an emerging legal term has surfaced: "deepfake," a concept that contributors strongly believe we should proactively prepare for, given its implications. The rapid evolution of technology poses challenges, as it often leads to the obsolescence of existing tools in a remarkably short timeframe. The digital tools that are currently available today are likely to be viewed as outdated and subsequently replaced sooner or later, while simultaneously opening up new horizons and opportunities in the field. It is noteworthy that despite this rapid pace of change, a diverse range of digital tools is, however, already in relatively common use, primarily aimed at conducting business and legal activities in a more streamlined and efficient manner.[42]

8. CONCLUSION

Incorroboration with the analysis in the previous chapters clearly shows that digitalization within the legal profession presents a multitude of legal, economic, and ethical challenges that need to be carefully considered by lawyers, legal practitioners, and legal service providers alike. On the one hand, digitalization offers a remarkable opportunity for lawyers to economize their precious time when it comes to conducting routine tasks and administrative work on behalf of their clients. This enhancement in efficiency could allow them to focus more on strategic and complex legal issues rather than getting bogged down by the mundane aspects of their daily operations. On the other hand, however, the onset of digitalization may also lead to a myriad of potential legal and ethical risks that can present significant challenges, potentially complicating the landscape for all those involved in the legal profession. Addressing these complex challenges is

[41] Mokofe, W. M., *Digital Transformations of the South African Legal Landscape,* Journal of Digital Technologies and Law, 2(1), 2023, p. 30.

[42] Celeste, E.; Formici, G., *Constitutionalizing Mass Surveillance in the EU: Civil Society Demands, Judicial Activism, and Legislative Inertia,* German Law Journal, 25(3), 2024, p. 439.

vital, as the advancements stemming from digitalization do not inherently restrict or even prevent lawyers, legal practitioners, and other stakeholders from engaging in the digitalization process. Instead, what is required is an informed and knowledgeable approach to navigating this digital transformation, allowing them to effectively meet the necessary demands of legality while simultaneously achieving economic efficiency in their operations.[43]

In addition, the integration of digital technology significantly brings to the fore new and complex features of software ethics that are particularly relevant for the legal profession. This integration not only highlights the importance of ethical standards but also poses a challenge that requires lawyers to consciously position themselves as ethical actors who actively fulfill the ethical principles essential for respecting the freedom and dignity of their clients. Additionally, it is imperative that they take on the responsibility of protecting society from the potential negative impacts that can arise from the rapid pace of digitalization in various sectors, including their own. To some extent, this means that the era dominated by AI and deep learning is pushing legal professionals to acquire essential skills in digital legal literacy, alongside a firm grounding in digital legal ethics. This trend strongly concludes that the legal profession needs to be subject to active management and oversight during the ongoing digitalization process. This need is driven not only by the increasing administrative burdens imposed by relevant legal authorities but also by the significant implications that stem from potential ethical violations, which must be proactively anticipated during the digital transformation of the legal sector. For ethical and practical reasons, continual advancements in machine learning and AI systems within the legal profession now necessitate the active involvement of all stakeholders. This includes not only legal practitioners but also relevant regulatory bodies and society itself. Together, these stakeholders must work collaboratively to create a harmonious and equitable balance between legality and economic efficiency throughout the digitalization of the legal profession. It is equally important to recognize and clarify that the era defined by digitalization does not signal the end of the legal profession as we know it. Instead, it represents the beginning of a series of aggressive and necessary adjustments in an era where technology increasingly becomes not just a tool but the very heart of the legal profession itself, redefining its landscape and future.[44]

[43] Bawa, Z.; Rathore, K. S., *Corporate Governance in the Era of Digital Transformation: Evaluating the Impact of Emerging Technologies on Organizational Strategies,* Business Strategy Review, 35(1), 2024, p. 80.
[44] Ruslan, S., *Challenges and Opportunities for Legal Practice and the Legal Profession in the Cyber Age,* International Journal of Law and Policy, 12(3), 2023, p. 248.

According to the research, while digitalization enhances efficiency in legal workflows, it also poses significant ethical and legal compliance challenges, especially regarding the deployment of AI for legal reasoning and data handling. While technology increases access to legal services, it risks widening inequality due to algorithmic bias and lack of transparency. These findings suggest a need for updated regulatory frameworks and a more ethically integration of digital tools. While this paper provides foundational insight into the digitalization of the legal profession, it is limited by the absence of empirical fieldwork and jurisdictional constraints. Future research should focus on empirical analysis, especially involving comparative legal systems, and collect data from law firms and judicial bodies to assess real-world application of legal tech innovations.

REFERENCES

BOOKS AND ARTICLES

1. Aben, T. A. E.; Van der Valk, W.; Roehrich, J. K., *Managing information asymmetry in public–private relationships undergoing a digital transformation: the role of contractual and relational governance,* International Journal of Operations & Production Management, 41(13), 2021, pp. 1–27.
2. Akpobome, O., *The Impact of Emerging Technologies on Legal Frameworks: A Model for Adaptive Regulation,* International Journal of Research Publication and Reviews, 5(4), 2024, pp. 123–135.
3. Akpuokwe, C. U.; Adeniyi, A. O.; Bakare, S. S., *Legal challenges of artificial intelligence and robotics: a comprehensive review,* Computer Science & IT Research Journal, 5(3), 2024, pp. 45–58.
4. Babikian, J., *Navigating legal frontiers: exploring emerging issues in cyber law,* Revista Española de Documentación Científica, 17(2), 2023, pp. 95–109.
5. Barroso, M.; Laborda, J., *Digital transformation and the emergence of the Fintech sector: Systematic literature review,* Digital Business, 2(2), 2022, p. 28.
6. Barr-Pulliam, D.; Brown-Liburd, H. L.; Munoko, I., *The effects of person-specific, task, and environmental factors on digital transformation and innovation in auditing,* Journal of International Financial Management & Accounting, 33(1), 2022, pp. 3–25.
7. Bawa, Z.; Rathore, K. S., *Corporate Governance in the Era of Digital Transformation: Evaluating the Impact of Emerging Technologies on Organizational Strategies,* Business Strategy Review, 35(1), 2024, pp. 67–80.

8. Bilić, A., *The impact of COVID-certificates on the right to work and the labor law status of workers in the Republic of Croatia,* Collected Papers of the Faculty of Law in Split, Vol. 59, No. 3, 2022, pp. 539–562.
9. Celeste, E.; Formici, G., *Constitutionalizing Mass Surveillance in the EU: Civil Society Demands, Judicial Activism, and Legislative Inertia,* German Law Journal, 25(3), 2024, pp. 427–446.
10. Chen, C. L.; Lin, Y. C.; Chen, W. H.; Chao, C. F. et al., *Role of government to enhance digital transformation in small service business,* Sustainability, 13(18), 2021, pp. 10200–10218.
11. Dąbrowska, J.; Almpanopoulou, A.; Brem, A., *Digital transformation, for better or worse: a critical multi-level research agenda,* R&D Management, 52(2), 2022, pp. 165–180.
12. Gkrimpizi, T.; Peristeras, V.; Magnisalis, I., *Classification of barriers to digital transformation in higher education institutions,* Education Sciences, 13(1), 2023, p. 20.
13. Golia Jr, A., *The Transformative Potential of Meta's Oversight Board,* Indiana Journal of Global Legal Studies, 30(1), 2023, pp. 123–144.
14. Gromova, E. A.; Koneva, N. S., *Legal barriers to the implementation of digital industry (Industry 4.0) components,* The Journal of World Economy, 2022, pp. 67–84.
15. Hafnawi, B., *Regulating digital transformation: technologies, scenarios, and contracts,* in: Contracting for Digital Transformation and Industry 4.0, 2021, pp. 45–60.
16. Iyelolu, T. V.; Agu, E. E.; Idemudia, C., *Legal innovations in FinTech,* Journal of Finance & Accounting Research, 6(2), 2024, pp. 75–92.
17. Klochan, V.; Piliaiev, I.; Sydorenko, S., *Digital Platforms in Public Administration,* Journal of Information Technology & Politics, 18(2), 2021, pp. 201–220.
18. Lescrauwaet, L.; Wagner, H.; Yoon, C., *Adaptive legal frameworks in emerging technologies,* Law and Economics Review, 14(4), 2022, pp. 311–328.
19. Lino, A. F.; Aquino, A. C. B.; Neves, F. R., *Accountants' postures under compulsory digital transformation imposed by government oversight authorities,* Financial Accountability & Management, 38(4), 2022, pp. 512–530.
20. Mokofe, W. M., *Digital Transformations of the South African Legal Landscape,* Journal of Digital Technologies and Law, 2(1), 2023, pp. 25–40.
21. Nguyen, M. T.; Tran, M. Q., *Balancing security and privacy in the digital age: an in-depth analysis of legal and regulatory frameworks impacting cybersecurity practices,* International Journal of Intelligent Systems, 39(2), 2023, pp. 210–229.

22. Plekhanov, D.; Franke, H.; Netland, T. H., *Digital transformation: A review and research agenda,* European Management Journal, 41(1), 2023, pp. 44–58.
23. Popa Tache, C. E.; Săraru, C. S., *Evaluating today's multi-dependencies in digital transformation, corporate governance and public international law triad,* Cogent Social Sciences, 10(1), 2024, pp. 1–18.
24. Reier Forradellas, R. F.; Garay Gallastegui, L. M., *Digital transformation and artificial intelligence applied to business: Legal regulations, economic impact and perspective,* Laws, 10(3), 2021, pp. 45–65.
25. Reis, O.; Eneh, N. E.; Ehimuan, B.; Anyanwu, A., *Privacy law challenges in the digital age: a global review of legislation and enforcement,* Journal of Applied Research in Legal Studies, 5(2), 2024, pp. 99–114.
26. Ruslan, S., *Challenges and Opportunities for Legal Practice and the Legal Profession in the Cyber Age,* International Journal of Law and Policy, 12(3), 2023, pp. 233–251.
27. Saeed, S.; Altamimi, S. A.; Alkayyal, N. A.; Alshehri, E., *Digital transformation and cybersecurity challenges for business resilience: Issues and recommendations,* Sensors, 23(2), 2023, pp. 675–690.
28. Schneider, S.; Kokshagina, O., *Digital transformation: What we have learned (thus far) and what is next,* Creativity and Innovation Management, 30(4), 2021, pp. 725–735.
29. Vermesan, O.; Bacquet, J., *Cognitive hyperconnected digital transformation: Internet of things intelligence evolution,* Journal of Internet of Things, 6(3), 2022, pp. 50–70.
30. Weber-Lewerenz, B., *Corporate digital responsibility (CDR) in construction engineering ethical guidelines for the application of digital transformation and artificial intelligence (AI),* SN Applied Sciences, 3(4), 2021, pp. 145–160.
31. Zafar, A., *Balancing the scale: navigating ethical and practical challenges of artificial intelligence (AI) integration in legal practices,* Discover Artificial Intelligence, 2(1), 2024, p. 22.

UDK: 614 : 004 (497.5)
342.721 : 614 (497.5)
Review paper

Ana-Marija Kraljik, PhD student
Faculty of Law, University of Osijek, Croatia
E-mail: ana-marija.kraljik@obz.hr
ORCID ID: 0009-0009-4730-0549

EUROPEAN HEALTH DATA SPACE - A NEW APPROACH TO THE DIGITAL TRANSFORMATION OF THE EUROPEAN UNION

ABSTRACT

Digital transformation is the most important factor in the further economic, technological, security and international strengthening of the European Union. The first common European data space of the European Union relates to health and the protection of health data. This paper examines the current state of health data protection of citizens of the Republic of Croatia in the context of other EU member states. The paper analyzes the impact of technological innovations on the security of health data processing, ie their interoperability. The risks and challenges related to the security of health data processing in the context of technological innovations are assessed. In conclusion, the potential contribution of the European health data space is determined and recommendations are made for improving the security of health data with new digital solutions.

Keywords: *Regulation (EU) 2025/327, public health, European Union.*

1. INTRODUCTION

The European Health Data Space (EHDS) is a key initiative of the European Union (EU) aimed at the digital transformation of the healthcare sector. The aim of the EHDS is to establish an integrated system that enables secure access, exchange and reuse of health data across the EU, thereby stimulating innovation, research and improving healthcare.[1] Digital transformation has become an indispensable part of modern society, permeating all aspects of life, including the healthcare

[1] The European Health Data Space (EHDS) is an important pillar of a strong European Health Union and is the first common EU data space for a specific area to emerge from the European Data Strategy, https://health.ec.europa.eu/ehealth-digital-health-and-care/european-health-data-space_hr, 17.01.2025.

sector.[2] The EU has recognised the need to integrate digital technologies into healthcare systems in order to improve the quality of care, increase efficiency and enable personalised medicine. In this context, the EHDS represents a fundamental initiative for achieving these goals.[3] The paper presents the legal framework of the EHDS at the EU level and provides a comparative overview with the Republic of Croatia (RC). The topic of the implementation of the new Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Area and amending Directive 2011/24/EU and Regulation (EU) 2024/2847 (hereinafter: the EHDS Regulation) is addressed, which enables better access for patients and healthcare professionals to comprehensive and up-to-date health data regardless of geographical borders.[4] Finally, the paper presents initiatives and provides guidelines for further action and harmonisation of the Croatian healthcare sector in promoting further digitalisation, interoperability, and primary and secondary processing of patient health data within the EHDS. The problem-based research paper presents individual open provisions important for the primary and secondary use of health data regulated by the EHDS Regulation.

2. EUROPEAN HEALTH DATA SPACE – LEGAL FRAMEWORK

The EHDS legal framework should be clearly demarcated into horizontal-vertical legal legislation that forms the backbone of the legal framework within which primary and secondary processing of health data in the EU operates.[5] Within the

[2] European Declaration on Digital Rights and Principles for the Digital Decade COM (2022) 28 final "Digital transformation is also a challenge for our democratic societies, our economies and for individuals. As the digital transformation is accelerating, it is time for the EU to make clear how its values and fundamental rights that apply offline should apply in the digital environment. Digital transformation should not lead to a regression of rights. What is illegal offline is also illegal online."

[3] Council Conclusions on Strengthening the European Health Union (14029/21) "Continued and coordinated strategic investments in improving health systems will strengthen their resilience and optimize healthcare in the future. While they play a crucial role in overcoming current and future health challenges, health systems are also crucial for the development of our societies and economies.", 30.11.2021, Brussels.

[4] Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme of the Union's action in the field of health (EU4Health Programme) for the period 2021–2027 and repealing Regulation (EU) No. 282/2014, OJ L 107, 26 March 2021.

[5] European Commission, *Assessment of EU Member States' rules on health data in the context of the General Data Protection Regulation*, 2021, http://ec.europa.eu, 17 February 2025.

horizontal legal legislation, in addition to the General Data Protection Regulation,[6] the Directive on Cross-Border Healthcare stands out.[7] The Directive on Cross-Border Healthcare mentioned the term e-health for the first time in EU legislation,[8] marking the beginning of a digital reform in the field of digitalisation of healthcare. Given that the provisions of the Directive on Cross-Border Healthcare are applied voluntarily, this explains why the Directive has shown limited effectiveness in terms of processing electronic health data. The evaluation of the Directive's e-health provisions concluded that its effectiveness and efficiency are quite limited due to the voluntary nature of the actions related to the e-health network.[9] In addition, the use of personal electronic health data for primary purposes in the context of cross-border healthcare is progressing slowly. The MyHealth@EU platform[10] has been introduced in only 10 Member States and currently supports only two services (electronic prescription and patient medical summary). The weak and slow implementation is partly linked to the fact that the Cross-Border Healthcare Directive, while establishing the right of individuals to a written record of their treatment, does not require that medical records be in electronic form. Individuals' access to their personal electronic health data remains difficult and individuals have limited control over their health data and the use of that health data for medical diagnosis and treatment. The eHealth Network recommended that Member States implement standards and specifications for the exchange of electronic health records in their procurement procedures in order to achieve interoperability. However, their actual implementation of this format has been limited, leading to a fragmented environment and unequal access to and portability of electronic health data. On the other hand, the EHDS, as part of the overall EU data policy strategy, is designed to complement other EU legislation, including the General Data Protection Regulation.[11] The EHDS also aims to develop vertical legal regulation, which is *a conditio sine qua non* for an efficient,

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4 May 2016,

[7] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4 April 2011.

[8] Article 14 of the Directive on cross-border health care: "The Union supports and facilitates cooperation and exchange of information between Member States operating within a voluntary network connecting state bodies responsible for e-health, designated by Member States".

[9] Regulation of the European Parliament and of the Council on the European Health Data Space, No. 2022/0140,

[10] The cross-border infrastructure for the primary use of electronic health data is regulated by Article 13 of the proposal of the General Data Protection Regulation (My Health@EU).

[11] Hansen, J. et al., Assessment of the EU Member States' Rules on Health Data in the Light of GDPR, 2021, https://ec.europa.eu/health/system/files/2021-02/ms_rules_health-data_en_0.pdf, 17 February 2025.

cost-effective and effective public health sector. Among the vertical regulations that are important for the functioning of the EHDS, we can single out sectoral regulations, among which the Regulation on serious cross-border threats to health stands out,[12] which is important for establishing an epidemiological framework in the event of new public health crises. Given that a large number of electronic data that will be accessed within the EHDS are personal health data, the EHDS Regulation was designed as the core of the legal framework together with the Regulation on the protection of individuals with regard to the processing of personal data by the institutions, bodies, offices and agencies of the Union.[13] The importance of harmonizing the horizontal-vertical legal framework related to the primary and secondary processing of individual health data is a factor without which the story of a single European data space within the European Health Union cannot succeed. Time will tell how pretentious the plan of the EU and its institutions is aimed at the right of individuals to access their own personal electronic health data.[14]

3. IMPLEMENTATION OF THE REGULATION ON THE EUROPEAN HEALTH DATA SPACE AND OPEN PROVISIONS

The EHDS Regulation represents a key legislative framework for ensuring the interoperability of health data in the EU at a vertical level. In order to implement the provisions of the EHDS [15]Regulation into the legal system of the Republic of

[12] Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU., "In view of the experience gained during the current COVID-19 pandemic and in order to facilitate adequate preparedness and response at Union level to all cross-border threats to health, it is necessary to extend the legal framework for epidemiological surveillance, monitoring, early warning and combating serious cross-border threats to health."

[13] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No. 45/2001 and Decision No. 1247/2002/EC, OJ L 295, 21 November 2018.

[14] The slogan of the EU "*United in diversity"* shows in the best way that in a legally uneven system like the EU, a way should be found to find an interoperable way of exchanging and processing health data within the EHDS.

[15] Law on data and information in healthcare "Narodne novine" No. 14/19., Ordinance on the scope and content of data and on the manner of keeping e-Karton "Narodne novine" No. 74/23., Ordinance on the manner of processing health and other personal data in health national and institutional information systems in healthcare, methods of storing and protecting health data and creating health indicators, standardized forms and registers and records in healthcare "Narodne novine" No. 150/24. and Rulebook on procedural, technical,

Croatia in terms of open provisions, it is necessary to harmonize national legislation, primarily existing laws such as the Health Data and Information Act and implementing secondary legislation. This is evident from the key provisions of the EHDS Regulation related to the individual's right and their *primary use* of personal electronic health data, these are the provisions defined in Articles 3, 8, 10 and 11, which regulate; the individual's right to access their own personal electronic health data (Article 3), the right to restrict access (Article 8), the individual's right to be excluded from primary use (Article 10) and access by healthcare professionals to personal electronic health data (Article 11). In addition to the above, the key provisions of the EHDS Regulation are set out in Articles 53 and 71 of the EHDS Regulation, which relate to the purposes for which electronic health data may be processed for secondary use (Article 53) and the right to object to the processing of personal electronic health data for secondary use (Article 71). Relying on the provisions of the General Data Protection Regulation, which lay down specific provisions on the rights of individuals with regard to the processing of their personal data, in particular the right of individuals with regard to the processing of their personal data. [16]The EHDS Regulation builds on these rights and supplements some of them. Thus, the EHDS Regulation defines personal and non-personal electronic health data.[17] Furthermore, Article 3 of the EHDS Regulation establishes that individuals have the right to access personal electronic health data belonging to priority categories and which are processed for the purpose of providing healthcare through electronic health data access services, free of charge. In accordance with Article 23 of the General Data Protection Regulation, Member States may limit the scope of the right, in particular where restrictions are necessary for reasons of patient safety and ethical requirements. Here, *the de lege lata* link between horizontal and vertical legal regulations is clearly visible. In practice, the right to access health data is still provided in many places in paper form or in the form of scanned documents. On the other hand, the EHDS Regulation promotes electronic access to health data and implies an immediate response or fulfillment of requests for access.[18] However, in practice, it is necessary to allow for the postponement of the provision of access to electronic health data if they would be harmful to the safety of individuals or unethical.[19] One of the provisions of the EHDS Regulation is regulated by Article

organizational and semantic data processing standards for professional and business areas in healthcare "Narodne novine" No. 117/24.

[16] Article 2 of the EDPS Regulation: "1. For the purposes of this Regulation, the following definitions shall apply: (a) the definitions of "personal data", "processing", "pseudonymisation", "controller", "processor", "third party", "consent", "genetic data", "data concerning health", "international organisation" set out in points 1, 2, 5, 7, 8, 10, 11, 13, 15 and 26 of Article 4 of Regulation (EU) 2016/679."

[17]Article 2, points a) to c) of the General Data Protection Regulation.

[18] Recital 9 of the EDHS Regulation.

[19] Recital 10 of the EDHS Regulation, ibid. Article 3, paragraph 3.

10, which speaks of the right of an individual to be exempted from primary use. However, selective sharing of personal electronic health data should be supported and implemented only in cases where individuals are aware of the risks to which they are exposed or which are related to the safety of the patient. On the other hand, the unavailability of limited personal electronic health data for healthcare professionals may affect the provision of healthcare services to the individual. Therefore, if restrictions on access to personal electronic health data could have life-threatening consequences, healthcare professionals should be allowed access to such data.[20] It is recommended that Member States enact provisions in their national law on mechanisms that restrict individuals' access to parts of their electronic health data. In the Republic of Croatia, it is first necessary to enact the Act on the Implementation of Regulation (EU) 2025/327 of 11 February 2025 on the European Health Data Area and amending Directive 2011/24/EU and Regulation (EU) 2024/2847, and to enact a subordinate legislation related to supplementing the so-called open provisions of the EHDS Regulation. In particular, the rights of healthcare professionals with regard to exemptions from primary use in the case of cross-border data exchange. Namely, such exemptions as well as the right of an individual to restrict access to healthcare professionals and healthcare providers to all of their electronic health data pose a risk to both the individual and the public health. In that case, Member States must establish rules and specific safeguards for such restriction mechanisms.[21] As stated in the Republic of Croatia, it is necessary to enact a subordinate legislation establishing rules and safeguards. As already indicated, three subordinate legislations are in force regulating e-health, namely: the Ordinance on the method of processing health and other personal data in national and institutional health information systems in healthcare, the method of storing and protecting health data and creating health indicators, standardized forms and registers and records in healthcare, the Ordinance on process, technical, organizational and semantic standards of data processing for professional and business areas in healthcare, and the Ordinance on the scope and content of data and the method of maintaining e-Cards. Given that they changed during 2023 and 2024, they need to be amended again, as does the Act on Data and Information in Healthcare from 2019. Given that the EDHS Regulation enters into force on 25.03.2025. and that it applies from 26.03.2027., Croatian and European experts and legislators have enough time to adapt the same legal regulations. Contributions are also possible through EU

[20] Article 9(2)(c) of the General Data Protection Regulation.
[21] In Article 71(1) of the EHR Regulation, an individual has the right to object at any time and without giving reasons to the processing of personal electronic health data relating to them for secondary use. However, in paragraph 4 of the same Article, an exception to the right to object is established, whereby a Member State may provide in its national law for a mechanism for making available data in respect of which the right to object has been exercised for specified reasons.

projects implemented by the Croatian Institute of Public Health and the Croatian Institute of Health Insurance. In order to further improve the implementation of the open provisions of the EHDS Regulation, it is necessary to determine the body and its role in the implementation of the EHDS Regulation through national law in the Republic of Croatia.[22]

Furthermore, as far as positive legal regulations are concerned, we should first of all single out the Health Care Act and the Patient Rights Protection Act,[23] which regulate that healthcare activities are performed at the primary, secondary and tertiary levels and at the institution level. [24]It is important to point out that the healthcare system in the Republic of Croatia is based on the principles of social insurance, i.e. the compulsory social health insurance model based on contributions from wages.[25] Precisely because it is based on compulsory health insurance, it has the characteristics of the Bismarck model.[26] In addition to the above, the cost-effectiveness assessment system in Croatia is not fully developed, which leads to the fact that cost-effectiveness criteria are not taken into account when making decisions, which reduces the likelihood of providing quality care. In addition to the financial part, the legal and institutional framework needs to be adjusted in a timely manner and more agile and up-to-date activity in numerous EU projects related to the EHDS needs to be encouraged.[27] However, there is

[22] Each member state appoints one or more digital health authorities responsible for the implementation and enforcement of the primary use of health data, Article 19 of the EDHS Regulation.

[23] Health Care Act, Official Gazette, No. 100/2018, 125/2019, 133/2020, 147/2020, 136/2021, 119/2022, 156/2022, 33/2023, 145/2023, 36/2024; and Act on the Protection of Patient Rights, Official Gazette, No. 169/2004, 37/2008.

[24] Article 28 of the Health Care Act reads: "Healthcare activity is an activity of interest to the Republic of Croatia that is performed as a public service and that is performed by healthcare workers in accordance with professional medical doctrine and with the use of medical technology when providing healthcare, under the conditions and in the manner prescribed by this Act.", https://www.iusinfo.hr/zakonodavstvo/zakon-o-zdravstvenoj-zastiti/clanak-28 , 24.02.2025.

[25] Malešević, A., *Digital Health in Croatia: Expectations, Challenges and Implementation*, Doctoral Thesis, Sociology: Values, Identity and Social Changes in Croatian Society, Zagreb, June 2024.

[26] Health systems are often described by their predominant source of financing (e.g. "Bismarckian" social health insurance systems, general "Beveridge" tax-financed systems), https://repo.ozs.unist.hr/islandora/object/ozs:1579/datastream/PDF/view , 24.02.2025.

[27] One of the current European projects is CHDC, the Croatian Health Data Centre, about which you can read more or less on the website of the Croatian Institute of Public Health. In November 2023, the Croatian Institute of Public Health launched the establishment of the Croatian Health Data Centre (HZCP). The planned duration of the project is 4 years, financed through the EU Direct Grant, and three institutional partners are participating in the implementation: the Croatian Institute of Public Health as the project leader and the Croatian Institute of Public Health (HZZO) and the Ministry of Health (MiZ) as associated partners. The CHDC will connect to the HealthData@EU infrastructure to enable cross-border workflows for the secondary use of electronic health data at the European Union

scientific research by relevant experts in the field of personal data protection; e-card, e-health, the application of artificial intelligence in healthcare and data and information management in healthcare, which significantly helps to better understand and implement European law.[28] However, the data on measuring the satisfaction of health service users is worrying, which is also reflected in the establishment of an interoperable public health framework within the EHDS. Among others, it is important to highlight the Health Care Quality Act.[29] It is important to highlight that the Compulsory Health Insurance Act transposes the provisions of Directive 2011/24/EU of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare.[30] The Health Care Act also states the transposition of Directive 2011/24/EU into Croatian legislation.[31] In this context, the Croatian Institute for Health Insurance (hereinafter referred to as HZZO) acts as a national contact point for providing information on the use of health care in other EU member states.[32] In conclusion, the Republic of Croatia, or rather the competent institutions, can only solve the problems of adaptation and interoperability of the Croatian health system through interdisciplinary teamwork and timely involvement in its implementation. *De lege ferenda,* the Republic of Croatia needs an operable, efficient and effective way of acting for the satisfactory implementation of the EHDS Regulation.

(EU) level. Furthermore, CHDC will actively cooperate with already established Health Data Access Authorities (HDABs) and Member States that are in the process of establishing HDABs, relevant networks and other stakeholders to facilitate access to secondary use of health data and participate in the exchange of health data at the EU level, https://www.hzjz.hr/projekti/hrvatski-centar-za-zdravstvene-podatke-eng-croatian-health-data-centre-chdc/ , 24.02.2025.

[28] Boban, M., *E-card – challenges of implementation and protection of patients' personal data*, in: *4th "KOKOZ" Congress and 6th Croatian Congress of Medical Law with International Participation*, Novi Vinodolski, 2023, pp. 147–177.; Boban, M., *Personal data protection and the new EU data protection regulation*, Bulletin of the Croatian Medical Informatics Society, vol. 24, no. 1, 2018, pp. 26–40.; Boban, M., *Data and information management in health information systems of the Republic of Croatia – security, protection and responsibility*, in: *Medicina, pravo & družba, Proceedings*, Maribor, 2021, pp. 211–233.

[29] Law on the Quality of Health Care, Official Gazette No. 118/18 and 40/2025.

[30] Compulsory Health Insurance Act, Official Gazette, No. 80/2013, 137/2013, 98/2019, 33/2023.

[31] Health Care Act "Official Gazette" No. 100/2018, 125/2019, 133/2020, 147/2020, 136/2021, 119/2022, 156/2022, 33/2023, 145/2023, 36/2024, Date of entry into force of the Act: 1. 1. 2019. " This Act transposes the following directives into Croatian legislation: Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ L 88, 4. 4. 2011).

[32] https://hzzo.hr/pristup-zdravstvenim-podatcima/europski-prostor-za-zdravstvene-podatke, unfortunately, although it acts as a national contact point until the research date of 20.02.2025., an error or page error occurs on the HZZO website and there is no relevant information about the European health data space.

3.1. Open provisions of the EHDS Regulation

On 25 March 2025, the EHDS Regulation will enter into force with a transitional period of two to four years for its application. Although the transitional periods may seem long, the European Commission has a lot of work to do to facilitate the implementation of the EHDS Regulation. It is important to establish the operation of the EHDS under the EHDS Regulation during the transitional period so that stakeholders, be they Member States, healthcare providers or the European Commission itself, can prepare. The EHDS Regulation therefore includes a deadline for the adoption of key implementing acts, namely 26 March 2027. The key implementing acts referred to above are legally open provisions that leave room for the legislator to supplement the EHDS Regulation through other implementing legal acts. The key implementing acts with the specified deadline are the following provisions of the EHDS Regulation: Article 13(4) on data quality requirements in primary use, Article 15(1) on technical specifications for ERHRxF, Article 23(4) on MyHealth@EU, Article 36(1) on common specifications for harmonised components of the EHR system, Article 70(1) on templates for applications, permissions and requests for access to data, Article 73(5) on requirements for secure processing environments, Article 75(12) on HealthData@EU, Article 77(4) on requirements for dataset descriptions, and Article 78(6) on data quality and usefulness labelling. Those implementing acts will undergo the usual comitology procedures[33] involving the Member States, as well as the necessary public consultations, while delegated acts adopted by the European Commission will be subject to a period during which the European Parliament and the Council may object to the delegated act. With regard to Article 13(4), the European Commission shall, by means of implementing acts, establish data quality requirements, including in relation to semantics, uniformity, consistency, accuracy and completeness, for the registration of personal electronic health data. The European format for the exchange of electronic health records is regulated by the open provision of Article 15(1), which states that the European Commission shall, by 26 March 2027, by means of implementing acts, establish technical specifications for the priority categories of personal electronic health data referred to in Article 14(1), specifying a European format for the exchange of electronic health records. That format must be common and machine-readable and enable the transfer of personal electronic health data between software applications, devices and healthcare providers. Such a format must support the transfer of structured and unstructured health data. Furthermore, in accordance

[33] Comitology applies when implementing powers are conferred on the Commission in the text of a law. The same law also stipulates that the Commission should be assisted by a committee in determining the measures set out in the final implementing act. https://commission.europa.eu/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts/comitology_hr, 25.03.2025.

with Article 23(4), the European Commission shall, by 26 March 2027, adopt implementing acts on the necessary measures for the technical development of the MyHealth@EU infrastructure, detailed rules on the security, confidentiality and protection of personal electronic health data and the conditions for the conformity checks required for connection to the MyHealth@EU infrastructure. In accordance with Article 36(1), the European Commission shall, by 26 March 2027, adopt implementing acts on common specifications for the essential requirements set out in Annex II, including a common template and a deadline for the implementation of those common specifications. Those common specifications shall, where relevant, take into account the specificities of medical devices and high-risk AI systems referred to in Article 27(1) and (2), including state-of-the-art health informatics standards and a European format for the exchange of electronic health records. In Article 70(1), the European Commission shall, by 26 March 2027, establish by means of implementing acts the templates for the request for access to health data, for the data authorisation and for the request for health data referred to in Articles 67, 68 and 69 of the EHDS Regulation. In addition, Article 73(5) regulates the secure processing environment, for which the European Commission shall, by 26 March 2027, establish by means of implementing acts the technical and organisational requirements, requirements in terms of information security, confidentiality and data protection, and requirements in terms of interoperability for secure processing environments, including in terms of the technical features and tools available to the user of health data in the secure processing environment. Then, in Article 75(12), Section 4 of the EHSS Regulation, which regulates the cross-border infrastructure for secondary use, the European Commission will adopt implementing acts, which, among other things, establish the requirements, technical specifications and IT architecture of the HealthData@EU infrastructure, which ensures state-of-the-art data security, confidentiality and protection of electronic data in the HealthData@EU infrastructure. In Article 77(4), which regulates the quality and usefulness of health data for secondary use, the European Commission will establish, by means of implementing acts, the minimum elements that health data owners must specify for data sets and the characteristics of these elements. To conclude the overview of the open provisions of the EHSS Regulation, Article 78(6) regulates the quality and usefulness of data, which establishes the visual characteristics and technical specifications of the quality and usefulness of data. All of the above open provisions, which determine the adoption of implementing acts in the comitology procedure, are important for understanding the complexity of the application of the EHSS Regulation. This is why the implementation deadlines for its application are so long. This is a comprehensive and detailed overview of open provisions that actually opens the door to further research into the European health data space in the narrow sense and the public health system in the field of EU public health. Professional and scientific cooperation of consistent and capable human resources is needed not only at the

EU level but also at the level of each EU Member State separately. So far, the implementation of the Directive on Cross-Border Cooperation has been visible, which did not have the same legal force as the EHDS Regulation. From its implementation, it is evident that by adopting and entering into force, and by applying the EHDS Regulation, an attempt is made to create a coherent legal, technical, and IT entity within the EU. Precisely because of its complexity, the next chapter of the paper will address the entry into force and application of the EHDS Regulation.

