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Artificial Intelligence Governance Beyond Borders: The EU AI Act's Influence on Third Party Legal Frameworks and Regional Organizations

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Abstract: This research examines the perspective and influence of the European Union's Artificial Intelligence Act (EU AI Act) on AI regulation in third countries and regional organizations. Using a doctrinal legal method with statutory and comparative law approaches, the study finds that the EU AI Act is a binding regulation applicable to all EU Member States. It aims to improve the internal market by introducing horizontal regulations focused on human rights protection. The Act defines AI broadly as a family of technologies affecting all aspects of life and classifies AI systems by risk level to determine development and market standards. This framework influences third-country regulations through the Brussels Effect. De facto, global companies, including from the U.S. and China, comply with the EU AI Act to access its market. *De jure*, some countries adopt its provisions into their own legal frameworks. The EU AI Act also impacts regional organizations such as ASEAN, which incorporates elements of the Act into cooperative policy documents, reflecting a shared political commitment to responsible AI governance.

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1. Introduction

The development of artificial intelligence (AI) technology in the era of the fourth industrial revolution and society 5.0 has had a significant impact on multiple dimensions of human life. AI's ability to autonomously process data has improved efficiency and provided solutions to global challenges.[1] However, alongside its advancement, AI has also raised ethical concerns regarding its associated risks and potential dangers.[2] One such example is the emergence of the slogan "No AI Art," which reflects artists' protests against AI-generated artworks that utilize human-made creations without attribution or compensation, ultimately raising copyright infringement issues.[3] The risks and dangers of AI are further exemplified by the fatal accident involving a Tesla autonomous vehicle in China in 2015, as well as 723 reported autonomous vehicle collisions in California between 2023 and July 2024.[4]

The growing risks posed by the deployment of AI highlight the importance of effective regulation to mitigate potential harm, particularly in terms of safety and governance. Concerns over AI-related risks have drawn the attention of states, international organizations, and non-state actors such as academics, industry stakeholders, and civil society. These concerns have sparked multidimensional debates encompassing technology, economics, ethics, law, and socio-political aspects.[5] Furthermore,

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1 Siti Masrichah, "Ancaman Dan Peluang Artificial Intelligence (AI)," *Khatulistiwa: Jurnal Pendidikan Dan Sosial Humaniora* 3, no. 3 (2023): 83–101, https://doi.org/10.55606/khatulistiwa.v3i3.1860.

2 Rostam Josef Neuwirth, "Prohibited Artificial Intelligence Practices in the Proposed EU Artificial Intelligence Act," *SSRN Electronic Journal*, https://doi.org/10.1016/j.clsr.2023.105798.

3 Jess Weatherbed, "ArtStation Is Hiding Images Protesting AI Art on the Platform," The Verge, December 23, 2022, accessed September 15, 2024, https://www.theverge.com/2022/12/23/23523864/artstation-removing-anti-ai-protest-artwork-censorship.

4 Wenjun Wu, Tiejun Huang, and Ke Gong, "Ethical Principles and Governance Technology Development of AI in China," *Engineering* 6, no. 3 (2020): 302–9, https://doi.org/10.1016/j.eng.2019.12.015; California Department of Motor Vehicles, "Autonomous Vehicle Collision Reports," California DMV, 2024, accessed July 27, 2024, https://www.dmv.ca.gov/portal/vehicle-industry-services/autonomous-vehicles/autonomous-vehicle-collision-reports/; "Examining Autonomous Car Accidents and Statistics," Lee, Gober & Reyna – Texas Personal Injury Attorneys, 2024, accessed July 27, 2025, https://www.lgrlawfirm.com/blog/examining-autonomous-car-accidents-and-statistics-2/.

5 Margarita Robles Carrillo, "Artificial Intelligence: From Ethics to Law," *Telecommunications Policy* 44, no. 6 (2020): 2, https://doi.org/10.1016/j.telpol.2020.101937.

the emerging regulatory competition at various levels indicates that ethical principles alone may be insufficient to address the complex challenges presented by AI.[6]

A major milestone in AI regulation was the publication of the White Paper on AI-A European Approach to Excellence and Trust by the European Commission in February 2020, followed by a formal legislative proposal in April 2021, and the adoption of the Artificial Intelligence Act (AI Act) in July 2024. The Act entered into force in August 2024 and will be fully applicable by 2027.[7] However, the AI Act also carries strong extraterritorial implications, giving rise to the so-called "Brussels Effect" due to the EU's market dominance and its ability to shape global standards in AI marketing.

Previous studies have indicated that the EU AI Act has the potential to become a global standard through the dissemination of EU values and standards via AI regulation. However, the presence of the Brussels Effect in each EU regulation also carries the risk of unintended consequences, including the weakening of human rights protections due to regulatory distortion.[8] Another study outlines three potential approaches to the future standardization of the AI Act, to be carried out through European Standardisation Organisations (SSOs). First, the SSO approach addresses complex normative questions independently. This approach may raise concerns regarding democratic legitimacy, as it tends to rely on technical discourse and often excludes non-expert stakeholders and the wider public. Second, the SSO tracks existing normative consensus by analyzing the standard-setting history of a major SSO to determine appropriate standards. Third, the SSO establishes a default minimum ethics disclosure standard, which

6 "Ethic and Governance of Artificial Intelligence for Health", World Health Organization, 2021, p. 23, accessed September 15, 2024, https://iris.who.int/bitstream/handle/10665/341996/9789240029200-eng.pdf?sequence=1.

7 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (OJ L202, 12 July 2024), 1–142.

8 Marco Almada and Anca Radu, "The Brussels Side-Effect: How the AI Act Can Reduce the Global Reach of EU Policy," *German Law Journal* 25, no. 4 (2024): 646–63, https://doi.org/10.1017/glj.2023.108.

defines basic technical, documentation, and public reporting requirements. This shifts ethical decision-making to local stakeholders and limits the discretion of providers in addressing difficult normative questions during the development of AI products and services. These three approaches give rise to new challenges concerning democratic legitimacy and inclusiveness in the development of AI.[9]

Based on the findings of the two aforementioned studies, a significant gap has been identified in the existing literature, namely the absence of discussion regarding the legal recognition of AI entities within the AI Act and the broader policy implications of regulatory instrument for AI governance in third countries and other regional organizations. Accordingly, this study aims to further explore the direction and perspective of the AI Act's regulatory framework, with a particular focus on the recognition of AI entities as a foundational element of its governance structure. It also seeks to analyze the influence of the AI Act on AI regulation in third countries and regional bodies, which may contribute to the formation of new international customary norms within the global AI development ecosystem. This research adopts a doctrinal legal method, supported by a statutory approach and a comparative legal approach. The statutory approach involves an examination of the EU AI Act and other relevant legal instruments, while the comparative legal approach is applied by comparing the EU regulatory model with those of third countries such as China and the United States, as well as regional organizations such as ASEAN.

2. Regulatory Characteristics and Structure of the EU AI Act

Global concerns over the rapid development of AI have triggered competition in drafting legal instruments to regulate its growth.[10] The unpredictable nature of AI, its lack of controllability, and the multiple risks already identified underscore the urgency of establishing specific regulations that

9 Johann Laux, Sandra Wachter, and Brent Mittelstadt, "Three Pathways for Standardisation and Ethical Disclosure by Default under the European Union Artificial Intelligence Act," *Computer Law & Security Review* 53 (2024): 1–13, https://doi.org/10.1016/j.clsr.2024.105957.

10 Esmat Zaidan and Imad Antoine Ibrahim, "AI Governance in a Complex and Rapidly Changing Regulatory Landscape: A Global Perspective," *Humanities and Social Sciences Communications* 11, no. 1 (2024): 2, https://doi.org/10.1057/s41599-024-03560-x.

can balance innovation with safety.[11] Policies in various countries generally focus on three intersecting and often conflicting aspects: the growth of the domestic AI industry, ethical considerations, and AI governance.[12]

The transformative potential of AI, with cross-sectoral impacts, has encouraged the emergence of various approaches ranging from ethics-based self-regulation to binding legal frameworks.[13] This shift aims to prevent misuse while creating a sustainable ethical ecosystem.[14] One of the binding legal instruments is the EU AI Act, a regulation that applies automatically and uniformly across EU Member States without the need for adoption or legal transplantation into national law. The general approach of the EU AI Act includes specific chapters governing collaborative governance structures involving both EU institutions and national bodies, thereby fostering the participation of stakeholders. This approach reflects the concept of collaborative governance, characterized by continuous knowledge exchange between public institutions and diverse stakeholders including citizens, businesses, NGOs, and academia in the policymaking process.[15] Such collaborative governance enables the integration of multiple perspectives, resulting in more comprehensive and evidence-based policies.

The formulation of the EU AI Act was grounded in the *White Paper on AI – A European Approach to Excellence and Trust* published by the European Commission, which outlined policy options to achieve dual objectives: promoting AI adoption while addressing risks arising from certain technologies, and building a trust-based ecosystem through a proposed

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11 Miriam C. Buiten, "Towards Intelligent Regulation of Artificial Intelligence," *European Journal of Risk Regulation* 10, no. 1 (2019): 48, https://doi.org/10.1017/err.2019.8.

12 Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Cham: Palgrave Macmillan, 2019), 225, https://doi.org/10.1007/978-3-319-96235-1.

13 Celso Cancela-Outeda, "The EU's AI Act: A Framework for Collaborative Governance," *Internet of Things* 27, no. 3 (2024): 101291, https://doi.org/10.1016/j.iot.2024.101291; Michael Veale, Kira Matus, and Robert Gorwa, "AI and Global Governance: Modalities, Rationales, Tensions," *Annual Review of Law and Social Science* 19 (2023): 255–75, https://doi.org/10.1146/annurev-lawsocsci-020223-040749.

14 Tate Ryan-Mosley, "Vuelta al mundo por las regulaciones de la IA en 2024," MIT Technology Review, February 23, 2024, accessed January 27, 2025, https://technologyreview.es/article/vuelta-al-mundo-por-las-regulaciones-de-la-ia-en-2024/.

15 Carmine Bianchi, Greta Nasi, and William C. Rivenbark, "Implementing Collaborative Governance: Models, Experiences, and Challenges," *Public Management Review* 23, no. 11 (2021): 1586, https://doi.org/10.1080/14719037.2021.1878777.

legal framework for trustworthy AI. Based on the *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence*, the primary objective of the EU AI Act is to ensure that AI placed on the EU market or affecting EU society remains human-centric. In this way, citizens can trust that AI technologies are used safely and lawfully while respecting fundamental rights.[16] This is reinforced in Recital 1 of the EU AI Act, which states that the main purpose of the regulation is to improve the functioning of the internal market by establishing a legal framework for the development, marketing, provision, and use of AI systems in the EU. The Act ensures consistency with EU values, safeguards health, safety, fundamental rights, democracy, the rule of law, and the environment, while simultaneously fostering innovation. Moreover, it guarantees the free circulation of AI-based goods and services across Member States without additional restrictions.

The EU AI Act accommodates both the flexibility required by AI's evolution and the need for legal certainty through the establishment of generally agreed conceptual definitions. Recital 4 defines AI as "a fast evolving family of technologies that contributes to a wide array of economic, environmental and societal benefits across the entire spectrum of industries and social activities."[17] Meanwhile, Article 3 defines an AI system as

> a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.[18]

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16 Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, April 21, 2021, COM/2021/206 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021PC0206.

17 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (OJ L202, 12 July 2024), 1–142, Article 4.

18 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and

The determination of definitions plays a pivotal role in shaping regulatory approaches, including the legal treatment of AI as either products or services.[19] AI may be considered a service when integrated into existing products to enhance functionality (e.g., chatbots, spam filters, facial recognition, AI-enabled cameras). Conversely, AI may also be considered a product when it requires the development of standalone applications, such as large language models (e.g., ChatGPT), autonomous vehicles, and virtual assistants.[20]

Several key terms are introduced in the EU AI Act, including foundation models, general-purpose AI models (GPAIMs), and generative AI.[21] A foundation model is a versatile AI model trained on large-scale datasets, capable of performing various tasks and serving as a foundational layer.[22] A GPAIM is an AI system based on a foundation model, designed to serve multiple purposes either directly or through integration with other systems.[23] Generative AI, on the other hand, refers to AI models specifically designed to generate new content such as text, images, audio, or code resembling or imitating human-created content.[24]

(EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (OJ L202, 12 July 2024), 1–142, Article 3.

19 Kostina Prifti, "Is Artificial Intelligence a Product or a Service?," RAILS: Robotics & AI Law Society, May 7, 2023, accessed January 24, 2025, https://blog.ai-laws.org/is-artificial-intelligence-a-product-or-a-service/.

20 Ishan Wadhwani, "Defining AI: Feature vs. Product," Medium, June 26, 2024, accessed January 27, 2025, https://medium.com/@ishanwadhwani/defining-ai-feature-vs-product-852d62dd9f27.

21 David Fernández-Llorca et al., "An Interdisciplinary Account of the Terminological Choices by EU Policymakers Ahead of the Final Agreement on the AI Act: AI System, General Purpose AI System, Foundation Model, and Generative AI," *Artificial Intelligence and Law*, published ahead of print, August 9, 2024, p. 2, https://doi.org/10.1007/s10506-024-09412-y.

22 Philipp Hacker, Andreas Engel, and Marco Mauer, "Regulating ChatGPT and other Large Generative AI Models." In *Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency (FAccT '23)* (New York: Association for Computing Machinery, 2023), 1113–5, https://doi.org/10.1145/3593013.3594067.

23 Fernández-Llorca et al., "An Interdisciplinary Account of the Terminological Choices by EU Policymakers Ahead of the Final Agreement on the AI Act," 7.

24 Philipp Hacker, "The European AI Liability Directives – Critique of a Half-Hearted Approach and Lessons for the Future," *Computer Law & Security Review* 51 (2023): 10, https://doi.org/10.1016/j.clsr.2023.105871.

The adoption of such terminology in the EU AI Act carries global consequences through the so-called Brussels Effect. Given the size of the EU market, developers worldwide are incentivized to align their products with EU standards.[25] The regulation adopts a comprehensive horizontal approach by regulating high-risk applications, establishing obligations for providers and users, requiring conformity assessments prior to market placement, introducing post-market monitoring, and creating governance structures at both EU and national levels.[26] In addition, the EU AI Act applies a risk-based approach, combining the probability and severity of harm, and classifies AI systems into four risk levels:

(1) Minimal or no risk – AI systems with the lowest risk, such as email spam filters, are not subject to specific obligations under the EU AI Act. Their development and use are governed only by general provisions, as set out in Article 95 (*Codes of conduct for the voluntary application of specific requirements*) and Article 96 (*Guidelines from the Commission on the implementation of this Regulation*).
(2) Limited risk – limited-risk systems, such as AI chatbots, must ensure that users are aware they are interacting with a machine, thereby allowing them to make informed decisions. In addition to general provisions, limited-risk AI systems are also subject to Article 50, which requires minimum transparency obligations for both providers and users.
(3) High-risk AI system – such systems have significant impacts on users' life opportunities or may pose serious threats to safety and fundamental rights.[27] Annex III of the EU AI Act identifies eight categories

[25] Anu Bradford, *The Brussels Effect: How the European Union Rules the World*, 1st ed. (New York: Oxford University Press, 2020), 9, https://doi.org/10.1093/oso/9780190088583.001.0001.

[26] Yoshija Walter, "Managing the Race to the Moon: Global Policy and Governance in Artificial Intelligence Regulation – A Contemporary Overview and an Analysis of Socioeconomic Consequences," *Discover Artificial Intelligence* 4, no. 1 (2024): 1–24, https://doi.org/10.1007/s44163-024-00109-4; Natalia Díaz-Rodríguez et al., "Connecting the Dots in Trustworthy Artificial Intelligence: From AI Principles, Ethics, and Key Requirements to Responsible AI Systems and Regulation," *Information Fusion* 99 (2023): 101896, https://doi.org/10.1016/j.inffus.2023.101896.

[27] The European Commission, "Artificial Intelligence – Q&As," Ec.Europa.Eu, August 1, 2024, accessed January 27, 2025, https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1683.

of high-risk systems: biometrics, critical infrastructure, education, employment, access to essential private and public services, law enforcement, migration management, and administration of justice and democratic processes.

(4) Unacceptable risk – AI systems deemed to pose unacceptable risks are strictly prohibited from being placed on the market, provided, or used within the EU, as they are considered to endanger safety, livelihoods, and fundamental rights. Prohibited systems include subliminal or manipulative techniques, exploitative systems, remote real-time biometric identification, and social scoring.[28]

The obligations imposed by the EU AI Act vary depending on the level of risk and the roles of actors involved, including providers, deployers, importers, distributors, operators, and authorized representatives.[29] A summary of these obligations includes:

(1) Providers – they are natural or legal persons who develop, market, or use AI systems under their own name or trademark, for commercial profit or free of charge. General providers must register their AI systems in the EU database and ensure information transparency. They are also required to conduct model evaluations, risk mitigation, continuous monitoring, reporting to the AI Office, and ensuring cybersecurity. High-risk AI providers are subject to additional obligations such as risk management, data governance, technical documentation, record-keeping, human oversight, conformity declaration, CE marking, post-market monitoring, and incident reporting.

(2) Deployers – they are natural or legal persons using AI systems under their authority, except for personal, non-professional use. Their general obligations include ensuring transparency, particularly in emotion recognition, biometric categorization, and synthetic content. For high-risk

28 Fabian Heymann et al., "Operating AI Systems in the Electricity Sector under European's AI Act – Insights on Compliance Costs, Profitability Frontiers and Extraterritorial Effects," *Energy Reports* 10 (2023): 4540, https://doi.org/10.1016/j.egyr.2023.11.020.

29 Asress Adimi Gikay, "Risks, Innovation, and Adaptability in the UK's Incrementalism versus the European Union's Comprehensive Artificial Intelligence Regulation," *International Journal of Law and Information Technology* 32, no. 1 (2024): 6, https://doi.org/10.1093/ijlit/eaae013.

AI systems, deployers are further required to provide operational guidance, ensure human oversight, use relevant input data, manage information responsibly, conduct human rights impact assessments, report incidents, and provide explanations for AI-generated decisions.

(3) Importers – they are natural or legal persons established in the EU who place AI systems on the market under the name or trademark of a non-EU entity. They are responsible for ensuring full compliance of marketed systems, including safe storage and transport, proper documentation, and cooperation with authorities for risk mitigation.

(4) Distributors – they are natural or legal persons in the supply chain, other than providers or importers, who make AI systems available on the EU market. Their obligations include ensuring compliance with regulations, guaranteeing secure storage and distribution, and taking corrective actions in cases of non-compliance.

The EU's commitment to AI regulation is further demonstrated by the imposition of proportional sanctions on parties failing to comply with the EU AI Act.[30] To support compliance in AI development, deployment, and risk management, the EU has established the European AI Office within the European Commission as the central hub for AI expertise and governance in Europe. Additionally, the EU AI Act establishes the European Artificial Intelligence Board, composed of representatives from Member States, to assist the AI Office in ensuring consistent and effective implementation of the regulation across the Union.

3. The Brussels Effect and the EU AI Act's Global Influence

The rapid advancement of AI has raised profound concerns regarding its misuse for disinformation, propaganda, and censorship, all of which carry serious implications for human rights and individual freedoms.[31] This situation has triggered a global competition to develop AI regulations, not only

[30] Qiang Ren and Jing Du, "Harmonizing Innovation and Regulation: The EU Artificial Intelligence Act in the International Trade Context," *Computer Law & Security Review* 54 (2024): 1, https://doi.org/10.1016/j.clsr.2024.106028.

[31] Bilge Azgin and Sevki Kiralp, "Surveillance, Disinformation, and Legislative Measures in the 21st Century: AI, Social Media, and the Future of Democracies," *Social Sciences* 13, no. 10 (2024): 1, https://doi.org/10.3390/socsci13100510.

to safeguard national security and economic interests but also to secure strategic positions in the global market. Designing an appropriate regulatory framework for AI governance is particularly significant for regulators, as first movers in regulation often gain a competitive advantage. However, the exploration of AI markets entails the risk that a "race to the top" in regulatory standards may paradoxically devolve into a "race to the bottom," driven by regulatory competition that compromises adequate protection against AI-related risks. Regulatory intervention by one state or organization frequently prompts others to adapt their legal frameworks, generating dynamic interactions between governments and technology companies, each striving to protect their respective interests in a rapidly evolving regulatory landscape.[32]

The notion of AI sovereignty, or the need for control over digital infrastructures across physical, code, and information layers, has been a central ambition of the EU AI Act. The Act's strategy emphasizes protecting citizens while maximizing the social benefits of AI. However, this inward-looking approach raises questions about Europe's responsibility toward societies outside its borders, particularly in low-income countries disproportionately affected by the Act's extraterritorial implications. The formulation of the AI Act explicitly reflects Europe's awareness of its external impact. By framing its regulatory leadership as ethically superior, the EU implicitly portrays itself as advancing AI for the benefit of all, while simultaneously attracting global technology talent through legal migration channels often at the expense of developing countries' expertise. Consequently, the EU plays a decisive role in shaping the trajectory of the global digital transformation.[33]

The EU's role in global AI governance exemplifies the Brussels Effect, a market-based mechanism through which the EU exports its regulatory standards via soft enforcement, leveraging the strength of its internal market. This phenomenon manifests de facto when companies comply with EU

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32 Nathalie A. Smuha, "From a 'Race to AI' to a 'Race to AI Regulation': Regulatory Competition for Artificial Intelligence," *Law, Innovation and Technology* 13, no. 1 (2021): 57–84, https://doi.org/10.1080/17579961.2021.1898300.

33 Daniel Mügge, "EU AI Sovereignty: For Whom, to What End, and to Whose Benefit?," *Journal of European Public Policy* 31, no. 8 (2024): 2200–25, https://doi.org/10.1080/13501763.2024.2318475.

standards for economic reasons, thereby aligning their practices globally. It also occurs *de jure* when third countries transplant EU regulatory approaches into their domestic frameworks, often due to political pressure to keep pace with technological progress or corporate lobbying that distorts democratic processes.[34] The extraterritorial scope of the AI Act applies to all stakeholders providers, users, importers, and distributors effectively restricting third-country actors from placing AI systems on the EU market unless they comply. The EU's vast market power incentivizes participation in the single market, even though providers outside Europe have limited flexibility to avoid the Act's reach. As a result, third-country adoption of the AI Act facilitates global regulatory harmonization in AI governance. Nonetheless, the Brussels Effect may also dilute the normative values embedded in the Act, particularly those relating to human rights, democracy, and the rule of law, if only partial recognition of its provisions occurs. Such dilution poses new risks for the global development of AI.[35]

One illustration of the Brussels Effect can be seen in the Digital Services Act (DSA). Regulatory convergence under the DSA demonstrates how the EU deploys soft power to shape global standards unilaterally.[36] The transplantation of European law into other jurisdictions is primarily driven by advocacy of norms, values, and principles, rather than traditional sources of power such as military or economic dominance.[37] Through diplomacy, international agreements, and the influence of non-state actors, the EU actively promotes its normative agenda beyond its borders. However, cultural sensitivities and diversity often lead to varying interpretations and responses.[38] In the Global South, particularly in former European colonies such as

34 Bradford, *The Brussels Effect*, 251.

35 Charlotte Siegmann and Markus Anderljung, "The Brussels Effect and Artificial Intelligence: How EU Regulation Will Impact the Global AI Market," version 1, preprint, arXiv, 2022, p. 35, https://doi.org/10.48550/ARXIV.2208.12645.

36 Thales Martini Bueno and Renan Gadoni Canaan, "The Brussels Effect in Brazil: Analysing the Impact of the EU Digital Services Act on the Discussion Surrounding the Fake News Bill," *Telecommunications Policy* 48, no. 5 (2024): 2, https://doi.org/10.1016/j.telpol.2024.102757.

37 Ian Manners, "Normative Power Europe: A Contradiction in Terms?," *JCMS: Journal of Common Market Studies* 40, no. 2 (2002): 235–58, https://doi.org/10.1111/1468-5965.00353.

38 Daniel Bertram, "Accounting for Culture in Policy Transfer: A Blueprint for Research and Practice," *Political Studies Review* 20, no. 1 (2022): 88, https://doi.org/10.1177/1478929920965352.

Indonesia, the EU is still perceived as the pinnacle of progress, which often prompts legislators to adopt or transplant EU legal frameworks when faced with regulatory dilemmas.

Another prominent case of the Brussels Effect arises from the General Data Protection Regulation (GDPR). De facto, the GDPR has become a global standard, driven by the importance of the European market and the inelastic nature of personal data.[39] Multinational corporations such as Apple and Meta have proactively implemented integrated privacy policies across jurisdictions, reflecting voluntary compliance with EU rules.[40] *De jure*, the GDPR establishes binding extraterritorial obligations, most notably in Article 44, which requires third countries and international organizations to adhere to EU rules in any transfer or processing of personal data. A similar model is evident in the AI Act, particularly Article 2(1), which extends the Act's applicability to providers, distributors, importers, and users both inside and outside EU territory. Therefore, the potential Brussels Effect of the EU AI Act, both *de facto* and *de jure*, not only fosters the harmonization of global regulations but also shapes the development of new international customary norms in AI governance. Such new customary norms emerge through the widespread and repeated compliance with the provisions of the EU AI Act by various states, thereby generating *opinio juris* that the standards enshrined in the EU AI Act constitute binding legal obligations in the global development and use of AI, particularly with regard to the protection of human rights, democracy, and the rule of law.

3.1. Third Countries

3.1.1. United States of America

One of the third countries that has developed its own AI regulatory framework is the United States of America (USA), which adopts a sectoral, decentralized, and vertical approach. AI regulation in the USA is largely

[39] Renan Gadoni Canaan, "The Effects on Local Innovation Arising from Replicating the GDPR into the Brazilian General Data Protection Law," *Internet Policy Review* 12, no. 1 (2023): 4, https://doi.org/10.14763/2023.1.1686.

[40] Kieron O'Hara, "The Second Internet: The Brussels Bourgeois Internet," in *Four Internets*, eds. Kieron O'Hara, Wendy Hall, and Vinton Cerf (New York: Oxford University Press, 2021), 77–91, https://doi.org/10.1093/oso/9780197523681.003.0007.

formulated at the state level, resulting in variations across sectors, industries, and applications within each state.[41] Pursuant to Section 101 of the *National Artificial Intelligence Initiative Act of 2020*, the USA implements AI governance through the *National Artificial Intelligence Initiative (NAII)* to ensure American leadership in global AI development and research.[42]

The development of AI is not specifically regulated under a single national law in the USA. However, the country has issued non-binding documents, most notably the *Blueprint for an AI Bill of Rights (BOR)*, which aligns with the principles of the EU AI Act. The BOR adapts the EU's normative values by outlining five principles: Safe and effective systems; Algorithmic discrimination protections; Data privacy; Notice and explanation; and Human alternatives, consideration, and fallback.[43] These principles are designed to support the formulation of policies and practices that safeguard civil rights in the governance of AI systems. In addition, the USA has developed the *NIST AI 100–1: AI Risk Management Framework (RMF)*, a voluntary framework that provides guidance for managing risks throughout the lifecycle of AI applications across organizations. The framework operates along four dimensions: Govern, Map, Measure and Manage.[44]

The sectoral approach to AI regulation in the USA has resulted in regulatory diversity across different institutions. This is reflected in the adoption of various sector-specific statutes, such as the Colorado AI Act (CAIA), the National Defense Authorization Act (NDAA), and the Artificial Intelligence Video Interview Act (AIVIA). First, the CAIA emphasizes consumer protection in interactions with AI systems, adopting a risk-based approach similar to that of the EU AI Act, by imposing specific obligations

41 Fabian Heymann et al., "Regulating Artificial Intelligence in the EU, United States and China – Implications for Energy Systems," in *2023 IEEE PES Innovative Smart Grid Technologies Europe (ISGT EUROPE)* (Grenoble: IEEE, 2023), 1–6, https://doi.org/10.1109/ISGTEUROPE56780.2023.10407482.

42 United States Congress, H.R. 6216 – National Artificial Intelligence Initiative Act of 2020, 116th Congress (2019–2020), introduced March 12, 2020, Section 101.

43 Blueprint for an AI Bill of Rights, Office of Science and Technology Policy, The White House, October 2022 (archived), "Making Automated Systems Work for the American People."

44 National Institute of Standards and Technology, *Artificial Intelligence Risk Management Framework* (AI RMF 1.0), NIST AI 100–1 (National Institute of Standards and Technology (U.S.), 2023), NIST AI 100–1, https://doi.org/10.6028/NIST.AI.100-1.

on developers, users, and other stakeholders involved in high-risk AI systems.[45] Second, the NDAA incorporates AI-related provisions that direct defense agencies to adopt AI technologies for strategic and operational purposes in national defense and security.[46] Third, the AIVIA regulates the use of AI in-job interviews by prohibiting certain practices, such as evaluating job applicants through AI-driven analysis without their prior consent.[47]

3.1.2. China

China adopts a hybrid approach to AI governance that combines horizontal and sectoral elements, emphasizing both AI innovation and strong state control. Compared to the EU AI Act, China applies more flexible standards by employing separate laws to regulate specific AI issues.[48] The horizontal approach is reflected in the *New Generation Artificial Intelligence Development Plan*, which introduces four fundamental principles: technology-led, systems layout, market-dominant, and open-source. This framework positions AI as a national strategic sector through the launch of the *National New Generation AI Innovation and Development Pilot Zone* and the integration of AI as a priority area in the Fourteenth Five-Year Plan.[49]

In addition, China has issued the *Interim Measures for the Management of Generative Artificial Intelligence Services* (Interim Measures) and drafted the *Cybersecurity Regulation in TC260: Basic Requirements for the Security of Generative Artificial Intelligence Services of Cybersecurity Technology* (TC260). The Interim Measures regulate the governance of generative AI services to safeguard national security and the public interest while

45 Colorado General Assembly, Senate Bill 24–205: Concerning Consumer Protections in Interactions with Artificial Intelligence Systems, enacted May 17, 2024.

46 United States Senate, S. 2296 – National Defense Authorization Act for Fiscal Year 2026, 119th Congress (2025–2026), passed by the Senate on 10 October 2025 (not yet enacted).

47 State of Illinois, HB2557 – Artificial Intelligence Video Interview Act, 101st General Assembly (2019–2020), enacted as Public Act 101–0260, effective January 1, 2020.

48 Walter, "Managing the Race to the Moon," 8.

49 State Council of the People's Republic of China, Notice on Issuing the New Generation Artificial Intelligence Development Plan (State Council Document No. 35 [2017]), issued on 8 July 2017 and published on 20 July 2017.

protecting citizens' rights.[50] Meanwhile, TC260, although not yet enacted, sets out the basic security requirements for generative AI services.[51]

3.1.3. Comparative Analysis

China's advancements in AI standardization have significantly impacted its geopolitical dynamics with the United States. Algorithms are not neutral; they reflect the socio-political visions of their creators and tend to reproduce and reinforce existing power structures. Given AI's strategic value in economic, military, and political domains, this dynamic has far-reaching consequences.[52]

At the global level, both China and the EU exert considerable influence over AI governance. China emphasizes technological innovation and rapid development, whereas the EU shapes business practices through the so-called Brussels Effect. The EU AI Act and the General Data Protection Regulation (GDPR) compel companies including those in the United States and China to comply with European standards to secure access to the EU market. A notable example is the regulatory scrutiny directed at TikTok over cross-border data flows.[53] In response, China has introduced domestic regulations aimed at counterbalancing the EU's normative influence on Chinese firms. Conversely, this competitive environment places the United States in a strategic yet dilemma-laden position: it must adapt to EU standards to preserve market access while simultaneously confronting the challenges posed by China's more authoritarian regulatory model.

These divergent regulatory models mirror each actor's position in the global AI market. The EU, as a dominant consumer, adopts a risk-based approach that prioritizes consumer protection. China, as a leading producer, advances innovation coupled with strong state control and the projection of

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50 Provisional Measures for the Administration of Generative AI Services (Order No. 15, jointly promulgated by the Cyberspace Administration of China and other ministries), adopted May 23, 2023, effective August 15, 2023.

51 Cybersecurity Technology – Basic Security Requirements for Generative Artificial Intelligence Services (GB/T 45654–2025), national standard, adopted 25 April 2025, to enter into force 1 November 2025.

52 Marta Cantero Gamito, "The Influence of China in AI Governance through Standardisation," *Telecommunications Policy* 47, no. 10 (2023): 1, https://doi.org/10.1016/j.telpol.2023.102673.

53 Wenlong Li and Jiahong Chen, "From Brussels Effect to Gravity Assists: Understanding the Evolution of the GDPR-Inspired Personal Information Protection Law in China," *Computer Law & Security Review* 54 (2024): 5, https://doi.org/10.1016/j.clsr.2024.105994.

domestic political visions. The United States, by contrast, pursues a decentralized path characterized by sectoral regulation fragmented across states and federal agencies, resulting in legal uncertainty despite the dominance of its major technology corporations. Ultimately, the differences among the EU, China, and the United States reveal that their rivalry extends beyond technological competition to a broader struggle over setting global norms for AI governance.

3.2. Regional Organizations – The Association of Southeast Asian Nations (ASEAN)

The EU AI Act not only influences third countries but also exerts a significant impact on regional organizations such as ASEAN. This influence is reflected in the *Joint Statement by the ASEAN Defence Ministers on Cooperation in the Field of Artificial Intelligence in the Defence Sector (JS AI Defence)*, adopted during the ASEAN Defence Ministers' Meeting.[54] The JS AI Defence underscores the importance of regional cooperation in addressing non-traditional security threats, including potential risks arising from the development and use of AI. In addition, ASEAN has introduced the *ASEAN Guide on AI Governance and Ethics (ASEAN Guide AI)* and the *ASEAN Responsible AI Roadmap 2025–2030 (ASEAN AI Roadmap)* to strengthen AI governance across the region.

The ASEAN Guide AI establishes seven key principles: Transparency and Explainability, Fairness and Equity, Security and Safety, Robustness and Reliability, Human-Centricity, Privacy and Data Governance, and Accountability and Integrity derived and modified from the values embedded in the EU AI Act.[55] These principles emphasize the orientation of AI governance toward the protection of human rights, aligning with the reality that most ASEAN member states primarily serve as consumers of AI technologies. Consequently, the Guide adopts key elements from the EU AI Act

54 ASEAN Secretariat, "Joint Statement by the ASEAN Defence Ministers on Cooperation in the Field of Artificial Intelligence in the Defence Sector," ASEAN Main Portal, February 26, 2025, accessed April 27, 2025, https://asean.org/joint-statement-by-the-asean-defence-ministerial-on-cooperation-in-the-field-of-artificial-intelligence-in-the-defence-sector/.

55 ASEAN Guide on AI Governance and Ethics, ASEAN Secretariat, Jakarta, 2024.

as well as the *EU Ethics Guidelines for Trustworthy AI*, while adapting them to the regional context.[56]

The influence of the EU AI Act on ASEAN is further reinforced by the ASEAN AI Roadmap, which integrates the EU's risk-based approach and data protection standards. The implementation framework is structured in three phases: short-term, medium-term, and long-term, corresponding to the regulatory readiness and capacity of individual ASEAN member states.[57]

4. Conclusion

The EU AI Act represents the most comprehensive regulatory framework for artificial intelligence governance, adopting a risk-based and human-centered approach. This regulation seeks to balance the need for innovation with the protection of fundamental rights, democracy, and the rule of law. Through clear definitions, regulation of high-risk applications, and differentiated obligations for providers, deployers, importers, and distributors, the EU AI Act offers legal certainty while maintaining sufficient flexibility to accommodate technological developments. This underscores the European Union's role as a normative regulator that prioritizes ethical governance amidst global dynamics.

The influence of the EU AI Act extends through the Brussels Effect, both de facto via adoption by multinational corporations and de jure through transposition into the legal frameworks of third countries and regional organizations. This effect accelerates regulatory convergence and contributes to the formation of global norms, as illustrated by ASEAN's adoption of its principles in the AI Governance and Ethics Guide and the Responsible AI Roadmap. Nevertheless, selective adoption may give rise to normative challenges concerning human rights and democratic accountability. Accordingly, the EU AI Act functions not only as a domestic regulatory standard but also as a global benchmark that drives the emergence of new customary international norms in AI governance.

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56 "Ethics Guidelines for Trustworthy Artificial Intelligence, High-Level Expert Group on AI, European Commission," European Commission, April 8, 2019, accessed January 27, 2025, https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai.

57 "ASEAN Responsible AI Roadmap (2025–2030)," ASEAN Secretariat, adopted March 5, 2025, accessed January 27, 2025, https://asean.org/book/asean-responsible-ai-roadmap-2025-2030/.

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AI-Assisted Works: Copyrightability in the United States, China, and the EU, and Implications for Academic Integrity

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Abstract: This article explores the legal aspects of the copyrightability of AI-assisted works in the U.S., China, and the EU, within the context of a fundamental principle shared across these jurisdictions: only creations involving meaningful human creative choices are eligible for copyright protection. The article also presents comparative insights from court rulings – including those in China and the U.S. – that reinforce the requirement of human authorship for copyright protection and the legal and ethical implications of using generative artificial intelligence (AI) in academic work, with a focus on academic integrity, authorship, and copyright compliance. It analyzes recent developments in legislation, case law, and internal university regulations in jurisdictions including the European Union, the United States, China, and selected EU Member States. The central thesis is that AI-generated content cannot be regarded as an outcome of independent scholarly work if it replaces the creative process – particularly the development of a research concept and first draft. While AI tools offer efficiency and support in technical tasks such as grammar correction or literature searches, their unauthorized or undisclosed use in substantive academic writing constitutes a breach of academic ethics and may lead to the invalidation of academic degrees. Moreover, it emphasizes the growing need for universities to adopt AI detection policies that respect the presumption of innocence and align with data protection law. Ultimately, the article argues for preserving academic authorship as an intellectual process that cannot be outsourced to machines – lest scientific credibility itself be undermined.

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1. Copyright Protection for AI-Generated Content in Academic Work: An Analysis of the Legal Framework in the United States, China, and the European Union

1.1. The Threshold of Human Creativity as a Condition for Copyright Protection in the Age of Generative AI

The first step is to determine whether content created using generative artificial intelligence qualifies for copyright protection. Content generated exclusively by artificial intelligence (AI) does not qualify for copyright protection because, not being the result of human labor, creativity, or originality, it lacks the characteristics of individual creative activity and therefore does not satisfy the legal definition of a "work." A key consideration is the degree of human involvement in the creation process. The generation of content solely by AI – as opposed to human creativity supported by AI in reasonable and fair proportions through auxiliary or technical functions – does not meet the threshold for authorship.

The United States Copyright Office (USCO) confirmed this position in a decision dated January 29, 2025, stating that works assisted by artificial intelligence may qualify for copyright protection only if there is sufficient human creative input. The USCO underscored the "centrality of human creativity to copyright" as a fundamental principle.[1] In its guidance for copyright registration, applications issued on March 16, 2023, the USCO emphasized the importance of human authorship. The guidance specifies that applicants must disclose the extent of AI involvement and assess whether the decisive creative elements – such as conception and expression – stem from human input or from the algorithm.[2] Therefore, the extent of AI involvement in the creation of the work must be disclosed.

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1 The United States Copyright Office, "Part 2 of Artificial Intelligence Report," *NewsNet*, no. 1060 (2025), accessed July 28, 2025, https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf; Matt O'Brien, "AI-Assisted Works Can Get Copyright with Enough Human Creativity, Says Us Copyright Office," *The Associated Press*, January 29, 2025, accessed July 28, 2025, https://apnews.com/article/ai-copyright-office-artificial-intelligence-363f1c537eb86b624bf5e81bed70d459.

2 The United States Copyright Office, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence," *Federal Register* 88, no. 51 (March 16, 2023): 16190–4, accessed July 28, 2025, https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf.

The degree of human authorship was also central to the USCO's decision of February 21, 2023, regarding Kristina Kashtanova's graphic novel *Zarya of the Dawn*. The Office determined that the text and graphic layout of the work could be protected by copyright, but the images generated using the AI tool Midjourney did not satisfy the requirement of human authorship and therefore were not eligible for protection. In her application to the US Copyright Office (USCO) for the registration of the comic book, the applicant identified herself as the author. However, after the work was registered, the USCO obtained information indicating that the applicant had described the comic on social media as created with the assistance of the AI tool Midjourney. When asked to clarify the matter, the applicant stated that her creative contribution involved providing the initial prompt (a textual command) that served as the basis for the creation of the graphics by Midjourney, as well as making subsequent modifications to the prompt to generate graphics consistent with her artistic vision. The applicant maintained that the AI tool was used as an auxiliary instrument. The Office rejected this argument and denied copyright protection for the graphics, reasoning that the user of an AI tool does not exercise control over the generative process, and the outcome is not predictable. Consequently, only the text of the comic and the selection of graphics were deemed eligible for copyright protection.

A similar conclusion was reached by the United States District Court for the District of Columbia in its judgment of August 18, 2023, in *Thaler v. Perlmutter et al.*,[3] where the court affirmed the US Copyright Office's decision to deny copyright protection for an image generated entirely by AI.

A similar interpretation has been consistently observed in China for several years. Works generated by AI without substantial human contribution are not protected by copyright. However, Chinese case law recognizes that copyright may be granted to creators of works in which human creative activity played a decisive role, even if AI tools were also used in the creation process. In the case of *Feilin v. Baidu*, decided on April 26, 2019,[4] the disputed work was a database of court records concerning the entertainment

[3] *Thaler v. Perlmutter et al.*, No. 1:22-cv-01564, Document 24 (D.D.C., August 18, 2023).

[4] Beijing Internet Court, Civil Judgment of 25 April 2019, Jing 0491 Min Chu No 239, accessed November 12, 2025, https://english.bjinternetcourt.gov.cn/2019-05/28/c_168.htm.

industry in Beijing, created by the Beijing Feilin Law Firm. The database included AI-generated drawings that had been modified by the law firm, as well as textual commentary. The database was generated using the Wolters Kluwer China Law & Reference program and was published on Feilin's official WeChat account in 2018. The defendant, Beijing Baidu Netcom Technology Co., Ltd., published a slightly modified version of this database on its platform, arguing that no copyright infringement could have occurred since the work was generated by AI. During the evidentiary proceedings, the court compared the database generated using Feilin's initial criteria with the final published version. Based on the differences between them, the Beijing Internet Court ruled that the work was original and thus eligible for copyright protection.

Nonetheless, the key principle – consistent with the European and American approach –remains that AI-generated content does not qualify as a "work" under Chinese copyright law, as AI is not considered an "author." Furthermore, Chinese law imposes an obligation to label AI-generated content appropriately.

This conclusion – that content generated entirely by AI cannot be considered a work and is not subject to copyright protection – was also affirmed by the Nanshan District People's Court in Shenzhen in its judgment of November 25, 2019, in *Tencent v. Yingxun*.[5] The court held that human creative input is a necessary condition for copyright protection. The disputed work in that case was an article generated in 2018 by Tencent's AI system Dreamwriter. The article was marked as AI-generated and published by Tencent Beijing Co., Ltd. on its Tencent Securities website. Shanghai Yingxun Technology Co., Ltd. copied and republished the article online under the same title and content, maintaining the same indication that it had been generated by Dreamwriter.

A similar conclusion was reached in a notable ruling issued by the Beijing Internet Court in November 2023,[6] concerning the copyrightability of

[5] Shenzhen Nanshan District People's Court, Judgment of 24 December 2019, *Tencent v. Yingxun Tech*, Case (2019) Yue 0305 Min Chu 14010, accessed November 12, 2025, https://www.chinajusticeobserver.com/law/x/2019-yue-0305-min-chu-14010.

[6] Beijing Internet Court, Civil Judgment of 27 November 2023, *Li v. Liu*, Jing 0491 Min Chu No. 11279. English translation available at: https://archive.org/details/li-v-liu-beijing-internet-court-20231127-with-english-translation [accessed July 28, 2025].

AI-assisted works. In this case, the plaintiff employed Stable Diffusion, a text-to-image generative AI model, to produce an image of a young woman by entering a combination of positive and negative prompts, as well as adjusting various parameters. Importantly, the court emphasized that the plaintiff did not merely retrieve pre-existing images or recombine pre-designed elements; rather, they actively designed the appearance of the woman portrayed in the image by crafting a prompt structure intended to yield a specific visual outcome. The plaintiff iteratively refined the prompts based on initial outputs generated by Stable Diffusion, demonstrating a clear degree of intentionality and human input in shaping the final image.

With respect to the requirement of originality, the court reaffirmed that this concept generally entails that a work must be independently completed by the author and must reflect their subjective expression. Even though the plaintiff did not manually draw the image with traditional tools, the court found that the design choices, prompt engineering, and parameter adjustments amounted to a sufficient degree of personal intellectual effort. On this basis, the court concluded that the final output met the standard of originality and qualified as a copyrightable work. Crucially, the court also took into account the licensing terms of Stable Diffusion, which explicitly state that the developers of the model do not claim ownership over any output. In light of the plaintiff's decisive role in the creative process and the absence of competing ownership claims, the court recognized the plaintiff as the rightful author and copyright holder of the image.

European Union law does not provide clear solutions in this area. Therefore, it is important to recognize the value of the limited case law that has emerged to address the challenges posed by AI. One of the first such rulings was the judgment of the Prague Municipal Court on October 11, 2023,[7] which denied the plaintiff copyright protection for an image generated by the DALL-E application based on a prompt, citing the absence of creative input (the prompt based on which DALL-E generated the image was very simple – just an instruction to depict the hands of two parties signing a contract at a law firm). This ruling aligns with the judgment of

[7] Prague Municipal Court, Judgment of 11 October 2023, Case no. 10 C 13/2023.

the Court of Justice of the European Union (CJEU) of 1 December 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and others*,[8] which emphasized the importance of creative effort, individual inventive activity, and intellectual creativity by the author.

Similarly, Polish case law underscores the requirement of individuality as inherently linked to human creative activity. For instance, the Appellate Court in Gdansk, in its Judgment of 30 September 2020,[9] explicitly affirmed this principle.

However, the development of AI, in my view, necessitates revisiting the question of the boundaries of human involvement in the creative process. We cannot rely solely on answers provided even just a decade ago, as the technological landscape has since shifted dramatically. An illustration of this shift can be found in a passage from the commentary on Article 1 of the Copyright Act (of Poland) by J. Barta and R. Markiewicz, whose work *Prawo autorskie*[10] (*Copyright Law*) carries exceptional authority. In defining a work as the "result of human labor (creativity)," they state that a pattern "painted" on glass by frost cannot be considered a work. The commentary was published in 2016, but the reality has changed in the nine years since – due not only to the widespread availability of AI, but also because, after all, when was the last time anyone in Central Europe saw frost flowers on a windowpane?

Across the jurisdictions discussed here, the fundamental principle is consistent in law, case law, and regulatory guidance: only creations involving meaningful human creative choices are eligible for copyright protection. Below are examples from each jurisdiction. The United States Copyright Office (USCO) confirmed (January 29, 2025) that works assisted by artificial intelligence may qualify for copyright protection only if there is sufficient human creative input, and underscored the "centrality of human creativity to copyright" as a fundamental principle. In China in *Li v. Liu*

8 CJEU Judgment of 1 December 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, Case C-145/10, ECLI:EU:C:2011:798.

9 Apellate Court in Gdansk, Judgment of 30 September 2020, Ref. No. V AGa 74/19.

10 Janusz Barta and Ryszard Markiewicz, *Prawo autorskie*, 8th ed. (Warszawa: Wolters Kluwer Polska, 2016).

(Beijing Internet Court, November 27, 2023[11]), the court recognized copyright in an image generated using Stable Diffusion – on the basis that the plaintiff's detailed prompts and further parameter selection reflected individualized intellectual input and satisfied the originality criterion under Chinese Copyright Law. The EU does not yet provide clear solutions in this area, but the Court of Justice of the European Union (CJEU), in its judgment of December 1, 2011 (*Eva-Maria Painer v. Standard VerlagsGmbH and others*[12]), emphasized the importance of creative effort, individual inventive activity, and intellectual creativity by the author.

1.2. Fair Use

To provide a comprehensive comparison of the copyright laws of these three legislations in the context of artificial intelligence, I should mention several recent and landmark rulings by U.S. federal courts concerning the legality of copying books for the purpose of training large language models (LLMs) in lawsuits brought against Anthropic (Claude model) and Meta Platforms (LLaMA model). In particular, this pertains to the rulings in *Bartz et al. v. Anthropic PBC* (Claude)[13] and *Kadrey et al. v. Meta Platforms, Inc.* (LLaMA)[14], including the ongoing proceedings regarding the alleged use of hundreds of thousands of unauthorized copies of books. The court held that the use of millions of books to train the Claude language model did not constitute copyright infringement, as it fell within the boundaries of "fair use." This conclusion was primarily based on the finding that "the purpose and character of using copyrighted works to train LLMs to generate new text was quintessentially transformative."[15] However, the provenance

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11 Beijing Internet Court, Civil Judgment of 27 November 2023, *Li v. Liu*, Jing 0491 Min Chu No. 11279.

12 CJEU Judgment of 1 December 2011, *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, Case C-145/10, ECLI:EU:C:2011:798.

13 United States District Court for the Northern District of California, Judgment of June 23, 2025, *Bartz et al. v. Anthropic PBC*, Case no. 3:24-cv-05417-WHA.

14 United States District Court for the Northern District of California, Judgment of June 25–26, 2025, *Kadrey et al. v. Meta Platforms, Inc.*, Case no. 23-cv-03417-VC.

15 United States District Court for the Northern District of California, Judgment of June 23, 2025, *Bartz et al. v. Anthropic PBC*, Case no. 3:24-cv-05417-WHA.

of the training data – namely, the source of the books used – remained a problematic and unresolved issue.

The court described the phrase "quintessentially transformative" in the following context:

> Everyone reads texts, too, then writes new texts. They may need to pay for getting their hands on a text in the first instance. But to make anyone pay specifically for the use of a book each time they read it, each time they recall it from memory, each time they later draw upon it when writing new things in new ways would be unthinkable.[16]

While these rulings are of fundamental importance to the American interpretation of the fair use doctrine in the context of AI training, they also complement the core subject of this article, which concerns the absence of copyright protection for AI-generated content created without sufficient human involvement. The article focuses on the inadmissibility of freely using such AI-generated outputs in academic work, even in the absence of copyright protection, as this practice may violate, which I think I managed to demonstrate, academic integrity – specifically, the requirements of independent authorship, proper attribution, and transparent documentation of sources.

It is important to emphasize that these rulings have thus far been issued only at the first instance level, and other lawsuits concerning the training of large language models (LLMs) using copyrighted content are still ongoing. Nevertheless, a clear trend is emerging in U.S. case law toward a permissive interpretation of the fair use doctrine in favor of technology companies. This may ultimately mark a fundamental divergence from the regulatory approach being developed within the European Union.

For now, I deliberately say *may*, as the American jurisprudence in this area remains unsettled, while in Europe, concerns surrounding generative artificial intelligence and copyright law are primarily reflected in non-binding reports produced by the European Parliament. These reports stand in marked contrast to U.S. court decisions and adopt positions less favorable to technology firms. Still, one should keep in mind that truly disconnecting

[16] Judge William Alsup, ibid.

from American AI would presuppose the existence of a viable European alternative…

In the report "Generative AI and Copyright – Training, Creation, Regulation," prepared by the Policy Department for Justice, Civil Liberties and Institutional Affairs (Directorate-General for Citizens' Rights, Justice and Institutional Affairs) at the request of the JURI Committee of the European Parliament, the authors call, among other things, for the establishment of mandatory licensing schemes, greater transparency in model training processes, and financial compensation for authors.[17] Similarly, in the draft own-initiative report of the European Parliament (2025/2058(INI)), presented by MEP Axel Voss (EPP) and published on July 7, 2025,[18] it is proposed that any commercial use of protected works for the training of AI systems should entail mandatory compensation for authors, and that opt-out mechanisms should be technically enforceable.

The first AIrelated reference before the CJEU is *Like Company v. Google Ireland Limited*,[19] triggered by a preliminary ruling request lodged on April 3, 2025, by the Budapest Környéki Törvényszék (district court). It concerns whether an AIpowered chatbot – Gemini (formerly known as Bard) – may infringe publishers' rights under Article 15 of the DSM Directive[20] when summarizing press content. Although the case does not directly address copyright protection for AIgenerated works (but related rights), it raises foundational questions about the legal status of AIenabled use of protected texts. I believe it is worth noting this case even at this early, prejudgment stage, as the questions referred to the CJEU are directed toward

17 Nicola Lucchi, *Generative AI and Copyright: Training, Creation, Regulation* (Brussels: European Parliament, 2025), accessed July 28, 2025, https://www.europarl.europa.eu/RegData/etudes/STUD/2025/774095/IUST_STU(2025)774095_EN.pdf.

18 Axel Voss, *Draft Report on Copyright and Generative Artificial Intelligence – Opportunities and Challenges*, 2025/2058(INI), European Parliament, Committee on Legal Affairs, June 27, 2025, accessed July 28, 2025, https://www.europarl.europa.eu/RegData/etudes/STUD/2025/774095/IUST_STU(2025)774095_EN.pdf.

19 CJEU Judgment of 12 March 2025, *Like Company v. Google Ireland Limited*, Case C-250/25, ECLI:EU:C:2025:250.

20 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L130, 17 May 2019), 92–125.

findings that may impact AI and copyright law. The referring court frames the dispute as follows:

> In response to the question 'Can you provide a summary in Hungarian of the online press publication that appeared on balatonkornyeke.hu regarding Kozsó's plan to introduce dolphins into the lake?', the defendant's chatbot provided a detailed response which included a summary of the information appearing in the news media belonging to the applicant.[21]

Google's Gemini was prompted to summarize a publisher's article, generating an answer that restated some factual content without reproducing the entire text. An article summary that is not identical to the content of the plaintiff's press articles and only refers to some of the facts appearing in the original content may sound strange as the subject of a court case.

The Hungarian court submitted the following key questions to the CJEU:

- Does the display by an LLMbased chatbot of partially identical text to protected press content constitute "communication to the public" under Article 15(1) DSM and Article 3(2) InfoSoc?[22]
- Does the process of training a chatbot using LLM techniques constitute "reproduction" under Article 2 InfoSoc and Article 15(1) DSM?
- If so, is such reproduction exempted under the "text and data mining exception" set out in Article 4 DSM?[23]
- If a user issues a prompt corresponding to content in a press publication, and the chatbot generates a related response, can that output constitute "reproduction" imputable to the service provider under the same provisions?

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21 CJEU Judgment of 12 March 2025, *Like Company v. Google Ireland Limited*, Case C-250/25, ECLI:EU:C:2025:250.

22 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L167, 22 June 2001), 10–9.

23 With reference to DSM: DSM permits the use of publicly accessible content for training models. Apart from the above scope, also almost without restriction for research purposes by research organizations and cultural heritage institutions. For commercial entities, however, the direct grants rights holders the option to object (opt-out) under Articles 3 and 4.

In attempting to analyze certain aspects of this case, I believe that the CJEU may take into account that the generated summary was not identical to the original text and was produced in response to a specific prompt: "Can you provide a summary in (…) of the online press publication that appeared on (…) regarding (…)?". In this context, the chatbot's role was limited to the literal execution of the user's instruction. Moreover, the summary included facts identified in the analyzed note, and these are not subject to copyright protection.

In China, while no binding judicial precedents have yet addressed copyright infringement claims arising from AI training, the Interim Measures for the Management of Generative Artificial Intelligence Services, the world's first regulation explicitly focused on generative AI, promulgated on July 10, 2023, and effective from August 15, 2023,[24] formally codifies the principle of "respect for intellectual property rights" within the framework of AI training.[25]

When comparing the current trajectories of regulatory and judicial developments related to the use of protected content for training artificial intelligence models in the United States, the European Union, and China, one can observe that each legal system adopts a distinct approach – though none has yet reached a mature or final stage.

In the United States, the doctrine of "fair use" is applied flexibly and is increasingly interpreted in favor of technology companies – as evidenced by recent rulings of federal courts in cases concerning the training of large language models (LLMs) on copyrighted books.

In the European Union, the political direction – especially as reflected in reports and policy proposals emerging from the European Parliament – appears to lean toward stronger protection for authors. This includes calls for mandatory licensing schemes, technically enforceable opt-out mechanisms,

24 "Interim Measures for the Management of Generative Artificial Intelligence Services," China Law Translate, July 13, 2025, accessed July 28, 2025, https://www.chinalawtranslate.com/en/generative-ai-interim/.

25 Li You and Han Luo, "Copyright Implications and Legal Responses to AI Training: A Chinese Perspective," *Laws* 14, no. 4 (2025): 43, https://doi.org/10.3390/laws14040043.

and financial compensation. We are waiting for the CJEU judgment in the first AI-related case *Like Company v. Google Ireland Limited*.[26]

On 11 November 2025, the Regional Court of Munich I (Landgericht München I) delivered a judgment in the case *GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte – Germany's primary collective management organization) v. OpenAI* (the judgment is not yet final).[27] This is the first decision of its kind in Europe addressing memorization in large language models and is likely to influence the relationship between authors and AI providers across the EU. The Court found in favor of GEMA, holding that OpenAI had infringed copyright. The case concerned nine German hit songs that had been used in the training of ChatGPT and were subsequently reproduced in responses to user prompts, either exactly or in substantial parts identical to the originals. Therefore, they were memorized within OpenAI's systems, which constitutes reproduction within the meaning of Article 2 of Directive 2001/29/EC (the InfoSoc Directive) and Section 16 of the German Copyright Act (UrhG).[28] Such reproduction, the Court held, does not fall within the scope of permissible use, including the exceptions for text and data mining (TDM). The storage and subsequent reproduction of a protected work by an AI model, according to the Court, cannot be regarded as an analytical act (as in TDM), but rather as a continuous infringement of the author's economic rights.

China occupies a middle ground between these models: it already has in place a regulatory framework (the Interim Measures for Generative AI of 2023), which obliges providers to respect copyright during the training phase. However, judicial interpretation in this area is still in its early stages of development.

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26 CJEU Judgment of 12 March 2025, *Like Company v. Google Ireland Limited*, Case C-250/25, ECLI:EU:C:2025:250.

27 Landgericht München I, Judgment of 7 November 2025, *GEMA v. OpenAI*, Case no. 42 O 14139/24.

28 Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 28 of the Act of 23 October 2024 (Federal Law Gazette 2024 I No. 323).

2. Lack of Copyright Protection and the Risk of Similarity to Pre-Existing Works

The conclusion that content generated entirely by an AI system does not qualify as a copyrightable work cannot justify disregarding the risk of substantial similarity to pre-existing works. There remains a significant risk that the generation of such content for subsequent use may infringe the copyright of works incorporated into the AI training data or works used to train the underlying models.

Generative AI models operate based on vast datasets used for training. "A model that has memorized training data is a 'copy' of that training data in the sense used by copyright."[29] The output generated in response to a prompt may be heavily influenced by works contained within the training data. While AI algorithms are designed to prevent direct plagiarism or the faithful reproduction of existing works to some extent, what an algorithm may interpret as a sufficient modification could appear to an average observer as nothing more than a clumsy attempt to avoid liability.

For instance, if an AI system were prompted with the command, "Create an image of Christ and the apostles eating the Last Supper," the resulting image might well be perceived – even by a not merely average but highly educated observer familiar with *The Last Supper* by Leonardo da Vinci – as essentially a copy of *The Last Supper*. Although the AI system may classify the output as a unique interpretation rather than a direct reproduction, such close imitation of style could, in certain cases, also be examined under the lens of unfair competition. An instructive experiment would be to prompt an AI system to generate such an image, then evaluate whether the result appears to be a copy of *The Last Supper* (which, I presume, it would despite the prompt not explicitly referencing Leonardo da Vinci's work). If so, one could then ask the AI system whether the result constitutes a copy and compares the explanation provided.

Regardless of the algorithm's capacity to modify the generated content relative to the training data (which ultimately raises the question of how effectively this modification is perceived by the average observer), the user bears the responsibility of ensuring that the copyrights of the creators of

[29] A. Feder Cooper and James Grimmelmann, "The Files Are in the Computer: Copyright, Memorization, and Generative AI," *Chicago-Kent Law Review* 100, no. 1 (2025): 141–219, accessed July 28, 2025, https://arxiv.org/abs/2404.12590.

the underlying works are not infringed. For example, Canva prohibits the creation of content that infringes third-party rights, including copyright, while Midjourney forbids using the system for any unlawful activity.

However, with the increasing use of AI in education and creative work, the likelihood that users will recognize works, especially those that are not widely known, may diminish over time. Consequently, the use of AI-generated content that closely resembles copyrighted works may occur inadvertently due to user ignorance. This risk might be mitigated if AI systems themselves provided tools for identifying similarities to copyrighted works, but declining user awareness could also undermine recognition of the need for such verification.

Inspiration from style was also at the center of the lawsuit filed by *The New York Times* against OpenAI and Microsoft, seeking to prevent further copyright infringement arising from the use of millions of articles published by the newspaper to train artificial intelligence systems. The lawsuit alleges that the AI was developed to mimic the style of *Times* journalists in competing chatbots[30] without obtaining consent or providing compensation to the authors – actions that could ultimately lead to a loss of readership, revenue, and trust. A significant blow to the paper's credibility stemmed from an incident in which Microsoft's Bing Chat supplied false information it attributed to *The Times* – information that had never actually been published by the newspaper. AI hallucinations represent one of the key issues that have prompted prohibitions within academic institutions on the automated generation of research concepts or essential elements of scholarly work (as discussed below).

The previously discussed "fair use" doctrine in *Bartz et al. v. Anthropic* and *Kadrey et al. v. Meta* (see above) allows training copyrighted materials if transformative and non-market-reducing, but courts in both rulings caution that output similarity may still infringe. For example, in Bartz, though the court noted transformative fair use, it emphasized that the case would differ if the output created by the model were infringing. Specifically:

[30] Michael M. Grynbaum and Ryan Mac, "The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work," *The New York Times*, December 27, 2023, accessed July 28, 2025, https://www.nytimes.com/2023/12/27/business/media/new-york-times-open-ai-microsoft-lawsuit.html.

"the court expressly distinguished this case from others where the AI system's outputs might themselves be infringing." In China, Guangzhou Internet Court ruled (February 8, 2024, case number not publicly disclosed, often referenced as 2024 Guangzhou Ultraman Case) that images generated by the defendant's AI platform are "substantially similar" to the protected Ultraman works (a Japanese science-fiction character owned by Tsuburaya Productions, that includes TV shows, films, and merchandise) and infringed the copyright of the Japanese IP owner (Tsuburaya Productions). The AI platform was found to be contributorily liable[31] (a similar judgment regarding the generation of images similar to the Ultraman character was also issued by the Hangzhou Internet Court in the Ultraman Case: December 30, 2024).

A key similarity between the American (Bartz & Kadrey) and Chinese (Guangzhou Ultraman) case law is that both recognize that AI-generated outputs may infringe copyright if they are too similar to protected works. However, there are also differences. The American judgments require the plaintiff to demonstrate that the AI outputs are too similar to their works or that they are a substitute for them in the marketplace, while the Chinese judgment found the AI to be contributorily liable without requiring market substitution analysis. The United States lacks a regulation that explicitly addresses this, while China does (CAC's Interim Measures for the Management of Generative AI Services).

3. The Obligation of Academic Independence and Integrity

3.1. Claiming Authorship of AI-Generated Content as a Violation of Academic Ethics

Attributing authorship to AI-generated content does not constitute a copyright infringement, as established above, but it presents a serious problem within the academic community because it amounts to academic fraud and a blatant violation of research ethics – whether committed by a student or a faculty member.

[31] Seagull Song and Wang Mo, "China's First Case on AIGC Output Infringement—Ultraman," King & Wood Mallesons, February 28, 2024, accessed July 28, 2025, https://www.kwm.com/cn/en/insights/latest-thinking/china-s-first-case-on-aigc-output-infringement-ultraman.html.

AI has undoubtedly facilitated the search for information, the verification of research projects, and the resolution of both theoretical and practical problems. AI tools have already become integral to academic work and will likely continue to be used more widely in the future. A study conducted by the Higher Education Policy Institute (HEPI) and Kortext confirms a significant increase in the use of generative AI tools among students.[32] Neither a comprehensive statutory ban nor a blanket prohibition within internal educational regulations has been implemented, primarily because AI's utility in academic work stems from its time-saving functionality.[33] "While AI offers transformative educational opportunities, its unregulated use could threaten academic integrity."[34]

However, it is essential to counteract the risks that AI poses to intellectual integrity and independent academic work, particularly regarding academic honesty, hallucinations (i.e., the reliance on and subsequent citation of false information), and copyright infringement. Additionally, AI-generated content undermines the ability to verify learning outcomes for students and professional advancement for faculty members. Academic policies must, therefore, emphasize that while AI can serve as an auxiliary tool, it cannot replace the creative process essential to scholarly work.

For instance, the *Science* journal group explicitly states:

> AI-generated images and other multimedia are not permitted in the Science journals without explicit permission from the editors. Exceptions may be granted in certain situations—e.g., for images and/or videos in manuscripts specifically about AI and/or machine learning. Such exceptions will

32 Anna Armstrong, "Academic Misconduct, Generative AI and Authentic Assessment," Online Education at the University of London, March 11, 2025, accessed July 28, 2025, https://onlinelearning.london.ac.uk/2025/03/11/ai-and-authentic-assessment/.

33 Saeed Awadh Bin-Nashwan, Mouad Sadallah, and Mohamed Bouteraa, "Use of ChatGPT in Academia: Academic Integrity Hangs in the Balance," *Technology in Society* 75 (2023): 102370, https://doi.org/10.1016/j.techsoc.2023.102370; Xiaoyi Tian et al., "Let's Talk It Out: A Chatbot for Effective Study Habit Behavioral Change," *Proceedings of the ACM on Human-Computer Interaction* 5, no. CSCW1 (2021): 1–32, https://doi.org/10.1145/3449171.

