



# UNIVERSITATEA TITU MAIORESCU

The 19<sup>th</sup> International Conference

## EDUCATION AND CREATIVITY FOR A KNOWLEDGE BASED SOCIETY

### LAW PROCEEDING BOOK



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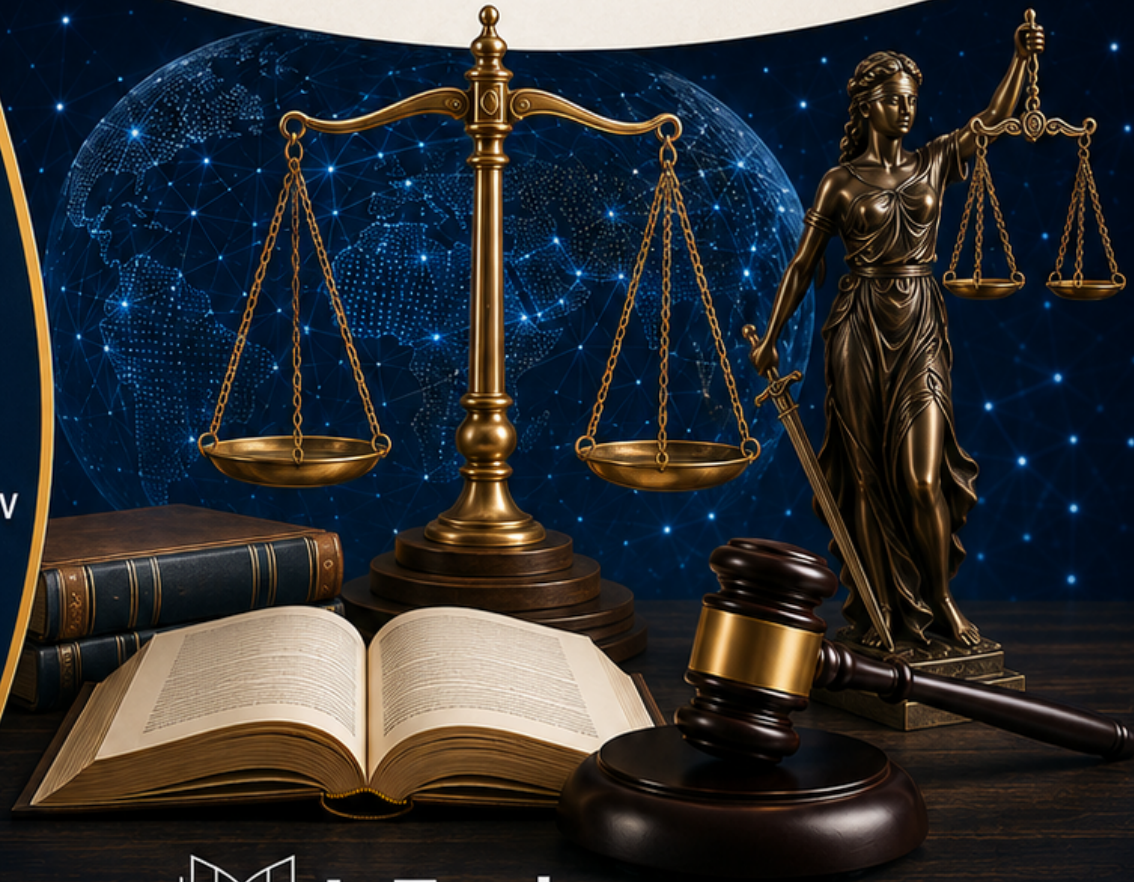
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I am gratified to have the honour to put forward the vote of thanks to all the Congressional Coordinators, Congressional Committees, and Authors who provided intensive work performance for the Conference.

We aim to contribute international trade field through our International Conference “Education and creativity for a knowledge based society (19th edition)”, Bucharest, Romania, November 20 - 22, 2025.

A beautiful congress with more than international Conference criteria is waiting for all of you. I wish to meet you all at these new international conferences...

**PhD University Professor Titi Paraschiv**

**Vicerector of Titu Maiorescu University**

International Conference “Education and creativity for a knowledge based society (19th edition)”, Bucharest, Romania, November 20 - 22, 2025.

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# CONSIDERATIONS ON LEGAL PROVISIONS OF CRIMINAL OFFENCES UNDER THE COMPANIES LAW

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## **Abstract:**

*Companies Law no. 31/1990<sup>1</sup>, a fundamental pillar of Romanian company law, gives legal provisions not only the establishment, operation and dissolution of commercial companies, but also a set of criminal offenses intended to protect corporate assets, public trust and the fairness of economic relations. Thus, in Title VIII „Contraventions and Offences”, a series of offenses are criminalized whose qualified or unqualified subjects are expressly provided for by the legal text. Thus, the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company, the censor, the judicial liquidator or other persons who are expressly targeted by the incrimination norm may have the quality of active subject of the offenses incriminated by the legal texts. The present work proposes an analysis of the legal regime of the offenses regulated by the Companies Law, in relation to the constitutive content of these offenses, from a doctrinal and practical perspective, taking into account the updated provisions of the law, correlated with the norms of the Criminal Code and related legislation.*

## **1. INTRODUCTION**

The provisions of corporate law offenses aims to protect the economic and legal values that underlie the functioning of the business environment: good faith, transparency, competitive loyalty and the security of the civil circuit. In Romania, the Companies Law no. 31/1990 (republished and amended successively, most recently by Law no. 299/2024) provides in Title VIII - Criminal Liability - a distinct set of offenses, some having the character of their own offenses, committed exclusively by persons with special capacity (administrators, censors, liquidators), and others with a common law character adapted to the corporate environment.

These provisions complement the general regime of economic offenses in the Criminal Code, ensuring specific protection for legal relationships arising from the acts of incorporation and operation of companies carrying out commercial activity.

Law no. 31/1990 has undergone numerous amendments, determined by the need to harmonize with European directives on corporate governance and combating economic and financial crime. In its current form, the main provisions criminalizing acts as crimes are contained in articles 271–280, grouped thematically as follows:

- Offences concerning the establishment of companies (art. 271–272);
- Offences concerning the operation of companies (art. 273–276);
- Offences concerning dissolution and liquidation (art. 277–278);
- Provisions concerning the liability of legal persons and complementary sanctions (art. 279–280).

This structure highlights a functional logic: criminal sanctioning of any conduct that violates the principles of transparency, fairness and good management of corporate assets.

## **2. OFFENCES COMMITTED BY PERSONS WITH MANAGEMENT OR SUPERVISORY POSITIONS WITHIN THE COMPANY (art. 271–272)**

The provisions of art. 271 of the Companies Law criminalize several acts of persons with management and/or supervisory responsibilities within the company: in bad faith, in prospectuses, reports and communications addressed to the public, false data on the establishment of the company or on its economic or legal conditions or concealing, in bad faith, in whole or in part, such data; in bad faith, presenting to shareholders/associates an inaccurate financial situation or with inaccurate data on the economic or legal conditions of the company, in order to conceal its real situation; deliberate obstruction of experts in the exercise of their duties.

The active subject of this norm is qualified, being, as the case may be, the administrator, the general manager, the director, the member of the supervisory board or the board of directors or the legal representative of the company. When the administrator or member of the supervisory board is a legal person, the rules of criminal

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<sup>1</sup> Republished in the Official Gazette Part I No. 33 of January 9, 1998

liability of the legal person shall apply<sup>2</sup>. The penalty provided by the legislator is imprisonment from 6 months to 3 years or a fine.

The specific legal object of this offense, which can be committed in any of the ways listed in points 1-3, consists of that group of social relations that target the trust that the public, shareholders or associates and authorities must have in the reality and accuracy of the information that certain categories of documents emanating from companies must contain.

The doctrine<sup>3</sup> emphasized that the passive subject is unqualified, in the case of the offense under letter a), and can be any natural or legal person. In the case of the offenses under letters b) and c), the passive subject is any of the associates/shareholders, respectively the company, as a legal person; the passive subject is not the state, because it is not harmed by these offenses, but remains in the position of a general passive subject<sup>4</sup>.

The form of guilt is intention, the acts can be committed exclusively in bad faith, which makes it particularly difficult to prove the commission of the act, the jurisprudence on the matter being poor<sup>5</sup>.

Article 272 incriminates specific abuses in the management of the company's assets.

The active subject of the crimes regulated by this article is qualified, being, as the case may be, the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company, including the *de facto* administrator<sup>6</sup>. If the acts are committed by employees of the company, as conventional representatives, they no longer fall under any of the hypotheses listed in art. 272 of Law no. 31/1990 but may possibly constitute the offenses provided for by the Criminal Code (such as embezzlement, fraudulent management, etc.). When the administrator or member of the supervisory board is a legal person, the rules of criminal liability of the legal person will apply.

The passive subject is the company, as a legal person, and not its associates, because the latter is prejudiced as a result of the act, by the diminution of its assets; the passive subject is not the state either, because it is not harmed by these offenses, but remains in the position of a general passive subject<sup>7</sup>.

According to paragraph (1), under penalty of imprisonment from 6 months to 3 years or a fine, the active subject (same professional classification) who commits any of the following acts is criminally liable for:

- Art. 272 (1) (a): Acquisition, on behalf of the company, of shares of other companies at a clearly overvalued price or sale of shares of one's own company at clearly undervalued prices, with the aim of obtaining personal benefit to the detriment of the company.

The special legal object of the offense provided for in art. 272 para. (1) lett. a) is the social relations that protect the assets of a company carrying out commercial activity against damaging acts committed intentionally by its management bodies.

The offense has no material object. The shares issued by another company, which the company managed or managed by the perpetrator acquires or disposes of at a clearly overvalued or undervalued value, represent the means used by the perpetrator to commit the offense<sup>8</sup>.

The objective side of the crime consists in the acquisition or alienation, by the company managed by the perpetrator, of shares issued by another company, and the purchase or sale price of these shares is clearly overvalued, respectively clearly undervalued in relation to the effective value of the shares that are the object of the purchase or sale operation. As a result, the acquisition or alienation of own shares, even at clearly overvalued, respectively clearly undervalued values, does not fall within the hypothesis of the crime, although the social danger is the same. The reason for incriminating the act was to protect the company from the risks of speculative operations that the management or control bodies can carry out through and with its money, assuming only the gains, but not the losses suffered by the company.

- Art. 272(1) (b): The use, in bad faith, of the assets or credit enjoyed by the company, for purposes contrary to its interests or for personal benefit or for the benefit of another company in which the defendant has interests. The text of the law that establishes a prohibition for the person who is the legal representative of a company to use

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<sup>2</sup> Bodu, S., *Legea societăților comentată*, Ed. Rosetti International, București, 2023, p. 246

<sup>3</sup> Bodu, S., *Legea societăților comentată*, ediția a II-a din 15-ian-2023, Wolters Kluwer, *Comentariu la articolul 271 din Legea societăților*, <https://sintact.ro/#/commentary/587240063/1/bodu-sebastian-legea-societatilor-comentata-editia-a-ii-a-din-15-ian-2023-wolters-kluwer?cm=URELATIONS>

<sup>4</sup> Hotca, M.A., (coordonator), *Infrațiuni prevăzute în legi speciale. Comentarii și explicații*, ed. 3. Ed. C.H. Beck, București, 2013, p. 349.

<sup>5</sup> Toader, Th., *Răspunderea penală a administratorilor în dreptul societății*, <https://revista.universuljuridic.ro/raspunderea-penala-a-administratorilor-in-dreptul-societar/>

<sup>6</sup> Bodu, S., *Tratat de drept societății*, ed. 2., Ed. Rosetti International, București, 2019, p. 718

<sup>7</sup> *Ibidem*

<sup>8</sup> Sebastian Bodu, *op. cit.*, p. 53

its assets, directly or through intermediaries, for his own benefit or to favor another company in which he has direct or indirect interests.

It is the offense with the most applications in judicial practice among all the offenses regulated by Title VIII. The administrators or representatives of the company have the obligation to act loyally in the interest of the company. The norms of the company law (art. 144 ind. 4 paragraph (1) of Law 31/1990) require administrators to exercise their mandate with loyalty. Thus, the analyzed legal provision punishes abuse in the administration of the company's assets.

The special legal object of the offense provided for in art. 272 paragraph (1) letter b) is the social relations that protect the assets of a company against abusive acts of its management bodies or, in other words, the prevention and combating of the abuse of assets and the abuse of credit.

This offense has no material object, the goods not suffering a physical change through use; the same goes for credit, which is an intangible asset.

The objective side of the crime consists in the use, in bad faith, of goods and credit, in a way contrary to the interest of the company or in the interest and benefit of the perpetrator or of a company in which the perpetrator has a direct or indirect interest.

Paragraph (2) of the same article provides the exception to the rule and provides: "The act provided for in paragraph (1) letter b) does not constitute a crime, if it was committed by the administrator, director, member of the board of directors or the legal representative of the company in the framework of treasury operations between the company and other companies controlled by it or which control it, directly or indirectly."

In the case law, it has been held that the act of "bad faith use of the company's assets or credit, for a purpose contrary to its interests..." is held responsible for administrators who favored other companies or exploited the company's assets in their own interests. By way of example, in a decision in this case, the court held that the act of the defendant ##### consisting in the fact that, as the legal administrator of SC ##### SRL, between June 2008 and February 2011, he successively collected, in the performance of the same criminal resolution, monthly rents from SC ##### SRL, following the rental in his own name and claiming to be the owner, of the property owned by SC ##### SRL (located in Sălăjeni, no. 216/A), received in commodification from this company following the agreement with the defendant ##### (representative of the company), meets the constitutive elements of the crime of using, in bad faith, goods or credit enjoyed by the company, for a purpose contrary to its interests or for his own benefit or to favor another company in which he has direct or indirect interests, in the form continued, provided for by art. 272 paragraph 1 letter b) of Law 31/1990 with the application of art. 41 paragraph 2 of the 1968 Penal Code.

The material element of the objective side consists of the material acts by which the defendant used the real estate property of the company whose administrator he was, for personal purposes, renting the property after concluding the loan agreement with the company represented by the defendant ##### and collecting the monthly rents from SC ##### SRL.

The immediate consequence consists of the violation of social relations relating to the administration of a commercial company in its interest, the causal link resulting from the materiality of the act<sup>9</sup>.

• Art. 272(1) (c): Loans granted by the company (or affiliated companies) to the administrator, in an amount exceeding the legal limit (art. 144 ind. 4 para. 3) or the guarantee by the company of the administrator's own debts.

This offense falls under the category of offenses of abuse of office in the corporate field, aiming to protect the company's assets and public trust in the business environment.

The text of the law sanctions loans granted by the company to its own administrators, directors or representatives, in order to prevent the conflict of interest between the company's interest and the personal interest of its management bodies.

Its rationale is twofold: economic, on the one hand, to prevent the diminution of the company's assets through unauthorized "self-lending", and ethical and legal, on the other hand, to guarantee the management's loyalty to the company, avoiding the abuse of a dominant position within the company.

The offense provided for in art. 272 para. (1) letter c) is a separate offense (can only be committed by persons who hold the capacity required by law: founder, administrator, director, member of the supervisory board or of the board of directors or legal representative of the company). It is a dangerous crime, since the simple realization of the loan or the use of the company's assets is sufficient to attract criminal liability, without the need to cause actual damage<sup>10</sup>.

The active subject of the crime is limited to the persons expressly indicated in the text of the law. The capacity of administrator or representative must exist at the date of the commission of the act, and the lack of this capacity excludes criminal liability under this letter.

<sup>9</sup> Decizia nr. 428/2015 pronunțată de Curtea de Apel Cluj în dosarul nr. 7093/337/2013, <https://www.rejust.ro/>

<sup>10</sup> Popa, B., Aspecte penale privind utilizarea bunurilor societății de către administratori, Revista de Drept Comercial nr. 2/2022, pp. 73-85

The legal object is the social relations relating to the protection of the company's assets and ensuring the integrity of the corporate management.

The material object:

– in the case of a loan: the sums of money or goods borrowed;  
– in the case of the use of goods: the movable/immovable property, assets or credit of the company used for personal purposes.

Regarding the objective side, the act consists alternatively of: borrowing in any form (directly or through an intermediary) from the company it manages and using, in bad faith, the company's assets or credit, for a purpose contrary to its interests or for one's own benefit/other persons. Therefore, the norm brings together two distinct conducts: "self-lending" (absolutely prohibited, with the exceptions of paragraph 2); "abuse of the company's assets" (for a purpose contrary to its interests).

Regarding the subjective side, the form of guilt required is direct intention, and sometimes bad faith is expressly provided. It presupposes the awareness of the active subject that he is acting contrary to the interests of the company and the will to obtain a personal benefit or to favor a third party<sup>11</sup>.

Paragraph 3 of the same article provides for the exception to the rule and states: "The act provided for in paragraph (1) letter c) does not constitute a crime if it is committed by a company that has the status of founder, and the loan is made from one of the controlled companies or that controls it, directly or indirectly."

Therefore, internal loans between companies in the same group (for example, parent company and subsidiary) may be exempted if they are economically justified and made for treasury purposes, without bad faith.

From a jurisprudential perspective, the Constitutional Court analyzed the constitutionality of art. 272 paragraph (1) letter c), holding that the text is predictable and proportionate, since the legislator has the freedom to criminalize acts that affect the loyalty of the company management. The Court considered that "self-lending" represents a major risk for the company's assets and creditors.

As an example, the court held an administrator liable for transferring funds from the company's accounts to personal accounts under the pretext of "advances for travel", qualifying the act as bad faith use of the company's assets, within the meaning of art. 272 para. (1) c)<sup>12</sup>.

In similar cases, it was held that simple temporary withdrawals of cash that are later returned do not remove the criminal nature of the act if fraudulent intent is proven<sup>13</sup>.

By Decision no. 108/2025, the High Court of Cassation and Justice established that the administrator of a limited liability company cannot be an active subject of the offense provided for in art. 272 para. (1) let. c) (unpermitted loans), since the incriminating provision refers exclusively to joint-stock companies. This solution reaffirms the strict delimitation of active subjects in the Companies Law.

- Art. 272(1) (d): Violation of the provisions regarding the company's reserve fund (art. 183).

The specific legal object of the offense regulated in art. 272 para. (1) letter d) is the social relations that protect the integrity of the share capital of a commercial company - regardless of the legal form - and, implicitly, the assets of the social creditors who trust in the general corporate pledge represented by the subscribed share capital.

This offense has no material object because the legal reserves are constituted by deductions in the accounting sense, so that, physically, there is no movement of money, the company's cash being recorded in its bank accounts or, within the limits of the law, in the company's cash. The legal reserves represent, like the share capital, a liability account in the balance sheet liabilities, while the money represents the company's assets, recorded in the related balance sheet asset items.

The objective side of the crime is represented by the passivity of the members of the competent administrative body to establish and maintain the reserve fund of the company they administer/lead, by not taking - although it is imperatively required - a quota of 5% of the annual profit, until it reaches a minimum of 20% of the share capital.

Most companies established in Romania are limited liability companies, in which case the Companies Law no longer provides for a minimum level of share capital, thus, the minimum level of the legal reserve provided for by law is completely insignificant (in most limited liability companies being approximately 20 lei).

### **3. CAPITAL MARKET MANIPULATION AND ILLEGAL DISTRIBUTION OF DIVIDENDS (art. 272<sup>1</sup>)**

The provisions of art. 272<sup>1</sup> criminalize the act of the founder, administrator, general manager, director, member of the supervisory board or of the management board or the legal representative of the company who:

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<sup>11</sup> Udroiș, M., Drept penal. Partea specială, vol. II, București: Editura C.H. Beck, 2023, p. 422-424

<sup>12</sup> Curtea de Apel Cluj, decizia nr. 44/2015, <https://www.rejust.ro/>

<sup>13</sup> Curtea de Apel București, secția penală, decizia nr. 120/2020, <https://www.rejust.ro/>

a) spreads false news or uses other fraudulent means that have the effect of increasing or decreasing the value of the company's shares or bonds or other securities belonging to it, in order to obtain, for himself or for other persons, a benefit to the detriment of the company;

b) collects or pays dividends, in any form, from fictitious profits or which could not be distributed during the financial year based on the interim and annual financial statements, based on the annual financial statements, or contrary to those resulting from them.

The legal norm responds to several objectives:

a) Protecting the company's assets and equity between associates/shareholders, by sanctioning the manipulation of securities held by the company or of the titles belonging to it. Thus, letter (a) targets "market manipulation" practices internal to the company or in the value chain of shareholders.

b) Guaranteeing the legality and substantiation of dividend distribution, since letter (b) prohibits the payment/collection of dividends from fictitious profits or profits that could not be distributed - which protects creditors, associates and the capital market.

c) Strengthening the criminal-corporate liability of management bodies (administrator, director, board member, etc.) in companies with shares or bonds.

Therefore, art. 272<sup>1</sup> is a provision of "criminal diligence" in corporate law, which contributes to the discipline of the securities market and the prevention of internal abuses of the company.

The legal norm defines two distinct offenses, in letters a) and b) of the legal text:

- they are own offenses, that is, they assume the quality of the active subject (founder, administrator, etc.).

- they are criminal in nature, with custodial sanctions (1-5 years).

- they are, for the most part, offenses of result: in letter (a) the intended effect – the increase or decrease in the value of the securities is part of the offense; in letter (b) the payment/collection of illicit dividends is the result of the action.

They have as their special legal object the social relations that are located at the intersection of corporate law and capital market law.

The active subject of the offenses provided for in art. 272<sup>1</sup> is qualified, being, as the case may be, the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company, including the de facto administrator.

The passive subject is the commercial company, because the latter is prejudiced as a result of the act, by the diminution of its patrimony. In the case regulated in letter b), in addition to the company, the passive subject are also the social creditors or, if the illegal distribution of dividends benefits only some of the associates, the passive subject are the other associates; the passive subject is not the state because it is not harmed by these crimes, but remains in the position of a general passive subject<sup>14</sup>.

In the case law, it was held that the act of the defendant who, as administrator of S.C. P.P. SA Galați, paid the associates of this company (among which the defendant was also included), starting with May 31, 2000 and until October 2, 2000, the total amount of 100,000,000 lei ROL, as dividends for the year 2000 (the current year), before the closing of the year, the end of the financial accounting exercise, the preparation of the balance sheet and the verification and approval of the financial-accounting execution by the authorized bodies within the public finances, meets the constitutive elements of the offense provided for by art. 272<sup>1</sup> point 2 of Law no. 31/1990 with the application of the provisions of art. 41 paragraph (2) of the Criminal Code and art. 13 of the Criminal Code<sup>15</sup>.

#### **4. OFFENCES RELATING TO SHARES AND SHARE CAPITAL (art. 273–275)**

Art. 273 criminalizes illegal issuances and transactions of securities: issuing shares at a value below the legal value or not fully paid, before the full payment of the share capital, using shares not subscribed by the general meeting, granting loans/guarantees for shares under impermissible conditions or surrendering shares before the legal deadlines. The active subject is the administrator or persons with management responsibilities, and the punishment is imprisonment from 3 months to 2 years or a fine. The legal object is the integrity of the share capital and the protection of creditors and shareholders from operations that would illegally modify the capital structure.

The active subject of the crime is qualified, being, as the case may be, the administrator, general manager, director, member of the supervisory board or the board of directors or the legal representative of the company, including the de facto administrator. These persons, as members of a management body, are those in whose competence issues related to corporate securities fall. When, according to the form of management of the company, there are several levels of management (as in the case of joint-stock companies managed in a unitary system with delegation of management or managed in a dual system), the qualified subject is that member of such a level to

<sup>14</sup> Hotca, M.A., (coordonator), *op. cit.*, p. 349

<sup>15</sup> ÎCCJ, S. pen, dec. nr. 2091 din 27 mai 2010, [www.scj.ro](http://www.scj.ro)

whom the respective issue actually falls, according to the law and, where the law does not provide, according to the internal act of the company (the constitutive act, the decision of the general meeting, the internal regulations or the decision of the management body). When this is not provided for either, the qualified subject is the member of the management body (the director, respectively the member of the board of directors). Offences are regulated only for joint-stock companies, although certain acts are equally socially dangerous when they occur in connection with another corporate form, which represents a legislative handicap, possibly generating abuses. The incriminated acts present the risk of prejudice or lead to actual prejudice, as the case may be, to some of the associates, the social creditors and the company itself (as a legal person), which therefore represent the passive subjects; the passive subject is not the state, because it is not harmed by these crimes, but remains in the position of a general passive subject<sup>16</sup>.

Text of art. 274 criminalizes the act of the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company who:

a) carries out the decisions of the general meeting regarding the change of the form of the company, its merger or division or the reduction of the share capital, before the expiry of the deadlines provided by law;

b) carries out the decisions of the general meeting regarding the reduction of the share capital, without the members having been executed for making the payment due or without them having been exempted, by the decision of the general meeting, from paying subsequent payments;

c) carries out the decisions of the general meeting regarding the change of the form of the company, merger, division, dissolution, reorganization or reduction of the share capital, without informing the judicial body or in violation of the prohibition established by it, in the event that criminal proceedings have been initiated against the company.

This rule is part of the regulations on the criminal liability of management bodies in the context of capital changes of the company and reorganization procedures.

Art.274 has as its main objective the protection of the corporate and patrimonial order of joint-stock companies and limited partnerships by shares, as well as the prevention of criminal abuses in the process of changing the legal form, merger, division, dissolution, reorganization or reduction of the share capital:

a) Premature execution of the decisions of the General Meeting of Shareholders (lit. a), which could harm the company or third parties by executing decisions before the legal deadlines.

b) Reduction of the share capital without respecting the payments due (lit. b), which would affect the financial balance of the company and its creditors.

c) Execution of decisions in a criminal context without informing the judicial body or violating its prohibitions (lit. c), thus preventing fraud or damage in criminal proceedings.

Art. 275 (1) of Law No. 31/1990 of companies: Any administrator, general manager, director, member of the supervisory board or of the board of directors who:

a) violates, even through intermediaries or simulated acts, the provisions of art. 1443;

b) fails to convene the general meeting in the cases provided for by law (...);

c) begins operations on behalf of a limited liability company before the full payment of the share capital has been made;

d) issues negotiable securities representing shares of a limited liability company;

e) acquires shares of the company on its behalf in cases prohibited by law.

From the point of view of criminal law, this offense is the "guarantor" of the functioning of commercial companies, in the sense that decisions regarding the fate of the company are adopted in the general meeting of associates and there is always the possibility for the associate who is injured by being unable to exercise his rights as an associate, to file a criminal complaint against the manager who does not convene, under the terms of the law, the meeting of associates.

### **CONCLUSIONS:**

The legal regime of the crimes analyzed in this article represents an essential component of the criminal law of businesses, with the role of guaranteeing the integrity of the economic activity and protecting the interests of the associates and creditors.

In a globalized economic context, characterized by complexity and interdependence, the need for a coherent criminal policy in the matter of companies carrying out commercial activity is obvious. At the same time, a better correlation between corporate, fiscal and criminal law is required, as well as the consolidation of internal compliance mechanisms within legal entities. The analysis highlights the fact that the sanctioning regime in the criminal matter of companies aims mainly to protect the social heritage, the subscribed capital and the integrity of the company's internal transactions. Each crime has as active subject persons with a management or control position in the company, and the sanctions provided (imprisonment and/or fine) aim to discourage abuses specific to the business environment. Integrating the relevant case law, we have illustrated how the courts interpret

<sup>16</sup> Hotca, M.A., (coordonator), *op. cit.*, p. 349

the limits of these crimes. In conclusion, the legal regime of these crimes reflects a balance between facilitating commercial activity and strictly sanctioning fraudulent behavior in the management of companies.

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# CONCEPTUAL CLASSIFICATIONS OF JUSTICE - LEGAL AND PHILOSOPHICAL CONCEPTS

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## Abstract:

*Justice is the concept of justice based on moral ethics, reason, law, natural law, fairness and equity. The right is usually equivalent to justice because, the latter is characterized by a series of rational elements. The concept of justice refers to fairness and equity, both as a moral principle and as a judicial organization. In a broad sense, justice means the equality of all before the law and the fair application of rights and obligations, and in a narrow sense, it is related to the attribution of each person what is due to him. In fact, the force of justice, its purpose and role lie precisely in the element of balance between justice and power, and reaching this balance, affecting it, makes justice no longer justice, but power. It is undeniable that the act of justice can only be achieved through force, the power of the state, knowing that the strongest will also be the one listened to, but it is equally important that power manifests itself justly, that is, in a framework governed by equal laws for all and in which man, with his rights and needs, is at the center of the legislator's concerns.*

*Keywords: justice, law, rule of law, equity, ethics.*

*Justice is the moral concept of justice based on ethics, rationality, law, natural law, fairness and equity. Conception of justice is a key feature of society.<sup>1</sup>*

Revealing the role of law as the main guarantor of social order and regulations and respect the rights and freedoms of individuals, a number of authors<sup>2</sup>, among which Mircea Djuvara, considered that the right<sup>3</sup> is usually equivalent to *justice* because, the latter is characterized by a series of *rational* elements (such as equal parts, rational and logical nature of justice, the idea of fairness and proportionality in the distribution of justice) and *actually* (embodied in the stability of the laws, their uniform application).

Consequently, the right can not fully achieve these elements<sup>4</sup> rational and actually *social justice's* elements, and therefore it can never be, and at the same time, *fair, just* and *equitable* for all individuals, even as a society or just not right will be more effective and functional than an unjust in terms of legal and legislative, which leads to the relativity of criteria which are defined according to the notions of *justice* and *law* in different legal systems.

For Aristotel as for Plato, the *supreme good*<sup>5</sup> is happiness produced by virtue. The state is a necessity not a simple alliance is a perfect organic union, which aims universal virtue and happiness. It regulates the life of citizens through laws that dominate his life for individuals does not belong to them, but the state.

The content of laws is *justice*, whose principle is *equality*.<sup>6</sup>

Starting from Aristotel's theory of justice in terms of classification theory and practice of law, believe they can be distinguished several types or ways of achieving justice in society.

*Distributive justice*, based on the guarantee and the realization of rights and obligations of individuals in accordance with certain rules established by the legislature in proportion so that each person receive what he deserves (which is worth) based on its contribution in the company. Usually, distributive justice refers to proportional equality established by the legislature considering what caused the corporate (state) of its members

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<sup>1</sup> Popa Nicolae, General Theory of Law, Actami Publishing House, Bucharest, 1996, p.100.

<sup>2</sup> Popescu Sofia, General Theory of Law, Lumina Lex Publishing House, Bucharest, 2000.

<sup>3</sup> Mircea Djuvara, Rational law, sources and positive law, Publishing HouseAll, Bucharest – 1995, p.114.

<sup>4</sup> Craiovan Ion, Philosophy of Law or Law as Philosophy, Universul Juridic Publishing House, Bucharest, 2010, p. 219.

<sup>5</sup> Platon, Republic, in Works V, Scientific and Encyclopedic Publishing House, Bucharest, 1986, p.309.

<sup>6</sup> Aristotel, Rhetoric, translated by Maria-Cristina Andries, Publishing HouseIRI, Bucharest, 2004., p.98.

that apply to the distribution of honors and property and that each of the partners tend to get a merit or right. Is proportional justice, or what Aristotel called even "geometric"<sup>7</sup>.

Rawls's *theory of distributive justice* is based on the assumption that society is a system of cooperation for mutual benefits between individuals. Justice thus embodies the most important value is related political and fundamental institutions of society.<sup>8</sup>

*Theory of justice as fairness* is a moral to accept Rawls, defined as the nucleus of a panoply of principles, standards, ideals, defining political values. Author's theory is a moral concept founded for specific purposes such as political institutions, social, economic, and in particular, apply basic structure of society.<sup>9</sup>

Like Aristotel treated and equity issue<sup>10</sup> - *epieikeia* - as something distinct from justice. In essence, he says, what is fair is really fair, but not according to law. Equity is rather a correction of *legal justice*. Because of the irregular and natural variety of the material on which the law seeks to regulate, it can not provide for a fair treatment for every possible case. Therefore, equity does not act by changing the general law, but by a popular vote to soften the ad hoc application and by an arbitrator agreed by the parties to a dispute.

In another work, *Rhetorica*, he says what is right and fair is a kind of justice that goes over the *legal justice* that people prefer a judge who is guided by the principle of equity, but a judge applying strict the law. Therefore the judge was actually invented.

Aristotel does not analyze *epieikeia* in terms that are related to the natural sense of justice or moral hierarchy in which the spirit of the law would have preferred the letter. Aristotel's idea is not up to the Athenians to recognize the dual system of law and equity, familiar English and, in a different form, Roman law. On the contrary, it can be shown that even when the facts bring out something resembling good faith that the British and the Romans would have been a fair defense and justice, Athenian courts were bound by the letter of the law and not apply the principle of equity in opposition to it.

In modern terms, we may qualify as matching this definition of a *legislative judiciary*, of the kind that appears in statutes and other government measures that distributes benefits and sets limits and proportions that we can accept as rational and fair vis-a-vis a problem raised.

*Coercive justice*, trying to achieve a certain equality of rights and obligations of individuals, so that each individual was not due or to receive no more and no less than others. It is conceived as a kind of "equality" between what you offer and what individuals receive, between acts and their deeds and their consequences.

This type of coercive justice, which could still appoint as proposed by Giorgio Del Vecchio, and corrective equalization, ie regulating the relations of mutual exchanges. This court must but understood in a broader sense, applying it not only voluntary or contractual relations, but also those whom Aristotel called them unintentional, arising from crime, because there is some equality that is required correspondence between crime and punishment.

Coercitive justice is not *legislation justice* but rather what we call a judicial justice, justice made by the courts. Her mission is to restore a balance where the balance of justice was unbalanced. For Aristotel does not matter the quality of the human parties involved in such an imbalance: ie it does not matter. damaged as a good man a bad man, what matters is that there was an inequality which must be removed, and the judge seeks to make them equal with the penalties imposed.

*Coercive justice* and it presents two forms: one that occurs in cases of voluntary and involuntary situations that occurs.

Depending on the method of achieving this kind of justice can be of two kinds:

*Commutative justice*, which refers to an equivalent relation between individuals, when they establish their own measure or "norm" opposable relations between them (for example, the case of the purchase, repair damage, etc..)

*Commutative justice* is justice that governs relations between individuals, which is based on justice issues like gender equality and the legal position of equivalent value of the benefits and consideration (such justice finds expression in formula sublimated *do ut des* (I give it to you, so that you can give it.)). Commutative justice restored, also the balance between private parties when it is disturbed or broken. It is the simplest form, the form of elementary justice. Such justice bind (*juris vinculum*) or actively or passively, so collectivity (legal, collective entities) and individuals (natural persons), without distinction - when it is a collective entity - if a corporate body (person) public or private, without distinguishing whether it is a legal bond in domestic or international. For a community to participate in commutative justice it must be an organized community, thus enjoying the quality of legal entity (whether such a community is organized in a sociological sense, so the

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<sup>7</sup> Craiovan Ion, *Treatise on the general theory of law*, Universul Juridic Publishing House, Bucharest, 2007, p.88.

<sup>8</sup> <http://cw.routledge.com/textbooks/philosophy/downloads/a2/unit3/political-philosophy/JusticeRawlsNozick.pdf>.

<sup>9</sup> Rawls John, *Political Liberalism*, New York: Columbia University Press, 1993, p. 11.

<sup>10</sup> Aristotel, *Nicomachean Ethics*, translation from the Greek language: Traian Braileanu, Antet XX Press, Bucharest, 1988. p. 114.

functional group with structure and internal hierarchy crystallized either in the legal sense, so as a legal entity recognized authority in accordance with the fulfillment of a legal procedure under the condition of meeting legal requirements stated for such recognition);

*Justice "judicial"* intervention is based on the third factor (the judge) in the event of dispute or neantelegere of individuals about their rights and liabilities.

Jean Dabin<sup>11</sup> believe that there are so-called *legal justice*, which is based on legal duties and obligations that individuals owed the community (in this case, the state), it can claim collective performance and achievement by individuals of such obligations (such as , for example, taxes, various fees and cash contributions, provision of social activities for the community, etc.).

So *legal justice* (or justice is the general governing relations between subjects of private law and authorities, consisting in obedience to the order so the community (social community to give what is due). Rule *legal justice* has its expression in law ( here the name of legal justice). Unlike distributive justice, which has a downward, from social authority / public towards members of society in the quality of each of them as a citizen, legal justice is an upward, that is moving from company to company members organized as a whole political society, as a society that is elderly. In such a court, every member of society, regardless of social rank that is placed (governments or government) has the capacity of the borrower, is the daughter of company policy / which a society that belongs to both a *debitum legalum*, and a *debitum moralum*, so a complex duty (legal and moral at the same time) to return to the social good (*bonum commune civitatis*) which caused that person (tax and fee stipulated military service, attending public functions, to show respect for law and power / public authority).

*Legal justice* is impartial at origins but as it is applied ceases to be impartial in the sense that it creates the relationship of subordination between the state and its authorities on the one hand and other persons (natural or legal) on the other hand, causing it fair value through the law itself, being able to restrict or expand the scope of distributive justice.

The term *social justice*<sup>12</sup> has a broader sense in which it uses as a point of justice, especially in political practice, taking into account the general fact that political decisions do not put into play only objective, but value judgments about the man or the society.<sup>13</sup> One refers to value judgments, always and in any political program of governance, social justice.<sup>14</sup>

Concept of social justice has been given many interpretations, so that social justice means:

- a) is applicable justice to what would call, usually "social problem";
- b) social justice is a term synonymous with the legal justice (general), except that, in accepting the social justice emphasis placed on content sc of the term natural, less on the law;
- e) combining social justice means justice terms of legal content and distributive justice.

Underlining some confusion in each of the three meanings of the notion of social justice, Professor Pierre Pescatore noted that, in fact, social justice is not a fourth type-form of justice, completing or overlapping typology santomista Aristotel and classical but only a means to making aware, in a more modern notion of common good, becoming, in this sense, a notion of great value especially in combat and political ideology.

In any society, *social justice* must ensure unhampered exercise by individuals of fundamental rights and obligations, thus making the legality and legitimacy of justice.

On 10 June 2008 International Labour Organization unanimously adopted ILO Declaration on Social Justice for a Fair Globalization. It is the third largest political statement and the International Labour Conference adopted the ILO Constitution by 1919. It is based on the Declaration of Philadelphia in 1944 and the ILO Declaration on Fundamental Principles and Rights of Labour in 1998. The 2008 Declaration expresses the contemporary vision of IOM Mission in the age of globalization.

*Oppressive justice* is found in countries with an authoritarian approach to legislation policy, which is fully independent of justice, a tyrannical interpretation of law. This society is one where people live under laws restricting illegal in the sense that legal rules are given without regard to societal values that society members but to "shelter" totalitarian regimes create their own law class oppression. However, historically, this type of justice should be considered to avoid.

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<sup>11</sup> Jean Dabin, *Théorie générale du droit*, Bruxelles, Émile Bruyland, 1953.

<sup>12</sup> Pierre Pescatore, *Introduction à la science du droit*, Luxembourg, Office des Imprimés de l'État, 1960, p.440.

<sup>13</sup> Duverger Maurice, *Introduction à la politique*, Paris, Gallimard, 1964, p. 19.

<sup>14</sup> Universality present this concept in any political program exemplifies the foot, symptomatic for any thinking or policy decision, for example, U.S. Constititiei bases of liberalism in the federalist doctrine of bowing to the thesis that "justice is the goal of government, people always asking for justice and i always have to meet the governance "to this requirement (Harvey C. Mansfield jr., *Social Science and the Constitution*, in vol. *Confrunting the Constitution (The Challenge to Locke, Montesquieu, Jefferson, and the Federalists front Utllitarianistn, Historicism, Marxism, Freudianism, Pragmatism, Existentialism...)* (ed. by Alian Bloom), Washington, the AEI Press, 1990, p. 413).

*Procedural justice* focuses on how the decision is made, for example, were used to define specific procedures for making decisions, or to investigate a complaint right? Determinants of procedural justice include the consistent application of decision-makers objectivity, accuracy of information, remedies, the possibility that the intervention of the affected area, and prevailing moral standards. By ensuring conformity and compliance procedures, to respect human dignity and social acceptance creates the premise of those decisions, which inherently can not be for everyone.<sup>15</sup>

From the standpoint of Christian doctrine<sup>16</sup>, justice was classified into three kinds: divine justice (Justice Dei), human justice (Justice hominis) and evil justice (Justice evil).

*Divine justice* is that it rewards evil with good (Justitia Dei est reddere bonum pro bono et malum pro bono);

*Human justice* is to reward good with good and evil with evil (Justitia hominis est reddere bonum pro bono malum pro malo) - and the very positive fundamental principle of criminal law,

*Justice evil*, if one may say so (si tamen dicendum est habere posse diabolum aliquam justitiam), why is to always (semper) to reward good with evil (reddere malum pro bono)<sup>17</sup>

Justice belongs to and participate - in the Christian doctrine that is based on natural law - in order transmundan (from beyond our world) truth, so the order of absolute values, the absolute and eternal law, it enjoys two attributes:

a) is high in relation to the changing nature of laws prescribed by people;

b) is absolute in our spirit I ephemeral compared with the changeable nature of the sensible world.

Obviously, the idea of justice - the innate human spirit - an order suppressing safer going through is a long way from primitive and embryonic Clemente until the insurance policy with a high degree of technical perfection, through a complex regulatory rules and thus limiting human conduct, in moments of a long history in times of social crisis is especially accustomed invoking *divine justice*.

### Conclusions

If justice is a questionable, relative thing, perceived in different ways by the beneficiaries of the laws, the power factor is recognized beyond particular wills, beliefs or opinions, so that the only way for justice to triumph is to associate justice with power. Therefore, in order to be respected, justice needs power, since the latter cannot be contested, questioned; justice without the force of authority seems powerless. It is equally true that power without the value of justice transforms into a tyrannical, condemnable dimension, capable of making a society sick and overturning the rules of democracy.

It is undeniable that the act of justice can only be achieved through force, the power of the state, knowing that the strongest will also be the one listened to, but it is equally important that power manifests itself justly, that is, in a framework governed by equal laws for all and in which man, with his rights and needs, is at the center of the legislator's concerns.

If power were to manifest itself discretionarily, beyond rules and laws and violating the rights of the recipients and beneficiaries of these laws, the notion of justice would dissipate, and power would become tyrannical. A healthy, democratic society is one in which justice and force are put together, with no hierarchy between them, but, on the contrary, both constituting a bond and making it fully possible for what is just to be strong, and what is strong to be just.

It is perfectly true that justice has a relative character, in the sense that it cannot be ascertained, evaluated, appreciated unanimously, in the same manner by all people. It often happens that what some people consider an act of justice, others consider to be nothing more than a great injustice, especially if they were involved in one way or another in a certain procedure.

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<sup>15</sup> Morton Deutsch, Justice and Conflict, in The Handbook of Conflict Resolution: Theory and Practice, ed. M. Deutsch and P.T. Coleman (San Francisco: Jossey-Bass Inc. Publishers, 2000)

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<sup>17</sup> Giorgio del Vecchio, Giustizia divina e giustizia umana, in vol. Diritto naturale è unità europea Tramo Angeli, Editore, 1958, p. 17-18.

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# THE LIMITS OF ARTIFICIAL INTELLIGENCE IN THE REASONING AND DRAFTING OF JUDICIAL DECISIONS: BETWEEN TECHNOLOGICAL EFFICIENCY AND JURISDICTIONAL RESPONSIBILITY

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## Abstract

*This article examines the role of artificial intelligence (AI) in the judicial process, focusing on its use for reasoning and drafting of judicial decisions. While large-language models (LLMs) and other AI tools offer considerable gains in efficiency and research support, they raise serious concerns when applied to the deliberative, reason-giving and responsibility-laden functions of a judge. This article argues that AI may serve as a valuable technical assistant, but cannot replace the judge’s human reasoning, independence and accountability. The analysis covers (i) the context of digitalization of justice, (ii) the normative and ethical foundation of judicial independence, (iii) the current uses of AI in judicial systems, (iv) the normative, deontological limits of AI use and practical risks and dilemmas, (v) a framework of permissible uses, and (vi) concluding reflections and outlook. Recommendations are made for judicial training, institutional safeguards and regulatory oversight.*

**Keywords:** digital justice, artificial intelligence; judicial decisions; judicial independence; human oversight.

## 1. INTRODUCTION – CONTEXT OF THE DIGITALISATION OF JUSTICE

Over the last decade, many European and national justice systems have embarked on extensive digitalization programmes, introducing e-file systems, digital case management, and portals for online access to court documents<sup>1</sup>. These efforts seek to increase efficiency, transparency and access to justice<sup>2</sup>. Concurrently, advanced artificial intelligence models — notably large-language models (LLMs) such as GPT, Claude or Gemini — have emerged, capable of processing and generating natural-language texts at high speed, summarizing documents, extracting legal issues, and even proposing structure and reasoning.

From a jurisdictional perspective, this technological shift invites reflection on both the promises and the risks. On one hand, AI may shorten the path to preliminary hypotheses, facilitate legal research and reduce routine burdens. On the other hand, the core activity of adjudication remains deeply human and value-laden, anchored in the judge’s independent reasoning, impartiality and motivation. The European framework seeks to ground technological innovation within fundamental rights, transparency and human oversight<sup>3</sup>.

The objective of this article is to clarify the boundary between technological assistance and judicial decision-making, to identify what uses of AI are permitted, what uses are problematic or should be prohibited, and to provide recommendations for a responsible integration of AI in the reasoning and drafting of judicial decisions.

## 2. CONSTITUTIONAL AND ETHICAL LIMITS TO THE USE OF AI IN JUDICIAL DECISION-MAKING

The independence of judges is enshrined in constitutional and statutory norms. For example, under the

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<sup>1</sup> In Romania, judicial digitalization has advanced through tools such as ReJust, which provides judges with secure electronic access to consolidated case files and allows remote consultation and drafting under full audit controls, and the Portal of Romanian Courts ([portal.just.ro](http://portal.just.ro)), offering public access to anonymised case data and jurisprudence sourced from the ECRIS system. Courts currently operate ECRIS IV as the primary case-management platform, still used alongside paper files, while undergoing phased replacement by the next-generation ECRIS V.

<sup>2</sup> Reiling A.D., „ Courts and Artificial Intelligence”, International Journal for Court Administration, Volume 11, Issue 2, 2020, p.8, <https://iacajournal.org/articles/10.36745/ijca.343>.

<sup>3</sup> European Commission for the Efficiency of Justice (CEPEJ), European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, adopted on 4 December 2018, Council of Europe, Strasbourg. The Charter establishes the first European framework of ethical principles governing the development and use of artificial intelligence in the administration of justice, with the objective of ensuring that such technologies uphold judicial independence, fundamental rights and the rule of law, <https://www.coe.int/en/web/cepej/cepej-european-ethical-charter-on-the-use-of-artificial-intelligence-ai-in-judicial-systems-and-their-environment>

Constitution of Romania, Article 124 paragraph (3) states that “Judges are independent and subject only to the law.” The statutory framework, Law no. 303/2022 on the status of judges and prosecutors, further emphasizes that a judge must decide in accordance with his or her own reasoning, independent from external influences. These legal guarantees underpin the requirement that the judicial decision must reflect the personal conviction of the judge, not the mere output of an algorithm<sup>4</sup>.

International standards echo this approach. The Consultative Council of European Judges, in Opinion No. 10 on the Judiciary at the service of society, underscores that a judicial decision must reflect the judge’s own conviction<sup>5</sup>. In parallel, the Council of Europe’s Ethical Principles for the use of Artificial Intelligence in judicial systems establish fundamental requirements of transparency, fairness, non-discrimination and human oversight. Taken together, these instruments constitute a normative and ethical framework against which the introduction and use of AI tools in judicial decision-making must be evaluated.

These safeguards are not theoretical. They have direct practical relevance, particularly in cases implicating fundamental rights, where procedural fairness and the right to a defense must be rigorously protected and human judgment must remain central.

