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# SELLING (EU) CITIZENSHIP OR EXERCISING SOVEREIGNTY? RETHINKING THE EU LAW LIMITS ON NATIONAL COMPETENCE IN GRANTING MEMBER STATE NATIONALITY AFTER *COMMISSION v MALTA*

ALINA TRYFONIDOU*

*This article analyses the Court of Justice's judgment in Commission v Malta, the first case to assess whether investor citizenship schemes comply with EU law. These schemes, which grant nationality in exchange for financial investment, have been widely criticised due to risks such as money laundering, tax evasion, and corruption. The key legal question, however, was whether granting Member State nationality – and thus Union citizenship – through such transactional mechanisms is compatible with EU law. The article supports the Court's conclusion that Malta's scheme is unlawful insofar as it confers Union citizenship, but questions whether granting Member State nationality alone should fall within the same prohibition. It also argues that the Court's reasoning lacks sufficient doctrinal clarity and depth, especially given the constitutional importance of the issue. Despite these concerns, the judgment represents a significant development, confirming that Member State competence over nationality is subject to EU law constraints and challenging the traditional view that such matters lie largely beyond EU scrutiny. At the same time, important questions remain unresolved, including whether the prohibition extends to nationality itself and whether the ruling has retroactive effects on previously granted citizenships.*

## 1 INTRODUCTION

In its recent judgment in *Commission v Malta*,[1] the European Court of Justice (ECJ) was called upon to assess, for the first time, the compatibility with European Union (EU) law of so-called 'golden passport' schemes – investor citizenship programmes under which EU Member States confer their nationality in exchange for financial investment. The case arises against the background of longstanding concerns over such schemes, which have often been criticised for facilitating money laundering and tax evasion, enabling corruption, and granting privileged access to citizenship for wealthy individuals.[2] Yet, in the EU context, these arguments – while politically, legally, and ethically significant – are not the central point of contention. The core issue before the Court was whether the practice of 'selling' Member State nationality, and by extension EU citizenship, is in breach of EU law.

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[1] Case C-181/23 *Commission* v *Malta* EU:C:2025:283.

[2] Transparency International and Global Witness, 'European Getaway: Inside the Murkey World of Golden Visas' (2018) <https://images.transparencycdn.org/images/2018_report_GoldenVisas_English.pdf> accessed 6 August 2025; Financial Action Task Force, 'Misuse of Citizenship and Residency by Investment Programmes – A Joint FATF/OECD Report' (2023) <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Misuse-CBI-RBI-Programmes.pdf.coredownload.pdf> accessed 6 August 2025.

Although I agree with the outcome of the case – which rules that the grant of Union citizenship through investor citizenship programmes is contrary to EU law – I find the Court's reasoning wanting. Given the constitutional significance of the matter and its political sensitivity, one would have expected a more sophisticated and robust legal analysis, as well as greater clarity regarding the implications of the judgment. Instead, the judgment lacks the depth and doctrinal clarity that a case of this magnitude would have deserved.[3]

This shortcoming is particularly notable in light of the ruling's broader constitutional implications. *Commission v Malta* marks the first time the Court has applied – in a concrete case – the principle that Member State competence to determine who qualifies as a national is subject to EU law constraints. While earlier judgments had acknowledged in abstract terms that this competence must be exercised with 'due regard to EU law',[4] this is the first instance in which the Court found that a Member State's conferral of nationality violated EU law. The ruling, therefore, constitutes a clear and express departure from the longstanding assumption that nationality conferral lies outside the scope of EU scrutiny.

To unpack the significance of the case, the article begins with a brief overview of 'golden passport' schemes and the growing concern they have sparked among EU institutions, which since 2014 have closely monitored these programmes, issued critical reports, and warned of their potential implications for Union citizenship. It then turns to a detailed analysis of the *Commission v Malta* case. Finally, it offers a critical assessment of the Court's reasoning and explores its broader implications, not only for the future of investor citizenship programmes within the EU, but also, more broadly, for the evolving balance between national sovereignty and EU oversight in the field of nationality.

## 2 'GOLDEN PASSPORT' SCHEMES: AN OVERVIEW

The conferral of nationality falls within the competence of States, which retain sovereign authority to determine the conditions under which individuals may acquire it. This principle is recognised under both international law and EU law, which acknowledge that the determination of nationality lies primarily within the domain of the States.[5] Nationality can be acquired in two ways: by birth or through naturalisation. With regard to acquisition at birth, States generally follow the *jus sanguinis* principle (citizenship by descent), the *jus soli* principle (citizenship by birth on the territory), or a combination of both.[6] For naturalisation, States typically require a period of lawful and effective residence, often combined with additional integration requirements such as proficiency in the national language, knowledge of the country's society and culture, and evidence of social ties.[7] These requirements reflect

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[3] Basheska and Kochenov even argue that the ruling completely lacks a legal basis and is 'not guided by any principle' – see Elena Basheska and Dimitry V Kochenov, 'A Successful Attempt to Hijack the Union's Liberal Promise: *Commission v Malta*' (2026) 2 Nordic Journal of European law (forthcoming).

[4] See, inter alia, Case C-369/90 *Micheletti v Delegación del Gobierno en Cantabria* EU:C:1992:295 para 10; Case C-192/99 *Kaur* EU:C:2001:106 para 19; Case C-135/06 *Rottmann* EU:C:2010:104 para 39; Case C-221/17 *Tjebbes* EU:C:2019:189 para 30.

[5] See, inter alia, *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PJIC Series B No 4 24; *Micheletti* (n 4) para 10. As regards EU law, this is also reflected in Declaration 2 attached to the Maastricht Treaty, which will be mentioned subsequently in the main text.

[6] Rainer Bauböck, 'The Three Levels of Citizenship within the European Union' (2014) 15(5) German Law Journal 751, 753-754.

[7] For a full overview of types of acquisition (and loss) of citizenship across the world see the Global Database

the common underlying assumption that nationality should be reserved for individuals who have established a 'genuine link' to the State and its society.[8]

Most States also provide for alternative pathways to their nationality, designed to attract individuals who can make exceptional contributions to the State, including in the economic sphere. The strategic use of nationality and residence rights as instruments of State policy is far from a novel phenomenon: since antiquity, States have sought to attract wealth, talent, and influence by offering privileged access to citizenship or residence to the world's moneyed elite.[9] In modern times, these practices have evolved into more formalised investor residence and citizenship programmes, commonly referred to – respectively – as 'golden residence' and 'golden passport' schemes.[10] Through investor residence programmes, individuals obtain residence rights in return for significant financial investments. While such schemes do not directly confer nationality, they facilitate lawful residence which may, over time, enable individuals to meet the residence requirements for ordinary naturalisation.[11] Investor citizenship programmes, on the other hand, grant nationality directly in exchange for financial contributions, without imposing the usual residence, language, or integration requirements. It is these latter schemes, therefore, that have generated particular controversy, as they allow for the acquisition of nationality without any meaningful connection to the conferring State or its society. Such schemes create a new 'model' of citizenship, which is based on the economic capacity of the candidates and their willingness to invest in the country.[12]

Within the EU, investor citizenship programmes have attracted sustained criticism and increasing political and legal scrutiny.[13] Beyond the several objections associated with the commodification of citizenship – as well as concerns regarding corruption, tax evasion, and money laundering, the circumvention of traditional naturalisation requirements, and the creation of privileged access for the wealthy – the existence of 'golden passport' schemes, raises specific legal questions under EU law. As nationality of a Member State automatically confers EU citizenship and the full spectrum of rights attached thereto, the 'sale' of Member

on Modes of Acquisition of Citizenship <https://globalcit.eu/databases/globalcit-citizenship-law-dataset/> accessed 6 August 2025.

[8] For an article analysing the different types of citizen-State links that are found in EU Member State rules for citizenship acquisition and loss see Ashley Mantha-Hollands and Jelena Džankić, 'Ties that bind and unbind: charting the boundaries of European Union citizenship' (2023) 49(9) Journal of Ethnic and Migration Studies 2091.

[9] See Jelena Džankić, *The Global Market for Investor Citizenship* (Palgrave Macmillan 2019) ch 2; Maarten Prak, 'Citizenship for Sale in Pre-modern Europe' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales* (Cambridge University Press 2023).

[10] In the EU context, one could add a third type of scheme – the 'golden visa' scheme – which provides the right to reside in the territory of an EU Member State *together* with the grant of a visa to travel in the Schengen area.

[11] For an explanation of investor residence programmes and the concerns that may be raised by them, see European Commission, 'Investor Citizenship and Residence Schemes in the European Union' COM(2019) 12 final 6-9 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52019DC0012> accessed 6 August 2025.

[12] Athanasia Andriopoulou, 'The "ius pecuniae": The Prize of Citizenship' (BRIDGE Network Working Paper 4, June 2020) 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633777> accessed 6 August 2025.

[13] For an explanation of the various investor citizenship and investor residence programmes in the EU see Jelena Džankić, 'Investment-based citizenship and residence programmes in the EU' (EUI Working Paper RSCAS 2015/08, Robert Schuman Centre for Advanced Studies 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558064#> accessed 6 August 2025.

State nationality effectively permits the purchase of EU citizenship itself, thereby implicating the application of EU law.[14] EU citizenship is a particularly valuable asset, granting its holders free and largely unrestricted access to the entire Union, for both economic and personal purposes.[15] Therefore, realistically, the ultra-rich availing themselves of such programmes are often not primarily interested in acquiring the nationality of the particular Member State concerned, but rather seek access to EU citizenship. As Spiro has put it, 'Those who buy Maltese citizenship are less likely to settle in Valletta (one wonders how many could even name the capital city before – or perhaps even after – they have made the purchase) than in Berlin or Paris or Milan'.[16]

The political controversy surrounding golden passport schemes at EU level has persisted for over a decade. In her speech at the Plenary Session debate of the European Parliament on 'EU citizenship for sale', on 15 January 2014, the then Vice-President of the European Commission and EU Justice Commissioner, Viviane Reding, noted that 'Citizenship must not be up for sale!' and that 'One cannot put a price tag on it'.[17] The following day, in its Resolution which resulted from that Plenary Session, the European Parliament voiced concerns that 'golden passport' schemes risked undermining the very concept of Union citizenship. It therefore urged the Commission to assess the various 'golden passport' schemes in Member States, in the light of European values and the letter and spirit of EU legislation and practice.[18] In response, the Commission initiated a dialogue with the Member States operating investor citizenship schemes, aiming to monitor more closely the design and implementation of such programmes.[19] Malta – among the first, if not the first, to come under the Commission's scrutiny – amended its legislation in 2014 to introduce a formal requirement of 'proof of residence' for a period of twelve months prior to the grant of citizenship.[20] In practice, however, this condition had been loosely interpreted, as applicants were deemed to satisfy the requirement merely by obtaining a residence permit, without the need to demonstrate actual physical presence in Malta.[21] While the Commission initially welcomed these legislative changes,[22] it continued to monitor the operation of

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[14] Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 11) 1.
[15] This is the basis of the 'free rider' argument against 'golden passport' schemes in the EU – see Sergio Carrera, 'How much does EU citizenship cost? The Maltese citizenship-for-sale affair: A breakthrough for sincere cooperation in citizenship of the Union?' (CEPS Paper in Liberty and Security in Europe No 64, April 2014) 18, 26 <https://www.ceps.eu/ceps-publications/how-much-does-eu-citizenship-cost-maltese-citizenship-sale-affair-breakthrough-sincere/> accessed 6 August 2025. See, also, Magni-Berton Raul, 'Citizenship for Those who Invest into the Future of the State is not Wrong, the Price is the Problem' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer Open 2018) 22. For a rejection of this argument see Matjaž Tratnik and Petra Weingerl, 'State Autonomy versus 'Genuine Links': Nottebohm and Beyond' in Dimitry Kochenov, Madeleine Sumption, and Martijn van den Brink (eds), *Investment Migration in Europe and the World* (Hart 2025) 138.
[16] Peter J Spiro, 'Cash-for-Passports and the End of Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer Open 2018).
[17] Viviane Reding, 'Citizenship must not be up for sale' (Speech, European Parliamentary Plenary Session debate on 'EU Citizenship for Sale', Strasbourg, 15 January 2014) SPEECH/14/18 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_14_18> accessed 6 August 2025.
[18] European Parliament Resolution of 16 January 2014 on EU citizenship for sale [2013/2995(RSP)].
[19] European Commission, 'On progress towards effective EU citizenship 2013-2016' COM(2017) 32 final 4.
[20] Maltese Legal Notice 47 of 2014, reg 7(12) <https://legislation.mt/eli/ln/2014/47/eng/pdf> accessed 6 August 2025.
[21] 'Golden Passports' (The Documentary, *BBC*, 21 June 2018) <https://www.bbc.co.uk/programmes/p06bn4dv>accessed 6 August 2025.
[22] See, for instance, European Commission and Maltese authorities, 'Joint Press Statement on Malta's

the Maltese scheme and – more broadly – of 'golden passport' schemes across the EU.

In its 2017 EU Citizenship Report, the Commission announced its intention to prepare a dedicated report on Member State investor citizenship programmes, outlining the actions it had undertaken in this area and analysing the relevant legal frameworks and practices across the Member States.[23] To support this effort, it commissioned a Study on the legislation and practice governing citizenship and residence by investment schemes in all relevant Member States.[24] Drawing on, inter alia, the findings of this Study, the Commission published its Report on investor citizenship and residence schemes in 2019.[25] The Report identified a range of serious risks posed by such schemes, not only to individual Member States, but to the Union as a whole. These included threats related to security, money laundering, corruption, tax evasion, and the circumvention of EU legal norms; risks which, according to the Commission, were exacerbated by significant deficiencies in transparency, oversight, and inter-state cooperation.[26] The Commission expressed particular concern that the measures adopted by Member States to mitigate these risks were often inadequate and undertook to closely monitor the implementation of these schemes, with a view to addressing both the governance failings and potential violations of EU law.[27] Similar concerns had been raised by the European Parliament in a May 2018 debate, during which the risks associated with investor citizenship and residence schemes were discussed.[28]

In her first State of the Union address in September 2020, Commission President Ursula von der Leyen explicitly condemned 'golden passport' schemes, declaring that 'European values are not for sale' and linking these programmes to broader rule of law concerns.[29] It therefore came as no surprise that, just one month later, the Commission launched infringement proceedings against Malta and Cyprus, which were operating 'golden

Individual Investor Programme (IIP)' (29 January 2014) <https://ec.europa.eu/commission/presscorner/detail/en/memo_14_70> accessed 6 August 2025.

[23] European Commission, 'EU Citizenship Report 2017: Strengthening Citizens' Rights in a Union of Democratic Change' (2017) <https://ec.europa.eu/newsroom/just/items/51132> accessed 6 August 2025.

[24] Milieu Law and Policy Consulting, 'Factual Analysis of Member States' Investor Schemes granting citizenship or residence to third-country nationals investing in the said Member State' (2018) <https://commission.europa.eu/document/download/e5ae8330-646b-49b5-9651-16aef54f21d9_en?filename=deliverable_d_final_30.10.18.pdf> accessed 6 August 2025.

[25] Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 11).

[26] For a critical view of the Report see Dimitry Kochenov, 'Investor Citizenship and Residence: the EU Commission's Incompetent Case for Blood and Soil' (*Verfassungsblog*, 23 January 2019) <https://verfassungsblog.de/investor-citizenship-and-residence-the-eu-commissions-incompetent-case-for-blood-and-soil/> accessed 6 August 2025.

[27] Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 11). In 2021, a Study was published by the European Parliamentary Research Service which sought to explore potential avenues through which the EU could address the problems arising from 'golden passport' and 'golden residence' schemes – see Meenakshi Fernandes, Cecilia Navarra, David de Groot, and María García Muñoz, 'Avenues for EU action on citizenship and residence by investment schemes' (European Union 2021) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)694217> accessed 6 August 2025.

[28] European Parliament, 'EU values and the proliferation of corruption and crime through Golden Visas (topical debate)' (Verbatim report of proceedings, Strasbourg, 31 May 2018) <https://www.europarl.europa.eu/doceo/document/CRE-8-2018-05-30-ITM-019_EN.html?redirect> accessed 6 August 2025.

[29] Ursula von der Leyen, 'State of the Union Address at the European Parliament Plenary' (Speech, Brussels, 16 September 2020) SPEECH/20/1655 <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655> accessed 6 August 2025. Emphasis added.

passport' schemes at the time,[30] ultimately referring Malta – the last Member State operating such a scheme – to the Court of Justice in 2023, thus giving rise to the case under examination in this article.[31]

The Russian invasion of Ukraine in February 2022, further heightened political and institutional pressure on Member States to terminate such schemes, particularly with respect to applicants from Russia and Belarus. In a Resolution issued one month after the invasion, the European Parliament denounced 'golden passport' schemes as ethically, legally, and economically objectionable and as posing serious security threats, including risks of money laundering and corruption.[32] In that Resolution, it also suggested that investor citizenship schemes 'should be phased out fully across the Member States' and requested the Commission 'to submit, before the end of its current mandate, a proposal for an act to that end that could be based on Article 21(2), Article 79(2), Article 114 or Article 352 TFEU'.[33] The Commission likewise intensified its calls for Member States to discontinue these programmes, and to strictly regulate 'golden residence' programmes.[34]

## 3 *COMMISSION V MALTA*

At the heart of *Commission v Malta* lies a fundamental question: can a Member State offer access to EU citizenship – and all the rights that come with it – in exchange for a payment? This infringement action, brought by the European Commission under Article 258 TFEU, challenged Malta's 'Individual Investor Programme', allowing the naturalisation of foreign nationals on the basis of predetermined payments and investments, irrespective of any genuine connection with the country. According to the Commission, by establishing and operating this scheme, Malta had breached its obligations under Article 20 TFEU[35] – on

[30] European Commission, 'Investor citizenship schemes: European Commission opens infringements against Cyprus and Malta for "selling" EU citizenship' (Press release, Brussels, 20 October 2020) IP/20/1925 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925> accessed 6 August 2025.

[31] The infringement action against Cyprus was dropped after Cyprus abolished its 'golden passport' scheme in 2020. The Commission had also been in contact with Bulgaria, expressing its concerns regarding the investor citizenship programme operated by it; however, on 24 March 2022, the Bulgarian Parliament approved an amendment to the Bulgarian Citizenship Act, which ended the investor citizenship scheme, and thus the Commission did not proceed with initiating an infringement action.

[32] European Parliament resolution of 9 March 2022 with proposals to the Commission on citizenship and residence by investment schemes [2021/2026(INL)] [2022] OJ C347/97.

[33] ibid para 18.

[34] European Commission, 'Commission Recommendation of 28 March 2022 on immediate steps in the context of the Russian invasion of Ukraine in relation to investor citizenship schemes and investor residence schemes' C(2022) 2028 final.

[35] Article 20 TFEU provides:
'1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
(a) the right to move and reside freely within the territory of the Member States;
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in

the status and substance of Union citizenship – and Article 4(3) TEU, which enshrines the duty of sincere cooperation.[36]

Before turning to the Advocate General Opinion and the Court's reasoning, it is important to understand the national framework that gave rise to the dispute.

### 3.1 THE MALTESE 'GOLDEN PASSPORTS' SCHEME

The Maltese Citizenship Act governs the acquisition, deprivation, and renunciation of Maltese citizenship.[37] Under the Act, there are two main routes through which an individual may acquire citizenship. The first is through ordinary naturalisation, which requires, inter alia, that the applicant has resided in Malta continuously for the twelve months immediately preceding the application, and for a cumulative period of at least four years during the six years prior to that.[38] The second route is naturalisation on the basis of 'exceptional services to the Republic of Malta or to humanity', or where the individual's naturalisation is deemed to be of 'exceptional interest to the Republic of Malta'. This latter category includes cases involving exceptional services rendered through direct investment, namely, the Maltese 'Individual Investor Programme'.[39]

Malta first introduced an investor citizenship programme in 2014, following amendments to the Maltese Citizenship Act which paved the way for this,[40] and the introduction of Regulations in 2014, which established the scheme.[41] Although – as seen in the previous section – the Commission had voiced concerns about the scheme from its inception, it was only in October 2020 that it issued a letter of formal notice to Malta (and Cyprus), stating that the Maltese 'Individual Investor Programme' (as it then stood), was incompatible with EU citizenship and the principle of sincere cooperation.[42] The Commission, in particular, considered that the granting of Member State nationality – and thereby EU citizenship – in exchange for a pre-determined payment or investment and without a genuine link with the Member States concerned, was not compatible with the principle of sincere cooperation enshrined in Article 4(3) TFEU, and undermined the integrity of the status of EU citizenship provided for in Article 20 TFEU.

Following the above letter, Malta adopted a revised framework, through the Maltese

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the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'.

[36] Article 4(3) TEU provides: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

[37] Maltese Citizenship Act, CAP 188 <https://legislation.mt/eli/cap/188/eng/pdf> accessed 6 August 2025.

[38] ibid Article 10(1).

[39] ibid Article 10(9).

[40] Malta, Act No XV of 2013, Government Gazette No 19,166 (15 November 2013) <https://legislation.mt/eli/act/2013/15/eng/pdf> accessed 6 August 2025.

[41] Malta, Individual Investor Programme of the Republic of Malta Regulations 2014, Subsidiary Legislation 188.03, Government Gazette No 19,205 (4 February 2014) <https://legislation.mt/eli/ln/2014/47/eng/pdf> accessed 6 August 2025.

[42] Commission, 'Investor citizenship schemes: European Commission opens infringements against Cyprus and Malta for "selling" EU citizenship' (n 30).

Citizenship (Amendment No. 2) Act of 2020[43] and the Granting of Citizenship for Exceptional Services Regulations of 2020.[44] The 2020 Regulations contained detailed rules governing the processing of applications for naturalisation on the basis of exceptional services by merit and 'by direct investment in the economic and social development in the Republic of Malta'. In particular, the Regulations provided that foreign investors could apply to be naturalised if they fulfilled, or undertook to fulfil, the following conditions:[45]

a) contributed either EUR 600,000 or EUR 750,000 to the Maltese Government, of which EUR 10,000 was to be paid as a non-refundable deposit upon submission of the residence application or the eligibility form, with the balance payable after approval of the application for naturalisation,
b) acquired and held residential immovable property in Malta with a minimum value of EUR 700,000, or leased such a property for a minimum of five years at a minimum annual rent of EUR 16,000,
c) made a donation of at least EUR 10,000 to a registered philanthropic, cultural, sporting, scientific, animal welfare, or artistic non-governmental organisation or society, or to another entity approved by the authorities,
d) had been resident in Malta for a period of 36 months (where the contribution amounted to EUR 600,000), which could be reduced to a minimum of 12 months if the applicant made an exceptional direct investment of no less than EUR 750,000, and
e) had passed an eligibility assessment by the authorities and had been authorised to submit an application for naturalisation.

Therefore, while the 2020 Regulations introduced a more detailed procedural framework and included a nominal residence requirement, the overall structure and rationale of the programme remained largely unchanged, as the acquisition of citizenship continued to depend primarily on financial contribution rather than on substantive ties to Malta: unlike ordinary naturalisation, which requires long-term actual residence and other integrative criteria, the Maltese 'Individual Investor Programme' did not require applicants to demonstrate a specific link to Malta, such as integration into, and a 'genuine link' to, its society.

In June 2021, the Commission addressed an additional letter of formal notice to Malta (and Cyprus), in which it observed that the revised legislative framework did not alter the transactional nature of the Programme and was thus contrary to EU law.[46] Being unsatisfied with Malta's replies to its letter of formal notice and its subsequent reasoned opinion,[47] the Commission decided to challenge this revised scheme before the Court,

[43] Malta, Maltese Citizenship (Amendment No 2) Act 2020 <https://legislation.mt/eli/act/2020/38/eng> accessed 6 August 2025.
[44] Malta, Subsidiary Legislation 188.06 <https://legislation.mt/eli/sl/188.6/eng/pdf> accessed 6 August 2025.
[45] ibid, Regulation 15(3), Regulation 16(1)(a)(b) and (d), Regulation 16(7), and the first annex to the 2020 Regulations.
[46] See European Commission, 'June infringements package: key decisions' (Press corner, 9 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743> accessed 6 August 2025.
[47] European Commission Representation in Malta, '"Golden passport" schemes: Commission proceeds with infringement case against Malta' (6 April 2022) <https://malta.representation.ec.europa.eu/news/golden-

arguing that its transactional nature and absence of meaningful connection with Malta undermines the essence of EU citizenship and the principle of sincere cooperation under EU law, and is thus in violation of Article 20 TFEU and Article 4(3) TEU. Therefore, the Commission referred Malta to the Court of Justice in March 2023.[48]

In its defence, Malta argued that the power to grant nationality lies at the core of national sovereignty and forms part of Member States' national identity, which the EU is bound to respect under Article 4(2) TEU. Malta rejected the Commission's claim that EU law requires a 'prior genuine link' between a naturalised individual and the Member State, asserting that neither EU law nor international law imposes such a condition. It contended that the Commission's action effectively challenges an entire national legal framework adopted in an area of exclusive national competence and risks turning the Court into an 'indirect legislator'. According to Malta, EU scrutiny should be limited to cases where a Member State's naturalisation policy leads, in a general and systematic way, to serious breaches of EU values or objectives. The 2020 investor citizenship scheme, it maintained, is neither automatic nor unconditional, but subject to a complex, discretionary, and multi-stage assessment process, with meaningful safeguards and a substantial rejection rate. Malta also disputed the Commission's characterisation of the scheme as purely transactional or motivated by budgetary interests, insisting that the scheme is legitimate, well-regulated, and consistent with EU law.[49]

### 3.2 THE AG OPINION

In his Opinion delivered on 4 October 2024, Advocate General Collins focused on the Commission's central claim: that to preserve the integrity of EU citizenship, there must exist a 'genuine link' between a Member State and the individual it naturalises. He began by affirming that EU citizenship is inseparably linked to, and entirely dependent upon, the possession of the nationality of a Member State.[50] Nonetheless, he stressed that it is settled case-law that Member States have exclusive competence to determine the conditions for the acquisition and loss of their nationality, provided they respect international law. If the Member States had chosen to do so, they could have pooled this competence and conferred on the EU the power to regulate access to EU citizenship; but they have deliberately refrained from doing so.[51]

Within the framework of mutual trust, Member States have agreed to recognise unconditionally the nationality of other Member States – and therefore EU citizenship – regardless of the nature of the link between the individual and the granting

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passport-schemes-commission-proceeds-infringement-case-against-malta-2022-04-06_en> accessed 6 August 2025.

[48] See *Action brought on 21 March 2023*, *European Commission v Republic of Malta* (Case C-181/23) <https://curia.europa.eu/juris/document/document.jsf;jsessionid=D5A95E15C2FEE3622497802F8CD249AC?text=&docid=273734&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=8988594> accessed 6 August 2025.

[49] A detailed analysis of both parties' arguments is found in paras 16-30 of the AG Opinion in Case C-181/23 *Commission v Malta* EU:C:2024:849 and paras 42-78 of the ECJ judgment in *Commission v Malta* (n 1).

[50] AG Opinion in *Commission v Malta* (n 49) para 42.

[51] ibid para 44. See also paras 45-46.

state.[52] Citing the Court's judgments in *Micheletti*[53] and *Zhu and Chen*,[54] the Advocate General explained that this framework of 'mandatory mutual recognition' implies that Member States are *not required* to share a common conception of nationality, and their national rules on naturalisation may diverge accordingly.[55] Nonetheless, although EU law does not prescribe the conditions for granting or withdrawing nationality, the application of such rules must not breach EU law in situations falling within its scope.[56]

He then observed that, to date, the Court has never assessed national rules on the *acquisition* of nationality through the lens of EU law.[57] He agreed with Malta that an exact parallel cannot be drawn between the acquisition and the withdrawal of nationality, and that the two must be treated differently under EU law.[58] Referring to the Court's rulings in *Rottmann*[59] and *Tjebbes*,[60] he explained that while EU law *permits* Member States to rely on a requirement of a genuine link for *withdrawing* their nationality – provided it complies with proportionality and due process – it does not *impose* such a requirement for the *acquisition* of nationality.[61]

Turning to international law, the Advocate General rejected the Commission's reliance on the *Nottebohm* judgment.[62] He explained that although the International Court of Justice (ICJ) in that case held that a State may refuse to recognise nationality granted by another State in the absence of a 'genuine link' between the individual and the nationality asserted, the judgment did not establish a general obligation under international law to require such a link for the acquisition of nationality. Rather, the ruling merely affirmed that a State could, in specific circumstances, withhold *recognition* of another State's nationality in the absence of such a link. Crucially, the ICJ did not define the concept of a 'genuine link', nor did it require States to grant nationality by reference to that concept. On the contrary, it reaffirmed that it is for each sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality.[63]

The Advocate General further emphasised that there is no divergence between international and EU law on this point: neither legal order imposes a requirement that a 'genuine link' must exist between an individual and the State granting nationality. While EU law does require Member States to recognise each other's nationality decisions, this obligation flows from mutual respect for each other's sovereignty – as such, this obligation is not a mechanism for undermining Member States' exclusive competence in the field of nationality. To find otherwise, the Advocate General warned, would disrupt the carefully negotiated balance between national and EU citizenship reflected in the Treaties and would constitute an unlawful encroachment into a domain that the Member States have explicitly

52 AG Opinion in *Commission v Malta* (n 49) para 47.
53 *Micheletti* (n 4).
54 Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639.
55 AG Opinion in *Commission v Malta* (n 49) para 48.
56 ibid para 49.
57 ibid para 50.
58 ibid para 52.
59 *Rottmann* (n 4).
60 *Tjebbes* (n 4).
61 AG Opinion in *Commission v Malta* (n 49) paras 53-55.
62 *Liechtenstein v Guatemala (Nottebohm)* [1955] ICJ Rep 4.
63 AG Opinion in *Commission v Malta* (n 49) para 56.

retained under their exclusive control.[64]

He therefore concluded that the Commission had failed to establish that Article 20 TFEU imposes a legal obligation on Member States to require a 'genuine link' – or a 'prior genuine link' – as a condition for the lawful grant of nationality. That matter remains within the discretion of the national legislature.[65] Accordingly, he proposed that the Court dismiss the Commission's action in its entirety.[66]

### 3.3 THE JUDGMENT

The Court, sitting in its Grand Chamber formation, departed from the Opinion of the Advocate General as to the final outcome of the case.

It began its ruling by recalling that every person holding the nationality of a Member State is a Union citizen, and that whether a person possesses the nationality of a Member State is to be determined solely by reference to the national law of that Member State.[67] It also noted that while Member States have the power to set the conditions for granting and withdrawing nationality, that competence must be exercised in compliance with EU law.[68]

The Court then rejected Malta's argument that EU scrutiny of the conditions *for the grant* of nationality should be limited to *general and systematic* breaches of Union values.[69] Referring to Article 3(2) TEU, which provides that the EU is to offer its citizens an area of freedom, security, and justice without internal frontiers in which the free movement of persons is ensured,[70] and to the provisions on free movement, democratic participation, and consular protection of Union citizens,[71] the Court underlined that Union citizenship is grounded in mutual trust between the Member States and the principle of mutual recognition, and structured around a framework of rights and obligations, with solidarity and good faith at its core.[72] Union citizenship, as the fundamental status of the nationals of the Member States, is both a concrete expression of this solidarity and an essential component of the EU's constitutional framework.[73] It follows, the Court pointed out, that the Member States' discretion in granting nationality is not unlimited:

> Union citizenship is based on the common values contained in Article 2 TEU and on the mutual trust between the Member States as regards the fact that none of them is to exercise that power [i.e. the power to lay down the conditions for granting nationality] in a way that is manifestly incompatible with the very nature of Union citizenship.[74]

The Court then explained that 'the bedrock of the bond of nationality of a Member State is formed by the special relationship of solidarity and good faith between that State and

[64] AG Opinion in *Commission v Malta* (n 49) para 57.
[65] ibid para 58.
[66] ibid para 62.
[67] *Commission v Malta* (n 1) paras 79-80.
[68] ibid para 81.
[69] ibid paras 82-83.
[70] ibid para 84.
[71] ibid paras 86-95.
[72] ibid paras 85 and 96.
[73] ibid para 91.
[74] ibid para 95. See, also, para 98.

its nationals and the reciprocity of rights and duties',[75] and this special relationship 'also forms the basis of the rights and obligations reserved to Union citizens by the Treaties'.[76]

The Court then proceeds to note that a Member State 'manifestly disregards the requirement for such a special relationship of solidarity and good faith […] and thus breaks the mutual trust on which Union citizenship is based' when it establishes and implements a naturalisation scheme based on a transactional process, under which its nationality – and thereby Union citizenship – is granted essentially in exchange for predetermined payments or investments.[77] According to the Court, a scheme such as Malta's 'Individual Investor Programme' amounts to the commercialisation of Union citizenship and is incompatible with its nature under the Treaties.[78] Moreover, because EU law requires Member States to recognise the nationality granted by another Member State for the purposes of EU rights, a transactional approach to naturalisation threatens the mutual trust that underpins this obligation of recognition, 'since that trust relates to the premise that the grant of the nationality of a Member State must be based on a special relationship of solidarity and good faith justifying the grant of rights resulting, in particular, from Union citizenship'.[79]

The Court then turned to apply these principles to the Maltese 'Individual Investor Programme'. It found that the three core requirements of the scheme – fixed contributions, property investment, and donations – place payments and investments at the heart of the naturalisation process.[80] Although the 'Individual Investor Programme' included a residence requirement, the Court held that this did not amount to a genuine requirement of *actual residence* in Malta, since physical presence was only necessary for administrative steps such as the provision of biometric data and the oath of allegiance.[81] The limited physical presence required thus did not constitute a meaningful connection supplementing the financial conditions.[82] The Court also noted that while post-naturalisation monitoring was envisaged, there was no binding requirement that such a meaningful connection be established or assessed after the grant of nationality.[83] Finally, the Court referred to promotional material by authorised agents, which advertised the Maltese 'Individual Investor Programme' as a means of accessing the rights of Union citizenship, particularly free movement.[84] The Court explained that the fact that the scheme was publicly presented as offering EU citizenship benefits through Maltese nationality reinforced the conclusion that Malta had established a transactional system amounting to the commodification of EU citizenship for the purpose of promoting its scheme.[85] On this basis, the Court upheld the Commission's action and found that Malta had failed to fulfil its obligations under Article 20 TFEU and Article 4(3) TEU.

[75] *Commission v Malta* (n 1) para 96.
[76] ibid para 97.
[77] ibid para 99.
[78] ibid para 100.
[79] ibid para 101.
[80] ibid para 103.
[81] ibid para 106.
[82] ibid para 108.
[83] ibid paras 116-118.
[84] ibid para 119.
[85] ibid para 120.

# 4 RETHINKING THE EU LAW LIMITS ON NATIONAL COMPETENCE IN GRANTING MEMBER STATE NATIONALITY AFTER *COMMISSION V MALTA*

## 4.1 THE FUTURE OF 'GOLDEN PASSPORT' SCHEMES IN THE EU

The question of the acceptability of so-called 'golden passport' schemes has generated significant controversy, with passionate debates and legitimate arguments presented on both sides of the discussion.[86] At its core, the divergence of views often reflects underlying ethical dilemmas regarding the nature of nationality: whether it can be treated as a marketable commodity or whether it is a legal status grounded in the existence of a special relationship – a genuine link – between a person and a particular State. The positions adopted in this discussion are, in many instances – including within the context of EU law – shaped more by these ethical intuitions than by strictly legal reasoning.[87] It is therefore perhaps this underlying ethical discomfort that also informs, at least implicitly, the approach taken by the Grand Chamber in *Commission v Malta*, where the decision to declare such schemes incompatible with EU law appears to precede, and indeed shape, the reasoning offered in support of this outcome.

The Court's reasoning is based on what appears to be a rather simple line of argument: the conferral of nationality by a Member State must be based on a special relationship of solidarity and good faith between the State and the individual, which constitutes the foundation of both national and Union citizenship.[88] A Member State violates this principle, and undermines the mutual trust essential to Union citizenship, where it grants nationality in exchange for predetermined payments or investments.

Central to the Court's reasoning in *Commission v Malta* is, therefore, the notion of a 'special relationship of solidarity and good faith' – a formulation which appears to echo, if not entirely replicate, the much-contested concept of a 'genuine link'.[89] I use the term

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[86] See, for instance, the views expressed in different chapters in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer Open 2018) Part I.

[87] For a criticism of such a 'functional institutional ethos' approach see Joseph H H Weiler, 'Postscriptum: Commission v Malta (*Citizenship for Sale*): Who of the Two is Selling European Values?' in Dimitry Kochenov, Madeleine Sumption, and Martijn van den Brink (eds), *Investment Migration in Europe and the World* (Hart 2025) 399. For an article defending the sale of citizenship from an ethical perspective see Javier Hidalgo, 'Selling Citizenship: A Defence' (2016) 33(3) Journal of Applied Philosophy 223. For views that are clearly against 'selling' citizenship from an ethical perspective see, inter alia, Ayelet Shachar and Ran Hirschl, 'On Citizenship, States and Markets' (2014) 22(2) The Journal of Political Philosophy 231; Laura M Johnston, 'A Passport at Any Price? Citizenship by Investment through the Prism of Institutional Corruption' (Edmond J Safra Working Paper No 22, 12 September 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324101> accessed 6 August 2025; Ana Tanasoca, 'Citizenship for Sale: Neomedieval, Not Just Neoliberal?' (2016) 57(1) European Journal of Sociology 169. For an argument that there are certain things that should in no circumstances be put up for sale because of their inherently 'superior' nature see Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin 2013).

[88] The reference to 'a special relationship of solidarity and good faith between a State and its nationals' had already been made in the Court's case-law concerning the withdrawal of nationality (see, for instance, *Rottmann* (n 4) para 51; *Tjebbes* (n 4) para 33); even previously, in its public service exception case-law, for the purposes of Article 45(4) TFEU, the Court referred to a 'special relationship of allegiance to the state' in order to define the situations when a Member State *can* rely on this exception – see, for instance, Case 149/79 *Commission v Belgium* EU:C:1980:297 para 10.

[89] For a different view see Martijn van den Brink, 'Why bother with legal reasoning? The CJEU judgment in

'contested' deliberately: both the 'genuine link' requirement and the judgment from which it originates (*Nottebohm*)[90] have been the subject of extensive academic criticism, both on legal and normative grounds.[91] Notably, this is the first time the EU institutions have questioned *the grant* of Member State nationality – and by extension Union citizenship – on the basis of the absence of such a connection. In other instances where the existence of a genuine link is questionable, the EU institutions have remained silent. Consider, for instance, Italy's practice of granting nationality to individuals in Latin America who have never resided in Italy but can trace ancestry to an Italian national,[92] or Spain and Portugal's laws conferring citizenship on the descendants of Sephardic Jews expelled in the 15th and 16th centuries.[93] In such cases, there is often no meaningful connection between the individual and the Member State in question, let alone with the EU.[94] Yet, none of the EU institutions challenged these practices, nor even raised any concerns in relation to them.[95]

Indeed, the Court's own case-law prior to *Commission* v *Malta* appears to be in line with the hands-off approach followed by the (political) EU institutions with regard to this matter. In *Micheletti*, which involved Spain's refusal to recognise the Italian nationality of a dual

Commission v Malta (Citizenship by Investment)' (*Global Citizenship Observatory*, 2 May 2025) <https://globalcit.eu/why-bother-with-legal-reasoning-the-cjeu-judgment-in-commission-v-malta-citizenship-by-investment/> accessed 6 August 2025, where it was noted that the Court of Justice did not employ the 'genuine link' argumentation put forward by the Commission: 'By foregrounding solidarity and mutual trust and thereby substituting the principle of genuine link, the Court will at least escape criticism that it does not understand ICJ case law'.

[90] *Nottebohm* (n 62).

[91] For an article explaining why *Nottebohm* (n 62) has been misread by the EU institutions and by some academics as imposing a genuine link requirement for the acquisition of nationality, whereas a close reading of it demonstrates that such a requirement has been imposed only for the *recognition* by States of nationality acquired in another State see Martijn van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?' (2022) 23(1) German Law Journal 79. See, also, Peter J Spiro, 'Nottebohm and 'Genuine Link': Anatomy of a Jurisprudential Illusion' in Dimitry Kochenov, Madeleine Sumption, and Martijn van den Brink (eds), *Investment Migration in Europe and the World* (Hart 2025).

[92] Costica Dumbrava, 'External Citizenship in EU countries' (2014) 37(13) Ethnic and Racial Studies 2340; Jo Shaw, 'Citizenship for Sale: Could and Should the EU Intervene?' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer Open 2018). It should be noted, however, that recently Italy has taken steps to limit the instances that its nationality can be granted in these circumstances – see Francesca Strumia, 'Neither Soil, Nor Blood, Nor Money: Disquiet over citizenship in the US, Italy, the UK, and at the CJEU' (*Verfassungsblog*, 20 June 2025) <https://verfassungsblog.de/neither-soil-nor-blood-nor-money/> accessed 6 August 2025.

[93] Hans Ulrich Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews' (2015) 11(1) European Constitutional Law Review 13.

[94] In fact, for many commentators, the absence of a 'genuine link' between individuals and the State of which they are nationals indicates the arbitrariness of the rules determining the acquisition of citizenship, suggesting that objections to investor citizenship programmes on the basis of a missing 'genuine link' are misplaced – see, for instance, Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its price' and Chris Armstrong, 'The Price of Selling Citizenship', both in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer Open 2018); Odile Ammann, 'Residency by Investment and Citizenship by Investment: Just the Tip of the Iceberg? The Pervasiveness of Meritocratic Considerations in Immigration and Citizenship Law' in Dimitry Kochenov, Madeleine Sumption, and Martijn van den Brink (eds), *Investment Migration in Europe and the World* (Hart 2025); Tratnik and Weingerl (n 15); Dimitry Kochenov, 'Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales* (Cambridge University Press 2023); Francesca Strumia, 'Twice a missed chance: On citizenship, agency and movement in Commission v. Malta (citizenship for sale)' (2026) Maastricht Journal of European and Comparative Law 1; Basheska and Kochenov (n 3).

[95] Though, as will be seen in the next sub-section, the Court has held that Member States are *entitled* (but not required!) to withdraw their nationality (and as a result Union citizenship), in the absence of such a link – *Tjebbes* (n 4).

(Argentine and Italian) national on the basis that the individual lacked a genuine link with Italy, the Court categorically held that Member States may not question the nationality conferred by another Member State.[96] Moreover, the Court's free movement case-law confirms that EU citizens need not reside within EU territory in order to exercise free movement rights.[97] Taken together, these principles allow us to imagine a scenario in which a person who acquires Member State nationality solely through a distant blood connection – without ever having lived in the EU or established any 'special relationship of solidarity and good faith' with a Member State and the EU – may nonetheless claim full access to Union citizenship and the rights attached to it. And, of course, that imagined scenario is not so hypothetical: it is precisely what happened in *Micheletti*!

Against this backdrop, therefore, the Court's conclusion in *Commission v Malta* cannot be explained solely by the absence of a genuine link.[98] Rather, what seems to have motivated the Court is a broader ethical unease with the commodification of (Union) citizenship – the idea that access to this EU status and its attendant rights may be purchased. It is thus this transactional nature of 'golden passport' schemes – rather than merely the lack of a 'genuine link' or a 'special relationship of solidarity and good faith' – that appears to (really) lie behind the Court's ruling.

Once the dust settles from the first reading of this significant ruling, one is left wondering, however, how the principles established in this ruling, will be applied in future scenarios.

The core concepts invoked by the Court – solidarity, good faith, and mutual trust – are inherently abstract and remain broadly undefined.[99] It is true that the Court has, in the past, employed such notions in its citizenship case-law to construct arguments leading to a finding of a violation of EU law. For instance, in the landmark case of *Grzelczyk*, the Court invoked the idea that a certain degree of financial *solidarity* must exist between nationals of the host Member State and those of other Member States, for requiring the host Member State to extend a minimum subsistence allowance to an economically inactive national of another Member State who was lawfully resident in its territory.[100] This assumption underpinned the Court's broader move towards recognising Union citizenship as a fundamental status, capable of conferring rights even in the face of restrictive EU secondary law provisions. The appeal to solidarity in that case served to frame the interpretation of secondary EU legislation in light of primary law rights, anchoring the assessment of whether a Union citizen had been unjustly deprived of the enjoyment of fundamental rights stemming from EU law. In *Commission v Malta*, however, the Court takes

[96] *Micheletti* (n 4).
[97] See, for instance, Case C-138/02 *Collins* EU:C:2004:172 and Case C-214/94 *Boukhalfa* EU:C:1996:174.
[98] Unless, of course, the ECJ wished to depart from its previous case-law, which does not appear to be the case. Writing prior to the delivery of the Court's ruling in *Commission v Malta*, Oosterom-Staples considered that the EU institutions arguments against citizenship investor programmes appeared to be calling for a departure from the principles established in *Micheletti* – Helen Oosterom-Staples, 'The Triangular Relationship Between Nationality, EU Citizenship and Migration in EU Law: A Tale of Competing Competences' (2018) 65 Netherlands International Law Review 431, 451.
[99] Another commentator has noted that '[t]he relation to solidarity or good faith, which are often cited in reference to the genuine link, relate to personal subjective feelings of individuals' – see Katja Swider, 'Legitimizing precarity of EU citizenship: *Tjebbes*' (2020) 57(4) Common Market Law Review 1163, 1167 and 1169.
[100] Case C-184/99 *Grzelczyk* EU:C:2001:458 para 44.

a different approach. Here, these abstract principles do not serve as (merely) ancillary tools supporting the application of concrete Treaty rights, such as the right to free movement and residence; rather, they form the very foundation for establishing a breach of another equally indeterminate constitutional principle, namely, the duty of sincere cooperation under Article 4(3) TEU.

Furthermore, the Court's reasoning leaves many important questions unanswered,[101] thereby providing those who are critical of the judgment with grounds to challenge its persuasiveness.[102] In particular, it remains unclear what implications the ruling will have for the future of 'golden passport' schemes, how the judgment is to be applied in practice by national authorities, and – most significantly – the extent to which EU law will now constrain Member States' discretion in matters concerning the grant of their nationality.

As will be explained in more detail in the next part of this section, the judgment has opened the door for the EU to exercise control over national policies and laws concerning the grant of nationality. Is, however, the *transactional* grant of nationality – that is, the conferral of nationality in return for payment or investment and in the absence of the required 'special relationship' – *the only* situation in which a Member State's nationality law may now be found to be in conflict with EU law? If not, what other forms of nationality grants could similarly be deemed incompatible? Can, for instance, the bestowal of nationality upon a top athlete who has no 'special relationship' with the Member State concerned, now be considered a breach of EU law?

Moreover, as another commentator has put it, 'By its decision, the Grand Chamber has effectively created, at the level of EU law, a form of "genuine link" requirement, expressed as the need for "a special relationship of solidarity and good faith justifying the grant of rights resulting, in particular, from Union citizenship"'.[103] This is not surprising, given that the EU institutions have often referred to the concept of a 'genuine link' when commenting on 'golden passport' schemes, and in fact the absence of such a link has been central to the Commission's arguments in *Commission v Malta*.[104] According to the judgment,

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[101] These (and more) questions have been raised in, inter alia, Simon Cox, 'The EU Free Market Does not Extend to Citizenship' (*Verfassungsblog*, 30 April 2025) <https://verfassungsblog.de/the-eu-free-market-does-not-extend-to-citizenship/> accessed 6 August 2025; Eric Fripp, 'EU Court of Justice finds Malta "golden passports" scheme incompatible with EU law' (*EJIL: Talk!*, 9 May 2025) <https://www.ejiltalk.org/eu-court-of-justice-finds-malta-golden-passports-scheme-incompatible-with-eu-law/> accessed 6 August 2025; Steve Peers, 'Pirates of the Mediterranean meet judges of the Kirchberg: the CJEU rules on Malta's investor citizenship law' (*EU Law Analysis*, 30 April 2025) <https://eulawanalysis.blogspot.com/2025/04/pirates-of-mediterranean-meet-judges-of.html> accessed 6 August 2025; Luke Dimitrios Spieker, 'It's solidarity, stupid! In defence of Commission v Malta' (*Verfassungsblog*, 7 May 2025) <https://verfassungsblog.de/its-solidarity-stupid/> accessed 6 August 2025.

[102] See, for instance, Dimitry V Kochenov and Guillermo Íñiguez, 'EU citizenship's new essentialism' (2025) 50 European Law Review 455; Dimitry Kochenov, 'Never Mind the Law, again: Commission v Malta (C-181/23)' (*EU Law Live*, 30 April 2025) <https://eulawlive.com/op-ed-never-mind-the-law-again-commission-v-malta-c-181-23/> accessed 6 August 2025; van den Brink, 'Why bother with legal reasoning?' (n 89); Guillermo Íñiguez, Op-Ed: 'On Genuine Links, Burdens of Proof, and Declaration No. 2: Some Musings on the Court's Reasoning in Commission v. Malta (C-181/23)' (*EU Law Live*, 5 May 2025) <https://eulawlive.com/op-ed-on-genuine-links-burdens-of-proof-and-declaration-no-2-some-musings-on-the-courts-reasoning-in-commission-v-malta-c-181-23> accessed 6 August 2025. For a positive view of the ruling see Merijn Chamon, 'Commission v Malta (C-181/23) and the trilemma of EU citizenship' (2025) 50 European Law Review 475 and Luke Dimitrios Spieker and Ferdinand Weber, 'Commission v Malta (C-181/23): a "miracle" of Union citizenship?' (2025) 50 European Law Review 487.

[103] Fripp (n 101); Spieker, 'It's solidarity, stupid! In defence of Commission v Malta' (n 101).

[104] See, for instance, Reding, 'Citizenship must not be up for sale' (n 17); European Parliament Resolution on

in the absence of 'actual residence' (meaning, physical presence) such a 'special relationship' (or 'genuine link') appears to be missing. However, what level of 'actual residence' or other connecting factors are required to ground the 'special relationship' necessary for the compatibility of a naturalisation decision with EU law?[105]

The ruling also leaves open whether schemes that combine financial contributions *with genuine residence or other substantial ties* to the Member State might be permissible under EU law. Should the Court's reasoning be understood to imply that transactional elements are not inherently objectionable, provided they are accompanied by sufficiently demanding residence or integration requirements? Or does the mere presence of a transactional component render such schemes incompatible with EU law, regardless of additional requirements? These questions are likely to arise as Member States, including Malta, consider revising or redesigning their citizenship and residence schemes in the light of the ruling.[106]

The most significant question that emerges – and one that will more broadly determine the extent to which EU law now limits Member State competence with regard to the bestowal of nationality – is the following: when a Member State grants nationality through a 'golden passport' scheme, what are the consequences for the individual's nationality and Union citizenship statuses? Is the nationality invalid solely for the purposes of EU law, meaning that the person does *not* hold Union citizenship (and cannot be considered a Member State national *for the purposes of EU law*) but can still be considered a national of that State *under national (and international) law*? Such a (rather more limited) implication would reflect the approach taken by the Court in *Airola* back in the 1970s,[107] where it held that Italian nationality – automatically conferred on the wife of an Italian national under a discriminatory rule – while remaining valid under Italian law, could not be recognised for the purposes of EU law, as it breached the general principle of non-discrimination on the basis of sex. The Court thus clarified that, where the manner in which Member State nationality is acquired breaches EU law, its effects may be disregarded for the purposes of EU law, even if the nationality remains valid for all other legal purposes.

In my view, in order to be respectful of Member State sovereignty in the field of nationality, the Court should have made it clear that the prohibition on investor citizenship schemes established in *Commission v Malta* applies only to the *acquisition of Union citizenship* (and to the grant of Member State nationality *for EU law purposes*), and not to the grant of Member State nationality as such.[108] Consequently, individuals acquiring nationality through such

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EU citizenship for sale (n 18); Commission, 'Investor Citizenship and Residence Schemes in the European Union' (n 11).

105 Carrera, who has been critical of 'golden passport' schemes has, nonetheless, criticised the 'genuine link' requirement, wondering what this criterion is really about and pointing out that it is open to a certain degree of arbitrariness and margin of manoeuvre by State authorities – Carrera (n 15) 31. Similarly, van den Brink has argued that while the 'genuine link' requirement may be normatively justified, its application is fraught with inconsistency and ambiguity. He questions how one can assert that investor citizenship schemes fail to meet the requirement, while the grant of nationality to individuals with only ancestral ties is generally accepted, despite similarly tenuous connections – van den Brink, 'Revising Citizenship within the European Union: Is a Genuine Link Requirement the Way Forward?' (n 91). See, also, Basheska and Kochenov (n 3).

106 Cox (n 101).

107 Case 21/74 *Airola* EU:C:1975:24.

108 That said, whether such a separation between national and EU-level effects could function effectively in practice is far from clear. In the context of the Schengen acquis, which is based on a unified external border and the absence of internal border controls, it would be very difficult for a Member State to operate two categories of its own nationals – those whose nationality produces EU-level effects and those whose

schemes should not be able to acquire Union citizenship; and their acquisition of Member State nationality should not count for EU law purposes (for instance, a person who became Maltese through a golden passport scheme, should not qualify as a 'worker' for the purposes of EU law). However, the EU cannot and should not intervene when Member States operate investor citizenship schemes for the exclusive purpose of conferring their own nationality. From the perspective of EU law, the grant of Member State nationality alone – without the accompanying conferral of Union citizenship – does not appear to contravene any principle of EU law and would fall within the legitimate exercise of national competence in the field of nationality.[109]

In practice, this would mean that Member States would be able to continue to operate investor citizenship schemes domestically, provided, following the logic accepted in *Kaur*,[110] that individuals acquiring nationality under such schemes do not acquire Union citizenship. While in *Kaur* – as will be seen in the next part of this section – the Court accepted that a *Member State* may limit *the EU law consequences of its own nationality* by excluding *certain nationals* from Union citizenship,[111] what I propose here would entail the reverse: the EU itself determining that certain nationals of Member States – namely, those who have acquired their nationality through investor citizenship schemes – are not entitled to Union citizenship.[112]

This rationale should also guide how the mutual recognition of the bestowal of Member State nationality is approached by the Member States. In *Commission v Malta*, the Court justified its finding that Malta's scheme was incompatible with EU law by invoking the principle established in *Micheletti*[113] that Member States are required by EU law to recognise the nationality conferred by other Member States for the purposes of EU law.[114] According to this approach, EU law prohibits a 'bottom-up' approach whereby individual Member States, on their own initiative, refuse to recognise another Member State's nationality – and by extension the resulting Union citizenship – *for the purposes of EU law*. However, in my view, this does not mean that EU law requires an outright prohibition on investor citizenship schemes or that such schemes must necessarily render *both* the grant of Union citizenship *and the bestowal of Member State nationality* invalid. Rather, what is required is a top-down approach: a uniform rule at the EU level that limits *the recognition of Union citizenship status* – not nationality itself – where nationality has been acquired through such schemes.

nationality does not. For instance, a person holding Maltese nationality under domestic law but not recognised as a national of a Member State *for EU law purposes*, would, in principle, have to be treated as a third-country national when entering Malta, a result that would generate significant operational and legal inconsistencies. The alternative solution, which is allowing such individuals to enter Malta without the application of Schengen external-border rules, while simultaneously preventing them from circulating freely within the wider Schengen area, would undermine the mutual trust framework on which Schengen is constructed. These practical constraints distinguish the situation from older cases such as *Airola* (ibid), which arose outside this integrated border-management system. I'm grateful to Professor Jukka Snell for this point.

[109] For a similar view see Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship and Beyond' in Nathan Cambien, Dimitry Kochenov, and Elise Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill 2020) 40.

[110] *Kaur* (n 4).

[111] Gerard-René de Groot, 'Towards a European Nationality Law' (2004) 8(3) Electronic Journal of Comparative Law 1, 5-12.

[112] I am, of course, aware of the practical difficulties that will be involved when Member States will need to identify nationals of other Member States who obtained their nationality through a 'golden passport' scheme and who, accordingly, should not be regarded as Union citizens. See, also, note 108 above.

[113] *Micheletti* (n 4).

[114] (n 4).

Under this approach, individuals who have obtained Member State nationality via an investor citizenship scheme would not be able to invoke Union citizenship rights in the territory of other Member States.[115] That said, this would not prevent a host Member State, if it so chooses, from recognising the underlying nationality for its own purposes, provided this does not extend to the enjoyment of rights attached to Union citizenship.[116]

Another difficult question is whether the ruling has retrospective effect and will thus require Member States operating such schemes to now withdraw nationality (or – according to my suggestion above – only Union citizenship) granted through investor citizenship schemes. In response to this, investor citizens may invoke general principles of EU law, such as legal certainty and legitimate expectations, but also fundamental rights stemming from EU law, to challenge any attempt to revoke their citizenship. It would seem, also, that given that there would be withdrawal of Union citizenship by States which continue to be EU Member States, the principles established in *Rottmann*[117] and *Tjebbes*[118] would be applicable, according to which there needs to be an individual assessment of the situation and an examination of whether the withdrawal complies with the principle of proportionality and fundamental human rights protected under EU law.[119] Related to the above question is the position of secondary beneficiaries, for instance children, who have acquired their nationality (and Union citizenship) as dependents of individuals who obtained nationality through 'golden passport' schemes which are in breach of EU law. Should these children also lose Union citizenship (as suggested above) or – even – their Member State nationality, in situations where the parent from whom they derived it has lost it?

Finally, and at a more fundamental level, in paragraph 94 of its judgment the Court recalls that, 'in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, it is for each Member State, inter alia, to refrain from any measure which could jeopardise the attainment of the European Union's objectives'. Yet, which EU objective or objectives have been undermined by the operation of the Maltese scheme?[120]

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115 Such a scenario was examined – but rejected – in Dominique Ritleng, 'The relationship between Union citizenship and nationality: Is it altered by *Wiener Landesregierung?*' (2023) 60(4) Common Market Law Review 1055, 1069-1070.

116 Spieker and Weber have similarly argued that a mere obligation of refusal of *recognition* of Member State nationality granted through 'golden passport' schemes with supranational effect for the entire Union 'would not only be doctrinally sound and respectful of the Member States' competences, but also effective in practice. Russian oligarchs who have acquired Maltese nationality through an investor citizenship programme would continue to live in Malta as Maltese citizens – they would simply be denied access to other Member States' – Luke Dimitrios Spieker and Ferdinand Weber, 'Bonds without belonging? The *genuine link* in international, union, and nationality law' (2024) 43 Yearbook of European Law 1, 38.

117 *Rottmann* (n 4).

118 *Tjebbes* (n 4).

119 Kochenov and Íñiguez (n 102) 472. For an analysis of the loss of Union citizenship case-law see Alina Tryfonidou, 'Member State Nationality and the Gain and Loss of EU Citizenship' in Petra Minnerop, Volker Roeben, Robert Schütze and Jukka Snell (eds), *EU Citizenship as an Independent Status: Between Form and Substance* (Oxford University Press 2026 forthcoming).

120 Elsewhere, I argued that 'golden passport' schemes violate the principle of equality, which is among the EU's values, as noted in Article 2 TEU, as they lead to discrimination on the basis of property; since one of the EU's objectives is to promote its values, action by Member States which jeopardises the attainment of this objective is liable to amount to a breach of the principle of sincere cooperation – see Alina Tryfonidou, 'Citizenship-for-sale schemes and EU law: can third-country nationals buy their way into becoming subjects of EU law?' in Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU law* (Edward Elgar 2017) 154. For a similar view, in terms of the inequality of treatment created by such schemes between those who can pay and those who cannot, see Andriopoulou (n 12) 9. Without connecting

Greater clarity on this point might have helped to resolve some of the interpretive uncertainties identified earlier in this part of the chapter, and would also have enhanced the judgment's value as a precedent by providing a clearer basis for its application in future cases involving similar schemes.

## 4.2 EU INTERFERENCE AND NATIONAL COMPETENCE IN THE CONFERRAL OF MEMBER STATE NATIONALITY – A DEFENCE OF *COMMISSION V MALTA*

Having examined the implications of the *Commission v Malta* judgment for the future of 'golden passport' schemes in the EU, and in light of the many questions it raises regarding its broader legal effects, we now turn to a more fundamental issue: how this judgment may affect Member States' competence in the field of nationality. This final part of the section offers a defence of the ruling, exploring the extent to which it may be interpreted as redefining, constraining, or clarifying the scope of national discretion in conferring nationality – an area traditionally regarded as lying at the core of national sovereignty.

Under international law, it is imperative that States should be left free to determine who can acquire their nationality.[121] This stems from the fact that nationality and sovereignty are 'inseparable'[122] and, hence, sovereign independent States should be free to promulgate their own nationality laws.[123]

Yet, the power of Member States to determine who may acquire, retain, or lose their nationality has long posed a conundrum for EU law, given that EU citizenship remains a completely derivative status: there is no way for an individual to acquire Union citizenship without first acquiring the nationality of a Member State. This makes access to EU citizenship entirely contingent on national rules and raises the question of whether Member States can be left with unfettered discretion in defining the personal scope of EU citizenship and the rights attached to it.[124]

Accordingly, the EU has faced the enduring challenge of reconciling, on the one hand, the need to respect the sovereignty of Member States in the nationality field with, on the other hand, its own interest in exercising a degree of control over who may acquire, retain, or lose Union citizenship.

The basis of the EU's position has always been that, since Member States remain sovereign States under international law, they maintain their competence with regard to issues involving nationality attribution and its effects. In order to secure this, the Member States shortly before the status of Union citizenship was introduced in 1993, appended to

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discrimination on the basis of property or wealth with 'golden passport' schemes, Worster has explained that under international law, in their nationality laws, States must not discriminate against persons on the basis of prohibited characteristics; among the prohibited characteristics that he mentions are property and wealth – William Thomas Worster, 'Citizenship by Investment and the Right to Change Nationality' in Dimitry Kochenov, Madeleine Sumption, and Martijn van den Brink (eds), *Investment Migration in Europe and the World* (Hart 2025) 26-27.

121 Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67(4) Modern Law Review 588, 596.

122 Andrew Evans, 'Nationality Law and European Integration' (1991) 16 European Law Review 190.

123 Stephen Hall, *Nationality, Migration Rights and Citizenship of the Union* (Martinus Nijhoff 1995) 18.

124 For a critical account of this see Dimitry Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 Columbia Journal of European Law 169.

the Final Act of the Treaty on European Union the 'Declaration on Nationality of a Member State' (Declaration No 2), which confirms that Member States maintain their competence with regard to issues involving nationality attribution. Thus, whenever the Treaties make reference to nationals of the Member States 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'.[125] This was confirmed judicially in the case of *Kaur*, which concerned the compatibility with EU law of the UK's refusal to consider certain of its citizens as its 'nationals' *for the purposes of EU law*.[126] The Court held that the contested decision did not amount to a violation of EU law as it 'did not have the effect of depriving any person who did not satisfy the definition of a national of the United Kingdom of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person'.[127] Hence, with this pronouncement, the ECJ clearly demonstrated its intention of leaving Member States free to determine who can acquire their nationality, *even for the purposes of EU law*.