34 "EduTalks on Artificial Intelligence and Academic Integrity," Council of Europe, April 26, 2023, accessed July 28, 2025, https://www.coe.int/en/web/education/-/edutalks-council-of-europe-artificial-intelligence-and-academic-integrity.

be evaluated on a case-by-case basis and should be disclosed at the time of submission.[35]

Similarly, Wiley's AI Policy in its Author Guidelines provides that:

> Artificial Intelligence Generated Content (AIGC) tools—such as ChatGPT and others based on large language models (LLMs)—cannot be considered capable of initiating an original piece of research without direction by human authors. (...) Therefore—in accordance with COPE's position statement on AI tools—these tools cannot fulfill the role of, nor be listed as, an author of an article.[36]

Interestingly, the *Science* journals acknowledge that: "(…) this area is rapidly developing, and our position on AI-generated multimedia may change with the evolution of copyright law and industry standards on ethical use."[37] This may suggest that the current stance is provisional, reflecting the fact that currently available AI programs do not meet the criteria for academic authorship – especially in terms of accountability for the presented findings. However, in the future, as AI systems become more sophisticated, they may meet the necessary criteria for academic authorship.[38]

It is worth noting an interesting argument: namely, that there is no reason to question the validity of scientific publications solely because they were produced with the assistance of AI, since misinformation (resulting from AI hallucinations) also occurs in human scientific activity.[39] While I agree that AI may contribute to solving research problems, a clear

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35 "*Science* Journals: Editorial Policies," American Association for the Advancement of Science, accessed July 28, 2025, https://www.science.org/content/page/science-journals-editorial-policies#authorship.

36 "Author Guidelines," John Wiley & Sons, Inc, accessed July 28, 2025, https://onlinelibrary.wiley.com/page/journal/14653435/homepage/forauthors.html.

37 "*Science* Journals: Editorial Policies," American Association for the Advancement of Science, accessed August 29, 2025, https://www.science.org/content/page/science-journals-editorial-policies#authorship.

38 Ju Yoen Lee, "Can an Artificial Intelligence Chatbot Be the Author of a Scholarly Article?," *Science Editing,* 10, no. 1 (2023): 7–12, http://dx.doi.org/10.6087/kcse.292; Ryszard Markiewicz, "ChatGPT i prawo autorskie Unii Europejskiej," *Zeszyty Naukowe Uniwersytetu Jagiellońskiego: Prace z Prawa Własności Intelektualnej* 2 (2023): 142–71, accessed July 28, 2025, https://sip.lex.pl/komentarze-i-publikacje/czasopisma/chatgpt-i-prawo-autorskie-unii-europejskiej-151439247.

39 Markiewicz, "ChatGPT i prawo autorskie Unii Europejskiej."

distinction between the scholarly authorship of the researcher and the output generated by AI must be maintained. Otherwise, what will define a graduate or a scholar? What will a diploma – whether a degree or a doctoral certificate – attest to? If we accept the publication of AI-generated results as legitimate academic work, a diploma will no longer be a certificate of "educational achievement and fulfillment of the institution's standards"; it will merely confirm that its holder is an operator of AI applications and tools within a specific field. That is not what science is about.

Would the problem be resolved by simply disclosing the involvement of AI? Not entirely. Disclosure of AI involvement is not necessary for technical tasks – most university policies permit this. However, acknowledging that a specific AI tool contributed to the conceptual phase or replaced the author in the creative process would not resolve the problem; it would merely confirm that the problem exists.

An example of an internal academic regulation reflecting this approach is the Appendix to Rector's Regulation No. 5 of the SGH Warsaw School of Economics of 5 February 2024[40] The regulation, in Sections 1.4 and 1.5, prohibits the "automatic generation of the concept of a written assignment or its essential elements" and requires that "artificial intelligence-generated suggestions should be critically and meticulously analyzed by the author." Similarly, the automatic generation of paragraphs, chapters, or a first draft of a text, followed by independent editing, is prohibited; these elements should be the product of the author's reflection (Section 3.1).

Since auxiliary AI-based tasks are permitted, the regulation identifies acceptable uses of AI, such as searching for literature, generating keyword lists, automatically creating a database of scholarly works related to a given topic, and summarizing texts to understand a specific area of literature (without using those summaries directly in a written work). However, all such outputs must be approached critically and verified against reliable sources, as AI-generated information may be inaccurate or false (Section 2).

Above all, it must be emphasized that violating the principle of using AI solely as a tool to support technical tasks – such as improving grammar and general editing – would constitute a serious breach of ethical standards.

[40] Appendix to Rector's Regulation No. 5 of the SGH Warsaw School of Economics of 5 February 2024, accessed July 28, 2025, https://bap.sgh.waw.pl/lang/en-GB/d/8351/5/.

AI can facilitate processes but must not replace the creative phase or the independent formation of ideas, text, or research. Fabrication of content and plagiarism constitute the core of research dishonesty and undermine trust.[41] Scientific integrity is a key aspect of "academic integrity." Such misconduct would implicate both students and faculty members, potentially resulting in the invalidation of a degree and even criminal liability.

Given the motivation to obtain degrees or academic promotions more quickly and easily, it is foreseeable that AI-generated content will, at times, be falsely presented as original work. Copyright law will not resolve this challenge, as it protects the author of a work, whereas, in this case, the protected interests are academic integrity, the credibility and ranking of the institution, and the trust of recipients who may be misled. "Submitting AIgenerated content as one's own is nearly universally classified as academic misconduct."[42] There may even be cases – though this lies beyond the scope of this article – where unjust compensation is paid to the purported author. This justifies the use of AI detection and plagiarism detection tools by universities (regardless of any legal obligation or internal university regulation requiring the disclosure of AI-generated content). However, the evolution of AI tools introduces the risk that detecting AI-generated text created in violation of ethical standards will become increasingly difficult – along with the challenge of proving such violations.[43]

Chinese universities use similar policies and practices:

> Chinese universities continue to crack down on AI ghostwriting. In a report in May, the University World News identified at least five universities that have issued their first guidelines on AI use or specifically AI-generated content (AIGC) for graduation thesis works. Hubei University said in a notice

41 Maura Hiney, "Briefing Paper on Research Integrity: What It Means, Why It Is Important and How We Might Protect It," Science Europe, December 2015, accessed July 28, 2025, https://www.scienceeurope.org/our-resources/briefing-paper-on-research-integrity-what-it-means-why-it-is-important-and-how-we-might-protect-it.

42 Cecilia Ka Yuk Chan, "Is AI Changing the Rules of Academic Misconduct? An In-depth Look at Students' Perceptions of 'AI-giarism,'" June 6, 2023, https://doi.org/10.48550/arXiv.2306.03358.

43 Elsayed Abdelaal, Sithara Walpita Gamage, and Julie E. Mills, "Artificial Intelligence Is a Tool for Cheating Academic Integrity," AAEE 2019 Annual Conference, Brisbane, Australia, accessed July 28, 2025, https://www.researchgate.net/publication/339375213_Artificial_Intelligence_Is_a_Tool_for_Cheating_Academic_Integrity.

> that it would assess articles using generative AI during their review. If a thesis is identified as having a 'high risk of ghostwriting,' academic staff will guide the students to make revisions.[44]

Concerns about unfair and false accusations of AI-generated content were the basis for the decision by several American universities – including Vanderbilt University, Northwestern University, and the University of Texas – to disable Turnitin's AI-generated content detection feature.[45] Although tests showed that the false positive rate was approximately 1%, this still amounted to hundreds of papers per year, and the algorithm's operation was not fully transparent.[46] Similar concerns at British universities led to AI detection tools being made available on a voluntary basis.[47]

In my view, the use of AI detection tools does not necessarily lead to unjust accusations if the system does not make automated decisions with legal effects but instead requires human intervention (consistent with Article 22(1) of the GDPR). Thus, if an author is asked to clarify the origin of a text and can present an initial draft or working notes that support their claim of authorship – rather than attributing it to AI – the accusation could be resolved fairly.

Paradoxically, as AI technology advances, the role of experienced academic staff in identifying AI-generated texts will become increasingly important – particularly when the student or researcher presenting the work as their own has invested minimal effort in further verifying the content's accuracy and editing AI-generated proposals.

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44 Aamir Sheikh, "Chinese Universities Warn that Theses with High Risk of AI Ghostwriting Will Face Revisions or Sanctions," University World News, June 11, 2024, accessed July 28, 2025, https://www.cryptopolitan.com/chinese-universities-rules-ai-thesis-writing/.

45 The analysis of AI detection tools in higher education, including the effectiveness, and ethical implications in the context of preserving academic integrity, was presented in: Cesare G. Ardito, "Contra Generative AI Detection in Higher Education Assessments," arXiv, December 8, 2023, https://doi.org/10.48550/arXiv.2312.05241.

46 Tom Carter, "Some Universities Are Ditching AI Detection Software amid Fears Students Could Be Falsely Accused of Cheating by Using ChatGPT," Business Insider, September 22, 2023, accessed July 28, 2025, https://www.businessinsider.nl/some-universities-are-ditching-ai-detection-software-amid-fears-students-could-be-falsely-accused-of-cheating-by-using-chatgpt.

47 "Plagiarism and Academic Misconduct," University of Cambridge, accessed July 28, 2025, https://www.educationalpolicy.admin.cam.ac.uk/plagiarism-and-academic-misconduct.

This comparative perspective highlights three trends: U.S. universities combine internal codes with case law that supports strong disciplinary powers but face challenges regarding false positives; Chinese universities operate under clear statutory authority and adopt stricter *ex-ante* controls over theses and dissertations; EU universities rely primarily on internal regulations with strong procedural safeguards for students.

3.2. Misattribution of Authorship of AI-Generated Content as a Legal Violation

The principles of academic integrity and independent scholarly research, including the preparation of theses and dissertations, are not confined to the realm of ethics – they are also statutory requirements. For instance, under Polish law, a thesis must be an independent analysis of a research problem (Article 76(2)), and a doctoral dissertation must demonstrate the candidate's ability to conduct independent scientific research.[48] Replacing the creative phase of research and writing – including the development of the research concept and the drafting of the first version of a work – with AI-generated content would constitute a clear breach of these statutory requirements.

In China, the Law on Academic Degrees[49] provides that an academic degree may be revoked by the educational institution that conferred it, should it be determined that the degree was obtained through conduct constituting a violation of academic integrity. Such misconduct includes plagiarism, data falsification, ghostwriting, or the unauthorized use of artificial intelligence.[50] The decision in such cases is made by the Academic Degree Evaluation Committee (学位评定委员会) in accordance with the procedures set out in the law. This does not preclude potential criminal liability if the conduct in question constitutes an offence under criminal law. The legislative framework also emphasizes the requirement of an appropriate academic standard and a demonstrable contribution to the relevant field. This,

48 Article 187(1) of the Act of 20 July 2018 on Higher Education and Science, consolidated text: Journal of Laws of 2024, No. 1571.

49 Standing Committee of the National People's Congress, Law of the People's Republic of China on Academic Degrees, adopted on April 26, 2024, in force since January 1, 2025, Order No. 22 of the President of the People's Republic of China, accessed July 28, 2025, https://www.lawinfochina.com/display.aspx?id=42873&lib=law.

50 Yao Yuxin, "Academic Plagiarism Has a New AI Face?," China Daily, September 1, 2023, accessed July 28, 2025, https://www.chinadaily.com.cn/a/202309/01/WS64f19b34a310d2dce4bb3720.html.

by implication, entails an expectation of research autonomy, which would be compromised if the creative phase – namely, the formulation of the research concept and design – were replaced by artificial intelligence.

In the United States, there is no federal bill analogous to the Chinese draft law on academic degrees that would regulate the revocation of diplomas in cases of academic dishonesty involving AI. However, at the state level, a particularly significant ruling is the decision of the Supreme Court of Texas, which held that universities have the authority to revoke degrees after graduation if academic misconduct is established.[51] The core rationale of the decision is that a degree constitutes a "university's certification to the world" affirming the graduate's educational achievements and the fulfillment of the institution's standards.[52] The Texas ruling cited similar decisions from courts in Maryland, Michigan, New Mexico, North Dakota, Ohio, Tennessee, and Virginia, all of which recognized universities' right to revoke degrees obtained through academic dishonesty.

Nevertheless, issues of academic integrity and the consequences of its violation are generally governed at the institutional level through so-called *Academic Integrity Policies*. An example of such an internal regulation is the *Academic Integrity Policy* of The City University of New York (CUNY).[53] Under this policy, academic dishonesty may result in reduced grades and disciplinary sanctions, including suspension or expulsion. The policy explicitly identifies academic dishonesty as a form of "cheating" and highlights its negative impact on the university's accreditation.

CUNY's policy defines cheating to include the unauthorized use or attempted use of artificial intelligence (AI) systems during an academic exercise, copying from a generative AI system for credit or a grade, and submitting content generated by an AI tool as solely one's own work

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51 Texas Supreme Court, Judgment of 31 March 2023, *Hartzell v. S.O.*, 23–0694; Ryan Quinn, "Texas Supreme Court Says Universities Can Revoke Degrees," Inside Higher Ed, April 6, 2023, accessed July 28, 2025, https://www.insidehighered.com/news/2023/04/06/texas-supreme-court-says-universities-can-revoke-degrees.

52 "A degree is not merely a piece of paper; it is a 'university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards" (Quinn, "Texas Supreme Court Says Universities Can Revoke Degrees").

53 "Academic Integrity Policy," The City University of New York (CUNY), accessed July 28, 2025, https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/academic-integrity-policy.

("the unauthorized use or attempted use of artificial intelligence (AI) systems during an academic exercise, copying from a generative AI system for credit or a grade, submitting content generated by an AI tool as solely your own work"[54]).

4. Long-Term Concerns

Beyond the fact that replacing independent scholarly work and creativity with AI-generated content constitutes a violation of integrity – not only academic integrity but honesty more broadly – there are significant long-term implications that merit attention. Over time, this trend could lead science, and an entire generation that will shape future education and the economies of individual societies, into a dead end.

Optimistic visions, such as those presented by Sam Altman, suggesting that AI will liberate people from repetitive and tedious tasks, thereby allowing them to focus on more creative and meaningful work,[55] overlook the practical consequences of this shift. While saving time by using AI tools to perform technical tasks involved in scholarly work is undeniably beneficial, it is reasonable to assume that reliance on AI will not remain limited to this stage. It is likely to extend to the unauthorized drafting of research concepts and initial versions of academic texts. The more widespread this practice becomes, the more it will erode the capacity for conceptual and creative thinking.

> The brains of people writing an essay with ChatGPT are less engaged than are those of people blocked from using any online tools for the task, a study finds. The investigation is part of a broader movement to assess whether artificial intelligence (AI) is making us cognitively lazy.[56]

Tasks such as summarizing a book – while not necessarily prohibited, depending on the context and purpose – could discourage reading, thereby

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54 Ibid.

55 Ken Metral, "Sam Altman: AI Agents Will Transform Work in 2025," Cosmico, January 6, 2025, accessed July 28, 2025, https://www.cosmico.org/sam-altman-ai-agents-will-transform-work-in-2025/.

56 Nicola Jones, "Does Using ChatGPT Change Your Brain Activity? Study Sparks Debate," Nature, June 25, 2025, accessed July 28, 2025, https://www.nature.com/articles/d41586-025-02005-y.

impairing imagination, the ability to describe places and phenomena creatively, vocabulary range, the capacity to concentrate on longer texts, and ultimately, general knowledge and educational attainment. Academic guidelines increasingly emphasize the need for critical engagement with AI-generated content, as such content may be inaccurate or flawed, potentially stemming from AI hallucinations. However, verifying the reliability of AI-generated information requires a certain level of educational competence – not only in evaluating sources available online, which may themselves be erroneous if they are based on AI-generated data insufficiently verified by human authors.

Returning to the idea of liberation from repetitive and tedious tasks, it is worth recalling that wealthier societies have already freed themselves from physically demanding tasks – even from walking and climbing stairs – with the side effect now reflected in obesity and overweight statistics. This analogy is instructive: it serves as a reminder not only of the benefits but also of the potential negative side effects before we rush to eliminate the necessity for creative thinking.

5. Conclusions

This article explores the legal aspects of copyrightability in the U.S., China, and the EU, in the context of the fundamental principle, which is consistent across these jurisdictions, that only creations involving meaningful human creative choices are eligible for copyright protection. However, in the academic sphere, the issue of copyright protection for AI-generated content, while certainly important, is by no means the only concern. Even if the content itself is not protected by copyright, the principles of independent scholarship and academic integrity remain of paramount importance.

Artificial intelligence is transforming academic environments faster than legal and ethical frameworks can respond. While its use in auxiliary academic tasks may enhance efficiency, its encroachment on the creative process demands caution and critical scrutiny. Universities must set clear boundaries: AI may support, but must never substitute, the intellectual labor that defines authorship. The future of scientific credibility depends on preserving the human element in academic research and education. In this context, maintaining transparency, reinforcing academic integrity,

and developing responsible AI policies are not just institutional choices – they are obligations rooted in law and ethics.

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Legal Features of Children's Rights and Duties During Armed Conflict: The Ukrainian Case

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Abstract: It is universally recognized that children are the most vulnerable and unprotected category of civilians. Moreover, when it comes to the period of any armed conflict. The twentieth century is the Century of the Child. The international community's actions, which were reflected in the adoption of a number of international legal treaties establishing the legal status of the child in general and securing the rights of each child, are evidence of this. The rights of a child are one of the key elements of the legal construct of the legal status of a child. This article analyzes children's rights both during the peaceful period and during the armed conflict. The article examines a number of international legal treaties which enshrine children's rights during armed conflict. Conventional wisdom does not refer to children's duties. However, the period of armed conflict is fundamentally opposite to the peaceful period of the State's existence. During an armed conflict, it is not always possible to fulfill children's rights. On the contrary, this period is marked by increased risks to children's lives and health. Moreover, it is necessary to take into account the nature of contemporary armed conflicts (their methods and means). The period of armed conflict produces new rules of behavior (which may be restrictive) that are intended to maximize the life and health of each child. The behavioral rules form a number of duties that are collective in nature (their fulfillment is entrusted to the children's legal representatives, public administration bodies, and children themselves with due regard to their age). Based on the Ukrainian case

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study, the author analyzes a number of duties arising during an armed conflict, and the fulfillment of which is entrusted to several actors, including children. During the course of writing the article, the author used the method of document analysis. First of all, the researcher analyzed international legal acts related to the topic of the study. The second level of legal acts that were analyzed were Ukrainian legal acts depending on their legal force. Simultaneously with the analysis of regulatory acts, the author reviewed the academic literature that formed the scientific basis of this study. This helped to analyze the children's rights and duties during armed conflicts. The scientific basis of the study is based on scientific publications in the field of children's rights in general. The author used a systematic process during the writing of the article, involving reading, identifying specific provisions, and categorizing information. The generalization method was applied on the basis of the comparison, which helped to formulate the relevant conclusions to the article.

1. Introduction

Being a child is a period of life when everyone begins to actively explore the world, grow, and develop. Childhood is the most carefree period of life. Each armed conflict is primarily a change in the usual way of life for children and a darkening of their childhood. Back in 1989, when the Convention on the Rights of the Child was adopted, the international community stated that children have the right to special care and assistance. During the twentieth century, the legal status of the child as a whole was formed. The key elements of this legal structure are rights and duties. Time of armed conflict is a specific period, given the increased risk to the life and health of every child. The number of children living in conflict zones has almost doubled since 1990. Therefore, the issue of child protection during armed conflict is increasingly becoming one of the main topics at the international community level such as the International Conference on Protecting Children in Armed Conflict[1]

[1] "International Conference on Protecting Children in Armed Conflict," Government.com, May 8, 2023, accessed May 14, 2025, https://www.regjeringen.no/en/whats-new/international-conference-on-protecting-children-in-armed-conflict/id2975968/.

Nuremberg Forum 2024 "For Every Child: Protecting Children's Rights in Armed Conflict",[2] International Summit on the Rights of the Child.[3]

During any armed conflict, children are the most defenseless category of the population and those who are most in need of attention from the state, represented by public administration bodies. Such a period generates new types of social relations and, therefore, a separate legal regulation and a set of rights and duties. Children are no exception.

2. Children's Rights: Theoretical Background

There are generally known two theories of the category of rights: the theory of will and the interest theory of law.

The so-called theory of will (or theory of choice) states that to have a right means to have the right to freely choose from some available options. The essence of the right is the realization of freedom of will. The right holder has a certain degree of control over the duties of others (authorized to demand fulfillment or refuse to fulfill such duties). The main problems with the theory of will arise in relation to situations of incapacitated rights holders (such as infants, persons with mental illness). It is difficult to argue that the law authorizes such persons to exercise their will to control the duties of others. This would mean that such persons could not have any legal rights. It is also difficult to reconcile the theory of will with some so-called inalienable rights that exist and are enforced by law regardless of the will of their full beneficiaries.

The interest theory states that the core of a right is the legal protection of the interest of the right holder. Legal rights correspond to certain duties of other persons that limit the freedom to infringe upon the interest protected by the right. To have a right therefore means to be a beneficiary of

2 "Nuremberg Forum 2024 'For Every Child: Protecting Children's Rights in Armed Conflict,'" International Nuremberg Principles Academy, accessed May 14, 2025, https://www.nurembergacademy.org/public-discourse/nuremberg-forum/nuremberg-forum-2024.

3 "Speech of His Holiness Pope Francis to the World Leaders Participating in the Summit on Children's Rights," The Holy See, February 3, 2025, accessed May 14, 2025, https://www.vatican.va/content/francesco/en/speeches/2025/february/documents/20250203-summit-diritti-bambini.html.

a duty imposed for the benefit (interest) of the right holder.[4] Interest theory is the one that works from the perspective of children.

Both the international community and representatives of the doctrine faced the question of how to construct the category of children's rights, taking into account the main feature of the child population – age. The approach proposed by Katherine Hunt Federle to building the legal category of children's rights used as the basis for this paper.

A child's need for protection is itself a right – for example, to care and nurture or to live permanently in a safe and loving family. This approach to rights as the needs of the child that need to be protected is entirely consistent with the interest-based theory of rights. According to this theory, certain individual interests give rise to rights, although the theory itself leaves open the question of what interests actually give rise to rights. Rights are thus those interests that are deemed worthy of protection; thus, any duties that arise are the result of the recognition that a particular interest merits such protection.

Those who argue that children have rights under the interest theory invariably define as rights those interests that are closely related to the child's need for protection. For example, a child's interest in being cared for, nurtured and loved deserves protection as a right. A child's basic interests, such as the need for food, shelter and love, may require protection as a right and may take precedence over other types of interests as rights, such as the need for education. One might even say that a child's status as a child creates a specific set of rights based on the child's developmental and other needs. Interest theory thus has the advantage of allowing us to speak of children's rights without reference to their power to oblige others.

By viewing rights in this way, it overcomes one of the main difficulties in articulating children's rights. Typically, to have a right, a person must have the capacity to insist that those who have a duty fulfill that duty – once they have decided to pursue their right. Since children are generally thought to lack this capacity, it seems particularly fruitless to say that children have

[4] Tomasz Pietrzykowski, "Beyond Personhood: From Two Conceptions of Rights to Two Kinds of Right-Holders," in *New Approaches to the Personhood in Law Essays in Legal Philosophy*, eds. Tomasz Pietrzykowski and Brunello Stancioli (Frankfurt am Main: Peter Lang, 2016), http://dx.doi.org/10.2139/ssrn.2597028.

rights, since they seem to lack the ability to demand the fulfillment of the relevant duties that follow from the exercise of rights. Having a right without the power to exercise it is not much of a right.

The theory of interest, at least at first glance, tries to solve this problem of having a right without the ability to exercise it. Since a right is an interest based on the child's need, the right exists regardless of who the obliged person is or how he or she fulfills his or her obligations. Thus, it can be said that a child has the right to care regardless of who is the person who has the corresponding obligation to provide such care. Moreover, if this person does not fulfill his or her duty, the right still exists. Thus, the theory of interest provides an explanation of the rights of the child that is not tied to the capacity of the rights holder.

The challenge is that, even in theory, someone other than the child must ensure that his or her rights are respected. Since the interests that are defined as contributing to the exercise of rights are always protective, they inevitably confirm the lack of capacity of children. Thus, interests, even those that give rise to rights, continue to contribute to children's lack of legal capacity.[5]

There is both a theoretical and a practical component to this question. From a theoretical perspective, the construction of rights for children has been problematic because of the organizing influence of capacity on theories of rights. Our tradition of rights, which emphasizes autonomy and individuality, limits the class of rights holders to those who have legal capacity. What does it mean to be a competent rights holder may vary from one approach to rights to another, but it is clear that capacity is a prerequisite for having those rights in the first place. So, in developing a theory of children's rights, we are drawn into a debate about children's capacity; the difficulty, of course, in the debate about children's capacity is that we simply cannot say with any degree of legal, psychological or sociological certainty that children are capable.[6]

5 Katherine Hunt Federle, "Children's Rights and the Need for Protection," *Family Law Quarterly* 34, no. 3 (2000): 422–23, http://www.jstor.org/stable/25740300.

6 Katherine Hunt Federle, "Constructing Rights for Children: An Introduction," *Family Law Quarterly* 27, no. 3 (1993): 302, http://www.jstor.org/stable/25739942.

Their capacity stems from the peculiarity of the children's part of the population – their age range. Consider that this is the main feature, as it is the basis for the derivatives that can be divided into two groups – psychological/physiological and legal. Given their age, children cannot fully exercise their "children's" rights provided for in legal acts on their own, and do not have sufficient capacity to protect their rights, because in most cases a legal representative must be involved (a legal peculiarity). Given the age criterion, children have specific needs, interests, and rights (a legal peculiarity). Children are characterized by social and psychological immaturity and, as a result, increased trust in others and an inability to objectively assess life situations (psychological/physiological peculiarity).

This dilemma has both theoretical and practical components. On the theoretical side, constructing rights for children has been problematic because of the organizing effect of capacity on rights theories. Our rights tradition, which emphasizes autonomy and individuality, limits the class of rights holders to those with capacity. What it means to be a competent rights holder may vary within a particular account of rights, but it is clear that capacity is a prerequisite for having those rights in the first instance. In constructing a rights theory for children, then, we are drawn into a debate about their competencies; the difficulty, of course, with arguing about the capacity of children is that we simply cannot say with any degree of legal, psychological, or sociological certainty that children are competent.

However, the construction of children's rights must include someone else responsible for ensuring that the rights of the child are respected, and this theory would seem to be a good one.[7] This "someone else" should be, first of all, the child's legal representative. At the same time, the state, represented by public administration bodies, has a dual role: (1) supervising the integrity of the legal representative of the state; (2) the state creates the conditions under which children's rights are realized. These entities are the agents who help children to realize their rights owing to their age and limited capacity.

7 Federle, "Children's Rights and the Need for Protection," 422–23.

Visa Kurki considers this issue through the prism of legal personhood (legal rights and/or duties), which is represented by an active and passive scale and is divided into purely passive legal capacity (infants have rights but at the same time do not have the competence to exercise them and do not bear responsibility), dependent legal personality (this is the case for most children who have survived their first years of life – such children have some control over their rights and duties and can bear some responsibility; thus, they are not completely passive, but they are not independent either), and independent legal capacity (adults).[8] But it is still worth clarifying the division into the age of childhood and the scope of legal capacity accordingly. This issue is determined by each state at the legislative level.

The Ukrainian legislator made the following decision on this question.[9] By Ukrainian law, children are divided into two categories: minimally capable (a person under the age of 14 – part 1 of Article 31 of the Civil Code of Ukraine) and minors (a person aged 14 to 18 – part 1 of Article 32 of the Civil Code of Ukraine). The minimally capable have partial civil capacity. As for minors with incomplete civil capacity, the following should be noted. In accordance with Article 313 of the Civil Code of Ukraine, it is stipulated that persons who have reached the age of 14 have the right to free independent movement throughout Ukraine and to choose their place of residence. Persons under the age of 14 are allowed to move throughout Ukraine only if accompanied by one of their legal representatives or an authorized person. Minors in Ukraine have a significant scope of rights and are liable for damages on a general basis.

The Polish lawmaker used a slightly different approach. The Civil Code[10] distinguishes two periods of childhood: the first, from birth to reaching the age of 13 (Article 12), the second, from 13 to 18 years old (Article 15). These two periods define the person – the child – as a minor.

8 Visa Kurki, "Active but Not Independent: The Legal Personhood of Children," *Griffith Law Review* 30, no. 3 (2021): 395–412, https://doi.org/10.1080/10383441.2021.1996881.

9 The Civil Code of Ukraine, Vidomosti Verkhovnoi Rady Ukrainy 2003, No. 40–44, item 356, as amended.

10 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Journal of Laws 1964 no. 16, item 93) [Act of 23 April 1964 – The Civil Code].

Minors who have reached the age of 13 have limited capacity for legal acts, whereas persons who have not reached the age of 13 do not have any capacity for legal acts.[11]

An analogous approach is applied in the Civil Code of Hungary.[12] Thus, Hungarian legislation divides childhood into two periods: from birth to the age of 14 and from 14 to 18. "Minor" is the term used to describe both periods. Minors shall have limited capacity to act if they have attained the age of 14 and do not lack the capacity to act (Section 2:11). Minors who have not attained the age of 14 shall have no capacity to act (Section 2:13).

In France, the legislature does not distinguish between different ages of children. The general concept is used – the minor – the individual of either sex who has not yet reached the age of 18 (Article 388 of the Civil Code of the French Republic).[13]

To sum up, each European country adopts its own approach to the issue at hand. At the same time, there is a similarity in the approach to the classification of children's age in terms of legal capacity among European countries.

In contrast, Brazilian lawmakers have taken a rather different approach. Article 2 of the Statute of the Child and Adolescent[14] defines a child as a person who has not yet reached the age of 12 and an adolescent as a person between the ages of 12 and 18.

Duty is a separate legal category closely related to the category of rights. Henry T. Terry considered duty as the direct description of conduct commanded or forbidden. Duties therefore are the primary legal entities.[15] A legal duty is a legal condition of a person that commands or prohibits a certain action. The act can be called the content of the duty; it is what must be described when defining a specific duty. Duty is a condition, merely as a result of law.

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11 Elżbieta Szczot, "'Person' in the Polish Family and Guardianship Code," *Philosophy and Canon Law* 7, no. 2 (2021): 1, https://doi.org/10.31261/PaCL.2021.07.2.06.

12 Act V of 2013 on the Civil Code of Hungary (as in force on September 1, 2023).

13 Code civil des Français, accessed July 7, 2025, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/.

14 Brazil: Statute of the Child and Adolescent, Law n° 8.069, July 13, 1990, accessed July 7, 2025, https://www.refworld.org/legal/legislation/natlegbod/1990/en/74276.

15 Henry T. Terry, "Legal Duties and Rights," *The Yale Law Journal* 12, no. 4 (1903): 185–212, https://doi.org/10.2307/781938.

Jaap Hage defines duties as a particular kind of relation between agents and action types. Every duty has a duty-holder, and this duty-holder is an agent. An agent is an entity that can perform acts. Duties come in two variants: duties to do and duties not to do (duties to refrain).

Duties also come in two other variants, which are distinct from the duties to do and to refrain: duties to do something and duties to do something in a particular way. Duties always refer to action types or "actions." Action types must be distinguished from act tokens, or "acts." Acts are concrete events, linked to a particular place and time, that have actually taken place. Most duties are the result of rule-application; they are attached by some rule to an existing fact situation.[16]

There is no common practice of discussing children's duties. However, they have certain duties, and even more so in times of armed conflict. Children's duties have their own specificity, just as with children's rights, namely the age of the children. An obligatory condition for their formation is a collective form of implementation, which requires a combination of efforts of several actors (legal representatives, representatives of public-administration entities, etc.).

3. The Historical Roots of Formulating Children's Rights During Armed Conflict

Prior to the twentieth century, a child was not recognized as a person at all. In colonial times, children were considered the property of their parents. Children as property had no independent rights, and parents had the final say in the supervision, discipline, custody and control of their children. Accordingly, the state did not interfere in family life.[17]

It is not novel to suggest that the documents that began and developed the liberal rights tradition were products of particular historical and social contexts, and thus in many ways reflect particular bargains reached by given individual rulers and those over whom they held power.[18] Children's rights

16 Jaap Hage, "Duties, Obligations and Rights," 2021, accessed May 14, 2025, https://www.academia.edu/59920943/Duties_Obligations_and_Rights.

17 Karen M. Staller, "Children's Rights, Family Rights: Whose Human Rights?," *International Review of Qualitative Research* 4, no. 2 (2011): 175, https://doi.org/10.1525/irqr.2011.4.2.171.

18 Jean Thomas, "Our Rights But Whose Duties? Reconceptualizing Rights in the Era of Globalization," in *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and*

are no exception. The historical context that triggered the consolidation of children's rights at the international level is expressed by the First and Second World Wars.

World War I was a shocking experience behind the front lines, the vulnerability of the civilian population was dramatically exposed, as women and children became actual as well as symbolic victims of the war (the evidence of starving children throughout Europe, etc.). World War II exposed a landscape of even greater destruction and horror in which children died in millions – the direct targets of belligerents and the subject of inhuman "scientific" experiments, as well as collateral damage. Wars of the twentieth century had changed. The direct targeting of civilian populations became a more "normal" part of twentieth-century warfare, obscuring earlier distinctions between military and civilian arenas. Children had become more explicitly victimized.

A major shift in thinking occurred during the progressive era (roughly 1880–1914).[19] Among the social factors that strongly influenced the final product, three deserve some attention: (1) the role of NGOs, (2) the emergence of Sweden as an international influence in matters of civilian relief and assistance, and (3) the role of women[20] (Ellen Key, a Swedish intellectual, an author of the book *The Century of the Child*, fueled the process of the social inclusion of children and the full membership of boys and girls in the human structure;[21] Eglantyne Jebb, the founder of the Worldwide Save the Children Alliance, drafted the Geneva Declaration of the Rights of the Child). No wonder that the role of women was of great importance for the formation of a child as a person, because it is inherent in nature that a woman gives life and lays the foundations for every child.

Positive Obligations, eds. Anat Scolnicov and Tsvi Kahana (Cambridge: Cambridge University Press, 2016), 3, https://ssrn.com/abstract=2881454.

19 Staller. "Children's Rights, Family Rights," 174–75.

20 Paula S. Fass, "A Historical Context for the United Nations Convention on the Rights of the Child," *The Annals of the American Academy of Political and Social Science* 633, no. 1 (2011): 23, https://doi.org/10.1177/0002716210382388.

21 Elin Eriksen Ødegaard and Jorunn Spord Borgen, eds., *Childhood Cultures in Transformation: 30 Years of the UN Convention on the Rights of the Child in Action Towards Sustainability* (Leiden: Brill, 2021), 14, https://www.jstor.org/stable/10.1163/j.ctv1sr6k8f.

In a world of adults, children could not claim their rights on their own. Since the ranks of childhood are continuously depleted by entry into adult life, no "children's movement" on the model of the women's movement or of civil rights movements can be envisaged.[22]

The main ideas that prevailed in the twentieth century are that children are people; they have the right to pursue individual interests as they see fit, to have their claims considered fairly, and to have their best interests assessed in terms of pragmatic consequences.[23] By giving children individual rights, we indicate awareness of children's unique experiences, capabilities, and vulnerabilities as a group that needs protection.[24] Children are persons and the law should recognize that fact, although it will take some doing. And adults have made efforts.

4. Legal Framework of Children's Rights During Armed Conflict

The legal framework for the protection of children's rights both in peacetime and during armed conflict began to develop. The overall regulation of children's rights is performed at the international and regional levels. The international level:

(I) the Geneva Declaration on the Rights of the Child (1924);[25]
(II) the Universal Declaration of Human Rights (1948);[26]
(III) the Declaration of the Rights of the Child (1959);[27]
(IV) the Convention on the Rights of the Child (1989).[28]

The regional level, as exemplified by Europe, is covered by acts such as the Treaty of Lisbon,[29] the Charter of Fundamental Rights of the European

22 Onora O'Neill, "Children's Rights and Children's Lives," *Ethics* 98, no. 3 (1988): 462, https://doi.org/10.1093/lawfam/6.1.24.

23 Henry H. Foster, Jr., and Doris Jonas Freed, "A Bill of Rights for Children," *Family Law Quarterly* 6, no. 4 (1972): 343–75, https://www.jstor.org/stable/25739035.

24 Ødegaard and Borgen, eds., *Childhood Cultures in Transformation*, 18.

25 Geneva Declaration on the Rights of the Child adopted on 26 September 1924.

26 Universal Declaration of Human Rights adopted on 10 December 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

27 Declaration of the Rights of the Child adopted on 20 November 1959, G.A. Res. 1386 (XIV).

28 Convention on the Rights of the Child adopted on 20 November 1989, G.A. Res. 44/25.

29 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C306, 17 December 2007).

Union,[30] the European Union Strategy on the Rights of the Child,[31] and so on.

The Convention on the Rights of the Child (1989) is undoubtedly the pivotal international instrument whose provisions have served as the basis for the development of both regional and national legislation in the field of children's rights, which groups all the rights of children. Since the adoption of the Convention on the Rights of the Child by the United Nations General Assembly in 1989, it has been heralded as a major breakthrough in children's rights, a remarkable achievement in international law, the most widely ratified human rights treaty in history, and the single most comprehensive statement of children's rights ever written. The Convention on the Rights of the Child marked a shift in "attitude towards children and childhood" by acknowledging that "children should be recognized as social actors" and as "participants in society."[32]

The Convention on the Rights of the Child can be summarized as the three P's – Provisions, Protection and Participation. Children's rights can be grouped into the next way:

(1) The Right to Survival – the right to life, the highest attainable standard of health and nutrition and adequate standard of living, the right to a name and a nationality.
(2) The Right to Protection – freedom from all forms of exploitation, abuse, inhuman or degrading treatment, and neglect, including the right to special protection in situations of emergency and armed conflicts.
(3) The Right to Development – the right to education, support for early childhood development and care, social security, the right to leisure and recreation, and cultural activities.

30 EU(2012) Charter of Fundamental Rights of the European Union, 2012/C 326/02, October 26. 2012, https://eur-lex.europa.eu/eli/treaty/char_2012/oj/eng.

31 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Strategy on the Rights of the Child, COM/2021/142 final, March 24, 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52021DC0142.

32 Staller, "Children's Rights, Family Rights," 176–77.

(4) The Right to Participation – respect for the views of the child, freedom of expression, access to appropriate information and freedom of thought, conscience and religion.[33]

The majority of countries have adapted their legislation to the new rights of the child provided for by the Convention, thereby greatly improving the legal status of children.[34] The emphasis in its legal interpretation is on children, whose position in society has undergone significant changes over the past decade, namely: from children as objects of rights to children as subjects of rights, and then as active bearers of rights.[35]

All of the above rights of children exist both in peacetime and during armed conflict. Obviously, during an armed conflict, ensuring all of these rights becomes more difficult, and sometimes impossible. During armed conflict, additional risks and dangers to the life and health of children arise. The protection of children in armed conflict was one of the earliest concerns of the international law on the rights of the child; the standard of protection was, however, minimal.[36] All norms related to the rights of children during armed conflict are based on the basic principle that children are entitled to special protection.

For this reason, apart from the above-mentioned international legal acts, the international community has adopted a number of norms that relate specifically to the rights of the child during armed conflict, namely:

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33 Abhay Vikram Singh, "Theory of Human Rights in Perspectives to Child Rights," *The Indian Journal of Political Science* 73, no. 2 (2012): 372–73, https://www.jstor.org/stable/41856598.

34 Olga Cvejić Jančić, "Rights of the Child in a Changing World," in *The Rights of the Child in a Changing World*, ed. Olga Cvejić Jančić (Cham: Springer, 2016), 1–36, https://doi.org/10.1007/978-3-319-23189-1_1; Rifkah Anniza Rahman et al., "Ensuring Child Protection in Armed Conflict: An International Legal Perspective Under SDG 16," *Journal of Lifestyle and SDGs Review* 5, no. 3 (2025):e04820, https://doi.org/10.47172/2965-730X.SDGsReview.v5.n03.pe04820.

35 Jana Borská, Jitka Vacková, and Mark A. Small, "United Nations Convention on the Rights of the Child and Its Implementation in the 21st Century," *Kontakt* 18, no. 2 (2016): e96–e102, https://doi.org/10.1016/j.kontakt.2016.05.005.

36 Geraldine Van Bueren, "The International Legal Protection of Children in Armed Conflicts," *The International and Comparative Law Quarterly* 43, no. 4 (1994): 811–12, https://doi.org/10.1093/iclqaj/43.4.809.

(1) The Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949)[37] (formulated the basic principles for protecting children's rights during armed conflict and proposed possible mechanisms for their protection in general terms);
(2) The Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)[38] (contains purely declarative provisions, without providing for any mechanisms to protect children during armed conflict, states that children are the most vulnerable category of the civilian population, and that the protection of children is a fundamental obligation of the international community);
(3) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)[39] (hereinafter – AP I) (the document is more detailed in terms of possible mechanisms for protecting children during armed conflict, for example, evacuation mechanisms);
(4) The Convention on the Rights of the Child (1989) (separate articles relating specifically to the period of armed conflict: Articles 22, 38);
(5) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)[40] (arrangements to protect children from being directly involved in armed conflict);
(6) Rome Statute of the International Criminal Court (2002)[41] (provisions establishing international criminal responsibility for violations of children's rights during armed conflicts);

37 Geneva Convention relative to the Protection of Civilian Persons in Time of War adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War.

38 Declaration on the Protection of Women and Children in Emergency and Armed Conflict adopted on 14 December 1974, G.A. Resolution 3318 (XXIX).

39 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) adopted on 8 June 1977 by Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts.

40 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict adopted on 25 May 2000, G.A. Res. A/RES/54/263.

41 Rome Statute of the International Criminal Court (last amended 2010), UN General Assembly, July 17, 1998, https://www.refworld.org/legal/constinstr/unga/1998/en/64553.

(7) The Safe Schools Declaration (2015)[42] (ensuring children's right to education and a secure environment during armed conflict);
(8) Reykjavík Declaration (Appendix II. Declaration on the situation of the children of Ukraine; 2023).[43]

The United Nation Security Council Resolutions should be highlighted as a separate group, as they outline clusters of issues and create monitoring mechanisms to resolve them: Resolution 1261 (1999)[44] – first to recognize the involvement of children as direct participants in armed conflict;[45] Resolution 1379 (2001)[46] – focused on the negative impact of armed conflicts on children and the urgent need for states engaged in armed conflict to ensure that children's basic needs are met; Resolution 1612 (2005)[47] – created the Monitoring and Reporting Mechanism and the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, etc.

However, it should be remembered that both the Geneva Conventions and the Convention on the Rights of the Child were written and adopted in the 50s and 80s of the twentieth century. During this period of time, humanity has developed significantly in all spheres of life, including in the field of military equipment and weapons. As a result, modern methods of warfare are significantly different from those of the past. The Ukrainian experience has shown that modern armed conflicts can have territories of possible combat operations, territories of active combat operations, occupied territories, and at the same time attack all parts of the country (even if it is far from the front line). Hence, the provisions of the Geneva

42 The Safe Schools Declaration created on 13 July 2015.
43 Reykjavík Declaration adopted on 16–17 May 2023, 4th Summit of Heads of State and Government of the Council of Europe.
44 Resolution 1261 (1999) adopted by the Security Council at its 4037th meeting, on 25 August 1999.
45 Manuchehr Tavassoli-Naini, "Education Right of Children During War and Armed Conflicts," *Procedia – Social and Behavioral Sciences* 15 (2011): 302–5, https://doi.org/10.1016/j.sbspro.2011.03.090.
46 Resolution 1379 (2001) adopted by the Security Council at its 4423rd meeting, on 20 November 2001.
47 Resolution 1612 (2005) adopted by the Security Council at its 5235th meeting, on 26 July 2005.

Conventions and the Convention on the Rights of the Child are not always fully effective today.[48]

The characteristic feature of most international legal acts is that they establish general principles and rules for legal relations without specifying mechanisms for their implementation. Hence, national mechanisms of a permanent nature with the mandate and capacity to monitor, promote and protect the full range of children's rights, regardless of whether they are directly related to the conflict, are therefore crucial.[49]

5. Duties During Armed Conflict

Advances in weapons and military equipment do not stand still. Each armed conflict becomes a platform for the development of new types of weapons and military equipment. For instance, during the First World War, gas was used, and during the Second World War, various types of bombs, including nuclear ones, were used.[50] The armed conflicts of the twenty-first century are characterized by the use of ballistic missiles and unmanned aerial vehicles of various types. Mobility, survivability, rate of fire, combat power, and applicability can be defined as the basic features of the latest weapons and military equipment that meet the principles of modern warfare.[51]

Missiles and rockets revolutionized warfare, allowing armed forces to fight from greater distances. Weapons development has led to the emergence of non-contact operations, when any part of the country can be attacked at any time. The Ukrainian experience can be used as an example. The Ministry of Communities and Territories Development of Ukraine

48 Tara M. Collins and Laura H.V. Wright, "The Challenges for Children's Rights in International Child Protection: Opportunities for Transformation," *World Development* 159 (2022): 106032, https://doi.org/10.1016/j.worlddev.2022.106032.

49 Ann Linnarsson and Vanessa Sedletzki, "Independent Human Rights Institutions for Children: An Actor for the Protection of Children's Rights During Armed Conflict?," *Human Rights Quarterly* 36, no. 2 (2014): 447–72, https://doi.org/10.1353/hrq.2014.0023.

50 Gorda Gibradze, Alika Guchua, and Giga Gogua, "The Role of Modern Technologies in Military Conflicts of the 21st Century," *Ukrainian Policymaker* 11 (2022): 26–34, https://doi.org/10.29202/up/11/4.

51 Oleksandr Krakhmalyov et al., "Key Aspects of the Production of Modern Armaments and Military Equipment Systems," *Novum Jus* 17, no. 1 (2023): 119, https://doi.org/10.14718/NovumJus.2023.17.1.5.

issued an order categorizing the country's territories.[52] Under this order, the following categories of territories are defined: I. Territories where hostilities are (were) conducted: (1) territories of possible hostilities; (2) territories of active hostilities; (3) territories of active hostilities where state electronic information resources operate. II. Temporarily occupied territories of Ukraine by the Russian Federation. The legal regime of martial law is in effect throughout Ukraine starting from February 24, 2022.[53]

Protection of children's rights and their implementation become difficult, and sometimes impossible, due to these characteristics of contemporary armed conflicts. The period of armed conflict produces additional rules of behaviour aimed at preserving the life and health of children during armed conflict. These rules of conduct form new duties, which are characterized by a collective nature, as they arise for several groups of subjects. These duties arise, first and foremost, for the legal representatives of children and for representatives of institutions where children without legal representatives are placed. These duties are also imposed on the children themselves. However, in fulfilling each duty, it is necessary to take into account the age gradation of children, because an infant, for example, cannot understand what is being said at all due to his or her age.[54]

Using the example of the Ukrainian case study, an overview of possible duties for both adults and children (taking into account the age of the child) is proposed.

I. The duty to complete a full general secondary education. Obtaining a complete general secondary education in Ukraine[55] is a duty under the

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52 Order of the Ministry of Communities and Territories Development of Ukraine List of territories where hostilities are being (were) conducted or temporarily occupied by the Russian Federation of 28 February 2025, No. 376.

53 Decree of the President of Ukraine on the introduction of martial law in Ukraine of 24 February 2022 No. 64/2022, Official Bulletin of Ukraine 2022, № 46, item 2497, as amended.

54 Carmit Katz, Maayan Jacobson, and Ayelet Noam Rosenthal, "Reclaiming Their Rights: A Comprehensive Framework for the Reintegration of Children Abducted and Held Hostage During Armed Conflict and Political Violence," *Children and Youth Services Review* 162 (2024): 107696, https://doi.org/10.1016/j.childyouth.2024.107696.

55 Complete general secondary education in Ukraine is education from grades 1 to 12: primary education is completed within four years; basic secondary education is completed within five years; specialized secondary education is completed within three years.

Constitution of Ukraine[56] (Article 53) (1996). As per Ukrainian law, children living in Ukraine have to go to school at the age of 6 or 7. This duty does not stop during armed conflict. In this regard, Ukraine has introduced alternatives to full-time education, namely "blended learning" – a way of organizing education for learners, which provides for the organization of pupils' education by combining full-time (daytime) and distance learning in a certain order (week after week, day after day, etc.), as determined by the schedule of classes in the educational establishment.

The implementation of this duty is assigned to legal representatives who are obliged to take measures to enroll the child in school (submitting an application and the necessary documents to the school) and ensure that the child subsequently attends school in accordance with the established daily schedule. Another subject of this duty is the school institution that provides the educational process. The realization of this duty is also imposed directly on children (Article 53 of the Constitution of Ukraine).

If a child has gone abroad and has not completed full general secondary education in Ukraine, he or she must complete it through distance learning. The peculiarities of its organization are also defined in the Regulations on the Distance Form of Complete General Secondary Education and the Methodological Recommendations on Certain Issues of Education in General Secondary Education Institutions under Martial Law in Ukraine (2023).[57]

II. The duty of children granted temporary protection in the European Union to receive education. Ukrainian citizens, including children, have been granted temporary protection status, which was introduced by Council Implementing Decision (EU) establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, with the effect of introducing temporary protection (2022).[58] The specific feature of this mechanism is that it is temporary

[56] The Constitution of Ukraine, Vidomosti Verkhovnoi Rady Ukrainy 1996, № 30, item 144, as amended.

[57] On approval of methodological recommendations on certain issues of education in general secondary education institutions during martial law in Ukraine Order of the Ministry of Education and Science of Ukraine of 15 May 2023 № 563.

[58] Directive EC (2001) of the European Council on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting

in nature and is only provided for the period during which the circumstances causing the mass influx exist. This is the European Union's first experience with applying this mechanism. The European Union countries have adopted national laws throughout March 2022 and continue to adopt subordinate legislation, so the practice of application is still being developed. This also applies to children.

The European Union countries hosting the highest number of beneficiaries of temporary protection from Ukraine are Germany (1,140,705 people; 27.2% of the EU total), Poland (983,880; 23.4%), and Czechia (379,370; 9.0%). Children accounted for almost one-third (32.0%).[59]

Around half of the Member States have compulsory schooling. For example, States with a constitutional duty for children to complete their school education: Czech Republic (school attendance shall be obligatory for the period specified by law – Article 33); Hungary (Hungary shall ensure this right by extending and generalizing public education, by providing free and compulsory primary education – Article X); Montenegro (elementary education shall be obligatory and free of charge – Article 75); Poland (education to 18 years of age shall be compulsory – Article 70); Spain (elementary education is compulsory and free – Article 27), etc.

Consequently, Ukrainian school-age children face a dual duty to obtain school education. Children must continue their Ukrainian education by distance learning and start attending appropriate educational institutions in their host countries. According to the European Commission's 2024 report, Ukrainian children face the following problems: double educational intensity, language barriers, and capacity problems in host systems.[60]

The subjects of this duty will be, first of all, the child's legal representatives, who are responsible for taking registration measures to enable the

a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L212, 20 July 2001).

59 "Temporary Protection for 4.2 Million People in October," Eurostat, December 6, 2024, accessed May 14, 2025, https://ec.europa.eu/eurostat/en/web/products-eurostat-news/w/ddn-20241206-2.

60 "Ukrainian Children in EU Education Systems – What Is the State of Play?," European Commission, July 29, 2024, accessed May 14, 2025, https://school-education.ec.europa.eu/en/discover/news/ukrainian-children-eu-education-systems-what-state-play.

child to start studying abroad, and the child themselves, who is to receive education.

III. The duty to go to the shelter if the "Air Alert" signal sounds while the child is in an educational institution. Ukrainian experience shows that the air raid alarm can sound at any time of the day. According to the Air Alert Algorithm, all children in an educational institution, regardless of what they are doing (attending class/eating/recess), must immediately go to a shelter assigned to each school. In the conditions of martial law in Ukraine and in order to ensure the safety of participants in the educational process in the territory controlled by the state authorities of Ukraine, general secondary education in full-time (daytime) form, including the use of mixed learning, is organized if there are objects of the fund of civil defense facilities suitable for sheltering participants in the educational process and to which they are provided with unimpeded access in the educational institution or at a distance of no more than 500 meters from it.

Fulfillment of this duty is primarily the responsibility of representatives of the educational institution where the child is receiving education and stays in accordance with the daily schedule. In addition, this duty also applies to each child individually, who must clearly follow the instructions of adults in such a situation.

IV. The duty to evacuate. The mechanism of evacuation during armed conflict is prevalent throughout humankind's history. The most striking examples of children's evacuation during armed conflict are as follows:

(1) The Spanish Civil War of 1936–1939, during which children were repeatedly evacuated both within Spain and beyond its borders (France, Belgium, Mexico, Switzerland, and Denmark together took in almost 29,000 children, while Great Britain took in 4,000 children). However, the evacuations were carried out in a chaotic manner, so it is impossible to determine the exact number of children whose parents were killed, or those who were placed in "children's colonies" or sent to third countries and never saw their families again.[61]
(2) Evacuation of children during the Second World War in Great Britain. In 1939, Operation Pied Piper was carried out, the aim of which was to

[61] Maggie Brookes, "The Spanish Civil War: A War against Children," The Historical Writers Association, June 5, 2022, accessed August 15,2025, https://historiamag.com/the-spanish-civil-war-against-children/.

evacuate children *en masse* to safer areas of the country. Children were evacuated without adult supervision (in the summer of 1939, more than 3 million children were evacuated from London and other cities). Most parents remained behind to work and assist in the war effort. The evacuation period officially ended in March 1946.[62]

(3) Evacuation of children during the armed conflict in Rwanda in 1994, which was unique in that it was organized by the international community. On June 27, 1994, the International Committee of the Red Cross and the United Nations Children's Fund issued a Joint Statement on the evacuation of unaccompanied children from Rwanda (Joint Statement).[63] It is interesting to note that the Joint Statement emphasized that such children should not be referred to as "orphans," because orphan status always requires careful verification. One of the tasks outlined in the Joint Statement was to actively search for the relatives of the children who remained behind, with the aim of reuniting separated children with their family members after the end of the armed conflict. For this reason, a mandatory registration mechanism for children was established, enabling their tracking, informing interested parties, and facilitating family reunification.

The common feature of all evacuations was that children were evacuated without their legal representatives. For many children, this type of evacuation without their relatives was a time of great upheaval and had negative consequences for their health (researchers on this issue claim that there is a phenomenon called "evacuation neurosis," which indicates that children develop neurological diseases after being separated from their families).[64]

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62 Grace Huxford, "Child Evacuees in the Second World War: Operation Pied Piper at 80," Gov.uk, August 30, 2019, accessed August 15, 2025, https://history.blog.gov.uk/2019/08/30/child-evacuees-in-the-second-world-war-operation-pied-piper-at-80/.

63 International Committee of the Red Cross (ICRC); United Nations Children's Fund (UNICEF); International Federation of the Red Cross and Red Crescent Societies (International Federation), Joint Statement on the Evacuation of Unaccompanied Children from Rwanda, UN High Commissioner for Refugees (UNHCR), June 27, 1994, https://www.refworld.org/policy/declas/unhcr/1994/en/29395.

64 Everett M. Ressler, "Evacuation of Children from Conflict Areas: Considerations and Guidelines," Inter-Agency, December 1992, https://www.refworld.org/policy/legalguidance/ia/1992/en/61735.

Ukraine also uses a mechanism for evacuating children, but with certain modifications – the compulsory evacuation of children by force (forced evacuation). In accordance with the Procedure for Evacuation in the Event of a Threat or Emergency, approved by a Resolution of the Cabinet of Ministers of Ukraine (2023),[65] in order to protect children in the area of hostilities and armed conflicts, during martial law, regional military administrations, in consultation with the military command authorities in the relevant territory[66] and the Coordination Headquarters for Evacuation Measures and Effective Response to Mass Displacement of the Population, established by the Cabinet of Ministers of Ukraine, may adopt a decision on the forced evacuation of children with their parents, persons *in loco parentis*, or other legal representatives from a particular settlement in the area where hostilities are taking place. The decision of the regional military administration is made in the form of an order, which must contain the following elements: settlements from which the specified type of evacuation will be carried out; terms of evacuation; assembly and reception points for evacuation; state bodies involved in such evacuation.

Thus, if the regional military administration issues an order to conduct a forced evacuation, the duty to evacuate the specified settlement arises. At the same time, this duty is collective in its form of realization, as it arises for several groups of subjects. In particular, public administration entities that ensure its organization and control, legal representatives of the child, and the children themselves. But it is important to clarify the age at which children have this duty. According to the Law of Ukraine "On Freedom of Movement and Free Choice of Residence in Ukraine,"[67] persons who have reached the age of 14 have the right to freely choose their place of residence. However, this right may be restricted for the period of martial law

65 Resolution of the Cabinet of Ministers of Ukraine Procedure for Evacuation in the Event of a Threat or Emergency of 30 October 2013 № 841, Official Bulletin of Ukraine 2013, № 92, item 3386, as amended.

66 Military administrations are temporary state bodies established by the decision of the President of Ukraine during martial law to ensure, together with the military command, the introduction and implementation of measures of the legal regime of martial law, defense, civil protection, public safety and order, protection of critical infrastructure, protection of the rights, freedoms and legitimate interests of citizens.

67 Law of Ukraine on Freedom of Movement and Free Choice of Residence in Ukraine of 2003, Vidomosti Verkhovnoi Rady Ukrainy 2014, № 15, item 232, as amended.

(Article 64 of the Constitution of Ukraine). Therefore, the duty to evacuate under the forced procedure also applies directly to children aged 14 to 18. In the case of children under the age of 14, the duty to evacuate remains exclusively the responsibility of the legal representatives of each child.

V. The duty to undergo a certain procedure after returning from deportation. The deportation of children is one of the issues that arises during an armed conflict. The Russian-Ukrainian armed conflict is no exception. Representatives of the Ukrainian authorities have stated that about 20,000 children have been deported/forcibly displaced since February 2022.[68] At the level of international legal regulation, there are no mechanisms for the return of deported/forcibly displaced children. As a result, the Government of Ukraine has defined an algorithm of actions to identify and return children deported or forcibly displaced as a result of the armed aggression of the Russian Federation against Ukraine.[69]

The above algorithm determines that a child, who is returned from deportation or forced displacement, should be taken to the Child Protection Center, where an interview procedure and an assessment of the child›s situation and needs will be conducted. The realization of this duty is entrusted to public administration entities that ensure the search for and return of children.[70] The second subject of this duty is the child's legal representatives, who must accompany the child at all times. The third subject is the child himself or herself, as they are the main participant in such an interview procedure.

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68 "The Scale of the Tragedy," Bring Kids Back UA, accessed May 14, 2025, https://www.bringkidsback.org.ua/.

69 Resolution of the Cabinet of Ministers of Ukraine Procedure for the identification, return, support and reintegration of children deported or forcibly displaced as a result of the armed aggression of the Russian Federation against Ukraine of 14 May 2024 № 551, Official Bulletin of Ukraine 2024, № 47, item 2928, as amended.

70 State authorities and local self-government bodies, the Ministry of Foreign Affairs (in terms of finding and engaging new intermediary countries to negotiate the return of children), as well as the Ukrainian Parliament Commissioner for Human Rights, the Joint Center for the Coordination of the Search and Release of Prisoners of War and Illegally Deprived Persons as a Result of Aggression against Ukraine under the Security Service of Ukraine, the Ministry of Social Policy, the State Service for Children, foreign non-governmental organizations.

6. Conclusion

Summarizing the above, the following can be stated. The legal category of "children's rights" has been the property of humankind since the beginning of the twentieth century and continues to develop further. Unfortunately, humanity cannot exist without armed conflicts. Therefore, the protection of children's rights during armed conflict remains relevant. The study found that the Convention on the Rights of the Child enshrines a list of children's rights for both peacetime and armed conflict. During armed conflict, there are obviously great risks to children's lives and health. The realization of children's rights is not always possible to the fullest extent. The international community has also adopted international legal acts concerning the rights of children during armed conflict.

In times of armed conflict, there are heightened dangers to the life and health of all children living in the territory of the state. Consequently, the period of armed conflict generates new rules of behavior for children aimed at the protection of their lives and health. These rules of behavior form new duties that are collective in nature. Their fulfillment is entrusted to several categories of actors: legal representatives of children, representatives of educational institutions, public administration, and children themselves. Children's ages must be taken into account, as these determine the scope of a child's legal capacity.

The Ukrainian case study has shown that, along with rights during armed conflict, children also have duties. In particular, they have the duties to evacuate, to complete general secondary education (both in Ukraine and abroad), to follow a certain procedure during the "Air Alert" signal, to undergo the procedure after returning from deportation, etc.

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United States Concepts of Due Process in Criminal Procedure and the International Criminal Court

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Abstract: The provisions of the Rome Statute of the International Criminal Court should be evaluated considering the due process principles of the United States Constitution to determine if it would be appropriate for the US government to sanction the sending of a US citizen to the ICC or adopting the Rome Statute. There are several areas including the right to trial by jury, right to confrontation, speedy trial and the composition of the Court that raise serious due process concerns from an American perspective. Considering the ICC's inability to guarantee the same due process protected by the US Constitution there are serious doubts about American involvement in the Court.

1. Introduction

There are many reasons given for why the United States has not ratified the Rome Statute and acceded to the International Criminal Court. Among these reasons are many of a political nature given the role the US plays on the international stage and many of them pre-dating the Trump Administration.[1] In addition to these concerns of a political nature there are also objections based on issues involving whether an American defendant

[1] Anthony Dworkin, "Why America Is Facing off Against the International Criminal Court," European Council on Foreign Relations, September 8, 2020, accessed October 16, 2025, https://ecfr.eu/article/commentary_why_america_is_facing_off_against_the_international_criminal_cou/.

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could get a fair trial at the ICC. Some of these questions involve political questions,[2] others involve the process or procedure a criminal defendant would receive at the tribunal. As a former criminal trial defense attorney in the United States who has spent the last 25 years working and teaching in the area of international law and human rights, I think it is interesting to discuss the legitimate questions involving American concepts of due process and constitutional protections in criminal process in light of the Rome Statute. Traditional international scholarship has dismissed due process concerns regarding the court with very limited analysis or understanding of the actual law being dismissed. First, we will look at the American concept of "due process of law" in the context of criminal proceedings, and then we will examine several key protections under American constitutional law for criminal defendants that might be implicated by the Rome Statute, including the right to trial by jury, the rights of confrontation and speedy trial, and the composition of the Court. Finally, we will ask whether the United States could still agree to the Rome Statute despite any due process differences between the Statute and the US Constitution.

2. Due Process in the Criminal Procedure of the United States

Due process of law is a legal concept that can be traced back to the Magna Carta of 1215 in England. Clause 39 of the Magna Carta included the provision:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.[3]

The United States Supreme Court found that "due process of law," as included in the US Constitution, had the same meaning as "by the law of the land" in the Magna Carta.[4]

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2 See for example the discussion on the "myths and facts" about the ICC at Human Rights Watch; accessed April 14, 2025, https://www.hrw.org/legacy/campaigns/icc/facts.htm.

3 Magna Carta (1297).

4 The United States Supreme Court, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272 (1855).

Due process is included in two places in the United States Constitution: the Fifth and Fourteenth Amendments. The Fifth Amendment provision was written by James Madison and adopted as part of the initial 10 amendments to the US Constitution, now commonly known as the Bill of Rights. These amendments were based on the ideas of the Magna Carta (1215), the English Bill of Rights (1689),[5] and the Virginia Declaration of Rights (1776).[6] The Fifth Amendment provision reads that "[n]o person shall be (…) deprived of life, liberty or property, without due process of law."[7] Initially, all the provisions of the Bill of Rights applied only to the federal government; state and local governments were not subject to the provisions of the Bill of Rights.[8] In 1868, the Fourteenth Amendment to the US Constitution was adopted and took effect. This Amendment, which was a response to the US Civil War, granted citizenship to all persons "born or naturalized" in the United States, including former slaves, and included due process language that applied directly to the states. "Nor shall any state deprive any person of life, liberty, or property, without due process of law."[9] Through a process of selective incorporation, the Supreme Court has deemed most of the rights in the Bill of Rights as necessary requirements of due process against the states and local governments, beginning with free speech in 1925.[10] Over the years, many of the rights in the Bill of Rights applying to criminal procedure were incorporated into the concept of due process by the Fourteenth Amendment. This includes Fourth Amendment rights, such as representation by counsel in death penalty cases,[11] freedom from unreasonable search and seizure,[12] and requirements in a warrant;[13]

5 "Bill of Rights 1689," UK Parliament, accessed October 12, 2025, https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights/.