A core principle emerging from this framework is that of human oversight<sup>6</sup>: judges must be able to articulate and justify the reasoning supporting their decisions, even when assisted by AI. Responsibility for legal reasoning, assessment of evidence, and motivation cannot be transferred to an algorithm. Judicial authority and accountability are inherently human, and the use of AI must never erode independence, responsibility or transparency in the decision-making process<sup>7</sup>.

### 3. CURRENT FORMS OF AI USE IN THE JUDICIAL SYSTEM

At present, the integration of artificial intelligence within judicial systems remains predominantly auxiliary, supporting the preparatory and administrative dimensions of judicial work<sup>8</sup>. Several main areas of application can be identified.

First, AI tools are increasingly employed in the documentation phase, particularly for automated search, filtering, and classification of jurisprudence and legislative materials<sup>9</sup>. Enhanced legal-search engines and analytical legal databases illustrate this trend. Such systems can expedite the identification of relevant case law or legislative provisions; however, their contributions must always be subject to rigorous verification by the judge or judicial staff, as responsibility for the accuracy and relevance of sources cannot be delegated to automated systems<sup>10</sup>.

Second, AI is used for drafting assistance, especially in improving linguistic clarity, stylistic coherence, and structural organization of judicial documents. Large-language models may suggest phrasing, refine syntax, or assist in developing logical narrative flow. These functionalities can increase drafting efficiency, provided that the judge retains full control over the substance of the legal reasoning and ensures that the final text genuinely reflects their own deliberative process<sup>11</sup>. AI must never generate judicial reasoning autonomously nor replace the

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<sup>4</sup> On the role of inner conviction in judicial decision-making, see Ghigheci C., “Ethics of Judicial Professions”, Hamangiu Publishing House, Bucharest, 2017, p.259, “The judge must render decisions in accordance with the law and his or her inner conviction. Although current legislation does not explicitly provide for the role of inner conviction in judicial decision-making, it constitutes an inherent feature of the human being endowed with free will and therefore cannot be ignored in the adjudicative process.”

<sup>5</sup> Consultative Council of European Judges (CCJE) Opinion No 10 (2007), <https://rm.coe.int/168074779b>.

<sup>6</sup> Enqvist, L., “Human oversight” in the EU artificial intelligence act: what, when and by whom? *Law, Innovation and Technology*, Volume 15, Issue 2, 2023, p.508–535, <https://doi.org/10.1080/17579961.2023.2245683>.

<sup>7</sup> For an in-depth examination of the judge’s personal contribution to the reasoning of judicial decisions across the different stages of criminal proceedings, see Ionescu R., “Techniques for Drafting Judicial Decisions and Their Content,” *Journal of Legal Sciences of the University of Craiova*, no. 31/2004, ISSN 1454-3699; Ionescu R., “Reasoning of Judicial Decisions. Preliminary Chamber. Judicial Conviction,” *Annals of “Constantin Brâncuși” University of Târgu Jiu*, 2021; Ionescu R., “The Proper Way of Drafting the Minute When Reviewing Preventive Measures,” paper presented at the 13<sup>th</sup> International Conference on Social Sciences and Education, International Balkan University, Skopje, North Macedonia, 24–25 April 2025.

<sup>8</sup> Borgesano F., “Artificial Intelligence and Justice: A Systematic Literature Review”, *International Journal of Law and Information Technology*, Volume 28, Issue 11, 2025, p.349-385. The author reviews the emerging uses of AI in judicial environments and concludes that current systems primarily assist with research, document drafting, and procedural efficiency, while judicial reasoning remains a non-delegable human function due to constitutional, ethical, and due-process constraints, <https://www.emerald.com/ejim/article/28/11/349/1302111/Artificial-intelligence-and-justice-a-systematic>.

<sup>9</sup> In Romania, platforms such as Lege5 and ReJust already facilitate automated retrieval, indexing, and cross-referencing of laws and jurisprudence. While they do not constitute artificial intelligence in the technical sense, they exemplify the digital infrastructure supporting faster access to legal materials. Their output remains subject to judicial verification, as responsibility for accuracy and interpretation cannot be delegated to automated systems.

<sup>10</sup> Saplevic Z., “The Role of Artificial Intelligence in Judicial Systems”, *International Journal of Cognitive Research in Science, Engineering and Education*, Volume 12, Issue 3, 2014, p. 561-569.

<sup>11</sup> For a practical example of applied artificial intelligence in judicial document processing in Romania, see [Text.rejust.ro](https://text.rejust.ro). The platform converts scanned filings uploaded in the ECRIS system into fully editable Word documents, using OCR-based neural networks (including LSTM architectures), natural-language-processing models trained on court submissions and judicial decisions, and automated summarization

judge's intellectual contribution<sup>12</sup>.

Third, certain tools offer legal-analysis support, such as proposing analogies, suggesting potentially relevant precedent or doctrine, or conducting comparative-law scans. While these systems can serve as valuable orientation instruments, offering an initial map of legal arguments and authorities, they are not capable of exercising judicial discernment. They must therefore be treated as facilitative aids, not as substitutes for judicial evaluation, legal interpretation, or value-based deliberation.

Finally, AI has found application in administrative functions within court systems, including electronic case-file management, procedural workflow tools, and automated generation of standard procedural documents<sup>13</sup>. Such uses are, in principle, less sensitive from a deontological perspective and can be considered broadly permissible, particularly when integrated within secure institutional infrastructure and accompanied by appropriate data-protection safeguards.

In sum, current practice demonstrates that AI systems can meaningfully assist courts in tasks related to research, drafting support, and administrative efficiency. Nevertheless, their deployment must always respect the primacy of human judicial reasoning and be constrained by ethical and legal principles designed to protect independence, accountability, and the integrity of the judicial act.

#### 4. NORMATIVE, DEONTOLOGICAL AND EPISTEMOLOGICAL LIMITS IN AI USE

As the development of judicial technology advances from basic analytics toward decision-support tools, it becomes essential to delineate the boundaries within which such systems may operate. Any deployment of AI must remain subordinate to constitutional, procedural, and ethical guarantees that define judicial authority and legitimacy.

Legal and procedural safeguards impose clear limits on the use of artificial intelligence in adjudication. A judicial decision remains an act of personal conviction grounded in the assessment of facts and law, not a computational output. AI may only assist where fundamental procedural guarantees remain intact: the obligation to provide a reasoned decision, the principles of impartiality and equality of arms, and the right of access to justice. If an algorithm were to determine or materially influence the outcome without genuine judicial scrutiny, this would jeopardize rights protected by Article 6 of the European Convention on Human Rights<sup>14</sup>. Similarly, transparency obligations require disclosure of the system's role and scope, and the judge must always retain the capacity to trace, understand, and explain the reasoning path. The responsibility for the decision cannot shift to the system; it remains exclusively judicial.

Then, ethical and deontological limits reinforce that no technological tool may erode judicial independence. The judge must never become a mere "rubber-stamp" for algorithmic suggestions. Professional responsibility demands critical examination of sources, independent evaluation of arguments, and full accountability for the reasoning adopted. Any process through which technology supplants rather than supports judicial deliberation risks undermining the authority and legitimacy of the judiciary itself<sup>15</sup>.

Epistemological constraints remind us that contemporary AI systems are fundamentally probabilistic. They optimize for statistical likelihood rather than legal validity or doctrinal coherence. As a result, they may generate invented citations, fail to appreciate local judicial nuance, or overlook contextual and human-experiential dimensions intrinsic to adjudication. A recent analysis of generative AI use within Italian judicial settings underscored this limitation, warning that these systems risk "reducing the delivery of justice to statistical connections" instead of the deliberative, human-centered process that characterizes legitimate judicial reasoning<sup>16</sup>.

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tools. The system identifies and structures key legal sections (claims, parties, grounds, legal basis, evidence), restores diacritics, and generates a structured summary suitable for incorporation into judicial reasoning. While the application automates technical linguistic tasks, it does not perform legal assessment or judicial reasoning, and all outputs remain subject to human review and judicial validation. Accordingly, Text.rejust.ro constitutes a form of narrow, assistive AI supporting judicial workflow efficiency without replacing the judge's personal conviction or adjudicative responsibility.

<sup>12</sup> Although public discourse in Romania occasionally alludes to extensive digitalisation of judicial workflows, no official statement of the Superior Council of Magistracy confirms the development of a system capable of automatically drafting judicial decisions from pre-existing case-file materials. Current policy instruments remain limited to auxiliary functions. The 2025–2029 Judicial System Development Strategy situates AI use in technical support tasks (e.g., anonymisation, diacritics insertion, OCR), while the Ministry of Justice's speech-to-text projects and the ECRIS V programme focus on transcription, digital workflow, and interoperability. None of these initiatives presently foresee automated judgment drafting or procedural summarisation tools.

<sup>13</sup> Dymitruk M., "Artificial Intelligence as a Tool to Improve the Administration of Justice?" *Acta Univ. Sapientiae, Legal Studies*, Volume 8, Issue 2, 2019, p.179–189, <https://acta.sapientia.ro/content/docs/artificial-intelligence-as-a-tool-to-imp.pdf>.

<sup>14</sup> Ulenaers J., "The Impact of Artificial Intelligence on the Right to a Fair Trial: Towards a Robot Judge?," *Asian Journal of Law and Economics*, De Gruyter, Vol. 11, Issue 2, 2020, p.1, <https://www.degruyterbrill.com/document/doi/10.1515/ajle-2020-0008/html>.

<sup>15</sup> CEPEJ, Assessment Tool for the Operationalization of the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment (4–5 Dec 2023). Page 2: "The final decision-making should remain a human-driven activity and decision." <https://rm.coe.int/cepej-2023-16final-operationalisation-ai-ethical-charter-en/1680adcc9c>.

<sup>16</sup> Contini F., Minissale A., Blix S.B., "Artificial intelligence and real decisions: predictive systems and generative AI vs. emotive-cognitive

These limitations do not suggest incompatibility between AI and judicial activity. Rather, they establish a principled boundary: technology may support, but never replace, the rational, interpretive, and ethical functions inherent to the judge's role. Properly framed, AI can be a useful instrument; improperly employed, it would compromise the essential guarantees of judicial process and the legitimacy of adjudication.

Having outlined the constitutional, ethical, and epistemological boundaries that must govern judicial reliance on AI, it is equally necessary to consider the concrete risks that arise in practice when such systems are introduced into judicial workflows. These operational challenges highlight how theoretical safeguards are tested in real institutional environments and underscore the need for cautious, structured deployment.

Judges face substantial practical risks and dilemmas when incorporating AI tools into their work: they remain personally accountable for errors arising from AI-derived outputs, yet institutional frameworks often lag; the use of uncontrolled public AI systems risks breaches of confidentiality, data protection obligations and litigants' rights; algorithmic bias and discriminatory effects may be reinforced rather than mitigated, especially since judges themselves express skepticism about AI's reliability; public perceptions of legitimacy suffer when judges are assisted by AI rather than relying solely on human judgment; the standardization of AI-mediated decisions may erode judicial creativity and context-sensitivity; and opaque "black-box" systems undermine the duty of reason-giving, transparency and auditability in judicial decision-making<sup>17</sup>.

## 5. FRAMEWORK FOR PERMISSIBLE USE OF AI IN THE JUDICIARY

Drawing on the analysis developed throughout this article, the following framework is proposed as a structured foundation for the responsible integration of artificial intelligence into judicial activity. It is designed to strengthen — and never supplant — the human core of adjudication. The safeguards articulated here safeguard judicial independence, transparency, accountability, and the epistemic integrity of legal reasoning, ensuring that technological innovation operates strictly within the boundaries set by constitutional principles and the rule of law.

At the heart of this model lies the requirement that AI remains purely supportive, serving only as an instrument for research, information processing, and analytical assistance. Judicial conviction, personal assessment of evidence, and constitutional responsibility cannot be delegated to a machine under any circumstance. Artificial intelligence may streamline access to information, but decision-making authority must remain exclusively human.

A second fundamental principle is the need for meaningful judicial oversight over every computational output. Judges must not merely glance at AI suggestions — they must understand, scrutinize, and be able to justify the acceptance or rejection of any automated input. Reliance without comprehension would undermine reasoned judgment, diminish public trust, and risk transforming judicial reasoning into an opaque technical exercise. Ultimately, AI may inform reasoning, but it can never constitute reasoning.

Equally essential is the obligation of transparency when algorithmic tools play a material role in judicial analysis or procedural work. Courts must make clear when AI is used, under what conditions, and with which safeguards. Documenting the nature of data sources, technical limitations, and permissible functions reinforces due process and prevents the emergence of "black-box justice". Accountability requires visibility.

In parallel, the protection of confidential data and judicial secrecy remains non-negotiable. Any use of AI must be strictly compliant with data protection norms and built upon secured, encrypted, institutionally controlled infrastructures. Public or unregulated systems cannot be used for processing case-related information; doing so would violate confidentiality duties, expose sensitive information, and potentially contaminate AI models. Judicial secrecy prevails over convenience or technological temptation.

Recognizing this paradigm shift, the framework also stresses mandatory judicial competence and sustained professional training. Digital literacy is no longer optional: judges must understand algorithmic bias, hallucination risks, and contextual limitations in order to safeguard the integrity of their decisions. Competence in supervising technology becomes an extension of judicial independence and professional ethics.

To ensure ethical and lawful deployment, courts must implement institutional governance and algorithmic audit mechanisms. Regular evaluations, bias testing, traceability checks, and the power to suspend or withdraw systems are indispensable. This oversight must function with the same rigor demanded by judicial administration: technology must answer to the law, never the reverse.

Finally, the framework calls for continuous evaluation and contextual adaptability. AI tools must be periodically reviewed and updated to reflect jurisprudential evolution, legislative changes, and local legal culture.

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legal deliberations", *Frontiers in Sociology*, Vol. 9, 2024, <https://www.frontiersin.org/journals/sociology/articles/10.3389/fsoc.2024.1417766/full>

<sup>17</sup> Gastaldo F.C., "The automaton-judge: Some reflections on the future of AI in judicial decision-making", *Sortuz. Oñati Journal of Emergent Socio-legal Studies*, Volume 14, Issue 2, 2024, p.399-432, <https://opo.iisj.net/index.php/sortuz>.

Evaluation criteria must include qualitative assessments of legal reasoning, not only quantitative performance indicators. Judicial decision-making is interpretive and value-laden; thus, AI must remain dynamic, controlled, and always subordinate to legal principles.

Moving from principle to practice, the responsible integration of artificial intelligence in judicial work requires concrete institutional measures across training, governance, technology management, and legislation.

Enhancing judicial capacity requires that the National Institute of Magistracy integrate a coherent and compulsory training track devoted to the responsible use of artificial intelligence in adjudication. This curriculum would combine foundational instruction on the legal and ethical limits of AI with practical workshops dedicated to drafting supervision, evaluation of automated outputs, and protection of confidential data. Establishing an advanced-user certification pathway would ensure that each court benefits from specialized personnel capable of supervising complex digital tools. Complementary didactic materials — including checklists, case-based exercises aligned with CEPEJ principles, and simulated scenarios involving risks such as algorithmic bias or data leakage — would consolidate judicial competence in an increasingly digital environment.

A modern and integrity-focused judiciary requires a clear institutional framework governing the use of artificial intelligence by judges. In this respect, the Superior Council of Magistracy can play a pivotal role by adopting a comprehensive ethical and governance architecture. Such an instrument may include a judiciary-wide policy on AI use, the establishment of an official registry of authorized tools, transparency obligations regarding any material reliance on automated support, and a firm non-delegation rule affirming that judicial reasoning cannot be generated by or transferred to algorithmic systems. In addition, prohibiting public cloud platforms for case-file data and instituting a dedicated ethics-audit mechanism would provide essential safeguards. Experience from jurisdictions such as the United Kingdom, Canada, and Brazil illustrates the importance of clear standards, accountability mechanisms, and periodic technology review<sup>18</sup>.

Ensuring technological security and institutional autonomy calls for coordinated action by the Ministry of Justice and the Special Telecommunications Service. A robust framework for infrastructure and procurement would entail data-protection impact assessments, mandatory bias-testing, logging and traceability requirements, and explicit contractual clauses preventing model training on judicial data. Integration with platforms such as ECRIS V and ReJust should occur exclusively within encrypted, institutionally controlled environments, maintaining interoperability while preserving the confidentiality of judicial information. Comparable initiatives in the Netherlands and Brazil — including CNJ Resolution 332 — demonstrate that rigorous procurement standards and controlled technological environments are critical to preventing systemic vulnerabilities and maintaining public trust<sup>19</sup>.

Finally, a stable legal architecture is required to support responsible technological development in the judiciary. Legislative action, coupled with ministerial implementation, can provide a statutory basis for the use of artificial intelligence in judicial processes. Core components may include a public register of approved tools, mechanisms for incident reporting, and periodic audit obligations, all aligned with European principles on human oversight and fundamental-rights protection. By clearly defining responsibilities, transparency duties, and compliance structures, such a framework would ensure that efficiency gains are fully compatible with judicial independence, fairness, and access to justice.

## CONCLUSIONS

Artificial intelligence offers considerable promise to streamline research, summaries precedents and assist in drafting and free judicial time for deliberation. Yet, in the universe of judicial decision-making, the judge remains the indispensable actor: the one, who examines facts, weighs arguments, resolves conflicts of values and issues a reasoned decision. AI can “take notes” faster than any clerk, but it cannot decide.

In the context of judicial formation—particularly for magistrates under training at an institution such as the

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<sup>18</sup> United Kingdom: Judicial Office and Courts & Tribunals Judiciary, Artificial Intelligence (AI) – Judicial Guidance, <https://www.judiciary.uk/guidance-and-resources/artificial-intelligence-ai-judicial-guidance-october-2025/>; Canadian Judicial Council, Guidelines for the Use of Artificial Intelligence in Canadian Courts, <https://cjc-ccm.ca/en/resources-center/publications/guidelines-use-artificial-intelligence-in-canadian-courts.>; Brazil: Conselho Nacional de Justiça (CNJ), Resolução N° 332/2020 – Diretrizes sobre o uso de inteligência artificial no Poder Judiciário, <https://atos.cnj.jus.br/atos/detalhar/3429>.

<sup>19</sup> Netherlands's RAM data and Country Report, <https://www.unesco.org/ethics-ai/en/netherlands>; Resolution No. 332, of 21 August 2020, issued by the Brazilian National Council of Justice, sets forth guidelines and governance frameworks for the use of artificial intelligence in the judiciary, <https://www.cnj.jus.br/wp-content/uploads/2025/02/draft-ai-resolution.pdf>.

National Institute of Magistracy (NIM) in Romania—this means that training must emphasize not only the possibilities of AI, but above all the critical-thinking, verification and accountability required of judges. The future of justice is not about replacing judges, but about equipping them to use AI wisely and responsibly, so that efficiency does not erode legitimacy.

In closing, the judge’s pen remains guided by reason, conscience and law — the machine may hold the ink-well, but the judgment still flows from human judgment.

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# NEW REQUIREMENTS REGARDING THE ACTIVITY CARRIED OUT BY FOREIGN CITIZENS IN ROMANIA IN THE CURRENT ECONOMIC CONDITIONS ON THE DOMESTIC AND EUROPEAN REGULATORY MARKET IN THE MATTER

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## Summary

*This topic analyzes the new amendments regarding the legal regime of different categories of foreign workers from outside the European Union. The legal regime of these categories of workers is analyzed through the changes brought by the Government Emergency Ordinance no. 25/2024 on the amendment and completion of certain normative acts in the field of foreigners and the border.*

*Law no. 28/2024 on the amendment and completion of certain normative acts in the field of foreigners; Government Ordinance no. 25/2014 on the employment and posting of foreigners on the territory of Romania amended and completed by Government Ordinance no. 6/2024 normative acts that transpose some European provisions such as Directive (EU) 2021/1883 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment and repealing Council Directive 2009/50/EC.*

**Keywords:** *foreign worker - amended regulations, European Union norms, labor migration; employment notice, Law no 28/2024.*

The movement of the workforce from one place to another, from one country to another, is the result of the existence of several factors that encourage this phenomenon. These are economic, geopolitical, environmental factors, but also in terms of the diversity of the requirements of things, the differences between the different economies of the world, thus encouraging the migration of the workforce to other destinations, which correspond more closely to the demands of the workers. In fact, the integration of foreign workers in the state where they are going to perform an activity is in fact a complex process, which includes economic, social, cultural or other components.

It should be noted that the European Union has a continuous concern about workers who want to carry out an activity, a work in another country, which makes it necessary to impose appropriate protection measures adopted jointly by the Member States.

As a member country of the European Union, the national legislator must ensure a special legal framework appropriate to these categories of workers, as the employment of foreign workers on the Romanian labor market has experienced a significant development in recent years.

The harmonization of the internal rules of our country with the rules of the European Union has had the effect of appearing, amending or supplementing some normative acts in the field of foreign workers.

Such normative acts can be mentioned: Government Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania, republished<sup>1</sup>; Government Ordinance no. 25/2014 on the employment and posting of foreigners on the territory of Romania and for amending and supplementing some normative acts regarding the regime of foreigners in Romania<sup>2</sup>; Government Emergency Ordinance no. 25/2024 on the amendment and completion of certain normative acts in the field of foreigners and border<sup>3</sup>; Law no. 28/2024 on subsequent amendments and completions in the

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<sup>1</sup> Republished in the Official Gazette 421 of 5 June 2008, subsequently amended and supplemented;

<sup>2</sup> Published in the Official Gazette in 640 of 30 August 2014

<sup>3</sup> Published in the Official Gazette no. 250 of March 22, 2024

field of foreigners<sup>4</sup>; art. 36 of the Romanian Labor Code<sup>5</sup>; Directive (EU) 2021/1883 of the European Parliament and of the Council on the conditions of entry and exit of third-country nationals for the purpose of highly qualified employment<sup>6</sup> and Regulation (EU) 2018/1806 of the European Parliament and of the Council on the list of third countries whose nationals are required to obtain visas when crossing the external borders<sup>7</sup>.

It is mentioned that the employment of foreign citizens has become a common and necessary thing in our country, and foreign workers from abroad and from the European Union are an option and an advantage for many employers in Romania.

It is also noted that the number of foreign workers who can be hired as workers in our country is established every year, by a decision issued by the Government (for example, Government Decision no. 132/2022) allows the legal limit of employment for 2025 to about 100000 notices.

Workers from the Member States of the European Union have a special legal regime that is more permissive than workers from outside the European Union.

The category of foreign workers from outside the European Union is regulated by national legislation, which also includes provisions resulting from the implementation of European Union rules, as will be analyzed below.

The relevant normative acts, in particular Law no. 28/2024 and Government Ordinance 25/2014 (specified above), regulate several categories of foreign workers, as follows:

- permanent workers, who will be concluded an individual employment contract for an indefinite or fixed period, with the renewal of the employment notice at a maximum of 1 year;
- trainee workers, are those for professional training with the renewal of the approval at a maximum of 1 year;
- seasonal workers, are those workers who carry out seasonal activities in agriculture, tourism, etc. and whose approval will be renewed once every 9 months of the year;
- highly qualified workers, are those workers who have a salary double the average gross salary guaranteed in payment and who possess the European Union Blue Card.
- cross-border workers, are those workers who work in Romania, domiciled in the European Union. and have a special regime;
- au pair workers represent the foreigner temporarily employed by a host family on the territory of Romania.

The employment of foreign citizens, including stateless persons, is done, according to Article 36 of the updated Labor Code of Romania, by concluding an individual employment contract, based on the work permit or residence permit for work purposes, issued according to the law.

However, in order to employ foreign workers from outside the European Union, according to the normative acts specified above, it is necessary for employers – individuals or legal entities in Romania to go through the following formalities:

- a) obtaining the employment notice;
- b) obtaining the long-stay visa;
- c) the issuance of the residence permit for work purposes.

a) As regards the employment notice, the relevant legal provisions show that foreigners legally<sup>8</sup> residing on the territory of Romania can be employed on the basis of the employment notice obtained by employers under the conditions of these legal provisions. Likewise, Law no. 28/2024 specifies three categories of workers who can be hired without the need for an employment permit.

It is also noted that the work permit is mandatory for foreign citizens working in Romania and is granted by the General Inspectorate for Immigration (I.G.I.) through its territorial formations.

Foreign workers cannot carry out any kind of activity before obtaining a work permit and a work or secondment visa, as the case may be.

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*4 Published in the Official Gazette no.176 of March 5, 2024*

*5 Reprinted in the Official Gazette no. 345 of May 18, 2011, updated in 2025*

*6 Published in the Official Journal of the European Union 382 of 28.10.2021, pp 1-38*

*7 Published in the Official Journal of the European Union 303 of 28.11.2018, pp 39-58*

*8 Art.3 paragraph (1) of the Government Ordinance no.25/2014 regarding the employment and posting of foreigners in Romania*

The work permit entitles the foreign worker to work only in one company (which has obtained the permit) and in one position (COR code), and in case of transfer to another job or company he must obtain a new work permit.

As for obtaining the employment permit for the foreign citizen, the employer must carry out activities compatible with the position for which the foreigner is requesting employment, not have been convicted of an offense provided by the Labor Code or for a crime against the person committed intentionally, respectively not have been sanctioned for receiving at least 5 foreign workers without the right to work or for employing employees without the right to work. conclusion of an individual employment contract.

Important provisions brought by the aforementioned normative acts<sup>9</sup> also take into account employers who must effectively carry out their activity on the territory of Romania, and on the other hand their activity must not have been established or not be carried out for the main purpose of facilitating the entry of foreigners on the territory of Romania.

Also in this regard, the employer is obliged to effectively carry out the activity in the field of activity for which it requests the employment notice for at least 1 year.

In turn, the foreign worker must also meet all the legal requirements for carrying out the activity on the territory of the Romanian state, mainly not to be in any of the cases of not being allowed to enter Romania.

On the other hand, the foreign worker must not prejudice the maximum number of foreign workers set for the current year. Also, the employer must prove that the necessary diligence has been taken for the purpose of employing Romanian citizens, citizens of the member states of the European Union or citizens of the Swiss Confederation – for permanent foreign workers and trainees.

A very important aspect is the fact that, according to the new provisions on the matter<sup>10</sup>, the employer has the obligation to conclude the individual employment contract within 15 working days from the entry of the foreigner into Romania or, as the case may be, from obtaining the new employment notice in the case of the long-stay visa for employment.

The employment of foreign citizens is done by concluding an individual employment contract, in written form, in Romanian, in two copies (one for each party) with respect to the provisions of Law no. 53/2003 on the Labor Code, updated in 2025.

Prior to the start of the activity, the individual employment contract is registered in the general register of employees, which is sent to the territorial labour inspectorate.

Important provisions stipulated by the analyzed normative acts are addressed to the General Inspectorate for Immigration, which is not only empowered to issue the employment notice according to the submitted documents, but they can carry out controls through its territorial formations at the employer's registered offices or at the employer's work points, in order to verify the fulfillment of the legal obligations.

In conclusion, it can be shown that obtaining the approval is a condition of legality of the commitment to a job (even another one with another employer), and the obligation to ensure the legality of employment is incumbent on both the employer and the foreign worker<sup>11</sup>.

b) Regarding the work permit, it can be shown that when obtaining work permits, the General Inspectorate for Emigration issues a "single permit" to foreigners who are in Romania for the purpose of work (i.e. those who hold a long-stay visa in the initial period or have obtained an extension). This single permit is an identity document that also certifies the foreign citizen's right to work on the territory of Romania. As for the European Union Blue Card, an identity document issued to the foreigner by the General Inspectorate for Immigration, it is issued, according to Law 28/2024 as previously revised, for highly qualified workers whose right to temporary residence for work purposes has been extended or, as the case may be, who have been granted this right without the obligation to obtain a visa.

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<sup>9</sup> Art. 4 paragraph (2) letter a) and letter a1) of the Government Ordinance no. 25/2014 supplemented by Law no. 28/2024

<sup>10</sup> Art.31 introduced by the Government Emergency Ordinance for amending and supplementing the Emergency Ordinance no.25/2014.

<sup>11</sup> Art.6 para. (1<sup>1</sup>) of the Government Ordinance no. 25/2014

The new provisions<sup>12</sup> in the matter establish that if, upon submitting the application for the issuance of the European Union Blue Card or during its validity, the General Inspectorate for Immigration finds that the condition provided for by law is no longer met for reasons not attributable to the foreigner, the General Inspectorate for Immigration informs the foreigner in question in writing of his obligation, within 180 days from the date of receipt of the information, to identify his situation with the new employer to which he wishes to transfer.

Law no. 28/2024 also establishes that the right to long-term vision is also granted to holders of a European Union Blue Card who have had a legal and continuous right of residence on the territory of the Member States of the European Economic Area or of the Swiss Confederation, in the last 5 years or prior to the submission of the application, as holders of a right of residence as a researcher, as a student or as a beneficiary of international protection on the territory of the Member States<sup>13</sup> from which the right of residence continues for the last two years prior to the date of submission of the application in question as a holder of a European Union Blue Card if certain conditions are cumulatively met (for example, applicants must prove that they have means of subsistence at the level of the guaranteed minimum gross salary for a period of at least 12 months, with the exception of foreign family members of Romanian citizens. Also, Law no. 28/2024 established that the foreigner applying for the first European Union Blue Card may also request reunification family for spouse and minor children. At the same time, it was also established that the application for extension of the right of residence formulated by the holder of the European Union Blue Card obtained in another member state, submitted simultaneously with the application for extension of the right of residence formulated by his/her family members, can be resolved at the same time.

c) How long does a residence permit for work purposes last year or have previously made some clarifications regarding this issue. But regarding this issue, it can also be specified that the residence permit can be temporary or permanent. The temporary residence permit can be obtained by foreign citizens who have legally entered Romania based on a long-stay visa and if some requirements are met: the applicant holds a valid travel document and proves legal possession of a living space; the applicant must have social health insurance. The permanent residence permit can only be obtained if foreign citizens already hold a temporary residence permit and cumulatively meet some requirements: they prove a continuous and legal stay of maximum 5 years on the national territory, with a maximum absence of 6 consecutive months; they have special health insurance; they prove legal possession of a living space; have means of subsistence, at least at the level of the minimum guaranteed income in payment in Romania; prove that they have knowledge of the Romanian language at a level of at least satisfactory; do not represent any danger to national security. It is mentioned that requests for the issuance of the permit are resolved within a maximum of 6 months with the possibility of extending this term by another 90 days. In conclusion, it can be shown that the provisions of Law 28/2024 ensure the transposition of Directive (EU) 2021/1.883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment and repealing Council Directive 2009/50/EC. Thus, there are permanent concerns at the level of the European Union for the implementation of a fair status for migrant workers. The new legislative amendments analyzed above mainly target the activity of employers, foreign workers, but also of state bodies that have assigned specific control functions.

Consistent improvements have also been made in what the employer and foreign worker receive in the digitalization process at work. Thus, Government Ordinance no. 6/2024 for supplementing Government Ordinance 25/2024 on the employment and posting of foreigners on the territory of Romania<sup>14</sup> and for amending and supplementing certain normative acts regarding the regime of foreigners in Romania mentions that the transmission of the employment or posting notice can be made upon request and in electronic format, if the applicant has indicated the corresponding

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<sup>12</sup> Art.56 paragraph (92) of the same law.

<sup>13</sup> Art.50 paragraph (2) letter g) of Law no. 28/2024 specifies the proof of non-payment of special health insurance.

<sup>14</sup> Published in the Official Gazette no. 69 of January 25, 2025.

data for this purpose. The employment or posting notice will be signed with a qualified electronic signature of the issuing territorial unit of the General Inspectorate for Immigrants.

Therefore, the new amendments also consider the use of advanced or qualified electronic signatures, accompanied by the temporary electronic mark in the field of labor relations regulated by Law no. 208/2021 for the approval of Government Emergency Ordinance no. 36/2021<sup>15</sup>.

As a legislative gap in the new regulations, we consider it to be the failure to enshrine the respect for the collective rights of foreign workers in Romania. Thus, the right of foreign workers to establish or join a union should be expressly regulated by law, given that the number of this category of workers is increasing, and the need for protection is increasingly necessary. In this regard, the legislator must also concern himself with the legal enshrinement of collective rights for foreign workers, namely their union membership in order to avoid unpleasant situations in the conduct of production activity.

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-Directive (EU) 2021/1883 of the European Parliament and of the Council on the conditions of entry and exit of third-country nationals for the purpose of highly qualified employment;

-Regulation (EU) 2018/1806 of the European Parliament and of the Council listing the third countries whose nationals must be in possession of visas when crossing the external borders.

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<sup>15</sup> Published in the Official Gazette no. 720 of July 22, 2021.

# SOME CONSIDERATIONS ON THE BASIS OF THE CONCEPTS OF SUBSTANCE AND EXISTENCE OF FUNDAMENTAL RIGHTS IN THE ANALYSIS OF THE CONSTITUTIONAL COURT OF ROMANIA

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## **Abstract**

*The concepts of “substance of rights” and “existence of rights” differ from each other, not being in a relationship of equivalence. Thus, the difference between the concept of “substance of rights” used by the European constitutional legislators and that of “existence of rights” used by the Romanian constitutional legislator is not a terminological or purely formal one. They are based on different philosophical conceptions regarding fundamental human rights and freedoms. The Romanian constituent legislator and the other European constituent legislators use the two terms. We consider that the CCR has taken over the concept of “substance of rights” from the case law of the European Court of Human Rights, without taking into account the specifics of the Romanian constitutional framework provided for in the provisions of art.53 of the Romanian Constitution. The Strasbourg court has developed the concept of “substance of rights” in its case law, and in its analysis the Constitutional Court of Romania has focused on compliance with this standard.*

**Keywords:** fundamental rights, Constitutional Court of Romania, constitutional legislator, substance, existence

## **1. Introduction**

In the theory of constitutional law, terminological precision represents a fundamental and indispensable condition for the correct and efficient delimitation of the sphere of protection of the fundamental rights and freedoms of the person.<sup>1</sup> Each legal concept must be used with rigor and consistency, so that there are no ambiguities or confusions that could jeopardize the interpretation and application of legal norms. Thus, confusion between apparently close terms, such as "substance of law" and "existence of law", is not just a matter of terminological nuance, but can lead to divergent interpretations and, consequently, to contradictory legal decisions. This inconsistency can have direct and significant effects on the legal protection of citizens, affecting the fundamental rights of litigants and trust in the act of justice.

Clarity and terminological coherence in constitutional law is not a simple academic desire, but constitutes a sine qua non condition for ensuring legal certainty in the rule of law.<sup>2</sup> This means that legal norms must be clear, predictable and uniformly applicable, thus avoiding situations in which citizens or judicial bodies have difficulty interpreting the limits and content of fundamental rights. The use of different concepts to delimit the limits of restriction of these rights can generate not only legal uncertainty, but also a potential negative impact on the effective protection of the individual. In this context, the difference between the “substance” of a right and its “existence” acquires particular relevance, especially in the interpretation and application of constitutional norms regulating the restriction of fundamental rights.

The Constitutional Court of Romania (CCR), as guarantor of the supremacy of the Constitution, has an essential responsibility in ensuring a fair balance between the freedoms and fundamental rights of the individual and the general interests of society.<sup>3</sup> In exercising this power, the Constitutional Court is not limited to the strict interpretation of domestic norms, but also takes into account international and European standards in the field of human rights, including the case law of the European Court of Human Rights (ECHR). In the last two decades, the influence of the ECHR case law on the decisions of the Constitutional Court has become increasingly evident, which has led to a partial and sometimes contested adaptation of the concepts used in Romanian constitutional law, in the sense of approaching European terminology and criteria.

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<sup>1</sup> Iancu, Gheorghe / *Drept constituțional și instituții politice*, Ed. Lumina Lex, București, 2002, p.16

<sup>2</sup> Ionescu, Remus / *Introducere în teoria generală a dreptului*, Ed. Scrisul Românesc, Craiova, 2015, p.145

<sup>3</sup> Tutunaru, Mircea / *Drept constituțional și instituții politice. Volumul 2. Instituții politice*. Ed. PIM, Iași, 2025, p.203 și urm.

In the complex architecture of the modern rule of law, the Constitutional Court is called upon to ensure, on the one hand, respect for the supremacy of the Constitution, and on the other hand, to protect the fundamental rights of citizens, ensuring that these are not reduced or limited beyond the limits that can be accepted in a democratic society.<sup>4</sup> In this delicate process of interpretation and control, the CCR cannot ignore international standards, especially those established by the European Convention on Human Rights and the case law of the Strasbourg Court, which have shaped and defined in depth the concept of the protection of fundamental rights. This jurisdictional dialogue between the national and European systems has led to the emergence of phenomena of taking over and adapting certain legal concepts, of which that of “substance of the law” is one of the most relevant and controversial.

However, although the Constitutional Court has sometimes adopted in its reasoning the concept of “substance of the law” as used in the case law of the ECHR, the Romanian Constitution explicitly enshrines another formulation: that of “existence of the law”. This terminological difference is not a purely formal one, but indicates a conceptual discontinuity that raises serious problems regarding the compatibility and coherence of the Romanian constitutional system with the European one. More precisely, between “substance” and “existence” there is an essential difference in legal and axiological content, which influences the way in which the permissible limits of the restriction of fundamental rights are interpreted and applied.

The central issue analyzed in this paper lies precisely in this fundamental difference between the concepts of “substance” and “existence” of fundamental rights, as well as in the way in which the import of a foreign concept into the jurisdictional practice of the CCR can affect the coherence and stability of the national constitutional framework. This is a topic of paramount importance, as it determines not only legal certainty, but also the citizen's confidence in the effective protection of his fundamental rights, in the context of a plurality of normative sources and a complex jurisdictional dialogue.

## 2. The philosophical and legal foundation of the concepts

The term “substance” has its roots in the Aristotelian philosophical tradition, where the Greek expression *ousia* designates the essence or fundamental, immutable nature of an object or thing.<sup>5</sup> In this philosophical context, substance represents the essential core, the defining element without which an object can no longer be considered the same. The adoption of this concept in the field of law has led to a legal interpretation whereby the “substance of the right” designates the minimal, inviolable and indispensable core of a fundamental right, which cannot be affected or restricted without compromising the very nature of the right in question. Thus, the violation or impairment of this “substance” is equivalent to a fundamental infringement of the right, transforming any interference into incompatible with the legal order and the principles of the rule of law.

In the case law of the ECHR, the “substance” is equivalent to the “essence” of the right, and its violation transforms the restrictive measure into an automatically punishable violation, regardless of the legitimate aim pursued.<sup>6</sup> Thus, the concept of “substance” is treated as synonymous with the “essence” of the protected right. This means that any restrictive measure that affects this essence – that is, the fundamental core of the right – is considered a serious violation, automatically punishable by the Court, regardless of the legitimate aim or justification invoked by the authorities for the restriction. For example, if an administrative or legislative restriction completely eliminates the individual's ability to exercise a certain essential right, the ECtHR will declare it incompatible with the obligations assumed under the Convention. Thus, the “substance” standard is absolute, imposing a stringent and inviolable protection of the core of fundamental rights, without allowing for derogations or justifications for its infringement.

On the other hand, in the Romanian constitutional tradition, the concept of “existence” of a right has a different connotation, influenced by the positivist philosophy of law. This concept emphasizes the recognition of the right as an effective legal reality, enshrined in the constitutional text and protected in a concrete way. Thus, the “existence” of a right means that the right continues to be recognized and exercisable, even if the modalities or conditions of its exercise may be subject to temporary or conditional limitations. Article 53 para. (2) of the Romanian Constitution expressly provides that any restriction on the exercise of a right or freedom “may not affect its existence”<sup>7</sup> This text reflects a concern for keeping the fundamental right alive, that is, in the effective sphere of exercise, even when certain limits are imposed on the manner or intensity in which it can be used.

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<sup>4</sup> Tutunaru, Mircea / *Probleme teoretice și practice în edificarea statului de drept*, Ed. Scrisul Românesc, Craiova, 2010, p.28-30

<sup>5</sup> Aristotel / *Metafizica*, traducere și comentarii, Ed. Humanitas, București, 2007

<sup>6</sup> Hotărârea CEDO Sporong și Lönnroth c. Suediei, 23 septembrie 1982, § 63

<sup>7</sup> Constituția României, art. 53 alin. (2)

From this positivist perspective, the “existence” of the right has a more flexible and pragmatic character, allowing for broader restrictions than those permitted by the “substance” standard. Therefore, the restriction of a right is constitutional as long as it does not suppress the right entirely or does not eliminate it as a legal possibility, but only limits certain aspects of its exercise. This concept highlights a minimal protection of fundamental rights, focusing on maintaining them as active and viable legal entities in the legal system. This formulation leaves room for a broader restriction than that allowed by the concept of “substance” within the meaning of the ECHR: as long as the right is not completely suppressed, the restriction may be constitutional.<sup>8</sup>

This divergence between the concepts of “substance” and “existence” derives from a different philosophical foundation, which reflects two distinct approaches to the protection of fundamental rights. The concept of “substance” implies the existence of an immutable axiological core, an absolute standard of protection that does not admit of derogations under any circumstances, even for legitimate purposes. In contrast, the “existence” of the right expresses a minimal normative dimension, which must be preserved even under conditions of legitimate restriction, which implies a relative standard, which accepts limitations as long as the right is not eliminated in its entirety.

This conceptual difference results in significant practical implications in the matter of constitutional review of restrictions on fundamental rights. The “substance” standard requires courts, such as the Constitutional Court or the European Court of Human Rights, to carry out a stringent analysis of the impact of the measure on the core of the right, with a maximum protection that does not allow the essence of the right to be affected. In contrast, the “existence” standard offers a wider margin for the intervention of the legislator or authorities, accepting restrictions that do not suppress the very possibility of exercising the right.

In conclusion, the two concepts essentially define different levels of legal protection of fundamental rights: one absolute, of axiological nature, and the other minimal, of normative nature. This distinction is essential for understanding how national legal systems, such as the Romanian one, relate to international standards, such as those developed by the ECHR, and for assessing the impact of these differences on legal certainty and the effective protection of fundamental rights.

### **3. The perspective of Romanian constitutional law**

The Romanian Constitution establishes a rigorous and well-defined framework for restricting the exercise of fundamental rights and freedoms, imposing a series of cumulative conditions that must be respected for any limitation to be considered constitutional and legitimate.<sup>9</sup> Thus, according to the provisions of art. 53 of the Constitution, any restriction must be expressly provided for by law, meet a genuine need in a democratic society and be proportionate to the legitimate aim pursued. These conditions reflect a delicate balance between the protection of individual rights and the general interest of society, representing fundamental guarantees against arbitrary or excessive interference.

In addition to these requirements, art. 53 introduces an essential criterion, namely that the restriction of the exercise of a right or freedom “may not affect its existence”. This provision functions as an additional protective filter, designed to ensure that the fundamental right is not totally suppressed by restrictive measures, thus preserving the effective possibility of exercising the right, even if certain aspects of its use may be limited. In this sense, the condition of the “existence” of the right offers a minimal guarantee, which differs substantially from the stricter standard imposed by the case law of the European Court of Human Rights (ECHR), where the emphasis is on the protection of the “substance” or “essence” of the right.

The Constitutional Court of Romania (CCR), as the supreme body guaranteeing the supremacy of the Constitution, has consistently applied these cumulative criteria in the analysis of the constitutionality of restrictions on fundamental rights. In Decision no. 872/2010, concerning the reduction of salaries in the public sector, the Court held that the temporary reduction of the amount does not affect the “existence” of the right to a salary. Thus, the reduction was not considered a total suppression or denial of the right, but a temporary, proportionate and justified limitation, which did not eliminate the effective possibility of individuals to benefit from remuneration for the work performed.<sup>10</sup> Also, in Decision no. 308/2012, the Court held that the absolute prohibition to run for certain positions may affect the “existence” of the right to be elected, exceeding the limits of the restriction allowed by art. 53. Therefore, such an absolute and unjustified prohibition was considered unconstitutional because it completely eliminates the exercise of the fundamental right, thus violating the minimal condition of its “existence”.<sup>11</sup>

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<sup>8</sup> Muraru, Ioan; Tănăsescu, Simina / *Drept constituțional și instituții politice*, vol. II, Editura C.H. Beck, București, 2011, p. 294

<sup>9</sup> Remus Ionescu, *op.cit.*, p.196-197

<sup>10</sup> Decizia CCR nr. 872 din 25 iunie 2010, publicată în M.Of. nr. 433 din 28 iunie 2010

<sup>11</sup> Decizia CCR nr. 308 din 28 martie 2012, publicată în M.Of. nr. 309 din 9 mai 2012

From these and similar decisions it emerges that the CCR clearly operates with a criterion of total impairment, not that of affecting the essence of the right, so that restrictions that do not completely suppress the right remain within the admissible scope, provided that the other legal requirements are respected. This approach translates into the fact that the CCR analyzes whether the right continues to exist as an exercisable legal entity, without going into details regarding potential limitations of its essential content. Therefore, the standard of protection is a relative one, focused on preserving the fundamental possibility of exercising it, while the “substance” standard – much more restrictive – requires the protection of the inviolable core of the right, regardless of the circumstances.

This difference in approach between the CCR and the ECHR underlines the particularities of the Romanian constitutional system, highlighting the need for a balanced and contextual interpretation of fundamental rights, which takes into account both the national specifics and the international obligations assumed by Romania. Moreover, the social relations regulated by the Romanian Constitution concern the essence of the state, its foundations, the social phenomena that lie at the foundation of state power and can only be regulated in the constitution and constitutional law.<sup>12</sup>

#### 4. The concept of “substance of rights” in the case law of the ECHR

The concept of “substance of rights” represents one of the fundamental pillars in the protection of fundamental rights in the case law of the European Court of Human Rights (ECHR). This doctrine was developed starting in the 1970s, in a context in which the Court sought to establish clear and effective limits for state interferences with the rights guaranteed by the European Convention on Human Rights. During this period, the idea crystallized that the protection of fundamental rights is not limited to their formal existence, but must ensure their integrity and essential content.

From a theoretical perspective, the concept of “substance” or “essence” of law can be understood as the fundamental, immutable core or content that gives the law its meaning and intrinsic value. This idea has deep philosophical roots, inspired by the Aristotelian tradition, which designated *ousia* as the “essence” of an object, what makes it what it is, and without which it cannot exist as such.<sup>13</sup> Applied in international human rights law, this concept has been adopted as a standard of maximum protection, ensuring that no restrictive measure or governmental interference can touch the inviolable core of the protected right.

In the case law of the ECHR, this principle has been crystallized in numerous relevant cases. A landmark is the judgment in the case of *Sporrong and Lönnroth v. Sweden* (1982)<sup>14</sup>, where it considered that urban planning measures preventing the use of property for a long period of time constituted an infringement of the “substance” of the right to property. The Court examined restrictions on the right to property in the context of urban planning measures preventing the use of property for a long period of time. The ECtHR considered that these measures constituted an infringement of the “substance” of the right to property, because they deprived the applicants of the effective possibility of using their property, that is, of the essential content of the right. The judgment emphasises that the protection of the right cannot be reduced to a mere formal form, but must also include guaranteeing its effectiveness, in particular its fundamental core.

Another emblematic case in defining this standard is the judgment of *Sunday Times v. United Kingdom* (1979), in which the Court analyzed the restrictions imposed on freedom of expression. Here, the ECtHR established that measures restricting freedom of expression must not be such as to empty the right of content, thereby affecting its substance. This was a clear reaffirmation of the principle that, regardless of the justifications invoked (such as the protection of national security or public order), the right must retain an absolute minimum of meaningful content, which ensures its viability and effectiveness.<sup>15</sup>

From a procedural point of view, this standard functions as an absolute filter in the judicial review of restrictions on fundamental rights: once the “substance” of the right has been found to have been affected, the justifications invoked by the State become irrelevant and the interference is considered incompatible with the obligations assumed by the Convention. This rule ensures robust protection and prevents arbitrary or excessive derogations, highlighting the imperative nature of this standard.