4. ENTRY INTO FORCE AND APPLICATION OF THE EHDS REGULATION

As stated in the previous chapter, the EHDS Regulation will enter into force on 25 March 2025 and will apply from 26 March 2027. However, certain provisions will apply in stages, starting from 26 March 2029 or 2031. There are also provisions from Article 75, paragraph 5, which will apply from 2035.[34] In order to better understand the basis for the vertical implementation of the EHDS Regulation into the legal system of the Republic of Croatia, it is necessary to present its legal framework in more detail and in a meaningful way. The EHDS Regulation is an important milestone in the EU's efforts to build a secure and efficient digital health system as part of the European digital data strategy.[35] The EHDS Regulation itself is important because it encompasses a comprehensive framework for access to and use of electronic health data in all EU Member States. The benefits of the newly established European Health Data Space, implemented through the EHDS Regulation, are the empowerment of citizens and the strengthening of the reuse of health data. When we talk about empowering citizens, we primarily mean better control over their personal health data, which will enable unhindered access to medical records throughout the EU where they need healthcare (primary use).[36] The Regulation, in Chapter II, regulates a number of issues related to the primary use of individual health data, from the right to access their own personal electronic health data, the provision of electronic health data access services for individuals

[34] EDHS Regulation, Article 105. Entry into force and application.
[35] Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847.
[36] Ibidem., Chapter II. Primary Use , Section 1. Rights of individuals with regard to the primary use of their personal electronic health data and related provisions, Articles 3-18, Section 2. Governance for primary use, Articles 19-22, Section 3. Cross-border infrastructure for the primary use of personal electronic health data, Articles 23-24.

and their representatives,[37] the right of an individual to enter information into their own electronic health record, the right of an individual to correction, to data portability, to restriction of access, the right to obtain information about access to data, the right of an individual to be excluded from primary use, and access by healthcare professionals to personal electronic health data. In addition to the above, the Regulation deals with the registration of personal electronic health data, priority categories of personal electronic health data for *primary use* and the European format for the exchange of electronic health records, identification management. Furthermore, in the same Chapter II, Section 2, the Governance for primary use is discussed, more specifically on the Digital Health Authority, reporting to the Digital Health Authority, the right to lodge a complaint with the Digital Health Authority, and the relationship with the supervisory authority under Regulation (EU) 2016/679.[38] Section 3 regulates the cross-border infrastructure for the primary use of personal electronic health data, where the European Commission establishes a central interoperability platform for digital health, Mojezdravlje@EU, to facilitate the provision of services that support and facilitate the exchange of personal electronic health data between the national contact points for digital health of the Member States.[39] Chapter III of the Regulation regulates electronic health record systems and applications for well-being, where the scope and general provisions on electronic health record systems are elaborated.[40] Chapter IV elaborates on the secondary use of health data. When it comes to *the secondary use* of health data, the definition of the term is given in Article 2, paragraph 1, point e of the Regulation, where secondary use means the processing

[37] Ibidem, Article 4, paragraph 1. Member States shall ensure the establishment of one or more electronic health record access services at national, regional or local level…Such electronic health record services shall be free of charge for individuals and their representatives.

[38] Ibidem., Article 22. The supervisory authority or authorities responsible for monitoring and enforcing the application of Regulation (EU) 2016/679 shall also be competent for monitoring and enforcing the application of Article 3 and Articles 5 to 10 of this Regulation. Relevant the provisions of Regulation (EU) 2016/679 apply mutatis mutandis. Supervisory bodies are authorized to impose administrative fines up to the amount from Article 83, paragraph 5 of Regulation (EU) 2016/679.

[39] Ibidem, Article 23(3). Each national contact point for digital health shall enable the exchange of personal electronic health data referred to in Article 14(1) with national contact points for digital health in other Member States via MyHealth@EU. This exchange shall be based on the European format for the exchange of electronic health records.

[40] Chapter III. Titled Electronic health record systems and welfare applications , Section 1. Scope and general provisions on electronic health record systems Articles 25-29, Section 2. Obligations of economic operators with regard to electronic health record systems, Articles 30-35, Section 3. Conformity of harmonised software components of electronic health record systems, Articles 36-42, Section 4. Market surveillance of electronic health record systems, Articles 43-46, Section 5. Other provisions on interoperability, Articles 47-48, Section 6. Registration of electronic health record systems and welfare applications, Article 49.

of electronic health data for purposes set out in Chapter IV of the Regulation that are not for the original purposes for which they were collected or prepared.[41] When researching the EDHS Regulation, great attention should also be paid to the recitals of the Regulation, which are legally binding, because they contain explanations for numerous truncated definitions that could lead experts, scientists and professionals astray.[42] In addition to the above, an important feature of this Chapter is the establishment of the EU Dataset Catalogue regulated by Article 79, where it is clearly emphasized that we can define three categories of EU dataset catalogues; the first is the EU dataset catalogue, the second are national dataset catalogues, and the third are catalogues of authorised participants in the HealthData@EU infrastructure.[43] Chapter V of the Regulation provides for additional capacity-building measures, training and information programmes for healthcare professionals, digital literacy, additional requirements for public procurement, storage of personal electronic health data for primary use, provisions on the transfer of electronic data to third countries and international access by authorities to non-personal electronic health data.[44] Chapter VI deals with European governance and coordination, where the European Space Committee is defined,[45] the Stakeholder Forum is established, and[46] the MyHealth@EU and

[41] Chapter IV . Regulations Secondary use , Section 1. General conditions for secondary use, Articles 50-54, Section 2. Governance and mechanisms for secondary use, Articles 55-65, Section 3. Access to electronic health data for secondary use, Articles 66-74, Section 4. Cross-border infrastructure for secondary use , Section 5. Quality and usefulness of health data for secondary use, Articles 77-80, Section 6. Complaints, Article 81.

[42] Recitals 55-63 explain the context of secondary use of health data, user rights, their availability, etc.

[43] Article 79 of the Regulation The Commission shall establish an EU dataset catalogue which shall bring together the national dataset catalogues established by the health data access authorities in each Member State, as well as the dataset catalogues of authorised participants in the HealthData@EU infrastructure.

[44] Regulation, Chapter V. Additional measures, Articles 82-91.

[45] Regulation, Article 92. "A European Health Data Area Board is hereby established to facilitate cooperation and exchange of information between Member States and with the Commission. The European Health Data Area Board shall be composed of two representatives from each Member State, one representative for primary use and one representative for secondary use, appointed by each Member State. Each Member State shall have one vote. The members of the European Health Data Area Board shall undertake to act in the public interest and independently."

[46] Regulation, Article 93. " A Stakeholder Forum shall be established to facilitate the exchange of information and promote cooperation between stakeholders in relation to the implementation of this Regulation. 2. The Stakeholder Forum shall be balanced in composition and shall consist of relevant stakeholders, including representatives of patient organisations, healthcare professionals, industry, consumer organisations, scientific researchers and academia, and shall represent their views. Where business interests are represented in the Stakeholder Forum, the representation of such interests shall be based on a balanced combination of large companies, small and medium-sized enterprises and start-ups. The tasks of the Stakeholder Forum shall cover both primary and secondary use."

HealthData@EU Infrastructure[47] Steering Groups are established. Chapter VII regulates the delegation of powers,[48] while Chapter VIII elaborates on sanctions.[49] It is important to note that the aforementioned Chapter VIII, in Article 103, deals with the Amendment of Directive 2011/24/EU,[50] specifically its Article 14, which for the first time in EU law referred to healthcare and the interoperability of health technologies. We can therefore draw a link and briefly emphasize the importance of recital 8 of the Regulation, which speaks about the meaning of Regulation (EU) 2016/679, which establishes specific provisions on the rights of individuals with regard to the processing of their personal data. The European Health Data Area is based on these rights and supplements some of them as they apply to personal electronic health data. These rights apply regardless of the Member State in which personal electronic health data are processed. At the very end of the EDHS Regulation is Chapter IX. Under the title Deferred application, transitional and final provisions, which clearly states that in principle the Regulation applies from 26 March 2027, and enters into force 20 days after its publication in the Official Journal of the EU, more precisely on 25.03.2025. Therefore, the entry into force of the EHDS Regulation is important because it begins to apply two years later. This means that the difference between the entry into force and the start of application of the EHDS Regulation lies in their legal effect and time frame: entry into force means that the EHDS Regulation enters into force on the date specified in the text of the regulation itself, usually 20 days after its publication in the Official Journal of the European Union (unless otherwise specified). This means that the legislative act becomes part of the EU legal order, but does not necessarily

[47] Regulation, Article 95. " The management group Mojezdravlje@EU (MyHealth@EU) and the management group Zdravstvenipodatci@EU (HealthData@EU) ("management groups") are established for the cross-border infrastructures provided for in Articles 23 and 75. Each management group consists of one representative from each Member State appointed among the relevant national contact points. 2. Management groups make operational decisions on the development and operation of My Health@EU and HealthData@EU infrastructures. 3. Management groups make decisions by consensus..."

[48] Article 97 "1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article. 2. The power to adopt delegated acts referred to in Article 14(2), Article 49(4) and Article 78(5) shall be conferred on the Commission for an indeterminate period of time from 25 March 2025. ..."

[49] Article 99 of the Regulation "Member States shall establish rules on sanctions applicable to violations of this Regulation, in particular violations that are not subject to administrative fines in accordance with Articles 63 and 64, and shall take all necessary measures to ensure their implementation. The provided sanctions must be effective, proportionate and dissuasive. Member States shall notify the Commission of these rules and measures by March 26, 2027, and shall notify it without delay of to all subsequent changes that affect them."

[50] Directive on the application of patient rights in cross-border health care , Article 14 "E-health 1. The Union supports and facilitates cooperation and exchange of information between member states operating within a voluntary network connecting state bodies responsible for e-health, which have been appointed by member states."

have to be applied yet. On the other hand, the start of application means that the Regulation starts to apply from the date expressly specified in the regulation. This date can be immediately after the entry into force or with a certain deferral period (e.g. six months, a year or more). This period allows Member States, institutions and economic operators to adapt to the new rules.[51] Such a complex deferred application, or transitional and final provisions that are complex, will be difficult to monitor. Therefore, the provisions on education and information of stakeholders through regulation in the Regulation are an essential part of the implementation. Given that the European Health Data Space is the first common data space in the EU, the long period of application is understandable. The paper briefly covers the content of the EDHS Regulation, and it can be concluded that the Regulation has Chapter IX, 105 articles and Annex IV, of which 115 recitals.[52] For the first time, the research provides an overview of the new EHDS Regulation and its open provisions in order to clarify the legal framework for action in further research. The overview of the EHDS Regulation itself and other relevant legal regulations that directly or indirectly affect the interoperability and establishment of health data in the EU is truly, despite the difficulties in the EU, a pioneering undertaking. Even a small step forward is a step towards the goal. In conclusion, it is up to scientists and experts to make an effort at all levels to solve the upcoming

[51] The Regulation shall enter into force on 26.03.2025, and shall apply from 26.03.2027, with the exceptions that Articles 3 to 15, Article 23, paragraphs 2 to 6, Articles 25, 26, 27, 47, 48 and 49 shall apply as follows: (a) from 26 March 2029 for the priority categories of personal electronic health data referred to in Article 14, paragraph 1, points (a), (b) and (c) and for electronic health record systems intended by the manufacturer for processing such categories of data; (b) from 26 March 2031 for the priority categories of personal electronic health data referred to in Article 14, paragraph 1, points (d), (e) and (f) and for electronic health record systems intended by the manufacturer for processing such categories of data; (c) from one year from the date specified in the delegated act to be adopted pursuant to Article 14(2) for any change to the main characteristics of personal electronic health data set out in Annex I, provided that that date is later than the date of application referred to in points (a) and (b) of this subparagraph for the categories of personal electronic health data concerned. Chapter III shall apply to the electronic health record systems referred to in Article 26(2) from 26 March 2031, Chapter IV It shall apply from 26 March 2029. However, Article 55(6), Article 70, Article 73(5), Article 75(1) and (12), Article 77(4) and Article 78(6) shall apply from 26 March 2027, points (b), (f), (g), (m) and (p) of Article 51(1) shall apply from 26 March 2031 and Article 75(5) shall apply from 26 March 2035. The implementing acts referred to in Article 13(4), Article 15(1), Article 23(4) and Article 36(1) shall apply from the dates referred to in the third paragraph of this Article depending on the categories of personal electronic health data referred to in Article 14(1)(a), (b) and (c) or points (d), (e) and (f) of Article 14(1). The implementing acts referred to in Article 70, Article 73(5), Article 75(12), Article 77(4) and Article 78(6) shall apply from 26 March 2029.

[52] Recital 115 of the Regulation provides an explanation for the long period of application: "Given the need for technical preparation, this Regulation should apply from 26 March 2027. In order to support the successful implementation of the European health data area and to create effective conditions for European cooperation in the field of health data, implementation should be gradual."

challenges that the European Health Data Space brings us during the implementation period. The European Health Data Space, and after the entry into force of the EHDS Regulation, will not solve the problems like a magic wand, but will only achieve the goal for which the EHDS Regulation was adopted through the efforts and commitment of the professional and scientific community.[53]

5. KEY EU INITIATIVES IN THE FIELD OF E-HEALTH AND GUIDELINES FOR THE REPUBLIC OF CROATIA

Generally speaking, the digitalization of the EU has been discussed for more than two decades, and the COVID-19 pandemic has led to a strengthening of the EU policy framework for the digitalization of healthcare. Back in 2002, the eEurope 2005 Action Plan was adopted, where EU-27 countries were to ensure that citizens would be provided with online health services (e.g. Electronic Health Records) by 2005.[54] In 2020, the Digital Compass was adopted, where 100% of European citizens should have online access to their electronic health records by 2030.[55]As can be seen from the previously mentioned sources, in 2023, the Republic of Croatia ranked 20th in the EU-27 group in terms of the development of online health services. However, in terms of access of European citizens to their electronic health records, the Republic of Croatia ranked 12th in[56] the EU-27

[53] Recital 1 of the Regulation: "The objective of this Regulation is to establish a European health data area in order to improve individuals' access to and control over their personal electronic health data in the context of healthcare, as well as to better achieve other purposes involving the use of electronic health data in the health or care sector that would benefit society, such as research, innovation, policy-making, preparedness and response to health threats including prevention and response to future pandemics, patient safety, personalised medicine, official statistics or regulatory activities. Furthermore, this Regulation aims to improve the functioning of the internal market by establishing a single legal and technical framework, in particular for the development, marketing and use of electronic health record systems in line with the values of the Union. The European health data area will be a key component in creating a strong and resilient European Health Union."

[54] eEurope Action Plan 2005, The eEurope Action Plan 2005 succeeds the 2002 Action Plan which focused mainly on Internet connectivity in Europe. The new Action Plan, endorsed by the Seville European Council in June 2002, aims to translate this connectivity into increased economic productivity and improved quality and availability of services for all European citizens, based on a secure broadband infrastructure accessible to the largest possible number of people, COM(2002) 263 final.
https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=celex%3A52002DC0263 25.02.2025.

[55] Decision (EU) 2022/2481 establishing a policy programme for the Digital Decade up to 2030, op.cit., note 49.

[56] European Commission, "Digital Decade 2024" Annex Short country report Croatia, file:///C:/Users/aputric/Downloads/7_Annex_3_Croatia_Executive_Summary_TUGznDxJ9YCrD6ANcpnuMxxI70_106832%20(3).pdf , 25.02.2025.

group. The current state of the digital e-health services infrastructure is best measured through the My Health@EU infrastructure, which enables Member States to exchange e-prescription documents and patient medical data summaries. The long-term goal is to expand the use of the digital infrastructure to the specified priority categories for processing health data as regulated by the Regulation on the European Health Data Area.[57] The proposals for improving the implementation of the EHDS Regulation in the Croatian healthcare system are as follows: 1. Strengthening interoperability and system standardization: Establishing a single national platform for digital health services that is aligned with European e-health standards and Implementing standardized protocols for data exchange between different healthcare institutions and stakeholders. Connecting the Croatian health information system with the EU initiative *My Health@EU* to facilitate the exchange of e-prescriptions and medical data. 2. Improving cybersecurity and patient data protection: Introducing advanced security protocols to protect electronic health records, increasing capacity to monitor and respond to cyber threats within the healthcare sector , and strengthening the implementation of the General Data Protection Regulation (GDPR) through regular audits and education of healthcare professionals. 3. Digitalization and modernization of healthcare services: in improving electronic health records so that patients have better insight into their own health data, integrating artificial intelligence to analyze health data and improve diagnostics, further developing telemedicine services to enable quality care in remote and less developed areas**.** 4. Ensuring financing and transparency in the implementation of digital solutions: establishing a system for monitoring the costs of digitalization and transparent reporting to EU institutions, leveraging EU funds and other available financial mechanisms to accelerate the implementation of digital reforms and involving the private sector and start-ups in the development of innovative e-health solutions. 5. Education and awareness-raising among healthcare professionals and citizens: organization of continuous education programs for medical staff in the field of digital skills, awareness campaigns of citizens about the benefits of e-health and data security and development of user-friendly digital interfaces so that all citizens can easily use e-health services. By implementing these measures, Croatia can significantly improve its position in European e-health and ensure higher quality and more accessible healthcare for all citizens. Historically, the Republic of Croatia has only been part of the EU for a little over 10 years and must take great steps towards the digitalization of the system, as legislative initiatives in the EU began back in 1999. Therefore, it is necessary to view the digitalization process as a whole framed by a new legal framework that is only facing challenging times of implementation. (Annex I.). In addition to key EU initiatives to achieve operational digitalization of the health systems of the EU-27 group of countries, the security of individual

[57] Regulation on the European Health Data Area, op.cit., note 13.

health data has come to the fore in recent years, which is also a key issue in the context of protecting privacy and citizens' trust. Misuse of health data can cause serious consequences, including discrimination, loss of trust or damage to mental or physical health. In accordance with the General Data Protection Regulation, which horizontally regulates data processing within the EU, ensuring adequate protection of individual health data is not only a legal obligation but also an ethical imperative. Therefore, the Republic of Croatia faces a new challenging time of major digital reform of the healthcare system, which, hand in hand with cybersecurity and artificial intelligence, leads to new areas of digital transformation of the European Health Union.

6. CONCLUSION

The evolution of the digitalization of the EU healthcare system through the establishment of the European Health Data Space (EHDS) represents one of the most important initiatives within the European health policy. The digital transformation of healthcare is becoming a key priority, given the increasing need for efficient, secure and interoperable systems that can respond to the challenges of the modern healthcare sector. In this context, the EHDS brings revolutionary changes in the way health data of EU citizens are collected, exchanged and used. As a prerequisite for the successful implementation of the EHDS, it is necessary to establish a modern and secure digital infrastructure that will enable the smooth exchange of data between different Member States through implementing acts of the European Commission. In addition to the above, it is important to adopt national regulations in the Republic of Croatia to resolve the issue of open provisions as presented in the paper. The key challenge lies in ensuring the interoperability of systems, data standardization and harmonization of the legislative framework at the EU level, which would enable primary and secondary processing of health data. On the one hand, primary processing implies direct benefits for patients through improved healthcare, while secondary processing enables the use of data for scientific research, innovation and health policy development, where the protection of privacy and security of personal data are of paramount importance. This paper provides a detailed overview of key e-health initiatives within the EU, starting from the first steps in the digitalization of the healthcare system since 1999, up to modern strategies and regulations that define the future development of EHDS. Special attention is paid to the analysis of the legal framework, including the EHDS Regulation and the Cross-Border Healthcare Directive, which represent the basis for the legal regulation and implementation of digital healthcare solutions in the EU. The paper also deals with a detailed comparative analysis of the legal legislation of e-health in the Republic of Croatia, with the aim of identifying key challenges and opportunities for

improving national legislation and adapting to the EHDS. Within the European healthcare system, the Republic of Croatia occupies a specific position, since its healthcare model primarily rests on the Bismarckian system, which is based on mandatory health insurance and solidarity. In this context, it is important to consider the role of key institutions such as the Croatian Health Insurance Institute (HZZO), which serves as the national contact point for the implementation of the EHDS. The implementation of the EHDS brings numerous benefits, both for healthcare institutions and professionals, and for citizens themselves, enabling them to have better access to health data, improving cross-border healthcare and improving the quality and continuity of treatment. However, in order to ensure a successful transition to the EHDS, it is necessary to establish a clear strategy in the preparatory period, ensure political will and encourage mutual cooperation between all stakeholders - from decision-makers and regulatory authorities, to healthcare institutions, scientific organizations and the IT sector. It is crucial to create an enabling environment for the implementation of digital solutions, while ensuring appropriate education and training of healthcare professionals to work in the new digital system. It is also important to emphasize the need to raise awareness among citizens about the advantages of digitalization of healthcare, while ensuring high standards of privacy protection and data confidentiality. This work represents the basis for further research and development of strategies that will enable a successful digital transformation of the healthcare system in the EU and the Republic of Croatia. The digitalisation of healthcare is not only a technological challenge, but also an opportunity to improve the quality of healthcare, increase the efficiency of the system and strengthen citizens' trust in digital healthcare services. The implementation of the EHDS brings a new era in healthcare, in which data will play a key role in providing personalised and timely healthcare, but also in developing innovative therapeutic methods and health policies. Therefore, the EU and its Member States have a responsibility to harness the potential of digitalisation in a way that will ensure the long-term sustainability of healthcare systems and the well-being of all citizens. A new era of the digital healthcare revolution has begun, and the success of this process depends on the cooperation, innovation and strategic commitment of all stakeholders involved. The EHDS is not just a digitalisation project – it is a vision of a future in which healthcare becomes more accessible, efficient and tailored to the needs of each individual.

REFERENCES

BOOKS AND ARTICLES

1. Boban, M., *Data and information management in healthcare information systems of the Republic of Croatia - security, protection and responsibility*, in: *Medicine, Law & Society, Proceedings*, Maribor, 2021, pp. 211–233.
2. Boban, M., *E-card – challenges of implementation and protection of patients' personal data*, in: *4th „KOKOZ" Congress and 6th Croatian Congress of Medical Law with International Participation*, Novi Vinodolski, 2023, pp. 147–177.
3. Boban, M., *Personal data protection and the new EU data protection regulation*, Bulletin of the Croatian Medical Informatics Society, vol. 24, no. 1, 2018, pp. 26–40.
4. Croatian Academy of Sciences and Arts, Scientific Council for Public Administration, Judiciary and the Rule of Law, *European Health Union*, roundtable held on 17 February 2022, edited by Jakša Barbić, Zagreb, 2023.
5. Hansen, J.; Wilson, P.; Verhoeven, E.; Kroneman, M.; Kirwan, M.; Verheij, R.; van Veen, E. B., *Assessment of the EU Member States' Rules on Health Data in the Light of GDPR*, European Union, 2021.
6. Malešević, A., *Digital Health in Croatia: Expectations, Challenges and Implementation*, Doctoral Thesis, Sociology: Values, Identity and Social Changes in Croatian Society, Croatian Catholic University, Zagreb, June 2024.
7. Ostojić, R., *E-health – improving the health system through the use of information and communication technology*, Social Research: Journal of General Social Issues, vol. 21, no. 4 (118), 2012, pp. 843–862.
8. Sokol, T., *Health care and the European Pillar of Social Rights*, Proceedings of the Faculty of Law, University of Rijeka, vol. 44, no. 3, 2023, pp. 701–722.
9. Stevanović, R. et al., *Establishment and development of the Croatian integral health information system*, Medicus, vol. 13, no. 2, 2004, pp. 131–137.

LEGAL ACTS

1. Act on the implementation of Regulation (EU) No. 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use and repealing Directive 2001/20/EC, Official Gazette, No. 14/2019.
2. Compulsory Health Insurance Act, Official Gazette, No. 80/2013, 137/2013, 98/2019, 33/2023.

3. Health Care Act, Official Gazette, No. 100/2018, 125/2019, 133/2020, 147/2020, 136/2021, 119/2022, 156/2022, 33/2023, 145/2023, 36/2024.
4. Law on Data and Information in Healthcare, Official Gazette, No. 14/2019.
5. Law on the Protection of Patients' Rights, Official Gazette, No. 169/2004, 37/2008.
6. Law on the Quality of Health Care, Official Gazette, No. 118/2018.
7. Law on the implementation of Regulation (EU) 2017/745 on medical products and Regulation (EU) 2017/746 on in vitro diagnostic medical products, in force since 22 November 2018.
8. Ordinance on the method of processing health and other personal data in national and institutional health information systems in healthcare, the method of storing and protecting health data and creating health indicators, standardized forms and registers and records in healthcare, Official Gazette, No. 150/2024.
9. Regulation of the European Parliament and of the Council on the European Health Data Space, No. 2022/0140, 3 May 2022.
10. Council Conclusions on Strengthening the European Health Union, 14029/21, Council of the EU, 30 November 2021.
11. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88, 4 April 2011, p. 45.
12. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4 May 2016, pp. 1–88.
13. Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No. 45/2001 and Decision No. 1247/2002/EC.
14. Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021 establishing a Programme of the Union's action in the field of health (EU4Health Programme) for the period 2021–2027 and repealing Regulation (EU) No. 282/2014, OJ L 107, 26 March 2021, p. 1.
15. Regulation (EU) 2021/2282 of the European Parliament and of the Council of 15 December 2021 on health technology assessment and amending Directive 2011/24/EU.
16. Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724.

17. Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No. 1082/2013/EU.
18. Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847.

NETWORK RESOURCES

1. https://health.ec.europa.eu/ehealth-digital-health-and-care/european-health-data-space_hr, 17.01.2025.
2. https://ec.europa.eu/health/system/files/2021-02/ms_rules_health-data_en_0.pdf, 17 February 2025.
3. https://interoperable-europe.ec.europa.eu/
4. https://commission.europa.eu/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts/comitology_hr , 25.03.2025.
5. https://www.hzjz.hr/projekti/hrvatski-centar-za-zdravstvene-podatke-eng-croatian-health-data-centre-chdc/ , 24.02.2025
6. https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=celex%3A52002DC0263 , 25.02.2025.
7. https://op.europa.eu
8. https://www.eca.europa.eu/
9. https://hzzo.hr/pristup-zdravstvenim-podatcima/europski-prostor-za-zdravstvene-podatke
10. https://repo.ozs.unist.hr/islandora/object/ozs:1579/datastream/PDF/view
11. https://www.iusinfo.hr/zakonodavstvo/zakon-o-zdravstvenoj-zastiti/clanak-28

Annex I. The most important EU initiatives promoting eHealth

1999.	Communication "eEurope: information society for all"
2000	Communication "eEurope 2002: Action Plan"
2002.	Communication "eEurope 2005: Action Plan"
2004.	Communication "Action plan for a European eHealth Area"
2007.	"Action Plan in the area of eHealth: ICT solutions for patients, medical services and payment institutions (contribution to the communication entitled "Lead Market Initiative for Europe")"
2008.	Communication "Telemedicine for the benefit of patients, health systems and society"
2010.	Communication "Digital Agenda for Europe"
2011.	Directive on the Application of Patients' Rights in Cross-Border Healthcare (Directive on Cross-Border Healthcare)
2012	Communication "eHealth Action Plan 2012-2020: Innovative healthcare for the 21st century"
2015	Communication "A Digital Single Market Strategy for Europe"
2018.	Communication "Enabling digital transformation on a single digital market in the field of health and care"
2019.	Recommendation on a European format for the exchange of electronic health records
2021.	Digital Compass 2030: a European approach for the digital decade ('Digital Compass Communication')
2022.	Communication "European Health Data Space: unlocking the potential of health data for citizens, patients and innovation"
2022.	Proposal for a Regulation of the European Parliament and of the Council on a European Health Data Area (Regulation on the European Health Data Area)
2022.	Decision establishing a policy programme for the Digital Decade by 2030.
2023.	"European Declaration of Digital Rights and Principles for the Digital Decade"
2025.	Regulation (EU) 2025/327 on the European Health Data Area

UDK: 342.721 : 004
57
62
Original scientific paper

Pawel Urzenitzok, PhD student
Kozminski University, Poland
E-mail: purzenitzok@kozminski.edu.pl
ORCID ID: 0009-0003-2245-7407

ALGORITHMIC ACCOUNTABILITY IN FACIAL RECOGNITION TECHNOLOGY: ADDRESSING BIAS AND TRANSPARENCY IN EUROPEAN LAW ENFORCEMENT APPLICATIONS

ABSTRACT

Facial Recognition Technology (FRT) is now a key instrument for European police forces, increasing crime prevention and public security. FRT deployment presents several legal, ethical, and social concerns, especially about algorithmic bias and transparency, along with conformity to the standards of European legislation. Literature indicates that FRT technology is more likely to misidentify individuals belonging to minority groups disproportionately, thereby reinforcing structural discrimination and weakening confidence among the public. Despite efforts through regulation, such as the General Data Protection Regulation (GDPR) and the Artificial Intelligence Act (AI Act), there are loopholes in ensuring algorithmic accountability, control, and bias mitigation. The article critically analyzes the European regulatory framework governing FRT, focusing on data protection, algorithmic fairness, and human rights. The research employs doctrinal legal analysis, case studies, and empirical findings. It identifies gaps in current oversight and highlights the challenges of algorithms and fragmented national rules. The article calls for a European legal framework that would compel algorithmic transparency, independent audits, and bias monitoring in real-time in law enforcement scenarios. The study provides policy suggestions, including required impact analyses, accountability mechanisms, and encouragement of international collaboration, for creating ethical guidelines and technical norms for reconciling technological advancement with essential human rights.