Nonetheless, the Court's case-law has also made it clear that Member States' freedom in the field of nationality is not entirely without limits. While they retain the competence to define the content of their nationality laws and to determine who may acquire, retain and lose their nationality, Member States must exercise that competence with due regard to Union law.[128] Until recently, however, it remained unclear what this obligation entailed, as no case had *directly* addressed the question of whether the conferral of Member State nationality in a specific context was in violation of EU law.

Prior to *Commission v Malta*, the Court had occasionally addressed issues relating only indirectly to the acquisition of Member State nationality. In that case-law, the Court's role was confined to assessing whether such a grant should be *recognised* for the purposes of EU law, either by EU institutions, as in *Airola* (where it could not, because it violated the principle of non-discrimination based on sex),[129] or by other Member States, in contexts where individuals sought to invoke EU-derived rights in their territory, as in *Micheletti*,[130] *Zhu and Chen*,[131] and *Garcia Avello*[132] (where it was held that Member States should recognise for the purposes of EU law the decision of other Member States to grant their nationality, effectively indicating that they cannot require the nationals of other Member States to have a 'genuine link' with their Member State of nationality).

More recent jurisprudence has increasingly turned to questions concerning the withdrawal of Member State nationality, and, by extension, the consequent loss of Union

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125 'Declaration on Nationality of a Member State' (Declaration No 2) [1992] OJ C191/98. See also the Decision of the Heads of State and Government meeting within the European Council at Edinburgh on 11 and 12 December 1992 concerning certain problems raised by Denmark on the Treaty of European Union [1992] OJ C348/1.

126 *Kaur* (n 4). For comments see Stephen Hall, 'Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now' (2001) 28(3) Legal Issues of Economic Integration 355.

127 *Kaur* (n 4) para 25.

128 *Micheletti* (n 4) para 10; Case C-179/98 *Mesbah* EU:C:1999:549 para 29; *Kaur* (n 4) para 19; *Zhu and Chen* (n 54) para 37

129 *Airola* (n 107).

130 *Micheletti* (n 4).

131 *Zhu and Chen* (n 54).

132 Case C-148/02 *Garcia Avello* EU:C:2003:539.

citizenship. Since 2010, starting with the famous *Rottmann* ruling,[133] the Court has been seized with a steady stream of references for preliminary rulings addressing this issue. This evolving body of case-law can be broadly categorised into three strands. The first concerns the loss of nationality through individual administrative or judicial decisions which were made as a result of the actions of the citizenship holders (obtaining nationality by deception or committal of minor administrative offences), entailing a corresponding loss of Union citizenship, as illustrated in *Rottmann* and, more recently, *Wiener Landesregierung*.[134] The second strand involves the loss of nationality by operation of law, resulting from the application of general national provisions, as seen in *Tjebbes*,[135] *X*,[136] and *Stadt Duisburg*.[137] And the third strand encompasses the collective deprivation of Union citizenship following Brexit, which has given rise to the preliminary ruling in *Préfet du Gers*[138] and the trilogy of direct actions in *Silver*,[139] *Shindler*,[140] and *Price*.[141] The general principle established by this line of case-law is that when a Member State withdraws its nationality *from an individual* – whether through an individual decision (as in *Rottmann* and *Wiener Landesregierung*) or by operation of law (as in *Tjebbes*, *X* and *Stadt Duisburg*) – EU law, and specifically Article 20 TFEU, requires an individual assessment of the consequences of losing Union citizenship, in the light of the principle of proportionality and fundamental human rights; something which is not required where Union citizenship is lost en masse due to a Member State's sovereign decision to leave the EU.

Thus, until *Commission v Malta* the Court had mainly been called to consider the limits placed by EU law in situations governing the *loss* of Member State nationality and – through it – of Union citizenship. And, as Spieker and Weber have explained, 'limitations under EU law [on the loss of Member State nationality] have become increasingly more detailed, covering time limits or specific steps in the individual assessment'.[142] The ruling in *Commission v Malta* is therefore important because, although the Court had previously affirmed that Member States must exercise their competence in nationality matters (including in relation to the grant of their nationality) with due regard to EU law, this was the first time it was called upon to apply that principle concretely to a case involving *the acquisition* of Member State nationality.

Moreover, *Commission v Malta* signals the beginning of a jurisprudential trend in which

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133 *Rottmann* (n 4).
134 Case C-118/20 *Wiener Landesregierung* EU:C:2022:34.
135 *Tjebbes* (n 4). For analyses of the case see, inter alia, Hanneke van Eijken, 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights' (2019) 15(4) European Constitutional Law Review 714; Swider (n 99); Dimitry Kochenov, 'The *Tjebbes* fail' (2019) 4(1) European Papers 319.
136 Case C-689/21 *X* EU:C:2023:626.
137 Joined Cases C-684-686/22 *Stadt Duisburg* EU:C:2024:345.
138 Case C-673/20 *Préfet du Gers* EU:C:2022:449.
139 Case T-252/20 *Silver* EU:T:2021:347.
140 Case T-458/17 *Shindler* EU:T:2018:838.
141 Case T-231/20 *Price* EU:T:2021:349. In all three actions, appeals were brought before the ECJ against the rulings of the General Court, but they were dismissed – see Case C-499/21 P *Silver* EU:C:2023:479, Case C-501/21 P *Shindler* EU:C:2023:480, and Case C-502/21 P *Price* EU:C:2023:482.
142 Spieker and Weber, 'Bonds without belonging?' (n 116) 15. The Court's recent case-law concerning the limitations imposed by EU law on the loss and acquisition of Member State nationality has been characterised as 'a romantic turn in which the institutions seek to densify and consolidate EU citizenship', in the sense that the EU institutions go beyond the formalism that makes the Member States solely responsible for this issue – see Jules Lepoutre, 'Romantic Times? Nationality and European Citizenship' (2024) 38 Nordisk socialrättslig tidskrift 55.

the Member States' competence in the field of nationality is no longer merely subject to procedural and proportionality-based limitations, as in *Rottmann* and *Tjebbes*, but also to substantive ones. The principle emerging from *Commission v Malta* is that the exercise of the competence to grant nationality must not be used in ways that undermine the coherence or credibility of EU citizenship, which includes the requirement that naturalisation pathways leading to EU citizenship must be underpinned by an actual, verifiable, connection between the individual and the conferring State. More specifically, the Court appears to have drawn on an argument traditionally invoked by Member States *to justify the withdrawal of nationality* (the need to preserve the 'special relationship of solidarity and good faith' or 'genuine link' *between the State and its nationals*),[143] and repurposed it in order to limit the freedom of those same States in the nationality field: namely, to refrain from conferring Union citizenship (and perhaps even nationality?) in exchange for money *and* to require that in order for Union citizenship (and perhaps their nationality?) to be granted, there must be such a 'genuine link' or 'special relationship'.

Van den Brink has characterised this development 'as a massive stretch from where the case law used to stand'.[144] He noted that whereas 'one may find it logical that the deprivation of EU citizenship is subject to supranational supervision', the same cannot be said of the outcome in *Commission v Malta*, in which 'the Court decided to strike down an entire citizenship practice even though no one had been deprived of their rights'. Moreover, he contrasted the 'supervision [in citizenship withdrawal cases] that [was] so minimal that the proportionality requirement could not even protect individuals from being rendered stateless', with the absence of any requirement to comply with proportionality – or any other principle – in *Commission v Malta*, observing in relation to the latter that the Court 'did not seek to soften the blow by way of a proportionality analysis'.

One can agree that the Court's decision in *Commission v Malta may*, indeed, constitute – depending on the still unclear implications of the judgment – 'a massive stretch from where the case law used to stand'. This is particularly so if the ruling is read as prohibiting, as a matter of EU law, not only the conferral and mutual recognition *of Union citizenship* acquired through investor citizenship schemes, but also the very grant of Member State nationality itself. As explained earlier in this article, it remains unclear whether the judgment goes this far or merely imposes a duty on *all* Member States (including the one awarding its nationality) and EU institutions *not to recognise* that the status of Union citizenship was acquired in this way. If the former, the ruling raises serious questions about the link between such national naturalisation practices and the scope of EU law, which makes it questionable whether the EU's interference is at all warranted.

That said, even if the judgment does mark a significant expansion of the Court's approach, this does not necessarily make it legally flawed. The EU Treaties are viewed as a 'living instrument',[145] which must be interpreted in a way that responds to evolving realities and emerging challenges, while remaining faithful to the EU's core values. In this light, the underlying message of the judgment – that Member States cannot act with complete discretion in matters of nationality when their choices have consequences for the EU legal

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[143] This was the case for instance in *Rottmann* (n 4) paras 51-54.
[144] van den Brink, 'Why bother with legal reasoning?' (n 89).
[145] Spieker and Weber, 'Bonds without belonging?' (n 116) 13. This was explicitly noted by the Court – but only with regard to the Charter – in Case C-336/19 *Centraal Israëlitisch Consistorie* EU:C:2020:1031 para 77.

order – is not new or radical. It reflects a principle that has long been present in the Court's case-law, namely, that Member States' sovereignty in nationality matters must be exercised with due regard to EU law.[146] What may be contentious in *Commission v Malta*, therefore, is not the principle itself, but the extent to which the Court intended to extend it.

Moreover, the Court's decision to refrain from requiring a proportionality assessment through an individual examination of the situation is entirely logical. Unlike the case-law concerning the loss of nationality *in individual cases* – where proportionality needs to be assessed in light of the individual circumstances of the person affected – *Commission v Malta* did not concern a situation where the acquisition of nationality *by a specific individual* raised concerns. Rather, it involved a national scheme for granting Member State nationality, which the Court found to be *inherently* incompatible with EU law. As such, there was no scope for a proportionality analysis: the grant of Union citizenship in exchange for money was deemed unlawful by design, rendering any individual assessment irrelevant. Thus, to the extent that the judgment prohibits the *future acquisition* of Union citizenship under such schemes, no link with EU law arises that would necessitate a proportionality analysis: like in *Kaur*,[147] the individuals concerned – namely, third-country nationals *that would potentially* be interested in acquiring Union citizenship in this manner – have never held EU citizenship or enjoyed rights stemming from it. Therefore, the prohibition of granting them Union citizenship *in the future* does not affect pre-existing EU law entitlements and thus need not comply with general principles of EU law.

However, if the judgment is interpreted as requiring Member States to retroactively withdraw Union citizenship *already granted under such schemes*, the situation is arguably different. In that case, individuals who have already acquired Union citizenship and have been enjoying the rights attached to it would stand to lose that status. Thus, as observed by Basheska and Kochenov, 'even if you are an European citizen, the EU can be your enemy – pursuing the legal undoing of your status and rights with no legal basis on previously disclosed rules'.[148] One could therefore argue that such a loss should be subject to an individual assessment to ensure compliance with the principle of proportionality and respect for fundamental rights, as required by the *Rottmann* and *Tjebbes* lines of case-law. Nevertheless, the logic of the Brexit cases, might point in the opposite direction: there, too, Union citizenship was lost collectively and automatically, without an individual assessment being required. If that approach is followed, EU law would not mandate an individualised proportionality assessment even in cases of retroactive withdrawal of Union citizenship granted under investor citizenship schemes. At the same time, it could be argued that Brexit involved the withdrawal of a State from the Union, whereas Malta remains an EU Member State, and thus continues to be bound by EU law, including the obligation to ensure compliance with fundamental rights and proportionality.

The judgment appears also to be consistent with the Court's ruling in *Micheletti*,[149]

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146 See, for instance, *Rottmann* (n 4) para 41; Case C-274/96 *Bickel and France* EU:C:1998:563 para 17; *Garcia Avello* (n 132) para 25; Case C-403/03 *Schempp* EU:C:2005:446 para 19. For an analysis see Loïc Azoulai, 'The "Retained Powers" Formula in The Case Law of The European Court of Justice: EU Law as Total Law?' (2011) 4 European Journal of Legal Studies 178.

147 *Kaur* (n 4).

148 Basheska and Kochenov (n 3).

149 *Micheletti* (n 4).

which precludes Member States from unilaterally questioning the grant of nationality by other Member States for the purposes of EU law. As Coutts has observed,[150] the Court's reasoning in *Commission v Malta* relies heavily on the principles of mutual trust and mutual recognition, which are crucial for the creation and operation of the EU's area of freedom, security, and justice, which presupposes the exercise of free movement without internal borders. Under this logic, when Union citizenship has been *lawfully* acquired through the grant of Member State nationality, other Member States are expected to recognise that grant automatically. Read in this light, *Commission v Malta* may both reaffirm and qualify *Micheletti*. It affirms the need for mutual recognition, but it seems to be also introducing a caveat: Member States may now be *required* – as a matter of EU law – not to recognise the conferral of Union citizenship (and perhaps even Member State nationality?) if it has been granted through an investor citizenship scheme. In other words, while Member States still cannot *individually* reject another's bestowal of Union citizenship, they may now be required by EU law to deny recognition where EU law itself determines that the conferral was unlawful. This aligns with the settled approach that mutual recognition within the EU operates only in relation to statuses or products that have been *lawfully* acquired or produced in another Member State.

What *is* problematic with the ruling in *Commission v Malta*, nonetheless, is the absence of clearly articulated, justiciable, criteria and principles that national courts and authorities can apply when assessing whether a particular grant of nationality – or a particular scheme granting nationality – is incompatible with EU law. As explained in the previous part of this section, the ruling leaves the scope and intensity of EU-imposed control largely undefined. In particular, what the Court tells us in *Commission v Malta* is that in certain circumstances, Member States are precluded from granting Union citizenship (and perhaps from even conferring their nationality?), where doing so will conflict with EU principles and values. *Which* EU principles and values, however, and – most importantly – how should they be interpreted? Hence, the ruling leaves open the question of what criteria should govern EU law's scrutiny of nationality grants, potentially allowing challenges to a wide array of Member State practices that were previously considered to fall within national competence. As another commentator has noted, this lack of clarity means that excessive application fees or disproportionately burdensome naturalisation requirements, such as lengthy residence periods, could – as a result of this ruling – now be challenged as inconsistent with EU law if deemed unduly transactional or restrictive.[151]

The ruling in *Commission v Malta* may have (re-)sown the seeds of a broader conversation about whether it should remain entirely within the remit of Member States to determine who qualifies as their national. While Member States have long been understood to enjoy exclusive competence in this domain, the judgment implicitly raises the question of whether that competence should, in fact, be subject to certain limitations, not only as regards its exercise, but also as to its very scope. As Peers has observed, there is certainly a case, given the impact of the grant of nationality upon other Member States, for some degree of coordination of nationality laws within the EU. Such coordination would also be consistent

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[150] Stephen Coutts, 'Citizenship as a Constitutional Status: Commission v Malta' (*Global Citizenship Observatory*, 14 May 2025) <https://globalcit.eu/citizenship-as-a-constitutional-status-commission-v-malta/> accessed 6 August 2025.

[151] Cox (n 101).

with the logic underlying the existence of Union citizenship: why should a legal status that purports to confer membership in a shared European polity be left entirely without common rules governing its acquisition?[152] After all, '[m]utual recognition regimes range from conditional to unconditional and automatic to non-automatic' and, as a general rule, 'the greater degree of automaticity, the greater need there is for underlying common standards to ensure the required equivalence and hence mutual trust'.[153] Thus, if the Court will formulate an *absolute* mutual recognition principle in this context – as has appeared to be the case to date with *Micheletti* and the cases that followed – it should consider laying down some minimum standards.[154] In its recent proposals for amendments to the Treaties, the Parliament made a suggestion to this effect, arguing that a new paragraph 2a should be added to Article 20 TFEU, which would provide that 'The European Parliament and the Council may, in accordance with the ordinary legislative procedure, adopt common provisions on preventing sale of passports, or other abuses regarding the acquisition and loss of citizenship of the Union by third country nationals, with a view to approximating the conditions under which such citizenship can be acquired'.[155] In fact, one could view *Commission v Malta* as imposing such a minimum standard, and maybe this forms the beginning of the EU's action to impose such standards which will ensure the existence of mutual trust, which is necessary for the full and unconditional operation of mutual recognition.

Bringing this issue to the fore also raises a related, and potentially transformative, question: should Union citizenship remain a purely derivative status, or could there be circumstances in which it is acquired directly? In particular, one might ask whether there should be a route to Union citizenship for individuals whose 'special relationship' lies not with a particular Member State, but with the Union itself. Such a step would entail decoupling access to EU citizenship from national citizenship in exceptional cases where the individual's connection to the EU is sufficiently strong and independently justifiable, while it would not take away Member State sovereignty in the field of nationality. The plausibility of such an approach is reinforced by the Court's reasoning in *Commission v Malta*, which affirms that the conferral of Member State nationality – through which Union citizenship is acquired – must be based on a special relationship of solidarity and good faith between the State and the individual, which constitutes the foundation of both national *and Union citizenship*. I can, of course, understand why the Court considers that a special relationship of solidarity and good faith between *the State* and the individual constitutes the foundation *of national citizenship*; after all, the absence of such a 'special relationship of solidarity and good faith' was relied

152 Peers (n 101). See, also, Hanneke van Eijken, 'Op-Ed: Nationality for Sale: Different fruits in one basket?' (*EU Law Live*, 28 October 2024) <https://eulawlive.com/op-ed-nationality-for-sale-different-fruits-in-one-basket/> accessed 6 August 2025. For a similar view see Hannes Swoboda, 'Linking Citizenship to Income Undermines European Values. We Need Share Criteria and Guidelines for Access to EU Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer Open 2018).

153 Stephen Coutts, 'On Mutual Recognition and the Possibilities of a "Single European Polity": The Opinion of AG Collins in Case C-181/23 *Commission v Malta*' (2024) 9(2) European Papers 818, 823.

154 For an article supporting this view see Martijn van den Brink, 'A qualified defence of the primacy of nationality over European Union citizenship' (2020) 69(1) International and Comparative Law Quarterly 177. See, also, Bauböck (n 6) 762-763. See, also, Evans (n 122) 192-194, where the difficulties that would arise in an effort to harmonise the nationality laws of the Member States are analysed.

155 European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties [2022/2051(INL)] amend 87.

upon by Member States (in the case-law concerning loss of Union citizenship), in order to justify decisions to withdraw their nationality. In *Commission v Malta*, the absence of such a special relationship of solidarity and good faith between the individual *and the State*, was relied upon *by the EU*, in order to preclude a Member State from bestowing *Union citizenship* through a specific naturalisation route. It is not evident, however how a relationship of solidarity and good faith between *a State* and an individual can constitute 'the foundation *of EU citizenship*', especially in Member States where a Eurosceptic sentiment appears to be prevalent.

In other words, for the purposes of the acquisition or retention of Union citizenship, what should matter is the special relationship of solidarity and good faith between the individual *and the Union itself*, and this can be developed, whether an individual has established – in parallel – such a special relationship with one (or more) of the Member States or not. Thus, it may be time to consider whether individuals who can demonstrate such a special relationship directly with the Union but not with any particular Member State, should be eligible to acquire Union citizenship *directly* – or, in situations like Brexit, *maintain* EU citizenship – without having to first acquire (or maintain) the nationality of a Member State;[156] a move which would require a significant re-writing of the European Treaties. Yet, academic commentators still appear to be divided as to whether it would be a good idea to (wholly or partially) disentangle Union citizenship from Member State nationality.[157]

## 5 CONCLUSIONS

The judgment in *Commission v Malta*,[158] marks a significant – if still ambiguously defined – moment in the evolving relationship between EU law and Member State sovereignty in the field of nationality. For the first time, the Court of Justice found that a specific naturalisation route provided for under a Member State's nationality law, which led to the conferral of nationality (and thereby Union citizenship) in exchange for investment, could violate EU law, thereby subjecting naturalisation decisions to supranational scrutiny.

At the heart of the Court's reasoning appears to lie an ethical, or at least conceptual, concern with the commodification of EU citizenship. It is not simply the absence of a 'special relationship of solidarity and good faith' that renders investor citizenship schemes problematic, but rather the transactional nature of such schemes. The Court emphasised that treating Union citizenship as a tradable commodity undermines the principle of sincere cooperation under Article 4(3) TEU and jeopardises the mutual trust that underpins the functioning of the EU legal order.

Yet, despite the clarity of the Court's condemnation of the Maltese scheme, the judgment leaves unresolved a number of important questions. Chief among them is the question whether the judgment merely precludes the acquisition of Union citizenship through investor citizenship schemes, or whether it goes further, prohibiting the acquisition of *both* Union citizenship *and Member State nationality* through such schemes, effectively

156 This is the so-called 'partial autonomy' model of Union citizenship – see van den Brink, 'A qualified defence of the primacy of nationality over European Union citizenship' (n 154) 181.
157 See the various contributions in Liav Orgad and Jules Lepoutre (eds), 'Should EU Citizenship Be Disentangled from Member State Nationality?' (EUI RSCAS Working Paper 2019/24, Robert Schuman Centre for Advanced Studies 2019) <https://globalcit.eu/should-eu-citizenship-be-disentangled-from-member-state-nationality-2/> accessed 6 August 2025.
158 *Commission v Malta* (n 1).

prohibiting outright the operation of such schemes by Member States. Moreover, the extent to which the ruling applies retroactively, and thus whether Member States are now under a duty to revoke Union citizenship acquired through such schemes, and whether such revocation should also entail the loss of Member State nationality, remains shrouded in uncertainty. The judgment also invites reflection on the broader conceptual relationship between Union citizenship and Member State nationality. If the Court's intention was to prohibit not only the grant of Union citizenship, but also the very conferral of Member State nationality through investor citizenship schemes, this would represent a marked expansion of EU oversight into a domain traditionally considered as central to national sovereignty.

Ultimately, *Commission v Malta* unsettles long-standing assumptions about the boundary between EU and national competence in nationality matters. Whether it signals the beginning of a broader EU role in shaping the acquisition of Member State nationality remains to be seen. Its value as a precedent will depend on how subsequent judgments interpret and apply it and, particularly, in clarifying whether the prohibition it establishes concerns Union citizenship alone or reaches more deeply into national decisions concerning the grant of their nationality. Either way, the ruling opens a new and important chapter in the constitutional development of Union citizenship, which may eventually lead towards the adoption of common minimum standards or, even, the decoupling of EU citizenship from national status in exceptional cases. For now, however, the judgment raises as many questions as it answers, and its long-term legacy will depend on how its ambiguities are resolved in future case-law.

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# A SUCCESSFUL ATTEMPT TO HIJACK THE UNION'S LIBERAL PROMISE: *COMMISSION V MALTA*

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*The decision in* Commission v Malta *is an alarm bell signalling the continued construction of an illiberal union in Europe with the growth of arbitrary power constrained neither by democracy nor legality. This case marks the conclusion of an orchestrated political campaign of questionable legality that has resulted in the drastic expansion of the Court of Justice's (CJEU) powers in the domain of nationality law at the expense of foundational EU values and citizens' rights. None of the European Commission's three main arguments in its action against Malta – regarding EU competence in the field of citizenship, 'genuine links', and the illegality of the Maltese citizenship programme – have any foundations in EU, international, or national law. Rather, the case is an unwelcome solidification of the 'Eurowhiteness' ideal of belonging underpinning the Union in Europe since its inception, and which had never so openly been endorsed by the institutions. The CJEU needed no law or legal arguments to brush away many of the achievements of EU citizenship law with the U-turn in its ruling of 29 April 2025. It has abandoned legal reasoning by establishing a thick version of EU citizenship unwarranted by the Treaties, with a solitary reference to 'solidarity'. This notion has however acquired a new meaning: the construction of a solidarity of thick nationalist identities, policed from Kirchberg at the expense of EU citizens' status and rights – a development that contrasts with the established meaning of solidarity within the EU legal order. EU citizenship is significantly altered as a result, as the essence of citizenship is no longer a legal bond between a person and public authority, but also includes other, undisclosed, primordial extra-legal factors not enumerated in any act and thus potentially open for unconstrained deployment by the Court in future attacks against rule-based EU constitutionalism grounded in the rule of law and the respect of democratic values, as well as against the dignity of EU citizens and their legal status in the Union.*

## 1 INTRODUCTION AND STRUCTURE

As we learn from the actions of the European Commission,[1] millionaires can also be

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[1] Including, but not limited to Case C-181/23 *European Commission v Republic of Malta* EU:C:2025:283 (*Commission v Malta*); European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Investor Citizenship and Residence Schemes in the European Union' COM(2019) 12 final (European Commission's Report on EU Investment Migration Programmes), and the accompanying European Commission, Commission Staff Working Document SWD (2019) 5 final; European Commission, 'Recommendation of 28.3.2022 on immediate steps in the context of the Russian invasion of Ukraine in relation to investor

a problem for 'Fortress Europe', especially if they 'buy' the sacred privileges of Europeanness instead of winning them in life's 'birthright lottery'[2] or 'earning' them by cultivating 'genuine links' alongside the many 'others' who are not fortunate enough to qualify for citizenship by blood connections and towards whom the European Union (EU) is carefully calibrated to keep at bay.[3] In 2023, the Commission launched a case against Malta, alleging an infringement of Articles 20 TFEU and 4(3) TEU and challenging the Maltese citizenship-by-investment (CBI) programme.[4] In 2025, the Court of Justice of the European Union (CJEU) ruled in favour of the Commission,[5] contrary to the Opinion of Advocate General (AG) Collins and its previous case law, signalling a worrying departure from the founding principle of the Rule of Law,[6] opting instead for a 'miracle'[7] standing for an arbitrary exercise of power unchecked by democracy or legality.[8]

While legal scholars might have anticipated a drastically different ruling from the CJEU,[9] the Commission's decision to bring Malta to court was hardly unexpected. The Commission has been behind efforts to curb the acquisition of citizenship through citizenship-by-investment programmes.[10] It first responded to the launch of the Malta Individual Investor Programme (IIP) in 2013, when it began by clarifying that Maltese citizenship was none of its business,[11] only to offer an abrupt U-turn to push Malta to

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citizenship schemes and investor residence schemes' C(2022) 2028 final para 13 (European Commission's Recommendation on EU Investment Migration Programmes). See also Ursula von der Leyen, 'State of the Union Address by President von der Leyen at the European Parliament Plenary' (16 September 2020) <https://ec.europa.eu/commission/presscorner/detail/ov/SPEECH_20_1655> accessed 26 February 2026.

[2] Ayelet Shachar, *The Birthright Lottery* (Harvard University Press 2009).

[3] On the problematic ideology of 'integration' of the 'wrong' Europeans, see e.g. Sarah Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie* (Larcier 2021); Adrian Favell, 'Integration: Twelve Propositions after Schinkel' (2019) 7(21) Comparative Migration Studies; Sarah Ganty, 'Race and Merit in the Context of Citizenship and Residence by Investment' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[4] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU) Art 20; Consolidated Version of the Treaty on European Union [2016] OJ C202/13 (TEU) Art 4(3).

[5] *Commission v Malta* (n 1).

[6] On the rule of law as a bulwark against unchecked arbitrary power, see e.g. Martin Krygier, 'Tempering Power' in Maurice Adams et al (eds), *Bridging Idealism and Realism in Constitutionalism and the Rule of Law* (Cambridge University Press 2016); Gianluigi Palombella, 'Beyond Legality–before Democracy: Rule of Law Caveats in the EU Two-Level System' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016).

[7] Luke Dimitrios Spieker and Ferdinand Weber, '*Commission v Malta* (C-181/23): a "Miracle" of Union Citizenship?' (2025) 50(4) European Law Review 487.

[8] See for the broader context of this overreach in contemporary EU constitutionalism, Dimitry Kochenov and Jacquelyn Veraldi, 'Supremacy Rule of Law in the Service of a Depoliticised Democracy: Pondering the Nature of the EU's "Social Contract"' (2026) 32(1) ELJ 144.

[9] See for an exhaustive literature overview, Dimitry Kochenov and Elena Basheska, 'It's All about Blood, Baby! The EU's Attack against Investment Migration in the Context of EU Law, International Law and the War in Ukraine' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[10] Shah Guido, 'Divertissement Investment Citizenship: A Berlaymont Fantasia' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[11] Which is true, based on an honest reading of the law: Daniel Sarmiento and Martijn van den Brink, 'EU Competence and Investor Migration' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Petra Weingerl and Matjaž Tratnik, 'Relevant Links: Investment Migration as an Expression of National Autonomy in Matters of Nationality?' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Matjaž Tratnik and Petra Weingerl, 'State Autonomy versus "Genuine Links": *Nottebohm* and beyond' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025); Daniel Sarmiento and Guillermo Íñiguez, 'Investor

conduct 'negotiations' on a matter outside the Commission's competence, citing the lack of a 'genuine link' (outlawed by the CJEU long-ago in *Micheletti*)[12] and non-compliance with the principle of sincere cooperation enshrined in Article 4(3) TEU. Malta agreed at that time to amend its IIP to introduce a legal residence requirement for those seeking citizenship through investment.[13] While the matter seemed closed – notwithstanding the fact that the compromise seemed more of a strategy to appease the Commission and sidestep a potential escalation of the issue than a decision rooted in fact and law, as there is no and has never been such thing under EU law as a residence requirement to obtain nationality of a Member State[14] – the Commission did not take its own agreement with Malta seriously and continued its escalation.

The Commission enjoyed the support of the European Parliament in its efforts to combat investment migration programmes. The Parliament had passed several obviously non-binding resolutions – all of them strictly outwith the field of its competences (as the Resolutions themselves diligently recorded) – calling on EU Member States to put an end to such programmes.[15] Furthermore, a small but opinionated body of moral panic literature had also mushroomed around the issues of whether citizenship should be 'for sale'.[16] This literature steered clear of established practice and international, EU, or national law, and concerned itself rather with the innate suspicion of investment migration felt among the acolytes of good old blood-based citizenship ideologies:[17] a 'streetlight effect' in the words of Suryapratim Roy.[18] Naturalisation through investment has even been compared to the 'passport trade',[19] a trade that, strictly speaking, does not exist outside clandestine Pacific passport markets and other criminal circles that provide counterfeited official documents.[20] The Commission chose to shove the law aside in favour of poorly-engineered

Citizenship under EU Law: Recent Trends and Constitutional Implications' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

12 Case C-369/90 *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria* EU:C:1992:295 (*Micheletti*); cf Tratnik and Weingerl, 'State Autonomy vs "Genuine Links"' (n 11).

13 For a detailed analysis of the legal residence in the legal practice of the EU Member States as compared to physical presence, see Dimitry Kochenov and Martijn van den Brink, 'Legal Residence and Physical Presence' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

14 ibid; Elena Basheska, 'Why the EU's Top Court Should Clarify EU Law' (*Investment Migration Council,* 23 April 2021) <https://investmentmigration.org/articles/why-the-eus-top-court-should-clarify-eu-law/> accessed 26 February 2026.

15 European Parliament, 'Resolution of 10 July 2020 on a Comprehensive Union Policy on Preventing Money Laundering and Terrorist Financing – The Commission's Action Plan and Other Recent Developments' 2020/2686(RSP); European Parliament, 'Resolution of 9 March 2022 with Proposals to the Commission on Citizenship and Residence by Investment Schemes' 2021/2026(INL).

16 E.g. Ayelet Shachar, 'Dangerous Liaisons: Money and Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018); Ana Tanasoca, 'Citizenship for Sale: Neomedieval Not Just Neoliberal' (2016) 57(1) European Journal of Sociology 169. Cf also Jelena Džankić, 'The Maltese Falcon, or: my Porsche for a Passport!' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018).

17 Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018).

18 Suryapratim Roy, 'The "Streetlight Effect" in Commentary on Citizenship by Investment' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023).

19 See e.g. Dimitry Kochenov, '"Passport Trade": The Vicious Circle of Nonsense in the Netherlands' (*Verfassungsblog*, 8 June 2020) <https://verfassungsblog.de/passport-trade-a-vicious-cycle-of-nonsense-in-the-netherlands/> accessed 13 January 2026.

20 Georgi Gotev, 'Thousands obtained EU citizenship for €5000 in Bulgarian scam' (*Euractiv*, 30 October

moral panic, and the Court embraced this Orwellian approach as well.[21]

Accordingly, the CJEU decision in *Commission v Malta* results from a concerted, large-scale political campaign against several essential elements of EU constitutionalism, using the fight against investment migration programmes as a pretext. The European Commission has overstepped its authority by waging war on a handful of core EU law principles, from non-discrimination to conferral, to redefine EU citizenship as a legal status based on 'genuine links' in direct conflict with the key CJEU case law and the Treaties.[22] Worse still, the CJEU bowed to the Commission's requests and to ongoing efforts to misrepresent investment migration as an unjust means of acquiring citizenship. The Court has done so contrary to its earlier rulings and with recourse to no law at all, starring, again, as a 'high priest of lawlessness law'[23] (Section 2). Going into more detail, we unpack the CJEU's ruling in *Commission v Malta* in the light of the core legal arguments of the Commission's long-standing and empty moral panic narrative, addressing each claim individually – a job the Court has not done, as it preferred *not* to rule on any of the arguments submitted, as Guillermo Íñiguez perceptively noticed,[24] offering a decision seemingly in some *other* case, which neither Malta nor the Commission had argued before the Court.[25] Accordingly, we focus on the EU's competence (Section 3); the fictitious 'genuine links' requirement (Section 4); and the legality of the Maltese CBI programme (Section 5). Finally, we draw conclusions (Section 6) in light of the dangerous legal space created by the decision in *Commission v Malta*. To agree with Xavier Groussot and Matteo Valera, 'in EU law, there is now a day before and after the 29th of April 2025 […] [when the CJEU] delivered its "spring bombshell" in the case of *Commission v Malta*'.[26]

## 2 THE BETRAYAL OF LEGALITY: THE CJEU WILLINGLY LOSING ITS WAY

In *Commission v Malta*, the CJEU held on 29 April 2025 that Malta's citizenship-by-investment

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2018) <www.euractiv.com/section/justice-home-affairs/news/thousands-obtained-eu-citizenship-for-e5000-in-bulgarian-scam/> accessed 13 January 2026.

[21] On the Orwellian approach of the Commission to keep on repeating falsehoods until and as if they become 'the law', see Joseph H H Weiler, 'Postscriptum: Citizenship for Sale (*Commission v Malta*): Who of the Two Is Selling European Values?' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).

[22] Guillermo Íñiguez, 'On Genuine Links, Burdens of Proof, and Declaration No 2: Some Musings on the Court's Reasoning in *Commission v. Malta* (C-181/23)' (*EU Law Live,* 5 May 2025) <https://eulawlive.com/op-ed-on-genuine-links-burdens-of-proof-and-declaration-no-2-some-musings-on-the-courts-reasoning-in-commission-v-malta-c-181-23/> accessed 26 February 2026; Martijn van den Brink, 'Why Bother with Legal Reasoning? The CJEU Judgment in *Commission v. Malta (Citizenship by Investment)*' (*Verfassungsblog*, 5 May 2025) <https://verfassungsblog.de/why-bother-with-legal-reasoning/> accessed 26 February 2026.

[23] Sarah Ganty and Dimitry Kochenov, 'EU Lawlessness Law' (2024) 30(1) Columbia Journal of European Law 78, 119.

[24] Íñiguez, 'On Genuine Links, Burdens of Proof, and Declaration No 2' (n 22).

[25] This astonishing disregard of the most basic procedural imperatives is thus akin to what we have witnessed in the *Sharpston* cases: Dimitry Kochenov and Graham Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2021) 27(1-3) European Law Journal 262.

[26] Xavier Groussot and Matteo Valera, 'The Metamorphosis of EU Law through Article 19(1) TEU: From Loyalty to Value-Laden Interpretation' (2025) 4 Europarättslig Tidskrift 567.

programme violates EU law.[27] In doing so, the Court disagreed entirely with seemingly every single aspect of the Opinion of its Advocate General Collins, released on 10 October 2024.[28] Unlike the Advocate General, who recommended dismissing the case and ordering the Commission to pay the costs – effectively hinting at an abuse of procedure, given both the absence of EU competence in this field and the absence of any violation of EU law – the Court found the opposite, also dismissing virtually all the academic literature on the subject, including the analyses of Hans Ulrich Jessurun d'Oliveira,[29] Daniel Sarmiento, and Martijn van den Brink,[30] Matjaž Tratnik and Petra Weingerl,[31] Joseph H.H. Weiler,[32] and the present authors.[33] The voices to the contrary mostly, but not exclusively,[34] came from outside the legal field and did not engage with EU law at all.[35]

The divergence of views between the AG and the Court suggests a poor state of EU rule of law and the politicisation of basic legality.[36] Legality and legal certainty apparently are not guaranteed, and the rules remain unclear, particularly in light of this surprising judgment. *Commission v Malta* outlaws the 'commercialisation' of EU citizenship and hints at a possible U-turn away from the liberal conception of EU citizenship, celebrated in earlier case law as a legal link between the individual and authority capable of protecting the individual against any 'absence of genuine links' claims: that the ties that bind are procedural, rather than substantive, is the core added-value of liberal citizenship.[37]

This vision, at least at the EU level, is now gone. For the first time, instead of attempting – at least rhetorically – to defend the rights of Europeans, the Court does exactly the opposite: it assaults a group of European citizens attempting to strip them of dignity and rights. Rights and values aside, the move is obviously an attack on the very idea of democracy. We mean this not only in the sense of not respecting the outcome of Maltese decision-making in the national sphere of competence. The problem is much deeper, as the whole rationale for denaturalising a group of citizens turns European institutions, including the

[27] See Dimitry Kochenov and Guillermo Íñiguez, 'EU Citizenship's New Essentialism' (2025) 50(4) European Law Review 455, for one of the authors' initial reactions.
[28] Opinion of AG Collins in Case C-181/23 *Commission v Malta* EU:C:2024:849.
[29] Hans Ulrich Jessurun d'Oliveira, 'Golden Passports: European Commission and European Parliament Reports Built on Quicksand' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[30] Sarmiento and van den Brink (n 11).
[31] Weingerl and Tratnik, 'Relevant Links' (n 11); Tratnik and Weingerl, 'State Autonomy versus "Genuine Links"' (n 11).
[32] Weiler, 'Postscriptum: Citizenship for Sale' (n 21).
[33] Kochenov and Basheska, 'It's All about Blood, Baby!' (n 9).
[34] Luke Dimitrios Spieker and Ferdinand Weber, 'Bonds without Belonging? The Genuine Link in International, Union, and Nationality Law' (2024) 43 Yearbook of European Law 56; Simon Cox, 'The EU Free Market Does Not Extend to Citizenship' (*Verfassungsblog*, 30 April 2025) <https://verfassungsblog.de/the-eu-free-market-does-not-extend-to-citizenship/> accessed 6 August 2025.
[35] See also, for instance, Transparency International, 'Golden passports on trial: Can the EU stop countries from selling citizenship?' (25 April 2025) <https://www.transparency.org/en/news/eu-golden-passports-on-trial-malta-court-of-justice-citizenship> accessed 26 February 2026. For literature overviews, see e.g., Dimitry Kochenov and Kristin Surak, 'Learning from Investment Migration' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023); Dimitry Kochenov, Madeleine Sumption, and Martijn van den Brink, 'Introduction: Advancing Investment Migration Scholarship' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[36] For a critical overview of key literature supporting this worrying trend in the broader context of troubled EU constitutionalism, see e.g. Martijn van den Brink, 'Constitutionalism without Principle: Article 2 TEU and the Doctrinal Construction of EU Values' (2026) European Law Open (early view).
[37] Christian Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51(1) European Journal of Sociology 9.

Commission and the Court, from being the custodians of popular democratic power acting in the name of the sovereign citizens into a questionable locus of all available normativity. Indeed, in the absence of any law able to justify such moves, either theoretically or from the point of view of the substance and procedure in the available law *sensu stricto*, the EU institutional duo emerges as a collective tyrant in disagreement with the idea of popular sovereignty and *refusing to serve the people*. Instead the Court and the Commission view themselves as in possession of a right to pick the 'right' Europeans first, thereby brushing aside the idea of accountability. As a consequence, the ECJ has emerged as the direct opposite of the Supreme Court of the US in *Afroyim v Rusk*,[38] the latter protecting US citizens from expatriation using democratic logic, while the former is assaulting European citizens' dignity and rights with no regard for democracy or the rule of law.

This power grab by the EU comes without any kind of convincing demonstration of any harm having been caused by the national policy in question, no rule of EU law breached, thus hinting at the continuing intense politicisation of the EU legal order, where arbitrary power not grounded in the law goes unchecked.[39] This politicisation does not signal the glorious entry of politics on the EU's centre-stage, of course, since the EU's authoritarian liberalism,[40] in Michael Wilkinson's apt wording, is designed precisely to switch democratic politics off, rendering our continent largely 'apolitical'.[41] This significantly tames its moral appeal and constitutional ambition, in Andrew Williams' analysis.[42] What we are facing, instead, is politicisation in the sense of a robust departure from the rule of law: an unchecked rise of arbitrary power. This departure also plagues other fields,[43] from the independence of the judiciary[44] and judicial dialogue,[45] and the respect for dispute resolution through arbitration[46] and arrest warrants – which sometimes carry a presumption of guilt,[47] to the safeguarding of essential rights at the EU's borders,[48] unleashing what one of the authors writing with Sarah Ganty branded as the EU's 'death machine',[49] resulting in the infamous

[38] *Afroyim v Rusk* 387 US 253 (1967).
[39] For the crudest version of this, see, Omer Shatz, *EU Crimes against Humanity* (JSD Dissertation, Yale Law School, 2023).
[40] Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).
[41] For a detailed discussion and further literature, see, Kochenov and Veraldi (n 8).
[42] Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010).
[43] Joelle Grogan and Barbara Grabowska-Moroz (eds), *Rule of Law beyond the EU Member States: Assessing the Union's Performance* (2nd edn, CEU Democracy Institute 2025).
[44] Dimitry Kochenov and Petra Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' (2023) 60 Journal of Common Market Studies 150.
[45] Dimitry Kochenov, 'Restoring Dialogical Rule of Law in the European Union: Janus in the Mirror' (2024) CYELS (early view).
[46] Dimitry Kochenov and Nicolaos Lavranos, '*Achmea* versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States' (2022) 14 Hague Journal on the Rule of Law 195; Wojciech Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' (2018) 55(4) Common Market Law Review 1025.
[47] Petra Bárd and Dimitry Kochenov, 'What Article 7 is Not: The European Arrest Warrant and the *de Facto* Presumption of Guilt – Protecting EU Budget Better than Human Rights?' in Adam Łazowski and Valsamis Mitsilegas (eds), *The European Arrest Warrant at Twenty* (Hart Publishing 2026).
[48] Sarah Ganty et al, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"' (2024) 16 Hague Journal on the Rule of Law 739.
[49] Dimitry Kochenov and Sarah Ganty, 'The Death Machine: EU Lawlessness Law that Rules' in Catherine Barnard et al (eds), *The Pursuit of Legal Harmony in a Turbulent Europe. Essays in Honour of Eleanor Sharpston* (Hart Publishing 2024) 67; Sarah Ganty and Dimitry Kochenov, 'How the EU Death Machine Works' (*Verfassungsblog*, 27 February 2024) <https://verfassungsblog.de/how-the-eu-death-machine-works/>

'EU Crimes against Humanity'.[50] With *Commission v Malta* EU lawlessness law, which is behind the EU-procured and orchestrated death-trap in the Mediterranean among innocent non-citizens, is now moving closer to home: as Europeans too are arbitrarily targeted, the CJEU is opening the doors of Balibarian *apartheid européen*, which used to be reserved for non-citizens only, to all.[51] It is in this sense that we can agree with the Court that the case is about 'solidarity'.

While the stakes in *Commission v Malta* were seemingly significantly lower than the dozens of thousands of deaths resulting from the EU's carefully designed and lavishly funded criminal efforts,[52] upon a closer examination what we are dealing with could actually be more far-reaching: the Union where classical democracy is unavailable and the rule of law is so weak now turns away from its own citizens whom it was purported to serve since its inception.[53] It is now clear that even if you are a European citizen, the EU can be your enemy – pursuing[54] the legal undoing of your status and your rights with no legal basis relying on no previously disclosed rules, and in a context where the victims of such lawless attacks have no legal or democratic means to defend themselves. The unchecked, arbitrary power of Wilkinson's authoritarian liberalism has now revealed its punishing face better than ever before, moving a step further than mere 'adversity' or rendering rights an 'illusion', as diagnosed by Charlotte O'Brien.[55] The EU law of personhood has thus reached a high point of a smooth evolution: what started as mere exclusion of the 'Other' in the Balibarian '*apartheid européen*'[56] has progressed to become a strict division between the 'good' and 'bad' Europeans[57] based on 'internal market' hermeneutics[58] beyond considerations of ordinary

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accessed 26 February 2026.

50 Shatz (n 39).

51 Étienne Balibar, *Nous, citoyens d'Europe?* (La Découverte 2001) 192. See also Sarah Ganty, 'Neo-Ethnicization of Citizenship: The EU's Internal and External Governance of Citizenship by Investment' (2026) Fudan Journal of Humanities and Social Sciences (early view).

52 Shatz (n 39); Ganty and Kochenov, 'EU Lawlessness Law' (n 23); Joyce De Coninck, *The EU's Human Rights Responsibility Gap* (Hart Publishing 2024).

53 Remember the 'legal heritage' mantras of *van Gend en Loos* and all the hopeful literature on the EU and the individual: Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68(2) The Modern Law Review 233; Gianluigi Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3(2-3) International Journal of Constitutional Law 357.

54 Rather than merely assisting a Member State willing to attack and destroy your rights and/or status, as was the case, for instance, in Case C-391/09 *Runevič-Vardyn v Lithuania* EU:C:2011:291 and in Case C-221/17 *Tjebbes* EU:C:2019:189. The former case is analysed in this vein in Dimitry Kochenov, 'When Equality Directives Are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU' in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law beyond Gender* (Hart Publishing 2018). Cf Adam Łazowski, Egle Dagilyte, and Panos Stasinopoulos, 'The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights' (2015) 11 Croatian Yearbook of European Law and Policy 1. The latter case is analysed in: Dimitry Kochenov, 'The *Tjebbes* Fail' (2019) 4(1) European Papers 319; Katja Swider, 'Legitimizing Precarity of EU Citizenship: *Tjebbes*' (2020) 57(4) Common Market Law Review 1163.

55 Charlotte O'Brien, 'The Great EU Citizenship Illusion Exposed: Equal Treatment Rights Evaporate for the Vulnerable' (2021) 46 European Law Review 6; Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017).

56 Balibar (n 51) 192; Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' in Daniel Thym and Margarite Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill-Nijhoff 2015); Ganty and Kochenov, 'EU Lawlessness Law' (n 23) 88-98.

57 Gareth Davies, 'How Citizenship Divides: A New Legal Class of Transnational Europeans' (2019) 4(3) European Papers 675.

58 Maria Haag, 'The *coup de grâce* to the Union Citizen's Rights to Equal Treatment: *CG v. The Department for*

equality and respect,[59] and eventually resulted in an assault on the lives of 'Others' and the betrayal of own citizens alike,[60] which has now allowed a totally different, less benevolent face of the Union to emerge: *apartheid européen* is not only about the foreigners – after *Commission v Malta*, EU citizens are equally in danger.

The CJEU's ruling in *Commission v Malta* is thus just a new, albeit regrettably no longer surprising, step in the troubling evolution charted above – a reminder that the law does not matter much in the EU as it stands, as it can also mean 'EU law without the rule of law'[61] or 'EU Lawlessness Law'.[62] As viewed by Groussot and Valera, *Commission v Malta* 'constitutes "bad law" since it promotes rule by law rather than rule of law, expanding the scope of EU law regardless of the division of competences by Article 20 TFEU, Article 4(1)-(2) TEU and Declaration 2 Annexed to the Treaty'.[63] While we see what they mean, we respectfully disagree: there can be no 'rule by law' when no law has been disclosed in advance. We are thus bound to side with Martijn van den Brink: legal references or reasoning were simply not provided by the Court, which has manifestly failed to fulfil its only function. The outcome is thus far removed from rule 'by law': it is solely based on the petty considerations of empty prejudice apparently entertained by the Court, *replacing* the law and attempting, illegally, to disqualify citizens from the legal protections owed to them not only by the Union, but also by their state of nationality as a Member State of the EU. *Commission v Malta* is a triumph of frivolous and unlawful prejudice underpinning an abuse of power unchecked by law in a Union said to be an emanation of 'integration through law'.

What makes this finding even more troubling is the poor state of democratic self-governance across the levels of the law in Europe: precisely the nebulous uncertainty exploited by politicians to establish and keep the killing machine in the Mediterranean running.[64] In a Union where democracy is not in the legal system's 'DNA',[65] values emerge as purely textual[66] and the rule of law does not tame those in power – especially not at

*Communities in Northern Ireland*' (2022) 59(4) Common Market Law Review 1081; Dion Kramer and Anita Heindmaier, 'Administering the Union Citizen in Need: Between Welfare State Bureaucracy and Migration Control' (2021) 31(4) Journal of European Social Policy 380; O'Brien, 'The Great EU Citizenship Illusion Exposed' (n 55); Roxana Barbulescu and Adrian Favell, 'Commentary: A Citizenship without Social Rights? Freedom of Movement and Changing Access to Welfare Rights' (2020) 58 International Migration 151; Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in Fabian Amtenbrink et al (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (Cambridge University Press 2019).

59 Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) Jean Monnet Working Papers (NYU Law School) No 08/10.

60 O'Brien, 'The Great EU Citizenship Illusion Exposed' (n 55); O'Brien, *Unity in Adversity* (n 55).

61 Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34(1) Yearbook of European Law 74.

62 Ganty and Kochenov, 'EU Lawlessness Law' (n 23).

63 Groussot and Valera (n 26) 590.

64 Elena Basheska and Dimitry Kochenov, 'The True Show of Unity: Supremacy Rule of Law at the Service of Eurowhiteness Solidarity' in Stéphanie Laulhé Shaelou and Andreas Marcou (eds), *Rule of Law and European Values in Turbulent Times* (Springer, forthcoming 2026).

65 Joseph H H Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016); Štefan Auer, *European Disunion: Democracy, Sovereignty and the Politics of Emergency* (Hurst 2022).

66 Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29(3) Oxford Journal of Legal Studies 549.

the EU level which is marked by 'supremacy rule of law'[67] – we can expect many more sudden U-turns like this, further damaging the fabric of fundamental legality and pro-actively undermining the future of the integration project, holding Europhiles and Eurosceptics alike hostage of dubious arbitrariness immune to law, values, and principles.

## 3 EU COMPETENCE

The Commission's first argument concerned the existing division of competence in the field of citizenship – the proverbial 'federal bargain'.[68] While acknowledging that Member States have competence to establish the conditions for the acquisition and loss of citizenship, the Commission emphasised the need for Member States to adhere to EU law when exercising this authority. More specifically, Member States may not exercise their competence in a way that would compromise or undermine 'the essence, value and integrity of Union citizenship, to preserve the mutual trust which underpins that status'.[69] The Commission linked these requirements to the principle of sincere cooperation set out in Article 4(3) TEU and to the status of Union citizen set out in Article 20 TFEU. The Commission particularly emphasised that a Member State's nationality is the only requirement for access to EU citizenship and the wealth of rights enjoyed by EU citizens by virtue of EU law.[70]

The Commission's first argument is particularly problematic. Citizenship and territory are the essential starting points of the concept of state sovereignty.[71] The ABC of global citizenship law is that states are free to confer citizenship on whom they consider qualified under the Hague Convention of Nationality[72] and unquestionably under EU law – as Shaw,[73]

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[67] Dimitry Kochenov, 'Supremacy Rule of Law Undermines the European Union' in Marek Safjan (ed), *The Revival of the Rule of Law* (Intersentia 2024).

[68] Niamh Nic Shuibhne, 'Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

[69] *Commission v Malta* (n 1) para 42.

[70] ibid para 43.

[71] On sovereignty of states, see among many authors, Leo Gross 'The Peace of Westphalia: 1648–1948' (1948) 42(1) The American Journal of International Law 20; Henry Wheaton, *Wheaton's Elements of International Law*, Coleman Phillipson (ed) (5th edn Steven and Sons Ltd 1916); Hans Kelsen, *Principles of International Law* (Rinehart and Company 1952; repr by The Lawbook Exchange, Clark, NJ 2003); Charles E Merriam, *History of the Theory of Sovereignty Since Rousseau* (Faculty of Political Science of Columbia University, NY 1900; repr by The Lawbook Exchange, Clark, NJ 1999); Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton University Press 2001); cf Randall Lesaffer, 'International Law and Its History: The Story of an Unrequired Love' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 27-42; Stéphane Beaulac, *The Power of Language in the Making of International Law* (Martinus Nijhoff 2004); Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth' (2001) 55(2) International Organization 251 etc.

[72] See Article 1, Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89 (*The Hague Convention*).

[73] Jo Shaw, 'Citizenship for Sale: Could and Should the EU Intervene?' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018).

Kochenov,[74] Jessurun d'Oliveira,[75] Sarmiento,[76] and Tratnik and Weingerl[77] have demonstrated. By extension, this applies to EU citizenship, which remains an essentially derivative[78] – *ius tractum* – citizenship.[79] The importance of this consideration is significantly reinforced by the Declaration on the Nationality of a Member State,[80] which made the ratification of the Treaty of Maastricht and the formal introduction of the EU citizenship status into the system of EU law possible in the first place. The Declaration, which is an essential element of the legal nature of the citizenship of the EU as agreed by the *Herren der Verträge* alongside respect *vis-à-vis* Irish citizenship by investment at that time, reads as follows:[81]

> DECLARATION on nationality of a Member State
> The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.

The Court mentions none of this. In fact, it is not preoccupied by EU law in its decision: not in the part where arbitrary power should be constrained by any principle[82] – not a new transgression from the Baron Lenaerts Court,[83] but an important first nevertheless, since what is now under attack is not a member of that very Court,[84] not a lawfully appointed judge of a Member State in trouble,[85] nor a significant investment

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[74] Dimitry Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) EUI RSCAS Working Paper No 2010/21.
[75] Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship and beyond' in Nathan Cambien et al (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Brill-Nijhoff 2020). See also Jessurun d'Oliveira, 'Golden Passports' (n 29).
[76] Daniel Sarmiento, 'EU Competence and the Attribution of Nationality in Member States' Investment Migration Working Papers 2019/2.
[77] Weingerl and Tratnik, 'Relevant Links' (n 11); Tratnik and Weingerl 'State Autonomy vs "Genuine Links"' (n 11).
[78] Gareth Davies, 'Humiliation of the State as a Constitutional Tactic' in Fabian Amtenbrink and Peter van den Bergh (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010); cf Kochenov, 'Rounding up the Circle' (n 74).
[79] Dimitry Kochenov, '*Ius Tractum* of Many Faces' (2009) 15 Columbia Journal of European Law 169.
[80] For a more detailed discussion of this aspect of the case, see Guillermo Íñiguez, 'On Genuine Links, Burdens of Proof, and Declaration No 2: Some Musings on the Court's Reasoning in *Commission v Malta* (C-181/23)' (*EU Law Live*, 5 May 2025) <https://eulawlive.com/op-ed-on-genuine-links-burdens-of-proof-and-declaration-no-2-some-musings-on-the-courts-reasoning-in-commission-v-malta-c-181-23/> accessed 14 April 2026; Kochenov and Íñiguez, 'EU Citizenship's New Essentialism' (n 27) 466-468.
[81] Official Journal C 191, 29/07/1992, 98.
[82] On this worrying trend, from different angles, see e.g. Kochenov, 'Janus in the Mirror' (n 45); van den Brink, 'Constitutionalism without Principle' (n 36).
[83] E.g, Dimitry Kochenov, 'EU Rule of Law Today: Limiting, Excusing, or Abusing Power?' in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023) 18.
[84] As in the *Sharpston* cases: Kochenov and Butler (n 25).
[85] As in *T.B. v C.B.*: Dimitry Kochenov, 'Fake Judges Are Great Administrators! A New Word on Judicial Independence from CJEU in *T.B. v C.B.*' (*EU Law Analysis*, 2 October 2025) <https://eulawanalysis.blogspot.com/2025/10/fake-judges-are-great-administrators.html> accessed 1 May 2026.

deprived of any protection,[86] or basic accountability for unlawful international agreements.[87] At issue is the *undoing* of Europeans without a legal basis: something the Court has not attempted in the past.

The essential expression of the Rule of Law in the Union is that the principle of conferral governs the limits of the EU competences. This means that the EU lawfully acts only within the limits of the competences that EU Member States have conferred upon it in the Treaties, and nationality is not among them.[88] As per CJEU case law, the limitations on the principle of conferral are interpreted strictly and require close involvement of the Member States:[89] the Union can only intervene in such areas to safeguard the rights of Europeans and ensure the effectiveness of EU law, as has been the case until April 2025, and could be demonstrated by recourse to countless examples, from *Rottmann*[90] and *Micheletti*[91] to *Tjebbes*[92] and *JY*.[93]

The legal situation is clear: matters of nationality, including the loss of nationality and naturalisations of those who are not 'natural born' citizens, including a subtype of investment naturalisations, fall squarely within the national legal framework, and exceptions are made in the cases when EU citizens' *rights* are potentially threatened. The academic consensus is well-articulated and undisputed, and in the EU the division of competencies had been confirmed unequivocally prior to *Commission v Malta*, from *Micheletti*,[94] and *Zhu & Chen*[95] to *Tjebbes*.[96] Furthermore, EU citizenship is complementary to, but does not replace, national citizenship.[97] Put differently, EU citizenship protects the rights of EU citizens not granted by the Member States but by the Union itself.[98] It is, however, for the EU Member States to

[86] As in *Achmea* and its progeny: Kochenov and Lavranos (n 46); Sadowski (n 46).
[87] As in *EU-Turkey Deal*: Bas Schotel, 'The EU-Turkey Statement and the Structure of Legal Accountability' in Eva Kassoti and Nadin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 73; Ganty and Kochenov, 'EU Lawlessness Law' (n 23) 145 et seq.
[88] Article 5 TEU. For the historic development of the principle, see René Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30(1) Common Market Law Review 85; and Kieran Bradley, 'The European Court and the Legal Basis of Community Legislation' (1988) 13(6) European Law Review 379.
[89] See, in greater detail, Sarmiento and van den Brink (n 11); Sarmiento and Íñiguez (n 11).
[90] Case C-135/08 *Janko Rottman v Freistaat Bayern* EU:C:2010:104. Gareth Davies, 'The Entirely Conventional Supremacy of Union Citizenship and Rights' in Jo Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* EUI Working Papers RSCAS 2011/62, 5; Dimitry Kochenov, 'Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) Common Market Law Review 1831; Hans Ulrich Jessurun d'Oliveira, 'Ontkoppeling van nationaliteit en Unieburgerschap?' (2010) 16 Nederlands Juristenblad 1028.
[91] *Micheletti* (n 12); Weingerl and Tratnik, 'Relevant Links' (n 11); Jessurun d'Oliveira, 'Union Citizenship and beyond' (n 75).
[92] *Tjebbes* (n 54). Cf Kochenov, 'The *Tjebbes* Fail' (n 54); Hans Ulrich Jessurun d'Oliveira, '*Tjebbes* en aanhangend nationaliteit' [2019] Nederlands Juristenblad 37; Swider (n 54).
[93] Case C-118/20 *JY v Wiener Landesregierung* C:2022:34; Dimitry Kochenov and David de Groot, 'Helpful, Convoluted, and Ignorant in Principle: EU Citizenship in the Hand of the Grand Chamber in *JY*' (2022) 47 European Law Review 699.
[94] *Micheletti* (n 12).
[95] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639. Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017).
[96] *Tjebbes* (n 54).
[97] Article 20(1) TFEU. See also Declaration No. 2 discussed earlier.
[98] As stated by the CJEU many times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States: Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-*

regulate who qualifies as a national, having 'due regard to [EU] law'[99] – a limitation introduced by *Micheletti* precisely to safeguard the rights of EU citizens against Member State overreach. Ensuring the effective and uniform protection of the rights and status of EU citizens is key in all the relevant available case law cited above.[100] The EU has normally intervened in matters of nationality only when Member States have enacted measures that restrict the rights of EU citizens, or endanger the status itself.[101] *Commission v Malta* is truly remarkable in this context, indeed, it 'unsettles long-standing assumptions',[102] as it comes down to *problematising* the use of EU citizenship rights by a specific group of Europeans, using this as a pretext to announce them outwith the ambit of 'solidarity' and attempting to annihilate their status.[103] It is the reliance on the rights and protections provided by law and making them known to the potential applicants for naturalisation, rather than undermining such rights and protections, which is a problem in the unprincipled view of the Commission shared by the Court.

The Commission argued in its submission that its action was limited to a specific matter of granting Member State nationality to investors.[104] Specifically, the Commission's problem has clearly been the 'commodification' of EU citizenship, or the transactional nature of citizenship-by-investment programmes which enable the systematic – i.e. organised – grant of citizenship in exchange for predetermined payments or investments. It can, therefore, be distilled from the Commission's argument that the legislative competences of Member States in the field of citizenship are constrained by the commodification of Union citizenship. While 'commodification' of Union citizenship has not been analysed in detail by the Commission, its understanding of the term may be deduced in the context of other claims in the case, particularly regarding the transactional nature of the citizenship-by-investment programmes and the possibility for acquisition of citizenship in return for predetermined payments or investments.[105] Such understanding sits uneasily with the established pattern of departure from the principle of conferral to protect EU citizens' status and rights:[106] the use of rights by 'commodified' citizens, on the contrary, emerges as an implicit sign of transgression for reasons that are never disclosed. This intuition aligns with the CJEU's finding in the case, which is as inimical to the law in force as it is to the legal history of EU citizenship and the very idea of attaching any usable rights to this legal status. It is well

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*Neuve* EU:C:2001:458 para 31; *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493 para 82; *Carlos Garcia Avello v Belgian State* EU:C:2003:539 para 22; *Zhu and Chen* (n 95) para 25; and Case *Janko Rottman* (n 90) para 43. Until it started bringing EU citizens down, that is, which coincided with dropping 'intended': *Commission v Malta* (n 1) para 100. See also, Kochenov and Íñiguez, 'EU Citizenship's New Essentialism' (n 27) 464-465.

99 *Micheletti* (n 12) para 10.

100 See e.g. *Janko Rottman* (n 90) para 60; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124 para 45.

101 Dimitry Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18(1) Columbia Journal of European Law 56.

102 Alina Tryfonidou, 'Selling (EU) Citizenship or Exercising Sovereignty?' in this special issue of the Nordic Journal of European Law.