From a doctrinal perspective, this position of the ECHR has been interpreted as a way of maintaining a balance between the need to limit rights in certain circumstances and the need to protect their core in order to guarantee the effective respect of fundamental rights. The Court’s case-law has been interpreted by many authors as an effort to combine normative pragmatism with an axiological principle of rights protection, imposing minimum standards

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<sup>12</sup> Ciongaru, Emilian / *Teoria generală a dreptului*, Ediția a doua, Ed. Scrisul Românesc, Craiova, 2012, p.76

<sup>13</sup> Aristotel, *Metafizica*, traducere și comentarii, Ed. Humanitas, București, 2007

<sup>14</sup> Hotărârea CEDO, *Sporrong și Lönnroth c. Suediei*, op. cit., § 73

<sup>15</sup> Hotărârea CEDO, *Sunday Times c. Regatul Unit*, 26 aprilie 1979, § 65

that are not negotiable.<sup>16</sup> This has been seen as a manifestation of the "inviolable core theory" of fundamental rights, in which rights cannot be considered respected if their essence is distorted.<sup>17</sup>

In conclusion, the concept of "substance of rights" in the ECHR jurisprudence represents a standard of absolute protection, intended to guarantee that fundamental rights are not merely formal, but contain an effective core, which cannot be sacrificed in the name of legitimate interests or purposes.<sup>18</sup> This approach has profound implications in European and international constitutional law, constituting a fundamental benchmark in the evaluation of permissible restrictions on fundamental rights and freedoms.

## 5. Concept transfer and adaptation in CCR practice

After Romania's accession to the European Convention on Human Rights (ECHR) and especially after its integration into the European Union, the Constitutional Court of Romania began to invoke, more and more frequently, the concept of "substance" in the analysis of the restriction of fundamental rights, alongside the traditional one, enshrined in the Constitution, of "existence" of the right. This jurisprudential takeover was accompanied by a gradual adaptation of the national interpretative framework, in order to align it with European standards.

For example, in Decision no. 467/2023<sup>19</sup> The Court explicitly adopted the idea taken from the ECHR jurisprudence according to which the reduction of pensions must not affect the "substance" of the right to a pension. Thus, the CCR positioned itself as a guarantor not only of the national constitutional text, but also of European standards, operating a complex jurisdictional dialogue.

However, this introduction of the concept of "substance" in the analysis of the Romanian Court raises important conceptual and practical problems, given that, from the perspective of domestic law, the relevant and explicitly regulated constitutional criterion is that of the "existence" of the right. As provided for in Article 53 para. (2) of the Constitution, the restriction cannot affect the "existence" of the right, which means that the right must continue to remain a "core" of effective possibility of exercise, even if certain modalities or conditions of exercise may be limited. Thus, in Romanian law, the "existence" of law is a concept with a more flexible and pragmatic connotation than "substance" in the sense of ECHR jurisprudence, which imposes a stricter standard of protection of the immutable axiological core of law.

This difference between the two standards – constitutional "existence" and European "substance" – leads to an area of legal uncertainty. In practice, the Constitutional Court oscillates between the application of the more permissive standard of the Romanian Constitution and the more restrictive one, taken from European case law. This duality of criteria can generate confusion and lack of predictability in the interpretation and application of restrictions on fundamental rights. From the perspective of the principle of legal certainty, which requires clarity, predictability and normative stability, such a fluctuation between standards can be problematic.

From the perspective of constitutional review, an approach that alternates between two standards with different degrees of rigidity can directly influence the effective protection of fundamental rights. In some cases, the application of the "substance" standard can lead to a broader and stricter protection, while in others, the application of the "existence" standard allows for wider restrictions. This discrepancy raises questions related to the uniformity of jurisprudence and the predictability of decisions, essential aspects in a consolidated state of law.

In conclusion, the transfer of the concept of "substance" into the practice of the CCR is an eloquent example of the complexity of integrating European law into domestic law. In order to ensure both compliance with European standards and the maintenance of constitutional coherence, a clear and consistent delimitation between the two standards is necessary, as well as a solid legal argumentation of the reasons for choosing one of them in each specific case. In this way, a possible legal uncertainty that may affect the security and protection of fundamental rights in Romania can be avoided.

## CONCLUSIONS

1. The CCR should clarify, through a decision of principle, the exact meaning of the "existence" of a right, in order to avoid confusion with the "substance" of the right within the meaning of the ECHR.

2. The Romanian constitutional law doctrine should develop interpretative instruments to harmonize the two standards, preserving the national specificity.

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<sup>16</sup> Miroiu, Adrian / *Teorii ale dreptății*, Editura Altemative. 1996, p.253

<sup>17</sup> Vasak, Karel / *The International Dimensions of Human Rights*, vol. 2, UNESCO. Paris, 1983

<sup>18</sup> Safta, Marieta / *Drept constituțional și instituții politice. Volumul 1. Teoria generală a dreptului constituțional. Drepturi și libertăți*. Ed. Hamangiu, București, 2014, p.3-5

<sup>19</sup> Decizia CCR nr. 467 din 2 august 2023, publicată în M.Of. nr. 727 din 7 august 2023

3. The jurisdictional dialogue with the ECHR must be maintained, but with discernment, in order to avoid the mechanical import of concepts without adaptation.

Such clarification would contribute to strengthening legal certainty and the coherent protection of fundamental rights in Romania.

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# CONTROVERSIES REGARDING THE PHRASE “CONTROL AUTHORITIES” IN THE VIEW OF LAW NO. 50/1991 ON THE AUTHORIZATION OF CONSTRUCTION WORKS

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## Abstract

*The present study analyzes the legal controversy surrounding the interpretation of the phrase “control authorities” within the meaning of Law No. 50/1991 on the authorization of construction works, with reference to the offence provided for in Article 24 letter (b). The main objective of the research is to clarify whether the prosecutor can be regarded as a “control authority” when ordering the temporary suspension of construction works, and to highlight the legal consequences of this interpretation on the typical elements of the offence.*

*The research method employed is a juridical–doctrinal and jurisprudential analysis, conducted through a comparative examination of legal texts, judicial practice, and doctrinal opinions.*

*In our view, the legislator clearly distinguishes between administrative control authorities and judicial authorities (the prosecutor and the court), in which sense the prosecutor cannot be assimilated to a control authority within the meaning of the law. The implications of the research reveal the existence of a legislative gap *de lege lata* and suggest the need for an amendment *de lege ferenda* to separately criminalize the failure to comply with a temporary suspension ordered by the prosecutor, in order to ensure coherence and predictability of the criminal framework governing construction discipline.*

**Keywords:** *control authorities, criminal investigation body, prosecutor, offence.*

## I. Preliminaries

The issue of environmental protection and, more broadly, of quality of life has been legally shaped since the earliest written regulations. Initially, legal provisions focused on the protection of historical monuments and their surroundings, the existence of such regulations being justified by the interest in safeguarding the common cultural heritage.<sup>1</sup>

The evolution and dynamics of society have also been reflected at the level of regulation in this field. As human activities expanded and affected increasingly larger areas, the concept of quality of life and environmental protection began to occupy a growing place in the legislator’s attention. In

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<sup>1</sup> See Mircea Duțu, *Treatise on Environmental Law*, 3<sup>rd</sup> Edition, C.H. Beck Publishing House, Bucharest, 2007, p. 977.

this regard, the connections between environment and urban planning became stronger, leading to the emergence of new notions such as *urban ensemble* and *urban landscape*.

Over time, ecological requirements have also been added, progressively gaining greater importance. Zoning, servitudes, prohibitions imposed on individuals and even on authorities, and other similar measures have been gradually accepted in the name of the higher demand for collective well-being — including with respect to the natural environment.

This new dimension allows for the prefiguration of an integrated management approach, bringing together economic, financial, social, and increasingly environmental concerns, in line with the principles of sustainable development.

As rightly argued in the specialized literature, issues concerning the artificial environment cannot be regarded in isolation from those of the natural environment, both being of equal importance.<sup>2</sup>

Being regarded as a responsibility of local public authorities as well as of natural and legal persons, the protection of human settlements is regulated by Government Emergency Ordinance No. 195/2005 on Environmental Protection<sup>3</sup> (hereinafter referred to as *the law*, n.n. R.I.) in two main ways: on the one hand, by establishing a series of obligations incumbent upon these main actors, and on the other, by setting forth ecological requirements concerning urban planning and land management.<sup>4</sup>

Territorial planning represents a set of complex activities of general interest that contribute to balanced spatial development, the protection of natural and built heritage, the improvement of living conditions in urban and rural localities, as well as the assurance of territorial cohesion at regional, national, and European levels. The fundamental purpose of territorial planning is to harmonize, throughout the entire territory, the economic, social, ecological, and cultural policies established at national and local levels, in order to ensure balanced development across different areas of the country. It aims to enhance the cohesion and efficiency of economic and social relations among these areas (Article 7 of Law No. 350/2001 on Territorial Planning and Urbanism<sup>5</sup> as last amended<sup>6</sup> by Government Ordinance No. 33/2023 on the postponement of certain deadlines in the field of urban planning and construction<sup>7</sup>).

The main objectives of territorial planning are as follows:

- a) balanced economic and social development of regions and areas, with due regard to their specific characteristics;
- b) improvement of the quality of life of individuals and human communities;
- c) management of the landscape—an essential component of natural and cultural heritage—and of natural resources in the spirit of sustainable development;
- d) rational use of land by limiting the uncontrolled expansion of localities and preserving fertile agricultural land;
- e) preservation and development of cultural diversity (Article 9).

Plans and programs that may have significant effects on the environment are, prior to approval, subject to the requirement of obtaining an environmental approval (*aviz de mediu*), which has the status of a binding approval (its request and content being mandatory). This approval confirms the integration of environmental protection aspects, carried out in accordance with a specific

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<sup>2</sup> Ernest Lupan, *Treatise on Environmental Protection Law*, C.H. Beck Publishing House, Bucharest, 2009, p. 460.

<sup>3</sup> Published in the *Official Gazette of Romania*, No. 1196 of December 30, 2005..

<sup>4</sup> See Mircea Duțu, *op. cit.*, p. 977.

<sup>5</sup> Published in the *Official Gazette of Romania*, No. 373 of July 10, 2001.

<sup>6</sup> To date, the normative act has undergone 35 amendments.

<sup>7</sup> Published in the *Official Gazette of Romania*, No. 769 of August 24, 2023.

procedure established by Government Decision No. 1,076/2004<sup>8</sup>, as last amended by Government Decision No. 1,281 of October 19, 2022, providing a derogation from the provisions of Article 31 paragraph (1) of Government Decision No. 1,076/2004<sup>9</sup>) and which constitutes an integral part of the procedure for the adoption of the respective plans and programs.

According to the Romanian legislation in force, the following urban planning documents are subject to environmental assessment for the issuance of the environmental approval: development programs for the component localities of communes and towns, general urban plans, zonal urban plans, and detailed urban plans.

With regard to the legal instruments for protecting the urban environment, the most effective are environmental and urban planning servitudes, as well as prohibitions and restrictions.<sup>10</sup>

In this study, as previously stated, we aim to clarify certain controversial aspects concerning the phrase “control authorities” within the meaning of Law No. 50/1991 on the authorization of construction works.<sup>11</sup> The importance of this clarification lies in determining the conditions of typicality and, consequently, the constitutive elements of the offence<sup>12</sup>, regulated by Article 24 letter (b) of Law No. 50/1991, in situations where construction works continue after their temporary suspension has been ordered, during the criminal proceedings, by the prosecutor, in the case of buildings referred to in Article 3 paragraph (1) letter (b) of the same normative act.

Of course, in conclusion, we will also seek to formulate certain proposals for improving the legislative framework in this area.

## II. Aspects of Judicial Practice

An examination of the case law generated by the interpretation of the notion of “control authorities” reveals that, over time, two main judicial opinions have emerged, and the solutions adopted in individual cases call for as swift a generalization as possible.

To begin with, it should be noted that the version of Law No. 50/1991 in force as of August 7, 1991 did not contain any criminal provisions; it only established administrative sanctions for non-compliance with its provisions, including the complementary measure of suspending construction works (Article 28).

The offence of continuing construction works after an order for their suspension was introduced by Law No. 125/1996<sup>13</sup> for the amendment and completion of Law No. 50/1991, which, through Article 25<sup>1</sup>, stipulated that: “The following acts constitute offences:

- a) the execution, without authorization or in breach thereof, of the works provided for in Article 3 letter (b);
- b) the continuation of construction works, without authorization or in breach of its provisions, after the suspension of the works has been ordered by the authorities that imposed the administrative fine.”

This condition was maintained by the legislator even after the subsequent amendment introduced by Government Emergency Ordinance No. 231/2000<sup>14</sup>, which introduced the possibility for the prosecutor or the court, during the criminal proceedings, to order the temporary suspension of construction works as a provisional measure.

<sup>8</sup> Published in the *Official Gazette of Romania*, No. 707 of August 5, 2004.

<sup>9</sup> Published in the *Official Gazette of Romania*, No. 1,022 of October 20, 2022.

<sup>10</sup> Remus Ionescu, Andrei Ionescu, *Environmental Law. General Part*, Măiastra Publishing House, Târgu Jiu, 2021, p. 148.

<sup>11</sup> Published in the *Official Gazette of Romania*, No. 163 of August 7, 1991..

<sup>12</sup> For details regarding the constitutive elements of the offence, see Constantin Mitrache, Cristian Mitrache, *Romanian Criminal Law. General Part*, 3rd Edition, revised and expanded, Universul Juridic Publishing House, Bucharest, 2019, p. 163.

<sup>13</sup> Published in the *Official Gazette of Romania*, No. 259 of October 24, 1996..

<sup>14</sup> Published in the *Official Gazette of Romania*, No. 612 of November 29, 2000..

Some courts<sup>15</sup>, – when analyzing the offence provided for in Article 24 letter (b) of Law No. 50/1991 — namely, the continuation of construction works after their suspension has been ordered by the competent control authorities — some courts have held that the act of the defendant, who continued construction works on the building after the prosecutor had issued an order for the temporary suspension of works, meets the constitutive elements of this offence.

In support of this view, it is argued that, pursuant to Article 24<sup>1</sup> paragraph (2) of Law No. 50/1991 on the authorization of construction works, the prosecutor or the court may order, ex officio or upon request, the temporary suspension of construction works throughout the duration of the criminal proceedings.

When there are indications of the commission of an offence, the temporary suspension of works is ordered by the prosecutor who, in relation to the offence provided for in Article 24 letter (a) of Law No. 50/1991, is assimilated to a control authority, given that he is entrusted with supervising the criminal investigation concerning the offence.

It has also been argued that, although Article 24 letter (b) of the Law refers expressly to “control authorities,” since, in the case of works provided for in Article 3 paragraph (1) letter (b) of the same normative act, the suspension of works may only be ordered by the judicial authority upon the request of the control authority, the failure to comply with the prohibition imposed by the judicial authority to continue the execution of the works meets the constitutive elements of the offence provided for in Article 24 letter (b) of Law No. 50/1991.

In this context, it has been considered that if the legislator intended to criminalize the conduct of a person who continues to execute the works referred to in Article 3 paragraph (1) letter (b) of Law No. 50/1991 on the authorization of construction works after their suspension has been ordered by the control authority, then *a fortiori* it must have intended to criminalize the conduct of a person who continues to execute those same works after their suspension has been ordered by the judicial authority.

Other courts (the majority), whether sitting as panels for rights and liberties<sup>16</sup>, preliminary chamber panels<sup>17</sup>, or as trial courts have adopted an opposing view, holding that the offence is committed only when the construction works are continued after the suspension has been ordered by the competent control authorities — other than the prosecutor — namely, those expressly provided for by law (e.g., the local police or the County Construction Inspectorate).

In support of this view, it has been argued that, according to Article 24 letter (b) of Law No. 50/1991 on the authorization of construction works, it constitutes an offence — punishable by imprisonment from 3 months to 1 year or by a fine — to continue construction works after their suspension has been ordered by the competent control authorities, in accordance with the law.

Since the legal provision expressly refers to the suspension of works ordered by the competent control authorities, the material element of the offence is defined by the continuation of works after such suspension has been ordered by those authorities.

The notion of *control authority*, within the meaning of Law No. 50/1991, derives from the provisions of Article 27 of the same act, which stipulates that: “The presidents of county councils, mayors, and control authorities within local and county public administration bodies have the duty to monitor compliance with the rules on the authorization of construction works within their administrative-territorial units and, depending on the nature of the legal violations, to impose sanctions or to refer the matter to the courts or to the criminal investigation bodies, as the case may be.”

### III. Reception and Commentary on the Addressed Issue

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<sup>15</sup> Braşov District Court, Criminal Judgment No. 1.343 of September 11, 2023, available at [www.rejust.ro](http://www.rejust.ro).

<sup>16</sup> Suceava District Court, Order of October 1, 2025, available at [www.rejust.ro](http://www.rejust.ro).

<sup>17</sup> Bucharest District Court, 2nd District, Order of August 12, 2025, available at [www.rejust.ro](http://www.rejust.ro).

In support of the first judicial viewpoint, it may further be argued that Law No. 50/1991 on the authorization of construction works clearly distinguishes between the authorities competent to order the suspension of construction works, as follows:– for acts constituting contraventions, the measure is ordered solely by the authorities competent to establish and sanction such contraventions, pursuant to Articles 26 and 27 of Law No. 50/1991 on the authorization of construction works; – for acts constituting offences, the measure is ordered by the prosecutor or the court, in accordance with Article 24<sup>1</sup> paragraph (2) of Law No. 50/1991.

This distinction is explicitly confirmed by the provisions of Article 32 paragraph (4), which state that the competent control authorities, as provided by law, may request the criminal investigation bodies seized of the case and, as the case may be, the court, to order the temporary suspension of construction works throughout the criminal proceedings. This provision clearly refers to situations in which the control authorities themselves cannot order the temporary suspension of works — namely, in cases involving the commission of an offence.

Consequently, the prosecutor is the authority legally empowered to investigate the offences provided for in Article 24 of Law No. 50/1991 on the authorization of construction works. Therefore, he also holds the competence to exercise control over compliance with the legal provisions in this field (whose violation gives rise to criminal liability). Moreover, under Article 24<sup>1</sup> paragraph (2) of the same law, the prosecutor is likewise legally competent to order the temporary suspension of construction works during the course of criminal proceedings.

In our view, the second interpretative orientation is closer to the legislator's intent, given that the provisions of Article 24 of Law No. 50/1991 on the authorization of construction works criminalize two distinct types of conduct under letters (a) and (b).

Thus, letter (a) incriminates the execution, without a building permit or in violation thereof, of the works referred to in Article 3 paragraph (1) letter (b) of the Law, except for the cases expressly exempted. This provision concerns a specific category of works carried out on all types of historical monuments provided by law, on constructions located within protected monument zones and protected built areas established by law, or on constructions of particular architectural or historical value established through approved urban planning documentation.

The performance of such works on the mentioned buildings, given their special importance arising from their historical or architectural value, was expressly designated by the legislator as attracting the most severe form of **liability — criminal liability**.

The second offence provided for in Law No. 50/1991 on the authorization of construction works, namely that referred to in Article 24 letter (b), consists in the continuation of construction works after their suspension has been ordered by the competent control authorities<sup>18</sup>.

With regard to the meaning of the phrase “control authorities” within the offence set out in Article 24 letter (b) of Law No. 50/1991 on the authorization of construction works, a grammatical and systematic analysis of the legal provisions reveals that the legislator made a clear distinction between, on the one hand, the judicial authorities (the prosecutor and the court), which carry out activities within criminal proceedings concerning the offences provided for by this law, and, on the other hand, the control authorities responsible for ensuring compliance with construction discipline. The duties of each category of authorities are explicitly stated, and their competences are therefore strictly delimited by law.

From the content of Articles 27 and 28 of Law No. 50/1991, it is apparent that these provisions identify the control authorities responsible for supervising compliance with construction discipline and define their sphere of competence, namely:– control authorities within local and county public administration bodies, which are required to monitor compliance with the legal provisions on the

<sup>18</sup> The notion of *authority* (or *organ*), in its broad sense, designates a person or a group of persons who contribute to the exercise of the functions of the State. Every authority has specific duties which it performs within a legally defined scope of competence. For further details, see George Antoniu, Nicolae Volonciu, Nicolae Zaharia, *Dictionary of Criminal Procedure*, Scientific and Encyclopedic Publishing House, Bucharest, 1988, pp. 204–207.

authorization of construction works within their administrative-territorial units and, depending on the violations found, to impose sanctions or to refer the case to the courts or criminal investigation bodies, as appropriate; – control authorities designated within the Ministry of Transport and Infrastructure, which are required to supervise compliance with the legal provisions governing the authorization of construction works and, depending on the infringements found, to impose sanctions or to refer the case to the courts or criminal investigation bodies, as appropriate; – the control authorities of the State Inspectorate for Constructions.

These control authorities have the competence to establish the commission of the contraventions mentioned in Article 26 of Law No. 50/1991 on the authorization of construction works and, at the same time, to order—together with the imposition of the administrative fine—the suspension of works, accompanied by either measures for bringing the works into conformity with the building permit or measures for the demolition of works executed without a permit or in breach thereof.

From the provisions of Articles 24<sup>1</sup>, 27, 28, and 32 paragraph (4) of Law No. 50/1991 on the authorization of construction works, it follows that the control authorities, depending on the nature of the legal violation found, may: – impose the administrative fine and order complementary measures, – refer the matter to the civil courts when the violation constitutes a contravention, or – request the criminal investigation bodies seized of the case and, where applicable, the court, to order the temporary suspension of construction works throughout the duration of the criminal proceedings, in cases where the offences provided for in Article 24 of the Law have been established.

By correlating these provisions, it can be concluded that the legislator made a clear distinction between, on the one hand, the control authorities responsible for ensuring compliance with construction discipline — which may impose administrative fines and, at the same time, order the complementary measure of suspending construction works — and, on the other hand, the criminal investigation bodies or the court, which may order the temporary suspension of works within the framework of criminal proceedings.

From the wording of the aforementioned provisions, it is evident that the legislator did not intend to include the criminal investigation body within the scope of the competent control authorities. Had that been the legislator's intention, no distinction would have been made within the same legal text between the control authority and the criminal investigation body — a distinction that clearly results from Article 32 paragraph (4) of Law No. 50/1991, which provides: “In the situations referred to in Article 24, the control authorities may request the judicial bodies to order the measures mentioned in paragraph (1). The control authorities competent under the law may request the criminal investigation bodies seized of the case and, where applicable, the court, to order the temporary suspension of construction works throughout the criminal proceedings.”

We believe that the reasoning according to which the criminal investigation body should be assimilated to a control authority, on the grounds that it has powers relating to the supervision of the criminal investigation, is not applicable and would, in fact, constitute an analogy to the detriment of the defendant<sup>19</sup>. Considering that, from the corroborated interpretation of all the legal provisions cited above, it follows that the control activity referred to by the legislator concerns compliance with the discipline in the field of authorization of construction works or of works related to transport infrastructure of national interest, it becomes evident that equating the supervision of the criminal investigation with the control of construction activities regulated by Law No. 50/1991 would amount to a genuine addition to the law.

Moreover, within the offence provided for in Article 24 letter (b) of Law No. 50/1991, the legislator refers to the continuation of construction works after their suspension has been ordered, whereas in the content of Articles 24<sup>1</sup> and 32 paragraph (4) of the same act, the legislator expressly

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<sup>19</sup> Remus Ionescu, Andrei Ionescu, *General Theory of Law*, 3rd Edition, revised and expanded, Măiastra Publishing House, Târgu Jiu, 2021, p. 216.

assigns to the prosecutor and, respectively, the court, the power to order the temporary suspension of construction works during the criminal proceedings.

The use of distinct terminology in successive legal provisions within the same chapter demonstrates the dichotomic vision of the legislator regarding the liability established by Law No. 50/1991 for the protection of the construction regime, quality, and discipline in construction — namely, through distinct mechanisms for addressing administrative offences (contraventions) and criminal offences.

Thus, in the case of the execution or demolition, in whole or in part, without authorization, of the works referred to in Article 3 — except those mentioned in paragraph (1) letter (b) — by the investor or the contractor, or in the case of execution or demolition in violation of the building permit and technical project, the law establishes administrative liability. In such cases, the specific control authorities, upon imposing the administrative fine, are required to also order the complementary measure of suspending the works, together with the adoption of measures to bring the works into compliance with the permit provisions or to demolish the unauthorized works, in accordance with Article 28 paragraph (1).

Conversely, when the works referred to in Article 3 paragraph (1) letter (b) are carried out in the same unlawful manner — either without authorization or in violation of its provisions — criminal liability arises, triggering the initiation of a criminal investigation followed, where applicable, by referral of the case to the court.

The measure that the prosecutor or the court may order, according to the law, during the criminal proceedings is the temporary suspension of construction works for the duration of the investigation — until all aspects of the case are clarified and it is determined whether or not criminal liability is to be established.

The two measures have different purposes and legal nature, are ordered by different authorities, and operate within distinct frameworks of liability — administrative (contraventional) and criminal — their only similarity being that both involve the suspension of construction works on a given property.

By criminalizing the act of continuing construction works after their suspension has been ordered by the competent control authorities, the legislator sought to address situations in which the application of administrative liability proved insufficient to achieve the objective pursued by Law No. 50/1991 on the authorization of construction works — namely, ensuring compliance with construction discipline — because the offender persisted in unlawful conduct, continuing the works despite the imposition of a fine and the complementary measure of suspension.

The offence of continuing construction works after their suspension, as defined in the Law, includes as a constitutive condition that the works are continued after the suspension has been ordered by the authorities that imposed the administrative fine.

The simultaneous existence of (i) this offence, in the configuration described above, and (ii) a separate legal provision empowering the prosecutor or the court to order the temporary suspension of construction works as a provisional measure, clearly demonstrates the legislator's intention. It intended to criminalize — through Article 24 letter (b) of Law No. 50/1991 — only the conduct consisting in the failure to comply with a suspension ordered by the administrative control authorities, subsequent to the contraventional procedure, not the failure to comply with a temporary suspension ordered by the prosecutor or the court during criminal proceedings.

Finally, an additional argument supporting this interpretation lies in the fact that judicial authorities (the prosecutor and the courts) have their competence strictly defined by law, and cannot

be assimilated to administrative control bodies without breaching the principle of legality and the separation of powers.

With regard to this institution, we recall that<sup>20</sup>, this institution represents the extent to which a judicial authority (the prosecutor, the judge of rights and liberties, the preliminary chamber judge, or the trial court) exercises its legal prerogative to resolve criminal law disputes—in other words, the scope of its jurisdiction. This is the objective aspect of the notion of criminal competence, as it derives from the objective necessity of delineating the sphere of criminal activity among various judicial bodies.

From this perspective, competence is also legislatively enshrined in the Codes of Criminal Procedure, which regulate this demarcation by distributing—according to specific criteria—criminal cases among the various courts. Based on this legal allocation, the criminal competence of a given judicial authority represents the totality of criminal cases that it is legally empowered to hear and adjudicate.

Criminal competence thus refers to the lawful authority granted to a judicial body to rule on motions, applications, complaints, appeals, or any other submissions concerning acts or measures restricting fundamental rights and liberties, on the legality of the indictment and the evidence supporting it, as well as on the legality and soundness of non-indictment solutions, and to try and resolve a given criminal case. The competence of judicial bodies constitutes an essential element arising from the principle of legality, which is itself a cornerstone of the rule of law.

Material competence (*ratione materiae*) is determined by the subject matter of the criminal case, namely the act committed and defined by the criminal law, which has given rise to the legal conflict forming the object of the proceedings before the court or the judge of rights and liberties, as is the situation in the present case.

In recent Romanian criminal doctrine, Mihail Udroi explains this concept as follows:

“It is the form of competence determined by the subject matter of the criminal case (the offence that generated the criminal law conflict), by reference to which it is established which of the judicial bodies of different ranks may conduct the investigation or trial of a given criminal case, and which court hosts the judge of rights and liberties or the preliminary chamber judge who is to rule in accordance with the competences assigned by the Code of Criminal Procedure.”<sup>21</sup>.

#### IV. Conclusions

The clarification of the issue addressed is of significant importance, particularly from the standpoint of the premise situation of the offence regulated by Article 24 letter (b) of the Law. In our view, this offence presupposes two cumulative conditions: (i) the existence of an order to suspend construction works; and (ii) the suspension must have been ordered by a competent control authority.

Since criminal investigation bodies do not qualify as competent control authorities, for the reasons already explained, at least one of these two cumulative conditions is not met.

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<sup>20</sup> See Virgil Rămureanu, *The Criminal Jurisdiction of Judicial Authorities*, Scientific and Encyclopedic Publishing House, Bucharest, 1980, p. 37, cited in Remus Ionescu, “A View on the Material Competence of the Judge of Rights and Liberties to Hear and Decide on the Proposal for Preventive Arrest,” *Dreptul* Journal, No. 3/2019, pp. 147–153. .

<sup>21</sup> See M. Udroi, *Criminal Procedure. General Part*, C.H. Beck Publishing House, Bucharest, 2018, p. 183..

Given that the legal provisions expressly refer to the suspension of works ordered by competent control authorities, the material element of the offence is defined by the continuation of works after their suspension by such control authorities.

A systematic interpretation of the Law clearly indicates that the prosecutor cannot be regarded as a control authority within the meaning of Law No. 50/1991 on the authorization of construction works. The wording of the relevant provisions itself shows that the Law expressly distinguishes between control authorities and criminal investigation bodies. Since there is no other provision within the statute suggesting that criminal investigation bodies are encompassed by the notion of control authority, it logically follows that such an interpretation cannot be admitted.

Accepting an opposite interpretation would result in attributing an autonomous meaning to the term “control authority” as used in Article 24 letter (b), contrary to the meaning explicitly assigned to the same term in Article 27 of the same Law, without any logical or systematic indication that the legislator intended such a divergence.

Such an interpretation would moreover be unforeseeable and would contravene the principle of legality, specifically its *lex stricta* component.

The fact that Article 24<sup>1</sup> paragraph (2) of the Law provides that the prosecutor may, ex officio or upon request, order the temporary suspension of construction works during criminal proceedings does not justify the conclusion that such a measure could satisfy the conditions required to constitute the premise situation of the offence under Article 24 paragraph (1) letter (b) of Law No. 50/1991.

From the foregoing, it may be concluded that de lege lata, there exists a legislative gap, as the legislator has not criminalized the conduct consisting in continuing construction works after their suspension has been ordered by criminal investigation bodies. This gap cannot be filled by analogy in the application of substantive criminal law, for the reasons already explained.

Therefore, de lege ferenda, it would be appropriate for the legislator to expressly criminalize this conduct — that is, the continuation of construction works after a temporary suspension has been ordered by the prosecutor.

Finally, the doctrinal clarification of this issue remains of great significance. If the reflections presented herein serve as a foundation for further legal and policy-oriented reasoning and legislative guidance, then both their purpose and the intellectual passion from which they arose will have found their fulfilment and justification.

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# THE EMERGENCE OF A PRIVATE INTERNATIONAL LAW FOR THE DIGITAL ECONOMY: DIGITAL LEX MERCATORIA

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**Abstract:** *The Digital Lex Mercatoria represents a framework of private international law specifically tailored to the digital economy. It encompasses the “law” that private actors voluntarily define, promote, and enforce to govern online commerce across borders where no public-law jurisdiction exists or when applicable public rules diverge from private preferences. The Digital Lex Mercatoria comprises foundational models, templates, standards, criteria, guides, or conventions - collectively termed “digital private law” - that shape non-state governance over core transactions, conduct, content, and cross-border trade, as well as the infrastructure and apparatus needed to enforce compliance with such instruments. Definitions of such private law have evolved from earlier terms, including “voluntary,” “self,” “optional,” “transnational,” “neo,” “extra,” or “para-national law” - all of which have been applied to non-state rules, norms, and regulations for the digital economy.*

## CONCEPTUAL FOUNDATIONS OF THE DIGITAL LEX MERCATORIA

A central question concerns the validity and legitimacy of the Digital Lex Mercatoria. What constitutes private law compliance, and what entitlement derives from it? International governance - often termed “soft law” - applies to diverse issue-areas, non-state actors, and regulatory geometry (D. Rosen, 2004). Throughout its history, several intermediate systems have straddled the boundary between public and private law, and intellectual ventures continue to explore new avenues of soft law. The conduit connecting the Digital Lex Mercatoria to these vectors remains tenuous, and little is theorized on the interface among these disparate routes. Emerging digital platforms, cross-border contracts, the global circulation of services, and the consequent heightened need for practical private law solutions have amplified attention to private-law initiatives in the digital realm and invigorated long-standing academic discourse on their legitimacy and source.

A Digital Lex Mercatoria can be conceptualized as a private-international law framework for electronic commerce, addressing the need for hive digital standards to govern contracts for cross-border transactions and resolve disputes occurring during their performance. Such a framework is referred to as a digital lex mercatoria because it selects and furthers the broader legal and policy goals associated with that historical concept. The term lex mercatoria is widely used to denote the body of contemporary, transnational, private law that governs the rights and obligations of private parties engaged in international commercial transactions (Zumbansen, 2013). The lex mercatoria is understood to be private law in contradistinction to public law, which regulates the relationship between individuals and the state, or the relationships between different states. In the recent period digital technologies have transformed economic transactions among parties worldwide. New platforms facilitate the conclusion of cross-border contracts on a scale formerly unimaginable. Commonly employed boilerplate terms (standard-form, mass-use contract clauses) decisively guide the content of those contracts.

Private international law embodies a set of international legal norms assumed by private actors, invoked when domestic law is silent or conflicting (Michaels, 2007). In the digital economy, adherence to domestic law is tempered by the proliferation of non-state regulations or “private digital law.” Unregulated by traditional public international law, private digital law influences transactions mediated by the Internet. The Digital Lex Mercatoria constitutes a specifically digital and global private framework for e-commerce transactions (Mazzacano, 2008). Lex Mercatoria encompasses broadly applicable legal norms and legislation, while Digital Lex Mercatoria relates to digital architecture and services. These can be separated conceptually and legally owing to the nature of digital goods and the absence of a universal alternative. Governance extends to contract, transaction, content tolerance, and dispute resolution.

Private digital law emerged independently. Actors together have established international trade rules and boost effective compliance and implementation. Digital Lex Mercatoria is a collection of contractual obligations and a normative foundation for digital goods, identification of relevant rules, friction sources, criteria for clarification, and facilitate governance continuity. Digital services circulate autonomously, enjoy substantial normative independence, address a limited number of significant rules, offer auxiliary monetary trading services, transform conditions, facilitate payment, constitute additional services, and constitute demand.

While non-state governance in cyberspace occurs through soft law, public-law frameworks, and regulation, private digital-law models interact simultaneously with overlapping public frameworks and complex interplay

builds independent sophistication. Public regulation oversees digitally provided services, consumer policy efforts encompass private standards, and statutory initiative - EU Draft Directive on Electronic Contracts - recognizes proposal on preparatory private framework.

## **SOURCES AND VALIDITY OF DIGITAL PRIVATE LAW**

The diffusion of a Digital Lex Mercatoria - framework of private international law governing digital commerce - has evolved as a hybrid of non-state governance and public law. Tracing Euler's critique of governance and the interplay of state and non-state dimensions within the digital-sphere, international collaboration and adjudication have become pillars of transnational law. Central to the Digital Lex Mercatoria are the private and embedded norms characterizing Internet phenomena. Standardization emerged as the first form of transnational governance; it has given way to a tiered structure comprising (1) governance structures cultivated in transnational private-sector networks, (2) collaborative platform-driven infrastructures, and (3) legally imbedded norms cemented through jurisdictional adoption and inter-contextual alliance (Caruso, 2006). As the initiatives augmenting the Digital Lex Mercatoria proliferate across spheres of the Internet Economy, the enactment of intra- and extra-systemic norms increasingly pits private endeavours against public regulation. The expedited evolution of digital phenomena - including the rise of decentralized governance models and technological paradigms - demands further scrutiny of the resultant dynamics.

The digital economy - encompassing a wide range of commercial activities conducted online - has generated calls for a body of private international law to fill an existing governance gap. The actual structure of this law, labelled Digital Lex Mercatoria, remains contested. Competition exists not only over how to define the pertinent legal field, but also concerning the appropriate foundational concepts, basic terminology, and theoretical frameworks to employ (Mazzacano, 2008).

The inherent cross-border nature of communications on the Internet creates jurisdictional questions that private, cross-border transactions undertaken through digital platforms raise. Moreover, businesses must ensure that their digital sales and services platforms are compliant with the laws of foreign countries in which their customers are located and that foreign micro-enforcement of local regulations is avoided. Ornstein argues that the Internet helps to create a universal legal platform for all countries and that, provided that micro-enforcement is limited, statutes, constitutional contacts, and civil code regulations are viewed as unnecessary, except in cases of large-scale activities that can be plausibly connected with a country (Selvadurai, 2013). However, digital signage services adopted by businesses at specific locations to interpret signage are not likely to qualify for universal status because they continue to target consumers situated within the jurisdiction of the country applying restrictions. Wang proposes determining jurisdiction based on whether the advertising content is explicitly targeting the jurisdiction of a foreign country, rather than reliance on whether a business activity is of a cross-border nature (Wang, 2008).

Private digital law emerges through commercial relationships controlling the underlying terms and conditions while progress is made on a wider basis through the conduct of authorities, academics, and industry groups. The grounds for determining whether rules constitute law have been rigorously debated among scholars, notably in standard-setting; requirements for justification and validation can guide investigations into emerging forms of private digital law not yet captured in comprehensive treatises. Various illustrations provide an initial basis for evaluating sources and as private digital law proceeds a clearer identification of the associated paradigm will emerge, enhancing appreciation of the contexts associated with enforcement, compliance, and oversight.

The notion of Digital Lex Mercatoria denotes a system of private international law for the digital economy. The potential emergence of this system traces its roots to the mid-2000s as a reaction to growing online trade and rising demand for a harmonised normative framework guiding international commercial transactions conducted through electronic means. Digital Lex Mercatoria encompasses a broad spectrum of legal topics pertaining to the digital economy. The system is in continuous development and continues to receive active attention from a diverse array of actors, including states, multilateral organisations, international bodies, industry and business associations, non-governmental organisations, and the academic community.

Efforts aimed at articulating, elaborating, and advancing a distinct system of international commercial law for the digital economy often invoke the concept of Digital Lex Mercatoria. A prominent viewpoint posits that the origin of a Private International Law for the digital economy can be traced to the 1996 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce; consequently, the interconnected and ever-expanding domains of electronic commerce have propelled the call for a dedicated Private International Law for the Digital Economy. The emergence of a Private International Law for the Digital Economy has prompted scholarly exploration of its conceptual foundations, historical evolution, core principles, and normative structures.

## **SUBSTANTIVE RULES: CONTRACTING, DISPUTE RESOLUTION, AND ENFORCEMENT IN THE DIGITAL CONTEXT**

Particular attention must be paid to substantive rules that address the specific features of the digital context and that govern the conduct of parties. Contract formation in digital commerce is generally guided by established principles. The harmonisation of dispute resolution modalities is especially important given the speed and volume of online transactions, the imbalance in bargaining power, and companies' choice of mechanisms that favour their own interests. Finally, given the cross-border dimension of digital economy transactions, mechanisms of enforcement and of the gathering of digital evidence are developed with specific attention to these particular circumstances.

While the establishment of principles of contract formation and performance may at first sight appear like a mere reproduction of traditional doctrine, the digital setting carries specific features that shape its application. The essential elements of agreement, offer, acceptance, intention, consideration, certainty and legality are still fundamental, but the practicality of applying them must be carefully considered. The principles of contract interpretation developed in the face-to-face world may also be used in the online context. However, the role of an online platform as the intermediary in a transaction necessarily complicates the issue of interpreting the parties' true intention, and the fundamental characteristic of the nature of the contract (with respect to distance and speed) reduces the evidential value of what would be mere preliminary discussions. The practice of payment on the spot and instant contraction may not trigger the degree of certainty which those principles require.

Global electronic commerce (e-commerce) plays a crucial role in international trade, greatly contributing to the economy and development of nations. E-commerce digitalizes products and services, enabling exchanges and transactions across borders, thus becoming a core part of the global digital economy. Nevertheless, cross-border e-commerce still encounters a good number of impediments due to disparities among national laws and policies. Private Parties with conflicts must know in advance the applicable law and the competent forum in order to avoid inconsistent interpretation of rights and obligations, enforcement difficulties, and jurisdictional conflicts.

European and member-state laws are not uniform, and the arrangements that might apply still require further coordination. Different jurisdictions address the question of which nation's law applies to cross-border data flows in ways that echo well-established general principles (Wang, 2008). In particular, the conventional linking factors relevant to applicable law can be divided into three starting points: those that focus on contracts as legal instruments, those that pay attention to the quality of the parties to a given contract, and those that consider the location of performance.

The demand for uniform private international law applicable to electronic transactions has given rise to various soft law instruments at national, regional, and international levels. These instruments have been promulgated by governments, intergovernmental organizations, and private sector standard-setting organizations, in many cases with generous contributions from both limited liability companies and business associations. The general influence of these soft law instruments - together with the existence of several formal treaties governing cross-border electronic transactions that are open for accession - occasioned a soft international call for harmonization of digital transactions that sits comfortably at the intersection between private international law and commercial law.

## **CHALLENGES, CRITIQUES AND RISKS**

The Digital Lex Mercatoria confronts diverse challenges, critiques, and risks that inhibit its further development and limit its potential contribution to digital trade governance. Appearing in periodic scholarly examinations of the Digital Lex Mercatoria, many of these impediments echo those known to the wider lex mercatoria (Zumbansen, 2013) and concern similar concerns about legitimacy, coherence, and adaptability. Addressing these challenges constitutes an essential prerequisite for realizing the proposition that a Digital Lex Mercatoria is emergent, operative, or effective.

Technological advancements have increased both the horizontal and vertical fragmentation of the Digital Lex Mercatoria. Horizontal fragmentation refers to the proliferation of private international law regimes that apply to digital transactions, governed by a multitude of international treaties, regional frameworks, or national rules that define their respective scope and applicability. New actors or foundational treaties can lead to the coexistence of several regimes and the emergence of fragmented private international law within overlapping jurisdictions. Vertical fragmentation describes the co-existence of national or regional frameworks within a broader governance system that operates at the international level. "A significant number of States have entered into bilateral or multilateral agreements on electronic contracts, cybercrime, commercial information and privacy." (Kloza, 2010). In parallel, agreements that shape the governance of international digital trade multilaterally have not found W.T.O. consensus. Such tiered structures are characteristic of each digital-law domain, where regional or domestic legislative initiatives likewise reinforce the qualitative sub-division of these broader systems.

As a hybridized system of governance concurrently comprising private and public law, the Digital Lex Mercatoria is subject to contested legitimacy grounded in the doctrines of democratic accountability, transparency, and oversight. Fundamental and foundational notions of legitimacy, as derived from Weberian theory, maintain that the state uniquely possesses the lawful sources of authority from which bind and claim obedience from

subjects. Outside of the democratic state apparatus, or where state power is truncated, parties appear free to develop gainfully instrumental yet fundamentally deficient private systems of governance incapable of establishing binding authority (Selvadurai, 2013). The fragmented development of private digital commerce governance necessitates parallel scrutiny within the Digital Lex Mercatoria itself, and the absence of universally authoritative and generally accepted regimes raises fundamental questions about coherence across emergent normative frameworks. More specifically, empirical inquiries probing how state and non-state actors adopt, enforce, and vary Digital Lex Mercatoria norms reveal intersecting but somewhat disparate private governance projects. Understandably, concern about fragmentation-of regimes, standards, or laws-and the associated prospects for coherence, convergence, or convergence arise in such instances, particularly given the pace of innovation affecting foundational concepts and systems upon which digital commerce secures itself.

The economic importance of international electronic commerce and the undeniable growth of private cross-border digital networks have led to the emergence of a private international law, the Digital Lex Mercatoria, governing the Internet economy. This private international law, based on non-state rule-making, is intended to provide the legal framework for the digital economy. The Digital Lex Mercatoria, composed of tools, instruments, and topics of global governance with a cross-border dimension, covers Transnational Commercial Law, International Trade Law, and International Private Law, establishing regulations concerning Private Law, Public Law, the Global dimension of Law, and the Combinability of Forms of Law. The concept of the Digital Lex Mercatoria embraces four research issues: the legal nature of the Digital Lex Mercatoria, its adaptation to the Digital Economy, the role of private transnational rule-makers, and the Dynamic of Digital Lex Mercatoria.

### **PATHWAYS TOWARD COHERENCE: POLICY, PRACTICE, AND SCHOLARSHIP**

A private international law framework for digital commerce is emerging known by the name Digital Lex Mercatoria. Several conceptual aspects of this framework merit precise articulation. Digital commerce refers to a wide-ranging phenomenon that includes online shop front transactions, software or digital asset subscriptions, app-based service exchanges and often extends to the valuation and digital circulation of data. Private international law is a broad domain of law concerned with inter-jurisdictional trade, investment and service delivery. It encompasses topics such as: the jurisdiction of courts; the recognition and enforcement of judgments; the law applicable to cross-border contracts, torts, sales and services; and the field of arbitration. The Digital Lex Mercatoria seeks to address these topics and more specifically examines the scope and application of private and voluntary legal norms and associated enforcement mechanisms across digital trade involving two or more jurisdictions.

The emergence of a Digital Lex Mercatoria as a private, transnational regulatory framework for the conduct of digital commerce is evident from the increasing focus of scholars and practitioners on the phenomenon. Private International Law is therefore proposed as an encompassing umbrella term for the analysis of this widespread development. The following section lays the foundation for the presentation of its fundamental constituents, and it need to be given a title.

The phenomenon of a Digital Lex Mercatoria emerges as a private, transnational regulatory framework for the governance of digital commerce. Private International Law is proposed as an umbrella term for the analysis of this diffuse phenomenon. Various foundational aspects are defined, the evolution toward a comprehensive regime of digital norms and enforcement is traced, and research questions and hypotheses are articulated.

Digital commerce has proliferated rapidly since the advent of the Internet, giving rise to a fertile environment for the development of private law governance frameworks dealing with cross-border transactions. Economic and legal risks jeopardizing the unimpeded flow of digital commerce have prompted various actors to establish such frameworks, leading to the gradual emergence of a Digital Lex Mercatoria - a system of transnational rules aimed at ensuring the fluidity of digital trade. Yet frameworks specifically addressing the digital economy remain only partially developed, leaving numerous critical issues unresolved.

Digital Lex Mercatoria is defined as the transnational body of rules for international private law applicable to the digital economy. Its emergence is inextricably linked to the broad interaction of two phenomena: the rise of cross-border digital transactions, on the one hand; and the recognition that virtually all major legal systems are unable to fully cope with the vast array of legal transactions migrated onto digital media, on the other. The term echoes the earlier concept of *lex mercatoria* as a transnational system of commerce regulation characterised by the principles of neutrality towards substantive trade choices, party autonomy, and self-governance which provide a degree of legal certainty to traders operating in cross-border environments. Digital Lex Mercatoria is therefore described as an assembly of formal and informal rules, soft and hard law, designed to delineate the contours of applicable law, establish enforceable rights and obligations across jurisdictional boundaries; and regulate the resolution of disputes, all in the context of digital economic exchanges.

### **CONCLUSION**

Digital commerce is governed by a body of private international law termed the Digital Lex Mercatoria. A lex mercatoria establishes the commercial rules necessary to facilitate commerce and trade amongst strangers by minimizing legal uncertainty and maximizing predictability. Its peers are the traditional principles of private international law and modern transnational commercial law which originated with the European codification efforts of the nineteenth century (D. Rosen, 2004). The emergence of a Digital Lex Mercatoria is therefore not an indication that nation-states are abdicating their responsibility to govern cross-border flows of commerce. Abundant evidence demonstrates that commercial actors are creating and applying lex mercatoria on both a local and a global basis. Actors, institutions, and actors engaged in these collective and collaborative endeavours are therefore the focus.

The use of private norms - third-party industry-specific standards, model terms, boilerplate clauses, and non-State dispute resolution mechanisms - serves as a foundation for the development of a Digital Lex Mercatoria. Private norms alone do not, however, qualify as a full-fledged lex mercatoria. Commercial actors also rely upon platform-specific terms and contract-governance mechanisms to provide the requisite confidence to engage in cross-border digital transactions. The evolution of private standard-setting mechanisms towards norm-setting agreements for digital commerce therefore provides a critical focus for scholarly attention.