Keywords: *Facial Recognition Technology, FTR, Law Enforcement Technology, Algorithmic Bias, Algorithmic Transparency*

1. INTRODUCTION

Facial Recognition Technology (FRT) has recently become increasingly important in virtually all law enforcement practices. The technology is viewed as a ticket to

absolute safety, excellent investigative processes, and quick suspect identification. Its applications have gone from airport terminals and anti-terrorist watchlist surveillance to crowd control monitoring in real-time. Notwithstanding, the rapid progress of FRT has been met with skepticism in many European countries, particularly regarding its potential biases in algorithmic decision-making, transparency, and compliance with the law. The breakthroughs in machine learning have improved face verification accuracy; however, the trend of erratic error rates to date has been observed that impacts more users among minorities and women.[1] Such variances lead to moral and legal concerns because mistakes in the identification of a person by the police can lead to the loss of individual rights and increase societal inequalities.[2]

Educational institutions and global technological companies working on rectifying technological bias have targeted the foundational sources of the biases by investigating the technical components, such as selecting training data, facial alignment techniques, and determining the threshold settings.[3] Achieving full mitigation is, however, complex, particularly when public bodies are utilizing proprietary or "black-box" algorithms, i.e., those that restrict the possibilities of the people not directly affected or the independent auditors to recognize or contest the biased outcomes. On the other hand, the European Union has followed a strong regulatory strategy to protect personal data and AI governance. The General Data Protection Regulation (GDPR) sets out the basic rules of the game regarding the processing of personal data, and it includes the relevant provisions for automated profiling. Still, some critics point out that the transparency requirement for "meaningful information" can be challenging when the facial recognition systems are not transparent. Also, the Artificial Intelligence Act (AI Act) introduced specific biometric surveillance devices as "high-risk" thus subjecting them to regulatory scrutiny. At the same time, the effectiveness of the regulations and synchronization among the Member States remains a question.[4]

[1] Liang, H.; Perona, P.; Balakrishnan, G., *Benchmarking Algorithmic Bias in Face Recognition: An Experimental Approach Using Synthetic Faces and Human Evaluation*, IEEE/CVF International Conference on Computer Vision (ICCV), 2023, p. 1, 8.
[2] Buolamwini, J.; Gebru, T., *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, Proceedings of Machine Learning Research, vol. 81, Conference on Fairness, Accountability, and Transparency, 2018, p. 77.
[3] Leslie, D., *Understanding bias in facial recognition technologies*, The Alan Turing Institute, 2020, p. 8–12.
[4] Raposo, V. L., *The Use of Facial Recognition Technology by Law Enforcement in Europe: A Non-Orwellian Draft Proposal*, *European Journal on Criminal Policy and Research*, vol. 28, 2022, p. 1.

This paper investigates the inconsistency between the expansion of law enforcement functions using the FRTs and the need to respect the fundamental rights to privacy, the principle of equality, and the proper course of the law. It primarily pivots around three central research questions:

1. In what specific ways do the GDPR and the AI Act provide explicit and enforceable mechanisms for detecting and correcting algorithmic bias in facial recognition technology, including the one utilized by law enforcement authorities in Europe?
2. What specific legal, technical, and policy measures should form a unified framework across Europe to ensure transparency and accountability in law enforcement's deployment of FRT?
3. How can European regulatory frameworks balance law enforcement's operational requirements with the individuals' rights threatened by FRT's algorithmic biases?

The study employs doctrinal analysis and case studies and highlights serious remaining gaps. It illuminates the vital interdependence between the technical design options, data protection obligations, and the overall legal framework in which law enforcement agencies operate.

2. METHODOLOGY

The research employs a hybrid methodology that combines doctrinal legal analysis with a concentrated examination of the relevant academic and policy documents on facial recognition technology. This study's primary goal is to evaluate the adequacy of the GDPR and the AI Act to mitigate documented biases and enforce the respective transparency and accountability obligations. In this process, the paper looks at the text of each legal instrument, explanatory materials, and interpretive guidance provided by European institutions where necessary.[5] The study originates in the line of Reasoning that involves a technical evaluation of FRT followed by an empirically grounded application that highlights theoretical issues and addresses the practical difficulties law enforcement agencies face when employing facial recognition in various operational contexts.

The analysis is primarily based on legal texts such as the GDPR, the AI Act, regulations at the EU level regarding FRT by police authorities, the European Data

[5] European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts*, COM(2021) 206 final, Brussels 2021.

Protection Board (EDPB), and White Papers from the European Commission clarifying the key obligations and risk-classification methodologies.[6][7]

The literature review heavily relies on indexed and peer-reviewed articles. After thematic analysis, these sources were organized around specific issues related to algorithmic bias detection, fairness metrics, data governance, and accountability. Key considerations were given to empirical studies that examined different demographic groups in the performance of FRT and work advocating for formal instruments like algorithmic impact assessments (AIAs).[8] Other documents from advocacy bodies such as Fair Trials, Access Now, and AlgorithmWatch provide practical case studies showing companies' difficulties in auditing proprietary algorithms and guaranteeing the proper oversights of the deployments.[9]

This paper investigates the question of incorporating transparency and non-discrimination principles for FRT within the script and AI Act and GDPR through the doctrinal lens. The analysis reaches the endpoint with substantial empirical findings indicating that certain underrepresented demographic groups are more likely to experience higher false match rates, raising the possibility of systematic discrimination.

This research evaluates the currently available channels, including laws, technical research, and advocacy materials. It presents precise steps to tackle algorithmic bias in facial recognition technology. The comprehensive aim is to stimulate a spirit of a coherent EU-wide approach that would be capable of demonstrating both requirements of law enforcement as well as essential protections for equality, due process, and human dignity.

[6] European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65 final, Brussels 2020.
[7] European Data Protection Board, Guidelines 05/2022 on the use of facial recognition technology in the area of law enforcement, Version 2.0, adopted on 26 April, 2023.
[8] Kaminski, M. E.; Malgieri, G., *Multi-layered explanations from algorithmic impact assessments in the GDPR*, Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency, Association for Computing Machinery, New York 2020, p. 68.
[9] https://www.accessnow.org/wp-content/uploads/2022/07/Access-Now-submission-to-the-consultation-on-the-European-Data-Protection-Boards-FRT-for-LEAs-guidelines-05_2022.pdf, 13 February, 2025.

3. LITERATURE REVIEW

3.1. Evidence of Bias in FRT

Empirical studies show that Facial Recognition Technology exhibits higher error rates for certain demographic groups. In evaluation prepared by the U.S. National Institute of Standards and Technology that covers 189 algorithms it was found out that algorithms had far higher positive rates for Asian and African American faces in comparison to Caucasian faces with difference ranging 10 to 100 times depending on the algorithm. Additionally, African American females experienced disproportionally high false positive rates in one-to-many searches that in used by law enforcement to identify suspects in the crowds.[10] Commercial gender-classification systems mis-gendered 34% of darker-skinned women compared with less than 1% of lighter-skinned men.[11] European pilots reveal similar patterns. During trials of live FRT led by South Wales Police 95% of the alerts were false positive with Asians disproportionately flagged.[12]

With intersectional accuracy, it is said that commercial gender classification systems were misclassifying darker-skinned females at a rate that was dramatically higher than lighter-skinned men.[13] Despite promoting the ideas of mitigating racial bias by generative data augmentation and more balanced datasets,[14] it is also mentioned that the underlying network design decisions can exacerbate or lessen these diverse outcomes - such as specific normalization layers or loss functions. All of the above is further complicated by factors such as masks. Masked face recognition could create a more significant imbalance if the number of females is lower in the training set.[15]

Evidence shows that new advances can enhance algorithmic performance, which augmentation techniques, but the option of eliminating the risk of disproportional

[10] https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software, 14 February, 2025.
[11] https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212, 11 February, 2025.
[12] https://www.theguardian.com/technology/2019/oct/05/facial-recognition-technology-hurtling-towards-surveillance-state, 11 February, 2025.
[13] Buolamwini, J.; Gebru, T., *op. cit. note* 2, p. 87–88.
[14] Sumsion, A.; Torrie, S.; Lee, D.-J.; Sun, Z., Surveying Racial Bias in Facial Recognition: Balancing Datasets and Algorithmic Enhancements. *Electronics* 2024, *13*, 2317, p. 1-2
[15] Atay, M.; Poudyel, M.; Evora, S., *Evaluation of Gender Bias in Masked Face Recognition with Deep Learning Models*, IEEE Symposium Series on Computational Intelligence (SSCI), Mexico City, 2023, p. 829–835.

and wrong classifications remains challenging.[16] The researchers highlight the significance of robust auditing practices like systematic performance benchmarks on demographically balanced samples to identify if models tend to disadvantage a specific subpopulation. Literature warns that the consequences of these biases become increasingly severe in law enforcement contexts, where one misidentification can have legal implications for the person involved.

3.2. Ethical, Human Rights, and European Legal Frameworks

Besides the empirical data, there is a comprehensive discussion about the human rights implications of using facial recognition technology (FRT) - especially about privacy, autonomy, and equality. Critics claim that facial recognition used in public places on a large scale or in real time may deter people from participating freely in assembly and movement, affecting core democratic freedoms.[17] Presently, the debate is ongoing about the predisposition of "machine bias" to replicate social inequalities and, hence, to expose particular racial or ethnic groups to increased surveillance.[18] The same challenge was pointed out by stating that the weak safeguards around the design of FRT can be a risk to fundamental civil liberties.[19] From these angles, it is evident that the technical errors of the algorithms are the problem, as well as the societal prejudices that come into play when used in conjunction with law enforcement. It is also illustrated that historical racial injustices are likely to form both the development of these technologies and their application.[20]

The context of law in Europe is primarily revolving around two primary tools. The General Data Protection Regulation (GDPR) classifies biometric data as a sensitive category, restricting its processing unless there is a legitimate basis or explicit exception.[21] Scholars advocate that GDPR is a great foundational framework for data protection. Still, because of the lawfulness of derogations

[16] Amigo, G.; Perea, P. R.; Marks, R. J., *Mitigating Algorithmic Bias on Facial Expression Recognition*, arXiv preprint, arXiv:2312.15307, 2023, p. 4.
[17] Qandeel, M., *Facial recognition technology: regulations, rights and the rule of law*, Frontiers in Big Data, vol. 7, 2024, p. 10–11.
[18] Perkowitz, S., *The Bias in the Machine: Facial Recognition Technology and Racial Disparities*, MIT Case Studies in Social and Ethical Responsibilities of Computing, Winter 2021, p. 3.
[19] Leslie, D., *op. cit. note 3*, p. 4.
[20] Bacchini, F.; Lorusso, L., *Race, again. How face recognition technology reinforces racial discrimination*, Journal of Information, Communication and Ethics in Society, vol. 17, no. 3, 2019, p. 2.
[21] General Data Protection Regulation (GDPR), Art. 9(1), Regulation (EU) 2016/679.

extended to national security or law enforcement, there is a question about consistent implementation.[22] Right to transparency, the first and foremost right to "meaningful information" concerning the logic behind automated systems, is one of the most binding problems, often in opposition to the models that own the information and the secrecy surrounding police operations. Some scholars propose that Data Protection Impact Assessments (DPIAs) could help the situation. Yet, the police departments often remain under minimal scrutiny, and thus, the GDPR's regulatory power has been significantly reduced.[23]

In addition, the AI Act takes a risk-based approach, including specific biometric monitoring surveillance systems within the "high-risk" category where they have to meet additional requirements.[24] In literature, large generative AI and facial recognition are situated under this new regulatory structure, which aims to ensure trustworthy AI while fostering innovation.[25] However, opponents counter that they worry about the Act's dependency on internal conformity checks and its narrowed focus on "product safety," which may give rise to the problems of broader human rights.[26] Justification for a specialized law enforcement-oriented regulation would be more helpful and have stricter and enforceable rules than a broad patchwork.[27]

3.3. Accountability, Enforcement, and Real-World Gaps

The GDPR and the AI Act are both laws that include clauses designed to address algorithmic bias and safeguard fundamental rights; however, practical challenges are often grounds to undermine their effectiveness. Authors claim that real-world implementation of FRT technologies is tricky for them as law programs do not always abide by comprehensive oversight. Law enforcement agencies often claim

[22] Brkan, M., *Do Algorithms Rule the World? Algorithmic Decision-Making and Data Protection in the Framework of the GDPR and Beyond*, International Journal of Law and Information Technology, vol. 27, no. 2, 2019, p. 91, 95–97.
[23] European Data Protection Board, *Guidelines 05/2022, op. cit., note 7,* p. 5–6.
[24] Almada, M.; Petit, N., *The EU AI Act: Between Product Safety and Fundamental Rights*, SSRN Electronic Journal, 2022, p. 5–7.
[25] Hacker, P.; Engel, A.; Mauer, M., *Regulating ChatGPT and Other Large Generative AI Models*, Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency, 2023, p. 1.
[26] *Ibid*., p. 5-7.
[27] Raposo, V. L., *op. cit. note 4*, p. 1, 3.

exceptions for public security or trust private-sector partnerships.[28] Algorithmic Impact Assessments (AIAs) present a solution to the issue of implementing essential accountability, described as a process involving system developers, end users, and impacted communities who make evaluative standards together.[29] There are also advocates of creating "multi-layered explanations," which would meet the data protection regulations already in place and promote a culture of transparency through iteration.[30] Still, applying these accountability methods is challenging sometimes. Large organizations struggle with resource constraints and internal structures that are often isolated from each other, which prevents them from carrying out meaningful auditing or risk mitigation before an FRT system launches.[31] Proponents argue that the vendors are also to be blamed for the problem as they often require intellectual property protection, which is analogous to implementing black-box algorithms that are even less clear to independent evaluators.[32] Even though the guidelines exist, several Member States take liberal stands while others do not, resulting in a split-up regulatory network that makes cross-border task forces more complicated. Data governance risks should be considered, requiring broader legal harmonization and uniform enforcement.[33]

Policy refinements are necessary to bridge the gap between theory and practice. It is not just a call for higher accuracy but a need for explicitly enforceable standards of FRT adoption. This would demand the standardization of the scope of DPIAs or AIAs to evaluate bias, the obligatory periodic transparent auditing of the autonomous systems deployed, and appropriate redresses for misidentified or discriminated against citizens. These proposals show that this is a multi-level struggle: on the one hand, the police might see FRT as a quick solution to public safety. On the other hand, civil society and legal researchers fear that the contracts

[28] https://www.accessnow.org/wp-content/uploads/2022/07/Access-Now-submission-to-the-consultation-on-the-European-Data-Protection-Boards-FRT-for-LEAs-guidelines-05_2022.pdf, 14 February, 2025.
[29] Metcalf, J.; Moss, E.; Watkins, E. A.; Singh, R.; Elish, M. C., *Algorithmic Impact Assessments and Accountability: The Co-construction of Impacts*, Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency, Association for Computing Machinery, New York 2021, p. 735.
[30] Kaminski, M. E.; Malgieri, G., *op. cit. note 8,* p. 68, 72–73.
[31] Ashar, A.; Ginena, K.; Cipollone, M.; Barreto, R.; Cramer, H., *Algorithmic Impact Assessments at Scale: Practitioners' Challenges and Needs*, Journal of Online Trust and Safety, vol. 2, no. 4, 2024, p. 16.
[32] Urquhart, L.; Miranda, D., *Policing Faces: The Present and Future of Intelligent Facial Surveillance*, Information & Communications Technology Law, vol. 31, no. 2, 2022, p. 211.
[33] Gültekin-Várkonyi, G., *Navigating Data Governance Risks: Facial Recognition in Law Enforcement under EU Legislation*, Internet Policy Review, vol. 13, no. 3, 2024, p. 9, 16.

of the present times insufficiently protect individuals' rights in a changing environment of technology.

4. FRT IN EUROPEAN LAW ENFORCEMENT

Facial recognition technology has gained considerable traction among the different police forces across Europe, as some of them are conducting pilot testing, and others are already implementing it in major cities. Despite the law enforcement agencies arguing for its advantages, such as the benefits of suspect identification, time cost, and the provision of more personnel to other areas of safety, the deployments are also a challenge. This section looks into the practical environment of FRT in European policing, analyzes the infrastructure of law governing it, and highlights significant rights implications. In the end, it calls for a uniform that protects rights, assures technological efficiency, and, at the same time, upholds democratic values.

4.1. Technical and Operational Context

European law enforcement agencies have employed FRT to automate finding and matching faces in digital images or real-time video materials. The process converts a face into a distinctive numeric faceprint pattern that can be compared to known reference databases. Since the FRT works on the following lines, a face is first encoded into a faceprint, and afterward, it is compared against known reference databases. At present, the technology witnesses its usage in at least three main scenarios:

1. Real-Time Scanning in Public Spaces

Cameras are widely used in transport hubs, sporting venues, and city centers. They continuously match faces against watch lists of suspects, missing persons, or others. Real-time FRT is generally the most intrusive application because it scans all persons who pass through the facility's entrance, whether they know this fact or not, and tries to match them in just a few seconds. FRT professionals usually call this model “1:N” or “one-to-many” matching, because it checks one unknown face against an entire database of known faces.[34]

2. Retrospective (Post-Incident) Analysis

Investigators have used CCTV cameras to extract still frames of unknown individuals after they commit a crime and then submit them for comparison against

[34] European Union Agency for Fundamental Rights, *Facial Recognition Technology: Fundamental Rights Considerations in the Context of Law Enforcement*, FRA Focus Paper, 2019, p. 10–14.

national or EU-wide criminal databases. This method was used in the case R. (Bridges) v. South Wales Police, in which retrospective scanning was subject to legal scrutiny for compliance with data protection and human rights standards.[35]

3. Mobile On-the-Spot Checks

Some agencies are testing a system in which police officers use smartphones or tablets to capture a suspect's face in the field and cross-reference it with police records to verify the suspect's identity. It might seem narrow in scope, but if used without the provision strictly for its purposes, it can again become an abuse.[36] While FRT can speed up the process of suspect identification, technical audits reveal that it is often more difficult with women, ethnic minorities, children, and older adults. Although the FRT systems usually offset errors as false positives (wrong matches) or false negatives (missed matches) in these groups, FRT machines have been observed to struggle with these issues at higher levels. Even one use of a single person of 'false positive' can, in the eyes of society, lead to the establishment of unreasonable acts or arrests and discrimination based on that intervention.[37]

4.2. Fragmented Regulatory Framework

European law enforcement agencies use facial recognition technology based on fragmented regulations. No single, consistent one provides specific solutions for processing large-scale biometric data, which is a unique problem. Three main pillars are the GDPR, the Law Enforcement Directive (LED), and the AI Act. Although each has different provisions, the sum is partial and contradictory, which leaves considerable room for divergent practices among Member States.

4.2.1. The GDPR's Approach to Biometric Data

Facial data constitutes a sensitive personal data category and it stands as a special category under the GDPR, which notes that biometric data reveals a person's unique identifiers and is especially sensitive and subject to elevated protection.[38] As a rule, the Regulation prohibits processing such data unless it is strictly

[35] *Bridges v. Chief Constable of South Wales Police* [2020] EWCA Civ 1058, Court of Appeal (Civil Division), United Kingdom.
[36] House of Commons Science and Technology Committee, *The Work of the Biometrics Commissioner and the Forensic Science Regulator*, HC 1970, 6 February, 2019
[37] Grother, P.; Ngan, M.; Hanaoka, K., *Face Recognition Vendor Test (FRVT), Part 3: Demographic Effects*, National Institute of Standards and Technology, NIST IR 8280, Gaithersburg 2019, p. 5.
[38] Brkan, M., *op. cit. note 22,* p. 2.

necessary and there is a proper legal basis. Article 9 introduces very stringent conditions for processing sensitive data, and Recital 51 in particular, talks about the considerable risks from biometric technology such as FRT. Generally, police or other public bodies cannot make systematic public space face scans simply because they perceive it is a public good. Apart from what the law requires, they must observe the GDPR's preconditions of necessity and proportionality; the measure should be the only way to fulfill the aim and not be more intrusive than necessary.[39] The reality is that, apart from being busy with travelers and consumers, cameras at these events can take snaps of all left aside people, which might trigger questions regarding whether such wide-scale capture corresponds with the GDPR mandate of data minimization. Strangers outside the target group cannot consent to the scanning or opt-out. Observers raise this argument by saying that even though the FRT system would discard the samples of bystanders immediately, temporally stored information or partial data storage might contravene the GDPR unless there is a definite time, a narrow scope, or a specific law enforcement aim. Concerns also emerge from GDPR's transparency rules: police typically do not notify thousands of tourists in real-time or provide them with an easily accessible way of challenging processing.

4.2.2. The LED and Criminal Justice Data

Directive (EU) 2016/680, commonly known as the Law Enforcement Directive (LED), was adopted concurrently with the GDPR and acts as a framework governing personal data handling by law enforcement bodies.[40] Like the GDPR, it restates the main principles, such as accuracy and accountability, but instead emphasizes crime prevention and prosecution goals. Integrating the Directive into different national legislations by Member States takes diverse forms. A few jurisdictions enforce strict oversight while communities are left in the dark about security measures taken, as others engage the police under broadly defined "public security" or "national security" laws.[41] As a consequence of the abovementioned phenomenon, significant practical disparities exist. Police service in one Member State may be compelled to do a complete data protection impact assessment and need pragmatic consent from a supervisory authority before initiating real-time scanning. At the same time, a different one might see the LED as granting them

[39] Kaminski, M. E.; Malgieri, G., *Algorithmic Impact Assessments under the GDPR: Producing Multi-Layered Explanations*, International Data Privacy Law, vol. 11, no. 2, Oxford University Press, 2021, p. 130, suggesting strict necessity as a key threshold for large-scale biometric data gathering.
[40] Gültekin-Várkonyi, G., *op. cit. note 33*, p. 3.
[41] *Ibid.,* p. 16.

broad rights to use the system almost indefinitely with no required outside accountability. Causing legal uncertainty also cleaves cross-border cases or big cities dreaming of attracting international mobility like airport hubs or major rail traffic lines. The initiation of new policing technologies without a consistent framework for managing face-derived biometric data further weeds the field in which FRT is field-tested and installed.

4.2.3. The AI Act

In 2021, the European Parliament appeared with a proposal for an Artificial Intelligence Act that aims to end the "high-risk" AI applications, such as those based on remote biometric identification.[42] Earlier drafts proposed ruling out real-time FRT in public places as generally incompatible with fundamental rights. But from the beginning, the discussions have been over the possible exemptions such as those for serious or organized crime, anti-terror operations, and other "public security" concerns. If the exemptions are adopted broadly, they might neutralize the protective character of the law. The key feature of this Act is that it will focus on transparency, accountability, and accuracy testing. However, civil society coalitions protest that real-time scanning will not be complex to deal with theoretical questions without obligatory conditions and external checks.[43] Another pivotal aspect is the interplay between the Act's enforcement and existing data protection authorities. If the latter are confined to narrower data oversight, then it is likely that "high-risk" FRT systems avoid proper scrutiny.[44] It might seem as if law enforcement's needs are more important than the European Union's desire to ensure an ethical and human rights-compatible AI.

4.2.4. Centralized EU Oversight

A practical route out of this patchwork might by a centralized EU oversight model built around EDPB and ADPS. Under proposals advanced in Joint Opinion 5/2021 on AI Act, every law-enforcement FRT system would be entered in EU-wide registry managed by two bodies and deployment would require:

1) A Data-Protection Impact Assessment and Algorithmic Impact Assessment submitted for ex-ante clearance,

[42] Almada, M.; Petit, N., *op. cit. note 24,* p. 4–7, 25, referencing parallels between broad national security arguments and AI-based procedures.
[43] Leslie, D., *op. cit. note 3,* p. 22.
[44] Almada, M.; Petit, N., *op.cit. note 24,* p. 22.

2) Conformity assessment and post-market monitoring supervised by the future EU AI Office (Art. 63 AI Act),
3) Ongoing publication of demographic performance metrics enabling cross-border comparison[45]

EDPB's final Guidelines 05/2022 on FRT in Law Enforcement include procedural template with obligatory DPIAs, independent accuracy testing and periodic audits.

4.2.5. National Security

Often, law enforcement officials argue that extensive video surveillance is due to public security as a reason for such things. According to Article 2(2)(d) GDPR, "activities concerning national security" can be considered outside its perimeter, while LED Article 2 rather excludes certain operations for the sake of national security itself. The danger is that police may classify crowd scanning using FRT technology as one of the national security matters and hence evade to be examined. This modality ends up in a lack of accountability, where neither data protection authority nor ordinary administrative oversight can adequately supervise the processes regarding the deployment of the biometric register.

4.2.6. Consequences of the Patchwork

Notwithstanding the worldwide admiration that Europe has in regard to its data protection laws, the simultaneous operation of the GDPR, LED, and the unresolved AI Act make it a patchwork legal system. According to the norm, the GDPR's requirement for strict necessity and the LED's focus on purpose limitation should, in principle, negate broad, real-time face scanning. Practically speaking, the agencies usually claim that "public security" and "national security" entitlements permit them to analytically deploy the systems with ex-ante review. The responses of the authorities are diverse, as some local governments and courts take action by prohibiting partially or calling for robust assessments of the impacts on data protection. Others, however, concentrate on projects that they justify by a timely projected security fraction that defies concerns about privacy or bias. This lack of coherence makes it even more challenging to enforce the law across borders, as different states have different thresholds for what counts as a necessary and proportional response.

[45] https://www.edpb.europa.eu/our-work-tools/our-documents/edpbedps-joint-opinion/edpb-edps-joint-opinion-52021-proposal_en, 7 February, 2025.

The subjects of bias, transparency, and redress remain unresolved. If an FRT system wrongly tags someone as a suspect, the maze of legal instruments does not provide a clear guide for the individual to prove the role of facial matching in his police action or in any other way to rectify the in- pursued information. Critics maintain that these accountability gaps not only arise from mere general-purpose data protection guidelines but are rather a necessity for specific regulations of the FRT domain, which have to be built on a solid foundation of auditing, thorough demographic tests, and accessible complaints and redress mechanisms.

5. IMPLICATIONS FOR RIGHTS AND FREEDOMS

Despite the efficiency benefits, FRT's proliferation may also endanger some of the European Union's essential human rights, such as privacy, anti-discrimination, freedom of expression and assembly, and effective redress.

5.1.1. Privacy and Data Protection

FRT in public places permanently undercuts the sense of anonymity in daily life. The Court of Justice of the EU (CJEU) has repeatedly expressed that personal data being retained broadly and without discrimination is presumptively unfair.[46] Real-time identification in a central area could mean that people are being "mass identified" as a group, with vast amounts of facial data collected from unknown passersby. Although non-matching data is discarded after a short while, the practice, in its essence, changes the old paradigm of "being in public." The main questions pertain to how police officers can prove strict necessity and proportionality criteria, as stipulated in ECHR Article 8 and EU Charter Article 7.[47]

5.1.2. Accuracy, Bias, and Non-Discrimination

Empirical evaluations, including audits by the U.S. National Institute of Standards and Technology (NIST), show that error rates are systematically higher for specific demographic groups.[48] Within Europe, various pilot projects - such as the one in

[46] *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others* (C-293/12), EU:C:2014:238.
[47] *Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems* (C-311/18), EU:C:2020:559, 16 July, 2020.
[48] Buolamwini, J.; Gebru, T., *op. cit.* note 2, p. 3, 10.

the UK - demonstrated that Black and Asian individuals have been unfairly represented in the false positive statistics. This type of deviation does not align with the fundamental principle of equal treatment in Article 21 of the Charter. An algorithm that marks a large part of the minority citizens who are not culpable of any crime as potential suspects can convert the existing biases of the police into a high-tech feedback loop in the form of real-time FRT. On the other hand, several authorities are not obligated to calculate the demographic error rates and publish information concerning them.

5.1.3. Freedom of Assembly and Expression

Public demonstrations and the right to spontaneous protests sustain the inhibitory effect of the public on the citizens' democracy.[49] Individuals who realize that their faces might be scanned and logged decide not to participate in the marches or gatherings, which then affects the country's civic life. ECHR Article 11 protects peaceful assembly rights, but it will be very troublesome if law enforcement knows each demonstrator and they can even match with the list of the security files; this could lead to unimaginable harm. The opposers claim that real-time FRT is rarely the only option for keeping order, and they suggest other more proportionate ways, like using non-intrusive crowd management tactics.

5.1.4. Accountability and Redress

Part of democracy in policing is individuals making complaints regarding wrongful stops or arrests. If FRT was the technology used to justify the intervention, achieving fair means becomes impossible if the matching algorithm is regarded as proprietary or "highly technical."[50] Thus, this inconsistency is a deterrent to the fairness principle enshrined in EU data protection law. In 2020, the UK Court of Appeal, the aforementioned R. (Bridges) v. South Wales Police brought to notice the "lack of adequate guidance" on the technology's usage and, therefore, the demand for more explicit patrolling rules. Many European police forces, in contrast, still refrain from going public on crucial operational details (e.g., watch-list composition, match thresholds). False matches can still be hidden from the public without thorough auditing and the availability of a remedy process.

[49] Commissioner for Human Rights of the Council of Europe, *2nd Quarterly Activity Report 2022, 1 April to 30 June*, CommDH(2022)25, Strasbourg 2022.
[50] Selbst, A. D.; Boyd, D.; Friedler, S. A.; Venkatasubramanian, S.; Vertesi, J., *Fairness and Abstraction in Sociotechnical Systems*, Proceedings of the 2019 ACM Conference on Fairness, Accountability, and Transparency, Association for Computing Machinery, New York 2019, p. 59–60, analyzing "black-box" issues in machine-learning algorithms.

5.2. The road to cohesive governance

Regions with solid data protection traditions face challenges that may be either not addressed or not responded to through standard regulatory channels. The fact that many law enforcement actions are taken under exceptions related to national security or significant crime creates a daunting oversight authority, which cannot impose practical limitations or gain the transparency to examine operational details. The existence of extended pilots without any time limit is a model of how public acceptance may be engendered or forced by using the vague term "crime reduction," leaving the individuals wrongly tagged without legal recourse.

Observers suggest some reforms. First, stronger accountability should control the special agencies so that they regularly conduct bias and performance tests, and the results are subject to an external audit. Second, rules on ex-ante approvals by an independent court or data protection regulator will ensure that the public never sees real-time scanning unless done under specific, proportionate, and strictly limited conditions.[51]

As long as the plan is still not firmly in place, local or national-level bans or partial freezes may be the best and only shield against the unfettered expansions of FRT. Problems worsen as time goes by with no clear EU-wide or national framework. Hence, the inequality grows with law enforcement agencies or private vendors taking the lead in the regulatory vacuum, which is only loosely covered by fundamental rights. Whether a stricter approach - for example, the overall ban on real-time scanning - will lead the scene depends on ongoing discussions and the value that the courts confer on privacy, equality, and transparency in a democratic society. The powerful capacity FRT has to turn policing inside out is a torment for lawmakers, data protection bodies, and judicial authorities. This means they have a parallel duty to make sure that the fundamental rights do not become collateral damage due to technological advancement.

It is worth it to notice emphasize that the use of Facial Recognition Technology may have demonstrable public-safety gains. The UK Home Office argues that FRT "quickly and accurately identify those wanted for serious crimes as well as missing

[51] Oliveira, A. M. de; Rodrigues, H. X.; Nery, A. S.; Mendonça, F. L. L. de; Ribeiro Junior, L. A., *Influence of Racial Bias in the Use of Facial Recognition Applied to Access Control: A Critical Analysis*, Research, Society and Development, vol. 14, no. 2, 2025, p. 11.

or vulnerable people. It also frees up police time and resources".[52] South Wales Police report that their deployments of FRT facilitated 61 arrests for a robbery, violence and outstanding warrants without a single unlawful arrest.[53]

6. RECOMMENDATIONS

The increasing dependence on facial recognition technology by law enforcement throughout Europe is a clear indication of the immediate need for a rights-oriented and coherent regulatory system. Although the General Data Protection Regulation, the Law Enforcement Directive, and the AI Act contribute with partial controls, the result is a patchwork solution that does not address several key risks that the technology poses during its implementation. The chapter identifies the proposals that are meant to ensure the balance between legitimate policing purposes and the fundamental principles of fairness, transparency, and non-discrimination.

One of the pivotal measures is the improvement of algorithm transparency. Research have shown that FRT is frequently characterized by exhibiting elevated error rates for certain demographic groups, however, it is rare for it to be mentioned in public reports. Legislators and data protection supervisory authorities should make it mandatory for police agencies to publish demographic performance metrics for every FRT system they have deployed (or disclose the same to a supervisory body). This approach would Correspond to the arguments raised by scholars who accentuate the importance of systematic evaluations of face recognition accuracy across different demographic variables, consequently making biases visible and subject to remedy.[54] If these demographic results reveal consistent false-match spikes for certain populations, agencies would have to adopt specific mitigations - such as enhanced training data diversity or adjustment of algorithmic thresholds. Furthermore, official guidelines could potentially require law enforcement to perform continuous "field condition" audits, which underlines the fact that real-life performance often varies from the controlled laboratory tests.