6 "The Virginia Declaration of Rights," The U.S. National Archives and Records Administration, accessed October 12, 2025, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

7 U.S. Const. amend. V.

8 The United States Supreme Court, *Barron v. Baltimore*, 32 U.S. 243 (1833).

9 U.S. Const. amend. XIV.

10 The United States Supreme Court, *Gitlow v. New York*, 268 U.S 652 (1925).

11 The United States Supreme Court, *Powell v. Alabama*, 287 U.S. 45 (1931).

12 The United States Supreme Court, *Mapp v. Ohio*, 367 U.S. 643 (1961).

13 The United States Supreme Court, *Aguilar v. Texas*, 378 U.S. 108 (1964).

Fifth Amendment rights like double jeopardy,[14] the right against self-incrimination,[15] and the protection against taking property without due compensation;[16] Sixth Amendment rights like the right to a speedy trial,[17] right to a public trial,[18] right to an impartial jury,[19] right to notice of accusations,[20] right to confront witnesses,[21] right of compulsory process to obtain witness testimony,[22] and the right to counsel in non-capital cases;[23] and Eighth Amendment rights, such as protection against excessive bail,[24] and the prohibition on cruel and unusual punishments.[25]

The incorporation of these criminal procedure rights against the states was primarily based on the idea that due process required the incorporation of "fundamental rights essential to a fair trial in a criminal prosecution,"[26] or those "essential to the concept of ordered liberty."[27] In the area of criminal procedure, due process meant that those rights that were necessary to a fair process, as understood in the Anglo-American system of criminal procedure, were required by the Constitution to apply not only to the federal government through the Fifth Amendment but also to state and local governments through the Fourteenth Amendment.[28]

In addition to the specific rights listed in the Bill of Rights, the due process clauses of the US Constitution are given further meaning. The Court has consistently found that the Bill of Rights is not an exclusive list of

14 The United States Supreme Court, *Benton v. Maryland*, 395 U.S. 784 (1969).
15 The United States Supreme Court, *Malloy v. Hogan*, 378 U.S. 1 (1964).
16 The United States Supreme Court, *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).
17 The United States Supreme Court, *Klopfer v. North Carolina*, 386 U.S. 213 (1967).
18 The United States Supreme Court, *In re Oliver*, 333 U.S. 257 (1948).
19 The United States Supreme Court, *Parker v. Gladden*, 385 U.S. 363 (1966).
20 The United States Supreme Court, *In re Oliver*, 333 U.S. 257 (1948).
21 The United States Supreme Court, *Pointer v. Texas*, 380 U.S. 400 (1965), hostile witnesses; The United States Supreme Court, *Washington v. Texas*, 388 U.S. 14 (1967), favorable witnesses.
22 Ibid.
23 The United States Supreme Court, *Gideon v. Wainwright*, 372 U.S. 335 (1965).
24 The United States Supreme Court, *Schilb v. Kuebel*, 404 U.S. 357 (1971).
25 The United States Supreme Court, *Robinson v. California*, 370 U.S. 660 (1962).
26 The United States Supreme Court, *Pointer v. Texas*, 380 U.S. 404.
27 See: The United States Supreme Court, *Hurtado v. California*, 110 U.S. 516 (1884).
28 Jacob W. Landynski, "Due Process and the Concept of Ordered Liberty: 'A Screen of Words Expressing Will in the Service of Desire'?," *Hofstra Law Review* 2, no. 1 (1974): 1–66, https://scholarlycommons.law.hofstra.edu/hlr/vol2/iss1/1.

fundamental rights that are protected by the US Constitution.[29] The Court has determined that within the concept of due process are two key concepts: substantive due process and procedural due process. Substantive due process protects individuals against policies that exceed the authority of government, including issues like fundamental rights in the Bill of Rights, participation in the political process, and protection of discrete minorities.[30] In criminal procedure the second aspect of due process, procedural due process, is extremely important. It mandates that whenever the government attempts to take life, liberty, or property, it can only do so if the process allowing the government action is fair. While there is no definitive list of what process is required by procedural due process, Judge Henry Friendly has generated an influential list in terms of importance:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds for it.
3. Opportunities to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.[31]

These concepts, as well as those specifically listed in the Bill of Rights, form the core of the US constitutional requirements under the Fifth and Fourteenth Amendments regarding due process requirements in criminal procedure.

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29 See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the court found that the Constitution includes a right to privacy even though that right is not clearly written into the Constitution or any of its amendments.

30 Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* (Washington: Cato Institute, 2010), 90–100.

31 Peter Strauss, "Due Process," Legal Information Institute, accessed September 12, 2025, https://www.law.cornell.edu/wex/due_process.

3. Due Process and the ICC

The International Criminal Court includes provisions recognized by the international community based on humanitarian legal principles as well as major human rights instruments and customary international law.[32] In fact, many of the legal due process principles recognized under international law share a common source with the American provisions including the Magna Carta of 1215, and Fourteen and Fifteenth Amendments of the US Constitution.

Article 67 of the Rome Statute includes certain rights as a part of its minimum guarantees, including the right to be tried without undue delay, to be present at trial, to conduct a defense, right to counsel assigned and paid by the court, to examine or have examined witnesses against them, to have the attendance and examination of witnesses, assistance of an interpreter and a provision against mandatory self-incrimination, right to a fair and public hearing, and the right against double jeopardy. Certain rights are provided at each stage of the proceedings including pre-trial, during trial, and on appeal.[33]

It can be said that the Rome Statute provides the basic requirements of due process in criminal proceedings as recognized under international law.[34] Although the Rome Statute has due process protections in many areas of criminal procedure there are some areas where the United States' approach and the ICC's approach differ to the extent that they raise the question whether the United States handing a US citizen over to the ICC would violate the United States Constitution in a significant way. Below are some of those areas.

4. Right to Trial by Jury

American belief in the importance of the right to trial by jury is apparent from early days. By the time the United States was formed, jury trials had been in existence in England for several centuries and carried credentials

32 David Harris, "The Right to a Fair Trial in Criminal Proceedings as a Human Right," *The International and Comparative Law Quarterly* 16, no. 2 (1967): 352–78.

33 Rome Statute of the International Criminal Court, July 17, 1998, Article 67.

34 Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2005).

traced by many to the Magna Carta.[35] In the Declaration of Independence one of the reasons given for the colonies to declare their independence from Britain was the accusation that King George III had been guilty of "depriving us in many cases, of the benefits of trial by jury."[36] Article III of the Constitution included the right to trial by jury. This right was expanded in the Sixth Amendment to the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[37] The constitutions of the original states all included jury trial provisions and every state joining the Union thereafter included such provision in its constitution. The United States Supreme Court has consistently confirmed the importance of the right of jury trial in the American system of criminal procedure.

The arguments in favor of jury trials can be found in *Duncan v. Louisiana*,[38] the case that established the incorporation of the jury trial right through the Fourteenth Amendment due process clause to the states.

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. (…) Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.[39]

Jury trials then are designed to be a democratic check against government power, in particular the potential abuse of power by the government, including the prosecution and the judiciary. They also emphasize the importance of citizen participation and investment in the criminal justice

35 E.g. William Forsyth, *History of Trial by Jury* (London: John W. Parker and Son, 1852); James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown and Company, 1898); William S. Holdsworth, *A History of English Law*, vol. 1 (London: Methuen & Co., 1903).

36 United States, Declaration of Independence (1776), National Archives, accessed September 12, 2025, https://www.archives.gov/founding-docs/declaration-transcript.

37 U.S. Const. amend. VI.

38 The United States Supreme Court, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

39 Ibid., 391 U.S. 157, 158.

system. Jury trials are also important to effecting certain other due process concepts like the Exclusionary Rule[40] and the Fruit of the Poisonous Tree doctrines,[41] as well as the important concept of jury nullification.[42] Another fundamental due process right that is effected by jury trials is the presumption of innocence.[43] Legal professionals, such as judges, prosecutors, and even defense attorneys, who are consistently exposed to work within the criminal justice system, begin to be jaded by that experience. This develops a mentality where constant exposure to crimes and criminals makes everything seem criminal.[44] A juror who has never sat on a jury before, or has sat on one or two at most, does not bring that experience with them to a case. This then makes the jurors more likely to enter a case with a greater presumption of innocence. Therefore, it is obvious that the right to a trial by a jury of your peers is an essential element of due process in American constitutional law.

5. Jury Trial and the ICC

The International Criminal Court does not allow for trial by jury, instead the finder of fact is a panel of judges.[45] This means that defendants before

40 The Exclusionary Rule is a constitutional remedy adopted by the Supreme Court that prevents evidence collected in violation of the defendant's constitutional rights from being used in a court of law. The United States Supreme Court, *Weeks v. United States*, 232 U.S. 383 (1914).

41 The Fruit of the Poisonous Tree doctrine compliments the exclusionary rule as the court found that evidence indirectly gained as a result of an illegal act is "fruit of the poisonous tree" and should also be excluded from being used in a court of law. The United States Supreme Court, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Jury trials facilitate the exclusionary and fruit of the poisonous tree doctrines because any evidence excluded by the judge is never seen by the jury and cannot influence their decisions in the case. In a judge only trial, even if a judge excluded the evidence, that judge would continue to be aware of that evidence which could influence their decision.

42 Jury nullification is the practice of a jury finding a not-guilty verdict in a criminal case in spite of convincing evidence to the contrary usually in response to the jury's perception that a guilty verdict would be unjust or in response to overreach by the government. Justice William Goodloe, "Jury Nullification: Empowering the Jury as the Fourth Branch of Government," Fully Informed Jury Association, 1996, accessed October 12, 2025, http://callmegav.com/w/wp-content/uploads/2015/01/ES_Goodloe_jury_nullification.pdf.

43 The United States Supreme Court, *Coffin v. United States*, 156 U.S. 432 (1895).

44 Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Blinking on the Bench: How Judges Decide Cases," *Cornell Law Review* 93, no. 1 (2007): 1–44.

45 Rome Statute of the International Criminal Court, July 17, 1998, Part 6 – The Trial.

the court are not being tried by a jury of their peers. Instead, they are being tried by a group of professionals removed from the experience of many of those they are judging. A look at the current composition of the judges on the ICC based on their official biographies indicate the disparity between their experience and the experience of a military defendant before the court. Out of 18 judges: 13 have served as prosecutors; 13 have been part of human rights organizations; 11 have been law professors; 9 have previously served as judges; 9 have served in diplomatic positions, and only 2 have served as defense counsel. None, at least according to their official biographies, have served in the military.[46]

The background of these judges raises serious questions regarding pro-prosecution bias at the ICC. A prosecutorial background often leads to a bias for the prosecution either directly or on a subconscious level.[47] Judges with a background as human rights advocates can hardly seem to be sympathetic with those accused of serious human rights violations. Judicial, academic and diplomatic experience is significantly removed from the real-world experiences of defendants before the court, and a lack of military experience greatly hinders a complete understanding of the difficult decisions and situations that may arise in a war setting.[48] There are also serious questions concerning bias based on the nationality of the judges of the ICC.[49] In short, the ICC does not provide a trial in front of a jury of peers as required by the US Constitution.

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46 "Who's Who," International Criminal Court, accessed May 10, 2025, https://www.icc-cpi.int/judges/judges-who-s-who.

47 See: Casey J. Bastian, "Examining Pro-Prosecution Bias in the Judiciary: Unconscious Biases of a Prosecutorial Background," Criminal Legal News, March 2025, accessed September 12, 2025, https://www.criminallegalnews.org/news/2025/feb/15/examining-pro-prosecution-bias-judiciary-unconscious-biases-prosecutorial-background/.

48 See: Sabina Grigore, "Justice Delayed, Justice Denied: Bias, Opacity and Protracted Case Resolution at the International Criminal Court," Just Access, May 2, 2023, accessed October 16, 2025, https://just-access.de/bias-opacity-and-protracted-case-resolution-at-the-international-criminal-court/.

49 Milan Markovic, "International Criminal Trials and the Disqualification of Judges on the Basis of Nationality," *Washington University Global Studies Law Review* 13, no. 1 (2014), https://openscholarship.wustl.edu/law_globalstudies/vol13/iss1/5/.

6. Right to Confrontation

The Sixth Amendment to the US Constitution states that a person accused of a crime has the right to confront any witnesses against him in a criminal action. "(…) in all criminal prosecutions, the accused shall enjoy the right (…) to be confronted with the witnesses against him."[50] This right was incorporated to the States as a fundamental right via the Fourteenth Amendment incorporation doctrine.[51] The court has recognized that the fundamental purposes of the confrontation clause are to ensure that witnesses testify under oath and understand the serious nature of the trial process; to allow the accused to cross-examine witnesses who testify against him; and to allow jurors to assess the credibility of a witness by observing that witness's behavior in court while testifying.[52] It also has traditionally indicated a rejection of written testimony that does not allow the accused the right to face his accusers and put the honesty and truthfulness of that testimony to a test in front of a jury.

The right to confront witnesses is at the heart of the adversarial trial system which was adopted by the United States and other common law countries from the British system. The heart of the adversarial trial system lies in the belief that if two equal and opposing sides (in a criminal case, prosecution representing the state versus a defense attorney representing the accused) are motivated to prove the truth as they see it, that this adversarial process will lead to the finder of fact (jury or judge) to find the truth of the case. The ability to confront those witnesses in open court and subject them to cross-examination to test the truth of their testimony is an essential element of a fair trial. This system contrasts with the other major trial system, the inquisitorial system that is found in most European countries.[53] In the inquisitorial system, the judge generally has the burden to develop the evidence and seek the truth, rather than the parties to the case.

50 U.S. Const. amend. VI.

51 The United States Supreme Court, *Pointer v. Texas*, 380 U.S. 400 (1965); The United States Supreme Court, *Washington v. Texas*, 388 U.S. 14 (1967).

52 The United States Supreme Court, *Mattox v. United States*, 156 U.S. 237 (1895).

53 John R. Spencer, "Adversarial vs Inquisitorial Systems: Is There Still Such a Difference?," *The International Journal of Human Rights* 20, no. 5 (2016): 601–16, https://doi.org/10.1080/13642987.2016.1162408.

7. Right to Confrontation and the Adversarial Trial Process at the ICC

The Rome Statute confirms a preference for live testimony and for the parties' right to question and cross-examine witnesses. These provisions include the right of the accused to question witnesses, a preference for immediate examination of evidence by judges, the presence of all judges of the Trial Chamber at each stage of the process, and the presence of witnesses at trial.[54] However, under Article 68 of the Rome Statute, there are exceptions when the right to confront may be denied to the accused. The exceptions are based on the power of the Court to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.[55] Although the Rome Statute indicates that any restrictions under Article 68 cannot be prejudicial or inconsistent with the rights of the accused and the right to a fair and impartial trial, the rules do allow a number of restrictions on the right to confrontation that would be illegal in the American system. Included in these are the withholding of evidence from the defense and the potential for secret witnesses. One can argue that these are necessary provisions given the nature of the cases heard by the ICC, but there can be no doubt that they are inconsistent with the United States requirements on confrontation.

8. Speedy Trial

The Sixth Amendment to the United States Constitution includes a requirement for a speedy trial: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy (…) trial." This right was deemed fundamental and incorporated to the states via the Due Process Clause of the Fourteenth Amendment.[56] In *Barker v. Wingo*, the Supreme Court developed a four-part test to determine whether there has been a violation of the speedy trial right.[57] The Court said that in order to determine whether the delay was sufficient to raise a constitutional concern depended on consideration of the length of the delay, the reasons for the delay, whether the defendant had asserted his/her right to a speedy trial, and any prejudice that occurred to the defendant due to the delay. The remedy for violation of the speedy trial

54 Rome Statute of the International Criminal Court, July 17, 1998, Article 67, 68.
55 Rome Statute of the International Criminal Court, July 17, 1998, Article 68, Section 1.
56 The United States Supreme Court, *Klopfer v. North Carolina*, 386 U.S. 213 (1967).
57 The United States Supreme Court, *Barker v. Wingo*, 407 U.S.514 (1972).

provision is dismissal of the case with prejudice. In practice, speedy trials in US criminal cases are governed by strict limitations imposed by law on both the federal and state level. The Federal Speedy Trial Act[58] mandates that the information or indictment (the beginning of legal proceedings) must be filed within 30 days from the date of the arrest or service of the summons,[59] and that the trial must begin within 70 days from the date the information or indictment was filed, or from the date the defendant appears before the court, whichever is later.[60] The Federal Speedy Trial Act also mandates that defendants must have adequate time to prepare for trial, so it does not allow trials before 20 days have passed.[61] States also have strict speedy trial provisions that are contained either in their state constitutions or laws.[62] For example, in California, an information has to be filed within 15 days and a trial has to be scheduled within 60 days.[63] The right to a speedy trial is not merely a right for the defendant to invoke, but it is also a right that protects the public's interest.[64]

9. Speedy Trial and the ICC

The Rome Statute has a provision that guarantees the right to a trial without undue delay.[65] However, in practice, there is a substantial problem with timely trials at the ICC, as there has been at the other international criminal tribunals concerning Rwanda and the former Yugoslavia.[66] Early trials at the ICC have taken several years, with the average time between opening statements and final judgment taking three to five years. This is not consistent with the United States concept of a speedy trial.

58 Title 18, Chapter 208 of the United States Code.

59 18 U.S.C. § 3161(b).

60 18 U.S.C. § 3161(c)(1).

61 18 U.S.C. ch. 208.

62 Burke O'Hara Fort et al., *A Selected Bibliography and Comparative Analysis of State Speedy Trial Provisions* (Rockville: National Criminal Justice Reform Service, 1978).

63 California Penal Code §1382.

64 The United States Supreme Court, *Zedner v. United States*, 547 U.S. 489 (2006).

65 Rome Statute of the International Criminal Court, July 17, 1998, Article 68 (1)(c).

66 See: Cynthia J. Cline, "Trial Without Undue Delay: A Promise Unfulfilled in International Criminal Courts," *Revista Brasileira de Políticas Públicas* 8, no. 1 (2018): 55–88, https://doi.org/10.5102/rbpp.v8i1.5159; Brian Farell, "The Right to a Speedy Trial Before International Criminal Tribunals," *South African Journal on Human Rights* 19, no. 1 (2003): 98–117, https://doi.org/10.1080/19962126.2003.11865174.

10. The Composition of the Court

One of the most challenging aspects of the ICC, in terms of fairness and due process standard, is the way the court is established by the Rome Statute. Eighteen judges are appointed for nine-year terms. During their term, they can serve on the pre-trial, trial and appellate divisions of the Court, and many change from one division to another. In addition, all organs and divisions of the Court share office space in one institution in The Hague, including the presidency, vice presidents, judges, and the prosecutor. Essentially, the ICC is one institution with several divisions. A valid criticism of the Court can be made based on this organization:

> The ICC will act as policeman, prosecutor, judge, jury and jailor, all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. (…) From first to last, the ICC will be the judge in its own case. (…) As an institution, the ICC is fundamentally inconsistent with the political, philosophical, and legal traditions of the United States.[67]

One result of this institutional organization is the lack of a truly independent system of appeal at the ICC. In essence, appeals are made from one division of the court to another, with no real separation of judges or interests.

11. Could the US Government Ratify the Rome Statute Even If Its Provisions Are Inconsistent with the Due Process Requirements of the US Constitution?

Assuming then that some of the provisions of the Rome Statute are inconsistent with the provisions of due process in the United States Constitution, can the United States legally join the ICC and subject its citizens to the court's authority? To answer this question, we have to look at the application of the Constitution under US law. The United States has a clear hierarchy of laws embedded in law and practice. The United States Constitution is considered the "supreme law of the land," and all other laws are subordinate

[67] Lee A. Casey, "The Case Against the International Criminal Court," *Fordham International Law Journal* 25, no. 1 (2001): 840–72, https://ir.lawnet.fordham.edu/ilj/vol25/iss3/15.

to it. This rule is made clear from the beginning by the Supremacy Clause of the Constitution:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[68]

The Supremacy Clause has served as the basis for establishing the supremacy of the federal constitution and laws over state constitutions and state laws.[69] In the Supremacy Clause, treaties are given an equal status with laws passed by Congress in the US hierarchy of laws. The principle that laws passed by Congress cannot violate the US Constitution is laid down in perhaps the most important case in American constitutional history: *Marbury v. Madison*.[70] In addition to establishing the doctrine of judicial review,[71] the Marbury case also established that any law repugnant to the Constitution cannot stand. Given that laws passed by Congress that violate the Constitution are without legal effect and treaties are equivalent in the hierarchy to congressional laws, would not a treaty that violates the US Constitution also be without legal effect?

Fortunately, we do not need to guess at the answer to this question, as the US Supreme Court has provided us with an answer in a case that is directly on point: *Reid v. Covert*.[72] In that case, the defendant, Clarice Covert, killed her husband, a sergeant in the United States Air Force, at an airbase in England. In the companion case considered at the same time, Dorothy Smith killed her husband, an army officer, at a military post in Japan. According to a provision of the Uniform Code of Military Justice (UCMJ),

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68 United States Constitution, Article VI, Clause 2.

69 See: The United States Supreme Court, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); The United States Supreme Court, *Ableman v. Booth*, 62 U.S. 506 (1859).

70 The United States Supreme Court, *Marbury v. Madison*, 5 U.S. 137 (1803).

71 Judicial review is the doctrine that states that it is the prerogative of the judicial branch to determine what the law means. Specifically it the source for the US Supreme Court's power to declare actions by the other two branches of government unconstitutional.

72 The United States Supreme Court, *Reid v. Covert*, 353 U.S. 1 (1956).

persons accompanying armed forces members were subject to being tried by provisions of the UCMJ if any treaty or agreement to which the US was a party mandated so. In the cases of both England and Japan, the US had entered into treaties stating that family members accompanying military personnel would be tried for crimes committed on US military bases in their countries within the US military justice system, not in the local courts. Both Mrs. Covert and Mrs. Smith were convicted of murder by the military justice system. They both appealed these verdicts, arguing that trying civilians in a military court violated their constitutional due process rights, including the jury trial right in Article III and the Sixth Amendment. Under the UCMJ, trials have a limited jury made up of military officers only, and are conducted in a manner significantly different than normal civilian jury trial practice.[73]

In *Reid*, the Court first considered when, in acting against its citizens abroad, the United States can do so free of constitutional restraints. The Court's clear answer was no:

> At the beginning, we reject the idea that, when the United States acts against citizens abroad, it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other sources. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and the other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[74]

The Court then reaffirmed the importance of the right to a trial by jury in the American context of due process. Next, it asked whether the language of Article III, §2 of the US Constitution on jury trials indicated a desire that the constitutional protections in the article should apply when the US government acts outside the country. The Court pointed out that the language of this section should be given its plain meaning. This includes the part of the Constitution that states all criminal trials should be by jury and the part that indicates when a crime is "not committed within any State, the Trial

73 UCMJ, 64 Stat. 109 (1950), codified at 10 U.S.C. §§801–946.

74 The United States Supreme Court, *Reid v. Covert*, 354 U.S. 5, 6 (1956).

shall be at such Place as the Congress may by Law have directed." Federal law subsequently mandated that these jury trials occur either in the district where the offender is arrested or into which he is first brought.[75] Therefore, a plain language reading clearly indicates that it was anticipated that Americans who committed crimes outside the United States would still have the protection of the right to a trial by jury.

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our Government.[76]

The Court then identifies a possible solution to the question of what can be done if the provisions of an international treaty violate US constitutional provisions. "If our foreign commitments become of such nature that the government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes."[77] In other words, either obey the constitutional provisions or amend the Constitution. There can be little doubt about the certainty of the *Reid* Court's opinion regarding the question of whether a treaty commitment can override the US Constitution: "(…) no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[78]

Another relevant and more recent case that shows constitutional limits on treaty obligations is *Medellín v. Texas*.[79] In this case, José Medellín, a Mexican national, was convicted of the gang rape and murder of two teenage girls in Texas. He was sentenced to death. Medellín challenged his conviction, arguing that he had been denied his rights under Article 36 of the Vienna Convention on Consular Relations, which gives any foreign national detained for a crime the right to contact his or her consulate. The United States is a party to this convention. However, Texas had

75 18 U.S.C. §3238.
76 The United States Supreme Court, *Reid v. Covert*, 354 U.S. 14 (1956).
77 Ibid.
78 Ibid., 354 U.S. 16.
79 The United States Supreme Court, *Medellín v. Texas*, 552 U.S. 491 (2008).

not advised Medellín of his rights under the convention. His argument was partly based on a ruling of the International Court of Justice holding that the US had violated the Vienna Convention rights of 51 Mexican nationals (including him) and ordering that those convictions to be reconsidered.[80] He argued that the Vienna Convention granted him an individual rights that state courts must respect. He also cited a memorandum from the President of the United States that instructed state courts to comply with the ICJ's ruling by rehearing the cases, arguing that the Constitution gave the President broad powers to ensure that treaties are enforced. However, the State of Texas rejected all of his arguments and dismissed his petition.

The Supreme Court first found that a treaty may constitute an international commitment, but "it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' and is ratified on that basis."[81] In this case, the Vienna Convention was not self-executing, and there had been no legislation passed by Congress that indicated the Convention's provisions or the ICJ's decisions were domestic law. The argument that the President's memorandum had the ability to make the provisions of the treaty domestic law was also rejected by the Court because, under the constitutional system of government, the President lacks the authority to do so: "It is a fundamental constitutional principle that 'the power to make the necessary laws is in Congress; the power to execute in the President.'"[82] The President's authority to act must come from either an act of Congress or from the Constitution itself. In this case, neither were true. The decision of the Texas Court of Criminal Appeals was upheld. In our discussion, the lesson is clear. Actions taken by the executive in furtherance of international treaty obligations are still subject to the requirements of the US Constitution. If those acts violate the Constitution, they will not be enforced in domestic courts, including the Supreme Court.

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80 International Court of Justice, Judgment of March 31, 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, p. 12.

81 The United States Supreme Court, *Medellin v. Texas*, 552 U.S. 493 (2008).

82 See: The United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

12. Conclusion

While the Rome Statute of the International Criminal Court strives to establish a court based on accepted international legal concepts, including the due process of law, it does not meet the same due process requirements of the United States Constitution. Questions can be raised whether committing an American citizen to the jurisdiction of the ICC would violate due process protections in the areas of jury trials, the right to confrontation, and the right to a speedy trial. There is also the issue of the composition of the Court, including the lack of a truly independent appellate process. Likewise, it seems clear that when an international treaty, such as the Rome Statute, violates provisions of the United States Constitution, the treaty cannot be used against American citizens. It would therefore seem clear that the United States government surrendering an American citizen to the ICC would violate the due process protections of American law.

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Theoretical Aspects of Biodiversity Protection in European Monetary Legislation

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Abstract: The subject of the analysis in the paper is an overview of the causes, features, and consequences of the tendency of "greening" the concept of modern monetary law and central bank legislation to preserve natural resources in the context of biodiversity and provide a contribution to the realization of sustainable and humane economic development. In this sense, the paper tries to indicate the potential contribution of "green monetary legislation" in controlling and solving environmental problems, where a special place is devoted to identifying the potential ecological dimension of the mandate of the (European) Central Bank as the supreme monetary institution of the EU. In the following text, attention is paid to the functional analysis of the arguments that can justify the inclusion of environmental risks in central bank legislation. In contrast, in the further text, attention is paid to identifying the potential legal basis for biodiversity protection in the central bank mandate. Although at first glance, it may seem that monetary legislation has no direct connection with environmental law and policy, practice shows that there is a high degree of functional and content consistency between the goals of contemporary environmental and monetary policy, which only speaks in favor of the thesis of the "green lex monetae." By applying the dogmatic, axiological, and comparative legal methods, the author aims to point out the biggest dilemmas and challenges in the central bank's legal contribution to environmental concerns, identify certain solutions *de lege lata*, and possibly offer certain common recommendations *de lege ferenda*.

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1. Introduction

Unlike traditional branches of law, central bank law as a relatively new legal discipline due to the hybrid character of monetary norms enjoys a certain qualitative advantage in controlling the mentioned environmental problems. That primarily occurred due to the flexibility of monetary norms, relatively quick adaptation to new circumstances, and lower transaction costs of its application (because the negotiation procedure and designing secondary monetary rules from decrees, appeals, programs, regulations, and instructions is time and financially less demanding than the norms of hard monetary norm contained in primary monetary legislation).

Today, the primary task of a central bank is to ensure monetary stability, which usually refers to price stability and targeted inflation rates (under its primary mandate), and general financial stability (which falls under its secondary mandate). However, we can also notice a strong tendency toward the continual and profound evolution of central bank responsibilities. Nowadays, these extend to achieving certain standards in areas such as cohesion policy, human rights protection, and combating financial crime.[1] Environmental aspects of a central bank's mandate are not entirely new, considering the previously mentioned hybrid nature of monetary legal norms, which incorporate elements of both private and public law. Environmental policy has become an integral subsystem of general economic policy, and due to the high degree of synthetic-dialectical interconnection among its subsystems, it is logical to expect central banks to contribute to defending the primordial connection between humanity and nature. Monetary stability and environmental protection represent typical examples of public goods that are highly correlated, so the connection between normative regulation of public monetary management and environmental protection is quite natural and logical. According to the concept of humankind concerns developed in the area of international environmental law which emphasizes the need for coordination between states and international organizations in achieving environmental goals the same approach can be used in achieving international monetary stability as one more example of global public

[1] Marko Dimitrijević, *Pravo Evropske centralne banke* [*Law of the European Central Bank*] (Niš: Centar za publikacije Pravnog fakulteta u Nišu, 2023), 121–25.

good beside environmental conservation.[2] This is especially vital in a time of dynamic technological progress (information revolutions), which heavily relies on the use of environmental inputs in its development. Although the central bank's involvement in environmental protection is secondary, it remains relevant from a practical standpoint. Every positive contribution and effort in this area, even modest and limited in scope is equally important if we are to achieve sustainable outcomes and milestones on the path toward a net-zero, nature-positive economy. Therefore, recent central bank activities in this field are a natural consequence of the evolving framework around the provision of public goods. Beyond traditional monetary law as an independent and established legal branch, we can now speak of a new generation of "monetary rights" understood as the rights of monetary inhabitants[3] to a stable, healthy, and trustworthy currency. In a world lacking the conditions for a healthy environment, it seems that such a right risks becoming a hollow concept.

Clearly, central banks are not sub-legislators (or co-legislators) in the field of environmental protection, nor do they possess the specialized knowledge to define environmental goals.[4] However, this does not justify "eco-monetary nihilism" or a passive stance towards environmental crises. We believe that a more active role for central banks in environmental policy is a reflection of global humanitarian concern, emphasizing the need for international coordination among monetary authorities to preserve natural resources. This approach is particularly relevant to international monetary law, especially regarding the preservation of monetary stability as a global public good. Given the hypothesis that every monetary action has some impact, direct or indirect, on human quality of life, it is reasonable to further explore how central bank decisions and measures may affect natural resources. While this field of study is still in its early stages, growing

2 See more about humankind's common concerns in: Thomas Cottier, ed., *The Prospects of Common Concerns of Humankind in International Law* (Cambridge: Cambridge University Press, 2020).

3 Monetary inhabitants are people who live under the monetary jurisdiction of a state where we can see the implementation of its primary and secondary monetary legislations.

4 Chiara Zilioli and Michael Ioannidis, "Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies," *Common Market Law Review* 59, no. 2 (2022): 363–94, https://doi.org/10.54648/cola2022029.

legal initiatives and agendas are offering sophisticated frameworks for the convergence between environmental protection regulations and monetary stability frameworks. The first part of the paper refers to the place of environmental risks in contemporary monetary legislation, while the second part refers to establishing the bridges between the need for biodiversity protection and the legal mandate of the (European) central bank for such contribution, while in the conclusion author finds that greening the monetary and central bank legislation must be reached without jeopardizing its primary and secondary task in providing monetary and general financial stability.

2. A Review of the Concept of Environmental Risks in Contemporary Monetary Law

The interest of central banks in researching the connection between climate risks and the functions of monetary policy in the last decade is increasingly attracting the attention of theorists of monetary law when they deal with the issue of functional independence in the work of the supreme monetary institution. In considering the existence of a legal basis for undertaking an environmentally responsible monetary policy, the science of monetary law applies *de minimis* approach (with which we also fully agree) because the central bank, when creating a monetary strategy, must take into account the risks caused by climate change (including the risks aimed at the transition to the so-called low-carbon economy) because they target the degree of effectiveness in the effectiveness of financial and price stability as the main value of monetary legislation.[5] It seems that the aforementioned principle simultaneously enables the central bank to take an active part in finding a unique answer when it comes to environmental challenges, but in a way that does not undermine its primary and secondary mandate, but on the contrary only supports it more strongly, taking into account the sensitivity of price stability to changes in the fluctuations in the value of productive factors. In practice, the greening of the central bank mandates can be achieved through several legislative interventions,

[5] Piergiuseppe Spolaore, "Scientific and Regulatory Approaches to 'Green' Central Banking: The State of Art from a Legal Perspective," *Rivista di Diritto Bancario: Dottrina e giurisprudenza commentate*, no. 4 (2023): 496–560.

where it is most often realized through amendments to the prudential regulation of capital requirements or the application of requirements for additional capital buffers. In circumstances of more extensive application of non-conventional measures of monetary policy (such as quantitative easing) defining precise green parameters related to the eligibility criteria of assets with the function of collateral can also represent a significant solution. At the same time, in this context, it is important to note the increasingly frequent insistence on the so-called material dimension of the transparency of climate-related financial risks that are observed (both at the systemic level and at the level of operations of concrete companies and other business entities).[6] In that sense, the regulation of capital requirements as a standard prudential measure is based on the system of risk-weighted capital ratios, where their greening can be done in two ways: the first involves reducing the percentage of approval of risky loans and encouraging the so-called green loans (the so-called green supporting factor), which would favor the investment of loan capital in sustainable business ventures because they cost less in terms of capital requirements (which would also increase the demand for such loans compared to traditional ones that are not environmentally motivated). Otherwise, in the monetary law of the EU, the number of proponents of defining and applying special lending programs related to climate change is increasing massively, and their agenda concerns the introduction of the so-called "green dual interest rates" where lower (even zero) interest rates should be applied to lending to green projects, which would allow greater investment in renewable-energy projects, which was also emphasized by the submission of an "open letter" to the Commission (which received a lot of academic support).[7]

Recently, the international monetary community has particularly focused attention on comprehensive analyses of nature-related environmental risks, especially on the challenges of preserving biodiversity (that is, reducing its loss), which became evident after the first detailed

6 Christos Gortsos, *The Eurosystem's Monetary Policy at 25 (1999–2023): Legal Aspects of the Single Monetary Policy in the Euro Area – From the Establishment of the Eurosystem to the Current Inflation Crisis* (Zurich: EIZ Publishing, 2024), 181–82.

7 Ibid.

OECD studies on this topic (2019), and were then supplemented by many others studies elaborated by private and public sector actors, civil society and extensive academic reports.[8] In that manner, one of the first central banks that started research this topic is the De Nederlandsche Bank, which began researching financial risks associated with the loss of biodiversity (2020), where a major problem in their proper identification is the selection of adequate and suitable methodological instruments that will explain the interaction of the ecosystem with the economic system, and how ecosystems function in general – in terms accessible to the monetary-legal profession, because biodiversity cannot be described it is illusory to reduce it to a poor indicator like that, for example, feasible in the case of climate change where that indicator is met and brought under the measurement of harmful CO_2 emissions).[9] Also, in many studies of biodiversity, it is emphasized that increasing the accumulation of physical and human capital cannot be a justification for the reduction and loss of natural resources, because increasing income in a world without sustainable biodiversity calls into question the sole existence of humanity.[10] The success of the greening of monetary policy and the mandate of the central bank is directly conditioned by the careful development of scenarios and methodological tools for capturing the limited substitution of ecosystem services and its non-linearity (which is reflected in the difficulty of identifying critical thresholds that must not be crossed in the realization of economic activities), but also by establishing special mechanisms for monitoring the transition of this type of environmental risks between different economic sectors, which is a *conditio sine qua non* of achieving the desired transformative changes in society and the economy in which the biodiversity preservation is a priority goal.

Observing the monetary legislation in a comparative legal and global context, it seems that the largest number of central banks have developed some kind of specific climate action plan, which explicitly determines their approach, motive, sense, and instruments of action in the context of

8 Mathilde Salin et al., "Biodiversity Loss, and Financial Stability: A New Frontier for Central Banks and Financial Supervisors?," *Bulletin de la Banque de France* 237, no. 7 (2021): 2–3.

9 Ibid., 5.

10 Partha Dasgupta, *The Economics of Biodiversity: The Dasgupta Review* (London: HM Treasury, 2021).

addressing climate-related risks associated with climate change (whether in the form of conducting pilot studies or stress tests), it is clear the intention of the supreme monetary institution to be involved in the process of protecting natural resources consistently. When identifying and positioning the ecological dimension of the central bank's mandate, it is necessary to keep in mind that just descriptive (formally legal) changing the authorities under the mandate *per se* is not sufficient (and we would add that it is not even necessary) when the central bank is already overloaded with numerous tasks in the field of monetary and general financial policy, maybe a more suitable solution is fine-tuning the input legitimacy of political parties with the output legitimacy of institutions that already actively participate in preserving the environmental resources in all its aspects. In this way, an intermediate space is created in which the central bank, with its expertise, can offer a more visible contribution to the fight against harmful climate changes and the preservation of biodiversity, but in a way that does not complicate its existing organizational structure into a position in public monetary management. Such cooperation in the form of horizontal inter-political coordination is not legislatively and resource-demanding and can be established in the form of an open method of coordination based on the exchange of opinions, guidelines, and the issuing of joint announcements,[11] whose main addressees are entities that are actively legitimized in environmental policy, in contrast to the participation of the central bank where this level of activity is present at a lower level and is not so immediate (although this does not in any way diminish the concrete contributions that it can offer in the preservation of natural resources).

When it comes to EU monetary law, a potential legal basis for legitimising "the desire" of the European Central Bank to contribute to the achievement of environmental goals can be found in Article 11 of the EU Treaty, but in a way that does not undermine its main goal (price stability). The integration of environmental principles into ECB law must be carried out in a way that does not affect the essence and form of its mandate in practice, which does not mean that environmental principles are always in conflict with the achievement of price stability and then their support

[11] See more about EU economic policy coordination: Armin Steinbach, *Economic Policy Coordination in Euro Area* (London: Routledge, 2014).

and application can be broadly considered under the ECB's primary mandate.[12] When it comes to the obligation to support other EU goals (Article 3 of the EU Treaty), under which environmental policy can naturally be subsumed, it should be noted that the text itself does not contain provisions on establishing priorities between other goals. The ECB enjoys full discretion to decide which targets to accept "first." The addition of new responsibilities to the ECB must not be at the expense of the redistribution of already existing responsibilities in the context of price and general financial stability but is only done to harmonize the existing domain of responsibilities with new tasks. We believe that it is more correct to speak of environmental policy in the legislation of central banks as a new task of the central bank, and not as a newly formed competence (which does not in any way obscure its place in the concept of the work of central banks) but on the other hand, it must be separated from the primary field of its activity in an essential and formal legal sense, because the reason for the existence of central banks is monetary stability as a public good, not the preservation of nature, no matter how technocratic it may sound (even a bit unnecessary), but also inevitable because responsibility and salvation from environmental problems cannot fall into the hands of central banks alone.

Environmental risks in the banking management and operation of the EU are elaborated by the Basel III framework,[13] which pays special attention to their constitutive elements and distinguishes, within the structure of environmental risks, between physical and transitional ones that do not represent a separate category of financial vulnerabilities but represent the drivers translating into financial threats through various transmission channels (such as lower profitability, real-estate value, household wealth or asset performance or increased compliance and certain type of legal costs).[14] In the recent literature on monetary law, it is emphasized that taking into account

12 Christian Calliess and Ebru Tuncel, "Greening the Euro? The Impact of the Environmental Integration Clause (Art. 11 TFEU) on the European Central Bank (ECB) Primary and Secondary Objectives," *Berlin e-Working Papers on European Law*, no. 136 (2022): 1–3.

13 Regulation (EU) 2024/1623 of the European Parliament and of the Council of 31 May 2024 amending Regulation (EU) No 575/2013 as regards requirements for credit risk, credit valuation adjustment risk, operational risk, market risk, and the output floor (Text with EEA relevance) PE/80/2023/REV/1 (OJ L, 2024/1623, 19 June 2024).

14 Christos Gortsos, *European Banking Regulation Handbook*, vol. 2, *Substantive Aspects of European Banking Law and Regulation* (Cham: Palgrave Macmillan, 2025), 63–64.

their potential double materiality, the mentioned risks materialize in two ways where on the financial materiality side, the financial performance of that counterparty can be affected by environmental factors, while on the environmental materiality side, the activities of a counterparty may harm the environment, which may then become financially material for this counterparty through triggering or reinforcing a negative outside-in impact.[15]

Nature-related risks can be understood as risks with a negative impact on the economy, individual financial institutions, or the financial system as a whole, which are a direct consequence of the degradation of natural resources such as biodiversity and the loss of the ecosystem induced by it.[16] Climatic and environmental risks find their place in almost every category of relevant risks that the central bank oversees, starting from strategic risks and business-model risks, through market, credit, and insurance risks to operational risks and liquidity risks, which is perhaps the best indicator of the necessity of involving central banks in all activities related to environmental protection. We think that the inevitability of the occurrence of environmental risks in the prudential framework implies a very careful calibration of the trajectory of their management, because the conscientious acceptance of their existence and the fundamental importance of prudential supervision by the central bank can give the necessary credibility and legitimacy in an even greater range and, at the same time, provide a certain amount of "humanity" to public monetary operations and, generally speaking, its work, which supports the thesis of the humanization of monetary policy, in which man is at the center, and not only monetary stability as a public good which in a world without conditions for a healthy life represents nothing more than an abstract idiom.[17] At the same time, taking into

15 Ibid., 65. Between these two types of environmental components risks there are very sophisticated trade-off links in a manner that transition to a more sustainable economy may increase the risks to credit institutions, considering the potential impact on their counterparties or invested assets and *vice versa*.

16 Network for Greening the Financial System, "Nature Related Financial Risks: A Conceptual Framework to a Guide Action by Central Banks and Supervisors," Technical Document, NGFS, July 2024, p. 10, accessed January 1, 2024, https://www.ngfs.net/system/files/import/ngfs/medias/documents/ngfs_conceptual-framework-on-nature-related-risks.pdf.

17 Marko Dimitrijević, "The Importance of the Concept of Environmental Protection in the Law of the European Central Bank," *Foreign Legal Life* 68, no. 3 (2024): 403–19, https://doi.org/10.56461/SPZ_24305KJ.

account the differences that, in monetary jurisdictions, shape the postulates of independence in the work of central banks, i.e., the specific scope of their independence (especially the aspect of institutional and functional independence), it is necessary to bear in mind that the potential of the central bank to deal with the effect of environmental risks on monetary stability in the broadest sense of the word may vary. In more developed monetary jurisdictions, in addition to identifying problems, it also implies a concrete response (solution) to them, while in smaller monetary jurisdictions may remain at the level of identification depending on the specific legislative capacity of the central bank. It is for this reason that cooperation between central banks becomes an important instrument for more successful greening of monetary policy, where the Network for Greening the Financial System (NGFS) always represents the best example and indicator of the readiness of supreme monetary institutions to engage in this process.

3. Establishing a "Legal" Bridge between Biodiversity Conservation and the Mandate of the (European) Central Bank

Coordinated action between countries at the global level represents the first step in devising purposeful responses related to the preservation of biodiversity and human well-being, and the necessary condition for that coordination is influenced by the existence and collection of consistent, reliable, and location-specific data (since only on the basis of accurate information can optimal legal mechanisms be designed).[18] Through the transparent exchange of information (which strengthens the environmental dialogue at the same time), the axiological matrix of legal norms of a certain branch of law is viewed and understood more precisely. In that process, it determines the existence (or non-existence) of a connection with concrete ecological values, which can later be the basis for derogation or the adoption of new legal solutions that are more environmentally conscious.

Today, as we have already emphasized, the central bank is faced with financial risks associated with biodiversity in its work, primarily through decisions on the purchase of assets (which it accepts as collateral) and (or)

[18] Brian Blankespoor, Susmita Dasgupta, and David Wheeler, "Bridging Conflicts and Biodiversity Protection: The Critical Role of Reliable and Comparable Data" (WB Policy Research Working Paper 11076, February 2025), 22–23.

through the exposure of its counterparties in credit operations.[19] By adjusting the collateral framework and through its operations on the open financial market, the central bank can increase its exposure to the mentioned risks, that is, generate a greater loss of biodiversity. To adequately adjust monetary policy actions, the central bank must focus on the risk classification to recognize those that are the most obvious (indisputable) and whose harmful effects on biodiversity is unquestionable where the adoption of targeted monetary policy measures must be started immediately (even before all risks are fully identified – because the time costs of delayed monetary and legal decisions are very large and almost irreparable in the case of biodiversity conservation). Therefore, the precautionary principle requires that in the circumstances of balancing the need for robust data processing and the costs of non-sharing, central banks must act in the early stages of observed biodiversity damage on the basis of incomplete data, and not wait for the final data processing when the loss may be more far-reaching. In this sense, we believe that the delay in the processing of complex data does not reduce the legitimacy of the measures taken by the central bank, but, on the contrary, it indicates the awareness of the problem's importance that cannot be delayed and requires an adequate response, which is not the first time in the history of the central bank legislation development that it is required to act as an adaptive organization in circumstances that (sometimes) do not support the adoption of a little bit revolutionary (controversial) decisions (because the convergence of environmental risks in public law monetary operations certainly undoubtedly represents a significant novelty in contemporary monetary legislation).

In determining the ECB's response to challenges in the preservation of biodiversity, only the conceptual definition of it arises as a preliminary question, because in academia and practice it is often equated with the protection of ecosystems and the protection of nature, although they are not synonyms. Biodiversity is characterized by heterogeneity and by complex, dynamic cause-and-effect relationships. As a result of which, from a formal legal point of view, neither the discipline of monetary law (nor any other

[19] Pierre Monnin, "Monetary Policy Operations and Biodiversity Loss," Council on Economic Policies, CEO Policy Brief, March 2022, 9–10, accessed June 15, 2024, https://www.cepweb.org/monetary-policy-operations-and-biodiversity-loss/.

positive legal discipline) can currently offer a unique instrument validation that would be equivalent to the loss of biodiversity and led to the restoration of the previously disturbed state. That somewhat content-based elusiveness of the meaning of its content speaks in favor of the gradual creation of a heterogeneous corpus of international biodiversity law that incorporates diverse instruments of disciplines from the domain of public law and private law sciences in order to shape a unique response in the fight.[20] It is in this light that we can and should observe the functions of monetary and legal norms in the field of biodiversity conservation, as one of the many instruments that the modern legal order uses to protect fundamental rights to a healthy environment. The greening of monetary legislation and the legislation of central banks cannot be implemented in the absolute sense of that word, nor is something like that really necessary because the *modus operandi* of the central bank cannot be that of the environmental protection agency. However, integration of environmental risks in the broadest sense into the work of central banks contributes to the protection of nature in all its manifestations, which, in conjunction with the measures and instruments of other branches of law where this integration is more complete by the nature of things, i.e., the more compatible causes of relationships that are regulated, can result in achieving the desired outcome.

Interestingly, the ECB recently published two papers on biodiversity-loss risks, with a special focus on the spread of physical and transition risks. A notable innovation in these studies is the exploration of potential credit-portfolio losses resulting from biodiversity loss.[21] These studies reflect the principles of green central banking, where central banks incorporate ecological risks into the formation and adaptation of monetary strategies and other regulatory mechanisms. The *ratio legis* behind this research lies in the need to identify the EU economy's exposure to physical risks stemming

[20] Felix Ekardt et al., "Legally Binding and Ambitious Biodiversity Framework, and Human Rights Law," *Environmental Science Europe* 35, no. 80 (2023): 2–4, https://doi.org/10.1186/s12302-023-00786-5.

[21] Before greening the monetary legislation and the legislation of the central banks, it is necessary to identify the cause-and-effect mechanism between the climate system, ecological pressures, and biodiversity in order to find adequate actions for the central bank in that field. See more in: Andrej Ceglar et al., "The Impact of the Euro Area Economy and Banks on Biodiversity," *ECB Occasional Paper*, no. 335 (2023): 4, 27–28, https://dx.doi.org/10.2139/ssrn.4651049.

from ecosystem service degradation. The findings show that non-financial corporations (NFCs) in the euro area are significantly dependent on ecosystems through supply-chain linkages. Notably, around 75% of bank corporate loans are highly dependent on biodiversity.[22]

Today, central banks increasingly recognize nature-related risks as material financial risks, which, if left unregulated, can lead to transmission risks and the emergence of physical risks in the future. Some general *de lege ferenda* guidelines for reshaping monetary legislation may include: stricter rules on problematic asset types in collateral frameworks, setting concentration limits on carbon-sensitive or environmentally harmful assets discouraging financing of companies engaged in environmentally damaging activities, and integrating nature-resource-loss considerations into bank lending decisions, moving beyond just climate risk. Thus, the regulation of collateral frameworks must evolve to include not only climate-related risks but broader climate change considerations, supporting comprehensive risk management and market signaling. Still, to meet these criteria, we must define the threshold and scope of central bank activities, avoiding the externalization of environmental costs from the private sector to monetary institutions, which have limited tools but should not remain passive.

When it comes to the legitimacy of centralbank action in the area of environmental protection, the literature on monetary law distinguishes between so-called prudential and promotional reasons that justify such interventions. Prudential reasons relate to risk mitigation, which falls within the traditional mandate of central banks primarily concerned with maintaining price and financial stability, where climate-related factors can affect price levels. On the other hand, promotional reasons involve actions by the central bank that go beyond the scope of its existing (primarily monetary) mandate. In this second category, the central bank becomes one of the actors that initiates and promotes a gradual transition toward a low-carbon economy. While this is certainly not its primary goal, it can be broadly

[22] See more about this in: Maud Abdelli, Uuriintuya Batsaikhan, and Carolin Carlella, "Natures Nudge: The Role of Collateral Frameworks in the Transition Towards a Sustainable Economy," WWF, October 2024, accessed December 11, 2024, https://wwfint.awsassets.panda.org/downloads/ecb-collateral-framework-report.pdf; Simone Boldrini et al., "Living in a World of Disappearing Nature: Physical Risk and the Implications for Financial Stability," *ECB Occasional Paper Series*, no. 333 (2023), https://dx.doi.org/10.2139/ssrn.4630721.

viewed as aligned with the realization of other contemporary responsibilities central banks undertake. To fulfill these expanded functions, central banks through their influence on commercial banks can contribute to the preservation of natural resources. This influence can be exercised through incentives and targets that signal the need to incorporate climate risks into lending practices.[23] When discussing the legitimacy of the green-central-banking concept, it is important to recognize that it concerns the justification for using coercive authority over citizens, which should be grounded in the will and preferences of those citizens, while also being effective in achieving goals and avoiding risks that are perceived as collective concerns.[24] A central bank is, of course, not and cannot be a democratically elected institution, as it acts in the role of the guardian of monetary sovereignty, while also serving as a monetary regulator and the main innovator in monetary policy. This does not diminish the importance of ensuring legitimacy in its decision-making. Today, more than ever, it seems that central banks are attuned to the needs of their citizens and respect their preferences as demonstrated by numerous activities, such as extensive research into the issuance of public digital currencies and non-standard actions aimed at protecting natural resources.

Generally speaking, as we said, financial risks related to nature can be recognized in practice as physical risks (arising from the degradation of natural resources and the loss of ecosystem services) or transition risks (arising from the non-compliance of economic actors with actions aimed at protecting, restoring or reducing negative impacts on nature).[25] Although

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23 Peter Dietsch et al., "Green Central Banking," in *The Philosophy of Money and Finances*, eds. Joakim Sandberg and Lisa Warenski (Oxford: Oxford University Press, 2021), 3–4.

24 Fritz W. Scharpf, "Economic Integration, Democracy, and Social Welfare," *Journal of European Public Policy* 4, no. 1 (1997): 18–36, https://doi.org/10.1080/135017697344217.

25 Network for Greening the Financial System, "Nature-Related Financial Risks," accessed June 2, 2025, https://www.ngfs.net/system/files/import/ngfs/medias/documents/ngfs_conceptual-framework-on-nature-related-risks.pdf. The Network for Greening the Financial System (NGFS), which currently gathers 114 members from 90 different monetary jurisdictions, best confirms the legislative capacity of this coordinating body in the current and especially upcoming adjustment of monetary goals with environmental standards, because, in a relatively short period since its establishment, it has established a significant monetary-ecological framework within which central banks, as well as international monetary organizations, can adjust their monetary operations so that they are environmentally friendly.

at first glance it may seem that risks are inherent in activities with an indisputable negative impact on natural resources, it is necessary to point out that in some circumstances they represent negative consequences of activities that were primarily aimed at the renewal of natural resources that are no longer consistent with the current regulatory requirements and practices, as a result of which they appear as outdated or inappropriate, which is why they must also be phased out from the system of environmental protection, which may require a certain time in terms of canceling such legislation from a positive normative framework, thus in the context of summarizing the already produced consequences of its implementation (which certainly cannot be an exclusive task of the central bank, but implies the organized action of various subjects of environmental management). A particularly significant category of transitional risks in this sense is the risk of initiating legal disputes aimed at environmental protection, which can be diverse in terms of causes, but the most numerous are those related to changes in policies and behavior that call for responsibility for non-compliance with certain environmental standards and guidelines.

The ECB's strong contribution to the realization of environmental policy goals can be found in its unequivocal support for the long-term goals of strengthening the competitiveness of the EU economy in a way that is compatible with the sustainable finance plan and the agreed agreement, where the position of the ECB in assisting with the purposeful reallocation of capital to projects and sectors that use clean technologies and renewable energy is indirect but still significant. In this regard, the incorporation of climate risks into future structural operations of monetary policy is a significant novelty.[26]

Regardless of the perhaps modest contribution of central banks in climate-change control, the question of whether, when, and how central banks should participate in climate-change control is gaining more and more relevance. Therefore, any change or interpretation of monetary legislation and the legislation of central banks must be accompanied by the simultaneous development of a concrete methodological framework, which,

[26] Opinion of the European Central Bank of 8 May 2025 of Proposals for Amendments to Corporate Sustainability Reporting and Due Diligence Requirements, CON 2025/10 (OJ C, C/2025/3667, 8 July 2025) 2–10.

in addition to checking the fit of environmental risks under the central bank's field of work, will also be accompanied by the question of the opportunity and convenience of such ecological monetary behavior, which can be brought under the arguments of duties and business standards of the banks themselves and later possible assessment of the legality of such actions by the court.[27] Also, in considering the contributions made by central banks in the field of environmental policy, it is necessary to make a distinction between what in the context of existing legal, economic, and scientific determinants the central bank can undertake (or should refrain from doing) and what the central bank must (or must not) undertake. Taking into account that in some comparative monetary jurisdictions, price stability can be understood as economic prosperity or sustainable development, the care of environmental goods can be seen more broadly and find a foothold of protection within the primary mandate of the central bank, where the development path of the content of the primary mandate itself is more determined as a result of the prevailing economic theories of the eighties of the last century during pronounced inflationary processes that were later only taken over by other monetary jurisdictions on the principle of emulation. At the same time, in practice, a distinction can be made between defining the central bank's primary mandate in a horizontal sense (when monetary stability is not exclusively linked to price stability) and when the central bank's mandate is defined in an instrumental sense (where the legal text itself indicates indicatively what the central bank should undertake within its competences, but without offering a concrete argument, i.e., an explanation in support of such an action).[28] It can be noted that the greening of the mandate is more rewarding in the case of a horizontal approach that is more flexible and leaves the monetary legislator more room for nice maneuvers to include new activities in the field of work of central banks. After all, it seems to us that the decision on the active role of central banks in the environmental dialogue is not something that the central bank can decide on its own, because such changes and mandate extensions

[27] David Ramos Munoz, Antonio Cabrales, and Angel Sanchez, "Central Banks and Climate Change, Fit, Opportunity and Sustainability in the Law and Beyond," *European Banking Institute (EBI) Working Paper Series*, no. 119 (2022), 1–2, accessed June 10, 2023, https://ebi-europa.eu/publication-working-paper-series-no-119/.

[28] Ibid., 14–16.

are also a previous political issue on which the government decides. In the definitive shaping of the ecological mandate of the central bank, the approach with which we completely agree, it advocates the idea that central banks today need a kind of "new model of the social contract,"[29] that will review the previously established and recognized tasks of the supreme monetary institution, interpret them, and adapt them to the spirit of the times we live in, in such a way that they more closely monitor the dangers that the endangerment of natural resources brings with it.

What is common to both physical and transitional risks is the object of action, because both types of risks can equally affect economic flows at the micro, macro, regional, and sectoral levels, thereby influencing business decisions and the legal position of households, companies, and creditors.[30] The ECB's interest in the domain of environmental policy is not so surprising given the decline of biodiversity most obviously on European soil, even though EU Member States are signatories to the Convention on Biological Diversity (1992), which is implemented in practice through the conclusion of a separate category of mixed agreements that fall under EU law, but their status in community law is equated to purely community acts where the European Communities enjoy priority for implementation. Such a specific legal matrix of these agreements in practice therefore binds all EU institutions, and thus also the ECB in accordance with Article 216(2) of the Treaty, which, in addition to the previously established potential legal bases for supporting environmental goals established by Articles 127 of the EU Treaty and Article 117 of the ESCB/ECB Statute provide an added note of consistency. The last and perhaps the most obvious proof of the convergence of the objectives of the EU centralized monetary policy and the value of the environmental policy is the so-called climate and natural plan of the ECB for the period 2024–2025,[31] which relies on the results achieved by the

[29] Ibid., 115.

[30] Marguerite O'Connell, "Birth of a Naturalist? Nature-Related Risks and Biodiversity Loss: Legal Implications for the ECB," *ECB Legal Working Papers Series*, no. 22 (2024), 6–7, accessed September 10, 2024, https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp24~643-ca542d0.en.pdf.

[31] "ECB Steps Up Climate Work with Focus on Green Transition Climate and Nature-Related Risks," European Central Bank, Press Release, January 30, 2024, accessed May 11, 2025, https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.pr240130~afa3d90e07.en.html.

implementation of previous action plans. The mentioned measure of the single monetary policy now used the ecological logic of the previously approved Corporate Sector Purchase Program, which has a better environmental performance compared to the originally approved program (2016), which, following the provisions of classical monetary legislation, was oriented towards a market-benchmark, i.e., the exposure of the Eurosystem to economic sectors that are carbon sensitive.[32]

Taking into account the challenges that exist and the determination of nature-related risks, which are reflected in the absence of fundamental values of biodiversity, the non-linearity of ecosystems, the limited sustainability of natural capital prone to cascading risks, numerous potential scenarios of the evolution of biodiversity and other problems, we must admit that each specific type of engagement of central banks in this field is more than valuable and at the same time a good indicator of the readiness and courage of monetary entities to tackle challenges. Another reason that justifies the increasing degree of involvement of central banks in the domain of environmental policy is related to the frequency of different environmental litigation, which in the broadest sense of the word can be understood as disputes initiated before administrative, investigative, and (or) judicial instances that are related to climate issues and the violation of various sources of hard and soft law that has nature as its object of protection.[33] Central banks in environmental litigation may sometimes face criticism if they accept or buy property of other institutions that potentially do not respect or violate the norms of environmental protection in their operations, which requires central banks to invest additional efforts in better understanding the causes, nature and manifestations of environmental threats. Also, the involvement of the central banks in this problem reflects, to some extent, the broader issue of state responsibility for the resulting environmental damage, which, although present in the area of international environmental

32 "ECB Takes Further Steps to Incorporate Climate Change into its Monetary Policy Operations," European Central Bank, Press Release, July 4, 2022, accessed April 17, 2024, https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220704~4f48a72462.en.html.

33 Joana Setzer et al., "Climate Change Litigation and Central Banks," *ECB Legal Working Paper Series*, no. 21 (2021): 2–5, https://dx.doi.org/10.2139/ssrn.3977335.

law from the beginning, clearly still has many challenges in identifying and applying responsibility in its various forms.[34]

4. Conclusion

Even in a time of serious ecological imbalances and stress, the primary task of monetary-law subjects must remain the preservation of monetary stability as a public good, but this cannot be achieved in isolation from natural conditions (nor can it mean anything in a world where there are no basic conditions for life and health). The "greening" of monetary policy and law, at first glance, may seem controversial, but we must emphasize that the newly established authority of the central bank to preserve the general financial stability (lender-of-last-resort function and even cohesion policy values) for a long period was inapplicable (even strictly prohibited by the provisions of hard monetary legislation). It is undoubtedly clear that environmental disasters have direct consequences on the objectives of monetary policy and that they can no longer be observed at isolated levels, which is best confirmed by the signing of the Paris Climate Agreement (2015), as well as the growing number of national, regional and international monetary frameworks in the world recognizing the potential impacts of climate change to the banking sector and the insurance sector. In a wider context, we believe that eco-friendly monetary legislation is a direct product of shaping public monetary management on a "more humane approach," where every monetary action impacts human rights and where the right to a healthy environment is particularly precious where protection from biodiversity loss maybe represents and confirms that right to a healthy environment and right to a stable currency are mutually dependent.

[34] Maciej Nyka, "State Responsibility for Climate Change Damages," *Review of European and Comparative Law* 45, no. 2 (2021): 131–52, https://doi.org/10.31743/recl.12246.

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International Legal Challenges in Regulating the Use of Artificial Intelligence for Military and Peacekeeping Purposes

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Abstract: On the threshold of the Fifth Industrial Revolution, the global security order is facing renewed instability, marked by the proliferation of armed conflicts and wars. Emerging technologies, particularly artificial intelligence (AI), are increasingly viewed both as tools of military superiority and as potential disruptors of peace. This paper examines whether AI can and should be developed as an instrument of international law (*de lege ferenda*) to prevent and end armed conflicts, or whether current trajectories in technological advancement are predominantly oriented toward military applications, thereby generating future hostilities and risking violations of international humanitarian law. Through a comparative and analytical approach, the study argues that, despite the erosion of trust in international law, sustainable peace mechanisms must remain rooted in the human dimension, which continues to be the decisive factor in implementing legal norms governing the cessation of hostilities (*de lege lata*).

1. Introduction

We are witnessing an erosion of trust in international law and in the provisions of international legal mechanisms, which ought to be applicable not only to the prevention of armed conflicts and wars, but also to the physical implementation and enforcement of mechanisms capable of bringing

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such hostilities to an end. This erosion poses an increasing challenge to those international institutions mandated to establish and maintain peace, as well as to global political leaders and states with the capacity to apply the relevant provisions of international law and the mechanisms derived from them.

Parallel to the challenges of a deteriorating security architecture, we are also witnessing rapid technological advancements, most notably in the field of artificial intelligence (hereinafter: AI). While the very concept of AI permeates public discourse and is omnipresent in academic journals and political debates, some voices caution that we must remain aware of AI's role as a "great amplifier" – magnifying both the positive and the negative, in ways that are inextricably linked to the dual nature of human behavior.[1] We are acutely aware that technology now demonstrates the capacity to perform tasks and address challenges at levels comparable to human expertise, with AI-generated systems exhibiting enhanced efficiency when compared with conventional human methods.[2] Consequently, problem-solving in the contemporary era is increasingly associated with the development of AI as a mechanism intended to serve the benefit of humanity – particularly in domains such as climate change mitigation, medicine, economic analysis, and in areas where human action is prone to confrontation, namely the prevention of armed conflicts and the achievement of peace. Given that global transformations occur on a daily basis, and that the number of armed conflicts and wars is presently increasing, AI should be expected to respond to such challenges. In the case of AI, the accelerated pace of change inherent in its deployment brings about profound shifts not only in technology but also in the political, economic, and social spheres worldwide. In the realm of international relations, however, fear of shifts in the balance of power often constitutes a catalyst for instability within the international system.[3]

1 Michele Giovanardi, "AI for Peace: Mitigating the Risks and Enhancing Opportunities," *Data & Policy* 6 (2024): e41–2, https://doi.org/10.1017/dap.2024.37.

2 Naek Siregar et al., "The Use of Artificial Intelligence in Armed Conflict under International Law," *Hasanuddinb Law Review* 10, no. 2 (2024): 190.

3 Damir Mladić, "Umjetna inteligencija i globalna raspodjela moći," *Međunarodne studije* 21, no. 2 (2021): 113–25, https://doi.org/10.46672/ms.21.2.5.

As international law holds a central role in the future governance of artificial intelligence (AI), and notwithstanding the view that AI offers clarity, predictability, and reliability in addressing global and complex challenges, the author approaches AI in this study from an inverse perspective, thereby formulating the following research questions:

(1) is humanity, in its current technological trajectory, primarily oriented toward the development of new military technologies through AI, even though certain AI-driven systems violate provisions of international humanitarian law, as opposed to –
(2) the development of AI as a future mechanism for the prevention of armed conflicts and wars, and for the attainment of peace, in accordance with existing or prospective provisions of international law (*de lege ferenda*); or –
(3) does the implementation of international legal mechanisms for the prevention of armed conflicts and wars, as well as the achievement of peace, remain inherently rooted in the human dimension as the dominant factor in the recognition and enforcement of international legal norms (*de lege lata*)?

In terms of methodology, this research is based on empirical analysis involving the collection and processing of data concerning AI development for military applications, as well as AI initiatives aimed at strengthening international legal mechanisms for peacebuilding. Through critical evaluation, the concluding section of the paper identifies the challenges in implementing AI within the framework of international law and in shaping future human engagement with its application.

Explanation: Before the presentation of the research, and in order to make it easier for the reader to understand the individual names, explanations of the following terms will be presented, which are cited throughout the paper:

– Autonomous Weapon Systems (hereinafter: AWS) – a weapon system that can select (search, detect, identify, track, or select) and attack (use force against, neutralise, damage, or destroy) targets without human intervention;
– Lethal Autonomous Weapon Systems (LAWS) – a special class of weapon systems that use sensor packages and computer algorithms

to independently identify the target and use a built-in weapon system to attack and destroy the target without manual human control of the system;
– as it is an AI-assisted weapon that is also mentioned in the research, the same also applies to AWS/LAWS, and these abbreviations will be used in the text in the context of mentioning and referring to said weapons.

2. Artificial Intelligence in the Context of Military Challenges

Contemporary wars and armed conflicts demonstrate that technology constitutes a critical element not only in the conduct of hostilities but also in shaping geopolitical relations. The deployment of cutting-edge technology reflects not merely the economic strength of a given state but also its capacity to influence the balance of power, to manage conflicts and wars, and to exert direct influence on the attainment of military and geopolitical objectives.[4] Similar observations are made by former United States Secretary of State Antony J. Blinken, who, in his 2024 RSA Conference address titled "Technology and the Transformation of U.S. Foreign Policy," emphasized that today's technological revolutions lie at the heart of American competition with geopolitical rivals and constitute a true test of national security. It is therefore unsurprising that there is profound human fascination with the use of technology – particularly the much-discussed artificial intelligence (AI) – in pursuit of political, geopolitical, and military objectives.[5] The use of AI is not exclusively confined to traditional international actors; non-state actors also employ it to achieve their own objectives. This pursuit of political, geopolitical, and military goals by diverse entities challenges the effectiveness of the existing international legal framework, paves the way for illegitimate and unlawful actions, and expands the gray zone between peace

4 Michael C. Horowitz, "When Speed Kills: Lethal Autonomous Weapon Systems, Deterrence and Stability," *Journal of Strategic Studies* 42, no. 6 (2019): 764–88, https://doi.org/10.1080/01402390.2019.1621174.