Digital Lex Mercatoria - Designating digital private international law for the economy - In the complex and fragmented governance landscape of the digital economy, the notion of digital lex mercatoria has emerged as a construct designating the nascent private international law governing digital trade. The concept is increasingly invoked in academic debates and international fora to delineate the scope, architecture, and content of binding norms that digital stakeholders invoke outside and beyond domestic legal systems.

Private international law regulating cross-border trading of goods and services via electronic means has developed in parallel with the rise of the Internet and the generalisation of Information and Communication Technologies (ICT) and electronic commerce. It is labelled lex mercatoria digitalis, lex informatica, and private law intervening in the field of information technology, law of electronic construction, or law applicable to electronic payment systems (Mazzacano, 2008). Digital lex mercatoria designates the evolving principles, rules, and norms governing such transactions, providing guidance to legislators, regulators, and enterprises affected directly or indirectly by these transactions (D. Rosen, 2004).

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# LAW AS A FORM OF KNOWLEDGE AND A VECTOR OF SOCIAL CHANGE

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## **Abstract**

*This paper analyzes law from an epistemological and sociological perspective, considering it both a specific form of knowledge and an instrument for social transformation. Starting from the idea that education and creativity are the foundation of a knowledge-based society, it argues that law is not merely a set of norms but an expression of collective rationality and of how society projects its core values. The study highlights law as a form of social knowledge and a vector of social change. It explores law as a system of reason and normativity, in which the interpretation and application of rules involve complex cognitive processes integrated with social and cultural values.*

*The paper emphasizes the role of legal education in shaping social consciousness, showing its impact on civic literacy, socialization, and digital responsibility. It presents law as a driver of social change, analyzing sociological theories, civic participation, and social innovation. Finally, it examines creativity and innovation in modern legal thinking, demonstrating how the interpretation of norms and legislative design contribute to adapting law to emerging realities. The study reveals that legal education and creativity are essential for consolidating a responsible, innovative, and adaptable society, where law functions as an instrument of cultural, social, and technological progress. The paper proposes an interdisciplinary approach, where legal education and social awareness contribute to adapting society to new realities and to strengthening a legal culture oriented toward knowledge and civic responsibility.*

**Keywords:** law, legal education, social change, creativity, innovation

## **Introduction**

In contemporary societies, the relationship between knowledge, education, and law is of fundamental importance. Education contributes to the formation of legal consciousness, while law, in turn, becomes an instrument through which social values are translated into norms. From this perspective, law is not merely a technical set of rules but a form of social knowledge, a symbolic system through which society expresses and structures its worldview. This paper aims to highlight how law functions as a vector of social change by analyzing its epistemological, educational, and creative components.

### **I. Law as a Form of Knowledge: Between Rationality and Normativity**

In contemporary society, law can no longer be understood solely as a set of legal rules intended to maintain order; it must be seen as a complex system of social knowledge – a way through which society understands itself, interprets its experiences, and projects its future. Law thus becomes an institutionalized form of social reason, an expression of the collective capacity to formulate concepts, norms, and structures that give meaning to coexistence.

Law, in essence, involves a cognitive activity: understanding, interpreting, justifying, and applying. It is a type of practical knowledge in which theory and experience converge. In Western tradition, since Aristotle, a distinction has been made between *episteme* (theoretical knowledge) and *phronesis* (practical wisdom). Law belongs to the latter category: it does not produce absolute truths but rational decisions suitable for specific social contexts.

Legal epistemology investigates how we know and justify law. Unlike the exact sciences, truth in law is not purely empirical but coherent and value-based. The interpretation of legal norms involves a complex cognitive process, in which judges or legislators do not merely apply rules but construct their meaning.

Hans Kelsen<sup>1</sup> argues that legal science must be axiomatically neutral, focusing on the logical coherence of norms. In contrast, Jürgen Habermas<sup>2</sup> emphasizes that norms are intrinsically linked to social values, and their validity depends on democratic dialogue and social consensus.

Max Weber<sup>3</sup> distinguished between formal rationality – strict adherence to rules aimed at predictability and stability – and substantive rationality – oriented toward values, justice, and equity. Modern law integrates these

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<sup>1</sup> Hans Kelsen, *Pure Theory of Law*, University of California Press, Berkeley, 1960, p. 78.

<sup>2</sup> Jürgen Habermas, *Facticity and Validity*, Polirom Publishing House, Iași, 2006, p. 132.

<sup>3</sup> Max Weber, *Economy and Society*, Political Publishing House, Bucharest, 1978, p. 356.

dimensions: it must be predictable but flexible, adapting to the evolution of social values. Any knowledge-based society needs reflexive law, capable of learning from experience and adjusting norms to new realities.

Law uses a specific language – normative, abstract, and symbolic. Legal terms and abstract concepts are not merely technical tools but also cultural and cognitive codes. Through legal language, values are transformed into applicable norms and concrete actions, facilitating social coordination.

Émile Durkheim<sup>4</sup> emphasizes that norms express social solidarity, while Niklas Luhmann<sup>5</sup> argues that law generates meaning and order through its communicative structure.

Relevant examples include: criminal law, which reflects collective values; constitutional law, which interprets the fundamental principles of society; and digital law, which adapts norms to emerging technological realities. These examples demonstrate that law is both an instrument of understanding and a vector of social change.

Viewed as a form of knowledge, law combines rationality, value, and creativity. It requires a continuous process of learning and reinterpretation, in which society adjusts its norms to emerging realities. Understanding law in this manner means recognizing it as an act of collective knowledge – a synthesis of science and culture, norm and life.

## **II. Legal Education and the Formation of Social Consciousness**

Education represents the means by which legal values are internalized and transformed into social practices. The formation of legal consciousness begins in school and continues throughout life. A knowledge-based society implies citizens capable of understanding the meaning of norms, not merely obeying them. Legal education develops critical thinking, interpretive skills, and the assumption of civic responsibility.

The sociology of legal education shows that internalizing norms does not occur solely through formal learning but also through social experiences, behavioral models, and institutional communication. Legal education thus becomes an essential component of civic education, fostering a culture of respect for law as well as active participation in community life. In a globalized world, this type of education contributes to forming a universal legal consciousness capable of integrating principles such as human rights, equality, and social justice.

### **1. The Role of Legal Education**

Legal education is a cornerstone in developing a knowledge-based society, as it ensures the transmission of normative values, understanding of citizens' rights and responsibilities, and supports the formation of critical social consciousness. In a complex and globalized world, legal education is no longer the privilege of legal professionals but an indispensable element of civic literacy for all ages.

Through legal education, individuals learn to recognize the social consequences of their actions, interpret laws, and actively participate in democratic life. John Dewey<sup>6</sup> emphasizes that education should aim to form the capacity for critical thinking and responsible action, directly applicable to the legal domain.

### **2. Legal Education as a Mechanism of Socialization**

Legal education functions as a mechanism of formal and informal socialization. By knowing the norms, individuals acquire analytical skills, respect for law, and the ability to assess the impact of their decisions on the community. Schools and universities implement civic and constitutional law programs, adapted to different age levels, facilitating the integration of legal norms into daily life. Civil society and NGOs organize awareness campaigns and educational projects on human rights, justice, and environmental protection, stimulating civic engagement. Practical examples include mock trials, legal debates, and law competitions, which allow understanding norms in applied contexts.

Durkheim<sup>7</sup> stressed that social norms are internalized more effectively through direct and practical experience, and legal learning provides precisely this experience, contributing to forming moral and civic consciousness.

### **3. Social Consciousness and Legal Norms**

Social consciousness reflects individuals' capacity to understand and respect collective norms, and legal education plays a decisive role in this process. By understanding law, citizens can anticipate the effects of their actions and make informed decisions, contributing to social stability and cohesion. Durkheim<sup>7</sup> emphasizes that internalizing norms is key to preventing deviant behavior. Moreover, legal education fosters critical attitudes, helping individuals distinguish between just and unjust norms, thereby supporting progressive social change.

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<sup>4</sup> Émile Durkheim, *The Division of Labour in Society*, Albatros Publishing House, Bucharest, 1996, p. 77

<sup>5</sup> Niklas Luhmann, *Law and Society*, All Beck Publishing House, Bucharest, 2004, p. 93.

<sup>6</sup> John Dewey, *Democracy and Education*, The Macmillan Company, New York, 1916, p. 76.

<sup>7</sup> Durkheim, Émile, *The Elementary Forms of Religious Life*, Editura Polirom, Iași, 1995 p. 113

#### **4. Law and Digital Education**

In the digital era, legal education must also include the digital component: personal data protection, online rights, cyberbullying, and responsible technology use. GDPR, cybersecurity legislation, and online consumer rights are examples of norms that must be integrated into education to form a digital social consciousness. Thus, legal education becomes a vector of social change, preparing citizens to act responsibly both in physical and digital environments. Daniel Goleman<sup>8</sup> shows that social and emotional intelligence develops through education, which applies directly in the legal context.

In this context, legal education is not just the transmission of norms but the formation of a critical and responsible social consciousness. Through formal and informal socialization, legal education contributes to social cohesion and the prevention of deviant behavior. Digital law and modern legal education are essential for a knowledge-based society and civic responsibility. Legal education functions as a vector of social change, forming citizens capable of active and informed participation in community life.

### **III. Law – Expression and Driver of Social Change**

Law reflects societal dynamics but also shapes them. Any significant social transformation eventually translates into legislative changes. From democratic revolutions to the digital transition, law has consistently served as an instrument of adaptation and innovation. Legal codes are not just normative texts but cultural maps capturing the mentality of an era.

A relevant example is the digitalization of justice, which redefined access to justice. Legislation on gender equality or environmental protection shows that law can be a driver of social progress. In this sense, law is both an expression of collective consciousness and a vector of change – a force capable of reshaping the relationships between individuals, communities, and the state.

Law is not merely a static set of rules but a dynamic instrument of social transformation, shaping behaviors, institutions, and collective values. In a knowledge-based society, law becomes reflexive knowledge, identifying social problems, proposing normative solutions, and stimulating institutional adaptation. Max Weber<sup>9</sup> emphasizes that formal and substantive law complement each other: law provides predictability and stability while serving social values and progress, demonstrating that norms can lead to cultural and social transformations.

#### **1. Sociological Theories of Social Change and the Role of Law**

Various sociological currents explain how law facilitates social change. Functionalist theory (Durkheim, Parsons) shows that legal norms maintain social cohesion and that their modification responds to emerging societal needs. Conflict theory (Marx, Dahrendorf) emphasizes that law reflects and can adjust power relations, contributing to correcting social inequalities. Systems theory (Luhmann, 1993) highlights that law is an autonomous communication system interacting with other social subsystems (education, economy, politics), facilitating adaptation and stability.

These perspectives show that law is both reactive, adapting to social changes, and proactive, generating new norms that influence behaviors and collective values.

#### **2. Legal Education and Civic Participation: Instruments of Change**

Legal education not only informs citizens but creates agents of social change. By knowing norms and participating in civic life, individuals interpret and apply law in concrete contexts, influence the legislative process through democratic participation, and contribute to transforming social values through civic initiatives. Practical examples include constitutional reforms, environmental legislation, minority rights, and digital law. All reflect the interdependence between legal education and social change.

#### **3. Law and Social Innovation**

In a knowledge-based society, law stimulates social innovation by creating legal frameworks for technology and the digital economy (e.g., artificial intelligence), supporting innovative educational and social projects, and protecting individual and collective rights in a continuously changing environment. Law is thus anticipatory, creating conditions for a more equitable and adaptable society.

#### **4. Law's Impact on Culture and Social Norms**

Social change occurs not only through legislation but also through the internalization of new norms and values. Law influences informal social norms through educational campaigns and jurisprudence, shaping socially

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<sup>8</sup> Daniel Goleman, *Emotional Intelligence*, Curtea Veche Publishing House, Bucharest, 2008, p. 209.

accepted or rejected behaviors. Through civic-legal culture, law shapes collective perception of justice, equity, and civic responsibility.

Niklas Luhmann<sup>9</sup> emphasizes that law generates social meaning and order through normative communication, which is essential in a knowledge-based society.

In this sense, law is an active agent of social change, not merely a mechanism for regulating behavior. Legal education, civic participation, and digital norms contribute to forming a responsible and adaptable society. Law stimulates social innovation, protects emerging values, and facilitates integrating technologies and knowledge into community life. In a knowledge-based society, law functions as a vector of cultural and social transformation, generating cohesion, responsibility, and progress.

#### **IV. Creativity and Innovation in Modern Legal Thinking**

Traditionally, law is associated with stability and predictability. However, legal interpretation involves a high degree of creativity. Every judicial decision, every doctrinal commentary represents a form of conceptual innovation. Modern legal thinking values this creative dimension, recognizing that law evolves through continuous reinterpretation and adaptation.

Legal creativity does not mean arbitrariness but the ability to generate new solutions within the boundaries of normative rationality. In the digital era, new challenges related to artificial intelligence, data protection, or digital rights require flexible and innovative legal thinking, in which the interpreter becomes a creator of meaning, not merely an enforcer of norms. Here lies the convergence of law and knowledge science: both aim to understand order but acknowledge the fundamental role of human imagination in constructing social reality.

Legal thinking is not limited to the mechanical application of norms but requires creativity and the ability to interpret law in new contexts. Modern law must respond rapidly to social, technological, and cultural changes, and innovation in jurisprudence and legislation becomes essential for a knowledge-based society.

Legal creativity includes interpreting norms in new situations, designing innovative legislative solutions, and adapting institutions and procedures to emerging social realities. Judges, lawyers, and legislators use creative thinking to resolve complex cases and fill legislative gaps. Concrete examples include jurisprudence on digital rights and personal data protection, innovative decisions in environmental, public health, and minority rights, and the creation of legal mechanisms for emerging technologies (artificial intelligence).

This interpretive flexibility allows law to function as a vector of social change, adapting rapidly to citizens' needs. Modern legal education must be practical and creativity-stimulating. Activities such as mock trials, debates on innovative topics, and interdisciplinary projects contribute to forming flexible, critical, and innovative thinking, essential for legislative and jurisprudential development in the 21st century.

Law changes not only through new legislation but also through interpreting existing norms in light of social change. Thus, creative legal thinking supports the transition to a knowledge-based society, encourages respect for rights and collective responsibilities, and consolidates citizens' trust in legal institutions.

Legal creativity is indispensable for adapting law to modern society. Innovation in interpreting norms and legislation facilitates progressive social change. Legal education must stimulate critical and creative thinking, preparing professionals capable of responding to emerging challenges. Modern law, combined with creativity, becomes a vector of cultural, social, and technological progress, aligned with the values of a knowledge-based society.

This study demonstrates that law transcends the normative sphere, becoming a specific form of knowledge and a force of social transformation. Legal education, interpretive creativity, and the legal system's adaptive capacity define law as a total cultural phenomenon. In a knowledge-based society, law should be understood not only as a state instrument but as a space of dialogue between reason, values, and reality.

The research results converge toward the idea that a knowledge-based society cannot exist without legal education, critical reflection, and normative creativity. Law, through its role as a link between individual and community, between morality and reason, is a form of collective intelligence, an expression of society's capacity to self-regulate and reinvent itself.

Legal education should thus be seen as an investment in social capital, and legal creativity as a source of institutional progress. Together, they provide the framework for a society where law is not only constraint but also possibility, not only a limit but also a space for affirming human freedom and dignity.

The study shows that law, education, and creativity cannot be conceived separately. They form the essential trilogy of a knowledge-based society – a society that learns, adapts, and evolves through a balance between norm and freedom, between order and innovation. Law thus becomes the rational language of humanity, a space for dialogue between past and future, tradition and progress.

The future of a knowledge-based society depends on our capacity to understand law not merely as a regulatory instrument but as a form of culture, education, and creation. Only through an interdisciplinary vision,

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<sup>9</sup> Niklas Luhmann, *Dreptul și societatea*, Editura All Beck, București, 2004, p. 93.

uniting law with sociology, philosophy, and education, can a legal culture oriented toward progress and responsibility be consolidated.

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# BRIEF CONSIDERATIONS ON THE ROLE OF LEGAL ETHICS IN THE DIGITAL AGE

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## **Abstract**

*As artificial intelligence reshapes many industries, the legal field is facing its own crossroads. In recent years, an increasing number of legal professionals have adopted artificial intelligence tools to increase efficiency and reduce costs. Legal experts intend to integrate artificial intelligence into their daily operations and agree that the effective use of artificial intelligence will increase in the coming years as the most interesting phenomenon of this beginning of the century is the presence of Artificial Intelligence everywhere, in the judicial system, including in all legal professions. And for a correct perception of the role of lawyers in society, a sustained and long-term effort is needed by them, by the judicial system as a whole. In such a situation, maintaining ethical integrity in the activity of administering justice has a major role.*

**Keywords:** *legal ethics, justice, legal professions, artificial intelligence, artificial intelligence law*

## **1. Argumentum.**

We are interested in obtaining quality legal services in the shortest possible time. But do we really know what their value is? How much unseen effort is behind it? The office of the judge, lawyer or notary, to take just these examples, does not mean only the lawyer entrusted with the legal situation of the parties, it is an entire institution, made up of people with many responsibilities, whose training involves numerous human and material resources. For example, the judge is not a product of artificial intelligence that asks you to answer a set of pre-established questions to identify yourself and, possibly, put you on hold until a real person can answer you. The lawyer maintains a lively connection with the clients, from whom he obtains and to whom he communicates information, issues and records invoices, keeps the registers, archives the documents and much more. Is there an appointment for signing at the notary? Absolutely not, because, before signing, the notary goes through numerous public registers that must be checked for each person individually. Of course, under the conditions in which the platform works. Next comes the checks on the property. After the forced execution has been completed, the executor's job is not over, as he must complete the advertising formalities in the land registry, transmit or even directly make the entries in public registers and make countless reports, some of them based on instructions that are difficult to understand and follow. Statistical reports are made on various sections for the INS in order to facilitate statistical research. And if he has a problem, he has only one solution: to talk to the chatbot!<sup>2</sup>

If we look at all this, if we think a little about the responsibility that those who participate in the administration of justice bear when making these checks, communications or records, and if we understand that entering a single wrong number can generate serious consequences, we realize that the most important part of the legal field, for which they have prepared intensely, seems to remain somehow in the shadows. Finding legal solutions to the extremely complex problems that he faces every day, drafting documents, discussions with clients, these should occupy most of his time. On the other hand, he has assumed the importance of checks in the

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<sup>2</sup> Laura Badiu, *Duce notarul, dar cât mai poate duce?*, <https://www.juridice.ro/essentials/8212>.

matter of specific procedures, they lead to increased security of procedural documents, which is why the quality of checks should not be discounted, no matter how many there are. But, in addition to these, the multitude of administrative duties in recent years, their increasing responsibility for tasks that are not necessarily related to the skills they have acquired (if you are not good at it and you do not have a good IT employee, you have no chance of doing your job) put an extraordinary pressure on them. And it is difficult to understand why, in the context of the much-hyped digitalization of public authorities through the government cloud, work is still carried out disparately, with each institution uploading as much data as possible, but which remains isolated, usable only by the applicant, owner or creator. It is also difficult to understand why public institutions do not collaborate and do not access information from the archives of other institutions, thus so that the same data is not created and stored multiple times, doubling the workload but without any real efficiency. Isn't it specified everywhere by the authorities responsible for digitalization that in order to ensure an efficient and coherent flow of information, the integration of different data systems and ensuring their compatibility is of paramount importance in order to avoid duplication of efforts and to ensure a fluent administration of public services?

The lack of interoperability of IT systems in public administration means, for example, that new tasks are imposed on public notaries, given that one of the purposes of the cadastre and land registry system is precisely the provision of data to public institutions of the state, as Law no. 7/1996 itself proclaims! Likewise, if the alienation of a property is already conditional on obtaining a tax attestation certificate from the local tax authority and an extract from the land registry issued by public registries, why are these tax/budgetary obligations not recorded in them? Why is it necessary to consult dozens of registers when all of this could be centralized in one? What is the point of digitization if the information is not correlated and must sometimes be searched manually, in PDF documents, as in the case of historical monuments? There are many questions, to which we will probably not receive answers. Many of these problems have already been reported. We wonder if and how much more the judicial system can take on the tasks and responsibilities that should be incumbent on other institutions? Or at least that they be truly utilized in the interest of the citizen! And after this gloomy picture of the administration of our justice, a possible panacea, the use of Artificial Intelligence in the legal professions.

## **2. Artificial Intelligence in the legal field**

### ***2.1. Clarifying questions regarding the presence of Artificial Intelligence in the legal field***

Artificial intelligence, in a broad sense, represents the ability of computer systems to perform tasks that, traditionally, required human intelligence: pattern recognition, decision-making, learning from data. The European Parliament has defined artificial intelligence as “the ability of a machine to imitate human functions, such as reasoning, learning, planning and creativity. AI allows technical systems to perceive the environment in which they operate, to process this perception and to solve problems, acting to achieve a specific goal. AI systems are capable of adapting their behaviour to a certain extent, analysing the effects of previous actions and operating autonomously.”<sup>3</sup>

Artificial Intelligence (AI) is no longer a promise of the future, but a reality of the present. If a decade ago AI seemed reserved for technical fields, today we find it in medicine, education, art – and, inevitably, in the legal field. Justice, built on rigor, reasoning and tradition, seems, at first glance, incompatible with the automatism of an algorithm<sup>4</sup>. And yet, AI has not only penetrated legal practice, it is beginning to transform it. As artificial intelligence reshapes

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<sup>3</sup> „Ce este inteligența artificială și cum este utilizată?”, <https://www.europarl.europa.eu/topics>

<sup>4</sup> Serafima Prodan, *Etica utilizării AI de către avocați*, <https://www.juridice.ro/788880>

many industries, the legal field is facing its own crossroads. In recent years, a growing number of legal professionals have adopted artificial intelligence tools to increase efficiency and reduce costs. According to recent figures, almost 73% of legal experts intend to integrate artificial intelligence into their daily operations and agree that the effective use of artificial intelligence will increase in the coming years as the most interesting phenomenon of this beginning of the century is the presence of Artificial Intelligence everywhere. Therefore, also in the judicial system including in the forced execution of court decisions. There are already judges who use AI in drafting decisions, such as the case of Great Britain where this issue has been regulated. Indeed, AI represents an interesting phenomenon and at the same time a major challenge worldwide, as it has the capacity to produce significant changes in certain industries.

At the moment, in Romania, in the legal field there is no AI system implemented that would help us in the activity or study of legal issues, but a future implementation is not excluded if such a system supports the increase in the quality of the services provided. By the nature of the profession, lawyers have quite strong opinions, which can lead to disagreements ranging from small to large in interpersonal relationships. And yet they have to work and interact, and books teach us that we need to cultivate courtesy towards each other.

I think it is important to understand that legal professionals face the same set of human challenges as the vast majority of intellectual service providers. They are guided by the same feelings, emotions and aspirations that define them as professionals and as people. The legal job market is visible, dynamic and competitive. Current trends show that law firms are emphasizing efficiency, digitalization and professionals who not only know the law, but also understand the economic and business context in which they operate. Also, soft skills, such as negotiation, leadership and client relationship management skills, are becoming as important as legal expertise. On the other hand, for a constructive dialogue with office colleagues, judges, clerks, prosecutors and all the lawyers they come into contact with, a constructive dialogue is needed in which they listen twice as much as they speak, to make sure that they are understood, to be diplomatic in the conversation. Be aware that everything they do has a significant impact on the community. In a profession where knowledge is constantly evolving, investing in their own training is not only a necessity, but also an opportunity to become better prepared and more valuable integrated into the evolution of artificial intelligence.

## ***2.2. The role of AI in the transformation of the legal professions***

As a lawyer, scientific researcher and university teacher, I have discovered the potential of AI in the transformation of the legal professions. My experience with this tool has led me to a captivating duality: sometimes, I find AI fascinatingly good – a remarkable help in my work, but at other times, I notice that it makes major errors. This ambivalence has generated a wide spectrum of reactions in me, from fear in the face of a technology with such vast potential, to enthusiasm for such a promising tool and culminating in reflections on ethical implications, data protection and professional responsibility. In addition, we have noticed that almost all legal professions, especially in law and notary, have already started to develop various AI applications dedicated to improving and streamlining their work. Also, local platforms propose AI assistants specialized in the legal field, clear evidence that the integration of technology in the legal professions is no longer a mere perspective, but a rapidly expanding reality. According to the World Economic Forum forecasts<sup>5</sup>, by 2030, approximately 35% of the current legal tasks of the legal professions will be automated. In this context, the question that arises is: is AI a simple assistant to the legal professional or a competitor that questions the very existence of the profession? Beyond its undeniable usefulness, AI raises ethical challenges, risks generating professional imbalances and puts pressure on the concept of legal originality. We are, perhaps,

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<sup>5</sup> „Future of Jobs Report 2025”, Sursa: WEF\_Future\_of\_Jobs\_Report\_2025.

the first generation of lawyers who must decide how human reason coexists with algorithmic reasoning.

A separate branch of AI, which has been the subject of heated discussions recently, is generative AI (such as ChatGPT), which is capable of generating coherent text, constructing reasoning and drafting documents, including legal ones. It seems that lawyers are one step ahead, already using this tool for document review, jurisprudential analysis, rapid identification of applicable rules and even for drafting argument schemes. We are not talking about the future – we are talking about a present in which AI is part of the law firm. According to the World Economic Forum’s predictions<sup>6</sup>, – based on a large study involving over 1,000 companies in 55 countries and integrating the opinions of industry leaders, including the legal sector – by 2030, approximately 35% of the activities currently carried out by lawyers could be automated. These mainly target repetitive and low-complexity tasks: reviewing contracts, analyzing files or automatically drafting standard clauses. This is not surprising – AI can process huge amounts of information with a speed and accuracy that exceeds human capacity, thus optimizing the time dedicated to this type of activity.

But the transition does not mean disappearance, but rather transformation. The same report estimates that in parallel with automation, approximately 25% of new roles in the legal field will emerge, which will require technological skills combined with legal expertise. This will lead to the emergence of positions such as legal technology managers – those who implement and monitor AI solutions in law firms, legal analysts – who interpret the results generated by algorithms, or digital compliance experts – responsible for complying with data protection regulations and the ethical use of AI. Another study, conducted by Goldman Sachs, goes even further, suggesting that up to 44% of current legal work could be automated – a significant percentage, higher than in other industries. However, automation will not eliminate the role of the lawyer, but will give him or her exactly what is essential: the time and energy needed to focus on strategic aspects, personalized advice, negotiation and other activities with higher added value. Now, we are witnessing the reconceptualization of legal services. From simple one-off consultations, the profession is evolving towards long-term strategic advice, anticipating legal risks and building preventive solutions. It is an evolution that enriches the intellectual dimension of the profession. In this context, continuing education becomes a tool of excellence in itself. It can no longer be episodic, but must become a continuous and systematic process. High-quality expertise remains the surest path to international recognition and professional satisfaction. In addition, the digital transformation of justice through various means - online processes, electronic files, legal research tools based on artificial intelligence - all of these are not obstacles, but tools that can streamline the lawyer's work and improve citizens' access to justice. Instead of signaling the end of the profession, these trends rather foreshadow a mutation: from the task-executing lawyer to the strategic advisor lawyer, with unpredictable consequences, AI - an effective ally or a rival. AI can be a valuable assistant: it streamlines repetitive tasks, speeds up database searches, offers suggestions for the logical structuring of a text or strategies, thus freeing up the lawyer's time for activities that require critical thinking and intuition.

However, the way generative AI models work – by identifying patterns and imitating information already in their database – raises a key question: if AI can “mimic” legal thinking, could it also become a competitor for lawyers? Especially in the field of legal advice, the quick and accessible answers provided by AI may seem enough for clients looking for immediate and inexpensive solutions. Thus, lawyers who do not integrate these tools risk becoming uncompetitive against those who use them effectively. This trend is confirmed by a study

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<sup>6</sup> S. Prodan, op. cit., p. 3.

conducted by the Thomson Reuters Institute<sup>7</sup>, according to which 84% of law firms plan to increase investments in AI technologies, considering them a strategic advantage. But the enthusiasm comes with real risks: excessive reliance on AI can lead to a decrease in the rigor of legal analysis and even serious errors.

Even if we have not entered the heart of the ethical issues of the legal professions, it is legitimate to ask whether it is moral for a lawyer to charge the same rate for work performed partially or significantly with the help of an automated tool. How do we quantify, in a fair and transparent way, “human work” when repetitive tasks - such as drafting standard documents, analyzing large volumes of data or legislative research - are taken over by an AI system? On the one hand, the effective use of AI could contribute to the democratization of access to justice, allowing lawyers to provide services faster and at lower costs. Ideally, this technological progress would mean that more people - especially those on low incomes - could benefit from qualified legal assistance. On the other hand, there is a risk that the efficiency achieved through technology is used only to increase profit margins, without actually reducing fees. Clients could end up paying high prices for standardized services, delivered mainly by algorithms, without substantial intervention by the lawyer. In such a scenario, technology becomes a screen behind which the value of human work is diluted, while maintaining high costs, to the detriment of transparency and fairness. This confusion between “automated assistance” and “professional legal assistance” can erode trust in lawyers and in justice in general.

From a legal point of view, Article 50 of Regulation (EU) 2024/1689 on artificial intelligence establishes transparency obligations mainly on the part of providers of AI systems and, under certain conditions, on the part of users who make AI-generated content available<sup>8</sup>. The obligation to information to the public usually occurs when the interaction takes place in an open setting or when AI generates content with the potential for manipulation or misleading. Therefore, a lawyer who uses an AI tool in the internal legal drafting or analysis activity is not automatically obliged, according to art. 50, to inform his client that he has used such a tool, as long as there is no direct interaction between the client and the AI system, and the final content is assumed by the lawyer. However, in the near future, as case law, ethical norms and judicial practices adapt to the use of artificial intelligence, it is possible that the standards of information and professional assumption will become stricter, including in the legal field.<sup>9</sup> Last but not least, there is the dilemma of the quality of the final result. Although a text generated with the help of AI may be coherent and well-structured, it often misses essential nuances, hidden contradictions and legal subtleties that can make the difference in a complex case or legal opinion. AI cannot be held liable for the errors it generates. Therefore, the lawyer remains responsible for any legal consequences of the delivered products. This requires not only a rigorous verification of any automatically generated content, but also a good understanding of how these models work – their limitations, the risks of hallucination, algorithmic bias or the lack of local legal context. Therefore, AI can be a valuable tool, but in the legal profession it cannot replace discernment, professional responsibility and the relationship of trust with the client. That is why its use requires transparency, ethical discernment and strict compliance with legal and deontological norms. Another subtle but profound risk is the dilution of legal creativity. To the extent that AI is trained on existing case law and texts, it sometimes faithfully reproduces, sometimes with stylistic variations, already established argumentative structures. This trend can lead to the standardization of legal thinking, inhibiting the innovation and

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<sup>7</sup> Report on the State of the US Legal Market Embracing Change in the Era of Innovation, Thomson Institute, 2025.

<sup>8</sup> Regulamentul (UE) 2024/1689 al Parlamentului European și al Consiliului din 13 iunie 2024 de stabilire a unor norme armonizate privind inteligența artificială (Regulamentul privind inteligența artificială).

<sup>9</sup> S. Prodan, op. cit., p. 5.

intuition of the lawyer, which are essential in high-stakes cases and, in general, in the development of the legal system. Faced with these challenges, the legal community must clearly answer: not if, but how can AI be integrated into the profession, without affecting fundamental values such as confidentiality, independence and loyalty to the client. In this regard, the need for an ethical framework is increasingly clear, which answers at least the following questions: is it necessary to inform the client when the lawyer uses AI in the provision of the service? What quality standards must be respected in AI-assisted drafting? What level of technological competence is expected from a lawyer? Who is responsible for errors generated by AI? All professional organisations and courts must work together to develop clear guidance on the use of artificial intelligence in legal practice. In this regard, the Council of Bars and Law Societies of Europe<sup>10</sup> has urged national, European and international institutions and regulatory authorities to contribute to the development of a coherent set of rules and principles to responsibly and ethically govern the integration of AI into the legal profession<sup>11</sup>. The European Union introduced the first legal framework for artificial intelligence, directly applicable in the Member States, through Regulation (EU) 2024/1689 of 13 June 2024<sup>12</sup>. Developed over years of debate, driven by models such as ChatGPT, the regulation promotes safe and ethical AI. Although this regulation represents an important step, it is too general to be sufficient in the legal profession, where ethics, data protection and accountability require clear and precise rules. In the current legal landscape in Romania, artificial intelligence is not able to provide reliable solutions to complex legal questions, which require nuanced interpretations, the corroboration of several normative acts and a deep understanding of the legislative and jurisprudential context. The limitations of AI become even more evident in the face of the lack of uniformity of legal language, the ambiguity of some key terms and variations in meaning depending on the branch of law or the applicable regulation. There are areas where AI simply cannot provide clear answers: value conflicts, interpretations of fairness, complex legislative corroborations. In Romanian law, for example, the interpretation of terms such as “good faith” or “just compensation” cannot be reduced to an algorithmic formula. Moreover, the legislation itself is often inconsistent, fragmented, with terms appearing in isolation and without clear definitions. AI, which operates on the basis of correlations, can miss precisely these subtle connections, essential in sound legal reasoning. In this context, artificial intelligence can produce subtle but significant errors in the interpretation of legal norms - errors that may go unnoticed by a layperson. Moreover, the appearance of authority of the language generated by AI can mislead the user, causing him to accept wrong conclusions or even question the opinion of a qualified lawyer. Therefore, at the current stage, AI is not a substitute for a practicing lawyer, but at most an auxiliary tool that requires validation and supervision by a legal professional. Now that we understand that generative AI works by assimilating and processing already existing content – including legal articles, doctrinal opinions and court decisions, it becomes clear that the intellectual activity of lawyers indirectly feeds AI. Paradoxically, the efforts made by lawyers to clarify and develop the law contribute to building a mechanism that, over time, can diminish their relevance.

From this perspective, the question naturally arises: is there any point in writing legal articles if they are going to be digested by AI and reused without recognition? The answer, although uncomfortable, must be affirmative. Law is a living organism, and its development depends on interpretations, adaptations and nuances – precisely those elements that AI, for now,

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<sup>10</sup> CCBE (Consiliul Barourilor și Societăților de Avocatură din Europa).

<sup>11</sup> Declarația CCBE privind utilizarea inteligenței artificiale în justiție și în aplicarea legii/25.05.2023.

<sup>12</sup> Mircea Duțu „Dreptul IA se prefigurează ca o mare provocare civilizațională și se cuvine tratat ca atare”, <https://www.juridice.ro/essentials>.

only imitates. And, perhaps most importantly, artificial intelligence has no empathy. He does not know the moral context in which a dispute is taking place, he does not feel the human tension in a courtroom, he does not perceive the hesitations in an answer or the silences loaded with meaning in a negotiation. However, law is not a simple mechanical application of the norm – but a permanent negotiation of its meaning in relation to the complexity of real life. A good legal professional does not only offer solutions that comply with the law, but filters them through a deep understanding of the context, emotions and human stakes. Making a legal decision often means weighing not only what is legal, but also what is fair, opportune and reasonable. And these value judgments cannot be generated by an algorithm, no matter how well-trained, in an artificial intelligence race that has surpassed even the most powerful Formula 1 cars.

### **3. The real challenge of artificial intelligence**

Globally, things are completely different - the division of spheres of influence in the world and the assumption of the role of a great world power - have made the discussions in Washington about artificial intelligence increasingly turn towards how the United States can win the AI race with China. One of President Donald Trump's first actions upon returning to office was to sign an executive order declaring the need to "sustain and strengthen America's global dominance in the field of artificial intelligence." At the AI Action Summit in Paris in February 2025, Vice President JD Vance emphasized the administration's commitment to ensuring that "American AI technology continues to be the gold standard worldwide." And in May, David Sacks, Trump's AI and cryptocurrency czar, invoked the need to "win the AI race" to justify exporting advanced AI chips to the United Arab Emirates and Saudi Arabia<sup>13</sup>. Given the prospect that AI could transform the power and prosperity of nations in the coming decades, it is better to win the race than to lose it. But determining who comes out on top depends on what winning means. A common conclusion is to be the first to cross the threshold of artificial intelligence. AI could unlock extraordinary breakthroughs in science, technology, and economic productivity—and the first country to develop it could reap significant benefits. Moreover, the military and intelligence agencies are capitalizing on the transformative potential of AI with a view to mitigating its destructive effects. Similarly, countries could gain a competitive advantage if they can adopt AI on a large scale across their economies and societies. And all must avoid a race to the bottom on AI safety by working together to manage the security risks posed by misused or rogue AI. Considering these aspects of AI makes the United States' position look precarious. While American companies maintain a significant lead on the frontier of AI research and development, Washington could lose other AI races. China has a significant advantage, and none of the superpowers seem eager to cooperate to avoid catastrophe. Given AI's world-changing potential, the stakes are high: losing it risks leaving the United States with economic dependence, military vulnerability, and diminished global leadership. To do so, the United States will need to put together a coherent AI strategy, one that balances innovation, integration, and risk mitigation to translate the country's immense technological dynamism into a sustainable strategic advantage. The race to AGI is more visible and immediate in the AI race. Private companies like OpenAI, Anthropic, and Google DeepMind in the United States, and DeepSeek in China, are rushing to innovate, backed by their governments. No one knows exactly how the technology will evolve. Large language models could be the first signs of emerging AGI, and they could manifest themselves when AI models surpass a certain threshold. In any case, AGI has enough potential to transform sources of national power and competitiveness that the world's two AI leaders have a substantial interest in securing their advantage. American AI labs currently have a fragile lead, aided by semiconductor export

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<sup>13</sup> Colin H. Kahl, *Adevărata cursă a inteligenței artificiale*, <https://www.foreignaffairs.com/united>.

controls designed to maintain the United States' computational advantage over China. Its leading AI companies, such as DeepSeek, are developing technologies that are only months behind their U.S. counterparts. And Beijing's centralized approach could help China consolidate and leverage private-sector innovations more quickly than Washington can. Meanwhile, the United States' open system encourages innovation but is inherently vulnerable to espionage and the rapid diffusion of algorithmic advances. Advances in algorithmic design or alternative paradigms for developing AI could diminish the importance of U.S. semiconductor dominance, and their spread could allow Chinese AI labs to outpace American competitors. Even if the United States can maintain its leadership in the innovation race, that may not be enough. Current market trends suggest that frontier AI models are becoming so accessible and undifferentiated that they offer no clear technological advantage to anyone. If this trend continues when general AI emerges, victory will depend on its effective adaptation, and there is no guarantee that the United States will emerge victorious.

In the realm of national security, adapting AI requires both understanding the capabilities enabled by and the threats posed by AI, and integrating AI into existing structures in ways that provide a decisive military advantage. AI integration promises to improve information processing, accelerate data-driven decision-making, optimize logistics and resource allocation, enable sophisticated autonomous systems, and possibly even lead to the development of a "wonder weapon"—such as a cyber weapon that could cripple an adversary's critical infrastructure and command and control, or, used defensively, render a country invulnerable to cyberattacks. Meanwhile, China's authoritarian system facilitates civil-military integration, giving it a structural advantage in adopting AI. The People's Liberation Army has embraced AI and is actively seeking contributions from the commercial and academic sectors. Staying at the forefront of innovation is necessary, but not sufficient, to win the national security race. The winner of the AI race will need to integrate AI into the national economy – to ensure that AI is widely accessible and diffused across sectors such as education, energy, finance, healthcare, logistics and manufacturing.

The world's tech powers are racing to provide the digital infrastructure that will support the development, deployment and global use of AI. While this is primarily a competition between the United States and China, other established tech powers (France, Japan, the Netherlands, South Korea, Taiwan and the United Kingdom) and ambitious emerging players (Brazil, India, Saudi Arabia and the United Arab Emirates) are also joining the fray. Each participant aims to control the data, chips and data centres, as well as the fundamental models needed to use AI, and to influence global AI norms and standards. A rapidly approaching threat is the potential emergence of a superintelligence that is not aligned with human values or intentions, performing actions that endanger human well-being due to faulty design, ambiguous instructions, or unintended consequences. The growing evidence of frontier AI models exhibiting deceptive behavior makes this risk increasingly credible. Even if rogue AI does not lead to a global calamity, a major AI-related incident, whether accidental or negligent, would undermine trust in the technology.

Finally, policymakers must also act to help workers who will lose their jobs to AI in industrial sectors. This means significantly increasing investment in education, training, and reskilling and upskilling programs – services that would allow those made redundant by automation to quickly move into new roles, such as maintaining robots or supervising AI systems. To provide clarity for businesses and protection for workers in an AI-centric economy, labor laws and regulations need to be constantly updated. As companies increasingly use algorithms to schedule work shifts and more employees work on short-term contracts, wage and hour laws should be modernized to ensure transparent and fair compensation and clearly defined work schedules. Workplace safety guidelines will need to be revised to include

standards for safe human-robot interaction in factories. Strengthening unemployment benefits and other forms of direct income support for people disproportionately affected by automation will be crucial to mitigating the destabilizing consequences of significant workforce layoffs. AI powers must avoid compromising on safety in their rush to compete ethically.

#### **4. Ethics of the Legal Professions in the Digital Age**

##### **4.1. Introductory Issues on Ethics**

Since ancient times, the idea has been formed that ethics is based on reflection on the practical aspects of knowledge and action, aiming at learning through learning, namely the education of capacities regarding the human will and spirit. The term ethics comes from the Greek *ethos*, which means habit, custom or custom. In turn, the term moral is designated in Latin by the noun *mos*, *mores*, which signifies morals, that is, the customs and habits of a human community or a people. And in German, it seems that the term "morals" is at the origin of the word "morality", or "moral". The following meanings are related to the specificity and domain of morals: morals, law, rule, prescription.<sup>14</sup> Ethics has been a branch of philosophy since antiquity, with the field of research being practical and theoretical issues of the moral world. It is a field of reflection, focused on what moral values, norms and principles represent in human life and society. Arising from the necessity of living together, moral norms are the basis for regulating relationships between people. The issue of morality is closely linked to the human being, morality encompassing both social and individual requirements. The reference to social requirements takes into account those related to the necessity of living together, an aspect that raises the question of the normality of interhuman and social relations. If the moral attitude, respectively the moral action, is that which proves the confrontation of man with the norms, the subjectivity of the one who does this is equally important. "A universe of desiderata and not of imperatives, morality involves in its structure the permanent and direct exercise of resolving concrete life situations according to the reason and affectivity of each individual when he becomes aware of the intimate need to assume himself by projecting himself exemplarily into the network of relationships with his peers."<sup>15</sup>

Ethics, as a philosophical discipline, respectively a science or theory about moral life, considers those constitutive elements that make up the moral universe; it is about moral norms, principles and values, all of which manifest themselves in the moral consciousness of people and the society that supports this consciousness. The problem of moral consciousness is complex; "it is one of the most important dimensions of human consciousness, which can manifest itself in various ways, having as its main function the censorship of our acts placed under the sign of moral values; of what is permitted and what is forbidden to man."<sup>16</sup> But AI has no soul, it lacks morality. And then how do we, legal professionals, proceed in a world in constant change? The balance between the use of AI in the legal field and the preservation of human reasoning, as well as ethical issues, will be discussed further.

##### **4.2. Ethics of legal professions**

Ethics is a field of philosophy, more precisely of moral philosophy. The question then arises as to why it would interest a specialized field, such as law? The answer is that the legal professional must also pursue the good in his professional activity, as in any human activity, in order to be in agreement with his "root". Only in this way can his activity be considered moral or ethical. Otherwise, if he were to pursue only one of the other values (for example, he would pursue only the truth), but would not also take into account the value of the good, it cannot be said that he has performed a moral act, because the values can only be taken together<sup>17</sup>. It should

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<sup>14</sup> Livia Durac, *Etică și integritate academică*, <https://www.upa.ro/wp-content/uploads>.

<sup>15</sup> *Idem*, p. 7.

<sup>16</sup> *Ibidem*.

<sup>17</sup> Cristinel Ghigheci, *Ce este etica profesiilor juridice?*, <https://www.juridice.ro/492023>.

be emphasized, however, that, at present, within the ethics of the legal professions, not only abstract, purely theoretical issues are debated, but especially issues of applied ethics in the field of the legal professions. As has been said, moral philosophy has been marked, in recent years, by the singular development of its subfield known as "applied ethics", which tends to present itself as a new paradigm within practical philosophy, as a new model of conceiving morality, alongside and sometimes in competition with deontological and theological models. Since morality has been the subject of so many theological and philosophical debates over time, the conclusions of these debates cannot be ignored within the framework of ethics, even if it is strictly applied to the legal professions.<sup>18</sup> The ethics of the legal professions therefore derives from the same need of man to seek the good, which animates him in most of his actions. Within it, man seeks the good in the exercise of the legal profession. I do not believe that the ethics of the legal professions would have as its source a need for professional recognition of individuals, because the need for recognition would be one of the forces behind political movements in the contemporary world.<sup>19</sup> Recognizing this source of professional ethics means retaining the egoism of the person as its foundation, which would contradict the foundation of morality, which is based on altruistic foundations. Therefore, the source that underlies the acquisition of the ethics of the legal professions cannot be the professional's need to obtain recognition in the profession, but the achievement of the good.

##### **5. Instead of conclusions, what is the role of the ethics of the legal professions?**

The issue that I have submitted for debate is of particular interest since the role of the ethics of the legal professions is that of "former of professional conscience, of serving the truth without serving it and, thus, of subjectively avoiding any dissonance between professional performances and aspirations and the concrete reality it serves."<sup>20</sup> Indeed, ethics helps the legal professional to serve the truth at the factual level, not just at the theoretical level. Although correct, this is a too generic justification of the ethics of the legal professions. More specifically, the justification of legal deontology consists, in the vision of the same authors<sup>21</sup> in that it helps the professional to: form the professional personality; achieve good through the profession; satisfy the aspirations of self-transcendence; mediate between morality and law; humanize the legal norm through knowledge of man; achieve justice through legal values; satisfy the feeling of justice; avoid judicial errors; offer vocational motivations to the profession; satisfy the need for social appreciation of the judge and, through him, of the profession; favor professional meta-discoveries; contribute to social-community progress; notify and resolve abuses of human rights violations; resolve conflicts of professional duties, in the sense that the natural ones precede the positive ones, the prohibitive ones precede the affirmative ones, the certain ones precede the uncertain ones, those of equity precede those of justice.

From the above, the conclusion follows that the legal professional has first natural duties, arising from natural law, and then duties provided for by law, and that the former should have priority over the latter, when there should happen to be an apparent conflict between them. Then, another conclusion is that first there is the professional's duty not to do something wrong and then the duty to do good, and if it should happen that the two duties come into conflict, the legal professional should choose the former. Likewise, between a certain, certain duty and an uncertain one, which perhaps exists only in the professional's imagination, the latter should choose the former. Finally, justice is the essential legal value, while equity is the essential moral value, and in case of conflict between the two values, the moral value of equity would have priority over the legal value of justice. For these reasons, we believe that by cultivating the

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<sup>18</sup> Idem, p. 2.

<sup>19</sup> Charles Taylor, *Multiculturalism. Différence et démocratie*, Flammarion, 1994.

<sup>20</sup> Gheorghe Scripcaru, Vasile Ciucă, *Deontologie judiciară. Syllabus*, Editura Sedcom Libris, Iași, 2009, p. 232.

<sup>21</sup> Idem, p. 42.

values of professional ethics, we can achieve the promotion of the principles underlying the science of law in the solutions adopted by the judicial bodies. The ethics of the legal professions thus contributes to strengthening the prestige of justice, ensuring the efficiency of the rule of law, because "Justice is placed right above the other powers systematized by Montesquieu, as long as no one is above the law and before which all are equal. In other words, the legal order in society depends on the integrity and fairness of the distribution of justice and, conversely, the loss of the authority of justice leads to social disorder."<sup>22</sup>

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<sup>22</sup> Ibidem.