103 At least it seems clear that the case has no legal effect as to the actual enjoyment of EU citizenship by all the Europeans included by the Court into this group of presumed violators of solidarity: Kochenov and Íñiguez, 'EU Citizenship's New Essentialism' (n 27).

104 *Commission v Malta* (n 1) para 44.

105 *Commission v Malta* (n 1) para 54.

106 E.g. *Janko Rottman* (n 90). See also Dimitry Kochenov, 'Case C-135/08, *Janko Rottmann v Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010' (2010) 47(6) Common Market Law Review 1831.

known that Irish citizenship was available for sale at the moment when the supranational citizenship was created by the Masters of the Treaties with the Maastricht revision, which was itself only ratified, once again, upon the promise to the Danish voters that anything like *Commission v Malta* would be absolutely impossible.[107] 'Commodification' has thus always been one of the *founding ways of acquiring EU citizenship*: a fact that neither the Commission nor the Court happen to mention or discuss.

We speak of an 'intuition', since both the Commission and the Court failed to clarify how the attributes of EU citizenship could be compromised when citizenship is obtained through investment as opposed to, say, blood or talent.[108] Instead, the questionable assumption that 'commodifying Union citizenship undermines the integrity of that status in a manner which constitutes a particularly serious infringement of EU law'[109] is never unpacked, especially in the context of EU citizenship's history, where the problem lies not in commodification, but rather in its blood-based, racist underpinnings.[110]

Arguing before of the Court, Malta distinguished between situations in which citizens are deprived of rights and those concerning the grant of nationality by a Member State.[111] In the case of granting citizenship, a breach of EU law would exist according to Malta, 'only where a Member State's naturalisation policy amounts in a general and systematic way to a serious breach of the values and objectives of the European Union',[112] which was not the case with the citizenship-by-investment programme. This reasoning is largely consistent with the CJEU's prior practice, since the *Commission v Malta* judgment has no precedent in EU law, whereas the EU has frequently intervened when the rights of EU citizens have been restricted.

The Court primarily confirmed that Member States must comply with EU law while exercising their competencies in the field of citizenship,[113] noting also that the examination of procedures for the acquisition of citizenship cannot be limited to significant breaches of EU values and objectives.[114] The Grand Chamber identified a new form of EU citizenship that is both illiberal and restrictive, downgrading the status's dignity and promise in a sharp disregard of the Treaty text, earlier case law, and prior national practice, especially in Ireland.

It cited Article 3(2) TEU on the area of freedom, security, and justice that the Union offers its citizens.[115] The Court listed the rights of EU citizens, including freedom of movement within the EU, consular protection outside the EU,[116] and rudimentary political rights (precisely those that underpin the Union's infamous democratic deficit).[117] It further noted that EU citizens participate in the democratic life of the EU through political rights,

[107] Íñiguez, 'On Genuine Links, Burdens of Proof, and Declaration No 2' (n 22).
[108] Ganty, 'Race and Merit' (n 3); Sarah Ganty, 'Merit as a Racial Device: The Ambiguous Case of Citizenship and Residence by Investment' (2026) Journal of Ethnic and Migration Studies (early view).
[109] *Commission v Malta* (n 1) para 44.
[110] Hanna Eklund, 'Peoples, Inhabitants and Workers' (2023) 34(4) European Journal of International Law 831; Hans Kundnani, *Eurowhiteness* (Hurst, London 2023); Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury Academic 2014).
[111] *Commission v Malta* (n 1) para 65.
[112] ibid para 66.
[113] ibid para 81.
[114] ibid para 82.
[115] ibid para 84.
[116] ibid para 90.
[117] ibid para 88.

thereby giving concrete expression to democracy as a value, which, under Article 2 TEU, is one of the Union's foundational values.[118] It concluded from the existence of these rights that grants of Member State nationality affect the 'functioning of the EU as a common legal order'.[119] This unquestionable finding, which is entirely unrelated to the particular nature of the naturalisation regime in question, was further linked to EU law: EU citizenship rights were found by the Court to underpin the *raison d'être* of EU citizenship in the context of the EU[120] as a 'fundamental status of the nationals of the Member States'.[121] Fair enough.

From this, the Court drew the conclusion that we are dealing with the 'primary expression of solidarity' among the Member States, requiring the Member States not to exercise their competences in the field of nationality law 'in a way that is manifestly incompatible with the very nature of EU citizenship':[122] we have heard all this from *Micheletti*, which the Court was, however, expressly minded to overrule. The Court underlined the 'special relationship of solidarity and good faith'[123] – which we had already heard in *Rottmann*[124]– as being the only reason for the Court to invoke all this to extinguish this 'special relationship' with regard to a particular clearly identifiable group of Europeans following the *ultra vires* attack by the European Commission. The special relationship between Member States and their nationals underpins the exercise of rights and (so far absent)[125] duties under EU law, which is why compatibility with EU law is required despite the Member States' discretion.[126] While it is up to the Member States to establish the materialisation of the relationship of solidarity and good faith,[127] the Grand Chamber took it upon itself to overrule national democracy acting within its sphere of competence. The CJEU has thus invoked an unwritten and previously unheard of presumption which nonetheless takes priority over democracy, the rule of law, and the protection of EU citizens' rights – to say nothing of the bonds of solidarity and good faith. The CJEU presumed that offering citizenship for 'predetermined payments or investments' – just as Ireland did when this status was negotiated and entered EU law – amounts to a manifest disregard of what EU law apparently now demands.

The Court is thus willing to rely on a previously unpublished law to revise the decisions of a Member State acting within its sphere of competence, and citizens alike. The Court's pronouncement of what solidarity and good faith imply is entirely lacking in good faith, if you pardon the calambour: a direct violation of the principle of conferral and the duty of loyalty, as well as the rule of law and basic legality.[128] The Court has thereby created 'only legal' citizens previously unknown to EU law, who are presumed to be lacking the 'bond of solidarity and good faith' and are thus not quite Europeans (the Court never mentioned its

[118] *Commission v Malta* (n 1) para 89.
[119] ibid para 89.
[120] ibid para 91.
[121] ibid para 92.
[122] ibid para 95.
[123] ibid paras 96, 97.
[124] *Rottmann* (n 90).
[125] Dimitry Kochenov, 'EU Citizenship without Duties' (2014) 20 European Law Journal 482; Christian Joppke, 'Liberal Citizenship Is Duty-Free' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 199.
[126] *Commission v Malta* (n 1) paras 96-99.
[127] ibid para 98.
[128] Weiler, 'Postscriptum: Citizenship for Sale' (n 21).

own case law prohibiting discrimination based on the mode of acquisition of nationality).

Thousands of people can thus be disowned by the EU (and quite possibly, by the Member States, although this remains unclear) at the whim of the Court's frivolous, ahistorical, and anti-democratic presumption with no legal basis, competence, or indeed reference to any rule in force. The meaning of being European, previously expansive and open, has been hijacked by blood solidarity enthusiasts afraid of money and unwilling to take the law into account, for whom solidarity and good faith are but rusty rhetorical tools to denigrate a class of cosmopolitan Europeans, speaking in terms borrowed from the age of high nationalism, which the EU had been created to overcome – but ended up upgrading to a new level. A Member State, according to the Court

> manifestly disregards the requirement for such a special relationship of solidarity and good faith, characterised by the reciprocity of rights and duties between the Member State and its nationals, and thus breaks the mutual trust on which Union citizenship is based, in breach of Article 20 TFEU and the principle of sincere cooperation enshrined in Article 4(3) TEU, when it establishes and implements a naturalisation scheme based on a transactional procedure between that Member State and persons submitting an application under that programme, at the end of which the nationality of that Member State and, therefore, the status of Union citizen, is essentially granted in exchange for predetermined payments or investments.[129]

As is well known, there is nothing in international (*Nottebohm*),[130] EU, or Maltese law (or the history of these legal systems – especially the established Irish citizenship-for-sale scheme that ran during the negotiation of the Maastricht Treaty and directly informed what EU citizenship is actuaally about)[131] which would somehow call investment citizenship into question. Not for the first time – not the last either, no doubt – the CJEU invented the law. This time, however, it was done to victimise and humiliate Europeans in violation of Article 2 TEU values. Once again: Professor JHH Weiler is right – only in the EU does the Orwellian principle apply that repeating a lie many times makes it the law:[132] for the Court in *Commission v Malta*, listing the rights of EU citizens and offering the repetition of a word unrelated to the legal framework in question sufficed. As noted by Groussot and Valera, the CJEU's overreach of its authority is a prime example of 'over-constitutionalisation and rule by law', as is the value-laden interpretation of EU law. This interpretation leads to more constitutional law, at the expense of democracy,[133] and is not guided by any principle.[134] One should definitely add legality – and, more generally, the rule of law – to the list of values

[129] *Commission v Malta* (n 1) para 99.

[130] Peter J Spiro, '*Nottebohm* and "Genuine Link": Anatomy of a Jurisprudential Illusion' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025). Quite astonishingly, notwithstanding the prohibition of mass expulsions in international law – and a mass expulsion of the thousands of Europeans attacked by the Court is definitely a possibility under the new case law – the judgment lacks a single reference to international law.

[131] Maarten Prak, 'Citizenship for Sale in Pre-modern Europe' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023).

[132] Weiler, 'Postscriptum: Citizenship for Sale' (n 21).

[133] Groussot and Valera (n 26) 595.

[134] van den Brink, 'Constitutionalism without Principle' (n 36); Kochenov, 'Janus in the Mirror' (n 45).

flushed down the drain by our illustrious judges, before stopping for a second to ponder a question: is this about any law at all? Given that no law is cited to attack and humiliate thousands of law-abiding citizens, the abuse of power we are dealing with is particularly hideous. No help to restore legality, democracy, and dignity seems to be forthcoming from the EU constitutional set-up as we know it today,[135] illuminating our own 'agreement with Hell,'[136] to borrow a phrase from Jack Balkin.

## 4 THE SHAME OF 'GENUINE LINKS'

The Commission's second argument concerned the lack of a 'genuine link' in the context of citizenship-by-investment programmes, which involve predetermined payments or investments.[137] This, according to the Commission, 'compromises and undermines the essence and integrity of Union citizenship established in Article 20 TFEU, and infringes the principle of sincere cooperation enshrined in Article 4(3) TEU'.[138] The Commission has been repeating this baseless claim since the inception of the first Maltese citizenship-by-investment programme, pushing AG Collins to hint at the abuse of procedure and ask the Commission to pay the costs, so absurd and outlandishly dumb was this argument.

The Commission pretended to rely on international law in general, and on the ICJ decision in the *Nottebohm* case in particular, to establish the necessity of a 'genuine link'. Yet, contrary to the allegations of the Commission that *Nottebohm* imposes an obligation on states to adhere to the 'genuine link,' or to residence requirements in cases of naturalisation, such a requirement has never been a binding rule of international law.[139] States have broad discretion, if not complete exclusivity, in deciding who qualifies as a citizen and under what circumstances. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 clarified this point in Article 1: 'It is for each State to determine under its own law who are its nationals'.[140] It further stipulates, however, that: '[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'.[141] Article 3 of the European Convention on Nationality (ECN) uses almost identical words to define the nationals of a state and the conditions under which a state's citizenship law should be recognised.[142] CBI naturalisations are fully recognised and practised in numerous states worldwide. It is thus unquestionable that CBI programme-based citizenship is lawfully acquired nationality in the eyes of international law.

The only rule that could stand in the way of states implementing investment migration programmes, as far as international law is concerned, is the requirement of the individual's consent to acquire citizenship, as non-consensual naturalisation is precluded. Non-

135 See also Kochenov and Veraldi (n 8).
136 John Balkin, 'Agreements with Hell and Other Objects of Our Faith' (1997) 65(4) Fordham Law Review 1703.
137 *Commission v Malta* (n 1) para 46.
138 ibid.
139 See e.g. Dissenting opinion of Judge Klæstad in *Nottebohm*.
140 Article 1, Convention on Certain Questions Relating to the Conflict of Nationality Law (adopted 12 April 1930, entered into force 1 July 1937), vol 179, p 89.
141 ibid.
142 Article 3, European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS No 166 (*European Convention on Nationality*).

consensual naturalisations have been consistently ruled out as breaching international law, at least since the attempts of Latin American nations to start regarding European expats born outside of their territory – like Mr Nottebohm – as if they were local citizens, as Peter Spiro reports.[143] All CBI naturalisations in the EU and its immediate vicinity have been unquestionably consensual.[144] Furthermore, the differential treatment of persons in similar situations is prohibited under international law unless it is reasonably justified and the measures taken are proportionate to a legitimate aim. In accordance with Article 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination and Article 5 of the ECN, the conferral of citizenship may not discriminate against citizens based on their national or ethnic origin. Lastly, discrimination on the grounds of sex in the conferral of nationality is equally prohibited.[145] While other requirements have also often been discussed in the context of possible constraints on state sovereignty in the field of citizenship, none of them has developed into binding international law that can affect a states' competence in citizenship matters.

Undoubtedly, the Commission has learnt that relying on international law in general, and on the *Nottebohm* case in particular, to justify its claims may not be an effective strategy and may even backfire. Consequently, it steered clear of *Nottebohm* in its arguments for the case. Instead, it entered into discussion about the foundations of the European Union, democratic principles, values, objectives, and interests, the *raison d'être* of the latter, and citizenship and associated rights as reflections of solidarity and mutual trust between Member States.[146] According to the Commission, such mutual trust between Member States in the field of EU citizenship is based 'on a common basic understanding of the nationality of a Member State, namely that nationality is the expression of a genuine link between a Member State and its nationals'.[147]

It is only on the understanding of Member States that citizenship is granted based on a 'genuine link' that they have agreed to extend, automatically and unconditionally, rights to citizens of other Member States.[148] If citizenship is granted in the absence of a genuine link, Member States would not be able to trust each other's decisions, ultimately undermining unconditional acceptance.[149] To support its claim, the Commission relied wrongly, yet

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143 Peter J Spiro 'Investment Citizenship and the Long Leash of International Law' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023) (and the literature cited therein).

144 The only possible example of a non-consensual CBI programme can be found in the Comoros: the island state used to offer wholesale naturalisation options to the Gulf monarchies seeking to reduce statelessness among the Bidoon population. This CBI programme has been subject to clear criticism in the literature for potentially breaching international law, e.g. Spiro, 'Investment Citizenship and the Long Leash of International Law' (n 143).

145 ibid.

146 *Commission v Malta* (n 1) paras 47-49. Compare with a leading scholarly account: Andrea Sangiovanni, 'Debating the EU's *Raison d'Être*: On the Relation between Legitimacy and Justice' (2018) 57(1) Journal of Common Market Studies 13.

147 *Commission v Malta* (n 1) para 50.

148 ibid para 51.

149 ibid.

unsurprisingly,[150] on the *Micheletti* case,[151] which obliges Member States to recognise each other's decisions in citizenship matters.[152] Pushing its argument further, it claimed that actual residence is one of the means for establishing a 'genuine link', albeit recognising that it cannot 'prescribe the connecting factors which must be prioritised by the Member States in awarding their nationality'.[153]

In what followed, the Commission explained the scope of constraints applicable to Member States in the field of citizenship:

> the establishment of an investor citizenship scheme of a *transactional nature*, which allows for the *systematic grant*, in return for *predetermined payments or investments*, of the nationality of a Member State to applicants who do not have *a genuine link* with a Member State and who are thus manifestly outside the class of persons which the authors of the Treaties intended to be beneficiaries of Union citizenship, is in contradiction with the very essence of the status of Union citizen.[154]

It is specifically citizenship-by-investment programmes to which the 'genuine link' requirement has been applied. Such programmes, according to the Commission, 'would jeopardise the integrity of the status of Union citizen and the mutual trust that underpins that status and the rights attaching to that status',[155] in breach of the negative duty included in Article 4(3) TEU to refrain from taking measures that could compromise the EU's objectives.[156] However, the reference to Article 4(3) TEU, which imposes duties on Member States arising from the principle of sincere cooperation, appears misplaced.

Article 4(3) TEU concerns the achievement of EU objectives and genuine compliance with EU law, neither of which seems to be related to investment migration.[157] In its previous case law, the CJEU has characterised the principle of sincere cooperation as a general principle that may be invoked in infringement proceedings only after a violation of a more specific obligation under EU law.[158] A possible infringement of that provision could arise in the context of mass naturalisation, which may have a significant negative impact on the internal market,[159] which has not been the case with the Maltese citizenship-by-investment programme. It is unclear precisely how the Maltese investment programme jeopardised the integrity of the status of Union citizen. The suggestion that 'genuine links' are the essence of EU citizenship in this context cannot be further from

[150] See e.g. European Commission's Report on EU Investment Migration Programmes (n 1). For analyses, see e.g. Costanza Margiotta, 'Ricchi e poveri alla prova della cittadinanza europea. Annotazioni sulla Relazione della Commissione europea sui programmi di cittadinanza per investitori' (2020) 55 Ragion Pratica 513; Dimitry Kochenov, 'Genuine Purity of Blood: The 2019 Report on Investor Citizenship and Residence in the European Union and Its Litigious Progeny' (2020) LEQS Paper No 164/2020; Jessurun d'Oliveira, 'Golden Passports' (n 29).
[151] *Micheletti* (n 12).
[152] *Commission v Malta* (n 1) para 51.
[153] ibid para 54.
[154] ibid (emphases added).
[155] ibid para 53.
[156] ibid.
[157] Basheska, 'Why the EU's Top Court Should Clarify EU Law' (n 14).
[158] See Case T-626/17 *Republic of Slovenia v European Commission* EU:T:2020:402. See also Brian McGarry, '*Republic of Slovenia v. Republic of Croatia*' (2021) 115(1) American Journal of International Law 101.
[159] See e.g. OSCE High Commissioner on National Minorities, 'The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations' (June 2008), recommendation 11.

the truth. The core principle of EU law on persons is non-discrimination on the basis of nationality. It states, to put it very roughly, in simple language that any links – however 'genuine' – with a particular Member State cannot matter; only the legal status of citizenship does. This is the law that both the Commission and CJEU are there to respect, uphold, and promote.

The Commission then broadened its argument by claiming that 'the "genuine link" must exist at the time when the nationality of a Member State is granted'[160] rather than to be developed subsequently, since the latter is 'inconsistent with the objective of strengthening the solidarity between the peoples of the European Union'.[161] The safeguards in citizenship-by-investment programmes, emphasised by Malta,[162] were largely irrelevant to the Commission's assessment, despite the earlier spotlight it had placed on those aspects.[163] Instead, the Commission found problematic the legal requirements for minimum actual presence in the country at the time of the granting of citizenship.[164] No other models for acquiring citizenship that do not require genuine links with Member States have ever been challenged by the Commission.

Malta rejected the Commission's argument that EU law imposes a legal obligation on Member States to require a 'prior genuine link' in the naturalisation process, notwithstanding the applicant's payments or other commitments.[165] Moreover, the 'genuine link' requirement has previously been expressly outlawed by the CJEU. As lucidly explained by the Court in *Micheletti*, which concerned an Argentinian moving to Spain to establish a business using an Italian passport, checking 'genuine links' is expressly prohibited by EU law.[166] In other words, the Court consistently held that a 'genuine link' is a requirement which *breaches EU law*. In *Commission v Malta*, the CJEU made a notable U-turn, trying to find 'genuine links' outlawed by its own case law in the Maltese CBI, only to dismiss payments and the transactional nature of the scheme, and to underline – in a departure from the dominant law and practice[167] – that 'transactional naturalisation' is not only contrary to the principle of sincere cooperation,

> but is also liable, by its nature, to call into question the mutual trust which underlies that requirement of recognition, since that trust relates to the premiss that the grant of the nationality of a Member State must be based on a special relationship of solidarity and good faith justifying the grant of rights resulting, in particular, from Union citizenship.[168]

While the CJEU has not specifically referred to 'genuine links' in its ruling, it added, without offering any basis for this, general words on 'special relationship' to

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[160] *Commission v Malta* (n 1) para 59.
[161] ibid.
[162] ibid paras 75, 76.
[163] Kochenov and Basheska, 'It's All about Blood, Baby!' (n 9).
[164] *Commission v Malta* (n 1) paras 61-62.
[165] ibid paras 69-70.
[166] *Micheletti* (n 12) paras 10-13.
[167] Dimitry Kochenov and Martijn van den Brink, 'Legal Residence and Physical Presence: The Law and Practice of Naturalization in EU Jurisdictions' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[168] *Commission v Malta* (n 1) para 101.

the Commission's argument on 'sincere cooperation' to establish a ground for banning citizenship by investment.[169] Rather than demonstrating logically sound insights, the Court seems to have used a budget thesaurus, replacing the non-starter argument of 'genuine links' with an equivalent wording unknown to the substance of EU law. By doing so, as Eric Fripp rightly observed, the Court established a genuine link requirement under the guise of sincere cooperation.[170]

Mutual trust has once again been viewed as a fundamental aspect of EU citizenship, without further analysis of how effectively the rule of law operates across Member States, and without the Court's earlier observation that blind trust is unnecessary.[171] In line with the Commission's stance, the due diligence checks of the candidates were less important to the Court, as they did not affect 'the commercialisation of the grant of Maltese nationality, following a transactional procedure'.[172]

## 5 LEGALITY OF THE MALTESE CBI

The third argument of the Commission concerned the Maltese investment programme: the CBI programme is unlawful because it permits the systematic granting of citizenship in exchange for predetermined substantial payments or investments and as such is transactional.[173] Such a claim was rejected by Malta, which considered that the country's CBI programme did not undermine the EU's objectives, and that 'the Commission's portrayal of that scheme as an automatic and unconditional access route to Maltese nationality, providing for the systematic granting of nationality in exchange for predetermined payments or investments'[174] is unfounded in law or in fact.[175]

Pronouncements about the 'immorality' of citizenship 'sales' do not constitute the only available approach to understanding the issue of investment migration, as the overwhelming popularity of investment migration among the EU Member States testifies. Acquiring citizenship in exchange for investment or donation is a historically mainstream practice[176] conducted entirely in accordance with the law.[177] CBI programmes are a mainstream application of a states' sovereign ability to decide who their nationals are.

Furthermore, the Commission's claim is inconsistent with the current practice of the vast majority of EU Member States, which legally practice investment migration. While only Malta faced the Commission in Court, more than twenty other Member States permit discretionary naturalisation for 'special achievements', including in most instances economic contributions. Yet the differences between the Maltese CBI programme and discretionary

[169] Guillermo Arranz Sánchez, 'Is EU citizenship for sale – or for keeps? A critical analysis of the CJEU's Golden Visa ruling' (*European Student Think Tank*, 2 July 2025) <https://esthinktank.com/2025/07/02/is-eu-citizenship-for-sale-or-for-keeps-a-critical-analysis-of-the-cjeus-golden-visa-ruling/> accessed 16 January 2026.
[170] Eric Fripp, 'EU Court of Justice finds Malta 'golden passports' scheme incompatible with EU law' (*EJIL Talk*, 9 May 2025).
[171] See in greater detail Groussot and Valera (n 26) 583.
[172] *Commission v Malta* (n 1) para 113.
[173] ibid para 55.
[174] ibid para 73.
[175] ibid.
[176] Maarten Prak, *Citizens without Nations: Urban Citizenship in Europe and the World, c. 1000–1789* (Cambridge University Press 2018).
[177] Weingerl and Tratnik, 'Relevant Links' (n 11).

naturalisation for economic contributions in other countries are formal rather than substantial and concern primarily one matter: *transparency*.[178] Make no mistake: it is transparency that has been sacrificed by the unprincipled *ultra vires* Court decision on the altar of the activist Commission's Eurowhiteness populism – not CBI *per se*. All the countries that naturalise by 'merit' – which frequently equals a donation as merit can legitimately be presented as financial wealth[179] – do so in secret. The Commission decided that, unlike numerous co-existing forms of naturalisation, only transparent investment migration programmes infringe the principle of sincere cooperation and undermine the essence of EU citizenship, and the CJEU confirmed that. Without amending the Treaties, the Commission has acquired a right to investigate and punish those who are citizens only by law: to conjure and then immediately destroy the 'wrong Europeans'.

The truth is that the Commission routinely demonised investment migrants prior to *Commission v Malta*. The core argument could be summarised as follows: third-country nationals who invest in Member States may be criminals and therefore, investment migration programmes create security risks; the fact that EU citizenship provides for cross-border rights further increases these risks.[180] The Commission has made assumptions about investors, primarily based on their status as beneficiaries of CBI programmes: wealthy individuals who wish to invest and become EU citizens are likely criminals, and this likelihood is even higher given the qualities of EU citizenship, which allow unrestricted movement in the EU. The same assumptions were notably missing concerning EU citizens who naturalise, because of kin blood connection, family links (even in cases where such naturalisations do not require any presence in the EU, as French or Dutch law would allow, for instance), or those who naturalise based on the discretion of the Member States – including following the payment of large *undisclosed* amounts of money. Only CBI clients naturalising transparently based on clear and pre-announced criteria are presumed criminals in the Commission's mind – and the presumption of innocence apparently does not enter the picture. This is entirely contrary to the EU Charter and broader EU law, particularly given that discrimination on the basis of the mode of acquisition of citizenship is prohibited. Based on the Commission's repeatedly expressed views, its approach to CBI appears to be driven solely by discrimination on the basis of the mode of acquisition of EU citizenship. To complicate matters further, the Commission repeatedly underscored the risks associated with the freedom of movement between Member States for these new citizens following naturalisation.[181] Interestingly, and as we already clarified earlier, the Commission did not dispute the safeguards provided in the Maltese citizenship programme, despite its obviously baseless claims in the past that 'citizenship is granted under less stringent conditions than under ordinary naturalisation regimes'.[182] This may well have been because 'ordinary conditions' – as opposed to the frowned-upon 'less stringent' ones – imply a level of due diligence which is significantly lower than what investment citizenship promises: the entirety

[178] Jacquelyn Veraldi and Oskar Gstrein, 'Nothing to Hide? Transparency Requirements, Accountability and Privacy in Investment Migration' in Dimitry Kochenov et al (eds), *Investment Migration in Europe and the World: Current Issues* (Hart Publishing 2025).
[179] Ganty, 'Race and Merit' (n 3).
[180] E.g., European Commission's Report on EU Investment Migration Programmes (n 1) section 4, pp 9–10.
[181] ibid. See also Press Release on infringement procedures, 6 April 2022 <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2068> accessed 13 January 2026.
[182] European Commission Report COM(2019)12 final 2.

of your finances and business connections, as well as your entire life history, would not normally be dug up by independent due diligence providers, unless you are an investor naturalising on that ground.[183] This is only right: different applicants require different standards.

What is crucial here is to mention the different ways in which the citizenship laws of all the Member States rationally accommodate the acquisition of citizenship by different categories of applicants. A perusal of any book on citizenship law makes it clear that, when we speak of citizenship acquisition, differentiated treatment of different cases is essential. It is an essential and characteristic part of any properly functioning nationality regulation. Most citizens are created by *ius sanguinis*: they are the sons and daughters of citizens (*de facto*, this is the case even in all the polities, where *ius soli* is the key official vehicle for the distribution of status). This paradigm is broken only by naturalisations, which account for fewer than 2% of citizenship acquisitions worldwide,[184] inviting basic blood privilege or aristocratic justice claims,[185] underpinning the global birthright lottery in today's world[186] and lying at the heart of the passport apartheid.[187]

The requirements for those who naturalise vary greatly. While some countries offer citizenship by investment to individuals through specially designed naturalisation procedures, others allow for discretionary naturalisation on the grounds of 'special achievements' (or similar notions) – often explicitly including the economic achievements of applicants – enshrined in national legislation. The difference between the specially designed programmes and discretionary naturalisation on the grounds of 'special achievements' is formal rather than substantial – the former are specifically designed to attract foreign investors, set clear criteria for applicants, and are marketed by service providers (agents), while the latter are not necessarily exclusively intended for investors, are less transparent in terms of qualification criteria, and not marketed by nor does it involve agents.[188]

The empirical diversity of the predominant naturalisation modes – whether spousal, ancestral, emigrational or other – raises questions about the ideological stakes that seem to underpin the belief held by both the European Commission and the CJEU. They appear to suggest that the pathway from immigrant to citizen serves as the standard against which all other naturalisation processes should be measured. Is boasting the right ancestral pedigree or tracing family origins to a particular area on a map a more just way of distributing the most important rights than money?[189] The focus of any naturalisation discussion thus turns

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[183] Mark Corrado and Kim Marsh, 'Investment Migration and the Importance of Due Diligence: Examples of Canada, Saint Kitts and Nevis, and the EU' in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging* (Cambridge University Press 2023).
[184] Cf Dimitry Kochenov, *Citizenship* (MIT Press 2019).
[185] Dimitry Kochenov, 'Citizenship as Aristocratic Justice' (2026) Brown Journal of World Affairs (forthcoming).
[186] Shachar, *The Birthright Lottery* (n 2).
[187] Dimitry Kochenov, 'Ending the Passport *Apartheid*. The Alternative to Citizenship is No Citizenship' (2020) 18(4) International Journal of Constitutional Law 1525.
[188] Kristin Surak, *The Golden Passport: Global Mobility for Millionaires* (Harvard University Press 2023).
[189] The two obviously overlap, so the question is necessarily tongue-in-cheek: if an investment visa is annulled, a Russian billionaire may be able to visit London again visa-free on an Israeli or a Portuguese passport, acquired via an established Sephardic connection – only 'blood' and no money involved: David Lesperance, 'Even for The Super-Rich, Citizenship by Descent Is Extremely Useful: Lessons from Abramovich' (*Investment Migration Insider*, 5 January 2022); Hans Ulrich Jessurun d'Oliveira, 'Iberian Nationality Legislation and Sephardic Jews' (2015) 11(1) European Constitutional Law Review 13.

precisely on this dilemma and the moral panic it provokes: if EU citizenship is sacred and rooted in the native possession of pure European blood providing a 'genuine link' to Europe, how could someone 'buy' it and forego the necessary humiliation of 'ordinary' naturalisation?[190]

EU Member States recognise hundreds of ways of conferring citizenship on foreigners, and the requirements vary depending on the class of person seeking naturalisation and the jurisdiction in question.[191] Kin groups, for instance, acquire citizenship without residence in the country of naturalisation or knowledge of the language: more than a million Italians, more than a million Hungarians, and hundreds of thousands of Greeks, Irish, Romanians and Bulgarians have been created this way in recent decades. The result is always the same – the acquisition of citizenship by the qualifying candidate, usually with no residence, language, or any other requirements. Getting the right spouse can also count: just get together with a Dutch or French person, and the time spent living together anywhere in the world, not just in the Netherlands or France, will count towards naturalisation. Member States establish what is desirable, and it is not up to the Commission to ask or comment on this. International law, just like European law, is clear: Member States will decide as they see fit. Morality has never played a role in citizenship law, especially in the EU, with its colonial past[192] and the essentially race-based exclusion from EU citizenship[193] approved by the ECJ in *Kaur*.[194] Globally, the picture is no different: citizenship is currently the primary mechanism for perpetuating global inequality, as Branko Milanović, among others, has explained clearly.[195]

## 6 CONCLUSION

The 'war' of the European Commission against investment migration programmes has brought confusion and uncertainty into previously well-established concepts in EU law. The CJEU sided with the Commission, supporting the questionable spirit of its submission while not engaging with any of its core arguments, which had been previously dismissed with such clarity and persuasion by AG Collins. The ruling in *Commission v Malta* did not meet the expectations that the CJEU would put an end to the over-politicisation of investment migration and the poisonous and half-hearted abuse of EU values inherent in the Commission's double-speak. Instead, it can be seen as a continuation of the Commission's efforts to push a nationalist 'genuine links'-based notion of citizenship onto the Member States. This certainly erodes the core principles of EU law, undermines the rationale for the Union, and annihilates in the process the promise of an anti-nationalist EU citizenship grounded in rights and protections, rather than arbitrary othering not grounded in law, confused by the Grand Chamber with (Eurowhiteness) 'solidarity'.

None of the three main arguments of the Commission was supported in law. The first

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190 Dora Kostakopoulou, 'Why Naturalisation?' (2003) 4(1) Perspectives on European Politics and Society 85.
191 Please consult the EUDO database of the European University Institute in Florence, which provides a reliable snapshot of the numerous ways available to acquire EU citizenship.
192 Hansen and Jonsson (n 110).
193 Lord Anthony Lester, 'Thirty Years on: The East African Case Revisited' (2002) 47 Public Law 52.
194 Case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice* EU:C:2001:106; Helen Toner, '*Case C-192/99, R v. Secretary of State for the Home Department, ex parte Kaur*, Judgment of the Full Court of 20 February 2001, [2001] ECR I-1237' (2002) 39(4) Common Market Law Review 881. Cf Kochenov, '*Ius Tractum* of Many Faces' (n 79).
195 Branko Milanović, *Global Inequality* (Harvard University Press 2016).

problematic aspect is the lack of EU competence in matters of citizenship. It is impossible, with recourse to the law in force, to justify the Commission's position and the CJEU's ruling in *Commission v Malta*, since this justification would require the annihilation of all that the EU stands for: liberal values, non-discrimination based on nationality, human dignity, and equality, *inter* many *alia*. To say, 'never mind the law', protecting a foundational imperative of the EU in the name of equity or justice can be fine – we witnessed this in the case law that introduced human rights into EU law in the first place, in one example.[196] To do this repeatedly, however, and with no pressing identifiable interest in mind, but only obscurantist prejudice, obviously erodes the very foundations of the legal system of the Union, which was once said to be a 'Union of law'.

The only way for the Court to safeguard the success of the Union is to be convincing and respect the letter and the spirit of the law.[197] Yet time is running out to become convincing again, after the countless recent betrayals of expatriated and humiliated EU citizens,[198] as well as the massacred and tortured third-country nationals thrown into the Union's death machine.[199] *Commission v Malta* is yet another public humiliation by the Court of the EU's ideal of the rule of law, showcasing its own limited ability to articulate a clear and dignifying ideal of justice that Europeans could endorse and identify with.[200] This is particularly painful, given that it also throws Maltese democracy under the bus in an area where the European legislator is not competent to act and for the outright illegitimate reason of protecting our 'solidarity' from other Europeans.

The constitutional implications of this case are quite significant. It hints at the further undoing of the Union's liberal heritage and original promise. The Union could thus pose a threat to the Member States, whose nationalities have been guided precisely by this liberal promise. The same applies to Europeans who cannot subscribe to petty illiberal ideals but are also unable to push the Union to change course in the absence of any continent-wide democracy.[201] National liberal constitutionalism and the dignity of Europeans alike came under attack from Kirchberg. The new illiberal Union will now decide for the Member States who their citizens should be, acting on the assumption that a legal link establishing such citizenship is insufficient *per se* and should be backed by an undisclosed set of other factors, which the Court, in deviation from the national law of the Member States, took it upon itself to police *ex post facto*. This creates a dangerous legal space uniquely established to mount assaults against the legal status and rights of indeterminate groups of Europeans on the basis of an official pretext built out of extra-legal considerations. EU citizenship based on the new *Commission v Malta* solidarity stands for an unprincipled *ultra vires* betrayal of our dignity and the EU's promise alike. Listing no arguments based on EU, international, or national law, the Court has attempted to hijack the Union's liberal promise and was successful. Pushing back in the context of such vacant legality and in the absence of consequential democracy

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196 Nicolas JS Lockhart and Joseph HH Weiler, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence' (Parts I and II, 1995) 32 Common Market Law Review 51.

197 Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) Law and Ethics of Human Rights 142.

198 O'Brien, 'The Great EU Citizenship Illusion Exposed' (n 55); Swider (n 54).

199 Ganty and Kochenov, 'How the EU Death Machine Works' (n 49).

200 On EU's justice deficit, see, Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015)

201 Cf. Kochenov and Veraldi (n 8).

will be difficult, but it is necessary to save the Union and the dignity of all Europeans, which is now threatened. Today, the Court has successfully attacked a group of Maltese millionaires based on no law, flying in the face democracy and common sense – tomorrow it could be *you*.

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# ASCERTAINING THE NATURE OF THE LINK BETWEEN ENLARGING AND REFORMING THE EUROPEAN UNION: WHITHER THE COPENHAGEN ABSORPTION CAPACITY CRITERION?

SERHII LASHYN*

*Some, although not all, past reforms of the EU were connected to the accession of new Member States, and, likewise, the current reform proposals are often presented in the context of the Union's possible next round of enlargement. This nexus between reforming and enlarging the Union has been formalised and justified as the Copenhagen absorption capacity criterion. But does this explanation actually hold up? This article examines the nature of the link between reforming and enlarging the EU against the backdrop of the newly discovered enlargement enthusiasm. The contribution demonstrates that, first, the current reform suggestions go much beyond what is actually needed to make the next round of enlargement possible, although they are framed in the enlargement discourse. Second, this article shows that in the past, reforms of the Union were only occasionally and partially necessitated by its enlargement, even when they were tied to it politically. It is suggested that the connection between enlarging and reforming the Union cannot be explained by the Copenhagen absorption capacity criterion alone. Instead, enlargement acts as a catalyst for reforms, providing a good political opportunity to resolve problems facing the Union irrespective of enlargement plans.*

## 1 INTRODUCTORY REMARKS

There are two 'evergreen' topics that have been reappearing as high-priority items on the political agenda of the EU in recent decades, shaping the bloc's legal evolution and generating sizeable amounts of literature: enlargement and reforms. Throughout the Union's history, these two often went hand-in-hand due to how politicians and scholars alike presented the former as requiring the latter.[1] The 2004 'big bang'[2] enlargement may serve as just one compelling example of this link. Still fresh in the memory, the Union's biggest round of enlargement thus far 'was undertaken with considerable trepidation',[3] for it posed an unprecedented challenge to the Union's institutional structure, governance mechanisms, and decision-making processes.[4] Ten new countries were about to join the Union, making it

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[1] When studying the relationship between reforming and enlarging the Union, scholars observe certain 'interdependencies' between the two. See Bernard Steunenberg, 'Enlargement and Reform in the European Union' in Bernard Steunenberg (ed), *Widening the European Union: The politics of institutional change and reform* (Routledge 2002) 7-8.
[2] Andrea Ott, '20 Years of the EU's Big Bang Enlargement: From the Return to Europe to the Escape from Europe?' (2024) 31(5) Maastricht Journal of European and Comparative Law 553, 554.
[3] Mark A Pollack, 'Europe United? The Impact of the EU's Eastern Enlargement, Five Years On' (2009) 8(2) European View 239, 240.
[4] See Frank Emmert and Siniša Petrović, 'The Past, Present, and Future of EU Enlargement' (2014) 37(5) Fordham International Law Journal 1349, 1379-1382.

bigger, more diverse and, apparently, much harder to govern. Responding to this challenge, the Nice Treaty[5] was meant to finish the job started in Amsterdam[6] and prepare the Union for the accession of ten new countries, ensuring that it would remain functioning and efficient.[7]

Designed initially as three Communities[8] for just the 'Inner Six',[9] the Union changed and adapted throughout its history, accommodating a much higher number of participating countries through reforms of its legal architecture and policies. The current situation resembles the late 1990s and the early 2000s to a great degree.[10] Just like back then, there are ten candidate countries wishing to join the Union.[11] And just like twenty years ago, the Union's institutions – the European Parliament,[12] the Commission,[13] and the European Council[14] – declared that a far-reaching reform of the EU is needed to make the next round of enlargement possible. Several specific and detailed proposals have already been tabled. The EU's 'capacity to absorb new members'[15] becomes crucial for the outcome of the candidate countries' membership bid, intertwining their EU aspirations with the Union's internal constitutional transformations and predicating their accession on the success of the Union's reform journey, which is, in its turn, likely to be long, complicated, and arduous.

These latest developments warrant a closer look at the nature of the connection between the EU's enlargement and reforms. On the surface, this link is formalised, justified, presented, marketed, and structured as one of the conditions that needs to be fulfilled for the next round of enlargement, namely the Copenhagen absorption capacity criterion. Yet, when analysed from a legal viewpoint and when tested against the practice of reforms and enlargement, does this actually hold up? Is the Copenhagen absorption capacity criterion a good explanation for how reforms of the Union are being tied to its enlargement and vice versa, in theory and in practice? These are the questions that this article undertakes to answer.

The analysis begins by briefly presenting the Copenhagen absorption capacity criterion and, particularly, by reflecting critically on how it functions as a legal requirement for the Union's enlargement under Article 49 TEU. Then, the article proceeds to examine the status quo and study how the current calls for reforms of the Union are being connected to

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[5] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C80/1. For an overview of the Treaty, see René Barents, 'Some Observations on the Treaty of Nice' (2001) 8(2) Maastricht Journal of European and Comparative Law 121.

[6] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1. For an overview of the Treaty, see Philippe Manin, 'The Treaty of Amsterdam' (1998) 4(1) Columbia Journal of European Law 1.

[7] See Finn Laursen, 'The Treaty of Nice: The Inadequate Preparation of Enlargement' in Finn Laursen (ed), *Designing the European Union: From Paris to Lisbon* (Palgrave Macmillan 2012).

[8] On the beginnings of the Communities, see F Roy Willis, 'Origins and Evolution of the European Communities' (1978) 440(1) The Annals of the American Academy of Political and Social Science 1, 3-7.

[9] Uwe W Kitzinger, 'Europe: The Six and the Seven' (1960) 14(1) International Organization 20, 20.

[10] See Eleanor Sharpston, 'Further EU Enlargement – a "Brave New World", or More like "Back to the Future"?' (2024) 25 ERA Forum 275, 275–276.

[11] European Commission, '2024 Communication on EU enlargement policy' COM(2024) 690 final, 1.

[12] European Parliament resolution of 29 February 2024 on deepening EU integration in view of future enlargement (P9_TA(2024)0120; 2023/2114(INI)).

[13] European Commission, 'Communication on pre-enlargement reforms and policy reviews' COM(2024) 146 final.

[14] European Council Strategic Agenda: 2024-2029.

[15] Copenhagen European Council (21-22 June 1993) (1993 Bulletin of the European Communities No 6) para I.13.

the possible next round of enlargement. After that, this article focuses on the relationship between EU reforms and enlargement phases in the past. Having demonstrated that the Copenhagen absorption capacity criterion cannot explain the link between reforms and enlargement in either the past or the present, this contribution investigates the actual nature of the nexus between enlarging the Union and reforming it, arguing that this link goes beyond the Copenhagen absorption capacity criterion and functions in a more complicated manner than previously thought.

## 2 THE COPENHAGEN ABSORPTION CAPACITY CRITERION

As studied in detail in the following two sections, the prospects of enlargement are often tied to the reform discourse taking place in the Union. The way this connection is theorised and legalised, at least since 1993,[16] is the so-called Copenhagen absorption capacity criterion. Also known as the 'integration capacity'[17] criterion, it might look like a suitable, ready-made explanation for the nexus between reforming and enlarging the Union. Before looking into whether this explanation holds up, the criterion has to be studied briefly from a theoretical perspective. As demonstrated below, the absorption capacity criterion is an unusual legal construct that has certain conceptual incongruities, which, in the end, undermine its ability to explain the nexus between reforming and enlarging properly.

Article 49 TEU, the only provision in the primary law of the Union that regulates accession to the EU,[18] reads: 'The conditions of eligibility agreed upon by the European Council shall be taken into account'.[19] This sentence has been successively interpreted as referring to the conditions adopted by the European Council in 1993,[20] better known as the Copenhagen Criteria,[21] 'a checklist of political and economic benchmarks for aspiring member countries'.[22] Apart from several political and economic requirements for

[16] It has to be noted that the Union's or, at that time, the Communities', ability to successfully integrate new members was given consideration in the enlargement rounds before the 1993 European Council, which indeed 'codified' the previously existent practice. See Christophe Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (2010) Report No. 6 SIEPS (Swedish Institute for European Policy Studies) 26.
[17] The expression 'integration capacity' was introduced as a better alternative to 'absorption capacity' by the Commission in 2006. See European Commission, 'Enlargement Strategy and Main Challenges 2006 – 2007 Including annexed special report on the EU's capacity to integrate new members' COM(2006) 649 final 17.
[18] For an overview of the enlargement law, see Serhii Lashyn, 'The Finalité of the European Union's Enlargement' (2025) 26 ERA Forum 249, 251–255; Dimitry V Kochenov and Elena Basheska, 'Ukraine and the EU Enlargement: What Is the Law and Which Is the Way Forward?' [2025] European Journal of Risk Regulation 1, 5–13.
[19] Consolidated version of the Treaty on European Union [2012] OJ C326/13 Art 49.
[20] Susanna Fortunato, 'Article 49 [Accession to the Union]' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2013) 1363–1366; Rudolf Geiger, 'Article 49 [Accession of New Member States]' in Rudolf Geiger, Daniel-Erasmus Khan, and Markus Kotzur (eds), *European Union Treaties: A Commentary* (C H Beck & Hart Publishing 2015) 181; Friedrich Erlbacher, 'Article 49 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 314–315.
[21] For an overview of the Criteria, see Christophe Hillion, 'The Copenhagen Criteria and Their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004).
[22] Danijela Dudley, 'European Union Membership Conditionality: The Copenhagen Criteria and the Quality of Democracy' (2020) 20(4) Southeast European and Black Sea Studies 525, 527.

membership,[23] the criteria also provide that '[t]he Union's capacity to absorb new members'[24] is 'an important consideration in the general interest of both the Union and the candidate countries'.[25] This particular condition is known as the absorption capacity criterion, 'the often forgotten internal aspect of the Copenhagen criteria'.[26] Although, as Article 49 TEU provides, this criterion shall only 'be taken into account',[27] it has become an indispensable and important part of the Union's enlargement that continues to play a significant role in each accession process.[28]

When examined from a theoretical perspective, the Copenhagen absorption capacity criterion presents some conceptual challenges that are rather difficult to disentangle. To begin with, unlike other Copenhagen Criteria, the absorption capacity criterion is a requirement for the Member States to fulfil, not for the candidate countries.[29] It is the Union that must satisfy this criterion, although its fulfilment or non-fulfilment has a bearing only on the candidate countries, as it directly impacts the outcome of their bid to join the Union. There is no feasible way for the candidate countries to directly influence the EU's absorption capacity. Before becoming a Member State, any candidate country has no say in the Union's policies and decision-making, let alone its constitutional reforms.[30] Presented as an accession requirement that has to be fulfilled before any individual accession may take place, the Copenhagen absorption capacity criterion can be satisfied only by the Union itself. These unusual, even counterintuitive, mechanics lead to the possibility of utilising the absorption capacity criterion as an 'emergency brake'[31] in any accession process that enables the Union to delay or prevent the admission of a third country even when it fulfils all other Copenhagen Criteria.

In light of this, one may question whether the absorption capacity criterion may be regarded as an accession criterion in the first place. If this is not for the candidate countries to fulfil, can it be plausibly called an accession criterion at all? While this issue requires more space to be addressed properly than this article can provide, it suffices to say the following. First, the European Council presented the absorption capacity criterion together with other accession criteria,[32] and the absorption capacity has been regarded as an accession criterion ever since. It is illustrative that, in the literature, the absorption capacity criterion is often

[23] For a detailed overview, see Kirstyn Inglis, *Evolving Practice in EU Enlargement: With Case Studies in Agri-Food and Environment Law* (Martinus Nijhoff Publishers 2010) 57-93.
[24] Copenhagen European Council (n 15) I.13.
[25] ibid I.13.
[26] Nicolai von Ondarza, 'Getting Ready Ukraine's Potential Accession and EU Institutional Reform' (*Verfassungsblog*, 22 December 2022) <https://verfassungsblog.de/getting-ready/> accessed 1 May 2026.
[27] TEU Art 49.
[28] See Inglis (n 23) 60–69.
[29] Marc Maresceau, 'EU Enlargement: Origins and Practice' in Mathieu Segers and Steven Van Hecke (eds), *The Cambridge History of the European Union* (Cambridge University Press 2023) 428.
[30] Nevertheless, it has to be mentioned that, as observed in the literature, the Union's relationship with a candidate country may, under certain circumstances and to a limited degree, cause some changes in the Union's policies, laws and institutional structures. See Antoaneta L Dimitrova and Rilka Dragneva, 'How the EU–Ukraine Association Agreement and Its Consequences Necessitated Adaptation and Drove Innovation in the EU' (2023) 61(6) JCMS: Journal of Common Market Studies 1454.
[31] Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (n 16) 26.
[32] Copenhagen European Council (n 15) para I.13.

referred to as 'the fourth' criterion,[33] meaning it is actually perceived as one of the accession criteria. Second and more importantly, if the absorption capacity is indeed not a condition for acceding to the Union *sensu stricto*, it is certainly a condition for the enlargement of the Union. All other Copenhagen Criteria may be better referred to as the accession criteria proper, meaning the requirements that the candidate countries have to fulfil if they wish to be admitted to the Union. The absorption capacity criterion is, in contrast, a requirement for the EU's enlargement, not for the accession of new countries. While other Copenhagen Criteria make sure that the candidate countries are ready to join, the absorption capacity criterion is there to verify that the Union is ready to admit those countries.

Another notable characteristic of the Copenhagen absorption capacity criterion is that the logic of this criterion goes against the essence of the principle of *nemo judex in causa sua* (no one should be a judge in their own case). With regard to other Copenhagen criteria, the EU and the Member States decide how exactly those criteria can be satisfied, the candidate countries work towards fulfilling those criteria, and then it is the Union and the Member States who are the ultimate arbiters of their success. With the absorption capacity criterion, things work in a completely different and quite uncommon manner: the EU itself establishes what the criterion exactly means in a given historical moment, how it can be fulfilled, and the Union decides, in the end, whether it has succeeded in fulfilling this criterion.[34] As aptly noted by commentators, 'the EU's absorptive capacity for further enlargement is going to be what its leaders choose it to be'.[35] The Union's leaders are also the ones who decide whether the absorption capacity criterion is satisfied, further proving that its actual function might be acting as the 'emergency brake' mentioned above.

A particularly significant problem with the absorption capacity criterion that flows from the previously mentioned characteristics is that it is, as commentators rightfully observe, 'vague and ill-defined'.[36] Although other Copenhagen Criteria are also not outstandingly specific,[37] the absorption capacity criterion is particularly opaque. Handing down a judgment on whether the accession of new Member States is possible in light of the Copenhagen absorption capacity criterion is very difficult and depends on numerous variables, as well as on how one perceives the course of European integration and its prospects. It is unclear how exactly the Copenhagen absorption capacity criterion should be fulfilled, particularly because nobody can predict when the next enlargement round will happen and which countries will join the Union, hence making it unlikely that a specific set of reform proposals can be plausibly presented as the fulfilment of this criterion at a certain point in time. Even ascertaining what the absorption capacity means in general terms, not in the context of a particular enlargement phase, is quite difficult.

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[33] Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (n 16) 26; Inglis (n 23) 60; Geoffrey Edwards, 'Reforming the Union's Institutional Framework: A New EU Obligation?' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 41.

[34] Christophe Hillion, 'Enlargement of the European Union: A Legal Analysis' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 413.

[35] Michael Emerson et al, 'Just What Is This "Absorption Capacity" of the European Union?' (2006) 113 CEPS Policy Brief 22.

[36] ibid 1.

[37] For example, on the political criterion, see Dimitry V Kochenov, 'Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' (2004) 8(10) European Integration Online Papers 1.

There is no Enlargement Methodology for the absorption capacity criterion; there are no benchmarks that would give a more or less precise idea of the specific content of this criterion. Shortly before the Commission presented its vision of the content of the absorption capacity criterion in 2006, some authors wrote that it was comprised of many elements and suggested a non-exhaustive list of such elements,[38] among them the capacity of the Internal Market to accommodate new Member States, the budgetary capabilities of the Union, its institutional capabilities, and even the 'capacity of society to absorb new member states',[39] as well as the capability of the Union 'to assure its strategic security'.[40] In its influential communication,[41] the Commission then defined absorption capacity as 'a functional concept',[42] the purpose of which is 'to ensure [the Union] can maintain its capacity to function'.[43] The Commission interpreted it as 'about whether the EU can take in new members at a given moment or in a given period, without jeopardising the political and policy objectives established by the Treaties'.[44] As to the specific content, the Commission's view was similar to what commentators suggested, although it was narrower and, particularly, did not include the societal dimension. From the Commission's standpoint, the Copenhagen absorption capacity criterion contained three essential elements: institutions, budget, and policies.[45] In all of these areas, the Commission's understanding of the absorption capacity can be boiled down to making sure that, first, the EU is prepared for an increase in the number of Member States and, second, that enlargement will not jeopardise European integration. Yet, the integration capacity of the Union might be interpreted quite widely. Particularly, some researchers see it as including external and internal dimensions.[46] For them, the absorption capacity of the Union relates not only to its own preparedness to integrate candidate countries but also to its ability to transform those countries with a view to eventually admitting them to the EU.[47] While all these may be quite helpful in picturing the Union's absorption capacity in broad strokes and perhaps determining some general direction for enhancing it, the lack of specifics is still tremendous. It is rather unsurprising that, as further shown in this article, the political actors can stretch or narrow the absorption capacity criterion as the situation requires.

A notable consequence of the theoretical flaws of the absorption capacity criterion and its significant conceptual uncertainties is that the discussion of it is frequently mixed up with the discourse on deepening and widening the EU.[48] There is 'a considerable body of

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38 Emerson et al (n 35) 9.
39 ibid.
40 ibid.
41 Although the communication dates back to 2006, the EU continues to steer its enlargement policy on the basis of the principles laid down in that communication, see Barbara Lippert, 'Ukraine's Membership Bid Puts Pressure on the European Union: A Security Policy Flanking, Not a Revision of EU Enlargement Policy, Is Advisable' [2022] Stiftung Wissenschaft und Politik Comment No. 21.
42 Commission, 'Enlargement Strategy and Main Challenges 2006 – 2007' (n 17) 17.
43 ibid 20.
44 ibid 17.
45 ibid 20-22.
46 Tanja Anita Börzel, Antoaneta Dimitrova, and Frank Schimmelfennig, 'European Union Enlargement and Integration Capacity: Concepts, Findings, and Policy Implications' (2017) 24(2) Journal of European Public Policy 157, 160-163.
47 ibid.
48 For an example, see Stefan Lehne, 'A Reluctant Magnet: Navigating the EU's Absorption Capacity' *Carnegie Endowment for International Peace: Carnegie Europe* (21 September 2023)

scholarship'[49] that looks into the link between the two processes. The 'large and established literature'[50] on widening and deepening of European integration is primarily concerned with the effects of the former on the probabilities and success of the latter.[51] The vocabulary of widening and deepening often pops up in the Union's absorption capacity discourse.

For example, after the 2006 summit where the issue of the absorption capacity played a prominent political role,[52] the European Council declared that '[i]t will be important to ensure in future that the Union is able to function politically, financially and institutionally as it enlarges, and to further *deepen* Europe's common project'.[53] More frequently, the widening-deepening dilemma sneaks into the scholarly discourse on the absorption capacity. For example, some authors write: 'Concerns about the Union's integration capacity have been part of the widening versus deepening debates that marked the wake of every enlargement round'.[54] Recently, when discussing the possibilities for treaty revisions in anticipation of the next round of enlargement, others wrote decisively and explicitly: 'Widening cannot go without deepening'.[55]

The reason for the overlaps between the absorption capacity and the widening-deepening discussion is the similarity between the two key terms: deepening and reforms. Widening is quite difficult to interpret divergently, and its meaning is the same as the meaning of enlargement: admitting new countries to the Union and increasing its membership. What concerns deepening, a danger of confusion appears to be significant here, as it might be temptingly easy to equate it with reforming. This is, however, not the case. Reforming the Union to prepare it for another round of enlargement does not mean deepening integration.[56] Instead, it means adjusting the Union's structures and policies in a manner that would make them suitable for a larger number of Member States. Deepening is something different. Deepening essentially relates to the extension of the Union's competencies and tilting the balance in favour of supranationalism. Reforming the Union with the purpose of enhancing its absorption capacity to successfully integrate new Member States does not mean more European integration, while deepening certainly does. It is true that enlarging the Union without properly addressing the issue of its absorption capacity first will likely prevent deepening of European integration or, at least, make it much more difficult.

<https://carnegieendowment.org/research/2023/09/a-reluctant-magnet-navigating-the-eus-absorption-capacity?lang=en> accessed 1 May 2026.

[49] Ann-Christina L Knudsen, 'European Union History' in Kennet Lynggaard, Ian Manners, and Karl Löfgren (eds), *Research Methods in European Union Studies* (Palgrave Macmillan 2015) 37.

[50] Lucas Schramm, 'Navigating Widening and Deepening: The European Council, Geopolitical Motives, and Union Enlargement' (2025) 47(8) Journal of European Integration 1 (1197), 2.

[51] For an overview of the scholarship on this matter in the domains of international relations and political science, see Roger Daniel Kelemen, Anand Menon, and Jonathan Slapin, 'Wider and Deeper? Enlargement and Integration in the European Union' (2014) 21 Journal of European Public Policy 647, 648-650.

[52] Emerson et al (n 35) 2.

[53] Presidency Conclusions of the Brussels European Council (15-16 June 2006) (10633/1/06 REV 1) para 53, emphasis added.

[54] Börzel, Dimitrova, and Schimmelfennig (n 46) 159.

[55] Dominique Ritleng, 'How to Amend the EU Treaties? Legal Ways and Deadlocks' (2025) 30(4) European Law Journal 1 (473).

[56] In fact, as rightfully suggested by some scholars, deepening European integration actually makes enlargement more difficult. Tom Casier, 'The New Neighbours of the European Union: The Compelling Logic of Enlargement?' in Joan DeBardeleben (ed), *The Boundaries of EU Enlargement: Finding a Place for Neighbours* (Palgrave Macmillan 2008) 21.

The process of enhancing the absorption capacity through reforming the Union is, however, distinct from the process of deepening European integration.

Last but not least, one of the core questions here is whether reforming the Union is absolutely necessary for its enlargement. Does the absorption capacity of the Union matter that much? Is it really as decisive as it is usually presented? The logic behind advocating for internal reforms of the EU to fulfil the absorption capacity criterion builds upon the fundamental premise that, once the number of Member States increases, making decisions gets more difficult because more parties need to find common ground.[57] This probably explains why one of the most noticeable and repeated reforms undertaken in the treaty revisions is moving from the unanimity rule to qualified majority voting in the Council. Yet, this premise is not as coherent as it might seem at first glance. If the Treaties require unanimity in a certain area, a single vote against is capable of vetoing the decision. This is possible in the Union of 27 or 37 Member States just as much as in the Communities of 6 countries. The risk of paralysis in the Union's decision-making has been present since the very inception of the European project, so remedying this risk is a challenge that exists independently from the increase in the number of Member States, although such an increase indeed elevates this risk.

Reflecting on the 2004 and 2007 rounds of enlargement, Mark Pollack observes that, 'even in the absence of fundamental constitutional change, EU institutions, both individually and collectively, have proven remarkably adaptable in the face of enlargement'.[58] This is true. Of course, one should not belittle the achievements of the Nice Treaty. It is undeniable that the reforms undertaken before 'the most challenging expansion of the Union'[59] in 2004 had positive effects on preserving the Union's functionality after the drastic increase in the number of Member States. Nevertheless, even without the Treaties of Nice and Amsterdam, the Union would still have been able to admit new Member States. Making enlargement conditional upon an institutional reform was foremost a political decision. Commentators recall that the Lisbon Treaty was indeed designed as 'enlargement-proof'.[60] While one can hardly deny that many improvements would be welcome, and some are very much desired or even urgently needed, whether revising the Treaties is absolutely indispensable for the next round of enlargement is questionable.

The short overview above demonstrates how problematic the construction of the Union's absorption capacity is at the theoretical level. Nevertheless, the Copenhagen absorption capacity criterion is, above all, a legal construct. The criterion is even seen by some commentators as encapsulating a legal obligation of the Union to reform its institutional structures.[61] The criterion was introduced by the European Council and, by means of the reference in Article 49 TEU, is a part of Union law. Whether this criterion can actually explain the nature of the link between reforming and enlarging the Union is the primary question this article is concerned with. In the two sections below, this article

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[57] See A Maurits van der Veen, 'Enlargement and the Anticipatory Deepening of European Integration' (2014) 21(5) Journal of European Public Policy 761, 762.
[58] Pollack (n 3) 240.
[59] Börzel, Dimitrova, and Schimmelfennig (n 46) 157.
[60] Olivier Costa, Gaëlle Marti, and Karine Caunes, 'A Roadmap for Enlarging and Reforming the European Union: Taking the Report of the "Group of Twelve" Seriously' (2025) 30(4) European Law Journal 466.
[61] Edwards (n 33) 27.

ascertains the nature of this nexus by looking into the current reform proposals and how enlargements and reforms were connected in the past.

## 3 CURRENT REFORM CALLS

At the moment, there are a number of specific reform proposals debated by politicians, policymakers, and scholars. Some commentators explicitly base their pleas for a change on the prospects of enlargement: 'Reform the European Union for Enlargement!'.[62] Borrowing the expression of Elise Muir, the 'winds of treaty change'[63] are indeed blowing. The history of European integration has entered a new chapter due to 'an existential crisis leading to a European Zeitenwende',[64] which has arguably revealed that 'the process of European integration is in need of a changed institutional setting'[65] and other reforms. There are currently four major sets of such proposals: the results of the Conference on the Future of Europe, the 2023 resolution adopted by the European Parliament, the report of the Group of Twelve, and the Commission's communication on pre-enlargement reforms and policy reviews. Below, these four sets of EU reform suggestions are examined in turn. The analysis below is, however, limited only to whether and how these proposals are being connected to the upcoming round of enlargement. The aim of this section is to investigate, first, to what extent the current reform proposals are linked to the prospects of enlargement and, second, whether the Copenhagen absorption capacity criterion can fully explain this link.

The current reform discourse began in 2021 when three EU institutions formally decided to convene the Conference on the Future of Europe.[66] The Conference was presented as 'a citizens-focused, bottom-up exercise'[67] designed specifically 'to give citizens a say on what matters to them'.[68] The Conference was a notable effort of the Union to involve ordinary citizens in the process of making decisions on the fundamental questions of European integration.[69] A 'novel experiment for the EU',[70] the Conference had an ambitious

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[62] Christian Calliess, 'Reform the European Union for Enlargement! Proposals to Prevent an "Overstretch in Integration"' (*Verfassungsblog*, 6 July 2023) <https://verfassungsblog.de/reform-the-european-union-for-enlargement/> accessed 1 May 2026.

[63] Elise Muir, 'Winds of Treaty Change? Taking Fundamental Rights in the EU yet More Seriously' (2023) 30(5) Maastricht Journal of European and Comparative Law 543.