5 Antony J. Blinken, "Technology and the Transformation of U.S. Foreign Policy," U.S. Department of State, May 9, 2024, accessed December 28, 2024, https://ru.usembassy.gov/technology-and-the-transformation-of-u-s-foreign-policy.

and war.[6] Thus, we could also refer to this as the gray zone of the (non) application of international law provisions, particularly those of International Humanitarian Law (IHL).

Achieving one's political objectives, in light of emerging geopolitical divisions worldwide and an open arms race, has created opportunities and capabilities for states to harness technological advances for military purposes, to secure dominance in global military innovation – one of the key components of power in international relations.[7] Some analysts describe the current situation even more precisely, noting that the war in Ukraine has generated a wealth of data derived directly from warfare, as well as returns on investment in defence technology companies. At the same time, the wave of conflicts across the globe has exposed a fragmented international community increasingly unable or unwilling to enforce international humanitarian law.[8] Consequently, recent and ongoing armed conflicts and wars demonstrate that the world is entering a new era of warfare, with artificial intelligence occupying a central role, as it makes armed forces faster, smarter, and more efficient. This underscores the fact that technology is a critical element in the evolution of various modes of warfare, highlighting AI's role as a force multiplier, a scenario-simulation aid, an enabler of extended weapon ranges, a generator of "smart weapons," a tool for risk reduction, and a mechanism for conducting surgically precise strikes.[9]

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6 Adolfo Arreola García, "Artificial Intelligence and Disinformation: Role in 21st Century Conflicts," *Revista Seguridad y Poder Terrestre* 3, no. 3 (2024): 116, https://doi.org/10.56221/spt.v3i3.66.

7 Ondřej Rosendorf, Michal Smetana, and Marek Vranka, "Algorithmic Aversion? Experimental Evidence on the Elasticity of Public Attitudes to 'Killer Robots,'" *Security Studies* 33, no. 1 (2023): 115–45, https://doi.org/10.1080/09636412.2023.2250259.

8 Kyle Hiebert, "The United States Quietly Kick-Starts the Autonomous Weapons Era: De-Escalation Mechanisms May Stop Future Military Accidents from Becoming Catastrophes," Centre for Interational Governance Innovation, January 15, 2024, accessed July 18, 2025, https://www.cigionline.org/articles/the-united-states-quietly-kick-starts-the-autonomous-weapons-era/.

9 Yordan Gunawan et al., "Command Responsibility of Autonomous Weapons Under International Humanitarian Law," *Cogent Social Sciences* 8, no. 1 (2022): 1–16, https://doi.org/10.1080/23311886.2022.2139906.

Technological advances in the field of artificial intelligence will lead to the development of weapons capable of taking human life without human control –so-called autonomous weapon systems (hereinafter: AWS).[10] The emergence of such weapons is referred to by some as the "Oppenheimer moment."[11] According to the definition provided by the International Committee of the Red Cross (ICRC), an AWS is any weapon system with autonomy in its critical functions – meaning a weapon system that can select (search for, detect, identify, track, or select) and attack (apply force against, neutralize, damage, or destroy) targets without human intervention.[12] Perhaps the most concise definition of such systems is given by Harwood, who describes them as "the most contentious form of technology."[13] Within this category of systems, even greater significance for the regulation of international law is attributed to lethal autonomous weapon systems (hereinafter: LAWS) and lethal autonomous weapons (hereinafter: LAW). These constitute a specific class of weapon systems that employ sensor packages and computer algorithms to independently identify targets, and that use an integrated weapon system to engage and destroy those targets without manual human control of the system.

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10 Joe Burton and Simona R. Soare, "Understanding the Strategic Implications of the Weaponization of Artificial Intelligence," in *11th International Conference on Cyber Conflict: Silent Battle*, eds. Tomas Minárik et al. (Tallinn: NATO CCD COE Publications, 2019), 3.

11 Alexander Schallenberg, Austria's Minister of Foreign Affairs, stated at the opening of the Vienna Conference on April 29, 2024 that there are growing risks associated with the use of artificial intelligence, describing the present moment as the "Oppenheimer moment" of this generation. He explained this characterization by noting that the risks posed by artificial intelligence in the military domain are comparable to the development and subsequent use of the atomic bomb in the 1940s. For further details on his speech, see: "AI and Autonomous Weapons Systems: The Time for Action Is Now," Safeworld, May 15, 2024, accessed November 28, 2024, https://www.saferworld-global.org/resources/news-and-analysis/post/1037-ai-and-autonomous-weapons-systems-the-time-for-action-is-now.

12 Neil Davison, "A Legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law," in *Perspectives on Lethal Autonomus Weapon Systems* (New York: UNODA, 2018), 11, 12.

13 Stephen Harwood, "A Cybersystemic View of Autonomous Weapon Systems (AWS)," *Technological Forecasting and Social Change* 205 (2024): 2, https://doi.org/10.1016/j.techfore.2024.123514.

Although these systems are not yet widely developed, it is believed they could enable military operations in environments where communications are degraded or denied – conditions in which traditional systems may be unable to function.[14] As Horowitz notes, if such systems are deployed on the battlefield, they can select and engage targets without direct human oversight.[15] Given the definitions of AWS and LAWS, it becomes clear why such weapons receive exceptional media attention, reflected in headlines such as "AI's 'Oppenheimer Moment': Autonomous Weapons Enter the Battlefield."[16] In the body of that article, the author underscores the significance of such weapons for armed conflicts and warfare, stating that they are already being used in the war in Ukraine and in clashes between the Israeli armed forces and Hamas in the Gaza Strip – evidence that such weapons are indisputably gaining prominence in armed conflicts and wars worldwide.

Regardless of public opinion and opposition to the use of such weapons, there are also counterarguments to these views. Horowitz has found that public resistance to such weaponry diminishes when individuals are presented with scenarios in which so-called "killer robots" provide greater military utility than alternative options.[17] This suggests that Horowitz's reasoning and conclusions are best reflected in the growth of the market for such weapons and the fact that its size has risen sharply in recent years. According to some analysts, the market was valued at USD 16.36 billion in 2024 and was projected to grow to USD 17.96 billion in 2025, reaching USD 26.98 billion by 2029, with a compound annual growth rate (CAGR) of 10.7% (for more on growth data, see Fig. 1).

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14 Kelly M. Sayler, "Defense Primer: U.S. Policy on Lethal Autonomous Weapon Systems," Congressional Research Service, December 17, 2024, https://www.congress.gov/crs-product/IF11150.

15 Horowitz, "When Speed Kills," 770.

16 Nick Robins-Early, "AI's 'Oppenheimer Moment': Autonomous Weapons Enter the Battlefield," *The Guardian*, July 14, 2024, accessed December 16, 2024, https://www.theguardian.com/technology/article/2024/jul/14/ais-oppenheimer-moment-autonomous-weapons-enter-the-battlefield.

17 Michael C. Horowitz, "Public Opinion and the Politics of the Killer Robots Debate," *Research and Politics* 3, no. 1 (2016): 3, https://doi.org/10.1177/2053168015627183.

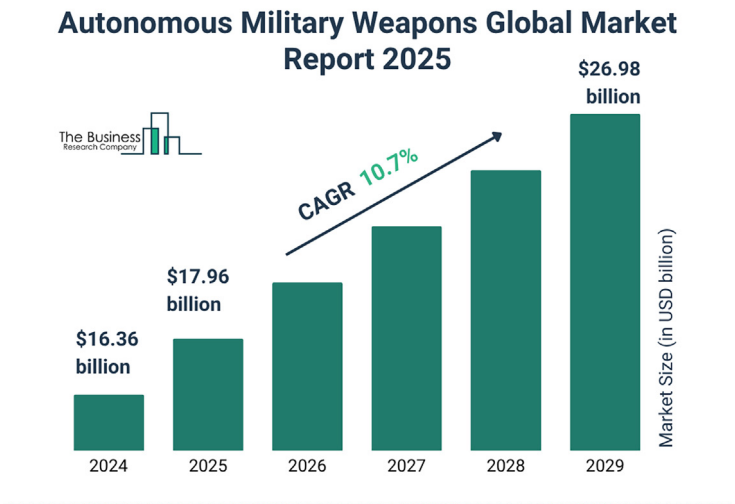

Fig. 1. Autonomous Military Weapons Global Market Report 2025 – By Type (Autonomous, Semi-autonomous), By Product (Missiles, Rockets, Guided Bombs, Target Pods, Others), By Platform (Land, Airborne, Naval) – Market Size, Trends, And Global Forecast 2025–2034 (The Business Reaserch Company, 2025, accessed December 4, 2025, https://www.thebusinessresearchcompany.com/report/autonomous--military-weapons-global-market-report)

3. AI-Enabled Weapons in the Context of International Law Challenges

3.1. Existing Realities of International Law – *de lege lata*

In parallel with the development and deployment of AI-enabled weapons, it is necessary to examine whether such weapons can be considered within the framework of:

(1) The definition of International Humanitarian Law (IHL), understood as: (a) a branch of international law that governs relations among states and the rights and obligations of the parties to a conflict in the conduct of hostilities, with the aim of protecting persons who do not, or no longer, take part in hostilities – namely the sick and wounded, prisoners

of war, and civilians;[18] (b) the body of law regulating relations between states, international organizations, and other subjects of international law, which, as a branch of public international law, consists of rules that, for humanitarian reasons, require – during armed conflicts – the protection of persons who are not, or are no longer, directly participating in hostilities, and the limitation of the means and methods of warfare.[19]

(2) The provisions of international public law, specifically international humanitarian law, i.e., the law of armed conflict (*jus in bello*), namely the Geneva Conventions (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; Convention Relative to the Treatment of Prisoners of War; Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949; Additional Protocols to the Geneva Conventions of August 12, 1949 for the Protection of Victims of International Armed Conflicts (Protocol I) – adopted in Geneva, June 8, 1977, Additional Protocols to the Geneva Conventions of August 12, 1949 for the Protection of Victims of Non-International Armed Conflicts (Protocol II) – adopted in Geneva, June 8, 1977,[20] Additional Protocol to the Geneva Conventions of August 12, 1949 on the Additional Distinctive Emblem (Protocol III) – adopted in Geneva, December 8, 2005.[21]

In the context of assessing the compliance of AI-enabled weapons – particularly AWS/LAWS – with the provisions of the Geneva Conventions, the primary focus is on their conformity with:

(1) Common Article 3 of all four Conventions, which stipulates that: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de

18 "War and International Humanitarian Law," International Committee of the Red Cross, October 29, 2010, accessed July 17, 2025, www.icrc.org/eng/war-and-law/overview-war-and-law.htm.

19 "What Is International Humanitarian Law?," International Committee of the Red Cross, July 5, 2024, accessed July 17, 2025, https://www.icrc.org/en/document/what-international-humanitarian-law.

20 Croatian Parliament, Official Gazette of the Republic of Croatia, No. 5/1994, of 12 May 1994.

21 Croatian Parliament, Official Gazette of the Republic of Croatia, No. 4/2007, of 25 April 2007.

combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely (…);"

(2) Article 1(2) of the Additional Protocol to the Geneva Conventions of August 12, 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I);[22]

(3) Article 35, which stipulates that in every armed conflict, the right of the parties to choose methods or means of warfare is not unlimited, and prohibits the use of weapons, projectiles, substances, and methods of warfare of a nature to cause superfluous injury or unnecessary suffering;

(4) Article 36, which requires that when studying, developing, acquiring, or adopting a new weapon, means, or methods of warfare, a High Contracting Party is obligated to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or any other rule of international law;

(5) Article 51(5), which prohibits attacks expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof; and

(6) Article 52, which provides for the general protection of civilian objects.

From the aforementioned definitions and cited provisions of International Humanitarian Law (IHL), it is evident that for such weapons to be permissible under international law, they must comply with the standards

[22] The cited provision is derived from the preamble of the Hague Convention on the Laws and Customs of War on Land of July 29, 1899 and is also known as the Martens Clause. It is named after Fyodor Fyodorovich Martens, the representative of the Russian Empire at the First Hague Conference in 1899, who proposed it. The clause states: "Until a more complete code of the laws of war is issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of international law, as they result from the usages established among civilized nations, from the laws of humanity, and the requirements of the public conscience." This clause is still regarded as a fundamental principle of international humanitarian law today. For more information on the Hague Convention, see: "Laws and Customs of War on Land (Hague II); July 29, 1899," Yale Law School, accessed March 8, 2025, https://avalon.law.yale.edu/19th_century/hague02.asp, as well as about the Clause itself in Theodor Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience," *The American Journal of International Law* 94, no. 1 (2000): 78–89, https://doi.org/10.2307/2555232.

of *jus ad bellum*, specifically the principle of distinction, as well as with *jus in bello*, namely the principle of proportionality. According to Gunawan et al., the principle of distinction requires that weapons, techniques, and methods of warfare must be capable of differentiating between legitimate targets and non-legitimate ones, as well as the ability to employ proportional use of force, including against civilians, provided the attacks remain proportionate.[23] Furthermore, it remains unclear and unknown how AI within such weapons can recognize or is expected to recognize those provisions of IHL related to the command and responsibility of commanders in the context of distinguishing between combatants and civilians, military and civilian objectives, wounded soldiers and soldiers in action, and soldiers and medical personnel. Additionally, Davison raises the question of how it can be determined, and expected, that an attack carried out by such weapons will not cause incidental civilian casualties or damage to civilian objects, or a combination thereof, which in a given case would be excessive in relation to the anticipated concrete and direct military advantage, as required by the principle of proportionality. He further questions how an attack can be aborted or suspended if it becomes apparent that the target is not a military objective or is entitled to special protection, or if it is anticipated that the attack would violate the proportionality rule, as demanded by the rules concerning precautions in attack.[24] Furthermore, Lachow, in his research, raises questions about whether autonomous weapons can reliably distinguish, under challenging battlefield conditions, between combatants and civilians – and target only the former without causing excessive civilian casualties.[25] Some scholars, such as Rosendorf and others, express legal concerns, questioning whether machines can be held accountable for striking incorrect targets. They also raise moral concerns, arguing that delegating life-and-death decision-making authority to robots violates

23 Gunawan et al., "Command Responsibility of Autonomous Weapons," 7, 8.

24 Davison, "A Legal Perspective," 7.

25 Irving Lachow, "The Upside and Downside of Swarming Drones," *Bulletin of the Atomic Scientists* 73, no. 2 (2017): 99, https://doi.org/10.1080/00963402.2017.1290879, according to Michael Schmitt, "Autonomous Weapon Systems and International Humanitarian Law: A Reply to Critics," *Harvard National Security Journal* (2013): 1–37, https://dx.doi.org/10.2139/ssrn.2184826.

human dignity.[26] To all these open questions, the answer might be that such weapons, i.e., these systems, are not specifically regulated by international law or IHL provisions.

3.2. International Legal Regulation of the Use of AI-Enabled Weapons – *de lege ferenda*

3.2.1. Third Countries, International and Regional Organizations

As Davison points out in his study prepared for the International Committee of the Red Cross, any AWS must be capable of being used, and must in fact be used, in accordance with the provisions of IHL. He argues that the responsibility for ensuring that autonomous weapon systems are employed in compliance with international law lies in the human dimension, where humans, by their own will, generate AWS.[27] In this context, to ensure that AWS operations remain under meaningful human control and are legally framed, a study conducted by Boulanin and other researchers at SIPRI (Stockholm International Peace Research Institute) recommends that government officials, scientists, and civil society representatives should engage in discussions regarding the range of legal, ethical, and security challenges potentially associated with emerging technologies in the field of LAWS.[28]

Beyond the legal question of the legitimacy of using AWS, perhaps the primary issue concerns the ethics of their operation. The ethical dilemma surrounding AI-driven AWS systems arises from the fact that these systems may operate based on a framework of indiscriminate target selection, i.e., enemies and targets without discrimination. This raises significant questions about how such systems can comply with the provisions of IHL. Some scholars argue that while certain targets may be considered legitimate to attack, there are also illegitimate targets.[29] Regardless of the distinction between legitimate and illegitimate targets, the question of responsibility remains critical. If AWS operate autonomously, without human engagement or direct military command – i.e., outside the traditional hierarchical

[26] Rosendorf, Smetana, and Vranka, "Algorithmic Aversion?," 126, 127.

[27] Davison, "A Legal Perspective," 11, 12.

[28] Vincent Boulanin, Netta Goussac, and Laura Bruun, *Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human–Machine Interaction* (Stockholm: SIPRI Publications, 2021), 1–55.

[29] Harwood, "A Cybersystemic View," 8, 9.

military command structure – how can a human be held accountable for the actions carried out by the machine? Furthermore, some authors raise the thesis or scientific inquiry as to whether it is morally and/or ethically acceptable for a machine, through AI, to decide who shall be killed, who shall be spared, and who shall live.[30]

Building upon the aforementioned, it is indisputable that a certain degree of legal and political activism is both necessary and currently underway among political actors at the national and international levels, as well as within organizations, the academic community, and researchers, to legally shape the application of AI in military contexts. In this regard, under the auspices of the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the global REAIM forum (2023) adopted a platform for all stakeholders – governments, industry, civil society, academia, and think tanks – to foster a shared understanding of the capabilities, dilemmas, and vulnerabilities associated with military artificial intelligence.[31] Based on this platform, further political and legal activism is reflected in the Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy, adopted by the United States on November 9, 2023, and signed by 51 states. This declaration recognizes the importance of legal regulation in accordance with international humanitarian law regarding AI employed for military purposes. Specifically, it asserts that the military use of AI capabilities must be responsible, including such use within military operations, under a responsible human chain of command and control.[32] It should also be emphasized, in the context of a comparative analysis of legal frameworks as well as activities directed towards national or international legislative activism, that the United States does not legally restrict the development of AWS/LAWS. Instead, through specific acts – most notably the updated

30 Peter Asaro, "On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making," *International Review of the Red Cross* 94, no. 886 (2012): 699, https://doi.org/10.1017/S1816383112000768.

31 See more on the official website of the Dutch government: "REAIM. Call to Action," Government of the Netherlands, February 16, 2023, accessed April 2, 2025, https://www.government.nl/documents/publications/2023/02/16/reaim-2023-call-to-action.

32 "The Political Declaration on Responsible Military Use of Artificial Intelligence and Autonomy," U.S. Department of State, November 9, 2023, accessed April 28, 2025, https://www.state.gov/political-declaration-on-responsible-military-use-of-artificial-intelligence-and-autonomy-2/.

Department of Defense Directive 3000.09 of January 25, 2023 – it requires that such weapon systems be developed in a manner that ensures commanders and operators retain an appropriate level of human judgment in decisions concerning the use of force. Furthermore, the Directive mandates that individuals who authorize, direct, or operate AWS/LAWS do so with due care and in compliance with the law of armed conflict, applicable treaties, and system-safety rules. Significantly, the Directive underscores that the development of these weapons may incorporate AI capabilities, provided that such integration adheres to the ethical principles of AI established by the U.S. Department of Defense, as well as its strategy and framework for implementing Responsible Artificial Intelligence (RAI).[33]

Within the broader context of international legal activism, the First Committee of the UN General Assembly approved a draft resolution on lethal autonomous weapons on November 12, 2023, forwarding it to the General Assembly. The draft resolution questions the ethical nature of such weapons, stating that even if an algorithm can determine what is lawful under IHL, it can never determine what is ethical.[34] In response to this proposal, the United Nations adopted the General Assembly Resolution on Lethal Autonomous Weapon Systems on December 22, 2023. The resolution requests the Secretary-General to seek opinions from Member States and other stakeholders regarding lethal autonomous weapon systems, including ways to address the associated challenges and concerns arising from humanitarian, legal, security, technological, and ethical perspectives, as well as the role of humans in the use of force itself.[35] Other international actors, specifically Human Rights Watch (HRW), submitted a communication to the United Nations Secretary-General on May 6, 2024, concerning the use of AWS/LAWS. In this submission, HRW (2024) highlights that AWS/LAWS would contravene fundamental principles of humanity and the dictates of public conscience as established by the Martens Clause and international humanitarian law (IHL). From the perspective of international legal activism and *de lege ferenda* regulation of these weapons, HRW

[33] Department of Defense, USA, Office of the Under Secretary of Defense for Policy. DoD Directive 3000.09, "Autonomy in Weapon Systems," January 25, 2023.

[34] United Nations General Assembly, First Committee, Lethal Autonomous Weapons Systems, draft resolution A/C.1/78/L.56, November 1, 2023.

[35] United Nations, Secretary-General, Report on Resolution 78/241, 2023.

proposes the adoption of a legally binding international instrument – an international treaty – applicable to all weapon systems that select and engage targets based on sensor processing without human intervention. As a concluding recommendation, HRW advocates that such a treaty should include a general obligation to maintain meaningful human control over the use of force, prohibit weapon systems that autonomously select and attack targets and inherently pose fundamental moral and legal challenges, and incorporate specific positive obligations aimed at ensuring meaningful human control over all other systems that select and engage targets.[36]

Further legal and political activism is evidenced by the fact that numerous regional initiatives have actively pursued the legal regulation of weapons assisted by artificial intelligence, such as the regional conference of the Caribbean Community (CARICOM). At this conference, Central American states adopted the "Declaration on Autonomous Weapons Systems," expressing concern over the development of lethal autonomous weapons and endorsing the necessity of meaningful human control over the use of force. Similar efforts can be observed in other regional initiatives, such as those by Indo-Pacific countries and the Economic Community of West African States (ECOWAS) Conference held in Sierra Leone in April 2024.[37] Building on these initiatives and in accordance with UN Resolution 78/241, world leaders convened at the United Nations Headquarters on September 22–23, 2024, for the Summit of the Future, where they adopted the "Pact for the Future" along with its annexes: the "Global Digital Compact" and the "Declaration on Future Generations." The significance of these documents, particularly the Pact for the Future, lies in the adoption of Chapter 27(b), which urgently calls for the advancement of discussions on lethal autonomous weapons through the Group of Governmental Experts on New Technologies in the Area of Lethal Autonomous Weapons Systems, with the aim of developing an instrument – without prejudging

36 "Submission to the United Nations Secretary – General on Autonomous Weapons Systems," Human Rights Watch, May 6, 2024, accessed July 6, 2025, https://www.hrw.org/news/2024/05/06/submission-united-nations-secretary-general-autonomous-weapons-systems.

37 "Caricom States Call for Urgent Negotiation of New International Legally Binding Instrument to Prohibit and Regulate Autonomous Weapons," Caricom Caribbean Community, September 11, 2023, accessed June 28, 2025, https://caricom.org/caricom-states-call-for-urgent-negotiation-of-new-international.

its nature – while recognizing that international humanitarian law fully applies to all weapon systems, including the potential development and use of lethal autonomous weapons systems.[38] Following these initiatives, the United Nations General Assembly is scheduled to adopt, on December 2, 2024, a political resolution expressing concern about the development of lethal autonomous weapons and calling for further steps toward their legal regulation.[39]

3.2.2. European Union

In the context of a comparative analysis of the legal regulation of the use of artificial intelligence–enabled weaponry (AWS/LAWS), it must first be emphasized that matters of defense and defense policy remain, to a large extent, within the competences of the Member States of the European Union, notwithstanding the fact that security and defense policies form an integral part of the Union's Common Foreign and Security Policy. Furthermore, when such weaponry is considered in the context of national security, pursuant to Article 4(2) of the Treaty on European Union, the legal regulation and operational deployment of these weapons remain within "national jurisdiction."[40] Irrespective of these provisions of the Treaty on European Union, and despite the fact that resolutions of the European Parliament are not binding upon Member States – having greater political than legal weight – the EU has nevertheless exhibited a certain degree of activism through the Parliament by adopting positions concerning the role and dimension of AWS/LAWS, and AI-enabled weaponry more broadly. In this regard, the European Parliament Resolution on Autonomous Weapon Systems of 12 September 2018 emphasized that meaningful human involvement and oversight are indispensable to the decision-making process concerning lethal force, as ultimate responsibility for life-and-death decisions rests with human actors. International law, in particular international

38 "Pact for the Future, Global Digital Compact, and Declaration on Future Generations," United Nations, September 2024, accessed May 13, 2025, https://www.un.org/en/summit-of-the-future.

39 UN General Assembly, Resolution 79/62, Lethal Autonomous Weapons Systems, A/RES/79/62 (December 2, 2024).

40 CJEU Judgment of 18 December 2014, The Queen, on the application of Sean Ambrose McCarthy and Others v. Secretary of State for the Home Department, Case C 202/13, ECLI:EU:C:2014:2450.

humanitarian law and international human rights law, is identified therein as the primary framework governing the use of such weaponry, as is the case for all categories of armaments.[41]

As the EU has not explicitly codified the military use of artificial intelligence nor the deployment of lethal autonomous weapon systems as such – beyond the scope of international humanitarian law – it has adopted a compromise approach. This is reflected in Article 10(6) of Regulation (EU) 2021/697 of the European Parliament and of the Council establishing the European Defence Fund, a binding legal instrument which states:

> (…) actions for the development of lethal autonomous weapons without the possibility of meaningful human control over the selection and engagement decisions when carrying out strikes against humans are not eligible for support from the Fund, without prejudice to the possibility of providing funding for actions for the development of early warning systems and countermeasures for defensive purposes.[42]

Santopinto observes that this provision embodies a certain ambiguity: while the EU seeks to prohibit financing of lethal autonomous technologies through the Defence Fund, it does not impose "human control" as an absolute constraint, but rather requires that the machine enable the path towards a "human decision" at the moment when a target must be identified. Thus, the requirement for human control is not synonymous with the imposition of a human decision.[43] Although the Regulation does not explicitly prohibit Member States from conducting research and development in this field, it is significant that the long-anticipated EU Artificial Intelligence Act – the first comprehensive legal framework on AI worldwide – excludes military and security applications from its scope, thereby

41 European Parliament Resolution of 12 September 2018 on Autonomous Weapon Systems (2018/2752(RSP)) (OJ C433, 23 December 2019).

42 Article 10 of the Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund.

43 Federico Santopinto, "The EU, Artificial Military Intelligence and Autonomous Lethal Weapons," IRIS – Institut De Relations Internationale et Stratetegiques, April 2024, p. 14, accessed December 19, 2024, https://www.iris-france.org/en/185422-the-eu-artificial-military-intelligence-and-autonomous-lethal-weapons/.

limiting its provisions to civilian AI.[44] The legal regulation of AI and the adoption of the aforementioned act – as we have noted, the first of its kind worldwide – will demonstrate the EU's role in global AI governance, often referred to as the "Brussels Effect." The Brussels Effect represents a market-based mechanism through which the EU exports its regulatory standards via relatively soft enforcement, leveraging the power of its internal market. This phenomenon manifests *de facto* when companies comply with EU standards for purely economic reasons, thereby aligning their practices globally with a single regulatory framework. It also occurs *de jure* when third countries transpose EU regulatory approaches into their domestic legal systems, often under political pressure to keep pace with technological advancement, which may, however, simultaneously undermine their own democratic processes.[45] Through this *de facto* effect, we can discern the trajectory the EU has pursued in the context of regulating AI: one primarily shaped by market considerations and economic relations.

This approach is consistent with the jurisprudence of the Court of Justice of the European Union, which has addressed AI exclusively in the context of civilian applications (e.g., data protection and processing under the GDPR, copyright, the right of access to environmental information, and freedom of establishment).[46] Thus, while it is commendable that the EU has taken the lead in developing a regulatory framework for AI, the Union simultaneously finds itself, given geopolitical realities and an increasingly unstable security architecture, in a challenging and disadvantageous position. This is particularly evident in the legal and geopolitical dilemma of having to allow the development of new weapons and related technologies, including AWS/LAWS, in order to respond effectively to evolving security threats, while at the same time as a global leader in the protection of

44 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (OJ L, 2024/1689, 12 June 2024).

45 Ana Bradford, *The Brussels Effect: How the European Union Rules the World* (New York: Oxford University Press, 2020), 251, https://doi.org/10.1093/oso/9780190088583.001.0001.

46 For further reference on the case-law, see: Court of Justice of the European Union, Cases C-250/25, C-129/24, C-336/23, C-817/19.

human rights, maintaining its commitment to safeguarding human dignity, international law, and international humanitarian law. This dual imperative presents a profound challenge in light of the operational realities of AWS/LAWS.[47]

In conclusion, it can be established that there is a global trend towards the development of AI for military purposes, and that such efforts currently occupy a dominant position in relation to the international legal regulation of AI in military contexts, particularly through AWS/LAWS. The strengthening of the defense industry and investment in AWS/LAWS not only generate economic profitability but also influence the positioning of states within systems of political, geopolitical, and military power. Therefore, in order to advance the protection of human security, human dignity, and global peace, a broader international political consensus is required, together with global political and legal activism aimed at ensuring the responsible use of AI in military environments, as well as the legal regulation and subjection of AI-enabled weaponry to the provisions of international law.

4. AI as an International Legal Mechanism for the Termination of Armed Conflicts/Wars and the Achievement of Peace

Given the substantial resources invested in the use of AI for military defence – as evidenced and demonstrated in Table 1 of this study – these efforts have been predominantly directed towards replacing human presence on the battlefield and enhancing military decision-making processes. Contemporary armed conflicts and wars across the globe demonstrate that technology constitutes a crucial element in the development of various war campaigns, thereby violating provisions of International Humanitarian Law (IHL). This raises the question of whether new mechanisms, enabled by technology, are both possible and necessary – mechanisms capable of overcoming today's global crisis concerning the identity of international legal norms, the belief in the sustainability of international law, and the capacity to halt ongoing and future armed conflicts/wars while achieving peace.

47 Diego Badell and Lewin Schmitt, "Contested Views? Tracing European Positions on Lethal Autonomous Weapon Systems," *European Security* 31, no. 2 (2022): 242–61, https://doi.org/10.1080/09662839.2021.2007476.

In other words, can the science and technology underpinning AI development contribute primarily to the prevention of wars?[48] The author of this paper would go further and pose the question of whether it is possible to develop algorithm-based technologies that are not dominant in conducting warfare but are instead capable of terminating armed conflicts and wars. Further scholarly inquiry thus moves towards asking whether AI could at least achieve Galtung's concept of "negative" peace, or whether the termination of armed conflicts/wars will remain primarily within the human dimension of action. In addressing this research question, it must be acknowledged that the current scientific and professional literature on the development and application of AI is extensively focused on the ethical issues surrounding its creation and deployment. Consequently, as Giovanardi notes, there is comparatively little literature that explicitly addresses the impact of AI on peace and conflict.[49] The fact that humanity's fascination with employing AI to achieve political and military objectives is not a novelty in today's world is widely acknowledged. Some contend that there are ongoing efforts to end violent conflicts and build peace that are increasingly digitalised, with peacebuilding and conflict prevention organizations beginning to rely more heavily on digital information and communication technologies.[50] As conventional mechanisms for the cessation of armed conflicts/wars and the achievement of peace become operationally questionable, yet remain legally relevant, a pressing question emerges: should the conventional methods for preventing armed conflicts/wars and fostering peace – methods that have thus far fallen within the domain of human agency – be replaced by artificial intelligence? Such a transformation could potentially revolutionise international peace and security, while enabling practitioners and policymakers to reduce the time and resource intensity associated with data collection, analysis, and the generation of policy options aimed at

48 Robert Trappl, Johannes Fürnkranz, and Johann Petrak, "Artificial Intelligence for the Avoidance of Crises and Wars," Austrian Research for Artificial Intelligence, 2024, accessed July 27, 2025, https://www.ofai.at/projects/peace.

49 Giovanardi, "AI for Peace," 2, 3.

50 Andreas Timo Hirblinger et al., "Digital Peacebuilding: A Framework for Critical–Reflexive Engagement," *International Studies Perspectives* 24, no. 3 (2023): 265, https://doi.org/10.1093/isp/ekac015.

establishing peace.[51] In practical terms, this would mean that the resources in question could be redirected towards complex tasks such as dialogue, negotiation, trust-building, and strategic decision-making. Therefore, in order to define the general actions, procedures, and solutions that AI should offer in the context of achieving peace, it is first necessary to identify the minimum conditions or *sui generis* provisions of international law and international legal mechanisms for the prevention of armed conflicts/wars and the attainment of peace, which would be relevant for AI application. If we consider one of the most fundamental principles of international law – the prohibition of the threat or use of force, as codified in Article 2(3)–(4) of the UN Charter, in conjunction with Article 51 as an exception to this principle in situations of self-defence and the restoration of international peace and security – an open question remains as to the extent to which AI can prohibit the threat or use of force. One possible solution could be sought in the deployment of autonomous weapon systems (AWS) designed to prevent threats, attacks, and war itself through preventive measures, thereby invoking the *jus ad bellum* principle. Furthermore, if we address the application of international legal mechanisms for terminating armed conflicts/wars – specifically, Articles 1(1), 33(1), 41, and 42 of the UN Charter, which stipulate that effective collective measures shall be taken for the prevention and removal of threats to peace – there remains the question of how AI can respond to the operationalization of such measures and mechanisms. If the resolution of disputes is sought through negotiation, enquiry, mediation, conciliation, arbitration, or other peaceful means of the parties' own choice, it is uncertain whether AI can support such methods or address the challenges associated with their implementation. In other words, it must be assessed whether AI is technologically adequate and sufficiently capacitated to terminate armed conflicts/wars through algorithmic solutions – bearing in mind that it operates on algorithmic logic under predefined conditions – and whether it could impose peace. A related issue concerns whether AI-enabled decision-support systems could influence a state's decision to initiate military action against another state or domestic group, or to

[51] Ola Mohajer, "Robot Diplomacy: How AI Could Usher in a New Era of World Peace," The Hill, September 21, 2023, accessed April 7, 2025, https://thehill.com/opinion/international/4211989-robot-diplomacy-how-ai-could-usher-in-a-new-era-of-world-peace/.

commence a preventive armed conflict/war.[52] The answer to these questions can be partially seen in the example of the use of AI for peacebuilding through the UN's understanding of the facts that it is changed by the means of conflict, so the means for achieving and maintaining peace must also change. Therefore, in order to respond to the challenges of technology development and conflicts in the world, the UN Department of Political and Peacebuilding Affairs (DPPA) established a dedicated unit called the Innovation Cell in 2020, which in its one part develops the application of new technologies to support inclusive peace processes. The new technologies would relate to the implementation of inclusive peace processes through large/mass digital dialogues enabled by the use of AI, and therefore the UN will go to peace negotiations in conflict zones through partnerships with artificial intelligence companies such as Remesh.[53] The AI-assisted software incorporates AI systems to search thousands of data points in dozens of languages, allowing the UN to engage populations in conflict zones in what it calls large-scale digital dialogues. This technology enables the simultaneous acquisition of qualitative insights into the opinions of all participants, and such digital dialogues supported by artificial intelligence can significantly improve the inclusiveness of different opinions and attitudes in peace processes. Such technology was used by the United Nations Support Mission in Yemen and Libya in such a way that the AI software was set up as a website for stakeholders in vulnerable regions. This software is designed to evaluate open responses on the Internet of up to 1,000 people at the same time and thus reach a consensus in near real time. The software helped the UN understand which groups in conflict zones are most concerned during face-to-face conversations with political leaders.[54] Based on this software, i.e. through the UN Digital Dialogues, the UN acted in the context of peacebuilding in Haiti in 2022, where the aim of the dialogue was to hear the opinions of the public in Haitian Creole about the situation in the country

52 United Nations, Charter of the United Nations, signed at San Francisco, June 26, 1945.

53 More about the use of AI software in peacebuilding, i.e., use of digital dialogues, see: "Futuring Peace," UN DPPA Innovation, accessed April 24, 2025, https://futuringpeace.org/about.

54 See more in Dalvin Brown, "The United Nations Is Turning to Artificial Intelligence in Search for Peace in War Zones," *The Washington Post*, April 23, 2021, accessed June 28, 2025, https://www.washingtonpost.com/technology/2021/04/23/ai-un-peacekeeping/.

and the work of the UN Integrated Office in Haiti, that is, the goal was to collect answers about the support that the UN can provide to the Haitian people. This software and digital dialogue methodologywere also used in Iraq in 2021 and Lebanon in 2022.[55]

Further efforts can also be observed in the fact that the United Nations engaged a private AI company to address the Israeli–Palestinian crisis. CulturePulse's AI model promised to create a realistic virtual simulation of Israel and the Palestinian territories.[56] However, given the events in Israel from October 7, 2023 onwards, it is evident that this project neither materialised nor achieved its intended significance in the context of preventing armed conflicts/wars, bringing them to an end, and establishing peace. In a broader analysis of the application of international legal mechanisms – specifically through the lens of AI deployment and the influence of technological innovations on peacebuilding – we must also consider concepts such as PeaceTech, Global PeaceTech, Peace Innovation, and Digital Peacebuilding. These terms refer to technological tools that have emerged from the interdisciplinary work of certain companies, institutes, laboratories, and other governmental and non-governmental organizations. As Bell describes, such actors form an "ecosystem of scientists, research institutes, civil society organizations, public institutions, private companies, philanthropic foundations, and venture capitalists" working on technologies for peace, including AI for peacebuilding.[57] Specifically, if we look at just one of the mentioned platforms, e.g., PeaceTech, we can see that according to this platform, the introduction of new technologies represents an unexplored space for cooperation and for developing peace both at the international and transnational levels. In reality, it seems that through the project Long-Term Divisions: Building Bridges in Virtual Spaces, through an online seminar, we learn about the digital literacy of peacebuilders and about the

55 "Futuring Peace," 53.

56 See more on this in David Gilbert, "The UN Hired an AI Company to Untangle the Israeli-Palestinian Crisis," WIRED, November 2, 2023, accessed June 2, 2025, https://www.wired.com/story/culturepulse-ai-israeli-palestinian-crisis/.

57 Christine Bell, in her recent book and research, places particular emphasis on new technologies for peacebuilding. See more in *PeaceTech: Digital Transformation to End Wars* (Cham: Palgrave Macmillan, 2024), https://doi.org/10.1007/978-3-031-38894-1.

processes and implications of how technological tools can be best used in long-term peacebuilding work.[58]

Further possibilities of using AI for peace-related purposes are analyzed by Zable and a group of authors, who conclude that AI can be employed to promote peace. They categorize its application into three temporal frameworks: before the conflict, during the conflict, and after the conflict.[59] The role of AI in peace promotion is also acknowledged by the United States Institute of Peace (USIP), which observes that the launch of OpenAI's ChatGPT in the autumn of 2022 attracted substantial global attention to both the risks and the benefits of AI. This attention also encompassed many uncertainties regarding the capacity of private companies to employ such technologies in the service of peace and security. For this reason, USIP argues that peacebuilding organizations can and should play a key role in collaborating with private companies, multilateral institutions, and governments to develop and implement AI in ways that inform and shape its application towards enhancing peace and preventing conflict. Specifically, activities aimed at establishing a future AI agenda would include the deployment of unarmed autonomous drones capable of monitoring lines of contact and ceasefire violations; supporting monitoring missions in processing imagery related to violence; observing the disarmament of combatants, and identifying war crimes. As part of peace negotiations, community agreements, or dialogue processes, USIP suggests that AI could also play a role in monitoring social media for hate speech targeting marginalised and vulnerable groups – actions that could influence the pursuit of fair and sustainable solutions.[60]

Therefore, if the role of individuals, institutions, and international legal mechanisms for the prevention of armed conflicts and the achievement of peace *de lege ferenda* is to be reduced to minimal human involvement, such

[58] See more on this in "Programme 2024–2025," The Interdisciplinary PeaceTech Network, accessed July 28, 2025, https://peacetech.group/peacetech-exchange/peacebuilder-led.

[59] Adam Zable et al., "How Artificial Intelligence Can Support Peace," Kluz Prize for Peacetech, October 11, 2024, accessed July 21, 2025, https://www.kluzprize.org/updates/how-artificial-intelligence-can-support-peace.

[60] Heather Ashby, "A Role for AI in Peacebuilding," United States Institute of Peace, December 6, 2023, accessed December 7, 2024, https://www.usip.org/publications/2023/12/role-ai-peacebuilding.

an approach will only function if AI tools are developed in a transparent and ethical manner so as to complement human and political efforts towards ending wars.[61] Transparent and ethical development is closely linked to the quality of the data entered into AI systems for algorithmic processing. In this regard, the United Nations Institute for Disarmament Research (UNIDIR), in its report "AI and International Security," emphasises that the primary risk areas associated with artificial intelligence lie in the domain of peace and security. Three global categories of security risks are identified: miscalculation, escalation, and proliferation. This means that outcomes ultimately depend on the data first entered into the system by humans, from which AI then generates algorithmic solutions. The first risk concerns the use of AI in presenting biased or inaccurate operational pictures, which could undermine decisions regarding the use of force or pave the way for the deterioration of international relations. The second risk focuses on the potential of AI technologies to contribute to the intentional or unintentional escalation of conflicts. The third risk refers to the misuse of AI for the development and proliferation of new weaponry, including weapons of mass destruction.[62]

In conclusion to this chapter, it is evident that non-state actors are investing in the development of AI in the field of peace establishment and implementation, envisaging it as a tool to support human decision-making in peacebuilding, the execution of such decisions, and the monitoring of their implementation. However, we have yet to witness technological advancements that would indicate the capacity of technology to replace human involvement in the execution of those international legal mechanisms which – despite the current erosion of confidence in them – remain firmly within the domain of human agency in the context of preventing armed conflicts and wars. This means that the prevention of armed conflicts/wars and the achievement of peace through the application of international

61 Claire Wilmot, "Can AI Bring Peace To The Middle East?," The Bureau of Investigative Journalism, December 19, 2024, accessed April 14, 2025, https://www.thebureauinvestigates.com/stories/2024-12-19/can-ai-bring-peace-to-the-middle-east/.

62 Iona Puscas, "AI and International Security: Understanding the Risks and Paving the Path for Confidence-Building Measures," UNIDIR, 2023, accessed May 12, 2025, https://unidir.org/publication/ai-and-international-security-understanding-the-risks-and-paving-the-path-for-confidence-building-measures/.

legal mechanisms still depends on the political will of those who would employ them (for example, in the context of the war in Ukraine) and on their choice of a specific mechanism to be applied for the purpose of ending a given armed conflict or war. Therefore, this chapter concludes with the observation that the human factor remains, at present, the decisive element in the implementation of international law and the mechanisms for conflict prevention and peacebuilding – meaning that solutions are still ultimately achieved at the negotiating table.

5. Conclusion

The world is undeniably confronted with the dilemma of how to direct technological development, particularly in the field of artificial intelligence. Bridging technology and international law represents a challenge of contemporary times, as well as a personal challenge for the author of this study. A legitimate question arises as to whether AI will become a tool for strengthening international law and the mechanisms for establishing peace, or, conversely, a means of intensifying armed conflicts and undermining the security architecture. The analysis presented in this research clearly demonstrates that human activity in the domain of technological advancement is more progressive in developing AI applications that enhance armed conflicts and military technologies – often disregarding principles of international humanitarian law – than in creating AI-driven mechanisms for the implementation of international legal norms and conflict-prevention strategies aimed at achieving peace (*de lege ferenda*). Although digital tools and platforms designed for peacebuilding do exist, and are primarily developed within the civil and non-governmental sectors, it is evident that their scope and application remain disproportionate when compared to the rapid development of military technologies, particularly AI-enabled weapon systems.

The fact that the European Union stands as the world's first leader in legislatively regulating the application of AI is indisputable. However, the currently disrupted security architecture – both in the European and global context – together with the crisis in the implementation of international law, undeniably favors the development of AWS/LAWS. As Bonsegna observes, many states, particularly those within the EU, are thus confronted with a normative-strategic dilemma: whether to pursue the development

of such weapons in order to remain aligned with other states that are simultaneously advancing these technologies without regard to international humanitarian law, or to remain consistent in upholding and protecting the rule of law, particularly international law, which is presently undergoing a profound crisis of implementation.[63] Such dilemmas must not influence states, nor the international bodies responsible for the establishment and enforcement of international law, in their broader commitment to global legal-political activism and to the international legal regulation (*de lege ferenda*) of AWS/LAWS. Moreover, legal-political activism, as well as public policy, should remain guided by the fundamental principle that only human beings are capable of making real-time decisions concerning matters of life and the operational use of such weapons in military activities.

With regard to the application of international legal mechanisms for the prevention of conflicts and wars, as well as for the achievement of peace, it is evident that – regardless of technological advancements and the emergence of global PeaceTech initiatives aimed at providing software-based assistance in peacebuilding processes – such ideas and efforts occasionally demonstrate success. Nevertheless, the factual realities of ongoing wars and armed conflicts across the globe indicate that the implementation of existing international legal mechanisms for peacebuilding still remains within the human domain and dependent on human action (*de lege lata*). At the same time, however, it is clear that human efforts alone, within the framework of the currently disrupted security architecture, often fail to produce the desired outcomes in the pursuit of peace.

Notwithstanding the foregoing, it is indisputable that human action, grounded in international legal norms and ethical principles, must continue to remain the dominant factor in shaping emerging technologies, including artificial intelligence. This applies both to the development of new technologies (including weaponry) that should not generate future conflicts, and to the implementation of existing and prospective international legal mechanisms aimed at achieving peace. Accordingly, in order to bridge the current gap between the rapid expansion of AI for military purposes and

[63] Nicola Bonsegna, "Integrating Autonomous Weapon Systems with Artificial Intelligence Into European Defense," The Defence Horizon Journal, May 26, 2025, accessed July 25, 2025, https://tdhj.org/blog/post/ai-autonomous-weapons-europe/.

the comparatively limited development of AI in the service of peacebuilding, it is essential that international actors entrusted with the establishment and enforcement of peace strengthen both awareness of and confidence in international law. A broader form of activism – legal, political, and *de lege ferenda* – is equally necessary, involving not only individuals but also non-governmental and other civil society actors. Such activism should foster a global conviction that AI-driven technologies must serve primarily the objectives of peace and humanitarian law, rather than becoming a source of further destabilization, which ultimately results in armed conflicts, wars, and human casualties. These activist efforts should be directed both towards national policymaking and towards international legal entities mandated with the protection and enforcement of international law.

Finally, as a concluding evaluation of this paper, we quote ChatGPT which in response to the author's inquiry on whether AI can stop the war in Ukraine, "stated that AI cannot end the war in Ukraine because decisions about war and peace are made by political leaders, military commanders, and international institutions". This leaves readers of this work and research with further reflections on whether and to what extent technology should or can always replace human agency. We also cite the opinions of Giovanardi (2024) and Harper (2024), whose views best capture the realities of contemporary times and the use of AI. Giovanardi reflects that despite widespread awareness that AI can be weaponized as a tool of power politics and military competition, relatively less systematic attention is devoted to what such technology can do for peace.[64] Harper concludes, sharing the view that "if military decision-making by artificial intelligence becomes the norm, opportunities for peace may be lost."[65]

64 Giovanardi, "AI for Peace," 8.

65 Erica Harper, "Will AI Fundamentally Alter How Wars Initiated, Fought and Concluded?," Humanitarian Law and Policy, September 26, 2024, accessed May 25, 2025, https://blogs.icrc.org/law-and-policy/2024/09/26/will-ai-fundamentally-alter-how-wars-are-initiated-fought-and-concluded/.

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Data Governance Act as an Instrument for Strengthening the European Union's Digital Sovereignty

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Keywords:
digital sovereignty,
open data,
data management,
data brokering,
protected data

Abstract: The Data Governance Act (DGA) aims to support the development of European data spaces in key sectors of the economy, reduce dependence on non-EU suppliers, and strengthen the data-driven economy. In this way, it will strengthen the EU's digital sovereignty. Achieving these objectives depends on consistent implementation of legislation, the elimination of interpretation gaps, and ensuring a balance between the free flow of data and the protection of public and private interests.

1. Introduction

Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022, on European data governance and amending Regulation (EU) 2018/1724, hereinafter referred to as the DGA (Data Governance Act),[1] is one of the pillars of the European data strategy.[2] The EU has announced

[1] Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European Data Governance and amending Regulation (EU) 2018/1724 (OJ L152, 3 June 2022).

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European

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two major legislative initiatives to achieve its ambitions for a European data economy of the future: the Data Act[3] and the DGA. The latter regulates three areas of concern that have data and its availability as a common ground. The regulation covers the reuse of protected data, data altruism, and data intermediation services. Unlike other recently adopted regulations targeting large technology companies, the DGA introduces new forms of data governance to reduce the problem of data concentration in the hands of large technology companies.[4] This regulation is a key component of the strategy to strengthen the EU's digital sovereignty, combining legal, technological, and economic dimensions. By establishing trusted mechanisms for data sharing, regulating intermediaries, and promoting the idea of data altruism, this regulation can contribute to increasing the EU's competitiveness in the global market while maintaining a high standard of protection of fundamental rights. The Act is a part of the larger regulatory framework pursued by the EU for digitalization, data economy, artificial intelligence, and other important policy goals often approached under the label of digital sovereignty.[5] The DGA aims to improve the sharing and reuse of data while protecting the privacy and data-protection rights of EU citizens.[6] This regulation aims to shape a system of trust for people, services, and industry to share their data, in stark contrast to the extraction practices of digital media platforms. The goal of the DGA is to ensure digital solidarity and data sharing.[7] It also sets out organizational or technical solutions that promote data altruism. The regulation allows for the voluntary sharing of data and

strategy for data, COM(2020) 66 final (OJ L345, 31 December 2003), accessed May 15, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0066.

3 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) (OJ L, 2023/2854, 22 December 2023).

4 Marta Maroni, "The Idea of Data and European Constitutional Imaginaries: an Immanent Critique of the Data Governance Act," *Rivista Internazionale di Filosofia del Diritto* 5 (2024): 285–315.

5 Jukka Ruohonen and Sini Mickelsson, "Reflections on the Data Governance Act," *Digital Society* 2 (2023): 1–10, https://doi.org/10.1007/s44206-023-00041-7.

6 Francesco Vogelezang, "Four Questions for the European Strategy for Data," Open Future, April 12, 2022, accessed May 15, 2025, https://openfuture.eu/blog/four-questions-for-the-european-strategy-for-data/.

7 Maroni, "The Idea of Data and European Constitutional Imaginaries," 285–315; Paweł Hajduk and Victor Obinna Chukwuma, "Digital Solidarity Through Spatial Data – An EU and

enables the creation of large data repositories for machine learning and data analysis. The EU has high hopes for it.

The purpose of this article is to assess the DGA as a regulatory instrument for building the EU's digital sovereignty. This article attempts to explain whether the DGA is one of the ways to strengthen this sovereignty. The assessment of the DGA is undertaken with regard to the reuse of protected data. This article poses the research question of whether the DGA is a tool for improving the EU's digital sovereignty. This is a topical issue given the ongoing debate on digital sovereignty and the nature of current relations, particularly between the US and Europe.

The article consists of four parts: the first contains an introduction, the second discusses the term digital sovereignty in the context of EU action, the third analyzes the DGA in the context of the approach to so-called protected data, and the fourth presents findings regarding the institutional infrastructure.

2. Digital Sovereignty

Today, in any mature information society, we no longer live online or offline but onlife, that is, we increasingly live in that special space, or infosphere, that is seamlessly analogue and digital, offline and online.[8] This reality poses new challenges for countries and, above all, for the EU. With the importance of information and communication technologies in every area of life, they have become environmental forces that shape and transform our reality. Therefore, we need to address the new challenges posed by these technologies and the information society.[9] Digital technologies can also bypass and invalidate the old models of institutionalized sovereignty.[10] If we recognize that technology shapes sovereignty, it means that we can influence the

African Perspective," *GIS Odyssey Journal* 4, no. 2 (2024): 101–16, https://doi.org/10.57599/gisoj.2024.4.2.101.

8 Luciano Floridi, "Soft Ethics, the Governance of the Digital and the General Data Protection Regulation," *Philosophical Transactions of the Royal Society A* 376, no. 2133 (2018): 20180081, http://doi.org/10.1098/rsta.2018.0081.

9 Luciano Floridi, *The Fourth Revolution: How the Infosphere Is Reshaping Human Reality* (Oxford: Oxford University Press, 2014).

10 Paul Timmers, "Sovereignty in the Digital Age," in *Introduction to Digital Humanism*, eds. Hannes Werthner et al. (Cham: Springer, 2024), 571–92, https://doi.org/10.1007/978-3-031-45304-5_36.

shaping of that technology.[11] We can demand that digital technology be designed to protect our values, human rights, and human dignity.[12] Hence, the idea of digital sovereignty has a "defensive" aspect.

To this end, EU institutions have long referred to the concept of digital sovereignty as an organizing principle.[13] This issue has become part of the EU's public policy based on digital humanism.[14] The concept of EU digital sovereignty is linked to ensuring Europe's strategic autonomy[15] and to political support aimed at enhancing it within the digital sphere. This requires the Union to update and adapt a number of existing legal, regulatory, and financial instruments, as well as to more actively promote European values and principles in areas such as data protection, cybersecurity, and ethically designed artificial intelligence (AI).[16]

The term digital sovereignty is contrasted with the concept of corporate digital sovereignty.[17] It is not unambiguous, and its meaning depends on the context.[18] The terms digital sovereignty and technological sovereignty

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11 Paul Timmers, "The Technological Construction of Sovereignty," in *Perspectives on Digital Humanism*, eds. Hannes Werthner et al. (Cham: Springer, 2022), 213–18, https://doi.org/10.1007/978-3-030-86144-5_28.

12 "Vienna Manifesto on Digital Humanism," TU Wien, May 2019, accessed May 15, 2025, https://caiml.org/dighum/dighum-manifesto/.

13 EU institutional actors have referred to the concept of digital sovereignty for several years. Viviane Reding, "Digital Sovereignty: Europe at a Crossroads," EIB Institute, 2016, accessed May 15, 2025, https://institute.eib.org/wp-content/uploads/2016/01/Digital-Sovereignty-Europe-at-a-Crossroads.pdf.

14 Timmers, "Sovereignty in the Digital Age," 571–92.

15 Frances G. Burwell and Kenneth Propp, "The European Union and the Search for Digital Sovereignty: Building 'Fortress Europe' or Preparing for a New World?," Atlantic Council Future Europe Initiative, June 2020, accessed May 15, 2025, https://www.atlanticcouncil.org/wp-content/uploads/2020/06/The-European-Union-and-the-Search-for-Digital-Sovereignty-Building-Fortress-Europe-or-Preparing-for-a-New-World.pdf; Timmers, "Sovereignty in the Digital Age," 571–92.

16 Tambiama Madiega, "Digital Sovereignty for Europe," European Parliamentary Research Service, July 2020, accessed May 15, 2025, https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf.

17 Luciano Floridi, "The Fight for Digital Sovereignty: What It Is, and Why It Matters, Especially for the EU," *Philosophy & Technology* 33 (2020): 369–78, https://doi.org/10.1007/s13347-020-00423-6.

18 Ausma Bernot, Diarmuid Cooney-O'Donoghue, and Monique Mann, "Governing Chinese Technologies: TikTok, Foreign Interference, and Technological Sovereignty," *Internet Policy Review* 13, no. 1 (2024), https://doi.org/10.14763/2024.1.1741; Huw Roberts et al.,

are used. They are most often treated as synonyms.[19] The term digital sovereignty is political and postulative in nature.[20] The need to clearly define this concept for the purposes of the EU is also emphasized.[21] This is not an easy task in itself, as the difficulties in defining it concern its constituent elements, primarily the concept of sovereignty.[22]

Digital sovereignty is Europe's ability to act independently in the digital world.[23] Digital sovereignty is the authority to set rules that regulate and govern action and, hence, the (digital) governance process involves the exercise of the capacities afforded, a priori, by sovereignty. Sovereignty captures the capacity of an actor to act (it is something that is held), whereas governance concerns the interactions of sovereign actors and the nature of the act itself (it is something that is done).[24] Digital sovereignty is – especially in Europe – now often used as a shorthand for an ordered, value-driven, regulated and therefore reasonable and secure digital sphere. It is presumed to resolve the multifaceted problems of individual rights and freedoms, collective and infrastructural security, political and legal enforceability, and fair economic.[25] Looking at the many definitions formulated by various

"Safeguarding European Values with Digital Sovereignty: An Analysis of Statements and Policies," *Internet Policy Review* 10, no. 3 (2021), https://doi.org/10.14763/2021.3.1575; differently André Barrinha and George Christou, "Speaking Sovereignty: The EU in the Cyber Domain," *European Security* 31, no. 3 (2022): 356–76, https://doi.org/10.1080/09662839.2022.2102895.

19 Roberts et al., "Safeguarding European Values with Digital Sovereignty"; differently Burwell and Propp, "The European Union and the Search for Digital Sovereignty."

20 Julia Pohle and Thorsten Thiel, "Digital Sovereignty," *Internet Policy Review* 9, no. 4 (2020), https://doi.org/10.14763/2020.4.1532; Roberts et al., "Safeguarding European Values with Digital Sovereignty"; Dennis Broeders, Fabio Cristiano, and Monica Kaminska, "In Search of Digital Sovereignty and Strategic Autonomy: Normative Power Europe to the Test of Its Geopolitical Ambitions," *Journal of Common Market Studies* 61, no. 5 (2023): 1261–80, https://doi.org/10.1111/jcms.13462.

21 Roberts et al., "Safeguarding European Values with Digital Sovereignty."

22 Rocco Bellanova, Helena Carrapico, and Denis Duez, "Digital/Sovereignty and European Security Integration: An Introduction," *European Security* 31, no. 3 (2022): 337–55, https://doi.org/10.1080/09662839.2022.2101887.

23 Madiega, "Digital Sovereignty for Europe."

24 Roberts et al., "Safeguarding European Values with Digital Sovereignty."

25 Annegret Bendiek and Jürgen Neyer, "Europas digitale Souveränität. Bedingungen und Herausforderungen Internationaler politischer Handlungsfähigkeit," in *Demokratietheorie im Zeitalter der Frühdigitalisierung*, eds. Michael Oswald and Isabelle Borucki (Wiesbaden: Springer, 2020), 103–25.

authors, it is possible to identify their common features. The core of digital sovereignty stipulates the need for control over the digital on the physical layer (resources, infrastructure, devices), the code layer (standards, rules, design), and the information layer (content, data). Control implies the ability to influence and restrict the manufacturing (including the mining and processing of necessary raw materials), design, use, and outputs of digital technologies.[26]

The issue of ensuring digital sovereignty through EU action can be considered on several levels. One of these is data control, which is presented as an integral part of the EU's digital sovereignty.[27] The European data strategy serves this purpose. The EU's goal is, on the one hand, to ensure privacy and the protection of personal data while maximizing the benefits for the economy and society. This approach aligns with the underlying principles of the DGA. The aim of the regulation should be to further develop a borderless digital internal market and a data-driven society and economy that are human-centered, trustworthy, and secure (recital 3). The data governance regulation will ensure access to more data for the EU economy and society and provide for more control for citizens and companies over the data they generate.[28] The DGA is therefore linked in EU documents to digital sovereignty.[29] The term "data sovereignty" is often used instead of "digital sovereignty."[30]

To sum up this part of the discussion, it must be said that defining digital sovereignty is not an easy task. There is no recognized definition of this concept developed by the EU. Nor is there such a definition formulated in

26 Gerda Falkner et al., "Digital Sovereignty – Rhetoric and Reality," *Journal of European Public Policy* 31, no. 8 (2024): 2099–120, https://doi.org/10.1080/13501763.2024.2358984.

27 Roberts et al., "Safeguarding European Values with Digital Sovereignty."

28 European Commission, Regulation on data governance – Questions and Answers, November 25, 2020, accessed February 15, 2025, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2103.

29 Ibid.; "The Once Only Principle System: A Breakthrough for the EU's Digital Single Market," European Commission, November 5, 2020, accessed February 15, 2025, https://ec.europa.eu/info/news/once-only-principle-system-breakthrough-eus-digital-single-market-2020-nov-05_en.

30 Patrik Hummel et al., "Data Sovereignty: A Review," *Big Data & Society* 8, no. 1 (2021): 1–17, https://doi.org/10.1177/2053951720982012; Anupam Chander and Haochen Sun, "Sovereignty 2.0," Georgetown Law Faculty Publications and Other Works, 2404, University of Hong Kong Faculty of Law Research Paper No. 2021/041, http://dx.doi.org/10.2139/ssrn.3904949.

the literature. Nevertheless, this cannot be considered an obstacle to achieving the objective of this article. The context related to data is important in this regard. In this sense, the term is not only postulative. It should be seen as an objective of EU public policy. It concerns the EU's control over data at the information level.[31] It should also be linked to the regulation of access to data with respect for the axiological foundations and fundamental values of the European Union. Digital sovereignty in relation to data, understood in this way, forms the basis for the analysis that follows.

3. Reuse of Protected Data

The DGA regulates the rules for the reuse of specific categories of data. In this regard, it supplements Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019, on open data and the re-use of public sector.[32] It regulates the scope of matters excluded from the scope of the Directive (Article 1(2)). The DGA applies to protected data. Pursuant to Article 3(1) of the DGA, these are data protected by trade secrets, including commercial, professional, and business secrets; the confidentiality of statistical information; the protection of intellectual property rights of third parties; or the protection of personal data, unless such data is covered by Directive 2019/1024. The DGA is a coordination instrument that sets out rules for the handling of data to which the Open Data Directive does not apply. In this way, it ensures that new categories of data (protected data) may be reused where possible while respecting its protected nature and the rights of third parties. The DGA regulation is therefore complementary to Directive 2019/1024. The DGA fills the gap left by that directive, which only concerns the re-use of public documents and does not refer to protected data.[33] The regulation of data reuse at the EU level thus creates a coherent system. Only minor issues can be raised, as both acts have a partially different scope in terms of subject matter and entities covered. Due to the list of exemptions from the scope of the DGA contained in Article 3(2) of that regulation, a data space is created to which neither Directive 2019/1024 nor

31 Falkner et al., "Digital Sovereignty," 2099–120.

32 OJ L172, 26 June 2019, p. 56.

33 Agnieszka Piskorz-Ryń, "European Data Governance Act – Essential Problems for Reuse of Public Sector Information," *Prawo i Więź* 53, no. 4 (2024): 322–33, https://doi.org/10.36128/PRIW.VI53.1148.

the DGA apply. There is therefore a gray area that is not regulated by either of these acts. In addition, problems may arise with the implementation of the Open Data Directive in national law and, as a consequence, affect the application of the DGA. This is the case in the Republic of Poland.[34]

Data to which the DGA applies is particularly protected against disclosure. Technical and legal procedural requirements must be met, primarily to ensure respect for the rights of others in relation to such data, or to limit the negative impact on fundamental rights, the principle of non-discrimination, and data protection (recital 6). Meeting such requirements is usually time-consuming and requires specialist knowledge. For this reason, such data were underused before the entry into force of the DGA. Few Member States had established structures, processes, or legislation to facilitate this type of data reuse. However, such measures were not taken across the Union. Brink and Ungern-Sternberg point out that one of the objectives of the Data Governance Regulation is to promote the reuse of certain categories of protected data held by public authorities, in the sense of technical and factual control over the data.[35] In this context, the DGA should be seen as a further step towards obtaining new categories of data for reuse. Opening up this resource would not have been possible without the proactive attitude of the EU and the completion of the regulatory landscape in this area.

Unlike the Open Data Directive, the DGA focuses on the protection of legally protected data. This act does not grant a public right to reuse protected data. Nor does it provide a basis for an obligation on obligated

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[34] Agnieszka Piskorz-Ryń, "Spotkanie legislatorów prawa administracyjnego" ["Meeting of Legislators of Administrative Law"], in *Prawo administracyjne jako miejsce spotkań: Księga jubileuszowa dedykowana Profesorowi Jerzemu Supernatowi* [*Administrative Law as a Meeting Place: An Anniversary Book Dedicated to Professor Jerzy Supernat*], eds. Barbara Kowalczyk et al. (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, 2024), accessed February 15, 2025, https://bibliotekacyfrowa.pl/Content/149252/PDF/Prawo_administracyjne_jako%20miejsce_spotkan_ksiega_jubileuszowa_dedykowana_Profesorowi_Jerzemu_Supernatowi.pdf.

[35] Stefan Brink and Antje von Ungern-Sternberg, "DGA," Beck`scher Online-Kommentar Datenschutzrecht, May 2023, accessed December 8, 2025, https://beck-online.beck.de/dokument?vpath=bibdata%2fkomm%2fbeckokdatens_44%2fcont%2fbeckokdatens.inhaltsverzeichnis.htm.

entities to allow the reuse of data. Nor does it provide a legal basis for exempting protected data from confidentiality obligations under Union or national law. The DGA does not interfere with this matter and does not amend existing provisions. It does not provide a legal basis for claiming the reuse of protected data. This solution is analogous to that adopted in the original text of Directive 2003/98/EC.[36] The DGA is "neutral" in terms of data rights, i.e., it does not affect the substantive legal provisions on access to data and their further use.[37] Each Member State, outside the scope of matters regulated by EU law, remains free to decide whether protected data are made available for reuse, including the purposes and scope of such access (recital 11). The DGA is therefore based on ensuring control over protected data. This act does not limit that control. From the point of view of digital sovereignty, the scope of control depends on the Union insofar as it exercises shared competences. Where the "occupied field" principle does not apply, responsibility lies with the Member States.

Nevertheless, this act can clearly be classified as regulatory action aimed at ensuring control over data by the Union or its Member States. This protection is intended to uphold important European values and fundamental rights. These include the protection of privacy and personal data, the protection of intellectual property, and the guarantee of economic freedom, including competition in the internal market.[38] Only statistical confidentiality cannot be linked to a specific EU fundamental right. It serves the performance of Community tasks,[39] while national statistics serve the tasks of the Member States. It allows for the collection of reliable, objective, and systematically provided information for EU bodies, national authorities,

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36 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ L345, 31 December 2003), 90–9.