The second critical goal is that the legal grounds for FRT usage must be set in clearly defined and limited terms. Even if the GDPR and LED demand necessity

[52] https://homeofficemedia.blog.gov.uk/2023/10/29/police-use-of-facial-recognition-factsheet/, 9 February, 2025.
[53] https://www.south-wales.police.uk/news/south-wales/news/2023/ebr-apr/commitment-facial-recognition-technology-reaffirmed-report-tech-does-not-breach-equality-requirements, 28 January, 2025.
[54] Liang, H.; Perona, P.; Balakrishnan, G., *op. cit. note 1,* p. 1, 8.

and proportionality conditions, it is pointed out that many current deployments are dependent on general allusions to public security or serious crime prevention, allowing, in some cases, real-time scanning of the public without any bounding limits and with no or less-than-usual pre-assessment. A more careful legal arrangement would compel agencies to give exact location-situated time-restricted justifications for not permitting specific live scanning. Real-time FRT is the least intrusive and most justifiable when used for a short period, so the operations are critical. Indefinite or "always-on" scanning in public spaces poses a risk of breaching proportionality and data minimization, as always-on scanning would be against respect toward people and their data. Courts or data protection authorities not being independent could also be used to oversee this authorization process, just as judges do when they issue warrants for other sensitive surveillance actions.

Besides its transparent technology, every facial recognition application should also ensure that people who are wrongly identified are entitled to adequate redress. Right now, the victims of FRT systems misidentification find out too late, if at all, that their match was automated and, therefore, triggered the police traffic stop. The "Black box" nature of proprietary algorithms makes it difficult to challenge the unequal outcomes of any such systems. Law enforcement should be compelled to state how their use of FRT in any police stop is pivotal; in addition to this, they are to offer formal access to the procedures that could be used to correct or wipe erroneous face-match logs, thus upholding the fairness and accuracy which the LED demands. If feasible, FRT vendors can be made to agree to allow at least some expert external tech audits.

To create uniformity in these measures across Europe, the suggested AI Act might outline uniform standards and regulations for law enforcement targeting FRT's "high-risk" usage. It would explicitly state that collective public real-time scanning is allowed only under exceptional and specific conditions. Algorithmic impact assessments should be permanently embedded into the project, ensuring that biases and adverse impacts are identified and acted on before the FRT systems are operational.[55]

Lastly, the European Data Protection Board and Member State data authorities can set up a centralized registry listing all the approved FRT systems in the law enforcement sector, and each of them will have their watch list criteria, accuracy metrics, and operational limits specified. This registry, managed jointly by national and EU regulators, would be the perfect remedy to cases of agencies operating facial recognition tech unnoticed by data protection supervisors. A consistent framework established for data sharing and oversight will eliminate the situation

[55] Metcalf, J., et. al, *op. cit*., note 29, p. 735–736.

where law enforcement might exploit lenient jurisdictions to test or operationalize experimental FRT solutions.[56]

7. CONCLUSION

The summary of the previous chapters is the remarkable increase in the use of FRT in European law enforcement, its changing operations in policing, and the legal frameworks that aim to protect the rights of individuals and fundamental values. Researchers illustrate that machine learning is not just a copy of the existing societal biases but can also worsen them if some demographic categories are missing or are wrong in the training datasets.[57] A single technical shortfall in an FRT algorithm can be translated into police contexts, which can promote the wrong arrests or profiling. At the same time, these technical aspects connect to a divided regulatory framework, where the GDPR, the Law Enforcement Directive, and the AI Act overlap but do not present a genuinely uniform, comprehensive regime.

A core concern is that law enforcement usually utilizes broad security targets to validate scanning entire populations - frequently with little demonstration of strict necessity and proportionality and possibly initiate an EU data protection principles breach, which requires narrow and definite uses of sensitive biometric data specifically. When real-time scanning becomes a regular activity in public life, Europeans might lose the anonymity usually linked with their freedom of movement; whether people will retain their strong civil liberties in a culture with almost all electronic identities is now crucial.

One of the main purposes of the AI Act is to qualify remote biometric identification as a high-risk, and even unacceptable practice that has to be subjected to audits or even completely prohibited at times in public places. However, security exemptions may well become the reason these protective provisions do not work, leaving law enforcement almost without any limits. The reasonable solution might be a more practical position that real-time scanning operations should not be used except in extraordinary cases, which should be for a limited period and only upon the approval of a judge or an impartial third party. In absence of a thorough, coherent system of checking, the local pilot projects can easily turn into a long-term status of continuous scanning across the entire city.

[56] Gültekin-Várkonyi, G., *op. cit. note 33,* p. 21–22,
[57] Liang, H.; Perona, P.; Balakrishnan, G., *op. cit. note 1,* p. 2.

Meanwhile, the attempts at bias reduction in FRT are often tied to improving datasets or using more advanced auditing methods like algorithmic impact assessments (AIAs). They indeed have good prospects, not the least because the empirical evidence suggests that slight changes to the proposal, like increased demographic balance in training data, can yield better accuracy rates for groups that are usually disregarded. Yet, the underutilization of performance metrics on the agencies' info handout is the leading direct cause of the relationship stalks, as the agencies cite the fear of getting attacked by the public or of revealing the investigative methodology as the reason for withholding the real-time numbers.

As the focal point, it is of paramount importance to develop a multifaceted plan. To begin with, the agencies must disclose demographic performance metrics, which will be subjected to third-party verification. They thus must restrict the general population scanning to genuinely urgent situational contexts. Watch-list criteria and retention of policies that allow for their independent audit would also make it possible for data protection bodies to establish whether FRT systems are operated in a reasonably proportional way with the threat. Leaps towards this goal will also involve the realization that accountability should be end-to-end, thus providing easy and straight solutions for wrongfully identified or profiled individuals. Courts and data protection authorities will have a decisive role by imposing the law enforcement agencies to include stringent transparency provisions within their procurement contracts and system rollouts.

Creating a coherent regulatory framework, Europe would stand on the one hand with FRT’s development and on the other upholding their values of human dignity, privacy, and non-discrimination by including elements such as tighter rules on real-time scanning, thorough auditing of algorithmic performance, mandatory DPIAs or AIAs, and transparent watch-list management. Failing this would risk normalizing a greatly intrusive policing environment, decaying public trust, and eroding the fundamental rights that form the basis of European law. The advancements regarding the AI Act and the GDPR, and LED, which will continue to shape law enforcers’ data processing, should form a coherent governance model, which is desired and needed. A society in which FRT genuinely serves security needs without perpetuating injustices is only feasible by having such robust guarantees, accompanied by a renewed pledge to transparency and algorithmic accountability.

REFERENCES

BOOKS AND ARTICLES

1. Access Now, *Submission to Consultation on EDPB's Guidelines 05/2022 on the Use of Facial Recognition Technology in the Area of Law Enforcement*, 2023.
2. Almada, M.; Petit, N., *The EU AI Act: Between Product Safety and Fundamental Rights*, Social Science Research Network, 2022.
3. Aloisi, A.; De Stefano, V., *Between risk mitigation and labour rights enforcement: Assessing the transatlantic race to govern AI-driven decision-making through a comparative lens*, Social Science Research Network, 2023.
4. Almeida, D.; Shmarko, K.; Lomas, E., *The Ethics of Facial Recognition Technologies, Surveillance and Accountability in an Age of Artificial Intelligence: A Comparative Analysis of USA, EU and UK Regulatory Frameworks*, Social Science Research Network, 2021.
5. Ashar, A.; Ginena, K.; Cipollone, M.; Barreto, R.; Cramer, H., *Algorithmic Impact Assessments at Scale: Practitioners' Challenges and Needs*, Journal of Online Trust and Safety, 2024.
6. Atay, M.; Poudyel, M.; Evora, S., *Evaluation of Gender Bias in Masked Face Recognition with Deep Learning Models*, IEEE Symposium Series on Computational Intelligence, 2023.
7. Bacchini, F.; Lorusso, L., *Race, Again: How Face Recognition Technology Reinforces Racial Discrimination*, Journal of Information, Communication and Ethics in Society, 2019.
8. Binns, R.; Adams-Prassl, J.; Kelly-Lyth, A., *Legal Taxonomies of Machine Bias: Revisiting Direct Discrimination*, Conference on Fairness, Accountability and Transparency, 2023.
9. Blacklaws, C., *Algorithms: transparency and accountability*, Philosophical Transactions of the Royal Society A, 2018.
10. Brkan, M., *Do algorithms rule the world? Algorithmic decision-making and data protection in the framework of the GDPR and beyond*, International Journal of Law and Information Technology, 2019.
11. Brown, S.; Davidović, J.; Hasan, A., *The algorithm audit: Scoring the algorithms that score us*, Big Data & Society, 2021.
12. Buolamwini, J.; Gebru, T., *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, FAT, 2018.
13. Casaburo, D.; Marsh, I., *Ensuring fundamental rights compliance and trustworthiness of law enforcement AI systems: the ALIGNER Fundamental Rights Impact Assessment*, AI and Ethics, 2024.

14. Castets-Renard, C., *Accountability of Algorithms in the GDPR and beyond: A European Legal Framework on Automated Decision-Making*, Fordham Intellectual Property, Media & Entertainment Law Journal, 2019.
15. Fortes, P. R. B.; Baquero, P. M.; Amariles, D. R., *Artificial Intelligence Risks and Algorithmic Regulation*, European Journal of Risk Regulation.
16. Gilman, M. E., *Five Privacy Principles (from the GDPR) the United States Should Adopt to Advance Economic Justice*, 2020.
17. Goodman, B.; Flaxman, S. R., *European Union Regulations on Algorithmic Decision-Making and a "Right to Explanation*", AI Magazine, 2017.
18. Grother, P.; Ngan, M.; Hanaoka, K., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, National Institute of Standards and Technology, 2019.
19. Gültekin-Várkonyi, G., *Navigating data governance risks: Facial recognition in law enforcement under EU legislation*, Internet Policy Review, 2024.
20. Gültekin-Várkonyi, G., *Predictive Policing and Bias in a Nutshell: Technical and Practical Aspects of Personal Data Processing for Law Enforcement Purposes*, Social Science Research Network, 2022.
21. Gürsoy, F.; Kennedy, R.; Kakadiaris, I. A., *A Critical Assessment of the Algorithmic Accountability Act of 2022*, Social Science Research Network, 2022.
22. Hacker, P.; Engel, A.; Mauer, M., *Regulating ChatGPT and other Large Generative AI Models*, Conference on Fairness, Accountability & Transparency, 2023.
23. Hildebrandt, M., *Algorithmic regulation and the rule of law*, Philosophical Transactions of the Royal Society A, 2018.
24. Kaminski, M. E.; Malgieri, G., *Multi-layered Explanations from Algorithmic Impact Assessments in the GDPR*, FAT, 2020.
25. Kaminski, M. E.; Malgieri, G., *Algorithmic Impact Assessments under the GDPR: Producing Multi-Layered Explanations*, International Data Privacy Law, vol. 11, no. 2, Oxford University Press, 2021, p. 130.
26. Kang, S. S., *Algorithmic accountability in public administration: the GDPR paradox*, FAT, 2020.
27. Kelly-Lyth, A., *Challenging Biased Hiring Algorithms*, Oxford Journal of Legal Studies, 2021.
28. Kouroupis, K., *The AI Act in light of the EU Digital Agenda: A critical approach*, Journal of Data Protection & Privacy, 2023.
29. Kun, E., *Exploring the Role of Data Protection Impact Assessments in the Use of Facial Recognition Technologies: From Accountability to Meta-Regulation*, Social Science Research Network, 2022.
30. Kuśmierczyk, M., *Algorithmic Bias in the Light of the GDPR and the Proposed AI Act*, Social Science Research Network, 2022.

31. Laux, J.; Wachter, S.; Mittelstadt, B., *Trustworthy artificial intelligence and the European Union AI act: On the conflation of trustworthiness and acceptability of risk,* Regulation & Governance, 2023.
32. Leslie, D., *Understanding Bias in Facial Recognition Technologies*, Social Science Research Network, 2020.
33. Liang, H.; Perona, P.; Balakrishnan, G., *Benchmarking Algorithmic Bias in Face Recognition: An Experimental Approach Using Synthetic Faces and Human Evaluation*, IEEE International Conference on Computer Vision, 2023.
34. Limantė, A., *Bias in Facial Recognition Technologies Used by Law Enforcement: Understanding the Causes and Searching for a Way Out*, Nordic Journal of Human Rights, 2023.
35. Malgieri, G., *Algorithmic Impact Assessments under the GDPR: Producing Multi-layered Explanations*, International Data Protection Law, 2019.
36. Metcalf, J.; Moss, E.; Watkins, E. A.; Singh, R.; Elish, M. C., *Algorithmic Impact Assessments and Accountability: The Co-construction of Impacts*, Proceedings of FAccT, 2021.
37. Mobilio, G., *Your face is not new to me – Regulating the surveillance power of facial recognition technologies*, Internet Policy Review, 2023.
38. Mökander, J.; Axente, M.; Casolari, F.; Floridi, L., *Conformity Assessments and Post-market Monitoring: A Guide to the Role of Auditing in the Proposed European AI Regulation*, Minds and Machines, 2021.
39. Mökander, J.; Floridi, L., *From algorithmic accountability to digital governance*, Nature Machine Intelligence, 2022.
40. Mökander, J.; Juneja, P.; Watson, D. S.; Floridi, L., *The US Algorithmic Accountability Act of 2022 vs. The EU Artificial Intelligence Act: what can they learn from each other?*, Minds and Machines, 2022.
41. Mundim De Oliveira, A.; Rodrigues, H. X.; Nery, A. S.; Mendonça, F. L. L.; Ribeiro Júnior, L. A., *Influence of racial bias in the use of facial recognition applied to access control: A critical analysis, Research, Society and Development*, 2025.
42. Neroni Rezende, I., *Facial recognition in police hands: Assessing the 'Clearview case' from a European perspective*, The New Journal of European Criminal Law, 2020.
43. Njoto, S.; Cheong, M.; Frermann, L.; Ruppanner, L., *Bias and Discrimination Against Women and Parents in Semi-Automated Hiring Systems*, New Technology, Work and Employment, 2024.
44. Ņesterova, I., *Questioning the EU proposal for an Artificial Intelligence Act: The need for prohibitions and a stricter approach to biometric surveillance*, Information Polity, 2022.
45. Perkowitz, S., *The Bias in the Machine: Facial Recognition Technology and Racial Disparities*, 2021.

46. Qandeel, M., *Facial recognition technology: regulations, rights and the rule of law*, Frontiers Big Data, 2024.
47. Raposo, V. L., *The Use of Facial Recognition Technology by Law Enforcement in Europe: a Non-Orwellian Draft Proposal*, European Journal on Criminal Policy and Research, 2022.
48. Roksandić, S.; Protrka, N.; Engelhart, M., *Trustworthy Artificial Intelligence and its use by Law Enforcement Authorities: where do we stand?*, International Convention on Information and Communication Technology, Electronics and Microelectronics, 2022.
49. Sanz Urquijo, B.; Fosch-Villaronga, E.; López Belloso, M., *The disconnect between the goals of trustworthy AI for law enforcement and the EU research agenda*, AI and Ethics, 2022.
50. Selbst, A. D. et al., *Fairness and Abstraction in Sociotechnical Systems*, Proceedings of the Conference on Fairness, Accountability, and Transparency, 2019, pp. 59–68.
51. Shenkman, C.; Thakur, D.; Llans'o, E., *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, arXiv.org, 2021.
52. Shumilo, O.; Kerikmäe, T., *The European Approach to Building AI Policy and Governance: A Haven for Bureaucrats or Innovators?*, IDP Revista de Internet Derecho y Política.
53. Siapka, A., *The Ethical and Legal Challenges of Artificial Intelligence: The EU response to biased and discriminatory AI*, 2018.
54. Sumsion, A. W.; Torrie, S. A.; Lee, D.; Sun, Z., *Surveying Racial Bias in Facial Recognition: Balancing Datasets and Algorithmic Enhancements*, Electronics, 2024.
55. Szostek, D., *Is the Traditional Method of Regulation (the Legislative Act) Sufficient to Regulate Artificial Intelligence, or Should It Also Be Regulated by an Algorithmic Code?*, Białostockie Studia Prawnicze, 2021.
56. Treleaven, P.; Barnett, J.; Koshiyama, A. S., *Algorithms: Law and Regulation*, IEEE Computer, 2019.
57. Tsamados, A.; Aggarwal, N.; Cowls, J.; Morley, J.; Roberts, H.; Taddeo, M.; Floridi, L., *The Ethics of Algorithms: Key Problems and Solutions*, AI & Society, 2020.
58. Urquhart, L. D.; Miranda, D., *Policing faces: the present and future of intelligent facial surveillance*, Information & Communications Technology Law, 2021.
59. Veale, M.; Brass, I., *Administration by Algorithm?* Public Management Meets Public Sector Machine Learning, 2019.
60. Wachter, S.; Mittelstadt, B.; Russell, C., *Why fairness cannot be automated: Bridging the gap between EU non-discrimination law and AI*, Computer Law & Security Review, 2021.

61. Whittlestone, J.; Nyrup, R.; Alexandrova, A.; Cave, S., *The Role and Limits of Principles in AI Ethics: Towards a Focus on Tensions*, AAAI/ACM Conference on AI, Ethics, and Society, 2019.
62. Williams, R., *Rethinking Administrative Law for Algorithmic Decision Making*, Oxford Journal of Legal Studies, 2021.
63. Yeung, K., *Algorithmic regulation: A critical interrogation*, Regulation & Governance, 2018.
64. Yeung, K.; Lodge, M., *Algorithmic regulation: an introduction*, Social Science Research Network, 2019.
65. Zouave, E. T.; Marquenie, T., *An Inconvenient Truth: Algorithmic Transparency & Accountability in Criminal Intelligence Profiling*, European Intelligence and Security Informatics Conference, 2017.

LEGAL ACTS

1. General Data Protection Regulation (GDPR), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4/5/2016.
2. Artificial Intelligence Act (AI Act), 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, COM/2021/206 final.
3. Directive (EU) 2016/680 (Law Enforcement Directive - LED), Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, OJ L 119, 4/5/2016.
4. Council Directive (EU) 2016/1164, of 12 July 2016 laying down rules against tax avoidance practices directly affecting the functioning of the internal market, OJ L 193, 19/07/2016.

LEGISALTIVE MATERIALS

1. Council of Europe's Commissioner for Human Rights, *Safeguarding Freedom in the Digital Age*, CommDH(2022)2.
2. Commissioner for Human Rights of the Council of Europe, *2nd Quarterly Activity Report 2022, 1 April to 30 June*, CommDH(2022)25, Strasbourg 2022.

3. EDPB, *Guidelines on Facial Recognition Technology in Law Enforcement*, 2022.
4. European Commission, White Paper on Artificial Intelligence - A European approach to excellence and trust, COM(2020) 65 final, Brussels 2020.
5. European Data Protection Board, Guidelines 05/2022 on the use of facial recognition technology in the area of law enforcement, Version 2.0, adopted on 26 April, 2023.
6. European Union Agency for Fundamental Rights, *Facial Recognition Technology: Fundamental Rights Considerations in the Context of Law Enforcement*, FRA Focus Paper, 2019, p. 10–14.

COURT DECISIONS

1. *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others* (C-293/12), EU:C:2014:238.
2. *Bridges v. Chief Constable of South Wales Police* [2020] EWCA Civ 1058, Court of Appeal (Civil Division), United Kingdom.
3. *Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems* (C-311/18), EU:C:2020:559.

NETWORK RESOURCES

1. Amigo, G. A.; Rivas-Perea, P.; Marks, R. J., "Mitigating Algorithmic Bias on Facial Expression Recognition," arXiv.org (2023), https://arxiv.org/abs/2303.11780.
2. https://www.accessnow.org/wp-content/uploads/2022/07/Access-Now-submission-to-the-consultation-on-the-European-Data-Protection-Boards-FRT-for-LEAs-guidelines-05_2022.pdf.
3. https://www.edpb.europa.eu/our-work-tools/our-documents/edpbedps-joint-opinion/edpb-edps-joint-opinion-52021-proposal_en, 7 February, 2025.
4. https://homeofficemedia.blog.gov.uk/2023/10/29/police-use-of-facial-recognition-factsheet/, 9 February, 2025.
5. House of Commons Science and Technology Committee, The Work of the Biometrics Commissioner and the Forensic Science Regulator, 6 February 2019, HC 1970, https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/1970/1970.pdf.

6. https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212, 11 February, 2025.
7. https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software, 14 February, 2025.
8. https://www.south-wales.police.uk/news/south-wales/news/2023/ebr-apr/commitment-facial-recognition-technology-reaffirmed-report-tech-does-not-breach-equality-requirements, 28 January, 2025.
9. https://www.theguardian.com/technology/2019/oct/05/facial-recognition-technology-hurtling-towards-surveillance-state, 11 February, 2025.

UDK: 007.52 : 34
Preliminary communication

Mario Diez Royo, PhD student
University of Zaragoza, Spain
759822@unizar.es
ORCID ID: 0009-0002-0566-0406

MICHIHITO MATSUDA AND THE SPECIFIC STATUS FOR ROBOTS

ABSTRACT

Artificially intelligent (AI) systems do not possess consciousness, and it is currently impossible to program such a capability into them. They remain advanced tools operating under human-defined instructions. However, the increasing parallels between AI capabilities and certain aspects of human cognition have led to debates about granting robots a specific legal status: electronic personhood. If a humanoid robot like Michihito Matsuda could run for municipal elections in Tama (Tokyo), why not consider granting robots a form of legal personality? The European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) proposed creating a specific legal status for sophisticated autonomous robots. This status would recognize them as electronic persons capable of assuming responsibility for damages they may cause, particularly in cases where they make autonomous decisions or interact with third parties independently. While this idea acknowledges the growing impact of AI systems, it also raises critical questions about agency, liability, and ethical boundaries. One way to approach these challenges is through historical analogies. For instance, in Roman law, the servus (slave), though lacking full legal personhood, could act on behalf of their owner, producing legal effects for the latter. Similarly, robots could be recognized as dependent agents—tools with a high degree of autonomy—without conferring upon them full independence or rights. This analogy illustrates a possible framework for assigning legal responsibility for the actions of autonomous systems while maintaining clear ethical and legal boundaries.

***Keywords**: Artificially intelligent, personhood, autonomous robots, responsibility, servus.*

1. INTRODUCTION. LEGAL FRAMEWORK FOR AI REGULATION.

We are on the cusp of a digital revolution with the potential to boost productivity, global economic growth and incomes around the world. However, the same revolution also presents risk of displacing jobs and increasing inequality. The rapid

advancement of artificial intelligence has drawn global attention, sparking both optimism and concern while prompting critical discussions about its economic implications. Due to the complexity of AI's influence on economies, its overall impact remains challenging to forecast. However, one certainty is the need for well-crafted policies that enable us to harness AI's immense potential safely and responsibly for the greater good of humanity.

The objectives of this research paper are to analyse the existing international legal framework for the regulation of AI and its adaptability to a globalised environment, and to examine the ethical and legal challenges posed by the use of AI in the transnational arena, including issues of liability.

The European Commission has for years facilitated and intensified cooperation on artificial intelligence across the EU to boost its competitiveness and ensure trust based on EU values. Following the publication of the European Strategy on AI in 2018,[1] and the guidelines for trustworthy AI developed by the High Level Expert Group on Artificial Intelligence in 2019,[2] The Commission on AI 2020 published the White Paper, which set out a clear vision for AI in Europe, for an ecosystem of excellence and trust, laying the foundation for today's proposals. The public consultation on the White Paper was widely attended worldwide.[3] The White Paper was accompanied by a "Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics",[4] which concludes that there are a number of gaps in existing product safety legislation that need to be addressed. In the White Paper on Artificial Intelligence, the Commission committed itself to promoting the use of artificial intelligence and to addressing the risks associated with certain uses of artificial intelligence. The Commission has proposed a legal framework for artificial intelligence that aims to address the risks posed by certain uses of AI through a set of rules focused on respect for fundamental rights and safety. At the same time, it aims to ensure that people

[1] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Artificial intelligence for Europe. Brussels, 25.4.2018, COM(2018) 237 final, {SWD(2018) 137 final}.
[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building Trust in Human-Centric Artificial Intelligence (COM(2019)168).
[3] White Paper On Artificial Intelligence - A European approach to excellence and trust. Brussels, 19.2.2020. COM (2020), 65 final.
[4] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics. Brussels, 19.2.2020, COM(2020) 64 final.

harmed by artificial intelligence systems enjoy the same level of protection as people harmed by other technologies.

In October 2020, the European Parliament will adopt an own-initiative legislative resolution based on Article 225 TFEU on civil liability for AI, calling on the Commission to propose legislation.[5] And in 2021, to create the first EU legal framework for AI, what we will call the AI Act, the Regulation of the European Parliament and of the Council of 2021 laying down harmonised rules in the field of artificial intelligence (AI Act) and amending certain legislative acts of the Union, will be presented.[6]

On 28 September 2022, the Commission responded to the objectives of the White Paper and the request of the European Parliament with a proposal for an AI Liability Directive.[7] The proposed AI Liability Directive aims to improve the functioning of the internal market by establishing harmonised rules on certain aspects of non-contractual civil liability for damage caused by AI systems. The proposal addresses specific evidentiary difficulties related to AI and ensures that legitimate claims are not hindered.

The EU Artificial Intelligence (AI) Act was published in the Official Journal of the European Union on July 12, 2024, as "Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence".[8]

The European Union is setting a milestone event with its groundbreaking Regulation (EU) 2024/1689, the world's first comprehensive legal framework for AI. Central to the EU's Digital Strategy, this legislation aims to create a balanced

[5] European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL).
[6] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts {SEC(2021) 167 final} - {SWD(2021) 84 final} - {SWD(2021) 85 final}. Brussels, 21.4.2021, COM(2021) 206 final.
[7] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) COM (2022), 496 final. 2022/0303 (COD). Proposal for a Directive of the European Parliament and of the Council on liability for defective products. Brussels, 28.9.2022. COM (2022), 495 final. 2022/0302 (COD).
[8] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

environment for the development and use of AI, ensuring significant socio-economic benefits while protecting fundamental rights and security.

The Regulation is a bold attempt to regulate artificial intelligence and its applications, reflecting the desire to harness its potential benefits, such as improvements in healthcare, transport safety, manufacturing efficiency and sustainable energy solutions, while addressing the risks and challenges it poses. It creates a risk-based approach and classifies AI systems according to the level of risk they pose, with different levels of regulation for each category, prioritising safety, transparency, traceability and environmental sustainability.

Together with the Identification of Unacceptable Risks, the LIA identifies AI practices considered to pose "unacceptable risk" and proposes their prohibition, such as cognitive manipulation of vulnerable groups or social scoring systems by governments. For AI systems considered "high risk", it proposes strict requirements, especially in critical areas such as product safety, law enforcement and public services. In regulating generative and limited-risk AI, the law calls for transparency and accountability standards for generative AI systems, as well as minimum requirements for limited-risk systems to ensure user awareness and informed decision-making. While the AI Act is an important step, there are challenges to its implementation, such as ensuring compliance and adapting to technological advances. However, it represents a commitment to the ethical development of AI and the protection of society from its potential risks.

The law has two clear objectives: to ensure that artificial intelligence systems used in the European Union and placed on the European market are safe and respect citizens' rights, and to stimulate investment and innovation in AI in Europe. The regulation should be implemented two years after its entry into force, in 2026. Notably, this is the world's first legislative proposal on artificial intelligence, so it may establish itself as a global benchmark for the regulation of AI in other jurisdictions. The law will regulate AI based on its risks. The higher the risk, the stricter the rules.

It also clarifies that the Regulation does not apply to areas outside the scope of EU law and does not affect Member States' competences in the field of national security. It does not apply to systems used exclusively for military or defence purposes, nor to systems used for research and innovation purposes. It guarantees the protection of fundamental rights and provides for the assessment of the impact of any new AI system on fundamental rights before it is placed on the market. In addition, the basic models, understood as large-scale systems capable of performing different tasks (generation of video, text, images, etc.), will have to comply with more specific transparency obligations. Furthermore, the obligation

of the users of an emotion recognition system to inform natural persons to whom such a system is exposed is highlighted.

Together with AI Acta, on 8 December 2024, the new Product Liability Directive comes into force. The new Product Liability Directive updates and adapts the EU's liability rules for new technologies, ensuring better protection for victims and greater legal certainty for economic operators.[9]

In addition to above regulation, one of the most interest questions that AI proposes is the creation of the legal status for robots. In Europe, in recent years we can find references to a possible subjectivity, or more specifically a legal personality for AI-equipped robots. Since the Robolaw Report of 2016, which looks for a possible solution to the liability for damages caused by autonomous robots.[10]

2. MICHIHITO MATSUDA THE ROBOT

Michihito Matsuda, an AI candidate, ran for mayor in Tama City, a part of Tokyo, Japan. The AI candidate finished in third place in the mayoral election, held on April 18, 2018, after garnering 4,000 votes. As part of the campaign, an android robot with female features named Michihito Matsuda was introduced, promising fair opportunities for all and running under the slogan "Artificial Intelligence will change Tama City". This unconventional candidacy sparked debates about the potential role of AI in governance. According to Michihito's campaign, the algorithm, through machine learning, could eliminate human emotional weaknesses—such as poor political decisions, corruption, and nepotism—by providing an objective analysis of citizens' opinions, expectations, and preferences. However, while the robot itself was the face of the campaign, it was important to note that it did not act independently. Instead, human organizers played a critical role behind the scenes. Michihito Matsuda had to comply with the requirements of electoral law just like any other candidate. Nevertheless, the AI was merely a representative, with its campaign orchestrated by Matsumoto, Vice President of SoftBank, and Norio Murakami, former representative of Google Japan. This raises the question: To what extent was this a true AI-driven candidacy rather than a symbolic experiment?[11]

[9] Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.
[10] Palmerini, E.; Azzarri, F.; Battaglia, F., *Guidelines on Regulating Robotics*, no. 6.2, 2014.
[11] Aguirre, J.F., *La digitalización electoral. Aplicaciones algorítmicas en el dominio*, IEEPC Nueva León, 2023, p. 175; Cortina, A., *Ética de la inteligencia artificial*, Anales de la Real Academia de Ciencias Morales y Políticas, no. 96, 2019, p. 380.

This situation introduces significant ethical dilemmas. It is one thing for an AI system to operate autonomously, and quite another for humans to supervise it while shaping its decisions. With AI's rapid advancements, society must ask whether we are using these systems as tools to assist decision-making or if we are allowing them to replace human leadership altogether. Furthermore, the blurred distinction between human and machine decision-making presents complex challenges in determining accountability and responsibility in governance.

Beyond political participation, the case of Michihito Matsuda also brings attention to broader legal and philosophical debates. Robots like this one exist in a grey area between subject and object, challenging our traditional notions of personhood. While Michihito has not been recognized as a legal person, its existence raises discussions about whether advanced AI could one day be granted legal status. Yet, this notion remains highly controversial. Many argue that legal personhood should remain exclusive to humans and certain organizations, fearing the consequences of attributing rights and responsibilities to non-human entities.

Given these premises, several fundamental questions arise: How do humans perceive cybernetic entities, and what are the implications of these perceptions? Research in human-robot interaction suggests that people neither see humanoid robots as simple objects nor fully accept them as living beings. Instead, they tend to attribute mental states to robots, making interactions more complex than they would be with inanimate tools. This raises ethical concerns about how robots should be designed and integrated into society to prevent unintended social consequences, such as reinforcing harmful biases or altering human behavior in undesirable ways.