[64] Marianne Riddervold and Pernille Rieker, 'Finally Coming of Age? EU Foreign and Security Policy after Ukraine' (2024) 33(3) European Security 497, 497.

[65] Federico Fabbrini, 'The War in Ukraine and the Future of the EU: Prospects for Reform' in Bart Vanhercke, Sebastiano Sabato, and Slavina Spasova (eds), *Social policy in the European Union: state of play 2022: Policymaking in a permacrisis* (ETUI aisbl 2023) 21.

[66] Joint Declaration of the European Parliament, the Council and the European Commission on the Conference on the Future of Europe: Engaging with citizens for democracy – Building a more resilient Europe [2021] OJ C091I/1 (CoFoE Declaration). For some reflections on the Conference, see Federico Fabbrini, 'The Conference on the Future of Europe: Process and Prospects' (2020) 26(5-6) European Law Journal 401; Alberto Alemanno, 'Unboxing the Conference on the Future of Europe and Its Democratic Raison d'être' (2020) 26(5-6) European Law Journal 484; Sandra Seubert, 'The Conference on the Future of Europe as a Chance for Democratic Catching up? Towards a Citizen-Centred Perspective on Constitutional Renewal in the European Union' (2023) 13(2) Global Constitutionalism 429; Karolina Borońska-Hryniewiecka and Lucy Kinski, *The Parliamentary Dimension of the Conference on the Future of Europe: Synergies and Legitimacy Clashes* (Routledge 2024).

[67] CoFoE Declaration (n 66) para a.

[68] ibid b.

[69] Seubert (n 66) 429–431.

[70] Fabbrini, 'The War in Ukraine and the Future of the EU: Prospects for Reform' (n 65) 17.

and far-reaching mandate. The report presented as the result of the Conference contained a voluminous catalogue of diverse suggestions.[71] Most of the plenary's proposals are rather general, requiring more action from the EU or more robust policies in some areas, without, however, providing specific suggestions.[72] While the majority of those proposals can be implemented without any treaty changes,[73] some of them require a full-scale revision of the Treaties, which is indeed 'a formidable obstacle'.[74]

Chronologically, the Conference and its reform recommendations precede the current phase of enlargement marked by granting the candidate status to Ukraine and Moldova in 2022.[75] It is not surprising that the Conference's proposals are generally not connected to enlargement. Only a few suggestions refer to the probable accession of new countries. For example, the Conference recommended 'agreeing on a strong vision and a common strategy to consolidate the unity and decision taking capacity of the EU in order to prepare the EU for further enlargement'.[76] Also, in the context of upholding the rule of law and other European values, the Conference rather cautiously noted that '[e]nlargement of the EU should not undermine the EU acquis with relation to fundamental values and citizens' rights'.[77] An even more cautious, if not sceptical, attitude towards enlargement can be found in an attached document titled 'Our vision of Europe: Opinions, ideas and recommendations'[78] which represents a shortened and translated version of the original report based on the work of citizens' panels in the Netherlands. Published in December 2021, the report presents a somewhat unenthusiastic outlook for enlargement, suggesting that the EU should admit new countries 'if enlargement brings added value'[79] and only after ensuring that 'the current club is stable'.[80]

Now, after more than two years have passed since the Conference's conclusion, it is now unlikely that the Conference itself will bring about any large-scale changes in the constitutional edifice of the EU. More importantly for the subject matter of this article, the Conference presented its vision for the development of the Union without framing it in the context of the upcoming enlargement. On the one hand, this could be plausibly explained by the fact that the Conference took place mostly in 2020-2021, before the widely felt enlargement fatigue was replaced by some significant enthusiasm.[81] On the other hand, the Conference remains the latest initiative to reform the Union's structure and policies that builds upon EU citizens' direct participation. It is not surprising that EU citizens are more concerned with the problems and challenges inside the Union, also not wishing to make

[71] Conference on the Future of Europe: Report on the Final Outcome 2022 (CoFoE Final Report).
[72] Just one example may be 'preserving and reforming our multilateral rules-based international trade architecture, and partnership with like-minded democracies' – ibid 63.
[73] According to the Council, '95 % of the Conference's proposals […] can already be implemented within the current Treaty framework'. The Council's follow-up to the Conference on the Future of Europe 2023 (Council of the European Union: General Secretariat).
[74] Federico Fabbrini, 'Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options' (2020) 5(2) European Papers 963, 977.
[75] European Council meeting (23 and 24 June 2022) – Conclusions (EUCO 24/22) para 11.
[76] CoFoE Final Report (71) 64.
[77] ibid 68.
[78] ibid 281-306.
[79] ibid 287.
[80] ibid 288.
[81] See Matteo Bonomi and Irene Rusconi, 'From EU "Enlargement Fatigue" to "Enlargement Enthusiasm"?' (2023) 19 ÖGfE Policy Brief.

a wide-ranging reform of the Union tightly connected to the prospects of enlargement. This is reflected in the content of the proposals made by the Conference, which predominantly do not relate to the institutional structure of the Union and the efficiency of its decision-making. The Conference's results retain their importance as a product of direct democracy, and, for that reason, the absence of a strongly expressed link between reforming and enlarging the Union in the Conference's vision for the future of the Union shall not be overlooked or ignored.

In recent times, the European Parliament has made consistent calls to revise the Treaties. In 2022, the Parliament officially requested the Council to launch the ordinary revision procedure under Article 48 TEU.[82] The Parliament based its call on the outcome of the Conference on the Future of Europe.[83] It also noted that the current version of the Treaties dates back to 2009 and established that 'the Treaties need to be amended urgently to make sure the Union has the competence to take more effective action during future crises'.[84] As commentators observe, contrary to the wording of the Treaties,[85] the Council did not hand over the proposals to the European Council for deciding on whether to convene a Convention.[86] Despite the apparent failure of this attempt to launch a major reform, the European Parliament later adopted a set of specific proposals for the amendment of the Treaties.[87] The 2023 resolution contains a long list of revision suggestions.[88] These revisions are aimed at making the Union more legitimate in the eyes of EU citizens, as well as to increase its capacity to act.[89] The resolution suggests, among other things, giving more powers to the Parliament,[90] establishing a defence union,[91] as well as more action across a wide spectrum of policies. More importantly, unlike the 2022 resolution based on the outcome of the Conference on the Future of Europe, the 2023 resolution is somewhat situated in the context of enlargement. Particularly, the Parliament observed that the institutional framework of the EU was 'barely adequate'[92] for the Union of 27 countries and that 'the prospect of future enlargements makes a reform of the Treaties inevitable'.[93] The list of reform proposals includes many institutional changes that may indeed make the EU more efficient in the event of its enlargement, such as extending qualified majority voting to more areas or limiting the college of commissioners to 15 members.[94]

[82] European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties (2022/2705(RSP)) [2022] OJ C493/130.
[83] ibid.
[84] ibid 4.
[85] TEU Art 48(2).
[86] Andrew Duff, 'Five Surgical Strikes on the Treaties of the European Union' (2023) 8(1) European Papers 9, 9.
[87] European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (P9_TA(2023)0427; 2022/2051(INL)) (EP Treaties Amendment Proposals).
[88] For an overview, see Robert Böttner, 'The Proposals of the European Parliament to Amend the European Treaties' in Marcel Szabó, Laura Gyeney, and Petra Lea Láncos (eds), *Hungarian Yearbook of International Law and European Law* (Nomos 2024).
[89] EP Treaties Amendment Proposals (n 87) para B.
[90] ibid 5-6.
[91] ibid 22.
[92] ibid D.
[93] ibid.
[94] ibid 4, 7.

The 2023 treaty amendment proposals were reportedly passed to the European Council.[95] So far, the Parliament's resolution has not brought about any real changes, and no clear plan for treaty revision based on the Parliament's blueprint is currently in sight.[96] For the present study, the Parliament's 2023 resolution is notable because of the following. The resolution is essentially a bridge between the Conference on the Future of Europe and the current EU reform discourse. This is probably the reason why the Parliament's plan also does not build upon the nexus between enlarging and reforming the Union. The Parliament's blueprint aims mostly at remedying the problems and insufficiencies that are present now and which are of immediate concern to EU citizens of the current Member States. The implementation of the Parliament's suggestions is not presented as preparation for the next round of enlargement and is to be pursued irrespective of whether and when more countries join the Union. Nevertheless, the prospects of a new enlargement round play a certain role in the Parliament's resolution, particularly justifying the urgency of the reform calls and elevating their priority on the political agenda of the Union.

One of the latest additions to the reform discourse has been the quite influential report written by a group of twelve experts coming from Germany and France.[97] The report is notable because, although it was produced by a small group of professors and researchers selected by just two Member States,[98] it managed to gain visibility and received some attention in the literature. The report places itself in the context of the crisis discourse, presenting the reform suggestions as a response to the multiple challenges facing the Union.[99] The link to the probable next round of the Union's enlargement is, however, quite evident here. Particularly, the specific question that the group of experts undertook to respond to was officially formulated in the following way: 'How can the EU be made enlargement ready while also improving its capacity to act, protecting the rule of law, enhancing democracy and preserving fundamental European values?'[100] This was the mandate given to the group by the German and French ministers responsible for European affairs. The way the question was formulated reveals a few important assumptions that underpin the political and scholarly discourse on the matter. The mandate assumes that the Union is not ready for the next round of enlargement, and changes are necessary to make it possible. However, the changes needed for enlargement are not being linked immediately to other reforms of the Union. The second part of the question quoted above is introduced by the phrase 'while also', meaning that the four objectives named in that question are to be achieved in parallel with making the EU enlargement-ready.

The approach taken by the Group of Twelve towards the nexus between reforming and enlarging the Union flows from the above-quoted mandate. On a more general note, the report suggests that '[t]oday's situation differs decisively from that of the early 2000s',[101] without, however, explaining how exactly it differs. In fact, the present situation resembles

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[95] Muir (n 63) 545.
[96] Böttner (n 88) 411–412.
[97] Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century 2023. For an overview, see Costa, Marti, and Caunes (n 60).
[98] Sailing on High Seas (n 97) 51.
[99] ibid 11.
[100] ibid.
[101] ibid 12.

the late 1990s and early 2000s to a considerable degree, as some commentators observe.[102] More importantly, the report specifically stipulates that the probable next round of enlargement is not the sole ground for reforms. According to the Group of Twelve, '[t]he EU's internal functioning and its capacity to act should not only be improved because enlargement is back on the agenda'.[103] In the triangle of goals to be pursued by the reforms, preparing the Union's institutional framework for enlargement is only one of the angles. The report calls this objective 'central',[104] but also specifically recognises that 'reforms aiming to strengthen the EU's capacity to act, the rule of law and fundamental values and democratic legitimacy should be pursued even if enlargement was substantially delayed'.[105] This statement further separates the domains of enlargement and EU reforms, essentially reflecting that, even if there were no candidate countries wishing to join the EU, changes would still be absolutely needed. The content of the report evidences that enlargement was, in fact, not the foremost issue or the main concern for the Group of Twelve. The first problem dealt with in the report is preserving the rule of law in the EU by means of enhancing budgetary conditionality and the Article 7 TEU procedure.[106] Another part of the report focuses on institutional reforms.[107] However, out of the five respective areas, only one is presented as linked to enlargement. Specifically, the report proposes limiting the size of the European Parliament and switching to the Cambridge formula,[108] turning from presidency trios to quintets in the Council, and limiting the size of the Commission or, should that fail, dividing the college of commissioners into two tiers with possible rotations.[109]

The report vividly demonstrates how elusive and uncertain the link between reforming and enlarging the Union actually is. Although this link is much more visible in the report than in the Parliament's resolutions or the Conference's recommendations, it is still thin. The report is reflective of the scholarly discourse and may, therefore, be perceived as authoritative expert advice. Yet, even in the eyes of experts, reforms are needed independently of enlargement prospects and the difficulties that might arise theoretically as a result of enlargement are apparently less serious than the problems currently present in the Union.

Finally, the latest contribution to the ongoing reform discourse has been made relatively recently by the Commission. In 2024, the Commission published a Communication on pre-enlargement reforms and policy reviews.[110] The Commission observed that, '[w]hile reforms were necessary before, with enlargement they become indispensable'.[111] The Commission suggested that reforming and enlarging the EU will have to 'advance in parallel'[112] and that enlargement should be used 'as a catalyst for progress'.[113]

102 Sharpston (n 10) 276.
103 Sailing on High Seas (n 97) 14.
104 ibid.
105 ibid.
106 ibid 15-17.
107 ibid 18-29.
108 For an overview of the Cambridge formula, see Geoffrey R Grimmett, 'European Apportionment via the Cambridge Compromise' (2012) 63(2) Mathematical Social Sciences 68.
109 Sailing on High Seas (n 97) 18-20.
110 Commission, 'Communication on pre-enlargement reforms' (n 13).
111 ibid 1.
112 ibid 2.
113 ibid.

The Communication mostly consists of policy suggestions. Only one section is dedicated to institutional reforms under the heading of governance.[114] Notably, the Commission took a cautious approach,[115] observing that there was no consensus on whether and how the Treaties should be changed.[116] Furthermore, the Commission favours 'using to the full the potential of the current Treaties'.[117] This means, among some other suggestions, taking advantage of the *passerelle* clauses[118] and reactivating the reduction of the college of commissioners already envisaged in the Treaties.[119]

When analysing the Commission's proposals, one has to bear in mind that the Commission has certain capabilities of steering the political discourse in the Union.[120] The way the Commission does this is by setting the agenda, initiating policies and implementing them, and facilitating decision-making processes.[121] This is why Communication should be seriously considered in the context of this article's subject matter. The approach taken by the Commission is quite sober when it comes to the link between reforming and enlarging the EU. While definitely not opposing treaty revisions with the aim of enhancing the Union's efficiency and furthering European integration, the Commission does not see a reform of the Treaties as a precondition for the next round of enlargement. Just like the Group of Twelve, the Commission also explicitly acknowledges that the necessity to reform the Union had existed before another round of enlargement became a probable scenario. What makes the Commission's Communication particularly notable in this context is the language it uses, which reveals the nature of the current connection between enlarging and reforming the Union: the former is 'a catalyst'[122] for the latter. The upcoming round of enlargement is seen by the Commission essentially as a good opportunity to introduce institutional reforms and policy changes that have been long overdue. As further explored below, this approach to the relationship between reforms and enlargement is not exactly new and has existed for quite some time.

## 4 EU ENLARGEMENT AND REFORMS IN THE PAST

In the course of its history, 'the EU has widened from 6 to 27 member states'.[123] This section looks into how enlarging and reforming the Union interacted in the past. The purpose of the below is, however, not to provide a detailed account of all previous enlargement rounds and all reforms of the Union. This article's analysis is limited to investigating whether and how reforming and enlarging the EU were connected to each other in the past, as well as

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114 Commission, 'Communication on pre-enlargement reforms' (n 13) 19-20.
115 Federico Fabbrini, 'The Impact of the War in Ukraine on the Enlargement of the European Union: "Securing the Blessings of Liberty" and Its Challenges' (2025) 74(1) International and Comparative Law Quarterly 123, 140.
116 Commission, 'Communication on pre-enlargement reforms' (n 13) 19.
117 ibid.
118 For a short overview of *passerelle* clauses, see Andrew Duff, *Constitutional Change in the European Union: Towards a Federal Europe* (Palgrave Macmillan 2022) 28-29.
119 Commission, 'Communication on pre-enlargement reforms' (n 13) 19-20.
120 See Arndt Wonka, 'The European Commission' in Jeremy Richardson and Sonia Mazey (eds), *European Union: Power and policy-making* (Routledge 2015) 93-96, 100-102.
121 Neill Nugent and Mark Rhinard, 'The "Political" Roles of the European Commission' (2019) 41(2) Journal of European Integration 203, 207-216.
122 Commission, 'Communication on pre-enlargement reforms' (n 13) 2.
123 Kelemen, Menon, and Slapin (n 51) 656.

whether this connection can be plausibly explained solely by the necessity to make sure that the Union is capable of accommodating incoming Member States.

A certain connection between the intensification of European integration and the admission of new Member States can be traced back to the very first enlargement of the Communities.[124] For example, in its opinion on the membership application of the UK, Ireland, Denmark, and Norway, the Commission devoted considerable attention to the prospects of deepening European integration and the issue of proper functioning of the institutions of the Community in light of enlargement. It is quite interesting that the Commission perceived the upcoming enlargement as a 'problem'.[125] Against the backdrop of this problem, the Commission wrote of a 'link between strengthening and enlargement'.[126] In essence, the Commission feared the weakening of European integration as a possible by-product of the first round of enlargement.[127] As to the institutional aspect, the Commission linked its suggestions to enlargement but conceded that '[t]he problem of improving and strengthening the institutional machinery must be tackled *in any case*'.[128] Indeed, the problems identified by the Commission, such as the effects of the Luxembourg Compromise[129] or the lack of budgetary powers of the Parliament and its election not by universal suffrage,[130] existed before the enlargement round became a realistic scenario and would have remained outstanding issues even if the enlargement had not happened.

The accession of new Member States was preceded by several policy innovations. After de Gaulle's resignation,[131] the French leadership took advantage of the momentum and insisted on several reforms as a precondition for the accession of the United Kingdom.[132] Specifically, this concerned the financing of the Common Agricultural Policy[133] and monetary cooperation.[134] France feared that, after the accession of new countries, it would not be able to achieve a reform of the Common Agricultural Policy financing in its favour.[135] Also, the withdrawal of the French veto over the UK's accession was made conditional upon establishing the Economic and Monetary Union.[136] However, it is important to note that

124 For an overview of the first enlargement round, see Emmert and Petrović (n 4) 1360-1365.
125 Opinion concerning the Applications for Membership from the United Kingdom, Ireland, Denmark and Norway submitted under Articles 237 of the EEC Treaty, 205 of the Euratom Treaty, and 98 of the ECSC Treaty (Bulletin of the European Communities Vol 2 No 9/10 (1969) Supplement) para 42.
126 ibid 43.
127 ibid.
128 ibid 45, emphasis added.
129 On the Luxembourg Compromise, see William Nicoll, 'The Luxembourg Compromise' (1984) 23 JCMS: Journal of Common Market Studies 35; Anthony L Teasdale, 'The Life and Death of the Luxembourg Compromise' (1993) 31(4) JCMS: Journal of Common Market Studies 567; Jonathan Golub and Michal Ovádek, 'Informal Procedures, Institutional Change, and EU Decision-Making: Evaluating the Effects of the 1974 Paris Summit' (2024) 32(11) Journal of European Public Policy 1 (2741), 2-9. For a fresh take, see 'Not Dead yet. Revisiting the "Luxembourg Veto" and Its Foundations' (2017) 13 European Constitutional Law Review 1.
130 Commission's 1969 Opinion on the Applications of the UK, Ireland, Denmark and Norway paras 47, 48.
131 Neil Rollings, *British Business in the Formative Years of European Integration, 1945–1973* (Cambridge University Press 2007) 167-168.
132 Schramm (n 50) 6-7.
133 For an overview, see Alan S Milward, 'The Hague Conference of 1969 and the United Kingdom's Accession to the European Economic Community' (2003) 9 Journal of European Integration History 117.
134 Final communiqué of the Conference 2 December 1969 (Bulletin of the European Communities Vol 3 No 1 (1970) pp 11-16) paras 5, 8.
135 van der Veen (n 57) 766.
136 André Szász, *The Road to European Monetary Union* (Palgrave Macmillan 1999) 15.

those reforms were not a prerequisite for the enlargement, and the UK, Ireland, and Denmark could accede without those reforms. The link between those novelties and the first round of enlargement was rather political, if any at all. Of course, the policy changes were chronologically connected to the accession of new Member States, so one may suggest that the very first enlargement was accompanied by some deepening of European integration. At the same time, it has to be acknowledged that both enlargement and deepening could have happened independently. The increase in the number of Member States from six to nine did not create any new problems in the decision-making processes or institutional structures, but could only exacerbate the problems already present. Those problems existed before and continued to manifest themselves after the accession of new countries. In essence, political actors took advantage of the circumstances and used their leverage to push for some changes. The first round of enlargement was not preceded by an increase in the integration capacity of the Communities or enhancements in their decision-making processes, so there are no sufficient grounds to speak of a substantial nexus between reforms and enlargement in that specific period.

The anticipation of the next two rounds of enlargement, namely the accession of Greece in 1981 and of Portugal and Spain in 1986,[137] gave the already ongoing discussions on the efficiency of the institutional framework of the Communities a new impetus. This resulted in two reports, namely the 1979 Spierenburg report and the 1980 report authored by Barend Biesheuvel, Edmund Dell, and Robert Marjolin. Both shed some light on whether and how internal reforms of the Communities related to the accession of new Member States.

The Spierenburg report largely focused on the place of the Commission within the wider institutional structure of the Communities.[138] The report recommended reducing the number of commissioners, particularly in light of the upcoming accession of three more countries.[139] Also, a reduction in the number of directorates-general was advised.[140] However, these proposals were not subsequently implemented. The report of Biesheuvel, Dell, and Marjolin, also known as the report of the Three Wise Men,[141] was wider in its scope and contained recommendations relating to virtually all the institutions except for the Court.[142] Notably, the report contained a separate chapter dedicated to enlargement.[143] In that chapter, the challenges posed by enlargement were seen twofold. According to the report, some difficulties would arise in decision-making processes due to the increase in the number of Member States, and other problems would appear in accommodating the interests of new

137 For an overview, see Emmert and Petrović (n 4) 1365-1371. Also see Robert Bideleux, 'The Southern Enlargement of the EC: Greece, Portugal and Spain' in Robert Bideleux and Richard Taylor (eds), *European Integration and Disintegration: East and West* (Routledge 1996). For a very short overview, see Frank Hoffmeister, 'Earlier Enlargements' in Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Enlargement* (TMC Asser Press 2002) 88-89.

138 Proposals for reform of the Commission of the European Communities and its services. Report made at the request of the Commission by an Independent Review Body under the chairmanship of Mr. Dirk Spierenburg (1979) para 6.

139 ibid 38, 43-44.

140 ibid 49-50.

141 See Andrew Duff, 'The Report of the Three Wise Men' (1981) 19(3) JCMS: Journal of Common Market Studies 237.

142 For a detailed account of the report in the broader context, see Edmund Dell, 'The Report of the Three Wise Men' (1993) 2(1) Contemporary European History 35.

143 Report on European Institutions by Barend Biesheuvel, Edmund Dell and Robert Marjolin (1980) 67-72.

members in the enlarged Communities.[144] The report decisively rejected what it called a 'two-tier'[145] model, meaning differentiation and fragmentation of European integration. Instead, some suggestions to streamline decision-making processes were made, particularly the wider use of majority vote.[146] Many more improvement suggestions were, however, made outside of the enlargement context. Particularly, the report called for a more prominent role of the European Council,[147] strengthening of the Council's presidency,[148] keeping only one commissioner per Member State along with the reduction of directorates-general,[149] and closer cooperation between the Parliament, the Council, and the Commission.[150]

Neither of the two reports led to any specific reforms. Yet, an attentive reading of the report of the Three Wise Men may shed some more light on the relationship between enlargement and reforms at that time. While the chapter on enlargement linked the report to the accession of new members, it explicitly recognised that a certain *'lourdeur'*,[151] the French word for clumsiness or heaviness, was very much already present in the Communities. The problems identified in the report existed before the admission of three new Member States and had to be dealt with anyway. One of the authors of the report later wrote that, 'if the institutions, and especially the Commission, were ineffective in a Community of nine, they could not cope with a Community of twelve'.[152] This is why the report said that the Community 'must put its own house in order',[153] meaning that the next round of enlargement would only exacerbate the already existent problems rather than cause new ones. This further demonstrates how enlargement was perceived not really as the reason for reform but rather as an opportunity to review the status quo and push forward some long-awaited improvements. Also, some Member States again took advantage of their leverage in the enlargement discussions and used it to change agricultural policies in their favour.[154]

The first substantial revision of the Treaties came in the form of the 1986 Single European Act.[155] By that time, three rounds of enlargement had taken place, doubling the number of Member States from the initial six to twelve.[156] The latest addition of Spain and Portugal took place shortly before the signing of the Act.[157] However, the adoption of the Single European Act was not primarily driven by the enlargement of the Communities. At the time of the Act's drafting and adoption, there were no more candidate countries, and further enlargement of the Communities seemed rather improbable. The enquiry into

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144 Report on European Institutions by Barend Biesheuvel et al (n 143) 67.
145 ibid 68-69.
146 ibid 70.
147 ibid 15-26.
148 ibid 27-48.
149 ibid 49-56.
150 ibid 57-62.
151 ibid 67.
152 Dell (n 142) 36.
153 Report on European Institutions by Barend Biesheuvel et al (n 143) 68.
154 Sebastián Royo and Paul Christopher Manuel, 'Some Lessons from the Fifteenth Anniversary of the Accession of Portugal and Spain to the European Union' (2003) 8(1-2) South European Society and Politics 1, 14.
155 Single European Act [1987] OJ L169/1. For an overview, see Hans-Joachim Glaesner, 'The Single European Act' (1986) 6(1) Yearbook of European Law 283; Desmond Dinan, 'The Single European Act: Revitalising European Integration' in Finn Laursen (ed), *Designing the European Union: From Paris to Lisbon* (Palgrave Macmillan 2012).
156 Maresceau (n 29) 412.
157 Dinan (n 155) 125.

an institutional reform launched at the Fontainebleau summit[158] did not link it to past or future enlargement rounds either.[159] The resulting Dooge report made an array of suggestions, some of which today sound, however, quite familiar in the context of enlargement, such as limiting the unanimity voting requirement and empowering the Commission while reducing the number of its members,[160] but they were also not framed in the enlargement context. The White Paper prepared by Jacques Delors concerned market matters only, likewise being prepared outside of the enlargement context.[161] The conclusions of the 1985 European Council did not mention enlargement and identified the completion of the internal market as one of the key objectives to be pursued by the upcoming treaty revision.[162]

It shall be noted that one of the Act's main reforms, namely moving away from the unanimity requirement to a qualified majority in the Council,[163] was put forward by the Commission in the run-up to the previous enlargement rounds against the backdrop of the ensuing difficulties in making decisions.[164] Yet, it is also true that a certain 'pressure'[165] on the Member States to limit the unanimity vote existed before the prospects of enlargement, which rather 'enhanced'[166] it. At the same time, the key objective of that reform was also to bring about the completion of the internal market by the end of 1993,[167] and not to preserve the Union's efficiency after the next rounds of enlargement. Overall, the novelties brought by the Act made the Union certainly more efficient and better adjusted for the increased membership, particularly the extension of qualified majority voting. However, its reforms and enlargement were not explicitly linked and could have taken place separately. The Communities had managed to increase from six to twelve members without any major treaty revision even before the Act; this evidences how widening European integration can proceed without substantially deepening it or undertaking some far-reaching institutional reforms.

Just like in the case of the Single European Act, the adoption of the Maastricht Treaty[168] was not immediately connected to enlargement, and its context was not largely shaped by the prospects of the accession of new Member States.[169] The Maastricht European Council mentioned enlargement, noting that a number of countries expressed their desire to join the Union, but did not link the reforms brought by the Treaty on European Union to the possible accession of new members.[170] Indeed, the changes introduced by the Treaty were not designed to prepare the Union for its enlargement, but were rather aimed at opening

[158] For an overview, see Roy Pryce, 'Relaunching the European Community' (1984) 19(4) Government and Opposition 486.
[159] 1984 European Council meeting at Fontainebleau – Conclusion of the Presidency para 7.
[160] Ad Hoc Committee for Institutional Affairs – Report to the European Council (Brussels, 29-30 March 1985) 25-31.
[161] Completing the Internal Market – White Paper from the Commission to the European Council (Milan, 28-29 June 1985) COM(85) 310 final.
[162] European Council in Milan (28-29 June 1985) – Conclusions.
[163] Single European Act (n 155) Art 7.
[164] Émile Noël, 'The Single European Act' (1989) 24(1) Government and Opposition 3, 12.
[165] Kelemen, Menon, and Slapin (n 51) 657.
[166] ibid.
[167] Single European Act (n 155) Art 13.
[168] Treaty on European Union [1992] OJ C191/1.
[169] van der Veen (n 57) 768.
[170] Maastricht European Council (9-10 December 1991) (1991 Bulletin of the European Communities No 12) para I.4.

a new chapter in the history of European integration in light of the major changes in the political landscape of Europe at that time,[171] particularly the fall of the Berlin Wall and the reunification of Germany.[172]

Some of the key reforms brought by the Maastricht Treaty were the establishment of the EU, the creation of Union citizenship,[173] and the introduction of a single currency.[174] Also, quite importantly, the Maastricht Treaty extended qualified majority voting to several more areas.[175] While this certainly increased the efficiency of the Union's decision-making, especially against the backdrop of the increased membership, the reason why the Maastricht Treaty is mentioned herein is that it granted several opt-outs to Denmark and the United Kingdom,[176] particularly in the area of the common currency.[177] The literature often speaks of a certain fear of 'overstretching'[178] European integration due to the admission of new countries. The Maastricht Treaty shows, however, that fragmentation of European integration may very well take place without an increase in the number of Member States. Stalling the progress of integration is so often seen as a likely consequence of enlargement that will happen unless sufficient precautions are taken. The Maastricht Treaty evidences that the legal structure of the Union may crumble even without the external pressure produced by enlargement. Moreover, one has to remember that treaty revisions may scare off some Member States, deepening European integration at the cost of its overall coherence.

The pace and spirit of European integration changed dramatically in the 1990s, largely due to the drastic and large-scale geopolitical shifts after the demise of the Soviet Union.[179] These events opened a historic window of opportunity for a number of European states to join the EU.[180] This was the time when enlargement started to shape the development of the Union to a considerable degree. For example, the famous Ioannina Compromise[181] was essentially a response to the changes in the power balance in the Council as a result of the Union's enlargement. Later, at the Corfu European Council, it was decided that 'institutional conditions for the proper functioning of the Union'[182] were deemed requisite in the context of enlargement and that their creation had to take place before accession negotiations with Central and Eastern European states could begin.[183] The trajectory for

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171 Finn Laursen and Sophie Vanhoonacker, 'The Maastricht Treaty: Creating the European Union' in *Oxford Research Encyclopedia of Politics* (Oxford University Press 2019).
172 Julie Smith, 'How 1989 Changed the History of European Integration' (2009) 8(2) European View 255, 257-259.
173 For a study of the interaction between EU citizenship and enlargement, see Serhii Lashyn, 'The Effects of Enlargement on European Union Citizenship' [2026] Yearbook of European Law.
174 For an overview of the Treaty, see Colette Mazzucelli, 'The Treaty of Maastricht: Designing the European Union' in Finn Laursen (ed), *Designing the European Union: From Paris to Lisbon* (Palgrave Macmillan 2012).
175 Michael H Abbey and Nicholas Bromfield, 'A Practitioner's Guide to the Maastricht Treaty' (1994) 15 Michigan Journal of International Law 1329, 1331-1332.
176 On opt-outs generally, see Maya Sion-Tzidkiyahu, 'Comparing Opt-Outs: How Different Is Differentiated Integration' in Thomas Giegerich, Desirée C Schmitt, and Sebastian Zeitzmann (eds), *Flexibility in the EU and Beyond: How Much Differentiation Can European Integration Bear?* (Nomos 2017).
177 Laursen and Vanhoonacker (n 171).
178 Calliess (n 62).
179 See Pierre-Henri Laurent, 'European Integration and the End of the Cold War' (1990) 1(3) Diplomacy & Statecraft 147, 151-157.
180 Smith (n 172) 259-261.
181 Declaration by the representatives of the Member States of the European Union (Ioannina, 30 March 1994).
182 Corfu European Council (24-25 June 1994) para I.13.
183 Corfu European Council (n 182).

the Amsterdam Treaty was determined, however, earlier at the 1993 Copenhagen European Council, which proclaimed that the countries of Eastern Europe 'shall become members of the European Union'.[184] Apart from this promise to admit new Member States, the European Council in Copenhagen also made another historic step when it declared that the admission of those countries would also depend on '[t]he Union's capacity to absorb new members'.[185] Apparently, the Amsterdam Treaty was seen, at least partially, as an effort to fulfil this absorption capacity criterion. Yet, the Treaty cannot be reduced to playing this role only.

In the 1995 report prepared by the so-called Reflection Group, the next round of enlargement was regarded as 'a political imperative'.[186] At the same time, the report described enlargement as 'not an easy exercise'[187] that would require quite a lot of effort. Importantly, the report demonstrates that the Amsterdam Treaty was prepared not solely because of the upcoming enlargement and maybe not even primarily for it. In fact, enlargement was named only third among the reasons for revising the Treaties, after internal challenges, such as unemployment, environmental problems, the lack of security, and external challenges, namely the uncertainty after the end of the Cold War and growing globalisation.[188] This demonstrates that the probable next round of enlargement was not the only factor shaping the preparation of the Treaty. Similarly to the current situation, the report explicitly made the success of the next round of enlargement dependent on the success of the reforms.[189]

As scholars observe, the Amsterdam Treaty 'was informed by fears concerning the potential institutional effects of the Union's impending enlargement'[190] and was, therefore, the 'first attempt'[191] to make the Union ready for its biggest enlargement. The real changes in this context were, however, modest, if not poor, likely explaining why some found the Treaty rather 'disappointing'.[192] The Amsterdam Treaty managed to remove the unanimity requirement in the Council in several areas but kept it in many. The most contentious and important issues, namely the composition of the Commission, weighing of votes in the Council, and extension of qualified majority voting, were left to be decided later in the Treaty of Nice.[193] In one of the declarations attached to the Treaty, three Member States noted that 'the Treaty of Amsterdam does not meet the need […] for substantial progress towards reinforcing the institutions'[194] and that such reinforcing was 'an indispensable condition'[195] for the accession of new members. Overall, the Amsterdam Treaty differs appreciably from the Maastricht Treaty and the Single European Act in how it was initiated by the upcoming round of enlargement. At the same time, saying that its content was designed with the sole purpose of preparing the Union for enlargement and fulfilling

184 Copenhagen European Council (n 15) para I.13.
185 ibid.
186 Reflection Group's Report (1995) II.
187 ibid.
188 ibid 5-6.
189 ibid 7.
190 Kelemen, Menon, and Slapin (n 51) 657.
191 Sophie Vanhoonacker, 'The Amsterdam Treaty: Modest Reforms' in Finn Laursen (ed), *Designing the European Union: From Paris to Lisbon* (Palgrave Macmillan 2012) 180.
192 Edwards (n 33) 33.
193 Bruno de Witte, 'The Impact of Enlargement on the Constitution of the European Union' in Marise Cremona (ed), *The Enlargement of the European Union* (Oxford University Press 2003) 215-216.
194 Amsterdam Treaty (n 6) 144.
195 ibid.

the Copenhagen absorption capacity criterion in mind would be wrong. Although these were the main objectives, the wider context and other problems influenced the preparation of the Treaty too. What is notable is how some Member States insisted on making a successful institutional reform, which later materialised in the Nice Treaty, a prerequisite for the accession of new countries.

The Treaty of Amsterdam apparently failed to make the Union fully prepared for the 2004 'unprecedented'[196] enlargement, necessitating another revision in the form of the Treaty of Nice.[197] As the Commission observed, the institutional reforms introduced by the Amsterdam Treaty were indeed 'only partial'[198] and had to be substantially enhanced. Scholars rightfully observe that the Nice Treaty was, therefore, 'almost exclusively an effort to prepare for enlargement'.[199] Apparently, this effort was driven by '[t]he widespread belief that Eastern enlargement would impair the effective functioning of EU institutions and lead to decision-making paralysis'.[200] The Nice Treaty remains probably the highest point when the connection between the Union's reforming and enlarging was particularly evident.

Particularly, this flows from how the Cologne European Council linked treaty revision explicitly to the prospects of enlargement. An institutional reform of the Union was launched specifically '[i]n order to ensure that the European Union's institutions can continue to work efficiently after enlargement'.[201] Subsequently, the European Council also made enlargement dependent on the success of the institutional reform, noting that only afterwards would the Union 'be in a position to welcome new Member States'.[202] The key purpose of the Nice Treaty could, therefore, be boiled down to ensuring that the Union institutions will stay 'properly functioning, efficient and legitimate'[203] after the next round of enlargement. Later at the Nice European Council, the link between successful completion of the reform and the enlargement prospects was reconfirmed.[204]

The core reforms brought by the Nice Treaty, sometimes referred to as Amsterdam 'leftovers',[205] were limiting the number of commissioners to one per Member State with a subsequent reduction once their number reached 27, reweighting of votes in the Council, redefining qualified majority voting, and extending it to more areas.[206] At the same time, the novelties brought by the Nice Treaty were not limited to those areas. Most notably, the Treaty made some changes to the so-called closer cooperation, renaming it enhanced cooperation.[207] This demonstrates that, although the Treaty of Nice introduced much-needed

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196 David Phinnemore, 'Beyond 25—the Changing Face of EU Enlargement: Commitment, Conditionality and the Constitutional Treaty' (2006) 8 Journal of Southern Europe and the Balkans 7, 8.
197 Ritleng (n 55) 5; Smith (n 172) 260.
198 Agenda 2000: For a stronger and wider Union 1997 (Bulletin of the European Union – Supplement 5/97) 12.
199 Pollack (n 3) 240.
200 Kelemen, Menon, and Slapin (n 51) 657.
201 Cologne European Council 3-4 June 1999 – Presidency Conclusions para 52.
202 Conclusions of the Helsinki European Council: extract concerning preparations for enlargement (10–11 December 1999).
203 Conclusions of the Santa Maria da Feira European Council (19–20 June 2000) para 3.
204 Nice European Council (7-10 December 2000) – Conclusions of the Presidency para 6.
205 Laursen, 'The Treaty of Nice' (n 7) 196.
206 Edwards (n 33) 23-24.
207 Peter Katz, 'The Treaty of Nice and European Union Enlargement: The Political, Economic, and Social Consequences of Ratifying the Treaty of Nice' (2003) 24 University of Pennsylvania Journal of International Economic Law 225, 253-254.

institutional reforms to enable the next round of enlargement, it also contributed to what is sometimes seen as the fragmentation of European integration.[208] While the Nice Treaty is a clear case of how institutional reforms of the Union aimed at fulfilling the Copenhagen absorption capacity criterion were immediately linked to enlargement, one should also not forget that the Treaty of Nice is, in essence, a continuation of the Treaty of Amsterdam and that it did what the Amsterdam Treaty failed to achieve in the first place.

Finally, preceded by the rejection[209] of the Constitutional Treaty,[210] the Lisbon Treaty[211] remains the latest major treaty revision. Signed between 27 Member States, it entered into force after six rounds of enlargement had already taken place. The Treaty is, therefore, not chronologically connected to enlargement. As to the substance, the intergovernmental conference mandate did not frame the Treaty as necessitated by another round of enlargement either.[212] The Lisbon Treaty was certainly a major step forward in the direction of deepening European integration. It further extended qualified majority voting in many more areas, making it the default option. Also, the Treaty finally reduced the number of commissioners to two-thirds of the number of Member States, although this rule still does not apply after the Council decided so in response to the negative outcome of the first Irish referendum.[213] All these and other changes brought by the Lisbon Treaty were not, however, meant to make the accession of some specific countries possible. Moreover, the drafting and conclusion of the Lisbon Treaty took place against the backdrop of the widely felt enlargement fatigue, which probably resulted in adding a reference to the Copenhagen Criteria in Article 49 TEU.[214]

## 5 THE LOGIC OF THE NEXUS BETWEEN ENLARGEMENT AND REFORMS

As Pierre Vimont aptly notes, 'EU enlargements and reforms have been constant if not always friendly travel companions'.[215] Indeed, it is hardly deniable that a certain connection between the enlargement of the EU and its reform exists and has been accepted by political actors, institutions, and commentators who base their policy proposals and visions for the future of the Union on that connection,[216] although not necessarily looking closely into the nature of it. At present, these two topics go almost always hand-in-hand and are rarely

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[208] As some commentators rightfully observe, enhanced cooperation is a 'part of the reality of differentiation in European integration' and its threatening potential shall not be overlooked. Robert Böttner, 'The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration' (2023) 7(3) European Papers 1145, 1162.

[209] For an overview, see David Phinnemore, *The Treaty of Lisbon: Origins and Negotiation* (Palgrave Macmillan 2013) 16-46.

[210] Draft Treaty establishing a Constitution for Europe [2003] OJ C169/1.

[211] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[212] Brussels European Council (21-22 June 2007) – Presidency Conclusions.

[213] Finn Laursen, 'The Lisbon Treaty: A First Assessment' (2011) 362 L'Europe en Formation 45, 53.

[214] Sonia Piedrafita, 'The Treaty of Lisbon: New Signals for Future Enlargements?' [2008] Eipascope 33.

[215] Judy Dempsey, 'Judy Asks: Will Enlargement Spur EU Reform?' (*Carnegie Endowment for International Peace: Carnegie Europe*, 27 June 2024) <https://carnegieendowment.org/europe/strategic-europe/2024/06/judy-asks-will-enlargement-spur-eu-reform?lang=en> accessed 1 May 2026.

[216] For a recent and very illustrative example, see Corina Stratulat et al, 'A Test of Times: Permachange through Enlargement and EU Reform' [2025] European Policy Centre.

discussed in isolation from each other, be it in the academic setting or otherwise. In countless policy briefs, research articles, political declarations, and other documents, the possibility and imperativeness of the next round of enlargement serve at least as an introduction to reform proposals or, more often, as an argument supporting the necessity of implementing those proposals. The way this nexus sets the agenda, permeates the relevant commentary, and determines the pace of discussions makes its better understanding particularly important and, in view of the current enlargement hopes, urgently necessary. So, what is the true nature of this connection?

This article contends that the nexus between enlarging and reforming the Union is not as simple as it might look. As flows from the review carried out in the previous two sections, the Copenhagen absorption capacity criterion alone is not able to explain this link for several reasons.

First, in the past rounds of enlargement, various reforms and policy changes were introduced, debated and justified as necessary to enable the accession of new Member States. However, as demonstrated above, those reforms were not always actually necessary to make the next round of enlargement possible. Quite frequently, the push for reforms was tied to the prospects of enlargement for purely political reasons. More often than not, the link between enlargement and reforms was essentially a form of a political bargain, as greenlighting the accession of new Member States was made conditional upon the adoption of certain reforms and policy changes. Second, it has to be pointed out that the current discourse goes far beyond absorption capacity. Enhancing budget conditionality, protecting the rule of law, setting up a defence union, empowering the Parliament – all these can hardly be seen as measures aimed specifically at enabling the Union to admit new Member States. Yet, these topics are central to the ongoing discussions on reforming the Union. A vast number of the current reform proposals are relevant for the EU in its current shape and have to be implemented irrespective of whether and when another round of enlargement takes place. The connection between enlargement and reforms, therefore, goes much beyond the Copenhagen absorption capacity criterion. In order to understand this nexus, one has to analyse it in the broader context and look for the real rationale behind it.

If the nexus between enlarging and reforming the Union cannot be boiled down simply to the fulfilment of the Copenhagen absorption criterion, then how else can it be explained?

A partial explanation for the link between the Union's enlargement and its reforms might lie in the text of the TEU. Specifically, Article 49 TEU allows introducing some 'adjustments to the Treaties on which the Union is founded'[217] in the accession agreement concluded with a new Member State. Read in a certain way, this provision might be interpreted as offering a unique opportunity to amend the Treaties. Killing two birds with one stone, an accession treaty may fulfil two purposes: formalising the admission of a new country to the Union and reforming the Union at the same time. Revising the Treaties is known to be a profound legal challenge[218] and, as the Constitutional Treaty showed, may fail unexpectedly. The idea of changing the constitutional framework of the Union by means of accession treaties is, for that reason, quite tempting for politicians and, as Dominique Ritleng

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[217] TEU Art 49.

[218] For an overview of the Treaties amendment rules, see Fabbrini, 'Reforming the EU Outside the EU? The Conference on the Future of Europe and Its Options' (n 74) 970-974.

writes, 'original and also puzzling'.[219] While this might partially explain where the connection between reforming and enlarging the Union comes from, one has to be reminded that a meaningful treaty revision through an accession treaty is not legally viable. Of course, the accession of new countries necessitates, for example, changes in the allocation of seats and votes in the Union's institutions.[220] However, Article 49 TEU has never been intended to go beyond that and serve as a vehicle for large-scale constitutional reforms of the Union. Furthermore, the Court of Justice ruled that the possibility of introducing some adaptations to the Treaties should not be interpreted broadly and shall be used sparingly,[221] accommodating new Member States.[222] Any other use of Article 49 will likely be incompatible with EU law.

The possibility for a limited treaty revision presented by Article 49 may explain some of the current reform proposals, but not all of them, particularly not those that suggest changes without rewriting the Treaties. The way enlargement and reforms interact in the current discourse at a deeper level may be better explained through the language of crises so familiar to the Union. As observed in the literature, the discourse produced, shaped, and steered by crises can, to some extent, be seen as a technique of government.[223] In the EU, crises indeed play this role predominantly. One may often come across the so-called 'polycrisis'[224] or 'polycleavage'[225] that the EU has been going through for quite some time. As commentators aptly suggest, the 'crisis mode has become the normal state of European politics'.[226] The accession of new Member States is often perceived by various actors and commentators alike as yet another crisis the Union faces. The next round of enlargement is seen essentially as a problem that has to be resolved. Reviewing the Union's policies, changing its institutional set-up and introducing fully-fledged constitutional reforms are presented as a response to that problem, a counter-measure for the crisis. Some authors suggest: 'In the permapolycrisis era, EUrope should embrace permachange, taking on both enlargement and internal EU reform with courage and ambition'.[227] When presented as overlapping crises, reforms and enlargement are more likely to be dealt with seriously at the political level.

Here, it is useful to recall how the current phase of the reform discourse started. As rightfully observed by commentators, the Conference on the Future of Europe was initiated 'in the need to relaunch the project of European integration after a decade of crises which

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[219] Ritleng (n 55) 4.
[220] See Emmert and Petrović (n 4) 1359.
[221] See Fortunato (n 20) 1378.
[222] Case C-273/04 *Republic of Poland v Council of the European Union* EU:C:2007:622 paras 45-46.
[223] Jessica C Lawrence, 'The EU in Crisis: Crisis Discourse as a Technique of Government' in Mielle K Bulterman and Willem JM van Genugten (eds), *Netherlands Yearbook of International Law*, vol 44 (TMC Asser Press 2014) 190-192.
[224] On the notion of polycrisis in the EU context, see Edoardo Bressanelli and David Natali, 'Tested by the Polycrisis: Reforming or Transforming the EU?' (2023) 11(4) Politics and Governance 246. On polycrisis in the global context, see Michael Lawrence et al, 'Global Polycrisis: The Causal Mechanisms of Crisis Entanglement' (2024) 7 Global Sustainability e6, 2-5.
[225] See Jonathan Zeitlin, Francesco Nicoli and Brigid Laffan, 'Introduction: The European Union beyond the Polycrisis? Integration and Politicization in an Age of Shifting Cleavages' (2019) 26(7) Journal of European Public Policy 963, 965-966.
[226] Nicolai von Ondarza, 'The Crisis Governance of the European Union More Responsibility Requires More Democratic Legitimacy' [2023] Stiftung Wissenschaft und Politik Research Paper 10 5.
[227] Stratulat et al (n 216) 65.

have increasingly exposed the unsustainability of the EU status quo'.[228] The subsequent 2023 resolution of the Parliament was also situated in the context of the polycrisis and may be seen, at least partially, as a response to it.[229] In a similar vein, the report of the Group of Twelve embeds itself in this discourse, citing the crises previously faced by the Union.[230] Finally, the Commission's set of reform proposals situates itself in the context of the many previous crises the Union had to respond to.[231] Apparently, being now attached to the prospects of enlargement, the current discussion of the EU reforms is rooted in the attempts to respond to previous crises. Seen through this prism, the next round of enlargement can be perceived as a new crisis in the longer chain of crises, explaining why the current reform proposals contain so many suggestions unrelated to enlargement despite being generally framed as necessitated by it.

Why does the EU need to perceive a certain challenge as a crisis to start acting decisively? The answer may be simple: political convenience. As a particularly notable and formidable crisis, enlargement presents itself as a perfect occasion to tackle long-lasting problems and make some long-awaited improvements to the Union's edifice. As observed in the literature, previous enlargements acted as '*catalysts* of constitutional change'[232] in the Union. Borrowed from the scientific language of chemistry, the word 'catalyst' succinctly describes the nature of the nexus between enlargement and EU reforms. It is not surprising that the Commission uses this word to describe what role the prospects of enlargement actually play for the fate of the Union's reform.[233] The problems found in the Union's institutional structure and decision-making processes exist independently and manifest themselves irrespective of whether the EU is going to enlarge. Those problems, such as democratic backsliding or deadlocks in the Council, present a profound challenge that demands decisive action and strategic thinking. It is not surprising that politicians, for different reasons, are reluctant to take on those challenges. This is where the issue of enlargement comes into play. The accession of new members essentially acts as an outside force that makes the Member States and the Union respond to the pre-existing internal problems. Enlargement serves as a political catalyst for resolving issues that are perhaps too complicated and intimidating to approach on their own.

The effects of this nexus are manifold. On the one hand, the political pressure of enlargement forces the Union to make its institutional structure, decision-making processes, and policies more efficient. The crisis connection between enlargement and reforms, therefore, stimulates the Union's evolution and development to a certain degree. On the other hand, there are some negative effects of how reforming and enlarging the EU are being made dependent on each other. The possibility of the next enlargement is now preconditioned upon EU reforms. In their turn, the reforms are often presented as something necessitated by the next round of enlargement or, at least, specifically tailored for

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228 Fabbrini, 'The Conference on the Future of Europe: Process and Prospects' (n 66) 403.
229 See Manuel Müller, 'Crisis Learning or Reform Backlog? The European Parliament's Treaty-Change Proposals During the Polycrisis' (2023) 11(4) Politics and Governance 311.
230 Sailing on High Seas (n 97) 11.
231 Commission, 'Communication on pre-enlargement reforms' (n 13) 3, emphasis added.
232 de Witte (n 193) 209.
233 Commission, 'Communication on pre-enlargement reforms' (n 13) 2.

it. While this link of interdependence allows for capturing political momentum, it also presents some dangers.

First of all, the chances of joining the Union by the current candidate countries depend on the successful outcome of the reform process. This is something that none of the candidate countries has any influence on. In essence, the fate of those countries' accession hinges upon reforming the Union, which is in itself a profound challenge and an extremely cumbersome venture, both legally and politically. Commentators point out how unpredictable the process of EU enlargement becomes,[234] and this surely adds more uncertainty to it. Second, the destiny of the EU reform process is tied to the success of enlargement. It means that, if the next round of enlargement does not take place, then the whole process of the Union's reform would look purposeless. This is further complicated by the incalculability of the accession of new Member States. It may be the case that, out of the current candidate countries, only a few will eventually join. Also, it is unclear when this will happen. Put simply, the current discourse ties reforming the Union to a probable event in the future whose specific form and shape are unknown and hardly predictable. It remains to be seen whether it is wise to link so tightly important constitutional reforms of the Union to the next rounds of enlargement, whose contours are blurry and hard to estimate.

## 6 CONCLUDING REMARKS

The link between the Union's enlargement and its reforms functions in a complicated, historically changing way and cannot be simply boiled down to the Copenhagen absorption capacity criterion. The way this nexus is being construed, justified, repeated, debated, and relied upon reveals many uncertainties about the bigger, existential questions that pertain to the future of the EU. How the Union should develop, what would be the best response to its current problems, whether and how European integration shall deepen – the connection between reforming and enlarging the EU grows from the doubts over how to approach these difficult issues.

The Copenhagen absorption capacity criterion is perceived as a legal requirement for the Union's enlargement. It is presented as a functional, almost technical, concept. Yet, when examined closely from a theoretical standpoint and tested against the past and current developments in the Union, the absorption capacity criterion fails to explain the link between reforming and enlarging. The nexus is not legal and functional at all; instead, it is political and discursive. Enlargement acts, in the best case, as the catalyst for reforms against the backdrop of another crisis manifesting the urgency and necessity of reforms. Attempts to analyse the current EU reform discussions and study the ongoing trajectory of reforms in the Union solely on the basis of the Copenhagen absorption capacity criterion are, for these reasons, unlikely to yield coherent results.

One can hardly deny 'the importance of enlargement as a geostrategic investment in peace, security, stability and prosperity'.[235] This explains why the subject of enlargement has

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[234] Elena Basheska, 'EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia' (2022) 14 Hague Journal on the Rule of Law 221, 225-227.

[235] European Council Strategic Agenda: 2024-2029.

'returned to the top of the policy agenda'[236] of the Union and experiences some clear 'revitalisation'.[237] Any individual accession to the Union is, however, a profound challenge with no guarantee of success. The Union's enlargement is very much 'an ongoing story',[238] whose finale is difficult, if not impossible, to foretell, particularly due to how the Union's 'complex enlargement labyrinth'[239] is regulated legally.[240] Commentators are certainly right when pointing out how the prospects of enlargement shed light on 'the different hopes, wills and needs of member states to reform the EU, which push the integration process in different directions while being intrinsically connected'.[241] This is especially evident when one looks at the nexus between enlarging and reforming the Union.

Although the next round of enlargement, 'a very hot topic'[242] at the moment, adds a certain sense of urgency to the discourse on EU reforms, it does not necessarily mean there will be more determination to transform and change the Union.[243] The way reforming and enlarging the EU are linked together has certain transformative potential, but to fully grasp the nature of that link, one has to look at it not only through the lens of the Copenhagen absorption capacity criterion.

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236 Andi Hoxhaj, 'How to Make EU Enlargement a Fairer and Merit-based Process: A Legal and Policy Analysis' (2024) 30(4) European Law Journal 571, 571.
237 Fabbrini, 'The Impact of the War in Ukraine on the Enlargement of the European Union: "Securing the Blessings of Liberty" and Its Challenges' (n 115) 4.
238 Emmert and Petrović (n 4) 1354.
239 Maresceau (n 29) 412.
240 On how the current regulation of enlargement creates uncertainties, see Lashyn (n 18).
241 Matteo Bonomi and Raffaele Mastrorocco, 'Reforming by Hope, Will or Necessity? EU Integration in Times of Enlargement' (2024) 64 Istituto Affari Internazionali Commentaries 5.
242 Levente Nádasi and Zsuzsanna Trón, 'How Decisive Are the Copenhagen Criteria for EU Enlargement?' (2023) 26(2) Európai Tükör 49, 49.
243 See Ben Crum, 'Models of EU Constitutional Reform: What Do We Learn from the Conference on the Future of Europe?' (2024) 13(2) Global Constitutionalism 392, 407-408.

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# CORPORATE GROUPS AND DUE DILIGENCE: RETHINKING LIABILITY IN EUROPEAN COMPANY LAW

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*This paper examines how mandatory due diligence obligations interact with the allocation of responsibility and liability within corporate groups in Europe. The principles of separate legal personality and limited liability continue to shield parent companies from the harms or violations of their subsidiaries, but recent legislation in France, Germany, and at European Union (EU) level introduces preventive due diligence obligations that require parent companies to identify and manage risks across their own operations, as well as those of their subsidiaries and value chains. These obligations do not disregard the separate legal personality of each company or create new forms of liability within corporate groups, but they influence its scope by defining the standard of responsible conduct expected of parent companies. In this way, due diligence establishes a link between responsibility and liability by connecting due diligence obligations to the capacity to control and oversee risk, without changing the existing framework of company law. The paper argues that while this development signals a better reflection of how corporate groups operate in practice, whether it will lead to a more coherent understanding of group liability within the legal framework in the EU is yet to be seen.*

## 1 INTRODUCTION

Corporate groups are the structure behind many of the world's most well-known companies. From Unilever to Samsung, these groups operate as collections of legally distinct entities under a single corporate umbrella.[1] The parent company usually holds the majority of voting rights and makes the decisions about the group's strategy, while subsidiaries carry out business activities in different sectors or jurisdictions. This structure allows groups to expand across borders, manage their risks, and remain legally independent through the principle of separate legal personality.[2] A corporate group typically refers to a collection of legally distinct entities that are linked by shared ownership, contracts, or other mechanisms of control and coordination.[3] The integration of economic activities across the group is usually facilitated by the parent or holding companies owning all or part of the equity in their subsidiary

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1 As an example see Samsung Electronics Co Ltd, '2024 Business Report', 21 <https://www.samsung.com/global/ir/reports-disclosures/public-disclosure-view.84359/>accessed 20 October 2025

2 Shalom Belenzon, Hyejin Lee, and Andrea Patacconi, 'Managing Risk in Corporate Groups: Limited Liability, Asset Partitioning, and Risk Compartmentalization' (2023) 44(12) Strategic Management Journal 2888, 2889–2890.

3 Virginia Harper Ho, Gerlinde Berger-Walliser, and Rachel Chambers, 'Toward Corporate Group Accountability' in Martin Petrin and Christian Witting (eds), *Research Handbook on Corporate Liability* (Edward Elgar 2023) 293.

entities.[4] However, such coordination can also take place through means other than ownership, such as contractual agreements, joint ventures, or supply chain relationships which can blur the boundaries of the group structure.[5]

Despite this high level of coordination and the blurred boundaries between group entities, most legal systems continue to treat each company within a corporate group as a separate legal entity. With limited exceptions such as in German law, the group as a whole is not recognised as a single legal subject, and there is no unified definition of what constitutes a corporate group.[6] This creates a disconnect between the way groups function in practice and how they are treated under the law. Even when group companies act together to pursue common strategies or operate under the direction of a parent company, the principle of separate legal personality means that each entity remains legally independent. This has important implications for how responsibility is allocated, particularly when harm occurs within the group.

Courts have attempted to address these challenges posed by corporate group structures through different doctrines such as piercing the corporate veil or recognising a duty of care in tort.[7] These mechanisms are intended to extend liability to the parent company in cases where it exercises significant control over the subsidiary or where the subsidiary operates as a mere façade. In practice, however, both approaches are narrow in scope and difficult to establish. Their application varies across jurisdictions and they are rarely effective in complex or cross-border cases. Scholars have also noted that these limitations reflect a deeper structural issue. In this regard, Mares observes that the current framework allows parent companies to compartmentalise risk while avoiding liability, even when their influence over subsidiaries is substantial.[8] Muchlinski similarly highlights the resulting imbalance in which parent companies benefit from the operations of the group but remain legally insulated when harm occurs.[9]

In recent years, however, there has been a shift in how legal systems approach corporate responsibility, particularly in the context of global business operations. A number of jurisdictions have adopted mandatory human rights and environmental due diligence laws, which require companies to identify, assess, and mitigate risks of harm not only in their own operations but also in the activities of their subsidiaries, suppliers, and other business partners. While this legislation was not introduced to regulate corporate groups, it nonetheless expands the scope of corporate responsibility in ways that may have implications for group structures. By placing preventative due diligence obligations on parent companies with respect to risks arising across their business relationships, due diligence laws suggest a broader recognition of the integrated nature of corporate groups, even though each entity

[4] Harper Ho, Berger-Walliser, and Chambers (n 3).
[5] ibid.
[6] For an overview of the German legal framework on corporate groups see Sebastian Mock, 'National Report on Germany' in Rafael Mariano Manóvil (ed), *Groups of Companies: A Comparative Law Overview* (Springer International Publishing 2020) 303–398.
[7] See *Adams v Cape Industries plc* [1990] Ch 433 (CA) on veil piercing and *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111 on parent company duty of care in UK.
[8] Radu Mares, 'Liability within Corporate Groups: Parent Companies' Accountability for Subsidiary Human Rights Abuses' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar Publishing 2020) 446, 469–70.
[9] Peter T Muchlinski, 'Multinational Group Liability and Directors' Duties' in *Multinational Enterprises and the Law* (3rd edn, Oxford University Press 2021) 300–335.

within the structure continue to be a separate legal person.

While the scope and enforcement mechanisms of these legislations differ across jurisdictions, they all impose an obligation on companies to identify and address risks before harm occurs. Instruments such as the French Duty of Vigilance Law[10] and the German Supply Chain Act[11] extend due diligence obligations beyond a company's own operations to include subsidiaries and certain business partners. At the European Union (EU) level, the Corporate Sustainability Due Diligence Directive (CSDDD)[12] is a step toward embedding such obligations within the broader framework of European company law. Although these measures do not change the company's separate legal personality, they signal a shift toward placing more obligations on parent companies in relation to risks arising within their corporate groups and supply chains.

Against this background, the main question this paper seeks to answer is: *To what extent do mandatory due diligence obligations challenge or reinforce the traditional liability framework governing corporate groups?* It examines whether the emerging legal landscape introduces new forms of parent company liability, or whether it ultimately preserves separate legal personality and limited liability as the core principles of corporate law. The analysis focuses on France, Germany, and the EU as examples of jurisdictions that have adopted mandatory due diligence legislation.

The paper proceeds as follows: Section 2 outlines the traditional liability framework that applies to corporate groups, with a focus on the principle of separate legal personality. Section 3 introduces the concept of due diligence and traces its evolution in legal and policy debates. Section 4 compares the national legislation adopted in France and Germany. Section 5 examines the EU directive and its potential implications for corporate group structures. Section 6 reflects on whether these developments represent a shift in how liability is allocated within corporate group structures. Section 7 discuss some concluding remarks.

## 2 CORPORATE GROUPS AND THE TRADITIONAL LIABILITY FRAMEWORK

Corporate group structures are attractive to businesses precisely because they allow economic coordination without full legal exposure.[13] This is made possible by two main features of corporate law: the ability of companies to hold shares in other companies, and the principle that each legal entity within the group is treated as separate, with its own limited liability.[14] Together, these principles enable parent companies to construct layered group structures through full or partial ownership, often spanning multiple jurisdictions.

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10 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (JO, 28 March 2017, texte n° 1) <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626> accessed 20 October 2025.

11 Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Lieferkettensorgfaltspflichtengesetz – LkSG) BGBl I 2021, 2959 <https://www.gesetze-im-internet.de/lksg/LkSG.pdf> accessed 20 October 2025.

12 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L2024/1760.

13 Harper Ho, Berger-Walliser, and Chambers (n 3) 293.

14 ibid 294. See also: Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89 Georgetown LJ 439, 439–440.