37 Brink and Ungern-Sternberg, "DGA."

38 Charter of Fundamental Rights of the European Union (OJ C303, 14 December 2007), p. 1, as amended, Articles 7, 8, 16, and 17(2).

39 Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics and repealing Regulation (EC, Euratom) No. 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No. 322/97 on Community Statistics, and Council Decision 89/382/EEC, Euratom establishing a Committee on the Statistical Programmes of the European Communities (Text with relevance for the EEA and for Switzerland) (OJ L87, 31 March 2009), 164–73, Article 1.

and the public. Public statistics therefore serve the public interest and activities aimed at achieving the common good. In this respect, they are instrumental in enabling the good administration of public affairs and the realization of other fundamental values and rights.

However, this is not enough. No regulation was needed to protect the rights and values identified. The scope of protection was already provided by EU and national data protection laws. They also set limits on data collection. However, the DGA has a special role as a set of rules on the reuse of protected data. It provides control over such data in a unique way. It regulates an area that was previously subject only to proactive measures and depended on the goodwill of Member States. The DGA standardizes procedures relating to protected data in order to reconcile the protected nature of the data and the rights of third parties. This means that the DGA establishes a regulatory framework for assessing:

(1) whether protected data can be transferred for reuse with the consent of the data subjects or the permission of the data holders, or
(2) whether protected data may be transferred for reuse after modification or processing in such a way that it no longer has a protected character, or
(3) whether protected data may be transferred for reuse in a manner that respects intellectual property rights.

Under the DGA, the context of personal data protection is also important, as personal data also fall within the category of protected data. Article 3(1)(d) of the DGA provides that Chapter II of the Regulation, concerning the reuse of certain categories of protected data held by public sector entities, applies to data protected for reasons of personal data protection to the extent that it goes beyond the application of Directive 2019/1024. Recital 10 of the DGA indicates that this refers to personal data excluded or restricted from access for reasons of privacy and integrity of the natural person, in accordance with data protection rules. However, the DGA does not clearly distinguish between the scope of reuse under Directive 2019/1024 and the scope resulting from the DGA, which makes it difficult to determine which data "go beyond" the scope of the Directive. It seems that the intention of the EU legislator was to cover only personal data whose reuse is explicitly excluded under Directive 2019/1024, its implementing provisions, or EU and national sectoral legislation. It is therefore

not a question of all data subject to privacy restrictions, but of data for which the law expressly excludes the open data mechanism. However, it remains difficult to determine precisely which categories of personal data meet this criterion. Recital 6 of the DGA indicates the desire to make data collected by the public sector available in the public interest, even if it is personal data, while complying with the technical and legal requirements of the GDPR, Directive 2002/58/EC, and Directive (EU) 2016/680. Directive 2019/1024, in Article 1(2)(h), excludes from its scope documents, or parts thereof, containing personal data whose reuse would be incompatible with data protection rules. At the same time, it is without prejudice to the GDPR, and recitals 52–53 specify that the reuse of personal data is only permitted in accordance with the principle of purpose limitation and after a data protection impact assessment has been carried out, if necessary. Similar principles are contained in recital 154 of the GDPR and Article 86 of the GDPR, according to which the disclosure of personal data from official documents may only take place within the limits of EU or national law, in order to reconcile public access with the right to data protection. In the relationship between the DGA and the GDPR, it is clear that the DGA does not create additional grounds for the processing of personal data. In the relationship between the GDPR and Directive 2019/1024, the principle of non-infringement of data protection standards applies. However, the relationship between the DGA and Directive 2019/1024 with regard to Article 3(1)(d) is unclear and requires interpretation. The most likely interpretation is that this refers to data to which Directive 2019/1024 does not apply at all by virtue of an explicit statutory exemption.

"Non-protected data" is data whose reuse is permitted by Directive 2019/1024 and the provisions implementing it into national law. Its scope is determined taking into account the principles and conditions for the processing of personal data set out in Articles 5–6 of the GDPR (for ordinary data) and Article 9(2) of the GDPR (for special categories of data). As a result, the application of Article 3(1)(d) of the DGA requires a case-by-case analysis of potentially conflicting and complementary provisions of the GDPR, Directive 2019/1024, and national provisions, including sector-specific regulations. The lack of clear criteria in the DGA means that the practical identification of personal data covered by this regulation is subject to significant interpretative risk.

4. Institutional Infrastructure

The DGA is a step towards democratizing data and opening it up, including protected data categories. Thanks to this regulation, the pool of data available for economic, scientific, and social purposes is to be expanded while respecting protected data and the interests of the data subjects or entities to whom the data relate, as well as public and private interests. The provisions of the DGA formalize the retention of control over data within the meaning of Article 3(1) in the process of its reuse. The significance of the DGA should not be seen solely as establishing a framework for the reuse of protected data. However, the content of the DGA regulations referred to above raises some reservations and justifies reflection on whether this regulation is indeed an effective tool for strengthening the EU's digital sovereignty. The answer to this question is affirmative, although it should be noted that ensuring digital sovereignty under the DGA requires appropriate institutional preparation and the development of additional legal instruments in the form of procedural mechanisms.

Due to the specific nature and complexity of the measures that the obligated entity must adopt to reuse data for the purpose of exercising control over data and ensuring the protection of rights and freedoms fundamental to the EU, it is very important to establish an infrastructure that facilitates reuse in Member States. The first element of this infrastructure is the appropriate entities. Each Member State must designate at least one competent entity. They should have the necessary legal, financial, technical, and human resources to perform the tasks assigned to them, including the necessary technical knowledge to comply with the relevant provisions of Union or national law on systems for accessing protected data. It is the responsibility of the Member State to provide these entities with the necessary resources. The task of the competent entities is to assist public sector entities. This assistance is intended to support them in their capacity as obligated entities and as potential users of data, as well as the data subjects. This assistance is to be provided at the request of such an entity. It may consist of proactive measures and include guidance and technical support on how best to structure and store data so that they are easily accessible (Article 7(4)(b)). Proper structuring of data will facilitate its provision upon request. In addition, it may include providing technical support by making

available a secure processing environment for access for the purpose of reuse of data (Article 7(4)(a)).

Another task of the competent entities is to provide technical support for pseudonymization and data processing in a manner that effectively protects the privacy, confidentiality, integrity, and availability of the information contained in the data for which reuse has been authorized, including techniques such as anonymization, generalization, masking, and randomization of personal data or other state-of-the-art privacy-preserving techniques, and the removal of confidential commercial information, including trade secrets or content protected by intellectual property rights (Article 7(4)(c)). It may also include providing assistance, where appropriate, to public sector entities in supporting re-users in requesting consent from data subjects for the reuse of data and from data holders for permission, in accordance with their specific decisions, including regarding the jurisdiction in which the data processing is to take place, and – where practicable – assisting public sector bodies in establishing technical mechanisms to enable the transmission of requests from reusers for consent or permission (Article 7(4)(e)). The competent entities may also substitute public sector bodies in examining requests for protected data (Article 7(2)). The actions of the competent entities show that control over protected data in the process of transferring it for reuse also includes the creation of an institutional framework to ensure control at the technical level. This includes ensuring a secure processing environment and serves to guarantee that data are processed in a manner that effectively protects the privacy, confidentiality, integrity, and availability of the information contained in the data for which reuse has been authorized.

5. Conclusion

The term digital sovereignty is a postulate. However, apart from the problems associated with its definition, it should be treated as an objective of EU public policy on data. It is difficult to determine in the long term whether it will continue to be a subject of scientific interest. At the moment, it certainly combines the important challenges facing the EU. It is therefore a concept that allows these challenges to be organized. This is also the case in the area described. In this respect, the DGA should be considered a regulatory

instrument for digital sovereignty. It guarantees control over data at both the legal and technical-organizational levels. It also serves to realize the values and protect the fundamental rights of the EU. The DGA is an important instrument for implementing EU policy on digital sovereignty, in particular by establishing a framework for the reuse of certain categories of data held by the public sector. Article 3(1)(d) provides that data protected for reasons of personal data protection are covered by the scope of the regulation, insofar as they go beyond the application of Directive 2019/1024. However, the lack of clear criteria for distinguishing between the scope of application of the two legal acts gives rise to interpretative doubts. As a result, the practical application of the DGA as a tool for strengthening the EU's digital sovereignty requires a thorough analysis of potentially conflicting and complementary legal norms on a case-by-case basis. The lack of clarity regarding the criteria for classifying data means that the implementation of the regulation's objective may encounter interpretative barriers, which justifies the need to clarify the relationship between the DGA and Directive 2019/1024 in future legislative measures.

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The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights in Cases Concerning Workplace Monitoring

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Abstract: This article examines the principle of proportionality in the jurisprudence of the European Court of Human Rights concerning workplace monitoring under Article 8 ECHR. It contrasts two models of proportionality, interest balancing and balancing as reasoning, and shows how the Court has increasingly adopted the latter in landmark judgments such as *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*. Particular emphasis is placed on the structural inequality inherent in the employment relationship, which undermines the notion of that relationship as a contract between equal parties and makes contextual, reasoning-based balancing especially relevant in cases concerning labor relations. The analysis highlights how proportionality, to a certain extent, constrains the margin of appreciation and provides normative guidance in adapting national legal frameworks to the challenges of digital surveillance. At the same time, the article cautions against an uncritical drive towards harmonization and eventual unification through instruments such as the GDPR or the AI Act, as excessive standardization may overlook the diversity of national labor markets. It also highlights the risks associated with

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the expanding role of the ECtHR beyond judicial review. Proportionality, understood as balancing as reasoning, therefore emerges as the suitable model for safeguarding employee privacy and dignity while preserving respect for legal and social pluralism in Europe.

1. Initial Remarks

The principle of proportionality is a widely recognized approach to balancing individual rights with the public interest. It is applied both in the national judiciaries of democratic states and within pan-European normative orders.[1]

There is no synthetic or comprehensive definition of proportionality in the European Convention on Human Rights[2] or in any of its additional protocols.[3] According to Wiśniewski, the jurisprudence of the European Court of Human Rights[4] is "relatively casuistic and does not easily provide a basis for the conceptualization of this principle."[5] The longstanding ambiguity surrounding the relationship between the principle of proportionality and the principle of fair balance further deepens this uncertainty. While the two are sometimes treated as synonymous,[6] an increasingly prevalent view suggests that

> the principle of fair balance should be regarded as a more fundamental norm, addressing the underlying tensions inherent in the application of the provisions of the ECHR. In contrast, the principle of proportionality ought to be

1 Magdalena Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawno-porównawcza," *Krytyka Prawa. Niezależne Studia nad Prawem* 14, no. 2 (2022): 82, https://doi.org/10.7206/kp.2080-1084.524.

2 Also referred to as the ECHR or the Convention.

3 Aleksander Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej: sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie* (Warszawa: Liber, 2010), 216–17; Adam Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," *Gdańskie Studia Prawnicze* 42, no. 2 (2019): 57, https://gsp.ug.edu.pl/index.php/gdanskie_studia_prawnicze/article/view/5262.

4 Also referred to as the ECtHR or the Court.

5 Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 57.

6 Bartłomiej Latos, *Klauzula derogacyjna i imitacyjna w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności* (Warszawa: Wydawnictwo Sejmowe, 2008), 45–46.

understood *sensu stricto* as referring specifically to the relationship between the objective pursued and the means used to achieve that objective.[7]

Despite the doubts indicated and the issues unresolved at a high level of generality, the principle of proportionality is one of the key interpretative tools used in the case law of the ECtHR.[8] As Michalska points out, despite the lack of a synthetic definition of proportionality, the ECtHR's jurisprudential practice shows structural repetition in the application of the three basic elements of the proportionality test: utility, necessity, and proportionality *sensu stricto*. This approach constitutes a *de facto* standard for assessing the legality of interference in the sphere of protected individual rights.[9]

Undoubtedly, the principle of proportionality serves as a tool for assessing the admissibility of state interference with individual rights, particularly in cases where the tension between private and public interests is especially pronounced, as is the case in the context of employee monitoring. Modern workplaces, shaped by extensive digitalization and the automation of processes, are increasingly becoming spaces where the boundaries of privacy are being redefined. Workplace surveillance (especially electronic monitoring, such as the inspection of email correspondence, the processing of geolocation data, or video surveillance) raises questions regarding its compatibility with Article 8 of the ECHR, which guarantees the right to

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7 Ibid., 69. See also: Alastair Mowbray, "A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights," *Human Rights Law Review* 10, no. 2 (2010): 289–317, https://doi.org/10.1093/hrlr/ngq006; Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Brill, 2009), 27.

8 Ibid., 1; Kai Möller, "Proportionality: Challenging the Critics," *International Journal of Constitutional Law* 10, no. 3 (2012): 709, https://doi.org/10.1093/icon/mos024.

9 Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawnoporównawcza," 89–93. According to K. Möller the principle of proportionality, widely used in human rights and constitutional law doctrine, has in its practical dimension taken the form of the proportionality test, commonly applied both by the ECtHR and by national courts and constitutional tribunals. In this author's view this test consists of four stages: (1) legitimate goal stage, (2) rational connection or suitability stage, (3) necessity stage, and (4) balancing stage, better known as proportionality in the strict sense. See: Möller, "Proportionality: Challenging the Critics," 711. The literature also emphasizes that "in order to strike a fair balance, the ECtHR applies strict (in respect of absolute rights) and persuasive (convincing) democratic necessity tests." See: Kristina Trykhlib, "The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights," *EU and Comparative Law Issues and Challenges Series (ECLIC)* 4 (2020): 151, https://doi.org/10.25234/eclic/11899.

respect for private life. In such cases, the ECtHR has repeatedly emphasized the need to strike a balance between the legitimate interests of employers (e.g., property protection, operational efficiency, data security) and employees' rights to autonomy and privacy. The mechanism for achieving this balance is precisely the proportionality test.

It is impossible to omit at this point the significance of the doctrine of the "margin of appreciation," which shapes the manner in which the ECtHR assesses the actions of member states. The scope of this margin, as demonstrated by case law, varies depending on the nature of the right being protected, the existence of European consensus, and the social context.[10] In cases related to workplace monitoring, this margin is often relatively broad, due in part to differences in labor law models and privacy-protection cultures among individual states. However, this does not exempt states from the obligation to demonstrate that the interference was proportionate to the legitimate aim pursued and that its impact on the rights of the individual was not excessive.

The article introduced by the foregoing remarks aims to reconstruct and critically analyze the manner in which the ECtHR applies the principle of proportionality in cases concerning workplace monitoring. By examining specific rulings of the Court, an attempt will be made to identify jurisprudential patterns, the scope of the margin of appreciation granted, and the consequences arising from a potential failure to uphold proportionality. Simultaneously, the analysis will address the axiological tensions underpinning such cases: between the need to ensure security, efficiency, and oversight in the workplace, and the protection of employee privacy and dignity. This approach is intended not only to deepen the understanding of the principle of proportionality but also to foster reflection on its practical significance in light of evolving surveillance technologies and socio-legal relations in the workplace.

[10] Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 64–67; Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawno-porównawcza," 93.

2. Character of Article 8 of the ECHR in the Context of Interference with Employees' Right to Respect Their Private Life by Monitoring Measures

The traditional interpretation of the right to privacy under Article 8 of the ECHR significantly differs from the modern understanding of this right. Initially, Article 8 of the ECHR was interpreted narrowly, with the aim of protecting the private and family life of citizens from arbitrary interference by public authorities. At that time, the provision had the characteristics of a negative right, serving primarily to restrain public authorities from acting.[11]

It was only later, alongside social changes, that the ECtHR began to indicate that, in addition to its defensive character, Article 8 of the ECHR also entails a positive dimension. This stems primarily from the Convention's formulation that everyone has the right to "respect" for their private and family life.[12] The positive dimension of Article 8 has a dual nature. On the one hand, it involves the use of the power and capacity of the state in such a way as to secure the rights of individuals under the Convention and to ensure that they are practically accessible, as exemplified in *Marckx v. Belgium*. On the other hand, it entails a duty on public authorities to adopt legal regulations that provide protection of Convention rights against interference by other private actors.[13] The latter concept is primarily related

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11 Ursula Kilkelly, "The Right to Respect for Private and Family Life, Home and Correspondence," in *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, eds. David J. Harris, Michael O'Boyle, and Colin Warbrick (Oxford: Oxford University Press, 2009), 362.

12 In the case of *Marckx v. Belgium*, regarding the "respect for family life" the Court stated that "it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life." See: ECtHR Judgment of 13 June 1979, Case *Marckx v. Belgium*, application no. 6833/74, para. 31.

13 In the case *X and Y v. the Netherlands*, the Court indicated that "although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." ECtHR Judgment of 26 March 1985, Case *X and Y v. the Netherlands*, application no. 8978/80, para. 23. David J. Harris et al.,

to the development of a horizontal interpretation of the Convention[14] and becomes especially visible in cases concerning employees' right to respect for their private and family life. Although the interference is most often carried out by a private entity – the employer – in accordance with the present conception, it is the state and its national judiciary that bear the burden of fulfilling positive obligations to protect individuals against unjustified violations of their Convention rights. As the Court itself has held:

> in certain circumstances, the state's positive obligations under Article 8 of the Convention are not adequately fulfilled unless it secures respect for private life in the relations between individuals by setting up a legislative framework taking into consideration the various interests to be protected in a particular context.[15]

The rapid technological progress, the development of new forms of workplace surveillance, and changes in the work environment that blur the boundaries between the public and private spheres,[16] have all contributed to an increasing number of cases before the Strasbourg Court concerning employees' privacy being infringed by employers. Accordingly, in line with the living-instrument doctrine, the ECtHR has begun reinterpreting

"The European Convention on Human Rights in Context," in *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, eds. David J. Harris, Michael O'Boyle, and Colin Warbrick (Oxford: Oxford University Press, 2009), 19–20.

14 Judge Pinto De Albuquerque in his partly dissenting opinion to the judgment of the fourth section of the ECtHR in case of *Bărbulescu v. Romania* stated that "[c]onvention rights and freedoms have a horizontal effect, insofar as they are not only directly binding on public entities in the Contracting Parties to the Convention, but also indirectly binding on private persons or entities, the Contracting State being responsible for preventing and remedying Convention violations by private persons or entities. This is an obligation of result, not merely an obligation of means." See: ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 23. The opinion is of great significance in the context of the subsequent judgment of the Grand Chamber in *Bărbulescu v. Romania*, as the court confirmed it when ruling on the violation of Article 8.

15 ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 115.

16 See: Kalina Arabadjieva and Paula Franklin, "Home-Based Telework, Gender and the Public-Private Divide," in *The Future of Remote Work*, eds. Nicola Countouris et al. (Brussels: ETUI, 2023), 61–81.

Article 8 of the Convention "in the light of present-day conditions,"[17] which has significantly influenced the principle of proportionality, one of the most important doctrinal tools used by the Court to resolve conflicts between fundamental rights or between a right and a competing interest.[18]

The principle of proportionality has a uniquely multi-dimensional character. Its interpretation and application may vary depending on the factual context, and especially on the nature of the Convention right in question and the interest or right that opposes it.[19] The rights stated in the Convention are divided into absolute rights, which cannot be restricted under any circumstances, and non-absolute (qualified) rights, which may be limited, but only within the boundaries defined by each state's (signatories to the Convention) margin of appreciation.[20] The scope of the margin of appreciation, i.e., the extent to which individual states are free to interpret the rights set out in the Convention,[21] depends on the existence of so-called "European consensus."[22] Where such consensus exists, the margin is narrower; in its absence, states enjoy broader discretion.[23] In cases involving alleged violations of employees' right to privacy through monitoring

17 ECtHR Judgment of 25 April 1978, Case of *Tyrer v. the United Kingdom*, application no. 5856/72, para. 31. The role of national courts in the doctrine of positive obligations has been clearly defined, *inter alia*, in the ECtHR Judgment of 17 October 2019, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, para. 15. The Court stated that "[i]n sum, we find that both the national courts and this Court failed to strike a fair balance between the rights of the employer and the rights of the employees."

18 Möller, "Proportionality: Challenging the Critics," 710.

19 Trykhlib, "The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights," 130.

20 Ibid., 130–31.

21 The Court clearly emphasizes the subsidiarity of the protection mechanism established by the convention in relation to national systems protecting human rights. Moreover, it also states that it is the responsibility of the national authorities to make the initial assessment whether specific provisions or actions comply with the ECHR. See: ECtHR Judgment of 7 December 1976, Case *Handyside v. the United Kingdom*, application no. 5493/72, para. 48. See also: Thomas A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights," *Human Rights Quarterly* 4, no. 4 (1982): 478, https://doi.org/10.2307/762206.

22 Consensus among member states of the Council of Europe on a specific issue connected to the rights indicated in the ECHR.

23 Trykhlib, "The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights," 145–46.

measures used by employers, the Court has explicitly stated that no European consensus currently exists,[24] which in turn grants states a wider margin of appreciation. This has a direct impact on how the principle of proportionality is applied. However, it must be remembered that the final assessment of whether the balancing of competing rights and interests, the use of specific measures, and the degree of interference with an employee's private life was proportionate ultimately rests with the Strasbourg Court, due to its supervisory role.[25]

3. Balancing Competing Rights and Interests – Conceptual Approaches in the ECtHR Case Law

The ECtHR, in its scrutiny, most often focuses on proportionality *sensu stricto*.[26] Moreover, the balancing stage is especially significant in cases concerning employers' interference with the privacy of employees, particularly through surveillance measures. This is mainly because the relationship between employer and employee is inherently unequal,[27] due to the structural subordination of the employee to the employer's authority.[28]

The essence of balancing can be summarized as the process of determining which of the competing rights, values, or interests, should be given priority in a particular case.[29] Therefore, it is a matter of weighing certain

[24] "It also appears from the comparative-law material at the Court's disposal that there is no European consensus on this issue. Few member states have explicitly regulated the question of the exercise by employees of their right to respect for their private life and correspondence in the workplace." See: ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 118.

[25] Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 66. ECtHR Judgment of 22 October 1981, Case *Dudgeon v. the United Kingdom*, application no. 7525/76, para. 59.

[26] Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawnoporównawcza," 90.

[27] See: Aditi Bagchi, "The Myth of Equality in the Employment Relation," *Michigan State Law Review* (2009): 579–628, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1255&context=faculty_scholarship.

[28] Nóra Jakab, "Theoretical Issues of Employment Contracts and Collective Agreements on Current Regulatory Issues," in *Fundamentals of Labour Law in Central Europe*, ed. Nóra Jakab (Miskolc: Central European Academic Publishing, 2022), 17.

[29] Möller, "Proportionality: Challenging the Critics," 715.

values against one another. This naturally gives rise to the question: how should such balancing be conducted?

The answer lies in two distinct conceptual models of balancing. The first is the so-called "interest balancing," closely associated with cost-benefit analysis, which constitutes one of the general standards applied by the ECtHR when assessing interferences with Convention rights.[30] Interest balancing involves weighing conflicting rights *sensu stricto* – comparing their relative weight and granting primacy to the one that carries greater importance.[31] However, this raises a further question: how is the weight of a particular right to be determined, and do the rights enumerated in the Convention possess an autonomous value regardless of the specific context, especially when it comes to non-absolute rights?

To address these questions, a second concept emerges: "balancing as reasoning." This model calls for a contextual and comprehensive weighing of all relevant factors present in a given case. It is best described as the construction of a moral argument to determine which right or interest, under the particular circumstances, ought to prevail.[32] This model of balancing, which may be referred to as balancing *sensu largo* or contextual balancing, takes into account both the direct and indirect elements of the situation, including the broader context in which the alleged violations have occurred. As such, it may lead to different outcomes from a purely interest-based approach.

A useful example to illustrate how these two approaches function in practice is the case of *Hatton v. United Kingdom*.[33] Due to the nature of competing rights and interests, this case provides a good starting point for analyzing cases concerning interference with the right to respect for private life of employees as a result of monitoring measures taken by employers and for determining which concept is more appropriate in such cases. In *Hatton*, the core conflict lay between the right to respect for private and family life under Article 8 ECHR, which had allegedly been violated by night-time

30 Michalska "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawno-porównawcza," 90; Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej*, 221.

31 Möller, "Proportionality: Challenging the Critics," 715.

32 Ibid.

33 ECtHR Judgment of 8 July 2003, Case *Hatton and Others v. the United Kingdom*, application no. 36022/97.

aircraft noise, and the public interest in ensuring economic development through the efficient operation of air transport. The case resulted in two diverging judgments. In the first, the Third Section of the ECtHR ruled in favor of the applicants, holding that a failure to maintain a fair balance between the public interest and the individuals' rights to respect for their private, home, and family life constituted a violation of Article 8 of the ECHR.[34] However, in the subsequent judgment, the Grand Chamber reached the opposite conclusion, assigning greater weight to the public interest.[35]

A comparative analysis of these two judgments reveals that the Court, in fact, applied a broad model of balancing. Had the Court relied solely on the interest balancing the outcome might have favored the public interest from the outset, given that economic benefits outweighed the relatively lower degree of harm caused by the night flights – an outcome that would likely have been reflected in the Section judgment. However, this was not the case. The primacy of the public interest was only confirmed by the Grand Chamber, suggesting that the reasoning process involved a contextual assessment of all relevant factors, rather than a mechanical application of cost-benefit logic.

This section now turns to the analysis of cases involving a conflict between employees' right to privacy and the monitoring measures implemented by employers for supervisory purposes. Two cases decided in recent years by the ECtHR play a key role in the analysis, offering valuable insights into how the principle of proportionality operates in this context. These cases are *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*. In general, it can be pointed out that the essence of each of the above-mentioned cases is the need to achieve a fair balance between the interests of the employee, i.e., his or her right to privacy, and the interests of the employer, which can be defined as the employer's right to monitor the employee deriving from the organizational function of labor law and the employer's obligation to properly organize the work process.[36] If this bal-

[34] ECtHR Judgment of 2 October 2001, Case *Hatton and Others v. the United Kingdom*, application no. 36022/97.

[35] ECtHR Judgment of 8 July 2003, Case *Hatton and Others v. the United Kingdom*, application no. 36022/97, paras. 129–130.

[36] Dominika Dörre-Kolasa, "Rights and Obligations of the Parties to an Employment Relationship," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters

ance were to be established using a strict interest balancing logic, we would most likely experience a dichotomy of decision: either each case would be decided in favor of the employer – on the basis that the employer's interest should be identified with the public interest in economic development through the efficient functioning of the business,[37] indicating that it outweighs the interests of individual employees – or, conversely, the public interest would be equated with the protection of employee privacy, leading to findings of violations of Article 8 ECHR in each case.

However, the reality is far more complex. The public interest can rarely be reduced to the interest of a single social group, as it is typically shaped by a variety of factors and composed of overlapping interests of different groups, which will be weighed differently depending on the circumstances. Furthermore, in cases concerning alleged violations of Article 8 ECHR through employee monitoring, a number of elements must be taken into account when assessing the rights and interests at stake: for example, how the right to privacy was exercised by the employee, the extent to which it was interfered with, and the purpose and nature of the monitoring measures used.

It appears that this conclusion was shared by the ECtHR, which, in the mentioned cases, departed from a simple cost-benefit analysis and refrained from assigning abstract or autonomous weight to competing rights and interests. Instead, the Court adopted a more context-sensitive approach, i.e., balancing *sensu largo*, focusing on the specific facts of each case.

The role of "balancing as reasoning" in cases concerning employee privacy is well illustrated by the judgments in *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*. In *Bărbulescu v Romania,* two separate judgments were delivered, each based on a different assessment. In the first judgment, issued by the Fourth Section, the Court found no violation of Article 8 of the Convention in relation to the monitoring by the employer of the employee's activity on a Yahoo Messenger account created for work purposes, which revealed that the employee had used the account

Kluwer, 2016), 259–60; Krzysztof W. Baran, "Functions of Labour Law," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2016), 35–36.

37 The basis for this statement is reasoning *per analogiam* in relation to *Hatton v. United Kingdom* case.

for personal communication.[38] The Court justified its decision by noting that the employer had acted within the scope of its disciplinary powers[39] and that its intention to verify whether employees were carrying out their duties during working hours was reasonable.[40] Moreover, the Court found that the monitoring measures used by the employer were limited in scope and showed features of proportionality.[41]

Therefore, it can be seen that, in balancing the competing rights and interests, the Court applied a narrow set of criteria and did not address the issue of whether the employee had been informed about the monitoring, which, in turn, became a key issue in the Grand Chamber's judgment. The limited scope of the Court's search for a fair balance leads to the conclusion that this judgment was more heavily influenced by the concept of "interest balancing" than by "balancing as reasoning."

The above-mentioned judgment, and specifically the brevity of the analysis concerning the alleged violation of Article 8 ECHR, was widely criticized by Judge Pinto de Albuquerque, who, in his partly dissenting opinion, drew attention to several important elements that had been overlooked by both the domestic courts and the ECtHR majority. These included: the absence of a policy on monitoring internet activity, which should have been properly implemented and enforced by the employer; the sensitive and personal nature of the employee's messages accessed by the employer; and the broad scope of the disclosure of the employee's private communications during the disciplinary proceedings.[42] Judge Pinto de Albuquerque placed particular emphasis on the employer's obligation to establish an appropriate internal policy on the use of the Internet and online communication tools in the workplace. While such policies may vary

38 ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 63.

39 Ibid., para. 56.

40 Ibid., para. 59.

41 The characteristics of the monitoring, such as its limited scope and proportionality, the Court derived from the fact that only the employee's communications on Yahoo Messenger were examined, excluding other data and documents stored on his computer. See: ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 60.

42 Partly Dissenting Opinion of Judge Pinto de Albuquerque, ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 2.

across companies depending on operational needs, they must in all cases clearly define the employee's rights and obligations, including the permissible scope of internet use, methods of monitoring, mechanisms for securing, using, and destroying data, and the individuals authorized to access it.[43] The implementation of such a policy should be consistent with the principles of necessity and proportionality, and Judge Pinto de Albuquerque elaborated in detail on what this should look like in practice.[44] Additionally, he drew attention to another important issue, indirectly referring to the unequal power dynamic between employer and employee. Namely, he warned that the absence of a clear internet-use policy in the workplace may lead to employer behavior resembling that of "Big Brother," wherein employee activity is excessively monitored. Such behavior reflects a commodification of the employee, as if both his or her labor and private life were subject to negotiations between two parties of equal standing.[45]

When analyzing the position of Judge Pinto de Albuquerque, it becomes clear that his reasoning goes far beyond a cost-benefit assessment. In weighing the employee's right to privacy against the employer's right to surveillance, he applies a contextual approach, placing the issue within a human-rights-centerd approach to internet usage in the workplace. He also draws attention to the unequal relationship between the parties to the employment contract, as well as to the personal and sensitive nature of the messages sent by the employee that were subject to monitoring. Applying a more extensive proportionality analysis, the judge reached a conclusion that diverged from that of the majority, holding that Article 8 ECHR had been violated in this case.

The approach to balancing expressed in the partly dissenting opinion found direct reflection in the Grand Chamber judgment, which held that there had indeed been a violation of Article 8 ECHR. Firstly, the Grand Chamber more precisely defined the employer's interest competing with the employee's right to privacy than had the previous judgment. Echoing the national courts, the ECtHR acknowledged that the employer has a legitimate interest in ensuring the smooth functioning of the company, which may be pursued through the implementation of monitoring mechanisms to

43 Ibid., para. 10.
44 See: ibid., para. 13.
45 See: ibid., para. 15.

check whether employees perform their duties diligently.[46] Secondly, the Court developed a list of six criteria intended to guarantee the proportionality of surveillance and guard against its arbitrary application. These factors should be taken into consideration by national authorities when assessing a situation involving employee monitoring, and they are as follows:

(1) whether the employee had been informed about the possibility of monitoring their communications and about the implementation of monitoring measures;
(2) the extent of the monitoring and the degree of intrusion into the employee's privacy;
(3) whether the employer provided legitimate reasons to justify the monitoring and access to the actual content of communications;
(4) whether less intrusive methods of monitoring could have been used instead of accessing the content of the employee's communications directly;
(5) the consequences of the monitoring for the employee, particularly whether the monitoring results contributed to achieving its stated objectives;
(6) whether appropriate safeguards were in place for the employee, especially where the surveillance was of an intrusive nature.[47]

The ECtHR found that none of the above factors had been adequately assessed by the domestic authorities. Therefore, the Romanian appellate court's conclusion that a fair balance had been struck between the competing rights and interests was called into question.[48]

The trajectory of the *López Ribalda and Others v. Spain* case closely resembles that of *Bărbulescu v. Romania.* This case also resulted in two contrasting judgments. In the first judgment, the Third Section of the ECtHR found that the domestic courts had failed to strike a fair balance between the employee's right to privacy and the employer's interest in protecting property. The Court supported its position with an in-depth

46 ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 127.
47 Ibid., para. 121.
48 Ibid., paras. 133–139.

proportionality analysis, concluding that the covert video monitoring had not been prompted by a specific suspicion of theft against particular employees but was directed at the entire group of checkout staff. Moreover, the Court observed that the hidden monitoring was not compliant with applicable domestic law, as it breached the obligation to provide prior and explicit notice to employees about the existence and characteristics of a system collecting personal data. It also deemed the period of surveillance as disproportionate and indicated that the employer's interest could have been protected by less intrusive means.[49]

The Third Section's judgment was accompanied by a dissenting opinion of Judge Dedov, who argued that illegal or abusive behavior is not protected by the right to private life under the ECHR. He stressed that in such circumstances, the public interest should prevail and that safeguards against illegality and arbitrariness should be limited to protection from abuse.[50] The judge's reasoning added an important dimension to the balancing process by introducing a public interest perspective – namely, the interest in preventing unlawful behavior, such as employee theft. This argument played a significant role in the subsequent judgment of the Grand Chamber, which overturned the judgment of the Third Section.

In its judgment, the Grand Chamber relied on the six criteria for assessing the proportionality of monitoring established in the *Bărbulescu* case. However, it emphasized that these criteria must be applied with regard to the specific context – the nature of the employment relationship and the increasing technological capacity to interfere with employees' private lives.[51] When analyzing the case, the Grand Chamber found that the Spanish labor courts had undertaken a thorough balancing exercise between the competing rights and interests. These domestic courts relied on criteria developed by the Spanish Constitutional Court, which largely mirrored the standards elaborated by the ECtHR.[52]

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49 ECtHR Judgment of Case of 9 January 2018, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, paras. 68–69.

50 Dissenting Opinion of Judge Dedov, ECtHR Judgment of 9 January 2018, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13.

51 ECtHR Judgment of 17 October 2019, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, para. 116.

52 Ibid., para. 132.

Nevertheless, the Court noted a departure from the indicated rules, which was the failure to inform employees about the monitoring measures. In addressing this issue, the ECtHR indirectly engaged with Judge Dedov's argument regarding the need to protect public interest against problematic behavior of certain groups. The Court held that only an overriding need to protect significant public or private interests can justify the lack of prior notification of the employee.[53] The argument was further developed by the Court, which stated that not every suspicion of employee misconduct justifies covert surveillance. Only suspicion of serious wrongdoing may warrant such measures, and in assessing the seriousness, one must consider the scale of losses suffered by the employer. Furthermore, misconduct that poses a risk to the employer's smooth functioning should not result from the actions of a single employee but rather from a group, as this creates an atmosphere of distrust in the workplace.[54] Ultimately, the Court found that the circumstances of the case, specifically the conduct of the employees in question, provided sufficient justification for omitting the information obligation and for the installation of covert monitoring.

A comparison between *Bărbulescu* and *López Ribalda and Others* cases leads to the conclusion that although the Court in its initial judgments adopted a rather narrower approach to balancing rights and interests at stake, focusing mainly on their core content or omitting certain contexts, later Grand Chamber judgments expanded the balancing process to include a broader context. This involved considering additional factors that significantly affected the ability to maintain a fair balance between competing rights and interests. The Court gave explicit expression to this approach in the *Bărbulescu* case, where it set out six comprehensively defined principles for employee monitoring, allowing an assessment of whether a fair balance had been struck. While such a broad approach to balancing in connection with Article 8 ECHR had already been established in the Strasbourg Court's case law,[55] in the specific context of employee monitoring and

53 Ibid., para. 133.

54 Ibid., para. 134.

55 ECtHR Judgment of 12 November 2002, Case *Płoński v. Poland*, application no. 26761/95, para. 35; ECtHR Judgment of 7 August 1996, Case *Johansen v. Norway*, application no. 17383/90, para. 73; ECtHR Judgment of 25 February 1997, Case *Z v. Finland*, application no. 22009/93, para. 113.

privacy, there is one further argument in favor of applying the "balancing as reasoning" model. This argument had already been briefly raised by the Court and deserves closer attention – it concerns the unique character of the employment relationship and, more precisely, the relative position of its parties.

If reality matched the neoliberal theory of employment, where labor is treated as a market commodity exchanged between workers and employers who are equal in economic power and freely enter employment for mutual benefit,[56] then "interest balancing" grounded in cost-benefit analysis might appear to be the more appropriate approach to balancing the rights and interests at stake. In such a scenario, there would be no need to account for additional factors derived from the specific nature of the employment relationship, and the analysis would be stripped of the broader legal and social context defined by modern labor-law standards.

However, in the real-world employment relationship departs from the neoliberal ideals.[57] As the ECtHR itself has recognized, employment is characterized by the legal subordination of the employee,[58] which results in an unequal relationship between the parties. This inequality also arises from the employee's weaker bargaining position in relation to the employer.[59]

The unequal position of employees and the resulting need to protect them have become, in a sense, formative factors in the emergence of labor law as a distinct legal field.[60] As Kahn-Freund famously stated:

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56 John W. Budd and Devasheesh P. Bhave, "The Employment Relationship: Key Elements, Alternative Frames of Reference, and Implications for HRM," in *Sage Handbook of Human Resource Management*, eds. Adrian Wilkinson et al., 2nd ed. (London: SAGE Publications Ltd, 2019), 46–47.

57 Already the Treaty of Versailles, which established ILO, stated in Article 427 that labor should not be regarded merely as a commodity or article of commerce. See: Part XIII (Labour) of the Treaty of Versailles of 28 June 1919, Article 427.

58 ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 117.

59 Frank Hendrickx, "Foundations and Functions of Contemporary Labour Law," *European Labour Law Journal* 3, no. 2 (2012): 120, https://doi.org/10.1177/201395251200300202.

60 A similar view was expressed by Pope Pius XI, who wrote in his encyclical *Quadragesimo Anno* that "[a] new branch of law, wholly unknown to the earlier time, has arisen from this continuous and unwearied labor to protect vigorously the sacred rights of the workers that flow from their dignity as men and as Christians. These laws undertake the protection of life, health, strength, family, homes, workshops, wages and labor hazards, in fine, everything

> The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.[61]

This idea has found reflection in national labor-law systems, taking the form of a doctrinal function of labor law or, in some cases, a legal principle enshrined in legislation. For example, the Polish labor law doctrine explicitly recognizes the protective function of labor law and links it with the principle of favoring the employee, as the economically and socially weaker party, expressed, *inter alia*, in Article 18 of the Polish Labour Code.[62]

The significance of the contextual inequality between the parties to the employment relationship has been recognized, among others, by such scholars as Barański and Piszczek. Pointing out the risks to which employees are exposed at work and their less privileged position in relations with their employers, they conclude that the information obligation under Article 8 of the Convention concerning the degree of environmental pollution in the workplace should, in principle, be considered absolute.[63] Admittedly, these authors address Article 8 ECHR in the context of the employee's rights

which pertains to the condition of wage workers, with special concern for women and children (…)." See: Pope Pius XI, *Quadragesimo Anno*, 1931, para. 28. See also: Łukasz Pisarczyk, "Przeobrażenia prawa pracy a jego funkcja ochronna," in *Studia Prawnicze: Rozprawy i Materiały – Prokatywna funkcja prawa pracy?*, eds. Barbara Wagner and Ewa Hoffmańska (Kraków: Oficyna Wydawnicza AFM, 2010), 19.

61 Otto Kahn-Freund, *Labour and the Law*, eds. Paul Davies and Mark Freedland, 3rd ed. (London: Stevens & Sons, 1983), 18.

62 Article 18 of the Polish Labour Code defines the specific nature of labor law provisions. These provisions are referred to as "unilaterally binding" (*jednostronnie bezwzględnie obowiązujące)* or "semi-imperative" provisions, as they allow for deviations only in favor of the employee. See: Teresa Liszcz, *Prawo Pracy* (Warszawa: LexisNexis, 2009), Chapter I, § 4. Funkcje prawa pracy. Moreover, see: Łucja Kobroń-Gąsiorowska, "Interes publiczny jako element podstawowy funkcji ochronnej prawa pracy – w kontekście ochrony sygnalistów," *Rocznik Administracji i Prawa* 1, no. 19 (2019): 340, https://doi.org/10.5604/01.3001.0013.3605; Mariusz Wieczorek, "Some Aspects of Labour Law's Protective Function at the Time of COVID-19," *Studia Iuridica Lublinensia* 30, no. 1 (2021): 340, http://dx.doi.org/10.17951/sil.2021.30.1.339-355; Krzysztof W. Baran, "Functions of Labour Law," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2016), 34–35; Zbigniew Góral, "Principles of Labour Law," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2016), 69–72.

63 Michał Barański and Anna Piszczek, "Employees' Right to a Pollution-Free Working Environment in the Context of Articles 2 and 8 of the ECHR," *Praca i Zabezpieczenie Społeczne* 65, no. 6 (2024): 7, https://doi.org/10.33226/0032-6186.2024.6.2.

to a safe and clean working environment, rather than from the perspective of workplace monitoring, where the obligation to provide information is only one of the criteria that must be taken into account when assessing the proportionality of the measures used. Nevertheless, the presented approach clearly illustrates how the context determined by the distinct nature of the employment relationship can influence the interpretation of Article 8 of the Convention and, in particular, an assessment of the proportionality of interference with the right to privacy.[64]

4. The Role of the Principle of Proportionality in Restricting the Margin of Appreciation Under the Necessity Test

The relationship between the principle of proportionality and the margin of appreciation has long been a subject of scholarly and judicial debate.[65] Although both concepts function as interpretive mechanisms within the ECtHR's jurisprudence, legal scholars frequently emphasize the normative tension between them – one granting discretion, the other imposing constraints.

Arai-Takahashi has noted that

> it is possible to consider the application of the proportionality principle as the other side of the margin of appreciation (…) It is proposed that the principle

[64] It appears that when ruling on *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, which is the latest case concerning the right to privacy and monitoring measures in the workplace, the Court avoided a more detailed analysis of the unequal position of the parties to the employment relationship. The court's position was widely criticized in a dissenting opinion, in which Judges Motoc, Pastor Vilanova, and Guerra Martins stated that the interference with the employee's privacy was very significant and that the balance between competing rights and interests had been incorrectly determined. See: ECtHR Judgment of 3 April 2022, Case *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, application no. 26968/16, para. 10. Regarding the case *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, see more: Michał Barański and Tomasz Mirosławski, "Geolocation of an Employee from the Perspective of Article 8 of the ECHR," *Acta Universitatis Sapientiae – Legal Studies* 12, no. 2 (2023): 1–17, https://doi.org/10.47745/AUSLEG.2023.12.2.01.

[65] Jan Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 29, no. 3 (2011): 326–28, https://doi.org/10.1177/016934411102900304.

of proportionality should be deployed as a device to ascertain whether national authorities have overstepped their margin of appreciation.[66]

In a similar vein, Möller stresses that proportionality – far from being a mere formalism – is best understood as a normative method of resolving conflicts between competing rights or interests. It provides a rational structure for evaluating whether interferences with rights are justified in the circumstances of a given case.[67] Importantly, Möller argues that the necessity component of proportionality functions as a "conflict filter" – it determines whether a real clash between rights exists, and whether the chosen means are the least intrusive available.[68] This idea is especially pertinent in the context of qualified rights under the ECHR, such as the right to respect for private life under Article 8, where justification for interference requires not only a legitimate aim and suitability, but also clear necessity and proportionality in the strict sense. From the perspective of ECtHR jurisprudence, as analyzed by Wiśniewski, proportionality and the doctrine of fair balance have evolved into interpretive standards that both constrain and shape the application of the margin of appreciation.[69] Fair balance, in particular, serves as the axiological foundation upon which the scope of permissible state discretion is evaluated. It is not merely a rhetorical reference to competing values but a substantive principle that obliges the Court to verify whether the rights of the individual have been sufficiently protected in light of public or third-party interests. Thus, proportionality and fair balance do not merely complement the margin of appreciation – they define its limits.

In the literature, it is frequently noted that the principle of proportionality becomes particularly salient when the margin of appreciation

66 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002), 14. See also: Oddný Mjöll Arnardóttir, "*Res Interpretata, Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights," *The European Journal of International Law* 28, no. 3 (2017): 819–43, https://doi.org/10.1093/ejil/chx045; Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 64–67.

67 Möller, "Proportionality: Challenging the Critics," 713–15.

68 Ibid.

69 Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 64–67.

is subject to limitation under the necessity test, insofar as this principle constitutes one of its inherent components (Article 8(2) of the ECHR).[70] As Wiśniewski observes,

> the principle of fair balance determines the boundaries of the margin of appreciation in the context of states' positive obligations, as well as in the resolution of conflicts between the interests of the individual and those of society, or between the rights of the individual and third parties.[71]

The original proportionality test adopts an overly simplistic approach by implying that it is sufficient to identify a less restrictive alternative that achieves the legitimate aim equally well.[72] In practice, responses to social issues often vary – some may impose greater restrictions, others may be more effective, and different options may place burdens on different groups.[73] A proper assessment must involve a comparative evaluation of all reasonable policy alternatives in relation to one another.[74]

This dynamic is particularly apparent in cases concerning monitoring in the workplace. As demonstrated in previous sections, the ECtHR interprets Article 8 of the Convention as generating both negative and positive obligations on the state. While public authorities must refrain from arbitrary interferences, they are also required to ensure a normative framework that protects individuals, including employees, from rights violations by private actors, especially employers. The challenge posed by surveillance in the employment relationship lies in the asymmetry of power between employer and employee, which demands additional legal safeguards and elevates the standard for justifying interferences. In this sense, the necessity test becomes a mechanism for ensuring that such asymmetries are not exploited in a manner incompatible with Convention rights.

The jurisprudence of the Court illustrates that although states are formally granted a margin of appreciation, particularly in the absence of a European consensus and in areas closely tied to socio-economic regulation,

70 Wiśniewski, "Proporcjonalnosć i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 65.

71 Ibid.

72 Möller, "Proportionality: Challenging the Critics," 715.

73 Ibid.

74 Ibid.

this margin is neither unlimited nor exempt from structured review. In *Bărbulescu v. Romania*, the Court held that domestic authorities had failed to verify whether the employee had been sufficiently informed about the scope and nature of the surveillance, or whether less intrusive measures had been considered. Notably, the judgment emphasized that the failure to conduct a proportionality assessment at the national level rendered the interference with Article 8 unjustified.[75]

The necessity of contextualized balancing was also underscored in *López Ribalda and Others v. Spain*, where the Court introduced a structured framework for assessing the legitimacy of covert video surveillance in the workplace. Although the majority accepted the employer's justification due to the specific circumstances of the case, the judgment explicitly warned that such surveillance must remain exceptional and be subjected to close scrutiny. Even where the Court recognizes a wide margin of appreciation, it conditions its application on the quality of the proportionality reasoning conducted domestically.[76]

These cases also illustrate the Court's insistence on pre-emptive legal guarantees. Where procedural safeguards are lacking – such as the absence of notification, oversight, or access to remedies – the legitimacy of state discretion is immediately undermined. In *Antović and Mirković v. Montenegro*, the failure to demonstrate that video surveillance in university lecture halls responded to a "pressing social need" led the Court to find a violation. The Court emphasized that general appeals to institutional efficiency or security are insufficient to justify interferences with Article 8 unless supported by a concrete, evidence-based necessity assessment.[77]

A similar logic underlies the Court's reasoning in *Köpke v. Germany*, where surveillance was upheld but strictly on the basis that it was limited in time and scope, conducted in response to substantiated suspicions, and compliant with national data-protection law.[78] This case illustrates that the

[75] ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08), paras. 139–141.

[76] ECtHR Judgment of 17 October 2019, Case of *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, paras. 124–137.

[77] ECtHR Judgment of 28 November 2017, Case *Antović and Mirković v. Montenegro*, application no. 70838/13, paras. 57–60.

[78] ECtHR Decision of 5 October 2010, Case *Köpke v. Germany*, application no. 420/07.

Court's acceptance of the margin of appreciation is not an act of deference but of calibrated judicial restraint, conditioned on the existence of substantive and procedural proportionality safeguards. The Court does not consider the margin of appreciation to be immunity from assessment of proportionality, and its acceptance is conditional, depending on the existence of procedural and substantive guarantees (e.g., transparency, legal remedies, prior analysis of alternatives).

Thus, the margin of appreciation functions not as a zone of unreviewable discretion but as a bounded space, the width of which is shaped by factors such as the presence of European consensus, the nature of the right at issue, and the quality of the state's justification. In cases concerning workplace monitoring, the absence of consensus on privacy standards may widen the formal margin, but the ECtHR uses the necessity test to narrow this space in practice, particularly when the interference is intrusive and affects core aspects of personal autonomy.

Although Wiśniewski does not directly refer to the risk of disproportionate employer interference with workers' privacy rights in the context of workplace surveillance, his analysis makes clear that the function of the fair balance principle, in tandem with the necessity requirement of proportionality, is to constrain discretion and to ensure that individual rights are not disproportionately subordinated to abstract or systemic interests.[79] This interpretive framework affirms that the Convention does not confer blanket authorization for unrestricted employer control over workers' private lives – especially in the digitalized and data-driven workplace environments of the twenty-first century. In this light, the ECtHR's approach reveals a deeper normative logic: the necessity test is not simply a formal step in proportionality analysis, but a substantive filter designed to protect vulnerable parties in asymmetrical legal relationships. The legitimacy of the margin of appreciation hinges on the meaningful application of that filter – a test that requires evidence, transparency, and deliberative justification, not mere invocation of authority or economic interest.

[79] Wiśniewski, "Proporcjonalnosć i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 62–67.

5. Conclusion

The article has demonstrated that the principle of proportionality, particularly when understood through the lens of balancing as reasoning, serves as a crucial interpretive and normative framework in the jurisprudence of the ECtHR, especially in the cases concerning employees' privacy and its alleged violation by means of monitoring introduced by employers. In such cases, the Court has increasingly attempted to implement a contextualized balancing model that considers not only the nature of the interference and the autonomous meaning of the rights and interests at stake, but also the broader socio-legal dynamics inherent in the employment relationship. This is clearly reflected in the Grand Chamber judgments in *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*, in which the Strasbourg Court overcame the formalistic cost-benefit analysis and engaged in reasoning sensitive to multiple factors, power asymmetries and institutional safeguards.

As indicated in the paper, the lack of a European consensus regarding workplace surveillance affords states a relatively broad margin of appreciation. Yet the discretion caused by the margin is not unbounded. The principle of proportionality, along with its utility[80] and necessity components, serves as a substantive check against excessive employer monitoring and ineffective national safeguards. In this regard, proportionality is not only an adjudicative tool but a standard-setting mechanism that can guide both the shape of the legislation and judicial review.

Despite the state's wide margin of appreciation and discretion in regulating workplace privacy, there are symptoms of a gradual shift towards harmonization of that issue. This can be evidenced by EU legislative efforts such as the AI Act (Regulation (EU) 2024/1689) and the General Data Protection Regulation (Regulation (EU) 2016/679), whose scope also extends to the realm of employment relations. These legal initiatives depict an emerging normative trajectory that seeks to balance technological development with rights-based accountability. This may, in the future, move

[80] Utility, also known as suitability, is part of the principle of proportionality, which means that a given regulation enables the intended objective to be reached. This objective should be achievable, at least to a small extent, because otherwise there would be no conflict. See: Möller, "Proportionality: Challenging the Critics," 713.

the EU closer to a shared regulatory framework, narrow the current margin of appreciation and contribute to the emergence of a European consensus among the signatories of the ECHR.

Nevertheless, approaching this issue from the critical standpoint, harmonization or even unification, including the creation of a European consensus, raises important concerns, especially considering the current state of the dispute on the competitiveness of European industry. A rigid, one-size-fits-all regulatory model may overlook the distinct needs of different national labor markets and the industrial strategies of individual Member States. Another problem, which is beyond the scope of this article but should be mentioned, is the ECtHR's gradual departure from its role as the final guardian of human rights in favor of a quasi-legislative body that sets legislative standards and influences the legal systems of individual states.

On the other hand, we cannot overlook the growing threats to privacy and, above all, to the dignity of employees, resulting from the accelerating use of advanced technologies, such as AI-driven algorithms and the monitoring of employees' social media activity. These developments not only interfere with the employees' right to privacy but also increasingly threaten other Convention rights, notably the freedom of expression. In such cases, the Court should approach the proportionality assessment with enhanced attention.

In the presented context, "balancing as reasoning" emerges as the most suitable model for adjudication. In contrast to the abstract "interest balancing," it follows an in-depth analysis of the specific circumstances of each case, including the nature of the employment relationship, the scope and purpose of the monitoring, the availability of alternative measures, and the procedural safeguards. This model acknowledges that employment is not a purely contractual exchange between equal parties but a legal relationship marked by subordination and structural hierarchy, which justifies heightened protective standards.

Regardless of the case law of the ECtHR, which in its proportionality-based reasoning leans towards contextual balancing,[81] this model of balanc-

[81] However, there are exceptions from this tendency. See: ECtHR Judgment of 3 April 2022, Case *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, application no. 26968/16.

ing may also set the path for national legislators, who, wishing to protect the privacy of employees, should conduct an in-depth analysis, that takes into account the reality of modern employment, normative clarity, and the need to ensure a fair balance between the interests and rights of both sides of the employment relationship.

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Definition of a Particularly Vulnerable Consumer Under Directive 2005/29/EC on Unfair Commercial Practices

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Abstract: Directive 2005/29/EC on unfair commercial practices establishes the normative benchmark of the "average consumer" as the primary standard for assessing the legality of commercial conduct. However, Article 5(3) of the Directive introduces an important corrective mechanism by recognizing the category of the "particularly vulnerable consumer," whose economic behavior may be disproportionately influenced by age, mental or physical frailty, or credulity. This article analyzes the legal contours of this category, with particular regard to the jurisprudence of the Court of Justice of the European Union and Czech judicial practice. The article examines both endogenous forms of vulnerability (such as illness, disability, or old age) and exogenous or situational factors (including linguistic barriers, lack of digital literacy, or acute distress), emphasizing the requirement of an objective and generalized assessment. Special attention is devoted to the cumulative conditions for the application of Article 5(3), notably the existence of a clearly identifiable group, the substantial distortion of economic behavior, and the criterion of reasonable foreseeability on the part of the trader. The article concludes that the concept of the particularly vulnerable consumer functions as a necessary complement to the average consumer model, thereby aligning EU consumer law more closely with social reality while preserving a fair balance between legitimate commercial practices and effective consumer protection.

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1. Introduction

Directive 2005/29[1] brought protection for consumers against unfair commercial practices by businesses. The Directive protects not only the average consumer in general but also particularly vulnerable consumers. It is this category of consumers that is the focus of this article. The aim is to identify the defining characteristics of a particularly vulnerable consumer under Article 5(3) of Directive 2005/29, focusing on the different categories of such persons, i.e., persons characterized by mental or physical frailty or persons worthy of special protection on grounds of age or credulity. All this with a focus on the case law of the Court of Justice of the European Union (CJEU) and the case law of the Czech courts.

2. The Average Consumer as a Key Frame of Reference for Assessing the Unfairness of Commercial Practices

The model of the average consumer, also referred to as the ordinary or model consumer, is used to assess the unfairness of a particular business' conduct.

The average consumer is a category that has a normative basis in European law in Articles 5, 6, 7 and 8 of Directive 2005/29.[2] According to Article 5(2)(b) of Directive 2005/29, where a commercial practice is directed at a particular group of consumers, it is to be assessed according to the average member of that group. The average consumer is further defined by the decision-making practice of the courts or supervisory authorities.

The CJEU (and subsequently the courts of the European Union Member States) has opted for the so-called normative model of consumer behavior, i.e., it does not deal with the question of how many consumers are influenced by the commercial practice under examination, but whether a model or avarage consumer would be affected or deceived by it. For this consumer, it assumes a certain level of vigilance and a critical approach to commercial messages in particular. The average consumer is consistently

[1] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L149, 11 June 2005), 22, as amended.

[2] In Czech law, the Directive 2005/29 was implemented in Act No. 634/1992 Coll., on Consumer Protection, as amended (hereinafter: Consumer Protection Act).

defined by the CJEU[3] and the Czech courts[4] as one who is aware, normally informed, reasonably attentive, and cautious,[5] i.e., not weak, inexperienced, or ignorant. The average consumer is one who is well informed and reasonably observant and cautious, considering social, cultural, and linguistic factors.

The assessment of the level and impressionability of the average consumer is a question of law, not fact. Its definition is therefore entrusted to the courts, not to experts.[6] The Regional Court in Prague[7] emphasized that the concept of the average consumer is an objectified concept that has no direct reflection in the real world (it cannot be identified with a specific person), therefore, it is no longer possible in principle to make (and therefore nor to demand) direct proof of the influence of such a consumer. The conclusion that the average consumer has been influenced is therefore an inferred factual conclusion based on evidence of the form of the commercial practice at issue and possible supporting evidence that specific consumers have been influenced by such a practice, taking into account the common knowledge of the social, cultural, and linguistic characteristics of consumers in a given place, time, and sector.

However, the notion of the very prudent average consumer is subject to criticism. For example, J. Bejček points out that this criterion does not accurately reflect the real behavior of consumers, as they not rational and

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3 Cf. e.g., CJEU Judgment of 10 November 1982, *Walter Rau Lebensmittelwerke v. De Smedt PVBA*, Case 261/81, ECLI:EU:C:1982:382; CJEU Judgment of 16 July 1998, *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, Case C-210/96, ECLI:EU:C:1998:369; CJEU Judgment of 2 February 1994, *Verband Sozialer Wettbewerb e.V. v. Clinique Laboratoires SNC and Estée Lauder Cosmetics GmbH*, Case C-315/92, ECLI:EU:C:1994:34; CJEU Judgment of 6 July 1995, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH*, Case C-470/93, ECLI:EU:C:1995:224, and many others.

4 Furthermore, regarding the definition of an average consumer, cf. e.g., the following decisions of the Czech courts: Czech Supreme Court, Judgment of 3 May 2006, Ref. No. 32 Odo 447/2006; Czech Supreme Court, Judgment of 26 November 2006, Ref. No. 32 Odo 1151/2005; Czech Supreme Court, Judgment of 18 February 2009, Ref. No. 23 Cdo 2749/2008; Supreme Administrative Court, Judgment of 29 April 2008, Ref. No. 5 As 69/2006; Supreme Administrative Court, Judgment of 17 January 2014, Ref. No. 4 As 98/2013, among others.

5 Cf. e.g., Case C-210/96, n. 4 above.

6 Cf. n. 4 above.

7 Regional Court in Prague, Judgment of 22 October 2015, Ref. No. 45 A 25/2013.

standardized beings according to theoretical assumptions.[8] Similar concerns about the normative model of the average consumer are raised in legal doctrine, which emphasizes that this benchmark insufficiently reflects cognitive biases[9] and the bounded rationality of real consumers.[10]

Not only the level of the concept of the average consumer, but also the general model of the one has been criticized in the literature,[11] as it did not take into account the individual behavior of specific groups of persons targeted by the commercial practice.[12] This has given rise to a group of so-called "particularly vulnerable consumers" who are entitled to enhanced protection under European Union (and Member State) law.

3. On the Model of the So-Called Particularly Vulnerable Consumer

Directive 2005/29 does not use the term "vulnerable consumer," but the term "particularly vulnerable consumer." This corresponds to the notion that *de facto* any consumer may be vulnerable, but only a "particularly vulnerable" consumer is worthy of protection in terms of the European legislator's intention. This concept thus implies a sort of *de minimis* rule in providing protection to a consumer who must be "particularly" vulnerable (i.e., beyond the normal vulnerability of any consumer in general) in order to qualify for an increased level of protection compared to a normal consumer. The institution of the particularly vulnerable consumer is a manifestation of social policy.[13] A detailed doctrinal analysis of the origins and structure of this category under Article 5(3) UCPD is provided by E. Kaprou, who critically assesses the focus on personal attributes as both a strength and a limitation

8 Josef Bejček, *Smluvní svoboda a ochrana slabšího obchodníka* (Brno: Masaryk University, 2016), 150.

9 Rossella Incardona and Cristina Poncibò, "The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution," *Journal of Consumer Policy* 30, no. 1 (2007): 21–54, https://ssrn.com/abstract=1084038.

10 Lisa B. Waddington, "Vulnerable and Confused: The Protection of 'Vulnerable' Consumers under EU Law," *European Law Review* 38, no. 6 (2013): 757–83.

11 Cf. Filippo Ippolito and Sergio I. Sainchez, *Protecting Vulnerable Groups: The European Human Rights Framework* (Oxford: Hart Publishing, 2015), 85.

12 Incardona and Poncibò, "The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution," 21–54.

13 Hans-W. Micklitz, *European Fair Trading Law: The Unfair Commercial Practices Directive*, eds. Geraint Howells, Hans-W. Micklitz, and Thomas Wilhelmsson (Aldershot: Ashgate Publishing, 2006), 111.

of the current definition.[14] J. Mulder[15] likewise notes that, even where the UCPD lays down a formally uniform definition, the actual configuration of protection for particularly vulnerable consumers varies according to domestic legal and cultural narratives, which underlines the importance of comparative research.

The introduction of a generally applicable definition of a particularly vulnerable consumer is not desirable as it would lose flexibility in taking into account the circumstances of a particular case.[16] The model of the particularly vulnerable consumer represents a special category alongside[17] the average consumer. A particular commercial practice is assessed either through the lens of the average consumer or through that of the particularly vulnerable consumer.

4. Conditions of Application for the Protection of Particularly Vulnerable Consumers Under Article 5(3) of Directive 2005/29

Although Directive 2005/29 sets out a general model of the average consumer, in some cases it provides an alternative aimed at preventing abuse of particularly vulnerable consumers.[18] However, according to the European Parliament resolution on the strategy for the rights of vulnerable consumers,[19]

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14 Eleni Kaprou, "The Current Legal Definition of Vulnerable Consumers in the UCPD: Benefits and Limitations of a Focus on Personal Attributes," in *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice*, eds. Christine Riefa and Séverine Saintier (Abingdon: Routledge, 2021), 51–68.

15 Jule Mulder, "Comparing Vulnerability? How Can EU Comparative Law Methods Shed Light on the Concept of the Vulnerable Consumer," *Journal of International and Comparative Law* 6, no. 2 (2019): 209–31, https://ssrn.com/abstract=4496030.

16 See also: María I. Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," Committee on the Internal Market and Consumer Protection, 2011/2272(INI), para. 2, accessed August 28, 2025, https://www.europarl.europa.eu/doceo/document/A-7-2012-0155_EN.html.

17 Willem H. van Boom, Amandine Garde, and Orkun Akseli, eds., *The European Unfair Commercial Practices Directive. Impact, Enforcement, Strategies and National Legal Systems* (Farnham: Ashgate Publishing Limited, 2014), 91.

18 Bram B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Cham: Springer International Publishing, 2015), 21.

19 Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," point 7.

Directive 2005/29 addresses the issue of vulnerability only marginally and is limited to the economic interests of consumers.

Normatively, the so-called particularly vulnerable consumer is regulated in Article 5(3) of Directive 2005/29 (similarly, Article 4(2) of the CPA):

> Commercial practices which are likely to substantially distort the economic behaviour of only a clearly identifiable group of consumers who, by reason of mental or physical weakness, age or gullibility, are particularly vulnerable to the practice or the product it promotes in a way that the trader can reasonably expect, shall be assessed from the point of view of the average member of that group. This is without prejudice to the normal and legitimate advertising practice of making exaggerated statements or statements which are not meant literally.

It follows from the above-cited provision that if a practice is capable of substantially affecting (distorting the economic behavior of) only a certain group of consumers – the group of particularly vulnerable consumers due to mental or physical weakness, age or gullibility, the practice must be assessed from the point of view of such an average member of that group.

Several application conditions (which must be met cumulatively) are derived from this provision for a particular commercial practice to be assessed from the perspective of an average member of the so-called particularly vulnerable consumers and to be unfair for that reason (the individual criteria defining the reasons for the particular vulnerability of consumers will be dealt with in the next chapter):

(1) they must be commercial practices which are likely to distort economic behavior in a substantial way; and
(2) such commercial practices can distort only the economic behavior of a clearly identifiable group of consumers who are so-called particularly vulnerable by reason of mental or physical weakness, age or gullibility to the practice or the product it promotes; namely
(3) in a manner that a trader can reasonably expect;
(4) this is without prejudice to the normal and legitimate advertising practice of making exaggerated statements or statements that are not meant literally.

4.1. The Commercial Practices Must Be Such as to Distort Economic Behavior in a Substantial Way

It follows from this condition that it is sufficient that the commercial practice can distort the economic behavior of particularly vulnerable consumers; it is not necessary that it cause actual harm to the consumer. Directive 2005/29 affects only the economic behavior of the consumer, not other consumer behavior (e.g., social or cultural). The economic behavior of the consumer must be distorted in a substantial way, i.e., significantly, not just to a negligible extent (*de minimis* rule – conduct with a completely insignificant impact on such a consumer or their economic behavior will not be sanctionable).