In summary, treating robots as social agents and becoming overly dependent on AI introduces significant ethical and societal challenges. These issues demand a careful reflection on how we wish to interact with technology and how it, in turn, shapes our morality and humanity. As human-like artifacts transition from fiction to reality, the legal and ethical implications become urgent matters of discussion. Acknowledging these concerns, the European Parliament has urged the European Commission to develop legislation addressing AI-related challenges—a prudent and timely initiative.[12]

Ultimately, it is necessary to determine the legal and ethical status of these intelligent agents.[13] Should they be considered a new category of entities, distinct

[12] Bryson J. J., *Of, For, and By the People: The Legal Lacuna of Synthetic Persons*, Artificial Intelligence and Law, volume 273, 2017, p. 278 – 79.
[13] Calo, R., *Robotics and the Lessons of Cyberlaw*, California Law Review, vol. 103, June 2015, p. 546.

from both humans and traditional machines? As society grapples with this evolving relationship with AI, understanding how we value and classify these cybernetic entities will be crucial in shaping the future of human-robot coexistence. Recognizing that AI should remain at the service of society, the EU's High-Level Expert Group has introduced Ethical Guidelines for Trustworthy Artificial Intelligence, emphasizing the need for AI to enhance human welfare and freedom rather than undermine it.[14]

3. THE CREATION OF A SPECIFIC LEGAL STATUS FOR ROBOTS

3.1. The European Union perspective

The use of robots and complex AI systems today challenges the rights of personalities and raises questions about the status of these electronic agents, whether they are subjects of rights and obligations and whether we should grant them a personality. European Parliament resolution of 16 February 2017, suggests that robots should be endowed with electronic personalities.[15] Paragraph (f) of its Recommendation 59 is interesting, suggesting that "*creating a specific legal status for robots in the long run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently*."

While it is true that the possibility of the future development of electronic personality for robots is first raised in this 2017 Resolution, the subsequent evolution of this Proposal has been so scarce that it has been forgotten. We find hardly any mention of it in subsequent European Proposals to date. From this scant development of the electronic personality of robots, we can deduce that this idea has been superseded. This possibility of creating an electronic personality for robots has been developed from a doctrinal point of view. As a reference, the AI Regulation 2024 says nothing about electronic personality, as does the Parliament's Resolution of 3 March 2022 on AI in the Digital Age, the Resolution on European industrial policy on AI and robotics of 12 February 2019, the 2020 White Paper on AI and a series of EU reports, communications and opinions

[14] European Commission, High-level expert group on Artificial Intelligence, Ethics guidelines for trustworthy AI, 2019.
[15] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL).

mentioned in the previous point, all of which avoid talking about electronic personality.

Although the above Resolutions are silent, we find some European Texts that have spoken out against cyber personality. Firstly, on 31 May 2017, the EESC[16] issued an opinion stating that it was against the introduction of any form of electronic personality for robots or AIs, because it would undermine the preventive remedial effects of liability legislation. This position is developed against the recommendations of the Resolution of 16 February 2017, on providing electronic personalities to attribute liability for damages to the robot: "*There is a lot of discussion regarding the issue of who can be held liable when a AI system causes damage, particularly if the AI system is self-teaching and continues to learn after entering into use. The European Parliament has drawn up recommendations for civil law on robotics, including a proposal to explore an "e-personality" for robots so that they can incur civil liability for any damage they cause. The EESC is opposed to any form of legal status for robots or AI (systems), as this entails an unacceptable risk of moral hazard. Liability law is based on a preventive, behaviour-correcting function, which may disappear as soon as the maker no longer bears the liability risk since this is transferred to the robot (or the AI system). There is also a risk of inappropriate use and abuse of this kind of legal status. The comparison with the limited liability of companies is misplaced, because in that case a natural person is always ultimately responsible. In this regard, it should be examined to what extent the current national and EU laws, rules and jurisprudence in the area of (product and risk) liability and own risk provide an adequate answer to this question and, failing that, what kind of legal solutions can be put forward.*"

On 2020 Committee on Legal Affairs presents a Report[17] in which Explanatory statement explains how electronic personality cannot be raised, "*Even though AI-systems are indeed posing new legal challenges to our existing liability regime, they are materially in many cases not so different to other technologies, which sometimes are based on even more sophisticated software. Modern AI-systems regularly function rather trivial and are far away from conscious robots we know from Sci-Fi movies. Any discussion about giving AI-systems legal personality is therefore obsolete. Choosing a sensible approach to address the legal challenges posed by new AI-systems means that we refrain from major changes to our liability framework. If a person suffered harm caused by a defective AI-system, the Product*

[16] Opinion of the European Economic and Social Committee on "Artificial intelligence — The consequences of artificial intelligence on the (digital) single market, production, consumption, employment and society" (own-initiative opinion) (2017/C 288/01).
[17] Report with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)) Committee on Legal Affairs, 5 October 2020, p. 36.

Liability Directive (PLD) should remain the legal means to seek compensation from the producer. If the harm was caused by an interfering third person, the existing fault-based liability system in the Member States offer (in most cases) a sufficient level of protection. In line with better regulation principles of the Union, any necessary legislative adjustments with regard to producers and interfering third persons should be discussed in these respective legal frameworks."

The European Parliament Resolution of 20 October 2020, with recommendations to the Commission on a civil liability regime for Artificial Intelligence, in its sixth preamble, considers that it should be made clear that AI systems have no legal personality or human conscience, and that their function is to serve humanity. In other words, this Resolution reiterates that it is not necessary to attribute an electronic personality to robots or AI systems.

As we have seen, since the Resolution of 16 February 2017, the possibility of creating an electronic personality for robots is now obsolete, since the rest of the subsequent Resolutions and Proposals of the European Union have not expressed any opinion on this personality, and the few that have expressed an opinion have flatly denied this possibility, as we have just seen. However, outside the European institutions, it has been the doctrine that has insisted on developing this postulation.

3.2. Why attribute an electronic personality to robots?

Since the idea of the electronic personality was presented in 2017, the industrial development of AI systems has been exponential. And today, as an integrated element in society, it has surpassed the triviality with which it was considered by the 2020 Report, so why not think about the possibility of attributing an electronic status for robots. Attributing to them an electronic personality of their own would enable them to be holders of their own rights and obligations.[18] But we must start from the differentiation between entities equipped with Artificial Intelligence systems that function autonomously to which we could attribute legal personality and human beings.

Although the history of law demonstrates a clear division between persons and objects, Artificial Intelligence systems cannot be categorised, the fact of recognising legal personality to other realities that are not human implies that this

[18] Solar, J. I., *Dimensiones éticas y jurídicas de la Inteligencia Artificial en el marco del Estado de Derecho*, Cuadernos de la Cátedra de Democracia y Derechos Humanos, Universidad de Alcalá, Alcalá de Henares 2020, p. 180.

faculty is not exclusive to humans. There is no theory of personhood in law that determines which realities deserve to be imbued with the legal institution of personhood and which do not. Thus cognitivists approximate human intelligence to AI by calling human beings "biological machines", and reducing the concepts of reasoning, will and interest to a simple handling of information.[19]

Many authors support the thesis of robotic personality in order to recognise the authorship of cybernetic works in intelligent systems. This necessitates a humanisation of robotic entities, which, to be able to act in traffic, must have a limited capacity to act. This does not entail the attribution of personality; rather, it involves the recognition of a degree of subjectivity that enables the establishment of a legal framework tailored to their distinct characteristics.[20] The introduction of artificial intelligence systems positions us at a nexus between objects and things. Robots seem different to us, more like living agents, as a new ontological category, located between object and agent, they have a social valence.[21] These categories are distinct but mutually reinforcing, although it is true that people do not tend to consider humanoid robots as living beings, neither do they understand them to be objects. This new category of legal subject, halfway between person and object, is partially qualified and its assignment incomplete, contextual and unstable, insofar as citizens may treat the robot as a person for some purposes and as an object for others.[22] Furthermore, the social impact of robotics is emphasised, as robots are seen as social agents that generate concern for people because of their impact on society. By focusing on a situation where the physical entity is present, humans tend to empathise and consider it similar to them.[23] However, there are authors who consider that attributing legal status to theft is the phenomenon of artificial empathy, which leads us to believe that the robot is endowed with human behaviour or emotions. At the current stage of development of robotics, the desire to attribute legal personality to a humanoid robot is tantamount to falling victim to this artificial empathy, the desire to attribute legal personality to a robot is based on a limited vision of the concept of robot, which is understood as a humanoid robot. The form is the result of the intended function, and if the builders give robots a human form, it is in order to provoke in the user a feeling of empathy, which will lead to acceptance.[24]

[19] Ortego, M., *La Inteligencia Artificial en la Justicia: Asistentes IA Judiciales y Jueces IA*, Tirant lo Blanch, Valencia, 2022, p. 124.
[20] Ortego, M., *El concepto de autor en la era de los robots*, en Anuario de propiedad intelectual, Reus Madrid, 2019. Tamayo, *op. cit.* note 18, p. 220.
[21] Calo, *op. cit.*, note 13, p. 512.
[22] Calo, R., *Robots as legal metaphors*, Harvard Journal of Law and Technology, no. 30, 2016, p. 237.
[23] Calo, *Robotics… op. cit.,* note, 13, p. 549.
[24] Nevejans, N., *Traité de Droit et d'Éthique de la Robotique civile*, LEH Éditions, Burdeos, 2017, p. 79.

The introduction of e-personality is largely dismissed in academic literature. Most authors focus in particular on the legal challenge posed by the liability of AI systems and security. This position is based on the implementation of mandatory minimum standards that strike the necessary balance between facilitating the technological development of robotics and protecting the values that are essential for human beings.[25]

However, some authors consider the creation of a specific category, such as the electronic personality of robots, to be a matter of convenience. Robots are capable of performing actions subject to rights and obligations, just like human beings. Just as human beings have relationships with one another, the legal world would also have relationships between people and robots.[26] In this scenario, the robot would be subject to rights and obligations. While denying the subjectivity of the machine due to its lack of autonomy, it is nevertheless possible to methodologically exclude the possibility of attributing legal personality to it when this specific technical solution is considered preferable in relation to a particular class of applications in a specific context of use.[27]

The law is struggling to place robotics in a new category, as the boundary between object and subject is unclear, and, very broadly speaking, the law tends to assume a dichotomy between individuals and tools.[28] Creating a new category of legal subject, halfway between person and object, is possible. Electronic personality as a capacity to be a holder of legal relations is an option for attributing rights to robotic systems, without the need to create a category of subject between object and person. This idea is based on the distinction between person and thing, but when this possibility of the legal personality of the intelligent system comes into play, we find ourselves halfway between the two possibilities. Giving rights and obligations to intelligent machines may seem strange, but the artificial or fictitious configuration of personality is not new, as we have seen for legal persons.[29]

The increasing humanisation of robots and AI systems may give rise to the view that the exclusivity of human personhood is diminishing. This prompts a crucial argument against the recognition of a robotic personality, an argument founded on

[25] Monterroso, E.; Muñoz, A., *Inteligencia Artificial y riesgos cibernéticos. Responsabilidades y aseguramientos,* Tirant lo Blanch, Valencia, 2019, p.76.
[26] Bertolini, A., *Robots as Products: The Case for a Realistic Analysis of Robotic Applications and Liability Rules*, Law, Innovation and Technology, 2013, p. 214.
[27] Biasi*,* M.*, Diritto del Lavoro e Intelligenza Artificiale,* Giuffrè*,* 2024, p. 55.
[28] Calo, *Robotics … op. cit*., note 13, p. 513.
[29] Santos, Mª J., *Regulación legal de la robótica y la Inteligencia Artificial: retos de futuro*, Law Review of the University of León, no. 4, 2017, p. 43; Barrio, A., *Hacia una personalidad electrónica para los robots. Revista de Derecho Privado*, Revista de derecho privado, 2018, p. 68.

the concept of the dignity of the person. The notion of recognizing an electronic personality in systems implies an equating with the human being, a recognition that non-living entities have the capacity to cause harm. This erroneous equating of personalities can lead to their denaturalisation, resulting in the loss of human control over the consequences of robots' actions.[30]

Proponents of electronic personality seek to provide legal certainty for users of intelligent systems, ensuring adequate protection for both robots and their users or third parties.[31] The need to grant electronic personality to robots raises the possibility of considering them as moral agents, which in turn raises concerns about legal security in the use of intelligent systems, ensuring adequate security for robots and artificial intelligence systems is a major concern in robotics. Attributing electronic personality to these agents means that the legal system can recognise a subject as having rights and obligations. This recognition is useful for them to assume the responsibility that may derive from their actions. The electronic personality of robots and systems that use Artificial Intelligence, from the perspective of liability, must be accompanied by the generation of a patrimony that can guarantee the damage caused by them. This legal personality can be understood as the same personality that is granted to companies.[32]

The legal personality is a solution to the problem of liability for personal or property damage that may be caused by any type of robots. Electronic personality may be a proposal worthy of consideration when it comes to solving the problem of liability caused by damage derived from the actions of robots,[33] but in order to attribute electronic responsibility it is necessary to identify the robots themselves with an identifier and create a register.

This autonomy of robots makes them subject to total human will, like a slave. This submission to human will does not prevent the robot’s liability, but it should be accompanied by the taking out of insurance: the robot would be liable with its own capital, as if it were a company, to compensate potential victims.[34]

[30] Gomez-Riesgo, J. M., *Candente debate sobre responsabilidad jurídica del robot,* Conferencia dictada en el colegio notarial de Madrid*,* 2022*.*
[31] Santos, *op. cit.,* note 29, p. 33.
[32] Santos, *op. cit.* note 29, p. 43.
[33] Llano, F.; Garrido, J.*, Inteligencia Artificial y derecho. El jurista ante los restos de la era digital,* Aranzadi, 2021, p. 222. Barrio, *op. cit.* note 29, p. 84
[34] Ercilla, J., *La Inteligencia Artificial en la Justicia: Asistentes IA Judiciales y Jueces IA,* Revista Aranzadi de Derecho y Nuevas Tecnologías, 2020*,* p. 52.

This identification and registration should be accompanied by the creation and financing of its own insurance, as is the case in motor vehicle legislation, and a compensation fund in the event of an accident.

3.3. The limited electronic personality

Some authors understand that when we talk about the personality of robots, we find that within the most favourable positions to electronic personality, there are several postulations. One of these, which understands that it is a more limited personality and with opportunistic purposes, a side that considers that it is an attribution of specific legal personality, and it is not a question of creating a general electronic personality, so that all robots can be total subjects of rights in a general way, "the limited personalisation serves so that the compensation for the damage caused can be made effective".[35] This limited and opportunistic position is the one we have to hold, for the basis for a robotic personality, whatever it may be, cannot be based on Artificial Intelligence itself, but on mere motives of opportunity and necessity. The fundamental basis for constructing an electronic personality of robots is to understand it from this opportunistic position, not as a personality similar to that of human beings, but as a more limited personality, which proposes to create a Personality restricted to the assumptions of liability generated by them, with indemnities and damages being objectively attributed to the robots.[36] The slave, although considered a human being, has no personality and his conduct could produce legal effects, but not for him, but for his owner. Intelligent systems are digital slaves, albeit slaves with superhuman capacities.[37]

Some authors have suggested recognising the limited personality of the cyber agent for the use for negotiation purposes, invoking the institution of the peculium born during the legal experience of Roman law. The legal acts performed by the slave fell directly within the legal sphere of the dominus, who retained the responsibility, a responsibility limited only to the peculium was foreseen. However, this institution which provided for the attribution of capacity to act to the *servus* will be analysed in the following point.[38]

---

[35] Herrera, R., *Aspectos legales de la Inteligencia Artificial, protección de Datos y responsabilidad civil*, Dykinson, Madrid, 2022., p. 35; Díaz, S. *Robots y responsabilidad civil*, Reus, Madrid, 2018, p. 77.
[36] Rogel, C., *Los robots y el derecho,* Reus, 2019, p. 77; Ercilla, J., *Approach to a specific legal status for robots*, Aranzadi Journal of Law and New Technologies, 2018., p. 5.
[37] Teubner, G., *Digital Personhood? The Status of Autonomous Software Agents in Private Law,* Ancilla Iuris, 2018, p. 6.
[38] Ercilla, J., *op. cit*., note 36, p. 9.

4. PECULIUM AND THE SLAVERY MODEL

The legal status of slaves could be used as a model for creating a legal status for autonomous robots. The Liability for artificial intelligence and other emerging digital technologies 2019 Report explains "One might even draw support for such a solution from the analogy to a historic precedent – the Roman legal concept of *noxal* liability for slaves, whom the law at the time treated as property and not as persons."[39]

In Rome, the slave was legally considered as a *res*, his human condition was not ignored, and as time went on, his human characteristics, such as the sensibility and intelligence of any human being, were increasingly recognised. Although the slave was classified as a *res*, the term *homo* was also used to refer to him, emphasising his humanity and distinguishing him to some extent from material goods. Man is here the slave, who is therefore homo, persona and res at the same time. It can be concluded that slaves in Rome were a completely atypical *res*, about which the law developed rules to regulate their treatment.[40]

The concept of *peculium* played a fundamental role in the development of legal relations between servus and third parties in ancient Rome. The Digest defines peculium: Peculium consists of whatever a slave has been able to save by his own thrift, or whatever his master has allowed him to keep for his own use.[41] It was not only property, but also had a legal and institutional dimension as a peculiar form of ownership.[42]

It refers to the actual patrimony that the slave managed under the authority of his *dominus*. Although the servus had a certain autonomy, it didn't extend to the procesdural sphere and he didn't have full legal capacity, the peculium allowed him a certain autonomy in the administration of property.[43] However, slaves could not be judged by their own actions, nor could they appear in court, as they were the property of the *dominus*, who was the only one with full legal capacity.[44]

[39] The Expert Group on Liability and New Technologies – New Technologies Formation, for Justice and Consumers, Liability for artificial intelligence and other emerging digital technologies, Publications Office, 2019.
[40] Crook, J., *Gaius, Institutes*, The Classical Review, 1967.
[41] Robinson, R.B.; Hardy JR, J. D., *An Actio de Peculio in Ante-Bellum Alabama*. The Journal of Legal History, vol. 11, no. 3, 1990, p. 364.
[42] Perani, R., *Intelligenza Artificiale e Digesta Iustiniani. La casistica Romana per un orientamento nella risuluzione automatizzata delle controversie*, Guiffré Francis Lefebvre, Universitá Degli Studi di Milano, 2023, p. 82.
[43] Ercilla, J., *op. cit*. note 36, p. 8.
[44] Lepore, P., *Fontes, Testi giurisprudenziali ad uso del corso di Istituzioni di diritto romano*, Giuffrè Francis Lefebvre, 2021, p. 15.

The *peculium* helped slaves to engage in economic transactions, but the obligations arising from these transactions did not fall directly on the *peculium*, but the *domunius* remained liable for the debts incurred by his slave. The introduction of the *actio peculio* was a crucial development in this context, as it allowed the master to be held liable for the slave´s debts up to the limit of the *peculium*.

The *actio de peculio* became a key tool for regulating the responsibilities of the dominus in relation to the economic activities of his slaves, this legal action allowed the *dominus* to assume liability for the slave's debts, as long as they were within the limits of the *peculium*. This figure allowed slaves to perform acts of legal significance in their own interest, third parties trusted the *peculio* as if it were the slave's own property, which allowed them to enter into transactions with them. Consequently, the *actio de peculio* sanctioned debts incurred by the slave in his own name and for his own benefit, and established a mechanism whereby the master was liable within the limits of the peculium.[45]

Although, legal liability remained with the master, the introduction of the concept of the *peculium* opened the way for the eventual attribution of liability to the slave himself. This statement shows how the existence of the *peculium* opened up the possibility that, in the future, the slave could henceforth legal responsibility for his actions within the limits of his peculium, albeit always under the supervision and responsibility of the master in the first instance.[46]

5. SIMILARITIES WITH THE REAL PERSONALITY OF ROBOTS

From today's perspective, a robot can be seen in the same way as the Roman slave: the AI cannot be considered a subject of rights, but it has the capacity to act autonomously and to cause damage. If in ancient Rome the owner of a slave was liable for the damage caused by the slave, the owner of an AI would be liable for the damage caused by the AI because of the relationship between the two, as was the case in Roman law. In the case of torts, the ancient Romans provided that in the case of unlawful behaviour by the slave, the penalty would fall on the person claiming ownership of the slave. The very structure of the criminal proceedings provided for in Roman private law made this necessary: in recognition of the

[45] Miceli, M., *Institor e procurator nelle fonti romane dell'età preclassica e classica*, Iura, vol. 53, 2002, p. 234.
[46] Lacruz, M. L., *Inteligencia Artificial Y Creatividad: Cabalgando Al Tigre*, Anuario de Propiedad Intelectual, no. 2021, 2022, p. 138.

pecuniary nature of the penalty, the objects of the civil obligation resulting from a conviction ex delicto could only be transferred to the only subject endowed with legal personality, the owner of a property, the dominus.[47]

The parallels between artificial intelligence systems and the ancient institution of slavery can be found, even if the machine does not have the limitations of personal freedom that characterise the slave. The symmetry between the slave and the machine is undeniable, both in terms of information obligations and in terms of the correct attribution of civil liability. As far as non-contractual liability is concerned, the common element is the *servus-dominus* relationship.

In Roman times, the *domunus-servus* link was very strong and exclusive, to the point where it was possible to manage family affairs without having to deal directly or indirectly with one or the other. In the case of modern robotic machines, however, there are other persons involved in addition to those who legitimately own them and use their productivity, and the reference is addressed in particular to the programmer and the producer.[48] From Roman law we learn that it is unthinkable that there should be an "intelligence" at the service of someone other than its owner, who, as such, can exercise all the known powers inherent in his absolute right over the thing. Slaves, on the other hand, are human beings as free persons: for this very reason, endowed with reason, they are capable of expressing themselves autonomously. This is also the reason why, in the legal sphere, a slave could regularly act on behalf of his owner. It is true, however, that acts of disposition of property of a certain value would have required an act of the master's will, but the need for this will, expressed by the *dominus* as *auctoritas*, tended to disappear in practice.

Ancient slavery and modern artificial intelligence share aspects on the legal level, but not only on the socio-economic level, given the widespread use of slave labour for commercial production in antiquity and the conceivable (but partly already existing) use of robots, today's inanimate slaves.

6. CONCLUSION

The case of Michihito Matsuda, an AI candidate in the 2018 mayoral election in Tama City, Japan, offers a fascinating glimpse into the evolving role of artificial intelligence in governance and society. The election campaign, which involved an

[47] Perani, *op. cit.*, note 42, p. 111.
[48] Franchini, L., *Disciplina romana della schiavitù ed intelligenza artificiale odierna. Spunti di comparazione*, Diritto Mercato Tecnologia, 2020, p. 22.

android robot named Michihito Matsuda running with a platform promising fairness and equality, sparked debates about the potential role of AI in decision-making, leadership, and responsibility. While the AI system presented itself as the face of the campaign, it was ultimately shaped and controlled by human organizers. This highlights the central question: are AI systems merely tools to assist human decision-making, or are we allowing them to replace human leadership altogether? This situation underlines the growing need to establish clear ethical and legal frameworks for AI's role in governance and society. In this particular case, the AI candidate did not act autonomously, but its very participation raised complex issues of accountability and responsibility. The distinction between human and machine decision-making becomes increasingly blurred as AI systems gain more autonomy and integrate into societal roles. As seen with Michihito Matsuda, AI systems are often presented as decision-making agents, but their actual independence is questionable. This raises concerns about the ethical implications of using AI as a replacement for human leadership and whether such systems should be granted any legal status or rights.

As AI systems like Michihito Matsuda continue to evolve, they challenge traditional notions of personhood and legal responsibility. AI entities often exist in a grey area between object and subject, questioning whether they could be granted legal personhood in the future. While this idea remains highly controversial, it serves as a prompt for society to reflect on the future relationship between humans and intelligent systems. The debate around granting AI legal status ties into the broader ethical discussions about the consequences of recognizing such entities as legal persons, which could complicate the allocation of responsibility for their actions.

The case also brings attention to the issue of human-robot interaction. People tend to attribute human-like qualities to robots, especially humanoid ones, even if they are not fully accepted as living beings. This complex interaction challenges our perceptions of technology and its role in society. It also raises questions about how AI systems should be designed and integrated into society to avoid unintended social consequences, such as reinforcing biases or influencing human behaviour in undesirable ways. As AI continues to develop and take on more prominent roles, the need for regulations that balance innovation with accountability becomes ever more pressing. Relating this to the broader context of AI ethics and legal status, the case of Michihito Matsuda illustrates the importance of carefully considering how these technologies are treated legally and socially. Should advance AI systems be recognized as new categories of entities, distinct from humans but also separate from traditional machines? As AI becomes more integral to our daily lives, society must decide how to classify and value these systems. Understanding their potential

impact on society and how they should be integrated into governance, law, and human relationships will be crucial in shaping the future of AI-human coexistence. In conclusion, as AI continues to gain prominence in fields like governance, the need for a legal and ethical framework that governs its use becomes critical. AI should remain a tool that serves humanity, promoting human welfare and freedom rather than undermining it. This evolving relationship with AI presents a pivotal moment for society to engage in discussions about the rights, responsibilities, and ethical considerations surrounding intelligent agents in our world.

REFERENCES

BOOKS AND ARTICLES

1. Aguirre, J.F., *La digitalización electoral. Aplicaciones algorítmicas en el dominio*, IEEPC Nueva León, 2023.
2. Bryson J. J., *Of, For, and By the People: The Legal Lacuna of Synthetic Persons*, Artificial Intelligence and Law, volume 273, 2017.
3. Barrio, A., *Hacia una personalidad electrónica para los robots*. Revista de Derecho Privado, Revista de derecho privado, 2018.
4. Bertolini, A., *Robots as Products: The Case for a Realistic Analysis of Robotic Applications and Liability Rules*, Law, Innovation and Technology, 2013.
5. Biasi, M., *Diritto del Lavoro e Intelligenza Artificiale,* Giuffrè, 2024.
6. Calo, R., *Robotics and the Lessons of Cyberlaw*, California Law Review, vol. 103, June 2015.
7. Calo, R., *Robots as legal metaphors*, Harvard Journal of Law and Technology, no. 30, 2016.
8. Cortina, A., *Ética de la inteligencia artificial,* Anales de la Real Academia de Ciencias Morales y Políticas, no. 96, 2019.
9. Díaz, S., *Robots y responsabilidad civil*, Reus, Madrid, 2018.
10. Ercilla, J., *Approach to a specific legal status for robots*, Aranzadi Journal of Law and New Technologies, 2018.
11. Ercilla, J., *La Inteligencia Artificial en la Justicia: Asistentes IA Judiciales y Jueces IA*, Revista Aranzadi de Derecho y Nuevas Tecnologías, 2020.
12. Franchini, L., *Disciplina romana della schiavitù ed intelligenza artificiale odierna. Spunti di comparazione*, Diritto Mercato Tecnologia, 2020.
13. Crook, J., *Gaius, Institutes*, The Classical Review, 1967.
14. Gomez-Riesgo, J. M., *Candente debate sobre responsabilidad jurídica del robot*, Conferencia dictada en el colegio notarial de Madrid, 2022.
15. Herrera, R., *Aspectos legales de la Inteligencia Artificial, protección de Datos y responsabilidad civil*, Dykinson, Madrid, 2022.

16. Lacruz, M. L., *Inteligencia Artificial Y Creatividad: Cabalgando Al Tigre*, Anuario de Propiedad Intelectual, no. 2021, 2022.
17. Lepore, P.; *Fontes, Testi giurisprudenziali ad uso del corso di Istituzioni di diritto romano*, Giuffrè Francis Lefebvre, 2021.
18. Llano, F.; Garrido, J., *Artificial Intelligence and law, the jurist before the remains of the digital age,* Aranzadi, Cizur minor, Navarra, 2021.
19. Miceli, M., *Institor e procurator nelle fonti romane dell'età preclassica e classica*, Iura, vol. 53, 2002.
20. Monterroso, E.; Muñoz, A., *Artificial Intelligence and cyber risks. Responsibilities and assurances,* Tirant lo Blanch, Valencia, 2019.
21. Nevejans, N., *Traité de Droit et d'Éthique de la Robotique civile*, LEH Éditions, Burdeos, 2017.
22. Ortego, M., *La Inteligencia Artificial en la Justicia: Asistentes IA Judiciales y Jueces IA*, Tirant lo Blanch, Valencia, 2022.
23. Ortego, M., *El concepto de autor en la era de los robots, Anuario de propiedad intelectual,* Reus, Madrid, 2019.
24. Palmerini, E.; Azzarri, F.; Battaglia, F., *Guidelines on Regulating Robotics*, nº 6.2, 2014.
25. Perani, R., *Intelligenza Artificiale e Digesta Iustiniani. La casistica Romana per un orientamento nella risuluzione automatizzata delle controversie*, Guiffré Francis Lefebvre, Universitá Degli Studi di Milano, 2023.
26. Robinson, R.B.; Hardy Jr, J. D., *An Actio de Peculio in Ante-Bellum Alabama*. The Journal of Legal History, vol. 11, no. 3, 1990.
27. Rogel, C., *Los robots y el derecho,* Reus, 2019.
28. Santos, Mª J., *Regulación legal de la robótica y la Inteligencia Artificial: retos de futuro*, Law Review of the University of León, no. 4, 2017.
29. Solar, J. I., *Dimensiones éticas y jurídicas de la Inteligencia Artificial en el marco del Estado de Derecho*, Cuadernos de la Cátedra de Democracia y Derechos Humanos, Universidad de Alcalá, Alcalá de Henares, 2020.
30. Teubner, G., *Digital Personhood? The Status of Autonomous Software Agents in Private Law,* Ancilla Iuris, 2018.

LEGAL ACTS

1. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Artificial intelligence for Europe. Brussels, 25.4.2018, COM(2018) 237 final, {SWD(2018) 137 final}.
2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of

the Regions: Building Trust in Human-Centric Artificial Intelligence (COM(2019)168).
3. Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.
4. European Commission, High-level expert group on Artificial Intelligence, Ethics guidelines for trustworthy AI, 2019.
5. European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL).
6. European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL).
7. Opinion of the European Economic and Social Committee on "Artificial intelligence — The consequences of artificial intelligence on the (digital) single market, production, consumption, employment and society' (own-initiative opinion) (2017/C 288/01).
8. Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts {SEC(2021) 167 final} - {SWD(2021) 84 final} - {SWD(2021) 85 final}. Brussels, 21.4.2021, COM(2021) 206 final.
9. Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) COM (2022), 496 final. 2022/0303 (COD).
10. Proposal for a Directive of the European Parliament and of the Council on liability for defective products. Brussels, 28.9.2022. COM (2022), 495 final. 2022/0302 (COD).
11. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance).
12. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics. Brussels, 19.2.2020, COM(2020) 64 final.
13. Report with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)) Committee on Legal Affairs, 5 October 2020.

14. The Expert Group on Liability and New Technologies – New Technologies Formation, for Justice and Consumers, Liability for artificial intelligence and other emerging digital technologies, Publications Office, 2019.
15. White Paper On Artificial Intelligence - A European approach to excellence and trust. Brussels, 19.2.2020. COM (2020), 65 final.

UDK: 342.56
347.962
Review paper

Judit Böröcz, PhD student
Faculty of Law, University of Szeged, Hungary
E-mail: colibry9@gmail.com
ORCID ID: 0009-0004-4894-4542

JUDICIAL INDEPENDENCE AS A GUARANTEE OF CONFIDENCE IN THE JUDICIARY: ADEQUATE REMUNERATION OF JUDGES AS A PREVENTION OF CORUPTION

ABSTRACT

Judicial independence, which is inherent in the task of adjudication, is inseparable from judicial practice and integral to the task of judicial decision-making. Mentioning judicial independence notions like institutional, procedural and personal guarantees of it usually come to mind. Hundreds and even thousands of studies talk about the rules of the appointment and promotion of judges, their immovability, the order of distribution of cases, the right to a legal judge, political, economic and official conflicts of interest, etc. At the same time, in scientific literature, little is said about the remuneration and financial independence of judges even though these are also essential parts of judicial independence. An efficient and timely functioning justice system, which greatly helps society's sense of security, economic growth and guarantees clean and predictable legal relations, can only be achieved by having a court that is independent in all respects, literally. This study argues that it is crucial for the Member States, here I put my focus on the European Union and its' Member States, to recognize the responsibility of judges with adequate remuneration. If judges' salaries do not conform to the dignity and responsibility of the profession, then the public's confidence in the judiciary weakens, because it undermines judicial independence and as a possible side-effect economic crime, especially corruption can appear, grow and flourish. Therefore, the main question is whether a judge can be independent without appropriate remuneration or not.