# DIGITALIZATION OF HEALTHCARE SERVICES AND THE IMPACT ON LEGAL REGULATIONS

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## *Abstract*

*This paper examines the impact of healthcare digitization and telemedicine on legal regulations within Romania. It highlights how telemedicine, initially limited, gained prominence during the COVID-19 pandemic through legislative adaptations, enabling remote consultations, diagnostics, and monitoring. The Romanian legal framework, including Law no. 95/2006 and OUG no. 196/2020, has evolved to incorporate telemedicine services, aligning with European directives on data protection and interoperability. The ongoing national digital strategy aims to modernize health infrastructure, enhance data security, and expand telehealth accessibility, especially in underserved areas. However, this transformation introduces new legal challenges, particularly regarding medical liability, evidentiary issues, and platform responsibility. The lack of specific regulations for digital malpractice and documentation complicates accountability, necessitating legislative updates to clarify responsibilities and ensure fair patient protection. The study underscores that digitalization offers significant opportunities for improved healthcare access and efficiency but requires careful legal adaptation to address emerging risks and uphold the integrity of the doctor-patient relationship. Ultimately, ongoing legislative reforms are essential for balancing technological advancements with legal and ethical standards in the Romanian healthcare system.*

## **1. INTRODUCTION**

*Telemedicine isn't just the new frontier of healthcare; it's a return to its most essential service – accessibility (dr. Sven Jungmann). We are used to looking at the advancement of information technology largely from the perspective of its contributions at the technical level. We follow with interest how technology finds its resonance in fields such as medicine, justice or education, but we also fail to look at the socio-human impact of these advances. Through the vision he expresses, Dr. Sven Jungmann points out exactly this: telemedicine is increasingly democratizing a service that by its essence must be accessible to everyone. Medical services, whether those of the prevention type or those in the field of treatment, must be available to anyone, and telemedicine, as an *adjunct* to classic services, is aimed at those who, for one reason or another, cannot travel, those who want a second opinion, an interpretation of results, a verification of the administration of the treatment or other procedures that lend themselves to being performed remotely. However, Dr. Jungmann's point of view is not endowed with complete accuracy, because, on the one hand, it democratizes access to medical services, but, on the other hand, it makes it inaccessible to those who, unfortunately, do not have access to technology. However, of interest for this paper is less the socio-human impact of the new telemedicine services, but the impact it has on the regulatory system in our country.*

The notion of *digitization* translates into the action of *numerically encoding information*. Simply put, by moving from the traditional, physical, unfolding level to the computerized one. *Medical services* cannot be digitized in their entirety, at least not at the current level of knowledge, however in all medical specializations there are services that lend themselves to being carried out online. Decision no. 1.133/2022 shows which are the medical services that are the subject of telemedicine services. These are teleconsultation services (establishing the diagnosis, monitoring, interpretation of results and investigations, prophylactic and therapeutic indications), teleexpression (exchange of opinions, information on a case), teleassistance (help offered by a doctor to another practitioner, at a distance), teleradiology and telepathology (electronic transmission of radiological or anatomopathological images at a distance, for the purpose of their interpretation), telemonitoring (remote

monitoring of health status and adjustment of treatment). The impact of the digitization of these services in the field of *legal regulations* concerns that set of rules that relate specifically to the field in question. In Romania, telemedicine is regulated by a specific legislative framework, which includes both primary and secondary normative acts. Non-exhaustively, we will recall, and then we will deal more extensively in the paper, that it is Law no. 95/2006 on health reform: this law forms the basis of the health system in Romania and has been amended to include provisions on telemedicine; Emergency Ordinance no. 196/2020 - was adopted to amend and supplement Law no. 95/2006, introducing specific regulations on the provision of remote medical services through telemedicine; The methodological norms for the application of OUG no. 196/2020 (these norms establish the details regarding medical specialties and the list of services that can be provided through telemedicine; the conditions for the organization and operation of telemedicine services; the modalities for providing telemedicine services; the responsibility for establishing the quality of telemedicine services and verifying its compliance).

In this context, we wonder how the modern path of generalized digitalization has shaped an entire system, in this case, the medical one? In order to answer, we will be guided by two main directions of discussion: we will seek to clarify what telemedicine represents, from a legal point of view, and what rigors it has brought to the doctor-patient relationship (point 2) and how the digitalization of the medical system as a whole has occurred, together with the forms of liability that this has generated (point 3).

## **2. TELEMEDICINE – IMPLEMENTATION AND EFFECTS IN THE DOCTOR-PATIENT RELATIONSHIP**

To begin with, we will briefly mention the legal means by which telemedicine was introduced into the Romanian legislation, while following some major contexts that favored the implementation of measures of this type (2.1). We will then see how the law changed the clinical interaction on the patient-doctor, patient-system levels (2.2).

### **2.1 The evolution of telemedicine regulation in Romania and at European level**

Until the outbreak of the health crisis caused by the COVID-19 pandemic, the use of telemedicine in Romania was limited by the lack of clear regulation. Although the concept was not completely unknown, in the absence of an express prohibition, the legislative framework was insufficient for its widespread application. An early example is the initiative in 2009, when an emergency telemedicine system was put into operation, meant to facilitate collaboration between hospitals via videoconferencing and monitoring of vital signs, with the support of two coordination centers: one in Bucharest and the other in Târgu Mureş. Later, in 2018, the amendments to Law 95/2006 included, at a declarative level, the telemedicine IT components in the health system infrastructure, but without generating effects applicable in practice. It was only in the context of the pandemic, when the pressure on the medical system increased considerably, that the authorities had to adopt concrete measures. Thus, by GD no. 252/2020, during the state of emergency, remote medical consultations were allowed. Subsequently, OUG no. 70/2020 extended this possibility, establishing a temporary framework valid until September 30, 2020, through which medical services such as primary medicine or specialized outpatient clinic could be offered through remote means of communication. These initiatives have demonstrated the need to make flexible regulations permanent, adapted to the modern realities in the medical field. During the COVID-19 pandemic, the legal framework did not use the term "telemedicine", but regulated the provision of remote medical services for certain categories of patients, in an exceptional context. However, these consultations are equivalent to teleconsultations, and the regulations for their settlement were established only in 2020. Thus, the adopted law allows the use of telemedicine in a permanent way, providing a viable alternative to face-to-face consultations, for services included in the basic or minimal package of medical services, regardless of the context of the pandemic. The new regulation clearly defines the procedures that can be carried out through telemedicine, including the establishment of diagnoses, the interpretation of investigations and the continuous monitoring of patients' health status. However, this form of remote medical consultation is a challenge for doctors, as the clinical examination will be carried out exclusively on the basis of verbal communication with the patient, without the possibility of directly observing the symptoms. The law provides that the patient will be informed about the limits of teleconsultations and will be directed to go to the office or call 112 if the symptoms worsen. Another important aspect of the new regulations is that medical

documents (prescriptions, referral notes and recommendations) can be issued electronically, being validated through the Information System for Electronic Prescription (SIPE), without the need for a holographic signature or the doctor's initial. The law also provides for the reimbursement of remote consultations by the CNAS, based on the same regulations as in the case of traditional consultations. The implementation of this legislative framework represents a significant progress in adapting the Romanian medical system to the new technological realities, and the expectations are that this process will continue to evolve, with a positive impact on the accessibility and quality of health services.

The European Commission has been addressing e-health and telemedicine since 1999, recognising their potential to improve healthcare and actively involve patients in managing their health. In this context, the "e-Europe" initiative was launched, aiming at the full integration of the European Union into the emerging information society. In 2008, the Commission defined telemedicine as the method of delivering healthcare services at a distance, highlighting the benefits for patients and health systems. Directive 2011/24/EU was an important step, facilitating patients' access to cross-border healthcare and promoting cooperation between Member States. Key European regulations for e-health include the Data Protection Directive 95/46/EC, the E-Commerce Directive 2000/31/EC, and the Medical Devices Directive. These regulations create a legal framework that supports the development and implementation of telemedicine services in the European Union.

In the European Union and globally, the way telemedicine is regulated varies significantly from country to country. A 2021 study conducted in 20 countries (19 in Europe and Israel) identifies three main types of approach: a group of 9 states (Belgium, Czech Republic, Denmark, Finland, the Netherlands, Norway, Spain, Sweden and the United Kingdom) have not adopted special laws for telemedicine, considering it part of the existing legislation for physical consultations; another group of 9 countries (France, Germany, Hungary, Italy, Portugal, Russia, Turkey, Ukraine and Israel) have introduced legislative changes to incorporate telemedicine; finally, Switzerland is a special case, where it is regulated only in some cantons. Slovakia, on the other hand, did not regulate or implement telemedicine in 2021. Israel, for example, has practiced telemedicine since the 90s, without specific regulations, the legislation being introduced only in 2019. In the case of France, telemedicine has been included in legislation since 2009, but it was only in 2013 that it was implemented in an experimental setting, and was subsequently expanded and regulated in more detail in 2017 and 2021. In Germany and Italy, legislation does not explicitly regulate telemedicine, but there are regulations and guidelines that allow it to be practiced under certain conditions. In the Netherlands and Spain, there are general regulations and recommendations, but without a clear legal framework for telemedicine. In the UK, telemedicine is regulated by standards and codes issued by regulatory authorities, and in Poland, telemedicine has been regulated since 2011, with the possibility of reimbursement of consultations [1][2]. This diversity of regulations shows how differently telemedicine is approached in different health systems, and the experiences of each country can provide valuable lessons for the development of more coherent regulations at European and global level.

Telemedicine, as a model for carrying out medical services, has changed the nature and dynamics of the relationship between patient and doctor. It is interesting to see what are the new parameters under which this relationship takes place, given the extensive digitalization in the system, but also the obligations that come with it.

## **2.2 Legislative changes brought by the digitization of the doctor-patient relationship**

The National Strategy for Digitization in Health 2024-2030 aims to transform the health system in Romania by implementing and integrating digital technologies, in order to improve access to medical services, their efficiency and the quality of the medical act. In the context in which digitalization plays an increasingly important role globally, Romania aims to modernize the health infrastructure, increase interoperability between health institutions and develop innovative solutions that meet the needs of patients and professionals in the field. One of the fundamental objectives of the strategy is to create a unitary, secure and interoperable technological framework that ensures better connectivity between hospitals, clinics and other healthcare entities. This digital system will facilitate quick and secure access to patients' medical information, given that electronic patient records will become a standardized practice, in accordance with European data protection regulations, such as Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data (GDPR). Thus, relevant information will be available in real time, which will contribute to a more efficient management of treatments and the reduction of medical errors. Another key objective of the strategy is to expand and develop

telemedicine services, in accordance with the norms provided by Law no. 95/2006 on health reform, in order to ensure access to specialized medical consultations, especially in isolated or disadvantaged areas. Through digital platforms, patients will be able to benefit from remote consultations, and doctors will be able to monitor their health status in real time, thus promoting a more accessible and flexible health system. The strategy also emphasizes the importance of continuous professional training of medical personnel, in order to familiarize them with new technologies, an essential process for the successful implementation of digitalization, according to Emergency Ordinance no. 141/2021 on the development of digital skills of health professionals. This training process will ensure the correct and efficient use of new digital tools. Another significant aspect of the strategy is the regulations and legislative policy, which will ensure the implementation of an adequate legal framework for the protection of patients' personal data and for their proper management in the digital environment. Compliance with European rules, including Directive 2002/58/EC on the privacy of electronic communications, will be a fundamental principle, given the major cybersecurity risks associated with the storage and processing of sensitive health data. To ensure the effective implementation of the strategy, the Romanian authorities will work closely with the European institutions and the private sector, aiming to attract European funds and make the optimal use of national financial resources. Also, clear mechanisms will be established to monitor and evaluate the progress of the implementation of the strategy, in order to adjust the measures according to the technological evolution and the needs of the health system. At the same time, among the challenges identified are the resistance to change of medical personnel and health institutions, but also the risks related to the protection of personal data, which require highly effective cybersecurity solutions, regulated by Law no. 362/2018 on cybersecurity measures. These challenges need to be managed very carefully, as the success of digitalisation in healthcare depends to a large extent on the ability of institutions to ensure both the adoption of technologies and the protection of patient data. The National Health Digitalization Strategy 2024-2030 represents an important step in the modernization of the Romanian health system, being a complex process that involves both the development of a solid IT infrastructure and the adaptation to new technologies and regulations. By implementing this strategy, Romania aims not only to improve the quality and accessibility of health services, but also to ensure a more efficient and transparent management of health resources.

This would be, in short, the main legislative echo of the implementation of telemedicine. At least an echo of the first intention, because the resonance of the concept materializes in the remodeling of an entire system, as we will see.

### **3. DIGITIZING A SYSTEM AND MEDICAL LIABILITY**

Beyond the "micro" effects brought by telemedicine, i.e. those in the doctor-patient relationship, the most palpable and concrete relationship for the ordinary citizen, there are, obviously, the "macro" effects, those that have repercussions on an entire system (3.1) and that lead to new forms of legal-medical liability (3.2).

#### **3.1 Digitization of the public health system – obligations and legislative changes for institutions**

Within the process of digitization of the Romanian health system, the responsibilities of the central authorities, especially the Ministry of Health (MoH) and the National Health Insurance House (CNAS), are regulated by a complex regulatory framework, which aims to ensure an efficient transition to a digitized, interoperable system in accordance with European standards. In this context, Romania, although it benefits from the necessary infrastructure for the implementation of digitalization, lags behind the European Union average, according to the European Commission's report on the evolution of digitalization in 2023. He points out that, despite the progress in the field of IT infrastructure, Romania is experiencing difficulties in the effective digitization of public services, including in the health sector. According to Law no. 95/2006 on health reform, the central authorities are responsible for implementing an integrated information system that ensures an efficient management of medical services and facilitates patients' access to treatments. A significant example of the challenges encountered in this process is the Single Integrated Information System (SIUI), an essential component in the management of relations between CNAS, medical service providers and insured. According to Order no. 1006/2014 for the approval of the regulations regarding the use of the SIUI, this system should ensure both the record of taxpayers and the management of the funds allocated to health insurance. However, technical problems and persistent malfunctions, including in terms of updating data, lead to interruptions in the operation of this

system, thus affecting the efficiency of the entire process of reporting and monitoring health services. Such shortcomings underline the need to revise the applicable legislation to ensure a more efficient integration of information systems, but also a better collaboration between the state institutions responsible for providing data to the SIUI. Regarding the protection of personal data, another fundamental aspect in the digitalization of health, the Romanian authorities are obliged to comply with the European regulations on the matter, as provided for in Regulation (EU) 2016/679 on the protection of personal data (GDPR), which imposes strict measures to protect sensitive patient information. Article 5 of the GDPR sets out the fundamental principles for the processing of personal data, including legality, transparency and purpose limitation, which must be applied at all stages of the digitalization of the healthcare system.

Another relevant normative framework in this regard is Law no. 362/2018 on Romania's cybersecurity, which regulates the cybersecurity measures to be implemented by all public institutions, including CNAS and the Ministry of Health, in order to protect the IT infrastructures used in the management of medical data. According to this law, the authorities are obliged to adopt technical and organizational measures to prevent cyberattacks and protect health systems against security risks. The interoperability of health information systems is another key objective in the digitalisation process, regulated in the European context by Directive 2011/24/EU on patients' rights in cross-border care, which stipulates the need for interoperability between the health systems of the Member States of the European Union. Article 14 of that directive requires Member States to ensure, by means of national measures, the exchange of health information between health institutions and the promotion of the use of electronic health records, including for patients receiving cross-border treatment. In this context, the CNAS and the Ministry of Health have the obligation to develop and implement IT platforms that allow the reporting and monitoring of health services in a transparent and efficient way. An important instrument in this process is Law no. 672/2002 on internal public audit, which regulates the audit procedures applicable to public institutions. According to this law, the authorities are obliged to ensure transparency and fairness in the management of public funds allocated for digitization and to implement a digitized audit system, which allows real-time verification of the performance of the health system [4].

Thus, the successful implementation of digitalization in the Romanian health sector depends not only on investments in IT infrastructure, but also on compliance with a clear regulatory framework, which regulates the protection of personal data, cybersecurity, interoperability of systems and transparency of audit procedures. CNAS and the Ministry of Health are directly responsible for coordinating this process and ensuring that the measures implemented comply with national and European legal regulations. The implementation of an integrated and interoperable IT system, in accordance with European and national legislation, will contribute to achieving the digitization objectives set at European Union level and will ensure faster and more efficient access for patients to quality health services.

In this context, problems specifically arise related to evidence and documentation in relation to the consultations carried out online. That is why it is important to analyze, as a final point, how the current malpractice rules apply in the digital context.

### **3.2 Adapting the legal framework on medical liability in a digital context**

The digitalization of the healthcare system has brought with it a number of advantages, but also significant legal challenges. Emerging technologies such as teleconsultations and e-treatments have been widely adopted, providing faster and more efficient access to healthcare services. However, their emergence has raised important questions in the field of law, in particular as regards the application of malpractice rules. The current legal framework is not clear enough to regulate all aspects of medical errors in the digital environment, and the need for legislative adjustments is becoming increasingly evident.

In Romania, medical malpractice is regulated by Law no. 95/2006 on health reform, which defines malpractice as any medical act performed in violation of the deontological norms, which leads to damage to the patient. In this context, malpractice can manifest itself in various forms, from diagnostic errors to treatment or procedural errors. These rules are applicable to both traditional consultations and teleconsultations or e-treatments. As regards teleconsultations and e-treatments, national regulations do not provide for a specific legal framework that directly addresses medical errors that may occur in these areas. Instead, the general rules of malpractice apply,

but with specific adjustments related to the characteristics of the digital environment. For example, according to Order no. 1318/2006 on the regulation of telemedicine activity and Regulation (EU) 2017/745 on medical devices, the use of information technologies in the medical field requires careful monitoring of the quality of services and the diagnostic process, as well as the protection of patients' personal data, according to Regulation (EU) 2016/679 on the protection of personal data (GDPR).

One of the most controversial aspects of digital malpractice is evidentiary issues. In the digital context, having clear evidence becomes much more difficult, given the virtual nature of consultations. Traditionally, evidence in medical malpractice cases included patient records, signed documents, or expert testimony. In the case of teleconsultations, however, the evidence may be much more difficult to obtain, given the fact that the entire consultation is conducted remotely, and the audio and video recordings of the consultations may not be sufficient to establish guilt [5]. Law no. 95/2006, in accordance with Law no. 272/2004 on the protection and promotion of children's rights, regulates the documentation of medical activities and data protection, and in the case of telemedicine, increasing the degree of data security and digital archiving becomes essential.

An essential aspect in the digital context of medical malpractice is the clarification of the responsibility between the doctor and the provider of the teleconsultation or e-treatment platform. Although the doctor remains responsible for the medical act itself, the platform provider has the obligation to ensure the proper functioning of the technology and IT infrastructure. Law no. Regulation (EC) No 455/2001 on electronic signatures and Directive 2000/31/EC on electronic commerce set out the responsibilities of e-health platform providers in ensuring a secure and reliable system. In this respect, any technical failure of the platform or any security breach affecting the diagnostic process may incur partial liability on the part of the provider, and the doctor could be exonerated from liability if technological deficiencies were the causes of the error [6]. At the same time, Directive 2011/24/EU on patients' rights in cross-border care underlines the responsibility of Member States to regulate patient protection and to establish clear procedures in case of medical errors, regardless of the nature of the consultation (physical or digital). This requires close collaboration between national authorities and technology platform providers to ensure an interoperable, safe and efficient telemedicine system.

Another significant aspect of digital malpractice is the challenges of evidence. In the case of online consultations, documenting medical errors can be much more complicated than in the case of traditional consultations. Given that most consultations take place through telemedicine platforms, audio and video recordings are essential to determine if the doctor followed the correct procedures and if the diagnosis was an adequate one. In Law no. 95/2006, medical documents must be kept in electronic archives, and patients must consent to participate in online consultations, an aspect also regulated by Law no. 675/2001 on the protection of personal data. Thus, in the evidentiary process, the question arises of the validity of these recordings and compliance with the rules of confidentiality and data protection.

In international jurisprudence, there are already relevant examples of cases of digital malpractice. In a case in the United States, the Supreme Court ruled that providers of telemedicine platforms can be held liable for technical errors that led to diagnostic errors, even if the doctor did not make a direct error in the patient's care. Also, in France, a malpractice case related to a diagnostic error following a teleconsultation led to the establishment of additional rules on the interoperability of telemedicine platforms and the protection of patient data.

#### **4. CONCLUSIONS**

In conclusion, the analysis highlights the fact that the digitalization of medical services, especially the implementation of telemedicine, has led to a profound transformation of the regulatory framework and legal-medical responsibilities in the Romanian health system. The legislative process has evolved gradually, culminating in the adoption of specific regulations in the context of the pandemic, which have facilitated and clarified the possibility and conditions of providing healthcare services remotely. At the same time, the national digitalization strategy for the period 2024-2030 aims to create an interoperable, secure and equal access system, in line with European standards, such as GDPR and Directive 2011/24/EU. At the same time, this digitalization has generated new challenges in the field of liability, mainly in terms of evidence and the delimitation of liability between the doctor and the provider of the technological platform, aspects that require further legislative clarifications. The lack of specific regulations for errors in telemedicine and the difficulties of documentation in the virtual

environment require a reassessment of malpractice rules, in order to ensure a clear and fair accountability in this new context. Thus, the transformation of the health system through digitalization represents both an opportunity and a challenge, requiring continuous legislative adaptation to protect patients' rights, ensure the accountability of doctors and guarantee a safe, efficient and fair health system.

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# COMPLIANCE ON BLOCKCHAIN: AML/KYC, PRIVACY AND DIGITAL IDENTITY

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## **Abstract:**

*The article examines blockchain compliance at the intersection of AML<sup>1</sup>/KYC<sup>2</sup> requirements, the right to privacy, and digital-identity infrastructures. It pursues three objectives: (i) to systematize the EU legal framework (MiCA–TFR–AMLR–AMLA–eIDAS 2.0) in relation to the relevant international standards (FATF); (ii) to assess the legal impact on users—especially the balance between identification/reporting duties and privacy/data-protection guarantees (GDPR); and (iii) to test the role of the European Digital Identity (EUDI Wallet; electronic attestations of attributes) as a data-minimization mechanism compatible with AML requirements.*

**Keywords:** blockchain; AML/KYC; MiCA; TFR; AMLR/AMLA; eIDAS 2.0; EUDI Wallet; FATF; GDPR.

## **I. INTRODUCTION**

Blockchain technology has moved from a technical experiment to infrastructure for payments, investments, and digital services, forcing the legal order to recalibrate the relationship between AML/KYC compliance and the rights to privacy and data protection. In the European Union, this recalibration rests on a normative ensemble: MiCA<sup>3</sup> (a sectoral regime for issuers and crypto-asset service providers—CASPs), the Regulation on information accompanying transfers of funds and certain crypto-assets (TFR 2023/1113—the EU version of the “travel rule”)<sup>4</sup>, the Anti-Money Laundering Regulation (AMLR 2024/1624<sup>5</sup>—a single set of directly applicable rules for obliged entities), the Regulation establishing AMLA (2024/1620<sup>6</sup>—a dedicated EU authority), and eIDAS 2.0 (2024/1183<sup>7</sup>—the framework for the European Digital Identity and electronic attestations of attributes). The fundamental-rights corollary remains the GDPR (2016/679)<sup>8</sup>, which structures the legal bases and the limits of processing for compliance purposes.

By its nature, a blockchain ledger operates with pseudonymity, whereas the AML regime requires identification, monitoring, and traceability of flows. In the EU, the TFR (Regulation on Transfers of Funds)<sup>9</sup> requires the collection, transmission, and retention of data about the originator and the beneficiary for crypto-asset

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<sup>1</sup> AML = Anti-Money Laundering;

<sup>2</sup> KYC = Know Your Customer;

<sup>3</sup> Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937;

<sup>4</sup> Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849;

<sup>5</sup> Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing;

<sup>6</sup> Regulation (EU) 2024/1620 of the European Parliament and of the Council of 31 May 2024 establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010;

<sup>7</sup> Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity;

<sup>8</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation—GDPR);

<sup>9</sup> Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849;

transfers whenever a CASP (Crypto-Asset Service Provider)<sup>10</sup> is a party to the transaction; in parallel, the AMLR<sup>11</sup> imposes CDD<sup>12</sup>/KYC and ongoing monitoring on obliged entities, while the GDPR conditions processing on lawfulness, data minimization, and proportionality. From this perspective, the research question is not only how users are identified, but how much data may legitimately be processed and retained, for how long and for what purposes, without exceeding what is strictly necessary to prevent money laundering and terrorist financing.

Beyond EU regulation, the Financial Action Task Force (FATF)<sup>13</sup> has extended its standards to virtual assets (VAs) and to providers (VASPs)<sup>14</sup>, clarifying the definition of VASPs, the treatment of stablecoins, licensing/registration, implementation of the travel rule<sup>15</sup>, and the use of digital identity in customer due diligence.

## II. THE EUROPEAN UNION LEGAL FRAMEWORK ON DIGITAL ASSETS AND AML COMPLIANCE

The European Union's legal framework for digital assets and AML<sup>16</sup>/CFT<sup>17</sup> compliance is built on four complementary pillars: (i) Regulation (EU) 2023/1114 (MiCA)—the *lex specialis* for crypto-asset markets and service providers (CASPs); (ii) Regulation (EU) 2023/1113 (TFR)—which extends the travel rule to crypto-asset transfers; (iii) Regulation (EU) 2024/1624 (AMLR)—a single set of direct, harmonized rules for obliged entities (including CASPs); and (iv) Regulation (EU) 2024/1620 (AMLA<sup>18</sup>)—establishing the dedicated EU authority for AML/CFT. Together, these instruments aim at legal certainty, traceability of flows, and proportionality in data processing, while avoiding overlaps with existing sectoral regimes.

### 2.1. MiCA: Scope and the Status of CASPs

MiCA enshrines the principle that no one may provide crypto-asset services in the European Union without authorization. The regime is nuanced by the exception for services rendered at the exclusive initiative of the client (so-called reverse solicitation). Once authorized, CASPs are bound by conduct obligations—to act "honestly, fairly and professionally" in the interests of their clients—and by governance requirements. For specific services, MiCA sets dedicated packages: custody and administration, operation of a trading platform, exchange of crypto-assets, and reception and transmission of orders. In addition, an "orderly wind-down" plan is required to protect clients<sup>19</sup>.

For e-money tokens (EMTs<sup>20</sup>), MiCA assimilates the legal relationship to a par-value claim against the issuer: the token is redeemable at any time, at nominal value, in funds (other than e-money), and the granting of interest is prohibited both to the issuer and to CASPs that provide services related to EMTs. The conditions for redemption must be visibly stated in the crypto-asset white paper<sup>21</sup>. These guarantees dovetail with the diligence and monitoring obligations under AML/CFT law, including at onboarding and in subsequent reviews.

### 2.2. TFR: The Travel Rule Applied to Crypto-Asset Transfers

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<sup>10</sup> CASP (Crypto-Asset Service Provider) is the term used in MiCA for providers of crypto-asset services in the EU.

<sup>11</sup> AMLR = Anti-Money Laundering Regulation (Regulation (EU) 2024/1624);

<sup>12</sup> CDD = Customer Due Diligence (client due-diligence measures that obliged entities apply at onboarding and throughout the business relationship in order to detect suspicious transactions);

<sup>13</sup> FAFT (Financial Action Task Force) — an inter-governmental standard-setting body for AML/CFT; see: <https://www.fatf-gafi.org/en/home.html>

<sup>14</sup> VASP (Virtual Asset Service Provider) — a provider that exchanges, transfers, safeguards, or intermediates virtual assets;

<sup>15</sup> The "Travel Rule" is a transactional-transparency rule requiring information about the parties involved (originator/beneficiary) and the transfer details (amount, date, asset) to accompany transfers;

<sup>16</sup> AML = Anti-Money Laundering;

<sup>17</sup> CFT = Combating the Financing of Terrorism;

<sup>18</sup> AMLA = Anti-Money Laundering Authority (the European Authority);

<sup>19</sup> Regulation (EU) 2023/1114 (MiCA), various provisions including arts. 66, 68, 74–77, 80;

<sup>20</sup> EMT = an e-money-like token issued by regulated entities (e.g., electronic money institutions) that is redeemable 1:1 into fiat currency;

<sup>21</sup> MiCA prohibits the granting of interest to holders of EMTs, both by the issuer and by CASPs providing services related to EMTs;

The TFR<sup>22</sup> transposes payment-transparency standards to the crypto environment. The Regulation on Transfers of Funds sets the mandatory information that must accompany transfers (name of the originator/beneficiary, DLT address or account, identifiers), including the obligation for the originator's CASP to verify such information<sup>23</sup>; Article 16 regulates detection of missing information by the beneficiary's CASP. For self-hosted addresses, the TFR requires obtaining and holding information for transfers above EUR 1,000 and, additionally, the originator's crypto-asset service provider must take appropriate measures to assess whether the address is owned or controlled by the initiator. The regime includes rejection/return procedures, internal policies for implementing restrictive measures, a five-year retention period, and publication of sanctions<sup>24</sup>.

### **2.3. AMLR: Direct, Uniform Obligations for Obligated Entities (Including CASPs)**

The AMLR<sup>25</sup> establishes CDD/KYC and ongoing monitoring, regulates correspondent relationships with third-country entities—including for CASPs—and, under strict conditions, allows reliance on another obliged entity<sup>26</sup>. It clarifies the reporting of suspicions to FIUs<sup>27</sup>, responsible data sharing for AML purposes, and document retention—the general five-year rule. Its application is set for 10 July 2027, and for certain sub-categories (Art. 3(3)(n),(o)) from 10 July 2029<sup>28</sup>.

### **2.4. AMLA: Coordination, Common Methodologies and Selective Direct Supervision**

Regulation (EU) 2024/1620<sup>29</sup> establishes AMLA, with extensive tasks (coordination, guidelines, methodologies, joint analyses) laid down in Article 5, and the possibility of assuming direct supervision in exceptional circumstances, at the request of a national financial supervisor<sup>30</sup>. This architecture seeks convergence of supervisory practices and rapid remedies for heightened cross-border risks.

### **2.5. Interactions and Delineations: The MiCA–TFR–AMLR Triangulation (Anchored in eIDAS)**

In practice, MiCA sets who may operate and how (authorization, governance, services); the TFR specifies what information must accompany transfers (including hosted–unhosted) and how to handle deficiencies; while the AMLR/AMLA lays down how diligence, monitoring, reporting, data sharing, and retention are to be carried out, and who coordinates supervision. For identity verification within CDD, eIDAS 2.0<sup>31</sup> creates the EUDI Wallet<sup>32</sup> and electronic attestations of attributes (QEAA), while Implementing Regulation 2015/1502<sup>33</sup> defines levels of assurance (LoA)—legal anchors that the AMLR may invoke when accepting electronic means of identification.

## **III. RELEVANT INTERNATIONAL STANDARDS AND REGULATIONS**

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<sup>22</sup> TFR = Transfer of Funds Regulation: Regulation (EU) 2023/1113 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849;

<sup>23</sup> Article 14 of Regulation (EU) 2023/1113 on information accompanying transfers of funds and certain crypto-assets (obligations of the originator's provider);

<sup>24</sup> Regulation (EU) 2023/1113, notably arts. 14(5), 16(2), 17, 23, 26, 30;

<sup>25</sup> AMLR — Regulation (EU) 2024/1624 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing;

<sup>26</sup> Regulation (EU) 2024/1624, notably arts. 20, 38, 49;

<sup>27</sup> FIU = Financial Intelligence Unit (in Romania: Oficiul Național de Prevenire și Combatere a Spălării Banilor—ONPCSB);

<sup>28</sup> Regulation (EU) 2024/1624, notably arts. 70, 77, 90;

<sup>29</sup> Regulation (EU) 2024/1620 establishing AMLA;

<sup>30</sup> Art. 14, *ibidem*;

<sup>31</sup> eIDAS 2.0: Regulation (EU) 2024/1183 (the eIDAS revision) introduces the European Digital Identity Wallet (EUDI Wallet) and electronic attestations of attributes for EU-recognized identification and identity verification;

<sup>32</sup> EUDI Wallet – European Digital Identity Wallet – a wallet through which users can store, manage, and present identity data and electronic attestations of attributes (e.g., age, professional status);

<sup>33</sup> COMMISSION IMPLEMENTING REGULATION (EU) 2015/1502 of 8 September 2015 laying down minimum technical specifications and procedures for assurance levels for electronic identification means pursuant to Article 8(3) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market.

### 3.1. FATF's Role and the Architecture of Global Standards

The Financial Action Task Force (FATF<sup>34</sup>) functions as the global standard-setter for preventing money laundering and terrorist financing (AML/CFT), including for virtual assets (VAs) and virtual asset service providers (VASPs). The 2019 revision of Recommendation 15 and its Interpretive Note<sup>35</sup> expressly extended FATF's scope to VAs/VASPs; the updated 2021 Guidance<sup>36</sup> elaborated six essential areas: definitions of VAs/VASPs, application of standards to stablecoins, risks pertaining to peer-to-peer transactions, licensing/registration of VASPs, implementation of the travel rule, and practical aspects for the public/private sectors. FATF Recommendations are not positive law, but serve as compliance benchmarks for jurisdictions and authorities, subsequently monitored through targeted updates (2024<sup>37</sup>, 2025<sup>38</sup>) that track implementation gaps and friction points (e.g., hosted–unhosted transactions, DeFi, stablecoins).

The 2021 Guidance clarifies that entities which exchange, transfer, safeguard or administer virtual assets, or facilitate intermediation (including through apparently decentralized arrangements where there exists an owner/operator with significant control), fall within the scope of VASPs and must be licensed/registered and supervised. In addition, issuers/administrators of stablecoins and wallet providers can be VASPs when they offer relevant centralized services; the technological label does not prevail over the economic function and AML/CFT risk.

FATF extends the principles of Recommendation 16<sup>39</sup> (payment transparency) to VA transfers between VASPs: they must obtain, retain and transmit information about the originator and the beneficiary “immediately and securely,” to ensure traceability. The 2021 Guidance offers implementation parameters, while the 2025 Best Practices on Travel Rule Supervision add recommendations on technical interoperability, counterparty due diligence, and testing flows across hosted–hosted/hosted–unhosted scenarios. The 2024 targeted update shows that implementation is uneven across states, underscoring the need for cross-border coordination and operational clarifications.

FATF's 2020 Guidance on Digital Identity<sup>40</sup> orients authorities and the private sector in using digital-ID systems within customer due diligence. The document is technology-neutral, emphasizes levels of assurance (identification, authentication, governance), and recommends a risk-based approach to remote onboarding with quality standards and independent audits<sup>41</sup>.

### 3.2. United States: BSA<sup>42</sup>/FinCEN<sup>43</sup>—Transposing the Standards into Federal Law

In U.S. law, the Bank Secrecy Act (BSA) is implemented through a network of administrative rules (31 C.F.R.) administered by FinCEN. Entities that fall under the Money Services Businesses (MSB) category must

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<sup>34</sup> FATF – Financial Action Task Force – an intergovernmental body created in 1989 (G7, Paris) that sets global standards against money laundering (AML), terrorist financing (CFT), and proliferation financing (PF);

<sup>35</sup> FATF Recommendations, Virtual Assets: Targeted Update on Implementation of the FATF Standards on VAs and VASPs, Paris, 9 July 2024;

<sup>36</sup> Financial Action Task Force (FATF), Updated Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (Paris: FATF/OECD, Oct. 2021), secțiuni privind definițiile VA/VASP, stablecoin-uri, P2P, licențiere/înregistrare și „travel rule”;

<sup>37</sup> FATF, Targeted Update on Implementation of the FATF Standards on Virtual Assets and VASPs (Paris: FATF/OECD, June 2024);

<sup>38</sup> FATF, Best Practices on Travel Rule Supervision (Paris: FATF/OECD, 2025), see: <https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/Best-Practices-Travel-Rule-Supervision.pdf?>

<sup>39</sup> FATF, The FATF Recommendations – R.16 (Transparența transferurilor), see: <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html?>

<sup>40</sup> FATF, Guidance on Digital Identity (Paris: FATF/OECD, 6 Mar. 2020), see: <https://www.fatf-gafi.org/en/publications/Financialinclusionandnpoissues/Digital-identity-guidance.html?>

<sup>41</sup> FATF, Guidance on Digital Identity – Appendices (Paris: FATF/OECD, 2020), see: <https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Guidance-on-Digital-Identity-Appendice-D.pdf?>

<sup>42</sup> Bank Secrecy Act (BSA) — also known as the anti–money laundering law — requires financial institutions to help combat financial crime by keeping records and reporting certain financial transactions, including cash transactions exceeding \$10,000;

<sup>43</sup> FinCEN = Financial Crimes Enforcement Network (the U.S. bureau for enforcing financial-crime regulations);

maintain an AML program (31 C.F.R. § 1022.210<sup>44</sup>), file Suspicious Activity Reports—SARs (31 C.F.R. § 1022.320<sup>45</sup>), and comply with the Recordkeeping & Travel Rule (31 C.F.R. § 1010.410<sup>46</sup>). In 2019, FinCEN issued FIN-2019-G001<sup>47</sup>, an interpretive guidance that systematizes the application of the BSA to Convertible Virtual Currencies (CVCs) and clarifies when an actor becomes a money transmitter (e.g., “exchangers” and “administrators” of CVCs), thereby falling under the MSB umbrella. The guidance stresses that industry labels are irrelevant; what matters is the actual function—transmitting value for others—and the attendant risks.

The federal “Travel” rule requires institutions to transmit and retain a minimum set of information for transmittals of funds of USD 3,000 or more<sup>48</sup> (e.g., the transmitter’s name and address, the name/address or identifier of the transmitter’s institution, the date and amount, the beneficiary’s bank, as well as the beneficiary’s name/address/account/identifier)<sup>49</sup>. The rule applies to both banks and non-bank institutions; recent official interpretations have reconfirmed this architecture and the follow-the-money<sup>50</sup> purpose in AML investigations<sup>51</sup>. In parallel, MSBs must file SARs under 31 C.F.R. § 1022.320, with FinCEN<sup>52</sup> guidance and updated FAQs<sup>53</sup> on reporting timelines and content.

#### IV. COMPLIANCE OBLIGATIONS OF BLOCKCHAIN SERVICE PROVIDERS (VASP/CASP)

##### 4.1. The Architecture of Obligations: Between the Lex Specialis (MiCA) and the AML/TFR Regime

The EU framework positions crypto-asset service providers (CASPs) at the intersection of a sectoral regime—MiCA, which determines who may operate on the market and how—and the transversal AML/CFT regime (AMLR, supplemented by AMLA), while TFR 2023/1113 implements the travel rule in the area of crypto-asset transfers. MiCA makes the provision of any service conditional on authorization, admits only narrow exceptions for services provided at the exclusive initiative of the client, imposes conduct (“honest, fair and professional”) and governance, and, for critical functions, requires an orderly wind-down plan and technical rules by service type (e.g., custody; trading platforms; exchange; reception/transmission of orders)<sup>54</sup>. In mirror, the

<sup>44</sup> 31 CFR § 1022.210 (Anti-money laundering programs for money services businesses) – see: <https://www.ecfr.gov/current/title-31/subtitle-B/chapter-X/part-1022?> ;

<sup>45</sup> 31 CFR § 1022.320 (Reports by money services businesses of suspicious transactions), see: <https://www.law.cornell.edu/cfr/text/31/1022.320?> ;

<sup>46</sup> 31 CFR § 1010.410 (Records to be made and retained; Recordkeeping/Travel Rule), see: <https://www.law.cornell.edu/cfr/text/31/1010.410?> ;

<sup>47</sup> FinCEN, Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies (FIN-2019-G001, 9 May 2019), see: <https://www.fincen.gov/system/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>;

<sup>48</sup> Federal Financial Institutions Examination Council (FFIEC), BSA/AML Examination Manual – Funds Transfers Recordkeeping (Travel Rule Requirements), see: <https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/09>

<sup>49</sup> Federal Register, Agency Information Collection Activities; Proposed Renewal... Recordkeeping and Travel Rule – reconfirmări privind 31 CFR 1010.410(f) (Oct. 23, 2020; Aug. 13, 2024), see: <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201023a.pdf>

<sup>50</sup> FATF, *Virtual Assets: Targeted Update on Implementation...* (2024) — findings on the status of implementation of the “travel rule.”, see: <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/targeted-update-virtual-assets-vasps-2024.html?>

<sup>51</sup> FinCEN, Funds “Travel” Regulations: Questions & Answers (Advisory Issue 7, Jan. 1997), see: <https://www.fincen.gov/system/files/advisory/advisu7.pdf>

<sup>52</sup> FinCEN, Advisory on Illicit Activity Involving Convertible Virtual Currency (9 May 2019) – corelat cu FIN-2019-G001, see: <https://www.fincen.gov/system/files/advisory/2019-05-10/FinCEN%20Advisory%20CVC%20FINAL%20508.pdf>

<sup>53</sup> FinCEN, Frequently Asked Questions Regarding the FinCEN SAR see: <https://www.fincen.gov/resources/frequently-asked-questions-regarding-fincen-suspicious-activity-report-sar>

<sup>54</sup> Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (MiCA): Art. 59 (authorisation), Art. 61 (provision at the exclusive initiative of the client), Art. 66 (conduct), Art. 68 (governance), Art. 74 (orderly wind-down), Art. 75 (custody), Art. 76 (trading platforms), Art. 77 (exchange), Art. 80 (reception and transmission of orders); see also Art. 110 (register of non-compliant entities);

AMLR<sup>55</sup> sets out CDD/KYC, ongoing monitoring, reporting of suspicions, data sharing for AML purposes and document retention, while the TFR<sup>56</sup> fixes the mandatory set of information that must accompany transfers and how to handle missing or incomplete information.

#### **4.2. Onboarding and Identity Verification: CDD/KYC, Reliance and Correspondent Relationships**

When entering into a business relationship, CASPs apply risk-calibrated know-your-customer measures and establish ongoing monitoring. For flows involving entities from third countries, the regime provides specific measures for correspondent relationships, including for CASPs, and reliance on another obliged entity is possible only with strict safeguards<sup>57</sup>. In addition, the AMLR explicitly anchors the retention of CDD documentation, including information obtained by means of electronic identification, as part of the client “file.”<sup>58</sup> In the digital-identity realm, eIDAS 2.0 creates the European Digital Identity Wallet (EUDI Wallet) and enshrines electronic attestations of attributes—including their qualified form (QEAA)—with rules on legal effects, requirements and reference standards, verification of attributes against authoritative sources, and data separation from other services provided by wallet providers<sup>59</sup>. This architecture enables AML-compliant onboarding based on verified data and selective disclosure of attributes, reducing exposure of personal data.

#### **4.3. The Travel Rule for Crypto-Assets: Transactional Transparency and the Treatment of Self-Hosted Addresses**

The TFR extends transparency requirements to crypto-asset transfers: the originator’s CASP must obtain, retain and transmit information about the originator and the beneficiary, including the DLT address and corresponding identifiers. For self-hosted addresses, the TFR requires maintaining information and, above certain thresholds/conditions, additional checks to establish control over the address. Where information is missing or incomplete, rejection/return and risk-based reporting procedures apply. The regime includes a five-year retention period and provides for the publication of sanctions<sup>60</sup>.

#### **4.4. Monitoring, Reporting and Responsible Data Sharing**

The AMLR requires CASPs to maintain ongoing monitoring and to report suspicious transactions to the FIU. Information sharing is permitted within dedicated partnerships, constrained by necessity and proportionality, and explicitly referring to CDD data and suspicions. Retention of CDD documents and related information is generally five years. From a data-protection perspective, KYC/AML processing relies on the legal-obligation basis, while respecting the principles of lawfulness, minimization, purpose and storage limitation, security, privacy-by-design and appropriate technical-organizational measures<sup>61</sup>. At the same time, the GDPR allows

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<sup>55</sup> Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; Art. 20 (CDD/monitoring), Art. 38 (correspondent relationships, incl. CASPs), Art. 49 (reliance), Art. 69 (reporting of suspicions), Art. 70 (information sharing for AML purposes), Art. 77 (retention), Art. 90 (entry into force and application);

<sup>56</sup> Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849; Art. 14 (minimum set of information), Art. 14(5) and Art. 16(2)–(4) (self-hosted addresses and checks), Art. 17, Arts. 21–22 (measures for missing information), Art. 26 (retention), Art. 30 (publication of sanctions);

<sup>57</sup> Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; Art. 20 (CDD/monitoring), Art. 38 (correspondent relationships, incl. CASPs), Art. 49 (reliance).

<sup>58</sup> *Ibidem*, art. 77;

<sup>59</sup> Regulation (EU) 2024/1183 of the European Parliament and of the Council of 11 April 2024 amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity; Arts. 45b–45h (legal effects, requirements, verification against authoritative sources, functional separation), references to Art. 5a (Wallet implementation) and Annexes V–VII (content and attribute lists);

<sup>60</sup> Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849: Art. 14, Art. 14(5), Arts. 16(2)–(4), Art. 17, Arts. 21–22, Art. 26, Art. 30;

<sup>61</sup> 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): Art. 5 (principles), Art. 6(1)(c) (legal basis — legal obligation), Art. 25 (privacy by design), Art. 32 (security of processing);

restriction of certain rights (access, objection, erasure) where necessary and proportionate for AML/CFT, which explains situations in which users' requests are limited when documentation is retained solely for AML compliance.

## V. LEGAL IMPLICATIONS FOR USERS OF DIGITAL ASSETS

### 5.1. Pseudonymity, Identification and Traceability

For users, participation in the regulated crypto ecosystem means moving from technical pseudonymity to legal identification at points of intermediation. From a traceability perspective, Regulation (EU) 2023/1113 (TFR) requires crypto-asset transfers involving a provider (CASP) to be accompanied by information about the originator and the beneficiary, and the originator's CASP must verify *ex ante* the accuracy of that information before initiating the transfer. In mirror, the beneficiary's CASP must have procedures to detect missing information and, on a risk basis, decide whether to execute, reject or return the transfer. The European regime starts from the premise that, unlike transfers of funds, crypto-asset transfers are subject to the same requirements regardless of value, precisely to counter "smurfing" and the cross-border nature of networks<sup>62</sup>.

### 5.2. Self-Hosted Addresses: Permitted, but Conditional

The TFR does not prohibit transactions to/from self-hosted wallets; however, it reiterates the obligation of the CASP to obtain and retain information about the parties to any such transfer. Moreover, when the amount exceeds EUR 1,000, the originator's CASP (for transfers to a self-hosted address) and the beneficiary's CASP (for transfers from a self-hosted address) must take appropriate measures to assess whether the address is owned or controlled by the client. For users, the practical consequence is that interaction with self-custody remains possible, but non-anonymous whenever the path touches a regulated intermediary; lack or inaccuracy of information may lead to rejection/return of the transfer or risk-based reports.

### 5.3. Users' Exposure and Extraterritorial Effects

Although the AML regime targets obliged entities, users can bear indirect effects: blocked transactions, requests for source-of-funds, and STR/SAR filings. The AMLR requires ongoing monitoring and reporting of suspicions to FIUs (Arts. 20, 69), and failure to comply with reasonable requests from CASPs may lead to refusal to execute<sup>63</sup>. In cross-border transactions, FATF standards (R.15/R.16)<sup>64</sup> and U.S. law (BSA/31 C.F.R. § 1010.410)<sup>65</sup> converge on the travel rule and maintenance of an information chain for transfers ≥ USD 3,000, with AML-program and SAR obligations for MSBs. In practice, users interacting with platforms subject to the BSA may experience similar transparency requirements, reinforcing a "global compliance standard" for traceability and identification<sup>66</sup>.