This condition will be met regardless of whether the undertaking deliberately targeted the commercial practice at a particularly vulnerable consumer (that consumer was the addressee of the commercial practice) or whether the practice "merely" affected them, for example, accidentally (it had an undesirable impact on that consumer); the undertaking's intention to target a particularly vulnerable consumer or the mere factual impact of a particular commercial practice (i.e., without the undertaking's intention) is irrelevant, since the actual impact on that consumer is decisive.

A commercial practice would be unfair if it can influence the economic behavior of a particularly vulnerable consumer, although the general (i.e., average) consumer would not, for example, be deceived by such a practice.

4.2. Such Commercial Practices Can Only Distort the Economic Behavior of a Certain Clearly Identifiable Group of Consumers Who, by Reason of Mental or Physical Weakness, Age or Credulity, Are Particularly Vulnerable to the Practice or Product Promoted To

In a legal sense, it is questionable to qualify a group as "clearly" definable, since the boundaries of each group of particularly trusting consumers are usually "vague" (e.g., when does old age begin? When does childhood end? etc.).

The problem may be to determine whether a particular commercial practice can distort the economic behavior of only a "clearly identifiable" group of particularly vulnerable consumers or of consumers more broadly (the general average consumer). An example would be an advertisement for chocolate featuring cartoon characters – is the advertisement aimed at

a particularly vulnerable consumer (in this case, children) or at any consumer who likes chocolate? Conversely, an advertisement for dark chocolate with a high cocoa content is more likely to be aimed at the general average consumer, rather than at a particularly vulnerable consumer (children do not generally like such chocolate).

4.3. In a Manner That a Trader Can Reasonably Expect

This condition includes a requirement of "predictability." The vulnerable consumer criterion applies if the practice affects the economic behavior of a vulnerable group of consumers "in a way that the trader can reasonably expect." This criterion adds an element of reasonableness when assessing the effects of a commercial practice on vulnerable consumers and the standard of professional diligence that can reasonably be expected of a trader. It is intended to hold traders liable only where a commercial practice could be expected to have an adverse impact on a category of vulnerable consumers. This means only reasonable measures are required of traders in assessing whether a practice will have a disproportionate impact on a clearly identifiable group and in taking measures to mitigate that impact. Some consumers may be misled or behave irrationally in response to even the most honest commercial practice due to their extreme naivety or ignorance. The aim of the provision is to penalize cases of unfair market practices (e.g., outright fraud or deceit) to which the majority of consumers are exposed, but which are in fact intended to take advantage of the weakness of certain specific groups of consumers.[20]

4.4. No Prejudice to Normal and Legitimate Advertising Practice of Making Exaggerated Statements or Statements That Are Not Meant to Be Taken Literally

The category of particularly vulnerable consumers (as well as the average consumer) is also subject to the possibility of using so-called normal (usual) advertising exaggeration. According to consistent decision-making

[20] Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), C/2021/9320 (OJ C526, 29 December 2021).

practice,[21] it is a normal advertising exaggeration if the average consumer (the addressee of the person affected by the advertisement) knows that it is an exaggeration.

In relation to the above, the question arises whether the average particularly vulnerable consumer can know where the boundaries are between the exaggeration that can be expected from advertising and deception; here it will depend in particular on the reason for the consumer's particular vulnerability (e.g., mental weakness). According to the CJEU (Case C-221/00, *Commission v. Austria*[22]), even a vulnerable consumer is not a "fool" – it is assumed that the consumer will not infer from the slogan "eat your apples" that they will not have to visit a doctor.

On the other hand, the possibility of exaggeration must be allowed, since in such a case the advertisement, which may influence the economic behavior of a particularly vulnerable consumer, would become a mere "quasi-package leaflet" or "instructions for use."

5. Criteria Defining a Particularly Vulnerable Consumer

5.1. General Remarks on the Criteria Defining a Particularly Vulnerable Consumer

Any consumer belonging to the category of ordinary consumer may find themselves in a particularly vulnerable position during their lifetime. Vulnerability can arise from both endogenous and exogenous influences. By endogenous, we mean cases where the temporary or permanent causes of vulnerability are inherent in the consumer or arise from their physical or mental state (children, young people, older persons, people with disabilities, etc.).We consider exogenous influences to be the action of external causes that lead to the vulnerability of a particular consumer: lack of knowledge of the language, lack of education (either general or in terms of

[21] Cf. e.g., Supreme Administrative Court, Judgment of 2 February 2010, Ref. No. 6 As 16/2004: "Exaggeration or exaggeration may generally be admissible in persuasive advertising campaigns; however, the extent to which they are admissible must always be assessed in relation to the addressees who may be affected by such a persuasive campaign, their age, their ability to detect exaggeration and the secondary consequences beyond their consumer behaviour which their role model, as the main character of the advertising spot on which the persuasive campaign is based, may subsequently provoke."

[22] CJEU Judgment of 23 January 2003, *Commission of the European Communities v. Republic of Austria*, Case Case C-221/00, ECLI:EU:C:2003:44.

ignorance of a specific market sector) or the need to use new technologies with which the consumer is not familiar.[23] Recent scholarship further argues in favor of a dynamic understanding of vulnerability, in which the same consumer may move along a continuum between "average" and "particularly vulnerable" depending on context, market structure, and the design of commercial practices.[24]

A consumer may be in a state of particular vulnerability on an *ad hoc* basis (e.g., acute illness of the consumer) but may also be in this particular situation for a longer period of time (e.g., a child, an older person) or permanently (a person suffering from a congenital mental or physical disability).

In my view, Article 5(3) of Directive 2005/29 contains a closed (exhaustive) list of the grounds of consumer vulnerability, namely "mental or physical infirmity, age or credulity." This interpretation is supported both by the wording of the provision ("[…] by reason of mental or physical infirmity, age or credulity […]") and by its systematic placement within a directive based on the principle of full harmonization (Article 4 of the Directive). From this structure it follows that Member States – and, by analogy, national authorities and courts through extensive interpretation – are not permitted to expand the normative content of the Directive beyond what expressly follows from its text, save for the exceptions that the Directive itself provides (e.g., Article 3(5) and (9)). Under these conditions, it appears untenable to infer additional, "independent" grounds of particular vulnerability beyond the expressly listed categories. Accordingly, factors such as financial distress, digital vulnerability, social status, or unemployment cannot be included among the grounds of particular vulnerability if the consumer otherwise meets the standard of the ordinary (average) consumer. This restrictive approach ensures a greater degree of legal certainty and predictability, as it limits the scope for extensive interpretation by national authorities.

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23 Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," para. 3.

24 Dániel Szilágyi, "Empowering Consumers: Towards a Broader Interpretation of the Vulnerable Consumer Concept in the European Union," *Hungarian Journal of Legal Studies* 63, no. 3 (2022): 279–93, https://doi.org/10.1556/2052.2022.00337.

The European Commission, by contrast, adopts the opposite view in its "Guidance on the implementation and application of Directive 2005/29," stating that the grounds referred to in Article 5(3) are "indicative only" and should cover "a wide range of situations".[25] The Commission's Guidance therefore proceeds on the assumption that the list is illustrative. This approach makes it possible to take into account additional contextual factors of vulnerability, such as digital literacy, social circumstances, or structural inequalities in specific markets. The practical consequence of such an interpretation is greater flexibility in assessing consumer harm and the capacity to respond to modern forms of exploitative practices, particularly in the online environment. At the same time, however, it results in a lower degree of legal certainty and greater inconsistency in the cross-border application of the Directive, especially given that the Commission's Guidance constitutes only soft law and cannot modify the Directive's normative content.

For these reasons, I take the view that, although the Commission's Guidance[26] provides an important methodological framework and persuasively highlights real (particularly digital and structural) forms of vulnerability, the binding normative text of the Directive, founded on the principle of full harmonization, must be interpreted restrictively, i.e., as an exhaustive list. This list may be operationalized through a broad range of factual situations within each of the enumerated categories (mental or physical infirmity, age, credulity) but cannot be extended to additional types of vulnerability that the Directive does not expressly recognize.

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25 The tension between the exhaustive wording of Article 5(3) and the broader, more open-ended approach suggested in the literature can be linked to a concern that an exclusively attribute-based understanding of vulnerability may fail to capture its structural and situational dimensions. See: Lisa B. Waddington, "Vulnerable and Confused: The Protection of 'Vulnerable' Consumers under EU Law," *European Law Review* 38, no. 6 (2013): 757–83; Kaprou, "The Current Legal Definition of Vulnerable Consumers in the UCPD," 51–68.

26 Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), C/2021/9320 (OJ C526, 29 December 2021), 29.

5.2. "Weakness" as a Criterion for Qualifying a Particularly Vulnerable Consumer

Weakness, according to the explicit wording of Article 5(3) of Directive 2005/29, is divided into mental or physical weakness. Of course, their accumulation is not excluded (e.g., in the case of an advanced pregnancy).

The criterion of frailty may be divided into frailty in the narrower sense (direct physical or mental disability qualified in medical terms) and frailty in the broader sense (also other reasons that may cause mental or physical frailty in a particular case on an *ad hoc* basis – e.g., a consumer who has had a loved one die or one with a diminished intellect).

The following could be included under the term "vulnerability," the fulfilment of which may lead to the qualification of a particular consumer as particularly vulnerable:

(1) Disease. The illness can be both mental (schizophrenia, depression, etc.) or physical (heart disease, lung disease, etc.). Physical illness can include external manifestations (e.g., sensory impairment, limited mobility, and other disabilities) but also internal manifestations that may not be 'visible' (diseases of internal organs, joints, etc.). These may be life-threatening illnesses (e.g. cancer), impairing a certain quality of life (sight, hearing, etc.) or affecting the consumer's appearance (especially dermatological conditions – acne, psoriasis, eczema, hair loss, missing limbs, etc.).[27] According to Italian decision-making practice, persons suffering from pain may also be included in this category, although pain is not generally regarded as a disease.[28] A consumer suffering from a certain kind of illness (whether chronic or short-term) is more susceptible to advertising for various preparations which may cure, suppress or make their disability less obvious to other people; the consumer may believe claims that an average rational consumer would reject (e.g. a consumer diagnosed with a life-threatening illness may try various healers[29] or so-called miracle preparations, etc.).

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27 One tends to fit in with others, if possible, not to stand out (in the physiological sense).

28 Autoritá Garante della Concorrenza e del Mercato, decision No. 2954 (PI446), April 13, 1995, *Argilla radiante*, cited in Duivenvoorde, *The Consumer Benchmarks*, 145.

29 The use of supernatural ("magical") forces in a difficult life situation was dealt with by the Higher Regional Court of Stuttgart, Judgment of 13 January 2011, Ref. No. III ZR 87/10; published in Legal Proceedings (2012): 37–38. The Court concluded that "the performance is objectively impossible and therefore cannot be provided at all, given the laws of nature or the state of

According to the Czech Supreme Administrative Court, if the target group of the advertisement is sick persons, it is necessary to take into account the lower critical judgment and greater credulity towards advertisements promising a cure of the disease of such consumers[30] and that the average consumer suffering from a certain disease is undoubtedly more likely to believe a certain claim concerning the cure of their condition than the average completely healthy consumer.[31]

(2) Pregnancy, early parenthood. The weakening of consumers falling into this category is due to frequent physical and psychological discomfort (hormonal changes, back pain, reduced mobility, etc.). The Committee on the Internal Market and Consumer Protection[32] considers pregnant women (alongside children) to be the most vulnerable consumer group. Pregnant women will generally be susceptible to various food supplements with promised positive effects on fetal development or to various products for newborn babies.

(3) A consumer subject to various types of addiction. This group includes gamblers, people addicted to alcohol and other addictive substances (e.g., tobacco, narcotics, or opioids). For example, a person addicted to alcohol will be susceptible to alcohol advertisements that depict the pouring of the drink, suggesting the great taste, the harmlessness of drinking it, or social success.

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scientific and technical knowledge. Such is the case with the promise of supernatural, 'magical' or parapsychological powers and abilities. The situation is different where the creditor has, by contractual allocation of risks, expressly or impliedly assumed the risk of a certain impediment to performance and that impediment to performance actually occurs. Accordingly, the contracting parties may agree, within the framework of contractual freedom, that one party will undertake, for consideration, to provide a performance whose basis and effects are not demonstrable according to scientific and technical knowledge, but correspond only to his inner conviction, belief or rational attitude, incomprehensible to third parties. It would be contrary to the content and purpose of the contract, as well as to the motives and ideas of the parties, to deny a claim for remuneration by the obligor for the provision of a service on the ground that the obligor is unable to prove that he actually makes certain predictions using magical or supernatural powers or that he can influence the formation of the will of third parties."

30 Czech Supreme Administrative Court, Judgment of 17 January 2014, Ref. No. 4 As 98/2013.

31 Czech Supreme Administrative Court, Judgment of 9 July 2014, Ref. No. 1 As 82/2014.

32 Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," point 25.

(4) A consumer with a reduced intellect (lower IQ), low level of education, or a lack of ability to act assertively. People with reduced intellectual capacity may fall into this category. These people are among the most vulnerable consumers because their weakness is not visible at first sight, and it is difficult to imagine how such a consumer will "prove" their particular vulnerability. Persons with a low level of education (e.g., incomplete primary education) can also be placed in this category.[33] They may have reduced access to justice (law enforcement) due to ignorance of their rights.[34]

(5) A consumer ignorant of foreign languages. This category of particularly vulnerable consumers has been identified by the CJEU,[35] which has found it necessary to point out that there is a higher risk of ill-considered purchases when customers are enticed to enroll in long-term language courses or the sale of educational materials. The potential customer often falls into a group of people who, for various reasons, are behind in their education and are trying to catch up. For this reason, in particular, this group is particularly vulnerable to sellers of learning material who tries to convince them that the material will improve their chances of getting a job.

(6) A consumer buying goods in a so-called bricks-and-mortar shop. The CJEU has concluded[36] that the consumer is more vulnerable in the face of the seller. This is in line with the case law of the Municipal Court in Prague,[37] which takes the approach that a consumer buying goods on e-shops is more cautious than when buying in a regular shop.

(7) Consumer not using the Internet/unavailability of the Internet to the consumer. This point includes both the inability of the consumer (mentally or physically) to control the internet, but also the unavailability of the internet in terms of coverage by the relevant network.

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33 Cf. e.g., Incardona and Poncibò, "The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution," 28–29.

34 Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," point 23.

35 CJEU Judgment of 16 May 1989, *R. Buet and Educational Business Services (EBS) v. Ministère public*, Case C-382/87, ECLI:EU:C:1989:198, recital 13.

36 See n. 28 above.

37 Municipal Court in Prague, Judgment of 21 August 2013, Ref. No. 9 A 9/2010 and Municipal Court in Prague, Judgment of 12 February 2014, Ref. No. 9 A 175/2010.

Consumers are generally considered to be more vulnerable to hidden practices on the Internet (mainly disseminated through social networks – so-called "steered advertising").[38] According to the Committee on the Internal Market and Consumer Protection, the digitalization of services may mean that consumers who, for various reasons, do not have access to or cannot use the Internet may find themselves in a vulnerable position, unable to take full advantage of e-commerce and therefore excluded from a substantial part of the internal market, either by paying more for the same products or by being dependent on the help of others.[39] This form of vulnerability is also emphasized in contemporary scholarship, which demonstrates that digital environments – including personalized interfaces, targeted engagement, and non-transparent online practices – systematically increase the risk of adversely influencing consumer decision-making, particularly for individuals with limited internet access or low levels of digital literacy.[40]

(8) A consumer whose loved one has died. A consumer who arranges the funeral of a loved one has reduced decision-making capacity. They are usually in a position where they do not have all the information they need, and are usually in a situation where their decision-making abilities are usually significantly impaired.[41]

(9) A foreigner. Consumers are particularly vulnerable when making purchases outside their own country – they are usually not familiar enough with the legal environment or language of the country to be able to properly defend their interests and rights. The foreign consumer becomes particularly vulnerable in relation to all businesses that sell

38 So-called friends on social media recommend certain products, but in reality, they are paid agents of various marketers.

39 Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," point 31.

40 See: Christine Riefa, "Protecting Vulnerable Consumers in the Digital Single Market," *European Business Law Review* 33, no. 4 (2022): 607–34, https://doi.org/10.54648/eulr2022028; Natali Helberger, Marijn Sax, Joanna Strycharz, and Hans-W. Micklitz, "Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability," *Journal of Consumer Policy* 45, no. 2 (2022): 175–200, https://doi.org/10.1007/s10603-021-09500-5; OECD, "Consumer Vulnerability in the Digital Age," *OECD Digital Economy Papers*, No. 355 (2023), https://doi.org/10.1787/4d013cc5-en.

41 Czech Supreme Administrative Court, Judgment of 7 April 2015, Ref. No. 3 As 176/2014.

them certain goods or services;[42] this vulnerability arises most often in relation to restaurant operators (discriminatory prices for foreigners) or hotels (charging for various other items) – in particular, because these services are most often used by foreigners.

(10) A consumer who is stranded at an airport due to extraordinary circumstances. This category of particularly vulnerable consumers has been defined by the CJEU.[43] The Internal Market and Consumer Protection Committee follows the same concept.[44] Furthermore, the consumer may be in a particular market, where there is a risk of a higher level of vulnerability for a consumer who would otherwise fall into the general category of the average consumer. It is the fact that they are in specific market areas that may make them particularly vulnerable. These areas are as follows:

(a) Consumers in financial services.[45] Older people in particular can find financial services difficult to navigate, but complexity can create vulnerability for otherwise very prudent (average) consumers – as the Committee on the Internal Market and Consumer Protection has also confirmed.[46] Advertising of financial investment products often does not adequately explain the underlying risks and overstates the potential gains, which are often not realized, so that consumers of these financial products lose their capital relatively easily and quickly.[47]

(b) Energy and telecoms consumers. In the energy sector, there is increased risk for consumers in understanding the items charged,

42 For example, a consumer was particularly vulnerable in a café in Venice's St Mark's Square, where he was charged for "live music" – an item he had not been warned about before entering into the contract, but due to his lack of linguistic ability to argue, he preferred to pay the item to avoid getting into trouble in a foreign country. It can be assumed that he would not have paid such an item in his home country.

43 CJEU Judgment of 31 January 2013, *Denise McDonagh v. Ryanair Ltd*, Case C-12/11, ECLI:EU:C:2013:43.

44 Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," point 30.

45 Financial services are understood to include banking, insurance, including pensions, capital markets, credit unions, and consumer credit.

46 Pérez, "REPORT on a Strategy for Strengthening the Rights of Vulnerable Consumers," point 21.

47 Ibid., para. 27.

> the possibility of changing providers, and navigating rates. The Committee on the Internal Market and Consumer Protection points out that the lack of transparency in the main supply markets, including in the energy and telecommunications sectors, may create additional difficulties for consumers in general, and vulnerable consumers in particular, in some cases, in choosing the most appropriate tariff to meet their needs, in switching providers, and in understanding the items charged.[48]

5.3. "Age" as a Criterion for Qualifying a Particularly Vulnerable Consumer

Customers considered vulnerable due to their age generally fall under one of the following three categories: children, adolescents, and older people.

Age is a factor that can significantly affect the ability to assess the substance[49] and scope of a particular business practice:

(1) Children as particularly vulnerable consumers. Children are considered to be the most vulnerable consumers of all[50] (especially in view of their trusting nature, lack of experience, and knowledge).[51] Children may be particularly vulnerable consumers in particular when toys, electronic games, products shaped or designed to attract children's attention are advertised, when toys are included in fast-food menus,[52] etc.

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48 Ibid., para. 32.

49 For example, a practice in the form of so-called product placement (cf. § 53a of the Act on the Operation of Radio and Television Broadcasting) will be very difficult to qualify and therefore to take with some "distance" a child or a very old person (another question is whether the average consumer really knows what this practice is and what effects it may have).

50 ANEC (European Association for the Co-ordination of Consumer Representation in Standardisation), "How to Protect Vulnerable Consumers?," December 2011, p. 11, accessed December 15, 2025, https://www.anec.eu/publications/position-papers/240-anec-position-paper-how-to-protect-vulnerable-consumers-december-2011.

51 For more details, see the decision of the Czech Supreme Administrative Court, Judgment of 30 June 2015, Ref. No. 30 A 63/2014.

52 This is the practice of McDonald's, for example, which adds popular toys (e.g., Shrek or Barbie) to children's menus as part of its "Happy meal" product. This is a practice that can attract the attention of children who subsequently want to go to McDonald's and request the menu from their parents (and others) because of the toys. This approach is particularly controversial in the United States, which is struggling with childhood obesity. It is in the United States of America in California that a lawsuit has been filed against McDonald's. Cf. "McDonald's Faces Lawsuit, Happy Meal Allegedly Exploits Children's Vulnerability," Lidovky.cz, accessed September 10, 2025, https://www.lidovky.cz/relax/zajimavosti/mcdonald-s-celi-zalobe-happy-meal-pry-vyuziva-zranitelnost-deti.

(2) Adolescents as particularly vulnerable consumers. Examples include the promotion of products that are particularly attractive to minors in a way that takes advantage of their lack of attention or discretion due to their immaturity (e.g., advertising for mobile phone services that suggests that signing up for a particular loyalty program can easily help make and keep friends; buying certain fashion brands of clothing, sports equipment, or electronics).
(3) Older people as particularly vulnerable consumers. The elderly are targeted by traders through practices such as pressure selling (demonstrations),[53] aggressive door-to-door sales, the sale of burglar alarms and similar products,[54] etc. According to P. Voráč,[55] the oldest age category is characterized by certain specific features of consumer behavior. On the one hand, the older people generally have more life experience, but, on the other hand, they gradually lose intangible forms of capital that are important for consumer behavior and influence decision-making. Retirement is an important milestone, which necessarily affects individuals' consumption habits and the way they spend their time, including its structure.

A101215_202809_ln-zajimavosti_kim. However, a similar lawsuit was filed against McDonald's in 2010 and subsequently dismissed in 2012. See: "Let There Be Toys! Judge Throws Out Lawsuit Brought Against McDonald's Happy Meals by Concerned Mom," DailyMail.co.uk, accessed September 10, 2025, https://www.dailymail.co.uk/news/article-2125756/Judge-dismisses-suit-McDonalds-Happy-Meals-concerned-mom-Monet-Parham-California.html.

53 Municipal Court in Prague in its Judgment of 15 April 2014 (Ref. No. 11 A 32/2011) found an unfair commercial practice in the conduct of an entrepreneur who promised a consumer gifts in return for attending a demonstration event, which he subsequently failed to deliver; the court emphasized that the promise of three whole large salami cones and a large neck of pork is, without more, capable of influencing the consumer's decision-making so that he may make a business decision that he would not otherwise have made. According to the court, consumers at sales presentations are largely capable of believing the salespeople's completely unrealistic arguments.

54 The elderly, particularly because of their frequent loneliness, are generally considered vulnerable to claims of crime in a particular area and, out of fear for their own safety, are willing to believe artificial statistics on burglary and other crime and purchase a product that is (often only supposedly) designed to make their home safe.

55 Jan Ondřej et al., eds., *Spotřebitelské smlouvy a ochrana spotřebitele: ekonomické, právní a sociální aspekty* [*Consumer Contracts and Consumer Protection: Economic, Legal and Social Aspects*] (Prague: C.H. Beck, 2013), 62.

5.4. "Trustworthiness" as a Criterion for Qualifying a Particularly Vulnerable Consumer

Trustfulness is a typical characteristic accompanying a certain age (children, adolescents, older people), but also people who are mentally or physically weak (especially in relation to health professionals).

Credulity concerns groups of consumers who more readily believe certain claims. The concept is neutral, so the aim is to protect members of a particular group who are susceptible to the influence of certain claims, for whatever reason. An example might be where a rogue trader will sell a winning lottery ticket on their website, which is accessible to the general public, even though they know that the site will only attract gullible consumers, such as those in debt.[56]

For this category, it will be necessary to examine whether the consumer is in a life situation that may lead to increased trustfulness, worthy of special protection, or towards whom. For example, a university student cannot generally be considered particularly vulnerable, but they may become so in relation to a lecturer who recommends a particular teaching aid, without which they cannot pass an examination (a claim which will not be based on truth).[57]

The following people can be considered as generally trusting, and they usually become trusting towards another specific person, not towards themselves: the owner of an animal may be a very bright, experienced, university-educated person, but at the moment of serious illness of their animal, they become particularly trusting towards a veterinarian who offers a certain preparation as a way out of a difficult situation:

(1) A sick consumer. They may be more trusting of certain persons, usually doctors, pharmacists, and other similar professionals. A sick consumer is also more trusting of advertisements for dietary supplements or

[56] Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (Text with EEA relevance), C/2021/9320 (OJ C526, 29 December 2021), 29.

[57] Bram B. Duivenvoorde points out the contradictions in American and British studies, according to which, women are more likely to be victims of unfair business practices because of their gullibility, while according to the British study, there is no difference in gullibility by gender. Cf. Duivenvoorde, *The Consumer Benchmarks*, 189–190.

pharmaceuticals, as the average consumer is aware of scientific advances in pharmaceuticals that have resulted in new products coming on the market that can treat diseases for which older medicine was not effective.[58]

(2) A parent. It cannot be stated across the board that parents are particularly vulnerable consumers, but they can become such at a certain time in the child's life (usually shortly after the child's birth – they generally fear for the child's health, safety, and comfort; this is usually more prevalent in mothers, who are hormonally unstable at that time), or in certain situations (e.g., the child's illness, or when relating to the education process), and in relation to certain persons – the doctor, the pharmacist, the seller of certain goods, the teacher, the coach, and others.

(3) An owner of an animal. It is also the case for these persons that they become particularly vulnerable consumers at the time of the animal's illness, in relation to the veterinarian or the seller of medicines or supplements for animals.

(4) A socially vulnerable person. They may become a particularly vulnerable consumer in relation to a financial adviser, a creditor, or a business in general (they do not have the means to reasonably defend or enforce their rights, so the creditor can usually employ "less savory" tactics). Cumulative qualifications with the criterion of weakness is evident for these persons.

(5) An unemployed consumer. They can become a particularly vulnerable consumer to financial advisors, various employment agencies, but also to potential employers (they are able to believe an employer's offer more easily than an employed person who is "looking" for a better, future job). There is also a strong interplay of weakness and gullibility.

(6) A consumer whose equipment breaks down. Particularly vulnerable consumers may also be those whose equipment breaks down and makes it difficult or unpleasant for them to function normally (e.g., people who have to manage the failure of a gas boiler, a car, a mobile phone, a door lock, or a window); these people are in a position of both "weakness" and "credulity" – in this case, towards the recommendations of experts (what needs to be done about the broken item and

[58] Cf. the decision of the Czech Supreme Administrative Court, Judgment of 17 January 2014, Ref. No. 4 As 98/2013.

what part to buy). Such persons become particularly vulnerable in relation to the repairers of damaged (defective) equipment, or to the businesses from which they have purchased such products (both within and outside the quality guarantee). The particular vulnerability is also compounded by the period in which the breakdown occurs (e.g., a gas boiler breaking down during the cold season, a car breaking down on a Sunday evening, or just before a holiday, etc.).

Various random situations or periods in life may also cause particular vulnerability for an otherwise entirely prudent consumer (i.e., otherwise falling into the category of the average consumer). These situations may be, for example:

- periods of divorce or partner breakdowns,
- periods of pandemics (COVID-19, etc.),
- periods following terrorist attacks,
- periods of job loss,
- period of serious illness or the death of a loved one,
- periods of natural disasters, etc.

6. Conclusion

The category of the particularly vulnerable consumer exists alongside that of the average consumer. While the average consumer criterion is applied to assess the unfairness of a practice in relation to any consumer in general, the particularly vulnerable consumer criterion is applied to cases of consumers vulnerable by reason of age, physical or mental weakness, or gullibility.

The mentioned criteria defining a particularly vulnerable consumer (age, physical or mental weakness, or gullibility) are very general (classified as vague legal concepts), allowing for the incorporation of a number of situations, which will be a task for the decision-making practice of the courts (CJEU and the Member States' courts). These criteria are considered to be demonstrative, according to the literature and the Commission Guidelines cited above, but the text of Directive 2005/29 suggests that they are, in fact, exhaustive (albeit with a wide possibility of fulfilling the content of the terms "weakness" or "credulity").

A particularly vulnerable consumer is a normative category (cf. Article 5(3) of Directive 2005/29 and Article 4(2) of the CPA). Vulnerability

must be assessed objectively and in a generalized manner; it is not possible to accept the interpretation that a particularly vulnerable consumer will be a person who, although properly educated, without the existence of a qualified weakness (physical or mental), behaves in a very trusting manner in their life.

A consumer's particular vulnerability due to "frailty" because of illness, pregnancy, early parenthood, or because they fall into one or more of the following categories: a consumer subject to various types of addictions, a consumer with a diminished intellect, a low level of education or a lack of ability to act assertively, a consumer in distress or fear, a consumer who has had a loved one die, a consumer who does not have knowledge of or lacks internet access or digital capability, consumers unfamiliar with foreign languages, a foreign consumer, a consumer who is stranded at an airport due to extraordinary circumstances, a consumer who purchases goods or services from bricks-and-mortar shops, and many consumers in the energy or financial services industry.

Particularly vulnerable consumers because of their "age" may be, for example, children, adolescents, older people, but also certain age groups targeted by specific business practices.

A particularly vulnerable consumer due to "gullibility" could be, for example, a sick consumer, a parent consumer, a pet-owning consumer, a socially vulnerable consumer, an unemployed consumer, a consumer whose equipment has broken down, or a consumer in a period of marital breakdown or breakdown of a partner relationship, a period of epidemics, terrorist attacks, loss of employment, or a period of serious illness or death of a loved one.

Knowledge of the definition of the group of particularly vulnerable consumers and the level of protection, defined in particular by the decision-making practice of supervisory authorities and courts, is therefore essential in business practice to avoid unnecessary sanctions by supervisory authorities and courts. This corresponds to a broader trend in EU law and policy, which increasingly treats vulnerability as a relational and context-dependent concept, rather than a static label attached to a fixed group of consumers.[59]

[59] Lisa B. Waddington, "Exploring Vulnerability in EU Law: An Analysis of 'Vulnerability' in EU Criminal Law and Consumer Protection Law," *European Law Review* 45, no. 5 (2020): 779–801.

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Transparency and Accountability in Local Public Finance: Evidence from Public Parking Fee Allocation

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Abstract: Municipalities worldwide play a crucial role in delivering essential public services to citizens. However, securing adequate resources and sustainable funding remains a persistent challenge for local self-governments. Depending on the state system, local circumstances, societal needs, and policy priorities, municipal revenue structures vary significantly. Yet modern urban municipalities are generally guided by common principles such as equality, solidarity, efficiency, transparency, accountability, and the promotion of public well-being. The adoption of the European Charter of Local Self-Government in the 1980s established an internationally recognized legal framework for local governance and local financing. As a member state of the Council of Europe, North Macedonia adheres to the Charter's core principles, which emphasize greater local fiscal autonomy and the responsibility of municipalities to manage both their revenues and expenditures independently of the central government. Despite the existing framework, Macedonian municipalities still rely heavily on central government transfers, with own-source revenues – such as property taxes, communal fees, and parking fees – making up a smaller share. Parking fees generally provide modest revenue, mainly funding public-space maintenance, traffic management, and minor

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infrastructure, and rarely support social welfare. Recently, some cities have introduced structured or solidarity-based parking fees for humanitarian or health purposes. This paper examines the core principles of local financing through an analysis of parking fees, focusing on the emerging practice of "humanitarian parking" as a case study. It employs a qualitative comparative case-study methodology that examines legal frameworks, policies, and practices of public and solidarity-based parking fees in cities in Macedonia and Serbia, as neighboring countries that share a similar socio-demographic, economic, and legal context. Particular attention is given to the emerging model of "humanitarian parking" as a municipal policy instrument. The analysis assesses the impact of this model on local fiscal autonomy and examines empirical evidence on citizen attitudes, including levels of public support and the transparency of parking-revenue allocation.

1. Introduction

There is no universally recognized model for the optimal management of municipal budgets or for achieving the most effective fiscal decentralization, nor do EU directives impose strict harmonization of local financing and fiscal autonomy. Nevertheless, modern urban municipalities are generally guided – explicitly or implicitly – by core principles such as equality, solidarity, efficiency, transparency, accountability, and the promotion of public well-being. Consequently, legal frameworks and policy instruments are typically grounded in these principles, operating under the fundamental premise that "there should be an adequate alignment between the financial resources available to a local authority and the responsibilities it is tasked to perform."[1]

The European Charter of Local Self-Government[2] – the first legally binding instrument, adopted in 1985, entered into force on September 1, 1988. The Charter is ratified by all member states of the Council of Europe,

[1] European Charter of Local Self-Government, Article 9, para. 2, C. Commentary on the Charter's provisions.

[2] Council of Europe, Congress of Local and Regional Authorities, European Charter of Local Self-Government (Strasbourg: Council of Europe).

including North Macedonia and Serbia. The Charter has become a landmark treaty for safeguarding the rights of local and regional authorities, such as the right to self-government, the right to elect their local bodies, to exercise their own powers, to have administrative structures and financial resources, and the right to take court action in the event of interference by other tiers of government.[3]

In contemporary governance theory, decentralization represents a fundamental principle through which modern states distribute public authority across multiple levels of government. As emphasized in the literature on multilevel governance, the existence of both central and local tiers is considered essential for ensuring democratic participation, service efficiency, and responsiveness to citizens' needs. The European Charter of Local Self-Government reinforces this perspective by requiring that local authorities possess adequate autonomy – political, administrative, and fiscal – to manage public affairs within their jurisdiction. Within this framework, local fiscal capacity, including the ability to generate own-source revenues such as local taxes, fees, and user charges (e.g., parking fees), is a core indicator of the degree of decentralization achieved in practice. Nevertheless, to carry out fiscal decentralization, it is assumed that there is a certain degree of political, administrative, and territorial development. Consequently, the execution of public expenditures in a municipality is guided by core principles such as legality, accountability, transparency (openness), general interest, rationality, efficiency, and effectiveness (value for money), planning, prioritization, fiscal discipline/sustainability, and, last but not least, public participation.

Despite these theoretical principles, the practical capacity of municipalities to raise and effectively use their own revenues varies significantly. In the Macedonian context, as in many transitional economies, a substantial share of municipal budgets still relies on central government transfers, while own-source revenues such as property taxes, communal fees, and parking fees account for a smaller proportion. Among these, parking fees are typically modest in scale, mainly financing local infrastructure,

[3] European Charter of Local Self-Government, p. 5, accessed November 11, 2025, https://rm.coe.int/european-charter-for-local-self-government-english-version-pdf-a6-59-p/16807198a3.

public-space maintenance, and traffic management. However, innovative or solidarity-based parking fee models, which allocate resources to humanitarian, health, or social purposes, are emerging as a policy tool to enhance both local fiscal autonomy and social welfare.

The present article focuses on assessing parking fee policies, comparing legal frameworks, practices, and policy instruments between North Macedonia and Serbia. These countries share similar socio-demographic, economic, and legal contexts, which makes cross-country comparison particularly relevant. The analysis is further focused on using the parking revenue for humanitarian purposes, and it aims to highlight how municipalities can balance fiscal efficiency with social objectives and offering insights into broader issues of local financial autonomy, accountability, and citizen participation.

Hence, to carry out fiscal decentralization, it is assumed that there is a certain degree of political, administrative, and territorial maturity. Consequently, the execution of public expenditures in a municipality is guided by core principles such as legality, accountability, transparency (openness), general interest, rationality, efficiency, and effectiveness (value for money), planning, prioritization, fiscal discipline/sustainability, and last, but not least, public participation.

2. Objective and Methodological Approach of the Research

Focusing on the principles of transparency and accountability in local public finance, this research assesses the public policy framework governing the introduction of parking fees in public spaces and the subsequent allocation of these revenues for humanitarian causes. Using the Municipality of Štip as a case study, the article provides a comprehensive analysis of the management and distribution of public parking fee revenues, with particular attention to the degree of transparency and accountability demonstrated by local authorities. Drawing on empirical data, the article further examines citizens' awareness of, and satisfaction with, this policy and the allocation of the collected funds.

The research applies a combined qualitative and quantitative methodological approach. We used a desk analysis of the applicable legal framework, including the national laws on local self-government and its financing, local taxes, bylaws, policy documents, and institutional reports

governing the introduction, administration, and allocation of public parking fees in the respective municipality. These documents were analyzed to evaluate the regulatory framework, financial flows, institutional responsibilities, and the transparency and accountability mechanisms governing the allocation of parking fee revenues for humanitarian causes.

Furthermore, we used data from July 2023[4] to June 2025, based on official financial reports of the public enterprise responsible for managing public spaces. These reports reveal the total revenue generated from public parking, and the portion allocated for humanitarian causes.

To examine citizens' awareness, perceptions, and satisfaction with the humanitarian parking policy, an empirical survey was conducted among residents of the Municipality of Štip. A total of 70 respondents participated. The questionnaire was administered in both electronically and in printed form, distributed directly to citizens. The collected data provide insight into public understanding of the policy, levels of support, and perceived transparency in the allocation of the collected funds.

As a limitation of this research, we were unable to find municipalities that implement the same model of so-called humanitarian parking zones. In this manner, the Municipality of Štip may be considered a pioneer in implementation, and the model can be viewed as a *sui generis* not only in practice but also in theory.

3. Transparency, Accountability, and Social Equity through the Lens of "Solidarity-Based Parking Fees"

For the purposes of this paper, we will just refer to several principles that are the subject of analysis in our particular case study. Parking fees are part of the local public revenue system, and they have been recently introduced in many developed municipalities. These fees are part of the own-source local revenues,[5] as defined in the Macedonian fiscal strategies: own revenues

[4] We selected July 2023 as the starting point, as this marks the introduction of the policy allocating parking fee revenues for humanitarian causes.

[5] Mileva Angelkovik and Marina Dimitrijevik, *Poresko pravo Srbije* (Niš: Pravni fakultet, 2009), 167–69.

of municipalities include "local fees (fees for development of construction land, fees for communal activities, fees for spatial and urban plans)."[6]

Consequently, the implementation of parking fees and methods applied also raise important considerations regarding transparency and accountability in municipal governance. Transparent management of local revenues ensures that citizens understand how fees are calculated, collected, and allocated, fostering trust in local authorities. Municipalities are expected to provide clear information on parking policies, pricing structures, and the specific use of collected funds, such as the maintenance of public spaces, local traffic management, or minor infrastructure projects. Transparency not only strengthens public confidence but also enhances compliance and the overall effectiveness of local fiscal policies. In recent years, some municipalities have introduced innovative forms of humanitarian parking as a mechanism that integrates revenue generation with social welfare objectives. Under this approach, parking fees are structured in a way that channels a portion of the revenue toward community support programs, such as healthcare initiatives, support for vulnerable groups, or other socially beneficial projects. This practice exemplifies how municipalities can align fiscal responsibility with principles of solidarity and public well-being, transforming a conventional local fee into a tool for both urban management and social impact.

On a broader scale, the solidarity (humanitarian)[7] parking fees contribute to the overall social-welfare and solidarity funds of the community, and their existence depends on the parking polices of the municipalities.

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6 "Fiscal Strategy of North Macedonia (2025–2029)," North Macedonia, Ministry of Finance, p. 51, accessed November 15, 2025, https://arhiva.finance.gov.mk/wp-content/uploads/2025/02/2025-2029-fiscal-strategy-of-the-republic-of-north-macedonia.pdf. The same appears in "Fiscal Strategy of North Macedonia (2024–2028)," North Macedonia, Ministry of Finance, p. 49, accessed November 15, 2025, https://arhiva.finance.gov.mk/wp-content/uploads/2023/12/2024-2028-Fiscal-strategy-of-the-Republic-of-North-Macedonia.pdf.

7 The terms "solidarity and/or humanitarian" indicate that part of the money goes to a public or social cause. For the purposes of this paper, we will use both words, because our analyses showed that, in a material sense, the meaning and the purposes of introducing this kind of parking fee indicate that part of the money from the parking fees goes to a public or social cause for the well-being of the citizens. We would just like to emphasize that the international terminology does not use the "humanitarian" zone; hence, we aimed to be closer to the original use of introducing this type of parking fee.

It usually refers to an extra fee added to parking tickets or parking prices, intended to support a social, community, or solidarity fund (e.g., disability programs, public-transport subsidies, social projects).

We should consider and be notified that in most cases, the key point of this concept of "solidarity" usually refers to "reserved parking for disabled persons." This is the most common association. Parking spaces reserved for disabled people are a legal entitlement rooted in the right to mobility and autonomy, reflecting a societal commitment to solidarity with a vulnerable group. Unjustified use of these spaces is often seen as a violation of social solidarity.

Additionally, the discussions around parking fees sometimes involve the social impact of costs on different community members, such as small businesses, low-paid workers, and local residents. Residents argue that high parking charges represent a "profit-grab" and an enclosure of a community resource, essentially questioning the social responsibility or "solidarity" of the charging entities. So, in this sense, should we question the degree of social equity among citizens and the users of public parking places? Are there hidden costs? Can we discuss how the decision-making process aligns with the established policies and the principles of fairness and economy? For further discussion, see the section Policy overview: Humanitarian Parking Zone below.

The concept of solidarity has been subject to research from many aspects in a broader sense. From a philosophical and socio-legal perspective, it can be considered as "the voluntary transfer of goods or services to another individual or to a group of individuals whenever this transfer is not the object of an explicit contract."[8]

4. Brief Overview of the Macedonian Legal Framework and the Municipality of Štip

The Republic of North Macedonia (formerly the Republic of Macedonia) ratified the European Charter in 1997 and subsequently adopted the new Law on Local Self-Government,[9] the Law on Territorial Organisation of

[8] Michael Baurmann, "Solidarity as a Social Norm and as Constitutional Norm," in *Solidarity*, ed. Kurt Bayertz (Dordrecht: Springer, 1999), 243–72.

[9] Official Gazette of Republic of North Macedonia No. 5/2002, 202/2024.

Local Self-Government,[10] and the Law on Financing of Local Self-Government Units,[11] based on the fundamental principles of the European Charter of Local Self-Government. In this way, it established municipalities as units of local self-government, which are legal entities operating through directly elected bodies. The Macedonian system of local self-government experienced a significant transformation after the decentralization reforms of the mid-2000s. While municipalities acquired broader competencies – urban planning, local infrastructure, education, communal services – their fiscal autonomy remains comparatively limited by European standards. A substantial portion of municipal revenues still derives from central government transfers, whereas own-source revenues constitute a smaller share of the local budget. Within own-source revenues, property taxes, fines, communal fees, and parking fees represent notable but constrained streams.

In the Macedonian context, municipalities are autonomously responsible for organizing and managing communal activities, including the construction and maintenance of public parking spaces.[12] The Law on Communal Activities implicitly provides that the construction and use of public parking spaces and facilities located in such spaces is one of the main activities that are within the jurisdiction of the municipality.[13] In addition, the Law on Financing the Units of Local Self-Government[14] provides that local self-governments are also financed from their own sources of revenue, including local taxes, local fees and charges, income from municipal property, self-contributions, fines, donations, and other income determined by law. Consequently, one of the municipal sources of financing can be the

10 Official Gazette of Republic of North Macedonia No. 55/2004, 12/2005, 98/2008, 106/2008, 149/2014.

11 Official Gazette of Republic of North Macedonia No. 61/2024, 96/2004; 22/2007; 67/2007; 156/2009; 47/2011; 192/2015; 209/2018; 244/2019; 53/2021; 77/2021; 150/2021; 173/2022; 170/2024; 37/2025.

12 Official Gazette of the Republic of Macedonia No. 5/02, Article 22, Law on Local Self-Government; Official Gazette of the Republic of North Macedonia No. 202/24.

13 Article 5, Law on Communal Activities, Official Gazette of the Republic of Macedonia Nos. 95/12, 163/13, 42/14, 44/15, 147/15, 31/16, and 64/18; Official Gazette of the Republic of North Macedonia Nos. 302/20, 255/24, 3/25, and 17/25.

14 Law on Financing the Units of Local Self-Government, Official Gazette of the Republic of Macedonia Nos. 61/04, 96/04, 67/07, 156/09, 47/11, 192/15, and 209/18; Official Gazette of the Republic of North Macedonia Nos. 244/19, 53/21, 77/21, 150/21, 173/22, 170/24, and 37/25.

parking fee, if the municipality decides to introduce such a policy; and that is a legitimate and common practice of municipalities.

Importantly, the introduction of such a fee must apply equally to all citizens who will use the same service, i.e., use of parking in a designated public space. This means that the principle of equality of citizens, which is a constitutionally guaranteed right and is characteristic of taxes, is equally applicable when it comes to local fees. In some constitutions, the principle of equality is expressed not only through a general principle, but also as a specific guarantee for equal treatment of citizens before tax laws.[15] Analogously, the universality of the fee represents a complementary aspect of the principle of equality before tax laws. Generality means that all individuals who use the same service are required to contribute to its cost.[16] Universality is a formal condition for fairness: it assumes that all persons to whom a decisive fact applies –regardless of their nationality, religious, gender, or any other characteristic – are obliged to pay when they use the same service.[17] The case study for the Municipality of Štip is presented *infra*.

5. Brief Overview of the Serbian Legal Framework and the Municipality of Niš

In this contribution, we have made a short overview of the legal basis of the public parking fees in the City of Niš, Serbia, including the status of the public parking fees and their solidarity-based models. We were led by the similar demographic, social, economic, and legal background of these two countries and cities.[18] Inevitably, even among countries with comparable socio-economic structures with the same or similar development, smaller or larger differences can be observed that are the result of certain specificities,[19] such as the size of the territory, the number of inhabitants, the development and structure of the region, geopolitical position, income of the population, etc.

15 Dejan Popović, *Poresko pravo*, 4th rev. ed. (Belgrade: Faculty of Law, University of Belgrade, 2009), 29–34.

16 Ibid., 30.

17 Vesna Pendovska, Aleksandra Maksimova-Veljanovska, and Kiki Mangova-Ponjavić, *Finansovo pravo* (Kumanovo: Makedonska Riznica, 2010), 256.

18 Niš is the largest administrative local government unit in the south of Serbia, by population and administrative area in the South part of Serbia, and Štip is the biggest local government unit in the Eastern part of Macedonia.

19 Božidar Jelčić et al., *Financijsko pravo i financijska znanost* (Zagreb: Narodne novine, 2008), 49.

Serbia signed the European Charter of Local Self-Government in 2005 and ratified it in 2007. When ratifying, Serbia made some reservations (did not accept all articles) on it. Specifically, parts of Articles 4, 7, 8, and the entire Article 6 concerning "appropriate administrative structures and resources" for local authorities. Additionally, Serbia signed an Additional Protocol on the right to participate in local authority affairs on March 8, 2017 and ratified it on June 29, 2018.[20] Regardless, some of the articles that Serbia did not accept are directly connected to fiscal decentralization, and they influence areas such as communal fees, local revenue autonomy, and local financial powers; still, this does influence our analysis concerning public parking fees and the humanitarian parking zones.

In modern societies, the parking fees in the context of social solidarity have not been sufficiently analyzed, and there is a clear lack of openly accessible scientific and professional publications or practical assessments. Although we can agree that in most analyses the solidarity-related parking issues are interpreted primarily through the lens of parking violations concerning reserved spaces for disabled persons,[21] penalties for the misuse of such spaces, or generally the cost of public parking and revenues.[22] The public parking pricing has also been considered an important issue.[23]

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20 "Serbia Ratifies the Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority," Council of Europe, June 29, 2018, accessed November 20, 2025, https://www.coe.int/en/web/congress/-/https-www-coe-int-fr-web-congress-staging-news-2018serbia-ratifies-the-additional-protocol-to-the-european-charter-of-local-self-government-on-the-rig?utm_source=chatgpt.com.

21 Aleš Bučar Ručman, "Questioning Social Solidarity through the Perspective of Parking Violations in Spaces Reserved for Disabled People," *Current Sociology* 68, no. 7 (2019): 990–1006, https://doi.org/10.1177/0011392119890667.

22 Katharina Goetting, Ulf Liebe, and Sophia Becker, "From Parking Place to Public Space: A Factorial Survey Experiment on Public Acceptability of Parking Space Reallocation in Germany," *Climate Policy* (2025): 1–19, https://doi.org/10.1080/14693062.2025.2539140.

23 William S. Vickrey, "My Innovative Failures in Economics," *Atlantic Economic Journal* 21 (1993): 1–9, https://doi.org/10.1007/BF02299771. Also: Paweł Mańczyk, "Parking Fees for Layover of Motor Vehicles on Public Roads – Legal Analysis of Selected Issues," *State and Local Government Budget Law* 9, no. 1 (2021): 95–112, http://dx.doi.org/10.12775/PBPS.2021.005.

According to the Serbian Law on Communal Activities,[24] public parking is explicitly defined as a communal activity.[25] The Law on Financing Local Self-Government[26] regulates how municipalities generate their own local revenue (own-source revenues) and what types of taxes and local charges they can impose.[27] The municipality designates certain areas as "solidarity" or "humanitarian" zones (e.g., cheaper parking for residents, low-income, special permit zones, "baby parking card"[28]).

According to the Business Program of the public company "Parking-Service" – Niš for 2025, the funds allocated for humanitarian activities will be used to help treat serious illnesses. The purchase of parking tickets for parking vehicles in the parking lot with access from Branka Krsmanovića Street will help children from Niš and the surrounding area who suffer from serious illnesses, as the money from the tickets sold will be paid into the budget of the City of Niš.[29]

6. Policy Overview: Humanitarian Parking Zone – City of Štip

On May 17, 2023, the Municipality of Štip, by a Decision of the Municipality Council,[30] introduced a new parking zone designated as the "Humanitarian Zone (Zone H)." Under the policy, an increased parking fee is charged, with a portion of the fee reserved for humanitarian causes. The decision entered

[24] Zakon o komunalnim delatnostima (Law on Communal Activities), Sluzbeni glasnik RS, no. 88/2011, 104/2016, 95/2018, 94/2024.

[25] See Article 2 and 3, Law on Communal Activities.

[26] Zakon o finansiranju lokalne samouprave [Law on Financing Local Self-Government], Sluzbeni glasnik RS, no. 62/2006, 47/2011, 93/2012, 99/2013 (uskladeni din. izn.), 125/2014 (uskladeni din. izn.), 95/2015 (uskladeni din. izn.), 83/2016, 91/2016 (uskladeni din. izn.), 104/2016 (dr. zakon), 96/2017 (uskladeni din. izn.), 89/2018 (uskladeni din. izn.), 95/2018 (dr. zakon), 86/2019 (uskladeni din. izn.), 126/2020 (uskladeni din. izn.), 99/2021 (uskladeni din. izn.), 111/2021 (dr. zakon), 124/2022 (uskladeni din. izn.), 97/2023 (uskladeni din. izn.), 85/2024 (uskladeni din. izn.)

[27] Article 6, Law on Financing Local Self-Government.

[28] "Baby Parking Card," PUC Parking Service Niš, accessed November 21, 2025, https://www.nisparking.rs/sr/паркирање/остало/беби-паркинг-карта.

[29] Working Program of Public Enterprise "Parking-Service" – Niš for 2025 – No. 12896/24, November 28, 2024, p. 99, accessed November 22, 2025, https://www.nisparking.rs/sr/документи/category/34-известији-и-програми.

[30] Decision Amending and Supplementing the Decision on the Use of Public Space for Parking in the Area of the City of Štip, No. 09–3383/2 ,18 May 2023; Official Gazette No. 6, 18 May 2023.

into force on May 19, 2023. The Humanitarian Zone – Zone H comprises a total of 131 parking spaces in the central urban area of Štip.

Importantly, parking in the humanitarian zone does not include privileged cards. This means that residents who hold a monthly or annual parking pass, including those granted as a privileged card for living or working in the central urban area, are required to pay an additional fee when using the designated spaces in Zone H.[31] According to the current price list for public parking lots managed by the responsible public enterprise "Stipion 2011," the fee in Zone H is 30 MKD per hour, with the same rate applied for each additional hour of parking.[32]

The revenues[33] generated from the humanitarian parking zone are transferred from "Stipion 2011" to a separate bank account of the Foundation for Information Technologies and Solidarity Fund. Specifically, according to the signed agreement between these two entities, 20% of the funds collected from Zone H parking fees are transferred to the Foundation to be used exclusively for humanitarian purposes,[34] while the remaining 80% is retained by PE "Stipion 2011" as income for the management and maintenance of public parking facilities in the municipality.

In practice, this allocation means that, from the total parking fee of 30 denars per hour in the humanitarian zone,[35] only 6 MKD are directed to humanitarian causes, whereas 24 MKD remain with the public enterprise.[36] For comparison, the parking fee in central-city zones that are not designated as humanitarian zones is 20 MKD per hour, all of which is retained by PE "Stipion 2011." Consequently, citizens who park in the humanitarian zone not only contribute a portion of their payment to charitable causes but

31 Article 3 from the Decision No. 08–3383/1.

32 PE "Stipion 2011" – Štip, Price List Amending and Supplementing the Price List of Services of Public Parking Areas, No. 0202–200/3, 27 April 2023.

33 According to Article 1 of the Agreement from January 13, 2025 signed between PE "Stipion 2011" – Štip and the Foundation for Information Technologies and Solidarity Fund, these revenues are treated as subventions.

34 Article 2 from the Agreement between PE "Stipion 2011" – Štip and the Foundation for Information Technologies and Solidarity Fund, No. 0307–21/3.

35 Price List Amending and Supplementing the Price List of Services of Public Parking Areas Managed by PE "Stipion 2011" – Štip, No. 0202–200/3 (27 April 2023).

36 The calculations are taken in absolute values.

also pay a higher overall rate – 20% more (4 MKD) compared to standard parking zones.

This policy structure highlights a notable discrepancy between the stated humanitarian objectives and the actual financial allocation, raising important questions about transparency, accountability, and citizen awareness in the management of local public funds.

7. Parking Revenues and Humanitarian Zone Contributions with Financial Indicators

The parking revenue data for the municipality of Štip, between 2023 and the first half of 2025, provide both overall municipal parking income and the specific contribution from the Humanitarian Zone (Zone H), while considering the differences in the periods covered.

In 2023, overall revenues reveal that the total income from the public parking and associated fees amounted to 9,804,484 MKD, of which the general parking fees accounted for the largest share – 6,980,015 MKD. Other sources of income included revenues from wheel clamps and local communal tax.[37] Notably, revenues from the humanitarian parking zone, applicable only from July 2023 (when the policy was introduced) to December 2023, were 1,440,800 MKD, representing approximately 14.7% of total parking-related income for the year.

In 2024, the total revenues were 8,697,978 MKD, with the humanitarian zone contributing 2,365,347 MKD.[38] This represents 27.2% of total parking-related income for the year. Meanwhile, revenues from general parking fees dropped to 5,217,332 MKD, and revenues from wheel clamps and local communal tax also decreased slightly.

In the first half of 2025, the total parking-related revenues amounted to 4,887,371 MKD, with the largest portion of 3,084,797 MKD coming from general parking fees. Contribution of the humanitarian zone for these six

[37] PE "Stipion 2011" – Štip, "Annual Report on the Work of PE "Stipion 2011" – Štip with Financial Indicators for the Period 1 January 2023 – 31 December 2023," under the Programme for the Use of Public Space for Parking, No. 0102–166/5 (February 26, 2024).

[38] PE "Stipion 2011" – Štip, "Annual Report on the Work of PE "Stipion 2011" – Štip with Financial Indicators for the Period 1 January 2024 – 31 December 2024," under the Programme for the Use of Public Space for Parking.

months was 1,160,346 MKD,[39] which represents approximately 23.7% of total parking income for this period.

Having in mind this data, and in order to enable meaningful comparison, we converted revenues to monthly averages, presented in the Table 1.

Table 1. Parking revenues

Year	Period covered	Humanitarian Zone Revenue (MKD)	Monthly Avg (MKD)	General Parking Revenue (MKD)	Monthly Avg (MKD)
2023	July – December (6 months)	1,440,800	240,133	6,980,015 (12 months)	581,668
2024	January – December (12 months)	2,365,347	197,112	5,217,322 (12 months)	434,777
2025	January – June (6 months)	1,160,346	193,391	3,084,897 (6 months)	514,149

Source: Report on the Amount of Financial Resources from the X-Humanitarian Parking Zone of PE "Stipion 2011" – Štip, No. 0503–287/1, 7 May 2024.

The monthly average revenues from the Humanitarian Zone (Zone H) provide a more precise picture of its contribution to municipal finances, accounting for the different periods covered. During the initial six months following its introduction in 2023, the humanitarian zone generated approximately 240,133 MKD per month. In 2024, covering a full twelve-month period, the monthly average decreased slightly to 197,112 MKD, and for the first half of 2025 it remained relatively stable at 193,391 MKD per month. This pattern indicates that although the total annual revenue increased in 2024 due to the extended reporting period, the intensity of monthly usage or collection per month slightly declined compared to the first six months of implementation.

A similar trend is observed for general parking revenues. The monthly average decreased from 581,668 MKD in 2023 to 434,777 MKD in 2024, reflecting a reduction in overall usage or revenue per month. In the first

[39] PE "Stipion 2011" – Štip, "Semi-Annual Report on the Work of PE "Stipion 2011" – Štip with Financial Indicators for the Period 1 January 2025 – 30 June 2025," under the Programme for the Use of Public Space for Parking.

half of 2025, however, the monthly average rose to 514,149 MKD, which may be attributed to seasonal variations, operational changes, or shifts in parking demand.

An examination of the proportional contribution of the humanitarian zone to the total monthly parking revenues reveals that Zone H has become a consistent and significant source of municipal income. Considering that the periods covered by the analysis are inconsistent, i.e., 6 months, 12 months, and 6 months, the only fair comparison is monthly averages. Table 2 shows what portion of total monthly parking revenue comes from the Humanitarian Zone (Zone H) for each period.

Table 2. Proportional contribution of the humanitarian zone to the monthly parking revenues

Year	Monthly humanitarian revenue	Monthly general parking revenue	Total monthly parking revenue	Humanitarian share
2023	240,133	581,668	821,801	29%
2024	197,112	434,777	631,889	31%
2025	193,391	514,149	707,540	27%

Source: Annual Report on the Work of PE "Stipion 2011" – Štip 2023; Annual Report on the Work of PE "Stipion 2011" – Štip 2024; Semi-Annual Report on the Work of PE "Stipion 2011" – 2025.

In 2023, when the humanitarian parking zone operated only during the second half of the year, the funds generated from this zone accounted for approximately 29% of the monthly parking revenues. This share increased to around 31% in 2024, suggesting that the humanitarian zone became a more significant and stable source of income once it operated for a full 12-month period. However, in the first half of 2025, the proportion slightly declined to approximately 27%, indicating a relative weakening of the humanitarian zone's contribution, although this might change during the second half of the year. If this downward shift remains, it may be attributed either to a decrease in usage of the humanitarian zone itself, an increase in revenues from general parking sources, or a combination of both factors.

Overall, the data indicate that the introduction of the humanitarian parking zone has had a measurable financial impact, generating substantial monthly contributions for the municipality. At the same time, it should be emphasized the importance of reporting revenues on a monthly or period-specific basis to allow for accurate assessment and to avoid misleading conclusions based on raw annual totals alone. These observations point to the need for continued transparency and careful monitoring of fund allocation, ensuring that the policy's humanitarian objectives are met and communicated effectively to citizens.

In the next section, we are going to present data regarding the citizens' perception of how effectively this policy is communicated to them and their perceived transparency in the allocation of the collected funds from this local policy.

8. Policy Support and Fiscal Transparency: Results from the Survey of Citizens

The local policy that permits paid parking revenues to be allocated for humanitarian causes raises two main questions: (1) whether such a policy is accepted and used by the taxpayers, and (2) whether the allocation process is transparent and accountable. Considering these two questions, we collected data from citizens living in the local community in order to capture their perceptions and behaviors regarding parking fee payments for humanitarian ends, together with perceptions of reporting and transparency in public-fund allocation.

The analysis assesses the support for the paid parking policy and for the humanitarian parking, perceptions of cost fairness, perceptions of whether the mandated 20% allocation to humanitarian causes is adequate, and citizens' knowledge of how much revenue is collected and where those funds are allocated.

The sample includes 70 respondents, where 57% are female and 43% are male. Most of the respondents, i.e., 87% are drivers, while 13% are not driving. The age group of the respondents ranges from 18 to 50+, where the largest group is 30–39 years with 47%, then 40–49 years with 27%, 18–29 years with 15% and 50+ with 11% of the sample.

The results reveal a high normative support for the policy idea for parking fees and humanitarian parking specifically. There are no significant

differences between male and female respondents in their perceptions regarding policy support and fiscal transparency. Most respondents (71%) clearly accept the policy idea, and a majority find the price acceptable (64%). On the other hand, the majority consider that a 20% allocation for humanitarian ends is not enough, and it should be bigger, while only 20% believe that it is enough. This can be interpreted as a normative signal that citizens want a bigger portion of the fee to go for humanitarian causes. An interesting result is that only 27% of the respondents know the exact area that is dedicated to humanitarian causes, while the majority know it only partially or do not know it at all.

When it comes to transparency, there is notably low informational transparency. Namely, almost no one knows the actual revenue from the parking fees or how much funding is allocated for humanitarian causes. This clearly shows some sort of a pattern in the local public finance, where citizens favor the ultimate goal of a policy, but they do not have the information or data to verify the implementation of such policies. Considering that only around 4% know how much money is collected through the policy and only around 1% are aware of where those funds are allocated, there is practically no transparent public reporting reaching citizens who are paying the fee. This gap undermines accountability in public finance and creates space for suspicion, misuse, and reputational risks, which can influence the public support of the policy overall.

The data reveal a significant gap between public support for a humanitarian-designated parking policy and the transparency in public finance required for democratic accountability. Most of the citizens find the policy acceptable and perceive the price as justified, indicating that the policy enjoys normative legitimacy. However, this normative acceptance is not matched by transparency, as almost no respondents know the amounts collected or the allocation destinations. This absence of basic fiscal information is problematic for two reasons. First, it prevents citizens from monitoring whether the promised humanitarian causes are actually funded, and second, it prevents informed debate about the adequacy of the 20% allocation, despite two-thirds of respondents indicating that 20% is insufficient. This creates a vague accountability environment in which citizens endorse the policy, but they cannot verify, challenge, or meaningfully shape the policy implementation. If citizens perceive the policy as a credible public-good

financing mechanism with verifiable results, the support will be durable, but if that perception is absent, its legitimacy may erode.

9. Conclusion

In public finance theory, principles have long been established to rationalize the process through which public revenues are generated and further allocated. Although very much discussed between the classical and contemporary views, the principles of openness and transparency remain foundational principles in public finance theories.[40]

The findings in our research emphasize the need for enhanced resource mobilization from parking fees to empower municipalities to fund and implement their development, social, and humanitarian goals successfully, based on the core principles. Considering the municipal policy introducing a "humanitarian" parking fee, there are several issues that should be addressed by the local authorities.

The lack of public awareness of the financial results of the humanitarian parking suggests that the municipality needs to improve its communication and reporting on this issue. Transparency and public awareness can increase support for the initiative, as people would be more willing to contribute when they know where the funds were going and how much has been raised.

In addition, the low level of public awareness about the spending of humanitarian parking revenue indicates the need for the municipality to improve its engagement and communication with the public. Clear communication about how these funds are used for social or humanitarian purposes can help build trust and increase the success of the policy.

Several recommendations can be considered to ensure better transparency and accountability of fund allocation. First, local authorities may use a targeted communication campaign as a tool to inform all residents – particularly older people – about the benefits of charging for parking and how it can improve urban mobility and infrastructure. Tailored campaigns can help reduce gaps in support between different age groups. Second, the municipality should regularly publish detailed reports on the collection

[40] Joanna Szołno-Koguc, "The Significance of Openness and Transparency for Accountability in Public Finances," *e-Finanse* 14, no. 2 (2018): 59.

and use of humanitarian parking funds. The information should be simple, clear, and easy to understand for an average person. Excessive technical or organizational detail may obscure the core information, whereas overly broad explanations prevent a clear understanding of the authorities' intentions.[41] Publicly disclosing this information in accessible formats (e.g., through social media, local media etc.) can increase awareness and trust in the policy.

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[41] Ibid., 59–60.

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Legal Event of Death and Collected Taxes in the Czech Republic: Comparative Study

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Abstract: Taxes certainly belong amongst the biggest social phenomena. They affect all residents of the state and are constantly in the focus of interest of the general public. They include legal, economic, social, sociological, psychological, and political aspects. Death as a legal event is connected with settlement of legal actions of the deceased. This article focuses on settlement of tax obligations *stricto sensu* of natural persons in the Czech Republic in connection with their death from a legal perspective.

1. Introduction

American statesman, diplomat, natural scientist, publisher, writer, and inventor Benjamin Franklin (1706–1790) once said that there are only two certain things in human life: taxes and death. He saw both as a form of justice and equality of everyone in the order of the world and existence. Paying taxes is one of the civic virtues and a sign of belonging to one's community. This statement represents a powerful philosophical metaphor reflecting the idea of inevitability of both phenomena. However, in a legal context, this parallel is misleading. While death is in fact biologically inevitable, tax liability can be moderated, minimized, or even completely eliminated in various ways, either legal (e.g., tax credits, exemptions), or illegal (e.g., income

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concealment). The actual inevitability of taxes is therefore a rather statist statement than precise legal judgment.

It is interesting to compare taxes and death in a different context, namely, whether tax liability elapses with death. The tax liability is overwhelmingly tied to a certain property value that, after one's death, passes to another person through inheritance proceedings. Subsequently, it is possible to deduce the hypothesis that the tax liability ends with the death of a person. Even though this conclusion seems to be absolutely correct by common logic, legal issues of this topic offer other alternatives. The aim of this article is to review the hypothesis that tax liability ends with death and create a comparative study that will verify this hypothesis in different taxes.

To properly verify the main hypothesis, selected types of taxes with differing characteristics that may, in connection with death, affect the verification of the main hypothesis will be described in general terms. By examining income tax, real estate tax, value added tax, and gambling tax (which collectively represent a broad spectrum of taxes – personal, property-based, etc.), a comprehensive picture can thus be obtained.