As Blumberg has observed, this model allows each tier in the group to operate behind its own legal shield, with upper-tier companies insulated from the liabilities of lower-tier entities sometimes through four or five layers of ownership.[15]

This legal framework has facilitated the growth of global corporate groups, making it easier to scale operations, diversify risk, and enter new markets. But the same mechanisms that allow for business integration can also be used to insulate the parent company from responsibility when harm occurs within the group. In most legal systems, the parent company is not liable for the legal violations or financial obligations of its subsidiaries, even when it owns all or nearly all of their shares.[16] This separation tends not to raise concerns when subsidiaries remain solvent and can be directly sued. However, when a subsidiary is undercapitalised, dissolved, or incorporated in a jurisdiction with weak enforcement, affected individuals may be left without an effective remedy.[17] This disconnect between economic integration and legal structure of corporate groups allows parent companies to extract value from the group while avoiding responsibility for its external impacts.[18] This section considers how courts and legal systems have responded to this gap through doctrines such as veil piercing, agency theory, and parent company liability in tort.

One of the exceptions to the principle of separate legal personality which applies equally to companies within a corporate group is the doctrine of piercing the corporate veil. This allows courts to disregard the separate legal personality of a company in exceptional cases typically where the company structure has been used for fraud or to evade legal obligations.[19] In the UK courts have long upheld the principle of separate legal personality, beginning with *Salomon v A Salomon & Co Ltd*, which established that a properly incorporated company is distinct from its shareholders even if fully owned and controlled by them.[20] In *Adams v Cape Industries*, the court of appeal reaffirmed this position, refusing to pierce the veil simply because the group operated as a single economic unit.[21] This position was later also confirmed in *Prest v Petrodel Resources*, where the UK supreme court held that veil piercing is only available when an existing legal obligation has been deliberately evaded through the use of a company.[22]

Civil law jurisdictions take a similarly cautious approach. For instance, Dutch law recognises the concept of *vereenzelviging*, a similar doctrine that allows courts to disregard legal separateness in narrowly defined cases. It is typically used where liabilities are shifted within the group in a way that leaves one company as an empty shell while operations continue through another.[23] In France also the doctrine is applied only in exceptional circumstances

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[15] Phillip I Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press 1993) 59.

[16] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 772.

[17] ibid.

[18] See: Phillip Blumberg, 'Limited Liability and Corporate Groups' (1986) 11 Journal of Corporation Law 630-631; Christian A Witting, 'Structuring of Corporate Group Relations' in Christian A Witting (ed), *Liability of Corporate Groups and Networks* (Cambridge University Press 2018) 100–101.

[19] See Alastair Hudson, 'The Salomon Principle' in Alastair Hudson, *Understanding Company Law* (3rd edn, Routledge 2025) 29–34.

[20] *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL).

[21] *Adams v Cape Industries plc* [1990] Ch 433 (CA).

[22] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415.

[23] Mieke Olaerts, 'National Report on the Netherlands' in Rodolfo M Manóvil (ed), *Groups of Companies: A Comparative Law Overview* (Springer 2020) 442.

in corporate groups, such as in cases involving unusual financial relationships like systematic transfers of assets without proper consideration, while routine group practices such as cash-pooling, staff exchanges, or extended internal loans are not seen as sufficient grounds for piercing the corporate veil.[24] Given these limitations, veil piercing offers only a narrow route to parent company liability within corporate groups.

Another possibility is agency theory, which has mainly developed in the United States. This approach does not require piercing the corporate veil. Instead, the parent company may be held liable on the basis that the subsidiary acted as its agent. To establish liability on this basis, courts generally require a high level of control by the parent over the subsidiary. In this regard, the New York court of appeals has held that the parent's involvement must be so extensive, and its influence so direct, that the parent qualifies as the principal and the subsidiary as its agent.[25] The requirements were further clarified in *Transamerica Leasing v La República de Venezuela*, where the court held that the parent must intend for the subsidiary to act on its behalf, the subsidiary must agree to do so, the parent must retain the right to direct the subsidiary's conduct in the relevant matters, and the level of control must go beyond ordinary shareholder rights such as voting powers or appointing directors.[26] In Delaware, another set of factors including overlapping directors, financial arrangements between the companies, how daily management responsibilities are divided, and how each company generates its business are considered when establishing an agency relationship.[27] Considering these examples, although agency theory offers a way to establish parent company liability without piercing the corporate veil, the level of control required is so high and specific that successful claims will probably continue to be rare.

A more promising possibility has been the development of direct liability, where the parent is held liable not for the acts of the subsidiary, but for its own failure to prevent harm. This approach does not require veil piercing or an agency relationship. Instead, it focuses on the parent's involvement in managing the specific risks that caused the harm. In *Chandler v Cape plc*, the court found that a duty of care could arise where the parent had assumed responsibility or exercised control.[28] It outlined four relevant factors: whether the parent and subsidiary operated in the same area of business, whether the parent had greater knowledge of the health and safety risks involved, whether it knew or ought to have known that the subsidiary's practices were unsafe, and whether it was reasonable for the subsidiary or its employees to rely on the parent's expertise.[29] According to the facts, the court found these elements were present and imposed liability based on the parent's failure to act where it clearly could have done so.

This reasoning was developed further in *Vedanta v Lungowe*, where the supreme court confirmed that a duty of care may arise if the parent takes active steps to manage the risks in question.[30] The mere existence of group-wide policies is not enough. But if the parent goes further by training staff, supervising compliance, or enforcing standards, it may be held

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24 Pierre-Henri Conac, 'National Report on France' in Rodolfo M Manóvil (ed), *Groups of Companies: A Comparative Law Overview* (Springer International Publishing 2020) 101–102.
25 *Berkey v Third Avenue Railway Co* 155 NE 58 (NY 1926).
26 *Transamerica Leasing Inc v La República de Venezuela*, 200 F.3d 843 (DC Cir 2000).
27 *Applied Biosystems Inc v Cruachem Ltd* 772 F Supp 1458 (D Del 1991).
28 *Chandler v Cape plc* [2012] EWCA Civ 525.
29 ibid at 80.
30 *Vedanta Resources plc v Lungowe* [2019] UKSC 20, [2020] AC 1045.

directly responsible.[31] The same applies where the parent publicly presents itself as overseeing its subsidiaries in those areas, even if that oversight is limited in practice.[32] This approach was reaffirmed in *Okpabi v Shell*, where the supreme court stressed that the key question is whether the parent company exercised a sufficient level of control over the operations that caused the harm.[33] A duty may arise where the parent directed, advised on, or implemented policies that influenced the operation of the subsidiary.[34]

The cases above show that courts have developed a number of tools to address the liability gap within corporate groups, but these remain limited in both scope and application. Veil piercing is available only in exceptional circumstances, and liability through agency is very jurisdiction-specific and rarely established due to the high level of control required. Even where courts are willing to recognise a direct duty of care, this is generally restricted to situations where the parent has taken clear steps to manage the risks in question. As Muchlinski points out, the legal framework continues to reflect the model of each company as a separate entity, and legal systems tend to respond through offering minor modifications to existing doctrines rather than systemic change.[35] As a result, significant obstacles remain for claimants seeking redress in cross border group structures. In light of these limitations, some scholars have suggested due diligence obligations as a way to support parent company liability within the context of corporate groups.[36] While these obligations do not alter the principle of separate legal personality, they may impose new responsibilities on parent companies to identify and address risks within the group. Whether this represents a shift in how liability is understood or simply reinforce the existing framework remains an open question. The next section traces the development of due diligence as a legal obligation and considers how it fits within, or departs from, the traditional liability framework.

## 3 THE EVOLUTION OF DUE DILIGENCE AS A LEGAL OBLIGATION

The modern concept of corporate due diligence in law originated in the work of John Ruggie, whose 2008 *Protect, Respect and Remedy* framework, developed as United Nations Special Representative on Business and Human Rights, distinguished the corporate responsibility to respect human rights from the state duty to protect them.[37] This framework was further developed in the *United Nations Guiding Principles on Business and Human Rights* (UNGPs), endorsed by the Human Rights Council in 2011.[38] The UNGPs define due diligence as

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31 *Vedanta v Lungowe* (n 30) at 53.
32 ibid.
33 *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 WLR 1294.
34 ibid at 157.
35 Muchlinski (n 9) 335.
36 Harper Ho, Berger-Walliser, and Chambers (n 3) 313.
37 John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (UN Human Rights Council, A/HRC/8/5, 7 April 2008) <https://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> accessed 8 August 2025.
38 John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN Doc HR/PUB/11/04, 2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> accessed 8 August 2025.

an ongoing process through which companies identify, prevent, mitigate, and account for adverse human rights impacts connected to their activities.[39] This process extends beyond a company's own operations to cover risks arising from its subsidiaries and business relationships, reflecting the nature of business operations.[40]

The *OECD Guidelines for Multinational Enterprises* build on the same approach.[41] They call on companies to integrate risk-based due diligence into their management systems to identify, prevent, and mitigate actual or potential adverse impacts, and to disclose the measures taken in response to them.[42] Both instruments describe due diligence as an ongoing process rather than a one-off exercise.[43] The UNGPs outline the main steps of due diligence to be identifying and assessing risks, taking measures to address them, monitoring their effectiveness, and communicating the results.[44] The OECD Guidelines further specify that companies should prioritise risks according to their severity and likelihood, adapt their responses as circumstances change, and embed these processes within their broader governance structures.[45]

Although the UNGPs and OECD Guidelines have shaped global expectations for responsible business conduct, they remain voluntary instruments and their implementation ultimately depends on corporation's willingness rather than legal enforcement. Empirical studies have suggested that many companies have yet to meet the standards they set. A 2018 survey of more than 350 firms found that while 37 per cent had adopted human rights due diligence processes, only half extended them across their full value chains, and many limited their scope to specific issues such as health, safety, labour, and environment.[46] Similarly, the Corporate Human Rights Benchmark 2020 report highlighted that only a minority of companies demonstrate the willingness and commitment to take human rights seriously and there is a disconnect between commitments and processes on the one hand and actual performance and results on the other.[47]

As result of these limitations, some jurisdictions have begun to make due diligence a legal obligation with penalties for non-compliance and, in some cases, the possibility of civil liability. Many of these laws build on the principles developed in existing voluntary international standards but make them binding. Some focus on specific issues, such as the UK Modern Slavery Act,[48] the Australian Modern Slavery Act,[49] and the EU Conflict

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39 UNGPs (n 38) Principles 17–21.
40 ibid Principles 13 and 18.
41 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023) <https://doi.org/10.1787/81f92357-en> accessed 8 August 2025.
42 OECD Guidelines (n 41) General policies, para 11.
43 UNGPs (n 38) Principle 17; OECD Guidelines (n 41) Commentary on General policies, para 15.
44 UNGPs (n 38) Principle 17-21.
45 OECD Guidelines (n 41) Commentary on General policies, para 15-16 and 20.
46 Liesbeth Smit, Claire Bright and Robert McCorquodale et al, *Study on Due Diligence Requirements Through the Supply Chain* (European Commission 2020) 48–50 <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> accessed 20 October 2025.
47 Corporate Human Rights Benchmark (CHRB), World Benchmarking Alliance, *Corporate Human Rights Benchmark: Key Findings Report 2020* (2020) <https://www.worldbenchmarkingalliance.org/research/corporate-human-rights-benchmark-2020-key-findings-report/> accessed 20 October 2025.
48 Modern Slavery Act 2015 (UK).
49 Modern Slavery Act 2018 (Cth).

Minerals Regulation.[50] Others take a broader approach, including the French Duty of Vigilance Law,[51] the German Supply Chain Act,[52] and the EU CSDDD,[53] extending due diligence obligations in the scope they cover as well as reaching across a company's own operations, subsidiaries, and certain business relationships. This mandatory due diligence legislation has attracted both support and criticism. Civil society organisations view them as an essential tool for addressing corporate misconduct, while many business associations have warned that such measures create economic burdens and reduce competitiveness.[54] Empirical research on the French vigilance law, however, indicates that firms subjected to the legislation performed no worse financially than those outside its scope, suggesting that the law is unlikely to undermine business prospects.[55]

While these laws were not designed specifically to regulate corporate groups, they have direct implications for liability within group structures. The UNGPs clearly indicate that the corporate responsibility to respect human rights is distinct from legal liability, which is to be determined by domestic law in each jurisdiction.[56] Nevertheless, subsequent guidance has emphasised that national liability regimes should clearly define the standards of management and supervision expected of different companies within a group structure, particularly in relation to the different stages of the human rights due diligence process, taking into account each entity's role and position within the group.[57] Within this framework, scholars have argued that human rights due diligence can provide a means for companies to demonstrate that they have exercised reasonable care in addressing harms linked to the operations of their subsidiaries or business partners, thereby serving as a defence for companies accused of breaching their duty of care.[58] Moreover, it has been suggested that imposing a legal duty on parent companies to conduct human rights due diligence, aligned with international standards with the possibility of civil liability where the parent exercises control over the entity causing the harm, could increase legal certainty regarding liability within corporate groups.[59]

In this way, due diligence does not replace the principle of separate legal personality but reveals an evolution in how responsibility and liability are understood within corporate

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50 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers [2017] OJ L130/1.

51 French Duty of Vigilance Law (n 10)

52 German Supply Chain Act (n 11).

53 Corporate Sustainability Due Diligence Directive (n 12).

54 See: Maria-Therese Gustafsson, Almut Schilling-Vacaflor, and Andrea Lenschow, 'Foreign Corporate Accountability: The Contested Institutionalisation of Mandatory Due Diligence in France and Germany' (2023) 17(4) Regulation & Governance 891; David Weihrauch, Sophia Carodenuto, and Sina Leipold, 'From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act' (2023) 17(4) Regulation & Governance 909; Lars Feld, 'Ich schaue mit großem Entsetzen auf das Lieferkettengesetz' (*Frankfurter Allgemeine Zeitung*, 26 August 2020) <https://www.faz.net/aktuell/wirtschaft/wirtschaftsweiser-feld-kritisiert-lieferkettengesetz-16921530.html> accessed 8 August 2025.

55 Bernhard Reinsberg and Christoph Volbert Steinert, 'The French Duty of Vigilance Law: Reconciling Human Rights and Firm Profitability' (2025) 32(6) Review of International Political Economy 1, 23.

56 UNGPs (n 38) Principle 12 commentary.

57 OHCHR, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance* UN Doc A/HRC/32/19/Add.1 (10 May 2016) para 12.3.

58 Claire Bright, Axel Marx, Nina Pineau, and Jan Wouters, 'Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?' (2020) 22 Business and Politics 667, 691.

59 Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence through Corporate Civil Liability' (2020) 69 International and Comparative Law Quarterly 789, 816.

groups. By requiring parent companies to identify and mitigate risks arising from the activities of entities under their control or influence, due diligence highlights the preventive focus of corporate responsibility and complements existing fault-based liability mechanisms within group structures. This development signals a gradual movement from ex post liability to ex ante responsibility, without disregarding separate legal personality and limited liability as the foundational principles of corporate law. Whether this evolution ultimately challenges or reinforces the traditional framework of liability within corporate groups depends on how these due diligence obligations are implemented and enforced in national legislation. The next section turns to France and Germany, where due diligence obligations have been incorporated into national law, to examine how this shift has taken shape in practice.

## 4 COMPARATIVE ANALYSIS: FRANCE AND GERMANY

### 4.1 FRANCE-DUTY OF VIGILANCE LAW

The French duty of vigilance law was developed through close cooperation between civil society organisations, trade unions, academics, lawyers, and members of parliament.[60] A first proposal was ready by November 2013, but it faced strong opposition from business groups, leading to a three-and-a-half-year debate between the National Assembly and the Senate.[61] The law was ultimately adopted on 21 February 2017 in a modified form. France thus became the first EU Member State to introduce binding human rights and environmental due diligence obligations for large companies, requiring them to prevent serious human rights abuses and environmental harm throughout their global value chains.[62] The law's scope extends beyond corporation's domestic operations, indicating an attempt to address global risks and to align corporate responsibility with the capacity of parent companies to exercise influence across their group structure.

Under Article 1 of the law, companies incorporated in France that meet the employee thresholds must establish and implement an effective vigilance plan. The obligation applies to companies with at least 5,000 employees in France, including subsidiaries, or 10,000 employees worldwide. The plan must contain reasonable measures to identify risks and prevent severe violations of human rights and fundamental freedoms, serious bodily injury, and environmental or health damage. It covers harm resulting directly or indirectly from the company's own operations, its subsidiaries and from those of subcontractors or suppliers with whom it maintains an established commercial relationship. The law therefore places the parent company at the centre of a risk-prevention system that extends across its corporate group and value chain. The vigilance plan must include five elements: a risk mapping to identify and prioritise risks, procedures to assess the situation of subsidiaries, subcontractors, and suppliers, preventive and mitigation actions, an alert mechanism for reporting risks, and a system to monitor and evaluate the measures taken. By requiring

[60] Claire Bright, 'Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Duty of Vigilance Law the Way Forward?' (2020) EUI MWP Working Paper 2020/01, 4 <https://cadmus.eui.eu/entities/publication/e8e92094-23e1-5665-8107-d0860f0ef253> accessed 10 April 2026.
[61] ibid.
[62] Begüm Kilimcioğlu, 'The French Duty of Vigilance Law: A Reference Guide for the Transposition of the Corporate Sustainability Due Diligence Directive' (2025) 43 Netherlands Quarterly of Human Rights 31, 32.

companies to make the plan public in their annual management report and update it regularly, the law embeds due diligence into corporate governance and transform what was previously a voluntary standard into a legal duty of prevention.

The law provides two avenues for enforcement. Parties with a legitimate interest may first send a formal notice to a company alleging noncompliance with its obligations. If the company fails to respond or take action within three months, the claimant may apply to the court for an injunction. This mechanism focuses on the preventive aspect of the duty of vigilance, allowing for stakeholders' intervention before any harm has taken place and encouraging companies to address shortcomings in their vigilance plans. Where harm has already occurred, Article 2 establishes a civil liability regime in which a company that causes damage which could have been avoided through appropriate due diligence is required to provide compensation. Such claims would be decided under Articles 1240 and 1241 of the French civil code which include the general framework of liability.

There have not been many cases brought under the law since it entered into force. Between 2017 and 2024, approximately thirty formal notices and thirteen lawsuits were filed, mostly against France's largest multinationals and some state-owned companies.[63] In the first years following its adoption, only a small number of cases resulted in decisions addressing the merits of vigilance plans. In *La Poste*, the court found that the company's vigilance plan failed to adequately address the risk of subcontractors employing undocumented workers.[64] It ordered improvements to risk mapping, subcontractor assessments, and alert mechanisms in cooperation with trade unions but refrained from requiring any specific measures to combat illegal employment.[65] The *SNCF* case was dismissed because the claimants had not clearly identified which risks were not included in the plan.[66] These early cases highlight both the preventive goal and the practical limitations of the duty of vigilance law. While courts have acknowledged the enforceability of the due diligence obligations, they have shown caution in defining their substantive content at this stage of implementation.

Most decisions so far have focused on procedural rather than substantive issues. Early rulings, such as in *Total Uganda*, interpreted these requirements narrowly, often dismissing claims that extended beyond the scope of the formal notice or where companies had issued updated vigilance plans during proceedings.[67] In June 2024, the Paris court of appeal clarified these procedural rules, confirming that the three-month notice period is intended to allow companies to address possible shortcomings of their plans and that claims may concern a more recent vigilance plan than the one in the notice, preventing companies from avoiding review by issuing new vigilance plans during proceedings.[68] The *Suez* appeal is particularly

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[63] CCFD-Terre Solidaire and Sherpa, *Mise à jour 2024 : une opacité persistante et des entreprises toujours sans plan (Radar du devoir de vigilance*, 10 October 2024) 4–5 <https://www.amisdelaterre.org/IMG/pdf/end-of-the-road-for-tncs-foef-aaf-oct17.pdf> accessed 9 August 2025.

[64] Tribunal judiciaire de Paris (1re ch., 4e sect., pôle social), 5 December 2023, n° RG 21/15827 (*SUD PTT c/ La Poste*).

[65] ibid.

[66] Tribunal judiciaire de Paris (34e ch., "Régulation économique, sociale et environnementale") 13 February 2025, n° RG 24/11283 (*CFDT c/ SNCF*)

[67] Tribunal judiciaire de Paris (référé), 28 February 2023, n° RG 22/53942 and 22/53943 (*TotalEnergies SE c/ Les Amis de la Terre France et Survie*); Tribunal judiciaire de Paris (référé), 30 November 2021, n° RG 20/10246 (*Comunidad Unión Hidalgo c/ EDF*); Tribunal judiciaire de Paris (référé), 1 June 2023, n° RG 22/07100 (*Les Amis de la Terre France et Survie c/ Suez*).

[68] Cour d'appel de Paris (ch. 5-12), 18 June 2024, n° RG 23/14348 (*Les Amis de la Terre France et Survie c/*

important for understanding liability within corporate groups. The court of appeal dismissed proceedings on the ground that the wrong entity had been sued.[69] The summons targeted a subsidiary, whereas the vigilance plan had been prepared and implemented by the parent company.[70] The court identified the parent as the entity responsible for publishing and implementing the plan, confirming that the duty is assigned to the company that determines and oversees its implementation.[71] This approach aligns liability with the company's capacity to identify and address risks, while also showing how separate legal personality continues to limit access to remedy.

More recently, the Paris court delivered an important decision in *Sherpa et al. v Laboratoires de Biologie Végétale Yves Rocher*.[72] The court held that the parent company had failed to comply with its obligations under the Duty of Vigilance Law by failing to identify and address the risk of violations of trade union freedom within its Turkish subsidiary. In particular, the court found that the company's vigilance plans for 2017 and 2018 had not adequately assessed the risk of infringements of workers' freedom of association, despite the availability of information indicating such risks. As a result, the court ordered the company to compensate the Petrol-Is trade union and six former employees, while awarding symbolic damages of one euro to the claimant NGOs Sherpa and ActionAid. However, the majority of employees' claims were deemed inadmissible because they had previously signed settlement agreements with the subsidiary in 2019. The ruling is significant as one of the first decisions finding a parent company liable under the Duty of Vigilance Law for failures in its vigilance plan relating to human rights risks within a foreign subsidiary, while also highlighting the procedural barriers that continue to limit access to remedies for affected workers.

## 4.2 GERMANY-SUPPLY CHAIN ACT

The German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz*, LkSG) emerged from the gradual shift in Germany from voluntary to mandatory human rights due diligence.[73] The Act builds on the framework set out in the UNGPs, translating their soft-law expectations into binding obligations. Germany's 2016 national action plan had initially promoted voluntary implementation, with a review planned to assess progress after several years.[74] When a 2020 survey revealed that only a small proportion of companies had adopted

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*TotalEnergies SE (Total – Climate Change)*); Cour d'appel de Paris (ch. 5-12), 18 June 2024, n° RG 21/22319 (*Comunidad Unión Hidalgo c/ EDF*).

[69] Cour d'appel de Paris (ch. 5-12), 18 June 2024, n° RG 22/18933 (*Les Amis de la Terre France et Survie c/ Suez*).

[70] Tribunal judiciaire de Paris (référé), 1 June 2023, n° RG 22/07100 (*Les Amis de la Terre France et Survie c/ Suez*).

[71] Cour d'appel de Paris (ch. 5-12), 18 June 2024, n° RG 22/18933 (*Les Amis de la Terre France et Survie c/ Suez*).

[72] Tribunal judiciaire de Paris (34e ch.), 12 March 2026, n° RG 22/04017 (Sherpa et al. c/ Laboratoires de Biologie Végétale Yves Rocher). See also: Sherpa, 'Workers' rights: The Yves Rocher Group found liable for failing in its duty of vigilance in Türkiye' (*Press Release*, 12 March 2026) <https://www.asso-sherpa.org/verdict-yves-rocher-turkiye> accessed 16 March 2026.

[73] German Supply Chain Act (n 11) adopted 16 July 2021, entered into force 1 January 2023.

[74] Federal Government, 'National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016–2020' (Federal Foreign Office 2016) <https://www.auswaertiges-amt.de/resource/blob/610714/fb740510e8c2fa4d7217436accc7/nap-wirtschaft-menschenrechte-engl-

meaningful due diligence processes, the government initiated the legislative process that resulted in the adoption of the legislation in June 2021.[75]

The law applies to companies of any legal form that have their central administration, principal place of business, administrative headquarters, statutory seat, or a branch office in Germany, provided they meet the employee threshold [Section 1(1)]. Upon its entry into force on 1 January 2023, the threshold was set at 3,000 employees in Germany, including those posted abroad and employees of German subsidiaries of foreign companies, and was lowered to 1,000 employees from January 2024. In the case of corporate groups, the total number of employees across all German entities is included in the threshold, ensuring that obligations extend to parent companies exercising control over group operations [Section 1(3)]. The law establishes human rights and environmental due diligence obligations, set out in Section 3 and detailed in Sections 4–10, requiring companies to identify, prevent, and mitigate risks to protected legal interests throughout their supply chains. The term 'supply chain' includes all products and services, from raw material extraction to delivery to the end customer, both within Germany and abroad. These obligations apply to a company's own operations, those of its direct suppliers, and, in certain circumstances, its indirect suppliers. In the latter case, duties are triggered only when the company has 'substantiated knowledge' of potential violations, which then requires it to conduct a risk analysis and adopt preventive or remedial measures [Section 2(5)-(8) and 9(3)].

The law incorporates a set of human rights and environmental standards drawn from international conventions listed in its annex. These include prohibitions on child labour, forced labour, slavery, breaches of occupational health and safety law, and restrictions on freedom of association, as well as environmental risks such as the use of mercury in manufacturing and the improper disposal of hazardous waste. It conceptualises risk as a sufficient probability that such a violation may occur, which in turn triggers a company's preventive obligations. Where a violation has already taken place or is imminent, the company must take immediate remedial action. The due diligence process under the Act is comprehensive, with obligations to establish a risk management system, designate a responsible person, conduct regular risk analyses, adopt a policy statement, and implement preventive and remedial measures both in the company's own operations and across its supply chain. It also requires the establishment of a complaints mechanism, due diligence for indirect suppliers where necessary, and documentation and public reporting on compliance. Annual reports must be published on the company's website and remain accessible for seven years, ensuring a degree of transparency that complements the preventive focus of the regime.

Enforcement of the Act is through the Federal Office for Economic Affairs and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*, BAFA), which monitors compliance by requesting information, conducting on-site inspections, and reviewing documentation [Section 14]. Where a breach is established, BAFA may order remedial measures and impose administrative fines for companies with an annual turnover exceeding

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data.pdf> accessed 11 August 2025.

[75] See: German Federal Foreign Office, 'Monitoring the National Action Plan for Business and Human Rights (NAP)' (13 October 2020) <https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2131054> accessed 11 August 2025.

€400 million up to two per cent of global turnover [Section 24]. Companies may also be excluded from public procurement for up to three years [Section 22]. Unlike the French law, the German supply chain act does not establish civil liability and enforcement is purely administrative. The act also does not provide affected individuals with a direct right to bring action before the courts. Instead, it creates an administrative complaints procedure, allowing affected persons, trade unions, and NGOs to submit complaints to BAFA, including on behalf of others. Upon receipt, BAFA must examine whether the company has breached its obligations and take appropriate action. This administrative model promotes consistency in enforcement by entrusting a single authority with oversight, but it also limits access to justice for affected individuals and reduces the deterrent effect that civil liability could provide.

According to BAFA's 2023 accountability report, the authority carried out 492 inspections, 406 of which were risk-based and 86 were triggered by specific events, and received 30 complaints concerning 40 companies.[76] Some complaints were dismissed because the alleged issues fell outside BAFA's capacity under the legislation, for instance where companies did not meet the employee threshold or the claims were unrelated to the covered human rights or environmental obligations. Others were rejected for insufficient substantiation, while several resulted in preventive or remedial measures.[77] Notably, BAFA did not impose any fines in 2023, instead focusing on encouraging companies to improve their internal procedures.[78] This early enforcement pattern suggests that the authority's initial approach has been primarily educational rather than punitive, aimed at fostering compliance and establishing interpretive guidance on the act's new due diligence requirements.

In May 2025, the German government announced in its coalition agreement an intention to abolish the supply chain act as part of a broader effort to reduce regulatory burdens.[79] The agreement itself has no legal effect, as repealing a law requires the introduction of a bill and completion of the full legislative process. However, its signal led a political shift in Germany's approach to mandatory human rights due diligence. On 2 September 2025, the government published a draft bill proposing amendments to the legislation. Rather than a full repeal, the proposal seeks to reduce the administrative and liability burden on companies during the transition period preceding the transposition of the CSDDD.[80] The draft removes the obligation to submit reports to BAFA and to publish them online, while companies would still be required to document their due diligence

[76] Federal Office for Economic Affairs and Export Control, 'Accountability Report 2023 on the German Supply Chain Due Diligence Act' (BAFA 2023) 11–12, 15–16 <https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/accountability_report_2023.html> accessed 11 August 2025.

[77] ibid 17.

[78] ibid.

[79] Due Diligence Design, 'Germany's New Government Signs Coalition Agreement Including Plan to Repeal Supply Chain Due Diligence Act' (5 May 2025) <https://duediligence.design/germanys-new-government-signs-coalition-agreement-including-plan-to-repeal-supply-chain-due-diligence-act/> accessed 11 August 2025.

[80] Due Diligence Design, 'German Government Published Draft Bill to Remove Reporting Obligation' (24 September 2025) <https://duediligence.design/german-government-published-draft-bill-to-remove-reporting-obligation/> accessed 31 October 2025. See also *Entwurf eines Gesetzes zur Änderung des Lieferkettensorgfaltspflichtengesetzes* (Draft Bill) <https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-gesetz-zur-aenderung-des-lieferkettensorgfaltspflichtengesetzes.pdf?__blob=publicationFile&v=1> accessed 31 October 2025.

processes internally. It also limits fines to serious breaches concerning preventive or remedial duties, excluding violations related to risk analysis and environmental risks. The government estimates that these changes would reduce annual compliance costs by approximately EUR 4.1 million. The bill must still pass through Parliament before entering into force, but its publication reflects a shift in Germany's regulatory direction and raises questions about the continuity and coherence of corporate due diligence obligations across the EU.

The proposed amendments to the German supply chain act could have important implications for corporate groups. Under the existing framework, employee thresholds are calculated across all German entities within a group, and the parent company bears responsibility for compliance where it exercises decisive influence [Section 1(3) and Section 2(6)]. This approach recognises that monitoring human rights and environmental risks is most effective when conducted at group level. By contrast, the draft bill's reduction of reporting obligations and limitation of liability risks weakening this group-wide accountability. Without the requirement to disclose due diligence measures publicly or to maintain comprehensive risk assessments, the incentive for parent companies to monitor the activities of their subsidiaries and supply chain may decline. This shift marks a move away from the preventive and transparent model that forms the basis of both the German and French frameworks, potentially narrowing the law's capacity to drive behavioural change within corporate groups.

National due diligence laws in Europe are at least indirectly challenging the structural limits of traditional corporate liability. Although they differ in scope, enforcement mechanisms, and legal effects, these regimes share a common goal to extend corporate responsibility beyond individual legal entities and attach obligations to companies that exercise control within a group. In doing so, they begin to redefine the role of parent companies in relation to their subsidiaries and global value chains, not by disregarding separate legal personality, but by aligning responsibility with the capacity to control and monitor. However, these national frameworks have also resulted in a fragmented legal landscape with different procedures and enforcement mechanisms. The EU CSDDD seeks to address this fragmentation by establishing a common baseline of obligations. The next section examines whether the Directive provides a coherent and effective framework for allocating responsibility within corporate groups and how it compares to existing national approaches.

## 5 THE EU DIRECTIVE AND THE CHALLENGE OF HARMONISATION

The CSDDD was developed as part of the EU's broader effort to move beyond fragmented national approaches and establish a harmonised legal framework for responsible business conduct within the internal market.[81] In 2021, the European Parliament called for legislation introducing mandatory due diligence obligations, and the European Commission followed with a formal proposal in February 2022.[82] The proposal aimed to harmonise Member State

81 Corporate Sustainability Due Diligence Directive (CSDDD) (n 12).
82 European Parliament, 'European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability' [2021] OJ C385/2; European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate

approaches by imposing obligations on large companies to identify, prevent, and address human rights and environmental risks throughout their operations and value chains. Over the course of the legislative process, several provisions were amended to accommodate Member State concerns about the scope of the directive and the potential administrative burden on companies. Following the proposal, both the Parliament and the Council adopted their own positions, each introducing further modifications to the draft text.[83] A provisional political agreement was reached in December 2023, but the adoption process was delayed in early 2024 when several Member States, including Germany and Italy, withdrew support over competitiveness and subsidiarity concerns.[84] After further negotiations, a revised text was endorsed by the Council's Committee of Permanent Representatives (COREPER) in March 2024 and subsequently approved by the European Parliament in April 2024. The legislative process itself reflects the underlying tension between the EU's aim to establish a consistent due diligence framework and the desire of Member States to preserve flexibility in implementation, a balance that continues to influence the directive.

The directive applies to EU companies with more than 1,000 employees and a net worldwide turnover of at least EUR 450 million in the preceding financial year, as well as to non-EU companies generating at least EUR 450 million within the EU [Article 2(1) and(2)]. These thresholds must be met for two consecutive financial years and apply at group level, meaning that an ultimate parent company falls within scope where the group as a whole satisfies the criteria [Article 2(3) and (5)]. The obligations cover a company's own operations, those of its subsidiaries, and the activities of direct and indirect business partners within its chain of activities [Article 1(1)(a)]. The chain of activities includes upstream partners involved in producing goods or providing services for the company and downstream partners engaged in distribution, transport, or storage of its products. It excludes certain export-controlled goods and, as recital 26 clarifies, downstream service-related activities, including those of financial institutions. The Directive's focus on the ultimate parent company as the entity responsible for compliance also raises concerns about potential regulatory arbitrage within the EU. Because the CSDDD is a minimum harmonisation instrument under Article 4, Member States keep discretion in transposing its provisions, which may lead to uneven national standards, which in turn could lead to corporate groups to locate or restructure their parent companies strategically in jurisdictions with less demanding due diligence requirements.[85] While implementation is still at an early stage, such differences could weaken the Directive's harmonising effect and limit its ability to ensure consistent implementation

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Sustainability Due Diligence and Amending Directive (EU) 2019/1937 COM' (2022) 71 final.

83 European Parliament, 'Amendments Adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' P9_TA(2023)0209 [2023]; Council of the European Union, 'General Approach on the Proposal for a Directive on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' 15024/1/22 REV 1 [2023].

84 European Parliament, 'Corporate Due Diligence Rules Agreed to Safeguard Human Rights and Environment' (5 December 2023) <https://www.europarl.europa.eu/news/en/press-room/20231205IPR15689/corporate-due-diligence-rules-agreed-to-safeguard-human-rights-and-environment> accessed 13 August 2025; Alessandra Silveira Ciacchi, 'The Newly-Adopted Corporate Sustainability Due Diligence Directive: An Overview of the Lawmaking Process and Analysis of the Final Text' (2024) 25 ERA Forum 29, 34–35.

85 Karsten Engsig Sørensen, 'Applying CSDDD in Corporate Groups' (2025) Nordic & European Company Law Working Paper No 25-03, 134.

across the Member States.

Article 5 of the Directive requires Member States to ensure that companies conduct risk-based human rights and environmental due diligence as laid down in Articles 7 to 16. This involves integrating due diligence into corporate policies and risk management systems, identifying and assessing actual or potential adverse impacts, and engaging meaningfully with stakeholders. Companies must identify and assess actual and potential adverse impacts connected to their operations, subsidiaries, and business partners in the chain of activities, using appropriate measures to map and evaluate risks. Where all risks cannot be addressed simultaneously, Article 9 permits prioritisation according to severity and likelihood. Additionally, companies must take measures to prevent or mitigate potential adverse impacts and to bring actual impacts to an end or minimise their extent, considering the source of the harm, the relationship to the company, and their ability to influence business partners. In this regard, appropriate measures may include stakeholder engagement, contractual assurances, capacity building, cooperation in industry initiatives, and, as a last resort, ending the business relationship.

Article 6 of the Directive clarifies how due diligence obligations function within corporate groups. It allows in-scope subsidiaries to delegate their obligations to an in-scope parent company, usually the ultimate parent, provided that the parent can ensure effective compliance. This mechanism is intended to avoid overlapping due diligence processes across entities within the same group and to concentrate responsibility at the company best positioned to oversee risks across operations and subsidiaries.[86] The delegation is dependent on cooperation and information sharing between the parent and subsidiary, as required under Article 6(2)(a) to (e). This means that while the parent company may take primary responsibility for compliance, effective implementation still depends on active engagement and information exchange within the group structure.

Once due diligence systems are established, the Directive requires companies to address actual and potential harms. Under Article 12, companies that cause or contribute to an adverse impact must provide remediation, while those indirectly linked to the harm must use their leverage to enable it. Article 13 emphasise the role of meaningful stakeholder engagement and accessible complaints mechanisms, providing an avenue for affected persons, trade unions, and NGOs to raise concerns. Together, these provisions strengthen the link between due diligence and access to remedy, laying the foundation for the Directive's enforcement mechanisms.

The Directive establishes a dual enforcement regime combining administrative supervision and civil liability. Member States must designate one or more supervisory authorities with powers to monitor compliance with the obligations adopted by national law with regards to the provisions of the directive [Article 24(1)]. Where breaches are found, authorities may impose penalties proportionate to the company's global turnover set at no less than five per cent and may exclude companies from public procurement. Additionally, Article 29 provides that persons suffering damage as a result of a company's intentional or negligent failure to prevent or end adverse impacts must have access to a civil liability regime. Together these mechanisms turn due diligence duties into enforceable standards by connecting administrative monitoring with potential liability for non-compliance.

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[86] Engsig Sørensen (n 85) 142.

Nevertheless, the current version of the Directive is still subjected to ongoing political and legislative debate. In early 2025, the Commission proposed a set of amendments through the Omnibus initiative to simplify the EU's sustainability framework and reduce compliance burdens.[87] The proposal removes the harmonised civil liability regime in Article 29, leaving Member States to decide whether and how to provide for liability under national law. Additionally, it removes the EU-level minimum penalty requirement, introduces a stronger risk-based approach to due diligence allowing companies to prioritise direct business partners, and limits stakeholder participation to employees, workers, trade unions, and directly affected communities. There is also greater flexibility for companies to continue business relationships despite serious risks, provided that credible mitigation plans exist. Finally, the implementation timeline is delayed by one year, with obligations for large companies postponed to 2028.

The Council's subsequent mandate went even further by proposing a higher applicability threshold and shifting towards a more flexible, risk-based approach to due diligence.[88] In October 2025, the European Parliament rejected the Legal Affairs Committee's proposal for simplified reporting rules, with a revised text scheduled for plenary discussion in November.[89] Following further negotiations, the Parliament approved a provisional agreement with the Council in December 2025 introducing simplified sustainability reporting and due diligence requirements.[90] The Council subsequently gave its final approval in February 2026, limiting the CSDDD to companies with more than 5,000 employees and EUR 1.5 billion in turnover.[91] The revised framework also removes the obligation for companies to adopt climate transition plans, caps penalties at 3% of a company's net worldwide turnover, postpones the transposition deadline to 26 July 2028, and requires companies to comply with the due diligence obligations from July 2029.[92] These developments reveal the continuous tension between the EU's objective of strengthening corporate sustainability obligations and the political push to reduce regulatory burdens in order to enhance European competitiveness.

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[87] European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2024/1760, (EU) 2024/1762, (EU) 2024/1761, (EU) 2024/1763 and (EU) 2024/1764 as regards their alignment to the requirements of Union law and reduction of administrative burdens' COM(2025) 81 final, 1.

[88] Council of the European Union, 'Simplification: Council agrees position on sustainability reporting and due diligence requirements to boost EU competitiveness' (*Council Press Release*, 23 June 2025) <https://www.consilium.europa.eu/en/press/press-releases/2025/06/23/simplification-council-agrees-position-on-sustainability-reporting-and-due-diligence-requirements-to-boost-eu-competitiveness/> accessed 13 August 2025.

[89] European Parliament, 'MEPs to vote on simplified sustainability and due diligence rules in November' (*Press Release*, 22 October 2025) <https://www.europarl.europa.eu/news/en/press-room/20251016IPR30956/meps-to-vote-on-simplified-sustainability-and-due-diligence-rules-in-november> accessed 3 November 2025.

[90] European Parliament, 'Simplified sustainability reporting and due diligence rules for businesses' (*Press Release*, 16 December 2025) <https://www.europarl.europa.eu/news/en/press-room/20251211IPR32164/simplified-sustainability-reporting-and-due-diligence-rules-for-businesses> accessed 05 March 2026.

[91] Council of the European Union, 'Council signs off simplification of sustainability reporting and due diligence requirements to boost EU competitiveness' (*Council Press Release*, 24 February 2026) <https://www.consilium.europa.eu/en/press/press-releases/2026/02/24/council-signs-off-simplification-of-sustainability-reporting-and-due-diligence-requirements-to-boost-eu-competitiveness/> accessed 5 March 2026.

[92] ibid.

The CSDDD can be viewed as the EU's effort to move beyond fragmented national approaches and integrate due diligence obligations into the broader framework of European company law. By extending these obligations across subsidiaries and value chains, it signals a reform in how oversight and compliance operate within corporate groups, placing responsibility with the company that is in the position to exercise control. Even if the final text leaves civil liability to national discretion, the Directive will make liability more likely by introducing an obligation to conduct due diligence.[93] This is a gradual shift that would not replace or disregard the principle of separate legal personality but reduces its insulating effect by linking legal expectations more closely to the capacity to influence and control. Considering the evolving soft law framework and legislative examples in France and Germany, the Directive reflects an emerging European approach in which parent companies are increasingly expected to manage group-wide risks and may face consequences when they fail to do so. The next section situates this development within the broader debate on how liability in corporate groups is being redefined across Europe.

## 6 RETHINKING GROUP LIABILITY IN EUROPEAN COMPANY LAW

Considering the developments in France, Germany, and the EU, due diligence legislation is gradually reshaping how responsibility is understood within corporate groups. While these frameworks do not fundamentally challenge the principle of separate legal personality, they allocate obligations in a way that reflects how corporate groups operate in practice. Rather than holding parent companies automatically liable for the acts of their subsidiaries, they impose preventive duties on parent companies to manage and oversee risk where they have the capacity and influence to do so. This is evident across all of the examined frameworks. According to French duty of vigilance case law, responsibility lies with the company that designs and implements the vigilance plan.[94] The German supply chain act also requires parent companies to establish appropriate and effective risk management within their own business area, which also extends to subsidiaries where the parent exercises decisive influence.[95] At EU level, the CSDDD builds on the same principle by allowing parent companies to fulfil due diligence obligations on behalf of their subsidiaries, provided there is sufficient coordination and access to information in Article 6. These frameworks indicate a shift from a formal separation of entities to a more functional understanding of responsibility, grounded in the capacity to influence and control risk across the group.

This shift suggests a rather slow redefinition of how liability and fault are understood within corporate groups. Traditionally, liability depended on showing direct wrongdoing or actual control through doctrines such as veil piercing, agency, or duty of care. The emerging due diligence regimes are more preventive and process based. They require companies to show that they have taken steps to identify, prevent, or mitigate risks, even where no harm

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[93] Engsig Sørensen (n 85) 163.
[94] *Suez case* (n° RG 22/18933).
[95] Federal Office for Economic Affairs and Export Control (BAFA), 'FAQ on the Supply Chain Due Diligence Act (LkSG)' (2024), question 4.10 <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText3> accessed 18 August 2025.

has yet occurred. In this way, companies are responsible to take action before any actual damage or harm occurs, which can lead to another layer of liability if they fail to fulfil their obligations. This form of liability would depend less on the formal relationship between entities and more on whether the company in a position of control has met its obligations. At the same time, the principle of separate legal personality continues to define the boundaries of corporate responsibility. Legislators, courts, and public authorities have avoided extending liability purely on the basis of group structure or economic control so far. The French and German frameworks both confirm that, in principle, each company remains responsible for its own obligations unless the parent company exercises decisive influence or implements a group-wide due diligence policy. The EU directive adopts a similar approach, permitting subsidiaries to delegate due diligence to a parent company only where the parent can ensure compliance. This would preserve the formal autonomy of each legal entity while recognising that in case of coordination and influence parent companies are better positioned to manage risks within the context of corporate groups. This is not necessarily a departure from foundation of company law but rather an adaptation to reflect how corporate groups function in practice.

These developments show that the focus of liability in corporate groups is slowly moving from a formal approach based on legal structure to one that considers how decisions are made and risks are managed in practice. Due diligence obligations do not make parent companies directly liable for the acts of their subsidiaries, but they require them to take active steps to prevent and address risks within their sphere of control. As a result, due diligence links the company's organisational capacity with its legal responsibility. However, the relationship between these new duties and traditional forms of liability remains uncertain. While these preventive due diligence obligations are now being embedded in law, the legal consequences of failing to meet them are still limited. Enforcement largely depends on administrative supervision, with claims of civil liability being either unavailable or rarely successful. Additionally, failure to meet due diligence obligations can indirectly serve as evidence of negligence in tort claims. This shows that although corporate responsibility is expanding in scope, the legal framework still falls short of establishing a clear and consistent model of group liability.

At the same time, the legal framework of due diligence in Europe is still developing, and its implications for liability are yet to be determined. While these instruments have moved corporate responsibility beyond voluntary standards, they do not yet establish a uniform or enforceable model of group liability. The French, German, and EU frameworks share a common understanding of due diligence obligations but differ in how these obligations are enforced, resulting in a fragmented enforcement landscape. The EU's effort to create a level playing field through the CSDDD has also raised concerns about competitiveness and remains subject to ongoing negotiation. Finally, the extent to which these duties will influence future interpretations of fault and control will depend on how national authorities and courts apply them in practice. For now, due diligence legislation represents an important step towards embedding corporate responsibility in law, even if its effect on liability within corporate groups remains limited.

## 7 CONCLUSION

This paper has examined whether mandatory due diligence obligations challenge or reinforce the traditional liability framework governing corporate groups. While the principles of separate legal personality and limited liability remain core features of corporate law, the analysis suggests that recent developments are slowly reshaping how responsibility is understood within the context of corporate groups. The due diligence frameworks in France, Germany, and at EU level do not impose liability solely based the group's legal structure and the formal separation between different entities within the group. Instead, they assign obligations to parent companies where they have the capacity to oversee and influence risk. This reflects a more functional understanding of responsibility that links legal duties to the practical exercise of influence and control, even as the formal legal separation between group entities remains in place.

At the same time, these frameworks do not lead to a new model of group liability. The French and German regimes, as well as the EU directive, continue to operate within the confines of the company law framework, which mostly maintain the separate legal personality of each entity within the group. While parent companies might take over due diligence obligations from their subsidiaries, this is only the case if certain conditions such as sufficient coordination and information sharing between the two entities are met. Moreover, enforcement remains largely administrative, with civil liability cases being rare and mostly unsuccessful. In this sense, the shift in responsibility does not translate into a similar shift in liability from subsidiaries to parent companies, nor does it provide a clear or consistent basis for liability within group structures.

In this context, due diligence legislation does not replace the traditional liability framework, but neither does it leave it entirely unchanged. Instead, it introduces an additional layer of preventive obligations that may increase the likelihood of liability for parent companies in certain circumstances. Whether these developments will lead to a more coherent understanding of corporate group responsibility and liability remains uncertain and will depend on how domestic courts and authorities interpret and apply these obligations in the coming years.

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# THE EUROPEAN COMMITMENT TO THE FULL RECOGNITION OF WORKERS' RIGHTS IN SUSTAINABLE DEVELOPMENT: TOWARDS CONSTITUTIONALISATION OF THE RIGHT TO WORK IN THE EU LEGAL ORDER?

ROSITA SILVESTRE*

*This article analyses the process of 'de facto constitutionalisation' of the right to work within the European Union's (EU's) legal order. Despite the absence of a formal treaty revision, this evolution is taking place through the systematic integration of the right to work into the EU's sustainability policies and development objectives. It argues that the interplay between the Charter of Fundamental Rights of the European Union (CFREU), secondary legislation, and the Court of Justice of the European Union's (CJEU's) case law serves as an engine of progress for elevating labour guarantees from mere programmatic social policy objectives to implicit, binding constitutional principles.*

*By examining this tripartite axis, this article highlights how the concept of decent work and sustainability agendas operate as a quasi-constitutional framework, capable of imposing criteria of legitimacy upon economic action. Ultimately, it suggests that the right to work is becoming a fundamental pillar of European democratic identity, transforming the single market into a community of law oriented towards social justice.*

## 1 INTRODUCTION

The introductory question – '*Towards a constitutionalisation in progress of the right to work in the EU legal order*?' – sits at the heart of the current debate on the valorisation of labour policies within the European integration process.

Indeed, the European Commission's Communication on Decent Work for a Just Global Transition and Sustainable Recovery (2022)[1] has supported the discussion on the European Union's (EU's) position as a global leader in promoting decent work, conceived as a cornerstone of social sustainability and a prerequisite for an inclusive and fair society based on full employment, social dialogue, and the recognition of the importance of good work and workers' well-being.

However, although the redevelopment of the right to work as part of a renewed European social policy seems to take place in the broader context of the Sustainable Development Goals specifically identified by the United Nations for 2030, the EU is preparing to independently cross the rhetorical line of '*do more!*', broadening the scope of its material policies to include concrete actions for the benefit of workers.

Seeking to move beyond a mere list of programmatic objectives in the context of the

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[1] European Commission, 'Decent work around the world for a just global transition and sustainable recovery' COM (2022) 66 final.

EU's sustainability actions, this article argues that EU policies and the European Pillar of Social Rights (EPSR)[2] operationalise a para-constitutional framework; one that elevates specific work-related guarantees beyond the scope of ordinary social policy, even in the absence of formal Treaty amendment.

This approach addresses critical gap in existing literature by moving the discourse beyond case-by-case social exceptions toward a systemic, sustainability-driven elevation of work-related rights. Then, the legal mechanisms – through which this constitutionalisation occurs – will be primarily clarified, while simultaneously delineating the precise boundaries of this process, including those imposed by Article 51 of the Charter of Fundamental Rights of the EU (CFREU), the principle of conferral (Article 5 TEU), and market freedoms (Articles 45-48 TFEU).

The analysis stems from the synergistic relationship between the right to work, understood as the EU's parameter of constitutional legality, and decent work (UN SDG8)[3] as its operational manifestation. In this architecture, the right to work represents an immanent constitutional principle, while decent work constitutes its dynamic and normative projection. This distinction allows for the transformation of ethical standards into actionable legal obligations, serving as a key criterion in resolving conflicts between market freedoms and social rights.

To investigate the evolving constitutional profile of the right to work within the European Union, this article employs a cross-disciplinary framework that combines positive law with normative reconstruction.

The investigation begins with a rigorous scrutiny of the legal sources, ranging from primary Treaty provisions (TEU/TFEU) to secondary legislation and the evolving case law of the Court of Justice of the EU. This foundational layer serves to map the existing normative anchors of labour protection in the EU order. To contextualise these findings, the article integrates a theoretical lens rooted in material constitutionalism.[4] By examining the structural tensions between market-driven integration and social safeguards, this framework illuminates how social priorities increasingly function as compulsory benchmarks for EU policymaking, even in the absence of explicit treaty-based mandates.

Drawing from these theoretical foundations, the European Pillar of Social Rights (EPSR) and the 'Just Transition' framework will be evaluated to demonstrate how sustainability-oriented initiatives function as engines of normative expansion for labour prerogatives. The analysis concludes by proposing a re-coupling of work-based rights and

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[2] European Commission, 'Establishing a European Pillar of Social Rights' COM (2017) 250 final; European Commission, 'Action Plan on the European Pillar of Social Rights' COM (2021) 102 final.

[3] See the digital leaflet of the European Commission, 'Goal 8 Decent Work and Economic Growth. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all' <https://know-sdgs.jrc.ec.europa.eu/sdg/8> accessed 15 February 2025.

[4] Drawing on Costantino Mortati's theory, the EU's Material (or real) Constitution encompasses the fundamental principles and power balances that drive institutional action beyond the codified treaties. Despite the Union's non-federal nature, this substantive core remains flexible, evolving through political practice and CJEU case law, thus justifying a constitutional framework rooted in the EU's actual political foundation. Costantino Mortati, *Istituzioni di diritto pubblico* (7th edn, Cedam 1967) 26 ff; Giuliano Amato and Jacques Ziller, *The European Constitution Cases and Materials in EU and Member States Law* (Elgar 2007).
A practical example of the constitutional approach described, in an evolutionary key, is given by social policy, on which see in depth: Catherine Barnard, 'EU "Social" Policy From Employment Law to Labour Market Reform' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 21.

sustainability governance. By navigating the tension between labour market flexibility and constitutional durability, the article establishes a foundational research agenda for the evolving landscape of legal scholarship.

The discussion is, accordingly, structured in five sections. Section 2 frames the immanence of the right to work within the Union's substantive legal order and its 'Material Constitution'. Sections 3 and 4 analyse the interconnection between workers' rights and the three dimensions of sustainability, tracing the transmigration of these principles from international to European legal spaces. Section 4.1 examines how sustainability policies have achieved constitutional standing within EU internal and external policy agendas. Finally, Section 5 evaluates the role of Court of Justice of the European Union (CJEU) in harmonising this framework, before the concluding remarks offer a roadmap for the future integration of work-related rights as foundational tenets of the European democratic system.

## 2 LABOUR RIGHTS IN THE MATERIAL CONSTITUTION OF THE EUROPEAN UNION

To understand the current legal landscape, it is necessary to frame the evolving right to work within the broader process of European integration. On the one hand, European institutions are increasingly adopting a discourse centred on shared constitutional values – such as dignity, solidarity, and equality – of which the right to work serves as an iconic embodiment.[5] On the other hand, there is a noticeable shift away from the view of workers' rights as merely social and political objectives.

Despite their inclusion in the European constitutional fabric, these rights are being gradually elevated to serve as fundamental principles guiding labour policies.

Indeed, the pursuit of European governance aligned with international labour standards relies on mechanisms that imbue the right to work with deeper normative value. This contributes significantly – if not formally – to its consolidation as a founding principle of the European constitutional order.

Moving further into the theoretical mapping of the right to work within the EU's architecture, it becomes essential to establish a rigorous conceptual distinction between the right to work (pertaining to labour market access and employment) and decent work (concerning the qualitative dimension of the employment relationship). A primary challenge in contemporary EU legal discourse remains the problematic overlap between these two constructs.

The right to work, *stricto sensu*, is ontologically prior to the international legal concept of decent work.[6] Rather than a subjective entitlement to guaranteed employment, it is framed as a fundamental freedom of access to a fair and inclusive labour market. Conversely, decent work – which requires upholding fundamental human rights within the workplace, as articulated in the 2006 UN discourse[7] – represents the tangible manifestation of the Social

[5] European Commission, 'Supporting people and strengthening our societies and social model , a priority for the 2024-2029 mandate in '*A Europe built on social fairness*'<https://commission.europa.eu/priorities-2024-2029/european-social-fairness_it> accessed 10 April 2025.
[6] Article 23 of the Universal Declaration of Human Rights (10 December 1948) The General Assembly 217 A (Resolution, 10 December 1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 7 May 2025.
[7] United Nations, Committee on economic, social and cultural rights, General Comment, n. 18, 24 November

Market Economy through the regulation of working conditions.[8] Intimately linked to this are 'rights at work': those fair and favourable conditions from which the broader well-being of the workforce flows. These rights are a direct corollary of the decent work agenda and remain inextricably bound to it.[9]

The proposed constitutionalisation represents a transformative convergence of these dual dimensions under the aegis of sustainable development. This interplay transmutes social objectives into robust interpretative principles for legislators and judiciaries alike. However, the elevation of labour rights requires looking beyond the Treaties' formal text to the EU's 'Material Constitution'—the substantive balance between market integration and social protection. While formal Treaties were long perceived as socially indifferent, the 'Material Constitution' has evolved through incremental constitutionalisation, systematically elevating social objectives into mandatory benchmarks for the legality of EU actions.

This incremental evolution is not a modern contingency but a historical necessity. The evolutionary trajectory of social rights is deeply embedded in the EU's development, having emerged primarily as a strategic response to the intensification of globalisation during the 1990s.[10]

Challenging the neoliberal paradigm, the constitutionalisation of work functions as a Polanyian 'societal counter-movement',[11] where regulatory frameworks insulate society from market expansion. Consequently, the integration of social rights into the economic system has fundamentally transformed the protection of vulnerable groups into a mandatory legal imperative rather than a discretionary moral concern.[12]

The material transition to the constitutional recognition of workers' rights, however, is due to the European Courts in the 2000s, when the importance of the debate over the admissibility of these rights became apparent. The legal subsumption of the most important labour rights, such as the right to strike, freedom of association, and collective action, under fundamental human rights bridged the rift that had previously complicated the relationship between labour rights and democratic constitutionalism, traditionally devoted to political and civil rights.[13] For its part, the process of constitutional harmonisation of labour

2005, Article 6 of the International Covenant on Economic, Social and Cultural Rights.

[8] The term 'decent work' was officially introduced in 1999 by Juan Somavía, then ILO Director-General, in his report to the 87th Session of the International Labour Conference <https://webapps.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> accessed 10 April 2025.

[9] During the UN General Assembly High-Level Event entitled 'Achieving Poverty Eradication through Full Employment and Decent Work for All in the Post-2015 Development Agenda', Secretary-General Ban Ki-moon identified decent work as a foundational pillar and an indispensable instrument for sustainable global progress <https://www.ilo.org/resource/statement/un-secretary-general-decent-work-related-all-facets-sustainable-development> accessed 10 April 2025.

[10]See e.g: Stefano Giubboni, 'Embedded liberalism: the original constitutional compromise and its crisis' in Stefano Giubboni (ed), *Social Rights and Market Freedom in the European Constitution A Labor Law Perspective* (Cambridge University Press 2009) 7-93.

[11] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press 1944). Judy Fudge, 'The new discourse on workers' rights: from social to fundamental rights?' (2007) 29(1) Comparative Labor Law and Policy Journal 29.

[12] Guy Standing, *Global Labor Flexibility: In Search of Distributive Justice* (Houndsmill, Basingstoke: Macmillan Press Ltd 1999).

[13] Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP* EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* EU:C:2007:809; *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008); *Danilenkov v Russia* App no 67336/01 (ECtHR, 30 July 2009).

rights can be traced back to a phase of constitutionalism in which sovereign States ceded their authority to market forces, entering into transnational agreements that limited their regulatory power.

At the same time, certain constitutional principles have been incorporated into international obligations (at the international level, through the International Labour Organization (ILO); at the supranational level, through the EC Treaties), thereby elevating the role of the Courts as privileged forums for workers' claims.[14]

Indeed, the formulation of labour standards as international human rights is rooted in international law. In this context, the ILO remains the pre-eminent body for the protection of human rights at work,[15] while the obligations imposed upon contracting parties are increasingly recognised as possessing a constitutionally binding scope and effectiveness.

While the development of international minimum standards on working conditions, along with the regulatory framework governing the full spectrum of fundamental workers' rights, falls primarily within ILO mandate, the 'value-based dimension' of labour-related provisions is equally discernible within the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[16] While the ECHR, as bears repeating, does not contain a catalogue of social rights, it does not erect an impermeable barrier between socio-economic rights and civil and political rights. Not surprisingly, thanks to the Strasbourg Court, the evolutionary and teleological interpretation of the Convention has facilitated the loosening of the inherent civil and political constraints, extending to social rights the protection it otherwise affords only to conventional rights. It is significant that the European Court of Human Rights (ECtHR), in adjudicating upon various provisions of the Convention, has developed formulas that entail a form of indirect or transversal protection of labour rights, thereby drawing attention to the economic and social implications of the civil and political rights enshrined in the 'Treaty'.[17]

The ongoing issue at international level is the absence of genuine indivisibility among human rights categories, even though the UN General Assembly has repeatedly affirmed it.[18] The international legal system maintains, in fact, a critical distinction between civil and

[14] Stephen Gill, 'Globalization, Market Civilization and Disciplinary Neoliberalism' in Eivind Hovden Edward Keene (eds), *The Globalization of Liberalism* (Millennium. Palgrave Macmillan London 2002); Christine Kaufmann, 'Globalization and Labor Rights: The Conflict between Core Labor Rights and International Economic Law' (2007) 36(4) Industrial Law Journal 491.

[15] ILO 'Declaration on Fundamental Principles and Rights at Work' 37 ILM 1233 (18 June 1998) <https://www.ilo.org/sites/default/files/2024-04/ILO_1998_Declaration_EN.pdf> accessed 10 April 2025.

[16] Virginia Montovalou, 'The Protection of the Right to Work Through the European Convention on Human Rights' (2014) 16 Cambridge Yearbook of European Legal Studies 313.

[17] On ECHR Article 10, *Guja v Moldova* App no 14277/04 (ECtHR, 12 February 2008). On ECHR Article 8, *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017); *López Ribalda v Spain* Apps nos 1874/13 and 8567/13 (ECtHR, 17 October 2019). On ECHR Article 6, *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018); *Pengezov v Bulgaria* App no 66292/14 (ECtHR, 10 October 2023). On ECHR Article 11, *Humpert and others v Germany* Apps nos 59433/18, 59477/18, 59481/18, 59494/18 (ECtHR, 14 December 2023). Mike Forde, 'The European Convention on Human Rights and Labor Law' (1983) 31(2) The American Journal of Comparative Law 301.

[18] The General Assembly, 'Declaration on the right to Development' A/RES/41/128 (4 December 1986) <https://digitallibrary.un.org/record/126476?v=pdf> accessed 7 May 2025; Second United Nations World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (14–25 June 1993) <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> accessed 7 May 2025.

political rights requiring immediate safeguard via domestic legal systems and social rights, whose realisation mandates the enactment of concrete measures.[19]

The obligation of States to implement measures ensuring the enjoyment of social rights is often tempered by the concern that incremental interventions might inadvertently infringe upon fundamental political rights, which are traditionally viewed as non-derogable[20]. A cautious approach to determining which categories of rights are deemed protectable independently of State action – and which are not – suggests that social rights possess an inherent existence that remains independent of their formal recognition or the specific socio-political conditions of their implementation.

As such, these rights play a fundamental role not only in the protection of the individual but also in the promotion of social cohesion and economic stability.[21]

Ultimately, labour rights serve, *inter alia*, as the cornerstone of social justice.[22]

In contrast to the international law, the supranational legal framework exhibits greater cohesion, organising labour rights within a hierarchical system of legal bases. These are specifically designed to promote high employment, robust social protection, and the continuous improvement of working conditions.

This structured set of legal sources establishes a consistent regulatory baseline for the European workforce, reflecting a clear path toward uniformity.

These provisions represent, in other words, a constitutional legacy inherent to European democracy, where the layering of regulatory protections ensures a comprehensive social safety net and a multi-level defence of fundamental rights across the EU.