## VI. DIGITAL IDENTITY AND ID-VERIFICATION SOLUTIONS IN THE BLOCKCHAIN ECOSYSTEM

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<sup>62</sup> Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849: Art. 14(1)–(3), (6)–(8), Art. 31, Art. 16(1), 17(1), 21–22, Art. 27, Art. 30;

<sup>63</sup> Regulation (EU) 2024/1624 of the European Parliament and of the Council of 31 May 2024 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing: Art. 20 (ongoing monitoring), Art. 69 (reporting of suspicions to the FIU — Financial Intelligence Unit);

<sup>64</sup> FATF, *Updated Guidance for a Risk-Based Approach to Virtual Assets and VASPs* (2021) — definitions of VA/VASP, stablecoins, the "Travel Rule," and implementation; the FATF Recommendations, R.16 (transparency of transfers);

<sup>65</sup> 31 C.F.R. § 1010.410(e)–(f) — Recordkeeping/"Travel Rule" for transmittals of funds of \$3,000 or more (obligations to transmit and retain data); FFIEC BSA/AML Manual — Funds Transfers Recordkeeping (threshold and minimum content);

<sup>66</sup> FinCEN, FIN-2019-G001 (*Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies*), May 9, 2019; FIN-2019-A003 (*Advisory on Illicit Activity Involving Convertible Virtual Currency*), May 9, 2019 — confirm the functional approach (MSB/money transmitter), AML program, and SAR requirements, see: <https://www.fincen.gov/system/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>

## 6.1. The European Framework: eIDAS 2.0 and the European Digital Identity Wallet (EUDI Wallet)

The revision of Regulation (EU) No 910/2014 through Regulation (EU) 2024/1183 (“eIDAS 2.0”) establishes the legal framework for the European Digital Identity Wallet (EUDI Wallet) and expands the suite of trust services, introducing, among others, electronic attestations of attributes (including their qualified form, QEAA). eIDAS 2.0 introduces a conformity-assessment mechanism for EUDI Wallets, with reference to European cybersecurity certification schemes (Reg. 2019/881—“Cybersecurity Act”), periodic vulnerability assessments, and adoption, by implementing acts, of the necessary reference standards. These policy choices increase legal trust and facilitate cross-border recognition.

From the users’ perspective, eIDAS 2.0 configures a regime of granular control: the wallet is optional and free of charge for natural persons; the user decides on selective data sharing, and wallet providers must ensure logical separation of data and avoid unnecessary collection/merging for service provision. This normative design is compatible with GDPR principles (lawfulness, minimization, purpose limitation, security) and, in practice, creates a compliance framework in which the user can prove attributes or identity with minimal exposure. Moreover, the recitals to eIDAS 2.0 provide for the generation of user-managed pseudonyms for authentication where full identification is not legally required—an instrument with potential to reduce data correlation in routine transactions.

In blockchain environments, where technical traceability may come into tension with privacy, use of the wallet and attribute attestations enables legal alignment between AML/KYC requirements (identification, verification, audit) and data protection. In practice, users can prove legal capacities (e.g., age, residence in a Member State, status as a regulated professional) using QEAA or other attestations, without fully disclosing their personal-data set. This evolution relies on recognized open standards such as the W3C Verifiable Credentials Data Model 2.0 and W3C Decentralized Identifiers (DID) 1.0, essential for cross-border portability and interoperability<sup>67</sup>.

## VII. CONCLUSIONS

FATF standards acted as a catalyst for this convergence: Recommendation 15 (VAs/VASPs), Recommendation 16 (payment transparency/travel rule) and the 2021 Guidance on VAs/VASPs, as well as the 2020 Guidance on Digital Identity, encourage licensing/registration of VASPs, risk-based CDD/KYC, and transmission of essential data to trace flows.

In the European Union, blockchain compliance is built on a coherent and complementary legal architecture: MiCA provides the sectoral regime for issuers and service providers (CASPs); TFR 2023/1113 extends the travel rule to crypto-asset transfers; AMLR 2024/1624 unifies AML obligations for obliged entities (including CASPs); and AMLA 2024/1620 creates a dedicated European supervisor. In parallel, eIDAS 2.0 (2024/1183) offers a recognized, interoperable digital-identity infrastructure. Together, these instruments reduce the arbitrariness of classifications, enhance traceability of flows, and strengthen users’ legal protection, while preserving—at least in design—the proportionality between transparency and privacy.

In the United States, BSA/FinCEN materializes equivalent requirements for AML programs, SARs, and recordkeeping/travel (31 C.F.R. § 1010.410), emphasizing a functional approach to value-transmission activities. In cooperation with FATF standards, a pragmatic equivalence dialogue (especially on the travel rule and acceptance of high-assurance digital-ID solutions) would facilitate operational alignment and reduce the arbitrariness of overlapping rules in cross-border transactions.

De lege ferenda, the following are recommended: (i) in secondary/tertiary EU law, an explicit clarification of GDPR–AMLR–TFR interactions (e.g., lists of legal bases, retention periods, and accepted pseudo-anonymization formulas); (ii) at the level of standardization, integration of the EUDI Wallet and qualified electronic attestations of attributes as sufficient proof for certain KYC elements (age, residence, professional status), accompanied by uniform guidance on assurance levels and mutual acceptance; and (iii) for transfers, an EU-wide interoperability protocol for the travel rule (hosted–hosted/hosted–unhosted), aligned with FATF recommendations and counterparty-verification mechanisms, to reduce the risk of fragmentation.

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<sup>67</sup> W3C, Verifiable Credentials Data Model v2.0 (Recommendation W3C, 15 May 2025) and Decentralized Identifiers (DID) v1.0 (Recommendation W3C). see: <https://www.w3.org/TR/vc-data-model-2.0/>

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# THE EUROPEAN ARREST WARRANT BETWEEN MUTUAL TRUST AND FUNDAMENTAL RIGHTS: AN ANALYSIS OF THE JURISPRUDENTIAL DEVELOPMENTS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THEIR EFFECTS

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## Abstract

Amid a European landscape increasingly marked by eroding mutual trust among certain Member States, the protection of fundamental rights within the European Arrest Warrant (EAW) mechanism has undergone notable consolidation. This study explores the extent to which the Court of Justice of the European Union (CJEU) has managed, since the inception of the EAW, the structural tension between the principle of mutual trust and the imperative of fundamental-rights protection. To this end, it examines the evolution and recalibration of the CJEU's case law, which now enables executing judicial authorities to refuse the enforcement of a warrant where the observance of fundamental rights is at stake.

Through the theoretical lens of the “rights as trumps” doctrine and the application of the “two-step test,” fundamental rights have progressively ceased to be perceived as abstract norms of primary law lacking binding effect and have instead become operational limits capable of tempering the automatism of judicial cooperation. By identifying the determinants of inter-state distrust and assessing their influence on the capacity of fundamental rights to counteract “blind trust,” this research traces the CJEU's jurisprudential transition toward a more balanced and contextualised understanding of mutual trust.

Accordingly, the paper advances the argument that the principle of mutual trust should be reconceptualised to encompass both trust and distrust as complementary instruments for managing uncertainty among Member States. From this perspective, mutual distrust—albeit exceptional and context-specific—emerges not as an obstacle but as a catalyst for the effective protection of fundamental rights. In so doing, it reinforces the European framework for their safeguarding and contributes to shaping the future orientation of judicial cooperation within the European Union.

## 1, INTRODUCTION

The principle of mutual trust occupies a pivotal position within the Union's constitutional architecture, serving as the cornerstone of numerous mutual recognition mechanisms that underpin the Area of Freedom, Security and Justice (AFSJ).

Although the centrality of mutual trust is undisputed, its precise normative scope and concrete legal implications continue to provoke sustained doctrinal and judicial debate. The principle is neither expressly mentioned nor defined in the Treaties but rather emerges as a jurisprudential construct progressively shaped by the CJEU. Through successive rulings, the Court has delineated its content, purpose, and limits—an evolutionary process in which preliminary references from national courts have played a decisive role. These references, often reflecting functional distrust among judicial authorities, have provided the Court with opportunities to clarify the contours of mutual trust and the conditions under which it may be restricted.

At the heart of this debate lies the challenge of reconciling the obligation of mutual trust with the protection of fundamental rights and the rule of law. This dialectic exposes a structural tension between the automaticity inherent in mutual recognition and the individualized scrutiny required by fundamental-rights standards. As Wendel observes, these tensions have a “quasi-federal” dimension, insofar as they reshape the distribution of responsibilities among Member States within the AFSJ and redefine the horizontal dynamics of rights protection.

The balance struck between automatic recognition and the possibility of refusal effectively determines the allocation of accountability for compliance with fundamental rights. Where trust is imposed, responsibility rests primarily with the issuing Member State; conversely, when distrust is permitted, the executing authority shares responsibility by verifying the compatibility of the measure with EU fundamental-rights guarantees.

This judicial dialogue between the courts from UE states and the CJEU has been pretty powerful regarding the EAW — a “quick” procedural path which, from its inception, has provoked real earthquakes regarding its compatibility with constitutional and human-rights principles. The EAW Framework Decision (FDEAW) revolutionised extradition by introducing a system of automatic recognition of judicial decisions, significantly restricting the discretion of executing authorities. Refusal of surrender is permissible only on the basis of an exhaustive list of mandatory and optional grounds, which notably does not include explicit references to fundamental rights.

Although Article 1(3) FDEAW provides that the instrument shall not affect the obligation to respect fundamental rights as enshrined in Article 6 TEU, early case law such as *Radu* (C-396/11) rejected the notion that fundamental-rights violations could constitute implicit grounds for refusal. *Radu* thus exemplified a phase of “blind trust,” privileging the efficiency of cooperation over fundamental-rights scrutiny. Yet the judgment failed to resolve the underlying question of whether mutual trust admits limits grounded in rights protection—a question that has since defined the evolution of CJEU jurisprudence.

Over the past decade, this issue has gained renewed urgency against the backdrop of rule-of-law backsliding in certain Member States. The presumption that all Member States “share and respect” the common values of Article 2 TEU has increasingly been challenged by empirical realities, prompting national courts to question whether trust imposed by law can substitute for trust earned through adherence to those values.

In response to this changing landscape, the CJEU has progressively refined its approach. Faced with the need to reconcile mutual trust with the protection of fundamental rights, it has developed a structured framework—the so-called “two-step test”—allowing, in exceptional circumstances, the suspension of EAW execution where systemic deficiencies in the issuing state create a real risk of rights violations. This evolution reflects a gradual shift from the ideal of unqualified trust toward a model of conditional and reasoned confidence, capable of accommodating legitimate distrust without undermining the efficiency of judicial cooperation.

Against this background, the present study analyses the CJEU’s jurisprudential trajectory concerning the EAW, with particular attention to cases addressing judicial independence. This area provides a compelling illustration of the tension between normatively imposed trust and empirically grounded distrust, amplified by democratic backsliding and institutional fragility. The analysis identifies the inconsistencies inherent in the CJEU’s reasoning—arising from the disjunction between legally presumed trust and factual distrust—and advances proposals for reconciling the legal obligation of mutual trust with the empirical realities of judicial cooperation within the European Union.

## **II. The CJEU’s Jurisprudential Evolution and Its Effects.**

In its early jurisprudence on the EAW, the CJEU appeared to endorse a model of almost unconditional or “blind” trust among Member States. In landmark cases such as *Radu* and *Melloni*, the Court interpreted the FDEAW strictly, excluding the possibility that fundamental-rights considerations could operate as autonomous grounds for refusal even if such grounds were not legislated by FDEAW. Within this paradigm, the principle of mutual trust prevailed even in circumstances where the protection of individual rights might have warranted further scrutiny.

However, this rigid conception of mutual trust did not remain unchallenged. Mounting criticism from national courts and from the European Court of Human Rights (ECtHR) compelled the CJEU to refine its approach. The decisive turning point came with the twin judgments in *Aranyosi* and *Căldăraru*, which concerned systemic deficiencies in detention conditions in Hungary and Romania. For the first time, the Court recognised that executing authorities could suspend, and ultimately refuse, the execution of a EAW where such deficiencies created a real risk of inhuman or degrading treatment, contrary to Article 4 of the Charter of Fundamental Rights of the European Union.

This doctrinal innovation introduced a critical nuance into the operation of mutual trust: while the FDEAW contained no explicit human-rights ground for refusal, the Court interpreted Article 1(3) as implicitly authorising such an exception in exceptional cases. The resulting “two-step test” requires, first, that the executing authority determine whether there are systemic or generalised deficiencies in the issuing state’s legal system; and second, that it assess whether, in the particular circumstances of the individual case, the requested person would face a real risk of a rights violation. This structured reasoning—anchored in the Charter and in the constitutional traditions of the Member States—signalled a transition from absolute to conditional trust, introducing a limited but meaningful space for “legitimate distrust.”

The *Aranyosi* and *Căldăraru* judgments thus marked a fundamental shift in the CJEU’s philosophy, bridging the gap between mutual recognition and fundamental-rights protection. The Court reaffirmed that mutual trust is not absolute and must yield, in exceptional situations, to the imperatives of rights protection. Subsequent case law, including *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* and *Dorobantu*, confirmed this line of reasoning and provided further operational guidance for national authorities assessing the risk of rights violations.

This jurisprudential evolution reached a new stage with *LM (Celmer)*, in which the CJEU extended the *Aranyosi* logic to the field of judicial independence. Against the backdrop of rule-of-law deterioration in Poland, the referring Irish court questioned whether it could refuse execution of an EAW on the ground that the issuing state’s judiciary lacked independence. In its judgment, the CJEU reaffirmed the two-step test as the governing framework. The first step requires establishing the existence of systemic or generalised deficiencies affecting judicial independence in the issuing state; the second step mandates an individualized assessment of whether the requested person faces a real risk that such deficiencies will compromise the fairness of their trial, in violation of Article 47 of the Charter.

Crucially, the Court confirmed that even where systemic deficiencies are proven, refusal of execution cannot be automatic. National courts must still ascertain, based on specific and concrete evidence, whether those deficiencies would affect the individual case. In so doing, the Court sought to preserve the delicate balance between upholding mutual trust and preventing impunity—the core rationale of the EAW system. Although this approach attracted criticism for being overly formalistic and insufficiently responsive to the gravity of rule-of-law erosion in Poland, it nevertheless provided a consistent analytical structure for national courts grappling with similar dilemmas.

Subsequent references from the Dutch *Rechtbank Amsterdam* further tested the boundaries of this framework. In 2020 and 2022, amid escalating concerns over judicial independence in Poland, the Dutch court asked whether the second step could be dispensed with when systemic deficiencies are so severe that any individual is presumed to face a real risk of an unfair trial. The CJEU, while acknowledging the worsening situation, maintained that the two-step test remains indispensable: general deficiencies cannot automatically justify refusal, as such a finding would effectively amount to a collective suspension of the EAW mechanism—a decision that lies with the EU’s political institutions under Article 7 TEU, not the judiciary.

Nonetheless, the Court gradually refined the operational content of both steps. It clarified that the first step requires a comprehensive, evidence-based assessment of the issuing state's judicial system, taking into account a wide range of sources, including European Commission reports, CJEU and ECtHR judgments, and national constitutional decisions. At the second step, the requested person bears the burden of demonstrating that systemic deficiencies have concretely affected, or are likely to affect, the handling of their case. However, where such proof is incomplete but credible indications exist, the executing authority must engage in dialogue with the issuing authority under Article 15(2) FDEAW. The absence of genuine cooperation in this dialogue may itself reinforce the finding of a real risk.

The CJEU's subsequent ruling in *Puig Gordi* confirmed the resilience and adaptability of the two-step test beyond the Polish context. In that case, Belgian courts refused to execute EAWs issued by the Spanish Supreme Court against Catalan political figures, citing doubts about the issuing court's jurisdiction and impartiality. The CJEU reiterated that the two-step test applies whenever fundamental-rights concerns arise, including those related to the right to a "tribunal established by law" under Article 47 of the Charter. Importantly, the Court clarified that deficiencies may also be group-specific rather than systemic, provided they affect an identifiable category of persons to which the requested individual belongs.

Taken together, these judgments illustrate both the continuity and the sophistication of the CJEU's approach. While the space for legitimate distrust remains narrowly circumscribed, the Court has progressively endowed national judges with clearer procedural and evidentiary tools for its exercise. The result is a jurisprudential equilibrium: mutual trust remains the default paradigm, yet it is now tempered by a structured and reasoned mechanism that allows fundamental rights to prevail in exceptional cases.

Through this evolution, the CJEU has transformed mutual trust from an unconditional legal fiction into a dynamic principle that must coexist with empirical realities of rights protection and rule-of-law compliance. The two-step test thus serves as both a procedural safeguard and a constitutional safety valve—preserving the functionality of the EAW while ensuring that cooperation does not come at the expense of fundamental rights.

### III. CONCLUSIONS

Although the theoretical possibility for national courts to refuse the execution of a European Arrest Warrant (EAW) on grounds related to the protection of fundamental rights was first recognised in *Aranyosi* and *LM (Celmer)*, its effective implementation initially proved both conceptually and practically challenging. National judicial authorities faced difficulties in determining the scope of their discretion within the CJEU's framework, caught between the imperative of judicial cooperation and the equally binding duty to ensure compliance with fundamental rights. Over time, however, successive clarifications in the Court's jurisprudence have gradually rendered the exercise of this discretion more coherent and operational. National courts now possess both the normative foundations and the interpretative tools necessary to substantiate and justify refusals based on "legitimate distrust."

The analysis undertaken in this study demonstrates that the CJEU's evolving case law has progressively redefined the contours of mutual trust, moving it away from a dogmatic presumption and towards a more nuanced and context-sensitive principle. The resulting balance acknowledges that mutual trust cannot exist in isolation from the factual and institutional realities within Member States. Where the rule of law or judicial independence is compromised, the presumption of trust must yield to a duty of verification. This recalibration does not undermine the principle itself; rather, it ensures its continued legitimacy and functionality within a pluralistic legal order.

Our central claim is that mutual trust, as a cornerstone of the Area of Freedom, Security and Justice, should not be construed as a rigid or self-contained obligation. Instead, it must operate within a relational framework which assure

that trust and distrust are reasonable joined in order to find a way for managing uncertainty among Member States. In this sense, distrust—when grounded in objective and reasoned assessment—functions not as a negation of trust, but as its necessary corrective, ensuring that cooperation remains consistent with the Union’s foundational values.

The jurisprudential trajectory examined here confirms that the CJEU has succeeded in maintaining this equilibrium, albeit within a narrow doctrinal corridor. The Court’s insistence on the exceptional nature of departures from mutual trust preserves the systemic coherence of the EAW mechanism, while its recognition of limited exceptions reinforces the primacy of fundamental rights and the rule of law. This dual movement reflects a deeper constitutional dynamic: the gradual Europeanisation of distrust as an instrument of accountability and rights protection within the Union’s judicial architecture.

Ultimately, the principle of mutual trust cannot be sustained through legal presumption alone. Its durability depends on the continued fidelity of Member States to the shared values of Article 2 TEU, and on the CJEU’s willingness to adapt its jurisprudence to evolving realities. As this study has argued, maintaining mutual trust in its current, largely one-dimensional form no longer suffices to safeguard the legitimacy of judicial cooperation in Europe. Recognising mutual distrust as an exceptional but integral component of the system represents not a weakening, but a maturation of the principle a shift from imposed confidence to earned reliability.

In this respect, the evolution of the CJEU’s case law offers both a doctrinal framework and a normative horizon for the future of the European Arrest Warrant: a model of judicial cooperation that remains efficient and effective, yet fully consonant with the Union’s constitutional commitment to the protection of fundamental rights and the rule of law.

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# THE ETHICAL BOUNDARIES OF FISCAL ENGINEERING IN INSOLVENCY CONTEXTS: FROM CREATIVE COMPLIANCE TO SYSTEMIC RISK

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## **Abstract:**

*This paper examines the intersection of tax optimisation and insolvency procedures within the context of European and Romanian legislation. It explores how lawful tax strategies may enhance business resilience while also identifying when such mechanisms cross the line into abuse. The study integrates legal, economic, and ethical dimensions, arguing that creative yet responsible fiscal planning contributes to the development of a knowledge-based society. The paper links directly to the theme “Education and Creativity for a Knowledge-Based Society,” by emphasising that fiscal literacy, professional ethics, and legal innovation are essential to maintaining equilibrium between efficiency and fairness. It concludes that both regulation and education must evolve to address the challenges posed by increasingly complex corporate tax behaviours in insolvency contexts.*

**Keywords:** boundaries, insolvency, risk, tax optimization.

## I. INTRODUCTION

Tax optimisation has evolved into one of the most intricate intersections between law, economics, and ethics in the contemporary regulatory landscape. In its legitimate form, it reflects a company’s ability to structure transactions efficiently, within the framework of fiscal legality and economic rationality. When pursued transparently and anchored in genuine economic purpose, tax optimisation reinforces market discipline, fosters investment, and promotes long-term financial resilience. It embodies the positive dimension of fiscal creativity, one that channels innovation toward compliance rather than circumvention.

Yet, when optimisation becomes detached from real economic substance and turns into a mechanism for concealing assets, manipulating balance sheets, or distorting financial transparency, it ceases to be an exercise of efficiency and becomes an abuse of law. The thin line separating creative compliance from systemic manipulation defines the ethical frontier of modern fiscal engineering. This frontier is particularly relevant in insolvency contexts, where the legitimacy of actions depends not only on legality in form, but also on fairness in substance.

From a legal standpoint, insolvency transcends the notion of financial incapacity; it represents a collective process of justice and equilibrium. Its essence lies in the protection of creditors’ rights and the preservation of market integrity. The procedural fairness of insolvency relies upon the truthful disclosure of the debtor’s assets and obligations. When artificial tax schemes obscure this reality, the fundamental principles of equality, transparency, and predictability, core pillars of insolvency law, are compromised. Consequently, fiscal

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manipulation does not merely alter financial outcomes; it undermines the moral and juridical architecture of the system itself.

The interaction between tax optimisation and insolvency thus reveals a structural tension between two legitimate yet conflicting values: economic freedom and normative integrity. On one hand, enterprises are entitled to pursue profitability through lawful structuring; on the other, the legal order imposes boundaries to ensure that such freedom is not exercised at the expense of justice or public trust. I strongly believe that this duality generates a grey zone, an area of interpretative complexity where economic logic, legal form, and ethical responsibility converge. Navigating this zone requires both technical expertise and moral discernment.

For the legal scholar and practitioner alike, the distinction between permissible tax planning and abusive fiscal behaviour is not merely a quantitative threshold, but a qualitative one, rooted in intention, substance, and societal effect. The doctrine of substance over form has thus become an essential interpretative principle, guiding courts and regulators in identifying practices that, though formally compliant, contradict the very objectives of the law.

Beyond its technical scope, this debate encapsulates a broader philosophical challenge: the construction of a legal culture that harmonises creativity with responsibility. The evolution of fiscal and insolvency frameworks should not aim solely at deterrence, but at cultivating ethical awareness and institutional accountability. Legal education, therefore, I think that it plays a transformative role, training jurists, economists, and administrators to distinguish between innovation that strengthens the system and innovation that undermines it.

Ultimately, the ethical boundaries of fiscal engineering in insolvency contexts reflect the deeper question of how modern societies reconcile economic dynamism with justice. A knowledge-based legal order cannot rely on regulation alone; it must rest on internalised principles of fairness, transparency, and proportionality. The challenge is not to suppress fiscal creativity, but to discipline it through ethics, ensuring that the pursuit of efficiency never becomes a pretext for systemic risk. In this equilibrium lies the moral and functional integrity of both the market and the law.

## **II. TAX OPTIMISATION: LEGAL AND ECONOMIC DIMENSIONS**

Tax optimisation denotes the intentional structuring of financial operations to achieve tax efficiency. Economically, it supports competitiveness and investment by reducing fiscal costs. Legally, its legitimacy derives from compliance with the Tax Code and EU directives (such as the Anti-Tax Avoidance Directive 2016/1164<sup>2</sup>). In Romania, the principle of legality in taxation (Article 1 of the Fiscal Procedure Code<sup>3</sup>) establishes the permissible scope of optimisation.

From an ethical perspective, tax optimisation can either sustain or erode public confidence. Multinational enterprises that exploit loopholes or use artificial arrangements may technically comply with the law yet violate its spirit. The Court of Justice of the European Union (CJEU) has repeatedly addressed such tensions, notably in

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<sup>2</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

<sup>3</sup> Law no. 207/2015.

the \*Halifax\* case (C-255/02<sup>4</sup>), establishing that abuse of law occurs when the main purpose of a transaction is to obtain a tax advantage contrary to the intent of the legislation.

Economic analysis shows that firms employing balanced tax planning exhibit higher resilience in times of financial distress. Conversely, aggressive planning correlates with opacity, reduced investor trust, and greater insolvency risk. A knowledge-based approach requires managers and legal advisers to integrate fiscal efficiency with transparent.

In my professional view, as a legal practitioner specialised in fiscal matters, tax optimisation should be pursued only within the boundaries where legal creativity still serves the genuine purpose of economic activity. The moment a structure exists solely to generate a fiscal effect, detached from commercial reasoning, it ceases to be optimisation and becomes distortion. A responsible legal person should measure the legitimacy of any fiscal decision not by how much tax it avoids, but by whether the transaction would still make sense if the tax advantage were removed. The essence of good tax practice lies in proportionality and transparency: to design strategies that respect both the text and the spirit of the law, and to ensure that efficiency never undermines fairness. Beyond that point, the lawyer’s duty is no longer to minimise liability at any cost, but to protect the credibility of the legal system itself.

### III. ECONOMETRIC AND COMPARATIVE ANALYSIS

Empirical research shows that efficient insolvency frameworks reduce credit spreads by enhancing recovery expectations. The AFME<sup>5</sup> model suggests that a one-point increase in average recovery rates may reduce corporate bond spreads by up to 15 basis points.<sup>6</sup>

<sup>4</sup> CJEU, Case C-255/02, Halifax plc and Others v Commissioners of Customs & Excise (2006): The Court established the general principle prohibiting abuse of law in the field of taxation. It held that taxpayers cannot rely on EU law provisions to obtain tax advantages resulting from purely artificial transactions devoid of economic substance. The judgment introduced the “dual test” for abuse: (1) the transaction results in a tax advantage contrary to the purpose of the law, and (2) the essential aim of the arrangement is to obtain that advantage. This case became a cornerstone for subsequent anti-avoidance doctrine in both EU and national jurisprudence.

<sup>5</sup> Association for Financial Markets in Europe (AFME), Potential Economic Gains from Reforming Insolvency Law in Europe, London, 2016.

<sup>6</sup>  $\Delta\text{Spread} = \beta \times \Delta\text{RR} + \varepsilon$  Comparative Tax Priority in Insolvency (Romania vs EU States)

Country	Fiscal Claim Priority	Observations / Legal Framework
Romania	Medium	Fiscal claims ranked as privileged, but restructuring and payment agreements are allowed (Law no. 85/2014, Fiscal Procedure Code).
Germany	Low	Tax authorities treated as ordinary creditors; insolvency aims at equal distribution and economic rehabilitation.
Netherlands	Moderate	Limited priority; pragmatic approach facilitating negotiated settlements with fiscal authorities.
Italy	High	Tax authorities enjoy extended privileges; may slow reorganisations. Reforms aim to reduce rigidity.
France	Moderate-High	Strong public creditor rights, balanced by administrative flexibility and preventive conciliation procedures.

Practical observation shows that the way insolvency rules are designed has a visible impact on the financial health of both companies and credit markets. When creditors can rely on predictable procedures and on a fair division of assets, they tend to offer financing at lower interest rates, which in turn supports investment and economic growth. The analytical framework used by AFME suggests that even small gains in recovery rates can lead to a measurable decline in risk premiums and borrowing costs. On the other hand, when tax practices become opaque or overly aggressive, the entire mechanism of insolvency loses credibility. Lenders react by increasing the cost of credit to compensate for the uncertainty, and that additional burden spreads through the business environment. In this sense, the law does not only regulate insolvency, it quietly shapes the cost of capital and the stability of the market itself.

A cross-country comparison within the European Union confirms these tendencies. States where fiscal authorities work alongside other creditors, rather than claiming absolute priority, show faster restructuring and higher repayment ratios. The Netherlands and Germany are often cited as examples of this balanced approach, while jurisdictions that still rely on rigid hierarchies for tax claims experience slower recoveries and prolonged court proceedings. The difference is not merely procedural but economic: flexible, cooperative systems attract investors and stimulate new lending, whereas adversarial or overly protective fiscal regimes discourage risk-taking and innovation. Ensuring consistency among Member States has therefore become one of the most urgent goals of European legal harmonisation, linking insolvency performance directly with economic confidence.

From my standpoint, the data only confirm what practice has already shown: a legal framework can never be truly efficient if it ignores the ethical behaviour of those applying it. In tax and insolvency alike, numbers tell only part of the story. The real difference lies in how responsibly companies and their advisers interpret the law. I have often seen that the firms most willing to cooperate transparently with fiscal authorities also manage to restructure faster and preserve their reputation with creditors. This does not happen by accident but because trust, once earned, becomes an economic asset. For that reason, I believe that the purpose of legal and economic reform should not be to design ever more complex rules, but to reinforce a culture of professional integrity, one in which tax optimisation remains a legitimate tool of strategy, never a weapon against fairness.

#### **IV. MANIPULATION THROUGH ARTIFICIAL TRANSACTIONS**

Abusive fiscal engineering often relies on artificial intra-group transactions designed to shift profits, inflate liabilities, or conceal assets before insolvency. While legally framed as “optimisation,” such mechanisms intentionally distort the economic reality that insolvency law seeks to reveal. These transactions undermine the *pari passu* principle, equal treatment of creditors, by creating a deceptive hierarchy of claims and obstructing the identification of the debtor’s true financial position. This manipulation transforms fiscal strategy into a tool of evasion rather than efficiency.

In practice, these structures can take many subtle forms: circular loans that never intend to be repaid, fictitious service contracts between related entities, or the transfer of intellectual property to offshore affiliates at undervalued prices. Each of these operations alters the debtor’s balance sheet in a way that conceals solvency risks and misleads both creditors and courts. The legal façade may be impeccable, yet the underlying substance tells a different story. When insolvency finally occurs, administrators face the almost impossible task of tracing assets

across a web of entities created for the sole purpose of dispersing accountability. The economic loss is not limited to creditors; it extends to public budgets and to the confidence that sustains the rule of law in commercial life.

From my point of view, what makes these practices particularly concerning is their normalisation within certain sectors of corporate advisory work. Complex structuring is often presented as a sign of sophistication, while in reality it masks an erosion of legal ethics. Genuine fiscal optimisation should enhance transparency and predictability, not concealment. The challenge for practitioners is to draw that line in daily advisory work, to recognise when legitimate planning turns into manipulation. Preventing abuse therefore depends less on new regulations and more on the integrity of those interpreting them, for no legal system can fully compensate for the absence of professional conscience.

## V. THE ROLE OF EU DIRECTIVES AND JUDICIAL PRACTICE

EU law plays a central role in harmonising the boundary between lawful tax optimisation and abuse. The Anti-Tax Avoidance Directive (ATAD) and the Directive on Restructuring and Insolvency (EU 2019/1023<sup>7</sup>) jointly promote fairness and sustainability. ATAD imposes controlled foreign company (CFC) rules and limits interest deductions, while the Insolvency Directive encourages early restructuring. Together, they aim to ensure that insolvency is not used as a vehicle for aggressive tax planning.

Judicial interpretation remains decisive. The CJEU's doctrine of abuse of law ensures that form cannot prevail over substance. In cases such as *\*Emsland-Stärke\** (C-110/99)<sup>8</sup> and *\*Cadbury Schweppes\** (C-196/04)<sup>9</sup>, the Court reaffirmed that transactions lacking economic substance, motivated solely by fiscal gain, constitute abuse. Romanian courts have echoed these principles, invoking Article 11 of the Fiscal Code to disregard simulated operations.

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<sup>7</sup> Directive (EU) 2019/1023 on preventive restructuring frameworks, OJ L 172/18 establishes a common framework for preventive restructuring procedures, aiming to enable viable enterprises facing financial distress to restructure at an early stage and avoid insolvency. It introduces minimum standards on debtor-in-possession models, creditor classes, and cross-class cram-down mechanisms, while ensuring the protection of workers and creditors. The Directive also promotes second chance policies and measures to increase the efficiency and transparency of insolvency proceedings across the European Union.

<sup>8</sup> JEU, Case C-110/99, *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* (2000): The Court articulated the general concept of abuse of law in EU jurisprudence, holding that legal rights may not be exercised for purposes contrary to their legitimate objective. It established a two-part test for identifying abuse: (1) the transaction results in an advantage contrary to the purpose of EU law, and (2) the essential aim of the operation is to obtain that advantage. The judgment laid the doctrinal foundation for the later fiscal anti-abuse jurisprudence, including *Halifax* (C-255/02).

<sup>9</sup> CJEU, Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* (2006): The Court clarified the scope of freedom of establishment under EU law in relation to controlled foreign companies (CFCs). It held that Member States may restrict this freedom to prevent wholly artificial arrangements intended to circumvent national tax law, but such restrictions must not hinder genuine economic activity. The ruling distinguished legitimate tax planning from abusive practices, reinforcing the principle of economic substance in cross-border corporate structures.

I believe that such jurisprudence demonstrates that creative structuring must remain anchored in lawful purpose. Ethical creativity is encouraged; deceptive creativity is not. This distinction sustains both the credibility of insolvency proceedings and the moral foundation of taxation in a knowledge-driven society.

## **VI. ETHICAL AND EDUCATIONAL PERSPECTIVES IN A KNOWLEDGE-BASED SOCIETY**

Education represents the foundation for responsible fiscal behaviour. Tax professionals, insolvency administrators, and judges must develop not only technical expertise but also ethical judgment. Universities and professional bodies have a duty to integrate fiscal ethics and corporate responsibility into curricula. The concept of creative compliance, acting innovatively within the law, illustrates the harmony between education and creativity.

Ethically, tax optimisation challenges notions of solidarity and distributive justice. Excessive avoidance undermines public services and erodes social cohesion. Economically, it distorts competition, favouring firms with greater access to sophisticated tax advice. Therefore, education must promote an equilibrium between entrepreneurial freedom and fiscal responsibility. Such training empowers professionals to detect and discourage abusive schemes before insolvency emerges.

I consider that a knowledge-based society values transparency, integrity, and innovation. Legal creativity should not be confused with manipulation; it entails designing fair and efficient rules that encourage compliance through understanding rather than fear. Thus, the reform of insolvency and tax regimes must be accompanied by continuous learning for practitioners and policymakers alike.

## **VII. CONCLUSIONS**

The ethical boundaries of fiscal engineering in insolvency contexts mark one of the most delicate intersections between legal innovation, economic rationality, and moral responsibility. Fiscal optimisation, when grounded in transparency and legitimate business purpose, can be a constructive force, stimulating investment, preserving liquidity, and sustaining enterprises in financial distress. It represents a form of creative compliance, where legal intelligence operates within the spirit of the law, reconciling efficiency with fairness. In this sense, responsible fiscal engineering contributes to the resilience of markets and the stability of the insolvency ecosystem.

However, when fiscal creativity exceeds its ethical perimeter, it transforms from a tool of financial prudence into a mechanism of systemic distortion. Abusive optimisation practices, such as artificial intra-group transactions, profit shifting, or strategic misrepresentation of asset values, undermine both the equality of creditors and the predictability of the insolvency process. They erode public trust in the fiscal system and create an asymmetry between economic actors who abide by the rules and those who exploit them. Such practices are not merely technical irregularities but manifestations of moral hazard that threaten the integrity of the entire economic order.

The legal challenge therefore lies not in suppressing creativity, but in disciplining it through ethical and normative coherence. Insolvency and fiscal law must evolve together, ensuring that financial innovation does not outpace the capacity of institutions to preserve justice and transparency. A sound regulatory architecture should

integrate preventive tools, such as early warning systems, enhanced due diligence, and cross-border information exchange, to detect and correct fiscal abuses before they escalate into insolvency crises.

Equally important is the ethical formation of professionals operating at the intersection of taxation and insolvency. Lawyers, accountants, and administrators must internalise that fiscal engineering is not merely a strategic or technical exercise, but an expression of public responsibility. Education thus becomes a pillar of prevention: by fostering critical judgment, ethical reasoning, and interdisciplinary understanding, it transforms fiscal expertise into an instrument of societal balance rather than advantage seeking.

In the European and Romanian context, where legal harmonisation coexists with diverse economic realities, maintaining this equilibrium demands continuous dialogue among policymakers, scholars, and practitioners. Ethics must no longer be perceived as an abstract constraint but as the invisible infrastructure of sustainable governance. A fiscal system that tolerates abuse ceases to be an instrument of equity; conversely, a system that rewards integrity fosters economic confidence and social justice.

Ultimately, the boundary between creative compliance and systemic risk is not drawn solely by statutes or codes, it is shaped by the collective conscience of the legal and economic community. Only when fiscal engineering operates under the discipline of ethical purpose can it serve its true function: supporting innovation while safeguarding the fairness, transparency, and moral coherence upon which every legitimate market and insolvency regime must rest.

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# THE CONVERGENCE BETWEEN EUROPEAN LAW AND INTERNATIONAL LAW IN THE PROTECTION OF VULNERABLE MIGRANTS: THE PREPONDERANT ROLE OF ECHR CASE LAW

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## **Abstract**

*The Article analyzes the convergence between European Union law and international human rights law in the context of the protection of vulnerable migrants, emphasizing the preeminent role of the European Court of Human Rights (ECtHR). Focusing on practical issues — returns, Dublin transfers, reception conditions and access to asylum procedures — the study demonstrates how the ECtHR, through landmark rulings (e.g. M.S.S., Hirsi Jamaa, Tarakhel), builds a protection standard grounded in the assessment of a real risk of inhuman or degrading treatment (Article 3 ECHR) and the principle of non-refoulement. These standards inform the interpretation and application of EU rules by national authorities and the Court of Justice of the European Union (CJEU), both through direct judicial dialogue and doctrinal mechanisms such as the presumption of equivalent protection (Bosphorus doctrine). The paper also addresses key tensions — notably transfers between Member States under the Dublin Regulation and situations where domestic or EU protection is deemed insufficient — and proposes practical criteria for assessing vulnerability in return procedures. The conclusion underlines that the ECtHR decisively shapes a common European protection standard for vulnerable migrants. At the same time, effective safeguarding of rights ultimately depends on coherent implementation at national and EU levels.*

**Keywords** —vulnerable migrants; European Convention on Human Rights; European Court of Human Rights; Court of Justice of the European Union; non-refoulement; Article 3 ECHR; Dublin Regulation; Bosphorus.

## **Introduction**

In our days, migration is a daily topic because of armed conflicts and other contemporary wars, such as the Israel–Gaza and Ukraine–Russia wars. The terminology of “migration” comes from Latin: migro means “I move.” A migrant is a person who moves away from their country either voluntarily, [1] to improve their living conditions) or involuntarily [2] (because of climate change or conflict). The main difference between migrants and refugees is that the latter fall under the 1951 Geneva Convention relating to the Status of Refugees [3]. Whereas the former do not. A migrant is a vulnerable person because they generally benefit from fewer protections under international law. In many cases, a migrant has a different origin and, when moving away from their country, leaves part of their family behind, entering a new country with a new language and traditions.

In 1990, the United Nations adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. [4] to establish fundamental legal standards and to ensure that all people are equal without exception in the primary areas of security, education, employment, and health care. The main problem with this Convention is that many states, such as most European Union [5] and North American states [6]—have not ratified it. This highlights a persistent global challenge.

The notion, often referred to as “absolute risk,” has been developed in the case law of the European Court of Human Rights (ECtHR) and is particularly relevant to Articles 2 and 3 of the European Convention on Human Rights in vulnerable contexts, such as those involving migrants or refugees. This terminology was discussed notably in *Chahal v. the United Kingdom* (1996) [7], where the ECtHR affirmed the absolute character of Article 3 in situations where there are substantial grounds for believing that a person would face a real risk of serious harm upon removal.

Altogether, contemporary migration pressures, uneven treaty ratification, and the ECtHR’s jurisprudence on the absolute nature of protection under Article 3 remind us that safeguarding human dignity must remain central to migration governance and state practice, even in the most challenging times.

## **From Security to Rights: Prioritizing Human Protection in ECtHR Migration Case Law**

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In the last decades, the ECtHR has established clear rules to limit a state's liberty in favor of the protection of human rights. More precisely, the ECtHR started to put human rights in a superior place at the detriment of national security. In this context, 3 (three) law cases help us to understand the essential direction of contemporary protection of human rights: *M.S.S v Belgium and Greece* [8], *Hirsi Jamaa and Others v. Italy* [9], *și Tarakhel v. Switzerland* [10].

The case of *Hirsi Jamaa and others* explains the extent of the ECHR's dispositions in the context of the protection of migrants. First, any push-back needs to be monitored and reviewed by the authorities of the host state to ensure that there is no real risk of torture or other prohibited treatment; in practice, each transfer must be assessed on an individual basis, not collectively. [11]. The Court also acknowledged the applicability of *Article 4 of Protocol No. 4* to interceptions at sea. It emphasized that collective expulsion practices are prohibited: any removal must be accompanied by procedures for identification, information, screening, and, above all, adequate protective safeguards for the persons concerned.

The proposal for a cumulative screening test for migrants arriving in Europe directly addresses these practical requirements. The test should be applied consistently by Member States — especially those at the external borders (Greece, Italy, Spain) — and should look for visible signs of trauma or violence, vulnerable age (very young children or elderly persons), and evident illnesses or disabilities. Individuals identified as vulnerable should benefit from expedited procedures and priority in the recognition of protection needs.

States transferring a person under the Dublin rules cannot treat the decision to transfer as a mere administrative formality. Even when the rules allocate responsibility, the transferring authority must, before transfer, carry out a genuine, individual and concrete assessment of whether the person's life and dignity will be protected in the receiving State — including reception conditions, risk of ill-treatment or degrading treatment, access to accommodation and protection, and exposure to violence or extreme destitution. Where there is evidence of systemic failings in the receiving State and no such individual check has been carried out, the transferring State may be held responsible under Article 3 ECHR. In short, Dublin does not remove the duty of care [12].

The judgment in *Tarakhel v. Switzerland* reiterates and operationalizes these principles in the context of interstate transfers under Dublin: the Court requires an effective and individualized verification of the qualitative standards in the state that is to receive the person, particularly where families with minors are concerned; the authorities must obtain concrete guarantees (not merely general statements) that reception will ensure tailored conditions and the preservation of family unity, failing which the transfer would breach Article 3.

### **The interaction between the European Court of Human Rights and the European Union Court of Justice**

There is a close interdependence between the ECtHR and the CJEU in judicial practice, and the CJEU is obliged to respect the ECHR under Article 6(3) TEU. Through the judgments in the cases discussed above, we observe a dialogue driving changes in European legislative systems between these two major authorities (the ECtHR and the CJEU). Owing to the *M.S.S* case, the Dublin Regulation underwent amendments to its asylum procedures, migration, and the best interests of the child [13]. States cannot expel individuals without assessing any potential risks in the state that is hosting them.

In 2013, the European Union procedures (32 and 33) set firm objectives for the asylum procedure, establishing minimum reception conditions for vulnerable persons in line with ECHR law. The rules on sea surveillance, Frontex, and the operations of maritime authorities must respect human rights by ensuring identification and interstate cooperation when persons or groups of persons are found in international waters [14].

The CJEU has indirectly incorporated ECtHR's decisions into its rulings. Thus, while in *M.S.S.* the judges held that the transferring state remains responsible for the victim status that a person may acquire by being sent to another state without an *in concreto* assessment of the conditions to which they are subjected, the CJEU held in *N.S. & M.E.* that the automatic transfer of a person to a state with deficiencies in reception and asylum conditions engages the responsibility of the transferring state for failing to respect the rights derived from the Charter of Fundamental Rights of the European Union.

As regards the individual assessment of vulnerability, the decision in *Tarakhel* emphasized the need for enhanced protection in cases involving vulnerable persons, including minors, and the CJEU in *Căldăraru* explained that the transferring state is responsible for the limitations on rights imposed on individuals, especially minors.

Since the European Union cannot apply the ECHR directly, EU legislation has delineated clear limits for maritime operations and migrant transfers through its migration and asylum legislative policy, based on both the Charter of Fundamental Rights of the European Union and relevant legislative frameworks such as Frontex and the Dublin Regulation. We should view the ECtHR–CJEU relationship as mutual cross-referencing, in which the ECtHR sets out principles and subsidiary protection standards. At the same time, the CJEU and EU law operationalize them into concrete procedures for use by state authorities.

*Bosphorus Hava Yollari v. Ireland*, dated 2005, had a Europe-wide impact on the application of human rights, linking the guarantees afforded by the ECHR with those provided by EU law through the Charter. At that time, the issue of the equivalence of human rights protection was debated: the Court recognized a rebuttable presumption that acts implemented under EU law provide a level of protection comparable to that of the Convention. This presumption, however, is relative and may be overturned by contrary evidence [15].

The presumption's relative nature should be seen as a precautionary measure intended to avoid permanent conflict between the ECtHR and the CJEU over the rights and freedoms of individuals. A potential violation of rights is not established on the basis a single isolated element, but rather through a complex assessment of effective protection in practice. Consequently, the presumption does not apply automatically. [16]: in *Michaud v. France* (2012), the Court held that the Bosphorus presumption cannot be invoked when the EU mechanism in question (for example, a directive or the manner of its implementation) does not, in practice, ensure a direct and equivalent protection of the rights guaranteed by the Convention. The cause, *Avotiņš* (2016) explained that, to rebut the presumption, the applicant must demonstrate that the protection afforded by EU law, viewed "as a whole," is manifestly and seriously inadequate, that is, "manifestly deficient," compared to the standards of the Convention [17].

It is essential to view the Bosphorus as a balancing mechanism between recognizing the European value of human rights protection and placing the ECtHR system as a supervisory instance when an individual's rights and freedoms are not evidently safeguarded.

## Conclusion

European institutions responsible for migration and asylum should apply a uniform, clear, and foreseeable procedure at external borders for vulnerable persons. This should include a rapid mechanism for collecting and registering personal data in compliance with data protection requirements, as well as an individual health assessment followed by the prompt provision of necessary treatment. In the event of the transfer of a family with children or other vulnerable people, the authorities should request adequate and verifiable guarantees from the destination state, preferably in written form, regarding compliance with minimum standards and with the obligations under the ECHR and the relevant EU instruments.

In recent decades, the dialogue between the ECtHR and the CJEU has progressively aligned: the ECtHR's standards on the prohibition of refoulement, individual assessment, and adequate safeguards are reflected, to a significant extent, in the interpretation of the Charter and in EU legislation applicable to migration and asylum. This dialogue strengthens the protection of fundamental rights through a dual layer of review: directly by the ECtHR and indirectly through the EU's normative and jurisprudential framework.

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# ROAD SAFETY. THE DRIVER'S BEHAVIOUR

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## *Abstract*

Road accidents are not merely random events but the result of a combination of interdependent factors: human, technical, environmental, and other contributing factors. The human factor is identified as the main element, both causing situations that lead to accidents and simultaneously bearing their consequences. Research in the field has identified 36 causes of road accidents, most of which are related to driver behavior, which justifies the well-known expression in legal literature that “there are no automobile accidents, only driver accidents.”

Road traffic crime represents a major global problem, with devastating effects on human health and life, as well as on the economy, estimated at 2% of the European Union’s GDP. According to statistical data, among all persons seriously injured in road accidents on public roads in Romania in 2023, the majority were vehicle drivers (1,623 persons), representing 46% of all seriously injured individuals.

**Keywords:** road accident, human factor, driver, road safety, crime scene investigation

## **1. Preliminaries**

The causes underlying road accidents have always been a topic of constant interest, both from the perspective of prevention and mitigation. According to some authors, no single dominant circumstance is present in all situations; rather, multiple factors usually contribute to the traffic incident, given that “these accidents are not entirely accidental.”<sup>1</sup>

According to Professor Emilian Stancu, road accidents are the result of the “independent or combined action of three factors: human, technical, and road-related.”<sup>2</sup> Other authors consider that the factors involved in the genesis of traffic injuries can be classified as follows:

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<sup>1</sup> Gheorghe Scripcaru, Mihail Terbancea, *Forensic Pathology*, Didactic and Pedagogical Publishing House, Bucharest, 1978, p. 218.

<sup>2</sup> Emilian Stancu, *Treatise on Criminalistics*, 4th Edition, Universul Juridic Publishing House, Bucharest, 2007, p. 617.

the primary factor – the human; secondary factors (the vehicle and the inappropriate road/access); and facilitating factors<sup>3</sup> (weather conditions, level of illumination, speed, health condition, etc.).