***Keywords**: judicial independence, confidence in the judiciary, remuneration of judges, corruption*

1. INTRODUCTION

The judiciary plays an essential role as the third branch of powers in a democratic state governed by the Rule of Law.[1] The role of the judiciary is to decide cases brought before the court by parties, and to do so impartially and dispassionately, by applying law to fact.[2] Its main function is the resolution of legal disputes during which courts make binding decisions for the parties. Its mission is to guarantee the very existence of the Rule of Law, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.[3] Judicial independence is one of the fundamental values include: procedural fairness, efficiency, accessibility, public confidence in the courts, and the value of constitutionality, in the sense of the constitutional protection of the judiciary.[4] Judicial independence and impartiality are essential prerequisites for the operation of justice,[5] and is a requirement in EU law stemming from the principle of effective judicial protection referred to in Article 19 Treaty on the European Union (hereinafter: TEU), and from the right to an effective remedy before a court or tribunal enshrined in Article 47 of the Charter of Fundamental Rights of the EU[6] (hereinafter: Charter). Furthermore, it forms part of the essence of the fundamental right to a fair trial.[7] When judicial independence is mentioned, notions like institutional, procedural and personal guarantees usually come to mind. Hundreds and even thousands of studies talk about the rules of the appointment and promotion of judges, their immovability, the order of distribution of cases, the right to a legal judge, political, economic and official conflicts of interest, etc. At the same time, in scientific literature, little is said about the remuneration and financial independence of judges even though these are also essential parts of judicial independence. An efficient and timely functioning justice system, which greatly helps society's sense of security,

[1] Consultative Council of European Judges (hereinafter: CCEJ) Opinion No. 24. (2021): The evolution of the councils for the judiciary and their role in independent and impartial judicial systems, para 1., See also CCEJ Opinion No. 18 (2015): "The position of the judiciary and its relation with the other powers of state in a modern democracy", CCJE(2015)4, London, 16 October 2015.
[2] Mack, K., The Judiciary and the Public: Judicial Perceptions, Adelaide Law Review, Vol. 39., No. 1., 2018, p. 4.
[3] CCEJ: Magna Carta of Judges (Fundamental Principles), CCJE(2010)3 Final, Strasbourg, 17 November 2010 (hereinafter: Magna Carta of Judges), para 1.
[4] Shetreet, S. (ed.), The Culture of Judicial Independence, Martinus Nijhoff Publishers, Leiden-Boston, 2012., p. 1.
[5] Magna Carta of Judges, para 2.
[6] The 2024 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2024) 950 (hereinafter: The 2024 EU Justice Scoreboard), p. 44.
[7] Court of Justice, Judgement of 20 April 2021, Repubblika v. Il-Prim Ministru case C-896/19, ECLI:EU:C:2021:311, para 51.

economic growth and guarantees clean and predictable legal relations, can only be achieved with a court that is independent in all respects. Therefore, the main question is whether a judge can be independent without appropriate remuneration or not.

My research is based on case-law-study methodology during which I collected, analyzed and compared the settled case-law of the Court of Justice of the European Union (hereinafter: CJEU) and the European Court of Human Rights (hereinafter: ECtHR) on the subject matter of requirements and remuneration of judges. My primary objective was to get an in-depth understanding as well as analysis of the European and international legal documents. The reminder of this study is organized as follows. Section 2 demonstrates the importance of judicial independence and the difference between the external and internal dimensions of it. Section 3 contains the reasons why the financial independence of judges is important with which I would like to point out that the remuneration and financial independence of judges is also an essential part of judicial independence, moreover it is just as important in terms of ensuring the general principle of judicial independence as any other guarantee elements. Section 4 presents the European and international expectations regarding judges' salaries, which basic requirements are uniformly defined in European and international legal documents. Section 5 discusses the role of judicial independence, the effective functioning judiciary and legitimacy of judicial authority in public confidence in the judiciary, which can be undermined by corruption. Section 6 concludes that it is crucial for the Member States to recognize the responsibility of judges with adequate remuneration.

2. THE IMPORTANCE OF JUDICIAL INDEPENDENCE AND ITS ASPECTS

In general, under a system of good governance the courts are expected to be impartial and fair institutions. In this regard, the judicial system is intended to be apolitical. Such a judicial system can uphold the Rule of Law and protect human rights. While the organization of courts may vary from country to country, this is the basic premise upon which societies seek to construct their judicial systems. To guarantee this judicial system, judicial independence is necessary.[8]

[8] Dakolias, M.; Thachuk, K., Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform, Wisconsin International Law Journal, Vol. 18., No. 2., 2000, p. 353.

The requirement of independent courts and tribunals is inherent in the task of adjudication.[9] Judicial independence is integral to the task of judicial decision-making,[10] it is inseparable from judicial practice, and it is an imperative feature of any justice system.[11] Independence is a basic pillar of administration of justice which operates efficiently and in accordance with the Rule of Law. Well-functioning, efficient and fully independent justice systems are crucial for the application and enforcement of EU and national law and upholding the Rule of Law.[12] It is vital for ensuring the fairness of judicial proceedings and the trust of the public and businesses in the legal system,[13] it is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU will be safeguarded.[14] In the absence of an independent and impartial judiciary, the enforcement of individual's fundamental rights might be violated, and may ultimately become impossible. Judicial independence is the key element to ensure that judgments are free from influence and bias, consequently the reliability of the courts and tribunals is the first basic condition for the existence of a democratic state. Only independent judges and courts can ensure the fairness of court proceedings and the protection of individual rights and are key to ensure that justice is delivered to the benefit of citizens and businesses. Judicial independence is also essential for judicial cooperation within the EU[15], which is a vital objective in an area based on freedom, security and the Rule of Law.

In a democratic state an independent judicial body is essential. Having said that, the court, as such, is not only the guardian and protector of public property and

[9] Court of Justice, Judgement of 15 July 2021, European Commission v. Republic of Poland case C-791/19, ECLI:EU:C:2021:596, para 58.; Judgement of 21 December 2023, L.G. v. Krajowa Rada Sądownictwa case C-718/21, ECLI:EU:C:2023:1015, para 61.; Judgement of 24 June 2019, European Commission v. Republic of Poland case C-619/18, ECLI:EU:C:2019:531, para 58.; Judgement of 5 June 2023, European Commission v. Republic of Poland case C-204/21, ECLI:EU:C:2023:442, para 354.; Judgement of 7 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas case C-64/16, ECLI:EU:C:2018:117, para 42.; Judgement of 7 February 2019, Carlos Escribano Vindel v. Ministerio de Justicia case C-49/18, ECLI:EU:C:2019:106, para 65.

[10] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2024 Rule of Law Report, The rule of law situation in the European Union, Brussels, 24.7.2024. COM(2024) 800 final (hereinafter: 2024 Rule of Law Report), p. 10., point 3.1.

[11] Dakolias, M. et al., p. 361.

[12] 2024 Rule of Law Report, p. 10., point 3.1.

[13] The 2024 EU Justice Scoreboard, p. 60.

[14] Court of Justice, Judgement of 24 June 2019, European Commission v. Republic of Poland case C-619/18, ECLI:EU:C:2019:531, para 58.; Judgement of 5 June 2023, European Commission v. Republic of Poland C-204/21, ECLI:EU:C:2023:442, para 354.

[15] Court of Justice, Judgement of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas case C-64/16, ECLI:EU:C:2018:117, para 43.

individual freedom, but also one of the most difficult-to-access bulwarks of a country's Constitution. The majority of civilized, developed, democratic states expressly guarantee judicial independence in law or Constitutions, and it is also declared and protected by several European and international legal documents.[16] Article 6 of the European Convention on Human Rights (hereinafter: ECHR) – which is perhaps the most frequently referred to at the ECtHR – and Article 47 of the Charter formulate the basic principle of an independent and impartial court with almost verbatim content, that is to say literally, its basic essence that everyone has the right to have their case heard and judged fairly, publicly and within a reasonable time by an independent and impartial court established by law. However, neither the EU legal norms, nor the international legal provisions *expressis verbis* define exactly what "independent court" means, and what those criterias are, which existence make a court to be considered as independent. But from European and international legal documents we can draw the conclusion that judicial independence means that judges are subject only to the law and they cannot be instructed in their judicial activity.[17]

The CJEU and the ECtHR have already explained their opinion in their settled case law about judicial independence formulating basic expectations and criterias. The two courts require rules which dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it, such as the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members.[18]

[16] E.g. European Convention on Human Rights (1950), European Charter on the Statute of Judges (1998), Charter of Fundamental Rights of the European Union (2000/2009), Recommendation of the Council of Europe CM/Rec(2010)12 Judges: independence, efficiency and responsibilities (2010), Magna Carta of Judges (2010), Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966/1976), International Bar Association (IBA): Code of Minimum Standards of Judicial Independence (1982), Montreal Universal Declaration on the Independence of Justice (1983), Basic Principles of the United Nations on the Independence of the Judiciary (1985), The Bangalore Principles of Judicial Conduct (2006), Mount Scopus International Standards of Judicial Independence (2008), Bologna and Milan Global Code of Judicial Ethics (2015).

[17] Point 1.c) of the Minimum Standards of Judicial Independence (1982) published by the IBA states similarly when it declares that "in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience".

[18] Comp. Human Rights Court, De Cubber v. Belgium (no. 9186/80) Judgement of 26 October 1984, para 24.; Anželika Šimaitienė v. Lithuania (no. 36093/13) Judgement of 21 April 2020, para 78.; Haarde v. Ireland (no. 66847/12), Judgement of 23 November 2017, para 103.; Findlay v. the United Kingdom (no. 22107/93) Judgement of 25 February 1997, para 73.; Bryan v. the United Kingdom (no. 19178/91) Judgment of 22 November 1995, para. 37.; Court of Justice, Judgement of 8 May 2024, Asociaţia "Forumul Judecătorilor din România" and Asociaţia "Mişcarea pentru Apărarea Statutului Procurorilor" v. Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Procurorul General al României case C-

The purpose of independence, as laid down in Article 6 of ECHR, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.[19] Therefore the independence of individual judges is a guarantee that every person's case is decided only in accordance with the law, based on the facts and evidences without any influence. If judges are not independent, they will be subject to influence that could distort the outcomes of cases, skew the development of substantive law, and detract from public confidence in the judicial system.[20] The independence of judges is not a prerogative or privilege granted in judges' own interest, but in the interest of the Rule of Law and people seeking and expecting impartial justice. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts.[21] As Shetreet articulates, independence must be established with the impartiality of the judge towards public opinion in general, towards himself, towards the parties and their lawyers, and acquire a degree of insulation from the press and the rest of the media.[22]

That is to say that judicial independence primarily means that judicial activity is free not just from political, but of any other (for example economic) influence. Its basic requirement is that judges adjudicate their decisions free of any outside or inside influence, exclusively in accordance with the laws in force, based on their inner convictions. According to the abovementioned, two aspects of judicial independence are usually distinguished: 1) external, or in other words institutional independence, meaning the independence of the court, tribunal itself, and 2) internal, or professional independence, meaning the personal or professional independence of individual judges. The first is related to the principle of separation of powers, while the second is related to impartiality.

2.1. External judicial independence

Regarding the external aspect of judicial independence, the CJEU explained that "The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any

53/23, ECLI:EU:C:2024:388, para 51.; Judgement of 19 November 2019, A.K. and Others v. Sąd Najwyższy case C-619/18, ECLI:EU:C:2019:53, para 74.; Judgement of 19 September 2006, Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg case C-506/04, ECLI:EU:C:2006:587, para 53.

[19] Recommendation CM/Rec(2010)12 and explanatory memorandum of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, 17 November 2010, [hereinafter: CM/Rec(2010)12], Appendix point 3.

[20] Miller, G. P., Bad Judges, Texas Law Review, December 2004, Vol. 83., No. 2., p. 457.

[21] CM/Rec(2010)12, Appendix point 11.

[22] Shetreet, S. (ed.), *op. cit*., p. 3.

hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions."[23] Furthermore, it recorded that "it is necessary that judges should be protected from external intervention or pressure liable to jeopardies their independence".[24] According to the jurisprudence of the ECtHR, – which is in line with the jurisprudence of the CJEU – Article 6 of the ECHR requires independence not only from the executive and the parties but also from the legislator,[25] the latter which follows from the principle of separation of powers.

The principle of separation of powers is one of the basic constitutional principles of liberal democracies,[26] states governed by the Rule of Law. It means that the powers must not accumulate in one hand, and they should be divided among the three main pillars of the state, i.e., executive, legislative and judicial.[27] Since the writings of Locke and Montesquieu, separation of the Legislator, the Executive, and the Judiciary is deemed essential to avoid usurpation and tyranny by the holder of these powers.[28] We know the fact that if the powers of a state are not divided among different institutions, then the power shall be concentrated in one hand which shall lead to abuse of power, which can be dangerous not only for the citizens, but also for the integrity of the state. This misuse of power can be prevented by adopting the concept of separation of powers in its true sense.[29] The major purpose of the principle of separation of powers is the betterment of mutual relations among the three branches so that democracy remains intact, and no institution should perform the functions of the other. So, the separation of powers is not meant to create a completely independent system. Although the branches are separate, they must work together to ensure that the system functions effectively.[30]

[23] Court of Justice, Judgement of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas case C-64/16, ECLI:EU:C:2018:117, para 44.; Judgement of 25 February 2025, XL v. Sąd Rejonowy w Białymstoku Joined Cases C-146/23, C-374/23, ECLI:EU:C:2025:109, para 49.
[24] Court of Justice, Judgement of 20 April 2021, Repubblika v. Il-Prim Ministru case C-896/19, ECLI:EU:C:2021:311, para 55.; Judgement of 2 Marc 2021, A.B. and Others v. Krajowa Rada Sądownictwa case C-824/18, ECLI:EU:C:2021:153, para 119.
[25] Human Rights Court, Ninn-Hansen v. Denmark (no. 28972/95) Judgement of 18 May 1999.
[26] Persson, T. et al., Separation of Powers and Political Accountability, The Quarterly Journal of Economics, November 1997, p. 1164.
[27] Abdullah, A., *Declassifying Theory of Separation of Powers and its Inherent System of Checks and Balances: A Comparative Study*, Zakariya Journal of Social Sciences, Vol. 2., No. 1., 2023, p. 31.
[28] Persson, T. et al., *op. cit.,* p. 1164.
[29] Abdullah, A., *op. cit*., p. 31-32.
[30] Abdullah, A., *op. cit*., p. 36.

Neither Article 2 TEU, nor the second subparagraph of Article 19(1) TEU, nor any other provision of EU law requires Member States to adopt a particular constitutional model governing the relationships and interaction between the various branches of the State, in particular as regards the definition and delimitation of their competences.[31] In view of this, every country has its own way of implementing the doctrine of separation of powers. But as a general rule we can say that the legislative branch is responsible for creating laws and making policies; the executive branch is responsible for enforcing the laws and policies created by the legislative branch; while the judicial branch is responsible for interpreting and applying the law.[32] The separation of powers principle holds that these respective tasks have, each of them, an integrity of their own, which is contaminated when executive or judicial considerations affect the way in which legislation is carried out, which is contaminated when legislative and executive considerations affect the way the judicial function is performed, and which is contaminated when the tasks specific to the executive are tangled lip with the tasks of law-making and adjudication.[33] This is the so-called system of checks and balances.

Checks and balances within governmental institutions are necessary to constrain the government from abusing its power.[34] The three branches of government are interdependent and rely on each other to function effectively. Its characteristic is the mutual control and balancing of the functioning of the constitutional institutions. The enforcement of the doctrine checks and balances ensures that no single branch can become too powerful, but it also means that each branch is dependent on the others.[35] It also means that along with a separation of powers, one branch of government cannot act unilaterally without the agreement of another.[36] The system works to enforce constitutional rules through a separation of power, so that no single elite group can act without the cooperation of others.[37]

From the above two principles (namely the principle of separation of powers and the doctrine of checks and balances) follows the judicial monopoly of the court, which is ultimately embodied in the exclusivity of judicial activity. The peculiarity of judicial power is that it is permanent and neutral compared to the other two

[31] Court of Justice, Judgement of 22 February 2022, *RS case* C-430/21, ECLI:EU:C:2022:99, para 43; Judgement of 25 February 2025, XL v. Sąd Rejonowy w Białymstoku Joined Cases C-146/23, C-347/23, ECLI:EU:C:2025:109, para 45.
[32] Abdullah, A., *op. cit*., p. 35-36.
[33] Waldron, J., *Separation of Powers in Thought and Practice*, Boston College Law Review, Vol. 54., No. 2., 2013, p. 460.
[34] Holcomb, R. G., *Checks and Balances: Enforcing Constitutional Constraints*, Economies, 2018, 6, 57; doi:10.3390/economies6040057, p. 1.
[35] Abdullah, A., *op. cit*., p. 36.
[36] Holcomb, R. G., *op. cit.,* p. 7.
[37] Holcomb, R. G., op. cit., p. 12.

"political" branches of power. Thus – in my point of view – external independence means the independence of the court as an institution, as an organization and as one of the three branches of power, according to which the other two branches of power cannot exert influence or pressure on it, and whose role is to protect judicial decision-making from every kind of improper influence outside the proceedings. It is vital for the well-functioning of the judicial system in any democratic state that the judiciary is truly independent. Whenever there is a lasting structural imbalance/impairment between the three branches of power and where checks and balances are weak or ignored, there is a serious threat to the independence, impartiality and integrity of the judicial system.[38] The separation of powers is a fundamental guarantee of the independence of the judiciary whatever is the legal tradition of a Member States.[39] Therefore, in accordance with the principle of the separation of powers, which characterizes the operation of the Rule of Law, the independence of the judiciary must be ensured in relation to the legislature and the executive.[40]

2.2. The internal dimension of judicial independence

Internal independence – according to the CJEU – means that "an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the Rule of Law".[41] The CJEU took the position that national rules laying down the guarantees of independence and impartiality must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.[42] Internal

[38] CCJE Opinion No. 21. (2018) Preventing corruption among judges, para 12.
[39] CM/Rec(2010)12, Explanatory Memorandum, para 13.
[40] Court of Justice, Judgement of 19 November 2019, A. K. and Others Joined cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para 124.; Judgement of 20 April 2021, Repubblika case C-896/19, ECLI:EU:C:2021:311, para 54.; Judgement of 22 February 2022, RS case C-430/21, ECLI:EU:C:2022:99, para 42.; Judgement of 25 February 2023, XL v. Sąd Rejonowy w Białymstoku Joined cases C-146/23, C-374/23, ECLI:EU:C:2025:109, para 50.
[41] Court of Justice, Judgement of 25 July 2018, L. M. case C-216/18, ECLI:EU:C:2018:586, para 65.; Judgement of 24 June 2019, European Commission v. Republic of Poland case C-619/18, ECLI:EU:C:2019:531, para 73.; Judgement of 19 September 2006, Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg case C-506/04, ECLI:EU:C:2006:587, para 52.; Judgement of 5 November 2019, European Commission v. Republic of Poland case C-192/18, ECLI:EU:C:2019:92, para 110.
[42] Court of Justice, Judgement of 20 April 2021, Repubblika v. Il-Prim Ministru case C-896/19, ECLI:EU:C:2021:311, para 55.

independence presupposes the personal independence of individual judges, according to which neither other judges nor court leaders can influence their judicial activity thereby are protected from undue internal pressure within the judiciary. According to Miller, the expression of judicial independence has gone beyond the concept that the judicial branch must be protected against intrusions by the political branches. In practical implementation, it entails granting trial courts substantial autonomy even from oversight and control within the judicial branch.[43] And as Shetreet notes, internal independence of the judiciary is the independence of a judge from his judicial superiors and colleagues.[44]

Hence, internal independence goes beyond the fact that judges are subject only to the law and cannot be instructed, and means the absence of undue influence, because the essence of impartiality is that the judge cannot be biased. This is what the CJEU's statement means that an equal distance is maintained from the parties to the proceedings and their respective interests. Impartiality is one of the basic requirement of the correct and well-founded judgments, because it guarantees that the judges has no conflicts of interest or association with the parties, or with the subject of the trial, that might be perceived to compromise objectivity.[45] In their decision-making judges should be able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary.[46] Shetreet phrased this as "substantive independence", which – according to him – refers to the neutrality of mind of a judge, to that judge's impartiality and total freedom from irrelevant pressure in judicial decision making.[47]

From my perspective, a judge can be and remain objective if he/she is able to exclude himself/herself from the case, if he/she is able to put his/her own human qualities, emotions, thoughts and interests into the background during his/her judicial activity, if he/she is able to step out of his/her own framework and look at the case from a top-down approach. It is not a mere coincidence that the eyes of the symbol of justice, the Goddess Iustitia, are covered by a cloth in artistic representations.

The ECtHR reiterated in its more recent judgment that Article 6 of the ECHR requires the court to be impartial. The ECtHR has also held that as regards the requirement of impartiality, the tribunal must be subjectively free of personal prejudice or bias and must also be impartial from an objective viewpoint, in that it

[43] Miller, G. P., *op. cit*., p. 457.
[44] Shretreet, S. (ed.), *op. cit.,* p. 2.
[45] CM/Rec(2010)12, Explanatory Memorandum, para 19.
[46] CM/Rec(2010)12, Appendix, para 22.
[47] Shretreet, S. (ed.), *op. cit.,* p. 2.

must offer sufficient guarantees to exclude any legitimate doubt in this respect.[48] I agree with the standpoint of the CJEU that impartiality requires objectivity. From my point of view objectivity requires the judge to pay full attention to the given legal problem itself and should not be misfocused by questions that are not in any way connected to the given legal case. That is why it is essential that a judge is not distracted by, for example, working conditions, or by personal/private life issues (for instance financial problems just to mention one).

3. THE IMPORTANCE OF FINANCIAL INDEPENDENCE OF JUDGES

Adequate remuneration of judges is essential for several reasons. On the one hand, because a judge has specific and extreme responsibilities in the field of the administration of justice, a sphere in which states exercise sovereign powers. Consequently, a judge participates directly in the exercise of powers conferred by public law and performs duties designed to safeguard the general interests of the state.[49] The task of a judge is multifaceted and difficult. People place their trust in the justice system and expect their legal disputes to be adjudicated by a professionally qualified, prepared, wise, impartial, unbiased and uninfluenced judge. A judge's duty is to protect, in all cases, the rights and freedoms of individuals equally, while respecting their dignity in the conduct of court proceedings.[50] It is also a requirement that judges should manage each case with due diligence and within a reasonable time, should give clear reasoning for their judgments in a language which is clear and comprehensible. Furthermore, judges should regularly update and develop their proficiency.[51]

I think it is not necessary to prove that courts operate with heavy workloads worldwide, and there is a lot of pressure and stress on judges. The task of a judge, which involves extreme responsibility and extraordinary amount of workload can

[48] Human Rights Court, Anželika Šimaitienė v. Lithuania (no. 36093/13) Judgement of 21 April 2020, para 79.; Haarde v. Iceland (no. 66847/12) Judgement of 23 February 2018, para 103.; Khoniakina v. Georgia (no. 17767/08) Judgement of 19 November 2012, para 52.; Kyprianou v. Cyprus [GC], (no. 73797/01), Judgement of 15 December 2005, para 118.; Grieves v. the United Kingdom [GC] (no. 57067/00) Judgement of 16 December 2003, para 69.; Castillo Algar v. Spain (no. 79/1997/863/1074) Judgment of 28 October 1998, para 45.; Ferrantelli and Santangelo v. Italy (no. 19874/92) Judgment of 7 August 1996, para 58.; Wettstein v. Switzerland (no. 33958/96) Judgement of 21 December 2000, para 44.
[49] Human Rights Court, Zubko and Others v. Ukraine (no. 3955/04, 5622/04, 8538/04 and 11418/04) Judgement of 26 April 2006, para 53.
[50] CM/Rec(2010)12, Explanatory Memorandum, para 61.
[51] CM/Rec(2010)12, Appendix para 59., 62-63., 65.

consume even the strongest organism. To meet the expectations of society and the challenges of our age and continuous changes in legislation, judges must learn and expand their professional knowledge a lot. That large and difficult task that usually falls to the courts can only be solved by a judiciary that is morally and financially independent, thus, free from all influence and from the burden of financial problems, both institutionally and personally. Accordingly, the independence of judges from all perspectives is the most important, since only qualified and independent judges can form a strong judiciary and only such a court can bear the full weight of responsibility.

Inadequate payment can undermine a judge's motivation to work, owing to the fact that if a judge is unable to live according to his position, he/she will not become a self-confident, strongly motivated judge and will not perform his/her office with full dedication. If judges' remuneration is so small that it does not provide e.g. professional training, recreation and cover only the minimum, first-order necessities of life, or it does not enable judges to achieve long-term life goals, start a family, raise their children decently, then the judicial career will not develop into respectable and reliable judges, but instead will create an army of humble clerks who either recede into the background of society or are supported by debts beyond their salaries. The independence, reliability, professionalism and diligence of judges, and thus the correct administration of justice, can only be ensured if judges receive such a salary that they can live without financial problems. From my perspective, it is impossible to imagine a well-functioning justice system with an embittered judiciary burdened by financial problems. In a democratic state governed by the Rule of Law, judges cannot struggle with financial problems at the end of the day, since financial problems could spill over into working time and distract attention from independent and uninfluenced judicial function.

On the other hand, inadequate payment can cause the judges to leave the judicial filed since – in my opinion – highly qualified, excellent professionals look for other career opportunities if their work is not financially appreciated. As a result of the low salary the judicial career will not be attractive to the best lawyers, and not the most qualified ones will apply to be a judge. However, to the judicial profession truly be the pinnacle of the legal profession, it is necessary that the most qualified and experienced professionals fill these positions, otherwise – without a properly trained judiciary – the state could be in trouble, since it could endanger the judicial system and the quality of justice. To make the judicial career attract talents and judges themselves be able to live in the judicial profession wholeheartedly, it is necessary to be respected as a person and to be recognized both financially and morally. Finally, the low salary can also cause the belief in reliable and incorruptible judges will not take root in society and justice will

become more and more uncertain. If a judge finds himself/herself in such an unfavorable situation in terms of wealth and income that he/she does not even see the sustenance of himself/herself and his/her family secured, this endangers the judge's spiritual independence.

An adequate level of remuneration is a key element in the fight against corruption of judges and aims at shielding them from any such attempts.[52] Corrupt judges constitute a threat to judicial independence and to judicial integrity.[53] Poor working conditions, which include along with poor infrastructure and equipment, insufficient salaries and social benefits can motivate a judge to accept an improperly offered favor more easily.[54] Therefore, adequate salaries, social benefits and equipment for the judicial staff are as vital for a corruption-free judiciary as proper working conditions for the judges themselves.[55] An income commensurate with the importance and difficulty of the task judges perform, the magnitude of the responsibility falling on judges, and the dignity of the position they hold, which also ensures moral integrity, can contribute to improve the quality of the administration of justice. If judges can spend money on books, further training, learning, etc., then their knowledge will expand, which can be utilized in the courtroom. Adequate salaries ensure that judges will not get into a vulnerable position and can make their decisions independently. Adequate wages are not only important from the point of view of individual income and the financial appreciation of judges, but also from the point of view of the stability of the legal system, social trust, economic growth and the efficiency of the judiciary. It is an important political interest that judges are able to devote themselves exclusively to solve their difficult judicial tasks with complete objectivity and calmness without financial worries, since only those who are truly educated and not burdened with tasks contrary to their profession and remunerated in a way worthy of the position can be independent and reliable and only such a judge is strong enough to bear the burden of responsibility that falls on him/her.

4. THR "UNIVERSAL" STANDARD OF REMUNERATION OF JUDGES

Judicial independence has a central place not only in national law, but also in international law. The norms and standards of judicial independence in each one

[52] CM/Rec(2010)12, Explanatory Memorandum, para 57.
[53] CCJE Opinion No. 21. (2018): Preventing corruption among judges, para 11.
[54] CCJE Opinion No. 21. (2018): Preventing corruption among judges, para 14.
[55] Ibid. para 19.

sphere affect the norms and standards of the other.[56] As I mentioned in the Introduction Section of my study, there are several European and international legal documents on judicial independence, which also set expectations as far as remuneration of judges is concerned. Thus, the Magna Carta of Judges declares that "the State shall ensure the human, material and financial resources necessary to the proper operation of the justice system. In order to avoid undue influence, judges shall receive appropriate remuneration and be provided with an adequate pension scheme, to be established by law".[57] The Recommendation of the Committee of Ministers of the Council of Europe pronounces that judges' remuneration should be commensurate with their profession and responsibilities and be sufficient to shield them from inducements aimed at influencing their decisions. Moreover, it holds that specific legal provisions should be introduced as a safeguard against a reduction in remuneration aimed specifically at judges.[58] The Venice Commission's Report on the independence of the judicial system also declares that the remuneration of judges has to correspond to the dignity of the profession and that adequate remuneration is indispensable to protect judges from undue outside interference.[59] The Consultative Council of European Judges expressed that it is necessary to ensure at least *de facto* provision for salary increases in line with the cost of living.[60]

The CJEU first expressed its position regarding judicial remuneration in the case of Associação Sindical dos Juízes Portugueses v. Tribunal de Contas according to which „Like the protection against removal from office of the members of the body concerned, the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.".[61] [62] Therefore, national rules on

[56] Shretreet, S. (ed.), *op. cit.,* p. 6.
[57] Magna Carta of Judges, para 7.
[58] CM/Rec(2010)12, Appendix para 54.
[59] European Commission for Democracy Through Law (Venice Commission) Report on the independence of the Judicial System, Part I: The independence of judges, Strasbourg, 16 March 2010, Study No. 494/2008, CDL-AD(2010)004, para 46.
[60] CCEJ Opinion No. 1 (2001) on Standards concerning the independence of the judiciary and the irremovability of judges, para 62.
[61] Court of Justice, Judgement of 27 February 2018 Associação Sindical dos Juízes Portugueses v. Tribunal de Contas case C-64/16, ECLI:EU:C:2018:117, para 45.; Judgement of 7 February 2019, Escribano Vindel case C-49/18, ECLI:EU:C:2019:106, para 66.; Judgement of 25 February 2025, XL v. Sąd Rejonowy w Białymstoku Joined Cases C-146/23, C-374/23, ECLI:EU:C:2025:109, para 49.
[62] In this case, the Portuguese legislator, by means of a law, periodically reduced the amount of the salary of several officials, persons performing tasks in the public sector, including representatives of the legislature, the executive and the judicial bodies (e.g. judges). This general salary-reduction measures were justified by the requirement to eliminate an excessive budget deficit. Since this salary-reduction measure did not exclusively affect judges, the CJEU did not consider it contrary to the principle of judicial independence,

judges' remuneration must not give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them.[63] The settled case law of the ECtHR deals with the issue of judicial independence under the title of the right to a fair trial referred to in Article 6 of the ECHR and in connection with the right to property referred to in Article 1 of Protocol No. 1. Thus, the substance of the case of Zubko and Others was that the Ukrainian State – referred to the lack of budgetary resources – for a long time did not implement the final judgments that obliged it to pay the arrears of salaries and other benefits of the applicant judges. The ECtHR held that the failure of the State to provide judicial benefits to judges in a timely manner is incompatible with the need to ensure their ability to exercise their judicial functions independently and impartially, in order to be shielded from outside pressures aimed at influencing their decisions and behavior. Furthermore, the ECtHR explained that the failure to ensure adequate and timely payment of the remuneration of domestic court judges upsets the fair balance that must be struck between the demands of the public interest and the need to protect the applicants' right to the peaceful enjoyment of their possessions. According to the ECtHR's opinion, if judges do not receive the benefits which they were entitled by law for a longer time due to the procedure of the national authorities (in the mentioned case: the non-enforcement of final judgments), this may impede the exercise of their judicial functions with the necessary dedication. In this case, the ECtHR found that the Ukrainian State violated the right to the peaceful enjoyment of judges' possessions within the meaning of the first paragraph of Article 1 of Protocol No. 1.[64]

The CJEU declared in its most recent case that the principle of judicial independence, read in conjunction with the principle of legal certainty, requires that the detailed rules for determining judges' remuneration be objective, foreseeable, stable and transparent, so as to exclude any arbitrary intervention by the legislature and the executive of the Member State concerned. It also explained that "the level of remuneration of judges must be sufficiently high, in the light of the socio-economic context of the Member State concerned, in order to confer on them a certain economic independence to protect them against any external interference or pressure that might undermine the neutrality of the judicial

because these were general measures aimed at ensuring that all members of the national civil service take part in mandatory requirements aimed at reducing the excessive budget deficit of the Portuguese State. In other respects, the CJEU took the same position in the case of Carlos Escribano Vindel v. Ministerio de Justicia (C-49/18), the facts of which are eerily similar to the facts of the previous case.

[63] Court of Justice Judgement of 25 February 2025, XL v. Sąd Rejonowy w Białymstoku Joined Cases C-146/23, C-374/23, ECLI:EU:C:2025:109, para 52.