Specifically, the right to work – which finds its initial constitutional consolidation within national legal systems – is further enshrined in the Treaties. This is reflected in the codified text by the presence of both the positive and negative dimensions of labour law.

Regarding the positive dimension of labour law – as the body of rights at work and the guarantee of favourable working conditions – the Treaties establish a distinct chain of functional integration. This framework derives from the combined effect of Article 3(3) TEU and Article 9 TFEU. At the constitutional apex, Article 3(3) TEU defines the EU's objective as the promotion of a 'highly competitive social market economy'. While this serves as the foundational constitutional anchor, it lacks autonomous regulatory power; nonetheless, it carries binding weight as an obligation of result.

Bridging this normative framework is the horizontal clause of Article 9 TFEU, which performs a dual function: it mandates that the objectives set out in Article 3(3) TEU must inform all Union policies, and, crucially, it acts as a cross-reference to the Social Policy Title (Title X TFEU), thereby conferring upon work the status of a right that can only be realised

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[19] Julie Fraser, 'Challenging State-centricity and legalism: promoting the role of social institutions in the domestic implementation of international human rights law' (2019) 23(6) The International Journal of Human Rights 974.

[20] Asbjørn Eide and Allan Rosas, 'Economic , 'Social and Cultural Rights: A Universal Challenge' in Asbjørn Eide et al, *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers 1995).

[21] ILO, 'The state of social justice- A work in progress' (23 September 2025) <https://www.ilo.org/research-and-publications/state-social-justice-2025> accessed 23 June 2025.

[22] Rapporteur Group on Democracy within the Committee of Ministers of the Council of Europe, 'Social rights are fundamental to democratic stability', Directorate General for Human Rights and the Rule of Law Council of Europe (9 August 2025) <https://www.coe.int/en/web/european-social-charter/-/social-rights-key-to-democratic-stability> accessed 23 June 2025.

through concrete measures defining its scope and substance.[23]

In this capacity, Article 9 TFEU functions as a constitutional shield within the field of social policy.

This chain is further substantiated through Article 151 TFEU, which identifies 'improved living and working conditions' as a shared objective, and Article 153(1)(a)(b) TFEU, which provides the EU with the specific legal basis to adopt binding directives.

Consequently, interpreting the right to work through the lens of job quality turns a general aspiration into a concrete mandate for Member States. This framework leverages the EU's social competences to establish minimum protection standards, thereby effectively grounding the right to work as a justiciable right to sustainable and regulated employment.

The negative dimension of labour law – understood as the regulation of access to employment – is primarily anchored in the internal market provisions set forth in Articles 45–48 TFEU. These articles inherently subordinate the right to work to the principles of free movement, which, serving as pillars of the single market, often act as a constraint on policies aimed at the unconditional protection of social rights.

Specifically, Article 45(2) TFEU – concerning the prohibition of discrimination based on nationality – and Article 45(3)(a)(c) TFEU – guaranteeing the right to accept offers of employment and reside in a Member State – provide the textual basis for a right to work configured as unhindered access to the labour market.

While prevailing doctrine often mischaracterises the right to work in the EU as a mere impediment to market policies,[24] it functions as a social right of freedom, encompassing the individual's liberty to access employment and pursue a preferred professional path without market-based interference.

Unlike programmatic social coordination, the provisions concerning the right to work within the EU Treaties create a direct, justiciable link between the individual and the European legal order.[25] Designed as a negative liberty, the right to work serves as a prohibition against barriers that might impede free movement or social progress. Consequently, the EU Treaties do not merely guarantee mobility; they grant individuals a subjective legal position, empowering them to challenge discriminatory obstacles and assert an unobstructed right of access to the European labour market.

In this regard, the scope of the right to work is delineated by the 'constitutional counter-limits' of Articles 145–149 TFEU. While these provisions align social objectives with economic policies, they simultaneously formalise a limitation on EU competences in the employment sphere. These policies function as instruments of coordination and support – an expression of 'soft power' rather than mandatory harmonisation. Even when the ordinary legislative procedure is employed for prescriptive measures under Articles 149 and 153(2)(b) TFEU, the objective remains the support of national systems rather than the homogenisation of domestic laws, thereby preserving the sovereignty of Member States in social affairs.

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[23] Silvia Giudici, 'Interpreting EU Internal Market Powers in Light of Article 9 TFEU Social Objectives: Implications for the Attribution of Competences' (2014) 20 (31) Croatian Yearbook of European Law and Policy 35.

[24] Diamond Ashiagbor, 'The Right to Work' in Gráinne de Búrca et al (eds), *Social Rights in Europe* (Oxford University Press 2005) 241–260.

[25] Paul Teague and John Grahl, 'The European Community Social Charter and Labour Market Regulation' (1991) 11(2) Journal of Public Policy 207.

However, while the EU acts in deference to the Member States' social responsibilities, the Treaties legitimise supranational institutions to require States to maintain or introduce more favourable provisions for workers, for example through directives establishing minimum requirements for working and employment conditions, which Member States are promptly required to transpose.

Therefore, while state sovereignty defines the boundaries of the EU's employment competences, sovereign employment policies must still be reconciled with the explicit Treaty mandate to develop national employment plans that integrate the respective institutional frameworks. This obligation enjoys unquestionable autonomy within the European legal space and grants indisputable regulatory authority upon European public bodies.

The EU's legal architecture reveals a distinct structural tension between the right to work and rights at work. While the former is addressed through macro-level employment policies, the latter – specific protections – relies on the more granular legal bases of Article 153 TFEU. Consequently, rather than relying on a monolithic paradigm, the EU approach to the right to work constitutes a composite structure bridging the 'soft' coordination mechanisms of Article 148 TFEU with the 'hard' minimum standards established under Article 153 TFEU.

Such a composite structure implies that, while subsidiarity rules out the forced alignment of national systems, it nevertheless creates a systemic obligation that Member States are bound to respect.

In this context, secondary legislation serves as the decisive mechanism for operationalisation, transforming broad, programmatic Treaty objectives into concrete, binding rules with direct impact within domestic legal orders.

Recent directives, in particular, serve as the catalyst for the completion of this regulatory framework. By incrementally implementing shared objectives and minimum protection requirements, these measures compel Member States to elevate their national standards and ensure the full coordination of their respective policies.

In this regard, the pursuit of sustainable policy objectives encompasses several key areas: identifying instruments with a direct regulatory impact on supply chains;[26] strengthening the protection of digital workers;[27] providing robust mechanisms for the processing of personal data in the workplace; harmonising the legal framework for the development, marketing, and use of AI in the workplace according to risk levels;[28] regulating remote work via the recognition of the right to disconnect;[29] and reinforcing the principle of transparency regarding essential working conditions.[30]

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[26] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L2024/1760, paras 1–58.

[27] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work [2024] OJ L2831/1.

[28] 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) [2024] OJ L2024/1689.

[29] European Parliament, 'Recommendations to the Commission on the right to disconnect' 2019/2181(INL) (21 January 2021).

[30] Directive (EU) 2019/1152 of the European Parliament and of the Council on transparent and predictable working conditions in the European Union [2019] OJ L186/105.

This approach demonstrates how the EU leverages the single market – now inextricably linked to sustainable development – to mandate social standards. Even in the absence of broad, formal social competence, the EU effectively converts its normative influence into binding, generally applicable regulation, thereby cementing the constitutionalisation of the right to work.

## 2.1 THE DIALOGUE BETWEEN THE CHARTERS ON SOCIAL RIGHTS FOR A WELFARE MODEL

The regulatory framework does not operate in a vacuum. While the Treaties and secondary legislation provide the structural mechanics of European social policy, their full constitutional significance is only revealed through the lens of fundamental principles.

To bridge the gap between economic governance and social justice, it is essential to look at the broader framework that informs the EU's legal order. This necessitates a shift in focus from the literal text of the Treaties to the interpretative role of international social Charters and the general principles of EU law, which serve as the leading guardians of the European social model.

In addition to the Treaties and the directives that operationalise their content, the general principles of European law, which are rooted in the constitutional traditions of the Member States, reaffirm the vision of workers' rights as enjoying axiological parity with political and civil rights. Yet, these rights are not absolute; rather, they stem from the jurisprudential process of negative integration that removed obstacles to market functioning through the extensive interpretation of the fundamental freedoms laid down in the Treaties.[31]

This finding is unsurprising, given that the post-constitutional right to work, in its nuances, is the result of a cross-reading of the European Charters of Fundamental Rights.[32] These Charters, even prior to the Charter of Fundamental Rights of the European Union (CFREU), celebrated the importance of a code of fundamental rights on par with the ECHR, as counterpart of the convention civil and political assumptions.[33]

These comprise the European Social Charter of the Council of Europe, as amended in 1996, and the Community Charter of the Fundamental Social Rights of Workers of 1989.

Although these instruments formally codify social rights as fundamental, it is notably to instil them with a substantive constitutional dimension.[34] The supervisory system of

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[31] Free movement of workers (TFEU Article 45); non-discrimination (TFEU Article 10); fair and decent working conditions (CFREU Article 31). See Stephanie Reynolds, 'Aim and Duty, Sword and Shield: Analyzing the Cause and Effects of the Malleability of "Social Integration" in EU Law' (2018) 2 European Papers 693.

[32] For a reading on the interaction of the relevant international human rights Charters and the EU law see Chiara Altafin, Karin Lukas, and Manfred Nowak, 'The normative framework of the EU's commitment to human rights: The Treaties, the Charter, Member States' constitutional traditions, and international law' in Jan Wouters et al (eds), *The European Union and Human Rights: Law and Policy* (Oxford University Press 2020) 79-116.

[33] Fritz Fabricius 'Die Europäische Sozialcharta' in Stavroula Vassilouni (ed), *Aspects of the Protection of individual and Social Rights* (Hestia Athens 1995) 187-202.

[34] With the 1995 Protocol (which subsequently came into force in 1998), a system of collective complaints was introduced, but the procedure remained different from the individual recourse typical of civil rights <https://www.cvce.eu/content/publication/2003/10/7/10186d55-fceb-4d6d-9e2e-c53c637a9b0e/publishable_en.pdf> accessed 12 March 2026.

the European Social Charter, for instance, has long relied on a framework of periodic reporting overseen by the European Committee of Social Rights, whose conclusions remain, in the first instance, non-binding.[35]

The Community Charter, while replete with social policy principles and objectives, functioned primarily as a programmatic document that guided the evolution of social policy during the early 1990s.[36]

Nevertheless, while these Charters do not constitute binding legislative texts, they contain value-laden, well-defined provisions that have profoundly influenced the integration of fundamental social rights into the founding Treaties. For instance, the European Social Charter outlines a comprehensive definition of the right to work, integrating the principle of individual freedom of choice with the States' obligation to guarantee the effective exercise of this right through proactive policies, therefore, by pursuing an economic policy aimed at full employment.[37]

Furthermore, pursuant to Articles 6 and 46 TEU, they serve as interpretative tools of significant value for the legal reconstruction of the right to work.[38]

In contrast, the CFREU – whose constitutional character must be reaffirmed – operates as a reference text for national jurisdictions and a source of domestic law, as well as part of the jurisdictional circuit within the Member States.

The CFREU, in fact, holds direct legal effects, though its application remains constrained by the Treaties' provisions and national practices, as mandated by Article 52(2). These factors, as *ius positum*, restrict the recognition of rights beyond those already conferred by the constitutional framework (Article 53).[39]

Building upon the foundation of the 2001 Constitutional Treaty, the Charter emerged as a primary response to concerns regarding the legitimacy of the European social model.[40] Although it does not establish a fundamental right to employment, it provides an undeniable constituent impetus to social policy by situating the social dimension alongside the European Union's market framework.

Thanks to the CFREU and the preceding Community Charter, the narrow perception of the right to work as a derivative of the EU's fundamental freedoms (Articles 45, 49, and 56 TFEU) is now obsolete. The right to work is no longer strictly commensurate with Union

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35 The European Committee of Social Rights (ECSR) serves as the supervisory body responsible for monitoring the compliance of Council of Europe Member States with the 1961 European Social Charter and its 1996 revised version <https://www.ecoi.net/en/source/11060.html#:~:text=%E2%80%9EThe%20European%20Committee%20of%20Social%20Rights%20monitors%20compliance,reports%20drawn%20up%20by%20Contracting%20Parties%20%28Reporting%20System%29> accessed 12 March 2026.

36 George M Kraw, 'The Community Charter of the Fundamental Social Rights of Workers' (1990) 13(3) Hastings International & Comparative Law Review 467.

37 Karin Lukas, 'Article 1: The right to work' in Karin Lukas, *The Revised European Social Charter* (Edward Elgar Publishing 2021) 30-47.

38 On the increased capacity for mutual influence between EU law in social matters and the European Social Charter in the face of crises see George T Theodosis, 'The European Social Charter and the Charter of Fundamental Rights of the European Union' in Despoina Anagnostopoulos (ed), *European Identities, Inclusion and Equality* (Springer 2025) 85-102.

39 Brian Bercusson, *European Labor Law* (Cambridge University Press 2009); Ruth Dukes, 'The Constitutional Function of Labor Law in the European Union' in Neil Walker, Josephine Shaw, and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011).

40 Brian Bercusson, *Social and Labor Rights under the EU Constitution* in Gráinne de Búrca et al (eds), *Social Rights in Europe* (Oxford University Press 2005) 169.

citizenship, having transcended its initial universalistic aspiration to become a constitutionally guaranteed freedom.

Indeed, the very existence of multiple provisions dedicated to labour rights refutes critical assertions regarding the Charter's failure to promote and stimulate employment policies. Moreover, some of its provisions evoke state or sub-state political actions, suggesting, in parallel, an active dimension that undoubtedly inspires the Charter and has been consistently highlighted by the ILO.[41]

In interpreting the principle of professional freedom articulated in Article 15(1) CFREU,[42] for example, one must consider its functional connection with paragraph 2 – which incorporates the four freedoms guaranteed by Articles 26, 45, 49, and 56 TFEU – and paragraph 3, which extends specific working conditions to third-country nationals. The latter must be read in alignment with Article 156 TFEU, regarding the Union's complementary role in supporting Member States' actions.

It would, however, be legally inaccurate to interpret Article 15 CFREU as a subjective right to employment. Both its textual structure and the *travaux préparatoires* confirm that it constitutes a freedom of choice and exercise of a profession without arbitrary barriers, rather than a guarantee of a job position.[43]

Therefore, the professional freedom enshrined in Article 15 CFREU functions as a *status libertatis* – a defensive right protecting the individual's self-determination within the market. Its interpretation requires a functional reading alongside the Union's supportive role in employment policy (Article 16 CFREU, freedom to conduct a business). Understood as 'occupational freedom' within the Treaties' constitutional framework, the right to work appears to be a justiciable right to free, non-discriminatory participation in the European labour market.

Similarly, Article 34(1) CFREU regarding social security and assistance is functionally linked to Directive 89/391/EEC on occupational health and safety. This relationship acts as a vital normative bridge, transforming the abstract right to protection into a concrete, proactive obligation. Rather than a purely technical standard, the Directive offers a material basis that renders the right to social security effective; by mandating a robust risk-management system, it ensures that social assistance is preceded by the prevention of damage. Consequently, the Directive shifts the focus of the right to protection from mere economic relief to the maintenance of physical integrity and work-related dignity within the single market.[44]

The potential constitutional elevation of labour provisions within the Charter faces, nonetheless, significant structural constraints. Crucial to this is the dichotomy between 'rights' and 'principles' under Article 52(5) CFREU, which establishes a functional threshold

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[41] See CFREU Article 27 on the right to information and consultation; Article 30 on protection in the event of unjustified dismissal; Article 31 on fair and just working conditions; Article 34 on social security and social assistance.

[42] Article 15 CFREU is also inspired by Article 1(2) of the 1961 European Social Charter and Article 19(4) of the 1989 Community Charter of the Fundamental Social Rights of Workers.

[43] Marc Steiert and Niall Coghlan, *The Charter of Fundamental Rights of the European Union: the 'travaux préparatoires' and selected documents* (European University Institute 2020) <https://hdl.handle.net/1814/68959> accessed 12 January 2026.

[44] On collective labour rights, CFREU Article 28 on the right to collective bargaining and action, located in Chapter IV, entitled 'Solidarity'.

for determining the justiciability of legal norms within the EU hierarchy.[45]

As emerged by *the Explanations relating to the Charter* – which has official interpretative value under Article 52(7) – this distinction is designed to preserve the balance of competences between the EU and its Member States, limiting judicial activism in areas requiring complex political and economic mediation.[46]

While rights are precepts endowed with a complete and unconditional normative structure capable of producing direct vertical (and, under specific conditions, horizontal) effects,[47] principles – such as those under Title II (Freedoms) and Title IV (Solidarity) CFREU – generally require legislative integration at the EU or State level to be fully invoked. Consequently, their judicial relevance is primarily confined to constituting benchmarks for the legitimacy of implementing acts or as interpretive tools for systematic legal coherence.[48]

However, CJEU case law demonstrates that this demarcation is not a static barrier.[49] Through the 'test of suitability for direct effect', the Court examines on a case-by-case basis whether a provision, despite its classification as a principle, is worded with sufficient clarity, precision, and unconditionality to serve as an enforceable standard of judgment.[50]

This progressive approach is increasingly evident in the transformation of Title II and Title IV provisions under the pressure of the 'third generations' of rights[51] – including the right to information, data protection, and intergenerational equity – all of which aim to transcend the classic dualism between rights and principles.

Crucially, the principle of sustainable development has evolved from a mere programmatic objective into a foundational framework for EU action, structurally informing the entire system of employment law.[52] Within this architecture, the 'Just Transition' serves as a catalyst, steering regulatory evolution toward the emergence of new, justiciable labour protections.[53]

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[45] For a more nuanced approach regarding the binding effects of principles, Tobias Lock, 'Rights and principles in the EU Charter of Fundamental Rights' (2019) 56(5) Common Market Law Review 1201.

[46] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303. Case T-13/99 *Pfizer* EU:T:2002:209. Steve Peers and Sacha Prechal, 'Article 52: Scope and Interpretation of Rights and Principles' in Steve Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Beck/Hart 2014).

[47] Matteo Fornasier, 'The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?' (2015) 1 European Review of Private Law 29; Sacha Prechal, 'Horizontal direct effects of the Charter of Fundamental Rights of the EU' (2020) 66 Revista de Derecho Comunitario Europeo 407.

[48] For comparison with Article 20 CFREU, see Case C-356/12 *Glatzel* EU:C:2014:350.

[49] Jasper Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11(2) European Constitutional Law Review 321.

[50] Nicole Lazzerini, '(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: *AMS*' (2014) 51(3) Common Market Law Review 907; Eleni Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable' (2019) 15(2) European Constitutional Law Review 306. On the evolution of the methodological approach of the Court of Justice regarding the horizontal direct effect of fundamental rights, see Eleni Frantziou, 'Mangold Recast? The ECJ's Flirtation with Drittwirkung in Egenberger' (*European Law Blog*, 7 August 2024) <https://www.europeanlawblog.eu/pub/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/release/1> accessed 4 February 2026.

[51] Regarding third generation rights, also called collective or solidarity rights, see: Abdul Hannan, 'Interface between the Third Generation Human Rights and Good Governance in a Globalized World' in Jeffery F Addicott et al (eds), *Globalization, International Law and Human Rights* (Oxford University Press 2012) 177.

[52] Article 3(3) TEU, which establishes the commitment to sustainable development based on balanced growth and social progress; Article 21(2)(d) TEU, which includes sustainability in external action; Article 11 TFEU, which requires the integration of environmental concerns into Union policies; and Article 37 CFREU (Environmental Protection), which ensures its integration into policies in accordance with the principle itself.

[53] E.g., the right to participation, consultation, information, the right to whistleblowing and the right to professional training/requalification – upskilling and reskilling.

As a result, the EU's 'Material Constitution' is clearly pivoting away from its original market-centrism. The interaction between Article 3 TEU and Article 9 TFEU provides the legal foundation to regard the Green Deal and the Sustainable Development Goals (SDGs) as instruments of constitutional density, rendering social rights mandatory parameters for the consolidation of the right to work in the EU.

## 3 INTEGRATING WORKERS' RIGHTS INTO SDGs: THE EU REGULATORY ROLE

In the EU, the mutual dependence between sustainable development and workers' rights is crucial for a system aimed at building a more equitable, resilient, and prosperous society.[54]

Framed by Articles 3(3), 5, and 21(2)(d)(f) TEU, sustainability constitutes a self-standing objective within the Union's legal order. This status reinforces its role as a foundational principle of the European economic model, mirroring the commitments of the UN 2030 Agenda and the Europe 2020 Strategy.[55]

Integrating labour rights into the EU's sustainability agenda is, however, a pragmatic imperative: social stability and productivity constitute the structural foundations upon which the success of the green and digital transitions depends.[56]

Indeed, while the European legal system provides the normative framework underpinning the link between sustainable development and workers' rights, this commitment is increasingly manifesting across several strategic fronts. Within a multipolar global landscape, the EU's pursuit of such goals has evolved into a key element of its broader geopolitical and economic positioning.

Understanding the right to work requires moving beyond the programmatic nature of sustainability to examine its formal integration into EU law. This process has not merely supplemented existing policies but has fundamentally reconfigured the EU's legal architecture.

The integration of SDGs into the EU legal order represents an operation of constitutional anchoring. The regulatory bridge of Articles 3(3) TEU and 9 TFEU grants the SDGs legal force, reorienting European integration from market-driven logic toward the substantive protection of labour rights.

At the heart of this evolution lies a rigorous regulatory sequence, which firmly establishes the right to work as a core, inalienable element of the EU's constitutional order:

1. The value base: principles of the CFREU (e.g. Articles 15 and 31) provide the foundational values. The Charter functions both as a 'shield' against deregulatory

[54] In the State of the Union 2023, 'Building Europe's corporate resilience', the European Commission has focused on 7 objectives for building a more democratic and resilient Europe <https://commission.europa.eu/strategy-and-policy/state-union/state-union-2023/building-europes-societal-resilience_en> accessed 8 July 2025. European Commission, 'Resilience 2.0: Empowering the EU to thrive starch turbulence and uncertainty' COM (2025) 48 def.

[55] European Commission, 'The Political Guidelines of the Presidency 2024-2029' (18 July 2024) <e6cd4328-673c-4e7a-8683-f63ffb2cf648_en> accessed 8 July 2025. See also European Parliament, Directorate-General for Internal Policies, 'Social Sustainability, Concepts and Benchmarks' (2020) <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648782/IPOL_STU(2020)648782_EN.pdf> accessed 8 July 2025.

[56] Of contrary opinion, Marios C Iacovides and Konstantinos Stylianou, 'The new goals of EU competition law: sustainability, labor rights, and privacy' (2025) 3(3) European Law Open 587.

pressures and as a 'sword' to expand worker protections beyond the literal scope of secondary legislation.

2. The legislative translation: the principles enshrined in the Charter are transposed into Directives (often reinforced by the financial leverage of Structural Funds).

3. Constitutional density through the CJEU's lens: by means of judicial interpretation (most notably concerning Article 31 on fair and just working conditions), sustainability objectives shed their peripheral status, acquiring the constitutional density to convert policy goals into mandatory, enforceable requirements for Member States.

In this respect, the transition from the rhetoric of programmatic goals to their material constitutionalisation occurs through a tripartite action structure, which aligns the protection of workers with the three dimensions of sustainability.

First and foremost, the protection of workers intersects with the economic and productive dimension of sustainability. This relationship necessitates a paradigm shift in the perception of long-term efficiency: the protection of labour rights is no longer viewed as a mere external cost, but rather as a constituent element of the production process itself.

Within this framework, the regulatory evolution spearheaded by the European Union – through the Directive on *Corporate Sustainability Due Diligence* (CSDDD) – stands as an emblematic example of the transition to binding legal requirements.[57]

The legal mechanism underpinning the CSDDD provides for decent work formal legal codification, whilst elevating sustainability to a core parameter of legitimacy for economic conduct within the single market.

By imposing specific obligations regarding conduct and transparency across global value chains, the Directive establishes a robust system of legal accountability, anchored firmly in the principles of CFREU, particularly those concerning solidarity set out in Title IV. In this scenario, instruments such as the *Corporate Sustainability Reporting Directive* (CSRD)[58] and financing mechanisms such as the *Just Transition Fund* or *InvestEU* should not be construed merely as mechanisms for expenditure or economic incentivisation. Rather, they function as legal instruments of conditionality, by elevating social protection to a prerequisite for investment validity and ensuring that the economic transition upholds the acquired rights of workers.

Second, the protection of workers – which includes the right to decent conditions (Art. 31 CFREU), freedom of association (Art. 12 CFREU), collective bargaining (Art. 28 CFREU), and the principle of non-discrimination (Art. 21 CFREU) – constitutes the centre of gravity of the social dimension of sustainable development. This dimension triggers a precise mechanism for the legalisation of global commitments within the EU legal order.

In this context, respect for workers' rights is a prerequisite for legitimacy for a fair and inclusive development model.[59] The EU, in fact, integrates these values into its resilience

[57] Directive 2024/1760/EU (n 26).

[58] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022] OJ L322/15 (CSRD); Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13 (Taxonomy Regulation).

[59] Tonia Novitz, 'Labour Standards and Trade: Need We Choose Between "Human Rights" and "Sustainable

actions, using proportionate measures to ensure that the functioning of the single market does not disregard the management of social and sectoral crises.[60]

The crucial step towards constitutionalisation takes place at a time when the goals of the UN Agenda (SDG 8 on Decent Work) intersect with EU primary law. Here, the prohibition of forced and child labour (Articles 5 and 32 of the CFREU) and the promotion of gender equality (Article 23 CFREU) cease to be merely hortatory principles to become mandatory criteria for the implementation of EU legislation. In particular, SDG 8 is being absorbed into the EU's long-term policy framework not only in a spirit of continuity, but as a normative standard that the Commission uses to balance economic freedoms with fundamental rights, elevating decent work to a structural principle of European resilience.[61]

Third, the intersection between safety at work and environmental sustainability represents the ultimate step in the process of constitutionalisation of the right to work. This mechanism operates through a progressive convergence of new market regulations and traditional labour law, effectively transforming the 'Just Transition' into a prescriptive regulatory obligation.

In this context, the green transition and the digitisation of the market are not simple economic phenomena, but catalysts for a new mode of legislative production anchored in the CFREU. A paradigmatic example is the Directive on platform work,[62] which translates the principle of dignity and social protection into concrete rules on the algorithm and working conditions.

The doctrinal trajectory – herein conceptualised – mandates that companies modernise supply chains through reskilling and robust social protection, mitigating the risks of digital marginalisation.

In this scenario, supranational legislation – exemplified by the foundational Framework Directive 89/391/EEC – establishes a binding framework of legal liability.[63]

This system also provides the legal certainty necessary for collective bargaining to serve as a primary instrument for implementing constitutionally oriented social justice.

The theoretical framework of sustainability is thus operationally reflected in the EU's active labour policies. Evolving beyond soft-law coordination, the EU social policy has expanded its regulatory repertoire to transform social protection objectives into binding governance parameters.

Firstly, the European Employment Strategy (EES)[64] and the Europe 2020 Agenda have evolved into modernisation mechanisms that impose high-quality standards on Member States via the European Semester and the European Social Fund Plus (ESF+).[65] As

Development"?' in Henner Gött (ed), *Labour Standards in International Economic Law* (Springer 2018) 113-134.

[60] European Council, 'Conclusions on COVID-19, crisis management and resilience, security and defence, external aspects of migration and external relations' [2021] EUCO 22/21.

[61] Commission Strategic Foresight Report 2020, 'Charting a course towards a more resilient Europe' (9 September 2020) <https://commission.europa.eu/> accessed 16 July 2025.

[62] Directive 2024/2831/EU (n 27).

[63] Council Framework Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183/1.

[64] Known as *the Luxembourg Process*, it was consolidated by Council Decision (EU) 2024/3134 of 10 December 2024 on guidelines for the employment policies of the Member States [2024] OJ L series <http://data.europa.eu/eli/dec/2024/3134/oj> accessed 26 July 2025.

[65] Ralf Rogowski, 'The European Employment Strategy, the European Social Pillar and their Impact on Labor Law Reform in the European Union' (2019) 35(3) International Journal of Comparative Labor Law

instruments of regulatory conditionality, they leverage targeted financing – specifically for retraining and youth employment – to align national policies with the EU's overarching social imperatives.

Secondly, sectoral strategies – supported by legislative acts such as Directive 2024/2831/EU – aim to guarantee decent working conditions and gender equality – transpose CFREU principles into specific mandates for digital and industrial markets. In this context, social dialogue becomes an essential tool to ensure that industrial competitiveness does not compromise the creation of high-quality employment.[66]

The European Green Deal represents the initiative with the greatest impact on this trajectory of legal formalisation. It is not merely an environmental policy; it mandates a fundamental social conversion of market logic.[67] In response to systemic crises, the EU increasingly demands that the market be governed by precepts of social justice and constitutionally guaranteed rights,[68] as indispensable components of systemic resilience and foundational tenets of economic transition.

Coherently, the EU's commitment to sustainability and labour protection extends beyond the borders of the single market, embedding its constitutional values into its relations with third countries. This process is not only diplomatic; rather, it is predicated upon a precise regulatory formalisation, which utilises trade policy as a strategic vector for the global dissemination and enforcement of social standards.[69]

The elected legal framework is constituted by Free Trade Agreements (FTAs). These agreements represent the junction point between internal policies and external action, transforming the objectives of decent work into real social conditionality clauses. Although often formulated as cooperative commitments, they bind partners to respect ILO fundamental Conventions elevating social dialogue and the protection of workers to requirements for economic integration.[70]

The mechanism for transposing the Charter's principles into international treaty law is particularly evident in pre-accession processes and association agreements, such as the Deep and Comprehensive Free Trade Areas (DCFTAs) established with Georgia, Moldova, and Ukraine. Within these settings, the EU's engagement is translated into an obligation of legislative approximation under Articles 114 and 115 TFEU, by preparing the candidate

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and Industrial Relations 283.

66 European Economic and Social Committee, 'A new framework for free trade, economic partnership and investment agreements ensuring the effective involvement of civil society organisations and social partners and public awareness-raising' [2021] OJ C290/11.

67 Sebastian Oberthür and Ingmar von Homeyer, 'From emissions trading to the European Green Deal: the evolution of the climate policy mix and climate policy integration in the EU' (2023) 30(3) Journal of European Public Policy 445.

68 European Commission, Joint Research Centre, Tommi Asikainen et al, 'The future of jobs is green' (Publications Office of the European Union 2021). European Parliament, Research Service, 'Social and labor market impact of the green transition' (2024) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762329/EPRS_BRI(2024)762329_EN.pdf> accessed 1 September 2025.

69 ILO Report, International Institute for Labour Studies, 'The Social Dimensions of Free Trade Agreements' (6 November 2013) <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40inst/documents/publication/wcms_228965.pdf> accessed 26 July 2025.

70 Giovanni Gruni, 'Labor Standards in EU Free Trade Agreements: Substantive Issues and Recent Developments Concerning Their Enforcement' in Geraldo Vidigal and Karl Claussen (eds), *The Sustainability Revolution in International Trade Agreements* (Oxford University Press 2024) 89-106.

countries to align their domestic legal orders with the European social *acquis*.[71]

This process of legal convergence serves as a vehicle for harmonisation, ensuring that the fundamental rights established within the Union – particularly those pertaining to labour standards and social justice – become benchmarks for legal reform in partner States. Consequently, association agreements and DCFTAs function not merely as instruments of trade liberalisation, but as conduit for the systemic expansion of the EU's regulatory paradigm.

In this light, the EU leverages sustainable development as a strategic regulatory catalyst, transposing social imperatives into basic operational standards. This consolidates the right to work as a core pillar of the EU 'Material Constitution', setting an enforceable standard that the EU projects globally to guarantee that economic and green transitions are achieved without compromising social equity.

## 4 THE EPSR BETWEEN STRATEGIC AUTONOMY AND SOCIAL SUSTAINABILITY

The creation of a European sustainable development model focused on social justice finds its most important historical intervention in the EPSR.

Through its 20 principles, it is not only a reference framework for labour markets efficiency and social protection, but also a pivotal strategic instrument for structurally embedding social sustainability at the core of the EU's economic and regulatory policy.[72] It forges a direct teleological and operational connection between workers' rights and the global sustainability agenda.[73]

As outlined above, the transition from a mere catalogue of labour and welfare initiatives to the recognition of a quasi-constitutional status of fundamental social rights takes place through a dynamic mechanism, of which the EPSR is an integral part. If the Charter-Directive system constitutes the technical framework of European social law, the Pillar represents the strategic vector that guides its evolution.

The Pillar, along with its 2021 Action Plan,[74] in fact, reveals a multifaceted nature that operates simultaneously on three interconnected levels: the redefinition of the relationship between EU and international law, the integration of sustainability into EU policies (internal dimension), and the projection of the Union as a global *norm-setter* capable of exercising true strategic autonomy (external dimension).[75]

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71 DCFTA pursuant to Articles 114 and 115 TFEU <https://trade.ec.europa.eu/> accessed 4 August 2025.
72 Council, the informal meeting of Heads of State and Government in Gothenburg (Press release, 7 November 2017) <https://www.consilium.europa.eu/it/press/press-releases/2017/11/17/european-pillar-of-social-rights-proclamation-and-signing/> accessed 5 August 2025. The informal discussion identified the founding principles of the European Pillar of Social Rights.
73 Konstantinos A Polomarkakis, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' (2019) 29(2) Social and Legal Studies 183.
74 The new action plan of 2026-2030, published at the end of 2025, takes into consideration the impact of digitalisation on employment and also address the related right to disconnect and advance equality. European Commission, Employment, Social Affairs and Inclusion, 'Action Plan on the European Pillar of Social Rights, on The new Action Plan to implement the European Pillar of Social Rights' <https://employment-social-affairs.ec.europa.eu/policies-and-activities/european-pillar-social-rights-building-fairer-and-more-inclusive-european-union/european-pillar-social-rights-action-plan_en> accessed 11 March 2026.
75 Charlotte Beaucillon, 'Strategic Autonomy: A new identity for the EU as a global actor' (2023) 8(2) European Papers 417.

The first line of inquiry concerns the redefinition of the EU's role in international labour law, marking a crucial transition from a logic of passive reception of international social standards to one of strategic autonomy in social sustainability policy.

In particular, the EPSR consolidates – and, to some extent, transcends – the cooperative framework established between the EU and the ILO, both of which are driven by a shared commitment to a fair and inclusive future of work.[76] While international labour standards serve as the normative cornerstone of this institutional relationship, the EU repurposes these standards as a programmatic foundation for its entire European social policy agenda.

The EPSR systemic structure reveals a synergistic convergence with rights and principles already codified in the ILO Conventions.[77] The axiological and systematic alignment – evidenced by the shared values of concepts such as decent work, social protection and equality – is not merely formal tribute to the International Organization, but embodies the functional transposition of social sustainability principles from the international to the European legal order.

The legal significance of this convergence lies in the Pillar's structural impact on the EU legal order, which manifests across two distinct normative levels. The first level is implementation: the principles contained within the Pillar are crystallised into a plurality of hard law acts.[78] Through this regulatory process, a programmatic principle is stripped of its purely political character, transitioning into a normative standard of legal conduct binding upon both Member States and individuals. The second level is interpretation, rooted in a robust constitutional nexus with the CFREU, as the Pillar serves as an interpretive lens for pre-existing social rights and general principles of law, such as equal treatment and non-discrimination.[79]

This means that, in implementing the EPSR, EU institutions move beyond a literal interpretation of isolated acts; instead, they apply a finalistic approach, decoding the *ratio* of EPSR to ensure full consistency with the EU's emerging social Constitution.

The rationale underpinning the research presented thus far is that the non-binding nature of EPSR does not impair its efficacy; rather it facilitates a more flexible and pervasive form of legal influence. By guiding national policy-making and anchoring Member States within a rigorous monitoring framework – exemplified by the Social Scoreboard's

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[76] ILO General Director, 'European Pillar of Social Rights central to an equitable future of work in Social Summit for Fair Jobs and Growth' (Conclusions, 17 November 2017) <https://www.ilo.org/resource/statement/european-pillar-social-rights-central-equitable-future-work> accessed 5 August 2025. More recent: ILO, Office for the Union European and the Benelux countries, 'Contribution to the consultation on the second Action Plan for the European Pillar of Social Rights (EPSR)' (2025) <https://www.ilo.org/sites/default/files/2025-09/ILO%20key%20messages_EPSR%202nd%20action%20plan.pdf> accessed 5 August 2025.

[77] ILO Conventions: Nos 29 (1930) and 105 (1957) on forced labour; Nos 87 (1948) and 98 (1949) on freedom of association; Nos 100 (1951) and 111 (1958) on discrimination; Nos 138 (1973) and 182 (1999) on child labour.

[78] (Principle 9, balance between work and family life): Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L188/79; (principle 7, Information on working conditions and protection in the event of dismissal): Directive (EU) 2019/1152 (n 30); (principles 6 and 14 wages and minimum income): Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union [2022] OJ L 275/33.

[79] On the legal effectiveness of soft law acts, Luis Arroyo Jiménez, 'Beyond bindingness: A typology of EU soft law legal effects' in Petra Láncos et al (eds) *The legal effect of EU soft law* (Elgar Publishing 2023) 9.

distributional impact assessments[80] – the Pillar exerts a functional pressure that surpasses the limits of traditional legislative bindingness.

The second line of inquiry examines how the EPSR structurally integrates the social dimension into European economic governance. This evolution signifies a departure from a market-centric paradigm in favour of a development model in which social advancement is a prerequisite for economic progress. In this context, the synergy between the EPSR and sustainability objectives functions as an operational mandate. Far from being a mere coordination clause, this mandate serves as the cornerstone of a new social governance, embedding mandatory macroeconomic objectives within the European Semester and leveraging structural instruments – such as Recovery and Resilience Facility[81] – to ensure their practical implementation.

Specifically, the operationalisation of social principles takes place through two key mechanisms: 1) quantitative targets such as macroeconomic objectives and 2) resilience and social justice.

As for the first, the targets set for 2030 (employment rate at 78%, adult participation in training at 60% and poverty reduction for at least 15 million people) transform social principles into parameters for measuring state compliance within the EU's programming cycle.

As for the second, the EPSR defines resilience as the ability of socio-economic systems to absorb shocks resulting from the digital and green transitions while preserving cohesion and equity. Alignment between ecological transition and social justice is considered essential to ensure a fair distribution of costs and benefits, preventing the emergence of disproportionate burdens on the most vulnerable groups.[82] As a result, social sustainability ceases to be an ancillary element to become an endogenous factor of productivity and competitiveness in the long term.

The third line of inquiry concerns the EU's external dimension. Here, the dynamic sophistication of the juridification mechanism is replicated on a global scale. The pillar's programmatic objectives are no longer confined to the internal market but are systematically translated into the foundational legal architecture of the EU's global labour and trade policies.

The declared objective is to preserve social standards at a global level, actively intervening to ensure a level playing field on the international scene.[83] The institutionalisation of global social principles in the States' political architecture is, therefore, a concrete manifestation of the EU's strategic autonomy, as evidenced by the ILO's applause for decisive action taken by the European institutions[84] and by the *La Hulpe Interinstitutional*

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[80] European Commission, 'Monitoring the implementation of the European Pillar of Social Rights' COM(2018) 130 final.

[81] Regulation (EU) 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

[82] European Commission, Joint Research Center of the Institute for Environment and Sustainability, 'Social Sustainability in Trade and Development Policy-A Life Cycle Approach to Understanding and Managing Social Risk Attributable to Production and Consumption in the EU-27' (2013).

[83] Ramses A Wessel et al, *EU External Relations Law and Sustainability-The EU, Third States and International Organizations* (TMC Asser Press Springer 2024).

[84] ILO, 'ILO welcomes EU's renewed commitment to a strong and resilient social Europe' (Press Release, 16 April 2024) <https://www.ilo.org/resource/news/ilo-welcomes-eus-renewed-commitment-strong-and-resilient-social-europe> accessed 15 August 2025.

*Declaration*, which reaffirms the Pillar as the compass of European social policy.[85]

Nevertheless, the external projection of EPSR's effects finds its legal basis in the principle of policy coherence (or integration), mandated by Articles 21 TEU and 3(5) TEU. This framework compels the EU to align its foreign policy – including international trade – with its foundational commitment to democracy, the rule of law, and the universality of human rights. In this direction, the EPSR can be understood as a strategic tool enabling the EU to be a model of social standardisation beyond the domestic sphere. Social policy is specifically incorporated into foreign policy via two main legal mechanisms.

First, the EU leverages its market power to promote international labour standards through trade policy. By integrating mandatory sustainable development clauses and linking GSP+ benefits to ILO standards compliance, the EU transforms its domestic regulatory standards into transnational legal requirements.[86]

Second, the adoption of instruments such as the widely discussed CSDDD extends the regulatory reach of the EPSR by imposing responsibility upon undertakings for the entirety of their global supply chains. In this manner, the principles enshrined in EPSR effectively migrate along global value chains, transcending the EU's territorial jurisdiction.[87]

The complementary and mutually supportive relationship with the ILO serves as the cornerstone of this ambition, facilitating the EU in exercising a profound recalibration of global economic governance.[88]

This mechanism of externalising social standards secures, in fact, a dual advantage for the Union. It establishes a regulatory lead in promoting a transition towards global market sustainability and fairness, while simultaneously enhancing the EU's normative credibility. By championing a model of resilience rooted in the protection of workers' rights, the EU leads to a positive response to the demand for greater social responsibility in the face of global structural changes.

This evolution represents what can be described as a Polanyian 'second movement', whereas the current emphasis on sustainability signals a deliberate effort to re-embed the market within a framework of social constitutionalism. Thus, the constitutionalisation of the right to work is not merely a policy choice; it is a vital corrective mechanism designed to preserve the EU's legitimacy in an era of global structural instability.

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[85] Presidency of the Council of the EU, 'The Hulpe Declaration: a strong commitment to social Europe and lifelong learning' (Conference of 15-16 April 2024) <https://wayback.archive-it.org/12710/20240718201809/https:/belgian-presidency.consilium.europa.eu/en/events/european-pillar-of-social-rights-the-la-hulpe-declaration-on-the-future-of-social-europe/> accessed 15 August 2025.

[86] Luca Pantaleo and Francesco Seatzu, 'Protecting Workers' Rights and Freedoms under the Eu-Mercosur Trade Agreement: a Dream Coming True?' (2023) 2 Diritto dell'Unione europea 278.

[87] For instance, on the impact of sustainability enforcement and international energy law see Talal Abdulla Al-Emadi, Eduardo G Pereira, Mostapha al-Masry, and Richard M E Fowler, 'The EU corporate sustainability due diligence directive: implications and the Qatari case study' (2025) 18(4) The Journal of World Energy Law & Business.

[88] European Commission, 'Trade Policy Review – An open, sustainable and assertive trade policy' COM(2021) 66 final.

## 4.1. THE EFFECTS OF SUSTAINABILITY POLICIES ON THE CONSTITUTIONAL ENHANCEMENT OF WORKERS' RIGHTS: A COMPLEX ANALYSIS

The preceding paragraphs have underscored the increasingly central role of labour rights within the EU's 'Material Constitution',[89] thanks to the emphasis on worker protection through post-crisis regulatory instruments.

The evolving conceptualisation of such rights as intrinsic to a sustainable socio-economic development model effectively reinforces the relevance of labour protections within the EU's overarching values and objectives.

Simultaneously, ensuring decent working conditions – as a social pillar of the 'Just Transition' – is essential for securing the legitimacy and public acceptance of sustainability initiatives.[90] The social consensus is fundamental to consolidating the constitutional status of these rights, embedding them ontologically within political and democratic life of the EU.

This consideration, however, does not overlook the intrinsic difficulties of ascribing a constitutional dimension to the right to work within the EU's legal order. Addressing the constitutionalisation of this right necessitates, first and foremost, confronting the inherent fragmentation and complexity that currently characterise the European regulatory landscape.[91]

Elevating labour guarantees to constitutional status ensures higher binding force and limited derogation yet directly challenges Member States' autonomy.[92] The resistance to a unified constitutional core formidably complicates the pursuit of a regulatory equilibrium across diverse national systems.

From a strictly legal standpoint, the evolutionary momentum of an emerging right to work must be reconciled with the normative constraints of Article 153 TFEU and Article 51 CFREU. While the EU lacks general competence over employment matters, the systematic integration of sustainability – mandated by Art. 11 TFEU and Art. 37 CFREU – fundamentally recalibrates the interpretative weight of these limitations.

This phenomenon operates through three primary channels. First, the principle of conferral (Art. 5 TEU) establishes a constitutional floor. While the EU lacks direct legislative competence over employment implementation, it remains bound by a positive obligation to ensure that its internal market policies do not undermine the EU overarching social sustainability.

Second, the scope of competences under Art. 153 TFEU necessitates a critical reinterpretation. The traditional, siloed approach to social competences must be re-evaluated in light of the EU horizontal objectives, specifically the constitutional mandate to foster

[89] OECD, 'Building a coherent response for a sustainable post-COVID-19 recovery', OECD Policy Responses to Coronavirus (COVID-19) (OECD Publishing, Paris 2020) <https://doi.org/10.1787/d67eab68-en> accessed 9 February 2026

[90] Council, 'Joint Statement, The new European consensus on development "Our world, our dignity , our future"' (26 June 2017) <https://international-partnerships.ec.europa.eu/policies/european-development-policy/european-consensus-development_en> accessed 10 September 2025.

[91] Dalia Gesualdi-Fecteau et al, 'The Fragmentation and Complexity of Labour Law, Effective Protections , and Better Work: An Analytical Framework' (2025) 25(1) Comparative Labor Law & Policy Journal 17.

[92] Femke Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction? The Clash between the European Business Freedoms and the National level of Workers' Protection' (2018) 9(1) European Labor Law Journal 50.

a 'highly competitive social market economy' (Art. 3(3) TEU). This implies a transition from a narrow, sector-specific conception of labour rights toward a systemic integration of social protections into the broader framework of economic governance.

Third, the functional scope of the Charter under Art. 51 CFREU provides the mechanism for direct enforceability. Whenever Member States implement EU objectives – particularly those regarding macroeconomic coordination and social cohesion – they act within the scope of EU law. Consequently, the Charter's provisions, including the right to work, are activated as normative standards. This transforms the social principle into a substantive constraint, serving as a rigorous benchmark for both judicial review and the administrative legitimacy of EU policy actions.

Furthermore, the tension between social rights and economic freedoms (specifically the internal market and free movement) remains a defining conflict within the EU.

The constitutionalisation of labour rights in general risks intensifying the inherent tension between social protections and market freedoms. Historically, the CJEU has navigated this conflict through case-by-case balancing;[93] however, an explicit constitutional framework would demand a fundamental shift in this judicial equilibrium.

Beyond legal criticalities, structural challenges persist. The internal market's competitive logic – often reliant on wage compression – clashes with diverse national social models, fostering regulatory fragmentation and social dumping. Furthermore, a constitutionalised right to work faces the risk of normative rigidity: while protecting individuals, it may stifle the contractual agility required by the 'twin transitions' (green and digital). The resulting risk of marginalising those unable to adapt could paradoxically transform the constitutional right to work into a driver of social exclusion.

The establishment of social practices within the European sustainable development agenda remains, *per se*, insufficient to formally expand the EU's competence in worker protection. Nonetheless, the structural teleology of the EU's legal order mitigates the institutional complexity. By synthesising diverse external inputs, the EU creates a framework for the right to work that is axiologically distinct.

In this regard, Article 2 TEU, which codifies the EU core values, serves as a robust legal basis for establishing a right to work recognised at EU level, acting as a vehicle for its constitutional elevation as the essential foundation of a democracy grounded in human rights.[94]

Article 2 TEU ensures that core workers' rights are indispensable pillars of the EU's institutional architecture, affirming their status as fundamental human rights essential to modern democracy.

A textual examination of the aforementioned Article 2 TEU reveals its multiple interpretative nuances.

First, human dignity and anthropocentrism. Inherent in modern constitutionalism, dignity is inextricably linked to the right to work. This encompasses professional dignity, fair

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[93] Aristea Koukiadaki, 'Enforcement of EU Labor Law: Legal foundations and the role of the CJEU' (2024) 15(4) European Labor Law Journal 623.

[94] Lucia Serena Rossi, 'La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 11 Revue Trimestrelle de droit européen 639. Opinion 1/17 *EU-Canada CETA Agreement* EU:C:2018:478 para 110. See even more emphatically: Opinion of AG Ćapeta in Case C-769/22 *European Commission v Hungary* EU:C:2025:408.

conditions, and just remuneration. Work, viewed through this personalistic principle, reflects the individual not merely as a factor of production, but as a bearer of inherent value.

Second, the rule of law. This principle mandates that institutions adhere to democratic legality, serving as a foundational guide for all social policy.[95]

Third, the principles of non-discrimination and equality. These tenets are the bedrock of any democratic society. While democracy is built upon the concept of work, its legitimacy relies on the full recognition of workers' rights.

By removing work from a purely mercantile logic, these principles safeguard human needs against the prioritisation of algorithmic efficiency, restoring the balance between subjective rights and public interests once eclipsed by market rationalism. Within this reconfigured order, the EU's harmonisation of social rights performs a dual function: it bridges divergent national models to restore collective trust, while providing a unified constitutional narrative that reconciles systemic cohesion with regional diversity.

Far from a purely ethical commitment, this evolution represents a calculated legal reinterpretation that can navigate the formal constraints of the Treaties.

Through the seen strategic legal triangulation – in tandem with the European strategy on decent work worldwide – the EU successfully bridges the gap between aspirational politics and enforceable standards.

At the heart of this process decent work gains a robust normative standing, moving beyond its marginal nature as policy objective. At the same time, the strategic frameworks are the structural drivers in the constitutionalisation of the European social *acquis*.

## 5 THE TRANSFORMATIVE IMPACT OF CJEU'S CASE LAW

Despite scholarly criticism of its perceived pro-market bias, the CJEU remains central to the evolution of EU labour law.[96]

By balancing social objectives with market demands, EU case law has outpaced mere clarification to fundamentally integrate the legal foundations of EU labour legislation. Through a teleological interpretation of Article 51 CFREU, the Court has effectively maximised its protective impact, fostering a unified European social space defined by high standards of worker protection.[97]

Far from formally expanding the Charter's scope beyond the limits of Article 51 CFREU, the Court has adopted a substantive approach to the concept of implementation. Consequently, by bringing national measures under the broader purview of EU law, this framework maintains a uniform standard of protection, ensuring that social rights are practically upheld rather than remaining purely aspirational.[98]

With a case-by-case method, however, the valorisation of a supranational model of

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[95] Jiří Přibáň, 'Sociology of the Rule of Law: Power , Legality and Legitimacy' in Jiří Přibáň, *Research Handbook on the Sociology of Law* (Elgar 2020) 110-123.

[96] How is it exhaustively argued in Julien Louis, 'Constructing the Viking and Laval cases as a major defeat for social Europe: a contextual and procedural analysis' (2024) 2(4) European Law Open 724.

[97] Stefano Giubboni, 'Freedom to conduct a business and EU labor law' (2018) 4(1) European Constitutional Law Review 172.

[98] Joined Cases C-609/17 and C-610/17 *TSN* EU:C:2019:981. Maxime Tecqmenne, 'The European Court of Justice, the EU Charter and the interpretation of fundamental social rights: Judicial law-making in disguise?' (2024) 31(2) Maastricht Journal of European and Comparative Law 254.

social protection and the strengthening of socially legitimate industrial relations, remain confined to narrow, proportionate exceptions to single market law.

In this regard, an analysis of the CJEU's jurisprudence is essential to determine whether the right to work is undergoing a genuine constitutionalisation process. To ascertain whether the Court's case law promotes a narrative of constitutionalisation – viewing the right to work as an intrinsic value and an implicit constitutional principle – or merely affirms a sectoral protection constrained by economic freedoms and limited social competences, a systematic examination of the Court's key evolutionary lines is required.

By functionally integrating competing interests, these decisions confirm that the consolidation of EU labour law stems from the progressive strengthening of fundamental rights. This evolution grants them a quasi-constitutional status, a necessary condition for their effective and uniform application across the EU.

The CFREU serves as the primary instrument for this process, as evidenced by the CJEU's consistent recourse to it in interpreting labour law directives.

This interpretive approach has significantly bolstered worker protection, elevating specific social guarantees to the status of fundamental rights and ensuring that secondary legislation is construed in a manner most favourable to workers.[99]

Nonetheless, this process is a legal construct, since the interaction between the labour directives and the Charter is governed by the basic principle that the directives, as secondary law, are the instrument by which the EU operationalises the rights and principles set out in the Charter.[100]

For instance, the principles of non-discrimination and equal treatment have had profound implications for employment law.[101] European judges have played a leading role in both applying and extending the principle of non-discrimination, which constitutes a cornerstone of EU law.

When called upon to interpret Directive 2000/78/EC in conjunction with Article 21 CFREU – which prohibits discrimination based on grounds including age, sexual orientation, religion, and disability – the CJEU has recognised the direct effect of the Directive's provisions beyond its specific temporal scope or prior to the expiry transposition deadlines.[102]

Through a functional and contextual interpretation, the Court has effectively reconstructed non-discrimination as a general, directly applicable principle of EU law. Furthermore, it has established this principle as a fundamental value that may be invoked – even in horizontal (private-to-private) relations – to disapply non-compliant national provisions.[103]

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[99] Malcom Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcom Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009).

[100] Parliament European Directorate for internal policies, 'Regulating working conditions through EU directives – EU employment law outlook and challenges' (2019) <https://www.europarl.europa.eu/> accessed 5 July 2025.

[101] Since the 1970s, a total of 16 legislative acts have been adopted with the aim of ensuring that women and men receive fair and equal treatment at work. See, in particular: *Equality Employment Directive* or Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[102] Case C-144/04 *Mangold* EU:C:2005:709.

[103] Case C-143/16 *Abercrombie* EU:C:2017:566; Case 414/16 *Egenberger* EU:C:2018:257; Case C-154/18 *Horgan Keegan* EU:C:2019:113.

According to the CJEU, Article 21 confers a right that workers may rely upon in disputes against employers. Despite the silence of Article 51(1) CFREU on the obligations of private entities, the Court has reasoned that this article cannot be interpreted as systematically precluding such an obligation. By its very nature, non-discrimination implies a corresponding duty on the part of these entities.[104]

In these circumstances, legal actions often aim not at the directive itself, but at the general principle it embodies. This ensures effective protection even in cases of flawed national transposition, allowing workers to invoke European standards before national Courts to bridge implementation gaps.

This judicial approach corroborates the hypothesis of a constitutional transformation that transcends mere sectoral protection. By integrating social rights with general principles, the Court ensures that the right to fair working conditions serves as a definitive parameter of legitimacy for all acts of the EU and its Member States.

Similarly, on the issue of health and safety, European judges have reaffirmed the primacy of EU law and the pivotal role of national Courts in upholding the protection of workers' fundamental rights. They have established that the rights guaranteed by Directive 89/391/EEC – when interpreted in conjunction with Articles 31 and 34(1) CFREU – must be afforded comprehensive protection. Crucially, national judges cannot be bound by a Constitutional Court's ruling that contravenes EU law by invoking the principle of national constitutional inviolability.[105]

The link between the Directive and the Charter in this vein marks the transition to a system based on framework principles. Safety is no longer just a technical requirement of the single market, but a preventive obligation that defines the dignity of work.

Notably, the elevated status of the CFREU as the primary instrument for interpreting workers' rights aligns with the Court of Justice's persistent exercise of its significant nomophylactic function.

The CJEU can be credited with institutionalising the definition of worker through a consistent line of judgments, thereby establishing it as an autonomous concept within EU law, independent of national definitions.[106] Under the Court's functional approach, the status of worker is predicated solely on economic and operational subordination – the performance of services under direction for remuneration – regardless of the duration of the engagement or the amount of compensation.

This framework has successfully delineated unambiguous criteria capable of accommodating new bargaining models and informing future judgments regarding the dependent nature of diverse working groups, including the nominally self-employed.[107]

And not only that. Furthermore, this trajectory, by extending protection to highly vulnerable workers, reflects a functional constitutionalisation of the right to work. By broadening this scope to encompass the evolving economy, the Court prevents structural transformations from hollowing out social rights, transforming the right to work into

[104] Case C-684/16 *Max Planck* EU:C:2018:874; Case C-385/17 *Hein* EU:C:2018:1018; Case C-147/07 *Commission v. France* EU:C:2008:67.
[105] Case C-792/22 *Energotehnica* EU:C:2024:788.
[106] Case C-66/85 *Lawrie-Blum* EU:C:1986:284.
[107] Case C-434/15 *Association professional elite* EU:C:2017:981; Case C-692/19 *B. v Yodel Delivery Network* EU:C:2020:288.

a substantive safeguard against market insecurity.

As can be observed, from an applicative perspective, the impact of the CJEU's rulings on occupational and social matters is profound.

First, moving forward, national judges will be required to interpret domestic law in accordance with EU law, which prescribes a differentiated regime on the right to work. This obligation stands regardless of any impediment arising from existing national labour law.

Second, the scope of worker protection appears to have expanded. This is due to the progressive bottom-up harmonisation of labour standards and the raising of worker protection standards across the Union, although directives generally provide minimum criteria.

Third, the broader reading of the Charter has enabled CJEU to define the conditions for the horizontal direct effects of social rights, thereby enhancing their operational impact within private legal relations.[108]

Applying the doctrine of horizontal direct effect elucidates the operational scope of these rights in the legal framework examined by the present article. By conferring an enforceable right against an employer – irrespectively of whether specific national implementing measures have been enacted – a sufficiently clear, precise, and unconditional Charter provision effectively bypasses domestic legislative inertia.[109]

In the case that is of interest here, horizontal effectiveness is not merely a judicial tool. It manifests through a dynamic process of juridification, operating along two axes. The first axis comprises the corrective function of horizontality, which acts as a mechanism for upholding the practical efficacy of fundamental rights in private disputes, particularly when these are compromised by conflicting national legislation or contractual provisions.[110] The second axis concerns the role of horizontal direct effect as a functional instrument for ensuring the *effet utile* of the Charter. The relationship between them is not merely a creative judicial choice, but a logical necessity within the EU legal order.[111]

Should national law or a contractual clause permit conduct prohibited by a Charter-protected fundamental right, the CJEU must recognise its horizontal effect to maintain systemic coherence, thereby empowering national Courts to neutralise the obstacle by disapplying the non-compliant domestic law.

It must be noted, however, that the Court's role remains strictly interpretative.[112] The invocation of the *effet utile* does not grant the CJEU the authority to a *praeter legem* law-making; rather, it serves to activate existing provisions.

Indeed, although CJEU's judgments show a clear trend towards a flexibility in the interpretation of fundamental rights – as highlighted in judgments such as *Åkerberg*

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[108] Case C-411/05 *Palacios de la Villa* EU:C:2007:604; Case C-555/07 *Kücükdeveci* EU:C:2010:21.

[109] Case C-176/12 *Association de médiation sociale* EU:C:2014:2. Eleni Frantziou, 'Case C-176/12 Association de Médiation Sociale: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10(2) European Constitutional Law Review 332.

[110] Eleni Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle' (2020) 22 Cambridge Yearbook of European Legal Studies 208.

[111] Marek Safjan, 'The Charter of Fundamental Rights in the Case Law of the ECJ: The Significance and Decisive Advantages of a Functional Approach' in Alexander Heger and Moritz Malkmus (eds), *On the Relation between the EU Charter of Fundamental Rights and National Fundamental Rights* (Springer 2024).

[112] Nuria Barmejo, 'Fundamental Rights and Horizontal Direct Effect Under the Charter' in Cristina Izquierdo-Sanz et al, *Fundamental Rights Challenges* (Springer 2021).

*Fransson*[113] – the emerging approach is not without doctrinal complexities.

Firstly, the application of the CFREU faces a persistent technical tension between 'subjective rights' and 'programmatic principles'.

While this distinction may blur when protecting the core essence of a right, the CJEU in *AMS*[114] has clarified that programmatic principles cannot automatically confer subjective rights or serve to fill regulatory gaps in private disputes. This technical hurdle is nonetheless overcome when the normative content of a principle crystallises into an unconditional rule, thereby enabling its direct application.

The Court's approach to Article 31(2) CFREU – regarding the right to paid annual leave – is emblematic of this evolution. In *Bauer,*[115] the Court has affirmed that the formal classification of a provision as a principle does not preclude judicial protection, provided its content is sufficiently clear, precise, and unconditional. Through a broad interpretation, the Court has synchronised Article 31(2) with Directive 2003/88/EC, elevating the right to rest to an essential component of worker dignity and a proactive duty for the employer.[116]

This judicial trajectory signals a decisive move towards a constitutionalising narrative that departs from the rigid dichotomy of Article 52(5) CFREU. The demarcation line between Article 21 (right to information and consultation), which remains devoid of unconditionality and requires legislative mediation, and Article 31(2) (right to a paid annual leave) that has preceptive content is illustrative. While the former presupposes the legislator's intervention, the latter constitutes a subjective right directly enforceable between private parties, confirming the substantive efficacy of the social *acquis* regardless of formal legislative intermediation.

The debate concerning the distinction between rights and principles under Article 52(5) of the Charter appears, thus, to have been superseded by a teleological interpretation that prioritises the *effet utile* of its provisions. The contrast between Article 21 and Article 31(2) reveals that the Court's focus has shifted from the textual classification of a rule to its capacity to serve as a parameter of judicial review.

Secondly, the application of CFREU remains bound by the scope defined in Article 51 CFREU, limiting its scope to situations where States implement EU law.

The challenge for legal scholars remains to define precisely when the link with EU law is sufficiently dense to activate this protection, overcoming the risk of judicial discretion that could affect the balance of powers provided for by the Treaties.

Rather than *ultra vires* conduct, the Court's expansive approach represents a systematic exercise of the competences conferred by the Treaties. Whenever national legislation operates within the orbit of a fundamental freedom, protecting Charter rights becomes essential to the integrity of the legal order.

Thirdly, the legacy of *Viking* and *Laval* – where social rights, such as the right to strike, were often subordinated to economic freedoms – continues to pose a critical challenge to

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113 Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

114 Case C-176/12 *AMS* EU:C:2014:2.

115 Joined Cases C-569/16 and C-570/16 *Bauer and Willmeroth* EU:C:2018:871.

116 On the right to paid annual leave, Case C-173/99 *BECTU* EU:C:2001:356; Joined Cases C-350/06 *Schultz Hoff* and C-520/06 EU:C:2009:18. On the employer's right to information, Case C-619/16 *Kreuzige* EU:C:2018:872. On unused holidays, Case C-233/20 *Job-medium* EU:C:2021:960; Joined Cases C-518/20 and C-727/20 *XP* EU:C:2022:707. On parental leave, Case C-12/17 *Dicu* EU:C:2018:799. On health and safety at work Case C-55/18 *CCOO* EU:C:2019:402.

the constitutional efficacy of worker protections. Yet, this 'market-first' bias is being progressively mitigated by a more dynamic interpretative framework.