From our perspective, although there are multiple contributing factors, the human element is the most important causal factor in the occurrence of road accidents (whether involving a driver, cyclist, or pedestrian), as it is the human who creates the situation that makes the accident inevitable; yet it is also the human who bears the negative consequences.<sup>4</sup>

Experts in the field have identified 36 causes of serious road accidents<sup>5</sup>, most of which are rooted in human behavior, particularly that of the driver. These include: excessive speed relative to road conditions; failure to yield to pedestrians; failure to yield to vehicles; distractions from other activities; improper overtaking; failure to maintain safe distance between vehicles; driving under the influence of alcohol; failure to signal a change of direction; other infractions committed by drivers; driving on the wrong side of the road; driving without a license; falling asleep at the wheel; failure to ensure safety when reversing; unlawful speed; failure to ensure safe lane change; failure to observe railway crossing regulations; ignoring traffic signals; driving under the influence of drugs; failure to obey regulatory traffic signs; physical disabilities or medical conditions; unsafe cargo stability; illegal stopping or parking.

Given the predominance of the human element in generating road accidents, legal literature has vividly highlighted the individual responsibility involved through the expression: “there are no automobile accidents, only driver accidents.”<sup>6</sup>

## 2. *Driver Behavior at the Wheel*

In the following, we will analyze driver behavior at the wheel, which is the primary circumstance that determines or facilitates the occurrence of road accidents.

It has been rightly said that driving behavior corresponds to one’s behavior in society.<sup>7</sup> A person drives as they live and behave in everyday life.

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<sup>3</sup> Valentin Iftenie, Dan Dermengiu, *Forensic Medicine*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2019, p. 191.

<sup>4</sup> Mircea N. Costin, *Criminal and Civil Liability for Violating Traffic Regulations on Public Roads*, Dacia Publishing House, Cluj-Napoca, 1978, p. 19.

<sup>5</sup> <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>, accessed today, 14 September 2025.

<sup>6</sup> Emilian Stancu, *op.cit.*, p. 617.

<sup>7</sup> Mircea N. Costin, *op. cit.*, p. 20.

As shown by data provided by specialists, among all persons seriously injured in road accidents on public roads in Romania in 2023, the majority were vehicle drivers (1,623 individuals), representing 46% of all seriously injured persons.<sup>8</sup>

The main components supporting driving behavior have been identified as<sup>9</sup>: sensory component<sup>10</sup>; memory component<sup>11</sup>; attention<sup>12</sup>; intellectual component and thinking<sup>13</sup>; affective-emotional component<sup>14</sup>; motivational component<sup>15</sup>; volitional and self-control component<sup>16</sup>; evaluative component<sup>17</sup>; motor-executive component<sup>18</sup>; and personality factors.<sup>19</sup>

Driver behavior is influenced by a series of factors, as will be discussed in the following sections.

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<sup>8</sup> *Road Safety Bulletin – 2023 Report*, <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>, accessed today, 15 September.

<sup>9</sup> Constantin D. Blaj, *Driver Behavior*, Medical Publishing House, Bucharest, 1982, pp. 53 et seq.

<sup>10</sup> It refers to the information received by the driver from various sources, namely: from the vehicle itself (regarding its condition and operating mode); from the route (including the system of road signs and signals, information obtained from other traffic participants, etc.); from the surrounding environment (signals derived from weather phenomena such as fog or precipitation); or from the passengers inside the vehicle, who can be passive or active sources of signals. Even the driver themselves represents a source of information for their own actions.

<sup>11</sup> It refers to the driver's behavior at the wheel, using informational and instrumental elements—specific, developed, and previously learned—in regulating driving behavior, with memory being an absolutely indispensable component.

<sup>12</sup> It is a mental function through which orientation and selective concentration of mental activity are achieved on a limited set of objects, phenomena, and defined actions, driving being considered an activity that is, par excellence, attention-dependent.

<sup>13</sup> They should not be neglected, as road traffic creates numerous new problematic situations for the driver, which require rapid orientation and the identification of the most appropriate solution strategy. It is evident that in such critical situations, the involvement of intelligence becomes absolutely indispensable.

<sup>14</sup> It is considered a permanent component in the structure of any activity and is also present during driving, with the driver experiencing various emotional states and feelings: surprise, alertness, fear, fright, or astonishment at one end, and joy, delight, or exhilaration at the other. The dynamics of emotional experiences involved in driving behavior depend not only on the objective characteristics of the stimuli but also on the person's affective typology (hypoemotional, normoemotional, or hyperemotional).

<sup>15</sup> It manifests as a complex of tendencies, impulses, needs, interests, and ideals, which perform the functions of initiation, orientation, and support. Every driver must be aware of the motives that exert a positive influence and those that have a disorganizing effect, in order to reinforce the former and reduce or eliminate the latter.

<sup>16</sup> Driving is a voluntary activity, in the performance of which the mobilization and deliberate orientation of the personality system intervene in relation to a specific set of tasks and in accordance with a particular goal.

<sup>17</sup> It is included in the structure of any activity, and therefore also in driving, alongside the operations and actions directly oriented toward solving specific tasks and achieving the expected performance.

<sup>18</sup> Without which a behavior oriented toward acting on an external object cannot be conceived, depending on the involvement of deliberation and conscious control in its execution. The motor components are divided into: involuntary or unconditioned, voluntary or intentional, and automated.

<sup>19</sup> In addition to the so-called directly operative components, such as cognitive, volitional, motivational, and affective ones, behavior is also supported by dynamic-energetic coordinates defined as personality factors.

## 2.1. Reaction Time

Among the factors playing an important role in the occurrence of road accidents is reaction time, which varies from individual to individual depending on temperament, age, and other conditions. In older adults, reaction time is slower than in younger people. However, older individuals are involved in fewer accidents than younger ones. This phenomenon can be explained by the greater caution exhibited by older drivers compared to younger ones. Prudence in driving compensates for the reduced reaction speed and generally allows potentially dangerous situations—requiring faster reactions—to be avoided.<sup>20</sup>

By age group, young drivers aged 18–19 are responsible for the highest number of serious road accidents, while the lowest accident rate is recorded among individuals aged 61–66.<sup>21</sup> A possible explanation is the experience gained in traffic over time. Younger drivers, having less experience, are more likely to be involved more frequently in serious road accidents.

Regarding the age of driving license holders, most are between 31 and 50 years old, followed by those aged 51–70. The proportion of license holders varies across age groups: the largest group consists of individuals aged 31–50, followed by those aged 21–30.<sup>22</sup>

## 2.2. Excessive Speed

Excessive speed plays a particularly important role in the occurrence of road accidents. Driving at excessive speed is sometimes the result of alcohol consumption, and other times a manifestation of aggressiveness and recklessness. Regardless of its cause, excessive speed remains the main factor in road accidents.

In Romania, in 2023, speed inappropriate for road conditions caused 545 accidents, resulting in 173 deaths and 375 serious injuries, with a mortality rate of 40%.<sup>23</sup> Similarly, in 2023, unlawful speed caused 57 serious road accidents, resulting in 37 deaths and 38 serious injuries, with a mortality rate of 64.9%.

Experts indicate that in the first seconds after sudden braking at a speed of 80 km/h, the weight of the driver's heart and that of any passenger increases from 300 g to 5 kg; the

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<sup>20</sup> Mircea N. Costin, *op. cit.*, p. 21.

<sup>21</sup> *Road Safety Bulletin – 2023 Report* <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>, accessed today, 15 September.

<sup>22</sup> *Ibidem*.

<sup>23</sup> *Road Safety Bulletin – 2023 Report*, <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>, consulted today, 14 September 2025.

weight of the blood rises from 5 kg to 85 kg; and the weight of the brain increases from 1.5 kg to 25 kg. At higher speeds, these coefficients increase even further.<sup>24</sup>

In the same context, it is noted that the impact of a vehicle with a hard object<sup>25</sup> at the following speeds is equivalent to falling from a building of the corresponding height: 60 km/h: equivalent to a fall from a three-story building, 80 km/h: equivalent to a fall from a six-story building, 100 km/h: equivalent to a fall from a ten-story building, 120 km/h: equivalent to a fall from a fourteen-story building.

These significant physiological changes can lead to severe health consequences, such as myocardial infarction, cerebral hemorrhage, or organ rupture. In collisions, some passengers can be projected with a force 10–20 times greater than their normal body weight. Survival chances in such cases are minimal.

It should be noted that, according to the WHO, the risk of death in road accidents could be reduced, among other measures, through: using seat belts – which can reduce the risk of death for vehicle occupants by up to 50%; using child safety systems – which can reduce child fatalities by up to 71%; proper use of helmets – which can reduce the risk of death in road accidents more than sixfold and head injuries by up to 74%.

### 2.3. *Balance of Mental Functions*

Considered one of the most important factors decisively influencing a driver's behavior is the balance of their mental functions. Concentration and foresight, attention, and the driver's experience are defining elements of such a balance.<sup>26</sup>

The aptitude or ability to drive is assessed and determined according to the individual's psychological qualities. This aptitude requires a perfect harmonization of neuropsychological faculties. Consequently, an imbalance in these faculties proportionally diminishes the ability to operate a vehicle and creates a constant risk of accidents.

In 2023, lack of attention caused 224 serious road accidents, resulting in 90 deaths and 160 serious injuries, yielding a mortality rate of 52.0%. The most frequent cause was the use of mobile phones while driving, which increases the risk of an accident fourfold. Even when used for navigation, the route should be set before starting the journey.<sup>27</sup>

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<sup>24</sup> Mircea N. Costin, *op. cit.*, p. 21.

<sup>25</sup> We Say YES to Traffic Safety, p. 6, [www.cnadr.ro/sites/default/files/siguranta\\_circulatiei\\_final.pdf](http://www.cnadr.ro/sites/default/files/siguranta_circulatiei_final.pdf)

<sup>26</sup> Ibidem.

<sup>27</sup> Few of us realize that what we today call a mobile phone is actually an information system that distracts our attention through the notifications we receive, which we read—or, more dangerously, respond to—while

## 2.4. Experience and Practice in Driving

Experience and practice in driving can significantly contribute to avoiding involvement in road accidents. It should be noted that driving experience does not necessarily equate to holding a driver's license for a long time, as a person may not have driven actively.

Practically, experience is accumulated by driving at least tens of thousands of kilometers annually. Experience and practice lead to the formation of automatisms and have positive effects on perception, reaction time, and the anticipation of other traffic participants' behavior.

According to statistical data, by the end of 2023, the number of driving license holders in Romania was 8,669,974, representing 45.5% of the total population and 56.6% of the adult population.<sup>28</sup>

Observing the distribution of drivers culpably involved in serious road accidents in 2023 according to license tenure, it was found that the majority of such accidents were caused by drivers with 1 to 5 years of experience. They represent 25% of the total involved in these incidents. The second-largest group comprises drivers with less than one year of license experience (20.1%). In line with numerous analyses, these data indicate that driving experience is a significant factor influencing the likelihood of road accidents. However, a portion of road accidents is due to unlicensed driving. In 2023, this caused 105 serious road accidents, resulting in 39 deaths and 350 serious injuries, yielding a mortality rate of 61.3%.

Lack of experience or attention may manifest through failures such as not ensuring safe lane<sup>29</sup> changes, insecure cargo stability<sup>30</sup>, improper reversing<sup>31</sup>, and other risky maneuvers.

## 2.5. Fatigue

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driving. Unnoticed, this system becomes indispensable and tends to subordinate us, transforming us from an active subject into a superfluous element, an extension of the car.

<sup>28</sup> In reality, given the number of people who actually reside in the country (much lower than the official figure), the percentage of individuals holding a driver's license is considerably higher.

<sup>29</sup> In 2023, it caused 23 serious road accidents resulting in the death of one person and the serious injury of 23 others, yielding a mortality rate of 4.3%.

<sup>30</sup> In 2023, it caused 2 serious road accidents resulting in the death of one person and the serious injury of 2 others, yielding a mortality rate of 50%.

<sup>31</sup> In 2023, it caused 88 serious road accidents resulting in the death of 14 people and the serious injury of 74 others, yielding a mortality rate of 15.9%.

Maintaining mental faculties, sensory acuity, and an adequate reaction speed—sine qua non conditions for proper vehicle operation—requires avoiding fatigue. The onset of fatigue in a driver often leads to a sudden micro-sleep lasting only a few seconds, without any warning signs. However, a few seconds at a speed of 60–80 km/h means covering tens or even hundreds of meters—a distance sufficient for an accident to occur. Accumulated fatigue while driving significantly increases the likelihood of traffic incidents, with the risk of an accident doubling after driving approximately 500 km.

Contrary to the belief of many drivers, driving is not a means of relaxation but rather a form of physical and mental overexertion. Therefore, assessing fatigue must take into account prior work, driving duration, and other factors that may exacerbate it, such as traffic intensity, road terrain, and cabin conditions.<sup>32</sup>

The first signs of fatigue include increased irritability, frequent opening and closing of windows, adjusting one's hair by hand, smoking more intensively, a tendency for the head to tilt toward the steering wheel, and repositioning the seat. Practically, after the first four hours of driving, a significant reduction in attention, slower reactions, fixed gaze on the road, and heightened nervous tension can be observed.

With excessive fatigue, after more than eight hours of driving, micro-naps of 0.5 seconds, perception changes, blurred object contours, narrowed visibility, a tendency for nocturnal hallucinations, increased reaction time, weakened motor coordination and dexterity, and heaviness in eyelids and limbs with a tendency to close the eyes may occur.

It should be noted that the negative effects of fatigue are more pronounced in older drivers; for example, reaction time after eight hours of driving increases by 40% in drivers under 45 years old and by 60% in those over 45.

Statistical data also show that in 2023, drivers who fell asleep at the wheel caused 93 accidents, resulting in 57 deaths and 84 serious injuries, yielding a mortality rate of 61.3%.<sup>33</sup>

## 2.6. *Personality and Social Adaptability*

Personality and social adaptability of traffic participants are also important factors in determining or facilitating the occurrence of traffic accidents.

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<sup>32</sup> Aurel Stătescu, *The Human Factor in Road Traffic*, in *Autoturism*, no. 8/1972, p. 10, cited in Mircea N. Costin, p. 20.

<sup>33</sup> Bulletin of Road Safety – 2023 Report, Poliția Română, accessed today, 14 September 2025, <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>.

Observing the postmodern individual and their approach to road traffic, several behavioral traits and sociological/psychological explanations emerge.

It is indisputable that contemporary reality reduces the infinite variety of human connections, fragments values, and the postmodern individual lives in a world without firm landmarks, with negotiable and often contested rules. This societal value relativism is reflected in traffic: traffic rules are perceived as “flexible,” and adherence depends on personal interest.

The acceleration of life’s pace, time pressure, multitasking, and speed culture lead drivers to rush, downplay the importance of rules, or seek shortcuts. Each traffic participant tends to prioritize their own interest (reaching faster, not losing priority, avoiding waiting) over the collective interest.

In this context, key personality traits include: aggressiveness – manifested through gestures, honking, sudden maneuvers, risky overtaking, and ignoring safe distances; competitiveness – the road becomes a “competition space” where the individual asserts status, power, or releases daily frustrations; impulsiveness and impatience – drivers struggle with waiting at traffic lights<sup>34</sup>, traffic jams, or adhering to speed limits; social anonymity – inside the car, the individual feels “hidden,” which allows less controlled behaviors (similar to dynamics in social media); externalization of frustrations – traffic becomes a field to release tensions accumulated at work, at home, or in daily interactions.

These factors, individually or collectively, can lead to situations where accidents become likely. Consequently, they are incompatible with traffic safety. Even as a non-specialist, but as a traffic participant—pedestrian, cyclist, or driver—I consider that these behaviors can be explained by: frustration–aggressiveness: jams, delays, perceived injustice (that “others don’t follow rules”) trigger aggressive responses; herd effect: aggressive behaviors can spread (if one forces entry into an intersection, others follow); culture of narcissism (described by sociologists such as Lasch): the postmodern individual has a fragile ego and reacts disproportionately to minor provocations (“they cut me off, so they disrespect me”); deindividuation theory: a person feels less responsible when in a crowd (in traffic, within a high flow of cars).

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<sup>34</sup> As a daily participant in road traffic, in the role of a pedestrian, I have observed that, even when the traffic light is orange, drivers “run the light,” even though 50 meters ahead there is another traffic light showing red. In practice, the driver gains nothing from this behavior, only endangering the safety of pedestrians and other road users.

Potential consequences include: illegal overtaking<sup>35</sup>, not respecting safe distance<sup>36</sup>, driving in the opposite lane<sup>37</sup>, ignoring railway crossing rules<sup>38</sup>, and disobeying traffic lights<sup>39</sup>. All these increase the number of conflicts and accidents, create a tense and unsafe climate, and erode social trust: each driver perceives others as “adversaries” rather than co-participants in a shared space.

This situation in Romania is confirmed by the fact that, between 2022–2025, the police issued over 10,000 fines for aggressive driving. In the first three months of 2025, nearly 1,300 fines were issued for aggressive driving, compared to around 1,000 in the same period of the previous year<sup>40</sup>.

## 2.6. Balance of Psycho-Motor Faculties

The balance of psycho-motor faculties of a vehicle driver can be significantly disturbed as a result of the ingestion of alcohol, drugs, or medications.

### A) Alcohol Consumption

Alcohol consumption is one of the causes that can generate traffic incidents, as even a small amount can negatively affect driving behavior, particularly visual capacity and reaction time.

Depending on blood alcohol concentration (BAC), the following effects<sup>41</sup> have been observed:

1. BAC 0.2–0.3‰ – Errors in responding to visual and auditory stimuli increase, unjustified courage appears which can lead to imprudence, and in about 30% of subjects, reaction time increases by 10–20%.

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<sup>35</sup> In 2023, it caused 200 serious road accidents resulting in the death of 104 people and the serious injury of 164 others, yielding a mortality rate of 40.2%.

<sup>36</sup> In 2023, it caused 156 serious road accidents resulting in the death of 45 people and the serious injury of 160 others, yielding a mortality rate of 52%.

<sup>37</sup> In 2023, it caused 117 serious road accidents resulting in the death of 61 people and the serious injury of 94 others, yielding a mortality rate of 52.1%.

<sup>38</sup> In 2023, it caused 16 serious road accidents resulting in the death of 18 people and the serious injury of 6 others, yielding a mortality rate of 112.5%.

<sup>39</sup> In 2023, it caused 12 serious road accidents resulting in the serious injury of 12 people.

<sup>40</sup> As shown in the study “*Social Attitudes Regarding Traffic Risk 2022*” (Romanian Police / Cult Market Research).

<sup>41</sup> Radu Gaiginschi, *Reconstruction and Expert Analysis of Road Accidents*, Tehnică Publishing House, Bucharest, 2009, p. 392.

2. BAC 0.3–0.5‰ – Depth perception is impaired, speeds of other vehicles are misjudged, visual perception disorders occur, and reaction time increases by approximately 25%.
3. BAC 0.4–0.8‰ – The visual field is reduced by 120° without the driver noticing, delaying the perception of lateral hazards and increasing reaction time. Distances to vehicles in front or behind are misjudged, and balance disturbances may occur, impairing perception of accelerations in curves.
4. BAC 1‰ – Adaptation to darkness is slower, decisions are delayed, motor reactions become confused, and driving becomes unsafe.

Individual reactions to alcohol depend on stature, weight, type of beverage, concomitant food intake, association with medications (which can potentiate alcohol's effect), pathological states, fatigue, and sex (women generally reach higher BAC faster than men of the same weight).

Alcohol metabolism occurs in three phases: absorption (15 minutes to 2 hours depending on stomach contents), equilibrium, and elimination. The liver synthesizes alcohol dehydrogenase to metabolize 90% of alcohol, with the remainder eliminated via breath, sweat, and urine. The metabolism rate is 0.15‰ per hour and is not influenced by coffee, cigarettes, or physical exercise.

According to 2023 statistics, drivers under the influence of alcohol caused 151 accidents, 65 deaths, and 119 serious injuries, resulting in a mortality rate of 43%<sup>42</sup>.

### *B) Drug Consumption*

Drug consumption affects driving capacity depending on the type and amount consumed, absorption, and elimination.

Most research has focused on cannabis-derived drugs. The primary psychoactive agent is  $\Delta^9$ -THC, which rapidly metabolizes into 11-OH- $\Delta^9$ -THC (short-lived psychoactive metabolite) and then into  $\Delta^9$ -THC-COOH (main non-psychoactive metabolite detectable in blood and urine).

The methods for detecting and measuring drugs in blood and urine are: F.P.I.-A (Fluorescent Polarization Immunoassay) and GC/MS (Gas Chromatography/Mass Spectrometry).

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<sup>42</sup> Road Safety Bulletin – 2023 Report, Poliția Română, accessed today, 14 September 2025.

The consequences of drug use are: decreased coordination of movements, imprecise movements, body imbalance, increased reaction time, delayed perception of hazards in traffic, loss of direction (observed even with inhalation of small doses, with effects lasting up to 8 hours), and delayed decision-making when reacting to dangers, as a result of late risk assessment.

Devastating consequences on driving behavior have been observed in the case of combined alcohol and drug use, with the following notable aspects<sup>43</sup>:

1. If a blood alcohol concentration of 0.4‰ is combined with 100–200 µg/kg body weight THC, driving becomes unstable and reaction time increases considerably;
2. The combination of 0.4‰ alcohol with 100 µg/kg body weight THC produces behavior similar to a 0.9‰ blood alcohol concentration;
3. The combination of 0.4‰ alcohol with 200 µg/kg body weight THC generates behavior equivalent to a 1.4‰ blood alcohol concentration.

In 2023, drivers under the influence of drugs caused 8 accidents, 3 deaths, and 37 serious injuries, resulting in a mortality rate of 37.5%<sup>44</sup>.

### *C) Medication Consumption*

The use of medication can influence driving. This is why the package leaflet, which contains information for users, generally includes a section titled “Driving vehicles and using machinery,” in which the manufacturer indicates whether or not the respective medication affects this ability.

The following categories of medications influence driving: hypnotics – bromoval, cyclobarbital, extraveral, phenobarbital; tranquilizers or sedatives – rudotel, rusedal; anxiolytics – diazepam, meprobamate, napoton; antihistamines – Benadryl, pheniramine, Romergan; antispasmodics; analgesics. Natural psychotropic substances – morphine, cocaine, heroin – or synthetic ones – amphetamines – generate dependence, and research has concluded that habitual drug users exhibit less dangerous driving behavior than those who occasionally experience toxic effects.

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<sup>43</sup> Marie-Berthe Biecheler, *Cannabis, Driving and Road Safety: An Analysis of the Scientific Literature*, Observatoire National Interministériel de Sécurité Routière, February 2003, p. 17.

<sup>44</sup> Road Safety Bulletin – 2023 Report, <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>, accessed today, 14 September 2025.

The method for determining whether a traffic accident occurred due to the ingestion of medications contraindicated for driving is a medico-legal examination, which will conclude, depending on the drug, the duration, and the type of behavioral reaction.

The negative consequences of taking certain types of contraindicated medications include: increased reaction time to hazards, decreased visual acuity, reduced attention and concentration, and drowsiness<sup>45</sup>.

At the opposite end are amphetamines, which, by increasing mental performance, initially produce an exaggerated sense of self-confidence that leads to reckless driving, with the final reaction resulting in physical and mental exhaustion, which may be even more dangerous.

Other physical reactions that may be observed include: slowed physical and mental reactions for more than 2 hours after taking sedatives; reduced attention and coordination after taking barbiturates; decreased attention and control, hyperexcitability after taking antidepressants.

The annex to Order No. 87/2003, for the approval of the list of medical conditions incompatible with the status of motor vehicle or tram driver and the list of psychoactive substances contraindicated for drivers (narcotic products or substances, or medications with similar effects)<sup>46</sup>, establishes the psychoactive substances prohibited for drivers. Order No. 1,162/2010<sup>47</sup> establishes the list of medical conditions incompatible with the status of motor vehicle or tram driver, also approving the list of psychoactive substances contraindicated for drivers (narcotic products or substances, or medications with similar effects).

In 2023, those who drove with medical conditions caused 4 accidents, resulting in 2 deaths and 2 serious injuries, yielding a mortality rate of 50%<sup>48</sup>.

Recently, especially among young people, combinations of the three types of substances causing traffic accidents have appeared in different forms and doses.

## 2.7. Driver Health

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<sup>45</sup> Constantin Scripcaru, Mihai Covalciuc, *Road Accidents*, Panfilius Publishing, Iași, 2004, p. 38.

<sup>46</sup> Published in the Official Gazette of Romania, no. 597, August 22, 2003.

<sup>47</sup> Published in the Official Gazette of Romania, no. 807, October 4, 2003.

<sup>48</sup> Road Safety Bulletin – 2023 Report, <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>, accessed today, 14 September 2025.

According to statistics, the driver's health accounts for 4% to 6% of road accidents. Health problems can lead to: sudden death at the wheel, loss of consciousness due to chronic conditions, temporary loss of vision or other senses, etc.

Two categories of illnesses affecting road safety have been identified: diseases incompatible with holding a driving license and conditions that influence the driver's behavior at the wheel.

In 2023, those who drove with disabilities or medical conditions caused 4 accidents, resulting in 2 deaths and 2 seriously injured, yielding a mortality rate of 50%<sup>49</sup>.

## 2.8. *Driver Gender*

Although less analyzed, gender is an important variable in assessing the risk of causing a serious road accident. Deriving from differences in certain psychological characteristics that influence attitudes and driving behaviors, drivers' gender describes the different involvement of women and men in serious road incidents. Women's involvement in causing serious road incidents is much lower than that of men.

In 2023, serious road incidents involved a number of women (whether at fault or not) six times lower than men. Likewise, 5.7 times fewer women were found at fault in serious road accidents (these aspects should, however, be correlated with the presence of the two gender categories in traffic, as the number of men holding a driving license is almost twice that of women).

As shown by the distribution of at-fault drivers in serious road accidents by gender and age, both men and women aged between 19 and 24 are responsible for a higher number of such incidents compared to other age groups<sup>50</sup> (18.2% of men and 17.4% of women who caused serious accidents were in this age range).

## 2.9. *Driver Stress*

Finally, to conclude the enumeration of factors that determine or favor the occurrence of traffic accidents—which we do not present as exhaustive, but merely as illustrative—it should be noted that, according to the assessment of some earlier specialists of high scientific

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<sup>49</sup> Ibidem.

<sup>50</sup> Road Safety Bulletin – Report for the year 2023, <https://politiaromana.ro/ro/prevenire/buletinul-sigurantei-rutiere/buletinul-sigurantei-rutiere-raport-anul-2023>, accessed today, 14 September 2025.

authority in the field of medicine<sup>51</sup>, among these factors the driver's state of stress must also be mentioned. This stress is generated by the aggressive factors for the body that abound in road traffic.

Research conducted using this method has shown that, in drivers, the most pronounced neuro-vegetative reactions occur with decreasing intensity in situations such as: overtaking on winding roads with limited visibility; starting from a stop; high-speed overtaking; ascending winding roads during periods of heavy traffic; race starts; moments of inattention when the driver is forced to respond to various questions, etc<sup>52</sup>. Stress gradually reduces and ultimately eliminates the vegetative and psychological condition necessary for driving.

Medical research highlights that the effort of driving causes an increase in urinary catecholamines, along with a rise in corticosteroid hormones. These effects of hormones secreted under stress negatively influence the driver's psychology and behavior. They are reflected in the mistakes made by the driver, in moments of euphoria that sometimes characterize them, and in the aggressiveness they may display in certain circumstances.

However, the stress experienced by a driver during driving can be reduced to reasonable levels through training in vehicle operation under a wide variety of conditions, and by abstaining from substances that amplify such a state (alcohol and other nervous system stimulants). A driver enters a state of stress only under completely exceptional circumstances.

### 3. Conclusions

The scourge of road accidents at the global level will lead to the death of 13 million people and the injury of 500 million over the next decade.

In 2023, in Europe, approximately 20,418 people lost their lives, while in Romania, 4,527 serious road accidents occurred, events which caused the death of 1,545 people, the serious injury of 3,537 people, and the minor injury of another 2,172 people.

It should also be mentioned, not least, the significant material damages generated by these events, consisting of partial or total degradation of the vehicle involved in the accident, as well as the costs associated with treating the injuries suffered by the victims of road accidents, which can result in different degrees of disability or a major deterioration in

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<sup>51</sup> Ștefan Milcu, *Driving – a Stress Factor*, in *Autoturism*, no. 10, 1972, p. 12, cited in Mircea N. Costin, p. 24.

<sup>52</sup> Ibidem.

quality of life. The annual cost of these injuries is estimated at 2% of EU GDP, as mentioned in the Report on the EU Road Safety Policy Framework 2021–2030 – Recommendations on the Next Steps toward “Vision Zero.”

In the present study, we have tried to offer as complete a perspective as possible on the phenomenon addressed, combining legal, statistical, psychological, and social aspects.

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# EXTENDED CONFISCATION – EUROPEAN STANDARDS, RECENT CASE LAW, AND THE IMPORTANCE OF FINANCIAL INVESTIGATIONS IN CRIMINAL PROCEEDINGS

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## **Abstract**

*Extended confiscation is a key development in European and Romanian criminal policy, aiming to remove illicit gains and uphold the principle that crime must not generate profit. This paper examines its legal and jurisprudential foundations under Article 112<sup>1</sup> of the Romanian Criminal Code and Directive 2014/42/EU, in light of ECHR and CJEU standards. It highlights the crucial role of financial investigations in proving disproportion between lawful income and assets, as reflected in recent decisions of the High Court of Cassation and Justice. The study concludes that the effectiveness and legitimacy of extended confiscation depend on proportionality, evidentiary rigor, and institutional cooperation.*

**Keywords:** *extended confiscation, proceeds of crime, financial investigation, evidentiary standards, preventive measures*

## **1. Introduction**

The safety measure of extended confiscation represents one of the most significant developments in modern criminal policy, conceived as an instrument for neutralizing the economic advantages derived from criminal activities and for consolidating the principle that crime must not produce profit. The institution pursues a dual objective: on the one hand, restoring social equity by removing the proceeds of crime from the civil circuit; on the other hand, strengthening public confidence in the State's capacity to combat organized crime and corruption.

In Romania, extended confiscation was introduced by Law No. 63/2012 and subsequently strengthened by Law No. 228/2020, in the context of alignment with European Union standards. Its legal nature as a safety measure has been consistently confirmed in doctrine and case law, being considered a legitimate interference with the right to property under Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR).

The issue of extended confiscation requires an integrated approach – normative, jurisprudential, and practical. The practical dimension involves, essentially, the financial investigation conducted during the criminal investigation phase, which provides the evidentiary foundation of the measure. The judge cannot order extended confiscation without thorough documentation of the disproportion between lawful income and assets, examined over a relevant period, usually the five years preceding the offence.

## **2. The Legal Framework of Extended Confiscation**

The current regulation is contained in Article 112<sup>1</sup> of the Romanian Criminal Code, as amended by Law No. 228/2020. It provides that the court may order extended confiscation of assets acquired by the convicted person within the five years preceding or following the offence if there is a disproportionality between the value of those assets and the person's lawful income, and the court is convinced that the assets originate from criminal activities.

This provision transposes Article 5 of Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which requires Member States to adopt extended confiscation mechanisms corresponding to the gravity of the offences and the social danger of profit-generating acts.

Procedurally, Article 249 of the Code of Criminal Procedure obliges judicial authorities to adopt precautionary measures over assets susceptible to confiscation. Extended confiscation cannot be effective without early seizure measures. In the same sense, Law No. 318/2015 on the National Agency for the Management of Seized Assets (ANABI) regulates the administration of seized goods and their early sale.

### **3. The Case Law of the European Court of Human Rights**

The ECHR has consistently examined the compatibility of confiscation measures with the right to property and the presumption of innocence.

In *Phillips v. the United Kingdom* (2001), the Court held that legal presumptions concerning the illicit origin of assets do not infringe Article 6 § 2 of the Convention if they are reasonable and rebuttable by the person concerned. This judgment confirmed the legitimacy of evidentiary mechanisms allowing the court to infer a criminal origin from an obvious disproportion between income and wealth.

In *Gogitidze and Others v. Georgia* (2015), the Court stated that confiscation measures may be compatible with Article 1 of Protocol No. 1 when they are provided by law, pursue a legitimate aim—such as combating corruption and economic crime—and respect the principle of proportionality between public interest and individual rights.

In *G.I.E.M. S.R.L. and Others v. Italy* (Grand Chamber, 2018), the Court clarified that when confiscation is punitive in nature and applied without a criminal conviction, it breaches Article 7 of the Convention. Thus, the Court established a clear distinction between preventive confiscation (compatible with the Convention) and penal confiscation (requiring a conviction).

These jurisprudential landmarks outline the European standard: extended confiscation is admissible if it is based on a fair, foreseeable, and proportionate procedure.

### **4. The Case Law of the Court of Justice of the European Union**

The CJEU has interpreted Directive 2014/42/EU in a manner that strengthens both the State's efficiency in recovering criminal assets and the procedural safeguards of affected persons, including third parties.

In the joined cases C-845/19 and C-863/19, DR and TS, judgment of 21 October 2021, ECLI:EU:C:2021:864, several key principles were established.

Member States may provide mechanisms for extended confiscation targeting assets that cannot be directly linked to a specific criminal act, as long as the court is convinced, based on objective circumstances, that the assets originate from criminal activity.

The court must concretely verify the link between assets and the criminal activity or the means of their acquisition, even if it is not necessary to identify the exact offence or the direct connection between each asset and the act.

Third parties who hold assets that may be subject to extended confiscation must have the opportunity to be heard and to defend their property rights, in accordance with Article 47 of the Charter of Fundamental Rights of the European Union.

Directive 2014/42/EU thus achieves a balance between efficiency in confiscating the proceeds of crime and the protection of property rights. Extended confiscation is compatible with EU law only if procedural guarantees and proportionality are respected.

Moreover, the CJEU emphasized that Member States cannot automatically and indefinitely prioritize the State's recovery rights over individual property rights; effective judicial remedies must be available, and courts must state the reasons leading to the conclusion that the assets derive from criminal activities.

In practice, the DR and TS judgment requires Romanian courts to give detailed reasoning in extended confiscation decisions: a generic finding of "disproportion" between assets and income is insufficient. Courts must indicate how, based on financial investigations, they became convinced of the illicit origin of assets, and must ensure that third parties—such as transferees—have an effective right of defense.

This decision thus aligns Romanian law (Article 112<sup>1</sup> Criminal Code) with European standards, requiring strong evidentiary and procedural infrastructure to support such measures.

### **5. Recent Case Law of the High Court of Cassation and Justice**

Recent case law of the Romanian High Court of Cassation and Justice (HCCJ) reflects a consolidation of the evidentiary standards underlying extended confiscation.

In Decision No. 26 of 27 January 2025 (Official Gazette No. 467/20 May 2025), the Court emphasized that confiscation orders must rely on concrete evidence of patrimonial disproportionality and must distinctly identify the confiscated assets.

Likewise, Decision No. 13/2023 confirmed that courts must verify the source of lawful income and establish a concrete ratio between such income and the value of acquired assets. The absence of a thorough financial investigation during prosecution often prevents courts from applying extended confiscation.

In Decision No. 11/2015, the Constitutional Court held that the measure cannot apply to assets acquired before the entry into force of Law No. 63/2012, reaffirming the non-retroactivity of harsher criminal law.

Recent jurisprudence also confirms that confiscation may extend to assets transferred to third parties who knew or should have known that the transfer's purpose was to avoid confiscation.

## **6. The Importance of Financial Investigations in Criminal Proceedings**

The effective application of extended confiscation is inseparable from the quality and depth of financial investigations, which constitute the factual basis for assessing disproportion between income and assets.

Financial investigation is a central dimension of an efficient criminal process, especially in cases of economic crime and corruption. According to A.R. Micu (2025), the financial investigation must not be treated as an auxiliary stage but integrated systematically and proactively into the criminal procedural strategy. Its purpose is not only to prove the offence but also to identify, trace, and recover criminal proceeds.

European legal instruments—Directive 2014/42/EU, Directive (EU) 2018/1673 on money laundering, and Regulation (EU) 2018/1805 on mutual recognition of freezing and confiscation orders—expressly require Member States to ensure efficient and coordinated financial investigations.

In Romania, effective cooperation between prosecutorial bodies, ANAF, ANABI, and FIU-RO (ONPCSB) is essential. A unified methodology for assessing disproportion between income and assets is fundamental to the lawful application of extended confiscation.

Investigations must typically cover at least the five years preceding the offence, as well as any subsequent period, and must analyze both lawful income (salaries, dividends, rent, inheritances) and property acquisitions (movable and immovable assets, bank accounts, investments).

The prosecutor must order early precautionary measures and cooperate with specialized institutions to identify, freeze, and manage assets. The final financial investigation report must concretely detail income sources and objectively establish disproportion.

The judge cannot compensate for the absence of such analysis. Incomplete financial data leads courts to refrain from applying confiscation to avoid breaching proportionality.

According to ANABI annual reports, in 2022 confiscated assets worth over 31.4 million RON were realized, while in 2023 the value dropped to approximately 19.5 million RON, despite a similar number of final confiscation decisions (1,843 in 2022). This discrepancy illustrates how the quality of financial investigations directly impacts the efficiency of extended confiscation.

Recent judicial examples (e.g. HCCJ Decision No. 109/2022) underline that the patrimonial analysis must cover the entire wealth accumulated, not only assets directly linked to the offence. Similarly, Constitutional Court Decision No. 356/2014 reaffirmed that the measure's legality depends on a clear, period-specific financial analysis (typically five years before the offence).

Hence, financial investigation is not a mere technical instrument but a *sine qua non* condition for the legality, proportionality, and effectiveness of extended confiscation.

## **7. Recent Doctrinal Orientations**

Romanian legal doctrine has examined extended confiscation in depth, focusing on its nature, limits, and compatibility with fundamental rights. Toader & Safta (2015) emphasized constitutional safeguards such as non-retroactivity and the presumption of lawful acquisition.

Udroiu (2017) analyzed its hybrid character—a safety measure with preventive aims but punitive effects—requiring strict legality and a high evidentiary standard. Zlate (2021) noted that courts must rely on the overall circumstances rather than on a purely arithmetic disproportion. Mihălceascu (2018) focused on economic evaluation and the transmission of assets to third parties. Moiceanu & Toader (2020) addressed practical challenges—lack of uniformity, proportionality, and the risk of transforming the measure into a disguised sanction.

At the European level, comparative studies confirm that the success of extended confiscation depends on the quality of financial investigations, cross-border cooperation, and the existence of effective judicial oversight.

Recent doctrinal consensus holds that although extended confiscation plays a vital role in restoring social equity and recovering illicit assets, critical aspects remain: judicial reasoning, evidentiary standard, third-party protection, and respect for legality and proportionality.

## 8. Conclusions

Extended confiscation has become an indispensable instrument in combating economic crime and corruption. However, its effectiveness depends decisively on evidentiary foundations and the quality of financial investigations.

ECHR and CJEU standards confirm its legitimacy provided that proportionality and procedural safeguards are ensured. The recent practice of the Romanian High Court reflects a balanced approach between public interest and private property protection.

For the Romanian judiciary, the current challenge lies in strengthening financial analysis capacities, improving institutional cooperation, and ensuring consistent jurisprudence. Only through a probative, economically grounded approach can extended confiscation become an efficient and legitimate instrument of contemporary criminal justice.

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# BRIEF CONSIDERATIONS ON THE CRIMES OF FRAUD AND BREACH OF TRUST

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## Summary

*Through the current criminalization of fraud and breach of trust, the legislator sought to create a punitive framework designed to provide increased protection in the context of the diversification of the means of committing these crimes.*

*Fraud is a crime against property that criminalises the act of misleading a person, followed by causing them harm.*

*Breach of trust is an offense that involves abusing the trust that one person has in another for the purpose of obtaining a financial gain.*

*Fraud and breach of trust have a number of elements in common, but also several distinctive features that differentiate them.*

*The crimes of fraud and breach of trust serve to protect social values relating to the relationships of trust that exist between people living together in society, to ensure that the property rights of others are respected and not infringed upon by means that cause them harm. Criminal law provides a degree of security for property against any acts of abuse of trust, including those committed for the purpose of obtaining financial gain from others.*

*The social values protected by the criminalization of these offenses are some of the most important ones, protected by both criminal and civil law.*

**Keywords:** fraud, breach of trust, subjects, sanction.

## Introduction

This study addresses the issue of the two crimes (fraud and breach of trust) by examining their typical characteristics (legal object, material object, subjects). Thus, we conducted a comparative analysis of the two crimes against property through breach of trust.

The importance of criminalizing these acts under criminal law stems from the social values protected by the legislator regarding the trust that must accompany property relations. Therefore, the establishment of these crimes has the potential to act as a deterrent for those who violate the normal conduct of property relations.

Often, questions have been raised regarding the legal classification of actions committed in contexts such as those mentioned above, namely whether such acts could be classified as breach of trust or fraud.

According to Article 244 of the Criminal Code, the crime of fraud consists of "misleading a person by presenting a false fact as true or a true fact as false, for the purpose of obtaining an unjust financial gain for oneself or for another, and if damage has been caused, it is punishable by imprisonment from 6 months to 3 years."

With regard to the crime of breach of trust, Article 238 of the Criminal Code states that "the unlawful appropriation, disposal, or use of another person's movable property by the person to whom it was entrusted on the basis of a title and for a specific purpose, or the refusal to return it, shall be punished by imprisonment from 3 months to 2 years or by a fine."

At first glance, the legal texts regulating the two offenses are comprehensive and can provide a clear and predictable definition for practitioners. However, in judicial practice we often encounter seemingly controversial situations, for which even doctrine proves ineffective.

This study was conducted because, in my opinion, the two offences have a relatively symmetrical structure, given the way they were established by the legislator. For example, in the case of breach of trust, the perpetrator has gained trust in a lawful manner and is already in possession of the property at the time of the commission of the offense, whereas in the case of fraud, the characteristic aspects appear in a distinct manner. Thus, the perpetrator takes possession of the property after gaining trust, but unlawfully, either by misrepresentation, in the typical scenario, or even "by using false names or qualities or other fraudulent means."

As we will see below, we believe that a scientific approach is needed to address an issue that is both useful and topical.

### **Fraud and breach of trust – differences**

In the following, I will analyze the differences between the two offenses, as they have caused a series of controversies in judicial practice, where we encounter different solutions pronounced by courts for similar cases.

After conducting a brief analysis of the legal texts, we will observe the existence of numerous similarities, but especially differences, which highlight the two criminal acts.

In conducting this comparative examination, it should be noted that both the crime of fraud and the crime of breach of trust are provided for in Title II of the Criminal Code, entitled "Crimes against property," and are included in the same chapter, "Offenses against property through breach of trust."

Thus, I believe that it is necessary to conduct a thorough examination of all the characteristics of that offense in order to achieve a correct legal classification and eliminate any possible ambiguities, because, as I mentioned earlier, even if the text of the law is as clear as possible, extremely complex situations can arise in judicial practice. The lack of a thorough analysis of all the elements characteristic of the situation described may lead to the imposition of a penalty that is too lenient or, on the contrary, too harsh.

In principle, even though crimes against property are covered by very explicit criminal provisions, judicial practice has revealed increasingly varied situations that must be treated with particular care in order to prevent erroneous solutions (for example, theft can be confused with breach of trust).

If, in the case of fraud, we can have the special legal object represented by social relations referring to protection against acts of fraud [1], in the case of a breach of trust offense, this is expressed through social relations relating to property rights, which involve a legal relationship based on the trust placed by the injured party [2].

From the perspective of this first defining element, we note that the two crimes are similar, which is one of the reasons why they are included in the same chapter, the same section of the Criminal Code – the special part. This first comparison may create the false impression that the two crimes are similar in content, with the differences being mainly in the object targeted, the form of guilt, etc.

According to the criminalization rules in the current Criminal Code, fraud (Article 244) has other similarities with breach of trust (Article 238), but, as a first difference, this offense requires that the active subject have come into possession of the property on the basis of a preexisting title and not on the basis of misleading the passive subject [3], and the transfer of the property into the possession of another person is carried out on the basis of a legal title, but subsequently, in bad faith, the perpetrator converts his temporary possession of the property into full ownership, behaving abusively as the owner and causing damage to the person who entrusted the property to him [4].

We note that, in the case of the crime of fraud, possession will be achieved through the use of fraud, the injured party being misled by means of fraudulent maneuvers, and in the case of the crime of breach of trust, possession will initially be obtained by obtaining the expression of legal consent from the passive subject of the crime.

Assessing the characteristics of the two offences is essential for conducting a comparative examination that highlights the specific, distinctive features of acts that may constitute breach of trust or fraud, so that they are not confused and can be more easily recognized when there are difficulties of interpretation.

In order to identify the elements of the crime of breach of trust, as compared to the act of fraud, the movable property belonging to another person must be held by the perpetrator under any title (deposit, mandate, loan for use, lease of the item, pledge, etc.); if the property is not held by the perpetrator but is in the possession of another person or is property that has been involuntarily removed from a person's possession, the act of appropriation does not constitute the crime of breach of trust but theft (if done by theft), appropriation of found property (if the property was found) or fraud (if the property was taken by deception or misrepresentation) [5].

Furthermore, among other things, I believe it should be pointed out that the material object is a similar element for both crimes, since both concern, in principle, tangible movable property, namely property rights expressed in documents with monetary value or even energy that has economic value [6]. At the same time, even assets considered immovable under civil law may form the material object of both crimes if the asset is, in fact, a

movable asset to be incorporated into an immovable asset. In such a case, accession takes effect, with the legislator developing a legal institution that is not relevant to criminal law, as accession is specific to civil law.

In my view, the essential distinction arises as a result of a double protection established by the legislator, first of a quantitative nature and then from a qualitative perspective. This perspective could be an argument for the fact that, in the case of breach of trust, the material object may be represented by tangible movable property that is entrusted for a specific purpose and on the basis of a specific title, while in the case of fraud, the material object is more diverse, including, in addition to those mentioned above, intangible assets and even documents of patrimonial value.

Unlike fraud, legal literature indicates that the material object of breach of trust may be a movable tangible asset that is entrusted with a specific title and for a specific purpose. Thus, according to the opinion expressed in doctrine, the asset must be entrusted with a title different from that expressing ownership, because if the right of ownership were also transferred at the same time as the asset, it would not be logical to ask the owner to hand over the asset that belongs to him. For the same reasons, a loan for consumption cannot be the subject of the crime of breach of trust, because when it is granted, an agreement is concluded which stipulates that the same goods that were transferred will not be returned at maturity [7].

Another perspective outlined in doctrine shows that, in the case of fraud, it is irrelevant whether the material object is represented by an individual asset determined or individualized by the parties, because any asset of economic value can lead to a financial gain for the perpetrator, along with causing damage to the passive subject. It is possible that even the provision of a service, following misrepresentation, could constitute the offense of fraud. Thus, legal protection in this situation plays a more quantitative role, attempting to protect any asset with economic value.

The difference is somewhat understandable, since in the case of the crime of breach of trust there is, in principle, a relationship of trust between the perpetrator and the victim, whereas in the case of the crime of fraud, this relationship is absent, with recent judicial practice highlighting examples where the offender and the injured party do not know each other, do not meet, and do not establish a specific relationship.

Therefore, while fraud does not require a pre-existing legal relationship, breach of trust presupposes the existence of a legal relationship without any misleading activity. The most telling example in this regard is offering a sum of money to be exchanged for foreign currency at a bank where the perpetrator claims to have connections and will obtain a better exchange rate, after which they run away with the money, without returning anything to the injured party, constitutes the crime of fraud, not breach of trust [9].

The distinction between the two offences can also be made from the perspective of the immediate consequence. In this regard, in the case of the offence of breach of trust, the immediate consequence is not conditional on the occurrence of damage, which must exist at the moment when the owner or possessor loses control of the property [10].

Therefore, in the case of the crime of breach of trust, the commission of the act is not conditional on the occurrence of damage to the passive subject's assets. On the other hand, the situation is different in the case of the crime of fraud, which requires the occurrence of damage to the victim.