[64] Human Rights Court, Zubko and Others v. Ukraine (no. 3955/04, 5622/04, 8538/04 and 11418/04) Judgement of 26 April 2006, para 68-70.

decisions they must take. Thus, the level of that remuneration must be such as to protect judges against the risk of corruption."[65]

Based on the above, a certain conclusion can be drawn from European and international legal documents along with the settled case law of the CJEU and the ECtHR as far as judges' remuneration is concerned and as a summary, it can be stated that it is expected, both at the European and international level, that the salaries of judges should be in line with the dignity of the office they hold, the size and weight of the responsibility they bear, be proportionate to the complexity and difficulty of the task they perform, and be sufficient to protect them from outside or inside improper interference influencing their decisions and behavior.

5. JUDGES WHO ARE NOT PAID CAN BE BOUGHT: PUBLIC CONFIDENCE IN THE JUDICIARY

As is clear from the above 4 Sections of this study, the justice system plays an important role in democracies. In many countries, judiciary is the final instance when it comes to controversial issues, which are very often of high political as well as societal relevance.[66] Public confidence is seen as essential to the effective functioning and even the legitimacy of judicial authority.[67] The trust of the public in the justice system and its truthfulness depends on many factors, e.g. the level and age of the established democratic system of a state; the wealth of a country, the level of financial autonomy of the judiciary; the population size of a country; historic traditions of a country; the influence of the media on individuals; gender, age and education of the individuals; personal experience of individuals with courts; citizens' level of awareness and knowledge about the political system and institutions of a country; the political orientations and interests of citizens; the level of personal life satisfaction; the performance and quality of the judiciary; etc.[68]

[65] Court of Justice Judgement of 25 February 2025, XL v. Sąd Rejonowy w Białymstoku Joined Cases C-146/23, C-374/23, ECLI:EU:C:2025:109, para 56., 58.
[66] Bühlmann, M.; Kunz, R., *Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems*, West European Politics, 2011., 34:2, p. 317., DOI: 10.1080/01402382.2011.546576.
[67] Mack, K. et al., *op. cit.,* p. 33.
[68] See more about this in Çakir, A. A.; Sekercioglu, E., *Public confidence in the judiciary: the interaction between political awareness and level of democracy*, Democratization, 2016., 23:4, pp. 634-656, DOI: 10.1080/13510347.2014.1000874; Bühlmann, M.; Kunz, R., *op. cit.,* pp. 317-345, DOI: 10.1080/01402382.2011.546576.

But how does confidence develop? One of the important characteristics of a judiciary is that its opinions be consistent and predictable.[69] Confidence is rooted in the public's belief that the judicial institution is generally trustworthy, that a specific decision or judgement is correct and legal full, when the public thinks it should be obeyed.[70] The fairness and impartiality of the justice system foster confidence in it. Bühlmann and Kunz, for instance, believe that the higher the degree of independence of a judiciary in a country, the higher the probability that an individual has confidence in the justice system of this country.[71] However, there is a very important thing that can undermine the trust of the public in democratic institutions, and that is corruption, which can have a multitude of tangible negative effects on judicial independence.[72] Corruption and perceptions of corruption in the judiciary not only undermine the courts' credibility as corruption fighters. More generally, it erodes trust in the courts' impartiality, harming all the core judicial functions, such as dispute resolution, law enforcement, protection of property rights and contract enforcement. In addition, it harms the broader accountability function that the judiciary is entrusted with in democratic systems – upholding citizens' rights, securing the integrity of the political rules of the game, and sanctioning representatives of other branches when they act in contravention of the law.[73]

All in all, corruption among judges weakens public trust in the justice system as a whole, because a judge does not represent him or herself in the courtroom, but the state, and therefore his/her activities affect the entire judiciary. Therefore, national, transnational, regional, and international law prohibits corruption and requires that countries take affirmative steps to prevent and prosecute it.[74]

Judicial system corruption is a diverse phenomenon, which takes many forms, and knows no boundaries.[75] According to Pahis, judicial corruption can be understood as the selling and purchasing of legal decisions,[76] while Dakolias and Thachuk think that one of the more comprehensive definitions of corruption is the use of public office for private gain.[77] Corruption among judges includes all forms of

[69] Dakolias, M. et al., *op. cit.,* p. 364.
[70] Bühlmann, M.; Kunz, R., *op. cit.,* p. 320.
[71] Bühlmann, M.; Kunz, R., *op. cit.,* p. 323-324.
[72] Shretreet, S. (ed.), *op. cit.,* p. 3.
[73] Gloppen, S., *Courts, corruption and judicial independence*, In Søreide, T., Williams, A. (ed.), *Corruption, Grabbing and Development Real World Challenges*, Edward Elgar Publishing Limited, 2014., p. 68.
[74] Chodosh, H. E., *Corruption and judicial Independence*, In Shretreet, S. (ed.), *op. cit.,* p. 154.
[75] Dakolias, M. et al., *op. cit*., p. 355.
[76] Stratos, P., *Corruption in Our Courts: What It Looks like and Where It is Hidden*, Yale Law Journal, Vol. 118, No. 8, June 2009, p. 1906.
[77] Dakolias, M. et al., *op. cit*., p. 355.

inappropriate influence that may damage the impartiality of justice, and may involve any actor within the justice system.[78] It can appear in different activities like abuse of office or entrusted power for personal gain; pressure from the superior; overstepping of authority; misuse of prestige; lobbying other judges to whom the matter is assigned; allowing their personal financial interests to come into conflict with their official responsibilities; taking bribes, engage in political conduct; etc. Corrupt judges get various rewards for influencing cases: goods; sex; debt relief; cash or the satisfaction of helping family, friend, lovers. Rewards may also take the form of avoiding something undesired, in the form of threats,[79] or to reach something desired, e.g. higher position. Judges also accept gratuities. Although gifts may not constitute bribery or extortion themselves, they smack of impropriety when offered by lawyers or litigants with cases that may come before the judge.[80]

Low salaries are often blamed for judicial corruption. Not only has the remuneration given to judges and their supporting staff in many countries been historically low, but they have also often been devalued by high inflation rates.[81] Bribery is one of the most pernicious forms of corruption. It can purchase favors in high-stakes cases and does not necessitate any personal or professional relationship between the briber and judge. It would seem, therefore, to be one of the most serious – and difficult to detect – forms of judicial corruption that exists.[82] Bribes offered by users of the legal system may take many forms, including illegal 'fees' that court personnel levy to do what they should do anyway. Court users pay just to get their case through the system, to influence the outcome of a given case, or to delay it. Bribes may be paid to the judge, or to assistant staff or lawyers to remove files or get the case assigned to a particular judge.[83] Gloppen calls it "petty corruption", which is only one part of the problem.

I agree with the opinion that independence depends on resources.[84] In many countries the judiciary commonly depends on the parliament for budgetary allocations, that is the administration of justice gets its financial source from the state budget. But control over the purse strings gives many governments a stronghold over the courts by enabling them to strategically regulate not only judges' salaries and benefits, but also the running costs of the judiciary.[85]

[78] Gloppen, S., *op. cit*., p. 69.
[79] Gloppen, S., *op. cit*., p. 69.
[80] Miller, G. P., op. cit., 434-435.
[81] Dakolias, M. et al., *op. cit*., p. 398.
[82] Stratos, P., op. cit., p. 1905.
[83] Gloppen, S., *op. cit*., p. 70.
[84] Bühlmann, M.; Kunz, R., *op. cit.,* p. 323.
[85] Gloppen, S., *op. cit*., p. 72.

It needs to be taken into consideration that due to the strict conflict-of-interest rules, during their terms of office, judges – in many countries – can only engage in scientific and educational, sports-related activities, artistic, copyright-protected, proofreading, editorial, and creative work as a gainful activity beside their judicial duties, which is a non-negligible circumstance. A judge therefore can earn income from other activities in addition to his work, but this usually requires extra time and energy at the expense of family life. For this reason, judges must support their family and their livelihood from their judicial salary, in contrast with lawyers, whose conflict-of-interest rules are not so strict, so they may even be able to earn income from other legal relationships, thus increasing their monthly income and the amount they can spend on living.[86] Hence, I share the view that an adequate income for judges and a fixed budget for the judiciary as a whole can help in preventing corruption or the purchase of judicial decisions.[87] Improvement in material conditions for judicial personnel and support can help prevent corruption because the lack of a living or socially acceptable wage is seen to be a significant driving factor for corruption.[88]

6. CONCLUSION

In my opinion the remuneration of judges is an inseparable part of judicial independence, moreover, is one of the pledges for the enforcement of the principle of judicial independence. Therefore, the financial recognition of judges is of decisive importance in the appropriate quality and uninfluenced judicial activities. Ensuring adequate remuneration is also justified by the strict conflict-of-interest rules for judges.

Based on the principle of loyal cooperation referred to in the first subparagraph of Article 4, paragraph (3) of the TEU, Member States are obliged to ensure the application and respect EU law in their territory, and they are also required to comply with their obligations deriving from EU law and, in particular, from Articles 2 and 19 TEU.[89] That is the case, in particular, where they lay down the

[86] However, according to the Court of Justice, lawyers cannot be compared to judges, because other legal professionals, in particular those exercising a liberal profession, such as lawyers, are clearly in a different situation from that of judges. See Judgement of 25 February 2025, XL v. Sąd Rejonowy w Białymstoku Joined Cases C-146/23, C-374/23, ECLI:EU:C:2025:109, para 63.
[87] Treisman, D., *The Causes of Corruption: A Cross-national Study*, Journal of Public Economics, 2000, 76:3, pp. 399–457.
[88] Gloppen, S., *op. cit*., p. 74.
[89] Court of Justice, Judgement of 22 February 2022 RS case C-430/21, ECLI:EU:C:2022:99, para 38.

detailed rules for determining judges' remuneration.[90] This all means that the Member States must fully respect the requirements set by EU law and the settled case law of the CJEU, moreover they must also consider the European standards when developing their judicial system,[91] and must take all necessary measures to respect, protect and promote the independence and impartiality of judges.[92] Therefore – according to the conclusion drawn from the European and international legal documents mentioned in Section 4 of this study – judges' remuneration should be commensurate with their responsibilities; with the importance of the function they carry out and has to correspond to the dignity of the profession. It also should be in line with the social importance of judicial activity, and it should be proportional to the complexity and difficulty of the task judges perform. Countries should give judges that reasonable salary that is sufficient to protect them from undue outside or inside interference aimed at influencing their decisions and behavior. Appropriate remuneration as a core element of judicial independence is not a prerogative or reward of judges, but rather the safeguard of the organizational integrity of the judiciary, and the continuous improvement of the high standard of justice. Salaries of a reasonable lifestyle may remove the temptation of corruption.[93] Thus, adequate remuneration is necessary to prevent corruption among judges, which is needed for fostering public confidence in the justice system. All in all, we can say that appropriate remuneration of judges is not the judge's selfish interest, this is the interest of the state and the public.

In view of all this, the answer to the main question can be given that without a level of remuneration receipt by judges commensurate with the importance of the functions they carry out, judicial independence is undermined and as a consequence, social confidence in the justice system weakens.

REFERENCES

BOOKS AND ARTICLES

1. Abdullah, A., *Declassifying Theory of Separation of Powers and its Inherent System of Checks and Balances: A Comparative Study*, Zakariya Journal of

[90] Court of Justice, Judgement of 25 February 2025 XL v. Sąd Rejonowy w Białymstoku Joined cases C-146/23, C-374/23, ECLI:EU:C:2025:109, para 46.
[91] 2024 Rule of Law Report, p. 11.
[92] CM/Rec(2010)12, Appendix point 13.
[93] Dakolias, M. et al., *op. cit*., p. 398.

Social Sciences, Vol. 2., No. 1., 2023, pp. 31-41., file:///C:/Users/boroczj/Downloads/_4.+3rdddddd-1.pdf

2. Bühlmann, M.; Kunz, R., *Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems*, West European Politics, 2011., 34:2, pp. 317-345, DOI: 10.1080/01402382.2011.546576., https://www.tandfonline.com/doi/epdf/10.1080/01402382.2011.546576?needAccess=true
3. Çakir, A. A.; Sekercioglu, E., *Public confidence in the judiciary: the interaction between political awareness and level of democracy*, Democratization, 2016., 23:4, pp. 634-656, DOI: 10.1080/13510347.2014.1000874, https://pure.eur.nl/ws/portalfiles/portal/95660495/Public_confidence_in_the_judiciary_the_interaction_between_political_awareness_and_level_of_democracy.pdf
4. Chodosh, H. E., *Corruption and judicial Independence,* in Shetreet, S. (ed.), The Culture of Judicial Independence, Martinus Nijhoff Publishers, Leiden-Boston, 2012., pp. 153-167., DOI: https://doi.org/10.1163/9789004215856_010
5. Dakolias, M.; Thachuk, K., Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform, Wisconsin International Law Journal, Vol. 18., No. 2., 2000, pp. 353-406., file:///C:/Users/boroczj/Downloads/18WisIntlLJ353.pdf
6. Gloppen, S., *Courts, corruption and judicial independence*, In Søreide, T., Williams, A. (ed.), *Corruption, Grabbing and Development Real World Challenges*, Edward Elgar Publishing Limited, 2014 pp. 68-79., https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2475256/Courts%2C%20Corruption%20and%20Judicial%20Independence?sequence=1&isAllowed=y
7. Holcomb, R. G., *Checks and Balances: Enforcing Constitutional Constraints*, Economies, 2018, 6, 57; doi:10.3390/economies6040057, pp. 1-12., file:///C:/Users/boroczj/Downloads/economies-06-00057-4.pdf
8. Mack, K., et al., The Judiciary and the Public: Judicial Perceptions, Adelaide Law Review, Vol. 39., No. 1., 2018, pp. 1-36., file:///C:/Users/boroczj/Downloads/39AdelLRev1-1.pdf
9. Miller, G. P., Bad Judges, Texas Law Review, December 2004, Vol. 83., No. 2., pp. 431-488., file:///C:/Users/boroczj/Downloads/83TexLRev431.pdf
10. Persson, T. et al., Separation of Powers and Political Accountability, *The Quarterly Journal of Economics*, November 1997, pp. 1163-1202., https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=f883b6272394560ad8568ba9da877eb52980010d
11. Shetreet, S.(ed.), The Culture of Judicial Independence, Martinus Nijhoff Publishers, Leiden-Boston, 2012.

12. Stratos, P., *Corruption in Our Courts: What It Looks like and Where It is Hidden*, Yale Law Journal, Vol. 118, No. 8, June 2009, pp. 1900-1944., file:///C:/Users/boroczj/Downloads/118YaleLJ.pdf
13. Treisman, D., *The Causes of Corruption: A Cross-national Study*, Journal of Public Economics, 2000, 76:3, pp. 399–457., https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=73accec47e2c7bf537b88e8e903e61e479d1a83d
14. Waldron, J., *Separation of Powers in Thought and Practice*, Boston College Law Review, Vol. 54., No. 2., 2013, pp. 433-468., file:///C:/Users/boroczj/Downloads/54BCLRev433-1.pdf

LEGAL ACTS

1. Consultative Council of European Judges Opinion No. 1. (2001) on Standards concerning the independence of the judiciary and the irremovability of judges, CCJE (2001) OP No. 1, Strasbourg, 23 November 2001, https://rm.coe.int/1680747830
2. Consultative Council of European Judges Opinion No. 18. (2015): "The position of the judiciary and its relation with the other powers of state in a modern democracy", CCJE(2015)4, London, 16 October 2015., https://rm.coe.int/16807481a1
3. Consultative Council of European Judges Opinion No. 21. (2018) on Preventing corruption among judges, CCJE(2018)3Rev, Zagreb, 9 November 2018, https://rm.coe.int/ccje-2018-3e-avis-21-ccje-2018-prevent-corruption-amongst-judges/16808fd8dd
4. Consultative Council of European Judges Opinion No. 24. (2021): The evolution of the councils for the judiciary and their role in independent and impartial judicial systems, CCJE(2021)11, Strasbourg, 5 November 2021, https://rm.coe.int/opinion-no-24-2021-of-the-ccje/1680a47604
5. Consultative Council of European Judges: Magna Carta of Judges (Fundamental Principles), CCJE(2010)3 Final, Strasbourg, 17 November 2010, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063e431
6. The 2024 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM(2024) 950, https://commission.europa.eu/document/download/84aa3726-82d7-4401-98c1-fee04a7d2dd6_en?filename=2024%20EU%20Justice%20Scoreboard.pdf

7. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2024 Rule of Law Report, The rule of law situation in the European Union, Brussels, 24.7.2024. COM(2024) 800 final, https://commission.europa.eu/document/download/27db4143-58b4-4b61-a021-a215940e19d0_en?filename=1_1_58120_communication_rol_en.pdf
8. Recommendation CM/Rec(2010)12 and explanatory memorandum adopted by the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, 17 November 2010, https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d
9. European Commission for Democracy Through Law (Venice Commission) Report on the independence of the Judicial System, Part I: The independence of judges, Strasbourg, 16 March 2010, Study No. 494/2008, CDL-AD(2010)004, https://rm.coe.int/1680700a63

COURT DECISION

Court of Justice of the European Union

1. Judgement of 19 September 2006, Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg case C-506/04, ECLI:EU:C:2006:587.
2. Judgement of 7 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas case C-64/16, ECLI:EU:C:2018:117.
3. Judgement of 2 Marc 2021, A.B. and Others v. Krajowa Rada Sądownictwa case C-824/18, ECLI:EU:C:2021:153.
4. Judgement of 24 June 2019, European Commission v. Republic of Poland case C-619/18, ECLI:EU:C:2019:531.
5. Judgement of 7 February 2019, Carlos Escribano Vindel v. Ministerio de Justicia case C-49/18, ECLI:EU:C:2019:106.
6. Judgement of 19 November 2019, A. K. and Others Joined cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.
7. Judgement of 25 July 2018, *L. M.* case C-216/18, ECLI:EU:C:2018:586.
8. Judgement of 5 November 2019, European Commission v. Republic of Poland case C-192/18, ECLI:EU:C:2019:92.
9. Judgement of 20 April 2021, Repubblika v. Il-Prim Ministru case C-896/19, ECLI:EU:C:2021:311.
10. Judgement of 15 July 2021, European Commission v. Republic of Poland case C-791/19, ECLI:EU:C:2021:596.
11. Judgement of 21 December 2023, L.G. v. Krajowa Rada Sądownictwa case C-718/21, ECLI:EU:C:2023:1015.

12. Judgement of 5 June 2023, European Commission v. Republic of Poland case C-204/21, ECLI:EU:C:2023:442.
13. Judgement of 22 February 2022, RS case C-430/21, ECLI:EU:C:2022:99.
14. Judgement of 8 May 2024, Asociaţia "Forumul Judecătorilor din România" and Asociaţia "Mişcarea pentru Apărarea Statutului Procurorilor" v. Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Procurorul General al României case C-53/23, ECLI:EU:C:2024:388.
15. Judgement of 25 February 2025, XL v. Sąd Rejonowy w Białymstoku Joined Cases C-146/23, C-374/23, ECLI:EU:C:2025:109.

EUROPEAN COURT OF HUMAN RIGHTS

1. De Cubber v. Belgium (no. 9186/80) Judgement of 26 October 1984.
2. Bryan v. the United Kingdom (no. 19178/91) Judgment of 22 November 1995.
3. Ferrantelli and Santangelo v. Italy (no. 19874/92) Judgment of 7 August 1996.
4. Findlay v. the United Kingdom (no. 22107/93) Judgement of 25 February 1997.
5. Castillo Algar v. Spain (no. 79/1997/863/1074) Judgment of 28 October 1998.
6. Ninn-Hansen v. Denmark (no. 28972/95) Judgement of 18 May 1999.
7. Wettstein v. Switzerland (no. 33958/96) Judgement of 21 December 2000.
8. Grieves v. the United Kingdom [GC] (no. 57067/00) Judgement of 16 December 2003.
9. Kyprianou v. Cyprus [GC], (no. 73797/01), Judgement of 15 December 2005.
10. Zubko and Others v. Ukraine (no. 3955/04, 5622/04, 8538/04 and 11418/04) Judgement of 26 April 2006.
11. Khoniakina v. Georgia (no. 17767/08) Judgement of 19 November 2012.
12. Haarde v. Ireland (no. 66847/12), Judgement of 23 November 2017.
13. Anželika Šimaitienė v. Lithuania (no. 36093/13) Judgement of 21 April 2020.

UDK: 343.143 : 341.73 (498)
Review paper

Eugen Gheorghe Crisan, Postdoctoral researcher
Faculty of Law, Babes-Bolyai University, Romania
E-mail: eugengheorghecrisan@gmail.com

POLITICAL IMMUNITY AND LEGAL LIABILITY

ABSTRACT

At present, the political scene in Romania is characterized by turmoil that has led to an increase in the level of verbal aggression or violence and some politicians have resorted to actions that violated criminal, misdemeanour or civil law. If persons other than those acting in their capacity as politicians had committed such acts, accountability in any of its variants would have followed its natural course. In the case of politicians holding public office, however, it seems that the reaction of the judiciary seems to be either restrained or non-existent because of the political immunity they enjoy. As political immunity does not mean the granting ab initio of a general amnesty for politicians, an up-to-date analysis is needed of what political immunity is and what it represents, its place and role in public and legal life, its limits, when politicians can be held liable in any of the above-mentioned forms, the effectiveness and efficiency of this liability, in order to make the necessary legal and approach corrections.

Keywords*: political immunity; criminal liability; contravention liability; civil liability.*

1. INTRODUCTION

In a democratic society, its members act in the knowledge that their anti-social acts attract their liability. As a result, this paper will begin with a punctual analysis of liability, i.e. the forms of legal liability, with an emphasis on criminal liability. In the same society, its members have established that there are persons who exercise certain functions and who, in order to carry out their duties freely and unhindered, need to benefit from a certain protection. This category includes politicians, who enjoy immunity, which comes into play under certain conditions, has certain limits and requires certain steps to be taken, all of which will be discussed in the second part of this paper, with a view to placing it properly, where appropriate, alongside and among the other legal institutions.

2. LEGAL LIABILITY

2.1. Concept

With reference to liability in general, in an older work[1] it was explained that when a willful wrongful act is committed and another person has been injured in his physical or moral being or in his property, bearing the consequences of this injury is the issue of liability. This is described as the reaction triggered by an action which society at the place and time of its commission considers condemnable. Each ruling class imposes on society ethical rules of conduct which pass into the moral conscience of society and, through its medium and pressure, into the conscience of the people of that society. When a wrongful act violates the moral rules of conduct accepted by the social conscience it brings reprobation from the social circle in which the act took place. On the other hand, the perpetrator may also have regrets or remorse about the act committed, because their conscience is shaped by the social environment reflecting the morals of that society, which gives rise to moral responsibility. Moral liability differs from legal liability in that the former is based on the violation of obligations that have no correlative rights and cannot be sanctioned by means of state coercion. In the latter case, the sanction lies in the offender's conscience and possibly takes the form of a reaction of disapproval on the part of the community. Legal liability, however, can be discussed only with the emergence of the state and of the law, when the reaction to conduct contrary to the rules of conduct takes an increasingly organized form, which implies the possibility of recourse to state coercion.

As mentioned above, any subject of law, whether we are talking about a private individual in relation to his fellow human beings, the state in relation to its subjects or other states, must answer for their acts by bearing the consequences of the undertaken commitments or the breach of legal duties. In this form, liability is similar to responsibility as a general principle of law, representing the general framework for its realization. Some of its defining features are better highlighted if we compare liability with other legal institutions. Thus, for example, legal liability also implies guilt, conduct contrary to the law, whereas political liability is not incurred because of violations of the law. Even if liability means an obligation to make reparation, it is not the same as punishment as an effect of responsibility, because of the difference between them and then, because the first objective is to restore the situation to that prior to the act, to erase, to remove all consequences, and only in the subsidiary is there a pecuniary reparation. There is

[1] Eliescu, M., *Răspunderea civilă delictuală*, Academiei R.S.R., București 1972, pp. 6-8; see also Popa, N., *Teoria generală a dreptului*, C.H. Beck, București 2008, pp. 234-236; Vida, I.; Vida, I., C., *Teoria generală a dreptului*, Universul Juridic, București 2016, p. 174.

a difference between liability and sanction, the former being a pre-sanctions phase and the latter being a materialization of the consequences of liability.[2]

Legal liability has been defined as a relationship established by a legal norm between the perpetrator and the state, represented by the public authorities, which may include courts of law, state officials or other agents of public power. Legal liability is based on the violation of legal rules, which contain legal sanctions, and the legal sanction is therefore both a prerequisite for the institution of legal liability and its object. In these circumstances, legal liability is a legal framework for the realization and embodiment of the legal sanction. It is within this framework that the legal sanction is applied, which may consist in the restitution of a thing, the annulment of an act, reparation for damage or even the imposition of a penalty.[3]

2.2. Forms, principles, conditions

Taking into account a number of factors considered to be interdependent and interfering, such as the social values affected, the type of legal rule infringed, the degree of social danger of the act, the culpability of the perpetrator and so on, we can distinguish several forms of legal liability, which are somehow specific to each branch of law. If we were to establish an order, the first would probably be constitutional or politico-legal liability. It results from failing to comply with certain obligations contained in constitutional rules, such as those addressed to the President, the Parliament, the Government or their members. Criminal liability arises as a consequence of the commission of an offence, i.e. by infringing criminal rules, and entails the application of a penalty necessary to restore the order of law and even the authority of the law. Civil liability can be found in civil law, with two components, namely tortious and contractual, both based on the idea of compensation for damage caused by a person's actions. Tortious civil liability covers the obligation to compensate for the damage caused by a wrongful act, whereas in the case of contractual civil liability, the obligation breached is a concrete obligation that is outlined in a valid contract concluded between the aggrieved party and the party who has entered into the contractual obligations. Then there would be administrative liability, with several variants. One of them would be the contraventional liability generated by the commission of a contravention, an anti-social act of less serious gravity than the crime, committed with culpability. Another form of administrative liability is that of the state

[2] Dănișor, D.; C., Dogaru, I.; Dănișor, G., *Teoria generală a dreptului*, Ed. 2, C.H. Beck, București 2008, pp. 537-538; for the distinction between liability and responsibility see also Vida, I. *et al., op. cit*. note 1, p. 174.
[3] Craiovan, I., *Tratat de teoria generală a dreptului*, Universul Juridic, București 2015, p. 501; for a different approach to the issue see also Vida, I. *et al., op. cit*. note 1, pp. 174-176.

administration for damage caused by unlawful administrative acts. The pecuniary liability of the State and of magistrates, who have acted in bad faith or gross negligence, for damage caused by judicial errors. Disciplinary liability is another component of administrative liability for acts which constitute misconduct rather than contraventions. Developments in society naturally lead to the emergence of other forms of liability, such as environmental liability, known as *ecological liability*, but the list is still open.[4]

Even if there are different forms of legal liability, they are all based on several common principles, including the legality of legal liability, personal liability, imputability, uniqueness and individualization.[5] At the same time, the incurring of any form of legal liability is subject to the fulfillment of certain conditions. Among them we find: unlawful conduct which is an action or inaction that contravenes legal rules; the harmful result is that element that causes damage to society as a whole or only to a specific individual, harming social values; the existence of a causal relationship between the act and the result is given by the generation of the result by the unlawful act; guilt designates the subjective side of the breach of law, given that acts of human nature are characterized not only by material features but also represent a manifestation of will and conscience; the non-existence of certain circumstances which in principle preclude legal liability has the effect of exonerating the person from further punishment.[6] Because criminal liability is the harshest form, attracting also the most serious possible sanction in most democratic systems (life imprisonment), in the next section I will point out some of its particularities.

2.3. Criminal liability

Criminal liability, as a form of legal liability, is the consequence of not complying with the provision of the criminal law. As such, it arises only as a result of the commission of an offense and is realized in the criminal legal relationship through the activity of the subjects of that relationship, who are the holders of correlative rights and obligations. Criminal liability has several specific features. For a start, the unlawful act must be criminal in nature and constitute an offense. Then, the subjects of criminal liability are the State and the offender, the former creates the legal constraint to apply and ensure the realization of the legal sanction. The last one is to bear the consequences of the act committed by applying and enforcing

[4] Craiovan, I., *op. cit.* note 3, pp. 502-508; Dănișor, D. *et al., op. cit.* note 2, pp. 538-541; Popa, N., *op. cit.* note 1, pp. 236-237; Vida, I. *et al., op. cit.* note 1, pp. 176-181.
[5] Craiovan, I., *op. cit.* note 3, p. 508.
[6] Craiovan, I., *op. cit.* note 3, pp. 508-510; Dănișor, D. *et al., op. cit.* note 2, pp. 542-543; Popa, N., *op. cit.* note 1, pp. 237-239; Vida, I. *et al., op. cit.* note 1, pp. 181-183.

the sanction. At the same time, the content of the legal relationship of criminal liability, consisting of the correlative rights and obligations of the subjects, contains the right of the state to hold the offender criminally liable and the obligation to punish him, the obligation of the offender to answer for the offense committed, to execute the sanction imposed, and the right to answer and be punished within the limits of the law. Lastly, the legal relationship of liability is the sanction imposed by the State for the unlawful act committed, with criminal sanctions being the most serious form of legal constraint.[7]

The principles underlying criminal liability are also different from other forms of liability and concern the following facts. First, the offense is the sole basis of criminal liability, according to which criminal liability can be incurred only in the case of the commission of a crime, and not in the case of an anti-social act, unlawful act, act provided for by criminal law. Second, the personality of criminal liability directs it to the person who participated in the commission of the crime. Third, the uniqueness of criminal liability is where the commission of a crime entails only once the application of the criminal sanction provided for by the criminal law for it. Then, we have the celerity of criminal liability which aims at reducing the time between the act and the sanction. Next is the inevitability of criminal liability, based on the rule that the commission of the crime always entails criminal liability, the exceptions being limited. After that, there is the individualization of criminal liability, meaning adapting the punishment to the act and the person. Last but not least, the prescriptibility of criminal liability which is based on the fact that, as a rule, the passage of a certain period of time makes it no longer of interest to be held criminally liable, the exceptions being limited here as well.[8] Although Art. 16 para. 1, 2 of the Constitution of Romania (*hereinafter CR*) states that *"(1) The citizens are equal before the law and public authorities, without privileges and without discrimination. (2) No one is above the law",*[9] certain persons, however, because of the public functions they hold, benefit from a certain preferential treatment, which does not necessarily mean that criminal liability is removed, but that it is made more difficult. This preferential treatment is known in current parlance as immunity.

[7] Pascu, I., *Drept penal. Partea generală*, Ed. a 2-a, Hamangiu, București 2009, pp. 323-325; see also Pașca, V., *Drept penal. Partea generală*, Ed. a III-a, Universul Juridic, București 2014, pp. 387-390; Lefterache, L.,V., *Drept penal. Partea generală*, Ed. a 4-a, Hamangiu, București 2024, pp. 646-648; Hotca, M., A., *Manual de drept penal. Partea generală*, Universul Juridic, București 2024, p. 561.
[8] Pascu, I., *op. cit.* note 7, pp. 326-329; some authors have approached three of the principles as conditions of criminal liability, in which sense see Pasca, V., *op. cit.* note 7, pp. 391-392.
[9] The Romanian Constitution can be consulted in full at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, February 20, 2025.

3. POLITICAL IMMUNITY

3.1. The concept

Given that from an etymological point of view immunity is considered to be a set of rights or privileges enjoyed by certain categories of persons,[10] for the sake of a precise understanding of immunity, I will turn to works that provide explanations on the fundamental law where immunity is regulated first. It is laid down in Art. 72 of the RC, but here, as we shall see in the next section, its effects and the procedure it generates are regulated, in a somewhat natural way. However, the explanations provided on this article[11] state that parliamentary immunity is a form of defense, but also a guarantee that deputies and senators will be safe from the executive power which would resort to attempts to intimidate, threaten and sanction parliamentarians for the way in which they exercise their mandate, or, in other words, the executive cannot bring criminal or misdemeanour proceedings against them unless certain conditions are met. However, through Art. 20 para. 1 of Law No. 96/2006 on the status of deputies and senators[12] it has been stated that "*The parliamentary immunity is the set of legal provisions that provide deputies and senators with a legal regime derogating from ordinary law in their relations with the judiciary and in order to guarantee their independence"*, which essentially comprises the elements outlined above. Although the above data refer to parliamentary immunity, a form of political immunity, the definition of parliamentary immunity can also be transferred to the concept of political immunity, with the proviso that it covers not only members of parliament but also the president of the republic and members of the Government.