This maturation is not an arbitrary expansion of power, but the result of applying a rigorous 'test of preceptiveness' to Charter provisions. By requiring clarity, precision, and unconditionality, the Court effectively filters social values into enforceable rules of conduct, reconciling fundamental rights with the EU's economic order.

In this framework, the *Explanations* to the Charter serve as a regulatory hinge, balancing the rights-principles dichotomy. They act as both a constitutional filter, safeguarding the division of competences, and a permissive mechanism that legitimises the evolution of principles into subjective rights as the legal environment matures.

This metamorphosis confirms that fundamental protection is driven less by static text than by judicial dynamism.

Looking ahead, as the EU labour *acquis* gains complexity, the CJEU, as the ultimate lever of the triad – Charter, EPSR, Directives – is set to solidify this para-constitutional conception of labour rights.

Ultimately, the recent developments suggest material, rather than formal, constitutionalisation. Under this aegis, the right to work, informed by the decent work paradigm and social sustainability, is poised to drive a transformative shift in the legal protection of labour over the long term.

## 6 CONCLUSIONS

The right to work – substantiated by the interplay between Treaties, the Charter, and secondary legislation – forms a foundational pillar of the EU's constitutional and democratic identity.

It operates through a 'social axis' where the decent work paradigm – as a catalyst for policy – intersects with concrete rights to ensure substantive protection.

Despite the lack of a unified Labour Code, the EU's multi-layered regulatory architecture and case law guarantee a harmonised threshold of protection. This increasingly constitutional framework is further reinforced by sustainability initiatives that embed labour rights within a broader agenda of environmental and social resilience. Together, these dimensions create a dynamic legal system uniquely equipped to address the evolving demands and social requirements of the European labour market.

In light of systemic challenges, nevertheless, the constitutional evolution of the right to work – oriented toward sustainable development – requires redefining labour's substantive value within the EU legal order. The focus must shift from work as a socio-economic variable toward a stronger affirmation of its subjective dimension, as a right intrinsic to the individual.

Rather than advocating for an overreaching constitutionalisation, this approach affirms the right to work as inherent to the individual's 'social genetics'. By prioritising policy flexibility, it ensures that the EU's response to the evolving world of work remains substantive, preventing a decoupling of legal standards from socio-economic realities and maintaining a continuous alignment between protection and reality.

Against this backdrop, the full affirmation of the right to work in the EU necessitates a strategic distinction between incremental adaptations and comprehensive structural legislative interventions.

In the medium term, overcoming systemic obstacles requires the EU to treat the Charter as a living tool for policy evolution. A pivotal shift involves leveraging Article 114 TFEU to qualify labour dignity as a prerequisite for market access, thereby framing social dumping as an affront to competitive integrity. This regulatory evolution must also extend to the digital sphere by targeting algorithmic management. By redefining algorithms as exercise of managerial prerogatives rather than protected secrets, the EU can establish the uniform standards necessary to eliminate *forum shopping* in the transnational platform economy.

In the long term, the right to work must evolve from a mere market exception into a structural pillar of market legitimacy. This systemic transition demands a profound strategy: elevating human dignity as a non-negotiable threshold – immune to economic balancing – to catalyse a 'European social sovereignty'. Such a path recasts the Single Market as a true *communauté de droit*, ensuring that Europe's future is inherently and constitutionally social.

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# FROM JUST PRICE TO RESILIENT MARKETS – LAW AND ECONOMICS OF UNFAIR, EXCESSIVE PRICING AND DIGITAL MARKET ABUSES IN EU COMPETITION LAW AND POLICY

BEHRANG KIANZAD*

*Historically, societies have imposed limits on excessive pricing and abuse of market power, a legal tradition informing Article 102 TFEU prohibition against unfair, excessive pricing.*
*In today's digital economy, traditional ex post enforcement, such as cases against Google, Meta, Amazon, or Apple, often struggles to keep pace with rapid market developments and leads to lengthy investigations. This lag has spurred calls for ex ante regulatory frameworks, with fairness and equitable exchange re-emerging as guiding principles. Recent EU legislative efforts, including the Digital Markets Act (DMA), explicitly emphasise fairness, aiming for contestable markets and equitable value distribution.*
*The COVID-19 pandemic reignited debates over unfair pricing, revealing tensions between neoclassical economic models and fairness-oriented enforcement grounded in real-world conditions. These developments mark a broader shift: the reintroduction and evolution of fairness within regulatory instruments such as the DMA, the AI Act, the Data Act, and so on.*
*This paper argues that the reintegration of fairness offers a necessary corrective to outdated legal-economic paradigms exerting an undue influence over Union law, calling for a rethinking of competition law and policy to meet the challenges of crisis-prone digital and antitrust enforcement, especially in light of legal-historic and behavioural economic perspectives on unfair pricing.*

## 1 INTRODUCTION: THE RE-EMERGENCE OF FAIRNESS AS A COMPETITION AND REGULATORY NORM IN EUROPEAN LAW AND POLICY

Recent years have witnessed the re-emergence of the highly contested concept of 'fairness' in European competition law, economics, and policy, not least regarding digital markets, Big Tech, and AI.[1] This development is seen by some as part of a notable shift from the neoclassical focus on 'efficiency' to a broader competition law and economics policy

* LLM / PhD; Senior Researcher, Institute of Global Political Studies, Malmö University. This research has been supported by Swedish Competition Authority between through grant between 2025-2028 for the project 'Towards A Working Definition of Fairness in Digital & AI Markets'.

[1] See e.g. Commissioner Margarethe Vesterager keynote speech at the European Competition day 2022 in Prague, 'Fairness and Competition Policy', available at: <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6067> accessed 1 May 2026: 'So protecting competition is about efficiency, but not only. Fundamentally, it is a question of fairness'.

including goals such as sustainability[2] and fairness.[3]

The intersection of fairness and competition law has noted a revival[4] with added focus on digital markets and tech giants in the EU and hefty fines against tech giants such as Google, Meta, and Apple on the heels of DMA and EU Competition Law. Also, other sectors such as pharma have seen an unprecedented enforcement appetite towards 'unfair' and excessive pharmaceutical pricing.[5]

As we all seemingly become Keynesian[6] and even Kantian[7] during crises such as the COVID-19 pandemic, including antagonists such as Milton Friedman,[8] such crisis might be used as a proxy towards insights[9] regarding whether the Pareto / Kaldor-Hicks efficiency criterion, the cherished Wealth maximisation standard, and the strict division between equity and efficiency in Antitrust law and policy stand closer scrutiny.

As opposed to many claims in the doctrine on law and economics of competition law, there exists no such thing as 'mainstream' or 'sound' economics, against which all other approaches are to be measured. Regarding the goals of competition law, as noted by Stucke regarding the supposed 'consensus' in Antitrust law and economics:

> Despite the push for a single economic antitrust goal, there is no consensus in the U.S. or worldwide on any well-defined goal. Four oft-cited economic goals (ensuring an effective competitive process, promoting consumer welfare, maximizing efficiency, and ensuring economic freedom) have failed to unify antitrust analysis. No consensus exists on what the four goals mean or how they are achieved.[10]

The recent decades of economic research on both macro and micro level by way of behavioural, experimental, Neuro-economics, and empirical industrial economics have thoroughly challenged the normative foundations upon which the efficiency-oriented

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[2] Julian Nowag, 'OECD - Sustainability and Competition' (OECD Competition Committee Discussion Paper 2020) <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf> accessed 1 May 2026.
[3] Margarethe Vesterager, 'Fairness and Competition - Speech at GCLC Annual Conference' (Brussels, 25 January 2018); Johannes Laitenberger, 'EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective' (Brussels, 10 October 2017).
[4] Behrang Kianzad, 'Fairness, Digital Markets and Competition Law – Reconciling Fairness Norms in Digital Markets Act, Data Act and AI Act with Competition Law' (2025) 4 Journal of Law, Market & Innovation 133.
[5] Behrang Kianzad, 'Towards Fair Pricing of Medicines? Lessons from European Commission's Aspen Decision' (2022) 6(1) European Health & Pharmaceutical Law Review 3.
[6] Jorge Padilla, 'A Keynesian Antitrust Response to the COVID-19 Crisis' (2020) 8 Journal of Antitrust Enforcement 302.
[7] Joe Humphreys, 'Are We All Kantians Now? The Covid-19 Effect on Moral Philosophy' (*The Irish Times*, 23 April 2020) <https://www.irishtimes.com/culture/are-we-all-kantians-now-the-covid-19-effect-on-moral-philosophy-1.4229595> accessed 1 May 2026.
[8] Milton Friedman, 'We are All Keynesians now' (*Time Magazine*, 31 December 1965) <http://content.time.com/time/magazine/article/0,9171,842353,00.html> accessed 19 November 2025.
[9] INET Commission on Global Economic Transformation, 'The Pandemic and the Economic Crisis: A Global Agenda for Urgent Action' (*Institute for New Economic Thinking*, 11 March 2021) <https://www.ineteconomics.org/research/research-papers/the-pandemic-and-the-economic-crisis-a-global-agenda-for-urgent-action> accessed 19 November 2025.
[10] Maurice E Stucke, 'OECD Hearing on Competition and Behavioural Economics – The Implications of Behavioural Antitrust' DAF/COMP/WD(2012)12.

approach traditionally has relied upon.[11]

People are not rational, care less about utility than punishing perceived 'unfair behaviours', and neither firms nor people display the cherished utility and wealth maximisation tendency over other concerns such as equity, sustainability, and fairness in pricing. This matter becomes yet more complex concerning price gouging and excessive pricing during a crisis such as the COVID-19 pandemic.[12] Nevertheless, such dynamics are not caught by the strict neoclassical and marginalist analysis, which is partly due to a circular view of what constitutes price, value, and profit.

For decades, the prevailing competition-law paradigm, especially in U.S. antitrust but also with marked influence in EU such as the now all but abandoned 'More Economic Approach',[13] has been dominated by neoclassical economics and a single-minded focus on efficiency and consumer welfare.[14] Post-financial crisis of 2008, the Chicago School approach to Antitrust law and policy, and neoclassical economics as a whole, have experienced a severe reckoning which has paved the way for other approaches, which we are witnessing in the case of manifest focus on issues such as fairness pertaining to digital markets and AI.

The neoclassical forefathers such as Walras, Jevons, and Menger, and later Arrow and Debreu,[15] all pre-supposed and developed different views on competition as part of the general theory on how markets function, placing great emphasis on this neutral arbiter. The distinction between price, value, and profit, although made already some 150 years ago, has simply been forlorn in the ever more mathematical approach to economics, where exchange value has come to be the end-all definition of value, although the gist of human writings on value instead contemplates 'intrinsic value' and how to define this value more narrowly.

Fairness in pricing is such an 'intrinsic value', a value in itself, to use Kantian parlance, which cannot be substituted by any increase in utility. This is underscored by the manifest human preferences for fairness in pricing which people hold higher than any increase in utility, as evidenced by, for example, Ultimatum Game experiments.[16] It is argued that the classic tension between neoclassical economics, with its singular focus on efficiency and 'total welfare', thus stands in bright contrast with the European discipline´s tradition on administration of fairness and justice.[17]

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[11] For a collected volume on some recent research on this matter, see: Alexander W Cappelen and Bertil Tungodden (eds), *The Economics of Fairness* (Edward Elgar Publishing 2019).
[12] For an in-depth study, see: Behrang Kianzad, 'Excessive Pricing during the COVID-19 Crisis in the EU: An Empirical Inquiry' (2021) 1 Concurrences 250 <https://awards.concurrences.com/IMG/pdf/09.concurrences_1-2021_legal_practices_kianzad.pdf> accessed 1 May 2026.
[13] Wouter PJ Wils, 'The Judgment of the EU General Court in Intel and the So-Called "more Economic Approach" to Abuse of Dominance' (2014) 37 World Competition 405; Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U. S. Antitrust* (Oxford University Press 2008).
[14] Joseph Stiglitz, 'Towards a Broader View of Competition Policy' in Tembinkosi Bonakele, Eleanor M Fox, and Liberty Mncube (eds), *Competition Policy for the New Era: Insights from the BRICS Countries* (Oxford University Press 2017).
[15] Kenneth Arrow and Gerard Debreu, 'Existence of equilibrium for a competitive economy' (1954) 22 Econometrica 265.
[16] Martin A Nowak, Karen M Page, and Karl Sigmund, 'Fairness Versus Reason in the Ultimatum Game' (2000) 289(5485) Science 1773.
[17] Michael Nance and Jeppe von Platz, 'From Justice to Fairness Does Kant's Doctrine of Right Imply a Theory of Distributive Justice' in Kate A Moran (ed), *Kant on Freedom and Spontaneity* (Cambridge University

This tension in law and economics, highly observable in the divergent approaches to monopolist pricing,[18] is only to be understood through a soul-searching of the moral-philosophical foundation of the European Legal Corpus as opposed to the US Antitrust approach, having its own distinct historical roots. The tension further finds its roots in what has been dubbed the 'adversarial institutions' of firms and markets, where although greed and profiteering are frowned upon on an individual level, firms have profit-seeking as their main objective, which is why they should be granted a 'free pass' from the strict moralistic view on profit-seeking, although within limits set by the Sovereign.[19]

In the words of Friedrich Hayek: 'Where the source of a monopoly position is a unique skill, it would be absurd to punish the possessor for doing better than anyone else by insisting that he should do as well as he can'.[20]

This position is a far cry from the substantive law of European competition law as well as settled case law of CJEU,[21] banning abuse of dominance and requiring that dominant firms, at least in some respects, behave 'as if' they were not dominant. There is also a normative aspect of what harm competition law should act against and along what rationales. However, as noted by Ioannis Lianos, 'it is possible to build a broader narrative for intervention, on the basis of some wider conception of "consumer welfare" or "consumer harm"'.[22] The undue wealth transfer from consumers to suppliers enabled by sheer market power, dependency, or defunct competition is and ought to be the 'original sin' in Antitrust.[23]

The recent legal approaches at the EU level targeting digital and artificial intelligence (AI) sectors all have one common denominator, namely the manifest focus on fairness in transactions and equality in exchange, a clear step away from efficiency-oriented discourses. Beside the numerous new legal acts and proposals, such as the Digital Markets Act, the Digital Services Act, the Data Act, the AI Act, and the Digital Fairness Act, which have seen the light of the day, the appetite among enforcers to pursue cases alongside fair exchange stratum has also increased considerably.

In July 2025, a senior European Commission (EC) official confirmed multiple ongoing investigations into algorithmic pricing. In September 2025, the UK Competition and Markets Authority's (CMA's) chief executive described the practice as an 'area of focus and concern', noting the agency is 'watching and learning' from US cases and exploring links with generative AI.[24]

These crises of paradigms, one being the crisis of neoclassical economics post-financial

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Press 2018).

18 Michal S. Gal, 'Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly?' (2024) 49(1-2) The Antitrust Bulletin 343.

19 Joseph Heath, 'The Moral Status of Profit' in Mark D White (ed), *The Oxford Handbook of Ethics and Economics* (Oxford University Press, 2019).

20 Friedrich Hayek, *Law, Legislation and Liberty, vol. 3* (Chicago 1979) 72, cited in Antonio Robles Martín-Laborda, 'Exploitative Prices in European Competition Law' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (ASCOLA Competition Law Series 2018).

21 Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* EU:C:1974:18 para 25.

22 Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65(1) The Antitrust Bulletin 49.

23 Robert H Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34(1) Hastings Law Journal 65.

24 Michael Masling et al, 'Algorithmic Pricing Emerges as Enforcement Priority for EU & UK Antitrust Regulators' (*Morgan Lewis*, 14 October 2025) <https://www.morganlewis.com/pubs/2025/10/algorithmic-pricing-emerges-as-enforcement-priority-for-eu-and-uk-antitrust-regulators> accessed 1 May 2026.

crisis of 2008/9, the other being the experiences during the COVID-19 crisis, and finally, the emerging challenges within the digital realm, compels us to rethink law and economics of antitrust law and economics and move towards a more holistic paradigm. The next section investigates the neoclassical crisis of faith more in-depth.

Following this introduction, framing the problem of unfair pricing and exploitative abuses, as well as the crisis of neoclassical economics paired with COVID-19 crisis, the second section investigates the said crisis in light of Union competition law and policy and legal-historic perspectives on the role of the Sovereign intervention in markets and pricing. The third section depicts some legal-economic approaches to the matter of fairness and fairness in pricing. The fourth section recasts an empirical inquiry into European approaches to unfair pricing during COVID-19 crisis as a proxy. The fifth section connects the ex-ante regulation of fairness, with ex-post approaches to unfair pricing within Union competition law. The sixth section concludes.

## 2 NEOCLASSICAL ECONOMICS AND THE QUESTION OF INTERVENTION BY THE SOVEREIGN

Neoclassical-welfarist Economic Analysis of Law,[25] which has come to dominate not only much of antitrust debate but also law and policy in the European Union[26] during the past four decades, is in turn characterised by five core assumptions, those being:

1) the assumption of scarcity of resources,
2) the belief in Homo Oeconomicus, presupposing that all economic agents are self-interested, act based on perfect and complete information, and that the human good consists in nothing more than economic welfare,
3) the idea of Utilitarianism, meaning that human behaviour can be reduced to rational calculation and maximisation of welfare,
4) that the value of any given thing originates from the value individuals consider it to have,
5) the availability and readiness of multiple possibilities guiding individuals in their search for the optimal choice.

Whereas neoclassical economics finds its roots in the Utilitarian and Welfarist perspectives, focusing on economic efficiency and total welfare, the Keynesian, neo-Keynesian,[27] Kantian,[28] or the Progressive (dubbed by its neoclassical antagonists with the derogatory, 'Hipster Antitrust' School)[29] schools allow more room for other public policy rationales beyond economic efficiency.

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[25] Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer Law & Business 2014).
[26] Dzmitry Bartalevich, 'The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy: The Influence of the Chicago School' (2016) 54(2) Journal of Common Market Studies 267.
[27] Padilla (n 6).
[28] Behrang Kianzad, 'A Neo-Kantian Approach to Competition Law? – The Re-Emergence of Fairness in Antitrust Law & Policy' in Ramsi Woodcock (ed), *Inframarginalism and Internet* (Cambridge University Press 2025).
[29] Joshua D Wright et al, 'Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust' (*SSRN Electronic Journal*, 19 September 2018) <https://doi.org/10.2139/ssrn.3249524> accessed 1 May 2026.

Price controls and direct government intervention in the market to alter prices have always been hotly debated issues, depending on what economic theory and legal rationales one adheres to. Such rules can be found in the Old Testament prohibiting interest on loans to fellow Israelites;[30] war-time government price controls (such as the creation of the US Office of Price Administration);[31] and more recent regulations of prices such as petrol, wages, or rents.[32]

Already back in 1780 BC, the Code of Hammurabi regulated prices and economic transactions.[33] Later during Roman times, the Diocletian's Edict on Maximum Prices (Edictum De Pretiis Rerum Venalium) sought to set maximum prices to combat inflation and excessive prices, built on the concept of 'laesio enormis', i.e. great harm, or excessive harm.[34] There was further an equivalent to be found in the law of the Catholic Church, the Canon Law, where '[…] the sale of anything for more than its just price was considered turpe lucrum, or ill-gotten gain, and prohibited'.[35] This in turn built the basis of the Scholastic Just Price theory.[36]

It is important to note that for Aristotle, economic value contained both use and exchange value. It might be meritorious to quote him in full here, not least due to his enduring influence on what has been dubbed 'equitable exchange', a concept that just recently was applied to Digital and AI Markets, where the Digital Markets Act defines fairness as 'For the purpose of this Regulation, unfairness should relate to an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage'.[37]

Aristotle on his part defined equitable exchange as meaning:

> These names, both loss and gain, have come from voluntary exchange; for to have more than one's own is called gaining, and to have less than one's original share is called losing, e.g., in buying and selling and in all other matters in which the law has left people free to make their own terms; but when they get neither more nor less but just what belongs to themselves, they say that they have their own and that they neither lose nor gain. **Therefore the just is intermediate between a sort of gain and a sort of loss,** viz. those which are involuntary; it consists in having an equal amount before and after the transaction […]. If, then, first there is proportionate

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30 Aaron Levine, 'Price Controls in Jewish Law' in Aaron Levine, *Economic Morality and Jewish Law* (Oxford University Press 2012).
31 Office of the Price Administration <http://www.archives.gov/research/guide-fed-records/groups/188.html#188.1> accessed 1 May 2026.
32 Rockoff, 'Price Controls' in *The Concise Encyclopaedia of Economics, Library of Economics and Liberty* <http://www.econlib.org/library/Enc/PriceControls.html> accessed 1 May 2026.
33 KV Nagarajan, 'The Code of Hammurabi: An Economic Interpretation' (2011) 2(8) International Journal of Business and Social Science 108.
34 Diocletian's edict on maximum prices, in AD 285 <http://www.forumancientcoins.com/NumisWiki/view.asp?key=Edict+of+Diocletian+Edict+on+Prices> accessed 1 May 2026; Mark R Reiff, *Exploitation and Economic Justice in the Liberal Capitalist State* (Oxford University Press 2013).
35 Reiff (n 34).
36 Daryl Koehn and Barry Wilbratte, 'A Defense of a Thomistic Concept of the Just Price' (2012) 22(3) Business Ethics Quarterly 501.
37 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1, recital 33.

> equality of goods, and then reciprocal action takes place, the result we mention will be effected. If not, the bargain is not equal, and does not hold; for there is nothing to prevent the work of the one being better than that of the other; they must therefore be equated […]. This is why all things that are exchanged must be somehow comparable. It is for this end that money has been introduced, and it becomes in a sense an intermediate; for it measures all things, and therefore the excess and the defect – how many shoes are equal to a house or to a given amount of food.[38]

The concept of prohibition of excessive / unfair prices and state-imposed price controls has indeed deep historical roots, from the time of Hammurabi, by way of Aristotle, through Jewish Halacha,[39] Christian[40] and Islamic[41] writings, and onwards to the Just Price framework developed by Albertus Magnus and his pupil, Thomas Aquinas, as well as other Scholastics.[42]

More recently, the ban on exacting excessive prices by Charles II in 1674, the so-called Maximum Laws during the reign of Robespierre, as well as laws prohibiting excessive prices on goods during times of war can be mentioned as historical examples,[43].[44] This connects with the scathing critique by Mestmäcker of Posnerian approaches,[45] who argues that some elements in the neoclassical legal-economic tradition do not have the necessary legal-historic perspective to understand how and why legal concepts are shaped and transformed and what 'values' are uncovered by a structured doctrinal analysis.

Fundamentally speaking, the question of controlling prices concerns the reach of state authority, an issue fiercely debated within liberal economic theory. Economists such as Adam Smith regard most forms of government intervention as 'superfluous, useless and harmful'.[46] Instead, the built-in forces in the market such as demand, surplus, and competition were supposed to form the 'invisible hand' that would serve to self-regulate prices when high profit margins in turn would invite competition and innovation.

With Smith, then, 'just price' theory becomes 'price' theory, moving away from the normative domain to one that is purely descriptive.[47] In view of Smith and also John Stuart Mill, state imposed price regulation was a futile and counter-productive exercise, to the detriment of 'industry and ingenuity'.[48] To Nozick, who defined state interventions as morally wrong, this proposes a libertarian night-watchmen state. To Rawls, who emphasises

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[38] Aristotle, *Nicomachean Ethics*, trans. W D Ross (Batoche Books 1999) Book V, 79. Emphasis added by the author.
[39] Dr Itamar Warhaftig, 'Consumer Protection: Price and Wage Levels' in Ezra Rosenfeld and Rav Binyamin Tabory (eds), *Crossroads: Halacha & the Modern World* (Urim Pubns 1999); Ephraim Kleinman, '"Just Price" in Talmudic Literature' (1987) 19(1) History of Political Economy 23.
[40] Biblical writings include Leviticus 19:9, Ezekiel 18:13, Deuteronomy 23:19, Leviticus 25:37 and Proverbs 28:8, to name a few.
[41] Muhammad Bashar, 'Price Control in an Islamic Economy' (1997) 9(1) Journal of King Abdulaziz University-Islamic Economics 29.
[42] John W Baldwin, 'The Medieval Theories of the Just Price – Romanists, Canonists, and Theologians in the Twelfth and Thirteenth Centuries' (1959) 49(4) Transactions of the American Philosophical Society 1.
[43] Barry E Hawk, 'Antitrust in History' (2018) 63(3) The Antitrust Bulletin 275.
[44] Edgar Watkins, 'The Law and the Profits' (1922) 32(1) The Yale Law Journal 29.
[45] Ernst-Joachim Mestmäcker, *A Legal Theory Without Law* (Mohr-Siebeck 2007).
[46] von Mieses 1923; <http://mises.org/etexts/mises/critique/section5.asp> accessed 1 May 2026.
[47] Reiff (n 34).
[48] Watkins (n 44).

social justice, state intervention is instead deemed necessary, the same as with Dworkin, causing the latter to criticise the Posnerian position of elevating 'wealth maximisation' as the end-result and an objective value to be pursued.[49]

Adam Smith worked partly in line with the virtue ethics of Plato and Aristotle but showed highly 'Kantian' tendencies in connecting the reason-experience-induction dots which were later completed by Kant. As Smith explains:

> It is by reason that we discover those general rules of justice by which we ought to regulate our actions: and it is by the same faculty that we form those more vague and indeterminate ideas of what is prudent, of what is decent, of what is generous or noble, which we carry constantly about with us, and according to which we endeavour, as well as we can, to model the tenor of our conduct. The general maxims of morality are formed, like all other general maxims, from experience and induction.[50]

Thus, the grandfather of political economy seems to realise the inherent importance of fairness in relation to efficiency and its universal implication.[51] Nevertheless, the notion of the Smithian 'invisible hand' as the means to engage market regulation has invited two diverging approaches on intervention. One affirms the self-correcting capacity of excessive prices, the other maintains the necessary and beneficial aspects of intervention. The debate between non-interventionist and interventionist approaches to competition law unfolds in the tension between the two.[52]

The non-interventionist school dismisses the subjection of excessive prices to antitrust intervention. Since new actors will challenge dominant ones while entering the market, excessive prices are not supposed to be upholdable on a long-term basis. Although intervention would lower prices and hence increase consumer welfare in the short run, the proponents of the non-interventionist school argue that new competitors would be less likely to enter the market, incentives and risk-taking would decrease, and dominant actors would be prevented from maximising their efficiency in order to obtain a higher profit margin. The non-interventionist school further objects to the capacity of a price-cost comparison to detect excessive prices, since audited financial data is not developed for the purpose of competition law and does not calculate investment in research and development, inflation, return on risk etc., this is not deemed viable.

Nor are comparisons to a competitive profit benchmark deemed 'economically sound', since this would require ex ante defining of what a competitive profit would be. Also, the experience and ability of authorities and courts to regulate prices and monitor markets are questioned, a problem escalated by the need for continued interventions and supervision of markets.[53] In sum, the non-interventionist school highlights the difficulties in assessing

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[49] Ronald Dworkin, 'Is Wealth a Value?' (1980) 9(2) Journal of Legal Studies 191.

[50] Adam Smith, 'Part VII. Of Systems of Moral Philosophy' in Adam Smith, *The theory of moral sentiments; or, an essay towards an analysis of the principles by which men naturally judge concerning the conduct and character, first of their neighbors, and afterwards of themselves, to which is added a dissertation on the origin of languages* (new ed.) (Henry G Bohn 1861).

[51] Manfred J Holler and Martin Leroch, 'Efficiency and Justice Revisited' (2010) 26 European Journal of Political Economy 311.

[52] Liyang Hou, 'Excessive Prices Within EU Competition Law' (2011) 7(1) European Competition Journal 48.

[53] Massimo Motta and Alexandre de Streel, 'Excessive Pricing in Competition Law: Never Say Never?' in

excessive prices and views enforcement as only one possible solution to the problem, while debating how lowered entry barriers can stimulate competition.

The interventionist school, which has been more triumphant in recent years — as seen in the string of excessive pricing cases brought and fines imposed[54] — takes the opposite view, asserting that excessive, unfair prices must be included in the jurisdiction of competition law due to the manifest and inherent harm they pose to consumer welfare through the undue rent transfer from consumers to the monopolist. They point both to the rather deep roots of the ban against 'unfair pricing' in legal history and to the concomitant reasoning whereby a monopolist can extract undue profits for a prolonged period of time, be it due to inelastic demand, barriers to entry, or other reasons leading to a defective competitive process.

On the law and economics of fairness as a concept, and in regard to the 'fairness' versus 'efficiency' debate, one might observe that notions of fairness have had much better empirical and experimental economic successes[55] than oft-invoked theoretical notions of self-interest[56] and rationality.[57] On the normative side, as aptly summarised by Klaus Mathis: 'In people's minds, justice – however it is defined – has an immanent value, which is very difficult to weigh up against an increase in economic efficiency'.[58] Regarding the division between fairness and efficiency, prevention of undue wealth transfer sits at the core of competition policy, as noted by Gerard:

> At the highest level, competition policy may indeed be theorised as an institution aimed at reconciling individual and collective rationality, i.e., each entrepreneur's efforts to maximise profits, on the one hand, and the welfare of society at large, on the other hand. To that extent, fair competition may entail that there are boundaries to profit maximisation strategies beyond which these are considered socially unacceptable by reference to certain standards of justice as articulated in anti-trust principles and applied by means of an array of legal tests and enforcement rules.[59]

Nevertheless, in the words of Frédéric Jenny '[…] the complementary concept of "fairness" is again a concept alien to economic analysis'[60] but this statement is only true given a narrow definition of 'economics'. One could also argue that economics might indeed

Swedish Competition Authority (ed), *The Pros and Cons of High Prices* (Kalmar: Swedish Competition Authority 2007) 15 ff.

54 Behrang Kianzad, 'The Giant Awakens: Law and Economics of Excessive Pricing During the COVID-19 Crisis' in Klaus Mathis and Avishalom Tor (eds), *Law and Economics of the Coronavirus Crisis, vol 13* (Springer International Publishing 2022).

55 Joseph Henrich et al, 'In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies' (2001) 91 American Economic Review 73.

56 Daniel Kahneman, Jack L Knetsch, and Richard H Thaler, 'Fairness and the Assumptions of Economics' (1986) 59(4) The Journal of Business 285.

57 Daniel Kahneman, Jack L Knetsch and Richard H Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' (1986) 76(4) The American Economic Review 728.

58 Klaus Mathis, *Efficiency Instead of Justice?* (Springer 2009) 48.

59 Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' (2018) 9 Journal of European Competition Law & Practice 211.

60 Frédéric Jenny, 'Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment' in Yannis Katsoulacos and Frédéric Jenny (eds), *Excessive Pricing and Competition Law Enforcement* (Springer International Publishing 2018) 5–70.

contain conceptual basis for fairness,[61] as the law for its part has indeed shown itself to be able to accommodate economic reasoning. The sheer number of economic papers on fairness in pricing and transactions, as well as Nobel prizes awarded to economists in one way or another addressing fairness-related issues (Kahneman, Stiglitz, Sen, et alia), speaks for itself.

Offering a contrary view to that of Jenny, in the words of 2001 Nobel Laureate in Economics Joseph Stiglitz:

> This fallacious idea is that you can separate equity from efficiency. It's sometimes referred to as the Second Welfare Theorem. We now know that those two issues can't be neatly separated in that way.[62]

The aforementioned evidence from behavioural and neuro-economics invariably demonstrate innate human morality and fairness preferences in transactions, and not a sense of 'utility maximisation' or proneness to 'efficiency'.[63] As also noted by Stucke regarding the supposed 'consensus' in Antitrust law and economics:

> Despite the push for a single economic antitrust goal, there is no consensus in the U.S. or worldwide on any well-defined goal. Four oft-cited economic goals (ensuring an effective competitive process, promoting consumer welfare, maximizing efficiency, and ensuring economic freedom) have failed to unify antitrust analysis. No consensus exists on what the four goals mean or how they are achieved.[64]

Returning to the matter of unfair pricing, and the intervention by the Sovereign, having crucial importance for the fairness-efficiency discussion, as submitted by Motta and de Streel: 'Due to the general formulation of Article 82, every dominant firm, however its market power has been acquired or maintained […] has the special responsibility not to set excessive prices'.[65]

Gal also comments along the same lines, connecting the European competition law 'as if' approach to Fairness and the influence of the Ordo-liberal School, noting:

> Thus, the Ordo-liberals […] stressed the goal of fairness, which was understood as protecting the individual's economic freedom of action as a value in itself against any impairment of market power. It led some Ordo-liberals to suggest that dominant firms had to act 'as if' they were operating in a competitive market.[66]

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61 Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).
62 Joseph Stiglitz, 'Competition Policy, the Need for a More Nuanced View' (Interview) (2019) 2 Concurrences 16-17.
63 Michael Koenigs et al, 'Damage to the Prefrontal Cortex Increases Utilitarian Moral Judgements' (2007) 446(7138) Nature 908; Gregory S Berns et al, 'The Price of Your Soul: Neural Evidence for the Non-Utilitarian Representation of Sacred Values' (2012) 367(1589) Philosophical Transactions: Biological Sciences 754; Alexander W Cappelen et al, 'Equity Theory and Fair Inequality: A Neuroeconomic Study' (2014) 111(43) Proceedings of the National Academy of Sciences 15368; Joshua D Greene et al, 'The Neural Bases of Cognitive Conflict and Control in Moral Judgment' (2004) 44(2) Neuron 389.
64 Stucke (n 10).
65 Harry First, 'Excessive Drug Pricing as an Antitrust Violation' (2019) 82(2) Antitrust Law Journal 59.
66 Michal S Gal, 'Abuse of Dominance – Exploitative Abuses' in Ioannis Lianos and Damien Geradin (eds),

Already here we note the tension between Ordoliberal approaches to competition law — including notions of 'special responsibility' and 'fairness' to some extent — versus the neoclassical, welfarist ,and Chicagoan economic schools which not only do not always take exception to monopolies, but are wary of including any other notion in the analysis beyond 'efficiency'.

This normative position, relying on a Chicagoan Economic Analysis of Law in the Posner and Shavell tradition, scored its most important legal victory in a US Supreme Court case which was more centred around essential facilities and duty to deal than excessive pricing. In a majority judgement written by the late Antonin Scalia it was claimed that:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly price – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.[67]

The above has been abundantly cited in the European literature on excessive pricing, but also in some court proceedings and in the Advocate General Wahl's Opinion in the excessive pricing case *AKKA / LAA* before the CJEU in 2017.[68] Many European commentators have alluded to this US Supreme Court ruling and the expressed rhetoric, i.e. while they acknowledge the existence of monopoly pricing or excessive pricing — at least in theory and by way of valid and binding EU competition law — they do not recognise the practice to be an evil in and of itself to be enforced against by competition authorities, at least not when it relates to ensuring 'fairness in pricing'.

The equation of consumer welfare with total welfare,[69] and the ignoring of undue wealth transfer[70] and manifest consumer harm as being prima facie anti-competitive practices, are the necessary scaffolding holding the *Trinko* claim and interconnected assumptions together.

It should firstly be observed that *Trinko* did not concern the legality of monopoly profits as a purely exploitative case targeted at consumers, per se. As noted by Harry First[71] as well as Eleanor M Fox, the case treated the question of essential facilities and 'duty to deal' doctrine. Further, as demonstrated by Kirkwood and Lande, the original legislative intent behind the Sherman Act and American Antitrust tradition did not concern 'efficiency', but rather 'consumer welfare', defined in the true meaning of the term and not its Borkian version.[72] Justice Scalia further cited no precedent in support of his view on the virtues of monopolistic profits. *Trinko* is an oddity.

The scathing criticism mounted against *Trinko* by noteworthy US Antitrust scholars seems to have been largely ignored by those who routinely invoke *Trinko* and the wording

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*Handbook on European Competition Law* (Edward Elgar Publishing 2013).

[67] Verizon Communications, Inc v Law Offices of Curtis v Trinko, LLP 157 L Ed 2d 823, 836 (2004).

[68] Opinion of Advocate General Wahl in Case C-177/16 EU:C:2017:286 para 117.

[69] KJ Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(2) The Competition Law Review 121.

[70] Lande (n 23).

[71] First (n 65).

[72] John B Kirkwood and Robert H Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency' (2008) 84(1) Notre Dame Law Review 191.

by the late Antonin Scalia as passages from some holy scripture in the many works on excessive pricing in European competition law.

It is also relevant to note that the Amicus Brief on the part of the respondent Verizon was written by none other than Robert Bork,[73] one of the chief engineers of the Chicagoan-turn in US Antitrust, whose nomination to the Supreme Court notably was not confirmed by the US Senate.

Finally, as noted by Giorgio Monti on the excessive quoting of the Scalia opinion in the literature on unfair, excessive pricing but also in European court proceedings:

> Since the express prohibition of excessive pricing in Article 102 suggests a diametrically opposite attitude to the one expressed here, it is hard to see why one should see *Trinko* as a helpful discussion for the purposes of EU Law, but it reveals the trend to assimilate much of the thinking (ideology?) that underpins Scalia's thinking into EU antitrust even when, as here, it runs against the statutory text.[74]

One would hope that future literature on European discourse on excessive and unfair pricing will avoid the conceptual confusion of invoking *Trinko*, as it does not advance our knowledge and is merely recasting a certain approach to antitrust economics which is doctrinally — to borrow expression from aforementioned Bork — is at war with itself due to manifest misconceptions.

The next section depicts various legal-economic perspectives on the matter of fairness and fairness in pricing.

## 3 UNFAIR, EXCESSIVE PRICING FROM A LEGAL-ECONOMIC PERSPECTIVE

Narrowing down the discussion of fairness in economics to the case at hand, namely 'fairness in pricing' for the purpose of discussion of Article 102a TFEU prohibition against unfair pricing, it should firstly be observed that there exists a substantial body of economic research on the matter of fairness notions related to pricing.

The modern economic research on the matter has mainly taken the form of behavioural and experimental research, with Kahneman et al. laying some of .the groundwork for this field of research in the mid 1980's. In behavioural science, fairness oftentimes denotes the social preference for equitable outcomes, largely alongside the views of fairness analysed in the previous section. Such preference for equitable outcomes can also manifest itself as 'inequity aversion', denoting people's tendency to dislike unequal payoffs in their own or someone else's favour, a matter which has been investigated by way of experimental games, such as the ultimatum, dictator, and trust games.[75]

Further economic research has targeted fairness in pricing and customer notions related to price increases, demonstrating that consumers are generally less accepting of price

[73] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978).
[74] Giorgio Monti, 'Excessive Pricing: Competition Law in Shared Regulatory Space' <https://www.tilburguniversity.edu/sites/default/files/download/Monti%20Excessive%20pricing.pdf> accessed 1 May 2026.
[75] Ernst Fehr and Klaus M Schmidt, 'A Theory of Fairness, Competition, and Cooperation' (1999) 114 The Quarterly Journal of Economics 817.

increases as a result of a short-term growth in demand than a rise in costs.[76] Recent approaches in behavioural economics also contribute to our understanding of human biases towards fairness and aversion to unfairness, especially regarding transactions and pricing.

The work of Kahneman, Knetsch, and Thaler,[77] Piron and Fernandez,[78] Fehr and Schmidt,[79] Varian,[80] Ulen,[81] Sunstein and Jolls[82] et al., in combination with research on neuro-economics experiments,[83] further contributes to our normative understanding when trying to make sense of what role fairness should and could play in the law and economic analysis of unfair, excessive pricing.

The reliance on past prices when judging the appropriateness of current prices, and the use of current prices to predict future prices, have also been demonstrated by other researchers.[84] However, past prices are not the sole determinant regarding fair pricing perceptions, where prevailing competitive prices are also of importance.[85] As noted in one literature overview, 'it appears that people do not spontaneously or fully appreciate retailer costs when judging fair prices. Profit is viewed as constituting a large proportion of the selling price'.[86]

Interestingly, comparison with past prices, or prices charged for the same product in other markets, are two of the central assessment methods related to unfair and excessive pricing in European jurisprudence related to Article 102a TFEU.[87]

One of the behavioural and experimental approaches to observe fairness preferences and biases has consisted of experimental games, such as the Ultimatum Game, and its related derivation, the Dictator Game. Briefly explained, the Ultimatum Game consist of a setting where one player, called the proposer, is endowed with a set amount, such as $100. The proposer will then share this amount with another player, called the responder, by way of a proposal regarding division of the total sum in question. After the proposition is made, the responder has the choice to accept or reject the offer made by the proposer. If the responder accepts the offer, both players get to keep the proposed sum. However, if the responder rejects the offer, neither party gets to keep any of the proposed division.

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76 Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).

77 Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).

78 Robert Piron and Luis Fernandez, 'Are Fairness Constraints on Profit-Seeking Important?' (1995) 16(1) Journal of Economic Psychology 73.

79 Fehr and Schmidt (n 75).

80 Hal R Varian, 'Distributive Justice, Welfare Economics, and the Theory of Fairness' (1975) 4 Philosophy & Public Affairs 223.

81 Thomas S Ulen, 'Law and Economics, the Moral Limits of the Market, and Threshold Deontology' in Aristides N Hatzis and Nicholas Mercuro (eds), *Law and Economics: Philosophical issues and fundamental questions* (1st edn, Routledge 2015).

82 Cass R Sunstein, Christine Jolls and Richard H Thaler, 'A Behavioural Approach to Law and Economics' (1998) 50 Stanford Law Review 1471.

83 Cappelen et al, 'Equity Theory and Fair Inequality: A Neuroeconomic Study' (n 63); Mario F Mendez, 'The Neurobiology of Moral Behavior: Review and Neuropsychiatric Implications' (2009) 14(11) CNS Spectrums 608; Ming Hsu, Cédric Anen, and Steven R Quartz, 'The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency' (2008) 320(5879) Science 1092.

84 Richard A Briesch et al, 'A Comparative Analysis of Reference Price Models' (1997) 24(2) Journal of Consumer Research 202.

85 Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).

86 Lisa E Bolton, Luk Warlop and Joseph W Alba, 'Explorations in Price (Un)Fairness' (K.U.Leuven - Departement toegepaste economische wetenschappen, Research Report 0145, 2001) <https://lirias.kuleuven.be/1831171?&lang=en> accessed 1 May 2026.

87 Jenny (n 60).

The players are aware of the rules of the game in advance, thus characterising the game as an 'ultimatum game'.[88]

Strict utility-maximising and rational choice based Game Theory would dictate that the proposer should offer a minimal sum, as the responder has the alternative between accepting a small sum, or nothing – where the small sum, however small, increases the responder's utility equal to the proposed sum, however marginal it might be, turning this into a 'Nash Equilibrium'.[89]

From the outset, the proposer, being aware of this fact, thus has no incentive to offer any 'fair' allocation. Surprisingly, the proposer more often than not opts to offer a rather fair allocation, and the responder tends to reject unfair offers, as noted:

> The key result of ultimatum experiments is that most proposers offer between 40% and 50% of the endowed amount, and that this split is almost always accepted by responders. When the proposal falls to20% of the endowment it is rejected about half of the time, and rejection rates increase as the proposal falls to 10% and lower.[90]

The fair allocation can be seen as evidence regarding fairness as constraint on pecuniary gaining, where people engage in fair sharing

> in order to avoid large deviations from what they consider a fair solution. This type of behaviour has been extensively documented in laboratory experiments with games such as the ultimatum game and the dictator game.[91]

The implication of fairness concerns for Game Theory and Equilibrium was highlighted by Rabin in 1993, noting:

> People like to help those who are helping them, and to hurt those who are hurting them […] one should care not solely about how concerns for fairness support or interfere with material efficiency, but also about how these concerns affect people's overall welfare.[92]

Earlier still, the seminal work by Kahneman, Knetsch, and Thaler in 1986,[93] which is of great importance for the context of the present work on excessive pricing, demonstrated

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88 Mascha van't Wout and Johannes Leder, 'Ultimatum Game' in Virgil Zeigler-Hill and Todd K Shackelford (eds), *Encyclopedia of Personality and Individual Differences* (Springer International Publishing 2018).

89 Nash Equilibrium is defined as 'Nash equilibrium, named after American Economist John Nash (1928-2015) is a solution to a non-cooperative game where players, knowing the playing strategies of their opponents, have no incentive to change their strategy. Having reached Nash equilibrium a player will be worse off by changing their strategy' – Economics Online, <https://www.economicsonline.co.uk/Definitions/Nash_equilibrium.html> accessed 1 May 2026.

90 Daniel Houser and Kevin McCabe, 'Experimental Economics and Experimental Game Theory' in Paul W Glimcher and Ernst Fehr (eds), *Neuroeconomics: Decision Making and the Brain* (2nd edn, Elsevier 2014); see also Stéphane Debove, Nicolas Baumard, and Jean-Baptiste André, 'Models of the Evolution of Fairness in the Ultimatum Game: A Review and Classification' (216) 37(3) Evolution and Human Behavior 245; Nowak, Page and Sigmund (n 16).

91 Alexander W Cappelen et al, 'The Pluralism of Fairness Ideals: An Experimental Approach' (2007) 97(3) American Economic Review 818; John von Neumann and Oskar Morgenstern, *Theory of Games and Economic Behavior (60th Anniversary Commemorative Edition)* (Princeton University Press 2007).

92 Matthew Rabin, 'Incorporating Fairness into Game Theory and Economics' (1993) 83 The American Economic Review 1281.

93 Kahneman, Knetsch, and Thaler, 'Fairness as a Constraint on Profit Seeking' (n 57).

that people are wary of pricing unfairness, where prior prices of the undertaking served as one benchmark for such fairness considerations.

Just a year earlier in 1985, the non-maximising tendencies (framed around non-rationality) and its implications for rationality and overall Economic Equilibrium was also investigated by Akerlof and Yellen.[94] Building on prior work by Artur Okun in 1981,[95] who had also observed that firms do not maximise prices despite facing excess demand (such as new models of automobiles or tickets for events which ex ante are known to generate excess demand), Kahneman et al. investigated fairness perceptions regarding (unfair)pricing.

The observed behaviour in the experimental games and the asserted human bias towards fairness and equity were labelled by some as altruism; however, the work by Fehr and Schmidt showed that this was not the case, noting:

> Altruism is consistent with voluntary giving in dictator and public good games. It is, however, inconsistent with the rejection of offers in the ultimatum game, and it cannot explain the huge behavioural differences between public good games with and without punishment. It also seems difficult to reconcile the extreme outcomes in market games with altruism.[96]

Maurice Stucke, putting forward a behavioural approach to competition law and policy, noted that '[…] antitrust policy is not divorced from subjective well-being. First, competition does not exist independently of legal and informal norms. Competition is defined in part by the prevailing legal and informal social, ethical, and moral norms',[97] thus underscoring the Kantian view of fairness advanced in the present work and reconnecting it with the claim that competition law must invariably rely on the ratio legis and ratio oeconomica of preventing undue wealth transfer, with fairness being a building block in both law and policy surrounding the prohibition and its legal and economic history.

Against this view of price gouging and excessive pricing as something inherently 'unfair' which would be the object and focus of Competition and Antitrust laws, the Economic Analysis of Law discipline invokes that meddling with prices and the normal functioning of the markets, even with benevolent intentions, will invariably have the end-result of making everyone worse off.

As the argument goes, since prices are central to the modern economy and a signal to entry to competitors, and the instrument which ensures efficient resource-allocation, fairness preferences related to pricing should be treated as externalities to the analysis.

The COVID-19 pandemic indeed offered an apt possibility to observe such responses from economists departing from welfarist and marginalist notions, which took issue with price control laws set up in different countries and states, which they castigated as missing the target of efficient allocation of scarce resources. Summarising the critique against price gouging laws, Weiss notes that:

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[94] George A Akerlof and Janet L Yellen, 'Can Small Deviations from Rationality Make Significant Differences to Economic Equilibria?' (1985) 75 The American Economic Review 708.

[95] Arthur Okun, *Prices and Quantities: A Macroeconomic Analysis* (Brookings Institution 1981).

[96] Fehr and Schmidt (n 75).

[97] Stucke (n 10).

> price gouging provides great benefit to those in desperate need, and simply reflects the value that buyers and sellers choose to place on the goods and services that they exchange. Consumers' willingness to pay high prices demonstrates that they value the goods more than the money they are giving up for them. Buyers consciously and voluntarily consent and enter into the exchange that will improve their lot. Therefore, price gouging is not greedy or brazen, but rather how goods and services get allocated in a free society and reflects the actual value of such goods and services. Unfettered markets respect individual freedom since they allow people to choose for themselves what value to place on the goods they exchange, rather than dictate the value of such goods. Thus, price gouging is not disrespectful or exploitative.[98]

This position is reliant on several assumptions which, when examined more closely, do not hold up. The first assumption relates to markets being more suitable, informed, and able, than the public authority, to determine the needs and preferences among the general population. The second relates to price increases actually bringing about an efficient allocation of resources, when it can simply be used for profiteering without having any positive results for the buyers.

Nor does this conceptualisation address the matter of initial endowments, i.e. who can afford the desired goods, no matter their 'utility'. Some will have to forego the goods, although they might be in greater 'need' of the said goods and thus value them higher than those able to afford them but having less 'need' but a higher ability to pay for the price increases.

Offering a rebuttal to the above, namely that the poor will have to forego goods due to price gouging, Lee argues that price controls will lead to prices actually going up more than they would if market forces were to be allowed, due to decreasing supply in turn caused by increased costs. Further, in relation to consumer surplus, Lee claims that:

> Consumers don't like high prices, but they receive what economists refer to as 'consumer surplus' when they make a purchase, wherein the total value they receive from a purchase exceeds the total value sacrificed. It should also be recognised that this consumer surplus is greater the more desperate consumers are for a product, as measured by the inelasticity of demand. Thus, by preventing prices from clearing markets, 'price gouging' laws impose the greatest loss of consumer surplus on the most desperate consumers, who are generally the poor.[99]

The above relies heavily on stylised notions which face not only theoretical but also empirical shortcomings, which will be expanded upon in the forthcoming chapters on substantive law and economics analysis of excessive pricing. It suffices to state that the poor citizen who is not able to buy water to satisfy his needs does not meditate on the theoretical and abstract 'consumer surplus' described in the theoretical welfarist model when the price of water goes up from \$5 to \$10 overnight or when the price of a life-saving medicine

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[98] Shira Weiss, 'Ethics of Price Gouging' in Shira Weiss, *Ethical Ambiguity in the Hebrew Bible: Philosophical Analysis of Scriptural Narrative* (Cambridge University Press 2018).
[99] Dwight R Lee, 'Making the Case against "Price Gouging" Laws: A Challenge and an Opportunity' (2015) 19 The Independent Review 583.

increases by several thousand percent. This returns the discussion to the present context of incommensurable goods and inelasticity of demand.

The main problem with positing high prices as beneficial because they would induce market entry is that this line of reasoning confuses ex ante prices with ex post prices; it is the latter that are of importance for a potential entrant, not the former.[100] Also, during a pandemic, the temporal element is of crucial importance, same with a life-saving, essential medicine which is being price-hiked by several thousand percent.

Further, there is an obvious wealth transfer from the consumer to the supplier, begging the question of why such an allocation would be more efficient than allowing the surplus to stay with the consumer. This sits alongside the same logic of individual freedom and choice, which is hard to maintain when demand is ipso facto inelastic. Claiming any 'efficiency' resulting from price gouging that bears no relation to any increase in costs is a circular and self-defeating argument, ignoring the non-economic preferences held by people and societies, which do act as constraints on profit-seeking and market freedom.[101]

Furthermore, the claim by Lee seems to contradict settled science on human preferences regarding fairness in pricing, and ultimately, trust in markets and the democratic basis for markets. Regarding the connection between economics and legal discipline regarding notions of fairness, Holler and Leroch note that:

> […] recent findings, mainly from the field of experimental economics, reintroduce aspects of 'fair pricing' and fairness in transactions into economic modelling. Other theories, evolutionary models for instance, take up the key findings and apply the economic rationale in order to find out why human traits which apparently run counter to individual self-interest may have survived...we date this discussion back to the days of Adam Smith and argue that he already set the basis for such a discussion. Apparently, Smith was well aware that principles of justice and the market may, at times, be contradictory. However, he also found that both served a common purpose.[102]

The legal framework prevalent in the European Union regarding fairness in pricing seems to reconnect more with the Just Price approach, and not a utilitarian or 'wealth maximisation' approach, with Article 102a TFEU ipso facto limiting the economic freedom of dominant undertaking in their pricing.

The present article hence asserts that the roots of the prohibition of excessive and unfair pricing in European competition law display clear elements of Natural Law and Kantian legal philosophy, in part relying on Roman Legal Norms of contract, tort, liability, and related matters, although the Just Price is more scholastic than Roman in its nature. Thus, anyone looking for the roots of the 'unfair pricing' is best advised to search for the roots of the prohibition in not only the Justum Pretium[103] (Just Price) and Scholastic writings,

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[100] Ariel Ezrachi and David Gilo, 'Are Excessive Prices Really Self-Correcting?' (2009) 5(2) Journal of Competition Law and Economics 249.

[101] See the work of Karl Polanyi on the matter of non-economic constraints: Gareth Dale, *Karl Polanyi: The Limits of the Market* (Polity Press 2010).

[102] Holler and Leroch (n 51).

[103] Nathan Isaacs, 'The Revival of the Justum Pretium' (1921) 6 Cornell Law Quarterly 381.

but also in the Kantian and Neo-Kantian legal-economic philosophy.[104]

Indeed, in the later years, it is the interventionist school which has prevailed in European competition law and policy, as seen in the avalanche of cases mainly in the pharmaceutical sector,[105] but price-based cases are also emerging in the digital and AI sectors, as well as within the context of COVID-19 crisis, as depicted in the next section.

## 4 COVID-19, UNFAIR PRICING AND THE EUROPEAN UNION

The COVID-19 pandemic triggered an explosion of demand for certain essential products – from protective masks and hand sanitiser to life-saving medicines – and, with it, instances of extreme price spikes. Public outrage at 'price gouging' became a global phenomenon in the spring of 2020. This section relays an earlier empirical inquiry[106] into how different jurisdictions responded, revealing starkly different legal frameworks and economic philosophies at play. The focus of the present section is, however, on European Union.

In the EU, unfair and excessive pricing by dominant firms is unequivocally prohibited by primary law – Article 102(a) TFEU – and has been recognised in seminal cases since the 1970s, from which there has been a consistent enforcement at both Union and Member State level.

The claim that there would exist a 'scarcity' of cases, in turn used by some commentators as evidence for a 'reluctance' on part of competition authorities, is a flawed one. This is evidenced merely by the fact that no less than 28 cases on Union level and more than 95 cases on Member state level exist between 1971–2021.[107] The claim of 'scarcity of cases' is thus wholly void and should be avoided in the context of unfair pricing cases in the European Union, in the same spirit that the quote from *Trinko* should be avoided as it does not advance our knowledge.

The European Court of Justice in *United Brands*[108] set out the seminal two-prong test for identifying an unfairly high price: first, the price must be excessive (disproportionate to the economic value of the product), and second, it must be 'unfair either in itself or when compared to competing products'.[109]

A string of national cases in the late 2010s (for example, the *Italian Aspen Pharma* case and the *UK Pfizer/Flynn* case involving cancer and thyroid drugs with overnight price increases of several hundred or thousand percent) signalled a renewed willingness by

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104 Mark D White, 'With All Due Respect: A Kantian Approach to Economics' in Mark D White (ed), *The Oxford Handbook of Ethics and Economics* (Oxford University Press 2019).
105 Kianzad, 'Towards Fair Pricing of Medicines?' (n 5).
106 Kianzad, 'Excessive Pricing during the COVID-19 Crisis in the EU: An Empirical Inquiry' (n 12).
107 Behrang Kianzad, 'Are Excessive Pricing Cases Few and Far between? A Quantitative Analysis of Fifty Years of European Jurisprudence 1971-2021' (Nominated to Concurrences Antitrust Writing Awards 2024) (2023) 3 Concurrences 1 <https://awards.concurrences.com/en/awards/2024/academic-articles/are-excessive-pricing-cases-few-and-far-between-a-quantitative-analysis-of> accessed 1 May 2026.
108 Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* EU:C:1978:22, see paras 248-252. Observe that the Court does notes difficulties in appreciation of costs in para 254, but does not consider this an 'insurmountable' challenge, as some scholars erroneously have claimed.
109 See also Case 85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36 para 90, reaffirming that charging a price which is excessive because it bears no reasonable relation to the value of the product is an abuse, re-affirming the *United Brands*.

European enforcers to tackle exorbitant pricing in situations of consumer harm.[110] These cases relied on the *United Brands* framework, comparing the contested prices against cost benchmarks and cross-market prices to conclude the firms had earned 'excessive and unfair' profits at the expense of consumers. It should be noted that these enforcements occurred against a backdrop of manifest doctrinal adversity by neoclassical and welfarist minded scholars.[111]

When the pandemic hit, the European Competition Network (ECN) – the coordinating body of EU and national competition authorities – swiftly issued a joint statement in March 2020, underscoring that authorities would not hesitate to take action against companies exploiting the crisis. The ECN highlighted the importance of ensuring that essential protective goods (such as face masks and sanitising gel) 'remain available at competitive prices' and warned that dominant firms should not abuse the situation by gouging customers.[112] In tandem with 'nudging'[113] and moral persuasion, several Member States activated or adopted emergency price regulation measures.

For instance, France imposed price caps on hand sanitiser in March 2020, fixing maximum prices (e.g. €2 for 100ml bottles) to prevent runaway pricing.[114] Romania announced it might introduce price caps if needed to curb excessive increases.[115] Malta directly regulated the price of face masks after investigating reports of fourfold increases in pharmacy retail prices.[116] These interventions, unusual in normal times, reflected the political

110 Behrang. Kianzad and Timo Minssen, 'How Much Is Too Much? Defining the Metes and Bounds of Excessive Pricing in the Pharmaceutical Sector' (2018) 2(3) European Pharmaceutical Law Review 133. See, e.g., Italian Competition Authority (AGCM), Decision No. 26185 (29 September 2016) – Aspen Pharmacare, finding that Aspen's exorbitant price increases (1500%–11000% on cancer medications) were unfair and abusive. The AGCM applied the United Brands test, comparing Aspen's prices to its costs and to prices in other EU countries, and concluded the prices were excessive and imposed unfairly on Italy's national health system. In the UK, the Competition and Markets Authority's case CMA v. Pfizer and Flynn Pharma (Case CE/9742-13, decision of 7 December 2016) likewise found that the prices for an anti-epileptic drug were unfairly excessive after a 2,600% overnight increase. (Though the CMA's original decision was overturned on appeal for insufficient analysis and has been re-examined, it reflected a willingness to pursue such cases). These cases show a resurgence of excessive pricing enforcement in Europe pre-COVID.

111 Jenny (n 60); David S Evans and A Jorge Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1(1) Journal of Competition Law & Economics 97; Motta and de Streel (n 53).

112 European Competition Network, 'Joint Statement on the Application of Competition Law During the Corona Crisis' (23 March 2020). The ECN (comprising the European Commission and national competition authorities of the EU/EEA) stated that while the crisis might necessitate certain cooperation among companies to ensure supply, it remained vigilant against abuses: 'At the same time, it is of utmost importance to ensure that products considered essential to protect the health of consumers […] remain available at competitive prices. The ECN will therefore not hesitate to take action against companies taking advantage of the situation by cartelising or abusing their dominant position'.

113 Behrang Kianzad and Timo Minssen, 'Sweden's Response to COVID-19: A tale of trust, recommendations, and odorous nudges' (*Harvard Law Blog*, 12 May 2020) <https://petrieflom.law.harvard.edu/2020/05/12/sweden-global-responses-covid19/> accessed 1 May 2026.

114 French Government, Decree No. 2020-197 of 5 March 2020 (as amended by Decree No. 2020-281 of 20 March 2020), setting maximum retail prices for hydroalcoholic gels. For instance, 50ml bottles were capped at €2 and 100ml at €3. This measure was justified under the French Commercial Code's provisions allowing price regulation in exceptional circumstances.

115 Romanian Competition Council, Press Release (24 March 2020), noting that if price spikes for essential products could not be contained via competition enforcement, the Council advises the government to use its legal powers to cap prices temporarily. Romania had passed emergency legislation allowing price caps on food and medical products during the state of emergency. In the end, Romania did not impose broad price caps, but the warning itself exemplified authorities leveraging regulatory backup powers to keep prices in check.

116 Malta Competition and Consumer Affairs Authority, investigations in April 2020 found significant price

imperative to protect consumers from exploitation and to ensure broad access to essentials.

Notably, while EU competition law provides an ex post tool to attack unfair pricing by dominant firms, in the acute phase of the COVID-19 crisis most European authorities favoured swift, precautionary measures (like price ceilings and public warnings) over formal abuse-of-dominance cases. This pragmatic approach was likely due to the evidentiary and timing challenges of pursuing a full antitrust case during an ongoing emergency. A formal case under Article 102 TFEU can at times take years to pursue, whereas immediate price regulation can blunt harm in real-time.

Indeed, after the initial months of the crisis, some national authorities did open investigations (the Greek and Italian authorities, for example, looked into price spikes for healthcare products), but no major EU-level excessive pricing case was ultimately decided during the pandemic. The relative paucity of antitrust enforcement in this area could be criticised, as the Europe's existing law of Article 102a TFEU could and should have been used more aggressively to sanction pandemic profiteering, rather than relying on consumer protection laws or ad hoc regulations.[117]

The counterargument would make the case that competition agencies complemented their enforcement discretion with consumer protection tools better suited for the emergency: many EU countries empowered consumer protection authorities to police unjustified price hikes for essential goods regardless of dominance, thus filling the gaps that competition law's dominance requirement left open.

From a normative perspective, the EU's experience during COVID-19 underlines a tension: the law on the books embraces a fairness-oriented view that excessive pricing is an 'abuse' of monopoly power, yet enforcers often hesitate to apply it, much due to the influence of a Chicagoan, Neoclassical, and Welfarist influence, where many works on the matter of excessive pricing still cite the aforementioned US Supreme Court egregiously decided *Trinko* case, although here the Trinko forwarding of monopolistic prices run counter to the statutory text of Article 102a TFEU.[118] This hesitation can indeed be attributed to the influence of neoclassical law-and-economics thinking.[119]

Over the years, a number of scholars of the Neoclassical and Welfarist schools have warned that prosecuting high prices could chill investment or confuse the goal of antitrust.