In the case of fraud, the immediate consequence involves the fulfillment of an essential requirement, which consists in causing economic damage to the victim's assets [11]. There must be a link between the financial loss suffered by the victim of the crime and the enrichment of the perpetrator, which must be manifested by a reduction in assets or loss of income, which must be permanent or at least temporary.

At the same time, in a situation where the passive subject of the crime of fraud does not suffer any damage, as only the act of misleading has been carried out, it follows that the act has not been consummated, the objective aspect not having been fulfilled, which means that the crime remains in the form of an attempt to be punished as such.

The causal link in the case of the crime of breach of trust results from the materiality of the act, which does not need to be proven because the incriminating actions and the immediate consequence are directly related [12].

For the offense provided for in Article 244 of the Criminal Code, the causal link between the material element and the immediate consequence must be proven, based on the factual circumstances of the offense, more precisely on the occurrence of the material element by misleading the victim in order to obtain a financial advantage from the victim. In this sense, the damage must be the result of the fraudulent action used by the active subject with the aim of misleading the victim and obtaining financial advantages for themselves or for another person, as stated in the text of the law.

We note that, although at first glance there is a temptation to assume that the causal link results *ex re*, in such a case a thorough examination must be carried out in order to establish a link between the criminal activity and the immediate consequence.

The form of guilt characteristic of the crime of breach of trust is direct intent or indirect intent, which implies, among other things, that the perpetrator is aware of the consequences of their actions, acts knowingly, and seeks to cause harm by appropriating the movable property handed over by the victim[13].

A detailed analysis of the characteristic elements of the subjective aspect is necessary, as this analysis reveals a distinctive element that can serve as a basis for a fair legal classification.

Therefore, with regard to the subjective aspect of the crime of fraud, this is the direct intention qualified by purpose [14]. This consists of obtaining a financial gain for oneself or for another, having a direct connection with the immediate consequence of the crime.

By adopting such an attitude, the perpetrator shows that they are fully aware of the socially dangerous result of the criminal activity, showing contempt for the danger created, knowing the risk and trying by all means at their disposal to bring it about.

At the same time, we are in the presence of direct intent, as the perpetrator acts knowingly, seeking to cause damage to the passive subject's property by misleading them, by altering aspects that characterize reality, or by using fraudulent means.

Legal literature also indicates that these offenses cannot be considered concurrently with regard to the same object. Thus, it is inconceivable that the same property could be in the actual possession of both the perpetrator and the injured party, nor could the same property be voluntarily surrendered and then stolen. The second rule is that the nature of the perpetrator's initial activity will be taken into account; if the refusal to return the property was decided by the perpetrator with the aim of misleading the victim, and the contract by which the property was handed over was only a means of deceiving the victim, the offense of fraud will be retained. If the decision to deprive the victim was made after the property came into the actual possession of the perpetrator, the act will be classified as the crime of breach of trust. The refusal to return the property in this case is not an act of interversion of possession by the perpetrator [15].

Therefore, a complex analysis of the form of guilt with which the perpetrator acts is required, since in most cases the distinctive element may be represented by the subjective aspect and the legal classification may be influenced in an erroneous manner.

From the above, it follows that the crime of breach of trust is a complex offense that can sometimes be confused with the crime of fraud, which takes many forms. However, if an in-depth examination of the criminal investigation or trial framework were carried out, the distinction between the two crimes could be made under optimal conditions.

## **Conclusions**

This scientific study shows, among other things, that fraud and breach of trust are two different forms of property crime, with the common element of obtaining an unjust material gain. While in the case of fraud the perpetrator relies on deceiving the victim, in the case of the other crime it is a matter of betraying the trust placed in them.

In the context of strengthening current criminal legislation, the subject of crimes against property, which is a field whose specific nature requires constant effort to adapt legislation to new criminal methods, has undergone minimal changes from a regulatory perspective, these changes mainly referring to systematization.

Therefore, even though it was recommended that the relationship between the crime of fraud and that of breach of trust be resolved in order to avoid uncertainty regarding solutions in judicial practice, this aspect was not included among the new legislative elements. Moreover, I believe that it would be very difficult for the legislator to find a more concise wording that would leave no room for contradictory practical interpretations, so it is up to the judicial authorities and even legal doctrine to identify and clarify those cases where uncertainty remains.

The legislator's task is to provide an incriminating text that is, among other things, clear and does not allow for confusion. Comparing the elements presented above, we can conclude that, although the legal norms incriminating the two offences are sufficiently well defined and do not contain identical elements, in judicial practice, confusion may arise when classifying an act as a crime against trust in relation to property rights.

Thus, we will continue to deal with different solutions regarding the treatment of these crimes, and certain aspects concerning specific legal issues that describe these crimes and which have received contradictory solutions will sometimes be resolved through the promotion of extraordinary appeals.

As this study shows, the problem of confusing the crime of fraud with that of abuse of office is not a new issue in criminal law, as it was also encountered under the old Criminal Code. However, due to a lack of interest in providing a legislative framework adapted to the new socio-legal reality, some courts continue to confuse the two crimes, which is why we encounter and will continue to encounter contradictory solutions regarding them.

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# CONSIDERATIONS ON THE NATURE AS WRIT OF EXECUTION OF THE LETTER OF GUARANTEE

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## **Abstract**

*The letter of guarantee is a well-known instrument utilized in the current business activity being issued by credit /financial institutions aiming to support the celerity required by the commercial activity. The goal of the present paper is to highlight the main typologies of the letters of guarantee, the legal traits & roles pursued in a market economy, the operation mechanism and the modalities by which the envisaged outcome is achieved namely the payment to the beneficiary at first and simple demand especially when the letter of guarantee is not issued in the execution of a credit contract signed with a credit/financial institution, considering also the local recent jurisprudence. Also we scrutinize which are the valid alternatives (inclusively by submitting proposals to amend the law) to ensure the performance of the payment (deriving from the letter of guarantee) even the issuer of the letter of guarantee is not the guarantor (the payer) taking into account also the role of the letter of guarantee as credit instrument besides the existing ones as guarantee & payment instrument to support the business community, in general.*

**Keywords:** *letter of guarantee, writ of execution, credit contract, payment at first and simple demand, autonomous guarantee*

## **CHAPTER I – LETTER OF GUARANTEE. CONCEPTS. MAIN TRAITS**

**1.1.** The letter of guarantee represents the result of the international commercial practices aiming to diminish the potential legal/administrative impediments coming from the debtor's national legislations and to set-up a uniform conventional regime with the goal to engender a more faster & flexible approach both for creditor and debtor (contractual balance) supporting in this way the achievement of the economic scope: the payment of the amount as provided by the letter of guarantee and to unlock the business circuit consequently.

The aforesaid commercial practices come from North America and they brought a lot of pragmatism derived from the business urgencies ("Right now & here" kind of requirement).

From a diachronic perspective, the first attempt in this sense was represented by the Publication 325 *The Uniform Rules for Contract Guarantees* issued by the International Chamber of Commerce (ICC) from Paris in 1978, "the scope being to ensure an uniformity of the practice based on a fair balance of the involved parties's interests considering also the economic finality, namely to warrant the availability of the funds administered by an independent third party in case a beneficiary should have a grounded claim against an applicant; to the same

extent the ratio was **to be justified** any request to executing the guarantee aiming to moralize the guarantees practice and to instil trust in the area of the international commerce<sup>1</sup>.

The envisaged outcome has been not achieved as intended considering that the bureaucracy was not reduced and the celerity was not increased as effect. To the same extent, the intended autonomy of the guarantee was not achieved due to need to document/to justify any payment request.

The weak point of the abovementioned Publication consisted in the fact that there was an imbalance between the debtor status and the creditor status the provisions being more favourable to the debtor.

A more successful action was the issuance of the Publication 458 *Uniform Rules for Guarantees on demand* by the International Chamber of Commerce in 1995.

Thus, the novelties brought by the Publication 458 consists in the following:

- (i) express provision that the guarantee are **distinctive** from contracts and understandings that may rely on, the guarantors having no involvement in such contracts and understandings;
- (ii) detailed information regarding the assignment of the right to request the payment of the guarantee and also in respect to the beneficiary's right to assign any amount that shall be cashed;
- (iii) essential aspects like the entering into force, the regime of the counter-guarantee, the reduction of the of the guarantee amount, the payment of the demand guarantee, the prolongation of the tenor, the expiration date and so on.

Considering the above we may reasonably deem that the impact of the Publication 458 in the European market was a fruitful one especially regarding the financial relations occurring in the European perimeter.

It seems that the outcome was not the expected one in relation with the US considering that the North-American banks were (very) familiarized with the stand-by letter of credit with no evident correlation with the Publication 458<sup>2</sup>.

The aforesaid Publication was replaced with the Publication 758 on *Uniform Rules for Guarantees on demand* by CCI in 2010.

Besides the upgrade of the abovementioned aspects regarding the Publication 458, the new (and existing) one brings clarifications with regard to the non-compliant demand guarantee, renunciation & notification, the liability exoneration (regarding the legal effects of the documents, the action of the third party), the transfer of the guarantee and the assignment of the cashed amounts.

In respect to the aforesaid publications it is worthy to be mentioned that their provision are not binding but such provisions shall apply if the parties voluntarily adhere to the respective publications (e.g. the Publication 758 for the time being).

**1.2.** The letter of guarantee is regulated by the Article 2321 from the Civil Code entered into force on 2011.

First of all, the letter of guarantee is qualified as a personal guarantee (surety) in line with the Article 2279 from the Civil Code.

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<sup>1</sup> Negrus, M., *Payments and international guarantees*, 3<sup>rd</sup> edition, C.H. Beck Publishing House, Bucharest, 2006, p.555

<sup>2</sup> Rizoiiu, R. *Course of civil guarantees*, Hamangiu Publishing House, Bucharest, 2020, p.246

Considering the operation mechanism, the roles pursued, we may reasonably state that the letter of guarantee is an atypical instrument formally with no strong resemblance with a standard surety.

Basically the letter of guarantee is a payment instrument before all and it fulfils a guarantee role within the performance of the payment by the issuer namely in this way is guaranteed the non-performance of the obligation(s) derived from the underlying transaction between the applicant (debtor) and the beneficiary (creditor).

The issuer intervenes in this context upon the applicant request for the aim to make the payment when the beneficiary will submit (to issuer) a request in this respect. The payment is made upon at the first and simple demand (unconditional letter of guarantee) or against documents as provided by the letters of guarantee (documentary letter of guarantee).

Before commencing the analysis of the letter of guarantee it is worthy to be pointed-out that there may be situations when the issuer is different than the entity that will make the payment of the letter of guarantee (exception) the standard being that the issuer (credit institution or financial institution) make also the payment.

**1.3.** In line with the Article 2321 from the Civil code the letter of guarantee is the irrevocable and unconditional commitment by which a person, called the *issuer*, undertakes, at the request of a person called *the applicant*, in consideration of a pre-existing obligatory relation, but independent of it, to pay a sum of money to a third party, called *the beneficiary*, in accordance with the terms of the commitment assumed.

**Firstly**, the letter of guarantee is an **irrevocable** commitment encountered between issuer and applicant.

The aforesaid trait is expressly provisioned by the Article 4 from the Publication 458.

Moreover, the guarantee attains this trait **by default**, namely since the moment of its issuance although the letter of guarantee does not provide it.

Undoubtedly, this trait highlights the **independence** of the letter of guarantee from any event especially the events deriving from the relation bank-applicant (e.g. insolvency/bankruptcy of the applicant, the non-performance of the credit contract by the applicant).

In synthesis, the issuer may not revoke by any reason the commitment undertaken.

**Secondly**, the letter of guarantee is an **unconditional** commitment.

The content of this trait resemblances with the previous one but it is worthy to emphasize that no term, condition may shift the unconditional nature of the letter of guarantee.

**Thirdly**, the letter of guarantee displays autonomy/independence.

In the same line we point-out that a *guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship; a reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee* (Article 5 from the Publication 758).

To the same extent we highlight that it can be denied a connection (at least economical) with the underlying transaction; otherwise the letter of guarantee should have been not issued.

This connection does not impact the independence of the letter of guarantee.

**Forthly**, the letter of guarantee is an *intuitu personae* commitment<sup>3</sup>.

It means that the issuer undertakes personally and in principal (as principal debtor) to the beneficiary.

**Fifthly**, the letter of guarantee is not an abstract instrument considering the abovementioned namely there is a connection between the letter of guarantee and the underlying transaction.

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<sup>3</sup> Nedelea, Z., *The demand guarantee*, C.H. Beck Publishing House, Bucharest, 2010, p.27

Certainly this connection is not a principal one but it exists.

**Sixthly** the letter of guarantee is a formal and literal instrument.

Although there is not a template of letter of guarantee, we may sustain the formal trait by the definition of the demand guarantee namely a demand guarantee means any **signed** undertaking, however named or described, providing for payment on presentation of a complying demand.

The literal trait derives from the fact that the beneficiary rights and obligations are exclusively determined by the clauses comprised by the letter of guarantee.

**1.4.** In respect to the legal nature, the letter of guarantee may be not framed in a given structure since it displays its own operation mechanism.

Although there are some resemblances with other legal institutions like the stipulation for a third party, bill of exchange, the promise of a third party's fact, we reasonably deem that the letter of guarantee is a *sui-generis guarantee*.

Also the letter of guarantee is a unilateral contract.

**1.5.** With regard to the relation (in term of **prevalence**) between the Publication 758 and the Article 2321 from the Civil Code we may affirm that this article comprise general rules already detailed in the Publication 458 or within the po.1.3 above.

Therefore, the general "tone" is of a *recommendation* except for two situation as provided by the 3<sup>rd</sup> and fourth paragraphs namely:

(i) the issuer may not raise against the beneficiary any exceptions based on the obligation relationship pre-existing the commitment assumed by the letter of guarantee and may not be held to pay in case of abuse or obvious fraud;

(ii) the issuer who made the payment has the right of recourse against the applicant.

**1.6.** In general, if the issuer of the letter of guarantee is a bank or a financial institution, the credit contract and all the related personal and real guarantees are writs of execution based on the Emergency Govern Ordinance no. 99/2006 on the credit institutions and capital adequacy and the Law no. 93/2009 on the financial non-banking institutions.

There beyond of any doubt that the execution of a letter of guarantee is tremendously supported (in terms of time & financial resources) by this legal safeguard, namely the credit contract (signed by the issuing bank and the applicant) and the letter of guarantee are writ of execution.

Nonetheless there may be situations (as exemption) when the letter of guarantee is issued by a different entity than a credit institution or a financial non-banking institutions, taking into consideration that there is no absolute legal banning in sense of being issued the letter of guarantees by the credit institution or a financial non-banking institutions **only**.

We have in mind the provisions of the Article 272, 3<sup>rd</sup> paragraph, letter c) from the Law on companies no. 31/1990:

"Art. 272 - (1) It is punishable by imprisonment from 6 months to 3 years or a fine the founder, administrator, general manager, director, member of the supervisory board or of the board of directors or the legal representative of the company who:

c) borrows, in any form, directly or through an intermediary, from the company he manages, from a company controlled by it or from a company that controls the company he manages, the amount borrowed being higher than the limit provided for in art. 144 index 4, 3<sup>rd</sup> paragraph, letter a), **or causes one of these companies to grant him any guarantee for his own debts;**

**(3) The act provided for in the 1st paragraph, letter c) does not constitute a crime if it is committed by a commercial company that has the status of founder, and the loan is made from one of the companies controlled or that controls it, directly or indirectly.”**

If such an event shall occur, we reasonably deem that the beneficiary (of the letter of guarantee) may submit **for payment** - the letter of guarantee issued by the respective company- to a bank where the respective company benefits from a credit facility granted by the bank having as destination the financing of the presented documents that are connected with the company current activity (e.g. working capital revolving line).

The request could be honoured but this is a purely theoretical situation where the beneficiary of the letter of credit may face impediments because of the fact that the letter of guarantee is not writ of execution.

In the same line if the letter of guarantee should be authenticated by a Notary Public (such a document is a writ of execution based on the Article 101 from the Law. 36/1996 on the Notaries Public and notaria activity) and submitted to the bank through a judicial executor the payment could be performed but with delays as effect of setting up a garnishment.

**1.7.** Although the doctrine assimilated the letter of guarantee to a **credit title** considering mainly its operation mechanism we recommend to be amended in this way the Article 2321 from the Civil code stipulating that the letter of guarantee is writ of execution even in situation when the issuer is not a credit institution or a financial non-banking institution<sup>4</sup>. We have in mind the legal provisions related to the foreclosure where the writs of execution have to be expressly mentioned and also the recent jurisprudence stating that the letter of guarantee issued by a credit institution is writ of execution only if it was issued aiming to guarantee a credit contract<sup>5</sup>.

## **CHAPTER II - CONCLUSIONS**

Our conclusion is that the letter of guarantee has to be always writ of execution even in situation when the issuer is not a credit institution or a financial non-banking institution the advice being to proceed to the revisal of the Article 2321 from the Civil code.

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## CONSIDERATIONS REGARDING EXCISE TAX EVASION

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### 1. Introductory aspects regarding excise taxes

The Fiscal Code establishes an indirect tax on the consumption of certain goods under the name of excise taxes. Excise taxes have a different legal regime, distinguishing between harmonized excise taxes and other excise taxes (coffee, jewelry, furs, yachts, etc.). Harmonized excise taxes, due for alcohol, processed tobacco and energy products (including electricity) are regulated by Directive no. 262/2020 establishing the general system of excise duties (reform).[1]

In national legislation, harmonized excise taxes are regulated in the provisions of art. 335 et seq. of the Fiscal Code, which shows that harmonized excise taxes are revenues due to the state budget, are special taxes[2] levied directly or indirectly on the consumption of the following products:

- a) alcohol and alcoholic beverages;
- b) processed tobacco;
- c) energy products and electricity.

### 2. The Purpose of Introducing Excise Duties

Metaphorically speaking, excise duties were originally conceived to act as a kind of “*social outlaw – a haiduc*”, taking from the wealthy — from income spent on ostentatious luxury and the consumption of vices — and giving to the poor (not to those impoverished due to individual weaknesses such as laziness and/or recklessness). Thus, excises were designed as a “**tax on eccentric, extravagant expenditures**”, a “**tax on luxury and vice consumption**”, intended to curb such consumption while generating additional budgetary revenue that would be used primarily to alleviate poverty.

At the time when excise duties were first conceptualized and introduced, no one would have accepted the idea that they could be imposed on goods and services of basic necessity for the population, including items that form part of the “*minimum means of subsistence*.”

Today, however, the main purpose of excise duties has changed radically. Their primary function is to ensure a large, secure, and constant flow of revenue to the state budget. For this reason, excises are now imposed even on certain categories of products that:

1. are of **strict necessity** for the entire population, including for those living below the poverty line;
2. are consumed (a) in large quantities, (b) on a constant basis, and (c) cannot easily be replaced by consumers with other goods — such as electricity and natural gas for domestic use, fuels, petroleum products, tobacco, coffee, wine, beer, alcohol, etc.[3]

Although the initial main purpose of introducing this tax was to curb the consumption of luxury and vice products and to reduce poverty, today, at the national level, its purpose is to ensure revenues for the state budget. However, if we refer to the objectives of excise duties within the European Union, we observe an

additional goal compared to national ones, namely fiscal harmonization in order to ensure the free movement of goods. The EU's harmonization efforts (e.g., excise directives, systems for the controlled movement of excisable goods) play an important role in reducing these types of offences. However, for these measures to be effective, several factors must be in place: cross-border cooperation, adequate control capacity, and the implementation of appropriate sanctions.

Essential in combating economic offences are:

- the existence of a functional system for monitoring, fiscal inspection, and sanctioning;
- information and education measures aimed at economic operators regarding their obligations in the field of excise duties.

Another aspect that can contribute to reducing the phenomenon is the simplification of procedures, which, together with clear and coherent legal regulations, can diminish the motivation for fraud.

### **3. Particularities of Excise Duties**

Excisable products are subject to the excise regime at the moment of:

- a) their production — including, where applicable, the moment of their extraction — within the territory of the European Union;
- b) their importation or irregular entry into the territory of the European Union.

Excise duties are owed to the state budget for products originating from domestic production or from import (according to the Fiscal Code, import means any entry of excisable products from outside the territory of the EU), and they become chargeable at the moment of release for consumption and in the Member State where the release for consumption takes place.

But what exactly is the moment of release for consumption, so that we may determine the moment when the excise duty becomes chargeable?

Since commercial operations have characteristics specific to each type of product traded, the legislator has provided several situations in which chargeability is deemed to arise, also regulating situations involving products traded in violation of the law. Thus, release for consumption means:

- a) the removal of excisable products, including irregular removal, from an excise duty suspension arrangement;
- b) the possession or storage of excisable products, including irregular cases, outside an excise duty suspension arrangement, where excise duties have not been collected in accordance with the applicable provisions of EU law and national legislation;
- c) the production or transformation of excisable products, including irregular production or transformation, outside an excise duty suspension arrangement;
- d) the importation of excisable products, except where the products are placed immediately after import under an excise duty suspension arrangement, or the irregular entry of excisable products, except where the customs debt has been extinguished under Article 124(1)(e), (f), (g) or (k) of Regulation (EU) No. 952/2013;
- e) the use of excisable products within a tax warehouse for purposes other than as raw material.

Release for consumption is also deemed to occur when excisable products that were released for consumption in another Member State are held for commercial purposes by a person, and the excise duty has not been paid in Romania.

The moment of release for consumption is different from the moment of exit from an excise duty suspension arrangement, the latter being relevant for determining the moment of release for consumption, as will be shown below.

According to Article 340(1)(a) of the Fiscal Code, release for consumption takes place through the removal of excisable products from an excise duty suspension arrangement. Consequently, in order to determine the moment of release for consumption, we must first determine the moment of removal from a suspension arrangement; this moment differs depending on the commercial operations carried out.

In practice, we also encounter cases where certain excisable products leave the tax warehouse but are not considered released for consumption, for example when they are moved:

- a) to another tax warehouse in Romania or in another Member State;
- b) to a registered consignee in another Member State;
- c) to a territory outside the European Union.

We also encounter situations involving the total destruction of excisable products under suspension arrangements, or their irreversible, total or partial loss as a result of a fortuitous event, force majeure, or pursuant to an authorization to destroy the products issued by the competent authority. In such cases, the legislator has provided that the products are not deemed to be released for consumption.

The legislator has also established exceptions from the obligation to pay excise duties, providing that excisable products are exempt when they are intended for use:

- a) in the context of diplomatic or consular relations;
- b) by international organizations recognized as such by the public authorities of Romania, and by the members of these organizations, within the limits and under the conditions laid down by the international conventions establishing such organizations or by the headquarters agreements.
- c) by the armed forces of any state that is a party to the North Atlantic Treaty, other than Romania, for the use of the respective armed forces, for the accompanying civilian personnel, or for supplying their messes or canteens;
- c1) by the armed forces of any other Member State, other than Romania, for use by those armed forces or by the civilian personnel accompanying them, or for supplying their messes or canteens, when those armed forces are participating in a defence action carried out to implement an activity of the European Union within the framework of the Common Security and Defence Policy;
- d) for consumption under an agreement concluded with third countries or with international organizations, provided that the agreement in question is permitted or authorized with respect to exemption from value-added tax.

#### **4. Possession, outside a tax warehouse, of excisable products subject to marking which are unmarked, improperly marked, or bear false markings**

In practice, prior to the entry into force of the new Fiscal Code in 2015, the issue arose as to how to legally classify the act of possessing, outside a tax warehouse, excisable products subject to marking, which are unmarked, improperly marked, or bear false markings, while knowing that they originate from smuggling. The solution provided by the High Court of Cassation and Justice[4] was that in situations where an economic operator possesses, outside the tax warehouse, excisable products subject to marking that are unmarked, improperly marked, or bear false markings, in quantities exceeding the legal limits, and knowing that they originate from smuggling, the conduct constitutes only the offence provided for in Article 270(3) of Law No. 86/2006 (the Romanian Customs Code), and not a concurrence of offences between:

- Article 270(3) of the Customs Code,
- Article 296<sup>1</sup>(1)(l) of the former Fiscal Code, and
- Article 9(1)(a) of Law No. 241/2005 on the prevention and combating of tax evasion.

It was held, in the reasoning of this solution, on the one hand, that the offence of smuggling is a complex offence, which includes the possession of goods outside the tax warehouse when the origin of those goods is smuggling; and on the other hand, that the violation of the customs regime through the omission to declare at the border goods originating from outside the European Union represents, as the case may be, either a preparatory act of tax evasion or even a consummated act of tax evasion. For this reason, once the offence of smuggling (Article 270 of the Customs Code) is retained, the provisions of Article 9 of Law No. 241/2005 can no longer apply, because the material element of tax evasion—just like the purpose of committing the offence (obtaining financial benefits by avoiding the payment of fiscal obligations)—is already encompassed within the material element[5] and purpose of the smuggling offence.

In another court decision[6], it was held that tax evasion represents the general incrimination of the failure to pay taxes and duties related to goods located on the territory of Romania, whereas the offence of smuggling represents a complex offence concerning the omission to pay the same taxes and duties when

the goods were introduced into the country fraudulently. Smuggling therefore constitutes a special and complex incrimination of a specific way of evading the payment of taxes—namely, by introducing goods in violation of the legal regime of the state border. The legal interest protected by the offence of tax evasion differs from that of smuggling only in that, in the case of smuggling, the legal regime of the state border is also protected, not only the regime governing the administration of taxes, duties, contributions, and other amounts owed to the consolidated general budget.[7]

**When and under what circumstances the excise duty (whose taxable event consists in the introduction of certain products into the territory of the Community) becomes chargeable is therefore a crucial question.**

A case likely to give rise to legal controversy was brought before the CJEU, where the European court was asked whether and at what point excise duty (whose taxable event consists in the introduction of certain products into the territory of the Community) becomes chargeable.

In situations where goods transported by sea are seized and subsequently destroyed by the local customs and tax authorities before leaving the first customs office located within the territory of the Community, it follows that those goods have not been imported into the territory of the Community. Consequently, the taxable event for excise duty has not occurred, and therefore such goods cannot be subject to excise duty. By contrast, when such goods are seized and destroyed by the authorities after they have left the first customs office located within the territory of the Community, it must be considered that they have indeed been imported into the Community; accordingly, the taxable event for excise duty has occurred in their regard.

As to the question of whether and at what moment excise duty—whose taxable event consists in the introduction of products into the territory of the Community—becomes chargeable, it must be noted that this tax becomes chargeable, among other situations, at the moment when those products are released for consumption. Release for consumption includes “any import of the products concerned, even if irregular, where the products have not been placed under a suspension arrangement.”[8]

However, the concept of “import” of goods within the meaning of the Excise Duty Directive requires that the goods have left the area in which the first customs office located within the customs territory of the Community is situated.

Regarding goods transported by land, the question arises whether the chargeability of excise duty may be suspended on the ground that the goods—seized and confiscated after their illegal introduction into the customs territory of the Community—were subsequently placed under a customs warehousing procedure. In this respect, it should be recalled that a suspension arrangement is the fiscal regime applicable to the production, processing, holding, and movement of products under which the excise duty is suspended. Such a regime is characterized by the fact that the excise duties applicable to the products falling under it are not yet chargeable, even though the taxable event has already occurred.[9] Therefore, with regard to excisable products, this regime postpones the chargeability of excise duty until a specific condition of chargeability is fulfilled.

Of course, the suspension of excise duty presupposes that the illegally introduced goods fall under one of the suspension procedures, among which is the customs warehousing procedure.

However, excise duty became chargeable as soon as the goods left the area in which the first customs office located within the customs territory of the Community is situated.

It follows that smuggled goods which were the object of such an illegal import must be regarded as having been released for consumption, so that their subsequent placement under a customs warehousing procedure, following their seizure and confiscation, has no effect on the chargeability of the excise duty.[10]

## **5. Conclusions**

Offences in the field of excise duties (smuggling, tax evasion, false reporting, etc.) represent a recurring issue within the European Union, with significant impact both on the revenues of Member States and on fiscal fairness and fair competition.

Fraud and irregularities involving excise duties (energy products, tobacco, alcohol) constitute an important threat to budgetary revenues and to the functioning of the internal market. The black market and activities that disregard fiscal obligations — including those related to excise duties — remain significant in various EU Member States, suggesting that excise-related offences are far from isolated incidents.

According to Europol, the illicit trade in cigarettes within the EU is a significant problem: in 2016, consumption was estimated at approximately 48 billion contraband cigarettes, generating a loss of about €10.2 billion in excise revenue for EU governments.

In Romania, in 2023, the black market for cigarettes accounted for approximately 8.2% of total consumption, compared to around 7.1% in 2022. Also in 2023, Romanian authorities seized more than 150 million contraband cigarettes, with an estimated black-market value of nearly 110 million lei (~€22 million).

In the first half of 2024, more than 40 million contraband cigarettes were seized, over 75% of which were recorded in the southern region of the country. The declared value of these seizures exceeded 40 million lei.

In July 2025, the black market for cigarettes reached a peak of approximately 12% of total consumption — the highest level in the past five years — while in October 2025 it stood at around 9.6%.

The phenomenon of tobacco smuggling — a representative segment of excise-related offences — is increasing in Romania, both in terms of the volume seized and as a percentage of total consumption.

This growth includes sensitive geographic areas (the southern region, border areas), which underscores the importance of border control and cross-regional cooperation.

The economic values involved (millions of lei) highlight the significant fiscal and budgetary impact of these offences on the Romanian state. For this reason, in the case of offences relating to excise regimes, Member States must adopt the most effective possible measures.

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[1] Published in the Official Journal of the European Union No. 58 of 27 February 2020. The previous regulation — Council Directive 2008/118/EC on the general arrangements for excise duty — was repealed and replaced by Directive 262/2020. I. M. Costea, *Financial Law. Course Notes*, 7th revised and expanded edition, Hamangiu Publishing House, Bucharest, 2021, p. 226.

[2] As regards the Romanian legislation, we note an error on the part of the legislator in the definition of excise duty, namely the use of the term “special tax”, which may create confusion as to the nature of this levy. Excise duties are not taxes, but indirect taxes, which is why we define excise duty as an indirect tax levied on the consumption of the following products:

a) alcohol and alcoholic beverages;

b) processed tobacco;

c) energy products and electricity.

[3] G. Lacrita, *Accizele – armonizate, nearmonizate și scopul introducerii lor*. [www.legestart.ro](http://www.legestart.ro)

[4] By High Court of Cassation and Justice Decision No. 17 of 18 November 2013.

[5] For an extensive presentation of the material element of the offence, see: A.M. Truichici, *Criminal Law, General Part*, 2nd revised edition, Universul Juridic Publishing House, Bucharest, 2011, p. 117.

[6] High Court of Cassation and Justice – Criminal Division, Decision No. 101 of 8 February 2023.

[7] A.M. Truichici, L. Neagu, *Tax Evasion. National Case Law*, Universul Juridic Publishing House, Bucharest, 2025, p. 427.

[8] CJEU, Third Chamber, Judgment of 29 April 2010, Case C-230/08.

[9] Decision of 12 December 2002, Cipriani, C-395/00, ECR I-11877, paragraph 42.

[10] A.M. Truichici, L. Neagu, *Criminal Law. Case Law of the Court of Justice of the European Union*, Universul Juridic Publishing House, Bucharest, 2017, p. 427.

# STUDY ON THE USE OF ARTIFICIAL INTELLIGENCE IN DETECTING FRAUD OR SUSPICIOUS ACTIVITIES THROUGH ALGORITHMS

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## Abstract

*This article examines the use of Artificial Intelligence (AI) in detecting fraud and suspicious activities, emphasizing the role of machine learning and deep learning algorithms in analyzing complex financial data. AI enables the identification of abnormal patterns and the prevention of illicit transactions through supervised, unsupervised, and hybrid models that adapt to the dynamic behavior of users. Although these technologies offer superior performance and real-time detection, they also raise challenges related to algorithmic bias, interpretability, and data protection. Current trends - such as Explainable AI (XAI), federated learning, blockchain analytics, and integration with cloud and edge computing infrastructures - outline a future based on transparency and interdisciplinary collaboration. In this context, the success of AI applications depends on balancing technological efficiency, ethical decision-making, and legal regulation, which are essential for maintaining trust and security in the digital economy.*

**Keywords:** artificial intelligence, fraud detection, machine learning, deep learning, XAI, blockchain, cloud computing, algorithmic ethics, financial security.

## 1. Introduction

In recent decades, the volume and complexity of data generated by economic and financial activities have grown exponentially, driven by global digitalization and the development of interconnected information infrastructures. This phenomenon has led to a major shift in how organizations manage, analyze, and interpret transactional information. The increasing number of online financial operations, the expansion of digital markets, and the diversification of payment channels have also amplified the risk of fraudulent activities that are difficult to identify through traditional control methods (Bolton & Hand, 2002). Consequently, conventional audit and verification systems can no longer cope with the massive volume and high speed of modern transactions.

In this context, automatic fraud detection has become a priority for financial institutions, e-commerce companies, and government entities responsible for economic security. AI-based technologies offer advanced solutions for identifying suspicious behavioral patterns through the rapid and continuous analysis of real-time data streams (Ngai et al., 2011). Fraud detection involves identifying subtle deviations from normal user or system behavior - a task that is challenging for classical statistical models but feasible for machine learning algorithms capable of evolving and continuously adapting recognition strategies (Phua et al., 2010).

Artificial intelligence is particularly suited to this problem because of its capacity to learn from historical data, recognize complex regularities, and adapt to contextual changes (Goodfellow, Bengio, & Courville, 2016). Machine learning algorithms can simultaneously process millions of transactions, estimating fraud probabilities based on multidimensional features such as purchasing behavior, digital fingerprints, geolocation, and temporal patterns (Bhattacharyya et al., 2011). Thus, AI not only automates the detection process but also makes it faster, more precise, and less dependent on human intervention. Moreover, deep learning algorithms enable the automatic extraction of relevant features without extensive preprocessing, thereby increasing system efficiency (LeCun, Bengio, & Hinton, 2015).

The purpose of this article is to provide a theoretical analysis of how artificial intelligence is used in detecting fraud and suspicious activities, focusing on algorithmic foundations, technical and ethical challenges, and the legal implications associated with these technologies. The study also addresses the current limitations of machine learning models and the future prospects of AI amid the growing volume of data and the demand for decision-making transparency (Gogoi et al., 2011).

The structure of the article is as follows: the first section defines the theoretical and conceptual framework of fraud detection and describes the main learning models used; the second section examines the key categories of algorithms involved in detection, such as supervised classification, unsupervised methods, and hybrid deep learning techniques; the third section discusses current challenges and limitations in applying AI to fraud detection, including algorithmic bias, privacy, and legal liability; and the final section synthesizes future development directions and interdisciplinary perspectives that may enhance both the efficiency and ethical grounding of automatic detection systems.

Overall, this article proposes an integrated approach in which technological analysis is complemented by a critical reflection on the social, legal, and moral implications of artificial intelligence in financial security, emphasizing the need for responsible governance of algorithms and the data they process (Brennan & O'Halloran, 2021).

## **2. Theoretical and Conceptual Framework**

The detection of fraud and suspicious activities through automated means relies on a series of key concepts that define both the applied domain and the theoretical foundations of artificial intelligence. In general terms, fraud can be defined as an intentional act of deception aimed at obtaining an undue financial or material advantage, typically by exploiting vulnerabilities within an economic or informational system (Bolton & Hand, 2002). In digital environments, fraud manifests through a wide range of behaviors - from transaction manipulation and identity falsification to coordinated attacks on financial infrastructures (Ngai et al., 2011). The term suspicious activity refers to any abnormal or unusual behavior that deviates from the statistical or behavioral patterns of legitimate users and, although not necessarily confirmed as fraud, signals a potential risk to system integrity (Phua et al., 2010).

At the core of the detection process lies artificial intelligence (AI), defined as a set of methods and algorithms capable of simulating human cognitive processes such as learning, reasoning, and decision-making (Russell & Norvig, 2021). A fundamental branch of AI is machine learning, which enables computer systems to extract knowledge from data without being explicitly programmed for each specific case (Hastie, Tibshirani, & Friedman, 2009). In the context of fraud detection, machine learning algorithms can be trained to distinguish between legitimate and suspicious transactions using classification models based on labeled datasets or anomaly detection methods that identify deviations from normal behavioral patterns (Chandola, Banerjee, & Kumar, 2009).

General models of fraud detection can be divided into three main categories. First, supervised models use labeled data to learn the distinction between legitimate and fraudulent transactions through techniques such as logistic regression, decision trees, or neural networks (Bhattacharyya et al., 2011). These models are effective when large, validated datasets are available but tend to perform poorly in class imbalance situations, where fraud represents a very small fraction of total transactions. Second, unsupervised models do not require predefined labels but instead detect unusual patterns - for instance, abrupt variations in transaction values or frequency - using clustering or density-based methods (Bolton & Hand, 2002). Third, hybrid models combine supervised and unsupervised approaches, often employing deep learning

algorithms to capture complex non-linear relationships and enhance prediction accuracy (LeCun, Bengio, & Hinton, 2015).

The typologies of automatically detectable fraud vary depending on the application domain. In the banking sector, AI is used to identify suspicious transactions, money-laundering schemes, and abnormal account behaviors (Gogoi et al., 2011). In insurance, predictive models can detect false or exaggerated claims. In e-commerce, automated detection systems analyze unusual purchases, return behaviors, and credit card abuse. In social networks, AI contributes to identifying fake accounts, disinformation, and phishing activities (Ahmed, Natarajan, & Hameed, 2016). Finally, in blockchain ecosystems, where anonymity and decentralization favor fraudulent behavior, detection algorithms analyze transaction patterns to uncover illicit activities such as cryptocurrency laundering or repeated transfers between seemingly independent wallets (Chen et al., 2020).

A crucial factor in the performance of automated detection systems is the quality and preprocessing of data. Since machine learning models are sensitive to errors, missing values, and class imbalances, stages such as data cleaning, transformation, and normalization are critical (Kelleher, Namee, & D'Arcy, 2015). Furthermore, selecting relevant variables and reducing dimensionality can significantly improve prediction accuracy while minimizing computational costs (James, Witten, Hastie, & Tibshirani, 2021). Ideally, preprocessing should be complemented by rigorous validation and interpretability techniques to ensure transparency and trust in results, particularly in fields with significant financial and legal implications.

Thus, the theoretical framework of fraud detection through AI is grounded in the interplay between technological dimensions (algorithms and models), methodological aspects (data processing and selection), and applied contexts (risk domains and behavioral characteristics of fraud). Together, these dimensions provide the foundation for a comprehensive analysis of algorithmic mechanisms and their ethical and legal implications within the contemporary digital economy.

### **3. Algorithms Used in Fraud Detection**

Automated fraud detection through artificial intelligence relies on a diverse range of machine learning algorithms, selected according to the nature of the data, label availability, and analytical objectives. The choice of algorithm directly influences the system's precision, interpretability, and scalability (Hastie, Tibshirani, & Friedman, 2009). In the specialized literature, fraud detection methods are generally grouped into three main categories: supervised classification algorithms, unsupervised anomaly detection algorithms, and hybrid or deep learning models.

#### **3.1. Supervised Classification Algorithms**

Supervised algorithms are among the most frequently used in fraud detection, as they rely on labeled datasets - i.e., transactions already classified as "fraudulent" or "legitimate" (Bhattacharyya et al., 2011). By learning the relationships between transaction features and their corresponding labels, the model can predict the likelihood that a new transaction is suspicious.

One of the classical models is logistic regression, valued for its simplicity and interpretability (Hosmer, Lemeshow, & Sturdivant, 2013). Although efficient for linear problems, it struggles to capture complex relationships among variables. Random Forest, based on ensembles of decision trees, offers a more robust solution and reduces overfitting risk while assessing the relative importance of variables (Breiman, 2001).

Another important approach is the Support Vector Machine (SVM), which identifies an optimal separating boundary between classes (Cortes & Vapnik, 1995). SVMs are recognized for strong

performance in high-dimensional problems and robustness to noise. Recently, artificial neural networks (ANNs) have gained prominence due to their ability to model complex nonlinear relationships and automatically extract relevant features (LeCun, Bengio, & Hinton, 2015). However, supervised models face notable limitations: their performance depends on large amounts of labeled data - difficult to obtain since actual frauds are rare (Ngai et al., 2011) - and they are vulnerable to class imbalance, where fraudulent transactions make up only a small portion of the dataset.

### **3.2. Unsupervised and Anomaly Detection Algorithms**

In the absence of labeled data, unsupervised algorithms provide a viable alternative for identifying abnormal behaviors. These models assume that legitimate transactions follow predictable patterns, while fraudulent ones appear as significant statistical deviations (Chandola, Banerjee, & Kumar, 2009).

Among the most widely used methods are K-Means, which clusters data and detects isolated instances located far from cluster centers (MacQueen, 1967), and DBSCAN (Density-Based Spatial Clustering of Applications with Noise), which identifies anomalies through local density analysis (Ester et al., 1996).

Another key model is Isolation Forest, specifically designed for anomaly detection by isolating unusual observations in fewer partitioning steps (Liu, Ting, & Zhou, 2008). Similarly, Autoencoders, a type of unsupervised neural network, learn to reconstruct input data - with fraudulent transactions yielding higher reconstruction errors, thus revealing their atypical nature (Sakurada & Yairi, 2014).

These methods do not rely on labeled data, making them flexible, but their interpretation can be complex, and high false-positive rates often require careful calibration and integration with other techniques.

### **3.3. Hybrid and Deep Learning Algorithms**

Hybrid models combine the strengths of both supervised and unsupervised methods to enhance detection accuracy. For example, a system may use an unsupervised algorithm to identify suspicious transaction clusters, followed by a supervised model for final classification (Zhang et al., 2020).

Within deep learning-based detection, convolutional neural networks (CNNs) and recurrent neural networks (RNNs/LSTMs) are employed to capture spatial and temporal structures in transactional data (Hochreiter & Schmidhuber, 1997). CNNs are effective in analyzing fixed patterns such as aggregated transaction matrices, while RNNs and their long short-term memory (LSTM) variants model transaction sequences and detect subtle behavioral changes (Roy, Sun, & Mahoney, 2018).

These models have been successfully applied in banking account monitoring, user behavior analysis, and real-time transaction detection. Their advantages include high scalability and the ability to autonomously learn complex features. However, they are often criticized as “black-box” models and involve high computational costs (Goodfellow, Bengio, & Courville, 2016).

### **3.4. Empirical Findings from Recent Literature**

Recent empirical studies confirm the efficiency of combining traditional models with deep learning algorithms. For example, Phua et al. (2010) demonstrated that hybrid methods combining Random Forest and neural networks can achieve precision rates exceeding 95%, while combinations of SVM and Autoencoders optimize recall and F1-score for rare fraud cases. Other research highlights the benefits of advanced preprocessing techniques - such as

Principal Component Analysis (PCA) - in improving model stability and robustness (West & Bhattacharya, 2016).

In conclusion, the selection of detection algorithms depends on the application context, data availability, and operational requirements. In practice, the most effective systems integrate multiple models within adaptive frameworks based on continuous learning and dynamic evaluation, reflecting the current direction of research in AI-driven financial security systems.

#### **4. Challenges and Limitations**

The article analyzes the use of artificial intelligence (AI) in fraud and suspicious activity detection, emphasizing its strategic importance in the context of the exponential growth of data volumes and the increasing complexity of financial transactions. As traditional audit methods become less effective, AI provides solutions capable of processing massive datasets, identifying hidden patterns, and anticipating fraudulent behaviors (Ngai et al., 2011).

The theoretical framework of the study is based on the concepts of fraud, suspicious activity, machine learning, and anomaly detection. Automated fraud detection involves applying machine learning algorithms to classify legitimate and fraudulent transactions. In this context, three main model categories are identified: supervised, unsupervised, and hybrid. Supervised models (e.g., Logistic Regression, Random Forest, Support Vector Machine) rely on labeled data and deliver accurate results under proper training conditions (Hastie, Tibshirani, & Friedman, 2009). Unsupervised models (K-Means, DBSCAN, Isolation Forest) are effective for identifying anomalies in unlabeled data, while hybrid and deep learning models (CNN, RNN, LSTM) integrate both approaches, achieving superior performance in sequential transaction analysis (LeCun, Bengio, & Hinton, 2015).

Despite their efficiency, these systems raise several challenges. Algorithmic bias, lack of interpretability, and the difficulty of obtaining labeled datasets are major issues, along with high computational costs and legal risks related to data protection (Barocas, Hardt, & Narayanan, 2019). The need for explainable artificial intelligence (XAI) thus becomes essential to ensure transparency and public trust (Doshi-Velez & Kim, 2017).

Future development directions include the adoption of federated learning, which enables collaboration between institutions without sharing raw data (McMahan et al., 2017), the integration of AI models with cloud and edge computing infrastructures for real-time detection, and the expansion of blockchain analytics for monitoring decentralized transactions (Chen et al., 2020).

In conclusion, the use of AI in fraud detection holds enormous potential for strengthening financial security. However, the success of this technology depends on balancing algorithmic performance with ethical, legal, and social principles in the digital society. Accountability, transparency, and interdisciplinary collaboration will be the essential pillars guiding the future evolution of this field.

#### **5. Development Directions and Future Perspectives**

The evolution of artificial intelligence (AI) and digital infrastructures is redefining the development directions in fraud and suspicious activity detection. Current research focuses on dynamic, explainable, and collaborative systems capable of operating in real time and ensuring decision transparency (Goodfellow, Bengio, & Courville, 2016). A key trend is Explainable Artificial Intelligence (XAI), which enables the interpretation of algorithmic decisions by identifying the factors that determine the classification of transactions as fraudulent (Doshi-Velez & Kim, 2017). This approach strengthens public confidence and supports the legal accountability of automated decisions (Wachter, Mittelstadt, & Floridi, 2017).

Another major direction is federated learning, which allows institutions to collaborate without sharing raw data, thereby ensuring privacy and data security (McMahan et al., 2017). At the same time, real-time detection and blockchain analytics contribute to the rapid identification of suspicious activities and the analysis of transactions within decentralized ecosystems (Chen et al., 2020).

From a technological standpoint, the integration of AI models with cloud and edge computing architectures enhances distributed processing and reduces decision latency (Dean et al., 2012). These developments indicate a transition toward a more secure, transparent, and adaptive ecosystem of automated fraud detection.

However, the future of the field depends on strong interdisciplinary collaboration among computer scientists, economists, legal experts, and behavioral psychologists (Brennan & O'Halloran, 2021), ensuring that technological innovation is accompanied by algorithmic ethics, decision responsibility, and the protection of fundamental values in the digital society.

## 6. Conclusions

The detection of fraud and suspicious activities through artificial intelligence (AI) marks a fundamental transformation in financial and cybersecurity systems. Machine learning and deep learning algorithms have enabled the transition from reactive, rule-based systems to proactive models capable of identifying complex patterns and anticipating fraudulent behaviors (Ngai et al., 2011). This evolution has been supported by advances in digital infrastructure and the increasing power of data processing (Goodfellow, Bengio, & Courville, 2016).

The theoretical analysis highlights the complementary role of supervised, unsupervised, and hybrid models. The first category performs well when labeled data are available, while the second detects anomalies without explicit supervision (Chandola, Banerjee, & Kumar, 2009). Hybrid and deep learning models offer superior performance but present challenges related to interpretability and computational costs (Hastie, Tibshirani, & Friedman, 2009).

AI has a major impact due to its capacity to analyze large volumes of transactions in real time and to reduce economic losses (Bhattacharyya et al., 2011). Nevertheless, its use raises concerns about bias, privacy, and legal responsibility (Barocas, Hardt, & Narayanan, 2019). In this context, ethical regulation and transparency are imperative for maintaining public trust (Doshi-Velez & Kim, 2017; Wachter, Mittelstadt, & Floridi, 2017).

Ultimately, the future of this field depends on interdisciplinary collaboration across computer science, law, economics, and behavioral psychology (Brennan & O'Halloran, 2021), with the goal of developing efficient, fair, and human-centered detection systems.

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