The authors base their research primarily on substantive and procedural primary legal regulations. The bibliography in the researched area only offers texts of a general or theoretical nature and does not explore the topic to an appropriate depth. With regard to certain issues, it even does not exist at all. From a territory point of view, the subject of research is the Czech Republic. From a methodology point of view, the research mainly applies methods of description and legal analysis, and comparative methods. The text covers the legal status as of September 1, 2025.

2. Death as a Legal Event

In human life, death is an event associated with a number of consequences by law, on both a private law, as well as a public law level. The legal definition of death, from a medical point of view, is regulated by the Transplantation Act, where death is defined as "irreversible loss of function of the entire brain, including the brainstem, or irreversible cessation of blood circulation."[1] Death limits actions of a human as a natural person, and is

[1] Act No. 285/2002 Coll., as subsequently amended, Section 2, lit. e.

associated with the settlement of their elapsing liabilities. For legal entities, such "death" is represented, in a figurative sense, by their dissolution.

According to the Civil Code (hereinafter referred to as "CC"),[2] Section 23, a person has a personality from birth to death. Pursuant to Section 26 of the CC, the death of a person is proven by a public document issued after examining the body of the deceased. If the body of a deceased person cannot be examined, the court shall declare the person dead *ex officio* if the person was involved in an event that, given the circumstances, makes their death appear certain. The court shall establish the day of death in its decision. For the resolution of legal situations resulting from death, the basic prerequisite is merely biological death, but also, in particular, its proof. The following table shows the development of the population in the Czech Republic over the last five years.[3]

3. Taxes in the Czech Republic

To collect its revenues, the Czech Republic does not apply only one, but several types of taxes – a tax system with various, mutual internal linkages, collected on its territory.[4] As of September 1, 2025, the following monetary payments flowing into public budgets are considered taxes from a legal point of view: income tax of natural persons and legal entities (hereinafter referred to as the "ITA"),[5] additional taxes for large multinational groups and large domestic groups,[6] real estate tax (hereinafter referred to as the "RETA"),[7] road tax,[8] value added tax (hereinafter referred to as the "VATA"),[9] excise taxes: mineral oils, alcohol, beer, wine, and intermediate products, tobacco

2 Act No. 89/2012 Coll., as subsequently amended.

3 Český Statistický Úřad [Czech Statistical Office], "Základní údaje o stavu a pohybu obyvatel – roční údaje, absolutní hodnoty," 2025, accessed September 17, 2025, https://csu.gov.cz/zakladni-udaje?pocet=10&start=0&podskupiny=131&razeni=-datumVydani#data-a-cas-ove-rady___zakladni-udaje-o-stavu-a-pohybu-obyvatel-rocni-udaje-absolutni-hodnoty.

4 Anna Outlá, *Veřejnoprávní aspekty podnikání* (Plzeň: Aleš Čeněk, 2012), 81.

5 Czech Collection of Laws, Act No. 586/1992 Coll., on Income Tax, as subsequently amended.

6 Czech Collection of Laws, Act No. 416/2023 Coll., as subsequently amended.

7 Czech Collection of Laws, Act No. 338/1992 Coll., on Real Estate Tax, as subsequently amended.

8 Czech Collection of Laws, Act No. 16/1993 Coll., on Road Tax, as subsequently amended.

9 Czech Collection of Laws, Act No. 235/2004 Coll., on Value Added Tax, as subsequently amended.

products, heated tobacco products, and raw tobacco,[10] energy taxes: on coal, natural gas, electricity,[11] gambling tax.[12]

The tax system also includes other public budget revenues that represent taxes from an economic point of view, or are very close to them, such as customs duties, social security contributions, and contributions to state employment policy, as well as public health insurance contributions.[13] The tax system usually also includes fees. The issue of tax revenues of public budgets was addressed by Boháč.[14] However, the theme chosen refers only to the issue of taxes.

From a legal perspective, tax is one of the means of power of the state, regulated by legal norms of the highest legal force.[15] The Charter of Fundamental Rights and Freedoms, which is part of the constitutional order of the Czech Republic, in general provisions of Article 4(1) of the Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., as subsequently amended, on the proclamation of the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, stipulates that obligations may only be imposed on the basis of and within the limits of law and only under the condition of preserving fundamental rights and freedoms. Article 11 specifies and explicitly regulates that taxes and fees may only be imposed based on the law. From a legislative point of view, the tax is defined by Act No. 280/2009 Coll., Tax Code, as subsequently amended (hereinafter referred to as the "TC"), in its Section 2(3), as

> a monetary payment that the law designates as a tax, duty, or fee; a monetary performance if the law stipulates that its administration shall be carried out in

10 Czech Collection of Laws, Act No. 353/2003 Coll., on Excise Taxes, as subsequently amended.

11 Czech Collection of Laws, Act No. 261/2007 Coll., on Stabilisation of Public Budgets, as subsequently amended.

12 Czech Collection of Laws, Act No. 187/2016 Coll., on Gambling Tax, as subsequently amended.

13 Petra Jánošíková, "Daňová soustava jako nástroj finančního plánování státu," in *Minulost, současnost a budoucnost finančního plánování státu*, ed. Kristýna Řezníčková (Olomouc: Iuridicum Olomucense, o.p.s., 2018), 7–22.

14 Radim Boháč, *Daňové příjmy veřejných rozpočtů v České republice* (Praha: Wolters Kluwer ČR, 2013), 332.

15 Petr Mrkývka, *Determinace a diverzifikace finančního práva* (Brno: Masarykova univerzita, 2012), 174.

accordance with the Tax Code, and a monetary performance within the framework of divided governance.

This is the definition of tax *sensu largo*. For the purposes of this article, the authors work with this narrower concept of tax.

From the population statistics set out below,[16] together with data on tax collection in the Czech Republic and on active taxable entities,[17] it is possible to infer, at least in outline, the potential frequency of tax collections relating to death for the selected representative taxes.

Table 1. Population development in the Czech Republic in 2020–2024

Year	Population	Death	Birth	Difference
2024	10,909,500	112,211	84,311	-27,900
2023	10,900,555	112,795	91,149	-21,646
2022	10,827,529	120,219	101,299	-18,920
2021	10,516,707	139,891	111,793	-28,098
2020	10,701,777	129,289	110,200	-19,089

Source: "Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2020–2024.

16 Český Statistický Úřad [Czech Statistical Office], "Základní údaje o stavu a pohybu obyvatel – roční údaje, absolutní hodnoty," 2025, accessed September 17, 2025, https://csu.gov.cz/zakladni-udaje?pocet=10&start=0&podskupiny=131&razeni=-datumVydani#data-a-casove-rady___zakladni-udaje-o-stavu-a-pohybu-obyvatel-rocni-udaje-absolutni-hodnoty.

17 Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2024, accessed September 15, 2025, https://financnisprava.gov.cz/assets/cs/prilohy/fs-financni-sprava-cr/vyrocni_zprava-financni-spravy-2024.pdf; "Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2023, accessed September 15, 2025, https://financnisprava.gov.cz/assets/cs/prilohy/fs-financni-sprava-cr/vyrocni-zprava-o-cinnosti-financni-spravy-2023.pdf; "Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2022, accessed September 15, 2025, https://financnisprava.gov.cz/assets/cs/prilohy/fs-financni-sprava-cr/Vyrocni_zprava_o_cinnosti_FS_CR_za_rok_2022.pdf; "Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2021, accessed September 15, 2025, https://financnisprava.gov.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2021.pdf; "Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2020, accessed September 15, 2025, https://financnisprava.gov.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2020.pdf.

Table 2. Tax collection in the Czech Republic in 2020–2024 (CZK million)

Year	Tax liability	Collection	Difference	Yield rate (%)
2024	1,216,840.5	1,222,521.6	24,318.9	100.5
2023	1,211,564.2	1,209,395.1	- 2,229.1	99.8
2022	999,696.4	1,002,948.7	3,252.4	100.3
2021	883,851.4	865,971.0	-17,880.4	98
2020	832,353.7	850,732.3	18,378.6	102.2

Source: Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2020–2024.

Table 3. Number of registered and active tax entities in the Czech Republic in the 2024

Tax type	Registered	Active
VAT	1,039,593	658,774
Legal Entity Income Tax – tax returns	750,755	745,737
Natural Person Income Tax – tax returns	3,029,443	2,088,331
Natural Person Income Tax – flat rate regimen	165,798	108,402
Natural Person Income Tax – income from employment	764,162	609,701
Withheld income tax based on special rate	626,822	522,939
Real Estate Tax	5,102,488	4,278,890
Road Tax	1,017,759	21,619
Gambling Tax	1,209	83

Source: Výroční zpráva o činnosti Finanční správy ČR" ["Annual Reports on the Activities of the Czech Financial Administration"], 2024.

4. Death and Taxes – Procedural View

The TC stipulates that, for tax administration purposes, the death of a natural person is governed by the legal fiction that the testator is alive until the day preceding the date of the closing of the inheritance proceedings, regardless of when the testator died or how far apart these two points are in time. In contrast, similar fiction does not apply to the inheritance law system. According to the provisions of Section 1479 of the CC, the right of inheritance arises upon the death of the testator, and the decision on inheritance has merely declaratory effects. Therefore, for inheritance law, the decisive point in time is the death.

The legal fiction established in the TC represents an exception in the Czech legal system, and its *raison d'ětre* is the effort to avoid ambiguities in tax issues arising in the period between the death of the testator and the decision on the inheritance.[18] For tax administration purposes, the testator is therefore considered alive and having tax liabilities until the heir is confirmed by a court decision. According to the provisions of Section 239a(1) of the TC, at the above mentioned moment, the tax liability passes from the testator to the heir, who takes the testator's position, and the continuity of the tax liability is preserved. Due to the legal fiction, a number of questions related to the application of this system arise.

By its very nature, the testator can no longer fulfill the tax declaration obligation. After the death of the testator, their tax obligations under Section 239b(1) of the TC are fulfilled by the person managing the estate, in their own name and on the estate's behalf.[19] The person managing the estate is the person appointed by the testator to manage the estate. If the testator failed to appoint any person as an administrator, such role pertains, under the provisions of Section 1554(2) and Section 1556(1) of the CC, to the executor of the will, potential heir, or liquidator, or the court may pass a different resolution. If tax liability on behalf of the testator arises for several persons, they shall fulfil it jointly and severally, according to the principle of solidarity expressed in the provision of Section 239b(1) of the TC. The liability is fulfilled in the name of the person managing the estate, e.g., a signature on a tax return, as it is inherently no longer possible for the testator to sign it themselves, and is fulfilled on behalf of the estate. In practice, the system works in such a way that the tax declaration is drafted by the person managing the estate, stating the testator's first and last name, their birth certificate number, as well as their tax identification number. The tax will still be recorded in the testator's tax account.[20] For practical reasons, in addition to the signature, the identification data of the person managing the estate are also included in the tax declaration filing.[21] If there are several persons managing the estate, communication between

18 Ondřej Lichnovský et al., *Daňový řád: komentář*, 5th ed. (Praha: C.H. Beck, 2024), 1012.

19 Miloslav Kopřiva, Jan Breburda, and Jaroslav Novotný, *Manuál k daňovému řádu*, 3rd ed. (Ostrava: Sagit, 2022), 1087–88.

20 Lichnovský et al., *Daňový řád: komentář*, 1013.

21 Ibid., 1015.

them and the tax administrator will run through a joint attorney or representative. Pursuant to the provisions of Section 30(1) of the TC, if several tax entities have a common tax liability, they shall establish their common representative. Should they fail to do so, even after being invited by the tax administrator, the tax administrator shall appoint a joint representative for them. In the case of the death of a natural person, this procedure shall apply to the filing of income tax and real estate tax returns in particular. Due to the nature of the legal event of death, this does not apply to legal entities that are not alive.

The tax after the testator's death is paid from their estate by the person managing it. Regarding the payment of tax, the heir is liable for the testator's debts only up to the amount of their share of the inheritance,[22] and if the testator left only assets of little or no value, the tax debts will remain unpaid.[23] Pursuant to the provisions of Section 239b(3) of the TC, the tax administrator who was competent on the day of the testator's death shall remain competent for the testator's tax liability.

In the case of the death of a natural person-entrepreneur, it is necessary to file an income tax return and all other tax returns related to business activities, in particular VAT returns, road tax returns, tax statements for employees, reports for the Social Security Administration, the health insurance company, etc. There are exceptional situations when an established business continues to operate under the leadership of a legal successor, designated either based on a will or an agreement with other heirs. Upon the death of an entrepreneur, their business ends, but under certain conditions specified in the Trade Licencing Act, the heir may proceed with it. Such heir then assumes tax obligations, namely, as of the date of the court's decision on the inheritance. Until then, the estate administrator settles tax obligations on behalf of the deceased, from their estate. The heirs' tax obligations only begin upon conclusion of the inheritance proceedings. Within three months of the death of an entrepreneur, pursuant to Section 13(2) of the Trade Licencing Act,[24] their successor shall inform the Trade Licencing

22 Supreme Court of the Czech Republic, Judgment of 29 October 2002, File No. 33 Odo 593/2002.

23 Supreme Court of the Czech Republic, Judgment of 18 February 2015, File No. 29 Cdo 1074/2013.

24 Czech Collection of Laws, Act No. 455/1991 Coll., as subsequently amended.

Office about the continuation of the activity. If this period expires in vain, the deceased entrepreneur's trade license expires as of the day of their death.

The above rules are established and are being finalized by case law rather in terms of application technical aspects. In the Resolution of the Regional Court in Ostrava,[25] it is stated that the power of attorney of an authorized representative terminates upon the death of the principal (i.e., the tax subject), because the Tax Code does not provide for a different regulation of the termination of representation in such a situation, the general rule according to the provisions of Section 28 of Act No. 99/1963 Coll. of the Code of Civil Procedure will apply. Furthermore, in the judgment of the Supreme Administrative Court, it is stated that the provisions of Section 239a of the TC apply entirely to the tax obligations of the testator and their performance in the period before the decision on the estate, and not to tax obligations from the sale of property.[26]

Jurisprudence that interferes with the legal fiction is absent, according to the provisions of Section 239a(1) TC, which means that the current regulation is already established and legislative changes are not expected.

It is an interesting fact that Polish legislation contains several interesting features in relation to the transfer of tax rights and obligations upon death. Issues connected with the continuation of business activities after the death of an entrepreneur are regulated in Poland by the Act on the management of a successive enterprise of a person's enterprise,[27] which lays down the rules for the temporary management of an enterprise following the entrepreneur's death. This Act also amended the relevant tax statutes. The duration of succession management under the Act may last for two years after the entrepreneur's death and may be extended by a court for up to five years. For tax obligations, the principle of the enterprise's uninterrupted operation is of key importance.[28] An enterprise under succession

25 April 27, 2023 file no. 25 Af 13/2023.

26 Supreme Administrative Court of the Czech Republic, Judgment of 25 November 2025, File No. 4 Afs 34/2025.

27 Ustawa z dnia 5 lipca 2018 r. o zarządzie sukcesyjnym przedsiębiorstwem osoby fizycznej, Journal of Laws 2018, item 1629, as amended.

28 Paulina Pałach and Błażej Pezda, "Zarząd sukcesyjny – zmiany w prawie gospodarczym w zakresie działalności reglamentowanej i prawie podatkowym," *Gubernaculum et Administratio* 20, no. 2 (2019): 31–46.

management is regarded as a taxable entity that continues the business activities of the deceased entrepreneur, rather than an entity commencing a new business activity. The principle of uninterrupted continuation of the enterprise is likewise reflected in the Tax Ordinance. The same principle applies to value added tax. The temporary form of enterprise management after the entrepreneur's death undoubtedly contributes positively to ensuring continuity of business operations and, consequently, to the certainty of economic transactions, including from the perspective of tax law.[29]

5. Comparative Analysis of Selected Taxes and Death

This chapter undertakes a comparative analysis of a selected set of direct and indirect taxes in relation to the specific legal and factual event of death. For the purposes of comparison, the authors selected from the Czech tax system representatives of each tax category, namely: direct taxes of the income type (personal income tax); direct taxes of the property type (real estate tax); other direct taxes (gambling tax); and indirect taxes (value added tax).

A detailed analysis of the procedural dimension of the issue clearly refutes the hypothesis that a person's tax liability terminates upon death. The mechanism of the legal fiction, established in Section 239a(1) of the TC, together with the principles of inheritance law, demonstrates unequivocally that tax liability persists even after death. The remaining question is whether this fiction is relevant for all types of taxes.

The aim of this chapter is to explain how the heterogeneous nature of individual types of taxes is reflected in the determination of tax liability, the fate of which is, as a consequence of death, transformed, modified, or, in certain cases, entirely extinguished.

Each of the taxes examined has unique criteria (a link to the person, a link to property, a link to a transaction, or a link to an activity), and each of them may, by virtue of the occurrence of death, potentially be governed by a different mechanism. Their combined examination provides a comprehensive view of the functioning of the legal fiction created by the Tax Procedure Code, according to which the deceased person is deemed to be alive until the day preceding the conclusion of the probate proceedings,

[29] Tomasz Janicki, "Przedsiębiorstwo w spadku – problemy interpretacyjne," *Przegląd Podatkowy*, no. 12 (2025): 14–16.

irrespective of the actual date of death. Given their differing characteristics, this chapter first outlines the individual types of taxes in general terms and identifies the specific issues associated with death.

The purpose of the comparative examination of the selected types of taxes is to verify whether the legal fiction, under which the deceased is deemed to be alive until the day preceding the conclusion of the probate proceedings, is applicable to all categories of taxes in the Czech Republic.

5.1. Income Tax

Income tax is regulated by the ITA, which establishes the legal framework for the taxation of income of natural persons and legal entities in the Czech Republic, distinguishing between individual categories of income and establishing conditions for their taxation.

According to the provisions of Section 2 of the ITA, every natural person earning taxable income is subject to income tax, namely, both for tax residents in the Czech Republic (from worldwide income) and for non-residents (only from income from sources in the Czech Republic). The key factor for the resulting tax is the tax base, which, according to the provisions of Section 5 of the ITA, is the amount by which the income accruing to the taxpayer in the tax period exceeds the expenses demonstrably incurred to achieve, secure, and maintain it.[30] The tax base is composed of the sum of partial tax bases from individual types of income, according to the provisions of Sections 6 to 10 of the ITA, which include income from employment, entrepreneurship, capital assets, rental, and other income, while some income is exempt from tax and is added to the tax base, e.g., occasional (irregular) income up to the limit of CZK 50,000 per year (e.g., sale of redundant apples from the garden), gifts, inheritances, etc. The ITA further regulates deductible items in the provisions of Section 34, which can be subtracted from the tax base, e.g., interest on a loan for housing needs.[31] The tax rate is progressive and, according to the provisions of Section 16 of the ITA, it is established at 15% for up to 36 times the average wage, and at

[30] Ondřej Dráb et al., *Zákon o daních z příjmů: komentář*, 2nd ed. (Prague: Wolters Kluwer, 2024), 75.

[31] Vladimír Pelc and Vladimír Pelc ml., *Daně z příjmů s komentářem*, 19th rev. ed. (Olomouc: ANAG, 2024), 500.

23% above this limit. For natural persons, this tax is assessed once a year, for the entire tax period, which, according to the provisions of Section 16b of the ITA, is a calendar year. The obligation to file a tax return arises when income exceeds the legal limit of CZK 50,000, according to Section 38g of the ITA.[32] Every taxpayer who achieves taxable income during the tax period is obliged to file a tax return (basic deadline: April 1) and pay the resulting tax. The ITA contains a number of exceptions, e.g., according to the provisions of Section 2a, the possibility of paying tax in a lump sum if the conditions are met. Tax administration is provided by the locally competent tax administrator. According to the provisions of Section 13 of the TC, the criterion for a natural person is the address of the place of permanent residence of a citizen of the Czech Republic, or the address of the registered place of residence of a foreigner, or the place where the natural person primarily stays.

In the case of the death of a natural person-taxpayer, it is inherently impossible for them to carry out any further activity that would lead to taxable income and new tax obligations. An unfulfilled tax liability can only exist for the period when the person was still alive and did not fulfill its tax liability. After the death of the testator, such liabilities are fulfilled, pursuant to the provisions of Section 239b(1) of the TC, by the person managing the estate, in their own name and on behalf of the estate. Given the above, two situations may arise. If the taxpayer dies during the tax period, e.g., on December 1, the person managing the estate shall file a tax return for the deceased for the part of the tax period in which they lived, i.e., from January 1 to December 1. If the taxpayer dies, for example, on February 1, and has not yet fulfilled the tax obligation, the person managing the estate shall file two tax returns for the deceased, for the previous tax period and for the part of the tax period in which they lived. The legal fiction under Section 239a(1) of the TC applies to this type of tax.

According to the provisions of Section 17 of the ITA, a taxpayer is any legal entity that has its registered office or place of effective management in the Czech Republic (all their income is subject to taxes), or that receives income from sources in the Czech Republic (only income from sources in the Czech Republic is subject to taxes). Since a legal entity is not alive, the

[32] Dráb et al., *Zákon o daních z příjmů: komentář*, 75.

legal event of death cannot affect its tax obligations. The legal fiction under Section 239a(1) of the TC is excluded for this type of tax.

5.2. Real Estate Tax

Real estate tax in the Czech legal system is regulated by the RETA. This tax comprises two categories: land tax and building and unit tax, as established by the provisions of Section 1 of the RETA. The subject of the tax is real estate registered in the Real Estate Register in the Czech Republic, which is the only official real estate database. According to Section 3 of the RETA, the taxpayer is the property owner, tenant, or, if applicable, the user (e.g., state property). The amount of the tax depends on the type of property, its area, location, and other coefficients provided in the provisions of Sections 5 to 12ab of the RETA. For example, the local coefficient is established by municipalities in the form of a sub-statutory legal regulation-generally binding decree.

Tax administration is provided by the locally competent tax office, with local jurisdiction being established based on the property location. If the taxpayer owns multiple properties and different local tax offices are locally competent for each of them, the tax will consist of individual parts. The tax is assessed in accordance with the provisions of Section 12b(1) of the RETA, for a tax period of one year, and always as from January 1 of the relevant year. The obligation to file a tax return arises upon acquisition or change of decisive facts, typically when purchasing real estate, by January 31 of the tax period. If there is no acquisition or change in the decisive facts, the tax is assessed at the same amount as in the previous tax period, without the obligation to file a tax return. For example, if a person buys a property in December, the tax on this property will be assessed only for the following tax period, from January 1, and the person is obliged to file a tax return.[33] The tax is usually paid in a single payment by May 31 of the tax period.

In the case of the taxpayer's death, tax liabilities pass, according to the principle of universal succession expressed in Section 239 of the TC, to another taxpayer, namely, the person who inherited the property. The moment of transfer of tax liability and ownership rights to the subject of the tax

[33] Petr Koubovský and Monika Novotná, *Zákon o dani z nemovitých věcí: komentář*, 2nd ed. (Prague: Wolters Kluwer, 2022), 84.

is the day of the legally binding inheritance decision and the registration of the heir in the Real Estate Register. Given the above, several different situations may arise. If the taxpayer duly paid the tax, died, and the inheritance proceedings were concluded (or the ownership rights were transferred to the heirs) in the same tax period, the procedure is the same as, for example, when selling real estate. The new owner files a tax return and pays tax for the next tax period. Furthermore, if the taxpayer duly paid the tax and died in a certain tax period, and the ownership right was transferred to the heirs only in the next tax period, the tax liability still pertains to the deceased, and the real estate tax will be paid from the estate. The same procedure will be followed in cases when the inheritance proceedings extend over multiple tax periods.[34] Filing a tax return on behalf of the deceased person is governed by the procedural rules of Section 239a of the TC. For the case of death, the RETA determines a special moderation of the statutory deadline, such that the deadline for filing a tax return is extended by two months if the taxpayer dies during that period, or if the inheritance proceedings end during that period.[35] The legal fiction under Section 239a(1) of the TC is clearly applicable to this type of tax. The Real Estate Tax Act even introduces a special provision for cases of death.

5.3. Value Added Tax

Value Added Tax (VAT) is an indirect, universal, mandatory, central, object-based, neutral, non-purpose, and rate-based tax.[36] It has been collected in the Czech Republic since 1992, when it replaced the turnover tax. The most important feature of value added tax is its multi-phase nature. Added value increases at individual stages of turnover and is subject to taxation for VAT purposes. VAT is collected at individual stages of production and distribution, when selling, purchasing, or providing a service. The taxpayer is entitled to deduct from their tax liability the amount of tax they paid as input tax to their suppliers. Subsequently, the tax is borne by the final consumer within the sales price of the purchased goods and services, who is

[34] Tomáš Rozehnal, *Daňový řád. Praktický komentář*, 2nd ed. (Prague: Wolters Kluwer ČR, 2021), 449.

[35] Koubovský and Novotná, *Zákon o dani z nemovitých věcí*, 86–87.

[36] Petra Hrubá Smržová and Petr Mrkývka, *Finanční a daňové právo*, 4th ed. (Pilsen: Aleš Čeněk, 2024), 380.

not entitled to deduct input value added tax. Goods are subject to VAT even when imported into the Czech Republic, in which case the tax is paid upon import by business entities, and by other legal entities and citizens, provided that the value of the goods imported by them exceeds the legally established limit. The tax entity liable for the tax to the public budget is the payer.

According to Section 6 of the VATA, a taxpayer is a person liable for tax who has its registered office, place of business, or establishment in the country, whose turnover in 12 calendar months exceeds CZK 2,000,000, and who becomes a taxpayer as of the first day of the calendar year immediately following the year in which the specified turnover was exceeded. The person becomes a payer as of the day following the day the amount is exceeded, in the case of timely registration and notification that they want to become a payer as of that day, or after the day when domestic turnover exceeded CZK 2,536,500 in the relevant calendar year. Furthermore, a taxpayer is also a person liable to pay tax, with a registered office, place of business, or establishment in the country, who carries out taxable or tax-exempt transactions with the right to deduct tax, and purchases goods from another Member State; they become a taxpayer as to the day when the value of the purchased goods (tax excluded) in the current calendar year exceeds CZK 326,000. Further details about taxpayers are provided in Section 6b of the VATA. The taxpayer is obliged to provide the tax identification number in the structure: country code "CZ," and a main part consisting of a general identifier according to a special legal regulation, which is the birth registration number for a natural person and the identification number for a legal entity. It can be stated that, for legal registration, monitoring the amount of domestic turnover is required. Reaching the limit of CZK 2,000,000 or CZK 2,536,500 will cause the relevant tax entity to become a VAT payer by law. The only difference is as to which day they become a VAT payer, whether on January 1 of the following year or the day after the turnover is exceeded. The obligation to file an application for registration for value added tax arises for entities when the turnover exceeds the specified threshold of CZK 2,000,000. The deadline for filing an application is 10 days as of the date the specified limits are exceeded.

The tax administrator may cancel the value added tax registration, based on the taxpayer's request or *ex officio*, pursuant to Section 106 of the VATA. In this case, it is completely irrelevant whether the person is

a self-registered taxpayer or a statutory taxpayer. In the case of registration cancellation, the taxpayer shall meet the conditions established by law – the taxpayer may ask for registration cancellation no earlier than one year after the effective date stated on the registration certificate, if their turnover did not exceed CZK 2,000,000 in the preceding 12 consecutive calendar months.

Section 106 of the VATA sets out the conditions for the cancellation of registration *ex officio*. If the conditions provided in paragraphs 2 and 3 are met, the tax administrator shall cancel the payer's registration. If a VAT payer dies, their registration ends as of the day preceding the date of transfer of tax liability (court decision on inheritance). The reason for it is that, according to Section 6e of the VATA, the heir who continues to carry out economic activities becomes a payer. If the heir does not proceed with the economic activity after the deceased payer, the person managing the estate is obliged to reduce the deduction under the conditions set out in Sections 79a–79e of the VATA for assets for which the claim for tax deduction was filed. Section 79a of the VATA sets out general rules, and the following Sections 79b–79e of the VATA establish certain specific rules. The basic general principle applies that, upon registration cancellation, the payer is obliged to reduce the tax deduction applied to assets that represent their business assets as of the date of cancellation of registration and for which they still claimed a tax deduction as a payer (Section 79a(1) of the VATA). Specific rules for tax settlement upon cancellation of registration due to the death of the payer are set out in Section 79b of the VATA. The obligation to reduce the applied tax deduction arises for the person managing the estate, who must assess, before drafting the final tax return, whether the heir who acquires the business assets of the deceased payer intends to proceed with carrying out economic activities with such assets, or not. The legal fiction under Section 239a(1) of the TC is clearly applicable to this type of tax. The Value Added Tax Act contains a partial special regulation for cases of death.

5.4. Gambling Tax

Gambling tax became part of the Czech tax system on January 1, 2017. This tax was adopted as part of the regulation of gambling operations, when, in addition to Act No. 187/2016 Coll., on Gambling Tax, other laws were also

adopted, namely Act No. 186/2016 Coll., on Gambling, and the so-called Amending Act, Act No. 188/2016 Coll. From a system perspective, this tax is classified as a direct tax due to the subject of taxation, which taxes a specific activity – the operation of games of chance.[37]

The subject of the tax is the operation of a game of chance in the territory of the Czech Republic for a participant of this game, for which a permit or notification is required under the Gambling Act.

According to this Act, operating a game of chance means performing activities necessary for the actual implementation of such a game, with the intention of making a profit, in particular: accepting bets and deposits into a game of chance, paying out winnings, other activities of an organizational, financial, and technical nature related to putting this game into operation and ensuring this operation, as well as activities necessary for the termination and settlement of such a game.

The tax also applies to games operated on the Internet, where the condition of operation in the Czech Republic is met if the game of chance is aimed at, or targeted, at least in part, at persons residing in its territory. The Gambling Act establishes the rebuttable legal presumption that every natural person who participates in a game of chance in this way is resident in the territory of the Czech Republic.

The payer of gambling tax is the holder of an elementary permit under the Gambling Act, or the person who operates a game of chance for which such a permit is required, or the person who notifies a game of chance, or the person who operates such a game for which notification is required. The wording of the law implies that the taxpayers of gambling tax are all those who operate these games in the Czech Republic, whether the operation is legal or illegal. Taxpayers file tax returns, or additional tax returns, only electronically, i.e., with a data message (in Czech: *datová zpráva*), signed in a manner associated with the effects of a handwritten signature under another legal regulation, or with the verified identity of the filer, in a manner that allows logging into their data mailbox (in Czech: *datová schránka*). The tax is due by the 25th day after the end of the tax period, which is a calendar quarter, to the appropriate account of the Financial Administration of the Czech Republic. Tax administration is provided by

[37] Petra Hrubá Smržová et al., *Daňové právo de lege lata*, 3rd rev. ed. (Pilsen: Aleš Čeněk, 2022), 126.

the Financial Administration of the Czech Republic. The nationwide gross revenue from gambling taxes is shared and it represents both the state budget and municipal budgets.

The Gambling Tax Act establishes the institution of self-assessment and additional self-assessment in its Section 11. This is a special provision to the general legal regulation. The idea is to assess the tax without issuing a decision by the tax administrator, reducing its administrative burden. Another advantage is the legal certainty of taxpayers, who are familiar with the amount of the last known tax, without having to review the file.[38] If the taxpayer does not file a tax return within the deadline established by law, the tax assessed as of the date of the deadline is zero by law (*ex lege*). The fiction is established here that the taxpayer claimed the zero tax. The taxpayer's last known tax under Section 10 of the Gambling Tax Act will therefore be zero. In the case of any further claim or additional assessment *ex officio*, it will always be assessed based on the zero baseline. If the taxpayer dies without filing a tax return, the legal fiction of zero value will apply. The legal fiction under Section 239a(1) of the TC is, in theory, applicable to this type of tax. In practice, however, it is superseded by a zero tax return, which effectively negates it.

6. Conclusion

The aim of this article was to review the hypothesis that tax liability ends with the death of a natural person. However, based on examination of the subject matter in general, and by also focusing on individual types of taxes, this hypothesis was not confirmed.

The death of a natural person does not mean the elapse of their tax obligations. The TC explicitly establishes that the testator is considered to be alive for tax administration purposes until the day preceding the date on which the inheritance decision becomes legally binding. This legal fiction allows the tax administrator to complete tax proceedings initiated during the taxpayer's lifetime, and at the same time, ensure that any tax arrears are settled within the framework of the inheritance proceedings. In this way, tax administration ensures the protection of public budgets,

[38] Vladimír Pelc, *Daň z hazardních her: s komentářem* (Olomouc: ANAG, 2016), 46.

without the suspension or termination of tax proceedings due to the death of the taxpayer.

The heirs assume the rights and obligations of the testator, to the extent of the acquired assets. Their liability is therefore limited to the value of their inheritance, which ensures a certain degree of protection. The estate administrator plays a key role in ensuring the proper settlement of tax obligations – they are not only obliged to notify the tax administrator of the death, but must also ensure cooperation in ongoing proceedings. At the moment the inheritance decision becomes legally binding, the heirs assume not only the assets, but also the obligations, including taxes. Such a system provides legal certainty to all parties involved – the tax administrator, heirs, and other creditors. However, in practice, it can still raise not only practical, but also ethical questions.

The comparative analysis of the selected set of taxes has confirmed that the legal fiction under Section 239a(1) of the TC is, with varying degrees of adaptability, applicable to most components of the Czech tax system, particularly to taxes linked to a person or to property.

In the case of income tax, the fiction is clearly applicable. The tax liability relates to that part of the taxable period during which the taxpayer was alive. The fiction enables the person administering the estate to file the necessary tax returns (for the previous, as well as the incomplete, taxable period) on behalf of the deceased, but under their own identification, thereby preserving procedural continuity. However, the application of this fiction is limited solely to natural persons, as it does not extend to legal persons, which are not "alive."

For real property tax, the application of the fiction under Section 239a(1) of the TC is likewise indisputable and is even supplemented by a special provision in the Real Property Tax Act, which extends the deadline for filing a tax return in the event of the taxpayer's death or the conclusion of probate proceedings. The fiction is essential for determining who bears the tax liability during the transitional period, in which ownership of the property has not yet passed to the heirs.

For an indirect tax, such as value added tax, the legal fiction under Section 239a(1) of the TC is fully applicable. The Value Added Tax Act contains specific, partial provisions for cases of a taxable person's death. The fiction is indispensable for settling VAT obligations (including the obligation to

adjust the input tax deduction) and for determining the moment at which the taxable person's registration is canceled.

In the case of gambling tax, the application of the fiction is only theoretical. The Gambling Tax Act introduces a special rule of self-assessment and self-determination. If the taxpayer fails to file a tax return within the statutory period (which necessarily occurs upon the taxpayer's death), the tax is assessed *ex lege* at zero, thereby eliminating the need to apply the fiction under Section 239a(1) of the TC.

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Civil-Law Aspects of Agrivoltaic Contractual Arrangements Under Italian Law: Between Innovation and Constraints

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Abstract: Under Italian law, the installation of agrivoltaic systems may be brought within the scope of an agricultural enterprise only where there exists an effective, verifiable, and not merely declaratory link with the agricultural land (*fondo rustico*), within the meaning of Article 2135 of the Italian Civil Code. From this standpoint, the production of energy from renewable sources qualifies as a connected activity, and not as a substitute for the primary agricultural activity. Against the background of the European Union's Common Agricultural Policy (CAP) and the EU climate and energy objectives, this article takes Italy as a case study within the EU legal framework and examines how the civil-law notion of "connected activity" can be reconciled with CAP conditionality and eligibility rules. On the basis of this principle, Italian agrivoltaic contractual practice – in particular, deeds establishing surface rights, land tenure titles, and coordination agreements – must be structured so as to ensure continuity of cultivation, effective access to the land, compliance with the rules of the Common Agricultural Policy (CAP) and with national incentive schemes (Ministerial Decree of 22 December 2023; GSE Director's Decree No. 149 of 19 June 2025) and, at the same time, the bankability of the projects. The legal point of equilibrium in the Italian framework lies in translating the principles of sustainability and multifunctionality into binding contractual clauses capable of preserving the agricultural identity of the land and making

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energy production compatible with the economic and social function of the agricultural enterprise. The analysis also offers brief comparative insights into selected EU Member States, showing that similar tensions between dual land use (food/energy) and CAP requirements arise across Europe, and suggesting criteria for a possible future revision of Article 2135 of the Italian Civil Code in line with EU law.

1. Systemic Framework: Agrivoltaics, the Ecological Transition and Agricultural Law

The integration between agricultural production and power generation amounts to a structural transformation of the agricultural undertaking, with a direct impact not only on technological or permitting aspects, but also on the civil-law configuration of the relationships on which the organization of the farm business is based. This tension between technological innovation and the preservation of agricultural land use can be observed, in different forms, across EU Member States, making agrivoltaics a particularly significant testing ground for European agricultural and energy law.[1]

Agrivoltaics – in its most advanced forms, that is, "advanced" systems compliant with the Ministerial Decree of 22 December 2023 and with the GSE's Operational Rules[2] – implements a model of spatial and

[1] For an EU-wide overview of agrivoltaics as a dual land-use solution and the related legal and policy challenges, see: Anatoli Chatzipanagi, Nigel Taylor, and Arnulf Jäger-Waldau, *Overview of the Potential and Challenges for Agri-Photovoltaics in the European Union* (Luxembourg: Publications Office of the European Union, 2023), https://dx.doi.org/10.2760/208702. For a political-economic analysis of how agrivoltaics reshapes the relationship between solar deployment and farmland protection within the European Green Deal and the CAP, see: Rubén Vezzoni, "Farming the Sun: The Political Economy of Agrivoltaics in the European Union," *Sustainability Science* 20 (2025): 1519–34, https://doi.org/10.1007/s11625-024-01601-7. With specific reference to the Italian debate on the tension between renewable energy development and the protection of agricultural landscapes and traditions, see: Gaetano Armao, "Environmental Sustainability of the Energy Transition: Agrivoltaics in Italy and in the Insular Regions," *Rivista Giuridica AmbienteDiritto.it* 24, no. 4 (2024): 1–23.

[2] By "advanced configurations" this article refers to plants that comply with the rules on so-called advanced agrivoltaics (Ministerial Decree of 22 December 2023; GSE Operational

managerial integration between agricultural production and photovoltaic modules, combined with obligations of agronomic monitoring and continuity of cultivation. In the civil-law system, the sustainability of agrivoltaics is measured by its ability to reconcile technological innovation in plant design with the preservation of the agricultural function of the land. In the Italian case, this assessment is anchored expressly in Article 2135 of the Civil Code, while comparable debates in other European jurisdictions often arise within more general doctrines on land use and rural development.[3]

Agricultural law thus becomes the backbone of the entire system: it is through contractual technique that cultivation obligations must be made enforceable, powers of access regulated, and remedies calibrated for long-term relationships that are exposed to subsequent regulatory and technological developments. From a comparative perspective, this central role of agrarian contract law mirrors broader European concerns about how to channel the green transition through private-law instruments without eroding the productive and social role of farmland.

The core issue is not the mere possibility of coexistence between cultivation and electricity generation, but rather the capacity of the farm organization to keep the latter ancillary and instrumental to the former, in

Rules; GSE Director's Decree of 19 June 2025, No. 149), characterized by spatial and operational integration between agricultural production and photovoltaic modules, together with obligations of agronomic monitoring and verifiable continuity of cultivation.

3 On the central role of Article 2135 of the Italian Civil Code in structuring agricultural multifunctionality and "connected" activities, see: Francesco Tedioli, "Exploring Italian Agritourism: A Model of Sustainable Rural Development," *Journal of Agribusiness and Rural Development* 75, no. 1 (2025): 64–77, https://doi.org/10.17306/J.JARD.2025.00017R1; Anna Kapała, "Legal Instruments to Support Local Food Systems in Italian Law," *EU Agrarian Law* 9, no. 1 (2020): 5–11, https://doi.org/10.2478/eual-2020-0002; Mariagrazia Alabrese et al., eds., *Agricultural Law: Current Issues from a Global Perspective* (Cham: Springer, 2017), 3–6. For broader European debates framed through multifunctionality, ecosystem services and rural land-use planning, see: Massimo Rovai and Maria Andreoli, "Combining Multifunctionality and Ecosystem Services into a Win-Win Solution: The Case Study of the Serchio River Basin (Tuscany—Italy)," *Agriculture* 6, no. 4 (2016): 49, https://doi.org/10.3390/agriculture6040049; Jiao Huang et al., "Comparative Review of Multifunctionality and Ecosystem Services in Sustainable Agriculture," *Journal of Environmental Management* 149 (2015): 138–47, https://doi.org/10.1016/j.jenvman.2014.10.020.

accordance with the paradigm laid down in Article 2135 of the Italian Civil Code. The classification of energy production as an "ancillary" (connected) activity cannot be based on boilerplate clauses or declaratory statements; it must, instead, follow from a carefully structured contractual architecture capable of ensuring the persistence of the agricultural function and of making continuity of cultivation measurable.

In the absence of such safeguards, multifunctionality remains an assertion at the lexical level but not in substance. Where, by contrast, the principles of agricultural compatibility are translated into enforceable contractual obligations, multifunctionality becomes an operational criterion for the governance of the farm enterprise.

Public regulation (in the fields of land-use planning, environmental protection, and energy) and the CAP framework interact with civil-law rules without overlapping, in a relationship of mutual integration. Administrative regulation determines the lawfulness of the plant; the CAP makes access to payments conditional upon the maintenance of effective agricultural use; and the national incentive scheme guides project design towards technical models compatible with cultivation. This multi-level interaction between EU CAP conditionality and national private-law tools is a common feature of agrivoltaic governance in Europe, but the Italian experience offers a particularly clear example of how these layers can be coordinated through contract law.

The junction between these three levels finds its point of equilibrium in agrivoltaic contractual practice: contractual models (surface rights, agricultural tenure titles, coordination agreements) must ensure certainty, opposability, and duration, preventing conflicts between landowner, tenant, and the energy operator; at the same time, they must incorporate agronomic standards and adjustment mechanisms required by public regulation, without altering the contractual synallagma.

In this sense, agrivoltaics constitute, for agricultural law, a crucial test of the "concrete cause" of contracts. If energy integration leads to the marginalization of cultivation, the transaction becomes inconsistent with the economic and social function referred to in Article 2135 of the Civil Code and with the requirement that the parties' interests be worthy of legal protection. Conversely, where the contractual structure makes it possible to demonstrate, over time, the continuity of agricultural activity

– through binding agronomic plans, detailed rules on access, allocation of risks and restoration clauses – energy production retains its ancillary nature and the model of ecological transition acquires a stable legal anchorage. This functional assessment of the contract resonates with broader European debates on the social function of property and the need to align private autonomy with environmental and rural-development objectives.

Innovation, therefore, does not lie in the contractual type chosen, but in the drafting technique, which must be able to internalize the protection of the agricultural vocation of the soil within the language of obligations, making it an object of monitoring and guarantee, both for CAP purposes and in relation to national incentive schemes.

2. Classification of the Activity Under Article 2135 of the Italian Civil Code and the Multifunctionality of the Agricultural Undertaking in Agrivoltaics

The civil-law classification of electricity production as a "connected activity"[4] to the agricultural undertaking, within the meaning of Article 2135 of the Italian Civil Code, does not follow from a mere formal statement; it instead requires a substantive and functional assessment of the organizational structure of the farm. It is necessary to demonstrate that the energy activity is instrumental and complementary to the main agricultural activity and not economically or operationally predominant. A similar functional approach to "ancillary" or "secondary" activities can be found in other EU legal systems, even though it is often articulated through different legislative techniques and sectoral regimes.

The reform of Article 2135 of the Italian Civil Code, brought about by Legislative Decree No. 228 of 18 May 2001, replaced the previous criterion of "normality" with that of prevalence, and articulated connected activities in two forms: (1) connection by product, where processing, transformation, or marketing activities relate predominantly to products originating

[4] In the terminology of Article 2135 of the Italian Civil Code, "connection" characterizes the functional relationship between the activity and the agricultural undertaking, while "prevalence" is the evaluative parameter (qualitative/quantitative) used to ascertain it. There is no fixed statutory threshold: the assessment is concrete and is anchored in the actual organization of the holding and in the resources employed.

from the holding; (2) connection by undertaking, where the additional activity predominantly employs resources or means normally used in the agricultural enterprise.

In the first case, prevalence is assessed in terms of quantity or value of the farm's own products, coming from the holding, as compared with products purchased from third parties; in the second, in terms of the predominant use of the farm's resources (land, equipment, buildings, internal roads, labor organization). The aim is to prevent the ancillary activity from acquiring economic and functional autonomy, such as to shift the center of gravity of the undertaking outside the agricultural sphere.[5]

This distinction is of decisive importance in the context of agrivoltaics because it determines the only doctrinal pathway through which electricity generation may be brought within Article 2135 of the Italian Civil Code. Electricity does not constitute an "agricultural product" in the technical sense; therefore, the inclusion of the energy activity within the paradigm of Article 2135 of the Italian Civil Code cannot be based on connection by product, but only on connection by undertaking. Energy production can be classified as "connected" within the meaning of Article 2135 only if it relies on the prevalent and continuous use of typically agricultural resources (land, appurtenances, internal roads, farm infrastructures), without jeopardizing the continuity of the cropping cycle, and provided that the farmer retains material control over the land, management of the activity, and full decision-making power over agronomic choices. Only under these

[5] When the legal system has to determine the functional prevalence of one activity over another, it resorts to objective and measurable parameters. In cooperative company law, Article 2513 of the Italian Civil Code defines "prevalent mutuality" by means of quantitative indices (prevalence of transactions with members), thus providing a model for measuring prevalence. In the tax field, the practice of the Italian Revenue Agency has historically employed numerical criteria to classify connected agricultural activities in the context of energy production from renewable sources (see Circular No. 44/E/2004; Circular No. 32/E/2009), giving weight to prevalence ratios between farm resources employed and external inputs. The reference is purely methodological: it is not suggested that these regimes should apply directly to agrivoltaics, but rather that, for the civil-law purposes of Article 2135 of the Italian Civil Code, "connection" must be demonstrated and measured through verifiable indicators, to be designed *ad hoc* in the agrivoltaic context, and not left to mere declaratory statements.

conditions does the requirement of connection acquire legal substance, resulting in a functional prevalence of agriculture over energy production, consistent with the evolutionary rationale of Article 2135. From a comparative perspective, this reflects a broader European trend towards reading renewable-energy activities on farmland through the lens of functional subordination to primary production, rather than through purely formal classifications.

Prevalence is not a qualitative label, but an objective and measurable parameter, which must be assessed through concrete and verifiable indicators. As regards connection "by products," a comparison must be drawn in terms of quantity and value of own products versus those purchased from third parties. On the side of connection "by undertaking," it is essential to compare the revenues generated by means of normally agricultural equipment and resources, with those produced through assets that are extraneous and not typically agricultural. Turnover that is grossly disproportionate to the size of the holding and to the economic and financial capacity of the agricultural enterprise will thus constitute an indicator of a merely commercial activity.

From this standpoint, one may recall the quantitative criteria developed by the legislature and the tax authorities for energy production by farmers: from the annual thresholds introduced by Law No. 266 of 27 December 2005, Article 1(423) (2,400,000 kWh/year for agroforestry sources; 260,000 kWh/year for photovoltaics) to the parameters elaborated by Circular No. 32/E/2009 of the Italian Revenue Agency (a 200 kW safe harbor; prevalence of agricultural turnover net of incentives; a land/power ratio of 1 hectare for every 10 kW in excess, up to 1 MW). Although conceived for tax purposes, these criteria offer a methodological model for measuring prevalence that can also be adapted in the civil-law sphere in order to assess the genuine subordination of the energy activity. Comparable quantitative or functional thresholds can be found, *mutatis mutandis*, in several other EU jurisdictions when defining the boundary between agricultural activity and commercial energy production on farmland.

The rules on advanced agrivoltaics (Ministerial Decree of 22 December 2023[6] and GSE Director's Decree No. 149 of 19 June 2025[7]) confirm this orientation, shifting the focus from mere energy proportionality to effective agronomic verifiability: connection is not presumed, but must be demonstrated through structural indicators of agricultural prevalence, such as continuity of crops, access to land, and monitoring of production parameters. This approach ensures consistency with the principle, expressed by the legislature and by administrative authorities, whereby the production of energy from renewable sources can be attributed to the agricultural undertaking only where it constitutes an effective, measurable, and verifiable connected activity.

The civil-law inclusion of energy production within the scope of Article 2135 thus has not only a systemic, but also a preventive, value: it reduces the risk of interpretative disputes in the tax or administrative sphere and ensures a coherent reading of the multifunctionality of the agricultural undertaking within the broader framework of the ecological transition.

3. Contractual Models for Agrivoltaics and Drafting Techniques

In the current Italian legal framework, two basic contractual models can be identified through which agricultural activity is coordinated with the production of energy from renewable sources, which broadly correspond to patterns that can also be found, with different labels and technical solutions, in other EU Member States when agrivoltaic projects are implemented on farmland: (1) the dualistic model, in which the plant is developed by an

6 The reference is to the Decree of the Italian Minister for the Environment and Energy Security No. 436 of 22 December 2023, on the "support scheme for innovative agrivoltaic systems" (*regime di sostegno per il fotovoltaico in area agricola cd. agrivoltaico innovativo*), adopted under the National Recovery and Resilience Plan (PNRR), Mission 2, Component 2, Investment 1.1 "Sviluppo agro-voltaico", and in force since February 14, 2024.

7 The reference is to the Director's Decree of the Italian Energy Services Operator (Gestore dei Servizi Energetici – GSE) No. 149 of 19 June 2025, approving the "Operational Rules for access to incentives for advanced agrivoltaic systems" (*Regole operative per l'accesso agli incentivi per impianti agrivoltaici avanzati*), which implement the support scheme established by the Ministerial Decree of 22 December 2023 under Italy's National Recovery and Resilience Plan (PNRR).

energy operator holding a surface right over the agricultural land;[8] (2) the integrated model, in which the farmer retains ownership and management of the plant within the structure of their farm business.

3.1. The Dualistic Model and the Shaping of the Surface Right

In what is currently the most widespread model, the plant is developed by an energy operator, who acquires a surface right, pursuant to Articles 952 et seq. of the Italian Civil Code, that is, a real right enabling the construction and maintenance of buildings on another's land, separating ownership of the structures from ownership of the land. Functionally similar arrangements, based on a split between land ownership and ownership or long-term control of the agrivoltaic plant (e.g., long leases, real rights in rem, concession-like titles), can likewise be found in other EU Member States' practice, whenever solar assets are installed on agricultural land.[9] This structure, while fully lawful in the abstract, must nonetheless be adapted to the concrete cause of the agrivoltaic operation, which presupposes the actual coexistence of cultivation and energy production.

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[8] The right of superficies, governed by Articles 952 et seq. of the Italian Civil Code, is a real right of enjoyment that entitles the holder (superficiary) to construct and maintain a building on another's land, or to acquire ownership of an existing building, separating it from the ownership of the underlying land. This institution constitutes an exception to the principle of accession (Article 934 of the Civil Code), bringing about a temporary split between ownership of the land and ownership of the structure: the superficiary acquires title to the asset and the corresponding power to exploit it economically, while the landowner retains bare ownership (*nuda proprietà*) of the land. In the agrivoltaic context, the function of the right of superficies lies in the possibility of attributing to the energy operator ownership and management of the plant without transferring title to, or control over, the land itself, thereby ensuring the permanence of the agricultural function and full opposability to third parties through registration pursuant to Article 2643(2) of the Civil Code.

[9] For example, in France the agrivoltaic framework introduced by the APER Law and subsequent Decree No. 2024–318, now reflected in the French Energy Code, explicitly organizes dual land use on agricultural parcels while leaving wide room for contractual solutions based on long-term rights in rem and leases between farmers and PV developers. In Spain, renewable-energy plants on rural land are frequently structured through contracts for the transfer of surface rights, usufruct or long-term leases between landowners and project companies, which separate land ownership from control over the installation. In Germany, practice has largely relied on long-term Pachtverträge for ground-mounted PV on arable or grassland, sometimes in agrivoltaic configurations, again illustrating a functional split between agricultural land tenure and solar asset operation within a single project.

In the context of advanced agrivoltaics, the full and exclusive ownership of a surface right may prove incompatible with the agricultural function of the land and with the paradigm of Article 2135 of the Italian Civil Code, as it risks excluding the farmer from effective use of the land and shifting the economic center of gravity towards the energy component.

The functional cohabitation between plant and cultivation, therefore, requires a functional reinterpretation of the surface right, oriented towards safeguarding continuity of cultivation and the farmer's material availability of the land. The contract must, therefore, precisely delimit the areas physically occupied by the installations, preclude any form of exclusive enjoyment of the agricultural land, impose obligations of non-interference, and provide for mechanisms of periodic verification of agronomic standards.[10]

Recent case law and legal scholarship acknowledge that the surface right may be "shaped by its cause," that is, tailored in its content and limits, in accordance with the specific needs of the agrivoltaic project. In application of this principle, the agrivoltaic real right should: (1) be confined to the sole footprints and works that are indispensable for the plant; (2) include any exclusive use of the interposed agricultural areas, ensuring the tenant's access and the possibility of mechanized farming; (3) make the duration and renewal of the relationship conditional upon the periodic verification of agronomic standards, through suspensive or resolutive conditions linked to the outcome of the checks; (4) lay down non-interference clauses

[10] Cf. Francesco Tedioli, "Il diritto di superficie nel modello agrivoltaico avanzato: compatibilità civilistica, soluzioni contrattuali e disciplina fiscale," *Diritto e giurisprudenza agraria alimentare e dell'ambiente*, no. 3 (2025): 1–9. From a civil-law perspective, the surface right under Article 952 of the Italian Civil Code can be "shaped" in accordance with the concrete cause of the project: in advanced agrivoltaics, the coexistence of cultivation and plant operation requires (1) an objective limitation of the right to the sole footprints and indispensable plant works; (2) the exclusion of exclusive enjoyment over the areas reserved for agricultural use (inter-row spaces/under-panel areas), coupled with obligations of non-interference and coordination of access; and (3) binding agronomic safeguards (plan, KPIs, inspections) that condition the duration of the relationship and its renewals (e.g., suspensive/resolutive conditions or renewal made conditional upon the outcome of periodic checks). This "cohabitative surface right" is consistent with the function of advanced agrivoltaics (integration rather than substitution of agricultural land use) and with the need for opposability and certainty of the legal structure vis-à-vis third parties (Article 2643(2) of the Italian Civil Code), without turning the land into a predominantly energy-based platform.

and rules on operational coordination during critical phases of the cropping calendar.

In the absence of such corrective measures, energy production remains external to the agricultural undertaking and cannot be classified as a connected activity, within the meaning of Article 2135 of the Italian Civil Code. Continuity of cultivation must persist in an effective and verifiable manner, in line with the contractual parameters and the agreed technical standards.

3.2. The Integrated Model

In the integrated model, the farmer retains ownership and direct management of the plant – possibly through an agricultural company – and organizes energy production as an activity "by undertaking," based on the prevalent and continuous use of farm resources. In this way, electricity production preserves its instrumental, complementary, and subordinate nature in relation to cultivation, in full consistency with the multifunctional logic of Article 2135 of the Italian Civil Code. This configuration fits neatly with the CAP narrative on the farm as a multifunctional unit, where on-farm energy generation is recognized only insofar as it remains functionally subordinated to primary agricultural production.[11]

The plant becomes an integral part of the farm organization, rather than a mere infrastructure placed on the land. Consequently, contracts perform a dual function: (1) in the dualistic model, they govern the coexistence of two autonomous activities (agricultural and energy-related), ensuring coordination and non-interference; (2) in the integrated model, by contrast, they operate as an internal mechanism for regulating the multifunctional enterprise, defining how the land is to be used, allocating

[11] See: European Commission, Directorate-General for Agriculture and Rural Development, "Approved 28 CAP Strategic Plans (2023–2027): Summary Overview for 27 Member States – Facts and Figures" (June 2023, pp. 4, 41–42, 63–73, accessed December 19, 2025, https://agriculture.ec.europa.eu/document/download/7b3a0485-c335-4e1b-a53a-9fe3733ca48f_en?filename=approved-28-cap-strategic-plans-2023-27.pdf), which emphasizes that income support and eco-schemes remain tied to the maintenance of the "agricultural area" and the "agricultural activity"; and RES4LIVE Consortium, "Policy Brief no. 1 – Policy Recommendations for the Common Agricultural Policy (CAP)," (2024, pp. 2–4, accessed December 19, 2025, https://res4live.eu/wp-content/uploads/2024/09/Policy-Brief-1_RES4LIVE-PDF.pdf), highlighting that CAP area payments for agrivoltaics are possible only where there is a "predominance of agricultural activity" on the land concerned.

technical responsibilities, and providing for periodic checks on continuity of cultivation and agronomic compatibility. From this perspective, the contract does not transfer ownership of the land, but regulates the functional coexistence between plant and cultivation, translating the principle of agricultural prevalence into binding obligations.

The typical parties to the relationship may be: (1) the landowner and the agricultural company that both farms the land and owns the plant; (2) the farmer and the technical provider or financier (EPC,[12] O&M,[13] agrivoltaic leasing, or an agri-energy partnership agreement[14]); (3) several farms grouped in a consortium or company for joint management; (4) temporary business groupings or consortia (*ATI/RTI*),[15] including mixed groupings, with an agricultural entity as the lead partner or at least one agricultural participant, in line with the project configurations admitted by the GSE for access to incentives.

3.3. Drafting Techniques

Contractual drafting must translate into legally enforceable obligations the agronomic and environmental standards on which the sustainability of the plant is based. In agrivoltaic projects, this "translation" from technical

12 "EPC" (Engineering, Procurement and Construction) refers to a turnkey contract under which the contractor is responsible for the design, procurement and construction of the plant, and hands it over to the client fully operational and tested.

13 "O&M" (Operation and Maintenance) concerns the ordinary and extraordinary management and maintenance of the plant; agrivoltaic leasing is a specific form of operating or financial leasing designed for agricultural undertakings for the installation and use of renewable-energy plants on the holding.

14 The agri-energy partnership agreement – an atypical contract developed in practice – governs cooperation between the farmer and the energy operator in the construction and management of the plant, with a proportionate allocation of risks, revenues and agronomic obligations, and thus operates as a contractual model consistent with the multifunctionality outlined in Article 2135 of the Italian Civil Code.

15 "ATI/RTI" refers to Associazioni Temporanee di Imprese or Raggruppamenti Temporanei di Imprese (temporary business groupings) under Italian public procurement law, i.e., contractual alliances through which multiple operators submit a joint bid and appoint a lead partner (*capogruppo*), while internally allocating functions, risks and revenues. In the agrivoltaic context, such groupings allow at least one agricultural operator to be formally involved in the project structure admitted to incentives, alongside technical and financial partners.

design into binding covenants is crucial to ensure that the legal structure reflects, and not merely proclaims, the agricultural primacy of the land use.

The relationship must be structured around three essential layers: (1) a binding agronomic plan, attached to the contract, identifying crops, rotations, soil operations, and standards of mechanical compatibility with the photovoltaic modules, and forming the objective basis for verifying continuity of cultivation; (2) rules on access and coordination, intended to ensure the farmer's effective availability of the land during critical windows of the production cycle and, where necessary, the temporary suspension of non-agricultural activities, in order to avoid interference with agronomic operations; (3) an end-of-life regime, including obligations of selective dismantling and agronomic restoration, backed by appropriate financial instruments (performance bonds or surety bonds)[16] to protect the soil and business continuity. These guarantees – which correspond to insurance suretyships within the meaning of Articles 1936 et seq. of the Italian Civil Code – must be payable on first demand, of an adequate amount, and with a duration covering the entire life cycle of the project, so as to ensure proper fulfilment of restoration obligations even in the event of default by the energy operator.

As regards the material demarcation of the land, cadastral and cartographic documentation must clearly distinguish: (1) the footprints permanently occupied by plant structures; (2) agro-compatible areas (inter-row, under-panel, and buffer strips); (3) appurtenances intended for cable ducts, internal roads and transformer stations. External connection works must be supported by connection and right-of-way easements with clearly defined boundaries and consistent cadastral coordinates.

In complex projects, a coordination agreement between the landowner, the tenant farmer, and the energy operator is a useful tool for regulating access, interference, and operational priorities, as well as for governing forms

[16] Performance bonds and surety bonds are guarantee instruments of Anglo-Saxon origin, which have been progressively incorporated into Italian contractual practice and are used to secure the fulfilment of non-monetary obligations. In the agrivoltaic context, these instruments are employed to guarantee dismantling and agronomic restoration obligations at the end of the plant's useful life, ensuring financial coverage even in the event of insolvency or cessation of the obligated party.

of shared self-consumption[17] or participation in renewable energy communities (RECs/CERs).[18]

The participation of the farm in a renewable energy community constitutes an activity instrumental to the operation of the agricultural undertaking and may fall within the scope of connected activities under Article 2135 of the Italian Civil Code, provided that membership serves the energy needs of the farm and does not upset agricultural prevalence.

The contract must therefore contain obligations of information-sharing and clauses ensuring consistency with CAP conditionality and with the incentive-related constraints laid down by the Ministerial Decree of 22 December 2023 and by GSE Director's Decree No. 149 of 19 June 2025. In this way, private-law arrangements are aligned *ex ante* with both

[17] The literature on self-consumption, energy communities and renewable energy communities is now quite extensive. Without any claim to exhaustiveness, see: Gabriella De Maio, *Povertà energetica e comunità energetiche. Criticità e prospettive per una transizione giusta* (Naples: Editoriale Scientifica, 2024); Paolo Brambilla, "Le comunità energetiche e la sagacia di Pirandello," *Rivista Giuridica AmbienteDiritto.it* 24, no. 1 (2024); Alessandra Coiante, "*Think Global, Act Local*. Le comunità energetiche rinnovabili e il principio di sussidiarietà (anche) sociale come perno della transizione energetica," *Rivista Giuridica AmbienteDiritto.it* 24, no. 1 (2024); Mario Renna, "Le comunità energetiche e l'autoconsumo collettivo di energia. Tutela della concorrenza e regolazione del mercato," *Nuove Leggi Civili Commentate* 1 (2024): 161 ff.

[18] The participation of a farm in Renewable Energy Communities (RECs/CERs) constitutes, in private-law terms, a form of organizational cooperation with patrimonial relevance, based on distributed self-consumption and local sharing of energy within the meaning of Articles 31–32 of Legislative Decree No. 199/2021 and the implementing rules adopted by ARERA and GSE. It is to be regarded as an activity instrumental to the operation of the agricultural undertaking and, as such, may fall within the scope of connected activities under Article 2135 of the Italian Civil Code, provided that participation in the REC serves to meet the farm's energy needs or, in any event, does not alter the prevalence of the agricultural function over the energy function. From this perspective, joining an REC can operate as a mechanism for valorizing the energy produced by the agrivoltaic plant without changing its nature as an activity subordinated to cultivation, on condition that the community's governance model ensures that the farmer plays an effective role in management and decision-making, and that the allocation of economic benefits and shared energy reflects the need to preserve the centrality of agricultural activity. At the contractual level, it is advisable to provide for obligations of information-sharing and cooperation between the farmer and the energy operator, as well as clauses ensuring that the modalities of participation in the REC are consistent with CAP conditionality requirements and with the incentive-related constraints applicable to advanced agrivoltaic plants.

EU-level conditionality and national support schemes, reducing the risk of *ex post* conflicts between contractual practice and public-law requirements.

In conclusion, the surface right and the other contractual instruments that can be used in agrivoltaic models are compatible with Article 2135 of the Italian Civil Code only to the extent that the contractual structure makes agronomic obligations effective and verifiable, and rigorously defines the conditions of opposability, the allocation of risks, and the guarantees for restoration. The integration between cultivation and plant operation is not achieved through declaratory formulas, but through a rigorous contractual architecture capable of making the organizational prevalence of agriculture measurable, verifiable, and guaranteed over time.

4. Agrivoltaics and the CAP: Civil-Law Aspects and Safeguard Clauses

4.1. AP Compatibility, Continuity of Cultivation and Contractual Safeguards

The relationship between agrivoltaic systems and the Common Agricultural Policy (CAP)[19] does not end with the *ex post* verification of the legality of payments; it requires an *ex ante* design of the contractual and organizational structure of the holding, capable of ensuring the compatibility of cultivation with the presence of the photovoltaic plant. Taking Italy as a case study, this section shows how civil-law tools are used at the national level to give concrete effect to CAP eligibility rules on "agricultural area" and "agricultural activity." At the EU level, this reflects the general CAP logic, whereby income support is conditional on maintaining "agricultural area" under "agricultural activity," even if other non-agricultural uses are present on the same land, provided that agriculture remains effective and verifiable.

The point of connection between the two planes – civil and administrative – is the continuity of effective agricultural use, a condition that the CAP takes as a prerequisite for eligibility for direct support and which, in

[19] The Common Agricultural Policy makes the granting of direct payments and area-based interventions conditional upon compliance with substantive obligations to maintain the agricultural use of the land and to carry out an effective agricultural activity. These obligations are now framed within the system of enhanced conditionality laid down in Articles 12 et seq. and Annex III of Regulation (EU) 2021/2115, as well as in the requirement of "active farmer" (Articles 4(1)(b) and 9 of the same Regulation). The legal order therefore does not exclude the coexistence of non-agricultural activities on the holding, provided that they do not undermine the continuity of cultivation and do not lead to the loss of the minimum eligibility requirements for receiving payments.

private-law terms, must be translated into specific, verifiable, and enforceable contractual obligations.

EU law (Regulation (EU) 2021/2115 and Regulation (EU) 2021/2116) and the national implementing rules require that the land maintain an effective and permanent agricultural use, in compliance with environmental conditionality rules[20] (GAEC[21] 1, 5, 6, 7 and 8) and with the obligations relating to the "active farmer" (Articles 4 and 9 of Regulation 2021/2115). Failure to comply with these requirements entails, under Article 83 of Regulation 2021/2116, the reduction or exclusion of direct payments. This does not, in the abstract, exclude the coexistence of non-agricultural activities on the holding;[22] coexistence is allowed provided that cultivation remains effective, prevalent, and verifiable.