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inflation on face masks. The Maltese government issued a legal notice (LN 112 of 2020) in April 2020 fixing maximum prices for face masks and face shields (e.g., a maximum retail price of €0.95 per mask) to prevent exploitation. These caps were gradually lifted later in 2020 when supply conditions improved.

117 Kianzad, 'The Giant Awakens: Law and Economics of Excessive Pricing During the COVID-19 Crisis' (n 54).

118 Eleanor M Fox, 'The Trouble with Trinko' (American Bar Association Antitrust Section Spring Meeting 2004); Spencer Weber Waller, 'Microsoft and Trinko: A Tale of Two Courts' (2006) 901(3) Utah Law Review 741; First (n 65); Kianzad, "the Giant Awakens", 2022; Bartalevich (n 26).

119 A common argument in law and economics literature is that punishing high prices can deter firms from entering markets or investing in capacity (since the upside of profit is curtailed), ultimately harming consumers. See, for example, Frank H Easterbrook, 'Monopolistic Pricing and Related Defenses in Antitrust' (1984) 51 University of Chicago Law Review 567, and William J Baumol and Janusz Ordover, 'Use of Antitrust to Subvert Competition' (1985) 28 Journal of Law & Economics 247, which caution against overzealous price regulation by antitrust authorities. But see Ioannis Lianos, 'Pricing, Politics, and Equality: A Social Welfare Approach to Excessive Pricing' in Yannis Katsoulacos and Frédéric Jenny (eds), *Excessive Pricing and Competition Law Enforcement* (Springer International Publishing 2018), arguing that in certain contexts, especially involving essential goods, antitrust must incorporate social fairness considerations even if there is some risk to investment incentives. For an in-depth study on unfair pricing in European Competition Law, see Kianzad, 'Towards Fair Pricing of Medicines?' (n 5).

They pointed to the difficulty of distinguishing a genuinely abusive price from a high but permissible reward for innovation or risk-taking. However, the pandemic arguably weakened the force of these arguments. When faced with blatant profiteering on masks or disinfectant, even market-oriented policymakers recognised that short-term distributive justice and public trust in markets had to take priority over theoretical long-term efficiency considerations.

Europe's mixture of soft and hard responses can thus be seen as a pragmatic balancing act, using price caps and moral pressure to curb the worst abuses in the short run, while keeping the antitrust tool in reserve for egregious or clear cases where a dominant company's conduct had no conceivable merit. The black-letter prohibition of unfair pricing in EU law remained a powerful backdrop; a statement of principle that fairness mattered even when its enforcement was tempered by caution during the crisis.

The EU leaned on its black-letter legal basis for fairness but was cautious in its direct use, preferring interim regulatory fixes. The U.S. during the COVID-19 crisis had no such antitrust instrument on the federal level, yet it marshalled an array of consumer protection and emergency tools to achieve a similar immediate end: preventing outrageous exploitation and keeping supplies flowing. South Africa, in comparison,[120] leveraged competition law most directly to restore fairness in the market. These choices reflect underlying philosophies but also practical realities (legal competencies, readiness of tools, and political climate).

From a law-and-economics standpoint, as discussed in the previous section on unfair pricing in law and economics, the pandemic experience revives the argument that maintaining the resilience of markets in extreme conditions is an objective that competition policy should foster alongside traditional efficiency.

Resilience here means the ability of the market system to continue functioning and serve consumers under stress, without collapsing into chaos or sparking public outrage that can lead to even more heavy-handed controls. Unchecked price gouging might allocate goods efficiently to those willing to pay, but it can also undermine the social legitimacy of the market, triggering loss of confidence and demands for draconian intervention (as seen historically, extreme profiteering can lead to public disorder or calls for nationalisation).

Thus, one can argue that a degree of fairness – preventing the most egregious exploitative prices – contributes to the stability and resilience of the competitive process in the long run. This perspective bridges the gap between fairness and welfare: maintaining public trust through fair dealing can be efficiency-enhancing over time, avoiding backlashes and ensuring broader participation in the market.

The crisis also highlighted that the efficiency vs fairness dichotomy often presented in antitrust debates is too simplistic. In a pandemic, short-term allocative efficiency (pricing based solely on willingness to pay) conflicted with long-term dynamic efficiency and public health goals (ensuring widespread access to essentials).

Fairness-driven interventions, such as price caps or punishment of gougers, arguably improved outcomes by preventing wealth-based stratification in access to crucial goods and by incentivising cooperative solutions (e.g. companies repurposing production for essential goods at reasonable prices, knowing they would not be undercut by unscrupulous profiteers). In summary, the COVID-19 experience suggests that competition policy can incorporate

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[120] Willem H Boshoff, 'South African Competition Policy on Excessive Pricing and Its Relation to Price Gouging during the COVID-19 Disaster Period' (2021) 89(1) South African Journal of Economics 112.

fairness norms in times of crisis without abandoning economic rationality – and that doing so may reinforce the system's resilience.

This sets the stage for considering how fairness is being woven into the fabric of competition-adjacent regulation in the digital era, to which we turn next.

## 5 RECONCILING REGULATORY FAIRNESS WITH COMPETITION LAW: TOWARD A UNIFIED APPROACH

It is instructive for the above discussion on law and economics of unfair pricing in European law to compare how 'fairness' is treated in some recent EU legislative frameworks – namely the Digital Markets Act, the AI Act, and the Data Act. All of the said acts elevate fairness as a central goal to be pursued, yet they do so in different contexts and terms, raising questions of coherence and harmonious application, and more importantly, convergence with Union competition law approach to fairness.

The DMA was explicitly enacted to ensure 'contestable and fair markets in the digital sector'. As noted, it liberally references fairness/unfairness vis-à-vis gatekeeper platforms. The DMA's fairness norm chiefly concerns the imbalance of power between dominant platforms and their business users or end-users. For example, Recital 33 DMA frames unfairness as a significant 'imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage'.

This reflects a notion of fairness as equitable exchange or proportionality in business relations. However, beyond listing certain prohibited 'unfair' practices (such as self-preferencing or tying), the DMA does not define fairness in general economic or legal terms. It leaves the interpretation of what is 'unfair' largely to context, guided by the regulation's objectives. The result is that fairness under the DMA is a principle to be inferred (reduce power asymmetries), rather than a rule with a clear test, creating a potential weakness and gaps in enforcement.

The EU AI Act in turn approaches fairness from an ethical and fundamental rights perspective. It references fairness in the context of Trustworthy AI principles, linking it mainly to non-discrimination. Annex III of the AI Act (drawing from the 2019 AI HLEG Ethics Guidelines) defines 'diversity, non-discrimination and fairness' broadly as a requirement that AI systems be developed and used in a way that includes diverse stakeholders, promotes equal access, and avoids unfair bias.

In essence, the AI Act equates fairness with the absence of unfair bias or discrimination (e.g. preventing AI-driven outcomes that violate equality laws). While laudable, this definition is narrow and primarily procedural – it ensures algorithms treat people fairly (without illegal bias), but does not speak to broader notions of fairness like equitable distribution of benefits or power.

This definition does not expand our knowledge at all, as it basically points back to existing non-discrimination law and ethical ideals without providing an operational metric for fairness in AI contexts. In short, the AI Act's fairness concept, though consistent with the recently proposed Digital Fairness Act's spirit (protecting individuals from unfair algorithmic harms), is relatively restrictive (focusing on bias) and abstract.

Finally, the Data Act elevates fairness in the realm of data sharing and digital value chains. It aims to ensure 'fair access to and use of data', particularly to prevent large data holders from abusing their advantage over smaller firms or consumers. The term 'fair' appears 28 times in the Data Act, underscoring goals like equitable data-sharing arrangements and balanced opportunities in the data economy.

Notably, the Data Act does incorporate more concrete mechanisms for fairness: in Article 13 (and Recital 62), it defines certain contractual terms as 'unfair' in business-to-business (B2B) data-sharing contracts – effectively blacklisting clauses that gravely imbalance parties' rights (akin to how EU consumer law treats unfair contract terms). For instance, any term that unreasonably limits a small-to-medium enterprise's (SME's) use of data or strips them of legal remedies could be deemed void for unfairness.

The Act provides a list of clauses 'always considered unfair' and those 'presumed to be unfair', borrowing the technique of per se and presumptive unfairness from competition law (e.g. the concept of hardcore restrictions). This approach – specifying unfair terms ex ante – adds clarity, though it is context-specific to data contracts. Outside these clauses, the Data Act does not articulate a general theory of fairness, instead cross-referencing existing laws on unfair commercial practices for interpretation.

The Data Act, the DMA, and the AI Act all elevate 'fairness', but in varying dimensions (market power balance, algorithmic equality, and fair data access, respectively). They all broadly align with an Aristotelian 'equitable exchange' conception of fairness – i.e. that no party should be unduly exploited or left without recourse. Yet, they stop short of a common, holistic definition.

This divergence means that a practice considered 'unfair' under one regime might not neatly translate into another, potentially creating gaps or overlaps. For example, an exploitative personalised pricing strategy might fall under the recently proposed Digital Fairness Act's unfair personalisation ban and also trigger competition law or Data Act concerns – making it imperative that all define fairness coherently.

The above demonstrates at least a partial alignment on fairness across recent acts targeting digital and AI sectors with traditional Union Competition law is needed, as all seek to curb 'unfair' exploitation, imbalance, or bias. But we also note a lack of uniformity in language and scope across the said acts, where the Digital Fairness Act, but also the recently proposed Digital Omnibus Act, present the opportunity to unify these fairness norms. In particular, it should ensure that its notion of fairness complements and reinforces those in the DMA, the AI Act, and the Data Act, rather than conflicting.

The introduction of fairness-centric provisions in these digital regulations has in turn sparked debate on how they will coexist with and influence traditional competition law enforcement. Some critics worry that enshrining fairness in regulation could lead to double jeopardy or inconsistency – for instance, could a company be penalised under the DMA and also face an Article 102 TFEU case for essentially the same unfair conduct?

The European Commission has indicated that it will coordinate the two, possibly using competition law in cases not covered by the DMA, or where broader precedent or remedies are needed. From a positive perspective, the regulatory acts can be seen as pilot grounds for new concepts that might later be absorbed into competition analysis. Notably, the regulations themselves sometimes acknowledge competition law's legacy. The DMA's recitals note that certain practices it bans had been identified in past competition cases as problematic. The Data Act's impact assessment discusses how lack of data access can lead to market power and reduced competition. There is thus an inherent logic in aligning the interpretation of fairness across these realms.

This author has suggested that the fairness norm in the DMA and the Data Act should be interpreted in light of the 'unfairness' prohibitions in Article 102 TFEU and unfair competition law discourse to ensure coherence and legal certainty.[121]

For example, if a question arises under the Data Act whether a certain term is unfair, one might analogise as to how competition law would view a similar restriction by a dominant firm. Conversely, competition authorities might take note of the regulatory benchmarks: if the Data Act says a data holder must give access on reasonable terms, a refusal by a dominant data holder outside the Act's scope might more readily be seen as an abusive, unfair refusal in the post-Act world, because the standard of industry fairness has shifted.

Another area of reconciliation is the use of behavioural economics in shaping these rules. As noted earlier, humans do care about fairness; similarly, small businesses dealing with giant platforms often voice fairness grievances ('the platform changed terms without notice', 'we have no choice but to accept'). The EU's Platform-to-Business (P2B) Regulation of 2019, which predates the DMA, already obliged platforms to have transparent and fair terms for business users. These regulatory developments feed into the competition narrative by highlighting persistent patterns of imbalance and possibly providing evidence of market failure that competition law can address if needed.

Ultimately, the push is toward a harmonious application of fairness across legal tools: ex ante regulation sets clear bright-line rules for the worst imbalances, while ex post competition law retains flexibility to tackle unforeseen or particularly egregious unfair practices that slip through.

The common thread is the conviction that markets should not just be free, but also fair and resilient. That philosophy marks a shift from the pure total welfare model towards a more holistic competition paradigm, which is addressed in the concluding section.

# 6 CONCLUSION: TOWARD A RESILIENCE-ORIENTED, FAIRNESS-ANCHORED COMPETITION LAW AND ECONOMICS PARADIGM ON UNFAIR AND EXCESSIVE PRICING

As it has been clarified, Fairness and its twin-concept, Justice, are abstract, man-made concepts which can be defined in numerous ways, their existence proven or denied, and their relevance attested or contested, reflecting the multifarious human approaches to the concepts throughout the recorded history of mankind.

The legal decree against 'unfairness' in pricing does not explain in of itself what is fair, fair to whom, and who can decide on the substantive content of the decree in question. Nor does our expanding modern understanding of inherent fairness biases reveal to a judge or competition authority how such insights regarding fairness preferences should be applied in

121 Kianzad, 'Fairness, Digital Markets and Competition Law – Reconciling Fairness Norms in Digital Markets Act, Data Act and AI Act with Competition Law' (n 4); concepts like 'equitable exchange' in the Data Act or 'fair and contestable' in the DMA can draw from competition law precedents to achieve consistency and legal certainty. For instance, competition law's approach to what constitutes a reasonable price or non-discriminatory treatment can guide regulators in applying the DMA/Data Act provisions, ensuring a harmonised evolution of the fairness standard across the EU's legal framework.

a practical case, why the 'abstract' needs to be translated into a rational, practical, and enforceable standard of fairness along certain anchorage points.

Akin to many other areas of law, the legal discipline — by way of legal-dogmatic method, teleological interpretation, legal history by way of preparatory works, and stringent jurisprudence — strives to interpret and enforce valid law alongside the intent of the legislature, albeit allowing a certain degree of progression and expansion of knowledge, which iss in turn enriched by other disciplines, such as economics. Where neoclassical economic theory assumes humans to be rational, self-interested beings having perfect willpower, the findings of behavioural and experimental economics instead show that human behaviour is best described by traits such as bounded rationality, bounded self-interest, and bounded willpower.[122]

Removing, or relaxing, the strict rationality assumption,[123] which does not hold up neither normatively nor empirically, does not mean removing economics from law and economic analysis of competition law. It merely entails a more balanced approach to reality and human nature as it has shown itself to be when empirically and experimentally tested.[124]

The legal discipline routinely operates alongside a multitude of abstract concepts (although diverging in their level of abstraction), where some examples relevant to the present inquiry are the legal (but also equally economic) concepts of dominance, relevant market, market power and abuse — all abstract concepts enabling the unfair pricing prohibition under Article 102a TFEU.

Analogically speaking, although there is an 'economic' definition of what constitutes a relevant market (market shares above 40%), this mathematically defined economic concept of the relevant market neither prevents nor contradicts a contrary, more expansive 'legal' definition of the relevant market, where other factors beyond mere market shares are also considered. This approach is also evident from the latest guidance by the European Commission on definition of relevant market, e.g. in digital markets.[125]

Both firms and consumers take fairness considerations seriously regarding pricing. Therefore, reliance on a theory of harm alongside Dual Entitlement theory could offer a new way forward, as it is argued that this theory re-connects to the aforementioned Just Price theory.[126]

Modern insights from behavioural and experimental economics seem to reinforce the universal character of the concept of 'Just Price' and its opposite, i.e. unfair pricing, which can be read as codification of social preferences, having developed throughouthuman evolution by way of rational experience and practical reason. It would be counterintuitive for the prohibition to have survived so long an in such diverse cultural and historical settings if

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122 Lande (n 23).

123 Russel B Korobkin and Thomas S Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88(4) California Law Review 1051, 1053.

124 ibid.

125 Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2023/6789, OJ C, C/2024/1645.

126 Julio Rotemberg, 'Fair Pricing' (2011) 9(5) Journal of the European Economic Association 952; Daniel Kahneman, Jack L Knetsch, and Richard H Thaler, 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market' in Daniel Kahneman and Amos Tversky (eds), *Choices, Values, and Frames* (1st edn, Cambridge University Press, 2000); Holger Herz and Dmitry Taubinsky, 'What Makes a Price Fair? An Experimental Study of Transaction Experience and Endogenous Fairness Views' (2018) 16(2) Journal of the European Economic Association 316.

it runs counter to innate human preferences on transactions.

One practical example used as proxy to illustrate the normative tensions detailed above is the matter of unfair pricing during the COVID-19 crisis which was elevated to the global stage.

Many of the textbook assertions with regard to how markets function and what the role of competition law ought to be regarding excessive pricing were found not to pass a basic 'smell test', especially so during a pandemic.

They stand in conflict with how the law is being administered around Europe and globally as the string of cases in the recent decade demonstrates and, most importantly for the legal discipline, at odds with the legislative intent and the normative soul of European competition law — in turn reflecting the aforementioned inherent values and human biases.

The experience of the COVID-19 crisis demonstrated that markets are not infallible self-correcting mechanisms, especially under severe stress. A rigid adherence to neoclassical models during such times would have left consumers at the mercy of extreme price gouging and supply shortages. Instead, authorities around the world – even in traditionally laissez-faire systems – intervened to uphold a basic level of fairness in transactions.

Far from being an irrational or populist reaction, these interventions can be understood as efforts to preserve the integrity and resilience of the market system. By curbing the most outrageous abuses of market power during the emergency, regulators arguably helped maintain public trust and avoided even more disruptive outcomes (such as public disorder or overzealous price controls that could have disincentivised supply altogether). In EU competition circles, this might be viewed as a revival of the idea that competition law has a public interest dimension – safeguarding consumers not only from collusion and exclusion, but also from exploitation when circumstances render them vulnerable.

The advent of fairness as a leitmotif in digital market regulation signals that the EU is forging a path toward sustainable competition in high-tech sectors. Concepts like fairness and contestability in the DMA, or equitable access in the Data Act, highlight a policy choice: that the digital economy should be structured in a way that prevents the entrenchment of power imbalances and ensures robust opportunities for competitors and new entrants.

This is essentially about making the digital ecosystem resilient to dominance – preventing gatekeepers from so completely controlling the playground that innovation and competition wither. The fairness obligations placed on big platforms serve as circuit breakers against that kind of systemic fragility.

Incorporating fairness also addresses the social acceptability of the digital economy. There has been growing public concern about the outsized influence of tech giants, the opacity of algorithms, and the feeling that individuals and smaller businesses are at the mercy of decisions made by distant, powerful corporations. By instituting fairness norms (e.g. transparent and just terms, non-discrimination, and data portability), regulators aim to ensure the digital markets operate on principles that users and business partners perceive as just. Over time, this can enhance voluntary compliance and reduce conflict; a fair system is one that market participants are more likely to consider legitimate, and hence resilient.

The alignment of these fairness initiatives with competition law traditions suggests a normative reunification. For a time, the discourse of competition law (especially in the U.S.) divorced itself from moral or fairness considerations, styling itself as purely positive economic analysis. That era appears to be waning, at least in the EU and many other jurisdictions. The language of fairness is no longer taboo; it is explicitly included in laws and speeches. This does not mean a free-for-all of arbitrary fairness claims – rather, it means a careful integration of fairness with empirical and economic analysis.

For example, determining an 'excessive, unfair price' still involves economic benchmarks and evidence, but the ultimate criterion – whether the price unfair in itself or when compared in light of *United Brands*– acknowledges a value judgment informed by both data and societal standards. Similarly, deciding what is a fair term in a data-sharing contract can be guided by looking at competitive outcomes (would this term persist in a competitive market?) and notions of good faith.

Importantly, the new paradigm is anchored in resilience. By resilience, is the text refers to the capacity of the market and its regulatory framework to adapt to shocks, to correct course when imbalances occur, and to sustain a healthy level of competition over time. A resilience-oriented competition policy is proactive in identifying systemic risks (like the concentration of data, or the potential for AI to facilitate collusion) and is willing to apply precautionary principles – even if that means departing from the wait-and-see approach of the past.

In conclusion, the twin crucibles of the pandemic and the digital revolution have forged a new trajectory for competition law. Excessive pricing enforcement, once considered a relic or an aberration by some, has been re-legitimised in the face of both the crisss of neoclassical economics and COVID-19, but also digital and AI market challenges, reminding us that at its origin, competition law was as much about preventing market abuses as about economic optimisation and efficiency. Meanwhile, fairness in digital markets is being codified in unprecedented ways, effectively writing into law a concept of fair play that had often been implicit or ignored in the internet economy.

A fair market – one where dominance does not equate to unrestrained power to exploit – may also be a more resilient and innovative market in the long run, as it encourages trust and participation. Conversely, a resilient market that can weather crises likely needs norms of fairness to prevent collapse into chaos or monopolisation when tested. European competition law, with its rich tradition and flexibility, appears poised to lead in this direction, blending its black-letter rules on unfair practices with the new ex ante tools to shape a competitive landscape that is not only vibrant and dynamic, but also fundamentally fair.

This represents a rethinking of competition paradigms for a crisis-driven age – one where the measure of success will not just be growth or low prices, but the endurance of competitive markets that deliver equitable benefits to consumers and businesses alike.

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# THE CONVERSATIONAL NATURE OF THE DMA – A TAXONOMY OF ACTORS, CONVERSATIONS AND PURPOSES

CRISTINA TELEKI*

*Big Tech corporations have created important spatial and temporal problems, such as the spillover of market power into political power or their lifespan and legacy. Competition law – the long-perceived archnemesis of bigness – appears to be unfit for addressing these challenges and ensuring that digital markets produce new entrants. Consequently, the European Union has adopted the Digital Markets Act (DMA), a regulation based on a novel regulatory strategy. This strategy – called here a 'conversational approach' – is understood as a chain of conversations among a diverse range of actors and areas of law for the purpose of building an 'ethics of the future'. The conversational approach relies on a double hybridisation, one between competition law and regulation, and a second between competition law and the three elements of anticipatory governance – foresight, engagement, and integration. What distinguishes the conversational approach to regulation is its promise to address both the spatial and temporal issues raised by gatekeepers.*

## 1 INTRODUCTION – THERE IS AN ELEPHANT IN THE ROOM

Everybody knows that an elephant in the room represents a troublesome situation. Big Tech – understood as encompassing 'the largest corporations that prioritise high technological intensity as a key pillar of their business development'[1] – poses a similar conundrum to regulators around the world. It is now widely accepted that these corporations wield unprecedented influence on production and consumption by commanding vast resources, attaining granular reach, and exercising informational leadership in the expansive ecosystems and elite technology with which they operate.[2] Big Tech corporations, in other words, raise important questions in relation to the space in which they operate.

Big Tech corporations also raise interesting questions of temporality. In an influential essay from 1997, Arie de Geus wrote that corporations were newcomers in the world of institutions, which 'have been around for only 500 years – a mere blip in the course of human civilization'.[3] He goes on to show that by 1983, one-third of 1970's Fortune 500 companies had been either acquired, broken into pieces or merged with other companies.[4] In other words, most companies that De Geus observed had a life span of 10-15 years. De Geus

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1 Publications Office of the European Union, *Futures of big tech in Europe – Scenarios and policy implications* (Foresight 2024) <https://data.europa.eu/doi/10.2777/93885> accessed 1 October 2025.

2 ibid 4.

3 Arie de Geus, 'The Living Company' (Harvard Business Review, March-April 1997) <https://hbr.org/1997/03/the-living-company > accessed 1 October 2025.

4 ibid.

explains that:

> individuals, communities, and economies are all affected – even devastated – by untimely corporate deaths. The high corporate mortality rate seems unnatural. No living species suffers from such a discrepancy between its maximum life expectancy and the average span it realizes. And few other types of institution – churches, armies, or universities – have the abysmal record of the corporation.[5]

De Geus offers an interesting vision of the corporation as a species amongst other species. He articulates his narrative of the 'living company' as a corporation that could live up to 700 years, as some companies in the sample that he studied did. Returning to the subject of Big Tech, these corporations are all beyond the 10-15-year mark, becoming 'living companies'. Regulators are thus facing the challenge of addressing corporations that not only have amassed previously unseen levels of power, but they appear to be on their way to permanence as well.

This conundrum is nothing new. The rise of the first global corporations has been accompanied by important questions about their power and the role that law and regulation should play in relation to them.[6] Business and human rights scholars have drawn attention to the need to secure voluntary cooperation and engagement by global corporations, while at the same time establishing clear rules and standards to mitigate their power.[7] The quick spread and adoption of digital technology has promised, for a brief time, a line of enlightened law-abiding global corporations that would self-regulate. The renowned economist Thomas Friedman declared in this sense that the world was flat and that hierarchies within and between corporations would be flattened out by the imminent advent of the global interconnected economy.[8] Whereas Friedman's theory indeed has some validity, it is also true that contested inequalities can be observed within and around the digital giants that have emerged from the interconnected global economy. Competition law scholars in particular have drawn attention to the growing power of Big Tech companies and the spillover of market power into other forms of control and command.[9] Despite being tasked with controlling market power, competition law has largely failed to prevent the rise and entrenchment of Big Tech corporations.

One weakness of the efforts to regulate Big Tech corporations has been the focus on *spatial* issues such as the exercise of market power. Still, despite numerous cases involving an abuse of dominant position by Big Tech corporations, their market power, political power, and social power continued to grow. This could be due to another weakness in the efforts to regulate Big Tech, namely competition law enforcement being focused on past behaviours. *Temporal* or *future-oriented* efforts were thus absent from the efforts to address

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[5] de Geus (n 3).
[6] Nadia Bernaz, *Business and Human Rights: History, Law and Policy: Bridging the Accountability Gap* (Routledge 2016) 62–78.
[7] ibid.
[8] Thomas L Friedman, *The World Is Flat: A Brief History of the Twenty-First Century* (1st edn, Farrar, Straus and Giroux 2005).
[9] Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018). Anna Gerbrandy and Pauline Phoa, 'The power of Big Tech corporations as Modern Bigness and a vocabulary for shaping competition law as counter-power' in Michael Bennett, Huub Brouwer, and Rutger Claassen (eds), *Wealth and Power: Philosophical Perspectives* (Taylor & Francis 2022) 166-176.

some of the consequences of what Hans Jonas calls our new 'collective technological practice'.[10] This collective technological practice constitutes a new kind of human action, Jonas contends, because of the novelty of its methods, the unprecedented nature of some of its objects, the sheer magnitude of most of its enterprises, and the indefinitely cumulative propagation of its effects.[11] Jonas reasoned that, in light of this, a new ethics for the future is needed, one 'where that which is to be feared has never yet happened and has perhaps no analogies in past or present experience'.[12] Jonas acknowledges that public policy has never had to deal with matters of such inclusiveness and such lengths of anticipation before. However, his diagnosis is clear: 'if the realm of making has invaded the space of essential action, then morality must invade the realm of making, from which it has formerly stayed aloof, and must do so in the form of public policy'.[13]

The European Union (EU) has chosen to address the challenge posed by Big Tech corporations using a 'name and tame' strategy, whereas the Digital Markets Act (DMA) establishes a procedure for designating gatekeepers and emerging gatekeepers and sets out to regulate their behaviour. In so doing, the DMA adopts a novel regulatory strategy that I call 'a conversational approach', which can be understood as a chain of conversations among a diverse range of actors and areas of law for the purpose of building an 'ethics of the future'. The conversational approach relies on a double hybridisation – one between competition law and regulation, and a second between competition law and the three elements of anticipatory governance – foresight, engagement, and integration. What distinguishes the conversational approach to regulation from the theoretical ground from which it draws its source is the fact that it is meant to address both the spatial and temporal issues raised by gatekeepers.

The conversational approach of the DMA stands in contrast with EU competition law, which is marked by a serious commitment to specialness. Advocate-General Ad Geelhoed has argued that EU law has mainly been public economic law 'aimed at the establishment and proper functioning of the internal market'.[14] This initial arrangement had numerous consequences. One such consequence has been the widely shared belief that *competition law is special* and that it should, therefore, remain sealed away from exogenous influences. As Gerber has noted:

> a central feature of European competition law tradition has been the idea that competition law is special and that using law to protect competition moves outside law's normal domain. In this view, competition law is a new type of law which deals with problems for which traditional legal mechanisms are inappropriate, and thus it requires correspondingly non-traditional methods and procedures.[15]

The special status of EU competition law has had a number of consequences. First, as

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[10] Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (1st edn, University of Chicago Press 1984) 23.
[11] ibid.
[12] ibid 27.
[13] ibid 9.
[14] Ad Geelhoed, 'The expanding jurisdiction of the EU Court of Justice' in Dierdre Curtin, Alfred Kellerman, and Steven Blockmans (eds), *The EU Constitution: The Best Way Forward* (TMC Asser Press 2005) 403.
[15] David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001).

highlighted by Bietti, competition law is deemed 'ontologically separated from and preferred to other forms of regulation'.[16] In this view, competition law is a welcome partner to the idea that markets self-regulate and that competition law should be used sparingly to address market failures. Second, the specialness of EU competition law has also led to a refusal to engage with other areas of EU law, such as the right to privacy and data protection. An early example of this could be observed in the case of *Asnef/Equifax*.[17] There, the Court of Justice of the European Union (CJEU) was called to rule on the relevance of privacy and data protection for competition law assessments. More precisely, the CJEU was asked to give guidance on whether Article 101 of the Treaty on the Functioning of the European Union (TFEU) prevented financial institutions from setting up a credit information system that would allow them to exchange solvency and credit information on individual customers through the computerised processing of data. The CJEU ruled that this type of agreement neither had the object of restricting competition nor was likely to have such an effect. It added, however, that any possible issues relating to the sensitivity of personal data were not, as such, a matter for competition law because they could be resolved on the basis of the relevant provisions governing data protection.[18] Although it appears that the interaction between EU competition law and data protection law has changed outcomes, the growing literature on this subject suggests that much cross-fertilisation is still needed to reach a coherent application in both legal regimes.[19] Lastly, the specialness of EU competition law can also account for its quasi-judicial procedures that would not survive a fair trial test under Article 6 of the European Convention of Human Rights (ECHR).[20]

Specialness may be a legitimate strategy at the beginning of a legal order. The European Communities attempted to build a strong supranational competition authority in the wake of a world war in which Big Business partook in damaging values, governments and people.[21] Similar to the autonomy of the EU legal order, specialness has had its time and justification. However, in light of digital markets showing signs of fast concentration and tipping,[22] specialness cannot be justified. Such siloing has not only hampered the evolution of law in the digital economy, but it has also 'obscured the full breadth and scope of legal possibility and produced slow and limited responses to digital harms and abuses'.[23] The complementarity of the DMA and EU competition law implies that specialness will continue to be maintained in competition law investigations.[24] At the same time, the conversational approach adopted in the DMA signals a hybridisation between regulation

[16] Elettra Bietti, 'Experimentalism in Digital Platform Markets: Antitrust and Utilities' Convergence' (*Social Science Research Network*, 11 November 2022) <https://papers.ssrn.com/abstract=4275143> accessed 24 October 2024.
[17] Case C-238/05 *Asnef-Equifax* EU:C:2006:734.
[18] ibid para 63.
[19] Klaudia Majcher, *Coherence between Data Protection and Competition Law in Digital Markets* (Oxford University Press 2023); Arletta Gorecka, 'The Interface between Competition Law and Data Privacy Law: Violation of Privacy as an Exploitative Theory of Harm under Article 102 TFEU' (University of Strathclyde 2024) <https://stax.strath.ac.uk/concern/theses/9s161673r> accessed 30 October 2024.
[20] Cristina Teleki, *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* (Brill/Nijhoff 2021).
[21] Bernaz (n 6).
[22] Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (1st edn, Alfred A Knopf 2010).
[23] Bietti (n 16).
[24] Viktoria HSE Robertson, 'The Complementary Nature of the Digital Markets Act and the EU Antitrust Rules' (2024) 12(2) Journal of Antitrust Enforcement 325.

and competition law that is likely to affect the specialness of EU competition law as well.

In this paper, I describe the advent and character of the conversational nature of the DMA. I lay the theoretical ground for the conversational nature of the DMA by drawing inspiration from scholars studying economics, regulation, and governance. Next, I suggest that the conversational approach adopted in the DMA has three main tenets inspired by anticipatory governance: engagement with the relevant actors, integration through conversation, and foresight. In the ensuing sections of the paper, I map and describe in more detail the contours of the conversational approach. To do so, I first list the actors amongst which conversations should take place, distinguishing between pre-existing actors and new actors. I then map two types of conversations mandated by the DMA: scripted and unscripted. I also identify two functions of the conversations mandated by the DMA, which I summarise as 'Enhance and Protect'. Finally, I conclude that the adoption of the DMA is the first step towards addressing the elephant in the room, and that the numerous challenges concerning the enforcement of the DMA can be tackled through its conversational nature.

## 2 CHANNELLING JULIA BLACK

A few authors have taken notice of a remark by the Nobel-winning economist, Jean Tirole, that 'participative antitrust' should be developed, that is, a competition law system in which 'the industry or other parties propose possible regulations, and the antitrust authorities issue some opinion, creating some legal certainty without casting the rules in stone'.[25] These authors suggest that 'participatory antitrust' is particularly astute for regulation in digital markets, where the regulated firms, their competitors and users should co-design the obligations to be enforced.[26]

Interestingly, the idea of 'participatory antitrust' aligns with a few ideas developed by scholars working in disparate fields such as regulation, governance and legal theory. Thus, Julia Black posits in her work that conversation is central to regulation. She suggests that conversations are 'communications and discussions between a regulatory official or officials and a regulated individual or firm as to the application of a generally applicable rule in their particular case'.[27] Black highlights that conversations may either occur at any point in the regulatory process – such as in the process of rule application, supervised rule formation, and monitoring and enforcement – or may be consciously adopted as a regulatory strategy. She notes that this approach is inspired by environmental and safety regulations and is beneficial both to the regulated enterprise, increasing the legal certainty needed to operate, and to the regulator, because rules are applied.[28]

Conversations are also central to experimentalist governance, which is defined as a machine for learning from diversity.[29] This is a 'recursive process of provisional goal-setting and revision based on learning from the comparison of alternative approaches to advancing

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[25] Allison Schrager, 'A Nobel-winning economist's guide to taming tech monopolies' (*Quartz*, 27 June 2018) <https://qz.com/1310266/nobel- winning-economist-jean-tirole-on-how-to-regulate-tech-monopolies/> accessed 16 October 2024.

[26] Vikas Kathuria, 'The Rise of Participative Regulation in Digital Markets' (2022) 13(8) Journal of European Competition Law & Practice 537, 538.

[27] Julia Black, 'Talking about Regulation' [1998] Public Law 77.

[28] ibid.

[29] Charles F Sabel and Jonathan Zeitlin, *Experimentalist Governance* (Oxford University Press 2012) 169.

goals in different contexts'.[30]

Experimentalist scholars focus on the ends and means of legal intervention and emphasise the importance of reflexive learning to ensure that the means are tailored to achieve the proposed ends.[31] Recent competition law scholars have used the experimentalist governance perspective to discuss competition law enforcement in the Italian case *AGCM v Google – Ostacoli alla portabilità dei dati*.[32] Other scholars have applied the experimentalist perspective to the DMA arguing that the more cooperative approach followed in the DMA offered novel perspectives when compared to the punitive model of enforcement in competition law.[33]

Although anticipatory governance has mainly been studied in relation to nanotechnology, it is increasingly relevant for the governance of emerging technology. Its three main tenets – foresight, engagement and integration – attempt to anticipate and shape the development and impact of emerging technology or other innovations during the early stages of their development, when there is still significant uncertainty as to their impact and when choices can still meaningfully influence outcomes.[34]

Lastly, legal theorists have embraced the conversationalist approach fully. In a recent book, Gargarella argues that law is a conversation among equals, conceived as a 'dialogue that we could and should have with those around us about the way we wish to live and the principles and rules that will define and organize our social lives'.[35] The idea of law as a conversation among equals centres on the need to develop rules to organise collective life. Consequently, Gargarella argues that:

> Disagreements over the rules arise, and solutions to those disagreements are sought dialogically, that is, put simply, the way people who take one another as equals tend to do. This is because they respect each other despite their differences and because they assume no one has a natural right to 'command' the others, imposing their vision of what the rules should be 'because I say so'.[36]

Gargarella continues to show that law as a conversation among equals should have six characteristics: equality, disagreement, inclusiveness, deliberation, debates focused on subjects of public interest, and open, continuous, and ongoing dialogue.[37] Insisting on the topic of inclusiveness, Gargarella notes that 'the privation of one person's perspective – of any single person – should be considered a fundamental, irreparable

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[30] Sabel and Zeitlin (n 29).
[31] Rory Van Loo, 'The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance' (2019) 72(5) Vanderbilt Law Review 1563.
[32] Emanuele Fazio, 'Experimentalist Competition Law Enforcement as a Complementary Data Sharing Toolkit: Learning from AGCM v. Google – Ostacoli alla Portabilità dei Dati' (2024) 17(29) Yearbook of Antitrust and Regulatory Studies 235.
[33] Anna Tzanaki and Julian Nowag, 'The Institutional Framework of the DMA: A Novel but Thoughtful Experiment in Regulatory Design?' (*SSRN*, 21 March 2023) <https://ssrn.com/abstract=4574518> accessed 11 March 2026
[34] Daniel Barben, Erik Fisher, Cynthia Lea Selin, and David H Guston, 'Anticipating Governance of Nanotechnology: Foresight, Engagement, and Integration' in Edward J Hackett, Olga Amsterdamska, Michael Lynch, and Judy Wajcman (eds), *The Handbook of Science and Technology Studies* (3 edn, MIT Press 2007) 979-1000.
[35] Roberto Gargarella, *The Law as a Conversation among Equals* (1st edn, Cambridge University Press 2022) 19.
[36] ibid 20.
[37] ibid. 21-25.

'loss' – a serious problem – that will end up harming the impartiality of the decision-making process'.[38]

These various streams of thought converge in a number of ways. First, the ideas explored by the authors above appear to have been built in response to the operations of global corporations. Julia Black developed her theory of regulation at a time when governments and international organisations were looking for ways to mitigate the environmental and social impact of multinational corporations. This search for regulatory solutions was also stimulated by the growing public awareness and understanding of the environmental and social harm resulting from the operations of multinational corporations. Second, these theoretical frameworks centre around the idea that periods of self-regulation – during which corporations are allowed to cumulate economic power and set their own rules – are followed by periods of government intervention through regulation. Third, previous scholars have intuited the growing power of large corporations as a phenomenon in itself and supported the optimistic ideal that such power can be mitigated through engagement with the corporations themselves.

The question then arises whether the regulatory approaches described above are appropriate for addressing the power of Big Tech. To answer this, one needs to acknowledge that Big Tech includes corporations that differ significantly from previous multinational corporations. Big Tech is actively shaping today's economic, cultural, and social milieu to consolidate its advantages.[39] In addition, as recently shown, Big Tech companies' activity in epistemic, instrumental, and technology constituencies highlights their roles as 'super policy entrepreneurs' in the policy process.[40] Big Tech is not only actively expanding beyond its traditional policy domains, but it also influences policy cycles.[41] In other words, Big Tech is part of the policy process. This renders the transition from self-regulation to external regulation particularly difficult. In addition, unlike previous regulatory waves, the public opinion of Big Tech companies has matured quickly, with the public demanding scrutiny into and action against some corporate practices of Big Tech companies. Finally, there has been no other time in history when both corporate activity and policy-making – or at least their public parts – took place with real-time feedback from the public.

In light of the above, I propose that the conversational approach to regulation embedded in the DMA is a novel regulatory approach that is suited to ecosystems in which the transition from self-regulation to external regulation is unwanted or cumbersome. I now turn to describing the specifics of this approach, which, I suggest, has three tenets – actors, conversations, and purposes – which curiously coincide with the three tenets of anticipatory governance – engagement, integration, and foresight.

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[38] Gargarella (n 35) 23.
[39] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile books 2019).
[40] Shaleen Khanal, Hongzhou Zhang, and Araz Taeihagh, 'Why and How Is the Power of Big Tech Increasing in the Policy Process? The Case of Generative AI' (2025) 44(1) Policy and Society 52, 53.
[41] ibid.

## 3 THE FIRST TENET OF THE CONVERSATIONAL APPROACH – ENGAGEMENT WITH ACTORS

Conversations need participants. The DMA ignites or imposes conversations amongst a range of participants that I call actors. Some of these actors existed before the entry into force of the DMA, and for others, the DMA has established novel legal regimes.

### 3.1 EXISTING ACTORS

The DMA imposes various obligations upon and interactions with existing actors such as business users, end users, advertisers, publishers, and third parties. In terms of public authorities, the DMA creates duties of dialogue and cooperation for the European Commission, Member States of the EU, the European Data Protection Board (EDPB), national authorities, national competent authorities, and national courts.

### 3.2 NEW ACTORS

The DMA also creates legal regimes for a number of new actors: gatekeepers, emerging gatekeepers, providers of new services and practices, compliance officers, monitoring officers, and the high-level group for the DMA.

Article 3 of the DMA stipulates that a gatekeeper is an undertaking providing core platform services (CPS) designated by the European Commission. At least two types of gatekeepers can be distinguished in the DMA for the purpose of this paper. A Type I gatekeeper fulfils two conditions: (1) they exercise control over whole platform ecosystems in the digital economy; (2) they are structurally extremely difficult to challenge or contest by existing or new market operators.[42] *A contrario*, Type II gatekeepers do not exercise control over whole platform ecosystems.

The DMA also provides a novel legal regime for the so-called emerging gatekeepers. Thus, according to Article 17(4) of the DMA, emerging gatekeepers are providing CPS, but do not yet enjoy entrenched and durable positions in their operations. However, emerging gatekeepers will foreseeably enjoy such a position in the near future.

Article 19 of the DMA establishes a legal regime for a third category of actors – the providers of new services and new practices that limit contestability or are unfair and which are not effectively addressed by the DMA.[43]

The engagement between the gatekeepers and the European Commission should be facilitated by two types of actors. On the one hand, the DMA foresees the creation of compliance officers to be established by the gatekeepers. In this sense, Article 28(1) of the DMA provides that compliance officers should be independent from the original functions of the gatekeeper and composed of one or more compliance officers, including the head of the compliance function. On the other hand, the DMA also foresees the creation of monitoring officers assisting the Commission in monitoring obligations and providing

[42] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1 (DMA), Recital 3.

[43] DMA, Art 19.

specific expertise or knowledge. According to Article 23(3) and Article 26(2) of the DMA, such monitoring services should be provided by independent external experts and auditors.

Finally, according to Article 40 of the DMA, a high-level group for the DMA was established.[44] The high-level group is composed of the (a) Body of the European Regulators for Electronic Communications; (b) European Data Protection Supervisor and European Data Protection Board; (c) European Competition Network; (d) Consumer Protection Cooperation Network; and (e) European Regulatory Group of Audiovisual Media Regulators.

The notion of ecosystem appears central to the conversational nature of the DMA. As recently highlighted, the ecosystem concept is increasingly used by the European Commission in its decisions, yet its use is often inconsistent. [45] This, however, is more a strength than a weakness in line with the conversational approach that requires open-textured notions to be debated and agreed upon through dialogue or litigation. In this sense, the Court of Justice of the European Union (CJEU) has found that a 'digital platform ecosystem may consist of one or more CPSs and other services connected to them, for example by means of technological links or interoperability'.[46] The CJEU has also noted that a digital ecosystem exists:

> where several categories of suppliers, customers and consumers are brought together and interact within a platform, and where the products or services comprising that ecosystem may overlap with, or be connected to, each other in terms of their horizontal or vertical complementarity.[47]

The differences between pre-existing and new actors are important for the conversational nature of the DMA. New actors will have to confront a steep learning curve to design not only the obligations imposed but also the relations between themselves. Pre-existing actors, on the other hand, will have to become DMA-fluent to ensure their participation in the enforcement process.

## 4 THE SECOND TENET OF THE CONVERSATIONAL APPROACH – INTEGRATION THROUGH CONVERSATIONS

The second tenet of the conversational approach to regulation consists of the integration of information achieved due to the conversations mandated by the DMA amongst relevant actors. I identify two main types of conversations mandated by the DMA: scripted and unscripted.

### 4.1 SCRIPTED CONVERSATIONS

Scripted conversations take place among unequal actors, facing the gatekeepers off against the European Commission. These are consequential conversations about the bounds of

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[44] DMA, art 40.
[45] Jasper Van Den Boom, 'Incumbent or Challenger? — Assessing Ecosystem Competition in the DMA' (2024) 20(4) Journal of Competition Law & Economics 409, 416.
[46] Case T-1077/23 *ByteDance v Commission* EU:T:2024:478 para 129.
[47] ibid.

digital power, and the discretion of both actors is limited. The script, therefore, focuses on the types of documents to be submitted by the actors, the deadlines to respect and the consequences for failing to engage. The designation of gatekeepers under Article 3 of the DMA, as well as the opening and conclusion of proceedings covered in Chapter 5 of the DMA, are examples of scripted conversations. Scripted conversations under the DMA draw inspiration from the procedural rules set in Regulation 1/2003.[48] These conversations serve the interests of all ecosystem members. They increase legal certainty for gatekeepers because they describe the kinds of actions the enforcer is empowered to take. For all actors involved in the platform ecosystem, they also increase transparency.

### 4.2 UNSCRIPTED CONVERSATIONS

In the DMA, unscripted conversations are conversations between equals. These are conversations about harms, risks, and mitigation measures. Taking into account their frequency and depth, the unscripted conversations mandated by the DMA could be classified as (a) information sharing, (b) dialogue, (c) cooperation and coordination, (d) exchange of information, and (e) insider cooperation.

First, under Article 27 of the DMA, any third party, including business users, competitors, or end-users of the designated gatekeeper, may inform the national competent authority of the Member State or the Commission directly about any practice or behaviour by gatekeepers that falls within the scope of the DMA. National competent authorities and the European Commission have the discretion to decide what to do with such information. I deem three other types of exchanges to be information sharing: (a) interactions with independent external experts and auditors pursuant to Article 26(2) of the DMA; (b) interactions with the high-level group for the Digital Markets Act pursuant to Article 40 of the DMA; and (c) exchanges with national authorities concerning any matter relating to the application of the DMA.

Second, there is an important exception to the general rule that conversations with the gatekeepers are scripted by a well-established procedural protocol. Article 8(3) of the DMA stipulates that a gatekeeper may ask the Commission to engage in a process to determine whether the measures that it intends to implement or has implemented to ensure compliance with Articles 6 and 7 of the DMA are effective. The Commission has the discretion to decide whether to engage. Recital 65 of the DMA clarifies that, when the Commission decides to engage in such a process, a dialogue with the gatekeeper will ensue.

Third, Article 37 of the DMA stipulates that the Commission and Member States shall work in close cooperation and coordinate their enforcement actions to ensure the coherent, effective, and complementary enforcement of the DMA.

Fourth, Article 38 of the DMA provides for an obligation of in-depth cooperation between the European Commission and the national competent authorities of the Member States. This obligation involves 'the power to provide one another with any information regarding a matter of fact or of law, including confidential information'.

[48] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) [2003] OJ L1/1.

Lastly, one of the innovations of the DMA is the creation of an insider cooperation mechanism in the form of the compliance function, established by Article 28 of the DMA. This is one of the most intrusive provisions of the DMA, obliging the gatekeepers to create an independent compliance function composed of one or more compliance officers. Pursuant to Article 28(5)(d), compliance officers must cooperate with the Commission for the purpose of the DMA, but the means and channels of such cooperation are not stipulated.

Unscripted conversations hold the promise of addressing two challenges that EU competition law failed to address. First, unscripted conversations will diversify both the pool of policy positions and options that the European Commission can access and the channels through which this information circulates. As mentioned above, gatekeepers are deeply involved with the policy-making process.[49] Unscripted conversations offer the possibility for a diverse range of actors to raise contestability and fairness concerns with the European Commission. Even more importantly, unscripted conversations open the possibility for various economic actors in the EU to consider the DMA as part of their business strategy. This line of argument can be deduced from a recent statement by Apple – a designated gatekeeper – in which Apple acknowledged that the European Commission is seeking broad feedback about the impact of the DMA.[50]

Unscripted conversations will also diversify the channels through which information about the contestability and fairness of markets circulates. The example above shows one way in which this diversification is taking place. Indeed, Apple used its newsroom to communicate with its users about its approach to the DMA. In addition, all actors enumerated in Section 3 above may receive and deal with such information.

The diversity resulting from unscripted conversations is also likely to address one of the main weaknesses resulting from the specialness of competition law, which was the inability to respond to non-economic harm in digital markets. Undoubtedly, unscripted conversations are a vehicle for addressing the economic harm to digital markets resulting from a loss of contestability and fairness. At the same time, the actors involved in these conversations are also likely to address harm to privacy, harm to freedom of speech, to dignity, and to the right to property. Although the DMA does not mention fundamental rights at all, which makes the DMA a notable exception in the EU to the rights-driven model proposed by Anu Bradford,[51] fundamental rights will be part of unscripted conversations. A recent example of this can be read in Apple's statement quoted above, in which Apple relied on privacy to justify some of its choices.[52] In other words, diversity will breed integration not only for the European Commission, but also for the gatekeepers.

## 5 THE THIRD TENET OF THE CONVERSATIONAL APPROACH – FORESIGHT

Scholars note that one of the weaknesses of competition law has been the fact that

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[49] Khanal, Zhang and Taeihagh (n 40).

[50] Apple, 'The Digital Markets Act's Impacts on EU Users' (*Apple Newsroom*, September 2025) <https://www.apple.com/newsroom/2025/09/the-digital-markets-acts-impacts-on-eu-users/> accessed 3 October 2025.

[51] Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023).

[52] Apple (n 50).

the traditional concept of market power appears unable to capture the complexities of competition between platforms and digital business ecosystems.[53]

Another reason competition law has failed to prevent the advent of Big Tech corporations could be the length of its proceedings.[54] In other words, there was a novel spatial and temporal problem in digital markets that could not be easily captured by traditional competition law.

The conversational approach adopted in the DMA proposes a new solution to the space-time problem in digital markets. I argue that the conversations mandated or pursued according to the DMA are a form of foresight that seeks to address the spatial and temporal issues in digital markets that competition law did not. They do so by enhancing and protecting certain values.

### 5.1 THE ENHANCEMENT FUNCTION OF DMA CONVERSATIONS

The conversations mandated by the DMA seek to enhance the transparency of and the knowledge existing on and about digital markets. Both gatekeepers and the European Commission must publish non-confidential summaries of important interactions with each other. Thus, pursuant to Article 11(2) of the DMA, gatekeepers should inform the Commission, through mandatory reporting, of the measures they have implemented in order to ensure effective compliance with the DMA. In addition, a non-confidential summary of such information should be made public. The DMA clarifies in the recitals that this non-confidential publication should enable third parties to assess whether the gatekeepers comply with the obligations laid down in the DMA.[55] In the same vein, the European Commission must publish non-confidential summaries of the case and the measures it intends to take or impose on the gatekeeper when it opens proceedings according to Article 20 of the DMA and when it investigates systematic non-compliance according to Article 18 of the DMA. In both cases, interested third parties may submit comments.

This approach is in line with insights from economists such as Laffont and Tirole, who in 1986 wrote one of the most influential papers on regulation. In their paper, Laffont and Tirole analysed the regulation of a monopolist in a situation in which the regulator observes the firm's production cost, but the firm has private information on the determinants of its costs. Laffont and Tirole note that in this situation, the regulator cannot distinguish between a firm that is more efficient because, for example, it benefits from economies of scale and a firm that has actively invested in the past to make its production more efficient. They show that a regulator cannot attain the first-best outcome because of the informational asymmetry between the firm and the regulator. Laffont and Tirole thus estimate that information rents are rents that a firm earns by exploiting the asymmetry of information existing between it

[53] Ioannis Lianos and Bruno Carballa-Smichowski, 'A Coat of Many Colours — New Concepts and Metrics of Economic Power in Competition Law and Economics' (2022) 18(4) Journal of Competition Law & Economics 795.

[54] Anne C Witt, 'The Digital Markets Act: Regulating the Wild West' (2023) 60(3) Common Market Law Review 625, 629; Pierre Larouche and Alexandre De Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12(7) Journal of European Competition Law & Practice 542, 546.

[55] DMA, Recital 68.

and the regulator.[56] Almost 40 years later, Tirole showed that asymmetries of information concerning costs, technological choices, and demand prevent regulators from guaranteeing the best services at the lowest prices for citizens.[57] He highlighted that even a regulated business can make strategic use of the information it alone has: 'it reveals this information when it is advantageous for it to do so, and keeps it to itself when transparency would endanger its revenues'.[58]

The non-confidential summaries that the DMA mandates will address asymmetries of information, like those identified by Laffont and Tirole. On the one hand, the gatekeeper releasing non-confidential summaries will, in fact, communicate its strategy for complying with the DMA and the changes to its business model that it is ready to implement. On the other hand, business users, end users, and relevant public authorities may publicly approve or contest these measures. Public opinion, in turn, may inform the future positioning of the gatekeepers, public authorities, and business users. This may result in a virtuous cycle of dialogue that, over time, will indeed establish new rules for contestable and fair markets.

A recent example of the above can be read from the 2025 non-confidential report of Meta, a designated gatekeeper. There, Meta declared that it 'has gone above and beyond the requirements of the DMA by working closely with the European Commission and third-party messaging services who may be interested in interoperability'.[59] Such statements signal not only the gatekeeper's willingness to engage with the European Commission, but they also act as positioning in terms of strategy and product development that can diminish the asymmetry of information in the gatekeeper's ecosystem.

The conversations mandated by the DMA will also enhance the contestability and fairness of digital markets. Since these terms are not defined in the DMA, actors will initiate conversations about the definitions and interpretations of contestability and fairness in digital markets, and are likely to rely on econometric calculations.

Transparency, contestability, and fairness in digital markets are goals in themselves and once they are reached, the whole digital ecosystem will be improved. However, the conversations about these characteristics have an intrinsic value as signposts of the improving quality of the digital space.

### 5.2 THE PROTECTIVE FUNCTION OF DMA CONVERSATIONS

By attempting to create an 'ethic of the future', the protective function of the DMA is future-oriented. The DMA acknowledged from the beginning that, despite their small numbers, gatekeepers 'exercise control over whole platform ecosystems in the digital economy and are structurally extremely difficult to challenge or contest by existing or new market operators, irrespective of how innovative and efficient those market operators may

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[56] Jean-Jacques Laffont and Jean Tirole, 'Using Cost Observation to Regulate Firms' (1986) 94(3) Journal of Political Economy 614.
[57] Jean Tirole, *Economics for the Common Good* (Steven Rendall tr, First paperback printing, Princeton University Press 2019) 457.
[58] ibid.
[59] Meta, 'Meta's Compliance with the Digital Markets Act: Non-Confidential Public Summary of Meta's Compliance Report' (6 March 2025) <https://transparency.meta.com/reports/regulatory-transparency-reports/> accessed 24 October 2025.

be'.[60] This is in line with the findings and arguments of 'modern bigness' scholars who have shown that the power of big technological companies goes beyond controlling prices on certain markets.[61] Indeed, due to their large investments in research and development (R&D),[62] gatekeepers are keeping the door closed to future potential competitors and markets. The proposed solution is a legal regime addressing so-called emerging gatekeepers, which entitles the European Commission, on the basis of Article 17(4) of the DMA, to designate as a gatekeeper an undertaking providing CPS that does not yet enjoy an entrenched and durable position in its operations, but which will foreseeably enjoy such a position in the near future.[63] The European Commission may declare applicable to that gatekeeper only one or more of the obligations laid down in Article 5(3) to (6) and Article 6(4), (7), (9), (10), and (13) of the DMA. However, the Commission shall only declare applicable those obligations that are appropriate and necessary to prevent the gatekeeper concerned from achieving, by unfair means, an entrenched and durable position in its operations.

The legal regime concerning emerging gatekeepers may be considered a first step towards protecting competitive markets for future generations in the EU.[64] A few scholarly and policy developments are showing the way. First, the 2024 United Nations (UN) Pact for the Future (PfF) highlights the importance of markets for achieving the goals set in the PfF.[65] In addition, its Global Digital Compact (GDC) emphasises that creativity and competition drive digital advance. The GDC also stresses that a predictable and transparent digital enabling environment is necessary in order to benefit from the digital economy. Such a predictable and transparent enabling environment encompasses policy, legal, and regulatory frameworks that support innovation, protect consumer rights, and promote fair competition.[66]

The protection of future generations in the EU is also a subject of growing concern, as the appointment of the first European Commissioner for Intergenerational Fairness, Youth, Culture and Sport suggests.[67] This appointment answers a scholarly argument that the creation of the EU and its predecessors, the European Communities, was rooted in an idea which, at its core, concerns the well-being of future generations.[68] Furthermore, Sulyok also argues that 'there are several elements already built into the current body of primary EU legislation, which would justify affording stronger and more effective protection

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60 DMA, Recital 3

61 Anna Gerbrandy, 'Revisiting the concept of power in the digital era' in Oles Andriychuk (ed), *Antitrust and the Bounds of Power – 25 Years On* (Bloomsbury 2023) 209-224; Gerbrandy and Phoa (n 9).

62 Gerbrandy (n 61).

63 DMA, Art 17(4).

64 Cristina Teleki, *Competitive Markets – A Fundamental Right of Future Generations?* available at: <https://digi-con.org/competition-fundamental-rights-and-power-in-the-digital-age-2/> accessed 1 May 2026.

65 United Nations General Assembly, 'The Pact for the Future' (22 September 2024) UN Doc A/RES/79/1

66 UN 'Global Digital Compact: rev.2' (6 June 2024) <https://www.un.org/techenvoy/sites/www.un.org.techenvoy/files/GlobalDigitalCompact_rev2.pdf> accessed 14 October 2025.

67 European Commission, 'Commissioners-designate 2024-2029' <https://commission.europa.eu/about-european-commission/towards-new-commission-2024-2029/commissioners-designate-2024-2029_en> accessed 14 October 2025.

68 Katalyn Sulyok, 'Protecting the Interests of Future Generation by the European Union' (Jesuit European Social Centre 2024) <https://jesc.eu/wp-content/uploads/2024/02/Sulyok-FG-EU-law.pdf> accessed 14 October 2025.

to long-term interests during the exercise of EU power'.[69]

Finally, competition law scholars emphasise that 'the concept of future markets has […] been applied in merger cases in the EU and US where the merging parties competed in R&D to introduce innovative products'.[70] Also, in one of the fastest-growing fields of study within competition law, scholars argue that novel ways to protect nascent competition should be considered.[71]

## 6 MASTERING THE METAGAMES – PROCEDURAL ASPECTS OF THE CONVERSATIONAL APPROACH

I have argued in the previous sections of this paper that the DMA is conversational in nature, linking the success of its enforcement with the duties of dialogue and cooperation among existing or new actors. These conversations may increase the transparency and predictability of digital markets, in addition to ensuring their fairness and contestability. However, the enforcement of the DMA will be only as successful as the institutions and people involved in it. In order to reap all the benefits of the conversational nature of the DMA, a few challenges should be addressed.

First, the European Commission – as the designated enforcer of the DMA – will have to strengthen its cooperative culture while preserving the adversarial culture needed for the enforcement of EU competition law. In other words, the conversational nature of the DMA will coexist with the specialness of competition law. This requires a careful appraisal of procedures and the people working as case handlers.

Second, there is a strong emphasis in the DMA on external independent expertise to support the European Commission's work. This is particularly important in light of the recent claim that undisclosed affiliations distort the enforcement of the DMA.[72] In addition, this demand for external independent expertise should be matched by an increase in the independence of the European Commission. The European Commission will also have to put in place guardrails – both epistemic and procedural – against regulatory capture.

Third, the conversational nature of the DMA requires enforcement officers who can assess digital markets from multiple perspectives. They should thus be able to understand the behaviour of gatekeepers, emerging gatekeepers, advertisers, publishers, and all other actors in a platform ecosystem. At the same time, they should understand privacy and other

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[69] Sulyok (n 68) 4.

[70] Velizar Kirilov, 'Sector-Specific Essential Facilities Doctrine: A Tool for Remedying Distortions of Innovation Competition for Future Markets' (2024) 45(1) ECLR 20. See also, Viktoria HSE Robertson, *Competition Law's Innovation Factor: The Relevant Market in Dynamic Contexts in the EU and the US* (Hart 2020) 122–128.

[71] C Scott Hemphill and Tim Wu, 'Nascent Competitors' (2019) 168 University of Pennsylvania Law Review 1879; Tristan Lécuyer, 'Digital Conglomerates and Killer Acquisitions – A Discussion of the Competitive Effects of Start-up Acquisitions by Digital Platforms' (*Concurrences*, 1 February 2020) <https://www.concurrences.com/en/review/issues/no-1-2020/droit-et-economie/digital-conglomerates-and-killer-acquisitions-a-discussion-of-the-competitive-92964-en> accessed 14 October 2025; Digital Competition Expert Panel, 'Unlocking Digital Competition' (2019) <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel> accessed 14 October 2025.

[72] Margarida Silva, Bram Vranken and Max Bank, 'Uncovering Big Tech's Hidden Network' (*SOMO*, 29 October 2024) <https://www.somo.nl/uncovering-big-techs-hidden-network/> accessed 4 November 2024.

fundamental rights in order to engage with such information. The positioning of Permeability Officers could thus ensure that silos – both bureaucratic and epistemic – are opened up to intersectional work.

Lastly, the conversational nature of the DMA is likely to result in numerous submissions from gatekeepers and third parties. Since certain undertakings have previously used large files in competition proceedings to overwhelm competition authorities, similar strategies may be redeployed during critical moments in DMA enforcement proceedings. At the same time, there is also a risk of not absorbing and integrating the knowledge shared during the conversations mandated by the DMA. This challenge could be addressed by establishing Filtering Officers who would deal independently with the submissions received by the European Commission.

## 7 CONCLUSION

In his essay dedicated to the living company, de Geus wrote that 'a company that survives for more than a century exists in a world it *cannot hope to control*'.[73] Although it remains debatable whether corporations *should want to* and *should be able to control the world*, the reality of Big Tech corporations is that they play a very important role in present day economies and societies by influencing everything from how we work to how we parent and live. These corporations raise novel spatial and temporal issues that cannot be easily addressed using past legal instruments.

I have attempted to show in this paper that the DMA relies on a novel regulatory approach in attempting to contain the spatial and temporal power of Big Tech companies designated as gatekeepers. I have argued that the conversational approach represents a hybridisation between regulation and competition law and between regulation and anticipatory governance. It has three main tenets: engagement with actors, integration through conversations, and foresight. Throughout the paper, I have mapped the actors, identified the types of conversations mandated by the DMA, and discussed the main functions of the mandated conversations. This approach promises to regulate the diversity of the actors and subjects involved in digital ecosystems and contributes to the establishment of an 'ethics of the future' for the EU.

[73] de Geus (n 3).

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