3.2. Forms

Depending on the criteria to be used, immunity can take several forms, such as immunity under domestic or international law, absolute or relative, functional or extra-functional. In order to remain within the scope of the subject, we will concentrate on immunity under domestic law, although some authors distinguish

[10] Academia Română, Institutul de lingvistică "Iorgu Iordan – Al. Rosetti", *Dicționarul Explicativ al Limbii Române*, Ed. a 2-a, rev., Univers Enciclopedig Gold, București 2009, p. 496.
[11] Ionescu, C.; Dumitrescu, C., A., (coordonatori), *Constituția României. Comentarii și explicații*, C.H. Beck, București 2017, p. 775; see also Ionescu, C., *Tratat de drept constituțional contemporan*, Ed. 3, C.H. Beck, București 2019, p. 1179.
[12] The full text of the law can be consulted at https://legislatie.just.ro/Public/DetaliiDocument/71194, February 20, 2025.

between immunity under substantive criminal law and procedural immunity, depending on the criminal matters in which they are involved.[13]

3.2.1. Parliamentary immunity

Through Art. 72 CR,[14] where it is stated that *"(1) Deputies and senators cannot be held legally liable for votes or political opinions expressed in the exercise of their mandate. (2) Deputies and Senators may be prosecuted and brought to criminal trial for acts unrelated to votes or political opinions expressed in the exercise of their mandate, but may not be searched, detained or arrested without the consent of the Chamber to which they belong, after hearing them. Prosecution and criminal proceedings may be brought only by the Public Prosecutor's Office of the High Court of Cassation and Justice. The High Court of Cassation and Justice shall have jurisdiction. (3) In cases of flagrante delicto, Members of Parliament or Senators may be detained and searched. The Minister of Justice shall promptly inform the President of the Chamber of Deputies of the detention and search. If the Chamber of Deputies finds that there are no grounds for detention, it shall immediately order the revocation of the measure.",* the first of the forms of immunity is regulated, excluding the liability of parliamentarians, whether deputies or senators, for the votes or political opinions they express in the exercise of their mandate. With regard to the forms of legal liability excluded, it was considered[15] that the legal text refers to criminal, civil or misdemeanour liability, not disciplinary liability, which arises in the event of misconduct of this nature.[16] Immunity takes effect when parliamentarians have to vote, and as the law does not make any distinction, I consider that it concerns any procedure in which a vote is taken. As far as the political opinions covered by immunity are concerned, these are speeches, expressions of positions in meetings of specialized committees, of the chambers, statements of a political nature, questions and interpellations addressed to members of the Government, in parliamentary inquiries, interaction with other state institutions, that is to say everything that involves the exercise of the function of parliamentarian and the performance of the duties of the legislature. It must be emphasized, however, that it is also important that there is a close link between the votes and opinions expressed and the exercise of the parliamentary

[13] Streteanu, F.; Nițu, D., *Drept penal. Partea generală, Universul Juridic*, București 2014, pp. 233-235.
[14] See the full text at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, February 20, 2025.
[15] Ionescu, C. *et al., op. cit.* note 11, p. 775.
[16] For disciplinary misconduct of parliamentarians see also Țiclea, Al., *Răspunderea disciplinară. Teorie și jurisprudență,* Universul Juridic, București 2014, p. 48.

mandate, otherwise immunity does not come into play[17]. As such, I share the views[18] that political opinions which are not related to the exercise of a parliamentarian's mandate are not covered by immunity, for example, opinions expressed within party structures or meetings in which the parliamentarian participates as a member of that party. The same applies to opinions expressed in statements and press conferences, interviews and broadcasts which do not relate to his or her duties but to general or specific political issues. Opinions expressed by members of parliament in public meetings with the population of the constituencies in which they stand as a candidate or with members of the public are also considered to be outside immunity. Nor are political opinions expressed by members of the parliament before the courts protected by immunity. Also, if parliamentarians in their speech defame the country, incite discrimination and territorial separatism, use slander or insults, these opinions attract legal liability because they exceed the constitutional framework that protects them. On the other hand, if the presiding officers or secretaries of the chambers perform their duties in bad faith, their actions attract legal liability. As far as gestures are concerned, it was considered that they do not amount to the expression of a political opinion and therefore, as they are often reprehensible, they attract legal liability when they are made.

In the doctrine[19] a judicious distinction has been made between political opinion and political statement. Thus, the formulation of an opinion is a fact of conscience, the result of thought, of a value judgment and expresses its content, which depends on the quality of thought and is influenced by the person's degree of culture and education. An opinion is the natural result of political reflection, of a subjective assessment of a political fact or event. A political statement, however, contains a statement, an observation, a public assertion of political nature and concerns an event or conduct of this kind. This form of manifestation is more a statement of a fact or an event and is not a value judgment or the result of reflection or reflection. Because the two forms of expression are distinguished more by intrinsic elements of the author, they may overlap or intertwine, and it is sometimes difficult in practice to determine whether it is an opinion or a political statement, I am of the opinion that, by confusion, political statements will be considered as opinions and under the protection of immunity, even though they are not mentioned in the constitutional text.

With regard to the temporal scope of immunity, a legal problem arises from the content of Art. 222 of the Rules of the Chamber of Deputies *(hereinafter the RCD)*,

[17] Ionescu, C.*, op. cit.* note 11, p. 1178.
[18] Ionescu, C. *et al., op. cit.* note 11, pp. 776-780; Ionescu, C.*, op. cit.* note 11, pp. 1184-1185.
[19] Ionescu, C. *et al., op. cit.* note 11, pp. 780-783.

which stipulates that *"Deputies have parliamentary immunity, in accordance with the provisions of Art. 72 of the Constitution of Romania, republished, from the date of issuance of the certificate proving the election, subject to validation and the swearing of the oath of allegiance to the country and the people."*,[20] which extends the protection of immunity from the moment of the issuance of the certificate of election, if the mandate is validated and the oath of allegiance has been sworn, although until the legal meeting of the Chamber of Deputies, members of the parliament cannot exercise their mandate. By this legal text, immunity acquires a kind of retroactive effect, it is established by the validation of the mandate and the taking of the oath, but it would also cover the period from the moment of the issuance of the certificate of election until the first meeting of the Chamber of Deputies. Concerning this issue, in some disagreement with the opinions expressed in the legal doctrine,[21] I consider that Art. 222 of the RCD, being contrary to Art. 72 of the RC, can be applied only within the limits set by the latter, and therefore any conduct of members before the start of their term of office is outside the protection of immunity. Moreover, during this period, the non-compliant conduct could consist only in the expression of political opinions, since it is not possible to talk about the expression of a vote during this period. Any argument of a philosophical nature pales before the supremacy of the constitutional rule and we have not identified any viable legal argument to apply the RC provisions differently from what they state. On the other hand, it is important to emphasize that Art. 192 para. 1 of the Rules of the Senate *(hereinafter the RS)* which states that *"Senators enjoy parliamentary immunity for the duration of their term of mandate."*,[22] although it refers to parliamentary immunity, does not add to the constitutional norm, it does not extend it, as the RCD does, as such, at least apparently, there is a difference in the extent of the immunity of deputies, compared to that of senators who are at a disadvantage. These aspects have also been emphasized by some criminal doctrine.[23] First, it was pointed out that Art. 72 para. 1 RC establish a substantive criminal immunity under which Members of Parliament can never be held criminally liable for the votes they cast, and this immunity operates even after the end of their mandate, being a functional immunity. On the other hand, it has rightly been argued that immunity does not apply to offenses committed in connection with the exercise of the right to vote. As for the other component of the activity under the protection of immunity - the

[20] The full text of the Regulation can be consulted at https://legislatie.just.ro/Public/DetaliiDocument/67896, February 21, 2025.
[21] Ionescu, C. *et al., op. cit.* note 11, p. 776.
[22] The full text of the Regulation can be consulted at https://www.senat.ro/pagini/reg_sen/REG_SENATULUI_republicare_ianuarie_2025.htm, February 21, 2025.
[23] Streteanu, F.; Nițu, D., *op.cit*. note 13, pp. 239-242; in a similar but narrower sense see also Rusu, M., I., *Drept penal. Parte generală*, Hamangiu, București 2014, p. 115; Pașca, V., *op. cit*. note 7, pp. 128-129; Hotca, M., A., *op. cit*. note 7, pp. 146-147.

expression of opinions, although a somewhat broader term is used in the approach to the issue, namely, taking positions related to parliamentary activity, however, the explanations highlight that it is essentially the same thing, protection is not offered if the facts are outside the duties of the parliamentarian. The example that needs to be mentioned here is an insulting speech against a minister that would fall under the offense of abusive behaviour under Art. 296 para. 1 of the Criminal Code, which stipulates that *"(1) The use of insulting expressions towards a person by another one in the performance of their duties shall be punishable by imprisonment from one month to 6 months or a fine. (2) Threatening or striking or other violence committed under the conditions of para. (1) shall be punishable by the penalty prescribed by law for that offense, the special limits of which shall be increased by one third.".*[24] Slightly debatable is the view that less serious acts which could be characterized as abusive conduct, public incitement, incitement to hatred or discrimination may be covered by immunity to the extent that they were committed in the exercise of the parliamentarian's duties, since I am of the opinion that anything which goes beyond the exercise of the mandate and meets all the conditions for criminal liability renders the institution of immunity ineffective. Moreover, Art. 72 para. 2, first sentence of the RC makes it very clear that members of the parliament may be prosecuted and brought to criminal trial for acts that are unrelated to the votes and political opinions expressed in the exercise of their mandate, without any further clarification. In this sense, the Constitutional Court of Romania (hereinafter: the CCR) has also ruled in this sense, which by Decision No. 96/2002[25] established that these provisions, being derogations from the ordinary law in order to protect the parliamentarian in order to enable him to perform his duties and his entire activity in good conditions, cannot be interpreted in a broad sense. It was also pointed out[26] that the practice of the European Court of Human Rights (hereinafter: the ECtHR) is along the same lines, essentially establishing that immunity is not absolute, that there must be a close link between parliamentary activity and the acts alleged against a parliamentarian, in the sense that parliamentary immunity cannot cover reprehensible acts committed by a member of parliament outside his parliamentary activity. The reason is that this would amount to restricting, in a manner incompatible with Art. 6 para. 1 of the European Convention on Human Rights (hereinafter: the ECHR), of the right of access to a court of law for private individuals, whenever a member of the parliament makes defamatory statements outside parliament and unconnected with his or her work.

[24] See the full text at https://legislatie.just.ro/Public/DetaliiDocument/109855, February 25, 2025.
[25] See the full decision at https://legislatie.just.ro/Public/DetaliiDocument/35861, February 25, 2025.
[26] Bârsan, C., *Convenția europeană a drepturilor omului. Comentariu pe articole*, Ed. 2, C.H. Beck, București 2010, pp. 464-466.

As for the other form of immunity, it is considered to be one of criminal procedural law, regulated by Art. 72 para. 2 RC and is intended to follow an exceptional procedure to be followed in the event of the commission by members of the parliament of any offenses not covered by substantive immunity. Moreover, I support the view that, unlike the former, this form of immunity is lost once the parliamentary mandate ends. The division of parliamentary immunity into the two forms of substantive law and criminal procedural law, although it is of great help in avoiding confusion between genuine, true, real immunity, as provided for in Art. 72 para. 1 RC and, I would say, procedural conditions, which are also considered to be an immunity, is questionable. That is because the latter is not in essence an immunity, but procedural mechanisms to guarantee the former, which are derogatory in nature from those laid down by criminal procedural law as a whole. In other words, I consider that the parliamentarian enjoys full immunity for all the acts expressly and imitatively mentioned in Art. 72 para. 1 RC, and the sorting out of the acts that fall within the scope of immunity or not, is carried out by each chamber (an activity not expressly specified in the RC), which also have the role of authorizing or not the search, detention or preventive arrest of members of the parliament (an activity expressly specified in Art. 72, paras. 2, 3 RC). As such, once the chambers have decided that the act of a particular member of parliament is not one of those referred to in Art. 72 para. 1 RC and immunity is lifted, he or she may be held legally liable in any of its forms without further formalities except for the criminal ones characterized by some additional steps, previously presented.

It is true, however, that both the constitutional text and the texts of the two rules of procedure of the Chambers of Parliament are slightly deficient, focusing on the procedure of criminal or misdemeanour liability, leaving other forms of legal liability out of account. Nevertheless, if there was no examination of the acts that a parliamentarian is accused of having committed, and the Chambers did not decide to waive immunity, the constitutional provision would be devoid of content and effective practical application. Therefore, if someone were to sue a parliamentarian with a view to holding them liable in tort (when, for example, from the rostrum of the Chamber of Deputies, they state that things are going badly in a particular ministry because the minister is corrupt), I am of the opinion that the court, ex officio or at the request of the interested party, should address the Chamber of which the parliamentarian is a member. That way, through the Standing Bureau, the Legal Committee and then the plenary of the Chamber, it can be determined whether or not the act is covered by parliamentary immunity, which can only be decided by each chamber and not by any other state body, institution or authority.

3.2.2. The immunity of the President

Art. 84 para. 2 RC states that *"The President of Romania shall enjoy immunity. The provisions of Article 72(1) shall apply accordingly."*[27] On the basis of these legal provisions, it has been considered[28] that the President enjoys parliamentary immunity, with the proviso that he is not exempt from any kind of liability for decisions taken or for acts or actions carried out outside his constitutional and legal functions, and as such does not enjoy total or absolute immunity, as would appear from a first reading of the constitutional text. Criminal doctrine[29] has expressed the view that the immunity of the President cannot be considered either general or absolute, nor can it be limited to mere opinions expressed in the exercise of the mandate, considering that it is a general and perpetual functional immunity that covers acts arising from the totality of presidential powers that operate even after the end of the mandate.

If we take the legal text as a starting point, the issue of the President's immunity appears to be a simple one, and the above mentioned issues regarding parliamentary immunity are applicable here as well. Still, the differences between the two institutions (functioning, powers, organization etc.) raise several issues for which there are no regulations in the fundamental law or in the rules of the Chambers, which is why discussions arise. One of these concerns the liability of the President in the case of acts and deeds involving the exercise of state power, on which the view has been expressed[30] that in the case of such powers only political liability could be incurred and not criminal liability, which could be incurred only for high treason under Art. 96 of the Constitution, and that in other situations, even if the President commits offenses, although in theory criminal liability could be incurred, there is no procedural framework that establishes the procedures to be followed to facilitate this.

In another point of view,[31] it was not accepted that in the case of offenses not covered by immunity, the provisions of indictment of the President for high treason would apply by analogy, but it was considered that the President during his term of office can only be held criminally liable for the crime of high treason and not for other crimes that could be subject to criminal proceedings after the end of his

[27] See the full text at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, February 20, 2025.
[28] Ionescu, C. *et al., op. cit.* note 11, p. 892; see also Ionescu, C.*, op. cit.* note 11, pp. 1218-1219.
[29] Streteanu, F.; Nițu, D., *op.cit*. note 13, p. 236.
[30] Ionescu, C. *et al., op. cit.* note 11, pp. 892-893.
[31] Streteanu, F.; Nițu, D., *op.cit*. note 13, pp. 237-239; see also Hotca, M., A., *op. cit.* note 7, pp. 147-149; Pașca, V., *op. cit.* note 7, pp. 127-128; Rusu, M., I., *op. cit.* note 23, pp. 114-115;

term of office. It has been argued that the same applies to offenses committed by the President prior to the beginning of his term of office. The conclusion to be drawn from this would be that the substantive and procedural criminal immunity in respect of acts committed in the exercise of his functions is perpetual, with the exception of the crime of high treason, and that the procedural immunity in respect of other acts is strictly limited to the duration of the President's term of office, during which the limitation period will be suspended.

Although the opinions expressed are well reasoned, I believe that things should be approached from another perspective as Art. 96 RC which establishes that *"(1) The Chamber of Deputies and the Senate, in a joint session, with the vote of at least two thirds of the number of deputies and senators, may decide to impeach the President of Romania for high treason.*
(2) The proposal for impeachment may be initiated by a majority of the Deputies and Senators and shall be brought to the attention of the President of Romania without delay, so that he may explain the facts alleged against him. (3) From the date of impeachment until the date of removal from office, the President shall be suspended by operation of law. (4) The High Court of Cassation and Justice shall have jurisdiction. The President shall be automatically removed from office on the date of the final judgment of conviction."[32] refers to impeachment. This is a special procedure that is triggered by Parliament if the President commits a specific offense, namely high treason under Art. 398 of the Criminal Code which provides that *"The acts provided for in Art. 394-397, committed by the President of Romania or by another member of the Supreme Council for the Defense of the Country, constitute the crime of high treason and are punishable by life imprisonment or imprisonment for 15 to 25 years and the prohibition to exercise certain rights."*[33]. I consider that by the constitutional provision, it is established in concrete terms which is the body that can be referred for such an offense, how the suspension of the President by right, and finally his removal from office.

In addition, the President may also be suspended from office under Art. 95 RC which stipulates that *"(1) In the event of serious acts in violation of the Constitution, the President of Romania may be suspended from office by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of the deputies and senators, after consulting the Constitutional Court. The President may give explanations to Parliament with regard to the acts alleged against him.*
(2) A proposal to suspend a Member from office may be initiated by at least one-third of the number of Members and Senators and shall be brought to the

[32] See the full text at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, February 20, 2025.
[33] See the full text at https://legislatie.just.ro/Public/DetaliiDocument/109855, February 25, 2025.

immediate attention of the President. (3) If the proposal to suspend the President from office is approved, a referendum shall be held within 30 days at the latest to remove the President from office.",[34] if serious acts have been committed in violation of the Constitution. The provisions of the two legal texts referring to the suspension of the President raise the question of whether the suspension of the President in fact means a waiver of his immunity in order to enable him to be held legally responsible. The way the rules are presented, it would appear either that the suspension of the President means a waiver of his immunity or that the institution of suspension automatically and directly entails a waiver of his immunity, in any case, once the President is suspended he is no longer protected by immunity. Then, the question arises, what would be those serious acts that violate the provisions of the Constitution, for example, causing a traffic accident by the President who personally drove his car and killed a person would be such an act? Art. 22 para. 1 of the RC states that*"The right to life and the right to physical and mental integrity of the person are guaranteed",*[35] therefore an act violating this right of a person may be considered to violate the Constitution and to be of a serious nature,[36] in which case I believe that the President may be suspended from office, his immunity removed and the President held criminally liable. Unfortunately, the provisions of Art. 95 RC do not contain a procedure like Art. 96 RC, under which the President is removed from office as of the date of the final judgment of conviction for the crime of high treason. Art. 95 RC stipulates that in this case, the consequence of the suspension of the President is that a referendum is to be held on his removal from office, i.e. the citizens entitled to vote are called upon to decide whether or not to end his term of office in this way.[37] Under these circumstances, I am of the opinion that only ordinary, minor offenses, which do not violate the RC, could be subject to criminal proceedings after the end of the mandate. This would also apply to acts of a non-criminal nature. It is for Parliament to examine the facts and decide on them on the basis of Art. 95 RC. The opinion I have expressed does not contradict and is not contradicted by the CCR Decision no. 678/2014[38] in which the Court has judiciously argued that the President of Romania, being elected by citizens with the right to vote in the exercise of his mandate, should enjoy immunity, which in its reasoning does not

[34] See the full text at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, February 20, 2025.
[35] See the full text at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, February 20, 2025.
[36] With reference to the aspect that the gravity of the facts must be proven and established, see CCR Decision No. 266 of March 21, 2004, which can be consulted in its entirety at https://www.ccr.ro/wp-content/uploads/2020/10/D0266_07.pdf, February 28, 2025.
[37] For other opinions, analysis and procedural details see also Ionescu, C., *op. cit*. note 11, pp. 1219-1230.
[38] The full decision can be consulted at https://legislatie.just.ro/Public/DetaliiDocument/163602, March 1, 2025.

discuss the situations that could arise under Art. 95 RC. On the other hand, I would also find it hard to believe that a President who committed a serious act, such as the one given as an example, which is in no way connected with the exercise of his mandate, would still have the legitimacy necessary to carry out his duties, and in such circumstances i believe that the solution is the one offered by Art. 95 RC.[39]

3.2.3. Ministerial immunity

Since in Romania the Government is formed by a vote of confidence given by the Parliament to the government team, the Government will be mainly politically accountable to the Parliament for the way in which it has carried out the government program. Political accountability may also be supplemented by legal accountability, depending on the facts held against a particular minister. In this case the legal liability can be criminal and civil. Any form of liability implies guilt and punishment. In the case of political liability, the members of the Government are jointly and severally liable, guilt is established by a vote of the Members of Parliament, and the sanction may even be dismissal from the Government.[40]

As far as the criminal liability of members of the Government is concerned, it has been pointed out[41] that because ministers are not elected by the electoral body, they cannot benefit from an immunity similar to parliamentary immunity, which would give them full freedom in the exercise of their duties and at the same time protect them from any kind of threats, influence or interference from other public authorities or even from citizens. However, Art. 109 para. 2 RC which states that *"(1) The Government is politically accountable only to Parliament for its entire activity. Each member of the Government is jointly and severally politically accountable with the other members for the work of the Government and its acts. (2) Only the Chamber of Deputies, the Senate and the President of Romania have the right to request the criminal prosecution of members of the Government for acts committed in the exercise of their office. If prosecution has been requested, the President of Romania may order their suspension from office. The indictment of a member of the Government entails suspension from office. The High Court of Cassation and Justice shall have jurisdiction. (3) The cases of liability and the penalties applicable to members of the Government shall be regulated by a law on ministerial responsibility."*[42] has provided a ministerial protection measure

[39] For further discussion of the serious offences referred to in Art. 95 RC, see Ionescu, C. *et al., op. cit.* note 11, pp. 984-994.
[40] Ionescu, C. *et al., op. cit.* note 11, pp. 1135-1137.
[41] *Ibid.*, pp. 1140-1145.
[42] See the full text at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, February 20, 2025.

consisting in the right to request the criminal prosecution of a member of the Government for acts committed in the exercise of his office. The right of referral belongs to the Chamber of Deputies, the Senate and the President of Romania and can only concern a person who is a member of the Government. The protection measure is of an objective nature, representing a procedural constitutional guarantee aimed at safeguarding the public interest consisting in the realization of the act of Government through the exercise of the mandate.

Given that in the constitutional system in Romania members of the Government may hold such a position at the same time as deputies or senators, those deputies and senators who also fulfil the position of members of the Government will be criminally liable for acts that are not related to the exercise of their mandate as elected representatives of the people and may be criminally liable if the acts were committed in the exercise of their duties within the Government. In the case of such a person, it is necessary to determine whether his acts are connected with the exercise of his mandate as a parliamentarian or with the exercise of a ministerial function, and if the acts fall into the first category, his immunity should be waived in accordance with the above.

Returning to Art. 109 para. 2 RC, it follows from their content that the members of the Government are criminally liable only if the acts they are accused of are committed in the exercise of their ministerial function, *per a contrario*, for other acts the members of the Government will be liable according to the rules of ordinary law regardless of the position they hold within the Government, and liability may take any of the forms analysed above. Through Art. 8 of the Law no. 115/1999 which provides that *"(1) The following acts committed by members of the Government in the exercise of their office shall constitute offenses and shall be punishable by imprisonment from 2 to 12 years: a) impeding, by threat, violence or by fraudulent means, the exercise in good faith of the rights and freedoms of any citizen;b) presenting, in bad faith, inaccurate data to Parliament or to the President of Romania on the activity of the Government or of a Ministry, in order to conceal the commission of acts likely to harm the interests of the State. (2) The following acts committed by a member of the Government shall also constitute offenses and shall be punishable by imprisonment from 6 months to 3 years: a) unjustified refusal to submit to the Chamber of Deputies, the Senate or their standing committees, within 30 days of the request, the information and documents requested by them in the framework of the activity of informing the Parliament by the members of the Government, pursuant to Art. 110 para. (1) of the Constitution; b) issuing normative orders or instructions of a discriminatory nature on grounds of race, nationality, ethnicity, language, religion, social category, beliefs, age, sex or sexual orientation, political affiliation, wealth or social origin, of such a nature as to infringe human rights. (3) Attempting the acts referred to in para. (1) shall*

be punishable.",[43] the offenses that entail the criminal liability of the members of the Government together with the corresponding punishments were established, these offenses have a specific character and are closely related to the ministerial activity. According to Art. 9 of the same law, if the offences do not fall within those provided for in Art. 8, the liability is a common law liability under criminal law.

The criminal doctrine[44] has held that members of the Government enjoy a procedural immunity for the duration of their term of office which, in relation to acts committed in the exercise of their office, in order to protect the office and not the office holder, requires a kind of authorization prior to the initiation of criminal proceedings. In addition to the above-mentioned forms of immunity, the immunity of the People's Advocate, judicial immunity or family immunity have also been considered,[45] if we refer to domestic law, and, at the international level, those concerning diplomatic representatives, heads of state, representatives of an international organization, members of a foreign army, etc., but to deal with these would go beyond the subject I have set out to address here.

4. IMMUNITY IN EUROPEAN LAW

Just for the sake of giving a full outline to the issue addressed, I would like to point out very briefly at the end of the paper that immunity is also regulated by European legislation. For example, Art. 9 of Protocol No. 7 on the privileges and immunities of the European Union[46] states that during the sessions of the European Parliament its members enjoy the immunities accorded to members of their own parliaments on the national territory, and immunity from arrest or prosecution in the territory of any Member State. Immunity shall continue to have effect while a member is travelling to attend a meeting of the European Parliament and during his or her return travel to the country of origin, but shall not be waived in cases of flagrante delicto. The development of privileges and immunities in terms of their content, the procedure for waiving them and the defense of immunity are governed by Art. 5-9 of the Rules of Procedure of the European Parliament.[47] In accordance with the general provisions at the end of Protocol No 7, privileges and immunities are

[43] The full text of the law can be consulted at https://legislatie.just.ro/Public/DetaliiDocument/59416, March 1, 2025.
[44] Streteanu, F.; Nițu, D., *op.cit*. note 13, pp. 242-244.
[45] Streteanu, F.; Nițu, D., *op.cit*. note 13, pp. 244-250.
[46] The content of the whole act can be consulted at https://www.europarl.europa.eu/cmsdata/199812/A2_RO.pdf, March 1, 2025.
[47] The full Regulation can be consulted at https://www.europarl.europa.eu/rules/rules20240716/Rules20240716_RO.pdf, March 1, 2025.

enjoyed by Members of the European Parliament and other officials such as Members of the Commission, senior staff of the Court of Justice of the European Union, certain categories of staff of the two European banks, etc. Of course, each individual immunity of each individual official at European level would require a detailed approach, but it would go far beyond the proposed topic, taking it in a different direction, which is why I will limit myself to what has been shown so far at European level.

5. CONCLUSION

The above analysis shows that the issue of immunity is permeated by two main principles: the first, according to which any member of a state organization must be held accountable in one or more of the forms provided by law when he or she commits an act against the social rules; the second is that, in order to ensure the unrestricted and proper exercise of their duties, certain members who exercise certain functions within the community are exempt from liability for those acts inherent to their function, but only within the limits of the exercise of that function. In other words, certain members of the community are given a certain mandate by others to do something for the whole community to make things work for the better, and the fear of being held accountable for the decisions made, for the work done, is stopped by immunity. If, however, those members who exercise certain functions commit anti-social acts that are unrelated to the exercise of the function or represent an overstepping of that function, I consider that they are in fact in doing so overstepping the popular mandate given to them, and therefore the community no longer understands to protect them, but to treat them the same as everyone else. Under these circumstances, the procedures for verifying whether or not a person is subject to immunity and for lifting immunity should be swifter and easier, i.e. they should not become insurmountable obstacles to holding to account anyone who has violated the trust of other members of the community. To do otherwise is to turn immunity into a legal institution of unlimited character, which is undesirable in a democratic society and, I would say, harmful for the other members of the community, who, by generalization, see in those members of public office who enjoy immunity a bunch of corrupt persons, weakening confidence in the democratic structures of the state organization, in its smooth functioning in accordance with the general interests of all its members, leading to social outbursts against state institutions and regression in its development.

REFERENCES

BOOKS AND ARTICLES

1. Academia Română, Institutul de lingvistică ”Iorgu Iordan – Al. Rosetti”, *Dicționarul Explicativ al Limbii Române*, Ed. a 2-a, rev., Univers Enciclopedig Gold, București 2009.
2. Bârsan, C., *Convenția europeană a drepturilor omului. Comentariu pe articole*, Ed. 2, C.H. Beck, București 2010.
3. Craiovan, I., *Tratat de teoria generală a dreptului*, Universul Juridic, București 2015.
4. Dănișor, D.; C., Dogaru, I.; Dănișor, G., *Teoria generală a dreptului*, Ed. 2, C.H. Beck, București 2008.
5. Eliescu, M., *Răspunderea civilă delictuală*, Academiei R.S.R., București 1972.
6. Hotca, M., A., *Manual de drept penal. Partea generală*, Universul Juridic, București 2024.
7. Ionescu, C., *Tratat de drept constituțional contemporan*, Ed. 3, C.H. Beck, București 2019.
8. Ionescu, C.; Dumitrescu, C., A., (coordonatori), *Constituția României. Comentarii și explicații*, C.H. Beck, București 2017.
9. Lefterache, L.,V., *Drept penal. Partea generală*, Ed. a 4-a, Hamangiu, București 2024.
10. Pascu, I., *Drept penal. Partea generală*, Ed. a 2-a, Hamangiu, București 2009.
11. Pașca, V., *Drept penal. Partea generală*, Ed. a III-a, Universul Juridic, București 2014.
12. Popa, N., *Teoria generală a dreptului*, C.H. Beck, București 2008.
13. Rusu, M., I., *Drept penal. Parte generală*, Hamangiu, București 2014.
14. Streteanu, F.; Nițu, D., *Drept penal. Partea generală, Universul Juridic*, București 2014.
15. Țiclea, Al., *Răspunderea disciplinară. Teorie și jurisprudență,* Universul Juridic, București 2014.
16. Vida, I.; Vida, I., C., *Teoria generală a dreptului*, Universul Juridic, București 2016.

LEGAL ACTS

1. Romanian Constitution, published in M. Of. No. 767, October 31, 2003.
2. Law No. 96/2006 on the status of deputies and senators, republished in M. Of. No. 49, January 31, 2016.

3. Rules of the Chamber of Deputies, republished in M. Of. No. 1277, December 18, 2024.
4. Rules of the Senate, republished in M. Of. No. 9, January 9, 2024.
5. European Convention on Human Rights, published in M. Of. No. 135, May 31, 1994.
6. Law no. 115/1999, published in M. Of. No. 300, June 28, 1999.
7. Protocol No. 7 on the privileges and immunities of the European Union, published in O. J. No. C 202/266, 07.06.2016.
8. Rules of Procedure of the European Parliament, published online.

COURT DECISIONS

1. Decision of Constitutional Court of Romania No. 96/21.03.2002, published in M. Of. No. 308, May 9, 2002.
2. Decision of Constitutional Court of Romania No. 266/21.03.2007, published in M. Of. No. 322, May 14, 2007.
3. Decision of Constitutional Court of Romania No. 678/13.11.2014, published in M. Of. No. 886, December 5, 2014.

NETWORK RESOURCES

1. https://www.presidency.ro/ro/presedinte/constitutia-romaniei
2. https://legislatie.just.ro/Public/DetaliiDocument/71194
3. https://legislatie.just.ro/Public/DetaliiDocument/67896
4. https://www.senat.ro/pagini/reg_sen/REG_SENATULUI_republicare_ianuarie_2025.htm
5. https://legislatie.just.ro/Public/DetaliiDocument/109855
6. https://legislatie.just.ro/Public/DetaliiDocument/35861
7. https://www.ccr.ro/wp-content/uploads/2020/10/D0266_07.pdf
8. https://legislatie.just.ro/Public/DetaliiDocument/163602
9. https://legislatie.just.ro/Public/DetaliiDocument/59416
10. https://www.europarl.europa.eu/cmsdata/199812/A2_RO.pdf
11. https://www.europarl.europa.eu/rules/rules20240716/Rules20240716_RO.pdf

ISSN 3043-9906