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[20] CAP conditionality requires that agricultural activity be maintained in terms of continuity and accessibility, as laid down in the EU regulations (Regulation 2021/2115 and Regulation 2021/2116) and in the practice of the accredited Paying Agencies. This framework reflects a functional logic of protecting the effective agricultural use of land, in line with the environmental and climate objectives of the CAP and with the principle of environmental conditionality as an indispensable prerequisite for the sustainability of public support. In the agrivoltaic context, conditionality translates into the obligation to ensure that the land on which the plant is located maintains an effective and verifiable agricultural use, and that the presence of photovoltaic structures does not prevent compliance with GAECs 1, 5, 6, 7 and 8, relating respectively to the preservation of soil organic matter, minimum land management, crop rotation and the protection of habitats. Failure to comply with these standards leads, pursuant to Article 83 of Regulation 2021/2116, to proportional reductions or exclusions from direct payments, irrespective of the ownership or contractual structure of the holding.

[21] "Good Agricultural and Environmental Conditions" (GAEC, in Italian BCAA) refer to the set of minimum standards that a farm must comply with, failing which CAP payments may be reduced or excluded, as part of the so-called enhanced conditionality regime. These standards, defined within the framework of Regulations (EU) 2021/2115 and 2021/2116 and specified in the National Strategic Plan, concern, inter alia: soil cover and anti-erosion measures, crop rotations/alternations, buffer strips and set-back areas along water bodies, the protection of permanent grassland, the conservation of landscape features (hedgerows, tree lines, dry-stone walls, etc.), prohibitions/limitations (e.g. stubble burning, save for derogations), and specific provisions for wetland and peatland areas. Compliance is subject to administrative and satellite checks (IACS/AMS) and must be evidenced by appropriate planning and traceability of farming practices.

[22] The Common Agricultural Policy makes the granting of direct payments and area-based interventions conditional upon compliance with substantive obligations to maintain the agricultural use of the land and to carry out an effective agricultural activity. These obligations are now framed within the system of enhanced conditionality set out in Articles 12 et seq. and Annex III of Regulation (EU) 2021/2115, as well as in the "active farmer"

It follows that the CAP-compatibility of an agrivoltaic plant depends, in practice, on the civil-law framework governing the cohabitation of cultivation and the plant: the material availability of the land, the continuity of the cropping cycle, and the farmer's decision-making power must be legally guaranteed by the contract.

In this sense, MASAF Note No. 0336902 of 21 July 2025 clarifies that the effective availability of the land, the continuity of cultivation, and the farmer's decision-making power are essential conditions for eligibility for direct payments. The relevant criterion is not the mere "absence of permanent structures" on the land, but the objective possibility of cultivating it.[23] Private law is therefore called upon to provide a contractual structure that makes these conditions enforceable, preventing the withdrawal of aid on account of an unsuitable management setup of the holding.

The incentive scheme for advanced agrivoltaics (Ministerial Decree of 22 December 2023; GSE Director's Decree No. 149 of 19 June 2025) has introduced technical and agronomic parameters and monitoring systems, which, although designed for the granting of financial support, also operate as civil-law reference standards: the agronomic plan and monitoring systems form part of the content of contractual good faith and professional diligence under Articles 1176 and 1375 of the Italian Civil Code. The contract must therefore incorporate these parameters, not merely as documentary attachments, but as essential clauses of the contractual *synallagma*, aimed at guaranteeing the permanence of the agricultural vocation of the land.

From this perspective, the agronomic plan becomes the technical keystone of the relationship: it identifies crops, rotations, soil operations, and standards of mechanical compatibility with the plant, as well as indicators

requirement in Articles 4(1)(b) and 9 of that Regulation. The legal framework therefore does not exclude the coexistence of non-agricultural activities on the holding, provided that they do not undermine the continuity of cultivation and do not lead to the loss of the minimum eligibility requirements for receiving CAP payments.

23 Among the most recent administrative indications, particular mention should be made of MASAF Note No. 0336902 of 21 July 2025, which takes as decisive elements the farmer's effective availability of the land, the continuity of the cropping cycle and the farmer's decision-making power as conditions for eligibility for CAP direct payments in the presence of agrivoltaic installations. Cf. Francesco Tedioli, "PAC e agrivoltaico 'Tipo 2': inammissibilità ai pagamenti diretti?," *Rivista per la consulenza in agricoltura* 104 (2025): 13–28.

of effective agricultural use and verification procedures. Its binding effect makes it possible to translate CAP requirements into enforceable contractual obligations, thereby reducing the risk of discretionary assessments by controlling authorities.

The same logic applies to the availability of the land: the farm must retain the ability to access and operate on the land during the critical phases of the production cycle. The contract must therefore provide for access routes, time windows of exclusivity reserved for farming operations, and, where necessary, the suspension or rescheduling of energy-related activities. This is a clause of substance, not of style: it translates the public-law requirement of effectiveness into private-law terms, acting as a guarantee both for CAP verification purposes and for the day-to-day management of the holding.

The monitoring of continuity of cultivation may be entrusted to contractual monitoring tools (such as agronomic records, periodic reports, joint inspections, or checks entrusted to a third party), thereby providing documentary evidence of continuous cultivation, reducing the risk of administrative litigation, and strengthening the legal certainty of the relationship.

As regards the economic risk arising from the loss or reduction of aid, private law must govern its causal allocation. If the exclusion from direct payments results from plant configurations or management conduct attributable to the energy operator, the financial burden cannot be placed on the farmer. The contract must therefore provide for: (1) specific information obligations for audits and inspections; (2) a regime of liability and indemnification proportionate to the CAP-related loss suffered; (3) a change-in-law[24] or technical adaptation clause governing the

[24] In long-term contracts, the change-in-law clause operates as an instrument for the ex-ante allocation of regulatory risk, designed to govern the impact of subsequent legislative or regulatory changes on the economic and performance structure of the relationship. Italian practice in the field of infrastructure and public–private partnerships (see: ANAC Guidelines and case law on contractual rebalancing under Article 9 of Legislative Decree No. 50/2016, now Article 9 of Legislative Decree No. 36/2023) has consolidated the use of such clauses in order to preserve the sustainability of the contract in the event of regulatory shocks. In the agrivoltaic context, these clauses play a particularly significant role: not only as a safeguard for the bankability of the investment, but also as a mechanism for protecting the functional balance required by Article 2135 of the Italian Civil Code, by ensuring that any technical

impact of regulatory or technical supervening events without jeopardizing continuity of cultivation.

Ultimately, the compatibility between agrivoltaics and the CAP depends on an *ex ante*, contractual design that renders the multifunctionality commitments that are effective and verifiable: (1) structured and controllable agronomic obligations; (2) guarantees of access to and effective management of the land; (3) transparent allocation of risks and remedies. Only such an approach makes it possible to reconcile the objectives of the energy transition with the protection of agricultural income, ensuring that electricity production remains legally connected and subordinate to cultivation.

4.2. Maintaining "Active Farmer" Status and the Tax Classification of Energy Production

A further aspect, closely linked to CAP sustainability and to the logic of Article 2135 of the Italian Civil Code, concerns the maintenance of "active farmer" status in the presence of agrivoltaic plants.

From a tax perspective, the Italian Revenue Agency, in coordination with the Ministry of Economic Development (now the Ministry for the Environment and Energy Security), has clarified that agrivoltaic plants must comply with the same criteria already laid down for photovoltaics, in order to be regarded as a connected agricultural activity and thus benefit from the preferential tax regime (agricultural income and agricultural VAT). Similar tensions between tax classification, "active farmer" status, and on-farm renewable energy can be found in other EU Member States; although, they are addressed through different combinations of income-tax rules and CAP implementation choices.

Circular No. 32/E of 6 July 2009 identifies three alternative parameters under which energy production may be considered a connected activity, when annual output exceeds 260,000 kWh: (1) structural integration of the plant on existing farm buildings (greenhouses, barns, sheds, agricultural structures); (2) prevalence of agricultural turnover over that deriving from

or economic adjustments do not unduly impair continuity of cultivation and the agreed agronomic standards. The clause must therefore clarify the criteria, timing and effects of the adjustment, linking the economic burden to the party that derives the predominant benefit from the supervening change, and providing for graduated remedies where the adjustment proves impossible or excessively onerous.

the sale of electricity; (3) availability of at least 1 hectare of cultivated land for every 10 kW of installed capacity exceeding 200 kW, up to a maximum of 1 MW per farm. In Ruling No. 61/2025, the Revenue Agency specified that agrivoltaic plants installed on poles and not integrated into buildings cannot benefit from the first criterion (structural integration) and must, therefore, comply with one of the other two parameters. Both, however, present practical difficulties.

On the economic side, energy production from medium- or large-scale energy plants tends to significantly exceed agricultural turnover, making it difficult to demonstrate the prevalence of agricultural income. On the territorial side, the land-based criterion of "1 hectare for every 10 kW in excess" implies very large areas, often incompatible with the average size of Italian farms and with the yields of modern photovoltaic panels, which are now significantly higher than in 2009.

A quantitative check confirms the problem: one hectare of land in Central Italy, occupied by an advanced agrivoltaic plant, produces, on average, between 250,000 and 350,000 kWh per year. This value is at the limit of the threshold within which, for tax purposes, energy production can still be brought under the heading of agricultural income. The surplus must instead be classified as business income (*reddito d'impresa*) and may be determined on a lump-sum basis by applying the 25% profitability coefficient (Article 56-bis of the Italian Income Tax Code – TUIR), provided that agricultural turnover continues to prevail over energy-related turnover.

Losing such prevalence has significant consequences also for the CAP: an undertaking that can no longer qualify as an "active farmer" within the meaning of Article 9 of Regulation (EU) 2021/2115 risks losing eligibility for direct payments, with immediate repercussions at the civil law and contractual levels. Maintaining agricultural status therefore requires a substantive balance between the energy dimension and agricultural activity, to be pursued already at the design stage and in the drafting of contracts.

Where energy production is predominant in economic or organizational terms, the operator can no longer benefit from the preferential tax regime, nor invoke the notion of a connected activity under Article 2135 of the Italian Civil Code, with knock-on effects for the economic and legal viability of the entire agrivoltaic project.

5. Civil-Law Constraints, Liability, and Remedies in Agrivoltaic Contracts

The real test of the civil-law sustainability of agrivoltaic contractual relationships does not lie in the mere technical compliance of the plant, but in the ability of the contractual structure to withstand, over time, the constraints imposed by private law.

The first critical juncture concerns the "concrete cause" and the *meritevolezza*[25] of the contractual arrangement (Article 1322 of the Italian Civil Code): a contract which, in substance, downgrades cultivation to an ancillary or marginal function, turning the land into a production platform for energy, is incompatible with Article 2135 of the Italian Civil Code and with the economic and social function of the agricultural undertaking.

The prevalence of the agricultural component must emerge, in fact, not by mere declaration, and must result from the combination of contractual stipulations and their performance in accordance with good faith (Articles 1366 and 1375 of the Italian Civil Code).

The contractual architecture must therefore constitute a coherent system of primary obligations, including: (1) continuity of the cropping cycle; (2) effective availability of the land during critical operational windows; (3) regulation of powers of access and coordination between the farmer and the plant operator; (4) an undertaking to carry out agronomic restoration at the end of the plant's life. In the absence of such safeguards, the contract will be supplemented *ex lege*, pursuant to Article 1374 of the Civil Code (*eterointegrazione*), with a corresponding increase in interpretative uncertainty and in the risk of litigation.

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[25] In Italian contract law, the notion of *meritevolezza* (literally, the "worthiness" of the interests pursued) refers to the requirement, laid down in the second paragraph of Article 1322 of the Civil Code, that atypical contractual arrangements must pursue interests that are compatible with the legal order. It operates as a substantive limit to contractual freedom, allowing courts to refuse protection to schemes whose underlying economic or social function is inconsistent with constitutional principles, public policy or the structural safeguards of a given area of law. In the agrivoltaic context, the requirement of *meritevolezza* implies that contractual configurations which effectively displace agricultural activity and transform the land into a mere energy platform cannot be regarded as worthy of legal protection where this outcome conflicts with the statutory paradigm of Article 2135 of the Civil Code and with the recognized economic and social function of agricultural undertakings.

From the formal and publicity standpoint, the surface right must be created by notarial deed or authenticated private writing[26] and registered in the land registers (Article 2643(2) of the Civil Code), while respecting continuity of registrations (Article 2650 of the Italian Civil Code). A lack of publicity, or inconsistencies in the contractual chain, may result in the inopposability and priority conflicts (Article 2644 of the Italian Civil Code), with consequences for the validity of the *titoli di disponibilità* required by the GSE and for the bankability of the project. Where the landowner grants rights that are incompatible with pre-existing legal situations, this may amount to non-performance (Article 1218 of the Italian Civil Code) or to pre-contractual liability (Article 1337 of the Italian Civil Code).

The material delimitation of the object of the contract is of substantive importance: the footprints, appurtenances, and easements must be identified with precision, not only for cadastral purposes, but also as a guarantee of continuity of agricultural use. Imprecise delimitation may lead to overlapping rights of enjoyment and, as a consequence, to a distortion of the contractual balance.

As regards contractual performance, the clauses must ensure cooperation between the parties in such a way as to preserve the agricultural destination of the land. In particular, the contract must provide for: (1) obligations of non-interference and operational coordination during cropping phases; (2) procedures for scheduled access for the plant's personnel and machinery; (3) a system for periodic verification of compliance with the agronomic plan; (4) end-of-life restoration guarantees by means of first-demand bank or insurance guarantees.

The liability of the plant operator is not exhausted by the performance of the primary obligations but extends to harmful consequences resulting from abnormal use or alteration of the soil (Article 2043 of the Italian Civil Code) and, where dangerous activities are involved, to strict liability under Article 2050 of the Italian Civil Code. The farmer remains the holder of the *position of guarantee* associated with the custody of the land (Article 2051

[26] On this point, see Article 1350(1) of the Italian Civil Code, which requires a notarial deed (*atto pubblico*) for contracts transferring or creating rights in rem over immovable property, and Article 2643(2) of the Civil Code on registration. In practice, an authenticated private deed is also accepted for the purposes of both form and registration in the land registers.

of the Italian Civil Code) and is liable towards third parties for damage attributable to failures in supervision or maintenance, without prejudice to the right of recourse against the person actually responsible.

The issue of professional negligence is relevant for technical, agronomic, and legal advisers involved in drafting the contracts: failure to provide for adequate safeguard clauses or failure to point out structural incompatibilities may amount to a breach of the heightened standard of professional diligence (Article 1176(2) of the Italian Civil Code). In this framework, contractual remedies acquire the role of substantive safeguards, because they translate agronomic and regulatory constraints into enforceable legal consequences.

In addition to express termination clauses for breaches of agronomic obligations, it is advisable to provide for: (1) technical revision mechanisms (change-in-law or change-in-technology)[27] allowing the project to be adapted to supervening regulations without altering the overall contractual balance; (2) guarantee penalty clauses,[28] calibrated on any loss of CAP support or GSE incentives; (3) obligations of separate accounting, in order to distinguish agricultural income from energy-related income and to document the prevalence of agricultural activity.

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[27] The change-in-technology clause is borrowed from international contractual practice in energy and infrastructure projects. It provides for the possibility of adapting the plant or its operating methods to technical progress occurring during the performance of the contract, without altering the original economic function of the relationship. In the agrivoltaic context, such a clause allows components to be replaced or innovations to be introduced (for example, bifacial modules, solar-tracking systems, agronomic sensors or monitoring software), provided that agronomic compatibility is respected and that continuity of cultivation, agricultural prevalence and compliance with CAP conditions and GSE incentive standards are not impaired.

[28] Guarantee penalty clauses in agrivoltaic contracts serve as an economic safeguard against regulatory and management risk. They provide for the payment of a predetermined sum in the event of a breach of agronomic obligations or of conduct resulting in the total or partial loss of CAP contributions or GSE incentives. Their function is not merely punitive, but compensatory of the loss suffered by the agricultural undertaking, which must be able to maintain the economic sustainability of its farming activity even in the face of the energy operator's default. In this sense, the amount of the penalty must be proportionate to the foreseeable damage and calibrated to the extent of the lost benefit, pursuant to Article 1382 of the Italian Civil Code, and may also operate as a clause for the pre-liquidation of agronomic or environmental damage.

At a systemic level, agrivoltaic contracts must also incorporate the public-law obligations deriving from Ministerial Decree No. 436 of 22 December 2023 and from the GSE's Operational Rules: agronomic monitoring, periodic data reporting and traceability of cropping activities must be embedded in the contractual framework as essential ancillary obligations. Their omission does not simply lead to the possible forfeiture of incentives, but may also amount to non-performance in private-law terms, by reason of a breach of statutory obligations that supplement the contract.

In conclusion, private law provides the framework of stability and liability within which agrivoltaics can operate. The validity of the entire contractual set-up depends on the parties' ability to translate the principles of agricultural compatibility and sustainability into enforceable clauses, thereby preserving the function of the land and the *meritevolezza* of the contractual cause, in line with the paradigm of Article 2135 of the Italian Civil Code.

6. A European Comparative Glimpse of Contractual Frameworks for Agrivoltaics

Although the present analysis focuses on the Italian framework, the contractual challenges posed by agrivoltaics are not unique to Italy. Across the European Union, Member States are experimenting – often within their own civil-law traditions of property and rural leases – with long-term legal structures that must simultaneously secure access to land for agricultural use, deliver bankable rights for energy operators, and remain compatible with CAP-based income support schemes.

In France, the *Loi relative à l'accélération de la production d'énergies renouvelables* of 10 March 2023 (the so-called *Loi APER*) introduced, for the first time, a statutory definition of *installation agrivoltaïque* in Article L. 314–36 of the *Code de l'énergie*. An agrivoltaic installation is defined as a facility producing electricity from solar radiation, whose modules are located on agricultural land and "durably contribute to the installation, maintenance, or development of agricultural production" on that parcel. This general principle has been further specified by Decree No. 2024–318 of 8 April 2024, which sets out the regulatory framework for agrivoltaic projects and other photovoltaic installations on agricultural, natural, and forest land, including conditions on siting, monitoring, and sanctions. Subsequent

administrative guidance and industry summaries emphasize quantitative thresholds – such as limits on the percentage of agricultural land that may be covered by modules and minimum yield levels to be maintained compared with a reference plot – as well as reversibility of the installation and the requirement of financial guarantees to secure decommissioning and soil restoration. From a private-law perspective, these public-law constraints are translated into contractual clauses embedded in *baux ruraux* combined with separate agreements with the energy operator, or in long-term real rights (*droits réels* such as *droits de superficie* or *baux emphytéotiques*) that remain subordinated to the requirement, now explicit in French law, that agriculture must retain the primary role on the plot and that the solar installation must demonstrably provide agronomic services (protection against climatic risks, improvement of yields, animal welfare, etc.).

In Spain, where no specific statutory category of "agrivoltaic installation" has yet been introduced, contractual practice on agricultural land has so far relied on classic civil-law instruments: *arrendamientos rústicos* governed by Law 49/2003 of 26 November on rural leases (*Ley de Arrendamientos Rústicos*) and, for more capital-intensive projects, the *derecho de superficie* and related real rights structures. Law 49/2003 defines the rural lease as a contract whereby one or more rustic plots are temporarily ceded for agricultural, livestock, or forestry use in exchange for a price or rent, and imposes a minimum contractual duration of five years with automatic renewals in the absence of notice. In the context of ground-mounted solar or nascent agrivoltaic schemes, this has led to layered arrangements, in which the farmer remains *arrendatario rústico* with full rights to exploit the holding, while a separate surface right or easement is granted to the energy company for the installation of PV structures. Practice-oriented Spanish literature on PV projects underlines that the *derecho de superficie* is particularly attractive for financiers because it is a registrable, real right, opposable to third parties and mortgageable, yet ultimately temporary and reversible. At the same time, some regional guidance – most notably in Catalonia – has begun to require that agricultural activity and yields be maintained above certain thresholds, so that the priority of agricultural use must increasingly be reconstructed and guaranteed at the contractual level. The key challenge, however, is that – absent an agrivoltaic-specific regime – the parties must contractually reconstruct the priority of agricultural use

within instruments that were originally conceived either for pure farming leases or for urban and infrastructure developments; this raises delicate questions of qualification for tax purposes and for the implementation of the Spanish CAP Strategic Plan, when energy revenues become significant.

Germany offers a third model, where the public-law framework for agrivoltaics has advanced rapidly under the *Erneuerbare-Energien-Gesetz* (EEG) 2023 and the subsequent "solar package" reforms. The EEG 2023 introduced specific support categories for Agri-PV systems on arable land, permanent crops and grassland, subject to conditions intended to ensure continued agricultural use and to exclude sensitive areas, such as moorland and certain protected sites. Recent legal commentary and administrative guidance also stress minimum proportions of the area that must remain available for normal agricultural operations (often expressed as a high percentage of the surface that may not be structurally occupied by PV infrastructure), as well as technical standards for system height and configuration. On the contractual side, these requirements are typically implemented through long-term *Pachtverträge* (farm leases) and ancillary use agreements (*Nutzungsverträge*) that allocate rights and duties between landowners, farmers, and plant operators: the farmer must retain effective control over cropping decisions and access to the land, while the operator is granted defined rights to erect and maintain the PV structures, often backed by decommissioning guarantees. German transactional practice thus closely mirrors the Italian distinction between the "dual" and "integrated" models but is strongly influenced by the detailed Agri-PV categories and funding conditions laid down in the EEG and subordinate regulations.

Taken together, these examples suggest that, despite significant differences in legislative technique and market maturity, European legal systems are converging around a common private-law grammar for agrivoltaics. Long-term real rights (surface rights, emphyteusis-like arrangements, concession-type schemes) and leases remain the backbone of contractual structuring, but they are increasingly "shaped by their cause" to embed agronomic obligations, monitoring duties, and decommissioning guarantees drawn from public-law regimes and CAP-inspired conditionality. In this comparative perspective, the Italian approach – based on a functional reading of Article 2135 of the Civil Code, the "configured" surface right, and the centrality of an enforceable agronomic plan – appears less as an outlier

and more as one of several national laboratories where the civil-law instruments of rural property and long-term use rights are being re-engineered to accommodate the dual objective of land-based energy production and the preservation of agricultural activity.

7. Towards a Revision of Article 2135 of the Italian Civil Code?

Agrivoltaics is currently one of the most significant testing grounds for agricultural and civil law: it tests the capacity of Article 2135 of the Italian Civil Code to accommodate, within its boundaries, hybrid productive models combining agriculture, technology, and energy, in a context where EU climate and energy objectives require a rapid deployment of renewables without undermining food production and rural cohesion.

The challenge is not only technical or environmental, but also legal: to find a balance between the need to maintain the centrality of cultivation and the need to recognize energy production as a structural factor in the economic resilience of farm enterprises. From a broader European perspective, this balance mirrors the tension between the CAP's green architecture and the accelerated roll-out of renewable energy under the European Green Deal and the "Fit for 55" package.

Positive law, in its current configuration, continues to confine electricity production within the perimeter of "connected" activities, which are ancillary and instrumental. However, the most advanced agrivoltaic practices show that renewable energy generation, when fully integrated into the farm cycle and managed directly by the farmer, does not constitute an extraneous element but a stable component of the productive organization.

The jurist's task is therefore twofold: in the short term, to ensure the civil-law compatibility of legal relationships through contractual arrangements capable of making agronomic obligations enforceable; and, in the medium term, to foster a systematic reflection on the need to update Article 2135 of the Italian Civil Code.

Perhaps the time has come to recognize, with clear limits and adequate legal safeguards, that energy production from renewable sources may constitute a primary activity of the farmer, where it is intrinsically integrated into the organization of the farm and subject to strict regulatory conditions capable of preventing the "energeticization" of the agricultural undertaking. Such a reclassification would also need to be coordinated with EU

State aid rules and CAP eligibility criteria, in order to avoid distortions of competition and inconsistencies between national civil law and EU funding conditions.

In this direction, a possible reform should be based on a number of key criteria: (1) functional and territorial integration: plants located and configured in harmony with the cropping cycle, with verifiable agronomic compatibility (height, layout, access, soil management); (2) substantive agricultural prevalence: measurable indicators (agronomic KPIs, material availability of the land, protected operational windows) and separate accounting, so as to avoid energy becoming economically dominant; (3) agricultural governance: entrepreneurial control firmly vested in the agricultural operator, including through an agricultural company, with a prohibition on purely vehicular structures lacking organizational substance; (4) a "net agro-environmental benefit" clause: a legal obligation to achieve a measurable improvement of soil quality, biodiversity, and water resources compared with a verifiable baseline, backed by standardized remedies (corrective measures, penalties, suspensions); (5) guaranteed end-of-life: a legally mandated obligation to dismantle the plant and restore agronomic conditions, backed by an autonomous, callable guarantee or segregated escrow, as an essential and not merely ancillary element; (6) anti-avoidance safeguards: a prohibition on transactions that shift the economic center of gravity towards energy; consistency with CAP conditionality and the applicable incentive schemes.

Such an evolution would not "denature" the agricultural undertaking, but would broaden its economic and social function: energy would become a primary productive resource, on condition that it remains anchored to the land, to cultivation, and to environmental stewardship.

The legislative drafting technique could follow two paths: (1) the creation of a new category of primary agricultural activity based on "integrated and conditional" renewable energy; or (2) the strengthening of the legal regime of connected activities through statutory presumptions and binding thresholds. In either case, the centrality of agriculture must remain the non-derogable core of the system.

The objective, more than lexical, is cultural: to move from a criterion of "non-impediment" to one of "improvement," making improvement itself a legal rule, rather than a mere aspiration. Only under this approach

can the energy transition become a truly agricultural practice, capable of enduring over time and anchored not only in technical design, but also in a coherent body of EU and national law.

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Gloss on the Judgment of the Court of Justice of the European Union of November 9, 2023, *Staatsanwaltschaft Aachen*, C-819/21

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Abstract: The subject of the considerations undertaken in the paper is the judgment of the CJEU of 9 November 2023, *Staatsanwaltschaft Aachen*, C-819/21. The judgment under comment was issued in response to preliminary questions submitted by the Landgericht Aachen (Aachen Regional Court). It primarily addresses the possibility of recognizing and enforcing a custodial sentence by a court of the executing State if there are grounds to believe that the conditions in the issuing State – at the time of the judgment to be enforced or subsequent judgments concerning it – are inconsistent with the fundamental right to a fair trial, in particular because the judicial system in the Member State in question has been found to be incompatible with the rule of law and has a specific, adverse effect on the convicted person in the proceedings. The CJEU ruled that the application of an exceptional ground for refusal not expressly regulated in FD 2008/909 is possible after conducting the two-stage test developed in the CJEU's case law in relation to the procedure for enforcing an EAW. This position of the CJEU does not deserve uncritical approval, although it is broadly consistent with the Court's approach to the significance of abstract and concrete deficiencies relating to fundamental rights, including those affecting the right to a fair trial, in relation to the principle of mutual recognition of judgments and

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the exceptional possibility of derogation from that principle. The solution developed in the judgment of 9 November 2023 fails to take into account the fundamental differences between the EAW procedure and that set out in FD 2008/909 and raises doubts as to its functionality.

1. Thesis

Article 3(4) and Article 8 of Council Framework Decision 2008/909/JHA of 27 November on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009,[1] must be interpreted as meaning that the competent authority of the executing Member State may refuse to recognize and enforce a judgment imposing a criminal sentence delivered by a court of another Member State where it has evidence of systemic or generalized deficiencies in that Member State regarding the right to a fair trial, in particular in so far as concerns the independence of the courts, and where there are substantial grounds for believing that those deficiencies may have had a tangible influence on the criminal proceedings brought against the person concerned. It is for the competent authority of the executing Member State to assess the situation existing in the issuing Member State up until the date of the criminal conviction in respect of which recognition and enforcement are requested and, if necessary, up until the date of the new conviction which resulted in the revocation of the suspension initially attached to the sentence in respect of which enforcement is requested.

2. Selected Factual and Legal Grounds

The CJEU's ruling, which constitutes the sentence of the judgment of 9 November 2023, in case C-819/21,[2] was issued in response to preliminary

[1] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition in judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L327, 5 December 2008); thereafter referred to as "FD 2008/909."

[2] CJEU Judgment of 9 November 2023, *Staatsanwaltschaft Aachen*, Case C-819/21, ECLI:EU:C:2023:841.

questions submitted by the Aachen Regional Court (Landgericht Aachen). It resolves the issue of the possibility of refusing to execute a penalty of imprisonment within the system of mutual recognition standardized in FD 2008/909, irrespective of the negative grounds provided for in the aforementioned legal act, after conducting a two-stage test, the findings of which lead to the conclusion that executing the judgment would result in a real risk of violating the right to a fair trial within the meaning of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (CFR).[3] According to the ruling cited, the court of the executing State has the authority to conduct the test and, consequently, refuse to recognize the judgment and enforce the prison sentence. The examination of potential irregularities should refer to the situation existing prior to the issuance of the convicting judgment, which is to be executed under FD 2008/909, as well as to the issuance of a new conviction, which resulted in the order of a previously conditionally suspended prison sentence.

The problem outlined above arose in relation to M.D., a Polish citizen residing in Germany, in connection with a Polish court's application for recognition and enforcement of the remaining six-month prison sentence, initially imposed with a conditional suspension of its execution. It should be noted that, in the present case, after ordering the execution of the conditionally suspended prison sentence, a European Arrest Warrant (EAW) was issued first.[4] However, the German authorities refused to execute it, finding a negative ground under Article 4(6) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States,[5] owing to the requested person's habitual residence in Germany and his objection to being transferred to Poland. Subsequently, given the failure to take into account the Polish EAW and seeking an alternative to the ineffective cooperation measure, the Regional Court in Szczecin requested the execution of M.D.'s prison sentence in Germany using the legal instrument provided for in FD 2008/909. During the examination, M.D. claimed that he had not received a summons

3 OJ C326, 26 October 2012, p. 391–407; thereafter referred to as "CFR." Opinion of Advocate General Emiliou delivered on 4 May 2023, ECLI:EU:C:2023:386, para I.3.

4 European Arrest Warrant – thereafter referred to as "EAW."

5 OJ L190, 18 July 2002, p. 34–51; thereafter referred to as "FD 2002/584."

to the trial in Poland, following which the judgment sought to be recognized and enforced was issued. He also stated that the charges against him were unfounded. However, the Aachen Public Prosecutor's Office (Staatsanwaltschaft Aachen), considering that all the conditions for executing the sentence of imprisonment in Germany against M.D. had been met, requested that the Landgericht Aachen enforce the judgment.

In considering the recognition and enforcement of a custodial sentence, the Landgericht Aachen noted the existence of systemic or generalized deficiencies in the Polish judicial system, both at the time of the judgment imposing a conditionally suspended custodial sentence and at the time the Polish Court (Szczecin-Prawobrzeże District Court) issued the decision to order the enforcement of the previously conditionally suspended sentence. The Landgericht Aachen considered whether it was for the court of the executing State – in considering a takeover of a penalty of imprisonment under FD 2008/909 – to determine general, systemic judicial deficiencies and a violation of the individual's fundamental right to a fair trial, or whether the CJEU should make relevant findings in this regard. Furthermore, the German court was unsure how to proceed in a situation where the rule of law in the issuing state was satisfactory at the time the judgments for which enforcement was sought were issued, but subsequently changed unfavorably and existed at the time the executing State ruled on the recognition and enforcement of the judgment.

Taking into account the issues raised above, the Landgericht Aachen submitted four specific questions to the CJEU.

First, it requested a ruling on whether a court of the executing state may, on the basis of Article 3(4) FD 2008/909, in conjunction with the second paragraph of Article 47 CFR, refuse to recognize a judgment and thus enforce the prison sentence imposed therein in accordance with Article 8 FD 2008/909, if there are grounds for believing that conditions prevailing in the issuing State – at the time of the adoption of the judgment to be enforced or subsequent decisions relating to it – are incompatible with the fundamental right to a fair trial on the grounds that the judicial system in the issuing state is not consistent with the rule of law as defined in Article 2 of the Treaty on European Union.[6]

[6] OJ C202, 7 June 2016, p. 1–388; thereafter referred to as "TEU."

Secondly, the German court asked whether a court of the executing Member State to which a request for the transfer of a prison sentence has been made may refuse, on the basis of Article 3(4) FD 2008/909, in conjunction with the principle of the rule of law enshrined in Article 2 TEU, to recognize and enforce the judgment of another Member State, in accordance with Article 8 FD 2008/909, if there are indications that the judicial system of the issuing State is not consistent with the rule of law set out in Article 2 TEU.

The third question was formulated by the Landgericht Aachen, depending on an affirmative response of the CJEU to the first question. It addressed the issue of whether, before refusing to recognize and execute a judgment under Article 3(4) FD 2008/909, in conjunction with the second paragraph of Article 47 CFR, due to general deficiencies found in the issuing state, resulting in the incompatibility of the judicial system in that state with the rule of law, it is necessary to examine whether these consequences, contrary to the fundamental right to a fair trial, had an adverse effect on the convicted person in the proceedings concerned.

The final and fourth question concerned a situation in which the CJEU would answer negatively regarding the competence of a court of the executing State to determine the compatibility of the relations in the issuing State with the fundamental right to a fair trial, given the incompatibility of the judicial system in that State with the rule of law, and acknowledged that the CJEU had the authority in this regard. It referred to a potential decision by the CJEU on whether, on the date of the conviction of a suspended custodial sentence and that of the decision ordering the execution of the suspended sentence, the judicial system in the issuing State was and is currently compliant with the rule of law.

As emphasized in the reasoning of the judgment of 9 November 2023, the CJEU – in accordance with recital 5 FD 2008/909 – stated that FD 2008/909 constitutes an expression of closer judicial cooperation in criminal matters regarding the recognition and enforcement of judgments imposing custodial sentences, and the purpose of the cooperation measure standardized therein is to facilitate the social reintegration of the convicted person. According to Article 8 FD 2008/909, mutual recognition of such judgments is therefore the principle, and their recognition and enforcement may be refused if the grounds for refusal set out in Article 9 FD 2008/909 are

met. However, it remained problematic whether, in the field of cooperation under FD 2008/909, the additional limitations established before the CJEU, in particular in the judgment of 5 April 2016,[7] 25 July 2018,[8] and 22 February 2022[9] with regard to EAW, could be applied by means of the two-stage test established in CJEU case law. The CJEU answered this issue in the affirmative, deriving from Article 3(4) FD 2008/909, read in conjunction with recital 13 FD 2008/909 that a transfer request may be refused if it is established that there have been systemic or generalized violations of the right to a fair trial in the issuing state and that, in the specific case, the deficiencies identified at the first stage could have affected the functioning of the courts in the issuing state competent to prosecute the person concerned, taking into account the situation of that person, the nature of the offence for which he or she was convicted and the factual circumstances in which the conviction was handed down, the enforcement of which is sought, as well as any additional information provided by the Member State. It is therefore necessary to find that, with respect to a specific person in a given proceeding, there are substantial grounds for believing that there was an actual risk of a breach of the right to a fair trial within the meaning of the second paragraph of Article 47 CFR.

Against this background, the CJEU argues that the assessment of systemic and generalized deficiencies in the judicial system in the issuing State should be made in relation to the situation in that State on the date of the conviction sought for recognition and enforcement under FD 2008/909, taking into account the development of that situation up to that day. In this context, the authority of the executing state should analyze the specific impact of the generalized deficiencies on the criminal proceedings pending against the individual. An appropriate individualized assessment is to be conducted in relation to the evidence presented by the person for whom the transfer of the custodial sentence is sought.

However, the CJEU stated that the two-stage test does not apply to the situation in the issuing state at the time the executing authority rules on

7 CJEU Judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

8 CJEU Judgment of 25 July 2018, *LM*, Case C-216/18 PPU, ECLI:EU:C:2018:586.

9 CJEU Judgment of 22 February 2022, *X and Y v. Openbaar Ministerie*, Case C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100.

a request for recognition of a judgment and enforcement of a custodial sentence. Likewise, it found that there is no need to examine any potential irregularities at the time of the decision by the authority of the issuing State to order the execution of a conditionally suspended penalty of imprisonment, where the basis for the decision to execute the sentence was the issuance of a new conviction. In such a case, the authority of the executing state assesses the situation in the issuing state up to the date of the new conviction, as a factor resulting in the ordering of a suspended custodial sentence, allowing the application for recognition and enforcement of that sentence.[10]

3. Commentary on the CJEU Judgment

As can be seen from the background outlined above, the most important issue was that of resolving doubts as to the possibility of refusing to recognize and execute a judgment due to deficiencies in the sphere of fundamental rights, including the right to a fair trial, in particular in the context of judicial independence, which – given the existence of serious reasons for doing so – may influence the determination of their specific impact on the proceedings pending against the person concerned.[11] The approach that allows for the application of an exceptional ground for refusing to recognize and execute a custodial sentence requested to be taken over by the issuing State, not only within the procedure for reviewing an EAW by the authorities of the executing state, but also within the scope of the measure regulated in FD 2008/909, derogating from the general principle of mutual recognition, should be approved. Thus, although the rule is that a refusal may occur only in the event of circumstances falling within the grounds of Article 9 FD 2008/909, this does not exclude the possibility of a refusal decision as an exception dictated by the risk of violating fundamental rights, in particular the right to a fair trial.

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10 Cf. CJEU Judgment of 23 March 2023, *Minister for Justice and Equality (Levée du sursis)*, Joined Cases C-514/21 LU and C-515/21 PH, ECLI:EU:C:2023:235.

11 Cf. Barbara Augustyniak, "Komentarz do art. 611(tk) Kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz aktualizowany*, vol. 2, ed. Dariusz Świecki (LEX/el., 2025), thesis 3; Tomasz Partyk, "Systemowe problemy sądownictwa to nie konkretne wyroki. Omówienie wyroku TS z dnia 9 listopada 2023 r., C-819/21 (Staatsanwaltschaft Aachen)" (LEX/el., 2023).

The argumentation for the position presented can be found in Article 3(4) FD 2008/909, since that provision contains for a general clause on the protection of human rights, stating that FD 2008/909 does not infringe the obligation to respect fundamental rights and fundamental legal principles set out in Article 6 TEU. In accordance with recital 13 of FD 2008/909, which is a development in this respect, cooperation using the measure serving to transfer a penalty of imprisonment for execution in another Member State must be carried out in compliance with the principles set out in the CFR.[12] Incidentally, it is worth noting that the premise of a violation of fundamental rights finds *expressis verbis* expression in Article 611tk § 1 point 5 of the Polish Code of Criminal Procedure (CCP).[13] Within the framework of mandatory grounds for refusal to take over a prison sentence for execution, despite the lack of an appropriate prototype in the grounds under Article 9(1) FD 2008/909, the one relating to the violation of human and citizen's rights and freedoms was taken into account. This premise is defined in a manner analogous to that resulting in the refusal to execute an EAW, regulated in Article 607p § 1 point 5 of the CCP. It is rightly highlighted in the doctrine of Polish criminal procedural law that the possibility of violating rights and freedoms must be assessed in terms of the effects of taking over the sentence to be executed in Poland, and in this context the problem of compliance of the conditions of serving a prison sentence with fundamental rights is perceived as a potential obstacle, linking this issue, in particular, with the overcrowding of prisons.[14]

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12 Stefano Montaldo, "Framework Decision 2008/909/JHA and Fundamental Rights Concerns: In Search of Appropriate Remedies," in *The Transfer of Prisoners in the European Union. Challenges and Prospects in the Implementation of Framework Decision 2008/909/JHA*, ed. Stefano Montaldo (Hague: Eleven International Publishing; G. Giappichelli Editore, 2000), 47.

13 Act of 6 June 1997, consolidated text: Journal of Laws 2025, item 46, as amended; thereafter referred to as "CCP."

14 See in this context: Augustyniak, "Komentarz do art. 611(tk) Kodeksu postępowania karnego," thesis 8; Adam Górski, "Komentarz do art. 611tk Kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warsaw: C.H. Beck; Legalis, 2025), thesis 3; Marek Smarzewski, "Przejęcie i przekazanie kary pozbawienia wolności do wykonania na podstawie decyzji ramowej Rady 2008/909/WSiSW," in *System Prawa Karnego Procesowego*, vol. 18, *Współpraca międzynarodowa w sprawach karnych*, ed. Małgorzata Wąsek-Wiaderek (Warsaw: Wolters Kluwer Polska, 2025), 1116–17.

Against this background, the main objection to the judgment under comment can be raised: the CJEU's incorrectly and imprecisely applied of the mechanism for refusing to execute an EAW based on a violation of the fundamental right to a fair trial, following the two-stage test established in case law, to the level of cooperation in the recognition and enforcement of a custodial sentence. It should be noted that when deciding whether to accept a transfer of a penalty of imprisonment for enforcement, the assessment by the authority of the executing State refers to its taking over, not its transfer. Therefore, the subject of the assessment is the existence of grounds for refusal on the part of the executing State, not the issuing State.

Even before the CJEU delivered its judgment of 9 November 2023, the doctrine highlighted the issue, correctly noting the problem with applying the two-stage test formulated in *Aranyosi and Căldăraru* due to the fundamental difference between the EAW procedure and that laid down in FD 2008/909. A comparison of the two cooperation measures reveals a reversal of the roles of the issuing and executing authorities. In the case of a transfer of a prison sentence, the authority of the issuing State, requesting recognition and enforcement of the judgment, often also materially transfers the person concerned.[15] However, with regard to EAW, the transfer remains the responsibility of the executing authority. In turn, in the context of the transfer of sentenced persons under FD 2008/909, the concept of the executing authority is linked to the enforcement of the sentence of imprisonment in the Member State to which the transfer was made.[16] From the perspective of FD 2008/909, the subject of the assessment is therefore whether the exceptional ground for refusal exists in the executing Member

[15] In many cases, the person subject to the transfer of a custodial sentence under FD 2008/909 may also reside in the executing Member State where the issuing authority seeks recognition and enforcement of the judgment. It should be recalled that this is precisely the configuration that occurred in the factual circumstances of the case under analysis.

[16] Stefano Montaldo, "Intersection Among EU Judicial Cooperation Instruments and the Quest for an Advanced and Consistent European Judicial Space: The Case of the Transfer and Surrender of Convicts in the EU," *New Journal of European Criminal Law* 13, no. 3 (2022): 264–65.

State, and whether the fundamental rights of the person concerned will be violated in that State and not in the issuing Member State.[17]

Of course, it can be argued that the potential refusal adopted in the judgment under comment concerns the execution of a sentence of imprisonment and thus refers to a conviction that was handed down in the issuing State. Its creation based on the application of FD 2008/909 is a response to the doubts raised by the Landgericht Aachen as to whether the Polish judicial system guarantees the right to a fair trial within the meaning of Article 47 CFR.[18] In this context – given the subject of reference – one should in particular seek a general pattern in the CJEU judgment of 22 February 2022,[19] which states that a judicial authority executing an EAW that has evidence confirming the existence of systemic or general irregularities concerning the independence of the judiciary of the state issuing the EAW, especially with regard to the procedure for appointing judges, may refuse to execute an EAW issued, among others, for the purposes of executing a custodial sentence when it finds that, in the circumstances of a given case, there are serious and verified grounds for believing – taking into account, in particular, the information provided by the requested person concerning the composition of the panel of judges who heard his or her criminal case or relating to any other circumstance relevant to the assessment of the independence or impartiality of that panel – that the person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law, as set out in second paragraph of Article 47 CFR, has been violated. Assessing the judgment of 9 November 2023, from this perspective, it appears that the CJEU formulates the exceptional ground for refusal based on a violation of the right to a fair trial – interpreted on the basis of FD 2008/909 and the case law concerning the EAW – in an overly general manner. The CJEU failed to take into account that the EAW and the instrument for transferring a prison sentence differ fundamentally in

17 Alessandro Rosanò, "*Staatsanwaltschaft Aachen*, ovvero la tutela dei diritti fondamentali sulla base del test *LM* nelle procedure di transferimento interstatale di detenuti," *European Papers* 8, no. 3 (2023): 1117–18.

18 Ruairi O'Neill, "Defending Judicial Independence in Court: A Subjective Right to Independence in EU Law," *Liverpool Law Review* 46 (2025): 71.

19 CJEU Judgment of 22 February 2022, *X and Y v. Openbaar Ministerie*, Case C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100.

their impact on the individual in a situation where the executing authority refuses to recognize and enforce a judgment. In the case of the EAW the situation is rather clear as the requested person is residing in the territory of the executing Member State. However, the situation may be different when applying for the transfer of a prison sentence. The person concerned by the cooperation measure may reside in the State where enforcement is requested. Nevertheless, it is often the case that such a person is still in the territory of the issuing State. This means that refusing to take over a custodial sentence based on the exceptional ground for refusal conceived by the CJEU could, paradoxically, have a negative impact on the individual, who would then, by definition, ultimately serve a penalty of imprisonment in the issuing state, where systemic and specific deficiencies in the protection of fundamental rights have been identified. Therefore, it cannot be ruled out that applying the solution proposed by the CJEU in the commented judgment may result in failure to achieve the primary objective of FD 2008/909, which is to facilitate the rehabilitation and social reintegration of the convicted person. In a situation similar to the one in the case under review, where the execution of an EAW was refused and then the possibility of refusal arose under FD 2008/909, there is a risk of impunity for the individual concerned.[20]

Regardless of the polemical comments raised, it is true that, by its judgment of 9 November 2023, the CJEU established a two-stage test applicable to the decision of an authority of the executing State regarding the transfer of a custodial sentence. Thus, it is necessary to establish a reference point for examining general, systemic, and specific deficiencies. The FD 2008/909 mechanism concerns the recognition and enforcement of a custodial sentence. With this in mind, in the context of this cooperation measure and assuming the possibility of applying a two-stage test, the consequence was that the assessment of the existence of general, systemic, and specific deficiencies in the issuing State should occur, in particular, at the time of the conviction imposing the custodial sentence to be

[20] See: Jannemieke Ouwerkerk, "The Missing Link in CJEU *Staatsanwaltschaft Aachen* (C-891/21) and the Argument for Humanitarian Considerations in Prison Transfer Proceedings," *European Journal of Crime, Criminal Law and Criminal Justice* 32 (2024): 186–90, https://doi.org/10.1163/15718174-32030001.

transferred. It seems fair to conclude that this is a universal approach that can generally be applied to transfers under FD 2008/909, even in cases where an absolute custodial sentence is imposed. However, it should be recalled that in the factual circumstances of the case under analysis, in the proceedings in the issuing state, the prison sentence was imposed with conditional suspension and only then was its execution ordered owing to the fact that the person concerned had committed a similar intentional offence during the probation period.

In such a situation, according to Article 75 § 1 of the Polish Criminal Code,[21] there was a mandatory requirement to order the execution of the sentence. Therefore, considering the possibility of taking over a sentence of imprisonment (previously conditionally suspended), the CJEU found that the special ground for refusing to recognize a judgment and enforce the sentence may also apply if general and specific irregularities are identified in a given case until the day of the new conviction, the issuance of which resulted in the existence of a mandatory basis for ordering the execution of the previously suspended custodial sentence. In such a situation, the executing authority does not examine the situation in the requesting State at the time of deciding on the order for the sentence to be carried out. The mandatory nature of managing the execution of a sentence in the event of a new conviction for a similar intentional offence leaves no choice to the competent authority of the issuing state deciding on the enforcement of the penalty of imprisonment. In fact, it is obliged to order the enforcement of the suspended sentence.[22] The subject of the assessment, in the context of the possible application of the exceptional ground for refusal of recognition and enforcement, is the situation prevailing in the issuing State until the date of the new conviction, the issuance of which resulted in the mandatory order for the execution of the custodial sentence to be taken over in the executing State. However, the point of reference for conducting

[21] Act of 6 June 1997, consolidated text: Journal of Laws 2025, item 383; thereafter referred to as "CC."

[22] As a side note, it is worth noting that the application of the special ground of refusal of recognition and enforcement could apply to situations in which general, systemic, and specific deficiencies in the right to a fair trial occurred in the context of a decision based on the finding of the existence of optional grounds for ordering the execution of a suspended custodial sentence, as defined in Article 75 § 2 and § 3 CC.

the two-step test is not the moment when the authority of the issuing state decides to request the recognition and enforcement of the custodial sentence in another Member State. Similarly, it is not justified to carry out a two-step test of the existence of a risk of violation of fundamental rights in the issuing state at the time when the authority of the executing State takes a decision on the request for recognition and enforcement of a custodial sentence imposed in that issuing State.

In summary, it seems reasonable to conclude that the judgment under comment recognized the possibility of applying an exceptional ground for refusal, which, in its form – developed for the purposes of the procedure for deciding on the execution of an EAW – does not fit the specific nature of the cooperation measure used to transfer the execution of a prison sentence. The reason for creating a special ground for refusal unregulated in FD 2008/909 is the finding of systemic and generalized irregularities concerning the right to a fair trial, particularly those relating to the functioning of the judicial system and respect for the rule of law, which may have a specific impact on the convicted person. In fact, the existence of a specific ground for refusal can be considered primarily in the event of participation in the issuance of a judgment imposing a prison sentence or a judgment resulting in the ordering of the execution of a suspended prison sentence in the issuing State by a person appointed to the office of judge at the request of the National Council of the Judiciary, established pursuant to the provisions of the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts.[23] Identifying and applying this ground when the person sentenced to imprisonment is in the executing State will most likely lead to impunity. In turn, if the person concerned remains in the issuing State, refusal can paradoxically lead to the execution of the prison sentence in a State where general, systemic and specific violations of the fundamental right to a fair trial have been identified.

[23] Journal of Laws 2018, item 3, as amended.

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Conference Report: "COVID-19 in Central and Eastern Europe (CEE): Lessons Learned and Pandemic Preparedness – Five Years Later", Lublin Conference Centre, October 2–3, 2025

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On October 2–3, 2025, the Faculty of Law, Canon Law and Administration of the John Paul II Catholic University of Lublin (Poland) and the Institute of Social Sciences in Belgrade (Serbia), in cooperation with the Institute for Self-Government Development, organized an international scientific conference titled "COVID-19 in Central and Eastern Europe (CEE): Lessons Learned and Pandemic Preparedness – Five Years Later." The event was held under the Honorary Patronage of the Marshal of the Lublin Voivodeship and the Patronage of the European Association of Health Law.

The conference was conducted in a hybrid format, fully in-person and virtually, reflecting both the accessibility goals and the digital transformation accelerated by the pandemic. Scholars, legal practitioners, and policymakers from 13 European countries gathered to discuss how COVID-19 experience reshaped governance, law, ethics, and public health preparedness in Central and Eastern Europe (CEE).

The event took place only a few months after the adoption of WHO Pandemic Agreement (May 2025) – an international legal instrument aiming to strengthen global prevention, preparedness, and response to future health emergencies. Against this background, the discussions addressed two guiding questions:

(1) What lessons have been learned from national responses to the COVID-19 pandemic, and how have these influenced preparedness for future emergencies?

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(2) How are CEE states responding to the new global health governance framework introduced by the Pandemic Treaty?

The conference opened with welcoming remarks from hosts and organizers, emphasizing the need for continued comparative legal research in public health emergencies. Marta Sjenicic and Katarzyna Miaskowska-Daszkiewicz spoke on behalf of the organizers, emphasizing that the event was a follow-up to the conference held in spring 2021, during which participants discussed the public law instruments being introduced in response to the COVID-19 pandemic, which was raging around the world.

The first keynote speech was delivered by Leszek Bosek (University of Warsaw, Poland), titled "Anti-Epidemic Emergency Regimes and Professional Standards." Professor Bosek analyzed the constitutional and administrative dimensions of emergency regimes enacted during COVID-19, highlighting tensions between public necessity and professional autonomy in healthcare. He argued that the pandemic had exposed structural weaknesses in national legal frameworks, particularly in defining proportional restrictions and maintaining medical accountability under emergency powers.

The first session provided a comparative perspective on national legal and administrative responses. Manuela Sîrbu (Titu Maiorescu University, Romania) opened this panel with "Operationalizing One Health in Europe after COVID-19: Legal and Governance Perspectives with Reflections on Romania's Emerging Engagement." She argued that the COVID-19 pandemic exposed the lack of integrated governance linking human, animal, and environmental health, and calls for embedding the One Health approach – endorsed by the WHO Pandemic Treaty and the EU Scientific Advice Mechanism – into clear, enforceable legal frameworks, with Romania urged to reform its legislation and institutions to operationalize this model effectively.

Larisa Patru (University of Medicine and Pharmacy of Craiova, Romania) followed with "Strengthening Health Emergency Legislation: Lessons from Romania's COVID-19 Response," showing how Romania's 2024 Regulation on the Management of Emergency Situations Generated by Epidemics institutionalizes intersectoral crisis governance, aligns national law with the 2025 WHO Pandemic Agreement, and provides a model for reconciling rapid emergency response with the protection of fundamental rights.

Next speaker, Ivan Demchenko (Bogomolets National Medical University, Kyiv, Ukraine), discussed "National Responses to COVID-19 Pandemic Consequences and Preparedness for Future Emergencies: The Case of Ukraine." His presentation offered insight into crisis governance during wartime conditions. Demchenko analyzed Ukraine's dual challenge of managing the post-COVID-19 recovery amid ongoing war, highlighting reforms such as the 2022 Law "On Public Health" and digitalization efforts that improved governance and preparedness, while noting persistent institutional and strategic gaps in emergency planning and coordination.

Athina Sophocleous (Alexander College, Cyprus) contributed "From Emergency to Opportunity: Cyprus and the COVID-19 Wake-Up Call," underlining that Cyprus's experience with COVID-19 revealed deep structural weaknesses and the absence of a constitutional right to health, concluding that enshrining this right in the Constitution is essential to guarantee universal healthcare, accountability, and resilience in future public health crises.

Finally, Marko Milenković (Institute of Social Sciences, Serbia) presented "Emergency Governance and Constitutional Oversight in Serbia – Reflections Five Years After the COVID-19 Outbreak." He evaluated the balance between efficiency and constitutional safeguards, concluding that constitutional review mechanisms must be strengthened for future crises. Milenković reviewed Serbia's 2020 COVID-19 state of emergency, arguing that governance by decree, weak institutional oversight, and limited judicial review exposed enduring vulnerabilities in constitutional accountability, and concludes that Serbia's experience highlights the urgent need for transparent, rights-based frameworks to balance health security with democratic resilience in future crises.

The second panel focused on systemic reforms in public health governance. Martin Rusnak and Viera Rusnakova (Trnava University, Slovakia) presented a systematic review of "The Impact of the COVID-19 Pandemic on Primary Care in Central Europe and the Western Balkans." They presented a systematic review of primary healthcare disruptions in Central Europe and the Western Balkans during COVID-19, identified shortages, staff stress, and weak monitoring as major challenges, and concluded that strengthening primary care through better communication, streamlined

administration, and secured resources is essential for future health crisis preparedness.

Katarzyna Małgieś (War Studies University, Warsaw, Poland) discussed "The Use of the Armed Forces in Public Health Emergency Situations," analyzing the military's role as a public health actor and the associated accountability concerns. She reviewed the post-pandemic legal framework authorizing the Polish Armed Forces to support civil authorities in managing public health emergencies, concluding that their discretionary involvement – formalized through statutory amendments after COVID-19 – enhances crisis response capacity without undermining the military's institutional structure.

Ranko Sovilj and Aleksandar Vukadinović (Institute of Social Sciences, Serbia) examined "Legal and Ethical Challenges in the Reform of the Serbian Healthcare System in the Post-COVID Era." They argued that underfunding, inequitable access, and growing private sector involvement threaten health equity, and concluding that timely legal and policy reforms are crucial to ensure sustainable, affordable, and just healthcare for all citizens.

Sanja Zlatanović and Andjelija Stevanović (Institute of Social Sciences, Serbia) explored "Resilience in Labour Regulation: Evaluating Serbia's Post-Pandemic OSH Reform." Presenters assessed Serbia's post-pandemic labor law reforms, concluding that despite the enaction of Law no. 35/2023 on Occupational Safety and Health of the Republic of Serbia, the legal framework remains unprepared for future health crises due to its failure to integrate psychosocial risk management, mental health protection, and comprehensive emergency labor governance mechanisms essential for true regulatory resilience.

Concluding the panel, Anna Jacek (University of Rzeszów, Poland) presented "State Sanitary Inspection in the System of Prevention and Monitoring of Infectious Diseases and Epidemics. Evaluation of the Current Legal Status," highlighting administrative coordination challenges within Poland's public health system. Jacek evaluated the Polish State Sanitary Inspection's legal competences in preventing and controlling infectious diseases, concluding that while its administrative powers partially ensure sanitary and epidemiological security, legislative ambiguities, insufficient resources, and lack of clearly defined oversight functions limit its effectiveness in epidemic prevention and response.

The third session addressed digital transformation and its implications for governance and rights. Nina Gumzej (University of Zagreb, Croatia) opened with "AI-Driven Disinformation and the WHO Pandemic Agreement: Legal and Governance Challenges in a Post-COVID World." She argued that while the WHO Pandemic Agreement marks progress in global health law, it lacks enforceable mechanisms to combat AI-driven disinformation, leaving a regulatory gap that threatens effective pandemic response, and proposes integrating EU-style binding digital regulations with stronger global partnerships to ensure the authenticity and rapid dissemination of trustworthy health information

Judge Dragana Marčetić (Court of Appeal in Belgrade, Serbia) followed with "Remote Judging – Pros and Cons," reflecting on judicial practice during lockdowns. She examined the rapid adoption of remote judging during the COVID-19 pandemic, outlining its advantages in health protection, efficiency, and access to justice, while warning that it also threatens core judicial principles such as immediacy, publicity, and witness integrity, thus requiring robust legal and procedural safeguards to maintain fairness and transparency.

Claudia Severi (University of Modena and Reggio Emilia, Italy) discussed "Digitalisation of Education after the Pandemic: Opportunities, Risks, and the Role of Rights." She analyzed the post-pandemic digital transformation of education, arguing that while digital tools and AI offer inclusivity and innovation, they also deepen inequalities and pose ethical and legal risks, and concludes that a human-centred, rights-based framework is essential to balance technological progress with equality, dignity, and the holistic development of learners.

Next speakers, Petra Stanojević and Sofija Nikolić Popadić (Institute of Social Sciences, Serbia) presented "The Impact of the COVID-19 Pandemic on Digitalization and eHealth in Serbia." They analyzed how the COVID-19 pandemic accelerated Serbia's healthcare digitalization, leading to new eHealth services, telemedicine, and legal reforms such as the Digitalisation Programme in the Health System 2022–2026, while also identifying persistent challenges, including limited digital literacy, uneven implementation, and concerns over data privacy and system trust.

Finally, Sławomir Fundowicz (The John Paul II Catholic University of Lublin, Poland) examined "Regulating Sport in Times of Crisis: Legal

Responses to COVID-19," addressing the interplay between public health and sporting autonomy.

Second day of the conference began with the second keynote, delivered by Claudia Seitz (Private University in the Principality of Liechtenstein), titled "The WHO Pandemic Agreement 2025 – Union Law in the Context of Global Health Crises." Professor Seitz provided an in-depth analysis of how EU law interacts with the new global framework, noting that coherence between national, European, and international mechanisms will be essential for future pandemic preparedness. According to Professor Seitz, the WHO Pandemic Agreement should be understood not only as a health policy measure, but also as a building block of global crisis resilience with relevance to EU and constitutional law. This presents the Union with an opportunity to combine regulatory coherence, fundamental rights standards and international solidarity in a sustainable regulatory framework. The incorporation of an international legal instrument such as the WHO pandemic agreement into Union law could thus become a touchstone for the interaction of national, European and global legislation in a changing international legal order.

Fourth panel of the conference: Public Health, Vaccination and Bioethics examined bioethical and legal dilemmas. Dimitra Lempesi (Aristotle University of Thessaloniki, Greece) addressed "Critical Medicines Act," discussing the EU's strategy for secure supply chains. Lempesi presented the concept of the Critical Medicines Act, its basic principles, and assessed its effectiveness in terms of building the resilience of EU Member States' markets to medicine shortages during the next public health crisis.

Andra Mažrimaitė and Vilius Lapis (Mykolas Romeris University, Lithuania) presented "COVID-19 Vaccines and Compensation for Damages: The Lithuanian Legal Framework in a Global Context." The panellists presented the actions taken by the Lithuanian authorities at the beginning of the pandemic with a view to introducing protective vaccinations against COVID-19, illustrating the impact of the no-fault liability system for vaccine damage on the level of public confidence in vaccinations.

Katarzyna Miaskowska-Daszkiewicz (The John Paul II Catholic University of Lublin, Poland) analyzed "The Challenge of Mandatory COVID-19 Vaccinations: Between Public Health Protection and Human Rights Concerns." She compared the result of the proportionality test of restricting the

right to decide about one's health by the possible introduction of mandatory COVID-19 vaccinations at the beginning of the pandemic – in particular, taking into account the conditional marketing authorization procedure for these vaccinations in the EU – to the current conditions, recognizing that the obligation to undergo these vaccinations would be unacceptable from the perspective of the lack of urgent social need, as mentioned by the ECtHR in its 2021 Vavricka judgment.

Nino Lipartia (Grigol Robakidze University, Georgia) explored "Legal and Ethical Aspects of Medical Triage: A Comprehensive Analysis of German Federal Constitutional Court Jurisprudence and European Human Rights Framework." Lipartia analyzed legal and ethical dimensions of medical triage during the COVID-19 pandemic through German constitutional and European human rights law, concluding that the German Federal Constitutional Court's 2021 ruling established a binding duty for states to adopt clear, non-discriminatory triage regulations protecting persons with disabilities and ensuring equal dignity and access to care in future health crises.

The panel concluded with Jerzy Bednarski, Jakub Pawlikowski, and Paweł Piwowarczyk (Medical University of Lublin, Poland) presenting "Prioritisation of Patients in Access to ECMO during the COVID-19 Pandemic – Ethical, Legal and Clinical Aspects."

This lecture was devoted to presenting the legal, ethical and medical issues involved in reconstructing criteria to facilitate decision-making on prioritizing access to ECMO for patients during a pandemic.

The fifth panel of the conference was devoted to the security and future challenges. Marta Sjenicic and Hajrija Mujovic (Institute of Social Sciences, Serbia) began with "COVID-19 Aftereffect: New Health Needs and Public Health," focusing on emerging post-pandemic health demands. Presenters highlighted that the COVID-19 pandemic exposed serious gaps in Serbia's disease surveillance and emergency preparedness, arguing that strengthening International Health Regulations (IHR) core capacities through coordinated national action plans and initiatives such as the 2023–2027 "EU for a More Responsive Healthcare System" project is essential to build a resilient, internationally aligned public health system capable of preventing and responding to future crises.

Maciej Banach (The John Paul II Catholic University of Lublin, Poland) followed with the question "Could We Have Been More Effective in

the Diagnosis and Treatment of Covid-19?." Based on statistical data, Professor Banach presented various scenarios for diagnostic and therapeutic outcomes during the COVID-19 pandemic, pointing to the need to register and monitor patients with symptoms of so-called long COVID, which would allow for better satisfaction of their health needs, as well as the collection of data on the effects of COVID-19.

Silvia Capíková, Ján Mikas, and Mária Nováková (Comenius University and Slovak Medical University, Slovakia) discussed "Legal Protection of Healthcare Workers against Violence – Lessons from the Pandemic." They argued that the COVID-19 pandemic exposed widespread violence and harassment against healthcare workers, revealing inadequate legal protection and state accountability, and concludes that national emergency laws and preparedness plans must explicitly codify safeguards, establish monitoring and redress mechanisms, and align with the WHO Pandemic Treaty to ensure the safety, dignity, and rights of healthcare personnel during future crises.

Sebastian Czechowicz (University of Łódź, Poland) presented "How Should Public Health Be Defined to Ensure It Receives Proper Legal Protection?." He argued that defining "public health" with conceptual precision is essential for its effective legal protection, especially in criminal law, since the COVID-19 pandemic exposed the inadequacy of *ad hoc* regulations and inconsistent interpretations; it calls for an interdisciplinary legal–medical framework to clearly delineate this collective good and strengthen its protection against future global health threats.

Igor Milinković (University of Banja Luka, Bosnia and Herzegovina) closed with "What's Law Got to Do with It? Implementing a One Health Approach in National Legal Frameworks after COVID-19." Professor Milinković explored how the One Health approach – linking human, animal, and environmental health – has become a core element of post-COVID-19 global health governance, analyzing its integration into the WHO Pandemic Agreement, EU law, and selected national legal systems, and concluding that embedding One Health principles in domestic legislation is essential for coherent, treaty-based preparedness and response to future health threats.

The final panel took the form of a discussion on "The Role of Local Authorities in Combating the Pandemic."

Speakers – including hospital administrators and representatives of public authorities during COVID-19 – highlighted the crucial role of local authorities in implementing public health measures, ensuring communication with citizens, and coordinating local preparedness strategies. The panel discussion was moderated by Małgorzata Ganczar (The John Paul II Catholic University of Lublin, Poland).

The two-day conference demonstrated the intellectual maturity of CEE legal scholarship in addressing global health governance. Across all sessions, participants underlined the need for legal clarity, cross-sectoral cooperation, and ethical reflection.

Several cross-cutting themes emerged:

- the necessity of harmonizing emergency powers with constitutional guarantees;
- the integration of digitalization and AI regulation into health governance;
- and the role of One Health as a holistic paradigm bridging environmental, animal, and human health.

The discussions revealed both national diversity and shared regional experiences. The Lublin conference provided not only a comprehensive reflection on the legal and ethical legacies of COVID-19 but also a forward-looking roadmap for pandemic preparedness in Europe and beyond, in particular in view of the entry into force of the WHO Pandemic Agreement.